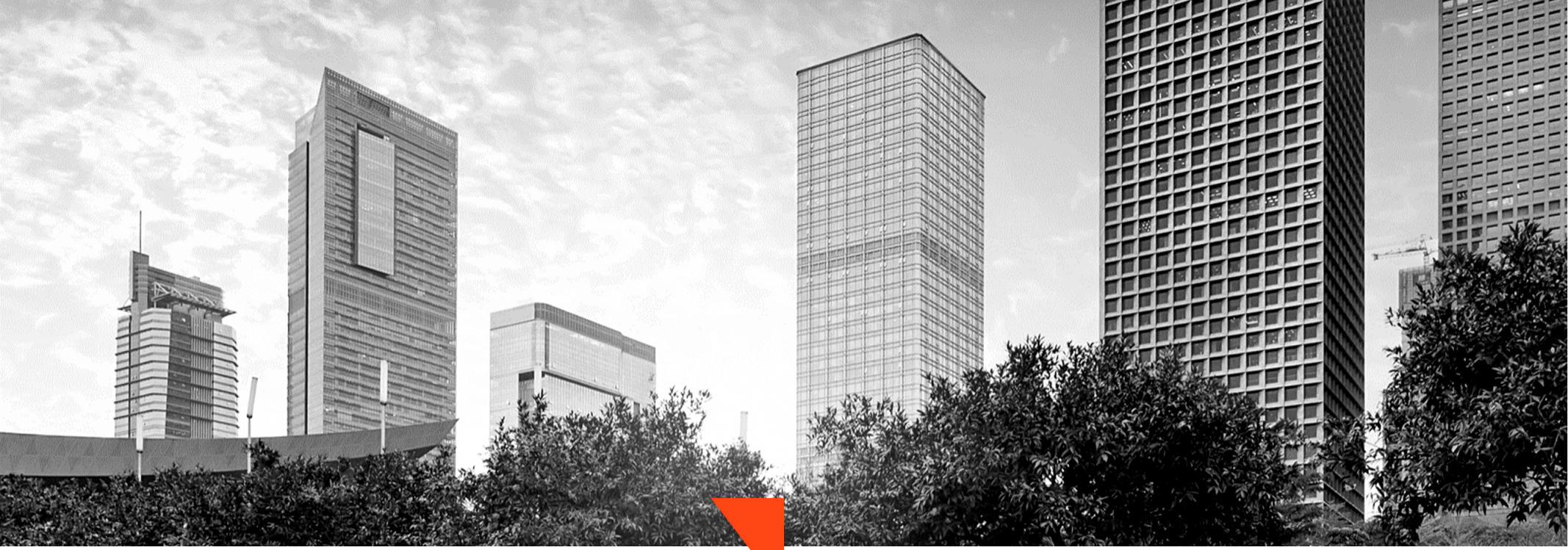

Capital Markets

2024 Highlights

FASKEN

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01.

CBCA director elections and shareholder activism

Canada Business Corporations Act (CBCA) amendments to the requirements for election of directors, notably the majority voting requirement for director candidates in uncontested elections of CBCA distributing corporations, which came into effect in August 2022, are already having an impact on board elections, as seen in the 2023 proxy season, with one activist shareholder "vote no" campaign resulting in the incumbent chair of a TSX listed corporation not being re-elected.

Recap on amendments:

Before	Now
Shareholders were allowed to vote "for" or "withhold" and a director could be elected with only one vote "for" if the election was uncontested.	If election is uncontested, only votes "for" or "against" are allowed, and in order to be elected, directors need to receive a majority of "for" votes. If election is contested, shareholders continue to be allowed to vote "for" or "withhold".

It remains to be seen if CBCA issuers will become more frequent targets of activist shareholder "vote no" campaigns, which are a cost-effective way of expressing discontent. Overall, the majority voting requirement could lead to more shareholder engagement on director election matters.

02.

2024 benchmark policy guidelines from Glass Lewis and ISS

In advance of the 2024 proxy season, Glass Lewis and Institutional Shareholder Services (ISS) have published their 2024 benchmark policy guidelines.

