ESG in Canada: What We Learned in 2021 and Looking Ahead to 2022

Introduction

If 2020 was a year that illuminated our fragile relationship with nature and the need for strong engagement with environmental, social, and governance ("ESG") principles, then 2021 can be classified as the year in which businesses, regulators and investors began to earnestly explore the implications of the transition towards sustainability, to consider how to achieve climate-friendly outcomes and impact, and to communicate their plans and progress to stakeholders.

Looking forward, we believe that the developments of the past few years have set the stage for a significant ramp-up in ESG-focussed initiatives, investments and capital markets. Within Canada, 2021 witnessed the achievement of several key ESG milestones, including deployment of significant amounts of capital towards sustainable finance by investors and finance providers, and increasing indications of consumers' preference for sustainability friendly products and services. This growing private sector momentum has been complemented by new actions from governments, regulators, and non-governmental organizations that are mandating new sustainability focussed requirements.

This report offers companies and business leaders in Canada an essential overview of the ESG developments in regulations, laws and norms that have occurred over the last year. It also highlights issues to watch as we enter 2022. Many of these developments will re-shape Canada's business landscape for decades to come. Businesses can no longer afford to ignore ESG initiatives. Not only would inaction be damaging for a company's brand and the planet, but it could also negatively impact their bottom-line and financial returns.

We hope the following pages help summarize the big shifts that took place in 2021 to set you and your business up for success in 2022.

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Integration of ESG principles into corporate strategies has gone from a peripheral concept to a rapidly developing priority. It provides competitive advantages to businesses such as a lower cost of capital, supply chain resilience, and strong relationships with stakeholders.

At McMillan we have the expertise, experience and effectiveness to assist you in this transition.

ESG at McMillan

As a leading business law firm providing solutions-oriented legal advice, McMillan LLP recognizes the importance of embedding environmental, social, and governance best practices in our own organization. Our ESG promise revolves around the people we serve, the communities we work in, and the planet we depend on.

ENVIRONMENT: Understanding the impacts of our operations

McMillan aims to entrench environmental stewardship across everything we do, including our relationship with suppliers and business partners. This commitment guides all of our actions as we aim to minimize the energy, carbon, water, and waste impacts of our business.

We also work to encourage sustainability practices amongst firm members, including supporting Pollution Probe's Clean Air Committee that encourages the use of public transit, carpooling, and fuel-efficient vehicles, as well as supporting firm members to work remotely to reduce commuting.

SOCIAL: Championing our people and communities

In keeping with McMillan's commitment to fostering an environment where individuals can flourish, we focus on building an equitable, diverse, and inclusive culture. Furthermore, our gender parity initiative brings to life networking, leadership, and business development opportunities for women in law.

It is an honour to be an employer of choice with an outstanding work culture dedicated to recognition and appreciation, while preserving the health and safety of our people. This includes recognizing the importance of mental health and wellness. In addition to our own internal mental health initiatives, McMillan is active in the annual "Not Myself Today" campaign building greater awareness, reducing stigma, and fostering a safe and supportive culture.

At McMillan, we take seriously our social responsibility to assist people and communities in need across Canada and globally. We contribute to various local charitable organizations, including advancing reconciliation through Level Justice's Youth Indigenous Outreach Program and supporting lesbian, gay, bisexual, transgender, queer and ally (LGBTQA) undergraduate and graduate students through Start Proud. In addition, McMillan provides in-kind legal services to charitable organizations that otherwise could not afford representation. We also actively support social justice initiatives in the community, including participation in the BlackNorth Initiative CEO Pledge.

McMillan prioritizes working with suppliers that uphold ethical labour policies and practices, including providing healthy and safe workplaces for their workers; ensuring supply chains respect human rights and follow the law in the jurisdictions where they operate; and, contributing positively to the communities in which they are active.

GOVERNANCE: Setting a standard of excellence

We believe that our people and strong governance practices are critical to our success, led by a highly effective Board of Partners. McMillan is committed to advancing the diversity of our leadership teams. Our senior management, partners, and employees also conduct themselves in accordance with the highest moral and ethical standards.

Respect, Teamwork, Commitment, Client Service, and Professional Excellence are McMillan's core values. During our annual performance review, firm members at all levels are evaluated through these lenses and new hires at onboarding sign the firm's Core Values Agreement.

For more information on McMillan's equity, diversity, and inclusion practices, please read our booklet on Inclusion and Diversity.

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This report provides an overview for general informational purposes only and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained. This report may contain public information or information from third parties that is not separately reviewed, approved or endorsed by us.

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Overview

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Amid a climate crisis, social movements, and renewed calls for equity, businesses around the world are increasing their focus on environment, social, and governance ("**ESG**") initiatives. ESG refers to non-financial business initiatives that seek to improve a business' own environmental footprint, equity and diversity, and social impacts, as well as improving those of the world at large and the businesses with which the business interacts. Investors and consumers increasingly demand transparency as they seek to understand how businesses govern themselves, interact socially, and affect the environment. More than ever before, investors and consumers are basing their financial decisions on a holistic understanding of businesses and their commitment to ESG. We share these values at McMillan LLP, and the report below outlines the recent history of ESG, the risks and opportunities for businesses, and the growing number of regulatory frameworks that pertain to ESG.

Emergence of ESG

In recent years, a number of global and Canadian monitoring and regulatory bodies have sought to define ESG and offer businesses guidelines for being transparent about their work. Companies and consumers can look to the following examples when seeking to understand and quantify businesses' commitments to ESG.

In June 2017, the Financial Stability Board — an international body that monitors and makes recommendations about the global financial system — launched its Task Force on Climate-Related Financial Disclosures (the "**TCFD**") to provide climate-related disclosure recommendations. These recommendations aimed to assist companies in improving their capital allocation disclosure on a voluntary basis, spanning the areas of governance, strategy, metrics and targets, and risk management.[1]

In April 2018, the Canadian Securities Administrators (the "**CSA**") issued CSA Staff Notice 51-354 *Report on Climate change-related Disclosure Project* to help issuers navigate climate-related opportunities and risks, as well as quantify the financial impacts and governance that may impact an issuer's business. The report was the result of a 2017 CSA project to investigate climate change-related disclosure.[2]

In August 2019, the CSA issued another notice, CSA Staff Notice 51-538 Reporting of Climate Change-related Risks. This staff notice offers guidance to issuers about integrating climate-change related risks within current public disclosure frameworks.[3]

In 2019, Chartered Professional Accountants undertook a study of climate-related disclosures by Canadian public companies. This study involved canvassing climate-related disclosures by 40 TSX-listed Canadian companies to uncover how their disclosure practices align with the TCFD recommendations from the global Financial Stability Board.[4] The study found that TCFD recommendations are being "widely recognized and implemented"; however, despite the increasing prevalence of climate-related disclosure, "they still appear to lack the scale and quality needed to satisfy investor demands".[5]

COVID-19 has highlighted the importance of ESG as it brought to the fore the fragility of society and placed immense strain on our economic systems. There is a growing need for sustainability to protect investments. As the world looks to regain stability, companies that integrate ESG initiatives will fare better. Companies that adopt an ESG mindset can anticipate benefits to their bottom line as well as the double bottom line — the concept of measuring a company's environmental and social impact in addition to its financial health.

Risks of ESG Inaction

From a business-model sustainability standpoint, ESG considerations can no longer be ignored. Early-movers to ESG disclosure may boast competitive advantages, including accumulated goodwill among consumers. Investors and consumers may take their money to other more visibly ESG-compliant substitute businesses, and the competitive positioning of dissentients may suffer. Moreover, companies who opt out of non-mandatory ESG reporting may later be forced to comply anyway, as regulatory landscapes evolve to reflect societal demands.

Opportunity for Differentiation

Over the past year, in addition to boosting ESG initiatives, more and more companies have embraced the concept of "purpose" — or the overarching reason that a company exists, how it should conduct itself, and the impact it has on the people it serves and the planet it depends upon. Leadership on "purpose" and early-movers to ESG disclosure may develop competitive advantages, including:

- **Enhanced image:** Consumers reward companies that are committed to making the world a better place with increased product sales, and these commitments also increase brand affinity and loyalty.
- **Increased engagement:** Employees want to work for companies that champion real and lasting change. This has significant recruitment and retention implications.
- **Stronger relationships:** Stakeholders are more ready and willing to work together. For many businesses, improved stakeholder and government relations are the greatest areas of return.
- **Improved performance:** Investors are attracted to businesses that are helping advance ESG priorities commensurate with their own goals and priorities. In addition, new sources of revenue are available for companies that are innovating to address ESG challenges.

The remainder of this report will summarize key Canadian ESG-related developments that have taken place throughout 2021, across a number of key areas pertaining to business needs, including: (i) Capital Markets, (ii) Corporate Governance, (iii) Financial Services, (iv) Commercial Real Estate, Construction, and Development, (v) Tax, (vi) Advocacy, (vii) Labour and Employment, and (viii) Regulatory.

Capital Markets

Capital Markets

The increasing demands for sustainability focussed financial instruments are also placing new expectations on businesses and their stakeholders. This growth in ESG-disclosures is also prompting new calls from regulators to streamline frameworks.

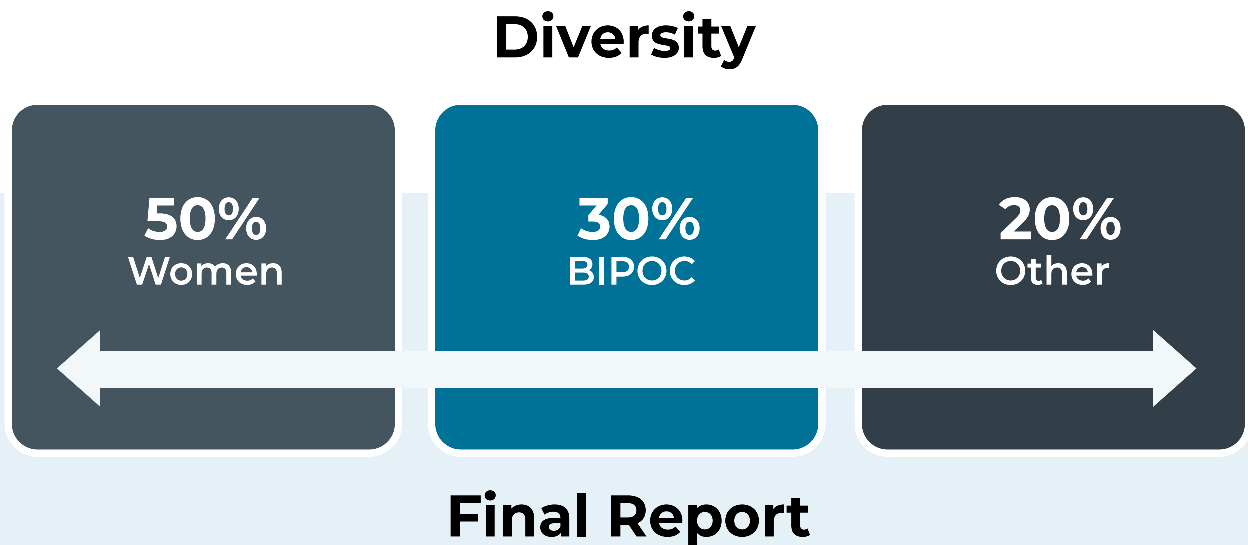
Notable ESG developments pertaining to capital markets in 2021 are summarized below.

Ontario's Capital Markets Modernization Taskforce Releases Final Report

On January 22, 2021, Ontario's Capital Markets Modernization Taskforce (the "**Taskforce**") released its final report (the "**Final Report**") following consultations and feedback from various stakeholders.[6] Among its findings, the Taskforce discusses how the inclusion of ESG criteria positively correlates to investment performance, which has prompted greater transparency and interest in ESG policies in capital markets.[7] The Final Report sets out the following recommendations, several of which support the advancement of ESG factors.

