ACTING LIKE OWNERS:

PROXY VOTING, CORPORATE ENGAGEMENT AND THE FIDUCIARY RESPONSIBILITIES OF PENSION TRUSTEES

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1. INTRODUCTION

Pension trustees have the primary responsibility for establishing a prudent investment policy for a pension plan and overseeing its implementation. Historically, the focus for trustees in this process has been limited to identifying authorized asset classes and setting the portfolio's asset mix. Few have considered the rights and responsibilities of the pension plan as shareowner in the companies in which the plan is invested as a means of mitigating firm risk and enhancing the long-term performance of the plan's investment portfolio.

This issue merits consideration for several reasons. First, pension plans have acquired a significant stake in Canadian equity markets.[1] Statistics Canada data from the fourth quarter 2004 indicate that trusteed pension plans own approximately 21.7% of the domestic market capitalization of the Toronto Stock Exchange with the average plan portfolio containing anywhere between 35% equities.[2] Pension plan holdings in Canadian equities doubled in the decade between 1994 and 2004 from $90.1 billion to $181.2 billion.[3] For the most part, pension plans are invested broadly across the entire market. Consequently, trusteed pension plans have a very significant stake in capital markets and the performance of companies in which they are invested.

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* The author wishes to thank Peter Chapman, Tanis McLaren, and Professor Jack Quarter for their invaluable comments. The opinions expressed are entirely those of the author.

[1] Gil Yaron, "Canadian Institutional Shareholder Activism in an Era of Global Deregulation" in Janis Sarra, ed., *Corporate Governance in Global Capital Markets* (Vancouver: UBC Press, 2003) 111.

[2] Statistics Canada, Trusteed pension funds, market and book value of assets, by foreign and domestic holdings, quarterly (CANSIM Table 280-0003)(Fourth quarter 2004), online: Statistics Canada <www.statcan.ca>; TSX, TSX Statistics – December 2004 (January 2, 2004) (Media release), online: Toronto Stock Exchange <http://www.tse.com/en/tradingServices/docs/8289TSXVentureMonthlyStats_December2004.pdf>.

[3] Statistics Canada, *ibid.*

Second, high profile and persistent corporate scandals and malfeasance have focused shareowner attention on corporate policy and practice. The devastating impact on the market and investor portfolios resulting from the misdeeds and poor governance practices among Canadian firms such as Nortel Networks, Hollinger Inc., and Bennett Environmental Inc.[4], could have been mitigated by more diligent oversight. These lessons have spurred regulators, businesses, civil society and investors to implement various regulatory, voluntary and market mechanisms to hold corporations, their officers and directors more accountable. Indeed, corporate accountability has become the main preoccupation of capital markets as they attempt to shore up investor confidence.

Studies continue to explore the relationship between proxy voting, corporate engagement, and firm financial performance and risk mitigation.[5] While findings remain inconclusive, the application of active ownership practices[6], such as proxy voting and corporate engagement, to influence corporate performance and to minimize firm and market risk is recognized.

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[4] Eric Reguly, "Possible clues to implosion of Bennett were largely ignored" *Globe & Mail* (August 5, 2004), B2, online: Stop Bennett Environmental Inc. www.stopbennett.com.

[5] Johathan M. Karpoff, Paul H. Malatesta & Ralph A. Walking, "Corporate Governance and Shareholder Initiatives: Empirical Evidence" (1996) *J. of Fin. Econ.* 365; Sunil Wahal, "Pension Fund Activism and Firm Performance" (March 1996) 31:1 *J. of Fin. & Quan. Analysis* 1; Mark Anson, Ted White and Ho Ho, "The Shareholder Wealth Effects of CalPERS' Focus List" (Winter 2003) 15:3 *J. of Applied Corp. Fin.* 8; Claire E. Crutchley, Carl D. Hudson & Marlin R.H. Jensen, *The Shareholder Wealth Effects of CalPERS' Activism* (1998) 7:3 *Financial Services Rev.* 1; Tim C. Opler & Jonathan Sokobin, "Does Coordinated Institutional Shareholder Activism Work? An Analysis of the Council of Institutional Investors" (May 1998) [unpublished, on file with author]; Jennifer E. Bethel & Stuart L. Gillan, *The Impact of the Institutional and Regulatory Environment on Shareholder Voting* (New York: TIAA-CREF Institute, 2002) [Working Paper 1-100100], online: Social Sciences Research Network < http://papers.ssrn.com>; Jonathan M. Karpoff, "The Impact of Shareholder Activism on Target Companies: A Survey of Empirical Findings" (September 8, 1998) [draft, on file with author]. *See* additional studies in Stapledon, *infra* note 13 at fn21 & fn22.

[6] For the purposes of this paper, reference to "shareholder activism" or "active investing" includes both the practices of voting proxies and corporate engagement collectively. "Active investing" is defined as "…comprised of investment strategies in which the investor takes actions involving the target corporation, other than simply buying or selling securities, that are designed to increase

Accordingly, some pension plans have begun taking a more role as owners. Fairvest Corporation reported that five management resolutions proposing stock option plan amendments in 2003 were defeated at annual general meetings of shareholders.[7] In another instance, GSI Lumonics Inc. cancelled a vote on changing its jurisdiction of incorporation to Delaware after it had received advanced proxies representing more than half of the eligible votes.[8] And more than 100 shareholder proposals were submitted to Canadian companies in both 2004 and 2005 on various corporate governance, social, some of which received majority support, including endorsements from management.[9]

Yet, the vast majority of pension plans do not articulate a shareholder activism strategy of voting proxies and corporate engagement as part of their overall investment policy. Proxy voting by institutional investors continues to be low. Fairvest Corporation estimates that the average voter turnout for companies listed on the S&P/TSX Composite Index was 63.5% in 2003, a figure that has remained

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the returns generated by this investment. Such actions typically involve exerting significant influence over corporate policy or control over the corporate entity in the hope of elevating the value of the firm. An active investing strategy is thus one in which the returns derived from a given investment are endogenous – subject to influence by the individual investor after the investment is made.": Lilli Gordon & John Pound, *Active Investing in the U.S. Equity Market: Past Performance and Future Prospects* (Jan. 11, 1993) at 9 cited by Koppes and Reilly, *infra* note 66.

[7] Michelle Tan, "At Long Last, Mandatory Disclosure. How Canada's Proxies Were Voted in 2003" (January 2004) 16:1 *Corporate Governance Review* 1 at 4.

[8] Ibid. at 3.

