

CLIMATE-RELATED DISCLOSURE FOR CANADIAN ENERGY COMPANIES – GETTING READY FOR THE MANDATORY REGIME: VOLUNTARY GUIDELINES, RULE PROPOSALS, GOVERNANCE IMPLICATIONS, AND BEST PRACTICES TO AVOID GREENWASHING ALLEGATIONS

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Canadian energy companies are increasingly releasing corporate statistics, metrics, and strategy on climate-related matters to the public. These disclosures, offered both independently and in response to investor and stakeholder demand, detail strategic management of risks and opportunities related to a company's present and future environmental impact. The Task Force on Climate Related Financial Disclosures (TCFD) and the International Sustainability Standards Board (ISSB) have helped to standardize voluntary disclosure frameworks and standards, influencing recent proposals for mandatory disclosure rules issued by securities regulators in Canada and the United States. This article presents a comprehensive review of this fast-shifting landscape, outlining governance implications and best practices to help organizations navigate these complex regulatory developments. In this context, it also presents noted trends and international perspectives to help Canadian companies manage legal exposure to civil and regulatory "greenwashing" allegations stemming from voluntary and mandatory public disclosures.

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I. INTRODUCTION

Many Canadian energy companies are already making voluntary climate-related disclosures. These companies are both responding to investor and other stakeholders' expectations and also taking the opportunity to lead in this developing area. A confusing array of voluntary disclosure frameworks has developed, but, more recently, the market's desire for standardized and more comparable disclosures has led to a coalescing of voluntary frameworks around the Task Force on Climate-Related Financial Disclosures (TCFD) disclosure framework and the work of the International Sustainability Standards Board (ISSB) in developing disclosure standards. Regulatory proposals for mandatory climate-related disclosure rules have been put out by the Canadian Securities Administrators (CSA) and the United States Securities and Exchange Commission (SEC), in parallel with the development of the ISSB climate-related disclosure standard which was released on 26 June 2023. This article reviews these regulatory developments, taking account of recent updates to 5 July 2023. The key governance implications for organizations preparing to comply with these rules are outlined in the form of a set of governance best practices. Organizations should be considering these issues now.

In connection with the increase in both voluntary and mandatory disclosure of climate-related matters, companies should be prepared to face a heightened risk of exposure to allegations of unsubstantiated or misleading claims regarding their environmental performance, otherwise known as "greenwashing." This article discusses Canadian trends in greenwashing allegations, as well as recent regulatory actions and civil litigation claims in the United Kingdom and the United States with a view to how Canadian companies can best protect themselves from both regulatory and civil greenwashing claims.

II. TERMINOLOGY

A discussion of climate-related disclosure requires an understanding of some terminology. This section outlines what we mean in this article by certain often-used terms.

Environmental, Social, and Governance (ESG) and sustainability have different meanings though they are related. Various efforts have been made to define these two terms, but in simple terms, ESG refers to a set of criteria used to assess a company's environmental, social, and governance impact, while sustainability is the capacity to maintain or endure, focusing on the interplay of environmental, social, and economic factors.¹ ESG is a methodology to help measure and report on an organization's impact through an environmental lens (for example, waste management, air quality, climate change, or biodiversity), a social lens (for example, diversity, inclusivity, human rights, labour standards, or safety), and a governance lens (for example, board composition, executive

¹ "The Difference Between ESG and Sustainability and Why It Matters" (7 July 2022), online: *GEP* [perma.cc/DXB7-ALGQ].

compensation, ethics, or lobbying).² Corporate sustainability is the property of being environmentally sustainable — the degree to which a process or enterprise is able to be maintained or continued while avoiding the long-term depletion of natural resources.³ Examples of sustainability initiatives would be going paperless and working on energy efficiency.⁴

“Climate-related disclosure” primarily lies within the “E” of ESG. In this article, we use the TCFD framework to capture what we mean by climate-related disclosure: disclosure of how climate-related risks and opportunities are identified, assessed, and managed, how those risks and opportunities impact strategy, and the targets and metrics used to measure emissions.⁵ Note that “climate-related risks” can include physical risks, both acute (for example, flooding) and chronic (for example, increasingly volatile weather), and transition risks, like policy and legal, technology, market, and reputation risks associated with the transition to a lower carbon economy.

Greenhouse gas (GHG) emissions are often described as either “Scope 1,” “Scope 2,” or “Scope 3” emissions. The three scopes of GHG emissions are classified according to the GHG Protocol, which is a protocol built by a partnership between World Resources Institute and the World Business Council for Sustainable Development. The GHG Protocol establishes comprehensive global standards to measure and manage GHG emissions and mitigation actions.⁶ The GHG Protocol Corporate Standard classifies GHG emissions as follows: “Scope 1 emissions are direct emissions from owned or controlled sources. Scope 2 emissions are indirect emissions from the generation of purchased energy. Scope 3 emissions are all indirect emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions.”⁷

The term “greenwashing,” like many terms regularly used in ESG parlance, has no universal definition. It has been defined as “unsubstantiated or misleading claims regarding an actor’s environmental performance” or “the selective disclosure of positive environmental or social impacts of a company’s business practices, without complete disclosure of negative impacts.”⁸ Where energy companies are concerned, some non-governmental organizations (NGOs) have described greenwashing as “making dubious statements about the industry’s direct and indirect impacts on the climate and environment, and more recently, about the sector’s efforts to reduce carbon emissions.”⁹

² “ESG vs. Sustainability: What’s the Difference?” (24 May 2022), online (blog): *FigBytes* [perma.cc/VB6A-Q65D] [“ESG vs. Sustainability”].

³ See also Michael Proffitt et al, eds, *Oxford English Dictionary* (Oxford: Oxford University Press, 2023) sub verbo “sustainability,” online: [perma.cc/9VKK-C5XN].

⁴ “ESG vs. Sustainability,” *supra* note 2.

⁵ *Recommendations of the Task Force on Climate-Related Financial Disclosures* (15 June 2017), online: [perma.cc/BYG9-U6EB] [*TCFD Report*]. Further discussion of this topic will be found at Part III.A, below.

⁶ “About Us,” online: *Greenhouse Gas Protocol* [perma.cc/9APM-QSZW] [*GHG Protocol*].

⁷ “FAQ” (December 2022) at 1, online (pdf): *Greenhouse Gas Protocol* [perma.cc/MRT2-DZ5G].

⁸ Lisa Benjamin et al, “Climate-Washing Litigation: Legal Liability for Misleading Climate Communications” (January 2022) at 4, online (pdf): *Climate Social Science Network* [perma.cc/U7F8-LGZ6].

⁹ Greenpeace Canada, “‘Driving Carbon-Neutral’ Is Impossible with Fossil Fuels: Complaint to the Competition Bureau of Canada Against Shell’s Misleading Promotion of Forest-based ‘Offsets’ as Sustainable, Climate Action” (November 2021) at 3, online (pdf): *Greenpeace* [perma.cc/3DNJ-83JE] [Greenpeace Complaint Against Shell].

