

The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights

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This article considers the relationship between social disclosure and corporate accountability in Canada. It focuses on the potential benefits social disclosure can provide in terms of the overall human rights project. I explore this issue with reference to the broader theoretical frameworks of new governance and reflexive law. While I ground my analysis in these analytical approaches, I distance myself slightly from particular arguments in the literature to date: specifically, the argument that the disclosure process will result in self-correcting behaviour on the part of corporate decision makers. Rather, I argue that the value of social disclosure may lie more in its ability to empower socially conscious shareholders who will be equipped with information that can be used to engage corporate management in dialogue and influence corporate operations. I further contend that a movement towards enhanced social disclosure should be viewed as the corollary of recent developments in Canadian corporate law involving directors' and officers' fiduciary obligations.

Cet article réfléchit à la relation entre la divulgation sociale et l'obligation corporative de rendre des comptes au Canada. Il s'intéresse aux avantages potentiels que peut apporter la divulgation sociale sur le plan du projet global des droits humains. J'explore cette question en référence au cadre théorique plus général de la nouvelle gouvernance et du droit réflexif. Certes, je fonde mon analyse sur ces trois démarches analytiques, mais je prends

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légèrement mes distances vis-à-vis d'arguments précis, trouvés dans la documentation produite jusqu'ici : en particulier, l'argument selon lequel le processus de divulgation entraînera une modification auto-correctrice du comportement de la part des décideurs corporatifs. Plutôt, j'argue que la valeur de la divulgation sociale pourrait bien se trouver davantage dans sa capacité de donner le pouvoir aux actionnaires citoyens, qui seront munis d'information pouvant servir à pousser les dirigeants corporatifs à engager le dialogue et influencer le fonctionnement corporatif. En outre, je soutiens qu'une progression vers une meilleure divulgation sociale devrait être perçue comme le corollaire des derniers développements en matière de droit corporatif canadien concernant les obligations fiduciaires des administrateurs et des cadres.

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[C]orporation law, as a field of intellectual effort, is dead. ... When ... law ceased to take the "corporation" seriously, the entire body of law that had been built upon that intellectual construct slowly perforated and rotted away. We have nothing left but our great empty corporation statutes—towering skyscrapers of rusted girders, internally welded together and containing nothing but wind. ... There is still a good bit of work to be done to persuade someone to give a decent burial to the shivering skeletons.¹

OVER THE COURSE OF THE LAST THREE YEARS, two important—and seemingly unrelated—public policy processes concluded in Canada. First, the Investment Dealers Association of Canada sponsored a comprehensive review of Canadian securities regulation with a view towards modernizing the legislative framework and improving the effectiveness of our capital markets. The Final Report of the “Task Force to Modernize Securities Legislation in Canada” was

1. Bayless Manning, “The Shareholder’s Appraisal Remedy: An Essay for Frank Coker” (1962) 72 Yale L.J. 223 at 245, n. 37.

released in October 2006 (Task Force Report).² The sixty-five recommendations set forth are the product of thirty research papers prepared by international and Canadian academics and practitioners, oral and written submissions,³ and a series of eight stakeholder consultations.⁴ Second, the federal government—under the leadership of the Department of Foreign Affairs and International Trade—sponsored a process designed to address issues of corporate social responsibility *vis-à-vis* the developing world operations of the mining, oil, and gas sectors. The final Advisory Group Report arising from the “National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries” (Advisory Group Report) was released in March 2007.⁵

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2. Task Force to Modernize Securities Legislation in Canada, *Canada Steps Up: Final Report*, vol. 1 (Toronto: Task Force to Modernize Securities Legislation in Canada, 2006), online: <http://www.tfmsl.ca/docs/Volume1_en.pdf> [Task Force, *Final Report*]. For a discussion of the Task Force’s recommendations from the perspective of retail investors, see Paul Halpern & Poonam Puri, “Reflections on the Recommendations of the Task Force to Modernize Securities Legislation in Canada: A Retail Investor Perspective” (2008) 46 Can. Bus. L.J. 199.
 3. Task Force, *Final Report*, *ibid.* at 21; *Report of the Task Force to Modernize Securities Legislation in Canada: Written Submissions and Presentations*, vol. 7 (Toronto: Task Force to Modernize Securities Legislation in Canada, 2006), online: <http://www.tfmsl.ca/docs/Volume7_en.pdf>.
 4. One of these consultations was a roundtable titled “Critical Issues in Enforcement,” held at the University of Toronto’s Capital Markets Institute (3 February 2006), which I participated in.
 5. National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries, *Advisory Group Report* (March 2007), online: <http://www.mining.ca/www/media_lib/MAC_Documents/Publications/CSRENG.pdf> [National Roundtables, *Advisory Group Report*]. In June 2005, the Standing Committee on Foreign Affairs and International Trade (SCFAIT) adopted a report of its Parliamentary Subcommittee on Human Rights and International Development, which was then submitted to Parliament. The SCFAIT Report was groundbreaking, calling for the Canadian government to, *inter alia*, enhance incentives to foster corporate compliance with international human rights norms, and to improve and create new tools for monitoring corporate operations in the developing world. See House of Commons, Standing Committee on Foreign Affairs and International Trade, *Fourteenth Report*, 38th Parl. 1st Sess. (2005), online: <http://cmte.parl.gc.ca/Content/HOC/committee/381/faae/reports/rp1961949/FAAE_Rpt14-e.htm>. The government tabled a response in October 2005 that neglected to adopt many of the SCFAIT Report’s recommendations. It did, however, agree to organize the roundtable process. See Government of Canada, *Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade: Mining in Developing Countries—Corporate Social Responsibility* (October 2005), online: <http://cmte.parl.gc.ca/Content/HOC/committee/381/faae/govresponse/rp2030362/faae_rpt14_gvtrsp-e.htm>. The stated purpose of the

The twenty-seven recommendations set forth are the product of 156 oral and 104 written submissions,⁶ and a series of multi-stakeholder consultations held in four Canadian cities.⁷

At first instance, the two processes may appear as two ships passing in the night⁸—and under conditions of poor visibility. Surely an initiative designed to enhance the efficiency of Canadian capital markets and another to address the harmful practices of Canadian extractive companies would have incongruous aims. And yet, upon deeper consideration, the possibility of convergence—of a collision at sea—becomes apparent. The particular point of intersection that is of interest in this paper is the concept of mandatory social disclosure.⁹ The crux of this concept is that publicly traded corporations must report to investors not only on the fact of revenue generation, but also on the method by which revenues are generated.¹⁰ For example, in addition to traditional financial information, a company would report on its patterns of legal compliance and its policies, practices, and business impacts as they relate to issues such as the environment, labour, and human rights.

Although the recommendations of the Task Force Report did not make explicit mention of social disclosure, it is both directly and indirectly referenced in some of the underlying research studies that the Task Force commissioned,

roundtables was “to examine measures that could be taken to position Canadian extractive sector companies operating in developing countries to meet or exceed leading international Corporate Social Responsibility ... standards and best practices.” See “The National Roundtables on Corporate Social Responsibility,” online: Foreign Affairs and International Trade Canada <http://geo.international.gc.ca/cip-pic/current_discussions/csr-roundtables-en.aspx>.

6. National Roundtables, *Advisory Group Report*, *ibid.* at i.
7. I participated as an invited expert at the roundtable consultation held in Toronto (3 February 2006).
8. This metaphor was recently used by Philip Alston in discussing the relationship between the Millennium Development Goals and international human rights. See Philip Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals” (2005) 27 Hum. Rts. Q. 755.
9. Other similar terminology in the literature includes non-financial disclosure, extra-financial reporting, triple bottom line reporting, corporate social transparency, and sustainability reporting.
10. Cynthia Williams, “The Securities and Exchange Commission and Corporate Social Transparency” (1999) 112 Harv. L. Rev. 1197 at 1201 [Williams, “The Securities and Exchange Commission”].

including those of Professor Sarra, and Professors Condon and Puri. In exploring the possibility of an integrated market disclosure document,¹¹ Janis Sarra suggests that it “may also be timely to require disclosure ... in respect of corporate social and environmental responsibility measures, as part of the corporate governance disclosures.”¹² Mary Condon and Poonam Puri further note that “investors, especially retail investors ... are motivated to seek investments where good corporate governance and a commitment to social responsibility are a factor.”¹³

Meanwhile, the Advisory Group Report took a strong step further with two final recommendations that engage social disclosure. Recommendation #3 asks the federal government to adopt the Global Reporting Initiative (GRI)¹⁴ as a disclosure framework and to mandate that the extractive sector be progressively required to report using this framework or its equivalent.¹⁵ Further, recommendation #14 asks the federal government to work with the Canadian Institute of Chartered Accountants (CICA), provincial regulators, and the Canadian Securities Administrators (CSA) to clarify that environmental, social, and governance-related information is to be considered “material” in respect of the public markets disclosure process.¹⁶

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11. That is, “[a] sort of ‘living’ electronic [disclosure document] that investors can access at any point in the life cycle of [an] issuer.” Janis Sarra, “Modernizing Disclosure in Canadian Securities Law: An Assessment of Recent Developments in Canada and Selected Jurisdictions” (Paper Commissioned by the Task Force to Modernize Securities Legislation in Canada, 29 May 2006) at 11, online: <[http://www.tfmsl.ca/docs/V2\(1A\)%20Sarra.pdf](http://www.tfmsl.ca/docs/V2(1A)%20Sarra.pdf)>.
 12. *Ibid.*
 13. Mary Condon & Poonam Puri, “The Role of Compliance in Securities Regulatory Enforcement” (Paper commissioned by the Task Force to Modernize Securities Legislation in Canada, 28 June 2006) at 19, online: <[http://www.tfmsl.ca/docs/V6\(1\)%20CondonPuri.pdf](http://www.tfmsl.ca/docs/V6(1)%20CondonPuri.pdf)>.
 14. The Global Reporting Initiative is a not-for-profit, multi-stakeholder initiative that provides guidance on sustainability reporting. See “About GRI,” online: <<http://www.globalreporting.org/AboutGRI/>>.
 15. National Roundtables, *Advisory Group Report*, *supra* note 5 at v. Among other accompanying recommendations, it suggests that the federal government “[c]ollaborate with securities regulators and exchanges on adopting GRI reporting for the overseas operations of Canadian extractive-sector companies as a requirement for listing” (at vi).
 16. *Ibid.* at xi. Frustratingly, the government of Canada has not yet provided a response to the Advisory Group Report. This lack of action recently led SCFAIT to recommend to the House of Commons that “the government provide its response in a reasonable time.” See House of Commons, Standing Committee on Foreign Affairs and International Trade,

In the nearly fifty years since Bayless Manning declared the death of the study and development of corporation law,¹⁷ the corporation as a site of inquiry has undoubtedly been resurrected. Not all of the catalysts behind this change have been positive. The Task Force Report and the Advisory Group Report come at a time when the overseas operations of Canadian corporations are being increasingly impugned by civil society organizations,¹⁸ United Nations treaty bodies,¹⁹ parliamentarians,²⁰ and scholars²¹ for their severe human rights-related

Sixth Report, 39th Parl. 2d Sess., No. 34 (3 June 2008), online: <<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=242142>>. The Government has, however, announced its support for the Extractive Industries Transparency Initiative, a multi-stakeholder organization which “supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas and mining.” See Department of Finance Canada, “Canada’s New Government Supports an International Initiative to Improve Governance in Resource-Rich Countries” (February 2007), online: <<http://www.fin.gc.ca/news07/07-012e.html>>; Extractive Industries Transparency Initiative, “EITI Summary” (September 2007), online: <<http://www.eitransparency.org/eiti/summary>>.

