Governance Insights 2025

A Preview of 2025: 10 Legal Updates GCs, Boards and Investors Need to Know

In this *Governance Insights* article, we review 10 developments that general counsel and directors of Canadian public companies, and their investors, should know for 2025 and beyond.

1 – Board Oversight: Increased Scrutiny and Importance

As issuers adapt and respond to evolving and uncertain times, boards should continue to understand and manage "mission-critical" risks to ensure effective corporate oversight. High-profile incidents in 2024 involving the alleged failure of board oversight of risk management practices, together with recent *Caremark* litigation in the United States, highlight growing scrutiny of boards and demand a sharper focus. Boards must also grapple with an increasingly complex mix of macro risks, including potential trade wars, geopolitical risk, the effects of climate change, artificial intelligence (AI) and the growing prevalence of cyber attacks and corporate espionage. We expect that the conversation regarding the expanding dimensions of risk oversight will continue to gather steam in 2025, making it critical for boards to revisit the adequacy of their risk management policies to plan for and meet the future. For more on this topic, refer to **Board Oversight** (pg. 6).

2 – Supreme Court Guidance on the Meaning of Material Change

Canadian public companies are required to "forthwith" announce the occurrence of a "material change." A material change includes a "change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer." Although the latter half of the definition, which speaks to the expected impact of the change on an issuer's share price, has been the subject of numerous decisions, there has been little opportunity for courts and securities regulators to consider exactly what is "a change in the business, operations or capital" of an issuer?

In two decisions of the Ontario Court of Appeal in 2023 – *Markowich v Lundin Mining Corporation* and *Peters v SNC-Lavalin Group Inc.* – the Court endorsed an expansive interpretation of "change" that captures a broad range of developments, from the significant down to "minor" accidents and equipment failures. Under this framework, whether any such change should be immediately disclosed turns not on the nature or substance of the change but rather on whether it would reasonably be expected to have an impact on the share price.

In 2024, the SCC granted leave to appeal the decision in *Lundin* and agreed to hear from numerous interveners on the issue.[1] The hearing took place on January 15, 2025, and the Court's decision is expected in the coming months. The SCC's reasons are likely to address whether the Court of Appeal broadened the scope of an issuer's disclosure obligations beyond what the legislature intended, and to also offer guidance on the meaning of "change in the

[1] Davies is acting for the Mining Association of Canada as intervener in the *Lundin* case.

business, operations or capital of the issuer." Regardless of the result, *Lundin* will contribute significantly to shaping the legal framework for the way issuers communicate with investors.

3 – Canadian Activism in 2024 and the Scope of Target Defensive Measures

Activism activity in Canada 2024 was consistent with historical levels. Notably, we saw two high-profile activist campaigns in 2024 (Gildan and Dye & Durham) whereby the investor achieved a decisive victory, in each case resulting in a wholesale change of the board – a feat rarely achieved even once in a single year.

In 2024, the market also observed Canadian boards responding to activists by adopting new and creative uses of defensive measures, including a defensive private placement in the face of an ongoing activist "withhold" campaign (Mithaq) and a 15% trigger poison pill (Bitfarms). Although not all of these defensive measures, such as the 15% trigger poison pill, were ultimately successful, they are reflective of two trends and concerns that we think will continue to play out in 2025 and beyond. First, our securities law infrastructure and guidance regarding the scope of acceptable defensive measures need a refresh to address changes in the public M&A and activism markets in Canada that have transpired over the last two decades. Second, securities regulators should consider broadening their scope of intervention and providing streamlined solutions for certain disputes; forcing market participants to seek redress by applying to securities tribunals – or worse, backlogged courts – is not always a viable option for many disputes given the compressed timeframe in which contested M&A and proxy contests play out.

For a more detailed discussion of Canadian activism in 2024 and trends to watch for in 2025, see our *Governance Insights* article, *A Review of Shareholder Activism in Canada for 2024: Key Decisions and Trends to Watch for in 2025*.