III. VOLUNTARY VERSUS MANDATORY CLIMATE-RELATED DISCLOSURE FRAMEWORKS

Canadian energy companies have already been making voluntary disclosure of climate-related and general sustainability-related matters in response to stakeholder demands. These disclosures follow various voluntary frameworks and standards. Investors are increasingly asking for sustainability and climate-related disclosures in making investment decisions. Companies that have raised funds using sustainable finance instruments, loans, or bonds are required to make sustainability or climate-related disclosure to creditors. Other stakeholders also are seeking these disclosures, including governments, communities, industry and environmental monitoring organizations, customers, and employees.

There have been multiple voluntary disclosure frameworks and standards to choose from. The different disclosure frameworks and standards have included those developed under the Global Reporting Initiative (GRI), the Sustainability Accounting Standards Board (SASB), the International Integrated Reporting Council (IIRC), the Value Reporting Foundation (VRF), the Climate Disclosure Standards Board (CDSB), and the TCFD. In addition, a number of ESG ratings and research organizations have emerged, and companies have been submitting answers to these organizations' questionnaires and research, including the Carbon Disclosure Project (CDP), MSCI, S&P, Sustainalytics, Vigeo, and others. These organizations produce their own ratings and disclosure on companies' sustainability and ESG practices, often based on criteria that vary across organizations. The different frameworks and standards, in some cases measuring different aspects of sustainability or ESG, have led to confusion, uncertainty, and questions among investors and other stakeholders around what the disclosure means, comparability of information, what exactly is being disclosed or measured, and how reliable the data or ratings actually are.

In addition to choosing from a variety of disclosure models, companies have adopted different approaches to the location, style, timing, and content of their disclosure. Disclosure has appeared on websites, and in stand-alone corporate social responsibility reports, sustainability reports, and climate reports. Information often is published at different times than regular corporate reporting and sometimes with a significant time lag from regular annual financial reporting. Investors and other stakeholders have clearly indicated that they want standardization in disclosures in order to allow greater comparability among companies.

The desire for standardization, and a recognition that there needed to be an evolution in disclosure practices, has led to two developments: (1) regulator-driven requirements for climate-related disclosure; and (2) movement to more voluntary standards of disclosure. First, regulators have taken an interest in standardizing climate-related disclosure. In October 2021 the CSA published its proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (NI 51-107)¹⁰ and its proposed Companion Policy 51-107CP¹¹ (together with NI 51-107, the Climate Disclosure Proposals). One of its stated goals is to standardize disclosure to allow greater comparability of disclosure across issuers. The goal is not just

¹⁰ *Consultation: Climate-Related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107: Disclosure of Climate-related Matters*, OSC CSA Notice, (2021) 44 OSCB 8731 at 19 [*Climate-Related Disclosure Notice*].

¹¹ *Ibid* at 26.

standardizing the information to be provided, but also in what document the disclosure is to be made and the timing of release of the disclosure. The SEC has also proposed rule amendments to require registrants to provide certain climate-related information in their registration statements and annual reports. Both of these regulatory proposals are discussed further below.

The current regulatory proposals from the CSA and the SEC are directed at publicly traded companies. However, the proposals should be seen as relevant for private companies as well, even if they are not directly impacted. Stakeholder pressures are generally relevant to both public and private companies, and it should be expected that as public companies make disclosure on climate-related matters, there will be growing expectations on private companies to do the same, especially as they compete for the attention of the same stakeholders. In addition, as public companies start disclosing emissions attributable to their value chain (that is, Scope 3 emissions) then private companies with public company customers will be expected to disclose their emissions so their public company customers can make those disclosures.

In addition, Canadian banks will need to disclose their emissions, including emissions financed by the banks, starting at the end of their 2024 financial years (2025 financial year in the case of financed emissions). On 7 March 2023, the Office of the Superintendent of Financial Institutions published its Guideline B-15: Climate Risk Management (the Guideline) applicable to federally regulated financial institutions, including Canada's major banks.¹² The Guideline is broadly based on the requirements of the TCFD disclosure framework and generally consistent with the ISSB disclosure standards, both of which are discussed below. As banks are required to disclose emissions attributable to their lending customers, those customers, public and private, will eventually be asked to disclose their emissions to facilitate the banks' disclosure.

The second development is that some of the organizations that have driven the voluntary frameworks and standards have merged their efforts. Recognizing the importance of "standardization," the voluntary standard organizations have been combining their efforts. In 2021, the International Financial Reporting Standards (IFRS) Foundation Trustees formed the ISSB to establish the IFRS sustainability disclosure standards, a single set of global sustainability disclosure standards. In 2022, each of the CDSB, VRF, SASB and IIRC were all consolidated into the ISSB. The GRI is coordinating with the ISSB on standard-setting activities, and the ISSB has determined to permit users of its standards to consider the GRI standards in identifying disclosures about sustainability-related risks and opportunities in the absence of a specific ISSB standard.

¹² Office of the Superintendent of Financial Institutions Canada, *Guideline: Climate Risk Management*, No B-15 (March 2023), online (pdf): [perma.cc/VLL9-4YKD].

A. TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES RECOMMENDATIONS

The TCFD was established by the Financial Stability Board, an organization under the G20 group of countries with a key role in promoting international financial stability by coordinating national financial authorities and international standard-setting bodies.¹³ Since the TCFD published its final recommendations for climate-related financial disclosures in June 2017, there has been increasing consensus internationally on aligning climate-related disclosure standards with the TCFD framework recommendations. This can be seen in the CSA and SEC proposals and the ISSB Standards discussed below.

The TCFD recommendations are organized around four core elements: (1) Governance; (2) Strategy; (3) Risk Management; and (4) Metrics and Targets. For each of its four core recommendations, the TCFD also provides specific recommended climate-related disclosures for financial filings.¹⁴

1. GOVERNANCE

The TCFD recommends disclosure of “the organization’s governance around climate-related risks and opportunities.”¹⁵ The supporting recommended disclosures are: “a) [d]escribe the board’s oversight of climate-related risks and opportunities”¹⁶ (for example, is this primarily a board matter or are board committees involved); and “b) [d]escribe management’s role in assessing and managing climate-related risks and opportunities.”¹⁷

2. STRATEGY

The TCFD recommends disclosure of “the actual and potential impacts of climate-related risks and opportunities on the organization’s businesses, strategy, and financial planning where such information is material.”¹⁸ The supporting recommended disclosures are: “a) [d]escribe the climate-related risks and opportunities the organization has identified over the short, medium, and long term”;¹⁹ “b) [d]escribe the impact of climate-related risks and opportunities on the organization’s businesses, strategy, and financial planning”;²⁰ and “c) [d]escribe the resilience of the organization’s strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario,”²¹ in accordance with the TCFD’s scenario analysis recommendations referenced below.

¹³ See *TCFD Report*, *supra* note 5 at 1–2.

¹⁴ *Ibid* at 13.

¹⁵ *Ibid* at 14.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Ibid*.