17. Manning, *supra* note 1.
18. See e.g. Rights Action, “Investing in Conflict: Public Money, Private Gain – Goldcorp in the Americas” (2008), online: <<http://www.rightsaction.org/Reports/research.pdf>> [Rights Action, “Investing in Conflict”]; CorpWatch, “Barrick’s Dirty Secrets: Communities Worldwide Respond to Gold Mining’s Impacts” (May 2007), online: <http://s3.amazonaws.com/corpwatch.org/downloads/Barrick_final_sml.pdf>; Canadian Network on Corporate Accountability, “Dirty Business, Dirty Practices: How the Federal Government Supports Canadian Mining, Oil and Gas Companies Abroad” (May 2007), online: <<http://www.halifaxinitiative.org/dirtypractices/DirtyPractices.pdf>>; MiningWatch Canada, “Victim or Villain? Canadian Mining Investment in South-east Ecuador Exacerbates Divisions, Conflicts” (July 2007), online: <http://www.miningwatch.ca/updir/Ecuador_Analysis_final.pdf>; and Canadian Catholic Organization for Development and Peace, “Mining for Justice: The Struggle of Honduran Civil Society for Responsible Mining” (September 2007), online: <<http://www.devp.org/devpme/eng/advocacy/doc/Hondurasreport.pdf>> [CCODP, “Mining for Justice”].
19. In 2007, the United Nations Committee on the Elimination of Racial Discrimination reviewed Canada’s compliance with the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195. See United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on Elimination of Racial Discrimination – Canada*, UN CERD, 17th Sess., UN Doc. CERD/C/CAN/CO/18 (25 May 2007) at para. 17, online: Office of the High Commissioner for Human Rights <[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3278670d0ea97704c125730600385a7a/\\$FILE/G0742169.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3278670d0ea97704c125730600385a7a/$FILE/G0742169.pdf)>. The committee writes:

The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and

impacts. Allegations of Canadian corporate complicity in human rights-related violations and unethical practices have run the gamut from environmental and ecological degradation to resource exploitation; the use of security operatives that have been linked to killings; forced evictions, land expropriation, and the displacement of civilian populations; threatening indigenous spiritual, historical, and burial sites; campaigns to silence opposition; poor working conditions;

the way of life of indigenous peoples living in these regions. ... [T]he Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard.

20. In 2007, Canadian and British members of Parliament conducted a fact-finding mission on mining operations in Honduras, meeting with civil society representatives, local community members, and Honduran government officials. The parliamentarians noted, *inter alia*, the lack of legal infrastructure and the power imbalance that “allows mining companies to define the terms of engagement with the government of Honduras, with local communities and with the environment.” They further wrote as follows: “[w]e call on all home countries of mining, oil and gas corporations operating in the countries of the Global South, in particular on Canada, to enact standards of corporate social responsibility in overseas operations.” See Open Letter of Parliamentarians Keith Hill, Stephen Pound & Alexa McDonough (13 September 2007) in CCODP, “Mining for Justice,” *supra* note 18 at 29-30.
21. See *e.g.* Craig Scott & Robert Wai, “Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational ‘Private’ Litigation” in C. Joerges, P. Sand & G. Teubner, eds., *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004) 287 at 297-303 (discussing the operations of former Quebec-based mining company Cambior in Guyana—in particular, a cyanide spill into a Guyanese river. The paper analyzes the subsequent litigation and argues that the result “should not obscure the potential of human rights discourse to inform conflict-of-laws queries as to the adequacy of foreign courts” at 297); Shin Imai, Ladan Mehranvar & Jennifer Sander, “Breaching Indigenous Law: Canadian Mining in Guatemala” (2007) 6 *Indigenous L.J.* 101 [Imai, Mehranvar & Sander, “Breaching Indigenous Law”] (exploring the dispute between Glamis Gold/GoldCorp and indigenous communities in Guatemala); Sara L. Seck, “Home State Responsibility and Local Communities: The Case of Global Mining” (2008) 11 *Yale Human Rts. & Dev. L.J.* 177 at 205 (noting alleged Canadian corporate complicity in human rights violations abroad and arguing that “there is an emerging obligation for home states to regulate and adjudicate transnational mining corporations”); and Georgette Gagnon, Audrey Macklin & Penelope Simons, “Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones – Implications For Human Rights and Canadian Public Policy” (January 2003) at 3-4, online: <www.law.utoronto.ca/documents/Macklin/DeconstructingEngagement.pdf>.

and health and safety violations.²² These concerns have focused primarily on the Canadian extractive industry. Canada has listed on its stock exchanges more mining firms than any other state,²³ and, globally, these exchanges represent “the world’s largest source of equity capital for mining exploration and production.”²⁴

To date, the concept of social disclosure has received scant consideration in Canadian academic legal literature.²⁵ Recommendation #14 of the Advisory Group Report, which proposes that the federal government “support the development and dissemination of research and further guidance on the materiality of environmental, social and governance issues,”²⁶ arguably reflects and is intended to redress this shortfall. The aim of this article is to contribute to the evolving discourse and to inform current and future policy reform initiatives.²⁷

22. See generally notes 18-20 above.

23. National Roundtables, *Advisory Group Report*, *supra* note 5 at 3 [citation omitted].

24. *Ibid.* at 3 [citation omitted]. My analysis in this paper focuses on publicly traded corporations that issue securities for public distribution and are the subject of securities regulation. These corporations are more likely to be implicated in problematic overseas conduct.

25. Exceptions include David J. Doorey, “Who Made That?: Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation” (2005) 43 Osgoode Hall L.J. 353 [Doorey, “Who Made That?”]; Benjamin J. Richardson, “Financing Environmental Change: A New Role for Canadian Environmental Law” (2004) 49 McGill L.J. 145 at 195-98; Allan C. Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Toronto: Irwin Law, 2005) at 299-304; Ian Lee, “Corporate Law, Profit Maximization and the ‘Responsible’ Shareholder” (2005) 10 Stan. J.L. Bus. & Fin. 31 at 65-71 [Lee, “Corporate Law”]; and J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 2d ed. (Toronto: Irwin Law, 2003) at 467-69.

26. National Roundtables, *Advisory Group Report*, *supra* note 5 at xi.

27. This includes policy reform through the following initiatives. First, as mentioned above, the Canadian government has not yet given its response to the Advisory Group’s National Roundtables Report. Second, in February 2008, the “Expert Panel on Securities Regulation” was appointed by the federal finance minister to provide “advice and recommendations to the federal Minister of Finance, and the provincial and territorial ministers responsible for securities regulation” on the best way forward to improve securities regulation in Canada. See “About Us,” online: Expert Panel on Securities Regulation <<http://www.expertpanel.ca/eng/about-us/index.php>>. Third, under s. 143.12(1) of Ontario’s *Securities Act*, R.S.O. 1990, c. S.5, the Ontario government is required by 31 May 2007 to designate an advisory committee to review current legislation, regulations, and rules pertaining to provincial securities law. Presumably, the work of this panel will begin in due course. The last advisory committee report was released in 2003. See Five Year Review Committee, *Final Report: Reviewing the Securities Act (Ontario)* (Toronto: Publications Ontario, 2003), online:

In previous articles, I analyzed the relationship between corporations and human rights through the lens of corporate law and governance.²⁸ Those works revisit aspects of the underlying DNA and conceptual architecture of the law, culture, and practice that shape corporate activity; in doing so, they explore how traditional corporate law tools and doctrine can raise the level of human rights discourse and awareness within the corporate structure, and influence business operations. Building upon this, the present article is one of two that explores the relationship between social disclosure and corporate accountability in Canada at both the doctrinal and conceptual levels.

Elsewhere, I argue that existing continuous disclosure obligations in Canadian securities law, which require public companies to provide periodic and timely disclosure to investors, provide a sufficient legal basis to compel corporations to report the types of material social information listed above.²⁹ Various weaknesses, however, limit the potential of existing securities provisions and arguably facilitate corporate opacity. The article offers recommendations to enhance the social disclosure landscape. Its argument, based on risk and investor value, is that, with the disclosure of material social information, shareholders are in a better position to assess pecuniary risks and to allocate capital to firms that are best suited to mitigate these risks.

The present article moves beyond the sphere of investor protection to explore the issues at a more conceptual level. I address the potential benefits of social disclosure within the overall human rights project. In the next Part, I

Ontario Ministry of Finance <<http://www.fin.gov.on.ca/english/publications/2003/5yrsecuritiesreview.pdf>>.

28. 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. L.J.* 365 at 369-74 [Dhir, "Realigning the Corporate Building Blocks"]; Aaron A. Dhir, "Of Takeovers, Foreign Investment and Human Rights: Unpacking the Noranda-Minmetals Conundrum" (2006) 22 *B.F.L.R.* 77 at 92-94 [Dhir, "Of Takeovers, Foreign Investment and Human Rights"].
29. Aaron A. Dhir, "Shadows and Light: Addressing Information Asymmetries through Enhanced Social Disclosure in Canadian Securities Law" 47 *Can. Bus. L.J.* [forthcoming in 2009] [Dhir, "Shadows and Light"]. In this complementary article, I review the extent to which Canadian companies have been reporting social information and canvass the degree to which such disclosure is actually required under securities law. I focus my analysis of continuous disclosure obligations on three of the key components of periodic disclosure: quarterly and annual financial statements, the management discussion and analysis, and, most importantly, the annual information form.

explore the topic of social disclosure with reference to the broader theoretical frameworks of new governance and reflexive law. Although grounding the analysis in these approaches, I distance myself slightly from the argument in the literature, to date, that the disclosure process will result in self-correcting behaviour modification on the part of corporate decision makers. Rather, in the second Part, I argue that the value of social disclosure may lie more in its ability to empower socially conscious shareholders, who will be equipped with information that can be used to engage corporate management in dialogue and influence corporate operations. The third Part contends that a movement towards enhanced social disclosure should be viewed as the corollary of recent developments in Canadian corporate law involving directors' and officers' fiduciary obligations. In the final Part, I offer some concluding remarks.

