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# Environmental, Social & Governance Law 2025 Canada

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# Environmental, Social & Governance Law 2025

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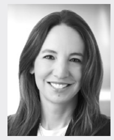
## Expert Analysis Chapters



## Q&A Chapters

# Canada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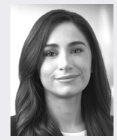
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## 1 Setting the Scene – Sources and Overview

### 1.1 What are the main substantive ESG-related regulations and who is driving the regulatory agenda in your jurisdiction?

There are a variety of environmental, social and governance (“**ESG**”)-related regulations applicable to federally and provincially incorporated companies; however, the focus of this chapter is on public companies that qualify as “reporting issuers” under applicable Canadian securities and corporate laws, with references to general Canadian corporate law and specific section references to the federal *Canada Business Corporations Act* (the “**CBCA**”).

In compliance with the CBCA, corporate directors are required to manage, or supervise the management of, the business and affairs of a company; and, in doing so, directors must comply with their fiduciary duty and duty of care. The duty of care standard requires directors to act honestly and in good faith with a view to the best interests of the company. Consistent with the Supreme Court of Canada’s decision in *BCE Inc. v. 1976 Debentureholders* (2008 SCC 69) (“**BCE**”), section 122 of the CBCA was amended to specifically provide that when acting with a view to the best interests of the corporation, directors may consider, but are not limited to, factors such as the interests of shareholders, employees, retirees and pensioners, creditors, consumers and the government, as well as the environment and the long-term interests of the corporation. When exercising their duty of care and taking corporate action that will affect stakeholders, directors should treat each stakeholder group equitably and fairly and, in resolving competing interests, the directors should evaluate and assess stakeholder interests alongside the best interests of the company with a view to creating a “better” company.

As ESG incorporation relates to the consideration of environmental, social and governance considerations in respect of a business, a director’s fiduciary duty, broadly speaking, encompasses a duty to manage and oversee material ESG-related matters relevant to the company, particularly with respect to risk management, risk mitigation and governance, which may include actively addressing certain challenges and opportunities in the context of specific environmental and social (“**E&S**”) matters. While generally director fiduciary duties have evolved over time through case law, they can also evolve through legislative amendments. Once such recent proposal was tabled in May 2024, as Bill S-285, by an independent member of the Canadian Senate of Canada. Bill S-285 proposes to amend the CBCA to provide that a corporation’s purpose is to pursue its best interests while also operating in a manner that: (a) benefits the wider society and the environment in a manner proportionate to its size and the nature of its operations; and (b) minimises any harm that the corporation causes to the wider society and the environment, with the objective of eliminating such harm. As independent member’s bills typically require broader support to move forward, it remains to be seen whether Bill S-285 will have any impact.

In Canada, the regulation of capital markets is a matter of provincial and territorial jurisdiction, and while each province and territory has its own securities laws, regulations and rules administered by a local securities regulator, these local securities regulators who form the Canadian Securities Administrators (the “**CSA**”) have adopted national instruments and policies that apply in all Canadian jurisdictions. Collectively, these securities laws, policies, rules and instruments are referred to in this discussion as the “**Canadian securities laws**”.

Substantive ESG-related requirements are prescribed by the CSA under applicable Canadian securities laws and the rules of the Toronto Stock Exchange (the “**TSX**”) and, for the most part, securities laws relating to ESG-related requirements, disclosure and best practices have been harmonised through national instruments and national policies adopted by all of the Securities Commissions. Corporate governance disclosure and best practices are governed by National Instrument 58–101 *Disclosure of Corporate Governance Practices* (the “**Corporate Governance Rule**”) and National Policy 58–201 *Corporate Governance Guidelines* (the “**Corporate Governance Guidelines**”).

By mandating corporate governance-related disclosure, which is generally to be included in an issuer’s management proxy circular, the goal of the Corporate Governance Rule is to provide greater transparency on how issuers apply various corporate governance principles. While the CSA requires issuers to disclose how they deal with certain matters, they also recognise that many corporate governance matters cannot be prescribed in a “one-size-fits-all” manner, and neither the Corporate Governance Rule nor the Corporate Governance Guidelines are intended to prescribe or restrict specific governance matters. The Corporate Governance Guidelines are thus meant to reflect “best practices” that have been formulated with desirable corporate governance principles in mind. Issuers can choose to apply or follow the best practices as set out in the Corporate Governance Guidelines, in whole or in part, depending upon their own unique circumstances, or to explain how they achieve the goals of the related corporate principles.

The "best practices" set out in the Corporate Governance Guidelines include the requirement to adopt a written code of business conduct and ethics, which applies not only to the employees but also the board of directors of the issuer. Although the content and tone of the code are left to the issuer's discretion, the Corporate Governance Guidelines recommend that the following matters be covered by the code: conflicts of interest; protection of corporate assets; confidentiality of corporate information; fair dealing with security holders and others; compliance with laws; and reporting of illegal or unethical behaviour. While these subject areas may be seen to form the core "ethical" components of an internal ESG framework, given the broad scope of matters covered by ESG, a number of social and governance matters have evolved to be covered expressly under applicable codes of conduct or ethics. These include business ethics, human rights protection, anti-harassment and workplace wellness, supply chain governance, cybersecurity and community relations, as well as anti-bribery and corruption, environmental protection, equity and inclusion. However, these are often, if not always, accompanied by more specific ESG-related policies, reports or disclosures.

A set of corporate governance-related amendments have also steadily increased prescriptive governance regulation under the CBCA, including in respect of majority voting for directors, enhanced record-keeping, detailed disclosure relating to board diversity, and a more shareholder-friendly framework for submission of shareholder proposals. Under the adopted majority voting standards, nominees for board positions must receive at least 50% of the votes cast in support of their election in order to be elected. A similar policy has been imposed by the TSX for many years, although unlike the CBCA, the TSX policy affords discretion to boards to permit a director who fails majority vote to continue to serve in exceptional circumstances. Shareholders of CBCA companies may submit proposals, and CBCA Issuers are required to disclose in their management proxy circular, closer to the date of the corporation's annual meeting of shareholders – the final date by which a shareholder proposal must be submitted for the following annual meeting of shareholders.

The TSX also substantively regulates governance through various policies or restrictions. These include requirements relating to director independence, as well as restrictions against staggered boards and slate voting through the requirement for annual elections for individual directors. As noted above, the TSX also requires its listed companies to adopt majority voting policies, which require voluntary resignation by directors who fail to garner a majority of "for" votes in director elections, although they have been supplanted, to an extent, given recent changes in corporate law that have a similar effect.

In efforts to provide further clarity and facilitate consistency and comparability among issuers, in October 2021, the CSA published the CSA Consultation Climate-related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107 *Disclosure on Climate-related Matters* ("**NI 51–107**"), a series of securities regulations meant to introduce disclosure requirements regarding climate-related matters for reporting issuers (other than investment funds). Governance-related proposed climate disclosure would be included in a reporting issuer's management information circular, and proposed climate disclosure related to strategy, risk management, risk metrics, and targets would be included in the issuer's Annual Information Form ("**AIF**").

Shortly after the CSA proposal of NI 51–107 in October 2021, the International Sustainability Standards Board (the "**ISSB**") formed a sustainability standard-setting body associated with the International Financial Reporting Standards (the "**IFRS**") Foundation, and subsequently released two sustainability disclosure standards in June 2023. As a result, the CSA largely undertook to reconsider their approach in light of the ISSB developments and are actively evaluating implementation plans for Canadian public companies. On March 13, 2024, the Canadian Sustainability Standards Board ("**CSSB**") released proposed Canadian sustainability disclosure standards, using the ISSB Standards as a foundation. These are discussed further in question 1.2 below.

One of the most noteworthy developments in ESG-related regulations has been the enactment of the *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, which came into force on January 1, 2024 (the "**Modern Slavery Act**"). The Modern Slavery Act applies to prescribed Canadian "entities" that produce, sell, or distribute goods in Canada, import foreign goods into Canada or control entities that do, requiring them to produce annual public reports about their corporate structure and supply chains that detail the company's actions towards eliminating forced labour and child labour. Specifically, Canadian entities cover a corporation or a trust, partnership or other unincorporated organisation that either: (1) is listed on a Canadian stock exchange; or (2) has a place of business in Canada, does business or has assets in Canada and that meets at least two of the three following size requirements based on consolidated financial statements:

- has at least CA$20 million in assets;
- generated at least CA$40 million in revenue; or
- employs an average of at least 250 employees.

The legislation also amends the *Customs Tariff* to prohibit the importation of goods produced by either forced or child labour. The annual report must be filed with the Minister of Public Safety and Emergency Preparedness and published on the entity's website before May 31 of each year. Persons and entities that fail to comply with certain provisions of the Modern Slavery Act, including a failure to file and publish their report, are guilty of an offence punishable on summary conviction and liable to a fine of no more than CA$250,000. Further, the Modern Slavery Act extends liability to an entity's directors, officers, agents and mandataries to the extent that they directed, authorised, assented to, acquiesced in or participated in the commission of an offence.

A look at the reports tabled by Canadian companies in accordance with the Modern Slavery Act as of May 31, 2024, reveals that 87% have supply chain policies and due diligence processes in place to address forced labour and child labour (Millani, *Millani's 8th Annual ESG Disclosure Study: A Canadian Perspective,* October 2024).

The basic approach taken by Canada follows that of the UK, California, and Australia, by requiring entities to focus their disclosure on the steps they are taking to ensure that forced labour and child labour are not present in their supply chains. This "reporting" approach is less demanding than the "diligence" approach underlying the French and German legislation, which requires entities to actively investigate their suppliers and to report on the results of those investigations. However, unlike some other jurisdictions, Canada also requires that a report addressing a list of specified topics be filed with the government for publication on a searchable government website.

### 1.2 What are the main ESG disclosure regulations and how have they evolved during the past 12 months?

Reporting issuers are subject to specific reporting requirements in periodic disclosure documents, which are required to be filed under applicable Canadian securities laws. These include Financial Statements (in accordance with the IFRS), Management's Discussion & Analysis ("**MD&A**", under Form 51–102 F1), AIFs (under Form 51–102 F2), and Information Circulars (under Form 51–102 F5), which include Executive Compensation (under Form 51–102 F6), and Disclosure of Corporate Governance Practices (under Forms 58–101 F1 and F2).

