



Nature-related risks and the duties of directors of Canadian corporations

Legal Opinion

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EXECUTIVE SUMMARY

Resilient LLP prepared this legal opinion to provide guidance on the legal obligations of directors of Canadian for-profit corporations in relation to nature-related risks (“**NRR**”, or “**Nature-Related Risks**”).¹ Nature-related risks are defined as potential threats (effects of uncertainty) posed to an organization that arise from its and wider society’s **dependencies and impacts** on nature.²

The opinion addresses the following legal questions related to Nature-Related Risks:

- (a) Are Nature-Related Risks foreseeable and may they constitute material risks of harm to the interests of Canadian corporations?
- (b) Are directors of Canadian corporations permitted and/or required to consider Nature-Related Risks in order to discharge their fiduciary and related duties under s. 122 of the *Canada Business Corporations Act* (“**CBCA**”),³ analogous Canadian provincial and territorial statutes, and Canadian common law jurisprudence?
- (c) What, if any, obligations do Canadian corporations (and the directors that oversee them) have related to: (i) systems to assess the disclosure of nature-related dependencies and impacts; and (ii) the disclosure of Nature-Related Risks?

In undertaking the above analysis, we have also considered: (i) potential impacts of a breach of director duties associated with Nature-Related Risks; and (ii) the potential impact of the recommendations (the “**TNFD Recommendations**”) of the Taskforce on Nature-related Financial Disclosures⁴ (“**TNFD**”) on the assessment of directors’ duties and disclosure obligations related to Nature-Related Risks.

The current context. It is necessary to understand the current context of nature-related risks to determine whether a director in Canada has met their potential duties associated with nature-related risk. Specifically, the current context is relevant to the determination of the legal and jurisprudential requirements that include an assessment of the “prudence” and “reasonableness” of a director’s actions, and the “similar circumstances”, “the current time”, and “context” in which a director may be acting. Section 3 of this opinion provides: (i) a detailed overview of the financial materiality of biodiversity loss and NRR globally and in Canada; and (ii) consolidated information on the legal, policy, and business responses to NRR. This includes the following extensive and readily available information on NRR that Canadian directors know or reasonably ought to know:

- (a) the World Economic Forum (“**WEF**”), the Organization for Economic Cooperation and Development (“**OECD**”), the Financial Stability Board (“**FSB**”), the Network for Greening the Financial System (“**NGFS**”), the World Bank Group, EY, and PwC have published warnings of the severity and potential materiality of NRR for business, with over 50% of the world’s gross domestic product

¹ Note: We rely on our particularization of the definition of NRR as set out in paragraph 12 of this opinion for the purposes of this opinion.

² Note: This definition of “nature-related risks” is provided by the recommendations of Taskforce on Nature-related Financial Disclosures.

³ *Canada Business Corporations Act*, R.S.C., 1985, C-44.

⁴ TNFD, *Recommendations of the Taskforce on Nature-related Financial Disclosures* (September 2023) (“**TNFD Recommendations**”).

(“GDP”) estimated to be moderately or highly dependent on nature and exposed to nature loss by 2030, and each calls for prudent business action to address biodiversity loss (Section 3.1);

- (b) there are international and Canadian treaty obligations (*Convention on Biological Diversity*⁵ and its *Global Biodiversity Framework* (“GBF”)⁶) requiring signatories, including Canada, to restore 30% of degraded ecosystems and conserve and manage 30% of global land, inland waters, coastal waters and oceans by 2030 (Section 3.3.1);
- (c) the TNFD Recommendations provide an NRR policy and disclosure framework that has been endorsed and adopted by over 500 corporations (Sections 3.3.1 and 3.3.2);
- (d) the G7 and G20 have committed to implement the GBF and facilitate economic and financial sector action on NRR (Section 3.3.2);
- (e) Indigenous rights and title in Canada are intrinsically tied to nature, constitutionally protected, and current policy priorities of the new federal government (Section 3.4);
- (f) Canada’s Arctic and northern regions are warming at a rate nearly four times faster than the rest of the country, posing significant nature-related impacts on the forestry, mining, oil and gas, and extractive sectors that are reliant on Arctic ecosystems (Section 3.2.2); and
- (g) the expectations of Canadian investors related to NRR include the expectation that corporate boards anticipate, manage, and integrate NRR into business strategy in order to create and preserve corporate value over the long-term (Section 3.5).

