

SHAREHOLDER PROPOSALS MECHANISM UNDER THE MANITOBA *CORPORATIONS ACT*: A PROPOSAL FOR REFORM

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I. INTRODUCTION

The *Corporations Act* allows shareholders “entitled to vote at an annual meeting of shareholders” to submit to the corporation proposals with regard to any matter that they propose to raise at the meeting.¹ Shareholders are also entitled to attach to their proposal a statement of not more than 200 words in support of the proposal.² Corporations are required to distribute such proposals, along with any statement in support of the proposals, to their shareholders prior to the annual meeting of shareholders. In practice, corporations distribute shareholder proposals by including the proposals in the management proxy circular sent to shareholders prior to the annual meeting of shareholders.³ Subject to the exemptions in section 135(5) of the *Corporations Act*, a proposal may contain “any matter” including matters such as the nominations of persons for election as directors.⁴

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¹ *Corporations Act*, RSM 1987, c C-225; CCSM c C-225, s 131(1) [*Corporations Act*].

² *Ibid.*, s 131(3).

³ *Ibid.*

⁴ *Ibid.*, s 131(1) & (4).

The statutory scheme dealing with shareholder proposals under the *Corporations Act* (and comparable corporate statutes in Canada) is not only intended to facilitate communication and dialogue between corporations and shareholders,⁵ but more importantly, it is also aimed at promoting shareholder participation in corporate governance.⁶ It enables shareholders to “challenge some of management’s policies and operations” and, in some instances, forces corporate management to justify its position concerning the affairs of the corporation.⁷ By enabling shareholders to compel corporate management to justify its position, shareholder proposals could promote efficiency and effectiveness in corporate governance.

As well, shareholder proposals are significant mechanisms for “encouraging management to be more socially responsible”.⁸ For example, shareholder proposals seeking the disclosure of corporate information on socially sensitive transactions could “incite management to alter its policies or behaviour.”⁹ Evidence exists to suggest that even in cases where shareholder proposals are defeated at the annual meeting of shareholders, such proposals may yet have a tremendous influence on corporate policy. In fact, it is not uncommon for corporate management to make concessions to address the concerns and issues raised in shareholder proposals. For example, in the 1970s, the group Project on Corporate Responsibility submitted several proposals to General Motors Corporation, one of which sought diversification of its board of directors. The proposal was strongly opposed by the board of General Motors and was consequently defeated. However, within three years of the proposal, General Motors diversified its board and created a public policy committee consisting of independent directors.¹⁰ More recently, a

⁵ See Anthony VanDuzer, *The Law of Partnerships & Corporations*, 3d ed (Toronto: Irwin Law, 2009) at 575.

⁶ *Verdun v Toronto-Dominion Bank*, [1996] 3 SCR 550 at para 32, 139 DLR (4th) 415. See also Robert WV Dickerson et al, *Proposals for a New Business Corporations Law for Canada*, Vol 1 (Ottawa: Information Canada, 1971) at para 276.

⁷ Raymonde Crete, *The Proxy System in Canadian Corporations - A Critical Analysis* (Montreal: Wilson & Lafleur, Martel, 1986) at 193-194.

⁸ VanDuzer, *supra* note 5 at 575.

⁹ Crete, *supra* note 7 at 194.

¹⁰ See Donald E Schwartz & Elliot J Weiss, “An Assessment of the SEC Shareholder Proposal Rule” (1977) 65 Geo LJ 635 at 646-7. See also VanDuzer, *supra* note 5 at

proposal requiring Enbridge Inc to adopt a human rights policy and to report on its operations in Colombia prompted the company to adopt the Voluntary Principles on Security and Human Rights, an international code designed to promote security and human rights in the mining industry.¹¹ Corporate management sometimes make concessions in return for the withdrawal of a proposal by shareholder(s). For example, in 2005 no less than twenty-six proposals resulted in successful negotiations between shareholders and company management, with the result that some of the issues raised in the proposals were conceded by management.¹² The potential for shareholder proposals to influence management policies explains the observation that “today’s proposals may become tomorrow’s corporate policy”.¹³

While shareholder proposals are important dialogic tools, the utility of shareholder proposals in Manitoba is severely constrained by two factors: (1) the restriction and limitation on shareholders eligible to submit proposals, and (2) the overly broad exemptions provided for under the *Corporations Act*.¹⁴ This article intends to provide a template for liberalizing the statutory regime governing shareholder proposals in Manitoba. More specifically, the article argues that the statutory regime should be amended not only to enlarge the categories of shareholders eligible to submit proposals but also, to curtail or restrict the circumstances under which a corporation may refuse to distribute proposals to shareholders prior to their annual meeting. The article begins in Part II by analyzing the statutory regime governing shareholder proposals in Manitoba, identifying in the process certain deficiencies in the regime. Part III offers suggestions on how the deficiencies identified in Part II could be remedied. Finally, in

575-6; Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009) at 196 [Regulating TNCs].

¹¹ Janis Sarra, “Shareholders as Winners and Losers under the Amended Canada Business Corporations Act” (2003) 39 Can Bus LJ 52 at 76.

¹² Canadian Shareholder Association for Research and Education, 2005 Key Proxy Vote Survey, at 9, online: Shareholder Association for Research and Education <http://www.share.ca/filoes/Proxy_Vote_Survey_2005_EN.pdf>. See also Sarra, *supra* note 11 at 75.

¹³ *Ibid* at 74-75.

¹⁴ *Corporations Act*, *supra* note 1, s 131(5).

Part IV the article proposes model legislation on shareholder proposals in Manitoba.

II. STATUTORY PROVISIONS WITH REGARD TO SHAREHOLDER PROPOSALS IN MANITOBA

Section 131 of the *Corporations Act* provides as follows:

131(1) A shareholder entitled to vote at an annual meeting of shareholders may
(a) submit to the corporation notice of any matter that he proposes to raise at the meeting, hereinafter referred to as a "proposal"; and

(b) discuss at the meeting any matter in respect of which he would have been entitled to submit a proposal.

131(2) A corporation that solicits proxies shall set out the proposal in the management proxy circular required by section 144 or attach the proposal thereto.

131(3) If so requested by the shareholder, the corporation shall include in the management proxy circular or attach thereto a statement by the shareholder of not more than 200 words in support of the proposal, and the name and address of the shareholder.

....

131(5) A corporation is not required to comply with subsections (2) and (3) if
(a) the proposal is not submitted to the corporation at least 90 days before the anniversary date of the previous annual meeting of shareholders; or

(b) it clearly appears that the proposal is submitted by the shareholder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the corporation or its directors, officers or security holders, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes; or

(c) the corporation, at the shareholder's request, included a proposal in a management proxy circular relating to a meeting of shareholders held within two years preceding the receipt of the request, and the shareholder failed to present the proposal, in person or by proxy, at the meeting; or

(d) substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident's proxy circular relating to a meeting of shareholders held within two years preceding the receipt of the shareholder's request and the proposal was defeated; or

(e) the rights conferred by this section are being abused to secure publicity.¹⁵

A. Who May Submit Proposals?

A shareholder is eligible to submit a proposal if the shareholder is “entitled to vote at an annual meeting of shareholders”.¹⁶ Although the phrase “entitled to vote” is found in several provincial corporate statutes in Canada,¹⁷ these statutes do not define or specify shareholders that are “entitled to vote” at annual meetings of shareholders. Thus the phrase “does not seem to have one generally accepted ‘plain meaning’ that is recognized as such by the business community.”¹⁸ However, as urged by the Supreme Court of Canada, the proper approach to the interpretation of the phrase is the “modern contextual approach” which takes into account the statutory “provisions in their immediate context, the Act as a whole, the external context and policy implications”.¹⁹ Thus, while the phrase is not defined in corporate statutes its meaning may be derived from sections of the statutes dealing with the rights of shareholders. In the context of the *Corporations Act*, shareholders “entitled to vote” would seem to have a narrow meaning because of the provision in section 47 of the Act dealing with registered holders of a corporation’s security. That section provides in part as follows:

47(1) A corporation or a trustee defined in subsection 77(1) may, subject to *The Executions Act* and sections 128, 129 and 132 of this Act, treat the registered owner of a security as the person exclusively entitled to vote, to receive notices, to receive any interest, dividend or other payments in respect of the security, and otherwise to exercise all the rights and powers of an owner of the security.

Section 47 of the *Corporations Act* gives meaning to the phrase “entitled to vote” under section 131(1) because it empowers corporations to treat registered owners of shares as the persons “exclusively entitled to

¹⁵ *Corporations Act*, *supra* note 1, s 131.

¹⁶ *Ibid*, s 131(1).

¹⁷ See *Ibid*, s 131(1); *Business Corporations Act*, SNB 1981, c B-9.1, s 89(1); *Corporations Act*, NSNL 1986 c12, s 224; *Companies Act*, RSNS 1989, c 81, Schedule 3, s 9(1); *Business Corporations Act*, SNWT 1996, c 19, s 138(2); *Business Corporations Act*, RSS 1978, c B-10, s 131(1); *Business Corporations Act*, RSY 2002, c 20, s 138(1).

¹⁸ *Verdun v Toronto Dominion Bank*, *supra* note 6 at para 3.

¹⁹ *Ibid* at para 5.

vote” in respect of the shares.²⁰ Thus contextualized, the phrase “entitled to vote” refers to shareholders that are the registered owners of a corporation’s voting shares. In other words, to be entitled to vote at meetings of shareholders of corporations incorporated under the *Corporations Act*, a shareholder must prove that they are named in the corporation’s Record (or Register) of Shareholders as the owner of voting shares.²¹

Section 131(1) of the *Corporations Act* is unduly restrictive because it prevents shareholders who are not entitled to vote at meetings of shareholders from submitting proposals to the corporation. Depending on the articles of incorporation of a corporation some shareholders may not be entitled to vote at meetings of shareholders. For example, beneficial owners²² of shares and holders of non-voting shares cannot vote at meetings of shareholders. The effect is that, under the *Corporations Act* beneficial owners of shares and holders of non-voting shares cannot submit proposals to Manitoba corporations. This conclusion finds support in *Verdun v Toronto-Dominion Bank*,²³ where the Supreme Court of Canada held that a similar provision in the previous version of the *Bank Act* precluded beneficial owners of shares from submitting proposals.²⁴ In that case, the Appellant owned common voting shares in Toronto-Dominion Bank through two trustees, Montreal Trust and RBC Dominion Securities. The shares were registered in the name of these trustees. The Appellant submitted several proposals to the bank for inclusion in the bank’s management proxy circular to the shareholders of the bank. The

²⁰ *Corporations Act*, *supra* note 1, s 47(1). See also *Verdun v Toronto Dominion Bank*, *supra* note 6 at para 29.