In addition to these periodic disclosure requirements, reporting issuers are also required to make timely disclosure of material changes (under Form 51–102 F3) and, under applicable TSX Rules, timely and accurate disclosure of material information. These general periodic and timely disclosure requirements encompass various disclosures relating to ESG issues under Canadian securities rules, and the CSA encourage reporting issuers to demonstrate ESG considerations in their applicable disclosure filings. Some of these requirements are discussed in further detail below.

Pursuant to the Corporate Governance Rule and Form 58–101 F1 *Corporate Governance Disclosure* ("**Form 58–101 F1**"), reporting issuers are required to disclose certain prescribed information relating to board and committee duties and responsibilities as well as board independence, composition, education, and board and committee self-assessments (the requirements of which differ among venture companies and those listed on the TSX or other non-venture exchanges). While these requirements have remained relatively static since inception, they were substantively expanded to include prescribed disclosure with respect to the representation of women on boards of directors, in the director identification and selection process, and in executive officer positions (the "**Diversity Disclosure**").

Generally, the Diversity Disclosure follows a "comply or explain" model, which does not require issuers to adopt any particular form of policy with respect to board appointments and the appointment of senior management. Rather, the approach provides flexibility and allows issuers to determine the considerations and policies with respect to board nominations and the appointment of senior management that are appropriate to their particular circumstances.

Under these rules, an issuer is required to include disclosure as set out in Form 58–101 F1 in its management information circular any time that the issuer solicits a proxy from a security holder for the purpose of electing directors to its board of directors (or equivalent).

Under Form 58–101 F1, each TSX-listed reporting issuer to whom the Corporate Governance Rule applies is required to disclose the following:

- Whether the board has adopted term limits for directors or other mechanisms for board renewal, and, where adopted, a description thereof.
- Whether the issuer has adopted a written policy relating to the identification and nomination of women directors, and, where adopted, a summary of its objectives and key provisions, the measures taken to ensure that the policy has been effectively implemented, annual and cumulative progress by the issuer in achieving the goals of the policy and whether, and if so, how the board or its nominating committee measures the effectiveness of the policy.
- Whether, and if so, how the board or nominating committee considers the level of representation on the board in identifying and nominating candidates for election or re-election to the board.
- Whether, and if so, how the issuer considers the level of representation of women in executive officer positions when making executive officer appointments.
- Whether the issuer has adopted targets for women on the board and in executive officer positions, and, if adopted, disclosure of the target and the annual and cumulative progress of the issuer in achieving such target(s).
- The number and proportion (as a percentage) of directors on the issuer's board and of executive officers of the issuer and its major subsidiaries who are women.
- Where an issuer has not adopted any of the components described above (i.e., term limits, policies, targets) or does not consider the representation of women on its board or among its executive officers in identifying candidates for such positions, the issuer must disclose why it has not done so.

Under the Corporate Governance Rule and Corporate Governance Guidelines, the CSA may periodically review compliance with these requirements and may order prospective and/or corrective disclosure, but also have the authority to enforce these through other enforcement mechanisms.

While the Corporate Governance Rule focuses on gender representation, amendments to the CBCA that came into force in 2020 expand annual disclosure requirements respecting term limits, diversity policies, and statistics regarding representation of women to include Aboriginal peoples, persons with disabilities and members of visible minorities.

To assist CBCA-incorporated issuers in addressing the CBCA disclosure requirements, Innovation, Science and Economic Development Canada ("**ISED**") have published guidelines intended to encourage more consistent Diversity Disclosure. Notably, corporations are encouraged to disclose information in tabular format, separate disclosure with respect to boards and senior management, and specifically indicate timelines for targets. CBCA Issuers are reminded that they must also submit this information directly to Corporations Canada in the prescribed manner.

In 2024, ISED published Canada's fourth annual report on the diversity of boards and senior management of federal distributing corporations, encompassing a review of 526 distributing corporations (the "**CBCA Issuers**"), namely the *Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations 2023 Annual Report*. According to the report, 59% of these corporations have at least one woman on the board of directors, women hold 22% of board seats, and 22% have adopted targets for the representation of women on their boards. Similarly, in October 2024, the CSA also published Multilateral Staff Notice 58–317, *Review of Disclosure Regarding Women on Boards and in Executive Officer Positions (Year 10 Report)*, which summarises the review of the disclosure of 574 TSX-listed issuers with year-ends between December 31, 2023, and March 31, 2024 (the "**TSX Issuers**"). According to Staff Notice 58–317, 90% of TSX Issuers reviewed had at least one woman on their board, 29% of board seats were held by women, 72% had at least one woman in an executive officer position and 44% had adopted targets for representation of women in on their board.

The CSA have also published guidance under Staff Notice 51–333 *Environmental Reporting Guidance* to provide insight on satisfying existing continuous disclosure requirements with respect to environmental concerns.

In the context of a wide range of environmental issues, Staff Notice 51–333 focuses on the following types of disclosure:

- *Environmental Risks and Related Matters*. The five key disclosure requirements in National Instrument 51–102 *Continuous Disclosure Obligations* that relate to environmental matters are: environmental risks; trends and uncertainties; actual and potential environmental liabilities; asset retirement obligations ("**AROs**"); and the financial and operational effects of environmental protection requirements, including the costs associated with these requirements:

- Environmental Risks: Issuers are required to disclose risk factors relating to the issuer and its business under item 5.2 of Form 51–102 F2. These risks include litigation risks, physical risks, regulatory risks, reputational risks, and risks relating to business model.
- Trends and Uncertainties: The MD&A should include a narrative explanation of material information not fully reflected in the financial statements relating to applicable trends and uncertainties, including those that have affected or may affect the financial statements.
- Environmental Liabilities: These can arise from past or ongoing business activities that could impact the environment or involve potential environmental liability due to ongoing or future business activities. With a potential liability, an issuer may be able to prevent liability by changing practices or adopting new practices to reduce negative impacts on the environment.
- AROs: Item 1.2 of Form 51–102 F2 requires disclosure regarding an issuer's financial condition, results of operations and cash flows including disclosure on commitments or uncertainties that are reasonably likely to affect the issuer's business. Assets are considered retired if they are sold, abandoned, recycled or otherwise disposed of. An ARO is a requirement to perform a procedure rather than a promise to pay cash; as such, legal obligations resulting from the retirement of an asset could manifest.
- Financial and Operational Effects of Environmental Protection Requirements: An issuer should disclose financial and operational effects of environmental protection requirements under item 5.1(1)(k) of Form 51–102 F2, including on capital expenditures, earnings, and competitive position.

- *Environmental risk oversight and management*. Two key sets of disclosure requirements provide insight into a reporting issuer's oversight and management of environmental risks: environmental policies implemented by the issuer; and the issuer's board mandate and committees. In relation to environmental policies, a reporting issuer should explain the purpose of its environmental policies and the risks they are designed to address, and evaluate and describe the impact the policies may have on its operations. For an issuer's board mandate and committees, the reporting issuer should disclose the board of directors' (or any delegate committee's) responsibility for the oversight and management of environmental risks in a manner that is meaningful to investors.
- *Forward-looking information requirements*. Issuers are advised that disclosing goals or targets with respect to greenhouse gas emissions or other environmental matters may be considered forward-looking information or future-oriented financial information and would be subject to the disclosure requirements generally applicable to such information, including requirements to identify material assumptions and risks.
- *Governance structures around environmental disclosure*. Staff Notice 51–333 provides that a meaningful discussion of environmental matters in an issuer's MD&A and AIF is critical in ensuring fair presentation of the issuer's financial condition. Issuers should therefore consider discussing which environmental matters are likely to impact the business and operations in the foreseeable future and the potential magnitude of anticipated environmental risks and liabilities. An issuer should also have adequate systems and procedures to provide structure around its disclosure of environmental matters, including disclosure controls. The CSA also encourage voluntary reporting and disclosure responsive to third-party frameworks as a means to provide additional information to investors outside of continuous disclosure requirements.

In 2019, the CSA published the CSA Staff Notice 51–358 Reporting of Climate Change-related Risks aiming to improve issuer disclosure, to address popularized reports on climate change disclosure and environmental governance topics and to respond to increased investor interest in climate change-related risks, particularly among institutional investors. The Notice highlights the respective roles of management and the board (and audit committee) in strategic planning, risk oversight and the review and approval of an issuer's annual and interim regulatory filings; and while the Notice is intended to be a guidance tool the following practices are suggested for an issuer's board of directors and management:

- Ensure that the board of directors and management have, or have access to, appropriate sector-specific climate change-related expertise to understand and manage climate change-related risk.
- Establish and design disclosure controls and procedures to collect and communicate climate change-related information to support management in assessing materiality and providing timely disclosure.
- Consider the level of integration of climate change-related risks and opportunities in the issuer's strategic plan.
- Assess whether the issuer's risk management systems and methodology, including business unit responsibility, appropriately identify, disclose and manage climate change-related risks.
- Review the CSA's select questions for boards and management designed to inform the assessment of climate change-related risk including whether the board: (a) provided appropriate resources to help members understand sector-specific climate change-related issues; (b) was comfortable with management's methodology used to categorise and assess the nature of climate change-related risks and the materiality of such risks; and (c) considered the effectiveness of the disclosure controls and procedures implemented relative to the climate change-related risks.

The Notice emphasises that climate change-related risks are mainstream business issues with the potential to induce long term financial impacts. Furthermore, due. to their complex nature and longer evaluation horizons boards and management should take appropriate steps to understand and assess the materiality of climate change-related risks to their business sooner than later as climate change-related risks may evolve differently from other business risks.

For purposes of assessing materiality, the Notice also provides certain considerations specific to climate change-related risk including:

- **Timing** – Issuers should review design their materiality assessments to include short-term and long-term risks.
- **Measurement** – Boards and management should consider the current and future financial impacts of material climate change-related risks on the issuer's assets, liabilities, revenues, expenses and cash flows over the short, medium and long term. Where practicable,

issuers should quantify and disclose the potential financial and other impact(s) of climate change-related risks, including their magnitude and timing.