4 – Managing AI Technologies Risk and Disclosure

The use and development of AI technologies by issuers has unsurprisingly drawn the attention of regulators and corporate governance advocates. In late 2024, the Canadian Securities Administrators (CSA) released two staff notices that address the subject, highlighting the obligation of issuers to disclose their use or development of AI systems, and the risks to their businesses arising therefrom, if such use, development or risks are material. At the same time, the CSA has warned against the growing prevalence of "AI washing," a practice of making overly promotional statements to capitalize on investors' increasing interest in the technology. Proxy advisory firm Glass Lewis has amended its voting guidelines to focus on how boards are overseeing the use and development of AI systems, while the CSA has expressed its expectation that issuers should adapt their risk management procedures to account for the rapidly evolving technology. For more on this topic, refer to **Managing AI Technologies** (pg. 7).

5 – Greenwashing: New *Competition Act* Provisions and CSA Warnings

The growth in investor and consumer attention to environmental, social and governance (ESG) matters has invited regulatory scrutiny of the use of overly promotional and misleading environmental claims by issuers, both in their marketing to consumers and in their disclosure to investors. Businesses should expect continued scrutiny of "greenwashing" practices from the Competition Bureau and the CSA in 2025. Issuers can proactively address regulatory scrutiny by reviewing their environmental claims for vague or overly broad statements and replacing them with specific and substantiated claims. For more on this topic, refer to **Greenwashing** on (pg. 9).

6 – Slow Progress Towards Mandatory Climate Disclosure

Canada made slow progress in 2024 towards implementing mandatory climate disclosure.

In October 2024, the federal government announced its intention to amend the *Canada Business Corporations Act* (CBCA) to mandate climate disclosure for large, federally incorporated private companies. The scope of the proposed disclosure has not been confirmed; nor has there been any indication whether similar amendments will be made by any of the provinces to their corporate statutes. The federal government has stated that it will seek to harmonize the CBCA climate disclosure with the CSA's climate disclosure rule, which has remained in draft since 2021.

In December 2024, the Canadian Sustainability Standards Board (CSSB) issued its final voluntary Canadian Sustainability Disclosure Standards – CSDS 1, which relates to sustainability disclosure broadly construed, and CSDS 2, which relates specifically to climate disclosure. Notwithstanding the extensive comments received during public consultations, the final CSSB standards are nearly identical to those issued by the International Sustainability Standards Board, furthering its objective of providing a global baseline of sustainability disclosure standards.

In a statement released concurrently with the CSSB standards, the CSA confirmed that it continues to work towards a mandatory climate disclosure rule for Canadian public companies, and that it will consider both CSDS 2 and the feedback received during the CSSB consultations, and may include modifications appropriate for the Canadian capital markets.

The CSA also indicated that, given the interconnectedness of the markets, it will be carefully considering developments in the United States. The mandatory climate disclosure rule adopted by the U.S. Securities and Exchange Commission (SEC) in March 2024 has been subject to numerous legal challenges and most commentators predict that the SEC's climate disclosure rule will not survive the Trump administration. The precarious fate of the SEC's climate disclosure rule leaves the CSA with the difficult task of finding a balanced approach that reasonably responds to investor demands for consistent, comparable and decision-useful disclosure, while not imposing a Canadian climate disclosure regime that departs too greatly from the approach taken by our neighbours to the south.

7 – Shareholder Proposals: Virtual Meetings, Climate Change and Anti-ESG

The 2024 Canadian proxy season featured a number of developments in ESG-related shareholder proposals, including proposals targeting issuers' virtual shareholder meeting policies and procedures, climate-change related proposals and so-called "Anti-ESG" initiatives. We expect that shareholder attention to virtual shareholder meetings will be sustained in 2025, as regulators and corporate governance advocates continue to issue guidance on best practices for issuers to ensure that effective shareholder participation in a virtual setting is made possible and accessible. Climate-related proposals, however, may retreat in 2025 as anti-ESG advocacy spreads from south of the border. For more on this topic, refer to **Shareholder Proposals** (pg. 10).