I. NEW GOVERNANCE, REFLEXIVE LAW, AND SOCIAL DISCLOSURE

The concept of corporate reporting of social information has moved on and off the public radar (and has received both warm and hostile reactions) in recent times, and has been a matter of continuous inquiry since the mid 1990s.³⁰ As discussed above, the central idea is that corporations should provide investors with information that goes beyond mere reports of revenue generation in order

30. Rob Gray, "Thirty Years of Social Accounting, Reporting and Auditing: What (if anything) Have We Learnt?" (2001) 10 *Bus. Ethics: A European Rev.* 9 at 9. The issue of required social disclosure is an aspect of the broader debate surrounding required disclosure by public corporations in general. See Lee, "Corporate Law," *supra* note 25 at 66. For a sample of recent discussions regarding US corporate/securities law and the disclosure of social information, see Perry E. Wallace, "Climate Change, Fiduciary Duty, and Corporate Disclosure: Are Things Heating up in the Boardroom?" (2008) 26 *Va. Envtl. L.J.* 293; David Monsma & Timothy Olson, "Muddling through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information" (2007) 26 *Stan. Envtl. L.J.* 137; Eric Engle, "What You Don't Know Can Hurt You: Human Rights, Shareholder Activism and SEC Reporting Requirements" (2006) 57 *Syracuse L. Rev.* 63; Allison M. Snyder, "Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer?" (2007) *Colum. Bus. L. Rev.* 565; Michael J. Viscuso, "Scrubbing the Books Green: A Temporal Evaluation of Corporate Environmental Disclosure Requirements" (2007) 32 *Del. J. Corp. L.* 879; and David Monsma & John Buckley, "Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure" (2004) 11 *U. Balt. J. Envtl. L.* 151.

to account for the method of such generation.³¹ Professor Cynthia Williams, one of the most prominent supporters of social information disclosure, articulates its potential content as follows:

Expanded social disclosure would generally include information on the products a company produces and the countries in which it does business; on the company's law compliance structure; on its domestic labor practices; on its global labor practices and supplier/vendor standards; and on its domestic and global environmental effects. Other types of social disclosure could include information on corporate charitable contributions, political contributions, or the effects of using a company's products on consumer health and safety.³²

Beyond its content, the next question is what such social disclosure would achieve. What are the potential benefits of social disclosure to the overall human rights project? Can it be argued that the disclosure of social information will actually influence corporate operations in a manner that serves to partially remedy the rights-violating repercussions of corporate conduct?

A. ANALYTICAL FRAMEWORK

In present currents of legal thought, there has been a marked movement away from traditional regulatory models to a focus on issues of governance.³³ In recognition of constantly shifting political and socio-economic conditions,³⁴ and the constraints of conventional legal approaches,³⁵ “new governance”³⁶ is a re-

31. Williams, “The Securities and Exchange Commission,” *supra* note 10 at 1201.

32. *Ibid.* at 1201-03. For more on the elements of social reporting, see David Hess, “Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness” (1999) 25 J. Corp. L. 41 at 64 [Hess, “Social Reporting”]; David Hess, “Regulating Corporate Social Performance: A New Look at Corporate Social Accounting, Auditing, and Reporting” (2001) 11 Bus. Ethics Q. 307 at 318 (setting out possible items of relevance to various stakeholder groups).

33. Orly Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” (2004) 89 Minn. L. Rev. 342 at 343 [Lobel, “The Renew Deal”].

34. *Ibid.* at 356-57.

35. *Ibid.* at 361. See also Eric W. Orts, “A Reflexive Model of Environmental Regulation” (1995) 5 Bus. Ethics Q. 779 at 780 (“Thinking about law only from a legal perspective inevitably truncates analysis, confining it to a narrow perspective of the legal system and its institutions”).

36. See *e.g.* Charles F. Sabel & William H. Simon, “Destabilization Rights: How Public Law Litigation Succeeds” (2004) 117 Harv. L. Rev. 1015; Lester M. Salamon, ed., *The Tools of*

constructive project that seeks, in part, to transcend traditional punitive and deterrence-based measures³⁷ in favour of generating norms and enhancing “internal self-regulatory capacities.”³⁸ Its models cannot be derived from any particular strand of socio-legal theory, but represent a confluence of various approaches including responsive regulation, democratic experimentalism, collaborative governance, reflexive law,³⁹ post-regulatory law, and regulatory pluralism.⁴⁰

Conceptions of reflexive law, particularly those developed by Gunther Teubner (discussed below),⁴¹ can figure prominently in the new governance frame-

Government: A Guide to the New Governance (New York: Oxford University Press, 2002); James S. Liebman & Charles F. Sabel, “A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform” (2003) 28 N.Y.U. Rev. L. & Soc. Change 183 (regarding new models of governance in the American public school system); and Michael C. Dorf & Charles F. Sabel, “A Constitution of Democratic Experimentalism” (1998) 98 Colum. L. Rev. 267 at 345–56.

37. David Hess, “Social Reporting and New Governance Regulation: The Prospects of Achieving Stakeholder Accountability through Transparency” (2007) 17 Bus. Ethics Q. 453 at 453 [Hess, “New Governance Regulation”].
38. Lobel, “The Renew Deal,” *supra* note 33 at 365. See also Bradley C. Karkkainen, “‘New Governance’ In Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping” (2004) 89 Minn. L. Rev. 471 at 473. Karkkainen explains that:

This scholarship endeavors simultaneously to chronicle, interpret, analyze, theorize, and advocate a seismic reorientation in both the public policymaking process and the tools employed in policy implementation. The valence of this reorientation ... is generally away from the familiar model of command-style, fixed-rule regulation by administrative fiat, and toward a new model of collaborative, multi-party, multi-level, adaptive, problem-solving New Governance.

For a recent, thought-provoking application of new governance ideas in the context of Canadian securities law, see Cristie L. Ford, “New Governance, Compliance, and Principles-Based Securities Regulation” (2008) 45 Am. Bus. L.J. 1 (positing principles-based securities regulation as a form of new governance, using reform initiatives in British Columbia as a case study). For a discussion of the corporate social responsibility movement as an element of the new governance project, see John M. Conley & Cynthia A. Williams, “Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement” (2005) 31 J. Corp. L. 1 at 31–36 [Conley & Williams, “Engage, Embed, and Embellish”].

39. Hess, “New Governance Regulation,” *supra* note 37 at 454.
40. Lobel, “The Renew Deal,” *supra* note 33 at 346 [citations omitted]. This, of course, is not to suggest that these approaches are uniform or that there is no debate amongst them. As noted by Karkkainen, “there are not only disagreements but often important incompatibilities ... sometimes on questions of fundamental importance, within a family of scholars whose work is nonetheless seen from a more distant perspective as broadly related.” Karkkainen, *supra* note 38 at 480.
41. See *e.g.* Gunther Teubner, “Autopoiesis in Law and Society: A Rejoinder to Blankenburg”

work. There is not necessarily a symbiotic relationship between new governance literature and Teubnerian notions of reflexivity. As argued by Bradley Karkkainen, Teubner's work is not used or even accepted by many new governance scholars; however, Karkkainen acknowledges that some new governance scholars rely on Teubner's writing to develop their analyses and advocate reflexivity-based answers similar to those proposed by Teubner.⁴² Further, Orley Lobel convincingly demonstrates "strikingly similar patterns of explanation" between democratic experimentalism and reflexivity, and argues that Teubner himself clearly connects his research to the former.⁴³ As such, I will draw from elements of both new governance and reflexive law.

David Doorey notes that Teubner, among other important scholars, "argues that a theory of 'global legal pluralism' is required to explain new forms of emerging 'global law,'" and that these forms "will grow mainly from the social peripheries, not from the political centres of nation-states and international institutions."⁴⁴ Under this global regulatory model, the decentred state plays "an indirect role in the governance of complex social and economic matters, a role as facilitator and motivator of the norm-producing potential of non-state actors."⁴⁵ It follows that, under this model, the role of the state is no longer regarded as the primary analytical fulcrum, but rather as one amongst many different—and essential—roles to be considered (e.g., those of civil society organizations, shareholders, end purchasers, and organized labour).⁴⁶

The reflexive approach endeavours to promote an institutional culture that is mindful, conscious, and self-scrutinizing in terms of the social consequences of the institution's practices.⁴⁷ With respect to corporations in particular, reflexive law and the new governance paradigm are less preoccupied with "directly regu-

(1984) 18 *Law & Soc'y Rev.* 291; Gunther Teubner, "Regulatory Law: Chronicle of Death Foretold" (1992) 1 *Soc. & Legal Stud.* 451; and Gunther Teubner, "Substantive and Reflexive Elements in Modern Law" (1983) 17 *Law & Soc'y Rev.* 239.

42. Karkkainen, *supra* note 38 at 481, 483 [citations omitted].

43. Orly Lobel, "Setting the Agenda for New Governance Research" (2004) 89 *Minn. L. Rev.* 498 at 504 [citation omitted].

44. Doorey, "Who Made That?" *supra* note 25 at 363, quoting Gunther Teubner, "'Global Bukovina': Legal Pluralism in the World Society" in Gunther Teubner, ed., *Global Law Without a State* (Aldershot: Dartmouth Publishing, 1997) 3 at 7.

45. *Ibid.* at 366.

46. *Ibid.* at 364.

47. Orts, *supra* note 35 at 780.

lating corporate behavior—such as through traditional command-and-control models”—and seek instead to affect how companies are governed.⁴⁸ Applying this to social disclosure, rather than directly regulating corporate conduct that has rights-violating implications, the state would regulate the corporate and securities law landscape in which businesses operate with a view towards having a normative influence on corporate operations.⁴⁹ Exposing corporate action to the public should have a positive impact on how the firm is managed. The possibility of exposure will provide corporate managers with cause for reflection and will serve to deter socially undesirable practices.⁵⁰

B. SOCIAL DISCLOSURE AND NORMATIVE INFLUENCE

Moving beyond its intended objective under reflexive thinking, can social reporting exert a normative influence in the realm of corporate social responsibility? Can it change the way the firm is managed?

Perhaps the most involved consideration of social disclosure in the Canadian legal academy originates from Doorey. In a thoughtful and nuanced piece, Doorey draws heavily on conceptions of reflexive law and the writing of Teubner in particular. The focal point of his analysis is the unfair foreign labour practices of certain multinational corporations. He observes that most of the impugned firms operate under a “veil of secrecy,” and are unwilling to disclose the details of who makes their goods and the working conditions under which they operate.⁵¹ In attempting to establish the connection between social disclosure and firm management, Doorey provides a few examples, two of which are especially relevant to the present discussion.