3. RISK MANAGEMENT

The TCFD recommends disclosure of “how the organization identifies, assesses, and manages climate-related risks.”²² The supporting recommended disclosures are: “a) [d]escribe the organization’s processes for identifying and assessing climate-related risks”;²³ “b) [d]escribe the organization’s processes for managing climate-related risks”;²⁴ and “c) [d]escribe how processes for identifying, assessing, and managing climate-related risks are integrated into the organization’s overall risk management.”²⁵

4. METRICS AND TARGETS

The TCFD recommends disclosure of “the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material.”²⁶ The supporting recommended disclosures are: “a) [d]isclose the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process”;²⁷ “b) [d]isclose Scope 1, Scope 2, and, if appropriate, Scope 3 [GHG] emissions, and the related risks”;²⁸ and “c) [d]escribe the targets used by the organization to manage climate-related risks and opportunities and performance against targets.”²⁹

5. SCENARIO ANALYSIS

In addition to the four core elements discussed above, another key recommendation of the TCFD is that organizations use “scenario analysis” to inform strategic and financial planning and disclose the resiliency of their strategy to risks and opportunities in various climate-related scenarios, both favourable and unfavourable. Noting that scenario analysis is a recent practice that will evolve over time, the TCFD has not prescribed specific standardized climate-related scenarios, but “recommends organizations use a 2°C or lower scenario in addition to two or three other scenarios most relevant to their circumstances.”³⁰ The TCFD suggests that organizations should disclose key aspects of the scenario analysis, including the scenarios used, critical input parameters and assumptions, time frames and milestones, and information about the resiliency of the organization’s strategy.³¹

As will be outlined further below, the concepts in the TCFD framework have become a foundational piece of the various proposals for mandatory climate-related disclosure as well as the ISSB’s work on its sustainability reporting standards.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 *Ibid* at 27–28.

31 *Ibid* at 28.

B. MANDATORY FRAMEWORKS

1. CSA PROPOSED FRAMEWORK

The CSA is an umbrella organization of provincial and territorial securities regulators under Canada's harmonized securities regulatory system.³² According to the CSA, its mandate is threefold: (1) to provide investor protection; (2) to foster fair and efficient capital markets; and (3) to maintain market integrity and investor confidence in the markets, while retaining regional flexibility and innovation.³³ CSA members (provincial and territorial securities regulators) coordinate and harmonize securities rules and regulations for the capital markets, including the development of standardized disclosure rules that elicit "consistent, comparable and decision-useful information" for investors, in furtherance of the CSA's mandate.³⁴

Prior to the Climate Disclosure Proposals, the CSA had not developed standardized rules for climate-related disclosures in Canada. Existing climate-related disclosure standards are, instead, based on the disclosure of certain climate-related information where the information is material.³⁵ The CSA had previously provided guidance to issuers on existing continuous disclosure requirements related to environmental and climate-related matters, in three publications on climate-related disclosures: CSA Staff Notice 51-333 in October 2010;³⁶ CSA Staff Notice 51-354 in April 2018;³⁷ and CSA Staff Notice 51-358 in August 2019.³⁸ When the CSA reviewed the state of climate-related disclosure by large Canadian issuers in the spring of 2021, the CSA noted an increase in climate-related risk disclosure since prior reviews and raised concerns about "boilerplate, vague or incomplete" risk disclosure.³⁹ To address these concerns, and following an international trend toward mandatory climate-related disclosures in response to an increasing investment focus on climate-related risks, the CSA moved to standardize climate-related disclosure through the Climate Disclosure Proposals.

a. Proposed CSA Rules

The CSA released its Climate Disclosure Proposals on 18 October 2021, publishing a CSA Notice and Request for Comment (the Notice) on proposed NI 51-107 and Companion Policy 51-107CP.⁴⁰ According to the CSA, the Climate Disclosure Proposals are intended to provide consistent, comparable, and decision-useful disclosure by issuers, allowing investors to make more informed decisions regarding climate-related risks and facilitating an equal playing field for issuers.⁴¹ The changes are also intended to align Canadian

³² "Who We Are" (2023), online: *Canadian Securities Administrators* [perma.cc/R8PK-MQU4].

³³ "2022-2025 CSA Business Plan" (9 June 2022) at 3, online (pdf): *Canadian Securities Administrators* [perma.cc/7S6F-8XPT].

³⁴ *Climate-Related Disclosure Notice*, *supra* note 10 at 2.

³⁵ *Ibid* at 3.

³⁶ *CSA Staff Notice 51-333: Environmental Reporting Guidance*, OSC CSA Notice, (2010) 33 OSCB 9951.

³⁷ *CSA Staff Notice 51-354: Report on Climate Change-Related Disclosure Project*, OSC CSA Notice, (2018) 41 OSCB 2759.

³⁸ *CSA Staff Notice 51-358: Reporting of Climate Change-Related Risks*, OSC CSA Notice, (2019) 42 OSCB 6617.

³⁹ *Climate-Related Disclosure Notice*, *supra* note 10 at 34.

⁴⁰ *Ibid* at 1.

⁴¹ *Ibid* at 2.

disclosure standards with international markets in an effort to improve access to global capital markets, remove the costs of navigating multiple disclosure frameworks, and reduce market fragmentation.⁴² The Climate Disclosure Proposals would be applicable to all reporting issuers (meaning, generally, a corporation that is listed on a recognized Canadian stock exchange), including venture issuers (for example, issuers that are listed on the TSX Venture Exchange (TSXV) or the Canadian Securities Exchange), with the disclosure requirements being phased in over a one-year transition phase for non-venture issuers and a three-year transition phase for venture issuers.⁴³

The Climate Disclosure Proposals would require issuers to disclose certain climate-related information, in alignment with the four pillars of the TCFD recommendations (Governance, Strategy, Risk Management, and Metrics and Targets). NI 51-107 would mandate climate-related governance disclosure, requiring an issuer to describe “the board of directors’ oversight of climate-related risks and opportunities” and “management’s role in assessing and managing climate-related risks and opportunities.”⁴⁴ This requirement would not be subject to a materiality assessment and would be mandatory in all cases. An issuer would be required to make this disclosure in its management information circular. If an issuer does not send a management information circular, an issuer would be required to make this disclosure in its annual information form (AIF) or, if the issuer does not file an AIF, in its annual management’s discussion and analysis (MD&A).⁴⁵ NI 51-107 would also mandate climate-related strategy, risk management, and metrics and targets disclosure.⁴⁶ An issuer would be required to make this disclosure in its AIF or, if the issuer does not file an AIF, in its annual MD&A.⁴⁷

As currently drafted, NI 51-107 would require issuers to “comply or explain” with GHG emissions disclosure by disclosing Scope 1, Scope 2, and Scope 3 GHG emissions. An issuer could choose to disclose each of these types of emissions, or explain why it is not making that disclosure if it chooses not to disclose that information. An issuer would also be required to disclose the reporting standard it uses to calculate GHG emissions.⁴⁸ If an issuer does not use the GHG Protocol,⁴⁹ an issuer would be required to disclose how the reporting standard it uses is comparable with the GHG Protocol. An issuer would be able to incorporate GHG emissions information by reference to another document that is clearly identified and filed on SEDAR.⁵⁰ This is currently the only climate-related disclosure requirement that would be permitted to be incorporated by reference. The CSA is also consulting on an alternative disclosure requirement for GHG emissions that would make the disclosure of Scope 1 GHG emissions mandatory, either when that information is material or in all cases, but maintain a comply-or-explain approach for Scope 2 and Scope 3 GHG emissions.⁵¹

⁴² *Ibid.*

⁴³ *Ibid* at 2–3.

⁴⁴ *Ibid* at 23.

⁴⁵ *Ibid* at 9.

⁴⁶ *Ibid* at 24.

