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Abstract
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In Search Of Things Past And Future: Judicial Activism And Corporate Purpose

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Corporate purpose does not lend itself to any clear or constant definition. Rather, courts' understanding of corporate purpose adapts over time to reflect evolving social norms and expectations as to the proper role of the corporation in society. We use the oppression remedy under Canadian corporate law to explore how Canadian courts have and will continue to play a key role in shifting legal and market understandings of corporate purpose towards a more long-termist, stakeholder-focused perspective. We begin by exploring the rationale for moving the law in this direction, outlining some of the causes and effects of short-term horizons on corporate and investment manager decision making, and how ideology and overly conservative legal advice contribute to this dynamic. We then outline an emerging role for judicial activism in breaking the log jam and helping us to re-focus on the real strength of capitalism—its flexibility to evolve and respond to a society's expressed needs.

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THE DEFINITION OF CORPORATE PURPOSE has been a perennial subject of legal (and other) discussion. During the 1930s it was the subject of a historic debate between Professors Adolf Berle and E. Merrick Dodd in the Harvard Law Review.[1] While Berle argued for what is now referred to as "shareholder primacy," Dodd advanced a view of the business corporation as an "economic institution which has a social service as well as profit-making function."[2] Berle agreed, however, that shareholders of widely held public companies lacked the practical power to hold management accountable for its actions,[3] and, in a 1954 lecture series, he conceded Dodd's contention that management accountability needed to come from regulators, customers, and others in the public sphere, as only they had sufficient power to oversee and monitor corporate conduct.[4] In doing so, Berle effectively embraced a stakeholder-based model of corporate purpose. This reflected the marketplace reality of the day, in which the most significant "countervailing powers" to managerial and board action were employees, through their unions, and regulators.[5]

Over time, US and Canadian jurisprudence have taken different paths on this issue, one which continues to attract robust debate to this day. The current jurisprudence in the United States, led by the Delaware Supreme Court's

1. AA Berle Jr, "Corporate Powers as Powers in Trust" (1931) 44:7 Harv L Rev 1049; E Merrick Dodd Jr, "For Whom Are Corporate Managers Trustees?" (1932) 45:7 Harv L Rev 1145.
2. Dodd, *supra* note 1 at 1148.
3. Adolf A Berle & Gardiner C Means, *The Modern Corporation and Private Property*, revised ed (New York: Harcourt, Brace & World, 1968) at 78–84.
4. Adolf A Berle Jr, *The 20th Century Capitalist Revolution* (New York: Harcourt, Brace and Company, 1954) at 169; David J Berger, "In Search of Lost Time: What if Delaware Had Not Adopted Shareholder Primacy?" in Steven Davidoff Solomon & Randall Thomas, eds, *The Corporate Contract in Changing Times: Is the Law Keeping Up?* (Chicago: University of Chicago Press) [forthcoming].
5. Berger, *supra* note 4 at 12.

decisions in *Unocal*[6] and *Revlon*,[7] lies squarely within the shareholder primacy camp.[8] In contrast, the Supreme Court of Canada clearly articulated a stakeholder primacy view in its *BCE* decision.[9]

The reality is that neither standard is static. As William T. Allen, then-Chancellor of the Delaware Court of Chancery, wrote (following the *Unocal* and *Revlon* decisions), "[t]he questions 'What *is* a corporation?' and 'For whose benefit do directors hold power?' are … not simply technical questions of law capable of resolution through analytical rule manipulation."[10] Rather, in defining corporate purpose, "we implicitly express our view of the nature and purpose of our social life," issues to which there can be no clear or constant response.[11] As a result,

> our law of corporate entities is bound itself to be contentious and controversial. It will be worked out, not deduced. In this process, efficiency concerns, ideology and interest group politics will commingle with history (including our semi-autonomous corporation law) to produce an answer that will hold for here and now, only to be torn by some future stress and to be reformulated once more. And so on, and so on, evermore.[12]

Chancellor Allen understood that corporate purpose is an area where, as Robert Cover put it, thinking about the trajectory of the law requires more than an understanding of "the [legal] precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.'"[13]

We have explored elsewhere how the doctrine of reasonable expectations has evolved into a powerful tool for judicial and regulatory activism and, as a result, a bellwether for the trajectory of the law, allowing courts to reach beyond existing legal rights to achieve fair outcomes for those harmed by the actions of powerful

6. *Unocal Corp v Mesa Petroleum Co*, 493 A (2d) 946 (Del 1985).
7. *Revlon, Inc v MacAndrews & Forbes Holdings, Inc*, 506 A (2d) 173 (Del 1986).
8. See Leo E Strine Jr, "The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware Generation Corporation Law" (2015) 50:3 Wake Forest L Rev 761.
9. *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560 [*BCE*].
10. William T Allen, "Our Schizophrenic Conception of the Business Corporation" (1992) 14:2 Cardozo L Rev 261 at 280-81 [emphasis in original].
11. *Ibid* at 281.
12. *Ibid*.
13. Robert M Cover, "The Supreme Court, 1982 Term — Foreword: Nomos and Narrative" (1983) 97:1 Harv L Rev 4 at 10.

persons and entities.[14] Because human behaviour is affected by expectations of others' behaviour and attitudes, changes in social norms can give rise to tipping points for behavioural change.[15] They can also give rise to legal change: Where the law is in a state of transition, expectations contribute to reform. Posner describes this dynamic as follows:

> [Judicial d]ecisions are not the only source of expectations—far from it. Changing the law to bring it into closer harmony with lay intuitions of justice and fair dealings may protect rather than defeat the parties' expectations.[16]

This article uses the oppression remedy under Canadian corporate law to explore how corporate law will continue to be subject to the vicissitudes of social norms and expectations. In doing so, we take a normative view as to the trajectory of the law and, unlike Berle,[17] suggest that the courts (in Canada, at least) will and should continue to be key players in the evolution of corporate purpose. In particular, we illustrate how the Supreme Court of Canada has significantly expanded the scope of the Canadian oppression remedy, well beyond what was originally contemplated by the legislative draftspersons. We argue that the Court has done so in a way that provides considerable scope for stakeholders to encourage and discipline "long-termism" in corporate decision making.

The remainder of this article proceeds as follows. First, we outline some of the causes and effects of short-term horizons on corporate and investment manager decision making. In a world in which an "at-all-costs" approach to growth is no longer sustainable,[18] we must refocus on governance models aimed at generating

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14. Edward J Waitzer & Douglas Sarro, "Protecting Reasonable Expectations: Mapping the Trajectory of the Law" (2016) 57:3 Can Bus LJ 285.
15. Karine Nyborg et al, "Social norms as solutions" (2016) 354:6308 Science 42; H Peyton Young, "The Evolution of Social Norms" (2015) 7:1 Ann Rev Econ 359.
16. Richard A Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990) at 260.
17. Berle & Means, *supra* note 3 at 296.
18. See Generation Foundation, *The Transformation of Growth: How Sustainable Capitalism Can Drive a New Economic Order* (2017), online: <www.genfound.org/media/1436/pdf-genfoundwp2017-final.pdf>. The authors warn that, "[w]e need to pursue a more inclusive form of growth, so the benefits of capitalism are shared more widely. If not, we would run the risk of still more popular rejection of capitalism and its associated liberties – which, in our view, would lead to even worse outcomes in the future" (*ibid* at 4). See also Oxford Martin Commission on Future Generations, *Now for the Long Term: The Report of the Oxford Martin Commission on Future Generations* (Oxford: Oxford Martin School, 2013), online: <www.oxfordmartin.ox.ac.uk/downloads/commission/Oxford_Martin_Now_for_the_Long_Term.pdf>. The authors note that "[r]isks arising from the plundering of our planet's natural capital, growing inequality, and the potentially devastating results of

financial returns today without compromising our ability to create value in the future.[19] As part of this discussion, we consider the challenges and opportunities this poses for decision making by companies and asset owners and managers, and how static, conservative legal advice may pose an obstacle to meeting these challenges. Second, we outline the emerging role for judicial activism in breaking the logjam and helping us to re-focus on the real strength of capitalism—its flexibility to evolve and respond to a society's expressed needs. Our particular focus is the possibility of expanding the range of potential claimants under the oppression remedy.

I. THE CHALLENGE OF SHORT-TERM HORIZONS

The global narrative of progress, and the role of the public corporation as an engine of growth, productivity, innovation and, ultimately, societal prosperity, is increasingly being called into question.[20] At the same time, in the face of often weak or ineffective political institutions, there has been a growing focus on the importance of the large allocators of capital (public pension and sovereign wealth funds) and users of capital (taken to be public corporations) both as contributors to and possible sources of solutions for the systemic problems we face.[21]

Views on the proper role of the public corporation are shifting—from the narrow view of the corporation as a profit-maximizing enterprise that exists solely to serve the immediate interests of shareholders, to a broader understanding of the corporation as both an economic and social institution, with responsibilities to a range of stakeholders in addition to current shareholders, and with a responsibility

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accidental or deliberate use of new technologies are among the reasons we urgently need to deepen our understanding of the threats posed by business as usual" (*ibid* at 9).

