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Protecting Workers' Equitable Investments in the Firm
Viewing Corporate Governance Reform
Through the Lens of Dismantled Government Infrastructure

by

Janis Sarra

A thesis submitted in conformity with the requirements for the degree of LL.M.,
Graduate Department of the Faculty of Law, University of Toronto

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Abstract

Corporate governance reform needs to encompass a recognition of workers as equitable investors in the firm. The present formulation of corporate law is inadequate to remedy or diminish the harms caused by the remittance by governments of labour relations and human rights to the private sector. It is not sufficient to leave the development of alternative governance structures to the private sector or common law judicial interpretation. Crucial to any redefinition of governance is an acknowledgement of the current normative underpinnings of the wealth maximization model. Once it is recognized that definitions of efficiency and shareholder wealth are normative choices, then the decision to exclude workers’ human capital investments from consideration under fiduciary duty becomes much less compelling. Governance structures must accord a decision making role to those whose investments in the firm are at greatest risk. Fiduciary duty is best served when directors and officers must act in the best interests of the corporation having regard for both the equity investments of shareholders and the equitable investments of workers. Application of relational board theory, use of institutional investors whose capital contributions come from workers, and increased access to governance by workers and their bargaining agents, are likely to result in highly effective decision making which enhances the viability of the corporation.
Protecting Workers' Equitable Investments in the Firm
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INTRODUCTION

The removal of equity, human rights and employment standards from the realm of public regulation is an ongoing phenomenon in Ontario and other jurisdictions. This paper examines whether the transfer of responsibility for these topics of public concern to the private sector must be accompanied by a parallel change in the way corporate governance is seen in the law. Scholars who have rejected the notion of an expanded fiduciary duty have concluded that protection of workers is more properly within the purview of the state as architect of public policy. However, with the current trend towards private regulation of labour and equity concerns, this issue needs to be revisited. Is a proper concern for the interests of workers congruent with a system of governance based on the property and contractual rights of shareholders? The stakeholder debate on all sides still lacks an integrated understanding of corporate governance and remedial labour and equity law, notwithstanding the need for co-existence of these regimes in Canadian society.

My thesis is that with the remittance of these subjects to the private sector, corporations must necessarily adapt their methods of governance to recognize the human capital investments of workers, including the most disadvantaged workers such as women, racial minorities, and the disabled. I set out some possible means by which this can be achieved, including a recasting of

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employees as "equitable" claimants, a redefinition of fiduciary duty which recognizes both the equity investments of shareholders and the human capital investments of workers, and a governance role for workers as equitable investors in the wealth creation of the corporation.

Part I sets a context for the governance debate in terms of how both the common law and statutory regime have shaped our notions of corporate governance and protection of workers, using the Ontario experience as an illustration. Traditional notions of corporate governance have worked to narrow the normative framework. For example, extension of fiduciary duty is largely rejected because of an assumption that these protections are available through remedial statutory regimes and the government infrastructure that supports them. Infrastructure is the administrative and quasi-judicial mechanisms that are given to government functionaries to provide education, technical support, enforcement services and appeal mechanisms which together give effect to the legislative objectives of particular remedial statutes. Seriously reduced state commitment to remedial protection of workers and some notable failures of the present relationship between statutory remedial protection and traditional corporate governance seriously challenge the assumption that workers are protected by employment and human rights statutory regimes.

Part II revisits the current corporate governance debate through the lens of reduced statutory protection. A normative context is a necessary and unavoidable component of any discussion about governance reform, and this part explores whether the basic premise of maximization of shareholder value can be reconciled with a new form of stakeholder accountability. The limits of individual contracts, both express and implicit, as the alternative to providing broad based remedial protection are considered. Employees are often simultaneously both fixed and residual claimants, and their human capital investment is of an equitable nature such that corporations should afford them a claim for greater protection against harms caused by restructuring due to global capital and labour markets.

Part III examines the current debate regarding fiduciary obligation and proposes a more textured definition of fiduciary duty which includes workers as equitable investors. The "constituency" or "stakeholder" statutes in the United States offer lessons about enforcement and agency costs.
Recent scholarship advocating a relational board theory is examined as one method of
governance which encompasses broader recognition of workers' human capital investments. Part
III also analyzes whether there is a role for shareholders as advocates of obligations to workers,
and briefly canvasses whether it is likely that institutional shareholders will move to fill the gaps
created by the dismantling of remedial legislation.

In Part IV, I use the governance model crafted in the worker buy-out of the Algoma Steel
Corporation in Sault Ste. Marie, Ontario, to illustrate the potential for enhanced governance and
economic performance from the integration of notions set out in Parts I, II, and III. The Algoma worker buy-out was the largest in Canadian history, involving 6,000 employees. It is a concrete example of the turn around of a corporation's economic health using a combination of
governance reform and collective bargaining strategies to accord employees status as key
stakeholders. It utilizes a form of relational board theory accompanied by worker participation
structures throughout the firm. While not expressly adopting the definition of fiduciary duty I
have proposed, directors nevertheless undertake decision making on the basis of a de facto
recognition of both the equity investments of shareholders and the human capital investments of
workers. Algoma also raises vitally important questions about whether such an alternative
governance structure can be sustained when corporations are successful, and brings the debate
full circle to my conclusions about the role remedial legislation needs to play in the long term
protection of workers.

I conclude that my proposals for recognition of equitable claims arising from human capital
investments and a redefinition of fiduciary duty to encompass these claims, cannot provide
equivalent protection to that offered by remedial legislation effectively enforced. In fact, the
proposals themselves will likely require legislation to give the judiciary clear direction.
However, in the present atmosphere of dismantled statutory protection for workers, this is
unlikely and thus, it will take some leadership from corporations to begin the process of
redefinition and recognition of equitable claims of workers.
PART I  A CONTEXT FOR THE GOVERNANCE DEBATE

A.  Traditional notions of corporate governance

Firms structure themselves in a myriad of ways, from different kinds of partnership and joint venture arrangements, to the spectrum of closely held private corporations to publicly traded widely held companies, and all the variations borne of mergers, acquisitions, subsidiary arrangements, and cross shareholdings. The classic starting point is that ownership of private property is the key means by which resources are efficiently used in our society. The goal of the modern corporation has been most often articulated as maximizing shareholder wealth, maximizing the wealth of the corporation, and much less frequently as maximizing wealth creation as a benefit to society. The maximization of shareholder wealth as an objective recognizes that as residual owners of the corporation, shareholders must be compensated for the period in which their capital is committed, the risk that they are asked to bear, and the amount of return required to ensure the continued use of their capital. This has resulted in shareholder-centred governance structures, in which directors and officers as agents of shareholders try to balance shareholder rights with sometimes competing statutorily and judicially imposed

2 The focus here is the corporation, although much of the governance debate is adaptable to other firm structures.

3 Mark Kessel, "International Aspects of Corporate Governance, A United States Perspective" (Canadian Bar Association Conference on Corporate Governance, A National Perspective, Vancouver, 1997) at 2.


5 This is what MacIntosh calls the "social welfare standard", supra, note 1 at page 403. Daniels also suggests that wealth creation of the corporation benefits society, but distinguishes this from a social welfare view of the firm; Ronald Daniels, "Stakeholders and Takeovers: Can Contractarianism Be Compassionate" (1993) 43 University of Toronto Law Journal 315 at 351.

6 Blair, supra, note 4 at 125. She points out that the cost of capital is difficult to measure.
obligations to manage the corporation.\textsuperscript{7}

The assumption in our current governance structure is that any decisions which include broader social objectives such as human rights, pay and employment equity, or health and safety, where their inclusion is not required by statutes, are inefficient decisions by managers, leading to increased agency costs. Even if shareholders were willing to forgo short term wealth maximization to accomplish a social objective, both the structure of ownership and traditional notions of fiduciary duty militate against such change. In the United States, for example, diffuse share ownership and the resultant lack of direct accountability give managers little incentive to consider workers' interests, and not surprisingly, shareholders rarely express a collective voice about such matters. Even if they were to do so, the goal of maximization of shareholder value is paramount, and there is little, if any, reflection on the social ramifications of any particular decision once a determination is made that it will maximize wealth.\textsuperscript{8} Workforce stability issues, for example, only become important when a major labour disruption could directly reduce shareholder value; managers then respond as a result of immediate pressure. Similarly, managers respond to crises concerning fairness or equity for workers only when there is possible legal liability.\textsuperscript{9} These responses are different from having pro-active governance strategies to encompass human rights and other public policy concerns before they reach the crisis stage. Our traditional notions of corporate governance both explicitly and implicitly legitimize the view of wealth creation paramountcy.

The dominant theoretical approaches to corporate governance explain and reinforce this notion of maximization of share value as the singular and optimal goal of corporate decision making. Economic theorists have historically argued that the free market promotes efficient and

\textsuperscript{7} Roberta Romano "What is the value of other constituency statutes to shareholders" (1993) 43 University of Toronto Law Journal 533 at 535.

\textsuperscript{8} Blair points out that American managers control the proxy-solicitation process, and thus, dominate the communication and ultimate decision making of the corporation, supra, note 4 at 176.

\textsuperscript{9} The settlement in 1996 by Texaco of a multi-million dollar human rights lawsuit is a good example. Jonathan Macey, "Comparative Corporate Law" (Lecture, Intensive Course on Comparative Corporate Law, University of Toronto, Faculty of Law, 1996). See also Macey and Miller, supra, note 1 at 411-414.
accountable use of resources, and thus, those investing share capital or their agents should have exclusive carriage of decision making because their market success or failure will result in efficiency. For this theoretical approach, job creation and retention should be left to private market ordering.\textsuperscript{10} This approach, however, ignores the reality that the state has long intervened to correct the most egregious abuses of the market, such as securities legislation to prevent fraud and address information asymmetries for small investors, and labour laws to protect against excessive exploitation of workers’ human capital.\textsuperscript{11}

Similarly, finance theory, one dominant theoretical approach to share price, suggests that the current price of shares fully reflects the market’s best estimate of the value of all future profits.\textsuperscript{12} Thus, shareholder interests are best served by corporate decisions which maximize the value of shares in the short run. Proponents of this theory therefore advocate an "unfettered market for corporate control" in order to enhance the power of shareholders.\textsuperscript{13} Macey has called this a "managerial horizon", where short term share price takes priority, whether or not it is a measure of good corporate decision making.\textsuperscript{14} In contrast, Blair describes the "market myopia theory" as challenging this use of financial markets as an accurate indicator of future value, arguing that it acts as a bar to long term decision making.\textsuperscript{15} At best, the myopic approach merely adds a short term/long term dimension.\textsuperscript{16} Both theories start from the premise that the appropriate goal of corporations is to maximize shareholder return. Both fail to account for the interests of others who have investments at risk in the corporation.


\textsuperscript{11} Blair, supra, note 4 at 18, 49. Securities laws were enacted to instill public confidence in information which publicly traded companies report.

\textsuperscript{12} Ibid. at 202.

\textsuperscript{13} Ibid.

\textsuperscript{14} Macey, supra, note 9.

\textsuperscript{15} Blair, supra, note 4 at 203.

\textsuperscript{16} Ibid. at 202, 209-210.
Similarly, the law and economics view of the corporation as a nexus of contractual relations concludes that directors and officers are the agents of shareholders and should be accountable exclusively to them in order to ensure decision making which results in the maximization of shareholder value.\textsuperscript{17} While some of these theorists acknowledge that there may be others who have an interest in the success of the corporation, they advocate that any rights or obligations of creditors, employees or community ought to be strictly limited to contractual and statutory rights.\textsuperscript{18}

These theoretical approaches to efficient use of resources typically are complemented by board theories which advocate accountability of corporate decision makers to ensure that share value maximizing goals are met. For example, agency cost theory seeks to ensure that managers do not abuse the power they have acquired as the result of separation of ownership and control, and as the result of judicial deference to business judgments.\textsuperscript{19} Here, the goal of corporate governance is to control managerial abuse while minimizing agency costs such as bonding, monitoring, prevention and reduction of abuse.\textsuperscript{20} Agency cost theory relies on markets to determine board composition and to discipline managers.\textsuperscript{21} The board's role is improved financial performance for shareholders through reduction of agency costs, performing functions based on the particular expertise of each director, and acting as arbiter of the internal labour market.\textsuperscript{22} However, boards need not perform monitoring functions if this can be accomplished by less costly methods such

\textsuperscript{17} Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305 at 305-316. For a more detailed discussion of these notions, see infra, note 176.

\textsuperscript{18} Macey and Miller, \textit{supra}, note 1 at 427.


\textsuperscript{20} Dallas (1996), \textit{supra}, note 10 at 8; Blair, \textit{supra}, note 4 at 97-98. See also Alice Belcher, "The Invention, Innovation and Diffusion of Self Regulation in Corporate Governance" (1996) 47 Northern Ireland Legal Quarterly 322 at 325.

\textsuperscript{21} This is because if their decisions don't result in efficiencies, they will be replaced. Dallas (1996), \textit{supra}, note 10 at 8-10.

\textsuperscript{22} \textit{Ibid.} at 16.
as aligning managers' interests with those of shareholders through compensation by stock ownership. Agency cost theory is one of several widely accepted theories which reinforce traditional notions that the goal of corporate governance is shareholder wealth maximization. Other theories differ in their approach, but are aimed at the same objectives. For example, "contra-managerial hegemony theory" is aimed at countering pressures that create board member dependence on managers; advocating rules to allow access to information independent of managers and strategies to deal with the problems of influence and time constraints. Like agency cost theory, the goal of this theory is narrowly cast to maximize shareholder wealth. It does not take account of other investments in the firm.

These traditional views of corporate governance have been reinforced by statutory and judicial support for the notion that the objective of the corporation is shareholder wealth maximization. Notwithstanding vigorous debate about change in governance in recent decades, the legal standard of director and officer liability has remained fairly constant since the inception of the modern corporation. Courts, while recognizing the reasonable expectations of shareholders, have used tools such as the business judgement rule to move away from standards of correctness, to a process approach of how decision making occurred, and an inquiry into whether shareholder interests and statutory responsibilities were duly taken into account.

Thus, both theory and practice converge to create and legitimize a view of corporate governance


26 John Howard, "The Changing Role of the Corporate Director" (Canadian Bar Association Conference on Corporate Governance: A National Perspective, Vancouver, 1997) at 1-2.

27 Ibid. at 2, 3, 6. Howard suggests that in the absence of conflict of interest or complete abdication of role, a director is unlikely to be found in breach of a common law or statutory duty of care. See also CW Shareholdings Inc., supra, note 25.
narrowly cast to take account of shareholder interests. As will be explored in Part II, however, increasingly, it has been acknowledged that the manager/shareholder paradigm of governance has failed to recognize that many parties in addition to shareholders have an interest in the success of a corporation. Creditors, managers, and workers all have firm specific investments and varying degrees of claims, both fixed and residual, depending on their arrangements with the firm and on its solvency. Employees, in particular, contribute human capital to the enterprise, both general and firm specific, as well as any additional equity capital they may have invested through share purchase or pension plans. Traditional governance mechanisms provide inadequate protection against the expropriation of workers' human capital investments.

i. The "visage" of Canadian corporations

The closely held nature of Canadian corporations exacerbates the problem of a narrow framework for the governance debate because of characteristics of high share concentration, close alliance of controlling shareholders and managers, and high turnover of corporate structures. Ron Daniels and Edward Waitzer report that only 14% of corporations traded on the Toronto Stock Exchange 300 are widely held. 60.3% are controlled by a single shareholder or group of shareholders with legal control, and 25.4% are controlled by a single or small group of shareholders with effective control. Privately held companies in Canada are also, for the most

28 Often managers own at-risk assets are relatively small compared to the investment of others, and compared to the assets these managers administer; Blair, supra, note 4 at 3. However Barton suggests that this is less the case with managers of closely held Canadian corporations; Roger Barton, "How Institutional Shareholders See Themselves: the Ontario Teachers' Pension Plan" (Canadian Bar Association Conference on Corporate Governance, A National Perspective, Vancouver, 1997).


31 Legal control is defined as greater than 50% of voting shares. Effective control is 20-49.9% of voting shares. Ibid. at 26. Canadian publicly traded companies differ from their American counterparts, because although they are more widely held than private corporations, share ownership is not nearly as diffuse in Canada as in the United States.
part, very closely held, and often the directors, officers and owners are the same individuals, wearing simultaneous hats.32

Most of the board theories discussed above revolve around the fact of diffuse share ownership and the need to monitor managers to ensure they do not abuse the power acquired from the separation of ownership and control.33 Yet, in Canada, the high concentration of share capital means that shareholders are more likely to be knowledgeable and to exercise decision making power, compared with shareholders in the United States. As a consequence, while managerial accountability issues are reduced, it also means that shareholders are likely to be guiding corporate decisions affecting the welfare of workers. Thus, it is likely that tensions created by managers balancing benefits and protection of workers against shareholder profit, are exacerbated when the controlling power and principal beneficiaries of short term decisions are directly making those decisions. Daniels and Waitzer suggest that highly interconnected corporate structures and directorships create problems of fairness between controlling and minority shareholders, altering traditional problems of manager/shareholder accountability.34 Controlling shareholders are either the managers or managers have closely identified with their interests. Although directors and officers are not required to own shares, in Canada, directors have considerably more capital at risk than their American counterparts. One study found that a substantial percentage of directors of Canada's largest public companies have significant amounts of their own wealth at risk, more than 43% had greater than $100,000 worth of shares at risk in the enterprise.35

32 In order to be exempted as a private company under the *Ontario Securities Act*, R.S.O. 1990, c.S.5, [hereinafter *OSA*], a company must meet three criteria; it cannot offer securities to the public, it is limited to a maximum of 50 shareholders, and there is a general restriction on the transfer of shares.

33 Hart, *supra*, note 19 at 303.


35 The study was conducted by the Ontario Teachers' Pension Plan, Barton, *supra*, note 28 at 17. The Plan examined the information disclosed in 1995 proxy circular of the TSE35 companies. 38% of directors owned shares worth $25,000 to $100,000, 24% had shares invested in the amount of $100,000 to $500,000; and 19% had shares valued greater than $500,000.
Firm trends are also relevant because governance reform needs to take into account the longevity and size of firms. More than 96% of Ontario firms employ fewer than 50 people, and in total, they account for one third of the Ontario working population. Only 3.7% of Ontario workplaces employ greater than 50 people, accounting for two thirds of employees. Thus, there are a few firms with large numbers of employees, whereas the vast majority are relatively small workplaces. The trend has been heavy job loss in large firms, whereas small businesses, defined as fewer than 50 employees, have accounted for one third of private sector job creation in the past decade. There is also a high turnover in corporate entities. Trebilcock and Howse report that each year in Canada, approximately 136,000 firms are created and roughly 109,000 disappear.

These trends pose particular issues for Canadian workers, as employees are essentially dealing with managers who have an equity stake in decisions, in addition to their fiduciary duty as directors and/or officers. The traditional view of the separation of ownership and control is that shareholders try to align the objectives of management with their own in order to reduce the risk of managerial opportunism. In the Canadian context, the objectives of managers are already closely aligned with controlling shareholders, and the challenge is to reduce risk of decision making in the interest of those shareholders to the detriment of workers as human capital investors. As a result, many Canadian workers cannot look for any mediating effect on wealth maximizing decision making which might be present when there is a substantial separation between control and ownership of the corporation. Further, the governance debate must take account of trends toward smaller workplaces, job losses in large firms, and high turnover of corporate entities, issues which I explore in Part II.

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37 Ibid.


39 Hart, supra, note 19 at 300.
ii. **Statutory and common law constraints on the governance debate**

Much of the debate around governance issues has addressed the accountability gap between directors, officers and shareholders. Normative assumptions that directors and officers are exclusively accountable to shareholders in terms of wealth maximization have been bolstered by the remedial provisions of corporate and securities statutes which legislate requirements for accountability and fiduciary duty to shareholders, particularly minority shareholders. It is important to understand this context, in order to appreciate law's role in frustrating reforms that would inject public concerns into the private regulatory environment.

Corporations in Canada are very much creatures of statute; their creation and maintenance are shaped by a myriad of laws, such as corporations statutes, competition legislation, trade law and securities regulation. In addition, a number of remedial statutes provide suppliers, creditors, employees and the community with remedies against particular behaviour which is considered contrary to public policy.\(^{40}\) This regulatory scheme has a profound effect on our economic system, and on how corporations and non-shareholding stakeholders contract and interact.\(^{41}\) The corporate statutory regime is aimed at imposing a duty of care on directors and officers in order to safeguard against abuses and self-dealing transactions, as well as structuring rights and limitations on shareholder participation in decisions of the corporation.\(^{42}\) The *Ontario Business Corporations Act* \(^{43}\) and the *Canada Business Corporations Act* \(^{44}\) are two statutes that

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42 Daniels and Waitzer supra, note 30 at 28. See also Margo Priest et al, *Directors' Duties in Canada: Managing Risk* (Toronto: CCH Canada Limited, 1995).

43 R.S.O. 1990, c.B.16, [hereinafter OBCA].

44 R.S.C. 1985, C-44, [hereinafter CBCA].
extensively regulate corporations and their directors, officers and shareholders. Section 102 of the CBCA, for example, requires that at least two directors on the board of a publicly traded corporation be independent to the extent that they are neither employees nor officers of the corporation or its affiliates. Another example is that particular arrangements for restructuring of public companies must receive court endorsement.

That directors and officers of a corporation have a fiduciary duty to shareholders is long established. Notions of fiduciary duty were historically imported to fulfil what were essentially incomplete contracts. That common law duty has now been enshrined in various Canadian statutes which regulate corporations, and directors are governed by a whole regime of statutory and common law duties and liabilities. For example, section 134 of the OBCA sets out the duties of directors and officers; specifically, that every director and officer of a corporation, in exercising her or his power and discharging duties, shall act honestly and in good faith with a view to the best interests of the corporation, and shall exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Directors and officers are required to comply with statutes, regulations, corporation articles, by-laws and any unanimous shareholder agreements. Both the OBCA and CBCA allow for unanimous shareholder agreements which restrict, in whole or part, the ability of directors to manage the business affairs of the corporation, but require that any transfer of responsibilities be accompanied by a transfer of liabilities to shareholders who must then assume them. In the absence of such arrangements, directors cannot fetter their decision making in management of a business as this would be a breach of their responsibility to act in the best interests of the

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45 See for example, section 118(3) of the OBCA, supra, note 43.

46 CBCA, supra, note 44, s. 102(2).

47 See for example, OBCA, supra, note 43, s.182.

48 Hart, supra, note 19 at 303.

49 OBCA, supra, note 43, s. 134(1). The CBCA language regarding the standard of care of directors is almost identical, supra, note 44.

50 OBCA, supra, note 43, s. 108; CBCA, supra, note 44, s. 146.
corporation and their principal objective of enhancing shareholder value, including balancing gain with risk, in order to ensure the firm's continued viability.51 Directors and officers cannot contract out of their statutory liability in terms of duties under particular statutes, although the regime does allow shareholders to acquire some of this liability through unanimous shareholder agreements.52

Directors in closely held Canadian corporations are usually the principal shareholders or nominees of these shareholders. Nominee directors can consider the interests of their appointing shareholders, but have an obligation to act in the best interests of the corporation.53 Best interests of the corporation has, however, been interpreted as acting in the best interests of shareholders.54 While courts have sought to take account of minority shareholder interests, they rarely take account of others who have investments in the corporation.

There has been considerable judicial support for strong enforcement of director liability to shareholders.55 A good example is the oppression remedy under the OBCA. The statute specifies that a complainant may seek a remedy where the court is satisfied that an act, omission, or particular conduct of the corporation, or the powers exercised or threatened to be exercised by the directors, is "oppressive or unfairly prejudicial to" or "unfairly disregards the interest of any security holder, creditor, director or officer of the corporation".56 The judiciary has a plethora of


52 OBCA, supra, note 43, ss. 108, 134(2), (3).

53 The Alberta Business Corporations Act, R.S.A. 1980, c. B-15, s. 117(4), specifically provides that directors can give special but not exclusive consideration to the interests of its appointing shareholders.

54 C.W. Shareholdings, supra, note 25 at para. 97.

55 Daniels and Waitzer, supra, note 30 at 30. They suggest, however, that the Canadian corporate legal climate is highly decentralized, and that the blur between commercial and corporate law jurisdiction has meant that securities regulators have made themselves the de facto guardian of rights of minority shareholders in public companies. Thus, judicial intervention in this context is very low.

56 OBCA, supra, note 43, ss. 248(1), (2). For a discussion of the difficulty with the term complainant see Jacob Zeigel, "Creditors as Corporate Stakeholders: The Quiet Revolution - An Anglo-Canadian Perspective" (1993) 43 U.T.L.J. 511 at 527.
remedies it can impose, including appointment of new directors, receivers, amendment of the articles of the corporation, and any other remedy "it thinks fit". The oppression remedy is designed to protect minority interests, and courts have approached the balancing of interests of parties by determining the "reasonable expectations of the party alleging oppression". Courts have attempted to fashion remedies that will fulfill the defeated reasonable expectations of the oppressed party, while interfering as little as possible with the continued operation of the corporation. The judiciary will only exercise its discretion to rectify, not to punish, oppressive conduct, protecting complainants' interests in terms of their reasonable expectations.

The courts have also recognized, albeit somewhat unevenly, the right of creditors to have remedial relief under the oppression remedy. The oppression remedy is available for "complainants", an undefined term in the OBCA; however, the harm for which there is a remedy specifies security holders, creditors, directors, and officers. Yet this remedy, as broadly as it has been interpreted, is unlikely to be available to employees seeking to remedy the oppressive or unfairly prejudicial actions of managers. To date, the courts have held that only where employment matters are integrally or "indivisibly" intertwined with an individual's interest as a shareholder, officer or director of the corporation will the judiciary consider employment issues as part of an oppression case. The law frustrates what may have provided a powerful statutory

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57 OBCA, supra, note 43, s. 248(3).

58 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 at 185-7, 191. These expectations can evolve from the time a shareholder enters the corporation, as directors undertake decision making. Thus, they are not static.


61 See for example, Sidaplex-Plastic Suppliers, Inc. v. Elite Group Inc. [1995] B.L.R. 25 (Ont. Ct. (Gen. Div.) Commercial List); see also Royal Trust Corporation of Canada v. Hordo [1993] B.L.R. 10 (Ont. Ct. (Gen. Div.)) at 19 in which the Court held that it may exercise its discretion to grant or deny a creditor status as complainant, but that this is not defined as of right.

tool in a scheme in which directors and officers have a fiduciary duty to workers. Even if workers could persuade a court that they were complainants within the meaning of the legislation, they would likely be barred from bringing most actions because of jurisprudence which has established that workers cannot bring civil actions when they are covered by comprehensive remedial human rights and labour law regimes.63

The law sets the framework for governance in other ways. Directors of corporations are personally liable for a number of harms inflicted on individuals and communities under a myriad of statutes.64 Courts have been willing to enforce such obligations, particularly where the statutory duty is to take all reasonable precautions to prevent particular harms.65 Much of the liability imposed by remedial legislation is based on the premise that attaching personal liability to an individual, as opposed to an entity, will significantly reduce the level of corporate wrongdoing in society.66 Daniels and Waitzer challenge this premise on the basis of the lack of empirical evidence on the deterrent value of personal director liability; their view is that directors are not the most efficient risk bearers of corporate wrongdoing since it creates managerial risk aversion, and ultimately, added agency costs for the firm.67


65 R. v. Bata Industries Ltd. (1995) 25 O.R. (3d) 321 (Ont. C.A.); R. v. The City of Sault Ste. Marie (1975), 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353 at C.C.C. 371; P. & L. Tire Recycling Inc. v. Director, Ministry of the Environment, unreported decision of the Environmental Appeal Board (Swaigen, Chair) dated May 13, 1992 (file no. EPA.001.90) at 22. Directors and officers, in addition to the corporation as a legal entity, will be considered to have control, and thus, statutory liability if they have taken an active role in the business, had an opportunity to take preventive or corrective action, but failed to take this action.

66 Martha Findlay, “The Practitioner as Director and Lawyer” (Lecture to Corporate Decision Making Class, University of Toronto, Faculty of Law, October, 1997). She points out that notwithstanding this rationale, there exists a problem with off-shore corporations who have nominal Canadian residents as directors and then pass USA’s vesting all responsibility with shell corporations as exclusive shareholders [quoted with permission].

67 Daniels and Waitzer, supra, note 30.
The statutory framework and judicial pronouncement of the duties of directors and officers has ensured that their first loyalty and obligations are to shareholders. While this is constrained by remedial legislation, enforcement of the remedial scheme is largely complaint based and decided on a case by case basis. The remedial legislation serves as a check on the realization of the duty to shareholders through its imposition of "agency costs". However, the presence of remedial legislation has not served to initiate any changes in governance models per se; it seems likely that further changes will only result from further legislative initiatives facilitating changes to existing governance models. However, that is not the direction in which legislation is moving. As is set out below, legislation is retreating from imposition of remedial regimes and important areas of regulation are being shifted to the private sector.