²¹ See *Greenpeace Foundation of Canada v Inco Ltd*, (1984) OJ No 274 at paras 8-9, 24 ACWS (2d) 176 (Ont H Ct J), affirmed (1984), 25 ACWS (2d) 149 (Ont CA) [*Greenpeace Foundation of Canada v Inco Ltd*].

²² “Beneficial owners” of shares means persons owning shares through legal representatives such as trustees, agents or other intermediaries recognized by law. See *Canada Business Corporations Act*, RSC 1985, c C44, s 2 [CBCA].

²³ *Supra* note 6.

²⁴ Under sections 93(1) and 143(1) of the previous version of the *Bank Act*, SC 1991, c 46, 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, s 143(1).

bank rejected the proposals on grounds that the Appellant was not qualified to submit a proposal under the *Bank Act* because he was not a registered owner of the bank's security. The Appellant brought an application seeking an order to restrain the bank from holding its annual meeting of shareholders until it included the proposals in its management proxy circular. Both the trial court and the Ontario Court of Appeal dismissed the application. Adopting a contextual approach to statutory interpretation, the Supreme Court of Canada held that the phrase "entitled to vote" under section 143 of the *Bank Act* is to be interpreted in the context of section 93 of the Act which provides that a bank may "treat the registered owner of a security as the person exclusively entitled to vote" at meetings of shareholders.²⁵ Finding that "the language and context of the provisions in question make their meaning clear",²⁶ the Supreme Court of Canada held that registered owners of security are the persons "exclusively entitled to vote" under the *Bank Act*; and that because the Appellant is not a registered owner of the bank's security he is not entitled to vote at the annual meeting of the bank's shareholders.²⁷ In the words of the Supreme Court of Canada, "only a shareholder 'entitled to vote' can submit a shareholder's proposal; the Appellant is not 'entitled to vote' and therefore cannot submit a shareholder's proposal".²⁸

The Supreme Court of Canada's decision in *Verdun* has been followed and applied in *Trumpeter Yukon Gold Inc v Omni Resources Inc.*²⁹ In this case the petitioner, Trumpeter Yukon Gold Inc, was the beneficial owner of 6,000,000 shares of the respondent corporation. These shares were registered in the name of a trustee, Canadian Depository for Securities Limited. The petitioner appointed a representative to represent its interest at the annual meeting of the respondent corporation. The chairman of the annual meeting allowed the petitioner's representative to participate in the meeting. In fact, on behalf of the petitioner the petitioner's representative nominated persons for the position of directors of the respondent corporation, while the respondent corporation nominated other persons as management nominees. However, the chairman disallowed the votes

²⁵ *Verdun v Toronto Dominion Bank*, *supra* note 6 at paras 27-29.

²⁶ *Ibid* at para 21.

²⁷ *Ibid* at para 29.

²⁸ *Ibid*.

²⁹ 46 BLR (2d) 685, available on Quicklaw Can (BC SC).

cast by the petitioner's representative. The result was that the persons nominated by the respondent corporation were declared elected.

The petitioner filed an action seeking, amongst other things, a declaration that the chairman erred in disallowing the votes cast by its representative. The petitioner argued that as a beneficial owner of the shares of the respondent corporation it had a right to vote at meetings of shareholders. Relying on the *Verdun* decision, the British Columbia Supreme Court held that "voting rights attach to the registered holder of shares."³⁰ Thus, "[t]he petitioner, not being the registered holder of the shares, is not entitled to vote or be recognized at a meeting of the company."³¹

Manitoba courts have yet to be presented with an opportunity to interpret the phrase "entitled to vote" under section 131 of the *Corporations Act*. However, as argued above the meaning of the phrase is plain given the language and context of the *Corporations Act*. It is difficult to imagine a scenario where Manitoba courts would depart from the Supreme Court of Canada's decision in *Verdun* given that the language and context of the previous version of the *Bank Act* interpreted in *Verdun* is similar (some might say identical) to the language and context of the *Corporations Act*. Both statutes authorize corporations to treat registered owners of shares as the persons exclusively entitled to vote at meetings of shareholders.³² Thus the phrase "entitled to vote" is restricted to the registered owners of a corporation's shares.³³

In fact, the *Corporations Act* has historically restricted the class of shareholders capable of exercising the rights vested in shareholders under the Act. For the most part, the rights vested in shareholders are exercisable only by shareholders registered in a corporation's record of shareholders. For example, a registered owner of shares is the person exclusively entitled to vote, to receive notice of meetings and "otherwise to exercise all the

³⁰ *Ibid* at para 12.

³¹ *Ibid*.

³² See *Bank Act*, *supra* note 24, s 93(1) and *Corporations Act*, *supra* note 1, s 47(1).

³³ See *Agbi v Geosimm Integrated Technologies Corp*, 1998 ABCA 374 at para 22, [1997] 7 WWR 398; *Greenpeace Foundation of Canada v Inco Ltd*, *supra* note 21 at paras 8-9; *Marshall Boston Iron Mines Ltd v Marshall* (1981), 129 DLR (3d) 378 at paras 11 & 14, available on Westlaw Can (Ont SC); *Tough Oakes Gold Mines Ltd v Foster* (1917), 34 DLR 748 at paras 23-26, 39 OLR 144 (Ont SC).

rights and powers of an owner of the” shares.³⁴ In addition, the right to dissent is exercisable only by a “registered shareholder on the books of the company.”³⁵ Thus shareholders who are not registered in a corporation’s books are not entitled to the right to dissent, as is evident in *Manitoba Securities Commission v Versatile Cornat Corporation*.³⁶ In this case Versatile Corporation adopted a special resolution on May 19th 1978 changing its status from a Manitoba corporation into a British Columbia corporation. At the time of the resolution Mr. Wesman was a registered shareholder of Versatile Corporation. On 1 June 1978, Wesman transferred his shares to a trustee and he ceased to be a registered shareholder. On 7 June 1978, Wesman sent a notice of dissent to Versatile Corporation pursuant to section 184 of the *Corporations Act* and asked to be paid a fair value for his shares. On 28 June 1978, the trustee transferred the shares back to Wesman. Versatile Corporation declined Wesman’s request for payment of a fair value on grounds that the right to dissent under the *Corporations Act* is exercisable only by registered shareholders. The Manitoba Court of Queen’s Bench held that Wesman was not entitled to the right to dissent because at the time he sent his notice of dissent he had ceased to be a registered owner of shares on Versatile Corporation’s record of shareholders. The court elaborated on its position thus:

³⁴ *Corporations Act*, *supra* note 1, s 47(1). However, in certain instances the *Corporations Act* recognizes “constructive registered holder” of shares and “permissible registered holder” of shares as registered shareholders entitled to exercise all the rights of the shareholders they represent. A “constructive registered holder” may be:

(a) the executor, administrator, heir or legal representative of the heirs, of the estate of a deceased security holder; (b) a guardian, committee, trustee, curator or tutor representing a registered security holder who is an infant, an incompetent person or a missing person; (c) a liquidator of, or a trustee in bankruptcy for, a registered security holder; or (d) a substitute decision maker for property for a registered security holder, who has been appointed under The Vulnerable Persons Living with a Mental Disability Act, and who has the power to exercise such rights on behalf of the registered owner.

See *Corporations Act*, *supra* note 1, s 47(2). A ‘permissible registered holder’ is “a person upon whom the ownership of a security devolves by operation of law” who “furnishes proof of his authority to exercise rights or privileges in respect of a security of the corporation that is not registered in his name” *Corporations Act*, *supra* note 1, s 47(3).

³⁵ *Manitoba Securities Commission v Versatile Cornat Corporation* (1979), 97 DLR (3d) 45 at para 37, [1979] 2 WWR 714 (Man QB).

³⁶ *Ibid.*

Turning to s. 184 of The Corporations Act, ss. (1) covers the right to dissent by "a holder of shares". On the basis of my interpretation, I would take this to mean anyone who was a registered shareholder on the books of the company is entitled to dissent in accordance with the provisions of s. 184(1).

My interpretation would be the same where the terms "holder of shares" or "shareholder" are used in any of the subsections of that section. In other words, in order for a person to have the right to dissent from any action contemplated by a corporation, he must first of all be a person who is the registered shareholder on the books of the company. Only if he falls squarely within that category can he then avail himself of all the rights, duties and obligations that flow therefrom and that are described in s. 184 of The Corporations Act. So that when in this case, s. 184(7) requires a dissenting shareholder to provide a notice in writing within a specified period of time containing specified information, it means that it requires such a notice of a dissenting shareholder who is registered as a shareholder on the books of the company.³⁷

The rationale for this narrow interpretation is that "[i]t would cause utter chaos in the world of commerce to hold otherwise and to expect corporations to deal with past shareholders, prospective shareholders, or simply share 'holders' in their attempt to run the business of the companies."³⁸

The restrictions on exercise of shareholder rights are not unique to the *Corporations Act*. Corporate statutes in other common law jurisdictions have historically restricted exercise of the rights of shareholders including the right to vote, right to dissent, right to notice of annual meetings and the right to submit proposals.³⁹ For example, under the *Canada Business*

³⁷ *Ibid* at paras 36-37.

³⁸ *Ibid* at para 34. See also *Westmin Resources Ltd v Hamilton*, [1991] 3 WWR 716 at 726, [1990] BCJ No 2758 (BC SC) (holding that it "would unduly fetter the running of a company" if beneficial owners of shares were permitted to exercise the right to dissent.).

