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A Fiduciary Duty to Future Generations? Corporate Governance and Sustainable Development

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PREFACE

I would like to take this opportunity to thank the Canadian Foundation for Governance Research for having found this Project deserving of a Robert Bertram Doctoral Research Award. The grant allowed me to present my research at the Sustainable Companies conference at the University of Oslo in Norway, which took place August 30 and 31, 2011. Here, I received valuable feedback on my research, which I was able to apply to the "job talks" I gave as part of academic interviews in January and February 2012. I am pleased to report that I will commence a tenure-track position at the University of Alberta's Faculty of Law in January 2013, where I will be teaching Corporations Law. I also hope to develop a seminar course on Advanced Topics in Corporate Governance, which would cover current topics such as "say on pay" and corporate social responsibility. The grant also provided me with the opportunity to attend the Institute of Corporate Directors' Annual Conference in Edmonton, Alberta in May. The conference theme, sustainable development, was directly relevant to my research. It was interesting and heartening to hear the directors of major Canadian natural resource companies speak of the importance of environmental issues both to the companies and to their role as board members.

Most significantly, the grant allowed me to purchase from the proxy advisory firm Glass Lewis a list of all of the "environmentally-related" shareholder proposals filed against companies in Canada and the United States between January 1, 2009 and June 30, 2012. I then used this information to determine how the five largest Canadian public-sector pension funds voted on these proposals.[1] This research forms a central part of the empirical case study conducted for my dissertation, and summarized in Section II below. It also provides me with a rich source of data on which to base future research projects on the use of shareholder proposals to change corporations' behaviour on

[1] The sixth largest, the Public Sector Pension Investment Board, does not publicly disclose its voting record on a disaggregated basis. See

environmental issues and the possible influence of public-sector pension funds in supporting such proposals.

In addition to financial assistance, the Robert Bertram Doctoral Research Award has given me an important opportunity to receive feedback from the very constituency on which my research is focused: members of boards of directors, as well as those who advise them. I would like to thank Stan Magidson in particular for his thoughtful questions and suggestions.

The purpose of this Research Report is to inform the CFGR of the developments, outcomes and results of my Project. I have attempted to provide a readable summary of the two Chapters of my dissertation which formed the substance of my Project. In light of this aim, I have omitted certain sections of my empirical chapter, including the full theoretical background and detailed methodology. Since I will begin teaching in January, I have postponed my dissertation defence until Spring 2013, but I would be happy to provide a copy of my completed dissertation to the CFGR, post-defence.

My Project title may be somewhat misleading, although hopefully it had the intended effect of getting your attention. My dissertation does not argue for a duty to future generations *per se*. Given the irreparable and far-reaching nature of many environmental problems, I focus my discussion of corporate environmental sustainability on the interests of future generations in the natural environment. I argue that fulfilling our moral obligation to protect the environment for future generations requires altering the corporate governance framework in order to better ensure that environmental factors are taken into account in present-day business decision-making. My specific policy proposal is to impose a legal duty on boards of directors to minimize the corporation's environmental impacts. In other words, the role of the board is not to consider broadly the possible effects of a business decision on future generations, but rather to consider its potential environmental impacts, and thereby indirectly safeguard the interests of future generations with respect to the natural environment.

I have elsewhere attempted to articulate, as have many others, our moral obligations to future generations with respect to the natural environment.[2] I argue that we have an obligation to preserve for future generations fair equality of opportunity to benefit from and to enjoy the natural environment. This can be described as “strong sustainability”. “Weak sustainability” holds that we need only pass on to future generations the same amount of total “capital”, natural and man-made as we enjoy currently. To the extent we deplete natural resources or destroy the environment, we need only ensure that the equivalent value is passed on in the form of savings or investments in infrastructure or other public goods. The latter approach does not require imposing a duty on boards of directors; instead it assumes that the wealth generated by corporate activity will compensate for any environmental harm. The problem with this approach is that many environmental goods and services cannot be replaced with synthetic substitutes.

Assuming that only a strong sustainability approach can fulfill our moral obligations to future generations, it is necessary to impose on directors a duty under corporate statute to minimize the corporations’ environmental impacts. I have put forward my reasoning for such a duty elsewhere,[3] but outline it briefly here. First, “external” environmental regulations – regulations that do not directly affect the internal decision-making structures of the corporation – are insufficient to ensure strong sustainability. This is due, first, to the nature of this type of regulation, which tends to target individual environmental problems in isolation from one another, rather than the corporation’s overall environmental impact; and, second, to the information asymmetry between regulators, on the one hand, and those inside the corporation, including the board of directors, on the other. These problems with external regulation leave gaps in environmental protection that must be filled by targeting directly the internal decision-making function of the corporation in order to integrate better environmental factors into

[2] Gail E Henderson, “Rawls & Sustainable Development”, (2011) 7 McGill International Journal of Sustainable Development Law & Policy 1.

[3] Gail Henderson, “A Fiduciary Duty to Minimize the Corporation’s Environmental Impacts” (2011) University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2011-32 (SSRN) (working paper; currently under review for publication). This article forms a substantial part of Chapter Two of my dissertation. See also Gail Henderson, “The Role of the Board of Directors in Protecting the Environment for Future Generations”, Report to the Ethics Centre Graduate Award Committee, May 2012, online: http://www.ethicscentre.ca/EN/education/index.cfm.

business decisions so as to prevent environmental harm from occurring in the first place. A duty to minimize the corporation's environmental impacts would fill these gaps by improving corporate environmental performance in three ways: first, by helping directors to internalize a norm of environmental protection; second, by improving compliance with existing environmental regulations, thereby at least minimizing the gaps discussed above; and, third, by moving environmental factors from the periphery to the core of factors considered by directors in making business decisions.

Having set out my main argument, I then turn to two additional questions raised: first, how would such a duty work in practice; and, second, what role, if any, will institutional investors play in achieving sustainable development? The answers to these two questions constitute two chapters of my dissertation and my Project for the CFGR.

Section I examines how a duty to minimize the corporation's environmental impacts would work in practice, as well as the concerns raised by imposing a duty to minimize the corporation's environmental impacts on boards of directors. I start by addressing an overarching concern – the potential effect on Canada's global competitiveness. Next I attempt to articulate why the board is a suitable vehicle through which to implement this duty. Third, I set out an overview as to how boards would go about satisfying the duty in practice. Fourth, I argue why boards would comply with the duty. Fifth, and finally, I discuss the problem of enforcement.

Section II summarizes the results of a case study of the responsible investing policies and practices of Canada's six largest public-sector pension funds. Much has been written recently regarding the potential of "responsible investing" to change corporate behaviour, particularly with respect to environmental, governance and social (ESG) matters. The case study attempts to answer the question whether Canadian public-sector pension funds are actually behaving as responsible investors. In order to shed some light on this question, I review the funds' investment policies and other documents publicly disclosed on the funds' websites, as well as the websites themselves. I also use data obtained from Glass Lewis to calculate the level of support for environmentally-related shareholder proposals for five of the six funds which disclose how they vote on a disaggregated basis. I find that a majority of these funds are taking steps to implement responsible investing policies, but the policies themselves still lack detail on environmental issues. I also find that the voting records of three of the five funds demonstrate strong support for greater corporate environmental responsibility. I conclude, however, that responsible investing alone is insufficient to fulfill our obligations to future generations, given the focus on maximizing investment returns and the inherent limits on institutional investors as monitors.

My modest hope in proposing this change to corporate law in Canada is to stimulate further debate about the role of corporations and corporate law in achieving sustainable development.[4] At this point in time, the debate can no longer be whether the legal framework for corporate governance must incorporate environmental sustainability, but how it should do so. The problem is no longer one that can be left to external government regulations, although these continue to play an important role in setting a floor of expected conduct. The very characteristics that make it difficult for governments to regulate corporations effectively also make them a key player in solving the sticky problem of sustainable development, namely their abilities to innovate, to respond quickly to changing conditions and to leverage their "financial, managerial and technological resources".[5] Corporate leaders, their advisors and government officials are already tackling this question, as the increasing attention to "responsible investing", discussed below, demonstrates. We cannot continue to tinker on the margins, however, attempting to fit the square peg of sustainable development into the round hole of shareholder primacy. It may be that incorporating environmental factors into the legal framework for corporate governance sacrifices some of the apparent clarity that comes with giving boards a singular purpose. As recognized by the CFGR in awarding me with

[4] The term "sustainable development" is often criticized as being too vague and empty of content, but at the very least the concept seeks to account for the interests of future generations in present-day decision making. The most popular definition of the term is "development that meets the needs of current generations without compromising the ability of future generations to meet their own needs", from The World Commission on Environment and Development [Brundtland Commission], *Our Common Future* (New York: Oxford University Press, 1987) at 8.
[5] Elisa Morgera, "From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment?" (2004) 13 RECIEL 214 at 216. See Claudia Cattaneo, "Questions & Answers", *Financial Post*, Friday, September 28, 2012 at 12 (in an interview with Ms Cattaneo, John Abbott of Royal Dutch Shell PLC discusses the role of international oil companies in bringing innovation and technology to address environmental problems).

a Robert Bertram Doctoral Research Award, however, the fact that my Project raises this or other concerns is not a reason to shy away from the debate.

Like most major academic projects, this one is a work in progress. Any academic project worth pursuing, however, should raise as many questions as it answers, open new avenues for research, or beg just a little more time and attention from the researcher on this or that point. This is particularly true of research in the area of sustainable development, since there are so many pieces of the puzzle that must be taken into account in order to see the whole picture. In that spirit, I look forward to your comments and questions and the new directions they will take me over the next few years as I embark on my academic career.

I. Satisfying the Duty to Minimize Environmental Impacts

A. Introduction: Maintaining Canada's Competitiveness

A proposal to impose on boards of directors a legal duty to minimize the corporation's environmental impacts raises a number of concerns. Many of these concerns are narrow, albeit important, practical concerns for the corporate governance framework itself. Some of these concerns are addressed in the sections below. A broader concern is the effect imposing such a duty might have on Canada's economic competitiveness. To some extent, the same characteristic of the Canadian economy that makes the problem of sustainable development so salient is the primary reason investors would continue to invest in Canadian corporations: our abundance of natural resources and our accompanying expertise in natural resource extraction. A staunch commitment to the paradigm of shareholder primacy is unnecessary to Canada's economic success. A parallel can be drawn here with China: "The popularity of China as a destination for capital investment has not been inhibited by the absence of shareholder value corporate governance arrangements."[6] Canada's distinctive natural resource-based economy allows us the luxury of distinct corporate governance arrangements.

[6] Roderick Martin, Peter D Casson & Tahir M Nisar, *Investor Engagement: Investors and Management Practice under Shareholder Value* (Oxford, UK: Oxford University Press, 2007) at 165.

The problem, of course, with imposing a duty under corporate law is that it is always possible for a company to incorporate in another jurisdiction. Arguably, however, the global economy is heading towards greater corporate environmental responsibility, and a Canadian company would gain little from reincorporating in Delaware, for example. Starting with the 1972 United Nations Conference on Human Development, a global consensus is emerging with respect to corporate responsibility for environmental harm.[7] Agenda 21, adopted at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, “acknowledged the importance of governments in encouraging improved corporate environmental management” and “exhorts corporations to recognize environmental management as among the highest corporate priorities”.[8] The importance of the role of the private sector in achieving sustainable development was reaffirmed at the Rio + 20 Conference this past June.[9] In 2003, the UN Commission on Human Rights adopted a set of norms for transnational corporations, which included “contributing to the wider goal of sustainable development.”[10] In addition to these broad declarations on the expected role of corporations in achieving sustainable development, the OECD Guidelines for Multinational Enterprises, discussed in more detail below, set out more specific expectations with respect to corporate due diligence on environmental issues. Altogether, these international documents add up to an emerging consensus on the part of “the vast majority of States” with respect to the role of the private sector in achieving sustainable development.[11] In addition to this growing international consensus among states is the increasing expectation among members of the public that corporations “consider the environmental implications of their actions regardless whether specific legal obligations require them to do so.”[12] Corporations have acknowledged and

[7] See Elisa Morgera, “From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment?” 13 RECIEL 214.
[8] Morgera at 217.
[9] “The Future We Want”, adopted by the General Assembly, UN Doc. A/RES/66/288 (11 September 2012).
[10] UNHCHR, “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights”, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 Aug 2003), approved by UN Doc. E/CN.4/Sub.2/2003/L11 (2003). See Morgera at 221.
[11] Morgera at 218 and 219 (“all these instruments have referred consistently to corporate ‘responsibility’ in the field of the environment and sustainable development.”).
[12] Morgera at 220. See also National Round Table on the Environment and the Economy, “Capital Markets and Sustainability – Investing in a Sustainable Future” (2007) at 14, online: National Roundtable on the Environment

accepted this expectation, as reflected in the "plethora" of voluntary codes of conduct adopted by corporations and the growing number of sustainability reports published annually.[13]

Many companies are already responding to the emerging international consensus on their role in achieving sustainable development. In Papua New Guinea, Chevron partnered with the World Wildlife Fund on a "large-scale integrated conservation and development project that has avoided many of the negative social and environmental impacts of energy development in fragile ecosystems."[14] In the US, Ford redesigned its River Rouge plant in Michigan into "a model of sustainable manufacturing."[15] In Canada, companies operating in the oil sands have come together to form Canada's Oil Sands Innovation Alliance (COSIA) for the purpose of sharing innovation targeted specifically at improving environmental performance of oil sands operations.[16] Even if these are viewed by some as "token" gestures, they represent an acknowledgement by these companies that the environment matters to the public, they bear some responsibility for the environmental harm they cause and they have a role to play in finding solutions to reduce this harm.

The risk to Canada's economic prosperity over the long-term is that Canadian companies are competing on the basis of cheap access to natural resources. A parallel might be drawn with the Canadian dollar: in the past, Canadian manufacturers relied on a low Canadian dollar to give them a competitive edge in the international marketplace, rather than on productivity or quality. When the dollar rose, Canadian manufacturers found themselves unable to compete and the Canadian economy has suffered as a result, leading to even greater reliance on the natural resource extraction industry. Right now, the world is focused on the flailing global economy, but the emerging international consensus discussed above means that Canadian corporations could soon wake up in

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and the Economy, http://www.nrtee-trnee.com/eng/publications/capital-markets/NRTEE-capital-markets.pdf at 16.
[13] Morgera at 221.
[14] David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institute Press, 2005) at 147.
[15] Vogel at 122.
[16] Claudia Cattaneo, "Questions & Answers", *Financial Post*, Friday, September 28, 2012. See also www.cosia.ca.

a world in which cheap access to natural resources is no longer a competitive advantage: as environmental law scholar Daniel Esty notes, the ability to externalize the costs of environmental harm is "an inherently unstable basis for competitive advantage."[17] European companies, currently subject to more stringent environmental standards,[18] may find themselves suddenly ahead of the game. Canadian corporations would be wise, therefore, to view the ongoing global economic crisis and the current domestic political climate as a temporary reprieve, rather than a permanent shift.

Even in the midst of the global economic crisis, Canadian companies, particularly those operating in the Alberta oil sands, are facing increasing international scrutiny. Although directors might at first view a legal duty to minimize the corporation's environmental impacts as a sword environmental NGOs or others could wield against the company, an alternative view is that such a duty might shield companies against allegations of environmental mismanagement by lending credibility to corporate claims of environmental responsibility.[19] The content of sustainability reports is often viewed as unreliable on the basis that, unlike mandatory disclosure under securities law, there is no clear legal liability for misrepresentation. For similar reasons, corporate claims of environmental responsibility tend to receive similarly skeptical responses. A legal duty, and the possibility of legal accountability that it implies, would help to make credible corporations' claims of best efforts to reduce environmental harm.

B. The Role of the Board of Directors

Beginning in the early nineties, "large institutional shareholders, legislators, and even the corporate community [began] to look to boards to provide a more independent

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[17] Daniel C. Esty, "On Portney's Complaint: Reconceptualizing Corporate Social Responsibility" in Bruce L. Hay, Robert N. Stavins & Richard H.K. Vietor, ed.s, *Environmental Protection and the Social Responsibility of Firms* (Washington, D.C.: Resources for the Future, 2005) at 139. See also David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 217 ("The prospect of losing customers abroad caused forest companies to support the designation of new protected areas in biologically important locations and accept provincial regulatory improvements, such as BC's *Forest Practices Code*.").
[18] See, e.g., Boyd at 330 (describing Germany's *Closed Substance Cycle and Waste Management Act*, which requires that all components of a product be either reused or recycled).
[19] The OECD Guidelines are intended to serve this purpose, but they remain voluntary. See Lahra Liberti, "OECD 50th Anniversary: the Updated OECD Guidelines for Multinational Enterprises and the New OECD Recommendations on Due Diligence Guidance for Conflict-Free Mineral Supply Chains" (2012) 13(1) Business Law International 35 at 36.

review of corporate performance, direction, and strategy."[20] The expectation of governments, investors and the general public is that boards of directors will effectively supervise and oversee corporate managers. Boards are also responsible for "set[ting] the company's values and standards".[21] In order to fill the gaps in the traditional forms of environmental regulation, corporations must adopt and incorporate environmental values into their decision-making processes.[22] The board of directors is in the best position to make these values an integral part of how the company operates, by setting the "tone at the top". The board can also help to foster a culture of compliance in which managers and employees are encouraged to report problems, rather than conceal them in the name of profit maximization.

