

Legal update

Your 20/20 foresight on proxy season 2020

November 2019 Corporate Governance

As we did last year, this update presents our predictions, based on the current governance environment, and our recommendations on issues that should be of importance when preparing for the upcoming proxy season. This update takes into account comments made by representatives of institutional investors and the *Autorité des marchés financiers* (Quebec's securities regulator) at a conference held recently in our Montreal office.

Meeting disruption head on

Disruption comes from various sources. This upcoming proxy season, we anticipate issuer disclosure will respond more thoroughly to climate risks and cybersecurity concerns.

Climate change: What's the forecast?

For many years now, asset managers such as BlackRock have identified climate risks and related disclosure as one of the top corporate engagement priorities.¹ Thorough climate-related disclosure may enable investors and other stakeholders to see how a corporation prepares for and builds its model's resilience to climate change. Although investor demand for better climate-related disclosure is not a recent trend, issuers adapt slowly and institutional investors in Canada remain dissatisfied with the state of climate-related reporting.² Key stakeholders have started to challenge corporations to address risks and opportunities associated with climate change:

- The Canadian government's Expert Panel on Sustainable Finance released a [report](#) in July 2019 with 15 recommendations on how Canada can build a stronger, greener and more resilient economy. Among its recommendations, the report lays out a strategy for Canadian businesses to comply with the globally applicable principles and high-level recommendations articulated by the private sector-led Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) for more relevant, consistent, and comparable voluntary climate-related financial disclosures by companies and financial institutions.

The TCFD's recommendations continue to garner support globally and the TCFD is becoming a global benchmark for climate-related reporting and for measurement and governance of climate issues. The TCFD's authority in Canada was significantly enhanced when, in its 2019 budget, the Canadian government expressed its support for the TCFD framework and encouraged its phased adoption by major Canadian companies and federal Crown corporations.³ Further, the Canadian Securities Administrators expressly endorsed such framework in the August 2019 Staff Notice 51-358 - Reporting of Climate Change-related Risks (SN 51-358).⁴ SN 51-358 does not create new obligations nor modify the existing ones. It emphasizes, however, the importance of material climate change-related risk disclosure and provides further guidance to help

corporations properly identify and assess climate-related risks. Notably, the notice includes questions that boards and senior management should consider in preparing their disclosure materials.

- While climate risk awareness is growing, so too is the sustainable financial market.⁵
- In the United States, Senator Elizabeth Warren reintroduced in July 2019 the *Climate Risk Disclosure Act*, which directs the SEC to issue rules within two years that would require companies to disclose, among other things, their direct and indirect greenhouse gas emissions as well as their risk management strategies related to the physical and transition risks posed by climate change.⁶

Recommendation: Climate change-related risks need to be understood and proactively managed. Issuers should consider whether their existing practices are sufficient to ensure material risk factors are adequately identified, qualified and reported. Corporations should review and consider adopting existing disclosure frameworks such as the TCFD.

Cybersecurity: What's on your radar?

With the recent escalation of cyber threats and incidents, regulators have taken notice: cybersecurity is more than just an IT issue, it has evolved into a broader governance one. Unsurprisingly, corporations are called on to increase their reporting in this field:

- Both the Canadian Securities Administrators (CSA) and US Securities and Exchange Commission (SEC) have published statements and guidance challenging senior executives and boards of directors to improve disclosure of cyber risks and threats.⁷
- In February 2019, the United States Senate introduced Bill S.592, titled *Cybersecurity Disclosure Act of 2019*, to promote transparency in the oversight of cybersecurity risks of publicly traded companies. If passed, it could require American public companies to disclose whether they have board members with cybersecurity skills.
- In June 2019, rating agency Moody's Corporation partnered with Team 8, a leading cybersecurity think tank, to establish a global standard for objectively and independently evaluating and assessing defenses against and preparedness for cyber risks facing global corporations.⁸
- Some major investors are actively developing advanced tools to assess the sophistication of cybersecurity risk management among specific issuers, with the underlying objective of engaging early with some of them.

Recommendations: Improve your ability to identify cybersecurity risks and strengthen the board's oversight capabilities. Review your disclosure and benchmark against best practices. Monitor and update your policies periodically, as cybersecurity risks are evolving and becoming increasingly complex.

What's the purpose?

Beyond the Bottom Line

The traditional theory of shareholder value maximization as the primary responsibility of corporate executives is fading. A shift away from the "shareholder primacy" model to a broader conception of corporate purpose – one that addresses the interests of companies' multiple stakeholders including employees, customers, and the communities in which they operate – is being confirmed.