³⁹ See, for example, *Tough Oakes Gold Mines Limited v Foster*, *supra* note 33 at paras 23-26. The restrictive interpretation of 'shareholder' appears to emanate from the English case of *Pender v Lushington* (1877), 6 Ch D 70 at 77, 157-8 where Jessel MR held that the word "member" under the English Companies Act means 'registered shareholder or stockholder'. The court also held that a company's register of members (shareholders) is the appropriate basis for determining those members who are entitled to receive notice of, and vote at, annual meetings of shareholders. According to the court, "You can only give him notice by referring to the register, ... So that a member is a man who is on the register." Ultimately Jessel MR concluded at 157-8 as follows:

Myrtice Oakes and Winifred Robins were the registered holders of the shares in question, and as such they were entitled to recognition as

Corporations Act, “[n]otice of the time and place of a meeting of shareholders shall be sent within the prescribed period to each shareholder entitled to vote at the meeting” and “a notice of a meeting is not required to be sent to shareholders who were not registered on the records of the corporation” at the prescribed date.⁴⁰ Now, because the right to vote under the CBCA is exercisable only by shareholders whose names appear on the corporation’s voting list or register of shareholders⁴¹ it follows that shareholders who are not “registered on the record of the corporation” are not entitled to a notice of annual meetings of shareholders.⁴² Furthermore, the right to dissent under section 190 of the CBCA is limited to registered shareholders, thus precluding beneficial owners of shares from exercising the right to dissent.⁴³ Similarly, the Ontario *Business Corporations Act* restricts voting rights to registered owners of shares,⁴⁴ while in Alberta a corporation is “entitled to rely upon its Record of Shareholders” in determining shareholders entitled to receive notice of annual meetings.⁴⁵ Moreover, in Alberta the term ‘shareholder’

shareholders to whom notice of meetings of the company should be given; and it was not within the province of the president or presiding officer to sit in judgment in respect of that right as between them and any others claiming these shares, and to declare against the right of these two holders to attend or be represented and to vote at such meetings. If that course were permissible, then how could it be possible to carry on such business of a company as must necessarily be transacted at a meeting of its shareholders? For never would there be certainty as to who is properly entitled to appear at a shareholders' meeting and take part in its deliberations.

That being said, the word “shareholder” may have a broad meaning with regard to certain procedural rights such the right to apply to court for a legal remedy or the right to petition the court for a winding-up order. For example, a beneficial owner of shares is a shareholder for the purpose of a derivation action or an oppression remedy suit or winding-up petition even though the beneficial owner is not registered on the corporation’s register of shareholders. See *Canada Business Corporations Act*, *supra* note 22, ss 238-241. See also *Re Kootenay Valley Fruits Lands Co* (1911), 18 WLR 145 (available on WL Can); *Re Great West Permanent Loan Company and Winding-Up Act*, [1927] 2 WWR 15 (available on WL Can).

⁴⁰ CBCA, *supra* note 22 s 135(1) & (2).

⁴¹ *Ibid*, s 138.

⁴² *Ibid*, s 135(2).

⁴³ *Westmin Resources Ltd v Hamilton*, *supra* note 38.

⁴⁴ See *Marshall Boston Iron Mines Ltd v Marshall*, *supra* note 33 at paras 11 & 14.

⁴⁵ *Agbi v Geosimm Integrated Technologies Corp*, *supra* note 33 at para 22.

under section 184 of the *Business Corporations Act* (dealing with the right to dissent) “means a registered shareholder.”⁴⁶ Thus in Alberta a beneficial owner is not entitled to the right to dissent.⁴⁷

Returning now to our primary focus, one is tempted to ask this question: why has Manitoba chosen to limit the right to submit proposals to shareholders “entitled to vote”, that is, registered shareholders? What are the justifications for barring beneficial owners of shares and owners of non-voting shares from submitting proposals? The parliamentary debate preceding the enactment of the *Corporations Act* does not indicate any particular reason for the restrictions on eligibility to submit proposals in Manitoba.⁴⁸ That being said, there are several justifications for restricting eligibility to submit proposals. One justification is that, although beneficial owners of shares are not eligible to submit proposals in that capacity, they can utilize other strategies to achieve the same purpose. For example, a beneficial owner of voting shares may request their trustee (the person in whose name the shares are registered in the company’s record

⁴⁶ *Lake & Co v Calex Resources Ltd*, (1996) 139 DLR (4th) 35, available on CanLii (Alta CA).

⁴⁷ *Ibid* at paras 47-48. Although the Alberta Court of Appeal agreed with the general position that the right to dissent is limited to registered shareholders, it also held that in exceptional circumstances beneficial owners of shares can exercise the right to dissent. Such would be the case where a corporation issues a notice of special meeting that is misleading. In the words of the court (at para 74):

What arises here is the obligation of a corporation to inform shareholders in a manner that is not misleading. Had Calex stated in its circular the position that it openly took after the fact (that dissent rights were only exercisable by registered shareholders), I would be inclined to a different result. As I have said, however, Calex's circular and the proxy attached could have left shareholders with the impression that it did not matter whether or not they were registered, in order to exercise dissent rights. In those circumstances, I agree with the chambers judge that it would be unfair not to permit the exercise of dissent rights by beneficial owners who objected in time. It is not enough to reproduce the provisions of the Act and to counsel the obtaining of legal advice, when the overall information provided suggested that registration was not critical to the exercise of the dissent rights. This is especially the case given that Calex had knowledge that there were many unregistered, beneficial owners.

⁴⁸ Manitoba, Legislative Assembly, *Debates and Proceedings*, 33rd Legislature, 2nd Sess, Vol 47 (13 May 1987) at 1999 (Hon A Mackling).

book) to submit a proposal on their behalf.⁴⁹ In the alternative, a beneficial owner of voting shares may ask their trustee to register a certain number of shares in their name so that “the shareholder would be entitled to submit proposals in his or her own right.”⁵⁰

In addition, the provincial legislature may have felt that, at the time of enacting the *Corporations Act* in 1987, ‘beneficial owners’ of shares and shareholders owning non-voting shares were too few in number to warrant the right to submit proposals. It also appears that the exclusion of beneficial owners of shares from the shareholders eligible to submit proposals is premised on the notion that the interests of beneficial owners of shares are represented adequately by their trustees and portfolio managers. Trustees owe a fiduciary duty to the beneficial owners of the shares entrusted to their care.⁵¹ However, such fiduciary duty does not necessarily include an obligation to submit proposals on behalf of beneficial owners of shares.⁵² While trustees may submit proposals on behalf of the beneficial owners of shares, trustees cannot be compelled to submit such proposals. This is because, as Allan Sykes argues, trustees cannot be expected to “exercise any active ownership role in relation to the shares” entrusted to their care.⁵³

The eligibility criterion under the *Corporations Act* is even more precarious for beneficial owners of shares who are socially conscious investors. Trustees may be reluctant to submit proposals raising social issues such as human rights and environmental protection because they may fear that submitting such proposals could amount to a breach of their fiduciary duty. As Benjamin Richardson notes, “pension fund trustees have traditionally shunned [socially responsible investment] in the belief

⁴⁹ See *Verdun v Toronto Dominion Bank*, *supra* note 6 at para 35.

⁵⁰ *Ibid* at para 35.

⁵¹ See Jay Youngdahl, “The Time Has Come for a Sustainable Theory of Fiduciary Duty in Investment” (2011) 29 Hofstra Labor & Employment LJ 115.

⁵² See Gil Yaron, “Acting Like Owners: Proxy Voting, Corporate Engagement and the Fiduciary Responsibilities of Pension Trustees”, (June 28 2005) at 19 (“Canadian law imposes no specific obligation on pension trustees to include corporate engagement as part of the pension plan’s investment policy”), online: SHARE <http://www.share.ca/files/Acting_Like_Owners.pdf>.

⁵³ Allan Sykes, *Capitalism for Tomorrow: Reuniting Ownership and Control* (Oxford: Capstone Publishing, 2000) at 51.

that it contravenes fiduciary duties”.⁵⁴ This fear is anchored on the narrow or “sole interest” view of the trustee’s fiduciary duty which is often said to oblige trustees to act solely in the best interest of beneficiaries including the maximization of investment returns for the beneficiaries of the trust.⁵⁵ In *Cowan v Scargill*, for example, it was held that “the best interests of the beneficiaries are normally their best financial interests”, particularly where the trust in question is established for the purpose of enhancing the financial status of the beneficiaries.⁵⁶ This sentiment was echoed in both *Martin v City of Edinburgh District Council*⁵⁷ and *Harries v Church Commissioners for England*.⁵⁸

However, the fear may be unfounded given that, in the modern business environment, investment decisions are no longer based solely on financial considerations but are increasingly influenced by a plethora of social and economic factors.⁵⁹ The fear of breach of the trustee’s fiduciary duty through the consideration of non-financial issues is even more unfounded in Manitoba because the *Trustees Act* allows trustees to use “non-financial criterion” in making investment decisions provided “the trustee exercises the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others.”⁶⁰ Nonetheless, the fear of breach of fiduciary duty represents a

⁵⁴ Benjamin J Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (Oxford: Oxford University Press, 2008) at 222.

⁵⁵ See John H Langbein, “Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?” (2005) 114 Yale LJ 929 at 932 (“The underlying purpose of the duty of loyalty, which the sole interest rule is meant to serve, is to advance the best interest of the beneficiaries.”).

⁵⁶ *Cowan v Scargill* [1985] Ch 270 at 287, [1984] 3 WLR 501.

⁵⁷ [1988] SLT 329 (available on WL Can).

⁵⁸ [1991] TLR 478, [1992] 1 WLR 1241 (Ch D). It should also be said that although these cases emphasize that trustees must give priority attention to the financial interests of trust beneficiaries, they also stress that trustees may, in appropriate cases, consider non-financial issues provided such consideration does not adversely affect the financial benefits of trust beneficiaries.

⁵⁹ See Stephen Viederman, “New Directions in Fiduciary Responsibility” (2003) 5:6 J Pract Est Plan 21 at 22 (arguing that “fiduciary responsibility must acknowledge that economic reality must incorporate the social, environmental and financial into a single investment decision-making process if it is to maximize returns both for beneficiaries and the society as a whole.”) See also Youngdahl, *supra* note 51 at 134-8.

⁶⁰ *The Trustees Act*, RSM 1987 c T-160, CCSM c T-160, s 79.1.

significant obstacle even for those trustees who may be inclined to submit proposals on behalf of beneficial owners of shares. Thus, the reality today is that pension fund trustees are often inactive in terms of submission of proposals on behalf of beneficial owners of shares. For example, of the nine hundred and ninety-one (991) proposals submitted to Canadian corporations between 2000 and 2011, only 89 were submitted by trustees of pension funds.⁶¹

B. Statutory Exemptions

As indicated above, the *Corporations Act* provides for certain circumstances under which a corporation is not obliged to circulate a proposal to shareholders. Some of these exemptions are routine procedural requirements and in that sense, they pose no immediate threat to the right of shareholders to submit proposals. For example, a Manitoba corporation is not required to set out or circulate a shareholder proposal in its management proxy circular if “the proposal is not submitted to the corporation at least 90 days before the anniversary date of the previous annual meeting of shareholders”.⁶² This exemption is meant to afford corporations adequate time to circulate proposals to shareholders. However, it may be difficult for shareholders (particularly new shareholders) to determine the last anniversary date of the previous annual meeting of shareholders unless the corporation makes public disclosure of the information. This concern could be ameliorated through the publication of information relating to the previous annual meetings of corporations on their websites. In addition, a corporation is not required to circulate a shareholder proposal if “the corporation, at the shareholder's request, included a proposal in a management proxy circular relating to a meeting of shareholders held within two years preceding the receipt of the request, and the shareholder failed to present the proposal, in person or by proxy, at the meeting”.⁶³ This exemption is intended not only to prevent frivolous proposals, but also to ensure that shareholders who had, in the past, put the corporation to the expense, effort, and time of

⁶¹ See Evaristus Oshionebo, “Shareholder Proposals and the Passivity of Shareholders in Canada: Electronic Shareholder Forums to the Rescue?” (2012) 37(2) *Queen's LJ* 623 at 642 [Shareholder Proposals].

