

**DATE:** December 8, 2015  
**TO:** University of British Columbia (UBC)  
**FROM:** Koskie Minsky LLP  
**FILE:** 151941  
**SUBJECT:** UBC Divestment Proposal

---

**ISSUE**

The University of British Columbia (“UBC”) has requested that Koskie Minsky LLP answer the following inquiry:

“Does the UBC AMS Divestment Proposal meet UBC’S Endowment Responsible Investment Policy divestment criteria?”

**BACKGROUND**

*UBC Endowment Management*

We have been advised that there are over 3,300 endowments provided over the past ninety years, with individual endowment deeds in some cases, but not in others. There are no constating documents for the endowment.

As set out in UBC's Endowment Management Presentation dated April 13, 2015, the endowment consists of \$1.46 billion in assets. It is managed in such a way as to ensure that the principal is not eroded; it cannot be spent and a portion of income derived from investments is added each year to the principal to maintain the purchasing power of the endowment with a view to preserving inter-generational equity.

UBC’s endowment includes:

- \$1.01 billion in funds administered under the University’s Endowment Management Policy (#113), which are largely invested by UBC Investment Management Trust Inc. (IMANT);
- \$5 million in funds pursuant to a Merilees Chair endowment and certain promissory notes;
- \$27 million in funds from the Vancouver Foundation where the University has the discretion to transfer all or any part of the capital to the University;

- \$87 million in funds from the Peter Wall endowment, held within the UBC Foundation, which includes 6.5 million shares of Wall Financial Corp valued at \$11.01 per share at March 31, 2014 (equivalent to \$71.6 million), \$4.4 million in cash and \$11 million due from the Wall Group;
- \$193 million in funds pursuant to the Trek endowment;
- \$137 million in funds pursuant to the Student Housing Financing Endowment ("SHFE").

The largest component of the endowment (\$1.01B) is administered under the Board of Governors' Endowment Management Policy (the "Management Policy"), which provides for the general framework for the management of the endowment, including spending rates, allocation of income and costs to endowment pools, reporting and review procedures. Currently the spending rate is 3.5% with an administration fee of 0.65%. The Policy appears to contemplate an allocation to the capital account of each endowment fund only on an approximate and notional inflation-adjusted basis and the Policy further provides in section 1.6 that "This Policy does not apply to endowment funds that are subject to contrary trust terms and endowment funds held by other organizations for the exclusive benefit of the University as such funds are subject to the distribution and capital preservation policies of those organizations." The TREK endowment is governed by the Trek Endowment Fund Terms of Reference and principles on the use of the trek endowment. SHFE is governed by the SHFE terms of reference.

### ***UBC AMS Fossil Fuel Divestment Proposal***

The UBC AMS Fossil Fuel Divestment Proposal (the "Proposal") requests UBC to "immediately forgo further investments in fossil fuel companies, and to divest from all existing fossil fuel holdings within five years."

The rationales for the Proposal are as follows:

- There is overwhelming evidence that fossil fuel development imperils human prospering and must be curtailed;
- There is a moral imperative to divest given the magnitude of the risk, which divestment would be consistent with UBC's core values of sustainability, global citizenship and innovation;
- Divestment is effective by undercutting the economic and political power of the fossil fuel industry just as the anti-Apartheid movement de-legitimized that government's political influence;
- Alternative policies are ineffective as UBC's on-campus carbon-reduction efforts are 1/9 of its off-campus "carbon shadow". Fossil fuel companies' mission is to extract carbon such that active ownership would not change behaviour;
- Alternative investments can yield similar returns; and
- A "carbon bubble" poses a significant threat to fossil fuel investments.

### ***UBC Endowment Responsible Investment Policy Divestment Criteria***

UBC's Endowment Responsible Investment Policy ("Responsible Investment Policy") guides the investment policy of the endowment. Of particular relevance are the five criteria (the "Criteria") set out therein that must be met prior to the Board of Governors considering a divestment proposal, namely, there must be:

**1. Proven social, political, economic or environmental rationale.**

Such a rationale must be supported by a body widely seen as competent and objective, such as the Canadian Coalition for Good Governance or a research or policy institute generally accepted as impartial and credible. Such an assessment does not preclude the University to take a different position on an issue.

