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A Topography of Effective Climate Governance in Canada: The Contours of Fiduciary Obligation

Abstract: Directors' fiduciary duties in Canada include an obligation to identify and oversee management of the company's climate-related risks and opportunities. The precise contours of these obligations need further articulation. Internationally adopted financial disclosure accounting standards and green and transition finance taxonomies help to clarify the reasonable expectations of regulators, investors, creditors, and other stakeholders in respect of directors' specific duties to achieve climate financial resilience and transition the company to net-zero carbon emissions.

Keywords: directors, fiduciary duty, climate-related financial risk, oppression remedy, misrepresentation, greenwashing

I. Introduction

Topographic maps are two-dimensional representations of the earth's three-dimensional landscape, their contours revealing the location, height, and shape of features such as mountains, valleys, and rivers (NASA 2024). Understanding of these contours is enhanced by developments such as the 2024 launch of the PACE satellite (plankton, aerosol, cloud, ocean ecosystem satellite), which allows researchers to study air particles and microscopic ocean life to advance our knowledge of climate-related impacts such as wildfires and ocean warming (McNamee 2024). Climate change is causing widespread elevational range shifts, associated with an increased risk of extinction of plant and animal species as topographic constraints impose significant reductions in areas available for their survival (Elsen, Monahan, and Merenlender 2020, 1974).

The United Nations Intergovernmental Panel on Climate Change (IPCC) has mapped how human-caused climate change is already affecting every region across the globe and has caused substantial damage and increasingly irreversible losses in terrestrial, freshwater, cryospheric, and ocean ecosystems, affecting more than 3.5 billion people (IPCC 2023, 5–6, 14). Adverse impacts are concentrated among economically and socially marginalized urban residents (ibid. at 5–6, 14). The Canadian Net-Zero Emissions Accountability Act (CNZEAA) expressly states that "the science clearly shows that human activities are driving unprecedented changes in the earth's climate" and that "climate change poses significant risks to human health and security, to the environment, including biodiversity, and to economic growth." *Canadian Net-Zero Emissions Accountability Act*, S.C. 2021, c. 2, preamble.

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There is another kind of topography that needs mapping—the contours of what fiduciary duty entails as corporate directors and officers meet their obligations in respect of managing climate-related risks and opportunities. There is now broad recognition globally that the fiduciary duties of directors include a duty to identify, oversee, and manage climate-related risks, as evidenced by legal opinions globally (Hansell LLP 2020; Hansell 2022 (Canada); Hutley and Hartford Davis 2016; 2019; 2021 (Australia); Yamada, Serra, and Yakahigashi 2021; 2025 (Japan); Chan et al. 2021 (Singapore); Divan, Yadav, and Sawhney 2021 (India); Stock and Fan 2021 (Hong Kong)). What has yet to be clarified are the precise contours of that duty.

In Canada, the fiduciary duty of directors has been very clear for more than twenty years; the Supreme Court of Canada has consistently held that the duty of directors is to act with a view to the best interests of the corporation.[1] In this respect, Canada's case law diverged from that of the United States, which for years fixated on a shareholder primacy approach to directors' duties.

There is no doubt that the fiduciary duty of directors and officers involves consideration of climate-related risks and opportunities. Canada's Office of the Superintendent of Financial Services (OSFI) has observed that "[c]limate change and the global response to the threats it poses have the potential to significantly impact the safety and soundness of federally regulated financial institutions (FRFI) and the financial system more broadly" (OSFI 2023). The chief executive officers of Canada's eleven leading pension plan investment managers have called on companies to embrace the International Sustainability Standards Board (ISSB) disclosure framework, integrating material climate-related factors into their strategies and investment decisions, recognizing that management of climate risk is an integral part of the duty they owe to clients, contributors, and beneficiaries (Maple 11 Pension Plans 2023).

Directors that fail to meet their obligations for oversight and management of climate-related risks leave themselves and their companies vulnerable to both regulatory sanction and civil litigation. This article discusses the contours of climate governance and directors' duties in relation to climate risk management. A comprehensive understanding of fiduciary duties can facilitate, rather than constrain, the ability of directors, officers, and other fiduciaries to address the complex challenges of climate-related financial risk (Sarra 2018). Such an understanding provides an answer to concerns that consideration of climate change somehow places social benefits before maximization of enterprise wealth and financial performance of a company's investments. Fiduciaries have a duty to acknowledge, identify, and address the potential costs and benefits of climate change risk, even where those costs and benefits cannot be fully quantified immediately (Sarra 2020, 64).

The article is structured as follows. Part II briefly summarizes Canadian case law on directors' duties. Part III highlights where Canadian regulators lead and lag on providing direction on effective climate governance and briefly discusses how litigation risks may arise for the failure of fiduciaries to act. Part IV explores the contours of effective climate governance. Part V concludes.

II. Highest Elevation—the Supreme Court of Canada on Fiduciary Duty

[1] Peoples Department Stores Inc. v. Wise, [2004] 3 S.C.R. 461 (SCC); BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560 (SCC).

In Canada, both statutory and common law fiduciary obligations ground a duty to address climate-related financial risk. Codified fiduciary duty provisions operate in tandem with common law obligations. Corporate directors and officers are fiduciaries of the corporation. The Supreme Court of Canada (SCC) has held that 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." *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (SCC).

Canadian corporate laws specify that directors and officers of a corporation must "act honestly and in good faith with a view to the best interests of the corporation" and must "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" (*Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and sister provincial statutes). These duties arise from both the statutory language and the common law. The SCC has held: "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." *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (SCC), para. 39. In executing its duty of loyalty to the corporation, the board of directors is required to reflect on the interests of the corporation both as an economic actor and as a "good corporate citizen." *BCE*, 3 S.C.R. at para. 66.

While early court decisions on the common law fiduciary obligation found that the obligation includes both the duty of care and the duty of loyalty, twenty years ago, in applying statutory corporate law, the SCC separated the statutory director and officer duties into the duty of loyalty (calling it the statutory fiduciary obligation) and the duty of care. While the substance of the duties did not change, the entit(ies) to whom the duty was owed were distinguished. The duty of loyalty is to the corporation and the duty of care is broader—it is a duty of care to both the corporation and potentially other stakeholders. The SCC held that the duty of care does not specifically refer to an identifiable party as the beneficiary of the duty, and thus, the identity of the beneficiary of the duty of care is more open-ended. *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (SCC), para. 57. This approach may mean that stakeholders other than those with a direct financial investment could seek remedies for directors' failure to act on climate change if they were adversely affected by these failures.

The SCC held that the statutory duty of care requires more of directors and officers than the traditional common law duty of care. *Peoples Department Stores Inc. v. Wise*, [2004] 3 S.C.R. 461 (SCC), para. 62. Specifically, the statutory duty of care includes the words "in comparable circumstances," which modifies the statutory standard by requiring that the context in which a given decision was made be taken into account. *Peoples*, 3 S.C.R. at para. 62. The SCC held that it is an objective standard; the factual aspects of the circumstances surrounding the actions of the director or officer, as opposed to the subjective views of the director or officer, are important in the statutory duty of care. *Peoples*, 3 S.C.R. at para. 63. The SCC stated:

> 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. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions. The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care.

