

CORPORATIONS IN THE CROSSHAIRS: STAKEHOLDER ACTIVISM AND THE ROLE OF CORPORATIONS IN SOCIETY

— MCGILL LAW JOURNAL ANNUAL LECTURE —

Poonam Puri*

INTRODUCTION

THANK you *McGill Law Journal* Editor-in-Chief Pascale Malenfant, and Managing Editor Chlöe Shahinian. It is an honour to be here today to deliver the 2025 *McGill Law Journal* Annual Lecture. It is a privilege to join you, as well as the faculty and students here at McGill, along with members of the community. Today, I am here to speak with you about the uncertainty facing corporations and those who run corporations—management, led by the CEO team, and the boards of directors that oversee them—particularly on topics of environmental, social and governance (ESG), where activist stakeholders are using legal and market-based tools to push corporations to align with those stakeholders’ interests. As I share with you these trends, I will draw out important lessons for appropriate responses by management and boards and those who advise them—especially lawyers, which will one day include all of you. I will also explore the tension between stakeholder theory, which posits that boards and management should consider a range of stakeholder interests when making decisions, and shareholder primacy, which

* Poonam Puri is a Full Professor of Law at Osgoode Hall Law School, York University. She holds the Tier I York Research Chair in Corporate Governance, Investor Protection and Financial Markets. This transcript is from the delivery of the *McGill Law Journal* Annual Lecture, Montréal, 28 January 2025. The author wishes to thank the *McGill Law Journal* and the McGill Faculty of Law.

© Poonam Puri 2025

Citation: (2025) 70:3 McGill LJ 587 — Référence : (2025) 70:3 RD McGill 587

This is an Open Access article distributed under the terms of the Creative Commons License CC-BY-ND (<https://creativecommons.org/licenses/by-nd/4.0/>).

posits that creating value for shareholders is the paramount consideration for corporations.

Imagine that you sit on the board of directors of a Canadian public corporation on January 1st, 2020. The economy is strong, there is no inflation of consequence, and the world is relatively peaceful. Consumers are healthy and spending their money at your company. Now, fast forward to January 1st, 2025. Over those five years, what did you, as a public company director, deal with? COVID-19 and the world shutting down; war in Europe and the Middle East; increasingly divided societies; inflation and the steepest interest rate hikes in a generation. Meanwhile, an ongoing climate crisis threatens business operations with fires, floods and severe weather, and polarized societies are leading to increasingly charged political debates. This stark change in circumstances shows that in business, uncertainty is a feature, not a bug. But the degree of uncertainty over the last five years has been greater in my view than at any time since World War II. The severity of this uncertainty places enormous pressure on corporations and those that run them—management (as well those that oversee and supervise management), as well as boards—in Canada and around the globe.

This tumult, along with the rise of social media and inequality, has led to an increasingly polarized political and social climate, including among the stakeholders that matter to the success of a corporation: employees, customers, local communities, government, and regulators, among others. This polarization, which is not unique to North America—though we certainly see a lot of stories from Canada and the United States—leads to significant complexity for those who manage and oversee companies as they operate and continue to integrate ESG priorities into their strategy and business efforts.

Stakeholder expectations and regulatory landscapes vary widely, even within a single country, making it challenging for corporations to implement consistent ESG strategies. For instance, in the United States, there is a stark contrast between states like California and New York, which promote pro-ESG regulations, and states like Florida and Texas, which actively work against ESG initiatives. Texas has banned state pension funds from investing with certain asset managers deemed to be discriminatory against the oil and gas industry—all while California has pushed

public companies to adopt environmental policies.¹ You might be tempted to think: “These are just two American states, and the challenge is not that significant.” But both California and Texas have larger economies than Canada.² This example is emblematic of the challenges that management and boards face on ESG issues, especially environmental and social ones. This impact of a polarized landscape, even within one country, creates a challenging environment for companies trying to maintain consistent ESG practices within their enterprise. The impact becomes that much more complex on a global scale.

From divided societies and war, to inflation and complex social debates, businesses are being pulled in multiple directions by multiple stakeholders, and these stakeholders are using the law as a tool to push their agendas. Boards of directors and management at corporations, but also at government agencies and non-profits, depend on their legal departments and external legal counsel in times of uncertainty.

As you enter the legal profession, the job of counsel—which means adviser—is more complicated than ever. But as a profession, we have the tools that we need to help corporate boards and management navigate this uncertainty and exercise good judgement. And you as students are getting those skills here at McGill—from critical thinking to strategic and persuasive communications, to risk assessment and mitigation.

When I articulated, it was 1995; when I started teaching at Osgoode, it was close to the year 2000. Let me give you a flavour of some of the major events in the corporate world and in corporate governance at that time. Lawyers were advising on high-profile initial public offerings in the technology industry, but there was fear about Y2K and potential coding issues when the year changed from 1999 to 2000. Corporate growth and big balance sheets were the name of the game, and lawyers were on big M&A deals. Ultimately, the tech bubble burst; Y2K was not a crisis; and

1 Mitchell Ferman, “Texas Bans Local, State Government Entities from Doing Business with Firms that “Boycott” Fossil Fuels”, *The Texas Tribune* (24 August 2022), online: <texastribune.org> [perma.cc/K76Q-VPC7]; Michael R Littenberg et al, “Complying with California Climate Disclosure Legislation: A Dozen Observations and Recommendations” (20 October 2024), online: <ropesgray.com> [perma.cc/W6VP-K9RA].

2 Dustyn Lanz, “Will Canada Import America’s Anti-ESG Campaign?”, *Investment Executive* (26 July 2023), online: <investmentexecutive.com> [perma.cc/FPG3-C68B].

Worldcom was the first American company to fail from inflating its earnings, followed by Enron and others.

