The Promotion of Active Shareholdership for Corporate Social Responsibility in Canada

SUBMITTED TO:

Canadian Friends Service Committee
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JANTZI RESEARCH
Leading-edge social investment analysis

SHARE
Shareholder Association for Research and Education

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JANTZI RESEARCH INC. is an independent investment research firm that evaluates and monitors the social and environmental performance of Canadian companies. It works with mutual funds, pension funds, money managers, investment advisors, foundations, religious orders, governments, and other organizations to help fulfill their social and environmental mandates. Jantzi Research launched the Jantzi Social Index® – Canada's benchmark SRI Index – in January 2000.

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THE SHAREHOLDER ASSOCIATION FOR RESEARCH AND EDUCATION is a national not-for-profit organization helping pension funds build investment practices that protect the interests of plan beneficiaries and contribute to a just and healthy society. SHARE works with institutional investors to promote socially, economically, and environmentally responsible investment practices through research, education and advocacy. SHARE's board of directors and advisory board include senior representatives from national trade unions and the investment community.

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RECOMMENDATION 1 **(Page 14)**

If s. 137(5)(b) of the *Canada Business Corporations Act (CBCA)* is not eliminated as a result of the current government review, a legal test case should be supported to try to establish a precedent regarding the proper subject matter for a shareholder proposal that would be more accommodating to issues of corporate social responsibility.

RECOMMENDATION 2 **(Page 16)**

A coordinating mechanism for groups supporting changes to the shareholder proposal provisions in the *CBCA* and in provincial acts such as the *British Columbia Companies Act* should be established, with adequate secretarial support to ensure regular meetings and a process for sharing information.

RECOMMENDATION 3 **(Page 20)**

A handbook on proxy voting should be produced. It should provide a wide variety of examples of proxy voting guidelines on both corporate governance and social issues, and suggest procedures for handling proxy voting in different types of institutions.

RECOMMENDATION 4 **(Page 21)**

A process should be supported to encourage submissions by groups supporting socially responsible investment to the proposed Senate banking committee review of pension fund governance. Submissions should discuss the role of proxy voting guidelines and other proposals for encouraging pension funds and trusts in the exercise of socially responsible investment policies.

RECOMMENDATION 5 **(Page 28)**

Research on the governance of pension funds in Canada should be undertaken, with the goal of setting up a database of pension funds that are union controlled or jointly trusteed, or in which plan members play a significant role in decision-making (e.g., some church and university pension funds).

RECOMMENDATION 6 **(Page 30)**

A legal memorandum should be commissioned on the subject of the responsibilities and abilities of Canadian pension fund trustees as shareholders. The memorandum should summarize the criteria that can and should be used by pension fund trustees in their decisions to vote proxies, to initiate shareholder proposals or to generally undertake shareholder actions, all in the context of the fiduciary responsibilities imposed on them by statutory and common law.

RECOMMENDATION 7 **(Page 31)**

A Canadian benchmark index for social investors should be created. The index would be intended to provide a financial comparison between companies in the TSE 300 that have passed multiple, broad-based social screens and companies in the TSE 300 universe. As the market to support the costs of developing such an index is still very small, and the index would, in turn, contribute to the growth of the social investment movement, it would be appropriate and probably necessary to seek financial support for the start-up costs of such an index.

RECOMMENDATION 8 **(Page 44)**

The effort of unions in British Columbia to establish a pension asset database and other services such as workshops for union trustees should be monitored as a possible model for unions elsewhere as well as for pension funds in other sectors. If required, start-up financial assistance, e.g. matching funding, should be offered in view of the project's potential for encouraging more shareholder activism by pension funds.

RECOMMENDATION 9 **(Page 55)**

Increased effort should be made to encourage the ethical mutual funds to be activist shareholders. Steps might include:

- Ensuring the continued regular monitoring and publication of the funds' positions on various forms of active shareholdership;
- Annual monitoring of the funds' holdings in relation to shareholder proposals (both U.S. and Canadian proposals), and publication of the funds' responses to questions regarding how they voted on these proposals. This might be undertaken as a special time-limited project to raise awareness within the funds, and among ethical investors generally, of the need for active shareholdership by the funds.

RECOMMENDATION 10 **(Page 59)**

An effort should be made to obtain the investment portfolios of selected major public charities (e.g. health and environmental charities) and foundations, for the purpose of analysing them in relation to socially responsible investment objectives and providing the analyses to their boards, along with an invitation to a meeting to consider active shareholdership as a responsible investment option.

RECOMMENDATION 11 **(Page 64)**

Discussions regarding the establishment of a Common Fund to pool university or all charitable endowments should be monitored and responded to with respect to any opportunity for a responsible investment/active shareholdership commitment.

RECOMMENDATION 12 **(Page 69)**

A Canadian social issues proxy service should be established to provide Canadian investors with "shareholder alerts" about Canadian proposals on social issues. The service should also provide Canadian investors with easy and relatively inexpensive notice about U.S. shareholder proposals on social issues. As the provision of such a service may not be economically feasible until there is a larger Canadian market for it, consideration should be given to seeking a subsidy. The service would ideally be linked with one of the Canadian organizations currently working in the area of socially responsible investment.

RECOMMENDATION 13 **(Page 71)**

A guide to shareholder activism for corporate responsibility should be published. A model for such guide is provided in the British publication *The Shareholder Action Handbook: Using Shares to Make Companies More Accountable*. Such a publication would be useful not only to environmental groups and NGOs but to any organization considering shareholder activism.

RECOMMENDATION 14 **(Page 71)**

The SIO should sponsor a meeting of all groups interested in shareholder activism to consider options for networking and coordination, and to prepare a proposal to be considered by all potential network participants and by potential contributors to possible costs of establishing such a network. The costs of the initial meeting should be funded by the participating organizations. Consideration should also be given to preparing a proposal for a larger conference on shareholder activism in Canada and seeking funding for such a conference.

1

Mandate

THE PROJECT COMMISSIONED BY THE CANADIAN FRIENDS SERVICE COMMITTEE HAS AS ITS goal: "a feasibility study on how to facilitate the growth of shareholder activism in Canada as part of the larger socially responsible investment movement."

The following topics were to be included in the study.

1) "Review of the status of active shareholdership in Canada with respect to regulatory frameworks, groups working in the area, interest in the movement, and the success enjoyed by active shareholders in the past."

2) "Recommendations to facilitate the growth of shareholder activism in Canada as part of advancing the SRI agenda overall." The options for change to be examined include:

    a) public education;

    b) working for changes in the legal and regulatory framework;

    c) encouraging groups working in SRI to intensify their focus on this area; and

    d) creating social research products that facilitate the growth of active shareholdership.

It was agreed that it would be important to include in the study information about the growth of active shareholdership in the United States, and to a lesser extent the United Kingdom, in order to learn from their successes and failures. It was also agreed that the project should be action-oriented, rather than simply analytical. Because of this emphasis on action, the researcher prepared a brief for the federal government review of the *Canada Business Corporations Act*. The researcher also responded to requests for information from various individuals and organizations, in addition to those contacted during the research process.

The recommendations that emerge from this report would ideally be implemented through coordination provided by a single organization (existing or established). However, we have formulated recommendations that could be implemented on a more piece-meal basis and still make a significant contribution to the development of shareholder activism in Canada. The implementation of most of these recommendations would require some funding on a project basis.

2

Context

THIS STUDY WAS CONDUCTED WITH THE FOLLOWING QUESTION GUIDING MUCH OF THE research: Why is there so much more shareholder activism in support of financial goals, corporate governance, and most importantly, corporate social responsibility in the U.S. than in Canada? This question led to the realization that we need to distinguish public activism, which is more common in the U.S. than Canada, from activism behind the scenes, which takes place in Canada, the United Kingdom and the United States, the three countries reviewed.

In the initial stages of research the researcher reviewed the literature and interviewed people knowledgeable about the role of institutional shareholders in Canada, the U.S. and the U.K.[1] The most common response has been that differences between Canada and the U.S. in institutional activism are related to differences in the structure of the markets.

Institutional investors are corporate and public pension funds, mutual funds, banks and near banks, insurance companies, and public and private endowments. In the U.S. these investors held 53 per cent of the equity market in 1992. In Canada institutional investors held 35 per cent of the equity market in 1993 (Patry and Poitevin 1995, 351).

In both Canada and the U.S., the size and power of institutional investors has increased substantially over the past 30 years. In both countries, as well, this increase has been accompanied by awareness of corporate governance problems and the potential benefits shareholders could derive from a louder institutional "voice."

The interest in Canada in corporate governance and the protection of minority shareholders is reflected in the *TSE Report on Corporate Governance*, the *Corporate Governance Standards* of the Pension Investment Association of Canada, the *Proxy Voting Guidelines* of the Toronto Society of Financial Analysts, and the corporate governance guidelines of several major investors. As well, Fairvest Securities Corporation has developed a score card on corporate governance of Canadian corporations.

While decisions to "vote with their feet," sometimes called the "exit mechanism," have become less attractive to large institutional shareholders in both the U.S. and Canada, the use of the "voice mechanism," or institutional activism, is less usual in Canada than in the U.S. This relative lack of institutional

activism appears puzzling, given the fact that the Canadian equity market has less liquidity than the U.S. market (Patry and Poitevin 1995,351).

The reasons for a relative lack of institutional activism appear to be related to the structure of the market. Canada has higher levels of share ownership concentration, and highly interconnected and interdependent corporate ownership.

In Canada in 1994, 60 per cent of the largest Canadian non-financial corporations listed on the *Financial Post 500* were wholly owned or effectively controlled by a single shareholder. Only 16 per cent could be considered widely held (Patry and Poitevin 1995, 352). In contrast, 63 per cent of *Fortune 500* firms are widely held (Daniels and MacIntosh 1991, quoted in Patry and Poitevin 1995, 352).

Canadian corporations also have a high level of cross-ownership. Of the top one hundred most profitable companies in Canada in 1987, close to 45 per cent held 10 per cent or more of the voting shares of another company on the list (Daniels and MacIntosh 1991, quoted in Patry and Poitevin 1995, 353).

> Through cross-ownership and inter-linked directorships, a few large groups have spun an intricate web of relationships that allows these groups to exercise extensive control over the largest enterprises of Canada....
>
> This networking effect has many implications for the potential role of institutional investors. First, it is a source of the relative lack of liquidity in the equity market in Canada. This raises the cost of exit and might lead one to think that, as in Japan and Germany where liquidity is lower and interconnectedness higher than in the United States, Canadian institutional investors would be induced to play a more active role. Second, interlocking directorships create circumstances in which managers can assist each other to entrench themselves further, which makes disciplining corporate managers much more difficult since no one wants to "rock the boat." Third, the extensive control and power wielded by a few large groups or families increases the severity of the penalty that a disgruntled management could impose on an unsettling institutional investor (Patry and Poitevin 1995, 353, 3540).

Barriers to Canadian institutional involvement which are related to these features of the market structure have been identified (Montgomery 1996). They include:

- Lack of time, resources and the knowledge required for effective monitoring and shareholder action. Institutional shareholders in Canada are not as well organized as those in the U.S. and U.K., where there are several organizations promoting good corporate governance and facilitating the monitoring of corporations. Organizations such as Fairvest Securities Corporation and the Pension Investment Association of Canada are becoming established, but coordination among institutional shareholders is generally informal.
- Legal and regulatory constraints that make it difficult for shareholders to identify each other, communicate concerns and coordinate with each other.
- Conflict of interest pressures which arise when institutions have commercial relationships with companies in which they invest.
- Dislike of publicity associated with shareholder activism.

- Management resistance to the disclosure of information to shareholders who may be invested in competing corporations; and to intervention from institutions it views as transitory investors with short-term outlooks.

While there are barriers to institutional activism in Canada, a recent survey found that institutions themselves believe not only that activism has increased substantially over the last ten years, but that it will continue to increase in the future (Montgomery 1992, 11,12). Just under half (49 per cent) of institutions surveyed indicated that they would likely sell when in strong disagreement with the direction taken by management. However, several developments make selling a less attractive response to poor corporate performance, and heighten institutional interest in corporate governance (Montgomery 1996, 191, 192):

- Strong growth in funds managed: Demographic trends favour retirement savings with a higher proportion of savings being managed by professionals.
- Concentration of ownership: As institutions' share of equity capital increases, they have less overall liquidity, increasing the cost of exit and their interest in control. Estimates suggest that 50 or 60 per cent of the shares of widely held companies traded in deep markets in Canada are held by institutional owners. Increased concentration of ownership by institutions has resulted in larger individual positions and thinner equity markets with increased volatility, as the buying and selling of large blocks of shares disrupts the market and affects stock prices.
- Fewer investment opportunities: Restructuring has reduced the number of public companies in which institutions invest, and some restrictions still apply which limit non-Canadian investment alternatives.
- Growing popularity of index funds: Indexing creates a class of "permanent" shareholders.
- More competition in fund management: With growing professionalism in investment, the basis for evaluation is not only investment performance, but how effective the fiduciary is in safeguarding the investment.
- Regulatory changes: Some measures have been taken to increase protection of minority shareholders and enhance collective action.

It is not clear whether these developments will encourage public expressions of disapproval and activism, or simply more of the private consultations with management that are currently preferred by Canadian institutions. The most overtly active institutions have been the public pension funds, perhaps because they tend to be immune from management pressure. Other sectors where activism might be expected have been quiet. In the U.K., insurance companies are the most active of all institutional investors. In Canada, despite significant equity holdings, relatively long investment horizons, and a comparatively small need for liquidity, they have not been active (MacIntosh 1996, 180).

It is within this context of limited (although growing) institutional activism on corporate governance issues that we can best understand the relative lack of Canadian shareholder activism on social and environmental issues. Canadian shareholders concerned about corporate social responsibility have had to take the lead not only in raising social and environmental issues, but also on the corporate governance changes needed to protect the rights of minority shareholders.

Shareholder activism on issues of corporate social responsibility can involve many types of action: letter writing, meeting with management, participation in annual meetings, proxy voting, filing shareholder proposals. A broader range of actions is available to large institutional investors who have the power to claim board seats, or who can afford the costs of proxy control fights, proxy campaigns against management proposals, appeals to regulatory agencies or legal intervention.

Letter writing, meetings with management and participation in annual meetings are useful, but lose their effectiveness in situations where management knows that the shareholder has no recourse to the shareholder proposal mechanism through which other shareholders can be reached. The "core" shareholder rights on issues of social responsibility are the right to vote and to file shareholder proposals. It is on these that this study primarily focuses.

Our study begins with a general review of the use of the right to file shareholder proposals and to vote in Canada, the U.S. and the U.K. It then reviews shareholder activism in each of the following institutional sectors: churches; pension funds (private sector union funds and public sector funds), ethical mutual funds; universities; foundations and charities; and environmental and other NGOs. It concludes with a brief review of shareholder advisory and coordinating organizations. The sectors chosen for review are those in which there has been some interest in socially responsible investment, but not necessarily in shareholder activism.

The study focuses on shareholder activism, which is only one component of the larger socially responsible investment movement. We have not attempted to systematically review and compare the other forms of socially responsible investment in Canada, the U.S. and the U.K., (e.g. screened or ethical investment). However, we do note policies of some of the institutions we review regarding ethical screening policies for stock market investments as they relate to their policies on voting and filing shareholder proposals.

It was revealing, but not surprising, that a large majority of those interviewed assumed initially that the project was about screened investment, despite a careful introduction of the subject matter. This, of course, reflects the lack of success shareholder activists have had in communicating the message that socially responsible investment includes both screened investment and active shareholdership.

The reasons for the preoccupation of the Canadian socially responsible investment movement with screened investment are difficult to ascertain. The general lack of institutional activism (as discussed above) is probably the major factor. The lack of a visible regulatory forum for encounters between shareholder activists and corporations such as exists in the U.S. Securities and Exchange Commission (SEC), may be another.

It is also possible that the introduction of the shareholder proposal mechanism at a time when the anti-apartheid campaign was the major issue on the corporate social issues agenda affected perceptions of its usefulness. The shareholder proposal mechanism was available to Canadian minority shareholder activists only after changes to the legislation in 1980. In 1982, churches filed the first proposal in Canada regarding Alcan's investment in South Africa. Given the unfamiliarity of the shareholder proposal mechanism, and institutional resistance to using it, most anti-apartheid activists outside of the churches gave their attention to divestment strategies in relation to Canadian investment in South Africa. Divestment was the "hassle-free" alternative for institutions under pressure from their constituents about their South African investments. As well, for some of the church activists, as well as for activists in other sectors, the "clean hands" approach of divestment best expressed their moral outrage over apartheid. Responsible investment came to be defined as an investment portfolio made up of "good" companies.

3

Shareholder Proposals

THE FILING OF SHAREHOLDER PROPOSALS IS A CORNERSTONE OF SHAREHOLDER ACTIVISM. Participation in the question period of the corporation's annual meeting has limited effectiveness because it does not allow for communication with the vast majority of the shareholders. Other forms of shareholder action such as writing letters to the company or requesting a meeting with management may meet with an unresponsive company, unless it knows that its lack of response may result in the submission of a formal shareholder proposal.

United States

Canadian legislation on shareholder proposals compares unfavourably with U.S. legislation. The U.S. system was the inspiration for many of the suggestions in a brief we submitted in June 1996 to Industry Canada (Michael Jantzi Research Associates 1996). However, the U.S. system is also under considerable pressure. The Interfaith Centre on Corporate Responsibility has been coordinating a campaign to try to prevent the erosion of shareholder rights in the U.S.

The SEC has recently been making administrative rulings against the circulation of proposals that previously were considered legitimate subject matter. Of particular concern are its decisions to allow some companies to exclude proposals that focus on operations in countries such as Burma. The SEC says these resolutions are excludable when the companies do less than five per cent of their business in Burma and the issue is not "otherwise significantly related to the companies' business." If the SEC had taken this position in the 1980s, shareholders would never have been able to bring resolutions to most of the companies investing in South Africa.

The SEC has also been excluding proposals on workplace issues, arguing that they are "ordinary business." For example, rulings have excluded some resolutions related to discrimination in employment in the U.S., Northern Ireland and Mexico, and international codes of conduct. The SEC stance has led to absurd situations. This year, the SEC took no action when Shoney's excluded a resolution on its equal employment

opportunity record that gained an impressive 20 per cent of the vote last year, even though the company spent over $125 million of the shareholders money to settle discrimination suits (Billenness 1996a, 1).

The Council of Institutional Investors attempted to work out a consensus package of reforms to the SEC, but failed. A committee of institutional shareholders and corporate representatives was unable to agree on a proposal to eliminate the "ordinary business" and "five per cent of business" grounds for exclusion in exchange for rules that would limit the numbers of proposals any one company would have to include in its proxy circular, raise stock ownership requirements, and raise the threshold for resubmitting proposals (O'Hara 1995a, 10).

Pressure from companies concerned about the growing success of shareholder resolutions is having an effect on SEC commissioners and staff who joined the agency during the Reagan and Bush administrations. U.S. shareholder activists are therefore seeking political support and favourable regulation from the Clinton administration. The fact that the legislation to review shareholder proposal legislation in Canada is under review at a time when these rights are under attack in the U.S. can only make it more difficult to improve the legislation in Canada.

United Kingdom

In the United Kingdom, shareholders rights in relation to proposals are very limited. Shareholders may requisition a resolution to be proposed at the annual meeting, but the requisition must be made by any number of shareholders representing at least five per cent of the company's total voting rights, or not less than 100 shareholders with an average shareholder per member worth not less than 100 pounds. The proponents may require the company to circulate a statement of not more than 1,000 words with respect to the proposal but the company may charge the shareholders the cost of circulating the proposal. The possible expenses have been a deterrent to shareholders. The cost of circulation of a resolution has been estimated at 50,000 pounds for most listed companies, and up to 100,000 for companies with large registers (Younghusband 1996).

Despite these difficulties, in 1995 there were twelve shareholder resolutions circulated at five companies, up from three in 1994. All of the proposals were on corporate governance issues. According to the organization Pensions Investment Research Consultants (PIRC):

> This is a break with the British tradition of private negotiation between companies and institutions, marking a new stage in development of the UK's shareholder democracy (PIRC 1995).

The mechanism by which shareholders may propose resolutions in the U.K. could be subject to change. The Cadbury Committee on the Financial Aspects of Corporate Governance said in 1992 that if there was sufficient support "from the shareholder body as a whole," the subject should be reviewed by its successor committee. A successor committee was due to be convened in late 1995 (PIRC 1995).

Because of the obstacles to circulating shareholder proposals in advance of the annual meeting, the only current option is to present a shareholder proposal at the company's annual general meeting. This option, as in the U.S. and Canada, means that most shareholders have no opportunity to vote, as they don't attend the meeting and have delivered their proxies to the directors.

Canada

Because we have no national securities commission in Canada, the legislation of provincial governments as well as federal legislation is of concern to us. A review of the legislation in every province is beyond the scope of this study. We focus instead on the issues that have been identified by shareholder activists in relation to the federal legislation, the securities commissions of Ontario and Québec in relation to the U.S. security commission, and legislation in Ontario and B.C.

