Shareholder Proposals and the Passivity of Shareholders in Canada: Electronic Forums to the Rescue?

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Shareholders in Canada can try to influence corporate governance through their statutory right to present proposals challenging management decisions. Amendments in 2001 to the Canada Business Corporations Act *and in 2005 to the* Bank Act *sought to liberalize the process for submitting such proposals. Nevertheless, very few are in fact submitted, and most of those that are submitted tend to get little support from other shareholders. One reason is that the eligibility of certain classes of shareholders to present proposals continues to be limited. The author examines data collected from the Shareholder Association for Research and Education to analyze the impact of these amendments. He suggests that most Canadians own shares only to generate income and that shareholder passivity may be related to a number of factors: the cost of submitting a proposal; the popularity of dual-class share structures which can enhance the voting power of a minority; and most important, a lack of frequent and direct communication among shareholders and corporations.*

After reviewing the use of electronic shareholder forums in the United States and their treatment by legislation in that country, the author suggests that such forums would be an efficient and low-cost way of improving the shareholder proposal mechanism in Canada. If these forums were made available and were secure enough, Canadian shareholders would be likely, in the author's view, to use them to discuss and seek support for proposals.

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Introduction

The *Canada Business Corporations Act* (*CBCA*), the *Bank Act* and Canadian provincial corporate statutes allow shareholders to submit proposals for consideration at a corporation's annual general meeting.[1] The shareholder proposal mechanism intends to give shareholders a greater voice in the corporation's affairs[2] and is used as a tool to influence corporate behaviour. It also represents "a legislative commitment to the promotion of shareholder participation in corporate governance."[3] In effect, it allows shareholders to challenge management decisions and forces management to justify its positions.[4]

Shareholder proposals promote dialogue between shareholders and management and aim to change corporate policy.[5] For example, a proposal filed with Enbridge Inc., a Canadian transnational corporation, required the company to adopt a human rights policy complying with

1. *Canada Business Corporations Act*, RSC 1985, c C-44, s 137(1) [*CBCA*]; *Bank Act*, SC 1991, c 46, s 143(1); *Business Corporations Act*, RSA 2000, c B-9, s 136(1) [*ABCA*]; *Business Corporations Act*, SBC 2002, c 57, s 187(1) [*BCBCA*]; *Corporations Act*, CCSM 2010, c C-225, s 131(1) [*MCA*]; *Business Corporations Act*, SNB 1981, c B-9.1, s 89(1) [*NBBCA*]; *Corporations Act*, RSNL 1986, c C-36, s 224 [*NLCA*]; *Companies Act*, RSNS 1989, c 81 Schedule III, s 9(1)(a) [*NSCA*]; *Business Corporations Act*, SNWT 1996, c 19, s 138(2) [*NWTBCA*]; *Business Corporations Act*, RSO 1990, c B-16, s 99(1) [*OBCA*]; *Business Corporations Act*, RSS 1978, c B-10, s 131(1) [*SBCA*]; *Business Corporations Act*, RSY 2002, c 20, s 138(1)(a) [*YBCA*].

2. See Robert W V Dickerson et al, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) at para 276.

3. *Verdun v Toronto-Dominion Bank*, [1996] 3 SCR 550 at para 32.

4. Raymonde Crête, *The Proxy System in Canadian Corporations—A Critical Analysis* (Montreal: Wilson & Lafleur, 1986) at 194.

5. See Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009) at 196.

international standards and to report on its Colombian operations.[6] After negotiations with the proposal sponsors, Enbridge adopted the Voluntary Principles on Security and Human Rights.[7] Similarly, Shell Canada Ltd., the oil and gas giant, agreed to a shareholder proposal asking the company to implement environmental and human rights policies for operations in developing countries.[8] Shareholder proposals have also yielded concrete and positive outcomes in corporate governance, leading to the curtailment of executive compensation at several corporations.[9]

Although the shareholder proposal mechanism can produce positive outcomes, some critics doubt its utility. They argue that it creates a "free rider" problem because corporations bear the financial burden of distributing a proposal.[10] Shareholders are encouraged "to free ride on the shareholder proposal mechanism".[11]

There are other means through which shareholders can influence management—for example, through their voting power to elect and remove directors,[12] and through the oppression remedy if the corporation's affairs are conducted "in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards [their] interests".[13] This article will confine itself to shareholder proposals, as they provide a statutory right to challenge management decisions.

When the *CBCA* provisions on shareholder proposals and the *Bank Act* were amended in 2001 and 2005 respectively, some scholars expressed optimism about the likely result. Scholars agree that the

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6. Janis Sarra, "Shareholders as Winners and Losers under the Amended Canada Business Corporations Act" (2003) 39:1 Can Bus LJ 52 at 76.

7. *Ibid.* The Voluntary Principles on Security and Human Rights are an international code that promotes best security practices and international human rights standards in extractive industries, online: Voluntary Principles on Security and Human Rights <http://voluntaryprinciples.org/files/voluntary_principles_english.pdf>.

8. Oshionebo, *supra* note 5.

9. Randall S Thomas & Kenneth J Martin, "The Effect of Shareholder Proposals on Executive Compensation" (1999) 67:4 U Cin L Rev 1021 at 1022.

10. See Susan W Liebeler, "A Proposal to Rescind the Shareholder Proposal Rule" (1984) 18:3 Ga L Rev 425 at 438–39.

11. *Ibid* at 440.

12. *CBCA*, *supra* note 1 at ss 106(3), 109(1).

13. *Ibid*, s 241(c).

amendments represented an important change to the shareholder proposal framework in Canada,[14] especially given the stringency of the previous *CBCA*, as will be discussed later. Professor Janis Sarra expressed the hope that the amendments would "result in a greater willingness for institutional shareholders to express their governance preferences".[15] However, eleven years after the *CBCA* amendments, it is unclear that they have promoted shareholder participation in corporate governance. Are Canadian shareholders more willing to submit and support proposals to challenge corporate management today than before 2001?

This article will consider whether the liberalization of the statutory requirements for shareholder proposals has aided shareholder participation in Canadian corporate governance. It will also look beyond those amendments and make suggestions to ensure ongoing shareholder participation. Part I examines the statutory regimes on shareholder proposals, including the criteria of eligibility to submit such proposals and the circumstances in which corporations can exclude them from proxy circulars.[16] Part II analyzes shareholder proposals filed with Canadian corporations between 2000 and 2011 inclusive. The analysis focuses on key issues such as the level of support for proposals at meetings of shareholders, the subject matter of proposals, who filed them, and what industries attracted them. Part III draws conclusions from Part II's data, and finds that the shareholder "culture of passivity"[17] persists despite an increase in proposals submitted to Canadian corporations since the liberalization of the governing rules. Shareholders have not made optimal use of their statutory right to submit proposals—only a negligible number do so. Moreover, if a proposal is filed, Canadian shareholders are unlikely to vote in support of it at a

14. Gil Yaron, "Canadian Institutional Shareholder Activism in an Era of Global Deregulation" in Janis Sarra ed, *Corporate Governance in Global Capital Markets* (Vancouver: UBC Press, 2003) 111 at 119.

15. Sarra, "Winners and Losers", *supra* note 6 at 75.

16. Part I will discuss only the *CBCA* and the *Bank Act*, because the majority of proposals analyzed in this paper were submitted to federal corporations.

17. BS Black, "Shareholder Passivity Reexamined" (1990) 89:3 Mich L Rev 520 at 563, cited in Jeffrey G MacIntosh, "Institutional Shareholders and Corporate Governance in Canada" (1996) 26:2 Can Bus LJ 145 at 168.

corporation's annual meeting. Part III introduces the idea of Canadian shareholder passivity, and Part IV identifies factors that could account for such passivity in the context of submitting proposals. Part V suggests that creating electronic shareholder forums before annual meetings could make the shareholder proposal mechanism more effective, and considers the American experience in this respect. Part VI analyzes the potential for electronic shareholder forums in Canada and the possible legal issues and obstacles that could affect their success.

I. Statutory Regimes Governing Shareholder Proposals in Canada

Under the *CBCA*, the *Bank Act*, and provincial corporate statutes, a shareholder may (to use the language of the *CBCA* as an example) "(a) submit to the corporation notice of any matter that he proposes to raise at the meeting and (b) discuss at the meeting any matter in respect of which he would have been entitled to submit a proposal".[18] These statutes require a corporation to include such proposals in any management proxy circular distributed before an annual general meeting, allowing shareholders to communicate about matters of common interest at the expense of the corporation.

Before the 2001 amendments to the *CBCA* and the 2005 amendments to the *Bank Act*, statutory provisions on shareholder proposals were limiting. Before submitting a proposal to a corporation, shareholders had to meet several procedural and substantive conditions. For example, under the previous *CBCA*, only a "shareholder entitled to vote at an annual meeting of shareholders" could put forward a proposal.[19] In *Verdun v. Toronto-Dominion Bank*,[20] the Supreme Court of Canada held

18. *CBCA*, *supra* note 1, s 137(1). See also *Bank Act*, *supra* note 1, s 143(1); *ABCA*, *supra* note 1, s 136(1); *BCBCA*, *supra* note 1, s 187(1); *MCA*, *supra* note 1, s 131(1); *NBBCA*, *supra* note 1, s 89(1); *NLCA*, *supra* note 1, s 224; *NWTBCA*, *supra* note 1, s 138(2); *NSCA*, *supra* note 1, Schedule III, s 9(1); *OBCA*, *supra* note 1, s 99(1); *SBCA*, *supra* note 1, s 131(1); *YBCA*, *supra* note 1, s 138(1).

19. *CBCA*, RSC 1985, c C-14, as amended by SC 2000, c 12, s 137 (1) [Pre-amendment *CBCA*].

20. *Verdun*, *supra* note 3. Under the previous version of the *Bank Act*, SC 1991, c 46, ss

that a similar provision in the previous *Bank Act* precluded beneficial owners[21] of shares from submitting proposals.