Mandatory Adoption of Diversity Targets, Timelines, and Director Implementation Policies

According to the Final Report, there is increased attention to long-standing inequities related to a lack of diversity at a management and board level.[8] The Taskforce recommends amending Ontario securities legislation to mandate all publicly listed issuers in Canada to set their own board and executive management diversity targets and implementation timelines.[9] It also recommends boards annually provide data concerning the representation on boards and in executive management of those who self-identify as women; Black, Indigenous, and people of colour ("**BIPOC**"); and persons with disabilities or those who self-identify as LGBTQ+.[10] These recommendations would go a step further than the current "comply or explain" disclosure model, which does not require TSX-listed companies to adopt any gender and diversity policies, practices, or targets.[11] The Final Report also recommends a target of 50 per cent representation of women and 30 per cent representation of BIPOC to be implemented within five years.[12]



Maximum Board Term Limits to Address Entrenchment

To encourage diverse and skilled boards, the Taskforce recommends modifying Ontario securities legislation to set a 12-year maximum board term-limit for publicly listed issuers with the following exceptions: (i) a "15-year maximum tenure limit for the Chair of the board"; (ii) "non-independent directors of family-owned and controlled businesses, where such nominees represent a minority of the board"; and (iii) "no more than one other director who will be deemed not to be independent, and will still have a 15-year limit."[13]

Universal Proxy Ballots and Mandatory Voting Disclosure

To help encourage effective shareholder participation in proxy voting, the Taskforce recommends using universal proxy ballots at all contested meetings commencing September 1, 2022, and mandating disclosure of voting tallies.[14] The use of universal ballots would provide greater flexibility to shareholders voting by proxy, including in cases where they vote for a combination of board nominees; it would also provide issuers and dissidents with improved transparency.[15] Additionally, the Taskforce recommends the consideration of further requirements for universal proxies — including notice and minimum solicitation requirements applicable to dissidents — and form requirements for universal proxies.[16]

Mandatory Independent Committees in Conflicts of Interest

The Final Report highlights certain concerns with inconsistent issuer use of independent committees and inconsistent protection of minority security-holder interests when security holders are asked to vote on transactions.[17] To increase transparency and minority shareholder protection, the Taskforce recommends codifying CSA guidelines and best practices by mandating the formation of independent committees to oversee material conflict of interest transactions.[18]

Early Warning Disclosure

The Final Report recommends lowering the threshold from ten per cent to five per cent ownership of shares for determining when to require ownership disclosure of non-passive investors.[19] This recommendation stems from the recognition that even five per cent ownership of an issuer's voting securities can provide considerable control over an issuer, given that shareholders can requisition a shareholders' meeting if they own five per cent of a company.[20] The Taskforce therefore suggests requiring non-passive shareholders who pass the five per cent threshold to file a news release and an early-warning report disclosing their ownership. However, such shareholders would not be subject to a moratorium on further acquisitions following this disclosure, until their holdings increase to ten per cent.[21]

Director Elections and Voting Requirements

Canadian securities laws do not currently require issuers to hold annual director elections, nor do they require directors to stand for election individually (rather than as a slate).[22] Instead, these key elements to shareholder democracy are imposed by TSX and TSXV rules. Further, a recent Ontario Court of Appeal decision now provides a court precedent supporting the TSX majority voting policy, in both design and function.[23] Under this policy, any votes that are "withheld" during a director election must be considered votes cast "against" the election of that director.[24] The Taskforce recommends codifying requirements for annual director elections and individual director voting in addition to a majority-voting requirement to provide greater shareholder democracy. This majority-voting requirement should: (i) only apply in respect of uncontested director elections and provide for a reasonable transition period in the event a director does not receive a majority to allow for the recruitment of qualified replacement board members; (ii) provide for an exemption where an issuer is subject to and complies with substantially similar requirements in corporate law; and (iii) permit an issuer to apply to the Ontario Securities Commission (the "OSC") for exemptive relief in exceptional circumstances.[25]

Enhanced ESG Disclosure

Approximately 72 per cent of global investors now incorporate ESG principles into their investment decision process, and there is wide support from various stakeholders for increased ESG disclosure.[26] However, the current absence of a standardized disclosure framework has contributed to market confusion and is linked to increased compliance costs. As such, the Taskforce recommends standardizing disclosure of material ESG information for reporting issuers on a "comply-or-explain" basis.

The standardized mandatory disclosure framework would apply to all reporting issuers and would also require disclosure recommended by the TCFD. Specifically, ESG disclosure would include disclosure concerning governance, strategy, risk management, and greenhouse gas ("**GHG**") emissions.[27] To ensure uniform adoption, the Taskforce recommends implementing a transition phase, whereby a reporting issuer's market capitalization at the time of implementation would determine its obligations. A TCFD recommendations-based disclosure framework would give issuers the flexibility to complement their disclosure with other frequently adopted industry standards, such as those presented by the Sustainability Accounting Standards Board or the Global Reporting Initiative.

Ontario Government Releases Provincial Budget

On March 24, 2021, the Ontario Government released its provincial budget, which expressed support for certain ESG-focussed recommendations provided in the Final Report.[28]

Adopting Certain Taskforce Recommendations

The Ontario Government announced that it would move forward with legislative changes to support the expansion of the OSC's mandate to include competition and capital formation in order to facilitate economic growth.[29] The Ontario Government also announced that, among other things, it would support changes to the board and adjudicative roles of the OSC, as well as amendments to separate the OSC Chair and Chief Executive Officer positions, to align current standards with corporate governance best practices.[30]

Announcing Upcoming Capital Markets Act for Stakeholder Consultation

The Ontario Government plans to publish a draft Capital Markets Act that will be made available for stakeholder consultation. The OSC will help inform this process by determining which TCFD recommendations are within the scope of the OSC's rules.

Proxy Voting Guidelines from ISS and Glass Lewis

The recommendations of proxy advisory firms, including Institutional Shareholder Services ("ISS") and Glass Lewis, can have a large influence on the business conducted at company shareholder meetings. The 2022 ISS updates were released on December 7, 2021, and apply to shareholder meetings of public companies occurring on or after February 1, 2022.[31] The Glass Lewis guidelines are in effect for meetings that are held on or after January 1, 2022.[32] It is important that companies are current on the most recent recommendations of ISS and Glass Lewis, so they can take appropriate actions to adjust their disclosure and governance practices, as necessary, to best align with industry standards.

Gender Diversity

ISS and Glass Lewis both recognize the increasing importance of having a diverse board of directors. Each has accordingly enhanced its policies on gender diversity. Gender diversity provides broader perspective and insight. It also helps diversify the experience and skill-set of a company's management and board.[33]

ISS is expanding its board diversity policies, both regarding gender and ethnicity.[34] For S&P/TSX Composite Index companies, ISS will generally recommend to vote "withhold" for the chair of a nominating committee, or a committee that services that function, where the company: (i) does not consist of at least 30 per cent women; and (ii) has not provided a formal, publicly-disclosed written commitment to achieve at least 30 per cent women on the board at or before the company's next annual general meeting.[35] For other TSX companies that are not on the S&P/TSX Composite Index, ISS will generally recommend to vote "withhold" for the chair of a nominating committee, or a committee that services that function, if the company: (i) does not have at least one woman on the board; and (ii) has not disclosed a formal written gender diversity policy.[36] ISS' recommendations will be evaluated on a case-by-case basis.

Glass Lewis has replaced all guideline references to "female directors" or "women" to "gender diverse directors", which is defined as women and directors that identify with a gender other than male or female.[37] Glass Lewis' 2021 guidelines recommend voting "against" the nominating committee chair where there are no female members. However, beginning in 2022, Glass Lewis now recommends voting "against" the nominating committee chair when there are fewer than two gender diverse directors on a board at companies listed on the TSX. However, where a company is not listed on the TSX, and for all boards comprised of six or fewer directors, the recommendation remains to vote "against" only when there are no gender diverse directors.[38]

Beginning in 2023, Glass Lewis will transition away from fixed numerical recommendations, and instead adopt a percentage-based approach, with a recommendation to vote "against" the nominating committee chair for boards of TSX-listed companies that are not at least 30 per cent gender diverse.[39] For boards of companies not listed on the TSX, the minimum threshold will remain at one gender diverse member on the board.

Glass Lewis may refrain from making voting recommendations if a company's board has provided an adequate rationale or a plan to address the lack of diversity on its board.[40]

Audit Committees

ISS and Glass Lewis provide guidelines to vote in favour of corporate governance that supports the retention of objective, competent, and diligent auditors who provide reasonable representations of a company's financial position. This practice is deemed crucial to the provision of accurate information for shareholders and the market generally.[41]

ISS specifically recommends voting "withhold" for members of the audit committee if no audit fee information is disclosed by the company within a reasonable amount of time prior to any shareholders' meeting considering the ratification of auditors.[42] Similarly, ISS recommends voting "withhold" if non-audit fees that are paid to the audit firm are greater than audit fees, to avoid excessive payment of non-audit related fees that may interfere with auditor independence.

Glass Lewis provides standards for assessing a company's audit committee. Its proxy voting guidelines continue to suggest that shareholders should be given reasonable assurance from audit committees regarding the accuracy of financial statements based on the quality and integrity of the documents, the completeness of disclosures necessary for investors to make informed decisions, and the effectiveness of internal controls.[43] Glass Lewis also recommends that companies should have at least one financial expert.[44]

Additionally, Glass Lewis will recommend voting against the audit committee chair if the audit committee chair fails to clearly disclose the breakdown of fees paid to its external auditing firm for the most recent fiscal year.[45]

Board Refreshment

Board refreshment helps promote director independence and enhances skills and diversity on boards. In its 2022 guidelines, Glass Lewis once again noted its concern where directors had an average tenure of ten years or more when no new independent directors have joined the board within the past five years.[46] More specifically, Glass Lewis would not make recommendations solely on this basis; however, insufficient board refreshment may be a contributing factor in negative recommendations if other board-related concerns have been identified.[47]

ESG Disclosure

ISS will recommend "against" incumbent directors of companies identified as Climate Action 100+ Focus companies — an investor-led collaboration to require the largest companies to pursue Net Zero emissions by 2050 —when: (i) the company has not made adequate disclosure according to the TCFD, or (ii) when the company does not have quantitative GHG emission reduction targets that cover at least a significant portion of the company's direct emissions.[48]

Glass Lewis has updated its guidelines concerning board-level oversight of environmental and social issues. As of 2021, Glass Lewis will flag S&P/TSX completion companies that do not provide clear disclosure concerning board-level oversight of environmental and/or social issues.[49] Beginning on January 1, 2023, Glass Lewis will generally recommend voting against the governance chair of an S&P/TSX completion company that fails to provide explicit disclosure regarding the board's role in overseeing environmental and/or social issues.[50]

Glass Lewis' 2022 updated guidelines also contain an additional section detailing the importance placed on ESG disclosure generally, with particular attention paid to specific ESG factors that aid in determining the financial materiality of adopting or failing to adopt any proposed shareholder resolution.[51] Notably, when a substantial environmental or social risk has been ignored or inadequately addressed by the company, Glass Lewis may recommend voting against members of the audit committee.[52]

Board Skills

Diversity of skills on a board of directors is recognized as benefitting companies by providing a broad range of perspectives and insights.[53] ISS continues to recommend that companies ensure their directors have specific skills and expertise to add value to the company.[54]

Glass Lewis currently recommends voting "against" the chair of the nomination committee if the mix of skills on a board is not addressed (which echoes Glass Lewis' 2019 board skills and competencies matrices).[55] The Glass Lewis skills matrices divide companies into five sectors: (i) Consumer, (ii) Financial, (iii) Industrials, (iv) Pharma/Healthcare, and (v) Resources. Glass Lewis highlights criteria for board skills within each sector with the expectation that companies provide adequate disclosure of board skills and competency.

Say-on-Climate Votes

In 2021, according to data from Laurel Hill Advisory Group, environmental and social shareholder proposals accounted for approximately 62 per cent of all proposals (almost two-and-a-half times the 25 per cent in 2020 for that category).[56] However, ISS and Glass Lewis are taking a cautious approach in respect of say-on-climate votes.[57]

Glass Lewis will generally review management and shareholder proposals requesting that companies adopt a policy of providing shareholders with an annual vote on a climate-related plan, on a case-by-case basis, with a view to promote long-term shareholder value, until it codifies its suggested approach.[58]

ISS has codified its framework concerning "say-on-climate" management and shareholder proposals. Management proposals for climate transition plans will be analyzed using ten different factors, including the quality of the disclosure of a company's supply chain and operational GHG emissions, and the extent to which a company's climate-related disclosures are aligned with the parameters set by the TCFD.[59] Shareholder proposals concerning say-on-climate will be assessed using four factors, which include the completeness of a company's climate-related disclosures and whether the company has been the subject of recent controversies related to GHG emissions.[60]

Unequal Voting Rights

Glass Lewis has provided guidance on their recommendation concerning boards of companies that carry unequal voting right structures.[61] Beginning on January 1, 2022, Glass Lewis recommends voting "against" the chair of the governance committee at companies with a multi-class share structure and unequal voting rights, provided the company does not provide for a reasonable expiry of the multi-class share structure.[62] Glass Lewis has specified that a "reasonable" time period for this expiry is seven years or less.