8 – Diversity at Canada's Public Companies

In October of 2024, the CSA released a 10-year review of disclosure regarding women on boards and in executive positions. The report echoes a refrain that has become familiar to constituents of the intersection of corporate governance and diversity and inclusion (D&I). While representation by women on boards and in executive positions at Canada's TSX-listed companies has demonstrably increased over the past decade, progress has been greatest at Canada's largest companies – and appears to be slowing. Unfortunately, the CSA's 10-year review did not provide an update on the status of proposed diversity disclosure rules released in 2023. The D&I pushback playing out in the United States has created a backdrop against which to observe whether Canadian legislation proceeds or stagnates in 2025. For more on this topic, refer to **Diversity at Canada's Public Companies** (pg. 11).

9 – Canada's Anti-Slavery Regime: First-Year Report

Canada's *Fighting Against Forced Labour and Child Labour in Supply Chains Act* (*Supply Chains Act*) created a stir when it came into force on January 1, 2024, after limited consultation and no concurrent guidance. All Canadian-listed public issuers, and other entities doing business in Canada (or having a place of business or assets in Canada) that meet minimum worldwide size thresholds (assets, revenue, employees), are required to report under the *Supply Chains Act*. After receiving considerable criticism of the legislation, the federal government asked companies to simply report whatever information was in hand and confirmed that enforcement actions would not be taken against non-compliant entities. Reports are publicly available, however, meaning that the weight of public scrutiny may propel disclosure and the development of industry practices forward. For more on this topic, refer to **Canada's Anti-Slavery Regime** (pg. 12).

10 – Canada Tax Policy: Expect a Change of Course

Although the federal government has introduced considerable tax legislation in recent years, national and international political developments leave the future of some of the most noteworthy proposals in doubt. Canadian companies should be prepared for significant changes in the Canadian tax landscape in 2025.

Arguably the most significant development in 2024 was the federal government's spring budget proposal to increase the capital gains income inclusion rate to two-thirds, from one-half (effectively imposing a one-third increase in the tax on capital gains). The proposal spurred intense activity, with many taxpayers taking steps to trigger gains before June 25, 2024, the scheduled effective date for the change. However, the legislation has not yet been made law and, with a federal election imminent and the Conservative Party's publicized opposition to the change, it is possible that the proposal will never come into effect. The Canada Revenue Agency, consistent with its normal practice, is currently applying the proposed changes as though they were in effect, but taxpayers should carefully consider how capital gains are reported in light of the uncertainty regarding the proposed amendment to the inclusion rate.

The federal government also recently introduced two new taxes, each operating outside the income tax regime: the Global Minimum Tax (GMT) and the Digital Services Tax (DST). The GMT is part of an international effort to impose a 15% minimum corporate tax on large multinational groups, and the DST imposes a tax on revenues generated from the provision of certain online services to Canadian residents. Although these changes are now largely in force, they have faced fierce opposition and provoked retaliatory threats from the United States. In light of the anticipated reopening of trade negotiations with the incoming U.S. administration, it is possible that these new taxes will be repealed or significantly curtailed in 2025.

Further Reading

Board Oversight

Boards and management should consider their responsibilities to identify, monitor and manage critical risks to their businesses on an ongoing basis. Developments in Delaware litigation on risk oversight provide a backdrop against which corporate stewards can think about the role of Canadian directors and officers in managing critical risks.

CAREMARK CLAIMS IN DELAWARE

Caremark claims, named after the Delaware case *In re Caremark International Inc. Derivative Litigation* (1996), are actions brought against directors for breaching their oversight duties as established under Delaware law. *Caremark* oversight duties provide that directors face potential liability for breaching their oversight responsibilities if, with respect to key compliance risks facing the company, they have failed to implement or monitor reporting systems and controls. *Caremark* pleadings have involved a variety of fact patterns, including allegations of failure to oversee food safety risks leading to a listeria outbreak; ignoring red flags over clinical trial issues; failure to oversee aircraft safety standards; and, in the recent case of *McDonald's Corporation Stockholder Derivative Litigation* (2023), failing to address workplace harassment. Additionally, *McDonald's* extended the reach of *Caremark* duties to corporate officers, holding that they too may have a duty of oversight, particularly when the matter falls within their area of responsibility.