**2. Reasonable evidence that divestment is an effective way to achieve the desired outcome.**

This would be most compelling if divestment changes the behaviour of an offending company or industry. Divestment from a sector should not facilitate investment opportunities for less responsible investors, nor should it drive investment to countries and regions with weak or nonexistent regulatory regimes or ESG standards. Finally, since divestment would significantly impair, if not preclude UBC's ability to engage, the choice to divest should be demonstrably superior to our engagement.

**3. Absence of alternative policies.**

Alternative policies must be as effective at a lower cost, or more effective at the same cost. Implementation of divestment programs may be expensive for an endowment of the size of UBC. Costs of divesting activities include administrative and management resources, investment management fees, and reduced diversification.

**4. Consistency with the University's legal obligations as trustee.**

The UBC Board of Governors endorses the incorporation of ESG principles into its investment policy, subject to its primary fiduciary responsibility of acting in the best interest of the University and its stakeholders. When considering divestment, the University must consider the interest of its multiple stakeholders, which include students, faculty, staff, alumni, donors, the government and taxpayers.

**5. Consistency with its other University relationships.**

Any divestment proposal should be mindful of all the University's activities, of its public nature and of its ultimate accountability to the people of British Columbia.

### ***UBC Divestment Consideration Process***

The University of British Columbia Endowment Responsible Investment Committee's Divestment Proposal Review Process provides as follows:

- The UBC Board of Governors has established a Responsible Investment Committee as a working group mandated to advise the Board of Governors Finance Committee on matters of responsible investment policy.

- The Responsible Investment Committee reviews proposals with broad stakeholder (such as students, faculty, staff and alumni) support provided that it contains i) an outline of the specific actions proposed; and ii) in the case of a divestment proposal, a comprehensive case for divestment.
- A divestment will only be considered by the UBC Board of Governors with the recommendation of the Responsible Investment Committee, which, in turn, will only be provided if all five of the Criteria are met.

## CONCLUSION

The Proposal satisfies Criterion 1. The Proposal fails to satisfy Criteria 2, 3 and 4. It is unclear if Criterion 5 is satisfied.

## DISCUSSION

### *What are the legal obligations of the University as regards the Endowment?*

An endowment is a charitable purpose trust whereby a donor (settlor) has provided funds to a trustee to invest on his or her behalf for the particular trust object or purpose set out in the governing trust deed.

#### *Distinction between income and capital*

In *Arthritis Society v Vancouver Foundation (BC)*,<sup>1</sup> the Superior Court held that an endowment consists of the “provision of a fund which is intended to generate fixed revenue for the support of a charity” also citing the dictionary definition as the “bestowing money as a permanent fund, the income of which is to be used in the administration of a proposed work”.

At issue in determining the appropriate investment policy for an endowment can be whether the income of a fund includes capital gains, and therefore whether a total return strategy without distinction between capital and income is permissible, which, in turn, *inter alia* has consequences for determining the relative importance assigned to investment in securities with anticipated increases in share value as compared to the payment of regular dividends. It is sometimes possible for the court to authorize the use of a total return strategy where there is an impracticality in compliance with the terms of the agreement creating the trust that preclude this,<sup>2</sup> but for the purposes of this memorandum, it is assumed that such a strategy is permissible given that the Policy appears to contemplate an allocation to the capital account of each endowment fund only on an approximate and notional inflation-adjusted basis and the Policy further provides in section 1.6 that “This Policy does not apply to endowment funds that are subject to contrary trust terms and endowment funds held by other organizations for the

---

<sup>1</sup> *Arthritis Society v Vancouver Foundation*, 1992 CanLII 1334 (BCSC)

<sup>2</sup> *Re Killam Estate (Re)*, 1999 CanLII 9404 (NSSC); *Re Stillman Estate*, [1966] 1 OR 113-118 (ON H CJ); *Fenton Estate (Re)* 2014 BCSC 39;

exclusive benefit of the University as such funds are subject to the distribution and capital preservation policies of those organizations.”

### *Fiduciary Duties*

Fiduciary duties are imposed on a person who exercises discretionary power on behalf of another person who has reposed their trust and confidence in that person.<sup>3</sup> A fiduciary's duties are twofold: a duty to act prudently and a duty of loyalty.<sup>4</sup> A variety of duties, in turn, emanate from these two principal duties.

