Fiduciary Obligations in Business and Investment: Implications of Climate Change

Dr. Janis Sarra
Presidential Distinguished Professor and Professor of Law
University of British Columbia

April 2018

COMMONWEALTH
Climate and Law Initiative

Fiduciary Obligations in Business and Investment: Implications of Climate Change

Dr. Janis Sarra
Presidential Distinguished Professor and Professor of Law
University of British Columbia, Peter A. Allard School of Law

Executive Summary

Fiduciary obligation, under both corporate law and the common law, requires directors and officers to identify and address climate-related financial and other risks. In fulfilling their obligations to act in the best interests of the company, directors and officers must directly engage with developments in knowledge regarding physical and transition risks related to climate change and how these risks may impact their corporation. Depending on the firm's economic activities, the risk may be minor or highly significant, but directors and officers have an obligation to make the inquiries, to devise strategies to address risks, and to have an ongoing monitoring to ensure the strategies continue to be responsive to the risk. Directors' fiduciary duty requires that they have overseen and monitored the actions of the individuals charged with mitigation and adaptation; and have mechanisms in place to respond rapidly to changes in the company's risk profile. In addition to fiduciary obligations, this study examines the statutory duty of care under corporate law, which requires directors and officers to exercise the care, diligence and skills that a reasonably prudent person would exercise in the circumstances. This duty requires directors and officers to supervise and manage the transition that will address the specific risks, as well as the new opportunities, posed by climate change.

The study also examines pension plan trustees and other investment fiduciaries in respect of their fiduciary obligations related to climate change. Pension fund trustees have a fiduciary obligation to pension beneficiaries to act prudently in their best interests in making investment decisions regarding fund portfolios. In fulfilling their obligations to beneficiaries, pension trustees and their investment managers have an obligation to identify and address climate-related financial risk. Trustees can take climate change into account as a legitimate investment issue over the short or long term or both. If trustees fail to act to address material climate change risk, they may be personally liable for breach of their fiduciary obligation. Inaction is no longer acceptable, given all the evidence that climate change risk is material across the entire economy. Trustees can also take climate change into account because they have duties as public fiduciaries additional to their financial duty to beneficiaries. Fiduciaries have a duty to act even where the potential costs and benefits of climate change cannot be fully quantified immediately. Fiduciary obligation also requires considering the benefits of investment in green adaption and mitigation technologies and other products and services that are likely to have upside financial potential for return on investment.

To date, there is no jurisprudence in Canada that expressly clarifies fiduciary obligation regarding climate risk, but existing Supreme Court of Canada judgments make clear that the obligations of fiduciaries are contextual and broad enough to recognize such a duty. The Supreme Court has held that in considering what is in the best interests of the corporation, directors may look to the interests of shareholders, employees, creditors, consumers, governments and the environment, as well as prevailing socio-economic conditions to inform their decisions. The statutory obligation that directors act honestly and in good faith, and act diligently in supervising and managing the corporation's affairs, necessarily means that they must engage with the issues of physical and transition climate change risks. In assessing violations of fiduciary obligations regarding climate-related financial risk, the courts will look to see that the directors made a reasonable decision, not a perfect decision. Provided that the decisions and the action taken to monitor, mitigate and/or adapt with respect to climate risk is within a range of reasonableness, the courts are unlikely to find personal liability. Yet while courts are reluctant to second-guess the application of business expertise to the considerations involved in corporate decision making, they have made clear that they will determine whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

While the existing statutory and common law obligations of all these fiduciaries are sufficient to ground a fiduciary obligation to address climate-related financial risk, Canadian governments could adopt legislation similar that enacted in France to require corporations, financial institutions, and institutional investors, including mutual funds and pension funds, to disclose annually the financial risks related to the effects of climate change and the company's measures to reduce them, including how they are implementing a low-carbon strategy in every component of their activities, and how their corporate and investment decision-making is contributing to the energy and ecological transition to limit global warming. Relevant for this study are the requirements that institutional investors publish commitments on responsible investment regarding climate change risk, including explanations of how these commitments align with their fiduciary duties.

Moving forward, fiduciaries should embed mitigation and adaptation strategies in their corporate decisions and investment portfolio management, and report to shareholders, pension beneficiaries and other stakeholders on how these commitments have been implemented and the resultant outcomes. Companies should provide robust, credible and detailed accounts of their management of climate risk. They should ensure that trustees, boards and executives have the resources and knowledge to hold investment managers and advisers to account on climate-related issues. The study also canvasses other avenues for holding directors accountable for failing to address climate-related financial risk, including corporate law oppression remedies, personal and derivative actions. It examines environmental liability in Canada for lessons that can be drawn for climate-related litigation risk. The study offers a starting list of due diligence that fiduciaries could undertake now to engage in proactive governance regarding climate-related financial risk.

The law as currently framed is a driver for positive action on climate change. While the focus of the study is Canada, it draws on international developments and its key findings have broad application internationally.

Table of Contents

Fiduciary Obligations in Business and Investment: Implications of Climate Change

Janis Sarra*

I. Introduction

The allocation of capital in business and investment have an impact on and are impacted by climate change. This study examines the scope of duties of directors, officers, pension fund managers, trustees and other fiduciaries in respect of climate change risk. While the focus is on Canadian statutory and common law, the reasoning has broad application internationally, and is also informed by recent international developments. The study concludes that a comprehensive understanding of fiduciary obligation can facilitate, rather than constrain, the ability of directors, officers and other fiduciaries to address the complex challenges of climate-related financial risk. It provides an answer to concerns that consideration of climate change somehow places social benefits before enterprise wealth maximization and maximization of the financial performance of a fund's investments. Fiduciary obligations require fiduciaries to make decisions based on a horizon longer than the financial quarter or year and limited to profit/return on investment for such limited period. Fiduciaries have a duty to identify and address the potential costs and benefits of climate change risk, even where those costs and benefits cannot be fully quantified immediately.

Climate change represents a significant risk in financial and other markets; it could substantially affect the valuation of many publicly listed companies and place some investment portfolios at risk.[1] Anthropogenic climate change - climate change due to the activities of humans - presents the greatest challenge of this century. As 195 countries agreed in December 2015 in the first fully-global climate change agreement, "COP 21",[2] there is urgent need to reduce annual emissions of greenhouse gases (GHG)[3] by 2020 if we are to have any hope of holding the increase in the global average temperature to below 2°C above preindustrial levels and pursue efforts to limit it to 1.5°C

* My sincere thank you to the Ivey Foundation for providing financial support for this research. Many thanks to participants at climate finance roundtable discussions in Toronto, Calgary and Vancouver, who provided helpful comments on the first draft of this research study. Thanks also to MaryGrace Johnstone for research assistance.

[1] World Economic Forum, *The Global Risks Report 2017*, online: WEF <http://reports.weforum.org/global-risks-2017/>.

[2] United Nations Framework Convention on Climate Change ("UNFCCC") Conference of the Parties ("COP 21"), Paris Agreement, 12 December 2015, at 1, unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf; *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/L.9, 11 December 2015 at para 137; unfccc.int/resource/docs/2015/cop21/eng/l09.pdf. More than 174 countries have since ratified the agreement, including Canada, http://unfccc.int/2860.php. On 5 October 2016, the threshold for entry into force of the Paris Agreement was achieved. The Paris Agreement entered into force on 4 November 2016.

[3] Environment and Climate Change Canada (ECCC), "Canadian Environmental Sustainability Indicators Greenhouse Gas Emissions", 2017, https://www.ec.gc.ca/indicateurs-indicators/default.asp?lang=en&n=F60DB708-1. "Greenhouse gases trap heat in the Earth's atmosphere, just as the glass of a greenhouse keeps warm air inside. Human activity increases the amount of GHGs in the atmosphere, contributing to a warming of the Earth's surface. This is called the enhanced greenhouse effect. Over the past 200 years in particular, humans have released GHGs into the atmosphere primarily from burning fossil fuels. As a result, more heat is being trapped and the temperature of the planet is increasing. Sea levels are rising as Arctic ice melts, and there are changes to the climate, such as more severe storms and heat waves. All of this impacts the environment, the economy and human health", at 5 ("ECCC Indicators").

in order to survive as a planet.[4] Scientists have known about the serious risks to our planet from anthropogenic climate change for more than 30 years.[5] More than 800 scientists internationally have recognized a strong scientific case for urgent and long-term action on climate change, calling for fossil fuels to be phased out by 2100 and for immediate, substantial and sustained reductions in greenhouse gas emissions.[6] In meeting the COP 21 goals, two-thirds of the world's fossil fuel reserves will not be used and are at risk of becoming stranded assets, placing trillions of dollars of shareholder value at risk.[7] Canada's economy faces significant risk in this respect. Canada is only at a nascent stage of addressing climate change,[8] and this moment in time presents an important opportunity to shift the trajectory of our efforts to address climate change risk.

This study explores one important aspect of the transition to a low carbon economy, the fiduciary obligations of directors, officers, pension fund managers, trustees and other fiduciaries to identify and address climate change financial risk in their business operations and investment portfolios. It suggests that corporate and pension laws, as currently framed, already create a fiduciary obligation in respect of climate change. In fulfilling their duty to act in the best interests of companies, directors and officers have an obligation to identify and address climate-related financial risk. Pension and other investment fiduciaries, in fulfilling their obligations to beneficiaries, have an obligation to identify and address climate-related financial risk. There are both statutory provisions and a highly developed jurisprudence on fiduciary obligations in the business context in Canada. The study examines why they are sufficient to ground a fiduciary obligation to address climate-related financial risk. It examines whether it will take an appellate court judgment to generate widespread adoption of this idea. It also explores whether legislators could act now to clarify the scope of the duty, to help provide a roadmap for directors, encouraging them to take meaningful action to transition towards a low-carbon economy.

While the legislation governing corporate directors and officers, and that governing pension funds and other institutional investors, have different parameters, one point of intersection is the scope of fiduciary obligation, and more specifically, that obligation in respect of climate-related risk. A comprehensive analysis of fiduciary obligation and climate-related financial risk is therefore best accomplished through the lens of multiple stakeholders implicated in financial markets. Hence, a research study considering the duties of all these fiduciaries.

Part II of this report provides a description of the current state of fiduciary obligation in Canada. Part III examines the fiduciary obligation of Canadian directors and officers, suggesting that as framed, the current obligation to act in the best interests of the company includes the obligation

---

[4] *Ibid.*
[5] The Intergovernmental Panel on Climate Change ("IPCC"), "Climate Change 2014. Impacts, Adaptation and Vulnerability", at 9, https://www.ipcc.ch/.
[6] IPCC, 2014 Synthesis Report, http://www.ipcc.ch/news_and_events/docs/ar5/ar5_syr_headlines_en.pdf.
[7] Carbon Tracker Initiative, Unburnable Carbon, 2014, http://www.carbontracker.org/wp-content/uploads/2014/09/Unburnable-Carbon-Full-rev2-1.pdf; Cambridge Institute for Sustainability Leadership, "Unhedgeable risk How climate change sentiment impacts investment", 2015, https://www.cisl.cam.ac.uk/publications/publication-pdfs/unhedgeable-risk.pdf.
[8] Canadian governments and businesses are ahead of others in terms of thinking through the implications of climate change risk, but overall, the country lags other efforts internationally: Howard Covington and Raj Thamotheram, "The Case for Forceful Stewardship", Part 1, 10 January 2015 working paper, SSRN-id2551478.

to identify and address climate-related risk. This part also discusses the statutory duty of care and corporate law oppression remedies as further avenues for holding directors accountable for failing to address climate adaptation and mitigation. Part IV examines investment practices and fiduciary obligation in respect of climate-related financial risk, including the obligations of pension fund managers and trustees. While the jurisprudence on financial fiduciaries is not as developed as obligations under corporate law, part IV engages in careful analysis of both statutory and common law that does exist. It identifies a governance role for institutional investors and pension fiduciaries in respect of tacking the challenges posed by climate change. Part V suggests that while the duty currently exists, legislators in Canada could create greater certainty by clarifying the scope of current statutory language. Part VI concludes.

The methodology for the study includes consideration of the statutory language governing fiduciaries under corporate, securities, pension and trust law; the common law jurisprudence in Canada and elsewhere; and international developments in climate-related financial risk and policy and strategies to address it. Consultations were held with industry and financial stakeholder groups in Toronto, Calgary and Vancouver, and a draft of the study was circulated for comments.

II. Fiduciary Obligation in Canada – the Current State of the Law

Generally, a fiduciary relationship is "a relationship in which one person is under a duty to act for the benefit of another person on matters within the scope of the relationship."[9] A fiduciary obligation "arises in a relationship in which the fiduciary has a discretion or power to exercise, the fiduciary can unilaterally exercise this discretion or power, and the beneficiary is vulnerable to, or at the mercy of, the fiduciary."[10] The precise scope of a fiduciary's duties depends on the nature of the fiduciary's relationship with one or more beneficiaries.[11] A trustee, for instance, is in a fiduciary relationship with the beneficiaries of the trust. The trustee is expected to be loyal to the beneficiaries in carrying out the trust obligations in the best interests of the beneficiaries.[12] Another long-accepted fiduciary relationship is that of an agent to the agent's principal. An agent is expected to act with care and in the best interests of the principal.

In terms of individuals and firms who manage other people's money, their fiduciary obligation requires them to act in the interests of beneficiaries, rather than serving their own interests,

[9] See the definition of "fiduciary relationship" in *Black's Law Dictionary*, 10th ed (St Paul, Minn: Thomson Reuters, 2009). Similarly, *The Dictionary of Canadian Law*, 4th ed (Toronto: Carswell, 2011) says that a "fiduciary duty" is "1. One that arises in the context of a trust. 2. Certain relationships give rise to this type of duty: trustee and beneficiary, guardian and ward, principal and agent. 3. A duty by which the law seeks to protect vulnerable persons in transactions with others." For a discussion see R Yalden, J Sarra, M Gillen, M Khimji, C Liao, P Patten, M Condon, G Campo, B Bryan and M Deturbide, *Business Organizations: Practice, Theory and Emerging Challenges* (Toronto: Emond Montgomery, 2017) ["Yalden *et al*"].

[10] *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 ["*Lac Minerals"*]. *Dictionary of Canadian Law*, *ibid*.

[11] *Guerin v The Queen,* [1984] 2 SCR 335 at 384.

[12] Yalden *et al*, *supra* note 9.

including a duty of loyalty and a duty of prudence.[13] The duty of loyalty requires fiduciaries to act in good faith in the interests of their beneficiaries, impartially balance the conflicting interests of different beneficiaries, avoid conflicts of interest, and a duty not to act for the benefit of themselves or a third party. The prudential obligation requires fiduciaries to act with the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.[14] Prior to modern corporations statutes, directors were found to be in a fiduciary relationship with the corporation and, therefore, required to exercise care in making management decisions with respect to the corporation.[15]

The Supreme Court of Canada ("SCC") has held that there are certain common threads running through fiduciary duties that arise from relationships marked by discretionary power and trust, such as loyalty and "the avoidance of a conflict of duty and interest, and a duty not to profit at the expense of the beneficiary".[16] This part examines fiduciary obligation through the lens of the obligations of corporate directors and officers. However, the approach of the SCC in these judgments offers valuable insights for pension trustees and other fiduciaries as well.

1. Director and Officer Fiduciary Obligations

Corporate legislation in Canada has codified fiduciary duty provisions,[17] which operate in tandem with common law obligations. Corporate law specifies that directors and officers of corporations incorporated under such statutes have a duty to act in the best interests of the corporation.[18]

---

[13] Ronald B Davis, *Democratizing Pension Funds, Corporate Governance and Accountability* (Vancouver: UBC Press, 2008) at 54 ["Davis"].

[14] See for example, the Ontario *Pension Benefits Act,* RSO 1990, c P 8 [*OPBA*], as amended, s 22(1).

[15] *Lac Minerals, supra*, note 10.

[16] *Ibid.*

[17] See the *Canada Business Corporations Act*, RSC 1985, c C-44, as amended [*CBCA*], s 122(1). For corresponding provisions in general statutes of incorporation of the provinces and territories, see the Alberta *Business Corporations Act*, RSA 2000, c B-9 [*ABCA*], s 122(1); the British Columbia *Business Corporations Act*, SBC 2002, c 57 [B*CBCA*], s 142(1); the Manitoba *Corporations Act*, CCSM c C225 [*MCA*], s 117(1); the New Brunswick *Business Corporations Act*, SNB 1981, c B-9.1 [*NBBCA*], s 79(1); the Newfoundland and Labrador *Corporations Act*, RSNL 1990, c C-36 [*NLCA*], s 203(1); the Northwest Territories *Business Corporations Act*, SNWT 1996, c 19 [*NTBCA*], s 123(1); the Nunavut *Business Corporations Act*, SNWT (Nu) 1996, c 19 [*NuBCA*], s 123(1); the Ontario *Business Corporations Act*, RSO 1990, c B.16 [*OBCA*], s 134(1); the Québec *Business Corporations Act*, CQLR c S-31.1 [*QBCA*], s 119; the Saskatchewan *Business Corporations Act*, RSS 1978, c B-10 [*SBCA*], s 117(1); the Yukon *Business Corporations Act*, RSY 2002, c 20 [*YBCA*], s 124(1). The Nova Scotia *Companies Act*, RSNS 1989, c 81 and the Prince Edward Island *Companies Act*, RSPEI 1988, c C-14 do not have a corresponding provision.

[18] Section 122(1) of the *CBCA, ibid*, provides:

Every director and officer of a corporation in exercising their powers and discharging their duties shall

> (a) act honestly and in good faith with a view to the best interests of the corporation; and
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

For corresponding provisions in general statutes of incorporation of the provinces and territories, see *ABCA*, *ibid,* s 122(1); *BCBCA*, *ibid,* s 142(1); *MCA*, *ibid,* s 117(1); *NBBCA*, *ibid,* s 79(1); *NLCA, ibid,* s 203(1); *NTBCA*, *ibid,* s 123(1); *NuBCA*, *ibid,* s 123(1); *OBCA*, *ibid,* s 134(1); *QBCA*, *ibid,* s 119; *SBCA, ibid,* s 117(1); *YBCA, ibid,* s 124(1).

The primary role of directors is to manage, or supervise the management of, the business and affairs of a corporation.[19] The directors may appoint officers, specify their duties and delegate powers to manage the corporation's business and affairs.[20] The *Canada Business Corporations Act (CBCA)* and its sister corporations statutes in the provinces and territories establish duties to be discharged by directors and officers in managing, or supervising the management of, the corporation. Two components of the codified duties of directors and officers are the duty of loyalty and the duty of care. The corporate statutory duty of loyalty requires that the directors and officers of a corporation "act honestly and in good faith with a view to the best interests of the corporation."[21] The statutory duty of care requires that the directors and officers "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."[22] The SCC has held that it is the first of these duties that is the "statutory fiduciary duty".[23] These duties are discussed in turn.

2. The Statutory Fiduciary Duty under Corporate Law

The SCC has held that the statutory fiduciary duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation.[24] It has held that considerable power over the deployment and management of financial, human and material resources is vested in the directors and officers of corporations. In deciding to invest in, lend to or otherwise deal with a corporation, shareholders and creditors transfer control over their assets to the corporation, and hence to the directors and officers, in the expectation that the directors and officers will use the corporation's resources to make reasonable business decisions that are to the corporation's advantage.[25] Directors and officers must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation.[26] They must serve the corporation selflessly, honestly and loyally.[27]

In considering the specific substance of the fiduciary duty based on the relationship of directors to corporations, the SCC held that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders"; that from an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation, but that various other factors may be relevant in determining what directors should consider in

[19] Section 102(1), *CBCA, ibid*.
[20] Section 121, *CBCA, ibid.* Subject to any unanimous shareholder agreement and several other provisions of the statute.
[21] *CBCA, ibid,* s 122(1)(a); *ABCA, supra* note 17, s 122(1)(a); B*CBCA, supra* note 17, s 142(1)(a); MCA, *supra* note 17, s 117(1)(a); *NBBCA, supra* note 17, s 79(1)(a); *NLCA, supra* note 17, s 203(1)(a); *NTBCA, supra* note 17, s 123(1)(a); *NuBCA, supra* note 17, s 123(1)(a); *OBCA, supra* note 17, s 134(1)(a); *QBCA, supra* note 17, s 119; *SBCA, supra* note 17, s 117(1)(a); YBCA, s 124(1)(a).
[22] *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461 ["*Peoples Department Stores*"].
[23] *Ibid* at paras 34-35, citing s 122(1), *CBCA, supra* note 17.
[24] *Ibid* at para 32.
[25] *Ibid* at para 34.
[26] *Ibid* at para 35. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position.
[27] *Ibid* at para 35.

soundly managing with a view to the best interests of the corporation.[28] The SCC held that: "We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment."[29]

The SCC held that the various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty - at all times, directors and officers owe their fiduciary obligation to the corporation.[30] The Court further held that "In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders."[31]

In *BCE Inc v 1976 Debentureholders*, the SCC reiterated its holding in *Peoples Department Stores* that "In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions.[32] The SCC held that:

> The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.[33]

The SCC further held that, in executing its duty of loyalty to the corporation, the board of directors was required to reflect on the interests of the corporation both as an economic actor and as a "good corporate citizen".[34]

3. *The Duty of Care under Corporate Law*

The second obligation, the duty of care, imposes a legal obligation on directors and officers to be diligent in supervising and managing the corporation's affairs.[35] That directors must satisfy a duty of care is a long-standing principle of the common law, although the duty of care has been

---

[28] *Ibid* at para 42.
[29] *Ibid* at para 42.
[30] *Ibid* at para 43.
[31] *Ibid* at para 47. The SCC held that if the stakeholders cannot avail themselves of the statutory fiduciary duty (the duty of loyalty), to sue the directors for failing to take care of their interests, they have other means at their disposal.
[32] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 39, [2008] 3 SCR 560 ["*BCE"*], citing *Peoples Department Stores, supra* note 22.
[33] *Ibid* at para 38.
[34] *Ibid* at para 66.
[35] *Peoples Department Stores, supra* note 22 at para 32.

reinforced by statute to become "more demanding".[36] The SCC held that unlike the statutory fiduciary obligation, the statement of the duty of care in s 122(1)(*b*) of the *CBCA* does not specifically refer to an identifiable party as the beneficiary of the duty.[37] Instead, it provides that "[e]very director and officer of a corporation in exercising their powers and discharging their duties shall . . . exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Thus, the identity of the beneficiary of the duty of care is much more open-ended.[38] The SCC held that the statutory duty of care requires more of directors and officers than the traditional common law duty of care. The standard by which to assess their conduct is objective; thus, the factual aspects of the circumstances surrounding the actions of the director or officer are important to assessing whether directors met their duty of care.[39]

The SCC held that "the contextual approach dictated by s.122(1)(*b*) of the *CBCA* not only emphasizes the primary facts, but also permits prevailing socio-economic conditions to be taken into consideration."[40] Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made, and when challenged, the courts will look to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board, even though subsequent events may have cast doubt on the board's determination.[41] In order for a plaintiff to succeed in challenging a business decision, he or she has to establish that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff; and directors and officers will not be held to be in breach of the duty of care if they act prudently and on a reasonably informed basis.[42] The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known.[43]

In most circumstances, the court's analysis of whether directors and officers have met their duty of care involves an inquiry into the process undertaken by the directors or board of directors in making the decision and the procedures they have in place to identify and address problems, not an inquiry into the substance of the decision where the complaint is not directly related to a specified statutory violation.[44]

---

[36] *Ibid* at para 59.
[37] *Ibid* at para 57.
[38] *Ibid.* The SCC held that this result is clearly consistent with the civil law interpretation of the word "another"; thus, if breach of the standard of care, causation and damages are established, creditors can resort to article 1457 to have their rights vindicated.
[39] *Ibid.* As opposed to the subjective motivation of the director or officer, which the SCC held is the central focus of the statutory fiduciary duty of s. 122(1)(a) of the *CBCA, supra* note 17.
[40] *Ibid* at para 64. It held that the establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care.
[41] *Ibid* at para 64.
[42] *Ibid* at para 67.
[43] *Ibid* at para 67.
[44] Even where a director does not take a position at a board meeting, he or she can be held accountable for a decision of the board. For example, *CBCA, supra* note 17, s 123(1) provides that a director who is present at a meeting of directors or a committee of directors, is deemed to have consented to any resolution passed or action taken at the meeting unless the director's dissent has been entered in the minutes of the meeting, the director requests that a dissent be entered in the minutes, the director sends a written dissent to the secretary of the meeting before the

The SCC has held that courts should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making.[45] However, the SCC also held that courts "are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made".[46] The SCC has clearly signaled that the courts have the capacity and the responsibility to consider factors such as prudence and diligence when assessing corporate decision-making.

Important for the Canadian context is the interplay of the *Civil Code of Québec (Civil Code)* and corporations law, since directors' and officers' obligations fall under both common law and civil law in Québec. The SCC in *Peoples Department Stores* held that the *Civil Code* is used as suppletive law, in that directors have been held liable to creditors in respect of either contractual or extracontractual obligations.[47] The SCC held that three elements of article 1457 *Civil Code* are relevant to the integration of the director's duty of care into the principles of extra-contractual liability: who has the duty ("every person"), to whom is the duty owed ("another") and what breach will trigger liability ("rules of conduct"). Directors and officers come within the expression "every person" and "another" can include the creditors. The reach of article 1457 *Civil Code* is broad, and it has been given an open and inclusive meaning. Thus, in Québec, directors and officers can be found to have violated a duty of care under both corporate law and the *Civil Code*.

The scope of directors' obligations was affirmed by the SCC in *BCE Inc v 1976 Debentureholders*, noting that, "under the business judgment rule, deference should be accorded to business decisions taken in good faith and in the performance of the functions they were elected to perform."[48]

In Canada, therefore, the law is clear that directors owe their duty of loyalty to the corporation. The SCC has also confirmed that, in considering what is in the best interests of the corporation, directors can consider the interests of multiple stakeholders.[49] The trend of Canadian

---

meeting is adjourned, or the director sends a dissent by registered mail or delivers it to the registered office of the corporation immediately after the meeting is adjourned. This provision addresses the contours of the fiduciary obligation when directors fail to dissent or disagree with a decision of the board. See also: *ABCA, supra* note 17, s 123(2); *BCBCA, supra* note 17, s 154(6); *MCA, supra* note 17, s 118(2); *NBBCA, supra* note 17, s 80(2); *NLCA, supra* note 17, s 204(2); *NTBCA, supra* note 17, s 124(2); *NuBCA, supra* note 17, s 124(2); *OBCA, supra* note 17, s 139(2); *QBCA, supra* note 17, s 139; *SBCA, supra* note 17, s 118(2); *YBCA, supra* note 17, *s* 125(2).

[45] *Peoples Department Stores, supra* note 22 at para 67.

[46] *Ibid.*

[47] *Ibid* at para 54. The SCC held that contractual liability arises where the director personally guarantees a contractual obligation of the company. Liability also arises where the director personally acts in a manner that triggers his or her extra-contractual liability. Article 1457 Civil Code of Québec, c CCQ-1991 (CCQ): "Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody." *Ibid* at para 55.

[48] *BCE, supra* note 32 at para 99.

[49] Yalden *et al, supra* note 9 at 51.

jurisprudence in respect of directors' fiduciary obligations makes clear that the duty can include obligations in respect of climate change risk.

III. Why Director and Officer Fiduciary Obligation Requires Attention to Climate Change Risk Reduction

Most Canadian directors and officers have only recently turned their attention to climate change risk. Canada, as a federal system, has very uneven levels of commitment to addressing climate change. Some corporations, investment funds and governments are exhibiting leadership, others are not.

Thus, there is a lag in addressing these issues, in comparison to other jurisdictions. The reasons are complex, but two primary reasons are the temporal nature of climate change and the reliance of the Canadian economy on fossil fuel production and use. With Canada's vast natural resources, it is difficult for Canadians to comprehend that decisions made today will continue a trajectory towards severe harm to the climate in the longer term.[50] Coupled with pressure on directors and officers, particularly of publicly-traded companies, to realize short-term profits, there is a disconnect between the responsibilities of companies to address climate change and market pressure to realize return on investment over very short periods.[51] Absent pressure by shareholders and other stakeholders to hold directors and officers accountable, changes in businesses' behaviour will be slower than is required to meet the COP 21 urgent challenges.[52]

While the harmful effects of fossil fuels and GHG emissions are now well-documented, Canadian fiduciaries face the challenge that Canada's fossil fuel sector generates 7.7% of Canada's GDP,[53] and thus they are heavily invested in a sector that has only a limited future.[54] In 2010, Canada exported $85 billion in value of crude oil, refined petroleum products and natural gas.[55] Oil production in Canada increased by over 50% in the past decade.[56] The United States ("US") Energy Information Association estimates that energy consumption is rising globally for all fuels, except

[50] Janis Sarra and Sally Aitken, "A Greener Future", in P Tortell, M Young and P Nemetz, eds, *Reflections of Canada* (Vancouver, UBC, 2017) at 24-32 ["Sarra and Aitken"].
[51] Exacerbated by requirement to disclose quarterly returns.
[52] This point is discussed in part IV below.
[53] Natural Resources Canada, "Energy Factbook 2016-2017", https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/EnergyFactBook_2016_17_En.pdf, at 5 ("Energy Factbook 2016-2017"); Mark Carney, "Resolving the climate paradox", Arthur Burns Memorial Lecture, Berlin, 22 September 2016, http://www.bankofengland.co.uk/publications/Documents/speeches/2016/speech923.pdf, at 9. See also Natural Resources Canada, "National Economic Performance", http://www.nrcan.gc.ca/publications/statistics-facts/1239 ("Natural Resources Canada").
[54] "Energy Factbook 2016-2017" *supra* note 53 at 5: Oil and Gas generates 3.9% of employment, 700,000 jobs.
[55] Natural Resources Canada, *supra* note 53. 99% of Canadian crude oil exports are to the US, and Canada is the largest foreign supplier of crude oil to the US, accounting for 43% of total US crude oil imports and for 20% of US refinery crude oil intake; "Energy Factbook 2016-2017" *supra* note 53 at 31.
[56] Lawrence McKeown, Corben Bristow and Anthony Caouette, "Canada's shifting sands: Oil production, distribution and implications, 2005 to 2014", Environment, Energy and Transportation Statistics Division, Statistics Canada (12 July 2016), http://www.statcan.gc.ca/pub/16-002-x/2016002/article/14629-eng.pdf, at 1.

coal.[57] Production growth continues in numerous countries, including Canada.[58] Canada's predicted 1.26 million b/d increase in production by 2040 mainly comes from oil sands production.[59] Nicholas Stern observes that delays in taking immediate action to mitigate climate change will amount to a decline of 5 to 10% of worldwide GDP, but the reduction in GDP will only be 1 to 2% if action is taken now; thus, any delay now poses a substantial financial risk.[60]

Consumption is also an important part of the challenge.[61] In 2015, Canada's total GHG emissions were 722 megatonnes (Mt) of carbon dioxide equivalent ("CO_2 eq"). The oil and gas sector was the largest GHG emitter in Canada, accounting for 26% of total GHG emissions, followed closely by the transportation sector, which emitted 24% of total emissions.[62] The other Canadian economic sectors: buildings, electricity, heavy industry, agriculture, and waste, each accounted for between 7% and 12% of total GHG emissions in Canada.[63] Emissions of GHG from the oil and gas sector have increased 76% since 1990, mostly attributable to the increased production of crude oil and the expansion of the oil sands industry.[64] The oil sands alone account for 9.3% of Canada's total GHG emissions.[65]

---

[57] US Energy Information Association, *International Energy Outlook* 2017, 14 September 2017, www.eia.gov/ieo ("EIA *International Energy Outlook"*). It predicts that most of the growth in world liquid fuels consumption from 2015 to 2040 will come from non-OECD countries, where strong economic and population growth increase the demand for liquid fuel; and that more than 80% of the total increase in liquid fuels consumption will be in non-OECD Asia, as China and India experience rapid industrial growth and increased demand for transportation. In OECD countries, it predicts that the demand for liquid fuels will grow slowly or decline between 2015 and 2040, at 35-36. The US Energy Administration, "Short Term Energy Outlook", 11 October 2017, https://www.eia.gov/outlooks/steo/report/global_oil.cfm, suggests that the short time outlook for Canada is stable production, not a large growth.