Peoples, 3 S.C.R. at para. 64. Applying this reasoning, directors' duties include consideration of what good corporate citizenship requires in the context of climate change.

Effective November 2019, the Canada Business Corporations Act (CBCA) was amended to codify the common law to specify that, when acting with a view to the best interests of the corporation, the directors and officers of the corporation may consider, but are not limited to, the following factors: the interests of shareholders, employees, retirees and pensioners, creditors, consumers, and governments; the environment; and the long-term interests of the corporation. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1.1). The language is permissive in that directors may consider multiple interests as they meet their statutory duty to "(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." R.S.C. 1985, c. C-44, s. 122(1). The amendments apply to more than 450,000 Canadian companies. Even without this statutory language, Canadian case law is very clear that the duties are to the company.

To date, there is no Canadian appellate court judgment on directors' duty to manage climate-related risks, but there is no doubt that these issues will come before the courts, as they have in other jurisdictions. It therefore makes sense to consider the contours of these duties prior to their reaching the litigation stage.

Another remedy available under Canadian corporations statutes is the oppression remedy. It is a broader accountability mechanism than fiduciary duty and a potentially powerful tool to press directors to take action on climate change. The oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. If the court finds that the directors acted in a manner that is "oppressive, unfairly prejudicial or unfairly disregarding" to the interests of security holders (and by leave of the court, other stakeholders), an extraordinarily broad set of remedies is available to complainants bringing such claims. *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (SCC), para. 45; *Wilson v. Alharayeri*, [2017] 1 S.C.R. 1037 (SCC). The remedy "is available to a wide range of stakeholders—security holders, creditors, directors and officers"; it "seeks to ensure fairness—what is just and equitable." *BCE*, 3 S.C.R. at paras. 45, 58.

In establishing that directors have breached their obligations such that the oppression remedy is available, the complainant must first identify the expectations that they claim have been violated by the conduct at issue and establish that the expectations were reasonably held. *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (SCC), paras. 59, 68. Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive, unfairly prejudicial to, or unfairly disregarded the interests of "any security holder, creditor, director or officer." *Wilson v. Alharayeri*, [2017] 1 S.C.R. 1037 (SCC), para. 24. The scope of the remedy is broad, including orders restraining conduct, replacing directors, setting aside transactions, and compensating aggrieved persons. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 241(3). The oppression remedy seeks to apply a measure of corrective justice, but the remedy should go no further than necessary to correct the injustice or unfairness of the directors' actions or inaction. *Wilson*, 1 S.C.R. at para 27.

The SCC has held that the concept of reasonable expectations is objective and contextual. Fair treatment—a central theme running through the oppression jurisprudence—is most fundamentally what stakeholders are entitled to "reasonably expect." *Wilson v. Alharayeri*, [2017] 1 S.C.R. 1037 (SCC), paras. 62–64. There need not be any bad faith or an intention to harm the complainant. 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." *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (SCC), para. 81.

The SCC has also clarified the scope of potential personal liability of directors in an oppression action under Canadian corporate law. The test for personal liability requires that the "oppressive conduct must be attributable to the individual director because of his or her action or inaction." *Wilson v. Alharayeri*, [2017] 1 S.C.R. 1037 (SCC), paras. 41–55. The SCC held that the general principles guiding the courts in fashioning a remedy include that the remedy requested must be a fair way of dealing with the situation; fairness is central to the inquiry, and it may be fair to hold a director personally liable where a remedy against the corporation would unduly prejudice other security holders. The SCC held that while personal benefit and bad faith are hallmarks of conduct attracting liability, they are not necessary preconditions to imposing personal liability. Fairness must be assessed in light of all the circumstances of a particular case. Any order should go no further than necessary to rectify the oppression and vindicate the reasonable expectations of stakeholders, and a court should consider the general corporate law context in exercising its remedial discretion. *Wilson*, 1 S.C.R. at paras. 53–55.

Applying these standards to conduct in respect of climate change risk, under Canada's corporate law oppression remedy, "unfair disregard" of interests extends the remedy to instances where directors have ignored an interest as being of no importance, contrary to the stakeholder's reasonable expectations. Courts have interpreted access to the remedy to include security holders and directors, including employee creditors,[2] although the statute specifies that a complainant can also be "any other person who, in the discretion of a court, is a proper person to make an application." *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 238(d). Directors and officers are arguably at risk of personal liability if a complainant had a reasonable expectation that they would address climate change risks and they disregarded the risks. Once the court recognizes the risk or harm caused, it has broad authority to craft a remedy to address it. However, directors' due diligence in addressing climate risk will protect them from personal liability.

III. Differing Scales—Canadian Policymakers and Regulators Both Lead and Lag in Providing Direction on Effective Climate Governance

Directors and officers benefit from policymakers and regulators setting clear direction regarding their obligations in relation to climate governance. Topographically, "scale" represents the ratio of a distance on the map to the actual distance on the ground (Natural Resources Canada 2014). Here, scale represents the distance between the actions of Canadian corporate, securities, and financial services regulators and international regulatory developments. In this respect, OSFI leads, as does its equivalent supervisory authority in Québec, L'Autorité des marchés financiers (AMF), whereas securities regulators and corporate policymakers, to date (February 2025), seriously lag. These actions or inaction can leave directors and officers in some sectors without clear direction on the contours of their climate-related governance obligations.

[2] Joncas v. Spruce Falls Power & Paper Co. Ltd., [2001] O.J. No. 1505 (Ont. C.A.); Downtown Eatery (1993) Ltd. v. Ontario, [2001] O.J. No. 1879 (Ont. C.A.), *leave to appeal refused*, (2002) 163 O.A.C. 397 (SCC).

A. The Summit—Financial Regulators Lead in Climate Regulatory Guidance and Supervision

OSFI was the first financial supervisory authority in North America to issue mandatory guidance on climate risk management, issuing Guideline B-15: Climate Risk Management in 2023 (OSFI 2023) and updating it in March 2024 to align it with ISSB's International Financial Reporting Standards (IFRS) Foundation's IFRS S2 Climate-Related Disclosures Standard (IFRS S2). Guideline B-15 applies to more than four hundred federally regulated insurance companies and banks and will have ripple effects in the wider economy as these entities account for their financed transactions and investments in lower-carbon-emitting companies. Among OSFI's requirements is that the federally regulated financial institution (FRFI) must describe the governance body and individuals responsible for oversight and management of climate-related risks and opportunities, including their identity, responsibilities, skills and competencies, oversight of strategy, major transactions, risk management processes, monitoring and oversight of climate-related risks and opportunities, and target setting and monitoring progress toward those targets, and describe whether and how climate-related considerations are factored into senior management compensation.

