







ESG Comparative Guide



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1. Legal and enforcement framework

1. 1. What regulatory regimes and codes of practice primarily govern environmental, social and governance (ESG) regulation and implementation in your jurisdiction?

Canada

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Regulatory requirements relating to ESG in Canada arise from many different statutes. The distribution of legislative powers in Canada is divided between the federal and provincial governments, as set out in the Constitution. As such, there is relevant ESG legislation from both levels of government, as well as municipal governments and Indigenous governing bodies. Canada does not have a specific and comprehensive ESG-directed code or statute. Rather, ESG-related regulatory obligations are imposed through multiple statutes, as well as common law requirements, including with respect to:

- corporate law;
- securities law; and
- areas of law relating to subject matter such as:
 - environmental;
 - occupational health and safety;
 - employment; and
 - pension regulation.

For example, the legal framework in Canada with respect to the operations of business corporations, and specifically directors' duties, acknowledges that directors can consider other stakeholders when exercising their discretion to make decisions in the best interests of the corporation, including:

- employees;
- the environment;
- consumers;
- governments; and
- retirees and pensioners.

This broader stakeholder interest approach was codified in the Canada Business Corporations Act (CBCA) in 2019. At that time, the CBCA was also amended to require directors of certain corporations to disclose at the annual meeting the remuneration approach for senior management, as well as prescribed information on the wellbeing of employees, retirees and pensioners. The CBCA was also amended in 2018 to require public corporations existing under the CBCA to make mandatory disclosures about the diversity of their boards of directors and senior management with respect to designated groups.

Securities legislation imposes obligations on public corporations to disclose material risks that affect their business and, where practicable, the financial impacts of such risks. In recent years, Canadian securities regulators have provided further guidance on the identification of material financial impacts – including, most recently, climate impacts.

Legislation – including the Competition Act and the Consumer Packaging and Labelling Act – has broad application with respect to responding to false or misleading representations and deceptive marketing practices. Environmental and occupational health and safety legislation provides additional frameworks for

ESG factors. For example, environmental assessments under the federal Impact Assessment Act require designated projects to be assessed from the perspective of a number of specific ESG factors, including:

- the extent to which a project contributes to sustainability; and
- the extent to which a project hinders or contributes to the federal government’s ability to meet its climate commitments.

The Extractive Sector Transparency Measures Act was enacted in Canada to contribute to global efforts to increase transparency and deter corruption in the extractive sector. In force since 2015, it requires certain organisations to file an annual report disclosing certain cash and in-kind payments to domestic and foreign governments.

Canada has also seen developments in the area of pension regulation. Since 2016, the province of Ontario has imposed ESG requirements relating to statements of investment policies and procedures (SIPPs). SIPPs must specifically disclose whether ESG factors were incorporated into the SIPP and if so, how ESG factors were addressed by the plan’s investment strategy.. Other pension regulators across the country have issued guidance, are in the process of issuing guidance or have otherwise signalled an interest in requiring greater transparency by plan administrators on how ESG factors have been incorporated into investment and risk management strategies.

Future legislation to address modern slavery in corporate supply chains is being considered for a third time in Canada. There are federal efforts to pass legislation that will require certain entities to publicly report the measures they have taken to prevent and reduce the risk that child labour or forced labour has been used at any step in the production of goods within Canada or elsewhere in the entity’s supply chain for imported goods. Under the Customs Act, Canada already prohibits the import of goods that are manufactured or produced, in whole or in part, with forced labour.

1. 2. Is the ESG framework in your jurisdiction primarily based on hard (mandatory) law and regulation or soft (eg, ‘comply or explain’) codes of governance?

Canada
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The key components of Canada’s legal ESG framework are based on ‘hard’ (mandatory) law. The ESG regulatory framework in Canada consists of numerous statutes and regulations from all levels of government relating to ESG considerations. For example, environmental, occupational health and safety laws impose requirements including minimum standards of conduct and reporting requirements. These laws impose mandatory obligations and provide for a range of enforcement measures to support compliance with these requirements.

Examples of ‘soft’ laws include diversity and climate change governance disclosure recommendations by the Canadian Securities Administrators (CSA), which follow a ‘comply or explain’ model. However, ‘soft’ laws are increasingly becoming ‘hard’ laws. For example, the CSA has proposed, through National Instrument (NI) 51-107: Disclosure of Climate-related Matters (NI 51-107), rules that would expand on the CSA’s prior guidance for the disclosure of climate-related risks and greenhouse gas emissions by specifying mandatory information that must be disclosed by reporting issuers in their annual filings. Under NI 51-107, all reporting issuers (other than investment funds, issuers of asset-backed securities and certain foreign issuers) would be

required to disclose their governance practices around climate-related risks and opportunities, in close alignment with the Task Force on Climate-Related Financial Disclosures (TCFD) reporting framework recommendations.

There are also a variety of guidelines, standards and recommendations developed by industry associations and regulators that drive standards of conduct related to ESG. For example, the Competition Bureau has published guidelines on the application of the Competition Act, the Textile Labelling Act and the Consumer Packaging and Labelling Act to greenwashing (see question 1.4) and the risks of making false, misleading and unsubstantiated environmental advertisements or claims in Canada. Other examples include the Canadian Association of Pension Supervisory Authorities, the national association of federal and provincial pension regulators, which is developing a principles-based guideline on integrating ESG factors into pension fund investment and risk management for pension plan administrators. A draft of this guideline was published on 9 June 2022. This development and the influence of institutional investors are explored further in question 6.1.

1. 3. Which bodies are responsible for implementing and enforcing the rules and codes that make up the ESG framework? What powers do they have?

Canada
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Many different regulators are responsible for administering the various statutes that are part of the ESG regulatory framework in Canada. These include all levels of government and their respective departments, ministries, agencies and professional governance regulatory bodies, among others. Statutes that form the ESG framework in Canada generally include an enforcement regime that provides for prosecution and the levying of fines, penalties and other enforcement mechanisms, such as administrative orders, in connection with a breach of an obligation.