In addition to helping to instil organizational values, Robert Monks and Nell Minow argue that the board is "[t]he best entity for establishing goals and evaluating the performance of any corporation".[23] By extension, boards are in the best position to evaluate and to set goals for environmental performance *of the corporation*.[24] The focus of the duty to minimize the corporation's environmental impacts is the corporation; the problem of cumulative environmental harm is best left to government regulators. The hope is that shifting some of the regulatory burden with respect to individual company environmental performance, including compliance with existing regulations, on to the board, will free regulators to better address problems of cumulative environmental harm.[25]

The tension in the role played by the board of directors comes from the fact that acting as a member of a board is a part-time position. The theory of corporate governance in North America is "that corporations [are] managed by officers, under a system of checks

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[20] Robert A G Monks & Nell Minow, *Corporate Governance*, 2d ed (Oxford, UK: Blackwell Publishers, 2001) at 141.
[21] The UK Corporate Governance Code, s. A.1.
[22] See Benjamin J Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (New York: Oxford University Press, 2008) at 527.
[23] Monks & Minow at 34.
[24] See, e.g., Deloitte, "Directors' Alert: 12 issues for 2012: When Uncertainty Reigns" at 10, online: www.corpgov.deloitte.com ("With their responsibility for the oversight of organizational strategy and the identification and mitigation of risk, boards have a clear responsibility for the oversight of sustainability activities.").
[25] See Steve Waygood et al, "Integrated investment analysis: Investment implications of the REACH regulation" in Sullivan & Mackenzie, *Responsible Investment*.

and balances provided by the board of directors and the shareholders."[26] The reality is that the ability of directors to provide the necessary checks on senior managers is limited by independent directors' part-time status.[27] There seems to be an inherent tension, therefore, "between the recognition on the one hand that the board (as a body meeting periodically comprising part-time members) cannot participate in operational management except on isolated occasions, and a determination on the other hand to perceive directors as seated at the 'head table' of the company's management system, bearing ultimate responsibility for everything that occurs within the organisation."[28] The part-time nature of the position notwithstanding, the fact that many directors, particularly those of large public companies, "draw payments…which dwarf" the full-time salary of the average Canadian, makes it increasingly difficult, in the wake of the Occupy movement, to argue against increasing responsibility.[29] The amount of time board members spend on board business is also increasing: "In 2011, [US] directors averaged over 227 hours performing their board duties, or an average of 18.9 hours per month".[30]

Another apparent limit on the board's ability to fulfill its supervisory role is senior managers' control over the flow of information to the board.[31] Independent board members' part-time status, coupled with their reliance on managers for information, means that, practically speaking, "[d]irectors can never know as much about the

[26] Robert A G Monks & Nell Minow, *Corporate Governance*, 2d ed (Oxford, UK: Blackwell Publishers, 2001) at 100 and 171 ("In theory, management serves at the pleasure of the board. The reality is exactly the opposite.").
[27] See, e.g., Lynn A Stout, "On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite *Homo Economicus* to Join Your Board" (2003), 28 Del J of Corp L 1 at 2 ("…this means a company's assets are managed by a handful of individuals who may collectively hold very little of the company's equity and debt, who may have full-time positions and responsibilities at other firms or institutions, who may be scattered around the country, and who may only meet to deliberate on the company's future a half-dozen times a year.").
[28] Philip Crutchfield & Catherine Button, "Men over board: The burden of directors' duties in the wake of the Centro case" (2012) 30 Company and Securities L J 83 at 86.
[29] Crutchfield & Button at 86 (speaking of the Australian context). See also Monks & Minow at 185 ("Still, for a job that seldom demands more than two weeks a year, the compensation is generous").
[30] Elizabeth Mullen, "Main Street's Mood Warms for Directors, Cools for CEOs" *NACD Directorship*, March/April 2012 at 31 (according to the 2011 National Association of Corporate Directors' Public Company Governance Survey).
[31] Roderick Martin, Peter D Casson & Tahir M Nisar, *Investor Engagement: Investors and Management Practice under Shareholder Value* (Oxford, UK: Oxford University Press, 2007) at 128-29 ("The papers for board meetings are prepared by the senior management team, giving corporate management access to control of the board agenda"). See also James P. Hawley & Andrew T. Williams, *The Rise of Fiduciary Capitalism* (Philadelphia: University of Pennsylvania Press, 2000) at 136.

operation of the company as management".[32] This does not change the legal fact, however, that ultimate authority rests with the board,[33] and it is the responsibility of board members to know enough to recognize when they are being stone-walled and to take appropriate action.[34] Directors of public companies already have a responsibility "to know that management has implemented systems, procedures and controls to gather reliable and timely environmental information for both management analysis and decision-making purposes and disclosure to investors, regulators and other stakeholders."[35] When it comes to environmental matters, directors cannot be expected to have intimate knowledge of every aspect of the company's operations, but they need to know when they are getting only part of the picture.

Imposing a duty on the board to minimize the firm's environmental impacts should reduce the likelihood that senior managers will obscure negative environmental information from the board. Under the existing corporate governance framework, the board is likely to see its role as solely or primarily to generate profits for shareholders, which may compel senior managers to provide the board with good environmental news only. Altering the duty of directors also alters managers' personal incentives with respect to the flow of information to the board.

The inherent tension between the supervisory role of the board and board members' part-time, outsider status is resolved in part by one important rationale for this structure. Recent emphasis on director stock-ownership notwithstanding, the purpose of installing a board of directors to supervise full-time senior managers is that part-time board members are able to take a more disinterested view of the company. We want the CEO to view himself or herself as the captain who will go down with the ship; the problem is that this close identification with the company may occasionally cloud the CEO's

[32] Robert A G Monks & Nell Minow, *Corporate Governance*, 2d ed (Oxford, UK: Blackwell Publishers, 2001) at 171.
[33] Ian Lee, "Citizenship and the Corporation" (2009) 34 Law & Soc. Inquiry 129 at 141 (any corporate decision, such as terminating an employee or recalling a defective product, is the exercise of "power that can be traced back to the board, and ultimately to the board's own plenary powers under corporate law.").
[34] See, e.g., Tim Leung & Jon Webster, "Directors' duties, financial literacy and financial reporting after Centro" (2012) 30 Company and Securities L J 100 at 106 (directors are required to "[stand] back, armed with [their] own knowledge" and consider the information presented for themselves, quoting Middleton J in *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291).
[35] CSA Staff Notice 51-333 at 23.

judgment. In particular, as disinterested outsiders, the board may be more inclined to take risks that will generate shareholder value.[36] The problem with this structure is that the environmental costs of this risk-taking are often externalized on to future generations. This makes it necessary to balance the board's inclination to take financial risks with an aversion to taking environmental risks.

The other rationale for the division of labour between the board and senior managers is that managers' attention may be almost entirely eaten up by the day-to-day management of the company, leaving it "up to the board to address longer-term issues", including environmental issues, "such as…integrating the organization's sustainability program in[to] the governance structure."[37] Managers' focus on the day-to-day may also help to explain why some companies have yet to make operational changes that could reduce both financial and environmental costs. The board could play a key role in making it a priority to find and implement these changes.

The division of labour between part-time directors and full-time managers will fail to fulfill its purpose, however, if the board refuses to question the decisions or opinions of the CEO. Board members may shrink from their supervisory role out of fear of losing their board seat,[38] or out of deference to a previous relationship with the CEO.[39] This problem may be compounded by the fact that the board is a small group and directors might feel a strong pull to agree with their fellow board members.[40] Independent directors may be more likely to question management; so long as one independent director is prepared to speak up, the others may follow their lead. Ensuring that directors fulfill their supervisory role is an ongoing issue for the North American

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[36] See, e.g., James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* (Charlottesville, VA: The University of Virginia Press, 1970) at 54 (writing of developments in the 20th century: "Management of established companies grew more prudent, as management interests ran more strongly to maintaining the continuity and market position of firms than to short-run gambles.").

[37] Deloitte, "The Sustainable Board" (2011), www.global.corpgov.deloitte.com at 3.

[38] Robert Monks & Allen Sykes, "Companies run in shareholders' long-term interests also serve society's long-term interests" in Rory Sullivan & Craig Mackenzie, ed.s, *Responsible Investment* (Sheffield, U.K.: Greenleaf Publishing, 2006) at 234.

[39] Franklin A Gevurtz, "The Historical and Political Origins of the Corporate Board of Directors" (2004) 33 Hofstra L Rev 89 at 105.

[40] James P. Hawley & Andrew T. Williams, *The Rise of Fiduciary Capitalism* (Philadelphia: University of Pennsylvania Press, 2000) at 135.

corporate governance structure, one that requires further work by director education organizations, such as the Institute of Corporate Directors, in order to ensure that directors feel empowered to challenge managers in a constructive manner.

It might be argued that the actual decision-making power of boards is highly constrained by market forces and external regulation, and, therefore, the difference a board can make is quite limited. It seems unlikely however that most boards exercise *no* decision-making power. As John Parkinson notes, within the limitations imposed by law and markets "there is a core of real business discretion."[41] Under these circumstances, it is legitimate to require directors to exercise this discretion in a manner consistent with our obligations to protect the environment for the use and enjoyment of future generations, by ensuring that steps are taken to minimize the corporation's environmental impacts.

C. Satisfying the Duty

Part of the argument in favour of imposing on boards a duty to minimize the corporation's environmental impacts is that what is needed to fill the gaps left by the traditional forms of external environmental regulation is not more narrow, substantive regulation, but a broad *procedural* duty "that can facilitate (but not dictate) change."[42] As Stephen Bottomley notes, "a large part of corporate life is devoted to the processes of decision-making", which are shaped by the "rules, doctrines and standards" found in corporate law.[43] Corporate law, therefore, is well-suited to implementing this kind of broad procedural duty. The existing duty of directors to act in the best interests of the corporation is largely a procedural duty: it dictates neither specific actions to be taken by the board, nor specific substantive outcomes, because the specific actions that will be in the corporation's best interests will differ for each company. Similarly, each company will have a different set of environmental impacts, and a different set of actions to best minimize those impacts. For example, a particular technical fix may be feasible for one

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[41] J. E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Clarendon Press, 1993) at 19. See also Benjamin J Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (New York: Oxford University Press, 2008) at 528 (arguing that, like individuals, corporations can pursue multiple goals not all of which are determined by economics).

[42] Benjamin J. Richardson, "Financing Environmental Change: A New Role for Canadian Environmental Law" (2004) 49 McGill L. J. 145, 159 at 171.

[43] Stephen Bottomley, *The Constitutional Corporation* (Hampshire, England: Ashgate Publishing, 2007) at 67.

company, but not another, but the latter may be able to find efficiencies not available to the former.

The problem with focusing on procedure is the danger that boards will take a "tick-the-box" mentality to complying with the duty to minimize the corporation's environmental impacts. Robert Monks and Nell Minow criticize corporate lawyers for presenting boards "with routine check-lists of options which are then 'considered' just to make a strong [paper] record in case of a challenge in court, rather than for any substantive purpose."[44] One way to guard against this is to emphasize the *moral* content of the duty to minimize the corporation's environmental impacts. Indeed, one problem with much environmental law is that it is often viewed as a stand-alone requirement, unconnected to any underlying moral theory or principle. A duty to minimize the corporation's environmental impacts serves the "expressive" function of law by expressing a norm of behaviour in a way that a "duty to institute an environmental management system" would not.[45] The difference is that the former expresses the underlying moral reason for implementing the procedure. When a legal requirement is also seen as the "right thing to do", individuals are more likely to take this requirement seriously.[46] There is still a danger that companies will take a "tick-the-box" approach to fulfilling a duty to minimize the corporation's environmental impacts, but, as discussed above, part of the role of the board is to set the "tone at the top"; a board that allows a "tick-box" culture in one area of management seems more likely to let it spread to other areas that may have a more immediate impact on shareholder value and is therefore failing in fulfilling its overall supervisory role. Such a board makes itself more vulnerable to removal by increasingly activist shareholders.

Even if a board does take a "tick-box" approach to satisfying its duty to minimize the corporation's environmental impacts, there are certain steps that a board must take in

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[44] Robert A G Monks & Nell Minow, *Corporate Governance*, 2d ed (Oxford, UK: Blackwell Publishers, 2001) at 198. See also Gudula Deipenbrock & Mads Andenas, "Directors' Duties to Promote the Success of the Company and 'Enlightened Shareholder Value'. Comparing English and German Company Law" (2010) 7 Int'l and Comparative Corp L J 1 at 22.
[45] Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corp Fidu'y Duties" (2009) 48 Cdn Busi. L. J. 232 at 245.
[46] Iacobucci at 245.

order to create an adequately protective paper trail. This would include the presentation to the board of environmental information. Once board members are aware of the company's environmental impacts, these may prove difficult to dismiss. In other words, a board that initially is merely going through the motions may find itself taking the necessary further steps to truly satisfying its environmental obligations.

The first procedural step in fulfilling the duty to minimize the corporation's environmental impacts is to ensure that the board is fully informed of those impacts. It is trite to say that the board can only manage what the corporation measures. For some companies, particularly those in "high impact sectors",[47] board members may already receive a substantial amount of information about the company's environmental impacts, the steps taken to mitigate such impacts and the record of compliance with existing environmental regulations. In these cases, satisfying the board's duty to minimize the corporation's environmental impacts would require the board to ensure that policies or procedures are in place so that environmental impacts are continually monitored and that when operational changes occur, a new risk assessment of environmental impacts is conducted. For public companies, the tools developed to comply with existing disclosure obligations under securities law may provide a model for such an environmental information system.[48] The "controls and procedures" put in place must ensure that "information required to be disclosed…is accumulated and communicated to the issuer's management to allow timely decisions regarding required disclosure".[49] Environmental information ought to be included in this system already, given regulators' recent scrutiny of public companies' environmental disclosure. In a recent staff notice, the CSA clarified that "[w]hile materiality determinations may limit what is actually disclosed by the issuer, they should not limit the information that management considers in making its determinations."[50] For public companies then, completing the first step in satisfying a duty to minimize the corporation's environmental impacts may simply be a matter of reviewing existing procedures and controls to ensure that these

[47] See FTSE4Good Index Series Inclusion Criteria, Environmental Criteria at 3.
[48] See NI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings.
[49] Ontario Securities Commission, Corporate Sustainability Reporting Initiative: Report to the Minister of Finance, December 18, 2009, Sched 1 at 35.
[50] *Environmental Reporting Guidance*, CSA Staff Notice 51-333 (October 27, 2010) at 6.

are capturing sufficient environmental information and presenting this information to the board.

It may be objected that boards are already over-burdened with information, which they have only a limited amount of time to review, digest and critically analyze. The SEC has noted, however, that "[i]mprovements in technology and communications in the last two decades have significantly increased the amount of financial and non-financial information that management has and should evaluate, as well as the speed with which management receives and is able to use information."[51] A duty to minimize the corporation's environmental impacts also would not alter the ability of the board to reasonably rely on expert reports produced by engineers, environmental consultants or other appropriate professionals.[52]

This problem of information-overload has been dealt with in part by the formation of specialized board committees to deal with particular issues, including the auditing of financial statements (the audit committee) and CEO succession and executive compensation (the human resources committee). Between 2010 and 2012, shareholders filed eight proposals against US public companies asking the companies to establish a sustainability committee.[53] An additional eight proposals requested the appointment of a board member with some environmental expertise.[54] Although it would seem undesirable to create a situation in which satisfying a duty to minimize the corporation's environmental impacts could be seen to fall on a single board member, having a board member with the scientific or educational background to decipher potentially complex information on environmental impacts would be beneficial to senior management and other board members alike. Having such a person on the board would not mean that other members could sit back and refrain from asking questions; rather, it

[51] SEC, Interpretive Release: Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (February 2, 2010) at 18.
[52] *Canada Business Corporations Act*, RSC, 1985, c. C-44 s. 123(4)-(5)
[53] These proposals were filed against Apple, Cisco Systems (2010 and 2011), Microsoft (2010 and 2011), Oracle, Google and Starbucks.
[54] See proposals filed against Chevron (2010, 2011 and 2012), Freeport-McMoRan (2010, 2011 and 2012, as well as 2009) and Occidental Petroleum (2011 and 2012).

would make discussions among board members in the absence of management more productive.

The second step in satisfying the duty to minimize the corporation's environmental impacts is to determine what steps could be taken to reduce these impacts. Obviously, board members cannot themselves make this determination; rather, in keeping with their supervisory role, the board must ensure that procedures are put in place so that environmental impacts are taken into account at every stage of the company's operations.[55] The OECD Guidelines for Multinational Enterprises direct corporations to "establish and maintain a system of environmental management".[56] An environmental management system "provides the internal framework necessary to control an enterprise's environmental impacts and to integrate environmental considerations into business operations."[57] This framework should include timely collection and evaluation of information, the establishment of measurable targets for reducing harm, verification that targets have been met, and regular review to set new targets.[58] The ISO has developed a standard for environmental management systems (EMS), ISO 14001. The standard, on its own, does not require any specific substantive goals. It is therefore the role of the board, working with senior management and other employees to ensure that such goals are established and worked towards. The point of an EMS is to help to ensure that continuous progress on environmental performance is made. It is crucial that environmental impacts are continuously monitored and the possibility for additional reductions regularly assessed, since the technologies or less harmful production inputs available to the company change over time.

Perhaps most importantly, satisfying a duty to minimize the corporation's environmental impacts will require boards to integrate environmental considerations into their decision-making processes, so that environmental impacts can be taken into account and steps

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[55] See bc IMC, Corporate Governance Principles and Proxy Voting Guidelines (August 2010) at 31 ("Directors are responsible for ensuring the company has systems in place to effectively assess and manage risk, including environmental risks. bcIMC will withhold votes from, or vote against, directors who have not effectively performed this critical function and corporate performance has been unsatisfactory.").
[56] OECD Guidelines for Multinational Enterprises (2011) at 42, online: http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf.
[57] OECD Guidelines, Commentary at 44.
[58] OECD Guidelines at 42.

taken to prevent or to reduce them *before* a decision is made. The Commentary to the OECD Guidelines notes that "[n]ormal business activity can involve the *ex ante* assessment of the potential environmental impacts associated with the enterprise's activities."[59] While consideration of environmental issues already may be at the forefront of business decisions regarding oil and gas or mining projects, this is unlikely to be the case for many other types of business decisions that may nevertheless have significant environmental impacts over time. Imposing a legal duty on boards is designed to change this, so that the environmental impacts of every business decision are considered before that decision is made.