⁴⁷ *Ibid* at 9.

⁴⁸ *Ibid* at 24.

⁴⁹ See *GHG Protocol*, *supra* note 6.

⁵⁰ *Climate-Related Disclosure Notice*, *supra* note 10 at 24–25. The System for Electronic Document Analysis and Retrieval, commonly known as SEDAR, is the system used for electronically filing most securities-related information with the Canadian securities regulatory authorities.

⁵¹ *Ibid* at 25.

b. TCFD Comparison and Further Developments

While NI 51-107 generally aligns with the TCFD recommendations, the instrument would depart from the TCFD recommendations in two respects. First, NI 51-107 would not require an issuer to describe the resilience of its strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario. Second, NI 51-107 would not make GHG emissions disclosure mandatory and would instead adopt a comply-or-explain approach to GHG emissions disclosure. In the Climate Disclosure Proposals, the CSA decided against adopting these two TCFD recommendations to minimize the regulatory burden and cost of disclosure for issuers.⁵²

The comments received by the CSA in respect of the Climate Disclosure Proposals⁵³ demonstrate support for standardized climate-related disclosure in Canada in line with TCFD recommendations and reveal concerns about the divergence from the TCFD framework in respect of a comply-or-explain rather than mandatory disclosure of GHG emissions.⁵⁴ In particular, a majority of comments that addressed GHG emissions disclosure supported the mandatory disclosure of Scope 1 emissions in accordance with the CSA's alternative proposal for GHG emissions disclosure under NI 51-107.⁵⁵

On 12 October 2022, the CSA published an update that it was “actively considering” the impact of international developments, in particular recent developments from the SEC and ISSB, on its proposed climate-related disclosure rule.⁵⁶ On 5 July 2023, the CSA published a further update announcing its intention to conduct further consultations to adopt disclosure standards based on the ISSB Standards, with appropriate modifications for the Canadian context.⁵⁷

The CSA's submissions in response to the consultation on the ISSB Standards provide additional insight as to how the CSA may respond to international developments and their effect on the Climate Disclosure Proposals. In its comment letter in July 2022, the CSA expressed support for the development of a “global baseline of sustainability disclosures” to improve reporting and provide reliable, clear, and comparable information for investors.⁵⁸ However, the CSA also made four recommendations to the ISSB: (1) to develop climate-related disclosure standards first, and broader sustainability disclosure standards in the future; (2) to phase in and scale disclosure requirements to accommodate smaller issuers; (3) to provide industry-specific guidance on disclosures that is non-mandatory initially; and (4) to

⁵² *Ibid* at 2.

⁵³ *Corporate Finance Branch 2022 Annual Report*, OSC Staff Notice 51-734 (1 December 2022) at 59, online (pdf): [perma.cc/2TL7-GMPD]. The CSA received 131 submissions during the comment period with respect to the Climate Disclosure Proposals.

⁵⁴ *Climate-Related Disclosure Notice*, *supra* note 10 at 39.

⁵⁵ “Summary of 131 Submissions to CSA on Proposed National Instrument 51-107 Disclosure of Climate-Related Matters” (24 March 2022), online: *Canadian Climate Law Initiative* [perma.cc/DJD9-4MDY].

⁵⁶ “Canadian Securities Regulators Consider Impact of International Developments on Proposed Climate-Related Disclosure Rule” (12 October 2022), online: *Canadian Securities Administrators* [perma.cc/K36B-JRVK] [*CSA News Release*].

⁵⁷ “Canadian Securities Administrators Statement on Proposed Climate-Related Disclosure Requirements” (5 July 2023), online: *Canadian Securities Administrators* [perma.cc/2K7Z-RL5Y].

⁵⁸ Letter from Stan Magidson, Chair, Canadian Securities Administrators to Emmanuel Faber, Chair, International Sustainability Standards Board (25 July 2022) at 1, online (pdf): *Canadian Securities Administrators* [perma.cc/2UTF-92E7].

work with other regulators developing reporting standards internationally with the goal of aligning disclosure standards for consistency.⁵⁹

2. ISSB FRAMEWORK

The ISSB is an independent private sector body that develops and approves IFRS sustainability disclosure standards and functions under the oversight of the IFRS Foundation. The IFRS Foundation is well known for setting globally accepted accounting standards through the International Accounting Standards Board (IASB). An important principle established by IFRS is “connectivity” of its work to provide coherent and connected financial reporting packages. To connect the work of the ISSB and IASB, the Integrated Reporting and Connectivity Council advises the IFRS Foundation, the ISSB and the IASB on how the reporting standards established by either can be integrated with the other, as well as on adopting integration principles and concepts into their design. Many of the historical sustainability reporting standards have now been integrated into the ISSB, including SASB, CDSB, VRF and IIRC. The ISSB has developed a voluntary disclosure standard. However, as will be discussed below, it is likely to have significant influence on the development of mandatory disclosure regimes.

a. ISSB Standards

After the release of the CSA’s Climate Disclosure Proposals, in March 2022, the ISSB published for consultation a proposed climate-related disclosure standard (S2) as well as a proposed general standard for disclosure of sustainability-related financial information (S1) and asked for comments. The standard on climate-related disclosure would function as a specific standard to be followed within the general sustainability disclosure standard.⁶⁰ Through October, November, and December 2022 and early 2023, the ISSB met to consider comments it received and provided regular updates on its deliberations.

On 26 June 2023, the ISSB published its final Climate-Related Disclosure Standard (Climate Standard)⁶¹ as well as the General Standard For Sustainability-Related Financial Information⁶² (the General Standard, and together with the Climate Standard, the ISSB Standards). The ISSB Standards are intended to be adopted as “the global baseline” with the approval of the International Organization of Securities Commissions (IOSCO).⁶³ The ISSB is consulting with IOSCO on a regular basis to facilitate its early approval. IOSCO has indicated issuers should be ready to make disclosures with their end-2024 accounts. The ISSB will allow issuers to adopt the ISSB Standards for annual reporting periods beginning on or after 1 January 2024. Notably, the General Standard provides that an entity in its first annual reporting period is permitted to apply the General Standard only on disclosures

⁵⁹ *Ibid* at 2–4.

⁶⁰ “ISSB Issues Inaugural Global Sustainability Disclosure Standards” (26 June 2023), online: *IFRS* [perma.cc/XAX4-48TH].

⁶¹ International Sustainability Standards Board, *IFRS S2: Climate-related Disclosures* (June 2023), online (pdf): [perma.cc/TA9X-XA75].

⁶² International Sustainability Standards Board, *IFRS S1: General Requirements for Disclosure of Sustainability-related Financial Information* (June 2023), online (pdf): [perma.cc/2MML-68WP].