As an example, securities regulators in Canada generally have broad powers under applicable securities legislation to make orders in the public interest, including imposing sanctions and penalties against reporting issuers and their directors and officers for failure to comply with applicable securities laws. For instance, securities regulators may issue orders to:

- suspend or prohibit trading in securities;
- require the publication or amendment of disclosure documents;
- impose an administrative penalty;
- impose bans on individuals from being directors or officers of any issuers; or
- require disgorgement of profits.

In addition, securities regulators may commence quasi-criminal proceedings for contravention of securities laws or apply to a court for civil enforcement orders, such as orders to pay damages or compensation.

1. 4. What is the regulators' general approach to ESG and the enforcement of the ESG framework in your jurisdiction?

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The general approach to the enforcement of elements of the ESG framework in Canada depends on the

The general approach to the enforcement of elements of the ESG framework in Canada depends on the underlying statute and the enforcement policies and practices of the administering body.

For example, in the context of securities law, regulators have been focused on ensuring that reporting issuers provide investors and the public with disclosure that is not false or misleading. In recent years, the securities regulators have made it clear that ESG-related disclosure will be subject to increased scrutiny for compliance with securities law requirements. For instance, in 2021, both the British Columbia Securities Commission and the Ontario Securities Commission commenced a ‘green’ sweep of registrants, such as investment fund managers, which were identified as participants in ESG investing to monitor their compliance with securities laws and ensure that their disclosure in marketing materials for ESG products is consistent with their investment portfolios.

Other regulators in Canada have scrutinised misleading and/or unsubstantiated claims by businesses relating to their business or products in relation to ESG factors. These claims – generally referred to as ‘greenwashing’ – may violate certain requirements under statutes such as the Competition Act, the Consumer Packaging and Labelling Act, the Textile Labelling Act or the Trademarks Act.

For example, in January 2022, Keurig agreed to pay C\$3 million for misleading claims to consumers about the recyclability of its single-use coffee pods. In addition, as part of the settlement with the Competition Bureau, Keurig agreed to:

- pay C\$85,000 for the costs of the investigation and donate C\$800,000 to a Canadian environmental charity;
- enhance its corporate compliance programme;
- change its recyclability claims and packaging; and
- publish corrective notices about the recyclability of its product.

Separate from regulatory enforcement, we are also seeing governments use other mechanisms to support ESG objectives. For example, the government of Canada established a Large Employer Emergency Financing Facility to provide short-term loans to large businesses affected by the COVID-19 pandemic. To receive funding through this programme, borrowers had to:

- commit to publishing an annual climate-related financial disclosure report following TCFD recommendations; and
- disclose what they are doing to meet Canada’s 2050 environmental targets.

1. 5. What private sector initiatives have been launched in your jurisdiction to complement the ESG framework?

Canada
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A number of private sector initiatives have been launched in Canada that complement the regulatory aspects of the ESG framework. Examples include the following:

- The Mining Association of Canada’s Towards Sustainable Mining initiative requires the disclosure and verification of certain environmental and social performance metrics. Participation in the initiative is mandatory for all of the association’s members for their Canadian operations.
- Electricity Canada has created the Sustainable Electricity Company™ brand – a designation established

by Electricity Canada for utilities based primarily on International Standard 26000 – Guidance on Social Responsibility. Among other things, companies that wish to use this designation must commit to:

- adhere to the Sustainable Development – Corporate Responsibility Policy;
 - report on key performance indicators; and
 - verify company performance.
- The recently announced pilot project by Teck Resources Limited and DLT Labs™ employs a variety of uses of blockchain technology to enhance the traceability and transparency of goods. In particular, this pilot project aims to use blockchain technology to trace responsibly produced germanium from the mine to the customer – the first such use of blockchain to trace this critical mineral.
 - Climate Engagement Canada is an initiative led by several investor networks – including the Shareholder Association for Research and Education, the Responsible Investment Association and Ceres Investor Network – and which is supported by the UN Principles for Responsible Investment. It aims to facilitate dialogue between finance and industry and promote a just transition to a net-zero economy.

Canadian corporations are also participating in international ESG initiatives. For example, six of Canada’s largest banks have signed up to the Net-Zero Banking Alliance, an initiative which brings together banks around the world which are committed to aligning their lending and investing portfolios with net-zero emissions by 2050.

Beyond private sector initiatives, self-regulated bodies across Canada are also launching ESG initiatives. For example, the provincial bodies that regulate the legal profession have imposed mandatory requirements with respect to education on ESG issues such as equity, diversity and inclusion and Indigenous intercultural competency.

2.Scope of application

2. 1. Which entities are captured by the rules and codes that make up the principal elements of the ESG framework in your jurisdiction?

Canada
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In the broadest application, every entity is captured in some respect by the Canadian regulatory framework relating to ESG. The entity’s activity, location and structure, among other considerations, will determine which specific laws apply to it. Public reporting issuers, for example, are subject to the applicable securities laws and the relevant securities exchange rules (including climate-related financial disclosure requirements). Public and private corporations are subject to the federal or relevant provincial business corporation statutes. All organisations are subject to applicable ESG laws such as environmental and occupational health and safety laws, and laws aimed at the prohibition of deceptive marketing practices.

Financial institutions, insurance companies and pension plan administrators may be required to comply with specific ESG legislation, guidance or reporting requirements. In Budget 2022, A Plan to Grow Our Economy and Make Life More Affordable, the federal government announced that federally regulated banks and insurance companies will be required to report on their climate-related financial risks in accordance with the Task Force on Climate-Related Financial Disclosures (TCFD) framework through a phased approach, starting in 2024. Financial institutions will also be expected to collect and assess climate risks and emissions

from their clients, which will have a secondary effect for businesses accessing financing and other financial services. On 26 May 2022, the financial regulator, the Office of the Superintendent of Financial Institutions (OSFI), issued draft guideline B-15 – Climate Risk Management for stakeholder feedback on OSFI’s expectations for climate-related governance, risk management and disclosure practice for federally regulated financial institutions.