[58] The EIA *International Energy Outlook* 2017, *ibid* at 40, reports that world liquid fuels production are expected to rise by 16.1 million b/d from 2015 to 2040, with more than half of the increase coming from a 10.3 million b/d increase in crude oil and lease condensate, including production from tight and non-tight resources, and extra-heavy crude oils and processed bitumen from oil sands from OPEC member countries; and that production of other liquids (natural gas plant liquids, gas-to-liquids, coal-to-liquids, oil shale, refinery gain, and biofuels) will increase by 4.2 million b/d (25%) from 2015 to 2040.

[59] *Ibid* at 44.

[60] Nicholas Stern, Stern Review on the Economics of Climate Change (IPCC: 2014), <http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf>.

[61] Government of Canada, Pan-Canadian Framework on Clean Growth and Climate Change, 9 December 2016, https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html. 80% of Canada's GHG emissions are caused by the production and use of energy.

[62] Emissions from passenger and freight travel amounted to 96% of these emissions, ECCC Indicators, *supra* note 3 at 9. There have been improvements in the fuel efficiency of both passenger cars and light trucks over the last few decades, but they were not sufficient to offset the increases in emissions due to the change in composition of the vehicle fleet.

[63] *Ibid* at 8.

[64] *Ibid* at 9. "GHG emissions from conventional oil production have increased by 26%, while emissions from oil sands production have increased more than fourfold. About half of the increase in emissions from oil sands production over this period came from the growth of i*n situ* production. A temporary decrease in GHG emissions between 2008 and 2011 is mostly attributable to the world economic downturn that resulted in a lower global demand for petroleum products." 61% of Canada's oil production in 2015 was in the oil sands, with an estimated $271 billion of capital investment to date, including $22.5 billion in 2015, Energy Factbook 2016-2017, *supra* note 53 at 34.

[65] Energy Factbook 2016-2017, *ibid* at 35.

However, overall, Environment and Climate Change Canada reports that the level of emissions per unit of gross domestic product (GDP) was 33% lower in 2015 than in 1990.[66] These improvements are attributable to a number of factors such as more efficient industrial processes, a shift to a more service-based economy and a decrease in the emissions associated with energy generation, such as realized through fuel switching.[67] As one industry leader noted, given heavy reliance on oil and natural gas, at least Canada is producing under some of the highest environmental standards in the world and is actively developing cleaner technologies.

The impact of climate change on Canadian cities is not yet as visible as it is in the far north, away from population centres, such that it is not obvious that Canada has a higher rate of warming than most other regions of the world and the risks are great.[68] Moreover, since Canada's economy is heavily dependent on the very resources that generate some of the most egregious GHG emissions, our capital markets are directly implicated in both the risk-generating activity and the potential to mitigate the risks. The influence of the GHG producing industry in Canada's capital markets is exacerbated by the temporal mismatch between the climate change risks and the temporal horizons of investors. While some investors are interested in the long-term sustainability of firms, there are significant investors that press for short-term returns that maximize value to them but create risks to the firm overall.

There has also historically been a perception that alternative business pathways are not as profitable. However, as renewable energy and other technologies become more profitable, for example, renewable energy sources currently provide 19% of Canada's total primary energy supply, directors and officers may recognize that adaptation can align with the corporation's long-term success.

There are mismatched timelines between capital markets' need for profit, directors' and officers' obligations to act in the best interests of the company, and Canada's need for long-term sustainability of its economy.[69] Bank of England Governor Mark Carney has called climate risk a "tragedy of the horizon", in that the most serious consequences of today's emissions will eventuate beyond the time-frame of current business and regulatory cycles.[70] He has observed that: "the catastrophic impacts of climate change will be felt beyond the traditional horizons of most actors – imposing a cost on future generations that the current generation has no direct incentive to fix."[71] The Bank identified three types of financial risk: "physical risks" that arise from increased frequency and severity of climate-related and weather-related events that damage

---

[66] ECCC, *supra* note 3 at 6: "Over that period, GHG per unit of gross domestic product decreased from 0.62 megatonnes (Mt) of carbon dioxide equivalent (CO_2 eq) per $billion gross domestic product in 1990 to 0.41 Mt CO_2 eq per $billion gross domestic product in 2015. The amount of GHGs emitted per person in Canada decreased to 20.1 tonnes CO_2 eq in 2015, compared with 22.1 tonnes CO_2 eq in 1990."

[67] *Ibid.*

[68] Government of Canada, Impacts of Climate Change, 27 November 2015, http://climatechange.gc.ca/default.asp?lang=En&n=036D9756-1

[69] Janis Sarra, "The Anthropocene at the Time of Trump" (forthcoming, *UBC Law Review,* 2018) ["Sarra, Anthropocene"].

[70] Mark Carney, "Breaking the Tragedy of the Horizon- climate change and financial stability", Bank of England (29 September 2015), http://www.bankofengland.co.uk/publications/Pages/speeches/2015/844.aspx# at 3 ["Carney"].

[71] *Ibid.*

property and disrupt trade; "transition risks" resulting from adjustment towards a lower-carbon economy; and "liability risks" from parties seeking compensation for suffering loss from the effects of climate change from those individuals and entities they hold responsible.[72] Changes in policy, technology and physical risks could prompt reassessment of the value of a large range of assets, which may affect financial stability.

Building on the Bank of England's insights, the Financial Stability Board ("FSB") Task Force on Climate-Related Financial Disclosures ("TCFD") has reported that climate-related risks fall into two major categories: (1) risks related to the transition to a lower-carbon economy and (2) risks related to the physical impacts of climate change.[73] It suggests that transitioning to a lower-carbon economy may entail extensive policy, legal, technology, and market changes to address mitigation and adaptation requirements related to climate change; and such risks pose varying levels of financial and reputational risk to organizations.[74] Policy aimed at constraining actions that contribute to the adverse effects of climate change, or aimed at promoting adaptation to climate change, include: implementing carbon-pricing mechanisms to reduce GHG emissions, shifting energy use toward lower emission sources, adopting energy-efficiency solutions, and promoting more sustainable land-use practices.[75] The TCFD observes that litigation risk is on the rise, with an increase in climate-related litigation claims being brought before the courts by shareholders, public interest organizations, institutional investors and others. These lawsuits are often filed due to the failure of organizations to mitigate impacts of climate change, failure to adapt to climate change, and the insufficiency of disclosure around material financial risks.[76] It observes that as the value of loss and damage arising from climate change grows, litigation risk will also likely increase.

Technology risk is also part of transition risk, as technological innovations that support the transition to a lower-carbon, energy-efficient economic system can have a significant impact on organizations. The TCFD points to emerging technologies such as renewable energy, energy efficiency, and carbon capture and storage, all of which will affect the competitiveness of certain corporations, their production and distribution costs, and demand for their products and services.[77] Part of the risk is that new technology will displace old systems and disrupt some parts of the existing economic system. The timing of technological development and deployment is a key uncertainty in assessing technology risk. Market risk is also a factor, in terms of shifts in supply and demand for certain commodities, products and services, as climate-related risks and opportunities are increasingly taken into account.[78] The final transition risk is reputational risk, in

---

[72] *Ibid.* An example of this latter risk is ExxonMobil, which is under investigation in the US for misleading the public on climate change research; Bradley Olson and Aruna Diswantha, "SEC Probes Exxon Over Accounting for Climate Change", *The Wall Street Journal* (20 September 2016), http://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593.
[73] Financial Stability Board, Task Force on Climate-related Financial Disclosures, *Final Report, Recommendations of the Task Force on Climate-related Financial Disclosures*, https://www.fsb-tcfd.org/publications/final-recommendations-report/ at 5 ("TCFD *Final Report*").
[74] *Ibid.*
[75] *Ibid*.
[76] *Ibid,* citing Peter Seley, "Emerging Trends in Climate Change Litigation," Law 360, 7 March 2016.
[77] *Ibid* at 6.
[78] *Ibid.*

terms of changing customer or community perceptions of a corporation's contribution to, or detraction from, the transition to a lower-carbon economy.[79]

The second major risk identified by TCFD is physical risk resulting from climate change, which can be event driven (acute) or longer-term shifts (chronic) in climate patterns.[80] Physical risks may have financial implications for organizations, such as direct damage to assets and indirect impacts from supply chain disruption, changes in availability of sourcing and quality of water and other inputs, extreme temperature changes affecting organizations' premises, operations, supply chain, transport needs, and employee safety.[81]

It is easy to see how each of these risks may manifest themselves in Canadian corporations. In terms of physical risks, Canada's arctic is one place where these manifestations of climate change are most pronounced, with the far north already experiencing "polar amplification".[82] If the weather and climate effects continue to spread, there will be additional costs from flooding, drought, fires, and loss of supply sources.

The transition risks are already becoming clear. Alberta has recently seen a large growth in orphan wells (1391 as of March 2017), due to low commodity prices, environmental factors and an unprecedented number of corporate failures in the oil and gas sector.[83] There has been an 80% increase in these stranded assets.[84] One can project similar impacts if the Paris COP21 agreement targets begin to be reached. Such risks accrue directly to corporations, but also to particular sectors, such as the oil and gas sector. The risks and attendant costs can also accrue to governments and to taxpayers as a whole, where there is no one else to pay for remediation of these stranded assets.

Liability risk is also possible from parties seeking compensation for suffering loss from the effects of climate change from those directors and officers they hold responsible, although to date, the type of litigation brought in the US and other countries has not yet materialized in Canada. For example, in the US, Robbins Geller Rudman & Dowd LLP has commenced a class action on behalf of purchasers of Exxon Mobil Corporation ("Exxon") common stock during the period between 19

---

[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid* at 6. It reports that acute physical risks refer to those risks that are event-driven, including increased severity of extreme weather events, such as cyclones, hurricanes, or floods; and chronic physical risks refer to longer-term shifts in climate patterns (e.g., sustained higher temperatures) that may cause sea level rise or chronic heat waves.

[82] Sarra and Aitken, *supra* note 50; "Polar amplification" describes greater climate change near the north pole, Arctic warming is already highly significant and substantial.

[83] Unprecedented at least in the past 30 years.

[84] In the upstream oil and gas industry, an orphan is a well, pipeline, facility or associated site that has been investigated and confirmed as not having any legally responsible and/or financially able party to deal with its abandonment and reclamation responsibilities. Orphan Well Association, Annual Report 2016-2017, http://www.orphanwell.ca/OWA%202016-17%20Ann%20Rpt%20Final.pdf at 13. See also: http://www.orphanwell.ca/pg_faq.html. One commentator has observed that the number of orphan wells is more attributable to a judgment in which federal insolvency legislation "trumped" provincial legislation remedying orphan wells. While that judgment has serious implications for how such wells are dealt with, and the extent to which tax dollars will be required to remediate these stranded assets, the judgment itself is unlikely to have caused an uptick in the number of stranded assets.

February 2016 and 27 October 2016.[85] The complaint alleges that Exxon and its directors and officers violated the US *Securities Exchange Act of 1934* in making materially false and misleading public statements. It alleges that they failed to disclose that Exxon's own internally generated reports concerning climate change recognized the risks associated with global warming and climate change, the inability of the company to extract existing hydrocarbon reserves and therefore, a material portion of Exxon's reserves were stranded and should have been written down; and that Exxon had employed an inaccurate price of carbon in evaluating the value of its future oil and gas prospects, materially overstating the value of its reserves.[86] In September 2016, the market learned that federal regulators were actively scrutinizing Exxon's reserve accounting related to climate change and its refusal to write down any of its oil and gas reserves in the face of declining global oil prices.[87] On these disclosures, the price of Exxon common stock fell than 13% from the stock's class period high, erasing billions of dollars of market capitalization.[88]

Even where there are not lawsuits, Williams and Conley suggest that extra-legal pressure generated from highly publicized problems with stakeholders create risks to companies' reputations and therefore to the value of their brands.[89] Such pressure may be stronger mechanisms of enforcement of environmental risk than the risks of actual liability in a court proceeding.

Carney cautioned that "too rapid a movement towards a low-carbon economy could materially damage financial stability".[90] In that respect, directors and officers should be taking immediate action to identify risks, but materiality, remoteness and downside risk of transitioning should also be careful considerations. Fiduciary obligation also requires considering the benefits of investment in green adaption and mitigation technologies and other products and services that are likely to have upside financial potential.

The statutory obligation that directors act honestly and in good faith, and act diligently in supervising and managing the corporation's affairs, necessarily means that they must engage with the issues of physical and transition climate change risks. Depending on the firm's economic activities, the risk may be minor or highly significant, but directors and officers have an obligation to make the inquiries, to devise strategies to address risks, and to have an ongoing monitoring and adjusting plan to ensure the strategy continues to be responsive to the risk. The SCC has expressly

---

[85] Robbins Geller Rudman & Dowd LLP, "Robbins Geller Rudman & Dowd LLP Files Class Action Suit Against Exxon Mobil Corporation", 7 November 2016, http://www.rgrdlaw.com/cases/exxon/; *Ramirez v Exxon Mobil Corporation, et al*, No 16-cv-3111, Northern District of Texas, http://www.prnewswire.com/news-releases/robbins-geller-rudman--dowd-llp-files-class-action-suit-against-exxon-mobil-corporation-300358768.html.
[86] *Ibid.*
[87] Through a series of partial disclosures issued by different news sources between mid-August 2016 and late September 2016. *Ibid.*
[88] It fell to USD 82.54 per share on September 20, 2016. *Ibid.*
[89] Cynthia Williams and John Conley, "Is There an Emerging Fiduciary Duty to Consider Human Rights?" (2005) 74 *U Cin L Rev* 75 at 77. See also Pratima Bansal, "Evolving Sustainably: A Longitudinal Study of Corporate Sustainable Development", (2005) 26 *Strategic Mgmt J* 197.
[90] Carney, *supra* note 70 at 2. He observes: "A wholesale reassessment of prospects, as climate-related risks are re-evaluated, could destabilize markets, spark a pro-cyclical crystallization of losses and lead to a persistent tightening of financial conditions."

approved the ability of directors to take account of the interests of diverse stakeholders.[91] Directors' decisions must be reasonable business decisions in light of all the circumstances about which they knew or ought to have known.[92] Directors are given broad authority to address climate change risk, and provided that decisions taken are within a range of reasonableness, the courts will defer to their business judgment.[93]

Addressing climate risk is the responsibility of directors and officers in determining the best interests of the corporation. In addition to this fiduciary obligation, the duty of care requires directors and officers to exercise the care, diligence and skills that a reasonably prudent person would exercise in the circumstances; and arguably, this duty requires directors and officers to identify and develop a strategy to supervise and manage the transition that will address the specific risks posed by climate change.

The crucial question of what are the best interests of the corporation in respect of climate change risk requires directors and officers to directly engage with developments in knowledge regarding physical and transition risks and how that information may impact their corporation. As discussed above, fiduciaries can consider the interests of numerous types of stakeholders and the environment when determining how to act in the corporation's best interest in respect of climate change. Directors and officers who engage in good governance practices already take account of socio-economic conditions and the diverse and sometimes conflicting interests of all the stakeholders with an interest in the company. Ronald Davis has observed that:

> While shareholder wealth maximization as a goal of corporate activity has an appealing simplicity to it, the simplicity is deceiving. Conceptually it contains a level of indeterminacy that continues to raise issues of the proper exercise of corporate power, the balance between interests of investors with differing time horizons, and the appropriate concern to be shown to stakeholders other than shareholders by corporate management.... the range of options on corporate management's desk rarely involves the following decision pairs - profit, only if socially irresponsible versus no profit, only if socially responsible. Providing one takes into account all consequences that can reasonably be expected to occur over the foreseeable future, having only these choices before one is rare. These rare choices will be provided only if one is focused solely on the immediate cost and benefit, to the exclusion of all other costs and benefits." [94]

As also discussed above, the SCC has recognized that directors and officers need to look to the long-term interests of the corporation. As long as the decision was a reasonable one at the time, courts will defer to directors' decisions. That means that where directors and officers are duly diligent in trying to identify climate-related financial and other risks, and take action to mitigate

---

[91] *Peoples Department Stores, supra* note 22 at para 34. The Court further held that in determining whether directors are acting with a view to the best interests of the corporation, it may be legitimate, given all the circumstances of a given case, for the board of directors to consider the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment, at para 42.
[92] *Ibid* at para 67.
[93] *Ibid* at paras 64 and 65.
[94] Davis, *supra* note 13 at 175.

and adapt, they will not face personal liability risk. Acting prudently and on a reasonably informed basis is what is required. At the same time, failure to consider climate change risk does leave directors and officers open to actions against the corporation and in some cases, the directors and officers personally.

1. The Fiduciary Obligation Involves Corporate Citizenship

In Canada, the scope of fiduciary obligation in the business context goes beyond mere survival of the corporate entity. The SCC in *BCE Inc v 1976 Debentureholders* held that directors and officers must treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.[95] The SCC held that directors should resolve conflicts among stakeholders or between them and the corporation "in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen".[96] Thus, a director's fiduciary duty implicates considerations of what "good" corporate citizenship requires in the context of climate change. Climate change risk poses a challenge made complex by the growing degree of interdependence and interconnectedness that have come to define our world, where domestic and sectoral regulation no longer provide adequate instruments to deal with public stewardship challenges.[97] Directors' responses to these challenges should accord with their duty to conform to good corporate citizenship.

As noted in the introduction, the COP 21 agreement recognizes that deep reductions in global emissions through both climate adaption and remediation are required and urgent.[98] Both the risks posed by climate change and recent governmental commitment to its remediation create reasonable expectations by citizens that legal and other processes will advance these public policy objectives.[99] Reasonable expectations have been used to achieve objectives that are remarkably consistent, requiring the fair treatment of others and upholding the integrity of legal or regulatory regimes by closing the gaps and loopholes that allow avoiding the obligations associated with these regimes.[100] A focus on systemic risks acknowledges interdependencies and requires that decision-makers act with reference to others in society and to the principles that inform "reasonable expectations". These principles – fair treatment of others as well as upholding the integrity of legal regimes – are concerned with the protection or enhancement of the public good.[101] These expectations can also inform a judgment as to what constitutes "good" corporate citizenship in the context of climate change when evaluating whether directors have fulfilled their fiduciary duty. John Rawls envisioned society as a fair system of social cooperation over time that reflects a notion

---

[95] *BCE, supra* note 32 at paras 80, 81.
[96] *Ibid* at paras 81, 111.
[97] Edward Waitzer and Douglas Sarro, "Fiduciary Society Unleased: The Road Ahead for the Financial Sector" (2014). *Osgoode Legal Studies Research Paper Series.* 10. http://digitalcommons.osgoode.yorku.ca/olsrps/10 ["Waitzer and Sarro"].
[98] Janis Sarra and Edward Waitzer, "Climate Change – A Case Study/Tipping Point for Rebalancing Interests in Insolvency Law?", in Janis P Sarra and Barbara E Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Carswell, 2017).
[99] *Ibid.*
[100] *Ibid.*
[101] John Rawls, *Political Liberalism* (Cambridge, Mass: Harvard University Press, 1966).

of reciprocity or mutuality, passed inter-generationally, guided by publicly recognized rules and agreed upon standards.[102] He observed that if individuals had to determine distribution of goods or treatment of others ignorant of where they would fall within that distribution, they would strive for a more equitable distribution for everyone.[103] Viewing climate change in this way, the SCC's direction that fiduciaries are to act to as good corporate citizens has relevance for the allocation of both the benefits and costs of addressing climate change financial risk equitably across society.

Directors and officers should understand that their fiduciary duty requires that they have undertaken efforts to identify any relevant risks to their business from climate change and climate change policies; that they have put appropriate strategies in place to manage these risks; that they have overseen and monitored the actions of the individuals charged with managing these risks; and have mechanisms in place to respond rapidly to changes in the company's risk profile. Considering whether climate change poses a risk to the business requires directors to take account of the business sector, sources of energy, direct carbon emissions, benefits and risks of investing to support a lower carbon infrastructure, best environmental practices in terms of regulatory compliance, and integration of asset climate risk and resiliency in the firm's investment decision making.

Given the broad mandate of directors and officers under their statutory fiduciary obligation and their duty of care, specific decisions made to address climate change are unlikely to give rise to personal liability. It is the failure to act that is likely to attract liability, given the reasonable expectations of stakeholders, either through derivative actions on behalf of the company or personal actions against directors and officers. Courts will examine directors' decisions balancing competing interests, but once a decision is found to be reasonable, it will be upheld. Measuring fulfillment of directors' duties against reasonable expectations serves not only as an accountability check, but it may also provide evidence that directors have met their statutory and common law obligations, and thus provide a defence against shareholder and other claims of breach of those obligations.

Under Canadian corporate statutes, the "oppression remedy" is a powerful potential tool for specified stakeholders to press for climate action.

2. *The Oppression Remedy*

The oppression remedy under Canadian corporate law focuses on harm to the legal and equitable interests of stakeholders when directors act oppressively or unfairly prejudicially.[104] If directors act in a manner that is oppressive or unfair prejudicial, an extraordinarily broad set of remedies is available to complainants bringing such claims to the courts.

However, there are limits to who can bring a complaint and from what harm they can seek relief. Oppression remedies offer another potential mechanism for the courts to assess the reasonable

[102] John Rawls, *Justice as Fairness, A Restatement*, ed by E Kelly (Cambridge, Mass: Harvard University Press, 2001).
[103] John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971, revised 1999).
[104] *Wilson v Alharayeri*, 2017 SCC 39 ["*Wilson*"]. See also *BCE, supra* note 32 at para 45 (SCC).

expectations of certain stakeholders in respect of directors' decisions or lack thereof regarding climate change risk. The oppression remedy under corporate law statutes creates an equitable remedy that "seeks to ensure fairness – what is just and equitable".[105]

In establishing that directors have breached their obligation such that the oppression remedy should be available, the complainant must first "identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held".[106] Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive, or unfairly prejudicial to, or that unfairly disregarded the interests of "any security holder, creditor, director or officer".[107] The scope of the remedy is broad, but it must be tailored to remedy only the oppressive conduct. Remedies include orders restraining conduct, replacing directors, setting aside transactions, and compensating aggrieved persons.[108] The oppression remedy seeks to apply a measure of corrective justice, but it should go no further than necessary to correct the injustice or unfairness.[109]

In *BCE Inc v 1976 Debentureholders,* debentureholders sought relief under the oppression remedy provisions of the *CBCA* on the ground that the increased debt contemplated by the purchase agreement under a plan of arrangement and "going-private" transaction under corporations legislation would reduce the value of their bonds.[110] The SCC held that the oppression remedy

---

[105] *BCE, ibid* at para 81; *Wilson, ibid* at para 23.
[106] *BCE, ibid* at para 70; *Wilson, ibid* at para 24.
[107] *Wilson, ibid* at para 24.
[108] Section 241(3), *CBCA, supra* note 17, in full reads as follows:
(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
(a) an order restraining the conduct complained of;
(b) an order appointing a receiver or receiver-manager;
(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
(d) an order directing an issue or exchange of securities;
(e) an order appointing directors in place of or in addition to all or any of the directors then in office;
(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;
(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
(j) an order compensating an aggrieved person;
(k) an order directing rectification of the registers or other records of a corporation under section 243;
(l) an order liquidating and dissolving the corporation;
(m) an order directing an investigation under Part XIX to be made; and
(n) an order requiring the trial of any issue.
[109] *Wilson, supra* note 104 at para 27. See also *Naneff v Con-Crete Holdings Ltd* (1995), 23 OR (3d) 481 (CA).
[110] *BCE*, *supra* note 32 at para 1. The case involved an appeal from BCE and Bell Canada of a decision from the Québec Court of Appeal that overturned the trial judge's approval of a plan of arrangement that contemplated the purchase of the shares of BCE Inc by a consortium of purchasers by way of a leveraged buyout. These appeals arose out of an offer to purchase all shares of BCE Inc, a large telecommunications corporation, by a group headed by the Ontario Teachers

focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors; and the remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.[111] The SCC in *BCE Inc v 1976 Debentureholders* held that, although directors must consider the best interests of the corporation, it may be appropriate, although not mandatory, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders, citing its judgment in *Peoples Department Stores.*[112] The SCC held that oppression is an equitable remedy; it seeks to ensure fairness and what is just and equitable, giving the court broad, equitable jurisdiction to enforce not just what is legal, but what is fair.[113] Thus, a court considering claims for oppression should look at business realities, not merely narrow legalities. The SCC also held that oppression is fact-specific; and that what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play; thus, conduct that may be oppressive in one situation may not be in another.[114] The reasonable expectations of these stakeholders are the cornerstones of the oppression remedy. The SCC held:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations. Particular circumstances give rise to particular expectations. …
>
> Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment - the central theme running through the oppression jurisprudence - is most fundamentally what stakeholders are entitled to "reasonably expect".[115]

The Court held that not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression; the court must be satisfied that the conduct falls within the concepts of oppression, unfair prejudice or unfair disregard of the claimant's

Pension Plan Board, financed in part by the assumption by Bell Canada, a wholly owned subsidiary of BCE, of a $30 billion debt. The plan of arrangement was approved by 97.93% of BCE's shareholders. The debentureholders alleged that the arrangement was not "fair and reasonable" and opposed court approval of the arrangement under s. 192 of the *CBCA, supra* note 17. The crux of their complaints was that, on the completion of the arrangement, the short-term trading value of the debentures would decline by an average of 20% and could lose investment grade status.

[111] *Ibid* at para 45.

[112] *Ibid* at para 37.

[113] *Ibid* at para 58.

[114] *Ibid* at para 59.

[115] *Ibid* at paras 62-64.

interest, within the meaning of the statutory provisions.[116] The concepts do not represent watertight compartments, and often overlap and intermingle.[117] Under the unfair prejudice and unfair disregard branches of the oppression remedy, the focus is on the effect on the injured complainant of the conduct.[118] This approach has been interpreted as conduct that unfairly disregards the complainant's interests, conduct that unjustly or without cause fails to pay attention to, or ignores or treats as of no importance the interests of security holders, creditors, directors or officers.[119] In this aspect of the oppression remedy, there need not be any bad faith or an intention to harm the complainant.[120] The remedy is available to protect a complainant's legal rights, as well as reasonable expectations arising out of the course of dealing between the parties or corporate law itself.[121]

The court is to conduct two related inquiries in a claim for oppression. First, does the evidence support the reasonable expectation asserted by the claimant in the specific facts of the case? The claimant must identify the expectations that have been violated by the conduct at issue and establish that his or her expectations were reasonably held. Second, does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?[122] While the Supreme Court noted that it is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature, some generalizations can be made. Actual unlawfulness is not required to invoke the oppression remedy, as the remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play; and thus, not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression.[123] The Court held that factors to be considered in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the

---

[116] *Ibid* at para 89. The Court observed that: "Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s 241 [of the *CBCA*], may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable." The Court continued at para 90: "As in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression".

[117] *Ibid* at para 91.

[118] *Nystad v Harcrest Apartments Ltd*, [1986] BCJ No 3145 at para 24 (BCSC) ["*Nystad*"]; *Piller Sausages & Delicatessens Ltd v Cobb International Corp*, [2003] OJ No 2647, 35 BLR (3d) 193 (Ont SCJ), aff'd [2003] OJ No 5128, 40 BLR (3d) 88 (Ont CA) ["*Piller Sausages*"].

[119] *Piller Sausages, ibid; Harbert Distressed Investment Master Fund, Ltd v Calpine Canada Energy Finance II ULC*, [2005] NSJ No 317 (NSSC); *Nystad, ibid* at para 24 (BCSC); *Olympia & York Developments Ltd (Trustee of) v Olympia & York Realty Corp*, [2001] OJ No 3394 at paras 30-31 (Ont SCJ [Commercial List]), additional reasons at 2001 CarswellOnt 4739 (Ont SCJ [Commercial List]), aff'd [2003] OJ No 5242, 68 OR (3d) 544 (Ont CA).

[120] *Downtown Eatery (1993) Ltd v Ontario*, [2001] OJ No 1879, 200 DLR (4th) 289 (Ont CA), leave to appeal refused, [2001] SCCA No 397 (SCC) ["*Downtown Eatery*"]. See also *Ferguson v Imax Systems Corp*, [1983] OJ No 3156, 150 DLR (3d) 718 at 727 (Ont CA), leave to appeal refused (1983), 2 OAC 158 (note), 52 NR 317 (note) (SCC) ["*Ferguson*"]; *Brant Investments Ltd v KeepRite Inc,* [1991] OJ No 683, 3 OR (3d) 289 (Ont CA).

