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Beyond Environmental Compliance, with a View to the Best Interests of the Company
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The 1990s saw issues of environmental compliance move front and centre in the boardrooms of Canada, pushed there as a result of directors' and officers' concerns about liability. Regulators recognized that imposing personal responsibility on officers and directors was an effective tool for increasing the compliance of corporations. The result has been the development of systems of environmental management to ensure compliance and reduce the risk of liability. These same systems have made directors aware that environmental compliance is only a minimal requirement and that acting in the best interests of the company may require addressing long-term environmental sustainability in considering corporate strategy. There has been much legal analysis of directors' obligations to ensure compliance. An area still to be explored involves the responsibilities and limitations of a director, assuming that the director wishes to exercise the powers of the board in a proactive fashion to reduce the environmental risks to the corporation. Whereas Ronald Davis and Cheryl Wade explored related questions from the perspective of investors in Chapters 5 and 6, this chapter examines issues of environmental sustainability from the perspective of directors. It explores the legal obligations of directors to act in the best interests of the company, and demonstrates that implementing proactive environmental strategies to ensure the long-term financial viability of the corporation is in keeping with those legal obligations.

Best Interests of the Company

Section 122 of the *Canada Business Corporations Act (CBCA)* states:[1]

> 122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
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> (a) act honestly and in good faith with a view to the best interests of the corporation; and

> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[2]

This broad statement, echoed in most provincial corporate legislation, is supposed to set out a director's duty for overseeing the management of the company, including its policies on sustainability. Mr. Justice Berger considered this duty to "act honestly and in good faith with a view to the best interests of the corporation" in *Teck Corporation Ltd.* v. *Miller et al.,* stating that "directors must act in good faith [and] there must be reasonable grounds for their belief."[3] In other words, when a director or board of directors makes a decision to implement a proactive environmental business strategy, this decision must be undertaken in "good faith" and there must be "reasonable grounds" to support the belief that this is in the best interests of the company.[4] Reasonable grounds, therefore, implies more than an affinity for environmental issues. It implies some method of information review and analysis of the information presented.

This decision in *Teck* has most recently been adopted in *Rio Tinto Canadian Investments Ltd.* v. *Labrador Iron Ore Royalty Income Fund (Trustee of),*[5] where Mr. Justice Farley quoted from *Pente Investment Management Ltd. (Maple Leaf)* v. *Schneider* (1999).[6] In *Maple Leaf,* Ms. Justice Weiler, for the Ontario Court of Appeal, stated:

> The mandate of the directors is to manage the company according to their best judgment; that judgment must be informed judgment; it must have a reasonable basis. If there are no reasonable grounds to support an assertion by the directors that they have acted in the best interests of the company, a court will be justified in finding that the directors acted for an improper purpose.
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> One way of determining whether the directors acted in the best interests of the company, according to Farley J., is to ask what was uppermost in the directors' minds after a "reasonable analysis of the situation.
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> It must be recognized that the directors are not the agents of the shareholders. The directors have absolute power to manage the affairs of the company even if their decisions contravene the express wishes of the majority shareholder … There may be a conflict between the interests of individual groups of shareholders and the best interests of the company.[7]

What is clear from this statement is that the director's duty to act is "to act in the best interests of the corporation" and not in the best interests of any specific shareholder. However, when a director is acting in the best interests of the corporation, it would be difficult to argue that the shareholders do not benefit, even if it is possible that other stakeholders of the corporation may also benefit. In Mr. Justice Berger's analysis of directors' responsibilities in *Teck,* he refers to the United States Supreme Court decision of Judge Jackson in *State Tax Commission* v. *Aldrich et al.,*[8] where Jackson states that the "classical theory [of a director's duty] ... must yield to the facts of modern life. If today the directors of a company were to consider the interests of its employees [or] ... the consequences to the community ... it could not be said that they had not considered the bona fide interests of the shareholders."[9] The 1994 Dey Report[10] on corporate governance, analyzed at some length by Stéphane Rousseau in Chapter 1, echoes the proposition that corporations no longer operate in isolation and that shareholders are not the only group of stakeholders directors should consider in providing sustainable, long-term strategic guidance to the corporation.

