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Disclosure of Information Concerning Climate Change: Liability Risks and Opportunities

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The Climate Change and Law Initiative[1]

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It is clear that climate change presents material – if not unparalleled – economic risks and opportunities to companies and investors, given changes in the physical environment brought about by climate change, and given regulatory efforts to limit those changes and adapt to the environment as it changes.[2] Climate change awareness is motivating governments to accelerate a transition to a low-carbon economy, seen most specifically in the global agreement by close to 200 countries in Paris in December, 2015, to limit the warming of the Earth to "well under" 2º Celsius compared to the pre-industrial era, and "pursuing efforts" to limit to 1.5° Celsius.[3] In Canada, the Pan-Canadian Framework on Clean Growth and Climate Change has been agreed by the federal government and all of the provinces and territories with the exception of Saskatchewan in December, 2016, to meet Canada's commitment to the Paris Agreement.[4] That commitment is to reduce Canada's greenhouse gas emissions by 30% below 2005 levels by 2030; the Pan-Canadian Framework uses establishing a price on carbon as its central policy tool to accomplish that goal.[5] It can be expected that the Pan-Canadian Framework will have a significant effect on companies not only in the oil, gas, coal, and energy sectors, most directly affected by the transition to a lower-carbon economy, but in all sectors of the economy, given its effects on energy and transportation services.

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[2] WEF (2016). The Global Risks Report 2016, World Economic Forum, Davos, January 2016.

[3] Paris Agreement, article 2(1)(a), Dec. 12, 2015, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf ("Article 2 (a): Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;"). The Paris Agreement entered into force as of November 4, 2016, when countries representing 55% of global GHG emissions had ratified the Agreement. By August, 2017, 160 countries have ratified the Agreement. United Nations Framework Convention on Climate Change, *Paris Agreement: Status, available at*: http://unfccc.int/paris_agreement/items/9444.php.

[4] Pan-Canadian Framework on Clean Growth and Climate Change, December 9, 2016, *available at* https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html.

[5] *Ibid.*

As a result of the increasing awareness of climate-related financial risks, shareholders are increasingly demanding strategic responses from their investee companies.[6] Institutional investors, such as public pension funds and asset managers, and insurers, in particular, have significantly increased their corporate engagement on climate change risk management, driven in part by a number of high-profile inquiries into their own financial and fiduciary exposures.[7]

One area of business practice to which regulators and investors have given particular attention is the disclosure by operating companies of risks and opportunities precipitated by climate change and transition initiatives, both mandatory disclosure pursuant to a country's securities regime, and voluntary disclosure pursuant to leading initiatives such as CDP (formerly the Carbon Disclosure Project)[8] or, more recently, the Financial Stability Board ("FSB") Task Force on Climate-related Financial Disclosures (TCFD or "Task Force").[9] In this White Paper, we generally discuss the following questions related to (a) Canadian climate disclosure practices and (b) some liability issues engendered by those practices, in light of the transition to a lower-carbon economy: What are current requirements, if any, for climate-related disclosure, and what is the quality of current climate disclosure by Canadian public companies? Can disclosure as anticipated by the FSB's Task Force help promote serious attention at board and management levels to transition strategies? What are the expectations by Canadian investors regarding disclosure of climate-relevant information, particularly given the framework of the FSB Task Force? Finally, what liability risks are companies exposed to when they either misstate their opinions about the causes and consequences of climate change, or misstate or omit material facts about their businesses in light of climate change and the transition to a lower-carbon economy?

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[6] For example, see: https://www.cdp.net/en-US/News/Pages/why-aiming-for-a.aspx; https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/responsible-investments/id446948/; http://shareaction.org/become-shareholder-activist

[7] For example, the UNEP Finance Initiative published its 10-year update to its seminal 'Freshfields Report' in September 2015. *See* UNEP, *Fiduciary Duty in the 21st Century* (2015) ("21st Century Fiduciary") , *available at* http://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf. And later in the same month Mark Carney (Governor of the Bank of England) gave a major speech on climate change and simultaneously the Bank of England Prudential Regulation Authority published a report on climate change impacts and the UK insurance sector, both of which cited *litigation* and liability as major potential concerns. *See* Governor Mark J. Carney, *Breaking the tragedy of the horizon - climate change and financial stability*, Sept. 29, 2015, *available at* http://www.bankofengland.co.uk/publications/Pages/speeches/2015/844.aspx; Bank of England Prudential Regulatory Authority, *The impact of climate change on the UK insurance sector: A Climate Change Adaptation Report by the Prudential Regulation Authority* (Sept. 1, 2017), *available at* http://www.bankofengland.co.uk/pra/Documents/supervision/activities/pradefra0915.pdf.

[8] CDP is a non-governmental organization (NGO) that "request[s] information on climate risks and low carbon opportunities from the world's largest companies on behalf of 827 institutional investor signatories with a combined US$100 trillion in assets." *See* https://www.cdp.net/en/climate (last visited August 6, 2017).

[9] The Task Force, chaired by Michael R. Bloomberg, was established by the FSB in December 2015 pursuant to a request from Bank of England Governor Mark Carney 'to develop a set of voluntary disclosure recommendations for use by companies in providing information to investors, lenders and insurance underwriters about their climate-related financial risks." *See* https://www.fsb-tcfd.org/news/# (last visited August 6, 2017). The Task Force recommendations will be discussed below.

These issues will be addressed as follows. Part I discusses the proposed transition to a lower-carbon economy as Canada and the provinces implement the Pan-Canadian Framework, and sets out some of the more significant implications for companies and investors. Part II describes the voluntary disclosure framework being suggested by the FSB's Task Force on Climate-related Financial Disclosures, and on-going efforts by Canadian securities regulators to evaluate that framework, among others, for potential incorporation into required disclosure. Part III describes the current securities disclosure framework in Canada, with a particular emphasis on required disclosure of environmental information. Part IV discusses the expectations of leading Canadian institutional investors for disclosure of climate-related financial information. Part V evaluates the securities liability risks for Canadian issuers given three particularly trenchant disclosure issues: (1) a failure to discuss financially material "stranded assets", given the transition to a lower-carbon economy; (2) misstatements or omissions of a company's strategy for undertaking the transition to a lower-carbon economy; and (3) materially misstating the risks of continued extraction and use of a high-carbon product such as oil, gas, or coal. Specific case studies illustrating each of these risks will be discussed. Part VI concludes.

I. Transition to a Lower-Carbon Economy

As with every developed economy, to transition to a low-carbon economy, Canada's mechanisms for producing and using energy need to change. The Pan-Canadian Framework estimates that 80% of Canada's GHG emissions are caused by the production and use of energy: to power homes, offices, and industrial facilities; to fuel the transportation of people and goods; to build and heat homes and other types of facilities; to grow food, and transport that food; to fish, manage forests, cut trees, and generally to fuel the economy.[10] But Canada faces a number of particularized challenges in its transition to a low-carbon economy. It is a large, cold country, with people primarily clustered along its southern border, but also living at great distances to the North. These geographic aspects require extensive systems of transportation, and intensive amounts of energy for heating, including the use of carbon-intensive and polluting diesel generators in the North. Moreover, 14.4% of the Canadian economy is tied to the extraction, refining, transport and sale of oil, gas, coal, and mineral extraction.[11] Transitioning away from these GHG-intensive sources of energy and economic inputs to the Canadian economy over the next decades will have effects on both producers and consumers; and could disproportionately

[10] *See* Pan-Canadian Framework, *supra* note 10, Forward. *Ibid.* at Forward. Canada's GHG emissions are coming from the following sources: 37% industry, the majority of which is coming from oil and gas production; 23% transportation; 12% buildings; 11% electricity production; 10% agriculture; and 7% waste and other. *Ibid.* at 8; oil and gas emissions constitute the majority of industrial emissions: *ibid*. at 16. Electricity production is a small part of Canada's overall GHG emissions because 80% of its electricity comes from low-emitting sources, presumably hydro and nuclear power. *Ibid.* at 9.

[11] Natural Resources Canada, *Ten Key Facts on Canada's Natural Resources*, *available at* https://www.nrcan.gc.ca/publications/key-facts/16013 (2017).

affect particular provinces in Canada, notably Alberta, and particular people, such as those who work in the oil, gas, and coal industries. Thus, as the governments have recognized, the transition needs to be carefully managed, to say the least.

Yet, leadership on these and other challenges in the transition has already been demonstrated by provinces and the federal government. Carbon pricing is a central aspect of that leadership. As stated in the Pan-Canadian Framework report:

> "British Columbia has a carbon tax, Alberta has a hybrid system that combines a carbon levy with a performance-based system for large industrial emitters, and Quebec and Ontario have cap-and-trade systems. With existing and planned provincial action, broad-based carbon pricing will apply in provinces with nearly 85 per cent of Canada's economy and population by 2017, covering a large part of our emissions."[12]

The provinces, territories, and federal government have also recognized that carbon pricing may not do everything necessary to reduce GHG emissions by 30% from 2005 levels, particularly (we would argue) if the price is set too low and does not rise fast enough to spur necessary innovations. As a result, further steps that have been agreed include developing complementary regulatory actions concerning electricity production, transport, building standards, agriculture, and industry; taking actions on adaptation and building resilience to withstand extreme weather events; and the federal government providing funds for investments in innovation, clean technology, and new jobs.[13] Some of the more significant regulatory commitments include phasing out the use of coal to produce electricity by 2030;[14] reducing methane and HFC emissions from the extraction of oil and gas by 40-45% by 2025 (as part of a multi-lateral treaty, the Kigali Amendment to the Montreal Protocol);[15] developing models for net-zero energy building codes by 2030;[16] and establishing and updating vehicle emissions standards.[17]

Here the main point is that the transition is already beginning, both as a matter of technology and policy developments; and also that the physical changes of climate change are already underway, particularly seen in melting summer sea ice in the Artic and the drought and resulting extensive fires in Fort McMurray in 2016. Each kind of transition that we currently see—physical, technological, and regulatory—is creating challenges for companies and investors that may lead to litigation and liability risk if not well evaluated and managed. It is these latter risks that this White Paper, and the companion White Paper on Fiduciary Duty, seek to evaluate.

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[12] *See* Pan-Canadian Framework, *supra* note 10, at 8.
[13] *Ibid.*, Forward.
[14] *Ibid.*, at 11.
[15] *Ibid.*, at 16.
[16] *Ibid.*, at 13.
[17] *Ibid.*, at 15.

II. Task Force on Climate-Related Financial Disclosures (TCFD)

Over the last twenty-five years, voluntary disclosure of environmental, social and governance (ESG) information, and voluntary frameworks for that disclosure, have proliferated to meet the demands for information from investors, consumers, and civil society. The most comprehensive source of data on ESG reporting of which these authors is aware is that done by KPMG in the Netherlands. KPMG published its first ESG report in 1993, and its most recent in 2013. In 1993, 12% of the top 100 companies in the OECD countries (ex. Japan) published an environmental or social report.[18] By 2013, 76% of the top 100 companies in the Americas publish a separate corporate responsibility report, as do 73% of top 100 companies in Europe and 71% in Asia.[19] Of the largest 250 companies globally, reporting rates are 93%.[20] The Global Reporting Initiative (GRI)'s voluntary, multi-stakeholder framework for ESG reporting has emerged as the clear global benchmark: 78% of reporting companies worldwide and 82% of the Global 250 use GRI as the basis for their corporate responsibility reporting.[21] Of particular note, slightly over half (59%) of the Global 250 now have their reports "assured," most often (two-thirds of the time) by the specialist bureaus of the major accountancy firms.[22]

As part of this trend of voluntary disclosure frameworks, the FSB's Task-force on Climate Related Financial Disclosure (TCFD) is important for our discussion because it is (a) specific to climate-change risk, is (b) being developed by extremely influential, international participants in business and government; (c) has been endorsed by some of Canada's largest pension funds;[23] and (d) has been endorsed by hundreds of businesses around the world.[24] Thus, we interpret the

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[18] See Ans Kolk, A Decade of Sustainability Reporting: Developments and Significance, 3 INT'L J. ENVIRONMENT & SUSTAINABLE DEVEL. 51, 52 Figure 1 (2004). KPMG has changed the format of the report since its original 1993 report on corporate responsibility reporting, so direct comparisons are not possible between the Global 250 in 1993 and the Global 250 in 2013. *Ibid.*

[19] KPMG, The KPMG Survey of CR Reporting 2013, at 10, *available at* http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Documents/corporate-responsibility-reporting-survey-2013-exec-summary.pdf.

[20] *Ibid.*

[21] *See ibid*.at 11. The Global Reporting Initiative is now in its fourth iteration. It has been developed by, and is used by, thousands of companies, governments, and non-profit entities around the world to report on the economic, environmental, social and governance effects of entities' actions. *See* Global Reporting Initiative, *available at* http://www.globalreporting.org.

[22] *See* KPMG 2013 Report, *supra* note 9, at 11

[23] *See* Shawn McCarthy, *Task force report puts 'material risks' of climate change in focus,* Globe and Mail, June 29, 2019, *available at* https://www.theglobeandmail.com/report-on-business/task-force-report-puts-material-risks-of-climate-change-in-focus/article35493217. According to this article, the Task Force standards have been endorsed by Ontario Teachers, Caisse de depot & placement du Quebec, and CPPIB. We discuss these funds' positions on climate disclosure below.

[24] *See* Emily Farnworth, *Global CEOs call for greater disclosure of climate risks and opportunities*, World Economic Forum, April 21, 2017, *available at* https://www.weforum.org/agenda/2017/04/global-ceos-call-for-

Task Force standards as a rapidly-emerging global best practice for climate disclosure, and will concentrate our discussion on it.