19. Generation Foundation, *supra* note 18.
20. See *e.g.* Dezsö Horváth & Dominic Barton, "Capitalism Re-Imagined" in Dominic Barton, Dezsö Horváth & Matthias Kipping, eds, *Re-Imagining Capitalism* (Oxford: Oxford University Press, 2016) 319 at 319-20. Barton & Horvath observe that "[o]ne of the fallouts of the financial crisis is that public trust in capitalism has sunk to an all-time low in many developed countries" (*ibid*).
21. Rebecca Henderson & Karthik Ramanna, *Do Managers Have a Role to Play in Sustaining the Institutions of Capitalism?* (Washington, DC: Brookings Institution Center for Effective Public Management, 2015) at 3, online: <www.brookings.edu/wp-content/uploads/2016/06/BrookingsInstitutionsofCapitalismv5.pdf>. Such problems include environmental (*e.g.*, climate change and access to fresh water), social (*e.g.*, rising income inequality, access to health care and human and labour rights), and financial (*e.g.*, the stability and credibility of financial intermediation) trends and issues.

and critical role to play in fostering economic and societal sustainability.[22] So, too, with respect to views on the proper role of major asset owners and managers, which reflect a growing recognition of the broader context of their investment impacts and, accordingly, the need to manage risks and rewards at systems levels, as well as at the portfolio level.[23] In each case, there is a growing awareness of the challenge presented by incentive mismatches that tend to foster an unduly short-term focus on the part of key decision makers.[24]

As Lynn Stout has argued,[25] the board-controlled corporation historically functioned as a means of creating and preserving wealth and prosperity for the benefit of future as well as present generations, thereby promoting intergenerational efficiency and equity. The same ideal is central to defined benefit pension plans and sovereign wealth funds.[26] Yet the modern embrace of "shareholder value" and "shareholder democracy" as ideals, unbridled by the mediating role of directors focused on long-term, sustainable growth, threatens to damage these important functions just when their social utility has become more widely recognized. Analogous concerns have arisen with respect to the efficacy and integrity of governance structures in many investor organizations.[27]

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22. See *e.g. BCE*, *supra* note 9; California Public Employees' Retirement System, *Governance & Sustainability Principles* (Sacramento: California Public Employees' Retirement System, 2017) at 31, online: <www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf>; Andrew Crane & Dirk Matten, "Engagement Required: The Changing Role of the Corporation in Society" in Barton, Horváth & Kipping, *supra* note 20 at 116.
23. Steve Lydenberg, *Systems-Level Considerations and the Long-Term Investor: Definitions, Examples, and Actions* (The Investment Integration Project, 2017), online: <www.tiiproject.com/wpcontent/uploads/2017/03/Systems_Level_Considerations_Long_Term_Investor.pdf>.
24. See *e.g.* John Kay, *Kay review of UK equity markets and long-term decision-making* (2012), online: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31544/12-631-kay-review-of-equity-markets-interim-report.pdf> [Kay, *Kay Review*].
25. Lynn Stout, "The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form" (2015) 38:2 Seattle UL Rev 685.
26. John Kay, *Other People's Money: The Real Business of Finance* (New York: Public Affairs, 2015) at 239 [Kay, *Other People's Money*].
27. See Kay, *Kay Review*, *supra* note 24 at 39-42; Simon Zadek, Mira Merme & Richard Samans, *Mainstreaming Responsible Investment* (Switzerland: World Economic Forum, 2005), online: <www.griequity.com/resources/integraltech/GRIMarket/MainstreamingResponsibleInvestment.pdf>. The report quotes Simon Zadek in his presentation at the International Corporate Governance Network's July 2004 Annual Conference in Rio de Janeiro, Brazil (see *ibid* at 19); Amin Rajan, *DB & DC Plans: Strengthening Their Delivery* (Tunbridge Wells: CREATE-Research, 2008) at 22.

An analysis of the recent DuPont settlement,[28] in which the company paid more than 670 million US dollars to settle claims over emissions of a toxic chemical used in the making of Teflon, is instructive. Professors Roy Shapira and Luigi Zingales point out that even though preventing pollution would have cost less than the damages caused by pollution, the corporate decision to pollute—which in this case was made in a deliberate and informed manner—was rational, at least from the perspective of maximizing the short-term financial interests of shareholders.[29] The immediate costs of polluting would be borne by others, and any damages, penalties, or reputational harm for which the company or its managers ultimately might be accountable are discounted by both the probability of detection and the time lags between the decision to pollute and the detection of pollution, and between detection and enforcement.[30] Accordingly, existing legal mechanisms of control failed to deter corporate conduct that was both wrongful and, from a social perspective, inefficient.[31]

The Governor of the Bank of England recently spoke about the need to break the "tragedy of the horizon" with respect to "the catastrophic impacts of climate change [that] will be felt beyond the traditional time horizons of most actors—imposing a cost on future generations that the current generation has no incentive to fix."[32] We face the same dilemma with respect to many other public policy concerns. Indeed, inter-generational equity may well be the defining policy challenge of our time. Decision making that focuses on the next quarter, rather than the longer-term sustainability of the enterprise (or pension promise), that assumes efficient markets, ignores externalities and systemic risks, and relies on narrow compliance with existing (often outdated and ineffective) regulatory frameworks is increasingly suspect and, arguably, has become a driver

28. DuPont, Press Release, "DuPont Reaches Global Settlement of Multi-District PFOA Litigation" (13 February 2017) online: <www.dupont.com/corporate-functions/media-center/press-releases/dupont-reaches-global-settlement-of-multi-district-pfoa-litigation.html>.

29. Roy Shapira & Luigi Zingales, "Is Pollution Value-Maximizing? The DuPont Case" (version dated 1 September 2017) at 2-3, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3037091>.

30. *Ibid* at 20-21.

31. *Ibid* at 33.

32. Mark Carney, "Breaking the Tragedy of the Horizon – climate change and financial stability" (Speech delivered at Lloyd's of London, 29 September 2015) at 4, online: <www.bankofengland.co.uk/-/media/boe/files/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability.pdf>.

of the widening trust gap that tears at the fabric of our major economic and political institutions.[33]

A. THE PROBLEM WITH CORPORATE DECISION MAKING

It has been over a decade since the Supreme Court of Canada held in *BCE* that "[i]n 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,"[34] and that fiduciary duty "is not confined to short-term profit or share value," but "looks to the long-term interests of the corporation."[35] Yet, when it comes to governance, corporate boards appear to be consumed by the short term.

For example, there has been significant activity and debate in recent years over issues like proxy access, majority voting, and other seemingly "low stakes" issues—debates that, it has been suggested, are primarily "symbolic."[36] In contrast, little progress has been made on cutting the Gordian knot of executive compensation, which, due to a combination of perverse incentives created by tax laws and other regulations, mass adherence to the ideology of "pay for performance," and the perceived imperative to keep executive pay in line with peers' pay practices, has skyrocketed since the early 1990s.[37] And Canadian companies have done little to

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33. Edelman, *2017 Edelman Trust Barometer Global Report*, online: <www.edelman.com/trust2017> (finding that "[t]he general population's trust in all four key institutions—business, government, NGOs, and media—has declined broadly"); Edelman, *2018 Edelman Trust Barometer Global Report*, online: <cms.edelman.com/sites/default/files/2018-02/2018_Edelman_Trust_Barometer_Global_Report_FEB.pdf> (finding results substantially similar to those found in the prior year).
34. *BCE*, *supra* note 9 at para 40. See also *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461 [*Peoples*].
35. *BCE*, *supra* note 9 at para 38.
36. Marcel Kahan & Edward Rock, "Symbolic Corporate Governance Politics" (2014) 94:6 BU L Rev 1997.
37. See Andrew CW Lund, "Tax's Triviality as a Pay-Reforming Device" (2012) 57:3 Vill L Rev 571; Hugessen Consulting, *Highlights from the 2017 Proxy Season – TSX 60: CEO Pay Bucks the Market Trend* (2017) at 3, online: <www.hugessen.com/sites/default/files/news/Hugessen%202017%20TSX%2060%20Briefing.pdf> (finding that CEO pay within the TSX 60 has been relatively flat since 2012, but still averages at over $7 million per year).

adapt to a rapidly changing world by increasing the diversity of their boards and executive officers.[38]

Moreover, given market participants' continuing focus on narrow, quarterly financial metrics,[39] there seems to be little or no incentive to curb financial engineering tactics undertaken by companies, such as repurchasing shares or adjusting stated earnings to manipulate share-based metrics (other than solely as means of returning capital to shareholders or better reflecting performance, respectively), which, in turn, influence perceptions of performance to help get boards re-elected and justify high executive pay.[40]

We argue that boards' reluctance to act on important issues and use the significant resources available to them to promote the long-term interests of corporate stakeholders reflects the continued dominance of shareholder primacy as a market ideology—the lingering view that a company's board must act in the best interests of shareholders, and that the best interests of shareholders are best determined by listening to a company's most vocal shareholders—notwithstanding Canadian courts' adoption of a long-term, stakeholder-based view of corporate purpose.

As Berle noted, shareholder primacy was intended to prevent boards from being captured by management and deal with the problem of "agency costs"—the costs imposed on investors (principals) when management (agents) waste resources by, among other things, investing in projects that are not worthwhile or awarding themselves above-market compensation.[41] But taking this view guides us to the conclusion that, when boards take action that is contrary to the expressed wishes of major shareholders, or when boards cite considerations

38. Canadian Securities Administrators, CSA Multilateral Staff Notice 58-309: *Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practices* (5 October 2017) at 3, online: <www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20171005_58-309_staff-review-women-on-boards.pdf>; Nicholas Keung, "Ryerson study highlights severe lack of visible minorities on corporate boards," *Toronto Star* (4 October 2017), online: <www.thestar.com/news/immigration/2017/10/04/ryerson-study-highlights-severe-lack-of-visible-minorities-on-corporate-boards.html>.
39. Focusing Capital on the Long Term, *Straight talk for the long term: How to improve the investor-corporate dialogue* (Boston: FCLT Global, March 2015) at 2, online: <www.fcltglobal.org/docs/default-source/default-document-library/straight-talk-for-the-long-term_summary-vfo2263494db5326c50be1cff0000423a91.pdf>.
40. William Lazonick, "Profits Without Prosperity," *Harvard Business Review* (September 2014), online: <hbr.org/2014/09/profits-without-prosperity>.
41. AA Berle Jr, "For Whom Corporate Managers Are Trustees: A Note" (1932) 45:8 Harv L Rev 1365 at 1367. See also Lynn A Stout, "Bad and Not-so-Bad Arguments for Shareholder Primacy (2002) 75:5 S Cal L Rev 1189.

apart from shareholder value to justify their actions, one should presume that the board is in fact acting to deliver disproportionate benefits to management and destroy shareholder value. It implies that boards have no independent legitimacy to act, or credibility when acting, on behalf of the best interests of a company and its stakeholders—that their legitimacy flows solely from shareholder support.