Compensation

ISS and Glass Lewis both provide new amendments related to "say-on-pay" compensation for company management.

ISS is raising the minimum support threshold that triggers a responsiveness analysis on a company's say-on-pay proposals from 70 per cent to 80 per cent.[63] This change is consistent with recommendations from the Canadian Coalition for Good Governance.

70%

80%

Glass Lewis reviews each advisory vote on executive compensation on a case-by-case basis, looking at company and industry-specific factors. If Glass Lewis considers that a company's policies and practices fail to demonstrably link compensation with performance, Glass Lewis will recommend voting "against" a say-on-pay proposal.[64]

Sustainability-Linked Bonds in Canada

In June 2020, the International Capital Market Association ("ICMA") published its Sustainability-Linked Bond Principles, which provides guidance on the core components of a sustainability-linked bond ("SLB").[65] SLBs are a type of bond instrument with characteristics that are dependent on whether the issuer meets predetermined ESG goals.[66]

2021 marked a major development for SLBs in Canada, as TELUS Corporation issued the very first

Canadian SLB in June.[67] Pursuant to the issuance of its SLBs, TELUS has committed to reducing its GHG emissions by 46 per cent by 2030. This SLB incorporates a self-imposed penalty of a higher interest rate in the event TELUS does not meet this target.[68] That same day, Enbridge Inc. — a Calgary-based pipeline company — announced the closing of its first SLB, which incorporates emission reduction as well as diversity and inclusion goals into the financing terms.[69]

With the shift towards a more ESG-focused agenda, SLBs are an innovative way for companies to finance their projects and operations while demonstrating their commitment to ESG standards.

International Capital Market Association Publishes Principles for Green Bonds and Social Bonds

With a stronger focus on and commitment to ESG in capital markets, ICMA published the Green Bond Principles[70] and the Social Bond Principles[71] in June 2021 to provide guidance when issuing bonds that serve environmental and social purposes.

Green bonds are a type of bond instrument where the proceeds are used for eligible green projects, including projects relating to renewable energy, energy efficiency, and climate change adaptation. The ICMA recommends that issuers explain their green bonds with the four components of the Green Bond Principles, namely: (i) use of proceeds, (ii) process for project evaluation and selection, (iii) management of proceeds, and (iv) reporting.[72]

Similar to green bonds, social bonds are a type of bond instrument, the proceeds of which are to be used for eligible social projects. Categories of social projects include affordable basic infrastructure, food security, and socioeconomic advancement and empowerment. Social projects are intended to achieve positive outcomes for target populations, such as those living in poverty, marginalized populations, migrants, and other disadvantaged groups.

Canadian companies have issued green bonds and social bonds in line with their commitment to ESG. In May 2021, Alimentation Couche-Tard Inc. issued green

bonds consisting of a USD$350 million aggregate principal amount of 3.625 per cent senior unsecured notes due in 2051. The proceeds of these bonds will be used for environmental projects and community initiatives relating to clean transportation, energy efficiency, renewable energy, pollution prevention and control, sustainable water and wastewater management, and green buildings.[73] More recently, Desjardins Group announced the offering of bonds that will be used to finance or refinance green and social projects, including renewable energy, sustainable food production and affordable housing.[74]

CSA Notice on Climate-Related Disclosures

On October 18, 2021, the CSA issued a notice (the "**CSA Notice**") to solicit comments, over a 90-day period ending January 17, 2022, on the proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (the "**Proposed Instrument**") and its companion policy (the "**Proposed Companion Policy**").[75] The CSA Notice discusses how mandatory climate-related disclosure is gaining traction with investors and how other stakeholders are seeking improved disclosure of issuer opportunities, risks, governance models, and financial implications of climate change.

The Proposed Instrument aims to "level the playing field" by addressing incomplete, incomparable, and inconsistent climate-related disclosure practices. The Proposed Instrument also strives to balance the desire for improved disclosure with the increased regulatory burden it may yield. This would be achieved by adapting the TCFD recommendations to: (i) not require scenario analysis, including an under two degree Celsius threshold; (ii) provide the option to disclose GHG emissions or, in the alternative, be able to explain reasons for not doing so; and (iii) allowing for a phase-in period of one year for non-venture issuers and three years for venture issuers, with the Proposed Instrument being unlikely to come into force in advance of December 31, 2022. Once in force, the Proposed Instrument would apply to all reporting issuers, excluding investment funds, designated foreign issuers, issuers of asset-backed securities, SEC foreign issuers, certain credit support issuers, and certain exchangeable security issuer.

The Proposed Instrument includes disclosure requirements from the four core TCFD elements: (i) governance, (ii) strategy, (iii) risk management, and (iv) metrics and targets. Disclosure would be included in a reporting issuer's management information circular, annual information form, and/or management discussion and analysis.

- *Governance disclosure*: a description of management's assessment and managing of climate-related opportunities and risks, as well as board oversight of the same.
- *Strategy disclosure:* presenting climate-related opportunities and risks in the near-, medium- and long-term, as well as the impact of such risks and opportunities on the issuer's financial planning, strategy, and business.
- *Risk management disclosure:* a description of processes for identifying, assessing, and managing climate-related risks and the integration of such processes into the issuer's overall risk management approach.
- *Metrics and targets disclosure:* pertains to metrics used to assess climate-related opportunities and risks, vis-à-vis the issuer's strategy and risk management, as well as targets used to manage and assess performance, relative to such opportunities and risks.

The Proposed Companion Policy provides interpretation guidance of the Proposed Instrument, including how such disclosure may constitute forward-looking information and how to approach GHG emission disclosure. According to the policy, mandatory disclosure for climate-related governance and risk management stands to improve stakeholder transparency through dissemination of content that while deemed "immaterial" by the reporting issuer, may nonetheless inform investor and consumer decision-making and public perception of the company's climate-related risk response.

The Canadian government has also recently indicated a shift towards mandatory climate-related financial disclosures for Crown corporations. Crown corporations holding more than $1 billion in assets are expected to begin reporting on their climate-related financial risks by 2022, while Crown corporations with less than $1 billion in assets are expected to begin this reporting by 2024, at the latest.[76] This development further strengthens a more stringent ESG-focused future for company disclosure, and exists within a broader set of efforts by the Canadian government to support ESG-related initiatives.

International Sustainability Standards Board

The International Financial Reporting Standards recently announced the creation of the International Sustainability Standards Board (the "**ISSB**"). The ISSB is currently creating universal company material information disclosure standards related to significant sustainability matters that will be relevant to investors' decision-making, including industry-based requirements. The objective of these disclosure requirements is to provide exposure of a company's climate-related risks and opportunities.[77] While headquartered in Frankfurt, the ISSB also has an office in Montreal. These offices will be responsible for key ISSB functions and fostering deeper cooperation with regional stakeholders.[78]

International Organization of Securities Commissions Final Report

On November 2, 2021, the Sustainable Finance Task Force (the "**STF**") of the International Organization of Securities Commissions published its final report, "Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management" (the "**IOSCO Report**"), which follows the consultation report published in June 30, 2021. Although the IOSCO Report is a report produced by an international organization, the OSC was actively involved as a co-lead on the STF work stream that produced it.

The IOSCO Report aims to improve sustainability-related practices, policies, procedures, and disclosures in the asset-management industry through five recommendations for securities regulators and policymakers: (i) asset manager practices, policies, procedures and disclosure; (ii) product disclosure; (iii) supervision and enforcement; (iv) terminology; and (v) financial and investor education.

Release of Fourth Status Report from the TCFD

In October 2021, the TCFD released its 2021 Status Report,[79] which provides an overview of climate-related financial disclosures of over 1,650 companies in 69 countries across eight industries: banking, insurance, energy, materials and buildings, transportation, agriculture, food, forest products, technology and media, and consumer goods. The TCFD published two additional documents to support decision-useful disclosure, including updates to implementation guidance initially published in 2017 and new guidance on metrics, targets, and transition plans.

For the first time, over 50 per cent of companies reviewed disclosed their climate-related risks and opportunities. Since last year's report, the number of TCFD supporters has grown by over a third. As of October 6, 2021, TCFD had over 2,600 supporters globally, with a combined market capitalization of over $25.1 trillion — a 99 per cent increase since last year.

ESG considerations have led to the development of an enhanced and standardized disclosure scheme. Issuers would be wise to carefully consider the implications of these reporting recommendations and incorporate them as necessary into their own practices. Proactive adoption of these new standards may enable issuers to benefit from heightened positive perception of ESG-aware companies, and will better position them for the ESG-focused future.

Corporate Governance

Corporate Governance

Sound corporate governance is often the bedrock of successful businesses. The pandemic brought a number of new governance challenges, which spurred several changes.

Notable ESG developments regarding corporate governance in 2021 are summarized below.

Legislative Amendments in B.C. on Virtual Shareholders' and Directors' Meetings

The COVID-19 pandemic has made, and will continue to make, a lasting impact on corporate governance practices. One example of this is the *Finance Statutes Amendment Act (No. 2)* in British Columbia, which came into force on May 20, 2021. This Act amends the *Business Corporations Act, Cooperative Association Act, Credit Union Incorporation Act, Financial Institutions Act* and *Societies Act,* allowing corporations governed by these British Columbia Acts to host fully electronic and partially electronic meetings.[80]

The Proposal of Benefit Corporations in Quebec

On May 26, 2021, Bill 797, An Act to a*mend the Business Corporations Act to include benefit corporations* ("**Bill 797**") was tabled before the Quebec National Assembly. The bill proposes to introduce benefit corporations as a new business entity. Benefit corporations are corporations whose articles of constitution include a commitment to operate responsibly and sustainably and to promote one or more stated social interests or public benefits.[81] If Bill 797 is enacted, Quebec will become the second province in Canada, after British Columbia, to introduce this type of corporation. It will also join over half of the U.S. states in allowing for this type of corporation.

A "benefit corporation" corporate structure is distinct from a "B Corporation" ("**B Corps**") certification. While benefit corporations operate as a new type of statutorily created corporation, B Corps are companies that have attained a third-party certification offered by the non-profit B Lab. Moreover, being a benefit corporation is one way a company can satisfy the legal requirement necessary to become a certified B Corp.

CBCA Amendments on Election of Directors and Voting

Bill C-25, the *Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act* ("**Bill C-25**"), received Royal Assent on May 1, 2018.[82] The majority of Bill C-25 came into force upon Royal Assent, with certain aspects taking effect at later dates to be specified by the Governor in Council. Bill C-25's regulations amending election of directors and voting were expected to come into force on July 1, 2021. The enforcement date for these regulations has since been postponed, and a revised date will likely be scheduled for after the proxy season concludes, in order to prioritize minimal disruption.[83] Currently, directors of *Canada Business Corporations Act* (the "**CBCA**") distributing corporations[84] can be elected for up to three years. The proposed regulations, if enacted, would limit this term to one year, requiring directors to be elected at each annual shareholders' meeting. Bill C-25 also requires directors to be elected on an individual basis as opposed to as a slate. In addition, the proposed amendments create a majority-voting requirement, which requires each shareholder to cast a vote "for" or "against" each director nominee, rather than "for" or "withhold." This removes the possibility that a director nominee is elected despite more votes "withheld" than "for" their election.

First Annual Diversity Disclosure Report Released by Corporations Canada

In 2021, Corporations Canada released its first annual diversity disclosure report following the enactment of Bill C-25, entitled "Diversity of Boards of Directors and Senior Management of Federal Distributing

Corporations".[85] Bill C-25 requires federal distributing corporations to disclose the representation of women, Indigenous peoples, people with disabilities, and visible minorities on their board of directors and in senior management. These disclosure requirements are broader than those under securities regulations, which only requires disclosure of the representation of women and exempts venture issuers.

Citing technical difficulties and lack of awareness, Corporations Canada found diversity disclosures from only 403 of the approximately 670 federal distributing corporations. The disclosure from these 403 corporations indicates a strong need for improvement - for example, only 17 per cent of all board seats are held by women, only 4 per cent by members of visible minorities, only 0.3 per cent by persons with disabilities and only 0.3 per cent by Indigenous peoples. These percentages will serve as a benchmark against which future improvements to representation can be measured.