First, Doorey cites an anecdotal piece describing the surprise of former Monsanto C.E.O., Richard Mahoney, when he learned of the immensity of Monsanto’s toxic emissions after it went through a mandated disclosure process under US Toxics Release Inventory requirements. Mahoney then undertook to reduce

48. David Hess, “Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development” (2007) 2 Va. L. & Bus. Rev. 221 at 232 [Hess, “Public Pensions”].

49. Doorey, “Who Made That?” *supra* note 25 at 366 [citation omitted].

50. Risa Vetri Ferman, “Environmental Disclosures and SEC Reporting Requirements” (1992) 17 Del. J. Corp. L. 483 at 508.

51. Doorey, “Who Made That?” *supra* note 25 at 355-56.

the company's global air emissions by 90 per cent within four years.⁵² Second, Professor Doorey considers the issue of executive compensation. He references Edward Iacobucci's argument that mandated reporting of compensation figures and calculation processes may influence corporate directors and compensation committees, which will be forced to defend compensation levels to interested stakeholders and, therefore, be more measured in their approach.⁵³

While these points are compelling, they arguably reflect a key limitation of both reflexive and new governance approaches. Although a wide body of literature has developed and makes "ambitious claims," these claims and theories are often speculative—their application to concrete situations is still in a state of development.⁵⁴

According to Professor Doorey, the Monsanto example reflects an educative process of managerial self-analysis⁵⁵ as well as an element of shaming.⁵⁶ I

52. *Ibid.* at 374, citing Mary Graham, "Regulation by Shaming" (2000) 285 *Atlantic Monthly* 36 at 38.

53. *Ibid.* at 375, citing Edward M. Iacobucci, "The Effects of Disclosure on Executive Compensation" (1998) 48 *U.T.L.J.* 489 [Iacobucci, "The Effects of Disclosure"]. Similar arguments have been made by other scholars in the United States. See *e.g.* Sandeep Gopalan, "Shame Sanctions and Excessive CEO Pay" (2007) 32 *Del. J. Corp. L.* 757 at 757 ("[t]his article argues that increased disclosure of executives' compensation agreements will trigger emotions like shame, guilt and embarrassment by corporations and executives. This in turn has the potential to influence financial behavior and cause corporations to be more likely to heed the concerns of the public and shareholders vis-à-vis executive pay").

54. Karkkainen, *supra* note 38 at 476–77 [citations omitted]. Karkkainen remarks (at 476):

Innovations occur here and there, discernible within a number of disparate policy domains but dominant in few, and the outcomes of these scattered policy experiments remain ambiguous and contested. Even the most successful experiments have yet to be replicated widely, leaving them vulnerable to the skeptics' charge that their success depends upon factors unique to their own time, place, and fortuitous circumstances. Consequently, within any given field of inquiry, New Governance approaches may appear to some to be aberrational, idiosyncratic, or unproven.

David Trubek and Louise Trubek have also recently recognized similar limitations. See David M. Trubek & Louise G. Trubek, "New Governance and Legal Regulation: Complementarity, Rivalry or Transformation" (2007) 13 *Colum. J. Eur. L.* 539 at 543, 560 ("[w]e ... recognize that substantial further work needs to be done to clarify terminology, secure empirical information, and develop a more sophisticated typology"; "[t]his process will require careful delineation of variables and substantial empirical work. ... [T]here is very little hard data available on most of the cases we have identified").

55. Doorey, "Who Made That?" *supra* note 25 at 374.

56. *Ibid.* at 374-75 ("[i]f disclosure of the information may impede the company's own goals—perhaps by threatening the firm's public image in a manner that might influence sales or by

agree that the very process of assembling the necessary data can be educative; however, I am less convinced of the effectiveness of shaming. As stated by Professor Oshionebo, shaming through public disclosure of misbehaviour can, in some cases, have a positive effect on corporate behaviour, but “[c]orporations are not monolithic entities, they can exhibit varying behavioral images and control public relations. Thus, whether or not ‘shaming’ affects the behavior of a corporation may depend on its character.”⁵⁷ Further, although there may be examples of changes in the way the firm is managed, economist Philip Monaghan cautions that “little evidence to date exists of social and sustainability reporting providing an effective tool in making a real difference to corporate decisions, practices and outcomes.”⁵⁸

With respect to the example of executive compensation, I am also hesitant. Iacobucci himself concedes that his claims are speculative, and he has not attempted to substantiate them empirically.⁵⁹ Arguably, compensation disclosure requirements have actually produced a result that is the *opposite* of what was anticipated by reflexive approaches.⁶⁰ Although the scholarship is still in its in-

increasing public demand for more direct forms of state intervention—then it may encourage corporate leaders to take a more personal interest in the targeted social practice”) [citation omitted].

57. Evaristus Oshionebo, “The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities” (2007) 19 Fla. J. Int’l L. 1 at 18 [citations omitted]. See also Alon Harel & Alon Klement, “The Economics of Shame: Why More Shaming May Deter Less” at 2 (24 August 2005) [unpublished], online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=789244> (arguing as follows: “[t]he effectiveness of shaming penalties is inversely related to the rate of shaming in the society. The more people are shamed, the less effective shaming penalties may become” [citations omitted]).
58. Philip Monaghan, “Does Reporting Work? The Effect of Regulation” (2003) 21 AccountAbility Q. at 4-5. See also Hess, “Public Pensions,” *supra* note 48 at 234 (“[b]eyond anecdotal evidence, sustainability reporting has yet to have any demonstrated impact on corporate social performance”). The dearth of relevant empirical work partially reflects difficulties with data availability and, in particular, adequate indicators (e-mail correspondence with Dr. Irene Herremans, Haskayne School of Business, University of Calgary (17 April 2008) [copy on file with author]).
59. Iacobucci, “The Effects of Disclosure,” *supra* note 53 at 500, 502. Iacobucci does reference Xianming Zhou, *Essays on Executive Compensation and Managerial Incentives* (Doctoral Thesis, University of Toronto, 1997) at 489, n. 6. For Zhou’s later work, see *infra* note 61.
60. See *e.g.* Jared D. Harris, “What’s Wrong with Executive Compensation?” (2009) 85 J. Bus. Ethics 147 at 153 (the author writes that “not only do such efforts address the wrong problem and are therefore misguided, but increased disclosure is, paradoxically, unlikely to

fancy, very recent studies have analyzed finance literature in light of sociological thought on the relationship between satisfaction and remuneration relative to peer groups. These studies concluded that “[i]ncreasing disclosure on CEO compensation without restricting CEOs’ influence on the pay setting process could ... intensify the race for greater pay, which has contributed to the observed rise in levels and dispersions of CEO compensation in recent years.”⁶¹ Further, these findings appear to resonate with those of recent industrial and organizational psychology studies on pay-level satisfaction.⁶² Consonant with what has been termed the “keeping up with the Joneses” or “Lake Wobegon” effect, executives do not want to be under-compensated relative to their peers, and firms do not want to be seen as employing substandard executives.⁶³ With increased disclosure, both factors militate towards upward trends in compensation. These results appear to confirm the prior speculation of certain academics⁶⁴ and consultants,⁶⁵ as well as the anecdotal observations of the latter group.⁶⁶

be a diminishing force on executive pay trends in any event and has the potential to backfire” [citation omitted]).

61. James S. Ang, Gregory Leo Nagel & Jun Yang, “Is there a Social Circle Premium in CEO Compensation?” (17 March 2008) at 7 [unpublished], online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107280> (“[w]e predict and empirically confirm that ... greater compensation disclosure intensifies social comparisons and increases the social circle premium” at 1). But see Xianming Zhou & Peter L. Swan, “Does Executive Compensation Disclosure Alter Pay at the Expense of Incentives?” (21 June 2006) at 29 [unpublished], online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910865> (“we identify a positive impact of executive compensation disclosure on managerial incentives, but no impact on pay levels as such”).
62. See Michael M. Harris, Frederik Anseel & Filip Lievens, “Keeping up with the Joneses: A Field Study of the Relationships among Upward, Lateral, and Downward Comparisons and Pay Level Satisfaction” (2008) 93 *J. Applied Psychology* 665 at 666, 667, 669, 671 (finding as follows: “[u]pward comparison will significantly predict pay level satisfaction” at 666; “[w]hen people perceive that they are paid less than is the upward comparison group, they will be dissatisfied with their pay level” at 667; and “highest pay level satisfaction will occur when pay level is congruent with the upward comparison” at 667).
63. See *e.g.* “Executive Compensation and Corporate Performance: Should Regulators Focus on the Substance of Compensation Arrangements, or is Process-Based Review Enough?” (1996) 9 *Can. Investment Rev.* 43; Scott Schaefer & Rachel M. Hayes, “CEO Pay and the Lake Wobegon Effect” (February 2007) [unpublished], online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=966332>.
64. Jill E. Fisch, “Teaching Corporate Governance through Shareholder Litigation” (2000) 34 *Ga. L. Rev.* 745 at 762 (the author writes that “disclosure may have the perverse effect of increasing compensation levels as corporate executives become increasingly aware of

I very much hope that the arguments presented by Professor Doorey will prove correct—that the process of information gathering as part of social disclosure requirements will lead to managerial self-reflection and the accompanying behavioural modification.⁶⁷ In light of the speculative nature of these arguments, however,⁶⁸ I pursue a slightly different and complementary approach,⁶⁹ which focuses on the role of non-state actors: specifically, on empowering socially conscious shareholders through the shareholder proposal mechanism.⁷⁰ The following section will provide an overview of this mechanism and explore its rela-

payments made to their peers” [citations omitted]).

