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MINING FOR EQUALITY

Soft Targets and Hard Floors for Boards of Directors?

Keith MacMaster and Sara Seck

Introduction

Gender equality and the empowerment of women and girls are central to achieving the United Nations 2030 Sustainable Development Goals (SDGs).¹ An indicator of women's equality and empowerment is the number of women on boards of directors and in senior management of firms. The Canada Business Corporations Act (CBCA) was amended in 2018 to mandate disclosure of the number of designated persons, the percentage of the board that they comprise, whether the firm has a written policy in respect of diversity and whether there are targets

¹ *Transforming our world: the 2030 Agenda for Sustainable Development*, UNGAOR, 70th Sess, UN Doc A/RES/70/1 (2015) [2030 Agenda], online: <www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E>.

for representation.² The changes include gender diversity and disclosure of representation of minority groups, Aboriginal peoples and people with disabilities.³

In this chapter, we consider the CBCA amendments in light of broader concerns associated with Canadian-based mining companies operating within and outside of Canada, including violations of rights of women and girls.⁴ The industrial mining sector is male dominated, and has faced accusations and lawsuits over gender bias, violence (including sexual violence) against women and children, health and safety problems, and environmental harms.⁵ The 2019 report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) explicitly linked resource extraction with violence against Indigenous women and girls.⁶ Among the calls to justice in the report are five aimed at “Extractive and Development Industries,” including that industries consider “safety and security of Indigenous women and girls” at “all stages of project planning, assessment, implementation, management, and monitoring.”⁷

This chapter aims to contribute to the literature on international law, women and mining from a Canadian perspective, focusing on legal developments related to corporate board diversity. We first examine the importance of women’s equality and empowerment in sources of international human rights and sustainable development law, and then consider Canadian initiatives aimed at the extractive sector. Second, we review the data on female representation on Canadian corporate boards and in senior management, with particular attention to the mining sector. Third, we consider insights and limitations of current literature on corporate board diversity, with attention to the definition of “firm performance,” arguing that it must account for respect for the rights of women and girls. A broader understanding of firm performance is essential in light of Canada’s promotion of business responsibilities to respect international human rights

- 2 Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act*, 1st Sess, 42nd Parl, 2015 (assented to 1 May 2018), SC 2018, c 8; *Regulations Amending the Canada Business Corporations Regulations*, 2001, SOR/2019-258 [*Regulations Amending*]; Laura Levine, “Increased Diversity Disclosure for CBCA Corporations Coming in 2020” (9 August 2019), online: *Stikeman Elliot LLP* <www.stikeman.com/en-ca/kh/canadian-securities-law/Increased-Diversity-Disclosure-for-CBCA-Corporations-Coming-in-2020>.
- 3 *Regulations Amending*, *supra* note 2, Part 8.2. Designated groups will be the same as under the *Employment Equity Act*, SC 1995, c 44, s 3; Corporations Canada, “Explanatory note on proposed regulatory amendments” (19 January 2018), online: <www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs07274.html>.
- 4 Sara L Seck & Penelope Simons, “Resource Extraction and the Human Rights of Women and Girls” (2019) 31:1 CJWL 1 [Seck & Simons, “Resource Extraction”]; Sara L Seck & Penelope Simons, “Sustainable Mining, Environmental Justice, and the Human Rights of Women and Girls: Canada as Home and Host State” in S Atapattu, C Gonzalez & S Seck, eds, *The Cambridge Handbook on Environmental Justice and Sustainable Development* (Cambridge, UK: Cambridge University Press, forthcoming 2020) [Seck & Simons, “Sustainable Mining”]; Katy Jenkins, “Review Article: Women, mining and development: An emerging research agenda” (2014) 1:2 *Extractive Industries & Society* 329; Penelope Simons, “Unsustainable International Law: Transnational Resource Extraction and Violence against Women” (2017) 26:2 *Transnat’l L & Contemp Probs* 415; Raywat Deonandan, Kalowatie Deonandan & Brennan Field, “Mining the Gap: Aboriginal Women and the Mining Industry” (2016).
- 5 Seck & Simons, “Resource Extraction”, *supra* note 4; Seck & Simons, “Sustainable Mining”, *supra* note 4; Jenkins, *supra* note 4; Simons, *supra* note 4; Deonandan, Deonandan & Field, *supra* note 4; UN Women, *Promoting Women’s Participation in the Extractive Industries Sector: Examples of Emerging Good Practices* (2016) at 10.
- 6 National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1A (2019) at 584–94 [MMIWG Report], online: <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a.pdf>.
- 7 *Ibid* at 196 (“Calls to Justice: Calls for Extractive and Development Industries 13.1–13.5”). The report includes the rights of “2SLGBTQIA people.”

law at home and overseas.⁸ We conclude by considering different approaches to board and management diversity in light of the recent amendments to the CBCA,⁹ and offering recommendations for law and policy reforms as well as future research.

International and Canadian Law and Policy

Canada plays a prominent role in the global mining and natural resources industries.¹⁰ Canada is the pre-eminent leader in mining finance, with more than 59 percent of the world's extractive financing taking place through the Toronto Stock Exchange (TSX) or TSX-Venture (TSX-V).¹¹ Canada is home to more than 214 TSX-listed companies, and 945 listed on the “junior” TSX-V.¹² The Canadian mining industry has been implicated in human rights violations within Canada and internationally, including violations of the rights of women and girls.¹³ The most notorious international examples include those involving sexual violence, such as at Barrick Gold's Porgera Mine in Papua New Guinea,¹⁴ or the allegations of gang rape in Guatemala that are the subject of the *Hudbay* litigation.¹⁵ Within Canada, concerns have been raised about increased violence against Indigenous women from mining activities, most recently in the MMIWG report.¹⁶ Gendered human rights violations also include environment-related violations of rights to health and food,¹⁷ intersectional violations of Indigenous rights,¹⁸ and employment-related dimensions of violations of a woman's right to mine.¹⁹

Paragraph 46 of the Plan of Implementation of the 2002 World Summit on Sustainable Development in Johannesburg states that active participation of women and Indigenous communities is essential for sustainable mining development.²⁰ Yet globally, women continue to

8 Sara L Seck, “Business, Human Rights, and Canadian Mining Lawyers” (2015) 56 Can Bus LJ 208 [Seck, “Business, Human Rights”]; Sara L Seck, “Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights” (2011) 49 Can YB Intl L 51 [Seck, “Canadian Mining Internationally”].

9 Bill C-25, *supra* note 2.

10 Natural Resources Canada, “10 Key Facts on Canada's Minerals Sector”, online: <www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/emmc/pdf/2019/10-Key-Facts-on-Canada_s-Mineral-Sector-EN-access-1.pdf>; Natural Resources Canada, “Minerals and Metals Facts”, online: <www.nrcan.gc.ca/our-natural-resources/minerals-mining/minerals-metals-facts/20507>.

11 TMX, “TMX TSX | TSXV — Mining”, online: <www.tsx.com/listings/listing-with-us/sector-and-product-profiles/mining>.

12 *Ibid.*

13 Seck & Simons, *Resource Extraction*, *supra* note 4; Seck & Simons, “Sustainable Mining”, *supra* note 4. See also Kalowatie Deonandan & Colleen Bell, “Discipline and Punish: Gendered Dimensions of Violence in Extractive Development” (2019) 31:1 CJWL 24.

14 Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, “Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned” (2015).

15 *Choc v HudBay Minerals Inc*, 2013 ONSC 1414.