The labour law regime also frustrates corporate governance reform which would create an enhanced role for workers. Prohibitions on employers interfering with the administration of unions result in exclusion of employees exercising managerial functions from bargaining units. Moreover, unionized workers assuming director positions on corporate boards have usually been excluded from participation in the union, or alternatively, are excluded at the board meetings from all decisions which may affect workers' interests. This results in legal rules which prevent unions or employees from bargaining for a direct role in corporate decision making. Yet if the price of a governance role is exclusion from either union protection or from board decision making which affects the interests of workers, this defeats the purpose of participation at the board. Further, in the United States, the statutory prohibition on interference with the formation of unions has been interpreted by the National Labour Relations Board as prohibiting a number of worker participation models of governance. In Ontario, similar statutory language has not, to

68 See for example, section 70 of the Ontario Labour Relations Act, 1995, S.O. 1995, c.1, as amended [hereinafter OLRA].

69 Ibid., s. 3. See also Katherine Van Wezel Stone, "Policing employment contracts within the nexus-of-contracts firm" (1993) 43 U.T.L.J. 353 at 373. However, this rigid delineation may now be somewhat blurring; refer to my discussion of Algoma Steel in Part IV.

70 Richard Gely, "Whose Team are you on? My Team or my TEAM? The NLRA's Section 8(2)(a) and the TEAM Act" (1997) 49 Rutgers Law Review 323 at 326. Gely points out that the TEAM Act, which was vetoed by Clinton in 1996, would have allowed participatory exemptions to enhance competitiveness and
date, led to challenges to worker participation models, although the Ontario Labour Relations Board does enforce language prohibiting managerial influence in the administration of unions.\textsuperscript{71} The resistance by unions in the United States may be due to firms undertaking worker participation strategies to supplant unions as opposed to working with unions toward a co-determination model. Thus, while statutory constraints on labour participation in governance may work to limit the governance reform discussed in Parts II and III, the discussion of Algoma Steel in Part IV demonstrates that where firms undertake governance change which is complementary to traditional bargaining rights, the result can be enhanced corporate performance.

\textbf{B. Common law and statutory protection for workers}

\textbf{i. An introduction}

Historically, corporate law has left protection of workers to the remedial statutory scheme of labour law. This has been based on the assumption that if it was public policy to protect workers, democratically elected governments were the best means to accomplish this. Yet labour law alone is proving increasingly inadequate to protect workers from changing capital and labour markets. As the discussion in this part illustrates, the shunting of labour issues by corporate law to labour law fails to protect workers in a number of key respects; particularly at a time when governments are declaring that while remedial protection is public policy, the vehicle for its delivery is to be left to private regulation.

It is incontestable that workers contribute their human capital to the corporation. What is subject to enduring debate, however, is the extent of that capital investment, and what, if any, obligations flow from that investment. Economists have long argued that workers bargain for wages and benefits in exchange for their labour, and that the market price of that labour reflects not only the productivity, but unions opposed this as undermining collective bargaining rights.

\textsuperscript{71} Rob Herman, Alternate Chair, Ontario Labour Relations Board, telephone interview (22 February 1998).
demand for workers' particular skills, but reflects a contract price of the risks that workers assume in terms of their safety, health and job security.\textsuperscript{72} The same view concluded that the market price of wages was sufficient discharge of any obligations by the corporation to the employee, and thus, nothing further in the way of a duty was owed. Under common law, there were essentially no rights attached to employment, and employees worked at will for the corporation. Employment standards such as minimum wages or maximum hours of work were non-existent.\textsuperscript{73} There was no protection from harms caused by fatal workplace injuries, child labour, or prohibitions on access to jobs based on race or gender.\textsuperscript{74}

The separation of workers' labour from the ownership and control of production as a by-product of industrialization necessitated workers searching for a form of economic and social structuring to protect their interests in the face of product and labour market competition.\textsuperscript{75} This resulted in the formation of unions as exclusive bargaining agents, and in the agitation for state intervention to set basic employment standards.\textsuperscript{76} Both the emergence of statutory minimum standards and the right to collectively bargain were responses to the competing objectives of managers' efficiency goals and workers' desire for an end to the most egregious workplace abuses.\textsuperscript{77} They were also in part the result of strategic choices by managers, not only to reduce labour strife, but

\textsuperscript{72} E. Tucker, "The Law of Employers' Liability in Ontario 1861-1900" (1984) 22 O.H.L.J. 213 at 217-221; see also Labour Law Cases, Materials and Commentary (Kingston: Industrial Relations Centre, Queen's University, 1991) at 1068-1094.


\textsuperscript{76} Ibid.

\textsuperscript{77} C. Kerr et al., Industrialism and Industrial Man (New York: Oxford University Press, 1964) at 105.
to temper fluctuations in the market price of labour, thus, reducing competition. Job security has been a primary objective of workers and a dominant theme of labour relations since the turn of the century.

The development of our current employment and labour law regime arises out of the complex interaction of a number of inputs, the economic, legal and political sub-systems, which have shaped rights and obligations of both workers and managers in the employment paradigm. In Ontario, as an example, the past century has witnessed a slow evolution of state imposed remedial protection for workers. In return for workers giving up the ability to use economic warfare except at specified times and the ability to bring civil actions against employers for workplace injuries, inequitable pay practices or human rights harms, a statutory framework was established which afforded workers some basic rights. This framework enshrined public policy goals such as the right to collectively bargain, human rights, and the right to have some health and safety risks reduced. Changes to this initial regime were slowly but progressively introduced, and in Ontario, as in many North American jurisdictions, workers' compensation, enhanced health and safety protection, pay equity and employment equity were added as public policy goals, responding to failures of existing market and statutory regimes. Today, legal regulation determines minimum standards of pay and working conditions; defines who is considered an employee for purposes of remedial protection; defines the scope of matters which can be collectively bargained; and imposes a whole host of other provisions which have distributive consequences for the balance of power between employers and workers.

Workers, however, have been unable to attain state enacted remedial protection from harms due to capital relocation, corporate restructuring and rapidly changing markets. Changes in product,


79 Chaykowski and Verma, supra, note 74.

80 Craig and Solomon, supra, note 73 at 73.

81 The labour movement has also worked in coalition with other equity and church based groups to lobby for statutory changes to provide what collective bargaining has been unable to accomplish.
labour and capital markets, including technological change, international trade liberalization and the exit of capital, have created pressures on corporations to restructure to remain competitive.\(^8^2\) Global labour markets and the creation of an unwaged workforce of welfare recipients have created enormous downward pressure on wages.\(^8^3\) The products markets also affect labour relations by limiting the scope of costs for compensation, retraining and relocation that managers can pass onto consumers.\(^8^4\) This in turn affects decision making by managers, in terms of corporate obligations to employees, because managers may be less willing to fulfil both implicit and express contracts to workers.

The collective bargaining regime has tempered the vulnerability of workers to the global market. However, information asymmetries result in collective agreements that do not reflect the bargaining priorities of workers, because unions do not have access to information on corporate decisions to restructure in order to properly set those priorities.\(^8^5\) There is little incentive on managers to disclose foreseeable major transitions unless there is a statutory requirement to do so. In Ontario, case law on bad faith bargaining under labour legislation has only sporadically imposed a duty on managers to disclose during negotiations any plans for major restructuring or shut down, depending on how firm the decision is.\(^8^6\)

Most recently, corporate restructuring and relocation have left workers highly vulnerable to the vagaries of the market. Job loss, worker displacement and downsizing are all products of the market driven environment.\(^8^7\) Unions have charged that this has resulted in low wage strategies

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\(^8^2\) The Canadian Labour Congress reported a loss of 250,000 jobs between the signing of the U.S. Canada free trade agreement and the second two quarters of 1991; *The Crisis of Canadian Manufacturing* (Ottawa: Canadian Labour Congress, 1991) at 13.

\(^8^3\) Craig and Solomon, *supra*, note 73 at 15-16.

\(^8^4\) Ibid. at 16.

\(^8^5\) Daniels, *supra*, note 5 at 346. Daniels also notes that Union have their own internal agency problems in the context of collective bargaining for protection.


\(^8^7\) David Richardson, “Income Inequality and Trade: How to Think, What to Conclude” (1995) 9 The
by managers who believe this is necessary to remain globally competitive.\textsuperscript{88} The quantum of job loss has increased the likelihood of permanent job loss and created new barriers to rapid re-employment.\textsuperscript{89} Displaced workers who do find employment often find it at lower wages, with their wages not recovering in real dollars for many years.\textsuperscript{90} Although reports of the results of these economic trends vary, they all paint a picture of serious dislocation and harm to workers and their families. Family income in the 1990's has been consistently falling, pushing a record number of families below the poverty line.\textsuperscript{91} There were 400,000 fewer jobs in Canada in 1996 than in 1990.\textsuperscript{92} In January 1998, there were 457,000 Ontario people receiving welfare.\textsuperscript{93} Market changes have resulted in increased contingent and secondary labour markets, which allow managers to negate expectations of long term job security and deferred compensation.\textsuperscript{94}

The rapid structural changes in labour markets have caused considerable debate as to whether corporations have any obligation to mitigate the negative impact of restructuring on workers. Employees have frequently made firm specific investments in their human capital and have little

\begin{itemize}
\item \textsuperscript{88} United Steelworkers of America, \textit{Canadian Codetermination: The Story of Algoma Steel} (Toronto: USWA, 1992) [hereinafter, USWA] at 9.
\item \textsuperscript{89} Trebilcock and Howse, \textit{supra}, note 38 at 751.
\item \textsuperscript{90} Richardson, \textit{supra}, note 87 at 51.
\item \textsuperscript{91} E. Beauchesne, "Family Incomes Devastated by Recession, StatsCan Reports", The Ottawa Citizen, (22 December 1994) at A1.
\item \textsuperscript{92} Statistics Canada, \textit{Employment Earnings and Hours, Historical Employment, all of Canada}, December 1997, table 8. The Ontario Government reported a loss of 71,000 Ontario jobs from 1989-91, two thirds of which were companies shutting down all or part of Ontario operations; Craig and Solomon, \textit{supra}, note 73 at 50.
\item \textsuperscript{94} K. Klare, “Comment: Untoward Neutral principles- market failure, implicit contract, and economic adjustment injuries” (1993) 43 U.T.L.J. 393 at 395. Klare discusses the destructive consequences this will have for the long term degradation of human capital and for the economy as a whole.
\end{itemize}
opportunity to diversify away the risks associated with such firm specific investments.\textsuperscript{95} Often, they are not able to contract to compensate for this risk, other than perhaps pension protection.

A number of scholars have suggested that workers forgo wages in exchange for job security. Shareholders and managers benefit from the fact that workers essentially agree to accept wages below their marginal productivity in exchange for future wages in excess of their marginal productivity. In other words, job security at a time in workers' lives when their productivity begins to decline and their marketability outside of the firm has decreased.\textsuperscript{96} If workers are displaced or terminated, this displacement has serious economic and social consequences for the workers and their families.\textsuperscript{97} Debate regarding obligations which managers may have towards workers in the face of uncertain labour markets and corporate restructuring often suggests that any obligations are more appropriately the subject of state regulation through remedial statutes, and thus, not within the scope of the governance debate. However, this needs to be revisited in the wake of a trend towards dismantling the role of the state as the instrument of worker protection and the effect on wages of the bargain for job security.

\textit{ii. The recent trends toward dismantling state protection of workers}

Much of the literature on corporate governance examines fiduciary duty and board structure through the lens of extensive state regulatory protection of workers. Scholars such as MacIntosh, for example, argue against extension of fiduciary duty because employment protection is better accomplished by legislation for reasons of "certainty and ease of enforcement".\textsuperscript{98} Others suggest

\textsuperscript{95} Daniels, \textit{supra}, note 5 at 345.


\textsuperscript{97} Daniels suggests that these costs include monetary costs in relocating and non-monetary costs of severing community and family ties. He correctly links the consequences to community with losses suffered by both suppliers and workers residing in the community, including the effects on the municipal tax base, the strain on social support services, and the quality of community life, Daniels, \textit{supra}, note 5 at 319, 322.

\textsuperscript{98} MacIntosh, \textit{supra}, note 1 at 469.
that government social safety nets, tax policy and regulatory incentives are the optimal way to protect the human capital of workers, particularly with the shift in employment patterns to jobs which have neither implicit nor explicit guarantees of continued employment. Yet governments have adopted exactly the opposite approach. In Ontario, we are currently witnessing a systematic dismantling of statutory remedial protection for workers. The rationale given is that government intervention in business should be reduced and labour matters turned more appropriately back to private parties. The changes are systematically and pervasively destructive in the sense that under the rhetoric of greater efficiency and autonomy of firms, public standards and enforcement are being dismantled, and workers' fixed or residual claims are being seriously eroded, without an accompanying enforceable access by workers to governance change.

Three trends illustrate how workers' human capital investments are being seriously eroded. The first is actual elimination of statutory protection; the second is a reduction of substantive remedies for harm under the guise of creating systems efficiencies; and the third is reduced access to administrative justice from the creation of new barriers to enforcement. These illustrate the need to re-examine existing governance theories which leave protection of workers to the state, an exercise I undertake in Part III.

a. Elimination of statutory protection

Two examples illustrate the first trend of explicit dismantling of statutory protection for workers, the repeal of the Ontario Employment Equity Act, 1993, and the exclusion of workfare workers from protection of labour and human rights legislation.

The Ontario Employment Equity Act was originally enacted to redress inequitable access to the

99 Trebilcock and Howse, supra, note 38 at 754.

100 Elizabeth Witmer, (then) Ontario Minister of Labour, (Remarks to the Ontario Bar Association, Toronto, 1996) [hereinafter Minister of Labour].
employment market, a problem well documented by independent studies and government commissions. These studies concluded that there are economic benefits to the integration of a more diverse workforce whose skills are currently under-utilized, but that these benefits are not currently realized because of employment barriers. Canadian governments recognized the need to intervene to redress systemic discrimination in employment practices. Human rights legislation, with its complaints based structure, was viewed as inadequate to accomplish the goals of equitable employment. Federal employment equity legislation was enacted in 1986, and the Ontario Employment Equity Act was enacted in 1993, reinforcing merit-based hiring, but recognizing that assistance was needed to dismantle systemic employment barriers. The Ontario legislation was drafted to reflect extensive consultation with business, workers and the designated groups at whom the legislation was directed, specifically, women, racial minorities, the disabled and First Nations. Covering approximately 90% of the Ontario workforce, the statute required firms to make "reasonable efforts" to implement measures to address systemic discrimination through the elimination of structural barriers to employment, identification of support and accommodation measures to facilitate access to employment, and for larger employers, through setting self-imposed targets for employment of the designated groups.

The legislation was entirely self-directed, although it required managers to negotiate with unions where they represented the affected employees. There were no quotas, no mandatory filing of employment equity plans, and firms were to design their own strategies of reaching self-

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102 Employment Equity Act, R.S.C. 1985 (2nd supp.), c.23, as amended; Employment Equity Act, 1593, S.O. 1993, c.35. Interestingly, the federal experience has differed, and legislators strengthened the statute in 1996.

103 Many of the provisions for First Nations employees were never enacted; they required government to government negotiations and there was a change in government before these negotiations were completed.

determined objectives. The standard of review for legislative compliance was one of "reasonable efforts" towards accomplishing those self-determined objectives, and good faith in dealing with employees and unions. Nevertheless, the statute obliged corporations to examine the skills they required as a business, and to determine why the firm was not reflective of the available local skilled workforce.\textsuperscript{105} The legislation was also designed to assist workers with serious information asymmetries in their advocacy for equitable employment practices, and to assist corporations in tapping into pools of available skilled labour not previously recognized because of systemic attitudes about gender, race and disability.

The current Ontario Conservative government, however, simply repealed the entire statutory scheme in 1996, arguing that the state should have no role in requiring business to have equitable employment practices.\textsuperscript{106} The legislation repealing the law went so far as to require employers to destroy any information gathered for purposes of identifying where there might be barriers to equitable employment, thus, ensuring even greater information asymmetries than already existed for workers.\textsuperscript{107} The practical result of this reversion to the private sector is that those businesses which had equitable employment programmes prior to the legislation continue to realize the benefits of such programmes; and those at whom the legislation was aimed have no incentive whatsoever to change their employment practices. The long term gains from the integration of workers from different racial backgrounds, gender and abilities are not part of a business agenda to create short term wealth for shareholders. The privatization of public policy about equal access to employment disadvantages those workers who are already the most disadvantaged in the workforce.\textsuperscript{108}

\begin{footnotes}
\item[105] Thus, workforce representation was to be measured against both available skills in the local labour markets and the proportional representation of the designated groups in the particular community in which the corporation operated.
\item[106] \textit{Job Quotas Repeal Act}, S.O. 1995, c.4.
\item[107] \textit{Ibid.}
\item[108] There is a \textit{Charter} challenge to repeal the legislation; leave to appeal granted by the Ontario Court of Appeal, which was heard on April 6, 1998; the Court reserved judgment. Appellants’ Factum, \textit{Marilyn Ferrel et al v. Attorney General of Ontario}, Court File No. C27917; \textit{Canadian Charter of Rights and Freedoms}, Part I of the \textit{Constitution Act, 1982}, being Schedule B of the \textit{Canada Act, 1982}, c. 11.
\end{footnotes}
The second example of relegation of a public employment policy to the private sector in Ontario is the recent imposition of mandatory workfare for welfare recipients. This entails the creation of an unwaged workforce that is not afforded the same basic health and safety, employment standards and human rights protection afforded to waged workers. The Employment Standards Act was expressly amended to exclude these workers. Their status under the Occupational Health and Safety Act is highly uncertain; careful examination of the legislative definitions of wage earners creates some serious doubt as to whether they have any protection. Similarly, the definition of employee under the Human Rights Code excludes workfare workers from state protection against harassment and other human rights violations. Most recently, the Ontario government introduced legislation prohibiting welfare workers from joining trade unions as a means of protecting their interests, and expressly prohibiting them from having any of their terms or conditions of work determined through collective bargaining. More than 300,000 workers are affected by this dismantling of state protection. This strategy to cut welfare roles and create a marginal unpaid workforce has been fully canvassed elsewhere; however, for purposes of this paper, it illustrates that there is a current trend towards simply dismantling the statutory regime of protection for workers. With extension of workfare to the private sector, managers will have little incentive to voluntarily protect these workers from harms when they have been excluded from most remedial employment and human rights legislation. This leaves workers

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110 Ontario Human Rights Code, supra, note 40, s. 5.


113 For a full discussion of this see J. Sarra, “Workfare and the Implications for Labour Law of the creation of an unwaged workforce”, [unpublished, 1997, on file with author].

114 When workfare was initially introduced, the government assured the public that it would not extend the programme to the private sector. It has now completely reversed this position, announcing the creation in 1998 of a private sector workforce, unwaged and largely unprotected. J. Rusk, “Report on the Speech from the Throne”, The Globe and Mail (24 April 1998) at A3.
vulnerable and increases risks of managerial opportunism.

Further, the cost of unemployment and social assistance, a cost already externalized by firms, will be accompanied by externalizing some of the firm's wage costs because firms do not pay for any workfare labour. Firms will also be able to avoid transaction costs associated with compliance with human rights, employment standards and health and safety legislation. In turn, this will create downward pressure on wages paid to the waged workforce. Since the sanction for failure to meet workfare requirements is loss of all welfare benefits, workfare workers will be reluctant to enforce what limited protection they may have. Moreover, since workfare workers will compete with the lowest waged workers for jobs, this dismantling of state protection disproportionately disadvantages women, disabled and racial minority workers, because it is these groups that hold the jobs at the lowest end of the waged workforce. Further, under new welfare legislation, new definitions of disability and sole support parents means that these individuals will form a substantial portion of the individuals required to participate in mandatory workfare. Yet, they are most at risk from harms from failed state protection because these groups are the most dependent on retaining state assistance.

\[ b. \quad \text{Downgrading of existing remedial protection} \]

The second trend, the downgrading of existing remedial protection, is harder to detect, but is equally, if not more, pervasively harmful to workers than the removal of an entire regime. For example, recent changes to workers' compensation law are aimed at the gradual privatization of the system of compensation for workplace injury. The \textit{Workplace Safety and Insurance Act (WSLA)}, effective January, 1998,\(^\text{115}\) is so recent that it is difficult to fully assess its impact on


\(^{116}\) S.O. 1997, c. 16, as amended. The chronic pain provisions, s. 14, will come into force at a later date by proclamation; and section 40(1) to (7) return to work provisions will come into force July 1, 1998; Office of the Worker Advisor, \textit{Summary of Significant Bill 99 Provisions} (1997, Toronto: Ministry of Labour) at 2.
workers. However, practitioners have already raised a number of concerns relevant to this discussion of governance.

The workers' compensation system is one of Canada's oldest regimes for protection of workers.\footnote{117} It has provided workers with benefits for workplace injuries, while simultaneously reducing transaction costs to firms. It has constantly evolved, with important legislative changes in the 1970's and 1980's which further protected injured workers through indexation of benefits, recognition of diseases associated with workplace processes, and greater access to enforcement through a quasi-judicial independent appeal process.\footnote{118} The system is an important part of the remedial scheme protecting workers for whom, in 1995, there were 120,000 lost time injuries in Ontario workplaces.\footnote{119}

Enactment of \emph{WSIA} represents the beginning of a fundamental shift in public regulation of compensation and rehabilitation for workers injured on the job.\footnote{120} Although enacted ostensibly to create system efficiencies, the changes begin the process of converting a public service to a privately regulated system, with very questionable results whether assessed on an efficiency or equity basis. Some of its prominent features highlight the need to examine whether these changes will somehow be addressed through corporate governance structures. For example, decision making regarding level of benefits has been vested to a greater degree with private managers. Prior to 1998, employees injured on the job were compensated in the longer term based on "available and suitable work". Under the new regime, managers can determine that another position is suitable to the capacity of the injured worker, whether or not such a position

\footnote{117} It was enacted in 1915. Office of the Worker Advisor, S. Clement, interview (28 January 1998) [hereinafter OWA].

\footnote{118} \textit{Ibid.}

\footnote{119} Ontario, Workers' Compensation Board, Industry Sector Profiles on Lost Time Injuries, (Toronto: Queen's Printer, November, 1997).

\footnote{120} For example, benefits under \emph{WSIA} are reduced. This will have a serious impact on the quality of life of these injured workers, and on costs to the municipal tax base because injured workers who previously were ineligible for welfare top-up will now be forced to turn to the welfare system in order to receive sufficient money to support families. OWA, \textit{supra}, note 117.
will be available in the foreseeable future. Benefits will be reduced to match that loss of income capacity, as opposed to the loss of the original level of income. Decision making is now vested in managers who will face a moral hazard of finding "suitable" jobs at considerably lower pay, given that they no longer have to make such work available.  

The claims process is also being restructured to create new barriers for injured workers. 

Previously, employers had to file claims, in recognition of the information and resource barriers to workers and the fact that it is employers who are registered with the Board. Now, the onus is on the worker to file the claim. Lack of access to information will likely act as a serious barrier to filing and enforcement of claims, particularly for those workers whose first language is not English. Further, without mandatory employer claim filing, there is risk of managerial opportunism in placing pressures on workers, particularly non-unionized workers, not to make claims. Moreover, an overload to the system from new rigid time frames will likely create pressures to privatize the claims processing function, as the government has recently done with the comprehensive auto insurance regime.

Decision making in regard to rehabilitation has also been shifted to private regulation. As one practitioner has characterized it, the new government agency administering the Act, the Workplace Safety and Insurance Board (WSIB), "is now out of the return to work business",

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121 This incentive to reduce benefits by decision making about suitable work is based in part on the experience rating system, in which sectors of employers are rewarded for cost reductions by reduction in premiums. See also I. Anderson, “Basic Principles Governing the Amount of Loss of Earnings Benefits Under the Workplace Safety and Insurance Act” (Toronto, Law Society of Upper Canada, December, 1997) at 15.

122 For example, all outstanding potential claims prior to January 1, 1998, must be filed by June 30, 1998. WSIA, supra, note 116, s. 126.

123 Ibid., s. 22. Previously, if the employer did not file a claim, the worker could, but it is the employer that pays the premiums, registers, receives the materials, not workers. Now, the employer must give the employee and the Board notice of the accident, but this does not trigger a claim by the worker.

124 In addition, a worker can no longer file a claim without first signing a consent form for the employer to have access to medical information; the extent of disclosure was previously limited and protected by the Appeals Tribunal. Although technically there are limits to this access, in terms of information on "functional ability" it is doubtful that doctors will have the time to edit medical information to release only some of it. Workers no longer have access to appeal to the Tribunal regarding unreasonable requests by employers for medical information; WSIA, ibid., s. 36(4).
observing that significant administrative functions are being shifted to private parties.\textsuperscript{125} Vocational rehabilitation has been recast as a "Labour Market Re-entry Assessment", its access limited, and caseworkers are to be privatized within the next year.\textsuperscript{126} Now managers determine if there is suitable work at the employee's functional ability level; and even if that work is not available, the employee will be denied access to a Labour Market Re-entry Assessment and any accompanying training.\textsuperscript{127} Given that there is no obligation on managers to make the work available, this change creates further risk of managerial opportunism. Managers can merely arbitrarily designate a suitable position, with no concomitant obligation to make it available, thus by-passing any requirement to participate in assessment and retraining.\textsuperscript{128} The statute does impose a duty to co-operate, but the sanctions for failure to co-operate disproportionately place workers at risk; firms risk fines, whereas, injured workers risk loss of all entitlement to benefits.\textsuperscript{129} The notion of managers as the new guardians of workers' reintegration into the workplace is entirely inconsistent with incentives to reduce risk of further injury. The emphasis has shifted from getting the injured worker back to her or his previous job, to one of making the worker available to re-enter the general labour market.\textsuperscript{130} The subtle language differences have substantive effects for workers; employers have a reduced obligation to take back the workers who were injured by their work practices. Rather, workers are to be made generally re-employable and then left to the growing uncertainties of external labour markets. Thus, the new


\textsuperscript{126} Prior to January 1, 1998, injured workers were entitled to an assessment about vocational rehabilitation needed in order to make them productive members of the workforce again; OWA, supra, note 117.

\textsuperscript{127} Ibid.

\textsuperscript{128} As Gorelle has noted, now that it is parties who have carriage of the return to work process, as opposed to the Board's adjudicators, one can expect a more adversarial system of return to work not withstanding the duty imposed on parties to co-operate; supra, note 125 at 3-8, 3-9.

\textsuperscript{129} Further, private parties will now establish a return to work profile. Without government monitoring, managers can merely impose a return to work profile and if the employee disagrees, benefits are denied. While managers' decisions may be appealed, the worker may be unaware that he or she has only 30 days to appeal or lose all rights to entitlement which may exist. WSIA, supra, note 116, s. 120.

\textsuperscript{130} Anderson, supra, note 121 at 11; WSIA, supra, note 116, s. 42(1).
regime allows firms to further externalize costs of harms to workers, while privatizing the decision making associated with workers' reintegration.

Further, specific injuries previously found to be compensable have been expressly excluded by the new legislation. For example, mental stress caused by any decision or action of the employer about work, conditions of work, discipline or discharge, are no longer compensable. This externalizes firm costs of any abuses of managerial decision making that has resulted in stress related harm, and creates additional avenues for managerial opportunism. Further, it is questionable whether these workers would now have access to the civil law regime for harms that are no longer compensable under the workers' compensation regime. In any event, most workers do not have the information or resources to pursue such claims, and any successful claim will come years after the harm has been caused. Thus, one can no longer assume state protection for risks of workers losing all or part of their human capital investment in the firm from injury on the job.

In June, 1998, the Ontario government introduced yet another legislative bill designed to further reduce remedial protection for workers. For example, Bill 31 deprives the Ontario Labour Relations Board of the jurisdiction to order certification of a bargaining agent as a remedy to serious unfair labour practices by corporations. This remedial power has historically acted to deter managerial abuse because managers understood that if they were found by the Labour Board to have engaged in serious anti-labour practices such that a vote could not determine the democratic wishes of the employees, the Union would be certified and given an opportunity to negotiate a collective agreement. Bill 31 eliminates the Labour Board’s remedial powers in this respect, effectively licensing unfair labour practices by eliminating an effective remedy for, and deterrent to, such harms to workers.

131 WSIA, supra, note 116, ss. 13(4), (5). The new Act prohibits compensation for mental stress except in circumstances which are an "acute reaction to a sudden and unexpected traumatic event".