[9] A proposal submitted by Real Assets Investment Management Inc. and Ethical Funds Inc. in 2004 calling on the Bank of Montreal to report its environmental liabilities received a record 90.90% of votes cast with the support of management. A proposal submitted in 2003 to the Royal Bank of Canada by the Protection of Quebec Savers and Investors, Inc. (APEIQ) calling on the company Chair and Board Committees to report orally to the AGM garnered 83.80% of total votes cast. The Shareholder Association for Research and Education provides a complete list of all shareholder proposals submitted to Canadian corporations at www.share.ca. Lists of shareholder proposals filed by investors with U.S. companies are available at www.SocialFunds.com, Council of Institutional Investors (www.cii.org), and www.ishareowner.com.

relatively consistent over the past seven years.[10] Data from the United States indicate a similar response amongst investors in American companies. ADP Investor Communications Services reports only 68% of all proxy ballots were returned in 2003; small shareholders (i.e. less than 1,000 shares) returned 40% of their shares while large shareholders (i.e. more than 300,000 shares) had a 70% response rate.[11]

Where proxies are voted, pension plans continue to delegate without any instruction the entire responsibility to voting intermediaries. According to the *2004 Key Proxy Vote Survey* conducted by the Shareholder Association for Research and Education (SHARE), 22 of the 33 investment managers surveyed exercised discretion over 85% or more of Canadian proxies voted on behalf of client pension plans.[12]

Others speculate that the failure of Canadian shareowners to exercise their voting rights will create a vacuum where foreign investors ultimately come to exert control.[13] A 1999 report from a UK government committee (Newbold Committee) raised concerns about the potential influence of American investors on UK firms stating that "unless UK-held shares are voted, effective control may be overly influenced by US owners."[14] While companies in Canada are more closely-held, the concern may be mirrored to some extent in this country, where US investors have more than CDN$66 billion invested in Canadian stock

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[10] Tan, *supra* note 7 at 3.

[11] ADP Investor Communications Services, "2004 Proxy Season Statistics," online: ADP Investor Communications Services <http://ics.adp.com/release10/public_site/about/stats.html#three> cited in Rockefeller Philanthropy Advisors & As You Sow Foundation, *Unlocking the Power of the Proxy* (San Francisco: As You Sow Foundation, 2004) at 9, online: As You Sow Foundation <http://www.asyousow.org/powerproxy.pdf>.

[12] Shareholder Association for Research and Education, *SHARE 2004 Key Proxy Vote Survey* (Vancouver: SHARE, 2004).

[13] Geofrey P. Stapledon, "Are UK institutional investors obliged to vote their shares? If not, should this be mandated?" at 5 [unpublished draft, on file with author].

[14] Committee of Inquiry into UK Vote Execution (Yve Newbold, Chair), *Report* (National Association of Pension Funds: London, 1999) at ¶ 4.6, cited in Stapledon, *ibid.* at 7.

amounting to approximately 6% of the total domestic market capitalization of the TSX.[15] Failure of Canadian shareholders to exercise their voting rights may therefore result in the abdication of control of Canadian firms to foreign investors, or at least give disproportionate power to more active foreign owners.

The picture is similar with regards to shareholder activism. Despite the introduction of new rules at the federal level easing restrictions on filing shareholder proposals and allowing for greater shareholder coordination and communication, only a small number of pension plans have incorporated corporate engagement strategies into their investment policies.[16] In 2005, while more than 100 shareholder proposals were submitted to Canadian corporations, only two Canadian pension plans filed proposals (five in 2004).[17] Many, however, prefer to take a quiet approach to engagement focused on dialogue with corporate directors and management.[18] This attitude makes it difficult to assess the degree to which pension plans are engaging corporations; however, the observable instances of pension plan shareholder activism generally reflects their low involvement to date.[19]

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[15] Statistics Canada, *Canada's International Investment Position* (Statistics Canada: Ottawa, fourth quarter 2003) Catalogue no. 67-202-XIE at 30, online: Statistics Canada, <www.statscan.ca> .

[16] No reported survey of pension plan investment policies has been conducted in Canada. However, the UK government recently found that a mere 9% of pension plans had either established their own policy or been influenced in their choice of investment manager based on the policies they offered in this area. *See* Sarah Horack, John Leston & Margaret Watmough, *The Myners Principles and Occupational Pension Schemes,* vol. 2 (London: Department of Work and Pensions, 2004) at 106.

[17] These pension funds included the United Brotherhood of Carpenters and Joiners Local 27 Pension Trust, and the Fonds Elisabeth Bergeron.

[18] Canadian Coalition of Good Governance, *2004 Annual Report* at 3, online: CCGG <http://www.ccgg.ca/web/website.nsf/web/CCGGAnnualReport2004/$FILE/CCGGAnnualReport2004.pdf>.

[19] For a discussion of the role and history of pension fund shareholder activism, *see* Moira Hutchinson, *The Promotion of Active Shareholdership for Corporate Social Responsibility in Canada* (Toronto: Michael Jantzi Research Associates, 1996), online: SHARE <www.share.ca>; Marleen O'Connor, "Union Pension Power and the Shareholder Revolution" (Paper presented to the

In light of these observations, this paper asks whether pension trustees have fiduciary responsibilities with regards to voting proxies and engaging companies that they own. Furthermore, what processes, if any, must trustees follow to fulfill such obligations, and what legal barriers hinder compliance? Does the failure of a plan to employ an activist investing strategy whose aim is to contribute to protecting the long-term interests of plan members leave trustees open to claims of breach of fiduciary duty? If such an obligation exists, does it extend to all issues including social, environmental and ethical (SEE) aspects of a company's operations? Does it extend to agents to whom responsibility is delegated? The next section outlines the policies and processes for proxy voting and corporate engagement by pension plans in Canada. Section three explores whether pension trustees have fiduciary obligations with regard to these practices. Reflecting on the previous two sections, section four explores some possible reasons for the observed failure of pension plans as a group to exercise their franchise in keeping with fiduciary standards. Section five concludes with suggested approaches for prudent proxy voting and corporate engagement by plan fiduciaries.

2. THE PROCESS OF PROXY VOTING AND CORPORATE ENGAGEMENT

2.1. The Proxy Voting Process

Proxy voting is a technically obscure and poorly understood aspect of shareholder activism. The assumption of "one share, one vote" is easily comprehended, however this principle is rarely, if ever, realized due to a highly complex framework in which control is vested through various means in the hands of the companies and their agents. This section attempts to lay out the relevant aspects of the process from the perspective of pension trustees and the relationship of proxy voting to a pension plan's investment policy.

