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Tying It All Together: The Potential of Legal, Social and Market-Based Control Mechanisms to Enforce Integrated and Sustainable Decision-Making

Isabelle Martin

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Résumé de l'article

Le principe de la prise de décision intégrée et durable, qui requiert des dirigeants des sociétés par actions qu'ils prennent en considération les répercussions environnementales, sociales et économiques de leurs décisions, constitue la pierre angulaire des principes juridiques de la responsabilité sociale des entreprises. Une forme volontaire de ce principe fait partie du droit canadien des sociétés depuis que la définition des devoirs de loyauté des dirigeants a été élargie dans la décision *BCE*. Quoique la sociologie du droit ait démontré la possibilité que les principes volontaires puissent avoir autant sinon davantage d'impact que les dispositions impératives du droit, l'effectivité du principe volontaire de prise de décision intégrée et durable n'a cependant pas encore été établie. Nous proposons dans cet article de commencer l'évaluation de cette effectivité par l'étude des mécanismes de contrôle tant juridiques que marchands et sociaux qui prennent part à la mise en oeuvre du principe de prise de décision intégrée. Jusqu'à quel point ces mécanismes de contrôle peuvent-ils parvenir à imposer le principe de prise de décision intégrée, considérant l'accès inégal qu'ils offrent aux parties prenantes et le fait qu'ils véhiculent aussi les principes concurrents de maximisation de la valeur actionnariale et de primauté des actionnaires? Bien que chacun des mécanismes de contrôle puisse être utilisé pour mettre en oeuvre le principe de prise de décision intégrée, notre étude démontre qu'aucun de ces mécanismes n'est suffisant pour faire en sorte qu'en cas de conflit entre les considérations financières et sociales ou environnementales, ces dernières prévaudront. Nous concluons en esquissant les pistes d'action qui s'offrent à nous pour renforcer l'application du principe de prise de décision durable et intégrée.

Tying It All Together: The Potential of Legal, Social and Market-Based Control Mechanisms to Enforce Integrated and Sustainable Decision-Making

Isabelle Martin*

ABSTRACT

Integrated and sustainable decision-making, which requires directors of corporations to take into account environmental, social and economic issues into their decision process, is the "keystone" of the legal principles of corporate social responsibility. A voluntary form of the principle of integrated and sustainable decision-making is part of Canadian corporate law since the enlargement of corporate directors' duties of loyalty in the BCE *decision. Although socio-legal literature has shown that voluntary principles may have a real regulatory impact, the effectiveness of a voluntary principle of integrated decision-making in furthering social and economic issues has still not been assessed. This article will argue that in order to determine the potential of integrated decision-making in ensuring greater corporate social responsibility, it is necessary to study the legal, social and market-based control mechanisms by which integrated decision-making is implemented. To what extent do these control mechanisms enforce the principle of integrated decision-making, given the unequal access of stakeholders to these control mechanisms and the competing norms of shareholder primacy and share value maximization they carry? We find that while each of the regulatory mechanisms could be used to implement the principle of integrated decision-making, no mechanism alone is sufficient to ensure that social responsibility will trump financial considerations if a choice has to be made. The analysis concludes on the regulatory courses of action that could be taken to strengthen the principle of sustainable and integrated decision-making.*

* D.C.L., Member of the Quebec Bar and Assistant Professor, School of Industrial Relations, Université de Montréal. This article is based on my doctoral thesis which was conducted under the supervision of Prof Jean-Guy Belley at McGill University and benefited from funding provided by a SSRHC Doctoral Award. Earlier versions of this article were presented at the 2012 Canadian Law and Economics Association in Toronto and at the 2013 Law and Society Association (Boston). I would like to thank Jean-Guy Belley, Michel Coutu, Sophie Morin, Marie Annik Grégoire, Julie Paquin, Renée-Claude Drouin and two anonymous reviewers of the *Revue générale de droit* for their comments and support. I would also like to thank Ellen Murray and Marc Cigana for their proofreading assistance. All remaining errors are my own.

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KEY-WORDS :

Corporate social responsibility, sustainable and integrated decision-making, Canadian corporate law, fiduciary duties, socially responsible investment, corporate governance.

RÉSUMÉ

Le principe de la prise de décision intégrée et durable, qui requiert des dirigeants des sociétés par actions qu'ils prennent en considération les répercussions environnementales, sociales et économiques de leurs décisions, constitue la pierre angulaire des principes juridiques de la responsabilité sociale des entreprises. Une forme volontaire de ce principe fait partie du droit canadien des sociétés depuis que la définition des devoirs de loyauté des dirigeants a été élargie dans la décision BCE. *Quoique la sociologie du droit ait démontré la possibilité que les principes volontaires puissent avoir autant sinon davantage d'impact que les dispositions impératives du droit, l'effectivité du principe volontaire de prise de décision intégrée et durable n'a cependant pas encore été établie. Nous proposons dans cet article de commencer l'évaluation de cette effectivité par l'étude des mécanismes de contrôle tant juridiques que marchands et sociaux qui prennent part à la mise en œuvre du principe de prise de décision intégrée. Jusqu'à quel point ces mécanismes de contrôle peuvent-ils parvenir à imposer le principe de prise de décision intégrée, considérant l'accès inégal qu'ils offrent aux parties prenantes et le fait qu'ils véhiculent aussi les principes concurrents de maximisation de la valeur actionnariale et de primauté des actionnaires? Bien que chacun des mécanismes de contrôle puisse être utilisé pour mettre en œuvre le principe de prise de décision intégrée, notre étude démontre qu'aucun de ces mécanismes n'est suffisant pour faire en sorte qu'en cas de conflit entre les considérations financières et sociales ou environnementales, ces dernières prévaudront. Nous concluons en esquissant les pistes d'action qui s'offrent à nous pour renforcer l'application du principe de prise de décision durable et intégrée.*

MOTS-CLÉS :

Responsabilité sociale des entreprises, principe de décision durable et intégrée, droit canadien des sociétés par actions, devoirs des dirigeants, investissement socialement responsable, gouvernance corporative.

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INTRODUCTION

Integrated and sustainable decision-making is the "keystone" of the legal principles of corporate social responsibility.[1] It requires directors of corporations to take into account environmental, social and economic issues into their decision process[2] in order to achieve sustainable development: "[development that meets] the needs of the present without compromising the ability of future generations to meet their own needs."[3] It paves the way for a socially responsible form of corporate governance where directors have responsibilities toward all the firm's stakeholders rather than solely toward shareholders.[4] In Canada, a voluntary form of the principle of integrated and sustainable decision-making is part of corporate law since the enlargement of

1. Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, Ont: LexisNexis, 2009) at 105.

2. *Ibid*.

3. *Report of the World Commission on Economic Development: Our Common Future*, 1987, transmitted to the General Assembly as an Annex to *document A/42/427* - Development and International Co-operation: Environment, chapter 2 at 41. On sustainability as a principle of socially responsible corporate governance see Judd F Sneirson, "Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance" (2009) 94:3 Iowa L Rev 987 at 990.

4. On CSR as a model of extended corporate governance see Lorenzo Sacconi, "A Social Contract Account for CSR as an Extended Model of Corporate Governance (1): Rational Bargaining and Justification" (2006) 68:3 J Bus Ethics 259 at 262.

corporate directors' duties of loyalty in the *BCE* decision.[5] The principle is essentially process-oriented[6]: it does authorize the consideration of social, economic and environmental issues but does not indicate which should be prioritized.[7]

The voluntary and process-based character of the principle of integrated decision-making may not necessarily render it less influential than a mandatory one. Law and society scholarship in general has shown the inadequacy of command-and-control regulation regimes for grasping the complexities of contemporary life[8] and directly regulating "semi-autonomous social fields" such as the corporation.[9] In particular, Gunther Teubner has argued that due to the difficulties of law to communicate with other social systems, legal intervention is "either irrelevant or produces disintegrating effects on the social area"[10] it seeks to regulate. The key to a legal norm's effectiveness then becomes its capacity to regulate the self-regulating processes of the other social systems "with which it interacts."[11] In this respect, integrated and sustainable decision-making as a voluntary and process-oriented norm could be as effective as a mandatory one if it was relayed by the control mechanisms of the social and market systems with which it interacts.

However, the extent to which integrated decision-making is relayed by social and market control mechanisms is still undetermined. Although references to "responsibility" and "sustainability" regularly punctuate

5. *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at 39-40, [2008] 3 SCR 560 [*BCE*].

6. On process-oriented regulation see Christine Parker, "Meta-Regulation: Legal Accountability for Corporate Social Responsibility" in Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, UK: Cambridge University Press, 2007) 207 at 215-16, 233 [Parker, "Meta-Regulation"].

7. *BCE*, *supra* note 5 at 84.

8. Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought" (2004) 89:2 Minn L Rev 342 at 357. For a discussion of this issue addressing specifically CSR see Kerr, Janda & Pitts, *supra* note 1 at 100-04; Doreen McBarnet, "Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability" in McBarnet, Voiculescu & Campbell, *supra* note 6, 33 at 33, 35 [McBarnet, "Corporate"].

9. Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7 Law & Soc'y Rev 719 at 722-23; Kerr, Janda & Pitts, *supra* note 1 at 81.

10. Gunther Teubner, "Juridification—Concepts, Aspects, Limits, Solutions" in Gunther Teubner, ed, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin: W de Gruyter, 1987) 3 at 21.

11. Lobel, *supra* note 8 at 365.

corporate governance discourse, it has not completely displaced the emphasis on shareholder value. As the corporate governance website of a major Canadian corporation puts it: "Bombardier has always believed in the importance of applying good corporate governance practices to ensure the proper management of its business because it creates sustained profitability and, therefore, enhances shareholder value."[12] Moreover, while integrated decision-making and pursuing shareholder value are not necessarily incompatible values, there may be times when economics, social and environmental interests conflict.[13] In such conflictual situations, the capacity of the voluntary principle of integrated decision-making to further social or environmental interests has yet to be established.[14]

This capacity is especially uncertain when the pluralistic regulatory environment of corporations is taken into account. One should not presume that the overall regulatory environment, made up of social and market-based control mechanisms as well as state regulation, exclusively promotes integrated decision-making.[15] For instance, the recent take-over bids of Valeant and Osisko have shown the overriding importance in these types of situations of *National Policy 62-202* (developed by *Canadian Securities Administrators* and adopted by securities commissions in Canada), which requires corporate directors to maximize the value of shares during take-over bids.[16] Given the persisting

12. Bombardier, "Statement of Corporate Governance Practices," online: Bombardier <http://www.bombardier.com/en/governance.html>.

13. Doreen McBarnet, "Human Rights, Corporate Responsibility and the New Accountability" in Tom Campbell & Seumas Miller, eds, *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (Dordrecht, Nethl: Kluwer Academic Publishers, 2004) 63 at 77 [McBarnet, "Human Rights"].