132 If not, whether this is vulnerable to a claim under the Charter of Rights and Freedoms, supra, note 108.


The above cited examples are illustrative of the fact that, increasingly, the state cannot be relied on to enforce protection for workers. In only a few years, a comprehensive regime of protection which has taken a century to implement, has been seriously eroded, without alternate governance structures in place.

c. Reduced access to administrative justice

The third trend in the erosion of state protection is the systematic reduction of access to administrative justice under remedial employment schemes. For example, under the new workplace safety and insurance scheme, vesting a greater portion of the decision making with employers has been accompanied by a serious reduction in access to adjudicative mechanisms to fairly hear and decide claims. The quasi-judicial tribunal which adjudicates on claims, the Workplace Safety and Insurance Appeals Tribunal (the "Tribunal") has now been limited to being bound by government policy which is neither legislated nor regulated.\(^{135}\) If the Tribunal finds that a policy is inconsistent with the legislation, its only jurisdiction is to refer it back to the WSIB for review. If the WSIB disagrees, the Tribunal is then bound to the policy, and must apply it.\(^{136}\) Moreover, the Tribunal no longer has jurisdiction in other substantive areas, for example, to determine whether a worker may re-elect where the worker has options to sue or to collect workplace insurance benefits.\(^{137}\) Prior, the Tribunal acted as a forum for equitable relief

\(^{135}\) Section 123(2) lists a series of exclusions of matters in which the Tribunal does not have jurisdiction. See also: B. Abrams, "The Board, the Appeals Tribunal, and Board Policy: Predictability in Decision Making?" (Toronto, Workplace Safety Insurance Board, 1997) at 8-2; WSIA, supra, note 116. While Tribunals generally draw their jurisdiction from government enacted legislation, the process by which legislation is enacted provides a check on public policy. Even regulations at least go to Cabinet for approval. Here, the Tribunal is bound by policy promulgated by unaccountable staff of the government.

\(^{136}\) Anderson, supra, note 121, citing WSIA, supra, note 116, s. 126(3). Given that there is not access to a substantive remedy, the issue is then whether the only recourse is to the courts on judicial review, creating additional barriers to access to justice for injured workers.

\(^{137}\) Ian Strachan, Chair, Workplace Safety and Insurance Appeals Tribunal, "The Role of the Appeals Tribunal" (Toronto: Law Society of Upper Canada, 1997) at 16.
in particular circumstances. There are also many other provisions that now eliminate workers' rights of appeal. Thus, there is greatly diminished access to impartial decision making regarding the substantive protections afforded by the statute.

Moreover, advocacy on behalf of injured workers has also been seriously eroded. Effective January 1, 1998, the Office of the Worker Advisor, which has provided free specialized advocates to represent workers in their claims, is prohibited from representing any employee who is unionized. This denies one in three Ontario workers that representation. Given that unions already have limited information and resources, and given the specialized information required to effectively advocate on behalf of injured workers, these workers will inevitably have less access to remedies for workplace harms to their health.

Similarly, the legislation introduced by the Ontario government in June, 1998 has eliminated many rights to a fair hearing in occupational health and safety complaints by amending the OHSA to make the holding of a hearing discretionary. The new "consultation" process, while using the rhetoric of "informality", essentially reduces workers' access to administrative justice by curtailing the right to a fair hearing and to full evidence and submissions on alleged occupational health and safety violations.

Moreover, the Ontario Works Act, which came into effect April 1, 1998, essentially guts the system of quasi-judicial review of social assistance appeals. Previously, the Social Assistance Review Board was the quasi-judicial administrative tribunal that heard and decided appeals

138 Such as elimination of the right to appeal decisions about the scope of employer access to medical evidence. Gorelle, supra, note 125 at 2; section 43(7) WSIA, supra, note 116.

139 For example, a recent Board policy is that dementia will not be compensated where it derives from exposure to aluminum; the Tribunal now has no jurisdiction to determine otherwise, even based on expert medical evidence. OWA, supra, note 117.

140 In addition, the Ontario Labour Relations Act, 1995, supra, note 68, does not require unions to represent their members in compensation claims, unionized workers will be severely prejudiced in their ability to have their claim fairly determined.

141 Davis, supra, note 134.
regarding welfare, social assistance and disability benefits. On average, approximately 40% of all appeals were granted after a full hearing. The appeal process served as an important check on the decisions of government functionaries respecting basic benefits for workers and others who no longer have access to paid work or employment insurance benefits. The Board is now replaced by the Social Benefits Tribunal, and there are extensive exclusions to the new Tribunal's substantive jurisdiction under both the *Ontario Works Act* and the *Ontario Disability Support Program Act*.

Another example of this trend is access to remedies under the *Employment Standards Act* (ESA), which sets out minimum standards for pay and conditions of work in Ontario workplaces. The statute gives little protection in terms of corporate restructuring, but does provide for notice and in some cases, for severance pay. These standards are enforceable by Ministry of Labour employment standards officers with appeal to the Ontario Labour Relations Board. In practice, it is difficult for employees to enforce their employment standards if they are in workplaces not protected by a collective agreement. This is largely because there is no protection against unjust dismissal in Ontario. An employer can terminate any employee, with or without cause, as long as it gives appropriate notice. The ESA provides some minimum notice requirements, and

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145 Part XIV, *ibid*. For example, where 50 or more employees are terminated within six months or less because all or part of a business is discontinued, they are entitled to severance pay equal to one week per year to a maximum of 26 weeks, if the employee has worked for the firm for five years. Trebilcock and Howse note that notice requirements do at least ameliorate the adjustment process for workers, *supra*, note 38 at 787.

146 Part XV, *ibid*. Prior to January 1997, the appeal route was to the Office of Adjudication, an administrative tribunal specializing in employment standards and health and safety. The Ontario government has now dismantled that office and appointed the Chair of the OLRB as the "Adjudicator" for purposes of the legislation. Given that the OLRB has traditionally not dealt with unrepresented complainants, the implications for parties who are unrepresented and less sophisticated, remains to be seen.
individuals have some civil remedies for damages in cases such as wrongful dismissal or constructive dismissal. However, reinstatement rights apply only to the narrow category of reprisals for the individual seeking enforcement of their rights under the ESA. For other employment standards violations, there is no remedy of reinstatement to employment. Thus, an individual making an employment standards complaint leaves him or herself vulnerable to being terminated for seeking to enforce his or her rights. In an era of stiff competition for any kind of employment, waged workers are forced to live with employment standards violations, rather than risk being unemployed.

One study recently concluded that the Employment Standards Improvement Act, 1996, reduced investigation and complaint periods, placed caps on claims, and created even further barriers to enforcement of employment standards claims for the waged workforce. Recent amendments to the ESA also include a requirement that unionized employees take employment standards complaints to private arbitration instead of a public tribunal; thus, the cost will now act as a serious barrier to unions enforcing employment standards violations.

The dismantling of avenues to pursue claims for protection means that unions are increasingly unable to protect workers in the face of rapid labour market change. The consequence is that, in Ontario, managers will rarely be held accountable for ESA violations, exacerbated by the new barriers to enforcement. This dismantling of remedial protection means that workers will disproportionately bear the cost of capital mobility, because increasingly, firms

147 s. 76, ibid. In some egregious cases of violations to the ESA, the Ministry will prosecute an employer, and a court can ultimately convict the employer for the violation and order the reinstatement of the individual. The statute has been amended to prohibit pursuit of both statutory rights and civil remedies, forcing individuals to elect.

148 Ibid., or where they have given evidence or information to an employment standards officer or at a hearing.

149 In unionized workplaces, where collective agreement clauses protect against unjust dismissal, there is greater security in trying to enforce employment standards violations because individuals can be reinstated if the employer tries to discharge them as a sanction for trying to enforce their statutory rights. S. Gordon, Workers' Information and Advocacy Centre, City of Toronto, telephone interview, (2 December 1996).

150 S.O. 1996, c. 23. The study was conducted by Employment Standards Work Group, Bad Boss Stories: Workers Whose Bosses Break the Law, (Toronto: Parkdale Community Legal Services, August, 1996). More than one hundred cases of flagrant violations of employment standards were documented, where individuals have been too economically vulnerable to complain.

151 ESA, supra, notes 144, 150, s. 64.5(2). Private arbitrators cost $1500- $3500 per day. Ursula Hardman, Office of Arbitration, Ontario Ministry of Labour, telephone interview (3 March 1997).
are able to externalize dislocation costs. Those costs are now shifting not only to the community, but to individual workers.  

iii. Failures of governance even where there is statutory protection

Even where legislation is in place and on its clear reading should be adequate to protect workers, there can be failures of governance. The Westray mining disaster is a poignant example. In 1992, an explosion at the Westray coal mine in Nova Scotia killed 26 miners. Scholars, courts and a public inquiry all concluded that these deaths were entirely unnecessary and were due to failures of corporate governance and government enforcement mechanisms. The Public Inquiry inquiring into the deaths at Westray concluded that had there been a safety ethic by managers and effective statutory enforcement, there would not have been any deaths. The Westray disaster illustrates that there are failures of governance under the existing statutory framework, with deadly consequences for workers.

The opening of the Westray mine was a response to problems of serious unemployment in Nova Scotia, driven by political and business deadlines. Both federal and provincial governments injected a great deal of capital, loan guarantees and minimum purchase guarantees, in order to ensure that the mine opened. Feasibility studies from 1981 to 1990 identified serious problems with geological structural faults and high risk of methane gas explosions, but assessed these in

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152 Klare discusses this externalizing of the costs to the community, including increased social costs from increases in family violence, alcohol and drug abuse, and community decline. Klare, supra, note 94 at 394.


154 Public Inquiry, supra, note 153 at 2.

terms of technical costs and economic feasibility, not risks to workers' safety. Tucker and Glasbeek point to normative assumptions that safety risks are inevitable, that workers understand that there are risks to their health and safety, and that they are free to contract for reduction of risk; thus, there is no reason for governments to enforce risk reduction at the outset of an enterprise.

From the time the Westray Mine commenced construction in 1989, government officials, particularly the provincial government which had carriage of health and safety enforcement, were aware of a number of hazards. The Public Inquiry found that in the rush to attract investment and jobs to this economically depressed region, and then to reach saleable coal, government officials and managers alike ignored serious safety issues. Despite unsafe blasting practices, numerous roof cave-ins, seven rock falls, and excessive coal dust and methane levels observed by government inspectors, orders were issued to the company but never enforced; no stop work orders were issued nor were charges laid. From the time the mine opened in September 1991, there was considerable media and public attention about its safety, as well as concerns raised by the miners to managers and government inspectors, yet few orders were written and virtually nothing done to enforce the statutory violations which inspectors knew existed. For example, although inspectors knew that the Company had failed to produce roof support plans and adequate stone dusting plans, they did not enforce these requirements. Equally, the Department of Natural Resources staff expressed concern about the mine being too close to another old mine, concern about the Company deviating from the plans that were approved, and

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157 Ibid. at 18. They contrast these assumptions with the kinds of environmental screening that takes place in advance of allowing corporations to undertake activities potentially harmful to the environment.

158 Public Inquiry, supra, note 153.

159 Ibid. at 4, 21.

160 Jobb, supra, note 155 at 187.

161 Public Inquiry, supra, note 153 at 5.
concern about violations of the Mineral Resources Act, 1990, but failed to carry out their statutory duty to enforce the legislation.\textsuperscript{162} A number of experienced miners quit because of the safety hazards and the failure of government inspectors to enforce statutory protection, but younger less experienced workers were merely hired to take their place. The Public Inquiry found that the Department of Labour was derelict in its duty to enforce occupational health and safety and coal mines legislation.\textsuperscript{163}

The Public Inquiry concluded that the key to compliance of any regulatory health and safety regime is enforcement, and further concluded that regulations, no matter how effective on paper, are worthless if ignored by managers and not enforced by inspectors.\textsuperscript{164} The Public Inquiry made extensive recommendations regarding the need for effective enforcement of occupational health and safety and mining legislation, including more rigorous monitoring of mine planning, spot site inspections, and removal of inspectorate individuals who failed to enforce the legislation. The recommendations highlight that although the statutory framework was in place, there was serious neglect by enforcement officials and inadequate mechanisms to make directors and officers accountable for the risks to health and safety.

Of the 74 recommendations, only two related to corporate accountability. The Public Inquiry recommended that the federal and Nova Scotia governments conduct a review of the accountability of corporate executives and directors for the wrongful or negligent acts of corporations; and recommended that governments at both levels introduce legislation aimed at ensuring that corporate directors and officers are held accountable for failure of the corporation to maintain a safe workplace.\textsuperscript{165} Brooks has suggested that a key failure in the Westray disaster was likely inadequate oversight by directors, and that a lack of codification of directors’ accountability in terms of workplace safety led to dangerous trade-offs between profit and

\textsuperscript{162} Ibid. at 5, 9.  
\textsuperscript{163} Ibid. at 6.  
\textsuperscript{164} Ibid. at 132.  
\textsuperscript{165} Ibid. at 601.
safety. Yet Ontario and other governments are moving in precisely the opposite direction, away from codification of corporate responsibility for workers. Westray illustrates that even where statutory protection exists, without adequate state enforcement or governance structures that serve as a check on managerial abuse, workers will be at high risk from managerial opportunism.

These trends illustrate that instead of a movement towards a comprehensive government strategy to assist workers in either reducing risk of loss of their human capital investment or of providing adjustment assistance, the response of governments, particularly in Ontario, has been to eliminate state regulation. The risk of firm failure does not decrease; it has merely been transferred disproportionately to workers who have fewer protections against the opportunism of managers. While there should be strong enforcement of remedial protection and massive retraining programs aimed at reintegration to expanding job markets, current trends are exactly the opposite. Interestingly, unlike remedial employment law, there is no indication that corporate legislation is being dismantled. In fact, shareholder remedies are firmly entrenched and being enhanced by judicial decision making. State regulation of the activities of corporations has for the most part been embraced as helpful to firms to reduce transaction costs, but similar reasoning has not been applied to regulation of corporations in respect of their workers.

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166 Brooks, supra, note 153.

167 Trebilcock and Howse advocate this as the optimal strategy for dealing with changing labour markets, supra, note 38 at 789.

PART II  REVISITING THE GOVERNANCE DEBATE

Law and economics scholars have provided a valuable starting framework for assessing governance. Yet the parameters of the debate have been too narrowly drawn. This Part utilizes existing governance theory as a starting point to reconceptualize the governance debate. I examine why a normative context is necessary to governance theory, arguing that such a context already exists in corporate law and yet its normative underpinnings need to be made visible and redefined. I build on traditional notions of fixed and residual rights, putting forth a claim that workers' rights are equitable and should be recognized as such. This then provides a valuable tool in redefining the duties of directors and officers of the corporation, and in understanding why workers should have a meaningful role in the governance of corporations, both of which I advocate in Part III.

A. Are the parameters of the current debate sufficient?

i. Is a normative context necessary?

If the current trend continues of relegating much of equity, health and safety, and other employment standards to the private sphere, the corporate governance debate must be revisited. My starting point is that all of these issues are situated in a normative context. This premise no doubt parts company with some law and economics scholars. A number of scholars dismiss the idea of importing a normative context into the governance debate, arguing that such normative objectives are difficult to articulate; are subject to uneven interpretation by courts which have little or no business expertise; are better protected by legislative initiative or private contract; or that the normative legitimacy of stakeholder conceptions of the corporation are

169 Macey, supra, note 9.
170 MacIntosh, supra, note 1.
questionable because of uncontrollable internal agency problems. Those scholars who expressly import normative notions into the governance debate are often severely criticized for failing to understand that normative standards such as a social entity concept of the corporation are incompatible with efficiency and wealth maximization. However, most critiques ignore the normative implications of defining efficiency in terms of wealth maximization of shareholder interests.

More specifically, concepts of property, maximization of shareholder wealth and efficiency goals are deeply embedded in our collective consciousness. Thus, they are rarely articulated as normative concepts, and as a result, they are rarely questioned as the underpinnings of current theories of corporate governance. Yet their normative invisibility does not render their normative content non-existent, and any efforts by scholars to inject new normative assumptions in the governance debate should not be viewed as injecting them into a debate devoid of normative context. For example, the nexus of contractual relations discourse assumes as a normative starting point that the owners of capital are free to externalize the costs of injury or adjustment from restructuring. Similarly, the notion of "free labour market" ignores the fact that employment contracts are made entirely within the context of legal regulation that has made normative choices about the allocation of power in internal and external labour markets, which in turn has distributive employment consequences. Belcher suggests that the crux of resistance to relational conceptions of corporations is the normative assumption about the hierarchy of the

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171 Daniels and Waitzer, supra, note 30 at 39.


173 Klare, supra, note 94 at 399. Klare has suggested that it is fair that the costs of injuries to victims of economic adjustment be borne both by society which benefits from such adjustments and by the firms who profit directly from public policies which enhance capital mobility. This, he suggests, is a normative choice, even though adjustment assistance can be supported because it enhances long term economic productivity. See also K. Klare, "Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform" (1988) 38 Catholic University Law Review 1.

174 Van Wezel Stone, supra, note 69 at 356, 359. She disputes the equation of wages bargained in exchange for job security, pointing out the workers attempt to bargain for both.
firm, and thus, employee protection is only undertaken as permissive activity which must be justified on grounds of interests of shareholders.\textsuperscript{175}

These normative assumptions form the underpinnings of governance goals of directors and officers, but they also inform the contracts, both implicit and express, that managers make with workers. It is difficult to determine what bargains were struck and the reasonable expectations of parties to the employment bargain without some reference to normative assumptions and concepts of fairness, efficiency, and residual management rights theory. The efficient use of capital and shareholder wealth as principal goals are the current normative assumptions. Thus, the conclusions which follow, specifically, that fiduciary duty should flow exclusively to shareholders and that contracts are the most efficient way to safeguard workers, are both normative concepts as well.\textsuperscript{176} Yet, as the discussion in the next part indicates, normative assumptions that the corporation exists to maximize shareholder wealth exclusively are outdated and no longer allow us to respond to modern governance challenges.

Berle and Means, as early as 1932, raised the issue of who a corporation should be run for, suggesting that:

\ldots the owners of passive property, by surrendering control and responsibility over the active property, have surrendered the right that the corporation should be operated in their sole interests,\ldots the control groups have, rather, cleared the way for the claims of a group far wider than either the owners or the control. They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control, but all of society.\textsuperscript{177}

Berle cautioned, however, that the emphasis on corporations existing for the sole purpose of

\textsuperscript{175} Alice Belcher, "Gendered Company: Views of Corporate Governance at the Institute of Directors" (1997) 5 Feminist Legal Studies 57 at 73-75. She observes that to grant a role in corporate governance based on relationship is to challenge the moral values currently attributed to companies, and yet she points out that such a query is usually derided as silly or irrelevant.

\textsuperscript{176} This is in respect of a solvent corporation. Daniels and Waitzer point out that as a corporation moves towards insolvency, others may have greater claim to a fiduciary duty, \textit{supra}, note 30 at 39.

making profits for shareholders could not be abandoned until there is a "clear, reasonable and enforceable scheme of responsibilities to someone else".\textsuperscript{178} Sixty years later, we continue to have an ill-defined scheme of corporate responsibility, and no clear and reasonably enforceable scheme of responsibility to workers, let alone other stakeholders. The proliferation of statutes imposing director and officer liability arose as legislative band-aids to cure or prevent specific harms to particular constituencies. Thus, in Ontario alone, there are more than a hundred statutes imposing liability on directors and officers.\textsuperscript{179} Yet an integrated theory of governance to reflect where the corporation is situated in our society continues to be lacking.

If managers can point to a statutory prohibition or provision granting a pro-active remedy, they can justify decision making which may accord workers protection or more equitable treatment. If not, existing normative assumptions effectively prohibit such managerial decision making by creating risks for managers in terms of liability to shareholders. Similarly, there may be agency costs associated with managers making assessments about the risk of being prosecuted for particular statutory violations. Then, the issue becomes weighing the risk that individual potential claimants have the information and resources to enforce claims or that government agencies have the resources to enforce, not the issue of whether the corporation is fulfilling duties to various stakeholders. The current trend in dismantling or privatizing remedial regimes will exacerbate this type of risk assessment and private decision making about the cost of violating public policy.

MacIntosh suggests that employees as stakeholders can exploit situational power, using the example of a company with high firm-specific skilled workers, who use their situational power to extract wages in excess of their marginal product.\textsuperscript{180} This, he concludes, is purely

\textsuperscript{178} A. A. Berle, "For Whom Corporate Managers Are Trustees: A Note" (1932) 45 Harvard Law Review 1365 at 1367. Berle wrote at 1372 that "most students of corporation finance dream of a time when corporate administration will be held to a high degree of required responsibility, a responsibility conceived not merely in terms of stockholders’ rights, but in terms of economic government satisfying the respective needs of investors, workers, customers, and the aggregated community".

\textsuperscript{179} Daniels and Waitzer, \textit{supra}, note 30.

\textsuperscript{180} MacIntosh, \textit{supra}, note 1 at 427.
redistributional and constitutes an efficiency loss because capital is misallocated as an overpayment to workers. Efficiency is implicitly normatively defined as anything that detracts from shareholder value. While his point about situational power is well argued, his conclusions about efficiency are more questionable. Taking the opposite example, the manager who has easily replaceable human capital can extract major concessions from workers, using the legal framework of strike replacements and depressed labour markets to take advantage of the lack of situational power. This creates a redistribution away from workers, with no evidence of efficiency gains. The problem is that efficiency is defined solely as short term shareholder wealth maximization, based on normative assumptions that firms are free to externalize costs of worker dislocation, that distributions of capital do not result in longer term efficiencies, and that workers are free to exit the employment relationship any time they wish.

I highlight the existence of these narrow normative assumptions in order to properly set a context for the discussion that follows. One goal of this paper is to temper, as opposed to dismantle, normative assumptions that efficiency and shareholder wealth maximization are the optimal goals. The concept of firm wealth maximization is not incompatible with equitable protection for workers. It is possible to supplement the underlying normative context in which corporations currently operate with concurrent objectives of equitable and safe workplaces as obligations arising out of workers' human capital investments. Just as maximization of shareholder wealth and efficiency are normative assumptions, so too will I import a notion that employees are, by virtue of their human capital investment in the firm, entitled to protection from, and remedies for, particular harms to that investment inflicted by the corporation or its directors and officers. Goals of maximization of shareholder wealth, should, as a normative objective, be balanced with goals of equity in employment, an elimination of discrimination based on gender, race and physical capacity, compensation which reflects workers' human capital investments, and the provision of a safe workplace. These objectives can be justified on efficiency grounds, if efficiency is recast to encompass an interest in the long term viability of the

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181 Daniels also suggests that there can be humane assistance to victims of restructuring which does not detract from wealth creation of the corporation. Daniels, supra, note 5 at 351. Although I agree with Daniels that some approaches, such as his implicit contract theory, are highly amenable to a number of normative contexts, that does not mean that they are devoid of a normative context.
corporation, not merely enhanced short term shareholder value, as well as on the basis of a more
textured normative purpose of the corporation. A further discussion of this purpose is in Part
III of this paper.

**ii. Workers as equitable claimants whose human capital investment is at risk**

Distinguishing between fixed and residual claims to the corporation’s assets provides a valuable
framework for determining how corporate control and decision making are to be allocated. Fixed
claims are specific claims to the corporation’s assets based on contract - accounts payable in
exchange for supplies, wages owing under employment contracts, interest and repayment charges
agreed to in debt instruments. Residual claims arise from expectations, whether implicit or
explicit, that the value of dealings with the firm will increase with the firm's increase in value and
decrease with decrease in firm value. The traditional view has been that shareholders are the
only residual claimants of the corporation. For the solvent corporation, residual interest is
recognized between various classes of shareholders. For the insolvent corporation, the fixed
claims of workers, suppliers and creditors are against the residual assets of the corporation, after
which the residual claims of shareholders are last to be satisfied.

In this section, I examine why notions of workers as fixed claimants have not developed to
accommodate our rapidly changing labour and capital markets. Neither traditional corporate
theory nor more recent advocates of workers as residual claimants have fully articulated a
governance theory that recognizes the broad spectrum of types and quantities of human capital
investments that workers make. I conclude by suggesting that workers' human capital
investments result in their having an equitable interest in the corporation such that they should

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Implications" (1995) *Academy of Management Review* 65 at 91. They suggest that "the normative
principles that underlay the contemporary pluralistic theory of property rights also provide the foundation
for the stakeholder theory as well".

183 Bernard Black, "Corporate Law and Residual Claimants" (Columbia University School of Law, Centre for
Law and Economic Studies, 1996) at 16. [Working paper, cited with permission]. This is a working
definition of residual interest that I adopt.
have both enhanced protection of that investment and such that they should have access to governance structures of the corporation.

Traditional models of corporate governance have regarded employees as fixed claimants, concerned with wages and working conditions, and without concern for the continued prosperity and viability of the firm. Much of the scholarly work rejecting stakeholder accountability other than through contract enforcement flows from this conception of workers. Similarly, the separation of corporate and labour law results in employees being regarded as fixed claimants, because any obligation owing to workers is seen to be taken care of by the labour law regime.

For example, Jensen and Meckling have described the corporation as a legal fiction which serves as a nexus for contracting relationships, and which is characterized by the existence of divisible residual claims on the assets and cash flows of the organization, complex relationships between the owners of labour and capital, and the legal system which shapes and enforces these relations. In Canada, the notion of workers as fixed claimants is illustrated by the fact that there is virtually no legislated protection of workers in the event of radical economic restructuring, beyond very narrow fixed claims. Corporations do have some limited notice and severance pay requirements in the event of closure or massive lay-off. However, since there is no recognition of workers' human capital investment, there is no acknowledged obligation to assist with adjustment costs of workers when a particular business or sector declines or fails. It is left to governments to initiate any post facto restructuring strategies in which corporations are only involved as the recipients of time limited wage subsidies in return for providing training for temporary placements.

Since labour is viewed as a cost, not an investment in current or future competitiveness, only a marginal amount is expended on workforce skills development. With economic pressures for

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184 Macey and Miller, supra, note 1 at 417.

185 Jensen and Meckling, supra, note 17 at 311.

186 In the steel industry for example, less than 0.5% of payroll is expended on workforce skills development. USWA, supra, note 88 at 9.
firms to remain globally competitive, there has been an accompanying pressure to reduce wages, remove benefits, pay less equitably and create short term contract jobs. This has been called a "low wage strategy." There is no accompanying strategy of creation of a skilled workforce to respond to market changes and to assist displaced workers to reintegrate into the labour market. Corporations and governments are content to leave the rapidly increasing numbers of unemployed workers to employment insurance, and ultimately, welfare and workfare programmes. Thus, the costs of economic restructuring are externalized by firms, and market theory does not need to take account of workers in decision making.188

Global markets which create pressure for radical restructuring, and corporate decisions on takeover, exit or downsizing have well documented consequences for workers.189 Effects on local labour markets can be devastating, particularly in communities which are highly dependent on a single or few industries. As Daniels points out, if a local market experiences massive layoffs, then displaced workers face severely discounted wages in any future job, which in turn detrimentally affects workers' expected life time earnings.190 Individual employment contracts, collective agreements and public and private insurance all seem inadequate to efficiently spread the high risks of job loss.191

In light of the inequities that workers face by being described as fixed claimants, it is not surprising that some scholars have recently suggested that employees are also residual claimants as the result of the human capital they have invested in the corporation. O'Connor and Van Wezel Stone, for example, argue that managers induce workers to invest their human capital over

187 Ibid. at 12.
189 Carney, supra, note 172 at 385. Carney suggests that it is difficult to apportion how much is attributable to corporate decision making and what is attributable to world markets.
190 Daniels, supra, note 5 at 318; see also Richardson, supra, note 87 at 51.
the long term in exchange for promises of advancement in internal labour markets, deferred compensation and job security. Similarly, Blair observes that employees are implicitly promised a share in quasi-rents, and thus, are prepared to share firm-specific training costs by accepting lower wages early in their employment; these wage promises, rather than being fixed, are contingent on the performance of the firm, thus, making employees residual claimants.

Where there is highly firm-specific human capital investment, decision making by firms imposes a high risk on workers' investments comparable to that borne by equity investors; thus, employees' interests should be part of the firm's decision making in order to protect the value of that human capital. Shareholders, particularly in widely held companies, may bear less residual risk than workers because of limited liability, ease of diversifying holdings or of exit if not satisfied with the performance of the corporation.

A number of key assumptions underlie such efforts to reclassify workers as residual claimants. First, workers' human capital investment is regarded as firm specific. Second, workers are regarded as unable to diversify risk. Third, workers are viewed as having forgone wages or other opportunities in exchange for firm-specific skills training or job security. Closer examination of these premises, however, reveals that workers do not neatly fit into either a fixed claimant or residual claimant status, because of how different workers are differently situated.