⁶² *Corporations Act*, *supra* note 1, s 131(5)(a).

⁶³ *Corporations Act*, *supra* note 1, s 131(5)(c).

circulating a proposal are not rewarded for their failure to present the proposal at a meeting of shareholders.

Other exemptions are substantive in the sense that they relate to the contents of shareholder proposals. For example, corporations can reject proposals that promote “general economic, political, racial, religious, social or similar causes.”⁶⁴ So too can corporations reject proposals on grounds of abuse of shareholder’s right to submit proposals.⁶⁵ These exemptions are problematic not only because they limit and constrain the substantive contents of proposals, but also because they are broad and wide in scope. The wide scope of the exemptions could constrain the ability of shareholders to participate in corporate governance. In addition, the broadness of the exemptions could lead potentially to abuse of a corporation’s right to reject proposals. Corporations could rely on these broad exemptions as basis for rejecting a proposal even though the proposal is designed to enhance the effective management of the corporation and even though the proposal relates significantly to the business or affairs of the corporation. In the ensuing pages I elaborate on these exemptions and describe how they impact negatively on the ability of shareholders to participate in corporate governance.

1. Exemption of Proposals on Grounds of Personal Grievance or Primarily Promoting General Causes

Under section 131(5)(b) of the *Corporations Act*, a corporation is not required to set out or circulate a shareholder proposal in its management proxy circular if:

it clearly appears that the proposal is submitted by the shareholder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the corporation or its directors, officers or security holders, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes.

The first part of the exemption, which allows corporations to reject a proposal if it is submitted primarily to enforce a personal claim or redress a personal grievance, is understandable. Its purpose is to protect corporate managers from the vindictiveness of activist shareholders which could compromise their ability to manage the affairs of the corporation.

⁶⁴ *Corporations Act*, *supra* note 1, s 131(5)(b).

⁶⁵ *Ibid*, s 131(5)(e).

However, the second part of the exemption under section 131(5)(b) is problematic because the phrase “primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes” is ambiguous and too wide in scope. Put bluntly, section 131(5)(b) of the *Corporations Act* permits company management to reject (or to refuse to circulate) any shareholder proposal that raises general causes such as environmental protection and human rights.⁶⁶ As Professor Janis Sarra argues, this exemption hinders “efforts by shareholders to inject corporate accountability or social responsibility into [corporate] decision making” in Canada.⁶⁷ In fact, Canadian corporations have relied on this exemption as basis for rejecting shareholder proposals that seek to promote human rights.⁶⁸

Judicial interpretation of similar exemptions in corporate statutes in Canada also buttresses the view that the exemption precludes proposals that raise social issues. In *Greenpeace Foundation of Canada v Inco Ltd* the Ontario High Court of Justice held obiter that:

I am also of the view that Greenpeace seek to file a proposal for the purpose of advancing an environmental cause, namely, the abatement of acid rain. However noble that purpose may be, s. 131(5)(b) provides that under such circumstances, management is exempted from having to entertain the proposal. This is a further fatal defect to the application.⁶⁹

A similar exemption in the previous CBCA was interpreted in *Re Varsity Corporation and Jesuit Fathers of Upper Canada*⁷⁰ as precluding shareholder proposals from raising social and political issues. In that case, two shareholders submitted a proposal requiring Varsity Corporation to divest from apartheid South Africa. Varsity objected to the contents of the proposal. Consequently, Varsity applied for a court order permitting it to exclude the proposal from its proxy circular on grounds that the proposal was submitted primarily for the purpose of promoting general causes and,

⁶⁶ See *Re Varsity Corporation and Jesuit Fathers of Upper Canada*, [1987] 59 OR (2d) 459, 38 DLR (4th) 157 (H Ct J), aff'd [1987] 60 OR (2d) 640 (Ont CA); *Greenpeace Foundation of Canada v Inco Ltd*, *supra* note 21.

⁶⁷ Sarra, *supra* note 11 at 61.

⁶⁸ See Aaron A Dhir, “Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability” (2006) 43 Am Bus LJ 365 at 388-9.

⁶⁹ *Greenpeace Foundation of Canada v Inco Ltd*, *supra* note 21 at para 13.

⁷⁰ *Supra* note 66.

in particular, the abolition of apartheid in South Africa. The shareholders argued that the proposal had a specific goal in that it was directed at the Varsity's specific business investment in South Africa. They also argued that their desire was to have the company terminate its investment in South Africa because it contributed to the maintenance of an unstable and undesirable business climate. In granting the order sought by the company, the court held that:

I agree that the proposal has a specific purpose and that the purpose is directly relevant to Varsity....The language of the proposal and the supporting statement leave me in no doubt that the primary purpose of the proposal is the abolition of apartheid in South Africa. As I read the legislation, the fact that there may be a more specific purpose or target does not save the proposal. That more specific purpose here is the withdrawal of Varsity. The legislation makes it clear that if the primary purpose is one of those listed, however commendable either the specific or general purpose may be, the company cannot be compelled to pay for taking the first step towards achieving it. In other words, the company cannot be compelled to distribute the proposal.⁷¹

The prohibition of proposals that are primarily for the purpose of promoting general causes unduly restricts the rights of shareholders to participate in corporate governance. It encourages corporations to reject "almost any proposal addressing issues of corporate social responsibility."⁷² It is hardly surprising then that a similar provision in the previous *CBCA* "was most frequently used" by corporations as basis for excluding proposals from their proxy materials.⁷³ In this sense, this exemption impacts negatively on the potency and efficacy of shareholder proposals as mechanisms for influencing corporate governance, particularly on issues relating to corporate social responsibility.⁷⁴

⁷¹ *Ibid* at 462. This decision was affirmed by the Ontario Court of Appeal, [1987] 60 OR (2d) 640. However, Justice Tarnopolsky held in dissent that the proposal was not disqualified under the old *CBCA* because:

... the issue of apartheid in south Africa and its nefarious effects on investment in that country by the respondent cannot be a "general economic, political, racial, religious, social or similar cause; it must be considered "specific" in the sense of being "exact" or "particular" as opposed to "general" in the sense of "universal" or "unbound."

⁷² Moira Hutchinson, *The Promotion of Active Shareholdership for Corporate Social Responsibility in Canada* (November 1996, reprinted 2005) at 16, online: SHARE <www.share.ca/files/Active_Shareholdership_for_CSR_in_Canada.pdf>.

⁷³ *Ibid* at 16.

⁷⁴ See Canada, Industry Canada, *Canada Business Corporations Act Supplement to*

2. Exemption of Proposals on Grounds of Abuse of Shareholders' Right to Secure Publicity

A further problematic provision is section 131(5)(e) of the *Corporations Act* which allows corporations to reject a proposal if "the rights conferred by this section are being abused to secure publicity."⁷⁵ Although the *Corporations Act* does not expressly say so, this provision appears to be an effective bar on shareholder proposals raising social policy issues which, by their very nature, tend to attract wide publicity and public debate. For example, proposals on human rights and environmental protection issues tend to attract publicity and public debate. Similarly, proposals touching on governance issues such as executive compensation tend to attract publicity. The potential for proposals on executive compensation to attract media attention has increased tremendously in recent years given the current financial crisis.

This exemption also "undercuts the most useful function of the proposal mechanism", which is that proposals compel corporate management "to put forth a defence of its position".⁷⁶ The ability of a proposal to force management to justify its position is enhanced where shareholders are able "to attract media attention to the subject at issue in the proposal".⁷⁷ The exemption could also compromise the ability of shareholders to communicate prior to the annual meeting of shareholders, even though such communication is permitted by statute.⁷⁸ As Janis Sarra argues, under this exemption a "shareholder who publicly announces its intention to vote on a particular issue that is considered controversial by the corporation could then find the corporation refusing to submit the proposal based on publicity generated by the shareholder's compliance with communication provisions of the statute."⁷⁹

Manitoba corporations may be tempted to rely on this exemption as basis for excluding proposals that have attracted media attention or publicity. This is the more so because, unlike the situation in the United States where the Securities and Exchange Commission acts as an arbiter of

Discussion Paper Proposals for Technical Amendments (July 1996) at 22.

⁷⁵ *Corporations Act*, *supra* note 1, s 131(5)(e).

⁷⁶ Dhir, *supra* note 68 at 402-3.

⁷⁷ *Ibid* at 403.

⁷⁸ Sarra, *supra* note 11 at 72-3.

⁷⁹ *Ibid* at 72-3.

disputes arising from the exclusion of shareholder proposals from a corporation's proxy circular, there is no administrative mechanism for dispute resolution under section 131 of the *Corporations Act*.⁸⁰ Rather, the *Corporations Act* relies on the judicial system for dispute resolution by providing that shareholders aggrieved by a corporation's refusal to circulate a proposal may apply to court for an order restraining the holding of the meeting to which the proposal is sought to be presented.⁸¹ The costs of litigation could dissuade even well-meaning shareholders from challenging a corporation's refusal to circulate their proposals.

To the knowledge of the author, this exemption has not been litigated before any court in Manitoba. But when such litigation arises, how should Manitoba courts interpret and apply the exemption? While it is clear that the exemption requires abuse of the rights of the shareholder to submit a proposal, it is less clear whether the requisite abuse must be for the specific purpose of securing publicity. Would abuse of the rights of the shareholder for any other purpose suffice? Is abuse determined subjectively or objectively? It is arguable that the mere fact that a proposal has attracted publicity is not enough for company management to reject the proposal under this exemption. This is because the *Corporations Act*, like the *CBCA* and the *Bank Act*,⁸² requires an "abuse" of the shareholder's right to submit a proposal. Interpreting a similar provision under the *Bank Act*, the Quebec Superior Court held in *Michaud v Banque Nationale du Canada*⁸³ that, although 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 shareholder's right to submit a proposal.⁸⁴ Thus, the bank's refusal to include the proposals in its management proxy circular was unjustified.