The precise scope of a fiduciary's duties is dependent upon the nature of the fiduciary relationship.<sup>5</sup>

For the purposes of this analysis, it is important to highlight that fiduciary obligations have evolved in a private law context. They govern the relationship between fiduciaries and the persons to whom those fiduciary duties are owed. Fiduciary relations exist between trustees and beneficiaries, directors of a corporation and the corporation itself, lawyers and clients, guardians and their wards and others in similar positions. In general, fiduciary obligations are owed to specific persons and require the fiduciary to act in the best interests of those persons.

Fiduciary obligations are not owed to the public in general. To the contrary, they are directed towards specific persons, and are protective of the rights and interests of those persons, even if they conflict with the interests of others or the interests of the public at large.

This is well illustrated with reference to the case of divestments from South Africa. In order to resolve a conflict between trustee fiduciary obligations and South Africa divestment strategies, the Province of Ontario adopted a statute, the South African Trust Investment Act, R.S.O 1990, Chapter s.16, that protected trustees of pension funds, charitable trusts and other trusts from liability if their divestment program was approved by the beneficiaries of the trust. The statute was considered necessary because, in the ordinary course, and notwithstanding the compelling political and social objectives of the divestment movement, divestment was considered difficult to reconcile with trustees' fiduciary obligations and with the best financial interests of the beneficiaries of pension, charitable and other trusts.

### *Duty of Prudence*

In British Columbia, the *Trustee Act* requires a trustee to exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.<sup>6</sup>

Practically speaking, trustees are required to make decisions on an informed basis, after conducting appropriate due diligence including retaining specialized advice where it is relevant to the decision at hand.

---

<sup>3</sup> *Hodgkinson v Simms*, [1994] 3 SCR 377 [*Simms*] at 419.

<sup>4</sup> *Ibid*; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.

<sup>5</sup> *Guerin v The Queen*, [1984] 2 SCR 335 at 384.

<sup>6</sup> *Trustee Act*, RSBC 1996, c 464, s 15.2. This can be modified by the terms of the trust agreement itself. (*Trustee Act*, s 21.)

Trustees are to invest with a reasonable expectation of return commensurate with the risk assumed pursuant to a plan. Provided that a trustee invests pursuant to “a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances”<sup>7</sup> trustees are not liable for any particular investment loss.

### *Duty of Loyalty*

The duty of loyalty requires that fiduciaries act to fulfill the purposes of the trust<sup>8</sup>. In turn, this duty implies a number of related duties to:

- a. Treat all beneficiaries impartially;<sup>9</sup>
- b. Act honestly;<sup>10</sup>
- c. Disclose relevant information,<sup>11</sup> inform, and consult<sup>12</sup>; and
- d. Prevent other interests from conflicting with their duty as trustees- for example to:
  - i. Not profit from their position;<sup>13</sup>
  - ii. Not benefit third parties;<sup>14</sup> and
  - iii. Not be swayed by personal, political or social/economic belief.<sup>15</sup>

The duty of loyalty applicable to the endowment fund in the investment context requires that fiduciaries act in the long-term interests of the fund *and in no other interests*. The long-term nature of endowment funds gives rise to issues of inter-generational wealth maximization such that fiduciaries’ management of trust assets requires allocation of assets between near-term needs and future wealth creation.<sup>16</sup> At a minimum, the duty of impartiality implies that short-term interests ought not to be privileged over long-term interests, requiring sufficient attention to systemic risks.

### *The adoption of a plan*

In furtherance of their fiduciary duty, the Management Policy, Process and Responsible Investment Policy have been adopted. In general these policies are designed to meet the fiduciary standard by facilitating an investment process that brings relevant information to light in order to generate reasoned and informed decision-making. The Responsible Investment Policy sets out five criteria for the consideration of any divestment proposal. The Proposal does not meet all of the Criteria.

---

<sup>7</sup> *Trustee Act*, s 28.

<sup>8</sup> *Galambos v Perez*, [2009] 3 SCR 247 at para 69.

<sup>9</sup> Ari Kaplan & Mitchell Frazer, *supra* note 16 at 331; Laby, *supra* note 20 at 99-108; Eileen Gillese, *The Law of Trusts*, (Toronto: Irwin Law Inc., 1997) at 137.

<sup>10</sup> Gillese, *supra* note 22 at 137.

<sup>11</sup> Kaplan & Frazer, *supra* note 16 at 335; *Froese v. Montreal Trust Company of Canada*, 1996 CanLII 1643 (BCCA) at para 61.

