CORPORATE GOVERNANCE IN THE CANADIAN RESOURCE AND ENERGY SECTORS

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This article reports the results of a qualitative empirical study of the corporate governance practices of 23 resource and energy sector firms in Canada. The authors examine public disclosure and other documents filed by subject firms in each of the oil and energy, oil and gas trust, precious metal and forestry sectors and compare the firms' governance practices against ten indicia of effective governance advocated by regulators and stock exchanges. The working hypothesis of the article is that due to the global scope of the subject sectors, the sample firms may be better developed than, or have unique qualities compared to, firms in other sectors.

The authors conclude that the sample firms perform reasonably well against the ten indicia. However there are significant sectoral differences. The authors note nearly all subjects have adopted codes of corporate conduct and an overall commitment to comply with new, more rigorous audit committee standards. Weaknesses include a lack of board diversity as one indicator of board independence, lack of formalized continuing education and uneven evaluation processes for corporate boards. Although this study provides insight into Canadian resource and energy sector governance practices, the authors note the need to dedicate more resources to developing consistent and independent standards to use as benchmarks in evaluating corporate governance practices.

Cet article porte sur les résultats de l'étude empirique qualitative sur les pratiques de gouvernance de 23 firmes du secteur des ressources et de l'énergie au Canada. Les auteurs examinent la divulgation publique et les autres documents déposés par les firmes étudiées des secteurs pétrolier et énergétique, pétrolier et gazier et celui des métaux précieux et de la foresterie, et ils ont comparé les pratiques de ces firmes aux dix indices de gouvernance efficace préconisés par les autorités de réglementation et les bourses. Cet article repose sur l'hypothèse de travail qu'en raison de la portée mondiale des secteurs en cause, les firmes faisant partie de l'échantillon sont mieux développées que celles d'autres secteur, ou présentent des caractéristiques uniques.

Les auteurs concluent que les firmes de l'échantillon fonctionnent assez bien en regard des dix indices. Il y a cependant de grandes différences sectorielles. Les auteurs notent que presque toutes les firmes ont adopté un code de conduite générale et un engagement global à respecter de nouvelles normes et des normes plus rigoureuses du comité de vérification. Les faiblesses comprennent le manque de diversité des membres du conseil en tant qu'indicateur d'indépendance du conseil, un manque d'éducation permanente formalisée et des procédés d'évaluation inégaux pour les conseils d'entreprise. Bien que cette étude donne une idée des pratiques de gouvernance du secteur des ressources et de l'énergie, les auteurs font remarquer qu'il existe un besoin de dédier plus de ressources au développement de normes constantes et indépendantes visant l'utilisation de repères dans l'évaluation des pratiques de gouvernance d'entreprise.

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I. INTRODUCTION

Canada is a world leader in energy and extractive resource activity and offers fertile ground for investigating the link between governance practice and economic sustainability. This article reports the results of a qualitative empirical study examining the corporate governance initiatives and practices of 23 firms representing the mining, oil and energy and forestry sectors. It explores how these firms measure up to indicators of effective governance as required or advocated by securities regulators and stock exchanges. It also examines whether recent changes are driven by regulatory or voluntary initiatives. A working hypothesis of the study was that the global nature of business enterprises in these sectors is such that they may have governance measures that are either better developed than other sectors and/or that they have unique governance qualities because of the environmental implications of their economic activity and the challenge of operating in resource rich transitional economies. While the sample is relatively small, it is representative of the Canadian resource sector in terms of market capitalization and type of activity. There is a serious lack of empirical research on Canadian corporate governance activity, and what little exists is generated by the corporate sector itself. This study was aimed at making a modest start to such empirical work, with the hope that further resources will be dedicated to empirical study as the basis on which to make substantive policy decisions. It is evident from this study that there are challenges in terms of transparency and measurable independent standards for such research, an issue that requires much further consideration.

The framework in which this study was conceptualized is one of enterprise wealth maximization, adapting elements of both law and economic and law and socio-economic theoretical approaches to corporate law.[1] While the article does not engage in a discussion of theories of the corporation, it is grounded in the notion that a principal objective of corporate governance is to maximize the wealth-generating capacity of the corporation. However, unlike pure efficiency theory, the approach here is to recognize that corporations are both socially and economically situated; and that their legal personality is shaped by the regulatory framework in which they operate, including not only corporate and securities law, but a host of statutory and common law in respect of remedial requirements under environmental, employment, labour relations and other legislation. Hence, enterprise wealth

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[1] Stéphane Rousseau, "Canadian Corporate Governance Reform: In Search of a Regulatory Role for Corporate Law" in Janis Sarra, ed., *Corporate Governance in Global Capital Markets* (Vancouver: University of British Columbia Press, 2003) 3 [Sarra, *Corporate Governance*]; Janis Sarra, "Oversight, Hindsight, and Foresight: Canadian Corporate Governance through the Lens of Global Capital Markets" in Sarra, *Corporate Governance*, *ibid.*, 40 [Sarra, "Oversight, Hindsight"]; and Lynne L. Dallas, "The Relational Board: Three Theories of Corporate Boards of Directors" (1996) 22 J. Corp. L. 1.

maximization is an objective that is aimed at long-term sustainability of the corporation, not merely short-term return to investors. It also takes account of multiple stakeholders in terms of inputs to the corporation, including equity investors, secured and unsecured lenders, trade suppliers, employees and the communities in which corporations operate. Enterprise wealth maximization theory as utilized here also suggests that many elements of the corporation's relationships with capital markets, the regulatory state and stakeholders should recognize that particular externalities are not currently costed to the corporation and ought to be internalized in measuring efficient generation of wealth. The current ability of corporations to externalize some of the social and environmental costs of their activities is a function of the nature of the legal personality under both domestic and foreign law, the challenge of unlimited subsidiaries, the problem of information asymmetries and unequal bargaining power and the normative debate regarding whether and how to regulate the international activities of domestically regulated corporations.[2] While a fulsome discussion is beyond the scope of this article, these influences ground some of the observations in the study, particularly in the area of economic and environmental sustainability.[3] The framework also recognizes that there is a growing literature on the nature of "soft law" in respect of both non-legally enforceable norms in corporate governance and voluntary initiatives, neither of which has the force of statutory law, but which are nevertheless having an impact on how corporations are being governed.[4] These issues underpin some of the observations in the empirical study, both in governance practice and sustainability measures.

Part I briefly sets out the methodology of the study and the research objectives. Part II examines indicators of good governance as promulgated by securities regulators and through voluntary guidelines, and explores some of the market and regulatory challenges. These indicators are briefly compared with the few empirical studies that have been conducted in Europe and the United States. This part also makes a few observations about the nature of income trust governance. Part III analyzes the firms in the study sample against the backdrop of ten indicia of good governance, providing a brief profile of the firms selected and a summary of both the domestic and international governance practices of these Canadian-based issuers. Part IV examines the limits of this kind of study of corporate governance, including the problems of transparency and externalities of Canadian-based issuers operating internationally. Finally, the article considers whether recent corporate governance reforms and standards that have emerged from those reforms in Canadian corporate and securities law are likely to have an impact on governance of resource and energy firms.

Overall, the article suggests that generally the resource and energy firms comprising the sample perform reasonably well against the ten corporate governance indicators. Weaknesses include lack of board diversity as one initiative towards independence, lack of formal

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2 Janis Sarra, "Corporate Social Responsibility in the Global Economy: Canadian Domestic Law and Legal Processes as a Vehicle for Creating and Enforcing International Norms" in Patricia Hughes & Patrick A. Molinari, eds., *Participatory Justice in a Global Economy: The New Rule of Law* (Montreal: Les Éditions Thémis, 2004) 333 [Sarra, "CSR in the Global Economy"].

3 A number of these debates are referred in the discussion of sustainability, below, Part III.B.10.

4 See *e.g.* Edward B. Rock & Michael L. Wachter, "Islands of Conscious Power: Law, Norms and the Self-Governing Corporation" (2001) 149 U. Pa. L. Rev. 1619; Melvin A. Eisenberg, "Corporate Law and Social Norms" (1999) 99 Colum. L. Rev. 1253 at 1256; Rousseau, *supra* note 1; Sarra, "Oversight, Hindsight," *supra* note 1; and Richard A. Posner & Eric B. Rasmusen, "Creating and Enforcing Norms, with Special Reference to Sanctions" (1999) 19 Int'l Rev. L. & Econ. 369.

continuing education programs and uneven board evaluation processes, while strengths appear in auditing practices. Corporate codes of conduct are common to all, although the sole monitoring instrument in most cases is employee complaint rather than proactive systematic monitoring. The study raises the question of whether there is a market for governance in the resource and energy sector and whether the current level of transparency of governance practices is sufficient to inform investors. The larger question identified by the study is whether the indicators chosen offer a reliable measure of effective corporate governance. The level of compliance may suggest that self-disclosure, absent another external measure, will not provide investors with sufficient insight of governance to make informed investment decisions. If it is an accurate point of reference, then the corporate governance practices of Canadian resource and energy industry firms measure favourably against other firms. One limitation is the absence of any standard of measurement that will provide comparability between corporations and different economic sectors. The absence of a widely accepted standard for comparison of performance and effectiveness of these corporate governance indicators undermines the ability of the capital markets to reward good governance and discount for bad governance in the prices of shares in those markets.[5] The study provides insights into corporate governance practices among resource firms in Canada, especially their performance in relation to each other. However, it is not able to reliably benchmark their performance in the absence of a tool that generates standardized measurements of corporate governance activity. It also reveals the need to dedicate considerably more resources to empirical study and the creation of independent measurable standards.

A. METHODOLOGY

A University of British Columbia study on corporate governance in the Canadian resource and energy sector was conducted in 2004.[6] The methodology was fourfold. First was selection of the 23 companies based on market capitalization, obtaining a representative sample of large-cap and mid-cap firms, and a representative number from each of the oil and energy, precious metals and forestry sectors: four oil and gas producers, four integrated oil firms, three oil and gas trusts, six mining companies and six forestry companies. Oil and gas trusts were examined separately because of their unique structure and because there are no codified statutory requirements under corporate law for the governance of Canadian-based business trusts. All companies in the sample are Canadian-based issuers; most are parent corporations, but several subsidiaries were included for comparison purposes. Their profiles are discussed in Part II. Information sources included each firm's most recent Annual Report, Information Circular, Code of Conduct, web-based disclosures based on securities law requirements and statements and policies relating to corporate governance and sustainability issues, including data collection with respect to their current and anticipated corporate governance strategies.

The second phase comprised a literature search on corporate governance in the resource and energy sectors, focusing predominantly on North America and recent European corporate governance practices. Regulatory changes in corporate and securities law in respect of

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5 Ronald B. Davis, "Investor Control of Multinational Enterprises: A Market for Corporate Governance Based on Justice and Fairness?" in Sarra, *Corporate Governance*, *supra* note 1, 131.

6 Data was collected in the period from June to December 2004.

corporate governance were also examined, including their potential efficacy (or inefficacy) as an accountability check on the quality of governance. While there is considerable literature on corporate governance generally, there is only limited sector-specific discussion of corporate governance in the resource extractive and energy sector, primarily focused on social and environmental sustainability.

The third phase featured a survey of the sample firms, both from the oversight/managerial perspective and from a stakeholder perspective. After analyzing the firms' disclosures, we interviewed top-level representatives from the relevant labour unions, as representative of one stakeholder group dealing with the corporation. Utilizing the firms' disclosures in a variety of annual reporting documents, including Annual Information Forms, Management Discussion and Analysis (MD&As), website reports and publications and electronic-based disclosures, we compiled a list of questions for each corporation. While an effort was made to speak with the lead director or board chair, the firms were asked to select the most appropriate person to comment on the corporate governance of the firm. Interviewees included the corporate secretary, lead director, board chair, director of corporate responsibility, corporate responsibility and international relations business analyst and vice-president of regulatory affairs. There was a relatively high degree of co-operation, although one firm agreed to answer questions on board structure, but not on economic or environmental sustainability.[7]

Finally, the study examined how the governance practices of the studied firms measure against indicators of good governance promulgated by securities regulators, Canadian and U.S. stock exchanges and other self-regulatory agencies, and the Global Compact. It examined what factors, if any, are unique to the oil and gas production, integrated oils, precious metals and forestry sectors in terms of effective governance. It also tried to ascertain how the firms measure outcomes of effective governance and whether one can adequately distinguish between market forces and governance practice in terms of corporate performance. The study explored whether increased codification of disclosure and governance practice is likely to enhance or detract from effective governance. The study asked whether British Columbia's proposed regulatory shift toward continuous market access and less codification of governance and reporting provides a viable alternative to the trend toward increased codification in the rest of Canada and the U.S.

II. CORPORATE GOVERNANCE — KEEPING AN EYE ON BOTH THE TREES AND THE FOREST

Corporate governance refers to a broad range of activity that is implicated in the oversight and management of firms. It engages strategic planning and risk management, "and supervision of corporate officers to prevent shirking or self-dealing transactions."[8] It also includes oversight of regulatory compliance, independent monitoring of audit and operational functions, economic sustainability and corporate responses to market changes. Governance

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[7] A draft of the firm summaries was sent to each firm with an opportunity to correct any information prior to its publication in the study. One firm that had recently undergone reorganization proceedings under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 [*CCAA*] quite reasonably declined to participate.

[8] Sarra, "Oversight, Hindsight," *supra* note 1 at 40.

encompasses issues pertaining to human resource management, succession planning, economic sustainability, community investment and engagement, health and safety, human rights and environmental sustainability. While this definition may seem multi-faceted, the unifying notion is that directors have a fiduciary obligation to act in the best interests of the corporation and hence to maximize enterprise value through oversight of managerial activity in the effective use of corporate assets.

Until recently, most aspects of corporate governance were not mandatory. The Toronto Stock Exchange (TSX) has had voluntary guidelines for several years, with the only mandatory requirement being to disclose annually whether or not the firm is in compliance with the guidelines.[9] The New York Stock Exchange (NYSE) has mandatory corporate governance rules, promulgated in the wake of U.S. corporate failures and subsequent enactment of the *Sarbanes-Oxley Act*.[10] Ten of the firms in the sample are listed on the NYSE as well as the TSX and thus must comply with these new requirements. In 2004, the Canadian regime was supplemented by a series of new national and multilateral securities instruments, including National Instrument 51-102 *Continuous Disclosure Obligations*;[11] Multilateral Instrument 52-110 *Audit Committees*;[12] Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*;[13] National Instrument 58-101 *Disclosure of Corporate Governance Practices*;[14] National Policy 58-201 *Corporate Governance Guidelines*;[15] and sector specific national instruments. These instruments, most of which came into effect in 2004, set new standards for Canadian issuers in terms of

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9 Toronto Stock Exchange, *Toronto Stock Exchange Company Manual*, s. 474, online: TSX Group <http://142.201.0.1/en/pdf/CorpGovCurrentRequirements.pdf> [TSX Guidelines]. On 30 June 2005, National Policy 58-201 *Corporate Governance Guidelines* (NP 58-201) and National Instrument 58-101 *Disclosure of Corporate Governance Practices* came into force across Canada. The corporate governance guidelines enunciated in NP 58-201 have replaced the now-repealed TSX Guidelines. Compliance with the new guidelines is a listing requirement for TSX-listed companies. Issuers are urged to develop their individual corporate governance practices with these non-binding guidelines in mind. The recommended practices in NP 58-201 strongly resemble the TSX Guidelines. Nonetheless, NP 58-201 additionally suggests: adopting a written board mandate; formulating clear position descriptions for the board chair and each committee chair; ensuring continuing education opportunities for directors; adopting a written code of business conduct and ethics, to be filed on SEDAR; appointing a nominating committee composed exclusively of independent directors and adopting a written charter; and appointing a compensation committee consisting entirely of independent directors and adopting a written charter. The concept of "unrelated" director found in the TSX Guidelines has been replaced with that of the "independent" director (National Policy 58-201, *Corporate Governance Guidelines* (2005) 28 O.S.C.B. 3615 [NP 58-201]).

10 *Sarbanes Oxley Act of 2002*, Pub. L. 107-204, 116 Stat. 745.

11 National Instrument 51-102, *Continuous Disclosure Obligations* (2004) 27 O.S.C.B. 3439, online: Ontario Securities Commission (OSC) <www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20040402_51-102-cont-disc-ob.pdf>.

12 Multilateral Instrument 52-110, *Audit Committees* (2004) 27 O.S.C.B. 3252, online: OSC <www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20040326_52-110-audit-comm.pdf> [MI 52-110].

13 Multilateral Instrument 52-109, *Certification of Disclosure in Issuers' Annual and Interim Filings* (2005) 28 O.S.C.B. 1318, online: OSC <www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20050204_52-109_certdisc.pdf>.

14 National Instrument 58-101, *Disclosure of Corporate Governance Practices* (2005) 28 O.S.C.B. 3615, online: OSC <www.osc.gov.on.ca/Regulation/OSCB/2005/oscb_2815-toc.jsp>.

15 NP 58-201, *supra* note 9. For a discussion of these instruments, see Mary G. Condon, Anita I. Anand & Janis P. Sarra, *Securities Law in Canada: Cases and Commentary* (Toronto: Emond Montgomery, 2005).

independence of audit committees, certification requirements for corporate officers and disclosure standards. The cumulative effect of these regulatory shifts is that public issuers in Canada will be held to more rigorous standards in terms of the transparency of their governance structures and practices and in the requirement of independence in supervision of management. While the first reporting years under these new standards will not be effective before this article is published, it is hoped that the data reported here will serve as a base-line on which to measure gains in transparency in future years. The Global Compact's indicators of good governance were also examined. The Global Compact is a voluntary initiative of the United Nations aimed at corporate environmental and social sustainability, and a number of firms in the sample study are signatories to the Compact.[16] Together, the regulatory requirements and suggested best practices provided the basis for setting indicia of effective governance.

A. THE AMBIENT NATURE OF GOVERNANCE

The UBC study employed ten indicators to assess the corporate governance practices of the sample firms, based on an amalgam of the TSX voluntary guidelines, the NYSE Final Rules, Canadian securities requirements and suggested standards in the UN Global Compact. These indicators are not air-tight compartments and they overlap to create a synergistic sense of effective governance; however, unpacking them allowed for cross-company and cross-sector comparison of particular aspects of governance. Ten charts are included in Part III of this article, which illustrate overall the level of compliance of the studied firms with the indicia.

1. INDEPENDENCE

The first indicator is the necessity of board independence. If directors are to engage in effective oversight, they need to be able to critically and independently assess the actions of managers. Independence is implicated in all ten indicators because without board independence, the rest of the governance measures are likely to be less effective. However, independence as an indicium of effective governance should be defined as not only unrelatedness in terms of financial interest (other than shareholdings); it should also include the ability of a director to critically examine, and where necessary challenge, the strategic and operational decisions of corporate officers where the director believes a particular decision or strategy is or may not be in the overall best interests of the corporation. Inside directors have information advantages that may assist in critical assessment of corporate performance, although their critique may be tempered given their economic dependence on continued employment and concern about reputational capital. Hence, while they are not "unrelated," they bring information to the board room that can contribute to overall board independence. All of the advantages and disadvantages of outside and inside directors need to be considered in constructing the optimal mix of board membership that encourages independent oversight. While the authors sought to unearth this facet of independence in the surveys, it was impossible to truly measure. Hence, the results reported here are those that

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[16] United Nations Global Compact (UNGC), "What is the Global Compact?" online: UNGC <www.unglobalcompact.org/AboutTheGC/index.html> [UNGC].

meet securities and stock exchange criteria in terms of the meaning of independence or unrelatedness.

The TSX Corporate Governance Guidelines recommend that every corporation's board of directors should comprise a majority of "unrelated" individuals, defined as a non-management director that is free from any interest or relationship that either could or could reasonably be perceived to materially interfere with the director's capacity to act in the corporation's best interests, other than interests and relationships emanating from shareholding.[17] The NYSE Rules require that listed companies have a majority of independent directors with no material relationship with the company.[18] Material relationships may encompass "commercial, industrial, banking, consulting, legal, accounting, charitable, and familial affiliations."[19] These definitions have been tightened in the U.S. in the past two years, in the wake of Enron, WorldCom and other recent corporate failures that highlighted the challenges for independence. Those companies met statutory definitions of independence; however, indirect financial benefits, corporate climate and failure to effectively engage in oversight resulted in a complete failure of governance to the detriment of investors, employees and creditors alike.[20] The challenge for new independence criteria is not so much the prohibition of undisclosed self-dealing transactions, for which there is greater vigilance, but rather, whether the rules create the appropriate incentive effects in terms of truly engaged and independent oversight. One feature of this increased board independence is whether the board has a non-management board chair or a lead director, in order to offer some independence from the CEO or president of the corporation.

Good governance practice also suggests that non-management directors convene sessions in the absence of inside directors on a relatively regular basis. This has become a requirement of the NYSE Rules and recommended by the Canadian Securities Administrators (CSA) in its new corporate governance guidelines.[21] The meetings of independent directors without inside directors and senior managers allow directors to speak candidly about issues or strategies that are of concern. Whereas five years ago the notion of independent directors meeting separately was highly contested, it is now viewed as one more element to ensure real, and not just statutorily defined, independence. One goal of the UBC study was to ascertain how energy and resource sectors view independence requirements.