The first premise is that highly specialized human capital investment is the basis for a residual

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192 Van Wezel Stone, supra, note 69 at 255. See also O'Connor, supra, note 29. Trebilcock and Howse, while categorizing employees as fixed claimants, nevertheless acknowledge that benefits are often directly tied to the corporation, thus, creating risks greater than wage loss. They suggest that statutory and collective agreement protections for workers are "tin parachutes", which fail to recognize the risks workers face on restructuring. Trebilcock and Howse, supra, note 38 at 758.

193 Blair, supra, note 4 at 254-5. She suggests that there is empirical evidence that employees in large corporations are paid more than their short term opportunity cost, and thus, they are compensated for their firm specific skills investment. Her explanation is that there are rents or quasi-rents extracted by unions. Rents are returns that are greater than the minimum required to induce the corporation to make new investments; quasi-rents are where the return is higher that the minimum required to induce a corporation to continue producing good, given the investment to date.

194 Ibid. at 351.

195 Ibid. at 229.
claim, because firm specific skills enhance corporate performance and may not be marketable elsewhere; and because technological innovation is application of those skills to wealth creation of the corporation, compensation for which workers cannot completely contract. However, if workers have not made specialized skills investments, they appear to be excluded from this notion of residual claimant, on the premise that they can market their human capital elsewhere. This approach inadequately accounts for the fact that workers make human capital investments without necessarily contributing highly firm specific or specialized skills. For example, workers contribute and utilize informational capital regarding workplace practices or client preferences, effective production methods and idiosyncrasies of production equipment, all of which add value to the firm. Workers' human capital investments in the service sector, while not necessarily firm specific skills, nevertheless contribute added value to the success of the enterprise from the effective delivery of service and consequent generation of good will and repeat clientele.

The second premise is highly relevant because workers are generally unable to diversify risk. The human capital investment which they make in the firm usually consumes all of their available human capital if they are employed full time and unable to invest that capital elsewhere. For many workers, particularly those who are most economically disadvantaged, such as women and racial minorities, the income earned is rarely adequate to cover the cost of living let alone allow equity investments elsewhere which could diversify their risk.

The third premise, that workers forgo wages in exchange for training or job security, fails to account for employees who, given the growth in secondary and contingent labour markets, no longer have access to long term employment with one firm. Traditionally, workers have made firm-specific human capital investments with the expectation of long term employment. Even with rapid structural changes in labour markets, employees continue to view long term employment as a priority in terms of employment objectives. While the economic reality is that these jobs are becoming less available as managers make "efficiency" decisions by reducing long term commitments to employees, human capital continues to be extracted from workers on the

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196 Ibid. at 238, 265.

197 This is indicated by increased contracting out, elimination or reduction of benefits, short term contracts and little skills training.
implicit expectation of possible long term employment. Further, while the number of so-called short term jobs has steadily risen over the past two decades, there is indication that these short term contract workers are often long term workers, having their employment contracts constantly renewed, with all the expectations of job security without the income or benefits that have traditionally formed part of the implicit or express employment contract.\textsuperscript{198} In such cases, there is really an implicit promise of job security, even where there appears not to be. In other cases, there is not even this implicit promise. It is here that O'Connor and Van Wezel Stone's claim to residual interest based on implicit promises becomes problematic. Therefore, are workers who are making firm-specific investments deserving of some sort of residual claim, when there appears to be no implicit promise of long term job security?

While the notion that workers make firm specific human capital investments as part of the wealth creation of the corporation is being increasingly acknowledged, opinions differ as to whether there should be any enhanced protection of workers or any sharing of residual gain as the result of that investment and its attendant risks. What is needed for that leap is legitimization of the notion that employees have an interest in decision making of the corporation and an interest in its continuation as a viable business enterprise.

Currently, any recognition of the residual rights of employees appears to take place at the point at which the corporation is insolvent, when workers (and creditors) are viewed to have the most at risk. This idea needs some reconceptualization since the contribution of workers' firm specific human capital to the enterprise seems independent of the solvency question. It is questionable that workers would only have residual claims at the point of insolvency, but no claims beyond a fixed claim when the enterprise is viable. Black points out that defining residual interest based on priority of payment at the point of liquidation is not a particularly useful measure because profitable firms are seldom liquidated and because at the point of liquidation, few decisions are left to be made by the firm. He argues that a more useful measure is to examine residual interest and control rights in the short to medium term, where business decision making is still active and

\textsuperscript{198} N. Weiner, \textit{Employment Equity: Making it Work} (Markham: Butterworths, 1993), Appendix A, Statistics.
more directly affects the risks of firm gain or loss. Although Black's analysis paves the way for recognition of workers' residual interest, he glosses over the fact that the "liquidation benchmark" serves the purpose of identifying those who have the most at risk of complete loss of investment in the firm. In Canada, with the high turnover of corporate entities, as discussed in Part I, the notion of risk at the point of insolvency continues to be valid in trying to establish workers' claims. I agree, however, that there needs to be greater consideration of risks to workers when firms are viable. Workers are rarely able to diversify their risks, as I have noted above. Thus, Black's notion that control rights should be allocated to those with residual interests in the short to medium term has some real merit.

Moreover, my assertion that workers risk their human capital investment does not depend on establishing that their aggregate risk of loss is equal to or greater than that borne by shareholders. Rather, just as different shareholders have varying degrees of investment and varying abilities to diversify risk, so too do workers. This does not detract from the notion that both shareholders and workers have a residual interest in the corporation, nor does it detract from the notion that both have an interest in the efficiency of, and generation of wealth by, the corporation. Both equity and human capital investors have an expectation that the value of their investment will increase if the firm's value increases, and will decrease or be lost if the value of the firm decreases. Once this interest is acknowledged, then decision making by directors and officers of the corporation, in terms of investment or resource allocation, can be more efficient if it takes account of both investments. This is an issue I explore further in Part III, and which is illustrated in the discussion of Algoma Steel Corporation in Part IV.

One further issue is whether recognized residual claims of workers would be negatively affected in terms of current priority rights in the case of firm bankruptcy. Under the Bankruptcy and Insolvency Act, workers currently have limited priority in claims for wages owing in the six months prior to bankruptcy. Similarly, under the Bank Act, employee claims for up to six

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199 Black, supra, note 183 at 19, 36.

months of unpaid wages have priority over a bank realizing on security under s. 427. There has been considerable debate over the priority to be accorded workers’ claims for unpaid wages and pension contributions when a firm is bankrupt, fuelled by recent judicial pronouncements on where workers claims stand in the priority list. While it might be argued that fixed claims would or should disappear if workers are found to be residual claimants, such an argument fails to account for both the fixed and residual claims of workers. This dual claim status is not antithetical to current corporate law. For example, an equity investor might also have a secured debt with the corporation. In the case of bankruptcy, that shareholder would have the same rights as other secured creditors to the extent of the secured debt, this being distinguishable from her or his lower priority as a common shareholder. Similarly, the current legal structure can accommodate the fixed claims of workers, while still recognizing their residual interest.

I argue that workers' human capital investments result in their interest being located along a continuum of fixed and residual claims. Those claims, while not requiring shareholding to fall in the residual category, nevertheless are deserving of special attention in the governance debate. As the foregoing discussion has demonstrated, part of the difficulty is that workers cannot be neatly categorized as fixed or residual claimants. In order to determine their interests along the continuum, and thus, establish their claims, it may be that there is need to describe workers differently from either fixed or residual claimants. This could encompass a notion of "equitable investment" and equitable claims. Equitable notions are well entrenched in our law, and equitable remedies have been available where courts have found that fairness or even handedness required the ordering of a particular course of action or remedy. Black's Law Dictionary defines equitable as "just, conformable to the principles of justice and right". Concepts such as equitable interest, equitable relief, and equitable estoppel have all recognized interests not strictly defined by title or by law, yet for which fairness suggests parties are deserving of remedies in

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particular circumstances. Applied to the governance context, workers have fixed claims under statutes and collective agreements, but their human capital investment may be deserving of broader claims. While they are not always residual claimants in the traditional sense of equity capital at risk upon failure of the firm, they do have investments at risk, investments that are usually undiversified, even if they are not specialized. With the dismantling of state protection, there needs to be a remedy in law that recognizes their equitable claims under notions of even-handedness and fairness to all investors in the firm.

The type and extent of claims that a notion of workers as equitable investors would support depends on the kind and quantum of human capital that workers are contributing, and on their reasonable expectations as investors of human capital in the particular enterprise. Valid claims could encompass claims for participation in the governance of the corporation; claims for representation on the board of directors; or claims that equitable investments are deserving of some kind of priority in corporate decision making terms of job security or access to employment equity initiatives. The model of governance crafted by Algoma Steel, discussed in Part IV, illustrates that the equitable nature of the claim could result in enhanced worker participation in decision making at all levels of the firm, greater job security, profit sharing and other gain sharing plans which recognize and reward workers’ contribution to productivity. This is to enhance, not to supplant, rights and benefits that workers currently have under collective agreements or employment contracts.

This notion of equitable interest will likely be attacked by some as uncertain, inefficient, and leading to high transaction costs in identifying and litigating the extent of equitable claims by workers. In fact, the introduction of the statutory regime of worker protection and protection for employers from civil suits was aimed in part at eliminating uncertainty and transaction costs associated with ill-defined duties. A key part of the resistance to recognizing workers as other than fixed claimants stems from the assumption that the state still protects workers’ claims through the statutory scheme of employment and human rights. That claim is increasingly doubtful with the current government agenda of relegating public protection of workers to the private market. Thus, there is growing need to address this question from a governance perspective, and recognition of workers' equitable investments may serve as an alternative
approach to preventing or remediing harm from workers' loss of human capital investments. Further, an equitable approach might provide a more textured way of addressing the increasingly segmented and contingent nature of labour markets. Rather than ground residual claims entirely on the notion of expectations of long term human capital investment, an equitable approach could take account of situations where workers have made shorter term human capital investments which are at risk.\textsuperscript{204} While greater than fixed claims, they may be insufficient to establish a full residual interest, based on equitable considerations. Recognition of these claims could result in a governance structure which allocates decision and control rights to those who have the information and incentive to use resources efficiently to create wealth, while at the same time ensuring that decision makers are accountable to all others who have investments at risk.\textsuperscript{205} Moreover, just as the courts have intervened to rectify oppressive conduct on behalf of shareholders, protecting their interests in terms of their reasonable expectations,\textsuperscript{206} so too could the judiciary assist in setting the parameters of the obligation to workers as equitable investors in terms of their reasonable expectations.

\textbf{B. Is a proper concern for the interests of workers congruent with a system of governance based on the property and contractual rights of shareholders?}

The premise of our current system of corporate regulation and governance is a notion of private property and the freedom to contract. The historical notion was that shareholders were the owners of the corporation and their property rights included the right to possess, use, control and dispose of the property as they wished. Legal regulation has limited property rights to protect the

\textsuperscript{204} Public policy has created an extensive regulatory framework for the environment, including strict liability for particular harms and the requirement to pay clean up costs in order to make the land available for future use when a corporation exits. Workers are viewed as a more disposable commodity. But, there could be a regime where corporations seeking to exit communities or shut down, equally, have liability to restore the community, i.e. its workers, to future productive use. Just as corporations factor in environmental liability in this respect, they would factor in employment liability. However, governments are moving in the opposite direction.

\textsuperscript{205} Blair, \textit{supra}, note 4 at 3, 19.

\textsuperscript{206} Nanef v. Con-Crete Holdings Limited, \textit{supra}, note 60; 820099 \textit{Ontario Inc. v. Harold E. Ballard Ltd. supra}, note 58.
legitimate interests of others, and thus, models of governance must be situated in the context of both property rights and the legal rules. The concept of a corporation divides these property notions, according shareholders the right to profits from use of the "property" injected as share capital and a residual and fractional right in corporate property, assigning management to the directors and officers of the corporation. Given this well entrenched understanding of the corporation based on property and contractual rights of shareholders, is a governance model that recognizes obligations to workers congruent with this understanding?

There have been some shifts over the years as to what normative underpinnings ought to inform corporate decision making. Corporate governance as a tool of social redistribution had its hey day in the 1960's when corporations justified certain benefits given to workers as wealth maximizing in the long term, and thus, ultimately beneficial to shareholders. This short term/long term analysis that tried to reconcile property rights of shareholders with obligations to workers diminished in acceptance in the 1980's with the rise of global capital and labour markets. Although there have been attempts to work out an accommodation between what were considered competing objectives of shareholder wealth maximization and corporate social responsibility, these efforts have been unsuccessful. Finance and market models suggest that corporations can voluntarily devote a reasonable amount of resources to benefit employees, but only where competing courses of action have comparable impact on shareholders. Under these models, the granting of job security or other benefits to workers is viewed as a tax inhibiting wealth generation.

207 Singer, supra, note 188 at 487-8.
208 Blair, supra, note 4 at 224 and the scholars cited therein.
209 Allen, supra, note 172 at 261-281; see also Blair, supra, note 4 at 216, 217.
210 Blair, supra, note 4 at 55.
211 Ibid. at 218.
212 Klare, supra, note 94 at 394.
For scholars such as Coffee and Singer, the objective is a well working market system that recognizes the legitimate interests of workers in job security and which ensures the market operates without unnecessary "social misery". Singer argues that jobs are the entryway into the economic system, and without access, workers are excluded from sharing in the benefits of wealth creation, thus, the market has failed on both efficiency and distributive grounds. This approach is premised on normative notions of social justice and liberty, that workers are entitled to participate in the economic system and share in its wealth generation through decent wages and benefits. In light of the fact that finance and social welfare scholars condemn each other for their narrow framework, the key question is whether the existing nexus of contractual relations view of the firm, with its normative underpinnings of property and contractual rights, can result in a corporate governance model which recognizes and accommodates the objectives underlying these competing models.

i. Debunking the myth that private contracts are sufficient to protect workers' interests

Workers as human capital investors, just as shareholders as equity investors, have difficulty in making complete contracts. Yet the rhetoric of remitting public policy to private regulation is based on a normative notion that parties will make employment contracts which best suit their respective needs. Thus, the Ontario government has argued that while protection of workers is still public policy, it can dismantle public remedial protection for workers because parties will more efficiently contract for this between themselves. However, without remedial protection, workers, just as shareholders, cannot contract to adequately protect their human capital investment.

The myth that private contracts are sufficient to protect workers' interests is grounded in deeply


214 Ibid.
embedded assumptions about property rights, in which theorists argue that all parties are free to contract over the use of resources and that this will produce the greatest efficiencies.\textsuperscript{215} Workers supposedly bargain a "risk premium" in wages that takes account of risk of injury or of displacement because of restructuring.\textsuperscript{216} Based on this notion of property rights, a corporation, for example, can contract with workers to work in an environment that is unsafe. Workers will supposedly contract for higher wages as the price of their labour at the potential cost of their health and safety, and corporations will be willing to pay the higher cost because it is "more efficient" to pay the higher wages than pay the costs of hazard elimination. Thus, there becomes what is essentially a "socially optimal price" for risking and harming workers. This, it is argued, is the most efficient decision for the corporation. If the cost of wages is too high, then it becomes more efficient for the firm to implement hazard reduction measures than to pay a wage rate high enough to compensate for all the risks associated with the work.

This reasoning is fundamentally flawed, both for reasons of information asymmetries and because workers rarely have the bargaining power to negotiate contracts which adequately protect their interests. Unlike a contractual relationship with an institutional creditor, parties to the employment contract, whether it is an express or implicit contract, are often contracting for an unspecified time, and unfixed quantities and quality of labour. Workers have reasonable expectations that they will do well if the firm does well. Workers rarely view the wage package as compensation for risk of injury or death on the job, and in fact, assume that they will work in a relatively safe environment because of statutory responsibility on employers to take all reasonable precautions to protect their safety.\textsuperscript{217} Contracting at the outset of the employment relationship for risk of unemployment is a rare exception, found usually where a worker's skills are so specialized and in short supply that they have the bargaining power to demand a wage.


Traditional employment contract theory makes four principal assumptions. It assumes that parties had full information at the time of the bargain such that they voluntarily contracted against a variety of foreseeable future risks. It assumes that if harm is not expressly provided for in the contract, it represents a decision by the parties in terms of risk assumption and compensation for that risk factored into the contract. It further assumes that parties to the contract understand that fiduciary duties flow exclusively to shareholders and the contract does not, therefore, rely on such a duty to fill any gaps in the contract. Finally, the assumption is that any government intervention in private ordering will distort optimal private bargaining.

These assumptions seriously discount the inability of workers to adequately contract for protection. They ignore the fact that many employees do not have formal employment contracts and only 37% of Canadian employees are covered by collective agreements. Rarely are these or other employment contracts complete contracts. A "complete contract" has been defined as specifying what happens in all circumstances, including compensation for any explicit, predictable risk that workers are bearing. Yet workers and unions face serious information asymmetries such that they cannot contract for foreseeable risks. With current labour markets, it is difficult to contract for all potential harms to workers. Even if workers or unions tried to bargain against "categories of future risk" such as plant shut-down or layoff from restructuring, they do not have the bargaining power to secure such contractual protection. Further, there are a myriad of enforcement problems, now exacerbated by the current trends in dismantling state

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218 Trebilcock and Howse, supra, note 38 at 754.

219 Absence of contractual protection for workers has been understood to indicate an unwillingness to contract for such protection rather than being unable to contract. Macey and Miller, supra, note 1 at 401, 417.

220 Daniels, supra, note 5 at 327.


222 Blair, supra, note 4 at 230.

Managers have strong incentives to renege on employment contracts or statutory standards where there are increasingly few avenues for workers to seek remedies for any breach.\textsuperscript{224}

In addition, labour laws prohibit strikes during the life of a collective agreement, thus, removing what bargaining power or economic sanctions workers have for prolonged periods of time.\textsuperscript{225} Given that there is no right for unions to have collective agreements opened up during the life of the agreements, there is risk of managerial opportunism; managers can merely wait until periods in between negotiations before making restructuring or relocation decisions. Trebilcock and Howse point out that displaced workers are unable to extract compensation for post-contractual decisions which harm their human capital investments, even if decision making is opportunistic, and that this encourages expropriation of workers' investments.\textsuperscript{226} Moreover, in the collective bargaining context, arbitrators and courts have largely upheld notions of residual management rights; thus, if protection is not expressly contracted for, managers are largely free to make decisions that harm workers' interests.\textsuperscript{227} This creates additional barriers to unions seeking to utilize the collective bargaining structure to create governance changes.

Further, to rely on future collective bargaining to correct deficiencies or unforeseeable events ignores the fact that major restructuring or firm exit often results in permanent job loss and little or no future bargaining.\textsuperscript{228} Daniels observes that even if a union has an opportunity to negotiate a further contract, its bargaining power is seriously eroded, since the underlying premise of bargaining, the firm's commitment to a long term relationship, is gone.\textsuperscript{229} Further, the notion that

\textsuperscript{224} Van Wezel Stone, \textit{supra}, note 69.

\textsuperscript{225} \textit{Ontario Labour Relations Act, supra}, note 68, s. 79.

\textsuperscript{226} Trebilcock and Howse, \textit{supra}, note 38 at 761, 764.

\textsuperscript{227} J. Sarra, "A Public Purpose Model of Labour Arbitration, the Legislature's Mandate to Arbitrators" [unpublished, 1994], on file with author.

\textsuperscript{228} Daniels, \textit{supra}, note 5 at 328.

\textsuperscript{229} \textit{Ibid.}
for unforeseen circumstances in which the interests of workers are injured, that courts will intervene to protect workers by construing their employment contracts in light of original purposes, ignores the realities of today’s labour markets.\textsuperscript{230} Courts and labour arbitrators often decline to gap-fill on employment contracts and collective agreements, on the theory that such contracts were freely bargained, and thus, must comprise a complete contract.\textsuperscript{231}

Moreover, while contracts may be a logical means for executives or professionals with skills in demand to protect their interests, this notion ignores the reality that most workers do not freely contract wages and job security with the corporation. The vast majority are hired in response to a job advertisement, often based on a probationary period or some sort of training or apprenticeship programme in which employees have few rights. While it is legitimate that such periods give managers an opportunity to assess the skills of workers, their work habits and compatibility with the firm, employees enter with no contractual commitments. The offer of longer term employment, upon passing probation or apprenticeship after a period of firm specific human capital investment, means that workers are unlikely to have any bargaining power. Agreements rarely reflect the voluntary and optimal choices of workers, particularly in current labour markets when the choice is the job offered or no job at all. Workers do not have the bargaining power to negotiate compensation or other benefits for foreseeable risks. Further, workers are unlikely to know that fiduciary duties exist, let alone acknowledge in the employment bargain that such obligations flow exclusively to shareholders.

Even where there are unions present, the ability of unions to adequately contract protections on behalf of workers depends on two key factors. First, the statutory scheme of labour relations can either facilitate or create barriers to collective bargaining.\textsuperscript{232} For example, under Ontario labour law, there is very limited obligation on managers to disclose information about possible closures

\textsuperscript{230} Macey and Miller, \textit{supra}, note 1 at 401.

\textsuperscript{231} Only where the contract is extremely dated, where it violates statutory standards, or where there are extraordinary and compelling reasons for granting an equitable remedy have the courts acted to gap-fill on incomplete contracts.

\textsuperscript{232} Recent changes to the \textit{Ontario Labour Relations Act}, \textit{supra}, note 68, for example, have made it more difficult to unionize and to sustain collective strength during strike situations.
or restructuring during negotiations for a new collective agreement. The Ontario Labour Relations Board has generally not granted remedies for harms caused by withholding of such information unless it is established that an actual or *de facto* decision was made at the time of bargaining. Thus, legal rules have distributive consequences for the ability of unions to effectively contract. Second, the bargaining power of the union may be limited, leading to incomplete contracts. Unlike the ability of institutional creditors to contract extensively for the risk of loss of investment, with rapidly restructuring labour markets, unions often do not have the information or bargaining power to negotiate complete contracts. Collective agreements may try to protect workers' investments by securing seniority, lay off and severance provisions, but they are unable to predict or provide adequate remedies for the range of possible losses to workers' investments. Bargaining for governance change, except in the limited circumstance of insolvency and worker buy-out, is almost impossible, because basic needs pre-empt governance reform in terms of bargaining priority.

Unions try to bargain for protection against the most egregious management behaviour in terms of qualifying residual management rights under the collective agreement. To contract for covenants to reduce moral hazard problems or prohibit decision making that would increase risk to workers' investments is almost impossible given limited bargaining power and normative assumptions which discourage unions from bargaining for control rights. Trebilcock and Howse propose a revamping of collective bargaining rules to allow unions to undertake *ex ante* bargaining that more accurately takes account of risks. They suggest that such rules would allow collective agreements to be reopened on particular events, thus, overcoming the problems created by the prohibition on strikes during the life of collective agreements. While these initiatives

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233 *Westinghouse Canada Ltd* [1980] OLRB Rep. April 577; *Consolidated Bathurst Packaging Ltd.* [1983] OLRB Rep. September 1411. The paucity of cases since then would indicate that employers are now careful not to make these decisions, even on *a de facto* basis, until the negotiations for collective agreement are concluded.


235 Including the use of strike as a sanction. Trebilcock and Howse, *supra*, note 38 at 760, 765.
could result in more complete contracting and greater protection to workers, given the trend of dismantling state protection, it is highly unlikely that legislative provisions will be enacted to allow workers the bargaining power to make more complete contracts. Further, the reopening of collective agreements at the point at which the union's bargaining power is seriously eroded may result in greater harms to workers; any revamping of the rules would have to address this possibility.

ii. Implicit contract enforcement as an alternative to the extension of fiduciary duties

Implicit contract theory offers one possible remedy to harms caused by corporate decision making. The premise is that managers and employees make implicit contracts in recognition of firm specific human capital investments by workers. The theory arises in part from the notion that workers bear residual risks, as discussed above, and that parties are unable to foresee and thus adequately contract for particular future risks. For example, Daniels advocates importing a notion of implicit contract enforcement, based on parties' actual expectations, the nature of their relationship, and the risks of firm specific human capital investment as the rationale for protecting employee interests.236 Van Wezel Stone also observes that labour economics theory supports encouraging internal labour markets through promises of job security and steadily increasing wages, in order to enhance productivity and minimize shirking or sabotage.237 The content of the implicit contract is governed by considerations of deferral by workers of payment in exchange for training and job security, productivity, morale, and technical efficiency.238 The

236 Daniels, supra, note 5 at 317, 331, 340, 345. Daniels suggests that implicit contract theory should not focus solely on takeovers because there are a variety of other non-control transactions that impose losses on stakeholders, and the only difference is the degree of crystallisation of shareholder gain and or stakeholder loss. He attempts to chart a middle course between what he calls the normative approach of "contractarian non-protectionists" and "communitarian protectionists", citing at 326, Milton Friedman, Capitalism and Freedom (Chicago: University of Chicago Press 1962); K. Scheppele and J. Waldron, "Contractarian Methods in Political and Legal Evaluation" (1991) 3 Yale Journal of Law & Humanities 195.


238 Ibid. at 363.
value of these theories is the recognition and broader acceptance of the notion of human capital investments in the firm, investments which should somehow afford workers remedies upon loss of that investment and input into decisions which affect that investment.

Implicit contract theory is offered as an alternative to a social welfare view of the corporation, and scholars have insisted that legitimate reliance interests must arise from the actual intentions of the parties, not merely flow from their relationship, and must be subject to notions of reasonableness.\(^{239}\) Daniels suggests that, absent takeovers, managers are unlikely to harm employees because of potential loss of their reputational capital and resultant depreciation in overall value of organizational capital.\(^{240}\) This assumes, however, that shareholders are aware of breaches by managers of implicit contracts and will take steps to prevent or remedy such breaches; yet as my discussion in Part III indicates, shareholders do not necessarily recognize an interest in protecting workers’ investments. This also assumes that workers are aware of breaches of other workers’ implicit contracts and are able to respond by withdrawal of their labour. Yet the very nature of labour market changes: declining wages, the growth of contingent and secondary labour markets, and loss of local labour markets, means that workers aware of breaches of implicit contracts do not have the bargaining power or economic means to sanction those breaches such that there is a loss of reputational capital. This is best illustrated by the vast number of employment standards breaches which workers feel powerless to enforce, as noted in Part I.

Moreover, there may be a class bias to arguments about reputational capital as an enforcement tool. While managers and professionals making career choices may have the information and resources to seek out information in terms of reputational capital, the vast majority of workers do not. Workers, other than in communities with small local labour markets, are unlikely to hear about breaches of implicit employment contracts. Workers whose first language is not English face even greater barriers to this information. Thus, the reputational capital argument as a means

\(^{239}\) Daniels, supra, note 5 at 329-330, commenting on what he describes as communitarian protectionists.

\(^{240}\) Ibid. at 338.
of enforcement of implicit contracts is highly questionable. Further, on takeover, managers will feel little, if any, obligation to comply with implicit contracts which they did not make, leaving workers with serious enforcement problems. Klare suggests that risk of reputational capital loss only functions as a deterrent when legal rules and cultural norms attach a stigma to actions creating adjustment injuries; that implicit contract theory as currently constructed is based on notions of consent, not unequal distribution of power and wealth, and any enforcement will continue to reinforce the existing distribution of these. Workers may be aware of implicit contract breaches, but be unable to respond with sanctions to that reputational capital because their employment choices are limited and because of the social and economic costs of relocation away from their community.

If a notion of implicit employment contracts were to be imported, then the corporation would be obligated to a worker to the degree contemplated by the agreement. However, it is questionable whether parties would be able to fully articulate their intent, and scholars give little indication as to how differences in intent would be reconciled in finding the actual substance of the implicit contracts. Interestingly, this focus on the actual intention of the parties is precisely what the remedial statutory scheme in human rights and labour legislation strove to eliminate. Intention has historically proven very difficult to establish, and as a result, was eliminated from most of our remedial employment and human rights legislation. Lack of intent to discriminate, to pay inequitably or to hire unfairly, are not a defence to remedying inequitable labour practices.

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241 Blair observes that the restructuring, re-organization, mergers and takeovers of the past two decades has seriously undermined the utility of reputational capital as a mechanism for ensuring a fair allocation of rents from firm specific investments, supra, note 4 at 259. See also Van Wezel Stone, supra, note 69 at 370.

242 Klare, supra, note 94 at 399, what Klare calls the existing social subordination of working people. In contrast, MacIntosh recognizes that implicit contracts are firm assets, but suggests that their breach should not trigger remedies because the market will correct any breaches by depreciating the value of current and future implicit contracts, thus, reducing shareholder wealth or organizational capital; MacIntosh, supra, note 1 at 463. The implicit contract theory has been eschewed by Carney as being misleading in its characterization of employment relationships, that implicit agreements regarding fair wages do not conform to legal descriptions of contracts and are not legally enforceable. Carney, supra, note 172 at 386, 391.