However, abuse in this context means a misuse of the shareholder's right to submit a proposal or a perversion of the purpose of the

⁸⁰ It has been suggested that corporate statutes in Canada should be amended to require a corporation seeking to reject a proposal to justify before a special review agency (such as the Securities Commission) why a shareholder proposal is excluded. See Dhir, *supra* note 68 at 401.

⁸¹ *Corporations Act*, *supra* note 1, s 131(8).

⁸² *Supra* note 24, s 143.

⁸³ 2010 QCCLP 111, [1997] RJQ 547 (Que SC). My analysis is based on an unofficial translation of the Reasons for Judgment.

⁸⁴ See also *McVety v Sintra*, JE 2000 -139, available on Westlaw Can (Que Sup Ct).

shareholder proposals mechanism. Thus, a shareholder can be said to have abused their right if the shareholder submits frivolous proposals, or where the proposal is aimed at embarrassing the corporation or its directors.⁸⁵ However, in determining whether a shareholder has abused their right to submit a proposal the court must undertake an objective analysis of the proposal in the context of the circumstances surrounding its submission, including the statement in support of the proposal, the prior conduct of the shareholder, and any previous statement or admissions made by the shareholder, although the court need not be influenced unduly by these factors.⁸⁶ Thus, where “the shareholder has consistently threatened the [corporation] to cause the removal of some or all [of its] directors, a proposal seeking such removal may be examined in the light of prior communications of this very point.”⁸⁷

The nature of the relationship between the shareholder and the corporation is also relevant in determining whether a shareholder has abused their right to submit a proposal. For example, in the context of extant legal disputes, threats made by a shareholder to instigate shareholder actions against a corporation may be taken into account in determining whether the shareholder has abused their right to submit a proposal. In appropriate cases, the court may infer an abuse of a shareholder’s right to submit a proposal where the proposal is submitted in the midst of an acrimonious relationship between the shareholder and the corporation, as was the case in both *National Bank of Canada v Weir*⁸⁸ and *Cappuccitti v Bank of Montreal*.⁸⁹

⁸⁵ See *National Bank of Canada v Weir*, JE 2006-507 at paras 35, 36 (available on CanLII) (Que Sup Ct). In this case the court held that the proposals submitted by Mr. Weir to the National Bank of Canada should be omitted from the bank’s proxy circular because the proposals served no other purpose than to embarrass the bank, its directors and officials and to procure publicity. See also *Cappuccitti v Bank of Montreal*, [1989] OJ No 2153; 46 BLR 255 (Ont SC).

⁸⁶ *National Bank of Canada v Weir*, *supra* note 85 at para 28.

⁸⁷ *Ibid.*

⁸⁸ See *ibid.*

⁸⁹ *Cappuccitti v Bank of Montreal*, *supra* note 85. In this case, the Applicant was one of two brothers engaged in legal disputes with the Bank of Montreal, culminating in two suits in the State of Georgia and Ontario. In the Georgia action, the Applicant testified that he had told the bank that “if you push me, there is going to be a lawsuit” and that “I am going to get a few shareholders together and I am going to start a shareholders action”. The Applicant owned 100 common shares of the bank. In that

3. Exemption of Proposals on Grounds that ‘Substantially the Same Proposal’ was Defeated Previously

A corporation is not obliged to distribute a proposal if

substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident's proxy circular relating to a meeting of shareholders held within two years preceding the receipt of the shareholder's request and the proposal was defeated.⁹⁰

In effect, shareholders are precluded from submitting proposals containing issues that are essentially the same as issues contained in previous proposals that, within the previous two years, had been rejected by a majority of shareholders at the annual meeting of shareholders.⁹¹ This exemption aims at preventing abuse of the shareholder proposal mechanism through re-submission of proposals previously rejected by shareholders at their annual meeting. It is also aimed at ensuring that corporations are not needlessly subjected to the costs associated with the circulation and distribution of seemingly endless number of proposals by activist shareholders.

However, the immediate problem with this exemption is that it does not provide for a threshold for re-submission of proposals that were defeated at meetings of shareholders. Rather, it empowers corporations to reject a proposal irrespective of the margin of defeat of (or the level of support for) a similar proposal previously submitted by shareholders. For example, the exemption allows a corporation to reject a proposal if, within the two years preceding the submission of the proposal, a substantially similar proposal was defeated by a vote of 51 percent (against) to 49 percent (in favour) at a meeting of shareholders.⁹² In effect, this exemption prevents shareholders from re-submitting a proposal even if a similar

capacity, the Applicant submitted to the bank a proposal expressing his concern that certain policies adopted by the Bank “are financially prejudicing the interests of its shareholders”. Upon the Bank's refusal to include the proposal in its proxy circular, the Applicant brought a motion to compel its inclusion. The Ontario Supreme Court held that the proposal was vindictive, having been designed by the Applicant to embarrass and ridicule the bank and its officials. More significantly, the court held that the Applicant abused his right to submit a proposal in order to secure publicity. Thus the Bank was justified in refusing to include the proposal in its proxy circular.

⁹⁰ *Corporations Act*, *supra* note 1, s 131(5)(d).

⁹¹ See *Greenpeace Foundation of Canada v Inco Ltd*, *supra* note 21 at paras 11-12.

⁹² *Corporations Act*, *supra* note 1, s 131(5)(d).

proposal attracted as high as 49 percent support amongst shareholders at a meeting held within the preceding two years.

The deleterious impact of the exemption increases dramatically in corporations with controlling shareholders. For example, a shareholder that controls 51 percent of a corporation's voting shares could, simply by voting against a proposal, prevent other shareholders from submitting similar proposals during the following two years. Even when a similar proposal is submitted in the third year (which is allowed by the *Corporations Act*), the controlling shareholder needs only to vote against the proposal, thereby ensuring that other shareholders are not able to submit the same or similar proposal during the succeeding two years. In effect, controlling shareholders can utilize the exemption to perpetuate a vicious scheme for defeating and rejecting shareholder proposals.

III. TOWARDS ENHANCING SHAREHOLDER PROPOSALS IN MANITOBA

The extent to which proposals are filed with corporations in Manitoba is unclear due to lack of data. However, as currently constituted, the *Corporations Act* discourages the submission of proposals because of the restrictions and exemptions embedded in the statute. A comparable statutory regime under the previous version of the *CBCA* had a similar effect of discouraging the submission of proposals. For example, prior to the amendments to the *CBCA* in 2001 very few proposals were filed with Canadian corporations.⁹³ In fact, there were less than three shareholder proposals each year from 1982 to 1996.⁹⁴ The lack of utilization of the shareholder proposals mechanism under the previous *CBCA* was partly due to the stringency of the criteria for shareholder proposals, including the broadness of the circumstances under which corporations were

⁹³ See VanDuzer, *supra* note 5 at 576 ("Until the beginning of this century, there were only a small number of proposals each year in Canada"). See also Sarra, *supra* note 11 at 60 ("the shareholder proposal provisions of Canadian corporations statutes have seldom been used").

⁹⁴ Shareholder Association for Research and Education, "Shareholders Back Calls for Disclosure on Board Independence" (2001) 1:2 Prospectus 2, cited in 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 117.

permitted to exclude shareholder proposals from their management proxy circulars.

The stringency of the criteria under the previous CBCA has been cushioned by the 2001 amendments to the CBCA which not only liberalized the rules governing eligibility to submit proposals, but also restricted the circumstances under which a corporation may refuse to circulate proposals. The liberalization of the shareholder proposals mechanism under the CBCA has aided the activism of shareholders, culminating in a noticeable increase in the number of proposals filed with Canadian corporations.⁹⁵ More specifically, a total of nine hundred and ninety one (991) proposals were filed with corporations in Canada between 2000 and 2011.⁹⁶ It is likely that a liberalization of the rules governing shareholder proposals under the *Corporations Act* would produce similar positive effects in Manitoba. Such liberalization could occur by way of legislative amendments to section 131 of the *Corporations Act* in the manner articulated below.

A. Eligibility to Submit Proposals

The categories of shareholders eligible to submit proposals should be enlarged to include beneficial owners of shares. This position has been adopted by the CBCA and by provincial corporate statutes in Alberta and Ontario.⁹⁷ In these jurisdictions, registered holders of voting shares as well as beneficial owners of voting shares are eligible to submit proposals.⁹⁸ By granting beneficial owners of shares the right to submit proposals, these jurisdictions acknowledge rightly that all shareholders including beneficial owners of shares have a direct stake in the management of the business or affairs of their corporations. The Manitoba provincial Legislature may have had legitimate and justifiable reasons for restricting the categories of shareholders eligible to submit proposals when the *Corporations Act* was enacted in 1987. Nonetheless, given modern realities, it is no longer justifiable to exclude beneficial owners of shares, a significant and growing

⁹⁵ See Oshionebo, "Shareholder Proposals", *supra* note 61 at 638.

⁹⁶ *Ibid* at 636.

⁹⁷ See CBCA, *supra* note 22, s 137(1); *Business Corporations Act*, RSA 2000, c B-9, s 136(1); *Business Corporations Act*, RSO 1990, c B.16, s 99(1).

⁹⁸ *Ibid*.

constituency, from those shareholders eligible to submit proposals. As some observers noted several decades ago, amending the *Corporations Act*

to permit beneficial shareholders to submit shareholder proposals under [section 131] would both reflect the current market reality of share holdings and fit into a broader effort to improve communication among the corporation and the owners of its shares.⁹⁹

The author is unaware of data indicating the current number of ‘beneficial owners’ of shares in Manitoba corporations. However, there is reason to suspect that the number has increased significantly in recent years. The number of Canadians owning shares through intermediaries, agents or trustees has increased exponentially in the last three decades, as evidenced by the astronomical rise in pension fund investments in company stock. For example, pension fund investments in stocks stood at \$374.6 billion as of the first quarter of 2011.¹⁰⁰ Given the rise in pension fund investments in stock, it is equally likely that the number of Canadians that qualify as “beneficial owners” of shares has increased in recent decades. Moreover, the volume of shares on the capital market today is higher than the volume of shares on the market in 1987 when the *Corporations Act* was enacted. In fact, a larger percentage of Canadians own shares today than in 1987. For example, as of 2004, about 49 percent of Canadians were shareholders.¹⁰¹ It is counter-productive to prohibit beneficial owners of voting shares from submitting proposals given the stated objective of the statutory regimes on shareholder proposals to promote shareholder participation in corporate governance.