Furthermore, before the amendments, the sweeping nature of the exceptions under the *CBCA* and *Bank Act* restricted the ambit of shareholder proposals.[22] In particular, proposals touching on social issues such as environmental protection and human rights did not have to be included in a corporation's proxy solicitation materials. Under the *CBCA*, a corporation was not required to include a proposal in its proxy circular if the proposal's primary purpose was to promote general economic, political, racial, religious, social or similar causes.[23] Thus, in *Re Varity Corporation and Jesuit Fathers of Upper Canada*,[24] the Ontario High Court would not compel the corporation to distribute a proposal primarily aimed at abolishing apartheid in South Africa.[25] Similarly, in *Greenpeace Foundation of Canada v. Inco Ltd.*[26] the Court held that Inco's management did not have to circulate a proposal promoting the implementation of "pollution control measures to reduce acid rain by restricting sulphur dioxide emissions".[27] Corporate management was free to exclude proposals that advanced environmental causes.

Because the procedural and substantive obstacles made shareholder proposals an unattractive way to influence corporate practice under the pre-amendment *CBCA* and *Bank Act*, very few proposals were submitted

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93(1), 143(1), the registered owners of a security of a bank were "exclusively entitled to vote" at the annual meetings of shareholders and shareholders eligible to submit proposals were those "entitled to vote at an annual meeting of shareholders of a bank". The *Bank Act* has been amended to allow registered holders and beneficial owners of voting shares to submit proposals. *Supra* note 1, s 143(1).

21. "Beneficial ownership" of shares means a person who owns shares "through any trustee, legal representative, agent or mandatory, or other intermediary". See *CBCA*, *supra* note 1, s 2.

22. See Industry Canada, *Analysis of the Changes to the Canada Business Corporations Act*, online: Industry Canada <http://www.ic.gc.ca>.

23. Pre-amendment *CBCA*, *supra* note 19, s 137 (5) (b).

24. (1987), 59 OR (2d) 459, 38 DLR (4th) 157 (H Ct J), aff'd (1987), 60 OR (2d) 640, 41 DLR (4th) 284 (CA).

25. *Ibid* at 462.

26. [1984] OJ no 274 (QL) (SC).

27. *Ibid* at paras 11-13.

before 2001.[28] Less than three were put forward in each year from 1982 to 1996, with a modest increase in the following years.[29] The few that were submitted attracted very little support at annual meetings. As of 1997, only one shareholder proposal resolution had in fact been passed in Canada.[30]

The breadth of the exceptions under the pre-amendment *CBCA* and the *Bank Act* prompted calls for a re-evaluation of the shareholder proposal mechanism.[31] In response, the House of Commons passed Bill S-11 in 2001, liberalizing the mechanism under the *CBCA* and in 2005 it amended related provisions under the *Bank Act*. In particular, the eligibility rules were relaxed in both statutes and the prohibition on proposals aimed at general economic, political, racial, religious or similar causes was abolished.

A. Eligibility to Submit a Proposal

Under section 137(1) of the pre-amendment *CBCA*, only a "shareholder entitled to vote at an annual meeting of shareholders" could submit a proposal to the corporation, thus precluding beneficial owners of shares from doing so.[32] The amended *CBCA*, the amended *Bank Act*,[33] and provincial statutes in Alberta, British Columbia and Ontario largely remove this exclusion by granting "registered holders" and "beneficial owners" the right to submit proposals, subject to certain conditions.[34] Provincial corporate statutes in Manitoba, New Brunswick,

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28. See J Anthony Van Duzer, *The Law of Partnerships and Corporations*, 3d ed (Toronto: Irwin Law, 2009) ("Until the beginning of this century, there were only a small number of proposals each year in Canada" at 576). See also Sarra, "Winners and Losers" *supra* note 6 ("The shareholder proposal provisions of Canadian corporations statutes have seldom been used" at 60).

29. Shareholder Association for Research and Education, "Shareholders Back Calls for Disclosure on Board Independence" (2001) 1(2) Prospectus 2, cited in Yaron, *supra* note 14 at 117.

30. Brian R Cheffins, "*Michaud v. National Bank of Canada* and Canadian Corporate Governance: A 'Victory' for Shareholders Rights?" (1998) 30:1 Can Bus LJ 20 at 47.

31. See Industry Canada, *Analysis of the Changes*, *supra* note 22.

32. See *Verdun*, *supra* note 3 at paras 33–35.

33. *CBCA*, *supra* note 1, s 137(1); *Bank Act*, *supra* note 1, s 143(1).

34. See *ABCA*, *supra* note 1, s 136(1); *BCBCA*, *supra* note 1, s 187(1); *OBCA*, *supra* note

Newfoundland and Labrador, Nova Scotia, the Northwest Territories, Saskatchewan and the Yukon have not been amended to that effect, and the right to submit proposals is confined to shareholders entitled to vote at annual meetings.[35] In those provinces and territories, owners of non-voting shares and beneficial owners—no matter how many shares they own or hold in trust—have no right to submit proposals. For example, as of the first quarter of 2011, pension fund investments in stocks were valued at $374.6 billion, but beneficial owners of stocks held by pension funds cannot submit shareholder proposals.[36]

Despite the 2001 amendments, the current *CBCA* places new restrictions on the right of shareholders to submit proposals. Under the pre-amendment *CBCA*, a shareholder with one voting share could submit a proposal.[37] Now, the *CBCA* only allows a proposal to be submitted by someone who has been the registered holder or beneficial owner of the prescribed number of shares for the prescribed period of time.[38] The "prescribed number of shares" and the "prescribed period" are stipulated in section 46 of the *Canada Business Corporations Regulation*: the prescribed number of shares is the number of voting shares that is one percent of the total number of a corporation's outstanding voting shares, or whose fair market value is at least $2 000. The prescribed period is six months prior to the submission of the proposal.[39]

1, s 99(1).

35. *MCA*, *supra* note 1, s 131(1); *NBBCA*, *supra* note 1, s 89(1); *NLCA*, *supra* note 1, s 224(a); *NSCA*, *supra* note 1, Schedule III, s 9(1)(a); *NWTBCA*, *supra* note 1, s 138(2); *SBCA*, *supra* note 1, s 131(1)(a); YCBA, *supra* note 1, s 138(1)(a).

36. Statistics Canada, "Employer Pension Plans (Trusteed Pension Funds) First Quarter 2011", *The Daily* (13 September 2011), online: Statistics Canada <www.statcan.gc.ca/daily-quotidien/110913/dq110913c-eng.htm>.

37. Pre-amendment *CBCA*, *supra* note 19, s 137(1), read with s 140(1). See also *Michaud c Banque Nationale du Canada*, [1997] RJQ 547 (available on WL Can) (SC).

38. *CBCA*, *supra* note 1, s 137(1.1)(a). See also *Bank Act*, *supra* note 1, s 143(1.1)(a); *ABCA*, *supra* note 1, s 136(1.1)(a).

39. The statute reads as follows: "(a) the prescribed number of shares is the number of voting shares (i) that is equal to 1% of the total number of the outstanding voting shares of the corporation, as of the day on which the shareholder submits a proposal, or (ii) whose fair market value, as determined at the close of business on the day before the shareholder submits the proposal to the corporation, is at least $2000; and (b) the

The restrictions on eligibility to submit proposals attempt to discourage frivolous proposals, and reduce the likelihood of abuse of the right of submission by requiring (in the words of Industry Canada) that individuals who submit proposals have "a continuous minimum level of investment in the corporation for a specified period of time".[40] The restrictions are also designed to ease corporate management's concern that an unrestricted right to introduce shareholder proposals would lead to inefficiency by inundating management with such proposals.[41] In sum, the eligibility criteria seek to strike a balance between the concerns of management and the shareholders' right to participate in corporate governance, by ensuring that proposals are only submitted by those who have a significant vested interest in the corporation.

However, limiting the right to submit proposals to those who own at least 1 percent of outstanding voting shares of the corporation, or whose shares are worth at least $2 000, is retrogressive in its erection of economic barriers to minor shareholders.[42] The *CBCA* attempts to cushion the negative impact on those shareholders by allowing them to pool their holdings to meet the minimum requirement.[43]

The advent of the internet might well make it easier for small shareholders to find others willing to pool their holdings for the purpose of submitting a proposal. Such online communication does not violate proxy solicitation rules; under the *CBCA*, "a communication for the purposes of obtaining the number of shares required for a

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prescribed period is the six-month period immediately before the day on which the shareholder submits the proposal." *Canada Business Corporations Regulation*, SOR/2001-512, s 46.

40. Industry Canada, *Analysis of the Changes, supra* note 22.

41. *Ibid.*

42. *CBCA*, *supra* note 1, s 137(1.1)(a), read with *CBCR*, *supra* note 39, s 46(a).

43. *CBCA*, *supra* note 1, s 137(1.1)(b). See also *Bank Act*, *supra* note 1, s 143(1.1)(b); *ABCA*, *supra* note 1, s 136(1.1)(b). A shareholder who does not own the prescribed number of outstanding voting shares is eligible to submit a proposal if they "have the support of persons who, in the aggregate, and including or not including the person that submits the proposal, have been, for at least the prescribed period, the registered holders, or the beneficial owners of, at least the prescribed number of outstanding shares of the corporation". *CBCA*, *supra* note 1, s 137(1.1)(b). See also *Bank Act*, *supra* note 1, s 143(1.1)(b); *ABCA*, *supra* note 1, s 136(1.1)(b); *BCBCA*, *supra* note 1, s 188(1)(b).

shareholder proposal" is not a solicitation.[44] Nevertheless, even with the availability of the internet, the expense, effort and time involved in locating other shareholders could well dissuade the filing of proposals, as could the requirement that the pooled holdings of minor shareholders must all have been held for a minimum of six months before the day the proposal is submitted.[45]

B. Circumstances in which Corporations May Reject Shareholder Proposals

As well as enlarging the range of shareholders eligible to submit proposals, the amendments to the *CBCA* and the *Bank Act* curtailed the circumstances in which corporations may refuse to include a shareholder proposal in the management proxy circular. Those amendments abolished the exclusion of proposals which promoted general economic, political, racial, religious, social or similar causes. However, parallel amendments were not made to several provincial corporate statutes, which still allow corporations to ignore such proposals[46] and to exclude them from proxy solicitations, thereby

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44. *CBCA*, *supra* note 1, s 147.