In respect of strategy, Guideline B-15 requires disclosure of the climate-related risks and opportunities the FRFI has identified that have affected or could reasonably be expected to affect its financial position, financial performance, cash flows, and access to finance or cost of capital over the short, medium, and long term, classifying each as physical or transition risk; the expected timeframe for occurrence of effects associated with each risk and opportunity; and its definitions of short, medium, and long term in relation to strategic decision-making planning horizons. Directors must describe current and anticipated effects of climate-related risks and opportunities on the FRFI's business model and value chain, including where they are concentrated, and disclose information about current and anticipated changes to their business model, including resource allocation, to address climate-related risks and direct and indirect mitigation and adaptation efforts.

Critically important is the requirement to develop and disclose a climate transition plan (OSFI 2023, 5, 20). The financial institution must describe the resilience of its strategy, taking into consideration different climate-related scenarios. Directors must disclose information about processes and related policies for identifying, assessing, prioritizing, and monitoring climate-related risks and opportunities, including how the firm plans to remain financially resilient through severe, yet plausible, climate risk scenarios, and operationally resilient through disruption due to climate-related disasters (ibid. at 4, 21). Directors must disclose information about the extent to which, and how, their processes are integrated into and inform their overall risk management process. Guideline B-15 also sets out comprehensive disclosure requirements in respect of metrics and targets.

L'Autorité des marchés financiers (AMF) has also set out its expectations for directors and senior management in addressing climate-related risks. Given that Canada is a bijuridical jurisdiction, the AMF is the prudential supervisor for Québec-regulated financial institutions and the market conduct regulator for all banks and insurance companies operating in Québec. The AMF's Climate Risk Management Guideline (Ligne directrice sur la gestion des risques liés aux changements climatiques) (AMF 2024) builds on OSFI's guideline, including requirements that the financial institution develop transition plans, identify and integrate management of climate-related risks and their impact into their integrated risk management policies, and establish and monitor emissions reduction targets and

progress in meeting those objectives (ibid. at 5–7). The AMF expects the roles and responsibilities of directors and senior management to be clearly defined so that they fulfill their duties in addressing climate-related risks; the board's strategy must address climate change–related impacts and the transition to a lower-carbon economy.

The AMF Guideline states that the board of directors should act competently and independently when addressing climate-related risks and that directors should ensure that climate-related risks are addressed in integrated risk management policies and annual budgets; should monitor progress in relation to objectives and targets established to address climate-related risks; and should ensure that climate risks are considered when developing compensation policies for senior management and other key positions. The AMF expects the financial institution to maintain sufficient capital and liquidity to cover its climate risk exposures (AMF 2024, 9). The AMF Guideline specifies:

> It is crucial that the financial institution understand and identify the impacts of climate-related risks on its short- and long-term strategic, financial and capital planning. The institution's strategy should therefore include a description of what it considers to be appropriate for each time horizon while considering the useful lives of its assets and infrastructure. . . . The financial institution should implement a transition plan in line with its business plan, strategy and risk appetite. The transition plan should guide the institution's actions to manage physical risks and risks associated with the transition towards a lower-carbon economy. The institution should provide the methodology and measurements used to assess its progress against the initial transition plan (e.g., internal metrics and targets such as GHG emissions). The institution should use different time horizons and climate-related scenarios to describe the climate-related risks it has identified and the impacts of those risks on its operations, strategy and financial planning . . . the financial institution should establish strategies, policies and procedures to properly identify and assess its climate-related risks and to manage them in accordance with its integrated risk management framework, transition plan and risk appetite. (AMF 2024, 6–7)

In addition, the AMF Climate Risk Management Guideline sets out market conduct rules. Under the umbrella of "fair treatment of clients," a financial institution must be proactive in considering climate-related risks through the entire life cycle of its products or services, particularly with respect to product design and clients' needs and interests. Whether products are offered through intermediaries or directly, the financial institution must inform clients of the effects of physical and transition risks generated by climate change as well as the consequences of extreme weather events that could have an impact on the products it offers; review the appropriateness of certain financial products for target client groups; and ensure that the products (for example, insurance for acute events) deliver benefits and features that are reasonably expected by the target client groups (AMF 2024, 9–10). The AMF Guideline states that the complexity of certain financial products can interfere with clients' ability to clearly understand them and that a higher level of detail may be necessary to help clients understand the product and avoid causing them to believe they are adequately covered against climate-related risks or extreme weather events if such is not the case. The board of directors must engage in oversight of management complying with the fair treatment provisions.

The Canadian Sustainability Standards Board (CSSB) has also provided leadership in recommending adoption of the international sustainability and climate accounting standards (CSSB 2024a). The CSSB was established in 2023 to serve the public interest by setting and maintaining high-quality sustainability disclosure standards for Canadian entities. The CSSB issued two exposure drafts in

March 2024, Canadian Sustainability Disclosure Standard 2 Climate-Related Disclosures (CSDS 2) and a draft Sustainability Standard (CSDS 1) (CSSB 2024a, 2024b, 2024c). After extensive public consultation, the CSSB finalized the Canadian climate-related and sustainability disclosure standards in December 2024, with the standards becoming effective 1 January 2025. It adopted both ISSB standards in their entirety, with modifications on timing. The start date for annual reporting periods based on calendar fiscal year is 1 January 2028, with three years of relief on reporting quantitative scenario analysis (not the qualitative aspects) and for Scope 3 GHG emissions reporting.[3] The objective of CSDS 2 is to require an entity to disclose information about its climate-related risks and opportunities that is decision-useful to primary users of general-purpose financial reports. This standard requires an entity to disclose information about climate-related risks and opportunities that could reasonably be expected to affect the entity's cash flows, its access to finance or cost of capital over the short, medium, or long term. A qualifying provision in both IFRS S2 and CSDS 2 is that in identifying the climate-related risks and opportunities that could reasonably be expected to affect an entity's prospects, "the entity shall use all reasonable and supportable information that is available to the entity at the reporting date without undue cost or effort, including information about past events, current conditions and forecasts of future conditions" (ISSB 2023, para. 11; CSSB 2024b, para 11). The complete alignment of Canada's standards with the ISSB standards in terms of substantive provisions is viewed in Canada as a major step forward in aligning Canada with the global baseline of sustainability disclosure standards (CSSB 2024b, IOSCO 2023a). While the delayed timing is less than ideal when one considers the urgency of climate risk management, it does afford companies time to develop effective governance strategies and infrastructure to implement the transition.

B. Depressions—Securities and Corporate Regulators Lag

"Depressions" on a contour map signify areas lower than sea level, and here, signal that regulators have done less than the international standards baseline. The Canadian Securities Administrators (CSA) have acknowledged that climate-related risks are a mainstream business issue and stated that issuers should consider these risks as part of their ongoing risk management and that they must disclose any risks that are material to their business (CSA 2019). However, securities regulation is a provincial and territorial power under Canada's Constitution, which means that a national rule on climate-related disclosure needs the consensus of regional governments that are very divided on the issue of regulating climate risks.