16 MMIWG Report, *supra* note 6.

17 Seck & Simons, “Sustainable Mining”, *supra* note 4.

18 Sarah Morales, “Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries?” (2019) 31:1 CJWL 58.

19 See especially Kuntala Lahiri-Dutt, “Do Women Have a Right to Mine?” (2019) 31:1 CJWL 1.

20 *Report of the World Summit on Sustainable Development*, UNGAOR, UN Doc A/CONF.199/20 (2002) at 6 (“Resolution 2: Plan of Implementation of the World Summit on Sustainable Development”) [“Plan of Implementation of the World Summit”]. For an assessment of the contested nature of this statement, see Sara L Seck, “Transnational Corporations and Extractive Industries” in Shawkat Alam et al, eds, *International Environmental Law and the Global South* (New York: Cambridge University Press, 2015) 380.

be under-represented, especially in positions of power.²¹ Indeed, women's under-representation in leadership positions in Canada's private sector was described as problematic by the UN Human Rights Committee in 2015.²²

The most recent global consensus on sustainable development, women's empowerment and human rights is found in *Transforming Our World: The 2030 Agenda for Sustainable Development*, which was endorsed by 170 world leaders in September 2015.²³ Described as an action plan for "people, planet and prosperity," the SDGs consist of 17 goals and 169 targets. According to the preamble, the SDGs should be implemented by every country and "all stakeholders, acting in a collaborative partnership" to urgently "shift the world on to a sustainable and resilient path."²⁴ The preamble explicitly states that the SDGs "seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls."²⁵ SDG 16 promotes "peaceful and inclusive societies," as well as "access to justice for all" and the building of "effective, accountable and inclusive institutions at all levels."²⁶

SDG 5 is of particular relevance to corporate board diversity. SDG target 5.5 is to "[e]nsure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life." Indicator 5.5.2 is the "[p]roportion of women in managerial positions," while target 5.c is to "[a]dopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels."²⁷ Therefore, to meet the SDGs, private sector actors must promote and enable women to take on leadership roles, and government regulation should advance this action.

With regard to the extractive sector, the 2030 Agenda's overarching vision is described as sustainable production and consumption, including sustainable use of natural resources.²⁸ Paragraph 67 of the 2030 Agenda calls upon "all businesses to apply their creativity and innovation to solving sustainable development challenges," while protecting rights "in accordance with relevant international standards and agreements and other on-going initiatives...such as the Guiding Principles on Business and Human Rights"²⁹ [UNGPs]. The UNGPs date from 2011, and are comprised of three pillars: the state duty to protect human rights, the business responsibility to respect human rights and the need for access to remedy. The Government

21 Linda Doku, "Why the Mining Industry Needs More Women", *Forbes* (24 May 2019).

22 Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, UNESCOR, UN Doc CCPR/C/CAN/CO/6 (2015) at para 7.

23 *2030 Agenda*, *supra* note 1; Office of the High Commissioner on Human Rights, *Human Rights and the 2030 Agenda for Sustainable Development*, online: <www.ohchr.org/en/issues/SDGS/pages/the2030agenda.aspx>; United Nations, "Sustainable Development Knowledge Platform", online: <<https://sustainabledevelopment.un.org/post2015/summit>>.

24 *2030 Agenda*, *supra* note 1 at Preamble.

25 *Ibid.*

26 *Ibid* at Goal 16.

27 *Ibid* at Goal 5.

28 *Ibid* at para 9.

29 *Ibid* at para 67; Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNGAOR, 17th Sess, UN Doc A/HRC/17/31 (2011) [UNGPs].

of Canada has promoted the UNGPs to Canada's mining sector operating internationally.³⁰ If women held equal power at the board level, they would be better positioned to contribute to ensuring business respect for human rights in sustainable mining, including respect for the human rights of women and girls.

Other international initiatives support corporate board diversity as well. The Women's Empowerment Principles (WEP) are a joint initiative of UN Women and the UN Global Compact.³¹ Subtitled "Equality Means Business," the principles seek to emphasize the "business case for corporate action."³² Principle 1 of the WEP is "[e]stablish high-level corporate leadership for gender equality," while Principle 2 is "[t]reat all women and men fairly at work — respect and support human rights and nondiscrimination."³³ Chief executive officers (CEOs) should issue a "statement of support" that "encourages business leaders to use the seven Principles as guide posts for actions that advance and empower women in the workplace, marketplace and community."³⁴ Yet, implementation of the WEP has been critiqued.³⁵

The relationship between the business responsibility to respect rights and implementation of the SDGs has received increasing attention,³⁶ and international instruments have actively aligned their guidance with the SDGs.³⁷ From a human rights perspective, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women is the key widely ratified foundational human rights instrument.³⁸ A March 2019 report by the Working Group on Business and Human Rights (WGBHR) on the gender dimensions of the UNGPs notes that while "women's human rights are an inalienable, integral and indivisible part of universal human rights," and businesses and states "should take concrete steps to identify, prevent and remedy gender-based discrimination and inequalities in all areas of life," in reality, neither "have paid

30 UNGPs, *supra* note 29. On Canada's endorsement of the UNGPs and promotion of them to the mining sector, see Seck, "Business, Human Rights", *supra* note 8; Seck, "Canadian Mining Internationally", *supra* note 8.

31 UN Women & UN Global Compact, "Women's Empowerment Principles", online: <www.empowerwomen.org/en/weps/about>; UN Global Compact, "Endorse the Women's Empowerment Principles", online: <www.unglobalcompact.org/take-action/action/womens-principles> [UNGC, "WEP"].

32 UNGC, "WEP", *supra* note 31.

33 *Ibid.* The other principles are: "Principle 3: Ensure the health, safety and well-being of all women and men workers; Principle 4: Promote education, training and professional development for women; Principle 5: Implement enterprise development, supply chain and marketing practices that empower women; and Principle 7: Measure and publicly report on progress to achieve gender equality."

34 *Ibid.*

35 *Gender dimensions of the Guiding Principles on Business and Human Rights: Report of the Working Group on the issue of human rights and transnational enterprises*, 42nd Sess, UN Doc A/HRC/41/43 (2019) [WGBHR, *Gender dimensions*].

36 Shift & Business and Sustainable Development Commission, *Business, Human Rights and the Sustainable Development Goals: Forging a Coherent Vision and Strategy* (2016) at 34–35, online: <<http://s3.amazonaws.com/aws-bsdc/BSDC-Biz-HumanRights-SDGs.pdf>>; Office of the High Commissioner for Human Rights, *The business and human rights dimension of sustainable development: Embedding 'Protect, Respect and Remedy' in SDGs implementation* (30 June 2017), online: <www.ohchr.org/Documents/Issues/Business/Session18/InfoNoteWGBHR_SDGRecommendations.pdf>.

37 UN Global Compact, "Advancing Sustainable Development", online: <www.unglobalcompact.org/what-is-gc/our-work/sustainable-development>; GRI, "GRI and the Sustainable Development Goals", online: <www.globalreporting.org/information/SDGs/Pages/SDGs.aspx>; Organisation for Economic Co-operation and Development (OECD), *OECD and the Sustainable Development Goals: Delivering on universal goals and targets*, online: <www.oecd.org/dac/sustainable-development-goals.htm>.