Review of the *Canada Business Corporations Act*

Most companies would like nothing better than to get rid of shareholders who ask questions, and particularly those who file shareholder proposals. One of the most frequent responses shareholder activists on social issues initially receive from companies is: "If you don't like what we're doing, why don't you sell your shares?" It is for this reason that the current review of the *Canada Business Corporations Act (CBCA)* is of vital importance to shareholder activism in Canada. Major Canadian companies through a "Coalition for *CBCA* Reform" have proposed limiting the scope of shareholder proposals even more drastically than under the present legislation.[2]

When we began our research in the spring of 1996, hearings of the Task Force on Corporate Governance of the Senate Committee on Banking, Trade and Commerce had already concluded. The mandate of the Committee was to review the broad strategic questions related to the review of the *CBCA*. However, we were in time to make an informal submission to Industry Canada in June 1996 (Michael Jantzi Research Associates 1996), prior to the release of its final discussion paper (July 1996) before drafting legislation (Industry Canada 1996). The purpose of our submission was to review the history of the use of shareholder proposals in Canada, and make some concrete suggestions for amendments to the sections of the *CBCA* regarding shareholder proposals. The July 1996 Industry Canada discussion paper incorporated most of these suggestions as "options," although without recommendation.

We then prepared a formal brief, submitted in August 1996 as a response to the Industry Canada discussion paper (Canadian Friends Service Committee 1996). The brief was submitted on behalf of the sponsor of this project, the Canadian Friends Service Committee (CFSC). It was also reviewed by representatives of other interested groups (the Social Investment Organization, Democracy Watch, Michael Jantzi Research Associates, Fairvest Securities Corporation), and endorsed in principle by the Taskforce on the Churches and Corporate Responsibility (TCCR).

The informal submission and the brief to Industry Canada were based largely on TCCR's experience and efforts to strengthen shareholder action in Canada as part of the larger socially responsible investment movement. TCCR efforts over the last ten years to persuade Canadian governments to encourage shareholder activism on social issues may finally bear fruit. This is the first major government review of the *CBCA* since 1980. TCCR submitted briefs to Industry Canada (formerly Consumer and Corporate Affairs) and securities commissions, met with representatives of the government, and participated in the round table discussions related to current review.

The tentative timetable for the next stages of the policy process is that draft proposals will go to the Minister by the end of 1996 and legislation will be tabled in the spring of 1997. In view of the likelihood of a fall 1997 election, it may be late 1997 or 1998 before there are committee hearings on proposed legisla-

tion. However, expressions of interest and opinion from concerned shareholders will be helpful at any time before that, despite the "official" deadline of August 1996. Submissions from other groups to Industry Canada should be encouraged.

Shareholder activists seeking legislative changes should also note that Canadian bank legislation contains the same restrictive provisions regarding shareholder proposals as does the *CBCA*. Canadian banks have made use of these provisions to refuse to circulate shareholder proposals (see Appendix A).[3]

The submissions to Industry Canada identify the provisions of the *CBCA* that have been used by corporations as justification for refusing to circulate shareholder proposals in the proxy circular. The provision most frequently used is s. 137(5)(b), which permits a corporation to exclude a proposal if the corporation believes it is submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes." The broad interpretation of this clause by the courts in 1987 in *Re Varity Corp. and Jesuit Fathers of Upper Canada et al.* encouraged corporations subsequently to exclude almost any proposal addressing issues of corporate social responsibility.

The wording of the shareholder proposal in the Varity case was not prepared with the possibility of a court challenge in mind. Slightly different wording in the proposal might have led to a different judgement. However, shareholders submitting proposals since then have not had the financial resources to go to court to challenge corporate decisions to exclude their proposals. Thus, the precedent established in the Varity case gives companies an easy justification for excluding almost any proposal submitted.

RECOMMENDATION 1

If s. 137(5)(b) of the *Canada Business Corporations Act* is not eliminated as a result of the current government review, a legal test case should be supported to try to establish a precedent regarding the proper subject matter for a shareholder proposal that would be more accommodating to issues of corporate social responsibility.

Ontario

Ontario's legislation was revised in 1981 to reflect recent changes in the *CBCA*. In particular, the government proposed a change to make it possible for minority shareholders to present resolutions without holding a minimum of five per cent of the voting shares. TCCR submitted a brief supporting this change, and as well took issue with the loosely defined conditions under which a corporation could reject a minority shareholder resolution. TCCR suggested that the onus be placed on the refusing corporation to show cause and that some arbitrator other than the courts be designated to deal with such issues. An expert on the proxy system later commented favourably on this proposal, stating that it is unfortunate that no legislative changes were introduced and that the reasons for not doing so were not publicly discussed (Crête 1986, 143-244). This proposal was repeated in the Canadian Friends Service Committee submission of August 1996 to Industry Canada.

In addition, the brief asked for consideration of the rules of the SEC regarding the resubmission of defeated shareholder proposals. The new legislation also ignored this proposal, and there has been no further review of the legislation.

Ontario, Québec and U.S. Securities Commissions

In 1992 the Ontario, Québec and U.S. securities commissions agreed to a change in securities policies so that companies meeting certain guidelines would be governed by the rules of their home country when they offered securities across the border. Prior to this, Canadian companies had been required to submit to the rules of the U.S. Securities and Exchange Commission (SEC) if they sold shares in the U.S. It was this requirement that had protected shareholders when Varity Corporation in 1987 applied successfully to a Canadian court for permission to exclude a shareholder proposal from its proxy circular. The SEC required that Varity circulate the proposal, despite the Canadian ruling.

TCCR made representations to the Ontario, Québec and U.S. securities commissions regarding the *Proposal for a Multijurisdictional Disclosure System* without effect. The price of whatever administrative simplicity was achieved by the new system was soon evident. Northern Telecom refused to circulate a shareholder proposal which would have been circulated under SEC rules. Corporate information on subjects such as executive compensation was no longer available. It had previously been provided to shareholders by Canadian companies complying with SEC disclosure rules.

Widespread pressure from institutional investors led the Ontario government to pass its own legislation improving disclosure requirements, but there was no support from these investors or the government for strengthening the shareholder proposal mechanism. It appeared, however, that the issue might be important to U.S. investors. The Investor Responsibility Research Center (U.S.) stated at the time that U.S. pension funds might be deterred from investing abroad if shareholder rights were restricted. The interest of the U.S.-based Council of Institutional Investors in the lack of a shareholder proposal provision in *B.C. Companies Act* (see below) substantiates that there is U.S. investor concern about the rights of shareholders abroad.

British Columbia

The proposal rule in B.C. is linked to the conditions for requisitioning the holding of a meeting. Shareholders of five per cent of the shares can requisition their own meeting. Not only does this effectively rule out proposals from most minority shareholders, but it creates other problems. The shareholders may have to bear the costs of a separate mailing to shareholders, as well as the costs of the meeting (Welling 1984, 487-488.)

The B.C. legislation thus prevented shareholders from filing and circulating proposals to Fletcher Challenge in 1989 (regarding logging the Stein Valley), and in 1994 (requesting an environmental report from MacMillan Bloedel).[4]

TCCR and the Pension Investment Association in Canada (PIAC) wrote to the B.C. Minister of Finance in 1995 urging amendment to the *B.C. Companies Act* to provide for shareholder proposals. TCCR also communicated with the U.S. Council of Institutional Investors, which responded that it found the

absence of a shareholder proposal mechanism in B.C. "disturbing," and offered further assistance. Fairvest Securities Corporation, in its *Corporate Governance Review* (December 1995/January 1996) reported favourably on PIAC's action. It added the comment that "the *Canada Business Corporations Act* and other key provincial company acts all provide for shareholder proposals, although the restrictions imposed on shareholder proposals in these acts are somewhat onerous."

The B.C. government responded that it was addressing the issue, but its initial position was still very restrictive and suspicious of shareholder interest.

> One of the changes being considered would be to permit *substantial shareholders* [emphasis added] in British Columbia companies to make proposals at annual general meetings.... I hope the provision in the [forthcoming] discussion draft address your concerns, *while still ensuring that companies can conduct annual general meetings in an orderly and efficient manner* [emphasis added]. (Letter from the Minister of Finance and Corporate Relations, April 29, 1996, to TCCR.)

Amendment of the Canadian, B.C. and other provincial corporations acts and the *Bank Act* to support the socially responsible investment movement will require that a much wider range of investors and interested groups than those previously involved (primarily the churches) make their views known. This is already happening to some extent in B.C.[5]

An effort should be made to hold regular meetings or provide a regular communication forum for representatives of groups interested in shareholder activism, coordinated on a consistent basis by one of the participants. The Social Investment Organization (SIO), at a meeting convened by the Canadian Friends Service Committee in August 1996 to review the Industry Canada discussion paper, expressed tentative willingness to facilitate regular meetings. However, its capacity to play this role needs further discussion and confirmation.

RECOMMENDATION 2

A coordinating mechanism for groups supporting changes to the shareholder proposal provisions in the *Canada Business Corporations Act* and in provincial acts such as the *British Columbia Companies Act* should be established, with adequate secretarial support to ensure regular meetings and a process for sharing information.

4

Proxy Voting

THE EXERCISE OF THE SHAREHOLDER VOTE IS AS IMPORTANT AS THE RIGHT TO CIRCULATE shareholder proposals in the exercise of shareholder responsibility for corporate actions. Investors need to be encouraged to vote their proxies, rather than simply allowing management to vote for them.

In the U.S., 70 to 80 per cent of shares are voted (PIRC 1995b, 12). Among the top 250 companies in the U.K., the average number of voted shares is only about 35 per cent, with 90 per cent of companies having a voting level of 52 per cent or less (PIRC 1995b, 12; Stapledon 1995, 148). We did not find any statistics for Canada.

Efforts to encourage responsible use of the shareholder vote have included campaigns for the adoption by corporations of confidential voting policies, opposition to unequal or subordinate voting shares, and a call for disclosure by corporations to shareholders of voting results.

Socially responsible investors are giving increased attention to the question of how institutional investors, particularly pension funds, can be held accountable for their vote to their members or beneficiaries. It is important that institutional investors promote the development of proxy voting guidelines and the establishment of processes for reporting on the way proxies have been voted and the reasons why.

United States

In the U.S., the Department of Labor (DoL) requires pension funds to exercise their shareholder rights. In 1994, it issued regulations on voting proxies, monitoring corporate performance, and communication with management. It stated that the managing of plan assets must include the voting of proxies on matters that may affect the value of the stock. Where responsibility for voting proxies is delegated to an investment manager, plan sponsors are *required by law* to monitor proxy voting by their managers. This means that managers should keep records showing how items on the proxy were voted, as well as documenting why the vote was cast as it was (Zanglein 1991, and Zanglein 1995, 127-150).

These principles apply to pension funds' foreign as well as domestic holdings, with the result that companies based in countries such as Canada and the U.K. can expect increased levels of shareholder activism from their U.S. investors. This will, no doubt, have some impact on the level and style of activism by Canadian pension funds and other institutional investors

United Kingdom

In the United Kingdom, there is no legal obligation for pension fund trustees to vote Stapledon 1995, 155). Pension funds, which hold almost 35 per cent of the listed U.K. equity market, use external rather than internal investment managers. The low level of pension fund voting has been attributed to practical difficulties for external managers related to complications in the delivery of proxy forms, as well as strong economic disincentives for managers to expend resources on any form of monitoring, including voting.

Among the top 250 companies in the U.K., the average number of voted shares is only about 35 per cent, with 90 per cent of companies having a voting level of 52 per cent or less. Critics say that all the mechanisms and services for monitoring company resolutions and highlighting areas of contention are in place in the U.K., so that institutions have little excuse for not voting.

To remedy the situation, it has been suggested:

> Perhaps the best way forward is to rely less on institutional good faith than on legislative action. If diligent voting were a fiduciary duty for investors (as it is in the United States under the *ERISA* law), we might expect more rapid improvements (PIRC 1995, 12).

Others, however, are opposed to a compulsory voting rule. They cite evidence that in the U.S. some external fund managers have created formalised procedures and voting guidelines that are basically window-dressing, and that the government regulator lacks the resources for enforcement (Stapledon 1995, 151-152).

A new *Pensions Act* was passed in 1995, and provided the occasion for a debate about the question of mandatory proxy voting. Amendments to require mandatory proxy voting were put forward by Lord Haskel, Labour spokesman for trade and industry, but in the end were defeated (Gerson 1995).

Canada

The importance of the vote in the exercise of responsible investment has been addressed by Canadian shareholder activists primarily through work on policies on confidential voting and proxy voting guidelines.

Confidential Voting

The confidential voting issue was first raised in Canada by church shareholders in the Canadian Imperial Bank of Commerce. In 1983 the *Globe and Mail* revealed that management had been contacting shareholders to "verify" whether they had meant to support a church shareholder proposal on disclosure of sovereign loans. As a result, in 1984, the church shareholders filed the first shareholder proposal on confidential voting in Canada. In the following year they also discussed the issue with the Royal Bank and Alcan, both of which agreed to adopt policies.

In 1991-92, the growing interest of other institutional investors in confidential the subject encouraged shareholder discussions with a large number of companies. Most companies agreed to adopt policies, making the circulation of a shareholder proposal on the subject unnecessary. A shareholder proposal on confidential voting to Placer Dome received a stunning 51.05 per cent of the vote. It is believed to be the first time in Canada that a vote has gone against management of a major corporation. The proxy voting guidelines of investors such as the Ontario Teachers' Pension Plan Board and the Ontario Municipal Employees Retirement System now include statements of support for confidential balloting.

Proxy Voting Guidelines

The concern over the value of the shareholder vote also led service organizations such as the PIAC and TCCR to promote the development of proxy voting guidelines.

PIAC issued its statement, *Corporate Governance, Performance and Fiduciary Responsibility*, 1995, to help clarify that fiduciaries have a legal duty to ensure that proxies are voted in the best interests of fund beneficiaries, and that there is a positive link between good governance and good corporate performance. The PIAC corporate governance committee had found "too often that proxy voting is conducted by an agent on behalf of the fund without the pension investment executive monitoring the voting" (Fairvest 1995,1).

PIAC's interest is in guidelines for voting on corporate governance issues. TCCR's interest included the development of guidelines or a process for determining the shareholder vote on social and environmental as well as corporate governance issues. It had often found that institutional shareholders whom it might have assumed would support shareholder proposals on issues of corporate social responsibility had, carelessly or unknowingly, voted with management. These institutions had issued no guidelines to the investment managers or others who voted their proxies. In fact, TCCR found that while some of its own members had developed proxy voting guidelines, not all had done so.

To encourage its own members, TCCR prepared a short statement on *The Case for Proxy Voting Guidelines* and a guide, *Proxy Handling Procedures.*

While most other institutional proxy voting guidelines deal only with corporate governance issues, there are some notable exceptions in the U.S. These include the AFL-CIO guidelines (discussed below in the section on unions) and Domini Social Equity Fund guidelines (discussed below in the section on mutual funds). In Canada, the Ontario Teachers' Pension Plan's proxy voting guidelines rule out any possibility of supporting proposals in favour of social and environmental initiatives.

The development of a resource to assist socially responsible investors who would like to promote the development of proxy voting guidelines and processes in their own institutions (e.g. pension funds and mutual funds) would be helpful.

RECOMMENDATION 3

A handbook on proxy voting should be produced. It should provide a wide variety of examples of proxy voting guidelines on both corporate governance and social issues, and suggest procedures for handling proxy voting in different types of institutions.

Regulatory Requirements

While the voluntary development of proxy voting guidelines is to be encouraged, the need for accountability by pension funds, in particular, appears to invite regulatory requirements. Such requirements exist in the U.S. and are under discussion in the U.K. A regulatory requirement would address the problem that many pension funds were ignoring what PIAC had defined as a legal duty in regard to proxy voting. A 1992 PIAC survey showed that only 56 per cent had proxy voting guidelines.

TCCR initiated discussion of amendments to regulations of the *Ontario Pension Benefits Act* in 1992. The purpose of the suggested amendments was to require trustees to provide guidelines for voting and accountability for the exercise of that responsibility. It was predicated on the assumption that the shareholder vote has value and the trustees are responsible for the value of the asset they administer. Following discussions with the Ontario Pension Commission, TCCR submitted a formal proposal to the Ontario Minister of Finance. It proposed that regulations related to the *Ontario Pension Benefits Act* be revised to require that a pension plan's statement of investment policies and goals include a description of the criteria to be applied in the exercise of voting rights. It also proposed that plans with more than 25 members be required to keep a record of proxy voting for the current year.

The Minister of Finance replied (February 1, 1993):

> Given that only a small minority of proxies involve other than routine corporate matters, I am concerned that the benefits to be derived from a new information requirement of the nature proposed ... would not be sufficient to justify the considerable costs it would entail for both pension plan sponsors and the government as regulator.

Further correspondence in 1994 produced no change in the government's position.

The development of proxy voting guidelines and a process for reporting to beneficiaries on their implementation is important for the development of institutional investor accountability and will strengthen the credibility of shareholder activism, including activism on social issues, as an ingredient in the exercise of fiduciary responsibility. As Edward Waitzer told the Senate Committee on Banking:

> A traditionally proffered response to governance concerns has been the prospect (and emerging reality) of increased shareholder activism.... However, leaving aside the usually cited barriers to such activism, we need to concern ourselves with a mirror-image monitoring/accountability concern with respect to such institutional investors themselves viz. their beneficial owners.... Governance (as well as other) issues merit attention with respect to corporate and public sector pension funds as well. Duties should be clarified and disclosure to beneficiaries improved upon (Waitzer 1996).

The Senate Banking Committee announced in August, 1996 that it intends to undertake studies and hearings on the governance and accountability of Canadian pension funds and other institutional investors (McFarland 1996). This will provide an important opportunity to encourage policies that encourage these institutions to become active, socially responsible investors.

RECOMMENDATION 4

A process should be supported to encourage submissions by groups supporting socially responsible investment to the proposed Senate banking committee review of pension fund governance. Submissions should discuss the role of proxy voting guidelines and other proposals for encouraging pension funds and trusts in the exercise of socially responsible investment policies.

5

Churches

IN BOTH CANADA AND THE UNITED STATES THE CHURCHES HAVE BEEN THE LEADERS IN active shareholdership within the socially responsible investment movement. While shareholder activism is much less developed in the U.K., the churches have been pioneers there as well.

The church corporate responsibility coalitions in the three countries, while somewhat different in mandate and structure, have worked together in various ways. Their most significant joint achievement was the publication of *Principles for Global Corporate Responsibility: Benchmarks for Measuring Business Performance*. They are currently working to encourage worldwide discussion of the Principles.

Because the churches have been so prominent in active shareholdership, it would be easy to devote the bulk of this report to a history of their involvements. However, the purpose of this report is primarily to account for the lack of active shareholdership in other sectors in Canada, and to suggest how this might be changed. A brief history of the churches' role will be provided, but the emphasis of the analysis will be on what can be learned from some comparisons, and from the various efforts of the TCCR to encourage active shareholdership in other sectors.

Interfaith Center on Corporate Responsibility (ICCR)

Religious investors in the U.S., concerned about holding corporations socially accountable, joined together in 1971 in The Corporate Information Centre, ICCR's predecessor.[6] The Vietnam war was one catalyst, leading to the centre's publication of *Major National Church Agency Investments in Top 60 Prime Military Contractors*, examining Protestant church investments. In the same year, the Episcopal Church filed the first religious investor shareholder resolution calling on General Motors to withdraw from South Africa.

In 1972 the Corporate Information Centre and the Interfaith Committee for Social Responsibility in Investments merged to become ICCR. The coalition now includes 275 Protestant, Roman Catholic and Jewish investors, including national churches, religious communities, dioceses (regional church structures) and health care corporations.

In 1995-96, over one hundred ICCR-member religious investors submitted 185 shareholder resolutions to 126 companies. ICCR identified an additional 53 resolutions on social and environmental issues sponsored by other organizations and individuals.

ICCR's summary of its achievements in 25 years focuses on its work on South Africa, global corporate accountability (the PEPSICO disinvestment from Burma, Starbucks code for agricultural workers, and the Maquiladora code of conduct are among many examples), international health and tobacco, equality (e.g. equal employment opportunity, board diversity), militarism and environment (partners in developing and promoting the CERES principles).

The Ecumenical Committee for Corporate Responsibility (ECCR)

ECCR was established in 1989 by a group of Christians in the U.K. who were involved in their churches' aid agencies, industrial missions and church social justice programmes. It is not an "authorised" church structure (as are ICCR and TCCR) in the sense of having a charter from the various denominations, although it does have status as an associate of the Council of Churches for Britain and Ireland. In addition to individual members, it also has a large number (70 plus) of corporate associate members, including The Religious Society of Friends, the Methodist Church Division of Social Responsibility, the Baptist Union of Great Britain, various Anglican diocesan committees, and various Roman Catholic religious orders. According to its 1995-96 annual report, it is seeking "ownership by the churches themselves and a direct hand in studying the impact of their investments and holdings" (ECCR, 1996).

ECCR focuses primarily on British-based transnational corporations. It has studied a wide variety of issues, including environmental protection, diversification or conversion in the defence industry, employment of ethnic minorities, and the implications of Sunday trading for employees in the retail trade. ECCR considers its major achievement to be the building of an international network which includes India, South Africa, Brazil and the Philippines, as well as the U.S., Canada and Europe.

Although it is extremely difficult in the U.K. to file shareholder proposals, the Oxford ECCR Group prepared a shareholder proposal to Shell in 1995-96 regarding the company's environmental standards internationally, especially in Nigeria. Members of ECCR met with the company several times to discuss the issues and a member visited the Niger Delta. Under U.K. law there have to be 100 shareholders signing a resolution. The coalition got 96 signatories before the deadline for the publication of the agenda for the meeting.

Taskforce on the Churches and Corporate Responsibility (TCCR)

TCCR was established in 1975 to assist the participating churches, church agencies and religious orders to acquire and share research, and to develop strategies for addressing issues related to the social responsibility of corporations. By 1994, TCCR members included the Anglican, Evangelical Lutheran, Presbyterian and United churches; the Canadian Conference of Catholic Bishops; twenty-two religious orders and associations of religious orders and two consultative members.