Notable features of Glass Lewis' policies include changes to its guidelines in respect of:

- Board accountability for climate-related issues
- Human capital management
- Cyber risk oversight
- Interlocking directorships
- Audit financial expert designation
- Clawback provisions
- Executive ownership guidelines
- Proposals for equity awards for shareholders

Notable features of ISS' policies include updates in respect of:

- The coming into effect of the board policy on diversity for meetings on or after February 1, 2024
- Compensation regarding individual grants for TSX-listed companies
- Equity-based compensation plans regarding non-employee director participation for TSX-listed companies
- Equity-based compensation plans for venture companies

› See our Proxy Season Preview 2024: A Review of Recent Regulatory and Disclosure Developments for more detail.

03.

Well-known seasoned issuer expedited shelf prospectus regime

Since January 4, 2022, well-known seasoned issuers (WKSIs) have been able to rely on a set of harmonized blanket orders of the Canadian Securities Administrators (CSA) that provided exemptions from certain base shelf prospectus filing requirements, mainly the requirement to file a preliminary base shelf prospectus.

On September 21, 2023, the CSA announced proposed amendments to National Instrument 44-102 Shelf Distributions (NI 44-102) which are contained in CSA Notice and Request for Comment. The proposed amendments provide a permanent expedited shelf prospectus regime for WKSIs in Canada, the benefits of which are aimed at reducing unnecessary regulatory burden for WKSIs and thereby fostering capital formation in the Canadian public markets. The public comment period expired on December 20, 2023.

While the proposed amendments generally mirror the rules of the existing blanket orders in place, the CSA has introduced the following notable changes in the proposed amendments:

- The requirement to file and receive a receipt for a preliminary prospectus would not apply to a distribution under a WKSI base shelf prospectus. A receipt is instead deemed to be issued.

- Upon the filing of or amendment to a WKSI base shelf prospectus in compliance with all requirements, a receipt would be deemed to be issued in all jurisdictions in Canada where the prospectus has been filed. This receipt is generally effective for a period of 37 months from the date of its deemed issuance.
- The proposed amendments would contain an annual confirmation requirement. An issuer that has filed a WKSI base shelf prospectus would need to confirm whether it continues to qualify as a WKSI on an annual basis and evidence that fact by including a statement in its annual information form or by filing an amendment to its WKSI base shelf prospectus. If an issuer no longer qualifies as a WKSI, the issuer would be required to publicly announce that it will not distribute securities under a prospectus supplement to the WKSI base shelf prospectus and withdraw the WKSI base shelf prospectus.
- Under the proposed amendments, an issuer's "qualifying public equity", which must be at least $500 million, is defined as the aggregate market value of the issuer's listed equity securities, excluding securities held by affiliates or reporting insiders of the issuer, and is calculated using the simple average of the daily closing price of the issuer's equity securities on a short form eligible exchange for each of the trading days on which there was a daily closing price for the 20 trading days preceding the date of calculation (which must be within 60 days of the date of filing the WKSI base shelf prospectus). The definition was refined to exclude securities held by "reporting insiders". The CSA believes that excluding securities held by reporting insiders from the calculation is appropriate and provides a better approximation of an issuer's qualifying public equity.
- An issuer that files a WKSI base shelf prospectus must have been a reporting issuer in at least one jurisdiction in Canada for the previous three years. The proposed amendments increase the seasoning period to address the concern that an issuer that has been a reporting issuer for only 12 months may not have a sufficient continuous disclosure record, market following or history of participation in the capital markets to justify participation in the WKSI regime.

04.

Updates in the Canadian ESG landscape

Addressing environmental, social and governance (ESG) risks and opportunities has become increasingly important for organizations of all sizes, regardless of their particular industry. And even more so as significant developments in terms of ESG disclosure requirements are forthcoming both internationally and at the national level.

Legislative Landscape in Canada. As international pressure mounts, more legislation and requirements are anticipated in Canada:

- **Human Rights and Forced Labour** – The Forced and Child Labour Act [1] passed by the Canadian Parliament in May 2023 became law on January 1, 2024. The new legislation impacts a great number of listed companies in Canada, as well as thousands of private companies that reach certain asset, revenue and employee thresholds. The Canadian government indicated that the Act is only a "first step" and has announced its intent to introduce additional legislation in 2024 to "eradicate forced labour in Canadian supply chains". It has also released guidelines with respect to the required report – See The Canadian Government Releases Much-Anticipated Guidance as the New Canada's Forced and Child Labour Act Comes into Force .