Foreseeability. A plethora of global and Canadian reports highlight the known and significant impacts of NRR. This conclusion is supported by the GBF and TNFD Recommendations, Indigenous rights and Indigenous ecological knowledge (“TEK”), sector-specific impacts, Canada’s 2030 Nature Strategy,⁷ and Canadian policy. Canadian corporations may be subject to, or affected by: (i) nature-related physical risks (including extreme events such as pests and virus vectors, forest-fires, and floods); (ii) nature-related transition risks (including changing policy and regulatory requirements, new federal nature policy, Indigenous rights, and changing customer demands); and (iii) systemic risks (including tipping points). This information is detailed in Section 4 of this opinion. In light of the foregoing, it is our opinion that NRR, including both nature-related dependencies and nature-related impacts, are not far-fetched, but are real risks that are known, well-documented, and reasonably foreseeable at this time.

Director’s fiduciary duty. Section 122(1)(a) of the CBCA, stipulates that every director of a Canadian corporation has the duty to “*act honestly and in good faith with a view to the best interests of the corporation*”. Fiduciary duty is subjective, and the motivation of the director is the central focus of the duty. It is our opinion that:

- The s. 122(1)(a) fiduciary duty, as elaborated upon by s. 122(1.1)(b) and (c) and Canadian jurisprudence, both permits and may require companies and their corporate directors to, at a minimum, identify nature-related dependencies and impacts, and consider material NRR in the

⁵ *Convention on Biological Diversity*, 1760 U.N.T.S. 69 (adopted 5 June 1992, entered into force 29 December 1993). (“CBD”).

⁶ CBD, *Kunming-Montreal Global Biodiversity Framework*, (19 December 2022), CBD/COP/DEC/15/4) (“GBF”).

⁷ ECCC, *Canada’s 2030 Nature Strategy: Halting and Reversing Biodiversity Loss in Canada*, (2024).

context of the best interests of the company — particularly for directors in sectors that are known to be highly nature-dependent or have significant nature-related impacts.

- NRR may fall within the specific stakeholder and other interests that directors may be required to consider pursuant to s. 122(1.1) of the CBCA and related jurisprudence, given that nature and NRR are part of the environment, and NRR may materially impact corporate supply chains, customers, and the long-term interests of the corporation.
- The fiduciary duty does not require directors to elevate NRR above all other interests; however, it is likely to require them to, at a minimum identify the corporation's nature-related dependencies and impacts on nature and appropriately balance material NRR within the best interests of the corporation.

Duty of care. Section 122(1)(b) of the CBCA sets out the duty of care and stipulates that every director of a Canadian corporation has the duty to “*exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*” The director's duty to prudently oversee the management and affairs of the corporation is implicit in the duty of care. While the determination of whether the director has discharged their duty of care related to NRR will be fact-specific for the director decisions and company in question, it is our general opinion that simply ignoring the class of wide reaching and potentially material NRR is not reasonable, prudent, or diligent in the current context and circumstances. A reasonably prudent director must know, or ought to know, that NRR are foreseeable and may constitute a potential material class of risk for Canadian corporations, particularly those that are highly nature dependent or have significant impacts on nature.

It is our opinion that the duty of care requires directors to, at minimum, take reasonable and prudent action to:

- be informed and have sufficient knowledge of the class of NRR that may apply to the corporation — for example by making specific inquiries, seeking director education, or external expert advice;
- have a governance and risk management process in place to identify the corporation's nature-related dependencies and impacts on nature and assess the materiality of identified NRR as they would any other significant strategic or operational risk, especially in nature-dependent sectors (mining, forestry, agriculture, energy, insurance, and retail);
- consider current and longer-term NRR that may take the form of physical, transition, legal, or systemic NRR, and ensure oversight systems capture emerging NRR; and
- balance and manage material nature-related dependencies and material impacts on nature in the context of the entities to which a duty of care may be owed, including, without limitation, impacted Indigenous rightsholders.