The agenda in the early years focused on the impact of Canadian investment on human rights in southern Africa and Latin America and related policies of the Canadian government. In addition, TCCR undertook research and advocacy regarding government regulation of corporate structures, beginning in 1976 with briefs to the Royal Commission and Corporate Concentration, and on proposed revisions to the *Bank Act*. Later, the geographic and corporate focus was expanded, and the thematic focus was broadened to include energy and environmental issues (particularly in relation to aboriginal peoples) and economic justice (particularly international debt).

Attention throughout was given to the churches' own investment policies and practices, the development of ethical and alternative investment services, and to corporate governance issues affecting corporate accountability and shareholder rights. Differences between the TCCR and ICCR mandates and styles of operation may have contributed to, or perhaps simply reflect, the different experience with shareholder activism in the two countries.

First, TCCR is more involved than ICCR in research and advocacy concerning the government's role in relation to the corporate issues being addressed. For example, TCCR was the only forum for the churches' ecumenical work against apartheid until the mid 1980s, which meant that its members saw a focus on Canadian government policy as significant as a focus on corporate policy. The dual focus may also reflect a different (Canadian?) orientation to the role of government in relation to issues of corporate social responsibility.

Second, TCCR had to rely on its own primary research in corporate campaigns, given the lack for many years of other corporate research in Canada. It also responded to huge numbers of requests for corporate information. In the U.S., there appeared to be many more complementary research and advocacy resources, and therefore more capacity to expand the corporate agenda for shareholder action. In contrast, TCCR is able to put only a handful of corporations on its agenda at any one time.

TCCR made considerable effort, despite limited resources, to encourage shareholder activism in other constituencies, promote and respond to the growing interest in ethical investment, and answer requests for corporate information from investors and other activists. The establishment of the SIO relieved some pressure on TCCR to provide individuals and groups with information on ethical and alternative investment, and the establishment of corporate research services by Ethicscan and Michael Jantzi Research Associates relieved some of the pressure for corporate information. These organizations did not, however, attempt to play a role in promoting or coordinating shareholder activism initially.

The shareholder proposal mechanism was accessible generally to socially responsible investors in Canada for only eight years. Minority investors with less than five per cent of a company's shares could not file proposals until after the 1980 revisions to the *Canada Business Corporations Act*. Investors could attend annu-

al meetings and participate in the question period, but they had to depend on the unpredictable business press to communicate their message.

The Varity Corporation court case established a restrictive precedent in 1987, making it easy for companies to refuse to circulate proposals. After 1988, only two social responsibility proposals and six corporate governance proposals were circulated in Canada. In response to social issues proposals, companies in some cases refused circulation. In other cases, a degree of accommodation was reached and the proposal withdrawn. With the knowledge that companies could simply refuse to circulate a proposal, the churches no longer considered certain topics for shareholder proposals. Other interested groups simply abandoned the idea of using shareholder proposals to address issues of corporate social responsibility.

In contrast, U.S. churches had consistent access to the shareholder proposal mechanism. While the right to circulate proposals was subject to challenges by corporations and the SEC itself, the fact that those challenges took place through the highly visible forum of the SEC also helped to publicize shareholder activism in the service of corporate social responsibility.

The fact that Canadian churches filed relatively few shareholder proposals per year perhaps contributed to a lack of awareness on the part of other groups about the potential of shareholder activism for corporate social responsibility objectives. However, the larger context—the lack of institutional activism generally in Canada, and the restrictive legislative environment—is the primary factor explaining the underutilization of the proposal mechanism in Canada.

While there has been little interest outside of the churches in engaging in shareholder action, even that limited activity has had some impact on corporate behaviour. There have been numerous journalistic assessments that attest to the significance of shareholder action in a gradual change in the attitude of Canadian corporations to the issues raised by social investors.

6

Pension Funds

IN 1993, PENSION FUNDS OWNED ALMOST 17 PER CENT OF ALL EQUITY IN CANADA, AND 49 PER cent of all the equity controlled by institutional investors.[7] The largest number (48.1 per cent) of plans are registered in Ontario, 15.7 per cent in Québec, 7.6 per cent in Alberta, 7.3 per cent in B.C., and 8 per cent registered federally.

Asset portfolios of public and private funds in Canada differed considerably ten years ago. Since 1984, the investment practices of the two sectors have become much more similar. The public sector has been turning to equities in place of bonds, almost to the same extent as private sector funds. In 1994, the public sector had 34 per cent of its assets in stocks, compared with 39 per cent for the private sector (Statistics Canada 1996a, 71).

Governance of Pension Funds

Information about the governance of pension plans is important for assessing the potential for active shareholdership by pension plans on issues of corporate social responsibility.

Revenue Canada requires that pension plans be funded according to the terms of a trust agreement, an insurance company contract, or an arrangement administered by the federal or provincial government. Insurance company contracts are the most widely used funding instrument, accounting for 69.5 per cent of all plans in 1994, but covering only 13 per cent of total membership.

Most large plans operate under a trust agreement (Statistics Canada 1996, 65, 66). The trustee can be: individuals (at least three), a trust company or incorporated pension fund society. The trustee holds title to the assets of the fund in accordance with a written trust agreement for the benefit of the plan members (Statistics Canada 1996b).

Close to 60 per cent of the top 100 pension funds in Canada were managed in-house (Patry and Poitevin 1995, 360). Public pension funds relied more heavily on internal management (73 per cent) than private plans (31 per cent). Internal management may be a factor contributing to the relatively activist role of public pension funds as shareholders.

A pension plan sponsor may allow the fund manager "full discretion" or put the manager "under direction." In the United States, Canada and the U.K. the pattern until recently was that 75 to 80 per cent of all pension assets were at the discretion of the investment manager (Deaton 1989, 257). This may be changing with increased emphasis in all jurisdictions on the fiduciary responsibilities of the trustees.

Workers generally have very little control over the financial resources they invest in pension funds. It is almost exclusively in plans where unions have control or joint trusteeship that pension funds in the U.S. have become active shareholders on issues of corporate social responsibility.

Unfortunately, there is no publicly accessible data base of information about the governance of registered pension plans (RPPs) in Canada to indicate whether they are union controlled, jointly trusteed or company controlled. Nor is aggregate information published about the governance of plans. A study by Deaton (1989, 152) reported:

> In Canada in 1988, only 5 per cent of all major collective agreements covering 3 per cent of employees had any arrangement for joint union-management control of the occupational pension plan. Only a few private sector unions, such as the construction trades, have jointly trusteed pension plans. A number of large public sector plans, however, have a joint labour management pension committee which acts in an advisory or consultative capacity.

The Statistics Canada database of pension plans in Canada identifies those plans that are restricted to union members. In 1992, there were 1,167 such plans, accounting for 20 per cent of all RPP members (Statistics Canada 1994, 43, 44). These plans presumably are ones where it would be reasonable to think that union control or at least joint-trusteeship might be a goal.

In addition, Statistics Canada's questionnaire for the annual survey of trusteed pension funds asks who makes the investment decision (Statistics Canada 1996b). Data from this questionnaire would identify whether: decisions are made by trustee(s), employer, outside investment counsel or employee (plan members); and, in the case of a committee, which categories are represented on the committee.

Research proposed by the Canadian Labour Market and Productivity Centre (CLMPC 1996) may also provide aggregate data on the governance of pension funds.

However, while these data sources could provide a better picture of the governance of pension funds and the potential for union-based pension fund activism, fund-specific information about governance would be required by activists for the purposes of identifying potential allies in shareholder action.

RECOMMENDATION 5

Research on the governance of pension funds in Canada should be undertaken with the goal of setting up a database of pension funds that are union controlled or jointly trusteed, or in which plan members play a significant role in decision-making (e.g., some church and university pension funds).

The Responsibilities of Pension Fund Trustees

As recently as 1986 there was debate in Ontario over whether "a pension fund should be a passive investor and not exert significant influence over private sector companies." The Pension Commission of Ontario circulated this proposition for comment. Fortunately, not only socially responsible investors but also a number of institutional money managers were strongly opposed. When the Pension Commission later issued draft regulations, the concept of the passive investor had been dropped.

While there is general agreement that pension funds should be active investors to fulfil their fiduciary responsibilities, there is less certainty regarding the proper arena for pension fund activism. Even within TCCR, the pension funds of member churches took differing positions. While the United Church of Canada Pension fund took the lead in filing several shareholder proposals, some other church pension funds engaged in active shareholdership primarily by voting their proxies.

Legal Memorandum on Trustees as Active Shareholders

In 1989, the Public Social Responsibility Unit of the Anglican Church of Canada, following consultation with TCCR, commissioned a legal memorandum on the subject from Ed Waitzer of Stikeman, Elliott (Stikeman, Elliott 1989). (Waitzer subsequently became Chairman of the Ontario Securities Commission.)

As there is little legal authority on the subject of trustees as shareholders, the memorandum drew an analogy between the trustee as investor and trustee as active shareholder, and then defined the doctrine of prudence as applied to shareholder activism. It noted that there is a dearth of Canadian legal authority on the extent to which trustees may introduce ethical considerations into their investment decisions. The memorandum therefore reviewed the existing British and American jurisprudence, which is quite restrictive of the ability of trustees to use ethical criteria in investment decision-making. It concluded that trustees must vote securities in the best interests of the Fund, which is primarily defined in economic terms:

> It clearly does not require simply siding with management. Indeed, where management undertakes non-ethical activities, which may be detrimental to the value of an investment, and where disinvestment is not appropriate, the Trustees may be obligated to oppose such measures as shareholders, always with regards to the costs involved. Where shareholder activism on an ethical basis does not detract from investment return, the general legal position is that such activity is permitted.

The memorandum suggested the possibility that a less restrictive interpretation might be possible in the future:

> The prudence standard, as described above, may be subject to evolution, albeit slowly, as ethical investing becomes a more popular topic. The prudence standard has been described as an evolving concept. Further, there are legal authorities, increasingly vocal, which argue that social and ethical issues are proper considerations for trustees.... As ethical and social issues become more important for consumers, governments and investors, moreover, the standard of prudence may *dictate* that such considerations are necessary, as they impact upon the long term value of the firm. Case law does tend to react to popular trends, the

cases such as *Cowan* may be seen, by courts as well as commentators, as too restrictive in the future.

During the South African divestment debate, some proponents of disinvestments made the argument that corporate ethical behaviour leads to better economic performance in the long run, and that trustees need not fear being challenged. However, the existing jurisprudence protected trustees only if ethical choices did not, in fact, lower investment return. While it was not clear that divestment from South Africa would lower investment return in the long run, the Ontario government moved to protect trustees who were under pressure from their constituencies to divest. In 1987, the government enacted Bill 9, which permitted trusts, registered charities and pension funds to dispose of South African investments without fear of legal action even if the value of the fund's holdings decreased or failed to increase as a result.

Since 1989, when the Stikeman, Elliott memorandum was written, there have been developments in the U.S. and the U.K. in both case law and commentary on ethical (screened) investment which may have implications for Canadian jurisprudence. U.S. pension funds have divested stock, filed shareholder proposals, and engaged in "economically targeted investment." U.K. pension funds have also divested and filed shareholder proposals. [8]

In Canada, there has been little government support for questioning the short-term approach to pension fund investment—an approach that has satisfied prevailing understanding of the meaning of fiduciary responsibility. There has also been little support for exploring alternative types of investment outside of the stock market. However, other groups are raising some of the questions about what responsible investment of pension funds might include. For example, the Canadian Labour Market and Productivity Centre is proposing research on the potential offered to Canada's economy and society by pension fund assets (Canadian Labour Market and Productivity Centre 1996). The PIAC and Fairvest have been encouraging the idea that pension funds should be active shareholders in relation to corporate governance issues. These developments suggest that the prudence standard may also be evolving in Canada.

At least one Canadian union has commissioned its own legal memorandum on the subject of pension funds and responsible investment, although this was not made available to us. In view of the likelihood that the jurisprudence in the U.K., the U.S. and Canada regarding the standard of prudence for pension funds regarding their activities as shareholders has evolved since the writing of the 1989 legal memorandum, it would be helpful to commission a new memorandum, to be made publicly available.

RECOMMENDATION 6

A legal memorandum should be commissioned on the subject of the responsibilities and abilities of Canadian pension fund trustees as shareholders. The memorandum should summarize the criteria which can and should be used by pension fund trustees in their decisions to vote proxies, to initiate shareholder proposals or to generally undertake shareholder actions, all in the context of the fiduciary responsibilities imposed on them by statutory and common law.

The underlying issue for pension funds (and for charities and other organizations as well) is whether socially responsible investment, in the form of screened investment or active shareholdership, can be expected to reduce the financial return on investment. While arguments can be advanced against the assumption that financial return on investment should be the only consideration of investors such as pension funds or charities, it is also important to be able to provide investors with well-researched information about the actual performance of investment funds that use different types of screens or adopt activist shareholder strategies.

In the U.S., various measures of the success of social investing have been developed. One measure is the Domini Social Index. This is a market capitalization-weighted common stock index similar to the Standard & Poors (S&P) 500. It consists of 400 corporations that have passed multiple broad-based screens. In 1996, the return of the Domini Social Index over the previous five years was 16.96 per cent (annualized returns) compared to the S&P 500 return of 15.73 per cent (annualized returns) over the same period.

In the U.S. there have also been efforts to measure the effectiveness of active shareholder strategies, although only in relation to corporate governance concerns. CalPers (the California Public Employees Retirement System) targets the poorest performing companies in its portfolio for improvement and uses shareholder proposals as a means to enact corporate governance reforms. There have been several studies of the effectiveness of its approach. A study by Wiltshire Associates of 42 companies targeted by CalPers from 1987 to 1994 showed that the targeted companies under performed the S&P 500 by an average of 66 per cent before CalPers took action. After CalPers took action, the returns of these companies improved, outperforming the S&P 500 by 41.3 per cent.

While the tools have apparently not yet been developed to study the impact of shareholder activism in relation to corporate social responsibility on the financial returns to an investor, an important first step would be the development of the research capacity to track the relationship between screened investment and financial performance of Canadian companies.

RECOMMENDATION 7

A Canadian benchmark index for social investors should be created. The index would be intended to provide a financial comparison between companies in the TSE 300 that have passed a multiple broad-based social screen with the TSE 300 universe. As the market to support the costs of developing such an index is still very small, and the index would, in turn, contribute to the growth of the social investment movement, it would be appropriate and probably necessary to seek financial support for the start-up costs of such an index.

7

Union Pension Funds

THE FOLLOWING DISCUSSION RELATES PRIMARILY TO UNION PENSION FUNDS, ALTHOUGH unions do have other investments (strike funds), which might also be considered when reviewing the scope for responsible investment and shareholder action.

Shareholder action by public sector pension funds is reviewed in the next section. While unionized members comprise the majority of beneficiaries of these funds, funds may also include non-unionized beneficiaries.

United States

Shareholder proposals from unions such as the Amalgamated Clothing & Textile Workers Union (now UNITE), International Brotherhood of Electrical Workers, International Brotherhood of Teamsters, International Union of Operating Engineers, Labourers' International Union of North America, Oil, Chemical & Atomic Workers International Union, United Brotherhood of Carpenters and Joiners of America, and United Paperworkers International Union accounted for almost one fifth of all shareholder resolutions in 1995 (St. Goar 1996). Our question is: Are there differences between U.S. and Canadian unions that explain why U.S. unions are shareholder activists? Or are the differences explained by the barriers in Canada to institutional activism generally?

Governance

In the U.S. there are only a few small labour sponsored and controlled pension funds. The three major types of financing and administration of benefits are:

- employers contribute to a single-employer controlled "trust" fund (a pension fund) that is owned, but not controlled, by the workers covered by the plan;
- contributions to an insurance company pay for future annuities;
- contributions are made to a trust fund that has union members as joint trustees (Ghilarducci 1992).

Single-employer plans are generally administered without union representation. In the late 1940s the UAW spearheaded what was eventually a failed effort to win joint union-management control of defined-benefit plans. Unions were aware that the capital in pension funds was a source of economic power, but in the end, they dropped demands for joint control and focused on negotiating higher benefits. One commentator suggests that:

> ...The answer to the question of why control of pension investments is not of primary concern to the unions may be found in the fact that unions are constrained by imagination and financial markets not to invest any differently than corporate pension fund managers (Ghilarducci 1992).

This judgement should, however, be qualified by the fact that unions such as the UAW have sometimes reached agreements with companies that indicate they are not totally "constrained by imagination and financial markets." For example, they have negotiated for the investment of a per cent of new pensions contributions in socially desirable projects such as housing and retiree centres (Ghilarducci 1992).

Most multi-employer plans are trusteed by equal numbers of employer and union representatives. Multi-employer plans primarily exist in cases where one union represents all workers in an industry. Most building trades funds (e.g. the Teamsters and the United Mine Workers funds) are examples of jointly trusteed funds (Ghilarducci 1992). These are sometimes called Taft-Hartley funds, because a section was added to the 1947 U.S. *Taft-Hartley Act* specifically to prohibit unions from obtaining exclusive power over multi-employer pension plans (Deaton, 152).

With very few union-controlled funds, it is the jointly trusteed multi-employer plans that have become active shareholders in the U.S.

U.S. union shareholder activism initially appears to have been a response to the corporate restructuring and downsizing of the 1980s, in which millions of workers lost their jobs.[9] With a shift to "just-in-time" hiring and part-time and temporary workers, union membership fell from about 20 per cent in 1983 to 16 per cent in 1992. Labour felt betrayed, given its support of management in many ways in the 1980s, including pushing for anti-takeover laws and defending management from hostile bids through employee share ownership plans.

While union membership dropped, employee pensions and employee stock ownership grew dramatically. Unions adopted a new approach: if management was inattentive to shaping an effective long-term corporate policy, unions should generate their own standard of good management. Unions sought to build an alliance with corporate shareholders, some of whom also saw themselves as a disenfranchised constituency. Three labour funds were among the first members of the Council of Institutional Investors, and unions have played a key role in its executive committee. Several unions joined the shareholder proposal campaign and began filing corporate governance proposals in the mid 1980s, following the example of public sector pension funds. A group of shareholder activists representing more than a dozen public and private sector unions gathers regularly to discuss shareholder issues in common. This "Labour Caucus" operates as an adjunct to the CII.

Screened Investment and Economically Targeted Investment

In 1991, the AFL-CIO Executive Council adopted a policy on pension fund investments and model guidelines for proxy voting responsibility (AFL-CIO 1991). The investment guidelines include discussion of criteria for exclusionary and targeted investment. For example, they suggest that criteria may rule out investments in countries that violate human rights; hostile leveraged buy-outs; junk bonds; certain foreign investments that result in a loss of U.S. jobs; and companies that violate good labour-management, health and safety or environmental standards.

The AFL-CIO policy also addresses Economically Targeted Investments (ETIs) as a means of promoting workers' interests while providing prudent returns for pension funds. ETIs have been defined by the U.S. Department of Labor as "investments selected for the economic benefits they create apart from their investment return to the employee benefit plan." The Department of Labor in 1994 issued an interpretive bulletin on ETIs to make clear its long-standing policy that "all things being equal," a pension fund may make an investment which contains a collateral or social benefit (Zanglein 1995, 60).

Multi-employer trusts have been in the forefront of ETIs for more than 25 years in the U.S. The U.S. Department of Labor and the Department of Housing and Urban Development worked with the AFL-CIO housing and building investment trusts to put money into low-income community houses in rebuilding communities. The Bricklayers union earned above-market rates in the late 1980s by investing in low-and moderate-income housing in Boston. The Sheetmetal, Boilermaker, Carpenters and Electrical workers are among the many union plans that have ETIs (Ghilarducci and Grant 1995).

Proxy Voting

The AFL-CIO policy and guidelines state that trustees should develop criteria for the voting of corporate stock consistent with the long-term interests of plan participants and considering the obligations of the company to its workers, managers and local community. The model guidelines for proxy voting include a number of corporate governance issues (e.g. confidential voting) as well as issues such as health care coverage, the "MacBride Principles" on equal employment opportunities abroad, and the "Valdez Principles" on environment and health and safety standards.

Shareholder Proposals

A question that is only partially answered in this report is: What is the decision-making process in the many U.S. pension funds engaged in shareholder activism? In the case of jointly trusteed plans, how has the union side managed to obtain the agreement, or at least the acquiescence, of management when taking shareholder action on issues of corporate social responsibility?[10]

One commentator notes that as long as there is no sacrifice of rate of return, there has been little politicisation in the U.S. generally over the alternative use of pension funds for social investment schemes (Ghilarducci 1992). Similarly, shareholder activism has generally been on issues where management representatives have been persuaded of the fiduciary responsibility of taking action.

In fact, most union proposals seek traditional corporate governance reforms. Labour is pursuing issues that get strong backing from other institutional investors, such as removal of anti-takeover defences, voting confidentiality, hefty severance packages for management, and board structure. In 1995, union-related groups put forward a larger number of corporate governance proposals (77) than any other institutional investor (IRRC 1995,12).

One interpretation of this union shareholder activism is that labour is paying more attention than in the past to pension asset management and through shareholder activism is goading companies to perform financially. Unions have made it clear, however, that they are not acting solely as concerned shareholders who see corporate governance improvements as their only responsibility. In 1990, union funds also began to offer proposals raising social issues, in some cases on issues linked to broader corporate campaigns. Campaigns employing traditional labour strategies such as lawsuits, boycotts and strikes are being supplemented by shareholder activism. A spokesman for the UFCW says:

> We take the cause of workers forward in any forum that we can. If that means assisting workers and filing complaints before the Department of Labor, we'll do that. If it means referring workers to attorneys on workplace issues, we'll do that. And if that means raising issues at stockholder meetings, we'll do that, too (Sweeney 1996,23).