The bar to successfully make out a *Caremark* claim is high, and there are open questions about the extent to which *Caremark* duties extend beyond oversight of critical compliance matters to business risks more generally, particularly given the well-entrenched judicial deference afforded to a board's business judgment. The case law has largely circumscribed *Caremark* claims to "extreme events" or "mission-critical risks," the oversight of which has been so egregiously deficient that it constitutes bad faith on the part of the directors (or officers).

OVERSIGHT DUTIES IN CANADA

Although Canadian courts have not recognized *Caremark* duties *per se*, it is not implausible that a *Caremark*-style claim regarding management and oversight of significant risk could, with the appropriate facts, be brought in Canada on the basis of existing common law and statutory obligations owed by directors to the corporation, including the duty of care and loyalty.

Canadian securities laws also speak to the centrality of the board's oversight function. The CSA expects that a board's mandate should explicitly acknowledge directors' "responsibility for the stewardship of the issuer," including "the identification of the principal risks of the issuer's business, and ensuring the implementation of appropriate systems to manage these risks." Of particular focus in the rules is the role of the board in ensuring the integrity of financial and other continuous disclosure. As well, as we discuss in **Managing AI Technologies** below, the CSA recently expressed its expectation that "[g]overnance and risk management practices should be paramount" for issuers that are using or developing AI technologies.

RISK OVERSIGHT FUNDAMENTALS

In light of the foregoing, we set out below some key takeaways for boards and management to consider for 2025 and beyond.

- Boards and management should actively identify legal compliance and other mission-critical risks to their businesses, leveraging their internal expertise and outside advisers to help inform their decision-making and establish processes to manage and assess risk. Specialized board committees can play an important role in fulfilling this oversight function.

- Directors and officers should ensure that adequate reporting and information systems are in place and that these systems cover significant risks specific to the business and industry in which the corporation operates, as well as more obvious areas of legal risks and financial reporting compliance.

- Simply implementing reporting and information systems is not enough; once in place, they need to be actively monitored. Both directors and management should thoughtfully engage with the data and information produced from these reporting systems. Directors and officers cannot simply ignore "red flags" of non-compliance, particularly in areas relating to legal compliance and key operational matters.

Managing AI Technologies

USE AND OVERSIGHT OF AI SYSTEMS

In December 2024, the CSA released Staff Notice and Consultation 11-348 (*Applicability of Canadian Securities Laws and the Use of Artificial Intelligence Systems in Capital Markets*), addressing the use of AI systems by issuers and in capital markets more generally.

The CSA expects that issuers will adopt or adapt existing governance and risk oversight procedures (including those related to accountability and risk management) to address the incorporation of AI systems into their operations ("Policies and procedures should be designed in a way that accounts for the unique features of AI systems and the risks they pose.") and that issuers will utilize or incorporate systems whose outputs are "explainable" ("The use of AI systems that rely on certain types of AI techniques with lower degrees of explainability, also referred to as 'black boxes', may challenge the concepts of transparency, accountability, record keeping, and auditability.").

Increased focus on the business risks presented by AI systems has also drawn commentary from proxy advisory firms. Glass Lewis updated its voting guidelines for 2025 to recommend that issuers that use or develop AI technologies adopt "strong internal frameworks that include ethical considerations and ensure they have provided a sufficient level of oversight of AI." Glass Lewis also recommends that issuers address skill gaps on the board through director education and the appointment of directors with AI expertise. Disclosure concerning the role of the board in overseeing AI-related issues, including how issuers are "ensuring that directors are fully versed on this rapidly evolving and dynamic issue" is also recommended. Exactly how Glass Lewis may tie its voting recommendations to AI matters remains to be seen, although the firm did caution that it will closely evaluate issuers' disclosure and the way boards respond to and manage these issues. Glass Lewis may recommend voting against directors if it finds the board's oversight, response or disclosure insufficient. Closer board scrutiny by Glass Lewis will be invited in instances where "there is evidence that insufficient oversight and/or management of AI technologies has resulted in material harm to shareholders."