The Dey Report: Balancing Shareholder and Stakeholder Interests

The Dey Report put forth the proposition that while the primary purpose of the directors of a corporation is to enhance shareholder value, "the interests of shareholders will not be well served if the interests of other stakeholders are not considered."[11] In the current business climate, it is obvious that certain elements of the public are clamouring for increased consideration in corporate decision making. The recent protests at world trade and finance summits are merely a reflection of that concern. While these protests provide significant material for debate over the tactics used, they have also raised public awareness and increased concern with respect to how corporations manage the environmental and social impacts of their activities. Corporations who ignore these barometers of social action do so at their own peril. The outcome of this heightened awareness is most clearly seen in increased legislation and regulation designed to intervene in corporate activity. Additionally, corporations and consumers are seeing increased costs related to environmental and social impacts, and increased restrictions on access to resources.[12]

Directors' responsibility for stakeholders' interests is not a new issue. A variety of legislation already exists that mandates directors to consider the interests of other stakeholders when making decisions. For example, the *Income Tax Act*[13] mandates the withholding and filing of income tax on behalf of another person. When directors are evaluating strategic business plans and the available resources, they already understand that monies reserved for income tax payments on behalf of their employees are not a part of the available resource base. These assets are held in trust for the benefit of the stakeholders, and they may not be used for other corporate purposes.

In *Soper* v. *Canada (C.A.),*[14] the court talks of the "positive duty to act where a director obtains information, or becomes aware of facts, which might lead one to conclude that there is, or reasonably could be, a problem with remittances." While the decision is with regard to nonpayment of income tax withholdings, this same duty would apply to issues of fiscal stewardship, environmental liabilities, or any other area of corporate governance. Applying the principle in *Soper* to environmental issues, this means that when a director becomes aware of an environmental problem, the director has a duty to act on the problem.

This type of obligation to be proactive regarding certain corporate obligations found full expression in environmental legislation in the late 1980s and early 1990s. For example, the Ontario *Environmental Protection Act* includes the following express obligation for officers and directors:

> 194. (1) Every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.
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> 194. (3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.[15]

The first, and most significant, prosecution under this section was that of *R.* v. *Bata Industries Ltd.*[16] In the now infamous *Bata* decision, the court set out some details of what was expected of officers and directors in discharging this obligation. The requirements, reduced to their essence, were that the board be kept appropriately informed of environmental issues; review them, with the assistance of appropriate outside expertise where needed; and provide direction on environmental management to ensure compliance.

In *R.* v. *Bata Industries Ltd., Bata, Marchant and Weston,* the Ontario Ministry of Environment (MOE) charged the company with a number of offences relating to the discharge of waste from leaking drums onto the ground and into the groundwater.[17] In addition, the MOE charged Thomas Bata (chairman of Bata Industries Ltd.), Douglas Marchant (president of Bata Industries Ltd.), and Keith Weston (general manager and vice president on site) with failing to take all reasonable care to prevent a discharge, contrary to Section 194 of the *Environmental Protection Act.* The facts were relatively straightforward, and not unusual in the late 1980s, when the offences occurred. Bata Industries Ltd. was storing drums of waste chemicals, solvents, and similar materials behind the plant. Plant personnel had sought quotes for waste disposal for these drums, but the original quote had been too expensive and the company had sought a cheaper alternative. The drums remained in place over a long period of time, from 1986 through 1989, when they were finally removed. During this time, leaks had occurred from the drums, which resulted in the charges of causing or permitting a discharge into the natural environment.

The three directors and officers were charged with failing to take all reasonable care to prevent such a discharge. Ultimately, the company was found guilty of causing and permitting a discharge, and both the president and the on-site general manager and vice president were convicted under Section 194. The chairman, Thomas Bata, was acquitted based on bulletins issued from his office requiring appropriate measures to be taken with respect to waste management. In his reasons, the trial judge made clear that this was a first case, and that both the level of fine and the evaluation of the standard for taking reasonable care to prevent the corporation from causing or preventing a discharge were very much influenced by that. It is likely that the level of due diligence that was sufficient to result in an acquittal for Mr. Bata would not be sufficient today.

In sentencing the directors, the trial judge provided a great deal of guidance on what due diligence consisted of with respect to this type of charge. First, he looked at whether the board of directors had established a pollution prevention "system," including supervision, inspection, mandated improvement in business methods, and the exhortation of people under the director's or officer's control or influence. Such a system would have to be sufficient, within the terms and practices of the industry, to ensure compliance with environmental laws, ensure that officers report back periodically to the board on the operation of the system, and ensure that officers are instructed to report any substantial noncompliance to the board in a timely manner.