<sup>12</sup> Edward J Waitzer & Douglas Sarro, “The Public Fiduciary: Emerging Themes in Canadian Fiduciary Law for Pension Trustees” (2013) 91 (1) Can Bar Rev 163 [Waitzer & Sarro “Public Fiduciary”] at 197; Gary Watt, *Trusts and Equity*, 2d ed (New York: Oxford University Press, 2006) at 437.

<sup>13</sup> *Canadian Aero Services Ltd. v O’Malley*, [1974] SCR 592 at 609.

<sup>14</sup> *Bristol & West Building Society v. Mothew*, [1998] Ch 1.

<sup>15</sup> Gillese, *supra* note 22 at 137.

<sup>16</sup> Gillese, *supra* note 22 at 137.

## **Does the UBC AMS Divestment Proposal meet UBC'S Endowment Responsible Investment Policy divestment criteria?**

### **1. Criterion 1 is Satisfied**

Criterion 1 provides as follows:

#### **1. Proven social, political, economic or environmental rationale.**

Such a rationale must be supported by a body widely seen as competent and objective, such as the Canadian Coalition for Good Governance or a research or policy institute generally accepted as impartial and credible. Such an assessment does not preclude the University to take a different position on an issue.

This criterion is satisfied. The Proposal relies on the foremost global authority on climate change - the Intergovernmental Panel on Climate Change (IPCC) – established by the United Nations Environmental Programme (UNEP) and the World Meteorological Organization (WMO), for the propositions that evidence of global warming is “unequivocal” that it is “extremely likely” that the dominant cause is anthropogenic emissions”, that the effects of climate change are already being felt, will worsen significantly in the future absent mitigation or adaptation (which action is feasible and less costly if taken now than later) and that if global warming is to be kept to within a 2 degree Celsius threshold (which is necessary to avoid its deleterious effects), not all existing carbon reserves can be exploited.

We note as well that in June 2015, the G7 countries, of which Canada is a member, issued a declaration from their summit held in Schloss Emau recognizing that urgent and concrete action is needed to address climate change through the introduction of binding rules to hold the increase in global average temperature below 2 degrees Celsius with a common vision for a global goal of greenhouse gas emissions reductions of 40 to 70 per cent by 2050 compared to 2010 by inter alia supporting vulnerable countries' own efforts, eliminating inefficient fossil fuel subsidies, incorporating climate mitigation and resilience considerations into development assistance and investment decisions and applying effective policies and actions including through carbon market-based and regulatory instruments.

Between November 30, 2015 and December 11, 2015, the 21<sup>st</sup> Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change ("COP 21") will convene in Paris, France with a view to reaching an international agreement on climate change.

It is significant that an international political consensus has emerged about the urgency and seriousness of climate change. Such a consensus supports our conclusion about criterion 1, but is also suggest that governments will be taking increasingly forceful measures to limit carbon emissions and mitigate global climate change trends. Such measures may affect companies that produce or that utilize fossil fuels, and may affect, from an investment perspective, the risk/return characteristics of securities issued by those companies. In general, it is these risks that bear most directly on fiduciaries' decision-making in regard to their investment portfolios.

## 2. Criterion 2 Is Not Satisfied

Criterion 2 provides as follows:

### 2. Reasonable evidence that divestment is an effective way to achieve the desired outcome.

This would be most compelling if divestment changes the behaviour of an offending company or industry. Divestment from a sector should not facilitate investment opportunities for less responsible investors, nor should it drive investment to countries and regions with weak or nonexistent regulatory regimes or ESG standards. Finally, since divestment would significantly impair, if not preclude UBCs ability to engage, the choice to divest should be demonstrably superior to our engagement.

This criterion is not satisfied. This criterion requires the proponents to establish that the particular divestment is effective at mitigating climate change. In its current form, the Proposal does not make this case..

If UBC were to sell its fossil fuel holdings, those holdings would necessarily have a purchaser. From a systemic viewpoint, assuming that both UBC and the successor securities-holder were both passive investors, nothing would have changed other than the ownership interest. It has not been shown how this ownership change would do anything to mitigate climate change. This problem is compounded where the successor securities-holder is less responsible than UBC as UBC's ability to engage with the fossil fuel company through active ownership would be eliminated through a divestment decision.