Some companies receiving these proposals are beginning to argue that the objective of all union shareholder activism is the pursuit of the union's current labour agenda with the company, and that the SEC should allow them to omit the proposals from proxy circulars. Companies sought to have proposals on issues such as linking CEO compensation to the pay levels of lower-paid employees proposals excluded on the "personal grievance" grounds for exclusion. In 1995 the SEC tended to permit these resolutions to go forward unless there was evidence that the proposal was clearly intended to enhance the union's bargaining power in ongoing contract negotiations (McGurn 1995a).

Unions are also initiating or supporting proposals relating to broader social issues. A spokesperson for the Teamsters' says:

> Corporate governance is not our be-all and end-all. We work for accountability to shareholders, but we also want to see companies be responsible agents in the economy generally, to labor certainly, and also on human rights."

In 1995 and 1996, unions filed proposals requesting reports on health care reform, workplace standards, overseas supplier standards, worker health and safety, community environmental hazards, business in Nigeria, operations in politically volatile areas and linking executive pay to high performance workplaces.

There may be increased use of the shareholder proposal mechanism by unions in the future. The AFL-CIO is in the process of establishing a "pension investment clearinghouse." John Sweeney, recently elected as president of the AFL-CIO, and many of his supporters are from unions that have been shareholder activists. The Sweeney team's campaign brochure described the clearinghouse as including a database of information on union pension fund investments to help unions involved in shareholder activities. It could help them sponsor shareholder proposals, monitor investment managers and get information on economically targeted investments (O'Hara 1995, 3).[11]

United Kingdom

Proxy Voting

The general secretary of the Trade Union Congress (TUC) says the TUC is urging pension fund trustees "to use their voting power to change company behaviour on a number of issues, such as executive pay, directors' pensions and the environment" (EIRIS 1996c). It has prepared *Shareholder Voting: a Guide for Member Trustees* for union members who are pension fund trustees (PIRC 1994). The TUC expects the number of union members on trustee boards to increase as a result of changes to the *Pensions Act*, which require pension funds to draw at least one-third of their trustees from the membership (see Recommendation 13).

The TUC recommends that pension funds develop formal voting guidelines, and that these guidelines be issued to investment managers, beneficiaries and companies. Investment managers should be required to make their exercise of the vote part of their regular report to the trustees. TUC also suggests that these guidelines for voting on a company's reports and accounts should include evaluation of the company's record on issues such as fair employment and environmental strategy (TUC 1994, 22).

Shareholder Action and Proposals

Given the obstacles to filing a shareholder proposal in the U.K., it is not surprising that we found no reference to a union-sponsored shareholder proposal in the U.K., although we did not contact the TUC directly for information. However, we did find reference to another form of shareholder activism. In 1992 the General Municipal and Boilermakers union (GMB) coordinated an employee-shareholders campaign in relation to three of the newly privatised water companies. The union made use of a clause in the companies' articles, which allows a single shareholder to nominate a director, and nominated GMB representatives to the boards of the three companies. If elected, the proposed directors promised to raise a number of issues such as executive pay and environmental reports. The nominations secured a third of the vote at one company and less at the others (Mackenzie 1993, 62).

Unions have also been involved in other forms of shareholder action. In the U.K., one successful approach in the 1980s in relation to the anti-apartheid campaign was the "shadow annual report" produced on behalf of a "shadow board of directors." Union representatives were involved, for example, in the shadow board for Barclays' Bank (Mackenzie 1993, 141).

TUC's guide for pension fund trustees addresses the question of taking the initiative through shareholder action. It suggests that pension fund trustees can instruct their investment managers to obtain information on their behalf, "or even to initiate action coordinating with other shareholders if required." It also recommends establishing a mechanism through which requests to support initiatives by other shareholders can be considered (TUC 1994, 17).

Canada

The major practical obstacle to union shareholder activism in Canada (as well as the U.S. and U.K.) is employer control of pension funds. According to one observer:

> Labour centrals or confederations in Britain, Canada and the U.S. and their largest affiliates have promoted the co-management of pensions with increasing aggressiveness in recent years... (Deaton 1989, 156).

He notes, for example, that the Canadian Labour Congress (CLC) advocated employee participation in the administration of occupational pension plans as early as 1975 (Deaton 1989, 157).

Others, however, question the extent to which unions in Canada have been sufficiently willing to challenge employer control. Patricia Lane (1990, 51), at a 1990 conference on the subject of active shareholdership, acknowledged that one of the obstacles to union control is that those funds for which employers are willing to give up or share control easily are often underfunded. However, she goes on to say that there is a perceived high political risk in union control. Some union leaders and trustees fear that they may not be able to fulfil the responsibility to manage large pools of capital. Lane also suggested that unions have been slow to seek control of union pension funds because the position of the "right"—that how pensions are invested is the employers' prerogative—is allied with the position of some on the "left"—that it is not the job of workers to manage capitalism out of its mistakes.

Even where unions control pension funds, the union may have assigned voting rights to someone other than the trustees. This is common practice in many pension funds, not just union funds. It would require a change in the constitution to allow pension fund trustees to retain the right. Such a change may be opposed if members fear that it would have implications for the safe investment of their pensions.

Bob Baldwin, a senior researcher for the Canadian Labour Congress, also spoke at the 1990 conference, and suggested some other elements of union culture that make active shareholdership a low priority (Baldwin 1990). Baldwin argued that there is not a "clean fit" between the culture of collective bargaining, the focal point of union activity, and active shareholdership.

First, collective bargaining involves clear identification of the good guys and the bad guys, a categorical approach that may not be useful in a joint labour/business decision-making body such as a pension fund board. Second, collective bargaining is a process with involves consensus about objectives, and acceptance of an incrementalist process for achieving these objectives. Unions have not yet developed a consensus about what are reasonable outcomes of non-bargaining areas of activity such as pension fund management and active shareholdership. Finally, union resources are never sufficient, particularly leadership time, making it difficult to persuade leaders that it is worth diverting time from activities focused on collective bargaining to other activities.

In 1996, this caution about union influence or control over the management of pension funds is being challenged more sharply than ever. Critics have been asking why unions allow large sums of their members' money to be deployed in ways that hurt rather than help them. For example, one critic stated that the Ontario Municipal Employees' Retirement Fund has invested in the MDS Inc. (formerly MDS Health Group Ltd.), which operates a chain of private medical laboratories. This investment contradicts the union's policy opposing private health care and takes away jobs from unionised hospital worker (Finn 1996).

Screened Investment and Economically Targeted Investment

The impetus in Canada for much of the socially responsible investment movement, and for screened investment in particular, was the anti-apartheid campaign. However, one union spokesman suggested that even at the height of the campaign, divestment of South African holdings by private sector union pension plans was the exception rather than rule. It is not clear if this was equally the case in company controlled, jointly trusteed and union controlled pension funds.

A union trustee of one large multi-employer jointly trusteed pension fund described the difficulties of getting agreement on any ethical screening. He indicated that these same difficulties explained why the pension fund was not involved in active shareholdership.

This multi-employer fund originally was established with an agreement that proxies would not be voted, and that there would be a two-vote system on other issues (the union holding one vote and the employers holding the other). The fund originally was invested in Canadian equities. It was only when a decision was made to diversify into U.S. equities that the union had an opportunity to negotiate some ethical screening. The union and the employers agreed on the appointment of three new investment managers for the U.S. equities. With its selection (one manager), the union chose an investment manager who would apply an ethical screen. The screen agreed to was very limited, with criteria regarding South Africa and nuclear production. On a few occasions, however, the union and company trustees have agreed to divest holdings because of other issues (e.g. a company relocation out of Canada because of NAFTA, and a secondary boycott against the unions' own industry.

While Canadian unions have not been active shareholders or undertaken much screened investment through their conventional pension holdings, they have been leaders in non-conventional forms of investment and active shareholdership/ownership. Much of the "alternative" investing by Canadian trade unions began in Québec and B.C. According to Ted Jackson, a consultant in community economic development:

> In Québec, a unique combination of factors, including a broad-based social consensus on the importance of regional development to Québec, a large and influential labour movement, and a network of pro-Québec financial institutions and policies (including the massive Caisse de dépôt et placement, the province's public sector pension investment arm) have stimulated innovative approaches by organized labour. In British Columbia, a strong union movement, its informal links to an active credit union movement and the large number of jointly trusteed pension funds—especially in the forest and construction industries—have yielded equally innovative labour-directed investment projects in that province.

For example, the Carpentry Workers' Pension Plan has a subsidiary non-profit housing cooperative which uses a portion of the pension funds to build quality, affordable housing in B.C. using unionised workers (CUPE 1992, 4). The Telecommunications Workers Union, the International Woodworkers of America and other B.C. unions set up a specialized pooling vehicle, the Vancouver Land Corporation, to build moderately priced housing in Vancouver (Jackson 1990, 56).

Another investment innovation was the creation of the labour social investment funds, although these do not involve investments by union pension funds. The Québec Federation of Labour established a venture capital fund, the "Solidarity Fund" in 1984, and in the 1990s other labour venture capital funds followed: Working Opportunity (B.C.), Crocus Investment (Manitoba), First Ontario, Workers' Investment

(New Brunswick) and Working Ventures (Canadian Federation of Labour). The funds were intended to give workers a place to make individual investments (which could be part of an individual's retirement savings plan) that reinforce the economic and social aspirations of members and create employment. (See Ellmen 1996 for a review of the funds.)

Retrocomm Growth Fund Inc. is a labour venture capital fund sponsored by the International Brotherhood of Electrical Workers, the Ontario Pipe Trades Council and the Provincial Building and Construction Trades Council of Ontario. Unlike the other labour venture capital funds, it is offering institutional shares for pension plan investors. Retrocomm invests in retrofitting projects (Benefits Canada 1996).

Proxy Voting

There is no Canadian equivalent to the U.S. AFL-CIO or the U.K. Trades Union Congress (TUC) guidelines for shareholder voting. While some public sector pension funds have developed proxy voting guidelines, we did not learn of private sector union pension funds that have done so. In fact, one union pension fund trustee was under the impression that trustees are not allowed to vote their shares, and others seemed unaware of the possibility that they might do so, an indication that there is a need for education of union trustees regarding their rights and responsibilities.

The CLC should be encouraged to develop model proxy voting guidelines for Canadian union pension fund trustees, as has been done by the American AFL-CIO and the British TUC. (See Recommendation 3 regarding a handbook on proxy voting.)

Shareholder Proposals

The only documented instance of a union pension fund submitting a shareholder proposal was a proposal by the Communications and Electrical Workers of Canada (CWC) Multi-Employer Pension Fund. The proposal provides an interesting illustration of a debate that has taken place in the U.S., as well as in the case of this proposal, over whether shareholder proposals can and should be used for discussion of issues closely related to the bargaining process. The Fund submitted a proposal to Northern Telecom in 1992 requesting:

> That the shareholders request that the Northern Telecom Ltd. (the "Corporation") Board of Directors establish a Facilities Closure and Relocation of Work Committee composed of an equal number of outside board members and representatives of employees for the purpose of performing a strictly advisory role in weighing decisions on the closure of facilities and movement of work, as such decisions impact on the morale of the workforce, the economy of the communities which host the company's plants, and ultimately the Corporation itself.

The statement in support of the proposal referred to the effect of work site closures, cutbacks and relocation on employee morale, and the repercussions of a demoralized workforce for a company "which must remain on the leading edge of technology and whose products must meet exacting quality standards to stay competitive...." It suggested that the advisory committee would "conduct its deliberations apart

from the immediate and short-term operating concerns, and would focus on the larger concerns of the Corporation and its major constituents and stakeholders."

Shareholder proposals similar to this had been included in the proxy statements of several major U.S. corporations (e.g. United Telecommunications, Inc. in 1991 and AT&T in 1992), and the SEC had agreed that such a resolution was appropriate subject matter.

However, Northern Telecom refused to circulate the proposal on the grounds that the Fund lacked registered shareholder status (even though it was the beneficial owner). It also made clear that it felt it had additional grounds for refusing to circulate the proposal, (i.e. that the company had a collective agreement that addressed the issues raised).[12]

The CWC proposal is also interesting as an example of a jointly trusteed fund submitting a proposal. Union representatives in Canada generally suggest that it is difficult to get agreement on any socially responsible investment initiatives in jointly trusteed funds. It is not clear what the decision-making process was prior to the submission of the CWC proposal. The documents submitting the proposal were signed by the union representative who chaired the trustees of the fund.

Despite the barriers—cultural, regulatory, and institutional—Canadian union interest in shareholder activism is increasing. In particular, unions in B.C. have become increasingly activist as shareholders. A representative of the B.C. & Yukon Territory Building and Construction Union has attended several corporate annual meetings, sometimes using proxies provided by the union's affiliates, and sometimes using "action" shares. The union has been an active participant (sometimes almost the only participant) in the annual meeting question period, and has used the occasion to raise a range of issues, particularly corporate governance issues. For example, the confidential voting issue has been a priority, because of the union's experience of other shareholders indicating that they would sometimes like to vote against management, but are afraid to because of their vulnerability to management reprisals.

A new effort to encourage this and other forms of union shareholder activism began in B.C. in 1996. Members of the B.C. Federation of Labour and the B.C. and Yukon Building and Construction Trades Council have held several meetings "to discuss how the labour movement in B.C. can use pension investments to affect corporate behaviour" (Working Enterprises Labour Services Ltd. 1996). They were inspired by the accomplishments of labour and church organizations in the U.S. The advocates of a pension tracking program describe the benefits of shareholder activism:

> Through the submission of shareholder proposals, the initiation of shareholder communications and intelligent proxy voting on issues such as greater use of ethical investment screens, under-performance of stocks, volatile or depressed profits, unproductive buyouts and mergers and inappropriately high rewards for CEOs, labour's voice can effectively be used to achieve not only a good return on pension investment but also a good return for working people.

The proposal under consideration is to establish a basic pension asset tracking system to provide a snapshot of where the labour movement has an investment presence. If unions are unable to file shareholder proposals, other forms of activism (e.g. meetings with management, questions at an annual meeting) would have greater weight if the combined union assets in a company were known:

> This [the pension asset tracking system] will not only assist unions with mounting shareholder resolution campaigns, it will help the labour movement determine where pressure can most successfully be brought on corporations.

It was suggested that Working Enterprises Labour Services (WELS) would implement the program as a confidential third party. WELS is one of the Working Enterprises Ltd. group of companies, owned by the B.C. Federation of Labour and several unions (BCGEU, CUPE, HSA, OPEIU, USWA and UFCW).[13] However, before it can proceed, there are issues to be resolved such as financing the cost of the tracking system and access to information about pension fund holdings. It has also been suggested that there is a prior or simultaneous need for workshops for union trustees on their rights and responsibilities.

Other services might also be required to assist union pension fund trustees. One B.C. union representative spoke of the need for union trustees to receive regular information about issues relating to the companies in their funds' portfolio. He described the difficulty union representatives have in staying on top of issues in comparison with employer or government representatives and the money managers who work in the field full time. However, union representatives face opposition from the other trustees to the idea of paying for advisory services. This suggests that corporate information services may have to be provided, at least initially, as part of a joint union initiative.

Analysis

U.S. union pension funds have engaged in shareholder action despite the fact that—as in the case of Canadian and British union pension funds—unions control very few pension funds.

How have U.S. union pension fund trustees in jointly-trusteed funds managed to persuade corporate representatives to support their activist agenda? In Canada, the perception is that jointly-trusteed funds are unable to apply ethical criteria or pursue an activist agenda because of the stalemate that would be created by company representatives opposing union initiatives.

As noted above, it appears that U.S. unions have been able to get corporate trustees to agree to shareholder proposals on the strength of fiduciary arguments. Trustees are persuaded that their fiduciary responsibility requires "trying to create an investment and management environment where long-term investors can reap rewards" (Sweeney 1996, 26). This sometimes involves supporting corporate governance reforms, which they believe will improve financial performance, and which are supported as well by many other institutional investors. It may also involve supporting initiatives to try to improve a company's responsiveness to social and environmental concerns.

In Canada, such fiduciary arguments are less generally accepted by institutional investors. Those attempting to make the argument that efforts to improve corporate social and environmental practices are part of the pension fund trustee's responsibility lack the support they need. They are not well prepared to argue about the legal issues involved, and the networking and advisory services for responsible investors in Canada are relatively undeveloped.

Even with increased Canadian union interest in the control of pension fund investment, and improvement in advisory and other support services, it is unclear if there will be greatly increased interest in active shareholdership. The union agenda may continue to be primarily related to the objective of mobilizing pension savings for various socio-economic goals, and less to the goal of changing the practices of any particular corporation.

The interest in active shareholdership in B.C. is the most encouraging development. However, while Canadian union pension fund representatives are not likely to get excited about the possibilities for share-

holder action in general, one observer suggested that they may be willing to try shareholder action in the context of an important corporate campaign. Unfortunately, it may be difficult to sustain interest if a union attempts a shareholder action in the context of such a campaign and fails. This has already happened in the case of the union proposal to Northern Telecom, although the union's experience does not appear to have been widely publicized. The proposal was not circulated because of legislative barriers. The failure of the proposal no doubt discouraged that union from consideration of the shareholder proposal mechanism in other campaigns.

The Northern Telecom experience suggests that it may be counterproductive to encourage union pension fund shareholder proposals until the legislative barriers are removed, unless the union already has a clear commitment to shareholder action and to pressing for changes in the legislation governing it. Other forms of activism, such as participation in corporate annual meetings, could be encouraged in the meantime.

The position that unions take may be critical in relation to the prospects for active shareholdership in Canada. There has been no strong source of support for churches in their active shareholdership on social and environmental issues. While the encouragement of umbrella organizations such as the SIO is helpful, it will require other investors such as unions filing shareholder proposals and asking questions publicly at annual meetings to establish shareholder activism on issues of corporate social responsibility as a major force for change.

RECOMMENDATION 8

The effort of unions in British Columbia to establish a pension asset database and other services such as workshops for union trustees should be monitored as a possible model for unions elsewhere as well as for pension funds in other sectors. If required, start-up financial assistance, e.g. matching funding, should be offered in view of the project's potential for encouraging more shareholder activism by pension funds.

8

Public Sector Pension Funds

IN ALL THREE COUNTRIES STUDIED—CANADA, THE U.S. AND THE U.K.—LARGE PUBLIC SECTOR pension funds are among the most active institutional investors. In part, this is due to the size of the funds they manage, and their long-term investment horizon, which reflects the nature of pension fund obligations (Montgomery 1996, 196). As well:

> They are particularly immune from the corrupting influence of management pressure. Since they do not stand to lose business from the firms in which they have invested, they may stand relatively aloof from (and uncorrupted by) management (MacIntosh 1996, 162).

While public sector pension funds are immune from management pressure, their activism as investors may be affected by their susceptibility to or fear of political pressure. A survey of institutional investors indicates that public sector pension funds view publicity as a significant deterrent to investor activism. Publicity tends to draw public attention to their investment activities, raising the possibility of political pressure regarding investment decisions (e.g. pressure to invest locally) (Montgomery 1996, 197).

United States

CalPers, the U.S.'s largest public employee pension fund, is the best known shareholder activist, having focused on the relationship between a company's long-term economic performance and corporate governance issues. However, shareholder activism by public sector pension funds appears to have been pioneered by those involved in the South African anti-apartheid campaign.

Eric Wollman of the New York City pension funds described the three phases of their shareholder activism (Wollman 1990). It began with activism on South Africa in 1984, and included letter writing,

shareholder proposals and divestment. In 1985, the New York funds filed nearly 200 South African related proposals. A shareholder proposal campaign on behalf of the McBride Principles (a fair employment code for Northern Ireland) began shortly thereafter. As other issues of social concern were brought forward, the funds examined each on a case-by-case basis to determine if shareholder activism could make an impact and protect their investments.

The second phase of activism was in the area of corporate governance and shareholder democracy. As the funds' social activism expanded, they became increasingly aware of inequities in the proxy voting system. Without confidential ballots, voters were subjected to coercive pressure by management. Accordingly, in 1998 the New York and other funds began putting confidential ballot proposals forward. Proposals on other corporate governance issues such as poison-pills followed.

The third phase of shareholder activism was a shift from the broad generic reforms of governance to initiatives targeted to bring about improved economic performance at individual corporations. This involved looking at issues such as a company's board of directors, and the role of outside directors.

It is in this "third phase" of pension fund activism that CalPers has become known as the leading activist. CalPers, New York, Wisconsin, Florida and other pension funds actively vote their proxies and have sponsored shareholder proposals frequently.

In 1995, CalPers undertook a review of its shareholder activism and corporate governance program. In the early days, fund officials were frequently refused meetings with management and had to rely on shareholder proposals to attract companies' attention. Now, according to CalPers, most major U.S. corporations have "accepted shareholder scrutiny and corporate governance principles as a new way of life." CalPers has decided that its exercise of shareholder rights will include more emphasis on "vote no" campaigns and using various means to heighten director accountability. It will file shareholder proposals only to assist in efforts to meet with a company's independent directors (McGurn 1995a). Other public sector pension funds also appear to be keeping lower profiles and filing shareholder proposals only if negotiations fail.

CalPers' approach to social and environmental issues is that it will evaluate the impact of a social concern that bears a direct relationship to share value. For example, CalPers incorporated a "workplace practices" screen in its 1994-95 corporate governance program, but only after it studied whether such practices were likely to add value.