Still on the question of eligibility to submit proposals, it is worth noting that the CBCA, the *Bank Act* and some provincial corporate statutes in Canada place an economic barrier on eligibility to submit proposals by requiring shareholders to own a prescribed percentage or

⁹⁹ Canada, Industry Canada, Canada Business Corporations Act Discussion Paper: Proposals for Technical Amendments (September 1995) at 56-57, online: <publications.gc.ca/collections/Collection/C2-280-4-1995E.pdf>.

¹⁰⁰ Canada, “Employer Pension Plans (Trusteed Pension Funds) First Quarter 2011”, The Daily (13 September 2011), online: <<http://www.statcan.gc.ca/daily-quotidien/110913/dq110913c-eng.htm>>.

¹⁰¹ Toronto Stock Exchange, Canadian Shareowners Study 2004, cited in Australian Stock Exchange, “International Share Ownership (Comparison of Share Owners): Key Highlights” (September 2005) at 15-16, online: Australian Stock Exchange <www.asx.com.au/.../international_share_ownership_summary_05.pdf>.

volume of shares to be able to submit proposals.¹⁰² The CBCA requires eligible shareholders to own at least one percent of the total number of a corporation's outstanding voting shares, or shares with a fair market value of at least \$2000.¹⁰³ Likewise, in British Columbia a proposal is valid only if the submitter(s) of the proposal own "at least 1/100 of the issued shares of the company that carry the right to vote at general meetings" or if the submitter(s) own shares that have a market value in excess of \$2000.¹⁰⁴ Moreover, some statutes require shareholders to hold or own the prescribed percentage of shares for a prescribed period before they are eligible to submit proposals.¹⁰⁵ The imposition of an eligibility threshold has been justified on grounds that "those who put the corporation and other shareholders to the expense of including a proposal in its proxy material" ought to be required to "have a continuous minimum level of investment in the corporation for a specified period of time."¹⁰⁶ In other words, a shareholder should hold more than a minimal interest in the corporation if they are to be allowed to pass to the corporation the cost of distributing a proposal.

Unlike the CBCA, the *Corporations Act* does not place an economic barrier on eligibility to submit proposals. Under the *Corporations Act* any shareholder entitled to vote at a corporation's annual meeting is eligible to submit proposals to the corporation.¹⁰⁷ Thus, in Manitoba a shareholder with one voting share is eligible to submit shareholder proposals.¹⁰⁸ The

¹⁰² See CBCA, *supra* note 22, s 137(1.1); *Bank Act*, *supra* note 24, s 143(1.1); Alberta *Business Corporations Act*, *supra* note 97, s 136(1.1); British Columbia *Business Corporations Act*, SBC 2002, c 57, s 188(1).

¹⁰³ CBCA, *supra* note 22, s 137(1.1) read with s 46 of the *Canada Business Corporations Regulation*, 2001, SOR/2001-512.

¹⁰⁴ British Columbia *Business Corporations Act*, *supra* note 102, s 188(1) read with the *Business Corporations Regulation*, BC Reg 65/2004, s 17. See also Alberta *Business Corporations Act*, *supra* note 97, s 136(1.1).

¹⁰⁵ See CBCA, *supra* note 22, s 137(1.1) read with s 46 of the *Canada Business Corporations Regulation*, *supra* note 103; *Bank Act*, *supra* note 24, s 143(1.1); Alberta *Business Corporations Act*, *supra* note 97, s 136(1.1)(a).

¹⁰⁶ Industry Canada, "Analysis of the Changes to the Canada Business Corporations Act", online: <http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_c100269.html>.

¹⁰⁷ *Corporations Act*, *supra* note 1, s 131(1).

¹⁰⁸ See *Michaud v Banque Nationale du Canada*, *supra* note 83 where the court held that a similar provision in the old version of the *Bank Act* entitled a shareholder owning one voting share to submit a proposal to the Bank.

imposition of an eligibility threshold under the CBCA and the *Bank Act*, as well under provincial corporate statutes in British Columbia and Alberta may tempt Manitoba's legislature to introduce a similar eligibility threshold in Manitoba. However, it would be ill advised to do so given that there is no evidence of abuse of Manitoba's current regime which permits owners of one voting share to submit proposals. There is also no evidence of abuse of similar regimes in New Brunswick, Newfoundland and Labrador, Nova Scotia, Northwest Territories, Saskatchewan and Yukon.¹⁰⁹ However, if the Manitoba provincial Legislature is inclined to prescribe a threshold for eligibility to submit proposals, such eligibility threshold should be lower than the CBCA threshold. The CBCA threshold of ownership of at least one percent of a corporation's outstanding voting shares or shares that have a market value of at least \$2000¹¹⁰ is a significant economic barrier on the ability of minor shareholders to submit proposals. This economic barrier may explain why very few individual shareholders file proposals in Canada.¹¹¹ That being said, it is recognized that even a low eligibility threshold could hamper significantly the ability of minor shareholders to submit proposals. The adverse impacts of this economic barrier can be ameliorated by allowing minor shareholders to pool their shareholdings to satisfy the eligibility requirements. For example, the *Corporations Act* could permit shareholders owning less than the prescribed minimum value of shares to submit proposals if they obtain the support of persons holding, in the aggregate, the prescribed minimum value or percentage of a corporation's voting shares prior to submitting the proposal.¹¹²

¹⁰⁹ For similar regimes in these Provinces, see New Brunswick *Business Corporations Act*, *supra* note 17, s 89(1); Newfoundland and Labrador *Corporations Act*, *supra* note 17, s 224; Nova Scotia *Companies Act*, *supra* note 17, s 135A; Northwest Territories *Business Corporations Act*, *supra* note 17, s 138(2); Saskatchewan *Business Corporations Act*, *supra* note 17, s 131(1); Yukon *Business Corporations Act*, *supra* note 17, s 138(1).

¹¹⁰ CBCA, *supra* note 22, s 137(1.1) read with s 46 of the *Canada Business Corporations Regulation*, *supra* note 103.

¹¹¹ Oshionebo, "Shareholder Proposals", *supra* note 61 at 641.

¹¹² This is the strategy adopted under section 188(1) of British Columbia's *Business Corporations Act*, *supra* note 102 which provides that a proposal is valid if, amongst other things, it is "signed by qualified shareholders who, together with the submitter, are, at the time of signing, registered owners or beneficial owners of shares that, in the aggregate, (i) constitute at least 1/100 of the issued shares of the company that carry the right to vote at general meetings, or (ii) have a fair market value in excess of the

B. Liberalization of the Statutory Exemptions

Another area deserving of amendment is section 131(5) of the *Corporations Act* which prescribes the circumstances under which corporations may reject a proposal. For example, the *Corporations Act* exempts corporations from circulating shareholder proposals that promote general causes.¹¹³ This exemption is not peculiar to the *Corporations Act*. Provincial statutes in Alberta, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Saskatchewan and Yukon contain a similar exemption.¹¹⁴ However, despite widespread retention of this exemption in Canada, it is clear that the exemption has significant adverse impacts on the potency and utility of the shareholder proposals mechanism. It unduly restricts the right of shareholders to participate in corporate governance through the mechanism of shareholder proposals. The adverse impacts of a similar exemption on shareholders' ability to submit proposals in other jurisdictions have led to the repeal of the exemption. For example, the House of Commons abolished the exemption in 2001. Thus today, the CBCA allows shareholders to submit proposals that promote social or political causes provided the proposals relate in a significant way to the business or affairs of the corporation.¹¹⁵ Similarly, the rules established by the United States' Securities and Exchange Commission pursuant to the *Securities and Exchange Act of 1934* do not permit corporations to reject shareholder proposals on grounds of general causes.¹¹⁶ The Manitoba provincial Legislature should emulate these jurisdictions by repealing the portion of section 131(5)(b) of the *Corporations Act* dealing with proposals that raise general causes.

prescribed amount" See also CBCA, *supra* note 22, s 137(1.1)(b) read with s 46 of the *Canada Business Corporations Regulations*, 2001, *supra* note 103; *Bank Act*, *supra* note 24, s 143(1.1)(b); *Alberta Business Corporations Act*, *supra* note 97, s 136(1.1b).

¹¹³ *Corporations Act*, *supra* note 1, s 131(5)(b).

¹¹⁴ See *Alberta Business Corporations Act*, *supra* note 97, s 136(5)(b); *Newfoundland and Labrador Corporations Act*, *supra* note 17, s 227(b); *Northwest Territories Business Corporations Act*, *supra* note 17, s 138(6)(b); *Nova Scotia Companies Act*, *supra* note 17, 3rd Schedule, para 9(5)(b); *Saskatchewan Business Corporations Act*, *supra* note 17, s 131(5)(b); *Yukon Business Corporations Act*, *supra* note 17, s 138(5).

¹¹⁵ CBCA, *supra* note 22, s 137(5)(b.1).

¹¹⁶ 17 *Code of Federal Regulations*, s 240.14a-8 (2012).

Several legal justifications can be offered for the repeal of the exemption of proposals promoting general causes. First, the exemption is too broad. Many proposals, including proposals dealing with impacts of the activities of corporations on human rights, labour and the environment, could be perceived as promoting general causes and thus exempted under the *Corporations Act*. In this sense the exemption is unnecessarily hostile to the interest of shareholders who are socially conscious investors. Commenting on a similar exemption in the previous version of the *CBCA*, Gil Yaron has noted that “[t]his ground of exclusion constrained shareholders (as evidenced by the number of proposals challenged and rejected by corporations) and set an unreasonable threshold for shareholders to meet.”¹¹⁷

Secondly, the exemption is premised on the assumption that the sole function of the corporation is maximization of shareholder wealth.¹¹⁸ However, as Merrick Dodd eloquently argued several decades ago, although the corporation is primarily an economic institution, it is also a social institution because its activities affect not only its shareholders but also non-shareholder constituencies such as consumers, employees, suppliers and host communities.¹¹⁹ Given this reality, corporate governance is no longer confined purely to economic issues. Rather, corporate governance has evolved in the last three decades to include a broad array of economic, social and environmental issues. Thus today, in managing the affairs of corporations, corporate boards are allowed to consider the interests of several constituencies including non-shareholders. For example, the Supreme Court of Canada has held that

We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider,

¹¹⁷ 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 120.

¹¹⁸ This assumption is espoused by the shareholder primacy model of corporate law. For insight on this model, see Adolph A Berle, Jr, “Corporate Powers as Powers in Trust” (1930-31) 44:7 Harv L Rev 1049; Bernard Black & Reinier Kraakman, “A Self-Enforcing Model of Corporate Law” (1996) 109:8 Harv L Rev 1911.