243 Daniels, supra, note 5 at 349.

244 Royal Commission on Employment Equity, supra, note 101.
Further, as my discussion of contractual relations above indicated, while employees have expectations in employment, it is unclear that they can establish enforceable intentions in seeking remedies under implicit contracts. In addition, tests of reasonableness of employee expectation may differ considerably from reasonableness tests of implicit contracts grounded in a narrow shareholder wealth maximization paradigm. Without a normative context or statutory statement of public policy in terms of basic standards of human rights or employment protection, it is unclear whether or not implicit contracts would actually protect workers' rights.

Where parties have failed completely to contract for particular events, Daniels acknowledges that importing a notion of corporate responsibility is much more complicated. He suggests that the choice of government intervention versus private delivery of remedies for employee loss will depend on factors such as administrative efficiency, control of moral hazard problems, and fairness of delivery. Rather than trying to restrict restructuring, the state has a role in supplementing private ordering, such as relief on plant closure, but Daniels argues that where implicit contracts are found, the state should not intervene, deferring to the contract made. This approach, while recognizing a continued role for the state, appears to pose particular risks for employees. By trying to avoid a normative context, Daniels argues that the enforcement would be of the actual agreement found to have been made by the parties. Yet many of the problems discussed above regarding enforcement of express contracts appear also to exist for implicit contracts. In addition, workers under this model would lose their right to enforce statutory remedial protection if a corporation was able to persuade the judicial decision-maker that the "intention" of the implicit contract was to be narrowly construed. Under this approach, the state would not intervene where private ordering through implicit contracts was found to exist. Yet one of the most important features of our remedial human rights and labour law regime has been to recognize the imbalance in bargaining power, and thus, to prohibit parties from contracting out of basic legislated standards. Finally, implicit contract theory is premised

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245 Daniels, supra, note 5 at 349, 350.

246 Daniels qualifies this by saying that this is short of some sort of compelling rationale for intervening. The state's programmes would intervene only to assist employees "who are truly deserving of protection" under a "mutual mistake" model. Ibid. at 350.
on longer term employment relationships. Changing labour markets have resulted in a contingent labour force which in many cases has not implicitly contracted for job security because of lack of bargaining power. These workers would not have access to protections through implicit contract analysis.

Thus, while implicit contract theory may be one tool to recognize obligations to workers, there are problems associated with establishing the content of implicit contracts and with their enforcement. Scholars advocating this theory of worker protection rely on the gap-filling role of government. Given the discussion in Part I, this reliance is increasingly problematic. Without the safety net of government regulation, it is unclear that implicit contract theory offers an adequate solution to the problem of harm to workers caused by corporate decision making. Rather than being an enforcement tool in itself, it may really only serve to help explain why the relationship between corporations and workers is deserving of special attention in the governance debate.
PART III ALTERNATIVES IN CORPORATE GOVERNANCE

What is required is a reconceptualization of corporate law that recognizes and takes account of workers' equitable investments. This requires two key elements, a more textured definition of fiduciary duty and an examination of what governance role workers should be entitled to, in recognition of their equitable interest in the corporation.

A. Reconceptualizing fiduciary duty

i. Current debate on extension of director and officer liability

The concept of fiduciary duty arose as an equitable concept, imposing certain duties of loyalty on individuals who have undertaken, either expressly or implicitly, to act on another person's behalf. Remedies for breach of fiduciary duty are aimed at correcting self-dealing which has harmed persons to whom the duty is owed.²⁴⁷ Existing notions of fiduciary duty have been shaped by both statutory restrictions and judicial interpretation of fiduciary responsibility. The duty originally arose as a mechanism to resolve problems of incomplete contracts. As Gillian Hadfield points out, the value and necessity of fiduciary duty is that it is a reference point for determining, in light of the particular circumstances, the scope of conduct the fiduciary is obligated to meet.²⁴⁸

In the corporate context, directors are obligated to act in the best interests of the corporation; the premise is that if they do, shareholder wealth will be maximized. Nominee directors can consider the wishes of the appointing shareholder, but have an obligation to reasonably analyze


any decision prior to actually making it, in terms of what is in the best interests of the corporation.\(^{249}\) While not legally necessary for directors to consult with shareholders, the courts have held that ordinarily it is prudent to do so.\(^{250}\) Fiduciary duty includes a duty to disclose facts that may affect the business and to take steps to protect it. This judicial conception of fiduciary duty assumes that while directors and officers are to act in the best interests of the corporation, those best interests are defined by all of the above-noted normative assumptions about maximizing shareholder wealth.

The combination of statutorily and judicially imposed duties of directors makes it unclear that current fiduciary duty is adequate to meet the challenge of decision making in the modern corporation. Although it has been suggested that the recasting of the purpose of the corporation to a goal of maximizing the wealth of the enterprise is the first step in taking account of other stakeholders such as workers,\(^{251}\) it may be inadequate as a strategy. In Canada, current statutory requirements that directors act in the best interests of the corporation are still narrowly interpreted as maximizing shareholder wealth.\(^{252}\) Thus, while the statutory language on its clear reading could accommodate taking into account workers' equitable claims, it is unclear that the courts will move to broaden the scope of the duty in the absence of legislative directive.

In contexts other than corporate or labour law, courts have been expanding definitions of fiduciary obligation to encompass a variety of relationships, ranging from such diverse obligations as investment counselling through to breach of duties from sexual assault.\(^{253}\) The

\(^{249}\) \textit{PWA Corp v. Gemini Group} (1993) Callaghan, C.J.; (O.C.J. (Gen. Div.) Commercial List); (1993) 15 O.R. (3d) 730 (Ont. C.A.), appeal for leave refused, S.C.C., File No. 23708, 1993. There is an obligation on nominee directors to inform the appointing shareholder that her or his requested course of action is wrong if the director believes it is.


\(^{251}\) Blair, \textit{supra}, note 4 at 219.

\(^{252}\) \textit{CW Shareholdings Inc., supra}, note 25.

\(^{253}\) McCamus traces a number of recent decisions of the Supreme Court of Canada which has recognized this expanded definition, \textit{supra}, note 247 at 112-115.
criteria for recognizing a fiduciary duty now includes that the individual has scope for exercise of power or discretion, that he or she can unilaterally exercise that power or discretion so as to affect the beneficiary's practical or legal interests, and that the beneficiary is particularly vulnerable to the fiduciary holding that power. While there is some debate as to whether courts require that an undertaking has been made, the evidentiary hallmarks for identifying a fiduciary duty include discretion, influence, vulnerability, confidence and trust. Arguably, many of these elements exist in the employment relationship. Managers, by virtue of their residual management rights and economic power, have considerable scope for the exercise of discretion or power in the employment relationship, and thus, over workers' human capital investments. That power or discretion can be exercised unilaterally, affecting employees' interests, except where a collective agreement or statute has limited that exercise. Finally, workers are particularly vulnerable to the exercise of managers' discretion for many of the reasons discussed in Part II in terms of their inability to diversify or to make complete contracts.

Hadfield has pointed out that fiduciary duty provides a welfare function, that incomplete contracts give rise to issues of what commitments were made or what behaviour will achieve joint welfare maximization. Thus, in the trust context, the fiduciary acts on the welfare function defined by benefit to the beneficiaries, and in the shareholder/officer relationship, it is tied to acting in the interests of the shareholders. She points out that fiduciary duty exists where there is a relationship of unequal access to information, and vulnerability of one party to the exercise of discretion by another. Hadfield also suggests that contracts are incomplete for two reasons; either because the transaction costs of identifying, negotiating and drafting for all contingencies are too high, or because of strategic behaviour. Her theory of default fiduciary duty, where the duty would be recognized as gap filling for incomplete contracts, would, in the former instance, 


255 Ibid. at 114.

256 Hadfield, supra, note 248 at 142-3.

257 Ibid. at 145. She distinguishes fiduciary relationship from fiduciary duty as a gap filling for incomplete contracts.
give parties what was too costly to contract for, while still minimizing transaction costs. In the second instance, default fiduciary duty would act as a penalty, thus, creating incentives to negotiate over the ability to exploit some advantage and to contract out of the default duty by contracting for something that meets the joint objectives of parties.\textsuperscript{258}

Applying her ideas to the context of fiduciary obligation to workers, when employees are unable to make complete contracts because of information asymmetries discussed above, default fiduciary duty could act as gap filling for the contract. Similarly, fiduciary duty would reduce the tendency of managers to act opportunistically because of unequal bargaining power, and would create incentives for managers to contract for equitable employment practices as a way to prevent judicial imposition of remedies for breach of fiduciary obligations.

If one accepts that workers have an equitable investment in the firm, as discussed in Part II, then it is appropriate to extend the fiduciary duty of directors and officers of the corporation to take account of workers' equitable interests arising from their human capital investment. Yet scholars have traditionally opposed extension of fiduciary duties. Their arguments are three-fold: that unlike shareholders, workers' claims are fixed and thus protection more appropriately falls to contract or the remedial statutory scheme; that extension of fiduciary duty would result in unaccountable managers; and that judicial imposition of vague, value laden notions of the duty would lead to increased liability of directors, in turn detrimentally affecting both risk taking and those willing to serve as directors.\textsuperscript{259}

With respect to the first argument, I have suggested in Part II that workers' claims run along a continuum of fixed and residual claims, and that their interest in the corporation is an equitable one. If one accepts this analysis, then the argument that directors and officers should be accountable exclusively to shareholders falls to the side. Workers are not fixed claimants, they make an equitable investment of their human capital in the firm quite apart from any public policy on protecting their employment standards. This investment is deserving of special

\textsuperscript{258} Ibid. at 150.

\textsuperscript{259} Daniels and Waitzer, supra, note 30 at 40.
attention in the governance debate, just as shareholders’ investments have historically been accorded such attention. While legislation setting standards for managerial conduct in employment matters might be more efficient in terms of clearly enunciated responsibilities and lower transaction costs, its absence or impairment does not change the legitimacy of the notion of workers as equitable claimants. Moreover, as illustrated in Parts I and II, contract enforcement is inadequate as a tool for recognizing and protecting workers’ human capital investments. The Ontario government’s stated rationale for dismantling the statutory regime is that while health and safety and human rights continue to be public policy, their implementation and enforcement is best left to private parties. Thus, it is not sufficient to merely dismiss obligations to workers by concluding that if governments do not wish to act, firms should feel no particular obligation to fill the gap.

Another version of this argument is put forth by Macey and Miller who suggest that fiduciary duties are an asset, the aggregate value of which diminishes as it is shared by other groups whose interests conflict. They argue that employees will rationally agree that shareholders ought to be sole beneficiaries of fiduciary duty, in order to strengthen the monitoring role of shareholders and increase overall firm value. Their conclusion that shareholders most value fiduciary duty is premised once again on the notion of workers as fixed claimants. Employees are then to receive higher compensation in exchange for shareholders having the exclusive benefit of this duty, supplemented by legislative and judicial gap filling.

Yet greater overall firm value based on a duty owed exclusively to shareholders does not necessarily mean greater value for workers. For example, managers may decide that a large capital expenditure on new technology will maximize revenues and ultimately the overall value of the firm. This could be at the cost of a number of workers, particularly if the firm is unwilling

260 Minister of Labour, supra, note 100.

261 For example, a director’s decision to increase risk transfers wealth from fixed to residual claimants, and vice versa; they argue that the implications of this basic point have been lost with statutes that expand rights of non-shareholders to include fiduciary duties. Macey and Miller, supra, note 1 at 410.

262 Ibid. at 411.
to expend capital to teach them the skills required to operate the new technology. The fact that
the directors have a fiduciary duty exclusively to the shareholders means that the issue of lost
jobs is not relevant to the calculation of value maximization. Macey and Miller account for this
by suggesting that discretionary decisions will harm the rights of other claimants, but
employment contracts will remedy any harms. Such an argument assumes complete contracts
and relies on firms being able to externalize many of the costs of that decision, leaving the state
and community to pay the costs of displacement retraining and social assistance.263

The second principal argument against extension of fiduciary duties to workers is that directors
and officers would be able to justify any decision based on the “unarticulated interests” of
stakeholders and thus, would become completely unaccountable.264 Yet the corporation is
already a series of complex interests, multiple classes of shares, various arrangements, contracts
and obligations, and directors already must balance competing interests in the exercise of their
fiduciary obligations. When equity is diluted to raise equity capital for the firm, existing
fiduciary duty becomes further spread among different classes of shares with different priorities,
interests and risks, and yet this dilution does not necessarily result in unaccountable managers.
The fear is that managers, whose decisions are protected by the business judgement rule, would
be the beneficiaries of any expanded duty, because any decision would be justifiable on a
threshold of taking into account some stakeholder interest.265 Yet, if the duty is defined as
decision making in the best interests of the corporation and the goal is continued viability of the
enterprise having regard to the investments of workers as well as shareholders, the duty would
not suddenly result in decision making unaccountable to those interests. Further, the closely held
nature of Canadian corporations means that managers are more closely monitored, leaving much
less room for failures of accountability. Directors are ultimately accountable to shareholders for
their continued office and for fundamental decisions, and any decisions made based on a broader
fiduciary duty would be made with careful attention to this. Further, if extension of fiduciary

263 This argument might have some merit if it were accompanied by a rigorous taxation policy that ensured
corporations were taxed for these externalized costs.

264 Daniels and Waitzer, supra, note 30 at 40.

265 Macey and Miller, supra, note 1 at 412, 416.
duty was accompanied by rights of action accorded to both shareholders and workers, managers would necessarily account for those interests in making decisions in the best interests of the corporation. Rather than according managers a new defence in terms of their fiduciary duty, this could result in more balanced and efficient decision making.

The third argument against extending fiduciary duty is that it would be accomplished by evoking "vague, result-oriented conceptions of basic fairness and equity". This casts the debate squarely back to my earlier discussion that directors already make decisions in a normative and value laden context, that of maximizing shareholder wealth. It is unclear, therefore, why they would not have the capacity to balance other normative goals such as least harm to employee stakeholders in the decision making process. Hart suggests that expanded fiduciary duty would make directors vulnerable to legal liability when determining whether excess cash was to be paid in wages or dividends. He argues that wage increases would be a "windfall gain" for workers as fixed claimants, divert cash from shareholders, and impair the ability of the corporation to raise equity capital. Hart fails to acknowledge that risks associated with workers' human capital investment may create a residual or equitable claim, as discussed above. An expanded notion of fiduciary duty would merely necessitate a balancing in the decision making, based on the best interests of the corporation, taking those interests to be the broader ones articulated above.

Another facet of this argument is that expanded fiduciary duty will detrimentally affect the ability of corporations to attract effective independent directors because of problems of defining the duty, inadequate director and officer insurance, and the risk aversion associated with this broader duty. However, the existing extensive statutory liabilities already create such disincentive, and yet there is little empirical evidence that firms have difficulty in attracting qualified directors.

266 Ibid. at 401.
267 Hart, supra, note 19 at 303-4, 334.
268 Daniels and Waitzer, supra, note 30 at 42.
269 Robert Mansell, Partner, Tory, Tory, Deslaurier & Binington, suggests that corporate law firms always have a long list of competent people seeking directorships. (Lecture, “Environmental Law and Corporate Liability”, to Corporate Decision Making Class, University of Toronto, Faculty of Law, September, 1997) [Cited with permission].
Critics also suggest that an extended fiduciary duty would create legal uncertainty, increased transaction costs and increased litigation on the standards to be applied. MacIntosh argues that any extension would have to be "intellectually coherent and enforceable at reasonable cost", noting that a key indicator of a cost-effective fiduciary duty is that it discourages redistributional transactions while not preventing aggregate value maximizing transactions. Yet this indicator makes a normative assumption of the fairness of the existing distribution of value, which must then not be tampered with in the exercise of fiduciary duty because to do so would not contribute to value maximization, merely to redistribution. Moreover, extension of fiduciary duty is intellectually coherent if one accepts my earlier argument that workers have an equitable human capital investment in the corporation. While MacIntosh's point about enforcement costs is well taken, it should not be a bar to imposition of the duty. Just as the initial transaction costs for minority shareholders' remedies, such as oppression, have been decreasing with judicial guidance on the scope of the duty, so too would obligations towards workers have increasing certainty as the duty is defined.

One suggested alternative to expanding fiduciary duty is the idea of importing a corporate duty of good faith, restricting that duty to a good faith obligation in contracts. The difficulty with this argument is that, in the labour law context, good faith obligations have consistently been narrowly construed to deal with the process, not the content, of bargaining. This, combined with the contracting problems discussed above, would reduce good faith to a meaningless obligation, other than to correct the most egregious process problems.

While critics might suggest that there would be difficulty in redefining the scope of the duty to create obligations to workers, directors and officers already balance competing residual interests

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270 What he calls globally value maximizing, although he acknowledges that complete separation of these is not always possible. MacIntosh, supra, note 1 at 428, 433, 459, 473.

271 Ibid. at 449.

and priorities among different classes of shareholders. They also balance a number of competing exigencies, from market pressures, production needs, shareholder demands and statutorily imposed standards. Fiduciaries of trusts are obligated to apply a notion of "even-handedness" in their decision making. Thus, it appears that the extension of fiduciary duty could serve to enrich the balancing component in corporate decision making by having regard to all those who have investments at risk in the corporation.

A much more problematic issue is whether corporate law, as a matter of public policy, should supplant labour and human rights legislative regimes. This is not what I am advocating. As a public policy choice, the existence of effective remedial employment and human rights legislation and its traditional infrastructure (by infrastructure I mean government resources designated to educate, provide technical support, investigate and expeditiously and effectively enforce) are the optimal means by which human rights, occupational health and safety standards and employment standards are safeguarded and promoted. However, absent effective schemes, fiduciary obligations and enhanced corporate governance can be recast to recognize and reward workers’ human capital investments.

**ii. Lessons from American stakeholder statutes**

Much of the opposition to extension of fiduciary duty arises out of the American "constituency" or "stakeholder" statutes, which allow directors and officers to take account of the interests of stakeholders other than shareholders in determining what is in the best interests of the corporation as a whole.273 These statutes were enacted partially in response to massive job loss in past decades and in response to takeover trends as a means for managers to protect their control of the corporation.274 They have been the subject of much criticism. The premise behind these statutes is still wealth maximization for shareholders in the long term, but decision making

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273 Blair, supra, note 4 at 281. She reports that at least twenty seven U. S. states have passed these stakeholder statutes since 1985.

274 Singer, supra, note 188 at 477.
is to include an accommodation between shareholder's interests and those of other stakeholders such as employees, local communities, creditors and other debt holders. These statutes, with the exception of one, are permissive, and thus, do not require managers to take account of stakeholder interests. Further, they either expressly exclude enforcement mechanisms for non-shareholding constituencies or are silent, and no court has yet recognized stakeholders as having standing to sue under these statutes. Thus, there are no means for workers or other stakeholders to enforce what little obligation is owed. Finally, the statutes make no distinction between worker's equitable or residual interests and the interests of more attenuated stakeholders. As a result, these statutes act to insulate managers from accountability to shareholders, without enforceable obligations to other stakeholders.

Critics also claim that these statutes fail to recognize that fiduciary duties are owed solely to shareholders because they have severe contracting problems and that the duty is an efficient means of gap-filling for incomplete contracts. Yet this argument can equally be validly applied to employment contracts, particularly implicit contracts, where workers often have severe contracting problems. It has also been argued that expanded fiduciary duty shifts the legal analysis away from the actual employment contract, thus, taking judicial gap-filling out of its more appropriate framework of contract interpretation. Macey and Miller suggest that this deprives the court of any coherent basis for allocating rights and responsibilities, thus creating

275 Blair also cites caselaw which continues to invoke short term/long term goals rather than directly address the question of whose interests take precedence, citing for example Paramount Communications, Inc. v. Time Inc., Supreme Court of Delaware, 571 A. 2d 1140-1155 (Delaware 1990); supra, note 4 at 220.


277 Blair supra, note 4 at 220.

278 Macey and Miller, supra, note 1 at 404, 419. They argue that courts should only second guess a manager's decision if clearly made self-interestedly.
potential conflicts between express and implied rights of the actual bargains and the new rights created by the constituency statutes. They argue that to the extent to which new rights are allowed to trump contract terms, this would constitute a transfer of wealth to stakeholders from shareholders. Yet this argument regarding trumping of statute over contract is always made about collective agreements and remedial labour and human rights legislation. A more textured way of viewing this is that fiduciary duty could provide a baseline code of conduct for directors and officers vis à vis workers. While this would not prohibit parties from contracting for duties or obligations which improve on that baseline (just as unanimous shareholder agreements do), judicial inquiries into whether there has been a breach of fiduciary obligations would be quite a separate inquiry than that under contract or collective agreement interpretation.

What lessons can we draw from these criticisms? Perhaps any extension of fiduciary duty must articulate a hierarchy of duty or give normative direction to directors and officers as to how it is to be exercised or balanced. In the absence of such direction, the actions of managers may tend to focus on risk aversion, or alternatively, managers could be made less accountable for their decisions. Moreover, the obligation to take account of workers’ interests should not be discretionary, as it would likely lead to decision making which only selectively considers those interests. The discretionary nature of the American stakeholder statutes does leave shareholders and workers alike vulnerable to unaccountable decisions by managers. It is unlikely, however, that directors and officers would become entirely unaccountable because they are still subject to an entire regime of accountability to shareholders and of statutory liability. The third lesson is that any extension of fiduciary duty must be accompanied by enforcement mechanisms. Without a right of action and enforceable obligations, workers' interests will not be protected, and in some cases, neither will shareholders' interests. It may well be that the lack of standing to bring an

279 Ibid. at 420.
280 Ibid. at 421.
281 Parties to a collective agreement cannot contract out of the statutory requirements, although collective agreements can improve on statutory minimums. Miracle Food Mart-Steinberg Inc. (Ontario) and U.F.C.W. Local 175 & 633, unreported decision of Arbitrator Sarra (11 January 1997) and the cases cited therein.
action which plagues American stakeholder statutes does pave the way for managerial abuse. This, however, is easily remedied by building in a right of action as a means of enforcement.

iii. Towards a new definition of fiduciary duty

Fiduciary duty in the trust context has encompassed an obligation on the fiduciary to act "even handedly" in apportioning benefits and costs amongst beneficiaries. More often seen in cases of pension or other explicit trusts where trustees must make discretionary decisions, this concept may prove useful in counteracting fears that managers will be unaccountable by preferring the interests of one group over all others.

A definition of fiduciary duty that addresses the concerns discussed above is the following: *directors and officers must act in the best interests of the corporation, having regard to shareholders as contributors of equity capital and employees as contributors of human capital.* This would require managers to consider alternatives in decision making which might enhance the investments of both workers and shareholders. It would assist in the enforcement of implicit employment contracts by making managers less vulnerable to challenge by short-sighted shareholders. Further, if accompanied by rights of action, access to enforcement would keep managers more accountable. Just as trustees in a fiduciary relationship are required to be even handed in their decision making regarding beneficiaries, so too would managers be required to be even handed in their decision making with respect to shareholders and workers as the beneficiaries of the duty. Extension of fiduciary duty could also enhance employment contracts, by providing a more defensible reason for negotiating contractual and collective agreement provisions that enhance workers' protection.\(^{283}\)

Just as the courts have enforced the reasonable expectations of shareholders in determining the

\(^{283}\) Trebilcock and Howse, *supra*, note 38 at 767-8. They distinguish this argument from extension of fiduciary duty as alternative to contract.
scope of the fiduciary obligation, judicial guidance regarding the obligation to workers could be based on the same notions of reasonable expectations, grounded in the types of human capital investments made by workers in any particular circumstance. Further, just as courts have deferred to the business judgment rule in terms of particular claims by shareholders, presumably judicial interpretation of fiduciary obligation to workers would have regard to the same considerations, balancing business judgment with the obligation of directors and officers not to engage in oppressive or illegal conduct. As the Algoma Steel case in Part IV illustrates, the balancing of workers’ interests with business judgments has enhanced firm value at the same time as protecting workers’ interests. Unlike our current notions of fiduciary duty, however, the assessment of reasonable expectation would be based on explicit recognition of the value of workers’ equitable investments in the firm.

Some scholars have suggested that enhanced obligations to workers could create efficiencies by inducing firms to reduce the social waste from massive layoffs; however, these arguments appear to refer to overall societal efficient use of resources, as opposed to efficiency in the corporation.\(^{284}\) If firm specific efficiency is to be used as the measure of efficiency, as has traditionally been understood by law and economics scholars, the definition of fiduciary duty just proposed would never withstand the scrutiny of maximum efficiency analysis in terms of shareholder or corporate wealth. Efficiency, as it is currently understood, is measured by wealth generation, and thus, it is always efficient in the short term to seek out the lowest wages and to externalize adjustment costs.

Rather, efficiency needs to be recast to encompass maximizing firm efficiency within certain constraints. In other words, just as fiduciary duty would be recast to encompass acting in the best interests of the corporation having regard to both shareholders and workers as investors of capital, so too would efficiency be assessed by tempering traditional efficiency measures to have regard to equitable investments and claims of workers. Rather than seeking the "most efficient" course of action, as traditionally defined,\(^{285}\) directors and officers as fiduciaries of both

\(^{284}\) Singer, supra, note 188 at 496.

\(^{285}\) Maximizing shareholder value.
shareholders and workers might decide one of the most efficient courses of action. The notion that there are competing optimal decisions is well accepted in labour law. For example, the Ontario Labour Relations Board has held that bargaining units for collective bargaining purposes do not have to be the “most appropriate unit”, as long as they are "an appropriate unit", having regard to a number of economic and equitable factors.\(^{286}\) Similarly, corporate decision-making ought to encompass a choice between competing efficient decisions, having regard to competing investor interests. This concept would lead to a more even-handed approach to both efficiency and risk in terms of the two key stakeholders in the firm. This definition is more textured than a straight social distribution argument, and is more compatible with our current market economy than a social welfare standard of fiduciary duty. As the discussion below about relational boards and co-determination models indicates, any extension of fiduciary duty might be more easily accommodated if workers were given greater access to governance structures.

My reformulation of the fiduciary duties of directors and officers stops short of advocating expansion of the duty to all stakeholder groups such as the community or environmental interests. This is not to suggest that there is no merit in such an expansion. However, such a redefinition would require more consideration of the nature of the investments to the firm, of how stakeholder groups would be delineated in terms of accountability, and the nature of the obligations which might arise from such a duty. While I comment on the value of these stakeholders in my discussion on relational boards of directors at the end of Part III, whether fiduciary duty ought to be expressly expanded to encompass these groups is fertile ground for future study. Workers’ equitable investments have captured my attention because of the drastic dismantling of the statutory regime and because workers easily fit into the criteria of a fiduciary obligation that courts have recently set. Officers of the corporation have considerable scope for the exercise of discretion which affects the human capital investments of workers; they can unilaterally exercise that discretion to affect workers’ practical and legal interests upon corporate restructuring and other decisions; and workers are particularly vulnerable to the exercise of that discretion because of contracting problems.

B. Shareholders as Advocates of Obligations to Workers

i. Do shareholders have an interest in protecting workers?

No discussion of governance reform would be complete without posing the question of whether it is in the interests of shareholders to protect workers, and whether they have the capacity to act as advocates for such protection. Canada and the United States are quite similar in their formal corporate governance structures, notwithstanding their differences in share capital structures. While it would be interesting to speculate on whether a hybrid corporate governance model, with elements of "voice" and "exit", would affect the manner in which a corporation deals with the worker protection issues described above, there may be a statutory bar to individual shareholders exercising this kind of influence in Canada. The CBCA specifies that a corporation is not required to comply with a shareholder's request if it appears that the proposal submitted by the shareholder is primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes. This statutory language has been interpreted as giving corporate managers a right to refuse any shareholder motion relating to socially conscious issues. In Re Varity Corporation and Jesuit Fathers of Upper Canada et al, the Corporation sought and received a court order permitting the managers to exclude from a mailing to shareholders, a proposal by two religious shareholders that the company end its investments in South Africa for international human rights reasons. The court, while agreeing that apartheid was morally wrong and acknowledging that the proxy process was designed to enhance shareholder communication, nevertheless held that the content of the request, that of abolishing apartheid, fell

287 CBCA, supra, note 44, s. 137(5). Note that s. 99(5)(b) of the OBCA, supra, note 43, contains similar provisions, although not quite so expressly exclusionary.


289 The shareholders were the Jesuit Fathers of Upper Canada and the Ursuline Religious of the Diocese of London, Ontario. As a federal company, Varity was subject to the CBCA provisions that shareholders may require the company to circulate proposals and supporting statements. At the time, Varity was one of Canada's largest transnational corporations, and was also heavily invested in by both federal and provincial governments as shareholders.
squarely within the *CBCA* provision. Thus, the company could not be compelled to distribute the proposal.