45. *CBCR*, *supra* note 39, s 46(b). See Sarra, "Winners and Losers", *supra* note 6 at 69–71. The *CBCA* requires the name and address of the shareholder(s) and of their supporters, the number of shares held or owned by the shareholder(s), and the dates they were acquired. *CBCA*, *supra* note 1, s 137(1.2). See also *ABCA*, *supra* note 1, s 136(1.1)(c). A proposal must be submitted to the corporation at least ninety days before the anniversary date of the notice of meeting that was sent to shareholders in connection with the previous annual meeting. See *CBCA*, *supra* note 1, s 137(5a) read with the *CBCR*, *supra* note 39, s 49. A shareholder may submit a statement in support of the proposal and request that the statement is included in the management proxy circular distributed to shareholders. See *CBCA*, *supra* note 1, s 137(3). See also *Bank Act*, *supra* note 1, s 143(3); *ABCA*, *supra* note 1, s 136(3); *BCBCA*, *supra* note 1, s 188(2); *MCA*, *supra* note 1, s 131(3); *NBBCA*, *supra* note 1, s 89(3); *NLCA*, *supra* note 1, s 225(2)(a); *NSCA*, *supra* note 1, Schedule III, s 9(3); *OBCA*, *supra* note 1, s 99(3); *NWTBCA*, *supra* note 1, s 138(4); *SBCA*, *supra* note 1, s 131(3); *YBCA*, *supra* note 1, s 138(3). However, the proposal and supporting statement must not exceed 500 words. *CBCA*, *supra* note 1, s 137(3); *CBCR*, *supra* note 39, s 48. A corporation, within 14 days after receiving a proposal, can request proof of the eligibility criteria from the submitting shareholder. See *CBCA*, s 137(1.4); *CBCR*, *supra* note 39, s 47(a). The shareholder must provide the proof within 21 days. See *CBCR*, *supra* note 39, s 47(b).

46. See *ABCA*, *supra* note 1, s 136(5)(b); *MCA*, *supra* note 1, s 131(5)(b); *NLCA*, *supra*

barring any proposals that seek to promote corporate social responsibility.[47]

Even the current versions of the *CBCA* and the *Bank Act*, like their predecessors, still have several exceptions limiting the rights of shareholders to include proposals in the corporation's proxy circular.[48] These exceptions are based on "shareholder status, timing and content".[49] For example, a proposal may be refused if it is not submitted to the corporation at least 90 days "before the anniversary date of the notice of meeting that was sent to shareholders in connection with the previous annual meeting of shareholders".[50]

A corporation does not need to include a shareholder proposal in its proxy circular if within the previous two years the shareholder failed to present, at a meeting of shareholders, a previous proposal that had been circulated in a management proxy circular at the request of the shareholder.[51] This exception aims to encourage shareholder diligence and weed out frivolous proposals. It ensures that indolent shareholders are not rewarded for their failure to present their proposals.

A corporation may exclude a proposal if a similar proposal was presented previously at a meeting that took place within the last five years and it did not receive the prescribed minimum level of support.[52]

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note 1, s 227(b); *NSCA*, *supra* note 1, Schedule III, s 9(5)(b); *NWTBCA*, *supra* note 1, s 138(6)(b); *SBCA*, *supra* note 1, s 131(5)(b); *YBCA*, *supra* note 1, s 138(5)(b).

47. See *Varity*, *supra* note 24; *Greenpeace*, *supra* note 26.

48. *CBCA*, *supra* note 1, s 137(5); *Bank Act*, *supra* note 1, s 143(5).

49. *Varity*, *supra* note 24 at 460.

50. *CBCA*, *supra* note 1, s 137(5)(a); *CBCR*, *supra* note 39, s 49; *Bank Act*, *supra* note 1, s 143(5)(a). See also *ABCA*, *supra* note 1, s 136(5)(a); *MCA*, *supra* note 1, s 131(5)(a); *NBBCA*, *supra* note 1, s 89(5)(a); *NLCA*, *supra* note 1, s 227(a); *NSCA*, *supra* note 1, Schedule III, s 9(5)(a); *NWTBCA*, *supra* note 1, s 138(6)(a); *SBCA*, *supra* note 1, s131(5)(a); *YBCA*, *supra* note 1, s 138(5)(a). In Ontario, the notice must be submitted at least sixty days before the anniversary date. See *OBCA*, *supra* note 1, s 99(5)(a).

51. See *CBCA*, *supra* note 1, s 137(5)(c) read with *CBCR supra* note 39, s 50; *Bank Act*, *supra* note 1, s 143(5)(c). See also *ABCA*, *supra* note 1, s 136(5)(c); *MCA*, *supra* note 1, s 131(5)(c); *NBBCA*, *supra* note 1, s 89(5)(c); *NLCA*, *supra* note 1, s 227(c); *NSCA*, *supra* note 1, Schedule III, s 9(5)(c); *NWTBCA*, *supra* note 1, s 138(6)(c); *OBCA*, *supra* note 1, s 99(5)(c); *SBCA*, *supra* note 1, s 131(5)(c); *YBCA*, *supra* note 1, s 138(5)(c).

52. *CBCA*, *supra* note 1, s 137(5)(d) read with *CBCR*, *supra* note 39, s 51. See also *Bank Act*, *supra* note 1, s 143(5)(d); *ABCA*, *supra* note 1, s 136(5)(d); *BCBCA*, *supra* note 1, s 189(5)(c); *MCA*, *supra* note 1, s 131(5)(d); *NBBCA*, *supra* note 1, s 89(5)(d); *NLCA*, *supra*

As well, a proposal may be excluded if the submitting shareholder no longer holds the prescribed number of shares on the day of the meeting.[53] Moreover, the corporation may exclude from any meeting held in the following two years any proposal submitted by such a shareholder.[54]

The *CBCA* and the *Bank Act* retain some exceptions that were set out in their pre-amendment versions. A corporation can reject a proposal if its primary purpose is to press a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders.[55] This exception was retained to protect corporations and their directors from the vindictiveness of some activist shareholders. In addition, a corporation can exclude a proposal if the shareholder's right to submit a proposal is "being abused to secure publicity".[56] Although this exception is aimed at the abuse of shareholder rights, it is susceptible to abuse by managers and could well produce a chilling effect on shareholder participation in corporate governance.[57] Corporate

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note 1, s 227(d); *NSCA*, *supra* note 1, Schedule III, s 9(5)(d); *NWTBCA*, *supra* note 1, s 138(6)(d); *OBCA*, *supra* note 1, s 99(5)(d); *SBCA*, *supra* note 1, s 131(5)(d); *YBCA*, *supra* note 1, s 138(5)(d). Under the *CBCA*, the prescribed minimum levels of support are as follows: 3% of the total number of shares voted, if the proposal was presented at the annual meeting of shareholders; 6% of the total number of shares voted at the last submission of the proposal to shareholders, if it was presented at two annual meetings; and 10% of the total number of shares voted at the proposal's last submission to shareholders, if it was presented at three or more annual meetings. See *CBCA*, *supra* note 1, s 137(5)(d) read with *CBCR supra* note 39, s 51.

53. *CBCA*, *supra* note 1, s 137(5.1); *Bank Act*, *supra* note 1, s 143(5.1).

54. *CBCA*, *supra* note 1, s 137(5.1) read with *CBCR supra* note 39, s 52. See also *Bank Act*, *supra* note 1, s 143(5.1).

55. *CBCA*, *supra* note 1, s 137(5)(b); *Bank Act*, *supra* note 1, s 143(5)(b). See also *ABCA*, *supra* note 1, s 136(5)(b); *BCBCA*, *supra* note 1, s 189(5)(e)(ii); *MCA*, *supra* note 1, s 131(5)(b); *NBBCA*, *supra* note 1, s 89(5)(b); *NLCA*, *supra* note 1, s 227(b); *NSCA*, *supra* note 1, Schedule III, s 9(5)(b); *NWTBCA*, *supra* note 1, s 138 (6)(b); *OBCA*, *supra* note 1, s 99 (5)(b); *SBCA*, *supra* note 1, s 131(5)(b); *YBCA*, *supra* note 1, s 138(5)(b).

56. *CBCA*, *supra* note 1, s 137(5)(e); *Bank Act*, *supra* note 1, s 143(5)(e). See also *ABCA*, *supra* note 1, s 136(5)(e); *BCBCA*, *supra* note 1, s 189(5)(e)(i); *MCA*, *supra* note 1, s 131(5)(e); *NBBCA*, *supra* note 1, s 89(5)(e); *NLCA*, *supra* note 1, s 227(e); *NSCA*, *supra* note 1, Schedule III, s 9(5)(e); *NWTBCA*, *supra* note 1, s 138(6)(e); *SBCA*, *supra* note 1, s 131(5)(e); *YBCA*, *supra* note 1, s 138(5)(e).

57. See Sarra, "Winners and Losers," *supra* note 6 (arguing that this exclusion "seems to

management could rely on it as a basis for rejecting a proposal simply because the proposal had attracted publicity. By their very nature, proposals on human rights and environmental protection issues tend to attract publicity and public debate. So do proposals touching on certain governance issues such as executive compensation—a matter that can readily attract media attention in light of the current financial crisis. The mere fact that a proposal has attracted or is likely to attract publicity may not amount to "abuse" of the shareholder's right to submit a proposal and would not justify its rejection.[58] Abuse in this context means a misuse or perversion of the right to submit a proposal—for example, where a proposal is frivolous or seeks to embarrass the corporation and its directors.[59]

Although the amendments to the *CBCA* and the *Bank Act* abolished some of the restrictions on shareholder proposals, they introduced some new limitations. One is the "significant business or affairs" exception, allowing a corporation to exclude a proposal if "it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation".[60] Would this allow management to exclude a proposal on human rights because it did not significantly relate to the corporation's business or affairs? This unfortunate outcome would appear to be entirely possible on the basis of the statutory wording. For that reason, it has been suggested that this exception in effect mirrors the pre-amendment *CBCA*'s exclusion of proposals that sought to promote general economic, political, racial, religious, social or similar causes.[61]

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have potential for its own abuse by corporate officers" at 72).

58. See *CBCA*, *supra* note 1, s 137(5)(e); *Bank Act*, *supra* note 1, s 143(5)(e). See also *Michaud*, *supra* note 37. The Quebec Superior Court held that, although the plaintiff (a shareholder) attracted publicity for his proposals in order to persuade the greatest number of shareholders to support his viewpoint, that fact alone did not amount to "abuse" of the plaintiff's right to submit a proposal.