With respect to the scope of the duty, it is possible to look to international instruments for guidance. The due diligence requirements under the OECD Guidelines are intended to apply to "adverse impacts that are either caused or contributed to by enterprises through their own activities, or are directly linked to their operations, products or services by a business relationship."[60] "Contributed to" is qualified as "substantial" contribution.[61] The key is that a board ought to focus on the environmental impacts of the company's own operations or products.[62] Too often, companies appear to operate under the belief that if they fix a problem elsewhere, by planting new trees or helping to create a new wildlife preserve, for example, then they are helping to fulfill our obligation to future generations. The problem with this approach goes back to the argument made above regarding "strong" and "weak" sustainability: not all environmental goods and services are replaceable or can be substituted for others. For this reason, each corporation ought to focus on minimizing the environmental harm it causes. This might help to reduce, rather than increase, the public's expectations of corporations: social or environmental initiatives unconnected to a company's operations intended to boost the company's reputation may also raise and broaden society's expectations regarding the role of corporations in solving social problems. Part of the argument in favour of a duty

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[59] OECD Guidelines, Commentary at 45.

[60] Lahra Liberti, "OECD 50th Anniversary: the Updated OECD Guidelines for Multinational Enterprises and the New OECD Recommendations on Due Diligence Guidance for Conflict-Free Mineral Supply Chains" (2012) 13(1) Business Law International 35 at 39.

[61] *Ibid.*

[62] See bc IMC's Corporate Governance Principles and Proxy Voting Guidelines (August 2010) at 30 ("we believe that companies should focus on the environmental impact of their operations and products").

to minimize the corporation's environmental impacts is to focus management on solving those environmental problems most within their knowledge and control, while leaving other issues, such as the problem of cumulative harm, to democratically elected governments.

Although I have emphasized the board's decision-making processes and other procedures implemented throughout the corporation, a duty to minimize the corporation's environmental impacts would place some substantive limits on corporate actions. Corporate lobbying against environmental regulation, for example, would violate such a duty, when such lobbying is undertaken for the sole purpose of preventing or delaying otherwise inevitable regulation and the company is fully aware of the environmental harm being caused. Changing corporations' lobbying practices is crucial to improving environmental outcomes, given their significant influence over environmental law and policy.[63] Some critics of corporate social responsibility (CSR) argue that corporations promote CSR in order to ward off regulation, but corporate lobbying activities are themselves coming under increasing scrutiny, with growing demands for disclosure of political contributions and money spent on lobbying activities.[64] In other words, a consensus is emerging that a company's social responsibilities include an obligation to participate in the political process responsibly. As the scientific consensus around climate change strengthened, a number of companies withdrew from lobby groups and changed their public position on climate change.[65] An absolute prohibition on corporations' political activity might prove detrimental to the extent it would prohibit regulated entities from providing any input on the laws that affect them. Involvement in the political process should be undertaken with a view to cooperating, however, rather than obstructing or delaying.[66] A cooperative approach to government regulation would comply with a duty to minimize the

[63] David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 253-55; David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institute Press, 2005) at 171.
[64] Through, for example, shareholder proposals.
[65] See, e.g., Vogel at 123 (back in 1996, Shell withdrew from Global Climate Coalition, "a group formed by energy firms to challenge scientific claims about global climate change.").
[66] The OECD Guidelines provide some guidance on this point, advising against improper involvement in local political activities", but permitting the "right to seek changes in the statutory or regulatory framework": OECD Guidelines at 20-22.

corporation's environmental impacts, and would help to enhance the company's credibility with regulators and the public.[67] Corporate input also could help in drawing attention to other regulations that might hinder improved corporate environmental responsibility. High fees for the introduction of new pesticides, for example, may prevent a company from bringing a new, less environmentally-harmful product to market.[68]

A board that fulfills its duty to minimize the firm's environmental impacts is a board that asks questions and challenges management to do better. Giving the board a clear and distinct responsibility for the firm's environmental impacts may empower directors to ask questions and challenge management in other areas as well. In other words, a duty to minimize the firm's environmental impacts may empower the board to do a better job of monitoring management in other areas of corporate performance and thereby improve the overall long-term value of the firm. A duty to minimize the corporation's environmental impacts may also ensure that the board is continually alert, not just in a time of crisis. A board that is vigilant in ensuring that all environmental regulations are complied with, environmental impacts mitigated and potential environmental issues addressed will go a long way to protecting the company from environmental disasters that can cost millions of dollars to clean up and damage the company's reputation.[69]

D. Compliance

Much has been written on the benefits to companies from reducing their environmental impacts in the form of increased – rather than diminished, as might be assumed – profits. Actual evidence of increased profitability is mixed,[70] begging the question, if environmentalism is so good for business, why aren't all board members and managers environmentalists? In other words, if reducing environmental impacts in fact increases profits, then presumably every company would be minimizing its environmental impacts without the need for imposing a legal duty. Since this is not the case, the logic goes, it

[67] David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institute Press, 2005) at 170.
[68] David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 122. Of course such fees may also serve to reduce the total number of new pesticides introduced in Canada.
[69] Two years after the Deepwater Horizon explosion, the total costs to BP from the disaster had risen to $38 billion: Dan Milmo, "BP's Deepwater Horizon costs rise $847m", *The Guardian*, July 31, 2012 (online).
[70] See, e.g., Vogel at 29-33.

must be false that reducing environmental impacts increases profits. Rather, our initial instinct – that taking better care of the environment will cut into profits – must be right.

The conclusion that improving corporate environmental performance will have a negative effect on profits does not necessarily follow, however, from the mixed evidential support for the theoretical business case for sustainable development, nor from the fact that most companies have yet to put this theory into practice. The other possibility is that the business case for sustainable development undermines itself.[71] Reasons for action matter, and the profit-maximizing reasons for improving environmental performance may not appear compelling enough to motivate managers to deviate from "business as usual".[72] The National Round Table on the Economy and the Environment (NRTEE), (a 24-year old government-mandated independent organization that was producing important and valuable research until it was cut by the 2012 federal budget), observed that Canadian companies' CSR activities tended to be defensive, superficial and short-term, until the gap between the company's promises and practices "threatened the company's core business."[73] In other words, all too frequently, it takes a crisis to make the business case for environmental sustainability appear compelling enough to take real action. Moving beyond the business case may therefore enhance shareholder value by putting more emphasis on crisis prevention. The NRTEE blamed this failure in part on "cultural inertia".[74] Another reason the business case for environmental sustainability may fail to compel managers to take steps to reduce the corporation's environmental impacts is an ingrained bias against incurring present costs for future benefits, particularly when managers could be using those same resources to increase profits in the shorter term.[75] Focusing on the

[71] Benjamin J. Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (2008) at 102 (making a similar argument regarding socially responsible investing); Lawrence E. Mitchell, *Corporate Irresponsibility* (2001) at 5 (making a similar argument regarding shareholder primacy).
[72] See, e.g., Cary Coglianese, "The Managerial Turn in Environmental Policy", University of Pennsylvania Law School, Public Law and Legal Theory Research Paper Series, Research Paper No. #09-12 (SSRN): "Since firms have naturally not yet found their unidentified costs savings, they may well view their expected net benefits of doing so as being quite small".
[73] National Round Table on the Environment and the Economy, "Capital Markets and Sustainability – Investing in a Sustainable Future" (2007) at 17.
[74] National Round Table at 26.
[75] David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institute Press, 2005) at 125.

business case can send mixed signals to employees about the company's priority – is it environmental responsibility, and the long-term benefits thought to come with it, or is it maximizing short- and medium-term profits?[76] These reasons, taken together, explain why the UK's "enlightened shareholder value" approach to corporate governance, and the Supreme Court of Canada's broad interpretation of the "best interests of the corporation" in the *BCE* case are both insufficient to fill the gaps left by traditional forms of environmental regulation: although both approaches appear to encourage directors and officers to consider environmental and social factors in making business decisions, both also continue to rely on the business case for doing so.[77] It also helps to explain why "responsible investing", on its own, will fail to improve corporate environmental performance sufficiently to fulfill our obligations to future generations.[78]

The reasoning behind most moral principles relates back in some way to long-term self-interest. The golden rule, 'do unto others as you would have them do unto you', is the best example of such a principle. The reason for following the golden rule, rather than a rule to 'act in your own long-term best interests', is that in any particular instance, it may appear to be in our own best interests to break the rule. Furthermore, if we follow the rule purely out of self-interest rather than out of a sense of moral obligation, we may apply the rule in a way that ultimately leads others to treat us likewise. In other words, the fact that our own reasons for following the golden rule may affect the rule's effectiveness does not change the rule's general truthfulness. The same appears to be true of the "business case" for environmental sustainability.

Environmental law scholar David Boyd claims that fourfold to tenfold increases in efficiency as a result of environmental initiatives are realistically attainable,[79] and there is at least anecdotal support for such a claim. Two of the world's largest private equity firms, KKR and the Carlyle Group, both formed partnerships with an environmental NGO to improve the analytical tools needed to identify "win-win" opportunities, which will

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[76] David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institute Press, 2005) at 126.
[77] *Companies Act, 2006*, 2006, c. 46, s. 172(1); *BCE Inc v 1976 Debentureholders*, 2008 SCC 69.
[78] Discussed further in Section II.
[79] David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 326-27.

reduce both operating costs and environmental impacts.[80] The KKR partnership claimed early success, saving three companies a total of $16 million in costs while reducing greenhouse gas emissions by 25,000 metric tons and making other improvements in environmental performance.[81] This is only one example of a positive connection between environmental responsibility and profitability, but these results indicate that there are environmentally harmful production inefficiencies waiting to be found, thus supporting the claim that companies can both increase profits and improve environmental performance.[82] It also demonstrates that many corporate managers are not currently looking for these inefficiencies, thus providing these private equity firms with opportunities to create value.

Although we may conform to a moral principle from our sense of morality, our motivation to do so is enhanced when the connection to self-interest is evident or obvious. To the extent that boards of directors that take seriously their duty to minimize the corporation's environmental impacts are rewarded with improved efficiency and lower operating costs, they will be motivated to continue to comply with the duty. CEO cooperation with the board on environmental issues could be facilitated by making firm environmental performance a factor in executive compensation.[83] Adjusting existing compensation schemes, including the manner and number of stock options, may be necessary to ensure that board efforts are not counteracted by executives motivated by short-term financial incentives.[84]

[80] KKR, Press Release, "KKR and EDF Partnership Helps Companies Save Over $16 Million While Reducing Emissions and Waste", February 18, 2009, online: KKR, http://www.kkr.com/releasedetail.cfm?ReleaseID=365744&KeepThis=true&TB_iframe=true&height=461&width=592; The Carlyle Group 2009 Annual Report at 57.
[81] KKR, Press Release.
[82] For other examples, see, e.g., Caisse, Responsible Investment Report, 2011 at 8 (discussing the results of the Carbon Disclosure Project's Water Disclosure Project questionnaire, which showed that 63% of Global 500 respondents "identified opportunities for more effective water management, or cost reductions").
[83] Shareholder proposals requesting that boards link executive compensation to environmental criteria or sustainability were filed against Chevron (2011), Equity Residential (2011), Lowe's (2011), Sempra Energy (2011 and 2012), Cabot Oil & Gas (2012) and Range Resources (2012).
[84] This adjustment may already be necessary to avoid undermining institutional investors' efforts at responsible investing: Matteo Tonello, "Revisiting Stock Market Short-Termism" (Conference Board, 2006) at 5 and 8, online: SSRN.

This section attempted to explain why boards would comply with a duty to minimize the corporation's environmental impacts. The next section looks at what might happen when they don't.

E. Enforcement: Derivative Actions, the Business Judgment Rule and Director Liability

One concern my proposal raises is *who* will enforce such a duty? As US corporate law scholar Lawrence Mitchell has noted, if only shareholders are able to bring a derivative action for breach of fiduciary duty, then "judicial suggestions" of a broader duty to all of the firms stakeholders, such as those in the Supreme Court of Canada in *BCE*, are beside the point: boards will continue to care solely, or at least primarily, for the interests of shareholders, unless other stakeholders have an effective means of enforcement.[85]

In most discussions of a stakeholder approach to the duty of directors, it is taken for granted that stakeholders would be motivated to seek to enforce a breach of fiduciary duty. The additional complicating issue for a duty to minimize the corporation's environmental impacts is whether any of the firm's stakeholders – employees, creditors, customers – would feel that their interests are sufficiently aligned with the corporation's environmental performance to be motivated to enforce the duty. If shareholders had to rely on derivative actions to enforce the existing fiduciary duty, however, the duty would be mostly meaningless, given the difficulty and expense of bringing a derivative action. Rather, enforcement by derivative action is reserved for the most egregious cases.

When those cases arise, however, there is evidence that some shareholders might feel strongly enough about the firm's environmental performance to bring a derivative action.[86] The analysis of Canadian public-sector pension funds' voting records, summarized below, is based on hundreds of shareholder proposals filed by

[85] Lawrence E Mitchell, "A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes" (1992) Texas L Rev 579 at 605 ("Thus, notwithstanding judicial suggestions that directors' duties to the corporation may be broader than those to the stockholders, in fact, and without any contradictory method of enforcement, directors can be expected to act solely in the interests of stockholders."). This is one reason for the focus on responsible investing, discussed below.
[86] I also discuss this point in Gail Henderson, "A Fiduciary Duty to Minimize the Corporation's Environmental Impacts" (2011) University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2011-32 (SSRN).

shareholders – individuals, ethical funds and large institutional investors – who are concerned enough with the corporation's environmental performance to go to the effort and expense of filing a shareholder proposal. It is not unthinkable, therefore, that shareholders might feel strongly enough to bring a derivative action to enforce a duty to minimize the corporation's environmental impacts, particularly in the most egregious cases in which environmental irresponsibility may also have resulted in a significant loss in shareholder value. As I discuss in Section II, below, large institutional investors are starting to pay closer attention to the environmental performance and practices of their portfolio companies and are likely to have an important role to play in helping to enforce a duty to minimize the corporation's environmental impacts.

As noted in Part C, above, the duty to minimize the corporation's environmental impacts, while not devoid of substantive content, is primarily a duty on the board to ensure that the proper procedures are in place to gather and to respond to information about the company's environmental impacts. This is similar to the way that the existing duty of directors to act in the corporation's best interests has been interpreted by the courts; it is the process followed by the board in making a decision, rather than the decision itself, that a court will review in evaluating a claim that the board breached its duty. Investors also look to a board's decision-making process in determining whether it is fulfilling its responsibilities. As the Ontario Teachers' Pension Plan explains in its proxy voting guidelines, "[w]e recognize that shareholders cannot be privy to the state of mind of a director in the company's public filings, therefore we look to a board's process and the company's performance to assist with this."[87]

The "business judgment rule" protects board decisions from judicial review so long as the decision falls within a "range of reasonableness" and is an "informed" one.[88] As noted above, the first step in satisfying a duty to minimize the corporation's environmental impacts is to ensure that the board has complete and accurate information about those impacts. It is possible, therefore, for a judge to effectively

[87] Teachers, Good Governance is Good Business: Corporate Governance Principles and Proxy Voting Guidelines 2012 at 10 (with respect to directors' independence from management).
[88] *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 OR (3d) 177 at 190-92, affirmed in *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para. 40.

enforce this first step in complying with a duty to minimize the corporation's environmental impacts. It is likewise in board members' interests to fully inform themselves of the firm's environmental impacts in order to protect their decisions from judicial review.

The problem is that in many cases in which a decision of the board is called into question, the court's review of the process followed by the board is perfunctory at best. In *BCE*, for example, the Supreme Court of Canada held that the fact that one of the directors met with debentureholders was sufficient to fulfill the board's duty to consider the debentureholders' interests.[89] The Court did not review any evidence regarding the board's process in determining that a leveraged buy-out was in the company's best interests.[90] This superficial level of review is unlikely to guard against the risk that boards will take a "tick-box" approach to a duty to minimize the corporation's environmental impacts.

One of the crucial questions raised by my proposal is whether it places too great a burden on directors or increases potential director liability to a point at which it will affect individuals' willingness to sit on boards of directors in the first place. This argument has been made against almost every incremental move to raise the bar on directors' duties, including the application of an objective standard for directors' duty of care. One means of addressing this concern is through the provision of directors' liability insurance. Insurance coverage raises its own concerns, however, namely that it creates a disincentive for directors to be vigilant in fulfilling their duties. An alternative to increased insurance coverage might be a cap on liability. Since monetary damages for failure to fulfill a duty to minimize the corporation's environmental impacts will be difficult, if not impossible, to prove in most cases,[91] it might make more sense to enforce this duty

[89] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at paras. 103-04.
[90] The Court appears to rely on the fact that all of the bids received were leveraged bids: *BCE* at para. 106. See Mohammad Fadel, "*BCE* and the Long Shadow of American Corporate Law" (2010) 48 Can Bus LJ 190 at 207 (making a similar point regarding the decision by the board of Bell Canada to guarantee the debt obligations of BCE as part of the transaction: "there was no evidence in the record that the decision to approve the guarantee was guided by a rational process intended to protect Bell Canada's best interests.").
[91] Exceptions might be cases such as the Deepwater Horizon explosion, but such examples might just as easily constitute a breach of the board's duty to the corporation itself, given the drop in the company's share price following this tragic loss of life and environmental destruction.

through the imposition of a fine, as is the case for other provisions under Canadian corporate law.