Founded in 2009 in reaction to the global financial crisis, the FSB is an international organization of central bank governors and financial regulators established by the Heads of State and Government of the Group of Twenty (G-20) as a successor to the Financial Stability Forum.[25] Its remit is to enhance the stability of global financial markets by monitoring and making recommendations regarding financial regulations and policies.[26] The impetus for the FSB's Task Force on Climate-related Financial Disclosure (TCFD or Task Force) was discussed in a speech delivered by Governor of the Bank of England and current Chair of the FSB Mark Carney in September 2015, entitled *Breaking the Tragedy of the Horizon – climate change and financial stability*.

In his speech, Carney identified climate change as one of the greatest threats to the resilience and prosperity of global financial markets.[27] It was during this speech that Carney first promoted the establishment of a *climate disclosure task force* to, among other things, assess the effectiveness of various environmental disclosure regimes, but more specifically to develop an authoritative, voluntary disclosure framework so that markets could allocate capital properly to promote the necessary transition to a low-carbon economy.[28] In December 2015 the TCFD was established by the FSB, with Michael Bloomberg as its Chair, and with 32 global industry participants as members, including people from operating companies, banks, insurance companies, asset managers, and credit rating agencies.[29] Canadians Jane Ambachtsheer (Mercer, now based in Paris) and Stephanie Leaist (Canada Pension Plan Investment Board (CPPIB)) were part of the Task Force.

The TCFD was created to develop voluntary climate-related disclosures that "could promote more informed investment, credit [or lending], and insurance underwriting decisions" which would, in turn, "enable stakeholders to understand better the concentrations of carbon-related assets in the financial sector and the financial system's exposures to climate-related risks."[30] In keeping with its mandate, the TCFD released a scoping project on which it invited comments in

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greater-disclosure-of-climate-risks-and-opportunities/ (CEOs representing companies with $4.9 trillion in assets and $ 700 billion in revenue form Alliance of CEO Climate Leaders to advocate for adoption of TCFD Framework).

[25] See: http://www.fsb.org/about/.

[26] *Ibid*.

[27] Mark Carney, "Breaking the Tragedy of the Horizon – climate change and financial stability" (Speech delivered at the Lloyd's of London, 29 September 2015) [Bank of England] at 16.

[28] *Ibid* at 13-15.

[29] *See* Recommendations of the Task Force on Climate-related Financial Disclosures, June 2017, at iii, *available at* https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-TCFD-Report-062817.pdf (hereinafter "Task Force Report").

[30] FSB, *Proposal for a Disclosure Task Force on Climate-Related Risks* (9 November 2015), online: <www.fsb.org/wp-content/uploads/Disclosure-task-force-on-climate-related-risks.pdf>.

April, 2016; a consultation draft of recommended climate-related financial disclosures in December, 2016; and then a Final Report setting out the TCFD's recommendations on June 29, 2017.[31] Accompanying the Final Report, the TCFD published an Annex providing further specific guidance on how to report pursuant to its framework;[32] and a Technical Supplement providing further detail on how to develop climate-related scenario analyses.[33]

A. Overview of Recommendations

The TCFD identified four features of its recommendations that it considered "key features:" (1) that they could be adopted by all organizations, including financial institutions and investors as well as operating companies; (2) that climate-related financial disclosures should be included in required financial filings; (3) that the disclosure be decision-relevant, forward-looking information; and (4) that there should be a strong focus on risks and opportunities from the transition to a lower-carbon economy.[34] It also emphasized as a "key recommendation" the importance of using and disclosing the results of scenario analysis to determine the resilience of the organization and its strategies under different climate change and adaptation scenarios,[35] issuing a Technical Supplement to guide issuers and financial institutions in preparing scenario disclosure.[36]

The Final Report identifies four areas for climate-related disclosure that represent the core elements of how organizations operate: Governance, Strategy, Risk Management, and Metrics & Targets.[37] It conceptualized these recommendations follows:

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[31] *See* Task Force Report, *supra* note 29, at iv.

[32] *See* Task Force on Climate-related Financial Disclosures, *Annex: Implementing the Recommendations of the TCFD*, June 2017, *available at*: https://www.fsb-tcfd.org/publications/final-implementing-tcfd-recommendations/ (hereinafter Annex).

[33] *See* Task Force on Climate-related Financial Disclosures, *Technical Supplement: The Use of Scenario Analysis in Disclosure of Climate-Related Risks and Opportunities*, June 2017, *available at* https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-TCFD-Technical-Supplement-062917.pdf (hereinafter Technical Supplement).

[34] *See* Task Force Report, *supra* note 29, at iii.

[35] *See ibid.*, at v.

[36] *See* Technical Supplement, *supra* note 33.

[37] *See* Task Force Report, *supra* note 29, at v.

Core Elements of Recommended Climate-Related Financial Disclosures

Governance
The organization's governance around climate-related risks and opportunities

Strategy
The actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning

Risk Management
The processes used by the organization to identify, assess, and manage climate-related risks

Metrics and Targets
The metrics and targets used to assess and manage relevant climate-related risks and opportunities

Credit: Task Force Report, at v.

What is notable about the TCFD's disclosure categories is that they do not call on issuers to make speculative determinations about how large-scale, systemic disruptions such as climate change might affect their business at a far future date. Rather, they call upon individual companies to discuss how that company is approaching the identification, management, and quantification of climate change risks and opportunities today, and what strategic risks and opportunities the company perceives from the transition to a low-carbon economy. In other words, what are companies' managements doing *now* to respond to the challenges of the Paris Agreement and their country's Nationally Determined Contributions to meet the ambitions of that agreement? Far from requiring speculative or boiler-plate disclosure, then, the TCFD has focused on specific information that managers can provide (how are they evaluating and managing these risks to their company in their industry and geographic regions), and specific information that investors can use to direct their capital to companies with smart, proactive management.

B. Implementing the TCFD's Disclosure Framework

In the accompanying Annex, the Task Force provides further details on its recommended disclosures, using a structure comparable to other voluntary disclosure initiatives (e.g.,GRI; CDP's climate surveys; Sustainability Accounting Standards Board (SASB)): disclosure guidance for all sectors, including financial institutions; and then sector-specific disclosures. For all sectors, specific disclosures are identified relating to each of the four thematic areas

(governance, strategy, risk management, and metrics and targets).[38] For all sectors, there is no materiality screen for disclosures related to governance and risk management, but for strategy, metrics and targets materiality judgments are still relevant.[39] Thus, some of the difficulties that the concept of materiality presents will still need to be addressed, particularly how company by company materiality determinations should be evaluated in light of systemic risks where each company's contribution to the problem matters, but may not be independently "material." For asset managers and asset managers, the "Task Force recommends including carbon footprinting information in reports to clients and beneficiaries independent of a materiality assessment."[40]

Sector-specific disclosures are identified for financial institutions (banks, insurance companies, asset managers and asset owners (investors); and then for sectors particularly vulnerable to material financial implications from the physical effects of climate change and the transition to a low-carbon economy. The Task Force identifies those sectors as energy; transportation; materials and buildings; agriculture, food and forestry.[41] Again, sector-specific, detailed guidance is provided for disclosure across the four thematic areas of governance, strategy, risk management, and metrics and targets.

It is clear from the Task Force analysis that few significant sectors are understood *not* to be particularly vulnerable to climate change effects and transition efforts. That analysis is consistent with the conclusion of the U.S. based Sustainability Accounting Standards Board (SASB) that 72 of 79 industries, representing 93% of capital market valuations, are vulnerable to material financial implications from climate change, although the implications are obviously different for different sectors.[42]

C. Scenario Analyses

One of the key Task Force recommendations asks issuers to describe the likely impacts on the organization's "businesses, strategy, and financial planning" of various climate change scenarios.[43] Scenario analysis seeks to develop ideas about how "a business might perform under different future states," that is how resilient the business is to the stress of climate change and associated regulatory developments, and how robust management strategies are to uncertain medium- to long-term developments.[44] A number of companies particularly exposed to climate

[38] *See* Annex, *supra* note 32, at 14-20.
[39] *See* Annex, *supra* note 32, at 3.
[40] *Ibid.*
[41] *See ibid.*, at 46.
[42] Sustainability Accounting Standards Board, *Climate Risk—Technical Bulletin,* SASB Library 2017, *available at* https://library.sasb.org/climate-risk-technical-bulletin/.
[43] *See* Final Report, *supra* note 29, at 21, and Technical Supplement, *supra* note 33, *passim*.
[44] *See* Technical Supplement, *supra* note 33, at 2.

change risk have used the technique in recent years, including Glencore, BHP Billiton, Statoil, and ConocoPhillips.[45]

To be useful, the Task Force recognized that the scenarios in any scenario analysis should be:

"1. Plausible. The events in the scenario should be possible and the narrative credible (i.e., the descriptions of what happened, and why and how it happened, should be believable).

2. Distinctive. Each scenario should focus on a different combination of the key factors. Scenarios should be clearly differentiated in structure and in message, not variations on a single theme. Multiple scenarios should be used to explore how different permutations and/or temporal developments of the same key factors can yield very different outcomes.

3. Consistent. Each scenario should have strong internal logic. The goal of scenario analysis is to explore the way that factors interact, and each action should have a reaction. Neither actors nor external factors should completely overturn the evidence of current trends and positions unless logical explanations for those changes are a central part of the scenario.

4. Relevant. Each scenario, and the set of scenarios taken as a whole, should contribute specific insights into the future that relate to strategic and/or financial implications of climate-related risks and opportunities."

5. Challenging. Scenarios should challenge conventional wisdom and simplistic assumptions about the future. When thinking about the major sources of uncertainty, scenarios should try to explore alternatives that will significantly alter the basis for business-as-usual assumptions." [46]

The Task Force recognized that any number of potential scenarios could be used to evaluate climate change risks and opportunities, and that using a range of scenarios improves the usefulness of the technique.[47] The Task Force is recommending using "at a minimum, a 2°C scenario," and that companies should "consider using other scenarios most relevant to the organization's circumstances, such as scenarios related to Nationally Determined Contributions (NDCs), business-as-usual (greater than 2°C) scenarios, physical climate risk scenarios, or other challenging scenarios."[48] Ultimately, issuers should describe how they plan to mitigate climate-related risks and capitalize on the opportunities revealed by their chosen climate change scenario(s).

[45] *See ibid. at 3.*
[46] *See* Technical Supplement, *supra* note 33, at 2.
[47] *Ibid*.
[48] *Ibid.*, at 3.

1 Conclusion: The TFCD Environmental Disclosure Recommendations

The Task Force's recommendations are widely viewed as the foundation for improved reporting of climate-related issues in mainstream financial filings. The recommendations are ambitious yet practical. The TFCD believes that the reporting of climate-related risks and opportunities will evolve over time as organizations, investors, and others contribute to the quality and consistency of the information disclosed.

Canadian securities regulators have recently committed to reviewing climate disclosure in a number of jurisdictions—Australia, the U.K. and the U.S.—as well as reviewing a number of voluntary disclosure standards, including the TCFD's disclosure standards.[49] This review is a promising step forward. As we argue below, there is good reason for the CSA to propose a more robust climate change disclosure regime modelled after the TCFD recommendations. Given the innovative and highly detailed climate-related disclosures promulgated by the TCFD, and its attention to management strategy, board governance, specific targets and metrics, the CSA would be well-advised, and be in a leadership position, to choose to incorporate the TCFD's recommendations into the Canadian securities regulatory regime.

III. Current Disclosure Requirements in Canada

In this section we provide a brief overview of the structure of Canadian securities regulation, and the regulations that can be interpreted to require climate-related financial disclosures. The discussion will show that there is a lack of specificity in the requirements, which are principles-based; that there are no clear requirements to provide investment-relevant information on the management, strategy, risks and opportunities of climate change and its mitigation, although general materiality guidance could be interpreted to require such disclosure; and thus that there is significant room for regulations to be updated to improve companies' disclosure on this economically-material matter.

A Brief Overview of the Structure of Canadian Securities Regulation and the Exchanges

1. Canadian Securities Regulation

[49] *See Canadian Securities Regulators Announce Climate Change Disclosure Review Project,* March 21, 2017, *available at* https://www.securities-administrators.ca/aboutcsa.aspx?id=1567.

Securities regulation in Canada is divided amongst the 13 provinces and territories, each with their own respective securities laws and regulator.[50] In general, all provincial and territorial securities laws serve the purpose of creating fair and efficient capital markets. Despite this unity in purpose, each province and territory operates as a "closed system", with their respective regulators qualifying distributions of securities according to their statutes.[51] For example, if an issuer wishes to distribute its securities in the province of Ontario, it must comply with the Ontario *Securities Act*. As a result, when an issuer is registered in one province and seeks to distribute its securities in another province, it is faced with the regulatory burden of having to comply with another set of laws.

The regulators ("Commissions") have attempted to alleviate this burden by establishing an organization, the Canadian Securities Administrators ("CSA"), to coordinate amongst most of the provinces, and to harmonize regulations across the Canadian capital markets.[52] In 2008, the CSA created a "passport system" allowing market participants in all provinces, except Ontario, to participate "in all passport jurisdictions by dealing only with its principal regulator and complying with one set of harmonized laws".[53] On September 8, 2014, after efforts to directly establish a national regulator were frustrated,[54] British Columbia, Ontario, Saskatchewan, New Brunswick, Prince Edward Island, and the Yukon (Participating Jurisdictions) signed the first draft of the *Memorandum of Agreement Regarding The Cooperative Capital Markets Regulatory System*. The signatories of this memorandum have made a "strong commitment... to implement a cooperative capital markets regulatory system", particularly through the creation of a "single operationally independent *capital markets regulatory authority* (the 'CMRA')".[55] According to the Participating Jurisdictions, the CMRA would foster more globally competitive Canadian capital markets, encourage market innovation, bolster investor protection by creating consistent

[50] The statutory provisions applicable to a number of important provincial markets include the *Ontario Securities* Act, RSO 1990, c S5 [OSA]; *Alberta Securities Act*, SA 2000, c S4 [ASA]; *British Columbia Securities Act*, RSBC 1996, c 418 [BCSA]; *Nova Scotia Securities Act*, RSNS 1989, c 418 [NSSA].