The problem of agency costs is real, but by focusing on it exclusively we overlook the problem of "principal costs"—costs imposed on investors as a whole, as well as other stakeholders, as a result of a company pursuing the interests and priorities of particular groups of investors at the expense of others.[42] The interests and priorities of a company's most vocal and influential shareholders, whose influence may be magnified through "empty voting" and other techniques for increasing an entity's voting power relative to its economic stake in a company,[43] may not reflect the interests of a company's shareholder base as a whole, let alone the interests and expectations of other stakeholders. The most obvious way to distinguish different constituencies of investors may be their investment horizon—relatively short-term investors would favour an immediate return of capital in the form of dividends or stock buybacks to long-term investment projects that could dampen earnings in the short-term, for example.

Another factor to consider is that many large investors are actually agents themselves, hedge fund and pension fund portfolio managers, with agency conflicts of their own. For example, a highly-compensated portfolio manager has little incentive to throw stones in a glass house by questioning skyrocketing executive compensation.[44] Further, as these agent-investors' firms benefit from the increasing financialization of the economy by collecting fees for advising on and otherwise facilitating financial transactions such as stock buybacks and leveraged buyouts, one should not be surprised that they have not sought to discourage these activities even though they arguably destroy value in the long-run.[45] Hence a recent study of over 1,700 equity strategies with at least three years of consecutive data found that managers turn over their portfolios every 1.7 years

42. Zohar Goshen & Richard Squire, "Principal Costs: A New Theory for Corporate Law and Governance" (2017) 117:3 Colum L Rev 767.
43. Henry TC Hu, "Financial Innovation and Governance Mechanisms: The Evolution of Decoupling and Transparency" (2015) 70:2 Bus Lawyer 347.
44. Harriet Agnew & Linda Noonan, "Asset managers' pay set to beat investment bankers," *Financial Times* (15 February 2015), online: <www.ft.com/content/37cce456-b507-11e4-b186-00144feab7de>.
45. Kay, *Other People's Money*, *supra* note 26 at 193-94.

on average.[46] Such short-termism creates time horizon mismatches between asset owners, asset managers, securities issuers, and consumers of financial products, causing companies to overlook profitable long-term investment opportunities and to ignore long-term risks.[47]

The preferences and priorities of these agent-investors may also be shaped by the demographics of their respective investor bases. To the extent they consider systemic risks,[48] hedge funds with wealthier investor bases[49] may take the view that they have greater capacity to protect themselves from the costs of inequality, climate change, and other global challenges and, therefore, may be less likely to support or advocate for companies' investment in initiatives intended to promote environmental and social progress than pension funds, which have longer term obligations and a more diverse range of participants. Differences in ideology may also be a factor. Wealthier individuals tend to be more ideologically conservative than the population more broadly.[50] Millennials are more likely than older investors to support their investment managers' taking environmental and social factors into consideration when making investment decisions.[51]

Given that hedge funds and similar entities with similar investor demographics tend to be more vocal and, as a result, more influential than other institutional investors, these differences have significant implications for the capital markets. Indeed, Professor John Coffee notes that "the discretion that directors and managers once possessed to consider the public interest and morality is shrinking as a result of hedge fund activism."[52] He points to the example of NRG Energy,

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46. Alex Bernhardt, "Consequences of Short-Term Investment," *top1000funds.com* (23 August 2017), online: <www.top1000funds.com/2017/08/consequences-of-short-term-investment>. See generally 2° Investing Initiative, "Tragedy of the Horizon," online: <www.tragedyofthehorizon.com/#context>.
47. Bernhardt, *supra* note 46.
48. Systematic risk is something that investors may not be able to diversify away from. Systemic risk is something that could be a source of contagion that extends across markets.
49. See Leo E Strine Jr, "Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System" (2017) 126:6 Yale LJ 1870 at 1894-95.
50. See Tabatha Abu El-Haj, "Beyond Campaign Finance Reform" (2016) 57:4 Boston College L Rev 1127 at 1139-40; Benjamin I Page, Larry M Bartels & Jason Seawright, "Democracy and the Policy Preference of Wealthy Americans," (2013) 11:1 Perspectives on Politics 51.
51. Ernst & Young LLP, *Sustainable investing: the millennial investor* (Ernst & Young LLP, 2017) at 2, online: <www.ey.com/Publication/vwLUAssets/ey-sustainable-investing-the-millennial-investor-gl/$FILE/ey-sustainable-investing-the-millennial-investor.pdf>.
52. John C Coffee Jr, "The Agency Cost of Activism: Information Leakage, Thwarted Majorities, and the Public Morality" (EGCI Law Working Paper No 373/2017, November 2017) at 37-38, online: <ecgi.global/sites/default/files/working_papers/documents/finalcoffee.pdf>.

Inc., which set a goal of reducing its carbon dioxide emissions by fifty per cent by 2013, and ninety per cent by 2050, and began working towards that goal by investing in solar and wind power companies, only to sell the assets and abandon these goals in the face of pressure from two activist hedge funds.[53] He also points to evidence that "hedge fund activism is retarding or reversing the movement towards greater board diversity,"[54] including one 2017 study by Institutional Shareholder Services and the Investor Responsibility Research Center Institute finding that directors appointed in response to activist pressure or as a result of settlement agreements at S&P 1500 companies over 2011–2015 tended to be less diverse than the average for that index: only 8.4 per cent were women, and only 4.6 per cent were members of an ethnic or racial minority group.[55]

Relying on shareholder primacy to curb managerial excess may have helped to address agency costs, but it has magnified the risk of principal costs, as boards have been left without the legitimacy and credibility to act independently of their largest and most vocal shareholders by asserting an alternative vision for the best interests of the companies they notionally lead. This has led to decision making that focuses on the next quarter rather than the long-term success of a company, that ignores externalities, and that often relies on compliance with existing regulation as a substitute for thinking about sustainability and the interests and expectations of stakeholders.

Why are the courts' and the markets' understandings of corporate purpose so far apart? Part of the reason is that shareholder primacy is more than an ideology that influences the outcome of public company shareholder meetings—it is also embedded in our statutory corporate law and, in turn, influences the legal advice boards receive. We discuss how the nature of legal advice has compounded the concerns described above in the next section of this article.

B. THE LEGAL (ADVICE) PROBLEM

Given the expanding body of literature and case law suggesting that boards should direct themselves towards the long-term interests of the companies they

53. *Ibid* at 36-38.
54. *Ibid* at 22.
55. By comparison, in 2015, 16.5 per cent of directors at S&P 1500 firms were women, and 10.1 per cent were minorities. See Andrew Borek, Zachary Friesner & Patrick McGurn, *The Impact of Shareholder Activism on Board Refreshment Trends at S&P 1500 Firms* (New York: Investor Responsibility Research Center Institute and Institutional Shareholder Services Inc, August 2017) at 17, 20-21, online: <www.irrcinstitute.org/wp-content/uploads/2017/08/FINAL-Activism-and-Board-Refreshment-Trends-Report-Aug-2017.pdf>; *Ibid*.

serve, and are entitled to consider the interests of all stakeholders in doing so,[56] one would think the legal advice given to corporate boards of directors would shift over time to reflect a stakeholder-oriented approach. Efforts are underway to educate legal professionals, directors, pension fund trustees, and investment managers about these developments in fiduciary law.[57]

And, in fact, when describing the general nature of corporate directors' fiduciary duties and the oppression remedy, the various guides available to directors on their legal responsibilities do draw from the stakeholder-oriented language from *BCE* described in Section I above. One such guide notes that "fiduciary duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly,"[58] while another notes that "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."[59] It is doubtless that any seasoned counsel describing the general nature of these legal concepts to a corporate board would use similar language.

Issues arise, however, when the discussion of these concepts moves past generalities to specific questions about how best to balance the interests of specific stakeholders. Scholars have identified possible reasons why the stakeholder-oriented statements in *BCE* may not significantly affect corporate governance in practice (and, by implication, the content of the legal advice that guides corporate decision making). Professor Poonam Puri notes that, in the absence of specific guidance from the Court on how to prioritize competing interests, "the board benefits from a significant increase in discretion and decrease in litigation risk."[60] Professor Edward Iacobucci notes that, notwithstanding *BCE*, "shareholder primacy … [remains] embedded in corporate law in many ways":

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56. For a discussion of this evolution of fiduciary duty, see Edward J Waitzer & Douglas Sarro, "Fiduciary Society Unleashed: The Road Ahead for the Financial Sector" (2014) 69:4 Bus Lawyer 1081 at 1089-97.
57. See Edward J Waitzer & Douglas Sarro, "The Public Fiduciary: Emerging Themes in Canadian Fiduciary Law for Pension Trustees" (2012) 91:1 Can Bar Rev 163 at 182, n 102 and accompanying text.
58. Osler, Hoskin & Harcourt LLP & Institute of Corporate Directors, *Directors' Responsibilities in Canada*, 6th ed (Toronto: Osler, Hoskin & Harcourt LLP & Institute of Corporate Directors, 2014) at 8, online: <www.icd.ca/getmedia/581897ca-d69d-4d4f-a2a2-ca6b06ef223b/5467_Osler_Directors_Responsibilities_-Canada-FINAL.pdf.aspx>.
59. Torys LLP, *Responsibilities of Directors in Canada: A Business Law Guide* (Toronto: Torys LLP, 2009) at 19.
60. Poonam Puri, "The Future of Stakeholder Interests in Corporate Governance" (2010) 48:3 Can Bus LJ 427 at 432.

for example, directors are elected by shareholders.[61] These predictions appear, at least to some extent, to have been borne out. One prominent practitioner states that, on the basis of the law as it currently stands, while

> [t]he logic of *BCE* suggests that it would be wrong for the board simply to defer to shareholders or to give shareholders a veto over decisions for which the corporate statutes assign responsibility to the board. … [T]he lesson … [from recent judicial decisions] for Canadian boards struggling with controversial transactions would appear to be: when in doubt, let the shareholders decide.[62]