Governments, through their agencies and projects, are also subject to ESG rules. For example, under the Canadian Net-Zero Emissions Accountability Act, the minister of environment and climate change must report to Parliament with respect to plans and progress to meet the government of Canada’s emissions reduction targets. The Canadian Net-Zero Emissions Accountability Act includes specific measures for third parties to hold the government accountable for meeting these targets. Similarly, under the United Nations Declaration of the Rights of Indigenous Peoples Act, the minister of justice must, in consultation and cooperation with Indigenous peoples:

- develop and implement an action plan to achieve the objectives of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP); and
- prepare annual reports on the implementation of UNDRIP and the action plan.

2. 2. How are entities in your jurisdiction that are not subject to specific rules or codes implementing ESG?

Canada

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Organisations across all sectors in Canada are, to varying degrees, subject to certain obligations relating to ESG. However, an increasing number of organisations are implementing voluntary ESG initiatives for a multitude of reasons – whether to:

- attract and retain investors and capital;
- improve engagement with the workforce;
- compete for qualified candidates;
- satisfy stakeholders; or
- plan for their long-term sustainability.

Voluntary measures include:

- public reporting;
- the imposition of inter-organisational carbon fees;
- the establishment of diversity targets for the organisation and its supply chain;
- the establishment of climate related targets; and
- the pursuit of certification to obtain external assurance of the organisation’s practices.

For example, Pacific Cambrian Energy Ltd obtained the EO100 Standard for Responsible Energy Development as part of its commitment to validate its ESG practices. Microsoft imposes an internal carbon fee to accelerate and fund its decarbonisation efforts.

We discuss the growth in voluntary ESG reporting by public and private corporations further in question 3.2.

2. 3. What are the principal ESG issues in your jurisdiction that are either part of the ESG framework or part of the implementation of ESG?

Canada

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The issues that are evaluated as part of ESG continue to evolve. While not intended to be exhaustive, the principal ESG issues in Canada include the following:

- Environment – issues such as:
 - reduction, regulation and pricing of emissions (including greenhouse gases);
 - pollution;
 - waste generation;
 - resource extraction;
 - product stewardship;
 - energy consumption;
 - water stewardship;
 - use of non-renewable resources;
 - reclamation and impacts to land;
 - management of the impacts of increased hazardous weather and extreme weather events;
 - sustainable communities/development; and
 - biodiversity.
- Social – issues such as:
 - equity, diversity and inclusion;
 - human rights;
 - forced labour;
 - occupational health and safety;
 - affordable housing;
 - data protection; and
 - privacy.
- Governance – issues such as:
 - board composition and remuneration;
 - governance systems and strategy;
 - shareholder/stakeholder engagement;
 - anti-corruption supply chain;
 - information technology and security; and
 - tracking and compliance with evolving disclosure requirements.

In addition, considerations relating to Indigenous communities are part of all three pillars of ESG in Canada. Indigenous peoples in Canada have constitutionally protected rights, including that of self-government, which the government of Canada recognises as an inherent right. Provincial and federal governments have sought to uphold these rights through legislation, policies, programmes and initiatives, and as part of their respective commitments to advancing reconciliation. For example, in the province of British Columbia, the relationship between the provincial government and Indigenous communities is evolving to include shared decision making, including for natural resource development in the territories of Indigenous peoples. While relationships with Indigenous peoples are commonly framed as being similar to an organisation's relationship with stakeholders, in Canada, it is more appropriate to view this as a relationship with rights holders,

regulators and governments. Relationships with Indigenous peoples also present other opportunities, including as equity partners, employees and suppliers. Therefore, the relationship between an organisation and Indigenous communities can be a significant determinant of the sustainability of the organisation.

3. Disclosure and transparency

3. 1. What primary disclosure obligations relating to ESG apply in your jurisdiction?

Canada

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Under Canadian securities laws, reporting issuers (which generally refers to public companies) are required to:

- regularly disclose to the public all ‘material information’ regarding their business and affairs; and
- provide timely disclosure of any ‘material change’.

In addition, there are certain prescribed disclosure requirements – which include disclosure related to ESG factors – under corporate and securities laws. These requirements are supported by guidance from securities regulators. For example, Canadian Securities Administrators (CSA) Staff Notice 51-333 – Environmental Reporting Guidance, issued in 2010, provides reporting issuers with guidance on environment-related risk disclosure. CSA Staff Notice 51-358 – Reporting of Climate Change-related Risks, issued in 2019, expanded upon Staff Notice 51-333 by specifically providing guidance on climate change reporting and how to prepare disclosure of material climate-related risks in light of the existing continuous disclosure requirements. In 2021, the CSA published the proposed National Instrument 51-107 – Disclosure of Climate-related Matters (NI 51-107) for comment. If adopted, the proposed new rules would expand on the CSA’s prior guidance for disclosure of climate-related risks and greenhouse gas emissions by specifying mandatory information that all reporting issuers (other than investment funds, issuers of asset-backed securities and certain foreign issuers) would be required to disclose relating to their governance practices around climate-related risks and opportunities. Subject to certain modifications, the proposed climate-related disclosure under NI 51-107 largely aligns with the four core disclosure elements of the Task Force on Climate-Related Financial Disclosures (TCFD). Further, in January 2022, the CSA published Staff Notice 81-334 – ESG-Related Investment Fund Disclosure, which provides guidance for investment funds on their disclosure practices that relate to ESG considerations, particularly funds whose investment objectives reference ESG factors and other funds that use ESG strategies.

The guidance from the securities regulators has made it clear that reporting issuers must consider ESG factors as part of the determination of what information must be disclosed from a compliance perspective on the basis of materiality and the existing regulatory requirements. In addition, the securities regulators have been clear that the guidance does not create or modify any existing legal requirements.