- **Categorisation of risk and potential impact** – The range of climate change-related risk and its potential financial, operational and business impact, may vary depending on the level and scope of the assessment so consideration should be given to:
  - the physical risks of climate change, including acute (i.e., event-driven) or chronic changes in resource availability and climate patterns, including their impacts on sourcing, safety, supply chains, operations and physical assets;
  - the transitional risks arising from a gradual change to a low-carbon environment, including reputational risks, market risks, regulatory risks, policy risks, legal risks and technology risks; and
  - prospective opportunities resulting from efforts to mitigate and adapt to climate change.

With respect to specific issues related to environmental compliance, risks and opportunities, the ISSB released its first two sustainability disclosure standards, IFRS S1 and IFRS 2 (collectively, the "**ISSB Standards**") on June 26, 2023. These standards are designed to ensure that entities provide sustainability-related information alongside financial statements in the same reporting package and for the same reporting period. IFRS S1 provides a set of disclosure requirements designed to enable companies to communicate to investors about the sustainability-related risks and opportunities they face over the short, medium, and long term. This includes the approach, governance processes, controls, and procedures an entity uses to monitor and manage sustainability-related risks and opportunities, the processes an entity uses to identify, assess, prioritise and monitor sustainability-related risks and opportunities and an entity's performance in relation to sustainability-related risks and opportunities. IFRS S2 requires disclosure of climate-related risks and opportunities that could reasonably be expected to affect an entity's prospects. Climate-related risks include both physical risks (i.e., risks that arise from weather-related events such as storms, floods or droughts) and transition risks (i.e., policy, legal, technological, market or reputational risks that arise from efforts to transition to a lower-carbon economy). These are discussed in further detail below.

While regulatory bodies continue to consult on the adoption of standards for investor-focused ESG disclosures, recent amendments to the *Competition Act* introduce significant changes to its deceptive marketing provisions that directly impact the potential landscape of ESG disclosure.

In June 2024, Bill C-59 amended the *Competition Act* and introduced two new provisions to section 74.01 to combat greenwashing in the marketplace. These provisions target environmental and sustainability-related misrepresentations made to the public for the purpose of promoting, directly or indirectly, any product or business interest: (i) claims about a product's environmental, ecological, or social benefits in respect of climate change must be based on adequate and proper testing (section 74.01(1)(b.1)); and (ii) any representations about the environmental or ecological benefits of a business or business activity must be based on adequate and proper substantiation that is consistent with internationally recognised methodology (section 74.01(1)(b.2)). The term "internationally recognised methodology" is undefined, but the Senate Committee on National Finance has indicated that the term includes methodologies used by the European Union and federal and other Canadian best practices, as well as methodologies from standard-setting bodies such as the ISSB which is commonly used for climate-related disclosures.

The new changes represent the Competition Bureau's priority shift towards the green economy and the rise of six-resident complaint applications over the last few years. A significant portion of the complaints the Competition Bureau receives involve general or forward-looking claims about a business or brand as a whole (*Brief to the House of Commons Standing Committee on Finance*, March 2024). The *Competition Act* already contains a general provision under section 74.01(1)(a) restricting materially false and misleading representations, which is not specific to particular sectors, industries or types of claims and does not prohibit aspirational claims. While the existing general provision prohibiting material misrepresentations captures claims about a business or a brand as a whole, proving materiality can be challenging because the burden is on the party alleging misrepresentation. The new greenwashing provisions do not have these kinds of constraints and are most likely to impact forward-looking ESG reporting.

The Competition Bureau's latest guidance on greenwashing cautions businesses that making claims about the future – such as greenhouse gas emissions or achieving carbon neutrality – will be at a higher risk of greenwashing if the general impression they convey is aspirational rather than factual (Competition Bureau, *The Deceptive Marketing Practices Digest – Volume 7*, June 2024). Despite the Competition Bureau taking a stronger stance on greenwashing, no penalties or settlements have yet occurred under the new provisions. Private litigants are anticipated to play a significant role in shaping the interpretation of the new greenwashing provisions under the *Competition Act* once the upcoming provision allowing private parties access to the Competition Tribunal comes into effect on June 25, 2025.

### 1.3 What voluntary ESG disclosures, beyond those required by law or regulation, are customary?

Depending on the business and industry of the reporting issuer and its specific shareholder or investor focus, there are a number of voluntary ESG-related disclosures that issuers may provide. These are impacted or skewed to a certain extent by the prevalence of resource issuers in Canadian capital markets. As such, voluntary disclosures are often focused on the environmental impact of the issuer's operations, including stewardship and sustainability, emissions reduction, water use and management, supply chain governance and asset retirement or reclamation. However, there has also been an increasing focus on governance and social issues, including community relations, health and safety, human rights and diversity. Voluntary corporate sustainability reporting often includes disclosure relating to a company's environmental, social, and economic priorities, performance and impacts, governance and implementation of how these priorities are managed by an organisation, and has a broad focus on sustainability reporting to a broader group of stakeholders as opposed to a primary focus on investors and financial analysts. A survey of the disclosure practices of the S&P/TSX Composite Index constituents indicates that 73% of companies released a sustainability report (or ESG report) in 2023, while corporate S&P/TSX 60 issuers with dedicated ESG reports remained at 85% in 2023 (Millani, *Millani's 8th Annual ESG Disclosure Study: A Canadian Perspective,* October 2024). Furthermore, most S&P/TSX Composite Index issuers that produce a sustainability report refer to the TCFD framework for their disclosure of climate-related topics. In this respect, it is interesting to note that a large proportion of those issuers disclose Scope 1 and Scope 2 emissions, with Scope 3 emissions disclosure also increasing.

### 1.4 Are there significant laws or regulations currently in the proposal process?

As noted above, the Canadian Federal Government has recently expanded disclosure on board and executive composition disclosure beyond gender. Further amendments have also been adopted under the CBCA that will require prescribed corporations to develop an approach with respect to the remuneration of the directors and members of senior management, and hold an annual, non-binding vote on such approach (generally referred to as a "say-on-pay" resolution). As is typical for "say-on-pay" votes, the results of the vote are required to be disclosed but are not to be binding on the corporation. Additional amendments will require disclosure of "the recovery of incentive benefits or other benefits", more commonly referred to as clawbacks, on an annual basis. Note that the coming into force of these amendments is tied to the implementation of corresponding regulations. Accordingly, in early 2021, Corporations Canada launched public consultations on proposed regulations under the CBCA related to such recent amendments. The results of the consultations are being analysed and there will be an opportunity for stakeholder comment if regulations are proposed (Corporations Canada, 2024–2026 Forward Regulatory Plan).

While it remains to be seen when the foregoing amendments will take effect, in October 2024, the federal government announced its intention to amend the CBCA to mandate climate-related financial disclosures for large, federally incorporated private companies. The amendment being contemplated purports to support investors' understanding of how large businesses are thinking about and managing risks related to climate change, and ensuring that capital allocation aligns with the realities of a net-zero economy. In the announcement, the Canadian government indicated that it would launch a regulatory process to determine the substance of the disclosure requirements and the size of private federal corporations subject to them. In any case, small and medium-sized businesses would not be subject to the requirements, but the government remarked that it was considering ways to encourage those businesses to voluntarily release climate disclosures. No specific guidelines have been issued yet to determine what constitutes a "small or medium-sized business".

Consistent with the Ontario Taskforce's recommendation that TSX-listed companies adopt written policies that "expressly addresses the identification of candidates who self-identify as women, black, indigenous and people of colour ("**BIPOC**"), persons with disabilities or those within the LGBTQ+ community during the nomination process", the CSA proposed amendments in 2023 to expand the current requirement to focus on diversity beyond gender. This included disclosure on aspects of diversity beyond the representation of women, with the intention to elicit meaningful insight about how non-venture issuers identify and evaluate new candidates for nomination to the board, how they address board renewal, and how diversity is incorporated into those considerations. It is also intended to provide investors with decision-useful information that enables them to better understand how diversity ties into an issuer's strategic decisions and encourages issuers to better articulate their corporate governance practices related to board nominations, board renewal and diversity. Notably however, members of the CSA have published alternative proposals. One group favours a more flexible approach that allows issuers to determine which "identified groups" are relevant to their operations, accompanied by narrative disclosure on diversity objectives and mechanisms. The other group, led by the Ontario Securities Commission, advocates for disclosure in respect of prescribed "designated groups" and more prescriptive and standardised disclosure imposed on all issuers (Notice and Request for Comment on amendments to Form 58–101F1 Corporate Governance Disclosure of National Instrument 58–101 *Disclosure of Corporate Governance Practices* and proposed changes to National Policy 58–201 *Corporate Governance Guidelines* pertaining to director nomination process, board renewal and diversity, April 2023).

Building on these ISSB Standards discussed above, the CSSB released its proposed Canadian sustainability disclosure standards on March 13, 2024. Using IFRS S1 as a foundation, the CSSB developed the Proposed Canadian Sustainability Disclosure Standard 1, *General Requirements for Disclosure of Sustainability-related Financial Information* ("**CSDS 1**"). Similarly, based on IFRS S2, it developed the Proposed Canadian Sustainability Disclosure 2, *Climate-related Disclosures* ("**CSDS 2**"), with certain modifications to address Canadian-specific circumstances (collectively, the "**CSSB Standards**").

CSDS 1, like the IFRS S1, requires entities to disclose material information about sustainability-related risks and opportunities that could reasonably be expected to affect cash flows, access to finance, or cost of capital over the short, medium, or long term. It is focused on disclosures useful to primary users of general-purpose financial reports in making decisions related to providing resources to the entity. Information is material if omitting, misstating or obscuring information could reasonably influence the decisions of primary users of general-purpose financial reports, including financial statements and sustainability-related financial disclosures, about a reporting entity.