The decision removed one of the few avenues for shareholders of widely held companies to possibly act as advocates. Governments had recognized barriers to shareholder participation in corporate decision making by enacting requirements that officers circulate shareholder communications. Yet by expressly creating such a broad exemption, shareholders are prohibited from using these rights to raise any issues of socially responsible corporate decision making. This is notwithstanding the fact that in the *Varity* case, the shareholder proposal was only framed as a recommendation to management, which if adopted, would have had no binding effect on managers. The decision has been reinforced in other cases such as *Greenpeace Foundation of Canada v. Inco Limited*.\(^{290}\) There, the court held that a proposal made by Greenpeace as shareholder, calling for installation of pollution abatement equipment, fell within the meaning of the *CBCA* provision, and thus, management was exempted from having to entertain the proposal. Thus, in Canada, there is currently no serious potential for shareholders in widely held companies to exercise any voice regarding workers' equitable interests. It is doubtful that resolutions advocating protection of the corporation's workers would pass the hurdle posed by the statutory prohibition, unless a court, on review of managers' decisions, could be persuaded that the proposal was framed in the best interests of the corporation and did not fall within one of the prohibitions.

Similar provisions regarding shareholder participation were enacted in the United States in the early 1950's, modified in the 1960-70's by judicial decision making in civil rights litigation.\(^{291}\) Since then, American legislated provisions for proxy participation have attempted to balance enhanced information and participation, increased accountability and social responsibility, with

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\(^{290}\) *Greenpeace Foundation of Canada v. Inco Limited*, (23 February 1984) (Ont. H.J.) [unreported]. The court found that the timing of the purchase of the shares, as well as a previous shareholder proposal were fatal to Greenpeace's application, but also made very clear statements to indicate that, in any event, the motion could not have been circulated because it related to an environmental cause.

rights of managers not to have their business judgments interfered with. Lazaroff points out that in the United States, there has been greater acceptance, both in statutes and in judicial interpretation, of the notion that corporations exist not only to maximize shareholder wealth, but to act as citizen of society. However, shareholder proposals often need to make an efficiency case in terms of prevention of costly lawsuits or public boycotts before they are successful. In the United States, even this notion of corporate citizen has not been extended to encompass employment matters. Further, given the diffuse ownership in American public corporations, exit is the only mechanism by which shareholders can collectively voice their disapproval of particular management direction. As Roe points out, through complex historical development, American shareholders diversified their holdings, but did not do so through intermediaries who might then have shared decision making power with managers, and thus, who might have been more directly responsive to shareholder opinions. Shareholders are unlikely to exercise the exit option in order to protect workers' human capital investment, and without collective exit, there would be no impact on governance decisions.

Since managers require the support of concentrated shareholder interests in terms of their own job security, it should be possible for shareholders of closely held Canadian corporations to influence managers to protect workers' interests. However, it appears unlikely that this controlling share power is in the hands of people willing to sacrifice short term profits for equitable labour practices. There is also an inherent conflict between shareholders and workers in terms of the amount of risk parties are willing to adopt. Shareholders, particularly in highly leveraged firms, will tend to opt for high risk strategies to the detriment of workers who are less risk prone, yet have more at risk.

292 Ibid. at 78.

293 Ibid. at 80-1. Thus, statutes are permissive in terms of charitable contributions and acceptance that corporations can take account of other stakeholders or consider ethical interests.

294 This is because of the "ordinary business exception". Ibid. at 83.


296 Trebilcock and Howse, supra, note 38 at 757.
ii. Will relationship investing by institutional shareholders solve the problem of stakeholder accountability?

More recently, the governance debate has focused on the potential role of the institutional investor. There is a vast range of institutional investors including banks, mutual funds, insurance companies, labour sponsored investment funds, and pension funds. Each of these entities comprise not only different interests, but different structures, investment priorities and different legislation regulating their investment and governance roles. Institutional investors, particularly in the United States, are increasingly engaging in "friendly monitoring", defined as monitoring of corporate strategy without seeking to manage or control. A full discussion of the potential for these shareholders to be advocates for employee protection is beyond the scope of this paper; however, it is important to highlight that pension funds and labour sponsored investment funds may well be sleeping giants in terms of their potential to influence governance reform.

Pension funds as institutional investors can exercise a reasonable amount of governance influence, should they so desire. A 1996 study on the "CalPERS effect" reported that almost ten years after the California Public Employees Retirement System (CalPERS) began targeting companies to improve performance and governance structures, the 62 firms targeted over that period showed stock returns 34% above the S&P index returns over 5 years, whereas these same companies were 85% below for the five years preceding CalPERS' involvement.

In Canada, there has been rapid expansion of pools of pension capital in the past decade, spurred by population trends, high contributions to pension funds, particularly in the public sector, and changes in legislation in terms of the ability of pension plans to invest. In 1996, pension funds

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298 Kessel, supra, note 3 at 2.

299 Roger Barton, supra, note 28 at 2.
and mutual funds had $180 billion dollars invested in Canadian shares. For example, the Ontario Teachers' Pension Plan currently owns more than $17 billion worth of shares in over 400 Canadian companies. Pension funds are required to own 80% of their assets in Canada. As Barton points out, Canadian investment possibilities represent less than 3% of global capitalization, and thus, there are extremely limited investment opportunities. Therefore, pension plans have limited opportunity for exit as a means of demonstrating dissatisfaction with corporate decisions, leaving governance strategies as one of the few options. The lack of liquidity should mean that "voice" or activism by institutional shareholders should increase.

Pension funds may be better able to actively push for employee protection in corporate decisions on restructuring, because their contributors represent workers similarly situated and because transaction costs are spread across numerous investments.

In the United States, pension funds are increasingly engaging in activism to protect workers' interests where activities such as training or board participation will increase wealth without significantly adding to risk. Some funds are considering adopting criteria to vote shares of portfolio companies to include the "total well being of the plan participants", i.e. in their capacity

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300 Ibid. at 3. That is 36 times greater than the 1975 rate of investment.

301 Plus another $30 billion in foreign stocks, equity-based derivatives, debentures and other fixed income securities. OTPP was created by legislation in 1990 as an independent corporation, a joint partnership between the Ontario government and plan members represented by the Ontario Teachers' Federation. Barton reports that the Plan is an insider (greater than 10% equity ownership) in only 30 companies, many of which are private (this representing less than 2% of the funds total assets). Ibid. at 18.

302 Ibid. at 5. The 20% limit on investments outside of Canada was a recent increase in the limit, resulting from pressures by pension plans to liberalize the restrictions. Such pressures to lift restrictions on domestic investment are likely to continue.

303 Coffee, John, "Liquidity v. Control: The Institutional Investor As A Corporate Monitor" (1991) 91 Col. L. Rev. 1277 at 1281. OTPP considers itself a strong advocate of corporate governance, but that view is typical of other institutional shareholders in Canada in that activism appears confined to issues such as preventing dilution of share capital and encouraging corporate disclosure. The plan's objectives are to create shareholder value for the beneficiaries of the pension plan, and it does not try to impose its philosophy on corporations in which it invests. Plan representatives suggest that Ontario Pension Benefits Act's prudence rule and common law fiduciary obligations, requires that they act in the best interests of the plan's beneficiaries. Barton, supra, note 28 at 5, 6.

as employees and community, not just investors or plan beneficiaries.\textsuperscript{305} However, Blair questions whether institutional investors can enhance governance of companies, because effective governance requires developing real expertise in the industry, an impossibility with the diversified portfolios of pension funds, and because the intervention of these shareholders merely adds a layer which effective directors should be performing.\textsuperscript{306} In Canada, pension funds are bound by English and Canadian court decisions which have held that their fiduciary duty is solely to the current beneficiaries, not employees as future beneficiaries.\textsuperscript{307} Thus, while pension funds such as the Ontario Municipal Employees Retirement Board (OMERS) and the Ontario Teachers Pension Plan Board are taking a more active role in monitoring corporate governance, to date, this has been limited to maximizing shareholder value.\textsuperscript{308} As long as funds view their governance role through this narrow lens, it is unlikely that these institutional shareholders will be advocates for the protection of workers, notwithstanding the fact that workers are the source of their capital and are their ultimate beneficiaries.

Institutional shareholders have highly diversified holdings, which enable them to encourage some risk taking. In contrast, employees in the portfolio firms of these shareholders cannot easily diversify risk or withdraw their human capital investment. As a result, there may be an inherent conflict between the interests of institutional shareholders and workers in terms of decision making, where diversified institutional investors have little incentive to consider employee harm when deciding whether to promote risky strategies in order to maximize wealth.\textsuperscript{309} This is unlikely to change unless there is a shift in the normative assumptions under which the institutional shareholder is operating. If one of the normative goals is to encourage firms to

\textsuperscript{305} Blair, supra, note 4 at 180, cites this as a priority of the Clinton Administration, citing Department of Labor New Releases, and citing K. Salwen and L. Scism, "Corporate Pensions Face Proxy Rules", Wall Street Journal (14 December 1993) at C.1.

\textsuperscript{306} \textit{Ibid.} at 182.


\textsuperscript{309} Blair, supra, note 4 at 189.
undertake decision-making having regard to workers' investments, then enormous potential exists for institutional shareholder activism. This assumes that there is access to information to enable such shareholders to monitor worker-related decision making and assumes the political will to act in such a role. Potential activism may depend on the quantum of investment and how diversified investments are. In Canada, as long as the above-noted legal restrictions on domestic investment exist, neither of these problems should apply. Yet it is unclear that pension plans will move in such a direction, absent legislative direction on an enhanced fiduciary duty which includes future as well as existing beneficiaries.

In the 1980's and 1990's there has been tremendous growth in the global economy, evidenced by highly mobile capital, reduced trade barriers, rapid decline in manufacturing as a share of total employment in developed countries and the global exchange of rapid technological development.\(^{310}\) One of the effects of globalization of labour markets has been the tendency of capital to move to low wage areas. While there is rigorous debate about the impact and importance of international trade on domestic labour markets, there is agreement that technological development and international trade combined have lowered wages of North American workers, particularly unskilled workers by staggering amounts.\(^{311}\)

One response by workers has been the creation of Labour Sponsored Investment Funds (LSIF's) which raise and invest capital in Canadian enterprises as a means of retaining jobs and economic activity in the country. The rapid growth of venture capital through LSIFs has been a phenomenon of the past two decades, offering an alternative to workers investing solely in the firm in which their human capital is invested, thus, allowing workers to diversify their risk.\(^{312}\)

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\(^{311}\) Freeman, \textit{supra}, note 310 at 18, 19. For example, from 1979 to 1993, the real hourly wages of American males with grade 12 education dropped by 20% and for entry level men with the same education by 30%. In Europe, where labour market institutions buttress the lowest wages, the result is high unemployment, another outcome of the same trend. The debate centres on whether the impact of trade liberalization is direct, or whether it is a combination of technological change and free trade that have acted to lower wages.

\(^{312}\) The origins of LSIFs are highly political; the Parti Quebecois granted the Quebec Federation of Labour tax benefits normally given to business in exchange for its Solidarity Fund raising investment capital among
The federal government supported the idea of raising capital among workers to invest in Canadian jobs, and facilitated the commencement of LSIFs across Canada. Ontario enacted the \textit{Labour Sponsored Venture Capital Corporations Act, 1992} in order to give effect to the federal initiative.\footnote{S.O. 1992, c.18, amended to become the \textit{Community Small Business Investments Funds Act, 1997}, S.O.1997, c. 43.} The original premise of LSIFs was that there would be one fund per province, managed by the central labour body. This is largely true except in Ontario where there are thirteen funds.\footnote{Kenneth Delaney, President and CEO, First Ontario Labour Sponsored Investment Fund, interviews (12 February 1998) and (12 June 1998). This is the artefact of two things, first, the central labour body in Ontario, the Ontario Federation of Labour, declined to start a fund during the late 1980's. That left a gap. Second, the legislation drafted by the Ontario provincial government omitted to define "sponsor" and as a result, there are LSIFs which are essentially "rent a Union" where the Union gets a generous payment for lending its sponsorship to private capital seeking to structure itself this way for tax reasons.} These LSIFs present alternatives in terms of raising capital, investment strategies, and ultimately governance change that may potentially recognize the human capital investment of workers. In 1995, LSIFs in Canada had 1.9 billion dollars in assets, with all their investments in Canada.\footnote{Canadian Labour Market and Productivity Centre, \textit{The Role and Performance of Labour Sponsored Investment Funds in Canada} (Ottawa: Canadian Labour Market and Productivity Centre, 1995) at 6-9.} 

For example, First Ontario Labour Sponsored Investment Fund is a relatively new fund, and after three years, its 1998 assets are more than 30 million dollars.\footnote{The management company is wholly owned by the five sponsoring unions and housing co-operative, including the United Food and Commercial Workers Union, the Chemical Energy and Paperworkers Workers, the United Steelworkers of America and the Power Workers Union. Delaney, \textit{supra}, note 314.} The fund is not publicly traded, although the widely held nature of its shares bring it within the purview of the \textit{Ontario Securities Act}.\footnote{OSA, \textit{supra}, note 32.} About 60 percent of capital is raised on the shop floor of member organizations by workers trained to sell shares, and 30% is raised by direct sales through credit unions.\footnote{Only 10\% is raised through sales by private brokerage companies. The idea is to avoid expensive brokerage costs, and to use the capital elsewhere. The Securities Commission has approved the course used to train workers, to be used to keep jobs and firms in Quebec. The Solidarity Fund had assets of more than $1 billion in 1994, the largest venture capital fund in Canada. Jack Quarter, \textit{Crossing the Line: Unionized Employee Ownership and Investment Funds} (Toronto: James Lorimer \& Company, 1995) at 143.}
purpose of the Fund is to invest in small to medium size firms with a "plurality of employment" in Ontario.\textsuperscript{319} By legislation, investment must be in firms with fewer than 500 employees and less than $50 million in assets.\textsuperscript{320} The First Ontario Fund holds stock in a number of firms, and while employees of those firms hold some First Ontario shares, the strategy is to spread workers' risk away from the specific firm in which their human capital is invested. The Fund invests almost exclusively in closely held companies and receives a seat on the board of directors as a requirement of investment.\textsuperscript{321} The goal of the Fund is to maximize value over a particular time frame, usually five years, thus retaining a fair degree of liquidity. The First Ontario Fund makes two kinds of investments. The first type includes strategic passive investments aimed at job retention or creation where a firm is economically viable.\textsuperscript{322} In this respect, the Fund will not invest in firms with minimum or low wage practices, or with poor workers' compensation, environmental or labour relations records.\textsuperscript{323} These are normative choices combined with sound business practices. The second type of investment is pro-active, where the Fund looks for opportunities to finance employee buy-outs or to purchase an interest in co-operatives to promote alternative ownership and governance which takes account of workers' human capital investments.

For a number of LSIFs, investment possibilities are assessed through the lens of equitable

\footnotesize{workers to sell these shares, and there is expert in-house review of sales to ensure workers can afford the investment. Delaney, supra, note 314.}

\textsuperscript{319} \textit{Ibid.}

\textsuperscript{320} To date, investments by First Ontario are directed at firms with 75 employees on average, and assets in the range of $30 million. The LSIF, through covenants and warranties, ensures monies for investment are not used to pay dividends or buy stocks. \textit{Ibid.}

\textsuperscript{321} Except one publicly traded company it has invested in. \textit{Ibid.}

\textsuperscript{322} In such investments, financial structure is easiest to correct, managerial structure is more difficult and requires hands on control, and markets cannot be remedied. \textit{Ibid.} See also “Investment First Ontario at Work, Working People's Money at Work” (Toronto: First Ontario, January, 1998) at 2; Prospectus First Ontario Labour Sponsored Labour Fund Ltd. (23 December 1997), (Toronto: First Ontario).

\textsuperscript{323} For example, it turned down an investment opportunity where the firm was benefiting from Bell Canada outsourcing of higher paid, unionized jobs. Delaney, supra, note 314.
employment practices, a commitment to a healthy and safe workplace, and good labour relations. The First Ontario Fund conducts informal social audits as part of its due diligence. While it does not require the firms it invests in to be unionized, prior to investing, the Fund will assess the firm's labour relation practices, search for safety orders, records of unfair labour practices and human rights issues or statutory violations. These investment practices illustrate the potential for governance reform that begins to take account of workers' equitable investments.

LSIFs also offer an alternative route to workers gaining access to firm decision making, which is particularly important since it is difficult to negotiate or strike over governance reform. For example, in considering investments, Manitoba's Crocus Fund has a stated objective of promoting employee participation in corporate governance and management; it also supports, where feasible, investments that will increase employee ownership. Thus, institutional investors which are funded by workers' contributions or investments may be a very effective vehicle to be utilized in protecting workers' human capital investments in firms. To date, this potential has not been fully realized, the reason for which is fertile ground for future study.

C. Alternative Theories of Board Structure

Studies have indicated that there is a direct relationship between effective governance and investor confidence in capital markets. Current boards of directors have been criticized for their failures of governance, attributing failures to: information problems; board culture as a barrier to constructive criticism; lack of outside independent directors; oversize boards; and statistical violations. These studies were in response to increasing public concern regarding governance in light of the large number of corporate failures. Report of the Toronto Stock Exchange Committee on Corporate Governance in Canada, supra, note 51. Recommendations implemented now require Canadian incorporated public companies to disclose their approach to corporate governance in their annual reports or information circular.

324 Ibid.
325 Quarter, supra, note 312 at 144, 145, 160. The Crocus Fund is sponsored by the Manitoba Federation of Labour and has assets of 26 million dollars.
326 These studies were in response to increasing public concern regarding governance in light of the large number of corporate failures. Report of the Toronto Stock Exchange Committee on Corporate Governance in Canada, supra, note 51. Recommendations implemented now require Canadian incorporated public companies to disclose their approach to corporate governance in their annual reports or information circular.
lack of training for directors;⁴³⁰ and the improper influence of legal liability which focuses on risk reduction instead of maximizing value.⁴³¹ Different theories of board structure propose different strategies for governance. Agency cost theory relies on product and labour markets to discipline managers, complemented with board composition that uses expert directors to reduce agency costs and non-board strategies such as trying to align managers interests with shareholders through stock ownership.⁴³² Its contribution to board theory is that it draws attention to the different mechanisms available to discipline managers to act in the best interests of the corporation and its shareholders.⁴³³ While agency cost theory explains how markets discipline managers to adopt efficient decisions, it ignores many corporate realities such as norms which support existing board practice, the relative power and influence of inside versus independent directors, and legal and governance changes promoting independence of directors.⁴³⁴ Dallas reports that contra-managerial hegemony theory, also a board monitoring theory, differs in that it seeks legal regulation that would help create independence of boards. Legal regulation would accomplish this by ensuring access to information independent of managers, setting out procedures for nominating board members, and addressing time and cultural constraints on the

Journal of Finance 862 at 863.

328 Ralph Shay, "Regulatory Perspectives: Who is Ultimately Responsible for Corporations?" (Canadian Bar Association Conference on Corporate Governance: A National Perspective, Vancouver, 1997).

329 Barry Reiter, "The Use of Outside Directors: Recruiting and Maintaining an Effective Board", (Canadian Bar Association Conference on Directors' Liability, Toronto, June, 1996, revised July 1997), at 13. [Cited with permission].


331 Jensen, supra, note 327 at 864-5.

332 C. Bathala and R. Rao, supra, note 23 at 65-67; see also E. Fama and M. Jensen, "Separation of Ownership and Control" (1983) 26 Journal of Law and Economics 327 at 332; Dallas (1996), supra, note 10 at 8-10. According to agency cost theory, where less costly methods are available to reduce agency costs, boards need not perform a conflicts monitoring role.

333 Dallas (1996), supra, note 10 at 23.

334 ibid. at 8-10.
ability of board members to monitor managers.\textsuperscript{335}

What these theories share is a premise that the primary purpose of boards is to monitor managers. Increasingly, however, it is suggested that boards shift from their traditional role of supervising managers, to a more diverse role in strategic planning, risk assessment activity, and provision of broader board representation as a means of ensuring sensitivity to stakeholder interests.\textsuperscript{336} This diversified role may enhance overall corporate financial performance by explicitly recognizing the corporation's relationships with various stakeholder groups, including shareholders, creditors, workers and the community. Scholars and practitioners have suggested that corporate behaviour is influenced by coalitions of different corporate constituencies, where stakeholders interact in an economic, cultural and social environment.\textsuperscript{337} Thus, board activity can no longer be confined only to occasional review; both independent directors and new committee structures are needed to evaluate and continuously improve governance.\textsuperscript{338} Many proposals for board reform, however, ignore or only tangentially refer to workers as stakeholders who have a residual interest in the firm. This is largely because of the normative assumptions, discussed earlier, regarding the shareholder wealth maximization paradigm. Board theory will not accord a legitimate role for worker or union participation until there is a broader understanding of workers' equitable investments in the firm.

Van Wezel Stone advocates changes to the collective bargaining regime to allow an emphasis on union participation in strategic corporate decisions, arguing that unions should be allowed to use bargaining power in a governance role, consistent with the nexus of contractual relations view of

\begin{itemize}
  \item \textsuperscript{335} \textit{Ibid.} at 7. See also Laura Lin, "The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence" (1996) 90 Northwestern U.L.R. 898 at 915.
  \item \textsuperscript{336} Reiter, \textit{supra}, note 329 at 3. One proposal is to have a lead director, who is an independent board member who provides "unbiased leadership" in issues of board self-assessment, and access for individual directors in order to address crucial governance issues.
  \item \textsuperscript{337} Dallas (1996), \textit{supra}, note 10 at 10. Mansell reports that in his practice of environmental and corporate law, the most powerful influence on directors in terms of environmental liability is often the normative influence on their actions by family members and social relations. He suggests that one cannot underestimate the influence of these interactions on decision making, \textit{supra}, note 269.
  \item \textsuperscript{338} J. Lawson, "Management's Responsibility on Advising the Board" (Montreal: Royal Bank, 1997) at 4, 8.
\end{itemize}
the corporation. This view, however, accords a governance role contingent on the bargaining power of the union. Under such a model, any effectiveness at the board level would depend on the union's bargaining strength, and thus, would be vulnerable to the same kinds of problems as discussed above in terms of contracting as the vehicle to protect workers' investments.

In contrast, Lynne Dallas proposes a relational board theory in which the board of directors is utilized as a bridging strategy through which the corporation can enhance its various relationships with stakeholders. Value is added to the corporation by extending board memberships, thereby improving access to vital information and resources, mediating the relationships of various stakeholders, and reducing transaction costs. Dallas describes the board of directors as a bridging strategy of co-optation, contracting and coalescing. "Co-optation" is a strategy by which board memberships serve to: provide resources and skilled advice to the corporation; provide legitimacy in the eyes of the relevant stakeholders by fulfilling needs for representation by gender or community; support through identification with the corporation; as well as the more traditional role of monitoring and direction. Dallas points to empirical data which suggests that the board is an effective means of acquiring resources and reducing environmental uncertainty. In discussing the power relationships of boards, Dallas rejects both formal co-optation (designed to neutralize a stakeholder by offering a board position) and control co-optation (where one resource provider has power such that she or he can direct some of the affairs of the corporation). She favours an "equal power board relationship" in which board membership reflects a reciprocal relationship where information is exchanged and

339 Klare, supra note 94 at 395; Van Wezel Stone, supra, note 69 at 376.
341 Ibid. at 10.
342 Contracting is used by corporations to reduce future uncertainty by agreeing in writing for the exchange of particular goods or services or co-ordinating future behaviour. Coalescing comprises all those arrangements where there is a formal mechanism such as merger or joint ownership and control is used to reduce uncertainty. Ibid. at 11.
343 Ibid. at 14.
344 Ibid. at 21. See also Lin, supra, note 335 at 962 and the studies cited therein.
advice is given in exchange for board memberships which entail particular rights and privileges. She argues that relational board theory is not dependent on efficient markets, profit maximizing behaviour by firms, or equal bargaining strength among stakeholders. Rather, corporations undertake a variety of strategies to reduce uncertainty and increase autonomy and discretion, and that board composition as one of these strategies must take account of the context in which the corporation operates.

This theory of relational boards is not dependant on the stakeholders having an equity interest in the corporation, but does recognize that there are skills and resources that stakeholders such as workers or environmental activists can contribute. For those constituencies, access to decision making has traditionally been limited to strategies such as: pressing the corporation to act by initiating complaints under remedial statutes, the litigation for which is very expensive and time consuming; contracting for particular protections or access to decision making, the inadequacies of which I have discussed above; or public action such as boycotts, media or political pressure. This latter strategy also often results in acrimonious and expensive litigation as corporations respond by seeking injunctions for picket lines or gag orders for consumer boycotts. The determination with which stakeholders seek to influence decision making through all these strategies may indicate that they have an interest in the decision making of the corporation such that considerable time and energy is expended trying to bring their concerns to its attention.

Thus, the notion of board representation of stakeholders who have an interest in the corporation, including workers, is an economic and policy choice that could simultaneously bring a conflict resolution mechanism to the corporation and enhance corporate governance. Stakeholders appointed to the board would be working within our existing legal framework, and thus, would

\[345 \text{Ibid. at 15.} \]
\[346 \text{Ibid. at 24.} \]

\[347 \text{For example, in the forestry industry, it might be appropriate to appoint a director representative of the environmental community. Clearly, not every individual with a stakeholder interest would be willing to participate at the Board level, but such an appointment could successfully be accomplished without either improperly neutralizing the individual or creating problems of rancour within the board decision making structure.} \]
be taking on fiduciary obligations as a director. Decision-making would consider the interests of the stakeholder constituency, but the director would be legally bound to make decisions with a view to the best interests of the corporation. For worker-directors, that would mean decision making which takes account of workers’ human capital investments, but with a view to the best interests of the corporation. While this would be an easier task for worker-directors if fiduciary duty were redefined as I proposed in Part III, even without such a recasting of fiduciary duty, there is utility in appointing worker-directors. Trebilcock and Howse, for example, have suggested that employee board membership unlinked to ownership would give workers a fuller understanding of the economic status of the corporation; thus, where there is proposed restructuring or shut down, unions are better able to negotiate notice and severance provisions.348

Relational boards would provide a more effective conflict resolution mechanism. Directors representative of workers and other stakeholders with interests in the corporation could minimize conflict by the exchange of information and decision making which takes account of multiple interests; by early identification and intervention in some disputes with key stakeholder constituencies; and by contributing skills to the corporation which allows it to resolve these matters before they reach the point of litigation or consumer boycott. For example, a problem of workplace racism which managers have ignored, might be identified by a worker-director or by human rights advocates having access to a representative on the board. Early resolution would not only reduce ongoing liability, but might result in systemic responses to prevent future problems and could enhance the status of the corporation in the eyes of a relevant constituency. This is not to replace access to rights based enforcement, but rather, to provide an alternative mechanism. While all conflicts would not be resolved this way, early identification and intervention in situations where managers have been remiss in fulfilling statutory obligations could assist considerably in mediating relationships of the corporation with stakeholders such as workers. My discussion of Algoma Steel Corporation in Part IV illustrates that the board has a useful role in mediating relationships of the corporation.

The second contribution a relational board can make is enhanced governance. Participation of

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348 Trebilcock and Howse, supra, note 38 at 766; this assumes however, the bargaining power to achieve this.
workers and other stakeholders ensures that their interests, both legal and normative, are taken account of in decision making at the board level. For example, a decision by a firm to enter a particular market abroad might be flagged by a human rights nominee director because of likely adverse economic consequences due to international human rights boycotts. Similarly, a business plan proposed by management could benefit from the informational capital brought by worker-directors in terms of production processes or idiosyncrasies that may defeat the plan or skills deficiencies that must be corrected. Again, the discussion of Algoma Steel in Part IV highlights this kind of contribution that worker-directors make to corporate decision making. Further, workers are able to perform the traditional board role of monitoring managers, yet through a different lens, i.e. from the perspective of the plant floor or front line service delivery.

Thus, unlike agency cost theory, relational board theory allows for a multifaceted role for the board to enhance corporate performance. The relational board model could encompass the participation of workers on boards as a strategy to recognize their equitable interest in the firm, to assist in meeting fiduciary obligations to workers and shareholders as investors, and to mitigate harms caused by the dismantling of state protection.

One of Dallas' more recent proposals is the dual board, in which one board comprised entirely of independent directors would deal with conflicts issues, compensation of senior executives, duty of loyalty issues, monitor auditing practices, and compliance with legal and ethical standards of the corporation and its officers. The second board would make the business decisions of the corporation, performing traditional board functions of monitoring the business decisions of managers, reviewing and approving major strategic plans, financial objectives and major disinterested corporate transactions. Dallas acknowledges that studies have produced mixed results as to whether use of outside directors enhances legal and ethical conduct by corporations.