[51] Mary Condon, Anita Anand, Janis Sarra and Sarah Bradley, Securities Law in Canada, 3rd ed. (Toronto: Emond Montgomery, 2017) at 176.

[52] See online: https://www.securities-administrators.ca/aboutcsa.aspx?id=77.

[53] *Ibid*. See also Multilateral Instrument 11-102 *Passport System*.

[54] The prospect of establishing a national regulator has been difficult, given judicial interpretations of the *Constitution Act, 1867*, 30 & 31 Vict, c-3 (Constitution Act) and the *Charter of Rights and Freedoms* [part I of the *Constitution Act, 1982*] (Charter). As per section 92(13) of the *Constitution Act*, *1867,* provincial governments have exclusive power to regulate *property and civil rights*, while section 91(2) established the Canadian federal government's power to regulate *trade and commerce*. Unfortunately, with respect to the securities markets, the provinces' power to regulate *property and civil rights* has consistently been interpreted to be in conflict with the federal government's power to regulate *trade and commerce*. In short, this division of powers has been a significant obstacle to the creation of a national securities regulator. *See Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837, holding that the proposed federal Securities Act, which would have established a federal securities regulator, was outside of Parliament's power and an infringement of the provinces' power to regulate property.

[55] *Memorandum of Agreement Regarding The Cooperative Capital Markets Regulatory System* at 1-3.

regulatory standards, better coordinate enforcement activities, and enhance Canada's ability to manage systemic risks.[56]

The most important feature of the current decentralized system is the potential for the CSA to issue National Instruments (NI), which are agreed to by all regulators and thus intended to create uniform standards across the country. Since the CSA does not have regulatory authority, the provisions of National Instruments need to be "implemented by rule or policy in each participating province."[57] A number of National Instruments will be discussed below, including important instruments defining "material facts," creating requirements for what information is to be included in issuers' continuous disclosure for secondary market trading, and establishing parameters for the disclosure of environmental information.

2. The Exchanges

Of the provinces and territories, Ontario has the largest securities exchange in Canada, the Toronto Stock Exchange (TSX), owned by the TMX Group, which also owns the TSX Venture Exchange (TSXV), headquartered in Calgary, Alberta. A report published by the Market Intelligence Group in March 2017 pegged the TSX and TSXV total collective market cap in excess of CAD 2.2 trillion, with the majority of their listed companies headquartered in Ontario.[58] Ontario is also the home of the largest securities regulator in Canada, the Ontario Securities Commission (OSC), with more than 560 employees.[59]

Given the context of this research, it is also important to note that the majority of TSXV issuers have resource dependant business models, as do a significant minority of TSX issuers. As of March 2017, the Market Intelligence Group reported that Mining was the most dominant sector on these exchanges, comprising 60% of all TSXV and 16% of TSX listed issuers (second only to Exchange Traded Funds, which account for 31% of TSX listed issuers).[60] It is also worth noting that Oil & Gas is Alberta's most dominant sector (Canada's second largest capital market, responsible for 21% of Canada's capital markets activity), representing 49% of Alberta's industrial output.[61]

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[56] *See* Condon et al., *supra* note 51, at 1.
[57] *See ibid,*, at 25.
[58] The MiG Report: March 2017, online at: http://www.tsx.com/resource/en/1500.
[59] http://www.osc.gov.on.ca/en/About_our-structure_index.htm.
[60] The MiG Report: March 2017, online at: http://www.tsx.com/resource/en/1500. The second most prominent sector listed on the TSXV is Oil & Gas at 9% and the fifth most prominent sector on the TSX at 5% (subordinate only to the financial sectors and the broad sector referred to as Diversified Industries).
[61] *ASC Annual Report 2016*, ASC, at 10 and 13, online at: http://www.albertasecurities.com/Publications/2016-Annual-Report.pdf.

The dominance of the natural resource sectors in Canadian capital markets, and economy as a whole, underscores the challenges facing Canada in the transition to a low-carbon economy. It also underscores the need for clear, comparable disclosure of how companies are managing the strategic risks of that transition. As will be discussed below, current regulations are not leading to issuers generally producing clear, comparable disclosure about their transition risks and strategies.

A. Environmental Disclosure in Canada

As suggested above, the requirements set out in provincial securities legislation are the primary source of disclosure obligations in Canada, but they are reinforced by nationally harmonized standards.[62] General disclosure obligations are primarily provided by NI 41-101 *General Prospectus Standards* (NI 41-101) for primary market transactions, and NI 51-102 *Continuous Disclosure Obligations* (NI 51-102), for secondary market transactions and continuing disclosure.[63] According to those instruments, issuers' disclosures must generally provide "full, true, and plain disclosure of all material facts"; issuers must also notify security holders of any material changes to their business and operations.[64]

Three changes in the market motivated the CSA in 2010 to issue specific guidance on environmental reporting in Staff Notice 51-533: "increasing impacts on issuers of environmental matters; the changing environmental regulatory landscape; and increasing investor interest in environmental matters."[65] A staff notice is a less formal communication from the CSA, often, as here, to provide guidance on "emerging regulatory problems that have not yet become the subject of a policy or a rule."[66] The Staff Notice was published in an effort to "assist issuers in assessing which information must be disclosed on material environmental matters, such as risks related to weather patterns or environmental legislation".[67] In specific, CSA Notice 51-333 was drafted to provide guidance on definitions and principles concerning the following areas of disclosure:[68]

- Material Information (that is, the materiality of environmental information);

[62] *Ontario Securities* Act, RSO 1990, c S5 [OSA]; *Alberta Securities Act*, SA 2000, c S4 [ASA]; *British Columbia Securities Act*, RSBC 1996, c 418 [BCSA]; *Nova Scotia Securities Act*, RSNS 1989, c 418 [NSSA]; other provincial and territorial legislation will be omitted from this document.
[63] *General Prospectus Standards,* NI 41-101, *available at xxx; Continuous Disclosure Obligations*, NI 51-102, *available at* .
[64] **Citation needed.**
[65] Canadian Securities Administrators, *Staff Notice 51-333, Environmental Reporting Guidance,* October 27, 2010, *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101027_51-333_environmental-reporting.pdf.
[66] Condon et al, *supra* note 51, at 29.
[67] *News Release: Canadian Securities Regulators Publish Additional Guidance on Environmental Disclosure*, CSA (27 October 2010), online: http://www.securities-administrators.ca/aboutcsa.aspx?id=928.
[68] Staff Notice 51-333, *supra* note 65, at 6.

- Environmental risks and related matters;
- Environmental risk oversight and management;
- Forward-looking information requirements as they relate to environmental goals and targets;
- Impact of adoption of International Financial Reporting Standards (IFRS) on disclosure of environmental liabilities.[69]

It is also important to point out that Canadian environmental disclosure requirements are part of disclosure obligations generally, as established in NI 51-102 *Continuous Disclosure Obligations.* In other words, environmental disclosure obligations are not housed in a distinct instrument or piece of legislation, but rather, are an application of the general disclosure obligations of NI 51-102. Staff Notice NI 51-333 states that environmental matters comprise a "broad range of issues, including air, land, water and waste", which can affect issuers in several ways, "including interrupting operations, resulting in material unplanned costs, providing new business opportunities, and potentially affecting reputation, capital expenditures, and a license to operate".[70] Bearing in mind the source and scope of environmental disclosure in Canada, what follows is an overview of the purpose of Staff Notice 51-333 and the guidance it sets out for issuers.

1. Purpose: Notice 51-333

As stated by the CSA, the purpose of Notice 51-333 "is to provide guidance to reporting issuers (other than investment funds) on existing continuous disclosure requirements relating to environmental matters under securities legislation".[71] As stated by the CSA, the Notice is intended to assist issuers with: (1) determining what information about environmental matters needs to be disclosed, and (2) enhancing or supplementing their disclosure regarding environmental matters, as necessary.[72]

A. Material Information in Continuous Disclosure Documents: Discussion in Staff Notice 51-333

The determining factor in considering whether information should be disclosed under securities disclosure laws generally is materiality. The test for materiality is objective: "information relating to environmental matters is likely material if a reasonable investor's decision whether or not to buy, sell or hold securities of the issuer would likely be influenced or

[69] *Ibid*.
[70] Staff Notice 51-333, *supra* note 65, at 3.
[71] *Ibid.*
[72] *Ibid*.

changed if the information was omitted or misstated".[73] Where the information is deemed to be material, it must be disclosed. In order to assist issuers with determinations of the materiality of environmental information, the Notice set out several guiding principles for determining the materiality of information generally.

One caveat to note here is that CSA Staff Notice 51-333 states that it reviewed many "discussions of materiality in the environmental context" in arriving at its guiding principles for determining the materiality of environmental information, including reviewing five specific documents on climate change disclosure.[74] Notwithstanding, there is nothing specific to climate change disclosure in its discussion of material information, nor in its Staff Notice generally, although there are a number of examples of climate change related disclosure set out in the Appendix. Certainly there is no guidance on climate change related financial disclosure of the kind now provided by the TCFD Final Report and supplemental materials.

The first guiding principle provided by the CSA is that *there is no-bright line test for materiality*.[75] In order to make it clear that there is *no* quantitate threshold for materiality, the CSA states that issuers should consider both qualitative and quantitative environmental factors when deciding whether environmental matters are material and require disclosure.[76] As such, materiality is a flexible concept that varies between issuers and industries according to the circumstance.[77] In other words, an event that may warrant disclosure by one issuer, such as perhaps a small issuer, may not be material to another, larger issuer.

The second guiding principle is that *determinations of materiality depend on the context*.[78] Though certain facts and events may not be material on their own, they may be material if

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[73] *Ibid* at 5. See also Part 1(f) of Form 51-102F1 and Part 1(e) of Form 51-102F2.

[74] Documents CSA stated that it reviewed included: " • the CICA publication, Executive Briefing – Climate Change and Related Disclosures (March 2008) • the CICA publication, Building A Better MD&A: Climate Change Disclosures (November 2008) • the CICA publication, Climate Change Briefing (July 2009) • the CICA publication, Environmental, Social and Governance (ESG) Issues in Institutional Investor Decision Making (August 2010) • the May 2009 exposure draft of the Climate Disclosure Standards Board Reporting Framework, and • the U.S. Securities and Exchange Commission's guidance, Commission Guidance Regarding Disclosure Related to Climate Change (effective February 2, 2010)." Staff Notice 51-333, *supra* note 65, at 6.

[75] *See* Staff Notice 51-333, *supra* note 65, at 7.

[76] *Ibid*. See also s *National Policy 51-201 – Disclosure Standards*, OSC NP 51-102, (2002) 25 OSCB 4492, (12 July 2002), s 4.2 [NP 51-201]; OSC Staff Notice 51-716 *Environmental Reporting*, OSC Staff Notice 51-716, (2008) 31 OSCB 2223, (February 29, 2008) [OSC Notice 51-716]; Form 41-101F1 *Information Required in a Prospectus*, General Instruction 3. According to the University of Northern British Columbia, gathering both qualitative data and quantitative data are essential to the practice of environmental monitoring. Quantitative data is both "physical and measurable", such as PH levels in a body of water. Conversely, qualitative data is both "a non-physical or observable source of data", such as a "stream's colour or cleanliness". For more information, visit: http://online.unbc.ca/index.php/quantitative-vs-qualitative-data/.

[77] *See* Staff Notice 51-333, *supra* note 65, at 7.

[78] *Ibid.*

considered "in light of all the facts available".[79] Conversely, some facts and events are material on their own. In any case, issuers should not assess the materiality of individual facts, but rather holistically consider the total mix of facts.[80]

The next two guiding principles are closely related with an issuer's projected lifecycle. The third guiding principle, being the *timing of disclosures*, is driven by the circumstances of the issuer.[81] For instance, an issuer that is expected to have a long investment cycle, or develop and implement new technologies throughout its projected investment cycle, may be more susceptible to the impacts of gradual environmental change.[82] As such, an issuer should consider whether the impact of an environmental matter "might reasonably be expected to grow over time, in which case the matter may be considered material and warrant early disclosure on the basis that it might be important to reasonable investors".[83] Similarly, issuers should also understand how their business will intersect with known trends, demands, commitments, events and uncertainties. Accordingly, the next principle states that, *when an issuer's affairs are (or will be) affected by a trend, demand, commitment, event or uncertainty, such information should be disclosed*.[84] Issuers should consider their operational time horizon and assess the probability and the magnitude of the effects imposed by a trend, demand, commitment, event or uncertainty – such that environmental matters that are likely to come to fruition within the projected investment cycle of an issuer and materially affect its business and operations are disclosed.[85]

The last principle articulates the CSA's general pro-disclosure approach. As it states, "if there is any doubt about whether particular information is material", the CSA "encourages issuers to *err on the side of materiality* and disclose the information".[86]

B. Environmental Risk Disclosure: Notice 51-333

According to Notice 51-333, there are five key disclosure requirements relating to environmental matters that arise from NI 51-102 *Continuous Disclosure Obligations*. These categories of disclosure include: **(i)** environmental risks, **(ii)** trends and uncertainties, **(iii)** environmental liabilities, **(iv)** asset retirement obligations, and the **(v)** financial and operational effects of environmental protection requirements.