Similarly, CSDS 2 requires entities to disclose information about its climate-related risks and opportunities that could be reasonably expected to affect the entity's prospects. In line with IFRS S2, climate-related risks in this context, includes both physical risks and transition risks.

The CSSB also recently announced in late October of 2024 that the CSSB Standards, based on the global baseline standards of the ISSB and modified for the Canadian context, are expected to be finalised and issued in December 2024. In conjunction with the development of the CSSB Standards, the CSSB engaged approximately 3,900 individuals and over 700 organisations, incorporated feedback from a wide range of industries, regions and groups, including indigenous respondents in the commitment to further deepen consultation efforts, and considered the need for balance between global standards and Canadian-specific needs, including costs considerations, data availability, data quality, timeliness, capacity, competitiveness, small to medium enterprise limitations, and Canadian regulatory requirements.

Important developments are underway that will impact how greenwashing is enforced under the newly enacted provisions of the *Competition Act* discussed above. Shortly after the new greenwashing provisions came into law on June 20, 2024, the Competition Bureau launched a public consultation about the provisions and invited comments from interested parties until September 27, 2024. Feedback from the Competition Bureau's public consultation on the new greenwashing provisions will shape its anticipated guidance on environmental claims relating to business activities. A draft of this guidance is anticipated to be available at the end of 2024 for public comment, followed by its final version sometime in early 2025. This guidance will be a key indicator of the Competition Bureau's priorities and enforcement approach to the greenwashing provisions, as well as its views on public policy interests. This, in turn, is likely to help inform how the Competition Tribunal may grant leave to private parties trying to challenge environmental representations and disclosures under a new expanded right that will take effect after June 20, 2025. The expansion of private access rights to the Competition Tribunal marks a significant shift in Canada's competition enforcement framework, which has traditionally been enforced solely by the Competition Bureau. With this change, private litigants will be able to initiate legal proceedings by seeking leave from the Competition Tribunal, provided it is in the "public interest". However, there is currently no clear guidance on what constitutes a public interest or the threshold that must be met.

Lastly, in October of 2024, the Government of Canada announced its support for the development of voluntary Made-in-Canada sustainable investment guidelines to aid the categorisation of investments based on objective eligibility criteria consistent with the goal of reaching net-zero emissions by 2050 and limit global temperature rise to 1.5°C above pre-industrial levels.

The initial Canadian taxonomy will have a primary focus will on the electricity, transportation, buildings, agriculture and forestry, manufacturing, and extractives, including mineral extraction and processing, and natural gas industry sectors with secondary and tertiary priority sectors to follow. The taxonomy is expected to include guiding principles, defining green and transition investments, priority sectors, company-level expectations and governance and funding. Once completed, the Canadian taxonomy will not be mandated, but it will be available to financial institutions, lenders, and companies at large to be used on a voluntary basis.

### 1.5 What significant private sector initiatives relating to ESG are there? To what extent are private companies reporting on ESG issues?

ESG integration into private sector investing decisions continues to evolve. While responsible investing ("**RI**") as a component of risk mitigation is not new, there is a growing transition to focus on RI as an integral component of the value generation analysis. This correlates to growing pressure from the private sector for better standardisation and benchmarking of both disclosures and performance. As a result, the support for development of evaluation standards, rating indexes, and research organisations dedicated to evaluating ESG strategies, performance, responsibilities and risks, such as the Carbon Disclosure Project ("**CDP**"), the Global Reporting Initiative ("**GRI**"), the Dow Jones Sustainability Index, the ISS ESG, the MSCI ESG Index, and Sustainalytics began to develop. This also correlated to proxy advisory firms, including the Institutional Shareholder Services ("**ISS**") and Glass Lewis ("**GL**"), as well as shareholder groups such as the Canadian Coalition for Good Governance placing a heightened emphasis on ESG factors for the upcoming proxy seasons. The publication of the two inaugural standards published by ISSB regarding sustainability and climate-related disclosure is a notable development in this respect for issuers as the standards are meant to provide a global reporting framework that seeks to meet investors' and market participants' expectations.

## 2 Principal Sources of ESG Pressure

### 2.1 What are the views and perspectives of investors and asset managers toward ESG, and how do they exert influence in support (or in opposition) of those views?

Asset managers across several sectors are focused on the ESG performance, rating and/or evaluation of issuers, with many having specific requirements with respect to expectations or ratings, particularly regarding environmental stewardship and management, and thus require reports or disclosure responsive to these concerns in order to inform their investment decisions. However, there are a range of approaches taken to apply their principles to investing decisions, which may include the implementation of screens or exclusions through the restriction of investments in certain sectors (such as tobacco or weapons manufacturing), to full ESG integration into investment analysis. As the correlation between ESG and value-generation becomes increasingly recognised, the implementation of full ESG integration becomes more widely accepted. Interestingly, the ESG pushback in the U.S. has not translated materially into changes in Canadian institutional investors' investment approach, with almost 94% of 37 asset owners and managers representing CA$5.4 trillion in assets under management surveyed by Millani staying the course (Millani, *Semi-Annual ESG Sentiment Study of Canadian Institutional Investors*, September 9, 2024). Asset managers also exert influence through direct and indirect engagement, including through the implementation of proxy voting policies and policy-based voting; and as a result, Canadian institutional investors have generally reviewed their voting and engagement policies to increase the focus on ESG risks.

The Canada Pension Plan Investment Board and Public Sector Pension ("**PSP**") Investments are among some of the global leaders participating in the ESG Data Convergence Initiative with the aim of advancing an initial standardised set of ESG metrics and a mechanism for comparative reporting. Initiated by the California Public Employees' Retirement System and the global investment firm Carlyle, the collaboration efforts of the ESG Data Convergence Initiative are intended to consolidate and streamline the private equity industry's approach to collecting and reporting ESG data to create a critical mass of material, performance-based, comparable ESG data from portfolio companies. A primary goal of the initiative is to provide opportunities for deeper analysis and correlative studies between ESG factors and financial outcomes, in the hopes of ultimately resulting in more meaningful benchmarking and highlighting the more critical ESG issues with the potential for greater impact. The ESG Data Convergence Initiative examines the following initial six metrics: Scopes 1 and 2 greenhouse gas emissions; renewable energy; board diversity; work-related accidents; net new hires; and employee engagement.

Recently, in December 2023, under the auspices of Finance Montréal, a group of influential asset managers and investors signed the *COP28 Open Letter – Announcement related to ISSB Standards* where they stressed the importance of advancing the collective use of the standards set by ISSB as a global baseline for sustainability reporting, including climate-related issues.

### 2.2 What are the views of other stakeholders toward ESG, and how do they exert influence in support (or in opposition) of those views?

Stakeholder views on responsible investment and ESG remain strong, with a growing focus on biodiversity and greenwashing. In a 2023 survey conducted by the Responsible Investment Association (the "**RIA**"), 65% of respondents were interested in responsible investment, although indicating a decline in interest since 2021 when 73% indicated an interest (Responsible Investment Association, *2023 RIA Investor Opinion Survey – Canadian Investor Perspectives on Responsible Investing, Greenwashing & Artificial Intelligence*). The topic of biodiversity is also on the rise, being listed as one of the top three ESG issues by Canadian investors representing CA$4.5 trillion of assets under management (Millani, *Semi-Annual ESG Sentiment Study of Canadian Institutional Investors Canadian Institutional Investors*, 2024). This translates into the integration of nature-related considerations in investment decision-making processes by close to two-third of those investors. The Kunming-Montreal Global Biodiversity Framework provides support for this trend, aided by the Taskforce on Nature-related Financial Disclosures ("**TNFD**") guidance. Issuers are paying heed to investors' interest regarding biodiversity with 55% of reports by S&P/TSX Composite Index constituents including relevant metrics on this topic ((Millani, *Millani's 8th Annual ESG Disclosure Study: A Canadian Perspective,* October 2024).

Investors' concerns about biodiversity loss are also accompanied by widespread concerns about greenwashing which presents challenges for individual investors, their advisors and fund manufacturers. Greenwashing was defined as false information that is distributed by an organisation to make it look more environmentally responsible than it actually is; and 68% of the institutional investors surveyed by RIA in 2023 ranked "mistrust/concerns about greenwashing" as the top perceived deterrent to the growth of responsible investment ("**RI**").

In 2023, a management-supported proposal at Cenovus Energy, requiring that the company publish a report regarding its lobbying and public policy advocacy alignment *vis-à-vis* its net zero goal, received 99% support. In 2024, the number of shareholder proposals requesting say-on-climate votes doubled since 2023 with targeted companies now including non-financials proposals (ISS, *In Focus: 2024 Canada Proxy Season Recap*, August 12, 2024) as further discussed in question 2.7 below.

### 2.3 What are the principal regulators with respect to ESG issues, and what issues are being pressed by those regulators?

Leaving aside the Competition Bureau, which has the power to review, investigate and enforce environmental claims, the principal regulators of ESG issues are the CSA, the TSX, and the Canadian Federal Government through amendments to the CBCA. The Office of the Superintendent of Financial Institutions ("**OSFI**") also acts as regulator for federally regulated financial institutions ("**FRFIs**"). These regulators are focused on proper governance and stewardship, board and executive gender diversity with a shift towards diversity more generally, and E&S issues, including environmental and climate change-related risks, risk management and disclosure.