Before addressing the considerations reflected in this type of guidance, it is necessary to briefly explain the purposes for which legal advice is typically sought. First, legal advice generally is not focused on what range of activities is permissible, unless a client has already, at least on a preliminary basis, decided on a course of action and has asked its advisors to confirm whether this course has a reasonable legal basis. In the absence of such direction, legal advice tends to focus on identifying for the client the path that minimizes its liability exposure—typically, the most conservative path available[63]—and, in the absence of obvious conflicts of interest that would make such action inappropriate, that reflects the instructions, requests, and priorities of the individuals seeking the advice (as opposed to the "client" institution that formally employs the legal adviser).[64] This reflects the dual expectations placed on general counsel as managers of their internal legal departments and external counsel—that they will support business objectives identified from within the company while helping manage and minimize legal risk.[65]

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61. Edward Iacobucci, "Corporate Fiduciary Duties and Prudential Regulation of Financial Institutions" (2015) 16:1 Theor Inq L 183 at 189.
62. James C Tory, "Let the shareholders decide," in *M&A: Torys' Top Trends for 2011* (Toronto: Torys LLP, 2011) 8 at 10.
63. Jonathan T Molot, "A Market in Litigation Risk" (2009) 76:1 U Chicago L Rev 367 at 368. Molot describes the task of a lawyer as similar to that of a risk manager: "helping clients to structure conduct so as to minimize risk" (*ibid* at 369).
64. See *e.g.* Law Society of Ontario, *Rules of Professional Conduct* (Toronto: Law Society of Ontario, 2000, as amended) r 3.2-3, Commentary. The commentary accompanying rule 3.2-3 states that while a corporation "will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected."
65. See *e.g.* NYSE Governance Services & Barker Gilmore, *The Rise of the GC: From Legal Adviser to Strategic Adviser (Survey Report)* (NYSE Governance Services & Barker Gilmore, 2016), online: <www.nyse.com/publicdocs/2016_BarkerGilmore_The_Rise_of_the_GC.pdf>.

Relatedly, legal advice rarely aims to provide a binary, "yes or no" answer to a client's question.[66] When faced with a difficult legal issue, a prudent legal adviser will not claim to know with certainty how potential litigants or a court will react to the decision a company reaches on that issue.[67] Rather, like credit or other risk analyses, legal advice is expressed in the language of probability—the probability that a litigant will challenge a given action taken by a board, and the probability that a given court will reach a decision in favour of that litigant.[68] Legal advisers' perception of the prevailing ideology among potential litigants and courts naturally would be relevant to this analysis, to the extent it helps predict their likely behaviour.[69]

The assessment of the potential consequences of a corporate decision is not a purely quantitative exercise. Actions with potential legal consequences involve both risk and uncertainty: Risk refers to probabilities that are quantifiable, while uncertainty refers to probabilities that cannot be quantified with precision. For example, one could estimate the odds of a litigant or a court taking a particular action within a general band of confidence, but not with precision. Individuals, including lawyers, tend to respond to uncertainty by placing disproportionate weight on the worst-case scenario.[70] This phenomenon has been blamed, for example, for corporate lawyers' extensive reliance on precedents and overly complex contractual terms rather than plain language.[71] One's assessment of the worst-case scenario, in turn, may be influenced by *availability bias*—a tendency

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66. Molot, *supra* note 63 at 368.
67. See generally Karen Anderson & Julia Black, *Legal risks and risks for lawyers* (Herbert Smith Freehills and London School of Economics Regulatory Reform Forum, June 2013), online: <www.lse.ac.uk/collections/law/projects/lfm/0356o%20LSE%20HSF%20 discussion%20paper_d6.pdf>; Richard Moorhead & Steven Vaughan, *Legal Risk: Definition, Management and Ethics* (University College London Centre for Ethics and Law, 2015), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594228>; Richard S Gruner, "Lean Law Compliance: Confronting and Overcoming Legal Uncertainty in Business Enterprises and Other Complex Organizations" (2014) 11:2 NYUJ L & Bus 247 at 255-56.
68. Molot, *supra* note 63 at 368.
69. See Robert Samuel Summers, *Instrumentalism and American Legal Theory* (Ithaca, NY: Cornell University Press, 1982) at 118. Summers notes the relevance of "the ideologies, personalities, and personal values of the judges, their social backgrounds, and the like" to the prediction of litigation outcomes (*ibid*).
70. Eric L Talley, "On Uncertainty, Ambiguity, and Contractual Conditions" (2009) 34:3 Del J Corp L 755 at 766-67, 769-770.
71. Clare A Hill, "Why Contracts Are Written in 'Legalese'" (2001) 77:1 Chicago-Kent L Rev 59 at 67, n 21; Marcel Kahan & Michael Klausner, "Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases" (1996) 74:2 Wash ULQ 347 at 354.

to identify with and emphasize events that have already occurred and are easily recalled.[72] Thus, a lack of prior scenarios, or perceived future scenarios, in which non-shareholder stakeholders have pursued or succeeded in an oppression claim may influence practitioners' perception of the legal risk of corporate decisions that prioritize one set of stakeholders' interests over another's.

With these considerations in mind, we turn to the legal structures governing the exercise of corporate fiduciary duties. As discussed above, fiduciary duties permit boards to take a long-term perspective and to consider the effects their decisions will have on stakeholders. In fact, there is a significant body of literature suggesting that such a long-term and broader perspective is beneficial both to a company and its shareholders over the long-term.[73] But boards seeking to take such a perspective face two legal challenges. First, as a general proposition, only shareholders (and, in some jurisdictions, creditors) have a recognized right to sue boards for breaches of fiduciary duty or other actions that disregard their interests under corporate law. Second, it is far easier to file and prove a claim alleging disregard of shareholders' short-term financial interests than to prove a claim alleging harms caused by unsustainable behavior.

The first challenge is a product of existing statute and case law. In Canada, while the oppression remedy is an avenue for challenging corporate conduct that unfairly disregards stakeholder interests, not just for closely-held companies,

72. Ian Weinstein, "Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making" (2003) 9:2 Clinical L Rev 783 at 815, n 88.

73. See *e.g.* Dominic Barton, James Manyika & Sarah Keohane Williamson, "Finally, Evidence that Managing for the Long Term Pays Off," *Harvard Business Review* (7 February 2017), online: <hbr.org/2017/02/finally-proof-that-managing-for-the-long-term-pays-off>; Bruce Simpson & Tiffany Vogel, "Building the Right Long-Term Approach: The Power of Aligning Leadership, Strategy, and Execution" in Barton, Horváth & Kipping, *supra* note 20, 264 at 269-71.

but for large private and public companies as well,[74] to date (with a few narrow exceptions) only shareholders and creditors have been recognized as having access to this remedy.[75] Groups representing non-shareholder, non-creditor employees, customers, the environment or other parties affected by corporate actions, typically have not been recognized as having standing to challenge a board's decisions under corporate law.[76] Rather than considering how to minimize litigation risk from all stakeholders for breaches of statutory or fiduciary duties, it follows that legal advisers focus on how to mitigate litigation risk from those stakeholders who can actually litigate; which, based on the law as it currently exists, are most often shareholders. That shareholders have available to them additional mechanisms for challenging a board's conduct, including through shareholder meetings and proceedings brought under securities laws, further skews the analysis in their favour.[77]

The second challenge is an evidentiary one. Short-term financial harms are easy to quantify and, accordingly, assert in litigation—one need only choose a financial performance metric, be it revenue, net income, or changes in share

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74. *Canada Business Corporations Act*, RSC 1985, c C-44, s 241 [*CBCA*]. Section 241(2) provides that

> [i]f, on an application [by a complainant for an order under s 241], 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.

75. See Poonam Puri, "The Hallmarks of Good Corporate Law: A Performance Evaluation of the *Canadian Business Corporations Act*" (Submitted to Corporations Canada, Industry Canada, 16 January 2004) at 21, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1114&context=reports>.

76. Employee groups have sought, but not succeeded, in being recognized as proper persons to pursue oppression claims. See *e.g. Air Canada Pilots Assn v Air Canada ACE Aviation Holdings Inc* (2007), 26 BLR (4th) 124, 154 ACWS (3d) 592 (Ont Sup Ct), aff'd 2008 ONCA 531, 45 BLR (4th) 199 [*Air Canada*]. In one case, discussed in Section II below, a monitor appointed under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, was recognized as a complainant that could bring claims on behalf of creditors who included "trade creditors, pensioners and retirees," and a municipal government. See *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014, 139 OR (3d) 1 at para 61 [*Ernst & Young*].

77. Tory, *supra* note 62; Iacobucci, *supra* note 61 at 189.

price, and compare the company's performance with its prior performance or the current performance of a peer group or an index. In contrast, the long-term costs of unsustainable actions, or other actions that disregard the interests of non-shareholder stakeholders, or that disregard the preferences and long-term interests of shareholders who understand the connection between their financial interests and that of a sustainable, fair economy, are difficult to quantify prospectively and even more difficult to attribute to a particular firm.[78] The difficulty in quantifying the environmental or social costs of corporate action also may have prospective effects on corporate action, as individuals tend to focus on consequences that seem measurable and concrete over those that are less measurable, less immediate, and more abstract.[79] These considerations would naturally lead legal advisers to narrow their focus even further, from the threat of shareholder lawsuits generally to the threat of shareholder lawsuits asserting concrete, quantifiable, and immediate harms.

Because of the doctrine of *stare decisis*, the evolution of law is at least somewhat path dependent: The first case on an issue to reach the courts may determine the rule governing like cases for many years to come. Hence, a court's choice of cases is influenced by and, in turn, influences law the court would like to elaborate upon. The Supreme Court of Canada appears to have gone out of its way to "choose" its *BCE* decision in order to re-articulate the scope of the oppression remedy and its view of the "best interests of the corporation." This is evidenced, in part, by the fact that the remedy was not pleaded by the time the case reached the Court on appeal, and that the stakeholder conflict at issue in that case was one between bondholders and shareholders that hinged purely on economic considerations.[80] The current structure of corporate law is therefore

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78. While methods of quantifying the social or environmental consequences of corporate actions exist, they may not be widely employed. See Marc J Epstein, "Implementing Corporate Sustainability: Measuring and Managing Social and Environmental Impacts," *Strategic Finance* (January 2008) 25 at 25-26, online: <sfmagazine.com/wp-content/uploads/sfarchive/2008/01/Implementing-Corporate-Sustainability-Measuring-and-Managing-Social-and-Environmental-Impacts.pdf>. Epstein notes that:

> [t]he constant uncertainty about how much sustainability is necessary, the constantly changing emphasis on and costs of implementing sustainability, and the long time horizons necessary to measure the financial benefits of sustainability make it difficult to implement sustainability in the same way that other corporate strategic initiatives are implemented (*ibid* at 27).