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[79] *Ibid.*
[80] *Ibid*. See also *Re YBM Magnex International Inc* (2003), 26 OSCB 5285 [YBM Magnex] at paras 94 and 101.
[81] *See* Staff Notice 51-333, *supra* note 65, at 7
[82] *Ibid*.
[83] *Ibid*. The CSA recognized that this guiding principle was "derived from sources such as the CICA publication, *Building A Better MD&A: Climate Change Disclosures* (November 2008) and the May 2009 exposure draft of the *Climate Disclosure Standards Board Reporting Framework*." *Ibid.*
[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid*. at 8. See also *National Policy 51-201 – Disclosure Standards*, OSC NP 51-102, (2002) 25 OSCB 4492, (12 July 2002), s 4.2(2) [NP 51-201].

i. Environmental Risks

As per Item 5.2 of Form 51-102F2 *Annual Information Form*, relevant environmental risks should be considered when deciding what information needs to be disclosed.[87] "Generally, risks that may impact an issuer's business and operations can be divided into five categories: litigation, physical, regulatory, reputation and the business model."[88] Each of these environmental risks must be evaluated with a view not only to the present, but to the future as well. They are discussed in turn in Staff Notice 51-333.

First, issuers should disclose current, impending, or likely *environmental litigation* matters; as part of litigation disclosure, the issuer should disclose its anticipated exposures and the likelihood of success.[89] Second, an issuer should disclose how it is likely to be affected by the *physical risks* imposed by environmental matters; environmental matters refers to both distinct, human-initiated environmental events, such as toxic dumping, or naturally occurring events, such as flooding due to rising water levels.[90] Furthermore, physical risks disclosure includes information about the issuer's "risk management, adaptation and mitigation strategies," both in place and those that it plans to adopt in the future, and the associated costs.[91] Third, issuers should disclose their *regulatory risks*.[92] In particular, an issuer should disclose the ways in which it expects to be affected by both "current and likely environmental regulations"; boilerplate disclosure should not be used.[93] Fourth, issuers should disclose any *risks relating to its business model*, which includes information regarding "legal, technological, political and scientific developments regarding environmental matters" that have created (or will likely create) "new material opportunities or risks" for the issuer.[94] The fifth and final risk is *reputational*

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[87] *See* Staff Notice 51-333, *supra* note 65, at 8, *discussing* Item 5.2 of Form 51-102F2.
[88] *Ibid.*
[89] *Ibid* at 9.
[90] *Ibid*. According to the Notice, some potential environmental impacts that would warrant disclosure are: "property damage; health and safety issues for employees and to members of the public; disruptions to operations, including manufacturing operations or the transport of manufactured products; disruptions to operations of major customers or suppliers; increased insurance claims and liabilities for insurance and reinsurance issuers, and; increased insurance premiums and deductibles, or a decrease in the availability or loss of coverage." *Ibid.*
[91] *Ibid*.
[92] *Ibid.*
[93] *Ibid* at 9-10. Some examples of issuer specific considerations that should be included in regulatory risk disclosure are: "disclosure of applicable and anticipated regulatory requirements, disclosure as to whether or not the issuer will be in material compliance with such requirements, the costs of compliance, and any assumptions or facts used where the quantification of a regulatory risk is uncertain." *Ibid.*
[94] *Ibid* at 10. As stated by the CSA in the Staff Notice, possible indirect risks and opportunities may include: "changes to production practices; changes due to emerging technologies; decreased demand for goods that have a negative impact on the environment or fail to meet customer standards; increased demand for goods that have less of an impact on the environment than competing products; changes to tax incentives and subsidies; increased competition to develop innovative products; increased demand for generation and transmission of energy from alternative energy sources, and; decreased demand for services related to carbon-based energy sources, such as drilling services or equipment maintenance services." *Ibid.*

risk.[95] As the Staff Notice states, how an issuer addresses environmental matters may damage "brand value, consumer confidence, employee loyalty, ability to attract financial capital and obtaining regulatory approval of projects".[96] As such, an issuer should disclose how its interactions with local, national and international environmental matters would affect (or likely affect) its reputation and, thus, its business or operations. [97]

Once an issuer has evaluated its environmental risks, and determined that disclosure is required, it must incorporate that disclosure in the Annual Information Form (AIF).[98] The issuer's AIF should explain how these risks might affect its business and operations.

ii. Trends and Uncertainties

Management's Discussion & Analysis (MD&A) is an important part of an issuer's continuous disclosure, and should, as part of discussing an issuer's financial statements and operational results, provide management's narrative explanation regarding the potential and actualized material impacts of environmental trends and uncertainties.[99] According to established standards of materiality, "there is no specified future time period that must be considered in assessing the impact of a known trend or uncertainty that is reasonably likely to occur".[100] Rather, the issuer must identify all trends and uncertainties that a reasonably likely to have a material impact on its business and operation throughout its projected lifecycle. As specified in the Notice, an issuer should disclose: "(1) what has been, and is reasonably likely to be, the impact of environmental trends or uncertainties on revenues, expenditures and cash flows; and (2) the impact environmental trends or uncertainties have on its financial condition and liquidity, if any".[101] In summary, issuers should, at a minimum, disclose how trends and uncertainties will (or may potentially) materially impact its revenues and expenses.[102]

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[95] *Ibid.*
[96] *Ibid*.
[97] *Ibid*.
[98] *Ibid* at 8. For a full description of the required contents in an AIF, refer to Form 51-102F2 *Annual Information Form*.
[99] *Ibid*. at 10-11. See also Form 51-102F1 *Management's Discussion & Analysis*, Part 1(a) and Item 1.4(g).
[100] *Ibid* at 11.
[101] *Ibid* at 10-11. In particular, an issuer's MD&A should, among other things, "discuss: (i) material information that may not be fully reflected in the financial statements, such as contingent liabilities or other contractual obligations, and (ii) important trends and risks that have affected the financial statements, and trends and risks that are reasonably likely to affect them in the future." *Ibid.* Furthermore, "Item 1.4(g) of Form 51-102F1 requires the RI to discuss its analysis of its operations for the most recently completed financial year, including commitments, events, risks or uncertainties that it reasonably believes will materially affect the issuer's future performance." *Ibid.* at 11.
[102] *Ibid*. As per the Notice, environmental impacts on revenues include: "changes in consumer preference or demand for goods and services due, in whole or in part, to environmental matters or trends; changes in supply chain requirements related to environmental matters; new rules requiring design changes to products; the sale of, or royalties on, innovative technologies; delayed or denied regulatory environmental approvals; the availability and price of emissions credits or offsets." *Ibid.* Environmental impacts on expenses include: "the need to retrofit

iii. Environmental Liabilities

Environmental liabilities arise when an issuer's operations have, will, or may negatively impact the environment. The most common example would be liabilities arising from past, ongoing, or potentially future legal obligations to make expenditures "due to the manufacture, use, release or threatened release of a particular substance".[103] A *potential* environmental liability and the corresponding legal obligations are typically contingent on some form of law, regulation, or policy that is not yet in force.[104]

Once identified, environmental liabilities are either disclosed directly in an issuer's financial statements[105] or indirectly through MD&A.[106] That said, the CSA Staff is "of the view that in order for a TSX-listed issuer to meet the requirements of item 1.12 of Form 51-102F1, the issuer should quantify the accounting estimate [for an environmental liability] where quantitative information is reasonably available and would provide material information to investors."[107] Finally, the CSA is of the view that "a discussion of material potential environmental liabilities" should be included in issuers' continuous disclosure documents, regardless of whether the liability "has been accrued in the financial statements or has been disclosed in the notes to the financial statements", thereby allowing investors to better assess the nature and scope of potential liabilities, and their "probability of occurring."[108]

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existing facilities to address physical, health and safety, or regulatory constraints; research and development activities related to more environmentally efficient operations and processes; purchase and implementation of new information systems to measure and record natural resource impacts (including, for example, greenhouse gas emissions and water and energy usage); increased or new insurance coverage or premiums; purchases of allowances or offsets to meet regulatory emissions requirements; penalties for failure to meet government-mandated reduction targets; repairing or rebuilding facilities impacted by adverse weather events; investments in productive capacity that embody new 'green' or more energy efficient technologies; investments in projects to generate offsets; financing costs related to expenditures." *Ibid.* at 12.

[103] *Ibid* at 12. As the Notice states, environmental liabilities include: "compliance obligations related to laws and regulations or other binding requirements that apply to the manufacture, use, disposal and release of substances, and other activities that may adversely affect the environment; existing and future site remediation obligations; obligations to pay civil, administrative and criminal fines and penalties for statutory or regulatory noncompliance; obligations to compensate private parties for personal injury, property damage and economic loss; obligations to pay punitive or special damages, or make or maintain specific reserves for those damages; obligations to pay for natural resource damages." *Ibid.* at 13.

[104] *Ibid*.

[105] *Ibid., citing* Form 51-102F1, Item 1.12.

[106] *Ibid*., *citing* Form 51-102F1, Part 1(a).

[107] *Ibid.* According to the Notice, "[w]here measurement of an environmental liability involves a critical accounting estimate (as defined in Form 51-102F1), certain disclosure is required. Specifically, item 1.12 of Form 51-102F1 requires management of TSX-listed issuers to include an analysis of critical accounting estimates in their MD&A." *Ibid.*

[108] *Ibid.* at 14.

iv. Asset Retirement Obligations

According to the Notice, "assets are considered retired if they are sold, abandoned, recycled or disposed of," but this definition does not include assets that are "temporarily removed from service."[109] When an asset is retired, issuers may be required to meet certain legal obligations "to perform certain procedures, rather than a promise to pay cash," otherwise known as an *asset retirement obligation* (ARO).[110] The CSA expects issuers to disclose material AROs in their MD&A, in addition to including them in required financial disclosure.[111] When reasonably available, information regarding material environmental remediation costs should also be disclosed.[112] In summary, an issuer's MD&A should include "a comprehensive discussion of commitments, events or uncertainties, including AROs that are reasonably likely to have an effect on the issuer's business".[113] As AROs are generally incurred over more than one reporting period, the Notice also provides that "information should be provided for all periods that may be materially impacted".[114]

v. Financial and Operational Effects of Environmental Protection Requirements

As stated in the Notice, item 5.1(1)(k) of Form 51-102F2 requires issuers to disclose the "financial and operational effects of environmental protection requirements on the issuer's capital expenditures, earnings and competitive position in the current financial year and the expected effect in future years".[115] When discussing environmental protection requirements, issuers should disclose material costs where the information is reasonably available, any foreseeable changes to such costs, and the potential operational and financial impact of such costs.[116]

C. Risk Oversight and Management: Notice 51-333

Of particular relevance to this analysis, the Notice recognizes that "[i]nvestors have indicated that they would like information to assess whether directors are appropriately focusing on risk *management*, including environmental risk management."[117] In particular, the Notice states that there two "key sets of disclosure requirements" that "provide insight into an issuer's oversight

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[109] *Ibid.*
[110] *Ibid*. These legal obligations include: "government actions, such as laws or regulations; written or oral agreements between entities, and; a promise to a third party that imposes a reasonable expectation of performance." *Ibid.*
[111] *Ibid*. See also Item 1.2 and 1.6 of Form 51-102F1.
[112] *Ibid*. As stated in the Notice, disclosure of environmental remediation costs includes "a discussion of the costs associated with: the disposal of hazardous materials, and; the costs associated with the implementation of reclamation technologies." *Ibid.*at 15.
[113] *Ibid*.
[114] *Ibid* at 14-15.
[115] *Ibid* at 15.
[116] *Ibid*.
[117] *Ibid.*at 16.

and management of environmental risks: (i) environmental policies implemented by the issuer and (ii) board governance."[118]

i. Environmental Policies Implemented by the Issuer

According to the Notice, the term "policy" should be construed broadly to include policies for "sustainable development, community relations, the use and disposal of toxic or otherwise hazardous materials, prevention of spills, recycling, conservation of water and the reduction of greenhouse gas emissions".[119] Item 5.1(4) of Form 51-102F2 *Annual Information Form* requires issuers to describe any material environmental policies it has implemented or plans to implement, to explain the purpose of these policies, and to disclose the steps and costs associated with implementation (where quantitative information is reasonably available).[120]

ii. Board Governance

Staff Notice 51-333 points out that pursuant to section 3.4 of National Policy 58-201 *Corporate Governance Guidelines*, "the board should adopt a written mandate in which it explicitly acknowledges responsibility for, among other things: (1) adopting a strategic planning process and approving, on at least an annual basis, a strategic plan which takes into account, among other things, the opportunities and risks of the business, and (2) identifying the principal risks of the issuer's business and ensuring the implementation of appropriate systems to manage those risks".[121]

A particularly important component of Board Governance disclosures is the description of the issuer's Board Committees. In particular, these disclosures should describe how an issuer's board, standing committees, and management-level personnel oversee and manage environmental risks, if applicable.[122] In order to avoid boilerplate language, the Notice states that governance disclosures should provide insight into: "the development and periodic review of the issuer's risk profile; the integration of risk oversight and management into the issuer's strategic plan; the identification of significant elements of risk management, including policies and

[118] *Ibid* at 16.
[119] *Ibid*.
[120] *Ibid*.
[121] *Ibid* at 17.
[122] *Ibid*. Item 2 of Form 58-101F1 *Corporate Governance Disclosure* (Form 58-101F1) requires TSX-listed issuers to disclose the text of the board's written mandate, or if the board does not have a written mandate, to describe how the board delineates its role and responsibilities. In this regard, there are two relevant disclosure requirements relating to board standing committees and audit committees: "(1) Board Standing Committees: All board standing committees should be identified and their function should be described, and (2) Audit Committees: The audit committee's Charter should be disclosed in the AIF, which is particularly relevant where the audit committee has responsibility for responsibility risk management (which includes environmental risk)." *Ibid.*

procedures to manage risk; and the board's assessment of the effectiveness of risk management policies and procedures, where applicable".[123]