F. Conclusion

I have attempted to argue here that a duty to minimize the corporation's environmental impacts is a practically feasible proposition. There are important limits, of course, on the role corporate law and corporate governance can play in improving environmental outcomes. The board of directors of a pesticide company is not going to decide that the company ought to stop producing pesticides.[92] Nor would a duty to minimize the company's environmental impacts require it to: decisions concerning activities that are so inherently environmentally harmful that they should be prohibited must be left to governments. Such a duty would require the board to ensure that the proper procedures are in place to continually assess and reduce the company's environmental impacts.

Satisfying a duty to minimize the corporation's environmental impacts will have to be balanced against the board's duty to keep the company profitable. Striking this balance may be more difficult for some companies than others.[93] Like the existing duty to act in the corporation's best interests, it is not possible to tell boards in advance exactly how to strike this balance. But the very concept of sustainable development requires striking the right balance between economic development and environmental protection. We cannot avoid burdening boards with the task of balancing profits and environmental improvements if sustainable development is to be achieved and our moral obligations to future generations fulfilled. Satisfying the duty to minimize the corporation's environmental impacts will take more of what board members and those who advise them are doing already: educating themselves, sharing best practices, and learning from past experiences. The ability of corporations to adapt to changing circumstances is almost unsurpassed in human history. It is up to boards to adapt as well.

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[92] See David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 119 (noting that pesticides represent a more lucrative business than the more environmentally-friendly "integrated pest management").

[93] See, e.g., David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institute Press, 2005) at 147 (noting that mining companies operate with lower profit margins than oil companies).

II. THE ROLE OF INSTITUTIONAL INVESTORS

A. Introduction

There are those who would argue that improving corporations' environmental performance does not require altering the existing corporate governance structure, but rather reinforcing it. Over the long-term, the argument goes, environmental issues can pose significant risks to shareholder value, and, therefore, over a long enough investment horizon, the interests of shareholders and future generations align. Imposing a duty on directors is unnecessary, because directors and managers acting in the best long-term interests of shareholders will seek to minimize environmental risks to shareholder value, thereby improving corporate environmental performance and, indirectly, safeguarding the interests of future generations. To ensure that management is in fact acting in the best long-term interests of shareholders by working to minimize environmental risks, investors, particularly large institutional investors, are being encouraged to practice "responsible investing".

Responsible investing is defined as the "integrat[ion of] environmental, social and governance (ESG) considerations into the investment management process."[94] Proponents of responsible investing urge investors to incorporate ESG factors into investment decision-making not for moral or ethical reasons, but because effective management of ESG risks can enhance long-term investment returns.[95] This happy coincidence is often summed up in the phrase "doing well by doing good".[96] A growing number of academics, [97] non-governmental organizations,[98] and investment industry

[94] See, e.g., the Shareholder Association for Research and Education (SHARE), "What is Responsible Investment?", online: SHARE, http://www.share.ca.
[95] I use "responsible investing", rather than "socially responsible investing" or "SRI", in order to distinguish this approach to investing from "ethical investing" which screens out certain companies from the possible universe of investments solely or primarily on ethical or moral grounds.
[96] Michael S Knoll, "Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment" (2002) 57 Bus L 681 at 683. Knoll argues that these twin claims of responsible investing are inherently contradictory, although his analysis is focused on ethical screening.
[97] See, e.g., the work of Benjamin Richardson, Rory Sullivan, James Hawley and David Hess.
[98] See, e.g., Social Investment Organization (Canada), SHARE (Canada), US SIF, UKSIF, FairPensions (UK) and Eurosif.

practitioners[99] are championing responsible investing, and attempting to make it the industry standard. In 2006, the United Nations Environment Program launched the UN Principles for Responsible Investment (PRI). The PRI currently boasts over 1,000 signatories, including five of the six public-sector pension funds reviewed for this case study.[100]

The presumption that responsible investing will enhance long-term returns is based on the notion that integrating ESG factors into investment decision-making will identify risks and opportunities not captured by traditional market analysis.[101] On the opportunities side, proper management of environmental factors can reduce costs through energy efficiency, create new markets for more "sustainable" products and help to retain and motivate employees. On the risks side, a failure to properly manage environmental factors may result in government intervention, civil litigation, reputational damage, physical impacts (e.g., of climate change) or the inability to develop and operate proposed projects.[102] Analysis of ESG factors may also help to identify managers who are pursuing their own interests at the expense of the corporation and its shareholders by cutting corners on compliance in order to meet quarterly targets that affect their compensation at the risk of potential future liabilities not fully captured in the company's financial statements.[103]

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[99] See Rory Sullivan & Craig Mackenzie, ed.s, *Responsible Investment* (Sheffield, U.K.: Greenleaf Publishing, 2006). Business schools have begun to offer specialized training programs in responsible investing, such as the Sustainable Investment Professional Certification at the John Molson School of Business.

[100] See www.unpri.org.

[101] Freshfields Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* (2005) at 28, online: UNEP, http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf; and Ronnie Lim, "Morley Fund Management's approach to investment integration" in Rory Sullivan & Craig Mackenzie, ed.s, *Responsible Investment* (Sheffield, U.K.: Greenleaf Publishing, 2006)at 83. Interestingly, a recent study of institutional investor influence over companies' climate change disclosure found "risks and opportunities" to be the "worst area of climate change disclosure", behind emissions accounting, governance and verification and trading: Julie Cotter & Muftah M Najah, "Institutional investor influence on global climate change disclosure practices" (2012) 37 Australian Journal of Management 169 at 180.

[102] Sarah Forrest, Anthony Ling & Jonathan Waghorn, "The Goldman Sachs Energy ESG Index: Integrating environmental, social and governance factors into energy industry analysis" in Rory Sullivan & Craig Mackenzie, ed.s, *Responsible Investment* (Sheffield, U.K.: Greenleaf Publishing, 2006) at 114.

[103] Craig Mackenzie, "The scope for investor action" in Rory Sullivan & Craig Mackenzie, ed.s, *Responsible Investment* (Sheffield, U.K.: Greenleaf Publishing, 2006) at 25. See also David Hess, "Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development" (2007) 2 Virginia Law & Business Review at 233 (regarding negative shareholder reaction to the US

Empirical proof of a connection between firms' environmental and social performance and their financial performance remains elusive, however.[104] A pre-existing factual connection may be beside the point: "if [investors] believe something is true, and invest as if it were, then it often becomes so."[105] In other words, if investors believe that environmental factors affect long-term performance and invest accordingly, companies that are best able to manage their environmental impacts will attract more investment capital and generate higher returns than companies that do not.

Part of the explanation for the growing emphasis on the role of investors in improving corporations' environmental performance is the shift in share ownership from individual retail investors to institutional investors. This shift has affected not only the concentration of ownership, but also shareholders' ability to monitor corporate management. Institutional investors have a greater ability than individual retail investors to monitor portfolio companies, because they are run by professional investment managers and trustees, who owe a fiduciary duty to their beneficiaries.[106] The combination of duty and professionalism means that institutional investors have both the motive and the ability to be "active" shareholders by actively monitoring portfolio companies and exercising their voting rights.[107] The concentration of share-ownership under the control of a relatively small number of professional investment managers also makes it easier for these professional managers to coordinate their actions either through investor organizations, such as the Canadian Coalition for Good Governance,

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Toxic Releases Inventory "based on the belief that [such] data indicates operational inefficiencies, poor management…").

[104] Studies on the issue have come to contradictory conclusions: see Rory Sullivan, Craig Mackenzie & Steve Waygood, "Does a focus on social, ethical and environmental issues enhance investment performance?" in Rory Sullivan & Craig Mackenzie, ed.s, *Responsible Investment* (Sheffield, U.K.: Greenleaf Publishing, 2006) at 58. See also David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institute Press, 2005) at 29 and 29-33 for a summary review of various studies.

[105] UNEP Finance Initiative Asset Management Working Group, "Show Me the Money: Linking Environmental, Social and Governance Issues to Company Value" (2006) at 6, online: http://www.unepfi.org/fileadmin/documents/show_me_the_money.pdf.

[106] James P. Hawley & Andrew T. Williams, "The Universal Owner's Role in Sustainable Economic Development" at 285.

[107] Robert A G Monks & Nell Minow, *Corporate Governance*, 2d ed (Oxford, UK: Blackwell Publishers, 2001) at 109.

or on an ad hoc basis.[108] The fact that most institutional investors avoid taking a controlling stake in the companies in which they invest does not necessarily undermine their motivation to be active shareholders.[109] For the largest institutional investors, their stake in a particular portfolio company will be substantial enough to make exit undesirable and engaging with companies cost-effective.[110] To illustrate, Norway's Global Fund lost US$ 1.4 billion on its 1.75% stake in BP following the Deepwater Horizon disaster.[111] This means that large institutional investors have an incentive to act either individually or collectively for improvements to corporate conduct, even though the benefits of such action will accrue not only to the institutional investor but to investors as a whole and perhaps the corporation's other stakeholders.[112] For these reasons, institutional investors are viewed as having both the ability and the motivation to influence corporate behaviour.

Among institutional investors, public-sector pension funds are seen as ideally suited to practice responsible investing. First, their investment goals, to cover pension liabilities stretching indefinitely into the future, are very long-term. Second, pension funds are not under the same market pressures as other types of institutional investors to achieve high short-term returns. Third, they are not subject to the same conflicts of interest as other institutional investors, including private-sector pension funds, which may avoid criticizing the boards of their portfolio companies out of fear of reprisal. Fourth, public-sector pension funds are sometimes described as "universal owners", due to the fact that their large, highly diversified portfolios tend to reflect the market as a whole. The

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[108] James P. Hawley & Andrew T. Williams, *The Rise of Fiduciary Capitalism* (Philadelphia: University of Pennsylvania Press, 2000) at 68; Roderick Martin, Peter D Casson & Tahir M Nisar, *Investor Engagement: Investors and Management Practice under Shareholder Value* (Oxford, UK: Oxford University Press, 2007) at 182.

[109] Most of the public-sector pension funds included in the study are restricted from taking a controlling stake in a public company. See, e.g., *Public Sector Pension Investment Board Regulations*, SOR/2000-77, ss 11 and 13 (exceptions for real estate and resource companies). Canadian Mutual funds are also prohibited from acquiring more than a 10% share of any one portfolio company: NI 81-102, s. 2.2.

[110] See, e.g., CPPIB, Annual Report 2012 at 23 ("our public market trading could be large enough to adversely affect prices unless we tread carefully.").

[111] Trucost, "Universal Ownership: Why environmental externalities matter to institutional investors" (UN PRI and UNEP Finance Initiative, 2011) at 8. See also Hawley & Williams, *Fiduciary Capitalism* at 16 ("sheer magnitude" of their stakes large enough to "concentrate the minds" of universal owners).

[112] Julie Cotter & Muftah M Najah, "Institutional investor influence on global climate change disclosure practices" (2012) 37 Australian Journal of Management 169 at 185 ("Our research also provides some evidence that a powerful coalition of stakeholders is able to gain benefits for other stakeholders that may lack the ability to do so.").

Canada Pension Plan Investment Board, for example, holds shares in 2,200 international and 700 Canadian public companies.[113] For this reason, proponents of responsible investing argue, public-sector pension funds ought to be concerned with and take positions on public-policy issues that have the potential to affect the economy as a whole, including environmental issues such as climate change.[114]

Despite the apparent momentum of the responsible investing movement, there is very little research on pension funds' actual responsible investing policies and practices.[115] In other words, it is unclear whether public-sector pension funds are *actually behaving* as responsible investors and universal owners. I attempt to shed some light on this question using a small-*n* case study of the six largest Canadian public-sector pension funds. The study examines investment policies and other documents publicly disclosed on the funds' websites, as well as the websites themselves, to determine whether the funds are taking steps to implement responsible investing policies and to integrate ESG factors into their investment decision-making. Five of the six funds also disclose their proxy voting records on a disaggregated basis, and so I also examine how these funds voted on environmentally-related shareholder proposals in order to assess their overall level of support for increased corporate environmental responsibility.

B. Methodology and Hypothesis

The funds reviewed for this case study are the six largest public-sector pension funds in Canada. The Canada Pension Plan Investment Board ("CPPIB") is the investment arm of Canada's national public pension plan. The Caisse de dépôt et placement du Québec ("Caisse"), the British Columbia Investment Management Corporation ("bcIMC"), the

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[113] CPP Investment Board, "Public Equities", online: CPPIB, http://www.cppib.ca/Investments/Equities/publicly_traded_securities.html.

[114] Trucost, "Universal Ownership: Why environmental externalities matter to institutional investors" (UN PRI and UNEP Finance Initiative, 2011) at 4 ("it is in the financial interest of fund beneficiaries that Universal Owners address the environmental impacts of investments to reduce exposure to externalities and protect long-term returns.").

[115] See David Coles & Duncan Green, "Do UK Pension Funds Invest Responsibly? A Survey of Current Practice on Socially Responsible Investment" (Just Pensions, July 2002), online: www.justpensions.org (noting a significant gap between theory and practice; Social Investment Organization, Canadian Socially Responsible Investment Review 2010 (May 2011), online: http://www.socialinvestment.ca/documents/CanadianSociallyResponsibleInvestmentReview2010_English_final.pdf.

Alberta Investment Management Corporation ("AIMCo") and the Public Sector Pension Investment Board ("PSP") invest on behalf of multiple pension plans and other public sector funds. Ontario Teachers' Pension Plan ("Teachers") administers and manages the assets of Ontario's public school teachers' pension plan.

I chose public-sector pension funds for the case study, given the theoretical prediction discussed above that this type of fund is best-suited to responsible investing.[116] I use the six largest funds, because the size of their assets under management makes them the most likely to possess the characteristics that facilitate the implementation of responsible investing practices, namely an internally managed, active investment strategy and the retention of voting rights. Furthermore, the absolute size of their holdings provides these funds with both the means and the motivation to dedicate resources to responsible investing practices.

In reviewing the investment policies and other disclosure of these six funds, I focus in particular on the funds' investments in public equities. This is not to imply that these funds are not implementing responsible investing practices with respect to other asset classes, in particular real estate and private equity; in fact, one of the criteria I test for is whether the fund's responsible investing policy applies to all of the fund's investments. Public equities were the initial focus of the responsible investing movement, however, including the PRI, and so practices with respect to this asset class are the most developed.[117] Public equities also tend to represent the largest percentage of the funds' overall investment portfolios, although this may be changing in light of recent stock market volatility. I also focus on the "E" in ESG in order to help answer the further question whether responsible investing is sufficient to fulfill our obligations to future generations to maintain "strong sustainability".

In order to answer whether Canadian public-sector pension funds are actually behaving as responsible investors, I generated a list of relevant criteria based on the theories of

[116] The presumption is that if these funds are not actually behaving as responsible investors, it is even less likely that other types of institutional investors are doing so. Further research is necessary to confirm this presumption.
[117] See, e.g., Caisse, Policy on Responsible Investment at 4 (""[t]he model [of integration of ESG criteria] applies mainly to active management of equity investments. In some cases, the model can apply to other asset classes if the necessary adjustments are made. … The equity markets are a priority for integration of ESG criteria. Integration methods applicable to other asset classes are being developing [*sic*] and/or are evolving.").

responsible investing and universal ownership themselves,[118] as well as a review of responsible investing best practices from the PRI, Just Pensions (UK), the Social Investment Organization (Canada) and Eurosif. Whether a criterion is met in a particular case requires some exercise of judgment, but I attempted to choose criteria that would eliminate these judgment calls to the greatest extent possible while still providing a useful indicator of the extent of the fund's commitment to responsible investing. The list is divided into "threshold" and "advanced" criteria. As explained in greater detail below, the threshold criteria represent the minimal requirements a fund would need to satisfy to qualify as a responsible investor. These criteria cover what might be termed "cheap talk" or mere "lip service" to the principle of responsible investing. The advanced criteria, on the other hand, are intended to cover some of the key steps a fund ought to have taken in order to implement its responsible investing policy and to integrate ESG factors into its decision-making processes, based on the best practices put forward by leading responsible investing organizations. I apply the list of criteria to the fund's investment policies and other documents publicly disclosed on the fund's websites, as well as the websites themselves. Although an examination of the fund's public disclosure can only reveal what a fund *says* it is doing, rather than its actual practices, policies are intended to guide behaviour and so some inferences can be drawn from the policies themselves. The more advanced criteria a fund satisfies, the more likely it is that the fund is going beyond mere lip-service and is behaving as a responsible investor. A table of the criteria and results of this review is attached as Appendix 1.

Investment policies may not tell the whole story, however; funds can also practice responsible investing in how they vote on environmentally-related shareholder proposals. This may seem a weak form of practicing responsible investing, but shareholder proposals "have affected the behavior of some firms, even though they may have had no discernible impact on share prices."[119] Voting on shareholder proposals as a means of practicing responsible investing is especially relevant to the funds included in the case study, because they might interpret their fiduciary duty to their beneficiaries

[118] For example, the theory of universal ownership suggests that pension funds should demonstrate concern for economy-wide issues or policy concerns.
[119] David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institute Press, 2005) at 71.

as requiring them to prioritize diversification over divesting companies with poor social or environmental records. For these reasons, the case study also examines how five of the six funds' voted on environmentally-related shareholder proposals. Here, I look at the funds' overall level of support for environmentally-related shareholder proposals. Only five funds are included in this part of the case study because the Public Sector Pension Investment Board does not publicly disclose its voting records in a disaggregated form. Unlike mutual funds, pension funds are not legally required to disclose their voting records; the five largest funds do so voluntarily.