79. Selin A Malkoc, Gal Zauberman & James R Bettman, "Unstuck from the concrete: Carryover effects of abstract mindsets in intertemporal preferences" (2010) 113:2 Org Behav & Hum Decision Processes 112 at 115. The authors find that "people's default mindset is concrete and shows high levels of present-bias" (*ibid*).

80. *BCE*, *supra* note 9 at paras 96-121.

both difficult to move in a deliberate, systemic manner, as a result of accumulated precedent and statutory obstacles, but also dynamic, when the right cases make their way before the right court.

Conventional “wisdom” is that lawyers are required to advise on the law as it exists today, with the possibility of future changes in the law typically having only a tangential effect on their analysis, barring a clear indication of impending change from a legislature or regulator.[81] Given the current structure of the law—one that permits boards to consider stakeholder interests, but gives the right to challenge a board’s actions (almost) exclusively to shareholders—there seems little reason to believe that recent developments in fiduciary law have significantly changed the content of legal advice to boards, at least once this advice moves past generalities to the resolution of specific conflicts between stakeholders.

This need not, and arguably should not, be the case. In a “compliance-centric” environment, it is all too easy to lose sight of the fact that our major institutions ultimately function and depend on public trust.[82] Such trust emerges from shared norms and fair dealing, based on current and past practices and expectations of future behaviour. The erosion of such trust, over time, significantly impairs the value of any enterprise. In this context, good counsel should address what ought to be done in addition to what can be done.[83] Hence, for example, in 2012 the American Bar Association (“ABA”)’s House of Delegates endorsed UN and OECD principles and guidelines respecting the responsibilities of corporations concerning human rights and urged the legal community to integrate them into their practices. The ABA report supporting the resolution referred to ABA Model Rule 2.1, the commentary to which notes that “moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”[84]

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81. Bailey H Kuklin, “The Plausibility of Legally Protecting Reasonable Expectations” (1997) 32:1 Val U L Rev 19 at 27-29.
82. Paul Smith, “Public trust in financial services is returning but we can’t be complacent,” *The Telegraph* (29 March 2016), online: <www.telegraph.co.uk/business/2016/03/29/publics-trust-is-returning-but-we-cant-be-complacent>.
83. Edward J Waitzer, “Embracing Our Responsibility,” *Lexpert Magazine* (July/August 2012) 65.
84. American Bar Association, House of Delegates, *Resolution 109* (adopted 6 February 2012), accompanying report at 5, n 16, online: <www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/Trafficking%20Policies/2012_MY_109.authcheckdam.pdf>.

II. THE CANADIAN OPPRESSION REMEDY

The Canadian oppression remedy is one avenue by which the courts have sent a strong signal to legal advisers and to boards as to the future trajectory of the law. In doing so, the courts have also exposed some of the contradictions within the statutory structure of the remedy, providing an opening for legislative reform that augments the courts' movement towards a stakeholder-based vision for corporate purpose. In this section, we briefly introduce the oppression remedy, then turn to discuss "reasonable expectations," which lie at the heart of the remedy and help explain both the importance of the remedy and its potential for spurring future change in corporate behaviour. We then discuss the history and structure of the oppression remedy in greater depth, the tensions within the structure of this remedy that were exposed by the *BCE* decision, and possible legislative and judicial paths to resolving these tensions.

The Canadian oppression remedy allows certain corporate stakeholders to seek redress for breaches that amount to "oppression," "unfair prejudice," or "unfair disregard" of their interests.[85] Incorporated into the *Canada Business Corporations Act* (*CBCA*), which was enacted in 1975, the remedy was quickly recognized as the "broadest, most comprehensive and most open-ended shareholder remedy in the common law world … unprecedented in its scope."[86] As the Supreme Court of Canada put it, the remedy gives the courts "broad, equitable jurisdiction to enforce not just what is legal but what is fair."[87]

A. REASONABLE EXPECTATIONS – A SCAFFOLD FOR REFORM

In determining whether oppressive conduct has occurred, the courts focus on "reasonable expectations,"[88] a doctrine that has evolved into a powerful tool by which courts and regulators can adapt the law to respond to a changing world.[89] They are particularly relevant to contemporary society where legislative processes' ability to respond to risks to and expectations from the public have become constrained by various factors.[90] These constraints are reinforced by the growing degree of interdependence and interconnectedness that has come to define

85. *BCE*, *supra* note 9 at para 56.
86. Stanley M Beck, "Minority Shareholders' Rights in the 1980s" in *Special Lectures of the Law Society of Upper Canada – Corporate Law in the 80s* (Toronto: Law Society of Upper Canada, 1982) 311 at 312.
87. *BCE*, *supra* note 9 at para 58.
88. *Ibid* at para 56.
89. Waitzer & Sarro, *supra* note 14 at 313.
90. See *e.g.* Oxford Martin Commission for Future Generations, *supra* note 18 at 45-46.

the world we live in—a world where domestic regulation no longer provides adequate instruments to deal with public stewardship challenges.[91] As the tension between "public expectations" and legislative responsiveness becomes more acute, a growing role has emerged for our courts to attach the term "reasonable" to nouns such as "expectations" (or "doubt", "person" and the like) to forge new, often radical, legal pathways.

While not without its conceptual challenges, it can be argued that the norm of protecting reasonable expectations is a central organizing principle for most legal rules.[92] As noted above, the concept is explicitly invoked in a number of areas of the law, including contract, search and seizure, administrative law, fiduciary law, and corporate law. Even in areas of law which do not explicitly use "reasonable expectations," the concept's influence nonetheless can be observed.[93] Moreover, the standard is used to achieve consistent objectives—targeting actions that cause unnecessary or disproportionate harms to others and actions that evade or otherwise subvert existing legal frameworks. By definition, "reasonable" expectations mean something more than the current law. As the Supreme Court of Canada noted in *BCE*, reasonable expectations "look … beyond legality to what is fair, given all of the interests at play" to address conduct that is "wrongful, even if it is not actually unlawful."[94]

B. HISTORY AND STRUCTURE OF THE OPPRESSION REMEDY

The oppression remedy was first introduced to help protect the reasonable expectations of minority shareholders. The UK Parliament enacted the remedy to fill a gap left by the common law rule in *Foss v Harbottle*,[95] which held that, if a company is wronged, only the company (acting through its management and board of directors) can sue for a remedy, and not individual shareholders. In short, this rule left minority shareholders of closely-held companies without an effective remedy when the majority shareholder exercised its control of the company in

91. *Ibid* at 10.
92. Roscoe Pound suggests that one can "explain more phenomena and explain them better by saying that the law enforces the reasonable expectations arising out of conduct, relations and situations" than by, for instance, adopting the theory that the law enforces obligations only if the defendant explicitly consented to these obligations. See Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922) at 189.
93. See *e.g.* Waitzer & Sarro, *supra* note 14 at 301-303 (discussing how courts' willingness to pierce the corporate veil in certain circumstances reflects concerns common to the doctrine of reasonable expectations).
94. *BCE*, *supra* note 9 at para 71.
95. (1843) 67 ER 189, 2 Hare 461.

a way that disregarded their interests and, as a result, those of the company as a whole.[96] While the oppression remedy clearly was focused on protecting minority shareholders, at least some of the English case law on the remedy hints that the remedy could take on a broader scope, noting that the remedy recognizes that

> a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure.[97]

The *CBCA* oppression remedy applies to all corporations (not just closely-held corporations) and makes clear that at least some non-shareholder stakeholders can gain access to the remedy.[98] Oppression remedies of similar scope are provided under most of the provincial and territorial corporate law statutes as well.[99]

The statutory language describing exactly which stakeholders can access the remedy is, however, somewhat muddled. The statute places separate limitations on (i) the groups of stakeholders with standing to bring a claim for oppression, and (ii) the groups of stakeholders on behalf of whom a claim for oppression may be brought:

- First, section 241(1) of the *CBCA* provides that any "complainant" has standing to bring an oppression claim. The definition of "complainant" is open-ended, comprising any shareholder, director, or officer of a corporation, the Director (a government official tasked with executing certain responsibilities under the *CBCA*), and "any other person who, in the discretion of a court, is a proper person to make an application" for a court order remedying oppression.[100]

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96. Stephanie Ben-Ishai & Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995-2001" (2004) 30:1 Queen's LJ 79 at 85-86. While, at the time the oppression remedy was first introduced in England, shareholders could pursue derivative actions and actions for winding-up a company, Ben-Ishai and Puri note that these remedies were "unsatisfactory" due to derivative cases being "difficult to prove," and successful winding-up actions leading to "the demise of the corporation" (*ibid* at 86).
97. *Ebrahimi v Westbourne Galleries Ltd*, [1973] AC 360 at 379 (HL Eng), [1972] 2 All ER 492 (cited in *BCE*, *supra* note 9 at para 60).
98. *CBCA*, *supra* note 74, s 241.
99. See *Business Corporations Act*, RSA 2000, c B-9, s 242; *The Business Corporations Act*, RSS 1978, c B-10, s 234; *The Corporations Act*, CCSM c C225, Pt 2, s 234; *Business Corporations Act*, RSO 1990, c B.16, s 248; *Companies Act*, RSNS 1989, c 81, Third Schedule, s 5; *Business Corporations Act*, SNB 1981, c B-9.1, s 166; *Corporations Act*, RSNL 1990, c C-36, s 371; *Business Corporations Act*, SNWT 1996, c 19, s 243, *Business Corporations Act*, SNWT (Nu) 1996, c 19, s 243. See *infra* notes 127-28 and accompanying text for exceptions.
100. *CBCA*, *supra* note 74, s 238.