14. On this limit of CSR when economics, social and environmental interests conflict see *Ibid* at 77.

15. See Fabrizio Cafaggi, "Fiduciary Duties, Models of Firms, and Organizational Theories in the Context of Relational Interdependencies" in Fabrizio Cafaggi, Antonio Nicita & Ugo Pagano, eds, *Legal Orderings and Economic Institutions* (London, UK: Routledge, 2007) 268 at 274.

16. Canadian Securities Administrators, *National Policy Statement No 38*, 4 August 1997, *National Policy 62-202 Take-Over Bids—Defensive Tactics*, online: Ontario Securities Commission <http://www.osc.gov.on.ca/en/SecuritiesLaw_pol_19970704_62-202_fnp.jsp>. On the impact of this policy in the Valleant and Osisko bids see Yvan Allaire, "Counterpoint: Canada Needs a New Regime for Hostile Takeovers," *Financial Post* (30 April 2014). On the use of this norm by provincial securities agencies see Christian Paré, *De la légitimité et de la légalité des régimes de droits de souscription d'action en réponse à une offre publique d'achat* (M Law, mémoire, Université de Montréal, 2009), [unpublished] at 19 ff, online: <https://papyrus.bib.umontreal.ca/jspui/bitstream/1866/3234/2/12041832.PDF>. About the possible divergence between this norm and corporate directors fiduciary duties such as defined by *Peoples* see: Stéphane Rousseau & Patrick

influential character of the norm of share value maximisation, to what point can the principle of integrated and sustainable decision-making uphold social and environmental interests over purely financial ones?

This article will argue that in order to determine which interests will prevail, it is necessary to study the control mechanisms by which integrated decision-making is implemented. There is no longer much dispute among law and society scholars that legal solutions to corporate irresponsibility should be crafted by taking into account state control mechanisms as well as socially-based control mechanisms.[17] The rising phenomenon of socially responsible investment demonstrates that financial markets themselves may also provide a potentially influential control mechanism.[18] The aim of this article is to study jointly the three types of control mechanisms (state, social and market-based) that may be used to implement the principle of integrated decision-making in order to establish the overall strength of this principle over its main rival, the principle of shareholder-maximization.

At the core of our approach is the idea that law's effectiveness can only be evaluated by simultaneously taking into account the overall impact of laws, markets and social norms on how economic actors behave.[19] Such an analysis should also take into account that the respective impact of each is delivered through control mechanisms which do not provide the same access to all stakeholders and carry competing norms, not all with the same force. Analysis which is sensitive to these variables is critical in order to assess if integrated and sustainable decision-making can deliver the increase in corporate social responsibility environmentalists and social activists hoped. In endeavouring to demonstrate the possible effectiveness of voluntary and non judicially enforced regulation, socio-legal scholarship is sometimes overly optimistic about the result to be expected.[20] However, as David Vogel notes:

Desalliers, *Les devoirs des administrateurs lors d'une prise de contrôle : une étude comparative du droit du Delaware et du droit canadien* (Montréal: Thémis, 2007) at 218-25.

17. Kerr, Janda & Pitts, *supra* note 1 at 103-04; Cynthia A Williams & John M Conley, "Is There an Emerging Fiduciary Duty to Consider Human Rights?" (2005) 74 U Cin L Rev 75 at 104; McBarnet, "Corporate," *supra* note 8 at 54-56.

18. Kevin Campbell & Douglas Vick, "Disclosure Law and the Market for Corporate Social Responsibility" in McBarnet, Voiculescu & Campbell, *supra* note 6, 241; Benjamin J Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (New York: Oxford University Press) 2008.

19. Lawrence Lessig, "The New Chicago School" (1998) 27 J Legal Stud 661 esp at 666-67.

20. See for example Gunther Teubner, "Self-Constitutionalizing TNCs? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct" (2011) 18:2 Ind J Global Legal Stud 617 at 637:

> Many of the proponents of corporate social responsibility mistakenly assume that because some companies are behaving more responsibly in some areas, some firms can be expected to behave more responsibly in more areas. This assumption is misinformed. There is a place in the market economy for responsible firms. But there is also a large place for their less responsible competitors.[21]

Given the current control mechanisms that partake in its implementation and the identity of the actors that may use them, what are the prospects for integrated decision-making to ensure that corporations afford the same consideration to social and environmental issues as they do to economic and financial ones?

The remainder of this article is divided in four parts. In part one, the legal and theoretical foundation of socially responsible corporate governance will be presented. Part two will examine judicially enforced corporate law control mechanisms. Part three will be devoted to market-based socially responsible investment and part four to social control mechanisms such as corporate governance codes and principles. We will see that within all of these regulatory mechanisms, the principle of integrated decision-making is voluntary and that some support may still be found for its rival, the principle of maximisation of shareholder value.

I. THE (REFLEXIVE) LAW OF SOCIALLY RESPONSIBLE CORPORATE GOVERNANCE

The last 10 years have witnessed a growing convergence between corporate governance and corporate social responsibility (CSR).[22] It has been driven by the need for firms to secure their social legitimacy[23]

"The power pressures of protest movements, NGOs, unions [...] have proven to be crucial. Economic sanctions often tip the scales. The sensitivity of consumers, and of certain groups of investors, who exert economic pressures on the commercial enterprises, is decisive." See also Amiram Gill, "Corporate Governance as Social Responsibility: A Research Agenda" (2008) 26:2 Berkeley J Int'l L 452 at 463-70; Ramon Mullerat, *International Corporate Social Responsibility: The Role of Corporations in the Economic Order of the 21st Century* (Netherlands: Kluwer Law International, 2010) at 224, 453, 456-57.

21. David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington: Brookings Institute Press, 2005) at 3.

22. Gill, *supra* note 20 at 463-70.

23. Often referred to as "social license to operate": Joe W (Chip) Pitts III, "Corporate Social Responsibility: Current Status and Future Evolution" (2009) 6:2 Rutgers JL & Pub Pol'y 334 at 366.

following the explosion of corporate (Enron), financial (Goldman Sachs), and even humanitarian (Bhopal, Nike) scandals, and has been made possible by the development of a business case for CSR.[24] Referred to by some actors as "stakeholder capitalism,"[25] socially responsible corporate governance is largely based on the stakeholder approach,[26] which emphasizes the importance for firms to take into consideration the various parties that are affected by their activities. Thus, in addition to shareholder interests, the interests of employees, consumers, local communities, sub-contractors and creditors, as well as environmental impacts, are also considered.

The growing convergence between CSR and corporate governance has taken place without a radical shift in corporate law. Canadian corporate law has maintained its "enabling" law[27] model, and its orientation toward the best interests of the corporation.[28] This convergence has rather been conveyed through "soft-norms"[29] such as the Global Compact, *OECD Principles of Corporate Governance*,[30] using social control mechanisms such as self-regulation (non-financial reporting), private regulation (monitoring and certification) and meta-regulation (corporate governance best practices, Global Compact Principles).[31]

24. Gill, *supra* note 20 at 456-63. The business case for CSR establishes the benefits for corporations of adopting CSR initiatives. Pitts, *supra* note 23 at 365-73; Mullerat, *supra* note 20 at 139-43.

25. Dominic Barton, "Capitalism for the Long Term" (2011) 89 Harv Bus Rev 84.

26. About the stakeholder approach see especially: R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge, UK: Cambridge University Press, 2010); Max B E Clarkson, "A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance" (1995) 20:1 Academy of Mgmt Rev 92; James E Post, Lee E Preston & Sybille Sachs, *Redefining the Corporation: Stakeholder Management and Organizational Wealth* (Stanford, Ca: Stanford University Press, 2002).

27. Peer Zumbansen, "The Parallel Worlds of Corporate Governance and Labor Law" (2006) 13 Ind J Glob Leg Stud 261 at 279.

28. *Canada Business Corporations Act*, RSC 1985, c C-44, s 122 (1) a) [*CBCA*]. A similar comment could be applied to the United Kingdom's *Companies Act* (*Companies Act* 2006 (U-K), c 46). Even though integrated decision-making has been legislatively integrated at section 172, the corporation must still be operated in the interests of its members (s 172(1)): the shareholders (s 8 and 112).

29. Zumbansen, *supra* note 27 at 280.

30. OECD, *OECD Principles of Corporate Governance* (Paris: OECD 2004) at 58, online: OECD <http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf>.

31. Gill, *supra* note 20 at 466. Meta-regulation is defined as the attempt to regulate internal self-regulation: Parker, "Meta-Regulation," *supra* note 6 at 208.

This is not to say that state law has not played any role in this emerging convergence. In particular, the *Peoples* and *BCE* decisions have made it clear that directors may consider the interests of corporate stakeholders insofar as they could have impact on the corporation's best interests,[32] thus opening "a space for corporate fiduciaries to elaborate and implement mechanisms to earn public trust."[33] Within this space, the non-state principle of integrated decision-making and CSR social control mechanisms have provided the normative content and the organizational procedures to implement them, thus shaping directors' definition of where corporate best interests lie.

The ability of soft norms to influence a shift in corporate governance discourse within the rather open-ended and procedural norm of state-imposed fiduciary duties could be read as a demonstration of the regulatory potential of reflexive law.[34] Interestingly, an excerpt of the *BCE* decision hints at the regulatory potential of non-state control mechanisms: "Directors, acting in the best interests of the corporation, *may be obliged* to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals."[35] In our view, the Court is recognizing that other sources of obligation—among which statutory obligations are only a minimum[36]— "may oblige" corporate directors to take into account the interests of corporate stakeholders.

The theoretical connection between reflexive law and CSR law has indeed been acknowledged by corporate social responsibility legal scholars.[37] Reflexive law theory shows how desired socio-economic and organizational outcomes can be induced through a "dynamic, reflexive and flexible regime"[38] rather than through classic "command and control" centralized state regulation. Reflexive law theory draws

32. *BCE*, *supra* note 5 at para 40; see also *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at para 42, [2004] 3 SCR 461 [*Peoples*].

33. Kerr, Janda & Pitts, *supra* note 1 at 80.

34. Gunther Teubner, "Company Interest: The Public Interest of the Enterprise 'in Itself'" in Ralf Rogowski & Ton Wilthagen, eds, *Reflexive Labour Law* (Deventer, Nethl: Kluwer, 1994) 21 [Teubner, "Company Interest"].

35. *BCE*, *supra* note 5 at para 66 [emphasis added].

36. We infer this from the following passage of the *BCE* decision: "At a minimum, [the fiduciary duty] requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements." (*BCE*, *supra* note 5 at para 38).

37. Kerr, Janda & Pitts, *supra* note 1 at 80; Gill, *supra* note 20 at 466.

38. Lobel, *supra* note 8 at 365.

attention to the regulatory capacity of non-state law mechanisms.[39] It acknowledges "regulatory pluralism" where law is but one of the mechanisms that motivate individuals as well as organizations to comply with norms.[40] Regarding CSR, legal scholars especially emphasize the impact of social control mechanisms such as monitoring, disclosure, codes of conduct and best practices,[41] while acknowledging the regulatory impact of market-based control mechanisms.[42]

Reflexive CSR law highlights the interplay between social control mechanisms and corporate state law.[43] On the one hand, corporate law serves a meta-regulatory function[44] by imposing fiduciary duties oriented toward an indeterminate "corporate best interests," which induces the development of an internal reflection on the social responsibility of the corporation.[45] On the other hand, the principle of integrated decision-making and social control mechanisms influence corporations' behaviour by providing standards on how to comply with the meta-regulatory state norm of acting according to the best interests of the corporation.