Those were uncertain times in the corporate world and were foundational in ushering in the *Sarbanes-Oxley Act* of 2002 in the United States, and an enhanced focus on corporate governance around the world, including in Canada. It was only with *Sarbanes-Oxley* in the United States that the Canadian securities regulators took the TSX rules on independent directors and put them in securities laws, and also instituted independence rules for public companies' audit committees.³ Only then did the focus fall on independent directors, who are not employed by the company but bring outside perspectives and do not have their income primarily tied to the company's growth and performance (like the CEO does).

Having independent directors, mitigating conflicts of interest, and obtaining expert advice are just as important today as they were then. But today, there are additional new governance challenges, and greater uncertainty, with corporations being caught in the crosshairs of stakeholders who are demanding that they do more than just make money—but that they also have an impact on society and the environment.

I. OUR POLARIZED WORLD

Today, we live in a polarized world. When ESG first became prominent, it was largely seen as something proactive that companies *did*—companies would use ESG to advance a range of environmental, social and governance impacts that were part of their strategy and aligned with business operational goals.⁴ ESG became a buzzword in corporate Canada and corporate America. I do not mean buzzword in a negative sense; it was popular, and considered important by businesses and many of their internal and external stakeholders.

3 See generally Stephen P Sibold, "Assessing Canada's Regulatory Response to the Sarbanes-Oxley Act of 2002: Lessons for Canadian Policy Makers" (2009) 46:3 *Alta L Rev* 769.

4 See Elizabeth Pollman, "Corporate Social Responsibility, ESG, and Compliance" in Benjamin van Rooij & D Daniel Sokol, eds, *The Cambridge Handbook of Compliance* (Cambridge, UK: Cambridge University Press, 2021) at 5.

Companies were committing to climate-related objectives like Net Zero and emissions reductions; they were funding diverse community initiatives—including, for example 2SLGBTQ+ Pride parades; and they were taking stances on geopolitical issues to show their values. In turn, these initiatives built trust and loyalty from a range of stakeholders, including customers and employees. But they also created expectations among those stakeholders—expectations that companies would do what they said they would do, and that they would do more.

The most recent rise of ESG began in the later part of the last decade, around 2017, and one of its most prominent proponents was Larry Fink, the chairman and CEO of BlackRock, which is the world's largest asset manager with over \$11 trillion in assets under management. Mr. Fink writes an annual letter to CEOs where he outlines his thoughts on corporate governance and other matters. Mr. Fink made the case in his 2018 letter to CEOs that “[s]ociety is demanding that companies, both public and private, serve a social purpose.”⁵

A year later, the 2019 Statement on the Purpose of a Corporation was released by the US Business Roundtable of more than 200 CEOs. It was widely considered as a watershed moment in the modern story of capitalism. In the statement, the CEOs advocated for companies to move away from the shareholder primacy model of the corporation (which, as noted above, says that companies should only be focused on creating shareholder value) and toward stakeholder governance (which says that companies should make business decisions in the interests of a range of stakeholders, which still includes shareholders but also includes employees, customers, the environment, and local communities, among others).

Diversity and inclusion were identified as priorities in this statement, as was the environment.⁶ I mentioned it was considered a watershed moment, but the durability of this statement has been challenged in real time in the five years since it was released, as some stakeholders have pushed back against companies pursuing purposes beyond the creation of shareholder value. There is a tension between shareholder primacy and stakeholder governance; while we are seeing it play out in real time, it is not

5 Larry Fink, “A Sense of Purpose” (17 January 2018), online: <corpgov.law.harvard.edu> [perma.cc/H8CA-9TE6].

6 Business Roundtable, “Statement on the Purpose of a Corporation” (19 August 2019), online: <businessroundtable.org> [perma.cc/L6YQ-9C6V].

true only of the present moment. This tension is not just in the halls of political power in Ottawa and Washington or in boardrooms—it is also in the academy.⁷ Scholars are divided on what the purpose of the corporation should be, and what the legal duties that corporate directors hold—the fiduciary duty and the duty of care—require them to take into account as they make decisions. Right now, in my view, the balance is still in favour of stakeholder governance and taking affected stakeholder interests into account when making decisions, which I will expand on further.

II. SETTING/CREATING STAKEHOLDER EXPECTATIONS

In the ESG era, companies have set bold purpose statements, focused not just on profits but on improving society. Many companies also release annual ESG reports, sometimes stylized as impact reports, social responsibility reports, or sustainability reports. This allows stakeholders to track commitments and progress.

Sometimes, these purpose statements have been largely aligned with their business model. The Bank of Montreal (BMO), for example, pledges “To Boldly Grow the Good *in business and life*.”⁸ This purpose makes sense for a bank, which provides loans and other financial services to businesses and individuals and seeks to serve the communities where it operates. As a result, BMO has committed to a thriving economy, a sustainable future, and an inclusive society.

7 See e.g. Joan MacLeod Heminway, “Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents” (2017) 74:2 Wash & Lee L Rev 939 at 940; Carol Liao, “Corporate Governance Reform for the 21st Century: A Critical Reassessment of the Shareholder Primacy Model” (2012) 43:2 Ottawa L Rev 187; Poonam Puri, “The Future of Stakeholder Interests in Corporate Governance” (2009) 48:3 Can Bus L J 427 at 428; Carol Liao, “A Canadian Model of Corporate Governance” (2014) 37:2 Dal LJ 549 at 560; Dorothy S Lund & Elizabeth Pollman, “The Corporate Governance Machine” (2021) 121:8 Colum L Rev 2563 at 2565; Bryce C Tingle, “Two Stories about Shareholders” (2021) Osgoode Hall LJ 57 at 58–59. Yvan Alaire & Stéphane Rousseau, “To Govern in the Interest of the Corporation: What is the Board’s Responsibility to Stakeholders Other than Shareholders?” (2015) 5:3 J Management & Sustainability 1 at 2.