It has been more than three years since the CSA-proposed National Instrument 51-107 Disclosure of Climate-Related Matters (NI 51-107) and its companion policy were published for consultation and yet no standard has been finalized (CSA 2021). Proposed NI 51-107 is, at best, a very weak proposed disclosure document. At the time it was proposed, institutional investors with 21 trillion CAD in assets under management urged the CSA to move swiftly to substantially revise and finalize NI 51-107 if Canada is to obtain its share of capital flows to sustainable finance (Sarra, Irish, and Copithorne 2022). Since then, the world has moved forward exponentially on regulatory guidance on transition to net-zero GHG emissions and effective governance and disclosure of climate-related financial risks and opportunities (CCLI 2024), while the CSA member securities commissions have not agreed on disclosure rules.

The CSA's failure to act has left Canadian issuers increasingly vulnerable to litigation and enforcement risk as they try, on an ad hoc basis, to craft climate-related disclosure that meets regulatory and civil

[3] CSSB, https://www.frascanada.ca/en/cssb/news-listings/csds1_csds2_launch (18 December 2024).

liability materiality standards. Without clear requirements and guidance, the risk of litigation against issuers increases, as is evident by the more than twenty-three hundred climate litigation cases to date globally, 40 percent of which have been filed against corporations (Setzer and Higham 2023).

Canadian corporate law is also lagging behind that of other jurisdictions in respect of climate-related governance standards. Canada has many very large privately held companies, longstanding family-owned dynasties that will not be subject to securities requirements if and when securities regulators act. The federal government announced in its 2023 fall economic statement that it would create some disclosure requirements for large federally regulated corporations, but to date (February 2025), has failed to introduce any regulation. No provincial or territorial government has created corporate climate governance requirements. In this respect, Canada lags behind the United Kingdom, the European Union, and other countries.

The Canadian government is also lagging in developing a green and transition finance taxonomy. Taxonomies are a critical tool for increasing Canada's ability to attract global capital and for reducing the risk of "greenwashing" (SFAC 2022). Investors need transparency and certainty in order to make strategic investment decisions. A taxonomy does not dictate investors' or companies' investment or capital expenditure choices; rather, a science-based taxonomy will create the market integrity, clarity, and interoperability necessary to accelerate global capital investment in Canada's low-carbon transition (CCLI 2024). The twenty-six largest financial institutions in Canada, through the government of Canada's Sustainable Finance Action Council (SFAC), recommended a roadmap to create such a taxonomy more than two years ago (SFAC 2022). The SFAC Taxonomy Roadmap proposes three requirements for eligibility as green or transition finance: company-level net-zero target setting, transition planning, and effective climate disclosure; evaluation of project against framework criteria to determine whether it is green or transition finance; and assessment, by the company issuing the finance of the project, against "do no significant harm" criteria to ensure that the project is not detrimental to other environmental, social and governance (ESG) objectives (ibid. at 4).

As of February 2025, the federal government has yet to set up the council to develop and implement the taxonomy. Meanwhile, taxonomies have been adopted or are in the process of being adopted by more than forty countries (CBI 2024), and thus, Canada may miss important opportunities to attract sustainable finance capital.

C. Relief—Engagement with Companies and Litigation Risk

The "relief" on topographic maps refers to the mountains, valleys, and slopes, referenced by contour lines. In the context of this article, it marks a number of different ways to engage with companies regarding their carbon footprint and the need to manage climate-related financial risks and opportunities, each on a continuum of cooperation/pressure, and some with greater challenges to surmount. Corporate engagement relating to climate change includes direct engagement with corporate boards by investors, filing shareholder proposals, and using proxy voting at annual general meetings to pressure directors to act. These forms of engagement with corporate fiduciaries, as well as divestment, policy engagement, and litigation, are all strategies being deployed to shift companies' and institutional investors' activities toward achieving net-zero carbon emissions. If one thinks about climate change as the most serious symptom of failure to sustainably develop, various strategies of investors and other stakeholders to engage with companies can help them enhance their governance

and shift trajectory to take meaningful climate mitigation and adaptation measures (Sarra 2020, 199), as well as chart a map or pathway toward sustainability.

Litigation against companies and their directors and officers is often commenced when efforts at engagement fail to create meaningful change. Climate-related litigation in Canada is likely to arise in respect of securities law, financial services, corporate law, and competition law. There is particular risk of lawsuits alleging misrepresentation and "greenwashing/climate-washing" (IOSCO 2023b), particularly because of the lack of clear standards from securities and corporate regulators. While climate-related litigation is nascent to date, there are indications that claims will begin to increase.

1. Greenwashing Claims

Greenwashing cases have commenced in Canada. Greenwashing, sometimes referred to as "climate-washing," can take different forms, including providing misleading information on greenhouse gas (GHG) reduction targets, "truth to label," "enterprise branding," and financial reporting (Barker et al. 2023). They all refer to instances where a company misrepresents its sustainability-related risks, business credentials, or strategies, or those of its products or services.

One of the first civil greenwashing lawsuits in Canada was filed by two British Columbia residents and an NGO in March 2024 against FortisBC, alleging that Fortis is misleading consumers in its advertising by misrepresenting that its renewable natural gas supply is available as part of its climate action while not mentioning that 90 percent of the gas in its system is fossil fuel–produced, primarily from fracking. The lawsuit alleges that Fortis's misleading information is encouraging people to buy new gas furnaces and lock themselves into using gas for decades. They claim misrepresentation and greenwashing in violation of British Columbia's Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2.[4]

Federally, the Competition Bureau of Canada has investigation and enforcement authority regarding false, misleading, or unsubstantiated environmental claims pursuant to the Competition Act, the Textile Labelling Act, and the Consumer Packaging and Labelling Act (Competition Bureau Canada 2021). For example, the Competition Act protects against deceptive marketing practices and prohibits representations to the public that are false or misleading in a material respect. Effective 20 June 2024, new provisions were added to the Competition Act that explicitly enhance the ability to investigate and sanction greenwashing. Businesses are now required to have testing or substantiation to support environmental claims. Specifically, section 74.01 now states:

> (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
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> (a) makes a representation to the public that is false or misleading in a material respect;
>
> (b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;

[4] Notice of Civil Claim, *Stand Environmental Society*, No. S-241957 (Sup. Ct. B.C. March 25, 2024), paras. 3–5.

> (b.1) makes a representation to the public in the form of a statement, warranty or guarantee of a *product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change that is not based on an adequate and proper test*, the proof of which lies on the person making the representation;
>
> (b.2) makes a representation to the public with respect to the *benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is not based on adequate and proper substantiation in accordance with internationally recognized methodology*, the proof of which lies on the person making the representation.

Competition Act, R.S.C. 1985, c. C-34, s. 74.01 (emphasis added). The amendments give protections to consumers and create a baseline of accountability in respect of the environmental claims made by both private and public companies. The amendments will also allow private parties to bring cases for deceptive advertising practices directly before the Competition Tribunal as of mid-2025 if they can show public interest. R.S.C. 1985, c. C-34, s. 103.1. If granted leave by the tribunal, a private party can pursue interim injunctive relief, final orders, and administrative monetary penalties against companies.