Market participants are now questioning the idea that a corporation should be run solely for the shareholders' benefit, urging public companies to address societal issues to ensure the global business environment remains sustainable. Investors are particularly concerned by inequalities and workplace diversity.⁹

Many CEOs have been heeding this call to consider broader goals when doing business. In August 2019, the Business Roundtable, an association of some of the most powerful CEOs in the US, released a new [Statement on the Purpose](#)

[of a Corporation](#), signed by 181 CEOs who commit to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities, and shareholders.¹⁰ This is a shift from previous Principles of Corporate Governance issued by the Business Roundtable, which emphasized that corporations exist principally to serve the interests of shareholders. There are some skeptics and even a few opponents who are concerned this statement undercuts notions of accountability to shareholders.¹¹ As actions speak louder than words (or in this case, signatures), it will be interesting to see what concrete changes will materialize as a result of this joint statement.

In France, the paradigm shift away from shareholder primacy has materialized into legislative amendments. The so-called PACTE Act (Action Plan for Business Growth and Transformation), adopted in April 2019, now requires that every French company be managed in furtherance of its corporate interest and take into consideration the social and environmental issues arising from its activity.¹²

CBCA Amendments: Fiduciary duty 2.0

In Canada, recent amendments to the *Canada Business Corporations Act* (CBCA) assert an inclusive vision of stakeholder interests. Namely, when acting in the corporation's best interests, directors may, but are not obliged to, consider various stakeholders.

At first glance, the amendments seem to codify judicial interpretation established by *Peoples Department Stores Inc. (Trustee of) v Wise (2004) (Wise)* and *BCE Inc. v 1976 Debentureholders (2009) (BCE)*, two landmark Supreme Court decisions.¹³

Just like *Wise* and *BCE*, the amendments allow directors, when determining what is in the corporation's best interests, to consider the interests of employees, creditors, consumers, communities, and the environment. That said, unlike *Wise* and *BCE*, the amendments expressly include retirees and pensioners on the list of stakeholders. As discussed in our recent [legal update](#), adding these stakeholders is consistent with so-called constituency statutes of many US states.

As there are no clear guidelines on how directors are expected to act when the interests of shareholders and stakeholders do not align, open preventive dialogue with various stakeholders can be a first step towards shielding directors from liability. Adopting an engagement policy or expanding the scope of their current shareholder engagement policy may, through effective communication, allow directors to identify stakeholder expectations, categorize them, and ultimately factor these expectations into their decision-making.

Recommendation: Implement an effective engagement process with an expanded list of stakeholders to ensure a better identification and categorization of expectations and to help directors discharge their duties. Review documentation processes surrounding decision-making to help protect directors against potential liability.

Activism: the old and the new

Shareholders expand their agendas

In the current climate of strong shareholder activism, not only are issuers facing more numerous and more diverse activists, but they are seeing their agendas expanding into new frontiers, in Canada and abroad. In Canada, shareholder activism may have been down in 2019 from the record pace of 2018, but it is worth noting that 13% of total capital deployed by non-US activism globally, in the first half of 2019, came from Canada.¹⁴

According to recent data, 62% of TSX 60 companies disclosed shareholder engagement policies in their latest circulars.¹⁵ Furthermore, in 2018, the Globe and Mail added company engagement policies as a criteria in its Board Games, an annual ranking of issuers based on their governance practices. It is anticipated that more emphasis will be put on engagement in the near future.

This goes to show the importance of proactive engagement with shareholders, and not just nearing proxy season, but year round.

Employees crash the party

In the last few years, many issuers had to deal with an emerging trend of activism, as their employees joined forces to publicly hold their employers to account on a variety of social, environmental and political decisions. Some walkouts were organized in less than 24 hours. With the seemingly unstoppable rise of ESG, political developments in the US and millennials increasingly entering the work force, walkouts may become more frequent.

Employers should respond to this new phenomenon. For instance, they may consider implementing effective, trustworthy channels of engagement with their employees.

Recommendation: Assess the strategic necessity of meaningful engagement with activists and your employees, all year round, especially as activist agendas are expanding. Implement ways for stakeholders to make their concerns known to the board.

Take it to the next level: from diversity to inclusion

New diversity disclosure framework for CBCA corporations

Expanded CBCA diversity disclosure requirements will come into force on January 1, 2020, applying to the 2020 shareholder meetings of CBCA reporting issuers.¹⁶ As of that date, CBCA corporations will be required to disclose their directors' term limits as well as diversity policies, targets and statistics regarding representation of "designated groups" on the corporation's board of directors and at the executive officer level. While corporations are under no obligation to adopt specific policies or objectives related to diversity, they must disclose whether or not they have done so and, if not, why. In other words, the amendment adopts a "comply or explain" regime.

