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STUCK IN NEUTRAL? REFORMING CORPORATE PURPOSE AND FIDUCIARY DUTIES

Barnali Choudhury & Martin Petrin[*]

After decades of corporate leadership based on shareholder wealth maximization, momentum is now gathering behind a shift towards the recognition of stakeholder interests. However, from voluntary actions by business to changes in soft and hard law, the steps taken thus far have been insufficient to result in meaningful changes. Instead, we are stuck in neutral. A more decisive push is needed to ensure that business contributes to tackling the most pressing societal issues of our times in a substantial and timely manner. The Canadian corporate landscape, although beginning to shift away from shareholder primacy, is still not settled and in many ways has stagnated since the Supreme Court's decisions in People's and BCE. The CBCA's new section 122(1.1) codifies that case law and therefore cannot be expected to provide a new impetus. Drawing from the experience in the United Kingdom, which previously introduced legislation similar to the Canadian reforms, we suggest that more than minor tweaks to corporate law are necessary to achieve meaningful and timely change. Working along with regulation in other areas of the law, corporate law can help transform corporate acts away from a solitary focus on shareholder wealth maximization if it offers mandatory and tailored mandates that guide corporations to prescribed outcomes. We propose therefore legislative changes to re-define corporate purpose more broadly and implement a mandatory system of balancing of shareholder and stakeholder interests by corporate leadership, with an emphasis on protection and advancement of human rights and environmental considerations.

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STUCK IN NEUTRAL? REFORMING CORPORATE PURPOSE AND FIDUCIARY DUTIES

I. Introduction

With the issue of climate change risks climbing up the corporate agenda,[1] a recently concluded global pandemic, a war in Europe, and greater recognition of equality and human rights issues, an increasing number of corporations are seemingly embracing the idea that they must have a "purpose" that serves more than just shareholders. Instances of support for this shift in thinking are growing among corporate leaders, investors, and regulators alike. In a reflection of the new sentiment at the global level, the World Economic Forum introduced the 'Davos Manifesto,' which declared that "the purpose of a company is to engage all its stakeholders in shared and sustained value creation."[2] Similarly, CEOs of leading US corporations proclaimed their companies' "fundamental commitment to all … stakeholders."[3] The British Academy's project on Purposeful Business defined the purpose of corporations as "to produce profitable solutions to the problems of people and planet, and not to profit from producing problems for people or planet,"[4] while UK-based business newspaper, the Financial Times, declared that it is time for "a reset" because the capitalist model has "come under strain, particularly the focus on maximising profits and shareholder value."[5] In Canada, the Institute of Corporate Directors and TMX Group called for a "more inclusive form of capitalism" while heralding the notion of "multi-stakeholder capitalism."[6] In a similar vein, the Canadian Coalition for Good

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[1] K. Bresnahan et al., "Global Investor-Director Survey on Climate Risk Management" (Working Paper, Columbia Center for Law and Economics, Columbia University, 2020), online: <https://ssrn.com/abstract=3722958 or http://dx.doi.org/10.2139/ssrn.3722958>.

[2] Klaus Schwab, "Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution" (December 2019), online: <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

[3] Business Roundtable, "Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'" (Aug 19, 2019), online: <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

[4] British Academy, "Principles of Purposeful Business" (2019), online, <https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/>.

[5] Financial Times, "Capitalism. Time for a reset." (September 16, 2019), online: <https://aboutus.ft.com/press_release/ft-sets-the-agenda-with-new-brand-platform>.

[6] TMX Group Limited and The Institute of Corporate Directors, "Charting the Future of Canadian Governance: A Principled Approach to Navigating Rising Expectations for

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Governance, which represents institutional investors, developed Principles "to enhance the long-term sustainable creation of value, so companies and their investors can prosper and, in the process, benefit the market and society as a whole."[7] More recently, the Suzuki Foundation recommended that corporations introduce a social purpose to their articles of incorporation.[8]

With eminent businesses and organizations espousing the importance of a broader corporate purpose, it seems apparent that corporations are interested in, or at least willing to, redirect their activities and priorities away from an exclusive focus on shareholder value. Yet, despite these signs, there is no imminent death of shareholder wealth maximization. Certainly, investors' interest in ESG (Environmental, Social, and Governance) factors is growing, supported increasingly by regulatory initiatives directed towards business and financial market participants. These new attitudes have the potential to contribute to some changes in corporate behavior, even though the current level of investors' interest in ESG and similar concerns seems insufficient as a basis for transformative change.[9]

However, at the level of corporations themselves—where voluntary or mandated measures towards a new corporate paradigm would be most direct and effective——the world seems to remain stuck in neutral. Words and good intentions often remain just that when exposed to the harsh realities of markets and competition, especially in the current challenging economic environment. Policy-making and regulatory initiatives, if and where implemented, also tend to lack the necessary bite to make a difference. Such

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Boards of Directors — Report of the Committee on the Future of Corporate Governance in Canada" (2022) at 12, online, <https://chartthefuture.ca/assets/uploads/img/22-3325-Committee-Report-Dec2022_EN.pdf>.

[7] Canadian Coalition for Good Governance, "Stewardship Principles & Endorsers", online: <https://ccgg.ca/stewardship-principles-endorsers/>. Several large investors have endorsed the principles, including many public sector pension funds.

[8] I. Akintunde and R. Janda, *Bringing Corporate Purpose into the Mainstream: Directions for Canadian Law* (David Suzuki Foundation, 2023).

[9] On this, see also Paul L. Davies, "Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements" (Working paper, European Corporate Governance Institute, 2022), online: https://ssrn.com/abstract=4285770>, forthcoming in *Board-Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices* (Luca Enriques & Giovanni Strampelli eds., 2023, Cambridge University Press). Davies argues that if investors were to adopt true stakeholderist views, corporate law reforms such as revised purpose requirements would be unnecessary. See also the pushback to ESG initiatives in some US states. C. Houston et al., "ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.", Harvard Law School Forum on Corporate Governance, March 11, 2023, online: <https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/>.

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initiatives are frequently attacked, watered down, and delayed or derailed, including by academics in law and business who, in principle, voice their support for the idea of a broader corporate purpose.

Corporations themselves, despite making vocal commitments to promoting stakeholder interests, have been slow or reluctant to embrace meaningful actions in practice.[10] Although some companies have been working to better incorporate non-shareholder interests into their business,[11] numerous challenges remain. Corporations still perpetuate activities that foster issues with climate change;[12] continue to deny workers proper benefits;[13] ignore issues of forced labour,[14] and even child labour,[15] in supply chains; and deny or infringe on Indigenous rights;[16] among many other issues.

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[10] L. Bebchuk and R. Tallarita, "Will Corporations Deliver Value to All Stakeholders?" (2022), 75 Vand. L. Rev. 1031; M. Gatti and C.D. Ondersma, "Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera" (2020), 46 J. Corp. L. 1. However, see also Martin Lipton refuting the evidence of the Bebchuk-Tallarita study: Martin Lipton, 'More Myths from Lucian Bebchuk', *Harvard Law School Forum on Corporate Governance* (Aug 24, 2021), online: <https://corpgov.law.harvard.edu/2021/08/24/MORE-MYTHS-FROM-LUCIAN-BEBCHUK/>.

[11] See e.g., the examples cited in Martin Lipton, "More Myths from Lucian Bebchuk", *Harvard Law School Forum on Corporate Governance* (Aug 24, 2021), online: <https://corpgov.law.harvard.edu/2021/08/24/MORE-MYTHS-FROM-LUCIAN-BEBCHUK/>.

[12] M. Li, G. Trencher and J. Asuka, "The clean energy claims of BP, Chevron, ExxonMobil and Shell: A mismatch between discourse, actions and investments" (2022), 17(2) PloS One; Camilla Hodgson, "Canadian banks double financing of highly polluting oil sands", *Financial Times,* April 10, 2022, online: <https://www.ft.com/content/970e5b5d-74c7-4cc9-84a0-732da35769d5>.

[13] See e.g., *Uber v Heller Technologies* (2021) 2021 ONSC 5518; I. Mollaneda, "The Aftermath of California's Proposition 22", *California Law Review Blog* (May 2021), online: <https://californialawreview.org/the-aftermath-of-californias-proposition-22/>.

[14] See e.g., Ana Swanson, "Supply Chains Widely Tainted by Forced Labor in China, Panel Is Told", *New York Times,* April 8, 2022, online: <https://www.nytimes.com/2022/04/08/business/economy/china-forced-labor.html>; Mei Mei Chu, "Exclusive: Ferrero to stop buying palm oil from Malaysia's Sime Darby over labour concerns", *Reuters*, April 15, 2022, online: <https://www.reuters.com/business/retail-consumer/exclusive-ferrero-stop-buying-palm-oil-malaysias-sime-darby-over-labour-concerns-2022-04-15/>.

[15] John O'Brien, "Nestle now to face lawsuit over slave labor in West Africa", *Legal Newsline*, April 4, 2022, online: <https://legalnewsline.com/stories/622488142-nestle-now-to-face-lawsuit-over-slave-labor-in-west-africa>; Antony Barnett, "Cadbury's chocolate is made with cacao farmed by suppliers utilizing little one labour, I met the victims in Ghana", *iNews,* April 4, 2022, online: <https://inews.co.uk/news/long-reads/cadburys-chocolate-made-using-child-labour-1553331>.

[16] Melanie Burton, "Rio Tinto yet to pay compensation over sacred site destruction", *Reuters,* August 27, 2021, online: <https://www.reuters.com/world/asia-pacific/rio-tinto-

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In part, this is because the idea of prioritizing the interests of shareholders over all else has become ingrained in those who are in positions of power and could lead changes.[17] Privileging shareholders' financial interests is the longstanding default way of running a business, and it is difficult for managers to see another way forward.

Redirecting corporations' purpose away from a myopic view on shareholder interests will require more than positive sentiments from corporate CEOs and businesses, international organizations, or participants at the World Economic Forum. In particular, it will require more robust regulation. The shareholder wealth maximization paradigm is sticky and requires decisive steps in the form of binding, enforceable rules. Even in countries that have introduced legislation that seeks to re-define corporate purpose, the effects on curtailing business' devotion to profits over all else have been negligible.[18] This includes Canada with its recent changes to the CBCA's provision of fiduciary duties in section 122(1.1), which have been weak. Drawing from the experience in the United Kingdom, which previously introduced legislation similar to the recent Canadian reforms, we suggest that more than minor tweaks to corporate law are necessary to achieve meaningful and timely change, working along with regulation in other areas of the law.[19] Corporate law can only help transform corporate acts away from a solitary focus on shareholder wealth maximization if it offers directors and managers mandatory and tailored mandates that guide them to prescribed outcomes. Additionally, there is a need for stepped up enforcement mechanisms. This may involve a role for a new public body in pursuing actions as well as granting standing to enforce fiduciary duty breaches to non-shareholder parties.

This article aims to define what such regulatory mandates and changes in corporate law could look like and how the law in this area may be reformed to move corporations towards a broader corporate purpose, including above all sustainability. Part II begins by examining legislative approaches to

yet-pay-compensation-over-sacred-site-destruction-2021-08-27/>; Ellen McGirt, "A standoff between Indigenous land defenders and a Canadian energy company has broader implications", *Fortune*, November 23, 2021, online: <https://fortune.com/2021/11/23/a-standoff-between-indigenous-land-defenders-and-a-canadian-energy-company-has-broader-implications/>.

[17] Lynne Dallas, "Two Models of Corporate Governance: Beyond Berle and Means" (1988), 22 U Mich. J.L. Ref. 19.

[18] See discussion in Part II below.

[19] For instance, specific employee rights may be better addressed under employment and labour law. We recognize the importance of regulation of these areas as well as environmental law, human rights, etc., but will focus on corporate law only for the purposes of this article.

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temper the shareholder wealth maximization ethos, focusing on enacted legislation on fiduciary duties in the UK (s. 172 of the Companies Act) and its similar counterpart in Canada (s. 122(1.1) of the CBCA). In Part III, the article explains that despite good intentions the law in both countries remains weak and is unlikely to reorient corporate behaviour. It suggests that there is a need for a more decisive approach to overcome shareholder primacy and achieve a recalibrated, more balanced corporate purpose, with a specific focus on (broadly defined) sustainability. This is followed by a discussion in Part IV of the elements that are necessary to strengthen corresponding legislation. In this vein, the article outlines four proposed areas for corporate law reform to support the new model: the definition of corporate purpose; directors' and managers' fiduciary duties (working in tandem with duties directed to the corporate entity itself); and broader enforcement. Part V concludes.

II. The UK and Canada's Legislative Alternatives to Traditional Shareholder Wealth Maximization

To clarify or redefine the corporate purpose, some countries have introduced new provisions into their corporate laws. These legislative enactments are typically intended to, at least in part, soften the effects of shareholder wealth maximization. Focusing on developments in the United Kingdom and Canada, this Part discusses changes introduced via the UK's section 172 of the Companies Act 2006 and section 122(1.1) of the Canada Business Corporations Act. Section 172 is notable as one of the first types of provisions that prompts boards to include certain non-shareholder interests in their decision-making.