For a more in-depth discussion of these issues, refer to our *Governance Insights* article, *Get Smart on Artificial Intelligence (AI) and Corporate Governance: Key Considerations for Boards of Directors*.

DISCLOSURE OF USE AND RISKS OF AI SYSTEMS

Following its latest continuous disclosure review, in November 2024 the CSA released Staff Notice 51-365 (*Continuous Disclosure Review Program Activities for the Fiscal Years Ended March 31, 2024 and March 31, 2023*). During its review, the CSA observed that investor interest in AI has led some issuers to make inaccurate, unbalanced or embellished claims about their businesses in order to promote interest in their securities. The CSA noted a current practice among issuers of AI washing, in which an issuer makes false, misleading or exaggerated claims about the use of AI systems in its products or services to capitalize on growing interest in the field. The CSA reminds issuers to avoid such overly promotional language by ensuring that disclosure is factual and balanced, and eschews broad statements in favour of specific and factually supported claims.

While issuers must refrain from AI washing, the CSA reminds issuers that disclosure of the use of AI systems or the development of products or services that rely on AI systems, as well as the risks arising therefrom, should be included in their continuous disclosure where that use, development or risk is material: "Fulsome disclosure can assist an investor or client to understand the breadth and scope of a market participant's AI system use. It also allows investors or clients to better understand the material risks that are associated with that use." Disclosure should be tailored to the issuer and facilitate investors' understanding of the issuer's use of AI systems and their risks, including operational, third-party, ethical, regulatory, competitive and cybersecurity risks.

FORWARD-LOOKING INFORMATION

In both staff notices, the CSA cautions that future-oriented disclosure, such as an issuer's prospective or future use or development of AI systems, may constitute "forward-looking information" (FLI) within the meaning of securities laws. An issuer may not disclose FLI unless certain requirements are met, including that the issuer has a reasonable basis for the information and identifies the material risk factors that could cause actual results to differ materially from the FLI.

CLOSER SCRUTINY

Given strong market interest in AI, Canadian securities regulators are expected to monitor continuous disclosure in this area and engage with issuers as concerns are identified. Issuers that use or develop AI technologies should proactively review their disclosure to address potential regulatory concerns of AI washing. Boards should also expect increased scrutiny by regulators and proxy advisory firms on the way they oversee and manage the use and development of AI systems and the risks arising therefrom.

Greenwashing

COMPETITION ACT UPDATES

Of the many significant changes to the *Competition Act* that came into force in June 2024, the new "greenwashing" provisions are particularly noteworthy. These provisions prohibit representations to the public that (i) are statements, warranties or guarantees "of a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change" that are not based on an adequate and proper test; and (ii) relate to the "benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change," unless such claims are based on "adequate and proper substantiation in accordance with internationally recognized methodology." Violation of these provisions can lead to a penalty that is the greater of (i) C$10 million (C$15 million for repeat conduct), and (ii) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of worldwide gross revenues.

The scope of these provisions and the significant penalties available generated controversy and concern in the business community. Among other concerns, the concept of "internationally recognized methodology" is not defined in the legislation and raises questions about how this standard can be met. In December 2024, the Bureau released draft guidelines which are now open for public consultation until February 28, 2025. The draft guidance clarifies that the Bureau's enforcement focus is on representations made in marketing and promotional representations, "rather than representations made exclusively for a different purpose, such as to investors and shareholders in the context of securities filings." That said, the guidance also notes that if representations made in securities filings are repeated in promotional materials, they will be considered marketing representations.