Even prior to the 2024 amendments, the Competition Bureau investigated greenwashing complaints. In 2022, it settled with Keurig for 3 million CAD regarding allegations that Keurig had been making false or misleading representations about the environmental friendliness of its drink pods; Keurig also agreed to make changes to its packaging and advertisements going forward.[5]

The Competition Bureau investigated a complaint against Shell Canada in relation to its "Drive Carbon Neutral" advertising campaign, alleging that it is making false and/or misleading representations to the public.[6] In December 2023, Shell removed all representations regarding this ad campaign from its Canadian website and app and the Bureau terminated its investigation.[7] The Competition Bureau is also investigating a complaint about representations made by the Pathways Alliance, a coalition of the six largest oil sands producers, regarding their ad campaign "Let's clear the air," alleging that claims that they are reducing emissions are false and misleading given their continuing expansion of fossil fuel production, lobbying against climate action, and failure to meet their own emission targets.[8]

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[5] Consent Agreement, *Commissioner of Competition v. Keurig Canada Inc.* (No. CT-2022-001, Competition Tribunal, January 26, 2022), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/518827/index.do.

[6] Greenpeace, Complaint to the Competition Bureau of Canada Against Shell's Misleading Promotion of Forest-Based "Offsets" as Sustainable, Climate Action: "Driving Carbon-Neutral" Is Impossible with Fossil Fuels, 2021, https://greenpeace.org/static/planet4-canada-stateless/2011/11/a7369fc0-driving-carbon-neutral-is-impossible-with-fossil-fuels.docx.pdf.

[7] Competition Bureau, Letter re Termination of the examination into Shell Canada Limited's "Drive Carbon Neutral" program (December 2023), https://www.greenpeace.org/static/planet4-canada-stateless/2024/01/cedd98c3-letter-to-greenpeace-signed-dec-14-2023.pdf.

[8] Greenpeace, Complaint to the Competition Bureau of Canada: Application for Inquiry into False and Misleading Representations Made by the Pathways Alliance About Their Climate Action and the Climate Impact of Their Business, 2023, https://greenpeace.org/static/planet4-canada-stateless/2023/03/8c835b91-amended-competition-bureau-submission-for-pathways-alliance-ad-campaign.pdf; Competition Bureau of Canada, Notice of Commencement of Inquiry into Certain Marketing Practices of Pathways Alliance (April 25, 2023), https://greenpeace.org/static/planet4-canada-stateless/2023/05/cb0803da-cdpalumbo-inquiry-confirmation-2023-4-25-greenpeace.pdf.

Six Indigenous leaders filed a complaint to the Competition Bureau alleging that the Royal Bank of Canada (RBC) continues to produce misleading advertising related to the bank's commitments on climate action while financing fossil fuel development and announcing that it will not end fossil fuel investment. RBC is the fifth largest funder of fossil fuels among private banks globally, and the largest in Canada (Ecojustice 2022).

Stand.earth has also filed a complaint with the Competition Bureau about Lululemon's "Be Planet" campaign, in which the company highlighted the use of recycled fabrics in its products and pledged to reduce GHG emissions, relying on Lululemon's 2022 Impact Report to argue that Lululemon's Scope 3 emissions have in fact more than doubled since 2020. Among remedies it is seeking are revision of all public claims and a penalty of 3 percent of Lululemon's annual worldwide gross revenues, to be paid to an organization for the purposes of climate mitigation and adaptation in Canada.[9] The Competition Bureau opened an investigation into these greenwashing complaints in April 2024.[10]

These complaints over the past two years are only the beginning of challenges and litigation in respect of greenwashing. With the 2024 amendments, there will be considerably more scope to hold companies and their directors accountable for their climate-related marketing practices.

2. Securities Law Misrepresentation Claims

Even without a national instrument on climate-related disclosure, securities regulators have authority to sanction an issuer for misrepresentation or failure to disclose material information likely to influence investors' decisions to buy, hold, or sell securities. While regulators appear not to have commenced any enforcement actions in respect of climate disclosure, one CSA report in 2022 cautioned issuers against greenwashing, giving examples of overstating commitments to climate mitigation and sustainable finance (CSA 2022).

In addition to potential regulatory sanction, there is a statutory cause of action under provincial and territorial securities laws for investors who suffer losses in the secondary market in connection with misrepresentations or omissions by a company or its officers. There have been more than 125 statutory secondary market class action cases in the past two decades. Secondary market claims arise where an issuer or a person with actual, implied, or apparent authority to act on behalf of an issuer releases a document that contains a misrepresentation or makes a public oral statement that relates to the business of the issuer and contains a misrepresentation. Damages are measured between the time of the misstatement or failure to make timely disclosure and the time of its public correction.

A recent report suggests that major carbon-emitting Canadian firms are not sufficiently engaged in transition. Climate Engagement Canada (CEC) is a finance-led initiative comprised of forty-eight institutions with 6 trillion CAD assets under management that drives dialogue between the financial community and corporate issuers to help publicly held companies successfully transition to a net-zero economy. CEC reports that of forty-one companies in six sectors, the highest performance band

[9] Stand Environmental Society, Complaint to the Competition Bureau of Canada: An Application Pursuant to s. 9(1)(b) of the *Competition Act,* RSC 1985, c C-34 Requesting That the Commissioner Cause an Inquiry to Be Made into the Conduct of Lululemon Athletica Inc. (February 8, 2024), https://stand.earth/wp-content/uploads/2024/02/ApplicationFeb.pdf.
[10] Competition Bureau, Notice of Inquiry Commencement Your File No. 157336, https://stand.earth/wp-content/uploads/2024/05/3116813-DC-Palumbo-Notice-of-Inquiry-Applicants_2024-04-26_Redacted.pdf.

assigned to all companies assessed in the past year was a mark of "C"; none rated an A or B, which would have indicated support for a Paris Agreement–aligned climate policy (CEC 2024). Such results indicate that engagement with companies may not be sufficient and litigation may start to increase.

3. Corporate Law Relief

Arguably, when applying the statutory oppression remedies in corporate law to climate governance conduct, unfair disregard of interests extends the remedy to where directors have ignored an interest as being of no importance, contrary to the stakeholders' reasonable expectations. Given the evidence that climate-related risk is now a risk to all sectors of the economy, failure to identify and manage the risks and to have a plan to transition in the best interests of the company's long-term sustainability, could give rise to a finding of oppression. Directors and officers may also be at risk of personal liability if a complainant can establish a reasonable expectation that directors and officers would address climate change risks and they disregarded the risks.

Another tool that corporate stakeholders may have to encourage directors to act on climate change is a derivative action under corporate law, in which a complainant "steps into the shoes of the corporation" and brings an action in the name of the company to enforce directors' duty to the corporation when the directors themselves are unwilling to do so. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 239; *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (SCC), para. 43. With leave of the court, a complainant may bring (or intervene in) a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation, including the rights correlative with the directors' duties to the corporation. R.S.C. 1985, c. C-44, s. 239; *BCE*, 3 S.C.R. at para. 43. Arguably, stakeholders could establish that the failure of directors to act on climate change has caused harm to the financial viability of the company. The courts generally serve a gatekeeping role in exercising their power to grant leave to commence a derivative action. The complainant must first ask the directors to act, which creates an opportunity for the directors to turn their minds to climate risk management. One barrier to bringing such lawsuits, however, is the cost of litigation. Courts have 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 for anyone without deep resources.