59. See *National Bank of Canada v Weir*, 2006 QCCS 278 (available on WL Can) (SC).

60. *CBCA*, *supra* note 1, s 137(5)(b.1); *Bank Act*, *supra* note 1, s 143(5)(b.1). See also *BCBCA*, *supra* note 1, s 189(5)(d); *OBCA*, *supra* note 1, s 99(5)(b.1).

61. See Aaron A Dhir, "Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability" (2006) 43:2 Am Bus LJ 365 at 395.

II. Shareholder Proposals in Canada: Analyzing the Data

This section will analyze data from the Shareholder Association for Research and Education (SHARE) concerning proposals submitted to Canadian corporations from 2000 to 2011.[62] That data includes all proposals submitted to every corporation governed by federal or provincial statutes, although most were submitted under the *CBCA* and the *Bank Act*. The analysis focuses on the following aspects of shareholder proposals: their subject matter; their degree of support at shareholder meetings; who filed them; and the industries which attracted them.

Between 2000 and 2011, shareholders in Canada submitted a total of 991 proposals.[63] The number submitted each year is indicated in Figure 1.

62. See Shareholder Association for Research & Education, *Shareholder Proposals*, online: <http://www.share.ca/shareholderdb> [SHARE, *Shareholder Proposals*]. SHARE provides investment consulting services, research and education for institutional investors. It obtains copies of all proposals submitted to corporations in Canada. It also obtains records from corporations indicating the voting results for the proposals. The proposals and voting results are posted on the SHARE website.

63. See *ibid.* This figure includes proposals the results of which are designated on the SHARE website as 'omitted', 'not on ballot', 'withdrawn', 'voted' and 'NA' (not available).

Figure 1: Number of Proposals Filed Between 2000 and 2011 and the Average Level of Support at Shareholder Meetings

Year	Number of Proposals	Average Support amongst Shareholders[64]	Number of Proposals that attracted majority support at shareholder meetings[65]
2000	54	23.58%	8
2001	39	15.09%	0
2002	26	14.48%	2
2003	72	19.79%	3
2004	96	14.92%	3
2005	140	5.41%	0
2006	71	9.70%	1
2007	96	8.31%	1
2008	178	7.81%	2
2009	98	16.27%	12
2010	49	11.69%	1
2011	72	8.85%	2

64. Figures indicated in percentages do not include proposals designated as "withdrawn", "omitted", "not available", and "voted" (proposals with undisclosed voting results).

65. Figures do not include proposals designated as "voted". However, one proposal designated as "passed" is included in the figures.

As Figure 1 shows, the number of proposals peaked in 2008 (at 178), and there is a noticeable increase in the number of proposals filed by Canadian shareholders during the study period as compared to the period before the 2001 amendments. The increase may be due to the more liberal regime introduced under the amended *CBCA* and the *Bank Act*. Shareholder activism by the Mouvement d'éducation et de défense des actionnaires (MÉDAC), formerly known as the Association for the Protection of Quebec Savers and Investors (APEIQ), and to a lesser extent by Canadian institutional shareholders,[66] could also have contributed to the increase. However, Figure 1 indicates that there has been no corresponding increase in support for proposals at annual general meetings. Only a small proportion of the proposals filed between 2000 and 2011—35 of 991—received majority support.

Support for shareholder proposals at annual meetings dropped steadily between 2005 and 2008. In 2005, none of the 140 proposals submitted by shareholders attracted more than 50 percent support. The number of majority-supported proposals at shareholder meetings increased significantly in 2009 (to 12 of 98), and fell again in 2010 to only 1 of 49 and to two of 72 in 2011.

Of the 35 proposals that attracted majority support at annual general meetings from 2000 to 2011, all but one raised corporate governance issues. For example, in 2000 seven of the eight proposals that received majority support dealt with disclosure of auditor's fees, while only one proposal requested simultaneous communication to shareholders. In 2002, the two majority-supported proposals (attracting 100 percent and 98 percent support respectively) asked DuPont Canada Inc. and Loblaw Companies Ltd. to disclose their auditor's fees. In 2003, the three majority-supported proposals raised issues of stock options and verbal reports by board and committee chairs at annual general meetings. Of the three majority-supported proposals in 2004, two raised corporate governance issues and one requested a report on environmental liabilities. All proposals that received majority support from 2006 to 2011 raised corporate governance issues.

66. Examples include Ethical Funds Company, Inhance Investment Management, Real Assets Investment Management and Meritas Mutual Funds.

Although this figure indicates that Canadian shareholders are more likely to support proposals concerning corporate governance issues than those promoting social causes, it does not suggest that the latter will inevitably fail. In fact, a few have attracted substantial support. For example, a 2004 proposal, which sought a report by the Bank of Montreal on its environmental liabilities, had 90.90 percent support of shareholders.[67] In 2003, a proposal promoting gender diversity on OpenText Corporation's board and a proposal asking IPSCO Inc. to make environmental disclosure came close to attaining majority support, receiving 45.70 percent and 49.20 percent respectively.[68]

Although most of the proposals submitted during the study period were included in management proxy circulars, corporations omitted twenty proposals.[69] While there is no indication as to why these proposals were omitted, a corporation's refusal to circulate a proposal may hinge on several factors: non-eligibility of the proposal sponsors, timing, and the contents of the proposal.[70] Given these various grounds for exclusion of proposals, the number actually excluded from circulation is surprisingly low. This could be due to pressure from Canadian activist shareholders[71] and activist institutional shareholders,[72] who have become expert at meeting the statutory requirements for proposals and have thereby made it difficult for corporations to rely on any of the above grounds for exclusion. In addition, during the study

67. Shareholder Association for Research & Education, *Shareholder Proposals AGM Year 2004*, online: <http://www.share.ca/shareholderdb/proposal/Report-on-environmental-liabilities/335>.

68. Shareholder Association for Research & Education, *Shareholder Proposals AGM Year 2003*, online: <http://www.share.ca/shareholderdb/proposal/Environmental-Disclosure/928>; Shareholder Association for Research & Education, *Shareholder Proposals AGM Year 2003*, online: <http://www.share.ca/shareholderdb/proposal/Gender-Diversity-on-the-Board/924>.

69. SHARE, *Shareholder Proposals*, *supra* note 62. In addition, ten proposals filed during the study period were designated as "not on voting ballot" or "not voted" at shareholder meetings.

70. See *CBCA*, *supra* note 1, s 137(5); *Bank Act*, *supra* note 1, s 143(5); *ABCA*, *supra* note 1, s 136(5); *BCBCA*, *supra* note 1, s 189(5); *MCA*, *supra* note 1, s 131(5); *NBBCA*, *supra* note 1, s 89(5); *NLCA*, *supra* note 1, s 227; *NSCA*, *supra* note 1, Schedule III, s 9(5); *NWTBCA*, *supra* note 1, s 138(6); *OBCA*, *supra* note 1, s 99(5); *SBCA*, *supra* note 1, s 131(5); *YBCA*, *supra* note 1, s 138(5).

71. Such as Robert Verdun, Lowell Weir and APIEQ/MÉDAC.

72. Such as Ethical Funds.

period, 208 proposals were withdrawn prior to annual general meetings, thus denying shareholders an opportunity to vote on the proposals.[73] There is no information on why these proposals were withdrawn. Some of the withdrawals may have resulted from successful negotiations between the proposals' sponsors and the management of the corporations, with management agreeing to some or all of the suggested changes.

A. Subject Matter of Proposals

Figure 2: Subject Matter of Shareholder Proposals (2000–2011)

Year	Corporate Governance	Social and Environmental	Crossover	Other
2000	52	1	1	0
2001	37	2	0	0
2002	24	2	0	0
2003	65	6	1	0
2004	84	8	4	0
2005	123	14	3	0
2006	51	18	2	0
2007	63	21	12	0
2008	123	27	2	1
2009	72	15	11	0
2010	37	7	4	1
2011	45	14	1	0
Total	**776**	**135**	**41**	**2**

Figure 2 classifies proposals filed with corporations in Canada into three broad categories: corporate governance issues, social and environmental issues, and cross-over issues. The cross-over category represents proposals that addressed both corporate governance and social or environmental issues. A vast majority of the proposals filed within the study period (776 of 991, or 78.30 percent) raised primarily corporate

73. SHARE, *Shareholder Proposals*, *supra* note 62.

governance issues.[74] Many of these concerned executive compensation. Social issues such as environmental protection, human rights and labour standards, were raised in 135 proposals, or 13.62 percent. Among them, climate change was the dominant subject matter, followed closely by human rights. There were 78 cross-over proposals filed, or only 7.87 percent of the total. Most of these sought gender parity on the board of directors, while a few sought an increase in pension contributions.[75]

B. Filers of Proposals

Filers of shareholder proposals in Canada can be classified into six broad categories: individual shareholders; institutional investors; non-profit shareholder associations; trade unions; religious organizations; and public interest groups. Figure 3 indicates that individual shareholders accounted for 258 of the 991 proposals (or 26.03 percent) filed during the study period. However, Robert Verdun, a well-known advocate of shareholder rights in Canada, filed 170 of the 258, and two other such advocates, Lowell Weir and Yves Michaud, filed 21 and 12 respectively. Verdun's proposals have two common features. First, they focus on corporate governance issues such as phasing out stock options for directors, separation of the positions of chairman of the board and chief executive officer, streamlining executive compensation, and the election of directors by democratic means. Second, they are usually filed with financial institutions such as banks and insurance companies.

74. In classifying the proposals, the author adopted a view of corporate governance which is broad enough to include such matters as executive compensation, election, tenure and independence of directors, dividends policies, disclosure of investments/risks, independence of the executive compensation committee, disclosure of auditor's fees and voting rights of shareholders.

75. Two proposals, or 0.20%, could not be classified into any of the above categories. One requested the National Bank of Canada to review its policy on press releases and the other asked Encana Corporation to report on hydraulic fracturing risks.

Figure 3: Filers of Shareholder Proposals in Canada (2000–2011).

Filer	Number of Proposals	Percentage of Total Proposals	Average Support amongst Shareholders
Individual Shareholders	258	26.03%	8.49%
Institutional Investors	255	25.73%	24.34%
Shareholder Associations	449	45.30%	11.06%
Trade Unions	9	0.90%	16.67%
Religious Organizations	8	0.80%	11.48%
Public Interest Groups	12	1.21%	14.25%

As Figure 3 shows, institutional investors such as investment funds, mutual funds and pension funds also actively file proposals in Canada. This is particularly true of pension funds operated by trade unions. Investment funds collectively filed 166 proposals between 2000 and 2011, and pension funds filed a total of 89.[76] Altogether, institutional shareholders account for 255 of the 991 proposals, or 25.73 percent.