[121] *UPM-Kymmene Corp v UPM-Kymmene Miramichi Inc*, [2002] OJ No 2412, 214 DLR (4th) 496 (Ont SCJ), additional reasons at 2002 CarswellOnt 3579 (Ont SCJ [Commercial List]), aff'd [2004] OJ No 636 (Ont CA) ["*UPM-Kymmene Corp*"].

[122] *BCE, supra* note 32 at para 68.

[123] *Ibid* at para 71.

relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.[124]

The SCC held that commercial practice plays a significant role in forming the reasonable expectations of the parties; and that a departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of legal rights will generally, although not inevitably, give rise to a remedy.[125] Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.[126] The Court observed that reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors.[127] However, the SCC also noted that practices and expectations can change over time, and where valid commercial reasons exist for the change and the change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice.[128] Given that knowledge about climate-related financial risk and policy commitments to a low carbon economy have developed substantially in recent years, directors and officers are clearly able to depart from their past practice of ignoring climate change risk; they should develop new strategies to address the risk in the company's best interests. Reasonable expectations may be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars, and other communications.[129]

The SCC held that where conflicts among corporate stakeholders involve the interests of the corporation, "it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen."[130] It observed:

> …the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly.

---

[124] *Ibid* at para 72.
[125] *Ibid* at para 73, citing *Adecco Canada Inc v J Ward Broome Ltd*, [2001] OJ No 454, 12 BLR (3d) 275 (Ont SCJ); *SCI Systems Inc v Gornitzki Thompson & Little Co*, [1997] OJ No 2115, 147 DLR (4th) 300 (Ont Gen Div), var'd [1998] OJ No 2299, 110 OAC 160 (Ont Div Ct); *Downtown Eatery, supra* note 120.
[126] *BCE, supra* note 32 at para 74.
[127] *Ibid* at para 75. The Court held that "Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation" As noted in *Ferguson, supra* note 120, "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such".
[128] *Ibid* at paras 76 and 77, citing *Alberta Treasury Branches v SevenWay Capital Corp,* [1999] AJ No 1312, 50 BLR (2d) 294 (Alta QB), aff'd [2000] AJ No 801, 8 BLR (3d) 1, 2000 ABCA 194 (Alta CA). In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered, *ibid* at para 79, citing *Main v Delcan Group Inc*, [1999] OJ No 1961 (Ont SCJ); and *Lyall v 147250 Canada Ltd* [1993] BCJ No 874, 106 DLR (4th) 304 (BCCA).
[129] *BCE, ibid* at para 80, citing *Tsui v International Capital Corp*, [1993] SJ No 83, [1993] 4 WWR 613 (Sask QB), aff'd [1993] SJ No 293, 113 Sask R 3 (Sask CA); *Deutsche Bank Canada v Oxford Properties Group Inc*, [1998] OJ No 4375, 40 BLR (2d) 302 (Ont Gen Div); *Themadel Foundation v Third Canadian Investment Trust Ltd*, [1995] OJ No 888, 23 OR (3d) 7 (Ont Gen Div), var'd [1998] OJ No 647, 38 OR (3d) 749 (Ont CA).
[130] *BCE*, *supra* note 32 at para 81.

> There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.[131]

There is a further inquiry where the remedy sought is an order of personal liability of the directors. On 13 July 2017, in *Wilson v Alharayeri,* the Supreme Court of Canada unanimously reaffirmed that a corporation's directors may be personally liable in an oppression action under Canadian corporate law, clarifying the criteria for imposing personal liability.[132] The first of the two-prong test for personal liability requires that "the director or officer must be implicated in the oppressive conduct"; the "oppressive conduct must be attributable to the individual director because of his or her action or inaction".[133] Second, the imposition of personal liability "must be fit in all of the circumstances".[134]

The SCC in *Wilson v. Alharayeri* held that at least four general principles should guide courts in fashioning a fit remedy under the *CBCA* oppression remedy provision.[135] First, the oppression remedy request must, in itself, be a fair way of dealing with the situation.[136] Fairness is central to the inquiry. The Court held that it may be fair to hold a director personally liable where a remedy against the corporation would unduly prejudice other security holders. While personal benefit and bad faith are hallmarks of conduct attracting personal liability, as are other indicia, they do not constitute necessary conditions to imposing personal liability, and they should not overwhelm the analysis.[137] The SCC held that these factors merely represent indicia of fairness. The SCC held that the fairness principle is ultimately not amenable to formulaic exposition and must be assessed in light of all the circumstances of a particular case. The second principle is that any order should go no further than necessary to rectify the oppression.[138] Third, any order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders.[139] Fourth, a court should consider the general corporate law context in

---

131 *Ibid* at para 82. Citing *Maple Leaf Foods Inc Schneider Corp*, [1998] OJ No 4142 ["*Maple Leaf Foods*"], the Court held at para 83 that: Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction."

132 *Wilson, supra* note 104. The appeal was from a Québec Court of Appeal judgment, 2015 QCCA 1350, appeal dismissed. The SCC confirmed that the two-pronged test articulated *Budd v Gentra Inc* (1998), 43 BLR (2d) 23 (CA) continues to be valid, clarifying the parameters of the tests.

133 *Wilson, ibid* at para 31.

134 *Ibid* at para 31.

135 Section 241, *CBCA, supra* note 17. All the provincial corporate law statutes also have oppression remedy provisions.

136 *Wilson, supra* note 104. The SCC held that It may be fair to hold a director personally liable where he or she has derived a personal benefit in the form of either an immediate financial advantage or increased control of the corporation, breached a personal duty or misused corporate power, or where a remedy against the corporation would unduly prejudice other security holders. The SCC held that these factors merely represent indicia of fairness.

137 *Ibid* at paras 41 and 51. The SCC held, at para 50, that the list of factors is not closed.

138 *Ibid* para 53.

139 *Ibid* at para 54.

exercising its remedial discretion.[140] Director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where such relief may be more fitting in the circumstances.[141]

The SCC held that conduct may run afoul of s. 241 *CBCA* even when it is driven by lesser states of mental culpability, as a range of conduct can give rise to liability:

> "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations … [142]

The oppression remedy is concerned with the effects of oppressive conduct, not the intent of the oppressor.[143]

Applying these standards to conduct in respect of climate change risk, it is the latter two categories under the oppression remedy provisions that are likely to attract the attention of stakeholders seeking to hold directors and officers accountable for failure to address climate change risk. Directors could be held personally liable if they act in a manner that is unfairly prejudicial, based on adverse consequences to equity holders, and in some cases, other stakeholders. An example could be a decision to continue investing in fossil fuels when directors and officers ought reasonably to have known that the consequences of depressed market prices and policy changes means there will be firm failures and growing numbers of stranded assets. "Unfair prejudice" does not require a culpable state of mind; the court will assess whether the decision or failure to act had unfair consequences. The third threshold, "unfair disregard" of interests extends the remedy to where directors have ignored an interest as being of no importance, contrary to the

---

[140] *Ibid* at para 55.

[141] *Ibid.* In this case, directors took action to address continuing financial difficulties by altering share structure and issuing a private placement of convertible secured notes. The SCC held that the trial judge appropriately exercised the remedial powers provided in s 241(3) of the *CBCA* by holding W personally liable for the oppression. W and B, the only members of the audit committee, played the lead roles in Board discussions resulting in the non-conversion of A's A and B Shares, and were therefore implicated in the oppressive conduct. In addition, W accrued a personal benefit as a result of the oppressive conduct: he increased his control over Wi2Wi through the conversion of his C Shares, which was not the case for the C Shares held by others, into common shares, which allowed him to participate in the private placement despite issues as to whether the test for conversion had been met. This conversion was done to the detriment of A, whose own stake in the company was diluted due to his inability to participate in the private placement. The SCC held that the remedy went no further than necessary to rectify A's loss. The quantum of the order was fit, as it corresponded to the value of the common shares prior to the private placement. Finally, the remedy was appropriately fashioned to vindicate A's reasonable expectations that (1) his A and B Shares would be converted if Wi2Wi met the applicable financial tests laid out in the corporation's articles and (2) the Board would consider his rights in any transaction impacting the A and B shares.

[142] *BCE, supra* note 32 at para 67. See also *Wilson, supra* note 104 at para 41.

[143] *Wilson, ibid* at para 42, the Court quoting Gascon J (as he then was) in *Segal v Blatt*, 2007 QCCS 1488, at para 43 (CanLII), aff'd 2008 QCCA 1094, at paras 16-17: "In oppression matters, it is the effect of the acts and omissions of directors and officers of a company, rather than their intentions, that determines whether the conduct complained of is unfairly prejudicial. The rights conferred by Section 241 *CBCA* turn on effect, not intent. What is important is the result. Effect is key."

stakeholders' reasonable expectations. Directors and officers are arguably at risk of personal liability if a complainant had a reasonable expectation that they would address climate change risk; and the directors and officers disregarded their interests. However, their due diligence in addressing climate risk, as discussed below under "defences", will protect them from personal liability.

If the best interests of the corporation are defined in terms of decisions that advance the potential long-term operational, financial and environmental sustainability of an enterprise, including climate adaption and mitigation measures, arguably both the public interest and the interests of a broader number of stakeholders could become factors in shifting current approaches.[144] Assessed on the reasonable expectations of the complainant, the oppression remedy could be utilized to enforce directors' obligations to make decisions that are aimed at financial sustainability and addressing climate or other systemic risks. In particular, judicial reasoning as to what "unfairly disregards" and is "unfairly prejudicial" under oppression remedy provisions could be informed by (and inform) "reasonable expectations" regarding the need to address such risks both to ensure corporate survival and exercise good corporate citizenship.[145] Claimants seeking oppression remedies would have to establish the threshold of whether they come within the definition of complainant. Once recognized, the court has broad authority within the proceeding to craft a remedy to address the risk or the harm caused. On the other hand, claimants seeking to assert that climate mitigation strategies are oppressive because of the effect on immediate returns are liable to be thwarted by the "reasonable corporate citizen" view of the corporation's best interests as the lens through which the reasonableness of expectations will be evaluated.

In reality, climate-related litigation is likely to allege breaches of multiple duties. The SCC in *BCE Inc v 1976 Debentureholders* analyzed the relationship between the oppression remedy and directors' duties under corporations statutes:

> The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.[146]

[144] Waitzer and Sarro, *supra* note 97.
[145] *Ibid.*
[146] *BCE, supra* note 32 at para 66, [2008] 3 SCR 560 (SCC).

i. Who Can Bring an Oppression Remedy Application?

It is most likely that security holders would bring claims seeking an oppression remedy for allegations that the directors and officers failed to identify climate-related risk and develop mitigation and adaptation strategies. They have standing as of right and can more easily establish as reasonable their expectations that the directors and officers would address threats to the sustainability of the company and thus to their financial interests. The broad language of the remedy, including that the directors unfairly disregarded their interests, gives considerable scope for a potential claim.

In respect of potential claims by stakeholders other than security holders, it would be difficult for non-governmental organizations ("NGO") to bring a claim for an oppression remedy for two reasons. The first hurdle is that the claimant must qualify as a "complainant", as that term is defined in corporations statutes. Second, the remedy itself only protects the the interests of any security holder, creditor, director or officer.[147] The statutory language creates two classes of potential complainants: a defined class where the individual falls within one of the relationships with the corporation defined in the statute, and an undefined class of potential claimants who are, in the court's opinion, "a proper person". Individuals who are not security holders may apply for an oppression remedy by asking a court to exercise its discretion to recognize them as complainants.

Although the criteria for standing to bring an oppression remedy application do not specify any limits on who may commence the application, the criteria for those individuals who may obtain a remedy for unfair prejudice or unfair disregard of their interests appear restricted to members of a defined class of claimants.[148] While the court may determine anyone is a "proper person" to bring an oppression remedy claim, the remedy provided in the statute is limited to corporate actions that are oppressive or unfairly prejudicial *to*, or unfairly disregard the interests *of* a narrower set of stakeholders, "any security holder, creditor, director or officer".[149]

---

[147] The full provision is as follows:
Section 241 of the *CBCA, supra* note 17, specifies: 241 (1) A complainant may apply to a court for an order under this section.
(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
(a) any act or omission of the corporation or any of its affiliates effects a result,
(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.
The term security is not defined in the Nova Scotia *Companies Act*, although it is defined in the *CBCA, supra* note 17, and other statutes.

[148] Janis Sarra, "The Oppression Remedy: The *Peoples'* Choice", *Annual Review of Insolvency Law, 2005* (Toronto: Carswell, 2006) at 111-156.

[149] See the precise language in footnote 146. See also *Clitheroe v Ontario Hydro Inc,* [2002] OJ No 4383 (Ont SCJ), where the CEO of the corporation was terminated allegedly for just cause; and instead of commencing an action for damages for wrongful dismissal, she commenced a proceeding under the oppression remedy provisions of the Ontario *Business Corporations Act*. The Court struck out her oppression claim because it failed to allege a *pattern* of oppressive conduct. In *Walters v Harris Partners Ltd*, 2001 CarswellOnt 1424 (ON SC), the Court held that it must determine whether it the claim is "at its heart, an oppression claim with a wrongful dismissal component . . . or whether it is a wrongful dismissal claim that happens to have an oppression component to it". An oppression remedy may be

The Ontario Divisional Court held that the oppression remedy is designed to address the imbalance of power on the part of those directors in control with the vulnerability on the part of those individuals who have a genuine stake in the affairs of the corporation, but no control over its conduct.[150] The oppression remedy gives recognition to the fact that there are a number of classes of persons who have a legitimate stake in the manner in which the affairs of a business corporation are conducted. It prevents those individuals having power and control over the affairs of a business corporation from exercising that power with impunity.[151] Adopting the reasoning in *BCE Inc v 1976 Debentureholders*, the Court in *1413910 Ontario Inc (cob as Bulls Eye Steakhouse & Grill) v McLennan* held that the concept of reasonable expectations is objective and contextual.[152] The question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.[153]

The current reasonable expectation test used by Canadian courts in determining whether an oppression remedy should be granted may serve an important gatekeeping function in terms of the type of actions that give rise to a remedy, hence protecting the diligent director from frivolous claims. The significance of case law that emphasizes that the reasonable expectation test is an objective standard is critically important, given the scientific consensus regarding climate change risk and Canada's adoption of COP 21 reduction goals.

3. Derivative Action

The derivative action is aimed at enforcing a right of the corporation itself.[154] Many Canadian corporate law statutes utilize the same definition of a proper complainant under derivative action provisions as that utilized under the oppression remedy provisions. The complainant seeks leave of the court to bring an action on behalf of the corporation against directors. It is a remedy designed to hold directors accountable for conduct that harms the corporation itself. A derivative action can be sought for alleged violations of the statutory fiduciary duty, the duty of care, or under oppression remedy provisions. The remedy sought must be for the benefit of the corporation as

---

available in the former situation, but not in the latter. The court will consider whether the interests of the individual as an employee of the corporation were so closely intertwined with her interests as a shareholder, and whether the dismissal forms part of a pattern of conduct meant to exclude the individual from participation in the corporation.

[150] *1413910 Ontario Inc (cob as Bulls Eye Steakhouse & Grill) v McLennan*, [2009] OJ No 1828 Ont SCJ Div Ct). In that case, the Court held that a creditor to whom the corporation owed an obligation affirmed by judgment but not yet quantified by an assessment of damages, was no less in a vulnerable position *vis-à-vis* the corporation and had no less of a legitimate stake or interest in the manner in which the affairs of the corporation were conducted than one to whom a liquidation sum was owed. The Divisional Court held that the trial judge was correct in concluding that the creditor had a reasonable expectation that funds would be available to it, thus the thwarting of that expectation constituted oppression. It concluded that the creditor became a creditor when it obtained a summary judgment in its favour and although it was not yet a judgment creditor in that it did not have a legal right to enforce execution of a judgment for a specific sum of money.

[151] *Ibid* at para 31.

[152] *Ibid* at para 37.

[153] *Ibid.*

[154] *BCE, supra* note 32 at para 45.

a whole. The party seeking status must meet statutorily imposed tests of acting in good faith and have made reasonable prior efforts to have the directors pursue an action on behalf of the corporation.[155]

The derivative action is another possible avenue for shareholders and possibly others to seek a remedy against directors personally if they can meet the threshold criteria as a complainant and persuade the court to exercise its discretion to allow the claim to proceed. In addition to giving notice of the claim to the directors and providing a reasonable period for them to take up the claim, a complainant must demonstrate to the satisfaction of the court that the claim is being brought in good faith and that it has a reasonable prospect of success, in order to be granted leave to proceed with the claim.

Creditors, who are not one of the defined classes of complainants, have been granted access to derivative actions only in very limited circumstances, such as where the creditor has a direct financial interest or a particular legitimate interest in the manner in which the affairs of the corporation are being managed.[156] The courts have held that a creditor seeking to bring the derivative action must be in a position somewhat analogous to a minority shareholder, where it has no right to influence what it sees as abuses by management or conduct contrary to the corporation's interests.[157] If the court is satisfied of this interest and the creditor meets the other statutory criteria, the court may exercise its discretion to grant status.[158]

With respect to potential derivative action claims regarding climate-related risk, directors and officers will be most vulnerable to claims from shareholders, as they have a direct financial interest in corporate officers managing these risks. A derivative action is aimed at benefiting the corporation itself and the entire body of shareholders and others with legitimate interests in how the corporation is being managed. However, one could anticipate an NGO located in a "one company town" or "one industry community" in which directors failed to consider climate change risk seeking to commence a derivative action. The NGO would have to establish a legitimate interest in the corporation's future sustainability, such as, that its survival affects the economic security of the community. One-industry steel and mining towns in Northern Ontario come to mind as an example.

---

[155] For example, s 239, *CBCA, supra* note 17, specifies: Commencing derivative action
239 (1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.
(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that (a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action; (b) the complainant is acting in good faith; and
(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.
[156] *AE Realisations (1985) Ltd v Time Air Inc*, [1994] SJ No 684 at para 23, 127 Sask R 105 (Sask QB), aff'd [1995] SJ No 273, 131 Sask R 249 (Sask CA); *Re Daon Development Corp*, [1984] BCJ No 2945, 54 BCLR 235 at 243 (BCSC) ["*Re Daon*"]; *Constitution Insurance Co of Canada v Kosmopoulos*, [1987] SCJ No 2, [1987] 1 SCR 2 (SCC); *Jacobs Farms Ltd v Jacobs*, [1992] OJ No 813 at paras 29-31 (Ont Gen Div) ["*Jacobs Farms*"].
[157] *Re Daon, ibid; Jacobs Farms, ibid*.
[158] *Jacobs Farms, ibid*.

One benefit for potential complainants is that the court can order that the corporation fund the litigation where the complainant makes the case that it should fund the derivate action to hold directors personally liable.[159] It can also be a hurdle for getting approval of a derivative action. Where the court authorizes the derivative action and orders the company to finance the litigation, the claimant is often not risking its own resources in pursuing the claim against the directors personally. To this end, the rigorous tests in the statute and the high thresholds set by the court ensure that the resources of a corporation are not unnecessarily depleted by pursuit of the action, while still allowing potentially meritorious cases to proceed. An NGO would have to persuade the court that it met this threshold in order to ground a derivative action.

The court's approach, therefore, appears to be efficiency and fairness enhancing in that directors have incentives not to engage in conduct contrary to the interests of the corporation, creditors cannot inappropriately use corporate resources to pursue litigation, and availability of the remedy may enhance governance decisions, since institutional shareholders are unlikely to tolerate conduct by directors that results in corporate resources financing litigation.

4. Materiality

Materiality underpins much of the transparency requirements of Canadian securities law, a determining factor as to whether information must be disclosed to investors.[160] Materiality is also a tool with which to measure proper exercise of fiduciary obligations. If the risks to the business are material, whether direct risk to the business through physical risks, transition costs or material financial risk in terms of market prices, financial performance, etc, directors and officers should have identified material risk to the best interests of the company. They should have devised a strategy to address the challenges, and monitored its implementation on a continuing basis, whether the company is privately held or publicly traded. Non-financial material issues, which may be important to stakeholders, are also relevant, and directors and officers should be managing these issues effectively, even if they do not pose a significant threat to the viability of the business. They need to be able to establish for corporate stakeholders the ongoing steps they are taking.

The probability/magnitude test is a method sometimes used by Canadian securities regulators to analyze when contingent events become sufficiently crystallized that they are required to be

---

[159] For example, s 240 of the *CBCA, supra* note 17, specifies:
240 In connection with an action brought or intervened in under section 239, the court may at any time make any order it thinks fit including, without limiting the generality of the foregoing,
(a) an order authorizing the complainant or any other person to control the conduct of the action;
(b) an order giving directions for the conduct of the action;
(c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; and
(d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.
[160] Mary Condon, Anita Anand, Janis Sarra and Sarah Bradley, *Securities Law in Canada,* 3rd ed (Toronto: Emond Montgomery, 2017) at 282-312, 434-477 ["Condon *et al"*].

disclosed as material changes.[161] It requires an assessment of the probability that an event will occur, having regard to all the known or ascertainable facts. It also requires some assessment of the magnitude or significance of the change, in terms of whether the information would be viewed by reasonable investors as important information for making a decision to buy, sell, or continue to hold their securities.[162] An important question is whether materiality of climate-related financial risk depends on the existing probability/magnitude assessment,[163] or whether it needs to have a different understanding that recognizes the scale of risk, the longer timelines, and the impact of failing to act beyond an assessment of financial impact. In some instances, material changes are contingent or uncertain, although directors and officers of the corporation may have some information regarding the possibility of such a change. Disclosure relating to corporate governance is not subject to a materiality standard in Canada; climate-change disclosure should be treated similarly.

The TCFD has recognized that most information included in financial filings is subject to a materiality assessment.[164] However, it observes that because climate-related risk affects nearly all industries, many investors believe it requires special attention. For example, the TCFD reports that in assessing organizations' financial and operating results, investors want insight into the governance and risk management context in which such results are achieved.[165] It recommends that organizations provide climate-related financial disclosures in their mainstream public annual financial filings, noting that in most G20 jurisdictions, public companies have a legal obligation to disclose material information in their financial filings, including material climate-related information.[166] The TCFD recommends that organizations should describe their processes for prioritizing climate-related risks, including how materiality determinations are made within their organizations.[167] Essentially, the materiality requirement is that investors and other stakeholders should be able to see major trends and significant events related to climate change that affect or have the potential to affect the company's financial condition and/or its ability to achieve its business plan or strategy.

5. Is There Really Litigation Risk?

A decade ago, the question would have been, can directors and officers consider climate-related risk in the exercise of their duties, given its long time horizon? Today, the question has fundamentally shifted. Can directors and officers ignore climate-related risk in the exercise of their fiduciary duties and their duty of care? Arguably not.

---

[161] *YBM Magnex International Inc* (2003), 26 OSCB 5285.
[162] *Ibid.* It is important to note that provincial securities laws have slightly different definitions of material fact and material change, something that Canadian securities regulators must harmonize through national instruments; Condon *et al, supra* note 160.
[163] *Ibid.*
[164] TCFD *Final Report, supra* note 73.
[165] *Ibid.*
[166] *Ibid.*
[167] *Ibid* at 21.

Litigation on climate-related risk is most likely to arise in the context of securities disclosure obligations.[168] However, as corporations act through directors and officers, it is their actions that will determine the liability of the corporation. As Canadian courts determine the scope of the duty to disclose in relation to climate risk, they may look to how directors and officers have devised processes to identify material risk, and what programs, processes and strategies they have adopted to address the risks identified, even where securities law has not been amended to expressly require directors and officers to identify and disclose climate-related financial risk.

In August 2017, lawyers at Environmental Justice Australia filed a lawsuit on behalf of two shareholders of Commonwealth Bank of Australia ("CBA") alleging that the bank's 2016 directors' report did not adequately inform investors of climate change risks.[169] The Notice of Filing alleges that CBA knew, or ought to have known, that its climate change business risks might have a material or major impact on the operations, financial position, and prospects for future financial years of CBA's business and its customers; that CBA ought to have had business strategies to manage CBA's climate change business risks; and that CBA's members (shareholders) reasonably require a summary of CBA's climate change business risks and of the business strategies, if any, employed to manage those risks.[170] The shareholders argue that such a summary is necessary for shareholders to make an informed assessment of CBA's operations, financial position, business strategies, and prospects for future financial years.[171] They are seeking an injunction to stop the bank making the same omissions in future annual reports.

The action in Australia comes on the heels of the Australian Prudential Regulation Authority observing that entities can no longer treat climate change as "non-financial" and that risks associated with climate change extend far beyond the ecological realm to economic transition risks that "are actionable now by Australian banks, insurers, asset owners and asset managers".[172] In addition, a legal opinion released by the Australian Centre for Policy Development and the Future Business Council states that "company directors who fail to properly consider and disclose foreseeable climate-related risks to their business could be held personally liable for breaching their statutory duty of due care and diligence". [173]

These developments suggest that it is only a matter of time before some legal action is taken in Canada. Directors and officers should therefore be proactive in addressing climate-related risk, rather than reactive to a lawsuit under corporations law, securities law, environmental law, or the

---

[168] For a discussion, see Cynthia Williams and Jordan Routliff, "Disclosure of Information Concerning Climate Change: Liability Risks and Opportunities", Commonwealth Climate and Law Initiative Working Paper, 14 October 2017, draft on file with author.

[169] The Guardian, "Commonwealth Bank shareholders sue over 'inadequate' disclosure of climate change risks", 8 August 2017, https://www.theguardian.com/australia-news/2017/aug/08/commonwealth-bank-shareholders-sue-over-inadequate-disclosure-of-climate-change-risks.

[170] Notice of Filing, Guy Abrahams v Commonwealth Bank of Australia, Victoria Registry, federal Court of Australia, 8 August 2017, http://envirojustice.org.au/sites/default/files/files/170807%20Concise%20Statement%20(as%20filed).pdf.

[171] *Ibid.*

[172] Geoff Summerhayes, Executive Board Member of Australian Prudential Regulation Authority, "Australia's New Horizon: Climate Change Challenges & Prudential Risk", speech to the Insurance Council of Australia, 17 February 2017.

[173] *Ibid*.

common law. The previous discussion regarding the scope of fiduciary obligations and the duty of care has already canvassed some of the defences to actions that may be brought. The short answer is, if directors and officers are duly diligent in identifying whether there are climate-related risks and the scope of those risks, and if identified, in developing strategies to address the risk, they are unlikely to be held personally liable. Such diligence is also likely to help protect the corporation from losses due to climate-related civil actions. Thus, good governance would suggest directors and officers act now to meet their obligations.

Another possible source of litigation are the consumer protection statutes in various provinces. While not a claim for breach of fiduciary obligation, they may be a tool to hold companies accountable for failing to adequately disclose risks associated with climate change. If a consumer product being sold by a corporation carries a risk of negative impact on the environment, class action litigation risk associated with such matters should prompt directors and officers to diligently investigate their company's compliance and marketing practices. Recently, a Canadian class-action lawsuit against Volkswagen for its cheating emissions testing received Ontario court approval of a $2.1 billion settlement plan for the 105,000 purchasers and individuals that leased certain Volkswagen or Audi vehicles in Canada.[174] Similarly, in 2017, Koskie Minsky LLP and Lenczner Slaght Royce Smith Griffin LLP commenced a class proceeding against Mercedes-Benz Canada Inc, Daimler AG, and other defendants, alleging that Mercedes BlueTEC vehicles are non-compliant with Canadian emissions laws, both in emitting significantly higher levels of pollutants than are permissible and emitting toxic chemicals at much higher levels when the temperature drops below 10°C.[175] In both cases, companies are alleged to have sold cars as being “clean and green”, when in fact their emissions fell far below legal standards. Consumer protection legislation allows for class members to rescind their contracts and receive a full refund when a product was marketed by misrepresentation.[176] Consumer misrepresentation class actions provide another tool to hold corporations accountable when the misrepresentations by their officers lead to negative environmental consequences and reduced utility of the product purchased by consumers.[177]

Directors and officers have a duty to diligently investigate their company's business and marketing practices to avoid the litigation risk of such massive consumer fraud/misrepresentation cases.

There are relatively few cases in Canada in which suits are brought against directors for failure to exercise a duty of care.[178] In some measure, it is because Canada has a “cost follows results” regime that deters individual actions against directors; the plaintiff risks having to pay the legal costs for the defendant if it loses. However, one could anticipate a coalition of investors or a coalition of NGO funding an action for breach of the fiduciary obligation or duty of care, even where there are these potential cost consequences.

---

[174] Aleksandra Sagan, “Volkswagen emissions lawsuit in Canada reaches $2.1B settlement” Toronto Star Newspaper, 27 April 2017, https://www.thestar.com/business/2017/04/27/volkswagen-emissions-lawsuit-in-canada-reaches-21b-settlement.html.
[175] Koskie Minsky LLP, “Mercedes BlueTEC Class Action”, 2017, https://kmlaw.ca/cases/mercedes-bluetec-class-action/.
[176] Furthermore, the legislation does not require any reliance on the misrepresentation, or causation in the traditional sense, meaning it is very easy to prosecute these claims on a class-wide basis, *ibid.*
[177] *Ibid.*
[178] Janis Sarra and Ronald Davis, *Director and Officer Liability in Corporate Insolvency* (Toronto: LexisNexis, 2015).