Removal of the Director Residency Requirements in Multiple Provinces

Provinces across Canada are removing director residency requirements for Canadian corporations. In July 2021, provisions from Ontario's Bill 213, Better for People, Smarter for Business Act, 2020, came into force and eliminated the requirement for Ontario corporations to have a specific number of resident Canadian directors.[86] This follows Alberta's removal of its director residency requirements that was proclaimed into law in March 2021.[87] Prior to these changes, corporations incorporated under the Business Corporations Act (Ontario) or the Alberta Business Corporations Act were required to have at least 25 per cent of their directors be resident Canadians or, for corporations with less than four directors, at least one be a resident Canadian.[88] These recent changes in Alberta and Ontario align with similar positions on director residency with the majority of other Canadian provinces and territories.

Ontario Not-for-Profit Corporations Act, 2010 (Finally) Comes Into Force

After a ten-year wait, the Ontario Not-for-Profit Corporations Act, 2010, finally came into force on October 19, 2021. This Act established a new regulatory regime for Ontario not-for-profit corporations, removing them from the scope of Ontario's Corporations Act. The new Act includes a three-year transition period in which not-for-profit corporations can make the necessary changes to comply.

Release of the Kaplan-Dey Report on 360° Governance

In February 2021, Peter Dey and Sarah Kaplan — sponsored by the Michael Lee-Chin Family Institute for Corporate Citizenship at the Rotman School of Management at the University of Toronto — released a report titled "360° Governance: Where are the Directors in a World in Crisis?"[89] Drawing from broad consultations, the report put forward thirteen guidelines on modernized best practices for board governance.

Recent legislative changes concerning additional diversity disclosure requirements, greater electronic accessibility for shareholders, shortened director terms, and amendments to director votes provide stakeholders with greater transparency. As evidenced by the development of relatively novel forms of the corporation and growing guidance on board conduct, ESG considerations are affecting Canada's corporate governance climate in a considerable way.

Financial Services

Financial Services

The financial sector has an important role to play in the transition to ESG-focused business models. As businesses are faced with increasing pressure from investors to align their operations with ESG goals, companies can demonstrate their commitment to ESG by engaging in sustainable financings. Furthermore, international alliances comprised of leading players in the financial sector serve to bolster the sector's transition into a more sustainable future.

Notable ESG developments within the financial sector in 2021 are summarized below.

Social Loans and Green Loans

This past year saw an increase in the number of ESG-driven loans provided by Canadian banks. An important development in this sphere is the Social Loan Principles ("**SLP**"), published by the Loan Market Association, the Loan Syndications and Trading Association and the Asia Pacific Loan Market Association in April 2021.[90] The SLP provides a framework of market standards and guidelines for social loans, which are a type of loan instrument used to finance or refinance new or existing eligible social projects. The non-exhaustive categories of social projects include basic infrastructure, affordable housing and access to essential services. Pursuant to the SLP, social loans must have four core characteristics: (i) use of proceeds, (ii) process for project evaluation and selection, (iii) management of proceeds, and (iv) reporting.

First Green Loan from a Canadian Bank

2021 marked the first time in Canadian history a Canadian bank financed a labelled green loan, which had components that aligned with the Green Loan Principles. In February 2021, Bank of Montreal provided Canada's first labelled Green Loan to Atlantic Packaging Products Ltd. to finance a new 100 per cent recycled containerboard facility in Whitby, Ontario.[91]

Green loans and social loans represent an impactful way for companies to borrow funds to finance their projects while signalling to investors their commitment to ESG considerations.[92]

Sustainability-Linked Loans

Sustainability-linked loans ("**SLLs**") are another financial instrument that has gained popularity in 2021. Unlike social loans and green loans, which focus on how the proceeds of the loan are used, SLLs incorporate ESG compliance into the terms of financing. These loans are meant to incentivize the borrower to improve its sustainability initiatives, which are measured by key performance indicators ("**KPIs**") or sustainability performance targets.

While SLLs have been in existence in Canada since 2019, 2021 marks the year SLLs have been gaining traction across different sectors of the economy. The new credit facilities of Gibson Energy Inc. ("**Gibson**") and Enerplus Corporation ("**Enerplus**") are the first of their kind in the North American energy sector to incorporate ESG targets into the terms of financing. In April 2021, Gibson announced a financing deal with BMO Financial Group to amend an existing credit facility. The terms of the financing include a margin adjustment incentive mechanism linked to Gibson's commitment to reduce carbon emissions and increase diversity in its workforce and on its board of directors.[93]

In the same month, Enerplus announced that it increased and extended its senior unsecured credit facility, while linking ESG performance targets such as reducing GHG emissions and improved water consumption management.

In October 2021, Sandstorm Gold Royalties Ltd. became the first royalty company in Canada to obtain a credit facility linked to ESG performance metrics, including maintaining or improving an MSCI ESG rating of "A" — on a ranking scale that measures from leader (AAA, AA), average (A, BBB, BB) to laggard (B, CCC) based on a company's resilience to financially driven long-term ESG risks — and improving diversity within its senior management and its Board.[94]

In the real estate industry, the global real estate company Ivanhoé Cambridge Inc. announced in October 2021 that it will convert its term loans and lines of credit by aligning them with its ESG performance indicators.[95] A strong ESG performance, measured by KPIs such as low-carbon investments and the carbon intensity of its portfolio, will allow Ivanhoé Cambridge to obtain more preferable financing conditions, while a decline in its ESG performance will result in a self-imposed penalty pursuant to the financing terms.[96]

The increasing pressure from investors to align with ESG goals incentivizes companies to transition into sustainability-linked credit facilities — with the assistance of Canadian banks that play a fundamental role in facilitating this transaction.

ESG Disclosure in Leveraged Finance Transactions

In early 2021, the European Leveraged Finance Association ("**ELFA**") and the Loan Market Association published the "Guide for Company Advisers to ESG Disclosure in Leveraged Finance Transactions" (the "**Guide**").[97] The purpose of the Guide is to serve as a practical tool for company advisors to incorporate ESG topics into company offerings and financial materials, and provide guidance in the context of leveraged finance transactions.

In addition to the Guide, ELFA published general and sector-specific ESG fact sheets.[98] The ESG fact sheets establish a framework for disclosure of ESG considerations by providing guidance towards a consistent level of disclosure in each sector. They identify sector-specific ESG considerations that should be disclosed in leveraged finance transactions, which can play an important role in the due diligence process for investors.

Sustainability-Focused Financial Sector Alliances

In 2021, the United Nations convened a meeting that led to the formation of sustainability-focused financial sector alliances. On April 21, 2021, the Glasgow Financial Alliance for Net Zero ("**GFANZ**") was established with the goal of transitioning the financial sector to a low-carbon future. Members of GFANZ must be accredited by the UN Race to Zero campaign, upon assessment of science-based guidelines to reduce emissions in line with the campaign's criteria.

The banking arm of GFANZ is the Net-Zero Banking Alliance ("**NZBA**"), which was founded by 43 banks from 23 countries with combined assets of USD$28.5 trillion.[99] Members of NZBA have committed to aligning their lending and investment portfolios to net-zero emissions by 2050. In October 2021, six of Canada's largest banks — BMO, CIBC, National Bank of Canada, RBC, Scotiabank, and TD — announced that they had signed on to NZBA. By joining NZBA and signing the alliance's Commitment Statement, member banks have committed to setting targets for reducing GHG emissions. These commitments include: setting targets that cover a significant majority of their financed emissions, and annually publishing absolute emissions and emissions intensity in line with best practices.[100]

More recently, the Net-Zero Insurance Alliance, comprised of eight global insurance leaders, was established to join GFANZ and NZBA in transitioning to a net-zero international economy.[101] Together, these alliances propel the global financial sector into a more sustainable future.

Other Sustainable Initiatives in the Financial Sector

In late 2020, the Office of the Superintendent of Financial Institutions ("**OSFI**") launched a pilot project with Bank of Canada to promote preparedness and resilience to climate-related risks to Canada's financial system.[102] In January 2021, OSFI launched a three-month consultation period regarding this project by releasing a discussion paper titled "Navigating Uncertainty in Climate Change: Promoting Preparedness and Resilience to Climate-Related Risks".[103] The consultations sought input from federally-regulated financial institutions and federally-regulated pension plans about how these institutions define, identify, and build resilience to climate-related risks. The discussion paper identifies three types of climate related risks: (i) physical risk, (ii) liability risk, and (iii) transition risk. OSFI sought to use this input to develop its regulatory and supervisory approaches and to ascertain what role OSFI should play in facilitating preparedness in the financial sector.

In September 2021, HSBC Bank Canada announced the launch of new sustainability-linked financial products available to Canadian business of all sizes. The five products are: (i) Green Deposits, (ii) Green Trade Finance, (iii) Green Revolving Credit Facilities, (iv) Sustainability-Linked Loans, and (v) Green Equipment Financing.[104] This suite of sustainability-linked financial products makes HSBC the first bank in Canada to provide a broad array of options for small and medium Canadian businesses to implement ESG initiatives and achieve their sustainability goals.

In December 2021, the Investment Industry Regulatory Organization of Canada ("**IIROC**") published its updated "Know Your Client" rules, which now include ESG requirements.[105] IIROC members must ensure that they have sufficient information about their clients' investment needs and objectives, which includes information regarding the clients' personal values. IIROC members must also provide clients with an opportunity to express their investing needs and objectives, which may include investing in accordance with ESG criteria or other personal preferences. If investment goals are set, IIROC members should periodically update the client on progress made towards the goals.

Transitioning to a lower carbon future requires the cooperation of major players in the financial sector. The initiatives of OFSI, the Bank of Canada, HSBC, and other Canadian banks represents a positive development towards a more sustainable financial system.

The emerging ESG emphasis has permeated the realm of finance. In the last year, a series of financial instruments have been introduced or gained traction to address business needs and to incentivize ESG-focussed business development. These financial instruments paired with international sustainability-oriented alliances create a new chapter of opportunity and accountability in the Canadian financial services landscape.

Commercial Real Estate, Construction, and Development

Commercial Real Estate, Construction, and Development

ESG considerations are becoming imperative to the commercial real estate, construction, and development industries. Real estate investment requires a long-term outlook (especially where there is a climate and sustainability focus) and an understanding of what tenants and purchasers are seeking in respect of a social emphasis. As a result and in response to this shift in focus and emphasis, new programs and metrics are emerging in the construction and development industries, as governments and stakeholders become more focussed on reducing emissions, improving project sustainability, and providing greater investor stability.[106]

Notable ESG developments spanning commercial real estate, construction, and development in 2021 are summarized below.

Curbing Emissions in Global Building and Construction

According to a 2021 global status report, in 2020, global building construction and operations accounted for 36 per cent of global energy-related emissions.[107] As the world becomes more concerned with these environmental impacts, those in the business of construction and development increasingly face social and regulatory demands to compensate and innovate, which may sometimes translate to financial risks, and other times, rewards. Industry players should ensure their awareness of these factors and consider how they might ultimately impact key project metrics — such as contract price, schedule, profit, and profile — on a project-by-project basis.[108]

ESG initiatives appear to also interplay with the current housing market crisis faced by many major cities and surrounding regions. For example, major Canadian cities such as Toronto and Vancouver have been warming to the idea of "laneway housing", which aims to build compact housing on underutilized spaces in infrastructure-rich areas.[109] Due to the unique constraints associated with such buildings, such as the regulatory constraints under zoning by-laws and the Building Code, and the physical confines of the space, laneway suites both necessitate and provide an opportunity for builders' creativity. Laneway suites are an ideal setting for innovative architecture and use of new construction materials, as well as creating opportunities for builders and owners to engage with recent ESG initiatives in construction, such as LEED and "passive house design" (houses that are designed to naturally use less energy for lighting, heating and cooling). Similarly, using mass timber as a building material for construction of laneway suites may be a more desirable alternative to concrete and steel construction, as it is not only durable but also weighs much less.

Insurance Industry

In 2019, the federal government announced that it was undertaking consultations to create a low cost national flood insurance program. The goal of the national flood program would be to protect homeowners who are at a high risk of flooding and to ensure that they have access to low-cost flood insurance. In the 2021 federal budget, $63.8 million was earmarked to help provinces and territories update flood maps, a step experts say is necessary for future initiatives. The government's consultations and subsequent report, however, are not expected until later this year.