1. The UK's 'Success of the Company' Approach

A pioneering example of legislative changes concerning corporate purpose in the Anglo-American sphere originates in the United Kingdom. In 2006, the British government introduced the concept of 'enlightened shareholder value' (ESV) in section 172 of the revised (and still current) Companies Act.[20] ESV has been described as a political compromise between "(i) those who believe in shareholder value, namely, that the company should be

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[20] *Companies Act* (U.K.), 2006, s. 172. On the background to this legislative development, see A. Keay and H. Zhang, "An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law" (2011) Eur. Co. & Fin'l. L. Rev. 1 at p. 2. The most encompassing work on the subject is A.R. Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Abingdon: Routledge, 2013).

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working ultimately for the benefit of shareholders; and (ii) the legal pluralism school, who believe that the company has to take into account a wider range of interests."[21] The ESV concept may also soon appear in US corporate law as it is being considered for inclusion in the American Law Institute's Restatement of Corporate Governance Law.[22]

Section 172 requires directors to promote the success of their company for the benefit of its shareholders. It obliges directors to act in a way that he or she considers, in good faith, would "most likely … promote the success of the company for the benefit of its members as a whole".[23] The provision contains a list of relevant factors in this regard, including the likely long-term consequences of any decision; employee interests; "the need to foster the company's business relationships with suppliers, customers and others"; the company's impact on the community and environment; the company's reputation for "high standards of business conduct"; and the need to act fairly between shareholders.[24]

(a) Section 172: A Primer

While the language used in the main part of section 172 is mandatory, the list of factors directors can have regard to is neither exhaustive nor ordered in any type of priority. Most importantly, however, the ultimate corporate aim under the provision remains the advancement of shareholders' interests. This is one of the most contentious aspects of the provision.

Although not readily apparent from the language used in section 172 and its reference to the shareholders' ('members') interests, case law and legislative history make it clear that the section was not intended to deviate from the shareholder wealth maximization principle.[25] Instead, the aim was to encourage boards to consider a broad range of factors and engage in longer-term thinking in corporate decision-making. After all, *enlightened*

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[21] Parker Hood, "Directors' Duties under the Companies Act 2006: Clarity or Confusion" (2013), 13 J. Corp. L. Stud. 1 at 16.

[22] See Stephen Bainbridge, "A Comment on Eric Orts' Comment on the ALI's Restatement of Corporate Purpose", *ProfessorBainbridge.com* (June 7, 2022), online: <https://www.professorbainbridge.com/professorbainbridgecom/2022/06/a-comment-on-eric-orts-comment-on-the-alis-restatement-of-corporate-purpose.html>; L. Bebchuk, K. Kastiel, and R. Tallarita, "Does Enlightened Shareholder Value Add Value?" (2022), 77 Bus. Lawyer 731.

[23] *Companies Act* (U.K.), 2006, s. 172(1).

[24] *Companies Act* (U.K.), 2006, s. 172(1).

[25] Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public,* (Cambridge: Cambridge University Press, 2018) at 48.

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shareholder value, as the name suggests, is still based on the concept of shareholder value.

Consequently, the factors to which directors must "have regard" to are still subsidiary to the overall duty to promote the success of the company for the financial benefit of the shareholders.[26] Moreover, even if a director wishes to promote a non-shareholder interest, he or she can only do so if it ultimately benefits shareholders. The provision is also not enforceable by any of the non-shareholder stakeholders whose interests must be taken into account. For these reasons, the provision reinforces the traditional shareholder primacy approach, albeit differently worded and more broadly conceived, within UK corporate law.[27] In the same vein, taking into account non-shareholder interests is both required and sufficient; there is no obligation to actively promote stakeholder interests through positive actions or steps. Indeed, it would run against the duty of section 172 to promote non-shareholder interests if doing so would contradict shareholder interests. To be in compliance with the section, directors are thus only required to consider stakeholder interests in good faith, not more.[28]

Neither the provision itself, nor the Companies Act, provide any statutory explanation of the meaning of 'having regard to'. The required 'regard' is not specified in terms of process or amount, nor is it explained who decides what 'promoting the success of the company' means.[29] In an attempt to give meaning to the concept of 'having regard', a UK governmental Minister once explained that it means to 'think about' or to 'give proper consideration to'. As she noted, "[i]f 'thinking about' leads to the conclusion … that the proper course is to act positively to achieve the objectives in the clause, that will be what the director's duty is.[30]

Yet, while there can be some benefits to being prompted to 'consider' or 'think about' various interests, this hardly proves helpful in most instances of real-life board decision-making. Critically, there is also no guidance on prioritization between competing non-shareholder stakeholder interests,

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[26] Simon Mortimore, *Company directors: duties, liabilities, and remedies*, 3rd ed. (Oxford: Oxford University Press, 2017) at 289.

[27] David Milman, "Stakeholders in Modern UK Company Law" (2017), in *Sweet and Maxwell's Company Law Newsletter* 397, at p. 1.

[28] David Milman, "Stakeholders in Modern UK Company Law" (2017), in *Sweet and Maxwell's Company Law Newsletter* 397, at p. 290.

[29] Nicholas Grier, "Enlightened shareholder value: did directors deliver?" (2014), 2 The Juridical Rev. 95, at p. 97.

[30] Nicholas Grier, "Enlightened shareholder value: did directors deliver?" (2014), 2 The Juridical Rev. 95, at p. 97*, citing* Hansard, HC, vol. 450, col. 789 (October 17, 2006).

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which are inevitable.[31] While shareholder interests still trump non-shareholder interests, it is unclear how boards would balance, for example, employees' interests in higher wages versus suppliers' interests in improved margins and customers' interests in affordable products and services. Presumably, section 172 as currently drafted must provide boards considerable discretion in this regard. As we will discuss below, in practice, the process of boards' balancing of interests therefore becomes key.

(b) Steering not Directing Corporate Behaviour

Although section 172 establishes an enforceable fiduciary duty for directors, given the limitations described above, it has been characterized as a provision with only a 'soft law' impact on corporate decision making.[32] Apart from increasing documentation in boards' decision-making processes, the introduction of section 172 has not significantly changed the outcomes of corporate decisions.[33]

In addition, very few cases have been brought by shareholders to enforce duties under section 172.[34] Notable recent, albeit unsuccessful, examples of lawsuits invoking section 172 have included allegations of failing to adopt policies to mitigate climate change[35] as well as a case pertaining to directors' duties toward company creditors. The latter case, *BTI 2014 LLC v Sequana SA and Others*[36] is especially noteworthy given its discussion of section 172 and how the duty to promote the success of the company may require

[31] David Milman, "Stakeholders in Modern UK Company Law" (2017), in *Sweet and Maxwell's Company Law Newsletter* 397 at p. 6. See section IV.3.a. below on existing and new suggestions for prioritizing interests.

[32] Georgina Tsagas, "Section 172 of the Companies Act 2006: Desperate times call for soft law measures" (2018), in Nina Boeger, & Charlotte Villiers, eds., *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Oxford: Hart Publishing, 2018), p. 131.

[33] Georgina Tsagas, "Section 172 of the Companies Act 2006: Desperate times call for soft law measures" (2018), in Nina Boeger, & Charlotte Villiers, eds., *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Oxford: Hart Publishing, 2018), p. 131.

[34] Collins C. Ajibo, "A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory" (2014) 2(1) Birkbeck L. Rev. 37 at p. 50-51.

[35] In *Client Earth v. Shell plc* [2023] EWHC 1137 (Ch), it was alleged that Shell's directors breached their duties by failing to adopt an energy transition strategy that aligns with the Paris Agreement. The UK High Court dismissed the case, although at the time of writing a hearing to reconsider the decision was pending. Another case, *McGaughey et al. v. Universities Superannuation Scheme Ltd* [2022] EWHC 1233 (Ch) contained, inter alia, claims of fiduciary duty breaches relating to a pension fund's fossil fuel investments.

[36] [2022] UKSC 25.

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directors to consider or act in the interests of creditors.[37] Generally, however, the low volume of cases that are based on section 172 breaches suggests either a lack of appetite to bring relevant claims or, more likely, that the provision does not easily lend itself to enforcement. Indeed, the government may have intended for the force of the provision to arise through increased disclosure obligations as opposed to the threat of litigation.[38]

Directors of UK companies, other than small companies, have long been required to release an annual strategic report to their shareholders.[39] Although the purpose of this report was from the outset "to inform members of the company and help them assess how the directors have performed their duty under section 172",[40] there was no mandate to specifically address the consideration of non-shareholder interests enumerated in the provision. This changed in 2019, when the government introduced a requirement that large companies include in their strategic report a statement "which describes how the directors have had regard to the matters set out in section 172(1)(a) to (f) when performing their duty under section 172."[41] As advisory firm Deloitte noted, the 'section 172(1) statement' requires companies to report on the processes they used during the relevant reporting period and what they were applied to.[42]

While it seems that section 172 has not significantly changed the behaviour of corporations, the related reporting obligations appear to have at least nudged some corporations towards increased awareness of stakeholder issues. According to one survey, the statement requirement has been internalized by most companies and has led to the inclusion of metrics relating to stakeholder in key performance indicators, discussions on stakeholder engagement, and even statements or reflections on the question

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[37] The decision, which also includes an in-depth discussion of legislative materials, rejects the existence of a separate directorial duty to creditors. It confirms that the trigger point at which directors must consider creditor interests arises when a director knows or should know that a company is insolvent or bordering on insolvency. [2022] UKSC 25, para. 63-67.

[38] John Lowry, "The Duty of Loyalty of Company Directors: Bridging the Accountability Gap through Efficient Disclosure" (2009), 68 Cambridge L.J. 607 at p. 618.

[39] See generally, *Companies Act* (U.K.), 2006, s. Chapter 4A.

[40] *Companies Act* (U.K.), 2006, s. 417(2).

[41] The specific requirement in the Companies Act is: "…a statement (a "section 172(1) statement") which describes how the directors have had regard to the matters set out in section 172(1) (a) to (f) when performing their duty under section 172." *Companies Act* (U.K.), 2006, s. 414CZA.

[42] Deloitte, "Annual report insights 2019" (2019) at p. 3, online: <https://www2.deloitte.com/uk/en/pages/audit/articles/annual-report-insights.html>.

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of corporate purpose.[43] Still, nudging and subtle changes in boards' and managers' awareness concerning stakeholder interests are arguably unsatisfactory outcomes.

(c) Revising Section 172: A New Way Forward?

The inefficacy of section 172 has prompted suggestions for reform. A notable initiative in this regard is the Better Business Act campaign, which is supported by over 1,000 companies, the UK's Institute of Directors, politicians from across the political spectrum, and others. The campaign is proposing that the government redraft section 172.[44] Principally, it aims to replace the directors' duty to promote the success of the company with a "duty to advance the purpose of the company." Thus, the first sentence of the redrafted section 172(1) would read:

> A director of a company must act in the way the director considers, in good faith, would be most likely to advance the purpose of the company.

In working towards advancing the company purpose, the directors would still be required to "have regard" to the stakeholder interests already specified in the current section 172(1) and its subsections. However, in a substantial new subsection, the proposal suggests introducing language that would define the purpose of a company, which the directors would then be obliged to advance as per section 172(1). This proposed amendment would read as follows:

> The purpose of a company shall be to benefit its members as a whole, whilst operating in a manner that also—
>
> (a) benefits wider society and the environment in a manner commensurate with the size of the company and the nature of its operations; and

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[43] See Deloitte, "Annual report insights 2020" (2020) at p. 2, online: <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/about-deloitte/deloitte-uk-annual-report-insights-2020.pdf>.

[44] Better Business Act Campaign, "The Better Business Act" (2022), online: <https://betterbusinessact.org/wp-content/uploads/2021/04/The-Better-Business-Act-2021.pdf >.

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> (b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating any such harm or costs.[45]

According to the Better Business Act campaign, the aim of introducing the amendments is to "transform the way … business [is done], so that every single company in the UK, whether big or small, takes ownership of its social and environmental impact" by no longer making it a "choice to align the long-term interests of people, planet and profit."[46] Whether the redrafted section 172, as proposed, is sufficient for achieving these ambitious goals, is however doubtful.

Briefly, the current language of "having regard" to stakeholder interests, with its uncertainties as described above, would remain in place. Second, defining the purpose as consisting of benefiting its members (i.e. shareholders) is almost identical with the language in the current section 172, which requires directors to act for the benefit of its members. Although the proposed definition of purpose then goes on to say that a company should also operate in a manner that benefits society and the environment, and mitigates negative externalities, the wording of the provision still suggests that these considerations are subordinate to the pursuit of the shareholders' interests. Finally, the amendment continues to prevent third parties from enforcing the duty under section 172. This means that the most likely potential enforcement will continue to be via shareholders' derivative claims, which are rare. Yet, increased enforcement of directors' duties is one of the central considerations or areas for reform on the path towards a broader corporate purpose.