If a complainant pursues an action alleging a breach of fiduciary obligation owed to the corporation by the directors that had harmed the corporation in some way and thus indirectly harmed its interests, there would still be barriers to the pursuit of a derivative action. The courts generally serve a gatekeeping role in determining leave to commence a derivative action. They have generally been reluctant to order corporations to cover the costs of derivative actions until a judgment on the merits is obtained, creating a considerable cost barrier to their pursuit.[179]

The SCC in *Peoples Department Stores* recognized, for the first time, a "business judgment rule" in Canada, which serves as a type of defence to particular decisions or conduct of directors and officers.[180] The SCC observed:

> Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available *ex post facto*. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the "business judgment rule", adopting the American name for the rule. [181]

The SCC subsequently held that the business judgment rule accords deference to a business decision, so long as it lies within a range of reasonable alternatives.[182] It held that the deference reflects the reality that directors, who are mandated to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation, including decisions on the appropriate balance among stakeholders' interests, as well as other directorial decisions.[183]

With respect to climate-related financial risk, the court would look to see that the directors made a reasonable decision, not a perfect decision. Provided that the decision made, and the action taken to monitor, mitigate and/or adapt with respect to climate risk is within a range of reasonableness, the courts will not substitute their opinion for that of the directors, even though subsequent events may have cast doubt on the directors' decision. The SCC has held that courts should defer to business judgments when assessing whether there has been a breach of duty, although this deference is to duly diligent decisions rather than a presumption of sound business

[179] Janis Sarra, *Review of the Derivative Action Provisions of the Canada Business Corporations Act*, *Policy Implications and Options*, Report for Corporations Canada, 30 April 2005.
[180] *Peoples Department Stores* judgment, *supra* note 22 at para 64. Prior to the *Peoples Department Stores* judgment, Canadian courts had deferred to business judgment in a number of cases, but were frequently careful to distinguish such deference from an actual "rule". It was the first judgment in which the SCC found that it was a rule that serves as a defence to particular decisions or conduct.
[181] *Peoples Department Stores, supra* note 22 at para 64.
[182] *BCE, supra* note 32.
[183] *Ibid*. See also *Maple Leaf Foods, supra* note 131; *Kerr v Danier Leather Inc*, [2007] SCJ No 44, [2007] 3 SCR 331, 2007 SCC 44 (SCC).

judgment as exists in the United States.[184]

The Ontario Court of Appeal in *UPM-Kymmene v UPM-Kymmene Miramichi Inc* held that the business judgment rule "recognizes the autonomy and integrity of a corporation and the expertise of its directors", since they are "in the advantageous position of investigating and considering first-hand the circumstances that come before it and are in a far better position than a court to understand the affairs of the corporation and to guide its operation".[185] However, the court will not exercise deference unless directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions. Courts are entitled to consider the content of the directors' decision and the extent of the information on which it was based, and to measure these considerations against the facts as they existed at the time the impugned decision was made.[186] Therefore, although corporate board decisions are not subject to microscopic scrutiny with the perfect vision of hindsight, they are subject to examination.[187]

Hence, while statutory defences and the recognition of a judicial deference to business judgment offer directors and officers powerful defences against claims that they breached their statutory fiduciary duties or their duty of care, courts want to know they have been scrupulously diligent. While largely a process inquiry, judgments such as *UPM-Kymmene v UPM-Kymmene Miramichi Inc* emphasize that courts will consider the content of decisions and the extent of information on which they are based. While the courts will accord deference to reasonable decision-making and the business judgment of directors and officers, statutory terms such as due diligence offer considerable scope to the court for review in cases where corporations have caused considerable harm either to a third party or a minority entity. Rapidly developing technical and best practice information on climate-related financial risk allows directors and officers more information on scale of risk and best practice measures to address that risk. Directors will now need to demonstrate how they exercised their duties of loyalty and care in respect of climate-related risk that is reasonably foreseeable.

6. *Lessons from Existing Environmental Liability Cases*

Directors have been held personally liable for environmental harms in Canada. While there are not direct lessons for fiduciary obligation in the sense that environmental liability is expressly imposed by statute and a government agency enforces any breaches, the approach of the courts in considering personal liability and any available defences may offer some insights in respect of climate change and director and officer liability risk.

While there appear to be no Canadian judgments expressly addressing climate change, corporations and their officers have long been held accountable for emissions exceeding statutory limits. Environmental liability under both statute and common law in Canada is an area in which

---

[184] *Ibid.*
[185] *UPM-Kymmene Corp, supra* note 121 at para 152.
[186] *Ibid.*
[187] *Ibid* at para 153.

there has been a growth in the responsibility assigned to corporate directors and officers.[188] There are more than 30 statutes in Canada that afford protection to the environment and most, if not all, impose liability on directors for breach of the statute.[189] The purpose of environmental statutes is to prevent and remedy environmental contamination or harm. These statutes are generally referred to as "public welfare" legislation, aimed at preventing potentially adverse effects through the enforcement of minimum standards of care and conduct of corporations and their directors and officers.[190] Directors and officers face potential personal liability under these statutes in addition to the corporation's liability. The potential liability varies depending on the type and severity of the conduct giving rise to the environmental condition or damage. Directors and officers may face fines and/or terms of imprisonment, and even liability for clean-up costs.[191]

Environmental protection statutes are aimed at holding corporate officers accountable for actions of the corporation that are harmful to the environment or that negatively affect the health of residents. Much of the legislation imposes personal liability on those persons who have charge, management or control of the corporation's activities or property.[192] Directors and officers may be considered to have charge, management or control of a corporation if they take an active role in the business or if they had a duty or opportunity to take preventive or corrective action but failed to do so.[193] A directing or controlling mind can be attributed to more than one director or officer. "Control" lies not only in the ability to carry out activities, but also the ability or opportunity to restrain or prevent environmental harm.[194] Most of the environmental statutes in Canada specify that if the corporation commits an offence, any director that authorizes, permits or acquiesces in the offence commits the same offence.

The statutes impose a strict liability standard.[195] Liability can be imposed on both those directors and officers with day-to-day responsibility and directors who have personal knowledge of the problem and fail to exercise due diligence to make the site safer.[196] In addition to statutory reference to those individuals with "care, management and control", environmental protection legislation, in most provinces and federally, expressly provides for liability of corporate directors and officers. The standard for establishing liability is generally that directors and officers will be liable if they directed, authorized, permitted, participated in or acquiesced in the commission of an offence by the corporation, in most cases specifying personal liability whether the corporation is prosecuted or convicted of the offence, or not.[197] Ontario approaches the issue by imposing a

---

[188] Sarra and Davis, *supra* note 178.
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] See, for example, Alberta *Environmental Protection and Enhancement Act*, s 232 [*AEPEA*].
[193] *P & L Tire Recycling Inc v Director*, *Ministry of Environment* (1992), decision of the Ontario Environmental Appeal Board, EPA.001.90.
[194] *R v Sault Ste Marie (City)*, [1978] SCJ No 59 at para 68, [1978] 2 SCR 1299 (SCC). See also *Ontario (Ministry of the Environment and Energy) v 724597 Ontario Inc*, [1995] OJ No 3713, 26 OR (3d) 423 (Ont Div Ct).
[195] *R v Bata Industries Ltd*, [1992] OJ No 236, 9 OR (3d) 329 (Ont Prov Div), remedy var'd on appeal, [1993] OJ No 1679, 14 OR (3d) 354 (Ont Gen Div), var'd [1995] OJ No 2691, 25 OR (3d) 321 (Ont CA) ["*Bata Industries*"].
[196] *Ibid.*
[197] See, for example, *AEPEA, supra* note 192; Northwest Territories *Environmental Protection Act*, RSNWT 1988, c E-7, s 14.1(2); Saskatchewan *Environmental Management and Protection Act*, SS 2002, c E-10.21, s 74; Manitoba *Environment Act*, s 35 [*MEA*]; Nova Scotia *Environment Act*, SNS 1994-95, c 1, s 164. Section 179 of the Yukon

duty on directors and officers of a corporation to “take all reasonable care” to prevent the corporation from committing certain types of offences and providing that directors or officers who fail to carry out their duty are guilty of an offence.[198]

Directors and officers, in most cases, have a defence of due diligence available in terms of potential personal liability. However, in Ontario, directors and officers must prove that they carried out their duty to take reasonable care to prevent the corporation from committing an offence.[199] Directors are to take all reasonable care by establishing a proper system to prevent commission of the environmental offence and by taking reasonable steps to ensure the effective operation of the system. That includes a system that requires officers to report periodically to the board on the operation of the system and that ensures that officers are promptly addressing environmental concerns brought to their attention.[200] The degree of reasonable care to be exercised depends on the circumstances of the case and the precise language of the environmental legislation.[201] The British Columbia Court of Appeal has rejected a director’s contention that the Crown must prove an additional element - that the director had a wrongful intention in allowing the corporation to commit the offence.[202]

Environment Act specifies that liability is imposed on directors, officers and agents of the corporation where they “knowingly” directed, authorized, assented to, acquiesced in or participated in the commission of the offence, arguably importing a higher standard, that of “knowing” before liability will attach. The Prince Edward Island *Environmental Protection Act*, RSPEI 1988, c E-9, s 32 specifies that a director, officer or agent of a corporation who directed, authorized, assented to, acquiesced in or participated in the commission of an offence by the corporation is guilty of the offence.

[198] The Ontario *Environmental Protection Act*, RSO 1009, c E 19, as amended [*OEPA*], s 194 specifies:
Duty of director or officer
194. (1) Every director or officer of a corporation has a duty to take all reasonable care to prevent the corporation from, (a) discharging or causing or permitting the discharge of a contaminant, in contravention of, (i) this Act or the regulations, or (ii) an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under this Act; (b) failing to notify the Ministry of a discharge of a contaminant, in contravention of, (i) this Act or the regulations, or (ii) an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under this Act; (c) contravening section 27, 40, 41 or 47.3 in respect of hauled liquid industrial waste or hazardous waste as designated in the regulations relating to Part V;
(d) contravening section 93 or 184; (e) failing to install, maintain, operate, replace or alter any equipment or other thing, in contravention of an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under this Act; or (f) contravening an order under this Act, other than an order under section 99.1, 100.1, 150 or 182.1.
(1.1) Clause (1) (a) does not apply to a contravention of section 14 unless the contravention causes or is likely to cause an adverse effect. 2005, c. 12, s. 1 (65).
(2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
(2.1) If a director or officer of a corporation is charged with an offence under subsection (2) in connection with a specific contravention of the corporation, the director or officer has the onus, in the trial of the offence, of proving that he or she carried out the duty under subsection (1) in connection with that contravention. 2005, c 12, s 1 (66).
(3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.

[199] *Ibid*.

[200] *Bata Industries, supra* note 195.

[201] Sarra and Davis, *supra* note 178.

[202] Offence under the British Columbia *Waste Management Act,* RSBC 1996, c 482 [*BCWMA]*; *Alpha Manufacturing Inc v British Columbia*, 2010 BCCA 436 (BCCA).

The courts will carefully scrutinize the language of environmental statutes in order to determine the elements of the offence that the Crown must establish. The legislation is strictly construed because of the potential for sanctions such as imprisonment. For example, in Ontario, in order to establish liability for environmental conditions or damage, the Crown must establish that the accused emitted, caused or permitted the emission of the contaminant into the natural environment; and that the contaminant caused or was likely to cause the impairment of the quality of the natural environment, causing injury or damage to plant, property or animal life, causing harm or discomfort to a person, adversely affecting the health or safety of a person, causing loss of enjoyment of normal use of property, or interfered with the normal course of business.[203]

In *R v Shell Canada Ltd*, the Alberta Provincial Court held that the standard of reasonable care in assessing the defence of due diligence involves a proportionality test, assessing the risks involved, potential harm, potential benefit, and whether the level of sophistication of the system and its continual monitoring are reasonable given the activity sought to be regulated.[204] The judgment is instructive for what is expected of directors and officers in their due diligence efforts. Scrutiny of their conduct frequently arises either when there has been an event that gives rise to an investigation and charges, or when the corporation is insolvent, and creditors or others are assessing the value remaining in corporate assets, given liability for environmental harms or hazards. The courts have asked the following questions in assessing the due diligence defence:

- Did the directors establish a pollution prevention system?
- Was there supervision or inspection?
- Was there an improvement in business methods?
- Did the directors exhort those individuals controlled or influenced?
- Did each director ensure that the corporate officers had been instructed to set up a system, sufficient within the terms and practices of the particular industry, of ensuring compliance with environmental laws?
- Did the directors ensure that the officers of the corporation reported back periodically to the board of directors on the operation of the system?
- Did the directors ensure that the officers had been instructed to report any substantial non-compliance to the board of directors in a timely manner?
- Is there a system of ongoing environmental audit?
- Are there remedial and contingent plans for spills?
- Are there training programs in place, sufficient authority to act, and other indices of a proactive environmental policy?[205]

---

[203] This test set out by the SCC was in reference to provisions under ss 1 and 13 of the *OEPA, supra* note 198 (see also s 187(8)); *R v Canadian Pacific Ltd*, [1995] SCJ No 62, [1995] 2 SCR 1031 at para 60 (SCC). The SCC has held that the polluting conduct is only prohibited if it has the potential to impair use of the natural environment in a way that is more than trivial: *Canadian Pacific, ibid* at para 64.
[204] *R v Shell Canada Ltd*, [1999] AJ No 1297 at paras 29-31 (Alta Prov Ct) ["*Shell Canada*"].
[205] *Bata Industries, supra* note 195. See also *Shell Canada, ibid* at paras 23-27, where the corporation was found to have failed to exercise due diligence. See also *R v Pennecon Ltd*, [1996] NJ No 9, 138 Nfld & PEIR 278 (Nfld TD); *R v Commander Business Furniture Inc*, [1994] OJ No 313 (Ont Gen Div).

Courts have held that directors are responsible for reviewing environmental compliance reports provided by corporate officers, but are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties.[206] Directors have an obligation to substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties, including shareholders. Directors should be aware of the standards of their industry and other industries that deal with similar environmental pollutants or risks. Directors also have an obligation to immediately and personally react when they have notice that the system has failed.[207] "Reasonably foreseeable" is a factor to be considered in determining due diligence.[208]

Numerous statutes also allow environmental authorities to issue "preventative" orders to reduce the risk of or prevent spills; "control" orders to reduce or control emissions and discharges; and "stop" orders to halt particular practices, such as discharges, if there is imminent danger to human beings.[209] Under most of these statutes, directors, officers and persons who have charge, management or control can be held liable for non-compliance with the orders. Under Ontario legislation, directors owe a duty of care for preventing actual environmental contamination.[210] Directors and officers face similar liability under statutes aimed at special environmental concerns in specific industries.[211]

The availability of a due diligence defence for directors and officers is discussed in the various judgments in the *Bata Industries* case. In *R v Bata Industries Ltd.*, the trial judge held that the directors failed to take all reasonable care to prevent the corporation from causing or permitting an unlawful discharge of liquid material waste, contrary to the *Ontario Water Resources Act*.[212] The corporation

---

[206] See for example, *Bata Industries*, *supra* note 195.
[207] *Ibid.*
[208] *R v Northwood Pulp & Timber Co*, [1995] BCJ No 2380 (BCSC); *R v Anachemia Solvents Ltd*, [1994] OJ No 1201, 14 CELR (NS) 110 (Ont Prov Div); *Canadian Pacific, supra* note 203.
[209] See, for example, Québec *Environment Quality Act*, c Q-2, ss 25, 31.43, 109.1, 114.1; *AEPEA, supra* note 192*,* ss 113-114; *MEA, supra* note 197*,* s 24; Ontario *Pesticides Act*, RSO 1990, c P11, s 28. For example, the British Columbia *Environmental Management Act* [*BCEMA*] imposes liability on directors, officers and other persons in possession or control of polluting substances, allows the ministry to issue orders to take action to reduce risk of spills or escape, and specifies that if the corporation commits an offence under these provisions, a director, officer or agent who authorized or acquiesced is also deemed to have committed the offence, BC *Environmental Management Act,* SBC 2003, c 53 [*BCEMA*], ss 45, 82, 85, 121.
[210] *OEPA*, *supra* note 198, ss 91-99, 147(1)(*a*), 194.
[211] See, for example, Alberta *Oil Sands Conservation Act*, RSA 2000, c O-7, s 24 for causing or inducing a permit holder to contravene its provisions; Alberta *Gas Resources Preservation Act*, RSA 2000, c G-4, s 19; British Columbia *Environmental Assessment Act*, SBC 2002, c 43, s 41. There is also liability under most legislation regulating the transportation of dangerous goods or for pesticide use: see, for example, Saskatchewan *Dangerous Goods Transportation Act*, SS 1984-85-86, c D-1.2, ss 18, 21; British Columbia *Transport of Dangerous Goods Act*, RSBC 1996, c 458, ss 6, 19; Ontario *Dangerous Goods Transportation Act*, RSO 1990, c D1, ss 4, 7; Québec *Pesticides Act*, RSQ, c P-9.3, ss 110, 119; Ontario *Pesticides Act*, RSO 1990, c P.11, ss 4, 42, 49. Most provinces also have statutes relating to the quality and management of practices regarding water, air and other natural resources: see, for example, Nova Scotia *Water Resources Protection Act*, SNS 2000, c 10; Alberta *Water Act*, RSA 2000, c W-3, ss 142, 143, 146; Saskatchewan *Clean Air Act*, SS 1986-87-88, c C-12.1, s 22(1); New Brunswick *Clean Air Act*, SNB 1997, c C-5.2.
[212] *Bata Industries*, *supra* note 195; Ontario *Water Resources Act*, RSO 1990, c O.40, ss 116(1)-(3). Section 116(1) specifies that every director or officer of a corporation that engages in activity that may result in the discharge of any material into any water or shore or bank or any place that may impair the quality of the water contrary to the *Act* has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.

was convicted, the judge finding that the corporation did not establish proper systems to prevent the offence and the directors failed to take reasonable steps to ensure the effective operation of the system they had in place. The Court held that the onus is on the directors to establish due diligence.[213] The trial judge imposed a $60,000 fine on the corporation and imposed a probation order with an additional amount of $60,000 to fund a local toxic waste management program. The individual directors were fined $12,000 each and the corporation was ordered not to indemnify them in respect of their fines as a term of the probation order. The fines were subsequently reduced on appeal to $30,000 for the waste management program and to $6,000 each for the directors. In reducing the fines, the Ontario Court, General Division held that not enough consideration had been given to the defendants' records as responsible citizens and to their remorse. The Court found that it was not a deliberate contravention of the legislation, but rather, a failure to take action within a reasonable period of time. Moreover, the corporation had undertaken complete remedial action with respect to the area damaged and had circulated instructions to all of its related companies worldwide alerting them to environmental issues.[214] However, the Ontario Divisional Court upheld the non-indemnification order.

On further appeal, the Ontario Court of Appeal in the *Bata Industries* case struck out the non-indemnification order on the basis that it contradicted the legislative scheme of the Ontario *Business Corporations Act*, which sets out a comprehensive code governing the indemnification of corporate officers and directors.[215] The Court of Appeal held that the authority under the Ontario *Provincial Offences Act* to impose additional terms was aimed at deterrence and rehabilitation, allowing a court, in addition to imposing a fine or term of imprisonment as set out in the statute, to direct a defendant to comply with conditions in a probation order, in part to prevent similar conduct and to contribute to rehabilitation.[216] Here, however, the indemnification order was improperly aimed at punishment. The Court also held that its time-limited nature did little to advance the general deterrence objectives because the corporation could merely wait out the period and then cover the fine.[217]

A more recent case did not afford directors and officers access to indemnification when the Ontario Ministry of Environment ("MOE") issued orders to pay the costs of remediation. In *Baker et al v Director, Ministry of the Environment (Northstar),* former directors and officers of Northstar Aerospace Inc and its parent company, Northstar Aerospace (Canada) Inc, were held personally liable for contamination at the company's former manufacturing and processing facility in Cambridge, Ontario.[218] The environmental contamination arose from the migration of trichloroethylene from the

---

[213] *Ibid.* The Court dismissed a challenge to the provisions of the statute imposing liability on directors and officers under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, 1982, c 11. The Court held that the legislation is not void for vagueness, the statute clearly targets specific environmental problems and the overall scheme is clear. Directors are or should be aware of the risks and standards set out in the statute and the courts have offered guidance on acceptable standards of conduct.
[214] *Bata Industries*, *supra* note 195.
[215] *OBCA*, *supra* note 17. See also indemnity provisions under corporations statutes: for example, *ABCA, supra* note 17.
[216] Ontario *Provincial Offences Act*, RSO 1990, c P 33, as amended, s 72.
[217] *Bata Industries*, *supra* note 195. The Court held that the lower courts should have considered these provisions in determining whether an indemnification order was appropriate, specifically, consideration of whether the directors acted honestly, in good faith and in the reasonable belief that their conduct was lawful.
[218] *Baker et al v Director, Ministry of the Environment,* Case Nos: 12-158 to 12-169, Environmental Review Tribunal, 15 February 2013, written reasons, *Baker et al v Director, Ministry of the Environment,* 22 March 2013. *Baker et al v Director, Ministry of the Environment,* Case Nos.: 12-158/12-159/12-160/12-161/12-162/12-163/12-164/12-165/12-

company's site to nearby residential properties, which had resulted from the company's aircraft parts manufacturing activities from 1981 to 2010.[219]

In March 2012, the MOE issued a Director's order that Northstar clean-up the contaminated ground water and in May 2012, another Director's order required Northstar to provide more than $10 million of financial assurance to the MOE within a week. Northstar entered insolvency proceedings under the *Companies' Creditors Arrangement Act (CCAA)* in June 2012 and obtained a stay of the MOE orders from the court. Northstar sold all its assets except the Cambridge property on 24 August 2012 and became bankrupt on that date. After the sale proceeds were distributed to its creditors, it had no funds to conduct the remediation. The Ontario Minister of the Environment ordered the MOE to assume control of remediation of the site. The MOE then issued an order pursuant to the Ontario *Environmental Protection Act* (*EPA*) to Northstar's former directors and officers as "persons who had management and control of the undertaking or property".[220] The order sought payment of over $15 million for the remediation work.

The Ontario Superior Court of Justice held that the directors of Northstar were not eligible to receive an indemnity from the priority charge created to indemnify Northstar directors in that corporation's insolvency proceedings.[221] The order against the directors was issued following Northstar's commencement of *CCAA* proceedings and after it became clear that Northstar would have no funds available to pay the remediation costs. The court supervising the *CCAA* had issued an order that Northstar would indemnify the directors for any liability they would incur by acting in that capacity after the *CCAA* proceeding commenced, except for liability arising from gross negligence or willful misconduct, and ordered that directors would have the benefit of a charge of $1.750 million, in priority to the claims of other secured creditors, to pay any such indemnity claim.[222] However, the Court held that the MOE Director's order was not a claim that qualified for the indemnity and directors' charge because it was the result of events that occurred before the commencement of the *CCAA* proceeding and thus was not a liability incurred for acting as a director after the proceeding commenced.[223] The Court noted that to allow such a claim against the directors' charge would "wrongfully and inequitably" subordinate a secured creditor to the claims of an unsecured creditor.[224] The Court held that if the MOE Director wished to pursue its environmental claims against the directors, it would have to do so without recourse to the directors' charge and that the directors would have to defend these claims without the *CCAA* indemnity.

166/12-167/12-168/12-169, Environmental Review Tribunal, 2 December 2013, re Order No. 5866-8WKU92 issued by the Director, Ministry of the Environment, on 14 November 2012 under sections 17, 18, and 196 of the *OEPA*, *supra* note 198, ss 17, 18 & 196 [*EPA*].

[219] *Baker, ibid,* written reasons 22 March 2013.

[220] *OEPA, supra* note 198; *Baker*, *ibid.*

[221] *Re Northstar Aerospace Inc,* 2013 ONSC 1780 ["*Re Northstar*"].

[222] *Ibid* at paras 12, 13.

[223] *Ibid* at para 36.

[224] *Ibid* at para 34.

The former directors appealed the Director's order requiring them to pay the costs of remediation to the Environmental Review Tribunal.[225] The Ontario Environmental Review Tribunal refused a request by the directors for a stay pending a determination of the liability issues. It held:

> The Tribunal finds that there is sufficient evidence to demonstrate that danger to human health and serious risk of impairment to the natural environment would result if the remediation work were to be interrupted. This is not a situation where an order is issued to require commencement of a remediation program that might be able to be delayed for a few months pending the resolution of an appeal. Rather, the Order here was issued to confirm an ongoing remediation program for an extremely serious contamination problem affecting hundreds of nearby residents and regional water systems and to ensure that the program continues until all risk of harm due to the contamination is removed.[226]

The former directors had been unsuccessful in previous motions seeking an injunction against the MOE to prevent them from issuing the order once the *CCAA* stay expired.[227] The former directors also lost their motion for an order that the *CCAA* court assume jurisdiction over the merits of their appeal, rather than the Environmental Review Tribunal, arguing both paramountcy and administrative efficiency.[228] The Court rejected these arguments because they relied on the existence of an on-going *CCAA* proceeding for their applicability. Here, *CCAA* proceedings were at an end and there was no plan of arrangement that might have contained a compromise of claims against directors in its provisions. The corporation was bankrupt, the MOE order was against its former directors and there was no operational conflict between federal legislation and provincial legislation that would require the application of paramountcy.[229] The directors and officers subsequently reached a settlement with the MOE that involved, among other things, the payment of $4.75 million to the MOE in exchange for the withdrawal of the order.[230]

The careful attention that the Court pays to the specific requirements under environmental protection legislation, including the obligations of directors and officers and the availability of defences, is quite different than advancing a more general fiduciary obligation for directors and officers to identify and address climate change risk. There may, however, be an interplay between these various obligations, where the failure to address climate change intersects with emissions or other statutory violations. When corporations are financially healthy, they indemnify their directors, but where they are in financial distress and there is no value in the corporation's assets to cover the claims, stakeholders may look to the directors and officers personally. The *Baker* case illustrates that while the *CCAA* contains provisions permitting a compromise of claims against

[225] *Ibid* at para 12.
[226] *Baker et al v Director, Ministry of the Environment, supra* note 218 at para 54.
[227] *Re Northstar Inc,* 2012 ONSC 6362.
[228] *Re Northstar Inc,* 2013 ONSC 2719.
[229] *Ibid.* The Court held that it was bound by the SCC decision in *R v Consolidated Maybrun Mines*, which held that the appeal provisions in the *EPA* were part of a complete code that excluded the jurisdiction of the courts until an appeal from the Environmental Review Tribunal decision on a matter of law was filed, and thus appeal of the MOE Director's order was to be adjudicated by the Environmental Review Tribunal. *R v Consolidated Maybrun Mines*, [1998] 1 SCR 706.
[230] S Anderson, "Update on Directors' and Officers' Environmental Liability: Lessons from Northstar Aerospace", 22 January 2014, http://www.mccarthy.ca/article_detail.aspx?id=6607.

directors as part of the larger compromise of claims against a corporation in a plan of arrangement, where the assets are sold and no plan of arrangement is used to distribute the proceeds, the courts may be reluctant to intervene in claims against the directors personally.

The issue of environmental harm may also give rise to particular claims in tort with respect to third parties harmed by activities of the corporation, either through actual production processes or by accidental emissions or other environmental damage. Claims against directors and officers for torts related to the environment can be brought against directors or officers even where they are acting within the course of their duties; however, the facts giving rise to the claim in tort must be specifically pleaded.[231] Where properly pleaded, officers can be held liable for tortious conduct even when acting in the course of their duties.[232]

7. Due Diligence Defence for Climate Change Related Decisions

The environmental law jurisprudence does assist in thinking about what a due diligence defence might look like when stakeholders bring personal or derivative actions in respect of climate-related financial risk. Questions that the courts might pose, could include:

- Did the directors and officers undertake to identify potential transition risks and physical risks from climate change and climate change policies?

- Did the directors and officers develop an ongoing process or program for monitoring and identifying new climate-related risks, and have mechanisms in place to respond rapidly to changes in the risk profile?

- Did the directors and officers establish a program or put appropriate strategies in place to manage the climate-related risks identified, such as reduction of greenhouse gas emissions, climate mitigation and adaptation?

- Was there supervision or inspection of employees carrying out emissions related activities and mitigation or adaptation activities?

- Did each director ensure that the corporate officers had been instructed to set up a system, sufficient within the terms and practices of the industry, of ensuring compliance with the climate risk identification, mitigation and adaptation program?

- Did the directors ensure that the officers of the corporation reported back periodically to the board of directors on the operation of the system?

---

[231] *Swamy v Tham Demolition Ltd*, [2000] BCJ No 1734 (BCSC); *United Canadian Malt Ltd v Outboard Marine Corp of Canada*, [2000] OJ No 1554, 48 OR (3d) 352 (Ont SCJ) [*"United Canadian Malt"*].
[232] *United Canadian Malt, ibid* at paras 9-10, 48 OR (3d) 352 (Ont SCJ). See also *ADGA Systems International Ltd v Valcom Ltd*, [1999] OJ No 27, 43 OR (3d) 101 (Ont CA), leave to appeal to SCC dismissed [1999] SCCA No 124 (SCC).

- Did the directors ensure that the officers had been instructed to report any substantial non-compliance to the board of directors in a timely manner?

- Is there a system of ongoing climate-related risk audit?

- Are there remedial and contingency plans in place for acute events?

- Are there training programs in place, sufficient authority to act, and other indicia of pro-active climate risk identification, mitigation and adaptation program?

The best defence, of course, is proactive governance. There is evidence that an increasing number of corporate directors and officers are identifying and addressing climate-related financial risk. For example, Teck Resources Ltd has identified as one of its four primary sustainability goals a focus on taking "urgent action to combat climate change and its impacts".[233] It expressly recognizes that its "activities consume energy and generate significant greenhouse gas (GHG) emissions." [234] Its four pillars of tackling climate change include: setting ambitious targets to reduce its carbon footprint, which it is working to achieve through innovation, improved efficiency and adoption of low-carbon technologies; positioning Teck for the low-carbon economy in terms of products; advocating for climate action, including effective carbon pricing; [235] and adapting to the physical impacts, increasing the resilience of its operations by incorporating forecasted climate scenarios into project design and mine closure planning.[236]

A second example is TransAlta Corporation, a large publicly-traded corporation owning, operating and managing a diversified portfolio of 69 power generating facilities that use a variety of fuels, including coal, natural gas, hydro, and wind.[237] It is converting coal plants to gas plants to significantly reduce GHG emissions before 2030.[238] In addition to being the largest hydro producer in Alberta, it is now the largest wind energy producer in Canada.[239] Its disclosures reveal that its goal, in line with a commitment to the UN Sustainable Development Goals, is to reduce its total

---

233 Teck Resources Ltd, "Sustainability Report 2016", April 2017, http://www.teck.com/media/2016-Teck-Annual-Report.pdf, http://www.teck.com/responsibility/featured-topics/taking-action-on-climate-change/.
234 Teck Resources Ltd, "Taking Action on Climate Change", http://www.teck.com/responsibility/featured-topics/taking-action-on-climate-change/. As of April 2017, it has cut its GHG emissions by over 200,000 tonnes and its target is to reduce GHG emissions by 450,000 tonnes by 2030, "the equivalent of taking more than 40,000 cars off the road".
235 For example, Teck supported development of the SunMine—Western Canada's largest solar power facility and the first owned and operated by a municipality. *Ibid.*
236 *Ibid.* It reports: "we know that the metals and minerals we produce are essential to building the technologies and infrastructure necessary to reduce GHGs and adapt to the effects of climate change. For example, renewable energy systems can require up to 12 times more copper compared to traditional energy systems; and steel and the steelmaking coal required to make it is necessary for infrastructure that reduces emissions, such as rapid transit and wind turbines."
237 TransAlta, "Action on Climate Change", 2017, http://www.transalta.com/sustainability/climate-change-action-and-strategy/.
238 *Ibid.* TransAlta is focused on wholesale electricity generation and energy marketing in deregulated electricity environments. See also, TransAlta, 29 November 2016, http://www.transalta.com/statement-on-coal-to-gas-conversion/
239 TransAlta, "Action on Climate Change", *supra* note 237.