The judge stated that the directors are responsible for reviewing environmental compliance reports provided by the officers of the company, but are justified in placing reasonable reliance on the reports provided by officers, consultants, counsel, or other informed parties. They need to be assured that officers are promptly addressing environmental concerns and that they are being made aware of the standards of their industry and other industries that deal with similar environmental effects, and they are to personally react when they realize that the system has failed.

This general structure resulted in boards and management of major companies throughout Canada setting up environmental management systems to ensure that they could specifically address all of the requirements outlined by the court in the *Bata* decision. The systems resulted in regular reviews of environmental performance and compliance throughout a number of industries, with regular reports to boards of directors detailing corporate performance measured against both compliance with environmental law and industry standards.

What directors quickly learned in receiving the information generated under these systems was that compliance was no simple matter. They also quickly learned that environmental management was as much about reducing and managing impacts as it was about achieving compliance. A board's expertise in identifying environmental risks, and the potential for advantage from environmental management, grew rapidly as a result of these legal requirements. As the management systems and structures evolved, so did the ability of directors to formulate corporate strategy in the context of environmental management. A growing number of corporations have recognized that they must maintain a sophisticated level of understanding of the environmental aspects of the business, effectively manage those risks, and ensure that a strategic vision for that management is implemented throughout the company. This growing recognition, in our view, fits closely with the general obligations of directors, as those obligations have come to be understood during the past few years.

The directors of a corporation have a duty to act in the best interests of the company, whether to avoid risk or to capitalize on opportunity. This duty to act must be supported by knowledge and information, and, where a director lacks either, the duty extends to utilizing the skills of experts in the field to inform the director of the potential risks or opportunities. Section 124 of the *CBCA* absolves directors from liability when they rely in good faith on the reports of industry experts when they evaluate strategic business options. This is in response to the obligation for directors to be "reasonably prudent" when exercising their "care, diligence and skill." Interestingly, Section 122 does not call for reasonably skilled directors; it calls for "reasonably prudent" ones. This is to ensure that skill is not the measure of a director's ability; prudence and wisdom are. Knowledge can be obtained from a variety of sources; prudence and the wisdom as to how to apply it are another matter, however. Effectively, what these sections imply is that the *Act* provides protection for directors who seek to pursue shareholder value in an informed and responsible fashion.

As stated above in *Maple Leaf,* the director's duty is to the corporation and not to a specific shareholder or group of shareholders.[18] This duty to the best interests of the corporation even supersedes the wishes of any shareholder the director may specifically represent on the board. Where a director who is a nominee of a specific group of shareholders is placed in a position where the interests of the shareholder, short-term or long-term, are in conflict with the "best interests of the corporation" and that director fails to act in the "best interests of the corporation," that director may be held in conflict of interest.[19]

One of the objectives of corporate governance that the Dey Report identified was that "corporate strategies should be developed by taking a longer term view of the direction of the corporation."[20] The case law cited above makes it clear that for directors to fulfill their obligations under Section 122 of the *CBCA,* they must make informed and reasonable decisions based on the best interests of the company and not those of an individual shareholder. Combine Section 122 of the *CBCA* with the Dey Report recommendation that directors be responsible for the pursuit of "sound long-term strategies" and "ensuring financial viability," and it becomes readily apparent that one of the mandates of the directors is to provide guidance and direction for the implementation of sustainable business strategies.[21] A sustainable business strategy is one that evaluates the financial, environmental, and social risks of a business plan and considers what resources the corporation has available to mitigate these risks. The Dey Report refers to the need to balance stakeholder interests with shareholder interests, and to the implementation of an effective, sustainable strategic plan that has thoroughly evaluated these risks as the best way to accomplish this balancing act.[22]

Stewardship

The Dey Report identified five major responsibilities of directors, which the Toronto Stock Exchange subsequently included in their corporate governance guidelines. The five responsibilities of effective corporate governance that directors should assume are:

1. the adoption of a strategic planning process
2. the identification and monitoring of principal risks to the business and ensuring the implementation of appropriate systems to manage these risks
3. succession planning, including the appointment, training, and monitoring of senior management
4. a communications policy for the corporation
5. the integrity of the corporation's internal control and management information systems.[23]

The identification and monitoring of environmental risks through the implementation of appropriate management systems can be as important a feature of a strategic planning process as financial management. Depending on the information that went in to the formulation of a business strategy, environmental risk management can be a cost of business or an increased source of revenue, or both. Whether or not an environmental management strategy becomes a cost of business or a revenue stream may depend on how well the board understands the principal risks of the business and how much research has gone into the development of a long-term sustainable strategic plan for the business.