65. Anne Field, “New Challenges Shape Pay Levels” *Treasury & Risk* (May 2008) 48 at 50 (the author quotes Russell Boyle, a consultant with the Zurich based executive search firm, Egon Zehnder International: “[d]isclosure rules are, not in and of themselves, going to change the actual level of compensation for CEOs or other executives”).
66. Hannah Clark, “SEC: Show us the Money” *Forbes* (26 July 2006), online: <http://www.forbes.com/2006/07/26/leadership-salary-compensation-cx_hc_0726secupdate.html> (“[t]o the extent that the SEC thought by disclosing high pay levels it would influence behavior, it didn’t seem to really have that impact’ [quoting Mark Borges, a principal with Mercer Human Resources Consulting]. . . . As more data are disclosed, executives learn what their colleagues are really making. And compensation consultants, who advise boards on executive pay, can use the extra data to argue that CEOs should be making more money. In other words, a rising tide lifts all yachts”).
67. Doorey’s most recent work may further buttress his arguments. See David J. Doorey, “Can Factory List Disclosure Improve Labor Practices in the Apparel Industry? A Case Study of Nike and Levi-Strauss” (2008) [unpublished], online: CLPE Research Paper Series 1 <<http://www.comparativeresearch.net/index.jsp>>.
68. I do not mean to suggest that disclosure regarding executive compensation and disclosure regarding social information are directly analogous. It is difficult to imagine corporate executives wanting to “keep up with the Joneses” in terms of rights violations or environmental destruction. My point is simply to illustrate the speculative nature of the behaviour modification argument and the fact that the results of disclosure may not conform to the values and social norms that we would hope for or anticipate.
69. Professor Doorey acknowledges not only the potential value of disclosure with respect to self-reflection and behaviour modification, but also in terms of empowering “various groups in society—including consumers, investors, workers, and social activists.” In that regard, he makes brief mention of investor activism, and my intention here is to develop this point more fully. See Doorey, “Who Made That?” *supra* note 25 at 375, 376 [citations omitted].
70. Trubek & Trubek, *supra* note 54 at 562 (“[i]f important and affected groups are left out of the decision-making process, it is likely to lose legitimacy. . . . This could include . . . supporting groups that represent under-organized interests” [citation omitted]).

relationship to social disclosure. It will then situate this relationship within the theories of reflexive law and new governance.

II. SOCIAL DISCLOSURE AND SHAREHOLDER PROPOSALS

A. THE SHAREHOLDER PROPOSAL MECHANISM

Subject to certain exceptions, the shareholder proposal mechanism provides shareholders with the right to compel corporate management to hold a shareholder vote on issues that the proposing shareholder considers important. Shareholder-initiated proposals occupy a unique place in corporate law because they provide the shareholder with a mechanism by which to initiate corporate action, rather than simply react to the actions of management. They are one of the few corporate tools available to facilitate shareholder-to-shareholder and shareholder-to-management dialogue. The proposal mechanism is not intended to usurp the power of management, “but rather to provide shareholders with the opportunity to express their views on issues affecting their corporation,”⁷¹ and to allow them “to hold management accountable for its actions and to influence management’s future business decisions by having a public forum in which to challenge management.”⁷² Procedurally, the corporation is obligated to include a proposal in the management proxy circular materials,⁷³ and shareholders then consider the proposal before a vote at an annual or special meeting. The corporation, however, is absolved from the duty to distribute a proposal if certain procedural requirements are not met, or if there is a substantive basis for exclusion.⁷⁴

In 2001, the *Canada Business Corporation Act (CBCA)* was substantially amended. Particularly germane to the present discussion was an amendment pertaining to when management can lawfully refuse to circulate a shareholder

71. Thomas A. DeCapo, “Challenging Objectionable Animal Treatment with the Shareholder Proxy Proposal Rule” (1988) U. Ill. L. Rev. 119 at 138.

72. *Ibid.* at 138-39 [citations omitted]. The proposal mechanism is an alternative to simply raising an issue from the meeting floor, which “often gets a nonresponsive reply ... [and] [e]ven if [the shareholder’s] question is answered ... his efforts will generate as much noise as a tree falling in an uninhabited forest.” See Donald E. Schwartz & Elliott J. Weiss, “An Assessment of the SEC Shareholder Proposal Rule” (1977) 65 Geo. L.J. 635 at 641 [citations omitted].

73. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 137(2) [*CBCA*].

74. Dhir, “Realigning the Corporate Building Blocks,” *supra* note 28 at 385-90.

proposal on substantive grounds. Previously, the legislation permitted exclusion if the proposal was submitted “by the shareholder primarily for the purpose of ... promoting general economic, political, racial, religious, social or similar causes.”⁷⁵ Under the revised provision, exclusion is permitted where it “clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation.”⁷⁶

Although there is still substantial cause for skepticism and concern,⁷⁷ this revision is a positive development in influencing corporate behaviour. The federal government’s removal of the previously enumerated proposal restrictions can be viewed as a tacit acknowledgement that social, political, and similar issues need not be excluded from corporate discourse, so long as a nexus is established between these issues and the business or affairs of the corporation. It is clear from the federal government’s own Regulatory Impact Analysis Statement that the *CBCA* amendments were, in part, designed to enhance shareholder voice in the corporate decision-making process.⁷⁸

Subsequent to the amendment, there has been a marked increase in the use of the proposal mechanism in the realm of human rights and social policy. In 2001, the year of the amendments, only two social responsibility-related shareholder proposals were submitted to Canadian corporations.⁷⁹ The number of proposals stayed the same in 2002.⁸⁰ However, from 2003 to 2006, the numbers increased to thirteen,⁸¹ eleven,⁸² twenty-five,⁸³ and twenty-eight.⁸⁴

75. *Canada Business Corporations Act*, S.C. 1985, c. C-44, s. 137(5)(b) [prior to the 2001 amendments].

76. *CBCA*, *supra* note 73, s. 137(5)(b.1).

77. Dhir, “Realigning the Corporate Building Blocks,” *supra* note 28 at 368-69, 386, 390, 392-404.

78. Industry Canada, “Regulatory Impact Analysis Statement – Canada Business Corporations Act,” online: Industry Canada <<http://strategis.ic.gc.ca/epic/site/cd-dgc.nsf/en/cs01381e.html>>.

79. Richardson, *supra* note 25 at 183.

80. Social Investment Organization, “Canadian Social and Environmental Resolutions Reach 13 This Year, Up from Two in 2002,” online: <http://www.socialinvestment.ca/News&Archives/news-803-Canadian.htm>>. The Social Investment Organization is a non-profit organization that promotes Canadian socially responsible investment and monitors social policy-related shareholder proposals submitted to Canadian firms.

81. *Ibid.*

82. Social Investment Organization, “Socially Responsible Shareholder Proposals Double in 2005; Climate Change, Human Rights Leading Issues,” online: <<http://www.socialinvestment.ca/News&Archives/news-305-ShareholderProposals.htm>>.

The shareholder proposal mechanism is an invaluable tool in the corporate law workshop. Proposals serve to engage shareholders by facilitating communication. By generating debate and raising the level of discourse within the corporation, they play an educative role and can cause otherwise passive shareholders to rethink their sometimes uncritical support of management. It is of paramount importance that this mechanism compels management to put forth a justification of its decision to exclude a proposal. For example, under the CBCA, if the corporation wishes to exclude a proposal, it must “notify in writing the person submitting the proposal of its intention to omit the proposal from the management proxy circular and of the reasons for the refusal.”⁸⁵ On this point, approximately fifty years ago, Milton Freeman remarked:

In judging the value of the stockholder proposal rule, I believe it is of no consequence whether a stockholder ever prevails or whether a management ever accepts a stockholder’s proposal. The value which I see in the rule is that to the extent that stockholders challenge the judgment of management, management is required to make a defense of its position.⁸⁶

B. THE RELATIONSHIP BETWEEN SOCIAL DISCLOSURE AND SHAREHOLDER PROPOSALS

The value of a mechanism that serves to stimulate dialogue and heighten discourse is severely compromised if it is not accompanied by the necessary informational infrastructure.⁸⁷ Social disclosure is an integral component of shareholder voice. Without disclosure of material information, the ability to initiate dialogue and facilitate corporate democracy does not live up to its full potential. This is an important consideration given that shareholders who might actively

83. *Ibid.*

84. Social Investment Organization, “Canadian SRI Investors File 28 Social and Environmental Shareholder Proposals with Canadian Firms,” online: <<http://www.socialinvestment.ca/News&Archives/news-0306-Shareholderproposals.htm>>.

85. *CBCA*, *supra* note 73, s. 137(7).

86. Milton V. Freeman, “An Estimate of the Practical Consequences of the Stockholder’s Proposal Rule” (1957) 34 U. Det. L.J. 549 at 555.

87. A similar point was made by Raymonde Crête over twenty years ago, when she suggested that the use of Canadian proposal and proxy mechanisms generally was curtailed, among other things, by insufficient disclosure. See Raymonde Crête, *The Proxy System in Canadian Corporations: Critical Analysis* (Montréal: Éditions Wilson, Lafleur, Martel, 1986) at 351.

seek this information generally have finite access to corporate records that would assist in monitoring the corporate decision-making process.⁸⁸

As argued in the US context, legal and regulatory barriers that limit shareholder knowledge of socially relevant business activity—and therefore thwart the expression of shareholder views on said conduct—have “institutionalized a form of silence” and led to a “regime of enforced ignorance” that “foster[s] a false distinction between shareholders as investors and shareholders as citizens.”⁸⁹ Further, even particular commentators who are skeptical of my approach concede the importance of the politics of knowledge dissemination. For example, constitutional theorist Joel Bakan is dismissive of shareholder voice as a mechanism for facilitating corporate accountability and has argued that “tinkering with corporate governance” is insufficient.⁹⁰ He prefers to look outside of the corporate form and to focus on the regulation provided by the domestic democratic state. He acknowledges, however, that his hesitation stems in part from information asymmetries relating to corporate societal impact.⁹¹

With regard to information asymmetries, there is a dearth of information available to shareholders from corporations. Although some shareholder proposals may ask management to consider taking concrete steps *vis-à-vis* social and human rights-related issues (for example, to produce a human rights impact assessment⁹²

88. See Christopher C. Nicholls, *Corporate Law* (Toronto: Emond Montgomery, 2005) at 261-62 (canvassing the corporate records that shareholders are allowed to view and noting how limited shareholder access is, though for understandable reasons). See also Royal Commission on Corporate Concentration, *Corporate Disclosure: A Background Report* (Ottawa: Minister of Supply and Services Canada, 1977) at 46 (“[t]he firm responsible for the activity is in a better position than anyone to know what social costs it may be generating”).

89. Faith Stevelman Kahn, “Legislatures, Courts and the SEC: Reflections on Silence and Power in Corporate and Securities Law” (1997) 41 N.Y.L. Sch. L. Rev. 1107 at 1145.

90. Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Penguin, 2004) at 159.

91. *Ibid.* at 147. Professor Bakan writes:

[E]ven if significant numbers of ... shareholders ... were prepared to consider social and environmental concerns ... a large problem still remains: How do they get the necessary information to do this effectively? Corporations have no incentive to reveal their misdeeds to the public, and the nongovernmental organizations that monitor their activities, though valiant in their efforts ... nonetheless operate on shoestring budgets and lack the legal authority to compel corporations to disclose information.

