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MANAGING BIODIVERSITY RISK IN THE BOARDROOM: FIVE KEY RECOMMENDATIONS FROM THE COMMONWEALTH CLIMATE AND LAW INITIATIVE'S LATEST REPORT

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Articles

The UN Biodiversity Conference ("COP 15") is putting a spotlight on biodiversity risk worldwide. While Montreal is playing host to countries and the conservation community, what are the implications for companies and boards of directors?

On Dec. 13, 2022, the Commonwealth Climate and Law Initiative released the report, Biodiversity Risk: Legal Implications for Companies and their Directors (the "Report"). The Report analyses the relevance of biodiversity risks to companies and economies in the discharge of directors' legal duties globally. It helps directors understand biodiversity as an important factor in the context of their wider Environmental, Social and Governance ("ESG") efforts.

Gowling WLG lawyer Liane Langstaff and articling student Kip Phillips acted as expert reviewers to provide feedback and a Canadian legal perspective on the Report.

Biodiversity loss as a foreseeable and material financial risk

The global economy depends on services supplied by healthy ecosystems (called ecosystem services), which depend on biodiversity. Think about the value of bees to pollinate crops, forests to supply timber for construction and plants for pharmaceuticals (among many other services). The value of these ecosystem services is estimated at US$125-140 trillion per year.

However, biodiversity loss is occurring at an accelerating rate, 100 to 1000 times higher than that of the past million years. Biodiversity risks, which include physical, transition, and liability risks, can affect a company's business and trading performance. Many companies have direct or indirect dependencies on biodiversity through the critical value of ecosystem services, notably agriculture, construction and food and beverages.

The Report finds that the risk of biodiversity loss can present "foreseeable and material financial risks and opportunities to individual companies and the wider economic and financial systems." Thus, the Report recommends that directors consider their company's impacts on biodiversity when assessing risks and opportunities.

Biodiversity risks for Canadian boards

A company's social, regulatory and legal setting may influence the standard of care that directors must apply in considering and managing biodiversity risks. Context is key.

Many factors suggest biodiversity risks and opportunities are increasingly material to Canadian stakeholders. In particular, in Canada, we are blessed with biodiversity richness, related to our country's geographic size and varied environments, hosting approximately 10 per cent of the world's forest cover and 25 per cent of the world's wetlands. Federal and provincial laws protect species at risk, including threatened and endangered species.

However, Canada has also failed to meet its own biodiversity targets. Earlier this year, the Office of the Auditor General of Canada called out the federal government's lack of progress. Only 42 per cent of Canada's at-risk species are in recovery, which is not on track to meet Canada's 2025 goals.

Even where species and habitats are protected in Canada, the Report cautions that global value chains act as transmission channels, turning economic dependencies on nature within one jurisdiction into risk factors for corporations based in others.

Canadian law allows boards to consider these biodiversity risks both domestically and throughout a firm's value chain.

Specifically, the Canada Business Corporations Act, RSC 1985, c. C-44 codifies the common law duties of loyalty and care and require directors to:

- act honestly and in good faith with a view to the best interests of the corporation; and
- exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

Directors are permitted to consider a wide range of factors, including the environment, when acting in the best interests of the corporation. Furthermore, Canadian courts have scrutinized directors risk management, disclosure breaches and environmental risk disclosures.

Five key questions for directors

The Report finds that biodiversity loss may pose foreseeable and material risks to companies, and that failing to address these risks could create costs for a company as well as threats to its long-term reputation, value and viability.

In the face of these findings, the Report offers several practical questions for directors to help them think through how biodiversity risks and opportunities might affect their company. Key questions include:

1. Building board capacity: Do I have the appropriate skills and information about how biodiversity issues could affect my company to discharge my governance and disclosure roles? What training or information would help me and my colleagues to build our capacity?
2. Assessing risk: Is the management team assessing the company's foreseeable dependencies and impacts on biodiversity?
3. Disclosing risk: Is the management team measuring the company's material dependencies and impacts on biodiversity and disclosing them in corporate reports? If not, do we have a plan for them to do this?

4. Creating a biodiversity plan: Does my company have a corporate-level strategic biodiversity plan, based on identified dependencies and impacts specific to the company? This plan should enable the company to identify species, habitats, ecosystems and ecosystem services the company can focus on.
5. Assigning responsibility: Who is responsible in my company for following the development of Taskforce on Nature-related Financial Disclosures and International Sustainability Standards Board guidance and building the company's expertise and readiness to implement it?

Every risk has a corresponding opportunity. By mindfully considering how biodiversity impacts their company (and in turn how their company impacts biodiversity), boards can manage risk while future-proofing their businesses.

The Commonwealth Climate and Law Initiative a legal research and stakeholder engagement initiative founded by Oxford University Smith School of Enterprise and the Environment, ClientEarth and Accounting for Sustainability (A4S). Gowling WLG lawyers Liane Langstaff, Jennifer King and Adam Chamberlain act as Climate Governance Experts for the Commonwealth Climate and Law Initiative's Canadian partner, the Canada Climate Law Initiative.

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Authors

Liane Langstaff
Associate - Toronto

Email | Phone | vCard

Kip Phillips
Articling Student - Toronto

Email | Phone | vCard