⁶³ Members of the CSA participate in IOSCO and co-operate with other members to harmonize Canadian regulatory rules with global standards developed by IOSCO: “Regulatory Cooperation” (2023), online: *Canadian Securities Administrators* [perma.cc/66L8-EH26].

related to climate risks and opportunities pursuant to the Climate Standard. The prioritization of the Climate Standard is based on investor preferences and is consistent with the CSA's Climate Disclosure Proposals.⁶⁴

On 12 October 2022, the CSA announced that it was reviewing the ISSB and SEC proposals and how they may impact or further inform the Canadian Climate Disclosure Proposals. The CSA noted that the Canadian rule would need to reflect Canadian capital markets and investor needs, but has also considered international consensus with a view to providing climate-related disclosure standards that as a priority “elicit consistent and comparable disclosure for investors and that support a comprehensive global baseline of sustainability disclosures.”⁶⁵

Given the finalization of the ISSB climate-related disclosure standard in June 2023, and the CSA's announced intention to develop its own rules that, among other things, will support a global baseline disclosure regime, it seems that the ISSB's work will be very relevant to the development of the CSA's Climate Disclosure Proposals.

b. The ISSB Standard

Following are the key aspects of the ISSB Standards:

1. The ISSB Standards incorporate and consolidate the [TCFD] recommendations, [SASB] Standards, Climate Disclosure Standards Board Framework, Integrated Reporting Framework and World Economic Forum metrics to streamline sustainability disclosures.
2. The ISSB Standards require disclosures related to board mandates and composition as they relate to [sustainability-related and climate-related risks and opportunities (the Disclosed Risks and Opportunities)], such as (i) how the terms of reference, board mandates, role descriptions and other related policies identify responsibilities for oversight of climate-related risks and opportunities; (ii) how the board and any relevant committees ensure that the appropriate skills and competencies are available to oversee strategies designed to respond to Disclosed Risks and Opportunities; and (iii) how often the board and any relevant committees are informed about the Disclosed Risks and Opportunities.
3. The ISSB Standards require disclosures related to strategy, such as how the board and its committees consider Disclosed Risks and Opportunities when overseeing strategy, major transactions and risk management policies and how the board and its committees oversee the setting of targets related to significant Disclosed Risks and Opportunities and subsequently monitor progress towards them.
4. The ISSB Standards require disclosures related to management's role in assessing and managing climate-related risks and opportunities and how oversight is exercised over the relevant management positions.

⁶⁴ “ISSB Decides to Prioritise Climate-Related Disclosures to Support Initial Application” (4 April 2023), online: *IFRS* [perma.cc/DW4Y-SQS6].

⁶⁵ *CSA News Release*, *supra* note 56.

5. The ISSB Standards require disclosures around an entity's risk management processes, such as how Disclosed Risks and Opportunities are identified, assessed, prioritized and managed and how these processes are integrated in an entity's overall risk management process.
6. The ISSB Standards require that an entity disclose information that enables users of general-purpose financial reporting (being existing and potential investors, lenders and other creditors) to understand the effects of significant sustainability-related and climate-related risks and opportunities on its financial position, financial performance and cash flows for the reporting period, as well as the anticipated effects of climate-related risks and opportunities on these items over the short, medium and long term. This disclosure is to include quantitative and qualitative information about any significant risk of a material adjustment to carrying amounts of assets and liabilities within the next financial year, expectations around how an entity's financial position and financial performance will change over time given its strategy to address significant Disclosed Risks and Opportunities and planned sources of funding to implement strategy.
7. The ISSB Standards contemplate that sustainability-related and climate-related disclosure will be made with, and at the same time as, an entity's annual financial reporting, unless applicable regulators determine more frequent disclosure is required. The General Standard states any disclosures made thereunder would constitute part of an entity's general-purpose financial reports, and can be included, for example, in the entity's management commentary or similar report (i.e., the MD&A). An entity may make their climate-related disclosures with their second-quarter filings in the first reporting period in which the entity applies the ISSB Standards.
8. The Climate [Standard requires] that entities use climate-related scenario analysis to assess the resilience of the entity's strategy (including its business model) to climate-related changes, developments or uncertainties. Disclosure will include the entity's capacity to adjust or adapt its strategy and business model over the short, medium and long term to climate developments in terms of: (i) the availability of and flexibility in existing financial resources to address climate-related risks and/or to be redirected to take advantage of climate-related opportunities; (ii) the ability to redeploy, repurpose, upgrade or decommission existing assets; and (iii) the effect of current or planned investments in climate-related mitigation, adaptation or opportunities for climate resilience. The General Standard does not prescribe scenario analysis, but requires disclosure of whether and how an entity uses scenario analysis to inform its identification of sustainability-related risks.
9. The Climate [Standard requires] that an entity disclose its absolute Scope 1, 2 and 3 Greenhouse Gas (GHG) emissions in accordance with the GHG Protocol Corporate Standard. An entity is not required to disclose its Scope 3 emissions in the first annual reporting period in which the entity applies the Climate Standard.
10. The ISSB Standards require entities to consider all reasonable and supportable information that is available to the entity, without undue cost or effort, to identify and address the Disclosed Risks and Opportunities. The limit of undue cost or effort provides a guideline around the resources expected to be used in applying the ISSB Standards, which was not previously addressed in the draft standards.

However, it remains to be seen what would constitute undue cost or effort and entities should be prepared to spend significant resources to apply the ISSB Standards.⁶⁶

11. The Climate Standard will be adopted by CDP, meaning that CDP could start measuring and ranking disclosure against the ISSB Standards starting in 2024.

3. SEC PROPOSED FRAMEWORK

As the CSA considers the impact of international developments on the Climate Disclosure Proposals, as discussed above, it is monitoring in particular the SEC's proposals relating to the disclosure of certain climate-related information. On 21 March 2022, the SEC announced its proposed rule changes that would require public companies to disclose information about climate risks their businesses face, as well as the carbon emissions of parts of their operations (just as they do annual revenue, executive compensation, and any new updates on legal issues). At the time of announcement, SEC Chair Gary Gensler stated that the proposed disclosures to be required under the rule changes would "provide investors with consistent, comparable, and decision-useful information for making their investment decisions, and it would provide consistent and clear reporting obligations for issuers."⁶⁷

The SEC has indicated that the proposed disclosures are similar to those contained in broadly accepted disclosure frameworks, such as the TCFD and the GHG Protocol. The proposed rule changes apply to domestic and foreign public companies, and will require registration statements and periodic reports including: (1) climate-related risks and their actual or likely material impacts on the business, strategy, and outlook; (2) the governance of climate-related risks and relevant risk management processes; (3) GHG emissions; (4) certain climate-related financial statement metrics and related disclosures in a note to its audited financial statements; and (5) information about climate-related targets and goals, and transition plan, if any.⁶⁸

The disclosure of GHG emissions will require a description of GHG emissions (Scope 1) and indirect GHG emissions from purchased electricity and other forms of energy (Scope 2), separately disclosed, expressed both by disaggregated constituent greenhouse gases and in the aggregate, in absolute terms, not including offsets, and in terms of intensity (per unit of economic value or production).⁶⁹ Indirect emissions from upstream and downstream activities in the value chain (Scope 3) will also need to be reported, if material, or if the company has set a GHG emissions target or goal that includes Scope 3 emissions, in absolute terms, not including offsets, and in terms of intensity.⁷⁰

⁶⁶ "International Sustainability Standards Board Launches Climate-Related Disclosure Standard and General Standard for Sustainability-Related Financial Information" (5 July 2023), online: *Dentons* [perma.cc/BSH2-GUDK] [emphasis omitted]. Permission to reproduce obtained by authors from Dentons.

⁶⁷ US Securities and Exchange Commission, "SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors," Press Release, 2022-46 (21 March 2022), online: [perma.cc/P36F-PYYJ].