The Proposal makes the point that divestment could be effective by undercutting the economic and political power of the fossil fuel industry just as the anti-Apartheid movement de-legitimized the international position of the Apartheid regime in South Africa. This is a difficult claim to assess. Of course, it is possible that an international divestment by major institutional investors from fossil fuel companies would influence those companies to reduce their fossil fuel production and invest in alternative energy production. The proposal submits however that: "However, because the business model of fossil fuel companies relies fundamentally on exploiting carbon reserves that humanity can't afford to burn, working through shareholder channels is inadequate to achieve the transformative changes required." If active ownership is inadequate to change the behaviour of fossil fuel companies because their mission is to extract carbon, one must ask whether divestment would likely achieve this result? The proposal does not, in its current form, make a compelling case in this regard.

While the South African divestment campaign sought to delegitimize a government and a legal system, divestment from fossil fuel companies seeks to change corporate behaviour, a somewhat different objective. In this sense, the climate change divestment is more akin to divestment from tobacco companies – both seek to influence corporate behaviour. The proposal does not articulate the link between a delegitimation of fossil fuel production and a change in corporate behaviour, but this is what criterion 2 requires. While the Proposal does advance reasons why divestment *could* be effective, the Proposal, in its current form, fails to provide evidentiary support for the proposition that divestment *is* effective.

The Proposal notes that Canada's historical intransigence with respect to action on climate change renders action by institutional actors, including symbolic action intended to result in both legislative change and change in fossil fuel actors' behaviour through stigmatization, more relevant and effective. In light of the recent election of a new federal government with a stated

commitment to addressing climate change, it is difficult, in this transitional time, to rely on Canada's historical inaction with respect to climate change as a reason for divestment activity, since Canada's posture in regard to climate may change.

The paucity of evidentiary support for the effectiveness of the divestment proposal may be explained by the fact that the Proposal questions the relevance of the criterion itself, conceding that divestment by a single investor cannot be expected to make a significant dent in addressing climate change and arguing that insisting that individual action be demonstrably effective is ill-advised. The Proposal underlines the fact that the climate crisis is a collective action problem with respect to which individual action is likely to be of limited effect but submits that this logic is self-fulfilling. While the proponents may not like this criterion, so long as it is a criterion, they must satisfy that it has been met.

Finally, the Proposal contains no evidence that divestment is demonstrably superior to engagement. This omission is particularly problematic given the extent to which some fossil fuel companies are also alternative energy investors. The Proposal does provide reasons why active ownership is insufficient, but none for why divestment is superior to active ownership. In support of its claims that active ownership is insufficient, the Proposal asserts that given that the business model of fossil fuel companies is to extract carbon, shareholder activism cannot change that behaviour. This assertion is broad and may be true for some or all fossil companies, but it is unsupported in the Proposal. Second, the Proposal notes that UBC's equity holdings are in pooled funds making active ownership more challenging and less significant. However, the criterion requires that it be established that the divestment proposal is demonstrably superior than engagement, not the particular form of engagement employed by UBC. Finally, the Proposal notes that divestment will create incentives for fossil-free financial instruments without particularizing how this will mitigate climate change.

### **3. Criterion 3 Is Not Satisfied**

Criterion 3 provides as follows:

#### **3. Absence of alternative policies.**

Alternative policies must be as effective at a lower cost, or more effective at the same cost. Implementation of divestment programs may be expensive for an endowment of the size of UBC. Costs of divesting activities include administrative and management resources, investment management fees, and reduced diversification.

The Proposal only considers two alternative policies, namely:

1. The Proposal compares the effectiveness of divestment as against on campus carbon-reduction activities and concludes that on-campus carbon-reduction activities would be insufficient as such efforts are merely 1/9 of its "carbon shadow" through fossil fuel holdings.
2. The Proposal also compares divestment with active ownership and concludes that divestment is preferable as fossil fuel companies' mission is to extract carbon such that active ownership would not change behaviour. Active ownership is viewed as insufficient given *inter alia* that the business model of fossil fuel companies requires the extraction of

carbon and the endowment's holdings are in pooled funds making shareholder influence ineffective.

Even if it were the case that the foregoing two options are the only alternatives available, in order to determine whether or not these two alternative policies could achieve the same effects as the divestment proposal, reasonable estimates of the administrative costs and reduced diversification costs stemming therefrom need to be assessed and compared against the benefits of divestment. This result, in turn, would need to be compared to the reasonable costs and benefits of each of the foregoing options. The Proposal does not enter into a detailed cost-benefit analysis of fossil fuel divestment as compared to other alternatives and is wanting for that reason alone.

