



Fall 2017

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You want to be listed on the TSX?

*Make sure your
governance plans
include diversity*

Since

2014, Canadian securities law, with the implementation of National Instrument 58-101 *Disclosure of Corporate Governance Practices* (“NI 58-101”),¹ has required that non-venture issuers² in Alberta,³ Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec, Saskatchewan, and the Yukon disclose certain information regarding women on boards and in executive positions (the

1. Available at <http://www.osc.gov.on.ca/en/14198.htm>.

2. A “venture issuer” is a reporting issuer that, at the end of its most recently completed financial year, did not have any of its securities listed or quoted on any of the Toronto Stock Exchange, Aequitas NEO Exchange Inc., a U.S. marketplace, or a marketplace outside of Canada and the United States of America other than the Alternative Investment Market of the London Stock Exchange or the PLUS markets operated by PLUS Markets Group plc. A “non-venture issuer” does not fall under the same requirements.

3. The Alberta Securities Commission did not participate in the 2015 and 2016 reviews as the WB/EP Rules had not yet been adopted in Alberta. The British Columbia Securities Commission has not adopted the WB/EP Rules. However, Alberta-based and BC-based TSX-listed issuers were included in the respective samples.

“WB/EP Rules”, known as “comply or explain”).⁴ At a roundtable discussion held by the Ontario Securities Commission on October 24, 2017 (the “Roundtable”), the regulator signaled that it is ready to listen to the community and take further steps to advance gender diversity on boards and in executive officer positions of public companies.

To track the impact of the WB/EP Rules, the Canadian Securities Administrators (CSA) have conducted annual reviews of the Rules to assess non-venture issuers’ compliance with the requirements. The CSA’s most recent report, dated October 5, 2017 (the “2017 CSA Report”),⁵ showed an overall modest increase in the number of women holding board seats from 11% in year one to 14% in year three.

Relative newcomers to the TSX, many of which are generally regarded as innovative, have lagged in

this area. For example, only 5% of the board seats at publicly-traded cannabis issuers are currently occupied by women, according to data provided by The Associated Press.⁶ However, even the advisory board of a non-profit organization whose mandate is to push for the advancement of women on boards – Catalyst Canada – recently named a man as its Chair for the second time in a row, amid criticism.

Incorporating diversity among directors and the executive team is important – a board of directors that has the skills and reflects the various needs of the market is important for the ultimate success of issuers regardless of the industry. Part of the issue could be that not all companies are even complying with the “comply or explain” regime,⁷ which may be why participants in the Roundtable suggested implementing targets. If further requirements are implemented, whether it will be

4. Prince Edward Island and British Columbia have not adopted the WB/EP Rules.

5. Available at http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20171005_58-309_staff-review-women-on-boards.htm.

6. Available at <http://www.ctvnews.ca/business/industry-insiders-slam-lack-of-women-on-boards-of-corporate-cannabis-1.3447104>.

7. See <http://www.cbc.ca/news/business/women-on-boards-7-provinces-sign-on-for-new-osc-disclosure-rules-1.2799604>, October 15, 2014.



that regulators set the targets or that the regulations require that targets be set by each issuer, remains to be determined and various approaches are being deliberated.

Of the 660 issuers in the sample surveyed for the 2017 CSA Report, 53% of issuers disclosed that they did not adopt a policy. While this is an improvement from year one, in which 65% of issuers disclosed that they did not adopt a policy, there is tremendous room for improvement.

When issuers put their minds to the WB/EP Rules, progress has followed. The 2017 CSA Report found that the 232 issuers that had a policy had a higher percentage of women on their boards of directors (19%) than issuers without a policy (10%).

If the regulatory requirements do not instigate change, perhaps issuers will be more inclined to listen to their investors. Last month, 16 investors managing a combined total of \$2.1 trillion in net assets, known as the Canadian 30% Club Investor Group, released a joint statement of intent insisting that women represent a minimum of 30% of boards and executive management teams of S&P/TSX composite index companies

by 2022. Reaching a threshold of 30% was described as the level “at which critical mass is achieved and contributions of a minority group cease being representative of that particular group and begin to be judged on their own merit.” The statement emphasized how critical gender diversity is to good corporate governance and recognizes that diversity results in better outcomes for investors.

With a consumer audience who have a wide variety of needs, public issuers (and private companies) would benefit from directors and executives who reflect that diversity and those needs.

Special acknowledgement and thanks to Joseph Jamil, Student-at-Law, for his assistance.



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Online Defamation

What if the Author can't be Identified?