8 Bank of Montreal, “Our Impact” (last visited 20 January 2025), online: <our-impact.bmo.com> [perma.cc/J2DR-VVDT].

But there have been some surprising examples, as well. In 2016, Philip Morris International, the global tobacco company, agreed to support a new purpose to deliver a smoke-free future where adult smokers who do not quit switch to new smoke-free products and abandon cigarettes.⁹

Many companies have committed to Net Zero emissions, to specific workforce diversity targets, or to specific steps to advance reconciliation with Indigenous peoples. For companies with significant global supply chains, they often try to extend their ESG impacts along their supply chains—Dollarama, for example, has a Vendor Code of Conduct and conducts “social audits” to ensure human rights are being upheld.¹⁰

These purpose statements, commitments, and reports have in turn led to a broader accountability framework; as I mentioned, stakeholders form expectations based on these statements and commitments and they expect companies to report against their purpose statements and on their progress. When corporate actions do not align with those statements, stakeholders then agitate for change. Once a company has set a goal on paper and has articulated it to the world and to its stakeholders, there is a benchmark against which the company can be held.

Stakeholder disappointment in a company’s progress or disagreement with a company’s approach has in turn led to a rise in stakeholder activism. When stakeholders see a commitment to Net Zero, for example, they expect timelines and progress towards the goal. If that doesn’t manifest, it can lead to stakeholder disappointment and demands for a change of policy or even change of leadership. Clearly, stakeholders—including customers, employees, suppliers, communities, and governments, along with shareholders—have vested interests in corporate actions and want their voices to be heard and their demands actioned. Consider, for example, the Russian invasion of Ukraine, for which I note we are approaching the third anniversary. It was a shocking development in geopolitical affairs, and in addition to the bloodshed, it immediately became a business issue for companies in Canada and elsewhere. Outraged, stakeholders

9 Philip Morris International, “PMI Transformed: The Past, Present, and Future of Smoke-Free Products (November 2024), online: <pmiscience.com> [perma.cc/L9W8-QC3B].

10 Dollarama, “FY23 ESG Report” (June 2023) at 41, online (pdf): <dollarama.com> [perma.cc/4F3F-5BQP].

demanded action from businesses that had operations or financial interests in Russia.

Customers and employees, including those of Ukrainian heritage, demanded that companies pull out of Russia and divest from its economy. Governments put pressure on businesses and began restricting Russia's economy with sanctions. Companies reacted: For example, McDonald's sold its Russian operations, Adidas suspended sales, and Shell exited joint ventures with Gazprom, each incurring significant financial hits.¹¹ These are just three of hundreds of examples of companies that exited Russia or otherwise reduced their business presence there.¹² Non-governmental organizations (NGOs) and academics began tracking company reactions to the invasion and checking whether their actions matched their statements, combatting so-called “moral-washing.” These tracking tools were designed to hold companies accountable for the statements they were making publicly. When a company stated that it had pulled out of Russia or otherwise suspended business ties but was found not to have done so, it risked reputational damage with stakeholders, including consumers, employees, and governments.

Companies are finding that they may need “social license” in order to operate. By social license, I mean the informal acceptance of a company's business practices by the public and other stakeholders, based on the organization's alignment with societal and ethical standards. Some companies have a greater challenge in achieving social license, depending on their industry. For example, the oil and gas industry has had trouble getting their projects—such as the Kinder Morgan, Keystone XL, and Energy East pipelines—approved and built, in part because of a lack of social license that has manifested itself in protests from individuals,

11 Becky Morton, “McDonald's to Leave Russia for Good After 30 Years” (17 May 2022), online: <bbc.com> [perma.cc/FG2M-CTE3]; *Reuters*, “Adidas Has Around 100 Stores Left to Get Rid of in Russia, CEO Says” (3 August 2023), online: <reuters.com> [perma.cc/YR9E-ETCD]; “Leave Russia”, *Shell* (last visited 20 January 2025), online: <leave-russia.org> [perma.cc/89VM-N8R2].

12 Yale School of Management, “Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain” (28 January 2024), online: <som.yale.edu> [perma.cc/N87F-2ATJ].

campaigns by non-governmental organizations, and opposition from governments and politicians.¹³

III. COMPETING EXPECTATIONS FROM STAKEHOLDERS

But it is not just oil and gas companies—which are obviously the subject of controversy because of the prevalence of climate change in the political discourse—who are being targeted. For companies in a range of sectors, expectations from stakeholders are growing, becoming more polarized, and changing rapidly. Sometimes, they directly conflict with the demands of other stakeholders, resulting in the company being pulled in two opposite directions. This dynamic creates risks and demands significant resources to manage effectively. Ultimately, it may mean that companies say one thing and do another, as one study by Lucian A. Bebchuk and Roberto Tallarita suggests of companies that signed the Business Roundtable Statement on the Purpose of the Corporation.¹⁴

Let us explore some examples. I will start with an oil company, given I mentioned that sector. At its most recent annual general meeting of shareholders, Suncor, a major oil company in Canada, faced competing demands on its approach to climate change.¹⁵ It faced two shareholder proposals, which are essentially non-binding motions that call on management to take certain actions or make certain changes. One shareholder proposal asked the company to reverse its prior pledge to be Net Zero by 2050. The other asked the company to disclose an assessment of a range of climate transition scenarios, backed by an audit.¹⁶ To put it

13 *Reuters*, “Keystone Pipeline Officially Canceled After Biden Revokes Key Permit” (9 June 2021), online: <cnbc.com> [perma.cc/X2JG-T98H]; CBC News, “Indigenous Groups Lead Protest Against Kinder Morgan’s Trans Mountain Pipeline Plan” (12 March 2018), online: <cbc.ca> [perma.cc/DN6X-VN79]; Pete Evans, “TransCanada Pulls Plug on Energy East Pipeline” (5 October 2017), online: <cbc.ca> [perma.cc/VJN7-3SCJ].