One source of prescribed disclosure obligations relates to disclosure around diversity, which is mandated under the various provincial and federal corporate statutes, as well as securities laws. For instance, under the Canada Business Corporations Act, distributing corporations (which generally refers to public companies) must disclose information to their shareholders regarding the diversity of their boards and senior management, including disclosure relating to the representation of the following groups on the board and among senior management:

- women;
- Indigenous peoples (First Nations, Inuit and Métis);
- persons with disabilities; and
- members of visible minorities.

There are additional ESG-related reporting requirements under other statutes, including environmental laws. These include, for example, mandatory reporting of data on greenhouse gas emissions and emissions of other contaminants into the environment, which information is reported to the public by the government agency.

3. 2. What voluntary ESG disclosures are also commonly made in your jurisdiction?

Canada

Bennett Jones LLP

There has been a significant increase in voluntary ESG disclosures in Canada in recent years. One of the challenges that organisations face is deciding which standard or framework to utilise for their ESG disclosures.

It is common for companies to prepare their voluntary disclosures in accordance with, or guided by reference to, one or more of the ESG frameworks, such as those created by the Sustainability Accounting Standards Board, the TCFD and the Global Reporting Initiative. Some companies will prepare more tailored disclosures that focus on strategic elements of their ESG narrative that they wish to highlight to the public.

Depending on the sector, voluntary ESG disclosures often include detailed disclosures on a range of ESG factors, including the following:

- Environmental:
 - climate and greenhouse gas emissions;
 - energy efficiency;
 - air quality;
 - water and natural resource consumption;
 - waste; and
 - biodiversity.
- Social:
 - equity, diversity and inclusion;
 - occupational health and safety;
 - employee engagement;
 - labour relations and practices;
 - human rights;
 - forced labour;
 - privacy; and
 - relationships with Indigenous communities and other local communities.
- Governance:
 - board composition;
 - executive compensation;
 - governance structures;
 - business ethics;

- supply chain management; and
- bribery and anti-corruption.

Certain sectors have created their own sector specific frameworks which organisations in the sector may choose to use to measure and publicly report their ESG performance. One example is the natural resources sector, including mining and oil and gas. Many organisations in this sector were early adopters of voluntary ESG disclosure and have been voluntarily and publicly reporting on sustainability metrics, including occupational health and safety, water use and economic impact.

3. 3. What role is played in this regard by (a) the board and (b) other corporate bodies and/or officers?

Canada
Bennett Jones LLP

As part of the board's responsibility to supervise and make decisions in the best interests of the corporation, a key role of the board with respect to ESG reporting is first to oversee and exercise board-level discretion with respect to the development and implementation of ESG priorities, strategies and systems for the organisation. As part of exercising this discretion, boards must be informed and engaged, and obtain appropriate and relevant information to assist in establishing, monitoring and assessing the organisation's ESG performance and disclosure. The board plays a key role with respect to ensuring accountability of the ESG disclosures by ensuring that disclosure controls and policies are established and implemented to provide reasonable verification and assurance of the information, facts and assumptions reflected in the ESG disclosures.

Officers and senior management of an organisation are typically tasked with implementing board-level ESG decisions and ensuring the board has access to appropriate and relevant information. Officers and senior management are also generally responsible for overseeing the systems which ensure that:

- ESG disclosure is accurate and complete; and
- the information being disclosed is consistent and reliable, and complies with regulatory reporting requirements and, where applicable, voluntary reporting initiatives.

We have further considered the role of the board and other corporate bodies and/or officers with respect to ESG strategy and governance below in question 4.2.

3. 4. What best practices should be considered in relation to ESG reporting and disclosure?

Canada
Bennett Jones LLP

Regardless of which ESG reporting framework an organisation adopts, there are certain best practices that organisations should consider when preparing their ESG disclosures.

Disclosure should be specific: Organisations should focus on entity-specific ESG factors that are material and relevant to the short and long-term sustainability of the organisation and its business. If there is a question as to whether certain ESG factors are material, organisations should err on the side of materiality

and disclose the relevant information.

Avoid generalised and boilerplate language: Organisations should avoid boilerplate language and, to the extent possible, generalised disclosure used in the ‘comply-or-explain’ approach. Such disclosure often lacks comparability among reporting issuers and may omit information necessary to provide sufficient context for the disclosure.

Disclosure should be forward looking, balanced and objective: Organisations should ensure that disclosure is balanced and not focused solely on the organisation’s positive achievements, but also on reporting challenges and issues faced by the organisation and the impact these have had on the organisation and its business, including its financial performance.

Metrics should be reliable, measurable and comparable: Organisations should ensure that their chosen ESG framework is applied consistently in both their voluntary reporting and mandatory continuous disclosure filings (if applicable). Supplemental qualitative narratives can be used alongside quantitative data, benchmarks and targets. When quantitative ESG data is used, it should be disclosed consistently from year to year and across the organisation’s various disclosure documents. Organisations should also, where possible, explain the link between ESG metrics and financial performance, including demonstrating how ESG initiatives drive growth, promote productivity and address risk management in monetary terms.

4. Strategy and governance

4. 1. How is ESG strategy typically designed and implemented in companies in your jurisdiction?

Canada
Bennett Jones LLP

The design and implementation of a corporation’s ESG strategy will depend on a number of factors, including:

- the size of the organisation;
- the sector;
- the geographical location;
- the nature of the principal ESG issues; and
- the existing structure, composition and experience of the board and senior management.

An ESG strategy is generally determined by the board, with the assistance of senior management. The first step is the identification of priority ESG issues, risks and opportunities for the organisation, which is often completed by undertaking materiality assessments. Some organisations use their general materiality assessment to determine, for example, what public companies must publicly report, which can involve assessing the organisation’s issues, planned responses and the effectiveness of such responses. Other organisations use ESG reporting frameworks to help guide their ESG-specific materiality assessments. Others still record each actual and potential ESG impact on the organisation that affects the business strategy and financial planning, and undertake scenario analyses to assess the implications of ESG impacts. The scope of ESG priorities is typically influenced by the interests of key stakeholders of the organisation, as well as what others in the sector are doing with respect to ESG.