2. STRATEGIC PLANNING AND RISK MANAGEMENT

The second indicator of effective corporate governance is evidence of healthy strategic planning, risk assessment and risk management processes. The TSX Guidelines suggest that the board's overall stewardship role implicitly carries with it responsibilities for adopting a

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17 TSX Guidelines, *supra* note 9.

18 Either directly or as a partner, shareholder or officer of an organization that has a relationship with the company. New York Stock Exchange (NYSE), *Listed Company Manual*, s. 303A.02, online: NYSE <www.nyse.com/Frameset.html?displayPage=/listed/1022221393251.html> [NYSE Rules].

19 Commentary to NYSE Rules, *ibid.*, s. 303A.02.

20 For a discussion, see Janis Sarra, "Rose-Colored Glasses, Opaque Financial Reporting, and Investor Blues: Enron as Con and the Vulnerability of Canadian Corporate Law" (2002) 76 St. John's L. Rev. 715.

21 National Instrument 58-101, *supra* note 14.

strategic planning process and for overseeing risk management.[22] Risk management involves appropriate systems in place for monitoring and identifying the principal risks confronting the corporation's business and ensuring that appropriate mechanisms are implemented to address those risks in a timely manner. A TSX survey in 2001 of 600 firms in Canada found that less than 30 percent of boards are engaged in strategic planning and fewer than 40 percent had a formal procedure for oversight of risk management.[23] Yet strategic planning and risk assessment are essential elements of oversight, and the structures and processes in place should monitor the financial health of the firm, plan for market shifts and shocks and manage risks in a manner that creates long-term economic and financial viability.

3. CLEAR DISCLOSURE

The third governance indicator is transparency in disclosure; a factor key to investor confidence. Canada's continuous disclosure system is aimed at providing timely and efficient access to information about issuers. Disclosure allows issuing corporations to efficiently raise capital required for the business. Since approximately 97 percent of all capital market activity in Canada is in secondary markets, the continuous disclosure system is an important component of investor protection.[24] From a governance perspective, directors have an obligation to oversee the collection and reporting of financial and operational developments, material changes or risks to solvency and to ensure compliance with regulatory requirements. Given that there is some level of malleability of financial information, directors have an obligation to be duly diligent in their monitoring of managerial decisions and to ensure timely disclosure of those decisions where appropriate or required. Disclosure also acts as a signalling device for investors in respect of the quality of director oversight, officer managerial skills and operational efficiency. In March 2004, Canadian securities regulators promulgated National Instrument 51-102 *Continuous Disclosure Obligations*,[25] aimed at bringing transparency and uniformity to reporting. NI 51-102 is also aimed at creating transparency and continuity of proxy provisions under securities law, in order that investors are given enhanced default control rights over directors where dissatisfied with the governance of the firm.[26] There are also new certification of disclosure requirements, aimed at holding corporate officers accountable for the quality and accuracy of the issuer's disclosures.[27] British Columbia has opted out of these requirements because of a policy

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22 TSX Guidelines, *supra* note 9.

23 TSX Venture Exchange & Canadian Institute of Chartered Accountants, Joint Committee on Corporate Governance, *Beyond Compliance: Building a Governance Culture* (November, 2001) at 22, online: Canadian Institute of Chartered Accountants, <www.cica.ca/multimedia/Download_Library/Research_Guidance/Risk_Management_Governance/Governance_Eng_Nov26.pdf> [*Beyond Compliance*].

24 Blake, Cassels & Graydon LLP, "Are You Ready? Secondary Market Liability" (29 November 2005), online: Blake, Cassels & Graydon LLP <www.blakes.com/pdf/AreYouReadySecondaryMarketLiability.pdf>.

25 *Supra* note 11.

26 It is highly contested whether these shareholder democracy provisions really afford shareholders access to governance checks. For a discussion, see Janis Sarra, "The Corporation as Symphony: Are Shareholders First Violin or Second Fiddle?" (2003) 36 U.B.C. L. Rev. 403.

27 Multilateral Instrument 52-109, *supra* note 13 (except in British Columbia). The officer must certify that the financial information fairly presents in all material respects the financial condition, results of operation and cash flows of the issuer, and must certify that the officers are responsible for establishing and maintaining disclosure controls and procedures and internal control over financial reporting for the issuer.

determination that it can accomplish effective disclosure with lower transaction costs through its continuous market access and simplified disclosure requirements. It is committed to enhanced disclosure, but has normative disagreements with other provincial jurisdictions as to the level of codification required to achieve transparency.[28] There are also now specialized instruments relating to standards of disclosure for firms engaged in the sectors in the UBC sample study.[29] Another aspect of disclosure, and one that is increasingly significant for the sectors studied, is sustainability reporting: advising investors and the public of corporate strategies for economic, social and environmental sustainability.

4. DIRECTOR SELECTION — SKILLS AND DIVERSITY

A fourth criterion of good governance, and another aspect of independence, concerns effective director recruitment. Those selected to serve as directors must act in the best interests of the corporation, not purely in shareholders' interests. The notion of directors' duty of care has been bolstered recently by the Supreme Court of Canada's judgment in *Peoples Department Stores,*[30] in which the Court held that the "best interests of the corporation" should not be read simply as the "best interests of shareholders" and that from an economic perspective, best interests of the corporation means maximizing the value of the corporation.[31] The Supreme Court held that various factors and various stakeholder groups may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation.[32]

Historically, the CEO or chair of the board (often the same individual) selected directors for the corporation. This frequently led to a corporate culture in which directors felt somewhat beholden to the nominating officer and reluctant to challenge decisions made. While there is long-standing Canadian case law that directors owe a fiduciary obligation to the corporation, not to nominating shareholders or managers, the corporate culture created by this appointment process has been problematic, given that the board's mandate is to engage in independent oversight.

Best practice now suggests that corporations should establish a nominating committee that is composed entirely of unrelated directors. This committee should be responsible for identifying qualified candidates, selecting or recommending to the board selection of director nominees and retaining outside advisers and search firms to locate candidates.[33] A key aspect is to develop and approve a set of criteria for potential directors, in terms of the board's strategic needs and requirements. Board diversity is generally thought to enhance the capacity of the board to engage in critical oversight and to bring diverse relational and other assets to the oversight task, in turn maximizing enterprise wealth. Boards should manifest

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28 These issues continue to be unresolved among securities regulators.

29 National Instrument 51-101, *Standards of Disclosure for Oil and Gas Activities* (2002) 25 O.S.C.B. 534, online: OSC <www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20020125_51-101.pdf>; National Instrument 43-101, *Standards of Disclosure for Mineral Projects* (2005) 28 O.S.C.B. 8165, online: Blake, Cassels & Graydon LLP <www.blakes.com/english/publications/bsra/v128/rule_20051007_43-101_sd-mineral- projects.pdf>.

30 *Peoples Department Stores v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68 at para. 42 [*Peoples*].

31 *Ibid.*

32 *Ibid.*

33 NYSE Rules, *supra* note 18, s. 303A.04 and commentary.

an array of skill sets and backgrounds in order to have oversight expertise in all aspects of the corporation's operations.[34] Moreover, sufficient minority group representation is arguably linked to good corporate governance.[35] This diversity may be particularly relevant where corporations are operating in multiple jurisdictions with different cultural and economic norms.

Although there are no precise national figures, a recent survey found that only 7.4 percent of Canadian corporate board seats are held by women.[36] This is less than half the percentage in the U.S. and very well below the 35 percent of total management positions that women occupy in the Canadian workforce.[37] The Conference Board of Canada has reported that there are practical reasons to have diverse boards.[38] Using gender as a proxy for diversity, the Conference Board tracked corporations for six years and found that boards with two or more women directors in 1995 were far more likely to be industry leaders in profits six years later.[39] It found that 94 percent of boards with three or more women explicitly monitor the implementation of corporate strategy, compared with 66 percent of all-male boards; 94 percent of boards with three or more women ensured compliance with internal conflict of interest guidelines, compared with 68 percent of all-male boards; and 72 percent of boards with two or more women conducted formal board performance evaluation, compared to 49 percent of all-male boards.[40] Overall, the Conference Board concluded that an increased number of women on corporate boards is likely to enhance the oversight activities of corporate boards and that "[d]iversity on boards ... does change the functioning and deliberative style of the board in clear and consistent ways" and that "[g]ood governance improves organizational performance over the long term, financially and non-financially."[41] Important from an enterprise wealth maximization perspective, the Conference Board found that 86 percent of boards with three or more women had two-way communication between the corporation and its stakeholders, compared with 71 percent of all-male boards.[42] The Conference Board statistics merit reflection because they are one of the few empirical studies

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34 Sarra, "Oversight, Hindsight," *supra* note 1.

35 Cheryl L. Wade, "Racial Discrimination and the Relationship between the Directorial Duty of Care and Corporate Disclosure" (2002) 63 U. Pitt. L. Rev. 389 and Lynne L. Dallas, "Developments in US Boards of Directors and the Multiple Roles of Corporate Boards" in Sarra, *Corporate Governance*, *supra* note 1, 191.

36 Catalyst, "Catalyst Tracks Trends with Member Benchmarking Survey and Canadian Census" *Perspective* (April 2002) 1 at 2, online: Catalyst <www.catalystwomen.org/bookstore/perspective/april2002.pdf>.

37 Statistics Canada, "Experienced labour force 15 years and over by occupation and sex, by province and territory" (2001 Census), online: Statistics Canada <www40.statcan.ca/l01/cst01/labor45a.htm> (reporting that women held 574,380 of the total 1,620,900 management occupations in Canada according to the 2001 Census). See also Statistics Canada, "Canadian Statistics, Employment by Age, Sex, Type of Work, Class of Worker and Provinces (Monthly)," online: Statistics Canada <www40.statcan.ca/l01/cst01/labr66a.htm>. In the U.S., women hold 14 percent of board seats (Steven A. Ramirez, "A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?" (2003) 77 St. John's L. Rev. 837 at 838).

38 David A.H. Brown, Debra L. Brown & Vanessa Anastasopoulos, *Women on Boards: Not Just the Right Thing ... But the "Bright" Thing* (Ottawa: The Conference Board of Canada, 2002).

39 *Ibid.* at i.

40 *Ibid.* at 5-6, 11.

41 *Ibid.* at ii.

42 *Ibid.* at 13.

in Canada that have measured both indicia of good governance and financial performance with gender representation.[43]

5. TRAINING

The fifth indicator is tied to director skills and, specifically, to the scope of orientation and ongoing professional development training. Both the TSX Guidelines and the NYSE Rules advocate mechanisms that promote director orientation and continuing education. Directors are one of the few professional groups in today's society where there are no formal requirements either to qualify or to have ongoing professional development. Traditionally, director orientation has included development of directors' manuals, periodic tours of key facilities and requiring senior management to regularly make presentations to the board. The underlying rationale of such programs is to ensure that directors are familiar with the nature of the corporation's operations, in turn enhancing their ability to render informed decisions. However, this level of ongoing education appears inadequate, given rapidly changing regulatory requirements and market shifts. Effective governance should require the corporation to expend the resources necessary to ensure that effective training and continuing education in strategic planning, regulatory change, risk assessment, conflicts risk management and a host of other issues are available to board members. While directors bring particular expertise to a board, they need a current understanding of broader financial, regulatory and market issues. The UBC study tried to locate the amount of ongoing professional development in the sample firms beyond minimal orientation and update of directors.

6. PLANNING FOR SUCCESSION OF CORPORATE OFFICERS

The sixth indicator is effective management succession and planning processes. According to the TSX Guidelines, succession planning includes appointing, training and monitoring senior management. Similarly, the NYSE Rules define succession planning as encompassing policies and principles for CEO selection, performance assessment and succession in the case of an emergency or CEO retirement.[44]

7. EVALUATION OF PERFORMANCE

The seventh indicator used in the study suggests that corporate boards should establish effective means of self-evaluation in order to enhance governance. Board assessment is three-pronged: the board should evaluate its effectiveness as a collective entity, the contributions of individual directors and of any board committees. Assessment processes encourage directors to focus on board performance and to reflect, at least inwardly, on the contributions of their peers. "360 reviews" are increasingly used to gauge the performance of directors and officers from all points of contact with their role in the firm. However, the use of questionnaires in such assessment is uncertain because of the reluctance of directors to create a written record of any dissatisfaction with peer performance. Hence corporate

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[43] For a full discussion, see Janis Sarra, "Class Act: Considering Race and Gender in the Corporate Boardroom" (2005) 79 St. John's L. Rev. 1121.

[44] Commentary to NYSE Rules, *supra* note 18, s. 303A.09.

boards need to devise other strategies to candidly assess the strengths and weaknesses of the board as a whole and its individual members, including, where appropriate, the use of outside professionals that can conduct an assessment of the board's efficacy.

8. AUDIT COMMITTEE PERFORMANCE

The eighth indicium is whether the corporate board meets the increasingly robust requirements regarding the composition, role and responsibilities of audit committees. The TSX Guidelines state that audit committees should consist solely of non-management directors and that all committees should comprise a majority of unrelated directors. Corporate boards should create an Audit Committee Mandate that would set out duties, including overseeing that management has designed and executed effective internal controls and monitoring implementation of those programs.[45] The NYSE Rules are more stringent. Rule 303A.07 of the NYSE's *Listed Company Manual* stipulates that the audit committee must be composed of at least three directors, all of whom are independent pursuant to the NYSE standards.[46] Each committee member must be financially literate, and at least one individual must have accounting or related financial management expertise.[47] New Canadian securities instruments are drawn from these new standards under the *Sarbanes-Oxley Act of 2002* and the NYSE Rules.[48] Multilateral Instrument 52-110 *Audit Committees* sets new independence requirements for Canadian-based issuers, specifically, that every member of an audit committee is to be independent.[49] Independent is defined as the absence of any direct or indirect material relationship between the director and the issuer that could reasonably interfere with the exercise of the audit committee member's independent judgment.[50]

MI 52-110 also sets financial literacy requirements for audit committee members.[51] While the Canadian Instrument does not require at least one financial expert on the audit committee, those issuers that are cross-listed in the U.S. must have at least one financial expert in order to comply with requirements under the *Sarbanes-Oxley Act of 2002*. The audit committee must assist the board in oversight of matters such as the integrity of financial statements, the corporation's legal and regulatory compliance, the independent auditors' qualifications and the performance of the corporation's internal audit mechanisms.[52] Additionally, the audit committee acquires and reviews reports by the independent auditor outlining the firm's internal quality-control processes and all relationships between the independent auditor and the corporation. Another indicator of effective governance is that the audit committee periodically holds separate meetings with management, internal auditors and independent auditors.[53]

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45 TSX Guidelines, *supra* note 9.

46 NYSE Rules, *supra* note 18.

47 Section 407 of the *Sarbanes-Oxley Act of 2002*, *supra* note 10, requires public companies to disclose whether or not at least one "financial expert" serves on the audit committee.

48 MI 52-110, *supra* note 12.

49 *Ibid.*, s. 3.1(3).

50 *Ibid.*, s. 1.4(1). Section 1.4(3) sets out a list of relationships that are not eligible to serve on the audit committee.

51 *Ibid.*, s. 3.1(4).

52 *Ibid.*; see also NYSE Rules, *supra* note 18, s. 303A.07(c)(i)(A).

53 NYSE Rules, *ibid.*, s. 303A.07(c)(iii)(E).

9. CODE OF ETHICS

The ninth indicator of good governance is the board's adoption of a code of business conduct and ethics. Rule 303A.10 of the NYSE Rules expressly requires listed companies to adopt and disclose such a code for directors, officers and employees, and to immediately disclose any waivers of the code for directors and senior officers.[54] In addition to proactively promoting ethical behaviour, corporations should institute a system of monitoring compliance. While the existence of a code of ethics or business conduct does not necessarily translate into ethical behaviour, it does provide a starting point against which to measure the performance of corporate officers.

10. SUSTAINABILITY

The final indicator utilized in the UBC study is social and environmental sustainability measures. Sustainability is broadly defined and can include biodiversity and climate change measures, investment in co-generation facilities, sustainable technologies, engagement and community outreach, ethics and human rights, health management, spill prevention and response, product stewardship, technology cooperation and capacity building, urban air quality, waste management and water management.[55] In terms of human resource management, one issue is the extent to which the corporation exhibits its commitment to occupational health and safety. The UN Global Compact advocates three principles pertaining to corporate environmental practices.[56] Businesses should adopt a precautionary approach to environmental challenges, pursue schemes to endorse greater environmental responsibility and foster the development and dissemination of environmentally friendly technologies.[57] An environmentally responsible firm can also participate in the Voluntary Challenge and Registry to control greenhouse gas emissions;[58] undertake remediation, reclamation or reforestation efforts to minimize its environmental footprint; and commit to protect wildlife species and habitats. Finally, sustainable corporate governance encompasses the notion of community investment and engagement where communities in which corporations operate are key stakeholders.

The ten indicia of effective governance are highly integrated and it is the synergies created by a mix of these practices that create effective governance. The firms studied are measured against these indicators on a sector-by-sector basis. A brief profile of the companies is set out in Part III below. The firms had market capitalization ranging from Can$961million to Can$350 billion in 2004. Of note is the global nature of the business activities of these Canadian-based issuers, with operations in multiple jurisdictions, and many issuers listing on two or more stock exchanges.

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54 *Ibid.*

55 International Petroleum Industry Environment Conservation Association (IPIECA) & International Association of Oil and Gas Producers (OGP), *The Oil and Gas Industry from Rio to Johannesburg and Beyond: Contributing to sustainable development* (London: IPIECA/OGP, 2002), online: IPIECA <www.ipieca.org/downloads/WSSD.pdf>.

56 UNGC, *supra* note 15.

57 *Ibid.* at "Environment," Principles 7-9.

58 Canadian Standards Association, "Canadian GHG Challenge Registry," online: GHG Registries <www.ghgregistries.ca/challenge/index_e.cfm>.

B. SURVEY OF UNITED STATES AND EUROPEAN EMPIRICAL RESEARCH

Before discussing the firms studied, it is useful to situate the UBC study in the broader literature. In the U.S. and Europe, there is considerable empirical work on corporate governance. However, as in Canada, there is a paucity of empirical research on the resource and energy sectors. The existing empirical material comprises multi-industry analyses and multi-variable studies that examine governance in relation to other factors. Bearing the strongest resemblance to the UBC study was a multi-industry survey conducted in 2004 of 319 company directors representing 14 European countries.[59] The survey sought to determine how widely certain best practices had been adopted; the best practices measured included a number of indicia utilized in the UBC study. Such practices included establishing and enforcing a code of ethics (82 percent of respondents adhered to this practice) and holding meetings of non-executive directors (56 percent).[60] The survey also revealed increasing reliance on board committees. Among the companies surveyed, the following committees were in place: audit committee (82 percent), remuneration committee (67 percent), nominating committee (51 percent) and governance committee (32 percent).[61] With respect to director selection, a majority of companies surveyed cited general business experience as a predominant consideration, followed by financial acumen, international expertise and industry experience.[62] There were some outliers. German directors expressed particular concern for diversity and familiarity with mergers and acquisitions, the latter likely a function of current changes to their capital markets.[63] Boards in Spain, Portugal and Italy emphasized the legal expertise of director candidates.[64] Liability risk (59 percent) and time commitment (47 percent) emerged as the primary disincentives for serving on boards in the EU study.[65] The study exposed a dearth of highly qualified individuals willing to accept directorship. In terms of succession plans, only 45 percent of responding companies affirmed they understood the firm's succession plan for the CEO and senior executives.[66] "Director education" was limited primarily to briefings by management at board meetings (61 percent), attendance at formal shareholder meetings (58 percent) and participation in private meetings with major shareholders (45 percent).[67] There was little evidence of more robust individual and collective board training; only 58 percent of directors reported receiving education and training related to their capacity as directors.[68] Among those who received training, 63 percent responded that it had occurred more than one year prior.[69] The study found that the training void is most acute in France and Germany.[70] In respect of formal evaluation

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59 Corporate Board Member Europe & The Economist Group, "Board Insights 2004: What Europe's Board Directors Think" *Corporate Board Member Europe* (September 2004), online: Corporate Board Member Europe <www.boardmembereurope.com/resource_center/CBMEResearch.pdf> [Board Insights, 2004]. See also Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, "Corporate Ownership Around the World" (1999) 54 Journal of Finance 471.

60 Board Insights, 2004, *ibid.* at 6.

61 *Ibid.* at 7.

62 *Ibid.* at 10.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.* at 11.

66 *Ibid.*

67 *Ibid.* at 12.