In March 2024, the CSA published a revised version of *Staff Notice 81-334 ESG-Related Investment Fund Disclosure* (the "**Staff Notice**"), initially published in 2022, which seeks to clarify and explain how existing regulatory requirements apply to ESG-related fund disclosure, without creating any new obligations. Specifically, the Staff Notice provides guidance on how existing disclosure regulations apply to ESG-related funds, including in respect of the following:

- **Investment objectives and fund names**. According to the Staff Notice, to prevent greenwashing, the fund's name and description of its investment objectives should "accurately reflect the extent to which the fund is focused on ESG".
- **Fund types**. The CSA note that while not required, a fund may want to, where relevant, identify itself as a fund that focuses on ESG in addition to its primary fund type (i.e., an ESG Canadian equity fund, ESG Global equity fund, etc.).
- **Disclosure of investment strategies**. The requirement that a fund's prospectus disclose its investment objectives and processes applies to ESG-related objectives and strategies. As such, a fund is required to provide adequate disclosure about the ESG-related aspects of its investment strategies and selection process.
- **Proxy voting and shareholder engagement**. Where a fund uses proxy voting as an ESG investment strategy, it must include a summary of the ESG aspects of the proxy voting policies and procedures. While funds are not required to disclose their shareholder engagement policies, the Staff Notice encourages funds to provide transparency with regard to the scope and nature of shareholder engagement as an ESG strategy.
- **Risk disclosure**. Funds should consider whether there are material risks associated with its ESG strategies and disclose where applicable. Such ESG-related risks may include concentration risk and the risk of underperformance due to the fund's ESG focus or reliance on third-party ESG ratings.
- **Suitability**. According to the CSA, a fund's suitability statement should "accurately reflect the extent of the fund's focus on ESG" and, where applicable, the specific aspects of ESG on which the fund focuses. Where appropriate, the suitability statement may state that the fund is suitable for ESG-focused investors, provided such statement accurately reflects the ESG aspects of that fund.
- **Continuous disclosure**. A fund's annual and interim management reports of fund performance must, among other things, disclose how the fund's portfolio composition, and changes to composition, relate to the fund's ESG-related investment strategies and objectives. Further, as funds with ESG-related objectives will also aim for ESG-related outcomes, the Staff Notice encourages funds to disclose performance indicators towards achieving these outcomes.
- **Sales communications**. CSA Staff consider sales communications which fail to accurately reflect the extent to which a fund is focused on ESG, as well as the particular ESG aspect(s) the fund focuses on, to be misleading. According to the Staff Notice, examples of misleading disclosure may include suggesting that a fund is focused on ESG when it is not, misrepresenting the extent and nature of the fund's use of ESG strategies, and making inaccurate claims about the fund's ESG performance or results. Further, guidance is provided related to accurately providing fund-level ESG ratings, scores or rankings.
- **ESG-related terminology**. Funds using ESG-related terms that are not commonly understood should clearly explain the terms in plain language.

Since the publication of the Staff Notice, there has been a significant increase in the number of investment fund managers ("**IFMs**") that include disclosure about ESG factors and strategies in the prospectuses of their funds. However, for many of these funds, the consideration of ESG factors plays only a limited role in the fund's investment process with some only considering ESG factors as one of the many inputs in their risk management process. The revised CSA Staff Notice provides guidance with respect to those limited consideration funds, in particular regarding the disclosure in the prospectus of the limited role that the consideration of ESG factors and/or use of ESG strategies plays in the fund's investment process.

The Guideline B-15: *Climate Risk Management* sets out OSFI's expectations for the management of climate-related risks for FRFIs, and is OSFI's first prudential framework that is climate sensitive and recognises the impact of climate change on managing risk in Canada's financial system. In March 2024, OSFI updated Guideline B-15 to align with IFRS 2, incorporating several of IFRS 2's key elements with respect to reporting on governance, strategy, risk management, and metrics and targets. OSFI also introduced new Climate Risk Returns that will collect standardised climate-related data on emissions and exposures from FRFIs. This return is effective for fiscal year-end 2024 for domestic systemically important banks and internationally active insurance groups headquartered in Canada, and for all other in-scope FRFIs, it will take effect at fiscal year-end 2025.

### 2.4 Have there been material enforcement actions with respect to ESG issues?

Reporting issuers are subject to specific requirements relating to disclosure of material information as discussed above, including timely disclosure of material changes. In addition to exposure to sanctions and regulatory enforcement for failing to comply with these disclosure obligations and any potential enforcement actions from the Competition Bureau, issuers also risk secondary market liability for actions relating to misrepresentations and failure to make timely disclosure. With respect to ESG matters, particular areas of risk include inadequate assessment and/or disclosure of the impact of ESG factors on operations, particularly in respect of environmental and climate change-related liabilities, including changes to applicable regulations. As part of the preparation of Staff Notice 81–334 discussed above, the CSA conducted a review of 32 funds managed by 23 fund managers. The review identified a number of issues regarding the disclosure of investment strategy, proxy voting strategy and changes to portfolio composition. Those findings led the CSA to conclude that clarification was needed on how existing disclosure requirements apply to ESG-related funds in order to reduce the potential for greenwashing, whereby a fund's disclosure or marketing intentionally or inadvertently misleads investors about the ESG-related aspects of the fund. Consequently, the CSA updated the Staff Notice 81-334, as noted above, to clarify and explain how existing regulatory requirements apply to ESG-related fund disclosure.

Recently, a complaint was filed by a group of investors with the Alberta Securities Commission requesting that the regulator investigate into alleged misleading statements made by an issuer in a recent sustainability-linked bond ("**SLB**"), and to issue guidance as to how issuers should to structure their SLB targets. The complaint reflects the concern of market participants that SLBs can be structured with targets that are unambitious so as to allow issuers to reach them and benefit from lower borrowing costs.

### 2.5 What are the principal ESG-related litigation risks, and has there been material litigation with respect to ESG issues, other than enforcement actions?

As ESG standards and metrics continue to evolve alongside government legislation and market trends, companies are under increasing pressure to develop, report and respond to the growing criteria of ESG standards. With several consistent years of ESG reporting, stakeholders are holding companies more accountable to their ESG targets, seeking evidence of consistent corporate action and verifiable performance metrics. During times of increased scrutiny, companies must guard against overstatement and misstatement of ESG performance, as such practices can veer towards poor ESG practice resulting in significant financial and reputational harm, civil litigation and even criminal sanction in some cases.

The Ontario Court of Appeal's decision in *Barrick Gold Corporation* (*Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104) also illustrate the risk of class action litigation. In *Barrick Gold*, plaintiffs filed a class action against the corporation with respect to disclosure regarding an important gold mining project that was terminated after four years. Amongst others, plaintiffs argued that the corporation had failed to disclose material facts relating to serious environmental non-compliance regarding the project. While both the motion judge and the Court of Appeal found that plaintiffs had failed to establish environmental misrepresentations by omission, these allegations have led to careful judicial consideration of the context in which the disclosures were made.

In Canada, there appears to be a growing focus on climate change-related litigation involving tort claims against corporations with pressure exerted by the Crown, municipalities, Indigenous Peoples, private citizens and environmental non-governmental organisations. In the *Thomas and Saik'uz v. Rio Tinto Alcan Inc.* decision released in January 2022, the British Columbia Supreme Court confirmed that third-party proponents can be held liable for torts affecting a First Nations' established or claimed Aboriginal rights and title if these entities exceed the bounds of its regulated authority. Saik'uz First Nation and Stellat'en First Nation claimed in nuisance and for breach of riparian rights against Rio Tinto for the diversion of water from the Nechako watershed, which depleted Nechako white sturgeon, sockeye and chinook salmon fish stocks. They claimed that their Aboriginal right to fish for food and for use for social and ceremonial purposes was impaired. Rio Tinto successfully argued that such statutory authorisation was constitutionally valid and permitted them to commit the nuisance, and that they were not responsible for British Columbia ("**BC**") authorising the construction and operation of the Dam despite knowing it would affect fish population in the Nechako watershed.

As seen in the Supreme Court of Canada's decision in *Nevsun Resources Ltd v. Araya* in early 2020, social factors within ESG also present litigation risk for corporations. In *Nevsun*, Eritrean plaintiffs alleged that the Canadian mining company violated customary international law by allowing human rights abuses in the partly owned Bisha mine (*Nevsun Resources Ltd v. Araya*, 2020 SCC 5). The majority decision to allow the plaintiffs to bring their claim in Canada represents a progression in Canadian judicial thinking on the responsibilities and legal accountability of corporations operating abroad where human rights abuses may occur. ESG disclosure and compliance with ESG metrics is gaining importance as corporate liability is expanding.

Additionally, as discussed above, recently adopted OSFI Guideline B-15 also place federally regulated banks and insurers at an increased risk of litigation relating to misrepresentation of claims, deceptive trade practices and securities fraud.

In November 2021, Greenpeace Canada filed a complaint with the Competition Bureau alleging that Shell's "Drive Carbon Neutral" claims were misleading under the *Competition Act*, citing unsubstantiated "carbon neutral" claims and disputing the validity of its carbon offsets. The Competition Bureau closed its investigation into Shell in December 2023 because Shell removed its advertising from Canadian platforms. Greenpeace submitted another complaint to the Competition Bureau in March 2023 against the Pathways Alliance's "Let's Clear the Air" campaign. They argued that the Alliance's net-zero plan overlooks 80% of emissions, ignores fossil fuel expansion, relies on speculative carbon capture technology, and falsely portrays the Alliance as a climate leader, despite members opposing climate action. The status of the Pathways Alliance inquiry by the Competition Bureau appears to be ongoing as of October 2024, despite Pathways Alliance removing most of its public representations once the Competition Act's greenwashing provisions became law. In February 2024, the Competition Bureau confirmed an investigation into Lululemon after a complaint from Stand Environmental Society. The complaint alleges that Lululemon's "Be Planet" campaign, which promoted its use of recycled fabrics and pledged to reduce greenhouse gas emissions, was misleading due to findings in its own 2022 Impact Report showing a doubling of Scope 3 emissions since 2020.

These complaints were initiated through a six-resident complaint application to the Competition Bureau, a popular enforcement tool available under the *Competition Act*. A six-resident complaint compels the Competition Bureau to investigate the reviewable conduct in response to the complaint, and, if appropriate, file an application to the Competition Tribunal.

At the *Competition and Green Growth Summit* in September 2022, the Commissioner of Competition emphasised that the Competition Bureau would continue enforcement within the existing legal framework of the *Competition Act*, with no intention to expand the objectives of competition law and policy. Businesses were also advised to ensure that their ESG reports comply with the deceptive marketing provisions of the *Competition Act*, even though enforcement in this area has not historically been a focus for the Bureau. In the fall of 2024, the Competition Bureau re-affirmed its view that ESG disclosures in securities filings are promotional material and fall within the scope of the greenwashing provisions. This is noteworthy because ESG reports and other materials containing ESG-related claims now face heightened litigation risk – not only from the Competition Bureau, but also (more likely) from the newly expanded private access rights following recent amendments to the *Competition Act* that will come into force on June 20, 2025. This means that consumers, competitors, non-governmental organisations, and other stakeholders will have an additional avenue to challenge ESG-related claims.