The term "designated groups" takes its meaning from the federal *Employment Equity Act*, and includes women, Aboriginal peoples, persons with disabilities, and members of visible minorities. Defining some of these categories may require additional context. For instance, as per the *Employment Equity Act*, "Aboriginal peoples," means "persons who are Indians, Inuit or Métis." The term "Indians" is neither defined in the *Employment Equity Act*, nor in the CBCA, but one may argue that its scope should be limited to those who qualify as such under the federal *Indian Act*. This would mean, among other things, that individuals who qualify as "aboriginals" outside of Canada may not technically fulfill the diversity requirements under the CBCA, as currently drafted (unless, of course, they are members of other designated groups).

These disclosure requirements will apply – along the same lines as the term "executive officers" under securities regulations – to the chair and any vice-chair of the board, the president of the corporation, the chief executive officer and chief financial officer, each vice-president in charge of a principal business unit, division or function (including sales, finance, and production) and any other individual who performs a policy-making function. Consistent with the SEC's philosophy,¹⁷ corporations will need to invite these individuals to self-identify as members of "designated groups." To encourage self-identification, corporations will only be required to disclose aggregated, anonymous statistics.

A federal review of these provisions is set for 2025. If satisfactory increases in diversity in the boardroom and the executive ranks are not observed by then, the government may consider imposing quotas or other incentives to accelerate diversification.

What about gender diversity?

While most Canadian stakeholders welcome the CBCA's expanded disclosure requirements, some reiterated that there is still a lot of ground to cover on *gender* diversity. According to the data recently released by the CSA,¹⁸ women account for approximately 17% of directors and 4% of CEOs of Canadian issuers, while 22% of issuers adopted targets for the representation of women on their boards and only 3% of issuers adopted targets for the representation of women in executive officer positions. Given these statistics and notwithstanding the broad definition of "designated

groups” under the CBCA, investors and regulators will likely continue prioritizing inclusive leadership and greater female representation on corporate boards and management.

An NFL rule at the forefront

On October 11, 2019, the New York City Comptroller, representing one of United States’ largest pension funds with over US\$200 billion in assets, [announced](#) it would send letters to directors of 56 major companies to push them to adopt “Rooney Rule” policies for their board and CEO positions. This rule, adopted by the NFL in 2003, requires teams to interview and consider ethnic minority candidates for senior operational positions.

According to the comptroller’s statement, this is the first time a large US institutional investor has pushed for this type of structural reform for both board *and* CEO positions. This new campaign is the third phase of the comptroller’s “Boardroom Accountability Project.” Based on the past phases of the project, one can expect it will be taken very seriously by US issuers.

Diversity’s natural evolution: inclusion

Given the evolution in this field, issuers should look beyond diversity. It is one thing to comply with the new CBCA diversity disclosure regime by adopting diversity targets and statistics; it is another to implement inclusive governance practices. Inclusion should be a channel through which diversity becomes a sustainable driver of success. For this to happen, direction must come from the top of the organization.

Recommendation: Do not underestimate the importance of your diversity reporting and inclusiveness efforts. The next generation of directors, officers, workers and investors will be sensitive to the importance of diversity and inclusion. To ensure a proper level of accountability, issuers should consider allocating to a board committee the responsibility to oversee the implementation of diversity and inclusion policies.

Compensation: emphasis on the 5 Ps and their clear communication

Design trends

We advised last year that issuers keep in mind the [“5 Ps”](#) when preparing or reviewing their compensation mix. This advice is reiterated for the upcoming proxy season.¹⁹ These 5 Ps are as follows:

- **Policy infrastructure** (use a mix of compensation tools that support your strategy, implement minimum equity requirement for executives, double-trigger provisions for change-of-control payouts, clawback policies, etc.),
- **Performance-based awards** (align total compensation with performance),²⁰
- **Peer-adjusted package** (take into account horizontal benchmarking – i.e., compare compensation figures to companies of similar size and scope, or related industries),
- **Proportionate** (do not lose sight of vertical benchmarking and internal pay equity perceptions – i.e., CEO compensation is not disproportionate compared to its direct reports and average compensation of employees), and
- **Problematic awards** (i.e., avoid paying overly generous severance packages and special awards, especially if recurrent; justify any special payment).

Recommendation: Keep in mind the 5 Ps in your compensation design and policies.