14 Lucian A. Bebchuk & Roberto Tallarita, “Will Corporations Deliver Value to All Stakeholders?” (2022) 75:4 *Vand L Rev* 1031 at 1063–64.

15 Chris Varcoe, “Scrap Net-Zero Target, or Disclose More Transition Risks—Suncor Faces Duelling Climate Proposals at AGM”, *Calgary Herald* (27 March 2024), online: <calgaryherald.com> [perma.cc/Z4FD-398P]; Suncor, “Management Proxy Circular” (21 February 2024) at 4, online (pdf): <suncor.com> [perma.cc/7ZNV-82D9].

16 Principles for Responsible Investment, “End Pledge to Be Net Zero by 2050 at Suncor Energy” (last visited 20 January 2025), online: <collaborate.unpri.org>

simply, one was “pro-ESG” and the other was “anti-ESG.” When there is a shareholder proposal, management will often issue a recommendation to shareholders on how they think the shareholders should vote. However, it is rare that management will recommend a vote “for” a resolution—and in this case, Suncor management recommended “no” votes on both proposals.

Ultimately, the shareholder proposals did not pass. The resolution requesting that Suncor end its pledge to be Net Zero by 2050 was denied with 98.92% of the shares voted against; the resolution requesting that Suncor disclose audited results assessing a range of climate transition scenarios was denied with 88.45% of the shares voted against.¹⁷ The low levels of shareholder support for these proposals might lead you to think that the issues were not of importance to the shareholders and were not contentious. But this is not the case. The conversations sparked by the proposals garnered media attention and, I have no doubt, also the attention of activists and other Suncor stakeholders.

Now, to the second example—Disney, a US company that famously came out against Florida’s so-called *Parental Rights in Education Act*, dubbed the “Don’t Say Gay” bill by its critics, in 2022. Disney is a major employer in Florida and faced pressure from certain stakeholders, including employees and customers, to come out in opposition to the law. It did so, but this criticism set off a tense stand-off with another key stakeholder—the Government of Florida—as well as customers who supported the law and threatened boycotts. The state government began targeting the company, introducing laws and other actions that harmed it. For example, the state ended special tax treatment and removed other unique perks under state law that Disney had enjoyed for decades. Ultimately, Disney’s CEO stepped down. The dispute with Florida state government was not the main reason (in that the company was having financial troubles), but it certainly formed part of the mix of a company that was caught in the crosshairs.¹⁸

[perma.cc/5MTB-5BTY]; Investors for Paris Compliance, “Suncor Resolution” (14 March 2023), online: <investorsforparis.com> [perma.cc/C4PQ-DF92].

17 Suncor, News Release, “Suncor Energy Reports Voting Results from Annual General Meeting” (7 May 2024), online (pdf): <suncor.com> [perma.cc/C2CK-E3JZ].

18 Brittany Bernstein, “Disney Fires CEO Bob Chapek After Woke War with DeSantis”, *Yahoo! News* (21 November 2022), online: <yahoo.com> [perma.cc/AV66-T8NG].

These examples show that there is pressure from activist stakeholders on both or multiple sides of many issues. This was not necessarily the case until a few years ago. For much of the past decade, the pressure on companies has largely been in the progressive direction when it came to environmental and social issues. Now, there is a growing anti-ESG movement that has been developing—and while it is more prominent in the United States so far, we are starting to see signs that it is coming to Canada.

For example, some of the largest Canadian banks received a shareholder proposal for their 2023 annual shareholder meetings, asking them to clarify their commitment to continue to invest in and finance the Canadian oil and gas sector and to conduct a review of their policies to ensure there are none that have the effect of encouraging divestment from the sector. However, the votes in favour of this proposal were low, at less than 1 percent.¹⁹

In the United States, we are seeing how some companies are reacting to the emerging pushback against ESG. Recent US studies show reduced use of the term ESG in corporate public documents, as well as the term “diversity, equity, and inclusion” (DEI).²⁰ And it is not only about communication and disclosure—some companies are cutting DEI programming for their employees and ending financial support for community events such as Pride parades.²¹ With US President Donald Trump’s recent flurry of executive orders targeting DEI in the public and private sectors, we may see further such downplaying by companies due to this chilling effect.

IV. EVOLVING TOOLS OF STAKEHOLDERS

Of course, the goal of stakeholder activism is to influence an organization’s operational activities and strategic direction. Stakeholder

19 InvestNow made the proposal to CIBC, TD, and BMO. See Ruth Saldanha, “Shareholder Asks Canadian Banks to Invest More in Fossil Fuels”, *Morningstar* (14 March 2023), online: <global.morningstar.com> [perma.cc/5TTF-TA8G].

20 See e.g. Andrew Jones & Ariane Marchis-Mouren, *DEI in Transition: 2025 Corporate Diversity Disclosure Trends* (New York: The Conference Board, 2025) at 3.

21 David Milstead & Jeffrey Jones, “The Growing Backlash to DEI and ESG in the U.S. is Affecting Canadian Companies as Well”, *The Globe and Mail* (10 December 2024), online: <theglobeandmail> [perma.cc/4AKZ-9P5K].

activism can be done privately, through meetings with, and emails to, corporate management and board directors. Or, stakeholders can go public through social media campaigns, petitions, and protests, among other tools. Private activism often moves to public activism if activists feel that they are not being heard or discussions are not yielding their desired outcomes.

Stakeholders are using an increasingly diverse set of *public* tools to try to shape business practices to match their values. The examples I just gave hint at some of those: shareholder proposals, customer boycotts, government action, and employee unrest. There are many other tools that stakeholders are using, as well.

Let us explore how courts are being used around the world to advance stakeholder perspectives on climate issues, as a prominent example. Recently, KLM, the Dutch airline, was sued by Fossil Free, an environmental NGO, and a court found that the company was “greenwashing”—being misleading with its environmental claims.²² In Australia, a pension fund member sued their fund for not addressing climate risks, resulting in a settlement to adopt a Net Zero target by 2050.²³ Legal actions like these are becoming more common.