38 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Can TS 1982 No 31 (entered into force 3 September 1981; entered into force for Canada 9 January 1982).

adequate attention to gender equality” in meeting their respective human rights responsibilities and obligations.³⁹

The annex to the WGBHR report contains a set of 31 guiding principles on gender that align with the “protect, respect, and remedy” framework of the UNGPs. Principle 1 highlights the duty of states to ensure respect of women’s human rights by business enterprises, including through implementation of legislation.⁴⁰ States should “encourage business enterprises to appoint a certain percentage of women to their boards” and report “on the gender pay gap throughout their operations.”⁴¹ State-owned and controlled enterprises should “lead by example in achieving substantive gender equality” and use “leverage to require their business partners to do the same.”⁴² These enterprises should “appoint a certain percentage of women to their boards and annually disclose data on progress made in achieving gender parity in employment.”⁴³

Principle 11 concerns the responsibility of businesses to avoid infringing the human rights of women, including by reproducing existing discrimination in their own operations, and to “address adverse human rights impacts with which they are involved.”⁴⁴ Illustrative actions include “affirmative action and professional development support” and to ensure “equal representation of women in the workforce at all levels, including on boards.”⁴⁵ Principle 19 recommends implementation of “gender-transformative measures to prevent and mitigate adverse impacts” identified through impact assessment processes.⁴⁶ Illustrative actions include revising policies and management processes to address systemic concerns for women, and adopting “affirmative action policies to overcome underrepresentation of women in managerial positions and on boards.”⁴⁷

Despite international consensus in 2002 on the importance of the active participation of women and Indigenous communities for sustainable mining development,⁴⁸ to date, few international guidance tools promoted to the mining sector have explicitly embedded respect for the human rights of women and girls.⁴⁹ Human rights due diligence is an expectation for all businesses, and must receive attention in guidance tools for mining companies.⁵⁰ Yet while the 2017 OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive

39 WGBHR, *Gender dimensions*, *supra* note 35 at para 3; *ibid* (“gender refers to socially constructed roles of and power relations among men, women and gender non-binary persons” at para 9).

40 *Ibid* at Annex (“Gender guidance for the Guiding Principles on Business and Human Rights”), Guiding Principle 1.

41 *Ibid* at para 4(b).

42 *Ibid* at Guiding Principle 4.

43 *Ibid* at para 8(d).

44 *Ibid* at Guiding Principle 11.

45 *Ibid* at para 22(g).

46 *Ibid* at Guiding Principle 19.

47 *Ibid* at para 38(a)(i), (iii), (iv).

48 See “Plan of Implementation of the World Summit”, *supra* note 20 at para 46.

49 Seck & Simons, “Sustainable Mining”, *supra* note 4; Global Affairs Canada, “Canada’s Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad: Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad” (14 November 2014), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>; Global Affairs Canada, “Responsible Business Conduct Abroad”, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng#RBCGuidelines>.

50 Daniela Chimisso dos Santos & Sara L Seck, “Human Rights Due Diligence and Extractive Industries” in Surya Deva, ed, *Research Handbook on Human Rights and Business* (Edward Elgar, forthcoming 2020).

Sector dedicates an annex to gender, it does not adopt a human rights approach.⁵¹ In 2019, the Prospectors and Developers Association of Canada adopted its own guidance document for gender diversity and inclusion.⁵²

While gender inclusive rights-respecting guidance is essential to ensure businesses are able to implement their independent responsibility to respect human rights, states also have international human rights obligations. Additional opportunities exist to ensure that Canadian domestic law guarantees respect for the rights of women and girls in resource extraction, in particular Indigenous women as noted by the MMIWG report.⁵³ A recent domestic law reform initiative has integrated Gender-Based Analysis Plus (GBA+) into federal impact assessment legislation.⁵⁴ A second recently adopted domestic law reform initiative is legislation promoting corporate board diversity. The next section will examine the current state of Canadian board diversity, with particular attention on the mining sector.

Canadian Board and Management Diversity Data

Canada has low female representation on corporate boards compared to the percentage of women in the general population.⁵⁵ The TSX, and its more than 800 companies, has a female representation rate of 16.4 percent.⁵⁶ The rate of female representation on corporate boards jumps to 28.4 percent for the S&P/TSX 60 index, where only the large companies are included.⁵⁷ This percentage is comparable to the Australian S&P/ASX 100 at 31 percent, and the UK Financial Times Stock Exchange (FTSE) 100 index at 30 percent.⁵⁸ Examining a broader cross-section of stock exchanges, women comprise only 10.3 percent of directorships, with the lowest rates occurring in Chile, Japan and Morocco, and the highest occurring in France, Norway and Sweden.⁵⁹ Significant changes can occur in relatively short time periods, with France doubling female representation in five years, whereas Norway has fallen in the same time period.⁶⁰ There are no longer any all-male boards among the S&P/TSX 60 companies.⁶¹

51 OECD, “OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector” (2017) at Annex C (“Engaging with Women”), online: <<http://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm>>.

52 Prospectors and Developers Association of Canada, “Gender Diversity and Inclusion Guidance Document”, online: <www.pdac.ca/priorities/responsible-exploration/gender/gender-diversity-and-inclusion-guidance-document>.

53 MMIWG Report, *supra* note 6.

54 *Impact Assessment Act*, SC 2019, c 28, s 2(2.1). GBA+ is used to analyze sex and gender as factors underlying and intersecting with other identity factors that may be disproportionately impacted by proposed activities. See Impact Assessment Agency of Canada, *Practitioner’s Guide to Federal Impact Assessments Under the Impact Assessment Act*, s 2(2.1), “Guidance: Gender-Based Analysis Plus in Impact Assessment”, online: <www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/gender-based-analysis.html>.

55 Andrew MacDougall & John Valley, *2017 Diversity Disclosure Practices: Women in leadership roles at TSX-listed companies* (Toronto: Osler, 2017) at 10 [MacDougall & Valley, *2017 Diversity Disclosure Practices*].

56 Andrew MacDougall & John Valley, *2018 Diversity Disclosure Practices: Women in leadership roles at TSX-listed companies* (Toronto: Osler, 2018) at 3, 16 [MacDougall & Valley, *2018 Diversity Disclosure Practices*].

57 *Ibid.*

58 Hampton-Alexander Review, *FTSE Women Leaders Improving gender balance in FTSE Leadership* (2018) at 9, 34 [FTSE Women].

59 *Ibid* at 35.

60 Data for 2018 from *ibid* at 35; data for 2013 from Siri Terjesen, Ruth Aguilera & Ruth Lorenz, “Legislating a Woman’s Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors” (2015) 128 J Business Ethics 233 at 234.

61 MacDougall & Valley, *2018 Diversity Disclosure Practices*, *supra* note 56 at 23.

Large companies (greater than CDN\$10 billion of market capitalization) have higher rates of female representation than smaller firms.⁶² The percentage of boards without women has declined to 31.3 percent, while the percentage of boards with at least two women has increased to 33.7 percent.⁶³ This statistic is important, as research indicates that a critical mass of representation is required to be effective.⁶⁴ Strides are being made but have not yet been embraced by one important industry — the mining industry.

Canada has a concentrated stock market, with approximately one-third being extractives companies, which lag in female board representation, with mining having 11 percent representation.⁶⁵ Yet direct comparisons with other stock markets are difficult. The US markets are comprised of a broad range of companies, and mining firms are less important than in Canada.⁶⁶ Australia and South Africa are similar to the Canadian market, as approximately 33 percent of firms listed are financial services and 15.5 percent are extractives.⁶⁷ Historically, these two industries are divergent, with the former having among the highest female representation rate and the latter having the lowest.⁶⁸ Policies in Australia and South Africa have assisted in pushing higher numbers of female participation, with South Africa having the largest percentage of women on mining boards.⁶⁹

Mining suffers from a glaring lack of gender diversity at all levels, from entry-level positions up to the corporate and board levels.⁷⁰ Globally, women comprise only 10 percent of the industrial mining workforce, while in Canada it is 17 percent.⁷¹ Internationally, a 2013 study noted a severe shortage of women on boards of mining companies, and by 2015 the pipeline of female

62 Companies less than CDN\$1 billion in market capitalization have 10 percent female participation. Approximately 65 percent of TSX-listed companies fall under CDN\$1 billion in market capitalization. Canadian Securities Administration (CSA), “Roundtable Discussion — Third Review of Women on Boards and in Executive Officer Positions” (24 October 2017) at 13 [CSA, “Roundtable Discussion”], online: <www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20171103_transcript-wob-roundtable.pdf>; CSA, “Staff Review of Women on Boards and in Executive Officer Positions Compliance with NI 58-101 Disclosure of Corporate Governance Practices”, CSA Staff Notice 58-309 (5 October 2017) at Figures 3.1, 4.2.