¹¹⁹ E Merrick Dodd, “For Whom are Corporate Managers Trustees” (1931-32) 45:7 Harv L Rev 1145.

inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.¹²⁰

In fact, in the United States, the so-called corporate constituency statutes allow company directors to consider the interests of non-shareholders in making management decisions.¹²¹ Given that company directors can consider social issues such as environmental protection, there is no justifiable legal reason for preventing shareholders from prompting management to consider social issues through their ability to submit proposals to corporations. Thus, shareholders ought to be permitted to submit proposals on social and environmental issues, provided that those issues are related to the business or affairs of the corporation.

There is an analogous legislative precedent in Manitoba for the view that shareholders ought to be able to submit proposals on social causes. The legislative precedent is the *Trustee Act* which provides that:

Subject to any express provision in the instrument creating the trust, a trustee who uses a non-financial criterion to formulate an investment policy or to make an investment decision does not commit a breach of trust if, in relation to the investment policy or investment decision, the trustee exercises the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others.¹²²

The *Trustee Act* does not apply directly to shareholder proposals. Nonetheless, by way of analogy, this provision is significant because it demonstrates recognition by the Manitoba provincial Legislature that non-financial criteria including ethical factors may inform investment

¹²⁰ *Peoples Department Stores (Trustee of) v Wise*, 2004 SCC 68 at para 42, [2004] 3 SCR 461. See also *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 40, available on CanLII; *Tech Corp Ltd v Millar*, (1972) 33 DLR (3d) 288 at para 96, available on CanLII.

¹²¹ See Anthony Bisconti, "The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?" (2009) 42 LoyLA L Rev 765 at 780-783; Jonathan D Springer, "Corporate Constituency Statutes: Hollow Hopes and False Fears" (1999) Ann Surv Am L 85 at 96-102; Brett H McDonnell, "Corporate Constituency Statutes and Employee Governance" (2004) Wm Mitchell L Rev 1227 at 1230-1232; Robert G Murray, "Money Talks, Constituents Walk: Pennsylvania's Corporate Constituency Statute Can Maximize Shareholders' Wealth" (2000) 48 Buff L Rev 629 at 643-648.

¹²² *Trustee Act*, *supra* note 60, s 79.1. See also *Pension Benefits Amendment Act*, SM 2005, s 28.1(2.2).

decisions. This being so, it is indefensible for the same legislative body to deny a class of investors, that is, shareholders, the power to request through proposals that the managers of corporations in which they own shares should consider non-financial factors or social issues in managing the affairs of the corporation.

Thirdly, the repeal of this exemption would most likely encourage shareholders to participate actively in the governance of Manitoba corporations. Such repeal could spur an increase not only in the number of proposals submitted to Manitoba corporations but also in the number of proposals raising social issues such as environmental protection and human rights. I say this because the repeal in 2001 of a similar exemption under the CBCA has led to an exponential rise in the number of 'social issue' proposals submitted to CBCA corporations. For example, 135 of the 991 proposals submitted to Canadian corporations between 2000 and 2011 raised social and environmental issues including human rights and labour standards.¹²³ This figure represents 13.62 percent of proposals submitted during the period.¹²⁴

Fourthly, shareholder proposals raising social issues are useful and beneficial to both the corporation and the society at large. For example, shareholder proposals can help corporations to enhance their social responsibility including improvement in environmental and human rights practices. In some cases, shareholder proposals have prompted some corporations to adopt ethical codes of conduct.¹²⁵ For example, partly as a result of a shareholder proposal, the oil and gas giant, Shell, adopted and implemented specific environmental and human rights policies regarding its operations in developing countries.¹²⁶ Similarly, as noted previously a proposal prompted Enbridge Inc to adopt the Voluntary Principles on Security and Human Rights.¹²⁷ Some observers have credited shareholder proposals with disinvestment in apartheid South Africa.¹²⁸ Such

¹²³ Oshionebo, "Shareholder Proposals", *supra* note 61 at 640-41.

¹²⁴ *Ibid* at 641.

¹²⁵ See Craig Forcese, *Putting Conscience into Commerce: Strategies for Making Human Rights Business as Usual* (Montreal: International Centre For Human Rights and Democratic Development, 1997) at 64.

¹²⁶ Oshionebo, Regulating TNCs, *supra* note 10 at 196.

¹²⁷ Sarra, *supra* note 11 at 76.

¹²⁸ See Schwartz & Weiss, *supra* note 10 at 643.

disinvestment contributed in part to the eventual dismantling of apartheid, an obnoxious and inhumane system.

In sum, proposals on social issues are good for business because they help corporations to improve on their social responsibility. To the extent that a corporation secures a reputation as a good corporate citizen, it is likely to attract and retain the patronage of the public. For example, public perception or reputation of a corporation would likely be boosted if its management agrees with and actively implements shareholder proposals requiring the corporation to observe human rights. In turn, good public reputation could lead to more investment in the corporation's stock or an increase in the sale of its goods and services.¹²⁹ The reverse could readily be the case if management were to disregard such proposals. Moreover, the corporation is unlikely to be targeted for boycott campaigns by advocacy groups. On the contrary, corporations risk a backlash if they behave in a socially irresponsible manner. In the 1990s, for example, Talisman Energy Inc was the subject of divestment campaigns by NGOs because of its perceived complicity in human rights violations in the Sudan.¹³⁰ Ultimately the divestment campaigns prompted some institutional investors such as TIAA-CREF and California Public Employees' Retirement System (CALPERS) to divest their holdings in Talisman Energy Inc,¹³¹ resulting in a drastic decline in Talisman's share price.¹³²

Civil society campaigns are more likely to impact negatively on the financial fortunes of a corporation because in today's economic landscape, investors and consumers are becoming increasingly socially conscious. The result is that the investing and buying public now, more than ever before, base their investment and purchase decisions on social issues. In Canada,

¹²⁹ See Joshua D Margolis & James P Walsh, *People and Profits? The Search for a Link Between a Company's Social and Financial Performance* (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2001) at 10-14; Moses L Pava & Joshua Krausz, *Corporate Responsibility and Financial Performance: The Paradox of Social Cost* (Westport, Conn: Quorum Books, 1995) at 15.

¹³⁰ See Stephen J Kobrin, "Oil and Politics: Talisman Energy and Sudan" (2004) 36 NYUJ Int'l L & Pol 425 at 438-444; Dhir, *supra* note 68 at 389.

¹³¹ Kobrin, *supra* note 130 at 440.

¹³² Dhir, *supra* note 68 at 389 (reporting that "prior to its withdrawal from Sudan, Talisman suffered from a thirty-three percent decline in the value of its shares"); Kobrin, *ibid* at 444 ("... it is clear that the activities of the advocacy groups had a significant effect on Talisman's share price and enterprise value.").

for example, there has been a steady growth in social and ethical investments particularly amongst institutional investors. In fact, between 2010 and 2011 socially responsible investment grew by 16 percent in Canada.¹³³ More significantly, as of December 2011 total assets held by socially responsible investors in Canada stood at \$600.9 billion,¹³⁴ up from \$530.9 billion in 2010.¹³⁵ There is a similar trend on the global capital market where assets professionally managed on behalf of socially responsible investors are estimated to be worth at least US\$13.6 trillion.¹³⁶ Elsewhere in the world, stock exchanges have established indexes of ethically responsible corporations. The Dow Jones has established the Dow Jones Sustainability Index,¹³⁷ while the Financial Times Stock Exchange has established the FTSE4 Good Index Series.¹³⁸ By prohibiting proposals on social and ethical issues, the *Corporations Act* may unwittingly be dissuading socially conscious investors from investing in Manitoba corporations.

With regard to the exemption of proposals on grounds of abuse of the rights of shareholders, I have argued previously that Manitoba courts should interpret section 131.5(e) of the *Corporations Act* in a restrictive manner. However, the preferred option for change is abolition or repeal of the exemption because it is susceptible to abuse by corporate management.¹³⁹ As noted earlier, there is a danger that corporate management may rely on this exemption as basis for rejecting shareholder proposals simply because they attract publicity. The case for the repeal of

¹³³ See Social Investment Organization, Canadian Socially Responsible Investment Review 2012, at 6, online: Social Investment Organization <<http://www.socialinvestment.ca/wp-content/uploads/CSRIR-2012-English.pdf>>.

¹³⁴ *Ibid.*

¹³⁵ Social Investment Organization, Canadian Socially Responsible Investment Review 2010, at 7, online: Social Investment Organization <<http://www.socialinvestment.ca/wp-content/uploads/CanadianSRIReview2010.pdf>>.

¹³⁶ Global Sustainable Investment Alliance, 2012 Global Sustainable Investment Review, at 2, online: Global Sustainable Investment Alliance <<http://gsiareview2012.gsi-alliance.org/#/1/>>.

¹³⁷ Dow Jones Sustainability Indices, online: <<http://www.sustainability-indices.com/>>.

¹³⁸ FTSE4Good Index, online: <http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp>.

¹³⁹ See Sarra, *supra* note 11 at 72 (arguing that this exemption “seems to have potential for its own abuse by corporate officers”).

the exemption of proposals on grounds of abuse of the rights of shareholders to secure publicity is the more compelling given that, other exemptions in the *Corporations Act* cover instances of abuse of the right of shareholders to submit proposals. For example, a proposal submitted by a shareholder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the corporation or its directors (exempted under section 131(5)(b)) is an abuse of the right of the shareholder to submit proposals.¹⁴⁰ So too is the submission of a proposal by a shareholder who, in the preceding two years, failed to present a previous proposal at a meeting of the shareholders.¹⁴¹ Thus, section 131(5)(e) of the *Corporations Act* which exempts proposals on grounds of abuse of the rights of shareholders serves no useful purpose. Rather, it is legislative overkill. In Ontario the enumerated circumstances under which a corporation may reject a proposal do not include any grounds dealing with abuse of shareholders' right to secure publicity.¹⁴² Thus, Ontario corporations cannot reject a proposal on grounds that the right of the shareholder to submit a proposal has been abused to secure publicity.

Finally, the exemption that permits corporations to reject a proposal if a "substantially the same proposal" was submitted and defeated within the preceding two years ought to be amended to provide "greater flexibility for shareholders to re-submit a similar proposal at subsequent meetings" of the shareholders.¹⁴³ Shareholders ought to be able to re-submit the same or similar proposal within the two year period provided that the proposal obtained a prescribed minimum threshold of support amongst shareholders at the previous meeting. This is the position adopted under the CBCA, the *Bank Act*, British Columbia's *Business Corporations Act*, and under the United States SEC Rules.¹⁴⁴ Under the CBCA, for example, a corporation may reject a proposal if substantially the same proposal was

¹⁴⁰ *Corporations Act*, *supra* note 1, s 131(5)(b).