With respect to implementation, organisations typically use a top-down approach by implementing an internal system that continuously develops and implements the ESG strategy. Organisations may establish one or more board-level or management-level committees to specifically oversee and report on ESG issues. Organisations will typically establish specific ESG policies and procedures, as well as other means to support and track their ESG performance. Organisations may use ESG metrics and targets and set up internal systems for monitoring and performance evaluation. ESG performance within the company may be incentivised through company programmes, as well as senior (executive) level compensation arrangements.

4. 2. What role is played in this regard by (a) the board and (b) other corporate bodies and/or officers?

Canada
Bennett Jones LLP

Boards of directors in Canada take the lead in the design and implementation of the corporation's ESG strategy. This is consistent with the duties of directors to exercise their discretion and make decisions in the best interests of the corporation, as well as their ability to consider a broad range of stakeholders of the corporation when making these decisions.

There is no singular approach to how a board designs and implements an ESG strategy. Some will involve the entire board in the oversight of the ESG strategy. Others will establish new committees (eg, a standalone committee) to oversee ESG; or expand the mandate of existing committees (eg, the governance committee), to oversee ESG-related matters. It is also common to assign specific ESG responsibilities to a number of different board committees, including the audit and compensation committees. Much of this depends on the size of the organisation and the existing structure and committees of the board.

In-house counsel often play an important role in supporting the development and implementation of an organisation's ESG strategy, including advising on the establishment of appropriate structures and reporting mechanisms to implement ESG initiatives.

4. 3. What mechanisms are typically utilised to monitor the implementation of ESG strategy in your jurisdiction?

Canada
Bennett Jones LLP

Organisations typically use a number of mechanisms to monitor the effectiveness of the implementation of their ESG strategy. Organisations will generally implement systems, programmes and procedures to collect and track ESG-related data and information. This information may be compared against historical trends, internal targets or external ESG metrics, including through a comparative analysis with the organisation's peers.

Organisations may identify or define key performance indicators (KPIs) that are relevant to the implementation of their ESG objectives, which may be informed by the organisation's materiality assessments. These KPIs and other ESG performance data are reported to the board as part of periodic ESG performance reporting. With the assistance of data technologies, we are seeing a proliferation of ESG data being routinely generated, as well as more complex analyses being performed, to provide greater insight on

ESG performance. Areas of ESG performance that are not tied to specific quantitative measures may be harder to monitor, but may be tracked through employee engagement, the organisation's culture and ratings by external agencies, among others. Some organisations have implemented practices to monitor these areas, which may include qualitative assessments, surveys and other forms of feedback, sliding scale measurements and direct stakeholder engagement to monitor and track progress. Organisations will also often benchmark their ESG performance against data made publicly available by other organisations within their sector.

4. 4. What role is played in this regard by (a) the board and (b) other corporate bodies and/or officers?

Canada
Bennett Jones LLP

The role of the board and other corporate bodies will depend on the specific roles and responsibilities established by the organisation with respect to ESG. Given the board's ultimate responsibility for oversight of ESG, it is typically involved in the regular review and assessment of ESG performance through periodic ESG reporting. The monitoring of ESG performance will be supported by management and by a variety of departments within the organisation, sometimes working alongside Indigenous and local communities, non-governmental organisations and, external advisers such as consultants, certified public accountants and legal advisers.

4. 5. How is executive compensation typically aligned with ESG strategy in your jurisdiction?

Canada
Bennett Jones LLP

There is no standard way in Canada to align executive compensation with ESG strategy, but we are seeing common themes develop in certain sectors. The banking sector, for example, reported last year that the six largest banks added ESG components to the executive compensation of their respective chief executive officers.

A 2021 report by the Global Governance and Executive Compensation Group found that 63% of the 60 largest companies listed on the Toronto Stock Exchange – referred to colloquially as the TSX 60 – were using ESG-type measures in executive compensation. The main industries incorporating these measures were the materials, energy, financial and consumer staples industries. When used, the most frequent weight of these incentives in the measurement of the incentives is 20%.

The vast majority of executive compensation measures used by publicly listed companies in Canada are short-term incentives, with health and safety targets being the most common. While these specific operational ESG metrics have been used for many years, there was an 18% growth in ESG-related targets by companies on the TSX 60 between 2012 and 2019. Likewise, we are now seeing a small percentage of TSX 60 companies tying ESG-related measurements to long-term incentives for company executives, such as those relating to the environment and diversity, equity and inclusion.

As we see the trend of reporting on ESG and defining overarching ESG goals grow among Canadian companies, so too are we seeing executive compensation at these companies being tied to a broader range of

ESG factors.

4. 6. What best practices should be considered in relation to the design and implementation of ESG strategy?

Canada

Bennett Jones LLP

There is no ‘one size fits all’ approach when it comes to successfully implementing an ESG strategy within an organisation. Through ESG, organisations can identify priority issues and take an active approach to managing them. This includes identifying and evaluating the risks and opportunities of the organisation, and prioritising these issues to set realistic goals. The identification of risks and opportunities may be guided by input from internal as well as external stakeholders and an understanding of the laws in the ESG areas that apply to the organisation. It may also be guided by benchmarking ESG performance against others in the sector.

While the development of the ESG platform, its priorities and its communications should come from the top, ESG should also be integrated throughout the organisation so that an ESG lens can be applied to all decision making. The issues underlying ESG are dynamic and evolving, and legal requirements and priorities can change quickly. Accordingly, organisations must ensure that they take a holistic approach to ESG, embedding it in their mission, vision and values, as well as making it part of their culture.