Canada could also soon see an earthquake insurance initiative. The Property and Casualty Insurance Compensation Corporation ("**PACICC**") (industry-funded and not for profit) recently held discussions with the Insurance Bureau of Canada about the possibility of expanding the compensation fund to cover major losses resulting from earthquakes. Since its inception more than twenty years ago, the PACICC's

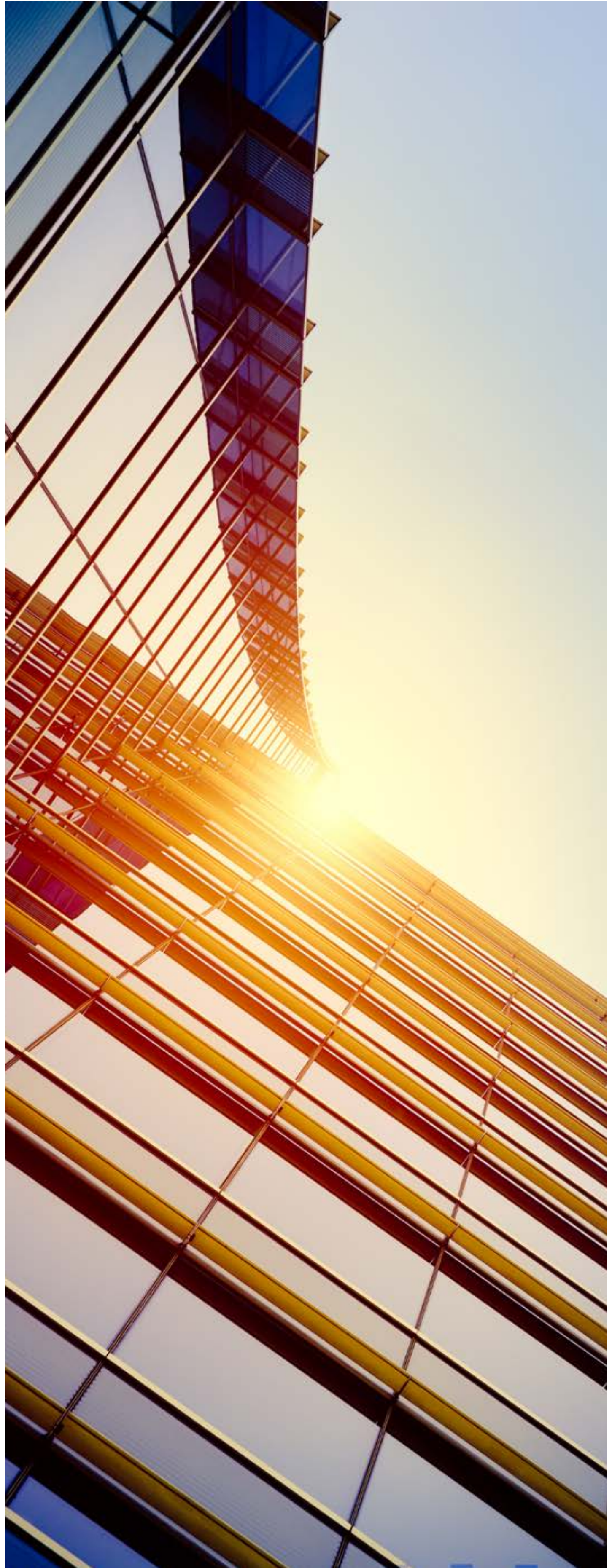
compensation fund has focused primarily on its ability to respond to claims from policyholders in the event of the insolvency of a property and casualty insurer.

ESG Considerations in Commercial Development

Governments and industry leaders are taking notice of ESG concerns with respect to the built environment, and they are responding with strategies on a macro-scale. For example, in May 2021, the federal government announced a partnership with the Canadian cement sector with a goal of enabling the cement and concrete industry to achieve net-zero carbon concrete by 2050.[110] This initiative is aligned with its Greening Government Strategy, which aims to position Canada's cement and concrete industry as a competitive global leader in low-carbon cement and concrete production and related technologies.[111]

Many companies are also using ESG as a means of increasing their market and profile. For example, global infrastructure consulting firm, AECOM, announced in April 2021 the launch of its "Sustainable Legacies", a new ESG strategy which lists four key pillars intended to: (i) increase sustainable development across the company's work, (ii) improve social outcomes for communities, (iii) achieve net-zero carbon emissions, and (iv) enhance governance.[112]

While the concepts of health, wellbeing, and environmental sustainability are not new to real estate, construction, and development industries, the ESG lens has provided increased visibility, incentives and metrics for these related initiatives. As such, stakeholders in these industries will do well to keep current with the evolving policies, strategies, initiatives, and interests of the market players, which will almost certainly continue to impact the landscape in the coming years.



Tax

Tax

Governments are also adopting an ESG lens to how they apply, change, and create new taxes. Notable ESG developments for Canadian and provincial tax laws in 2021 are summarized below.

ESG-Related Budget Decisions

Rate Reduction for Zero-Emission Technology Manufacturing

The 2021 Federal Budget ("**Budget 2021**") proposed a reduced corporate tax rate for certain zero-emission technology manufacturers. Specifically, this reduced corporate tax rate would apply to income from eligible zero-emission manufacturing and processing activities, where at least 10 per cent of the company's gross revenues is derived from such activities. Under this proposal, eligible income that would otherwise attract the general corporate rate (15 per cent) would now be taxed at 7.5 per cent and eligible income that would otherwise attract the small business rate (9 per cent) would now be taxed at 4.5 per cent.[113]

Accelerated Capital Cost Allowance for Certain Clean Energy Equipment

The *Tax Act* and *Income Tax Regulations (Canada)* (the "**Regulations**") create a capital cost allowance regime, which permits qualifying taxpayers to expense the cost of depreciable capital property over a specified number of years (the property's "useful life"). The rate at which the cost of the property can be expensed (i.e. depreciated) is different depending on the class the property falls into under the Regulations. If a taxpayer's capital property falls into a class that allows for rapid depreciation, the taxpayer can deduct a larger capital cost allowance expense from their taxable income early in the property's useful life — accelerating the tax deduction for such capital expenditures. The Regulations also provide that certain classes of eligible equipment qualify for accelerated expensing. To incentivize investment in clean energy equipment, the 2021 federal budget proposed expanding that list of eligible equipment to include a broader range of clean energy equipment. At the same time, it proposed removing certain equipment that generates or uses fossil fuels from these classes.[114] These changes would allow companies to write off the cost of certain clean energy equipment at an accelerated rate between 30 per cent and 50 per cent each year.[115]

ESG-Related Tax Incentives

In its 2021 Election Platform, the Liberal government proposed an investment tax credit for clean technologies, and the December 2021 Fall Economic Statement as well as the mandate letter for the Finance Minister furthered that promise. The details of the tax credit and likelihood of implementation are not yet determined, but the credit is proposed to be up to 30 per cent for a range of clean technologies as determined in consultation with external experts.[116]

Mandatory Disclosure Rules

In an effort to encourage responsible tax behavior and to ensure revenue authorities have greater oversight of tax planning strategies which they deem to be aggressive, the government announced its intention to enhance Canada's mandatory disclosure rules.[117] Doing so would ensure corporate taxpayers provide a more detailed view of their tax regimes to revenue authorities. The mandatory disclosure proposals contemplate (i) changes to the "reportable transaction rules", (ii) a new regime for reporting "notifiable transactions", and (iii) the mandatory reporting of "uncertain tax treatments" by corporations meeting certain conditions.[118]

i. Reportable Transactions

Certain transactions that are entered into for the purpose of providing a benefit to the taxpayer must be reported to the Canadian Revenue Agency ("**CRA**") under the rules of the *Tax Act*. These rules are in place to ensure that certain transactions that may not require reporting are otherwise brought to the attention of the CRA.

Currently, for a transaction to be reportable, it must be an "avoidance transaction", pursuant to the *Tax Act*, and must also bear two distinct "hallmarks" set out in the *Tax Act*.[119] The 2021 Budget proposes to expand the existing rule by broadening the definition of "avoidance transaction" and requiring only one "hallmark" to be present.

ii. Notifiable Transactions

Budget 2021 proposes implementation of reporting requirements for tax schemes with "specific hallmarks". These hallmarks would assist the CRA in identifying particular tax avoidance transactions (or series of transactions) and other transactions of interest. Such notification would allow the government to develop appropriate responses to tax schemes in an expeditious manner.[120]

Under the proposed regime, the tax treatment of these notifiable transactions would not change, however it would provide the CRA with information that would allow it to challenge aggressive tax planning in a timely manner based on its merits.

iii. Uncertain Tax Treatments

An uncertain tax treatment is "a tax treatment used, or planned to be used, in an entity's income tax filings for which there is uncertainty over whether the tax treatment will be accepted as being in accordance with tax law".[121] As it stands, there is no obligation to report such tax treatments in Canada. Budget 2021 proposes implementation of a regime similar to the one currently in place in the United States, which requires certain corporate entities otherwise required to file a corporation tax return are required to disclose uncertain tax treatments, subject to specific conditions set forth in the *Tax Act*. This measure is also intended to provide the CRA with tools to identify potential compliance issues and review certain transactions of interest in a timely manner.

The federal government continues to make the environment and responsible tax planning a priority. Budget 2021 introduced proposals to provide favourable tax treatment for zero-emission technology manufacturers and for clean energy equipment. Additionally, the proposed mandatory disclosure rules contemplated in Budget 2021 are intended to promote responsible tax planning.

Advocacy

Advocacy

Canadian courts are being seen as an increasingly viable forum for claims relating to human rights and environmental actions against companies with subsidiaries operating overseas.[122] In the new year, this increasing emphasis on sustainability is likely to continue to gain prominence.

Notable ESG developments surrounding advocacy in Canadian and provincial courts in 2021 are summarized below.

Human Rights

In 2020, the Supreme Court of Canada set a new precedent for protecting international human rights law in *Nevsun Resources Ltd v Araya*.[123] In a majority ruling, the Supreme Court confirmed that customary international law — akin to international common law — is part of Canadian law, and consequently, Canadian companies can be held responsible for violating it. The effects of the civil right of action for breaches of customary international law has the potential to continue to impact Canadian companies operating through subsidiaries in countries with poor human rights protections.[124] The full impacts of this decision are still unknown. Thus, all companies subject to Canadian jurisdiction, particularly natural resource operations, that operate and acquire foreign subsidiaries, should consider stricter corporate social responsibility programs and heightened due diligence in the face of this ongoing risk.[125]

Climate-Related Litigation

While courts have thus far refused to authorize class actions related to climate change,[126] and have dismissed actions for having no reasonable cause of action,[127] there is a growing appetite for climate-related litigation. These actions are primarily aimed at oil and gas companies and build on strategies from tobacco litigation.[128] This litigation may result in financial and reputational consequences for public issuers.[129]

One case to watch in Canada is *Mathur v Ontario*. In July 2020, seven youths brought an action against Ontario, alleging that the province violated their *Charter* rights by failing to meet its responsibilities to address climate change. Following the launch of this action, a motion brought to strike the application failed.[130] In coming to this decision, the Court found that both the repeal of the *Climate Change Act* and the preparation of the province's Environment Plan are governmental actions that are reviewable for compliance with the *Charter*.[131] This application decision represented the first time that a Canadian court recognized the potential for climate change to violate *Charter* rights. This case is now moving forward to a full hearing.

In British Columbia, the Court of Appeal is set to hear the question of whether an injunction against interference with logging of old growth forests should be extended. The extension was initially denied, with the Court offering reasons that included the harm to the company was outweighed by the public interest in protecting the court's reputation due to substantial infringement of civil liberties resulting from enforcement of the injunction.[132] Within a couple weeks, the Court of Appeal granted an interim stay, effectively extending the injunction pending the outcome of the appeal scheduled for November 15, 2021.[133] This decision could have broader impacts on the test for granting injunctions against protests related to natural resource projects.

In Federal Court, a judicial review is being conducted to determine if a report regarding oil and gas drilling off the coast of Newfoundland and Labrador is a "regional assessment" due to a lack of compliance with

the *Impact Assessment Act* (the "**IAA**").[134] This was the first regional assessment conducted under the *IAA*, and the plaintiffs assert it would create a dangerous precedent if permitted to stand.[135] Last year, the Federal Court refused an application to strike the claim or provide interim relief while the judicial review is underway.[136] Following this refusal, there was a hearing held in May 2021, but no decision has been released as of yet. For companies, this challenge could significantly affect assessments done under the new federal legislation with respect to natural resource projects and could lead to further challenges of regional assessments under the *IAA*.

In addition to these pending cases, there are a number of appeals to watch. In each of these cases, the courts originally refused the climate action, and the plaintiffs appealed. First, in *Environnement Jeunesse c Procureur général du Canada,*[137] the Quebec Superior Court originally refused to authorize a class action related to climate change on behalf of all Quebec residents under the age of 35.[138] This case is currently on appeal, and on February 12, 2020, the Quebec Court of Appeal granted intervener status to Amnesty International Canada.[139] Similarly, *La Rose v Canada*[140] is on appeal following a dismissal of a climate action led by 15 youth from across Canada and supported by the David Suzuki Foundation.[141] The notice of appeal was filed on December 22, 2020, and the plaintiffs filed their opening brief on May 3, 2021. Finally, two groups from the Wet'suwet'en First Nation sued the federal government for approving high GHG emission projects, including the Coastal GasLink pipeline. While the federal court granted a motion to strike on November 16, 2020,[142] the plaintiffs appealed. The parties filed their memorandums on April 30 and June 28 of 2021, but it does not appear that a date for the hearing has been set.