- Second, section 241(2) of the *CBCA* provides that, to establish an oppression claim, it is necessary that a "security holder, creditor, director or officer" of the company have been treated unfairly.[101]

Several of the stakeholders listed in section 241(2), however, do not automatically qualify as "complainants" for purposes of section 241(1)—creditors and security holders who are not shareholders, for instance, are listed in section 241(2), but are not defined as complainants under section 241(1).

Likewise, while the scope of potential "complainants" under section 241(1) is limited only by a court's discretion, section 241(2) suggests that the harm must be suffered by a security holder, creditor, director or officer of the company. It is not clear why this is the case. The Dickerson Committee report, which proposed the inclusion of an oppression remedy in the *CBCA* and set out the structure for the remedy that was ultimately enacted, did not address this gap, and more generally did not provide significant guidance as to the intended scope of the remedy, instead focusing largely on how the remedy would help protect minority shareholders.[102]

That the *CBCA* uses the same definition of "complainant" for both the oppression and derivative remedies is helpful in interpreting its potential scope. The latter remedy allows a complainant to seek leave of the court to bring an action on behalf of the corporation and for its benefit.[103] The complainant must demonstrate that it is acting in good faith and has made reasonable efforts to cause the directors to pursue the action on behalf of the corporation.[104] The court must also be satisfied that the action appears to be in the interests of the corporation.[105] Since the remedy is intended to benefit the corporation as a whole, there is no need to address the question of which specific stakeholders have been treated unfairly, and thus, there are no bright line restrictions on the types of stakeholders capable of acting as "claimants."

In practice, the courts have made use of the "proper person" branch of the definition of "claimant" to address the apparent disconnect between the criteria for standing and for obtaining remedial relief as well as the unique fact scenarios

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101. *BCE*, *supra* note 9 at para 45; see also *CBCA*, *supra* note 74, s 241. For the full text of section 241(2), see *supra* note 74.
102. Robert WV Dickerson et al, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) at paras 484-85 [*Dickerson Report*]; Jacob S Ziegel, "Creditors as Corporate Stakeholders: The Quiet Revolution—An Anglo-Canadian Perspective" (1993) 43:3 UTLJ 511 at 527.
103. *CBCA*, *supra* note 74, s 239(1).
104. *Ibid*, s 239(2)(a)-(b).
105. *Ibid*, s 239(2)(c).

that would not have been contemplated when the remedy was introduced. Since the *CBCA* oppression remedy was introduced, courts have recognized creditors, lessors, licensors, a trustee in bankruptcy, a monitor appointed under restructuring proceedings, and a widow of a former shareholder as proper persons to bring claims seeking the oppression remedy.[106] Two Alberta decisions have even concluded that the corporation itself can bring claims seeking the substantially similar oppression remedy available under Alberta's corporate statute.[107] Logically, the scope of those treated unfairly should coincide with the definition of "complainant."

C. "STAKEHOLDER" AS DEFINED IN *BCE*

Canadian judicial decisions applying the oppression remedy and fiduciary duties reflect a movement from a shareholder-centric view of corporate directors' duties to a view that takes into account the interests of other stakeholders affected by the decisions corporate boards make. *BCE* and *Peoples* are the best-known of these cases; while the cases themselves deal with economic conflicts between shareholders and creditors, the Supreme Court of Canada nonetheless used these cases as opportunities to state that, depending on the circumstances, it may be legitimate for a board to consider the interests of a broad range of stakeholders when making decisions, including, but not limited to, "shareholders, employees, suppliers, creditors, consumers, governments and the environment."[108] This understanding of the nature of the duties of corporate directors reflects the significant externalities that corporate decisions can produce, as well as the range of persons and interests that can be affected by these externalities.[109]

In *BCE*, the Court frequently discusses the oppression remedy as a means of protecting stakeholder interests, noting that "[t]he oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in

106. Ben-Ishai & Puri, *supra* note 96 at 104; *Ernst & Young*, *supra* note 76 at paras 111-27.
107. *Calmont Leasing Ltd v Kredl* (1993), [1993] 7 WWR 428 at 460-61, 11 Alta LR (3d) 232 (QB); *Gainers Inc v Pocklington* (1992), 132 AR 35 at 65-66, [1992] AWLD 741 (QB).
108. *BCE*, *supra* note 9 at para 39 (quoting *Peoples*, *supra* note 34 at para 42). The groundwork for these statements was arguably laid in earlier cases, including *Stelco* and *Hollinger*. See *Stelco Inc (Re)* (2005), 75 OR (3d) 5, 253 DLR (4th) 109 (CA); *Catalyst Fund General Partner I Inc v Hollinger Inc* (2004), [2004] OTC 1025, 1 BLR (4th) 186 (Sup Ct), aff'd (2006), 79 OR (3d) 288, 266 DLR (4th) 228 (CA). See also Stephanie Ben-Ishai, "The Promise of the Oppression Remedy: A Review of Markus Koehnen's Oppression and Related Remedies" (2005) 42:3 Can Bus LJ 450.
109. See Steven L Schwarz, "Misalignment: Corporate Risk-Taking and Public Duty" (2016) 92:1 Notre Dame L Rev 1 at 4-5.

their strict sense"[110] and that any oppression analysis must take into account "the reasonable expectations of the stakeholders in the context and in regard to the relationships at play."[111] But the Court also notes that the *CBCA* oppression remedy as presently framed does not provide protection to all stakeholders—a claim can be established only if there was unfair treatment of a security holder, creditor, director, or officer for purposes of section 241(2).[112]

We have already reviewed the perverse effects of structuring and applying the oppression remedy in a way that protects some stakeholders and not others. Directors and their advisors, seeking to minimize litigation risk, will naturally bend to the interests of those stakeholders whose interests receive the greatest protection under the law and that have the resources and incentive to challenge management's actions in court. In addition, placing limits on the types of stakeholders with access to the oppression remedy that are based on the nature of their legal interest in the company seems inconsistent with the remedy's focus on reasonable expectations and fair treatment of stakeholders rather than the adjudication of strictly legal rights. In light of this objective, instead of focusing on whether a stakeholder can be squeezed into the category of "security holder, creditor, director or officer" for purposes of section 241(2), we suggest that it makes more sense to focus on whether there was a stakeholder who had a reasonable expectation that was not met.

Correcting the confusion arising from the existing structure of section 241, exposed in *BCE*, suggests reform, either in the form of legislative change or litigation that leads courts to recognize that the oppression remedy should protect a broader range of interests than may currently be contemplated. We review each of these possible routes to reform below.

D. LEGISLATIVE REFORM

Legislative change could mean replacing the words "security holder, creditor, director or officer" in section 241(2) of the *CBCA* with "stakeholder." In other words, acts or omissions that are oppressive, prejudicial to, or unfairly disregard the interests of any stakeholder would constitute oppression. Using the word "stakeholder" gives the oppression remedy greater capacity to adapt to reflect the profound effects private enterprise has and can have on society as a whole, including both present and future generations. A corresponding change in the definition of "complainant" is likely unnecessary: If stakeholders' interests are

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110. *BCE*, *supra* note 9 at para 133.
111. *Ibid* at para 59.
112. *Ibid* at para 45.

explicitly protected by the oppression remedy, a court should not have difficulty recognizing that the equities favour allowing stakeholders to access this remedy.[113] This would be consistent with the view of the Ontario Divisional Court (adopting the reasoning in *BCE*) that the oppression remedy should address the "vulnerability … of those [who have] a genuine stake in the affairs of the corporation but no control over its conduct."[114]

Far from being a vague concept, the concept of "stakeholder" has been judicially defined in *Peoples* and *BCE*. New stakeholders could be recognized based on the reasonable expectations of the parties.[115] These reasonable expectations can be shaped, and their application made more predictable, through corporate conduct. For example, many companies publicly state who they view their stakeholders to be, often going beyond the list of stakeholders included in *Peoples* and *BCE* to include groups such as non-governmental organizations and suppliers.[116] Robert G. Eccles and Tim Youmans have argued that companies should go further by publishing an annual "Statement of Significant Audiences and Materiality" that makes clear which stakeholders the board views as significant, and over what time horizon the board considers these stakeholders' interests.[117] Such a statement would have the dual effect of giving a company board an opportunity to reflect on whether its decision-making processes adequately take into account the interests

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113. The recognition of an applicant as a "proper person" to bring an oppression case is within the court's discretion, and the exercise of this discretion is based on the equities of the case. See *First Edmonton Place Ltd v 315888 Alberta Ltd* (1988), 40 BLR 28 at 62, 60 Alta LR (2d) 122 (QB) var'd (1989), 45 BLR 110, 71 Alta LR (2d) 61 (CA).

114. *1413910 Ontario Inc (Bull's Eye Steakhouse & Grill) v McLennan* (2009), 309 DLR (4th) 756 at para 34, 249 OAC 333 (Div Ct).

115. See J Anthony VanDuzer, "Who May Claim Relief from Oppression: The Complainant in Canadian Corporate Law" (1993) 25:3 Ottawa L Rev 463 (suggesting that courts already use reasonable expectations to determine whether an applicant qualifies as a "complainant").

116. For example, each of the "Big Five" Canadian banks publicly lists the groups it views as its stakeholders. See Bank of Montreal, "Stakeholder Engagement," online: <www.bmo.com/home/about/banking/corporate-responsibility/our-approach/engaging-our-stakeholders>; Bank of Nova Scotia, *Scotiabank Corporate Social Responsibility Report 2016* at 7 <www.scotiabank.com/corp/downloads/EN_2016_CSR_Report.pdf>; Canadian Imperial Bank of Commerce, *CIBC 2016 Corporate Responsibility Report and Public Accountability Statement* at 10-12 <www.cibc.com/content/dam/about_cibc/corporate_responsibility/pdfs/cibc-crr-2016-en.pdf>; Royal Bank of Canada, *Royal Bank of Canada Corporate Citizenship Report 2016* at 3 <www.rbc.com/community-sustainability/_assets-custom/pdf/RBC-CCR-Report-2016-e.pdf>; Toronto-Dominion Bank, *2016 TD Corporate Responsibility Report* at 5, <www.td.com/document/PDF/corporateresponsibility/2016-Final-CRR_EN.pdf>.