This interaction between state law and social control mechanisms shifts the focus away from the debate between the voluntary versus regulatory means of promoting CSR as they appear to have a complementary role in its implementation.[46] However, what is still unclear is the potential the essentially process-driven processual principle of integrated decision-making has to increase social and environmental sustainability.[47] As the next section will set out, integrated decision-making does not give additional rights to stakeholders, and shareholders still enjoy the most straightforward access to courts. Integrated decision-making's enforcement essentially rests on the market-based

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39. Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society" in Gunther Teubner, ed, *Global Law Without a State* (Brookfield, Wi: Dartmouth, 1997) 3 [Teubner, "Global Bukowina"]; Christine Parker, "The Pluralization of Regulation" (2008) 9:2 Theor Inq L 349 at 351 [Parker, "Pluralization"].

40. *Ibid*.

41. Gill, *supra* note 20 at 466; Kerr, Janda & Pitts, *supra* note 1 at 79.

42. Teubner, "Global Bukowina," *supra* note 39 at 14; Gill, *supra* note 20 at 464.

43. Kerr, Janda & Pitts, *supra* note 1 at 79.

44. *Ibid*.

45. Teubner, "Company Interest," *supra* note 34 at 44-45; Kerr, Janda & Pitts, *supra* note 1 at 79.

46. *Ibid* at 103.

47. See Parker on the problems of using a purely process-oriented law to increase CSR: Parker, "Meta-Regulation," *supra* note 6 at 233; Parker, "Pluralization," *supra* note 39 at 360.

control mechanisms of Socially Responsible Investment (section III) and on the social-based control mechanisms of Corporate Social Responsibility (section IV). Yet, it will be seen that these processes may also be used to promote the norms of shareholder value maximization and shareholder primacy. Taking into account this normative plurality, and the fact that integrated decision-making leaves the established structure of corporate law untouched, what is the regulatory potential of integrated decision-making to foster social and environmental sustainability? We will argue in the next sections that such an assessment needs to take into account the uneven access of stakeholders to state law and market-based control mechanisms, since "stakeholders always represent values."[48]

II. LEGAL ENFORCEMENT OF INTEGRATED AND SUSTAINABLE DECISION-MAKING

There is a wide set of state laws and regulations that constrain corporate directors' decisions. Corporate law is only one of many legal constraints that limit the discretion enjoyed by directors. Contract law, labour law, environmental law, consumer law, and security law, to name a few, also re-direct the course of action that directors may determine while seeking the best interests of the corporation. However, the importance of corporate law has been amplified by economic globalization, which enables corporations to escape regulation[49] through offshoring or by using, as a bargaining chip, the competition between States trying to attract foreign investment. Corporate law in general, and directors' duties in particular, appear thus as a possible mean of accessing the financial decision-making level, which has become preeminent. In the context of globalization, corporate law thus appears to be a potentially crucial tool in terms of ensuring that corporations

48. *Ibid* at 363.

49. Tara J Radin, "Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making" (2007) 31 Wm & Mary Envtl'l & Pol'y Rev 363 at 372. A recent example of this impunity can be found in the difficulty in bringing before the courts an Australian mining corporation for alleged human rights violations. According to some human rights watch groups, the corporation would have lent transportation material and personnel to Congolese State troops who then used them to crush a local insurgency: *Anvil Mining Ltd v Association canadienne contre l'impunité*, 2012 QCCA 117, leave to appeal to SCC refused, 34733 (1st November 2012). The recent US case of Kiobel further illustrates this difficulty: *Kiobel v Royal Dutch Petroleum Co*, (2013) 133 S Ct 1659.

are held accountable to their various stakeholders.[50] Canadian corporate law provides a certain number of judicially enforced corporate law control mechanisms which could be used to implement the principle of integrated and sustainable decision-making, such as: directors' duties of loyalty and care, the election of boards by shareholders, shareholder proposals at annual shareholders' meetings, the derivate action[51] and the oppression remedy.[52] This section will show that a voluntary form of the principle of integrated decision-making is now part of Canadian corporate law since the enlargement of corporate directors' duties of loyalty in the *BCE* decision (A). A closer look at judicial enforcement of the principle of integrated decision-making will however reveal that the prospect for an effective enforcement is dim due to the lack of judicial control of the duty of loyalty and the unequal access of stakeholders to judicial control (B). The section will end on a cautious note of optimism stemming from recent developments regarding the duty of care (C).

A. Integrated decision-making in Canadian corporate law

The enlargement of corporate directors' duty of loyalty in *BCE* has in effect implemented a voluntary form of integrated decision-making. Corporate directors' duty of loyalty requires them to act "honestly and in good faith with a view to the best interests of the corporation."[53] Through its *Peoples*[54] and *BCE* decisions, the Supreme Court of Canada has widened the type of constituencies that may be considered in the determination of the corporation's best interests: "In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions."[55]

This enlarged definition of corporate directors' duty of loyalty, which allows directors to take into account the impact of their decisions on the interests of all the corporation's stakeholders when deciding the corporation's best course of action, implements the principle of integrated decision-making in Canadian corporate law. However,

50. Mullerat, *supra* note 20 at 56.
51. *CBCA*, s 239.
52. *CBCA*, s 241.
53. *CBCA*, s 122(1)a).
54. *Peoples*, *supra* note 32.
55. *BCE*, *supra* note 5 at para 40; see also *ibid* at para 42.

although the redefinition of the duty of loyalty *allows* corporate directors to take into consideration the impact on stakeholders' interests when deciding where the best interests of the corporation lie, it does not *require* them to do so.[56] The Court makes it clear that the fiduciary duty in itself does not render it mandatory to consider the interests of other stakeholders.[57]

B. Prospect for judicial enforcement of integrated decision-making

The voluntary character of the adoption of an integrated decision-making process results in the lack of effective judicial control of the broad discretionary power that corporate directors hold. Directors may decide which stakeholders' interests will be more relevant in choosing a course of action without fearing court intervention. For instance, in the *BCE* decision, the Supreme Court refused to intervene in a decision which clearly favoured shareholders and had negative repercussions on debentureholders.[58]

This lack of judicial control is compounded by the adoption of the "business judgment rule" which effectively shields corporate directors' decisions from court review. By virtue of this rule, corporate directors' decisions are presumed to be taken in good faith, on an informed basis, and with the conviction that the decision taken is in the best interests of the corporation.[59] Courts will exercise restraint in reviewing decisions taken by the board of directors and will not intervene as long as a decision "lies within a range of reasonable alternatives."[60] The

56. *Ibid* at para 39. On this interpretation see Jeffrey G Macintosh, "BCE and the People's Corporate Law: Learning to Live on Quicksand" (2009) 48:2 Can Bus LJ 255 at 256-58. See however J Anthony VanDuzer, "*BCE v. 1976 Debentureholders*: The Supreme Court's Hits and Misses in Its Most Important Corporate Law Decision Since Peoples" (2010) 43 UBC L Rev 205 at 206 [VanDuzer, "*BCE*"].

57. *BCE*, *supra* note 5 at para 39.

58. *Ibid*. The decision in *Peoples*, *supra* note 32, evidenced the same restraint on the part of the Supreme Court. The Court found that the Wise brothers, who were directors of both Peoples and Wise Department stores, did not breach their fiduciary duties in implementing a joint inventory procurement policy detrimental to the interests of Peoples' creditors.

59. Edward J Waitzer & Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439 at 442.

60. *BCE*, *supra* note 5 at para 40. See also *ibid* at para 99; *Peoples*, *supra* note 32 at para 65; *Maple Leaf Foods v Schneider Corp* (1998), 42 OR (3d) 177, 44 BLR (2d) 115, 1998 CanLII 5121 at paras 34, 36 (ON CA) [*Maple Leaf*].

Supreme Court in *Peoples*[61] and *BCE*[62] has confirmed the applicability of the business judgment rule in Canadian corporate law. The rule replaces the proper purpose test by virtue of which directors were required to establish that their decisions were based on the sole desire to further the corporation's interests.[63] Moreover, in *BCE*, the Supreme Court extended its application to situations where the duty of loyalty is in question,[64] whereas traditionally the rule has only been applied to situations regarding the duty of care.[65] The business judgment rule greatly increases corporate directors' decisional leeway.[66] It serves as a jurisdictional rule, which draws frontiers that delineate courts' power to intervene in corporate decision-making[67] and supports the idea of directors acting as mediating hierarchies.[68]

Another limitation to the implementation of integrated and sustainable decision-making resides in the unequal access of stakeholders to judicially-enforced mechanisms provided by corporate law. Most of the mechanisms are available only to shareholders.[69] While a theoretical case can be made for the access of any stakeholder to the mechanisms of derivative action[70] and the oppression remedy,[71]

61. *Peoples*, *supra* note 32 at para 65.

62. *BCE*, *supra* note 5 at para 40. See also *ibid* at para 99; See also *Maple Leaf*, *supra* note 60 at para 36.

63. Paul Martel, *La société par actions au Québec : les aspects juridiques* (Montréal: Wilson & Lafleur, Martel ltée, 2011) at Nos 23-112 to 23-115.

64. According to the Supreme Court's own characterization of the litigation: *BCE*, *supra* note 5 at paras 36, 39, 40.

65. Leonard I Rotman, "Debunking the 'End of History' Thesis for Corporate Law" (2010) 33:2 BC Int'l & Comp L Rev 219 at 252. *Contra*: Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 211.

66. VanDuzer, "*BCE*," *supra* note 56 at 227-28.

67. Edward B Rock & Michael L Wachter, "Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation" (2001) 149 U of Pa L Rev 1619.

68. On the mediating hierarchy theory of corporate law see Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85:2 Va L Rev 247 at 254. On its similarity to the Canadian corporate law model, see Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006) 44 Alta L Rev 299 at 306. On the similarity between Blair and Stout's theory and the Supreme Court reasoning in both *Peoples* and *BCE* see Waitzer & Jaswal, *supra* note 59.

69. Shareholders alone may elect directors (*CBCA*, s 106 (3)), remove a director (*CBCA*, s 109(1)), submit a proposal (*CBCA*, s 137) and enter into a unanimous shareholder agreement (*CBCA*, s 146). Shareholders' approval is needed for: the confirmation of by-laws (*CBCA*, s 103(2)) and any fundamental changes to the articles of a corporation (*CBCA*, Part XV).

70. *CBCA*, s 238. For such a case see Rotman, *supra* note 65 at 255-58.

71. *CBCA*, s 241(1). For such an interpretation see Rotman, *ibid* at 258-67. However, if s 241(2) is taken into account, the oppression remedy is as a practical matter only open to the expressly-mentioned categories of "security holder, creditor, director or officer." The following decisions

in practice, only shareholders, debentureholders and creditors are granted access to the courts.[72] Such a privileged access of shareholders and creditors may warrant directors and officers to put their interests first in order to avoid litigation.[73] It prevents an effective consideration of the interests of other stakeholders, such as workers and communities, with no effective access to judicially enforced mechanisms.