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

processes, 65 percent of directors reported having such procedures for individual executive directors; 61 percent reported having them for the board as a whole; and 44 percent reported having them for individual non-executive directors.[71]

Another study of 296 major European companies found substantial progress in corporate governance in the ten countries covered.[72] Scores were based on such indicia as disclosure and board structure. The U.K. led Europe in most areas of corporate governance, but the Netherlands and France were close behind. The weakest governance appeared to be in southern Europe, in particular Italy, Portugal and Spain. German companies also rated among the lowest in governance measured by Anglo-American standards; this deficiency was attributed by the authors of that study to the two-tier board system, where outside directors occupy merely a supervisory role.[73] Another Europe-based inquiry revealed a positive relationship between stock returns and firm valuation and corporate governance, yet this relationship weakened substantially after adjusting for country differences.[74] The study observed a negative correlation between governance standards and certain earnings-based performance ratios.[75] Yet another empirical investigation found evidence of convergence in governance standards within every major European country.[76] Overall, while the European studies found evidence of effective governance, they were unable to find clear causal links between governance and corporate performance.

American empirical research has focused on the correlation between corporate governance and long-term equity returns, firm value and accounting measures of performance. One study revealed that well-governed companies enjoy higher equity returns, are valued higher and their accounting statements demonstrate superior operating performance.[77] In another empirical inquiry, a model was devised that corroborated the authors' hypothesis that as governance becomes more vigilant, the frequency with which external candidates become CEO should increase; the average tenure of a CEO should fall; CEO effort should increase; and average CEO compensation should increase.[78] One research study of the U.S. market revealed: (1) that higher proportions of outside directors are not linked to superior firm performance; however, they are connected to better-quality decisions on issues including acquisitions, executive compensation and CEO turnover; (2) that board size is negatively correlated to overall firm performance and the caliber of decision making; and (3) that poor firm performance, CEO turnover and overhauls of ownership structure are commonly related

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71 *Ibid.* at 13.

72 Rob Connaught, "Europe's Boards Are Mending Their Ways" *Corporate Board Member* 7:2 (May/June 2004), online: Corporate Board Member <www.boardmember.com/issues/2004_2/>.

73 While arguably this could be normatively contested, it is beyond the scope of this article to explore that question.

74 Rob Bauer, Nadja Guenster & Rogér Otten, "Empirical evidence on corporate governance in Europe: The effect on stock returns, firm value and performance" (2004) 5 Journal of Asset Management 91.

75 *Ibid.*

76 Dariusz Wójcik, "Convergence in corporate governance: Empirical evidence from Europe: 2000-2003" (June 2004, revised February 2005), online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=5594247>.

77 Paul Gompers, Joy Ishii & Andrew Metrick, "Corporate Governance and Equity Prices" (2003) 118 Quarterly Journal of Economics 107.

78 Benjamin E. Hermalin, "Trends in Corporate Governance" (2005) 60 Journal of Finance 2351.

to changes in board membership.[79] Although no European or American study analogous to the UBC resource and energy study could be located (other than those regarding sustainability, referred to in Part III), the multi-industry survey conducted by *Corporate Board Member Europe* appears to reinforce, at least to some extent, trends in governance practices observed by the UBC study.[80]

C. A NOTE REGARDING INCOME TRUSTS

While three oil and gas trusts were included in the study, the only conclusions that can be drawn are that trusts need further examination as a governance structure.[81] Generally, income trusts grew from a Can$2 billion market cap in 1994, to Can$45 billion in 2002, to a market capitalization of Can$118 billion in 2004, with 175 TSX-listed income trusts at the end of 2004, an extraordinary rate of growth in 20 years.[82] The oil and gas sector is a desired target for such trusts as businesses meet the attributes required: consistent cash flow, low and predictable capital reinvestment and mature stage of development.[83] There is no statutory recognition in Canada of business trusts as distinct legal entities.[84] While there are clearly financial upsides to the trust structure, particularly for unitholders, there is no legislation governing business trusts in Canada similar to corporations statutes for governance and oversight accountability. Investors have no default control structure to access if dissatisfied with either governance or distribution policies.[85] The trust is established by contract under a declaration of trust or limited partnership agreement and unitholders' rights are confined by that contract, often limited to election/removal of trustees, appointment of trust auditors and some changes to and termination of the trust.[86] While some trusts have adopted governance rules similar to Canadian corporations' statutes, unitholders do not usually have default control rights such as election of directors or access to oppression or derivative action remedies. Stuart Morrow has observed that unitholders do not have the statutory limitation of liability and the exercise of control by unitholders may be antithetical to limited liability.

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79 Diane K. Denis & John J. McConnell, "International Corporate Governance" (2003) 38 Journal of Financial and Quantitative Analysis 111, providing an extensive review of international corporate governance research. For a discussion of the impact of governance standards mandated by the *Sarbanes-Oxley Act*, *supra* note 10, on certain performance indicators, see Roberta Romano, "The Sarbanes-Oxley Act and the Making of Quack Corporate Governance" (2005) 114 Yale L.J. 1521.

80 Board Insights, 2004, *supra* note 59.

81 For a thoughtful analysis of the governance issues raised, see Mark Gillen, "Income Trust Unitholder Liability: Risks and Legislative Response" (Capital Markets Institute Lecture, University of Toronto, December 2003); National Policy 41-201, *Income Trusts and Other Indirect Offerings* (2004) 27 O.S.C.B. 9685, online: OSC <www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part4/pol_20041203_41-201_income-trusts-oii.pdf>; Mark Gillen, "A Comparison of Business Income Trust Governance and Corporate Governance: Is there a need for legislation or further regulation?" (Capital Markets Institute Lecture, University of Toronto, December 2003).

82 Stuart Morrow, "Governance of Income Trusts in Canada" (presentation, 4 April 2005) [on file with author].

83 The tax advantage of income trusts is based on the tax-free flow of the operating business' available cash into investors' hands. *Ibid.*

84 Provincial Trustee Acts have limited application (*e.g.* Alberta's *Income Trusts Liability Act*, S.A. 2004, c. I-1.5).

85 Dirk Zetzsche, "The Need for Regulating Income Trusts: A Bubble Theory" (2005) 63 U.T. Fac. L. Rev. 45.

86 Unitholders have an undivided, beneficial interest in the trust property, subject to terms of the trust (Morrow, *supra* note 82).

He also observes that there is no requirement that trustees are independent of management and that investors often incorrectly equate the investment model with the corporate model and incorrectly assume that trusts are governed by a uniform set of rules and consistent minimum standards of investor protection.[87]

Many trustees are also the former and continuing directors and officers of the operating company, raising questions of best interests of the respective entities. Dirk Zetzsche has suggested that trust indentures delegate shareholder and creditor rights to trustees who, in many cases, are also managers of the operating firm or who may instead elect the management as a functional equivalent to boards of directors in corporations. In this setting, Zetzsche argues that the "market for trustees" does not discipline trustees because trustees of income trusts do not participate in that market. They participate instead in the managerial labour market, which is influenced by different considerations. While directors of a corporation might be subject to shareholder suits, unitholders of income trusts cannot pursue directors of the operating entity that are not at the same time trustees, and hence the trust structure shields the operating entity from unitholder activity.[88]

While the objective of including the oil and gas trusts was to gain some insights into their governance practice compared with traditional boards, given the unique features of this structure, the findings really only indicate that governance of these trusts is more of a "black box," revealing little about the effectiveness of the board, the relationships between the trust and the operating entities and the governance obligations of the trustees.

III. ANALYZING THE FIRMS AGAINST THE INDICIA OF GOOD GOVERNANCE

A. PROFILE OF FIRMS EXAMINED

1. OIL AND GAS PRODUCTION FIRMS

The study concentrated on four Calgary-based oil and gas producers: Canadian Natural Resources Limited, EnCana Corporation, Nexen Inc. and Talisman Energy Inc. These firms primarily engage in crude oil and natural gas exploration and production.

Canadian Natural Resources Limited (CNQ) is engaged in gas exploration, development and production and is listed on the TSX and NYSE.[89] It has core operations in five countries: Canada, Angola, Côte d'Ivoire, South Africa and the U.K. and five material operating subsidiaries. As of 6 July 2004, CNQ's market capitalization was Can$11.895 billion.[90] For

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87 *Ibid.*

88 Zetzsche, *supra* note 85 at 64-66. Zetzsche observes, at 67, that in recent years, "the consistently high demand for income trust units relative to supply suggests that there is no such intense scrutiny of management decisions, and that unit pricing is unresponsive with respect to management distribution decisions; thus the proposition that market forces could substitute for direct investor influence is cast into doubt." He observes at 68, that it is an open question which disclosure rules apply to income trusts and to what extent; and that the new National Policy *Income Trusts and Other Direct Offerings* (*supra* note 81) "prescribes reconciliation to the GAAP, a measure that might help clarify the issue."

89 Listed under the symbol CNQ.

90 *The Globe and Mail*, "Company Snapshots," online: The Globe and Mail <www.globeinvestor.com> ["Company Snapshots"].

the fiscal year ending 31 December 2003, CNQ had net earnings totalling Can$1.394 billion.[91] EnCana Corporation operates in the acquisition, exploration and development of natural gas, crude oil and natural gas liquids. It is listed on the TSX and NYSE.[92] EnCana conducts principal operations or invests in high potential exploration in 12 countries: Canada, Australia, Azerbaijan, Bahrain, Brazil, Chad, Ecuador, Ghana, Greenland, Oman, Qatar, Yemen, the U.K. and the U.S. The company has seven material operating subsidiaries and partnerships.[93] As of 6 July 2004, its market capitalization was US$28 billion.[94] EnCana reported net earnings of US$2.36 billion for the fiscal year ending 31 December 2003.[95] Nexen Inc. is an oil, gas and chemical producer listed on the TSX and NYSE.[96] It holds core assets and other producing properties in at least eight countries (Canada, Australia, Brazil, Colombia, Equatorial Guinea, Nigeria, Yemen and the U.S.) and reports 18 operating entities.[97] As of 6 July 2004, Nexen's market capitalization was Can$6.667 billion, and for the fiscal year ending 31 December 2003, it reported net earnings of Can$639 million.[98] Finally, Talisman Energy Inc. is engaged in oil and gas production and exploration and is listed on the TSX and NYSE.[99] It has production, development or exploration interests in 13 countries: Canada, Algeria, Colombia, the Falkland Islands, Indonesia, Malaysia, Norway, Papua New Guinea, Qatar, Trinidad, Vietnam, the U.K. and the U.S. Talisman lists six material operating subsidiaries.[100] Its market capitalization as of 6 July 2004 was Can$3.705 billion and it reported net earnings of Can$1.007 billion for the fiscal year ending 31 December 2003.[101]

2. INTEGRATED OILS SECTOR

In the integrated oils sector, the study sample consisted of four firms involved in numerous facets of the oil and gas business, all of which are headquartered in Calgary, Alberta: Husky Energy Inc., Suncor Energy Inc., Petro-Canada and Shell Canada Limited. TSX-listed Husky Energy[102] is engaged in exploration for and development of crude oil and natural gas; production, purchase, transportation and marketing of oil and gas products; and upgrading and refining of crude oil. Husky Energy operates or holds a significant working interest in Canada, China, Indonesia and Libya, and has 12 principal subsidiaries. As of 7 July 2004, Husky Energy's market capitalization was Can$10.972 billion.[103] Its net earnings for the fiscal year ending 31 December 2003 were Can$1.321 billion.[104] Suncor Energy Inc. has

91 *Ibid.*
92 Listed under the symbol ECA.
93 EnCana Corporation, "Annual Information Form" (25 February 2004), online: EnCana <www.encana.com/pdfs/2003AIF.pdf>.
94 "Company Snapshots," *supra* note 90.
95 *Ibid.*
96 Listed under the symbol NXY.
97 Nexen Inc., "Transitioning 4 Growth: Nexen 2003 Annual Report" (2004), online: Nexen <www.nexeninc.com/files/Annual_Reports/2003_AR2.pdf>.
98 "Company Snapshots," *supra* note 90.
99 Listed under the symbol TLM.
100 Talisman Energy Inc., "Annual Information Form for the Year Ended December 31, 2003" (3 March 2004), online: Talisman Energy <www.talisman-energy.com/pdfs/04_AIF.pdf>.
101 "Company Snapshots," *supra* note 90.
102 Listed under the symbol HSE.
103 "Company Snapshots," *supra* note 90.
104 *Ibid.*

operations in the exploration for and production of crude oil and natural gas and transportation, marketing and manufacturing of transportation fuels, petrochemicals and heating oils. It is listed on both the TSX and the NYSE.[105] Suncor operates in Canada and the U.S. with two principal subsidiaries.[106] As of 9 July 2004, Suncor's market capitalization approached Can$15.409 billion.[107] For the fiscal year ending 31 December 2003, Suncor Energy reported net earnings of Can$1.084 billion.[108] Petro-Canada is an integrated oils firm engaged in the exploration, production, refining and marketing of oil and gas and the sale of lubricants. It is listed on the TSX and NYSE and the Government of Canada holds a 19 percent interest.[109] It has production or exploration operations in 12 countries: Algeria, Canada, Denmark, the Faroe Islands, Libya, the Netherlands, Syria, Trinidad, Tunisia, Venezuela, the U.K. and the U.S., with three material operating subsidiaries.[110] As of 9 July 2004, Petro-Canada's market capitalization approximated Can$15.780 billion.[111] For the fiscal year ending 31 December 2003, Petro-Canada reported net earnings amounting to Can$1.669 billion.[112] Shell Canada Limited is engaged in the exploration for and production and sale of natural gas and related products; purchasing, refining, transportation and marketing of crude oil and related products; and the production and upgrading of bitumen. Shell Canada is a subsidiary corporation that is listed on the TSX.[113] Its parent company, Shell Petroleum N.V., is headquartered in the Netherlands. Through Shell Investments Ltd., it holds 78 percent of Shell Canada's equity and voting rights. In turn, Shell Petroleum N.V. is 40 percent owned by The "Shell" Transport and Trading Company and 60 percent owned by Royal Dutch Petroleum Company of the Netherlands. Although Royal Dutch/Shell Group operates in excess of 145 countries, Shell Canada has no foreign operations. It holds one principal subsidiary. As of 8 July 2004, Shell Canada's market capitalization was Can$17.704 billion and for the fiscal year ending 31 December 2003, it reported net earnings of Can$810 million.[114]

3. OIL AND GAS TRUSTS

The study focused on the corporate governance practices of three Calgary-based oil and gas trusts: ARC Energy Trust, Enerplus Resources Fund and PenGrowth Energy Trust. The oil and gas trusts were separated as a category because of the very nature of trusts as a business entity not engaged directly in production. Their relatively recent rise as a sought-after form of business entity indicated at the outset of the study that there may be governance features unique to the trusts. As noted earlier, this model requires further research, but the sample results are reported here for completeness, recognizing the limitations of the study.

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105 Listed under the symbol SU.

106 Suncor Energy Inc., "Annual Information Form" (26 February 2004), online: Suncor Energy <www.suncor.com/data/1/rec_docs/121_2004_AIF.pdf>.

107 "Company Snapshots," *supra* note 90.

108 *Ibid.*

109 Petro-Canada is listed on the TSX under the symbol PCA, and on the NYSE under PC2.

110 Petro-Canada, "Annual Information Form 2003" (4 March 2004), online: Petro-Canada <www.petro-canada.ca/eng/investor/pdf/2003-AIF-e-f.pdf>.

111 "Company Snapshots," *supra* note 90.

112 *Ibid.*

113 Listed under the symbol SHC.

114 "Company Snapshots," *supra* note 90.

ARC Energy Trust has operations solely in Canada and is listed on the TSX.[115] It is an investment trust that issues trust units entitling holders to a direct fractional interest in a royalty on income derived from two wholly owned subsidiaries, ARC Resources Ltd. and ARC Canadian Oil and Gas Ltd. As of 13 August 2004, the Trust's market capitalization approximated Can$2.914 billion.[116] For the fiscal year ending 31 December 2003, it reported net earnings of Can$290.201 million.[117] Enerplus Resources Fund investment trust is exclusively concerned with Canadian operations, listed on the TSX and NYSE.[118] Trust unitholders have a direct fractional interest in a royalty on income derived from oil and gas interests held by Enerplus' subsidiary, Enermark Inc., and Enerplus Resources Corporation, which is a wholly owned subsidiary of Enermark Inc. As of 13 August 2004, Enerplus Resources Fund's market capitalization reached Can$4.061 billion and it reported net earnings for the fiscal year ending 31 December 2003 of Can$249.6 million.[119] Finally, PenGrowth Energy Trust is an investment trust listed on the TSX and NYSE that focuses solely on domestic activity.[120] It holds a 99.99 percent interest in its lone subsidiary PenGrowth Corporation, making monthly distributions to trust unitholders from this royalty. The trust manager is PenGrowth Management Limited. As of 13 August 2004, PenGrowth Energy Trust's market capitalization was Can$2.564 billion, and for the fiscal year ending 31 December 2003 it reported net earnings of Can$189.297 million.[121]

4. MINING AND METAL PRODUCING SECTOR

The mining firms in the qualitative study were Barrick Gold Corporation, Falconbridge Limited, Kinross Gold Corporation, Pan American Silver Corp., Placer Dome Inc. and Teck Cominco Ltd. They range from mid- to top-tier producers and from non-gold to gold miners, selected as a representative sample of the sector.

Barrick Gold Corporation is engaged in gold exploration and production and is listed on the TSX, Paris Bourse, New York, London and Swiss stock exchanges.[122] The corporation has operating mines and development projects in Canada, Argentina, Australia, Chile, Peru, Tanzania, Russia and the U.S. Barrick Gold lists at least 41 significant subsidiaries.[123] As of 9 July 2004, Barrick Gold's market capitalization was Can$14.55 billion and it reported net earnings of US$146 million for the fiscal year ending 31 December 2003.[124] At the time of the UBC study, Falconbridge Limited was a subsidiary corporation listed on the TSX.[125] Both Falconbridge and its parent company, Noranda Inc., were headquartered in Toronto, and Noranda Inc. held 59 percent of Falconbridge's issued and outstanding shares. The

115 Listed under the symbol AET.UN.
116 "Company Snapshots," *supra* note 90.
117 *Ibid.*
118 Enerplus Resources Fund is listed on the TSX under the symbol ERF.UN, and on the NYSE under ERF.
119 "Company Snapshots," *supra* note 90.
120 PenGrowth Energy Trust (PenGrowth) is listed on the TSX under the symbol PGF.UN, and on the NYSE under PGH.
121 "Company Snapshots," *supra* note 90.
122 Listed under the symbol ABX. Its headquarters are located in Toronto.
123 Barrick Gold Corporation, "Annual Information Form for the year ended December 31, 2003" (19 May 2004), online: System for Electronic Document Analysis and Retrieval (SEDAR) <www.SEDAR.com>.
124 "Company Snapshots," *supra* note 90.
125 Listed under the symbol FL.

subsidiary corporation has major operations in Canada, Chile, the Dominican Republic and Norway; additionally, it has sales offices in Belgium, Japan and the U.S. Its principal activities involve exploration, mining, processing and marketing of nickel, ferronickel, copper, zinc, cobalt and other base metal products, precious and platinum group metals and sulfuric acid. Falconbridge has 11 significant subsidiaries. As of 13 August 2004, Falconbridge's market capitalization was Can$5.256 billion, and for the fiscal year ending 31 December 2003 it reported net earnings of US$194.424 million.[126] Subsequent to this study, Falconbridge and Noranda completed an amalgamation under the new corporate name Falconbridge Limited; however, for purposes of consistency in the study, the pre-merger board structure is assessed.[127] Kinross Gold Corporation is listed on the TSX and is headquartered in Toronto.[128] It specializes in the mining and processing of gold and silver ore and operates in six nations: Canada, Brazil, Chile, Russia, Zimbabwe and the U.S. It discloses 13 significant subsidiaries. As of 13 August 2004, Kinross' market capitalization was Can$2.326 billion. For the fiscal year ending 31 December 2003 it reported net earnings of US$9.7 million.[129] Pan American Silver Corp. is headquartered in Vancouver and is listed on the TSX and NASDAQ National Market.[130] Pan American is active in silver mining, exploration and development, and it has operating mines and development projects in Argentina, Bolivia, Mexico and Peru, reporting 14 significant subsidiaries. As of 13 August 2004, Pan American's market capitalization was Can$1.145 million.[131] It reported a net loss of US$6.794 million for the fiscal year ending 31 December 2003.[132] Placer Dome Inc. is headquartered in Vancouver and is listed on the TSX, Euronext-Paris, New York, Australian and Swiss exchanges.[133] Placer Dome is engaged in gold mining, with operations in nine countries: Canada, Australia, Chile, the Dominican Republic, Papua New Guinea, Peru, South Africa, Tanzania and the U.S. Placer Dome lists at least 30 significant subsidiaries.[134] As of 9 July 2004, the company's market capitalization was Can$9.260 billion, and for the fiscal year ending 31 December 2003, it reported net earnings of US$212 million.[135] Teck Cominco Ltd. is listed on the TSX and is headquartered in Vancouver, with major operations in Canada, Peru and the U.S.[136] Its principal activities involve the exploration for and mining of zinc, copper, gold and metallurgical coal. Teck Cominco discloses ten material subsidiaries. As of 13 August 2004, the market capitalization of TEK.A shares was

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126 "Company Snapshots," *supra* note 90.