GHG emissions in 2021 to 30% below 2015 levels, and 60% below 2015 levels by 2030.[240] It is working towards optimizing its plants to reduce energy consumption and thus GHG emissions. It seeks to generate offset and renewable energy credits from its renewable energy portfolio and emissions trading, and participates in carbon pricing structures in California, Alberta, Ontario, and Australia. It reports annually on climate change strategy, risk, opportunity and emissions database to the Climate Disclosure Project ("CDP").[241]

IV. Investment Practice, Fiduciary Obligation and Climate Change Risk

Internationally, institutional investors have increased their attention to climate risk management.[242] In Canada, pension funds in particular have begun to engage with companies in their portfolios in respect of climate risk. Pension funds and other institutional investors will potentially lose significant value of their investments if they do not act as prudent investors by recognizing climate change financial risk. The financial services sector in Canada accounts for approximately 6% of Canada's gross domestic product,[243] and thus these institutional investors can be a significant force in the move towards a lower carbon economy.

There are duties of both care and loyalty with respect to fiduciary obligation. Where institutional investors are fiduciaries, they could be held accountable for failing in their obligations if they do not address the issues discussed above regarding climate-related financial risk. As noted in part I, a fiduciary's duties to beneficiaries are twofold: a duty to act prudently and a duty of loyalty.[244] It is the prudential obligation that necessitates fiduciaries paying attention to climate change risk, for the same reasons that directors and officers of corporations must. However, as discussed in this part, the precise duties of pension fund trustees and other investment fiduciaries have their own unique considerations.

1. The International Context

The United Nations *Principles for Responsible Investment* ("UNPRI") reports that investors' fiduciary duties of loyalty and prudence are not a barrier to implementing environmental and social investment practices, suggesting that the failure to consider long-term environmental and social goals is a failure of the investor's fiduciary duty.[245] The report identifies several challenges in terms of financially material, immaterial, and socio-economic and environmental issues that need to be considered by the fiduciary.[246]

---

[240] *Ibid.*
[241] Formerly the Carbon Disclosure Project. TransAlta, "CDP Climate Change 2016", http://www.transalta.com/wp-content/uploads/2016/12/CDP_Climate_Change_2016.pdf.
[242] See for example, TCFD *Final Report, supra* note 73.
[243] Principles for Responsible Investment, *Fiduciary Duty in the 21st Century*, https://www.unpri.org/download_report/6131, 8 September 2015 ["*Fiduciary Duty in the 21st Century*"] at 38.
[244] *Hodgkinson v Simms*, [1994] 3 SCR 377 at 419.
[245] *Fiduciary Duty in the 21st Century*, *supra* note 243.
[246] *Ibid.* An analysis of Canadian asset owners and investment manager's reliance on fiduciary duties is presented, focused on how they interact with environmental and social governance principles.

These ideas have been discussed for more than a decade. A SHARE report in 2005 suggested that failure to consider climate change could constitute a breach of fiduciary duty "where it is determined that trustees ought to have had a reasonable expectation that such factors could influence materially the long-term performance of plan investments".[247] The UNEP Finance Initiative that same year concluded that integrating environmental, social and governance ("ESG") considerations into investment analysis is "clearly permissible and is arguably required".[248]

A report issued by UNPRI in 2015, in collaboration with the UN Global Compact, UNEP Finance Initiative, and Inquiry: Design of a Sustainable Financial System, titled *Fiduciary Duty in the 21st Century,* analyzed investment practice and fiduciary obligation in eight countries, including Canada.[249] While the report focused more generally on responsible investment and ESG issue integration in investment decision-making, it offered insights for thinking about climate change risk. *Fiduciary Duty in the 21st Century* notes that many asset owners have made commitments to responsible investment and have introduced codes requiring institutional investors to take account of ESG issues in their investment decision-making.[250] It observes that failing to consider long-term investment value drivers is a failure of fiduciary duty.[251] ESG considerations include climate change.

The report gives an example of a decision not to invest in a high-carbon asset because of financial concerns. Asset owners may take account of climate risk issues where there is a clear focus on beneficiaries' interests. A decision not to invest in coal mines because of risk of stranded assets can be a decision in the best interests of beneficiaries. Such a decision is likely to be consistent with fiduciary duties as long as the decision is based on credible assumptions and a robust decision-making process, including clear decisions on investment objectives and reviewing outcomes achieved, and willingness to change if the data change or if it is clear that the decision is causing significant damage to the beneficiaries' financial interests.[252]

The *Fiduciary Duty in the 21st Century* report recommends that fiduciaries need to be able to show that they have identified and assessed the risks of climate change to companies and to their investment portfolios. It recommends that fiduciaries show that they have recognized relevant risks, even if they are sceptics on the issue of climate change; and have analyzed how climate change might affect investment returns over the short, medium and long-term. They should also have explicitly managed the risks, and not assumed that the risks are automatically managed by other risk management strategies. Fiduciaries must demonstrate that they have interrogated and

---

[247] SHARE, "Fiduciary Duties, Investment Screening and Economically Targeted Investing: A Flexible Approach for Changing Times" (2005) http://www.share.ca/files/Fiduciary_Duties,_Investment_Screening_and_ETI.pdf at 9. See also Gil Yaron, "Acting Like Owners: Proxy Voting, Corporate Engagement and the Fiduciary Responsibilities of Pension Trustees", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=772184, Gil Yaron, "The Responsible Pension Trustee: Re-interpreting the Principles of Prudence and Loyalty in the Context of Socially Responsible Institutional Investing" in (2001) *Estates, Trusts and Pensions Journal* 305.

[248] UNEP Finance Initiative (UNEP FI), "A Legal Framework for the Integration of Environmental, Social, and Governance Issues into Institutional Investment" (London: Freshfields Bruckhaus Deringer LLP, 2005).

[249] *Fiduciary Duty in the 21st Century*, *supra* note 243.

[250] *Ibid* at 9.

[251] *Ibid* at 9.

[252] *Ibid* at 9, 16.

challenged the individuals or organizations, for example, investment managers and companies, to ensure that climate change risks are being effectively managed. They must have established processes that enable them to demonstrate the actions they have taken.[253] Integrating climate considerations will allow investors to make better investment decisions and improve investment performance consistent with their fiduciary duties, in turn allocating capital towards well-governed companies and engaging to influence investee companies to allocate capital internally in ways that address climate change risks. In this way, they will place "investors in a better position to contribute to the goals of a greener economy and a more sustainable society."[254]

Investors can embed concern about climate change in their investment processes by analyzing risks and opportunities over the longer-term and by encouraging companies to adopt higher standards and better practices on these issues, all consistent with their fiduciary duties.[255] Investors could also engage with regulators to encourage the adoption of policy measures to correct market failures and to require companies and investors to internalize externalities, for example, through the adoption of carbon pricing, as an integral part of their fiduciary duties.[256] Examples of this engagement exist in Canada and internationally.[257]

For example, the British Columbia Investment Management Corporation ("bcIMC") provides investment management services to British Columbia's public sector, with $123.6 billion in assets under management.[258] bcIMC invests patient capital for the long term, and it considers assessing climate-related investment risk to be integral to fulfilling its fiduciary duty.[259] It reports: "in discharging our fiduciary obligation of working in our clients' best financial interests to generate returns, bcIMC aims to manage the long-term risks and opportunities that ESG matters present".[260] bcIMC monitors ESG factors, and where it considers appropriate, uses its influence as a

---

[253] *Ibid* at 17.
[254] *Ibid* at 10.
[255] *Ibid* at 18.
[256] *Ibid*.
[257] See for example, bcIMC, submission to the federal Department of Finance statements on climate change, Canada, Review of the Federal Financial Sector Framework, October 2017, https://www.bcimc.com/newsroom/pdf/Submissions/2017/bcIMC%20response%20to%20Review%20of%20Federal%20Finanical%20Sector%20Framework%20Second%20Consultation.pdf; SHARE, Report *Canada's lobbyist registries What can they tell investors about corporate lobbying?* 5 September 2017, https://share.ca/documents/investor_briefs/Governance/2017/Lobbyist_Registry_Scorecard.pdf.
[258] British Columbia Investment Management Corporation ("bcIMC"), Responsible Investing Newsletter: Climate Change, April 2016 at 1, http://read.uberflip.com/i/664765-rin-april-2016.
[259] bcIMC, "Responsible Investing Fact Sheet", 2017, http://www.bcimc.com/publications/pdf/2017RIFactsheet.pdf at 1. See also bcIMC, "Engagement Factsheet": http://www.bcimc.com/publications/pdf/ESGIntegration-Factsheet.pdf. It reports that its express "mandate requires that we maintain our fiduciary responsibility while considering ESG factors throughout the investment management process; it does not permit us to select or exclude investments based solely on environmental, social, governance or values-based considerations; bcIMC, "An Overview of bcIMC's Approach to Responsible Investing", 2015, http://read.uberflip.com/i/605664-responsible-investing-overview, at 3. bcIMC defines responsible investing as: "Considering environmental, social and governance factors when selecting and managing investments, allows bcIMC to manage long-term investment risk with the view of protecting and enhancing the financial value of our investments. Responsible investing also includes contributing to initiatives that enhance the stability and integrity of global capital markets, *ibid* at 6.
[260] bcIMC, "2016 ESG Engagement: Public Equities Priorities and Process", at 6, http://read.uberflip.com/i/653745-2016-bcimc-esg-engagement.

shareholder to encourage companies to manage and report on risks and enhance governance and operational practices.[261] bcIMC focuses on reporting and disclosure, emissions reduction, resource efficiency and regulatory preparation.

Climate change is one of three areas of its focus in respect of long-term business challenges. bcIMC actively seeks to optimize the value of its public equities portfolio over the long term by integrating ESG factors, including climate change, into investment analysis and decision making.[262] Its investment reporting expressly recognizes that climate change has a wide-scale economic impact, directly through flooding and other extreme weather events, and indirectly through regulatory measures to limit GHG emissions. It observes that virtually all sectors are likely to be affected by climate change.[263] It engages in dialogue with companies in which it invests, to encourage them to disclose relevant data on climate risks, to encourage investment in research and new technologies to reduce carbon emissions, and to prepare for increased regulatory scrutiny regarding GHG emissions.[264] bcIMC encourages companies to manage climate change risk and be transparent about their progress.[265] In 2016, it engaged with 265 public companies.[266] Such engagement minimizes portfolio risk for its clients, and increases long-term returns.[267]

In 2016, bcIMC exercised its proxy votes at 2,183 shareholder meetings.[268] bcIMC voted in favour of shareholder proposals at Rio Tinto and Suncor Energy, which called for additional disclosure relating to the companies' exposure to climate change risks.[269] The proposals received 99.2 % and 98.2% support respectively, largely because the boards of both companies recommended support.[270] In 2016, bcIMC co-filed its first climate-related shareholder proposal with other global investors representing 5% of the company's outstanding shares. The proposal called on Anglo American Plc to report annually on the resiliency of its business model under different climate scenarios for 2035.[271] The proposal, which was passed by shareholders, also asked for emissions management and low carbon research and development.[272]

bcIMC actively engages with regulators and industry associations in encouraging policy change. bcIMC is signatory to the 2014 Global Investor Statement of Climate Change, which asks governments to bolster policies to influence investment flow towards a climate-resilient economy, adopt meaningful carbon pricing and promote low-carbon technologies.[273]

---

[261] *Ibid* at 6.
[262] bcIMC, "ESG Integration", March 2017, http://www.bcimc.com/publications/pdf/ESGIntegration-Factsheet.pdf at 1.
[263] bcIMC, "2016 ESG Engagement", *supra* note 260 at 6.
[264] *Ibid* at 6.
[265] bcIMC, Responsible Investing Newsletter: Climate Change, April 2016, *supra* note 258 at 1.
[266] *Ibid.*
[267] *Ibid* at 2.
[268] *Ibid.*
[269] bcIMC, "2016 Responsible Investing Annual Report", http://www.bcimc.com/ResponsibleInvesting/Reporting.asp ("bcIMC Report").
[270] *Ibid* at 9.
[271] *Ibid* at 6. In 2015, it voted in favour of similar proposals at Royal Dutch Shell Plc and BP Plc, both of which passed with 98% support.
[272] *Ibid.* Anglo's board supported the proposal; https://www.calpers.ca.gov/page/newsroom/calpers-news/2016/climate-risk-reporting-proposal-passes.
[273] *Ibid.* In 2016, it participated in nine collaborations on principles for responsible investment.

2. *Canadian Pension Funds as Fiduciaries*

Canadian pension fund trustees have a fiduciary obligation to pension beneficiaries to act prudently in their best interests in making investment decisions regarding fund portfolios.[274] Pension plan trustees' duties are assessed based on the express language in the pension plan, and the relevant pension and trust legislation.[275] For example, for a defined benefit pension plan, the objective is to build a life income for the future retiree. Pension plans have an obligation to make investment decisions that create sustainable pension funds, addressing intergenerational pressures such as the need to fund pensions in the short to medium term, and the need to look ahead to future generations of beneficiaries.[276]

Pension funds, which safeguard the financial security of our aging population, will potentially lose significant value of their investments if Canada does not shift the existing fossil fuel trajectory of our economy very soon.[277] That includes both decarbonizing efforts and technological improvement in fossil fuel extraction and production. Pension fund fiduciaries must act in the best interests of pension fund beneficiaries in accordance with the terms of the trust.[278] This fiduciary obligation is eminent in both statutory and common law, requiring positive actions on the part of the fiduciaries. In determining asset allocation between short-term and long-term investments, the duty of care precludes short-term investments that prejudice long-term investments, as the fund must be sustained over the long-term, and thus, trustees must take account of systemic risks.[279] Climate change is one such risk. The duty of impartiality requires trustees and fund managers to balance intergenerational interests in their investment decisions, in that the time horizon for older workers is much different than for workers just entering the workforce.[280]

This part examines two overarching points. Trustees can take climate change into account as a legitimate investment issue, which may be short or long term or both, because once climate change becomes material to the investment decision, it is part of trustees' fiduciary obligation. If trustees fail to act to address material climate change risk, they are liable for breach of their fiduciary obligation. Thus, inaction is no longer acceptable, given all the evidence that climate change risk is material across the entire economy. Second, trustees can take climate change into account because they have duties as public fiduciaries additional to their financial duty to beneficiaries. These ideas are examined in turn.

Public statements by several pension funds and their investment managers illustrate how they consider climate change to be a material financial risk. An example is the Canada Pension Plan

---

[274] Arguably, there are also foundations with an asset pool for which the same arguments can be made with respect to fiduciary obligation.
[275] *Burke v Hudson's Bay Co*, [2010] 2 SCR 273 at para 41; *Nolan v Kerry (Canada) Inc*, [2009] 2 SCR 678 at para 187.
[276] Davis, *supra* note 13.
[277] Sarra, Anthropocene, *supra* note 69.
[278] *Galambos v Perez*, [2009] 3 SCR 247 at para 69. See also Paul Miller, "A Theory of Fiduciary Liability" (2011) 56 *McGill LJ* 235 at 270.
[279] James Hawley, Keith Johnson and Ed Waitzer. "Reclaiming Fiduciary Duty Balance" (2011) 4 *Rotman International Journal of Pension Management* 2 at 13.
[280] Davis, *supra* note 13.

Investment Board ("CPPIB"), an investment management organization that invests the funds of the Canada Pension Plan on behalf of its 20 million contributors and beneficiaries.[281] CPPIB states that it has a responsibility to take climate change into account in ensuring it is making sound investments over the long term.[282] As a long-term investor, CPPIB reports that it is investing for multiple generations of beneficiaries, today and well into the future. It is positioning its portfolio to perform well through the transition to a low-carbon economy. CPPIB states that "as a significant long-term investor we believe we can have a powerful influence on the companies in which we invest. We seek to create change from the inside by engaging with numerous Canadian and global companies that are high emitters of greenhouse gas emissions."[283]

CPPIB seeks enhanced disclosure from companies it invests in, and discusses strategies to help them manage and improve their GHG emissions and practices related to climate change. It has co-filed climate change-related shareholder proposals.[284] CPPIB has also developed a cross-departmental Climate Change Working Group that actively reviews climate change risks and opportunities, and its strategy is both "bottom-up review of our investment due diligence as it relates to the consideration of climate change risks and opportunities" and a "top-down assessment of climate risk across our total portfolio", including how climate change is positioned in CPPIB's overall risk framework.[285] CPPIB has endorsed the TCFD recommendations and is engaging with investee companies on the recommendations. CPPIB views its approach to climate change as consistent with its mandate to seek to achieve a maximum rate of return.[286]

i. Pension Legislation and Fiduciary Obligation

Pensions are provincially regulated in Canada, except for employees in the federal sector, which are federally regulated. The legislation varies slightly across the country, but in all cases, imposes a duty of loyalty and a prudential duty. For example, the Ontario *Pension Benefits Act* specifies "the administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person".[287] The administrator of a pension plan must, in its administration

---

[281] Canada Pension Plan Investment Board ("CPPIB"), "Who We Are", http://www.cppib.com/en/who-we-are/our-mandate/. The CPP Investment Board was established by an Act of Parliament in December 1997.
[282] CPPIB, "Our approach to climate change", 2017, http://www.cppib.com/en/public-media/headlines/2017/cppibs-approach-climate-change/. CPPIB, "Addressing climate change for contributors and beneficiaries", http://www.cppib.com/media/documents/11141_CPPIB_Climate_Change_FINAL-2.pdf
[283] *Ibid.*
[284] *Ibid.* It co-filed shareholder resolutions on climate risk at Rio Tinto plc and Glencore plc, in collaboration with other global investors. it is also a signatory of the CDP, a widely adopted global disclosure system for companies to manage their environmental impacts and for investors to access environmental information for use in their financial decisions.
[285] *Ibid.*
[286] *Ibid.* CPPIB: "We have a singular objective: to maximize long-term investment returns without undue risk, taking into account the factors that may affect the funding of the Canada Pension Plan and its ability to meet its financial obligations." http://www.cppib.com/en/who-we-are/our-mandate/.
[287] The *OPBA, supra* note 14, specifies:
22 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
Special knowledge and skill

of the pension plan and in the administration and investment of the pension fund, use all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.[288] An employee or agent of an administrator is subject to the same obligations.[289] With respect to this obligation, care, diligence and skill would seem to indicate that climate change risk is a necessary consideration for all pension administrators in Canada, particularly since many pension funds are invested in fossil fuels and other energy assets at risk.

A 2011 report by Mercer Inc estimated that as much as 10% of a fund's portfolio risk exposure within the next 20 years will arise from climate change, technology, regulatory, and other impacts.[290] Important risk factors include: the rate of development and opportunities for investment into low carbon technologies, the extent to which changes to the physical environment

---

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
Member of pension committee, etc.
(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.
Conflict of interest
(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.
Employment of agent
(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.
Trustee of pension fund
(6) No person other than a prescribed person shall be a trustee of a pension fund.
Responsibility for agent
(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.
Employee or agent
(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).
Benefits of administrator
(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits and a refund of contributions. 2010, c 24, s 7.
Benefits of members of pension committee, etc.
(10) Subsection (9) applies, with necessary modifications, to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act for the administration of a pension plan. 2010, c 24, s 7.

[288] *OPBA*, *supra,* note 14, s 22(2). Section 22(3) states that: Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

[289] *Ibid* at s 22(8).

[290] Mercer LLC, Carbon Trust and International Finance Corporation, "Climate Change Scenarios - Implications for Strategic Asset Allocation", February 2011, http://www.mmc.com/content/dam/mmcweb/Files/Climate_Change_Scenarios_Implications_for_Strategic_Asset_Allocation.pdf at 7.

will affect investments and the implied cost of carbon. Published four years prior to the COP 21 Paris Agreement, the report noted the unclear global climate policy environment.[291] Four years later, Mercer updated its report, adding risk of resource availability and the impact on investments of chronic weather patterns, noting that climate change will unequivocally have an impact on investment returns such that it needs to be regarded as a new return variable.[292] Mercer observed that the two most significant categories of risk introduced by climate change that pension fund trustees may take into account are the physical risk of destroyed assets or assets with diminished value and the regulatory risk of stranded assets or assets with diminished value. It reported that traditional diversification across asset classes is insufficient to mitigate the portfolio risks of climate change. Rather, diversification must take place across sources of risk, not just traditional asset classes, including increased allocation to climate positive assets as a potential hedge for risk.[293] With the more certain policy direction coming out of the COP21 agreement, Mercer's recommendations have become prescient.

The British Columbia *Pension Benefits Standards Act* (BC *PBSA*) sets out the fiduciary obligations of the pension administrator. [294] The administrator stands in a fiduciary capacity in relation to the

---

[291] *Ibid* at 2.

[292] Mercer LLC, International Finance Corporation and UK Department for International Development, "Investing in a Time of Climate Change", April 2015, http://www.mercer.com/content/dam/mercer/attachments/global/investments/mercer-climate-change-report-2015.pdf at 14. The report modelled different scenarios: "transformation", under which climate change mitigation limits global warming to 2 degrees Celsius; "coordination", whereby actions are aligned to hold warming to 3 degrees Celsius; and two types of "fragmentation", first, where lack of action and coordination results in a 4 degree Celsius warming and the second, in which the same occurs but higher damages result, *ibid* at 10. In assessing the effects of climate change under these scenarios, sectors most effected were coal, renewables.

[293] *Ibid* at 2.

[294] British Columbia *Pension Benefits Standards Act*, SBC 2012, c 30, as amended, s 134 ["*BCPBSA*"], effective September 30, 2015.

35 (1) The administrator of a pension plan must ensure that the plan and the pension fund are administered in accordance with this Act, the regulations and the plan documents.

(2) While acting in the capacity of administrator of a pension plan, the administrator stands in a fiduciary capacity in relation to (a) the members, and (b) others entitled to benefits.

(3) Without limiting subsection (2), the administrator, while acting in the capacity of administrator of a pension plan, must

(a) act honestly, in good faith and in the best interests of

(i) the members, and (ii) others entitled to benefits, and

(b) exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person.

(4) The administrator of a pension plan, or, if the administrator is a board of trustees, a member of that board, must not, while acting in the capacity of administrator, knowingly allow his or her interests to conflict with the administrator's powers and duties in respect of the plan.

(5) For the purpose of subsection (4), an administrator does not knowingly allow the interests of the administrator to conflict with the administrator's powers and duties in respect of the pension plan merely because the administrator is or may become entitled to a pension or other benefit under the plan.

(6) In addition to any other responsibilities under this Act, the administrator of a pension plan must

(a) ensure that the plan documents comply with this Act and the regulations,

(b) if the plan is terminated, ensure that the plan is wound up in accordance with this Act and the regulations,

(c) ensure that any agreement respecting the transfer of money or benefits between the plan and any other pension plan does not contain any provision, relating to a benefit, that a pension plan is prohibited by this Act from containing, and members and others entitled to benefits.[295] The administrator must act honestly, in good faith and in the best interests of the members, and the care, diligence and skill that it must exercise mirrors that of the Ontario pension legislation.[296] Gold and Scotchmer have observed that the BC *PBSA*'s reference to "another person" is intended to obligate pension fund fiduciaries not simply to exercise the degree of prudence that they exercise in conducting their own affairs, but to conduct themselves in a more objectively justifiable manner that reflects the fiduciary's obligations to the beneficiaries of the pension plan.[297] Pension fund fiduciaries are to be duly diligent in their decision making. Kaplan and Frazer suggest that the duty of care requires trustees to use all relevant knowledge and skill that the plan administrator possesses or, by reason of his or her profession, business or calling, ought to possess.[298]

With respect to climate change risk, a relevant provision of the BC *PBSA* is section 60 on investment requirements. It specifies that pension plan assets must be invested in a manner that a reasonable and prudent person would adopt if investing the assets on behalf of a person to whom the investing person owed a fiduciary duty to make investments without undue risk of loss.[299] Assets must be invested with a reasonable expectation of a return on the investments commensurate with the risk, having regard to the plan's liabilities.[300] Given the long-term nature of a pension plan's liabilities, the need to consider the effects of climate change on those risks seems to be necessary to comply with this provision. Yet even without similar statutory language, the long-term nature of pension plans requires the plan's fiduciaries to consider the risks to comply with prudential and fiduciary obligations.

In Ontario, the *Pension Benefits Act* has been amended to require pension funds to disclose information about whether environmental, social and governance factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated.[301] It

---

(d) perform any other duties the administrator is obligated under the regulations to perform.
(7) If an administrator employs an agent to exercise one or more of the powers or perform one or more of the duties of the administrator, the administrator must
(a) be satisfied that the agent is qualified to exercise the powers or perform the duties for which the agent is employed, and
(b) carry out reasonable and prudent supervision of the agent.

[295] *BCPBSA, ibid*, s 35(2).

[296] *BCPBSA ibid*, s 35(3).

[297] Murray Gold and Adrian Scotchmer, "Climate Change and the Fiduciary Duties of Pension Fund Trustees in Canada", Report commissioned by SHARE, 1 September 2015 at 8 ("Gold and Scotchmer").

[298] Ari Kaplan and Mitch Frazer, *Pension Law* (Toronto: Irwin Law, 2006) at 322.

[299] *BCPBSA, supra* note 294, s. 60: *Investment requirements*
60 (1) Investments, including loans, and financial decisions respecting a pension plan must be made
(a) in accordance with this Act and the regulations, and
(b) in the best financial interests of plan members and other persons entitled to benefits under the plan.
(2) Pension plan assets must be invested in a manner that a reasonable and prudent person would adopt if investing the assets on behalf of a person to whom the investing person owed a fiduciary duty to make investments
(a) without undue risk of loss, and
(b) with a reasonable expectation of a return on the investments commensurate with the risk, having regard to the plan's liabilities.

[300] *Ibid.*

[301] O Reg 235/14, s. 8. *Pension Benefits Act*, RRO 1990, Reg 909 ("*Pension Benefits Act*").

is a "disclose and explain" approach.[302] Pursuant to Regulation 909 under the *Pension Benefits Act*, the administrator of a pension plan is required to establish a statement of investment policies and procedures ("SIPP").[303] Effective January 2016, plan administrators are required to file their SIPP and any amendments with the Financial Services Commission of Ontario ("FSCO").[304] FSCO observes that reporting that ESG factors are incorporated into the plan's broader investment policies and procedures requires action by the administrator beyond a broad delegation. Some examples of the actions that administrators could take include: summarizing policies where the managers incorporate ESG factors into their investment policies; describing how the administrator incorporates ESG factors as part of the manager search, selection and review process; and describing how the administrator incorporates ESG in the choice of investment fund options.[305] FSCO has observed that administrators have a fiduciary duty to supervise their investment managers, including ensuring that the managers are complying with the *PBA* and with the SIPP. This supervision requirement extends to the incorporation of ESG factors, where the SIPP contains them.[306]

One report suggests that the amendments have been important in stimulating boards of trustees to explicitly discuss ESG issues and to seek advice on how responsible investment is consistent with their fiduciary obligation.[307] One advance from the current Ontario requirements would be to

---

40 (1) A statement required under subsection 27 (1) of the Act shall contain, as recorded in the records of the administrator, at least,
(v) a statement that the administrator of the pension plan must establish a statement of investment policies and procedures for the plan that contains,
(ii) information about whether environmental, social and governance factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated;
40.1 (1) A statement to a former member required under subsection 27 (2) of the Act shall contain, as recorded in the records of the administrator, at least,
(s) a statement that the administrator of the pension plan must establish a statement of investment policies and procedures for the plan that contains,
(ii) information about whether environmental, social and governance factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated;
40.2 (1) A statement to a retired member required under subsection 27 (2) of the Act shall contain, as recorded in the records of the administrator, at least,
(r) a statement that the administrator of the pension plan must establish a statement of investment policies and procedures for the plan that contains,
(ii) information about whether environmental, social and governance factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated;
78 (3) The statement of investment policies and procedures shall include information as to whether environmental, social and governance factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated.

[302] Section 78(1) of Regulation 909 under the *Pension Benefits Act*, *ibid*. The Statement of Investment Policies and Procedures (SIPP) must meet the requirements of the federal investment regulations (FIR), as modified in sections 47.8 and 79 of the Regulation: Financial Services Commission for Ontario (FSCO), "Statement of Investment Policies and Procedures (SIPP)", http://www.fsco.gov.on.ca/en/pensions/legislative/Pages/sipp.aspx#ESG ("SIPP").

[303] *Pension Benefits Act, supra* note 301.

[304] *Ibid.*

[305] SIPP, *supra* note 302.

[306] *Ibid.*

[307] *Fiduciary Duty in the 21st Century*, *supra* note 243 at 15. See also FSCO, *ibid,* which reports that Ontario is saving approximately $4.4 billion annually in health, environmental and financial costs since it eliminated coal-fired energy

require pension plans across Canada to incorporate ESG factors, including climate change risk, into the plan's investment policies and procedures. Failure to do so would then give rise to liability for breach of fiduciary and prudential obligations.