92. See “Produce a human rights impact assessment” in Shareholder Association for Research and Education (SHARE), “Shareholder Resolution Database,” online: <<http://www.share.ca/en/node/1461>> [SHARE, Goldcorp proposal] (proposal to Goldcorp Inc. by the Public

or to establish a code of conduct for suppliers⁹³), many proposals seek out the information that would lead to such concrete steps.⁹⁴ My analysis of data compiled by the Shareholder Association for Research and Education reveals that, in the 2008 proxy season, shareholders submitted approximately eighteen proposals asking Canadian companies to provide the following disclosure and information production:

- Lending policies pertaining to climate change risk;⁹⁵
- Procedures for the appraisal and mitigation of climate risks in project assessment;⁹⁶
- a sustainability report conforming to reporting guidelines of the Global Report-

Service Alliance of Canada Staff Pension Fund *et al.*). SHARE is a Canadian organization that focuses on research, education, and advocacy in the field of responsible investment. It maintains a searchable electronic database of shareholder proposals submitted to Canadian companies and tracks the outcome of these proposals.

93. See “Develop code of conduct for suppliers” in *ibid.*, online: <<http://www.share.ca/en/node/1327>> [SHARE, Winston Proposal] (proposal to Harry Winston Diamond Corp. by Meritas Mutual Funds).
94. Historically, such attempts were unsuccessful, but not only on account of the previously enumerated proposal restrictions. In the early 1980s, some Canadian financial institutions and companies actually included particular social policy proposals, but then “quietly” recommended that shareholders reject them. This strategy was adopted by CIBC and Alcan, for example, with respect to proposals seeking disclosure regarding operations and lending policies in apartheid-era South Africa, and provided successful protection against media exposure. See Dhir, “Realigning the Corporate Building Blocks,” *supra* note 28 at 391-92, citing Crête, *supra* note 87 at 191. On a similar—and more recent—note, after two years of engagement with Goldcorp Inc., one set of investors felt the need to “[step] up engagement efforts” by actually conducting their own information gathering expedition to a company mine in Guatemala. See “Investors Spur Goldcorp to Address Human Rights In Guatemala” (April 2008), online: CNW Group <<http://www.newswire.ca/fr/releases/archive/April2008/24/c9323.html?view=print>> [CNW Group, “Investors Spur Goldcorp”]. While this action is to be commended, it arguably reflects the problematic gaps in company-investor communication and disclosure.
95. See “Disclose lending procedures regarding climate change risk” in SHARE, *supra* note 92, online: <<http://www.share.ca/en/node/1318>> and <<http://www.share.ca/en/node/1319>> (proposals to Bank of Montreal and Bank of Nova Scotia by Ethical Funds Co. These proposals were withdrawn after successful negotiations with both banks).
96. See “Disclose methods for evaluating and mitigating climate risks in project assessment” in *ibid.*, online: <<http://www.share.ca/en/node/1381>> and <<http://www.share.ca/en/node/1385>> (proposals to Encana Corporation and Teck Cominco Ltd. by Inhance Investment Management. Both proposals were subsequently withdrawn. The first was withdrawn after successful negotiations).

ing Initiative;⁹⁷

- a report pertaining to climate change risk and related disclosure;⁹⁸
- a report pertaining to investment in Burma, given state violations of human rights;⁹⁹
- a social and environmental sustainability report;¹⁰⁰ and
- a report pertaining to the Extractive Industries Transparency Initiative (in particular, a progress report on the firm's endorsement of the Initiative and its contribution to the implementation of the Initiative in places of operation).¹⁰¹

C. CONNECTING THE DISCLOSURE AND SHAREHOLDER PROPOSAL RELATIONSHIP WITH NEW GOVERNANCE AND REFLEXIVE LAW

My contention is that enhanced social disclosure is integral to a vibrant shareholder proposal culture, and the symbiotic operation of the two has the potential to be an important tool in the Canadian corporate accountability toolbox. This argument can be grounded in the reflexive law and new governance conceptions of regulation that are discussed above. David and Louise Trubek have set out a three-fold framework to describe the interaction between traditional legal regulation and new governance approaches. When both work simultaneously, but independently, towards a common goal, they are “complementary.” When the latter is set up to achieve the same goals as the former, and does so in a superior manner, the two systems are in a state of “rivalry.” And when both not only co-exist in a particular sphere, but are integral to one another's successful

97. See “Issue a GRI sustainability report” in *ibid.*, online: <<http://www.share.ca/en/node/1244>>, <<http://www.share.ca/en/node/1263>>, <<http://www.share.ca/en/node/1264>>, and <<http://www.share.ca/en/node/1328>> (proposals to Air Canada, Transat AT Inc., and WestJet Airlines Ltd. by Batirente, and a proposal to Shoppers Drug Mart by Meritas Mutual Funds).

98. See “Report on climate risks and disclosure” in *ibid.*, online: <<http://www.share.ca/en/node/1320>>, <<http://www.share.ca/en/node/1322>>, <<http://www.share.ca/en/node/1324>>, <<http://www.share.ca/en/node/1384>>, <<http://www.share.ca/en/node/1386>>, and <<http://www.share.ca/en/node/1389>> (proposals to Canadian Utilities Ltd., Finning International Inc., and Russell Metals Inc. by Ethical Funds Co., and proposals to Ritchie Bros. Auctioneers, Finning International Inc., and TSX Group Inc. by Inhance Investment Management).

99. See “Report on implications of investment in Burma” in *ibid.*, online: <<http://www.share.ca/en/node/1368>> (proposal to Power Corporation of Canada by Ethical Funds Co.).

100. See “Sustainability reporting” in *ibid.*, online: <<http://www.share.ca/en/node/1383>> and <<http://www.share.ca/en/node/1388>> (proposals to Sun Life Financial Inc. and Research In Motion Ltd. by Inhance Investment Management).

101. See “Endorse the Extractive Industries Transparency Initiative” in *ibid.*, online: <<http://www.share.ca/en/node/1314>> (proposal to Petro-Canada by Batirente).

performance, there is a state of “transformation,” where the synthesis of both approaches results in a new, hybrid type of regulation and governance.¹⁰²

When considering the shareholder proposal mechanism as a potential rights-based tool, the relationship between social disclosure and proposals might fall into the third category.¹⁰³ The governmental function is one that is traditionally “top-down”: the design and enforcement of social reporting provisions. Although this may not involve the direct regulation of corporate conduct with societal implications,¹⁰⁴ part of the goal of new governance and reflexive law is to provide information—and therefore empowerment—to various third party players for use in both the public and private spheres.¹⁰⁵ The new governance and reflexive approach is participatory and democratic, and involves multiple societal segments.¹⁰⁶

This approach focuses on the dialogue that will arise between corporate management and concerned investors, and the potential for negative market reactions. When investors receive the relevant disclosure regarding corporate social misconduct (*e.g.*, evidence of high polluting activity¹⁰⁷) their reaction is negative—they think that the information reflects inadequate management and operational inefficiencies, and is either an assault on reputational capital or a signal that more onerous direct forms of regulation will follow.¹⁰⁸ Shareholders can then express these concerns to management through a shareholder proposal. Instead of focusing solely on the decision and its result, management’s disclosure provides investors with a more complete picture of the rationales underlying corporate decisions. This disclosure initiates a dialogue that helps to facilitate a

102. Trubek & Trubek, *supra* note 54 at 543.

103. The fact that the shareholder proposal provision has existed in corporate law for quite some time does not preclude it from being thought of as reflecting a new governance approach. As argued by Trubek & Trubek, “the term ‘new’ does not necessarily mean that the techniques so labeled are all recent in origin. Some of these techniques have existed for some time, often as informal processes. What is new really is the self-conscious and regularized use of these approaches as an alternative or supplement to traditional forms.” *Ibid.* at 543, n. 9.

104. Hess, “Public Pensions,” *supra* note 48 at 234.

105. *Ibid.* at 233-34 [citation omitted].

106. Hess, “New Governance Regulation,” *supra* note 37 at 455.

107. Hess, “Public Pensions,” *supra* note 48 at 233 [citing various US studies regarding public disclosure of toxic emissions]. Studies suggest a negative market reaction to high pollution levels reported under US Toxics Release Inventory requirements.

108. *Ibid.* [citation omitted].

relationship of trust;¹⁰⁹ investors reply in the form of a proposal. The proposal should be seen less as an adversarial expression and more as a means of stimulating debate and negotiation, with a view towards addressing issues of mutual concern.

As stated above, I prefer to think of disclosure as a means of strengthening the position of human rights-conscious shareholders, rather than as a process that will result in self-correcting behaviour modification on the part of corporate decision makers. It is important not to overstate this position, as my claim faces the same speculative hurdles that are discussed above. However, there is increasing evidence in Canada “suggest[ing] that today’s proposals may become tomorrow’s corporate policy.”¹¹⁰ The proposal submission process, and resulting dialogue between proposing shareholders and management, has fundamentally influenced the formulation of corporate policy with respect to social and human rights-related issues. In particular cases, shareholders have withdrawn their proposals after concluding successful negotiations with management.

In 2006, I canvassed several examples of this trend: in particular, shareholder proposals submitted to Enbridge Inc., McDonald’s, IPSCO Inc., Petro Canada, the Bank of Montreal, Cott Corporation, and Encana Corp.¹¹¹ More recent examples include a 2008 proposal to Goldcorp Inc. by a group of investors led by the Public Service Alliance of Canada Staff Pension Fund. Goldcorp has been severely criticized for the human rights and environmental repercussions of its global mining practices.¹¹² The proposal asked the company to produce an independent human rights impact assessment pertaining to its activities in Guatemala and was withdrawn after the corporation agreed to do so in the following eight to twelve months.¹¹³ The importance of this development cannot be over-

109. Hess, “Social Reporting,” *supra* note 32 at 82-83.

110. Janis Sarra, “Shareholders as Winners and Losers under the Amended Canada Business Corporations Act” (2003) 39 Can. Bus. L.J. 52 at 74-75.

111. Dhir, “Realigning the Corporate Building Blocks,” *supra* note 28 at 405-07.

112. For recent examples, see Rights Action, “Investing in Conflict,” *supra* note 18; CCODP, “Mining for Justice,” *supra* note 18; and Imai, Mehranvar & Sander, “Breaching Indigenous Law,” *supra* note 21.

