Case Study: Trade Association lobbying

Attacking the Clean Power Plan: How Canadian corporations are indirectly supporting action against US climate regulations

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Authors: Kevin Thomas, Director of Shareholder Engagement, SHARE
Researcher: Georgia Marman
Editing and review: Peter Chapman, Norah Murphy and Laura Gosset
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This paper is the second in a series of case studies to be released as part of a three-year project to encourage dialogue among capital market participants about how Canadian corporations' influence on public policy debates and decision-making affects the interests of long-horizon investors. SHARE would like to thank the British Columbia Government and Service Employees' Union, the Columbia Institute, the Glasswaters Foundation, the J.W.McConnell Family Foundation and the Muttart Foundation for their support of this project. SHARE is solely responsible for the content of this report.

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Are Canadian corporations contributing to a legal challenge against the US government's foremost program to tackle climate change? Are they supporting an army of lobbyists that are challenging aggressive action on carbon emissions?

Yes, they are.

However they may not even be aware that they're doing it. They've joined trade associations both here and south of the border, often for good reasons – networking opportunities, membership benefits and programs, educational opportunities – and because they can also be effective advocates for the common interests of their membership.

But those trade associations may at the same time be carrying out lobbying and other activities that may not reflect the company's own views or interests, let alone those of their shareholders.

As organizations that represent diverse members, there will always be some discrepancies between the positions of some company members and those of the association as a whole. While on some subjects this discrepancy may not matter – the issues may be marginal to the business, or the misalignment between a company's own positions and that of its trade association may be slim – in some cases these misalignments may matter.

Climate lobbying is one such area. Not only is climate change a long-term risk for may Canadian corporations, it's a key area of shareholder interest. Global investors with more than US$24 trillion in assets under management have endorsed a statement calling for stronger political leadership and more ambitious policies to combat climate change, and for the companies in which they invest to ensure that they are minimising and disclosing the risks and maximising the opportunities presented by climate change and climate policy.[9]

Some of Canada's energy companies have taken positive steps to address their own climate impacts, invest in renewable energy projects, and have publicly advocated for effective measures such as a carbon pricing regime. In November 2015, for example, Suncor, Cenovus, Canadian Natural Resources Ltd and Shell Oil all stood publicly with Alberta Premier Rachel Notley as she announced the province's new climate action plans – including an increased price on carbon and emissions reductions targets.

At the same time, there has been a substantial, vocal and aggressive campaign against climate regulations in the United States, led by trade associations whose members include prominent US and Canadian companies including some of those mentioned above. These trade associations – prominent organizations like the US Chamber of Commerce, the National Mining Association and others – have gone as far as suing the US government to prevent effective climate change regulations.

Lobbying and public advocacy by trade associations is the most frequent way in which Canadian corporations participate in public policy development. In Canada, there are thousands of trade organizations, from regional or local Chambers of Commerce to larger industrial organizations like the Canadian Forestry Association and cross-sectoral organizations like the Canadian Council of Chief Executives (CCCE). Most of these are registered as non-profits, and they collectively make up the majority of registered lobbyists at the federal level.[7] The three top spenders on lobbying the US federal government last year were trade associations, led by the US Chamber of Commerce (which spent almost US$85 million on lobbying in 2015).[8]

> *"[The Clean Power Plan] is a bad deal for America, and we will pursue all available options, including litigation if necessary, to block EPA's regulatory power grab from taking effect."*[17]
>
> – U.S. Chamber of Commerce President and CEO Thomas J. Donohue

Their actions have the potential to delay or even stop effective climate actions by the government of the second-highest greenhouse gas emitting country[10] on the planet. If successful, they may also undermine the global agreement on climate change arrived at in Paris in December 2015. Their actions may also conflict with the business strategy or policy interests of their members, creating regulatory, operational and reputational risks for those companies.

This report catalogues the active opposition of some US trade associations to the Environmental Protection Agency's Clean Power Plan, a primary plank in the US government's effort to reduce carbon emissions and tackle global climate change. It is a case study of the risks that can arise for companies and their investors from aggressive trade association lobbying.