Other major filers are non-profit shareholder associations such as MÉDAC.[77] MÉDAC submitted 449 proposals during the study period, or 45.30 percent of the total. They focused on a wide range of corporate governance issues, including the disclosure of auditor's fees, enhancement of shareholder communication, corporate democracy, separation of the positions of chairman and CEO, executive

76. Examples of active investment funds include: Working Enterprises, Meritas Mutual Funds, Ethical Investment, Ethical Funds, Real Assets Investment Management, AFL-CIO Reserve Fund, Inhance Investment Management, Northwest and Ethical Investments LP, and Catholic Equity Fund. Examples of active pension funds include: Carpenters Local 27 Pension Trust, United Association of Canadian Pipeline Industry National Pension Trust, Pension Plan for the Employees of the Ontario Public Service Employees Union, and Batirente.

77. See Mouvement d'éducation et de défense des actionnaires, online: <http://www.medac.qc.ca>.

compensation, and the creation of ethics committees. As well, MÉDAC has filed proposals on social issues, including the need for gender parity on corporations' board of directors.

Although the average support for MÉDAC's proposals at shareholder meetings is 11.06 percent, it had several major successes. Twenty of the proposals filed by MÉDAC or its predecessor organization attracted a shareholder majority—occasionally more than 90 percent support. For example, two proposals it filed in 2000 with BCE Inc., seeking the disclosure of auditor's fees and requiring that any information which could significantly affect the value of BCE shares be simultaneously communicated to all shareholders, attracted 99.20 percent and 98.20 percent support.[78] Another proposal it filed with BCE in 2009 attracted 93.14 percent support.[79]

Trade unions submitted nine proposals (or 0.90 percent of the total) during the study period.[80] The average support for these proposals is low—16.67 percent. However, a proposal submitted to Merrill Lynch & Co. Canada Ltd. in 2006 by a US union—the American Federation of State, County and Municipal Employees—received 35.60 percent support.[81] All nine proposals filed by unions focused primarily on corporate governance matters. More specifically, they demanded shareholder approval of compensation committee reports, elimination of multiple voting shares, abolition of dual-class share structures, separation of the positions of chairman and CEO, and replacement of stock options with time-based and performance-based restricted shares.

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78. Shareholder Association for Research & Education, *Shareholder Proposals AGM Year 2000*, online: <http://www.share.ca/shareholderdb/proposal/Disclose-Auditor-s-Fees5/778>; Shareholder Association for Research & Education, *Shareholder Proposals AGM Year 2000*, online: <http://www.share.ca/shareholderdb/proposal/Simultaneous-Commmunication-to-all-Shareholders/777>.

79. Shareholder Association for Research & Education, *Shareholder Proposals AGM Year 2009*, online: <http://www.share.ca/shareholderdb/proposal/Non-binding-shareholder-approval-of-executive-compensation7/1070>.

80. This figure includes a proposal filed in 2007 by the Association of Retired Scotiabankers. However, it does not include proposals filed by pension funds affiliated with trade unions, which are included under proposals filed by institutional investors.

81. Shareholder Association for Research & Education, *Shareholder Proposals AGM Year 2006*, online: <http://www.share.ca/shareholderdb/proposal/Seek-shareholder-approval-of-Compensation-Committee-reports/504>.

The twenty proposals filed by religious organizations and public interest groups focused solely on social issues, such as environmental protection and human rights. All eight proposals from religious organizations focused on social issues. For example, in 2006 the Syndics Apostoliques des frères mineurs (or Franciscains) asked that Bombardier Inc. establish a human rights policy and report on compliance with that policy.[82] In 2000, the United Church of Canada requested that Talisman Energy Inc. follow the International Code of Ethics for Canadian Business and report compliance.[83] Public interest advocacy groups (namely the Atkinson Charitable Foundation, the Dogwood Initiative, and the Nathan Cummings Foundation) submitted proposals requesting certain corporations to report on the impact of their projects, on the labour practices of their contractors, and on climate change.

C. Industries and Economic Sectors that Attract Shareholder Proposals

As is indicated in Figure 4, shareholder proposals were submitted to corporations in different sectors of the Canadian economy, mainly in banking, energy and natural resources, financial management, insurance, telecommunications, service and retail, and agriculture and food processing.[84] A majority, or 56.50 percent, of all proposals filed during the study period were submitted to banks, including most of the 170 proposals submitted by Robert Verdun. APIEQ/MÉDAC's proposals were also largely focused on the banking industry; Yves Michaud, that organization's founder, is a prominent proponent of corporate governance reforms in Canadian banks.[85]

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82. Shareholder Association for Research & Education, *Shareholder Proposals AGM Year 2006*, online: <http://www.share.ca/shareholderdb/proposal/Establish-human-rights-policy-and-report-on-compliance/462>.

83. Shareholder Association for Research & Education, *Shareholder Proposals AGM Year 2000*, online: <http://www.share.ca/shareholderdb/proposal/Report-on-and-Implement-Procedures-for-Compliance-with-the-Internation/825>.

84. See SHARE, *Shareholder Proposals*, *supra* note 62.

85. See Mouvement d'éducation et de défense des actionnaires, *Histoire du MÉDAC*, online: <http://www.medac.qc.ca/index.php?option=com_content&task=view&id=12&Itemid=6>. Yves Michaud was the plaintiff in *Michaud*, *supra* note 37, a case where he sought to compel the defendant bank to circulate to shareholders several proposals relating to corporate governance. The Quebec Superior Court held in his favour.

Figure 4: Industries & Economic Sectors that Attract Proposals

Year	Banking	Energy & Natural Resources	Financial Management & Insurance	Telecomm-unications	Service & Retail	Agriculture & Food Processing	Other[86]
2000	50	2	0	2	0	0	0
2001	31	3	1	2	2	0	0
2002	21	1	0	0	3	1	0
2003	44	5	11	3	4	1	4
2004	54	19	10	8	2	0	3
2005	61	19	24	17	6	3	10
2006	25	16	8	7	4	1	10
2007	62	7	10	2	7	0	8
2008	102	20	22	9	10	1	14
2009	58	7	10	9	3	4	7
2010	17	11	7	1	2	5	6
2011	35	9	7	6	11	0	4
Total	**560**	**119**	**110**	**66**	**54**	**16**	**66**
% of Total Proposals	*56.50%*	*12.00%*	*11.09%*	*6.65%*	*5.44%*	*1.61%*	*6.65%*

86. "Other" industries include real estate, computer software, aerospace, paper mills, beverage, pharmaceuticals, auto parts manufacturing, print and media.

The above data warrants a few observations. First, the liberalization of the shareholder proposals mechanism under the *CBCA* and the *Bank Act* appears to have increased the number of proposals filed by shareholders. Second, the fact that a substantial majority of proposals submitted during the study period raised corporate governance issues suggests that Canadian shareholders are primarily concerned with optimizing the return on their investments. Third, the increase in proposals appears to be the work of a few activist shareholders and organizations.[87] Finally and most important, as we will now see, the "culture of passivity" on the part of Canadian shareholders identified by earlier studies appears to persist.[88]

III. Passivity of Shareholders

Despite the liberalizing amendments to the *CBCA* and *Bank Act*, Canadian shareholder passivity is still apparent from several indicia. First, few proposals are being filed by individual or retail shareholders. Between 2000 and 2011, only 33 individual shareholders filed proposals,[89] an infinitesimal number given that 49 percent of Canadians own shares.[90] A significant percentage of proposals were submitted by individual shareholders, as indicated in Figure 3, but more than half of these were submitted by one person—Robert Verdun.

Passivity is also apparent from the low percentage of support for proposals, particularly for those dealing with social issues. As noted above, only one proposal touching on social issues received majority

87. As indicated in Figure 3, one shareholder association (APIEQ/MÉDAC) submitted 45.30% of all proposals filed during the study period, while institutional investors such as mutual funds, investment funds and pension funds filed 25.73%.

88. See Black, *supra* note 17 at 168–69.

89. This includes one anonymous shareholder, as well as shareholders who filed proposals as a group. However, each group is counted as one shareholder.

90. See Toronto Stock Exchange, *Canadian Shareowners Study 2004*, cited in Australian Stock Exchange, "International Share Ownership (Comparison of Share Owners): Key Highlights", *Australian Stock Exchange*, (September 2005) at 15–16, online: <http://www.asx.com.au/documents/resources/international_share_ownership_summary_05.pdf>.

support between 2000 and 2011. This is noteworthy; although Canadians often publicly express their support for environmental protection, this has yet to manifest itself in the form of shareholder support.

The lack of support for proposals raising social issues is perhaps because Canadians usually buy shares to make money. Shareholders may be concerned that a corporation which adopts strict environmental standards will become uncompetitive, particularly if its competitors have not adopted similar reforms. Shareholders may overlook the possibility that proposals seeking to promote social causes such as environmental protection can enhance profits by improving a corporation's public image.[91]

Shareholder proposals may have an impact even if they fail to attract majority support at an annual general meeting. Canadian corporate statutes do not require that shareholder proposals be voted on formally at annual meetings;[92] defeated proposals may still influence corporate policy. For example, Shell changed its policy on social responsibility in 1997, even though a proposal to that effect attracted only 10.5 percent support.[93]

The separation between a corporation's ownership and management makes shareholder passivity a serious problem. Management power is vested in the board of directors,[94] although it may be restricted or usurped by shareholders through a unanimous shareholder agreement.[95]

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91. See Joshua D Margolis & James P Walsh, *People and Profits? The Search for a Link Between a Company's Social and Financial Performance* (Mahwah, NJ: Lawrence Erlbaum Associates, 2001) at 10–14; Moses L Pava & Joshua Krausz, *Corporate Responsibility and Financial Performance: The Paradox of Social Cost* (Westport, CT: Quorum Books, 1995) at 15.

92. See Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3d ed (London, Ontario: Scribblers Publishing, 2006) (observing that the *CBCA* "does not authorize the shareholders at a general meeting to do anything with respect to the proposal" at 460).