In order to conduct this portion of the case study, I obtained from the proxy advisory firm Glass Lewis a list of all of the environmentally-related shareholder proposals filed against US and Canadian companies between January 1, 2009 and June 30, 2012. "Environmentally-related" was defined to include any proposal regarding the natural environment or an aspect thereof; for example, proposals requesting that the company recognize a human right to water.[120] The main types of proposals included in the list call on the company to produce a sustainability report, to appoint a director with environmental expertise, to establish a board committee on the environment, to set and report on greenhouse gas reduction goals, and to review the environmental impacts of a particular activity, such as hydraulic fracturing. There were a number of environmentally-related proposals that I deemed *anti*-environmental. One proposal called on Ford to avoid spending money on projects solely designed to reduce greenhouse gas emissions. Another proposal filed against a number of companies called for a review of the financial risks of climate change on the basis that the scientific consensus on climate change had come into question. Although I include these proposals in the list and record how the funds voted on them, they were excluded from the Total Votes Recorded for the purpose of calculating the percentage of "For" votes.

I used the names of the companies in the Glass Lewis list to search the funds' voting records and record whether the fund voted "For" or "Against" the proposal or whether

[120] I reviewed each proposal in the list using SEDAR and EDGAR to confirm that the proposal met this rather broad definition. Proposals focused solely on health and safety and the security threat posed by space weapons were removed from the original Glass Lewis list, as were proposals regarding human rights that did not include an environmental component beyond mere mention of the word "environment".

there is no vote recorded on the proposal ("n/a").[121] I then calculated the frequency with which each of the funds supported the environmentally-related shareholder proposals filed in each year (2009, 2010, 2011 and 2012) as a percentage of the total number of the proposals (excluding the anti-environmental proposals) for which a vote was recorded.

My hypothesis was that although Canadian public-sector pension funds are expressing their support for responsible investing, their public disclosure would contain few references to concrete steps being taken to put it into practice. Specifically, I predicted that most, if not all, of the six funds would meet what I describe as the threshold criteria for responsible investing: they would have a responsible investing policy; they would express the belief that companies that minimize their environmental and social impacts make better investments over the long term; they would belong to investor organizations; and they would self-identify as universal owners and as long-term investors. Beyond meeting the threshold criteria, however, I predicted that the public disclosure of most, if not all, of the funds would reveal few details as to how responsible investing policies are being implemented or how ESG factors are being integrated into investment decision-making, and therefore the funds would fail to meet most of the advanced criteria.

I also predicted, however, that the funds' voting records would better reflect the concerns of responsible investors by demonstrating a significant level of support for environmentally-related shareholder proposals. The reason for predicting this distinction in the funds' behaviour is that, notwithstanding their stated belief that environmentally responsible firms make better long-term investments,[122] voting decisions might appear

[121] An "n/a" does not necessarily indicate that the fund did not own shares in the company at the time of the vote: many large institutional investors opt to participate in securities lending; if shares are loaned, they cannot be voted, unless the lender has contracted otherwise. CPPIB, Proxy Voting Principles and Guidelines at 2; AIMCO, Annual Report at 27.
[122] All of the six funds included in the study, even those without a responsible investing policy, included a statement of this belief somewhere in their public disclosure.

to raise fewer conflicts with the funds' investment objective and trustees' fiduciary duty to maximize returns than making investment decisions based on ESG factors.[123]

C. Results and Analysis

i. Policy Review

I should begin by noting that levels of disclosure varied significantly among the six funds reviewed. In contrast to the other five funds, AIMCo publicly discloses almost none of its policy documents, and this is reflected in the table of results attached as Appendix 1. In the table, I note the cases in which a document was not disclosed in its entirety. An important limitation of this study's methodology is that a fund may in fact satisfy a particular criterion, but this fact is not reflected in its public disclosure. In those situations in which a policy document was disclosed, I assumed that a failure to mention a particular detail or practice reflects the fund's actual practices. This assumption is justified given that a fund's public disclosure is likely to reflect its responsible investing practices in the best possible light (which imposes another limit on the study's methodology), and that in several cases another fund does expressly mention the criterion. I also attempted to focus on those aspects of responsible investing practices that were likely to be implemented at the board level and included in a responsible investing policy or other policy document, rather than particular practices more likely to be implemented at the level of individual investment managers. A fund's level of disclosure itself is part of behaving as a responsible investor, since disclosing responsible investing policies, including proxy voting guidelines, signals to potential and existing portfolio companies the fund's expectations with respect to environmental and social performance.

Overall, the funds met more of the advanced criteria than I had predicted. Two of the six funds met fifteen out of twenty-one advanced criteria and a third met thirteen. The other three funds scored less well, but two of these met half or almost half of the advanced

[123] It is beyond the scope of this report to get into an in-depth analysis of trustees' fiduciary duty and responsible investing. For such an analysis, see Freshfields Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* (2005), online: UNEP, http://www.unepfi.org/fileadmin/documents/ freshfields_legal_resp_20051123.pdf.

criteria. The lower scores may be due to their more recent adoption of responsible investing and, in the case of AIMCo, to very limited public disclosure. These scores would appear to indicate that Canadian public-sector pension funds are paying more than lip-service to responsible investing, and are taking steps to implement responsible investing policies. There are some important gaps, however, and the funds performed less well when looking at environmental issues in particular. Limitations of space do not allow me to discuss each criterion in detail; instead I try to focus on the most interesting or important results.

Before getting to the threshold and advanced criteria, I looked for characteristics of the fund that go to its potential to act as a responsible investor or universal owner. These characteristics are size of assets under management, whether the fund uses an active or passive investment strategy, whether most of the funds' assets are managed internally and whether the fund retains the power to exercise its voting rights. Although responsible investing practices can be integrated into a passive investing strategy or incorporated into contracts with external managers, it is easier to integrate ESG factors into an active investment strategy that is managed internally. I also note the amount of the fund's assets invested in public equities. Retention of voting rights also goes to the fund's ability to apply its own proxy voting guidelines on ESG factors to how its shares are voted. The size of the fund goes to whether it qualifies as a "universal owner".[124] All six funds met all four of these criteria.

The five "threshold" criteria for responsible investing were having a responsible investing policy; expressing the belief that ESG factors affect long-term investment value; belonging to investment organizations; self-identifying as a long-term investor; and self-identifying as a universal owner. All six of the funds express the belief that ESG factors can affect investment performance. Five of the six funds met all of the criteria with the exception of self-identifying as a universal owner. bcIMC comes closest to self-identifying as a universal owner in articulating its mission as delivering "the highest return for a given level of risk, at a reasonable cost, *while recognizing our responsibility*

[124] Roger Urwin suggests that for a fund to be considered a universal owner, it must have assets greater than $10 billion: Roger Urwin, "Pension Funds as Universal Owners: Opportunity Beckons and Leadership Calls" (2011) 4:1 Rotman Int'l J of Pension Management 26 at 32, note 2.

to the broader society through our governance, social and environmental related activities."[125] The lack of any reference to the term "universal owner" would seem to confirm that this idea is too "academic" for most pension fund trustees and other investment practitioners.[126] As summarized below, however, the funds still exhibit some of the behaviour expected of universal owners. Only one of the funds, AIMCo, neither disclosed, nor referred to a responsible investing policy per se, although the fund is a signatory to the PRI and states in its annual report that it takes into account ESG factors in making investment decisions.[127] Overall, the fact that five of the six funds met four of the five criteria would appear to confirm my prediction of a least a shallow level of support for responsible investing among Canada's largest public-sector pension funds.

The purpose of reviewing the funds' public disclosure for the "advanced" criteria is to determine whether these funds are going beyond mere expressions of support. These criteria are intended to assess whether the steps necessary to implement responsible investing policies are being taken. The criteria are divided into sub-categories for ease of description. These are support for responsible investing (RI); long-term investment horizon; universal monitoring; engagement; integrating ESG factors into decision-making; and implementation.

Under support for responsible investing, I look at whether the fund is a signatory to the PRI. Although being a PRI signatory may look more like a threshold criteria, I consider this criteria advanced, because signatories are required to report annually to the PRI on their progress in implementing the six Principles. Signing on to the PRI therefore makes the fund accountable to a third party, thus signalling a commitment to behaving as a responsible investor beyond a mere expression of support. Five of the six funds are signatories: three are founding signatories, two others signed on in 2010 and 2011.

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[125] bcIMC, Business Plan: Implementing Vision 2025 (April 12, 2012) at 5, online: http://www.bcimc.com/publications/pdf/Business%20Plan_Final_Jun2012.pdf [emphasis added].
[126] Roger Urwin, "Pension Funds as Universal Owners: Opportunity Beckons and Leadership Calls" (2011) 4:1 Rotman Int'l J of Pension Management 26 at 27 (although he suggests that the BP Deepwater Horizon disaster may have been "a turning point": *ibid* at 29). See also Hawley & Williams, *Fiduciary Capitalism* at 2 (noting that most institutional investors do not act as if they understood their universal owners status).
[127] Annual Report 2011/12 at 29, online: www.aimco.alberta.ca.

Follow-up research to this study might examine whether signing on to the PRI increases the number of advanced criteria that a fund satisfies.

A central aspect of responsible investing is a focus on the long-term, since ESG factors are more likely to affect investment value over the long-term rather than in the short-term. In theory, institutional investors ought to have investment horizons of at least five to seven years or a whole business cycle.[128] As noted above, all of the funds describe themselves as long-term investors. Whether a fund actually behaves as a long-term investor is likely to be determined by the fund's mandate[129] and other policies, particularly the time period over which fund performance is evaluated and performance-based compensation is assessed. A 2002 survey by the UK organization Just Pensions found that the "most serious gap" in funds' responsible investing practices was with respect to measurement, appraisal and reward of investment managers.[130] Only half of the funds met this criterion through their use of rolling three- or four-year time periods to determine performance-based compensation.[131] Even for these funds, it is questionable whether this is a sufficient length of time to ensure that managers are integrating ESG factors into their investment decision-making, given that ESG factors are likely to affect investment values only over the long-term.

Whether investment managers integrate ESG factors into investment decision-making may also be determined by the length of time a fund is expected to hold an investment. Although the investment goals of the funds may be long-term, the actual holding period of individual investments may not. Four of the six funds satisfied this criterion, although only three funds disclosed a specified time horizon for public equities. These horizons might also vary depending on the particular portfolio in which shares are held. Again, a

[128] Marathon Club, "Guidance Note for Long-Term Investing" (2007), online: USS, http://www.usshq.co.uk/Documents/MarathonClub%20Guidance%20on%20Long%20Term%20Investing%202007.pdf. The Marathon Club is a group of institutional investors, senior executives and senior specialists whose purpose is to encourage institutional investors "to be more long-term in their thinking and actions": Marathon Club, "Aims and Objectives", online: Marathon Club, http://www.marathonclub.co.uk/objectives.htm and Marathon Club, "Membership", online: Marathon Club, http://www.marathonclub.co.uk/membership.htm.

[129] For the funds in this case study, their mandate is set by an act of the provincial Legislature or Parliament.

[130] David Coles & Duncan Green, "Do UK Pension Funds Invest Responsibly? A Survey of Current Practice on Socially Responsible Investment" (Just Pensions, July 2002) at 1 and 9.

[131] Although the others make use of long-term incentive plans that pay-out only every four years, the amounts are determined based on the one-year return for each of the four years, rather than the four-year rate of return.

five-year investment horizon may ultimately prove insufficient to make ESG factors relevant to funds' investment decisions.

As noted above, none of the six funds identified themselves as "universal owners". Nevertheless, all of the funds met at least one of the criteria for the type of "universal monitoring" that would be expected of a universal owner. Three of the funds met two of the criteria and one of the funds, bcIMC met all three. These criteria indicate whether the funds are communicating their expectations of corporate behaviour on issues that affect the economy – and therefore funds' portfolios – as a whole. It is in this area that funds can potentially wield the greatest influence by helping to promulgate international standards of corporate behaviour, such as the OECD Guidelines for Multinational Enterprises and the Global Reporting Initiative. For this reason, the funds could do much more to communicate to portfolio companies on environmental issues specifically. Only one fund expressed a policy position on an environmental issue, and another one referred to an environmental law, standard or best practice.

Another important aspect of responsible investing is engaging directly with companies on ESG issues. Five of the six funds reported on specific instances of engagement. Because engaging with companies requires a commitment of time and resources, it also helps to indicate a fund's commitment to acting as a responsible investor. Four funds discussed engaging on one or more environmental issues. By engaging directly with management on environmental issues, a fund demonstrates its concern with corporate environmental performance. Although in most cases, engagement takes place on a confidential basis, by reporting on the issues involved, funds can signal their concerns to other portfolio companies without having to engage with them directly.

A fund can only engage directly with so many companies, however; being a responsible investor also requires integrating ESG factors into the funds' investment decision-making. This is difficult to test directly, however. One possible indicator of the extent to which a fund is integrating responsible investing practices is whether ESG factors are mentioned in the fund's other policies. In the literature on responsible investing, reference is often made to ESG "risks" – the risks environmental and social consequences can pose to a company's value over the long-term. Only two of the funds mention ESG factors in their risk management policies, and only one of the two mentions environmental risks specifically. Given the centrality of discussions of risks to long-term investment returns in much of the funds' public disclosure, this could indicate that while these funds are taking other steps, such as engaging with companies on ESG issues, they have yet to fully integrate ESG factors into their investment decision-making.

Another possible disconnect between policy and practice might be seen in the fact that five of the six funds indicate that their responsible investing policies are to apply to all investments, but there is no mention made of ESG factors in selecting external managers or hiring internal ones, or of incorporating responsible investing into contracts with external managers. The latter is a recommended best practice.

Finally, policies do not implement themselves: someone must be responsible for implementing them, those expected to follow them must be informed of their existence, and they should be updated regularly to ensure their ongoing relevance. Three of the funds designate a person or group as responsible for implementing the fund's responsible investing policy; one of these funds plus two others mention training for investment managers or others on ESG issues; and three of the funds state that responsible investing policies will be regularly reviewed. Only two funds mention having full-time staff dedicated to ESG issues. In order to ensure that their responsible investing policies are being implemented and followed, the funds would need to meet all four of these criteria. Although it is possible that the funds are meeting all four in their actual practices, including this information in their public disclosure helps to signal to other investors, portfolio companies and the fund's own employees the seriousness with which a fund takes its role as responsible investor. Putting these steps in writing can also ensure that they will continue even after a particular manager or employee has left the fund.

Overall, the three funds that scored 13, 15 and 15 respectively, met advanced criteria across the board – some each with respect to long-term investment horizon, support for responsible investing, universal monitoring, engagement, integration of ESG factors and implementation. It is possible to infer, therefore, that these funds are actually behaving as responsible investors. Even the funds which scored 11 and 10 would appear to be doing more than merely expressing support, but are also taking steps to put responsible investing into practice. All of the funds could do more – or communicate that they are doing more – to ensure that their responsible investing policies are being implemented and followed. They also could do more to incorporate more detail on environmental issues into their policies.

ii. Voting Records

One policy document in which almost all of the funds mention responsible investing and ESG factors is the fund's proxy voting guidelines. There is a significant difference, however, in the level of detail on corporate governance issues compared to environmental and social factors. Funds are also much more likely to indicate how they will vote on a corporate governance proposal than on an environmental proposal, preferring to assess the latter on a "case-by-case" basis.

Overall, however, three of the five funds included in this portion of the case study demonstrated a high level of support for greater corporate environmental responsibility, voting "for" environmentally-related shareholder proposals between 42% and 65% of the time. These numbers are fairly consistent over the four years of the study. One of the funds included, AIMCo, did not record a vote on most of the proposals in the list, making it difficult to draw any concrete conclusions.

Table 1: Number of Total Votes Recorded and Percent Voted "For" Environmentally-Related Proposals

	Caisse		CPPIB		Teachers		bcIMC		AIMCO	
2009	12	42%	38	58%	35	0%	34	65%	4	25%
2010	53	64%	57	65%	55	2%	47	64%	12	25%
2011	54	61%	54	57%	57	4%	51	59%	25	8%
2012	46	57%	45	56%	42	2%	46	59%	16	0%

The three funds demonstrating the highest level of support for environmentally-related shareholder proposals are the same three funds which met between 13 and 15 of the advanced criteria for responsible investing. Contrary to my prediction, these funds do not appear to be significantly more "responsible" in their voting habits than in their policies and other practices; the other two funds actually appear less "responsible" in their voting practices, in that they seem less willing to put environmental concerns ahead of maximizing returns in the way that they vote on shareholder proposals. This would appear to contradict my prediction that funds might feel freer to integrate ESG factors into their voting practices than other investment policies or practices.

Interestingly for the arguments made in Section I, all of the five funds tended to oppose proposals calling for the creation of a board committee on sustainability, and proposals calling for the linking of executive compensation to environmental performance or sustainability.[132] There was more support, however, for proposals calling for the appointment of a board member with environmental expertise.

To the extent that the funds' voting records can be viewed, along with other things such as direct engagement, as a reflection of their level of concern regarding firms' environmental performance, then the funds' voting records also allow me to draw some inferences regarding the role institutional investors could be expected to play in monitoring compliance with a duty to minimize the corporation's environmental impacts.[133] Although the study would need to be expanded to include a greater number of institutional investors to draw more concrete conclusions, it would appear that investors could be relied upon to some extent to maintain an ongoing interest in firms' environmental performance and to monitor firms for compliance with such a duty. Even without imposing a legal duty, these results also appear to indicate a growing expectation on boards to take greater responsibility for the corporation's environmental performance.

[132] The exception is BC IMC which supported proposals regarding compensation in 2012.
[133] Although institutional investors are likely to oppose my proposal, I hope that the arguments made in Part I would cause them to pause and reconsider.