63 *Ibid* at 22.

64 Hisham Farag & Chris Mallin, “Board diversity and financial fragility: Evidence from European banks” (2017) 49 *Intl Rev Financial Analysis* 98; Carolyn Wiley & Mireia Monllor-Tormos, “Board Gender Diversity in the STEM&F Sectors: The Critical Mass Required to Drive Firm Performance” (2018) 25:3 *J Leadership & Organizational Studies* 290. This is explained by signalling theories.

65 TMX, “TSX Market Statistics, The MiG Report”, online: <www.tsx.com/resource/en/2014/mig-report.pdf>; MacDougall & Valley, 2018 *Diversity Disclosure Practices*, *supra* note 56 at 19, 25.

66 NYSE is the oldest stock exchange and a traditional auction market, while the NASDAQ is a dealer market. Thus, they differ in both size and types of listings, but also in fundamental operational methods.

67 Canaccord Genuity, “Overview of the Australian Share Market”, online: <www.psl.com.au/Wealth-Management/News-Insights/Article-Library/Overview-of-the-Australian-Share-Market>; ASX List, “ASX 100 List”, online: <www.asx100list.com/>.

68 MacDougall & Valley, 2018 *Diversity Disclosure Practices*, *supra* note 56; CSA, “Report on Fourth Staff Review of Disclosure Regarding Women on Boards and in Executive Officer Positions”, CSA Multilateral Staff Notice 58-310 (27 September 2018) [CSA, “Report on Fourth Staff Review”]; CSA, “Roundtable Discussion”, *supra* note 62 at 11.

69 International Women in Mining & PwC, *Mining for talent: A study of women on boards in the mining industry* (London, UK: PwC, 2016) at 2, 11, 14.

70 Women in Mining Canada, *Welcoming to Women: An Action Plan for Canada’s Mining Employers* (2016) at 5, online: <<https://wimcanada.org/wp-content/uploads/2017/01/WIM-NAP-book-full.pdf>>.

71 Mining Industry Human Resources Council, *Strengthening Mining’s Talent Alloy: Exploring Gender Inclusion* (2016) online: <www.mihrc.ca/pdf/publications/MiHR_Gender_Report_EN_WEB.pdf>. On women’s experiences in the male-dominated occupations, see e.g. Phiona Marin & Antoni Barnard, “The experience of women in male-dominated occupations: A constructivist grounded theory inquiry” (2013) 39:2 *South African J Industrial Psychology*.

talent in the industry was actually falling.⁷² Yet the study observed: “there is no shortage of women in the talent pool; there is simply a perception of a lack of available female talent.”⁷³ In 2009, Women in Mining Canada formed in order to better enable empowerment of women in the sector.⁷⁴ During the same period, the UK market had the most significant increase in female representation, likely due to increased regulatory scrutiny.⁷⁵

The number of junior mining companies may also be relevant to the challenge of female representation. Junior mining companies tend to be small, and they may have only a few employees.⁷⁶ Many have little to no profit (many operate at a loss) and often have no revenue.⁷⁷ The TSX’s approximately 815 listed companies include significant numbers that have market capitalizations of less than CDN\$100 million.⁷⁸

Educational background is relevant to board membership and senior management service. Bias over educational requirements may be a factor, with 100 percent of female board members in the mining sector having undergraduate degrees and 69 percent having completed postgraduate study; 97 percent of male directors hold an undergraduate degree and 54 percent hold postgraduate degrees.⁷⁹ The most common degrees for female directors are finance/economics, whereas male directors are more likely to hold mining and engineering degrees.⁸⁰ Some argue that this is one reason why greater numbers of female engineers and mining science graduates are so desperately needed. While Canada now advocates STEM (science, technology, engineering and math) careers for women, there is a long way to go,⁸¹ as only 16 percent of Canadian mining/mineral engineers are female.⁸² This, together with the small number of women in junior positions, suggests change will be slow. Graduates of MBAs and engineering programs take time to work their way up the corporate ladder. In 2015, Engineers Canada launched its “30 by 30” program to increase the number of newly licensed female engineers to 30 percent by 2030.⁸³

72 International Women in Mining & PwC, *supra* note 69 at 2; Women in Mining (UK) & PwC, *Mining for talent 2015: A review of women on boards in the mining industry 2012–2014* (London, UK: PwC, 2015) at 13. In 2013, globally, women occupied eight percent of board seats in the top 100 mining companies, and there were four female executive directors.

73 *Ibid* at 25.

74 Women in Mining Canada, “Who we are”, online: <<https://wimcanada.org/who-are-we/>>.

75 Women in Mining (UK) & PwC, *supra* note 72 at 17.

76 TSX-V, *Market Insight 7* (30 September 2016); TSX, “Current Market Statistics”, online: <www.tsx.com/listings/current-market-statistics>.

77 TMX Money, “S&P/TSX Venture Composite Index”, online: <https://web.tmxmoney.com/index_constituents.php?qm_symbol=^JX>.

78 TSX, “excel spreadsheet, tsx-andamp-tsxv-listed-companies-2018-07-13-en”, online: <www.tsx.com/listings/current-market-statistics>.

79 Women in Mining (UK) & PwC, *supra* note 72 at 18.

80 *Ibid*.

81 Government of Canada, “The Government of Canada and STEM”, online: <www.ic.gc.ca/eic/site/013.nsf/eng/00014.html>.

82 Engineers Canada, “Canadian Engineers for Tomorrow”, online: <<https://engineerscanada.ca/reports/canadian-engineers-for-tomorrow>>; Engineers Canada, “Women in Engineering”, online: <<https://engineerscanada.ca/diversity/women-in-engineering>>.

83 Engineers Canada, “2018 National Membership Information”, online: <<https://engineerscanada.ca/reports/national-membership-report/2018-report>>.

Board Diversity and Firm Performance: Gender and Mining

International instruments are pushing for corporate board and senior management diversity as part of a movement toward implementation of international human rights and sustainable development law. Yet the rationale for increased numbers of women on corporate boards differs depending on whether the focus is on women's empowerment or on the protection of the human rights of women who may be adversely impacted by industrial mining yet are not part of the enterprise.

The UN Global Compact claims there is a business case for corporate action on gender equality and women's empowerment, as well as a gender equality justification.⁸⁴ Research shows that having more women on boards leads to lower volatility in share prices, and higher return on equity.⁸⁵ There is clear and concrete evidence showing gender diversity and equality means greater profit and lower risk for companies. Increased gender diversity and younger average board age are shown to have strong associations with improved share price performance. These findings are mainly attributed to human capital and signalling theories.⁸⁶ Women directors have a stronger quantitative impact on conditionally high-performance firms compared to low-performance firms.⁸⁷ While one study did not find that returns were materially different for companies with greater gender representation,⁸⁸ the same study showed that additional women were found to lead to lower financial risk.⁸⁹ Another study found a statistically significant positive relationship between a diverse board and company performance.⁹⁰ Other research has found that, over the long term, firms with lower risk should be able to survive market-shocking events such as corrections, contractions and bubbles. Whether it is higher returns or lower risk, the result is the same: more women lead to financial improvement.