93. Oshionebo, *supra* note 5 at 196.

94. *CBCA*, *supra* note 1, s 102; *ABCA*, *supra* note 1, s 101; *BCBCA*, *supra* note 1, ss 136, 137; *MCA*, *supra* note 1, s 97; *NBBCA*, *supra* note 1, s 60; *NLCA*, *supra* note 1, ss 167–69; *NWTBCA*, *supra* note 1, s 102; *OBCA*, *supra* note 1, s 115; *SBCA*, *supra* note 1, s 97; *YBCA*, *supra* note 1, s 102.

95. *CBCA*, *supra* note 1, s 102(1); *ABCA*, *supra* note 1, s 146(1); *MCA*, *supra* note 1,

Its separation from ownership may impose an "agency cost" on public corporations, because managers "rarely own a substantial stake in the corporation(s)", and are sometimes "tempted to use their control over corporate assets to further their own interests at the expense of those who own shares".[96] The active participation of shareholders in the corporate governance process may serve not only to restrain abuse of management power, but also to lessen agency cost and thereby enhance shareholder value.[97]

IV. Factors Accounting for Shareholder Passivity

Several factors account for the passivity of shareholders in Canada. First, a shareholder's ability to submit proposals is limited by legal restrictions imposed by the *CBCA*, the *Bank Act* and provincial corporate statutes,[98] such as restrictions on eligibility to submit proposals and on their timing and scope. For example, most provincial corporate statutes in Canada do not allow beneficial owners and owners of non-voting shares to submit proposals. Under the *CBCA*, as noted above, a shareholder must hold at least one percent of outstanding voting shares, or shares worth at least $2 000. While the *CBCA* allows shareholders to pool their holdings in order to meet the eligibility criteria, the qualification threshold essentially prevents smaller shareholders from filing proposals[99]—a new restriction under the amended *CBCA*.[100]

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s 140(2); *NBBCA*, *supra* note 1, s 99(2); *NLCA*, *supra* note 1, s 245(1); *OBCA*, *supra* note 1, s 108(2); *SBCA*, *supra* note 1, s 140(2).

96. Cheffins, *supra* note 30 at 25–26.

97. Lucian A Bebchuk, "The Case for Increasing Shareholder Power" (2005) 118:3 Harv L Rev 835 at 908.

98. MacIntosh, *supra* note 17 at 168.

99. Sarra, "Winners and Losers", *supra* note 6 at 69–70.

100. For example, before the 2001 amendments, the court held in *Michaud, supra* note 37, that Yves Michaud was entitled to submit a proposal to the bank under the previous *Bank Act* because he owned at least one common voting share, and that while his interest in the bank may have been minimal, it was "real enough" to entitle him to submit a proposal.

Second, the financial cost, time and effort involved in preparing and filing a proposal are disincentives.[101] Individual shareholders bear those burdens, while the benefits of a successful proposal are shared by all. This creates a "free rider" problem: in Jeffrey MacIntosh's words, shareholders may conclude that "it is better to let someone else 'bell the cat'".[102] This may explain why institutional shareholders tend to file proposals "only where it is likely to be profitable or where necessary to remedy conduct that negatively affects portfolio value".[103]

Filing a shareholder proposal can be particularly costly where there is a dispute over the validity of the proposal's exclusion from proxy materials. This problem is compounded by the fact that the *CBCA*, the *Bank Act* and provincial corporate statutes do not provide administrative avenues for resolving disputes, but rely on the judicial system. For example, the *CBCA* allows a shareholder aggrieved by a corporation's refusal to circulate a proposal to apply for a court order restraining the meeting where the proposal will be presented.[104] Where appropriate, the court may order the corporation to omit a shareholder proposal from its proxy circular if the proposal does not comply with legal requirements.[105] In effect, federal and provincial statutes impose both legal and financial burdens on shareholders to prove the appropriateness of their proposals.[106]

In contrast, the United States Securities and Exchange Commission (SEC) is vested with administrative power to interpret the rules governing proposals and to determine the validity of a proposal's exclusion.[107] While the SEC's rulings are non-binding, they are

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101. See Dhir, "Corporate Accountability", *supra* note 61 at 400–401; Sarra, "Winners and Losers", *supra* note 6 at 65.

102. MacIntosh, *supra* note 17 at 153–54. See also Sarra, "Winners and Losers", *supra* note 6 at 65.

103. *Ibid.*

104. *CBCA*, *supra* note 1, s 137(8). See also *Bank Act*, *supra* note 1, s 144(2). See also *ABCA*, *supra* note 1, s 136(8); *BCBCA*, *supra* note 1, s 191(2), (3); *MCA*, *supra* note 1, s 131(8); *NBBCA*, *supra* note 1, s 89(8); *NLCA*, *supra* note 1, s 230; *NSCA*, *supra* note 1, Schedule III, s 9(8); *OBCA*, *supra* note 1, s 99(8); *NWTBCA*, *supra* note 1, s 138(9); *SBCA*, *supra* note 1, s 131(8); *YBCA*, *supra* note 1, s 138(8).

105. *CBCA*, *supra* note 1, s 137(9). See also *Bank Act*, *supra* note 1, s 144(3).

106. See Dhir, "Corporate Accountability", *supra* note 61 at 400.

107. 17 CFR §240.14a-8.

persuasive and exemplify best practices for the circulation and exclusion of proposals. In addition, the corporation has the burden of proving that a proposal was validly excluded from proxy materials.[108] In Canada, giving administrative bodies the authority to deal with disputes over the exclusion of shareholder proposals might be a cost-effective way to resolve such disputes,[109] although that is not clear. In addition, the lack of appropriate mechanisms for dispute resolution does not explain the low level of support for shareholder proposals at annual meetings.

Third, shareholders may be dissuaded from filing proposals with corporations that have a dual-class share structure.[110] At common law, all shares have equal voting rights, but under the *CBCA*, the corporation's articles of incorporation may provide otherwise.[111] Thus, a corporation can modify or negate the principle of share equality if allowed by its articles of incorporation[112]—for example, where the articles provide for a share class structure[113] which sets out "the rights, privileges, restrictions and conditions attaching to the shares of each class".[114] The *CBCA* also allows articles of incorporation to grant more

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108. *Ibid*, §240.14a-8(g).

109. Sarra "Winners and Losers", *supra* note 6 at 73. See also Dhir, "Corporate Accountability", *supra* note 61 at 399–400.

110. The dual-class shares structure (or subordinated/restricted shares structure, as it is sometimes called) has been used by Canadian corporations for at least six decades. See Stephanie Ben-Ishai & Poonam Puri, "Dual-Class Shares in Canada: An Historical Analysis" (2006) 29:1 Dal LJ 117 at 118. In fact, in the early 2000s "more than a quarter" of the 207 corporations listed on the S&P/TSX Index had dual-class shares in one form or another. See Shareholder Association for Research & Education, *Second Class Investors: The Use and Abuse of Subordinated Shares in Canada*, online: <www.share.ca/files/Second_Class_Investors.pdf> at 10. In the recent past, a number of Canadian corporations have discarded their dual-class shares structure and it appears that Canadian investors are becoming wary of companies with such a structure. *Ibid* at 25–26. Nevertheless, the dual-class shares structure persists in Canada. See the Ben-Ishai & Puri article at 119.

111. *CBCA*, *supra* note 1, s 140 (1).

112. See *International Power Company Ltd v McMaster University*, [1946] SCR 178 at 203; *McClurg v Canada*, [1990] 3 SCR 1020 at 1041–42. See also *Re Bowater Canadian Ltd and RL Crain Inc* (1987), 62 OR (2d) 752, 46 DLR (4th) 161 (CA).

113. *McClurg*, *supra* note 112.

114. *CBCA*, *supra* note 1, s 24(4).

voting power per share to designated classes of shares,[115] and some classes may be denied any voting rights. This allows some shareholders, particularly founding shareholders, to retain control of the corporation despite having only a minority of shares. A few Canadian examples illustrate this point. At Onex Corporation, 0.062 percent of the company's shares hold 60 percent of voting power, while 1.3 percent of Magna International Inc.'s shares hold 86 percent of voting power.[116] At Shaw Communications Inc., 4.9 percent of the shares hold 100 percent of the voting power.[117] The family that owns 17.5 percent of Bombardier Inc.'s shares has 59.7 percent of the voting power.[118]

The dual-class share structure may not be a significant cause of the low number of individual shareholder proposals, given that it is actually used in only a limited number of Canadian corporations.[119] However, it

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115. *Ibid*, 140 (1).

116. Lily Nguyen, "Dual-class stock double trouble", *The Globe and Mail* (11 October 2002), online: Globe and Mail <http://v1.theglobeandmail.com/series/boardgames/charts/fairshare.html>.

117. *Ibid.*

118. SHARE, "Second Class Investors", *supra* note 110 at 12.

119. Ben-Ishai & Puri, *supra* note 110 at 118–19. The authors have argued that dual-class share structures persist in Canada because of nationalist policies and legislation that regulates foreign ownership and domination of Canadian business. Available data on dual-class share structures in Canada support Ben-Ishai and Puri's contention. Many of the corporations with such a structure are in sectors where the law requires them to maintain a certain minimum degree of Canadian ownership, or sectors that are related to Canada's cultural heritage or national identity. Under s 14.1(6) of the *Investment Canada Act*, RSC 1985, c 28 (1st Supp), the communications, media and entertainment sectors (including publishing, film and video recording and production, audio, music, radio and television) are designated as "related to Canada's cultural heritage or national identity". In the past, Canadian corporations have adopted dual-class share structures, in order to comply with foreign ownership restrictions under statutes such as the *Broadcasting Act*, SC 1991, c 11. See SHARE, "Second Class Investors", *supra* note 110 at 15. On foreign ownership restrictions under the *Broadcasting Act*, see Jeffrey Kowall, "Foreign Investment Restrictions in Canadian Television Broadcasting: A Call for Reform" (1992) 50:1 UT Fac L Rev 61. Currently, the acquisition of a Canadian corporation by a foreign purchaser is subject to ministerial review if the corporation's business is "related to Canada's cultural heritage or national identity" or if the acquisition exceeds the prescribed dollar amount. See *Investment Canada Act*, RSC 1985, c 28, s 14. Thus, this legislative restriction unintentionally encourages Canadian corporations to adopt dual-class share structure. See Canada, Parliamentary Information and Research Service, *Dual-*

does significantly affect the level of support for shareholder proposals at annual meetings, as it allows controlling shareholders, even if they are in a minority, to easily defeat proposals for change that they do not approve of. For example, the Desmarais family owns 26 percent of the shares of Power Corporation of Canada but controls 62 percent of the voting rights under the dual-class share structure,[120] and in 2010 the family easily defeated a proposal requesting that two-thirds of the corporation's board be independent directors.[121]

Despite the fact that the limited utility of shareholder proposals may deter rational shareholders from submitting them, they can still be useful corporate governance mechanisms. Management is not legally obligated to implement a proposal that has been adopted by a majority of shareholders,[122] but it is unlikely to disregard such a proposal given the checks and balances set out in corporate statutes such as the *CBCA*. For example, shareholders can retaliate by voting directors off the board if they refuse or neglect to implement proposals supported by a majority.[123] This helps to explain why corporate management sometimes accedes to shareholder demands and allows proposals to inform and influence corporate policies.[124]

Finally, the lack of formal mechanisms for direct communication among shareholders prior to annual meetings (other than the shareholder proposal mechanism and the proxy system) not only renders shareholder proposals "practically useless"[125] but also explains

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Class Share Structures and Best Practices in Corporate Governance by Tara Gray (Ottawa: Library of Parliament, 2005) at 5.