Although the case study relates to US government policy, it raises red flags for Canadian companies that are members of these US trade associations. For those companies that participate in trade associations both in the US and in Canada, we catalogue possible actions Canadian companies can take to address discrepancies between their policies and those of the trade associations to which they belong.

Case in point: Attacking the Clean Power Plan

Under the Obama administration, the US Environmental Protection Agency (EPA) has been given a leadership role in addressing climate change. The Agency's efforts have been centered on the Clean Power Plan (CPP), a set of national standards designed to ensure that fossil fuel-fired power plants operate efficiently and cleanly in order to reduce carbon dioxide emissions. According to the EPA and the U.S. government, the CPP represents the most significant action taken by the U.S. to date in relation to climate change policy.[11]

The CPP establishes state-specific carbon dioxide (CO2) emission performance rates for selected types of power plants. States are required to submit a plan to the EPA detailing how it will achieve the target designated by the agency. By 2030, when the standards are fully in place, carbon pollution from the power sector will be 32% below 2005 levels.

As soon as the CPP rules were proposed, they came under fire from trade associations like the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Petroleum Institute, the National Mining Association, and the American Gas Association.

Significantly, each of these trade associations also includes Canadian companies as members.

Opposition to the Clean Power Plan has now culminated in litigation against the EPA in the form of 21 petitions for review filed in the D.C. Circuit Court of Appeals. Plaintiffs include 26 states, utilities, electric cooperatives, two unions, a coal mining company and other organizations representing the coal industry, organizations representing manufacturing, industrial, and business interests, as well as trade associations – including the National Mining Association, the U.S. Chamber of Commerce and the Association of American Railroads.[12]

> *"The United States Chamber of Commerce's web site says the group supports "a comprehensive legislative solution" to global warming. Yet no organization in this country has done more to undermine such legislation."*
>
> – New York Times editorial[24]

The EPA's opponents largely argue that the Agency does not and should not possess the statutory authority to regulate in this area and in this way – that the plan represents an "unprecedented takeover of our energy system". The various associations also argue that the plan will increase energy costs and reduce competitiveness.[13]

While the legal argument centres on a question of statutory authority, lead plaintiff the US Chamber of Commerce has questioned the science and impacts of climate change[14] and opposed almost every legislative effort to limit carbon emissions, opposing a cap-and-trade program in 2009 and launching an unsuccessful legal challenge to the EPA's authority to regulate carbon pollution in 2010.[15]

If the Clean Power Plan is blocked, the US may not be able to meet the greenhouse gas reduction targets it agreed to in Paris in December 2015, which would be damaging to the global climate deal itself. The U.S. Chamber of Commerce triumphantly acknowledges that its legal action may have turned the gap between the US government's greenhouse gas reduction pledges and its effective programs into a "chasm".[16]

The case will be heard in June of 2016.

While the merits of the specific legal challenge may be up for debate, companies that are participating in the trade associations backing either legal challenges or aggressive lobbying campaigns against climate regulations should at minimum know who and what they're backing and what its effects may be for themselves and their shareholders.