Michael Porter and Class van der Linde point out that pollution activities are the result of inefficient production processes.[24] Whenever any inputs of production are disposed of as a waste product, there is inefficiency. This inefficiency is a waste of valuable resources and increases the cost of production, which is in turn passed on to the consumer as an increased cost of consumption. This increased cost of consumption then diverts scarce consumption resources away from other products that may be equally desirable to the consumer. Increasing efficiency, by reducing waste in the form of pollution, works to correct that.

One example of an industry that improved its environmental performance and reduced its costs is the Dutch tulip industry. This industry was constantly being faced with increased regulations with respect to the use of pesticides and fertilizers, which was having an effect on its business and production. In search of a solution, innovative producers within the industry devoted a portion of their resources to developing a closed-loop system of tulip production. By removing their bulbs from the earth and placing them in a rock wool bed nourished by a circulating water bath, these producers lowered their risk of disease and pest infestation and reduced their costs for pesticides and fertilizers.[25] Admittedly, there was an initial outlay of capital with respect to research and development in choosing to implement such a strategy, and directors and shareholders who are primarily motivated by short-term gains may be reluctant to implement such a strategy. These directors and shareholders, however, were set on developing sustainable corporate strategies and, as a result, have seen their long-term investment result in lower operational costs and higher profits.

Comparing this example with the director's duty to act in the best interests of the company, it becomes apparent that this environmentally proactive business strategy resulted in a sustainable production process that was in the corporation's best interests and that provided additional stakeholder benefits to the community. An accomplishment such as this requires a corporate paradigm shift from that of pollution control and regulatory compliance to one of resource productivity, however. This means implementing internal control and management information systems that reward innovation and employee ingenuity with respect to reducing the costs of production and regulatory compliance by converting wasted resources in the form of pollution into additional revenue sources. Dow Chemical California is a company that made this switch when increased regulation forced it to redesign its wastewater processes. By doing this in such a way that waste output from one production process could be used as an input to production in a different area of the plant, Dow effectively converted a $250,000 process redesign cost into a research and development project that increased production efficiencies and resulted in annual savings of $2.4 million.[26]

Max Clarkson calls this paradigm shift a move from the shareholder model of capitalism to the stakeholder model of capitalism, and maintains that "successful corporations are in fact managed in order to satisfy, and retain the participation of their primary stakeholder groups."[27] Mr. Justice Berger in *Teck* also recognized that where directors consider the need of employees or that of the community, it does not mean that they have not considered the bona fide interests of the shareholder. Mr. Justice Farley summarized this most succinctly in *Ballard,* where he stated:

> It seems to me that while it would be appropriate for a director to consider the individual desires of one or more various shareholders (particularly his "appointing" shareholder) in order to come up with a plan for the operation of a corporation, it would be inappropriate for that director (or directors) to only consider the interests of certain shareholders and to either ignore the others or worse still to act in a way detrimental to their interests. The safe way to avoid this problem is to have the directors act in the best interests of the corporation (and have the shareholders derive their benefit from a "better" corporation).[28]

What becomes apparent from the general discourse on directors' duties is that as long as the directors are implementing strategies that they reasonably believe are in the interests of the corporation, the courts will not intervene. This also means that where directors implement a long-term sustainable development strategy and believe that this strategy is in the best interests of the corporation, then even if it is in opposition to the wishes of any specific group of shareholders, the directors should follow the course of action with the most sustainable strategic plan containing a long-term view to the best interests of the corporation. The prevailing judicial opinions indicate that the directors' first loyalty is to the corporation, and that considering a shareholder's wish over the well-being of the corporation places the director in a conflict of interest.[29]