⁶⁸ US Securities and Exchange Commission, *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures* at 1, online (pdf): [perma.cc/XP7A-BBJM] [*SEC Fact Sheet*].

⁶⁹ US Securities and Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (Proposed Rule), Federal Register 87:69 21334 (11 April 2022) at 21345, online: [perma.cc/RGW7-QE5W] [*Proposed SEC Rule*].

⁷⁰ *Ibid.*

The proposed rule changes are not without controversy in the US. While the proposed rule changes were originally anticipated to be final in October 2022 (with the comment period extended to November 2022 due to a technology glitch which prevented market participants from providing their comments to the SEC), with a phase-in period with associated accommodations to begin as early as fiscal year 2023 (filed in 2024) for Scope 1 and 2 emissions, and fiscal year 2024 (filed in 2025) for Scope 3 emissions,⁷¹ the proposed rule changes have not yet been finalized. In February 2023, it was reported that SEC Chair Gary Gensler is considering scaling back the climate-risk disclosure due to concerns that a wave of lawsuits are expected to challenge the proposed rule changes once final, and that the SEC is giving further thought to the Scope 3 emissions disclosures.⁷²

Concerns over Scope 3 emissions disclosures focus on the challenges associated with obtaining and understanding the data required to make such disclosures, as well as the liability that companies may face from making disclosures that rely on estimates and assumptions involving inherent uncertainty.⁷³ Market participants have also shared their concern with the SEC that supply chains are multilayered; a company may have detailed information on its direct suppliers' emissions, but that is only the first level. There are further concerns from market participants in the US that there will be overlap between Scope 1, 2, and 3 emissions, and that issue is further exacerbated by the fact that smaller public companies (or companies that are private or not regulated by the SEC) will not be subject to the SEC disclosure rules and so their emissions would be hard to identify and quantify.

Proponents of the proposed rules, market participants, industry and advocacy groups, and the legal community — including the CSA — are all watching with interest to see what the final rules will look like when published by the SEC and how they will influence other international climate-related disclosure frameworks like the Climate Disclosure Proposals.

IV. COMPLIANCE WITH MANDATORY FRAMEWORK

With the introduction of mandatory climate-related disclosure rules expected in the short term, it is important for public companies and their directors to consider what steps need to be taken around their governance in order to prepare to make the disclosure.

A. GOVERNANCE BEST PRACTICES

This section of the article outlines what the Climate Disclosure Proposals mean for directors, boards, and public company governance, as well as steps that boards of directors (and any general counsel or legal counsel advising boards of directors within their companies) should consider in preparing to comply. This section also reflects on both the Climate Disclosure Proposals and the impact the ISSB Standards will have in these areas.

⁷¹ *Ibid* at 21346; *SEC Fact Sheet*, *supra* note 68 at 3.

⁷² Declan Harty, "SEC's Gensler Weighs Scaling Back Climate Rule as Lawsuits Loom," *Politico* (4 February 2023), online: [perma.cc/3RF2-PT3W]; Michael Kapoor, "Global ESG Rulemaker Says Investor Interests Are Paramount," *Bloomberg Tax* (19 October 2022), online: [perma.cc/3NN2-79N4].

⁷³ Letter from Alphabet Inc et al to Gary Gensler, Chair, US Securities and Exchange Commission (11 June 2021) at 2, online (pdf): [perma.cc/T6GW-F54A] [Joint Response Letter to SEC].

1. BOARDS OF DIRECTORS SHOULD EXPRESSLY ESTABLISH OVERSIGHT OF CLIMATE-RELATED RISKS AND OPPORTUNITIES OF THE ISSUER

This already has been established as best practice and as part of fulfilling directors' fiduciary and duty of care responsibilities. See for example the Hansell LLP Legal Opinion: Corporate Directors are Obligated to Address Climate Change Risk (June 2020). This will require reviewing, and where necessary amending, board charters and mandates and board skills and competencies matrices, and then reviewing whether any changes need to be made in board composition to ensure the board has the necessary climate competencies to effectively provide this oversight. Boards of directors should consider engaging external advisors on these issues, as well as ... providing training for board members where existing corporate resources, or board expertise and knowledge may be lacking or requires additional support.⁷⁴

2. BOARDS OF DIRECTORS SHOULD EXPRESSLY TASK MANAGEMENT WITH RESPONSIBILITY FOR ASSESSING AND MANAGING CLIMATE-RELATED RISKS AND OPPORTUNITIES

This will involve the review and revision of role descriptions and mandates. As climate-related disclosure is added to an issuer's management information circular, AIF or MD&A, the annual and interim [chief executive officer (CEO) and chief financial officer (CFO)] certifications ([National Instrument] 52-109), will apply to that climate-related disclosure. Management will need to have designed disclosure controls and procedures to provide reasonable assurance that climate-related material information will be made known to the CEO and CFO and that required disclosure on climate-related matters is made. Boards of directors will need to be comfortable that these controls and procedures are in place and have oversight over their effectiveness.⁷⁵

3. BOARDS OF DIRECTORS SHOULD CONSIDER BOARD COMMITTEE ROLES IN THE REVIEW AND ASSESSMENT OF CLIMATE-RELATED RISKS

Boards of directors should consider the mandates of any board committees that have delegated responsibilities around risk review and assessments and consider carefully where the assessment of climate risks should fit within those board committees, if at all. Existing committee composition may mean their involvement with all aspects of climate-related risks and opportunities is not appropriate. This question, and in particular the role of the audit committee, requires careful thought since the assessment of climate-related risks and opportunities is likely to be done within existing enterprise risk management systems, often overseen by the audit committee. As noted below, audit committees will have some role related to climate-related review and risk/opportunity assessment given their oversight of financial reporting, but issuers may have other board committees with risk assessment responsibilities. It's important to note that the board of directors will remain responsible for the overall climate-related risk/opportunity assessment though committees may assist in this assessment.⁷⁶

⁷⁴ Bill Gilliland, "The CSA and ISSB Climate-Related Disclosure Proposals: Significant Implications for Directors, Boards and Public Company Governance, One Year On" (January 2023) at 2, online (pdf): *Dentons* [perma.cc/9B83-DKGR]. Permission to reproduce obtained by authors from Dentons. See also "Putting Climate Change Risk on the Boardroom Table" (June 2020), online (pdf): *Hansell LLP* [perma.cc/7GNN-WMGX].

⁷⁵ Gilliland, *ibid* at 3.

⁷⁶ *Ibid* at 3–4.