The art of communicating compensation decisions

Compensation committees face a challenging task of staying up to date in addressing shareholders' (and other stakeholders') expectations. Incentive compensation plays a crucial role in communicating the company's priorities and showing management accountability to investors and other stakeholders. It should be reviewed regularly and translate what management is expected to focus on. Increasingly, stakeholders demand that sustainability-related metrics be factored into incentive plans. The ability to integrate substantial ESG metrics²¹ into executive compensation may indicate the level of issuer maturity in quantifying ESG importance and integrating it in its long-term strategy.

That said, compensation committee members should steer clear of certain dangers. For instance, wanting to show responsiveness and rigor in their compensation programs by including too many different metrics may be counter-productive and confusing. Programs should remain generally understandable and the importance and meaning of individual metrics clear, both to investors and executive officers.

Recommendation: Use compensation disclosure to communicate your priorities and show how incentives are in line with your strategy. Think about the reader in your drafting and try to keep things simple.

CBCA Reform status table

Several governance-related amendments to the CBCA have been passed and are now in force, while others will come into force on January 1, 2020, or are awaiting proclamation. The following table presents an overview of the status of each amendment applicable to "distributing corporations" under the newly amended CBCA, as of the date of publication of this update.

Status	New Requirements Applicable to "Distributing Corporations" (Reporting Issuers) Pursuant to the Amended CBCA
Fiduciary Duty of Directors & Officers	
In force since June 21, 2019	<ul style="list-style-type: none"> • Provision regarding the fiduciary duty of directors and officers amended to state that when acting in the corporation's best interests, the directors and officers may consider, but are not limited to, the following factors: <ol style="list-style-type: none"> a) the interests of shareholders, employees, retirees and pensioners, creditors, consumers and governments; b) the environment; and c) the corporation's long-term interests.
Diversity Disclosure	
Will come into force on January 1 st , 2020	<ul style="list-style-type: none"> • New "comply or explain" regime with no fixed targets on diversity among directors and "senior management" • Requirement to provide at every annual general meeting the information set out in Items 10 to 15 of Form 58-101F1 on all "members of designated groups" (i.e. women, Aboriginal peoples, persons with disabilities and members of visible minorities)

Status New Requirements Applicable to “Distributing Corporations” (Reporting Issuers) Pursuant to the Amended CBCA	
Well-being & Remuneration Disclosure and Mandatory Say-on-Pay Vote	
Awaiting proclamation	<ul style="list-style-type: none"> • Requirement to hold an annual non-binding say-on-pay vote and publish the results • Requirement to make annual disclosure regarding recovery of incentive benefits or other remuneration benefits (“clawback”) paid to directors and members of senior management • Requirement to make annual disclosure related to well-being of employees, retirees and pensioners
Election and Appointment of Directors	
Awaiting proclamation	<ul style="list-style-type: none"> • Requirement to hold annual director elections • Separate vote for each candidate • Requirement to use majority voting standard for uncontested elections. A candidate is elected only if the “for” votes represent a majority of the votes cast. This form of proxy will allow to vote “for” or “against” (instead of “withhold”). An incumbent director that fails to be re-elected may, if required to satisfy Canadian residency and other prescribed requirements, continue in office until the earlier of (a) the 90th day after the day of election; and (b) the day on which his/her successor is appointed or elected • Possibility to appoint, by default, one or more directors (up to one-third of the number of directors elected at the last annual general meeting) between meetings, unless articles provide otherwise
Shareholder Communications	
Awaiting proclamation	<ul style="list-style-type: none"> • Shareholders must submit their proposals 90 to 150 days before the anniversary of the previous annual general meeting • Notice & access (N&A): Intermediaries must send a copy of the meeting materials or, in the case of distributing companies using N&A, the documents prescribed by National Instrument 54-101 and National Instrument 51-102 for N&A. Various other CBCA provisions have been amended to facilitate N&A

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Footnotes

¹ Mindy Lubber, “Comments on the Climate Risk Disclosure Act of 2019” (2019), online: <https://corpgov.law.harvard.edu/2019/07/18/comments-on-the-climate-risk-disclosure-act-of-2019/>

² See Canadian Securities Administrators Staff Notice 51-354 - Report on Climate Change-Related Disclosure Project (2018), online: https://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20180405_climate-change-related-disclosure-project.pdf