113. SHARE, Goldcorp proposal, *supra* note 92. For recent accounts of local resistance to Goldcorp’s operations in Guatemala, see Andy Hoffman, “Goldcorp Bested by Mayan Mother” *The Globe and Mail* (10 July 2008) B1; Dawn Paley, “Goldcorp: Occupation and Resistance in Guatemala (and Beyond)” *The Dominion* (21 June 2008), online: <<http://www.dominionpaper.ca/weblogs/dawn/1887>>.

stated. It is unprecedented for a Canadian company to undertake a social impact assessment in this manner,¹¹⁴ the aim of which “is to provide the company with concrete recommendations regarding its implementation of policies and procedures, and the impact of those policies and procedures on human rights.”¹¹⁵

In addition to the end goal (*i.e.*, the impact assessment), the process of considering and adopting an assessment methodology is of great value. Since withdrawing their proposal, these shareholders have been working in collaboration with Goldcorp to design a procedure that will best yield a legitimate and inclusive impact assessment.¹¹⁶ The text of the proposal also makes specific reference to the assessment methodology generated by Rights & Democracy, a Canadian civil society group.¹¹⁷ This organization’s methodology for impact assessments entails ten steps that include ascertaining the human rights context in the state that will host the proposed investment; seeking expert views on relevant human rights challenges; interviewing community members, government officials, corporate representatives, and workers; formulating a draft report to be commented on by all relevant parties; establishing a set of conclusions and suitable corrective measures; and monitoring and continuing assessment.¹¹⁸ Undertaking an evaluation of this methodology (and others like it), and considering how it can be best integrated into corporate operations, is a process that will be educative for

114. CNW Group, “Investors Spur Goldcorp,” *supra* note 94.

115. SHARE, Goldcorp proposal, *supra* note 92. This development was regarded negatively by some civil society groups, pointing to the complexity of the debate surrounding shareholder action as a means of facilitating corporate accountability. See Rights Action, “Open Letter from Rights Action to Goldcorp Inc. and Shareholders” (1 May 2008), online: <http://www.rightsaction.org/articles/Goldcorp_Open%20Letter_050108.html> (“we believe it will harm and undermine the clearly stated demands and positions of the Goldcorp-affected indigenous communities and may result in a whitewashing public relations exercise that only benefits Goldcorp and company shareholders and investors”).

116. Shareholder Association for Research and Education, “Shareholder Engagement Activity Report Q1/08,” online: <http://www.share.ca/files/2008_Q1_Engagement_Report_WEB.pdf> at 6 [SHARE, “Shareholder Engagement Activity”].

117. SHARE, Goldcorp proposal, *supra* note 92.

118. Rights & Democracy, “Human Rights Impact Assessments for Foreign Investment Projects” (2007) at 18-19, online: <www.dd-rd.ca/site/_PDF/publications/globalization/hria/full%20report_may_2007.pdf>. Rights & Democracy is a non-partisan organization that works with governments and different interest groups in Canada and abroad in the realm of human and democratic rights. One of its specific areas of focus is corporate responsibility and the effects of investment and trade on human rights.

management and will assist it in developing a fluency in human rights concepts and processes.

Finally, other recent examples of shareholder “proposals becoming policy” include a 2008 proposal by Meritas Mutual Funds asking Harry Winston Diamond Corp. to establish, *inter alia*, a code of conduct for suppliers and a mechanism to evaluate supplier connections with oppressive governments (the proposal was withdrawn after successful negotiations);¹¹⁹ a 2007 proposal by Ethical Funds Co. asking Nortel Networks Corp. to report on the design and implementation of human rights related policies *vis-à-vis* operations in countries such as China and Iraq (withdrawn after successful negotiations);¹²⁰ a 2006 proposal by Les Soeurs de Sainte-Anne asking Barrick Gold Corp. to report regarding the on-the-ground repercussions resulting from its controversial Pascua-Lama project in Chile (withdrawn after successful negotiations);¹²¹ and a 2006 proposal by Ethical Funds Co. asking Enbridge Inc. to report, *inter alia*, on how existing and future operations could be impacted by indigenous land claims, and on plans for consultation with and compensation to affected indigenous communities (withdrawn after successful negotiations).¹²²

Although stakeholder participation and engagement is crucial (and, indeed, fundamental to my argument), some of the new governance literature that seems to celebrate the notion of the decentred state goes too far in shifting the state’s burden onto others.¹²³ For example, although the federal government’s National Roundtables were a true multi-stakeholder consultation, Sara Seck cautions that, when the state puts itself on the same level as other interested groups, there is the risk that it will abdicate its governmental responsibilities:

119. SHARE, Winston proposal, *supra* note 93; SHARE, “Shareholder Engagement Activity,” *supra* note 116 at 6.

120. See “Report on human rights policy and implementation” in SHARE, *supra* note 92, online: <<http://www.share.ca/en/node/982>>.

121. See “Report on local effects of Pascua-Lama Project” in *ibid.*, online: <<http://www.share.ca/en/node/584>>.

122. See “Report on effects on 1st Nation’s lands” in *ibid.*, online: <<http://www.share.ca/en/node/587>>.

123. Adam Crawford, “Networked Governance and the Post-Regulatory State?” (2006) 10 *Theoretical Criminology* 449 at 458 (“I believe it would be foolish to ‘throw out the state’ with the governance or governmentality bath water. ... [W]e should not get carried away with ‘a giddy sense at the moment among many intellectuals that the state is passé’” [citations omitted]).

In essence, the government committed to participating in a process in which its role was equal to that of other stakeholders, rather than acknowledging that as a state, the government of Canada possesses the authority—and has a responsibility—to govern in the public interest.

...

Thus, Canada is a partner in a process, instead of taking on a mandating, facilitating or endorsing role. ... While there is nothing wrong with the state taking on a partnership role, it is problematic when the state refuses to concede that it might also have a part to play in a mandating role.¹²⁴

This concern over a decentered state is especially consequential where there is an imbalance of power amongst stakeholders. There is the danger, for example, that global corporations will use their dominance to usurp processes and unduly influence corporate accountability discourse.¹²⁵

The state's leadership role in requiring and enhancing social disclosure is not antithetical to a new governance approach.¹²⁶ As Karkkainen has observed, a widespread misapprehension about new governance is that it is completely dependent on soft law tools and that it represents a sort of "wishful thinking" because its success is contingent on "good intentions and voluntary actions."¹²⁷ He further opines that this misapprehension may, in part, be unwittingly perpetuated by new governance writing itself.

The April 2008 report of John Ruggie, Special Representative of the United Nations Secretary General on Human Rights and Transnational Corporations, establishes an excellent balance between the role of the state and the importance of new governance and reflexive approaches that eschew traditional command-style regulation. The report resulted from several multi-stakeholder consultations

124. See Seck, *supra* note 21 at 184, n. 35 [citations omitted].

125. Conley & Williams, "Engage, Embed, and Embellish," *supra* note 38 at 36 [citation omitted].

126. Securities law in Canada falls under provincial jurisdiction (although particular federal provisions impact securities trading). As such, any direct action to enhance social disclosure would likely come from the provinces. In this context, my use of the term "state" should be read expansively, in harmony with the definition recently put forth by Professor Gordley: "I hope the word 'state' is not misleading. Public authority has taken many forms, and 'states' in the modern sense are a new phenomenon. By state, I will mean any public authority that administers justice on the basis of texts it recognizes or promulgates." See James Gordley, "The State's Private Law and Legal Academia" (2008) 56 *Am. J. Comp. L.* 639 at 639-40.

127. Karkkainen, *supra* note 38 at 488-89.

with Dr. Ruggie. I participated in the November 2007 consultation, in Copenhagen. As highlighted in the consultation summary:

Several participants noted the importance of considering corporate law when exploring the tools available to States in improving corporate behaviour. Corporations receive [legal] personality through government approval, and these participants said more thought should be given to how that privilege could be made conditional on respect for human rights.¹²⁸

The report advances a useful framework going forward; it presents the state as the primary duty-bearer, but clarifies that states, to date, have been adopting too narrow an approach in operationalizing their duty.¹²⁹ Under the state's "duty to protect" against human rights abuses by third parties (including corporations), it suggests that governments turn their attention to developing corporate cultures that foster rights-adherence through, for example, the development of sustainability reporting.¹³⁰

128. See *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises – Addendum: Summary of Five Multi-Stakeholder Consultations*, UN Doc. A/HRC/8/5/Add.1 (23 April 2008) at para. 18, online: <<http://www.reports-and-materials.org/Ruggie-1-addendum-23-April-2008.pdf>>.

129. See *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc. A/HRC/8/5 (7 April 2008) at para. 22, online: <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> ("many governments take a narrow approach to managing the business and human rights agenda. It is often segregated within its own conceptual and (typically weak) institutional box—kept apart from, or heavily discounted in, other policy domains that shape business practices, including ... securities regulation and corporate governance" [citations omitted]).

130. *Ibid.* at paras. 29-30. Taking this a step further, if it can be argued that the international law of state responsibility mandates the application of home-state jurisdiction over transnational corporate conduct with rights violating implications, can it also be said that a state's laws governing corporations should be analyzed through an international law lens? See Sara L. Seck, "Framework Principles: Home State Responsibility" (Doctoral thesis, Osgoode Hall Law School, York University, 2008) at 227 [citation omitted] [unpublished]. Seck explains that:

The argument here is that legislation granting legal personality to a corporation must surely be in breach of an obligation to regulate that corporation, if the grant of personality is made without ensuring that the requisite characteristics for effective regulation are part of incorporation status. A further argument could be that the obligation to regulate the conduct of Canadian mining companies in the realm of human rights and environmental norms cannot be met by corporate law statutes that embody a shareholder model of corporate governance consequently precluding effective procedures for bringing the rights of local communities to the attention of management.

III. THE RELATIONSHIP BETWEEN SOCIAL DISCLOSURE AND DIRECTORS' FIDUCIARY OBLIGATIONS

In addition to the arguments advanced above, a movement towards enhanced social disclosure should be viewed as the corollary of recent developments in Canadian corporate law involving directors' and officers' fiduciary obligations.

Canadian corporate directors and officers are subject to a fiduciary duty that requires them to "act honestly and in good faith with a view to the best interests of the corporation."¹³¹ The precise normative content of the nebulous phrase "best interests of the corporation" has been the subject of vibrant debate in the literature and jurisprudence, and engages one of the most critical aspects of corporate law theory: to whom exactly is this duty owed? In discharging this duty to "the corporation," should the interests of shareholders be considered exclusively, with a view towards maximizing shareholder wealth (*i.e.*, the shareholder primacy model)? Or is it appropriate to consider the positions of non-shareholder stakeholders, such as a company's creditors, employees, consumers, suppliers, and the broader community (*i.e.*, the pluralist or communitarian model)?¹³²

Although the shareholder primacy model has traditionally functioned as the dominant paradigm in modern American corporate law, its paramouncy in Canada was thrown into question by the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v. Wise*.¹³³ Scholars have said that the Court in *Peoples* rejected the shareholder primacy model¹³⁴ when it held that the board of directors, in fulfilling its duty to act in the "best interests of the corporation," was permitted to consider the interests of non-shareholder stakeholders. The Court stated:

[I]t is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders." ... [I]n determining whether they are acting with a view to the best interests of the corporation it may be legitimate,

131. *CBCA*, *supra* note 73, s. 122(1)(a). Parallel provisions exist in provincial corporate law statutes. See *e.g.*, *Business Corporations Act*, R.S.O. 1990, c. B.16, ss. 134(1)(a).