2. Canada's 'Best Interests of the Corporation' Approach

In June 2019, the Canadian government introduced a provision similar to section 172 of the UK Companies Act. The new provision, section 122(1.1) of the Canada Business Corporations Act (CBCA),[47] provides a non-

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[45] Better Business Act Campaign, "The Better Business Act" (2022), online: <https://betterbusinessact.org/wp-content/uploads/2021/04/The-Better-Business-Act-2021.pdf >. The proposed amendment further states that companies may specify purposes that are more beneficial to wider society and the environment than the purpose set out in the above provisions. Additionally, the amendment provides that the duty to advance the company's purpose "is owed solely to the company and not to any other interested parties.

[46] Better Business Act, "About the Better Business Act", online: <https://betterbusinessact.org/about/#thestory>.

[47] *Canada Business Corporations Act*, RSC 1985, c C-44 s. 122 (1.1).

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exhaustive list of factors that directors and officers may consider when discharging their duty to act in the best interests of the company. In addition to the interests of shareholders, the factors include the interests of various other stakeholders. The following will first discuss Canadian case law on corporate purpose and the best interests of the company, which is reflected in codified form in the new CBCA provision. It will then turn to examine section 122(1.1), including its legislative background.

(a) Canadian Jurisprudence on Corporate Purpose

Section 122(1.1) essentially codified Canadian case law on corporate purpose that had been brewing in the courts for many years. One of the early milestone decisions was *People's Department Stores Ltd. (1992) Inc.*,[48] which centered around directors' duties to act with a view to the best interests of the corporation under section 122(1)(a) CBCA. The Supreme Court of Canada held that the "best interests of the corporation" were not synonymous with the "best interests of the shareholders" and the maximation of the corporation's value.[49] Among others, the Court drew from a 1972 decision, *Teck Corp v Millar*.[50] In *Teck*, the BC Supreme Court already held that specific shareholder interests are to be distinguished from the interests of the company, with the directors' duties owed only to the company. *Teck* suggested that while directors may not entirely disregard the interests of shareholders, it would be proper for them to consider other interests, such as those of employees or the community, if they acted in good faith to advance the company's interests.[51] *People's* similarly observed that while complete disregard of shareholder interests would amount to a breach of fiduciary duty, "if [directors] observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not … leave directors open to the charge that they have failed in their fiduciary duty to the company.."[52]

People's also further clarified the scope of directors' duties, noting that:

> … in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the

[48] 2004 SCC 68 (S.C.C.).
[49] *People's Department Stores Ltd. (1992) Inc.*, 2004 SCC 68 (S.C.C.) at para 42.
[50] (1972) 33 DLR (3d) 288 (BCSC) at para. 314.
[51] *Teck Corp v Millar*, (1972) 33 DLR (3d) 288 (BCSC) at paras. 106–117.
[52] *People's Department Stores Ltd. (1992) Inc.*, 2004 SCC 68 (S.C.C.) at para. 42.

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> 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.[53]

The Supreme Court affirmed its decision in *People's* in the case of *BCE Inc., Re*.[54] In *BCE*, the Court had to decide whether a board had acted in accordance with its fiduciary duties when, as part of a proposed leveraged buyout, it considered, but ultimately acted against, the interests of a group of the company's debentureholders. The Court reiterated that the fiduciary duty of directors is to act in the best interests of their corporation. Approvingly citing *People's*, the Court also similarly noted that while the interests of shareholders and other stakeholders may often be co-extensive with the interests of the corporation, "if they conflict, the directors' duty is clear — it is to the corporation."[55]

The Court also clearly differentiated the interests of the corporation and the interests of shareholders as well as other stakeholders, going on to elaborate that the fiduciary duty owed "is a broad, contextual concept … 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."[56] The Court held that it is within the directors' discretion to decide to what extent, and which, shareholder and non-shareholder interests should be taken into account when advancing the interests of the company:

> 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. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule.[57]

BCE was of further significance because it clarified the broad range of remedies available to protect the interests of shareholders and other

[53] *People's Department Stores Ltd. (1992) Inc.*, 2004 SCC 68 (S.C.C.) at para. 42.
[54] 2008 SCC 69 (S.C.C.).
[55] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at para. 37.
[56] *BCE Inc., Re*, 2008 SCC 69(S.C.C.), at para. 38.
[57] *BCE Inc., Re*, 2008 SCC 69(S.C.C.), at para. 40.

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stakeholders of the corporation. As the Court explained, the first remedy under the CBCA is the derivative action, which enables broadly defined "complainants"——and not only shareholders——to enforce directors' duties to the corporation.[58] A second remedy is a civil action for breach of duty of care by directors that, as the Court noted, "unlike the s. 122(1)(a) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability."[59] A third remedy is a section 241 action for oppression that "focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders—security holders, creditors, directors and officers."[60] Finally, the court explained that there may be additional remedial provisions in the context of corporate arrangements, namely including the court approval process set out under section 192 of the CBCA.[61] In *BCE*, the specific claims to be decided by the Court were based on alleged oppression and the 'fair and reasonable' test for approval of an arrangement under the CBCA.

It is particularly in the context of the oppression remedy that the Court in *BCE* had occasion to elaborate further on corporate purpose and stakeholder interests. As it mentioned, the oppression remedy recognizes that the interests of different stakeholders may legitimately conflict, but that the key was for directors, when faced with such conflicts, to treat stakeholders fairly. The Court stated that "[t]he corporation and shareholders are entitled to maximize profit and share value … but not by treating individual stakeholders unfairly," clarifying further that fair treatment "is most fundamentally what stakeholders are entitled to 'reasonably expect'."[62] Making a seemingly circular argument, the Court further added "that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation," although in doing so the directors "may be obliged to consider the impact of their decisions on corporate stakeholders."[63]

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[58] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at para. 45.

[59] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at para. 44. A direct cause of action for breach of statutory duty is available under section 1457 of the Civil Code of Québec the Civil Code. In other provinces, it would typically rest on a common law duty of care. See, for example, *Mentmore Manufacturing Co. Ltd. v. National Merchandising Manufacturing Company Inc*, [1978] 89 D.L.R. (3d) 195 (F.C.A.). For a comparative analysis, see H. Anderson, "Directors' Liability for Corporate Faults and Defaults–An International Comparison" (2009), 18 Pac. Rim L. & Pol'y J. 1.

[60] *BCE Inc., Re*, 2008 SCC 69(S.C.C.), at para. 45.

[61] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at para. 46.

[62] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at para. 64.

[63] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at para. 66.

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The court also repeatedly referred to the metaphor of the company as a "good corporate citizen" as general guidance for the directors' actions. [64]

Finally, the *BCE* Court dismissed the notion of shareholder primacy when it stated that "[t]here is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests."[65] Instead, the Court noted that "[e]verything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way."[66] This rejection of shareholder primacy was a novel development as many courts had previously adhered to the idea.[67] Similarly, and remarkably, the Supreme Court's stance stood also "[i]n contrast to the [shareholder-centric] view that Canadian securities regulators have favoured over the last 30 years."[68]

While *People's* and *BCE* potentially broadened deference to board decision-making by allowing other stakeholder considerations to influence those decisions, it also left much to be clarified.[69] Without offering more specific guidance on exactly what constitutes the best interests of a corporation, the Court's broadening of board discretion and business judgement made it more difficult for stakeholders (including shareholders) to challenge directors' decisions.[70] Despite the seemingly stakeholder-friendly stance, one commentator concluded that *BCE* suggests that "a version of shareholder primacy remains [in Canadian law] although consideration should be given to the interests of other stakeholders".[71]

People's and *BCE*'s impact on subsequent case law appears limited, in part also because the issue of duties vis-à-vis stakeholders does not come often before courts. More recent decisions citing the two leading cases comment on the application of an oppression remedy to the circumstances and the reasonableness of the complainant party's (in most instances creditors

[64] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at paras. 66, 81 and 82.
[65] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at para. 84.
[66] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at para. 84.
[67] J. MacIntosh, "BCE and the Peoples' Corporate Law: Learning to Live on Quicksand" (2009), 48 Can Bus L.J. 255 at p. 257.
[68] R. Yalden, "Stuck at the Crossroads? The Regulation of Defence Strategies in Canadian M&A" (2020), 63 Can Bus L.J. 288, at pp. 303–04.
[69] As one commentator observed, the Court consciously adopted a 'policy neutral' stance. See R. Yalden, "Stuck at the Crossroads? The Regulation of Defence Strategies in Canadian M&A" (2020), 63 Can Bus L.J. 288, at pp. 303–305.
[70] E. Waitzer and J. Jaswal, "Peoples, BCE, and the Good Corporate "Citizen"" (2009), 47 Osgoode Hall L.J. 439 at 442; Poonam Puri, "The Future of Stakeholder Interests in Corporate Governance" (2009) 48 Can. Bus. L.J. 427, at p. 430.
[71] Poonam Puri, "The Future of Stakeholder Interests in Corporate Governance" (2009) 48 Can. Bus. L.J. 427, at p. 431 (footnote omitted).

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or shareholders) expectations, either without specifically commenting on the directors' duty to stakeholders or only cursorily. For instance, a 2018 Ontario case, *Alharayeri v Wilson*, contains the statement that the "best interests of the corporation are the best interests of shareholders and other stakeholders as a whole." [72] In another case, *Roussy v Savage*, the BC Superior Court cited *BCE* for the proposition that "[t]he relationship between shareholders and directors rarely gives rise to a fiduciary duty independent of the fiduciary duty already owed by the director to the corporation."[73] The *Roussy* court further noted that "[i]t is settled law that directors of corporations do not owe fiduciary obligations to any stakeholders, including shareholders, solely by virtue of their respective positions",[74] adding that "[t]his duty is owed to the corporation alone, not its shareholders, creditors, or any other stakeholders."[75]

In sum, while the jurisprudence strengthens the claim that shareholder primacy is no longer valid doctrine in Canada, it also does little to bolster the position of other stakeholders. The biggest beneficiaries appear to be boards and managers, which have been given more discretion and added insulation from claims alleging a breach of their duties. Although it has been over a decade since *BCE*, commentators are doubtful that much, if anything, has changed in the way of corporate governance. Some are convinced that a lack of consideration for long-term stakeholder interests remains rampant among boards,[76] which would suggest a continued dominance of shareholder primacy. That said, however, various industry-produced guides on directors' duties now include the stakeholder-oriented language of *BCE*, for example noting that "fiduciary duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly"[77] or that the "oppression remedy is a broad and flexible remedy that enables corporate stakeholders to challenge corporate actions that are contrary to 'reasonable expectations, even when no breach of legal rights has occurred'."[78] There is

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[72] (2018) 87 BLR (5th) 289 (Ont. SC), at para. 46.
[73] 2019 BCSC 1669 (B.C.S.C.), at para. 296.
[74] 2019 BCSC 1669 (B.C.S.C.), at para. 296.
[75] 2019 BCSC 1669 (B.C.S.C.), at para. 307.
[76] See E.J. Waitzer & D. Sarro, "In Search of Things Past and Future: Judicial Activism and Corporate Purpose" (2018), 55 Osgoode Hall L. J. 791 at p. 798.
[77] Osler, Hoskin & Harcourt LLP & Institute of Corporate Directors, "Directors' Responsibilities in Canada", 6th ed. (Toronto: Oster, Hoskin & Harcourt LLP & Institute of Corporate Directors, 2014) at p. 8, online (pdf): <http://www.icd.ca/getmedia/581897ca-d69d-4d4f-a2a2-ca6b06ef223b/5467>.
[78] Torys LLP, "Responsibilities of Directors in Canada: A Business Law Guide" (Toronto: Torys LLP, 2009) at p. 19.

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still little to no guidance, however, on how companies should balance the interests of stakeholders.

(b) CBCA Section 122(1.1)

In June 2019, House Government Bill C-97 received Royal Assent.[79] It contained, among others, an amendment to the CBCA concerning corporate fiduciary duties. The amendment, section 122(1.1) CBCA, elaborates on the Act's existing provision on the duty of care owed by directors and officers, which in part provides that they shall "act honestly and in good faith with a view to the best interests of the corporation."[80] The new section reads as follows:

> **Best interests of the corporation**
>
> (1.1) When acting with a view to the best interests of the corporation under paragraph (1)(a), the directors and officers of the corporation may consider, but are not limited to, the following factors:
>
> (a) the interests of
>
> (i) shareholders,
>
> (ii) employees,
>
> (iii) retirees and pensioners,
>
> (iv) creditors,
>
> (v) consumers, and
>
> (vi) governments;
>
> (b) the environment; and
>
> (c) the long-term interests of the corporation.

[79] Bill C-97, An Act to implement certain provisions of the budget tables in Parliament on March 19, 2019 and other measures (short title: *Budget Implementation Act, 2019, No. 1*), herein referred to as Budget 2019.
[80] *Canada Business Corporations Act*, RSC 1985, c C-44 s. 122(1)(a).