D. Conclusion: Why the Argument in Favour of a Duty on Directors Still Holds

The results of my case study may beg the question 'is imposing on boards a duty to minimize the corporation's environmental impacts really necessary?' or can we rely on "responsible investors" to fulfill our moral obligations to future generations? The answer to this question brings us back to the discussion in Part I of the golden rule and the importance of reasons for action. So long as investors are motivated by maximizing long-term investment returns alone, it seems unlikely that a corporation's environmental or social performance will be determinative of a decision to buy, sell or hold a security, except in a small number of cases.[134] In the case of public-sector pension funds, there are good policy reasons to prioritize returns over environmental performance, given the thousands of beneficiaries whose pension security is at stake. Nor is this inconsistent with these funds acting as responsible investors, given responsible investing's emphasis on enhancing long-term returns. The problem is that this may do little to shift corporate behaviour away from "business as usual". Responsible investing is insufficient, therefore, to achieve "strong sustainability" and to fulfill our obligations to future generations. Even if institutional investors were to base their investment and voting decisions on environmental or social factors independent of their effect on investment returns, the sheer number of companies in which these funds are invested would make it impossible for them to engage with most companies at the level of detail required to identify and implement changes to a company's processes so as to reduce the company's environmental impacts.

This is not to suggest that institutional investors have no role to play in achieving sustainable development. The practice of responsible investing would complement a duty to minimize the corporation's environmental impacts by helping to ensure that directors who took the duty seriously would be rewarded, and not punished, by the market. The support of institutional investors is crucial, therefore, to helping to ensure a sufficient level of compliance with the duty to make a significant difference in

[134] I also make this point in a paper presented at the CLPE Conference at Osgoode Hall Law School this past March and recently submitted for publication as part of a symposium on the conference.

environmental outcomes. The results of my case study indicate that Canada's public-sector pension funds could be relied upon, to some extent, to play this role.

Appendix 1: Policy Review

Y = Yes, N= No, NS = Not specified, ND = Document Not Disclosed, N/A = Not applicable

Investor Characteristics	**Caisse**	**CPPIB**	**Teachers**	**BC IMC**	**AIMCO**	**PSP**
Size of fund (in billions CDN$) (public equities)	159 (57.1)	161.6 (55.2)	117.1 (34.1)	92.1 (41.4)	69.7 (25.5)	64.5 (32.9)
Active investing strategy[135]	Y	Y	Y	Y	Y	Y
Internal investment management[136]	Y	Y	Y	Y	Y	Y
Retention of voting rights	Y	Y	Y	Y	Y	Y
Characteristics Met (/4)	**4**	**4**	**4**	**4**	**4**	**4**

Threshold Criteria	**Caisse**	**CPPIB**	**Teachers**	**BC IMC**	**AIMCO**	**PSP**
Support for RI: have a responsible investing policy[137]	Y	Y	Y	Y (ND)	N	Y
"belief statements"	Y	Y	Y	Y	Y	Y
Universal owner: member of investor organizations	Y	Y	Y	Y	Y	Y
self-identify as universal owner	N	N	N	N	N	N
Investment horizon: self-identify as long-term investor	Y	Y	Y	Y	Y	Y
Threshold Criteria Met (/5)	**4**	**4**	**4**	**4**	**3**	**4**

Advanced Criteria	**Caisse**	**CPPIB**	**Teachers**	**BC IMC**	**AIMCO**	**PSP**
Support for RI: RI discussed in annual report	Y	Y	Y	Y	Y	Y
PRI signatory (year)	Y (2006)	Y (2006)	Y (2011)	Y (2006)	Y (2010)	N
Long-term investment horizon (≥ 3): long-term mandate[138]	N	Y	Y	N	N	N
investment manager compensation	Y (3-4)	Y (4)	N (1)	N (1)	Y (1 & 4)	Y (4)
fund performance evaluation	N (1)	Y (4)	Y (11)	Y (1-20)	N (1)	Y (4-5)
long-term time horizon for equity investments	Y (NS)	Y (2-5)	Y (5-10)	Y (5-10)	ND	ND
Universal monitoring: stated position on economy-wide issues[139] and gov't policies (environmental issues)	N (N)	N (N)	Y (N)	Y (Y)	Y (N)	N (N)
collaboration with other investors[140] (on environmental issues)	Y (Y)	Y (Y)	Y (N)	Y (Y)	N (N)	Y (N)

[135] As a primary investment strategy.
[136] Management of all of the fund's assets have not been delegated to external investment managers.
[137] Stand-alone or incorporated into the Statement of Investment Principles.
[138] The legislative mandate or the mandate as stated in the SIP is expressed as a mandate or objective to cover liabilities/generate returns over the "long-term".
[139] Other than corporate governance issues.
[140] Beyond membership in investor organizations.

Laws or standards/best practices[141] (all docs) (environmental)	Y (N)	Y (Y)	N	Y (N)	N	N
Engagement: discussion of specific instances of engagement (on environmental issues)	Y (Y)	Y (Y)	Y (N)	Y (Y)	N	Y (Y)
Integrating ESG factors into decision-making: discussed in risk management policy (environmental specifically[142])	Y	N	N	Y (Y)	N	N
discussed in proxy voting policy (environmental specifically)	Y (N)	Y	Y (Y)	Y (Y)	ND	Y (N)
discussed in code of conduct/ethics policy	N	N	N	Y	N	N
discussed in compensation policies	N	N	N	Y	N	N
RI policy applicable to all investment decisions	Y	Y	Y	Y	NS	Y
RI included in contracts with external managers	N	N	N	N	N	Y
RI expertise relevant to selecting investment managers (internal or external)	N	Y	N	N	N	Y
Implementation: designated person responsible	Y	Y	N	N	N	Y
full-time staff dedicated to RI/ESG	N	Y	N	Y	N	N
training (board/trustees, managers, others)	Y	N	N	Y	N	N
regular review of RI policy	Y	Y	N	ND	ND	Y
Advanced Criteria Met (/21)	**13**	**15**	**10**	**15**	**4**	**11**

[141] Applicable to portfolio companies, other than corporate governance best practices.
[142] Beyond simply reference to "*environmental*, social and governance" factors.

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Company Name		Country	Meeting Date	Shareholder Proposal Topic	Votes For	Votes Against	% Shareholder Support	Caisse	CPPIB	Teachers	BC IMC	AIMCO
AEE	Ameren Corporation	USA	4/28/09	Shareholder Proposal Regarding Report on Reducing Releases From the Callaway Plant	14,215,494	115,270,277	11.0%	Against	Against	Against	Against	n/a
AAPL	Apple Inc.	USA	2/25/09	Shareholder Proposal Regarding Sustainability Report	35,088,343	405,326,486	8.0%	n/a	Against	Against	n/a	n/a
WTR	Aqua America, Inc.	USA	5/8/09	Shareholder Proposal Regarding Sustainability Report	17,015,715	46,713,604	26.7%	For	n/a	n/a	n/a	n/a
CAR	Avis Budget Group, Inc.	USA	6/12/09	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	6,350,972	47,513,823	11.8%	n/a	n/a	Against	n/a	n/a
AVP	Avon Products, Inc.	USA	5/7/09	Shareholder Proposal Regarding Nanomaterial Report	27,619,318	258,402,087	9.7%	For	Against	Against	Against	n/a
BBBY	Bed Bath & Beyond Inc.	USA	6/30/09	Shareholder Proposal Regarding Sustainability Report	31,357,852	144,701,700	17.8%	n/a	For	Against	For	n/a
BRK.A	Berkshire Hathaway Inc.	USA	5/2/09	Shareholder Proposal Regarding Sustainability Report	25,667	716,678	3.5%	n/a	For	Against	n/a	n/a
BXP	Boston Properties, Inc.	USA	5/19/09	Shareholder Proposal Regarding Sustainability Report	31,038,324	52,249,079	37.3%	n/a	For	n/a	For	n/a
CVX	Chevron Corporation	USA	5/27/09	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions				n/a	Against	Against	Against	n/a
CVX	Chevron Corporation	USA	5/27/09	Shareholder Proposal Regarding Report on Host Country Laws	101,461,352	1,058,100,189	8.7%	n/a	Against	Against	For	n/a
C	Citigroup Inc.	USA	4/21/09	Shareholder Proposal Regarding Carbon Principles Report	141,241,356	1,783,956,465	7.3%	Against	Against	Against	Against	n/a
COP	ConocoPhillips	USA	5/13/09	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	257,294,253	680,873,616	27.4%	n/a	For	Against	For	n/a
COP	ConocoPhillips	USA	5/13/09	Shareholder Proposal Regarding Report on Oil Sands Operations	286,987,567	659,598,520	30.3%	n/a	For	Against	For	n/a
DHR	Danaher Corporation	USA	5/5/09	Shareholder Proposal Regarding Eliminating Dental Amalgam Containing Mercury	43,706,520	180,658,793	19.5%	n/a	For	Against	For	n/a
D	Dominion Resources Inc.	USA	5/5/09	Shareholder Proposal Regarding Fossil Fuel Reduction	14,772,289	328,916,445	4.3%	Against	Against	Against	Against	n/a
DOV	Dover Corporation	USA	5/7/09	Shareholder Proposal Regarding Report on Climate Change	52,439,854	77,029,763	40.5%	n/a	For	Against	For	n/a
DYN	Dynegy Inc.	USA	5/22/09	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	106,237,047	510,689,821	17.2%	n/a	n/a	Against	For	n/a
EXC	Exelon Corporation	USA	4/28/09	Shareholder Proposal Regarding Global Warming Report	13,713,246	333,653,314	3.9%	Against	Against	Against	Against	n/a
XOM	Exxon Mobil Corporation	USA	5/27/09	Shareholder Proposal Regarding Greenhouse Gas Emissions Goals	797,275,710	1,951,943,111	29.0%	n/a	For	Against	For	n/a
XOM	Exxon Mobil Corporation	USA	5/27/09	Shareholder Proposal Regarding a Climate Change and Technology Report	274,740,079	2,478,475,827	10.0%	n/a	Against	Against	Against	n/a
XOM	Exxon Mobil Corporation	USA	5/27/09	Shareholder Proposal Regarding Renewable Energy Policy	743,884,565	1,984,340,842	27.3%	n/a	For	Against	For	n/a
FITB	Fifth Third Bancorp	USA	4/21/09	Shareholder Proposal Regarding Sustainability Report	88,851,771	221,746,678	28.6%	n/a	For	Against	For	n/a
FCX	Freeport-McMoRan Copper & Gold Inc.	USA	6/11/09	Shareholder Proposal Regarding Environmental Expertise on Board	90,130,264	181,954,653	33.1%	n/a	For	Against	For	n/a
HAL	Halliburton Company	USA	5/20/09	Shareholder Proposal Regarding Reporting Low-Carbon Energy Research and Development	35,739,015	523,825,598	6.4%	n/a	Against	Against	Against	n/a
HRL	Hormel Foods Corporation	USA	1/27/09	Shareholder Proposal Regarding Disclosure of Greenhouse Gas Emissions Via Product Packaging	2,296,658	99,743,248	2.3%	Against	Against	n/a	n/a	n/a
IDA	IDACORP, Inc.	USA	5/21/09	Shareholder Proposal Regarding Reducing Greenhouse Gas Emissions	14,568,648	13,875,126	51.2%	n/a	n/a	n/a	For	n/a
INTC	Intel Corporation	USA	5/20/09	Shareholder Proposal Regarding Human Right to Water	174,894,784	2,811,975,487	5.9%	n/a	Against	Against	Against	n/a
ICO	International Coal Group, Inc.	USA	5/20/09	Shareholder Proposal Regarding Climate Change Report	6,979,224	83,301,089	7.7%	n/a	n/a	n/a	n/a	n/a
IP	International Paper Company	USA	5/11/09	Shareholder Proposal Regarding Sustainable Forestry	18,509,828	260,191,818	6.6%	n/a	Against	Against	For	n/a
JPM	JPMorgan Chase & Co.	USA	5/19/09	Shareholder Proposal Regarding Carbon Principles Report (concern that it "discriminates" against coal)	67,451,876	2,196,769,367	3.0%	Against	Against	Against	Against	n/a
LVS	Las Vegas Sands Corp.	USA	6/10/09	Shareholder Proposal Regarding Sustainability Report	22,152,151	405,498,532	5.2%	n/a	For	n/a	n/a	n/a
LEN	Lennar Corporation	USA	4/15/09	Shareholder Proposal Regarding Reducing and Reporting on Greenhouse Gas Emissions	30,994,689	281,772,500	9.9%	n/a	For	Against	For	n/a
MEE	Massey Energy Company	USA	5/19/09	Shareholder Proposal Regarding Implementation of EPA Settlement Reforms and CSR Commitments	19,033,999	29,245,956	39.4%	n/a	For	n/a	For	Against
MEE	Massey Energy Company	USA	5/19/09	Shareholder Proposal Regarding Climate Change Report	22,183,878	26,412,691	45.6%	n/a	For	n/a	For	For
MGM	MGM Mirage	USA	8/4/09	Shareholder Proposal Regarding Sustainability Report	53,898,553	185,624,374	22.5%	n/a	For	Against	n/a	n/a
MIR	Mirant Corporation	USA	5/7/09	Shareholder Proposal Regarding Report on Global Warming	35,253,988	48,310,971	42.2%	For	For	n/a	n/a	n/a
NRG	NRG Energy, Inc.	USA	7/21/09	Shareholder Proposal Regarding Carbon Principles Report	2,553,249	189,432,665	1.3%	Against	Against	Abstain	n/a	Against
OXY	Occidental Petroleum Corporation	USA	5/1/09	Shareholder Proposal Regarding Report on Host Country Regulations	40,584,598	502,789,838	7.5%	n/a	Against	Against	Against	n/a
PEP	PepsiCo, Inc.	USA	5/6/09	Shareholder Proposal Regarding Report on Beverage Container Recycling Program	75,670,812	793,161,979	8.7%	Against	Against	Against	For	n/a
RRD	R.R. Donnelley & Sons Company	USA	5/21/09	Shareholder Proposal Regarding a Sustainable Forestry Report	11,744,679	123,497,424	8.7%	n/a	Against	Against	n/a	n/a
SNDK	SanDisk Corporation	USA	5/27/09	Shareholder Proposal Regarding Sustainability Report	28,011,159	81,643,957	25.5%	For	n/a	n/a	For	n/a
SPF	Standard Pacific Corp.	USA	5/13/09	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	21,923,025	121,179,555	15.3%	n/a	n/a	n/a	n/a	n/a
KO	The Coca-Cola Company	USA	4/22/09	Shareholder Proposal Regarding a Board Committee on Human Rights (mention of contamination of drinking water in India)	58,513,021	1,465,209,715	3.8%	Against	Against	Against	Against	n/a
DOW	The Dow Chemical Company	USA	5/14/09	Shareholder Proposal Regarding Environmental Remediation in the Midland Area	145,621,787	362,052,982	28.7%	n/a	For	Against	For	n/a
HD	The Home Depot, Inc.	USA	5/28/09	Shareholder Proposal Regarding Energy Usage	227,814,358	734,212,731	23.7%	n/a	For	Against	For	n/a
RYL	The Ryland Group, Inc.	USA	4/29/09	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	6,891,459	16,147,221	29.9%	n/a	n/a	n/a	n/a	n/a
SO	The Southern Company	USA	5/27/09	Shareholder Proposal Regarding Greenhouse Gas Emissions Reduction	43,159,326	332,611,437	11.5%	Against	n/a	Against	Against	n/a
TSN	Tyson Foods, Inc.	USA	2/6/09	Shareholder Proposal Regarding Disclosure of Product Greenhouse Gas Emissions	9,597,684	845,717,424	1.1%	Against	For	Against	n/a	n/a
ENB	Enbridge Inc.	CAN	5/6/09	Shareholder Proposal Regarding Risks Associated with the Gateway Project			11.1%	n/a	Against	Against	Against	Against
ENB	Enbridge Inc.	CAN	5/6/09	Shareholder Proposal Regarding Aboriginal Community Outreach (prior informed consent)			32.6%	n/a	For	Against	Against	Against
GWO	Great-West Lifeco Inc.	CAN	5/7/09	Shareholder Proposal Regarding Report on Climate Change			7.1%	For	For	Against	For	n/a
Total Recorded Votes								**12**	**38**	**35**	**34**	**4**
% For								**42%**	**58%**	**0%**	**65%**	**25%**