120. Shareholder Association for Research & Education, *2010 Key Proxy Vote Survey*, online: <www.share.ca/files/2010_Key_Proxy_Vote_Survey.pdf> at 15.

121. *Ibid.*

122. Welling, *supra* note 92 at 460. See also Cheffins, *supra* note 30 at 36–37. It should be noted, however, that under the Ontario *Business Corporations Act*, shareholder proposals which make, amend or repeal a corporation's by-laws are deemed to be effective from the date of adoption. See *OBCA*, *supra* note 1, ss 99, 116. Consequently in Ontario, it is arguable that a shareholder proposal is effective and binding if it is adopted as a by-law.

123. Cheffins, *supra* note 30 at 37.

124. See Aaron A Dhir, "Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity" (2010) 35:2 Queen's LJ 569 at 614.

125. Dirk A Zetzsche, "Shareholder Interaction Preceding Shareholder Meetings of

why they attract little support. Direct communication between shareholders could increase awareness of issues raised in proposals and enable sponsors to canvass support before the annual meeting. Sometimes shareholders do not read proxy material before the meeting, and may not be aware of proposals scheduled for debate. As MacIntosh points out, such material often "either goes in the garbage or is perfunctorily returned" to the company.[126] The efficiency and effectiveness of shareholder proposals would be greatly enhanced if formal channels of communication among shareholders were available before annual meetings.[127] The following section will address this matter.

V. Enhancing the Utility of Shareholder Proposals Through Electronic Shareholder Forums

As Zetzsche has noted, the shareholder proposal mechanism may be unable to promote participation in corporate governance "unless shareholders can campaign for their proposals in advance of the meeting" of shareholders.[128] American authors have argued that internet shareholder forums could help shareholders distribute and discuss information before meetings.[129] Such forums could be established separately by shareholders and corporations, or jointly by both. A website could, for example, provide for communication through an interactive discussion board.[130]

Public Corporations—A Six Country Comparison" (2005) 2:1 European Company and Financial Law Review 107 at 131.

126. MacIntosh, *supra* note 17 at 153.

127. *Supra* note 125 (arguing that "provisions on communication and co-ordination with other shareholders [are] crucial for the efficiency of shareholder minority rights" at 131).

128. *Ibid.*

129. See Blake Smith, "Proxy Access and the Internet Age: Using Electronic Shareholder Forums to Improve Corporate Governance" (2008) 2008:3 Colum Bus L Rev 1111.

130. See George P Kobler, "Shareholders Voting Over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance" (1998) 49:2 Ala L Rev 673.

In the United States, the SEC has recognized the facilitative and complementary roles of online shareholder forums. In 2007, it said:

> an online forum, restricted to shareholders of the company whose anonymity is protected through encrypted unique identifiers, could offer the opportunity for shareholders to discuss among themselves the subjects that most concern them, and which today are considered—if at all—only indirectly through the proxy process.[131]

In 2008, US proxy solicitation rules were amended by the SEC to permit communication and discussion through electronic shareholder forums.[132] This amendment allows such forums to be established, maintained or operated by shareholders, corporations or third parties acting on their behalf.[133]

Electronic shareholder forums could be beneficial in several ways. Managers could receive frequent, real-time input and feedback on shareholder concerns and interests,[134] which would give them "the opportunity to understand what their investors are thinking, in advance of the annual meeting".[135] For shareholders, the availability of information through electronic forums would put them in a better position to make decisions, and would enhance the quality and frequency of their participation in corporate governance.[136] Minority shareholders would find it easier to communicate with others who might be willing to pool their holdings to satisfy the minimum eligibility requirements for submitting proposals.[137] Certain communications made through electronic forums could trigger the

131. Securities and Exchange Commission, *Shareholder Proposals*, online: Securities and Exchange Commission <http://sec.gov/rules/proposed/2007/34-56160.pdf> at 42–43.

132. Electronic Shareholder Forums, 73 Fed Reg 4450 (proposed Fri Jan 25, 2008) (to be codified at 17 CFR pt 240) .

133. *Supra* note 107, §240.14a-17 (introduced by *ibid*, 4458).

134. See Lisa M Fairfax, "The Future of Shareholder Democracy" (2009) 84:4 Ind LJ 1259 at 1301. See also Smith, *supra* note 129 at 1130–31; SEC, "Shareholder Proposals", *supra* note 131 at 43.

135. Paul Brent, "Connecting Investors and Companies Online: Shareholders Talk", *Canada.com* (31 January 2011), online: Canada.com <http://www2.canada.com/life/connecting+investors+companies+online/4194991/story.html?id=4194991&p=2>.

136. SEC, *Shareholder Proposals*, *supra* note 131 at 43.

137. *CBCA*, *supra* note 1, s 137 (1.1).

proxy solicitation rules, but the definition of solicitation under the *CBCA* excludes "a communication for the purposes of obtaining the number of shares required for a shareholder proposal".[138]

Communication and dissemination of information through electronic shareholder forums could also make it more likely that proposals would be adopted at annual meetings. Online polls or referenda[139] could measure the level of support for a proposal, thereby helping to screen out unpopular proposals[140] and to save the corporation the time and expense of including them in proxy circulars.

Under the *CBCA*, all shareholders entitled to vote at shareholder meetings have a statutory right to appoint a proxyholder, who need not be a fellow shareholder,[141] "to attend and act at the meeting in the manner and to the extent authorized by the proxy and with the authority conferred by the proxy".[142] Electronic forums could help to gather support for shareholder proposals by making it easier for sponsors to obtain proxy mandates, thereby alleviating the problem that only a negligible percentage of shareholders usually attend and vote at annual meetings. Such forums might even help remind shareholders of the importance of coming to those meetings.

However, the effectiveness of electronic forums in enhancing shareholder participation in corporate governance has been questioned, as they may make it easier for corporations to ignore shareholders or avoid interaction with them.[143] As Lisa Fairfax notes, "it is possible that such forums undermine meaningful discourse and debate not only because they do not present a controlled flow of communication, but also because they occur in the context of comments by a large group of shareholders".[144] These concerns miss the point. Electronic shareholder forums are not designed to supplant face-to-face interaction between shareholders and corporations, but to complement such existing means of communications as shareholder proposals, the proxy process and

138. *Ibid*, s 147.
139. SEC, *Shareholder Proposals*, *supra* note 131 at 43.
140. "Electronic Shareholder Forums", *supra* note 132 at 4455.
141. *CBCA*, *supra* note 1, s 148(1).
142. *CBCA*, *supra* note 1, s 148(1).
143. Fairfax, *supra* note 134 at 1302–03.
144. *Ibid* at 1302.

annual meetings. If the communications relate in a significant way to the business of the corporation, corporate managers are unlikely to take the risk of ignoring them and thereby appearing to shareholders as unresponsive, if not irresponsible.

As yet, no Canadian corporation has set up an electronic shareholder forum, although some have expressed interest.[145] It is by no means certain that electronic forums would enhance shareholder participation in corporate governance, but they might well help to counter shareholder apathy. In our electronic age, people prefer instantaneous and readily accessible information to proxy solicitation materials that are sent only once a year. If the annual meeting's agenda can be posted on electronic forums in advance, it is more likely that shareholders will read it.

If electronic forums are to work, however, shareholders must be convinced that they are useful, secure and reliable. The few such forums that exist in the United States have incorporated safety features designed to ensure their reliability and effectiveness. Access is restricted to validated shareholders of the corporation.[146] The forums are often encrypted, and validated shareholders are issued personal identification numbers and passwords—features that could be supplemented with periodic verification and auditing.

The Canadian Securities Administrators (CSA), an association of securities regulators from across the country, unwittingly discourages corporations from establishing electronic forums. The CSA recommends, through *National Policy 51-201 Disclosure Standards,* that corporations should maintain up-to-date and accurate websites, but warns them not to "participate in, host or link to chat rooms or bulletin boards".[147] Furthermore, the CSA recommends disclosure policies that prohibit employees from discussing corporate matters in electronic forums, to shield the company "from liability that could arise from well-intentioned, but sporadic, efforts of employees to correct rumours or

145. National Post, "Constructing Trust", *National Post* (24 January 2011), online: National Post <http://www.nationalpost.com/Constructing+Trust/4155621/story.html>.

146. See e.g., Broadridge's Shareholder Forum, *Broadridge Client Logon Sites,* online: Broadridge <http://www.broadridge.com/logon.asp>.

147. *Disclosure Standards*, OSC NP 51-201, ss 6.12–6.13.

defend the company".[148] As more companies communicate electronically with their shareholders—for example, by delivering proxy materials electronically—it becomes increasingly obvious that the CSA policies are out of tune with reality. Those policies need to be amended to ensure adequate and timely communication between corporations and their shareholders.