  The federal government is treating this new legislation as the first of a two-step process. Public consultations with various stakeholders are underway in order to elaborate a new law that will impose full-fledged mandatory human rights due diligence. See Corporate Human Rights Behaviour in the Spotlight for more detail on the current legislation.
- **Diversity Disclosure** – The new diversity disclosure requirements[2] that were published by the Canadian Securities Administrators (CSA) in April 2023 will, depending on the proposal ultimately selected, impose additional disclosure regarding the diversity of board members and among issuer management.

  The CSA proposals describe two potential approaches – referred to as "Form A" and "Form B." The comment period on the proposals ended on September 29, 2023.

Form A

Does not require an issuer to disclose diversity-related information and data beyond women unless an issuer chooses to collect data on a particular identified group.

Form B

Requires disclosure on specific "historically unrepresented groups", such as Indigenous peoples, LGBTQ2SI+ persons, racialized persons, persons with disabilities or women.

This approach is more closely aligned with the diversity disclosure requirements applicable to reporting issuers incorporated under the CBCA.

› See Fasken's bulletin on the topic.

- **Climate-Related Disclosure** – The revised version of the CSA's new climate-related disclosure regulation[3] that was first made public in October 2021 is expected to be issued in 2024 and to better align with international standards (as well as the SEC proposed rules) than the first draft. Last year, California became the first state in the U.S. to impose requirements on greenhouse gas emissions disclosure and mandate reporting on climate-related financial risks.

International Momentum. New internationally accepted disclosure standards addressing overall requirements for disclosing sustainability-related financial information were issued by the International Sustainability Standards Board (ISSB) in June 2023 and are in force since January 1, 2024. The ISSB Standards are not yet mandatory in Canada, but Canadian securities regulators have already indicated that they will use such standards as guidance in developing their revised climate-related disclosure requirements.

1 An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff.
2 Proposed Amendments to Form 58-101F1 Corporate Governance Disclosure of National Instrument 58-101 Disclosure of Corporate Governance Practices and Propose Changes to National Policy 58-201 Corporate Governance Guidelines

3 Draft Regulation 51-107 respecting Disclosure of Climate-related Matters.

The ISSB Standards are currently limited to IFRS S1 *General Requirements for Disclosure of Sustainability-related Financial Information* and IFRS S2 *Climate-related Disclosures*, but they are expected to address other topics in the near future, such as biodiversity, human capital and human rights.

› See Fasken's bulletins on the topic:

- To ISSB or Not to ISSB, That is the Question: The New ISSB Sustainability Disclosure Standards Are Not Mandatory in Canada, But They Could Soon Be
- New ISSB Standards – Is This the End of the 'Alphabet Soup' for ESG Disclosure Requirements and How Will Canada Position Itself?

There are also significant developments in the European Union, where upcoming legislation is broad in scope and may apply to non-EU headquartered companies.

The landscape is evolving rapidly and public companies will be the first impacted by upcoming legislative changes and investor pressure.

Sustainability isn't a buzzword.
It's a roadmap.

To learn more about the latest ESG disclosure trends, see Fasken's 2024 ESG Disclosure Study:

05.

Has cybersecurity become your number 1 risk?

On July 26, 2023, the United States' Securities Exchange Commission (SEC) adopted Rule Number 33-11216 (Cybersecurity Rules) requiring the disclosure of material cybersecurity incidents and cybersecurity risk management, strategy, and governance by U.S. domestic and foreign private issuers (FPIs). As an exception, Canadian issuers eligible to report under the multijurisdictional disclosure system (MJDS) are permitted to use Canadian disclosure standards and documentation to satisfy the Cybersecurity Rules disclosure requirements.

Under the Cybersecurity Rules, U.S. domestic issuers and FPIs (except those except as discussed above) are now required to report cybersecurity incidents under a Form 8-K within four business days of determining that an incident is material to the issuer. The disclosure in the Form 8-K must include the material aspects of the breach, including: (a) the nature, scope and timing of the incident; and (b) the impact or reasonably likely impact on the issuer, including its financial condition and results of operations. The analysis for materiality of cybersecurity incidents is the same as the materiality analysis standard that generally applies under U.S. securities law, which is, "whether there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision or whether it would significantly alter the total mix of information made available".