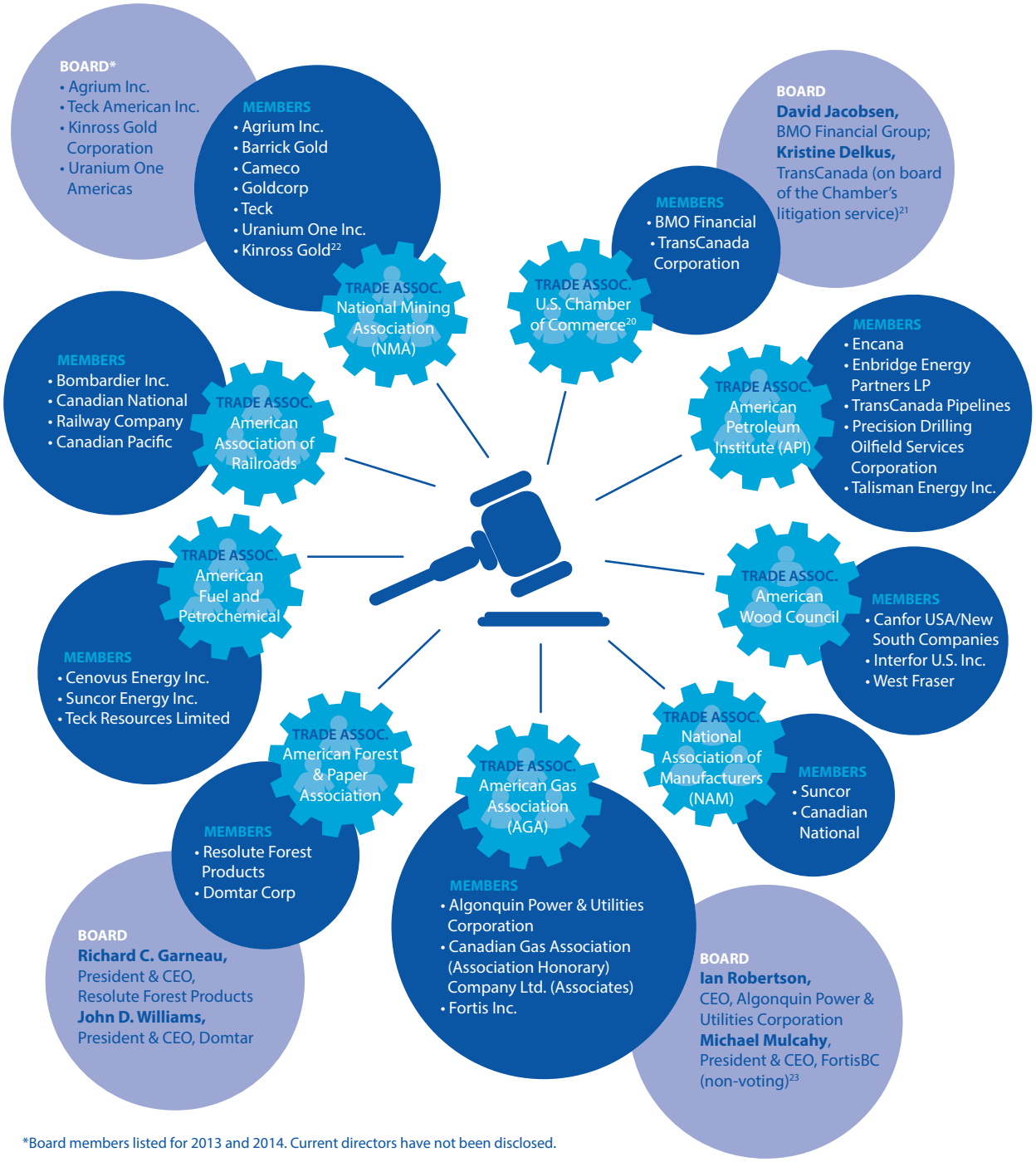
> *"The Nation's governors now have a clear choice to make about their course: accept this flawed plan and put their citizens at risk, or reject it and challenge EPA's authority and competence to manage their state's energy economy from Washington."*
>
> – National Mining Association[19]

> *"The last thing we need is a duplicative and costly regulation that could increase the cost of energy for American consumers and undermine America's energy renaissance."*
>
> – American Petroleum Institute[24]

Canadian connections

Canadian companies operating in the US sometimes join US trade associations to benefit from networks and other opportunities provided. This may be especially useful for companies with a smaller profile in the US market, to take advantage of the association's connections and expertise.

Unfortunately, those memberships may tie those companies to policy positions that are not aligned with the company's own outlook. In this case, a number of prominent publicly-traded Canadian corporations are participating in trade associations that are suing the US Environmental Protection Agency to block the Clean Power Plan.



*Board members listed for 2013 and 2014. Current directors have not been disclosed.

The investor interest: what we don't know may hurt us

Global investors are increasingly demonstrating concern over the impacts of climate change on their portfolios, over the contributions of portfolio companies to global GHG emissions, and over portfolio company interventions in the political process – especially around climate policy.