While the Bureau's guidance on this point is helpful, it is unlikely to impact the view or approach of private plaintiffs who, as of June 2025, will be able to initiate actions before the Competition Tribunal (with leave) and seek the disgorgement of benefits associated with the conduct. The ability for third parties to seek leave on the basis of "public interest" considerations may lead to increased private actions brought by environmental interest groups.

Businesses should expect continued focus and enforcement action in relation to environmental claims. To mitigate risks, issuers should closely review all environmental claims and avoid vague or overly broad claims in favour of clear, specific statements that are fully substantiated.

For a detailed summary of the 2024 amendments to the *Competition Act*, see our bulletin *Navigating the New Norm: Further Changes to Canada's Competition Act in Effect*.

CSA WARNINGS AGAINST GREENWASHING

The CSA's current concerns with overly promotional disclosure are not limited to AI matters (discussed in **Managing AI Technologies** above). In Staff Notice 51-365, the CSA also raised concerns about issuers making unbalanced or embellished environmental and ecological claims in order to promote interest in their securities. The CSA has observed an increase in misleading, unsubstantiated or otherwise incomplete claims about business operations or the sustainability of a product or service being offered, a practice that it characterizes as greenwashing. The CSA also cautioned that future-oriented environmental claims, such as plans to reduce greenhouse gas emissions, may constitute FLI (discussed above). Issuers should ensure that their environmental-related disclosure is specific, factual, balanced and, where applicable, hews to the requirements for making future-oriented statements, including that there be a reasonable basis for the FLI.

Shareholder Proposals

VIRTUAL-ONLY SHAREHOLDER MEETINGS

2024 saw significant push-back on the practice of virtual-only shareholder meetings. Over the past few years securities regulators, proxy advisory firms and shareholder advocacy organizations have publicized their concerns with the use of virtual-only meeting formats that limit shareholder democracy, either because technological complications create accessibility issues or because the online format can be used to restrict shareholder participation in the meeting. In its Virtual Shareholder Meeting Policy, released in January 2024, the Canadian Coalition of Good Governance noted that it has "observed that [virtual meetings] …. have used technology to limit shareholder voices and adversely impact the ability of shareholders to exercise their rights and directly express themselves to boards of directors."

The CSA also issued this past year renewed guidance on virtual shareholder meetings, emphasising that "it is important that reporting issuers provide clear and comprehensive disclosure in management information circulars and associated proxy-related materials with respect to the logistics for accessing, participating and voting at a virtual meeting." The CSA is also encouraging issuers to "provide for an ease, level and quality of shareholder participation at a virtual meeting that is comparable to that which a shareholder could reasonably expect if they were attending an in-person meeting."

Against this backdrop of scrutiny, many 2024 proposals that called for the reinstatement of in-person attendance at meetings (including through a hybrid of in-person and online participation) received significant shareholder support, including from prominent Canadian asset management firms. Nonetheless, we expect that some issuers will continue to utilize virtual-only shareholder meetings given the myriad advantages offered in terms of cost, convenience, security and, when conducted appropriately, the opportunities for increased shareholder participation.

Issuers offering a hybrid or virtual-only meeting format should do so with reference to the CSA's guidance and the concerns of the governance community in mind. In particular, we highlight that issuers should facilitate virtual participation at shareholder meetings through plain language explanations of how registered and beneficial shareholders can participate in the meeting; simplifying the registration and authentication process; adopting an effective technological platform for the virtual component of the meeting; ensuring the chair and others conducting the meeting are well-versed in the technology; and, perhaps most importantly, ensuring the virtual platform allows for robust shareholder participation. Specifically, the virtual meeting platform should provide shareholders with the ability to make motions and raise points of order and allow shareholders to ask questions and engage with management.

We expect the movement against virtual-only meetings and restricted-participation platforms to continue in 2025, in particular where such mechanisms are adopted by larger, TSX-listed issuers who do not implement adequate technology and procedures to ensure adequate shareholder participation.