Sustainable Strategic Planning

The Saucier Committee report entitled *Beyond Compliance: Building a Corporate Governance Culture* noted that "strategic planning is much more than developing a business plan" and that "directors are not there to manage the business, but are responsible for overseeing management and holding it to account."[30] The report refers to a 1999 survey indicating that "almost 30 percent of boards had no input or involvement in strategic planning, other than formal approval of the plan, and almost 40 percent of boards had no formal process for oversight of risk management."[31] (Stéphane Rousseau discussed these findings in Chapter 1.) Given that directors can be held personally liable under most environmental legislation for failure to properly manage environmental risks, this points to a significant gap in the current culture of corporate governance.[32]

The adoption of the Dey Report by the Toronto Stock Exchange is one example of using corporate governance guidelines to motivate change. Under Section 473, every listed company must disclose, on an annual basis, its approach to corporate governance in the company's annual report or information circular. Where the company's system is different from the guidelines listed in Section 474, the company must explain the differences or explain why the guidelines are inapplicable. The Saucier Committee recommended that these guidelines need to be "amended to *make it clear* that the board's responsibility *goes beyond* the 'adoption of a strategic planning process'"[33] (emphasis added). It recommended that the "board should be responsible for contributing to the development of the strategic plan."[34]

This requires change in the corporate governance model that many corporations use today. Royston Greenwood and C.R. Hinings hypothesize that change is a reaction to external and internal pressures as they act within an organization.[35] Two external pressures act on organizations to create change: market pressure and institutional pressure. Institutional pressure is pressure from regulatory agencies, professional institutions, social expectations, and the actions of other leading organizations. Section 122(1)(b) of the *CBCA* is an example of a legal institutional pressure that asks directors to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Various statutes that impose director liability for noncompliance are also examples of institutional pressure as applied to corporate governance. The work done by Dianne Saxe suggests that Greenwood's hypothesis that institutional pressure from environmental regulation increases compliance is correct.[36] It is also clear from the recommendations in the Dey Report and from the Saucier Committee that directors need to take a more active role in risk analysis and strategic planning. The Dey and Saucier Committees' recommendations that disclosure requirements with respect to corporate governance practices be strengthened is one way of increasing institutional pressure on directors to take a more active role in long-term sustainable strategic business planning. This type of planning requires that directors become involved and exercise sound business judgment based on information and knowledge provided by experts in the field in determining which strategic plan is in the best interests of the corporation. It is part of the directors' responsibility to exercise sound business judgment and provide guidance to management in choosing sustainable business strategies that provide for long-term corporate viability.

In *Schafer* v. *International Capital Corp.,* Mr. Justice Baynton states that the fundamental principle in the "Canadian version" of the sound business judgment rule is a "presumption that ... the directors of a corporation make an informed decision."[37] The directors' duty is to weigh the advantages against the disadvantages and make the decision that is in the best interests of the corporation. With respect to developing a sustainable strategic plan, this would imply that directors have a duty to look at the alternatives and make an informed decision based on long-term financial viability. Assessing environmental expenses accurately is as important a part of the production equation as assessing labour and resource expenses. When left out of the production cost equation, directors leave themselves open to being blindsided by personal as well as corporate liability. One of the criticisms the court had for the actions of one of the corporate officers in *Bata*[38] was that he did not exercise an informed business judgment when he chose to reject a waste disposal proposal as a result of price. In the *Bata* decision, it will be recalled, the site manager had rejected a proposal for the disposal of the drums that ultimately leaked and caused the problem, simply because the price was too high. He subsequently obtained a proposal that was lower, and was prepared to accept it without any further investigation as to the differences. The court felt that there was a duty to investigate further, to understand the reasons for the difference in price and the different services outlined in the two quotes he had received.

This has a bearing for directors today when deciding on which business strategies to implement. Business strategies are based on a choice of options. When confronted with implementing a long-term sustainable business strategy, there may be some immediate capital costs, as mentioned earlier in the Dow Chemical example, but the long-term advantages may outweigh the short-term disadvantages. In resource-based industries, this may mean harvesting later rather than earlier. In manufacturing industries, it may imply developing new technologies to use resources more efficiently.