VI. Barriers to Creating Electronic Shareholder Forums in Canada

Despite the need for change, there are three substantial obstacles to the establishment and operation of electronic shareholder forums in Canada. The first obstacle is the allocation of costs. If a forum is established jointly by shareholders and the corporation, it would be unfair to place the financial burden of maintaining it on one constituency; if both will benefit from it, they should share the cost, with half coming from the corporation and the other half being deducted from shareholder dividends. In any event, the operating expenses of an electronic shareholder forum should not be high, given the cost of operating comparable websites.[149]

Second, electronic shareholder forums might trigger proxy solicitation rules under the *CBCA*.[150] This could occur in the following circumstances: if there was a request for a proxy through the forum; if a proxy was sent as a result of discussions on the forum; if a request was made to execute or revoke a proxy; or if communications took place which indirectly led to procuring, withholding or revoking a proxy.

In each of these circumstances, the shareholder making the communication is obliged to send to all shareholders a dissident's proxy

148. *Ibid* at s 6.13.

149. "Electronic Shareholder Forums", *supra* note 132 at 4455.

150. *CBCA*, *supra* note 1, s 147: (i) a request for a proxy whether or not accompanied by or included in a form of proxy, (ii) a request to execute or not to execute a form of proxy or to revoke a proxy, (iii) the sending of a form of proxy or other communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy, and (iv) the sending of a form of proxy to a shareholder under s 149.

circular that includes disclosure about those submitting the proposal.[151] That circular must state the purpose of the solicitation and be sent to each shareholder and each director, to the auditor and to the corporation.[152] Compliance with these rules could become expensive, and non-compliance is an offence that attracts severe sanctions.[153]

There are two circumstances in which a shareholder may solicit a proxy without sending a dissident's proxy circular. The first is where no more than fifteen shareholders' proxies are solicited, and the second, set out in section 150(1.2) of the *CBCA*, is where the solicitation is "conveyed by public broadcast, speech or publication".[154] The scope of the exception for solicitation by public broadcast has yet to be judicially determined. Would proxy solicitations made through electronic shareholder forums qualify as being made through "public broadcast, speech or publication"? A strict reading might suggest that if the forums are not accessible to the greater public, they do not so qualify. However, this exception could be interpreted liberally, in a way that would promote the *CBCA*'s overarching aim of encouraging shareholder participation in corporate governance. Such an interpretation would see shareholder communication through an electronic forum as being a form of "public broadcast, speech or publication" because access is not restricted to a select group of shareholders, and a great many Canadians can own shares in a company. A narrower interpretation would defeat the purpose of the 2001 amendments, which was to "eliminate unnecessary regulatory obstacles to the exchange of views and opinions by shareholders and others concerning management performance and initiatives presented for a vote of shareholders".[155]

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151. Van Duzer, *supra* note 28 at 578.

152. *CBCA*, *supra* note 1, s 150(1).

153. The sanction is a fine of up to five thousand dollars or imprisonment for up to six months, or both. See *CBCA*, *supra* note 1, s 150(3).

154. *CBCA*, *supra* note 1, ss 150(1.1)–(1.2).

155. See Industry Canada, "Analysis of the Changes", *supra* note 22 at Part 13 Proxies. A shareholder who solicits proxies through the "public broadcast, speech or publication" exception would still need to comply with the *Canada Business Corporations Regulations*, which require such solicitation to contain required information. See *CBCR*, *supra* note 39, s 69(1).

Prior to 2008, a similar concern was expressed in the United States to the effect that shareholder communication through electronic forums would trigger the proxy solicitation rules,[156] because any "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy" is regarded as "solicitation".[157] This would have severely restricted the kinds of communication that could occur in a public online forum.[158] This concern was addressed by amendments which exempt statements made by persons in electronic forums from triggering the proxy solicitation rules.[159] The scope of the new exemption is limited: it does not include solicitations that directly or indirectly ask for consent to act as proxy for a shareholder, or solicitations that furnish or request a revocation, abstention, consent, or authorization.[160] Nonetheless, it removes an unnecessary barrier to shareholder communication, and could be expected to increase shareholder participation in corporate governance in the U.S.

The third obstacle lies in the fact that statements made by shareholders and corporations in an electronic forum could be libellous

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156. "Electronic Shareholder Forums", *supra* note 132 (indicating that "potential forum participants have expressed concern regarding whether views expressed through the forum would be considered proxy solicitation" at 4451).

157. *Supra* note 107, §240.14a-1.

158. SEC, *Shareholder Proposals*, *supra* note 131 at 46.

159. The exception states:

> "Any solicitation by or on behalf of any person who does not seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent, or authorization in an electronic shareholder forum that is established, maintained or operated pursuant to the provisions of s 240.14a-17, provided that the solicitation is made more than sixty days prior to the date announced by the registrant for its next annual or special meeting of shareholders. If the registrant announces the date of its next annual or special meeting of shareholders less than sixty days before the meeting date, then the solicitation may not be made more than two days following the date of the registrant's announcement of the meeting date."

Supra note 107, §240.14a-2(b)(6). For an introduction see *supra* note 132 at 4458.

160. *Ibid.*

or could violate securities law. In the event of a libellous statement, whoever makes it is personally liable in tort law. Also, anyone who makes a statement or communication that violates securities law is personally liable under such law.[161] Beyond this, it is not clear whether a corporation that established an electronic shareholder forum in which an offending communication was made would be held liable. The *CBCA*, the *Bank Act* and provincial corporate statutes of course do not specifically address the question of libellous communications made in electronic shareholder forums, but they do provide blanket immunity for corporations with respect to the circulation of shareholder proposals.[162] Thus, if such a proposal includes a libellous statement, the corporation is not liable. This immunity benefits a corporation irrespective of how it circulates a proposal, but it may not cover libellous statements that are not made in a proposal circulated by the corporation. Corporations could therefore be liable for statements made by shareholders in electronic forums.

For electronic shareholder forums to take root in Canada, the legislatures will need to extend federal and provincial immunity to liability for libel to include communications in those forums. Pending such legislative intervention, corporations could avoid or limit liability by expressly disclaiming responsibility for libellous statements made in shareholder forums. Disclaimers of that sort could, however, undermine the credibility of the forums. Alternatively or additionally, shareholders could be required to sign contracts making them solely responsible for their statements in electronic forums.

Under current securities law, it is conceivable that liability for a communication which violates securities law would extend to

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161. There is personal liability for misrepresentation and for tipping under provincial securities law. See e.g., *Securities Act*, RSO 1990, c S5, ss 130–34. For the US, see *ibid* at 4458–59, and the *Securities Act of 1933*, 48 Stat 74, 15 USC 77a-77mm at s 17.

162. Corporations and persons acting on their behalf shall not incur "any liability by reason only of circulating a proposal or statement in compliance with this section". See *CBCA*, *supra* note 1, s 137(6). See also *Bank Act*, *supra* note 1, s 143(6); *ABCA*, *supra* note 1, s 136(6); *BCBCA*, *supra* note 1, s 190; *MCA*, *supra* note 1, s 131(6); *NBBCA*, *supra* note 1, s 89(6); *NLCA*, *supra* note 1, s 228; *NSCA*, *supra* note 1, Schedule III, s 9(6); *NWTBCA*, *supra* note 1, s 138(7); *OBCA*, *supra* note 1 s 99(6); *SBCA*, *supra* note 1, s 131(6); *YBCA*, *supra* note 1, s 138(6).

shareholders or corporations that established the electronic forum. This would be a disincentive to set up and maintain such forums. In the United States, this concern has been allayed by a provision that shareholders and corporations are not "liable under the federal securities laws for any statement or information provided by another person to the electronic shareholder forum[s]".[163] However, persons contributing to electronic shareholder forums must ensure compliance with securities law because they bear personal liability for their statements.[164]

Despite these developments in the US, liability for securities law violations remains a significant barrier to the establishment of Canadian electronic shareholder forums, and it is compounded by the lack of a federal securities regulator in Canada.[165] Provincial legislatures should amend their securities statutes to exempt persons or corporations who establish and operate electronic shareholder forums from liability for statements posted online by users of the forums. Getting this done across the country would be a daunting task, given the disparate interests of the provinces with regard to securities regulation.[166] It would be more realistic for the Canadian Securities Administrators to set out guidelines for such an exemption and waiver, through a national policy or instrument.

Conclusion

The shareholder proposal mechanism is designed to facilitate shareholder participation in corporate governance, but Canadian shareholders have not used it to anything like its full extent. Only a small number of shareholders submitted proposals between 2 000 and 2011, and those who did were mostly established shareholder activists.

163. "Electronic Shareholder Forums", *supra* note 132 at 4458.

164. *Ibid* at 4458–59.

165. See *Reference re Securities Act*, 2011 SCC 66, 339 DLR (4th) 577.

166. For example, Alberta and Quebec are opposed to the creation of a national securities regulator, while other provinces are supportive of a national securities regulator. Similarly, Ontario is opposed to the harmonization of rules to allow corporations and market intermediaries to engage in securities trading in multiple jurisdictions. *Ibid* at paras 3, 42.

Even those proposals which were submitted rarely received majority support at annual meetings.

This shareholder passivity has several causes: the cumbersome submission requirements for proposals; the time, effort and cost involved in submitting a proposal; the popularity of dual-class share structures in Canada; and a lack of direct, instantaneous communication between shareholders and the corporation. A corporation that wanted to dissuade shareholder proposals could insist on letter-of-the-law compliance with the complex submission requirements, thereby ensuring a difficult submission process. Furthermore, the fact that it is expensive to distribute a dissident proxy circular, and the fact that dual-class share structures deter shareholders from pursuing proposals because of the inherent inequality of voting power, might mean that only a small percentage of proposals are approved.

Most important, there is a lack of direct communication between shareholders prior to annual meetings—a problem which might be remedied in part by the creation of electronic shareholder forums. The utility of the shareholder proposal mechanism can be improved by formal electronic means of communication, which would allow shareholders to solicit and gauge support for their proposals. Such forums have been used in the US, and have been supported by legislative changes designed to reduce liability for those who establish and operate them.

Canadian shareholders would undoubtedly benefit from electronic shareholder forums. Those forums would provide an important opportunity for discussion and debate, and could help to overcome shareholder apathy. They would provide an easy and efficient way for shareholders to communicate, to obtain support for their proposals, and to spread the word about good corporate governance practices. For all of these reasons, electronic shareholder forums could enhance shareholder participation in the governance of Canadian corporations.