The recent case of *Carleton Condominium Corporation No. 282 v. Yahoo! Inc. and Yahoo! Canada Co.* provides useful guidance on how a potential plaintiff in a defamation case can identify the author of a defamatory statement made online.

This case involved an individual, using a false name, who sent a series of emails from an email address which did not provide a clue as to the author's identity. The emails were sent to residents of the condominium building, following the resignation of the condominium corporation's superintendent, and stated that the members of the board of directors had been harassing the superintendent and deliberately ignoring a variety of problems. The emails also accused the board members of receiving kickbacks and generally mishandling problems.

The President of the board of directors emailed this individual asking him to identify himself. The author refused to do so.

The emails were sent using a Yahoo! email address. The condominium corporation brought an application to the Court for what is known as a *Norwich* order. A *Norwich* order is an order requiring a third party to a potential action to disclose information that would otherwise be confidential. The condominium corporation asked that Yahoo! be ordered to disclose the identity of the author of the emails.

The Court observed that the following factors needed to be satisfied for a valid application for a *Norwich* order:

- does the Applicant have evidence of a valid claim;
- does it appear that the third party is somehow involved in the acts complained of;
- is the third party the only practical source of the information available;
- can the third party be indemnified for any costs to which the third party may be exposed as a result of the disclosure; and
- do the interests of justice favour obtaining the disclosure?

The Court of Appeal has made it clear that a *Norwich* order is a discretionary remedy. Given that it is intrusive and extraordinary, it is to be exercised with caution. An Applicant for such an order must show that the information sought is required to permit a perspective lawsuit to proceed although it is not necessary for any Applicant to make a firm commitment to actually start the action.

In this case, the Court was satisfied that the condominium corporation had a valid claim for damages for defamation. Yahoo! Inc. and Yahoo! Canada Co. were involved in the alleged wrongful acts simply by virtue of the fact that they are communication service companies that had provided



the web-based email services. Clearly they were the only practicable sources of the information, the costs of compliance with the *Norwich* order would be nominal, and the interests of justice strongly favoured the disclosure.

Accordingly, the order was granted and Yahoo! and Yahoo! Canada were ordered to disclose their information regarding the identity and contact information of the individual using the fictitious user name and email address as well as the internet protocol address (IP address) associated with them.

Individuals making defamatory statements through email or on social media may feel secure in hiding behind fictitious names. This case is an important reminder that, as has been said in other contexts, you can run but you can't hide.



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Firm News

Minden Gross LLP is again ranked in the Top 10 Ontario Regional Law Firms as selected by the readers of *Canadian Lawyer* magazine. We'd like to thank all of our clients, friends, and colleagues who voted for us.

The 2018 edition of *The Best Lawyers in Canada* acknowledged our lawyers as leaders in their fields. The firm congratulates **Howard Black** (Trusts and Estates); **Andrew Elbaz** (Mining Law); **Eric Hoffstein** (Trusts and Estates); **Michael Horowitz** (Commercial Leasing Law and Real Estate Law); **Christina Kobi** (Commercial Leasing Law and Real Estate Law); **Stephen Messinger** (Real Estate Law - Commercial Leasing); **Hartley Nathan, QC** (Corporate Law); **Adam Perzow**

(Commercial Leasing Law and Real Estate Law); **Stephen Posen** (Commercial Leasing Law and Real Estate Law); and **Reuben Rosenblatt, QC, LSM** (Real Estate Law), who were recognized by their peers for the knowledge and expertise they bring to their work.

Minden Gross LLP welcomes **Andrian Lozinski** to the firm to practice in our Business Law group. Welcome back to **Whitney Abrams** (Litigation), **Ladi Onayemi** (Real Estate and Property Assessment and Taxation Law Groups), and **Jessica Thrower** (Business Law), who have returned as associates after articling with the firm from 2016 to 2017.



Whitney Abrams



Andrian Lozinski



Ladi Onayemi



Jessica Thrower

Professional Notes

Irvin Schein published four articles on *irvin-schein.com* including “Lawsuits and the Limitations Act - When is a Claim Discovered?” on Sept 26 and was quoted in “Don’t make this mistake with contractors” in *HRD Online* on Sept 20.

The Tax Group participated in the “2017 Tax Update: Proposed Changes to Tax Planning and the Use of Private Corporations” webinar by *Wolters Kluwer Ltd.* on Sept 20 with **Joan Jung, Michael Goldberg, Samantha Prasad, Matthew Getzler,** and **Ryan Chua.** **Joan** and **Michael** attended the STEP Canada Special Symposium on Aug 17 and **Michael** was a panelist.