D. International Financial Reporting Standards (IFRS): Notice 51-333

Financial reporting under IFRS is fundamentally different than reports provided using Canadian *Generally Accepted Accounting Principles* (GAAP). As the Staff Notice points out, IFRS may require issuers to "accrue more environmental liabilities, at higher amounts, and provide more disclosure regarding these liabilities".[124]

E. Forward-looking Information Requirements: Notice 51-333

If an issuer discloses an environmental target or goal in any form, and such information is deemed to be material, the document containing the target or goal must comply with the forward-looking information requirements in Part 4A of NI 51-102.[125] Furthermore, the Notice states documents containing targets or goals that constitute future oriented financial information or a financial outlook must comply with specific requirements in Part 4B of NI 51-102.[126]

2. Subsequent Developments

Since the release of Notice 51-333, regulators have continued to refine and update environmental disclosure obligations. On June 9, 2016, by way of OSC Notice 11-775 *Notice of Statement of Priorities for Financial Year to End March 31, 2017*, the Ontario Securities Commission (OSC) stated that "commenters have suggested that the OSC find ways to work with" the TCFD and "consider how the OSC can encourage adoption of the Task Force's recommendations."[127] In response, OSC emphasized that "companies already have an obligation to disclose material environmental and governance information," but then committed to "assessing whether additional disclosure may be required," which will include "monitoring and commenting" on the disclosure recommendations put forth by the TCFD.[128] That commitment was echoed in the OSC's latest *Statement of Priorities* (released on June 30, 2017).[129]

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[123] *Ibid* at 17-18.
[124] *Ibid* at 18.
[125] *Ibid* at 20.
[126] *Ibid*. As stated in the Notice, additional guidance regarding disclosure of forward-looking information is set out in CSA Staff Notice 51-330 *Guidance Regarding the Application of Forward-Looking Information Requirements* under NI 51-102 *Continuous Disclosure Obligations*.
[127] *Notice of Statement of Priorities for Financial Year to End March 31, 2017,* OSC Notice 11-775, June 9, 2016, 39 OSCB 5157.
[128] *Ibid*.
[129] *Notice of Statement of Priorities for Financial Year to End March 31, 2018*, OSC Notice 11-777, (2017) 40 OSCB 5449.

On March 21, 2017, the CSA announced a "project to review the disclosure of risks and financial impacts associated with climate change".[130] As part of this project, the CSA committed to gathering information on climate change disclosure in Canada and abroad.[131] The CSA has been engaged in consultation and in gathering information throughout the spring and summer of 2017, and plans to publish a report detailing its review. To date, no further public announcements about the results of this review have been made.

3. Evaluation: Current Disclosure Requirements in Canada

The detailed summary of Staff Notice 51-333 above was undertaken to make a simple point: well-meaning and well-counseled issuers have good, general, principles-based guidance on the disclosure of environmental issues in securities documents and financial statements. What is lacking, however, is specific, clear, and comprehensive guidance on the disclosure of specific climate-related information. There are obvious overlaps between the general environmental disclosure provisions emphasized in 51-333 and some of the aspects of the TCFD Framework. In our view, disclosure in a single document as part of required filings according to the TCFD Framework would give investors a clearer, more consistent, and more easily comparable picture of how companies are thinking about, and managing, their current and future challenges from the changing climate and regulatory efforts to mitigate those changes.

Our view is significantly informed by a recent study undertaken by Chartered Professional Accountants of Canada (CPA Canada), a national organization with over 210,000 members in Canada and abroad.[132] CPA Canada has recognized since 2008 that climate change has "significant implications for disclosures by public companies, both as a result of regulatory obligations and due to increased shareholder interest".[133] As part of its on-going policy work in this area, CPA Canada studied the climate-change disclosure practices of "75 listed companies, representing approximately 78% of the market capitalization of the S&P/TSX Composite Index across 10 major industries."[134] The study found that the majority (79%) of issuers were making some climate-related disclosure, but the disclosure was generally inadequate: there were inconsistent uses of terminology; the information was not comparable within or between

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[130] *News Release: Canadian Securities Regulators Announce Climate Change Disclosure Review Project*, CSA (21 March 2017), online: https://www.securities-administrators.ca/aboutcsa.aspx?id=1567.
[131] *Ibid*.
[132] *See* CPA Canada, *State of Play: Study of Climate-Related Disclosures by Canadian Public Companies*, 2017, at 14, *available at* https://www.cpacanada.ca/en/business-and-accounting-resources/financial-and-non-financial-reporting/sustainability-environmental-and-social-reporting/publications/climate-related-disclosure-study (hereinafter "CPA Study"). Data on CPA's membership can be found in About Chartered Professional Accountants of Canada, *available at* https://www.cpacanada.ca/en/the-cpa-profession/about-cpa-canada.
[133] CPA Canada, *Executive Briefing Climate Change and Related Disclosures* (March 2008) at 3, online: < https://www.cpacanada.ca/-/media/site/business-and-accounting-resources/docs/executive-briefing--climate-change-and-related-disclosures.pdf> [Executive Briefing Climate Change Disclosures].
[134] *See* CPA Study, *supra* note 132, at 14.

industries, 81% of issuers failed to provide specific disclosure about board or senior management oversight of climate-related risks, the majority of issuers failed to provide financial metrics or targets for their strategies regarding climate-change risks, and so on.[135] Only one-quarter of issuers discussed their strategies in light of the transition to a low-carbon economy[136] envisioned by both the Paris Agreement and Canada's Pan-Canadian Framework. When compared to the specific disclosure in the TCFD Framework about the governance, strategy, risk management, and metrics and targets companies are using to evaluate and manage the risks and opportunities of the transition to a low-carbon economy, we argue that there are obvious gaps between what information investors are being provided with today, and what information they would be provided with if the TCFD Framework is incorporated into a National Instrument in Canada.

IV. Investors' Expectations Regarding Climate-related Corporate Disclosure

Today, global investors have demonstrated in many ways that they consider environmental, social, and governance information, including climate-related information, to be economically significant information. Investors with $60 trillion of capital are committed to incorporating ESG factors in their investing and voting decisions as part of the U.N. Principles for Responsible Investment ("PRI").[137] These include " 27 Canadian asset owners, such as the Canada Pension Plan Investment Board, Caisse de dépôt et placement du Québec and the Ontario Teachers' Pension Plan, as well as 41 investment managers, such as AGF Investments, Manulife Asset Management and RBC Global Asset Management."[138] Institutions, pension funds, sovereign wealth funds and mutual funds with $95 trillion of invested capital support CDP's annual survey of companies regarding their greenhouse gas emissions and strategies for addressing climate change.[139] Global assets under management utilizing sustainability screens, ESG factors, and similarly motivated corporate engagement/shareholder action have risen 61% since 2012, to US $21.4 trillion at the start of 2014.[140]

A. Public Pension Funds in Canada

Compared to many other developed economies, the Canadian pension market is still overwhelming comprised of defined-benefit ("DB") pension plans. Thus, as of 2014, 85% of Canadian pension assets under management were held in DB plans; 10% in hybrid plans; and

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[135] *Ibid.,* at 2, Executive Summary.
[136] *Ibid.*
[137] *About the PRI, U.N. Principles for Responsible Investment*, *available at* https://www.unpri.org/about.
[138] CPA Study, *supra* note 132, at 10, *citing* Principles of Responsible Investment Signatory Directory.
[139] *Catalyzing business and government action*, Carbon Disclosure Project, https://www.cdp.net/en-US/Pages/AboutUs.aspx.
[140] Global Sustainable Investment Alliance, *The Global Sustainable Investment Review 2014* 3, 7-8, available at http://www.gsi-alliance.org/wp-content/uploads/2015/02/GSIA_Review_download.pdf

only 4% in defined-contribution ("DC") plans.[141] By way of contrast, in the United States, 42% of pension assets under management are in DB plans, versus 58% in DC plans.[142] Defined-benefit plans being primarily in the public sector and as provided by the federal government as part of Old Age Security,[143] this concentration of pension assets under management draws attention to the policies and expectations of public pension funds in Canada for disclosure of climate-relevant information. As public entities with responsibilities for the well-being of Canadians after retirement, we would expect that the transition risks of climate change would be particularly salient to these investors. We will thus use the expressed views and policies of these public pension funds as illustrative of the expectations of Canadian long-term investors for enhanced climate disclosure, recognizing that not even all long-term investors will have given the issue sustained attention. But to the extent that information is lacking for investors to make intelligent decisions about future trajectories, it will be public pension funds—and their beneficiaries, the citizens of Canada—that will be particularly poorly-served by such gaps.

A recent report by a think tank in the United States, the Bretton Woods II project of New America, evaluated the investment policies of 300 sovereign wealth funds and public pension funds, and after detailed examination published a list of the "most responsible" 25 funds based on the fund's commitment to incorporation of environmental, social, and governance (ESG) information, and disclosure of and accountability for such incorporation.[144] Canada had more public pension funds on the list of responsible investment leaders than any other single country, including six: Alberta Investment Management Corporation (AIMCo), British Columbia Investment Management Corporation (bcIMC), Caisse de depot et placement du Quebec (CDPQ or la Caisse), Canada Pension Plan Investment Board (CPPIB), Ontario Teachers' Pension Plan (Teachers or OTPP), and the Public Sector Pension Investment Board (PSP). In this section we discuss the expressed views of these leading funds regarding their expectations for climate change disclosure. These findings are based on a review of publicly-available information on each entity's website, including statements of each entity's expectations regarding disclosure, the institutions' proxy voting policies and guidelines, and other general guidance notes and reports published by each entity.

Although all of these Canadian responsible investment leaders have publicly committed to "support the voluntary recommendations of the industry-led Financial Stability Board Task

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[141] *See* 21st Century Fiduciary, *supra* note 141, at 38, *citing* Statistics Canada, Table 280-0014 - Registered pension plans (RPPs), members and market value of assets, by funding instrument, sector, type of plan and contributory status, annual, CANSIM (database), 2014.
[142] *See id.*, at 78, *citing* Tower Watson*, Global Pensions Asset Study 2015.*
[143] *See id.*, at 38.
[144] *See* Bretton Woods II Responsibility Asset Allocator Initiative, *Bretton Woods II Leaders' List*, October 18, 2017, *available at* https://www.newamerica.org/in-depth/bwii-responsible-asset-allocator/bretton-woods-ii-leaders-list/.

Force on Climate-related Financial Disclosures"[145] and have, in some of their published reports, recognized the materiality of the risks and opportunities stemming from climate change, the breadth and depth of their discussions of the topic in published reports vary considerably. While some have provided more detailed information on the disclosure requirements expected from investee companies as well as the methods used to assess climate change risk (Caisse, CPPIB and Teachers, in particular), others limit the discussion to high level policy statements, either without providing any concrete information or restricting it to a specific asset type, industry or geography, which is unlikely to be representative of the whole portfolio and their overall climate change risk exposure. One caveat here is that we are using the pension funds' published reports and websites to analyze this issue, which probably do not reflect the full range of the funds' activities, nor, certainly, their analytic methods. The funds' views on climate risk and expectations regarding climate disclosure will be discussed in alphabetical order.

(1) AIMCo

Alberta's Investment Management Corporation was established in 2008 as a Crown Corporation to manage Alberta's public sector pension assets, endowment, and government funds; as of December 31, 2016 it was managing $95.7 billion in assets.[146] AIMCo includes ESG analysis across asset classes, stating that "the consideration of ESG factors and related information enables better investment decisions and supports long-term stakeholder value."[147]

AIMCo emphasizes climate change as a fundamental, systemic risk that is material to its evaluation of its portfolio across asset classes.[148] As it has stated, "We recognize the business imperative of addressing climate change in our investing strategies, and view both the physical and the regulatory risks of climate change as material to our clients' objectives."[149] Without specifically identifying companies in Alberta as at risk, AIMCo does conclude that "[t]he physical and regulatory impacts of climate change create stranded asset scenarios for companies, leading to possible solvency issues and shrinking the investible universe for investors."[150] To address material risks from climate change, AIMCo emphasizes ESG integration, engagement with companies "to promote climate-resilient strategies," [i]nvesting to support lower carbon infrastructure, such as alternative energy solutions and eco-efficiencies to facilitate the transition

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[145] *See* Task Force on Climate-Related Financial Disclosures, June 29, 2017, page 1, "Supporting Companies," https://www.fsb-tcfd.org/wp-content/uploads/2017/06/TCFD-Supporting-Companies-28-June-2017-FINAL.pdf

[146] *See* AIMCo, *Responsible Investment Report 2016-2017*, Oct. 4, 2017, *available at https://www.aimco.alberta.ca/DesktopModules/AIMCoWhitepaper/Whitepapers/AIMCo-RI_Report17-Final-Combined-URL-PDF-Oct02-2017.pdf.*

[147] *Ibid.* at 1.

[148] *See* AIMCo, *Investment Philosophy: Strategic Response to Climate Change*, *available at https://www.aimco.alberta.ca/How-We-Think/Investment-Philosophy.*

[149] *Ibid.*

[150] *Ibid.*

to a lower carbon economy (Positively-themed ESG investments)," reporting on its portfolio activities, and "[p]articipation in collaborative initiatives and support for credible climate change policies and regulations based on achievable emissions reduction targets, water efficiency targets, alternate energy implementation strategies and industry best practices (Advocacy)."[151]

Regarding proxy voting policies, AIMCo emphasizes its support for shareholder proposals on board quality, independence, diversity, and pay aligned with performance.[152] It voted for 42% of environmental shareholder proposals, particularly those calling for increased disclosure of "environmental risk mitigation, performance and action on climate change."[153] On engagement, its key priorities are climate change, supply chain risks, shareholder voting rights, and women on boards,[154] and it engaged with ATCO, Suncor, and Goldcorp, among Canadian issuers, on climate change and indigenous rights issues.[155] Given both its proxy votes for better climate disclosure and its engagement priorities, it is logical to conclude that AIMCo would be well served by companies generally disclosing pursuant to the TCFD Framework.