Others have taken slightly more proactive positions. Eric Wollman, speaking about the New York City pension funds, said:

> ...As significant owners of publicly traded companies we have the capacity to help resolve questions of corporate social responsibility in a way that not only maximizes the bottom line for all shareholders, but also, at the same time, promotes decency and the general well-being of the society in which we invest (Wollman 1990).

Shareholder proposals filed by one or more public sector pension funds in 1995 and 1996 included calls to implement the McBride Principles, provide a report on operations in Northern Ireland, endorse the CERES principles, encourage board diversity, halt tobacco sales to minors and provide a workplace free of discrimination against gays.

United Kingdom

PIRC is an independent company, set up by a consortium of pension funds as an independent agency to provide research, advice and coordination among shareholders. In 1993, twelve public sector pension funds subscribed to PIRC's services, representing investments totalling 14 billion pounds (Mackenzie 1993, 90-91). It is primarily PIRC that undertakes the coordination of shareholder activity in the U.K., although a voting information service is also provided by the National Association of Pension Funds.

The organization mobilizes responses to company actions and advises clients on how to vote on management proposals. One of PIRC's strategies is to ask for a "poll vote" at the annual meeting, which is a means of ensuring that proxy votes are brought to bear in counting a vote. PIRC also undertakes research on issues of concern to its clients, and communicates its clients' positions to the company. Dissatisfaction with management responses to issues raised by shareholders may be expressed through a negative vote on the company's *Report and Accounts.*

PIRC encourages the use of shareholder proposals, although the procedure for putting forward a proposal has discouraged its use. The targets of the shareholder proposals put forward by public sector unions in 1995 were privatised utilities. The reason for this, according to the PIRC, is:

> Requisitioning a resolution is an arduous task at most companies but is often slightly easier at the privatised utilities. Their shareholders are drawn from a wider cross-section of the community than most other companies, so finding one hundred like-minded shareholders is easier (PIRC 1995).

In 1996 one of PIRC's major actions was in relation to Shell. The PIRC met with Shell representatives and produced a client report on its activities in Nigeria, recommending that shareholders consider a shareholder resolution. (There was no indication that the pension fund clients took up this option.) PIRC also advised clients to vote against Shell's "Report and Accounts," on the grounds that Shell had not fully addressed the issues raised by PIRC and others. PIRC then attended the annual meeting to call for a poll vote. However, the chair moved the vote on a show of hands, and closed the meeting. PIRC has since written to Shell objecting, and is now seeking disclosure of the proxy vote (PIRC 1996a, 6).

Canada

Thirteen of the fifteen biggest pension funds in Canada are public sector funds. Public pension funds manage nearly eight per cent of Canadian equity. Each of the two largest public pension funds, the Ontario Teachers' Pension Fund Board and the Québec Public Employees Fund, manages as many assets as the ten largest private funds (Patry and Poitevin 1995, 358). The top fifteen funds also include: OMERS, Ontario Hospitals, Ontario Pension Board, B.C. Municipal, Ontario Hydro, B.C. Public Service, Québec Teachers, Hydro Québec, B.C. Teachers, OPSEU, and Alberta Local Authorities.

Ontario Task Force on the Investment of Public Sector Pension Funds

In 1987, the Ontario Task Force on the Investment of Public Sector Pension Funds was established to determine whether the current approaches to the investment of the funds were meeting the needs of beneficiaries, and whether economic development could be increased through changes in the way public sector pension funds are invested. While it was a provincially based task force, it addressed issues being faced in every jurisdiction in Canada, and provided an opportunity for interested groups to raise issues of social investment and to broaden the discussion of trustees' obligations.

The unions and churches were active participants in discussions leading up to the preparation of the Task Force report, *In whose Interest?*, which concluded:

> We see no reason why public sector pension fund governors should not seek to achieve social or other objectives so long as the financial rate of return goal remains paramount and there is no concessionary investment of public sector pension funds.

Following release of the report there was a further round of discussion. TCCR submitted a brief which recommended that public sector pension plans be encouraged to form a "social responsibility" committee of the trustees, with guidelines against which investees' actions could be assessed, and with provisions for a report on the committee's activities to the plan members.[14]

The 1988 report on the consultation process, *A Fresh Start* reported consensus on the need for more formal participation and acceptance of responsibility for the pension programs by the participants—a recommendation that left open the possibility that pension trustees could become active shareholders and responsible investors in response to plan members' wishes.

Union Leadership

The effort by plan members to encourage public sector pension fund trustees to become active shareholders has been led by the unions, although many of the public sector pension funds have non-union as well as union employees in their membership and among the trustees.

There have been two issues on the agenda of public service unions in relation to the pension funds: joint governance of pension funds and socially responsible investment (defined to include both screened investment and active shareholdership). CUPE has advanced this agenda in presentations to public sector funds (e.g. see CUPE Ontario 1992 and CUPE 1993). Moreover, CUPE recently began courses for its members, and will begin courses for members who sit on pension advisory committees or as trustees. These courses will include discussion of the issues of governance and socially responsible investment.

On the issue of governance, CUPE does not regard the advisory committee required under some provincial pension benefits standards laws as equal partnership. It points out that:

> A union representing workers covered by a workplace pension plan could quite legitimately demand exclusive control of such a plan.... However, despite a strong case for full pension plan control by unions a more realistic and attainable goal is joint management—equal partnership. In the public sector the objective to attain joint control of our pension plan and fund has been a priority for many years now. The major thrust for making this goal a priority has been that employers, trust and insurance companies cannot be relied upon to manage our pension funds in the best interest of the plan members (Beggs 1993, 1).

Some of the larger plans have joint trusteeship between employer and employees (in some cases, non-union employees), e.g., Ontario Teachers; Ontario Hospitals (Beggs 1993,1), OMERS[15] (Laursen 1994, 17), and OPSEU. Others, including the B.C. public sector plans, do not. However, at least one of the four B.C. plans is close to joint trusteeship. Control of Ontario Hydro's pension fund is being contested by the union in the courts.

The effort by CUPE and individual public sector unions to introduce responsible investment criteria has focused on screened investment in some cases, and in others on active shareholdership, depending on the issues and what is already in place. In particular, CUPE is raising the issue of pension investments in companies that are poised to take jobs from public sector workers. At OMERS, for example, the garbage collectors union complained about OMERS investment in Laidlaw, a waste management company that provides services to municipalities (Laursen 1994, 17).

Ontario

Of the public sector unions we reviewed,[16] OMERS appears to be the most advanced in its policies on responsible investment. Unlike most public sector pension funds, it has proxy voting guidelines not only on corporate governance issues, but also regarding "Social Responsibility" issues. CUPE has asked OMERS to go further and begin to practice a level of social investment (CUPE Ontario 1992).

OMERS' *Proxy Voting Guidelines* (January 1993) state the general principle that:

> OMERS believes that a corporation that is not responsive to public concerns will eventually suffer in terms of its economic performance and therefore detract from overall investment results. To be successful in the long run, a company needs to carefully assess public attitudes and values that affect it and to operate in a way that is not offensive to them.
>
> ....The proxy vote is an important asset of a pension fund. Ownership and voting rights should be used to support ethical conduct but not any particular external social or political agenda at the expense of long term returns. Fiduciaries are obligated to exercise their ownership rights in order to optimise the long term value of their investments.

OMERS' guidelines state that it will make its view on issues of corporate governance known to management and Boards and if, over time, corporate performance is not satisfactory and management not responsive, OMERS will withdraw its support from the suggested slate of Directors.

The section of the guidelines on "Social Responsibility" notes that most shareholder resolutions have been framed as requests for information from Boards of Directors about the effect of their corporation's practices. OMERS supports shareholders' right to know about the activities of their investee companies and will generally vote for requests for reasonable information and disclosure. More specific shareholder resolutions that purport to mandate certain corporate actions will be examined on a case-by-case basis, with special regard for the effects the proposed action will have on the corporation's long term value and the financial well being of beneficiaries. The guidelines refer specifically to these principles in relation to proposals on environmental issues, nuclear energy, human rights, military production, and employment issues.

This statement of proxy voting guidelines is in stark contrast to the position of the Ontario Teachers' Pension Plan Board (OTPPB). Its January 1996 proxy voting guidelines state its position on corporate governance issues such as confidential voting and takeover protection, and then goes on to say:

> The OTPPB generally DOES NOT SUPPORT [emphasis in original] proposals referred to as "stakeholder proposals" which seek to alter the responsibility of the directors to supervise the management of the business of the corporation and which provide a wide range of discretionary considerations the directors must take into account in evaluating a business proposal....

The Ontario Teachers' Federation has received representations from a minority of teachers concerned about ethical issues, but the Executive Director at OTF says that for both legal and practical reasons, any kind of social investment approach would be impossible (Ellmen 1996a). The OTTPB's excuse is that there aren't enough investments that would pass a screen to meet its investment needs. This assumes that negative screening is the only option available to it. It apparently has not considered either a best of sector approach to screened investment, or the option of active shareholdership.

British Columbia

In B.C., despite strong unions, public sector plans are not yet jointly trusteed. There are four plans: B.C. Municipal (which includes health and other non-direct employees of government), B.C. Teachers, B.C. Public Service, and B.C. College. Public sector employees currently have a role on advisory pension boards. The Public Service union may shortly become jointly trusteed, as it has eliminated its unfunded liability.

CUPE has raised the question of shareholder action as well as screened investment with trustees. There appears to be possible agreement in principle on the withdrawal of investment if it can be replaced with an investment of comparable return. However, a process for implementing this policy and accountability to the members has not yet been put in place.

9

Ethical Mutual Funds

ETHICAL MUTUAL FUNDS MARKET THEMSELVES AS AGENTS OF POSITIVE SOCIAL CHANGE. Since they first appeared on the Canadian scene in 1986, some critics have suggested that in addition to screening, they should be offering a policy on shareholder activism in relation both to corporate governance and social/environmental issues.

United States

In recent years some U.S. ethical funds have begun not only voting their shares, but also filing shareholder proposals. In 1995 and 1996 these included Calvert Social Investment (equal employment opportunities, board diversity), Franklin Research (equal employment report, Burma, Pepsi code of conduct, human rights guidelines for Chevron), Domini Social Equity (CERES principles, code of conduct for non-U.S. operations, review Maquiladora operations, glass ceiling report).

Franklin Research's *Insight* produces "social change impact ratings" for the ethical mutual funds. The ratings evaluate their ethical screens as well as their shareholder activism such as letter writing or shareholder proposals (Franklin Research 1996, 1,4).

In what appears to be a new development, or perhaps a "first" for ethical mutual funds, the Domini Social Equity Fund in 1996 produced proxy voting guidelines in addition to its social screening criteria. The guidelines reflect the social considerations that go into voting on proxy resolutions. They cover subjects such as community (equal credit opportunity, redlining), diversity (equal employment opportunity, board inclusiveness), environment (climate change, paper production); governance (confidential voting, executive compensation), militarism (violence on television, peacetime production), non-U.S. operations (international debt, Burma), and tobacco (sales to minors).

United Kingdom

Initially, ethical investment in the U.K., as in Canada and the U.S., was based primarily on the principle of negative screening. Some investors then adopted a "positive screening" approach, including investment in projects that have social benefit but fail to attract the necessary capital from conventional sources.

There has been some acknowledgement that companies that survive the screening process can benefit from shareholder action. A new ethical unit trust launched in 1995 by NPI is described as a fund for people who support "engaging with industry and trying to encourage change." This approach allows the fund to use less stringent avoidance criteria than some others and is expected to therefore appeal to risk-averse investors (EIRIS 1995b).

Environmental funds managed by Jupiter Tyndall Merlin (JTM) have also been described as employing a form of shareholder action known as "constructive dialogue" (Mackenzie 1993, 97).

Canada

In 1986, the first ethical mutual fund was established in Canada. By 1996, the Social Investment Organization was reporting on the performance of nine mutual funds, with total assets of $1,754 million (SIO 1996, 3). (The assets of all mutual funds in 1993 were $28,889 million, representing seven per cent of all equity in Canada and twenty per cent of equity controlled by institutional investors.)[17]

Early efforts by the churches to monitor the funds included questions regarding the application of some of their screening criteria (military and environmental criteria), as well as questions about their role as activist shareholders. Funds using a negative screen were urged to communicate with companies the reasons for a decision not to invest. Funds using a best of sector approach were asked to remain "active" in efforts to improve company performance in relation to fund criteria. TCCR also asked the funds whether they send representatives to annual meetings, or sponsor or support shareholder actions such as shareholder proposals. Fund responses to these questions and suggestions were mostly equivocal or negative.

TCCR asked the funds to support at least one recent church shareholder proposal: the proposal to Placer Dome on confidential balloting. The outcome of the request is not known.

The position of the funds on these and other questions were published by TCCR in a booklet, *An Analysis of Ethical Criteria of Canadian Mutual Funds*, first issued in 1989 and updated until 1993 when it was discontinued. Eugene Ellman's book, *The 1997 Canadian Money Guide*, is now the primary resource for monitoring the ethical mutual funds.

In 1990, TCCR sought the endorsement of the ethical mutual funds for their position regarding its efforts to persuade the Canadian government to strengthen the rights of minority shareholders to file proposals. The Investors Group Summa Fund replied:

> While we as a company may support the principle of shareholder proposals, for Summa Fund to publicly support an issue could conceivably create a conflict of interest situation. As an institutional investment manager, our posture must be consistent for all of our funds. To that end, our normal policy has been to abstain from active involvement in shareholder resolutions. Summa fund, as a member of our family of funds, must conform to this overall policy.

VanCity Investment Services Ltd., the sponsor of what is now the Ethical Funds Inc. (EFI), agreed to endorse the TCCR brief, but this did not imply that it would itself publicly support or initiate shareholder proposals.

Ethical Funds Inc. uses the services of outside investment advisors for each of its funds. Neither EFI nor its investment managers play a publicly activist role, perhaps because the possibility of a conflict of interest is also a consideration for its investment managers. In recent interviews, an EFI spokesperson said that the fund was not set up to play an activist role, and gave as its reason the fact that it has not received indications from its investors that an activist stance would be welcomed. This lack of investor pressure for an activist stance was echoed by the spokesperson for another pooled fund which has an ethical screen.

The investment advisors for EFI are in some cases involved in behind the scenes activity on corporate governance issues. In voting proxies, the investment managers have only a general guideline to encouraging shareholder value, although the investment criteria of the Fund and of other organizations such as PIAC and Fairvest also provide some guidance. There are no EFI proxy voting guidelines, nor is there a clear process for referring shareholder proposals which might be controversial to the Fund or its advisory committee.

However, it appears that the question of proxy voting guidelines is one that may be explored by the EFI advisory committee. Implementing a proxy voting policy would be a relatively straightforward first step in shareholder activism.

Mutual funds and unit trusts have a responsibility to be more than simply reactive. They pool financial resources from thousands of individuals and groups who have delegated responsibility to the funds to make sure that their investments support corporate social responsibility. The funds in turn have a responsibility to ensure that their investors know what the choices are in pursuing that goal. The funds remain passive investors and justify this because of the lack of demand for change from unitholders. However, the ethical mutual funds position themselves as leaders in socially responsible investment and should therefore pursue all avenues to advance corporate social responsibility.

While the established ethical mutual funds have avoided active shareholdership, an environmental group has decided it would be worthwhile to explore the market for a mutual fund that would be explicitly activist. The Sierra Legal Defence Fund in B.C. has been investigating the feasibility of a proposal to establish a shareholder activist mutual fund to advance an environmental agenda. The idea is innovative and worthy of attention and support. At the same time, efforts should continue to encourage the ethical mutual funds to be activist shareholders.

RECOMMENDATION 9

Increased effort should be made to encourage the ethical mutual funds to be activist shareholders. Steps might include:

- Ensuring the continued regular monitoring and publication of the funds' positions on various forms of active shareholdership;
- Annual monitoring of the funds' holdings in relation to shareholder proposals (both U.S. and Canadian proposals), and publication of the funds' responses to questions regarding how they voted on these proposals. This might be undertaken as a special time-limited project to raise awareness within the funds and among ethical investors generally of the need for active shareholdership by the funds.

10

Foundations and Charitable Organizations

MOST FOUNDATIONS AND CHARITABLE ORGANIZATIONS HAVE NOT BEEN ACTIVE IN SOCIALLY responsible investment, but keep their program goals separate from their investment goals. However, there are recent developments in the U.S. that establish a new benchmark for the role of foundations and charitable organizations in the responsible investment movement.

United States

Shareholder activism is still relatively new to foundations in the U.S., but the concept of screened investment is not. Screening for South African investment was common, and screens for alcohol, tobacco, gambling, arms, and health and environment-related causes are now actively used. For example, the Nathan Cummings foundation of New York excludes tobacco stocks, the Henry J. Kaiser Family foundation of California avoids liquor and tobacco stocks, and the William Bingham Foundation of Cleveland excludes the nuclear power and weapons industry and companies with poor environmental records (Knowles 1995, 23).

The Jessie Smith Noyes Foundation is a pioneer in its decision to employ shareholder activism to relate its financial and social goals. The foundation President, Stephen Viederman, criticizes the "iron curtain" between making money and giving it away (Viederman and Tasch 1995, 43). Without such a curtain, the foundation realized that it needed to ask questions about its ownership of stock in Intel, the computer-chip manufacturer. One of the foundation's grant recipients, the Southwest Organizing Project, had been protesting Intel's plan to expand its plant in New Mexico because of environmental concerns.

Instead of divesting the stock, the foundation, after unproductive discussion with the company, filed a shareholder proposal in 1995 and 1996. The proposal asked Intel to adopt a formal policy of providing non-proprietary information on a regular basis to the communities in which it works (Billenness 1996). Co-filers in 1996 included four other foundations: Needmor, Merck, Levenson and the Education Foundation of America. Intel amended its policy satisfactorily, and Noyes with other organizations has monitored and assisted Intel's implementation of its policy.

The Intel proposal appears not only to have attracted the support of other foundations, but to have encouraged at least one to take the lead in another initiative. The Education Foundation of America filed resolutions with two paper companies, International Paper and Union Camp, asking them to phase out the use of chlorine in its manufacturing processes (Billenness 1996).

The Noyes Foundation and those few foundations that have joined it in shareholder activism are still a small minority, even in the U.S., which is generally more supportive of shareholder activism. As Viederman notes, citing a recent Council on Foundations report on philanthropic asset management, the mainstream approach continues to reinforce the "iron curtain," treating asset management as completely separate from grant making.

United Kingdom

In the U.K. it is not surprising, given the difficulties of filing shareholder proposals, that there are no reports of foundations and charities using shareholder action to relate their program goals with their investment goals. The Joseph Rowntree Charitable Trust does, however, engage management in dialogue on issues of social and environmental concern. The concern of the responsible investment movement appears to be focused on the question of the legal basis for the application of an ethical (screened) investment policy by charity trustees.

A 1992 judgement in a case brought by the Bishop of Oxford against church commissioners has given wider scope to charities wishing to invest ethically.[18] Despite this, only a small minority have chosen to do so (Hirst 1993).

In 1995 a number of major charities were in the headlines "for all the wrong reasons." According to the Ethical Investment Research and Information Service (EIRIS), cancer charities were found to be investing in tobacco and health charities in alcohol, in contravention of their ethical investment policies.

> The stories highlighted the potential for misunderstanding between investors and their investment managers as well as the paucity of collective ethical investment options for charities (EIRIS 1995a).

In an article by EIRIS on the options open to charities, it is noteworthy that there was no reference at all to the possibility of shareholder action (EIRIS 1996b, 7).

Canada

Very few Canadian foundations or charities practice socially responsible investment. A recent meeting organized by Michael Jantzi Research Associates brought together representatives of some major Canadian foundations to discuss approaches to responsible investment, and in particular, active shareholdership. One foundation, a B.C.- based family foundation, is actively exploring active shareholdership.

In the charitable sector, the YWCA, as an associate member of TCCR, has supported several shareholder actions and co-filed some proposals. In 1988, the YWCA co-filed a shareholder proposal to Placer Dome concerning the environmental impact of the company's operations in the Philippines. It co-filed a proposal to Thomson Corporation on confidential voting and to Federal Industries on board diversity in 1994 and 1995 respectively.

Early efforts by TCCR to engage the charitable and foundation sector in active shareholdership were largely unsuccessful. When the first church shareholder proposals on South African investments were filed in 1982 and 1983, TCCR attempted a formal solicitation of support from other shareholders, focusing on the charitable, foundation and university sectors.

The effort to reach these institutional shareholders proved to be a time-consuming and difficult process. Special legal exemptions were required under the *CBCA* in order to approach other shareholders. Because many beneficial owners could not be identified through shareholder lists, it was difficult to identify potential allies. Most of those approached (by letter) made no response. After these early efforts at formal solicitation, TCCR concluded that it was ineffective on a broad scale.

If the changes proposed to shareholder communication rules in the current review of the *CBCA* are put into effect, an effort to reach shareholders from the charitable and foundation sector might be effective, both in terms of support for a particular proposal, and in terms of stimulating their consideration of active shareholdership.

The assumption of most foundations and charities that socially responsible investment means primarily "screening out" certain investments may be a barrier to their involvement as active shareholders. In Canada, there appears to be very little screened investment by foundations and charities. A spokesperson for a small, closely held foundation that screens its investments said that it is the only foundation in Canada doing so.

A belief that screened investment necessarily implies a lower rate of return is probably the primary reason for lack of involvement. A spokesperson for a socially screened unit trust described the response of an environmental foundation to a presentation she made at the request of a donor to the foundation. The board of the foundation opposed screening because of its fear of a lower rate of return on its investments (see Recommendation 7).