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As the government stated, the section was introduced with the goal "to set higher expectations for, and better oversight of, corporate behaviour" by recognizing that "federally incorporated businesses are able to consider diverse interests such as workers and pensioners in corporate decision-making."[81] The Standing Committee on Finance also noted that the government viewed section 122(1.1) as "a codification of the common law," although with "the addition of retirees and pensioners"[82] in an effort to ensure that corporate bankruptcies no longer left "pensioners out in the cold."[83] Section 122(1.1) was further described as a permissive provision. Directors are not required to consult and consider the interests of all stakeholders in every instance. "It's up to them … to assess what's in the best interests of the corporation, and this merely codifies what the Supreme Court has already said—that in acting in the best interests of the corporation, depending on the circumstances, it is possible that you would consider these interests".[84]

Section 122(1.1) appears to be a watered-down version of the UK Companies Act's section 172, even though it specifically mentions pensioners as an additional enumerated interest group. Contrary to its UK counterpart, however, section 122(1.1) does not obligate directors and officers to consider the interests of the non-exhaustive group of stakeholders mentioned therein. Instead, it only provides that they *may* do so. Notably, in response to the introduction of section 122(1.1) a prominent law firm opined in a client newsletter that while the changes specifically rejected shareholder primacy and were potentially broader than the decision in *BCE* by naming

[81] Government of Canada, "Budget 2019, A Secure and Dignified Retirement for Canadian Seniors" (March 19, 2019), online: <budget.gc.ca>; Canada, House of Commons, News Release, "Investing in the Middle Class Budget 2019" (March 19, 2019), online: <https://www.budget.gc.ca/2019/docs/plan/budget-2019-en.pdf> at 67.

[82] House of Commons, Standing Committee on Finance, *Evidence*, 42-1, No. 215 (May 27, 2019) at 1200 (Darryl C. Patterson).

[83] Bill C-97*, An Act to implement certain provisions of the budget tables in Parliament on March 19, 2019 and other measures*, 2nd reading, *House of Commons Debates,* 42-1, No 403 (April 11, 2019) at p. 1520 (Joel Lightbound). Innovation, Science and Economic Development Canada shared that the CBCA amendments had been developed in response to concerns about workplace pension security. See Canada, "Consultation on regulatory proposals" (January 29, 2021), online: <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08918.html>. On this and the provision's genesis, see further R. Yalden, "Stuck at the Crossroads? The Regulation of Defence Strategies in Canadian M&A" (2020), 63 Can Bus L.J. 288, at pp.306–09.

[84] Bill C-97*, An Act to implement certain provisions of the budget tables in Parliament on March 19, 2019 and other measures*, 2nd reading, *House of Commons Debates,* 42-1, No 403 (April 11, 2019) at p. 1520 (Joel Lightbound).

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retirees and pensioners, it seemed that the new provision "likely will not have a significant impact on directors' decision-making."[85]

Although section 122(1.1) by no means poses a legal threat to corporate boards that wish to continue prioritizing shareholder interests, there has already been some pushback. According to media reports in late 2022, Conservative politician Tom Kmiec was considering proposing a private member's bill to amend section 122 of the CBCA. The aim of the bill would be to "ensure that officers and directors prioritize the interests of shareholders above political agendas that are unrelated to the company's business purpose."[86] Under the provisions of the proposed bill, it would be considered a breach of a board's duty of care if directors of a large distributing company (defined as those with a market value over $100 million) "make activist statements, including in relation to public policy or social issues, that is not directly related to the business the corporation carries out and that could reasonably be expected to reduce the value of shares."[87] As of the time of writing of this article, the bill's full details, its status, as well as its likelihood of gathering support remain unclear.

(c) The Impact of the 'Best Interests' Approach

The introduction of section 122(1.1) CBCA is still relatively new and therefore largely untested. However, the potential effects of the provision may be ascertained by studying the impact that the case law on which it is based, in particular *BCE*, has had on corporate governance and managerial decision-making. As it turns out, studies and academic commentary suggest that there are only very limited, if any, such effects. Indeed, the enhanced 'duty' to stakeholders outlined in *BCE*, now codified in the CBCA, has often been criticized.[88]

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[85] Torys LLP, "A new dimension to directors' duties: Bill C-97" (July 25, 2019), online: <https://www.torys.com/insights/publications/2019/07/a-new-dimension-to-directors-duties>.

[86] Jamil Jivani, "Jamil Jivani: The Conservative MP who's fed up with the menace of woke corporation" *National Post,* September 9, 2022, online: <https://nationalpost.com/opinion/jamil-jivani-the-conservative-mp-whos-fed-up-with-the-menace-of-woke-corporations>.

[87] Jamil Jivani, "Jamil Jivani: The Conservative MP who's fed up with the menace of woke corporation" *National Post,* September 9, 2022, online: <https://nationalpost.com/opinion/jamil-jivani-the-conservative-mp-whos-fed-up-with-the-menace-of-woke-corporations>.

[88] See, e.g., Camden Hutchison, *To Whom Are Directors Duties Owed? Evidence from Canadian M&A Transactions* (McGill L.J., forthcoming), online

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In one study, senior corporate law specialists at leading law firms have been particularly blunt, calling *BCE*'s best interests approach, among other unflattering attributes, "a thin piece of work", "incoherent", "terrible", and "written by people who didn't understand corporate law."[89] On the substance of the approach, the same respondents largely agreed that boards have been influenced by *BCE*, but noted that "there was significant consensus that the influence was more regarding the *process* of decision making, and there was serious question as to whether it had made a difference in terms of changing results."[90] Importantly, the study also conveyed that, in practice, boards perceive the difference between the "best interests of the corporation" and the "best interests of shareholders" to be "largely indistinguishable."[91] In the same vein, commentators have noted the absence of meaningful changes to governance practices in their assessment of the effects of the Supreme Court's "best interests" approach.[92]

Another study examined whether the "best interests" concept had influenced corporate litigation on fiduciary duties. The study failed to unearth any Canadian court decisions in which board members had been held to have breached their fiduciary duty to a non-shareholder stakeholder.[93] Finally, an empirical examination of more than 1,000 so-called 'fiduciary out' clauses in Canadian public M&A agreements between 2001 and 2021 (partially covering the post-section 122(1.1) period) found that, at least in the transactional context, directors are primarily concerned with protecting shareholder interests and mostly ignore stakeholders. Consequently, this study concluded that "[d]espite the formal allowances of Canadian law, structural economic factors make it exceedingly unlikely that directors meaningfully or consistently pursue corporate objectives other than profits,"

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4149644>, at p. 2, fn 14. Proponents of both stakeholderism and shareholder wealth maximization are critical of the approach. On the latter, see Patrick Lupa, "The BCE Blunder: An Argument in Favour of Shareholder Wealth Maximization in the Change of Control Context" (2011), 20 Dalhousie J. Legal Stud. 1, at p. 14.

[89] Carol Liao, "A Canadian Model of Corporate Governance" (2014), 37 Dalhousie L.J. 559, at p. 576.

[90] Carol Liao, "A Canadian Model of Corporate Governance" (2014), 37 Dalhousie L.J. 559, at p. 578.

[91] Carol Liao, "A Canadian Model of Corporate Governance" (2014), 37 Dalhousie L.J. 559, at p. 572.

[92] E.J. Waitzer & D. Sarro, "In Search of Things Past and Future: Judicial Activism and Corporate Purpose" (2018), 55 Osgoode Hall L. J. 791, at p. 798.

[93] Bryce C. Tingle and Eldon Spackman, "Do Corporate Fiduciary Duties Matter?" (2019), 4 Ann. Of Corp. Gov. 272.

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noting also that achieving a broader corporate purpose may require stronger measures than fiduciary duties.[94]

Given the minimal impact the case law appears to have had on corporate decision-making, and considering the similar UK experience with its legislative amendment, it is unlikely that the CBCA's section 122(1.1) will make meaningful headway towards a more stakeholder-oriented business landscape. The provision does not mandate that corporations consider stakeholder interests, continuing instead to operate as an optional regime.[95] It also does not elucidate how directors should balance stakeholder interests, particularly when the interests conflict. Moreover, there is no comparable requirement to the UK's section 172 reporting obligations on stakeholder interests in board decision-making,[96] meaning that the legislation does not contain mechanisms to further nudge directors. This could be addressed in part when new disclosure obligations on "the well-being of employees, retirees and pensioners" come into force, although this only extends to two interest groups.[97] Section 122(1.1)'s enumerated stakeholder list also missed an opportunity to include Indigenous interests as a potential factor to be taken into account, despite the growing recognition of these salient interests and the fact that they had already been highlighted as a governance concern in a recent influential report on Canadian corporate governance.[98]

In short, given its numerous shortcomings, there is "little reason to be optimistic" about section 122(1.1)'s ability to spark change.[99] To be fair, change is not what motivated the adoption of section 122(1.1); on the contrary, the provision aims to continue and solidify the common law 'best interests of the corporation' approach. Yet, as we will argue, change in

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[94] Camden Hutchison, *To Whom Are Directors Duties Owed? Evidence from Canadian M&A Transactions* (McGill L.J., forthcoming), online <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4149644>, at p. 16.

[95] P.M. Vasudev, *Beyond Shareholder Value: A Framework for Stakeholder Governance* (UK: Edward Elgar Publishing, 2021) at p. 260.

[96] Boards have a duty to disclose stakeholder engagement measures under National Policy 58-201 (Corporate Governance Guidelines). However, there is no obligation to report on how directors have taken into account stakeholder interests in their decision-making.

[97] The proposed new section 172.2 of the CBCA reads: "The directors of a prescribed corporation shall place before the shareholders, at every annual meeting, the prescribed information respecting the well-being of employees, retirees and pensioners."

[98] Peter Dey and Sarah Kaplan, "360˚ Governance: Where Are the Directors in a World in Crisis?" (2021), online: <https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report>.

[99] L. Lin, "The 'Good Corporate Citizen' Beyond BCE" (2021), 58 Alta. L. Rev. 551, at p. 566.

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governance practices surrounding corporate purpose and fiduciary duties is needed to counter the challenges that we face as a society.

III. The Need for a Better Approach (And Why it is Difficult to Move Forward)

The notions of an enlightened shareholder and a broader view of the best purposes of the corporation have now been in play in both the UK and Canada for more than 15 years. Yet there is scant evidence in either jurisdiction that corporations are behaving more responsibly towards non-shareholder stakeholders. Considering stakeholder interests is, after all, not the same as acting in their interests. But if the current model is not working, what else should it be? The answer to this question requires more clarity on an alternative to the "best interests" approach or, more broadly speaking, a revised corporate purpose. It also requires thinking about what mechanisms are appropriate to support a more stakeholder-oriented corporation.

1. Why the "Best Interests" and "Success of the Company" Approaches Are Failing

There are likely four main reasons why the UK and Canadian legislative approaches are not prompting better corporate safeguarding of stakeholder interests. First, it is not mandatory to do so in either jurisdiction, making this a weak counter to the status quo of shareholder primacy. In the UK, stakeholder interests need to be taken into account, but not necessarily promoted. Ultimately, the ESV principle still stands for shareholder wealth maximization. In Canada, the law appears permissive of deviations from shareholder wealth maximization, yet the consideration of other interests is not mandatory but subject to board/managerial discretion.

Second, even if a board of directors or corporate officers wanted, and would be legally permitted, to prioritize non-shareholder stakeholder interests, neither legislation nor case law tells them how and to what extent they may or should do so, particularly if there is a clear conflict between shareholder and other interests. More specifically, if the interests of shareholders and other stakeholders diverge or there is a conflict between two or more different stakeholder interests (such as a conflict between employee and environmental interests), neither case law nor the CBCA specify how such conflicts should be resolved.

Finally, enforcement of fiduciary duties relating to stakeholder interests is problematic. For the most part, duties of directors and officers are enforced

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by shareholders, although stakeholders could become shareholders to pursue litigation. Also, in Canada, the inclusion of "proper persons" in the definition of "complainants" under the CBCA theoretically enlarges the scope of parties that may enforce directors' and officers' duties.[100] Courts could grant stakeholders other than shareholders standing under the relevant provisions, although typically only creditors rely on such provisions. In any event, outside of the rare cases of direct actions, even where complainants are successful in enforcing fiduciary duty breaches, damages are awarded to the corporation to which these duties are owed. Unless there is a negotiated settlement stipulating actions beyond the payment of damages, stakeholders are unlikely to gain any remedies that would be helpful to them and justify protracted litigation.

2. A New Generation of Corporate Purpose-Related Legislation

The UK's section 172 of the Companies Act and Canada's section 122(1.1) CBCA belong to an older type of corporate purpose-related legislative provisions. Similar to various constituency statutes enacted in the 1980s in the US,[101] these provisions encourage or permit boards to take into account non-shareholder stakeholder interests. In recent years, however, a new type of legislation has emerged. This type of legislation features provisions that introduce specific due diligence obligations pertaining to companies' human rights and environmental or sustainability performance, typically focusing on their supply chains.

In February 2022, the European Commission released a draft for a Directive on Corporate Sustainability Due Diligence, notable for its wide geographic scope (including all EU member states) and substantial depth.[102] This draft directive follows comparable legislation in other jurisdictions, such

[100] CBCA, s. 238(d).