117. Robert G Eccles & Tim Youmans, "Materiality in Corporate Governance: The Statement of Significant Audiences and Materiality" (2016) 28:2 J Applied Corp Fin 39.

of its stakeholders, and provide a court with a framework (albeit a non-binding one) for identifying stakeholders as well as their reasonable expectations.

We also note that providing stakeholders with access to the oppression remedy does not mean that corporate boards would be obligated to weight the interests of all stakeholders equally, or that all stakeholders would stand on an equal footing when establishing a reasonable expectation. *BCE* makes it clear that the corporate decision-making process is context-specific, with some stakeholders' interests looming larger in some contexts than in others, and that whether or not a stakeholder can establish a reasonable expectation will depend on a variety of factors, including "general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders."[118]

Broadening the scope of the oppression remedy in this way creates a mechanism for preventing corporate decisions like that reached by DuPont, as discussed in Section I above. Recognizing stakeholders as parties who can sue when corporate decisions significantly affect their interests and violate their reasonable expectations would achieve two ends. First, by recognizing the rights of non-financial stakeholders, the law encourages directors to view costs imposed on these stakeholders not as externalities, but as costs borne by the corporation itself through its stakeholders. One of the functions of the law is to make these kinds of normative claims that are intended to influence future behaviour.[119] Second, the wide range of remedies available under the oppression remedy, which include personal liability on the part of directors, could pose a significant deterrent to behaviour that unjustifiably harms the interests of affected stakeholders.[120]

The potential risks attaching to this kind of reform are less serious than may first appear. While it has been suggested that an expansion of the scope of the oppression remedy would lead managers to "face conflicting influences that could threaten the coherence of their approach," as a result of "sharply different interests hav[ing] a possible influence over management because of the

118. *BCE*, *supra* note 9 at para 72.
119. Cass R Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021 at 2024-25.
120. *Wilson v Alharayeri*, 2017 SCC 39 at paras 47-48, [2017] 1 SCR 1037 [*Wilson*] (holding that personal liability may be imposed under section 241(3) of the *CBCA* if the director "exercised—or failed to have exercised—his or her powers so as to effect the oppressive conduct" and "the imposition of personal liability [is] fit in all the circumstances" (*ibid* at para 47).

threat of litigation,"[121] recent case law suggests that allowing all stakeholders to access the oppression remedy would not lead courts to second guess reasonable balances of interests reached by a board of directors. For example, in *Air Canada Pilots Assn v Air Canada Ace Aviation Holdings Inc*, a pilots' union sought to use the oppression remedy to, in effect, reopen a plan of reorganization that it had been involved in negotiating. While the claim was rejected on the basis of the union not constituting a "proper person" to bring the claim (as a result of its not being a creditor),[122] the court also explored in detail the nature of the reasonable expectations asserted by the union and concluded that they were being met, noting that union members "are in a stronger, more economically protected position because of the restructuring of the previously insolvent Air Canada,"[123] and that the union was substantially involved in negotiating this restructuring.[124] The analysis is similar to that which has been applied to holders of debt securities, finding that if the debtholders were aware of risks and agreed to contractual terms notwithstanding this awareness, they are not entitled to attempt to use the oppression remedy to reopen the deal that they had negotiated.[125] In short, it does not appear that expanding the oppression remedy to encompass all stakeholders would severely upset the remedy's functioning; rather, it would allow the remedy to function in the way generally described to directors of corporations, as a way in which stakeholders can seek redress for violations of their reasonable expectations.[126]

While one could argue that a change of this kind in one corporate law statute may lead companies to continue into a jurisdiction with a more restrictive oppression remedy, history does not appear to support this hypothesis. While most of the provincial oppression remedies resemble that set forth in the *CBCA*, the oppression remedies in British Columbia and Yukon relate only to shareholder interests, while the remedy in Quebec relates only to the interests of security

121. Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48:2 Can Bus LJ 232 at 247.
122. *Air Canada*, *supra* note 76 at para 85 ("ACPA's present and future members are, of course, employees entitled to wages, related benefit payments and pension benefits (from the pension plan trustee) as they become due in the future. In my view, this does not constitute ACPA a 'creditor' of Air Canada in any legal sense, and in particular, within the meaning of s. 241 (2) [of the *CBCA*]." (*ibid*)).
123. *Ibid* at para 60.
124. *Ibid* at para 31.
125. *Holders of 9.375% Senior Unsecured Notes of Crystallex International Corporation v Crystallex International Corporation*, 2010 ONCA 364 at para 16, 263 OAC 137.
126. Torys LLP, *supra* note 59 at 19.

holders, directors, and officers.[127] Prince Edward Island's corporate law statute does not include an oppression remedy.[128] The absence of any apparent concern about companies continuing into these jurisdictions would seem to indicate that changes resulting in differences in the scope of the remedy are unlikely to lead to such a result.[129]

E. JUDICIAL REFORM

Legislative reform has the advantage of signaling to boards and legal practitioners that the scope of the oppression remedy has expanded, providing an opportunity for proactive changes in the conduct of boards and their advisers. However, given the right case, it should be possible to effect a similar result through judicial reform. Security holders clearly have standing to bring claims in response to concerns that directors and officers have failed to properly evaluate systemic (*e.g.*, climate) risks and develop appropriate mitigation and adaptation strategies. The broad language of the remedy gives ample scope for such a claim. Moreover, the Supreme Court of Canada recently affirmed that corporate directors may be personally liable in an oppression action where the director (or officer) is implicated in the oppressive conduct and the imposition of personal liability is "fit in all of the circumstances."[130]

Time and again, courts have interpreted the oppression remedy expansively to address unjust conduct, recognizing a range of stakeholders as "proper persons" to bring claims under the remedy despite their not being named in sections 238 or 241(2) of the *CBCA*.[131] Moreover, the oppression remedy has been characterized as an open-ended standard, designed to reflect the fact that "it is

127. *Business Corporations Act*, SBC 2002, c 57, s 227(2); *Business Corporations Act*, RSY 2002, c 20, s 243(2); *Business Corporations Act*, CQLR c 31.1, s 450.

128. *Companies Act*, RSPEI 1988, c C-14.

129. While in recent years, different jurisdictions have cited competition as a motive for efforts to modernize their corporate laws, there appears to be no prospect of US-style competition for corporate charters coming to Canada. See Glenford Jameson, "Competing with Ourselves: Supply-Side Competition for Corporate Charters in Canada" (2013) 50:4 Alta L Rev 843 at 869. Despite this recent trend, the federal and provincial corporate law statutes remain substantially similar, and are characterized as such by corporate counsel. See *e.g.* Davies Ward Phillips & Vineberg LLP, *Doing Business in Canada*, 9th ed (Toronto: Davies Ward Phillips & Vineberg LLP, 2014) at 16-17, online: <www.dwpv.com/-/media/Files/PDF_EN/2014-2007/Doing_Business_in_Canada_9th_ed_En.ashx?la=en>; Stikeman Elliott LLP, *Doing Business in Canada: A Legal Overview* (Toronto: Stikeman Elliott LLP, 2016) at C2, online: <www.stikeman.com/en-ca/kh/guides/Doing-Business-in-Canada>.

130. *Wilson*, *supra* note 120 at paras 31-33.

131. See *supra* notes 106-107 and accompanying text.

generally assumed that participants in corporations would bargain for protection against oppression and unfair prejudice if bargaining were costless."[132] Where a court finds that the parties have not addressed the problematic conduct, it should attempt to construct the bargain the parties could reasonably be expected to have agreed to as a result of fully informed (and costless) bargaining.[133] In this manner, the oppression remedy could be used by the courts to reshape corporate law by changing to whom management and directors must be responsible.[134]

If the best interests of the corporation are defined broadly—in terms of decisions that are intended to advance its operational and financial sustainability—the interests of a broad set of stakeholders (beyond those specifically enumerated in section 241(2) of the *CBCA*) should become relevant factors in determining "reasonable expectations."

Such a focus on the public interest, and on outcomes that may be non-economic in the short term, as independent and legitimate values is consistent with the shifting focus of jurisprudence in Canadian insolvency law.[135] Consider, for example, a recent decision affirming the status of a court-appointed monitor under the *Companies' Creditors Arrangement Act* ("*CCAA*")[136] as a complainant under the oppression remedy. *Ernst & Young Inc v Essar Global Fund Limited* (*Ernst & Young*),[137] a 2017 decision of the Court of Appeal for Ontario, confirmed the existence of one pathway by which pensioners, retirees, and governments can have their interests represented in oppression proceedings. In that case, these stakeholders were creditors of a company under restructuring, and the court-appointed monitor brought an oppression claim arguing that their reasonable expectations had been violated. The company, acting at the behest of its shareholder, transferred core assets to a related party with the benefit of a change of control clause that gave it an effective veto right over any restructuring by the company.[138] The court sided with the monitor, and concluded that the reasonable expectations of the stakeholders it purported to represent had been violated:

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132. Brian R Cheffins, "An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law" (1990) 40:4 UTLJ 775 at 789.
133. *Ibid* at 793-94.
134. VanDuzer, *supra* note 115.
135. Janis Sarra & Edward Waitzer, "Climate Change—A Case Study/Tipping Point for Rebalancing Interests in Insolvency Law?" in Janis P Sarra and The Honourable Barbara E Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Carswell, 2017) 643.
136. RSC 1985, c C-36.
137. *Ernst & Young*, *supra* note 76.
138. *Ibid* at para 70.

> [I]t would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors, and employees.[139]

The Court specifically noted that "[a] monitor owes duties to all stakeholders, not just creditors."[140] Moreover, in articulating the factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant, the court focused on whether the claim "has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring."[141] By implication, this extends the scope of potential "complainants" beyond those named in section 241(2) of the *CBCA*.