Advocacy groups, students, and others are using the courts to advocate for climate action not just against corporations, but also the governments that regulate corporations.²⁴ A significant successful case was in Switzerland, where the European Court of Human Rights sided with activists in finding that Switzerland violated the European Convention on Human Rights by failing to adequately combat climate change.²⁵ In

22 Ajit Niranjana, “Dutch Airline KLM Misled Customers with Vague Green Claims, Court Rules”, *The Guardian* (21 March 2024), online: <theguardian.com> [perma.cc/83HP-92MP].

23 Michael Slezak, “Rest Super Fund Commits to Net-Zero Emission Investments After Brisbane Man Sues”, *ABC News* (2 November 2020), online: <abc.net.au> [perma.cc/96QA-P9Y5].

24 For example, some shareholders are advancing disclosure-related arguments in court to push companies to disclose their climate impacts/policies. See e.g. Emily Strauss, “Climate Change and Shareholder Lawsuits” (2022) Duke Law School Public Law & Legal Theory Series, Working Paper No 2022/41, online: <ssrn.com> [perma.cc/29PL-65CY].

25 *Verein Klimaseniorinnen Schweiz and others v Switzerland*, No 53600/20 (9 April 2024) at 230–31.

Canada, Ecojustice and student climate activists launched *Mathur v. Ontario*, arguing that failing to act on climate change violates the *Canadian Charter of Rights and Freedoms* because the level of emissions permitted by Ontario government targets causes disproportionate harm to young people and future generations.²⁶

In its decision, the Ontario Superior Court recognized climate rights but dismissed the application; the court found there was no breach of the applicant's *Charter* rights because any disproportionality in impact would be caused by climate change—not the Ontario government's greenhouse gas targets.²⁷ But, the matter isn't over yet. The Court of Appeal for Ontario referred the case back to the application judge, so there is more to come on this evolving homegrown development in stakeholder activism.²⁸

There has also been some discussion in the scholarship about the role of the oppression remedy in advancing stakeholder interests.²⁹ That said, in my experience, the potential of the oppression remedy has not borne out as a common tool by stakeholders.³⁰

Beyond the courts, activists are also filing complaints directly with regulators to influence change at the companies that they regulate. For example, Investors for Paris Compliance, a shareholder advocacy group that engages with companies to advance climate-related initiatives, submitted complaints to the Ontario Securities Commission and the *Autorité des marchés financiers* in Quebec claiming that the actions of multiple Canadian banks on climate were not matching their public commitments and statements.³¹

26 *Mathur v Ontario*, 2023 ONSC 2316 at paras 1–3.

27 *Ibid* at paras 106, 178, 188.

28 *Mathur v Ontario*, 2024 ONCA 762.

29 Edward J Waitzer & Douglas Sarro, “In Search of Things Past and Future: Judicial Activism and Corporate Purpose” (2018) 55:3 Osgoode Hall LJ 791.

30 See Stephanie Ben-Ishai & Poonam Puri, “The Canadian Oppression Remedy Judicially Considered: 1995-2001” (2004) 30:1 Queen's LJ 79 at 79.

31 Investors for Paris Compliance, “Securities Complaint Asks for Investigation Into Sustainable Finance Disclosures of Canadian Banks” (9 January 2024), online: <investorsforparis.com> [perma.cc/3A4X-97AV].

V. SHAREHOLDER PROPOSALS

Perhaps one of the most prominent tools that stakeholders have used to push for change is shareholder proposals.³² Shareholders who meet certain ownership thresholds (in Canada, \$2,000 or 1 percent of the company and 6 months holding) are allowed to submit proposals for consideration at annual general meetings of shareholders of a company.³³ Shareholder proposals can force a company to publicly reckon with environmental issues, social issues such as DEI, or other topics that they may not want to have to publicly comment on or make commitments about.³⁴

Shareholders are asked to vote on the matter—meaning that companies could receive a clear signal from their shareholder base about what direction they want the company to go in. This may not be the direction that management or the board want the company to go in, and it may not be at the pace that they want to go. These proposals do not usually pass at shareholder meetings. And even if they do, they are often not binding on the company.

The real power of a shareholder proposal is that it requires a company to go on the record and *pressures* a company to take certain action. Shareholder proposals are an important tool in stakeholder activism because they are one of the most high-profile ways that issues can be brought before management and the board and, to an extent, force them to respond.³⁵

32 For a discussion on shareholder proposals, see generally Brian R Cheffins, “*Michaud v. National Bank of Canada* and Canadian Corporate Governance: A ‘Victory’ for Shareholder Rights?” (1998) 30:1 Can Bus LJ 20; Lucian A Bebchuk, “The Case for Increasing Shareholder Power” (2004) 118:3 Harv L Rev 833; Evaristus Oshionebo, “Shareholder Proposals and the Passivity of Shareholders in Canada: Electronic Forums to the Rescue?” (2012) 37:2 Queen’s LJ 623 at 623.

33 Principles for Responsible Investment, “Filing a Shareholder Proposal” (22 February 2023), online: <public.unpri.org> [perma.cc/Y6BU-SF8W].

34 See e.g. Aaron A Dhir, “Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability” (2006) 43:2 Am Bus LJ 365; Alexander Dyck et al, “Do Institutional Investors Drive Corporate Social Responsibility? International Evidence” (2019) 131:3 J of Financial Econ 693 at 702–03.