In Manitoba, the *Pension Benefits Act* expressly allows "non-financial" factors to be taken into account so long as investment policy and decision making remain consistent with prudence standards.[308] The administrator of a pension plan must exercise the care, diligence and skill in the administration of the plan and the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.[309] Pursuant to the Manitoba *Pension Benefits Act,* the administrator is to invest and manage the assets of the pension fund in a manner that a reasonable and prudent person would apply in investing and managing a portfolio of investments of a pension fund. Unless a pension plan otherwise provides, an administrator who uses a non-financial criterion must have regard for the prudential and diligence standard.[310]

---

generation. Ontario Government Green Ontario Fund, "Climate Changes Everything", 2017, https://www.ontario.ca/page/climate-change.

[308] Manitoba *The Pension Benefits Act* CCSM c P32, as amended.
Care, diligence and skill
28.1(2) The administrator of a pension plan shall exercise the care, diligence and skill in the administration of the plan and the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
Investing pension assets
28.1(2.1) The administrator of a pension plan shall invest the assets of the pension fund, and manage those investments, in accordance with the regulations and in a manner that a reasonable and prudent person would apply in investing and managing a portfolio of investments of a pension fund.
Non-financial considerations
28.1(2.2) Unless a pension plan otherwise provides, an administrator who uses a non-financial criterion to formulate an investment policy or to make an investment decision does not thereby commit a breach of trust or contravene this Act if, in formulating the policy or making the decision, he or she has complied with subsections (2) and (2.1).
Special knowledge and skill
28.1(3) The administrator of a pension plan shall use in the administration of the plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
Application of subsection (3)
28.1(4) Subsection (3) applies with necessary modifications to a member of a board, agency or commission made responsible by an Act of the legislature for the administration of a pension plan.
Conflict of interest
28.1(5) An administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the plan and the pension fund…
Employment of agent
28.1(6) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ or appoint one or more agents to carry out any act required to be done in the administration of the plan and in the administration and investment of the pension fund.
Employee or agent
28.1(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (2), (2.1), (3) and (5).

[309] *Ibid*, s 28.1(2.2).

[310] Manitoba *The Pension Benefits Act, supra* note 308, s 28.1(2.2).

ii. Trustee Legislation and Fiduciary Obligation

Pension fiduciaries must also comply with trustee legislation, which is complementary to their obligations under pension standards legislation. The Ontario *Trustee Act* requires that "in investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.[311] A trustee may invest trust property in any form of property in which a prudent investor might invest.[312] A trustee must consider the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances: general economic conditions; the possible effect of inflation or deflation; the expected tax consequences of investment decisions or strategies; the role that each investment or course of action plays within the overall trust portfolio; the expected total return from income and the appreciation of capital; needs for liquidity, regularity of income and preservation or appreciation of capital; and an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.[313] Trustees are to diversify the investment of trust property to an extent that is appropriate to the requirements of the trust and general economic and investment market conditions.[314]

Other Canadian trustee statutes contain similar language, although not always as detailed as the Ontario legislation.[315] There is protection from personal liability; specifically, a trustee is not liable for a loss to the trust arising from the investment of trust property if his or her conduct conformed to a plan or strategy for investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor would adopt under comparable circumstances.[316] Trustees can delegate to agents.[317] Manitoba's trustee legislation has a section on trustee duties similar to

---

311 *Trustee Act* RSO 1990, c T 23, as amended, s 27(1) ("Ontario *Trustee Act*").
312 *Ibid*, s 27(2).
313 *Ibid*, s 27(5).
314 *Ibid*, s 27(6).
315 See for example, *Trustee Act,* RSBC 1996, c 464, as amended ["BC *Trustee Act*"], s 15.2. 15.2. In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments. See also Manitoba *The Trustee Act,* CCSM c T160, s 68(2).
316 Ontario *Trustee Act*, *supra* note 311, s 28; BC *Trustee Act, ibid*, s 15.3.
317 Ontario *Trustee Act*, *ibid,* s 27.1. See also: BC *Trustee Act, ibid*, s 15.3.
Delegation of authority with respect to investment
15.5 (1) In this section, "agent" means any person to whom a trustee delegates investment responsibility.
(2) A trustee may delegate to an agent the degree of authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice.
(3) A trustee who delegates authority under subsection (2) must determine the investment objectives for the trust and exercise prudence in
(a) selecting an agent,
(b) establishing the terms and limits of the authority delegated,
(c) acquainting the agent with the investment objectives, and
(d) monitoring the performance of the agent to ensure compliance with the terms of the delegation.
(4) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
(5) A trustee who complies with the requirements of subsection (3) is not liable to the beneficiaries or to the trust for the decisions or actions of the agents to whom the function was delegated.
(6) This section does not authorize a trustee to delegate authority under circumstances in which the trust requires the trustee to act personally.

wording of the province's pension benefits legislation that predates the pension provisions on prudence, judgment and care in administering the property of others.[318]

The Shareholder Association for Research and Education (SHARE) suggests that trustee decision-making should be aimed at protecting the long-term interests of investors, working people, communities and society, which in turn will help improve outcomes for pension plan members and other beneficiaries of trusts.[319] This objective is perfectly aligned with the statutory obligations under both pension and trustee law.

iii. A Deeper Understanding of Cowan v Scargill

The 1984 English judgment Cowan *v Scargill* [320] is often cited in Canada as limiting the scope of conduct of pension fiduciaries.[321] Yet a careful reading of the judgment reveals that it is entirely compatible with pension fiduciaries having an obligation to address climate-related financial risk in exercising their fiduciary duties. Given the significance of the judgment in Canada and other jurisdictions, it is worth examining in some detail.

Cowan *v Scargill* was a case in which five union-appointed trustees on the committee of management of the Mineworkers' Pension Scheme objected to funds being invested in energy sources in competition with coal, in overseas investments and in the acquisition of land overseas.[322] The objections were based both on the beneficiaries' best interests and on "matters of principle" determined at the union's annual policy conference.[323] The issue was whether the trustees were in breach of their fiduciary obligations in refusing approval of an investment plan unless it was amended to prohibit any increase in overseas investment and investment in energies in direct competition with coal, and provided for the withdrawal of existing overseas investments.[324] The Court held that the starting point was that trustees are to exercise their powers in the best interests of present and future beneficiaries, holding the scales impartially between different classes of beneficiaries.[325] They must obey the law, but subject to that, put the interests of their beneficiaries first.[326] Megarry V C held that trustees must exercise their power to invest so

(7) Investment in an investment fund referred to in section 15.1 (1) or a common trust fund referred to in section 15.1 (3) is not a delegation of authority with respect to the investment of trust property.

[318] Manitoba *The Trustee Act, supra* note 315, specifies: s 68(2) Subject to any express provision of the will or other instrument creating the trust, in investing money for the benefit of another person, a trustee shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others.

[319] SHARE Annual Report, https://share.ca/?s=annual+report.

[320] *Cowan v Scargill* [1985] Ch 270, [1984] 3 WLR 501, [1984] 2 All ER 750, [1984] ICR 646, [1984] IRLR 260, 128 SJ 550 [*Cowan v Scargill,* hereafter cited to Ch 270].

[321] See, for example, *Boe v Alexander,* 1987 CanLII 2596 (BC CA); *Bathgate v National Hockey League Pension Society*, 1994 CanLII 1427 (ON CA)

[322] *Cowan v Scargill, supra* note 320, at 276. The trustees were union-nominated trustees; the other five trustees were nominated by the National Coal Board.

[323] *Ibid* at 270.

[324] *Ibid* at 276-277, 279.

[325] *Ibid* at 286.

[326] *Ibid* at 287.

as to yield the best return for beneficiaries, judged in relation to risks, and, in judging potential return from yield of income and capital appreciation.[327] He observed that if trustees decided not to make a particular investment for social or political reasons and the investment made was equally beneficial to the beneficiaries, it would be difficult to criticize the decision; but where it is less beneficial, trustees would normally be open to criticism.[328] Trustees are not to refrain from making decisions that will benefit the beneficiaries because of the views they hold.

Megarry V C said that trustees might even have to act dishonourably, although not illegally, if the interests of beneficiaries required it, the judge giving a contract law example where trustees may be bound to consider a better price or offer, essentially an “efficient breach” of an agreement. Perhaps the language of the judgment in its use of “acting dishonourably” and “gazumping” (thwarting) a counterparty was unfortunate, but the judge was simply referring to the efficient contract formation issue.[329]

Megarry V C also made clear in his reasons that trustees do not need to make financial benefit their paramount concern, even if the only object of the trust is to provide financial benefits, as benefit has a wide meaning. He observed that beneficiaries might well consider that it is better to receive less money from investments where they are not morally or socially opposed to the investment.[330] In such decisions, there is a heavy burden on trustees to determine that it is for the benefit of beneficiaries as a whole to receive less, and to act with a degree of prudence on the facts, and such was not the specific case before the court.[331] Trustees are to act with care, prudence and reasonableness in providing the greatest financial benefits for present and future beneficiaries, including seeking advice on making investments and making decisions on that advice with prudence.[332] Trustees also have a duty to consider the need for diversification of investments in the circumstances, including considering the size of the trust fund, and the degree of diversification that is practicable and desirable.[333] The Court’s concerns on the facts were that: the trustees were advocating their position more for future beneficiaries than current ones; the trustees felt constrained to comply with union policy; and the prohibitions were too sweeping, when one could not predict the future potential benefits of discarding the disputed investments in the diversified portfolio.[334]

Megarry V C found that the defendant trustees had breached their duty to act with prudence and in the best interests of their beneficiaries when they hindered normal operation of the pension scheme by insisting on prohibitions that could not be justified as being in the interests of the beneficiaries.[335] The Court declined to make specific orders as it hoped that by giving direction to

---

[327] *Ibid* at 287.
[328] *Ibid* at 287.
[329] *Ibid* at 288.
[330] *Ibid* at 288.
[331] *Ibid* at 288.
[332] *Ibid* at 288-289.
[333] *Ibid* at 289.
[334] *Ibid* at 290, 293, 295.
[335] *Ibid* at 273.

the trustees on their duties, it would get the trust back on "its rails", but remained seized in case an order was needed.[336]

The detailed recitation of the court's reasoning in Cowan *v Scargill* is necessary to understand the full judgment, in order to challenge the argument that trustees cannot make investment decisions based on social or political grounds and thus cannot address climate change. In fact, the judgment in its entirely suggests the opposite. Given today's mounting evidence of the financial, health and other risks of climate change, today, pension trustees and other fiduciaries could be found in breach of their fiduciary obligations if they do not take into account the risks. Arguably, some of the current investments in fossil fuels are weighted in favour of current beneficiaries and not all beneficiaries because the huge financial risks only 15 years out must be considered. The judgment indicates that in fulfilling their fiduciary obligation, pension fiduciaries need to consider how their decisions impact on risk and return to the pension fund, and ultimately beneficiaries, in terms of the expected shifts to low carbon technologies, the risk of stranded assets, and diminished returns from companies failing or market prices plummeting.

Unusually, Megarry V C wrote an article commenting on his own judgment several years later, observing that the case was limited in its precedential value, and noting that the defendant Scargill did not have a lawyer speak for him in the court room.[337] He wrote that one could not say what would have emerged had the defendant's case been presented by a lawyer. He also wrote that "Another important factor is the narrow compass of the point that lay for decision. What was in issue was a matter not of preferences or policies but of exclusion."[338] It was the proposed absolute prohibition on certain types of investment, without any assessment of whether it was in the interests of the beneficiaries, that was rejected by the court. "The trustees cannot prefer their own interests – be they protectionist or otherwise, where those interests are not shared by the beneficiaries and are detrimental to those beneficiaries' financial interests".[339] Megarry also observed that many of the investments regarding which there are social, political or other non-financial objections are open to valid objections purely on investment grounds, such as fears for the political stability of the country concerned.[340] He wrote that much may be achieved by trustees exercising their discretion on perfectly proper grounds without subjecting themselves to any absolute prohibitions or, indeed, any policy of preference.[341] These observations are directly relevant to pension fiduciaries' consideration of climate change risk.

The UNEP Finance Initiative report on fiduciary responsibilities suggests that the *Cowan v Scargill* decision stands for the "uncontroversial position that trustees must act for the proper purpose of the trust, and not for extraneous purposes."[342] It observed that all factors relevant to risk and

---

336 *Ibid* at 297.
337 Rt Hon Sir Robert Megarry, "Investing Pension Funds: The Mineworkers Case", in Timothy G Youdan, ed, *Equity, Fiduciaries and Trusts,* (Toronto: Carswell, 1989) at 149-159.
338 The defendants were declared to be in breach of their fiduciary duties in refusing to concur in the adoption of the 1982 plan unless their proposals prohibiting investment overseas or in oil were adopted. *Ibid* at 156.
339 *Ibid* at 157.
340 *Ibid*.
341 *Ibid* at 158.
342 UNEP Finance Initiative (UNEP FI), "A Legal Framework for the Integration of Environmental, Social, and Governance Issues into Institutional Investment" (London: Freshfields Bruckhaus Deringer LLP, 2005).

return should be considered by fiduciaries in investment decisions, and it may be a breach of fiduciary duties not to take into account ESG considerations that are relevant, and to give them appropriate weight, bearing in mind that some important economic analysts and leading financial institutions are satisfied that a strong link between good ESG performance and good financial performance exists.[343] Climate change risk involves both material financial and non-financial risks, both relevant to fiduciaries.

iv. Does the Fiduciary Obligation Differ for Defined Contribution Pension Plans?

Although about 85% of assets under management in Canadian pension funds continue to be held by defined benefit pension plans, there has been a recent shift from defined benefit plans to defined contribution pension plans ("DCPP").[344] This shift raises another set of challenges for fiduciary obligation. Unlike defined benefit plans, in which fiduciary obligation is based on both statutory and trust obligations, defined contribution plans are contractually based. Nonetheless, pension legislation in Canada does impose fiduciary and prudential obligations on trustees of DCPP and their agents. The challenge arises because of the myriad ways in which such funds are invested.

For example, some DCPP offer beneficiaries a range of options of where to invest their money. If the employer chooses the options, they should be suitable to providing investment income for a pension. If the employee chooses the option, the employer's obligation is to provide beneficiaries with sufficient information about the risks and benefits of each option so that the employee can make an informed choice. The policy objective of such plans is to build a life income for the workforce, although time horizons differ for the beneficiary who is three years from retirement than for the employee who is 20 years from retirement. If the DCPP includes an option that is not suitable to that objective, the administrator, and arguably the pension plan trustees, can be liable for a breach of fiduciary obligations. In terms of climate change risk, the question is what is "not suitable". Here the courts will engage in an inquiry about what steps the fiduciaries took to apprise themselves of the risks to sustainability of the companies within each investment option, which includes risk of stranded assets, financial risks due to carbon transition, and other climate risks. While jurisprudence is sparse in Canada, these issues are being litigated in the US courts.[345]

Three recent judgments are illustrative. The US Supreme Court decision in *Fifth Third Bancorp v Dudenhoeffer* centred on Bancorp's defined-contribution retirement savings plan, where plan participants may direct their contributions into any of several investment options, including an "employee stock ownership plan" that invested primarily in the company's own stock.[346] When Bancorp's stock fell, the plan participants sued. They claimed the plan fiduciaries should have known Bancorp's stock price was too high and excessively risky. The fiduciaries defended on the

---

[343] *Ibid.*
[344] *Fiduciary Obligation 21st, supra* note 243 at 38.
[345] Julius Melnitzer, "Litigation risk for defined-contribution plans on the rise", http://www.canadianlawyermag.com/5712/Litigation-risk-for-defined-contribution-plans-on-the-rise.html.
[346] *Fifth Third Bancorp v Dudenhoeffer*, Supreme Court of the United States, 573 U S (2014); the judgment was vacated, and the case was remanded to the Sixth Circuit Court for a reconsideration decision on the merits.

basis that fiduciaries of the employee stock-ownership plan were subject to a relaxed duty of prudence compared with pension plan fiduciaries generally. The Court disagreed, unanimously holding that the fiduciaries were subject to the same duty of prudence as pension fiduciaries generally, except they didn't have an obligation to diversify assets.[347]

In *Pfeil v State Street Bank and Trust Co,* the Sixth Circuit Court of Appeals held that control by plan participants over the allocation of pension assets across a range of investment options does not exempt fiduciaries from their duty to use prudence when designating and monitoring the menu of different investment options that are offered.[348] In *Harris v. Amgen Inc*, the US Court of Appeals Ninth Circuit held that plaintiff beneficiaries had "sufficiently alleged" that defendants had violated the duty of loyalty and care they owe as fiduciaries under pension legislation by failing to provide material information to plan participants about investment in a common stock fund.[349] The Court held that the task of selecting information to include in summary plan descriptions to plan participants is performed in their fiduciary capacities and is a fiduciary communication to plan participants. Whether the fiduciary states information in the summary itself or incorporates by reference another document containing that information is of no moment, it all falls within the ambit of fiduciary obligation.[350]

These US judgments make clear that DCPP still give rise to fiduciary duties. Thus, the same reasoning as discussed above for defined benefit pension plans and fiduciary obligation arguably apply to DCPP and could ground complaints that the plan administrators failed to address climate-related financial risk in developing the menu of investment options offered to members of the plan.

DCPP can also, however, choose to invest through an insurance company, in which case, the counterparties to the contract are the DCPP and the insurance company. The issue with respect to the investment strategy is what obligations arise from the contract and to whom. Another issue is whether the beneficiaries can directly make a claim for breach of fiduciary obligation against the investment manager of the insurance company for failure to take account of climate change risk in their investment choices, because ultimately, they are the parties harmed by the risks. The caselaw in this respect is still under development.

One could argue that the pension fiduciary's duty even includes trying to cause the investee corporation to further the non-financial interests of the beneficiaries, where doing so does not demonstrably harm their financial interests. In respect of addressing climate change risk, arguably, it will benefit both the financial and non-financial interests.

[347] *Ibid.*
[348] *Pfeil v State Street Bank and Trust Co* 806 F.3d 377 (2015), US Court of Appeals, Sixth Circuit.
[349] In *Harris v Amgen Inc*, 770 F 3d 865 (2014), the US Court of Appeals Ninth Circuit applied *Fifth Third Bancorp* and refused to invoke a presumption of prudence or a duty to diversify in a case about two defined-contribution plans that included an option to invest in company stock. But the court did hold that the defendants had breached their duty of loyalty by failing to provide certain information to plan participants.
[350] *Ibid.*

v. Shifting Focus

While Canadian statutory reform has yet to move in the direction of requiring all investment funds to identify and address climate-related financial risk, efforts by institutional investors elsewhere provide insights on how a shift could occur.

For example, in 2016, ABP, the large Dutch pension fund, launched a program to invest sustainably. One objective is to reduce the carbon dioxide ("CO_2") footprint in its equity portfolio by 25% by 2020 compared to the start of 2015.[351] By the end of 2016, a reduction of 16% had been realized, largely from the disposal of most of the fossil branches of the energy companies RWE and E-on and from new "carbon budgets" that will gradually be reduced each year. ABP has committed to investing EUR 5 billion in renewable energy by 2020. In 2016, its investments in renewable energy rose by 25% to EUR 2.8 billion; and in 2016, the company achieved a total return of 9.5% on that investment.[352] ABP has set itself the objective of doubling the investments that contribute to solving social challenges and environmental problems, from EUR 29 billion at the start of 2015 to EUR 58 billion by 2020. At the end of 2016, these investments stood at EUR 41 billion.[353] ABP pursues dialogue with companies about climate measures and good corporate governance. In 2016, ABP held discussions with 245 companies and voted at more than 4,000 shareholder meetings, encouraging companies to become more sustainable.[354] In 2016, ABP also developed a system so that equity investors can see the precise size of a portfolio's CO_2 footprint, to be implemented fully over the next three years.[355]

Another example is the California Public Employee Retirement System (CalPERS) Board of Administration, which in May 2014 adopted a set of 11 "Pension Beliefs" that articulate the pension fund's views on public pension design, funding and administration.[356] Important for this discussion are the beliefs that "retirement system decisions must give precedence to the fiduciary duty owed to members but should also consider the interests of other stakeholders"; "funding policies should be applied in a fair, consistent manner, accommodate investment return fluctuations and support rate stability"; and "trustees, administrators and all other fiduciaries are accountable for their actions, and must transparently perform their duties to the highest ethical standards". In 2013, CalPERS also adopted ten "Investment Beliefs" to provide a basis for strategic management of the investment portfolio, to inform organizational priorities, and to guide

---

351 ABP, Pensioenfonds voor overheid en onderwijs, "ABP on course with sustainable investments", 8 May 2017, https://www.abp.nl/images/press-release-sustainable-and-responsible-investment-report%20-2016.pdf. The General Pension Fund for Public Employees (ABP) is the industry-wide pension fund for employers and employees of government and educational institutions in the Netherlands. ABP has 2.9 million participants and EUR 388 billion in available assets as at 31 March 2017.

352 *Ibid,* including, ABP invested in solar panels in India and the US, and in wind power in the Netherlands.

353 *Ibid,* relating primarily to investments in sustainable real estate and "green" bonds. New investments include mortgages for energy-efficient housing in the Netherlands.

354 *Ibid.*

355 *Ibid.* See also PGGM, a pension fund service provider in the Netherlands, managing pensions for different pension funds, the affiliated employers and their employees, managing pension assets worth EUR 206 billion in 2017, and committed to sustainable development in its investment and governance practice. PGGM, "Who We Are", https://www.pggm.nl/english/who-we-are/Pages/About-PGGM.aspx.

356 CalPERS has $266 billion under management. CalPERS, "CalPERS Investment Beliefs" (2014), https://www.calpers.ca.gov/docs/forms-publications/calpers-beliefs.pdf.

decisions that often require balancing multiple, inter-related decision factors.[357] Of note is Investment Belief 9, which acknowledges the need for a broad set of investment and actuarial risk measures and clear processes for managing risk; specifying that as a long-term investor, CalPERS must consider risk factors such as climate change, that emerge slowly over long time periods, but could have a material impact on company or portfolio returns.[358]

The SCC has held that fiduciary law protects vulnerable beneficiaries from abuses of power by those individuals who owe them a fiduciary duty of loyalty, but also reinforces the social institutions in which those fiduciaries operate.[359] Pension trustees and other fiduciaries should not shirk responsibilities in terms of thinking about climate change risk in respect of their investment portfolios. Where they do not possess the requisite knowledge and skill, they have an obligation to seek expert advice, and then engage in an informed decision process.

Gold and Scotchmer observe that pension standards legislation in Canada maintains an investment focus on risk and return in a diversified portfolio that is constructed in beneficiaries' best financial interests and with specific regard to the liability characteristics of the particular plan.[360] In some

---

[357] *Ibid*.
Investment Belief 1 Liabilities must influence the asset structure
Investment Belief 2 A long time investment horizon is a responsibility and an advantage, including "Favor investment strategies that create long-term, sustainable value and recognize the critical importance of a strong and durable economy in the attainment of funding objectives."
Investment Belief 3 CalPERS investment decisions may reflect wider stakeholder views, provided they are consistent with its fiduciary duty to members and beneficiaries.
Investment Belief 4 Long-term value creation requires effective management of three forms of capital: financial, physical and human.
Investment Belief 5 CalPERS must articulate its investment goals and performance measures and ensure clear accountability for their execution.
Investment Belief 6 Strategic asset allocation is the dominant determinant of portfolio risk and return.
Investment Belief 7 CalPERS will take risk only where we have a strong belief we will be rewarded for it.
Investment Belief 8 Costs matter and need to be effectively managed.
Investment Belief 9 Risk to CalPERS is multi-faceted and not fully captured through measures such as volatility or tracking error. Sub-beliefs: CalPERS shall develop a broad set of investment and actuarial risk measures and clear processes for managing risk; the path of returns matters, because highly volatile returns can have unexpected impacts on contribution rates and funding status; a s a long-term investor, CalPERS must consider risk factors, for example climate change and natural resource availability, that emerge slowly over long time periods, but could have a material impact on company or portfolio returns.
Investment Belief 10 Strong processes and teamwork and deep resources are needed to achieve CalPERS goals and objectives.

[358] *Ibid.* Materiality – does the issue have the potential for an impact on portfolio risk or return?

[359] *Hodgkinson v Simms*, *supra* note 244 at 422.

[360] Gold and Scotchmer, *supra* note 297 at 9-10. They observe: "the PBSA's admonition that a pension plan's liability structure is the appropriate reference point for its investment policy is particularly important. Different plans do, of course, have different liability structures. Some are more mature than others, for example, and we know, based on recent mortality tables issued by the Canadian Institute of Actuaries, that mortality varies according to the type of work plan members perform during their working lives. Nevertheless, it is generally true that pension plan liabilities include liabilities for active employees who range in age from their twenties to their sixties and, as well, for retirees whose ages typically range from the mid-fifties to (in some cases) over 100. Young active members may not draw a pension for 40 years, and, once they begin to draw their pension they may continue to do so for 30 or more years. Even the population of current retirees can generally be expected to remain on a pension payroll for more than 30 years. This means that pension liabilities are long term; considering investment strategy in the context of a plan's liabilities means that an

jurisdictions, such as British Columbia, pension benefits standards reflect some of the underlying objectives and concerns of modern portfolio theory, which they suggest is strong direction to configure an investment portfolio with regard to the specific characteristics of the plan's liabilities, and being concerned with asset/liability matching.[361] They also observe that pension fiduciaries are challenged by the global scale of climate change.

In summary, pension and other fiduciaries must address the full range of considerations relevant to both risk and return. Pension fund fiduciaries must make their investment strategy decisions based on a time frame commensurate with the pension plan's liabilities.[362] While there is always a risk of loss, trustees are to make decisions in a manner that avoids undue loss. Prudential obligations require the fiduciary to undertake a careful and thorough evaluation of climate change risk prior to making decisions, and to act on information generated by that process, including a rationale for their decisions. Materiality is important in assessing the likelihood of the risk materializing and the downside financial risk if it does. Pension trustees and other fiduciaries must evaluate the market and regulatory risks that are likely to depress market prices or restrain fossil fuel production and consumption, adjusting their investment strategies appropriately.[363] A pension fund trustee's fiduciary duty is to provide oversight of those fiduciaries making investment decisions, with the objective of trying to ensure that there are funds to pay the promised pension benefits owing to members currently and in the future. Pension fund trustees' fiduciary duty requires them to take into account any risks, within their portfolios, of climate change, as well as investment opportunities. Non-financial risks are ultimately financial risks, so these factors must be taken into account.

How can it be done? A number of initiatives address this question. The TCFD has developed voluntary, consistent climate-related financial risk disclosures for use by companies in providing information to investors, lenders, insurers, and other stakeholders. It also contains recommendations for improving investors' ability to appropriately assess and price climate-related risk and opportunities. A work in progress, it considers the physical, liability and transition risks associated with climate change and what constitutes effective financial disclosures across industries. One of its goals is to "help companies understand what financial markets want from disclosure in order to measure and respond to climate change risks, and encourage firms to align their disclosures with investors' needs."[364] The TCFD concluded that assessing climate change risk is complex, partly because there are no uniform risk assessment tools or disclosure standards, and

---

investment strategy must be cognizant of long duration liabilities, often for 70 years or more. For most open defined benefit plans, young employees are becoming new plan members as the employer's labour force is renewed; accordingly, pension liabilities for most open plans may be expected to remain longer term indefinitely."

361 *Ibid.*

362 Davis, *supra* note 13.

363 Damian Carrington and Caelainn Barr, "Coal crash: how pension funds face huge risk from climate change" The Guardian, 15 June 2015, www.theguardian.com/environment/2015/jun/15/coal-crash-how-pension-funds-face-huge-risk-from-climate-change. UNEP FI, "Portfolio Carbon – Measuring, disclosing and managing the carbon intensity of investments and investment portfolios", UNEP FI Investor Briefing, A document of the UNEP FI Climate Change Advisory Group and Investment Commission (July 2013), http://www.unepfi.org/fileadmin/documents/UNEP_FI_Investor_Briefing_Portfolio_Carbon.pdf at 3.
76 *Ibid* at 4-8.

364 Financial Stability Board, Introduction to the Task Force on Climate-related Financial Disclosures, https://www.fsb-tcfd.org/about/#.

because the interaction of climate science, financial markets, and regulatory frameworks is complex in determining downside risks of particular strategies.[365] However, there is global consensus in the scientific community that there is an urgent need for mitigation and adaptation, which can be guideposts for fiduciaries.

In June 2017, the TCFD released three key documents that serve as building blocks to describe and support implementation of the Task Force's recommendations: *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures*"; "Annex: Implementing the Recommendations of the TCFD", which provides detail to help companies implement the recommendations and is a "living" document that will be refined as companies gain more experience preparing climate-related financial disclosures; and "Technical Supplement: The Use of Scenario Analysis in Disclosure of Climate-Related Risks and Opportunities", which provides a further level of detail that can be helpful for companies in considering scenario analysis.[366] Scenario analysis can be very helpful to fiduciaries in determining climate-related financial risk and strategies to respond. It can also assist in identifying upside investment opportunities in developing technologies for climate adaptation.

3. Investors, Good Governance and Fiduciary Obligation

Institutional investors, particularly pension funds, have an important role to play in facilitating an overall strategy towards long-term sustainability. To date, business enterprises have externalized the negative environmental effects of their economic activities because of pressure to exhibit increased short-term returns to capital market funders. Institutional investors have the economic power to help businesses shift trajectory. The Bank of Canada reports that the eight largest Canadian public pension funds are major investors domestically and globally, with net assets under management of more than $1 trillion. Thus, they can influence how quickly strategies to address climate change could be integrated into decision making. Globally, investors are increasingly moving to hold directors to account for their failure to address climate risk.

Canada can learn from international developments. For example, in 2015, the French National Assembly enacted *La Loi de transition énergetique pour la croissance verte* (the *Law for Energy Transition and Green Growth*), aimed at reducing greenhouse gas emissions, capping fossil fuel production and increasing renewable energy usage.[367] Article 173 of the *Law* strengthens

---

[365] TCFD *Final Report, supra* note 73.