The Proposal presents a binary choice; to hold or not to hold fossil fuel securities. This does not represent the range of alternative policies available. One alternative may be to invest through segregated rather than pooled funds, facilitating engagement and security-by-security decision-making. Another alternative may be to design a policy intended specifically to evaluate the risks of security holdings in specific fossil fuel asset classes – such as coal, oil sands, traditional oil, natural gas, shale oil/gas - rather than approaching fossil fuels as a single undifferentiated class. This would also allow for a 'best in class' approach to energy companies – putting pressure on the worst offenders and perhaps rewarding those who are investing in alternative energy sources. None of these alternatives are considered. By presenting fossil fuel securities ownership as a binary choice, the Proposal fails to consider and assess the range of alternative policies available and therefore does not satisfy the second criterion.

#### **4. Criterion 4 Is Not Satisfied**

Criterion 4 provides as follows:

##### **4. Consistency with the University's legal obligations as trustee.**

The UBC Board of Governors endorses the incorporation of ESG principles into its investment policy, subject to its primary fiduciary responsibility of acting in the best interest of the University and its stakeholders. When considering divestment, the University must consider the interest of its multiple stakeholders, which include students, faculty, staff, alumni, donors, the government and taxpayers.

An overview of the fiduciary duties of trustees is set out at the outset of this memorandum. Trustees are to act in the best interests of the fund to maximize income returns over the life of the fund, the capital of which is typically to exist in perpetuity.<sup>17</sup>

---

<sup>17</sup> *Cowan v Scargill*, [1985] Ch 270 at 287. However, academic commentators have noted that "...courts have increasingly held that, in assessing the best interests of the beneficiary, a fiduciary must consider not only the beneficiary's narrow pecuniary interests, but the beneficiary's status as a responsible member of society," requiring compliance with the law, avoidance of unethical actions and actions in accordance with prevailing norms (see: Edward J Waitzer & Douglas Sarro, "The Public Fiduciary: Emerging Themes in Canadian Fiduciary Law for Pension Trustees" (2013) 91 (1) Can Bar Rev 163 at 189-90). The same view has been well articulated by Steve Lydenberg, who writes that fiduciary law has typically required 'reasonable' rather than 'rational' behaviour; while 'rationality' is a function of self-interest only, 'reasonable' behaviour is behaviour that takes account of others' interests. While rational behaviour may promote the self, it may also engender conflict and dysfunction; reasonable

### *Climate Change and Trustees' Fiduciary Duties*

At the security selection or investment decision-making level, all factors relevant to risk and return must be considered;<sup>18</sup> if climate change is relevant to an investment and not too remote, it must be considered.<sup>19</sup> It is not permissible for a fiduciary to bring personal or ideological views to bear on fiduciary decision-making. The Proposal makes the argument that divestment is a moral statement. That may be so, but fiduciaries cannot act on their own personal moral commitments, but it is equally true that at present, climate change denial is untenable for a reasonable fiduciary given the overwhelming scientific consensus about the causes and implications of global climate change. Accordingly, if climate change is relevant to a particular investment decision, it must be taken into account.

At the investment strategy level, pension fund fiduciaries are obligated in British Columbia, to avoid undue risk of loss, and to consider their investment strategies in a time frame commensurate with the fund's liabilities. To avoid undue risk of loss, fiduciaries of endowment funds must focus not only on 'alpha' (beating investment benchmarks) but on the conditions necessary for sustainable beta (market benchmark performance); this means that factors relevant to long term market performance are relevant to endowment fiduciaries. In calibrating investment activity to the duration of liabilities, it is noteworthy that, in the endowment context, liabilities are necessarily long-term such that the potential impacts of climate change, where sufficiently clear, may inform investment strategies.

### *The Proposal and Trustees' Fiduciary Duties*

As the Proposal itself makes clear, the climate change crisis is a "collective action problem". As mentioned above, the fact that divestment by one entity cannot, by itself, resolve the climate change crisis reduces its effectiveness as a strategy for combatting climate change. It is for this reason, based on the wording of Criterion 2, that Criterion 2 is not satisfied. However, the fact that individual divestment action (where not reciprocated collectively) may not be effective at combatting climate change is not sufficient to warrant disregarding such action as to hold otherwise implies that the law requires actors to exacerbate collective action problems, and to act in such a way as to ensure a collectively self-defeating outcome. The law requires that trustees act reasonably, in a manner capable of universalization; it does not require fiduciaries to pursue individually rational behaviour that is collectively self-defeating. This conclusion should not be read over broadly. All that the immediately foregoing implies is that the remoteness of a given course of action does not necessarily render that action fatal. Of course, the proposed course of action must still be prudent.