The decision indicates that, if presented with compelling facts and arguments that fit within the existing legal framework, courts are willing to apply the oppression remedy in ways that reflect the reasonable expectations of non-shareholder stakeholders. This is consistent with the Supreme Court of Canada's view of the oppression remedy as enabling courts to frame new norms in response to reasonable expectations.[142]

The oppression remedy as currently framed offers other potential pathways for stakeholders to form coalitions to assert reasonable expectations in an oppression claim. The first step would be to demonstrate that the interests of stakeholders not currently enumerated in section 241(2) of the *CBCA* can be aligned with the interests of at least one of the stakeholders currently listed in that provision—this will likely mean pursuing litigation in tandem with a security holder or creditor with whom the stakeholder's interests are aligned. Second, it would be necessary to show that those advocating for the stakeholder should be allowed to participate as interveners in proceedings brought by security holders or other complainants. A more ambitious option would be to argue that these groups are "proper persons" to bring the oppression claim in their own right.

Future generations have long been characterized as "creditors" internationally. For example, the Brundtland Report comments that "[w]e borrow environmental capital from future generations with no intention or prospect of repaying."[143] Given the existing case law on this matter, however, it appears unlikely that courts

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139. *Ibid* at para 160.
140. *Ibid* at para 96.
141. *Ibid* at para 123.
142. Waitzer & Sarro, *supra* note 14.
143. World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at para 25, online: <www.un-documents.net/our-common-future.pdf>.

would adopt such an expansive definition of creditor.[144] Nonetheless, one could argue that the systemic threat climate-related risks pose to shareholders, creditors, directors and officers could form a basis for litigation claiming that inaction in the face of this threat disregards these stakeholders' interests (as well as those of the corporation) and reasonable expectations. The increasing focus of securities regulators on the disclosure of environmental risks suggests that these risks should be viewed as material to investors.[145] The conduct of investors themselves, who have increasingly focused on climate-related risks associated with their portfolio companies,[146] provides further evidence of the link between shareholder interests and environmental sustainability.

In determining whether it is "just and equitable" to deem an environmental or other non-governmental organization to be a "proper person" to bring an oppression claim, a court could look to the test currently used for determining whether such a group can gain public interest standing to challenge a government action: whether (1) the party raises a "serious justiciable issue" and has a "genuine interest" or "real stake" in the issue, and (2) "in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts."[147] Even under this test, however, recognition could be difficult. While one could argue that the interests of individual shareholders in environmental and social matters are too diffuse to rely on them to bring oppression claims relating to these issues on their own, or that a public interest group is the only vehicle for representing the interests of future generations, the presence of large, institutional shareholders with a long-term outlook would seem to undercut this argument. The better prospect may be to follow the class action model and "partner" with a sympathetic shareholder who can act as a claimant, with the "ineligible" claimant seeking to participate in the proceedings as an intervener. Such status is typically granted to parties that bring a fresh perspective to proceedings that are of at least some public importance.[148]

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144. *Air Canada*, *supra* note 76 at para 85.
145. Cynthia A Williams, "Disclosure of Information Concerning Climate Change: Liability Risks and Opportunities," (2017) Commonwealth Climate and Law Initiative Working Paper Series at 15-16, online: <hennickcentre.ca/wp-content/uploads/2017/11/CCLI-Disclosure-Paper-October-30.pdf>.
146. *Ibid* at 3, 26.
147. *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 at para 37, [2012] 2 SCR 524.
148. *Reference re Workers' Compensation Act, 1983 (Newfoundland)* (1989), [1989] 2 SCR 335 at 340, 76 Nfld & PEIR 185.

Perhaps the most important element of any test case will be concrete evidence of a reasonable expectation that has been violated by the corporation. This means more than simply asserting that a corporate action has harmed a particular stakeholder: The business judgment rule protects corporate actions that balance the competing interests of different classes of stakeholders, so long as the action taken lies within a reasonable range of alternatives.[149] In addition, to the extent the harms asserted resulted from risks willingly undertaken by a stakeholder as part of a bargain, such as a plan of arrangement (as was the case in *Air Canada*), an oppression claim would seem unlikely to succeed.[150]

Rather, it will be necessary to demonstrate not only that harm has occurred or is occurring, but that the harm resulted from a defective corporate decision-making process that disregarded the interests of affected stakeholders, and in which stakeholders had no opportunity to bargain to protect their interests (such as in *Ernst & Young*).[151] Below, we suggest two possible examples of defective decision-making processes resulting in harm that could form a basis for asserting a violation of reasonable expectations.

The first is a scenario like that in the DuPont settlement, in which management understood that emitting C8 toxins into the atmosphere would cause specific harms to the environment and human health, but appeared to have evaluated these harms purely as a potential financial liability.[152] In other words, rather than weighing the *known* human health and environmental effects of their actions on all affected stakeholders, management's decision to pollute reflected a weighting only of the *potential* financial effects of their actions on shareholders and other financial stakeholders. Perhaps as a result of this incomplete process for evaluating how best to serve the long-term interests of DuPont, the board disregarded a third option: "investing in incineration techniques that would have mitigated many of the damages caused to the community and the sanctions later paid by DuPont."[153] Groups representing the interests of the environment and those who suffered adverse health effects from the company's actions, acting in tandem with a shareholder with a long-termist outlook, might have asserted a reasonable expectation that all of the known and potential effects of a decision to pollute on all affected stakeholders should have weighed on the board's decision,

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149. *BCE*, *supra* note 9 at para 40.
150. *Air Canada*, *supra* note 76 at para 84.
151. *Ernst & Young*, *supra* note 76.
152. Shapira & Zingales, *supra* note 29 at 2, 8 (management identified litigation, regulatory intervention and reputational harm as potential negative financial effects of polluting).
153. *Ibid* at 2-3.

and that had the board properly considered these effects, it at a minimum would have taken action to mitigate these potential effects.

The second is a scenario like that in NRG Energy, in which the balance of interests adopted by the board is colourable due to the visible influence of a particular constituency of shareholders over that decision. NRG Energy's management previously agreed on an ambitious plan to curb its greenhouse gas emissions over the long-term and to invest in green energy, only to reverse themselves under pressure from hedge funds.[154] One could argue that management's plan to mitigate its greenhouse gas emissions, while at the same time cutting costs, reflected a reasonable balance of the interests of its stakeholders, and that the wholesale unraveling of this plan reflected a narrow focus on serving the financial interests of a particular subset of stakeholders (and keeping the current board in office) to the exclusion of other stakeholders' interests—the opposite of the "fair treatment" expected of boards under *BCE*.[155]

In summary, to achieve reform of the oppression remedy through judicial means, it is likely that stakeholders would need to find ways in which their interests align with those of the stakeholders enumerated in section 241(2) of the *CBCA*, and find allies within these groups, to pursue litigation that focuses on defective decision-making processes that result in concrete harms to stakeholders. The silver lining of the muddled statutory drafting is that this type of litigation may provide a compelling stimulus and focus for engagement between companies, their institutional shareholders, and other stakeholders, and, as a result, reduce the pressure companies currently face to pursue the short-term interests of certain shareholders at the expense of the long-term interests of other stakeholders. Recent collaborative initiatives focused on shared responsibility for long-term thinking could be accelerated.[156]

III. CONCLUSION

We have tried, in this article, to trace the manner in which Canadian courts have moved towards a redefined corporate purpose—one that is timely and responsive to "reasonable expectations." Not entirely coincidentally, corporate leaders and long-term institutional investors both increasingly struggle with the challenge of managing system level opportunities, risks, and rewards that typically extend

154. Coffee, *supra* note 52 at 36-38.
155. *BCE*, *supra* note 9 at para 64.
156. See *e.g.* the Strategic Investor Initiative of CECP (www.cecp.co), or the work of the Investor Stewardship Group (www.isgframework.org), and FCLT Global (fcltglobal.org).

beyond their personal time horizons (in their organizational leadership roles), in the face of powerful short-term incentives, myopic political forces and backward-looking legal advice.

In a period of "thin" political markets,[157] this is a classic opportunity for judicial activism. This is not novel. Consider, for example, the 1932 decision of Judge Learned Hand of the US Court of Appeals for the Second Circuit in *The T.J. Hooper*.[158] Judge Hand concluded that tugboat owners were liable in negligence for loss of cargos in a storm because they failed to issue short-wave receivers to operators, on the basis that they were readily available at a reasonable cost and could have prevented the loss of cargo, even though the receivers were newly-developed, not required by regulation, and a rarity on tug boats. In concluding that following current market practice can constitute negligence, Judge Hand held as follows:

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. *Courts must in the end say what is required; there are precautions so imperative even their universal disregard will not excuse their omission*.[159]

This willingness to push beyond current practice to require market participants to be proactive in responding to new developments and changing circumstances sounds remarkably similar to the Supreme Court of Canada's discussion of "looking beyond legality, to what is fair, given all of the interests at play" to address conduct that is "wrongful even if it is not actually unlawful."[160] The immediate opportunity is to align corporate law remedies to better enable stakeholders to meaningfully engage and assist corporate boards to best ensure sustainability and growth, and to be able to impose discipline when that does not occur. Absent some mechanism to accelerate legislative responsiveness and reform, judicial

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157. See Rebecca Henderson & Karthik Ramanna, *Do Managers Have a Role to Play in Sustaining the Institutions of Capitalism?* (Center for Effective Public Management at Brookings, 2015) at 1. This term describes circumstances where "the political process of determining the institutions of capitalism is 'thin,' in that managers find themselves with specialized technical knowledge unavailable to outsiders and with little political resistance from the general interest" (*ibid*). In such circumstances, Henderson and Ramanna argue, managers have a moral duty to help sustain market institutions, "even if this entails acting at the expense of corporate profits," adding that acting in accordance with this duty also serves the long-term interests of managers (*ibid*).
158. *The TJ Hooper*, 60 F (2d) 737 (2d Cir 1932).
159. *Ibid* at 738 [emphasis added].
160. *BCE*, *supra* note 9 at para 71 (quoting *Dickerson Report*, *supra* note 102 at para 485).

activism is likely to carry the day. To be clear, this is not without challenges.[161] On the other hand, courts are attuned to reasonable expectations—something our regulatory and legislative processes appear increasingly incapable of doing.

To end where we began, with the words of then Chancellor Allen, "and so on, and so on, evermore."[162]

161. In addition to those we have described, these would include the costs of seeking relief, the lack of specialized judicial expertise or accountability, the lack of the process that is central to legislative or administrative policy-making, and the tendency of "hard facts" to make "bad law."

162. Allen, *supra* note 10 at 281.