Other Potential Causes of Action

There are a number of additional causes of action that have seen traction in the United States but have yet to arise in Canada. These fall under two categories. First, derivative actions against directors and officers may be rooted in ESG-related issues. The second is a broader category encompassing claims related to ESG disclosures and consumer protections, such as misrepresentation, unfair and deceptive business practices, and securities fraud.[143] Primarily, these arise under claims of "greenwashing", where companies oversell their ESG accomplishments to compete in the market. Other claims may arise where companies make false claims regarding sustainability, ecological impacts, and product composition. As this category of claims have had growing success in the United States, it is likely that they will soon appear in Canadian courts.

There is a growing appetite for ESG-related litigation both in Canada and around the world. ESG-related litigation will continue to grow in areas of disclosure, consumer protection, climate responses, and human rights. It is important to take action now to address liability risks.

Labour and Employment

The desire for greater action on ESG priorities has also influenced the application of — as well as government policies and bills affecting — labour and employment law.

Notable ESG developments affecting Canadian and provincial labour and employment law in 2021 are summarized below.

Social Issues Related to the *Federal Employment Equity Act* (the "*EEA*")

Social issues will continue to grow as a potential litigation risk. There are actions proposed and in process that could set important precedents for expectations regarding human rights in Canada. For example, a class action was filed on behalf of Black federal employees to address systemic racism and discrimination in the Public Service of Canada.[144] A certification hearing has been set for September 21, 2022. The action seeks, inter alia, a policy to increase representation of Black federal employees to at least the percentage reflected in the general population and an amendment to the *EEA* to create a separate category for Black federal employees to recognize the unique racism and underrepresentation issues for Black federal employees.

Taskforce Launched to Modernize the *EEA*

In 2021, the federal Minister of Labour launched the Task Force on the EEA (the "**EEA Task Force**"). The EEA applies to federally regulated industries, Crown corporations and other federal organizations with at least one hundred employees, as well as a portion of the federal public service. The Government of Canada states the EEA Task Force is engaging in the most extensive review of the legislation since its introduction in 1986, and that it will make "concrete, independent and evidence-based recommendations" on how to modernize the EEA.[145] The final report with these recommendations is expected to be released in early 2022.

Legislative Changes in Support of Pay Equity

In 2021, there were two important federal legislative changes with regard to pay equity. In January 2021, an amendment to the EEA came into force requiring federally-regulated private sector employers to undertake certain pay transparency measures. Specifically, the amendment requires employers' annual employment equity reports to include aggregated wage gap information. In August 31, 2021, the federal *Pay Equity Act* (the "**PEA**") and supporting regulations came into force.[146] The PEA and its regulations require that all employers with one hundred or more employees and unionized federal employers with over nine employees draft and post a pay equity plan.[147] The PEA also requires that all unionized federal employers and all employers with one hundred or more employees form a Pay Equity Committee.[148] The Pay Equity Committee's main purpose is to collaborate with management to develop a pay equity plan. Employers will be required to eliminate any inequitable compensation differences noted in their plan within three to five years. Further, an employer's pay equity plan must be updated at least every five years.[149] The government intends the legislation to be a proactive regime to help ensure individuals of all genders receive equal pay for work of equal value.

Amendments to the Public Service Employment Act

In July 2021, the federal government amended *Public Service Employment Act*. These amendments aim to address some of the systemic barriers faced by equity-seeking groups in public service staffing.[150] The changes include the mandatory evaluation of new or revised qualification standards (as well as all

assessment methods) for biases or barriers faced by individuals in equity-seeking groups. Despite these changes, there has been pushback, including from the Public Service Alliance of Canada, which contends that these amendments do not go far enough in disrupting the systemic barriers associated with staffing. [151]

Ontario's Proposed Working for the Workers Act, 2021

In October 2021, the Ontario government tabled a piece of legislation titled the Working for the *Workers Act, 2021,* (the "**Workers Act**") that proposes a number of amendments to the *Employment Standards Act, 2000*, aimed at improving employee rights. The Workers Act proposes a ban on non-compete agreements for employees (with limited exceptions), as well as a "right to disconnect" for Ontario workers. The "right to disconnect" follows similar pieces of legislation in the European Union ("**EU**") and would require employers to develop written policies on how employees will be able to disconnect from work so that they are free from work activities outside of their work hours, including being free from emails and phone calls. The Workers Act received Royal Assent on December 2, 2021.

Proposed Amendments to the Alberta *Employment Standards Code* for Unpaid Bereavement Leave

Bill 220 *Employment Standards (Expanding Bereavement Leave) Amendment Act, 2021* ("**Bill 220**"), proposes to revise Alberta's *Employment Standards Code* for unpaid bereavement leave. The proposed Bill would expand bereavement leave to include the loss of a pregnancy that ends in miscarriage or stillbirth. The individual entitled to the leave would be the individual who lost the child through a miscarriage or stillbirth, their spouse or common law partner, or a person who would have been a parent of the child born as a result of the pregnancy. Bill 220 received a motion of concurrence, which was passed on November 22, 2021. At the federal level, a similar bill titled *An Act to amend the Canada Labour Code (bereavement leave)* received Royal Assent on June 29, 2021 and came into force three months later.

Over the last year, promoting and ensuring equity in the workplace has clearly been a priority for the federal government. Between launching the Task Force on the *Employment Equity Act*, implementing legislative changes with regard to federal pay equity legislation and amending the *Public Service Employment Act*, the federal government has placed a large emphasis on the importance of equity in employment.

At the provincial level, the governments in both Ontario and Alberta have tabled legislation to improve employee rights and provide additional benefits to employees in their provinces.

Regulatory

Regulatory

The Canadian government regulates various aspects of the manufacturing, energy, and transportation industries in Canada, including in respect of environmental matters, competition, international trade, and public procurement. As emphasis on ESG initiatives increases, Canadian industries will have to navigate pressures from regulatory agencies and adhere to complex compliance requirements.

Some of Canada's most significant regulatory developments related to ESG from 2021 are summarized below.

Federal Environmental Regulation

Canada's Federal Carbon Pricing Scheme is Found Constitutional

On March 25, 2021, the Supreme Court of Canada ruled that the Greenhouse *Gas Pollution Pricing Act* (the "**GGPPA**") is constitutional.[152] The provinces of Ontario, Saskatchewan, and Alberta argued that the federal government was acting outside of its jurisdiction through enacting the GGPPA. However, the Court found that the GGPPA fell under federal jurisdiction as a matter of national concern under the "peace, order and good government" power in section 91 of the *Constitution Act,* 1867. The GGPPA, which came into force on June 21, 2018, sets a minimum national standard on GHG pricing in an attempt to reduce emissions and fulfil Canada's commitments under the 2015 *Paris Agreement*. The GGPPA acts as a backstop such that facilities in provinces and territories that do not have a carbon pricing scheme that meets federal requirements will be subject to the federal regulatory charge on fossil fuels and the federal carbon pricing system, the Output-Based Pricing System ("**OBPS**"). The GGPPA regime does not apply to provinces/territories with carbon pricing schemes that meet or exceed federal standards.[153]

In August 2021, the Canadian government announced a plan to extend the increases of carbon price beyond 2022, announcing annual increases from 2023 to 2030.[154] The GGPPA currently prices carbon until 2022, at which time covered facilities will be charged C$50 per tonne of excess CO2 or carbon dioxide equivalents ("**CO2e**") emitted.[155] The announcement outlines a plan to increase the cost of carbon annually by C$15 to reach a cost of C$170 per tonne of CO2e in 2030.

Canada Publishes Draft Regulations to Delineate a Greenhouse Gas Offset System

On March 7, 2021, the Canadian government published draft *Greenhouse Gas Offset Credit System Regulations* ("**Offset Regulations**") outlining requirements for projects to be eligible to generate offset credits under the GGPPA.[156] The Offset Regulations create a carbon-offset system aimed at incentivizing activities that remove GHGs from the environment or reduce GHG emissions. Regulated facilities can use offset credits generated through these approved projects to "offset" their emissions so as to meet their OBPS price or credit payment requirements. Eligible projects must achieve a real, verified, and quantifiable GHG reduction or removal that goes beyond business-as-usual practices (or the "baseline scenario" as used in the Offset Regulations). The number of offset credits assigned to a project will be determined by a specific formula outlined in the Offset Regulations.[157] The comment period is now complete, and the final enactment of the Offset Regulations is expected in the near future.[158]

Proposal to Legislate Canadians' Right to a Healthy Environment and to Overhaul Canada's Chemicals Management Regime under the Canadian Environmental Protection Act

Another notable development in the environmental regulatory sphere is the introduction of Bill C-28, *Strengthening Environmental Protection for a Healthier Canada Act* ("**Bill C-28**").[159] Bill C-28 proposes significant changes to the *Canadian Environmental Protection Act, 1999* ("**CEPA**"), the primary statute

through which the federal government regulates and protects the environment in Canada.[160] Significantly, Bill C-28 proposes that the preamble of CEPA will officially recognize Canadians' right to a healthy environment and that section 2 of CEPA will require the government to protect that right when making decisions relating to the environment.[161]

Additionally, Bill C-28 includes amendments that would overhaul Canada's chemicals management regime, introducing new provisions related to risk assessment, a public accountability framework, management of toxic substances, and management of new substances.[162] Based on the proposed amendments, the government plans to publish a Plan of Chemicals Management Priorities, which will set out an integrated plan for the risk assessment of various chemical substances.

Bill C-28 was introduced in Parliament for first reading on April 13, 2021, and died on the Order Paper when the 2021 election was called; however, the government is expected to re-introduce similar legislation in 2022.[163] Upon coming into force, the amendments would have the potential to significantly impact a wide range of industries and businesses in such areas as chemical manufacturing, oil and gas, petrochemicals, pharmaceuticals, and natural resources.

Reducing Plastics Pollution: "Plastic Manufactured Items" Designated as a Toxic Substance under Canadian Environmental Protection Act and Proposals to Prohibit Plastic Waste Exports

Additional changes were made to CEPA in 2021 to address the issue of plastics pollution. In 2018, the federal, provincial, and territorial governments of Canada approved in principle a "Canada-wide Strategy on Zero Plastic Waste".[164] In 2021, the federal government continued these efforts by increasing regulation and prohibitions surrounding single-use plastics. On April 23, 2021, "plastic manufactured items" were added as a toxic substance to Schedule 1 of CEPA.[165] This classification allows Environment and Climate Change Canada to take a broad array of risk-management actions to mitigate any adverse ecological effects of plastics, such as enacting regulations to ban or limit the use of certain plastic products, publishing pollution prevention plans, or environmental codes of practice.

Further, on June 2, 2021, the House of Commons adopted Bill C-204, *An Act to amend the Canadian Environmental Protection Act, 1999 (final disposal of plastic waste)* ("**Bill C-204**").[166] However, the bill died in the Senate upon the call of the 2021 election. The government is expected in 2022 to reintroduce legislation that would prohibit the export of "plastic waste" that specifically includes ethylene, styrene, and polypropylene, among others, to foreign countries, such as the United States and China, for final disposal.

As of the date of writing, Bill C-204 has not yet been re-introduced but the government has identified reducing single-use plastics as a priority. However, businesses whose activities involve the use and/or disposal of plastics or other waste exports should consider how such a law stands to affect them and their modes of operation.[167]

Each of the developments discussed above has the potential to significantly impact a wide range of industries and businesses, including areas like chemical manufacturing, oil and gas, petrochemicals, pharmaceuticals, and natural resources. Companies carrying out activities or planning projects regulated under the GGPPA, its regulations, or CEPA will need to be aware of the developing regulatory and compliance landscape.

Competition and International Trade

Canada Launches Consultations on Establishing a Border Carbon Adjustment

The Government of Canada announced in the 2021 Budget that it plans to develop Border Carbon Adjustments ("**BCAs**") as an element of Canada's Climate Plan.[168] On August 6, 2021, the government further announced the beginning of a BCA consultation process with exporters and importers

of carbon-intensive goods. Broader public consultations are expected to continue into 2022.