Given that the fiduciary standard requires adherence to what a prudent investor would do, some comfort can be taken from the fact that other universities and colleges, cities counties, and

---

behaviour, capable of being generalized and adopted by all, is more conducive to well-functioning social institutions (see: Steve Lydenberg, "Reason, Rationality and Fiduciary Duty" J. Bus Ethics (2014), 119; 35-380).

<sup>18</sup> UNEP Finance Initiative et al., "Fiduciary Duty in the 21<sup>st</sup> Century" (2015) online: [http://www.unepfi.org/fileadmin/documents/fiduciary\\_duty\\_21st\\_century.pdf](http://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf).

<sup>19</sup> Bank of England, *The impact of climate change on the UK insurance sector* (September 2015) online: <http://www.bankofengland.co.uk/prd/Documents/supervision/activities/pradefra0915.pdf>.

religious institutions, have committed to various forms of divestment, including Stanford University, the University of Glasgow and Australian National University, as noted in the Proposal.

Divestment is compatible with the fiduciary standard if alternative investments are available with a higher rate of return having regard to the relevant risk. There is, of course, an exception in cases where an investment with a lower rate of return itself advances the charitable purpose for which the endowment itself was given.<sup>20</sup> As regards the prudence of divestment, the Proposal makes the case that alternative investments can yield similar, and sometimes higher returns, while a “carbon bubble” poses a significant threat to fossil fuel investments. Both are relevant concerns and amply supported in the Proposal.

Ultimately, the Proposal is insufficient owing to its breadth. The prudence of any particular investment is to be assessed as against alternative investments, having regard to the relevant risk and measured in relation to the portfolio of investments as a whole. At the security-selection stage, investments are made on a case by case basis, rather than on an industry by industry basis. Yet the Proposal requires the fund to divest itself entirely of fossil fuel holdings. The Proposal makes no differentiation between the relative risk of different fossil fuel securities, nor to their expected performance. The Proposal also precludes the fund from some types of hedging, investing in many index funds, and investing in companies whose ambit includes but goes beyond fossil fuel extraction.

Divestment from a particular fossil fuel company, having regard to the relevant risk and return is not *prima facie* impermissible, and may be indicated as a result of a security by security analysis. Divestment from the an industrial sector, where participants invest in different types of energy assets, including some green assets, absent evidence of superior returns through alternative investments having regard to the relative risk and criteria of the different investment choices, is a much more difficult proposal that, in our view, would require a strong evidentiary and analytical basis.

## **5. There is insufficient information available to determine whether Criterion 5 has been Satisfied**

Criterion 5 provides:

### **Consistency with its other University relationships.**

Any divestment proposal should be mindful of all the University’s activities, of its public nature and of its ultimate accountability to the people of British Columbia.

The substance of Criterion 5 is unclear. We are not intimately familiar with UBC’s ongoing relationships to be in a position to opine as to whether this criterion is met. On the one hand, the Proposal makes clear that divestment is to be preferred on moral grounds. From that vantage point, it is unclear if divestment is consistent with the university's ongoing relationships and activities (such as, to accept research grants from persons or entities engaging in or benefitting

---

<sup>20</sup> See Susan N Gary, *Is it Prudent to Be Responsible: The Legal Rules for Charities that Engage in Socially Responsible Investing and Mission Investing*, 6 Nw JL & Soc Pol’y 106 (2011).

from fossil fuel extraction or to teach courses that promote the continued extraction of fossil fuels). On the other hand, this memorandum does not assess the merits of the Proposal on moral grounds but on its merits as against the articulated criteria. From that vantage point, absent evidence of some countervailing ongoing relationship militating against divestment, this criterion may be met as the Proposal makes clear divestment is aimed at benefitting the university, but also the general populace as a whole, consistent with the BC government's action to combat climate change. Moreover, as trustees of the endowment, regard has to be had with the proper course of investment conduct, not with whether there is some other inconsistent activity engaged in by the university at large. Otherwise, no action, even if beneficial, could be undertaken unless all change were undertaken by different actors with different responsibilities simultaneously.