127 Falconbridge Limited, "Corporate Profile" (2006), online: Falconbridge <www.falconbridge.com/about_us/corporate_profile.htm>.

128 Listed under the symbol K.

129 "Company Snapshots," *supra* note 90.

130 Pan American Silver Corp. (Pan American) is listed on the TSX under the symbol PAA, and on the NASDAQ National Market under PAAS.

131 "Company Snapshots," *supra* note 90.

132 *Ibid.*

133 Placer Dome Inc. was listed under the symbol PDG. In February 2006, Barrick Gold acquired 94 percent of Placer Dome shares. The following month, Barrick Gold completed the Can$12.1 billion acquisition, acquiring all remaining shares of Placer Dome.

134 Placer Dome Inc., "Form 40-F" (2004), online: Internet Archive: Wayback Machine <http://web.archive.org/20050205023539/placerdome.com/resources/115004.pdf>.

135 "Company Snapshots," *supra* note 90.

136 Listed under the symbols TEK.A, TEK.B, and TEK.DB.

Can$4.525 billion.[137] Teck Cominco reported net earnings of Can$149 million for the fiscal year ending 31 December 2003.[138]

5. FORESTRY SECTOR FIRMS

Finally, the study focused on six British Columbia-based forestry firms: Canfor Corporation, Norske Skog Canada Ltd., TimberWest Forest Corporation, West Fraser Timber Co. Ltd., Weyerhaeuser Company Ltd. and Doman Industries Limited. With the exception of the Duncan-based Doman Industries Limited, all the companies' respective headquarters were situated in Vancouver and listed solely on the TSX. Doman was the outlier in the sample because it was undergoing insolvency proceedings at the time of the study.

Canfor Corporation focuses on timber harvesting and the production and supply of numerous forestry goods and operates in Canada and the U.S. with six material subsidiaries and sales offices in Belgium and Japan.[139] As of 12 July 2004, Canfor's market capitalization was Can$1.215 billion, and for the fiscal year ending 31 December 2003 it reported net earnings of Can$153.3 million.[140] Norske Skog Canada Ltd. conducts its business under the name NorkseCanada.[141] As a consequence of amalgamation and equity issues, the interest of Norway-based Norske Skogindustrier ASA in Norske Skog Canada Ltd. has diminished to 29.4 percent. NorskeCanada operates primarily in the production of paper and forest products, with 13 principal subsidiaries. It has no foreign manufacturing operations; however, sales and marketing personnel are present throughout North America and Japan. As of 12 July 2004, the corporation's market capitalization was Can$961 million and it reported a net loss of Can$84.5 million for the fiscal year ending 31 December 2003.[142] TimberWest Forest Corporation concentrates on logging and the production of wood products. It operates exclusively in Canada and is listed on the TSX.[143] It holds four material subsidiaries or partnership interests. As of 12 July 2004, the company's market capitalization amounted to Can$1.012 billion and reported net earnings of Can$24.8 million for the fiscal year ending 31 December 2003.[144] TSX-listed West Fraser Timber Co. Ltd. focuses its activities on the production of forest products.[145] It operates in Canada and the U.S., and holds 11 principal subsidiaries or joint ventures. As of 13 July 2004, the Corporation's market capitalization was Can$1.595 billion, and net earnings were reported as Can$43.121 million for the fiscal year ending 31 December 2003.[146] Weyerhaeuser Company Ltd. is a subsidiary corporation of parent company, Weyerhaeuser Company, which is headquartered in Federal Way, Washington.[147] Although the parent company has operations in at least 13 countries, the production facilities of Weyerhaeuser Company Ltd. are situated solely in Canada and it is listed only on the TSX. The Canadian company holds two principal

137 "Company Snapshots," *supra* note 90.
138 *Ibid.*
139 Listed under the symbol CFP.
140 "Company Snapshots," *supra* note 90.
141 Listed under the symbol NS.
142 "Company Snapshots," *supra* note 90.
143 Listed under the symbol TWF.UN.
144 "Company Snapshots," *supra* note 90.
145 Listed under the symbol WFT.
146 "Company Snapshots," *supra* note 90.
147 The subsidiary is listed under the symbol WYL.

subsidiaries in Saskatchewan. As of 16 July 2004, the subsidiary corporation's market capitalization was Can$9.601 million.[148] The net earnings of the Canadian subsidiary alone are undisclosed; however, for the fiscal year ending 31 December 2003 the parent company reported net earnings of US$288 million.[149]

Doman Industries Limited was the outlier in the UBC study, having been in reorganization proceedings pursuant to the *Companies' Creditors Arrangement Act* (*CCAA*)[150] since 7 November 2002. As of 12 July 2004, while still under *CCAA* proceedings, the cumulative market capitalization of its Class A Common Shares and Class B Non-voting Shares was Can$4.597 million.[151] For the fiscal year ending 31 December 2003, Doman suffered a net loss of Can$3.804 million.[152] The observations in the study pertain to its corporate governance practices of the pre-restructured entity. Doman's restructuring process ended on 28 July 2004, when the debtor exited *CCAA* proceedings in the form of two new entities, Western Forest Products Inc., assuming all of Doman's logging, sawmilling, lumber remanufacturing and lumber marketing operations and Western Pulp Limited, assuming Doman's remaining pulp production and related operations.[153] The *CCAA* Plan of Arrangement contemplated payment in full and the discharge of secured notes. The unsecured debt was exchanged for 75 percent of the equity in the new company, with no equity remaining for pre-filing shareholders and no residual debt available for unsecured creditors.[154] There was also an elaborate refinancing strategy. On implementation of the *CCAA* plan, a new board of directors was constituted for Western Forest Products Inc., with only one pre-filing director (the CEO) being retained. The rest of the directors were appointed by bondholders on behalf of the new owners.[155] The compromise and debt for equity exchange of the second business entity was complex and, once more information is in the public domain, deserves consideration in terms of its new capital and governance structure.

Doman's financial distress highlights a key issue that has been facing the forestry sector in Canada. The long-standing softwood lumber dispute with the U.S. has failed to resolve the issues of imposition of softwood duties, higher stumpage rates and restrictions on harvesting. Combined with land use restrictions, First Nations claims and overall market decline, the forestry firms have faced serious challenges to both their governance and their financial health.[156] In such instances, a firm may be operationally sound but unable to weather the market and regulatory shocks. Hence, it is difficult to measure the effectiveness of governance in this sector.

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148 Stockhouse, "Company Snapshots," online: Stockhouse <www.stockhouse.ca> [Stockhouse].

149 *Ibid.*

150 *Supra* note 7.

151 Stockhouse, *supra* note 148.

152 *Ibid.*

153 Western Forest Products Inc. is listed on the TSX under the symbol WEF.

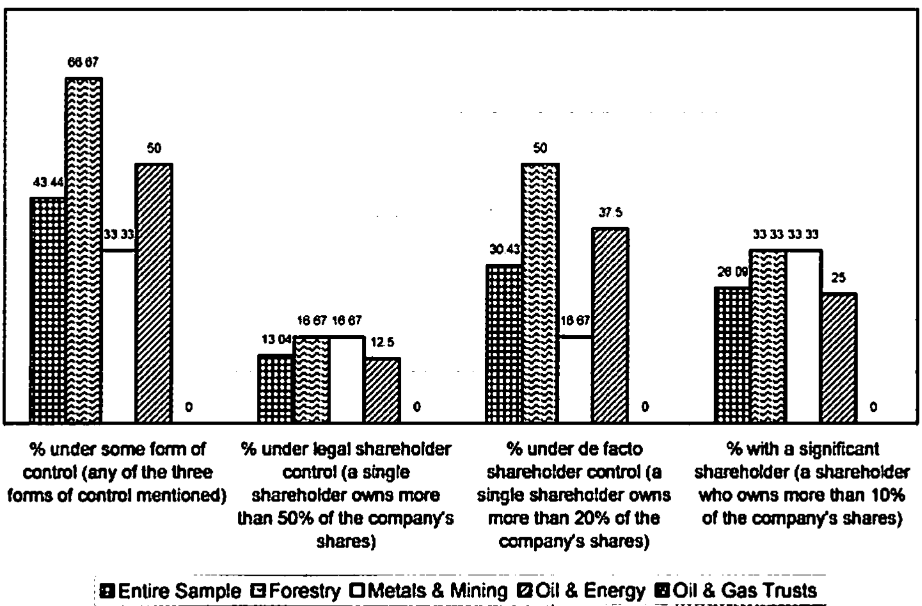
154 For an excellent discussion of the *CCAA* workout, see Michael Fitch & Kibben Jackson, "'Pulp Friction,' the Protracted Restructuring of the Doman Forest Companies" in Janis Sarra, ed., *Annual Review of Insolvency Law 2004* (Toronto: Carswell, 2005).

155 *Ibid.*

156 *Ibid.*

The oil and gas production companies are all listed on both the TSX and NYSE, while the integrated oils companies and oil and gas trusts studied are listed either on both these exchanges or solely on the TSX. A number of the mining and metal producing sector companies are listed more globally in capital markets, with companies listed on up to five stock exchanges internationally. The capital structure of the studied firms indicates that the forestry sector is particularly closely controlled; 50 percent of firms studied were under *de facto* shareholder control, defined as a single shareholder holding more than 20 percent of the company's shares, with over 16 percent of the firms being more than 50 percent single-shareholder controlled. Over 16 percent of the mining sector firms were also very closely held. In the oil and energy sector, 37.5 percent of companies were under *de facto* shareholder control. Chart 1 illustrates cross-industry comparison of shareholder control. While it was beyond the scope of this study to examine the linkages between capital structure and governance practices, this is an important research question to explore empirically in the future.

Chart 1: Cross-Industry Comparison of Shareholder Control



B. SOURCES OF RENEWABLE BOARD ENERGY

Overall, the study results indicated a fairly high level of disclosure and adoption of numerous measures that have been described as indicators of good governance. The strongest governance measures appear to be in the integrated oil, oil and gas production and oil and gas trust sectors, when one measures against the indicators.

One powerful observation that is not picked up in the indicators is the growing influence of institutional investors on governance. A number of firms in the study identified the intervention of institutional investors as the most powerful governance pressure currently faced by boards. Unlike the U.S., where management/shareholder disputes often take the form of proxy battles, Canadian institutional investors use a much more integrated strategy of quiet intervention, *in camera* meetings with the board, threat of proxy action and shareholder proposals and market pressure. In thinking about whether there is a market for good corporate governance, there is no question that on the basis of a number of these indicia, particularly in the independence and transparency areas, the institutional investors have created a Canadian market for good governance. While it is in its nascent stage, the UBC study revealed that this influence is likely to be equally, if not more, effective in shaping governance than new regulatory requirements.

Also of note in terms of all the firms studied is that they appear to have a higher level of sustainability reporting and programming than in manufacturing and other sectors, although this conclusion is tenuous given the lack of empirical data on comparator groups. Sustainability measures are clearly connected to the nature of operations in these sectors in two ways. First, resource-extractive industries have the issue of environmental damage and risk to ecosystems that the results of their extraction activities leave, and at least domestically, are highly regulated and must comply with statutory requirements for protection of the environment. Hence, reclamation is a critical operational consideration, particularly in Canada where there are standards for environmental protection. In some cases, the extraction or production process creates environmentally harmful waste products that must be dealt with in a manner that prevents harm to surrounding communities. In renewable sectors, such as forestry, there is the challenge of appropriate practices aimed at continual renewal of the resource. For non-renewable resource sectors, there is the driving pressure to find future supplies or to divert some of the current economic activity into developing future sources of energy or minerals. All of these challenges domestically are increased several-fold when the corporation is operating internationally. Douglas A. Kysar has observed that an underlying notion of the move to international markets has been that the world has an unlimited supply of material inputs and an infinite natural capacity to absorb waste outputs.[157] Yet sheer growth in economic activity means that there is an ecological limit, and hence, businesses need to be concerned with the sustainable maintenance of scale.[158] A number of firms in the study acknowledged the challenge of environmental and economic sustainability. They may have been more driven to engage these issues because of the type of economic activity in which they are occupied. What follows is a discussion of the application of the ten indicia to each sector in the study.

1. BOARD INDEPENDENCE

The study found that average board size has dropped in the past two decades and the number of independent or unrelated directors is increasing in the firms studied. Figure 1 below provides a cross-industry comparison of average board size. Directors reported that smaller boards are more efficient in strategic planning processes and risk assessment, and that they provide tighter monitoring controls on managerial decisions.

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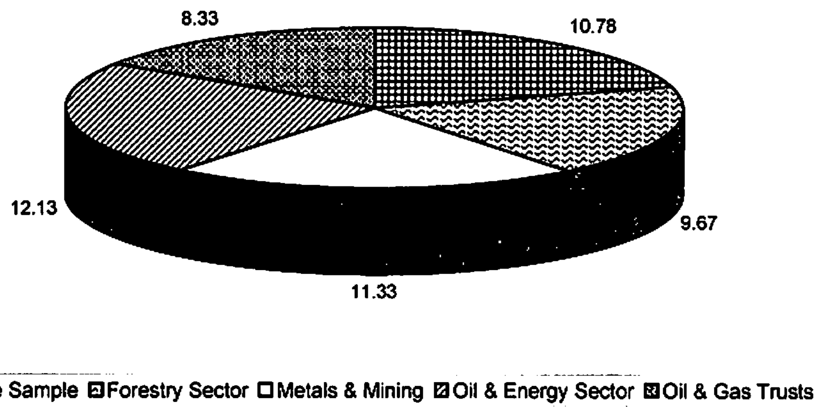
157 Douglas A. Kysar, "Sustainability, Distribution, and the Macroeconomic Analysis of Law" (2001) 43 B.C.L. Rev. 1 at 4, 7.

158 *Ibid.*

Figure 1: Cross-Industry Comparison of Average Board Size



Among the oil and gas producers in the sample study, the average board size was 11.5 directors. The average percentage of non-management directors on the board was 85.89 percent. The average percentage of unrelated directors, pursuant to TSX Guidelines, was 83.62 percent. The respective boards have established structures and processes to reinforce their autonomy. All of the firms are committed to regular meetings of non-management directors without senior officers present. Three of the four firms explicitly stated that prior to each regularly scheduled board meeting, the non-management directors meet in the absence of management. Only CNQ failed to feature a board with an unrelated chair; however, the Chair of the Nominating and Corporate Governance Committee was considered by the firm to be the *de facto* lead director at CNQ.[159]

The integrated oils sector had an average board size of 12.75 directors, the largest average of the firms studied. The average percentage of non-management directors on the board was 92.1 percent; the average percentage of unrelated directors was 79.46 percent. Only Husky Energy did not have a majority of unrelated board directors, with only half of its board comprised of unrelated directors. Husky justifies this departure from the TSX Guidelines by contending that the existing board adequately reflects its minority shareholders' perspectives and interests.[160] As of February 2004, L.F. Investments Limited owned 36.1 percent of common shares and U.F. Investments Limited held 34.7 percent of the common shares. Hence, while Husky is publicly traded, its capital structure is closely held and it is likely that these shareholders exercise considerable influence or control over the board. For the same period, directors and officers of Husky Energy owned less than 1 percent of outstanding common shares. Firms studied in the integrated oils sector have implemented structures and procedures aimed at board independence, similar to initiatives in the oil and gas production

[159] Husky Energy Inc., "2003 Management Information Circular" (2004), online: Husky Energy <www.huskyenergy.ca/investors/archives/Mgt_Info_Cir2003.pdf> [Husky Circular].

[160] *Ibid.*

sector. All firms regularly hold *in camera* board meetings without inside directors present. Three of the four firms expressly stated that their directors meet without management at each regularly scheduled board meeting. All four firms featured non-management board chairs, although Shell Canada's and Husky's board chairs are related directors.

Among the oil and gas trusts in the sample study, the average board size was 8.33 directors, essentially very compact boards. Both the average percentage of non-management directors on the board and the average percentage of unrelated directors were 79.64 percent. While the majority of directors are unrelated, these two averages are conspicuously lower than those of both the oil and gas production sector and the integrated oils sector. However, two trusts have appointed an unrelated board chair. The remaining trust features a board chair who is both President and CEO; however, it has formally selected an unrelated lead director. The Enerplus board convenes independently of management following each regularly scheduled board meeting.[161] The non-management directors of the ARC board meet quarterly.[162] PenGrowth vaguely states that independent directors will exclusively engage in decision making and evaluation in "matters that require independence of the Board of Directors," but does not disclose whether *in camera* meetings are held without inside directors.[163] Interestingly, there was 100 percent cross-appointment of trust directors as directors of the companies that were the operating entities. While one would expect a degree of cross-appointment, a complete overlap raises some interesting questions in respect of the obligations of board members of the trusts who act also as fiduciaries of the operating entity.[164]

With respect to the mining sample, the average board size was 11.33 directors. The average percentage of non-management directors on the board was 82.33 percent, and the average percentage of unrelated directors was 64.72 percent. In comparison to the other sectors in this study, the mining sector's average percentage of unrelated board directors was the lowest. In particular, Barrick Gold has only 53.85 percent unrelated directors on its 13-member board and Falconbridge has 45.45 percent unrelated directors on its 11-member board. Falconbridge fails to pass the majority threshold recommended by the TSX Guidelines since five of the six related directors are officers or directors of the parent company. Four of the six firms have appointed non-management board chairs and two of the four are unrelated. Three of the four firms with a related board chair have designated an unrelated lead director. Two firms convene meetings of non-management directors at each regularly scheduled board meeting; the remaining firms generally commit to hold regular sessions of non-management directors. Falconbridge has established an Independent Directors' Committee, although related directors comprise 50 percent of both the Corporate Governance Committee and the Human Resources and Compensation Committee.

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161 Enerplus Resources Fund, "2003 Information Circular and Proxy Statement" (2004), online: Enerplus Resources Fund <www.enerplus.com/investor_information/reports/documents/Info_Circ_English_year_2003.pdf> [Enerplus Circular].

162 ARC Energy Trust, "2003 Information Circular — Proxy Statement" (2004), online: ARC Energy Trust <www.arcresources.com/NR/rdonlyres/C2605EE1-34C6-4768-8F2D-50CA922DB797/0/Information_Circular_2003.pdf> [ARC Circular].

163 PenGrowth Energy Trust, "Renewal Annual Information Form" (15 May 2003) at 47, online: SEDAR, *supra* note 123.

164 See the earlier discussion on business trusts, *supra* note 81.

Among firms in the forestry sector, the average board size was 9.67 directors.[165] The average percentage of non-management directors on the board was 88.70 percent, and the average percentage of unrelated directors on these corporate boards was 81.29 percent.[166] Only the pre-restructured Doman failed to satisfy the TSX recommendation for a majority of unrelated board directors.[167] In terms of structures that promote board autonomy, half of the firms in the forestry sector have appointed an unrelated board chair; for the remaining three firms, two have formally designated an unrelated lead director. Further, half of the sample firms hold sessions exclusively for non-management directors at each regularly scheduled board meeting, fewer than the other sectors in the study.

While firms emphasized the enhanced structure of board independence, a number of those interviewed observed that independence designations do not fully identify board dynamics. One example is pressure for board independence by institutional investors. Board independence is a priority for these institutional investors and several directors interviewed saw this as a much stronger normative pressure to shift the composition of boards than any regulatory initiative. Chart 2 below provides a cross-industry comparative look at a number of indicators of independence.

Overall, the study revealed that most firms have a majority of unrelated directors on their corporate boards and expressly acknowledge the need for independence. The growing norm of meetings with non-management directors is a positive development that is likely to enhance board independence. The study found a degree of inter-directorships, tiny within a particular sector but greater across sectors, including sectors external to the study.[168] This raises the question of whether the inter-relatedness of boards means that the independence sought by current definitions of "unrelated" is sufficient to capture the close nature of the director community and hence possible risks to board independence. It also raises the question of how to measure the appropriate time commitment to board participation such that there is effective and independent oversight. Moreover, the overwhelming homogeneity and clear lack of gender and visible minority group representation on the corporate boards may also speak to the issue of board independence. Few of the boards surveyed even identified board diversity as a concern. Yet, as the Conference Board study revealed, diverse perspectives as well as diverse skills are the optimal means of ensuring that there is independent oversight of managers' activities.[169]

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165 The recent Doman restructuring has culminated in a new board size of eight directors.