350 Ibid. at 114, 122-6. Dallas' proposal would reduce conflicts between the two boards by creating liberal access to information and communication, and by providing legal avenues for redress. She points out that under the German dual board structure, one board can sue the other, although in reality, this rarely happens.
However, she concludes that because inside directors feel the competitive pressures of business more acutely, resulting in some unethical behaviour, that independent directors are better positioned to monitor issues of corporate responsibility.\footnote{Ibid. at 122. She relies on a study undertaken by S. Zahra, "Unethical Practices in Competitive Analysis: Patterns, Causes and Effects" (1994) 13 J. Business Ethics 53.} The dual board structure would be complemented with board ombudspersons, distinguishable from traditional corporate ombudspersons who are usually appointed by the CEO and who deal primarily with employee-manager relationships.\footnote{As of 1993, over 500 American corporations had corporate ombudspersons who often operate confidentially within the corporation to resolve disputes as they arise between employees and managers. Ibid. at 131.} The board ombudsperson would be appointed by the boards and be independent of management. Her or his task would be to assist the boards in performing conflicts monitoring, including facilitation of communication, conflict resolution between the dual boards, serving as an early warning device by providing an information outlet for whistleblowers regarding conduct of the corporation, and early identification of unlawful or unethical activity.\footnote{Ibid. at 134.}

The difficulty posed by this proposed dual board is that any separation of the boards could result in managers withholding information from the board on which workers participate. This has happened with the dual board structure under Germany's co-determination model, which I discuss below. The theory also assumes that workers contribute little or nothing to the business decisions of the corporation. Further, although Dallas envisions full access to information between the boards and that the board ombudsperson would play a conflict resolution role, she suggests that, ultimately, any unresolved conflicts would go to the courts by one board bringing a civil action against the other.\footnote{Ibid. at 128.} Although she suggests that there are factors which would militate against this outcome, such as shareholder accountability and clear allocation of tasks between the boards, this part of her theory appears problematic. Corporations maybe unwilling to opt for the dual board model because of the risk of litigation and judicial decision making for decisions which it considers properly internal to the corporation. However, this aspect of the
theory could be amended to provide for an internal, binding dispute resolution mechanism, such as recourse to private arbitration, or alternatively, to some sort of shareholder decision making not unlike that required for fundamental decisions. This latter option would create a mechanism by which shareholders would be alerted to conflicts or problems between boards, which might in turn prevent some illegal or unethical decision making before it occurred. It could also be more cost effective than litigation and would be more normatively acceptable to the principal decision-makers on both boards.

Stakeholder participation on boards is not a panacea for problems of corporate governance or economic performance of the corporation. Many of the problems currently faced by outside directors, in terms of influence of inside directors and access to information, still need to be addressed. However, worker-directors can contribute valuable information and advice, and relational board theory highlights the need to rethink governance structures based on who has what at risk in the corporation. If corporations are to recognize workers' equitable investments in the firm, then meaningful participation at the board level should be accepted as enhancing the decision making and thus the overall value of the corporation. Further, if one accepts my definition of an expanded fiduciary duty, worker participation on boards would assist in identifying the scope of the duty and could reduce transaction costs in board decision making which must take account of the investments of both workers and shareholders.
Worker buy-outs, employee purchase of share capital, and worker representation on boards all present alternatives to some of the problems outlined in Parts I, II and III regarding contracting problems and declining state protection. Although there continues to be little quantitative economic data, there is growing experience with these options, and scholars have pointed to different kinds of problems they raise. For example, there has been a proliferation of Employee Stock Ownership Plans (ESOPs) in the United States; it is estimated that by the year 2000, more than 25% of companies on the New York and American Stock Exchanges will be more than 15% employee owned.\(^{355}\) However, where employees invest in shares of their own company through ESOPs or other employee share purchase plans, they risk not only their human capital but additional capital which they could invest elsewhere to diversify their risk.\(^{356}\) Whether workers purchase equity with their pension funds contributions, savings or through wage concessions, if the firm fails, they are likely to lose both their fixed and residual capital claims.\(^{357}\) ESOPs are increasingly used to supplant retirement programmes, and the use of pension monies by workers to purchase stock, results in workers disproportionately increasing their risk compared to other stakeholders.\(^{358}\)

Moreover, share ownership through ESOPs and similar plans most often do not pass voting rights through to workers on an equitable basis.\(^{359}\) Even though employees believe they have

\(^{355}\) Hyde, supra, note 191 at 736.

\(^{356}\) Ibid. at 749.

\(^{357}\) Trebilcock and Howse, supra, note 38 at 778.

\(^{358}\) Hyde, supra, note 191 at 745, 747. Often such share purchase plans are not voluntary, and thus, the employee is required to buy-in, the ESOP acting as a savings plan.

\(^{359}\) Henry Hansmann, "Worker Participation and Corporate Governance" (1993) 43 U.T.L.J. 589 at 599; see also, Quarter, supra, note 312 at 116.
purchased a business or an interest in the firm, they find that control, both day to day management and fundamental decisions, is still vested entirely with management. Trustee who typically vote the shares for employees, are not accountable to these employees other than a broad notion of fiduciary duty to them as shareholders. Hyde suggests that trustee votes often align with managers, although courts have begun to develop caselaw regarding their duty to act in the interests of the ESOP beneficiaries. Thus, ESOPs cannot be equated with workplace democracy or participatory structures, and have been found to have little impact on work organization. Further, while share ownership may induce employees to work more efficiently, studies have found that employees have accepted ESOP and worker participation models and have increased the firm’s productivity, only to encounter massive layoffs because there is no governance mechanism in place which acts to protect their human capital investment. O'Connor discusses the low trust relationship such models have generated, further reinforcing the adversarial nature of the relationship between corporations, unions and the employees they represent.

The difficulty with accurately assessing the potential impact of worker ownership models is due to the fact that these options are rarely exercised except when the firm is on the verge of bankruptcy and needs an injection of capital (both equity and human capital), as well as internal restructuring, in order to create the efficiencies needed to survive. This is not necessarily because workers do not have interest in firm ownership. Rather, they do not have the resources to purchase healthy firms at their market price. When firms are in trouble, their market price is

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360 Hyde points out that in the United States, employee share ownership is an artefact of tax laws making employee owned businesses very appealing, because the owners of private corporations can sell to an ESOP and be exempted from taxable income on the proceeds. Further, ESOPs serve to insulate managers from other takeovers. Hyde, supra, note 191 at 731, 739.

361 Ibid. at 736.


363 O'Connor, supra, note 29 at 905.

364 Ibid.

365 Delaney, supra, note 314.
severely discounted, bringing them within the economic reach of workers. Further, because of
the normative assumptions discussed above, corporations and their officers are unlikely to
embrace governance reform that includes participation of workers. This is often only considered
at the point of insolvency, when employees and unions can exercise negative bargaining power to
initiate those changes.

In Germany, in comparison, corporate structures operate under a co-determination model, with
participation structures depending on firm size and the particular sector in which the firm
operates. For example, labour occupies one half of the seats on the Aufsichtsrat (supervisory
board) of steel and coal corporations.366 At first glance, these governance structures appear to
allow for corporate governance that reflects the interests of worker stakeholders. The
supervisory boards appoint managers for fixed terms, and while these managers handle ongoing
corporate decisions, major decisions are ostensibly required to be approved by the supervisory
boards. However, Roe suggests that managers under the German co-determination model
withhold information from the supervisory boards, in order that labour not gain an unfair
advantage, resulting in managers exercising greater power than would otherwise be possible.367
He suggests that while there are efficiencies, there is also co-optation of workers sharing the
boardroom, such that intermediaries such as banks have become more powerful; further,
takeovers or rapid organizational change are impeded if there is a negative impact on
employment.368 Labour's effectiveness is criticized as being limited by its narrow perspective,
something which would likely not occur in a model where labour-appointed directors had a
fiduciary obligation to act in the best interests of the corporation, having regard to both worker
and shareholder interests. The German model raises the question of whether there can be
effective co-determination, such that decisions are not based solely on job security and such that
third parties do not become the power brokers in decision making.

366 Roe, supra, note 295 at page 176; workers have one third the seats for corporations greater than 500
employees; full parity for steel and coal companies and quasi-parity for corporations employing more than
2,000 employees.

367 Ibid. at 176, 177.

368 Ibid. at 214.
The German model also encompasses other aspects of co-determination, including "work councils" in which decision making processes on the shop floor allow consultation and information sharing. In the North American context, Weiler has advocated mandatory employee participation councils, particularly for non-unionized workplaces, where employers would be required to share information and consult on a broad range of issues from wages, hiring and discipline decisions, to technological or organizational change. However, this model, while possibly reducing workplace discontent, does not accord any real bargaining power or normative weight in corporate decision making. More likely, these structures are used to identify micro-efficiencies in shop floor practices. However, Trebilcock and Howse respond that even if models advocating work councils or self-directed teams are not full co-determination, they still result in a better understanding by workers of the economic situation of the firm and will likely result in more informed and complete bargains between workers and managers.

Co-determination can result in enhanced decision-making because another party with equitable investments in the firm is participating in decision making. Board members who represent the narrow interests of shareholders are unlikely to be able to fully understand and weigh the effects of the firm's actions on workers as human capital investors. Arguably, shareholder representation exclusively can result in inefficient decisions in terms of maximizing the wealth creation of the firm, because decisions have not weighed the benefits and risks to workers as well as shareholders. While this kind of co-determination or relational board theory is an easier leap if workers own stock in the corporation, share ownership increases workers' investment and thus risk, but lack of ownership does not detract from the equitable interest which workers have in the firm.

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370 Trebilcock and Howse, supra, note 38 at 771, 776-8. They argue that even with minority board representation, workers can perform a whistle blowing function, deterring managers' actions that are detrimental to the interests of the firm and workers. They suggest that debt and equity markets will function to discipline worker/managers, in that unjustified wage increases will result in shareholder exit or increased debt costs.
The worker buy-out of Algoma Steel is one example of how a combination of collective agreement, traditional business restructuring tools, and innovative governance structures were used to save a corporation on the verge of bankruptcy. It highlights how a number of issues raised in this paper can be resolved, as well as posing the interesting question of how to retain governance gains in the wake of a successful turn around of the corporation.

A. Algoma Steel Corporation’s Co-determination Model

The corporate governance changes effected as the result of a negotiated worker buy-out of Algoma Steel Corporation illustrate the positive gains to the viability of a corporation, achieved through the structural recognition of workers’ investments in the firm. Some of the ideas explored earlier, such as the merits of relational board theory and the notion of taking account of both shareholder and worker interests in corporate decision making, are an explicit part of the governance reform undertaken by the Corporation. Other ideas that I have proposed, such as a more textured definition of fiduciary duty, are implicitly present, but not yet explicitly recognized. This, as I discuss, is likely because of the current limits placed on fiduciary duty under corporate law. The Algoma Steel co-determination model illustrates that corporations can recast their roles to take account of both shareholder and worker equity and human capital investments in the firm, and can accord workers a role in corporate decision making as part of that recognition.

As in many situations of employee buy-outs, the worker buy-out of Algoma Steel Corporation in Sault Ste. Marie, Ontario occurred in 1992 when the company became insolvent.371 Algoma faced a huge long term debt load, increased global competition, removal of trade barriers, unfavourable exchange rates, competition with plastics and aluminium substitutes, reduced domestic consumption, and rapid technological changes in steel production.372 Substantial capital investment was needed at a time when prices were flat and market share declining, yet the

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371 USWA, supra, note 88 at 1.

372 Quarter, supra, note 312 at 108.
company's capital expenditures were insufficient to maintain existing technology, let alone upgrade to become competitive.  

The Corporation sought protection under the Companies' Creditors Arrangement Act in February 1991. At the time, the debt of Algoma Steel was $700 million with $75 million in annual carrying costs. The impact of a shut down on the northern Ontario community in which the Company was located would have been a loss of 6,000 direct jobs and an estimated 23,000 spin-off jobs. Lost revenues and displacement costs to governments were estimated at $550 million. Labour relations had been very strained for a number of years, exacerbated by a 112 day work stoppage in 1990 as the result of downsizing, contracting out, severance payments and the question of indexing pensions.

The CCAA process affords an insolvent company an opportunity to propose a restructuring plan acceptable to its creditors, hopefully to allow the company to become viable once again and avoid bankruptcy. The initial restructuring proposal proposed by Algoma's parent corporation Dofasco, included shutting down three of its four production lines, closing its iron ore mine and sintering facility, cutting 2000-3500 jobs immediately, with additional substantial labour force reduction by 1995, reduction of the Company's $250 million pension liability by converting most of the liability into shares, and seeking exemption from liability for environmental clean-up estimated at between $75-200 million. Workers were to be given minority share holdings in exchange for major wage concessions. The Steelworkers Union, who represented the workers, rejected the initial proposals for restructuring, charging that it was a strategy to "eviscerate the

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373 Capital expenditures in 1990 were 11.5 million dollars. *Ibid.* at 111.

374 R.S.C. 1985, c. C-36 [hereinafter *CCAA*].

375 At the time of filing under the *CCAA*, the major creditors were four large banks. Delaney, *supra*, note 314.


377 Quarter, *supra*, note 312 at 111, the Union called it a lock-out, management had characterized it as a strike.

plant, employment and the community".379

The initial restructuring proposal posed many of the above-cited problems of workers and the community being required to bear a higher degree of risk in corporate restructuring. Massive downsizing, reduction in product lines, little capital expenditure, and reduction of liability through a conversion of debt and liability into shares, left a number of stakeholders highly vulnerable. Employees were asked to take substantial wage cuts in exchange for shares, but without any voice in decision making at the board or the shop floor level. At the same time, more than one third of the workforce was to be cut, with additional cuts the following year. Employees were being asked to contribute their human capital and equity capital in exchange for a work environment that continued to be hostile to employees and high risk in terms of job security. Moreover, the proposed exchange of pension liability for share holdings would exacerbate this situation of workers tying up much of their human and equity capital in the firm. The Corporation wanted to reduce its exposure to liability under the provincial government's Pension Benefits Guarantee Fund.380 The proposal would have shifted risks previously borne by the Corporation to the workers, placing their future income at risk as well. The community was also being asked to acquire a higher portion of the risk. There were additional costs to the municipal tax base from the reduction of operations, loss in purchase power of workers, loss in taxes, and increased numbers of people who would likely become dependent on municipal services such as social assistance.381 In addition, the community would bear the risk of any outcomes from the waiver of environmental clean-up liability that the Corporation was seeking from the provincial government.

i. **The Steelworkers' Alternative Restructuring Plan**

The United Steelworkers' previous experience with worker buy-outs in the United States had

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381 *Ibid.* at 122. Algoma Steel was at this time 20% of the city's tax base.
taught it that without change to governance practices to allow workers to participate in business decisions, they are left with much of the risk and little protection.\textsuperscript{382} The Union decided to offer its own restructuring proposal for Algoma and to take leadership in bringing the stakeholders together. This was extraordinary in that most worker buy-outs are typically initiated and co-ordinated by managers, with employees buying in.\textsuperscript{383} The Union used industry and banking experts with experience in American worker buy-outs to craft an alternative restructuring proposal based on a sound business plan.\textsuperscript{384} The Union's objective was two-fold, to create wealth for investors, but equally, to expressly set an objective of sustaining jobs for members.\textsuperscript{385}

The Union effectively used its negative bargaining power, the withholding of its agreement of any restructuring plan that would completely devastate its workforce, to push parties to use its restructuring strategy as the basis of discussions.\textsuperscript{386} While far from enamoured with the Union's initiative, the major creditors agreed to participate because it was a better option than bankruptcy.\textsuperscript{387} The Corporation needed government guarantee of an operating line of credit above the $180 million already secured, and the banks understood that the then NDP government would not consider it without the Union at the bargaining table.\textsuperscript{388} A negotiating protocol was

\begin{thebibliography}{9}
\item Delaney, \textit{supra}, note 314.
\item Hansmann, \textit{supra}, note 359 at 599.
\item Steve Boniferro, Area Co-ordinator, Northwestern Ontario, United Steelworkers of America, interviews (28 January 1998) and (11 June 1998).
\item Dofasco's reaction to the Union's proposal was that it wanted to walk away entirely from its investment. The Union insisted that the Company couldn't, because it would still have the pension and environmental liabilities even if it abandoned its investment. It was this statutory liability and intervention of the Court that forced Dofasco to the bargaining table. Delaney, \textit{supra}, note 314.
\item Ken Delaney points out that it wasn't until the banks realized that the Steelworkers would rather watch the plant close than accept a restructuring that gutted the workforce and imposed major wage concessions without governance changes, that it agreed to bargain. Then, a 40\% write off appeared more attractive than a complete write off of their investment. \textit{Ibid}.
\item Quarter, \textit{supra}, note 312 at 119.
\item Delaney, \textit{supra}, note 314. Interestingly, a coalition of business people, church, and community groups formed the Algoma Community Action Team, which initially offered an independent source of information for the community, but then lobbied for adoption of the Union's restructuring plan as the one which made the most economic sense for the community. Quarter, \textit{supra}, note 312 at 123.
\end{thebibliography}
established and a co-determination structure agreed to after the intervention of a General Division Judge under the case managed process envisioned by the CCAA.\(^\text{389}\) This process envisions that the Court will supervise any restructuring proposals and keep parties accountable for their statutory obligations during the process. The negotiations were also assisted by a new CEO willing to negotiate with the Union, and a restructuring expert appointed as Chair of the Board and Chief Restructuring Officer, approved by all the major stakeholders.\(^\text{390}\)

The terms of the takeover were elaborate, involving a partnership arrangement between workers, managers, creditors and the Ontario government as loan guarantor.\(^\text{391}\) The corporate restructuring was based on eight principles: that Algoma must restore all lines of business to profitability;\(^\text{392}\) that employees were to become majority owners; that the government would enact legislation to facilitate and expedite worker ownership;\(^\text{393}\) that there be an injection of capital into a programme to upgrade the plant; that the government would provide bridge pensions to facilitate workforce reduction without layoff; that Dofasco pay a share of the restructuring; that Algoma would be a "responsible corporate citizen" and not compromise the environment; and that there be government funding for a local Training and Economic Development Council to upgrade employee and management skills. The premise was that the short term costs of economic transition were considerably less than the long term cost of major

\(^{389}\) USWA, supra, note 88 at 4.

\(^{390}\) COO Gary Lucenti and oil industry executive Earl Joudrie, respectively. Quarter, supra, note 312 at 119.

\(^{391}\) Craig and Soloman, supra, note 73 at 26.

\(^{392}\) Quarter, supra, note 312 at 130. Algoma Steel needed to remain in its existing four products markets in order to stay viable. Given declining products markets and rise in competition, restructuring was required to ensure their viability. The restructuring plan agreed to keep all production lines open, but specified that Algoma would not subsidize any operation not contributing cash flow and value. Subsequent to the purchase, the Corporation made a decision to close the iron ore operation at Wawa in 1998, however, as is discussed below, this was decided in conjunction with, and with buy-in from, the workers and the Union.

\(^{393}\) The government enacted the Employee Share Ownership Plan Act, R.S.O. 1990, c. E.10, (repealed 1997, S.O. c.19), and Labour Sponsored Venture Capital Corporations Act, supra, note 313, however, the workers at Algoma were unable to take advantage of the legislation because they contributed equity through wage cuts instead of capital.
layoff, employee displacement, loss of equity and creditor losses.\textsuperscript{394}

Workers took a $2.89 hourly pay cut and salaried staff a 14.5% decrease in annual salaries, as well as cuts in vacation.\textsuperscript{395} The employees acquired 60% equity ownership in the corporation. In the first five years of restructuring, all employees who worked at least 1,800 hours received an equal number of shares, regardless of their wage rate. Disposal of the shares during this period was restricted to the greater of five years or permanent separation from the Corporation through resignation, retirement or permanent layoff.\textsuperscript{396} The shares are held and voted in two trusts by the Union, according the Union the voting power needed to ensure a real shift in governance structure.\textsuperscript{397} Special shares carrying the right to approve fundamental business decisions are held in an employee co-operative, with employee rights to vote these shares regardless of the amount of shares owned. Fundamental decisions requiring employee approval include: sale, merger or transfer of the Company; issuance of additional shares that would dilute the equity investment of employees to less than 50%; any major deviation in the business plan that is not supported by a super-majority of the board; and the purchase of any business or asset outside of either the steel business or the communities of Sault Ste. Marie or Wawa.\textsuperscript{398}

The debt was restructured through a combination of converting debt to shares and some debt forgiveness; reducing annual interest charges from $75 million to $11 million in one year.\textsuperscript{399} The restructuring plan focused on increasing sales by implementing an extensive capital investment programme of $500 million over 5 years, plus $45 million capital investment to meet

\begin{itemize}
\item \textsuperscript{394} USWA, \textit{supra}, note 88 at 8.
\item \textsuperscript{395} Craig and Solomon, \textit{supra}, note 73 at 26. $2.89 represented a 14.5% decrease for the hourly waged workers.
\item \textsuperscript{396} USWA, \textit{supra}, note 88 at 6.
\item \textsuperscript{397} Boniferro, \textit{supra}, note 384.
\item \textsuperscript{398} Super-majority defined as eight of the thirteen board members. USWA, \textit{supra}, note 88 at 5-6.
\item \textsuperscript{399} Quater, \textit{supra}, note 312 at 126.
\end{itemize}
environmental standards. Dofasco remained liable for half of the liability in the defined benefit pension plan in exchange for a release from further pension liability. The Union also secured "infant industry protection" from Dofasco, through a period of agreed non-competition with Algoma accounts and agreement that Dofasco would purchase some Algoma products for a specified period until Algoma was able to develop an independent sales and marketing capacity.

A new thirteen member Board of Directors included five union nominees, the CEO or her or his nominee, and seven independent directors selected by special committee and acceptable to both to the Union and the Bank debenture holders. Restructuring at the shop floor level took the form of vesting discretionary decision making with workers instead of supervisors, and reducing levels of supervision accordingly. The express goals were to make production safe, enhance the skills, responsibilities and accountability of workers, and create efficiencies by vesting day to day control of work operations in the hands of worker self-directed teams. A Joint Steering Committee of Union and senior management developed a workplace participation programme to redesign the workplace. Management was to have carriage of discipline, yet there was to be worker/manager co-determination in decisions relating to training, problem solving, cost reduction, and new technology.

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400 Ibid. at 127.
401 Ibid. at 128.
402 Delaney, supra, note 314.
403 Two selected by the national union, two selected by the Local and one elected by the salaried employees, i.e. managers and office employees who are now also unionized by USWA. Boniferro, supra, note 384.
404 Ibid.
405 Ibid.
406 Ibid.
At the time of the worker buy-out, the value of shares was a few cents per share. In the first two quarters of 1998, shares were trading between $5.00 and $8.00 per share.\textsuperscript{408} The turn around may be explained by the combination of governance changes accompanied by a sound business strategy.

\textit{ii. Lessons for governance}

It is important to note that it was the worker buy-out that precipitated the recognition of workers' human capital investments in the firm, by according them access to corporate decision making in exchange for their equity investment. That equity investment gave the workers and their Union access to the structures that would allow for governance reform. Thus, Algoma commenced its restructuring based on traditional notions of corporate governance, where equity holders are given access to the board because of their capital investment. However, the Union through its worker-directors almost immediately shifted the focus of decision making to account for workers' interests both as equity and as human capital investors. Algoma Steel therefore provides a working model of many of the notions explored in this paper. First, while the Corporation has not expressly redefined fiduciary duty, decision making at the board level contains many of the elements of the redefinition of fiduciary duty that I have proposed above. Second, the model has many of the elements of relational board theory, in terms of incorporating worker-directors and Union participation in corporate decision making at the board level. This has enhanced both conflict resolution and corporate governance by the involvement of those who have the greatest interest in the viability of the corporation. Third, governance reform extends throughout the organization and incorporates a worker participation model to enhance the co-determination model at the board level. An integral part of this is the reduction of information asymmetries, which address many of the above cited concerns regarding the ability of workers to effectively bargain or participate in the governance of corporations. Finally, notwithstanding the trend towards the dismantling of state protection, the combined use of corporate articles and collective agreements, and the recognition of workers' investments in the firm, have meant that

\textsuperscript{408} Boniferro, \textit{supra}, note 384.
Algoma workers have not suffered as seriously from the reduced access to remedial protection as other workers. Many remedial standards, such as safe production methods and equitable employment practices, are a corporate priority and joint participation in decision-making means that problems with human rights and safe work practices are identified and resolved at early stages.

a. Fiduciary obligations at Algoma and the express recognition of workers’ human capital investments

Both the Union and managers at Algoma make clear that the obligation of all the directors is to undertake decision making with a view to the best interests of the Corporation. It is evident that they are acutely aware of their obligations as fiduciaries, and of existing direction by the judiciary as to the scope of that obligation. However, the Corporation has, through its co-determination model, redefined what is in its best interests, which includes recognition of the value of workers’ human capital investments in addition to their equity investments. The mission statement of the Corporation includes the following phrase: “As equal partners, Algoma and the United Steelworkers of America make as top priority, the creation of an organization that is dedicated to economic security and empowerment of employees and to continuing improvements in productivity and quality.” While workers currently own only 25% of the equity in the corporation, their interest in the firm has been expressly recognized and entrenched in the Corporate Articles and the Collective Agreement. Since what is in the best interests of the Corporation is defined as both economic security and empowerment of workers and improved productivity and quality, decision making which advances those simultaneous objectives is entire compatible with the fiduciary duties of the directors. The Union nominated worker-directors find no particular conflict in their fiduciary duty to all shareholders and their

409 Pearce, supra, note 407; Boniferro, supra, note 384.

410 Memorandum of Agreement between Algoma Steel Inc. and United Steelworkers of America, Local Unions 2251, 5595, 4509, 3933, 5048, 2288, dated December 20, 1994 (hereinafter Memorandum of Agreement).

411 See discussion, infra, note 441 regarding recapitalization.
obligation to their nominating shareholders. This is because they have a fiduciary obligation to act in the best interests of the corporation as a whole, defined as both the welfare of the employees and the viability of the business. This is not unlike the role that all nominee directors have, to consider the interests of their nominating shareholder, while making decisions in the best interests of the corporation. In the case of these worker-directors, it is enhanced and facilitated by the express mission statement of the Corporation, which in effect recognizes workers’ equitable interests in the firm.

Thus, while it is unlikely that courts will redefine fiduciary duty without some legislative directive to this effect, entrenching a redefinition of the corporation’s goals has given normative direction to the directors and officers. They are to undertake decision making with a view to the best interests of the corporation, defined as having regard to worker and shareholder investments in the firm.

b. Algoma as a model of a relational Board of Directors

The premise behind relational board theory is that boards are structured to reflect those who have an interest in the continued viability of the corporation. As discussed in Part III, relational boards reduce uncertainty, enhance governance and provide an effective conflict resolution mechanism. At Algoma, both the Union and managers attribute much of the Corporation’s success to date to the structure of the Board. There is almost a complete separation of the Board from the officers; only the CEO has a vote on the Board. The combination of independent directors and worker-directors means that there is careful scrutiny of managers' decisions when they are brought to the Board, as well as active participation in strategic planning, review of business plans, risk assessment, and decision making that takes account of workers as human capital investors. The worker-directors act at arm's length from the Union, but take account of

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412 Boniferro, supra, note 384.

413 This is very similar to the Alberta Business Corporations Act, supra, note 53, s. 117(4), which specifies that nominee directors can give special but not exclusive consideration to the interests of the appointing shareholder.
the interests of the workers in determining what is in the best interests of the corporation. The co-determination model requires substantial input into the selection of directors and officers of the Corporation. Veto on selection of the CEO, fundamental changes or diversification out of the sector are good examples of what scholars would call "covenants" that address moral hazard problems by constraining some managerial decisions. At Algoma, rather than implementing an express prohibition on particular management decisions, certain actions must have either employee shareholder approval or a super majority of the board. This addresses Trebilcock and Howse's concerns about the infrequency of collective agreement contracting, in the sense that workers can temper post collective agreement opportunism by the alternative mechanisms of corporate decision making.