[101] See, e.g., Ariz. Rev. Stat. Ann. 10-2702 (West 2004); Conn. Gen. Stat. Ann. § 33-756(d) (West 1997); Fla. Stat. Ann. §607.0830 (West 2001); Ga. Code Ann. § 14-2202(b)(5) (Lexis 2003); Haw. Rev. Stat. § 414-221(b) (2004); Idaho Code § 30-1702 (Michie 2005); 805 Ill. Com Stat. 5/8.85 (West 2004); Ind. Code Ann. § 23-1-35-1(d) (Michie 1999); Iowa Code Ann. §491.101B(1) (West 1999).

[102] EC, *Proposal for a Directive of the European Parliament and of the Council 2019/1937/EC of 23 February 2022 on Corporate Sustainability Due Diligence and Amending Directive*. See also the updated version of this proposal: EC, *Proposal for Directive of the European Parliament and of the Council 2022/15024/REV1 of 30 November 2022 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach*.

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as France's *devoir du vigilance* (duty of vigilance), among others.[103] Due diligence laws are designed to force large corporations to initiate or strengthen efforts in monitoring, improving, disclosing, and enforcing human rights and/or environmental protection in all entities that form part of their supply or value chains.

The EU proposed directive on Corporate Sustainability Due Diligence is one of the most ambitious forms of this type of legislation.[104] Its Article 1 introduces obligations for companies regarding both human rights and environmental adverse impacts, and with respect to their own operations and its value chain. Article 4 lays out six elements of due diligence, which companies within the legislative scope must conduct.[105] These elements are: (1) integrating due diligence into company policies; (2) identifying actual or potential adverse impacts; (3) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent; (4) establishing and maintaining a complaints procedure; (5) monitoring the effectiveness of due diligence policy and measures; and (6) publicly communicating on due diligence. Articles 5–11 discuss these elements in considerable depth.

The Directive also specifically addresses climate obligations.[106] It requires companies to adopt a business plan and strategy that is consistent with the target of limiting global warming to 1.5 °C, in line with the Paris Agreement, and identify the impact on climate change and the risks of climate change to its business. If climate change is a principal impact of or risk to the company's operations, the business plan must include emissions reductions.

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[103] Other variations of this type of legislation include legislation enacted in Germany (*Lieferkettengesetz*; Supply Chain Law) and proposed in the Netherlands (Bill on Responsible and Sustainable International Business Conduct). See Germany, "Greater protection for people and the environment in the global economy" (March 3, 2021), online: <https://www.bundesregierung.de/breg-en/service/archive/supply-chain-act-1872076>; European Coalition for Corporate Justice, "Dutch parliament introduces corporate accountability bill" (November 2, 2022), online: <https://corporatejustice.org/news/dutch-parliament-introduces-corporate-accountability-bill/>.

[104] EC, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* [2022], COM, 71. For an in-depth discussion, see Christopher Patz, "The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment" (2022), 7 Bus. & Hum. Rts J. 291.

[105] These duties are discussed in more depth in articles 5–11.

[106] EC, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* [2022], COM, 71, at art. 15.

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Finally, the Directive establishes civil liability for companies that fail to adhere to these obligations.[107] In an earlier draft, the Directive also sought to require directors to take into account the consequences of their decisions for sustainability matters—including balancing stakeholder interests against shareholder interests[108] as well as establish liability for directors for failing to set up and oversee due diligence actions.[109] However, in a revised draft of the proposal, the provisions on directors' duties were removed. This change, as the responsible committee reported, was based on Member States' concerns that the provisions could amount to "an inappropriate interference with national provisions regarding directors' duty of care, and potentially undermining directors' duty to act in the best interest of the company."[110] The removal of provisions on directors' duties is also likely a consequence of critical comments received during an earlier consultation stage.

In contrast to the EU directive, efforts to craft similarly themed-legislation in Canada entail far less onerous obligations for corporations. Bill S-211,[111] currently expected to take effect in 2024,[112] addresses only issues of forced and child labour in supply chains. The Bill requires corporations to report annually on the steps they have taken "to prevent and reduce the risk that forced labour or child labour is used at any step of the production of goods in Canada or elsewhere by the entity or of goods imported into Canada by the entity."[113] It further prohibits the importation of goods that are manufactured or produced wholly or in part by forced labour or child

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[107] EC, *Proposal for Directive of the European Parliament and of the Council 2022/15024/REV1 of 30 November 2022 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach,* at art. 22.

[108] EC, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* [2022], COM, 71 at art. 22.

[109] EC, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* [2022], COM, 71, at arts. 25 and 26.

[110] EC, *Proposal for Directive of the European Parliament and of the Council 2022/15024/REV1 of 30 November 2022 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach,* at art. 31.

[111] Bill S-211, *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*, 1st sess, 44th Parl, 2022 (Received royal assent May 11, 2023).

[112] Hugh Christie, Michael Comartin and John Wilkinson, "Canada Introduces Legislation to Combat Modern Slavery in Supply Chains", *Ogletree Deakins* (November 15, 2022), online: <https://ogletree.com/insights/canada-introduces-legislation-to-combat-modern-slavery-in-supply-chains>.

[113] Bill S-211, *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*, 1st sess, 44th Parl, 2022 (Received royal assent May 11, 2023), at s. 11.

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labour.[114] With its limited focus on labour practices and primary focus on disclosure obligations, Bill S-211 is likely to follow the path of the UK, which introduced the Modern Slavery Act in 2015, legislation found to be relatively ineffective at reducing instances of labour violations.[115] The Bill, therefore, missed an opportunity to introduce more encompassing duties and, additionally, a broader scope that would extend to sustainability.

3. Stuck in Neutral When We Should Move Forward (Fast)

Given the developments outlined thus far, both in terms of the legal and policy background as well as the business community's shifting communication around corporate purpose, it seems fair to say that "some" changes are underway. However, the question now turns to whether those changes are sufficient in terms of substance and speed of implementation. On both counts, we doubt that they are. There is limited indication of real concern toward stakeholder interests by business. Neither hard nor soft law, nor voluntary measures by business, are currently sufficient to bring us on track to limit global warming along the lines of the Paris Agreement.[116] The reasons for these shortcomings are varied and include a lack of conviction or incentives by business leaders, insufficient investor and market pressures, political views and processes that impede "progressive" reforms, and—more generally—inertia and entrenched thinking. The lack of seriousness and sincerity by which business leaders pursue stakeholderist goals is well documented and includes corporate engagement in "greenwashing" and similar practices[117] to a general mismatch between corporations' words and

[114] *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*, 1st sess, 44th Parl, 2022 (Received royal assent May 11, 2023), at s. 26. The Canada-US-Mexico Free Trade Agreement already prohibited importation of goods made with forced labour.

[115] Business and Human Rights Resource Centre, "Modern Slavery Act: Five years of reporting – Conclusions from Monitoring Corporate Disclosure" (2021), online ,<https://media.business-humanrights.org/media/documents/MSR_Embargoed.pdf>.

[116] See Richard Black et. al., "Taking Stock: A Global Assessment on Net Zero Targets" (2021), at p. 19, online: <https://ca1-eci.edcdn.com/reports/ECIU-Oxford_Taking_Stock.pdf>.

[117] See e.g. "Sustainable Finance is Rife with Greenwash. Time for More Disclosure", *The Economist* (May 22, 2021), online: < https://www.economist.com/leaders/2021/05/22/sustainable-finance-is-rife-with-greenwash-time-for-more-disclosure >; A. Baker et al., "Diversity Washing (2022)" (Finance Working Paper, European Corporate Governance Institute, 2023), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298626>.

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deeds, including with the Business Roundtable's revised 2019 corporate purpose statement.[118]

On the academic side, meanwhile, scholars that support purely shareholder value-oriented capitalism have laid out their arguments.[119] A more recent, and less well understood, development is however pushback against legal reforms to broaden corporate purpose by commentators who declare themselves supportive of strengthening the position of stakeholders.[120] The main difference between this newer type of scholarship and traditional shareholder value focused commentary is that the former opposes stakeholderism not because it seeks to defend shareholder value. Rather, these commentators appear to be sympathetic to the cause of stakeholderism but argue that corporate law is not the appropriate place to implement changes to address these problems.

Academic or expert opposition to legislative reform is arguably especially significant in Europe, where the political process is not as 'stuck' as it is in the United States with its hardened bipartisan lines, and where progressive corporate reform ideas generally can be expected to fall on more fertile ground. The EU in particular is already making inroads in the area of sustainable corporate finance, having launched several regulatory initiatives in recent years. Still, even here, the headwinds are considerable.

A good example of this can be seen in some of the reactions to the EU's Directive on Corporate Sustainability Due Diligence (outlined above).[121] Despite being welcoming of its general thrust, numerous corporate law

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[118] See Lucian A. Bebchuk and Roberto Tallarita, "Stakeholder' Talk Proves Empty Again" *Wall Street Journal*, August 18, 2021, online: <https://www.wsj.com/articles/stakeholder-capitalism-esg-business-roundtable-diversity-and-inclusion-green-washing-11629313759>.

[119] For the leading and most comprehensive recent contribution, see Stephen M. Bainbridge, *The Profit Motive: Defending Shareholder Value Maximization*, (Cambridge: Cambridge University Press, 2023).

[120] See Lucian A. Bebchuk and Roberto Tallarita, "The Illusory Promise of Stakeholder Governance" (2020), 106 Cornell L. Rev. 91; Matteo Gatti and Chrystina Ondersma, "Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera" (2020), 46 J. Corp. L. 1. This case is typically made by drawing on various points that have been made over time by those that oppose deviations from shareholder primacy, including that: managers, if granted more discretion in decision-making, will not use it for the benefit of stakeholders; managers need the singular goal of profit maximization to avoid confusion and self-interested abuse of power; and providing stakeholder-oriented incentives would be difficult and costly.

[121] As part of the preparatory work for the Directive, the Commission had also tasked Ernst & Young with drafting a Study on Directors' Duties and Sustainable Corporate Governance. For a summary of concerns on this study, see Alex Edmans et al., "Call for Reflection on Sustainable Corporate Governance", *ECGI* (April 7 2021), online: <https://ecgi.global/news/call-reflection-sustainable-corporate-governance>.

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experts and other commentators expressed concerns about the Directive. Some common themes included that the Directive's due diligence and supply chain approach lacked details or was misguided; the draft was too narrow or too wide in scope; expanding directors' duties would be ineffective, politically sensitive, or otherwise confusing or inappropriate; the reference to human rights and environmental impacts is incomplete and vague; the climate obligations and enforcement mechanisms are too lax or too strict; and that the new framework would be overly burdensome on companies and undermine competitiveness.[122] Generally, there is a persistent concern, as recently voiced by a prominent commentator that "tinkering with the law of 'corporate purpose' threatens to disrupt the coherence of the corporate form."[123] Unfortunately, such concerns, and reliance on other "regulatory solutions"[124] to solve the pressing problems of our times, also threatens to paralyze much needed reform processes.

To be sure, academic analysis and criticism is essential for high quality regulation. However, there is also a danger of having "the perfect as enemy

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[122] See, e.g., Guido Ferrarini, "Corporate Sustainability Due Diligence and the Shifting Balance between Soft Law and Hard Law in the EU", *Oxford Business Law Blog* (April 22, 2022), online: <https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/corporate-sustainability-due-diligence-and-shifting-balance-between>; John Ruggie, "European Commission Initiative on Mandatory Human Rights Due Diligence and Directors' Duties", Harvard Kennedy School (February 2021), online : <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/EU%20mHRDD.pdf>; Soren Hansen and Troels Lija, "Corporate Sustainability Due Diligence: Is there a Legal Basis for the proposed Article 15" , Copenhagen Business School Law Research Paper Series, No 22-01, online: <https://ssrn.com/abstract=4075097>; Alessio Pacces, "Supply Chain Liability in the Corporate Sustainability Due Diligence Directive Proposal", *Oxford Business Law Blog* (April 20, 2022), online:<https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/supply-chain-liability-corporate-sustainability-due-diligence>; Anne Lafarre, "Mandatory Corporate Sustainability Due Diligence in Europe: The Way Forward", *Oxford Business Law Blog* (April 21 2022), online:<https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/mandatory-corporate-sustainability-due-diligence-europe-way-forward>; Steen Thomsen, "Sustainable Corporate Governance and the Road to Stagnation", *Oxford Business Law Blog* (April 14, 2022), online <https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/sustainable-corporate-governance-and-road-stagnation>; Luca Enriques and Matteo Gatti, "The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention", *Oxford Business Law Blog* (April 21 2022), online: <https://www.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate>.

[123] Edward B. Rock, "For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose" (Working Paper, European Corporate Governance Institute, 2020), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951> at p. 29.

[124] Edward B. Rock, "For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose" (Working Paper, European Corporate Governance Institute, 2020), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951> at p. 30.