The work done by Sanjay Sharma and Harrie Vredenburg indicates that when effectively used, sustainable business strategies actually stimulate innovation and increase competitive advantages.[39] Sharma and Vredenburg conducted a study of seven companies in the oil and gas industry to investigate the hypothesis that proactive environmental business practices stimulate innovation and increase revenue streams. The companies ranged from juniors to majors and were all surveyed and ranked according to their environmental responsiveness. Of the seven companies, two were ranked as being environmentally proactive and five were ranked as being environmentally reactive. Sharma and Vredenburg then measured the levels of innovation within these companies based on how many innovations and patents they attributed to their position on environmental responsiveness.

The results were significant. Over a fifteen-year period from 1980-1995, the two environmentally proactive firms could account for 132 innovations (of which 93 were patented), whereas the five environmentally reactive firms could account for only 38 (16 of which were patented).[40] The environmentally proactive corporations achieved more than three times the number of innovations or patents than the environmentally reactive ones. These innovations or patents helped the proactive corporations develop additional revenue streams or technologies that gave them a competitive advantage over the reactive corporations. Using comparative case studies, Sharma and Vredenburg discovered that the companies that implemented proactive environmental strategies also exhibited:

- a capability for higher-order learning
- a capability for continuous innovation
- a capability for stakeholder integration.[41]

The development of these capabilities is among the factors to which this study attributed the proactive companies' ability to maintain their competitive advantage in the oil and gas industry.

In considering what is in a corporation's best interests, directors should also take into account the corporation's reputation. "Intangible organizational assets, such as reputation, are seen as important sources of sustainable competitive advantage."[42] While some directors may hold that the costs of sustainable environmental management strategies are high, spills and other types of environmental disasters can not only have an effect on a company's reputation but also affect its stock price.

A study by Robert Klassen and Curtis P. McLaughlin indicates that good environmental management reduces costs or increases revenues.[43] This study also revealed that environmental awards and environmental disasters had a significant impact on shareholder value. Based on a seven-year study, an environmental award increased a company's share price by an average of $0.37 per share, whereas a negative environmental incident decreased the average share price by $0.70 per share. Effectively, a negative environmental incident affected shareholder value three times worse than a positive environmental award. The conclusion reached in this study was that environmental awards increased investor confidence in a company's ability to perform. Therefore, even if a director were to take a position that his or her responsibility was only to the shareholder, this study indicates that by not developing environmentally sustainable business practices and effectively taking into account other stakeholders a director is liable to reduce shareholder value, expose himself or herself or the corporation to liability, and tarnish the corporation's reputation. Good corporate governance in today's marketplace requires that directors exercise the "care, diligence and skill [of a] reasonably prudent person" when assessing all areas of a corporation's performance, including environmental policies, strategic direction, production processes, and financial results.

Managing Change

The three major studies on corporate governance – the Dey Report, *Five Years to the Dey,* and *Beyond Compliance* – all suggest that the model of corporate governance in Canada is under pressure to change.[44] The disclosure requirements in the Toronto Stock Exchange (TSE) *Company Manual* are also a call for change in accountability in corporate governance. Along with a call for change, however, there is also resistance to change. The Dey Report introduced the issue of "liability chill" into its discussion of developing an adequate human resource base from which to select competent directors to ensure good corporate governance.[45] It expressed disappointment at a report of a Federal Government Interdepartmental Working Group that stated that director liability was "limited to a handful of companies that were in severe financial difficulty."[46] The TSE report *Five Years to the Dey* examined this issue and determined that if there was a problem in recruiting directors, it resulted from a lack of qualified candidates, not "liability chill." This phenomenon appears to conform to the management change theories of Danny Miller[47] and Royston Greenwood.[48]

Miller's study concludes that as companies mature and develop, they simplify their processes. However, this simplification of processes eventually leads to lower organizational performance because past success patterns become the familiar norms. This in turn leads to less tolerance for ideas that deviate from past success factors. Corporations then lose their ability to deal with randomness and become stagnant. This becomes especially harmful in competitive environments and, given that many firms are using environmental or social responsibility strategies to gain competitive advantage, creates a resistance to governance strategies that incorporate other stakeholders.