Michael Goldberg published “Is a 93% Tax Rate Fair to Canadian Small Business Owners?” with Mac Killoran and Jay Goodis on Aug 2 and “Canada’s New Estate Tax” on Sept 8. He was quoted in “A 93% tax rate? Private corporation tax could make it possible” in the *Financial Post* on Aug 4 and in two *Globe and Mail* articles including “Rising costs, higher taxes have owners ‘feeling the brunt’ of what some call a war on small business” on Aug 13. He presented a webinar “Trending in Tax: Proposals Targeting Private Corporations” on Sept 12. **Michael** also hosted the first session of Tax Talk: Year 5 on Sept 20.

Joan Jung spoke at The ONE National Conference on “Tax Consequences of Shareholder Agreements” on Sept 18. She published “Income and Payment: Key Trust Law and Income Tax Differences” in the *Estates Trusts & Pensions Journal* and “Redemption of Preferred Shares for Non-Cash Payment” in the *Personal Tax and Estate Planning* journal.

Samantha Prasad published “Where to Find Losses to Shelter Capital Gains from Tax” in *The*

Fund Library on July 20. She also published three articles in *The TaxLetter* including “Private Corporations - A Cruel Summer” in August.

Melissa Muskat posted a Municipal Tax Law Update on Sept 20.

Ryan Chua’s article “Qualified Investments: What Can I Hold in my RRSP?” was published in the August/September *CannalInvestor*.

Matt Maurer was quoted in “Industry Leaders Come Together to Accelerate Budding Cannabis Focused Start-Ups” by *Leaf Forward* on Aug 8 and “Will the Canadian Government Choose Revenue or Ending Illegal Weed?” on *Marijuana.com* on Aug 17. He was a mentor at Canada’s First Cannabis Business Accelerator Program on Sept 15 & 20. He published six articles on *Canada Cannabis Legal* including “Toronto may tax Cannabis sales at Municipal level” on July 18 and two articles on *Slaw* including “Ontario Court Approves \$31.2 Million in Legal Fees for Class-Action Counsel” on Sept 12. He also hosted the “Canada’s Proposed Cannabis Act: Advertising and Promotion Guidelines” webinar on Sept 13. **Matt** and **Whitney Abrams** published “Is the Future of Commercial Cannabis Production Sungrown?” in the July/August *CannalInvestor*. **Whitney** also posted two articles on *Canada Cannabis Legal* including “Recreational Cannabis in the U.S.A.: Colorado” on Aug 3.

Andrew Elbaz, Matt Maurer, and **Sasha Toten** acted for Sunel Securities Inc. as a lead agent for financing in the INDIVA Corporation deal that closed first tranche of private placement for gross proceeds of \$5.75 million.

Sasha Toten hosted a Women Grow event on Aug 3 and a YWL event on Sept 28. She also

opened the Toronto Stock Exchange with Assure Holdings Corp. (TSXV: IOMN), a leading healthcare service provider in Colorado on Sept 21. **Andrew Elbaz** and **Sasha** are counsel to Assure.

Eguana Technologies Inc. closed a \$3 million Brokered Private Placement Financing of units on Sept 29. The transaction was co-led by Mackie Research Capital Corporation and BayFront Capital Partners, Ltd. (collectively, the "Agents"). **Andrew** and **Sasha** acted for the Agents.

Hartley R. Nathan, QC, and **Ira Stuchberry** published "Proxies" in the September issue of *The Directors' Briefing*.

Brian Temins, Aaron Grubner, Benjamin Bloom, and **Sasha Toten** acted for Rx Drug Mart in completing a \$10 million minority equity investment from BDC Capital.

Brian Temins, Spencer Bailey, and **Melodie Eng** advised Lynx Equity when they closed their

acquisition of Seattle-based G&W Commercial Interiors on June 22.

Brian Temins and **Samantha Prasad** acted for Area One Farms as they raised \$130 million for their third farmland private equity fund.

The Commercial Leasing Group spoke at the 2017 Real Estate Strategy & Leasing Conference on Sept 19. **Stephen Messinger** was a moderator for "Ancillary Uses: Creative Programming for Buildings from Food Courts to Lounges"; **Stephen Posen** was a panelist for "Why is it Taking so Long to Close Deals?"; and **Christina Kobi** was a panelist for "Risk Management in Today's Leasing Market". The Group also represented the firm at the ICSC Canadian Convention on October 2-4. **Stephen Messinger** was part of the Program Planning committee.

Stephen Posen was quoted in "Primary Wave Acquires Glenn Gould Publishing and Master Royalties" in *Billboard* on Aug 14.

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or on LinkedIn (<https://www.linkedin.com/company/103989/>)