Potential claims for breach of directors' duties. Generally, a director's breach of fiduciary duty may give rise to both statutory and common law claims and potential remedies in law and equity. However, a breach of the duty of care is not an independent foundation for legal action. The duty of care is relevant to the assessment of the “*standard of behaviour that should reasonably be expected*”⁸ of a director and is

⁸ *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69, at para 44.

therefore most likely to come into play where a board (or individual director) is sued in tort (including negligence) or under the CBCA oppression remedy. It is our opinion that, if directors are unduly passive toward NRR, do not engage in a reasoned process to identify and analyze NRR, and have no governance process to oversee the corporation's material nature-related dependencies and impacts on nature, they are likely to attract claims, both personally and against the corporation, under the CBCA or common law, and are very unlikely to benefit from the discretion afforded to them under the "*business judgment rule*."

Claims related to a breach of a director's fiduciary duty and/or the duty of care may take the form of direct or accessorial claims, including:

- derivative actions brought by a shareholder, the holder of a debt obligation, a creditor, or another person acting on behalf of the corporation pursuant to s. 239(1) of the CBCA;
- oppression actions alleging that the corporation's NRR decision was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of, any security holder, creditor, director or officer pursuant to s. 241(1) of the CBCA;
- in the event that the breach of the duty of care leads to a breach of disclosure obligations, disclosure-related complaints and claims as set out in Section 7;
- tort claims in negligence, or potentially nuisance; and
- injunctions against project proponents for failures to perform any delegated duty to consult and accommodate Indigenous rightsholders.

Materiality. The analysis set out in Section 6 of this opinion also supports the conclusion that each aspect of the class of nature-related risks (both the corporation's nature-related dependencies and the corporation's impact on nature) may pose material risks for the corporation. A number of global and Canadian institutions also report that NRR pose significant and potentially material threats to business and financial systems and have issued calls for action. Canadian securities law does not currently include the concept of impact materiality and instead focuses on information that is material to investors (financial materiality). It is our view, however, that both financial and impact materiality are relevant to investors and other stakeholders. They are intrinsically inter-related, and the distinction may be a difference in timing, not necessarily degree, as the impacts of the corporation on nature may be financially material if, now or in the future, they're likely to affect a company's financial performance, business reputation, financial position, cash flows, financing, or cost of capital, over the short-, medium- or long-term. Material nature-related impacts may be very relevant to investor decisions where they are financially material immediately (for example in the case of a breach of a tailings pond that harms a watershed and municipal drinking water) and/or become financially material over the corporation's longer term (for example, where a corporation's cumulative impacts on nature result in legal claims and/or harm to Indigenous rightsholders or stakeholders). It is our opinion that NRR that arise from nature-related dependencies and impacts are reasonably foreseeable and also capable of being material to a corporation.

Corporate disclosures. Canada lacks a standalone legal framework for mandatory NRR disclosures; however, existing securities laws and disclosure frameworks require disclosure of material risks, which we conclude is inclusive of material NRR. It is our opinion that:

- the identification of an NRR that would reasonably be expected to have a significant effect on the market price or value of the securities of a corporation with a continuous disclosure obligation is a

material fact that must be disclosed through the regular provision of documents such as proxy circulars and financial statements;

- the occurrence of an NRR that causes a change in the business, operations or capital of a corporation with a continuous disclosure obligation that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the reporting issuer, is a material change that must be disclosed at the time it occurs; and
- prudent directors should also consider disclosure of NRR in a manner consistent with the Canadian Sustainability Standards Board (“**CSSB**”) and the TNFD Recommendations.

Impact of TNFD. The TNFD Recommendations advance a materiality framework under which companies are expected to assess and disclose both how nature-related risks and dependencies affect their business (financial materiality) and how their operations impact nature and ecosystems (impact materiality). Canadian securities law does not currently mandate disclosure based on impact materiality and instead focuses on information that is material to investors (financial materiality). It is our view that it is prudent for corporations to identify, manage, and disclose NRR that have both financial and impact materiality, as this is consistent with acting in the longer-term interests of the corporation, its customers, suppliers, and the environment and the TNFD provides a useful framework for consideration.

Best practices. In Section 8, we outline recommended best practices for directors in managing NRR. They include the recommendations that:

- diligent corporate directors should ensure that, at a minimum, their corporations have a process to identify NRR and assess which NRR are material; and
- directors that identify and assess material NRR, must then take appropriate steps to manage and balance NRR, in accordance with their statutory and common law duties and in the best and long-term interest of the corporation.



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Directors' duties & nature-related
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