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Company Name		Country	Meeting Date	Shareholder Proposal Topic	Votes For	Votes Against	% Shareholder Support	Caisse	CPPIB	Teachers	BC IMC	AIMCO
AEE	Ameren Corporation	USA	4/27/10	Shareholder Proposal Regarding Report on Extending Operating License of Nuclear Facility	10,774,938	135,512,288	7.4%	n/a	Against	Against	n/a	n/a
AAPL	Apple Inc.	USA	2/25/10	Shareholder Proposal Regarding Sustainability Report	40,188,209	426,570,138	8.6%	n/a	Against	Against	n/a	n/a
AAPL	Apple Inc.	USA	2/25/10	Shareholder Proposal Regarding Formation of Sustainability Committee	25,093,630	459,476,961	5.2%	n/a	Against	Against	n/a	n/a
WTR	Aqua America, Inc.	USA	5/13/10	Shareholder Proposal Regarding Sustainability Report	21,086,123	45,628,444	31.6%	n/a	n/a	n/a	n/a	n/a
BXP	Boston Properties, Inc.	USA	5/18/10	Shareholder Proposal Regarding Sustainability Report	40,776,224	51,775,372	44.1%	For	For	Against	For	n/a
BCR	C. R. Bard, Inc.	USA	4/21/10	Shareholder Proposal Regarding Sustainability Report	18,836,346	39,251,207	32.4%	For	For	Against	For	Against
COG	Cabot Oil & Gas Corporation	USA	4/27/10	Shareholder Proposal Regarding Report on Hydraulic Fracturing	22,061,756	39,398,598	35.9%	n/a	For	Against	For	Against
CHK	Chesapeake Energy Corporation	USA	6/11/10	Shareholder Proposal Regarding Report on Hydraulic Fracturing	80,348,650	235,944,880	25.4%	For	For	Against	For	n/a
CHK	Chesapeake Energy Corporation	USA	6/11/10	Shareholder Proposal Regarding Sustainability Report	100,348,973	218,320,653	31.5%	For	For	Against	For	n/a
CVX	Chevron Corporation	USA	5/26/10	Shareholder Proposal Regarding Environmental Expertise on Board	361,712,487	989,390,642	26.8%	For	For	Against	For	n/a
CVX	Chevron Corporation	USA	5/26/10	Shareholder Proposal Regarding Report on Financial Risks of Climate Change	34,567,993	1,009,826,845	3.3%	Against	Against	Against	Against	n/a
CSCO	Cisco Systems, Inc.	USA	11/18/10	Shareholder Proposal Regarding Formation of Environmental Sustainability Committee	130,913,804	2,998,684,986	4.2%	Against	Against	Against	n/a	n/a
CMS	CMS Energy Corporation	USA	5/21/10	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	53,130,757	98,230,118	35.1%	For	n/a	Against	For	Against
CMS	CMS Energy Corporation	USA	5/21/10	Shareholder Proposal Regarding Report on Coal Combustion Waste	65,222,435	86,089,676	43.1%	For	n/a	Against	For	For
COP	ConocoPhillips	USA	5/12/10	Shareholder Proposal Regarding Risk Management Report	55,066,151	1,043,311,707	5.0%	Against	Against	Against	Against	n/a
COP	ConocoPhillips	USA	5/12/10	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	239,554,382	698,207,778	25.5%	For	For	Against	Against	n/a
COP	ConocoPhillips	USA	5/12/10	Shareholder Proposal Regarding Report on Environmental Impacts of Extending Oil Sands Operations	250,993,730	676,459,568	27.1%	For	For	Against	For	n/a
COP	ConocoPhillips	USA	5/12/10	Shareholder Proposal Regarding Louisiana Wetlands	62,164,374	871,879,757	6.7%	Against	For	Against	For	n/a
COP	ConocoPhillips	USA	5/12/10	Shareholder Proposal Regarding the Financial Risks of Climate Change	69,465,411	857,981,714	7.5%	Against	Against	Against	Against	n/a
COP	ConocoPhillips	USA	5/12/10	Shareholder Proposal Regarding Reducing Emissions of TRI Chemicals	64,160,627	861,510,547	6.9%	Against	Against	Against	Against	n/a
D	Dominion Resources Inc.	USA	5/18/10	Shareholder Proposal Regarding Establishment of 20% Renewable Energy Goal		18,899,749	316,250,154	5.6%	Against	Against	Against	Againstn/a
D	Dominion Resources Inc.	USA	5/18/10	Shareholder Proposal Regarding Rejecting Plans to Construct Nuclear Power Plant	10,163,603	321,826,523	3.1%	Against	Against	Against	Against	n/a
DYN	Dynegy Inc.	USA	5/21/10	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	61,270,576	319,709,573	16.1%	n/a	n/a	Against	n/a	n/a
DD	E. I. du Pont de Nemours and Company	USA	4/28/10	Shareholder Proposal Regarding Amendment to Human Rights Policy Regarding Seed Saving Rights	29,124,575	449,488,503	6.1%	For	n/a	n/a	Against	n/a
ECL	Ecolab Inc.	USA	5/6/10	Shareholder Proposal Regarding Human Right to Water	10,615,337	143,110,701	6.9%	For	Against	Against	Against	n/a
EOG	EOG Resources, Inc.	USA	4/28/10	Shareholder Proposal Regarding Report on Hydraulic Fracturing	54,161,112	120,860,276	30.9%	For	For	Against	For	n/a
XOM	Exxon Mobil Corporation	USA	5/26/10	Shareholder Proposal Regarding Human Right to Water	161,359,282	2,239,095,580	6.7%	For	For	Against	Against	n/a
XOM	Exxon Mobil Corporation	USA	5/26/10	Shareholder Proposal Regarding Louisiana Wetlands	220,736,043	2,211,784,381	9.1%	Against	For	Against	For	n/a
XOM	Exxon Mobil Corporation	USA	5/26/10	Shareholder Proposal Regarding Report on Oil Sands Operations	646,281,982	1,799,557,429	26.4%	For	For	Against	For	n/a
XOM	Exxon Mobil Corporation	USA	5/26/10	Shareholder Proposal Regarding Report on Hydraulic Fracturing	639,537,773	1,794,990,825	26.3%	For	For	Against	For	n/a
XOM	Exxon Mobil Corporation	USA	5/26/10	Shareholder Proposal Regarding an Energy Technology Report	160,604,723	2,236,202,200	6.7%	Against	Against	Against	Against	n/a
XOM	Exxon Mobil Corporation	USA	5/26/10	Shareholder Proposal Regarding Greenhouse Gas Emissions Goals	669,088,811	1,788,513,262	27.2%	For	For	Against	For	n/a
XOM	Exxon Mobil Corporation	USA	5/26/10	Shareholder Proposal Regarding Report on Future Energy Trends	189,688,866	2,234,991,289	7.8%	Against	Against	Against	Against	n/a
FRT	Federal Realty Investment Trust	USA	5/4/10	Shareholder Proposal Regarding Sustainability Report	17,328,391	21,497,225	44.6%	n/a	For	n/a	n/a	n/a
F	Ford Motor Company	USA	5/13/10	Shareholder Proposal Regarding Prohibiting Projects Concerned Only with Carbon Dioxide Reduction	86,049,619	3,630,421,029	2.3%	Against	Against	Against	Against	n/a
FCX	Freeport-McMoRan Copper & Gold Inc.	USA	6/9/10	Shareholder Proposal Regarding Environmental Expertise on Board	99,066,677	192,400,255	34.0%	For	For	Against	For	n/a
GNTX	Gentex Corporation	USA	5/13/10	Shareholder Proposal Regarding Sustainability Report	31,477,261	65,405,737	32.5%	n/a	n/a	n/a	n/a	Against
GOOG	Google Inc.	USA	5/13/10	Shareholder Proposal Regarding Sustainability Report	44,989,553	777,822,364	5.5%	For	For	Against	For	n/a
ICO	International Coal Group, Inc.	USA	5/19/10	Shareholder Proposal Regarding Climate Change Report	23,374,876	108,947,512	17.7%	n/a	n/a	n/a	n/a	n/a
KR	Kroger Co.	USA	6/24/10	Shareholder Proposal Regarding Report on Climate Change	165,592,670	241,040,670	40.7%	For	For	n/a	For	n/a
LVS	Las Vegas Sands Corp.	USA	6/3/10	Shareholder Proposal Regarding Sustainability Report	49,384,858	421,541,926	10.5%	For	For	n/a	n/a	n/a
LAYN	Layne Christensen Company	USA	6/3/10	Shareholder Proposal Regarding Sustainability Report	8,705,732	5,724,527	60.3%	n/a	n/a	n/a	n/a	n/a
LEN	Lennar Corporation	USA	4/14/10	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	27,749,933	283,756,326	8.9%	For	n/a	Against	For	n/a
MEE	Massey Energy Company	USA	5/18/10	Shareholder Proposal Regarding Implementation of EPA Settlement Reforms and CSR Commitments	17,899,866	34,955,433	33.9%	For	For	Against	For	Against
MEE	Massey Energy Company	USA	5/18/10	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	25,136,228	22,200,363	53.1%	For	For	Against	For	For
MDU	MDU Resources Group, Inc.	USA	4/27/10	Shareholder Proposal Regarding Report on Coal Combustion Waste	42,504,553	62,403,520	40.5%	n/a	For	n/a	n/a	For
MGM	MGM MIRAGE	USA	6/15/10	Shareholder Proposal Regarding Sustainability Report	54,749,479	203,043,868	21.2%	For	For	Against	For	n/a
MSFT	Microsoft Corporation	USA	11/16/10	Shareholder Proposal Regarding Formation of Environmental Sustainability Committee	194,555,704	5,193,428,670	3.6%	Against	Against	Against	n/a	n/a
MIR	Mirant Corporation	USA	5/6/10	Shareholder Proposal Regarding Climate Change Report	36,899,526	59,785,949	38.2%	n/a	For	n/a	n/a	n/a
OXY	Occidental Petroleum Corporation	USA	5/7/10	Shareholder Proposal Regarding Report on Host Country Regulations	33,682,650	472,012,579	6.7%	Against	Against	Against	Against	n/a
ORCL	Oracle Corporation	USA	10/6/10	Shareholder Proposal Regarding Formation of Sustainability Committee	34,254,086	3,371,528,976	1.0%	Against	Against	Against	n/a	n/a
PPG	PPG Industries, Inc.	USA	4/15/10	Shareholder Proposal Regarding Environmental Accountability Report	6,304,153	82,739,758	7.1%	Against	For	Against	Against	n/a
RRD	R.R. Donnelley & Sons Company	USA	5/20/10	Shareholder Proposal Regarding a Sustainable Procurement Policy	14,297,829	129,315,469	10.0%	For	n/a	Against	n/a	n/a
SFD	Smithfield Foods, Inc.	USA	9/1/10	Shareholder Proposal Regarding Reducing Greenhouse Gas Emissions	4,680,252	103,648,199	4.3%	n/a	n/a	Against	n/a	n/a
STJ	St. Jude Medical, Inc.	USA	5/7/10	Shareholder Proposal Regarding Sustainability Report	81,250,709	108,531,023	42.8%	For	For	Against	For	n/a
SPF	Standard Pacific Corp.	USA	5/12/10	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	26,474,531	126,005,233	17.4%	n/a	n/a	n/a	n/a	n/a
SBUX	Starbucks Corporation	USA	3/24/10	Shareholder Proposal Regarding Recycling Strategy for Beverage Containers	42,005,166	332,670,649	11.2%	Against	Against	Against	n/a	n/a
STI	SunTrust Banks, Inc.	USA	4/27/10	Shareholder Proposal Regarding Sustainability Report	87,097,157	229,359,415	27.5%	For	For	n/a	For	n/a
DOW	The Dow Chemical Company	USA	5/13/10	Shareholder Proposal Regarding Environmental Remediation in the Midland Area	67,782,905	625,083,961	9.8%	For	For	Against	Against	n/a
GS	The Goldman Sachs Group, Inc.	USA	5/7/10	Shareholder Proposal Regarding Report on Climate Science	11,083,048	311,133,916	3.4%	Against	Against	Against	Against	n/a
RYL	The Ryland Group, Inc.	USA	4/28/10	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	9,526,513	15,948,633	37.4%	n/a	n/a	n/a	n/a	n/a
SO	The Southern Company	USA	5/26/10	Shareholder Proposal Regarding Greenhouse Gas Emissions Goals	38,094,665	347,780,889	9.9%	Against	Against	Against	Against	n/a
SO	The Southern Company	USA	5/26/10	Shareholder Proposal Regarding Report on Coal Combustion Waste	80,883,224	303,993,233	21.0%	For	For	Against	For	n/a
TOL	Toll Brothers, Inc.	USA	3/17/10	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	23,365,298	56,508,169	29.3%	n/a	n/a	n/a	n/a	n/a
TSN	Tyson Foods, Inc.	USA	2/5/10	Shareholder Proposal Regarding Report on Prevention of Water Pollution	86,154,949	774,880,968	10.0%	n/a	For	Against	n/a	n/a
TSN	Tyson Foods, Inc.	USA	2/5/10	Shareholder Proposal Regarding Report on Reducing Environmental Impact	72,309,059	788,487,650	8.4%	n/a	For	Against	n/a	n/a
VLO	Valero Energy Corporation	USA	4/29/10	Shareholder Proposal Regarding Report on Rainforest Impact	25,631,324	287,678,855	8.2%	Against	Against	Against	For	n/a
WY	Weyerhaeuser Company	USA	4/15/10	Shareholder Proposal Regarding Report on FSC-Certified Products	32,461,781	108,079,181	23.1%	For	For	For	For	n/a
FFH	Fairfax Financial Holdings Limited	CAN	4/22/10	Shareholder Proposal Regarding Responding to CDP questionnaire				For	For	Against	For	Against
G	Goldcorp Inc.	CAN	5/19/10	Shareholder Proposal Regarding Policy on Indigenous Communities (prior informed consent)			10.2%	Against	Against	Against	Against	Against
GWO	Great-West Lifeco Inc.	CAN	5/6/10	Shareholder Proposal Regarding Report on Climate Change			9.8%	For	For	Against	For	Against
UPL	Ultra Petroleum Corp.	CAN	6/14/10	Shareholder Proposal Regarding Report on Hydraulic Fracturing	22,209,946	82,327,939	21.2%	For	For	n/a	For	n/a
VT	Viterra Inc.	CAN	3/10/10	Shareholder Proposal Regarding Climate Change Report			23.4%	For	For	n/a	n/a	Against
Total Votes Recorded								**53**	**57**	**55**	**47**	**12**
% For								**64%**	**65%**	**2%**	**64%**	**25%**