Important to note is that directors have a due diligence defense under corporate law, which means that if they take action to oversee and manage climate-related risks and err in some way, having acted duly diligently will protect them from personal liability. Courts will determine whether the directors made a reasonable decision, not a perfect decision. *Peoples Department Stores Inc. v. Wise*, [2004] 3 S.C.R. 461 (SCC), para. 65. Canadian courts have held that many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Provided the decision taken is within a range of reasonableness, courts are unlikely to substitute their opinion for that of directors, even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision (Sarra 2020, 81; *Maple Leaf Foods Inc. v. Schneider Corp.*, (1998) 42 O.R.3d 177 (Ont. C.A.); *Peoples*, 3 S.C.R. at para. 65). However, deference to business judgment is not boundless. Canadian courts have held that "they 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." *Peoples*, 3 S.C.R. at para. 67.

4. Ripple Effects of Public Law Litigation

Litigation against governments will also inform private sector litigation. For example, some aspects of Canadian Charter of Rights and Freedoms challenges have been allowed to proceed. La Rose v. Canada, 2023 F.C.A. 241 (FCA). The SCC has held that the fact that a matter is complex or contentious does not mean that the courts can abdicate the responsibility vested in them by the Constitution to review legislation for Charter compliance when citizens challenge it. *Chaoulli v. Québec*, [2005] 1 S.C.R. 791 (SCC), para. 107. There is litigation against governments in respect of their approval of various production processes that negatively impact the climate; examples include First Nations seeking to protect their traditional territory; a challenge to a failure to conduct a federal impact assessment for a several-thousand-kilometer pipeline; and litigation to protect orca whales from airport terminal expansion (*Mitchikanibikok Inik First Nation (Algonquins of Barriere Lake) v. Québec*, 2021 Q.C.C.S. 4752 (Que. S.C.), paras. 71–72; Ecojustice 2020; Ecojustice 2024).

Initially, cases were dismissed on the basis that they were not justiciable. *Mathur v. Ontario*, 2020 O.N.S.C. 6918 (Ont. S.C.J.) was the first case to find climate claims justiciable and to proceed to a full hearing before the Ontario Superior Court. In April 2023, the court dismissed the case. 2023 O.N.S.C. 2316 (Ont. S.C.J.). However, the court affirmed that the case was justiciable and found that it was "indisputable" that Ontarians are experiencing increased risk of death and serious bodily harm from climate change and that the government of Ontario, by enacting a target to reduce GHG emissions that falls well below what the global scientific consensus says is required, is contributing to that risk of harm. It also recognized that climate change disproportionately impacts young people and Indigenous peoples. The case was dismissed on the basis that the applicants had not established any violations of their rights pursuant to the Charter of Rights and Freedoms in the Canadian Constitution (*Charter*).

In October 2024, the Court of Appeal for Ontario allowed an appeal and set aside the superior court decision (*Mathur v. Ontario*, 2024 ONCA 762), concluding that by enacting the *Cap and Trade Cancellation Act, 2018*, S.O. 2018, c. 13, the Ontario government voluntarily assumed a positive statutory obligation to combat climate change and to produce the plan and the target for that purpose; it was therefore obligated to produce a plan and a target that were *Charter* compliant. The Court of Appeal held that the judge did not address whether Ontario failed to produce a plan and a target that was *Charter* compliant in accordance with its statutory mandate and as a result, the ss. 7 and 15 *Charter* issues raised by the appellants remain to be determined. Section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 15(1) specifies that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability. The Court of Appeal held that the judge's mischaracterization of the issue before her caused her to err in her analysis of the whether the impugned measures deprived the appellants of life or security of the person and, if so, whether the deprivations suffered were in accordance with the principles of fundamental justice against arbitrariness and gross disproportionality. The Court of Appeal remitted the matter for a new hearing, stating that issues raised on the application must be considered afresh and through the correct analytical lens (Mathur, paras 75, 76). The Ontario government has now made an application for leave to appeal the judgment to the Supreme Court of Canada. The youth complainants cross-appealed in January 2025, asking the SCC to take swift and

decisive action by either sending the case to an immediate hearing at the superior court, or, if leave is granted, asking the SCC to hear all aspects of this case and come to a final, fulsome resolution (Ecojustice 2025).

The outcome of these cases challenging governmental action or inaction will guide governments in how they meet their responsibilities regarding climate-related mitigation and adaptation, in turn affecting how they regulate or legislate requirements of companies. Federal and provincial governments have repeatedly stated that they support transition to net-zero emissions, and legal challenges (as well as elections) will ultimately determine the trajectory of statutory obligations on directors and companies.

IV. The Contours of Effective Climate Governance

"Magnetic north" is the direction to which a compass needle points, aligning maps to allow us to locate ourselves geographically and in comparison to others. The discussion to this point illustrates a growing consensus on the contours of effective climate governance through international efforts to set baseline accounting, corporate law, and financial services standards—by analogy, alignment in a common direction. This part shifts to a forward-looking analysis of what directors and officers should be considering as they oversee and manage the landscape of their climate-related fiduciary duties. It can support further understanding of the contours of directors' duties of care and loyalty in identifying and managing climate-related risks and opportunities, and offer insights for various stakeholders in respect of what their reasonable expectations should be of directors and officers of the corporations in which they have an interest. It may help inform courts as to how they should approach complaints that directors and officers are failing to meet their statutory or common law duties. Canadian policymakers, investors, companies, and civil society organizations have relied heavily on the development of international principles and best practices in climate governance, and where these developments have been embraced in Canada, they are cited. They may also offer insights for directors in the US and elsewhere on effective climate governance.

There is a direct economic link between directors' and officers' duties and effective climate governance. In acting in the best interests of the company, directors and officers have a duty to be proactive and critically evaluate and address the material financial and other risks and opportunities associated with climate change (Sarra 2020, 73). There is a diversity of issues for boards to address, depending on the location and type of the company's operations, assets, and supply chain. Climate-related risk is one of many risks that directors must identify and plan for in exercising oversight of the company, along with other current risks such as cybersecurity, fintech financing, insurance pricing and availability, and health pandemics. Part of directors' responsibility is to assess the materiality of these risks and work to address material risks to the extent that they can. In this respect, directors need to ensure that their managers are providing them with the information and technical expertise to allow the directors to make effective decisions about business strategies and responses to myriad risks, allocating resources as appropriate (ibid. at 73).

Fiduciary obligations require directors and officers to make decisions based on a horizon longer than the financial quarter or year, and these decisions should not be limited to profit or return on investment for such limited periods (Sarra 2020, 64). Climate-related financial risk will continue to increase as Canada transitions to a net-zero carbon economy. Directors and officers have a duty to identify the risks, and where these risks are material, they have an obligation to develop strategies to

address those risks in the best interests of the company. Duly diligent efforts by these fiduciaries are not likely to be second-guessed by the courts, and thus, the best strategy to avoid liability risk is by acting now.