CLIMATE-RELATED SHAREHOLDER PROPOSALS

Climate-related proposals in the 2024 proxy season included “Say on Climate” proposals, proposals requesting expanded greenhouse gas emissions disclosure (in particular with respect to scope 3 emissions) and proposals calling for detailed disclosure on energy transition and decarbonisation plans. Issuers targeted included banks and other financial institutions and companies in the energy sector.

This is perhaps the hardest trend to predict for 2025. On the one hand, in the United States there is significant political pushback against so-called “woke capitalism,” and asset managers have responded by pulling back support for climate-related and other ESG shareholder proposals. This has affected the Canadian landscape as well – note for instance the recent withdrawal of the last Canadian bank from the Net-Zero Banking Alliance, following the retreat of American counterparts. On the other hand, high-profile natural disasters such as the Jasper wildfire and the more recent Los Angeles fires underscore that climate-related disasters are not going away, and issuers must address climate change as part of their larger risk management programs.

As was the case in 2024, we expect that climate-related “advocacy” shareholder proposals will garner limited shareholder support in 2025. However, we expect issuers facing thoughtful and well-articulated climate-related proposals will, where appropriate, engage constructively with the proponents, in some cases resulting in formal withdrawal of these proposals. This is particularly so in light of crystalizing guidance on mandatory climate disclosure, which will allow issuers to reference a clear set of standards for disclosure that is consistent with stakeholder expectations.

ANTI-ESG SHAREHOLDER PROPOSALS

Anti-ESG proposals appeared as a small but growing trend in Canada during the 2024 proxy season, reflecting an emerging backlash against ESG and more particularly corporate D&I initiatives. A handful of these proposals came forward in Canada, including proposals requesting detailed disclosure of the costs and feasibility of decarbonisation initiatives and proposals calling for an end to D&I programs. These proposals received very low shareholder support, suggesting that at least for now the Canadian marketplace is much less receptive to anti-ESG proposals than in the United States.

Despite the still-solid regulatory and political foundation for ESG corporate initiatives in Canada, issuers should ensure that they are clearly communicating the value and benefit of ESG policies to their shareholders and other stakeholders to avoid polarization and discontent, including by providing transparent and fulsome disclosure of the benefits of their ESG policies, which may address financial benefits and risk mitigation.

Diversity at Canada’s Public Companies

When the CSA released its first canvas of women on boards and in the executive officer ranks, 51% of TSX-listed companies had no female directors. Only 10% of companies canvassed in the CSA’s latest report do not have a female director. In its first report, the CSA recorded only 8% of Canadian reporting issuers with three or more women on their boards, whereas the 10-year review found 42% of companies having three or more female directors. The 10-year review notes that approximately 29% of all board seats at TSX-listed companies were held by women in 2024.

The CSA's 10-year report gives less space and attention to the relative under-representation of women in executive officer roles at Canadian public companies, which clearly lags progress that has been made on Canadian boards. The report indicates that only 7% of Canadian public companies have adopted targets for the appointment of female executive officers. The CSA's findings indicate that 44% of TSX-listed mining companies still have no women in their executive officer ranks, with the industry making only a 4% improvement in the participation of women in executive officer ranks since the inaugural report was issued by the CSA 10 years ago.

Unfortunately, the CSA's 10-year review did not provide an update on the status of the Proposed 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*, which were released for comment on April 13, 2023 and discussed in more detail in an earlier *Governance Insights* article. The proposed amendments to Form 58-101F1 have languished as the CSA attempts to reconcile the significant volume of input received on the duelling proposals contained therein. We are hoping to see definitive draft legislation this year from the CSA indicating whether it will follow the more prescriptive approach to diversity disclosure for designated groups akin to the regime incorporated in the CBCA or the less prescriptive approach to diversity disclosure supported by British Columbia, Alberta, Saskatchewan and Northwest Territories.