35 See Aaron A Dhir, “The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights” (2009) 47:1 Osgoode Hall LJ 47 at 65–67; Lisa M Fairfax, “Social Activism Through Shareholder Activism” (2019) 73:3 Wash &

Consider a shareholder at a hypothetical agriculture company. The shareholder is concerned about animal welfare and writes letters to the CEO and perhaps (less commonly) the board chair. These letters may not receive a response, and the public likely will not ever know they exist. But when the annual general meeting of shareholders comes, the shareholder submits a proposal, and now management and the board will need to respond—and the other shareholders will be forced to pay attention to the issue, since it will be on the agenda at the meeting. The proposal may also attract media attention, as many shareholder proposals have in recent years.

I should note also that it is not only traditional shareholders that are using proposals as an important tool to try and shape business behaviour. Activist organizations that we would not necessarily consider traditional shareholders, such as unions and nonprofits, are buying shares, as well. They may not necessarily hold these shares for long-term financial gain but may instead hold them primarily to shape corporate behaviour through shareholder proposals. Many of the proposals to companies have come from a small group of these activists—including *Le Mouvement d'éducation et de défense des actionnaires* (MÉDAC), a Quebec-based investor rights group, as well as the British Columbia General Employees Union.³⁶

I have been working on a significant research project on shareholder proposals, analyzing about ten years of data from a range of countries, including Canada and the United States. This research is still preliminary, but I would like to share some of my analysis and observations thus far. In the last ten years, there have been almost 700 shareholder proposals in Canada,³⁷ with just over one-third of those being about environmental or social issues. Despite being over one-third of the number of

Lee L Rev 1129 at 1161–62; Evaristus Oshionebo, “Shareholder Proposals Mechanism Under the Manitoba Corporations Act: A Proposal for Reform” (2013) 36:1 Man LJ 1 at 1–3.

36 Poonam Puri, “Comparative Study of Shareholder Proposals in Canada and the US” (Lecture delivered at the “Shareholder Proposals: Value-Creating or Distracting?” conference in the Rotman School of Management, 22 November 2024) [unpublished], slide 32, online: <docs.google.com> [perma.cc/GYE2-9X8L] [Puri, “Comparative Study”].

37 Note: The Puri “Comparative Study” omitted shareholder proposals in respect of electing/removing directors.

proposals that went to a vote, they represent only about a quarter of *successful* proposals—meaning that shareholders are more likely to vote down environmental and social shareholder proposals than other types of proposals. By contrast, “governance” related proposals, such as those calling for in-person or hybrid shareholder meetings after many companies held virtual meetings post-COVID-19, are more likely to pass.³⁸

My research has shown that the financial services sector is, by far, the largest recipient of shareholder proposals. Of the top ten targets, six were banks.³⁹ I believe there are a number of reasons for this: Banks are consumer facing and they are statutorily-barred from having significant shareholders, meaning that their shareholder base is widely-dispersed; they are high-profile because of their size and the media interest they garner; and they are not just public companies in and of themselves, but they take our deposits and lend to people, businesses, and other entities throughout the economy.

Environmental and social shareholder proposals have focused on a number of issues, from climate change to DEI, and more. For example, some have asked for companies to adopt Net Zero pledges, to disclose the risks that climate change poses for their businesses, or to allow shareholders to vote on whether they approve or disapprove of the company’s climate plan (so-called “say on climate” votes). Other proposals have asked for racial audits and integrity of supply chain and human rights reporting. While most shareholder proposals do not receive majority support, there has been a decrease in support for environmentally and socially progressive shareholder proposals in recent years. This trend can be seen in both Canada and the United States.

One interesting and important area of ESG-related shareholder proposals has been on reconciliation with Indigenous peoples. I am currently conducting academic research on business engagement with Indigenous communities, including on the role of shareholder proposals, and I also teach a course on the topic together with an Indigenous colleague. In my view, this is an important area of corporate governance, with business practice developing in real time. In 2015, the Truth and Reconciliation Commission released its Calls to Action, which included Call 92,

38 Puri, “Comparative Study”, *supra* note 36, slides 11, 18.

39 *Ibid.*, slide 24.

calling on businesses to “[c]ommit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects,” among other actions.⁴⁰ There has been significant movement on this in the corporate sector. As one example, I recently finished my service on the board of the Canada Infrastructure Bank, where I served for seven years since its launch. As part of our work to advance reconciliation, we launched the Indigenous Communities Infrastructure Initiative, which provided low-cost, long-term loans for infrastructure development in Indigenous communities.⁴¹

In May 2021, SHARE (a progressive shareholder activist organization) and the Atkinson Foundation submitted a shareholder proposal on Indigenous economic inclusion and reconciliation to the TMX Group, which owns the TSX and other stock exchanges. After negotiations with the TMX Group, the company endorsed a revised version of the proposal. As far as I am aware, this was the first time in Canada that a reconciliation-based shareholder proposal was endorsed by a company. And it passed with 98 percent of shareholders in support. After passing, *The Globe and Mail* described the event as “a move that will spark change across this country’s capital markets.”⁴²

In all frankness, I agreed with this statement by *The Globe and Mail* at the time and would have predicted the same. In my view, the manner in which the board and shareholders endorsed this proposal sent a strong signal to other capital market participants, given the TMX Group’s prominence in the operations of Canadian markets. However, since this proposal, I am not aware of any reconciliation-related shareholder proposal that has gone to a vote and has been supported by management or received a majority of the shareholder vote.

40 Crown-Indigenous Relations and Northern Affairs Canada, “Business and Reconciliation” (last visited 20 January 2025), online: <rcaanc-cirnac.gc.ca> [perma.cc/5DGB-AAXT].

41 Canada Infrastructure Bank, “Indigenous Community Infrastructure Initiative (ICII)” (last visited 20 January 2025), online: <cib-bic.ca> [perma.cc/YU43-BSQ8].

42 Rita Trichur, “TMX Backing of Shareholder Proposal on Indigenous Inclusion Will Ripple Through Capital Markets”, *The Globe and Mail* (7 May 2021), online: <theglobeandmail.com> [perma.cc/YY8Y-Q9C9].