Second National Heartland Labor-Capital Conference , 1999) [unpublished], online: Heartland Labour-Capital Network <http://www.heartlandnetwork.org/conference4_99/downloads/OConnor.pdf>.

There are two legal interests in a share – a registered and beneficial interest. The registered shareholder is the individual whose name appears on the share or on the company's register[20]. The registered shareholder deals with the share on behalf of the beneficial owner who maintains the beneficial interest in the share, including the attendant voting rights. The registered shareholder is not permitted to exercise any of the attendant rights without instruction from the beneficial owner.[21]

A pension plan may hold a registered interest, beneficial interest, or alternatively no ownership interest at all. If pension plans purchase shares in their own name, they are both the registered and beneficial shareholder. More typically, pension plans hold a beneficial interest in the shares with the shares registered in the name of an intermediary, such as the plan's investment manager or custodian. This allows the plan's agent to deal with the securities on a day-to-day basis. However, the beneficial interest remains with the pension plan. In such instances, the pension plan as beneficial owner retains the authority to exercise the right to associated with the holding, including directing how proxies are voted. The registered shareholder is obligated to act on the directions of the beneficial owner.[22] In practice, pension plans commonly delegate many of the rights and powers associated with their shares to their investment manager or voting agent.[23] Finally, where pension plans are invested in equities through

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[20] In most instances, the registered name appearing is the Canadian Depository of Securities (CDS). The Canadian Depository of Securities (CDS) is Canada's national securities depository, clearing and settlement hub. CDS supports Canada's equity, fixed income and money markets, holding over $2 trillion on deposit and handling over 50 million securities trades annually. CDS is accountable for the safe custody and movement of securities, accurate record-keeping, the processing of post-trade transactions, and the collection and distribution of entitlements relating to the securities that have been deposited by customers.

[21] In practice, many of these rights are delegated to the registered shareholder by the pension fund through contract agreements.

[22] *Canada Business Corporations Act*, R.S. 1985, c. C-44, s.153(2) [hereinafter CBCA]: "An intermediary, or a proxyholder appointed by an intermediary, may not vote shares that the intermediary does not beneficially own and that are registered in the name of the intermediary or in the name of a nominee of the intermediary unless the intermediary or proxyholder, as the case may be, receives written voting instructions from the beneficial owner."

[23] See 2004 Key Proxy Vote Survey, supra note 12.

pooled funds, the pension plan has no legal interest in the shares. Both the registered and beneficial interests in that instance are vested in intermediaries associated with the pooled fund.

In advance of a shareholder meeting, management is required to provide each registered shareholder entitled to vote at the meeting with notice of the meeting, a proxy circular spelling out the matters to be considered by shareholders at the meeting, and a form of proxy with which to vote.[24] The registered shareholder is then obligated to forward the documents to the beneficial shareholder for consideration and instruction, unless this responsibility has been delegated in writing.[25] As a result of the common practice of delegating authority, pension plans and pension trustees rarely see documentation sent by companies to shareholders, let alone provide instruction on how to vote.[26]

Where documentation is received by the plan, it must review the ballot and proxy circular before voting either electronically, by mailing the ballot to the custodian, or voting in-person at the shareholder meeting.[27] The time taken to transmit the documentation to the plan reduces the amount of time it has to consider the issue and cast its vote prior to the meeting. Plans report that on average they receive

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[24] *See e.g. Ontario Business Corporations Act,* R.S.O. 1990, c.B.16, s.258(1)(c). Most institutional investors now receive a voter information form, not a legal proxy, and voting is done online.

[25] *See e.g.* CBCA, *supra* note 22, s. 153.

[26] New securities rules in force as of September 2004 permit a company to receive information about the identify of a beneficial owner from the registered owner unless the beneficial owner objects. If the beneficial owner objects, it must pay to receive corporate documents. Those opposed to this new policy argue that it is prejudicial to beneficial shareholders and exacerbates the divide that already exists between beneficial owners and firms. *See* National Instrument 54-101 (Communication with Beneficial Owners of Securities of a Reporting Issuer) and Companion Policy 54-101CP.

[27] *Canada Business Corporations Regulations 2001,* SOR/2001-512, s.65 [hereinafter "CBCA Regs."]: "A proxy circular shall be dated as of a date not more than 30 days before the date on which it is first sent to a shareholder of the corporation and the information, other than financial statements, required to be contained in it shall be given as of the date of the circular."

documentation for Canadian equities two weeks prior to a vote.[28] It is not unheard of for proxies of foreign equities to be received after the vote.[29] The time limitations often make it difficult for beneficial shareholders to properly consider matters raised, obtain the necessary authorizations and vote the proxies. This is one of the reasons why pension plans have historically delegated the responsibility for voting proxies to their investment managers or a proxy voting service.

Shareholders in Canada may appoint a proxyholder to vote on their behalf.[30] This practice recognizes the expertise of voting intermediaries and the nature of equity markets where beneficial owners may own many companies in their portfolio making it difficult for them to vote every share directly and even more onerous to attend all shareholder meetings.[31] In practice, pension plans typically appoint their voting agent as proxyholder and most proxies are now voted electronically in advance of the meeting.[32]

In Canada, the voting options available to shareholders depend on the issue in question. On "routine" business (i.e. the election of the board of directors, appointment of the auditor), shareholders only have the option of voting for the proposal, withholding their vote or abstaining.[33] They do not have the ability to vote against such proposals. The inability to vote against means that these proposals always pass. Shareholders consequently have no control over the election of the directors or appointment of auditors

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[28] Interviews conducted in July 2004 by the author with various pension plan staff responsible for directing or voting proxies.

[29] Interview with Catherine Smith, Shareholder Association for Research and Education (May 4, 2004). Apparently, the delay with respect to foreign proxies may be due in part to technical limitations of US custodians.

[30] CBCA, *supra* note 22, s.148(1).

[31] Historically, Canadian law required shareholders to vote in person at annual general meetings. Some countries continue to require shareholders to vote in person. *See* Theodor Baums, "Shareholder Representation and Proxy Voting in the European Union: A Comparative Study" (Paper presented at the Conference on Comparative Corporate Governance, Hamburg, May 15-17, 1997) [unpublished], online: Social Sciences Research Network http://papers.ssrn.com.

[32] SHARE, *supra* note 12.

[33] CBCA Regs, *supra* note 27, s.54(7).

through the voting process.[34] This is particularly troubling given the importance of issues such as director and auditor independence in the wake of recent corporate scandals.