¹⁴¹ *Ibid*, s 131(5)(c).

¹⁴² See *Business Corporations Act*, *supra* note 97, s 99(5).

¹⁴³ Industry Canada, "Analysis of the Changes to the *Canada Business Corporations Act*", *supra* note 106.

¹⁴⁴ See CBCA, *supra* note 22, s 137(5)(d) read with the *Canada Business Corporations Regulations*, 2001, *supra* note 103, s 51; *Bank Act*, *supra* note 24, s 143(5)(d); *British Columbia Business Corporations Act*, *supra* note 102, s 189(5)(c); *Code of Federal Regulations*, *supra* note 116, s 240.14a-8 (2011).

included in a management proxy circular or a dissident's proxy circular relating to a meeting of shareholders held not more than five years before the receipt of the proposal and did not receive the prescribed minimum amount of support at the meeting.¹⁴⁵ For this purpose, the prescribed minimum amount of support is 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 the proposal was presented at two annual meetings of shareholders; and 10% of the total number of shares voted at its last submission to shareholders, if the proposal was presented at three or more annual meetings of shareholders.¹⁴⁶ Thus, under the CBCA, proposals that received more than the prescribed minimum amount of support at meetings of shareholders can be re-submitted the following year.

The *Corporations Act* was modelled on the CBCA in order to promote "more uniform corporate law for Canada."¹⁴⁷ While the promotion of uniformity in corporate law across Canada is a lofty objective, where necessary, the Manitoba provincial legislature ought to chart its own course even if it entails a departure from the CBCA regime. I say this because, although the CBCA's shareholder proposals regime is more liberal than the regime under the *Corporations Act*, the CBCA itself contains the 'significant business' exemption which curtails the utility of shareholder proposals. The CBCA allows corporations 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."¹⁴⁸ The exact ambit of the 'significant business' exemption has yet to be judicially delineated, but it appears that it relates to the economic magnitude (or economic significance) of the issues raised in a proposal. This exemption mirrors the economic relevance exemption in the United States, which allows corporations to exclude proposals that relate to "operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings

¹⁴⁵ CBCA, *supra* note 22, s 137.(5)(d) read with the *Canada Business Corporations Regulations*, 2001, *supra* note 103, s 51.

¹⁴⁶ CBCA, *supra* note 22, s 137(5)(d) read with the *Canada Business Corporations Regulations*, 2001, *ibid*.

¹⁴⁷ *Supra* note 48 at 1999.

¹⁴⁸ CBCA, *supra* note 22, s 137(5)(b.1).

and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business."¹⁴⁹

The 'significant business' exemption sets the bar high because it potentially excludes proposals dealing with non-investment policies or issues. It has also been argued that the exemption permits corporations to exclude proposals that raise general causes such as environmental protection and human rights.¹⁵⁰ In this sense the 'significant business' exemption appears to be a reincarnation of the exemption that permitted the exclusion of proposals that promote general economic, political and social causes under the previous CBCA.¹⁵¹

The pitfalls associated with the significant business exemption could be avoided by making minor changes to the wording of the exemption. For example, the exemption could be couched in the following manner: A corporation is not obliged to set out a proposal in its management proxy circular 'if it clearly appears that the proposal does not relate directly to the business or affairs of the corporation.' In effect, issues raised in a proposal must relate directly to the business operations of the corporation. A corporation ought to be able to exclude a proposal if the proposal lacks a nexus or connection with the business operations of the corporation. The difference between the exemption suggested here (which I will refer to as the 'direct nexus exemption') and the significant business exemption is that, whereas the significant business exemption focuses on the economic magnitude of the issues raised in a proposal, the 'direct nexus exemption' focuses on the nature of the issues in a proposal. Thus under the 'direct nexus exemption', provided a proposal relates directly to the business of the corporation the proposal cannot be excluded even if the issues raised in the proposal account for less than a percentage of the corporation's business. Arguably, under the significant business exemption such a proposal is excludable because the proposal does not relate in a significant way to the business or affairs of the corporation.

¹⁴⁹ 17 CFR s 240.14a-8 (5).

¹⁵⁰ Dhir, *supra* note 68 at 395.

¹⁵¹ *Ibid.*

IV. MODEL LEGISLATION ON SHAREHOLDER PROPOSALS

The discussion in the preceding pages leads me to offer the following as a legislative template for the Manitoba Legislature, should they consider it necessary to amend section 131 of the *Corporations Act*. The model proposed here borrows best principles from the CBCA, *Bank Act*, provincial corporate statutes in Canada, and the SEC rules in the United States. However, the proposed model should not be seen as sacrosanct or unalterable. Rather, it is intended simply to provide a template for debate and possibly, legislative amendment to the *Corporations Act*.

Proposals

131(1) A registered holder entitled to vote or beneficial owner of shares that are entitled to be voted at an annual meeting of shareholders may

(a) submit to the corporation notice of any matter that the person proposes to raise at the meeting (a "proposal"); and

(b) discuss at the meeting any matter in respect of which the person would have been entitled to submit a proposal.¹⁵²

Information circular

131(2) A corporation that solicits proxies shall set out the proposal in the management proxy circular required by section 144 or attach the proposal thereto.¹⁵³

Supporting statement

131(3) If so requested by the shareholder, the corporation shall include in the management proxy circular or attach thereto a statement by the shareholder of not more than 500 words in support of the proposal, and the name and address of the shareholder.¹⁵⁴

¹⁵² This provision is based on the CBCA, *supra* note 22, s 137(1); British Columbia *Business Corporations Act*, *supra* note 102, s 187(1).

¹⁵³ This provision retains s 131(2) of the current *Corporations Act*.

¹⁵⁴ This provision differs from s 131(3) of the current *Corporations Act* in that it increases the length of the supporting statement to 500 words, as opposed to the current provision which stipulates that a statement in support of a proposal shall not be more than 200 words. The restriction of the supporting statement to 200 words is counter-productive because it does not allow shareholders enough room to explain their proposals to other shareholders. See Industry Canada, "Analysis of the Changes to the Canada Business Corporations Act", *supra* note 106.

Nomination for director

131(4) A proposal may include nominations for the election of directors if the proposal is signed by one or more holders of shares representing in the aggregate not less than 5% of the shares or 5% of the shares of a class of shares of the corporation entitled to vote at the meeting to which the proposal is to be presented, but this subsection does not preclude nominations made at a meeting of shareholders of a corporation other than a corporation that has made a distribution to the public.¹⁵⁵

Exemptions

131(5) A corporation is not required to comply with subsections (2) and (3) if

(a) the proposal is not submitted to the corporation at least 90 days before the anniversary date of the previous annual meeting of shareholders;¹⁵⁶

(b) it clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders;

(c) the corporation, at the shareholder's request, included a proposal in a management proxy circular relating to a meeting of shareholders held within two years preceding the receipt of the request, and the shareholder failed to present the proposal, in person or by proxy, at the meeting;¹⁵⁷

(d) substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident's proxy circular relating to a meeting of shareholders held within five years preceding the receipt of the proposal and did not receive the prescribed minimum amount of support at the meeting;¹⁵⁸

¹⁵⁵ This provision retains s 131(4) of the current *Corporations Act*.

¹⁵⁶ This provision retains s 131(5)(a) of the current *Corporations Act*.

¹⁵⁷ This provision retains s 131(5)(c) of the current *Corporations Act*.

¹⁵⁸ The Manitoba Business Corporations Regulations should stipulate that:

For the purpose of paragraph 131.(5)(d) of the Act, the prescribed minimum amount of support for a shareholder's proposal is

(a) 3% of the total number of shares voted, if the proposal was introduced at an annual meeting of shareholders;

(b) 6% of the total number of shares voted at its last submission to shareholders, if the proposal was introduced at two annual meetings of shareholders; and

(c) 10% of the total number of shares voted at its last submission to shareholders, if the proposal was introduced at three or more annual meetings of shareholders.

(e) it clearly appears that the proposal does not relate directly to the business or affairs of the corporation.

Immunity

131(6) No corporation or person acting on its behalf incurs any liability by reason only of circulating a proposal or statement in compliance with this section.¹⁵⁹

Notice of refusal

131(7) If a corporation refuses to include a proposal in a management proxy circular, the corporation shall, within 10 days after receiving the proposal, notify the shareholder submitting the proposal of its intention to omit the proposal from the management proxy circular and send to the shareholder a statement of the reasons for the refusal.¹⁶⁰

Shareholder application to court

131(8) Upon the application of a shareholder claiming to be aggrieved by a corporation's refusal under subsection (7), a court may restrain the holding of the meeting to which the proposal is sought to be presented and make any further order it thinks fit.¹⁶¹

Corporation's application to court

131(9) The corporation or any person claiming to be aggrieved by a proposal may apply to a court for an order permitting the corporation to omit the proposal from the management proxy circular, and the court, if it is satisfied that subsection (5) applies, may make such order as it thinks fit.¹⁶²

Director entitled to notice

131(10) An applicant under subsection (8) or (9) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.¹⁶³

This recommendation mirrors section 51 of the Canada Business Corporations Regulations, *supra* note 103.

¹⁵⁹ This provision retains s 131(6) of the current *Corporations Act*.

¹⁶⁰ This provision retains s 131(7) of the current *Corporations Act*.

¹⁶¹ This provision retains s 131(8) of the current *Corporations Act*.

¹⁶² This provision retains s 131(9) of the current *Corporations Act*.

¹⁶³ This provision retains s 131(10) of the current *Corporations Act*.

V. CONCLUSION

The overarching aim of the shareholder proposals mechanism is the promotion of shareholder participation in corporate governance. However, the extent to which this objective is being achieved in Manitoba is questionable given the strictness of the rules governing the submission and distribution of shareholder proposals in Manitoba. As discussed in this article, extant provisions of the *Corporations Act* unduly restrict the categories of shareholders eligible to submit proposals. Moreover, the circumstances under which Manitoba corporations may reject proposals are too broad. The effect is that proposals are hardly submitted to Manitoba corporations. This situation is untenable given modern business realities. Hence this article urges the Manitoba provincial legislature to liberalize the rules governing shareholder proposals in Manitoba. In particular, the article argues that beneficial owners of voting shares ought to be empowered to submit proposals. In addition, the exemption permitting corporations to reject proposals if the proposals raise general causes as well as the exemption of proposals on grounds of abuse of shareholder rights to secure publicity ought to be repealed. Doing so would send a strong signal that Manitoba wants investors and shareholders to participate actively in corporate governance.