More importantly, in our view, an increased number of women on boards of directors is associated with greater firm commitment to corporate social responsibility (CSR), environmental

84 UN Global Compact, "Gender equality" ("Companies that focus on women's empowerment experience greater business success. Research shows investing in women and girls can lead to increases in productivity, organizational effectiveness, return on investment and higher consumer satisfaction"), online: <www.unglobalcompact.org/what-is-gc/our-work/social/gender-equality>.

85 Bank of America, Merrill Lynch, "Women the X-Factor" (7 March 2018) at 1, online: <https://mlaem.fs.ml.com/content/dam/ML/bulletin/PDFs/ml_women-the-X-factor-BAML-Report.pdf>; Daniel Low, Helen Roberts & Rosalind Whiting, "Board gender diversity and firm performance: Empirical evidence from Hong Kong, South Korea, Malaysia and Singapore" (2015) 35 *Pacific-Basin Finance J* 381; Martin Conyon & Lerong He, "Firm performance and boardroom gender diversity: A quantile regression approach" (2017) 79 *J Business Research* 198; Shams Pathan & Robert Faff, "Does board structure in banks really affect their performance?" (2013) 37:5 *J Banking & Finance* 1573; Emma García-Meca, Isabel-María García-Sánchez & Jennifer Martínez-Ferrero, "Board diversity and its effects on bank performance: An international analysis" (2015) 53 *J Banking & Finance* 202.

86 Cobus CH Taljaard, Michael JD Ward & Chris J Muller, "Board Diversity and Financial Performance: A Graphical Time-Series Approach" (2015) 18:3 *South African J Economic & Management Sciences* 425.

87 Conyon & He, *supra* note 85.

88 Bank of America, Merrill Lynch, *supra* note 85 at 5.

89 *Ibid* at 6; Victoria Geyfman, Wade A Cooper & Laura M Davis, "Board Gender Diversity and Bank Performance" (2018) 18:1 *J Business Diversity* 51.

90 Vivian Hunt et al, *Delivering through Diversity* (2018), online: *McKinsey & Company* <www.mckinsey.com/~/media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx>.

sustainability and improved decision making more generally.⁹¹ Gender diversity also leads to innovation and respect for different viewpoints, both of which prepare businesses for inclusivity and sustainability.⁹² These would seem essential for tackling the challenges facing mining companies.

Others critique this justification for addressing inequitable board/management diversity, raising concerns that it reinforces unverifiable assumptions about human behaviour, with causation unprovable.⁹³ According to this view, companies with effective gender diversity programs are already run more efficiently, so gender diversity “is only one result and a correlation not a cause.”⁹⁴ The outcome of this debate remains to be seen.

This brief overview of studies examining justifications for increased gender diversity on corporate boards and in senior management suggests that while arguments could be made that increased gender diversity leads to better financial, social and environmental results for businesses, at best there is evidence of a correlation. The WGBHR proposes a different justification for states taking action to address the problems of the mining industry: to encourage business enterprises “to contribute to achieving substantive gender equality” would “enable the enterprises to discharge their responsibility to respect women’s human rights.”⁹⁵ This broader understanding is consistent with Canada’s commitment to respect international human rights law in operations both at home and overseas.

Approaches to Board Diversity: “Comply or Explain” and Quotas

Two types of interventions are believed to be most effective to increase the number of women on boards and senior management: comply or explain (CoE), and quotas.

CoE

CoE requires companies to disclose how many women are on boards and/or in executive officer positions, and whether there is a policy for diversity.⁹⁶ If they do not have targets or goals, then the company needs to publicly explain why it does not, with a goal of applying pressure on

91 Dolores Setó-Pamies, “The Relationship between Women Directors and Corporate Social Responsibility” (2015) 22:6 *Corporate Social Responsibility & Environmental Management* 334; Corinne Post, Noushi Rahman & Cathleen McQuillen, “From Board Composition to Corporate Environmental Performance Through Sustainability-Themed Alliances” (2014) 130 *J Business Ethics* 423; Lin Liao, Le Luo & Qingliang Tang, “Gender diversity, board independence, environmental committee and greenhouse gas disclosure” (2015) 47:4 *British Accounting Rev* 409; Aaron A Dhir, *Challenging Boardroom Homogeneity: Corporate Law, Governance & Diversity* (Cambridge, UK: Cambridge University Press, 2015) at 118–29 (noting improvements in decision-making processes and risk mitigation with increased gender diversity).

92 Irene Lynch Fannon, “A Toad We Have to Swallow: Perceptions and Participation of Women in Business and the Implications for Sustainability” in Irene Fannon & Beate Sjafell, eds, *Creating Corporate Sustainability: Gender as an Agent for Change* (Cambridge, UK: Cambridge University Press, 2018) 114 at 129.

93 *Ibid* at 123–24.

94 Kim Willey, “Bringing Canadian Women on Board: A Behavioural Economics Perspective on Whether Public Reporting of Gender Diversity Will Alter the Male-Dominated Composition of Canadian Public Company Boards and Senior Management” (2017) 29:1 *CJWL* 182 at 183, 191.

95 WGBHR, *Gender dimensions*, *supra* note 35, Annex at para 2(c).

96 Walid Ben-Amar, Millicent Chang & Philip McKlenny, “Board Gender Diversity and Corporate Response to Sustainability Initiatives: Evidence from the Carbon Disclosure Project” (2017) 142 *J Business Ethics* 369.

public companies through mandatory transparency.⁹⁷ CoE is preferred in Canada, Australia and the United Kingdom, because its goal is to increase transparency and disclosure to widely dispersed shareholders.⁹⁸ These soft law measures, allowing parties to disclose their strategies and activities, are considered the preferred regulatory tool to gradually, but steadily, increase diversity through various market practices and mutual understanding of needs.⁹⁹ Companies remain able to not comply. The only obligation is to explain the non-compliance in order to convince the outside world that being non-compliant is as appropriate as complying.¹⁰⁰ CoE, problematically, often follows this one-size-fits-all approach.¹⁰¹ This contributes to a lack of dialogue between management and shareholders about diversity: “shareholders and investors are predominantly focused on short-term prospects and are diverted from evaluating the potential positive long-term effects.”¹⁰²

Securities law is predicated on disclosure of material information.¹⁰³ Investors can make informed decisions if they possess all material information about a company.¹⁰⁴ Materiality, to which disclosure obligations are oriented, is subject to a great deal of academic debate and is traditionally viewed as information that a reasonable investor would view as relevant to making an investment decision.¹⁰⁵ Companies are confronting a “disclosure dilemma,” in that too much information can be as bad as too little.¹⁰⁶

Regulatory authorities are attempting to balance the requirements of disclosure of board composition. The Ontario Securities Commission (OSC), Canada’s largest provincial regulator, adopted its CoE disclosure model in 2014, which was subsequently adopted by most (but not all) other provinces.¹⁰⁷ In order to improve the relationship between firms and shareholders, the Canadian CoE model requires public disclosure documents to address compliance with a range of diversity initiatives or explain non-compliance.¹⁰⁸ NI 58-101 focuses on five disclosure areas, including targets and policies of identifying, nominating and selecting women on boards and as executive officers, term limits or other mechanisms of board renewal.¹⁰⁹

97 Jean-Christophe Duhamel, “Comply or Explain’ Approach as a Pascalian Wager” (2015) 5:3 Accounting, Economics & L 289 at 290.

98 Konstantinos Sergakis, “Deconstruction and Reconstruction of the ‘Comply or Explain’ Principle in EU Capital Markets” (2015) 5:3 Accounting, Economics & L 233.

99 *Ibid* at 236.