A request for disclosure of political spending, including lobbying expenditures and trade association memberships, is the most common subject of shareholder proposals filed in the US each year. Of the more than 400 US shareholder proposals filed in 2015, 107 were requests for disclosure of political activity, four of which specifically asked for the company to report on climate-related lobbying.[1] This year, at least 18 resolutions have been filed asking about anti-climate lobbying, including that done by trade associations to which the company belongs.

In 2016, SHARE also assisted with the filing of the first Canadian shareholder proposals on disclosure of lobbying expenditures at TransCanada Corporation and Enbridge Inc., both of which took note of the companies' participation in trade associations with misaligned positions.[2] A similar proposal has been filed at Suncor.[3]

Shareholder concern with lobbying expenditures, including that done by trade associations, does not depend upon one's political viewpoint; it is not about whether we "like" the political activity or not. Rather, it is foremost a question of governance. What board oversight exists regarding spending by management on influencing electoral politics and public policymaking? How does the board ensure that political spending is in the interests of the company, its shareholders, and its stakeholders? What risks does political spending create for investors, and how is the board managing those risks?

That said, there is an additional concern when lobbying by one company or its trade association may exacerbate risks for the rest of an institutional investor's portfolio. Climate change is one such risk. Institutional investors, who hold a broad range of assets that may be damaged or devalued by catastrophic climate change, have an interest as shareholders in public policies that can help address those risks and aid the transition to a low-carbon economy. The risks to returns in asset classes such as agriculture, timberland, real estate, and emerging market equities are expected to grow higher as action is delayed and the degree of warming increases.[4] Corporate support for lobbying against effective climate policies may be a case of using shareholder dollars to act against their long-term interests.

> *"The Clean Power Plan is a key component of the United States' plan to combat climate change …. Businesses are resolved to act to combat climate change; investors are allocating capital to facilitate the transition to low-carbon economy; and the general public supports these efforts."*
>
> – Tim Smith, Director of Environmental, Social, and Governance Shareowner Engagement, Walden Asset Management[5]

> *"Reducing carbon emissions through the Clean Power Plan is essential to fostering a stable business environment for investors. Shortsighted attempts to derail it threaten economic progress."*
>
> – Leslie Samuelrich, President, Green Century Capital Management[6]

Corporate political spending: management and disclosure

Membership in a trade association, of course, does not imply endorsement of every position taken by the association. Some associations have thousands of members with divergent interests, and one company's ability to influence the organization's policies may be limited.

Some companies, however, have taken steps to address the misalignment between their own policy stance and that of the associations to which they belong. For example, companies like Apple, Pacific Gas and Electric, Exelon and PNM Resources all resigned from the U.S. Chamber of Commerce in 2009 saying that the Chamber's position on climate change was out of step with theirs. Nike Inc. resigned from the Chamber's board, but stayed on as a member.[25] Similarly, more than a hundred companies (including Google, Microsoft, and Shell Oil) have withdrawn from the controversial American Legislative Exchange Council (ALEC) over its positions on climate change, gun control, and other controversial issues.[26]

Others have chosen to remain as members of trade associations like the Chamber for a variety of legitimate reasons, deciding that the important benefits of membership and common ground on other issues outweighs concerns about the association's activities in one area.

However they, too, can address investor concerns that the company is contributing to lobbying activity that runs contrary to shareholder interests. In 2015, a group of global investors coordinated by the UN Principles for Responsible Investment signed a statement on *Investor Expectations on Corporate Climate Lobbying*[27] which outlined the following steps for responsible policy activity:

- Support cost-effective measures across all areas of public policy that aim to mitigate climate change risks and limit temperature rises to 2 degrees Celsius. This support should apply to all engagement conducted by the company in all geographic regions, and to policy engagement conducted indirectly via third party organizations acting on the company's behalf or with the company's financial support.
- Establish robust governance processes to ensure that all direct and indirect public policy engagement is aligned with the company's climate change commitments and supports appropriate policy measures to mitigate climate risks. Within this, we expect companies to:
    - Assign responsibility for governance at board and senior management level.
    - Establish processes for monitoring and reviewing climate policy engagement.
    - Establish processes to ensure consistency in the company's public policy positions.
- Identify all of the climate change policy engagement being conducted by the company either directly or indirectly, across all geographic regions.
- Assess whether this engagement is aligned with the company's position on climate change and supports cost-effective policy measures to mitigate climate risks.