Greenwood's work on radical change identified the same resistance to change that Miller identified, and it examined how the pressure from the external business environment affected the firm's internal resistance to change.[49] According to Greenwood, the ability of a firm to change its model of strategic planning is tied to the manner in which a firm responds to external pressures and how these external pressures cause a firm to restructure its internal power dynamics. For a firm to effectively succeed at changing its strategic planning model, the power to implement change needs to be allocated to those who are willing to align the firm's strategic planning model with the new business environment. This allocation of power can be done through retraining or through succession planning. Greenwood's theory is in harmony with the TSE guidelines' call for corporate governance to accept responsibility for "succession planning, including appointing, training, and monitoring senior management." Where management is either unwilling or unable to adequately address the forces of environmental competitiveness it is the board's responsibility to insist on retraining of the senior management, so that the corporation can remain competitive; or consider developing succession strategies, so that the appropriately trained personnel can occupy the senior management positions.

Undertaking a strategy of environmental competitiveness requires commitment from the top down. This includes the directors on the board and the senior management team doing more than paying lip service to a long-term sustainable business strategy. A sustainable business strategy requires the accumulation of human capital that is a mix of interpersonal relationships, firm culture, and reputation among buyers and suppliers.[50] Once achieved, this asset becomes difficult to copy because it creates a nebulous quality within a company that drives its motivation and innovation. This in turn provides a company with a sustainable competitive advantage because of its competitors' inability to copy it.

An asset accumulation strategy of this type develops over years. Where a director elects to recommend that a corporation develop a sustainable strategic business plan, of necessity this means working towards the best interests of the company over an extended period. A director whose priorities are in conflict between a shareholder with a short-term reward horizon as opposed to long-term corporate viability will be faced with the task of gathering the required information to adequately explain to investors why the long-term strategy is in the corporation's best interests. While this may be challenging at times, this task is merely one of the group of responsibilities that directors take on when they accept a position as a member of a corporation's governing body. The case law referred to above always holds that directors are responsible for making informed decisions that are in the best interests of the corporation, whether they agree or disagree with any particular shareholder's position on the issue.

Conclusion

A review of the case law regarding directors' responsibilities shows that directorship is much more than a figurehead position. It is a position that requires informed involvement and prudent decision making. Where knowledge is lacking, it requires investigation, analysis of the reports obtained, and the turning of one's mind to adopting a business strategy that one believes will help ensure the corporation's long-term financial viability. This means considering all the risks that the business may face, including environmental, fiscal, and social risks, including risks to reputation, and then implementing a strategy that is in the corporation's best interests.

By so doing, directors should also achieve the best results for the shareholders. Best results should not be confused with quick results, as the implementation of long-term sustainable business strategies requires the accumulation of human capital capable of sustaining a corporate culture of innovation, and the ability to respond to change. Even a significant increase in the level of compliance cannot be accomplished overnight. Given the complexity of social, environmental, and regulatory issues that corporations face today, only by developing a culture of innovation will they attain the critical mass required to develop new technological processes that maximize resource efficiencies and reduce environmental impact.

Therein lies the director's vulnerability and strength. The director's role is not one of providing hands-on management. It is to provide objective reflection on where the corporation has been and where it should be going; to provide strategic advice that will ensure that the corporation is a long-term financially viable entity. There will undoubtedly be many corporations whose operations have minimal environmental risks and where strategic management does not require extensive consideration of sustainability. For most companies, however, the identification of risks and opportunities related to sustainability are crucial to corporate success, particularly over the long term. The obligation of today's director is to provide leadership that takes into consideration all of the stakeholders that contribute to a corporation's prosperity and all risks that can damage it. This requires recognition that the sustainable development of a corporation as an environmental concept is not so far from the sustainable growth of a corporation as a concept of financial viability.