Nevertheless, the failure of these shareholder proposals does not mean that there has been no progress. As previously mentioned, many companies have embraced the concept of economic reconciliation, providing access to loans and equity for Indigenous communities. For example, Scotiabank supported the creation of an Indigenous securities dealer in 2024.⁴³ Resource sector companies are partnering with Indigenous communities as well, with Indigenous communities receiving equity stakes in projects.⁴⁴ For example, in 2022, Enbridge entered into partnerships with twenty-three First Nations and Métis communities through the creation of a new entity, Athabasca Indigenous Investments.⁴⁵ As another example, Premium Brands Holdings partnered with the Mi'kmaq Coalition, a coalition of seven Indigenous communities in Nova Scotia and Newfoundland, to acquire Clearwater Seafoods in 2020.⁴⁶

To summarize, whether on reconciliation, climate, or social issues, shareholder proposals have become an important tool for activists to try to shape corporate behaviour. They force companies to address an issue, take the temperature of the shareholder and stakeholder base, and may ultimately lead to change.

VI. ROLE OF THE BOARD AND MANAGEMENT, AND HOW THEY RESPOND TO ACTIVISTS

As companies respond, they face a number of risks. If their reputations are tarnished because of their response, they might struggle to attract and retain top talent, leading to lower employee morale and productivity. Access to capital can also be affected, as investors and partners may prefer to engage with businesses that care about protecting their

43 Cedar Leaf Capital, “Welcome to Cedar Leaf Capital” (last visited 20 January 2025), online: <gbm.scotiabank.com> [perma.cc/MYL2-QWEE].

44 Amy Carruthers & Erin McKlusky, “Update on Trends in Indigenous Equity Investments in Canada” (22 April 2024), online (bulletin): <fasken.com> [perma.cc/MC7W-CKKM].

45 Enbridge, “Athabasca Partnership Assets” (last visited 25 January 2025), online (pdf): <enbridge.com> [perma.cc/4HF4-Z7ZP].

46 Clearwater Seafoods, “Clearwater Seafoods Incorporated to Be Acquired by Premium Brands Holdings Corporation and a Mi'kmaq First Nations Coalition” (9 November 2020), online: <clearwater.ca> [perma.cc/BDM3-F85U].

reputations and that match their values. The list of potential risks goes on with operational disruptions and increased regulatory scrutiny, alongside the threat of litigation.

Regardless of how they respond, however, they should follow principles of good corporate governance—meaning clear decision-making processes that are free of conflicts and consider a range of perspectives and outcomes.

There are a number of key players that get involved in responding to stakeholder activism, and there are a number of approaches they are taking. Let us start with the key players. First up is the board of directors, the ultimate stewards of a corporation under Canada's corporate governance framework. Directors hold fiduciary duties to act in the best interests of the corporation, and they hold a duty of care to act prudently as a reasonable director would in the circumstances.⁴⁷ They play a role in overseeing management in responding to stakeholder activism. They set the company's enterprise risk framework and monitor risks to the company, including from activists. They work with management to safeguard the company's reputation and ensure alignment with the company's purpose while considering different stakeholder interests.

Let me get into detail on roles within the board for a moment. It is common for the board chair and/or corporate governance committee chair to actively oversee their company's response to material activism. However, depending on the specific issue, other board committee chairs—or committees—may have to get involved. It would be reasonable for the audit committee to be engaged, for example, on issues about validating claims and providing assurances on environmental and social data, a complaint to a regulator, or a potential lawsuit. Similarly, it would be reasonable for the human resources committee to be engaged on material activist issues about workforce DEI for access to opportunities, compensation, or reconciliation practices.

While a board chair or committee chair may meet directly with activists, this is rare and is mostly used as a technique to advance discussion when an activist and management are at a standstill, or as part of a process that results in the withdrawal of a shareholder proposal. Rather, when it comes to the response to stakeholder activism, the main actors are in the

47 See *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at paras 34, 57.

management team—including the CEO and the general counsel, or chief legal officer and their legal teams. Management runs the day-to-day operations of the company, and this includes responding to and engaging with stakeholder activists. Management and their delegates, such as members of the legal team, may meet with stakeholders to better understand their positioning, provide a comprehensive picture of the company's policies and practices, and, ideally, negotiate an outcome that works well for all.

A meeting with the CEO or general counsel may be important tools in this process, much like meetings with board members. I will come back to the role of general counsel and the legal team in detail momentarily.

First, let's focus on the different approaches companies are taking to responding to activism. Sometimes, companies may choose to ignore activists. Other times, they may prefer sitting down, listening, and learning from activists. For example, a company may engage with local Indigenous communities that have raised concerns about a project and try to come to a resolution.

Sometimes, companies may try saying what the activists want to hear publicly without making any substantive changes. This approach is not optimal, in my view; trust between stakeholders and the company leadership is important for a company to function, and it is built over time by honouring commitments and following through on promises.

Companies may try to suppress activists, such as when companies fight against employee unionization efforts. Occasionally, companies will go on the offensive against activists. For example, Shell sued Greenpeace UK and Greenpeace International after their activists boarded a moving oil platform in 2023.⁴⁸

Regardless of the approach adopted, the company needs to consider its actions in terms of risk. The company needs to ask important questions: Who is the activist? What issue is the activist concerned about? What are the range of actions that we, as a company, could take, and what

48 “Shell Settles Lawsuit Against Greenpeace Over Activists Boarding Oil Vessel in 2023”, *The Globe and Mail* (10 December 2024), online: <[theglobeandmail.com](https://www.theglobeandmail.com/perma.cc/C7FH-RNWG)> [perma.cc/C7FH-RNWG].

are the risks and mitigating factors of each? What are the risks and mitigating factors if we take no action at all?