While these Cybersecurity Rules do not directly impact most Canadian issuers, they set a precedent for timely reporting and materiality assessments that could influence Canadian disclosure practices. In Canada, the CSA

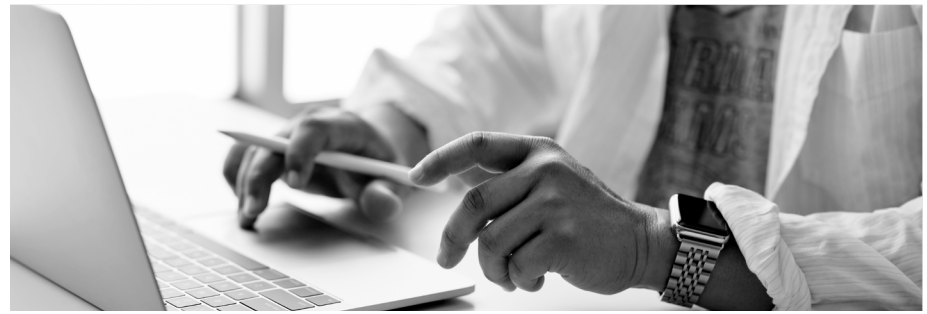
previously published Multilateral Staff Notice 51-347 – Disclosure of cyber security risks and incidents in 2017 which provided an overview of issuers' current practices regarding disclosure of cybersecurity matters, and guidance on proper disclosure of cybersecurity risks and actual cyberattacks going forward.

The recent adoption of these Cybersecurity Rules may gradually shape Canadian regulators' approaches to cybersecurity disclosure. In addition, the global trend toward tighter cybersecurity disclosure and reporting could influence Canadian issuers' approach to compliance and reporting standards. These Cybersecurity Rules set a benchmark for transparency and might encourage Canadian issuers to align their practices more closely with these rules over time to meet investor and regulatory expectations.

What can corporations do to be prepared? As reporting issuers will face enhanced scrutiny of their policies and procedures in light of these Cybersecurity Rules and the trend toward more transparency and enhanced disclosure and reporting, reporting issuers should conduct a review of their existing cybersecurity-related policies, procedures and control measures, identify and manage cybersecurity risks relevant to them, and develop robust incident-response and communication plans to be able to react quickly in the event of a cybersecurity incident.

Issuers should also assess their board and management expertise or knowledge relating to cybersecurity matters, and consider board and management engagement activities to enhance board expertise and education on cybersecurity matters.

Fasken regularly partners with information technology and public relations specialists to coordinate relevant and realistic cyber attack simulations for clients. Following these simulations, Fasken provides actionable recommendations to improve the entity's structure and response to incidents. All advice and opinions given by Fasken in this context are protected by lawyer-client privilege.



06.

Select litigation updates

a. Material change disclosure – a two-step analysis

The Ontario Court of Appeal (ONCA) has issued two companion decisions addressing the meaning of a "material change" under the Ontario Securities Act. The decisions together provide valuable direction and clarification regarding the meaning of a "material change" under the Ontario Securities Act, where the ONCA endorsed a "two-step analysis" for issuers to follow in deciding whether a development

impacting their business constitutes a "material change" requiring disclosure. The ONCA also stated that "change" should be given an "expansive" and "generous" interpretation:

I. The court must consider whether "there has been a change in the business, operations or capital of the issuer." This step does not involve an assessment of the magnitude of the change.

II. Where (I) is answered in the affirmative, the court then considers whether the "change was material, in the sense that it would be expected to have a significant impact on the value of the issuer's shares...".

Decisions: *Peters v. SNC-Lavalin Group Inc.*, 2023 ONCA 360 (CanLII) and *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359 (CanLII).

b. Tipping and the necessary course of business exemption

In *Kraft (Re)* 2023 ONCMT 36, the Ontario Capital Markets Tribunal considered the application of the "necessary course of business" exemption (NCOB Exemption) for the prohibition against tipping set out in the Ontario Securities Act. This decision relates to the disclosure of material non-public information concerning an issuer and insider trading.

Section 76(2) of the Act: "No issuer and no person or company in a special relationship with an issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed."

To determine if the NCOB Exemption can be used, the Tribunal listed certain factors to consider including:

- the use of the word "necessary" elevates the exemption beyond a simple business purpose and implies a degree of importance, something "essential", "indispensable" or "requisite", and
- the objectiveness with which the NCOB Exemption is to be applied where the subjective belief of the tipper is not considered. The Tribunal also indicated that the person seeking the NCOB Exemption bears the burden of proof for the application of such an exemption.

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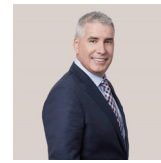

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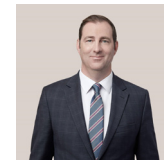

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