Directors also have a responsibility to consider the benefits of investment in green adaptation and mitigation technologies and other products and services that are likely to have upside financial potential in the transition to a net-zero carbon economy. Efforts to mitigate and adapt to climate change will produce new opportunities for business through resource efficiency and cost savings, technological innovation, the development and/or adoption of new low-emission products, services, and energy sources, and access to new markets as sectors shift to a net-zero carbon economy and build resilience along the supply chain (Financial Stability Board Task Force on Climate-Related Financial Disclosures 2017, 6–7; G20 Green Finance Study Group 2016).

Globally, the broad scientific consensus on the risks and impacts of climate change, and recent governmental commitments to its remediation, create reasonable expectations by citizens that legal and other processes will advance Canada's public policy objectives of shifting to net-zero GHG emissions (Sarra 2020, 75). A focus on systemic risks acknowledges the interdependencies of companies, financial organizations, and civil society. It 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 and upholding the integrity of legal regimes—are concerned with the protection or enhancement of the public good (Rawls 2021; Sarra 2020, 75). 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 duties (Sarra 2020, 75).

Given the wide acknowledgment by scientists, governments, and the courts that climate change is an existential threat to human life in Canada and globally, with resultant massive economic impacts, *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.R. 175 (SCC), directors can no longer claim not to be aware of climate change. The duty of care requires directors and officers to exercise the care, diligence, and skill that a reasonably prudent person would exercise in the circumstances. This duty requires directors and officers to identify and develop strategies to supervise and manage the transition that will address the specific material risks posed by climate change. It also requires ongoing monitoring and adjusting of climate-related strategies to ensure that they continue to be responsive to the risks. Neglect of their duty may increase financial risks for the corporation. To the extent that the failure to act causes foreseeable harm to third parties, the corporation may be held liable through tort and other civil actions (Sarra 2020, 76).

The crucial question of "what are the best interests of the company" 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. Corporate fiduciaries in Canada can consider the interests of numerous types of stakeholders, rights holders such as Indigenous peoples, and the environment when determining how to act in the corporation's best interest in respect of climate-related risks and opportunities. Directors and officers who engage in good governance practices already take account of socioeconomic conditions and the diverse and sometimes conflicting interests of all constituencies with an interest in the company.

Director oversight involves balancing multiple considerations and different types of risk over different timelines, and the interests of a range of stakeholders, including debt and equity investors, employees, consumers, and suppliers. Effective oversight of managers means that directors need to be alert to

how risks specifically impact their company, sector, and region, how they may affect supply chains or distribution of products and services, and what strategies can be deployed to manage those risks (Sarra 2020, 76). They can rely on managers and professionals to advise them, but cannot delegate their fiduciary duties.

Directors can benefit from globally agreed-upon guidance on the contours of effective climate governance. Commenced by the Financial Stability Board's Task Force on Climate-Related Financial Disclosures (TCFD) framework and now augmented by IFRS S2 and CSDS 2, there are indicia of effective governance that Canadian regulators, supervisors, and the courts are likely to consider when assessing whether directors have effective governance in place, including strategy, climate resilience, oversight and management of financial performance and cash flows, risk management, and targets and metrics. Disclosure creates transparency in how companies are managing climate-related risks and responsibilities; however, the baseline standards also help delineate specific governance duties for which there is now global consensus. These six duties are directly relevant to directors and officers in Canada and other jurisdictions.

A. Governance

Disclosure of a company's governance of climate-related risks and opportunities enables users of the company's financial reports to understand the governance processes, controls, and procedures that directors and officers use to monitor, manage, and oversee climate-related risks and opportunities (ISSB 2023, para. 5; CSSB 2024b, para. 5, CSSB 2024d).

Effective governance requires directors to consider, oversee, and disclose information about the board, board committees, and individual managers that have responsibility for oversight and management of climate-related risks and opportunities; how those responsibilities are reflected in the terms of reference, mandates, role descriptions, and related policies; how the board determines whether appropriate skills and competencies are available or will be developed to oversee strategies designed to respond to climate-related risks and opportunities; how and how often directors are informed and take into account climate-related risks and opportunities when overseeing the company's strategy, decisions on major transactions, and risk management processes and related policies; how the board oversees the setting of targets and monitors progress toward those targets, including whether and how related performance metrics are included in remuneration policies; and management's role in the governance processes, controls, and procedures and how oversight is exercised to monitor, manage, and oversee climate-related risks and opportunities, including information about how management uses controls and procedures to support the oversight of climate-related risks and opportunities and how they are integrated with other internal functions (ISSB 2023, paras. 6, 29, 33–36; CSSB 2024b, paras. 6, 29, 33–36).

B. Strategy

Directors and officers must develop a strategy for managing climate-related risks and opportunities. They must identify and disclose the climate-related risks and opportunities that could reasonably be expected to affect the company's prospects; the current and anticipated effects of those risks and opportunities on its business model and value chain; and their effects on the company's decision-making, including information about the board's climate transition plan (ISSB 2023, paras. 9–14; CSSB 2024b, paras. 9–14; OSFI 2023, 4–7).

Shareholders, creditors, and other stakeholders have a reasonable expectation that directors and officers will have a strategy to respond to climate-related risks and opportunities, including plans to achieve any climate-related targets the company has set and any targets it is required to meet by law or regulation. Directors should oversee management of, and disclosure of, information about current and anticipated changes to the entity's business model, including its resource allocation to address climate-related risks and opportunities and to respond to demand- or supply-chain changes; and strategy regarding resource allocations arising from transition capital expenditures or expenditure on research and development. Directors need to consider how the company defines short, medium, and long term and how these definitions link to their planning horizons for strategic decision-making. Directors need to consider both direct and indirect mitigation and adaptation strategies; determine, implement, and monitor their climate transition plan; and oversee the company's efforts to achieve its climate-related targets (ISSB 2023, para. 14; CSSB 2024b, para. 14).

C. Climate Resilience

Climate resilience is defined as the capacity of an entity to adjust to climate-related changes, developments, or uncertainties, to manage climate-related risks and benefit from climate-related opportunities, including the ability to respond and adapt to both physical and transition risks; it includes both strategic resilience and operational resilience (ISSB 2023, para. 22; CSSB 2024b, para. 22; OSFI 2023, 6, 16).

It is important that directors understand and oversee the company's assessment of its climate resilience at each reporting date, including different physical and transition risks; the implications, if any, of the company's assessment for its strategy and business model, including how to respond to effects identified in its climate-related scenario analysis; the significant areas of uncertainty considered in the entity's assessment of its climate resilience; the board's capacity to adjust or adapt its strategy and business model over the short, medium, and long term, including financial resources to respond, redeploy, repurpose, upgrade, or decommission existing assets; and the effect of the entity's current and planned investments in climate-related mitigation, adaptation, and opportunities for climate resilience (ISSB 2023, paras. 9, 22; CSSB 2024b, paras. 9, 22).

D. Oversight and Management of Financial Position, Financial Performance, and Cash Flows

A significant change in the past decade is the recognition that climate-related physical and transition risks are financial risks in addition to being a threat to the planet and to humanity. Directors and officers should be able to identify, oversee, manage, and disclose both current and anticipated effects of climate-related risks and opportunities on the company's financial position, financial performance, and cash flows over different time horizons, taking into consideration how climate-related risks and opportunities are included in their financial planning (ISSB 2023, paras. 15–21; CSSB 2024b, paras. 15–21).