Expanded access to the Competition Tribunal will allow private litigants to seek leave directly from the Competition Tribunal to file applications challenging the environmental representations (or other ESG-related representations) for deceptive marketing practices. Under the *Competition Act*, misrepresentations under the deceptive marketing provisions are treated as strict liability offences, and businesses can be liable for up to 3% of their worldwide gross revenues even if no one suffered any harm or was misled.

The principal ESG-related risks for businesses moving forward are consistent with the common types of six-resident complaints made to the Competition Bureau. These include forward-looking or aspirational statements about climate commitments that have not been independently verified, as well as claims about carbon neutrality, net-zero emissions, and emissions reductions that depend on offsets.

It is not uncommon for class actions to be initiated after a company reaches a settlement with the Competition Bureau for deceptive marketing practices. Following Keurig's settlement with the Competition Bureau to resolve concerns over false or misleading environmental claims made to consumers about the recyclability of its single-use Keurig® K-Cup® pods in 2022, Keurig then came to face three separate class actions claims filed in Ontario, British Columbia and Federal court for alleged misleading or deceptive marketing practices relating to the K-Cup coffee pods. Proceedings are currently ongoing.

The intersection of consumer protection and competition law is another source of litigation risk for companies with respect to environmental claims. For instance, in Quebec, a class action lawsuit against retailers alleging misleading information regarding bag recyclability was certified in 2024. In March 2024, a notice of civil claim was filed in the Supreme Court of British Columbia against FortisBC Energy Inc., FortisBC Holdings Inc. and Fortis Inc., alleging that the companies engaged in greenwashing by misrepresenting their natural gas supply practices and its connection with renewable sources. For now, no lawsuits have targeted directors or officers with respect to false or misleading ESG-related representations.

In May of 2023, in the Alberta Court of Justice, Criminal Division, Amberg Corp., an environmental and regulatory consultant company registered in Alberta, along with its senior environmental regulatory coordinator, were charged with 25 counts of false and misleading information, providing functions of a third-party assurance provider without the required qualifications, and failing to comply with the rules and requirements set out in the *Standard for Validation, Verification and Audit under the provincial Emissions Management and Climate Resilience Act*. The coordinator plead guilty to one count of knowingly providing false and misleading information pursuant to a requirement under the legislation, and was sentenced to pay a CA$10,000 fine inclusive of the victim surcharge, is prohibited from engaging in any employment that may involve collecting, analysing, reporting, validating, verifying or auditing environmental data for a period of three years, and was ordered to prepare an article for publication in the Environmental Services Association of Alberta Weekly News publication informing the public of the consequences of her failure to comply with the law. Proceedings against Amberg Corp. have not been concluded.

## 2.6 What are current key issues of concern for the proponents of ESG?

The development of standardisation continues to be a key issue for proponents of ESG with a push towards the adoption of standardised methodologies or frameworks which can be compared and assessed more objectively. The publication of the ISSB's two inaugural standards in June 2023 is changing the landscape for Canadian issuers. As discussed earlier, the CSSB is expected to release its sustainability disclosure standards for public corporations for Canada by the end of 2024.

There is also a growing trend among investors to focus on ESG analysis rather than ESG investing, the former incorporating ESG-based criteria as a fundamental part of investment analysis utilising a measurable and consistent approach that is fully integrated into the investment process, as opposed to the use of ambiguous criteria resulting in only perceived rather than actual value. ESG integration is defined as "the explicit and systematic inclusion of ESG factors in investment analysis and investment decisions", and the expectation over the long term is that "ESG investing" will be so intricately intertwined and integrated into the investment analysis that ESG investing will become the norm rather than an exception to it (CFA Institute, *ESG Integration in Canada*, 2020). Within the theme of enhanced ESG analysis, double materiality assessments are observed to be on the rise in Canada, taking influence from more advanced international standards and market and reporting activities observed in Europe. Double materiality requires a two-fold analysis incorporating measures of financial materiality and impact materiality. The metrics encompass a more wholistic and bi-directional analysis of an operation's activities, assessing financial metrics inwardly and environment and social impact outwardly with the goal of fostering a cycle of corporate sustainability.

Environmental issues continue to lead the ESG conversation in Canada in 2024, but in a recent survey of Canadian institutional investors of nearly 40 owners and managers representing approximately CA$5.4 trillion of assets under management, a shift was observed with social factors reporting in at 29% and surpassing governance by nearly 10%. The increased focus on social issues, which typically includes diversity, equal opportunity, inclusion, employee health and well-being, expands more broadly to recognising that social discord can have significant impacts on global systems and economies, thereby heightening its importance as a major risk across domestic and international markets. In Canada, the recognition of Indigenous rights and action towards reconciliation and economic development continues to be a top priority, and with the enactment of the Modern Slavery Act, Canadian companies are now prompted to review their supply chain lines with more scrutiny to identify and mitigate potential vulnerabilities where forced labour and/or child labour risks could be more prevalent in their supply chains.

A recent survey of prominent asset owners and managers reveals that biodiversity is cited as the third most important ESG topic by investors after climate, human capital and human rights (including Indigenous rights and reconciliation), ahead of Equality, Diversity and Inclusion ("**EDI**") (Millani, *Semi-Annual ESG Sentiment Study of Canadian Institutional Investors*, September 2024). Proponents of ESG are also continuing to press for incentive-based compensation structures that reward executives for incorporating and achieving ESG metrics with a focus on health and safety measures. Large-cap issuers are increasingly paying heed to these demands, with four in five TSX60 companies having formally incorporated at least one ESG metric in compensation plans or disclosed according to a 2024 global study by WTW.

Cybersecurity risk, including data security, is another top-ranked ESG concern for institutional investors. As the cyberattacks that have roiled large corporations in recent years have shown, malicious cyber activity can inflict serious financial, operational and reputational harm on firms, engaging a new level of corporate governance and social risk review. Following the global COVID-19 pandemic the remote-working environment is now a subsisting byproduct, which requires companies to allocate resources to accommodate for increased cybersecurity risk as the hybrid work structure with remote work options continues to create new avenues for unauthorised access to company data and information technology systems by hackers and cyber criminals. In the U.S., the Securities and Exchange Commission has recently adopted new rules requiring the disclosure of cybersecurity risk management, strategy, governance, and material incidents. Effective September 5, 2023, the Rules apply to U.S. domestic companies and foreign private issuers ("**FPIs**"). FPIs, including those eligible for the U.S.-Canada Multijurisdictional Disclosure System ("**MJDS**"), must furnish, on Form 6-K, information on material cybersecurity incidents that they disclose in a foreign jurisdiction to any stock exchange or securityholder. The Rules also require enhanced disclosure of a company's cybersecurity risk management and governance in annual reports on Form 20-F. Canadian issuers eligible to use MJDS are permitted to use Canadian disclosure standards and documents to satisfy the SEC's registration and disclosure requirements. Against this backdrop, it is likely that the application of the new SEC rules will provide guidance to Canadian issuers regarding their cybersecurity disclosure.

### 2.7 Have ESG issues attracted shareholder activism, and from whom?

The dominance of environmental and social shareholder proposals in recent years has continued into 2024, with 40 proposals already submitted to a vote at Canadian companies between January to June. While climate-related activism is trending to become a key issue for reporting issuers, the results of shareholder initiatives throughout the 2024 proxy season thus far, has unfortunately yielded little success with no shareholder proposal garnered majority support. Still, it is worth noting that say-on-climate proposals remain at the top of the agenda with 12 proposals put forward out of 27 addressing environmental issues. On the social side, the proposal requesting the disclosure of non-confidential information relating to bank's country by country reporting proposal was the most prevalent, accounting for 35% of such proposals, with all of the proposals submitted at major Canadian banks. Lastly, while anti-ESG proposals continued to be filed in 2024, support for these proposals remained low.

## 3 Integration of ESG into Strategy, Business Operations and Planning

### 3.1 Who has principal responsibility for addressing ESG issues? What is the role of the management body in setting and changing the strategy of the corporate entity with respect to these issues?

Generally, ESG strategy is directed by senior management, with relevant responsibilities divided among applicable business units or functions that are accountable and report to the board. Increasingly, there is integration across particular E&S-related factors given the growth in the trend towards companies providing consolidated external reports and disclosures, coupled with a shift towards a top-down approach as boards and board committees continue to expand on their direct oversight of E&S-related performance. There is, however, no "one-size-fits-all" approach for allocating ESG oversight responsibilities among the board and its committees and the delegation of responsibilities may change over time. Board oversight of ESG issues can reside with the full board, an existing board committee (i.e. audit committee), or a newly formed, dedicated ESG committee.

It can also be shared by the full board and one or more committees or by multiple committees covering ESG issues that fall within their charter mandates and/or policies. Companies may also use a combination of these approaches. Moreover, as many companies move to adopt a more holistic approach to integrating ESG metrics into their corporate frameworks, it is more common to see the addition of Chief Sustainability Officers to the executive teams as the need for collaborative oversight across business units increases. Ultimately, it depends on the size, industry and culture of the organisation.

As we see investors push for greater ESG disclosure, proxy advisor firms have also made changes to their guidelines that influence how management, boards and board committees make decisions. Current as of 2023, Glass Lewis has indicated that if there is evidence suggesting that environmental and/or social issues have been improperly manged or mitigated, it may recommend that shareholders vote against the members of the board who are responsible for oversight of environmental and/or social In addition, current as of 2023, for companies in the S&P/TSX Composite Index, Glass Lewis will recommend voting against the governance committee chair unless the company has provided explicit disclosure outlining the board's role in overseeing environmental and social issues. Glass Lewis' policy related to climate risk also requires that companies, particularly those whose financial position may be impacted by greenhouse gas emissions, disclose how they are mitigating and overseeing climate risk. Glass Lewis may recommend voting against board members responsible for overseeing climate-related matters in the case of failure to provide explicit disclosure relating to climate-related issues as recommended by the Task Force on Climate-related Financial Disclosures and/or concerning the board's role in overseeing E&S matters (Glass Lewis 2024 Policy Guidelines).