The wait for the CSA to conclude its deliberations on the incorporation of other aspects of diversity into Canada's continuous disclosure regime has taken on added import given the very public abandonment by some U.S. public companies of D&I initiatives in the wake of Donald Trump's re-election. We will be watching to see whether the D&I pushback in the United States will have any influence or response in Canada. A clear statement and definitive legislation from the CSA clarifying a new diversity reporting regime could go a long way towards dampening momentum behind any nascent anti-D&I movement here in Canada. In the absence of legislative action by the CSA, proxy advisory firms Institutional Shareholder Services and Glass Lewis, together with Canada's institutional investors, are likely to continue to advocate and exercise voting power to influence Canada's public companies to make further progress on the representation of women and other diverse groups on boards and executive teams.

Canada's Anti-Slavery Regime

THE REPORTING REQUIREMENT

When the *Supply Chains Act* came into effect, the expectation was that an issuer's report would disclose what it had done in the prior year to prevent and reduce the risk of forced or child labour in its supply chain. The first reporting deadline under the new legislation was set to May 31, 2024, providing businesses with only a few months from the time the Act came into force to determine if they were subject to the reporting obligation – a deadline that seemingly presumed that issuers were already assessing the risk of forced labour in their supply chains.

GUIDANCE AND ENFORCEMENT

After extensive criticism regarding the vagueness of the legislation, Public Safety Canada issued and reissued guidance. When such clarification efforts failed, Public Safety Canada simply asked companies to report whatever information was in hand and confirmed that enforcement actions would not be taken against non-compliance. (We understand that no enforcement actions have been undertaken and that reports for 2024 are still being accepted.)

THE EMERGENCE OF COMMON PRACTICES?

It is still too early to determine if and whether commonly accepted practices and reporting methodologies will develop across industries. A review of the 2024 *Supply Chains Act* reporting of various global mining companies suggests that common anti-slavery practices are developing in that sector. These practices include

- focused due diligence and self-certification of prospective suppliers;
- integrity codes of conduct for both employees and suppliers; and
- anonymous incident reporting.

Given that many mining companies have been involved in anti-slavery efforts for years, these practices may become commonly accepted in other industrial sectors. However, such measures may be criticized as simplistic; more sophisticated practices (such as third-party audits and express policies on remediation measures) have not been consistently adopted. As Canada's anti-slavery regime matures, we will be watching what common practices emerge.

THE COURT OF PUBLIC OPINION

Although issuers may doubt the willingness and capacity of the federal government to enforce strict compliance with the reporting obligations under the *Supply Chains Act*, the more serious risk currently facing issuers with few or no anti-slavery measures is public scrutiny – the key deterrent inherent in Canada's anti-slavery regime is the public nature of the required reporting.

Key Contacts

If you would like to discuss any of the issues raised in this report or receive more information, please contact any of the individuals listed below or visit our website at www.dwpv.com. To request a printed copy, email us.

Patricia L. Olasker
416.863.5551
polasker@dwpv.com

Aaron J. Atkinson
416.367.6907
aatkinson@dwpv.com

Brett Seifred
416.863.5531
bseifred@dwpv.com

Marc Pontone
416.367.7609
mpontone@dwpv.com

Franziska Ruf
514.841.6480
fruf@dwpv.com

TORONTO

155 Wellington Street West
Toronto ON Canada
M5V 3J7
416.863.0900

MONTRÉAL

1501 McGill College Avenue
Montréal QC Canada
H3A 3N9
514.841.6400

NEW YORK

900 Third Avenue
New York NY U.S.A.
10022
212.588.5500

Contributors

Aaron Atkinson (Corporate & Securities)

Anita Banicevic (Competition)

Jonathan Bilyk (Corporate & Securities)

Ian Caines (Tax)

Umang Khandelwal (Competition)

Alexandria Pike (Environmental)

Marc Pontone (Corporate & Securities)

Sarah Powell (Environmental)

Brett Seifred (Corporate & Securities)

Zachary Silver (Environmental)

Robin Upshall (Corporate & Securities)

Bryan Yau (Corporate & Securities)