C. Promising developments regarding the duty of care

There are however two recent developments regarding the duty of care, both in corporate law and in common law, that may prove more promising in securing access to courts for non-shareholders and in implementing integrated decision-making.

The first promising development concerns the enlargement of corporate directors' duty of care such as defined by section 122(1)b) of the *CBCA*,[74] which may spur integrated and sustainable decision-making. In the *Peoples* decision, the Supreme Court stated that primary facts and prevailing socioeconomic conditions could be taken into consideration in order to establish whether corporate directors have breached their duty of care.[75] In adopting an objective standard for the duty of care, the Court provides an incentive for directors to implement best practices governance norms.[76] The incentive is strengthened by

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have adopted such a narrow interpretation of the oppression remedy: *Naneff v Con-Crete Holdings Ltd* (1995), 23 OR (3d) 481 at 489-90 (j Galligan) (available on CanLII) (Ont CA); *Joncas v Spruce Falls Power and Paper Co* (2000), 48 OR (3d) 179, [2000] OJ No 1721 (QL), 2000 CanLII 22359 (ON SC), aff by 15 BLR (3d) 1, [2001] OJ No 1505 (QL), 2001 CanLII 6156 (ON CA); *Warner v Nova Scotia Textiles Ltd*, 2008 NSSC 17 (available on CanLII), 262 NSR (2d) 82 at para 42, notes 693, 694; *Hollinger v Prados-Hollinger*, 2009 QCCA 1004 (available on CanLII) at para 115 (j Brossard); *Regroupement des marchands actionnaires inc v Métro*, 2011 QCCS 2389 (available on CanLII). For a discussion see VanDuzer, "*BCE*," *supra* note 56 at 250-51.

72. On non-shareholder access to the oppression remedy, see especially: Stephanie Ben-Ishai & Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995-2001" (2004) 30 Queen's LJ 79.

73. VanDuzer, "*BCE*," *supra* note 56 at 258.

74. It should be noted that, in the aftermath of the *Peoples* decision, the duty of care in Ontario has been re-defined in such a way that the duty of care in this province is now oriented exclusively toward the corporation: *Business Corporations Act*, RSO 1990, c B.16, s 134(1), as modified by 2006 c 34 Schedule B, s 24. Likewise, the new Quebec corporation law adopts a similar narrow interpretation of the duty of care; *Loi sur les sociétés par actions*, RLRQ c S-31.1, s 119.

75. *Peoples*, *supra* note 32 at para 64.

76. Stéphane Rousseau, "Directors Duty of Care After Peoples: Would It Be Wise to Start Worrying About Liability?" (2005) 41 Can Bus LJ 223 at 231-32.

the indication by the Court that the adoption of "good corporate governance rules" could shield directors from allegations that they have breached their duty of care.[77] Kerr, Janda and Pitts infer from this that it "ought therefore to provide an impetus for directors to engage in integrated decision-making by adopting voluntary codes of corporate best practice and social responsibility."[78] Yet it should be noted that good corporate governance rules do not all point toward sustainable and integrated decision-making. As we will see in section III, some do favour shareholder profit maximization and the question is still open as to which norm will prevail.

It must also be noted that even though the duty of care may constitute a legal basis for stakeholders other than shareholders,[79] an enlarged duty of care does not in itself provide an independent foundation for claims.[80] In the *Peoples* decision, article 1457 of *Québec's Civil Code* provided such a foundation.[81] The absence of judicial mechanisms of enforcement in other provincial legislation has led some commentators to the conclusion that *Peoples*' application may be limited to federal corporations operating in Québec.[82] It is in this respect that jurisprudential developments regarding the common law duty of care may prove useful.

The use of the common law duty of care as a foundation for claims[83] from non-shareholder stakeholders seeking to judicially enforce the duty of care owed by corporate directors so as to take into consideration prevailing socio-economic conditions is the second promising development. The duty of care as defined by the common law has been used as an independent basis for directors' liability in a few decisions.[84] Still, the *Piedra v Copper Mesa Mining* decision[85] shows the

77. *Peoples*, *supra* note 32 at para 64.

78. Kerr, Janda & Pitts, *supra* note 1 at 127.

79. *BCE*, *supra* note 5 at para 44.

80. *Ibid*.

81. *Peoples*, *supra* note 32 at para 57.

82. Bruce Welling, Lionel Smith & Leonard I Rotman, *Canadian Corporate Law: Cases, Notes and Materials*, 4th ed (Toronto: LexisNexis, 2010) at 332.

83. *Ibid* at 331. See also Kerr, Janda & Pitts, *supra* note 1 at 125.

84. *Nielsen (Estate of) v Epton*, 2006 ABQB 21 (available on CanLII), (2006) 392 AR 81, aff by 2006 ABCA 382 (available on CanLII), 401 AR 63 (Alta CA), (2006) 277 DLR (4th) 267 (Alta CA) [*Nielsen*]; *Agda Systems International Ltd v Valcom Ltd* (1999), 43 OR (3d) 101 (Ont CA) (available on CanLII), 1999 CanLII 1527 (ON CA) leave to appeal to SCC refused [1999] SCCA No 124; *Scotia McLeod Inc v Peoples Jewellers Ltd* (1995), 26 OR (3d) 481, 1995 CanLII 1301 (ON CA).

85. *Piedra v Copper Mesa Mining Co*, 2011 ONCA 191 (available on CanLII), 332 DLR (4th) 118.

difficulty of using the common law duty of care to enlarge the duty of care of directors toward stakeholders who do not have a direct legal claim in relation to corporate directors. In this decision, the Ontario Court of Appeal rejected a claim by members of a South American community against two Copper Mesa directors, for having allegedly been subjected to physical abuse by a security firm hired by a Canadian mining corporation, writing: "[a] corporate director has no established duty in law to be mindful of the interests of strangers to the corporation when discharging his or her duties as a director."[86]

In this regard, it should be noted that the common law duty of care may be more promising in securing the responsibility of corporations *per se*. In a recent preliminary decision the Superior Court of Ontario has recognized the possibility that such a duty may exist for a parent corporation, Hudbay Minerals Inc, toward indigenous Guatemalans who were abused by security personnel during the forced evictions of a mining ground.[87] It is interesting to note that the fact that Hudbay Minerals had made public statements about its adoption of the Voluntary Principles on Security and Human Rights was considered by the Court as a factor indicating a *prima facie* proximate relationship between Hudbay and the plaintiffs.[88] This interrelated nature of the regulatory mechanisms, whereby the judicially enforced norm of the duty of care is defined by a social norm expressed by voluntary principles of governance, is also evidenced in Socially Responsible Investment, a market-based mechanism used to enforce integrated and sustainable decision-making.

III. SRI AND MARKET-BASED CONTROL MECHANISMS

A. Socially responsible investment

Socially Responsible Investment (SRI) is the use by some shareholders of their superior access to corporate law accountability mechanisms[89] and to financial markets[90] to push for greater social and

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86. *Ibid* at para 85.

87. *Choc v Hudbay Minerals*, 2013 ONSC 1414 at paras 56-58.

88. *Ibid* at paras 67-70.

89. Especially the possibility for shareholders to submit a proposal at the annual shareholders' meeting and to vote on these proposals.

90. It should be noted, however, that divestment campaigns are extremely rare even within the Socially Responsible Investment movement. The PRI, for one, does not recommend divestment, online: United Nations Principles for Responsible Investment <http://www.unpri.org/faqs/>.

environmental responsibility on the part of the corporation. SRI has been acclaimed by some observers as one of the most promising means of increasing corporate social responsibility.[91] While socially responsible investment started out as a way for activists to protest against some corporate policies,[92] it has since evolved into a more complex movement bringing together social shareholder activists,[93] institutional investors,[94] proxy voting consultants[95] and some mutual funds offering SRI portfolios to their customers[96] around the idea that financial performance is best assessed by an approach that integrates environmental, social and governance issues.[97]

SRI gained formal recognition by the UN with the adoption of the PRI,[98] the United Nations-backed Principles for Responsible Investment Initiative that brings together institutional investors, investment managers and professional investment service partners.[99] The UNPRI's focus on "responsible investment" rather than "socially responsible investment" is more centered around the business case of SRI than the ethical investment movement which constituted the earlier form of SRI.[100] Such a strategic stance is particularly amenable to large institutional investors that, as "universal investors"[101] who possess highly-diversified and long-term portfolios,[102] have a stake in all

91. J Anthony VanDuzer, *The Law of Partnerships and Corporations*, 3rd ed (Toronto: Irwin Law, 2009) at 575.

92. See for example: *Re Varity Corp and Jesuit Fathers of Upper Canada* (1987), 59 OR (2d) 459, 38 DLR (4th) 157 (Ont HCt), aff (1987), 60 OR (2d) 640, 41 DLR (4th) 284 (CA); *Greenpeace Foundation of Canada c Inco Ltd*, [1984] OJ No 274 (Ont HCt).

93. Nur Uysal & Katerina Tsetsura, "Corporate Governance on Stakeholder Issues: Shareholder Activism as a Guiding Force," online: (2014) J Publ Aff 1529 <http://onlinelibrary.wiley.com/doi/10.1002/pa.1529/>. See, for example 'As You Sow,' an organization that promotes environmental and social corporate responsibility through shareholder advocacy, online: As You Sow <http://www.asyousow.org/>.

94. Such as the Caisse de dépôt et placement du Québec.

95. Such as Shareholder Association for Research and Education, online: SHARE <http://www.share.ca/services/proxy-voting/>.

96. Richardson, *supra* note 18 at 1-2.

97. SHARE, online: <http://www.share.ca/about/responsible-investment/>.

98. Principles for Responsible Investment, online: United Nations Principles for Responsible Investment <http://www.unpri.org/> [PRI].

99. *Ibid* at <http://www.unpri.org/signatories/>.

100. Richardson, *supra* note 18 at 87-88.

101. *Ibid* at 88.

102. UNEP Finance Initiative & PRI, "Universal Ownership: Why Environmental Externalities Matter to Institutional Investors," online: UNEP Finance Initiative <http://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf> at 2.

corporate, social and environmental issues which may impact the economy as a whole.[103]

SRI relies on two main approaches, inclusion of ESG criteria in investment decision and shareholder engagement, which are implemented using various methods.[104] Inclusion of ESG criteria in investment decision is implemented through screening (inclusion or exclusion of certain companies involved in certain activities),[105] best-of-sector (where investors choose firms which outperform their sectors' performance relative to ESG issues or minimum scores of the Global Reporting Initiative),[106] financial risk management (consideration of ESG issues when they pose material risks for the investor)[107] and SRI index tracking such as Dow Jones Sustainability Index or FTSE4Good Index Series. Shareholder engagement is implemented using informal methods such as dialogue with corporate directors on particular issues and more formal methods such as shareholder resolution and proxy voting.