Respecting all other proposals, shareholders may vote for, against, withhold, or abstain from voting.[35] Where a shareholder elects to abstain and names management as its proxy holder, corporate regulations permit management to exercise the proxies on behalf of the shareholder.[36] In practice, corporate proxy circulars often indicate that management will be appointed as proxy holder in the event that the shareholder fails to make an election, in which case the vote will be treated as a vote "for" management's recommendation.[37] As a result, a decision not to vote often equals a vote for management by default.

A custodian is generally hired by the company to manage the voting of proxies. In the absence of a confidential voting policy, the company often scrutinizes votes received in advance of a shareholder meeting. It is common practice by companies to contact dissident shareholders in order to discuss and to attempt to influence their decision. Until recently, companies only had lists of registered shareholders (i.e. those whose names appear on the share).[38] In order to communicate with beneficial shareholders, companies hire firms specializing in shareholder communication, who effectively pierce the veil to

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[34] In its report of the 2004 proxy season, Fairvest reported that two Canadian companies (Manulife and TSX Group) presented a slate of nominees that exceeded the total number of available directorships. *See* Michelle Tan, "Moving Off the Beaten Path: A Review of the 2004 Proxy Season" (June/July 2004) 16:4 *Corporate Governance Review* 1 at 3.

[35] CBCA Regs., *supra* note 27, s.54(5).

[36] CBCA Regs, *ibid.,* s.54(6).

[37] *See e.g.* Precision Drilling, *2004 Proxy Circular*, online: SEDAR <www.sedar.com>: "The persons named in the enclosed form of proxy will vote the shares in respect of which they are appointed in accordance with the direction of the Shareholders appointing them. In the absence of such direction, such shares will be voted, for the approval of the election of the nominees hereinafter set forth as directors of the Corporation, for the re-appointment of KPMG LLP Chartered Accountants as Auditors of the Corporation and for the approval of the 2004 Stock Option Plan."

[38] NI 54-101, *supra* note 26.

ascertain the identity of the beneficial owner directing the vote. To date, the majority of public firms in Canada have not adopted confidential proxy voting policies, remaining free to review votes cast prior to the Annual General Meeting of shareholders.

At the annual general meeting, voting is conducted by a show of hands or a secret poll if requested by a shareholder or where the anticipated support for the proposal exceeds a prescribed percentage.[39] Where there is a show of hands, the outcome of the vote may or may not take into consideration votes cast electronically prior to the meeting. Furthermore, until 2004 with the introduction of rules requiring the disclosure of vote totals, companies could choose not to publish vote results and most elected not to do so. The rules still allow circumvention of the disclosure requirement. The rules do not specify exactly what information must be disclosed, and an early compliance report by the Canadian Coalition for Good Governance indicates that most companies are not providing meaningful vote disclosure in a timely manner.[40]

This framework for voting proxies presents certain challenges for pension plans and pension trustees. The delegation of voting authority to intermediaries, lack of reporting by intermediaries, corporate access to proxies in advance of the meeting, difficulties in obtaining proxy information, time constraints on directing and exercising proxies, and the inability to oppose routine business proposals or obtain vote results are some of the barriers which shareholders face. These barriers are discussed in more detail in section 4 of this paper.

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[39] CBCA, *supra* note 22, s. 141(1).

[40] Canadian Coalition for Good Governance, *Report on Compliance with Section 11.3 of National Instrument 51-102* (CCGG: Toronto, August 2004) [unpublished draft].

2.2. The Corporate Engagement Process

Corporate engagement is a process through which shareholders as owners communicate their interests and concerns directly to companies. Engagement mechanisms run the gamut from private acts such as letter writing and corporate-shareholder dialogue, to more public strategies including filing shareholder proposals, media campaigns and, in extreme situations, litigation. While there is often an incremental approach taken to engagement, the order of the mechanisms used may vary. For example, investors may wish to approach a company quietly to avoid public scrutiny and allow more freedom in negotiations. Alternatively, a proposal may be filed first in order to capture a company's attention and encourage dialogue.

The process of private negotiation can be relatively short or be protracted over several years depending on the parties and nature of the issues under consideration. Filing a shareholder proposal is often appealing because of its immediate publicity; however, it also has disadvantages including the need to comply with a regulatory framework. Rules governing the submission of proposals are provided in corporate law. Therefore, the applicable law is determined by the jurisdiction in which the company is incorporated. Once the jurisdiction is determined, the rules dictate which shareholders are eligible to file a proposal, what must be included in the proposal, the permissible issues that can be raised, timelines for filing and circulating the proposal, the grounds on which a proposal may be excluded by the company, and the mechanisms for resolving disputes.

For federally-registered companies (comprising more than one third of the S&P/TSX Composite Index), both registered and beneficial shareholders may submit proposals.[41] One or more shareholders must hold a minimum of $2,000 worth of shares or 1% of the total outstanding shares for a period of at least six

[41] CBCA, *supra* note 22, s.137. For a summary of the rules governing the filing of shareholder proposals with federally incorporated companies, *see* Gil Yaron, *A Guide to Preparing and Submitting Shareholder Proposals with Federally-Incorporated Canadian Corporations* (Vancouver: SHARE, 2003), online: SHARE < http://www.share.ca/files/pdfs/share-proposal-guide.pdf >.

months. In the case of nominations for director, a shareholder or shareholders must hold a minimum of 5% of outstanding shares or a class of shares entitled to vote. Proposals must include a set of prescribed information and be no more than 500 words in length. Proposals must be submitted to the company within 90 days of the date of the Notice of Meeting from the previous annual general meeting. The company may then exclude the proposal from the company's proxy circular on a number of grounds, including where the company deems the proposal to not relate in a significant way to the business and affairs of the corporation. In such instances, the shareholder's only recourse is to the court to obtain an order requiring the company to circulate the proposal.

Given the extent of financial losses incurred by investors since the collapse of financial markets in 2000, pension funds have started to resort to litigation in order to recover losses. While litigation is both timely and costly, the degree of damages claimed in these cases often makes it prudent for pension funds to seek legal recourse. For example, the Ontario Public Sector Employees Union Pension Trust is lead plaintiffs in separate class action lawsuits against Nortel Networks Inc. alleging that the company made misleading statements regarding its financial position and performance resulting in inflated stock valuations.[42] The Ontario Teachers' Pension Plan is co-lead plaintiff in a separate class-action against Nortel Networks for similar violations of securities law, as well as co-lead plaintiff along with Local 282 Welfare Trust Fund in a class action lawsuit against Biovail Corp.[43] Similar allegations have been raised by the Canadian Commercial Workers' Industry Pension Plan as lead plaintiff in a class action lawsuit against Royal Group Technologies.