5. Financing

5. 1. What is the general approach of lenders towards ESG in your jurisdiction? What internal and external information regarding a prospective borrower will they typically consider in this regard?

Canada

Bennett Jones LLP

Canadian debt investors are increasingly looking for opportunities to invest in environmental, social and governance-related debt instruments (referred to as ‘ESG products’).

ESG products in Canada come in a variety of forms and new varieties continue to emerge. At the time of writing, the three principal types of ESG products are:

- ‘use of proceeds’ products, the proceeds from which must be used to address specific environmental or social issues;
- ‘sustainability-linked’ products, in which the coupon and sometimes other pricing features of the instrument are adjusted depending on whether specified targets are satisfied; and
- increasingly, hybrids of the foregoing.

In a sustainability-linked financing, issuers that achieve their targets are often rewarded with a pricing decrease (e.g., a reduction in the coupon). Failure to achieve a given target typically does not result in a default under the debt instrument, but it may result in a pricing increase. Some sustainability-linked products feature both upward and downward pricing adjustments, while others include only one or the other.

When evaluating ESG products, Canadian investors look to non-binding principles published by the relevant authority. For bond issuances, the relevant principles are the Green Bond Principles, Social Bond Principles and Sustainability-Linked Bond Principles published by the International Capital Markets Association. For loans, the relevant principles are the Green Loan Principles, Social Loan Principles and Sustainability-Linked Loan Principles published jointly by the Asia Pacific Loan Market Association, the Loan Market Association and the Loan Syndications and Trading Association.

As in other jurisdictions, a lack of standardised criteria for the designation of an ESG product as green, social or sustainability-linked has led to concern over greenwashing (dressing up an otherwise conventional debt instrument with ESG terminology). To combat this, it has become standard practice for issuers of ESG products to produce a framework setting out how the proposed issuance aligns with the relevant principles. This framework is typically evaluated by a third-party expert (referred to herein as a ‘third-party reviewer’), which will report on the credibility of the framework.

In addition to their usual lending criteria, in an ESG financing, lenders/investors will consider:

- whether the issuer has a suitable ESG-related objective; and
- whether the terms of the proposed product appropriately reflect that objective.

This generally involves reviewing the issuer’s ESG framework and the third-party report thereon in addition to the specifics of the ESG instrument offered.

5. 2. Are bonds/loans that are marketed as green bonds/loans, social bonds/loans, sustainability bonds/loans or similar a feature of the markets in your jurisdiction?

Canada

Bennett Jones LLP

Yes, in recent years ESG financing activity in Canada has increased significantly, both in number of deals and in total transaction value.

Canada’s largest banks have prominent ESG lending businesses and Canada’s pension funds are investors in ESG products. In addition, Canadian banks have been significant issuers of ESG products and Canada’s largest pension funds have been active issuers in the green bond market since at least 2018.

‘Use of proceeds’ products initially represented a very large proportion of Canadian ESG financings. Many of these involved governmental entities, financial institutions and other investment-grade entities issuing green or social bonds. For example, the provinces of Ontario and Quebec, and the cities of Vancouver and Toronto, have all issued green or social bonds in recent years, in addition to the previously mentioned issuances by banks and pension funds.

Recently, there has been a marked increase in the variety of issuers accessing ESG finance in Canada, including a broader range of non-bank corporate issuers. As these issuers become more active in ESG finance, they are developing products tailored to their needs, including products that mix and match features of green, social and sustainability-linked instruments.

According to the CFA Institute, environmental issues affect corporate bond yields more frequently than social issues, while the opposite is true for sovereign debt yields. This may mean that, for corporate issuers,

environmental objectives tend to have a larger pricing impact than social objectives when it comes to ESG financings. A sustainability-linked bond with both environmental and social objectives was issued in 2021 by Enbridge Inc, a large Canadian energy company based in Calgary. Enbridge's sustainability-linked bonds, which mature in 2033, include targets of increasing the diversity of Enbridge's workforce and reducing its greenhouse gas emissions. If Enbridge fails to meet its workforce diversity goal by August 2026, the annual interest rate on the bonds will increase by five basis points to 2.55%. If Enbridge fails to meet its greenhouse gas emissions goal by August 2031, the annual interest rate on the bonds will increase by 50 basis points from the then-effective rate.

5. 3. What key developments have taken place in the structuring of these instruments in your jurisdiction?

Canada

Bennett Jones LLP

Although ESG financing is not new in Canada, the current state of the art has developed within the last two to three years and the pace of both growth and innovation remains high.

While ESG products were initially attractive predominantly to investment grade issuers, they are increasingly becoming a viable financing option for non-investment grade companies that are tailoring these products to their needs and developing new features. This is particularly the case in Canada's energy and natural resources industries. Participants in heavy industry are often able to develop well-defined environmental targets that have the potential to form the basis for an ESG debt offering.

One of the roles of the third-party reviewer is to determine whether the issuer's stated environmental and/or social aims are appropriate and credible. An issuer whose business has a significant environmental impact will generally need to include a suitable environmental goal in order to obtain a third-party reviewer's approval. If such an issuer also has a social goal, it may create a hybrid product. A social product with no environmental objective is less likely to pass muster with a third-party reviewer if the issuer's business has a significant environmental impact.

Other developments in Canadian ESG products include a move towards more specific use of proceeds requirements. Whereas earlier products often stated the use of proceeds at a high level, there is a trend towards increased specificity. As mentioned above, there is also an increasing blurring of the lines among the different categories of ESG products, with market participants looking to include use of proceeds requirements in sustainability-linked issuances and combine environmental and social objectives.

5. 4. What best practices should be considered in relation to ESG in the financing context?

Canada

Bennett Jones LLP

A successful ESG offering will have two principal features:

- an ESG structure that is aligned with the relevant principles and approved by a third-party reviewer;
- and

- an attractive risk-return profile as a conventional debt instrument.

Although there is significant investor demand for ESG products, the ESG aspect of the financing will typically be reviewed as part of an integrated investment analysis. Investors are looking to avoid sacrificing performance in favour of an ESG label.

Issuers considering an ESG financing should engage their legal counsel and financial advisers early in the process in order to:

- determine an appropriate structure for the offering, including the type of ESG product to be offered; and
- assess the expected marketing and pricing impact of the proposed ESG features.

In a use of proceeds offering, this involves establishing an appropriate use of proceeds. If the product will be sustainability linked, the prospective issuer will need to select key performance indicators (KPIs) relevant to the issuer's industry and business model. The issuer should then calibrate ambitious and meaningful sustainability performance targets (SPTs) with respect to each KPI. Each SPT should represent a material improvement in the corresponding KPI. An issuer's KPIs and SPTs will be reviewed by the third-party reviewer for alignment with the relevant principles. The issuer's success in achieving its SPTs will result in an adjustment to the pricing features of its sustainability-linked product.

6. ESG activism

6. 1. What role do institutional investors and other activist shareholders play in shaping ESG in your jurisdiction?

Canada
Bennett Jones LLP

Institutional investors play a significant role in shaping ESG in Canada. In many cases, they lead the way in influencing the adoption of ESG by virtue of their size and long-term investment horizons. Institutional investors have their own ESG strategies in place to assess ESG aspects across all their assets. They are increasingly evaluating the strength of an organisation's ESG performance as part of their investment decisions and allocating capital on the basis of ESG criteria and risk profile, which in turn affects valuations and access to capital.

The regulators of institutional investors are also influencing the implementation of ESG in Canada. For example, the Canadian Association of Pension Supervisory Authorities (CAPSA) is developing a principles-based guideline on integrating ESG factors into pension fund investment and risk management for pension plan administrators. This will be CAPSA's first guideline on ESG and it is expected to supplement existing CAPSA policies. CAPSA guidelines are an important source of authority in the pension sector – particularly where there is an absence of specific legislation requirements. A draft guideline was released by CAPSA for public consultation on 9 June 2022.

The draft CAPSA guideline addresses a number of key areas, including:

- formal recognition of the importance of ESG factors to pension plan investment strategies;
- guidance on how the consideration of these ESG factors over varying time horizons relates to the fiduciary requirements of plan administrators;

- guidance on how plan administrators can assess and incorporate ESG factors into their investment decision making and what, if any, processes should be in place to oversee any assistance used in the administration of the plan from investment managers; and
- how ESG factors will affect other aspects of plan administration and governance, including how plan administrators engage with those they are investing in (including documentation and disclosure and transparency with respect to plan members and other stakeholders).

Shareholder activism is also influencing the evolution of ESG in Canada. Shareholders are increasingly prompting assessment and changes with respect to the ESG strategies of organisations, including in the areas of:

- climate (targets and transition strategies);
- diversity on boards and management;
- human rights;
- technology; and
- governance.

6. 2. How do activist shareholders typically seek to exert influence on corporations in your jurisdiction in relation to ESG?

Canada

Bennett Jones LLP

Activist shareholders are putting pressure on corporations with respect to ESG matters in a number of ways. Shareholders (and other stakeholders) are directly engaging on a deeper level with corporations on ESG performance and commitments, and the growing ESG expectations of investors. Shareholders are not just seeking information on ESG matters, but are also seeking to influence ESG outcomes. Corporations across all sectors are seeing an increase in shareholder proposals relating to a range of ESG concerns, such as greater transparency and analysis on ESG risks and opportunities and commitments to specific ESG targets or practices. Activist shareholders are using proxy voting to push corporations to adopt initiatives based on shareholders' ESG objectives.

Activist shareholders are also collaborating with each other and with other institutional investors to effect change and ESG dialogue within organisations. Activist shareholders are not just limiting their influence and activities to the corporations in which they hold shares; they are also engaged with governments and regulators relating to ESG requirements.

6. 3. Which areas of ESG are shareholders currently focused on?

Canada

Bennett Jones LLP

In our experience, shareholders are focused on many areas of ESG, recognising that there are a multitude of ESG issues that have the potential to affect the sustainability and financial performance of corporations. Issues relating to climate risk and the risks and opportunities associated with the transition to a low-carbon economy continue to dominate the ESG dialogue in the energy sector, as well as other sectors preparing for a low-carbon future. In recent years, we have seen an increased focus on social issues, influenced by factors

such as the COVID-19 pandemic and significant social movements responding to racial and other social inequalities. This has resulted in a greater focus on workplace issues relating to equity, diversity and inclusion, human rights and overall employee engagement and wellbeing.

Shareholders (along with many other stakeholders in the private and public sector) are also focused on understanding and assessing the interactions that an organisation may have with Indigenous peoples. Shareholders are increasingly aware of the importance of reconciliation and Indigenous rights, and their importance to the sustainability of an organisation, including in relation to its regulatory environment. A wide variety of regulatory and policy actions are underway in Canada – including the implementation of the United Nations Declaration of the Rights of Indigenous Peoples – which underscore the material importance of Indigenous relationships and partnerships.

Other issues that shareholders are focused on include:

- supply chain management;
- cybersecurity;
- privacy;
- occupational health and safety;
- board and management diversity; and
- governance.

6. 4. Have there been any high-profile instances of ESG activism in recent years?

Canada
Bennett Jones LLP

ESG activism is increasing in Canada and is garnering greater public attention. In November 2021, Greenpeace Canada filed a formal complaint with the Competition Bureau alleging that Shell Canada’s “Drive carbon-neutral” advertising campaign is misleading the public. In its complaint, Greenpeace has challenged the credibility of Shell’s carbon ‘offset’ programme, which claims that all emissions from the corporation’s fossil fuels can be offset through forest restoration and other initiatives. In August 2021, the Netherlands’ advertising watchdog ruled that a similar Royal Dutch Shell Plc advertising campaign could not be substantiated; the campaign was pulled as a result.

In April 2022, six members of the public, backed by environmental groups Ecojustice and Stand.earth, called on the Competition Bureau to investigate a Canadian bank’s claims regarding climate commitments and fossil fuel financing. The applicants argue that until the bank stops funding the expansion of fossil fuel corporations, it should be prohibited from advertising itself as in support of the Paris Agreement or as aiming to become net zero by 2050. This complaint was outstanding at the time of writing.

From a shareholders’ perspective, in 2020, TCI Fund Management and its related charitable foundation Children’s Investment Fund Foundation launched the Say on Climate Initiative, under which corporations commit their climate change strategies to annual shareholder votes. Shareholders of both Canadian National Railway and Canadian Pacific Railway have since committed to hold Say on Climate votes at future annual meetings.

In June 2021, shareholders of TMX Group Ltd voted overwhelmingly in favour of an amended shareholder proposal which would require the board of directors to report to shareholders on its ESG work, including

work relating to:

- developing internal programmes and policies on equity, diversity and inclusion;
- reviewing procurement from businesses owned by Indigenous and other underrepresented groups; and
- engaging with qualified and other organisations to support this work.

6. 5. Is ESG activism increasing or decreasing in your jurisdiction? How and why?

Canada

Bennett Jones LLP

In line with the increase in ESG activism globally, and perhaps inspired by the recent successes of ESG activism in other jurisdictions, Canada's ESG activism is increasing. In November 2021, the Laurel Hill Advisory Group – a North American independent, cross-border proxy solicitation firm – published a report stating that over 60% of all shareholder proposals surveyed in Canada were related to ESG in 2021, up from 25% in 2020. We expect that this trend will continue as demand for information and performance on ESG issues increases.

In addition, as ESG reporting frameworks become more standardised and the overall quality and comparability of reported ESG information improve, shareholders will be better able to compare across organisations and see where their organisations may be lacking with respect to ESG performance. Shareholders may increasingly turn to ESG activism as a method to effect change.

7. Other stakeholders and rights holders

7. 1. What role do stakeholders or rights holders (eg, employees, pensioners, creditors, customers, suppliers, and Indigenous communities) play in shaping ESG in your jurisdiction? What influence can they exert on a company?

Canada

Bennett Jones LLP

In Canada, stakeholders – including customers, employees, pensioners, suppliers and creditors – are playing a significant role in shaping ESG. Indigenous communities are also continuing to significantly influence the ESG dialogue in Canada. As rights holders, Indigenous communities may influence the practices and targets set by organisations and governments across Canada. For example, the British Columbia environmental assessment process requires the government to seek consensus with participating Indigenous communities throughout the assessment process. Both the federal and British Columbia environmental assessment processes also enable Indigenous-led assessment of the environmental impacts of a project on the Indigenous community. Governments are also focused on advancing self-determination and self-government of Indigenous communities, including through co-management and joint decision making with Indigenous communities. For example, with the recent focus on water security and water management, British Columbia has announced the Watershed Security Strategy. To be developed in partnership with affected First Nations and local communities, the Watershed Security Strategy seeks to ensure that watersheds are adequately protected. It also explores opportunities for co-governance of watersheds with Indigenous communities.

8. Trends and predictions

8. 1. How would you describe the current ESG landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Canada

Bennett Jones LLP

The current ESG landscape in Canada is evolving rapidly and we expect that this will continue in the coming years. Provincial governments in Canada, for instance, are taking notice of ESG and using it as an opportunity to attract capital and investment to their jurisdictions. Government bodies are acting as both regulators and business owners, as they seek to create the right environment to attract investment and allow businesses to flourish in their jurisdictions. We are seeing greater alignment among regulators, industries and investors in this regard. We expect that ESG considerations will continue to be integrated into many aspects of public policy in the future.

Different regulators are becoming more involved with the implementation of ESG requirements. This is coming in the form of new mandatory ESG regulatory requirements (eg, the recent Canadian Securities Administrators' proposal to require climate disclosures for public corporations), as well as guidance from different regulators (eg, the draft Canadian Association of Pension Supervisory Authorities guideline on ESG for pension plan administrators).

We expect that ESG-related litigation and shareholder activism will continue to increase in the future, as the expectations of stakeholders and rights holders with respect to ESG performance increase. We also expect to see an increase in the role of ESG considerations as part of M&A strategy. Organisations are increasingly evaluating ESG considerations as part of the overall value assessment for a transaction. Organisations are also using ESG considerations in mergers and acquisitions to develop broader strategic opportunities for their organisation.

9. Tips and traps

9. 1. What are your top tips for effective ESG implementation in your jurisdiction and what potential sticking points would you highlight?

Canada

Bennett Jones LLP

There is no single approach to effective ESG implementation in Canada. ESG implementation strategies will depend on the nature of the organisation and the expectations of its stakeholders and rights holders, among other factors.

It is important that an ESG strategy be evaluated at the highest levels within an organisation, typically with leadership and oversight by the board. ESG considerations can impact all aspects of the organisation and typically require a cross-functional, multi-level commitment throughout the organisation.

An important starting point for any ESG strategy is to identify the priority ESG issues for the organisation, so that it can focus on the issues that will have the greatest impact. This is particularly important in the early stages of developing an ESG strategy where it may not be practical to address every ESG issue with the same level of attention. ESG materiality assessments can be a useful tool to identify the most critical ESG

issues.

Organisations should customise their own ESG priorities and narratives, and not simply rely on standard ESG reporting metrics to provide the ESG story. A tailored ESG approach is more likely to lead to meaningful interactions with stakeholders, better transparency and accountability, and overall improved ESG performance within the organisation.

There are a number of ESG risks that organisations must manage, many of which relate to ESG disclosure. Concerns regarding greenwashing or other misleading disclosures can lead to regulatory intervention, civil actions and reputational damage. Organisations must carefully evaluate all aspects of their ESG narrative and information disclosures for accuracy, transparency and consistency.

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