- Act in situations where policy engagement is not aligned. For third party organizations, actions could include making clear public statements where there is a material difference between the company and third party organization's position, working with the organization to make the case for constructive engagement, discontinuing membership or support for the organization, or forming proactive coalitions to counter the organization's lobbying.[28]
- Report publicly on:
  - The company's position on climate change and policies to mitigate climate risks.
  - The company's direct and indirect lobbying on climate change policies.
  - The company's governance processes for its climate change policy engagement.
  - The company's membership in or support for third party organizations that engage on climate change issues.
  - The specific climate change policy positions adopted by these third party organizations, including discussion of whether these align with the company's climate change policies and positions.
  - The actions taken when the positions of these third party organizations do not align with the company's climate change policies and positions.

SHARE's work on political spending

The Shareholder Association for Research and Education (SHARE) is engaged in a three-year project to encourage dialogue among capital market participants about how Canadian corporations' influence on public policy debates and decision-making affects the interests of long-horizon investors.

This is the third in a series of publications analyzing Canadian corporate political spending and legal and policy options to promote a balanced role for corporations, from an investor perspective. The first case study, published in October 2014, examined spending by Canadian publicly-traded corporations in the US 2014 mid-term elections.[29] The second was an overview and discussion paper examining the relevance of and options for political spending disclosure in the Canadian context.[30]

Conclusion

While trade associations can be effective advocates for their members' interests, and most do make the effort to represent the broad range of members they involve, they can also take positions that diverge substantially from a company's interests, and that of its investors. The effort by some US trade associations to stop the EPA's Clean Power Plan provides a number of clear lessons.

At minimum, Canadian companies need to establish clear and effective oversight and review of their trade association memberships to identify risks and substantial policy misalignments. Where the issue at hand is one with strong reputational, regulatory or business risks attached – such as climate change – that review needs to be even more robust. Further, where the trade association's policy interventions may have the effect of undoing the framework of a hard-won international agreement on climate change, additional actions may be necessary to publicly distance the company from the association's activities.

Attention to a company's political activity and requests for better oversight and disclosure from investors is increasing, especially around climate-related policy interventions; companies that take stock of their political activity and take charge of the process – including the use of dues and other funds by third-party organizations – will be better prepared to respond to that interest.

Endnotes

[1] http://www.proxypreview.org/

[20]See http://www.share.ca/shareholderdb/proposal/report-to-shareholders-on-political-spending/2420, and www.share.ca/shareholderdb/proposal/repor/2421.

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[19]NMA Labels EPA's Costly Power Plan "Change without Difference", August 2, 2015, http://nma.org/index.php/press-releases-2013/2263-nma-labels-epa-s-costly-power-plan-change-without-difference

[20] The US Chamber of Commerce does not release a list of its members publicly. Other Canadian companies are likely to be members but this information is not disclosed at present.

[21] http://www.chamberlitigation.com/about/board

[22] http://www.nma.org/index.php/member-list

[23] http://www.aga.org/About/leadership/Pages/default.aspx

[24] API to EPA: Falling methane emissions make new rules unnecessary, September 23, 2015 www.api.org/news-and-media/news/newsitems/2015/september-2015/api-to-epa-falling-methane-emissions-make-new-rules-unnecessary

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[26] http://www.alecexposed.org/wiki/ALEC_Exposed

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SHARE
SHAREHOLDER ASSOCIATION
for RESEARCH & EDUCATION

Shareholder Association
for Research & Education

1055 West Georgia Street
26th Floor PO Box 11171
Royal Centre
Vancouver, BC V6E 3R5

T: 604 408 2456
F: 604 408 2525
E: info@share.ca

www.share.ca