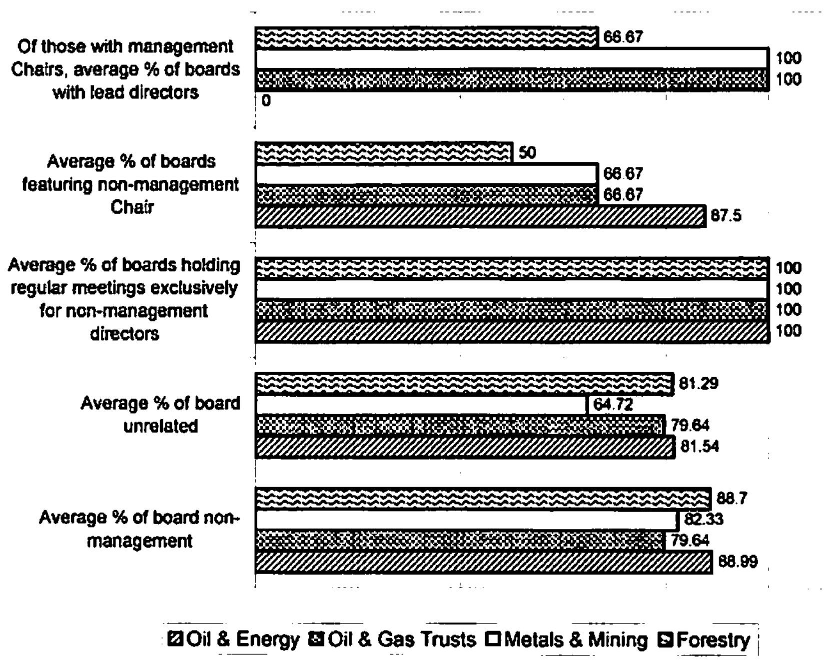
166 Excluding the pre-restructured entity from the sample yields figures of 89.77 (non-management directors) and 87.55 (unrelated directors).

167 As a parenthetical note, in the board structure post-exit from *CCAA* restructuring, one of the two emerging companies, Western Forest Products, has a board of seven members, 86 percent of whom are unrelated and all audit committee members are unrelated.

168 This data was difficult to obtain with a degree of reliability, but the study found that at least 40 percent of the directors held cross-appointments to other corporate boards.

169 Brown, Brown & Anastasopoulos, *supra* note 38.

Chart 2: Indicators of Independence
Note: "Unrelated" is defined in accordance with TSX Guidelines



2. STRATEGIC PLANNING AND RISK MANAGEMENT

Overall, the firms in the UBC study were significantly more involved in strategic planning than previous studies had indicated. Sixty-one percent of the corporations surveyed engaged in strategic planning. This was more than double the percentage identified in the 600-firm study conducted by the TSX in 2001.[170] Where boards exhibited strong strategic planning involvement, a critical feature of that planning was measuring corporate performance against strategic goals on an ongoing basis. The forestry sector still lags on formal board review of plans. All sectors performed better on risk management, overall a two-fold increase in risk management practices over the TSX study, in most cases specifically delegating that responsibility to a board committee. Enhanced involvement in strategic planning and risk management processes appears to be a combination of increased director diligence post-Enron and pressure by institutional shareholders who believe that risk assessment, including both upside and downside risk assessment and management, is a critical requirement for board oversight. Chart 3 illustrates in summary form the degree of risk assessment and formal approval of strategic planning processes; one can note a high degree of express risk management initiatives, whereas formal strategic planning processes are less evident in some sectors.

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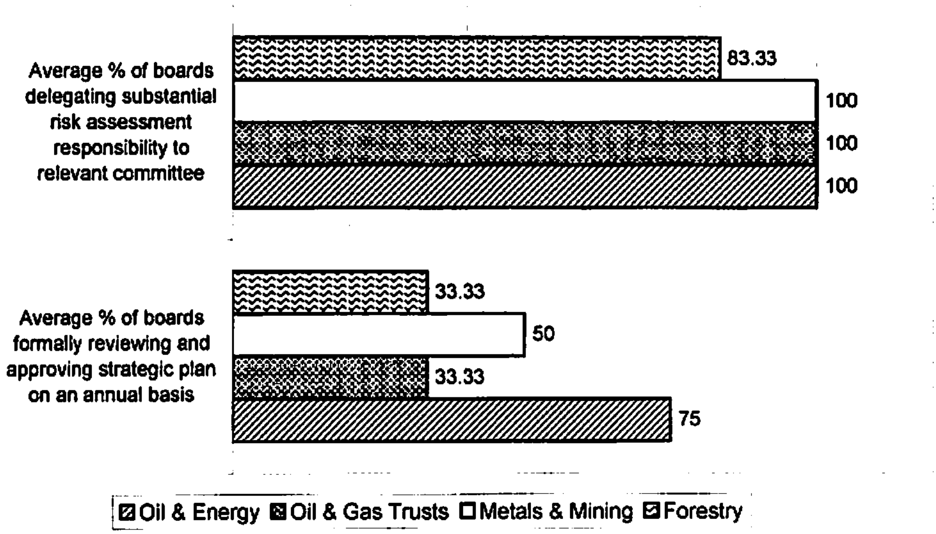
170 *Beyond Compliance*, *supra* note 23.

Chart 3: Degree of Formal Risk Assessment and Strategic Planning Processes
Note: The relevant committees include the audit committee, environmental committee, social responsibility committee and reserves committee.



Only 50 percent of firms in the oil and gas production sector formally review and approve management's strategic plan on an annual basis. The boards' engagement in strategic planning and risk management includes ensuring that the corporation has appropriate long-term objectives and that management has implemented a strategic planning process with long-term strategy development. The board of directors and senior management at EnCana collectively review all materials pertaining to the strategic plan. Factors that the board incorporates into the annual strategy review include key objectives, quantifiable operating and financial targets and systems for risk identification, monitoring and mitigation. Further, the board approves any transaction that could significantly impact the strategic plan.[171] With respect to risk management, all of the oil and gas boards are responsible for identifying the principal business risks and making certain that proper management mechanisms are in place. Each of the boards partially delegates risk management functions to the designated committee.

All the boards in the integrated oils sample play a pivotal role in their respective strategic planning process. Husky Energy and Petro-Canada explicitly state that their respective boards must annually approve the general strategic plan. Shell Canada's board must review

[171] EnCana Corporation, "Information Circular, General Proxy Information" (2004), online: EnCana <www.encana.com/pdfs/InfoCircularEnglish.pdf> [EnCana Circular].

and support the overall five-year strategic plan,[172] and Suncor Energy's board annually approves the long-range strategic plan.[173] Two of the firms stipulate that management must obtain board approval for any transaction that would significantly impact the strategic plan. Similarly, another firm emphasizes that the board must endorse major investments and notable shifts in capital structure and governance such as mergers, acquisitions and divestitures. Petro-Canada and Shell Canada report that their boards monitor management's performance against the plan's objectives; and Shell Canada's board will review the company's adherence to the plan at least quarterly. All four corporate boards in this sector assume responsibility for risk identification and risk management. As with their counterparts in the oil and gas production sector, these boards have delegated considerable risk-management duties to the applicable committees. For instance, the audit committee reviews financial risks, and the environmental, safety and health committees review relevant risks in these areas. Among the four firms, Shell Canada provided the most elaborate explanation of its risk management mechanisms, which include: risk assessments for all new projects; peer reviews on major projects; environmental certification; health, safety and environmental audits; an assurance committee that oversees appraisal mechanisms; and annual assurance letters from the CEO to the board concerning compliance with the corporate code, general business principles and the company's Health, Safety and Environmental Management System.[174]

For all three oil and gas trusts, the board engages in the strategic planning process but does not report formal review and approval of strategic plans. At PenGrowth, the board conducts an annual strategic planning process. The other two boards have adopted more of an oversight role, reviewing and monitoring the plans. During the fourth quarter of each fiscal year, a special strategic planning session enables Enerplus directors to comment constructively on management's plans.[175] In terms of addressing risks, the common strategy is for the board, in conjunction with the relevant committees, to identify the principal business risks and to monitor the implementation of appropriate risk management processes. Enerplus established an Audit and Risk Management Committee, which formally approves risk management controls. Three of the six mining firms expressly state that their boards hold special sessions focused on strategic planning. Only Barrick Gold and Placer Dome specify that management must obtain board approval for any transaction that would significantly impact the strategic plan. In terms of risk management, the boards have delegated much of this responsibility to relevant committees, which, in turn, report to the corporate board. In contrast, only two of the six firms in the forestry sector report that their respective boards formally approve management's long-term strategic plan. The remaining firms state that the board "reviews," "comments on" or "contributes to" the plan. In terms of risk management, all of the boards, excluding that of West Fraser, have delegated much of this responsibility to a designated committee. Canfor distinguishes itself from the entire sample by appointing

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172 Shell Canada Limited, "Management Proxy Circular" (2004) at 27, online: SEDAR, *supra* note 123 [Shell Circular].

173 Suncor Energy Inc., "2004 Management Proxy Circular — Appendix A" at 1, online: Suncor Energy <www.suncor.com/data/1/rec_docs/124_875_Proxy04.pdf> [Suncor Circular].

174 Shell Circular, *supra* note 172 at 28.

175 Enerplus Circular, *supra* note 161 at 16.

a full-time Director of Risk Management who is directly responsible for risk identification and management and who regularly reports to the Audit Committee.[176]

While strategic planning and risk management would appear to be essential elements of corporate governance, the study revealed that there are very uneven levels of such activity in the firms studied. In some instances, strategic planning is left to corporate officers, a decision that is not problematic if the board is engaged in effective oversight and monitoring of these activities. Where it is not, however, there could be risks to financial health from a lack of checks on corporate officers, particularly where their compensation is tied to short-term market expansion and share value. Having made that observation, the firms in the energy and resources sector fared considerably better in strategic planning oversight than firms overall, as noted above. Effective board oversight ensures that the appropriate incentives are driving strategic planning processes and risk assessment and management over the long term. A number of the firms in the study recognized this dynamic.

3. DISCLOSURE — TRANSPARENCY IN THE AIR

Overall, the survey found a high degree of disclosure of financial and operational information. All of the companies indicated that they have been responsive to securities regulation regarding the accuracy and timeliness of disclosure requirements. While a number of firms suggested that much of this disclosure occurred prior to new standards promulgated by the SEC and NYSE through Canadian National Instruments, others have clearly responded to the new requirements. There is also some evidence to suggest that recently enacted certification requirements by corporate officers has created a heightened commitment to accurate disclosures. It also appears that the level of reporting of social and environmental risks to the firm's health is higher in these sectors than generally observed in corporate governance activity, although this may change with new reporting requirements under Canadian securities laws. Two of the four oil and gas producing firms, Nexen and Talisman, release annual sustainability reports. With the exception of Husky Energy, all firms in the integrated oils sector release sustainability reports. None of the oil and gas trusts in the sample release sustainability reports, likely a function of their not having direct production activities. Given the complete overlap of director appointments to the trusts and their operating entities, a further research question would be the degree to which these directors provide enhanced disclosure for the operating entities. All the mining firms in the sample, excluding Kinross and Pan American Silver, release some form of a sustainability report. Aside from the pre-restructured Doman and TimberWest, all the forestry firms in the sample report on sustainability on a regular basis.

The results of the UBC study reinforce an earlier study that observed that climate change disclosure among integrated oil and gas companies has generally improved in Canada.[177] A study of the SEC filings (for the fiscal year ended 2001) of 18 integrated oil and gas firms publicly traded in U.S. capital markets revealed that except one U.S.-based firm, all climate

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176 Canfor Corporation, "Information Circular" (20 March 2003) at 14, online: SEDAR, *supra* note 123 [Canfor Circular].

177 Michelle Chan-Fishel, "Survey of Climate Change Disclosure in SEC Filings of Automobile, Insurance, Oil & Gas, Petrochemical, and Utilities Companies" (2002), online: Friends of the Earth <www.foe.org/camps/intl/corpacct/wallstreet/secsurvey.pdf>.

change reporters were European or Canadian.[178] Generally, the study observed that European, Japanese and Canadian firms reported at a rate of 56 percent, in contrast to a meager 15 percent for American companies.[179] Thirty-four of Canada's 100 largest corporations produced sustainability reports in 2005.[180]

Overall, there is a demand by investors for greater transparency of corporate actions and timely disclosure of material changes. Where corporations are effective in providing this access to information, investors are able to make assessments of the corporation's upside and downside potential; hence it is an important indicator of good governance. However, as will be discussed in the section on sustainability, there are problems associated with self-reporting in the absence of a universally acceptable standard of measurement by which to assess performance.

4. DIRECTOR AND OFFICER RECRUITMENT — ATTRACTING THE RIGHT ENERGY AND CAPACITY

Chart 4 provides summary data on director succession planning. The vast majority of companies studied follow best practice in establishing a nominating committee that is composed entirely of unrelated directors, responsible for identifying qualified candidates, then selecting or recommending to the board selection of director nominees. However, the results are more mixed in the key aspect of developing and approving a set of criteria for potential directors in terms of the board's strategic needs and requirements, as evident in the detailed analysis below. Moreover, there is clearly an issue with respect to lack of diversity on the corporate boards, falling considerably below the national average in terms of gender representation. The integrated oil sector far exceeded the other sectors in terms of diversity. While the boards may operate relatively efficiently, the losses potentially associated with this lack of diversity are not possible to calculate.

The boards of all the oil and gas producers studied have established a nominating and corporate governance committee with a mandate to identify and recommend potential directors to the board. All these committees are exclusively comprised of unrelated directors. Few firms mentioned, even imprecisely, the skills that the boards seek. At EnCana, the board must display a sufficient range of skills, expertise and experience to effectively fulfill its mandate. The company's nominating committee retains and evaluates candidate recommendations from individual directors, the President and CEO and professional search organizations.[181] The equivalent committee at Nexen Inc. has approved an intricate skills evaluation matrix, which details the skills and areas of expertise that are fundamental to the corporation's strategic direction.[182] Skill levels in the following areas are scrutinized: growth leadership and management, international affairs, CEO potential, exploration, human

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178 *Ibid.* at 9.

179 *Ibid.* at 12.

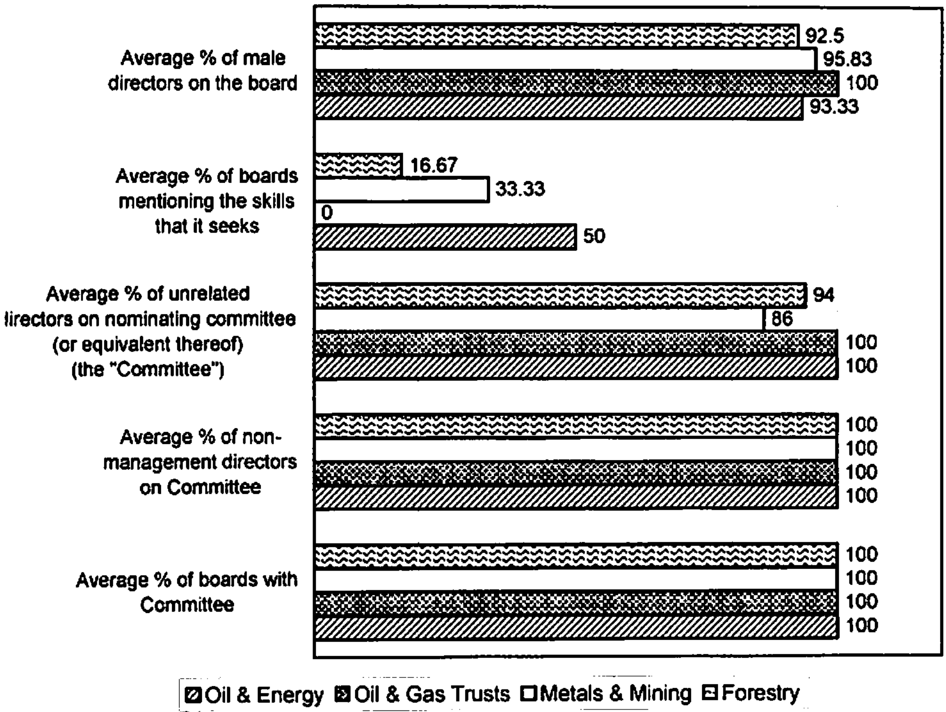
180 Jim Abraham, "A Competitiveness and Environmental Sustainability Framework — Transforming the Way We do Business" (17 May 2005), online: Environmental Protection Agency <www.epa.gov/glnpo/bns/reports/stakemay2005/abraham.pdf>.

181 EnCana Circular, *supra* note 171 at 22.

182 Nexen Inc., "Management Proxy Circular" (10 March 2004) at 23, online: SEDAR, *supra* note 123 [Nexen Circular].

resources, oil and gas, governance, financial acumen, social responsibility, diversity and marketing. Examining all of the oil and gas producers' public disclosures, however, suggests that board diversity is not a corporate priority. On the average oil and gas board, men occupy 91.6 percent of the directorships and no visible minority representation is apparent.

Chart 4: Director Succession Planning



All the boards studied in the integrated oils sector have established some version of a nominating and corporate governance committee, which consists solely of unrelated directors. Although all of these committees were given responsibility for proposing director nominees to the board, only two play an instrumental role in determining selection criteria. At Shell Canada, the nominating committee defines potential candidates' compulsory skills and qualifications.[183] Similarly, Suncor Energy's nominating committee collaborates with the board, outside advisers and management to establish criteria for director nominees.[184] Two of the firms supplied detail on desirable director attributes. Petro-Canada assesses nominees on the basis of business management experience, personal availability and special expertise in areas relevant to the company's strategic interest.[185] Suncor emphasizes board diversity; membership should represent a diverse array of backgrounds, experience, and skills.[186] In comparison to the oil and gas production sector, the four integrated oils firms feature more

183 Shell Circular, *supra* note 172 at 32.

184 Suncor Circular, *supra* note 173 at 3.

185 Petro-Canada, "Management Proxy Circular" (2004) at 28, online: Petro-Canada <www.petro-canada.ca/eng/investor/pdf/2004-ProxyCircular-e-f.pdf> [PC Circular].

186 Suncor Circular, *supra* note 173 at 2.

gender-representative boards: men occupy 78.07 percent of the average board's directorships. With respect to visible minority group representation, half of Husky Energy's 14-member board are visible minorities, and one director of Suncor Energy's 13-member board represented a visible minority group.

The boards of the oil and gas trusts have established some version of a nominating and corporate governance committee and all are comprised solely of unrelated directors.[187] Only PenGrowth details its search process; the Corporate Governance/Compensation Committee accepts and considers suggestions for candidates from individual directors, the President and CEO and professional search organizations.[188] All three trusts are silent on the skills that potential directors must possess. In terms of diversity, the boards of the sample trusts fared the worst: men held 100 percent of the directorships and they did not disclose their boards' visible minority composition.

The mining firms in the sample have all established a nominating and corporate governance committee; however, the average nominating committee, unlike the equivalent in the previously discussed sectors, is not wholly composed of unrelated directors. Falconbridge's committee consists of 50 percent unrelated directors, and Kinross' committee has 66.67 percent unrelated directors. Placer Dome considers factors such as records of achievement, professional and personal ethics, and diversity of backgrounds, geography and gender.[189] Placer Dome is the sole company in the mining sample to discuss board diversity, and almost 10 percent of its directors are women, higher than the national average. Generally, apart from the oil and gas trusts, the mining sample features the highest average proportion of male directors on the typical board, 96.97 percent. With the exception of Teck Cominco, where two of 14 directors are of a racial minority, visible minority representation also appears negligible.

All the firms in the forestry sample have established a nominating and corporate governance committee. With the exception of the pre-*CCAA* Doman, all these committees were solely composed of unrelated directors. The firms generally would not disclose exact nomination criteria. Only Weyerhaeuser Company expressly states that it considers candidates' skills, ethnicity and gender, in addition to the appropriate balance of internal and external directors. Generally, board diversity is not a priority; men occupy 94.01 percent of the average board's directorships, and visible minority representation appears negligible. Given both the Conference Board results discussed in Part II in terms of consistently better financial performance by diverse boards and the need for independence as an indicia of good governance, the diversity issue appears to be a lost opportunity for these sectors. Even where the corporation is performing well, arguably it could enhance governance further by a true diversity of skills and perspectives.

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187 Enerplus has created a Corporate Governance, Nominating and Environment, Health and Safety Committee and PenGrowth has established a Corporate Governance/Compensation Committee; the multiple responsibilities possibly a function of overall smaller board size.

188 PenGrowth Energy Trust, "Information Circular — Proxy Statement" (12 May 2003) at 17, online: SEDAR, *supra* note 123.

189 Placer Dome Inc., "Management Proxy Circular and Statement," (2004) at 6, online: Internet Archive: Wayback Machine <http://web.archive.org/web/20050205015051/placerdome.com/resources/118001.pdf>.

5. DIRECTORS AS A RENEWABLE RESOURCE — ORIENTATION AND CONTINUING EDUCATION

The largest gap between indicator and study results, other than the issue of diversity, is in ongoing director education. While there are orientation sessions offered to new directors across all sectors, the provision of continuing education was highly uneven. This included both formal professional development and educational sessions and more informal updates on legal or market developments. Given how dynamic these sectors are, domestically and internationally, as well as the fact that securities regulation is rapidly developing, it seems counter-intuitive that more is not offered in ongoing training, particularly given the fiduciary obligations of directors. Chart 5 below, provides a cross-industry summary of director education.