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of the good," meaning that well intended criticism can slow down or water down reform measures when what is needed are quick and decisive steps. The challenge, especially for regulators, is to reconcile and make sense of well-founded criticism and feedback, adjusting as needed without sacrificing legislative goals and regulatory effectiveness. In this vein, it is worth pointing out the tool of ex post review of legislation, adopted in various jurisdictions. As a corollary to ex ante measures such as Regulatory Impact Assessments, which measure the costs and benefits of a proposed regulation before its enactment, the guiding idea behind ex post reviews is that newly adopted policies should be regularly assessed and potentially adjusted.[125] This tool, which may come in different shapes and forms, allows regulators to implement appropriate tweaks and changes to recently adopted policies. Implementation reviews and re-assessments based on newly available information and surveys could even be further extended. These tools should also alleviate concerns of those that fear that new provisions, once adopted, will be set in stone.

IV. Elements of Reform

In this section, we outline proposed changes toward a revised model of corporate purpose. In Canada, the main priority should be to move beyond the current "best interests" approach, which is anchored in legislation and case law, towards a stronger commitment to a pluralist or stakeholderist model. Before outlining specific legislative changes, however, it is necessary to address the goals of these reform measures. Although thus far we have referred to a broader corporate purpose, stakeholder interests, or moving away from shareholder value, more clarity is needed on the direction of travel. In other words, when backing away from shareholder value maximization, to where should we move? As will be detailed in the following, we support a model that not only allows, but requires corporations to balance all stakeholder interests, including shareholder interests, combined with legislative guidance on balancing and prioritizing those interests. We

[125] Ex post reviews come in different shapes, with two examples being peer reviews and consultations. See Kenneth Arrow et al, "Benefit-Cost Analysis in Environmental, Health, and Safety Regulation" (AEI, 1996) at p. 9; OECD, *Proceedings from the OECD Expert Meeting on Regulatory Performance: Ex Post Evaluation of Regulatory Policies* (September 22, 2003).

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suggest a new attempt at defining corporate purpose in dedicated provisions, instead of relying solely on corporate and fiduciary duties to guide corporate behaviour and decision-making. Finally, as a logical corollary to these measures, we advocate for stronger enforcement measures, which also explicitly includes non-shareholders.

1. Moving from Shareholder Primacy to … ?

Much ink has been spilled over the divide in the fundamental approaches to corporate purpose, a divide which this article has already (implicitly) referred to numerous times in the previous sections. To state it again briefly, the first approach—which for the most part also still remains dominant in business practices—is shareholder wealth maximization. As the name readily implies, the corporate purpose here is exclusively about the furtherance of shareholders' financial interests, namely as expressed through the value of their shares in a firm. The second approach is the stakeholderist or pluralist approach.[126] While it is clear that this alternative view abolishes or relaxes the exclusive focus on shareholder value, it is also true that a settled definition of this second approach does not exist, which poses a problem for legal reform. Where precisely do we want to end up in a post-shareholder wealth maximization world?

To be sure, despite the lack of a uniform view, some commentators have developed suggestions for further defining alternatives to shareholder wealth maximization. These range, to mention just a few, from a system that empowers the board to mediate "competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together"[127] to establishing a requirement for companies to act within the concept of planetary boundaries.[128] Also, in a notable recent contribution, Hart and Zingales propose a shift from shareholder value maximization (SVM) toward shareholder *welfare* maximization (SWM),[129] which they argue can already

[126] For helpful discussions on this, see P. Zumbansen, "The Corporation in an Age of Divisiveness" (2023) TLI Think!Paper 1/2023, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4374323> and "Corporate Governance Choices and the Actual Stakes of Stakeholder Governance" (2022) TLI Think!Paper 3/2022, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4092148>.

[127] Margaret Blair and Lynn Stout, "A Team Production Theory of Corporate Law" (1999), 85 Va. L. Rev. 247, at p. 281.

[128] See Beate Sjafjell and Jukka Mahonen, "Upgrading the Nordic Model for Sustainable Companies" (2014), 11 Eur. Co. L. 2.

[129] Oliver Hart and Luigi Zingales, "The New Corporate Governance" (2022), 1 Chicago Bus. L. Rev. 195. This represents a continuation of their previous work, see for example

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be observed in real world scenarios, such as in shareholder support for proposals on environmental and social issues.[130] As they posit, shareholder value maximization may not represent the preferences of shareholders collectively and there is "no reason to think that SVM achieves a socially efficient outcome among the group of shareholders as a whole (or for society)."[131] Rather, Hart and Zingales argue that shareholder value maximization is a result of collective action and agency problems, legal and contractual rules, and business norms.[132] The shareholder welfare criterion, in contrast, would empower shareholders to have a stronger voice on directing companies to pursue social goals.

The limits of corporate pursuit of social goals, Hart and Zingales posit, should be based on the extent to which a business can be effective in achieving them. Thus, they suggest that corporations should advance goals insofar as they have a comparative advantage in achieving them, such as the control of a unique technology of production, market power, or where they are able to exercise political pressure.[133] This comparative advantage relates to other businesses, but importantly also to individuals. In this respect, although commentators have suggested that corporations should simply let their shareholders support social goals in their individual capacities, rather than get involved themselves,[134] this overlooks the fact that corporations are often in a much better position to do so.[135]

We agree with many points in Hart and Zingales' proposal, although we would go further and suggest a shift from their idea of shareholder welfare maximization to 'welfare maximization' more generally. In the following sections we will outline more specific features of a broader corporate purpose

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Oliver Hart and Luigi Zingales, "Companies Should Maximize Shareholder Welfare Not Market Value" (2017), 2 JL. Fin. & Accounting 247.

[130] Oliver Hart and Luigi Zingales, "The New Corporate Governance" (2022), 1 Chicago Bus. L. Rev. 195, 196. See also Frank Partnoy, "Shareholder Primacy is Illogical", in Elizabeth Pollman and Robert B. Thompson, eds, *Research Handbook on Corporate Purpose and Personhood* (Cheltenham: Edward Elgar Publishing Ltd, 2021) 186.

[131] Oliver Hart and Luigi Zingales, "The New Corporate Governance" (2022), 1 Chicago Bus. L. Rev. 195, 203.

[132] Oliver Hart and Luigi Zingales, "The New Corporate Governance" (2022), 1 Chicago Bus. L. Rev. 195, 204–07.

[133] Oliver Hart and Luigi Zingales, "The New Corporate Governance" (2022), 1 Chicago Bus. L. Rev. 195, 210–12.

[134] See e.g. Milton Friedman, "The Social Responsibility of Business Is to Increase Its Profits", *The New York Times,* September 13, 1970, p. 17.

[135] Hart and Zingales offer another useful reminder of this, citing real world examples such as the reduction of plastic pollution or the use of antibiotics in raising poultry. See Oliver Hart and Luigi Zingales, "The New Corporate Governance" (2022), 1 Chicago Bus. L. Rev. 195, at pp. 202–203.

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regime. In our view, in further defining the elements of directors' and managers' duties and the balancing of interests, the focus should lie on two of the core elements of sustainability: *human rights* and the *environment*.

In part, the focus on these two issues is particularly cogent as they not only represent two of the most pressing issues on which corporations have a notable impact, but they are also issues that widely represent the public interest.[136] Addressing both issues is also in line with international norms, including the United Nations Guiding Principles on Business and Human Rights, the OECD Guidelines on Multinational Enterprises, and the Paris Agreement on Climate Change.[137] It further aligns with growing movements aiming to make corporations more sustainable, such as the Task Force on Climate-Related Financial Disclosures, the UN Global Compact, and the UN Sustainable Development Goals. Introducing managerial and corporate duties for human rights and the environment is also becoming an established international practice, with several countries introducing or proposing similar legislation.[138]

In addition, unlike interests such as those of employees which could be captured well by changes to labour and employment law, human rights and environmental matters are more difficult to silo into one specific area of law. In part, this is because human rights and environmental issues are not confined to the jurisdiction in which the corporation is located, but rather

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[136] British Academy, "Reforming Business for the 21st Century" (2019), at p. 17. See also the more far-reaching concept of 'Ecocide', which has been proposed to include a duty for directors to "ensure the corporation does not engage in unlawful or wanton acts that cause severe and either widespread or long-term damage to the environment." Stop Ecocide Foundation, "Independent Expert Panel for the Legal Definition of Ecocide – Commentary and Core Text" (June 2021), online: <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf>.

[137] United Nations Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework" (2016); *Paris Agreement under the United Nations Framework Convention on Climate Change* (Dec. 13, 2015), U.N. Doc. FCCC/CP/2015/10/Add,1.

[138] See e.g., Loi Relative Au Devoir De Vigilance Des Sociétés Mères Et Des Entreprises Donneuses d'Ordre, No. 2017-399 (27 Mars 2017) [Law on the Duty of Vigilance of Parent Companies and Ordering Companies, No. 2017-399 (27 March 2017) (France)]; EC, *Proposal for Directive of the European Parliament and of the Council 2022/15024/REV1 of 30 November 2022 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach* [2022]. In India, s. 166(2) of the Companies Act, 2013 provides that a "director of a company shall act in good faith … in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment."

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often traverse borders. As a result, the domestic law of the country in which the corporation is located is usually unable to control corporate transgressions on these issues. Global externalities thus benefit in particular from inclusion of transnational businesses, prompted via corporate law, to work ex ante towards reducing and eliminating these impacts.

2. Corporate Purpose

The use of statutory or charter provisions that attempt to define a corporation's objects, although once normal practice—at the early stages of corporate history—has long fallen out of favour.[139] Mainly, the issue with such provisions has been found to be lack of flexibility and problems related to the traditional ultra vires doctrine (holding that corporations could only carry out acts authorized by their charter's objects clause), which led to legal uncertainty.[140]

Modern corporate law statutes tend to provide that corporations may carry on any lawful purpose without restrictions, unless their articles or similar corporate documents provide otherwise. Yet corporate purpose provisions may still be useful today, although not as provisions that define the activities in which the corporation can or cannot engage. Rather, corporate purpose provisions can define a corporation's overarching mission. The advantage of such corporate purpose provisions, compared to a model that relies solely on fiduciary duties and external regulation to steer corporate behaviour, is that they apply to a business as a whole (not only directors and officers), offer ex ante guidance, and may improve and create corporate commitments. Additionally, corporate purpose driven actions may and should go beyond what is already prescribed in external regulation, which often falls short of what is in the best interest of human health and the environment. Indeed, corporate purpose provisions have seen a partial revival in (public) benefit corporations – or, in British Columbia and Nova Scotia, 'Community Interest Corporations' and Community Contributions Companies' – which could serve as inspiration for a general approach for companies outside of these smaller niches.[141]

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[139] E. Pollman, "The History and Revival of the Corporate Purpose Clause" (2021), 99 Texas Law Review 1423.
[140] C. Nyombi, "The Gradual Erosion of the Ultra Vires Doctrine in English Company Law" (2014), 56 Intl J L. Mgmt 347.
[141] Community interest/contribution companies combine for-profit and non-profit elements, while benefit companies are structured as for-profit companies whose operations must be sustainable and promote public benefits. See D. Ullrich et al., "Business with a Heart of Gold – The New BC Benefit Companies", *Fasken Bulletin* (June 24, 2020), online: <

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In the social enterprise or benefit corporation field, most US states with relevant specialized legislation require that these companies provide a "general public benefit." This is usually broadly defined as a "material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation."[142] Some states additionally require that a company also create a specific benefit. However, because the various definitions of benefit tend to be vague, a third-party standard-setter, usually B Lab's Impact Assessment, is often used to assess whether a company satisfies the requirements to produce a required general or specific benefit. The B-Lab Model includes requirements for an explicit social or environmental mission, with legally binding fiduciary duties pertaining to the interests of shareholders and a broad range of stakeholders.[143]

In Delaware, for instance, the law defines a public benefit corporation as "a for-profit corporation … that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[144] Public benefit is defined as "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature." Adopting a balancing approach to stakeholder interests, Delaware law further provides that "a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation." Accordingly, the directors are required to manage their company "in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[145]

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https://www.fasken.com/en/knowledge/2020/06/18-new-bc-benefit-companies>. On recent French reforms on corporate purpose, see also I. Akintunde and R. Janda, *Bringing Corporate Purpose into the Mainstream: Directions for Canadian Law* (David Suzuki Foundation, 2023), at pp. 38–41; A. Hatchuel, K. Levillain and B. Segrestin, "When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose" (2021), 171 J. Bus. Ethics 1.

[142] *New York Business Corporation Law* (2016) s. 1702 (2016).

[143] B Global Network, "Common Concerns about B Corp Certification: a Q&A", *B Corporation,* (June 6, 2022), online: <https://www.bcorporation.net/en-us/news/blog/common-concerns-about-b-corp-certification-a-q-and-a>.

[144] Del. Code tit. 8, §362.

[145] Del. Code tit. 8, §§362–367.