Physicians for a Smoke-Free Canada and the Non-Smokers Rights Association are pressing the Canadian Medical Association (CMA) to follow the American Medical Association's lead in urging the public to divest investments in tobacco. MD Management Funds, the mutual fund subsidiary of the CMA, has a policy of avoiding tobacco-related investments (Medical Post 1996). The press coverage made no reference to consideration of shareholder activist strategies, although these have been considered by non-smokers' rights groups in the past.

Education is needed, both about the financial effects of screening, and about the complementary use of shareholder activist strategies. However, even with better information about the options, the response of a public charity or foundation to the suggestion of active shareholdership may in the end be influenced by the extent to which it depends on donations from corporations.

If it is possible to obtain the investment portfolios of selected public charities and foundations for the purpose of analyzing them, then an invitation to them to attend a meeting to explore the possibilities of active shareholdership might be seriously received.

RECOMMENDATION 10

An effort should be made to obtain the investment portfolios of selected major public charities (e.g. health and environmental charities) and foundations, for the purpose of analyzing them in relation to socially responsible investment objectives and providing the analyses to their boards with an invitation to a meeting to consider active shareholdership as a responsible investment option.

11

Universities

YALE UNIVERSITY, ONE OF THE UNIVERSITY "PIONEERS" IN ACTIVE SHAREHOLDERSHIP, FIRST exercised its shareholder rights in 1970 by abstaining rather than voting with management on shareholder proposals to General Motors calling for the creation of a shareholder committee on public policy and for the expansion of the board to permit the election of directors experience in ecological, minority and consumer issues (Stavovy 1990, 36). Queen's University was the first Canadian university to consider investor responsibility in response to a campaign opposing investment in Chile by Noranda.

Most other universities in the U.S and Canada were first challenged to respond to the social responsibility movement in connection with the participation of their members (faculty and students) in the South African anti-apartheid campaign.

Some universities established a clear process for deciding how to exercise their vote on shareholder proposals. Others simply continued to vote against all social responsibility resolutions, reflecting reasoning similar to for-profit institutions (Sommers 1991, 10).

United States

Universities such as Harvard, another pioneer among universities in active shareholdership, continue today to engage in a process of evaluating all proposals before exercising their vote. Harvard established two committees in 1972: the Corporation Committee on Shareholder Responsibility (CCSR) and the Advisory Committee on Shareholder Responsibility (ACSR). The ACSR, made up of faculty, students and alumni, is responsible for analysing proxy issues and making recommendations on how Harvard should vote its shares. The CCSR, acting for the President and Fellows, makes the final decisions about university investment policy. Harvard's policies provide for selective divestment.

Harvard issues an annual report outlining changes in investment policy, and reporting on its vote on shareholder proposals. For example its 1995 report (with the summary available on Internet) records its vote on 80 proposals, outlining the recommendation of the ACSR and its reasons for and against, and the decision of the CCSR (Harvard University 1995).

University sponsorship of shareholder proposals, as opposed to exercising the vote and corresponding with companies, appears to be rare. The Interfaith Center on Corporate Responsibility made special note in its 1995 year-end review of the fact that the University of Washington, Seattle, "inspired by student concern about human rights in Burma," joined ICCR members to co-sponsor two proposals. The proposals called on Pepsico and Unocal to update their company codes of conduct so that they provide advice on whether to invest in or withdraw from companies like Burma.

Canada

There has never been university sponsorship of a shareholder proposal in Canada.

As in the U.S., most universities were first confronted with the question of responsible share ownership in response to the South African anti-apartheid campaign. However, Queen's University developed its policies on responsible share ownership as a result of a campaign initiated by TCCR and a Queen's member of Amnesty International. In 1977, they asked Queen's to oppose Noranda's decision to consider investing in Chile during the Pinochet regime. The university's initial refusal to "get involved" led to letters, petitions, the formation of a student group, a referendum and a debate in Senate.

Queen's, in response to this campaign, established a special board Committee on Social Responsibility (CSR) "to receive expressions of concern on matters of social responsibility," with representatives from each of the university's major constituencies. The Committee joined the Investor Responsibility Research Center (U.S.) to assist it in preparing for dialogue with companies. Initially, the university resisted divestment of South African holdings, but under pressure from the constituency, adopted a divestment policy. A representative of the university estimated that this policy cost the endowment fund one million dollars (Buchan 1990, 42).

Other universities took positions on investment in South Africa, but most did not establish any ongoing process for reviewing their investments in terms of shareholder responsibility. The exceptions, which included McGill and the University of Toronto, established processes that require the organization of a campaign, such as a petition by members of the constituency, to trigger an examination of policy. McGill, like Queen's, established a social responsibility committee. However, a lack of continuing interest in the university community, and cutbacks and other pressures on the institutions led to decisions by both Queen's and McGill a couple of years ago to disband their social responsibility committees.

The process that had been established at McGill required a "sufficient" number of members of the university community to raise an issue and recommend action. For example, the McGill Board of Governors adopted a program to divest South African-related holdings when both the students and the University Senate (faculty) took a position. A McGill observer suggested that student activists today, while well informed and concerned about world issues, are preoccupied with other more immediate issues of university financing and cutbacks. McGill retains its power to vote its proxies. On corporate governance issues it generally votes with management unless it has been alerted by McGill's investment managers of a contentious issue. On social responsibility issues it generally abstains. A report on all votes is made to the investment committee annually.

We contacted the Canadian Association of University Business Officers (CAUBO), which undertakes annual surveys of university investment and endowment funds. The survey includes a question regarding

socially responsible investing. However, the lack of any indication of activity in this area in the last few years has prompted suggestions that the question should be dropped from the survey. The CAUBO spokesperson reported that in some universities questions continue to be asked occasionally about a university's "sin stocks" or other social investment issues, but without enough constituency support to result in any action.

The CAUBO spokesperson also said that most Canadian universities do not practice activist shareholdership through proxy voting. Some universities do, however, have proxy voting guidelines which leave room for the application of university policies. At the University of British Columbia, for example, the proxy voting guidelines specify that the university retains the right to vote on questions relating to public or social policies issues on which the university has taken a position. In fact, there are very few occasions when the university exercises its vote under this process. The investment manager(s) almost always vote the proxies, and there is no provision for a report back to the university.

We also contacted the Canadian Federation of Students (Ottawa) to ask about its position on shareholder responsibility in relation to university investment and pension funds. The response was that the Federation attempts to monitor and pass on information about consumer boycotts, with action determined by local student groups. There is no coordinated or central source of information should there be students interested in advocating the implementation of social investment policies.

Analysis

Canadian university students are responsive to issues such as human rights in Burma or Nigeria and often seek ways to address them. Consumer boycotts of companies associated with the problem are generally popular because of the possibility of engaging large numbers of individuals in an ad hoc campaign. Responsible investment strategies are more challenging because timely action is difficult without having first established processes in investment and pension fund boards for the examination of the issues. However, past experience suggests that students and other members of the university community are open to other investment-related strategies, if these are presented to them.

If universities are to be engaged in active shareholdership, it will happen as the result of an overture from an outside group, as in the case of Queen's and the Noranda campaign. Ideally, such an overture would include information about particular companies in relation to a social or environmental issue already of concern to the university community, advice about the structures and processes for responsible shareholdership which the university should be asked to establish to enable its response, and suggestions for campaign strategies in relation to the current issue of concern and the relevant companies.

To sustain the engagement of universities in active shareholdership over the long term, two factors need to be addressed.

- In the South African campaign, the focus of most activists (other than in the churches) was on persuading institutions to divest their holdings in South-African related holdings. There was little understanding of the approach of using divestment only as a final action when shareholder activism over a reasonable period of time had no impact. In universities, with their transient student populations, the emphasis on immediate divestment was natural. However, it encouraged most universities, with the exception of Queen's and McGill, to respond with a crisis management approach to constit-

uency activism, rather than making a commitment to responsible investment over the long term. Greater effort needs to go into communicating the message of long-term shareholder responsibility.

- Universities that do make a commitment to longer-term monitoring of their investments require more than what TCCR was able to offer: information specific to their needs. Both Queen's and McGill subscribed to the services of the Investor Responsibility Research Center in the U.S., but eventually dropped their memberships because of the cost at a time of apparently declining constituency interest. If there had been a similar Canadian organization, providing a more modest (and less expensive) level of service, would structures for the monitoring of responsible investment policies in universities have been maintained?

A new development which could have a major effect on the possibilities for active shareholdership by university endowment and pension funds is a possible "Canadian Common Endowment Fund" to pool the management of the endowments of Canadian universities (and, less likely, their pension funds.) A feasibility study is under way to see if there would be support for such a fund, modelled on the Common Fund in the U.S.

The Common Fund for U.S. colleges and universities was established in 1971. Poor investment performance by colleges provided the impetus for putting their assets under the control of full-time professional management. The Fund began with 72 schools and now manages 1,400 endowments of $19 billion. The size of the fund allows for broad diversification among money managers.

One vision of a Canadian common fund is that it might include *all* charities in Canada (churches, foundations, universities, health organizations, etc.). It is estimated that the value of Canadian charities is between $15 and $25 billion. Of this, the universities hold $3 billion.

The question for those interested in responsible investment is whether a common fund would enhance or decrease the support of universities (and other charities, if included) for active shareholdership. Would it, like a mutual fund, deprive individual institutions of the opportunity to vote their proxies and file shareholder proposals? If a pooled fund did agree to adopt policies for responsible share ownership, would these reflect a lowest common denominator and thus prevent serious engagement with controversial issues? Or, on the positive side, would the pooled resources of the fund facilitate involvement in responsible investment by institutions that are currently not engaged?

RECOMMENDATION 11

Discussions regarding the establishment of a Common Fund to pool university or all charitable endowments should be monitored and responded to with respect to any opportunities for a responsible investment/active shareholdership commitment.

12

Environmental Groups and Other NGOs

CRAIG MACKENZIE, AUTHOR OF *THE SHAREHOLDER ACTION HANDBOOK*, A BRITISH PUBLICATION, describes two categories of activists:

> In practice, the principle divide between existing shareholder activists is that between campaigning groups and investor groups. Campaigning groups are primarily interested in changing the social policies of companies and have little or no explicit interest in the financial performance of the business; investor groups, on the other hand, are primarily concerned about the long-term financial performance while seeing social responsibility issues as important subsidiary questions (Mackenzie 1993, 90).

Environmental groups and other NGOs are often, but not necessarily, in the campaigning group. Most of the organizations described in the previous sections of this report are in the investor group, although TCCR, the Canadian church coalition, maintains a sometimes uneasy internal balance between the two.

United States

In the U.S., some shareholder proposals are filed by groups other than the churches and unions, but not as many as one might expect. By far the majority of proposals come from groups fitting the "investor" description.

Filers that might fit in the "campaign" category have included groups such as Friends of Animals, GE Stockholders' Alliance Against Nuclear Power, New England Anti-vivisection, Maryland Safe Energy Coalition, People for the Ethical Treatment of Animals, Pro Vita Advisors, and Friends of the Earth.

United Kingdom

In the U.K., the virtual impossibility of filing shareholder proposals has discouraged much activity at all by potential "investor" activists. In the absence of the shareholder proposal mechanism, environmental groups and NGOs have been very creative in devising alternative forms of shareholder activism. For example, Friends of Earth (FOE) recently took the unusual step of advertising in a national newspaper for mass shareholder action. FOE appealed to people to contact construction companies tendering for a contract to build a controversial road and tell them that if they (the company) accepted the commission, they (the individual) would buy a single share in the company. These single share owners would plan to attend the companies' annual meetings to ask how they intended to repay their debt to the country's natural heritage (EIRIS 1996).

The End Loans to South Africa (ELTSA) campaign produced several "shadow" annual reports on behalf of a "shadow" board of directors for Barclays and Shell during the 1980s. In some years the shadow report and meeting got more press coverage than Barclays own AGM (Mackenzie 1993, 141).

Canada

In Canada the only environmental group or NGO known to have filed a shareholder proposal is Greenpeace. The second time it filed a proposal, a successful court challenge by Inco resulted in the exclusion of the proposal from the proxy circular. (The court challenge is reviewed in the paper on shareholder proposals attached in Appendix B.)

Greenpeace's experience was that it received more publicity by carrying a dead fish up the aisle of the annual meeting than it did from filing the proposal. This lesson may not have been lost on other campaign groups. Various groups—native, environmental, anti-smoking, etc.—have asked TCCR for advice on filing proposals. What seems like a complex process, combined with the current likelihood that a company will simply refuse to circulate a proposal, makes it difficult to judge whether the lack of proposals filed reflects a lack of interest or is an assessment of the difficulties of getting a proposal circulated.

An innovative form of shareholder activism—the formation of an activist mutual fund to pursue environmental objectives—is under consideration by an environmental group, the Sierra Legal Defence Fund. This would appear to combine the investor and campaigner approaches to shareholder activism in one organization.

13

Shareholder Activism Advisory Services and Networks

Advisory Services

A publication of the Interfaith Center on Corporate Responsibility, *International Sources of Information for Socially Responsible Investors*, provides a comprehensive listing of advisory services (Younger 1994).

The Canadian organizations it lists are: EthicScan Canada, Michael Jantzi Research Associates, the SIO and TCCR. The first two monitor and report on the social and environmental performance of Canadian companies. The SIO is described as an "information clearinghouse and networking facilitator which holds educational events and provides resources for investors." TCCR is described as a coalition of church investors that undertakes research and coordinates church action on the social and environmental impact of Canadian companies.

Currently, there is no Canadian professional advisory service for institutional investors interested in shareholder action on social and environmental issues. In the U.S., the Investor Responsibility Research Center provides proxy research service in three areas: corporate governance, social issues and global issues. This service includes notice of forthcoming proposals as well as analysis of the issue under consideration. It also provides a portfolio screening package. In the U.K., PIRC provides assistance to institutional investors in using their voting rights for corporate governance and socially responsible investment objectives. The National Association of Pension Funds provides a voting information service, but unlike PIRC it does not make recommendations or include issues such as political donations, environmental policy or executive compensation.

In Canada, Fairvest provides an institutional proxy review service which makes recommendations to clients on how to vote on such corporate governance matters as managerial share option plans and anti-takeover devices like poison pills. It also produces a corporate governance rating service, through which Fairvest reviews and compares corporate governance structures with the PIAC guidelines. Its publication, the *Corporate Governance Review*, is a forum for the discussion of matters of interest to institutional shareholders. Fairvest's activities are funded not only by fee-for-service activities (such as the proxy review service), but also through commission dollars, in which Fairvest champions institutional causes in return for brokerage business from institutional clients.

We reviewed several issues of Fairvest's *Corporate Governance Review*, and found that it reported on social issues shareholder proposals, but without taking a position. Discussions with a representative of Fairvest suggest that it is unlikely to play an advisory role in relation to social responsibility proposals.

The lack of a Canadian advisory service for shareholder activists on social and environmental issues is obviously related to the fact that almost no social or environmental shareholder proposals have been circulated in the last several years. However, in the U.K., where there is a similar absence of shareholder proposals on either social or corporate governance issues (because of the filing process), the PIRC plays a role in advising institutional shareholders on other possibilities for shareholder activism. Perhaps PIRC has a niche because the market for such services is much larger.

There is a "chicken and egg" problem in Canada. In the absence of an advisory service, those investing institutions in which there is at least a minimal level of interest in shareholder activism on social issues (e.g. certain pension funds and universities) lack easy access to the information they require to make a decision about voting their shares rather than simply abstaining or voting with management. But to establish an advisory service when so few social issues shareholder proposals are put forward in Canada is not an economic proposition, in that investing institutions are unlikely to pay for such a service at this time.

The information that a Canadian investment fund might need to review its portfolio and keep track of shareholder proposals on social issues is not available from any single Canadian source. Assuming that most portfolios have Canadian and international holdings, and that most international shareholder proposals pertain to U.S. companies, investors would need the following four types of information:

1. Social and environmental responsibility profiles of Canadian corporations.

   These are available in Canada through Michael Jantzi Research Associates Inc. (which has developed the computerized Canadian Social Development Database); and Ethicscan Canada (publisher of the *Corporate Ethics Monitor*);

2. Social and environmental responsibility profiles of U.S. corporations.

   These are available through a number of sources, including Kinder, Lydenberg, Domini & Co., Inc., the Council on Economic Priorities, The Data Center, Franklin Research and Development, and the Investor Responsibility Research Center (IRRC). Michael Jantzi Research Associates works in partnership with Kinder, Lydenberg, Domini so that investors can obtain Canadian and U.S. information from one source.

3. Information and analysis on U.S. social policy proxy issues.

   The Investor Responsibility Research Center provides both a social policy and a corporate governance service for U.S. companies, and includes Canadian issues in its global shareholder service. Kinder, Lydenberg, Domini is also developing a proxy advisory service, drawing on resources of the Interfaith Center on Corporate Responsibility.

4. Information and analysis on Canadian social policy proxy issues.

TCCR has acted informally as the primary source of information, largely because its members have been the proponents of almost all of the social policy proposals filed in Canada. However, TCCR is not structured to provide timely or disinterested "shareholder alerts" to investors. Reference to proposals is sometimes included in Fairvest's *Corporate Governance Review*, and in SIO newsletters. However, this infor-

mation is also not necessarily available on a timely basis to institutions that may require advance notice, and it lacks analysis of contentious issues.

Ideally, a Canadian organization would provide a service to Canadian investors that similar to the service provided in the U.S. by the IRRC. However, only a less expensive (and therefore less comprehensive) proxy review service is likely to have a market until active shareholdership is better established in Canada. We know that at least one Canadian university dropped its subscription to the IRRC because of the expense. We were also told by a union representative to a union pension fund that the other trustees were unwilling to pay for advisory services. A feasible first step might be a very basic "shareholder alert" service, providing investors with notice of forthcoming shareholder proposals without attempting extensive analysis or recommendations.

RECOMMENDATION 12

A Canadian social issues proxy service should be established to provide Canadian investors with "shareholder alerts" about Canadian proposals on social issues. The service should also provide Canadian investors easy and relatively inexpensive notice about U.S. shareholder proposals on social issues. As the provision of such a service may not be economically feasible until such time as there is a larger Canadian market for it, consideration should be given to seeking a subsidy. The service would ideally be linked with one of the Canadian organizations currently working in the area of socially responsible investment.

Shareholder Activist Networks

Underlying most of the analysis and recommendations of this report is the need for networking and coordination among shareholder activists and those attempting to encourage shareholder activism.

TCCR has been the only organization providing coordination and networking on a consistent basis for Canadian shareholder activists in relation to corporate social responsibility issues. It has given considerable time and attention to the task of encouraging shareholder activism outside of the churches. Efforts included responding to the many organizations that contacted TCCR to investigate the possibilities of shareholder action (native groups, unions, anti-tobacco groups, environmental groups, student groups, etc.); numerous speaking engagements, radio and television appearances, the production of videos and print materials on responsible investment by the member organizations, publication of a monthly (later bimonthly) *TCCR Mailing*, cooperation in the establishment of the SIO (and the earlier Canadian Network for Ethical Investment) and the organization of meetings and conferences for investors.

Three meetings are worth noting. In 1986, TCCR hosted a workshop on ethical investing, bringing together church representatives and representatives of newly established ethical investment funds and advisory services (some in the process of formation). While the focus of the meeting was on ethical (screened)

investment, the TCCR agenda was in part to encourage these organizations to consider active shareholdership as part of their mandate.

In 1987, TCCR organized an exploratory meeting on responsible share ownership. It attracted a dozen representatives of investment committees of universities, public sector pension funds, investment firms and consultants on shareholder rights and corporate responsibility. The meeting gave participants an overview of resources available in the U.S. to assist investors on questions of responsible investment, and discussed (inconclusively) the need and possibilities for more structured coordination for concerned investors in Canada.

In 1990, TCCR took the initiative in co-sponsoring, with the University of Toronto's Centre for Corporate Social Performance and Ethics, a conference entitled "Strategies for Responsible Share Ownership: Implications for Pension and Other Investment Funds." The conference attracted close to 100 representatives of public sector pension funds, unions, charities, churches, universities, governments, ethical investment services and funds, and featured speakers from the ICCR, IRRC, City of New York pension funds, the Royal Bank, the Canadian Labour Congress, Yale University, Queen's University, Ontario Hydro and others.

TCCR welcomed and assisted in the establishment of the SIO. TCCR was aware that for many investors, a church-sponsored coalition has limitations as the coordinating vehicle for socially responsible investment. It was also aware of its own limited financial and staff resources for meeting the needs of the growing socially responsible investment movement. With the development of the SIO's capacities, TCCR was able to refer inquiries about ethical (screened) and alternative investment.

Currently, the SIO is not structured to provide an ongoing meeting place for investors interested in shareholder activism. The need for such a meeting place will increase if unions continue their exploration of shareholder activist strategies. There are various options available, none of which have been tested with the groups named. A membership sub-group of the SIO could be established. Working Enterprises Labour Services in B.C., a regional organization providing new energy and strategies for active shareholdership, could provide the base for a national working group, perhaps linked in some way with the SIO. An "associates" group attached to TCCR could be established. A web conference could be established by one of the above organizations.

There has been some very preliminary discussion about the formation of regional groups for shareholder action in cities like Calgary, Montreal and Vancouver, where a number of companies now have their headquarters. The initiative for these discussions has come from church shareholders who have acted on behalf of their churches or religious orders when actions coordinated by TCCR have taken place in their cities. One of the difficulties for TCCR in assisting with the formation of such groups (intended eventually to become independent of TCCR) might be the extent to which they would depend, initially at least, on the already over-extended staff for guidance.