All of the corporate boards in the oil and gas production sector purport to have established director orientation and continuing education programs. However, with the exceptions of CNQ and Nexen, program descriptions were vague. The CNQ orientation includes background information on the company's business, current issues, corporate strategies and board, committee and director duties, and new recruits meet with key operations personnel.[190] CNQ expects director participation in continuing education programs to maintain the requisite level of expertise.[191] At Nexen, periodic presentations educate and inform the board of internal changes and of reforms in legal, regulatory and industry requirement and standards.[192] The integrated oils firms in the sample have demonstrated a commitment to director orientation and continuing education. All four corporations distribute some version of a directors' manual, containing corporate fact sheets, board and committee charters, corporate governance issues and other relevant business information. Orientations include meetings with senior management and tours of major operating facilities. With respect to continuing education, only Suncor has approved a Directors' Continuing Education Policy, which encourages directors to enroll in programs that enhance their knowledge and skills in areas relevant to their board functions.[193] Other firms promote continuing education through periodic information and briefing sessions, fully subsidized professional development courses and guided tours of company facilities.

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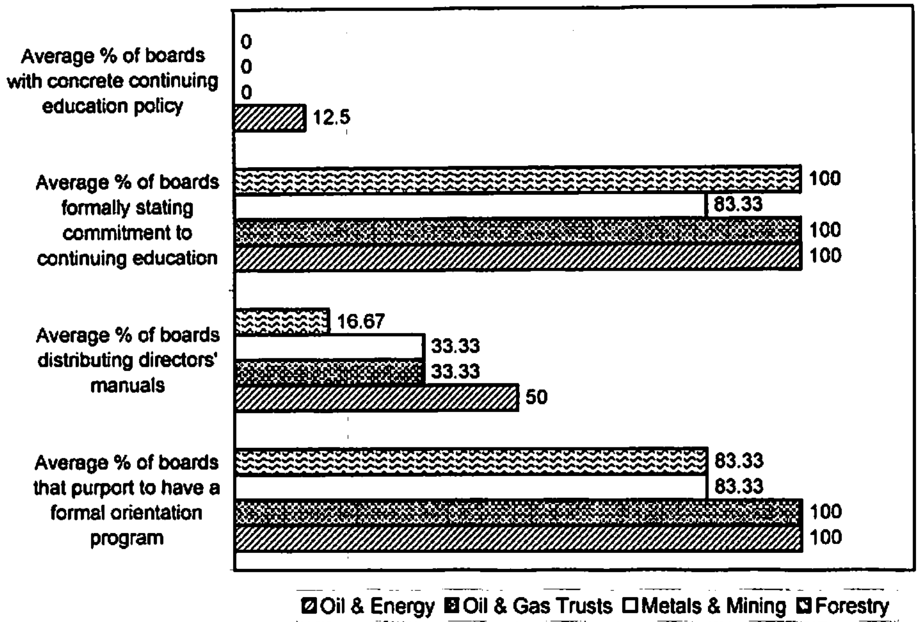
190 CNQ emphasizes that any director has unfettered access to senior management. Canadian Natural Resources Limited, "Management Information Circular" (2004) at 3, online: SEDAR, *supra* note 123 [CNQ Circular].

191 *Ibid.*

192 Nexen Circular, *supra* note 182 at B-2.

193 Suncor Circular, *supra* note 173 at 4.

Chart 5: Cross-Industry Comparison of Formal Director Education and Ongoing Skills Development



Two of the oil and gas trusts have delegated responsibility in this area to a board committee. Only Enerplus describes the nature of its orientation and education programs. In addition to receiving and undertaking regular review of the corporate governance manual, directors meet with the board chair and senior management to familiarize themselves with the organization, participate in environmental and safety field trips and are encouraged to take continuing education for directors.[194] The other two trusts did not disclose detail on these programs. Of the mining firms, only Kinross has not implemented a formal orientation program. Two firms in the sample supply directors' information manuals. Orientation strategies include meetings with senior management, educational resources and tours. Continuing education programs entail periodic presentations or updates to the board. Of the forestry sector companies, only the pre-restructured Doman had not implemented a formal orientation program. Doman rationalized this omission by reporting that the majority of extant directors had served on the board or had engaged in the company's business for considerable periods of time. West Fraser's program is distinct because it specifically encompasses an overview of directors' legal obligations under Canadian law and periodic presentations and updates.[195] Weyerhaeuser Company's program is to provide directors with

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194 Enerplus Circular, *supra* note 161 at 19.

195 West Fraser Timber Co. Ltd., "Management Information Circular" (2004) at 21, online: SEDAR, *supra* note 123.

routine operational reports, background information and summaries of major management presentations prior to each board meeting.[196]

Overall, the level of ongoing education appeared inadequate, given rapidly changing regulatory requirements and market shifts. Effective governance should require the corporation to expend the resources necessary to ensure effective continuing education in strategic planning, risk assessment and conflicts risks and a current understanding of broader financial, regulatory and market issues. Moreover, a specified continuing education policy, with specific objectives, should be part of the board's overall strategic planning process.

6. MANAGEMENT SUCCESSION AND PLANNING

Seventy percent of firms have delegated succession-planning responsibility to a board committee, and only Falconbridge's committee is not exclusively comprised of unrelated directors. The committees have a mandate to review and provide recommendations to the full board on succession planning, senior management development and management's performance against the annual objectives.[197] Chart 6 below, provides a comparative snapshot of indicators in respect of management succession processes. Surprisingly few companies viewed internal promotion as an express priority in succession planning.

Canadian Natural Resources Limited reports that its board must ensure the adequacy of current systems for appointing, developing and monitoring senior management. Annually, the CNQ board receives a report from the president on senior management succession issues and on the status of the corporation's ongoing program for management improvement.[198] Similarly, at Teck Cominco Ltd., an annual human resources report revises and discusses plans for succession, leadership development, performance improvement and competency development.[199] Four of the six forestry boards assume primary authority for succession planning, while they grant ancillary responsibilities such as reviewing and evaluating the succession plan to a board committee. Petro-Canada's succession plan is relatively unique in that it accentuates internal promotion: the company enrolls employees that have been identified as "high potential" into a Leadership Initiative Program.[200] The plan identifies principal roles and responsibilities and outlines the anticipated development of specific individuals who can assume those rules. ARC Energy Trust similarly facilitates internal promotion by encouraging enrollment in development programs.[201]

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196 Weyerhaeuser Company, "Board of Directors of Weyerhaeuser Company: Corporate Governance Guidelines" (2003) at 5, online: <http://media.corporate-ir.net/media_files/NYS/wy/corpgov/guidelines.pdf>.

197 EnCana Circular, *supra* note 171 at 21.

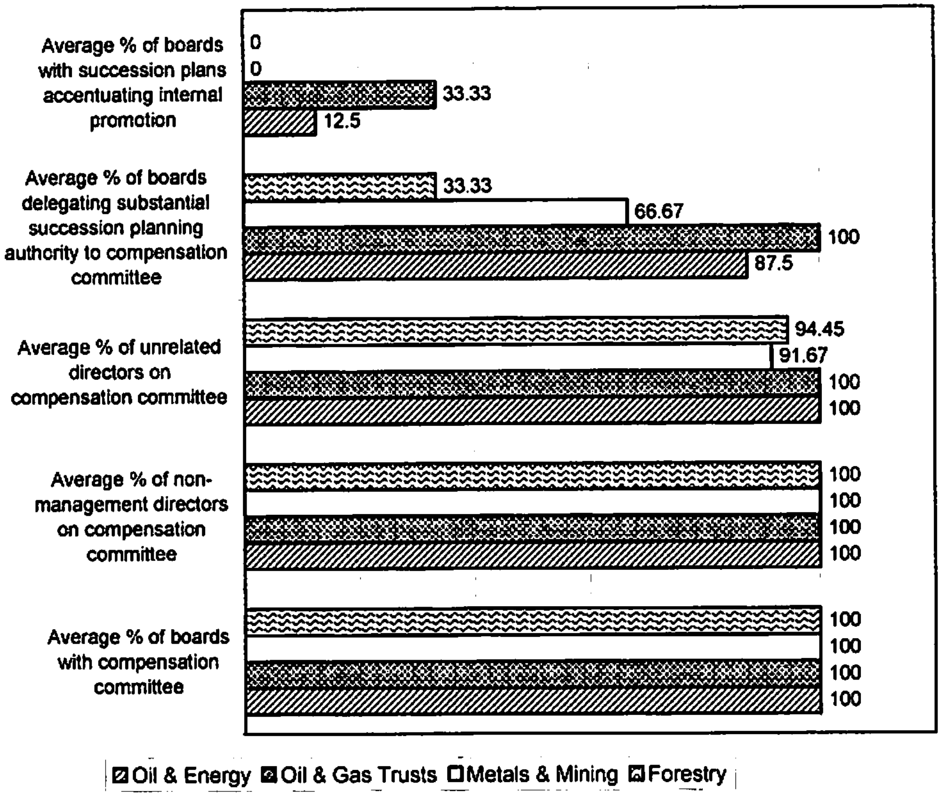
198 CNQ Circular, *supra* note 190 at 1.

199 Teck Cominco Ltd., "Management Proxy Circular" (2004) at 10, online: Teck Cominco <www.teckcominco.com/investors/reports/aif-circ/tc-cir-04.pdf> [Teck Circular]. Kinross Gold Corporation's Corporate Governance Committee and board are mandated to select, appoint, monitor, evaluate and replace the CEO (Kinross Gold Corporation, "Management Information Circular" (2004), online: SEDAR, *supra* note 123).

200 PC Circular, *supra* note 185 at 27.

201 ARC Circular, *supra* note 162.

Chart 6: Management Succession and Planning



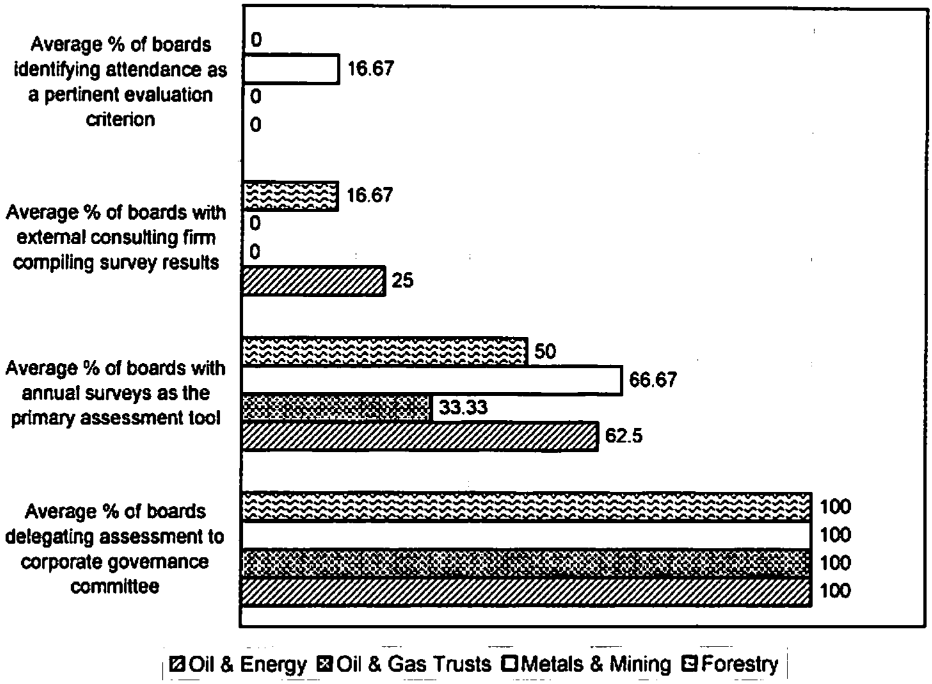
7. BOARD ASSESSMENT

All the firms in the study have assigned the task of board assessment to a corporate governance committee. An indicium of effective evaluation is whether the process involves conducting a three-pronged evaluation, scrutinizing the effectiveness of (a) the board, (b) board committees and (c) individual directors. Surveys to gauge directors' views feature prominently at 57 percent of the sample's firms. Among these firms, however, the nature of the survey process diverges. CNQ conducts an annual survey encompassing self-evaluation, appraisal of board and committee performance and peer review. An outside consulting firm analyzes the completed surveys and reports to the corporate governance committee on the responses. The consultants' written analyses, coupled with any outstanding issues and concerns that emanate from the survey, partially constitute a report to the full board.[202] Yet the practice of hiring outside consultants to compile results is rare; only 13 percent of the firms studied involve external professionals to conduct assessments. Rather, it is common for the board chair, lead director or the chair of the governance committee to meet periodically one-on-one with each director to discuss board, committee, peer and self-

202 CNQ Circular, *supra* note 190 at 3.

performance.[203] At Placer Dome Inc., board members complete both a Board Organization Review Process Questionnaire and an Individual Director Self-Evaluation Form.[204] Similarly, at Teck Cominco, results of the bi-annual Board Effectiveness Questionnaire are reported to the corporate governance committee and to the full board.[205]

Chart 7: Board Assessment



Another assessment strategy entails feedback at regular *in camera* sessions of non-management directors. Talisman Energy Inc.'s assessment procedure is unique among the firms studied in that the board chair conducts an annual three-pronged evaluation and reports findings to the corporate governance committee and to the full board.[206] Only Falconbridge identifies attendance at board and committee meetings as a pertinent evaluation criterion.[207] NorskeCanada specifically solicits director feedback on the operation of the board and its committees, the adequacy of information provided to directors, the extent and quality of

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203 EnCana Circular, *supra* note 171. Specifically, EnCana regularly evaluates the Board, its committees and its members by distributing a directors' questionnaire on board effectiveness. The evaluation encompasses directors' self and peer assessments. The board chair proceeds to discuss, on an individual basis, the results of the peer assessment and questionnaire. See online: EnCana <www.encana.com/investor/financial_info/annual2004/chairman>.

204 Placer Circular, *supra* note 189 at A-3.

205 Teck Circular, *supra* note 199 at 12.

206 Talisman Energy Inc., "Management Proxy Circular" (2004) Schedule A at 15, online: Talisman Energy <www.talisman-energy.com/pdfs/04_Circular.pdf>.

207 Falconbridge Limited, "Management Information Circular" (2004) Schedule A at 24, online: SEDAR, *supra* note 123.

communications between board and management and the company's strategic direction and processes.[208] Chart 7 above, compares board performance assessment practices.

8. EFFECTIVE AUDIT COMMITTEES

The highest degree of cross-industry consistency and compliance with an indicator of good governance was in the composition and practices of audit committees, with all the firms striving to comply with the new audit committee standards. The firms have all established audit committees consisting wholly of unrelated directors.[209] Each firm reported that its committee featured a full slate of financially literate members and most firms stated that at least one director satisfied the definition of "audit committee financial expert." Generally, the committees' roles and responsibilities include monitoring the preparation and audit of financial statements, establishing the appropriate internal controls, selecting and recommending for shareholder appointment the independent auditors, pre-approving all audit and non-audit services, and designing procedures for the receipt and treatment of complaints. Additionally, the audit committee serves as the loci of communication between the internal auditors, the independent auditors, financial and senior management and the board. The audit committee meets with the independent auditors and internal auditors, both with and without management present. The audit committee mandates are virtually identical, indicating that uniformity across sectors is achieved when regulators intervene to set national standards.

The only notable difference between sectors was that most of the firms require audit committee approval of any non-audit work by external auditors, while others insist that external auditors must not perform non-audit work. Enerplus Resources Fund is also distinct in that its Audit Committee meets with external auditors independently of management following each regularly scheduled committee meeting, which occurs at least four times a year.

Chart 8 highlights the remarkable degree of cross-industry similarity, likely due to the extent of codification in this area of governance. While there is considerable normative debate regarding the extent of codification of governance that should be required, particularly given the costs associated with compliance, this chart indicates that it is a mechanism for ensuring cross-industry consistency in structure and compliance.

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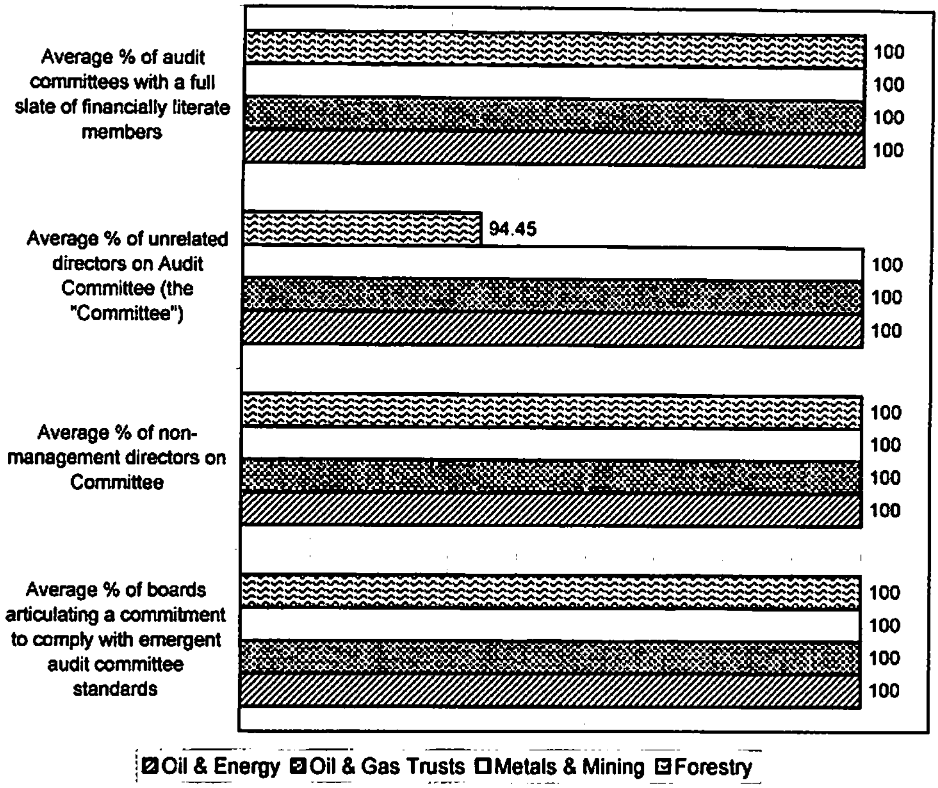
208 Norske Skog Canada Limited, "Management Proxy Circular" (2004) at 20-21 [Norske Circular]. Note that on 3 October 2005 NorskeCanada officially changed its name to Catalyst Paper Corporation; disclosure documents are available online: SEDAR, *supra* note 123, under the new name.

209 Only the Audit Committee of the pre-restructured Doman Industries Limited did not wholly consist of unrelated directors.

Chart 8: Audit Committee

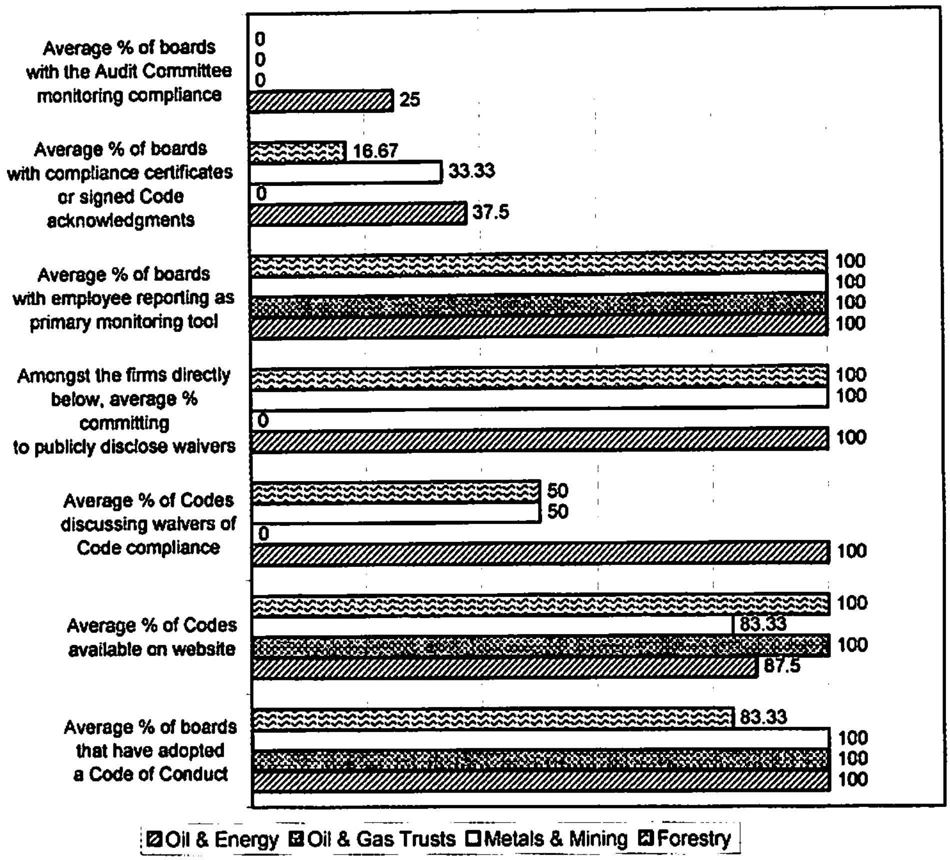


9. CORPORATE CODES OF CONDUCT

All the firms excluding the pre-restructured Doman Industries Limited have adopted codes of conduct.[210] Sixty-one percent discuss the potential for waivers from the code. Among these firms, all commit to publicly disclose any waivers; and in 2003, no sample corporation had granted such a waiver. Chart 9 illustrates that while codes are now universal tools, the method of enforcing the codes varies considerably.