Notes

1 *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, as am. by S.C. 2001, c. 14, s. 135 (Sched., s.43) [hereinafter *CBCA*].
2 *Ibid.,* s. 122(1).
3 *Teck Corporation Ltd.* v. *Miller et al.* (1972), 33 D.L.R. (3d) 288 at 315 (B.C.S.C.) [hereinafter *Teck*].
4 *Ibid.*
5 *Rio Tinto Canadian Investments Ltd.* v. *Labrador Iron Ore Royalty Income Fund (Trustee of),* [2001] O.J. No. 2440 (Ont. Sup. Ct. Comm. List), para. 16 [hereinafter *Rio Tinto*].
6 *Pente Investment Management Ltd. (Maple Leaf)* v. *Schneider* (1999), 42 O.R. (3d) 177 (Ont. C.A.) [hereinafter *Maple Leaf*].
7 *Ibid.,* para. 33 as quoted in *Rio Tinto, supra* note 5, para. 16. See also *Ontario Inc.* v. *Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Ct. (Gen. Div.)) [hereinafter *Ballard*]; *Maple Leaf, supra* note 6, para. 33 as quoted in *Rio Tinto, supra* note 5, para. 16
8 *State Tax Commission* v. *Aldrich et al.,* 316 U.S. 174 at 192 (U.S. Sup. Ct. 1942).
9 *Teck, supra* note 3 at 314.
10 Toronto Stock Exchange Committee on Corporate Governance in Canada, *Where Were the Directors? Guidelines for Improved Corporate Governance in Canada* (Toronto: Toronto Stock Exchange, 1994) [hereinafter *Dey Report*].
11 *Ibid.* at 8.
12 An example of the concern for sustainable development practices is the *Canadian Environmental Assessment Act* (1992), c. 37; brought into force 22 December 1994.
13 *Income Tax Act,* R.S.C. 1952, c. 148, s. 227.
14 *Soper* v. *Canada (C.A.),* [1998] 1 F.C. 124 (F.C.A.), para. 53 [hereinafter *Soper*].

15 *Environmental Protection Act* R.S.O. 1990, Ch. E. 19.
16 *R.* v. *Bata Industries Ltd.,* 25 O.R. (3d) 321 (Ont. C.A.) [hereinafter *Bata*].
17 *Regina* v. *Bata Industries Ltd., Bata, Marchant and Weston,* 9 O.R. (3d) 329 (Ont. Ct. [Prov. Div.]).
18 *Maple Leaf, supra* note 6, para. 34.
19 *PWA Corp.* v. *Gemini Group Automated Distribution Systems Inc.,* (1993) 101 D.L.R. (4th) 15 (Ont. Ct. (Gen. Div.)) [hereinafter *PWA*].
20 *Dey Report, supra* note 10 at 7.
21 *Ibid.*
22 *Ibid.* at 21.
23 Toronto Stock Exchange, *Company Manual,* s. 474, at 421 [hereinafter *Company Manual*].
24 Michael E. Porter and Class van der Linde, "Green and Competitive: Ending the Stalemate" (1995) September/October Harv. Bus. Rev. 120 at 122.
25 *Ibid.* at 121.
26 *Ibid.* at 126.
27 *Dey Report, supra* note 10 at 21.
28 *Ballard, supra* note 7 at 171-72.
29 *PWA*, *supra* note 19.
30 Joint Committee on Corporate Governance, *Beyond Compliance: Building a Governance Culture,* Final Report (Toronto: TSX/CNDX/CICA, 2001), <http://www.cica.ca/multimedia/Download_Library/Research_Guidance/Risk_Management_Governance/Governance_Eng_Nov26.pdf> [hereinafter *Beyond Compliance*].
31 *Ibid.*
32 *Canadian Environmental Protection Act,* 1999, s.c. 1999, c. 33, s. 280.
33 *Beyond Compliance, supra* note 30 at 23.
34 *Ibid.*
35 For a complete analysis on organizational change, see Royston Greenwood and C.R. Hinings,"Understanding Radical Organizational Change: Bringing Together the Old and New Institutionalism" (October 1996) 21(4) Acad. Mgmt. J. 1022 at 1025.
36 Dianne Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora: Canada Law Book, 1990) at 28, confirms that director prosecution significantly increases efforts at environmental compliance.
37 *Schafer* v. *International Capital Corp.,* [1996] S.J. No. 770 (Sask. Q.B) para. 25 [hereinafter *Schafer*].
38 *R.* v. *Bata Industries Ltd.,* (1992) 9 O.R. (3d) 329.
39 Sanjay Sharma and Harrie Vredenburg, "Proactive Environmental Strategy and Development of Comparatively Valuable Organizational Capabilities" (1998) 19 Strategic Mgmt. J. 729.
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46 *Ibid.*
47 Danny Miller, "The Architecture of Simplicity" (1993) 18(1) Acad. Mgmt. Rev. 116.
48 Greenwood and Hinings, *supra* note 35.
49 The business environment includes all of the forces working within society: legal, regulatory, social, political, as well as pressures within the firm's specific industry.
50 Jay Barney, "Firm Resources and Sustained Competitive Advantage" (1991) 17(1) J. Mgmt. 99.

Part 3
The Role of Directors in Governance Oversight: Domestic and International Lessons