

Shareholder Primacy and Intergenerational Environmental Justice

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Intergenerational environmental justice arguably requires ensuring that future generations have similar opportunities to benefit from and to enjoy the natural environment as current generations have. Direct government regulation may be insufficient to fulfill this requirement of justice, necessitating the search for additional means for controlling environmental harm. I argue that expanding the fiduciary duty of directors under corporate law to include a duty to minimize the corporation's environmental impacts is one way to fill the gap left by direct government regulation. This approach challenges the shareholder primacy approach to corporate governance dominant in North America. The shareholder primacy approach would foreclose any role for corporate directors in reducing the corporation's environmental impacts beyond ensuring compliance with government regulations. This paper calls into question the assumptions underlying shareholder primacy in order to open up the parameters of the debate about the role of corporations and their boards of directors in fulfilling our obligations to future generations. Although the shareholder primacy approach may be less dominant outside of North America, the global reach and influence of transnational corporations based in North America gives this question international relevance. The arguments made here in favour of a fiduciary duty to future generations may also be more widely applicable to other corporate governance regimes.

The predicted environmental impacts of climate change and ongoing loss of biodiversity mean that current generations can no longer assume that the benefits to future generations of today's economic development will outweigh the costs of the long-term environmental harm. Our increasing understanding of these environmental harms and their long-term consequences require that we move away from traditional approaches to intergenerational justice, which allow for the substitution of destroyed natural capital with man-made capital so long as total "capital", both natural and man-made, passed on to future generations is not depleted. A more just approach is one that requires current generations to ensure, to the greatest extent possible, that future generations have the same opportunities to benefit from and to enjoy the natural environment as current generations have. Direct government regulation of private economic activity, even if properly enforced, may be insufficient to meet the demands of this new understanding of intergenerational justice for two main reasons. First, as a by-product of otherwise desirable conduct, environmental harm is difficult to regulate by prohibitions. Second, the information required by regulators to control adequately the environmental harm caused by corporate activity is more easily obtained by officials or employees within the corporation. Filling these gaps requires corporations to play a greater role in controlling their own environmental impacts.

One way in which corporations could be required to play this role is by expanding the fiduciary duty of directors to include a duty to future generations to minimize the corporation's environmental impacts. This suggestion is a direct challenge to the shareholder primacy approach to corporate governance, currently dominant in North America. Under this approach to corporate governance, the role of corporate directors and managers is to maximize profits and the role of corporate law is to try to ensure that they do so; it is the role of government to take into account and regulate the broader social impacts of corporate activity. It is nonsensical, under this approach, to speak of the board of directors as having any legal duties to anything or anyone other than to the corporation and its shareholders. The shareholder primacy approach to corporate governance therefore appears to foreclose completely the possibility of requiring the corporation to play a greater role in reducing its own environmental impacts.

The principle argument in favour of shareholder primacy is that it is the best way to maximize social wealth or welfare. I suggest that, given the delay between the causes and effects of many environmental problems, shareholder primacy may not be maximizing wealth, but merely transferring it from future generations to present ones by externalizing the costs of environmental harm onto future generations. Another argument in favour of shareholder primacy is that focusing directors and managers on maximizing profits ensures that assets are allocated to their "most valued use". This argument is also problematic from the point of view of intergenerational environmental justice, since markets may undervalue many environmental goods and services. Moving resources to their "most valued use" according to existing market values therefore may work against fulfilling our obligations to future generations. For these reasons, it cannot be said that shareholder primacy maximizes wealth or welfare when the interests of future generations are taken into account. By challenging the primary assumptions underlying the shareholder primacy approach to corporate governance, I hope to expand the range of policy options for filling the gap left by direct government regulation to include a duty to future generations to minimize environmental harm as something conceivably within the scope of corporate governance and corporate law.

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Biographical Statement

I am in my second year of the Doctor of Juridical Science program at the University of Toronto, Faculty of Law. Prior to commencing my graduate studies, I clerked for Madame Justice Louise Charron of the Supreme Court of Canada and practiced commercial litigation and environmental law for two years with a leading national Canadian law firm. My doctoral research focuses on the question whether directors' ought to have a duty under corporate law to minimize the corporation's environmental impacts. My other research interests include intergenerational justice, environmental disclosure and socially responsible investing. Forthcoming in the summer of 2011 in the McGill International Journal of Sustainable Development Law & Policy is an article in which I apply John Rawl's *Theory of Justice* to set out a possible framework for sustainable development and intergenerational environmental justice.