210 Twenty of the codes are accessible on the applicable company's website, and the remaining codes can be acquired by writing to the Corporate Secretary.

Chart 9: Corporate Code of Conduct



Employee vigilance constitutes the primary means of monitoring compliance with the codes of conduct. Employees must report suspected violations to senior management or to their respective supervisors. Some firms have adopted additional mechanisms of varying strength to buttress the monitoring system. Talisman and Enerplus employees periodically complete compliance certificates confirming observance with the code, which are submitted to the CEO and board chair.[211] Petro-Canada's corporate governance committee receives declarations from senior management confirming both distribution and employee acceptance of the code.[212] Similarly, Suncor Energy Inc. and Teck Cominco require all employees to sign an acknowledgment of compliance with the business conduct policies.[213] Placer Dome has a similar practice, but the requirement is confined to employees possessing executive or

211 Talisman employees whose positions necessitate interaction with foreign operations may be asked to fill out certificates more frequently.

212 PC Circular, *supra* note 185 at 37.

213 Suncor Energy Inc., "Doing Business with Us: Business Conduct," online: Suncor Energy <www.suncor.com/default.aspx?ID=2050>; Teck Cominco, "Code of Ethics" (15 February 2006) at 10, online: Teck Cominco <www.teckcominco.com/articles/company/ethics2006.pdf>.

managerial responsibilities.[214] At both Husky Energy Inc. and Shell Canada Limited, the audit committee reviews compliance. Shell Canada's compliance strategy also obligates the CEO to annually compose an assurance letter to the board on compliance.[215] At NorskeCanada, primary responsibility for monitoring compliance lies with the Corporate Secretary, who determines which employees must complete a compliance certificate.[216] Weyerhaeuser Company's monitoring program features compliance officers who report directly to the board committee with oversight responsibility for a specific compliance area.[217]

The codes' contents tend to be quite similar, encompassing areas such as insider trading, conflicts of interest, gifts and entertainment, disclosure of corporate information and regulatory compliance. Some firms, such as Enerplus[218] and PenGrowth,[219] specifically discuss disciplinary measures for code infringements: a written reprimand, suspension, demotion, termination of employment and referral for criminal prosecution or civil action.

Nexen Inc. appears to stand out as a leading firm in this area of governance; it helped to develop an "International Code of Ethics for Canadian Business" as a template for Canadian businesses to follow when conducting business domestically and abroad.[220] The Code suggests that

> business should take a leadership role through establishment of ethical business practices; [and that while] national governments have the prerogative to conduct their own ... affairs in accordance with their sovereign rights[,] all governments should comply with international treaties and other agreements that they have committed to, including the areas of human rights and social justice.[221]

The Code also suggests that business activities internationally should be consistent with practices in Canada. The Code specifies that it values

> human rights and social justice; wealth maximization for all stakeholders; operation of a free market economy; public accountability by governments; a business environment that militates against bribery and corruption; equality of opportunity ... protection of environmental quality and sound environmental

214 Placer Dome, "Code of Conduct," online: Placer Dome <www.placerdome.com/investors/corpgov/codeofconduct.htm>.

215 Shell Canada Limited, "Management Proxy Circular" (2006), Appendix 2 at 66, online: Shell Group <www.shell.com/static//ca-en/downloads/about_Shell/how_we_work/statement_governance.pdf>.

216 Catalyst Paper Corporation, "Code of Corparate Ethics and Behaviour" at 3, online: Catalyst <www.catalystpaper.com/pdfs/codecorporatebehaviour.pdf>. Additionally, the company demands that all salaried employees have access to a code at all times.

217 Weyerhaeuser Company, "Notice of 2004 Annual Meeting of Shareholders and Proxy Statement" (2004), online: <http://media.corporate-ir.net/media_files/NYS/wy/reports/2003_proxy.pdf>.

218 Enerplus Resources Fund, "Code of Business Conduct" online: Enerplus <www.enerplus.com/about_enerplus/code_business_conduct.shtml> [Enerplus Code].

219 PenGrowth Energy Trust, "Code of Business Conduct and Ethics" (October 2005), online: Pengrowth <www.pengrowth.com>.

220 Nexen Inc., "International Code of Ethics for Canadian Business" online: Nexen <www.nexeninc.com/Governance/Integrity/Code_of_Ethics.asp> [Code].

221 *Ibid.*

stewardship; community benefits; good relationships with all stakeholders; and stability and continuous improvement within our operating environment.[222]

The Code further specifies that corporations will engage in

> meaningful and transparent consultation with all stakeholders and attempt to integrate ... corporate activities with local communities as good corporate citizens; ensure ... activities are consistent with sound environmental management and conservation practices ... provide meaningful opportunities for technology cooperation, training and capacity building within the host nation ... support and respect the protection of international human rights within [the corporation's] sphere of influence ... ensure health and safety of workers is protected; strive for social justice and respect freedom of association and expression in the workplace; and ensure consistency with other universally accepted labour standards related to exploitation of child labour, forced labour and non-discrimination in employment.[223]

For domestically-registered corporations operating in multiple jurisdictions, establishing a code of conduct is a significant attempt at corporate social responsibility. Such codes could be "tied to standards that are set by democratic processes in the home nation. Their value may be in creating a climate in which corporate social responsibility is given voice."[224] However, there are no requirements of mandatory disclosure of code compliance; nor is there internal or external monitoring of compliance.[225] These codes are voluntarily generated, and thus at best are a form of soft law. Absent independent monitoring or enforceable standards, it is difficult to assess the effectiveness of the codes in enhancing governance or increasing firm value. However, corporations do commit to adhering to international standards developed by international organizations. For example, signatories to the Global Compact are committed to complying with the *ILO Declaration on Fundamental Principles and Rights at Work*, which calls for the abolition of child labour, the elimination of employment discrimination and the recognition of the right to collectively bargain working conditions.[226] The ILO plans an annual monitoring strategy, although the potential success of this as a strategy is not yet known, since the Declaration has only recently come into force.[227] Adoption by corporations may also create some normative pressure on them to comply with these principles. Concerns have been raised about voluntary codes of conduct and whether they are window dressing designed to appeal to consumer or investor preferences or to give the impression of social responsibility without any real commitment.[228] Monitoring of

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222 *Ibid.*

223 *Ibid.*

224 Sarra, "CSR in the Global Economy," *supra* note 2 at 366. However, they are also contested in terms of their current effectiveness; see OECD, Trade Committee and the Committee on International Investments and Multinational Enterprises, "Codes of Corporate Conduct: Expanded Review of their Contents" (Working Papers on International Investment, OECD, May 2001), online: OECD <www.oecd.org/dataoecd/57/24/1922656.pdf>.

225 Sarra, "CSR in the Global Economy," *ibid.*

226 International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work and Annex* (1998) 37 I.L.M. 1233 [ILO]. The effectiveness of the UN Global Compact is also contested in terms of lacking enforcement capability; see James A. Paul & Jason Garred, "Making Corporations Accountable: Background Paper for the United Nations Financing for Development Process" (December 2000), online: Global Policy Forum <www.globalpolicy.org/socecon/ffd/2000papr.htm>.

227 ILO, *ibid.* The Declaration was adopted in June 1998.

228 For a full discussion, see Sarra, "CSR in the Global Economy," *supra* note 2.

compliance with voluntary codes is a challenge, both internally for the firm in respect of its subsidiary operations and externally in terms of access to information for investors, consumers and other interested parties.[229] One question is whether or not investor markets or consumer markets will recognize and encourage such initiatives.

10. SUSTAINABILITY

Financial, social and environmental sustainability measures are now critical indicators of effective governance. They are also the most difficult to gauge, since most of the reported activities by resource extractive firms take place in host nations that do not have effective monitoring and compliance infrastructures. Sustainability also squarely raises issues of whether corporations operating in host nations should be held to voluntary or mandatory standards, given that the laws in these jurisdictions are often weak or non-existent. This is the subject of intense normative debate.[230] Fabienne Fortanier and Maria Maher suggest that international investment tends to exacerbate environmental problems within host nations, and that there are risks that competitive market forces will divert foreign direct investment away from high-standard countries towards nations with lax standards (the "pollution haven" hypothesis) and/or that countries will resist upgrading domestic environmental standards due to competitiveness concerns (the "regulatory chill" hypothesis).[231] In part, this debate stems from the fact that the extent of voluntary compliance with domestic or international standards is frequently not transparent, is hard to measure or to enforce and may be "greenwash," giving the appearance of greater sustainability initiatives than actually exist.[232] It has also been suggested that public disclosures tend to focus on process rather than results, and that there is a need to examine current business practice norms to establish guidelines for Canadian corporations operating internationally that would accord at least with international

229 *Ibid.* at 368.

230 Yulanda Chung, "Applying Sustainability Indexes in the Mining Sector," online: Mineral Resources Forum <www.mineralresourcesforum.org>; Emeka Duruigbo, "Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry" (2001) 7 Ann. Surv. Int'l & Com. L. 101; United Nations Environment Programme Division of Technology, Industry and Economics, *Regulatory Approaches for the 21st Century: How Government Regulations Interface with Voluntary Initiatives to Improve the Environmental Performance of the Mining Sector, Summary Report* (Toronto: UNEP Division of Technology, Industry, and Economics, 2002), online: Mineral Resources Forum <www.mineralresourcesforum.org/workshops/regulators/2002/docs/workshop.report.pdf>; Kristian Tangen, "Shell: Struggling to Build a Better World?" (2003), online: Fridtjof Nansen Institute <www.fni.no/pdf/FNI-R0103.pdf>.

231 Fabienne Fortanier & Maria Maher, "Foreign Direct Investment and Sustainable Development" (Paper presented to the OECD Global Forum on International Investment, November 2001) at 4-5, online: OECD <www.oecd.org/dataoecd/2/39/1819941.pdf>. See also Mining, Minerals and Sustainable Development North America, *Towards Change: The Work and Results of MMSD-North America* (Final Report, 2002), online: International Institute for Sustainable Development <www.iisd.org/df/2002/mmsd_mining_toward_change.pdf>. OECD countries have launched several initiatives to promote corporate responsibility: these instruments include the OECD Principles of Corporate Governance, the OECD Guidelines for Multinational Enterprises, and the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

232 Neil Gunningham & Darren Sinclair, "Voluntary Approaches to Environmental Protection: Lessons from the Mining and Forestry Sectors" (Paper presented to the OECD Global Forum on International Investment, Conference on Foreign Direct Investment and the Environment, February 2002), online: OECD <www.oecd.org/dataoecd/46/1/1819792.pdf>; Andrew Pendleton *et al.*, "Behind the mask: The real face of corporate social responsibility" (2004), online: Global Policy Forum <www.globalpolicy.org/socecon/tncs/2004/0121mask.pdf>.

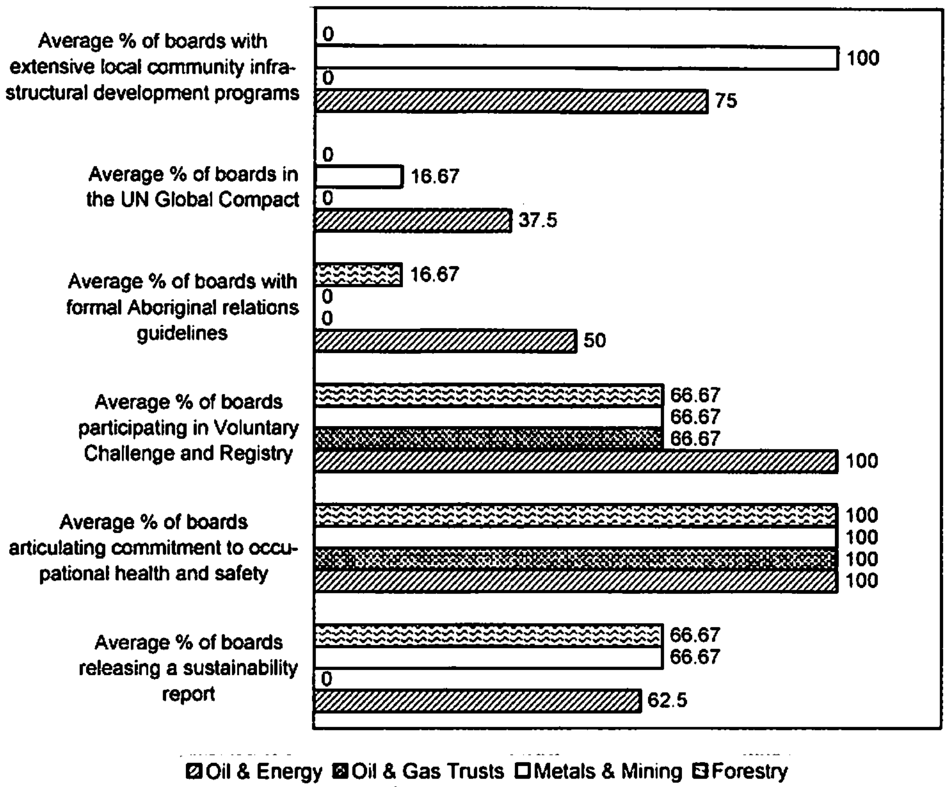
core labour and human rights standards.[233] Environmental certification and similar initiatives, while increasing corporate adherence to environmental standards, may also be inappropriately transferring some public regulatory functions to the private sector, with accompanying issues regarding the transparency participation and accountability of the regime.[234] Hence, while resource, energy and other corporations can contribute technical expertise, social support and economic activity to host nations in order to secure support of host nations, there are limited accountability checks on their activities.[235] Directors and officers are to act in the best interests of the company, and where that is normatively defined as long-term interests, sustainability measures may align with these goals. However, where shareholders are positioned to exert internal control and seek short-term return, there may be a conflict between fiduciary obligation and sustainability measures. It is in the context of this powerful normative debate that the UBC study attempted to assess sustainability measures. The study found that it is difficult to verify initiatives that are self-declared but are not otherwise in the public domain. With that long caveat, Chart 10 reveals that the firms studied report a degree of engagement in sustainability measures.

233 David Greenall, *The National Corporate Social Responsibility Report: Managing Risks, Leveraging Opportunities* (Ottawa: Conference Board of Canada, 2004), online: HazMat Management <www.hazmatmag.com/posted_documents/pdf/NationalCSR.pdf>; Bonnie Campbell, *Canadian Mining Interests and Human Rights in Africa in the Context of Globalization* (1999), online: Rights & Democracy <www.ichrdd.ca/english/commdoc/publications/globalization/globAfrCamp.html>; Kathryn Gordon, *Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses* (OECD, Working Papers on International Investment No. 2002/1, May 2002), online: OECD <www.oecd.org/dataoecd/46/31/2757771.pdf>.

234 Emily Walter, "From Civil Disobedience to Obedient Consumerism? Influences of Market-Based Activism and Eco-Certification on Forest Governance" (2003) 41 Osgoode Hall L.J. 531; Marta Miranda *et al.*, *Mining and Critical Ecosystems: Mapping the Risks* (Washington: World Resources Institute, 2003), online: World Resources Institute <http://pdf.wri.org/mining_critical_ecosystems_ full.pdf>.

235 Kathryn Gordon & Florent Pestre, "Moving Toward Healthier Governance in Host Countries — The Contribution of Extractive Industries" (Paper presented to the OECD Global Forum on International Investment, Conference on Foreign Direct Investment and the Environment, February 2002), online: OECD <www.oecd.org/dataoecd/3/56/1820268.pdf>; James Bond & Monika Weber-Fahr, "Attracting Foreign Direct Investment in Mining: The Role of Reliable Environmental Frameworks and Competent Institutions" (Paper presented to the OECD Global Forum on International Investment, Conference on Foreign Direct Investment and the Environment, February 2002), online: OECD <www.oecd.org/dataoecd/44/35/1819511.pdf>; Patricia Feeney, "The Relevance of the OECD Guidelines for Multinational Enterprises to the Mining Sector and the Promotion of Sustainable Development" (Paper presented to the OECD Global Forum on International Investment, Conference on Foreign Direct Investment and the Environment, February 2002), online: OECD <www.oecd.org/dataoecd/45/4/1819638.pdf>.

Chart 10: Sustainability Measures



a. Healthy and Safe Workplaces

The level of engagement in health and safety is a function, at least in part, of highly codified health and safety laws in Canada and the U.S., another instance of codification creating a high degree of consistency in cross-industry practices. While firms are required by law in Canada to comply with occupational health and safety requirements, all the firms in the study have also articulated a commitment to occupational health and safety that extends beyond domestic facilities. While CNQ has released a separate Corporate Statement on Health and Safety, the other firms have integrated health and safety issues into extant structures.[236] For instance, occupational health and safety is a key component of the Corporate Responsibility Policy at EnCana;[237] the Safety, Environment and Social Responsibility Program at Nexen;[238] and the Health, Safety and Environmental Management

236 CNQ, "Corporate Statement on Health and Safety" (November 2003), online: CNQ <www.cnrl.com/client/media/369/370/health_and_safety_2003.pdf>.

237 EnCana Corporation, "Corporate Responsibility Policy," online: EnCana <www.encana.com/responsibility/corp_policy/index.html>.

238 Nexen Inc., "2002 Sustainability Report," online: Nexen <www.nexeninc.com/files/Sustainability/2002_Sustainability_Report.pdf> [Nexen Sustainability Report].

Framework at Talisman.[239] Nexen embraces a "Total Governance" model, which encapsulates the company's approach to social responsibility: the board, management and employees collaborate to foster a company-wide "culture of integrity," employing independent verification.[240] In 2002, Petro-Canada subsumed its health, safety, environmental, security and reliability policies under a single Total Loss Management framework, implementing standards encompassing ten operational areas including health, safety and security; equipment integrity and reliability; employee competency; and emergency preparedness.[241] In 2003, Suncor Energy launched "Journey to Zero," a strategy to eliminate occupational injuries and illnesses, conducting an extensive safety survey of its employees and contractors, and developed corresponding three-year safety improvement action plans.[242] Among the four firms in this sector, only Suncor Energy reports being committed to conducting health and safety audits in partnership with qualified external parties.[243]

All of the mining companies in the sample have articulated a commitment to occupational health and safety, which is critical given the high rate of morbidity and mortality traditionally in this sector. Common strategies include audits of health and safety management systems. Barrick Gold's Safety and Health System defines corporate expectations, channels resources to fulfill its objectives, holds individuals accountable for performance and in 2004 initiated a company-wide evaluation of health and safety practices to enhance existing occupational health and wellness management systems.[244] Falconbridge has partnered with its parent company, Noranda Inc., to establish a program that compels senior executives to visit certain facilities to discuss safety issues with employees, and the companies have issued a Safety and Environment Manual for its integrated exploration group, available in four languages, discussing emergency response and eco-friendly practices.[245] Placer Dome's corporate safety program encapsulates five components: strong leadership; solid safety systems; a smart behavioural safety program; use of risk assessment tools and new technologies; and good

239 Talisman Energy, "2003 Corporate Responsibility Report," online: Talisman Energy <www.talisman-energy.com/pdfs/2003Reports/tlm2003cr.pdf> at 26 [Talisman CR Report]. In 2005, CNQ will implement a similar Health and Safety Management System, "2003 Annual Report" (2004), online: CNQ <www.cnrl.com/client/media/16/336/2003cnr_ar.pdf>.

240 Nexen Sustainability Report, *supra* note 238 at 4.

241 Petro-Canada, "A Commitment to Caring: 2003 Annual Report to the Community," online: Petro-Canada <http://petro-canada.ca/eng/pdf/pc-rttc-03-000-f-e.pdf> at 7 [PC Community].

242 Suncor Energy Inc., "What's at Stake? Our Journey Toward Sustainable Development: 2003 Report on Sustainability" (September 2003), online: Suncor Energy <www.suncor.com/data/1/rec_docs/25_SuncorSDReport2003.pdf> at 20. It also helped form the Oil Sands Safety Association, a non-profit organization that promulgates industry-sensitive safety training and certification standards (at 21).

243 Recently, Enerplus conducted a third-party audit of its Environmental, Health and Safety Management System (Enerplus Code, *supra* note 218). In 2000, PenGrowth received a Certificate of Recognition in the Partnership Program with Alberta Human Resources and the Worker's Compensation Board.

244 Barrick Gold Corporation, "Environmental, Health, Safety and Social Responsibility Report 2003," online: Omniserve <http://cpa.omniserve.com.au/reports/download/Barrick%20Gold%20Corporation%20-%20Environmental%20Health%20Safety%20and%20Social%20Responsibility%20Report%202003%20-38.pdf> [Barrick Responsibility].