4. **BOARDS OF DIRECTORS SHOULD SPECIFICALLY CONSIDER THE ROLE OF THE AUDIT COMMITTEE IN THE REVIEW AND ASSESSMENT OF CLIMATE-RELATED RISKS AND OPPORTUNITIES**

Boards of directors should ensure the resources and processes are in place to fulfill their role in this area. The audit committee must oversee the accounting and financial reporting processes of an issuer as well as its audit. This requires oversight of internal controls, including the processes underlying the CEO/CFO certifications which will now cover off climate-related disclosures. At a minimum, the audit committee will need to ensure that, once those risks and opportunities are assessed, their implications are properly reflected in the issuer's financial reporting including in assumptions and uncertainties and estimates made in the preparation of financial statements.⁷⁷

5. **BOARDS OF DIRECTORS SHOULD BE AWARE THAT THE CLIMATE DISCLOSURE PROPOSALS REQUIRE CLIMATE-RELATED DISCLOSURE TO BE CONTAINED IN DOCUMENTS THAT BY LAW SPECIFICALLY MUST BE REVIEWED AND APPROVED BY THE BOARD**

Climate-related disclosure is often made in stand-alone sustainability or other reports, so this will be a change for most issuers even if they are currently making TCFD-type disclosure. An issuer will need to disclose the board's oversight of climate-related risks and opportunities in its annual management [information] circular. In addition, an issuer will need to disclose (i) climate-related risks and opportunities (short, medium and long-term) and their impact (actual and potential) on the issuer's businesses, strategy and financial planning (Strategy), (ii) the issuer's processes for identifying, assessing and managing climate-related risks (Risk Management), and (iii) metrics and targets used by an issuer to assess and manage climate-related risks and opportunities (Metrics and Targets) in its AIF (or in its annual MD&A if it is not required to prepare an AIF). Many issuers make their risk disclosure in their MD&A, and then incorporate that risk disclosure by reference in the issuer's AIF to satisfy the AIF form requirement. The CSA has previously proposed changes to National Instrument 51-102 Continuous Disclosure Obligations (the [NI 51-102] Disclosure Proposals). Among other things, the [NI 51-102] Disclosure Proposals contemplate combining an issuer's financial statements, MD&A and, where applicable, AIF, into one reporting document for annual reporting purposes. It is not clear whether the [NI 51-102] Disclosure Proposals would allow issuers to continue to incorporate information from their MD&A into their AIF, so all risk disclosure — including climate risk — may need to move to the AIF. It is important to also note that MD&A disclosure should include trends and risks that are reasonably likely to affect an issuer's financial statements in the future. Given the nature of climate-related risks and opportunities, and the need to disclose the impact of these on an issuer's business, it is likely that climate-related risks and opportunities and their impacts will need to be disclosed in an issuer's MD&A and AIF.⁷⁸

⁷⁷ *Ibid* at 4.

⁷⁸ *Ibid* at 4–5. See also *CSA Notice and Request for Comment: Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Other Amendments and Changes Relating to Annual and Interim Filings of Non-Investment Fund Reporting Issuers*, OSC CSA Notice, (2021) 44 OSCB 4205.

6. BOARDS OF DIRECTORS WILL NEED TO ASSESS THE MATERIALITY OF CLIMATE-RELATED RISKS AND OPPORTUNITIES

The Climate Disclosure Proposals require an issuer to disclose (i) climate-related risks and opportunities (short, medium and long-term) and their impact on the issuer's businesses, strategy and financial planning (Strategy), (ii) the issuer's processes for identifying, assessing and managing climate-related risks (Risk Management), and (iii) metrics and targets used by an issuer to assess and manage climate-related risks and opportunities (Metrics and Targets) *only where the information is "material"* – i.e., where a reasonable investor's decision to buy, sell or hold securities is likely to be influenced if the information is omitted or misstated. Boards of directors need to be aware that there are widely recognized standards available, like the SASB standards of the Value Reporting Foundation, that identify a set of material sustainability topics and their related metrics for the typical company in a menu of industries. The SASB standards identify that climate change is materially impacting 72 of 77 industry subsectors. It will only be in the unusual case that "materiality" will be an acceptable basis to not include disclosure in this area, particularly because disclosure should address short, medium and longer-term risks, potential and actual impacts, and, under the TCFD recommendations both physical and transition risks. In the Climate Disclosure Proposals, the CSA notes that [it views] climate-related information as becoming increasingly important to investors in Canada and internationally. Many issuers are already disclosing climate-related information in investor presentations.⁷⁹

7. BOARDS OF DIRECTORS SHOULD DEVELOP A FAMILIARITY WITH THE TCFD RECOMMENDATIONS

The Climate Disclosure Proposals do not specifically incorporate the TCFD recommendations. However, the disclosure under the Climate Disclosure Proposals is intended to be consistent with the TCFD recommendations on the stated areas of disclosure, and issuers are encouraged to refer to those recommendations in preparing the required disclosure under the Climate Disclosure Proposals. The TCFD and others have published guidance on implementing the TCFD recommendations. The TCFD has also prepared guidance for issuers in different industry sectors in satisfying the TCFD disclosure recommendations. Boards of directors will need to be aware that management's assessment of climate-related risks and opportunities should include physical risks, both acute and chronic, and transition risks, like policy and legal, technology, market and reputation risks associated with the transition to a lower carbon economy.⁸⁰

8. BOARDS OF DIRECTORS SHOULD CONSIDER THE NEED FOR SCENARIO ANALYSIS AS CONTEMPLATED WITHIN THE TCFD RECOMMENDATIONS

Boards of directors should consider whether in order to properly identify climate-related risks and opportunities and their impact on an issuer's business management needs to undertake some scenario analysis as contemplated within the TCFD recommendations notwithstanding that the Climate Disclosure Proposals do not require disclosure in respect of those scenarios. In turn, boards would need to review that analysis. The use of scenario analysis as a tool to assess risks and opportunities is generally understood to offer benefits in situations where the precise timing and magnitude of risks is uncertain, the analysis needs to be forward

⁷⁹ Gilliland, *ibid* at 5 [emphasis in original].
⁸⁰ *Ibid* at 6.

looking and risks (and opportunities) can be high impact where historical experience is not necessarily a guide to the likelihood of their future occurrence.⁸¹

9. **BOARDS OF DIRECTORS WILL NEED TO CONSIDER THE ANNUAL TIMING OF PREPARATION OF AN ISSUER'S CLIMATE-RELATED DISCLOSURE**

Currently, many issuers are reporting this type of information in stand-alone sustainability reports and/or other documents released throughout the year on different schedules from the typical annual disclosure cycle. Issuers may already be on GHG disclosure timelines with banks under sustainability-linked disclosure instruments and those timelines will typically be more relaxed than the Climate Disclosure Proposals will allow. Issuers will need to develop the procedures and capacity to develop and produce this disclosure in line with the usual AIF and [management information circular] disclosure requirements. In some cases, issuers are obtaining limited assurance reports from their auditors on this disclosure. The requirements for obtaining and filing consents from those auditors will need to be considered, and audit engagements will need to adjust to reflect new timing requirements and the eventual inclusion of those reports in offering documents.⁸²

10. **BOARDS OF DIRECTORS SHOULD CONSIDER ANY DE FACTO REQUIREMENT TO DISCLOSE GHG EMISSIONS**

Boards of directors should consider whether there will develop (or maybe already has developed in some cases) a de facto requirement to disclose GHG Emissions in their disclosure documents, notwithstanding that the Climate Disclosure Proposals adopt a “comply or explain” model allowing issuers to omit that disclosure if they explain why. Access to the various sustainable finance tools or funding from some institutional investors may already require that an issuer discloses its GHG emissions. As issuers are entering into sustainability-linked financings based on GHG emissions, they will be reporting their GHG emissions to banks and bond holders. Canada's largest banks (and other Canadian and international financial institutions) are now members of the Net-Zero Banking Alliance. Members of the Net-Zero Banking Alliance have committed to transition the GHG emissions attributable to their lending and investment portfolios to align with pathways to net-zero by 2050, and to set interim targets for at least 2030 and every five years onwards to 2050. To satisfy these requirements, it seems likely issuers will face more general requirements to provide this GHG emissions disclosure to their banks. Many issuers are already providing GHG emissions information in investor presentations or in separate sustainability reports. Where investors and other stakeholders are asking for this data, it becomes harder to argue the information is not “material,” raising questions around selective disclosure unless it is provided in more general disclosure documents.⁸³