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As voluntary changes to corporate commitments to improve societal problems appear to stagnate or develop only slowly, a reformed vision of corporate purpose may therefore have to be injected legislatively. For instance, as a high-level approach, scholars in the UK have suggested, a corporation's purpose could be defined "to produce profitable solutions to the problems of people and planet" and "not to profit from producing problems for people or planet."[146] Alternatively, the UK's Better Business Act initiative proposes to define corporate purpose as businesses operating "in a manner that also (a) benefits wider society and the environment … and (b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating [them]." In Canada, a recent report prepared for the Suzuki Foundation calls for "a more solid legal scaffolding" for corporate purpose.[147] The Report suggests amending the CBCA to require boards of medium-sized and large companies to adopt and present annually to its shareholders "a statement of purpose setting out the reason for existence guiding [the corporation's] business conduct".[148] It further recommends that this should be coupled with an obligation for companies to either state a social purpose or explain why they have not done so.[149]

To be sure, any legislative additions would have to be designed or worded carefully to ensure alignment between purpose and fiduciary duty provisions to exclude the possibility of companies being able to adopt a purpose that runs counter to directors' and managers' fiduciary duties and vice versa. Under the CBCA, for instance, section 122(3) provides that duties arising under the Act cannot be altered by way of contractual provisions or a company's bylaws or resolutions. Acting in accordance with a purpose provision that is enshrined in corporate documents would therefore not

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[146] British Academy, "Reforming Business for the 21st Century" (2019); *Colin Mayer, Prosperity: Better Business Makes the Greater Good*, (Oxford: Oxford University Press, 2019) at p. 12. See also the Enacting Purpose Initiative, "Enacting Purpose within the Modern Corporation: A Framework for Boards of Directors" (2020), online, <https://www.sbs.ox.ac.uk/sites/default/files/2020-08/Enacting%20Purpose%20Initiative%20-%20EU%20Report%20August%202020.pdf>.
[147] I. Akintunde and R. Janda, *Bringing Corporate Purpose into the Mainstream: Directions for Canadian Law* (David Suzuki Foundation, 2023), at p. 5.
[148] I. Akintunde and R. Janda, *Bringing Corporate Purpose into the Mainstream: Directions for Canadian Law* (David Suzuki Foundation, 2023), at p. 43.
[149] I. Akintunde and R. Janda, *Bringing Corporate Purpose into the Mainstream: Directions for Canadian Law* (David Suzuki Foundation, 2023), at p. 46. In addition, the report recommends that: directors' and officers' fiduciary duties should be extended to pursuing the purpose of the corporation honestly and in good faith with a view to its best interests; the best interests of the corporation should be expanded to include impacts on the community, high standards of business conduct and fairness between stakeholders of the corporation; and the board should state annually how directors and officers have advanced the corporate purpose and best interests.

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relieve directors and officers from liability if their actions result in fiduciary duty breaches.

To provide some further nuance, we envisage purpose clauses that direct corporations to promote sustainability by respecting the environment and human rights. Respecting, in this context, can be understood as identifying, mitigating, and preventing harm. Indeed, companies should be expected to minimize the impact of their activities on human rights and the environment. They should further consider promoting sustainability issues within their 'circle of influence'; that is, based on the company's comparative advantage or market power[150] and where there is a significant link between a human rights or sustainability issue and the corporation's specific business activities. These detailed obligations—and consequences of failures to adhere to them—could then be delineated either in corporate laws or in standalone statutory instruments, akin to the EU's due diligence approach.

While new or revised corporate purpose provisions along these lines will not, by themselves, eliminate the negative impacts that they address, they would arguably make a strong contribution toward steering corporations in the direction of a broader function that combines profit-making and problem-solving for the benefit of the public. At the very least, such provisions would send a strong signal and act as guidance for corporations as a whole. However, this does not mean that corporate law should work by itself to support stakeholder interests. Rather it should complement external laws, which remain of paramount importance.

3. Fiduciary Duties

Corporate behaviour and purpose can be steered via fiduciary duties of directors and officers. In Canada and the UK, the "best interests" and enlightened shareholder approach, respectively, are based on fiduciary duties. Linking purpose with fiduciary duties is logical given the important role of boards and management in decision-making. It is however not strictly necessary as purpose could also, even exclusively, be shaped via duties addressed to the corporate entity itself. Some of the 'new generation' corporate due diligence-type laws discussed above, such as the EU's approach, operate with obligations that pertain to the company, not its

[150] See Oliver Hart and Luigi Zingales, "The New Corporate Governance" (2022), 1 Chicago Bus. L. Rev. 195.

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directors, with enforcement based on civil and administrative liability of the entity.

Still, linking individual fiduciary duties and the corporation's purpose is desirable to better align the company's aims with the actions of its leaders. A separate question arises with regard to directors' and managers' personal liability for breach of fiduciary duties, with the caveat being that there needs to be a balance between individual responsibility and protection from overly harsh liability for the individual agents that act for a business. As part of a balanced system, direct corporate duties and fiduciary duties should ideally work together to steer corporate behaviour.

(a) Balancing of Interests

Reforming fiduciary duties in line with the goal to broaden corporate purpose includes several key elements. The main overarching change is to adopt an approach that puts shareholder and other stakeholder interests on the same footing and requires corporate decision-makers to engage in a true balancing of interests of all potentially impacted parties. Putting shareholder and stakeholder interests on the same footing would still give corporations the necessary room to consider shareholder wealth concerns but, at the same time, also allow for decisions that may be more beneficial for non-shareholder constituents than shareholders. To gather the necessary information, boards could, among others, be mandated to consult with stakeholder advisory panels, composed of experts on particular stakeholder interests, or to designate certain directors to provide a voice for key stakeholders as a "formal part of the board structure."[151]

Additional guidance on balancing could take various forms. One such approach, which we have already advanced in previous work, is to require corporations to take stock of the positive and negative impacts of their actions or decisions and strive for an outcome that offers the highest net benefits for all relevant stakeholders, or the public, as a whole.[152] Under this approach, boards and managers would be generally required to pursue net beneficial corporate activities, taking into account financial and non-financial interests of any stakeholder group, including shareholders. For example, using this model, a corporation would refrain from relocating a factory if the benefit to shareholders and new employees is less than the cost to current employees. Such calculations are not exact but guidance along these considerations could

[151] U.K. Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform – Green Paper*, (Nov. 2016), at para. 2.19.
[152] Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public,* (Cambridge: Cambridge University Press, 2018) at pp. 56–59.

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lead to improved outcomes by forcing corporations to thoroughly consider and weigh the overall effects of their activities as precisely as possible.

Net benefit considerations would not always have to be the decisive factor. In accordance with a focus on sustainability in defining corporate purpose, guidance for balancing interests could provide that the environment and human rights should take precedence over other interests. This would not be without limits, which could be established by reference to the corporate purpose, discussed above, and the emphasis on reasonable steps to protect issues of sustainability. Finally, in our view, it would be appropriate to exclude purely political and religious considerations and preferences from informing the balancing exercise, unless they are directly relevant to a corporation's specific business or operations.[153] These considerations and preferences may, of course, coincide with sustainability goals, but should not by themselves be the motivating factor or bases for a decision to pursue a certain course of action.

The above differs from the current Canadian approach in that it mandates, and not only enables, directors and officers to consider non-shareholder interests.[154] It is also different from the UK approach (and, in practice, the Canadian approach and other ESV-inspired modifications of shareholder wealth maximization) as it is not merely a modified version of shareholder wealth maximization, but rather allows companies to prioritize non-shareholder interests over shareholder interests in appropriate circumstances. Another new element is the legislative guidance on how to balance and prioritize stakeholder interests, with an emphasis on protecting sustainability (pertaining to the environment and human rights) where these interests are involved and conflict with other interests, including purely financial ones. While advancing social goals may coincide with advancing financial interests (i.e., "doing well by doing good"), this is not always the

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[153] On this, see generally L.E. Strine, "Good Corporate Citizenship We Can All Get Behind?: Toward A Principled, Non-Ideological Approach To Making Money The Right Way", Bus. Lawyer (forthcoming 2023), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4296287>.

[154] Note, however, that a case can be made that directors already have a duty to inform themselves of the impact of their decisions on stakeholders under the duty of care. See Y. Allaire and S. Rousseau, "To Govern in the Interest of the Corporation: What Is the Board's Responsibility to Stakeholders Other than Shareholders?" (2015) 5 J. of Management and Sust. 1, at pp. 8–9. On the other hand, it could be argued that since case law and section 122(1.1.) of the CBCA do not mandate considering (specific) stakeholder interests, that duty does not impose additional obligations beyond those arising under the "best interests of the company" framework.

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case.[155] The hard cases are those where these interests diverge, and it is precisely in this area where a reformed corporate purpose will have its strongest effect.

Providing guidance on balancing would also address one of the most frequent criticisms of stakeholder models, namely that they do not specify which stakeholder interests should be considered by management and the methodology by which managers should be considering them.[156] While directors already practice ad hoc balancing of interests, ultimately such an approach lacks consistency and leaves considerable discretion in their hands. Boards have further shown little interest in using their discretion for the benefit of stakeholders other than shareholders.[157] If governments are committed to furthering sustainability, they should specify which stakeholder interests they want businesses to prioritize to meet this aim, and offer guidance on how to conduct the balancing, along the lines of what we have proposed above.[158]

Indeed, the need for boards to consider at least certain human rights or environmental interests may already be subsumed implicitly under existing obligations of oversight. In Delaware, for instance, courts have recently been more open to accepting claims in which boards' lack of oversight has led to human rights or environmental harms. Known as breaches of *Caremark* duties, directors are liable for failures to implement a reporting or information system or controls or, if such systems are already implemented, for failure to monitor or oversee them.[159] Courts have already been receptive to *Caremark*

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[155] Martin Petrin, "Beyond Shareholder Value: Exploring Justifications for a Broader Corporate Purpose" in Elizabeth Pollman and Robert B. Thompson, eds, *Research Handbook on Corporate Purpose and Personhood* (Cheltenham: Edward Elgar Publishing Ltd, 2021) at p. 344. See also H. Spamann and J. Fisher, "Corporate Purpose: Theoretical and Empirical Foundations/Confusions" (Working Paper, European Corporate Governance Institute, 2022), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4269517> at pp. 3–4.

[156] See e.g. R.T. Miller, "How Would Directors Make Business Decisions Under a Stakeholder Model?" (2022) 77 Business Lawyer 773; Edward B. Rock, "For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose" (Working Paper, European Corporate Governance Institute, 2020), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951>.

[157] See e.g. L. Bebchuk and R. Tallarita, "Will Corporations Deliver Value to All Stakeholders?" (2022), 75 Vand. L. Rev. 1031.

[158] Examples of shareholder value-deviating policies that companies could pursue are offered by L.E. Strine, "Good Corporate Citizenship We Can All Get Behind?: Toward A Principled, Non-Ideological Approach To Making Money The Right Way", Bus. Lawyer (forthcoming 2023), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4296287> at 62–71.

[159] *In re Caremark International Inc. Derivative Litigation*, 911 A.3d 362, 370 (Del. 2006).

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claims for failing to install a system of oversight in an ice cream manufacturing business that led to a deadly listeria outbreak;[160] for failing to implement or properly oversee a pipeline reporting system, which resulted in an oil spill into an environmentally sensitive area;[161] and for failing to monitor the safety of planes, which eventually led to two plane crashes.[162] New fiduciary duty models could, in part, follow and further develop this model along with provisions that specify the elements of sustainability to which directors should pay particular attention. This is reminiscent of the new types of due diligence laws already discussed further above, although these laws now tend to focus on duties of the corporation rather than those of corporate agents.

(b) Mandatory Obligations

Voluntary corporate governance measures are known to be better accepted by corporations and may offer potential benefits in terms of flexible adjustment to a corporation's specific circumstances. Yet, voluntary or quasi-voluntary approaches for broadened fiduciary duties in the UK, Canada, and elsewhere have not resulted in meaningful changes to corporate attitudes on stakeholder issues.[163] As already mentioned previously, approaches akin to the UK's "enlightened shareholder value" or Canada's "best interests" model lack the necessary potency to alter corporate behaviour.[164] Voluntary measures may also disadvantage corporations that choose to embrace such measures as they are forced to compete against companies that do not and thereby avoid the costs of such measures, creating an uneven playing field. Moreover, even if companies would embrace voluntary obligations, they may do so at a pace that is slower than is necessary to make meaningful changes.

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[160] *Marchand v Barnhill*, 212 A.3d 805 (Del. 2019).

[161] *Inter-Marketing Group USA, Inc. v Armstrong*, C.A. No. 2017-0030-TMR, 2020 WL 756965 (Del. Ch. 2020).

[162] *In re Boeing Company Derivative Litigation* 2021 WL 4059934 (Del. Ch. 2021).

[163] See also Paul L. Davies, "Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements" (Working paper, European Corporate Governance Institute, 2022), online: https://ssrn.com/abstract=4285770>, at pp. 10–16, using evidence from France and the US to support his argument that simply 'encouraging' companies to adopt broader purpose statements, or leaving the details of defining purpose to shareholders, is unlikely to deliver the desired results. While recognizing that mandatory purpose statements would be necessary, Davies rejects that approach based on concerns regarding the limitations of governmental imposition of corporate aims.

[164] On this, see also L. Bebchuk, K. Kastiel, and R. Tallarita, "Does Enlightened Shareholder Value Add Value?" (2022), 77 Bus. Lawyer 731, 754 (concluding that ESV is "[a]t best … unhelpful but harmless).

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As a result, the consideration of stakeholder interests by companies and their decision-makers must be made mandatory.