245 Falconbridge Limited, "Committed to Sustainability: 2003 Sustainable Development Report," online: Falconbridge <www.falconbridge.com/documents/sustainable_development/NorFal_2003_Sustainable_Dev.pdf> at 8, 10 [Falconbridge Sustainability]. It also reports improving ergonomic conditions for its employees (at 11).

safety information management.[246] The "We Care Global Project" is a Placer initiative aimed at standardizing health and safety practices across its domestic and overseas operations.[247] In the forestry sample, only the pre-restructured Doman failed to report on occupational health and safety initiatives, with the other firms adopting policies and safety risk management strategies. Weyerhaeuser Company has implemented a system that facilitates risk identification, the monitoring of remedial action and analysis of company-wide trends.[248]

b. Environmental Sustainability Management

Environmental protection and sustainability measures in the studied firms indicate that the type of initiative undertaken is dependent on the nature of the activity in the sector. All four oil and gas producers espouse environmental protection as a fundamental corporate value and have confirmed their intent to reduce greenhouse gas emissions by enrolling in the Voluntary Challenge and Registry. Nexen is in the process of adapting Responsible Care principles and codes of practice to its oil and gas operations.[249] CNQ, Nexen and Talisman have all reported active reclamation efforts.[250] Talisman sponsors studies in renewable energy sources and wildlife habitat and species protection. All four oil and gas producers report that they promote the environmental integrity of their international facilities, with EnCana, Nexen and Talisman each financing environment-related ventures in select host communities.

Firms in the integrated oil sector have articulated a commitment to environmental sustainability through efforts to reduce greenhouse gas emissions, pursuant to objectives of the Voluntary Challenge and Registry. Three of the four firms report resources devoted to reclamation or remediation projects and have invested in the development of alternative sources of renewable energy. Petro-Canada has adopted a Life Cycle Value Assessment tool to integrate environmental planning into all phases of a project to minimize adverse environmental implications.[251] The International Organization for Standardization's ISO 14001 certification system also appears to feature prominently among the integrated oils firms: Petro-Canada is pursuing a phased approach to ISO 14001 certification; Shell Canada's Health, Safety and Environmental Management Systems are registered to the standard; and Suncor Energy's Environmental, Health and Safety Management System is

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246 Placer Dome Inc., "PDG Corporate Sustainability Report" (2003), online: Internet Archive: Wayback Machine <http://web.archive.org/web/20050205015741/placerdome.com/resources/118002.pdf> at 6 [Placer Sustainability].

247 Placer Dome Inc., *PDG: Our People* (2001) [copy on file with authors].

248 Weyerhaeuser Company, *Roadmap for Sustainability: Weyerhaeuser Company 2004 Citizenship and Environment Report*, online: Weyerhaeuser <www.weyerhaeuser.com/environment/sustainability/webreport/pdf/2004RoadmapForSustainability.pdf> at 17.

249 Nexen, Sustainability Report, *supra* note 238. Responsible Care is a voluntary initiative of the chemical industry. Its objective is the continual improvement of the industry's health, safety and environmental performance.

250 CNQ, "Proactive Programs," online: CNQ <www.cnrl.com/operations/proactive_programs.html>; Talisman CR Report, *supra* note 239. Both CNQ and Talisman participate at various levels in the Canadian Association of Petroleum Producers Stewardship Program, which provides industry-wide reporting standards to foster continual improvement of the industry's health, safety and environmental performance.

251 PC Community, *supra* note 241 at 7.

designed to meet the standard.[252] Other strategies that have emerged in this sector include wildlife species protection plans, new ecologically sensitive seismic techniques and participation in stakeholder partnerships that promote biological diversity.

Disclosure by oil and gas trusts of sustainability measures appears sparse, likely a function of the trusts not being production entities. Both ARC and PenGrowth participate in the Voluntary Challenge and Registry. Of the three trusts, ARC provides the most extensive reports on its environmental practices, including a minimal disturbance policy that promotes the preservation of natural habitats and maintenance of sites' historical significance.[253] The remaining trusts in the sample provide little, if any, disclosure on their efforts to promote environmental responsibility.

All the mining companies reported environmental integrity as a governance goal. Mining firms are particularly susceptible to environmental issues, implicating air and water quality, acid rock drainage and tailings management. With the exception of Kinross Gold Corporation and Pan American Silver Corp., all of the mining firms participate in the Voluntary Challenge and Registry. Further, all the sample firms in this sector actively undertake reclamation efforts, reporting that restoration of sites is instrumental to sustaining biological diversity and minimizing environmental disturbance.[254] The mining firms boasting the largest market capitalization, Barrick Gold and Placer Dome, are major players in the development of the International Cyanide Management Code. In contrast to the sample firms in the integrated oils and forestry sectors, only half of the mining firms even mention the ISO 14001 system; the firms generally tended to accord mere instructive value to the standards.

All the forestry firms in the study have undertaken efforts to minimize environmental disturbance; only Doman and TimberWest did not participate in the Voluntary Challenge and Registry. For the timber harvesters, reforestation is a key sustainability strategy. The companies are expressly committed to compliance with environmental regulation and legislation. The forestry sector is particularly vulnerable to allegations of inadequate fish species and habitat protection, and three firms have partnered with environmental NGOs. Four of the five UBC study participants are part of the Coast Forest Conservation Initiative (CFCI).[255] CFCI companies have pledged to collaborate with one another and with environmental NGOs to develop a socially, economically and ecologically sound model for coastal forest conservation and management.[256] Of all the sectors analyzed in this study, the forestry sector places the greatest significance on certification schemes, which require

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252 The ISO 14001 scheme sets out standards that corporations must meet in order to certify their Environmental Management Systems.

253 ARC Energy Trust, "Health, Safety and Environment: Excellence in Performance, Care and Responsibility," online: ARC Energy Trust <www.arcenergytrust.com/en-CA/about/environment.htm>.

254 Both Placer Dome and Noranda/Falconbridge belong to the International Council on Mining and Metals, an alliance of the world's 15 largest mining and metal producing companies that has pledged not to exploit deposits situated near or in World Heritage sites (Falconbridge Sustainability, *supra* note 245). All the firms in the mining sample excluding Pan American Silver were members of the Mining Association of Canada (MAC), an industry advocacy organization that has endorsed promotion of sustainable operations (MAC, online: <www.mining.ca/english>). MAC has developed guidelines on how member corporations should address certain environmental sensitivities.

255 Canfor, NorskeCanada (now Catalyst), Western Forest Products Inc. and Weyerhaeuser Company.

256 CFCI, "The Participants," online: CFCI <www.coastforestconservationinitiative.com/about_us/the_participants.html>.

independent verification of practices. Ninety-one percent of Canfor's B.C. and Alberta harvest volume is certified to either the Sustainable Forestry Management (SFM) standard or the Sustainable Forestry Initiative (SFISM) program.[257] In terms of ISO 14001 certification, Canfor has certification of its Environmental Management Systems (EMSs) for all of its forest operations; NorskeCanada for all its mills; TimberWest for all its operations; and West Fraser and Weyerhaeuser for their forestry operations.[258]

c. Community Investment and Engagement

Social sustainability is difficult to gauge as reports are anecdotal as opposed to systematic in most of the firms studied. The oil and gas producers are developing social sustainability measures. A major challenge confronting the companies' domestic operations concerns corporate relationships with Aboriginal communities. Nexen and Talisman have developed formal Aboriginal Relations guidelines. All four oil and gas producers have articulated a commitment to fostering collaborative and consultative relationships with Aboriginal communities as key stakeholders. In addition to facilitating access to employment and contract opportunities, the firms strive to build partnerships that contribute to local education and training development programs.[259] Although all four corporations contribute to various charitable causes, only EnCana and Nexen subscribe to the Imagine Care program, which requires participants to donate at least 1 percent of average, pre-tax profits to charitable organizations.[260]

In the oil and gas production sector, CNQ reports supporting numerous community enterprises in West Africa. In Angola, the company has purchased medicine for a pediatric hospital, assisted in financing institutions that educate and house orphans and supported a homeless children's charity. Its operations in Côte d'Ivoire supported both a malaria prevention project and an education program for HIV-positive mothers.[261] EnCana pledges to pursue a partnership approach to community investment and development programs, and since 2003 has sponsored a health program that has reduced the incidence of malaria around the corporation's operating sites. In Ecuador, EnCana supports the Centre for Affordable

257 TimberWest manages its lands according to SFISM standards (West Fraser Timber Co. Ltd., "Certification," online: West Fraser Timber <www.westfraser.com/environment/certification.asp>) and is working towards certifying its Canadian woodlands operations under SFI.

258 Canfor Corporation, "Sustainability Certification," online: Canfor <www.canfor.com/sustainability/certification/>. The pre-restructured Doman reported managing its forest tenures and privately owned forestlands pursuant to SFM principles, CSA standards, ISO 14001 and ISO 9000 (Doman Industries Limited, "2003 Annual Information Form" (16 April 2004), online: Western Forest Products Inc. <www.westernforest.com/domans/download/6142500v8.pdf>); Catalyst Paper, "Environment," online: Catalyst <www.catalystpaper.com/socialresponsibility/socialresponsibility_environment.xml>; Timber West Forest Corporation, "Certifications," online: Timber West <www.timberwest.com/certifications.cfm>; Weyerhaeuser Company, "Certification," online: Weyerhaeuser <www.weyerhaeuser.com/environment/commonground/ certification.asp>.

259 EnCana Corporation, *What Matters: EnCana Corporation 2003 Annual Report to Shareholders*, online: EnCana <www.encana.com/investor/financial_info/annual2003/pdf/encana_full.pdf> at 40 [EnCana Annual Report]. In 2003, Indian and Northern Affairs Canada and the Alberta Chamber of Commerce commended EnCana on demonstrating the Best Practice in Aboriginal Relations (*ibid.*).

260 Nexen, Sustainability Report, *supra* note 238 at 26; EnCana Corporation, "Community Investment Program," online: EnCana <www.encana.com/responsibility/community/community_investment.html>.

261 CNQ, "Responsible Operations: Community Investment," online: CNQ <www.cnrl.com/operations/community_invest.html>.

Water and Sanitation Technology, which generates and distributes a low-cost water treatment technology specifically designed for developing countries.[262] As part of its commitment to the UN Global Compact, Nexen is working towards the implementation of a joint water and sanitation program in Yemen.[263] Since 1997, it has also had a Yemen scholarship program whereby the award recipient attends school in Calgary, and returns to Yemen with newly acquired knowledge and skills.[264] Finally, Talisman's community development spending in Colombia, Indonesia and Trinidad focuses on improving infrastructure, local education and health. Although Talisman sold its highly controversial interest in Sudan, it reports continued funding of community development projects such as adult literacy programs through 2005.[265]

The integrated oils companies have also undertaken some social sustainability measures. Domestically, a chief concern pertains to the impact of industrial activities on Aboriginal communities and all four firms have committed to foster long-term, mutually beneficial business relationships with Aboriginal groups. Suncor Energy has formally adopted an Aboriginal Affairs Policy, which sets out its dedication to job training, employment, community services, consultation and cross-cultural awareness.[266] Similarly, the guiding principles of Petro-Canada's Aboriginal Relations Framework focus on relationship development, training and education, employment, business development and community investment.[267] Three of the four firms report having signed either Memoranda of Understanding or Industry Relations Agreements with relevant Aboriginal groups.[268]

Three of the four integrated oil firms operate overseas; of these firms, two report on their respective international social sustainability measures. Petro-Canada is an active member of the UN Global Compact and the World Business Council for Sustainable Development, where membership is limited to companies exemplifying a commitment to sustainability. In 2002, having set an international expansion strategy, Petro-Canada adopted Principles for Investment and Operations, which specifically address the issue of human rights at its foreign facilities.[269] In comparison with the oil and gas sector, the sample integrated oils firms appear to have adopted fewer community infrastructure development initiatives; however, this divergence may partially be a function of the regions in which they operate. Operating in emerging states or rural communities necessitates the advancement of local infrastructure. No trust specifically mentions Aboriginal relations, and only ARC declares its general commitment to stakeholder consultations.[270]

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262 EnCana Annual Report, *supra* note 258 at 40.

263 Nexen Sustainability Report, *supra* note 238 at 11.

264 *Ibid.* at 17.

265 Talisman CR Report, *supra* note 239 at 20.

266 Suncor Energy Inc., "Aboriginal Affairs Policy Statement," online: Suncor Energy <www.suncor.com/data/1/rec_docs/772_CO-PS07A%20Aboriginal%20Affairs%20Policy%20 Statement.pdf>.

267 Petro-Canada, "Building Relationships: Our Commitment to Aboriginal People" (January 2004), online: Petro-Canada <www.petro-canada.ca/eng/pdf/abor.pdf>.

268 All four firms have contributed significantly to various charitable and non-profit organizations; only Suncor reports participation in the Imagine Care initiative.

269 PC Community, *supra* note 241 at 22.

270 All three oil and gas trusts report contributions to various charities, fundraising campaigns and local organizations.

The mining and metal-producing firms also report international social sustainability measures. However, only two firms in the mining sample pointedly express concern for indigenous peoples. All the firms claim to actively engage stakeholders (presumably including Aboriginal nations) throughout the mining life cycle. A recurrent theme in the mining sector concerns the companies' contribution of funds to create community development that will endure after extractive operations for the finite resource have ceased. Barrick Gold's community development initiatives expressly try to reflect the needs and priorities articulated by communities through dialogue and social impact assessments. In Peru, it developed a long-term partnership with World Vision to promote child health and well-being; it also augmented local business capacity by supplying financial aid, expert consultation and entrepreneurial and farmer training. In Tanzania, Barrick Gold has partnered with CARE International, developing a comprehensive health care program for mining employees and surrounding communities. In Argentina, it helped to provide hospital facilities, Internet access, and business support to local communities.[271] In South Africa and Papua New Guinea, Placer Dome has significantly advanced its HIV/AIDS programs for employees.[272] In South Africa, the CARE program at the South Deep Mine funds home-based care and economic programs in mineworkers' home communities and provides education and training to promote health and to build adult capacity. Placer Dome now completes and releases a scorecard based on the Socioeconomic Empowerment Charter for the Mining Industry.[273] Noranda/Falconbridge employees have helped to construct homes for underprivileged families in Chile.[274] In Zimbabwe, Kinross is involved in an industry-led initiative directed at AIDS prevention, and the company built a distribution system to facilitate access to potable water.[275] At Pan American Silver's international facilities, the company has improved nutrition, health and household budgeting programs; expanded employee safety and substance abuse programs to encompass surrounding communities; and constructed a community hospital.[276]

The forestry firms have recognized the industry's obligation to consult local stakeholder groups. Four companies have expressly committed to develop mutually beneficial business relationships with Aboriginal groups. Two firms have entered into joint ventures with Aboriginal groups. Only Weyerhaeuser Company has adopted an Aboriginal Relations

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271 Barrick Responsibility, *supra* note 244 at 29, 31, 34.

272 The company has implemented anti-retroviral drug programs at both sites (Placer Sustainability, *supra* note 246 at 11).

273 Cliffe Dekker Attorneys, "Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry," online: Cliffe Dekker <www.cliffedekker.com/literature/bee/docs/NCD_Mining Charter.pdf>; example at Placer Sustainability, *ibid.* at 13. The Charter addresses issues of workers' living conditions, education and training projects, employment equity, procurement from empowerment companies, and employee share-ownership schemes. In Papua New Guinea, Placer Dome reports to have consulted non-governmental organizations concerning the social ramifications of mine closure (Placer Sustainability, *ibid.* at 13).

274 Falconbridge Sustainability, *supra* note 245 at 13. Teck Cominco contributes to community sustainability by aiming to hire locally and by supporting local education and health services through charitable donations and royalty payments (Teck Cominco Ltd., "Approaching Sustainability" (2003), online: Teck Cominco <www.teckcominco.com/articles/environment/tcl-as-2003.pdf> at 7-8).

275 Kinross Gold Corporation (KGC), "Community," online: KGC <www.kinross.com/ir/cr/community.html>. In Russia, a 98 percent Kinross-owned subsidiary helps provide financial, logistical and infrastructure support to remote communities.

276 Specifically, the Quiruvilca project in Peru (Pan American Silver Corp. (PASC), "Project Statistics," online: PASC <www.panamericansilver.com/safetyenvironment/project_statistics.htm>.

Policy and claims to have extended its Aboriginal commitment beyond business relations to encompass cross-cultural awareness and education.[277] Other social sustainability measures in this sector include corporate donations, community investment schemes and public educational tours.

Overall, the studied firms disclose extensive social and environmental sustainability initiatives. What is also apparent, however, is the frequent disconnect between these initiatives and broad public criticism of non-governmental environmental and social justice organizations with respect to the international activity of these firms, among others. While the substantive sustainability goals appear to align, the breadth and effectiveness of programs in comparison with the financial benefits derived from economic activity is still much contested and should be the subject of further research.

IV. CONCLUDING OBSERVATIONS — LIMITS

Generally, the 23 Canadian resource and energy firms comprising the entire sample performed reasonably well against the ten corporate governance indicators. Weaknesses include lack of board diversity as one indicium of independence, lack of formal continuing education programs and uneven board evaluation processes. All the firms have committed to comply with more rigorous audit committee standards that have recently been promulgated and their governance practices reflect the increasing responsibilities expected of their members. Additionally, corporate codes of conduct are common to all, although the sole monitoring instrument in most cases is employee complaint rather than proactive systematic monitoring. The oil and gas producers and mining and metal-producing firms report superior social performance with an express commitment to create a social legacy within operating communities. The forestry sector appears to lead in terms of voluntary compliance with national and international certification schemes.

While the study tried to measure whether there were differences between those companies listed on the NYSE and thus subject to mandatory corporate governance guidelines, and those companies that had voluntarily adopted governance measures, the data proved to be inconclusive. In part, this is because many companies advised that they anticipated formal rules would be adopted in Canada, at least in some measure. Directors reported that they moved to stay ahead of regulatory change as a means both to encourage good governance practice and to help avoid public pressure for further regulation. Moreover, directors advised that the single largest influence on adopting such practices has been institutional investors rather than regulatory change. None of the companies studied was able to provide firm-specific data linking good governance practice to economic performance, but all were persuaded of the link. This latter point raises the interesting question of whether well-performing firms adopt good governance measures because they view this as part of a successful business strategy, or whether the governance measures enhance firm value. There was no means in the study to draw conclusions regarding causal links, and it may be that the causation works both ways in a synergistic manner.

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277 Weyerhaeuser Company, "A Policy and Framework for Building Relationships: Canada's Aboriginal Peoples and Weyerhaeuser," online: Weyerhaeuser <www.weyerhaeuser.com/ourbusiness/forestry/timberlands/sustainableforestry/incanada/AboriginalEnglish3.pdf>.

A larger question is whether the indicators chosen offer a reliable measure of effective corporate governance or whether the level of compliance suggests that self-disclosure, absent another external measure, will not provide investors with sufficient insight of governance to make informed investment decisions. If it is an accurate point of reference, then the corporate governance practices of Canadian resource and energy industry firms measure favourably against other firms. There is a further question of whether there is a market for governance in the resource and energy sector. As the above sample revealed, most of the firms studied operate in many nations, and frequently in emerging nations because raw resources are located in these countries. While the level of disclosure of environmental and community sustainability has increased considerably in the past decade, there continues to be issues of transparency for investors and other stakeholders. In part, this is because Canadian-based companies operating internationally are not bound to Canadian standards in their activities in host nations. Without question, there is a growing debate and hence growing literature on how multinational enterprises operating internationally can be held accountable in their home and host nations for any activities that may be harmful either to the environment or to the communities in which they operate. With the move to global capital markets, corporate governance issues have become more complex, engaging a host of new challenges.

Clearly, one of the limitations on an assessment of effectiveness is that the data are primarily self-generated by those who are being assessed. A second limitation is the absence of any standard of measurement that will provide comparability between corporations and different economic sectors. An attempt has been made to develop such a standard through the Global Reporting Initiative, but it is not yet in wide use.[278] The absence of a standard for comparison of performance and effectiveness of these corporate governance indicators undermines the ability of the capital markets to reward good governance and discount for bad governance in the prices of shares in those markets.[279]

The study provides insights into corporate governance practices among resource firms in Canada, especially their performance in relation to each other. However, it is not able to reliably benchmark their performance in the absence of a tool that generates standardized measurements of corporate governance activity. The study revealed the need to dedicate considerably more resources to empirical study and the creation of independent measurable standards. The study was unable to measure governance against economic performance, in part because of the inability to factor in other market influences properly, such as cross-border disputes on softwood lumber tariffs and other socio-political dynamics that influence both profit and share price. Further resources are needed to fund empirical research to measure costs and benefits of codification versus voluntary governance in terms of economic performance. While there is a growing market in monitoring, that service is purchased by individual corporations and the service providers do not disclose their methodology or benchmarks such that investors and the public can determine the true scope of what is being measured. While, intuitively, corporate governance is being enhanced as an instrument to maximize enterprise wealth, it has a long measure to go toward providing consistent and measurable practices.

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278 Global Reporting Initiative (GRI), "GRI at a Glance," online: GRI <www.globalreporting.org/about/brief/asp>.

279 Davis, *supra* note 5.