Regarding E&S issues, ISS has adopted a global approach and will generally vote on a case-by-case basis, primarily examining whether implementation of the proposal is likely to enhance or protect shareholder value. The ISS considers in its vote recommendations, among other things, the existence of significant controversies, fines, penalties, or litigation associated with the company's practices relating to issue(s) relating to environmental or social practices raised in a company's proposal. With respect to companies which are significant GHG emitters, through their operations or value chain, ISS will generally recommend voting against, or withhold from the incumbent chair of the responsible committee, in cases where it determines that the company is not taking the minimum steps needed to understand, assess, and mitigate risks related to climate change to the company and the larger economy. With respect to management or shareholder-sponsored say on climate proposal, ISS takes a case-by-case approach taking into account factors such as the completeness and rigor of the plan. Effective for meetings on or after February 1, 2024 and subject to certain exceptions, for companies in the S&P/TSX Composite Index, ISS will generally vote against, or withhold from the chair of the nominating committee, or chair of the committee designated with the responsibility of a nominating committee, or the chair of the board of directors, if no nominating committee has been identified or no chair of such committee has been identified, where the board has no apparent racially or ethnically diverse members (Institutional Shareholder Services, *Canada, Proxy Voting Guidelines for TSX-Listed Companies Benchmark Policy Recommendations* (January 2024); Institutional Shareholder Services, *Canada, Proxy Voting Guidelines for Venture-Listed Companies Benchmark Policy Recommendations* (January 2024)).

### 3.2 What governance mechanisms are in place to supervise management of ESG issues? What is the role of the board and board committees *vis-à-vis* management?

Board and board committee oversight of ESG strategies is important to ensure that the relevant ESG policies and practices are being incorporated and evaluated to align with the company's broader corporate strategy, while mitigating risk and capitalising on opportunities. As mentioned previously, oversight may be achieved through an already existing board committee, while certain organisations elect to form specific ESG-focused committees, including those with mandates focused on matters such as risk management, safety and sustainability, human resources, etc. Stikeman Elliott's internal 2024 study found that 21 of the S&P/TSX 60 issuers have "specialised" committees related to corporate social responsibility and health, safety and environment. As stakeholders delve deeper and demand more transparency into the oversight and management of ESG issues, boards and senior management are better positioned to articulate the rationale behind how ESG is incorporated into their reporting frameworks, how ESG is integrated in the development of corporate policy and evaluation of performance metrics, and how ESG reporting metrics influence the evolution of a company's corporate strategy.

Generally, a board and board committees are responsible for setting and developing a company's overall ESG strategies whereas senior management is responsible for overseeing the implementation and reporting of the company's ESG strategy. From the board's perspective, holistic ESG integration starts with setting the corporate culture, and then integrating key matters through risk management, corporate strategy, evaluation and compensation and disclosure. Implementation of a robust enterprise risk management framework is often the key component, with governance and accountability and ultimate oversight by senior management and the board.

### 3.3 What compensation or remuneration approaches are used to align incentives with respect to ESG?

The most common approach to compensation and remuneration is the integration of ESG-related targets and metrics into incentive-based compensation, with about 76% of the TSX 60 constituents implementing at least one ESG metric into their incentive plan, with an average weight of 20% which is consistent with the past few years. Notably, industrials and energy and materials companies are leaders in implementing environmental metrics into incentive plans. One of key themes present among TSX60 companies of all industries has been a focus on incorporating EDI, as well as environmental- and climate-related metrics within their incentive programmes (Hugessen Consulting, *ESG in Compensation: Learnings from the 2023 Proxy Season*, September 2023). While these are more commonly included under qualitative assessment components, there is an increasing trend towards assignment of quantitative weightings; however, the challenges with this approach include selecting components with a direct correlation to desired outcomes (i.e., business strategy, risk mitigation, etc.), ability for a meaningful individual impact, accuracy and measurement, external comparability, consistency and independent verification.

Common ESG metrics include occupational health and safety practices and outcomes, environment and sustainability goals, and diversity and inclusion factors in workforce composition and human capital and employee engagement. A significant number of Canadian companies listed on the S&P/TSX Composite link ESG performance to executive compensation in some manner. In general, the two main ESG themes identified in compensation plans across sectors are: (1) climate change; and (2) diversity, equity and inclusion. Notably, Canadian banks have emerged as global leaders in creating ESG-linked incentive structures for executives, and were highlighted by *Sustainalytics* in 2021 as being among the 9% of companies in the FTSE All World Index to tie executive incentives to ESG (Responsible Investment Association, *ESG in Executive Pay: A Look at the Big Canadian Banks*, May 2022).

Approaches with respect to integration also continue to evolve and include increased weighting, application of ESG modifiers and incorporation into long-term incentives. It is recognised that pairing executive compensation and remuneration incentives with long-term strategic plans including ESG strategies may contribute to the positive delivery of sustained shareholder value creation. However, it is critical for boards to discuss and monitor the selection, design and verification of comprehensive metrics, goals and related achievements associated with executive compensation consistently, and because ESG reporting and evaluation metrics are not standardised, boards should consider engaging independent third-party ESG experts to assist with the verification of ESG data and predetermined metrics to inform board members on company and executive performance. Boards should also consider which ESG factors are most relevant to their business and which factors will materially impact financial and operational performance and create long-term sustainable value. Further consideration should be given to an organisation's stakeholder base, as different stakeholders have called for the use of different reporting frameworks.

### 3.4 What are some common examples of how companies have integrated ESG into their day-to-day operations?

Companies use a variety of mechanisms to integrate ESG into their day-to-day operations. These include specific ESG-related policies and requirements, including the incorporation of ESG-related targets and goals into procurement activities, implementing higher reporting standards for suppliers to increase visibility and supply chain traceability, thoughtful recruiting and hiring practices, increasing health and safety reporting practices and incorporating employee feedback to enhance safer work environments, stakeholder and Indigenous relations, benchmarking and disclosure, financing, and integration into and reporting against achievement of business objectives. A more recent development in this area is the impact on portfolio composition and "integration into compensation incentives".

### 3.5 How have boards and management adapted to address the need to oversee and manage ESG issues?

As ESG topics expand and mature, and investors and proxy voting advisory firms continue to demand that companies incorporate and advance ESG strategies across industries and disciplines, boards and management need to stay current on the evolution of ESG topics to meaningfully respond to its stakeholders. The broad application of ESG can seemingly be challenging to manage, but it is widely recognised that there is no uniform solution on how a company should integrate ESG into its operations and framework. However, boards and management that spend time on identifying and prioritising key ESG issues that relate to and impact their primary operations are better positioned to collect data and report on meaningful advancements of their ESG strategies.

Sophisticated stakeholders will not be satisfied with mere declarations of ESG strategies and targets, and will probe boards and management for data and demonstrable results towards these strategies and targets. Therefore, boards and management that are charged with ESG oversight are increasing the frequency and scope of data collection with the aim of demonstrating the depth and transparency of their ESG reporting, in order to integrate appropriate ESG strategies and targets into their company standards and to guide their business objectives and activities. Boards continue to rely primarily on existing committees to address ESG challenges.

## 4 Finance

### 4.1 To what extent do providers of debt and equity finance rely on internally or externally developed ESG ratings?

Providers of debt and equity finance rely heavily on externally developed ESG frameworks, standards, and ratings. Those frameworks are, however, different depending on the financing instrument. For example, there are various categories of green bonds. The first, and most commonly used in Canada, are bonds with green use of proceeds. These bonds are like general obligation bonds, except that all the funds are directed towards green initiatives and projects. The second are project development bonds. The proceeds from this second type of green bond fund specific purpose entities that own either a single project or many green projects. Securitisation bonds are the third type of green bond. These bonds are collateralised by a pool of loans issued to fund numerous green projects. Green bonds are typically issued and monitored following specific frameworks that align with the Green Bond Principles, introduced by the International Capital Market Association ("**ICMA**"). A green bond framework is a document created by the issuer that clearly articulates the company's proposed use of proceeds for the bond. This disclosure enables investors to better assess the green eligibility of the projects and make more informed investment decisions (International Capital Market Association, *Sustainability-Linked Bond Principles, Voluntary Process Guidelines,* June 2024) (Sustainalytics, *Green Bond Principles: What Issuers Need to Know,* June 2023). It is usually recommended that issuers obtain a second-party opinion on their green bond framework from an external review provider to confirm its alignment with the four components of the Green Bond Principles (Sustainalytics, a Morningstar Company, *Second-Party Opinion Plans*, 2023). Though these principles are voluntary, they promote transparency, clarity and integrity around sustainable finance projects and how the environmental objectives will be achieved. Issuers who intend to launch a green bond are required to build a green bond framework, which should align to the following four components as specified under the Green Bond Principles (Chartered Professional Accountants Canada, *How to Ensure Finance Drives a Sustainable Economy*, 2023).

- **Use of proceeds**: proceeds of a green bond need to be used to finance or re-finance green projects. These projects should contribute to environmental objectives such as climate change mitigation, natural resource conservation, and pollution prevention and control.

- **Process for project evaluation and selection**: green bond issuers should clearly communicate the environmental sustainability of the projects to their investors. This includes the environmental objectives of the project, the process by which an issuer determines the green eligibility of the project and the process to manage any potential material, environmental or associated social risks. A high level of transparency into the issuer's overall objectives, strategy and policy is also encouraged.
- **Management of proceeds**: proceeds (funds) must be managed properly in a sub-account, a sub-portfolio, or the issuer must demonstrate that there is a formal internal process to manage those funds. This process should be linked and aligned to the lending or investment operations for green projects.
- **Reporting**: issuers are required to report on the allocation of proceeds to eligible green projects. This is usually communicated in an annual report where the issuer can specify the list of green projects, provide a brief description of the projects, and stipulate the respective allocations. The issuer may also report on the expected impact of its green bonds.