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[42] OPSEU Pension Trust, "OPTrust Files Class Action Complaint Against Nortel" (May 17, 2004), online: OPSEU Pension Trust <http://www.optrust.com/aboutus/nortel_may_2004.asp>.

[43] "Your Pension Plan Co-Leads Nortel Class Action Suit" (Fall 2004), online: Ontario Teachers Pension Plan <http://www.otpp.com/web/website.nsf/web/pwfall04_nortel>.

Given the complex regulatory framework governing the handling of shareholder proposals and the barriers that shareholders continue to face in this regard, shareholders rarely rely exclusively on this approach. A review of studies comparing various approaches in relation to firm performance suggests that quiet negotiation may be a more profitable strategy than filing shareholder proposals, although this conclusion is recognized to be overly simplistic, ignoring the myriad of factors that potentially confound the findings.[44] For example, observing the frequency and evaluating the effectiveness of private negotiations is difficult. Similarly, shareholder proposals might be considered necessary in response to challenging or intransigent management scenarios or to provide a focused context for private discussions.[45]

3. DOES THE EXISTING LEGAL FRAMEWORK IMPOSE A FIDUCIARY OBLIGATION ON PENSION TRUSTEES TO BE ACTIVE SHAREHOLDERS?

Canadian law does not explicitly articulate whether corporate engagement and proxy voting are fiduciary responsibilities of plan trustees. The current legal framework governing the voting of proxies by pension plans in Canada is minimal and not well known or enforced. Similarly, there is no policy or jurisprudence that discusses the prudent approach of pension plans towards corporate engagement. The courts have traditionally discussed the fiduciary obligations of pension trustees to act prudently and loyally in general terms. Rarely do these general principles get interpreted in relation to specific governance responsibilities of trustees and other plan fiduciaries. The absence of explicit regulatory guidance coupled with other systemic market barriers (discussed in section four of this paper) continue to leave trustees uncertain or unaware about their responsibilities with respect to the voting of plan proxies. For pension plans, the questions at issue are whether pension trustees have a fiduciary obligation to vote plan proxies

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[44] Brian Pearce, Patrick Roche, & Nick Chater, *Sustainability Pays* (London: Cooperative Insurance Society, 2002) at 51-52, online: Forum for the Future < http://www.forumforthefuture.org.uk/publications/Sustainabilitypays_page712.aspx>.

[45] *Ibid.* at 52.

and engage companies with whom they are invested, to what extent pension trustees may delegate responsibility for these practices to agents, and the degree of responsibility agents incur upon delegation. These questions are considered in this section.

3.1. Do pension trustees have a fiduciary obligation to vote proxies?

Federal pension regulations require that a pension plan's investment policy account for the retention or delegation of the voting rights attached to investments.[46] Eight of thirteen jurisdictions require the plan's administrator to provide instruction on "the retention or delegation of voting rights acquired through investments" in a plan's investment policy.[47] Accordingly, most jurisdictions require pension plans to have a policy addressing the voting of plan proxies[48], although none provide guidelines on the essential elements of a policy, or the process for its execution.

Some direction is provided in investment guidelines established by Office of the Superintendent of Financial Institutions (OSFI) for federally-regulated pension plans.[49] As guidelines, they are not law, but

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[46] See e.g. Pension Benefits Standards Regulations 1985, SOR/87-19, s.7.1(1)(f); Pension Benefits Regulations, R.R.0 1990, Reg. 909, amended to Reg. 680/00, s.78(2).

[47] Employment Pension Plans Regulation, Alta. Reg. 35/2000, s.51(1); Pension Benefits Standards Regulation, B.C. Reg. 433/93, s.38(3)(f); Pension Benefits Standards Regulation, SOR/87-109 amended SOR/90-363, s. 7.1(1); Pension Benefits Regulation, N.B. Reg. 91-19, s.44(3); Nfld. Reg. 114/96, s.39(6). Prince Edward Island's statutory regime for pensions is not yet in force, nor has it adopted the requirements of another jurisdiction.

[48] George P. Dzuro, Murray Gold, Arleen Huggins & Michael Mazzuca, "Pension Funds as Shareholders" in Raymond Koskie, Mark Zigler, Murray Gold, Roberto Tomassini, *Employee Benefits in Canada* (3rd ed. rev.) (Brookfield, Wisconsin: International Foundation of Employee Benefit Plans, Inc., 2004) at 287.

[49] Office of the Superintendent of Financial Institutions. *Guideline for the Development of Investment Policies and Procedures for Federally Regulated Pension Plans* (OSFI: Ottawa, April 2000), online: OSFI <www.osfi-bsif.gc.ca/eng/pensions/guidelines/pdf/penivst.pdf>.

are considered by the courts to have persuasive value. The guidelines state that proxies are valuable plan assets and must be voted in the best interests of plan members.

> Plan administrators should not ignore the value of voting rights acquired through plan investments. Shareholder votes are often most valuable when used in alliance with others. *Failure to describe in the investment policy how these rights will be used leaves plan administrators open to charges of either negligence or arbitrary action, possibly in violation of the standard of care requirement.* Investment policies should describe and require the use of voting rights, whether directly or through proxy.
>
> If the power to vote proxies is delegated to investment managers, proxies should be bound by rules established in the investment policy. The administrator should receive a report showing how proxies were voted, and affirming compliance with the administrator's proxy voting policy.[50] (emphasis added)

From a process perspective, the OSFI guidelines clarify that where pension plans delegate authority to vote plan proxies to a voting agent pursuant to regulation (above), the plan's board of trustees must provide direction on how the proxies are to be voted and monitor compliance of their voting agents. According to OSFI, failure to detail how voting rights will be exercised in the plan's investment policy could constitute a breach of fiduciary duty. This statement is supported by similar guidance at the international level under the *OECD Principles on Corporate Governance*.[51]

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[50] *Ibid.* at endnote 4, Appendix 1, section 1.6.6. Similar "Compliance Assistance Guidelines" adopted by the Pension Commission of Ontario in May 1990 (since rendered obsolete when Ontario adopted Schedule III of the federal *Pension Benefits Standards Act* ("investment rules")) provide that a policy "...should set out the plan's policy on voting of securities carrying voting rights – specifically, whether the administrator will retain voting rights acquired through the plan's investments, or, if they are to be delegated, to whom. If the pension plan has a policy or policies on voting, these should be stated. The [investment policy] should also describe the procedures to be followed to review proxy statements and solicitations and deciding how to vote securities."