SRI challenges both the discretion enjoyed by directors in deciding the best interests of the corporation and the stock market pressure for short-term maximization of profits. It puts forward a definition of the best interests of the corporation which takes environmental, social and governance issues into account, and fosters the implementation of integrated and sustainable decision-making.

The practices of socially responsible investment could come as a remedy to the short-termism induced by an exclusive focus on financial value.[108] Information concerning environmental, social and governance

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103. Richardson, *supra* note 18 at 88.

104. *Ibid* at 89-99; Anastasia O'Rourke, "A New Politics of Engagement: Shareholder Activism for Corporate Social Responsibility" (2003) 12:4 Bus Strat Env 227 at 228; Frank A J Wagemans, Kris van Koppen & Arthur P J Mol, "The Effectiveness of Socially Responsible Investment: A Review" (2003) 10:3-4 Journal of Integrative Environmental Sciences 235 at 240.

105. Richardson, *supra* note 18 at 89. For instance, the Caisse de dépôt et placement du Québec excludes companies that manufacture antipersonnel landmines: Caisse de dépôt et placement du Québec, *2013 Responsible Investment Report*, online: <http://www.lacaisse.com/en/investments/responsible-investment> at 75. Generally, however, exclusion is seldom used by institutional investors. Indeed, the UN PRI does not call for exclusion: UN PRI, FAQS, "Do the Principles call for exclusion or screening out of particular companies or sectors?," online: <http://www.unpri.org/about-pri/faqs/>.

106. Richardson, *supra* note 18 at 91.

107. *Ibid* at 92.

108. On the tendency of financial markets to short-termism see Lynne L Dallas "Short-Termism, the Financial Crisis, and Corporate Governance" (2011) 37:2 J Corp L 264; Lynn A Stout, "The Toxic Side Effects of Shareholder Primacy" (2013) 161 U Pa L Rev 2003 [Stout, "Toxic"]. The most telling examples of short-termism criticisms emanate from individuals not usually associated with a

issues are used both as depiction tools to identify potential risks to corporate profitability[109] and as an instrument to foster more integrated decision-making in corporations.[110] Moreover, shareholder engagement with a corporation in order to discuss environmental, social or governance issues opens up a space where commitment is possible.[111]

Does this imply that the maximization of shareholder value is losing its influence in financial markets in favour of a more socially responsible objective for corporate performance? Such a conclusion needs to be nuanced by a closer examination of the impact of SRI on shareholder primacy (B), the identity of financial market actors (C) and the rationale for those seeking to promote integrated and sustainable decision-making (D).

B. Impact of SRI on shareholder primacy

SRI does not undermine shareholder primacy. It could even be said that it strengthens it, firstly by granting increased legitimacy to shareholders and their interests, secondly by commending SRI's approaches which may be used to increase shareholders' power within corporations.

First of all, SRI lends legitimacy to shareholders as the best defenders of the stakeholders[112] since it relies on the special status shareholders hold within the corporation to further CSR issues. SRI lays a script for shareholders to legitimately act as "active owners"[113] or even

critical view of financial markets, such as Dominic Barton, executive director of the leading consultant firm McKinsey (Barton, *supra* note 25) and even Michael C Jensen, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function," Negotiation, Organization and Market Unit, Harvard Business School, Working Paper No 01-058, October 2001, online: SSRN: <http://papers.ssrn.com/abstract=220671>.

109. E.g.: Ontario Teachers' Pension Plan, *Statement of Investment Policies and Procedures for Ontario Teachers' Pension Plan*, 28 November 2013, online <http://www.otpp.com/391> at 2.

110. McBarnet, "Corporate," *supra* note 8 at 35.

111. On the importance of discussions in promoting engagement see Ian B Lee, "Implications of Sen's Concept of Commitment for the Economic Understanding of the Corporation" (2008) 21 Can JL & Jur 97.

112. Bruno Amann et al, "Shareholder Activism for Corporate Social Responsibility: Law and Practice in the US, Japan, France and Spain" in McBarnet, Voiculescu & Campbell, *supra* note 6, 336 at 361-62.

113. PRI, *The Six Principles*, Principle 2: "We will be active owners and incorporate ESG issues into our ownership policies and practices," online: PRI <http://www.unpri.org/about-pri/the-six-principles/>.

"responsible owners,"[114] who do "vote [their] shares."[115] Moreover, SRI's discourse reinforces the importance of shareholders' interests. For instance, environmental and social issues are often reformulated as strategic issues for shareholders rather than normative ones because of the need to reach out to a significant fraction of shareholders for support.[116] The need to gain the approval of a significant fraction of shareholders implies that proposals have to put forward a business case for CSR in order to convince other shareholders that enhanced corporate social responsibility will increase shareholder and corporate value.[117] This need to draw a large support for SRI is also reflected in the parity governance issues enjoy with social and environmental ones.[118] However, this parity given to "ESG" issues masks potential conflicts between governance issues and social and environmental ones. For instance, proposals such as those opposing supermajority vote requirements and the addition of poison pill are aimed at facilitating buyouts so that shareholders receive a premium[119] and do not necessarily represent the interests of the other stakeholders.

Second of all, SRI's approaches of including additional criteria than financial performance in investment decision and shareholder engagement are also used, and increasingly so, in order to advance the

114. O'Rourke, *supra* note 104.

115. Ontario Teachers' Pension Plan, *Good Governance: Corporate Governance Principles and Proxy Voting Guidelines*, 2014, online: OTPP <http://www.otpp.com/documents/10179/20940/Good+Governance+is+Good+Business/cfca9682-9368-4cf4-96ce-fe5381d5647e> at 6 [Teachers, *Governance*].

116. Legislation regarding shareholder proposals gives corporations the right to reject a proposal that was submitted earlier and did not receive the prescribed amount of support. According to *CBCA*, s 137 86(5)d) and *Canada Business Corporations Regulations*, s 51, SOR/2001-512, the submission of a proposal that has been submitted at a previous annual meeting of shareholders can be refused by the corporation if the proposal did not receive between 3% and 10% of the total number of shares voted, depending on the number of times the proposal has been introduced at an annual meeting of shareholders. See Aaron A Dhir, "Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights, and TWAIL Discourse" (2012) 22 Bus Ethics Q 99 at 107. See also discussion in Wagemans, van Koppen & Mol, *supra* note 104 at 242.

117. This is most apparent in workers' pension funds: Stewart J Schwab & Randall S Thomas, "Realigning Corporate Governance: Shareholder Activism by Labor Unions" (1998) 96:4 Mich L Rev 1018 at 1082, 1090. For a recent update on labour union shareholders' practices see Ashwini K Agrawal, "Corporate Governance Objectives of Labor Union Shareholders: Evidence from Proxy Voting" (2012) 25:1 Rev Financ Stud 187.

118. See for instance PRI, *supra* note 98 at preamble: "we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios."

119. Glass Lewis & Co, *Proxy Paper Guidelines: 2014 Proxy Season*, 2014, online: Glass Lewis <http://www.glasslewis.com/assets/uploads/2013/12/2014_GUIDELINES_Canada2.pdf> at 29-30.

shareholder primacy agenda and the maximisation of shareholder value. Indeed, it is now clear that changes in proxy rules in order to promote greater shareholder democracy have also facilitated hedge fund activism.[120] While a growing proportion of proposals relate to social or environmental issues,[121] they remain far less numerous in Canada than corporate governance proposals.[122] Moreover, those receiving support from a majority of votes are only concerned with governance issues,[123] most of them (majority voting in director elections, board declassification, shareholder approval of shareholder rights plan) with the aim of increasing shareholders' power.[124] The ability to raise a majority of support is increased by the development of proxy advisory services who manage institutional investors' voting rights.[125] Since this industry is highly concentrated within the hands of a few players,[126] "herd behaviour" among investors is getting to be widespread.[127]

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120. Thomas W Briggs, "Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis" (2007) 32 J of Corp L 681; Stout, "Toxic," *supra* note 108 at 2009. Furthermore, in Canada, activist investors gain additional leverage from the *CBCA*, s 150(1.1), which allows proxy solicitation without publicly circulating a dissenting proxy circular as long as no more than 15 shareholders are solicited. On *CBCA*, s 150(1.1) see Janis Sarra, "Shareholders as Winners and Losers Under the Amended Canada Business Corporations Act" (2003) 39:1 Can Bus LJ 52 at 80.

121. Dhir, *supra* note 116 at 102.

122. Institutional Shareholder Services, *2014 Regional Overviews-Americas*, 19 December 2013, online: Institutional Shareholder Services <http://www.issgovernance.com/policy-gateway/2014-policy-information/> at 12.

123. Amy L Goodman & John F Olson, "Shareholder Proposal Developments During the 2014 Proxy Season," Harvard Law School Forum on Corporate Governance and Financial Regulation (2 July 2014), online: <http://blogs.law.harvard.edu/corpgov/2014/07/02/shareholder-proposal-developments-during-the-2014-proxy-season/>. In comparison, proposals relating to social or environmental issues do not generally exceed 20% approval rates: Emma Sjöström, "Shareholder Activism for Corporate Social Responsibility: What Do We Know?" (2008) 16:3 Sust Dev 141 at 151. It must however be noted that proposals relating to social or environmental issues are often withdrawn after successful negotiations, as evidenced by a review of successful cases of social shareholder activism in Canada: Dhir, *supra* note 116 at 74.

124. Glass Lewis & Co, *supra* note 119 at 32.

125. Mats Isaksson & Serdar Çelik, "Who Cares? Corporate Governance in Today's Equity Markets," OECD Corporate Governance Working Papers, No. 8, OECD Publishing, 2013, online: <http://dx.doi.org/10.1787/5k47zw5kdnmp-en> at 52. See also Briggs, *supra* note 120 at 692.

126. Two firms dominate the proxy advisory industry in Canada: Institutional Shareholder Services and Glass, Lewis & Co (Ontario Securities Commission, *CSA Notice and Request for Comment Proposed National Policy 25-201 Guidance for Proxy Advisory Firms*, 24 April 2014), online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20140424_25-201_rfc-proxy-advisory-firms.htm> at 1. These are same firms that handle the vast majority of transactions (97%) in the US: Securities and Exchange Commission, "Proxy Roundtable Transcripts," Proxy Advisory Firms Roundtable, 5 December 2013, online: <http://www.sec.gov/spotlight/proxy-advisory-services/proxy-advisory-services-transcript.txt> at 27.

127. Isaksson & Çelik, *supra* note 125 at 52.

The problem with the enhanced legitimacy of shareholder primacy is that, as the next section will show, socially responsible investors with a genuine interest for social and environmental issues only account for a small percentage of the actors of financial markets. Institutional investors are the main actors of financial markets. And, while they may lend support to social and environmental issues, they may also push for short-term value maximisation.