U.S. and Canada 2011

Ticker	Company Name	Meeting Date	Shareholder Proposal Topic	Votes For	Votes Against	Shareholder Support	Caisse	CPPIB	Teachers	BC IMC	AIMCO
ADM	Archer-Daniels-Midland Company	11/3/11	Shareholder Proposal Regarding Sustainable Palm Oil	22,588,092	367,343,837	5.8%	For	Against	Against	n/a	n/a
AEE	Ameren Corporation	4/21/11	Shareholder Proposal Regarding Report on Coal Combustion Waste	74,950,082	67,241,677	52.7%	For	For	Against	For	n/a
AMZN	Amazon.com, Inc.	6/7/11	Shareholder Proposal Regarding Report on Climate Change	65,891,444	257,647,408	20.4%	For	For	Against	For	Against
ANR	Alpha Natural Resources, Inc.	5/19/11	Shareholder Proposal Regarding Pollution Report	20,404,753	53,780,002	27.5%	For	For	Against	For	n/a
BCR	C.R. Bard, Inc.	4/20/11	Shareholder Proposal Regarding Sustainability Report	15,050,725	39,541,022	27.6%	For	For	Against	For	Against
BRK.A	Berkshire Hathaway Inc.	4/30/11	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	68,733	608,576	10.1%	For	For	Against	For	Against
BXP	Boston Properties, Inc.	5/17/11	Shareholder Proposal Regarding Sustainability Report	32,770,759	65,139,738	33.5%	For	For	Against	For	n/a
CMS	CMS Energy Corporation	5/20/11	Shareholder Proposal Regarding Coal Risk Report	11,495,496	161,714,989	6.6%	Against	n/a	Against	Against	Against
COP	ConocoPhillips	5/11/11	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	239,416,181	654,288,544	26.8%	For	For	Against	For	n/a
COP	ConocoPhillips	5/11/11	Shareholder Proposal Regarding Report on Oil Sands Operations	256,990,761	666,090,398	27.8%	For	For	Against	For	n/a
COP	ConocoPhillips	5/11/11	Shareholder Proposal Regarding the Financial Risks of Climate Change	70,778,425	841,961,178	7.8%	Against	Against	Against	Against	n/a
COP	ConocoPhillips	5/11/11	Shareholder Proposal Regarding Louisiana Wetlands	56,096,217	869,652,935	6.1%	Against	For	Against	Against	n/a
CRZO	Carrizo Oil & Gas, Inc.	6/2/11	Shareholder Proposal Regarding Report on Hydraulic Fracturing	12,221,374	15,734,227	43.7%	n/a	n/a	n/a	For	n/a
CSCO	Cisco Systems, Inc.	12/7/11	Shareholder Proposal Regarding Formation of Environmental Sustainability Committee	165,450,791	2,640,306,323	5.9%	Against	Against	Against	n/a	n/a
CVX	Chevron Corporation	5/25/11	Shareholder Proposal Regarding Financial Risks of Climate Change	82,272,719	1,048,129,377	7.3%	Against	Against	Against	Against	Against
CVX	Chevron Corporation	5/25/11	Shareholder Proposal Regarding Offshore Drilling Report	37,513,750	1,032,560,611	3.5%	Against	Against	Against	Against	Against
CVX	Chevron Corporation	5/25/11	Shareholder Proposal Regarding Environmental Expertise on Board	330,618,956	1,000,293,032	24.8%	For	Against	Against	For	Against
CVX	Chevron Corporation	5/25/11	Shareholder Proposal Regarding Report on Hydraulic Fracturing	446,550,049	656,663,442	40.5%	For	For	Against	For	For
CVX	Chevron Corporation	5/25/11	Shareholder Proposal Regarding Sustainability as Compensation Performance Measure	73,123,616	1,224,457,729		Against	Against	Against	Against	Against
D	Dominion Resources, Inc.	5/12/11	Shareholder Proposal Regarding Establishment of 20% Renewable Energy Goal	16,152,338	302,988,260	5.1%	Against	Against	Against	Against	n/a
D	Dominion Resources, Inc.	5/12/11	Shareholder Proposal Regarding Mountaintop Removal Coal Mining	29,103,633	286,372,583	9.2%	Against	For	Against	Against	n/a
D	Dominion Resources, Inc.	5/12/11	Shareholder Proposal Regarding Report on Coal Risk	21,247,034	29,964,143	41.5%	Against	Against	Against	Against	n/a
D	Dominion Resources, Inc.	5/12/11	Shareholder Proposal Regarding Nuclear Power Plant Construction	12,848,864	304,125,567	4.1%	Against	Against	Against	Against	n/a
DD	E. I. du Pont de Nemours and Company	4/27/11	Shareholder Proposal Regarding Genetically Engineered Organisms	31,284,719	463,437,717	6.3%	Against	Against	Against	Against	n/a
DHI	D.R. Horton, Inc.	1/20/11	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	60,468,308	117,046,082	34.1%	For	n/a	Against	For	n/a
DUK	Duke Energy Corporation	5/5/11	Shareholder Proposal Regarding Report on Global Warming Lobbying Activities	43,192,794	624,521,525		Against	Against	Against	Against	n/a
DUK	Duke Energy Corporation	5/5/11	Shareholder Proposal Regarding Report on Coal Risk	56,567,429	610,053,517	8.5%	Against	Against	Against	n/a	n/a
DYN	Dynegy Inc.	6/15/11	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	7,620,132	81,588,634	8.5%	n/a	n/a	Against	n/a	n/a
ECL	Ecolab Inc.	5/5/11	Shareholder Proposal Regarding Human Right to Water	8,035,356	151,028,157	5.1%	For	Against	Against	For	Against
EGN	Energen Corporation	4/27/11	Shareholder Proposal Regarding Report on Hydraulic Fracturing	24,499,055	25,042,439	49.5%	For	For	n/a	n/a	For
EMR	Emerson Electric Co.	2/1/11	Shareholder Proposal Regarding Sustainability Report	176,190,640	346,453,987	33.7%	For	For	Against	n/a	n/a
EQR	Equity Residential	6/16/11	Shareholder Proposal Regarding Linking Executive Pay to Sustainability	9,425,846	243,646,477		Against	Against	Against	Against	n/a
FCX	Freeport-McMoRan Copper & Gold, Inc.	6/15/11	Shareholder Proposal Regarding Environmental Expertise on Board	192,611,674	432,644,339	30.8%	For	For	Against	For	Against
FE	FirstEnergy Corp.	5/17/11	Shareholder Proposal Regarding Report on Coal Combustion Waste	100,432,281	177,708,304	36.1%	For	For	For	For	n/a
FE	FirstEnergy Corp.	5/17/11	Shareholder Proposal Regarding Report on Coal Risk	87,709,708	191,314,311	31.4%	Against	For	For	For	n/a
GE	General Electric Company	4/27/11	Shareholder Proposal Regarding Report on Financial Risks of Climate Change	240,369,492	4,924,813,208	4.7%	Against	Against	Against	Against	Against
GEN	GenOn Energy, Inc.	5/4/11	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	89,208,590	443,054,796	2.6%	n/a	For	Against	n/a	n/a
GNTX	Gentex Corporation	5/12/11	Shareholder Proposal Regarding Sustainability Report	35,081,448	57,745,073	37.8%	n/a	n/a	n/a	For	Against
GOOG	Google Inc.	6/2/11	Shareholder Proposal Regarding Formation of Sustainability Committee	8,366,598	778,184,962	1.1%	Against	Against	Against	Against	n/a
GS	The Goldman Sachs Group, Inc.	5/6/11	Shareholder Proposal Regarding Report on Climate Change	8,304,358	313,384,096	2.6%	Against	Against	Against	Against	n/a
LAYN	Layne Christensen Company	6/9/11	Shareholder Proposal Regarding Sustainability Report	14,873,784	1,147,321	92.8%	n/a	n/a	n/a	n/a	n/a
LEN	Lennar Corporation	4/13/11	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	26,779,235	305,963,240	8.0%	For	n/a	Against	For	n/a
LOW	Lowe's Companies, Inc.	5/27/11	Shareholder Proposal Regarding Linking Executive Pay to Sustainability	42,601,488	933,506,586		n/a	Against	Against	Against	n/a
MCD	McDonald's Corporation	5/19/11	Shareholder Proposal Regarding Beverage Containers	162,708,811	392,191,720	29.3%	n/a	For	Against	For	n/a
MGM	MGM Resorts International	6/14/11	Shareholder Proposal Regarding Sustainability Report	51,887,520	237,927,181	17.9%	For	For	Against	n/a	n/a
MSFT	Microsoft Corporation	11/15/11	Shareholder Proposal Regarding Formation of Environmental Sustainability Committee	182,171,957	4,946,904,987	3.6%	n/a	Against	Against	Against	Against
OXY	Occidental Petroleum Corporation	5/6/11	Shareholder Proposal Regarding Environmental Expertise on Board	29,621,867	533,718,119	5.3%	For	Against	Against	Against	n/a
PPG	PPG Industries, Inc.	4/21/11	Shareholder Proposal Regarding Environmental Accountability Report	5,509,160	79,619,106	6.5%	Against	For	Against	Against	n/a
RRD	R.R. Donnelley & Sons Company	5/19/11	Shareholder Proposal Regarding a Sustainable Procurement Report	42,551,052	102,090,786	29.4%	For	For	Against	For	n/a
RYL	The Ryland Group, Inc.	4/27/11	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	5,175,983	17,759,505	22.6%	n/a	n/a	n/a	n/a	n/a
SBUX	Starbucks Corporation	3/23/11	Shareholder Proposal Regarding Recycling Strategy for Beverage Containers	35,903,461	407,720,919	8.1%	Against	Against	Against	For	n/a
SJM	The J.M. Smucker Company	8/17/11	Shareholder Proposal Regarding Coffee Sustainability Report	22,666,346	51,739,625	30.5%	For	For	Against	n/a	Against
SO	Southern Company	5/25/11	Shareholder Proposal Regarding Report on Coal Combustion Waste	96,860,153	313,557,303	23.6%	For	n/a	Against	For	Against
SPF	Standard Pacific Corp.	5/18/11	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	7,291,261	135,589,860	5.1%	n/a	n/a	n/a	n/a	n/a
SRE	Sempra Energy	5/13/11	Shareholder Proposal Regarding Linking Executive Pay to Sustainability	10,486,686	141,058,240		Against	Against	Against	For	n/a
STI	SunTrust Banks, Inc.	4/26/11	Shareholder Proposal Regarding Sustainability Report	78,180,386	226,854,647	25.6%	For	For	Against	For	n/a
TGT	Target Corporation	6/8/11	Shareholder Proposal Regarding Report on Electronic Waste	129,256,300	290,378,258	30.8%	For	For	Against	For	n/a
WMT	Wal-Mart Stores, Inc.	6/3/11	Shareholder Proposal Regarding Climate Change Risk Report	30,202,116	2,736,239,405	1.1%	Against	Against	Against	Against	Against
WMT	Wal-Mart Stores, Inc.	6/3/11	Shareholder Proposal Regarding Supplier Sustainability Reports	55,074,457	2,701,517,212	2.0%	Against	Against	Against	Against	Against
XOM	Exxon Mobil Corporation	5/25/11	Shareholder Proposal Regarding Report on Technology and Products to Become Environmentally Sustainable	161,083,010	2,473,137,404	6.1%	For	Against	Against	Against	Against
XOM	Exxon Mobil Corporation	5/25/11	Shareholder Proposal Regarding Greenhouse Gas Emission Goals	679,861,487	1,882,879,592	26.5%	For	For	Against	For	Against
XOM	Exxon Mobil Corporation	5/25/11	Shareholder Proposal Regarding Report on Oil Sands Operations	725,891,944	1,956,232,686	27.1%	For	For	Against	For	Against
XOM	Exxon Mobil Corporation	5/25/11	Shareholder Proposal Regarding Report on Hydraulic Fracturing	713,858,047	1,820,099,043	28.2%	For	For	Against	For	Against
XOM	Exxon Mobil Corporation	5/25/11	Shareholder Proposal Regarding Human Right to Water	182,936,514	2,450,745,370	6.9%	For	For	Against	Against	Against
ATD	Alimentation Couche-Tard Inc.	9/6/11	Shareholder Proposal Regarding Sustainable Development Report			6.1%	For	For	Against	n/a	Against
G	Goldcorp Inc.	5/18/11	Shareholder Proposal Regarding Human Rights			5.8%	Against	Against	Against	Against	Against
GWO	Great-West Lifeco Inc.	5/5/11	Shareholder Proposal Regarding Report on Climate Change			7.3%	For	For	Against	For	Against
UPL	Ultra Petroleum Corp.	5/25/11	Shareholder Proposal Regarding Report on Hydraulic Fracturing			41.7%	For	For	n/a	For	n/a
Total Votes Recorded							**54**	**54**	**57**	**51**	**25**
% For							**61%**	**57%**	**4%**	**59%**	**8%**

U.S. and Canada 2012

Ticker	Company Name	Meeting Date	Shareholder Proposal Topic	Votes For	Votes Against	Shareholder Support	Caisse	CPPIB	Teachers	BC IMC	AIMCO
ACI	Arch Coal Inc.	4/26/12	Shareholder Proposal Regarding Coal Mining Report	56,866,524	70,489,628	44.7%	For	For	n/a	For	n/a
AEE	Ameren Corporation	4/24/12	Shareholder Proposal Regarding Energy Efficiency and Renewable Energy	14,282,967	122,810,471	10.4%	Against	Against	Against	Against	n/a
AEE	Ameren Corporation	4/24/12	Shareholder Proposal Regarding Coal Risk	14,486,550	123,129,056	10.5%	Against	Against	Against	Against	n/a
AEE	Ameren Corporation	4/24/12	Shareholder Proposal Regarding Coal Combustion Waste	14,910,643	122,649,466	10.8%	Against	Against	Against	Against	n/a
AMZN	Amazon.com, Inc.	5/24/12	Shareholder Proposal Regarding Report on Climate Change	66,506,019	247,360,516	21.2%	For	For	Against	For	n/a
AVB	AvalonBay Communities, Inc	5/23/12	Shareholder Proposal Regarding Sustainability Report	37,267,868	40,988,526	47.6%	For	For	Against	For	n/a
BCR	C.R. Bard, Inc.	4/18/12	Shareholder Proposal Regarding Sustainability Report	59,065,065	90,002,577	39.6%	For	For	Against	For	Against
CNL	Cleco Corporation	4/27/12	Shareholder Proposal Regarding Sustainability Report	14,645,360	28,428,470	34.0%	n/a	n/a	n/a	For	n/a
COG	Cabot Oil & Gas Corporation	5/1/12	Shareholder Proposal Regarding Linking Executive Pay to Sustainability Criteria	12,783,613	162,078,503	7.3%	For	Against	Against	Against	n/a
COG	Cabot Oil & Gas Corporation	5/1/12	Shareholder Proposal Regarding Sustainability Report	59,065,065	90,002,577	39.6%	For	For	Against	For	n/a
COP	ConocoPhillips	5/9/12	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	201,293,573	543,431,482	27.0%	For	For	Against	Against	n/a
COP	ConocoPhillips	5/9/12	Shareholder Proposal Regarding Louisiana Wetlands	48,753,801	723,719,959	6.3%	Against	For	Against	Against	n/a
CVX	Chevron Corporation	5/30/12	Shareholder Proposal Regarding Hydraulic Fracturing	362,708,549	936,955,762	27.9%	For	For	Against	For	Against
CVX	Chevron Corporation	5/30/12	Shareholder Proposal Regarding Environmental Expertise on Board	298,006,987	1,088,886,009	21.5%	For	For	Against	For	Against
D	Dominion Resources Inc.	5/8/12	Shareholder Proposal Regarding Establishment of 15% Renewable Energy Goal	20,102,514	327,671,990	5.8%	Against	Against	Against	Against	n/a
D	Dominion Resources Inc.	5/8/12	Shareholder Proposal Regarding Renewable Energy Policy Options	22,102,968	325,658,455	6.4%	Against	Against	Against	Against	n/a
D	Dominion Resources Inc.	5/8/12	Shareholder Proposal Regarding Report on Natural Gas	31,362,603	314,656,834	9.1%	For	Against	Against	Against	n/a
D	Dominion Resources Inc.	5/8/12	Shareholder Proposal Regarding Mountaintop Removal Coal Mining	32,925,856	312,954,643	9.5%	Against	Against	Against	Against	n/a
DPS	Dr Pepper Snapple Group, Inc.	5/17/12	Shareholder Proposal Regarding Recycling Strategy for Beverage Containers	48,158,175	101,384,780	32.2%	For	For	Against	For	n/a
DTE	DTE Energy Company	5/3/12	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	31,947,907	76,500,948	29.5%	For	For	Against	For	n/a
DUK	Duke Energy Corporation	5/3/12	Shareholder Proposal Regarding Coal Risk	75,769,322	558,495,701	11.9%	Against	Against	Against	Against	Against
EMR	Emerson Electric Co.	2/7/12	Shareholder Proposal Regarding Sustainability Report	161,038,404	295,413,373	35.3%	For	For	n/a	For	n/a
EQR	Equity Residential	6/21/12	Shareholder Proposal Regarding Sustainability Report	108,323,365	131,909,732	45.1%	For	For	Against	For	n/a
FCX	Freeport-McMoRan Copper & Gold Inc.	6/14/12	Shareholder Proposal Regarding Environmental Expertise on Board	187,583,272	406,639,026	31.6%	For	For	Against	For	Against
FE	FirstEnergy Corp.	5/15/12	Shareholder Proposal Regarding Report on Coal Risk	33,518,554	261,318,891	11.4%	Against	Against	Against	Against	n/a
FE	FirstEnergy Corp.	5/15/12	Shareholder Proposal Regarding Coal Combustion Waste	87,283,560	207,084,266	29.7%	For	For	For	For	n/a
FOSL	Fossil, Inc.	5/23/12	Shareholder Proposal Regarding Supply Chain Standards	12,582,940	28,276,187	30.8%	For	For	n/a	n/a	n/a
GE	General Electric Company	4/25/12	Shareholder Proposal Regarding Nuclear Activities	139,867,058	5,665,681,965	2.4%	Against	n/a	Against	Against	n/a
GEN	GenOn Energy Inc.	5/9/12	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	141,063,954	434,403,560	24.5%	n/a	For	n/a	n/a	n/a
GNTX	Gentex Corporation	5/17/12	Shareholder Proposal Regarding Sustainability Report	36,204,609	75,276,952	32.5%	n/a	n/a	n/a	For	n/a
HD	Home Depot, Inc.	5/17/12	Shareholder Proposal Regarding Stormwater Management Policy	36,912,893	980,656,698	3.6%	Against	For	Against	Against	n/a
KFT	Kraft Foods Inc.	5/23/12	Shareholder Proposal Regarding Extended Producer Responsibility	288,672,924	837,619,646	25.6%	For	For	Against	For	Against
KFT	Kraft Foods Inc.	5/23/12	Shareholder Proposal Regarding Sustainable Forestry Report	92,766,541	1,031,483,118	8.3%	Against	Against	Against	For	Against
KR	Kroger Co.	6/21/12	Shareholder Proposal Regarding Extended Producer Responsibility	50,552,296	343,299,095	12.8%	Against	Against	n/a	For	n/a
LEN	Lennar Corporation	4/11/12	Shareholder Proposal Regarding Reporting and Reducing Energy Use	40,589,561	320,338,036	11.2%	For	n/a	Against	For	n/a
MON	Monsanto Company	1/24/12	Shareholder Proposal Regarding Genetically Modified Organisms	20,674,203	340,636,535	5.7%	Against	Against	Against	n/a	Against
MSI	Motorola Solutions, Inc.	4/30/12	Shareholder Proposal Regarding Supplier Sustainability Report	12,795,452	172,108,424	6.9%	Against	Against	Against	Against	Against
OXY	Occidental Petroleum Corporation	5/4/12	Shareholder Proposal Regarding Environmental Expertise on Board	26,839,808	561,945,376	4.6%	For	Against	Against	Against	Against
RRC	Range Resources Corporation	5/23/12	Shareholder Proposal Regarding Linking Executive Pay to Sustainability	6,359,129	126,242,878	4.8%	Against	Against	Against	For	Against
RRD	R.R. Donnelley & Sons Company	5/17/12	Shareholder Proposal Regarding Sustainable Procurement Report	33,089,044	90,892,656	26.7%	For	For	Against	For	n/a
SBUX	Starbucks Corporation	3/21/12	Shareholder Proposal Regarding Formation of Sustainability Committee	20,064,791	470,258,539	4.1%	Against	Against	Against	n/a	n/a
SMBL	Smart Balance, Inc.	5/23/12	Shareholder Proposal Regarding Sustainability Report	10,554,953	32,415,368	24.6%	n/a	n/a	n/a	n/a	n/a
SO	Southern Company	5/23/12	Shareholder Proposal Regarding Report on Coal Combustion Waste	120,574,479	343,006,063	26.0%	For	n/a	Against	For	Against
SRE	Sempra Energy	5/10/12	Shareholder Proposal Regarding Linking Executive Pay to Sustainability	10,206,486	157,426,874	6.1%	Against	Against	Against	For	n/a
TGT	Target Corporation	6/13/12	Shareholder Proposal Regarding Report on Electronic Waste	36,515,998	390,746,006	8.5%	Against	Against	Against	Against	n/a
WTR	Aqua America, Inc.	5/10/12	Shareholder Proposal Regarding Human Right to Water	7,415,336	72,242,693	9.3%	n/a	n/a	n/a	n/a	n/a
XOM	Exxon Mobil Corporation	5/30/12	Shareholder Proposal Regarding Reporting and Reducing Greenhouse Gas Emissions	737,052,910	1,983,230,385	27.1%	For	For	Against	For	Against
XOM	Exxon Mobil Corporation	5/30/12	Shareholder Proposal Regarding Hydraulic Fracturing	806,016,033	1,918,152,612	29.6%	For	For	Against	For	Against
YUM	Yum! Brands, Inc.	5/17/12	Shareholder Proposal Regarding Adopting Sustainable Palm Oil Policy	98,913,379	168,257,832	37.0%	For	For	Against	For	n/a
ENB	Enbridge Inc.	5/9/12	Shareholder Proposal Regarding Report on First Nations' Opposition to Northern Gateway Project			28.5%	n/a	For	Against	Against	Against
G	Goldcorp Inc.	4/26/12	Shareholder Proposal Regarding Closure of Marlin Mine			3.1%	Against	Against	Against	Against	Against
UPL	Ultra Petroleum	5/22/12	Shareholder Proposal Regarding Hydraulic Fracturing			35.4%	For	For	n/a	For	n/a
Total Votes Recorded							**46**	**45**	**42**	**46**	**16**
% For							**57%**	**56%**	**2%**	**59%**	**0%**