A BCA is a tariff imposed on imported goods based on their carbon content. BCAs would apply to imports from exporting countries that either lack their own domestic carbon pricing schemes or have weaker domestic carbon pricing than the importing country. In effect, BCAs are intended to "level the playing field" between the costs of producing carbon-intensive goods in domestic and foreign markets. Additionally, BCAs have a critical role in deterring the "carbon leakage" that occurs when firms relocate production to countries without, or with weak, carbon pricing schemes.

If implemented, Canada's BCA will likely cover imported iron, chemical, petroleum, and steel products that compete with Canadian products affected by the OBPS.[169] For example, the minimum price under the OBPS, currently C$40 per tonne of CO2e, could be imposed as an equivalent charge per tonne of CO2e embedded in imported products. However, implementation will be complicated where there are various provincial carbon-pricing systems that apply instead of the OBPS.

A BCA will be subject to challenge under the World Trade Organization's ("**WTO**") *General Agreement on Tariffs and Trade* ("**GATT**"). The GATT prohibits Canada from using tariffs to discriminate in favour of domestic producers of goods or in favour of imports from foreign countries that have more ambitious climate policies. Accordingly, a WTO-compliant BCA will need to be non-discriminatory, applying clear and consistent principles for all countries. Canada may learn lessons from the European Union, which released its proposal for a Carbon Border Adjustment Mechanism on July 14, 2021, regarding pathways for designing a WTO-compliant BCA.

European Union Proposes its Carbon Border Adjustment Mechanism

As mentioned above, on July 14, 2021, the European Commission announced its official Carbon Border Adjustment Mechanism ("**CBAM**") proposal, which is subject to approval by both the Council of the European Union and the European Parliament. The CBAM proposal is intended to fulfill the EU's WTO commitments while deterring carbon leakage amidst the expansion of the EU's climate action regime.[170]

The CBAM proposal will target carbon-intensive imports and is initially prioritizing traded goods from the following high-risk industries: iron, cement, aluminum, fertilizer, steel, and electricity generation.

The regime will operate through exporter purchases of CBAM certificates to offset the carbon costs of manufacturing their respective exported goods. Each certificate will be equivalent to one tonne of CO2 and will have its cost determined by "the weekly average of the daily carbon price certificates in the EU's internal carbon pricing system" and will be valid for a two-year period.[171] A reduction in CBAM certificates will be possible to account for domestic carbon pricing mechanisms where applicable. Exporters will be required to make an annual report to the EU about emissions and certificates in addition to quarterly reporting obligations.

The first stage of the CBAM would be a transitional phase that is set for 2023 to 2025, during which time exporters will develop an understanding of the administrative and reporting components prior to imposing the financial aspects of the regime. The second stage — purchasing CBAM certificates to offset carbon costs — would begin in 2026.

Canada's Comprehensive Economic and Trade Agreement with the EU may lead to additional EU-exporter consultations ahead of the implementation of CBAM as it "contains an environmental chapter that recognizes and reaffirms commitments to and consultations regarding multilateral environmental agreements."[172]

Uncertain Treatment of Competitor Collaboration on Sustainability Initiatives pursuant to Canada's Competition Act

One notable gap remains in the Canadian federal regulatory sphere: the treatment of competitor collaboration under the *Competition Act*. Collaboration between companies or on an industry-wide basis may go a long way towards achieving, or at least advancing, many sustainability initiatives, for instance agreeing to target improved emissions or joint development of new technologies. However, Canada's *Competition Act* prohibits some types of competitor collaborations, raising the risk of criminal penalties and lawsuits.[173]

The Competition Bureau's Competitor Collaboration Guidelines (the "**Guidelines**") delineate the Bureau's approach to assessing collaborations between competitors as either criminal offences or reviewable practices.[174] The Guidelines were recently updated on May 6, 2021.[175] In the draft revisions that preceded the update, the Bureau made some effort to address the issue of competition law stifling sustainability efforts. The draft revisions stated that an agreement among competitors to implement certain measures or industry standards designed to protect the environment may increase the costs of producing a product and ultimately result in an increase in price, but this alone will not be seen as a criminal price-fixing agreement.[176] In the final updated Guidelines, this statement was removed completely. In addition, there are other aspects of competition law that remain capable of restricting sustainability efforts — for example, criminal offences related to agreements between competitors that restrict output. Output restriction is a criminal offence, but improved environmental outcomes may be linked to a reduction in the supply of environmentally damaging products or services. Further guidance on how an agreement like this will be reviewed is required.

Summary of Canadian Commitments at COP26

The 2021 United Nations Climate Change Conference ("**COP26**"), was held from October 31, 2021 to November 13, 2021 in Glasgow, United Kingdom. The Conference was the 26th "Conference of the Parties" to the United Nations Framework Convention on Climate Change ("**UNFCCC**"), a 1992 international treaty providing a framework for cooperative global climate action. COP26 was anticipated and proved to be the most significant international climate change negotiation forum since the 2015 Paris Conference. In August 2021, the Intergovernmental Panel on Climate Change released its Sixth Assessment Report urging significant and immediate reductions in global GHG emissions to avert catastrophic outcomes. With this urgency in view, the goals of COP26 included to: (i) secure global net zero by 2050, and limit global warming from rising above 1.5 degrees ahead of 2100; (ii) protect human communities and natural habitats from the effects of global warming; and (iii) mobilize at least $100 billion in finance to these ends.[177]

As one of 197 countries party to the UNFCCC, Canada emerged from COP26 with a number of commitments.

Glasgow Climate Pact

Canada signed the Glasgow Climate Pact, reaffirming the commitments of signatories to the Paris Agreement to keep global warming below 2 degrees and to ensure that limiting temperature

increase to 1.5 degree increase remains possible. Canada also supported the High Ambition Coalition, which aims to ensure that the more ambitious 1.5-degree goal remains the top priority globally.[178]

Commitment to End Public Financing of Fossil Fuel Projects

Canada signed a deal to stop any new direct public financing of the unabated fossil fuel sector by the end of 2022. An exception exists for "limited and clearly defined circumstances that are consistent with the 1.5 degree Celsius warming limit and the goals of the Paris Agreement".[179]

Phasing Out Coal

Canada confirmed its intention to phase out coal-fired power generation by 2030. The government also committed to ending thermal coal exports by 2030, providing up to $1 billion in climate finance to help countries transition away from coal-fired electricity, and accelerating its goal of a net-zero emissions electrical grid by 2035.[180]

Methane Emissions Reduction

Canada reiterated its support for the Global Methane Pledge, under which it vows to cut methane emissions by thirty per cent from 2020 levels by 2030.[181]

Commitment to End Deforestation by 2030

Canada signed a declaration to "halt and reverse forest loss and land degradation by 2030."[182]

Canada also signed the UK global forest finance pledge, under which $12 billion will be provided collectively to address the causes of forest loss, and to enable the conservation and restoration of forests.

Zero-Emissions Road Vehicles

Canada signed a memorandum of understanding to strive for 100 per cent zero-emission new truck and bus sales by 2040,[183] and 30 per cent by 2030.

COP26

Secure global net zero by 2050

Limit global temperature increase to 1.5 degrees

Mobilize at least $100 billion in finance to these ends

Protect human communities and natural habitats from the effects of global warming

Canada also signed a declaration promising that all sales of new cars and vans will be zero emission by 2040 or earlier, or by no later than 2035 in leading markets.

Climate Finance

Canada has committed $5.3 billion in international climate finance from 2021–2026. Within this pledge, Canada will contribute $37.5 million to the Least Developed Countries Fund and up to $10 million to the Adaptation Fund, both of which will support vulnerable countries against the impacts of climate change.[184] Canada will also devote more than $1 billion to climate solutions that improve biodiversity in developing countries.[185]

Announcements by Canadian Leadership

Aside from these commitments, Prime Minister Trudeau also called for a global price on carbon that would cover sixty per cent of global emissions by 2030.[186] Prime Minister Trudeau also announced that Canada will impose a cap on oil and gas sector emissions to ensure they decrease at a rate consistent with net-zero by 2050.[187]

Government Mandate Letters

Prime Minister Trudeau released a number of mandate letters to cabinet ministers, which focus on a series of ESG-related considerations that fall within the purview of ministerial responsibilities. These mandate letters outline the various objectives that each minister is responsible for accomplishing as Canada moves towards a goal of net zero emissions by 2050 and an interim goal to cut GHG emissions by 40 to 45 per cent by 2030.

Energy-wise, the mandate letters introduce a Clean Electricity Standard to achieve a net-zero electricity grid by 2035, which accords with the government's movement towards cleaner technology production for the future.

In the mandate letters sent to the Minister of Finance and Minister of Environment and Climate Change, Prime Minister Trudeau directed movement towards a mandatory climate-related financial disclosure system, based on the TCFD created in 2017. The mandate letters also include requirements for federally regulated institutions to issue climate-related disclosures and net-zero plans.

The mandate letters also expand and introduce investment tax credits for a number of ESG-related industries. The Mineral Exploration Tax credit for minerals essential to the manufacture of vital clean technologies has been doubled, and additional investment tax credits for renewable energy and battery storage solutions were discussed. The mandate letters introduced investment tax credits for capital invested in projects related to carbon capture, utilization, and storage, as well as an investment tax credit of up to 30 per cent for a broad range of both market-ready and emerging clean technologies.

Industry-Specific ESG Initiatives: Transportation

Canada Accelerates Goal of Mandatory Target for 100 Per Cent Zero-Emissions Vehicles by 5 Years

On June 29, 2021, the Canadian government announced a new, mandatory target for 100 per cent zero-emission vehicles by 2035, which accelerated the previous goal of reaching net-zero by 2040.[188] The announcement was not accompanied by any new regulations or spending, but the government did indicate that these measures would be pursued in order to assist Canadians and the transportation industry navigate this transition.[189]

Upcoming Final Regulations Outlining Canada's New Clean Fuel Standard

Final regulations regarding Canada's new Clean Fuel Standard are anticipated to be published in the near future.[190] Draft regulations were published in December 2020 and were available for a 75-day consultation period.[191]

Industry-Specific ESG Initiatives: Public Procurement and Government Advisory

Canadian Government Partners with Cement Association of Canada

Green procurement involves procuring goods and services that have a reduced environmental impact. The Government of Canada's Policy on Green Procurement was updated in 2018 and was also integrated into the Greening Government Strategy, which was announced late 2020.[192] In support of the Greening Government strategy, on May 31, 2021, the Government of Canada announced a partnership with the Cement Association of Canada that seeks to position Canada's cement industry as a global leader in low-carbon cement, concrete production, and related technologies.[193] The goal of the partnership is to reach net-zero carbon concrete by 2050. Cement production is one of the largest sources of industrial sector emissions in the world, accounting for seven per cent of all industrial CO2 emissions in 2019. The partnership will establish a working group to support the decarbonisation of the sector by providing the Canadian industry with guidance on technologies, tools, and policies needed to reach net-zero carbon concrete. More specifically, the initial activities of the working group include: (i) building knowledge and opportunities for low carbon products, (ii) supporting domestic and global market development, (iii) identifying strategic and "lighthouse" projects, (iv) strengthening Canada's low emissions supply chain, (v) driving innovation through codes and standards, and (vi) supporting Canadian research and innovation.[194]

The government plans to buy into low-carbon building materials, thereby incentivizing industry players to adopt low-carbon concrete.

Navigating Negotiation of Joint Decision-making and Consent Agreements

Section 7 of British Columbia's Declaration on the Rights of Indigenous Peoples Act[195] ("**DRIPA**") permits the Lieutenant Governor in Council to authorize a member of the Executive Council to negotiate and enter into an agreement with an Indigenous governing body relating to the exercise of a statutory power. These agreements include providing Indigenous groups with joint statutory decision-making power with the government and other decision makers and the ability to veto statutory decision-making through consent agreements.[196] DRIPA received Royal Assent on June 21, 2021, and immediately came into force.

As part of DRIPA's action plan, the provincial government made a commitment to negotiate new joint decision-making and consent agreements under section 7.[197] The impact of these agreements on resource development may be significant.[198]

These agreements may also affect payments made to Indigenous groups through impact benefit agreements or similar agreements, as conferring statutory decision-making or veto power may make an Indigenous body a government "official".[199] These agreements carry implications for sections 121–123 of the Canadian *Criminal Code,* which prohibit influence peddling and providing gifts to any government official.[200] On an international level, this may also carry implications for the *US Foreign Corrupt Practices Act* or the UK *Bribery Act*.[201] These both prohibit bribery of foreign officials, creating risk for any parties who take steps that could be seen as an attempt to influence a foreign official.