C. Market enforcement of integrated decision-making: A closer look at financial markets actors

Although shareholders are increasingly active in Canada's corporations[128] and socially responsible investment has gained some momentum, the majority of shareholders are not social activists. Social shareholder activists and SRI funds represent but a very small proportion of the entire financial sector.[129] Apart from controlling shareholders,[130] the second most important category of shareholders in Canada is made of institutional investors.[131]

The expression "institutional investors" is a general term and comprises any investor organized as a legal entity.[132] However, institutional investment is a diversified and evolving reality and alongside "traditional institutional investors"[133] (traditional institutional investors such as pension funds, investment funds such as mutual funds[134] and insurance companies form the largest category of institutional investors),[135]

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128. Janis Sarra, "The Corporation as Symphony: Are Shareholders First Violin or Second Fiddles?" (2003) 36:3 UBC L Rev 403 at 410 [Sarra, "Symphony"].

129. Wagemans, van Koppen & Mol, *supra* note 104 at 244, 246.

130. Sarra, "Symphony," *supra* note 128 at 408.

131. Institutional investors held 31% of stocks in 2000 (*ibid* at 410). By way of comparison, according to the OECD, institutional investors hold 60% of publicly trade stocks in the US and 89% in the UK: Serdar Çelik & Mats Isaksson, "Institutional Investors as Owners: Who Are They and What Do They Do?," OECD Corporate Governance Working Papers, No 11, OECD Publishing, 2013, online: <http://dx.doi.org/10.1787/5k3v1dvmfk42-en> at 7.

132. *Ibid*.

133. *Ibid* at 8.

134. Anabtawi defines mutual funds as "financial intermediaries through which investors pool their money for collective investment, usually in marketable securities" (Iman Anabtawi, "Some Skepticism About Increasing Shareholder Power" (2005) 53 UCLA L Rev 561 at 580).

135. Çelik & Isaksson, *supra* note 131 at 8. See also Raymonde Crête & Stéphane Rousseau, "De la passivité à l'activisme des investisseurs institutionnels au sein des corporations : le reflet de la diversité des facteurs d'influence" (1997) 42:4 McGill LJ 863 at 866.

there are now two other categories of institutional investors: "alternative institutional investors" such as hedge funds, private equity firms, sovereign wealth funds and "assets managers."[136]

Traditional institutional investors do not mainly pursue social or environmental causes. They are looking for a corporation with a good strategy.[137] The interest that the vast majority of investors have in social and environmental issues is solely a function of the latter's potential impact on corporate performance.[138] According to the UN PRI, the integration of environmental, social and governance issues in the investment process within the global market as a whole reaches only 7% of all asset classes.[139] Even corporate governance issues are not considered to be important *per se*.[140] Environmental and social issues are considered to the extent that they may entail greater risks or greater profitability for the corporation.[141] Support for environmental issues will thus be driven by the desire to comply with or prevent impending legislation[142] and will fall if the "risk" of impending legislation is perceived as decreasing.[143]

136. Çelik & Isaksson, *supra* note 131 at 8.

137. OECD, *The Role of Institutional Investors in Promoting Good Corporate Governance,* Corporate Governance, OECD Publishing, 25 November 2011, online: <http://www.oecd.org/daf/ca/49081553.pdf> at 42.

138. See, for example, Ontario Teachers' Pension Plan, "Responsible Investing," online: OTPP <http://www.otpp.com/investments/responsible-investing>.

139. UN PRI 2011, *PRI Report on Progress*, 2011, online: <http://www.unpri.org/viewer/?file=wp-content/uploads/2011_report_on_progress.pdf> at 15.

140. OECD, *supra* note 137 at 42.

141. According to the 2009 UN PRI Report, 39% of asset owners and 29% of investment managers indicate that they use socially responsible screening filters to assess possible adverse publicity and damage to a brand. "Only a small proportion of these groups nominated ethical considerations as the only consideration": UN PRI, *Report on Progress 2009*, UNEP Finance Initiative, online: <http://www.unpri.org/wp-content/uploads/PRIReportonProgress091.pdf> at 17.

142. For a study linking the higher support given to environmental issues as compared to indigenous issues with the higher perceived probability of impending legislation, see Richardson, *supra* note 18 at 453.

143. For example, an analysis that was undertaken for a network of investors, companies and environmental interest groups (Ceres) associates the decrease in shareholders' resolutions addressing climate change with a "perceived reduction of regulatory risk": Rob Berridge & Jackie Cook, "New Ceres Survey Data: U.S. Mutual Funds Backtrack in Supporting Climate Resolutions in 2010" (Boston, Ma: Ceres, 2011), online: <http://www.ceres.org/resources/reports/new-ceres-survey-data-u.s.-mutual-funds-backtrack-in-supporting-climate-resolutions-in-2010>.

However, and this is especially the case with pension funds[144] since their time horizon is often long, traditional institutional shareholders often pursue a long-term investment strategy which make them more receptive to consider the social and environmental repercussions of corporate activities. Moreover, their large and diversified assets qualify them as “universal investors” who have a stake in the general state of society.[145] These reasons explain that collaboration may occur between institutional investors and social shareholder activists on social or environmental issues[146] and the possibility that some institutional investors may by themselves initiate shareholder proposals on extra-financial issues.[147]

There is however a relatively small but active proportion of institutional investors who are not interested in corporations’ long-term performance: hedge funds[148] and mutual funds which practice high-frequency trading.[149] They are instead looking for short-term profit.[150] While these forms of institutional investment do not represent the largest category of institutional investors,[151] their ability to impact financial markets, corporations and the behavior of traditional institutional investors should not be underestimated.

Regarding their impact on financial markets, hedge funds and high frequency trading mutual funds put forward a short-term use of leverage and derivatives to benefit from arbitrage opportunities.[152] The extremely short-term holding of shares of mutual funds, with a

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144. On this argument see David Hess, “Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development” (2007) 2:2 Va L & Bus Rev 221 at 235.

145. See *supra* note 101 and accompanying text.

146. Richardson, *supra* note 18 at 88.

147. For example, Bâtirente made proposals in favour of issuing a GRI sustainability report to various airlines companies in 2008: Share, Shareholder Proposals, online: <http://www.share.ca/shareholderdb/>. See also Hess, *supra* note 144 at 236-37.

148. On the diversified reality behind the term institutional investors see Çelik & Isaksson, *supra* note 131 at 7-8.

149. Stout, “Toxic,” *supra* note 108; Anabtawi, *supra* note 134 at 580. About the different strategy pursued by mutual funds see Çelik & Isaksson, *supra* note 131 at 33.

150. Anabtawi, *supra* note 134 at 579-80; William W Bratton, “Hedge Funds and Governance Targets” (2007) 95 Geo LJ 1375 at 1401.

151. Çelik & Isaksson, *supra* note 131 at 8-9.

152. *Ibid* at 14.

turnover rate of over 100%,[153] and hedge funds, which have a turnover rate three times higher,[154] have pulled the average equity holding to 7 months (compared to 7 years from 1940 to the mid-70s).[155] This high volume of trade gives an impetus to the promotion of short-term shareholder value maximization that cannot be ignored. "The short-term investor who expects to hold for only a few months or days wants to raise share today [...]."[156]

Hedge funds who seek active engagement with corporations and private equity firms also have an important impact on corporations. They orchestrate hostile challenges to publicly owned corporations.[157] Their aim is to rapidly increase the value of the corporation, by cutting costs, selling a part of the corporation, or initiating a large share repurchasing program.[158] Although private equity firms have a longer time horizon than hedge firms,[159] their involvement in a given corporation takes place within a pre-defined period at the end of which they intend to sell the company with a profit.[160]

Finally, traditional institutional investors such as pension plans and mutual funds who have a more passive strategy are not impervious to the short-termism displayed by other institutional investors. First, pension funds and insurance companies do invest in mutual funds.[161] Some even invest part of their holdings in hedge funds.[162] Second,

153. William T Allen, "Engaging Corporate Boards: The Limits of Liability Rules in Modern Corporate Governance" in Cynthia A Williams & Peer Zumbansen, eds, *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* (New York: Cambridge University Press, 2012) 82 at 102-03; Anabtawi, *supra* note 134 at 579. The turnover rate indicates the percentage of shares traded during one year.

154. *Ibid*, referring to 2004 data.

155. Andrew G Haldane, "Patience and Finance," (speech given at the Oxford China Business Forum, Beijing, 2 September 2010), online: Bank of England <www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2010/speech445.pdf> at 16. See also Stout, "Toxic," *supra* note 108 at 2017.

156. Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco: Berret-Koehler Pub, 2012) at 69 [Stout, *Myth*].

157. William W Bratton & Michael L Wachter, "The Case Against Shareholder Empowerment" (2009) 158 U Pa L Rev 653 at 682.

158. *Ibid* at 683; Stout, "Toxic," *supra* note 108 at 2017.

159. Isaksson & Çelik, *supra* note 125 at 47.

160. Çelik & Isaksson, *supra* note 131 at 27.

161. *Ibid* at 9.

162. Stout, *Myth*, *supra* note 156 at 66.

traditional institutional investors may follow a shareholder campaign initiated by a hedge funds or private equity fund.[163] As an OECD report sums it up:

> Hedge funds usually influence public corporations through small, non-controlling holdings. By using derivatives and other financial techniques such as share lending, they partly rely on other investors, including "traditional" institutions, to increase their potential voting power to influence change. These techniques have raised concerns that activist hedge fund strategies favour short-term profits rather than long-term value creation.[164]

An examination of financial market actors thus brings us to the conclusion that financial market control promotes both the importance of short-term share value, which is the focus of high frequency traders such as hedge funds, and the importance of the long-term profitability of the corporation. While long-term profitability is traditional institutional investors' main consideration, they may also follow hedge funds' lead in reaping short-term gains during take-over operations. Overall, consideration of social and environmental issues is still a minor point. Moreover, when corporate social responsibility is given any weight, it is only considered insofar as a business case can be made for it. The next section will highlight the potential problems with this strategic stance on social and environmental issues.

D. Financial markets' strategic stance on CSR and its impact on integrated decision-making

The dominant strategic stance on corporate social responsibility entails two problems for those who seek increased corporate responsibility for the social and environmental consequences of corporate activities: first, not all issues have the same impact on corporate profitability and, second, the business case for CSR is not as clear as its supporters imply.

The unequal impact of environmental, social and governance issues on corporate profitability is recognized in the preamble to the UN PRI: "we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios (to varying

163. Çelik & Isaksson, *supra* note 131 at 9.

164. Isaksson & Çelik, *supra* note 125 at 46 [footnotes omitted].

degrees across companies, sectors, regions, asset classes and through time)."[165] Priority will accordingly be given to issues whose impact on corporate profitability is clearer and closer. Issues that can easily be translated into monetary terms[166] will attract more attention from investors. In this light, environmental issues such as climate change are usually perceived as more urgent than social issues.[167]

The importance given to social issues will also vary according to their potential impact on a firm's reputation: they will vary from sector to sector, according to their importance in the eyes of customers[168] and their potential reputational impact.[169] In general, child labour issues and other issues that have an immediate emotional dimension will generate more attention than labour relations issues.[170] Social issues will have more impact on the reputation of a firm operating in a consumer market[171] than on that of a producer operating in the secondary sector. Consumer market control implies that the importance given to a specific CSR issue will vary according to the contemporary social agenda. Since such an agenda may easily be shifted in response to public opinion, a firm social or environmental policy put in place to address consumers' concerns may simply get discarded when a corporation is faced with another "crisis."[172]

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165. PRI, *supra* note 98.