100 Duhamel, *supra* note 97 at 290.

101 Sergakis, *supra* note 98 at 255.

102 Duhamel, *supra* note 97 at 291.

103 Kurt Schulzke & Gerlinde Berger-Walliser, “Towards a Unified Theory of Materiality in Securities Law” (2017) 56 Colum J Transnat’l L 6 at 8.

104 Alison Miller, “Navigating the Disclosure Dilemma: Corporate Illegality and the Federal Securities Laws” (2014) 102 Georgetown L Rev 1647 at 1652.

105 Schulzke & Berger-Walliser, *supra* note 103 at 8, 9.

106 Miller, *supra* note 104 at 1649, 1653.

107 Ontario Securities Commission (OSC), *Amendment Instrument for National Instrument 58-101, Disclosure of Corporate Governance Practices 1* (11 December 2014).

108 OSC, *National Instrument 58-101, Corporate Governance Disclosure* (17 November 2015), ss 11–15; Sir Adrian Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance* (London, UK: Gee, 1992) [Cadbury Report] at 2.8; Maria Elisabeth Sturm, “Corporate Governance in the EU and U.S.: Comply-or-Explain Versus Rule” (2016) European Union Law Working Papers No 16, Stanford-Vienna Transatlantic Technology Law Forum at 9.

109 *Ibid*; see also CSA, “Report on Fourth Staff Review”, *supra* note 68 at 11.

Despite the implementation of CoE in Canadian securities law, the federal government determined that variations on this approach should be implemented in federal corporate law.¹¹⁰ Bill C-25 received royal assent on May 1, 2018, and includes new diversity disclosure requirements, consistent with CoE.¹¹¹ Federally incorporated “prescribed corporations” (defined as distributing corporations under the CBCA,¹¹² these are reporting issuers, or publicly traded companies, and have filed a prospectus with a provincial securities commission)¹¹³ must disclose the number of designated persons, percentage of board, whether there is a written policy in respect of diversity, and whether there are targets for representation.¹¹⁴ The changes in Bill C-25 include the requirement to disclose the board’s gender diversity, as well as board members with visible minority, Aboriginal or disability status.¹¹⁵ The amendments do not mandate a change in policies or adopting specific targets (“comply”), but if the corporation does not have policies, it needs to state why (“explain”).

Unfortunately, only prescribed corporations are required to comply.¹¹⁶ Thus, only publicly traded companies registered under the CBCA will be subject to these new disclosure requirements.¹¹⁷

Many are unsatisfied with the updates.¹¹⁸ The New Democratic Party voted against Bill C-25 on the grounds that the bill did not go far enough in advancing diversity rights.¹¹⁹ The new CBCA regulations indicate that the information respecting gender diversity required by NI 58-101 needs to be disclosed at every annual shareholder meeting, which basically means that the CoE model is duplicated. The scope of diversity is broader than in NI 58-101,¹²⁰ however, and appears more consistent with a human rights approach and justification.

CoE is the standard of corporate governance in Australia and the United Kingdom.¹²¹ Introduced in 1992 by the Cadbury Report,¹²² and implemented in the Stewardship Code,¹²³ CoE has been

110 Bill C-25, *supra* note 2; Nova Scotia, *Companies Act*, RSNS, c 81; Ontario, *Business Corporations Act*, RSO 1990, c B16. For considerations when selecting a jurisdiction, see McInnes Cooper, “5 Key Considerations When Deciding Between Federal & Provincial Incorporation”, online: <www.mcinnescooper.com/publications/weighting-the-options-5-key-considerations-when-deciding-between-federal-provincial-incorporations/>.

111 Bill C-25, *supra* note 2; OSC, *supra* note 108; Lawson Lundell, “Bill C-25: A Catalyst for Corporate Diversity in Canada?” (14 May 2018), online: <www.lawsonlundell.com/the-business-law-blog/bill-c-25-a-catalyst-for-corporate-diversity-in-canada>.

112 *Canada Business Corporations Act*, RSC 1985, c C-44, s 2.

113 *Regulations Amending*, *supra* note 2, s 2(1).

114 *Ibid*, s 172.1; Steven E Salterio, Joan ED Conrod & Regan N Schmidt, “Canadian Evidence of Adherence to ‘Comply or Explain’ Corporate Governance Codes: An International Comparison” (2013) 12:1 Accounting Perspectives 23; Yan Luo & Steven E Salterio, “Governance Quality in a ‘Comply or Explain’ Governance Disclosure Regime” (2014) 22:6 Corporate Governance 460.

115 *Employment Equity Act*, *supra* note 3.

116 Bill C-25, *supra* note 2, s 172.1.

117 Venture issuers are not exempt. See Rima Ramchandani & Glen Johnson, Torys LLP, News Release, “CBCA Reforms Receive Royal Assent” (3 May 2018); *Regulations Amending*, *supra* note 2, s 2.

118 “Vote #348 on June 21st, 2017” re Bill C-25 [“Vote #348”], online: *Open Parliament* <<https://openparliament.ca/votes/42-1/348/>>; Parliament of Canada, “Bill C-25”, online: <<https://openparliament.ca/bills/42-1/C-25/>>.

119 “Vote #348”, *supra* note 118; Parliament of Canada, *supra* note 118.

120 Caroline Moreau, “Women on boards and the ‘comply or explain’ rule”, *Canadian Lawyer* (27 February 2017), online: <www.canadianlawyermag.com/article/women-on-boards-and-the-comply-or-explain-rule-3542/>.

121 Andrew Keay, “Comply or explain in corporate governance codes: in need of greater regulatory oversight?” (2014) 34:2 LS 279; Willey, *supra* note 94 at 193.

122 Cadbury Report, *supra* note 108 at 4.2, 4.7.

123 Financial Reporting Council, *The UK Stewardship Code* (2012), online: <[www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-\(September-2012\).pdf](http://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf)>; Keay, *supra* note 121 at 282.

partly responsible for increasing board representation of women on the FTSE.¹²⁴ Unfortunately, some UK firms neither comply nor explain their non-compliance, and the regulations do not give any regulatory power to induce action.¹²⁵ Australia has slightly more onerous provisions.¹²⁶ Yet, in essence, authorities regulate on whether a statement was made, not on the statement's substantive merit.¹²⁷ Securities regulators, in general, do not opine on the adequacy or merits of an investment or solution, only whether the broad public interest is considered.¹²⁸

Quota Systems

Countries that have instituted mandatory quotas have higher levels of female board representation, and have achieved these levels more rapidly, than countries that have opted for CoE.¹²⁹ Belgium, France, Germany, Iceland, Italy and Spain have all implemented stringent quotas, while India has implemented a weak quota system.¹³⁰ Germany requires 50 percent female representation, which was set in 2018, and also requires 3,500 medium-sized businesses to set their own targets to increase the number of women.¹³¹ Quotas do work, at least in the short term, and can help legitimize female representation in the long term.¹³²

There are drawbacks with quotas, including companies de-listing, going private or registering in another country.¹³³ There have been accusations of the promotion of “golden skirts” — women who hold a number of directorships, or figurehead directors promoted due to their celebrity status.¹³⁴ The cascading effect also has not materialized, as had been promised.¹³⁵ Quotas may result in “tokenism,” which is based on a suspicion that a woman is only appointed for legal purposes rather than for merit, causing a host of problems, including alienation and assimilation of the female director (that is, the director is not seen as an individual, but rather as a stereotype). The CSA Roundtable noted that “even when you have quotas in place and the numbers have risen quickly at the board level, there actually hasn't been the knock on effect, the cascading effect, into the executive teams that they had hoped for. Now it's possible that because Norway, for instance, kind of had to hollow out the female executives to move them up to the board that we have not seen the next generation of women come up, so maybe we need to give it more time.”¹³⁶

124 Catalyst, *Gender Diversity on Boards in Canada: Recommendations for Accelerating Progress* (Ontario: Catalyst & Province of Ontario, 2016) at 25; *FTSE Women*, *supra* note 58 at 25, 30.