[366] Technical Supplement, The Use of Scenario Analysis in Disclosure of Climate-Related Risks and Opportunities (December 2016), https://www.fsb-tcfd.org/wp-content/uploads/2016/11/TCFD-Technical-Supplement-A4-14-Dec-2016.pdf

[367] French National Assembly, *Law for Energy Transition and Green Growth*, 22 July 2015. On 18 November 2015, modifications were made to the *Code de l'environnement* - L222-1 in response to Article 173 of the *Law for Energy Transition and Green Growth* ("*Transition énergétique*"). The amendments address carbon budgets and national low-carbon strategy, regulating the quantity of greenhouse gases of certain types of large-scale operation, converting energy consumed or waste processed into corresponding emission factors. Emissions are recorded annually, excluding international air and sea links, under France's carbon budgets as set out by the European Commission and the UN Convention on Climate Change, UNFCCC, *supra* note 2. On 19 August 2016, modifications were made to the *Code de*

mandatory climate disclosure requirements for listed companies and financial institutions, and introduces the first mandatory requirements for institutional investors. Listed companies must disclose annually the "financial risks related to the effects of climate change and the company's measures to reduce them", including how they are implementing a low-carbon strategy in every component of their activities, and disclosing "the consequences on climate change of the company's activities and of the use of goods and services it produces". Institutional investors, including mutual funds and pension funds,[368] must disclose how their investment decision-making takes social, environmental and governance criteria into consideration, and disclose how they are contributing to the energy and ecological transition to limit global warming.[369] The law is an important step forward in addressing climate financial risk, both in the extensive reporting required and the obligation to disclose the manner in which climate change issues are being addressed.

The new provision survived a constitutional challenge. The entities subject to Article 173 were required to publish their ESG criteria by June 2017 for the 2016 financial year.[370] The Assemblée nationale published a report on implementation of the provision,[371] including how Caisse des Dépôts has taken steps to reduce its carbon footprint by 20% per thousand invested over the period 2014-2020, valued at approximately €55 billion.[372] The Climate Disclosure Standards Board observes that the French law has been important in requiring investors to report on how their policies and targets align with national energy and ecological targets; and that Article 173 includes a focus on integration, where companies must disclose information in their mainstream reports, creating a much stronger connection between climate and other corporate information.[373]

---

commerce - Art R225-105-1(M) in response to Articles 70 and 173 of the *Transition énergétique.* The *Commercial Code* now includes a section on Environment information:

A. General policy on the environment, including that environmental assessment must be made where appropriate, employees trained to protect the environment, and steps be taken to prevent environmental risks and pollution;

B. Pollution, including measures to reduce or repair damage;

C. Economical waste management, including recycling, reuse, use of sustainable resources, and the minimization of energy consumption;

D. Climate change, particularly significant emissions from the use or development of the company's product;

E. Protection of biodiversity.

The amendment also added societal commitments to sustainable development, including a commitment to use resources sustainably and to adapt to the consequences of climate change, *ibid.*

[368] As well as investment companies with variable share capital, *ibid.*

[369] As well as how they exert the voting rights attached to the financial instruments resulting from those choices. "Environmental" includes the exposure to climate-related risks, including GHG emissions associated with assets owned, *ibid.*

[370] The French government has committed to publish a report for the 2016 and 2017 financial years before 31 December 2018. (See *Fédération Française de l'Assurance* Report, at 12-13: https://www.ffa-assurance.fr/content/article-173-decryptage-guide-sur-la-loi-de-transition-energetique-et-son-decret-application).

[371] Assemblée nationale, France, *Rapport d'information sur l'application de la loi du 17 août 2015 relative à la transition énergétique pour la croissance verte*" on 26 October 2016, http://www.assemblee-nationale.fr/14/rap-info/i4157.asp..

[372] *Ibid.*

[373] Climate Disclosure Standards Board, "Mandatory climate change disclosure in the G20: where are we at?", 3 July 2017, https://www.cdsb.net/g20schemes; Climate Disclosure Standards Board, *Corporate Climate Disclosure Schemes in G20 Countries after COP 21,* 3 July 2017, https://www.cdsb.net/sites/default/files/climate-disclosure-standards-board-climate-disclosure.pdf.

The *Forum Pour L'Investissement Responsable* has observed that France's move to regulating based on the "comply or explain" principle is an innovative means to encourage investors and companies toward best practices aligned with the COP 21 Paris Agreement goals; and that Article 173 will direct financing toward companies that have a low carbon footprint. "It recognizes the key role investors play in the energy transition, acknowledging the financial aspect of the fight against climate change."[374] It observes that the new regulations and metrics being developed will provide solutions to the challenge of translating climate issues into the language of finance, investors distinguishing between the negative impacts of climate change financial risks and the positive impacts of energy transition opportunities, growth momentum, and activities that contribute to the 2°C target.[375]

The first reports under article 173 reveal some unevenness in the initial disclosure, some reporting reductions in carbon output by asset class,[376] others reporting on green investments and emissions avoided,[377] and some reporting only that these issues will be addressed going forward.[378] One report outlines the climate change risks to which the fund is exposed through the financial assets that it holds, developing a strategy that will enable it to continually assess its carbon footprint in terms of both emissions and stock holdings, its physical risks, transition risks, its portfolio's alignment with a 2°C scenario, as well as opportunities linked to ecological and energy transition.[379] It describes its methodology for meeting its climate trajectory and the limitations of that methodology.[380]

It will likely take some time for the reports to develop some consistency in their disclosures pursuant to article 173. However, what is evident in all the reporting is that it has focused the attention of pension funds and other institutional investors on climate change and required them to embed disclosure of climate-related financial and transition risks directly in their reporting. It will be interesting to monitor over the next period the extent to which they comply with the second part of the article, disclosing how they are contributing to the energy and ecological transition to limit global warming.

---

[374] The *Forum Pour L'Investissement Responsible,* Guide for understanding Article 173; http://www.frenchsif.org/isr-esg/wp-content/uploads/Understanding_article173-French_SIF_Handbook.pdf).

[375] *Ibid.* The guide outlines three carbon indicator 'scopes'. The first two relate to GHG emissions linked to an issuer's energy consumption, measured in CO_2 per square meter and CO_2 per €m. The third scope relates to GHG emissions from the issuer's activity. Avoided emissions and carbon efficiency/intensity may be measured based on these data, relative to a benchmark scenario. An investor may thereby measure the total GHG emissions of their portfolio.

[376] See for example, AXA 2017 Report, summary tables at 5-6, https://www-axa-com.cdn.axa-contento-118412.eu/www-axa-com%2Ff570ad25-6178-47a0-afb9-59a5b7d3d70a_changementclimatique_rapport_risqueinvestissement_vf_30.08.17-b.pdf.

[377] Caisse des Dépôts, *Green Bond Issuance Report*, http://www.caissedesdepots.fr/green-bond-issuance-report; http://www.caissedesdepots.fr/sites/default/files/medias/institutionnel/investissement_responsable/cdc_radd_2016_ven_def.pdf. Humanis, *Rapport ESG-Climat 2016 : reports reductions in carbon output and plans for green investments, 2016 report*: https://humanis.com/sites/default/files/doc5107-rapport-esg-climat2016.pdf

[378] See for example, ERAFP 2016 report: https://www.rafp.fr/sites/rafp_fr/files/file/charte_isr-2016.pdf.

[379] See for example, Fonds de reserve pour les retraites ("FRR"), "The FRR and Climate Change, Report under Article 173 of the *Energy transition Act* for the year 2016", http://www.fondsdereserve.fr/documents/Report-2016-article-173-lte.pdf and FRR 2016 press release: http://www.fondsdereserve.fr/documents/FRR_Carbon_Footprint.pdf.

[380] *Ibid* at 7.

Climate change presents both risks and opportunities across asset classes. There are clear benefits to investing in companies that prioritize energy efficiency and reduction of GHG emissions and that develop sustainable business models. Shareholder action on climate change can help to minimize risk and ensure that portfolio companies are working towards cost-effective and innovative climate solutions.

There is growing consensus that companies should also expressly report on their strategies to address how they are meeting their climate risk mitigation responsibilities.[381] For example, in 2016, SHARE engaged with 28 companies across a range of sectors on the importance of measuring, disclosing and reducing their climate risks.[382] SHARE reports that in 2016, 18 of these companies reported to the CDP Climate Change survey;[383] nine companies reduced their GHG emissions; five companies substantially expanded disclosure on key climate performance indicators; and two companies set new company-wide targets to reduce GHG emissions.[384] A growing number of shareholder resolutions calling for enhanced disclosure regarding climate change risk and management.[385] Through its proxy voting service, in 2016, SHARE executed votes in favour of 34 shareholder proposals on climate change-related matters.[386]

Transparency requirements draw fiduciaries' attention to climate risk and serve as a normative influence on fiduciaries to take action. Institutional investors with three trillion dollars under management have launched the Carbon Asset Risk project, calling on the world's top non-renewable energy companies to assess the risks of climate change to their businesses.[387] Institutional investors globally are beginning to protect their portfolios from the risks of global warming and climate change.[388]

[381] Covington and Thamotheram, *supra* note 8. See also Financial Stability Board Task Force on Climate-related Financial Disclosures, "Phase I Report of the Task Force on Climate-related Financial Disclosures", (March 2016); https://www.fsbtcfd.org/wp-content/uploads/2016/03/Phase_I_Report_v15.pdf.

[382] SHARE Annual Report 2016 at 7, http://share.ca/documents/annual_reports/annual_activity_report_2016.pdf

[383] CDP Climate Change Survey, which requests information on climate risks and low carbon opportunities from the world's largest companies on behalf of 827 institutional investor signatories with a combined US$100 trillion in assets, https://www.cdp.net/en/climate. CDP, "Out of the starting blocks, Tracking progress on corporate climate action", 2016. Only 49 of 200 companies surveyed in Canada answered the CDP Survey; https://www.cdp.net/en/research/global-reports/tracking-climate-progress-2016.

[384] SHARE Annual Report 2016, *supra* note 382 at 8, reporting that in 2016, Fortis Inc took a significant step by publishing its first environmental report, based on a shareholder proposal SHARE filed in 2015; Fortis is now measuring and disclosing key information for the first time, including the company's GHG emissions, paving the way for more substantial changes.

[385] 167 resolutions in 2015 in North America. Ceres, Letter to SEC, at 12, citing Investor Network on Climate Risk, Shareholders Spur Action on Climate Change: Company Commitments from 2014 & 2015 Proxy Seasons 3, 4 (Ceres) (2015), http://www.ceres.org/resources/reports/shareholdersspur-action-on-climate-change-company-commitments-from-the-2014-2015-proxy-seasons. Press Release, Record Number of Climate and Corporate Political Spending Resolutions Dominate 2016, Shareholder Votes, Proxy Preview (8 March 2016), available at http://www.proxypreview.org/wpcontent/.

[386] *Ibid* at 8.

[387] Aaron Pickering, "Investors ask fossil fuel companies to assess how business plans fare in low carbon future", Ceres, http://www.Ceres.org/press/press-releases/investors-ask-fossil-fuel-companies-to-assess-howbusiness-plans-fare-in-low-carbon-future. TCFD *Final Report*, *supra* note 73.

[388] For example, the Fourth Swedish National Pension Fund, known as AP4, will invest $3.2bn in passive investment funds designed by MSCI, which will track low carbon benchmarks. The SKr299bn ($35bn) pension scheme intends to "decarbonise" its $14.7bn global equity portfolio by 2020. It will drastically cut exposure to companies that pollute with

Of course, many institutional investors are not fiduciaries in the same sense as pension plans, in terms of prudential obligations to act in the interests of multigenerational beneficiaries. However, they are concerned with effective management and the sustainability of their investment portfolios. As noted above, the legislation in France and being considered in other jurisdictions is not confined to pension fiduciaries. Institutional investors such as mutual funds must also report on how their investment decision-making is directed at moving towards lower carbon emissions and increased sustainability.

The *Fiduciary Duty in the 21st Century* report sets out a number of recommendations for institutional investors. Relevant for this discussion on climate risk and fiduciary obligation are that institutional investors should: publish commitments to integration and responsible investment regarding climate change risk, including explanations of how these commitments align with fiduciary duties. Investors should implement these commitments effectively in their investment processes; monitor how investment managers are implementing these commitments; and report to beneficiaries on how these commitments have been implemented and the resultant outcomes. They should ensure that trustees, boards and executives have the resources and knowledge to hold investment managers and advisers to account on climate-related issues; and require companies to provide robust, credible and detailed accounts of their management of climate risk.[389] Institutional investors should also engage policymakers on issues relevant to long-term performance, including strengthened corporate reporting in respect of climate change risk.[390]

These recommendations, if implemented by institutional investors in Canada, would go a long way toward helping Canadian companies and asset funds make the transition to a lower carbon economy, therefore benefiting beneficiaries.

The report recognizes that asset owners have significant freedom to decide how they wish to take account of ESG issues in their investment practices and processes; but they should pay close attention to decisions that lead to skews in portfolios and explicitly assess the implications of these skews for the overall risk profile of the fund.[391]

---

fossil fuels and increase allocations to those with low carbon emissions. PKA, Denmark's fourth-largest pension fund, with €35.5bn in assets, asked 53 companies that generate between 25 and 50% of their revenues from coal to provide plans on how they will reduce their exposure to the fossil fuel, and has announced that it will pull money from businesses that lack plans or provide inadequate proposals "for the shift to a low-carbon future". PKA also divested itself of 31 coal-only companies in 2015. Chris Flood, "Sweden's AP4 pension fund avoids fossil fuels in landmark move", Financial Times, 18 July 2016.

[389] *Fiduciary Duty in the 21st Century*, *supra* note 240 at 20.

[390] *Ibid*.

[391] *Ibid.*

i. Financial intermediaries

Financial intermediaries, who manage money on behalf of others or give advice, have an obligation to include considerations of sustainability as part of their duty to their beneficiaries and clients.[392] A European Commission report observes that another challenge is the pursuit of financial returns in the presence of market failures, often leading fiduciaries to take action that avoids weaker short-term returns or losses while ignoring the long-term consequences.[393] It observes that "climate change and its related risks have become a crucial issue in fiduciaries' decision-making process", and the liability or litigation risk places an obligation on fiduciaries to consider climate-related risks as part of their fiduciary duty, stating that failure to do so could potentially lead to claims for damages by beneficiaries and clients of financial institutions who may not have acted in their best interests.[394] It suggests extending the definition of the prudent person principle, namely that "fiduciaries should throughout their decision-making process consider the broad range of long-term interests of their beneficiaries. In doing so, it should be made clear to financial actors that the long-term interests of beneficiaries include not despoiling the planet and exploiting their fellow human beings".[395]

Fiduciary Duty in the 21st Century contains a list of recommendations for intermediaries, such as legal advisors, actuaries, investment consultants, stock exchanges, brokers and data providers. The report points out that they should report to their fiduciary clients on how these commitments have been implemented and the implications for the research and advice provided. Intermediaries should advise fiduciaries that, as an integral part of their duties, they need to analyze and account for long-term value drivers, including climate change risk issues, in their investment practices and processes. Intermediaries should support research on the relationship between ESG issues and investment performance, and on the relationship between engagement and corporate performance. They should support efforts to change market views on ESG issues by making these issues an integral part of professional training, an integral part of codes of professional ethics; and raise market awareness of the investment case for ESG integration.[396] These recommendations are very important. If pension fiduciaries are relying on these intermediaries for expert advice and the intermediaries fail to develop that knowledge and skill to give that advice, the current pattern of investor risk from climate change will be reinforced, rather than remedied. Moreover, the failure of intermediaries to be informed of these developments and to give timely and relevant advice could lead to erosion of the due diligence defence if a court determines that it was not reasonable to rely on their advice.

---

[392] *Ibid* at 23-25, reporting that in the EU, notions of fiduciary duty or related concepts are enshrined in Solvency II (insurance), IORP II (occupational pensions), MiFID (investment firms), UCITS (mutual funds) and AIFMD (alternative investment funds).
[393] European Commission DG ENV, Resource Efficiency and Fiduciary Duties of Investors, 2014, http://ec.europa.eu/environment/enveco/resource_efficiency/pdf/FiduciaryDuties.pdf.
[394] *Fiduciary Duty in the 21st Century*, *supra* note 243 at 25.
[395] *Ibid* at 25.
[396] *Ibid* at 21.

In 2016, one hundred PRI signatories representing USD 16 trillion of assets and six credit rating agencies signed the “Statement on ESG in Credit Ratings”.[397] The goal over the next two years is to develop more systemic, practical and transparent incorporation of ESG into credit ratings and analysis, recognizing that ESG factors can affect borrowers’ cash flows and likelihood of default of debt obligations.[398] Ripe for further research inquiry are the deficiencies and biases currently in credit rating systems given the system of payment for credit rating, and the need for intermediaries and others to correct them before ESG credit rating becomes more accurate and thus helpful to addressing climate-related financial risk.

ii. Portfolio Investment and Fiduciary Obligation

Waitzer and Sarro observe that there is now broad-based acceptance of the idea that most investment returns come from general exposure to the market *(beta*), rather than from seeking market benchmark outperformance strategies (*alpha*).[399] Thus, systemic market factors are critically important to fiduciary responsibility in assessing the impact of investment decisions on intergenerational beneficiaries. In this respect, the definition of prudence in the duty of care has evolved as our understanding of investment risk has changed.[400] Under modern portfolio theory, fiduciaries must weigh risk by looking at the portfolio as a whole, to ensure that it is appropriate for beneficiaries and designed to generate a suitable rate of return without creating an undue risk of loss.[401] Asset classes of higher duration often yield the highest private and societal returns.[402] Decisions regarding investments must look beyond current market benchmarks and consider questions of future value, including systemic, governance and market risks, as well as potential benefits to current and future generations.[403] Fiduciaries charged with managing and advising investment vehicles that encompass multiple generations of beneficiaries, like pension plans, must therefore consider the intergenerational implications of their decisions or advice, importing the principle of intergenerational equity into the duty of loyalty.[404] Thus the duty of loyalty requires fiduciaries to take proactive steps to invest and encourage investment for the long term, serving the best interests of their beneficiaries by charting a course whereby investment decisions take account of important social and economic challenges, including sustainable development.[405]

Waitzer and Sarro also advocate that the fiduciary of the future needs to be an ethical fiduciary, recognizing its responsibility to preserve and build on the social and environmental infrastructure.

---

[397] bcIMC Report, *supra* note 269. Principles for Responsible Investment signatories, http://www.rbcgam.com/corporate-governance-and-responsible-investment/pdf/pri_statement-on-esg-in-credit-ratings_2016.pdf.
[398] *Ibid.*
[399] Waitzer and Sarro, *supra* note 97 at 1093.
[400] *Ibid* at 1091.
[401] *Ibid* at 1092.
[402] *Ibid* at 1093-1094, citing Roger Ibbotson, “The Importance of Asset Allocation”, (2010) *Fin Analysts J*, Mar–Apr at 18, 20.
[403] Steve Lydenberg, “Reason, Rationality and Fiduciary Duty” (2014) 119 *J Bus Ethics* 365 at 375.
[404] Waitzer and Sarro, *supra* note 97 at 1096, citing *Bennett v British Columbia*, 2009 BCSC 1358, 77 CCPB 56 (BCSC); *BC Nurses’ Union v Mun Pension Board of Trustees*, 2006 BCSC 132, 50 CCPB 77 (BCSC).
[405] *Ibid* at 1097.

That includes a natural environment capable of sustaining their operations, an education system that prepares the potential labour base for the workforce, and a stable, equitable economy capable of sustaining a strong consumer base for the enterprise's products or services. Otherwise, the financial sector will have enormous difficulty finding worthwhile investment opportunities.[406] They suggest that it implies a normative duty to help preserve this infrastructure by ensuring that externalities are properly priced and moral failures are addressed, by taking a more integrative approach to investment.[407] Fiduciaries should be identifying opportunities to mobilize and allocate more of the resources they control for broader social, economic, and environmental goals as part of their investment strategy. Waitzer and Sarro argue that it will require a shift from the zero-sum culture that has crept into finance, towards a fiduciary culture where service providers place a premium on treating clients fairly.[408]

That fairness norm is reflected in the investment strategy of Alberta Investment Management Corporation, ("AIMCo"), one of Canada's largest institutional investment managers with more than $90 billion of assets under management. It is responsible for the investments of 26 pension, endowment and government funds in Alberta.[409] Its investment strategy explicitly recognizes that addressing climate change risk is part of its fiduciary obligations:

> AIMCo has a fiduciary duty to satisfy the investment objectives of our pension and endowment fund clients. We believe the time horizon, scale, and complexity of climate change present challenges which can impact asset values and influence systemic economic, environmental and social risk. We recognize the business imperative of addressing climate change in our investing strategies, and view both the physical and the regulatory risks of climate change as material to our clients' objectives.
>
> The physical effects of climate change have the potential to significantly impact asset value across all asset classes and markets. For example, changes in the frequency of extreme weather events alter probability scenarios, asset life assumptions and net present value calculations. Investors also seek certainty regarding potential regulatory impacts on asset value. The physical and regulatory impacts of climate change create stranded asset scenarios for companies, leading to possible solvency issues and shrinking the investible universe for investors. Effectively addressing climate change requires concerted action from all actors – companies, investors and policymakers.
>
> . . .
>
> Many of the companies we invest in are pledging to support these political commitments. Over the coming decades, climate change will present strategic risks and opportunities to businesses. In alignment with our responsible investment pillars, AIMCo is committed to:

---

[406] *Ibid* at 1096.
[407] *Ibid* at 1098-1099, citing UN Environmental Programme Fin Initiative, "Integrated Governance: A new Model for Sustainability, (2014), http://goo.gl/AiZJou.
[408] *Ibid* at 1098.
[409] Alberta Investment Management Corporation, ("AIMCo"), a Crown corporation of the Province of Alberta, https://www.aimco.alberta.ca/Who-We-Are/At-a-Glance.

- Integrating consideration of an asset's climate risk and resiliency into our investment decision making, including voting by proxy to support reasonable proposals to limit carbon emissions (ESG integration).
- Investing to support lower carbon infrastructure, such as alternative energy solutions and eco-efficiencies to facilitate the transition to a lower carbon economy (Positively-themed ESG investments).
- Actively engaging with companies to promote climate-resilient strategies and best environmental practices. AIMCo champions a voice over exit approach- we prefer to engage with select companies to promote best practices and effect positive changes, where possible, rather than divesting of applicable holdings. (Engagement).
- Reporting on climate change related Responsible Investment activities (Reporting and Disclosure).
- Participation in collaborative initiatives and support for credible climate change policies and regulations based on achievable emissions reduction targets, water efficiency targets, alternate energy implementation strategies and industry best practices (Advocacy).

> AIMCo is committed to addressing climate risk across our portfolios in support of Canada's vision and strategy to achieve a more sustainable, low carbon economy, while continuing to focus on our fiduciary duty to our clients.[410]

In July 2017, the European Commission's Expert Group on Sustainable Finance reported that failure to consider climate-related risks may breach fiduciary duties and potentially lead to claims for damages by beneficiaries and clients of financial institutions.[411] It states that "The responsibility of directors and investors to manage long-term sustainability risks should be enshrined in their relevant duties, whether it is through fiduciary duty in common law or its equivalent in other legal systems."[412] It recommends establishing a single set of principles describing the content of what a fiduciary duty and all its related concepts entail, which can then feed into the respective relevant laws according to the specificities of market participants, observing that regulatory authorities need to make clear to all parties in the investment and lending chain that managing ESG risks is integral to fulfilling fiduciary duty, acting loyally to beneficiaries and acting in a prudent manner.[413]

The Investment Integration Project ("TIIP") helps institutional investors understand the feedback loops between their investments and the planet's overarching environmental, financial and other

---

[410] *Ibid*, "Investment Philosophy", http://www.aimco.alberta.ca/How-We-Think/Investment-Philosophy.
[411] European Commission, "High Level Group on Sustainable Finance Early Recommendations", 13 July 2017, https://ec.europa.eu/info/sites/info/files/170713-sustainable-finance-report_en.pdf. It specifies that the first is to improve the contribution of finance to sustainable and inclusive growth, in particular funding society's long-term needs for innovation and infrastructure, and accelerating the shift to a low-carbon and resource efficient economy. The second is to strengthen financial stability and asset pricing, notably by improving the assessment and management of long-term material risks and intangible drivers of value creation – including those related to environmental, social and governance (ESG) factors.
[412] *Ibid* at 5.
[413] *Ibid* at 25.

systems that make profitable investment opportunities possible.[414] It has created a guide to achieving the United Nations Sustainable Development Goals.[415] Institutional investors can conduct an audit of their climate-related activities, develop a targeted investment program on climate change, and tailor support to institutional investors.[416]

iii. The Governance Role of Debt in Climate Change Risk

Lenders also have a governance role in keeping directors and officers accountable for decisions regarding climate-related financial risk.[417] Triantis and Daniels posited that, in the past, banks assisted in correcting governance problems of firms through their monitoring activities, superior access to information under loan covenants, and through direct intervention with corporate officers or exiting the relationship.[418] To the extent that the bank's monitoring deterred directors from shirking their obligations, it reduced the risk on the firm's debt, and both equity and debt holders benefited from the bank's governance role. A fundamental assumption underlying this notion of interactive corporate governance was that all stakeholders shared the goal of firm-value maximization.[419] For companies relying on public debt markets, while the indenture trustee often had limited responsibility to monitor compliance, issuers frequently were required to back their commercial paper with lines of credit from banks, with the banks serving a similar governance role.[420]

Hence, the screening and monitoring activities of a lender produced positive externalities that benefited numerous stakeholders with an interest in the corporation through the bank's decision to lend, which signalled to potential and existing stakeholders the quality of the borrower; through the imposition of fixed obligations under the loan agreement that prevented managerial slack; through security rights that constrained the ability of managers to liquidate non-cash assets or unilaterally sell more debt; and through loan covenants and monitoring of specified prohibited types of behaviour. Triantis and Daniels called this feature "interdependent screening" to describe externalities that flow not only among creditors, but also from lenders to shareholders, employees and other stakeholders.[421] Therefore, there is a governance role for banks in ensuring that directors and officers are addressing climate change risk in an effective and timely manner.[422] It

---

414 The Investment Integration Project ("TIIP"), http://tiiproject.com/about/.
415 Steve Lydenberg, "From Goals to Action: Using TIIP's Tools for the UN SDG", (17 July 2017), TIPP, http://tiiproject.com/?s=climate+change
416 TIIP, "Systems-Level Considerations and the Long-Term Investor: Definitions, Examples, and Actions", http://tiiproject.com/systems-level-considerations-long-term-investor/.
417 Janis Sarra, "Creating Fairness and Sustainability in the Credit Derivative Market Design", in C Williams, ed, *The Embedded Firm,* (Cambridge: Cambridge University Press, 2011) at 205-233 [Sarra, "Credit Derivatives"].
418 George Triantis and Ronald Daniels. "The Role of Debt in Interactive Corporate Governance" (1995) *University of California Law Review* 83, 1073-1113.
419 *Ibid* at 1081.
420 *Ibid* at 1084, 1088-1089.
421 Triantis and Daniels observe that a "bank's choice between exit and voice is based on a self-interested evaluation of the relative net benefits from each option". *Ibid* at 1084.
422 See for example, RBC, which says it uses its influence and resources to promote environmental sustainability within RBC and in the communities where it operates; and by participating in prominent global initiatives, collaborating with

also links to the discussion above, in respect of what investors should expect of the financial institutions in which they invest.

However, a shift in the nature of debt markets in recent years also acts as a barrier to addressing climate change. The continual introduction of new structured financial products and the shift to non-bank debt financing, including syndication, securitization and collateralization, have profoundly altered the nature of debt.[423] The result has been a fundamental shift in credit relationships. For many years lending was "relational", the bank as operating lender had an ongoing relationship with the business and often the community in which the business was located. That relationship meant that lender and borrower shared goals of sustaining economic activity in the community. However, lending has radically altered. Domestic and foreign creditors often now have little interest or direct connection with Canadian companies, their stakeholders and the communities in which they operate.[424] Their focus is on short-term returns on their investment. In turn, there has been a loss in governance oversight of the debt by senior lenders, as they have fully hedged their risk.[425] While there are early indications that Canadian banks are beginning to think about climate change risk in terms of their lending portfolio priorities, many of these new types of debt have only a short-term time horizon and place pressure on corporate officers to deliver short-term returns or repayments as a condition of financing.[426]

Products currently being developed, such as catastrophe bonds and climate derivatives, have potential to advance or to hinder climate adaptation. For example, credit default swaps can help companies manage transition risks by hedging against failed strategies to move to lower carbon technologies. However, speculative credit default swaps can also hedge against development of green technologies, creating incentives to cause the failure of an alternative energy initiative or company, as the payout is higher if the business fails.[427] Unlike insurance, which requires the purchaser to have an insurable interest in the asset or business, the incentives in respect of numerous derivatives are skewed towards immediate profit, not long-term investment. The opaqueness, speed and sophistication of these markets makes them problematic for addressing climate change. There is need for new principles that link transactions in the climate finance market with sustainability goals.

Beyond the scope of this study, but ripe for research is consideration of the rapid growth in green bond markets. Green bonds are ostensibly aimed at financing environmental projects. Examples would be solar and other forms of clean or renewable energy; pollution reduction and prevention; environmentally sustainable management of living natural resources; environmentally sustainable fishery and aquaculture; terrestrial and aquatic biodiversity conservation and climate change

---

environmental organizations, it is fostering deeper links between the environment, communities and the economy. http://www.rbc.com/community-sustainability/index.html

[423] Sarra, "Credit Derivatives", *supra* note 417.

[424] See the discussion in Janis Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J Sarra and B Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Carswell, 2017).

[425] *Ibid*.

[426] Sarra, "Credit Derivatives", *supra* note 417.

[427] For a discussion of the incentive effects, see Sarra, *ibid*.

adaptation.[428] There are subspecies of such bonds, such as "landscape green bonds", aimed at environmental investment in entire landscapes, including reducing deforestation and creating sustainable livelihoods on a scaled up and much longer term timeline.[429] While green bonds are experiencing exponential growth, there is concern that some financial products are cashing in on a growing interest by investors in investing in sustainable businesses, while not directing the funds as promised. "Greenwashing", as it is called, is where businesses and financial firms offering green bonds benefit from the growing interest, but do not necessarily invest in economic activities that protect or enhance the environment or move us towards a lower carbon footprint.[430] The financial services firms or investment banks that sell green bonds often do not verify their sustainability. There is an opaqueness concern - once the funds have been raised, there is often no tracking of their use to verify whether the activities financed are carbon reducing or environmentally sound. Any standards that exist are purely voluntary and unenforceable, and are largely financial industry created.[431] Hence, an extremely important public policy question is how to encourage sustainable or green investing, but not have these developments set back by greenwashing actors in the market.