166. For instance, Richardson partially attributes the greater attention paid to climate change compared to indigenous issues to the relative ease of translating the impact of climate change into financial terms: Richardson, *supra* note 18 at 453.

167. Jeffrey Bone, "Corporate Environmental Responsibility in the Wake of the Supreme Court Decision of BCE Inc and Bell Canada" (2009) 27 Windsor Rev Legal Soc Issues 5 at 13 [Bone, "Corporate"]; Richardson, *supra* note 18 at 453.

168. Muhammad Azizul Islam & Ken McPhail, "Regulating for Corporate Human Rights Abuses: The Emergence of Corporate Reporting on the ILO's Human Rights Standards Within the Global Garment Manufacturing and Retail Industry" (2011) 22:8 Critical Perspectives on Accounting 790 at 809.

169. Evaristus Oshionedo, "The UN Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities" (2007) 19 Fla J Int'l L 1 at 18-19; Dara O'Rourke, "Outsourcing Regulation: Analyzing Nongovernmental Systems of Labour Standards and Monitoring" (2003) 31:1 Pol'y Studies J 1 at 22 [O'Rourke, "Outsourcing"]; Stephanie Barrientos, "Contract Labor: The 'Achille Heel' of Corporate Codes in Commercial Value Chains" (2008) 39:6 Dev't & Change 977 at 981.

170. André Sobczak, "Are Codes of Conduct in Global Supply Chains Really Voluntary? From Soft Law Regulation of Labour Relations to Consumer Law" (2006) 16:2 Bus Ethics Q 167 at 179-80.

171. O'Rourke, "Outsourcing," *supra* note 169 at 22; Felix Martin, "Corporate Social Responsibility and Public Policy" in Ramon Mullerat, ed, *Corporate Social Responsibility, The Corporate Governance of the 21st Century* (Alphen aan den Rijn, Nethl: Wolters Kluwer, 2011) 93 at 96.

172. For instance, Mattel Inc had devised a voluntary code of conduct to address complaints about working conditions throughout its supply chain in order to respond to public concerns

The centrality of the business case for corporate social responsibility makes gathering evidence regarding the profitability of the adoption of CSR practices essential in order to spur their widespread adoption. Yet, on this count, the evidence is contradictory. Empirical studies on the correlation between social and financial performance show that although social performance may sometimes be positively related to financial performance, this is not always the case.[173] A study of Canadian corporations observed a negative correlation between social performance and financial performance,[174] while other studies have shown mixed results.[175] A study of American corporations has concluded that there is no link between the two.[176] These contradictory results regarding the link between social performance and financial performance mean that, although social responsibility and financial performance do not need to be thought of as incompatible, social responsibility is not a necessary condition for corporations to be profitable. It is thus illusory to expect that market control will in itself increase corporate social responsibility.[177]

This study of market control shows that its prevailing forces still favour the maximization of share value while institutional investors also have a view to the long-term profitability of the corporation. Corporate social responsibility is given some consideration in the financial

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about sweatshop-like working conditions. The code of conduct was discarded by Mattel when the company faced a crisis following product recalls and a cost-benefit analysis showed no accrued benefits from following a more rigorous process than the one used industry-wide which did not provide for third-party monitoring (Prakash S Sethi et al, "Mattel, Inc: Global Manufacturing Principles (GMO)—A Life-Cycle Analysis of a Company-Based Code of Conduct in the Toy Industry" (2011) 99 J Bus Ethics 483 at 485).

173. See the literature review in Rim Makni, Claude Francœur & François Bellavance, "Causality Between Corporate Social Performance and Financial Performance: Evidence from Canadian Firms" (2009) 89:3 J Bus Ethics 409. See also: Campbell & Vick, *supra* note 18 at 241; Joshua D Margolis, Hillary Anger Elfenbein & James P Walsh, "Does It Pay to Be Good... And Does It Matter? A Meta-Analysis of the Relationship Between Corporate Social and Financial Performance" (1st March 2009), online: SSRN <http://www.ssrn.com/abstract=1866371>; Joshua D Margolis, Hillary Anger Elfenbein & James P Walsh, "Do Well by Doing Good? Don't Count on It" (2008) 86:1 Harv Bus Rev 19.

174. Makni, Francœur & Bellavance, *supra* note 173.

175. Lois Mahoney & Robin W Roberts, "Corporate Social Performance, Financial Performance and Institutional Ownership in Canadian Firms" (2007) 31 Accounting Forum 233; Michael L Barnett & Robert M Salomon, "Does It Pay to Be Really Good? Addressing the Shape of the Relationship Between Social and Financial Performance" (2012) 33:11 Strat Mgmt J 1304.

176. Hasan Fauzi, "Corporate Social and Financial Performance: Empirical Evidence from American Companies" (2009) 3:1 Globsyn Mgmt J 25.

177. Vogel, *supra* note 21 at 3.

markets, but almost solely in relation to its capacity to influence financial performance. We have witnessed how unequal that capacity is, and how it varies according to its potential impact on reputation and the social resonance of issues. If market control is to lead to increased social responsibility, it will need a definite push from its normative environment. It is with this in mind that we turn to the study of the enforcement of integrated and sustainable decision-making through corporate governance codes and principles.

IV. SOCIAL ENFORCEMENT OF INTEGRATED DECISION-MAKING

A. Integrated decision-making as a norm of corporate governance

The principle of integrated and sustainable decision-making is recognized by many corporate governance codes as a principle of corporate governance. The *OECD Principles of Corporate Governance* recognize for instance that, even though boards are chiefly responsible for "achieving an adequate return for shareholders," corporate boards "are expected to take due regard of, and deal fairly with, other stakeholder interests including those of employees, creditors, customers, suppliers and local communities."[178] Other principles of corporate governance, issued by actors directly seeking to increase corporate social responsibility, are more assertive in their promotion of integrated and sustainable decision-making. For instance, the *Ceres Roadmap for Sustainability* includes the principle of integrated and sustainable decision-making regarding environmental and social issues,[179] and the *Ruggie Report* affirms the obligations for corporations to integrate findings regarding adverse human rights impact across their internal functions and processes.[180]

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178. OECD, *OECD Principles of Corporate Governance* (Paris: OECD 2004), online: OECD <http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf> at 58.

179. *Ceres Roadmap for Sustainability*, online: Ceres <http://www.ceres.org/roadmap-assessment/roadmap-expectations/stakeholder-engagement>.

180. Principle 19 of the *Report of the Special representative of the Secretary-General on the Issue of human rights and transnational corporations and other business enterprises, John Ruggie*, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," Off Doc GA UN, 17e sess (2011), online: <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

As a social norm, the principle of integrated and sustainable decision-making relies partly on corporations' desire to anticipate state regulations[181] and their need to secure social legitimacy, often referred to as the "license to operate,"[182] for its implementation. The principle of integrated and sustainable decision-making acts as a social norm circumscribing what is needed socially in order to secure a "good" reputation, gain social esteem[183] and acquire status.[184] The rise of the social category of good corporate citizenship[185] can be seen in this respect as leverage for the implementation of corporate social responsibility in general, and the implementation of integrated decision-making in particular.

Social norms are enforced through the practices of signalling,[186] praising or shaming.[187] In this respect, integrated and sustainable decision-making is reinforced by disclosure practices[188] and processes[189] and by various awards[190] for reporting on sustainability and accountability. Pressure to disclose CSR practices is generally translated into pressure to report positively about one's accomplishments.[191] The

181. Corinne Gendron, Alain Lapointe & Marie-France Turcotte, "Responsabilité sociale et régulation de l'entreprise mondialisée" (2004) 59:1 IR 73 at 78.

182. Pitts III, *supra* note 23 at 366.

183. Richard H McAdams, "The Origin, Development, and Regulation of Norms" (1997) 96 Mich L Rev 338 at 355 [McAdams, "Origin"].

184. Richard H McAdams, "Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination" (1995) 108 Harv L Rev 1003.

185. Emmanuelle Champion & Corinne Gendron, "De la responsabilité sociale à la citoyenneté corporative: l'entreprise privée et sa nécessaire quête de légitimité" (2005) 18:1 Nouvelles pratiques sociales 90, online: <http://www.erudit.org/revue/nps/2005/v18/n1/012198ar.pdf> at 94.

186. Jason Scott Johnston, "Signaling Social Responsibility: On the Law and Economics of Market Incentives for Corporate Environmental Performance" U Pa, Inst for Law & Econ, Research Paper, No 05-16 (11 May 2005), online: <http://ssrn.com/abstract=725103>.

187. David A Skeel, "Shaming in Corporate Law" (2001) 149 U Pa L Rev 1811.

188. Such as the now well established practice for corporations to prepare an annual corporate social responsibility report. See for instance: Telus: <http://csr.telus.com/en/> and Loblaws: <http://www.loblaw.ca/files/6.%20Responsibility/Loblaw_eng_2013_CSR_May_20.pdf>. On disclosure practices see Aaron A Dhir, "The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights" (2009) 47:1 Osgoode Hall LJ 47.

189. Such as those devised by the Global Reporting Initiative, online: <https://www.globalreporting.org/Pages/default.aspx>.

190. See, for example, the Ceres-ACCA Reporting Awards, online: Ceres <http://www.ceres.org/awards/reporting-awards>.

191. McBarnet, "Corporate," *supra* note 8 at 33.

possibility of being shamed through reputational threats also constitutes a powerful driver to implement integrated decision-making.[192]

The principle of integrated and sustainable decision-making also relies on its close proximity to the more general norms[193] of accountability[194] and responsibility[195] that are favoured by corporate social responsibility. Corporate social responsibility in itself is increasingly perceived as a normative precondition in order for corporations to obtain a "license to operate."[196] It defines social legitimacy for corporate directors and for the corporation as a social institution.[197] More and more, society expects corporations to act responsibly and to take into account social and environmental sustainability while pursuing economic profitability.[198]

B. Competing norms within the normative environment of corporations

This very real possibility of implementing integrated decision-making through social norms should not however obscure the fact that the normative environment of corporate directors is not limited to social norms that advocate increased corporate social responsibility in general and integrated decision-making in particular. While it is true that institutions must take into account their normative environment in order to establish their legitimacy and their licence to operate,[199] the normative environment surrounding corporations does not solely favour increased corporate social responsibility. The norms of shareholder primacy and the importance of maximizing share value still do carry an important normative weight.

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192. McBarnet, "Human Rights," *supra* note 13 at 71.

193. On how specific norms are reinforced by their linkage to more general norms see McAdams, "Origin," *supra* note 183 at 407.

194. On accountability see Faith Stevelman "Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law" (2009) 53 NYL Sch L Rev 817 at No 2. See also McBarnet, "Human Rights," *supra* note 13.