[51] The OECD's *Principles on Corporate Governance* (2004) at Part I, section F state in part: "...Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights..."

In the United Kingdom, many investor organizations, such as the Pension Investment Research Council, view the voting of proxies as a fiduciary obligation of pension trustees.[52] The Newbold Committee asserted in its report that "regular, considered voting should be regarded as a fiduciary responsibility."[53] While such pronouncements are not law, they may have persuasive value.

The legal position in the United States is much clearer. Interpretative bulletins issued under the *Employee Retirement Income Security Act of 1974* (ERISA), legislation governing private pension plans in the United States, emphasize the importance and fiduciary nature of voting proxies:

> The fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock.[54]

This has been interpreted to require that a pension plan vote all of its proxies; "...failure to vote a proxy is a breach of a plan administrator's fiduciary obligations."[55] Former Assistant Secretary of Labor, David George Ball, pointedly reinforced this view more than two decades ago by affirming that a trustee's fiduciary obligation is breached if he/she "fails to vote, or casts a vote without considering the impact of the question or votes blindly with management."[56] At least one academic has argued that the US position reflects the obligations of Canadian pension trustees as well:

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[52] Submission made to the National Association of Pension Funds Committee of Inquiry into Vote Execution, "PIRC presents challenge on reform of the company AGM and the shareholder process" (11 December 1998), online: PIRC <www.pirc.co.uk/proxnapf.htm>.

[53] Newbold Committee, *supra* note 14 at 7 cited in Stapledon, *supra* note 13 at 18-19.

[54] 29 CFR 2509.94-2 (Interpretive bulletin on written statements of investment policy, including proxy voting policy or guidelines.)

[55] Dzuro et al., *supra* note 48 at 287.

[56] "Ball Signals Continued Commitment to Proxy Voting Issues at Department" (January 29, 1980) 17 *Pension and Benefits Reporter* 207 cited in *Unlocking the Power of the Proxy,* supra note 11 at 13.

> Given the strength of fiduciary law in Canada, it is undoubtedly the case that Canadian regulators and courts would find, as have their U.S. counterparts, that plan administrators must exercise proxy votes as an aspect of their fiduciary obligations.[57]

France also recently amended its law to require that investment managers vote all shares that they hold or explain why if they don't.[58]

Yet, Canadian law is does not address whether a pension trustee owes a fiduciary obligation to ensure that all proxies are voted. The Ontario Teachers' Pension Plan takes the view that abstaining is not in the best interests of plan members, thereby implying that abstaining constitutes a breach of trustee's duty of loyalty to plan members. A September 11, 2002, press release of the Canadian Coalition on Good Governance quotes Claude Lamoureux, President and CEO of the $85 billion dollar plan, as stating that "Our top priority is creating and preserving shareholder value for our plan members. That begins with taking share ownership seriously and *voting on every proposal in a company's proxy circular....*" (emphasis added) However, at least one academic argues that instances may arise where it is prudent to not vote on an issue, provided that the trustees and their voting agents have considered the issues and options and believe abstaining to be in the best interests of plan members.[59] Geofrey Stapledon, Deputy Director with the Centre for Corporate Law and Securities Regulation at the University of Melbourne's Faculty of Law, argues against a compulsory voting requirement. He concludes that "a failure to vote an equity investment will not normally involve a breach of duty so long as active and genuine consideration has been given to the issue of whether to vote."[60]

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[57] Dzuro et al., *supra* note 48 at 287.

[58] Stephen Davis, "Votes Rule" (June 27, 2003) 7:26 *Global Proxy Watch* 1.

[59] Stapledon, *supra* note 10 at 21.

[60] *Ibid.* at 5.

Based on this review of Canadian pension regulation and statements made by regulators along with policy from other common law jurisdictions, the better view would appear to be that pension trustees have a fiduciary obligation to ensure that both policy and process exist governing the voting of proxies. Consideration should be given to all matters subject to a vote, and guidelines and monitoring mechanisms implemented where responsibility is delegated. The law remains uncertain about whether plan fiduciaries have an obligation to vote all proxies. Evidence indicates this approach is not being followed in practice by most pension plans. Surveys cited earlier demonstrate low vote turnout by institutional investors, few pension plans with detailed policies on proxy voting, high levels of unsupervised delegation, and a general lack of attention to this area of responsibility by pension trustees and service providers in the absence of enforcement by regulators.[61]

3.2. Do pension trustees have a fiduciary obligation to engage the corporations in which the pension plan holds stock?

Canadian law imposes no specific obligation on pension trustees to include corporate engagement as part of the pension plan's investment policy. While there has been little consideration in Canada of the prudential value of corporate engagement by regulators or academics, I submit that the common law principles of prudence and loyalty impose an obligation on trustees to establish an engagement policy as part of a strategy to protect the long-term best interests of plan members. It is often asserted that pension plans invested in Canadian capital markets may not have the option to sell stock. In such instances, prudence dictates the need for policy that permits trustees and their agents to engage management to bring about improvements in performance.[62] Furthermore, as long-term investors, prudent management of plan assets arguably requires taking measures to ensure good governance practices prevail that

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[61] Tan, *supra* note 7.

[62] *See e.g.* Stephen Foerster, "Institutional Activism by Public Pension Funds: The CalPERS Model in Canada?" in Ronald J. Daniels & Randall Morck, *Corporate Decision-Making in Canada* (Calgary: University of Calgary Press, 1995) 379 at 381.

support a healthy economy, stable capital markets and investor confidence.[63] These views were reflected in submissions made to the Senate Standing Committee on Banking, Trade and Commerce in 1998 chaired by the Honourable Michael Kirby (Kirby Commission), and the Commission's findings in support of institutional investor activism.[64]

US regulation does not play any such obligation on plan fiduciaries; however, ERISA makes clear that an investment policy that contemplates corporate engagement activities as part of a pension plan's investment strategy is consistent with a trustee's statutory fiduciary duties provided the trustees determine that such action is likely to influence the value of the company's stock on a cost-benefit basis:

> Activities intended to monitor or influence the management of corporations in which the plan owns stock is [sic] consistent with a fiduciary's obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, is likely to enhance the value of the plan's investment in the corporation, after taking into account the costs involved...such a reasonable expectation may exist in various circumstances; for example, where plan investments in corporate stock are held as long-term investments or where a plan may not be able to easily dispose such an investment...[65]

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[63] See Yaron, *supra* note 1; James P. Hawley & Andrew T. Williams, *The Rise of Fiduciary Capitalism*: *How Institutional Investors Can Make Corporate America More Democratic* (Philadelphia: University of Pennsylvania Press, 2000).

[64] Canada, Senate Standing Committee on Banking, Trade and Commerce, *The Governance Practices of Institutional Investors* (November 1998) (Chair: Honourable Michael Kirby).

[65] *Supra* note 54.

ERISA is also clear that this position applies with respect to both actively and passively managed portfolios.[66]

A review of institutional investors in the UK, commissioned by the Chancellor of the Exchequer in 2000 (Myners Report), found a lack of active intervention by institutional investors in companies even where there was a reasonable expectation that such intervention would enhance the value of investments.[67] Principle 6 of the UK government's response to the Myners Report endorsed the view that pension plans should have a shareholder activism strategy:

> The mandate and trust deed should incorporate the principle of the US Department of Labor Interpretative Bulletin on activism. Trustees should also ensure that managers have an explicit strategy, elucidating the circumstances in which they will intervene in a company; the approach they will use in doing so; and how they measure the effectiveness of this strategy.[68]

In its response, the UK government signaled that it would introduce ERISA-like regulation if voluntary measures did not result in marked increases in pension shareholder activism. According to the Government's follow-up survey conducted in 2004, a mere 9% of occupational pension schemes were

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[66] 59 Fed. Reg. 38860,38862: "This standard would not be different for portfolios designed to match the performance of market indexes (sometimes referred to as 'index funds'). In such funds, the investments are often held on a long-term basis and the prudent exercise of proxy voting rights or other forms of corporate monitoring or communications may be the only method available for attempting to enhance the value of the portfolio." *See also* Richard H. Koppes and Maureen L. Reilly, "An Ounce of Prevention: Meeting the Fiduciary Duty to Monitor an Index Fund Through Relationship Investing" (Spring 1995) 20:3 *J. of Corp. L.* 413 citing *Donovan v. Cunningham,* 716 F.2d 1455, 1474 (5th Cir., 1983), *cert. denied,* 467 U.S. 1251 (1984); *Buccino v. Continental Assurance Co.,* 578 F.Supp. 1518 at 1521 (S.D.N.Y. 1983); *Katsarow v. Cody,* 744 F.2d 270 at 276 (2d Cir. 1984); *Public Service Co. of Colo. V. Chase Manhattan Bank,* 577 F. Supp. 92 at 104 (S.D.N.Y. 1983); *Citizens and Southern Nat'l Bank v. Haskins,* 327 S.E. 2d 192 at 197 (Ga. 1985): "the trustees of a modern pension plan have a clear and specific duty to monitor all equity holdings."

[67] Paul Myners, Institutional Investment in the United Kingdom: A Review (London: HM Treasury, 2001).

[68] HM Treasury and Department of Work and Pensions, Myners Review: Institutional Investment in the UK – The Government's Response (2001).

found to "have acted on activism and either established their own policy, or been influenced in their choice of Investment Manager by the policies they offered in this area."[69]

In October 2002, the Institutional Shareholders' Committee, which includes representation from the British National Association of Pension Funds, also issued a statement of principles on the responsibilities of institutional shareholders and their agents.[70] While the statement is not law, it requires that "both institutional shareholders and agents will have a clear statement of their policy on activism and on how they will discharge the responsibilities they assume."[71] Specific responsibilities to be addressed are also enumerated. A recent survey of local authority pension funds and investment managers in the UK found that 13% of 55 funds regarded themselves to be in full compliance with the ISC Statement of Principles reflecting a similar low level of activism as demonstrated in the UK government survey.[72] According to one author, the Statement of Principles was warmly received by the UK government and will likely figure into any new legislative requirements.[73]

In conclusion, while no statement of law exists in Canada on point, the emerging view supported by American law and British pronouncements is that prudence dictates the need to establish and oversee a policy of engagement to be applied in instances where poor corporate practices have the potential of adversely impacting shareholder value.

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[69] Horack et al, *supra* note 16 at 106.

[70] Institutional Shareholders' Committee, *The Responsibilities of Institutional Shareholders and Agents – Statement of Principles* (2002), online: Association of British Insurers <www.abi.org.uk/Display/File/38/Statement_of_Principles.pdf>.

[71] *Ibid.* at 2.

[72] Stuart Imeson, Delegating Shareholder Engagement – Local Authority Pension Funds and Fund Managers: A survey of policy and practice (West Yorkshire: Local Authority Pension Fund Forum, July 2004)[Interim Report] at 3.

[73] Mario Conti, "Shareholder Activism and Regulation" (Presentation to the Association of Pension Lawyers Annual Conference, London, 15 November 2002).

3.3. Do these obligations extend to corporate social and environmental practices?

For many pension plans, corporate engagement has focused on addressing aspects of corporate policies and practices that not only impact the financial performance of plan portfolios, but also the long-term health and well-being of plan members, their beneficiaries and communities. In the United States, pension plans have engaged corporations on a wide range of social and environmental issues, including gender equity, corporate activities and human rights abuses, sexual discrimination, access to pharmaceuticals, environmental emissions and reporting.[74]

There have been no statements made by Canadian regulators regarding the application of general principles on corporate engagement and proxy voting with respect to social and environmental practices of companies. Where there is a reasonable expectation that social and/or environmental issues might or do present a material consideration for a company, intervention is appropriate. Certainly, where issues are brought to a vote, the obligation to evaluate the potential impact of the issue on corporate performance would apply to social and environmental issues to the same extent as it does to other governance issues.

This view would seem to be in accord with statements by the US Department of Labor (DOL), the body responsible for regulating pension plans in the United States. According to the DOL, the responsibility to vote proxies extends to ***all*** matters subject to a vote, including issues pertaining to corporate governance, and corporate social and environmental practices:

> Active monitoring and communication activities would generally concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues may include such matters as consideration of the appropriateness of executive compensation,

[74] For a list of American shareholder proposals *see* <www.ishareowner.com/sac/index.cgi>.

the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans, *the corporation's investment in training to develop its work force, other workplace practices and financial and non-financial measures of corporate performance*.[75] (emphasis added)

3.4. To what extent may pension trustees delegate these responsibilities?

As stated, pension regulation specifically provides that a pension plan's investment policy must indicate whether responsibility for voting proxies is to be delegated.[76] However, the regulations do not specify a prudent process to be followed or require a pension plan to articulate a process. Similarly, the law makes no specific reference to the delegation of responsibility for corporate engagement.

Pension trustees have a duty at common law not to delegate their responsibilities (*delegates non potest delgare*).[77] This prohibition arose from concerns that fiduciaries might attempt to escape liability by delegating responsibility to a third party, thereby frustrating the purpose of the trust.[78] The interpretation of this principle has been relaxed somewhat in recognition of the complexities involved in administering a large, institutional trust, such as a pension plan. Pension statutes in several jurisdictions expressly permit delegation by the plan administrator to an agent, while requiring that the fiduciary personally select the agent, be satisfied of the agent's suitability to perform the requisite tasks, and carry out prudent and

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[75] *Supra* note 54.

[76] *Supra* note 46.

[77] *Boe* v. *Alexander*, *ibid.*; *Re Floyd* [1961] O.R. 50, 26 D.L.R. (2d) 66 (Ont. H.C.); *Re Blow* (1977), 18 O.R. (2d) 516, 89 D.L.R. (3d) 721 (Ont. H.C.).

[78] For a history of the duty not to delegate, *see* Koppes and Reilly, *supra* note 66 at 427-429.

reasonable supervision of the agent.[79] In jurisdictions whose statutes are silent on the issue of delegation, the question remains to what extent pension trustees may delegate responsibility for these practices and, where such authority is delegated, what requirements are imposed on trustees.

Trust law requires trustees to retain control over policy decisions while permitting delegation of responsibility for implementing decisions. According to the eminent trust scholar, Donovan Waters,

> The rule which emerges from the authorities seems to be this: whenever the power, discretion or duty assigned to the trustee requires that a policy decision be made, the trustee must make it himself. A policy decision is one which, if dispositive, determines how much and at what time a beneficiary takes; if administrative, it directly affects the likelihood of the trust's object or purpose being achieved.[80]

In *Wagner v. Van Cleeff,* the court held that trustees have a duty to supervise their agents. In that case, the plaintiff appointed respondent V as trustee of her deceased sister's estate at the recommendation of respondent W, a lawyer that V had recommended to the plaintiff. W later absconded with the estate's funds. On appeal reversing the trial judge, the court found that V had breached his duty by delegating entire responsibility for the administration of the estate to W and failing to supervise W's actions. In the court's words, "an administrator who puts the assets of an estate in the hands of an agent and takes no steps to ensure that the assets are properly dealt with has breached the duty to supervise."[81]

Similarly, the case of *R. v. Blair* focused on a breach of the 10% concentration rule, limiting a pension plan from investing more than 10% of plan assets in one particular investment. Enfield Corporation (E)

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[79] *Pension Benefits Standards Act,* R.S.B.C. 196, c.352, s.8(7-8); *Pension Benefits Act,* C.C.S.M., c.P32, s.28.1(6-8); *Pension Benefits Act,* S.N.B. 1987, c. P-5.1, s.8(1-3); *Pension Benefits Act,* N.S.R.S. 1989, c.340, s.29(4-6) as amended 2000, c.29; *Pension Benefits Act*, R.S.O. 1998, c.P.8, s.23(5-7).

[80] Donavan Waters, *Law of Trusts in Canada* (2nd ed.) (Toronto: Carswell, 1984) at 707.

[81] *Wagner v. Van Cleeff* (1991), 5 O.R. (3d) 477 at 484 (Div. Ct.).

owned a number of subsidiaries, including Federal Pioneer (FP). FP had a pension plan for its employees that was overseen by a pension committee appointed by E. The committee comprised the President and CEO of E, a vice-president from FP, and the president of another of E's subsidiaries who was also an external director of E. The committee appointed an investment manager for the plan who purchased two million common shares of E for the plan in violation of the 10% concentration rule.

The trial judge held that the committee was the plan administrator for the purposes of the *Pension Benefits Act* and was criminally liable for failing to supervise the investment manager. This decision was reversed on appeal on the basis that the committee was not deemed to be the plan administrator for the purpose of the Act and therefore could not be liable under the provision. However, the court did clarify that the trustee may not delegate "the control process because this represents the ultimate responsibility it has assumed to ensure that the plan is properly managed. Control responsibilities consist of regular policy reviews by the pension committee. Such reviews should be conducted at least once a year."[82] Operational responsibilities, the court noted, can and should be delegated.

According to one legal counsel, *R. v. Blair* stands for the proposition that the duty to supervise is a nondelegable responsibility of pension trustees. Trustees must "select and supervise the agent or employee personally and employ him or her only so far as the matter lies within his or her professional competence."[83] Pursuant to the case law cited above, supervision includes:

- Establishing standards against which performance is judged (in the context of proxy voting, this means setting guidelines);
- Selecting the agent and ensuring the requisite expertise and capacity to fulfill the tasks responsibly;

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[82] *R. v. Blair* (1995), O.J. No. 3111 at para. 213 (G.D.)(QL), rev'g (1993), 106 D.L.R. (4th) 1 (Ont. Prov. Div.)

[83] Roberto Tomassini, "Fiduciary Responsibilities" in Koskie et al., *supra* note 48, 23 at 25.

- Monitoring performance on a regular basis including compliance with the plan's policies and guidelines; and
- Questioning the agent regarding any issues of concern.

The delegation rule extends to all aspects of investment oversight, although no Canadian case has interpreted it in the context of proxy voting or corporate engagement. In the United States, trustees are obligated to "periodically monitor decisions made and actions taken by the investment manager with regard to proxy voting decisions."[84] According to one senior DOL executive, "*'monitoring and other active investment strategies', in addition to voting,* may be an aspect of the fiduciary duties of the trustees and investment managers of U.S. non-public pension funds."[85]

In practice, Canadian pension plans generally delegate authority in the plan's investment policy to their investment manager or service provider and grant them full discretion on how to vote in all instances.[86] A UK survey of 55 local authority pension funds found that 64% of the funds currently delegate all shareholder engagement activities on UK equities to an external investment manager and receive reports from their managers on a quarterly basis.[87] Observations suggest that practice in Canada is poorer with most pension plans not having proxy voting guidelines and delegating responsibility to their investment manager to be voted at the manager's discretion without any reporting or compliance requirements.[88]

The case is more problematic with respect to corporate engagement. Few pension plans in Canada address corporate engagement in their investment policy and their intermediaries consequently often act

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[84] *Supra* note 54. *See also* cases cited in Koppes and Reilly, *supra* note 66 at 427-429.

[85] Stapledon, *supra* note 13 at 6 citing Koppes and Reilly, *supra* note 66.

[86] SHARE, *supra* note 12.

[87] Imeson, *supra* note 72 at 4.

[88] SHARE, *supra* note 12.