The European Commission has commenced developing standards to create some oversight and accountability regarding how to label green bonds and other green investment products.[432] It is in the process of developing EU labels for green financial products.[433] The only accountability check now is that investors decide, with imperfect information, whether a bond is sufficiently green to meet their own investment priorities. Why mention this issue in a study on fiduciary obligation? Because, as institutional investors consider how to shift their investment management practices to address climate-related financial risk, part of their fiduciary obligations arguably include ensuring that the green financial products they are investing in truly are bonds and other products that meet their climate-related obligations.

V. Legislators Could Clarify the Scope of the Obligations

One means by which fiduciaries may be encouraged to address climate risk would be through legislation that clarifies the need for fiduciaries to address the issue and embeds the cost of carbon in capital market decisions.

---

[428] Green Bond Principles, June 2017, https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/GreenBondsBrochure-JUNE2017.pdf ("Green Bond Principles 2017").

[429] Andrew Mitchell, "Landscape Green Bonds: An emerging new asset class?", Gobal Canopy, 12 September 2017 https://medium.com/global-canopy/landscape-green-bonds-an-emerging-new-asset-class-41fcc515f02f

[430] Luca Morreale. "The Coming Backlash to 'Greenwashing' of Bonds", Bloomberg News, 10 August 2017, https://www.bloomberg.com/news/articles/2017-08-11/the-coming-backlash-to-greenwashing-of-bonds-quicktake-q-a.

[431] For example, the Green Bond Principles 2017, *supra* note 428, which aim to increase transparency and integrity of the Green Bond market.

[432] European Commission, "Communication: Action Plan: Financing Sustainable Growth", Brussels, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097

[433] *Ibid.*

Canadian provincial and federal governments have commenced addressing climate change risk.[434] British Columbia imposed the first carbon tax in North America.[435] The Government of Canada announced a pan-Canadian framework that includes a national floor price on carbon.[436] The framework agrees to phase out the use of coal to produce electricity by 2030; reduce methane and hydrofluorocarbons emissions from the extraction of oil and gas by 40-45% by 2025; create more rigorous vehicle emissions standards; and develop models for net-zero energy building codes by 2030.[437] The federal government invested more than $31 billon in the clean technology sector from 2010 to 2014,[438] ranking sixth in the world for investment in new domestic clean energy generation projects in 2014. Cleantech companies generated over $11 billion of revenues and employed over 50,000 people in 2014.[439]

However, provincial and federal governments appear to have largely avoided any mention of fiduciary obligation in their public references to climate change. A canvass of the public disclosures in August 2017 found that the federal government website, including news releases, briefings and public information, makes only brief mention of fiduciary duties in relation to climate change risks.[440] Global Affairs Canada briefly mentions climate change risks in relation to corporate social responsibility, observing that effective management of social and environmental risks can improve business performance, and has led to increased oversight by boards over how the company is managing its environmental performance as part of its fiduciary responsibility.[441] A 2010 study briefly refers to climate-related risks as fiduciary obligations regarding environmental performance.[442] The federal government website also includes a 2011 document by the Network for Business Sustainability, which observes that legal liability could arise for firms stemming from

---

434 Government of Canada, Federal actions for a clean growth economy, 2017, https://www.canada.ca/content/dam/themes/environment/documents/weather1/20170119-en.pdf.

435 British Columbia Government, "Revenue-neutral Carbon Tax Program", http://www.fin.gov.bc.ca/tbs/tp/climate/carbon_tax.htm.

436 Canadian provinces will be given until 2018 to implement a carbon pricing policy, starting with a minimum price of $10 per tonne in 2018, increasing $10 per year to $50 per tonne by 2022. *Ibid.*

437 *Ibid*, at 15.

438 Energy Factbook 2016-2017, *supra* note 53 at 11-12. However, the report notes that there is no generally accepted definition of the "energy and clean technology" ("cleantech") sector.

439 The Toronto Stock Exchange Venture (TSXV) defines Cleantech companies as companies whose operations fall under one of five environmental categories: Energy Efficiency; Low-Impact Material and Products; Renewable Energy Equipment Manufacturing and Technology; Renewable Energy Production and Distribution; and Waste Reduction and Water Management, *ibid.*

440 See for example, Government of Canada, "Federal Adaptation Policy Framework for climate change" (2011), https://www.canada.ca/en/environment-climate-change/services/climate-change/federal-adaptation-policy-framework.html ["Federal Adaptation Policy"]. Government of Canada*,* "Governance for Sustainability" (2010), https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rs00577.html. Global Affairs Canada observes that there is pressure on companies by investors to report on climate change risks. Global Affairs Canada, *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector*, Global Affairs Canada, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng.

441 Global Affairs Canada reports that a number of pension funds have formed coalitions around issues such as climate change in order to pressure companies, including those in the extractive sector, to report on related risks to their operations and performance; Andrea Baldwin & Coro Stranderg*, CSR Governance Guidelines* (2010) Canadian Business for Corporate Responsibility at 2, 21: Government of Canada, https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rs00577.html.

442 *Ibid.*

a breach of fiduciary duties should they fail to take impacts from climate-related risks into account.[443] The federal government's website discusses its fiduciary duties related to First Nations, Inuit and other areas of sole federal responsibility in the context of climate change, but does not discuss the obligations of corporations, pensions and other fiduciaries regarding climate change risk.[444]

Under the Alberta Government Climate Leadership Plan, all pollution from coal-fired electricity will be phased out by 2030, and 30% of electricity used by Albertans will come from renewable sources such as solar, wind and hydro by 2030.[445] The Alberta Government website does not discuss fiduciary obligations in relation to climate change risk in any direct way.[446] Alberta's Climate Change Advisory Panel, in its reports and consultation process, does not mention fiduciary obligations. Its final report focuses on a carbon tax as a means of effectively responding to climate change.[447] Alberta's Climate Leadership Action Plan also does not discuss fiduciary obligation.[448] That is not to suggest that the Alberta Government is not active in trying to reduce GHG emissions. In 2007, Alberta became the first jurisdiction in North America to have mandatory GHG emission reduction targets for large emitters across all sectors.[449] In June 2015, the reduction targets were strengthened so that facilities that emit more than 100,000 tonnes of GHG emissions per year will have to reduce their emissions intensity by 20% per barrel by 2017.[450] Companies unable to comply with the target through direct emissions reductions can use recognized offsets or pay a CAD 30/tonne fee by 2017 into its Climate Change and Emissions Management Fund. The fund is investing in technologies and projects that will further reduce GHG emissions.[451] The fund has collected more than CAD 577 million as of April 2015.[452] In November 2015 the Government of Alberta released a climate change policy that moves towards phasing out coal-generated

[443] Network for Business Sustainability, *Managing the business risks and opportunities of a changing climate: A primer for executives on adaptation to climate change* (2011) at 6, Collections and Archives Canada http://collectionscanada.gc.ca/webarchives2/20130322174802/http://nrtee-trnee.ca/wp-content/uploads/2011/12/Adaptation-to-Climate-Change-Primer-for-Business-Executives-english.pdf.

[444] Federal Adaptation Policy, *supra* note 440.

[445] Alberta Government, "Phasing out coal pollution", 2017, https://www.alberta.ca/climate-coal-electricity.aspx.

[446] Government of Alberta, "Climate Change Action Plan" (2015) https://www.alberta.ca/climate-leadership-discussion.aspx.

[447] Alberta, Andrew Leach *et al*, *Climate Leadership Report to Minister* (Edmonton: Climate Change Advisory Panel, 2015), https://www.alberta.ca/documents/climate/climate-leadership-report-to-minister.pdf.

[448] Government of Alberta, "Climate Leadership Plan" (2017) available online: Government of Alberta <https://www.alberta.ca/climate-leadership-plan.aspx#toc-2>. Some submissions relating to commercial and resources posted on the Alberta government's website discuss fiduciary duties and climate change risk. However, these are exclusively concerning the fiduciary duty of the Alberta government to consult, accommodate, and/or justify infringement with and upon First Nations groups and the potential impact on the climate of these projects. See for example: http://aep.alberta.ca/land/land-industrial/programs-and-services/environmental-assessment/documents/Dover-Commercial-Project-PTOR-Comments-4.pdf; http://aep.alberta.ca/land/land-industrial/programs-and-services/environmental-assessment/documents/Ivanhoe-Energy-Inc-Tamarack-IOS-Proj-PTOR-Comments-7.pdf; http://aep.alberta.ca/land/land-industrial/programs-and-services/environmental-assessment/documents/Kirby-In-Situ-Oil-Sands-Expansion-Project-PTOR-Comments-1.pdf.

[449] Natural Resources Canada, "Oil Sands: GHG Emissions – US", at 1, http://www.nrcan.gc.ca/energy/publications/18731.

[450] *Ibid.* More than 61 million tonnes of GHG emissions have also been reduced, from a business-as-usual scenario, since 2007.

[451] *Ibid.*

[452] *Ibid.*

electricity, implementing a new carbon price on GHG pollution, placing a hard-cap on oil sands GHG emissions and reducing methane gas emissions from oil and gas operations by 45%.[453]

Ontario has a five-year plan to fight climate change, reduce greenhouse gas pollution and transition to a low-carbon economy.[454] The Ontario five-year climate action plan and climate change strategy do not mention fiduciary duties, focusing on carbon pricing as the means to reduce GHG emissions in businesses.[455] The closest it comes is in a discussion of carbon pricing, which mentions that carbon pricing "reduces greenhouse gas emissions as businesses and households incorporate the cost of emitting carbon into their decisions, encouraging companies and consumers to move away from fossil fuels and towards cleaner and more efficient ways of doing business."[456] Ontario's five-year plan actively seeks to reduce GHG emissions and transition the province to a low-carbon economy.[457]

Some provincial governments have legislatively addressed treatment of stranded assets, an issue increasingly important. Yet fossil fuel companies are spending significant resources to challenge these efforts.[458] In upholding the validity of the legislation, the courts have observed that the treatment of stranded assets is, at its foundation, a policy issue informed by public interest considerations. At the same time, provincial legislation is being "trumped" by federal insolvency law as companies fail,[459] such that the costs of many stranded assets are likely to fall on taxpayers through the tax base as we transition our economy.[460]

The Government of Newfoundland and Labrador's website, *Turn Back the Tide*, offers tools for businesses and others in the province to address climate change. It mentions the Gold and Scotchmer report, discussed above, highlighting the report's conclusions that pension fund managers and trustees owe a legal duty to their clients to assess all potential risks and opportunities, including those posed by climate change.[461]

In May 2017, the Nova Scotia Public Service Superannuation Plan ("PPSP") issued a statement on climate change, stating that:

> The Trustee has a fiduciary obligation to present and future beneficiaries of the PSSP to maximize investment returns without incurring undue risk. To manage risk, the Trustee maintains a well-diversified portfolio. But the Trustee is also keenly aware of climate change as an investment risk, potentially jeopardizing returns over the long term. The Trustee further believes that a gradual global shift

---

[453] *Ibid.*
[454] Ontario Government, *Climate Action Plan,* https://www.ontario.ca/page/climate-change-action-plan.
[455] Ontario, Government of Ontario, *Ontario's Five Year Climate Change Action Plan 2016*-2020 (Toronto: Queen's Printer for Ontario), 2016, http://www.applications.ene.gov.on.ca/ccap/products/CCAP_ENGLISH.pdf. Government of Ontario, *Climate Change Strategy,* (2017), https://www.ontario.ca/page/climate-change-strategy.
[456] Ontario, *Climate Change Strategy, ibid* at 10.
[457] *Ibid.*
[458] *FortisAlberta Inc v Alberta (Utilities Commission),* 2015 *ABCA* 295.
[459] *Re Redwater Energy Corporation*, 2016 ABQB 278, 2017 ABCA 124, leave to appeal to SCC granted.
[460] Sarra, Anthropocene, *supra* note 69.
[461] Government of Newfoundland and Labrador, *Turn Back the Tide,* http://www.turnbackthetide.ca/tools-and-resources/wh.ats-new-2015.shtml

> away from carbon-based energy, as well as other effects of climate change, will present opportunities to the Plan."[462]

It notes that climate change has affected the trustee's mandate to enhance assets in a risk-prudent matter, and that it will monitor and manage the risks associated with climate change.[463]

Significantly, the Office of the Auditor General of Canada in March 2018 reported that, on the basis of current government policies and actions, Canada is not expected to meet its 2020 target for reducing greenhouse gas emissions, and that substantially more effort is needed.[464] A collaboration among 11 Auditors General across Canada, the report concludes that no government in Canada has met all its climate change commitments; many that have set GHG reduction targets are not on track to meet them, and none of them are fully prepared to adapt to the impacts of a changing climate.[465] Most provinces have developed high-level mitigation strategies that include actions to reduce emissions, but they lack detailed timelines, implementation plans, and cost estimates. The Auditor Generals conclude that meeting the 2030 target will require a joint and significant effort by all levels of government.[466]

The *Fiduciary Duty in the 21st Century* report identifies some challenges to ensuring that fiduciaries carry out their prudential duties, recommending government action to modernize definitions and interpretations of fiduciary duty in a way that ensures these duties are relevant to 21st century investors.[467] It makes a number of recommendations for legislators and regulators that are relevant to climate change risk:

- Clarify that fiduciaries must analyse and take account of ESG issues in their investment processes, in their active ownership activities, and in their public policy engagement.
- Clarify that fiduciary duty requires that investors pay attention to long-term investment value drivers, including ESG issues.
- Encourage or require institutional investors to support public policy efforts promoting responsible investment.
- Require investor transparency on all aspects of ESG integration and investment practice.
- Require better corporate reporting on ESG issues and on how these issues affect business performance over the short and long term.

---

462 Nova Scotia Public Service Superannuation Plan Trustee Inc, "Statement on Climate Change" (Halifax: Nova Scotia Pension Services Corporation, 2017), http://www.nspsspp.ca/sites/default/files/inline/documents/ClimateChangeStatement/pssp_climate_change_statement_-_final.pdf at 2.

463 Going forward, the PSSP believes that it has an obligation to assess climate-related risks at the macro and micro level: "the macro level involving continual monitoring of the Plan's asset mix to ensure there is not undue exposure to climate change-related risks; the micro level involving ongoing actions to ensure that climate change-related risks are adequately weighed in individual investment decisions, *ibid* at 3.

464 Office of the Auditor General of Canada, *Perspectives on Climate Change Action in Canada: A Collaborative Report from Auditors General,* 27 March 2018, http://www.oag-bvg.gc.ca/internet/docs/osh_20180327_e_42964.pdf.

465 *Ibid.*

466 *Ibid* at 9.

467 *Ibid.*

- Heighten expectations of trustee competence and skill.
- Better implement existing responsible investment legislation and policy instruments, such as stewardship codes and asset owner disclosure requirements, and clarify that these laws and instruments refer to environmental, social and governance issues, and analyse and report on how these affect investor and company performance.
- Support efforts to harmonize national and regional responsible investment legislation and policy instruments, eg stewardship codes and disclosure requirements.
- Develop an international statement or agreement on the duties that fiduciaries owe to their beneficiaries, reinforcing the core duties of loyalty, prudence and competence and stressing that investors must pay attention to long-term investment value drivers, including ESG issues, in their investment processes, in their active ownership activities and in their public policy engagement. This statement should reinforce the core duties of loyalty and prudence; and should stress that investors must pay attention to long-term investment value drivers, including ESG issues, in their investment processes, in their active ownership activities, and in their public policy engagement.[468]
- Support the development of guidance on implementation processes: investment beliefs, long-term mandates, integrated reporting and performance.[469]

The report had recommendations specific to Canada that were drafted by consulting investor and other groups that have already been engaged in investor action in Canada.[470] Recommendations include that the Office of the Superintendent of Financial Institutions Canada and the relevant pension regulators in each province should clarify that asset owners are expected to pay attention to long-term factors, including ESG factors, in their decision-making, and in the decision-making of their agents; and that the federal government and the governments of the provinces should follow the example set by Ontario and introduce ESG disclosure legislation.[471]

For each of the recommendations for legislators and regulators, the requirements proposed above could be tailored to expressly require fiduciaries to identify and address climate-related financial risk in the exercise of their obligations. It would go some measure towards directing fiduciaries' attention to the risks and the need for mitigation and adaptation strategies.

Companies respond positively to legislative standards, as they create a level playing field across all businesses and because they serve as a counter-balance to investor pressure for short-term returns. Absent regulatory requirements to reduce emissions and shift to green technologies, companies are unlikely to redirect their resources. Mark Carney has observed that by the time

---

[468] *Ibid* at 10.
[469] *Fiduciary Duty in the 21st Century*, *supra* note 243 at 21.
[470] See for example, SHARE Annual Report 2016, *supra* note 382. See also National Roundtable on the Environment and the Economy, "Capital Markets and Sustainability", 2007, http://nrt-trn.ca/capital-markets-index. The Canadian Institute of Chartered Accountants 2005 "Discussion Brief on Climate Change" observed that some environmental and social disclosures are already required by securities regulators' rules, and therefore are mandatory where likely to be material to investors; "MD&A Disclosure about the Financial Impact of Climate Change and Other Environmental Issues", October 2005, http://learn.environment.utoronto.ca/media/2113/e_cprb_discussion_brief_2005.pdf.
[471] *Ibid* at 22.

climate change becomes a clear danger to financial stability, it may already be too late to stabilize the atmosphere.[472]

Another area for government action is through mandatory disclosure requirements under Canadian securities law, a requirement being advocated by institutional investors in Canada. One 2017 study by the Chartered Professional Accountants of Canada of more than 75 publicly-traded companies in Canada found that while 79% were making some climate-related disclosure, disclosure was generally inadequate.[473] The vast majority failed to provide specific disclosure about oversight of climate-related risks, financial metrics for GHG emissions reductions or targets to move towards a lower carbon economy.[474]

Canadian securities regulators lag international developments in disclosure on climate change risk. On 5 April 2018, the Canadian Securities Administrators (CSA) published its long-awaited study of climate-change in Staff Notice 51-354 *Report on Climate change-related Disclosure Project*.[475] Over one year in the making, with extensive consultations with issuers and investors, securities regulators acknowledged the importance of climate-change financial risk, but they did not announce any new requirements. The CSA observed that although securities laws in Canada do not specifically address climate change, the general requirement to disclose material information requires disclosure of the material climate change-related risks and impacts.[476] At the same time, it reported that substantially all users consulted are dissatisfied with the current state of disclosure. The CSA announced that it *intends to consider* new disclosure requirements regarding non-venture issuers' corporate governance practices in relation to climate change risk, and how issuers oversee the identification, assessment and management of material risks, but wrote that "there is no assurance that any new rules or amendments will ultimately be adopted in any of the CSA jurisdictions."[477] While it is understandable that any potential new rules will need to follow the CSA's standard policy-making process, the CSA missed an important opportunity to state the principles that will drive the reform or to announce that it will require companies to disclose their governance and oversight of climate change-related risks and how they are contributing (or not) to Canada's climate targets.

Models exist that the CSA could have endorsed. For example, since October 2013, UK quoted companies (publicly-traded companies) have been required to report on their GHG emissions as part of their annual directors' report and account publicly for their contributions to climate change on an annual basis.[478] The requirement affects all UK incorporated companies listed on the main

[472] Carney, "Resolving the climate paradox", *supra* note 53 at 9.
[473] Chartered Professional Accountants of Canada, *State of Play: Study of Climate-Related Disclosures by Canadian Public Companies*, 2017, at 129, https://www.cpacanada.ca/en/business-and-accounting-resources/financial-and-non-financial-reporting/sustainability-environmental-and-social-reporting/publications/climate-related-disclosure-study
[474] *Ibid* at 2.
[475] CSA Staff Notice 51-354 *Report on Climate change-related Disclosure Project*, http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20180405_51-354_disclosure-project.htm.
[476] *Ibid* at 7-8.
[477] *Ibid* at 37.
[478] UK *Companies Act 2006,* Strategic Report and Directors' Report Regulations 2013. See also *Climate Change Act 2008* and UK Government, "Environmental Reporting Guidelines: including mandatory greenhouse gas emissions reporting guidance", June 2013 ("Guidance");

market of the London Stock Exchange, a European Economic Area market or whose shares are dealing on the New York Stock Exchange or NASDAQ.[479] Directors and officers must make every reasonable effort to acquire all material data to comply with the regulations.[480] They are also required to report on environmental matters to the extent it is necessary for an understanding of the company's business in their annual report, including where appropriate, the use of key performance indicators.[481] In circumstances where directors and officers find it difficult to compile all necessary data in a timely manner to comply with reporting requirements, they are to state what is omitted and explain why in the directors' report.[482]

The CSA review did offer some new data. While over half of the issuers it examined provide some specific climate change-related disclosure in their MD&A and/or Annual Information Form, the other half use boilerplate disclosure or no disclosure at all.[483] Almost no companies disclose their governance and risk management practices respecting climate change. The majority of issuers that mention climate change-related risks in their regulatory filings do not quantify the potential financial impact of those risks. The CSA noted an incomplete understanding by some issuers of the implications of climate change-related risks and financial impacts that may affect issuers' businesses irrespective of the carbon intensity of their own operations.[484]

Importantly, the CSA did acknowledge the fiduciary obligations associated with the assessment of materiality:

> In fulfilling their oversight functions, audit committees, boards and certifying officers should consider, among other things, the assessment management has made regarding the materiality of climate change related matters, and whether the disclosure made in securities regulatory filings is consistent with this assessment.[485]

Canadian securities regulators are caught up in the "materiality" issue under Canadian securities disclosure legislation. Yet insights from reports internationally and from investors surveyed by the CSA make clear that the current materiality standard does not work for climate-related financial risks, given both the timelines and the existence of risk across the entire economy. As noted earlier,

---

https://www.gov.uk/government/publications/environmental-reporting-guidelines-including-mandatory-greenhouse-gas-emissions-reporting-guidance.

[479] *Ibid,* Strategic Report and Directors' Report Regulations 2013.

[480] Guidance, *supra* note 477 at 28.

[481] Environmental key performance indicators are quantifiable measures that reflect the environmental performance of an organization in the context of achieving its wider goals and objectives, focusing on relevance, transparency, accurateness and comparability. The focus is on 'key' measures i.e. those most important to an understanding of an organization. the Institute of Chartered Accountants in England & Wales have published guidance for company directors and officers preparing and auditing annual financial statements to help them in understanding what is required to be reported and how this relates to the latest statutory financial accounting and reporting standards.

[482] *ibid.*

[483] CSA Staff Notice 51-354 *Report on Climate change-related Disclosure Project*, *supra* note 475. More companies undertake some disclosure in their voluntary reports, but most disclose it as a regulatory risk, rather than looking to their own emissions and other activities contributing to climate change.

[484] *Ibid* at 27.

[485] *Ibid* at 7.

climate-change disclosure could be treated similarly to corporate governance disclosure, which is not subject to a materiality standard in Canada.

Canadian securities regulators should adopt the recommendations of the TCFD, which provide a framework for disclosure of climate-related financial risks by corporations, financial enterprises, investors and asset managers.[486] SHARE has been facilitating a group of large Canadian pension plans and other institutional investors to ask Canadian securities regulators to adopt new requirements for large issuers, to advocate for an update to company disclosure obligations and guidance to address climate change-related concerns.[487] An enhanced framework for disclosure is critically important, but it is not a sufficient measure by itself to address the challenges regarding climate finance. There needs to be a deeper discussion about the role of financial markets in addressing climate risk, and the allocation of responsibility as between public and private interests.

Other jurisdictions are considering regulatory change to reflect developing notions of fiduciary obligation. The European Commission, as part of its Capital Markets Union initiative, is considering new regulation specifying that fiduciary duties of asset owners and asset managers include integrating ESG considerations into decision-making, which includes climate change risk; ensuring that sustainability is more central to corporate governance; and promoting better integration of ESG performance in issuer ratings and key market benchmarks.[488] The Commission's High-Level Expert Group on Sustainable Finance has recommended that the fiduciary duties of institutional investors and asset managers explicitly integrate long-term sustainability, including climate-related factors.[489] It has recommended that in the drafting of new legislative provisions on fiduciary duty, a "think sustainability first" principle should be applied to all key investor and financial legislation.[490]

SHARE has been meeting with federal government officials and Members of Parliament to advocate for similar ESG disclosure regulations for federally registered pension plans.[491]

Also, there needs to be fairness measures for smaller retail investors. With the diminution of pension funds, individuals forced to turn to capital markets to generate some return in preparation for retirement are not being given investment options appropriate to their risk bearing capacity.[492] There needs to be regulatory oversight of the financial products for the transitioning economy, to ensure that retail investors do not unnecessarily suffer losses. A very important step is for Canada to follow the rest of the world and impose a fiduciary obligation on investment advisors to consider the best interests of their clients when giving investment advice.[493] That advice should pay attention to climate risk as well as other financial risks to the retail investor.

[486] TCFD *Final Report, supra* note 73.
[487] SHARE Annual Report 2016, *supra* note 382.
[488] Report on the *Capital Markets Union* Initiative, 8 June 2017, https://ec.europa.eu/info/publications/mid-term-review-capital-markets-union-action-plan_en.
[489] European Commission, *Final Report by the High-Level Expert Group on Sustainable Finance,* January 2018.
[490] *Ibid* at 2.
[491] SHARE Annual Report 2016, *supra* note 382 at 14.
[492] Sarra, Anthropocene, *supra* note 69.
[493] On all matters, including climate financial risk.

Mutual funds in Canada should be required to make their proxy voting records public in an accessible form. Given that such disclosures are currently available only to unitholders, prospective purchasers are unable to evaluate the degree to which such funds are aligning their voting in support of climate change mitigation and adaptation. As in France, all institutional investors could be required to disclose their climate change risk management strategies and actions, and ensure that the decision-making board or advisory board designates someone with climate change competency to sit on the board.

Very important to note, but beyond the scope of this study, is that GHG emissions are a global challenge, requiring a shared global solution. While the Canadian oil sands contributed about 9.3% of Canada's total GHG emissions in 2014, that amount is equal to approximately 0.1% of global emissions.[494] The Canadian Government observes that all countries, governments, Indigenous peoples, as well as civil society, business and individuals will have to be mobilized in order to achieve significant reductions in global GHG emissions.[495]

VI. Conclusion

Climate-related financial risk exists, and it will continue to grow as Canada transitions to a low carbon economy. Directors and officers, pension trustees and other fiduciaries have a fiduciary obligation to identify the risks, and where they exist, to develop strategies in the best interests of the company, pension fund or investment fund to reduce the risk. Duly diligent efforts by these fiduciaries will not be second-guessed by the courts, and thus the best strategy is to avoid liability risk by acting now.

There are also significant opportunities for Canadian business in the transition to a low carbon economy. Efforts to mitigate and adapt to climate change will produce new opportunities for organizations through resource efficiency and cost savings,[496] investing in technological innovation, the adoption of low-emission energy sources,[497] the development of new low-emission products and services, and access to new markets as sectors shift to a lower-carbon economy and

---

494 Environment Canada National Inventory Report (2014), https://www.ec.gc.ca/ges-ghg/default.asp?lang=En&n=662F9C56-1.

495 Government of Canada, "GHG Emissions", 2017, http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/oilsands-sablesbitumineux/15-0513%20Oil%20Sands%20-%20GHG%20Emissions_us_e.pdf.

496 UNEP and Copenhagen Centre for Energy Efficiency, Best Practices and Case Studies for Industrial Energy Efficiency Improvement, February 2016; Environmental Protection Agency Victoria (EPA Victoria), "Resource Efficiency Case Studies: Lower your Impact", 2013, http://www.epa.vic.gov.au/business-and-industry/lower-your-impact/resource-efficiency/case-studies.

497 International Energy Agency, "Global energy investment down 8% in 2015 with flows signalling move towards cleaner energy", 14 September 2016. The International Energy Agency reports that to meet global emission-reduction goals, countries will need to transition a major percentage of their energy generation to low emission alternatives such as wind, solar, wave, tidal, hydro, geothermal, nuclear, biofuels, and carbon capture and storage. See also Frankfurt School-United Nations Environmental Programme Centre and Bloomberg New Energy Finance, "Global Trends in Renewable Energy Investment 2017", 2017; Ceres, "Power Forward 3.0: How the largest U.S. companies are capturing business value while addressing climate change", 2017, https://www.ceres.org/resources/reports/power-forward-3.

build resilience along the supply chain.[498] Good governance suggests that directors and other fiduciaries address these upside potential opportunities to offset transition risks and costs. Climate-related opportunities will vary depending on the region, market, and industry in which an organization operates.[499]

It may take time for an appellate court judgment to alert directors and officers of the extent of their fiduciary and other obligations in respect of climate change related financial risk. Canada's governments could help clarify the scope of obligations by either expressly legislating that companies address climate change financial risk or expressly requiring directors and officers to identify material climate-related risks and develop strategies to manage them. At a minimum, they should legislate the relevant disclosure requirements recommended by the TCFD. While directors, officers, pension trustees and other fiduciaries have an obligation to identify and address climate change risk under their existing duties, the federal government could offer clear guidance on the scope of their obligations.

---

[498] G20 Green Finance Study Group. G20 Green Finance Synthesis Report. 5 September 2016, http://unepinquiry.org/wp-content/uploads/2016/09/Synthesis_Report_Full_EN.pdf. TCFD *Final Report, supra* note 73 at 6-7. The TCFD reports that "The concept of climate resilience involves organizations developing adaptive capacity to respond to climate change to better manage the associated risks and seize opportunities, including the ability to respond to transition risks and physical risks. Opportunities include improving efficiency, designing new production processes, and developing new products. Opportunities related to resilience may be especially relevant for organizations with long-lived fixed assets or extensive supply or distribution networks; those that depend critically on utility and infrastructure networks or natural resources in their value chain; and those that may require longer-term financing and investment."

[499] *Ibid.*

PETER A. ALLARD
SCHOOL OF LAW
THE UNIVERSITY OF BRITISH COLUMBIA

IVEY foundation

OSGOODE
OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY