



ESG

Doing Business in Canada

AIRD BERLIS

2024
airdberlis.com

Environmental, social and governance (“**ESG**”) and sustainability matters are becoming increasingly important to governments, investors, public and private companies and their stakeholders. While “ESG” and “sustainability” are often used interchangeably, these terms represent different concepts. ESG is a set of criteria used to evaluate the sustainability and ethical impact of a company or investment. The “environmental” aspect assesses a company’s impact on the natural world and its efforts towards sustainability. The “social” aspect focuses on a company’s treatment of employees, customers, communities and broader societal impacts. The “governance” aspect evaluates the company’s leadership, transparency and accountability practices. ESG serves as a framework to measure and promote responsible and sustainable business practices, addressing not only financial performance but also the broader impact of organizations on the planet and society.

Sustainability refers to the ability of a company or investment to meet present needs without compromising the ability of future generations to meet their own needs. It encompasses environmental, social and economic considerations. In this context, sustainability involves practices that minimize negative environmental impacts, promote social well-being and maintain long-term financial stability. It entails responsible resource management, ethical business practices, community engagement and a commitment to addressing social and environmental challenges, all while aiming for long-term value creation and resilience.

There is growing investor demand for ESG and sustainability information from businesses operating in Canada, as investors increasingly recognize that these factors can affect a company’s long-term financial performance. Institutional investors in particular are placing more emphasis on ESG factors when making investment decisions, and many ESG and sustainability-focused financing tools (both debt and equity) have been developed in the market in response to this demand. Consumers are also becoming more conscious of the environmental and social impacts of the products and services they consume and are increasingly calling upon companies to implement sustainable practices and resolve any sustainability-related issues. Finally, a number of jurisdictions (in Canada and abroad) have begun developing or have implemented legislation that will require the disclosure of a company’s sustainable practices, in whole or in part. As the foundation of strong disclosure is strong performance, companies find themselves increasingly compelled to consider the sustainability of their operations and procedures.

KEY ESG AND SUSTAINABILITY CONSIDERATIONS FOR BUSINESSES OPERATING IN CANADA

Corporate Governance and Risk Oversight

Corporate governance and the risk oversight of ESG matters are key issues for businesses operating in Canada. Corporate governance is widely viewed as the “spine” or framework through which effective sustainability policies may be developed and implemented within an organization. Ultimately, the corporate governance mechanisms that are adopted by the company will depend on its stage of growth, its ESG-related needs and goals, and the level of expertise it already possesses.

Corporate governance is a key issue within the ESG framework for several reasons:

1. **Accountability and Transparency:** Effective corporate governance ensures that companies are accountable to their stakeholders, including shareholders, employees, customers and the wider society. It promotes transparency in decision-making processes, financial reporting and disclosure of material information. Transparency is vital for assessing a company’s environmental and social impact, and understanding its commitment to responsible business practices.
2. **Risk Management:** Good corporate governance practices help identify, assess and mitigate risks, including those related to environmental and social factors. By implementing robust governance structures, companies can better manage risks associated with climate change, resource scarcity, human rights violations, supply chain disruptions and other ESG-related issues. This, in turn, can enhance their long-term sustainability and resilience.
3. **Stakeholder Engagement:** Corporate governance fosters active engagement with stakeholders, enabling their voices to be heard in decision-making processes. The extent to which a company engages with its external stakeholders can lead to the development of meaningful plans and practices to address certain ESG-related issues. However, the Supreme Court of Canada has established that a director’s fiduciary duty (i.e., to act honestly and in good faith, in the best interests of the corporation for which they are directors) is owed primarily to the corporation. While directors may consider the interests of external stakeholders in exercising their judgment, there is no explicit requirement

to do so, and the courts will ultimately defer to the business decisions made by the directors that lie within a range of reasonable alternatives. Therefore, while there is a compelling business reason to consider external stakeholder interests when developing ESG-related strategies, there is currently no legal requirement to do so.

4. **Long-Term Value Creation:** Sound governance practices are closely linked to long-term value creation. Companies with strong governance frameworks tend to perform better financially, attract investment and enjoy a positive reputation.¹ By prioritizing ESG considerations, companies may enhance their competitiveness, attract and retain talent, and build relationships with customers who increasingly value responsible and sustainable business practices.
5. **Regulatory and Legal Compliance:** Corporate governance frameworks often incorporate legal and regulatory requirements. Compliance with applicable laws and regulations is critical for managing ESG risks and avoiding potential legal issues or reputational damage. Governance practices can help companies stay abreast of evolving regulations and proactively integrate them into their operations.
6. **Ethical Leadership and Culture:** Corporate governance sets the tone at the top and promotes ethical behaviour throughout the organization. Strong governance structures encourage ethical decision-making, integrity and responsible behaviour among executives and employees. This commitment to ethical leadership and culture reinforces the company's commitment to ESG principles.

Corporate governance plays a pivotal role in embedding ESG considerations into a company's strategy, operations and culture. It provides a framework for addressing environmental and social challenges, managing risks and creating long-term sustainable value for all stakeholders.

As discussed further under the heading "Voluntary and Mandatory Disclosures – Companies Publicly Listed in Canada," all Canadian publicly listed companies are required, on an annual basis, to disclose certain corporate governance matters to their shareholders.

¹ McKinsey and Company, for example, has noted that the spirit of governance involves proactively anticipating and managing violations before they occur, and ensuring transparency and dialogue with regulators instead of formalistically submitting a report and letting the results speak for themselves. Inherently, such practices demonstrate transparency, awareness and proficiency that tends to attract investment and create value, [<https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value>].

Diversity and Inclusion

A company's ability to implement and maintain meaningful diversity on its board, its senior management team and throughout its organizational structure is one of the most impactful aspects of its ESG performance.² Over the past several years, proxy advisory firms have exhibited an increased interest in demonstrated diversity on a public company's slate of nominee directors. Should an issuer fail to demonstrate diversity on its board, or a commitment to diversity otherwise, a proxy advisory firm may advise shareholders to vote against a director, an entire slate of directors or any other related matters at an issuer's annual meeting, thus impacting the leadership and direction of the company.

Public companies in particular are required to disclose the diversity present on their boards and senior management. At the federal level, Canada has implemented new disclosure requirements under the *Canadian Business Corporations Act* ("CBCA") requiring public companies existing under the CBCA to make certain disclosures about the diversity of their boards and executive officers. The disclosure requirements centre on representation of four designated groups: women, Indigenous peoples, persons with disabilities and visible minorities. Among other things, CBCA companies must annually disclose whether or not they have targets in place to enhance representation by these four groups and, if not, to provide an explanation for the lack of such targets. Most recently on April 13, 2023, the Canadian Securities Administrators (the "CSA") proposed and solicited feedback on two alternative approaches to enhance existing disclosure requirements set out in Form 58-101F1 *Corporate Governance Disclosure*, which currently does not require issuers to report on its diversity at the board level. Under the CSA's proposals, issuers will be required to report on the extent to which Indigenous peoples, LGBTQ2SI+ persons, racialized persons, persons with disabilities or women are nominated on and serve on an issuer's board. An approach has not been finalized to date.

² The Ontario Securities Commission, for example, noted in its CSA Notice and Request for Comment – *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* that in its consultations, it found that diversity on boards and in executive officer positions is a critical component of good corporate governance and remains an important consideration in investment and voting decisions.

Involvement of Indigenous Peoples

Many reporting frameworks view a company's ability to engage with Indigenous stakeholders and address their concerns as just one aspect of its overall ESG practices, ancillary to its broader ESG strategies. However, it is becoming increasingly understood that the integration of Indigenous peoples and the prioritization of their generational knowledge, practices and ingrained values regarding sustainability are crucial for ensuring a company's ESG initiatives are meaningful, robust, resilient and successful for all stakeholders involved. As noted by the Coalition for the Human Rights of Indigenous Peoples, "Indigenous peoples have long maintained ways of life and systems of law that embody principle and values which are now being described as 'sustainable development.'"³

The Truth and Reconciliation Commission of Canada's Calls to Action includes a call for corporate entities to do their part in advancing reconciliation with Indigenous peoples by adopting the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") as a reconciliation framework. This entails applying its principles, norms and standards to corporate policies and core operational activities involving Indigenous peoples, their lands and resources.⁴

At a corporate level, implementing UNDRIP can take multiple forms, and the meaningful participation of Indigenous peoples in an organization's decision-making and operations can vary depending on the specific needs and circumstances of each Indigenous community. Generally, companies should strive to implement the following:

1. **Meaningful Consultation on Projects:** Under the UNDRIP, project approvals generally require meaningful consultation with affected Indigenous communities. This process should accommodate any impacts on their rights and interests and consider Indigenous knowledge. Consultation should be a two-way dialogue with Indigenous communities aimed at minimizing the impacts of the project on each Indigenous community and exploring the opportunities that are created by the involvement of Indigenous communities. Furthermore, consultation should be an ongoing matter beyond obtaining initial approvals for such projects. Maintaining a meaningful dialogue ensures that the evolving
2. **Hiring Indigenous Peoples and Decision-Makers:** The retention of Indigenous peoples as employees, whether on the site of projects that affect Indigenous communities or elsewhere, can ensure that an organization meaningfully contributes to the economic advancement of Indigenous peoples and, by extension, Indigenous communities. Engaging Indigenous peoples in decision-making capacities, whether as directors or otherwise, can ensure that Indigenous values and generational wisdom, particularly those concerning sustainability matters, are truly respected in an organization and engrained in a company's operations and business practices.⁶
3. **Encouraging Indigenous Investment:** Retaining Indigenous investment in projects has been identified as a meaningful step towards reconciliation by multiple third-party Indigenous-led organizations on account of the consequent economic benefits for Indigenous communities. By encouraging investment in projects by Indigenous peoples, whether through Indigenous capital institutions or other means, companies can satisfy the Truth and Reconciliation Commission's calls to action to advance reconciliation efforts in the private sector while also attracting additional capital for applicable projects and ongoing operations.⁷

THE REPORTING LANDSCAPE

Mandatory Reporting Requirements

Supply Chain Monitoring and Reporting

As investors, governmental bodies, consumers, various stakeholders and the general public continue to exhibit an interest in the ESG performance of various entities, the supply chain risk management practices of an organization have increasingly come into focus. Through effective supply chain risk management, an organization may revise supplier agreements and implement the necessary mechanisms to identify and mitigate certain ESG-related risks, such as corruption, an excessively large carbon footprint, pollution and waste, and use of poor and even illegal labour practices. If left unaddressed, these ESG-related risks may expose

³ See declarationcoalition.com for the Coalition for the Human Rights of Indigenous Peoples' statements regarding the involvement of Indigenous Peoples in sustainability-related matters and issues.

⁴ [Truth and Reconciliation Commission of Canada: Calls to Action | Canadian Religious Conference \(crc-canada.org\)](https://www.crc-cc.gc.ca/acts/crc-cc)

⁵ [Environmental, Social and Governance Project and Indigenous Peoples Engagement Report \(statcan.gc.ca\)](https://www150.statcan.gc.ca/n1/pub/26-264-x/2019001/article/00001-eng.htm)

⁶ [FNMPC_Conference_Overview_v6.pdf](#)

⁷ [FNMPC_Conference_Overview_v6.pdf](#)

the organization to other financial, regulatory, legal or operational risks.

Of particular concern is an organization's ability to identify and prevent forced labour and child labour in the organization and its supply chain. Accordingly, on January 1, 2024, the *Fighting Against Forced Labour and Child Labour in Supply Chains Act* (the "**Act**") came into force. In summary, the Act sets out new import bans and requires federal government institutions and a broad range of other public and private companies⁸ – including certain international companies that conduct business or hold assets in Canada – to report on steps taken to reduce and prevent the risk of forced labour and child labour being used in their respective supply chains.⁹ Ultimately, the entities that are required to report under the Act must file an annual report with the Minister of Public Safety and Emergency Preparedness and publish the same on a prominent place on its website on or before May 31 of each year.

Regardless of their obligation to report under instruments such as the Act, certain companies have decided to conduct due diligence to both identify any forced labour or child labour in their respective supply chains and track the effectiveness of certain frameworks and policies to ensure that

8 Any Canadian federal government department or ministry of state, any body or office listed in Schedule 1 of the *Access to Information Act*, and any parent Crown corporation or wholly-owned subsidiary of such a corporation within the meaning of section 82 of the *Financial Administration Act* will be required to report under the Act. Furthermore, any corporation or unincorporated organization (including a trust or partnership that: (a) has a place of business in Canada, does business in Canada or has assets in Canada and that, based on its consolidated financial statements (i) has at least C\$20 million in assets; (ii) has generated at least C\$40 million in revenue; and (iii) employs an average of at least 250 employees; (b) is listed on a stock exchange in Canada; or (c) is otherwise prescribed by any regulations that may accompany the Act, which have not yet been released, will be required to report under the Act. The Act also notes that the government institutions and private sector entities described previously must be engaged in (a) producing, selling or distributing goods in Canada or elsewhere, where "production of goods" is defined as the "manufacturing, growing, extracting and processing of goods;" (b) importing goods produced outside of Canada into Canada; and (c) controlling an entity engaged in any of the foregoing activities, where "control" is defined as any direct or indirect control or common control in any manner (consequently a parent company that controls one or more subsidiaries, in the manner prescribed by the Act, will be required to report on the activities of these subsidiaries).

9 The report must set out a number of matters in relation to the entity's prior fiscal year, including: (a) the steps taken by the organization to reduce and prevent the risk of forced labour or child labour being used in the organization's business and supply chains; (b) the organization's structure, activities and supply chains; (c) the organization's policies and due diligence processes in relation to forced labour and child labour; (d) the parts of the organization's business and supply chains that carry a risk of forced labour or child labour being used, and the steps it has taken to assess and manage that risk; (e) any measures taken to remediate any forced labour or child labour; (f) any measures taken to remediate the loss of income to the most vulnerable families that results from any measure taken to eliminate the use of forced labour or child labour in its activities and supply chains; (g) the training provided to employees on forced labour and child labour; and (h) how the organization assesses its effectiveness in ensuring that forced labour and child labour are not being used in its business and supply chains.

the risk of forced labour and child labour is reduced. Companies have also decided to implement supplier codes of conduct to set out, for example, certain necessary prohibitions and monitoring procedures regarding suppliers' labour practices and specifically the use of forced labour or child labour. Entities may also choose to train directors, officers and internal personnel on their duties in light of the pending obligations under the Act, and proactively review and update contracts with existing suppliers to ensure that any risks associated with forced labour or child labour are promptly addressed and mitigated.

Climate-Related Risks and Measures

In March 2023, the Office of the Superintendent of Financial Institutions ("**OSFI**") published Guideline B-15: Climate Risk Management ("**Guideline B-15**") setting out its expectations for the management and disclosure of climate-related risks¹⁰ by over 350 federally regulated financial institutions in Canada ("**Institutions**"). Specifically, Guideline B-15 requires Institutions to report on the climate-related risks identified by the Institution and any governance mechanisms¹¹ implemented by the Institution to address such risks. For domestic systemically important banks and internationally active insurance groups headquartered in Canada, Guideline B-15 will be effective fiscal year-end 2024. For all other Institutions required to adhere to Guideline B-15, OSFI has noted that Guideline B-15

10 Guideline B-15 identifies three types of climate-related risks: physical risks (i.e. financial risks that arise from the increasing severity and frequency of climate-related extremes and events, longer-term gradual shifts of the climate, and indirect effects of climate change), transition risks (i.e. financial risks related to the process of adjustment towards a low-greenhouse gas economy, which can emerge from current or future government policies, legislation and regulations to limit greenhouse gas ("**GHG**") emissions, or new technologies, changes in market and consumer sentiment with respect to a low-GHG economy), and indirect risks (the risk of climate-related claims under liability policies, litigation and direct actions against Institutions for failing to manage climate-related risks).

11 Guideline B-15 requires Institutions to report on its climate-related governance (i.e. information on the Institution's board of directors' oversight of climate-related risks and opportunities, and management's role in assessing such climate-related risks and opportunities), strategy (i.e. information on the climate-related risks and opportunities the Institution has identified over the short-, medium- and long-term; the impact of climate-related risks and opportunities on the Institution's businesses, strategy and financial planning; the Institution's climate transition plan; and the resilience of the Institution's strategy, taking into consideration different climate-related scenarios, including a scenario which limits warming to the level aligned with the latest international agreement on climate change, or lower), risk management (i.e. information on the Institution's process for identifying and assessing climate-related risks; the Institution's processes for managing climate-related risks; and how processes for identifying, assessing and managing climate-related risks are integrated into the Institution's overall risk management), and metrics and targets (i.e. information on the metrics used by the Institution to assess climate-related risks and opportunities in line with its strategy and risk management process; the Institution's Scope 1 and Scope 2 GHG emissions; the Institution's Scope 3 GHG emissions; the targets used by the Institution to manage climate-related risks and opportunities, and the Institution's performance against these targets; and any prudential cross-industry and industry-specific metrics).

will become effective at fiscal year-end 2025. Once Guideline B-15 becomes effective, Institutions must publish the applicable disclosures on their websites no later than 180 days after fiscal year-end and must publish their relevant disclosures on an annual basis, at minimum (the Institution may choose to report on its climate-related risks more frequently on a voluntary basis).

Voluntary Reporting Frameworks

With the exception of supply chain reporting for certain government and private entities and climate-related risk reporting for financial institutions, it is not currently a legal requirement in Canada for businesses to publish ESG and sustainability reports. Nonetheless, as noted above, the business reasons for doing so are compelling for many entities doing business in Canada.

Companies seeking to integrate ESG and sustainability considerations into their operations may consider the wide array of practices and legal frameworks emerging in Canada and globally. For instance, the Corporate Sustainability Reporting Directive (“**CSRD**”), a European Union (“**EU**”)-based ESG reporting mandate that entered into force on January 5, 2023, will require non-EU companies meeting certain thresholds and companies with securities listed on a regulated EU market to report on the impacts of the company’s activities on people and the environment, and how various sustainability matters affect the company. The CSRD reporting requirements will cover a wide array of ESG topics including Scope 1, Scope 2 and Scope 3 greenhouse gas emissions, respect for human rights as defined by core United Nations and EU human rights conventions, and descriptions of how the company identifies and manages sustainability-related risks.¹²

ESG investing continues to grow in popularity. Many companies have elected to disclose their ESG performance to attract and retain investment. Some companies do so voluntarily by way of quarterly or annual sustainability reports, for example, that are prepared in accordance with ESG reporting frameworks (such as those developed by the Global Reporting Initiative, the Task Force on Climate-Related Financial Disclosure (“**TCFD**”) and the Sustainability Accounting Standards Board). There is currently a great deal of overlap in the reporting requirements set out in the various frameworks that

have been published which can result in confusion among companies in selecting the appropriate framework or combination of frameworks under which to report their sustainability performance. The variety of frameworks has also led to confusion among investors in the evaluation of the financial performance and longevity of a company, and comparing the performance of companies utilizing different ESG reporting frameworks. As a result, there has been increasing market demand for a comprehensive, high-quality global baseline of sustainability disclosures focused on the needs of the world’s financial markets and the participants in those markets.

It is in this context that the International Financial Reporting Standards Foundation formed the International Sustainability Standards Board (“**ISSB**”) in 2021 to develop a consolidated set of reporting standards, drawing on the frameworks that have already been published by various entities, to assist companies in producing high-level sustainability-oriented disclosures that investors can rely upon to make informed financial decisions. On June 26, 2023, the ISSB published its inaugural standards for sustainability and ESG-related disclosure: IFRS S1 – *General Requirements for Disclosure of Sustainability-Related Financial Information* (“**IFRS S1**”) and IFRS S2 – *Climate-Related Disclosures* (“**IFRS S2**” and, with IFRS S1, the “**ISSB Standards**”). The ISSB Standards were developed in heavy reliance on the TCFD framework and structures its disclosure requirements around the TCFD’s four key pillars: (a) governance, (b) strategy, (c) risk management and (d) metrics and targets (the “**Four Pillars**”). IFRS S1 requires disclosure across all Four Pillars of all material sustainability-related risks and opportunities that could affect an entity’s prospects. IFRS S2 requires disclosure across all Four Pillars of all climate-related risks and opportunities that could affect an entity’s prospects and that might be useful to primary users of general-purpose financial reports in deciding whether to provide resources, financial or otherwise, to the entity. The ISSB Standards came into force on January 1, 2024, with certain transition relief for the first annual reporting period. Entities looking to comply with the ISSB Standards will need to disclose any sustainability- and climate-related risks and opportunities identified in respect of the third quarter or entirety of 2023.¹³ In addition, the Canadian Sustainability Standards Board (“**CSSB**”) was formed in April of 2023 to “support the uptake of ISSB standards in Canada, highlight key issues in

¹² Canadian companies that (i) have annual net turnover in the EU exceeding €150 million for each of the last two consecutive financial years and (ii) have at least one large subsidiary, one subsidiary listed on an EU regulated market, or one branch in the EU that generated over €40 million in annual net turnover the preceding financial year, will be required to report under the CSRD in respect of all its entities, not just the EU subsidiary or branch.

¹³ For a more detailed breakdown of the ISSB Standards, please see our article published here: [<https://www.airdberlis.com/insights/publications/publication/progress-in-standardizing-voluntary-esg-and-sustainability-reporting>].

the Canadian context and facilitate interoperability between ISSB standards and any forthcoming CSSB standards.¹⁴ The CSSB is currently in the process of adapting the ISSB standards within Canada, and has sought feedback from the general public on its proposed methodology for adapting these standards.

Forthcoming Reporting Obligations

Companies that are listed on Canadian stock exchanges may be subject to additional mandatory ESG disclosure requirements. On October 18, 2021, the CSA released the proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (“**NI 51-107**”). While NI 51-107 is yet to be finalized, should the CSA adopt NI 51-107 in its current form, or something similar, issuers will potentially be required to disclose:

- the governance mechanisms (i.e., a description of the company’s board of directors’ oversight of climate-related risks and opportunities, as well as management’s role in assessing and managing those same risks and opportunities),
- risk management procedures (i.e., a description of the issuer’s processes for identifying, assessing and managing climate-related risks, including a description of how those processes are integrated into the issuer’s overall risk management),
- strategies developed to identify, assess and mitigate or capitalize upon climate-related risks and opportunities (i.e., would include a description of the climate-related risks and opportunities the issuer has identified over the short-, medium- and long-term, and the impact on the issuer’s business, strategy and financial planning), and
- the goals the entity has set for itself in reducing its greenhouse gas (“**GHG**”) emissions (i.e., a description of the metrics used by the issuer to assess climate-related risks and opportunities, in addition to a description of the targets used to manage those same risks and opportunities, along with the issuer’s performance against these targets).

The climate-related strategy, risk management, metrics and targets disclosure of proposed Form 51-107B would also require disclosure regarding GHG emissions, which would require, among other things, disclosure of all direct GHG emissions

(Scope 1), indirect GHG emissions (Scope 2), and all other indirect GHG emissions not disclosed under Scope 2 (Scope 3) and their related risks. If the GHG emissions are not disclosed, the issuer must provide reasons for not doing so. The issuer must also disclose the reporting standard used to calculate and disclose the GHG emissions.

Certain existing national instruments may currently apply to an issuer’s disclosure of climate-related information. For instance, Form 51-102F1 *Management’s Discussion and Analysis* and Form 51-102F2 *Annual Information Form* note that “materiality” is the deciding factor when determining whether information is required to be disclosed, and the latter specifically requires issuers, when completing their annual information forms, to note material risk factors that may influence an investor’s decision to purchase the issuer’s securities. National Policy 58-201 *Corporate Governance Guidelines*, National Instrument 52-110 *Audit Committees* and National Instrument 52-109 *Certification of Disclosure in Issuers’ Annual and Interim Filings* set out guidelines for adopting corporate governance mechanisms and internal controls and procedures to identify and manage principal risks and opportunities, including climate-related risks and opportunities. The details of an issuer’s corporate governance policies and practices are ultimately disclosed in an issuer’s continuous disclosure documents, if required. While the CSA is exhibiting an increased interest in an issuer’s ESG-related disclosures and may impose regulatory penalties on an issuer for failing to publish adequate public disclosures, proxy advisory firms in Canada such as Glass Lewis, Board Games, and ISS Corporate Solutions are also exhibiting an increased interest in an issuer’s ESG performance and may take such action as advising shareholders to vote against incumbent or nominee directors in an issuer’s upcoming annual general meeting if, for example, an issuer’s disclosure on governance practices, including board diversity, are insufficiently detailed or exhibit an inadequate commitment to good governance by the entity.

Regardless of whether a company chooses to disclose its ESG performance voluntarily or ultimately pursuant to mandatory disclosure requirements, it must be mindful not to engage in the practice of “greenwashing,” whereby a company may make misleading, or potentially misleading, unsubstantiated, overly broad or untrue claims about the sustainability of its operations, products or services. A company that greenwashes its products or services runs the risk of undermining its brand image, losing customer trust, triggering investigations from consumer protection

¹⁴ Canadian Sustainability Standards Board, [<https://www.frascanada.ca/en/cssb>].

authorities, and even sparking shareholder activism or litigation, whereby a company may be sued for damages arising from such misleading statements. In observing an increase in the practice of greenwashing among public companies listed on Canadian stock exchanges, the CSA has set out guidance in CSA Staff Notice 51-364 *Continuous Disclosure Review Program Activities* for the fiscal years ended March 31, 2022 and March 31, 2021 for such issuers when making voluntary or mandatory ESG-related disclosures.¹⁵

SUSTAINABLE FINANCE

As businesses look to support their operations, foster their growth and capitalize on the opportunities presented by investor demand around ESG, there are a number of sustainable financing options they can pursue:

1. **Green Bonds:** Green bonds are debt securities issued by companies to fund sustainable projects or investments and have attracted interest from domestic and international investors seeking socially responsible and environmentally sustainable investment opportunities. The proceeds from these bonds must be used for projects with a positive environmental impact, such as renewable energy, energy efficiency or sustainable agriculture. Green bonds can be differentiated from the narrower category of climate bonds – used to finance projects which reduce the impacts of climate change specifically, such as by reducing carbon emissions. In this way, green bonds have the potential to address a broader range of issues, such as biodiversity, which are becoming a greater focus in the ESG discourse.

Canada is considered a global leader in green bond issuance. The country's strong commitment to sustainable development and environmental stewardship has driven the growth of the green

¹⁵ In their guidance, the CSA noted that: (1) all statements regarding an issuer's current or anticipated ESG performance must be factual, balanced and substantiated; (2) certain statements regarding, for instance, an issuer's ESG-related targets, forecasts or projections, may constitute forward-looking information ("**FLI**"), and must therefore be supplemented by disclosure regarding material factors or assumptions used to develop the FLI, material risk factors that may cause any anticipated results to differ substantially, and any policies implemented by the issuer to update such FLI; (3) issuers should exercise caution when using promotional language; and (4) disclosures about any ESG ratings must be accompanied by additional details to provide context as to how such ratings were awarded. Depending on the nature and extent of the deficiencies in an issuer's ESG disclosures, the CSA may add the issuer to its default list, issue a cease-trade order and/or refer the issuer to enforcement. The CSA may also require an issuer to refile a document correcting any previously noted deficiencies (e.g., by issuing a clarifying news release), commit to making disclosure enhancements on a prospective basis or file a missing document. The CSA may inform issuers specifically of changes that it wishes to see in its next set of applicable continuous disclosure documents or may require the issuer to deepen its awareness on a particular topic.

bond market. Green bonds in Canada have been issued by a diverse range of entities, including government agencies, municipalities, provinces, corporations and financial institutions. As of September 2021, Canada had witnessed significant growth in green bond issuance and, since 2014, the cumulative issuance of Canadian green bonds had surpassed US\$39 billion (approximate amount) across various sectors.¹⁶

Transparency and accountability are crucial in green bond markets. Issuers typically provide regular reports on the use of proceeds, impact assessment and adherence to environmental standards. Verification by third-party organizations may also be conducted to ensure compliance with green bond principles.

2. **Green Loans:** Green loans are similar to green bonds in that the funds are tied to sustainable projects or investments. However, the structure is that of a loan and may be offered by a bank or other financial institution. This differs from green bonds, which are available for public listing or private placement. Given these differences, green loans are typically for smaller monetary amounts. This may be offset, however, by the lower transaction costs typically associated with green loans.

The Canadian government has been actively supporting green finance and sustainability through various programs and initiatives. For instance, the Canada Infrastructure Bank offers low-cost financing options for projects that support green infrastructure development. Many Canadian companies have been accessing green loans to fund sustainable projects. These loans are often used to finance renewable energy projects, energy efficiency initiatives, green building construction, sustainable transportation and other environmentally friendly ventures. Canadian banks and financial institutions play a significant role in promoting green loans. Several major banks in Canada have developed specific green loan products and frameworks to support sustainable initiatives.

To ensure credibility and transparency, lenders and borrowers often follow established frameworks and guidelines for green loans. Internationally recognized frameworks like the Green Loan Principles and the Green Bond Principles are used to guide the issuance and reporting of green loans.

¹⁶ Canada: Value of green bonds issued 2014 to 2021 | Statista, [<https://www.statista.com/statistics/1289366/value-of-green-bonds-issued-in-canada>].

- 3. Sustainability-Linked Bonds:** Sustainability-linked bonds are a relatively new type of bond that ties the financial terms and structural characteristics of the bond to the sustainability performance or ESG metrics of a company. For example, the interest rate or repayment terms may be adjusted based on the company's ability to meet certain sustainability targets.

One of the benefits of this type of bond is that the funds are not reserved for specific projects or purposes in the way that green or climate bonds are. Instead, sustainability-linked bonds can be used to finance general corporate activities, making them an attractive option for companies who, while not directly involved in activities like renewable energy, are seeking to improve their sustainability performance and take advantage of investor demand for ESG products. However, the flexibility of sustainability-linked bonds also presents a greater risk of actual or perceived greenwashing. Companies should therefore be careful to develop clear and credible ESG metrics, and transparent reporting and disclosure practices when pursuing financing through sustainability-linked bonds.

- 4. Sustainability-Linked Loans:** Sustainability-linked loans are similar to sustainability-linked bonds. However, given the loan structure, sustainability-linked loans share the same differentiating factors as green loans, discussed above. However, unlike green loans or green bonds that specifically finance environmentally friendly projects, sustainability-linked loans provide borrowers with more flexibility in the use of funds. The focus is on improving overall sustainability performance rather than funding specific green projects. Sustainability-linked loans are designed to incentivize borrowers to achieve predetermined sustainability performance targets, commonly known as key performance indicators ("KPIs"). These targets are related to ESG objectives and are linked to the terms and conditions of the loan.

The key feature of sustainability-linked loans is the link between the loan's pricing and the borrower's performance against the predefined KPIs. If the borrower achieves the agreed-upon targets, they can benefit from a lower interest rate or other financial incentives. Conversely, failure to meet the targets may result in higher costs.

Sustainability-linked loans are not limited to specific industries or sectors. They are available across a wide range of sectors, including but not limited to energy, manufacturing, transportation, real estate, retail and financial services. This allows businesses from various industries to integrate sustainability into their operations and financing strategies. To enhance transparency and comparability, market participants, including financial institutions and organizations like the Loan Market Association and the International Capital Market Association, have developed frameworks and guidelines for sustainability-linked loans. These initiatives aim to standardize key principles and definitions in the market. Sustainability-linked loans often require third-party verification of the borrower's performance against the agreed KPIs. Independent auditors or sustainability consultants assess the borrower's progress and provide assurance to lenders and other stakeholders.

- 5. Green Crowdfunding:** Crowdfunding is a way for companies to raise funds through small amounts of capital from a large number of individuals or organizations, typically via internet platforms. There are several crowdfunding platforms that have been specifically designed for sustainable projects. These platforms can help companies, particularly sustainability-related startups, reach a wider audience of socially and environmentally conscious investors, who often become customers once the product or service offering becomes available.
- 6. Social Impact Bonds:** Social impact bonds are a type of pay-for-performance contract by which the government pays investors based on the achievement of agreed-upon social outcomes. This allows the financial risk associated with social programs and services to be transferred from service providers and governments to investors. While there have been some pilot projects for social bonds in Canada, such as the City of Toronto's Social Debenture Program, social impact bonds have not yet gained much traction in the Canadian context. Nonetheless, social impact bonds remain an important option to watch for companies involved in the provision of social services.

Choosing the appropriate sustainable finance option will depend on the particular needs and ESG-related goals of the company.

TAX

Companies looking to do business in the electrification, clean energy, clean manufacturing, emissions reduction, critical minerals, infrastructure, electric vehicles and batteries, and major projects sectors may want to consider the recent tax incentives set out in the Canadian government's recent federal budget ("**Budget 2024**"). Budget 2024 delivered on the Canadian government's previously expressed intention to establish the Clean Hydrogen Investment Tax Credit (the "**CH Tax Credit**"), which provides a tax credit of up to 40% of the costs associated with the purchase and installation of eligible equipment. The CH Tax Credit would generally be available only in respect of projects that produce all, or substantially all, hydrogen through their production process and only for projects that produce hydrogen from electrolysis or natural gas. A number of requirements would have to be satisfied in order to obtain the credit.

Budget 2024 also maintains the existing Clean Technology Investment Tax Credit (the "**CTI Tax Credit**"), a 30% refundable credit, to include geothermal energy systems that are eligible for Class 43.1 of the *Income Tax Regulations*, and also proposed the introduction of a refundable investment tax credit (equal to 30% of the capital cost of eligible property associated with eligible activities) relating to clean technology manufacturing and processing, and critical mineral extraction and processing. Additionally, Budget 2024 maintains that the eligible activities qualifying for reduced tax rates for zero-emission technology manufacturers include certain nuclear manufacturing and processing activities. The budget also provides additional design details related to the existing tax credit for carbon capture, utilization and storage. Furthermore, Budget 2024 expands the CTI Tax Credit to include the cost of investments in eligible property primarily used (50% or more of the production value) to produce qualifying critical minerals. It also includes certain other adjustments to provide greater clarity to businesses involved in polymetallic extraction and processing.

Finally, Budget 2024 also proposed to amend the *Income Tax Act* (Canada) to include lithium from mines as a mineral resource, such that any eligible expenses made after the date Budget 2023 was announced would qualify as Canadian exploration expenses and Canadian development expenses. Under Budget 2023, lithium from brines would be eligible for the Critical Mineral Exploration Tax Credit, a 30% non-refundable tax credit.

LOOKING AHEAD

While the legal and regulatory aspects surrounding ESG are still rapidly evolving, a number of key developments in the ESG sphere that companies doing business in Canada may need to consider can be anticipated at this time, including:

- Increased sustainability reporting for public and private companies, whether by way of mandatory disclosure requirements or increased investor and stakeholder pressure to publish voluntary sustainability disclosures;
- Consolidated reporting standards leading to harmonization in the sustainability reporting landscape and greater confidence among investors in understanding and assessing companies' ESG performance;
- The advent of climate reporting in Canada, wherein issuers may be required to report on all or some of their Scope 1, Scope 2 and Scope 3 GHG emissions;
- An increased focus on biodiversity;
- An enhanced understanding of the importance of diversity beyond gender; and
- The increased use of sustainability finance mechanisms.

May 2024

AIRD BERLIS

**We are committed to being the
Canadian gateway for our clients.**



Brookfield Place, 181 Bay Street, Suite 1800
Toronto, Canada M5J 2T9
T 1.416.863.1500 F 1.416.863.1515

Other articles and papers written by our professionals can be viewed at:

airdberlis.com

Doing Business in Canada offers general comments on legal developments of concern to businesses, organizations and individuals, and is not intended to provide legal opinions. Readers should seek professional legal advice on the particular issues that concern them.

© 2024 Aird & Berlis LLP

Parts of this booklet may be reproduced with acknowledgment.