195. For a distinction between these norms, see Kerr, Janda & Pitts, *supra* note 1 at Ch 1.

196. Pitts III, *supra* note 23 at 366.

197. On social legitimacy through CSR see Pitts III, *ibid*. On corporate social responsibility as a non-judicially enforced norm see Claire Moore Dickerson, "Human Rights: The Emerging Norm of Corporate Social Responsibility" (2002) 76 Tul L Rev 1431.

198. Williams & Conley, *supra* note 17 at 78; Barton, *supra* note 25.

199. On that point see Kerr, Janda & Pitts, *supra* note 1 at 70.

The norms of shareholder primacy and the importance of maximizing share value are put forward by guidelines and other "best practices" that disseminate practices and offer a script of how "high-performing" directors and officers behave and which goals they pursue.[200] Although these instruments often recognize that good governance is about "creating long-term sustainable value and reducing investment risk,"[201] they also clearly affirm shareholder primacy by stating that the interests of boards should be aligned "with those of their shareholders."[202] Moreover, practices such as those prescribing directors' individual annual election, majority voting and rejecting staggered boards increase shareholders' influence within the corporation and proportionally decrease directors' autonomy to pursue long-term objectives.[203] These practices will be mandatory for TSX listed corporations (except those that are majority controlled).[204]

The importance of maximizing share value is communicated by corporation ratings, such as Standard and Poor's 500 Index,[205] and by general and specific management literature and business school curricula.[206] Frank Dobbin's work has shown how agency theory, which advocated the shareholder primacy norm, was disseminated through the popular business press, relayed by institutional investors and securities analysts, and well received by managers who were increasingly trained in finance.[207] The weight of the maximization norm during

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200. On how social roles shape behaviour and on how norms are "intensely role-specific," see generally Cass R Sunstein, "Social Norms and Social Roles" (1996) 96 Colum L Rev 903 at 922.

201. Canadian Coalition for Good Governance, "Building High Performance Boards" (August 2013), online: CCGG <http://www.ccgg.ca/index.cfm?pagepath=Policies/Building_High_Performance_Boards&id=17595> at 3.

202. *Ibid* at 2. See also at 20.

203. Martin Lipton & Theodore Mirvis, "Harvard's Shareholder Rights Project Is Wrong," Harvard Law School Forum on Corporate Governance and Financial Regulation, Archives (23 March 2012), online: <http://blogs.law.harvard.edu/corpgov/>.

204. TSX Company Manual, sections 461.3 and 461.4 (21 October 2014), online: <http://tmx.complinet.com/en/display/display_main.html?rbid=2072&record_id=1007>.

205. Standard and Poor's Rating Services: online: <http://www.standardandpoors.com/indices/sp-500/en/us/?indexId=spusa-500-usduf--p-us-l-->.

206. On how directors often feel obliged to comply with the short-term maximization norm as the overarching ethos of business and law schools, even though, strictly speaking, short-term profit maximization is not required by corporate law see Daniel JH Greenwood, "The Conflicting Norms of Market, Agency, Profit and Loyalty" (2005) 70:4 Brook L Rev 1213 at 1235.

207. Frank Dobbin & Jiwook Jung, "The Misapplication of Mr Michael Jensen: How Agency Theory Brought Down the Economy and Why It Might Again" in Michael Lounsbury & Paul M Hirsch, eds, *Markets on Trial: The Economic Sociology of the US Financial Crisis: Part B*, (2010) 30:B

take-over bids is amplified by the requirement of securities commissions that corporate directors maximize the value of shares during take-over bids.[208]

Finally, the primacy of shareholders is supported by a recent trend to depict shareholders as "owners," that is, as "shareowners"[209] or even as owners of the corporation.[210] Although it is legally inaccurate to conceive shareholders as owners of the corporation,[211] this does not take away the normative influence of such thinking which implicitly appeals to moral norms regarding ownership rights and responsibilities.[212] The purpose of replacing the term "shareholders" by "shareowners" is "to reflect a view that equity ownership carries with it active responsibilities and is not merely 'holding' shares."[213] These rhetorical trends lend legitimacy to a more active role for shareholders within the corporation. They may not necessarily impede the implementation of integrated and sustainable decision-making, as the phenomenon of SRI shows. Yet a reinforcement of shareholders primacy within the corporation may lessen the leverage of corporate directors to prioritize non-shareholder stakeholder issues and bring a focus on sustainable value rather than sustainability *per se*.

Research in the Sociology of Organizations 29 at 35-36. See also Frank Dobbin & Dirk Zorn, "Corporate Malfeasance and the Myth of Shareholder Value" (2005) 17 Political Power and Social Theory 179.

208. *National Policy 62-202 Take-Over Bids—Defensive Tactics*, *supra* note 16. The *BCE* attempted buy-out stands as a good example of the impact of such policies. Indeed, the Superior Court noted that the process put in place during *BCE* rearrangement "was based on the premise that once *BCE* was in play, the overriding duty of the Board was to maximize the value for the shareholders" (*BCE inc (Arrangement relatif à)*, 2008 QCCA 935 (available on CanLII) at para 98, rev *BCE*, *supra* note 5).

209. Teachers, *Governance*, *supra* note 115 at 2. See also California Public Employees' Retirement System, *Global Principles of Accountable Corporate Governance, Sacramento (CA)*, 19 May 2014, online: California Public Employees' Retirement System <http://www.calpers-governance.org/principles/home> at 6 [Calpers, *Global*].

210. See, for example, the website of the Canadian Coalition for Good Governance: "The Canadian Coalition for Good Governance was formed to promote good governance practices in the companies *owned* by our members" [emphasis added], online: Canadian Coalition for Good Governance <www.ccgg.ca>; see also, Teachers, *Governance*, *supra* note 115 at 56.

211. Legally, shareholders are simply owners of their shares and the corporation is a distinct legal person: s 298, 301, 302, 2188 CcQ; *CBCA*, s 15; *OBCA*, s 15.

212. On this normative influence through the imagery of the watchful owner, see Maria Drakopoulou, "Feminism and Consent: A Genealogical Inquiry" in Rosemary Hunter & Sharon Cowan, eds, *Choice and Consent: Feminist Engagements with Law and Subjectivity* (London, UK: Routledge Cavendish, 2007) 9.

213. Calpers, *Global*, *supra* note 209 at 6 [footnote omitted].

CONCLUSION

Although the principle of integrated and sustainable decision-making is but a part of corporate social responsibility, it plays a central role in bringing together the various initiatives seeking to induce corporations to act in a socially responsible way. Its capacity to influence decision-making is thus an important piece of the CSR regulatory framework. This article sought to evaluate the possibility that the adoption of a voluntary and process-based principle of integrated and sustainable decision-making could foster corporate social responsibility.

We argued that in order to conduct such an assessment, it is necessary to evaluate the potential strength of the whole regulatory environment surrounding the corporation—the legal, market and social control mechanisms—in terms of obliging directors to consider the social and environmental impacts of their decisions. Our analysis showed that legal control mechanisms were not designed to seriously constrain the discretion afforded to corporate directors when it comes to defining the best interests of the corporation. We also noted the superior access of shareholders to these mechanisms. As for market-based mechanisms, we saw that although the phenomenon of Socially Responsible Investment demonstrates that financial markets can be used to push for increased social and environmental sustainability, hedge funds and traditional institutional investors who practises high-frequency trading strongly push markets toward short-term value maximization. The same conclusion was made regarding the social enforcement of integrated and sustainable decision-making, noting the normative weight carried by the competing norms of shareholder primacy and the maximization of share value.

Throughout our analysis we looked at the potential for these control mechanisms to impose integrated and sustainable decision-making and found that while all the controls could be used to push for greater corporate social responsibility, no mechanism was designed to ensure that social responsibility would trump financial considerations if a choice had to be made between them. Our analysis has also shown the close interrelation of all three regulatory mechanisms. We have seen that all regulatory mechanisms rely on one another for implementing integrated decision-making. The judicially-enforced common law duty of care as well as SRI relies on non-judicially enforced principles of corporate governance for implementing integrated decision-making. Financial markets and corporate governance principles grant more importance to integrated decision-making when facing impending state legislation.

The picture we have drawn of the implementation of integrated and sustainable decision-making may appear bleak to those who wish to increase corporate social responsibility, but it is not desperate. On this front, a lot can be done, and the answer does not necessarily have to come from hard regulation such as the imposition of a mandatory principle of integrated and sustainable decision-making. From the outset, soft regulatory initiatives have fostered the principle of integrated decision-making, using existing legal, market and social regulatory mechanisms. They could be relied on to increase its regulatory strength.

Two improvements however could usefully be pressed for. The first one would be to give a more substantive character to the currently process-based principle of sustainable and integrated decision-making by asserting its substantive value and clarifying its meaning. Given the interrelation of control mechanisms, a strengthening of the substantive character of integrated and sustainable decision-making could increase its influence in courts' interpretation of the principle, as well as in financial markets and corporate governance norms. Asserting social, environmental and economic sustainability as a substantive value would intensify its normative importance as part of corporations' "social license to operate,"[214] increase the reputational stakes linked to compliance and help counterbalance the influential appeal retained by the norm of shareholder value maximization. Clarifying the normative content of social, environmental and economic sustainability would lessen the risk that it becomes a purely rhetorical device in the corporate governance apparatus. It would also pave the way for a more informed use of social, economic and environmental indicators, such as those developed by the Global Reporting Initiative. Eventually, the careful definition of social, economic and environmental sustainability and their interplay would help lay a course for board decisions in conflictual situations.

The second improvement would be the adoption of a selective approach by stakeholders to corporate governance initiatives aimed

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214. On the importance and usefulness of asserting substantive values in reflexive and responsive regulations see Christine Parker, "The 'Compliance' Trap: The Moral Message in Responsive Regulatory Enforcement" (2006) 40 Law & Soc'y Rev 591 at 614; Parker, "Pluralization," *supra* note 39 at 360.

at increasing corporate responsiveness to state law, market forces and social norms. This article has shown that not every corporate governance initiative is conducive to integrated and sustainable decision-making, as some rather seek to strengthen shareholder primacy and short-term value maximization. At the risk of stating the obvious, regulatory initiatives that increase the push toward short-term maximization should not be pursued by stakeholders who wish to foster sustainable and integrated decision-making. As for those which strengthen shareholder primacy, such as takeover rules, board declassification, advisory vote on executive compensation, they should be handled with care and their potential benefits assessed carefully compared to the risks of increasing shareholder legitimacy and power to enforce the principle of share value maximization.

Corporate social responsibility seeks to create a third path between shareholder primacy and directors' primacy in order to ensure that corporations pursue socially and environmentally desirable goals. In order to achieve such an ambitious agenda, CSR proponents must sometimes ally with shareholders, at other times with corporate directors, and be prepared to momentarily espouse some of their tactics and objectives without losing sight of their own values and ends. One of the keys to such perilous navigation resides in having the clearest possible picture of the legal, social and economic surroundings and their interaction. By drawing attention to the control mechanisms surrounding the corporation, the competing norms they convey and the differing access they provide to stakeholders, this article has sought to contribute to the discharge of such a task.