VII. ROLE OF GENERAL COUNSEL

The general counsel, or chief legal officer, and their team of lawyers, both in-house and externally at firms, will be crucial in supporting management and the board in decision-making. Legal departments have evolved significantly in recent decades. The general counsel has replaced outside counsel as the first stop for legal advice for the CEO—especially in an environment of uncertainty. Indeed, gone are the days, many decades ago, when legal departments focused purely on compliance and were consulted only on legal issues in a way that caused them to be siloed from the business.⁴⁹

Now, more than ever before, they are playing a critical and crucial role in supporting the strategic leadership of a company. General counsel are part of the core senior executive team of the modern company, with a mandate that is broader than advising on legal and compliance issues alone. They work cross-functionally with businesses and other units in the organization, such as the risk, ESG, communications, and investor relations teams. They have a deep understanding of the business and its stakeholder base, including consumers, employees, and investors. They anticipate activism and can predict potential activist activity for which the company should be prepared. They have the core skills to navigate and thrive in the uncertainty inherent in a polarized environment. In-house lawyers use their good judgment to navigate grey zones.

When activists agitate for change at a corporation, the legal team is at the centre of the company's response—not just providing legal advice in the moment, but considering other forward-looking factors, such as reputational and litigation risk. Among the highest profile and complex areas of stakeholder activism that legal teams are contending with is

49 For a discussion of the role of the general counsel/chief legal officer, see e.g. E Norman Veasey & Christine T Di Guglielmo, *Indispensable Counsel: The Chief Legal Officer in the New Reality* (New York: Oxford University Press, 2013); Robert C Bird, Paul A Borochin & John D Knopf, “The Role of the Chief Legal Officer in Corporate Governance” (2015) 34 J Corp Finance 1.

climate change, a topic on which there has been increasing stakeholder interest and demand globally.

With the second Trump Administration, the wavering commitment of global governments to the climate crisis, and the anti-ESG sentiment in the United States, climate change will become an even more challenging issue for a company to navigate. Even though the anti-ESG movement has caused support for environmental proposals at annual meetings to decline, there are sophisticated activists making demands of companies and governments to adopt better environmental protection measures, emissions reduction plans and Net Zero commitments. Moreover, governments and regulators are issuing mandatory rules and in-house counsel must understand the nuances of and achieve or spearhead compliance with those rules throughout their organization. From the European Union to (likely) the Canadian Securities Administrators, governments and regulators are requiring companies to record their environmental impacts and adhere to specific disclosure standards in explaining them to investors. The result is a regulatory environment that has become increasingly technical and complex.

On environmental issues, but also social ones—as companies consider demands from stakeholders and new rules—lawyers are being called upon to advise not just on pure legal questions, but strategic and communications ones, as well. For example, stakeholders are pushing companies to go beyond minimum standards set out in regulations—they want more environmental information (both risks and impacts) disclosed, and more commitments made. Whether to disclose beyond the minimum requirement is a business decision as much as it is a legal one.

Legal teams need to be careful that all the departments in their company are aligned and not greenwashing. For example, if the marketing department is making environmental claims on the company website, lawyers need to have eyes on that—especially with the heightened regulatory and market focus on environmental representations. The marketing claim is not a securities regulatory disclosure document or even legally required. But reputational risk arises, and a company could get into trouble with consumers—and even the Competition Bureau and securities regulators—if perceived as greenwashing. It will be important for in-house lawyers to ask the marketing department for the due diligence underlying the claim and whether the data has been verified. Otherwise, a

company may find that confidence in the company is compromised, and consumer trust is eroded—something that is hard to rebuild.

Social issues are important topics for boards and management teams because stakeholders are asking them to speak up or adopt specific changes—and with greater speed. Sometimes, these different stakeholders pull them in different directions. The Disney example I mentioned earlier illustrates this perfectly. On social issues, decision-makers and their advisers, including lawyers, must contend with the ESG movement, the anti-ESG backlash, and different stakeholders wanting the corporation to undertake diametrically opposed actions. While the anti-ESG movement is more prevalent in the United States than it is in Canada, there is a strong likelihood that the movement shows greater uptake in Canada in the coming years.

Some companies in the United States are under more significant pressure from anti-ESG activists than others. For example, John Deere, the tractor company, came under pressure from social activist Robby Starbuck, a conservative influencer who used X videos to publicly push companies to stop running DEI programs and funding events like Pride parades. Starbuck also targeted Harley Davidson and Ford, among others, arguing that companies whose customers tended to be more conservative should not be supporting progressive programs. The result is that many of the companies Starbuck has targeted have rolled back on their DEI programs and commitments, both internally and externally.⁵⁰

Legal teams are also instrumental in managing relationships with communities, fostering employee engagement, and upholding human rights standards. They need to be on top of existing and emerging legal and regulatory requirements on social issues, such as board and executive diversity reporting requirements or global supply chain human rights rules. But their responsibilities go further than that—they need to be aware of best practices and what peers are doing, what key stakeholders expect of the company, and what makes sense for the company's business and operations.

In sum, facing a complex risk landscape, legal teams play a crucial role integrating governance structures to address risks effectively, staying

50 Milstead & Jones, *supra* note 21.

ahead of legislative changes, anticipating and mitigating risks, and engaging with stakeholders.

CONCLUSION

In conclusion, I will reiterate that companies are facing unprecedented uncertainty and increasing and competing demands from stakeholders on environmental and social issues. Therefore, it is critical for companies to be prepared for increased scrutiny on how they operate and what they say publicly.

With the new tools stakeholders have in their toolkit to effect changes in the way a company behaves, companies should anticipate and be ready to respond to regulatory complaints and lawsuits, as well as social media campaigns, shareholder proposals, and perhaps even proxy contests for board seats. And they need to be nimble, responding quickly to a fast-changing environment.

Central to this task has been and will be lawyers. As law students, many of you will join law firms that help companies respond to activists, others will join companies themselves as in-house counsel, and some of you will be working for the activists. These challenges will be yours to face, and your clients will be depending on you.