(2) British Columbia Investment Management Corporation (bcIMC)

British Columbia Investment Management Corporation (bcIMC) " is the fourth largest fund manager in Canada, with $135.5 billion in funds under management as of March 31, 2017.[156] It states that its investment approach is to invest "patient capital for the long term, seeking assets with strong cash flows to create long-term client wealth while managing risks . . . We believe that skills matter; environmental, social, and governance matters make a difference to long-term returns; and high standards of corporate behavior are fundamental to long-term, sustainable performance."[157] Thus "assessing investment risk, including that related to ESG, is integral to fulfilling our fiduciary duties."[158]

In 2015, bcIMC supported 75% of climate change proposals, many of which were seeking better disclosure.[159] Consistent with this investment philosophy, climate change and water, human rights, and shareholder rights are bcIMC's core engagement priorities, areas that

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[151] *Ibid.*
[152] AIMCO *Responsible Investment Report, supra* note 146, at 7-9.
[153] *Ibid.* at 11.
[154] *Ibid.*
[155] *Ibid.* at 16.
[156] bcIMC, *Welcome to the British Columbia Investment Management Corporation, available at* https://www.bcimc.com/.
[157] bcIMC, *Fact Sheet 2017*, *available at* https://www.bcimc.com/publications/pdf/2017AboutbcIMCFactsheet.pdf.
[158] bcIMC, *Responsible Investment Factsheet 2017, available at* https://www.bcimc.com/publications/pdf/2017RIFactsheet.pdf.
[159] *See* bcIMC, *Responsible Investment Newsletter 2016*, *available at* http://read.uberflip.com/i/664765-rin-april-2016.

present "long-term, persistent business challenges."[160] Again, as with AIMCO, given bcIMC's proxy voting record seeking more climate disclosure and its engagement priorities, it is logical to conclude that bcIMC would be well served by companies generally disclosing pursuant to the TCFD Framework.

(3) Caisse de depot et placement du Quebec (CDPQ)

In October 2017, Caisse de depot et placement du Quebec (CDPQ), which manages $286 billion of public pension fund assets,[161] publicly announced an ambitious investment strategy to address climate change.[162] In announcing its strategy, CDPQ stated that its "investment strategy sets out targets and means for taking concrete and constructive action, as an investor, in the global challenge that the transition toward a low carbon economy represents. This is a first step for CDPQ, which will be better positioned to seize profitable investment opportunities and contribute to the fight against climate change."[163]

The strategy CDPQ announced has four aspects: (1) Factoring climate change into every investment decision; (2) increasing its low-carbon investments by 50% by 2020, representing more than $8 billion in additional investments; (3) reducing its carbon footprint by 25% per dollar invested by 2025; and (4) exercising strong leadership in accounting for climate risk.[164] Among the steps CDPQ has undertaken with respect to this latter point is to "participate in initiatives targeting transparency on climate change-related issues (e.g. TCFD, Principles for Responsible Investment, Montreal Carbon Pledge, CDP, Ceres)."[165] Consistent with the TCFD recommendations, CDPQ will publish audited information on its portfolios' GHG emissions when it publishes its annual report.[166]

In order to enact its newly-announced strategy to factor climate into every investment decision it makes, CDPQ will need the high-quality information that disclosure according to TCFD's Framework could potentially produce.

(4) Canadian Pension Plan Investment Board ("CPPIB")

The Canadian Pension Plan Investment Board (CPPIB) is the largest pension fund in Canada and the eighth largest pension fund in the world, by net assets under management as of

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[160] *Ibid.*
[161] CDPQ, *About Us*, *available at* https://www.cdpq.com/en/about-us.
[162] Caisse, *Our investment strategy to address climate change,* October 18, 2017, *available at* https://www.cdpq.com/sites/default/files/medias/pdf/en/investment_strategy_climate_change.pdf.
[163] *Ibid.* at 2.
[164] *Ibid.* at 3.
[165] *Ibid.* at 12.
[166] *Ibid.* at 13.

March 31, 2017,[167] with over $316 billion in assets under management.[168] The CPPIB is a federal Crown corporation and was established in 1997 under the *Canada Pension Plan Investment Act*.[169] Its mandate is clear: "CPPIB invests the assets of the CPP with a singular objective – to maximize returns without undue risk of loss taking into account the factors that may affect the funding of the CPP [Canada Pension Plan]."[170] In that regard, CPPIB "firmly believe[s] that organizations that manage environmental, social and governance factors effectively are more likely to endure and create more value over the long term than those that do not."[171]

To date, CPPIB has been a leader among Canadian institutional investors in climate awareness, as part of its broader recognition of the importance of environmental, social, and governance factors to companies' long-term success. For over a decade it has been pursuing a comprehensive approach to investing in light of the realities of climate change and "seeking enhanced disclosure from large greenhouse gas emitters".[172] During fiscal 2017 it established a cross-departmental climate change working group (CCWG) "with the objective of better addressing climate change as a long-term investment consideration in the years ahead; and, incorporate[ing] climate change into our ERM Framework and semiannual enterprise risk reports to the Board of Directors."[173] CPPIB's mandate is to review activities both from the top-down and the bottom-up and to embed climate change risk assessment in all investment activities. The work from the top includes a fulsome review of investment strategy across all of their asset classes to limit exposure to climate change risk, and from the bottom is working to integrate climate change risk considerations into individual investment decisions.[174] CPPIB's approach to climate risk is described as follows on its website:

ANALYZE	IDENTIFY	SELECT	ENGAGE
Analyze climate change risks in our portfolio companies	Identify engagement objectives considering	Select the best method of engagement: direct,	Engage with companies to seek improved practices

[167] Boston Consulting Group, *Measuring Impact of Canadian Pension Funds*, 5 (October 2015), *available at* http://stream1.newswire.ca/media/2015/12/10/20151210_C8159_PDF_EN_561953.pdf.
[168] *See* Canada Pension Plan Investment Board, *available at* http://www.cppib.com/en/our-performance/
[169] *See Canada Pension Plan Investment Act,* http://laws-lois.justice.gc.ca/eng/acts/C-8.3/
[170] *See* CPPIB, *How we Invest*, *available at* http://www.cppib.com/en/how-we-invest/
[171] *Ibid.*
[172] *See* Addressing climate change for contributors and beneficiaries, *available at* http://www.cppib.com/documents/1497/11141_CPPIB_Climate_Change_FINAL-2.pdf, at 3.
[173] 2017 Annual Report, page 68
[174] http://m.cppib.com/documents/6/11141_CPPIB_Climate_Change_Final_1.pdf (pg 3)

using internal and third-party research.	materiality, time horizon, resource implications and likelihood of success.	collaborative and/or proxy voting.	and enhanced disclosure.[175]

In light of these objectives, the CPPIB states that it is also actively engaging with regulators, intermediaries and the corporations in which it invests to lead and seek enhanced disclosure on environmental and climate-related topics. In additional to direct communication with individual corporations, it also uses an expert third-party, Hermes EOS, to engage companies on a range of climate-change related issues; and it supports CDP as CDP seeks increased disclosure and management of climate change risks from over 5,700 companies in which it invests. In addition, CPPIB partnered with S&P Dow Jones Indices and RobecoSAM to develop the S&P Long-Term Value Creation (LTVC) Global Index, which aims at facilitating the channeling of funds to companies that are better positioning themselves in terms of long-term value creation. The Long-Term Value Creation (LTVC) Global Index uses "both sustainability and financial quality criteria". [176]

CPPIB's Head of Sustainable Investing is one of the members on the Financial Stability Board's Task Force on Climate-related Financial Disclosures. CPPIB has emphasized its participation in the Task Force as evidence of its recognition of this issue as one that presents long-term risks and opportunities for investors.[177]

In terms of proxy voting activity, CPPIB aggregates and publishes annual decision-making data. [178] During fiscal 2016, CPPIB supported 47 shareholder proposals related to enhanced climate change disclosure specifically, and 55/70 shareholder proposals for enhanced environmental and social disclosures generally.[179] This figure includes the co-filing of shareholder resolutions requiring specific climate-related disclosures at the 2016 annual shareholder meetings of both Rio Tinto plc and Gencore plc.[180]

(5) Ontario Teachers' Pension Plan (Teachers)

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[175] *Infra,* at page 49.
[176] CPPIB, 2016 *Report on Sustainable Investing,* p.27, *available at* http://www.cppib.com/documents/4/Sustainable_Investing_2016.pdf.
[177] CPPIB, *How we approach climate Change, available at* https://www.cppib.com/en/public-media/headlines/2017/cppibs-approach-climate-change/.
[178] http://www.cppib.com/en/how-we-invest/sustainable-investing/proxy-voting/
[179] http://www.cppib.com/documents/9/Sustainable_Investing_2016_1.pdf (pg 21)
[180] http://viewer.zmags.com/publication/cd02813c#/cd02813c/44 (pgs 42-43)

The Ontario Teachers' Pension Plan (OTPP or Teachers') is the third largest pension fund in Canada and the twentieth largest pension fund in the world (by net assets under management as of December 31, 2014), with over $171 billion in assets under management. The OTPP is an independent organization jointly sponsored by the Government of Ontario and the Ontario Teachers' Federation.

Teachers' approach to climate change is based on four-pillars: (a) its fiduciary duty to pay pensions to current and future beneficiaries; (b) its responsibility to manage investment risks, which includes assessing climate change exposure; (c) its engagement with companies and policy makers, thus allowing it to use its influence to educate and encourage proper climate change risk policies, disclosures and management, and (d) its search for climate-friendly investment opportunities.[181]

Similarly to CPPIB, OTPP also highlights the need to assess climate change risk at both macro (regulatory issues) and micro (company-specific issues) levels. Considering the range of investments held by OTPP, it has grouped climate change risks into two areas: "risks from physical impacts of climate change and risks from potential climate change regulations". The first includes "water scarcity, rising temperatures, rising sea levels and more frequent or severe storms", and can impact business directly and indirectly through "revenues, operations, expenses, supply chains and distribution"; while the second refers primarily to carbon policies, including carbon tax, cap and trade system and green technologies incentives.[182]

Even though OTPP recognizes SASB's "Sector Guidance" as a useful starting point for identifying key ESG factors, in order to improve consistency and comparability, OTPP has launched a guide mainly for oil and gas investee companies, which clarifies OTPP's expectations about ESG disclosures. OTPP's "desired format" of sustainability reporting is divided into two sections: (1) governance and (2) strategy and operations. OTPP breaks governance items into three subcategories, which it will engage reporting issuers on: (a) strong culture for responsible corporate behaviour, (b) appropriate prioritization of material sustainability factors, and (c) effective board oversight. It also breaks its strategy and operations section into three subsections which it will engage reporting issuers on: (a) external actions on climate change that impact the company's strategy or operations, (b) the impact or potential impact of the company's strategy and operations on the environment and communities and (c) potential external/physical impacts

[181] https://www.otpp.com/investments/responsible-investing/perspectives/climate-change.

[182] CLIMATE CHANGE: Separating the Real Risks for Investors from the Noise, *available at* https://www.otpp.com/documents/10179/20936/-/7726319b-b1cf-4bbc-8775-7e3c6f28a858/Separating+the+Real+Risks+for+Investors+from+the+Noise.pdf

on a company's operations or strategy".[183] The guide includes a list of required information, the reasons for such requests and samples of best practices. OTPP states it has and will continue to seek and engage corporations in detailed discussions that show a systematic integration of relevant ESG considerations into corporate processes backed by appropriate metrics.

OTPP notes specifically the TCFD as a promising development in financial report and states the principles from the Phase I report guide its requests for information from companies. It encourages companies to consider these principles when providing ESG disclosures. It is also looking to reduce duplication and other inefficiencies in the current sustainability disclosure landscape.

On the specific topic of the TCFD, Teachers opines that "While it is too soon to tell if the TCFD's work will achieve its objectives, if successful, it would provide a single, globally-consistent, framework for financially-relevant disclosures for all organizations, including pension funds such as Ontario Teachers', thereby reducing duplication and other inefficiencies in the current sustainability disclosure landscape."[184]

(5) Public Service Pension Investments (PSP)

Public Service Pension Investments (PSP) manages the pension assets of public service employees such as the Canadian Armed Forces, the Royal Canadian Mounted Police, and the Reserve Force, currently valued at $135.6 billion.[185] On its website in late October, PSP featured a press release entitled "Institutional Investors Release Declaration on Financial Risks Related to Climate Change, " in which $1.02 trillion of invested capital from Canada and abroad call on companies to disclose climate related financial risk. Featured was PSP CEO André Bourbonnais in the following statement : "I am proud to see the financial community rallying around this key issue. As institutional investors, we all have a role to play to promote increased transparency and better climate change disclosure practices from the companies we invest in." This is a straight-forward indication of the importance of TCFD disclosure to PSP, which had been featured in the press release.

Conclusion

Leading public Canadian investors, who also are leading globally on ESG integration, are clear that climate change presents material risks and opportunities to long-term investors. In order to take advantage of the opportunities, and mitigate the risks, better disclosure is required.

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[183] OTPP, *Our Approach to Sustainability Disclosures, available at* https://www.otpp.com/documents/10179/20936/Our+Approach+to+Sustainability+Disclosures/8fb4386f-4f25-49ea-9773-45e831cea7d0.
[184] *Ibid*.
[185] PSP, *About Us, available at* www.investpsp.com/en.

We presume it is for that reason that Canada's leading public pension investors have all endorsed the TCFD Framework for climate related financial disclosure.