A guidebook to shareholder action such as *Shareholder Action Handbook* might be an effective solution to this problem, and useful as well in assisting NGOs and environmental groups in getting started on shareholder action. It might also play a role in encouraging students in universities, donors to charities, pension fund members, purchasers of ethical mutual funds, church members, etc. to require their institutions and organizations to become shareholder activists.

RECOMMENDATION 13

A guide to shareholder activism for corporate social responsibility should be published. A model for such a guide is provided in the British publication, *The Shareholder Action Handbook: Using Shares to Make Companies More Accountable.* Such a publication would be useful not only to environmental groups and NGOs but to any organization considering shareholder activism.

RECOMMENDATION 14

The SIO should sponsor a meeting of all groups interested in shareholder activism to consider options for networking and coordination, and to prepare a proposal to be considered by all potential network participants and by potential contributors to possible costs of establishing such a network. The costs of the initial meeting should be funded by the participating organizations. Consideration should also be given to preparing a proposal for a larger conference on shareholder activism in Canada and seeking funding for such a conference.

Notes

[1] Sources reviewed included Coffee 1994, Daniels and Morck 1995, Daniels and Waitzer 1994, Leith 1993, MacIntosh 1996, Montgomery 1992, Pozen 1994 and Zanglein 1992.

[2] The members of the Coalition are Alcan Aluminium Limited, BCE Inc., Canadian Pacific Limited, Imasco Limited, MacMillan Bloedel Limited, The Molson Companies Limited, Northern Telecom Limited, Nova Corporation, Petro Canada, Westcoast Energy Inc.

[3] However, in January 1997, the Québec Superior Court ruled that Royal Bank and National Bank must include shareholder resolutions in management proxy circulars. Mr. Philip Anisman, a securities lawyer specializing in these issues, stated that "the decision sets a precedent that could be applied not only to the other big banks but to all publicly held companies." The banks are appealing the decision.

[4] MacMillan Bloedel agreed to issue the environmental report requested, making the filing of a proposal unnecessary, but it had advised that it would not circulate a proposal because there was no legal requirement in B.C. to do so.

[5] Progress continues to be made in British Columbia with respect to a review of the *B.C. Companies Act.*

[6] This account of ICCR's origins is drawn from the ICCR's 1995-96 annual report (ICCR 1996a, 28).

[7] Calculated from Table 4, "Institutional Assets and Canadian Shares," in Patry and Poitevin 1995, 355.

[8] For developments in the U.S. see ICCR 1996b, regarding the ongoing court case over the divestment of South African stocks by the pension fund of the Evangelical Lutheran Church in America; and Zanglein 1995, 127-149 regarding shareholder activism by pension funds within the terms of the *Employee Retirement Income Security Act* [*ERISA*]. For developments in the U.K. see EIRIS 1996.

[9] The following history of union shareholder activism is based primarily on McGurn 1994b.

[10] Taft-Hartley funds are often portrayed as being "union-managed" or "union controlled," despite the joint trusteeship? For example, see Ghilarducci 1992, and Sweeney 1996, 22.

[11] This may not be an entirely new initiative. The AFL-CIO began a project in 1984 to pool and update portfolio information in 1984 (Ghilarducci 1992, ch.6).

[12] Letter, 1 October 1992, from Donald J. DeGrandis, Secretary, Northern Telecom, to the Taskforce on the Churches and Corporate Responsibility.

[13] The Working Enterprises group also provides services for unions and other companies which it owns or partly owns: WE Collective Bargaining Services, WE Media Ltd., WE Labour Services Ltd., WE Professional Services Ltd., WE Financial Services, WE Insurance Services], WE Travel Services, and it supports the Working Opportunity Fund.

[14] *Socially Responsible Investing and Public Sector Pension Funds*, 1988.

[15] In addition to an equal number of management and employee representatives, there is one provincial representative.

[16] We did not attempt to review all public sector pension plans in Canada, but we report here on the few major plans in Ontario and B.C. where there has been some discussion of responsible investment.

[17] Calculated from Table 4, "Institutional Financial Assets and Canadian Shares," in Patry and Poitevin 1995, 355.

[18] For the text of the judgement see *Harries and Others v. The Church Commissioners For England and Another* in *The Weekly Law Reports,* (December 4, 1992): 1241-1253.

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Appendix A

Shareholder Proposals and Shareholder Action in Canada 1982-1996

A. Introduction

In Canada, shareholders operated under the assumption of relatively open access to the shareholder mechanism until a court challenge regarding interpretation of the *Canada Business and Corporations Act* (*CBCA*) in 1987 and the Multijurisdictional Disclosure Agreement of 1991.

In 1987, the court, in *Re Varity Corp. and Jesuit Fathers of Upper Canada et al* upheld Varity Corporation's decision not to circulate a shareholder proposal on disinvestment from South Africa. Similar proposals had been circulated by other Canadian companies. The U.S. Securities and Exchange Commission (SEC) routinely recommended similar proposals for circulation as well. In fact, Varity was compelled by the SEC to circulate the proposal despite the Canadian court ruling because the company was listed on a US exchange.

The record indicates that even before 1987 remarkably few proposals were submitted to Canadian companies by shareholder activists in relation to the numbers of issues under discussion by potential proponents with companies. Proposals were generally submitted only after proponents had exhausted other avenues for attempting to influence management.[1] Also, almost all proposals were submitted by long-term shareholders, not by shareholders who purchased shares solely to influence or harass the company.

The conclusion that there has been relatively little use or abuse of the shareholder proposal in Canada is documented in the following studies. Raymond Crête attempted in 1983 to determine the extent of use of the shareholder proposal up to that date.[2] Of the 93 firms that responded to his survey, only nine reported they had *ever* received a shareholder proposal; of these, only three included the submitted proposals in their proxy materials.

A 1992 survey of institutional shareholders regarding their role in governing the affairs of Canadian corporations in which they invest did not even refer to shareholder proposals. A question about "methods of influence" included voting proxies independently of management, acting collectively with other shareholders to apply pressure, consultation with management, developing proxy voting guidelines, and active questioning at shareholders' meetings.[3]

A review of the annual reports from 1982 to 1995 of the Taskforce on the Churches and Corporate Responsibility (TCCR), the coordinating body for church shareholder proposals, reveals that only 13 church proposals were circulated in that period. The churches formally filed or signalled an intention to file 31 proposals. Of these, 11 were withdrawn because of an indication of partial or complete cooperation or agreement by the company, and seven were refused inclusion in the proxy circular. The proposals refused inclusion in the proxy circular were generally similar to proposals recommended for inclusion in proxy circulars by the SEC.

In addition to proposals from institutional shareholders, one individual in Edmonton has filed corporate governance proposals annually for the last several years. These have been routinely ignored by almost all companies.[4] The coverage provided in *The Corporate Governance Review*[5] confirms that in Canada, shareholder proposals are rarely circulated.

In total, it appears that only 18 proposals were circulated in the whole of the 1982-1995 period. Numbers of proposals submitted but not circulated are harder to obtain, but it appears highly unlikely that there have been more than two or three dozen per year.

In contrast, in the U.S. in 1994 alone, the Investor Responsibility Research Center tracked 701 proposals, of which 387 came to a vote.[6]

The restraint of church shareholders in the use of shareholder proposals can be seen in comparing the numbers of proposals circulated with the other forms of shareholder activism employed. In the same period (1982-1995) in which TCCR filed 31 proposals, the church shareholders attended and asked questions at more than 50 other annual meetings of companies. TCCR had meetings with the senior management of all companies where they filed shareholder proposals or asked questions at annual meetings. In addition, it had more than 50 meetings with the senior management of other companies (see Section D).

These other forms of shareholder action are useful, but of limited value without potential access to the mechanism of a shareholder proposal. In the experience of church shareholders, many (but not all) companies were unresponsive to correspondence and requests for meetings with senior management unless they were confronted with the possibility of a question or a shareholder proposal at an annual meeting.

Questions at the annual meeting of a company are also of limited usefulness, as they do not provide an opportunity for testing shareholder opinion on an issue, which is helpful in some cases. However, it should be emphasized that the likelihood of a proposal receiving a majority of shareholder votes should not be the sole measure of potential success of a proposal. Proposals may result in beneficial developments with respect to corporate governance and social responsibility even if they are not put into effect.

B. Proposals Filed by Member Churches of the Taskforce on the Churches and Corporate Responsibility, 1982–1996

In all cases, the filing of a shareholder proposal was preceded by correspondence, meetings with senior management (where agreed to by the company), and often by attendance at prior annual meetings to raise questions during the discussion period. In several cases, the signal of an intention to file a shareholder proposal was required to get management's attention to an issue.

Proposals were always filed by two or more proponents, at least one of whom held substantial shares in the company. Over the years proponents included:

Churches: Anglican Church of Canada (General Synod; Diocese of Ottawa Synod); Canadian Conference of Catholic Bishops; Evangelical Lutheran Church in Canada; Presbyterian Church in Canada; United Church of Canada (Investment Fund and Pension Fund)

Religious orders: Jesuit Fathers of Upper Canada; Oblates (OMI) (various provinces); Redemptorist Fathers; Religious of the Sacred Heart of Jesus of Montreal; Scarboro Foreign Mission; Sisters of Charity of St. Vincent de Paul (Halifax); Sisters of St. Anne (Lachine); Ursuline Religious of the Diocese of London; White Fathers Missionaries of Africa

Associate members: Young Women's Christian Association of Canada (YWCA)

In some cases, proposals were not formally filed, but the intention to file the proposal was discussed with management, with the proposal then being agreed to, or the company indicating its refusal to circulate it.

For the full wording of proposals, details of the company's response, media coverage, etc. see the TCCR annual reports.

1982 Alcan Aluminium Ltd.

Proposal: That the company review and report on the military implications of its investment in Huletts Aluminium in South Africa (sales to military, status of Huletts' Chairman on Defence Advisory Board, storage of weapons on company premises, training of militia units of Huletts employees).

Voting outcome: 8.8 per cent in favour.

Company response: The company opposed the proposal, but following the annual meeting, announced that it had received word the previous day that the Huletts' Chairman had resigned from the South African Defence Advisory Board.

1983 Canadian Imperial Bank of Commerce

Proposal: That the company disclose sovereign loans over a specified threshold.

Voting outcome: 2.25 per cent in favour (525,284 for, 22.8 million against).

Company response: *The Globe and Mail* revealed that management contacted shareholders prior to the annual meeting to "verify" whether they had meant to support the churches resolution, and a "significant number" of shareholders changed their ballots after being contacted.

While the Bank opposed the proposal, it began to disclose foreign loans representing more than 1 per cent of its total loans in its 1982 annual report.

1983 Alcan Aluminium Ltd.

Proposal: That the company report on extent to which Huletts Aluminium is involved in supply of products for South African military and inform Huletts of its opposition to sales for South African military use.

Voting outcome: 6.7 per cent in favour, 6.7 per cent withheld, 86.8 per cent against.

1984 Bank of Nova Scotia

Proposal: That the company adopt a policy to make no further loans to South African government and state agencies until apartheid is dismantled.

Voting outcome: 3.2 per cent in favour.

1984 Bank of Montreal

Proposal: That the company disclose policy criteria applied to South African loans, and report on loans in previous decade by category of recipient.

Voting outcome: 5.8 per cent in favour.

Company response: The Vice-Chairman of the Bank requested suggestions from the churches of persons in South Africa with whom he might meet on a fact-finding mission. At the annual meeting, the Chairman made a detailed disclosure of the Bank's outstanding South African loans, but did not provide a policy statement.

1984 Canadian Imperial Bank of Commerce

Proposal: That the company adopt secret ballot procedures for all shareholder meeting proxies and ballots (see bank's action in 1983).

Voting outcome: 2.7 per cent in favour.

Company response: *The Globe and Mail* reported on the "confusing turn of events" in which the Bank asked shareholders to oppose the proposal, but then at the annual meeting agreed to the spirit of the request.

1985 Bank of Nova Scotia

Proposal: That the company discontinue the purchase of the South African Krugerrand coin.

Voting outcome: The proposal was withdrawn by the proponents because of the company response (see below).

Company response: The Bank agreed to neither list nor advertise the availability of Krugerrand, nor to purchase the coins through the distribution network of the South African Chamber of Mines.

1986 Alcan Aluminium Ltd.

Proposal: That the company disinvest from Huletts Aluminium in South Africa.

Voting outcome: The proposal was withdrawn by the proponents because of the company response (see below).

Company response: Alcan announced its withdrawal one week before its annual meeting, shortly after TCCR released information about Huletts' involvement in the production of bomb components.

1987 Varity Corporation (formerly Massey-Ferguson)

Proposal: That the Board of Directors terminate Varity's investments and license agreements in South Africa.

Voting outcome: 14.7 per cent in favour. The church shareholders had lobbied for and received the support of the federal and provincial governments, which held 2.7per cent and 1.6 per cent of common shares respectively (acquired in refinancing assistance to the company).

Company response: Varity applied successfully to the Ontario Supreme Court for a ruling that it need not circulate the proposal, citing s. 137(5)(b) of the *CBCA*. The church shareholders appealed the decision unsuccessfully (losing in a 2 - 1 split decision), but in the end Varity had to circulate the proposal because of a U.S. Securities and Exchange Commission ruling. There was a significant amount of media coverage.

1988 Varity Corporation

Proposal: That Varity terminate its investments and license arrangements in South Africa.

Voting outcome: 14.4 per cent in favour.

1988 Rio Algom

Proposal: That the company report to shareholders regarding the financial, legal and ethical implications of Rio Algom's investment in Rossing Uranium Ltd. in Namibia.

Voting outcome: 11.73 per cent in favour; and of shares not held by RTZ, the controlling shareholder, 46.7 per cent.

1988 Placer Dome Inc.

Proposal: That Placer Dome facilitate an independent assessment of the environmental, health-related and socio-economic impacts of the operations of Marcopper Mine in the Philippines, and report on measures, if needed, for environmental clean-up and alternative livelihood programs.

Voting outcome: 5.09 per cent in favour.

Company response: The company opposed the proposal, but the Chairman stated at the annual meeting that Placer Dome recognized that Marcopper faces major changes in the tailings disposal system, and that Placer Dome would support practices so that the mine would eventually close in a "humane manner."

1989 Spar Aerospace

Proposal: That Spar provide a policy statement on nuclear weapons-related production and military exports, support an arms trade register, and support public disclosure by the Canadian government of countries to which military exports are banned.

Voting outcome: The proposal was discussed with management but not formally filed because of partial agreement (see below).

Company response: Spar management was sympathetic to two of four requests in the proposal.

1989 General Motors

Proposal: That General Motors provide a policy statement on nuclear weapons-related production and military exports, support and arms trade register, and support public disclosure by the Canadian government of countries to which military exports are banned.

Voting outcome: The proposal was discussed with management but not formally filed because of partial agreement (see below).

Company response: GM management agreed to give further consideration to the issues raised.

1989 Shell Canada Limited

Proposal: That the Board of Directors of Shell Canada express to the Royal Dutch/Shell Group the desire of the Canadian public shareholders that the Shell Group withdraw from South Africa.

Voting outcome: Shell refused to circulate the proposal, citing s. 137(5)(b) of the *CBCA*.

Company response: Shell applied successfully to the Court of Queen's Bench of Alberta for a ruling that it need not circulate the proposal. The churches did not defend their right to circulate the proposal because of the costs involved. Shell also applied to the U.S. Securities Exchange Commission for permission to exclude the proposal. Despite its own application to the SEC, Shell went ahead and circulated its proxy materials prior to receiving the SEC ruling. The SEC ruled in favour of the shareholders. Church shareholders agreed with Shell that they would not try to delay Shell's meeting to seek enforcement of the SEC ruling, and to negotiate instead the publication of statements in the minutes of the annual meeting or quarterly statement. Shell broke off negotiations just prior to the meeting, and seriously restricted the church shareholders' access to the annual meeting.

1989 Fletcher Challenge Canada Limited

Proposal: That the company agree not to undertake logging in the Stein Valley without a formal agreement between the Lytton and Mount Currie Indian Bands and the provincial government authorizing such logging.

Voting outcome: The proposal was not formally filed and circulated with the management proxy circular when the filers discovered that the B.C. Companies Act makes no provision for minority shareholder proposals.

Company response: A week before the annual meeting (at which shareholders planned to raise questions from the floor), Fletcher Challenge announced a one year moratorium on logging.

1990 Royal Bank

Proposal: That the bank accept the principle of debt reduction in some form as a necessary component of any solution of the international debt crisis, such concessions to be understood as compatible with a continuing banking relationship with the country concerned.

Voting outcome: The Bank was willing to circulate the proposal, but the shareholders did not formally file it (see below).

Company response: The shareholders and the Bank negotiated an agreement whereby the Bank enclosed with the proxy circular a church position statement and the Bank's response. The Bank's response indicated that it accepted voluntary debt reduction negotiated on a case-by-case basis.

1990 Bank of Nova Scotia

Proposal: That the bank accept the principle of debt reduction in some form as a necessary component of any solution of the international debt crisis, with such concessions to be understood as compatible with a continuing banking relationship with the country concerned; and that the Bank take the lead in offering concessionary terms to countries in the Caribbean to which the Bank is a major lender.

Voting outcome: The Bank was willing to circulate the proposal, but the shareholders withdrew the proposal (see below).

Company response: The shareholders and the Bank negotiated an agreement whereby the churches made a statement to the Annual Meeting that was printed along with the Bank's reply in the minutes.

1990 Bank of Montreal

Proposal: That the bank accept the principle of debt reduction in some form as a necessary component of any solution of the international debt crisis, with such concessions to be understood as compatible with a continuing banking relationship with the country concerned.

Voting outcome: The Bank refused to circulate the proposal.

Company response: The Bank stated at the Annual Meeting that it agreed in principle with the concept of debt reduction, with qualifications.

1990 Noranda Inc.

Proposal: That the company provide an annual report on the compliance of the company's forest land management practices with its environmental policy, and develop procedures for periodic independent audits and auditor's reports to identify successes, deficiencies and actions being taken to address deficiencies.

Voting outcome: 8 per cent in favour.

Company response: The company said it would seek to provide more information to shareholders about company environmental practices in the future. In the following year the company published a Noranda Forest Inc. environmental report (the first private sector environmental report to shareholders in Canada), and began development of a protocol for auditing forest management.

1990 Bombardier Inc.

Proposal: That the company provide a policy statement on the company's application of human rights and other criteria to the export of military goods and on its involvement in nuclear-weapons-related production; consider establishing a limit on military contracts as a percentage of sales; and indicate its support for disclosure by the government of countries to which the export of military goods is banned.

Voting outcome: The proposal was not formally submitted following discussion of it with management.

Company response: Management agreed to discuss with the Board of Directors the development of a company policy on military production and sales.

1991 Bank of Montreal

Proposal: That the Board of Directors indicate agreement with the principle that any further tax relief to banks on reserves against problem sovereign debt exposure should be in the form of incentives that encourage reductions in principal and interest rates (as proposed by the Parliamentary Standing Committee on External Affairs and International Affairs).

Voting outcome: The Bank refused to circulate the proposal.

1991 Bank of Nova Scotia

Proposal: That the Board of Directors indicate agreement with the principle that any further tax relief to banks on reserves against problem sovereign debt exposure should be in the form of incentives which encourage reductions in principal and interest rates (as proposed by the Parliamentary Standing Committee on External Affairs and International Trade).

Voting outcome: the Bank refused to circulate the proposal.

1991 Royal Bank

Proposal: That the Board of Directors indicate agreement with the principle that any further tax relief to banks on reserves against problem sovereign debt exposure should be in the form of incentives that encourage reductions in principal and interest rates (as proposed by the Parliamentary Standing Committee on External Affairs and International Trade).

Voting outcome: The Bank refused to circulate the proposal.

1993 Petro-Canada

Proposal: That the company produce a public code of conduct or statement of operating principles.

Voting outcome: The proposal was withdrawn.

Company response: The company agreed to produce a code before the year end, in consultation with churches and others.

1993 BCE Inc.

Proposal: That the company adopt a confidential voting policy.

Voting outcome: The proposal was withdrawn.

Company response: The company initially refused to adopt a policy, but when a formal shareholder proposal was filed, it changed its position.

1994 Fletcher Challenge Canada Limited

Proposal: That the company produce an annual environmental report.

Voting outcome: The proposal was withdrawn.

Company response: The company agreed to produce a report, which was released a few days before the 1994 annual meeting. It is noteworthy that the company did **not** refuse to circulate the proposal, as it might have done, on the grounds that the *B.C. Companies Act* makes no provision for minority shareholder proposals.

1994 MacMillan Bloedel Limited

Proposal: That the company produce an annual environmental report.

Voting outcome: The proposal was withdrawn. Had it not withdrawn, the company would have refused to circulate it.

Company response: The company had refused TCCR's request that they publish a report. After the proposal was filed, the company advised TCCR of its intention to publish a report, and suggested there was no longer any need for the proposal. However, the company stated further that because there is no legal requirement under the *B.C. Companies Act* for the company to do so, "under the circumstances it would not be appropriate for us to include the proposal in the information circular for 1994."

1994 Noranda Inc.

Proposal: That the Board of Directors provide a full written report to shareholders on the human, social and environmental impact of the mining project in Wisconsin (anticipating that the project would have an adverse effect on a river used by an adjacent aboriginal community.

Voting outcome: 9.3 per cent in favour.

Note: This particular proposal did not originate with members of TCCR, but TCCR members co-filed the proposal in solidarity with the U.S.-based Dominica Sisters of Sinsinawa Wisconsin.

1994 Thomson Corp.

Proposal: That the company adopt a confidential voting policy.

Voting outcome: The proposal was withdrawn.