The risks will be dependent on the particular section 7 agreement, the parties involved, and the particular circumstances of each case. As such, any company operating in the British Columbia resources sector,

particularly those subject to the US *Foreign Corrupt Practices Act* or the UK *Bribery Act,* must be cautious if any Indigenous group they have dealings with enters into a section 7 agreement.[202]

Industry-Specific ESG Initiatives: Energy

Mining Association of Canada Climate Change Protocol

On May 5, 2021, the Mining Association of Canada released the Climate Change Protocol for its Towards Sustainable Mining performance standards.[203] This protocol complements the seven pre-existing standards and is intended to address the expectations of investors regarding climate change-related disclosures. It sets out criteria for companies to: (i) "[c]ommit to ambitious climate action in business strategy and decision-making", (ii) "[m]anage climate change through comprehensive systems for energy efficiency, emissions reductions, and adaption to physical impacts", and (iii) "[s]et targets and report on a mine's performance on climate action."[204]

For companies with higher levels of performance, the protocol will also require them to make commitments to short- and long-term actions consistent with the Paris Agreement as well as long-term commitments to pursue net-zero emissions by 2050.[205]

There are additional requirements for physical climate impacts, including identifying and assessing the risks of such impacts, and identifying and implementing adaption measures in response.

Canadian Association of Petroleum Producers' Innovative Solutions

In July 2021, the Canadian Association of Petroleum Producers published a report entitled "Canada's Natural Gas and Oil Emissions: Ongoing Reductions, Demonstrable Improvement."[206] The report details a portfolio of innovative solutions to target emissions reductions efforts through technological advancements. The three key areas identified include: (i) methane reduction; (ii) carbon capture, utilization, and storage; and (iii) cogeneration to increase energy efficiency.

The report aligns industry actions with federal government targets to establish a coordinated approach

to energy efficiency. For example, the federal government-mandated 45 per cent reduction in methane emissions below 2012 levels by 2025 translates into reduction efforts in various oil and natural gas technologies, such as tank vents, pneumatics, and pumps.

Laying the Groundwork for Alberta's Future as a Mineral Producer

On November 4, 2021, Alberta's Minister of Energy introduced Bill 82, the *Mineral Resource Development Act* ("**Bill 82**").[207] Bill 82 was drafted in collaboration with the Mineral Advisory Council, which solicited input from various stakeholders and First Nations, Métis, and Indigenous organizations. The new Act is intended to establish a regulatory framework for Alberta's critical and rare earth minerals industry through centralizing all mineral regulatory functions with the Alberta Energy Regulator. It also intends to bring Alberta into alignment with the Canadian Minerals and Metals Plan.[208] These metals include lithium, uranium, vanadium, nickel, potash, and diamonds, which will play an important role in the development of green energy.

While the rare earth minerals industry has suffered from regulatory uncertainty in the past, this new framework will help provide certainty for the industry, position the province as a mineral producer, spur growth in the sector, and help to support a future low-carbon economy.

Small Modular Nuclear Reactors Action Plan

The provinces of Alberta, Saskatchewan, New Brunswick, and Ontario entered into a memorandum of understanding on April 14, 2021, regarding small modular nuclear reactors ("**SMRs**").[209] A feasibility report was then published that set out a timeline for deploying SMRs and a comparison against other energy sources.[210] These actions align with Canada's long history of nuclear power and provide a potential solution to meeting the country's goals regarding the reduction of GHG emissions.[211]

Canada has the opportunity to be a global leader in SMR technology and to support both domestic and international markets.[212] There are also opportunities for proponents to take advantage of this growing industry as SMR strategies continue to be developed.

Industry-Specific ESG Initiatives: Clean-Tech

Government Funding for Clean-Tech Initiatives

Government programs have been key in influencing the development of the clean-tech industry. These programs provide funding to entrepreneurs seeking to develop technologies that provide climate-related solutions as well as companies seeking to adopt such solutions.[213]

Federal initiatives include the Sustainable Development Technology Canada fund,[214] Strategic Innovation Fund's Net Zero Accelerator, [215] and the Zero Emission Vehicle Infrastructure Program.[216] These initiatives provide funding for a variety of projects seeking to research and develop clean technologies. In addition to these emerging funds, the Clean Growth Hub is a free resource developed by the Government of Canada to assist parties in their search for project funding.[217]

There are also a number of provincial initiatives, including the Innovate Clean Energy Fund in British Columbia,[218] the Carbon Capture Utilization Program in Alberta,[219] and the Voucher for Innovation and Productivity in Ontario.[220]

Together, these initiatives cover a wide variety of funding mechanisms to support education, product development, and the reduction of barriers to adopting new clean technologies.

Canadian Steel Producers Association Innovating Industry Technology

The Canadian Steel Producers Association has launched a five-year R&D partnership with the Canadian Carbonization Research Association to create new technological solutions to reduce GHG emissions in the steel sector.[221] Now in year one, the initiative aims to achieve a significant reduction in GHG emissions in ironmaking and steelmaking processes with existing production facilities, to research and develop non-fossil carbon-based iron and steelmaking processes to advance net-zero carbon emissions in steel production, and to improve the productivity and global competitiveness of the Canadian steel sector during this transition.[222]

The research and development timeline between now and 2025 includes short- and long-term goals around researching, developing, and implementing major technological changes in the sector to drastically reduce emissions. As an industry with fixed-process GHG emissions, these technological innovations will be key in modernizing industry practice for a cleaner steel industry as it moves towards a net-zero future.

Collaboration to Decarbonize British Columbia and Develop Sustainable Innovation

The First Nations Climate Initiative has entered into a partnership agreement with the Business Council of British Columbia to help decarbonize the British Columbian economy.[223] This collaboration aims to provide Indigenous people with business development opportunities while reducing British Columbia's GHG emissions and prioritizing low carbon ventures and sustainable innovation.

Industry-Specific ESG Initiatives: Agriculture and Farming

Canadian Federation of Agriculture's Online Sustainability Platform

Over the past four years, the Canadian Federation of Agriculture has been working to develop the Canadian Agri-food Sustainability Initiative ("**CASI**"). Working with a governance committee of stakeholders from across the value-chain in the Canadian agriculture sector, the goal will be to have the sector complete an online platform by 2023 to help facilitate alignment around the sustainability demands of global markets.[224]

The online platform will help producers in the industry identify and understand what is required to complete sustainability programs. CASI will benchmark sustainability programs and international standards to help provide an entry-point into on-farm sustainability

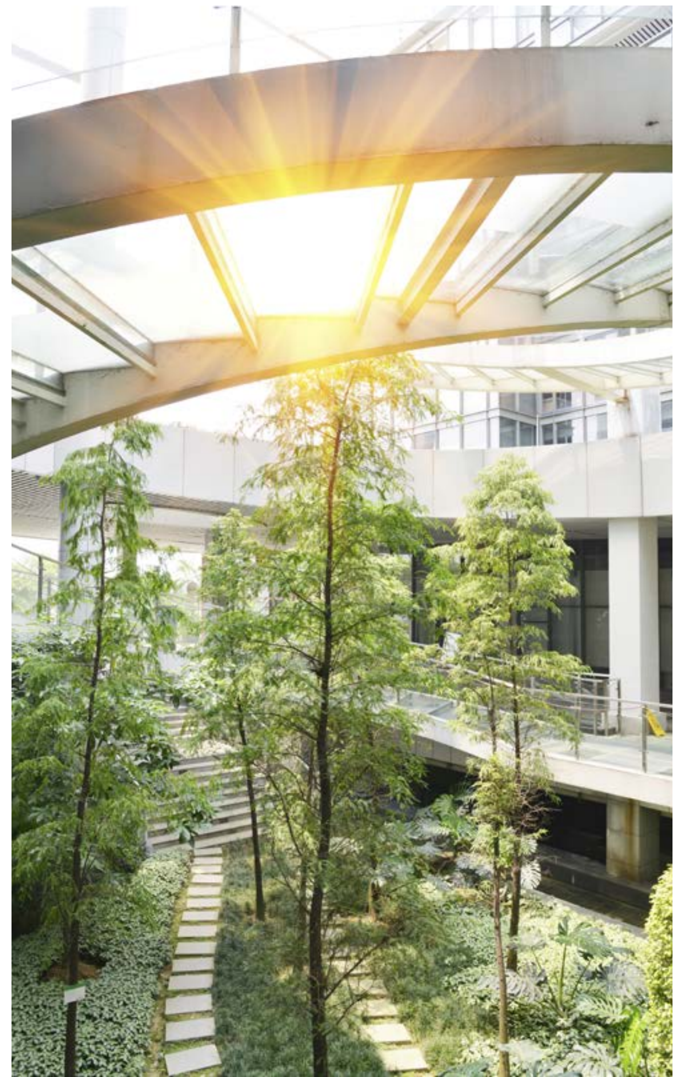
programming. Funded by the AgriAssurance program under the Canadian Agricultural partnership, the program will work to standardize and inform the sector's sustainability goals to support a transparent system throughout the value chain.

Canadian Roundtable for Sustainable Beef New Industry Goals

The Canadian Roundtable for Sustainable Beef ("**CRSB**") promotes sustainability across the Canadian beef industry through sustainability benchmarking, a voluntary certification framework, and sustainability projects.[225]

- The National Beef Sustainability Assessment benchmarks the environmental, social, and economic performance of the Canadian beef industry. It highlights the areas where the industry is doing well, and identifies opportunities for improvement.
- The Certified Sustainable Beef Framework, developed by the CRSB, provides a tool to: (i) certify farms, ranches, and processing facilities against sustainability standards; (ii) support retail and foodservice companies to meet sustainable sourcing commitments; and (iii) provide sustainability messaging for consumers through marketing labels and claims enabling purchasing of beef from certified operations.
- CRSB also facilitates sustainability projects that help advance the continuous improvement for sustainability in the Canadian beef industry.

Building on the National Beef Strategy, a suite of ambitious ten-year goals has been identified that will guide continuous improvement in areas of sustainable practices, product quality, enhancing natural environments, reducing our footprint, and embracing innovation that benefits people, health, safety, and profitability. Specific goals include: reducing GHG emission intensity by 33 per cent by 2030, maintaining 35 million acres of native grassland under the care of beef producers, and protecting wetlands to support sustainability in Canada's food system.[226]



Industry-Specific ESG Initiatives: Consumer Packaged Goods

Ontario Blue Box Transition

On June 3, 2021, the Minister of Environment, Conservation and Parks announced the finalization of the regulations regarding the transition of the Ontario Blue Box Program to an extended producer responsibility model.[227] The changes will see producers of materials sold into the Ontario market place responsible for the full lifecycle of those materials.

The transition to combine 253 local programs into a single provincial collection system aims to improve recycling operations across the province. The changes encourage producers to find efficiencies that will make recycling simpler and easier for residents, including

a standardized list of items accepted in Blue Boxes. Consultations highlighted an intention to drive innovation in recycling practices and technologies by rewarding producers who make their products easier to recycle and who can derive more value from waste.

The regulation that will make producers responsible for blue box materials falls under the *Resource Recovery and Circular Economy Act, 2016.* Also finalized in June 2021 were amendments to *Regulation 101/94: Recycling and Composting of Municipal Waste* to sunset municipal obligations to run blue box systems after transition to full producer responsibility.[228]

Under the blue box regulation, producers of blue box materials will be fully responsible for managing their products by:

- transitioning existing municipal, local services board, and First Nation blue box services to producer responsibility between July 1, 2023 and December 31, 2025; and
- making producers responsible for a consistent set of blue box materials and eligible sources beginning on January 1, 2026.

The blue box regulation will put in place a new framework that:

- makes individual producers responsible for the collection and end-of-life management of the blue box materials they supply to consumers in Ontario; and
- gives producers control over how they provide blue box collection services to residents, manage collected blue box wastes, and achieve compliance with diversion targets.[229]

Regulatory developments aimed at addressing climate change and waste management broadly as well as industry-specific developments in carbon-intensive spaces like energy, transportation, and agriculture and farming are making ESG hard to ignore. With Canada reaffirming its climate goals at COP26, companies can expect continued developments in the environmental regulation of industry.

McMillan's ESG Initiative

McMillan's ESG Initiative is a multi-practice service offering by McMillan LLP and McMillan Vantage to provide effective advice to boards of directors, C-Suite executives, and executive leadership teams in response to growing expectations towards a low-carbon future and sustainability. With a thorough understanding of the industry dynamics and expert counsel, we help business leaders navigate new trends and entrepreneurs develop and execute climate-related solutions.

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Footnotes

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