IV. Potential Issuers' and Directors' Liability for Inadequate or Misleading Climate-related Disclosure

In this final section of the White Paper, we discuss potential claims against issuers and directors for climate-change related disclosure or non-disclosure, based on the securities requirements and National Instruments, as discussed above, and based on the state of current Canadian disclosure, as discussed in Section III, above. To frame this analysis, we start with an overview of current climate-related litigation in other jurisdictions.

A. The Current State of Climate Change Legislation and Litigation

A recent report published by the *Grantham Research Institute on Climate Change and the Environment* offers an overview of current climate change legislation and litigation.[186] First, both climate change laws and climate change litigation are on the rise. Between 2009 and 2013, climate change laws were passed at a rate of approximately 100 new laws per year globally; since 2013, the rate of passage of new laws has decreased to approximately 40 laws per year.[187] Overall, 164 countries have passed 1200 climate change laws and policies since the Kyoto Protocol was ratified in 1997.[188] The slowdown in the number of laws being passed can be attributed to the previously passed laws that cover a large range of rudimentary environmental issues.[189] In other words, existing environmental laws are fairly comprehensive, which reduces the need to pass new laws. Not surprisingly, the majority of laws that are sector specific focus on the energy industry.

Of the 164 countries surveyed in Grantham's report, 88% had integrated some form of climate-related considerations into their energy policies.[190] These energy-related laws and policies account for 41% of the laws and policies included in the Grantham report dataset.[191] In particular, these policies and laws focus on conservation, efficiency, and renewable energy.[192]

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[186] Michal Nachmany, Sam Fankhauser, Joana Setzer and Alina Averchenkova, "Global trends in climate change legislation and litigation: 2017 Update", The Grantham Research Institute on Climate Change and the Environment (9 May 2017) at 5 [Grantham Report].
[187] *Ibid.*
[188] *Ibid* at 8.
[189] *Ibid* at 10.
[190] *See Grantham Report, supra* note 134, at 12.
[191] *Ibid*.
[192] *Ibid*.

Regarding litigation, the Grantham report categorized climate litigation according to its core objective, the four it identified being: (i) administration, (ii) protection/loss and damage, (iii) legislation/policies, and (iv) information/disclosure.[193] *Administration* litigation challenges the approval of particular projects or activities and is the most common type of litigation, representing 78% of the cases put before the courts.[194] *Protection/loss and damage* lawsuits deal with personal property damage or injury caused by climate change-related events; this category accounts for 8% of the total.[195] *Legislation/policies* based litigation calls for new laws and policies or halts existing ones, and it accounts for 8% of the total.[196] The final and smallest category of climate litigation (representing 7% of the total) is *information/disclosure*, which involves cases where the plaintiffs require further information from a government or firm.[197] These cases typically involve "climate risk disclosure, or claims for misleading or incomplete information."[198] The Grantham report does not identify any of these *information/disclosure* related cases as having originated in Canada, and nor could we find any—yet.[199]

An analysis by the Sabin Center for Climate Change Law at Columbia University and the United Nations Environment Program gives additional details on climate change litigation around the world. It found that as of March, 2017, there were 884 climate change cases filed in 25 different countries, of which 654 were filed in the U.S. alone.[200] A case was counted as a "climate change case," in either administrative, judicial, or other investigative proceedings, where the case centrally raised "issues of fact or law" concerning "the science of climate change and climate change mitigation or adaptation," and excluding incidental references to climate

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[193] *Ibid* at 14.
[194] *Ibid* at 15.
[195] *Ibid*.
[196] *Ibid*; As stated by the *Grantham Institute*, "these cases would typically be brought against governments in order to drive the course of climate change policies and regulation". The *Urgenda* case in the Netherlands (2015) is the best example of this kind of litigation. In that case, the Hague District Court agreed with the claimant (Urgenda) and ordered the Dutch government to reduce the country's emissions by at least 25% from 1990 levels by 2020, as opposed to a previously set reduction of 17%. The case is currently on appeal.
[197] *Ibid*.
[198] *Ibid*; the BUND and Germanwatch vs. Federal Republic of Germany (2006) case is a clear example in which two "NGOs successfully invoked the German Access to Environmental Information Act to compel the government to release information on the climate change impacts of German export credits".
[199] Though it is difficult to identify environmental disclosure cases currently before the courts or Commissions in Canada, many issuers have been identified by SHARE Canada for deficiencies in their disclosures. SHARE Canada, a "Canadian leader in responsible investment services, research and education" has identified several issuers that it argues have failed to provide adequate environmental disclosures. *See* SHARE: Jessica Lukawiecki & Laura Gosset, "Taking Climate on Board: Are Canadian energy and utilities companies boards equipped to address climate change?" *Shareholder Association for Research and Education* (January 2017) at 9-12, online: <http://share.ca/documents/investor_briefs/Environment/2017/Board_Climate_Competency_Report_Final.pdf>.
[200] *See* Michael Burger & Justin Gundlach, for the U.N. Environment Programme and Sabin Center for Climate Change Law, *The Status of Climate Change Litigation: A Global Review* (2017), *available at* http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf.

change.[201] Thirteen of the cases are in Canada,[202] although there is no discussion of them in the report.

B. Cases Studies of Potential Litigation

We evaluate the litigation risks to issuers from the implications of the transition to a low-carbon economy by sketching out three potential kinds of litigation that might be possible in Canada where companies (1) fail to discuss financially material transition risks; (2) materially misstate the value of a company's assets in light of "stranded assets" and unburnable carbon; or (3) materially misstate the risks of continued extraction and use of a high-carbon product such as oil, gas, or coal.

1. Material omissions of facts concerning transition risks: Kinder Morgan Canada Ltd. [203]

On May 16, 2017, Greenpeace Canada submitted a complaint to the Alberta Securities Commission (ASC), the Ontario Securities Commission, and the CSA, alleging that Kinder Morgan Canada Ltd. (Kinder Morgan) failed to provide full, true, and plain disclosure of all material facts in a prospectus being prepared to use to distribute its securities during an IPO announced on May 10, 2017.[204] This claim was grounded in two alleged breaches of securities laws:

[1] that Kinder Morgan used out-dated oil demand projections, which may have potentially misled investors by portraying an overly optimistic view of the international oil market;[205] and

[2] that Kinder Morgan failed to make adequate disclosures on the impact that climate change related risks may have on its business model.[206]

In response to these alleged breaches, Greenpeace Canada made a formal request to the ASC asking it to halt Kinder Morgan's efforts to raise money for the Trans Mountain Expansion pipeline in the IPO until the company adequately disclosed climate change related risks to

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[201] *Ibid.* at 10.
[202] *Ibid.*
[203] Submission from Greenpeace Canada to Alberta Securities Commission (16 May 2017) on Kinder Morgan Canada Limited's failure to meet Canadian disclosure obligations, online: http://www.greenpeace.org/canada/Global/canada/file/2017/05/Greenpeace-letter-to-securities-regulators-on-Kinder-Morgan-IPO.pdf [Greenpeace Submission].
[204] *Ibid* at 1; see also *Alberta Securities Act*, SA 2000, c S4, s 113(1) [ASA] and *Ontario Securities* Act, RSO 1990, c S5, s 56(1) [OSA].
[205] *Ibid*.
[206] *Ibid*.

potential investors. The ASC stated that it would give the Greenpeace complaint "the consideration we deem appropriate."[207]

Greenpeace alleged that Kinder Morgan's analysis in its prospectus of "climate policy risks" (or *regulatory risks*, as discussed in Section III, above) is incomplete. In particular, Greenpeace claimed that Kinder Morgan erred when it relied exclusively on the International Energy Agency's (IEA) *New Policies Scenario* forecast that was most favourable to the company, in which demand for oil continues to grow because aggressive climate policies are not adopted in the future.[208] Greenpeace alleged that the inclusion of a single climate change scenario was materially misleading, given that the scenario which was used ignored other IEA scenarios that forecast decreased demand for oil if governments took actions to achieve the *Paris Climate Agreement* goal of keeping warming well below 2° Celsius.[209]

As discussed in Section III above, "transition risks", which are the financial risks resulting from the transition towards a low-carbon economy, will prompt a reassessment of the value of a large range of assets. Greenpeace also argued that there are three risks to which Kinder Morgan is materially exposed should the global economy take meaningful action on climate change:

- *transition risks*: i.e., the business and financial risks associated with the adjustment of the world economy from high carbon intensity to much lower carbon intensity over the coming years;[210]
- *business risks*: i.e., increased operating costs, increased capital costs, the potential for assets (e.g. exploration licences, oil and gas reserves, or infrastructure required to develop those reserves) to become 'stranded', reputational damage and/or a reduced market valuation;[211] and
- *physical risks*: i.e., the risk of the physical impacts of climate change (extreme weather, sea level rises, water scarcity) damaging the economic value in the business.[212]

As discussed above, the CSA is evaluating the standards suggested by the TFCD with respect to disclosure of transition risks, but is not expected to issue a report on its evaluation until January of 2018 at the earliest. Even without CSA's explicit adoption or endorsement of the TCFD's Framework for the disclosure of transition risks, however, the failure to incorporate

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[207] *Ibid.*
[208] *Ibid* at 7; in particular, Greenpeace Canada argued that, "by failing to reference either the *450 Scenario* or the *66% Scenario*, [Kinder Morgan 's] Prospectus [failed] to present the IEA's alternative market forecasts", thereby misrepresenting significant risk to the Company's business model."
[209] *Ibid* at 8.
[210] *Ibid* at 11.
[211] *Ibid*.
[212] *Ibid*.

transition risks into a prospectus could potentially be found to be a material omission. Staff Notice 51-333 does indicate that, under NI 51-102, issuers are required to consider business risks and physical risks that are likely to materialize. A full and robust exploration of these kinds of risks involves the holistic consideration of readily accessible market data. According to Greenpeace Canada, Kinder Morgan failed to address the ways in which it was exposed to climate-related business risks by ignoring the possibility that Canadian and international governments might adopt more stringent climate regulations. Furthermore, Greenpeace Canada argued that Kinder Morgan failed to meaningfully address the physical risks posed by climate change, particularly increasingly volatile weather events causing damage or increased expenses for oil extraction and transmission. These deficiencies were exacerbated by Kinder Morgan's use of the IEA's overly optimistic oil demand forecasts.

Given recent policy moves in China and India aimed at boosting the use of electric vehicles, Greenpeace further argued that the IEA forecasts used by Kinder Morgan in its prospectus are out-dated.[213] The IEA has already expressed its intention to revise its estimates for oil demand downward.[214] With Asiatic countries adopting more aggressive measures to reduce oil consumption, there is the potential that the Trans Mountain Expansion pipeline (designed for the purpose of delivering oil to these markets) may become stranded at worst or, at the very least, greatly underperform Kinder Morgan's targets. Thus, Kinder Morgan could be found to have breached securities laws requirements with respect to its future oriented financial information, as it would likely fail to meet the threshold of the information being substantively reasonable by forecasting future profits using out-dated IEA models for global demand,[215] and by failing to address the risk that demand may drop in Asian markets.

In short, though Canadian law does not now specifically require a 2° Celsius scenario analysis, it may be the case that issuers are required to consider this scenario in the wake of the *Paris Agreement.* As it stands, issuers' MD&A must consider and discuss the actual and potential material financial effects of identified trends or uncertainties, and the *Paris Agreement* is such an identified uncertainty: how will it translate into regulation, both domestically and globally?[216] Moreover, actions taken by jurisdictions such as China and India (among many others) to reduce oil consumption are an identified trend that needs to be discussed as well in an extractive issuer's MD&A. Failing to do so, as Greenpeace alleged Kinder Morgan failed to do, could lead to litigation or liability risk under current Ontario provisions and national instruments.

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[213] *Ibid* at 9; China wants alternative fuel vehicles to account for a fifth of the projected 35 million yearly vehicle sales by 2025, while India is considering the electrification of all vehicles by 2032.
[214] *Ibid*.
[215] See section 3 above.
[216] *See SA* NI 51-333, *supra* note 65, at 8, discussing Form 51-102F1 *Management's Discussion & Analysis*, Part 1(a) and Item 1.4(g).

Subsequent to the Greenpeace complaint, Kinder Morgan changed its prospectus to include additional climate risks, including physical risks from extreme weather and rising seas, as well as transition risks such as negative impacts on its business arising from national and international progress on meeting the Paris goal to reduce global demand for hydrocarbons.[217] We have identified no public information concerning whether the ASC asked for these changes.

2. Overstating the Value of Stranded Assets

Among the industries most vulnerable to disruption of their business model in the transition to a low-carbon economy are the oil, gas, and coal industries. Carbon Tracker, U.N. Principles for Responsible Investment, and leading public institutional investors recently published a study of the value of "stranded assets," those "unburnable" assets that must stay in the ground if the goal of keeping global temperature increases to 2℃ or less is to be met. Evaluating the stated economic value of the assets in the ground of 69 oil and gas companies, the report concluded that "across the oil and gas industry $2.3 trillion of upstream projects – roughly a third of business as usual projects to 2025 – are inconsistent with global commitments to limit climate change to a maximum 2˚C."[218] If an oil, gas, or coal company values its assets in the ground without serious discounting for the possibility that some significant percentage of those assets are "stranded," because unburnable under their country's commitments to the Paris Agreement, that company can be materially misstating its financial position and business risks.

A case was recently brought against ExxonMobil in the U.S. on this theory. Here we briefly set out the allegations in that case, and then evaluate whether a similar case could be brought in Canada against Canadian oil or gas companies based on Canadian securities law.