Company response: The company agreed to adopt a policy.

1994 Placer Dome Inc.

Proposal: That the company adopt a confidential voting policy.

Voting outcome: 51.5 per cent in favour. This is believed to be the first time in Canada that a vote has gone against management of a major corporation.

Company response: The company announced that it will reconsider its position.

1995 B.C. Telecom Inc.

Proposal: That the company adopt a confidential voting policy.

Voting outcome: The proposal was withdrawn.

Company response: The company adopted a satisfactory policy.

1995 MacMillan Bloedel Limited

Proposal: That the company adopt a confidential voting policy.

Voting outcome: The proposal was withdrawn. Had it not been withdrawn, the company would have excluded it.

Company response: The company agreed to a satisfactory policy, but only after emphasizing that it would have discretion as to whether it chose to permit a shareholder proposal, given the lack of provision for proposals under the *B.C. Companies Act*. Information about the issue was then publicized widely among U.S. and Canadian institutional shareholders by shareholder information services, and the company agreed to a policy.

1995 Federal Industries

Proposal: That the nominating committee of the Board make a greater effort to review women and potential candidates from backgrounds not presently represented on the Board, and report to next year's annual meeting on its plans for adjusting the imbalances in the present Board structure.

Voting outcome: The proposal was withdrawn.

Company response: The company agreed to print a statement in its annual report indicating that the Board is seeking to balance industry and operational expertise with other disciplines and diversity of life experience.

1996 Ranger Oil Limited

Proposal: That the nominating committee of the Board make a greater effort to include qualified women and men with a variety of life experiences and backgrounds not presently represented on the Board, and report to next year's annual meeting on its plans.

Voting outcome: The company refused to circulate the proposal on the grounds that "it is clear to Ranger that it is submitted for the purpose of promoting general economic, political, racial, religious, social or similar causes." The company has not responded to the filers' request that it specify **which** of the adjectives quoted from s. 137(5)(b) of the *CBCA* it believes apply to the shareholders' proposal.

1996 IPL Energy Inc.

Proposal: That the nominating committee of the Board make a greater effort to include qualified women and men with a variety of life experiences and backgrounds not presently represented on the Board, and report to next year's annual meeting on its plans.

Voting outcome: The proposal was withdrawn.

C. Proposals Filed by Other Organizations and Individuals 1982–1996

This list does not include some proposals that were filed but excluded from the proxy circular. We do not know of all proposals falling into this category. We do know of some filed by Mr. Harold Bagot of Edmonton. Most of his proposals concerned issues of corporate governance. In most cases, according to Mr. Bagot, these proposals were either ignored by the company, or the company simply stated that it would not circulate them. In some cases, companies referred to s. 137(5)(b) as the grounds for refusal, as in the case of Husky Oil below. In others, they simply argued against the proposal.

This list may not be an entirely complete list of even those proposals which were included in proxy circulars. The sources of information referred to were recent issues of the *Corporate Governance Review* (Fairvest), annual reports of TCCR, and correspondence between Harold Bagot and TCCR.

1983 Inco Limited

Proponent: Greenpeace.

Proposal: That Inco implement the recommendations of the "Ontario-Canada Task Force on Pollution Abatement Options for Inco Ltd."

Voting outcome: Defeated.

1984 Inco Limited

Proponent: Greenpeace.

Proposal: That Inco adopt an expanded pollution abatement program, and, in light of its current financial difficulties, that Inco consult with the governments of Ontario and Canada concerning alternate means of funding such a program.

Voting outcome: The company refused to circulate the proposal, and Greenpeace applied to the Supreme Court of Ontario to require inclusion. Greenpeace lost because it did not hold share certificates in its own name. In addition, the court agreed with Inco that the proposal was substantially the same as one accepted by Inco in 1983. Finally, the court agreed with Inco that the primary purpose of the proposal fell within s. 137(5)(b) regarding the promotion of causes.

1987 Husky Oil

Proponent: Mr. Harold Bagot, Edmonton.

Proposal: That the company adopt confidential voting.

Voting outcome: The company refused to circulate the proposal on the basis of s. 137(5)(b) of the *CBCA*.

1989 Inco Limited

Proponent: Allenvest Group Ltd.

Proposal: That shareholders request management to reverse the decision to adopt a "poison pill."

Voting outcome: The proposal was defeated.

1990 Inco Limited

Proponent: Allenvest Group Ltd.

Proposal: That the company adopt confidential voting.

Voting outcome: 25 per cent in favour.

1990 Canadian Marconi Company

Proponent: The proposal is referred to in *The Corporate Governance Review* (January 1993) p. 13, but the proponent is not indicated.

Proposal: That the company adopt a dividend reinvestment plan.

Voting outcome: not known.

1992 Northern Telecom Limited

Proponent: The CWC Multi-Employer Pension Fund (Communications and Electrical Workers of Canada).

Proposal: That the Board of Directors establish a Facilities Closure and Relocation of Work Committee, composed of an equal number of outside board members and employees, to perform an advisory role in weighing decisions on closure of facilities and movement of work.

Voting outcome: The company refused to circulate the proposal.

Company response: The company rejected the proposal because the filer was not a registered shareholder, citing section 137 of the *CBCA*. The company also defended its decision as a rejection of special interest group resolutions and confrontational tactics. The stock was held through the nominee account of an investment advisor, and the investment advisor supplied a letter confirming the Pension Fund holdings. When the proposal was refused, the Pension Fund pointed out that under SEC rules it is common for shareholders to file resolutions while holding stock through nominee accounts. However, the company pointed out that as a result of the Multi-Jurisdictional Disclosure System established between the U.S. and Canada, Canadian companies were no longer required to request a no-action letter from the SEC with respect to shareholder proposals.

1993 Maclean Hunter

Proponent: Mr. Harold Bagot, Edmonton. The shareholder was not at the meeting to move the motion, so church representatives moved and seconded the motion.

Proposal: That the company adopt confidential voting.

Voting outcome: 23.8 per cent voted in favour.

1994 Toronto Sun Publishing Corporation

Proponent: Mr. Harold Bagot, Edmonton.

Proposal: That the company publish voting results.

Voting outcome: The proposal was removed from the agenda during the meeting because there was no shareholder present to make a formal motion. Fairvest's *Corporate Governance Review* said: "This was unfortunate because in Canada it is rare that voting results are disclosed and this would have been interesting and useful information for shareholders." The proponent stated that he was unaware in sufficient time that the company was planning to circulate the proposal to make plans to be at the meeting.

Company response: The company initially told Mr. Bagot (July 1993) that it would not circulate the proposal because the legislation requires proponents to hold at least five per cent of voting rights.

TCCR was informed by Mr. Bagot of this response, and initiated its own inquiries with the company. It found that the company was referring to the *Province of Ontario Act* of 1980, repealed more than ten years previously. The company's legal advisor wrote to Mr. Bagot to apologize, and to try to persuade him to withdraw the proposal.

1995 Suncor Inc.

Proponent: Mr. Harold Bagot, Edmonton; a member of TCCR held the proxy of Mr. Bagot and moved the proposal.

Proposal: That the board create a shareholder advisory committee for the purposes of enhancing communications between the board of directors and shareholders.

Voting outcome: 91 per cent opposed.

Company response: The company initially stated that it "would not be inclined to include this material in the management Proxy Circular as the material, including your signature, appears to be only a photocopy and on its face makes it unclear whether this proposal concerns Suncor Inc...." Mr. Bagot objected that using a photocopy is not grounds in the regulations for rejection, and asked for the grounds in the regulations. Suncor subsequently agreed to circulate the proposal. Fairvest's *Corporate Governance Review* called the proposal "well-worded and sensible," and recommended support from shareholders willing to participate in the process.

D. Other Shareholder Actions by Member Churches of TCCR, 1982–1995[7]

Clearly, the shareholder proposal has been used infrequently in Canada when its use by the churches—the filers of most proposals in Canada—is compared with other forms of church shareholder interaction with companies.

1. Correspondence

Some companies were approached by church shareholders through correspondence only. In some cases, the issue was resolved through correspondence, and, in other cases, the churches lacked the resources to pursue it further. In some cases, the issues were the same ones being addressed simultaneously with other companies through meetings and shareholder proposals (e.g. investments in South Africa and Namibia, Chile, and Guatemala; the Lubicon Lake Band's land claim; military exports; forestry issues; codes of conduct and codes of environmental practice; secret ballot practices). Other issues were also addressed, including the environmental impact of activities in Haiti, herbicide spraying in Nova Scotia, labour issues (such as the right to organize and severance issues), the development of ethical mutual funds, the social equity of the provision of banking services, forestry in Indonesia, pesticides in grape production, and Alcan's Kemano completion project in British Columbia.

2. Correspondence followed by meetings with management

With some companies, the churches were involved in correspondence and in meetings with the management, but they did not take the issue to the annual meeting of the company or file a shareholder proposal. In some cases a formal shareholder proposal was discussed with the company but not filed, and these are indicated below with an asterisk.

In addition to meetings with the senior management, the churches sometimes arranged workshops and roundtables to which corporate representatives were invited. These included workshops on codes of forestry practice and on international debt.

Meetings with senior management have included:

1983

Royal Bank (South Africa, disclosure of sovereign loans, human rights criteria in foreign lending, secret ballot procedures)

Inco (acid rain)

Gulf Canada Resources (Stokes Point, Yukon and native land use, environmental protection)

Norcen (Lubicon Lake Band land claim)

Shell (Lubicon Lake Band land claim)

Alcan (acid rain)

1984

Massey-Ferguson (South Africa)

Canada Wire and Cable (South Africa)

Noranda (acid rain)

1985

McLeod Young Weir (South Africa)

Du Pont Canada (lead in gasoline)

Great Lakes Forest Products (Whitedog and Grassy Narrows Bands and mercury poisoning)

1986

QIT-Fer et Titane (South Africa)

Bank of Montreal (South Africa, Chile)

Canadian Imperial Bank of Commerce (VISA centre strike, South Africa, Chile)

Bank of Nova Scotia (South Africa, Chile)

Toronto-Dominion Bank (South Africa, Chile)

Western Forest Products (Lyell Island, aboriginal land claims)

1987

Varity (Philippines included in meeting of January 1987)

1988

Abitibi-Price (forestry practices)

Spar Aerospace (military exports)

General Motors (military exports)

Toronto-Dominion (Third World debt)

Bank of Nova Scotia (Third World debt)

Royal Bank (Third World debt)

Canadian Imperial Bank of Commerce (Third World debt)

Bank of Montreal (Third World debt)

1989

Rio Algom (Namibia)

1990

Canadian Pacific Forest Products* (environmental policy, relations with Barrière Lak Algonquin)

Shell Canada (South Africa)

1991

Placer Dome (environment/Philippines)

Inco (environment, indigenous people in West Papua)

General Motors of Canada (sale of light armoured vehicles to Saudi Arabia)

Nestle (WHO/UNICEF code on infant formula)

Bank of Montreal (Hydro Québec/James Bay II, criteria for international lending and environmental lending)

Bank of Nova Scotia (Hydro Québec/James Bay II, criteria for international lending and environmental lending, Philippines' debt)

Canadian Imperial Bank of Commerce (Hydro Québec/James Bay II, criteria for international lending and environmental lending)

Royal Bank (Hydro Québec/James Bay II, criteria for international lending and environmental lending)

Toronto-Dominion (Hydro Québec/James Bay II, criteria for international lending and environmental lending)

1992

Petro-Canada (investment in Myanmar [Burma])

Nestle (infant formula marketing)

1993

Fletcher Challenge (environmental reporting)

1994

TransAlta Utilities Corporation (global warming)
Greenstone Resources (labour practices in Columbia)
Inco (Irian Jaya, East Timor, New Caledonia)
Roll'N Well Servicing (Sudan)
Royal Bank (banking services in low-income communities)

1995

Noranda Forest, Repap and Abitibi Price (industry-wide environmental code of practice)
Daishowa Forest Products (Lubicon Lake Band land claim)
Inco (Guatemala)
Northern Telecom (Columbia)

3. Participation in the annual meeting of the company

Church shareholder participation in the question period of an annual meeting was always preceded by correspondence, and, where agreed to by the company, a meeting with management. If a formal shareholder proposal was discussed with the company and either withdrawn or filed, this is indicated with an asterisk.

1982

Royal Bank (Chile, Guatemala, South Africa)
Bank of Nova Scotia (Guatemala, South Africa)
Bank of Montreal (Chile, South Africa)
Canadian Imperial Bank of Commerce (Chile, Guatemala, South Africa)
Toronto-Dominion Bank (Chile, Guatemala)
Alcan* (South Africa)
Rio Algom (Namibia)

1983

Bank of Nova Scotia (South Africa, Chile, Guatemala)
Canadian Imperial Bank of Commerce* (proposal on disclosure of foreign loans; also South Africa)
Bank of Montreal (South Africa and Chile)
Alcan* (South Africa; also discussed secret ballot in management meeting)
Massey-Ferguson (South Africa)

Falconbridge (Namibia and Chile)

1984

Bank of Nova Scotia* (South Africa)

Bank of Montreal* (South Africa proposal; management meeting also included discussion of loans to Chile, international debt, secret ballot)

Canadian Imperial Bank of Commerce* (secret ballot)

Royal Bank (secret ballot)

Alcan (South Africa)

Falconbridge (South Africa)

Rio Algom (Namibia)

1985

Bank of Nova Scotia* (South Africa and Chile)

Bank of Montreal (South Africa)

Canadian Imperial Bank of Commerce (South Africa and Chile)

Alcan (South Africa)

Falconbridge (South Africa)

Massey-Ferguson (South Africa)

Norcen (Lubicon Lake Band land claim)

Numac (Lubicon Lake Band land claim)

1986

Alcan* (South Africa)

Falconbridge* (South Africa)

Massey-Ferguson (South Africa)

1987

Varity Corporation (South Africa)

Rio Algom (Namibia)

B.C. Forest Products (South Moresby logging and aboriginal land claims)

1988

Shell Canada (South Africa)

Varity Corporation* (South Africa)

Rio Algom* (Namibia)

Placer Dome* (environmental and social impact of mine in the Philippines)

1989

Fletcher Challenge* (formerly B.C. Forest Products) (Stein Valley logging and aboriginal land claims)

Spar Aerospace* (military exports)

Toronto-Dominion Bank (Third World debt)

Bank of Nova Scotia (Third World debt)

Shell Canada* (South Africa)

Varity Corporation (secret ballot)

1990

Royal Bank* (international debt)

Bank of Montreal* (international debt, and refusal to circulate a shareholder proposal)

Bank of Nova Scotia* (international debt)

Shell Canada (South Africa, and shareholder democracy)

Placer Dome (Philippines)

Noranda Inc.* (environmental code of practice for forestry)

Bombardier* (military exports)

1991

Royal Bank* (international debt)

Bank of Montreal* (international debt)

Bank of Nova Scotia* (international debt)

Noranda (environmental reporting in forestry)

Bombardier (company policy on military production and sales)

1992

Petro-Canada (Myanmar [Burma] investment)

1993

Abitibi-Price (environmental reporting)

Canadian-Pacific Forest Products (confidential voting, Barrière Lake Algonquin)

Petro-Canada* (code of conduct)

BCE* (confidential voting)

Canadian Pacific (confidential voting)

Maclean Hunter* (confidential voting)

1994

Fletcher-Challenge* (environmental reporting)
Abitibi-Price (environmental reporting)
MacMillan Bloedel* (environmental reporting)
Noranda* (environmental impact on an aboriginal community in Wisconsin)
Petro-Canada (code of conduct)
Alcan (confidential voting)
Moore Corp. (confidential voting)
Northern Telcom (confidential voting)
Thomson Corp.* (confidential voting)
TransCanada Pipelines
Placer Dome* (confidential voting)

1995

B.C. Telecom* (confidential voting)
Inco (confidential voting)
Laidlaw (confidential voting)
MacMillan Bloedel* (confidential voting)
Imperial Oil (confidential voting)
IMASCO (confidential voting)
Molson (confidential voting)
PanCanadian Petroleum (confidential voting)
Renaissance Energy (confidential voting)
Federal Industries* (board diversity)

Notes

[1] See Section D for a summary of actions (1982-1995) other than shareholder proposals undertaken by church shareholders to influence companies: correspondence, meetings with management, and participation in the question period at corporate annual meetings.

[2] Raymond Crête, *The Proxy System in Canadian Corporations: A Critical Analysis, Wilson & Lafleur; Martel ltée, 1986,* p. 191.

[3] Kathryn E. Montgomery, "Survey of Institutional Shareholders," in *Corporate Governance Review* [Fairvest Securities Corporation], September 1992, Vol. 4, No. 4, pp. 5 - 12.

[4] This individual has communicated with government and with the Taskforce on the Churches and Corporate Responsibility about these refusals. His proposals were generally similar to corporate governance proposals which are routinely included in proxy circulars in the U.S. The concern that he or other shareholders might over-use the shareholder proposal mechanism is addressed below in a recommendation regarding limits on the number of proposals which can be submitted to a company by one shareholder.

[5] Fairvest Securities Corporation publishes *The Corporate Governance Review*.

[6] Investor Responsibility Research Center, "Statistics on Shareholder Proposals, 1986-1995," March 27, 1995.

[7] The Taskforce on the Churches and Corporate Responsibility was established in 1975, but the record of shareholder actions recorded here begins in the 1980s, when the first minority shareholder proposal was filed.

APPENDIX B

History of the Interpretation of s. 137(5)(b) of the *Canada Business Corporations Act*

S. 137(5)(b) of the *CBCA* permits a proposal to be excluded if it is submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

In the U.S., the identical clause to s. 137(5)(b) was revised in 1972 to eliminate reliance on motives, but the exclusion was retained for a proposal on "a matter that is not significantly related to the business of the issuer" (i.e. less than five per cent of the assets of the corporation). This change was intended to provide an objective rather than subjective test of relevance. However, in a further revision in 1976, the SEC stated that the economic standard should not preclude the inclusion of certain proposals that are otherwise significantly related to the business of the company.[1] The SEC's interpretation of this rule ensured the circulation of a wide range of social and environmental issues related to the business of the corporation.

Since 1992, the SEC's policies have again appeared to change regarding some (but not all) social proposals. At the centre of recent controversy regarding SEC policies is the rule that companies may omit resolutions from proxy statements when they involve "ordinary business." The SEC has been interpreting proposals on such topics as equal employment opportunity to involve ordinary business activity rather than important policy considerations. The issue is currently before the courts.

In Canada, s. 137(5)(b) of the *CBCA* was interpreted in the courts in 1987 in *Re Varity Corp. and Jesuit Fathers of Upper Canada et al.* Varity applied to the Supreme Court of Ontario for an order permitting the corporation to omit the Respondent's shareholder proposal from the proxy circular. The proposal requested that the corporation end its investments in South Africa. The Court held that shareholders had, as their primary purpose, the abolition of apartheid in South Africa. Even though the proposal related specifically to the affairs of the corporation, the Court was of the opinion that it was not outside the scope of the primary purpose test prescribed by the *CBCA*, s. 137(5)(b). The defence for the shareholders argued that the proposal "did not relate to a *general* public interest cause but rather to the *specific* business affairs" of the

corporation. The court disagreed with this position, holding that s. 137(5)(b) does not provide that a more specific purpose could *overcome* a primary purpose that the court clearly saw as the abolition of apartheid.

The unfortunate wording of s. 137(5)(b) led the court to its wide interpretation. While the appeal court affirmed this wide interpretation, Justice Tarnopolsky dissented, stating that "the issue of apartheid and its nefarious effect on investment in that country... must be considered 'specific' in the sense of being 'exact' or 'particular' as opposed to 'general' in the sense of 'universal' or 'unbounded.' It can also be argued that the legislative intent in enacting the provision was to prevent shareholders from using the proxy mechanism as a means of communicating to other shareholders, at company expense, proposals that concern matters irrelevant to the company because it has either no connection with or no control over the subject matter.[2]

An earlier case had also referred to s. 137(5)(b). In *Re Greenpeace Foundation of Canada and Inco Ltd.*, the court found a 1984 proposal regarding pollution control measures open to exclusion because it was not the owner of record, and because it was substantially similar to a 1983 proposal. The court also held that the purpose of the proposal was to advance the environmental cause of abating acid rain and that, hence, the proposal could be omitted as well on the basis of paragraph 137(5)(b).

In a later case in 1989, Shell Canada applied successfully to the Alberta court for an order permitting it to exclude a shareholder proposal relating to investment in South Africa. The church shareholders did not defend their position because of the legal costs involved.[3]

Other companies have since used this clause as grounds to circulate proposals put forward by church and other shareholders. Further court interpretation has not been sought by shareholders because of the costs to the shareholders. Under the current system, shareholders would have to apply to the court every time a company decided to use this clause as grounds to circulate a proposal. Canadian companies are therefore making decisions about the interpretation of the clause that are never reviewed or challenged.

Notes

[1] Crete, pp. 215-223.

[2] For commentary on this case see Hartley R. Nathan and Mihel E. Voore, *Corporate Meetings, Law and Practice*, Thomson Canada Ltd., 1995, p. 17-13; and J. Mills, "The Environment, The Modern Corporation, and The Charter," unpublished paper for Queen's University Law School, April 27, 1990 (available in the files of the Taskforce on the Churches and Corporate Responsibility).

[3] As in the Varity case, the SEC ruled that despite the Canadian court decision, Shell was required to circulate the proposal, although surprisingly, Shell ignored this ruling. Shell sent out its proxy circular without waiting for the SEC's final decision. For details see Taskforce on the Churches and Corporate Responsibility, *1988-1989 Annual Report*, pp. 71-75.