Directors and officers need to understand quantitative and qualitative information about how climate-related risks and opportunities have affected the company's financial position, financial performance, and cash flows for the reporting period; whether there is a significant risk of a material adjustment to the related financial statements within the next annual reporting period; and how the company expects

its financial position to change over the short, medium, and long term, given its strategy, taking into consideration its investment and divestment plans and its planned sources of funding to implement its strategy (ISSB 2023, para. 16; CSSB 2024b, para. 16).

Both international accounting standards and CSSB standards build in a proportionality test, which protects smaller companies in their efforts at effective management and disclosure. They state that in preparing disclosures about the anticipated financial effects of a climate-related risk or opportunity, a company shall use all reasonable and supportable information that is available to it at the reporting date without undue cost or effort; and use an approach that is commensurate with the skills, capabilities, and resources that are available to the entity for preparing those disclosures (ISSB 2023, para. 18; CSSB 2024b, para. 18). Another proportional provision is that a company "need not provide quantitative information about the anticipated financial effects of a climate-related risk or opportunity if the entity does not have the skills, capabilities or resources to provide that quantitative information" (ISSB 2023, para. 20; CSSB 2024b, para. 20).

To date, the system is one of "comply or explain" for quantitative information. Directors and officers must explain why they have not provided quantitative information; and they must provide qualitative information about financial effects within the related financial statements that have been, or are likely to be, affected by that climate-related risk or opportunity. They must provide quantitative information about the combined financial effects, unless officers conclude that quantitative information about the combined financial effects would not be useful to users of financial statements (ISSB 2023, para. 21; CSSB 2024b, para. 21). These proportionality provisions offer clear guidance to directors of companies with fewer resources in respect of how to navigate climate-related governance and disclosure requirements.

E. Risk Management

Oversight of risk management is a key component of directors' duties. Disclosure of that risk management allows stakeholders to assess a company's governance of climate-related risks and opportunities. Directors should be active in setting policies and processes that management must use to identify, assess, prioritize, and monitor climate-related risks, including information about data sources and scope of operations; whether and how the company uses climate-related scenario analysis to inform its identification of climate-related risks and assess the nature, likelihood, and magnitude of their effects; whether and how directors prioritize climate-related risks relative to other types of risk; and how directors monitor management of climate-related risks (ISSB 2023, para. 25; CSSB 2024b, para. 25). Directors need to have oversight of the extent to which climate-related risk management processes are integrated into and inform the company's overall risk management process (ISSB 2023, para. 25; CSSB 2024b, para. 25).

As part of their management of risks, directors and officers need to review public statements, packaging, advertising, and marketing statements to determine whether the company's claims are accurate, verifiable, and grounded in science. Key is to examine the value chain, for example, Scope 3 GHG emissions in the sourcing of raw materials or delivery of products and services. Directors should ensure that independent expert advice and any third-party verification is clear about the data and methodology used to assess the products and services. Forward-looking information should be particularly scrutinized, including whether emissions reductions targets are realistic and realizable with

the technology and business plan in place. Where there are uncertainties, it is better to identify and disclose them up front.

F. A Steep Slope—Metrics and Targets That Are Accurate and Have Integrity

The identification, management, and disclosure of GHG emissions metrics and targets has not yet matured in terms of meeting the expectations of investors and other stakeholders. There are targets set by legislation or regulation, and standards the company has set, and there needs to be integrity in how metrics are measured, recorded, and disclosed.

Emerging global consensus on IFRS S2 provides insights on what directors should be considering in terms of oversight and management of targets and metrics. IFRS S2 requires companies to report in a manner that enables users of general-purpose financial reports to understand climate-related targets they have set, and any targets they are required to meet by law or regulation (ISSB 2023, para. 27; CSSB 2024b, para. 27). Directors must oversee progress in meeting targets set by the company to mitigate or adapt to climate-related risks or take advantage of climate-related opportunities, including metrics used by management to measure progress toward these targets (ISSB 2023, paras. 28, 33–35; CSSB 2024b, para. 28). Directors need to understand the objective of the targets, the part of operations to which particular targets apply, the metric used to set the targets, the period over which they apply, the base period from which progress is measured, any milestones and interim targets, and if the target is quantitative, whether it is an absolute target or an intensity target (ISSB 2023, paras. 33, B66, B67; CSSB 2024b, para. 33).

Directors should be periodically reviewing targets, including whether the target and methodology for setting the target have been validated by a third party, what scope of emissions is covered by the target, including gross and net GHG emissions targets, and whether the explanation for the rationale and process underpinning any revisions of targets is clearly communicated in their financial disclosures (ISSB 2023, paras. 34–36; CSSB 2024b, paras. 34–36). Directors should be disclosing the extent to which, and how, achieving any net GHG emissions target relies on the use of any third-party verified carbon credits; the type of carbon credit, including whether the underlying offset will be nature-based or based on technological carbon removals, and whether the underlying offset is achieved through carbon reduction or removal; and any other factors necessary for users of general-purpose financial reports to understand the credibility and integrity of carbon credits the company plans to use (ISSB 2023, para. 36; CSSB 2024b, para. 36). The level of detail set out in the new standards provides clear guidance to directors and officers, particularly in respect of Scope 1, 2, and 3 emissions metrics, requiring companies to use measurements in accordance with the Greenhouse Gas Protocol (ISSB 2023, paras. 27–32, B23–B29; Greenhouse Gas Protocol 2004).

V. Conclusion—A Compass Bearing on Climate Governance

Getting one's bearings on a topographic map allows the user to see if they are headed in the right direction (Natural Resources Canada 2014). As of April 2024, four hundred organizations from sixty-four jurisdictions have committed to adoption or use of the ISSB standards (IFRS 2023; 2024). The standards have been endorsed by the International Organization of Securities Commissions, the European Commission, the Asian Infrastructure Investment Bank, the European Investment Bank, the Inter-American Development Bank, the European Bank for Reconstruction and Development, and a growing number of domestic, regional, and international organizations and governments. The

goals of the international standards are to create decision-useful, comparable information; to end the "alphabet soup" of voluntary initiatives; and to create an efficient reporting landscape, fully incorporating and enhancing the TCFD's landmark framework (IFRS 2024). Investors will have access to more consistent, comparable, verifiable, and comprehensive disclosures; directors and their companies will enhance their governance, strategy, access to capital, cost of capital, and reputation; there will be improved transparency about climate-related risk management that, ideally, promotes long-term financial stability; and civil society members (all of us) will benefit from directors and officers meaningfully transitioning their companies to net-zero emissions sustainable businesses. The best defense for a Canadian company and its directors and officers in meeting their fiduciary duties is for the corporate board to be proactive in its efforts to move the company to net-zero emissions. Canada's topographical charting has some unevenness that needs to be remedied before Canada is aligned with global leadership on effective climate governance for the urgent issues and challenges created by climate change.

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