125 Keay, *supra* note 121 at 282; Sridhar Arcot, Valentina Bruno & Antoine Faure-Grimaud, “Corporate Governance in the UK: Is the Comply-or-Explain Approach Working?” (2010) 30:2 *Intl Rev L & Econ* 193 at 194.

126 Catalyst, *supra* note 124 at 26, 30.

127 Keay, *supra* note 121 at 285.

128 *In the Matter of 31Q Corp and the Bitcoin Fund*, 3iQ Corp (Re), 2019 ONSEC 37.

129 *Ibid.*

130 Willey, *supra* note 94 at 191.

131 *Ibid* at 192.

132 Cathrine Seierstad, “Beyond the Business Case: The Need for Both Utility and Justice Rationales for Increasing the Share of Women on Boards” (2016) 24:4 *Corporate Governance* 390.

133 Terjesen, Aguilera & Lorenz, *supra* note 60 at 248.

134 *Ibid.*

135 CSA, “Roundtable Discussion”, *supra* note 62 at 35.

136 *Ibid* at 35.

Norway, in 2004, implemented a quota system.¹³⁷ The Norwegian stock market is small, with approximately 190 companies.¹³⁸ They do not have a large mining sector, so comparisons to Canada and Australia are difficult. Four of the largest six companies, representing 46.1 percent of the Norsk Index, are significantly owned by the government.¹³⁹ Canada's stock market is widely held, such that "investors are not likely to have the same influence on those companies."¹⁴⁰ This is also true for the United Kingdom, where "the dispersed ownership structure that exists in the UK can create hindrances to effective organization of shareholders so as to hold directors accountable."¹⁴¹

Making comparisons between countries is likely to overlook the myriad of complexities and nuances that cannot be fully assessed in a cursory analysis. No two countries share identical legislative or governance frameworks, board structures or initiatives to help drive female representation on listed company boards. The varying size of a country's index makes comparisons difficult. One can simply observe that CoE and quotas recognize the need for gender-balanced boards, and many firms are now implementing processes to achieve greater numbers of women on boards and in executive positions.¹⁴²

Conclusions and Recommendations for Future Law and Policy Reform

The problem of a lack of diversity, and in particular gender diversity, on Canadian corporate mining boards is multi-faceted. First, the problem represents a failure of women's empowerment and equality, and a failure to respect the equal rights of women to participate in economic activity in the mining industry. Solutions to the problem conceptualized in this way might include implementing quotas in university engineering programs to ensure that sufficient women are educated and ready to enter the mining industry, work their way up to senior management and eventually join a corporate board. However, a second way to view the problem is from the perspective of women and girls who are subject to gender-based human rights violations as a result of industrial mining practices. This perspective might suggest that replicating the educational backgrounds of those already in positions of power within the mining industry would not serve to help management and boards to understand the problems facing women, whether as employees or as members of communities affected by mining. Could it be that part of the problem is with the kinds of educational expectations that exist for corporate board members?

137 Dhir, *supra* note 91; Amanda K Packel, "Government Intervention into Board Composition: Gender quotas in Norway and Diversity Disclosures in the United States", Book Review of *Challenging Boardroom Homogeneity: Corporate Law, Governance & Diversity* by Aaron A Dhir (2016) 21 Stan JL Bus & Fin 192 at 205; Margarethe Wiersema & Marie Louise Mors, "What Board Directors Really Think of Gender Quotas" (14 November 2016), online (blog): *Harvard Business Review* <hbr.org/2016/11/what-board-directors-really-think-of-gender-quotas>.

138 Oslo Børs, "Facts and figures May 2018", online: <www.oslobors.no/ob_eng/Oslo-Boers/Statistics/Facts-and-figures/2018-Facts-and-figures-May-2018>.

139 Oslo Børs, "Benchmark Index Market Capitalization", online: <www.oslobors.no/ob_eng/markedsaktivitet/#/details/OSEBX.OSE/overview>; Telenor, "About Us", online: <www.telenor.com/about-us/our-history/>.

140 CSA, "Roundtable Discussion", *supra* note 62 at 39.

141 Keay, *supra* note 121 at 287.

142 CSA, "Roundtable Discussion", *supra* note 62 at 30.

The excuses for a lack of women in boardrooms point to many factors, ranging from the sublime to the ridiculous.¹⁴³ In Canada, the top reasons include that more women would compromise the principles of meritocracy; that more women may not result in the best candidates being selected; that corporations frequently have a small number of directors, with low turnover; and that existing policies are ineffective or arbitrary.¹⁴⁴ It must be acknowledged that in the mining sector, there may be differences between junior mining companies and senior producing companies, differences that require further study.

The idea that it is important to encourage more women in business¹⁴⁵ and engineering¹⁴⁶ is well accepted. Universities might consider following Engineers Canada's lead by mandating at least 30 percent of all types of engineering and computer science classes be female by no later than 2030. To date, there are no quotas in Canadian universities, but some people, such as the Institution of Engineering and Technology's first female president, Naomi Climer, have called on the engineering sector to bring in quotas.¹⁴⁷ Yet humans exhibit boundedly rational behaviour in decision making (that is, we often make poor, but predictable, decision-making errors).¹⁴⁸ This bias results in better treatment of "in"-group members (males) than members of stigmatized or "out" groups (women). This may also result in the use of heuristics, or mental shortcuts, pursuant to which certain attributes (in this case, being male) are seen as better suited to board and senior management positions, creating a conjunction fallacy that white males with experience (in law or business) make good candidates. The negative effect of such bias creates what behavioural economists term a "blind spot problem."¹⁴⁹ This suggests that the solution may not be as simple as having more women in STEM programs, but also that men with power need to value expertise from other disciplines that better support the human rights-respecting and environmentally conscious decision making that is essential for mining sustainability. This is particularly so once intersectional dimensions are considered, and the value of Indigenous knowledge, including gendered dimensions of such knowledge, is recognized.¹⁵⁰

Women have a positive effect on the bottom line, and increasing the number of women on boards is correlated with increased attention to environmental and social responsibility, and better decision making. Thus, a second recommendation is for more active institutional and retail investor involvement.¹⁵¹ State Street Global Advisors will engage in active dialogues with companies and board leadership on gender diversity, and if companies fail to take action to increase the

143 Kevin Rawlinson, "FTSE firms' excuses for lack of women in boardrooms pitiful and patronising", *The Guardian* (31 May 2018), online: <www.theguardian.com/business/2018/may/31/pitiful-views-on-women-in-boardrooms-permeate-ftse-firms>.

144 MacDougall & Valley, *2017 Diversity Disclosure Practices*, *supra* note 55 at 22; MacDougall & Valley, *2018 Diversity Disclosure Practices*, *supra* note 56 at 28.

145 Ryan Derousseau, "The MBA degree and the astronomical rise in CEO pay", *Fortune* (18 December 2014), online: <<http://fortune.com/2014/12/18/mba-ceo-pay-connection/>>.

146 Stefano Hatfield, "Where are all the female engineers?", *The Independent* (29 June 2015), online: <www.independent.co.uk/voices/comment/where-are-all-the-female-engineers-9571044.html>.

147 Edd Gent, "Would quotas bring more women into engineering?" *Engineering & Technology* (9 November 2015), online: <<https://eandt.theiet.org/content/articles/2015/11/would-quotas-bring-more-women-into-engineering/>>; Harriet Minter, "Want a plan for how to get more women into engineering? It's easy", *The Guardian* (9 October 2015), online: <www.theguardian.com/women-in-leadership/2015/oct/09/want-a-plan-for-how-to-get-more-women-into-engineering-its-easy>.