- ³ Expert Panel on Sustainable Finance, “Final Report : Mobilizing Finance for Sustainable Growth” (2019), online: http://publications.gc.ca/collections/collection_2019/eccc/En4-350-2-2019-eng.pdf
- ⁴ See Canadian Securities Administrators: Staff Notice 51-358 – Reporting of Climate Change-related Risks, August 1, 2019, online: https://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf
- ⁵ See for instance: CIBC, “Building a sustainable future” (2019), online: https://www.cibc.com/content/dam/about_cibc/inside_cibc/environment/building-a-sustainable-future-report-en.pdf In its report, CIBC announced that it will support environmental sustainability initiatives and committed to a \$150 billion environment and sustainable finance goal by 2027.
- ⁶ See Climate Risk Disclosure Act (2019), online: <https://www.warren.senate.gov/imo/media/doc/The%20Climate%20Risk%20Disclosure%20Act%20of%202019%20-%20One%20Pager.pdf>
- ⁷ See CSA Multilateral Staff Notice 51-347 *Disclosure of cyber security risks and incidents*; U.S. Securities and Exchange Commission, *Commission Statement and Guidance on Public Company Cybersecurity Disclosures*, SEC Release Nos. 33-10459; 34-82746, February 21, 2018. <https://corpgov.law.harvard.edu/2019/01/02/sec-cyber-briefing-regulatory-expectations-for-2019/> and <https://www.pwc.com/us/en/services/consulting/cybersecurity/disclosures-to-investors.html>
- ⁸ Reuters, “Moody’s, Israel’s Team8 to create cyber risk standard for businesses” (2019), online: <https://ca.reuters.com/article/technologyNews/idCAKCN1TS09N-OCATC>
- ⁹ See for instance:
 Holly J Gregory, “Everything Old is New Again – Reconsidering the Social Purpose of the Corporation” (2019), online: <https://corpgov.law.harvard.edu/2019/03/12/everything-old-is-new-again-reconsidering-the-social-purpose-of-the-corporation/>
 Groupe Investissement Responsable, *Enjeux sociaux, environnementaux et de gouvernance d’entreprise* (2019) , online: https://static1.squarespace.com/static/54bd8621e4b055fba2624324/t/5c79236cee6eb029ab45943f/1551442802089/GIR_int_rapport_2019_V4_2_web_low_justifie.pdf
- ¹⁰ Business Roundtable, “Statement on the Purpose of a Corporation” (2019), online: <https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf>
- ¹¹ See for instance: Council for Institutional Investors, “Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose”(2019), online: https://www.cii.org/aug19_brt_response
- ¹² Jean-Philippe Robé, Bertrand Delaunay & Benoît Fleury, “French Legislation on Corporate Purpose” (2019), online: <https://corpgov.law.harvard.edu/2019/06/08/french-legislation-on-corporate-purpose/>
- ¹³ *Peoples Department Stores Inc (Trustee of) v Wise*, (2004) 3 SCR 641, *BCE Inc v 1976 Debentureholders*, (2008) 3 SCR 560.
- ¹⁴ Lazard’s Shareholder Advisory Group, “Review of Shareholder Activism – H1 2019”, online: <https://www.lazard.com/media/451008/lazards-h1-2019-review-of-shareholder-activism.pdf>
- ¹⁵ See: Kingsdale Advisors, “The Definitive Guide to Director-Shareholder Engagement” (2019), online: http://www.kingsdaleadvisors.com/images/resources/PDFs/Shareholder_Engagement_Guide_Foreword.pdf
- ¹⁶ Our colleague Katherine Prusinkiewicz offers an in-depth analysis of this new regime in the legal update “New CBCA Diversity Disclosure Requirements Confirmed,” available here: <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/806cb42e/new-cbca-diversity-disclosure-requirements-confirmed>
- ¹⁷ United States Securities and Exchange Commission, *Regulation S-K*, online: <https://www.sec.gov/divisions/corpin/guidance/regs-kinterp.htm?fbclid=IwAR1iFRItCWxs-UaX-SqugvYatIgjKzKZ0Dv7LlzKq4pJmAxD1fZtl4PHh3k>
- ¹⁸ See Canadian Securities Administrators Staff Notice 58-311 - Report on Fifth Staff Review of Disclosure Regarding Women on Boards and in Executive Officer Positions (2019), online: https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20191002_58-311_staff-review-women-on-boards.pdf
- ¹⁹ See: <https://www.nortonrosefulbright.com/en/knowledge/publications/02456565/canadian-2019-proxy-season-what-lies-ahead>
- ²⁰ Time-vesting stock options are increasingly repulsive to investors who view performance-based incentive plans more favourably and expect their presence in the pay package. With the proposed changes in tax treatment of employee stock options and the repulsion of many institutional investors for such incentives tool, stock options are becoming less popular.
- ²¹ For instance, Royal Dutch Shell has decided to introduce Net Carbon Footprint three- or five-year targets in its long-term incentive program. See also Hugessen, online <https://www.hugessen.com/news/news-flash-royal-dutch-shell-to-introduce-carbon-reduction-metrics-its-executive-compensation>

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