When there is an intentional mix of environmental and social benefits, the bond is referred to as a sustainability bond, for which the ICMA provides a separate set of guidelines, namely Sustainability Bond Guidelines (International Capital Market Association, *Sustainability-Linked Bond Principles, Voluntary Process Guidelines*, June 2024).

Sustainability-linked bonds, while relatively new in the ESG investing scene, are becoming increasingly popular because unlike traditional green and social bonds, they do not impose restrictions on how the proceeds can be used. Instead, sustainability-linked bonds are linked to the performance of certain key performance indicators in achieving pre-defined sustainability performance targets, and depending on whether this is achieved, certain characteristics of the bonds may vary (e.g., coupon ratchet). A few notable examples are TELUS and Enbridge. TELUS was the first Canadian company to issue sustainability-linked bonds, raising CA$750 million in bonds that pay a low interest rate if the company reduces its greenhouse gas emissions. Calgary-based Enbridge was the first North American pipeline company to offer sustainability-linked bonds, whose US$1 billion sale included goals in reducing carbon emissions and bolstering workforce inclusion.

The Sustainability-Linked Bond Principles ("**SLBP**") are voluntary process guidelines which recommend structuring features, disclosure and reporting for sustainability-linked bonds. They are intended for use by market participants and are designed to drive the provision of information needed to increase capital allocation to such financial products. The SLBP are applicable to all types of issuers and any type of financial capital market instruments. The SLBP are collaborative and consultative in nature based on the contributions of members and observers of the Green Bond Principles ("**GBP**") and the Social Bond Principles ("**SBP**") (referred to as "**the Principles**"), and of the wider community of stakeholders. The SLBP recommend a clear process and transparent commitments for issuers, which investors, banks, underwriters, placement agents and others may use to understand the financial and/or structural characteristics of any given SLB. The SLBP have five core components:

1. Selection of Key Performance Indicators ("**KPIs**").
2. Calibration of Sustainability Performance Targets ("**SPTs**").
3. Bond characteristics.
4. Reporting.
5. Verification.

### 4.2 Do green bonds or social bonds play a significant role in the market?

Actions to address climate change and greenhouse gas emissions continue to play a critical role in supporting the green bonds market. Investors remain interested in green project initiatives, which include, *inter alia*, renewable energy products, clean technology, and green bond principle-based infrastructure. Domestic investors are the dominant consumers of Canadian-issued green bonds that dedicate funds to specific green projects, which are typically renewable energy projects, clean technology initiatives or low-carbon buildings and developments; however, as green bond funds continue to diversify, investments relating to green transportation and water conservation are gaining popularity.

Canadian-issued green bonds remain a modest presence in the international green bond issuance market in comparison to green bond products emerging from the U.S., Europe, and China (Investment Industry Association of Canada, *Opportunities in the Canadian Green Bond Market v.4.0,* February 2020) (Reuters, *Canadian green bond market riding high after record quarter,* July 2021). However, consistent with global trends, ESG bonds are quickly gaining popularity in Canada as companies seek to increase their "green" or sustainability credentials through a focus on renewable energy, pollution reduction, or climate change. The global green bond market is continuing its growth with more than half of a trillion dollars in issuance for the first six months of 2023, up by almost 20% compared to the same period in 2022 (Bloomberg, Green bonds boom in first half of 2023, July 27, 2023).

The issuance of Canadian green bonds has traditionally been led by public sector issuers (Responsible Investment Association, *Green Bonds – Fact Sheet for Investors,* February 2019), including ISED Export Development Canada ("**EDC**") and subnational issuers in Ontario and Quebec. In support of its climate and environmental objectives, the Government of Canada released its *Green Bond Framework* in March of 2022 (Government of Canada, *Green Bond Framework*, March 2022) and has since updated its *Green Bond Framework* to include nuclear energy expenditures, updated taxonomies, international best practices, and evolving investor preferences (Government of Canada *Green Bond Framework*, November 2023). The framework aligns with the Government's climate and environmental priorities and identifies those expenditures that are eligible for allocation to a green bond. Its core components deal with use of proceeds, process for project evaluation and selection, management of proceeds, and reporting. Both the framework and the allocations of proceeds are subject to independent external review. Following its evaluation of the Government of Canada *Green Bond Framework*, November 2023, Sustainalytics, an independent ESG research group, released a report concluding that the framework is a credible and transparent plan to deliver positive environmental benefits (Second-Party Opinion Government of Canada Green Bond Framework, 2023). Against this backdrop, the Government of Canada issued its inaugural CA$5 billion green bond in March 2023 and EDC issued a US$1 billion bond in 2024. In addition to the public sector, continued interest in green bond principle-based investments has attracted the attention of a broader spectrum of issuers, including certain Canadian corporations and pension funds**.**

### 4.3 Do sustainability-linked bonds play a significant role in the market?

The size of the sustainable investment market is still small relative to the larger retail fund market in Canada; however, the sustainable investment market is a growing area, as evidenced by the number of new sustainable fund launches over the last few years.

With regard to regulatory action, the OSC approved amendments to the TSX Rule Book to reflect trading of sustainable bonds on the TSX, expanding the types of securities that are able to be traded on the TSX to include sustainable bonds. Sustainable bonds became available for trading on the TSX as of March 1, 2021 (TSX, *TMX Equities Announces Sustainable Bonds Production Launch Details* (n.d.)).

The main goal of the sustainable bond initiative is to increase accessibility and transparency of securities that are already available to Canadian investors.

### 4.4 What are the major factors impacting the use of these types of financial instruments?

A major factor impacting the use of sustainable bonds, including green and social bonds, is the lack of regulatory verification and standardisation for these types of financial instruments, as discussed further in question 4.5. A consequence of a voluntary system for verification is that many bonds arguably lack transparency as to which sustainable projects or technologies will be financed. The need for consistency and transparency is heightened in the context of labelling green bonds as "greenwashing" or a reduction in standards, which could shake investor confidence in these valuable financial instruments. Given investors' expectations and sophistication, issuers are pressured to enhance transparency and provide more robust contractual commitments.

### 4.5 What is the assurance and verification process for green bonds? To what extent are these processes regulated?

As discussed above, the ICMA Green Bond Principles are the leading framework and guideline resource for green bond supply in Canada. The ICMA Green Bond Principles are voluntary process guidelines that recommend principles of transparency, disclosure and integrity in the development of green bonds, and are intended for broad use by the market, including issuers, various stakeholders, investors, and underwriters. According to the ICMA framework, the four principles applicable to Green Bonds, which are also applicable to Social and Sustainability bonds, include the use of proceeds, process for project evaluation and selection, management of proceeds, and reporting.

Canadian green bond programmes can be further bolstered by independent reviews from organisations such as Sustainalytics and the Centre for International Climate and Environmental Research – Oslo ("**CICERO**"). The International Organization for Standardization ("**ISO**") recently published parts of its international green bond standard (the ISO 14030 series), which may also enhance investor appetite for green bonds. In particular, ISO 14030–4:2021 now establishes requirements for verification bodies that review claims of conformity to the ISO 14030 series (ISO, *ISO 14030–4:2021 Environmental performance evaluation – Green debt instruments – Part 4: Verification programme requirements,* September 2021).

### 4.6 What other developments and factors are driving or hindering the financing of green projects?

Currently, no Canadian regulations have been established to provide verification of green bonds – only voluntary guidelines. The voluntary approach to green bond verification has resulted so far in a disjointed domestic and global market, creating ambiguity as to what constitutes a green bond, and may potentially be hindering the growth of these types of financial instrument.

The newly enacted greenwashing provisions under the *Competition Act*, combined with the upcoming expansion of private access rights in June 2025, have raised concerns about "greenhushing" in the marketplace. This concern stems from increased ambiguity in compliance requirements for companies making environmental claims, alongside rising legal costs and litigation risks. Consequently, companies may hesitate to make ESG-related disclosures – even those backed by credible evidence – due to fear of frivolous or vexatious lawsuits, which could deter the financing of green projects by potential investors seeking transparency and robust ESG reporting.

## 5 Trends

### 5.1 What are the material trends related to ESG?

Despite the recent trend in certain jurisdictions of moderating the prominence of ESG, ongoing regulatory changes and continued action from institutional investors in Canada will continue to be a focus in Canada for businesses to take responsibility for externalities affecting the environment and society.

Private sector initiatives have focused on best practices around biodiversity, such as the Cross-sector Biodiversity Initiative, which is a partnership between the Equator Principles, a financial sector industry association, the International Council on Mining and Metals ("**ICMM**"), a mining industry association, and Ipieca, a global oil and gas industry association.

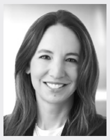
Furthermore, ESG-related matters continue to factor into the due diligence phase of mergers and acquisitions ("**M&A**") transactions in certain sectors. Specifically, specific PE fund buyers and some strategic buyers in M&A transactions continue to consider ESG-focused representations and warranties.

The Canadian corporate environment will likely continue to see increased attention towards diversity and inclusion, including increased pressure on companies to adopt meaningful targets or goals with respect to representation of women on boards and in senior positions, as well as an expansion to address the representation of BIPOC communities.

Sustainability and responsible environmental practices will also continue to be a priority, with a transition towards third-party standardisation and frameworks, including verification and benchmarking. With respect to ESG factors generally, investors will likely also continue to push for better disclosure and explanation as to how they integrate ESG metrics into key business strategies, and measurement and disclosure of their effects.

In light of the developments discussed above, ESG considerations are now part of the governance and strategic landscape of Canadian publicly listed companies, and will continue to grow with the adoption by the CSSB of its disclosure standards for Canada. The recent adoption of the Modern Slavery Act and the amendments to the *Competition Act* have also increased enforcement risk and the need for more granular policies and procedures around preparation and verification of disclosures.

Going forward, companies can expect increased pressure from regulators, investors, consumers, and other stakeholders to provide transparent, measurable, and decision-useful ESG disclosures that align with international standards and help ensure consistency and comparability across industries.



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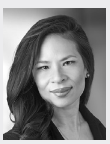

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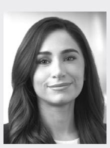

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