To avoid stakeholder interests being effectively cancelled out by managerial discretion, the obligations pertaining to stakeholder interests additionally need to be carved out from the scope of the business judgment rule.[165] In other words, when breaches of fiduciary duties are alleged, proof that stakeholder interests have been taken into account should not, by itself, be sufficient to insulate management from responsibility. Rather, the actual substance of the considerations should be subject to judicial review. Admittedly, judicial review of board decisions cannot be expected to be either straightforward or perfect. However, allowing review is arguably preferable over complete insulation of board decisions. Support for the application of the business judgment rule is already not uniform when it comes to claims brought by shareholders.[166] Claims involving stakeholders are comparatively less amenable to the rule's principal aim of promoting corporate risk-taking in the financial interest of shareholders. They also tend to be qualitatively different from actions brought by shareholders or the company. While shareholder claims will typically allege financial harm to the company, stakeholder related claims may include other types of harm, including property, physical, and environmental harm. Shareholders, moreover, have other tools at their disposal to counter misconduct by managers, such as exercising their vote to change the board's composition or compelling the company to release certain information. In contrast, stakeholders' options in this regard are far more restricted.

An applicable standard for judicial review of corporate decision-making could, for example, measure a board's decision against what reasonable directors or officers in the same position, and faced with the same facts, would believe would be an outcome that adheres most closely with the legislative mandate and guidelines on balancing interests and sustainability. Another or additional approach for an objective standard could consist of using key performance indicators or benchmarks against which corporations'

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[165] As Professor Vasudev notes, as long as the business judgement rule is in play, stakeholder groups will continue to face impediments seeking resolution of their disputes in courts. P.M. Vasudev, *Beyond Shareholder Value: A Framework for Stakeholder Governance* (Cheltenham: Edward Elgar Publishing, 2021) at p. 125.

[166] For a critical perspective, see J. Loughrey, "Review of directors' business judgments", in M. Petrin and C.A. Witting, eds. *Research Handbook on Corporate Liability*, (Edward Elgar, 2023), at p. 238. See also T. Kuntz, "ESG and the Weakening Business Judgment Rule", in T. Kuntz, ed., *Research Handbook on Environmental, Social, and Corporate Governance* (forthcoming), online: <https://ssrn.com/abstract=4395003> (arguing that ESG norms heighten directors' liability exposure).

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consideration of stakeholders would be assessed against, such as recognized sustainability and other factors.[167]

4. Enforcement

Reforms to corporate purpose and fiduciary duties will only be effective if they are enforceable. Since enforcement of corporate agents' fiduciary duties has mainly been limited to shareholder actions, their enforcement in practice has been essentially inaccessible for other stakeholders, although as mentioned above at least Canadian law would in theory allow for claims by stakeholders. Even Benefit Corporation legislation, which includes board duties to balance stakeholder interests, tends to limit standing to enforce these duties to shareholders.[168] In part, this is because fiduciary duties are thought to be owed to the company, and therefore only the company, or shareholders acting on behalf of the company, can enforce them. Other than shareholders and creditors, stakeholders of Benefit Corporations have not been directly recognized as having standing to challenge directors or managers for fiduciary duty breaches under corporate law.[169] Thus, one solution for increasing the enforceability of fiduciary duties would be to enable parties beyond just shareholders to be able to bring actions to enforce them.

To some extent, this already exists, albeit in relatively weak form. The Supreme Court in *BCE* even alluded to one option by way of its reference to "liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability."[170] Specifically, enforcement of corporate duties, and to some extent also managerial duties, is possible using old and new tools of administrative, civil, and criminal law, including monetary sanctions envisaged by the latest generation of corporate due diligence laws, but also actions based on general tort law. An example of the latter is the *Royal Dutch Shell* case, decided in 2021, in which a Dutch court

[167] For instance, to demonstrate that boards have considered employee interests they could look to the following list to inform their consideration: the number of employees hired and terminated; trends on employee remuneration; whether employees have been able to unionize; health and safety conditions; parental leave programs, employee lawsuits and policies on work-life balance. See Barnali Choudhury, "Social Disclosure" (2016), 13 Berkeley Bus. L. J 185, at p. 214.
[168] See e.g. section 367 of Delaware's Public Benefit Corporations Law (Del. Code tit. 8 § 367 (2014). Similarly, the UK's Better Business Act only gives shareholders the right to enforce directors' duties. To some extent, of course, this can be overcome by stakeholders that acquire shares, although there may be minimum holding requirements in place, such as under Delaware law.
[169] Del. Code tit. 8 § 813 (2014).
[170] *BCE Inc., Re*, 2008 SCC 69 (S.C.C.), at para. 44.

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held that the oil giant, Shell, owed a duty of care to the public to prevent injuries resulting from carbon-dioxide emissions and ordered it to reduce them.[171]

Another possible approach is the introduction of dedicated public enforcement mechanisms geared towards directors' duties.[172] Australia already uses such a model, through which a regulatory body has the power to enforce fiduciary duties if doing so is found to be in the public interest.[173] In Canada, the CBCA defines 'complainant' in relation to enforcement of fiduciary duty breaches to include the 'Director' appointed by the government to administer the Act.[174] The office of the Director General, Corporations Canada could be expanded and funded to serve this purpose, akin to the Australian model.[175]

There are several benefits associated with public enforcement of board duties.[176] Such a mechanism would not be reliant on shareholders' economic incentives to bring enforcement actions, a limitation of the current regime of private enforcement. Instead, it could be driven by broader societal aims, hence offering better protection for stakeholder interests. A public authority would also be able to offer access to consistent funding and could possibly prepare a matter for trial more efficiently than many private actors. In general, compared to a system that would allow a broader range of stakeholders to bring actions, sufficiently funded and effective public enforcement mechanisms may possibly be a better deterrent against corporate fiduciary breaches, while at the same time acting as a filter, making sure that boards are only confronted with claims that have been assessed to have sufficient merit.[177]

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[171] Barnali Choudhury and Martin Petrin, "Climate change poses triple threat to Canada's energy sector", *iPolitics* (June 7, 2021), online: <https://www.ipolitics.ca/news/climate-change-poses-triple-threat-to-canadas-energy-sector>.

[172] John Quinn, "The Sustainable Corporate Objective: Rethinking Directors' Duties" (2019) 11:23 Sustainability 1 at p. 8.

[173] Renee M. Jones and Michelle Welsh, "Toward a Public Enforcement Model for Directors' Duty of Oversight" (2012) 42 Vand. J. Transnat'l. L. 343.

[174] CBCA, s. 238(c).

[175] In the securities regulation area, there is of course a public enforcement system in place in Canada.

[176] Andrew Keay, "The Public Enforcement of Directors' Duties: A Normative Inquiry" (2014), 43 Comm. L. World Rev. 89. See also P.M. Vasudev, *Beyond Shareholder Value: A Framework for Stakeholder Governance* (Cheltenham: Edward Elgar Publishing, 2021), at p. 5, proposing specialist forums for the resolution of stakeholder disputes outside of the judicial system.

[177] This would help mitigate potential situations where, as one commentator put it, "stakeholder demands threaten to make directors' jobs impossible." Edward B. Rock, "For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose"

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The public body involved could be a corporate regulator such as a securities organization, as per the Australian approach, or an administrative body. For instance, in Germany, the Federal Office of Economics and Export Control has been tasked with enforcing the country's new supply chain laws.[178] Moreover, the applicable rules could provide that individual stakeholders are able to initiate complaints with the public body and/or that the public body itself could be tasked with initiating an enforcement action. In addition, if the public body is entrusted with enforcement, any damages that are awarded could be allocated to remedying or rectifying the human rights or environmental damage caused by the company. Finally, the remedies afforded in a public enforcement action can go beyond damages or fines. In particular, this could include various mandated corporate remedial and preventive measures.

Specifically with regards to the CBCA, a possible amendment to broaden enforcement mechanisms would be to tweak section 241(2). Currently, the provision allows parties to bring an oppression action if the interests of a "security holder, creditor, director or officer" are affected.[179] However, if this wording (or these parties) were replaced with "stakeholder", acts or omissions that are oppressive, prejudicial to, or unfairly disregard the interests of any stakeholder would constitute oppression. Using the word "stakeholder" would give the oppression remedy greater capacity to adapt and reflect the profound effects private enterprise can have on society.[180] According to Waitzer and Sarro, such an amendment would be consistent with the view of the Ontario Divisional Court, adopting the sentiment expressed in *BCE*, that the oppression remedy should address the

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(Working Paper, European Corporate Governance Institute, 2020), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951> at 29. There is, however, also the danger that the 'filter effect' could beomce too strong, which would dampen any deterrent effects.

[178] Initiative Lieferkettengesetz, *FAQ on Germany's Supply Chain Due Diligence Act* (Oct 2021), online <https://lieferkettengesetz.de/wp-content/uploads/2021/11/Initiative-Lieferkettengesetz_FAQ-English.pdf> .

[179] CBCA, s. 241(2) reads: If … 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.

[180] E.J. Waitzer and D. Sarro, "In Search of Things Past and Future: Judicial Activism and Corporate Purpose" (2018), 55 Osgoode Hall L. J. 791, at p. 815.

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"vulnerability ... of those [who have] a genuine stake in the affairs of the corporation but no control over its conduct."[181] They also posit that this would encourage directors to view costs imposed on stakeholders by corporations not as externalities, but as costs borne by the corporation itself, and deter behaviour that harms the interests of affected stakeholders. Finally, enhanced standing to bring claims can be viewed as a beneficial factor from a broader access to justice perspective.[182]

A particularly creative solution for addressing stakeholder disputes with boards would be the creation of an interdisciplinary forum as an alternative agency to adjudicate such conflicts. As Vasudev has suggested, "[t]he need for such an agency is illustrated by the experience with courts that demonstrates their difficulties in dealing with corporate disputes. The legal system, with its conventional tools and techniques, is apparently overwhelmed by the complexities of the stakeholder model of corporations and unable to formulate effective or meaningful responses."[183] The creation of a specialist forum for dealing with conflicts in this area of corporate law would compensate for courts' lack of understanding in stakeholder conflicts. Vasudev thus proposes creating panels made up of professionals from a variety of industries, including law and finance, structured to address stakeholder disputes. These panels, he envisages, would be able to arrive at balanced decisions that would be more likely to take into consideration the many dynamics at play. The multi-disciplinary perspectives of the panelists would also not be inhibited by the business judgement rule or "the technical rules that govern litigation and the adversarial culture that characterizes legal proceedings."[184]

V. Conclusion

After decades of corporate leadership based on the principle of shareholder wealth maximization, momentum is now gathering behind a shift towards the recognition of stakeholder interests. However, from voluntary actions by

[181] E.J. Waitzer and D. Sarro, "In Search of Things Past and Future: Judicial Activism and Corporate Purpose" (2018), 55 Osgoode Hall L. J. 791, at p. 816, citing *1413910 Ontario Inc (Bull Eye Steakhouse & Grill) v McLennan* (2009), 309 D.L.R (4th) 756 249 G.A.C. 333 (Ont. Div. Ct.), at para 34.
[182] See, for example, V. Rouas, *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (London: University of London Press, 2022).
[183] P.M. Vasudev, "Corporate Stakeholders in Canada: An Overview and a Proposal" (2013), 45 Ottawa L. Rev. 137, at p. 173.
[184] P.M. Vasudev, "Corporate Stakeholders in Canada: An Overview and a Proposal" (2013), 45 Ottawa L. Rev. 137, at p.177.

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business to changes in soft and hard law, the steps taken thus far have been insufficient to result in meaningful changes. As we appear to be stuck in neutral, a more decisive push is needed to ensure that business contributes to tackling the most pressing societal issues of our times in a substantial and timely manner.

The Canadian corporate landscape, although beginning to shift away from shareholder primacy, remains unsettled and, in many ways, has stagnated since the Supreme Court's decisions in *People's* and *BCE*. Although those decisions opened the door to a stakeholder-oriented corporate paradigm, they ultimately did not go far enough to trigger such a move in practice. The same is true for the CBCA's section 122(1.1), which essentially codifies that same case law and can thus not be expected to provide a new impetus. In short, Canada's "best interests of the corporation" approach, which leaves it up to directors' and officers' discretion if and to what extent they wish to consider various stakeholder interests in their decision-making, is too weak to prompt substantive changes to corporate behaviour.

If a legislative approach is to be relied on by governments to transform corporate behaviour, as we argue it is, the legislation must be mandatory, objective, specific, and more broadly enforceable. Legislation that lacks these elements will be impotent. Legislative changes therefore must be made to re-define corporate purpose more broadly and implement a mandatory system of balancing of shareholder and stakeholder interests by corporate leadership, with an emphasis on prioritizing the protection and advancement of human rights and environmental considerations.

Adjusting the duties of corporations and their directors and managers, along with a revised corporate purpose, in and of themselves, will not transform business and society. On the contrary, there will no doubt be many hiccups in the form of unforeseen, even undesirable, knock-on effects, prompting the need for adjustments. At the same time, doing nothing out of fear of changing the status quo, or because reform measures are seen as imperfect, is unhelpful. The past decades have proven as much.

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