148 Willey, *supra* note 94 at 200.

149 *Ibid* at 195.

150 Morales, *supra* note 18.

151 Sergakis, *supra* note 98 at 236.

number of women on their boards, they will vote against the chairs of the boards' nominating and/or governance committees.¹⁵² Bank of Montreal, a large financial institution, launched the BMO Women in Leadership Fund to invest in companies promoting "gender diverse leadership environments."¹⁵³ RBC Royal Bank, Canada's largest financial institution, launched the RBC Vision Women's Leadership MSCI Canada Index ETF, focusing on companies that demonstrate commitment to gender diversity as part of their CSR strategy.¹⁵⁴ The Pax Ellevest Global Women's Leadership Fund allows investors to close the gender gap by investing in companies that value women as leaders.¹⁵⁵ This is the first mutual fund that invests in the highest-rated companies in the world for advancing women through gender diversity.¹⁵⁶ And in 2020, Goldman Sachs announced it would no longer take companies public if they have an all-white, all-male board, and will force an increase to two diverse directors in 2021.¹⁵⁷ If Canadian financial institutions follow suit, as arguably they should, this will have a major positive impact on the mining sector. Thus, it will be the financial institutions themselves that implement a quota system, rather than waiting for a government to bring in regulation. It also sends the signal that a single change in board diversity membership is not enough to have a meaningful impact.

Another issue is the lack of vacancies. Implementing term limits and mandating at least one female candidate for all board and CEO vacancies is recommended.¹⁵⁸ If a woman is not selected by the end of this process, the board must be satisfied that there is an objective reason to support this outcome. The board should also have a diversity and/or inclusion committee.¹⁵⁹ While the Goldman Sachs initiative currently applies to initial public offerings, a similar policy for follow-on offerings (secondary stock sales, debt issuances and others) will put pressure on firms to enact term limits, as the only options for the company are to increase the board size or to rotate board vacancies.

A fourth recommendation is to create a new model with soft targets, stretch goals and hard floors. The 30 by 30 program is an example. It is a soft target, but as soon as it is reached, it becomes a mandatory floor. More work is required for several industry sectors, especially mining, and the work on gender parity on boards must go much further than publicly traded corporations and include privately held and state-owned enterprises.¹⁶⁰ The CBCA amendments do not go far

152 Amy Whyte, "State Street to Turn Up the Heat on All-Male Boards", *Institutional Investor* (27 September 2018), online: <www.institutionalinvestor.com/article/b1b4fh28ys3mr9/State-Street-to-Turn-Up-the-Heat-on-All-Male-Boards>; Rob Kozlowski, "SSGA plans on increasing efforts to get women on company boards", *Pensions & Investments* (27 September 2018), online: <www.pionline.com/article/20180927/ONLINE/180929890/ssga-plans-on-increasing-efforts-to-get-women-on-company-boards>.

153 BMO Asset Management Inc, "BMO Women in Leadership Fund, Fund Facts" (2018); Morningstar, "BMO Women in Leadership Fund", online: <http://quote.morningstar.ca/quicktakes/fund/f_ca.aspx?t=0P00017TVN®ion=CAN&culture=en-CA>.

154 RBC Asset Management Inc, "RBC Vision Women's Leadership MSCI Canada Index ETF", online: <<http://etfinfo.rbcgam.com/exchange-traded-funds/fund-pages/rldr.fs>>.

155 Pax World Funds, "Pax Ellevest Global Women's Leadership Fund", online: <<https://paxworld.com/funds/pax-ellevest-global-womens-leadership-fund/>>.

156 *Ibid.*

157 Jeff Green, "Goldman to refuse IPOs if all directors are white, straight men", *BNN Bloomberg* (23 January 2020), online: <www.bnnbloomberg.ca/goldman-to-refuse-ipos-if-all-directors-are-white-straight-men-1.1379006>.

158 Catalyst, *supra* note 124 at 35.

159 *Ibid* at 38.

160 Not all private companies are small, and solutions are equally applicable to medium and large-scale enterprises. Statscan, "Study: Representation of Women on Boards of Directors, 2016", *The Daily* (7 May 2019), online: <www150.statcan.gc.ca/n1/daily-quotidien/190507/dq190507a-eng.htm>; Industry Canada, "Key Small Business Statistics — January 2019 — SME research and statistics", online: <www.ic.gc.ca/eic/site/061.nsf/eng/h_03090.html>.

enough. Private company directors reported similar proportions of women on their boards as public company directors.¹⁶¹ The WGBHR highlights the need for state-owned enterprises to play a leading role in gender diversity.¹⁶² The Canada Pension Plan Investment Board created a Global Gender Diversity Voting Practice, to vote against the chair responsible for director nominations if the board has no women directors.¹⁶³ Internationally, the International Organization of Securities Commissions as well as Principles for Responsible Investment created guides for diversity in 2016 and 2017, respectively, yet no concrete actions have yet been taken.¹⁶⁴

Future amendments must take a tougher stance in setting normative standards (for example, 30 percent of boards should be filled with women by 2020) and require compliance (or detailed reasons and penalties for non-compliance). Canadian securities commissions must communicate results and educate issuers on the very existence of an unconscious bias. Quotas may have merit, and this method of “debiasing law” should be effectively communicated to the market, if voluntary measures are ineffective.¹⁶⁵

Finally, Patricia Devine’s studies in the context of racial bias show that stereotypes can be activated regardless of a person’s beliefs.¹⁶⁶ Having more women on nominating committees and represented as idealized board imagery could actually undermine the unconscious gender bias prevalent in the industry.¹⁶⁷ While mandatory disclosures seem like a valid solution to implicit bias, there are many shortcomings of mandatory disclosure, such as raising trust levels.¹⁶⁸

In conclusion, there are many possible avenues to pursue in order to address the lack of gender diversity in Canada’s mining sector. Among these are arguments for and against educational requirements due to conscious and unconscious bias. Women who do make it to board levels tend to have more advanced levels of education than their male counterparts, yet women have low enrolment in the kinds of degree programs (specifically engineering and master of business administration [MBA] programs) that are seen as most important to get them onto boards. But is this a cause or an effect? That is, is part of the problem that MBAs and STEM backgrounds are seen as important for boards? Is education needed to change the perception of what is valuable on boards? Further research is required on this subject.

Canadian law has yet to take seriously Canada’s international law obligations to prevent and remedy violations of the human rights of women and girls arising from resource extraction. Women’s empowerment through board and management diversity initiatives may be a crucial piece of the solution.

161 Catalyst, *supra* note 124 at 15.

162 WGBHR, *Gender dimensions*, *supra* note 35, Guiding Principle 4.

163 Canada Pension Plan Investment Board (CPPIB), News Release, “Canada Pension Plan Investment Board to Increase Board Diversity Advocacy” (21 December 2018), online: <www.cppib.com/en/public-media/headlines/2018/cppib-increase-board-diversity-advocacy/>; CPPIB, News Release, “How CPPIB is advocating for more women on boards” (25 October 2018), online: <www.cppib.com/en/public-media/headlines/2018/how-cppib-advocating-more-women-boards/>.

164 Principles for Responsible Investment, *Engaging on Director Nominations: An Investor Guide* (2017) at 11; International Organization of Securities Commissions, *Report on Corporate Governance* (2016) FR10/16 at 19.

165 Willey, *supra* note 94 at 210.

166 *Ibid* at 197.

167 *Ibid* at 203.

168 *Ibid*.