1. Ramirez v. ExxonMobil

On November 7, 2016, purchasers of Exxon Mobil's common stock (from February 19, 2016 to October 27, 2016, or the "Class Period") filed a class action lawsuit against ExxonMobil (Exxon) seeking compensation for investor losses arising from a breach of securities law disclosure obligations.[219] In particular, the complaint "alleges that throughout the Class Period, Exxon repeatedly highlighted the strength of its business model and its transparency and

[217] See K. Stewart, "*Kinder Morgan investors should be prepared to lose their shirts*", 29 May 2017, available at http://www.greenpeace.org/canada/en/blog/Blogentry/kinder-morgan-investors-should-be-prepared-to/blog/59522/.
[218] Carbon Tracker Initiative et al., "Two Degrees of Separation: Transition Risk for Oil and Gas in a Low Carbon World", 2017, *available at* http://www.carbontracker.org/report/2-degrees-of-separation-transition-risk-for-oil-and-gas-in-a-low-carbon-world/.
[219] *Pedro Ramirez Jr v Exxon Mobil et al*, No. 16-3111 (ND Tex 2016). Citations in this document are to the initial complaint filed in the case. There is now an Amended Complaint, filed July 26, 2017. Citations to that complaint will be substituted before publication of this White Paper.

reporting integrity, particularly with regard to its oil and gas reserves and the value of those reserves."[220]

The complainants allege that Exxon's public statements were materially false and misleading when made as they failed to disclose that:

[1] "Exxon's own internally generated reports concerning climate change recognized the environmental risks caused by global warming and climate change";[221]
[2] "given the risks associated with global warming and climate change, Exxon would not be able to extract the existing hydrocarbon reserves Exxon claimed to have and, therefore, a material portion of Exxon's reserves were stranded and should have been written down"; and[222]
[3] "Exxon had employed an inaccurate "price of carbon" – the cost of regulations such as a carbon tax or a cap-and-trade system to push down emissions – in evaluating the value of certain of its future oil and gas prospects in order to keep the value of its reserves materially overstated".[223]

The lawsuit claims that, during the class period, the price was artificially inflated by virtue of Exxon overstating the value of its assets, eventually reaching $95/share.

Towards the end of the class period, Exxon announced that the U.S. Securities and Exchange Commission (SEC) was evaluating Exxon's accounting for the value of its oil and gas reserves. Then, "on October 28, 2016, before the open of trading, Exxon issued a release announcing its financial results for the quarter ended September 30, 2016. Exxon disclosed that it might be forced to write down nearly 20% of its oil and gas assts. Specifically, the Company acknowledged that it might have to write down 3.6 billion barrels of oil sand reserves and one billion barrels of other North American reserves that Exxon now conceded were not profitable to produce under current prices." Once this information about Exxon's potential write-down entered the marketplace, plaintiffs alleged that they suffered damages through a $2/share decline in the value of Exxon's shares from its alleged artificially high price.[224]

This litigation is proceeding, albeit slowly. The Pennsylvania Carpenter's Union Pension Fund, an institutional investor, was substituted as lead plaintiff recently, and an Amended

[220] *Ibid*., para. 3
[221] *Ibid*.
[222] *Ibid*.
[223] *Ibid*., para. 5
[224] *Ibid*., para. 6

Complaint filed on July 26, 2017.[225] Exxon has until September 26, 2017 to answer or move to dismiss.[226]

2. A stranded asset case in the Canadian context

The recent Carbon Tracker/U.N. PRI report cited above suggests that there could be Canadian oil and gas companies currently at risk of overstating the value of their assets still in the ground, and/or failing to discuss material transition risks in their MD&A.[227] In that report, the capital expenditures currently underway or publicly announced by 69 oil and gas companies were analyzed to determine what percentage of those expenditures will be "stranded" if global efforts undertaken pursuant to the Paris Agreement to limit increases to 2 are successful. Canadian oil and gas companies, perhaps not surprising, are at risk: 50-60% of Imperial Oil, Vermillion and Encana's expenditures will become stranded, according to the analysis, and 40-50% of Husky's and Suncor's expenditures will also become stranded if regulators truly act to limit global warming to 2 °C.[228]

In the Canadian context, it is likely that a company acting as Exxon is alleged to have acted would risk, at a minimum, being found to have misrepresented its business and operations in two ways: (1) by having failed to disclose an asset retirement obligation (ARO); and (2) by overstating its oil and gas prospects such that its forward-looking information misled investors. Presumably there would also be implications for the accuracy of such a company's financial statements, and the risk of material misstatements in the financial statements.

As outlined in Section III, above, the CSA is of the view that, if an ARO is material to an issuer, the issuer should disclose the ARO in both the financial statements and its Management Discussion & Analysis (MD&A). Specifically, an issuer's MD&A should include a comprehensive discussion of commitments, events or uncertainties, including AROs that are reasonably likely to have an effect on the issuer's business. Finally, AROs are generally incurred over more than one reporting period, and information should be provided for all periods that may be materially impacted.[229] With that said, a company in Exxon's position would likely be found to be in breach of its securities obligations in Canada for having failed to disclose that its

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[225] Data gathered from PACER, which publishes federal court dockets, but the underlying documents are not available without a subscription.
[226] *Ibid.*
[227] *See* Two Degrees of Separation, *supra* note 196.
[228] *See* Two Degrees of Separation, *supra* note 196, at 7. These percentages for potentially stranded assets are comparable to some of the global oil majors: Exxon is analyzed to risk 40-50% of its current and announced capex; Chevron 30-40%, and Royal Dutch Shell 30-40%.
[229] NI 51-333, *supra* note 65, at 14-15.

hydrocarbon reserves were stranded as a result of the environmental risks imposed by climate change (i.e. an omission).

A company in Exxon's position would also likely be liable for providing an untrue statement of a material fact. In specific, such a company would likely be found to have breached securities laws requirements with respect to its future oriented financial information. In general, all information about the future offered in a disclosure document must be substantively reasonable. To reinforce this standard, NI 52-102 requires issuers to disclose the assumptions used to ground their assertions.[230] Assuming a Canadian company did, in fact, overstate its oil and gas prospects in its forward looking information, Canadian securities regulators might find that such a company had failed to meet the threshold of substantive reasonableness in its assumptions about future regulatory efforts or the likely "price of carbon" and how those might affect its business and products. Certainly a material overstatement of the value of assets would likely be considered influential in a reasonable investor's decision whether or not to buy a company's securities.[231]

Though the above summary of the claims made (or claims that may possibly be made in the Canadian context) against Exxon or a comparable company is cursory, it provides some insight into how a complaint may be grounded in Canada if another issuer's disclosure materials contained similar misrepresentations.[232] The *Ramirez* case has just begun, yet while it proceeds, Exxon is suffering reputational damage. As of May 31, 2017, a 62% percent majority of Exxon shareholders voted in favour of a shareholder proposal calling on it to assess and disclose how it is preparing its business for the transition to a low-carbon future.[233] According to an article in the *New York* Times, Exxon's management fought to sway investors to abandon the proposal up until the day of the shareholder meeting.[234] At the least, it seems Exxon's shareholders have lost confidence that Exxon's disclosure is adequate for them to evaluate its business trajectory, strategy, and risks in light of the transition to a low-carbon economy.

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[230] See NI 51-102 *Continuous Disclosure Obligations*, Part 4A Forward-Looking Information.
[231] *Ibid* at 5.
[232] Note that NI 71-101 *The Multijurisdictional Disclosure System* permits a distribution of securities previously issued and distributed in the U.S. to be distributed in Canada, so long as the securities and the corresponding prospectus comply with U.S. securities laws (and vice versa). Under this system, documents incorporated in a U.S. filing are deemed to be incorporated in a multijurisdictional prospectus (s. 4.4). Under 71-101, there are several additional prospectus requirements for U.S. securities that are distributed in Canada. For details, refer to Part 3 and 4 of NI 71-101. Some notable additional requirements include: legends indicating the prospectus is being prepared in accordance with U.S. law (s. 4.3(b)(i)), the reconciliation of financial statements so that they are in compliance with Canadian GAAP (s. 4.6), and the need for additional CEO, CFO, and board certifications (s. 4.7).
[233] https://www.ceres.org/news-center/press-releases/exxonmobil-investors-make-history-majority-vote-climate-risk-disclosure
[234] Diane Cardwell, "Exxon Mobil Shareholders Demand Accounting of Climate Change Policy Risks", *The New York Times* (31 May 2017), online: < https://www.nytimes.com/2017/05/31/business/energy-environment/exxon-shareholders-climate-change.html>.

3. **Understating the risks of a company's products**

One additional type of claim that is proceeding in the United States against Exxon is that it materially misstated the risks of continuing use of its products, so continuing to extract, transport, and burn hydrocarbons with their attendant GHG emissions, while knowing that these actions risked the serious, long-term consequences of climate change. This claim has been investigated since late 2015 by [fourteen] state Attorneys General in the U. S., led by N.Y. A.G. Eric Schneiderman and Massachusetts A.G. Maura Healey. This type of claim obviously raises important issues of public policy, and First Amendment free speech defenses which, for purposes of our securities analysis, we will set aside for the moment, and concentrate on one aspect of the case that may have implications under both U.S. and Canadian securities laws, which is being pursued by A.G. Schneiderman: Did Exxon materially misstate to its investors how it was incorporating the threat of carbon pricing in its forward planning? With respect to this claim below, we will briefly set out the claim and legal argument for a violation under U.S. law, and then evaluate such a claim under Canadian securities law. (Note: more can clearly be done here before this White Paper is published.)

Proxy pricing

There have been few details from the A.G.'s investigations about which specific aspects of Exxon's statements are being investigated, although the general parameters are as stated above: that Exxon lied to its investors and to consumers about the risks of continuing to extract, transport, and burn oil and gas, which would have material consequences to its business that it omitted to state (both from the physical changes wrought by climate change and from regulatory efforts to mitigate those changes). Recently, however, one strand of the N.Y. case has become public, and that is A.G. Schneiderman's claim that it has uncovered evidence that Exxon was using one "proxy cost" of carbon in its forward planning that was significantly lower than the "proxy price" of carbon it was telling its investors, starting in 2010, that it was using in that planning.[235]

So, as described by Bloomberg News, "Schneiderman's filing [seeking to compel production of additional documents and e-mails and to make an Imperial Oil company employee available for a deposition] focused on Exxon's claim that it applies so-called proxy costs to greenhouse gas emissions, which the company says 'reasonably approximates the range of potential future government actions with respect to climate change.'"[236] Schneiderman said

[235] Erik Larson, *Schneidrman Says Exxon's Climate Change Proxy Costs May Be A 'Sham,'* Bloomberg, June 2, 2017, *available at* https://www.bloomberg.com/news/articles/2017-06-02/n-y-says-exxon-s-climate-change-proxy-costs-may-be-a-sham.
[236] *Ibid.*

Exxon regularly cites the proxy costs [of $60 to $80 per ton of carbon in the future] to "assure investors that none of Exxon's projects or assets will be materially affected [become stranded] by future climate change-related regulations,"[237] while not actually using proxy costs in its internal planning, but for one "anomalous incident."[238] Schneiderman is also seeking the testimony of an employee of Exxon's majority-owned Canadian subsidiary, Imperial Oil, who was alleged to have been told not to use any proxy cost in evaluating tar sands investments.[239]

If these factual allegations are substantiated by the evidence, these would appear to be clear misstatements and/or omissions under Section 10(b) and Rule 10b-5 under U.S. law. For private parties to bring that cause of action, they must allege and eventually substantiate that Exxon, acting with an intent to deceive investors or recklessness about the propensity of its statements to deceive investors, misstated material facts, or omitted to state material facts required to be disclosed, on which the plaintiffs relied in connection with the purchase or sale of securities, causing damages. Plaintiffs here would likely contend exactly what A.G. Schneiderman apparently said in court: the very purpose of stating that it is using high proxy costs of carbon is to reassure investors that its assets will not become stranded, and that its capital expenditures for projects with a twenty to thirty to fifty year lifespan make sense. The N.Y. A. G. has additional causes of action it can pursue under N.Y. state law, in particular the very powerful Martin Act cause of action. The Martin Act provides for either civil or criminal charges, which only requires showing a material misstatement or omission, and does not have a *mens rea* requirement or a showing of an intent to deceive or recklessness.

If claims of this sort (stating publicly that a realistic proxy cost of carbon had been used in analyzing capital expenditures for new development and projects, and it is substantiated that either no cost of carbon was used or an unrealistically low one was used) were to be brought against a Canadian issuer, what would the likely analysis be? First, it should be recognized that Canada is soon to have actual costs of carbon in most provinces, although they may be somewhat low, so it is possible that Canadian oil, gas, and coal companies would not have this problem. It is, however, *future* costs of carbon that since 2010 Exxon said it was using in its forward planning, and which it allegedly wasn't using. If such claims were to be brought against a Canadian company, there could well be litigation and liability risk. Material facts in Canada are defined objectively, and investors are entitled to "full, true, and plain disclosure" of "facts that would reasonably be expected to significantly affect the market price or value of the securities."[240] Facts that could illuminate the likelihood that current capital expenditures would become wasted in the medium to long term would likely significantly affect the market price of a

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[237] *See ibid.*
[238] *Ibid.*
[239] *Ibid.*
[240] YBM Magnex International Inc., (2003), 26 OSCB 5285, paras. 154, 91.

company's securities today, particularly as long-term investors discounted the shares to reflect increased risks. Thus it would be likely that securities risk would follow if a Canadian company engaged in the kinds of misstatements that Exxon is alleged to have engaged in.

Conclusion

Presumably there are other kinds of claims that can, and perhaps will, be brought in Canada addressing material misstatements or omissions in companies' prospectuses or continuing disclosure. The primary risks are clear: stranded assets will need to be written down, financial values adjusted, and companies' transition plans discussed in adequate detail for investors to make intelligent asset allocations.

Canadian public investors have been judged to be global leaders in integrating sustainability factors, such as environmental, social, and governance data, in their investment, engagement, voting, and advocacy practices. We urge Canada and its investors to also be public leaders in incorporating climate change risks and opportunities into capital market practices, and leading developed countries in the direction of intentional low-carbon economies.