Moreover, the shareholder voting structure addresses potential conflicts among employee shareholders. The Union votes the shares in trust for the workers, although workers have direct say in fundamental changes proposed. Unions, by their very nature and by their statutory duty of fair representation, are required to constantly balance the interests of large numbers of members. This balancing of interests and risks has been within the scope of responsibilities of the Union as exclusive bargaining agent for years. Here, fulfilling those duties is accompanied by more complete information and greater decision making power. Some of the transaction costs of corporate decision making have now shifted to the Union. This is because the Union must expend its time and resources to ensure it meets its statutory duty to union members, its fiduciary duty to shareholders, and to ensure it accomplishes the political balancing of interests required to guarantee the continued support of union members.

\[\text{\footnotesize 414 Ibid.}\]
\[\text{\footnotesize 415 For example, the CEO was hired after a joint nominating process, with equal representation from Union and management, in which a majority recommendation went forward. Selection of directors follows the same process, recommendations are made by a nominating committee 50% represented by the Union, with final CEO approval, as does the hiring of other new officers of the corporation. Ibid.}\]
\[\text{\footnotesize 416 Trebilcock and Howse, supra, note 38 at 759.}\]
\[\text{\footnotesize 417 Ibid. at 761.}\]
\[\text{\footnotesize 418 Pearce, supra, note 407.}\]
As discussed earlier in Part IV, worker share purchase places employees at higher risk of losing their firm specific investments. The Algoma case illustrates that this risk can be reduced if stock ownership is accompanied by some access to the governance structure in the form of board membership. In addition to the Union nominated worker-directors, this particular model of the Board also crafts a separate role for the Union as an advocate for workers at the level of board decision making. The Union has a representative who attends all board meetings and who participates in a separate, non-voting capacity at the Board. Unlike the worker-directors who have a fiduciary obligation set by corporate law, the Union representative is present and involved as a vocal advocate for workers' concerns. Steve Boniferro, who is currently the Union's representative acting in that capacity, views this as a role complementary to the worker-directors. The Union's fundamental premise is that it is not there to manage, but that it will aggressively question what the implications of each decision are for the employees. While Boniferro concerns himself with the viability of the business, he participates as advocate to allow the Board exposure to the Union's views on particular issues. This frees the worker-directors from acting as advocates and allows them to participate as directors in conformity with the current state of the law on fiduciary duty.

Algoma's Board of Directors represents a working response to arguments that worker or union representation will bring conflicts of interest to corporate decision making and increase transaction costs. Both the Union and managers point out that while consensus takes longer, the Corporation benefits from the business expertise of the independent directors, the shop floor expertise of the worker-directors, and from a better understanding of the impact of decisions on workers. This model of governance also ensures greater worker buy-in when tough decisions are made. While worker/manager interests may sometimes conflict, Algoma's model illustrates the value of a relational board and multi-stakeholder decision-making as an effective wealth generating strategy. The benefits to the corporation, as indicated by Algoma's financial performance over the past six years, outweigh short term transaction costs.

419 Boniferro, supra, note 384.
420 Ibid; Pearce, supra, note 407.
421 In addition to their equity capital investment, the parties have agreed to set up a profit sharing
An example is the recent decision to shut down the iron ore mine in Wawa. While the Union's position during the initial restructuring was that the operation be maintained, it concluded, as did the Board, that the operation was not economically viable. However, given the massive injection of capital into other parts of the Corporation, especially the recent opening of the DSPC mill creating 160 positions, the number of jobs lost from the closure was minimal. Employees transferred to the new operation or to the jobs opened up from others successfully transferring to the new operation. The relational board structure resulted in the directors canvassing all of the alternatives, and through that joint process, workers eventually realized that the options were limited. That joint decision process, while somewhat time consuming, has ensured that harms to workers from restructuring decisions are minimized, that retraining and relocation of workers are high corporate priorities, and ensured that there was worker and Union agreement with the decision. Further, the income security, seniority and training provisions in the Collective Agreement complement and reinforce decision making which protects workers' human capital investments. Rather than allowing workers' human capital to depreciate at a time when their investment in the firm is the highest, comprehensive skills training has accompanied capital investment in new production technologies.

\[ c. \quad \textit{Reduction of information asymmetries as a means of enhancing governance}\]

Information asymmetries, cited by scholars as a major barrier to workers protecting themselves

plan for all employees based on a percentage of annual income from operations and a gain-sharing plan based on reduction of controllable costs, defined as costs that can be controlled by employees. Memorandum of Agreement, supra, note 410 at 7, 13.

\[422\] Direct Strip Production Company. This was a $440 million capital investment in the new mill, work will be entirely self-directed, including team design and all work processes. Boniferro, supra, note 384.

\[423\] Pearce, supra, note 407.

\[424\] Boniferro, supra, note 384. The Union is not opposed to all contracting out, it merely insists on canvassing alternatives, and assisting the workers displaced, as prerequisites to its agreement. Boniferro points out that there hasn't been a single grievance concerning contracting out since the restructuring, notwithstanding the fact that there has been some contracting out.
from corporate opportunism, has been seriously corrected at Algoma. Disclosure is an integral part of the co-determination model from the level of Board decision making down to departmental joint committees and work teams. Everyone is connected to the same information base on computer. Any worker, union member, board member or officer has the same access to information, whether it is raw materials and production costs for each department, production processes, or salaries and bonuses paid to officers. Boniferro juxtaposes former union meetings where members asked about vacation benefits, to the current debates about resource allocation, product markets and accounting methods of managers.\(^{425}\) Workers use their informational capital to suggest improvements in work methods. Not only do workers have access to decisions which allow the joint committees to find efficiencies, but management decisions are based on information which the Union and its technical experts can assess, and about which they have a powerful voice at the Board level. Accountability is enhanced and the likelihood of managerial opportunism reduced because each decision can be, and is, checked by workers or their Union. The Union uses its access to information to keep managers accountable for decisions they make, and to require them to consider options less damaging to the human capital and equity investments of workers. It allows workers an effective participatory role in workplace redesign, accomplishing the dual goals of preserving jobs and ensuring business viability.

Unlike some board models which restrict worker board member access to information or particular decision making, here there is full access. While this access might be critiqued by some as creating potential conflicts of interest in collective agreement negotiations, an alternative view is that much of the game playing is eliminated from negotiations, thus, reducing transaction costs. While worker-directors may be aware of corporate bargaining strategy, the amount of information sharing means that managers are also aware of what the Union requires as an outcome. Rather than viewing this as undermining management rights, it might result in more balanced and efficient contract decisions by both parties.

\(^{425}\) Ibid.
d. Worker participation integrated into a governance model that takes account of workers’ equitable interests

Much of the success of Algoma Steel to date is likely due to the integration of a worker participation model within the corporate governance structure. The governance model agreed to by the stakeholders at Algoma expressly sets criteria which includes a commitment that employees will have a significant role in decision making regarding new work processes. It also provides a guarantee that production changes will be not implemented if they are inconsistent with the corporate goals and the protections afforded by the collective agreement.\footnote{Memorandum of Agreement, supra, note 410 at 24.} Thus, while there is a worker participation model in place, it is not vulnerable to the expropriation of workers’ human capital investments, a problem I highlighted in Parts I and IV, because decision making must comply with the corporate objectives of economic security and worker empowerment.

The Board does not manage the day to day operations of the corporation. There are a series of joint committees, each vested with different types of decision making. The Joint Steering Committee (JSC), represented equally by Union nominated workers and senior managers, meets frequently to deal with major business decisions.\footnote{The Joint Steering Committee is made up of 18 people, the entire union executive, a salaried representative and the top managers of the corporation, Bonifèro, supra, note 384.} Its extensive mandate was negotiated by the Union and management, approved by the Board of Directors and incorporated into the Collective Agreement and Corporate Articles. At each part of the detailed mandate of the JSC, reference is made to the objectives of the Corporation; thus, decision making is undertaken having regard to the goals of economic security and empowerment of workers, and improved productivity and quality. The JSC works with the CEO and senior managers on business matters generally, and in particular, must review and approve all facets of implementation of the Company’s strategic plan, business plan, and all business decisions of the Corporation.\footnote{Memorandum of Agreement, supra, note 410 at 19, 21.} The JSC directs the worker
participation and workplace redesign processes. No programme, action or restructuring is initiated by the Company without agreement of the JSC. It directs workplace training and retraining programmes, cost reduction programmes, and the process of technological change including labour adjustment programmes.\textsuperscript{429} The JSC directs all the committees established throughout the workplace, and directs the human resources policies, including policy decisions on the delivery of benefits and selection of benefit insurance carriers. It does not, however, make determinations of individual entitlement, nor does it discipline; both are functions left to managers. Moreover, all decisions to hire or layoff must be reviewed by the JSC, and while decisions are ultimately vested with managers, they must be made having regard to the objectives of the Corporation. In addition, a joint training board with equal representation from Union and management and reporting to the JSC, reviews training needs, reviews new technology, and designs comprehensive training and retraining programmes. Combined, these create a powerful joint decision-making tool for the workers.

On the shop floor, there are Departmental Joint Steering Committees responsible for product standards and for the work teams who are in turn responsible for productivity. The restructuring agreement recognized the necessity of redesigning the workplace to become "less authoritarian, safer and more fair" and to provide workers with greater control over day to day operations, including creation of opportunities for problem solving and redesign. The role of supervisors was redefined to emphasize coaching and team co-ordination.\textsuperscript{430} The departmental committees report directly to the JSC. Their mandate is to: direct the implementation of change in the workplace; direct achievement of the department’s production goals; meet the requirements of the business plan; apply human resource policies; direct the departmental workplace redesign, restructuring and technological change activities; ensure self-directed work groups are functioning in each department; and resolve issues and problems at the departmental level.\textsuperscript{431} These committees are co-chaired by the Department head and a bargaining unit member selected

\textsuperscript{429} Ibid. at 19, 23. This includes approval of all programmes and costs of displacement, restructuring retraining, and health and safety training.

\textsuperscript{430} Ibid. at 18. The parties agreed to flatten the organizational structure, to eliminate unnecessary layers of management and administration, and made a commitment to ongoing joint participation in decision making.

\textsuperscript{431} Ibid. at 25.
by the Union, and include the health and safety representatives, Union stewards and other workers and supervisors as agreed to by the co-chairs. The parties have agreed in writing that all decisions will be made by consensus, which does not require unanimity but does require the consent of both co-chairs.\(^\text{432}\) The objective is to flatten decision making and vest much of this with the joint departmental committees. For example, the guidelines for workplace restructuring and redesign are extensive, including the express objective that processes and outcomes must be consistent with the objectives of economic viability and workers' security and empowerment. The mandate further recognizes that there is no "best way" to participate and that each workplace participation group has broad latitude to craft their own process. No decision or action on worker participation, restructuring or retraining takes place without consensus, and failing consensus, appeal can be made to the JSC.\(^\text{433}\) There are also principles articulated for the self-directed work groups which include reasonable workload and adherence to employment equity principles, thus illustrating that the governance process can incorporate public policy objectives.\(^\text{434}\)

Team accountability and normative peer pressure have proven more effective productivity tools than traditional supervision.\(^\text{435}\) There are also clear criteria for worker participation, for setting priorities for determining which ideas are to be implemented, and for communicating with employees the reasons for non-implementation of any ideas they have proposed. Further, resources are given to the Union to conduct its own biannual evaluation of workplace change processes, with the objective of evaluating employees' views about working conditions, improvements in work design and productivity and worker empowerment.\(^\text{436}\) The changes have been accompanied by strong policies and procedures for investigation and resolution of workplace disputes such as sexual and racial harassment, grounded in statutory standards such as

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\(^{432}\) Ibid.

\(^{433}\) Ibid. at 27-28.

\(^{434}\) Ibid. at 29.

\(^{435}\) This was reflected in interviews with both management and the Union; Boniferro, supra, note 384; Pearce, supra, note 407; Delaney, supra, note 314.

\(^{436}\) Memorandum of Agreement, supra, note 410 at 30.
the Ontario *Human Rights Code*. While these procedures can be invoked instead of arbitration, they expressly set out that an individual retains the right to pursue statutory remedies.

The joint process has managed to identify and remedy inefficiencies, and delivered skills training to broader numbers of workers, thus allowing acquisition of new skills to meet demands of the new technology. The work process has been redesigned over the past 6 years, away from a hierarchical structure, by placing both decision making and accountability for those decisions in the hands of self-directed work teams, thereby reducing shirking and creating efficiency through worker decisions. The model has created a downward pressure to ensure that problem solving and innovation takes place on the shop floor as much as possible. The Joint Steering Committee and the Board intervene only where these alternative structures cannot arrive at a resolution or where there are fundamental changes in the work processes.

Co-determination through the relational board and worker participation models has not occurred overnight. An adversarial relationship had previously been so entrenched that the idea that there would be joint decision making on all training, workplace redesign and allocation of work, was a shift of enormous proportions. Yet, there has been high worker buy-in to corporate decisions, including tough economic decisions, and since 1992, only two labour management issues have gone to arbitration.

**e. Recapitalization and current challenges for future governance**

In 1994, the Algoma Board, with employee approval, made a decision to recapitalize by going

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437 Anti-Sexual and Racial Harassment Policy, Algoma Steel Inc., dated December, 1994, on file with author.

438 Pearce, *supra*, note 407; Boniferro, *supra*, note 384. Needless to say, there was resistance from both managers and workers, the former concerned that their place in the hierarchy was being undermined, the latter fearing for the implications of having to share skills and knowledge, and having to learn new skills and accept new responsibilities.


440 Prior to the governance changes in the 1980’s, there were thousands of grievances, and hundreds went to private arbitration, costing thousands of dollars for both parties. *Ibid.*
public in mid-1995. Worker share ownership dropped overnight from 57% to 30%. The Union was aware, going into the initial buy-out and restructuring, that it did not have the capital necessary to make the capital investments required to become competitive, and that it would likely have to relinquish majority share control in a reasonably short time. In exchange for agreeing to the dilution of share capital, the Union negotiated income security and a number of protections to the governance structure. These were incorporated both into the Collective Agreement and the Articles of the Corporation, a unique use of the two governance documents. The Corporate Articles guarantee that the Board allocation of nominee and independent directors and the agreed upon governance structures will remain intact, unless worker share ownership falls below 10%. Thus, as long as equity ownership in that amount remains, the governance structure is secure.

The Collective Agreement negotiated as part of the recapitalization decision also implemented a crucially important job security provision, which guarantees the existing workforce their jobs or 90% of their incomes if laid off. This high standard of job security essentially forces the Corporation to examine the impact on jobs of any proposed change to the business plan, in terms of utilizing its labour force effectively, given that it will largely bear the costs of any layoff. This addresses the concerns raised in Part II that lack of job security deprives workers of an incentive to increase productivity. It illustrates how increased job security, rather than taxing wealth generation, can actually increase productivity by making workers receptive to

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441 Ibid; Delaney, supra, note 314.

442 The initial sunset clause was 20%, but that was renegotiated to 10% with the recapitalization agreement. Boniferro, supra, note 384.

443 Selection of the CEO was added to the joint decision making power at this time. Ibid.


445 Pearce reports that the corporation has never had to pay under this provision, but it acts as both a worker safety net and a temper on managerial decision making. Pearce, supra, note 407.

446 Singer, supra, note 188 at 509.
technological innovation. Thus, protection for workers can lead to “joint gains”.

At Algoma, managers continue to have the authority to discipline and discharge. This avoids some, but not all of the potential conflict of interest issues. This right to discipline has been accompanied by "justice and dignity" provisions in the Collective Agreement, which balance management's right to discipline and fire, with enhanced worker dignity and equality. One example is the imposition of a "reverse onus on discipline", leaving an employee on the shop floor until the matter is settled or if necessary, an arbitrator makes a determination as to whether there has been culpable behaviour. The model builds on the notion that managers and workers each have their respective responsibilities to ensure the overall viability of the corporation. Managing becomes a balancing exercise, just as much as other decision making, thus, enhancing corporate governance.

One measure of the value or success of worker ownership is trust levels established. Scholars have argued that managers are more likely to trust employees with an ownership stake; and similarly, that workers with greater access to information and decision making processes are more likely to trust or be supportive of managers' decisions. Some scholars have suggested that a low trust workplace is indicated by extensive collective agreement language. I suggest that the existence of extensive collective agreement language is not necessarily indicative of low trust levels, but rather, the number of times that such formal mechanisms need to be evoked is a

447 Klare, supra, note 94 at 394.

448 Boniferro, supra, note 384. The right of front line managers and supervisors to discipline is built right into the collective agreement of the salaried staff. While this may appear incongruent with traditional notions of scope of bargaining units, the Union claims that its hourly waged members are beginning to accept the notion that discipline is part of the job description of their fellow Union members.

449 Collective Agreement, supra, note 444 at Article 9. The worker remains on the shop floor, other than in cases of major theft or where the individual may endanger themselves or others. This is in contrast to our current labour relations regime, in which workers are disciplined for alleged culpable conduct and are suspended pending either investigation or disposition of the issue.

450 Hyde, supra, note 191 at 741, 743; see also O'Connor, supra, note 29.

451 Hyde, ibid. at 745.
better measure. Unions and economically disadvantaged groups have long believed in the "big stick" theory of equalizing power, in which co-operation may be the optimal strategy, but such co-operation is only as effective as the enforcement mechanisms available to back up what rights do exist. When strong collective agreement language forms the backdrop, transaction costs are reduced and co-operation is more likely, because energy is directed towards increased productivity instead of delineating workers' rights. At Algoma, the justice and dignity provisions, the income security provisions, and the co-determination governance model all give workers access to corporate decision making such that trust can be augmented, resulting in greater workplace efficiencies.

Similarly, the training provisions in the Collective Agreement allocate a maximum of 80 hours off-the-job training per year per worker, and outline the basis for directing corporate resources towards both general and firm specific training programmes to upgrade skills of its workforce. Some scholars have suggested that allocation of training costs should depend on the specialized skills the firm requires and that workers should reasonably expect to pay for generic skills because they are marketable elsewhere. Algoma's model presents an alternative. The skills required for many of the jobs are sector specific, but not always firm specific. Yet given limited labour markets, the risk in terms of the workers' investment is higher, especially factoring in the costs of relocation and family disruption. Algoma's approach is to recognize and to acknowledge the value of a stable workforce and the efficiency and continuity that can be generated by knowledge capital. The training programme recognizes workers' equitable investments in the firm and tries to ensure the continued protection and enhancement of those investments.

Both Union representatives and managers make reference to no one being entirely in control, and yet, both speak of an increasing level of comfort in the joint governance processes in place. However, the very nature of the structure means that the workers and Union face another major governance challenge in the next few years. As older workers retire, they can sell their shares on

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452 Collective Agreement, supra, note 444 at Article 3(c)(iii).

453 Blair, supra, note 4 at 249.

454 Pearce, supra, note 407; Boniferro, supra, note 384.
the market or take them out of the trust, which means the Union is no longer able to vote them. After the five year freeze was lifted, workers were able to sell 300 of the three thousand shares they owned, and about one third of the work force took advantage of this. Although this was a minority of workers, this cash-out plus those workers who have subsequently retired has meant a steady decline of the shares held in trust and voted by the Union. Worker ownership as of June, 1998, rests at 25%. The parties did not originally build in a mechanism to prevent this continual dissolution. Boniferro reports that the Union foresaw the problem, but did not anticipate it would materialize as quickly as it has. Within the next decade, the Union risks losing all its governance measures, according to the minimum worker shareholdings required under the Articles of the Corporation. The challenge for the Union is how to maintain the power it has acquired through this co-determination governance structure, while facing a dilution of share ownership. There is a crucial question of whether the governance structure can be maintained without substantial worker share ownership.

Some initial steps have been taken to address this concern. As of early 1998, there is now a mandatory payroll deduction directed toward share purchase, the shares of which continue to be voted by the trust. Similarly, for all new employees, there is a mandatory payroll deduction of $2.00 per hour for three years, directed at share purchase and held in the trust for at least three years. These measures are band-aids, but have slowed the process of loss of worker owned shares until longer term strategies can be crafted. Boniferro suggests that as the Corporation gets more successful, due in large measure to the governance changes, it will be harder to hold onto worker shares and joint control of the corporation.

This means that the negotiations for the next Collective Agreement will have an extremely difficult issue to wrestle with. One strategy currently being considered by the Union is to use the gain-sharing plan which has been agreed to but not yet implemented, as the strategy by which to allocate capital for the repurchase of shares off the market, shares which would then be voted by

455 Boniferro, supra, note 384.
456 Ibid.
457 Ibid.
the trust. Another is to consider further payroll deductions allocated to share repurchase.458 However, any collective agreement that builds in mandatory share purchases will have to be considered not only in terms of concessions the employees will be expected to offer in exchange, but also possible tension from workers about having to "buy the company twice". Whether the Union can negotiate some sort of share allocation that vests the voting shares in the workers of the day, in order to prevent further leakage in shareholdings, is a live question. It is unlikely that governance such as the one that has developed can be sustained without a continued ownership stake. One strategy might be to issue a special class of shares which vests control rights in the Union or the employees of the day. Such a strategy would have to be endorsed as a fundamental change by shareholders, and it is unclear whether it would be successful given the current share structure. During recapitalization, governance changes were safeguarded by the incorporation of participation guarantees in both the Corporate Articles and the Collective Agreement. Once the Articles of the Corporation no longer entrench these rights, it is highly doubtful that the Collective Agreement on its own will be sufficient to sustain this governance.

This is not to suggest that the worker buy-out and governance changes at Algoma were purely transitional arrangements. The parties continue to be committed to this governance model. When given the opportunity to cash out 10% of their shares in 1997, more than two thirds of the employees chose to keep all of their shares in the Corporation. This indicates that the majority of workers at Algoma are committed to share ownership and the governance reform that has resulted from recognition of their equity and human capital investments in the firm. The Union considers retention of its co-determination governance structure as its highest bargaining priority, and the new provisions for payroll deductions indicate its intention to retain sufficient equity ownership to maintain the governance reforms. What is clear is that the Corporation will have to examine longer term strategies if it is truly committed to retaining the governance reform in place. The difficulty is that the model does not have a lot of precedents and the parties are crafting strategies for long term governance as they go along. What does seem evident, however, is that the only means of protecting the governance model is to continue to entrench it in the Corporate Articles.

458 Ibid.
PART V CONCLUSION

Corporate governance reform needs to encompass both a governance role for workers and an obligation to them as equitable investors in the corporation. The present formulation of corporate law is inadequate to remedy or diminish the harms caused by the remittance of labour relations, human rights and equity in employment to the private sector. It is not sufficient to leave the development of alternative governance structures to the private sector or common law judicial interpretation.

The existing normative assumptions which drive our current notions of corporate law fail to recognize the equitable investments of workers, and thus, are inadequate to meet the challenge of crafting a governance model more responsive to those with investments at stake in the corporation. Similarly, efficiency models, while providing valuable measures of successful governance, nevertheless, militate against any substantive governance change. Efficiency must therefore be redefined to recognize that the starting point of measuring efficiency is to consider what interests and investments are at stake in the corporation, and to acknowledge that there are competing optimally efficient decisions. Crucial to the redefinition is the recognition that the current governance model of wealth maximization is founded on assumptions that are normative choices, not merely choices based on the dictates of “efficiency”. Once the normative underpinnings of this model are exposed, then the decision to exclude workers’ human capital investments from consideration under fiduciary duty becomes much less compelling.

Governance structures which take account of workers’ equitable interests and accord a decision making role to those whose investments are at greatest risk, are likely to result in highly effective decision making, enhancing the viability of the corporate enterprise.

I have proposed a definition of fiduciary duty that takes account of the equitable claims of workers as human capital investors and the residual claims of shareholders as the equity capital investors in the corporation. While some of this decision making already takes place, it is undertaken either as a means of avoiding statutory liability or as the result of benevolent decision
making. Crafting a fiduciary obligation more explicitly accountable to workers as human capital investors will lead to more effective corporate decision making. Absent such change, it is unlikely that corporations will seriously take stock of workers’ equitable interests unless such workers are also able to purchase equity in sufficient quantities to force this change on corporations. This relegates governance changes to firms approaching insolvency because these are the only firms that workers can afford to purchase.

In order to accomplish the changes I have proposed, either corporate law or labour law must be reformed to provide a shift in the normative underpinnings of corporate governance. These reforms must include a recognition of workers as equitable claimants whose human capital investment is at risk. They must also include a recognition that fiduciary duty is best served when directors and officers of the corporation act in the best interests of the corporation, having regard both for the equity capital investments of shareholders and the human capital investments of workers. These conclusions stem from the systematic dismantling of public protection of workers’ interests by government and my assertion that it is in the best interests of corporations to alter governance models to recognise the various investments in the firm in light of this dismantling strategy. The suggestions I have made in this paper would go a long way towards accomplishing these goals. Application of relational board theory, use of institutional investors whose capital contributions come from workers, and increased access to governance by workers and their bargaining agents can all contribute to their achievement. However, it is likely that corporate law will require statutory amendment because courts are unlikely to extend notions of fiduciary duty without clear legislative directive.

The much more difficult question is whether a shift in corporate law is a better vehicle for protecting workers’ human capital investments than remedial labour and human rights legislation. The short answer is likely no. The statutory regime of protection for workers, including minimum employment standards, occupational health and safety protection, human rights, workers’ compensation, employment and pay equity, was crafted in response to inadequate remedies for harms to workers from corporate decision making. Remedial legislation has reflected public policy recognition of the imbalance in bargaining power for workers. While there have been periodic skirmishes between workers and managers over the scope of particular
legislation, in general, labour and human rights legislation has effectively addressed the needs of workers and managers. Legislation which expressly sets out rights and obligations of parties to the employment relationship, assists all parties in more effective workplace practices. Expressly defined responsibilities and liabilities allow parties to govern themselves appropriately, and the cost of legislative compliance is no different than the costs of compliance with corporate statutes. Moreover, statutory obligations result in more equitable and competitive employment markets, because all employers are required to comply with the same standards of protection or equitable employment practices. The certainty in statutory liability and responsibility, the notion that these regimes are comprehensive and thus not vulnerable to civil liability, also results in reduced transaction costs and greater certainty in how workplace parties will conduct themselves.

Clearly, it is one of the reasons that law and economics scholars have suggested that this is a more efficient and preferable strategy for protecting workers' interests than a revision of corporate law. The optimal strategy is to reinstate the remedial protection and enhance it further by expressly recognizing and according value to workers' human capital investments in the corporation.

However, the rapidity with which almost a century of progressive remedial legislation is being dismantled speaks to its extreme vulnerability to the vagaries of the political legislative process. While the remedial labour and equitable employment statutory regimes may be the optimal means of protecting workers' human capital investments, the events of the past few years have seriously eroded the notion that such public policies are firmly entrenched in our collective psyche as mandatory public policy. Thus, there needs to be a multi-faceted approach to protecting these investments.

To draw from an analogy in the labour law regime, workers and their trade unions for years have understood that there needs to be a co-existence of statutory protection and gains negotiated through collective bargaining. This is because both are vulnerable to erosion from various sources. Collective bargaining protections are vulnerable to capital flight, depressed labour markets and fundamental restructuring. Legislative protections are vulnerable to changes in the political perspectives of governments. Together, however, the regimes have co-existed by enhancing and complementing one another. Legislation impacts to the extent that parties are to
comply with statutory minimum standards, at which point, it is the language of the collective agreement that governs the relationship between the parties.\textsuperscript{459} Similarly, directors and officers currently have simultaneous obligations to shareholders, through statutes, through Corporate Articles and through fiduciary obligation. Applying this analogy to the corporate and labour law contexts, directors and officers of corporations could continue to have statutory obligations to workers, while simultaneously fulfilling a fiduciary obligation to them as equitable investors in the firm. The co-existence of remedial labour and equity legislation and fiduciary obligations should not pose problems for a recasting of governance in light of the express recognition of workers’ human capital investments. What is evident from my discussion above, however, is that it is unlikely that the state will at this point in time intervene to entrench these rights in the corporate statutory regime. The only avenue open to workers is to seek changes in these areas through the courts, i.e. an incremental change in the common law and statutory definition of the reach of fiduciary duty to recognize worker’s equitable investments. While existing statutory language could accommodate this recognition, it is unlikely that the judiciary will view fiduciary duty and workers’ human capital investments in this manner without clear legislative direction. Thus, this will not be an easy task. However, as this paper illustrates, it is possible to make efficiency arguments for these results.

These conclusions do not prevent corporations from undertaking governance reforms that take account of workers’ human capital investments. Such reforms can lead to better economic performance of the firm. As the Algoma Steel case so amply demonstrates, fiduciary duty to act in the best interests of the corporation can be enhanced by expressly defining best interests of the corporation to have regard for both the equity capital and human capital investments in the corporation. Boards can adopt relational board models which recognize those investments, allow workers access to corporate decision making, increase jobs security through restructuring strategies, increase productivity, and accord a decision making role to those whose investments are most at risk in the corporation. Corporations have good business reasons for taking the lead in providing an integrated approach to corporate and labour law.

\textsuperscript{459} Miracle Food Mart-Steinberg Inc. (Ontario) and U.F.C.W. Local 175 & 633, unreported decision of Arbitrator Jolliffe dated February 19, 1988; see also Miracle Food Mart, supra, note 281.