132. I have canvassed particular aspects of this debate elsewhere and will not revisit them here. See Dhir, "Realigning the Corporate Building Blocks," *supra* note 28 at 369-74; Dhir, "Of Takeovers, Foreign Investment and Human Rights," *supra* note 28 at 92-94.

133. [2004] 3 S.C.R. 461 [*Peoples*].

134. Ian Lee, "*Peoples Department Stores v. Wise* and the 'Best Interests of the Corporation'" (2005) 41 *Can. Bus. L.J.* 212 [Lee, "*Peoples*"].

given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.¹³⁵

The corollary of permitting directors to consider non-shareholder interests in fulfilling their duties to the corporation is that their doing so will not result in a violation of their fiduciary duty.

The *Peoples* decision leaves various issues unresolved respecting the scope of directors' duties.¹³⁶ For example, it has been argued that the decision fails to appreciate the distinctions between concepts of oppression, duty of loyalty, and duty of care;¹³⁷ mischaracterizes the jurisprudence on which it relies;¹³⁸ and incorrectly suggests that director *mala fides* is an integral component of a breach of fiduciary duty.¹³⁹ Further, to the extent that *Peoples* assaults the "ideological hegemony"¹⁴⁰ of the standard shareholder primacy model, it does little in the way of offering a prescription for future board conduct. Most notably, *Peoples* does not resolve what it means for a board to consider the interests of non-shareholder stakeholders. What should such a consideration entail—how far must directors go in juggling competing interests, and how should conflicts be resolved?¹⁴¹ How much consideration will be sufficient to satisfy the fiduciary duty? Do directors themselves have the necessary tools and knowledge base to

135. *Peoples*, *supra* note 133 at para. 42.

136. Janis Sarra, "Class Act: Considering Race and Gender in the Corporate Boardroom" (2005) 79 St. John's L. Rev. 1121 at 1139 [Sarrra, "Class Act"].

137. Mohamed F. Khimji, "*Peoples v. Wise*—Conflating Directors' Duties, Oppression, and Stakeholder Protection" (2006) 39 U.B.C. L. Rev. 209.

138. Lee, "*Peoples*," *supra* note 134 at 217.

139. Darcy L. MacPherson, "The Supreme Court Restates Directors' Fiduciary Duty – A Comment on *Peoples Department Stores v. Wise*" (2005) 43 Alta. L. Rev. 383. For further critiques, see Warren Grover, "The Tangled Web of the *Wise* Case" (2005) 41 Can. Bus. L.J. 200; Jacob S. Ziegel, "The *Peoples* Judgment and the Supreme Court's Role in Private Law Cases" (2005) 41 Can. Bus. L.J. 236; and Robert Flannigan, "Reshaping the Duties of Directors" (2005) 84 Can. Bar Rev. 365.

140. Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89 Geo. L.J. 439 at 468.

141. Also, what are the accountability implications? "[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither." Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass.: Harvard University Press, 1991) at 38.

actually engage in a meaningful assessment of non-shareholder interests? If they do not, how can this be remedied?

Peoples represents a shift in the way fiduciary obligations are conceptualized under Canadian corporate law, given prior jurisprudence that interpreted the “best interests of the corporation” as being synonymous with maximizing shareholder return.¹⁴² However, the Supreme Court’s departure from traditional doctrine may not be so radical. For example, although shareholder primacy is considered to be the controlling model, Lee recently argued that its dominance as an actual matter of law is exaggerated both by its proponents and detractors and that “[t]he legal situation is, in fact, persistently ambiguous.”¹⁴³

Further, although there are inadequacies and troublesome ambiguities in the Supreme Court’s legal reasoning in rejecting shareholder primacy, analytical deficiencies should not be equated with normative deficiencies. The pluralist conception of directors’ fiduciary obligations is under-theorized in Canada and carries many difficulties; however, it does not necessarily follow that such a conception is ill-advised. There is robust literature supporting the pluralist model or variants thereof,¹⁴⁴ and, in jurisdictions comparable to Canada, there is a movement away from exclusively maximizing shareholder wealth in the short term and towards recognizing the long-term interests of other stakeholders as well.¹⁴⁵

142. Sarra, “Class Act,” *supra* note 136 at 1139, n. 77, citing various Ontario and Saskatchewan decisions.

143. Lee, “Corporate Law,” *supra* note 25 at 33. See also Ian B. Lee, “Is there a Cure for Corporate ‘Psychopathy?’” (2005) 42 Am. Bus. L.J. 65 at 72-73; Ian B. Lee, “Corporate Law and the Role of Corporations in Society: Monism, Pluralism, Markets and Politics” (2006) 85 Can. Bar Rev. 1 at 24.

144. For a limited sample, see the articles surveyed in Dhir, “Realigning the Corporate Building Blocks,” *supra* note 28 at 371, n. 22. It is beyond the scope of this paper to canvass the arguments in favour of a pluralist approach.

145. Cynthia A. Williams & John M. Conley, “An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct” (2005) 38 Cornell Int’l L.J. 493 at 496, 502.

While American corporate governance remains firmly focused on shareholder value, the United Kingdom ... appears to be setting out on a “third way” that merges elements of the shareholder and stakeholder approaches. ... In the realm of corporate social responsibility ... Britain has very recently emerged as a leader. Its “third way” explicitly advocates a shift in focus to long-term, “enlightened shareholder value” and requires that companies recognize and report on their effects on extended stakeholder constituencies, such as employees, suppliers, communities, and the environment.

...

Whether or not one supports a pluralist conception of the corporation, post-*Peoples*, Canadian directors are now legally permitted to consider non-shareholder interests.¹⁴⁶ Given this development, it will now be necessary for shareholders to evaluate directors' actions with respect to a range of constituencies. Enhanced social disclosure obligations are a logical progression. Recent social disclosure provisions in the UK are specifically linked to new, expanded fiduciary duty provisions. Under the *Companies Act 2006*, directors have a duty to advance the firm's success for the benefit of its members. In doing so, they are to have regard to various constituencies, including customers, suppliers, employees, the community, and the environment.¹⁴⁷ In light of this extended fiduciary duty, the business review that must form part of the director's report and its accompanying social disclosure elements are intended, in part, to assist shareholders in evaluating how directors are faring in fulfilling their fiduciary obligations.¹⁴⁸

[T]he relatively stronger pro-stakeholder influences in the UK are already leading to a subtle shift in the conceptualization of the corporate purpose from maximizing shareholder wealth in the short term, as in the United States, to the creation of a broader-based and longer-term "enlightened shareholder value."

146. This reality was further solidified by the Supreme Court in December 2008 in *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 at paras. 39-40 ("[i]n *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on ... particular groups of stakeholders. ... In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions" [emphasis in original]).
147. *Companies Act 2006* (U.K.), 2006, c. 46, s. 172(1).
148. *Ibid.*, s. 417(2). Cross-national studies have explored the linkage between culturally acquired views regarding business' proper societal function and cross-country disparities in social disclosure, concluding that there is strong evidence supporting the proposition that investors in countries with a pluralistic corporate culture rely on social disclosure more in making investment determinations than those in countries with cultures rooted in shareholder primacy. See Joyce Van Der Laan Smith, Rasoul H. Tondkar & Robert L. Andrews, "The Impact of Corporate Social Disclosure on Investment Behavior – A Cross-National Study" (Paper presented to the International Federation of Scholarly Associations of Management VIIIth World Congress 2006, 30 September 2006), online: IFSAM VIIIth World Congress 2006 <http://www.ctw-congress.de/ifsam/download/track_1/pap00542_001.pdf>. See also Joyce van der Laan Smith, Ajay Adhikari & Rasoul H. Tondkar, "Exploring Differences in Social Disclosures Internationally: A Stakeholder Perspective" (2005) 24 J. Accounting & Pub. Pol'y 123.

IV. CONCLUDING REMARKS

Canadian securities law provides a legal basis to compel the reporting of material social information through existing continuous disclosure obligations that govern public companies and require them to provide periodic and timely disclosure to investors. With the disclosure of this information, shareholders are in a better position to assess pecuniary risks and to allocate capital to firms that are best suited to mitigate these risks. But moving beyond the sphere of investor protection, social disclosure also has implications for the overall human rights project. The analysis of these implications is grounded in the broader theoretical frameworks of new governance and reflexive law. I distance myself slightly from the argument in the literature to date that the disclosure process will result in behaviour modification on the part of corporate decision makers. Rather, the value of social disclosure may lie more in its ability to empower socially conscious shareholders who will be equipped with information that can be used to engage corporate management in dialogue and influence corporate operations. A movement towards enhanced social disclosure should also be viewed as the corollary of recent developments in Canadian corporate law involving directors' and officers' fiduciary obligations.

The approach advocated here is not meant to detract from calls for direct state regulation. For example, civil society, non-industry members of the National Roundtables Advisory Group encouraged the adoption of federal legislation that would regulate the overseas business activities of the Canadian extractive sector and would be connected with a civil liability regime.¹⁴⁹ Direct regulation, however, presents significant hurdles. At the level of political feasibility, this issue could not be agreed upon within the Advisory Group itself,¹⁵⁰ and there have been few encouraging signs of direct regulation from the current federal government.

In addition, some scholars have argued that substantive law "is incapable of producing socially responsible behavior from corporations" because (1) it pro-

149. National Roundtables, *Advisory Group Report*, *supra* note 5 at 42. This idea recently received attention from Supreme Court of Canada Justice Ian Binnie. See Cristin Schmitz, "Binnie Calls for Corporate Accountability" *The Lawyers Weekly* (29 August 2008), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=745>> ("[l]awmakers should consider enacting new legislation that would enable Canadian companies to be sued domestically in superior court for alleged complicity in human rights violations abroad, says Supreme Court of Canada Justice Ian Binnie").

150. National Roundtables, *Advisory Group Report*, *ibid.*

duces a plethora of elaborate requirements that cannot be reasonably complied with; (2) it is too reactive in nature; (3) it may lack normative legitimacy and involve excessive enforcement costs; and (4) it incorrectly steers companies towards meeting threshold behavioural standards rather than creating innovative solutions.¹⁵¹

In light of these political and substantive challenges that must be addressed, the enhancement of Canadian social disclosure requirements—and, in particular, the resulting informational infrastructure—offers a complementary approach that will hopefully assist in addressing the deleterious impacts of transnational corporate conduct.

151. See Hess, “Social Reporting,” *supra* note 32 at 58-59.