11. **BOARDS OF DIRECTORS SHOULD CONSIDER WHETHER THE ISSUER SHOULD START EARLY IN ADDRESSING THE DISCLOSURE CONTEMPLATED BY THE CLIMATE DISCLOSURE PROPOSALS**

The Climate-Related Disclosure Proposals contemplate that the disclosure would be required in annual disclosures filed starting in early 2024 for TSX-listed issuers (2026 for TSXV-listed issuers with December 31 year ends). Given existing general obligations to disclose material risks and information, waiting to

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid* at 7.

disclose specific climate-related risks until the specific disclosure rules apply will raise the question of whether they really only became material in 2024 (or 2026), and therefore, whether an issuer's prior disclosure was appropriate.⁸⁴

12. BOARDS OF DIRECTORS NEED TO UNDERSTAND THE IMPACT OF THE CLIMATE DISCLOSURE PROPOSALS ON THEIR PROSPECTUS-RELATED LIABILITY

The full impact of the Climate Disclosure Proposals on the public offering process goes beyond the remit of this [article], but where climate-related disclosure moves into the AIF and management [information] circular, that information will be automatically incorporated by reference in offering documents, and boards and management will take on prospectus liability for that disclosure. It is important to note that under current prospectus rules where climate-related disclosure is already material to an issuer, the failure to include that information in a prospectus document (including through incorporation by reference) will give rise to liability for misrepresentation to purchasers under the prospectus.⁸⁵

13. BOARDS OF DIRECTORS WILL NEED TO MONITOR THE DEVELOPMENT OF CLIMATE DISCLOSURE RATINGS AND RANKINGS ESTABLISHED BY THIRD PARTIES

As has occurred in respect of general governance disclosure (see for example the Canadian Coalition for Good Governance and The Globe and Mail Board Games) benchmarking of [issuers'] climate-related disclosure has started. See, for example, the ClimateAction 100+ corporate benchmarking, which looks at corporate disclosures around climate-related governance, reduction of GHG emissions and public disclosure following the TCFD [recommendations]. These rankings (and their score cards) are likely to become a consideration in the preparation of issuers' public disclosure documents.⁸⁶

V. GREENWASHING LITIGATION

As is evident from the foregoing, disclosure pertaining to ESG and sustainability factors has grown significantly over the years as companies across all industries and sectors seek to become more transparent on their management of ESG factors and related risks.⁸⁷ Notwithstanding increased voluntary frameworks and regulatory proposals for mandatory climate-related disclosure, concerns persist about a lack of standardized terms and metrics in ESG and what impact such enhanced disclosures will have on compliance and litigation risk faced by companies. As noted by various leading technology industry participants in a joint letter responding to the SEC's request for public input regarding climate change disclosures, "[g]iven that climate disclosures rely on estimates and assumptions that involve inherent uncertainty, it is important not to subject companies to undue liability, including from private parties."⁸⁸

⁸⁴ *Ibid* at 8.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*.

⁸⁷ *CSA Staff Notice 51-364 Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2022 and March 31, 2021*, OSC CSA Staff Notice, (2022) 45 OSCB 9349 at 9363, online: [perma.cc/DKE3-VVPU] [*CSA Staff Notice 51-364*].

⁸⁸ Joint Response Letter to SEC, *supra* note 73 at 2.

Voluntary or mandatory disclosure in which issuers make “potentially misleading, unsubstantiated or otherwise incomplete claims about business operations or the sustainability of a product or service being offered” can convey a false impression known as “greenwashing.”⁸⁹ Sustainability disclosures that are false, misleading, or unsubstantiated can, and have, formed the basis for both civil lawsuits and regulatory action across the globe.⁹⁰ The disclosures that have given rise to claims and complaints have occurred not only in companies’ required continuous disclosure materials but also in voluntary documents, such as sustainability or ESG reports and public surveys,⁹¹ as well as in advertising campaigns across a variety of media.

Greenwashing claims are still relatively new in the environmental litigation landscape, with most claims to date having focused on challenging policies, permits, or individual projects, as well as certain aspects of corporate supply chains, and targeting both private and public sector entities.⁹² Canada is no exception, with the majority of climate-related litigation in Canada targeting provincial and federal governments on issues ranging from alleged infringements on rights to life, liberty, security, and equality under the *Canadian Charter of Rights and Freedoms*⁹³ through the government’s contributions and causation of GHG emissions,⁹⁴ to whether permits in the natural resources sector have been unlawfully extended.⁹⁵

While greenwashing claims are still in relative infancy, those claims that have been brought before courts and regulatory bodies suggest that energy companies are particularly vulnerable to greenwashing claims when they portray themselves as leaders in non-fossil energy systems, and in circumstances where their investments in non-fossil energy systems are comparatively much lower than their investments in conventional fossil fuel production.⁹⁶

⁸⁹ *CSA Staff Notice 51-364*, *supra* note 87 at 9363.

⁹⁰ Nneka Chike-Obi & Marina Petroleka, “ESG Litigation Risk: Climate Lawsuits Dominate, but Scope is Widening” (15 February 2022) at 2, online (pdf): *Sustainable Fitch* [perma.cc/BV8J-ZSA4].

⁹¹ *CSA Staff Notice 51-364*, *supra* note 87 at 9363.

⁹² Joana Setzer & Catherine Higham, “Global Trends in Climate Change Litigation: 2022 Snapshot” (June 2022) at 3, online (pdf): *London School of Economics and Political Science* [perma.cc/69HW-AD54].

⁹³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

⁹⁴ See generally *Cecilia La Rose by Guardian ad litem Andrea Luciuk v The Queen*, 2020 FC 1008, in which the plaintiffs (children and youth from across Canada) alleged that the government’s conduct in causing, contributing to, and allowing GHG emissions unjustifiably infringed their rights under sections 7 and 15 of the *Charter*, and that the government had failed to discharge its public trust obligations with respect to public resources. The plaintiffs’ claim was dismissed on the basis that the *Charter* claims were not justiciable, and neither the *Charter* claims nor the public trust doctrine claim disclosed a reasonable cause of action. The decision was appealed and a panel of the Federal Court of Appeal heard argument in February 2023.

⁹⁵ See generally *Highlands District Community Association v British Columbia (Attorney General)*, 2021 BCCA 232, involving the dismissal of an application for judicial review of a Mines Inspector’s decision to issue a permit to operate a rock quarry. The community association argued that climate change was such an important issue that the Mines Inspector’s failure to consider the issue relevant under the *Mines Act*, RSBC 1996, c 293 in issuing a permit was an unreasonable decision. The British Columbia Court of Appeal dismissed the appeal, finding that the legislation imposes a broad discretion on the Mines Inspector to require information he considers relevant to the matter before him; a failure to seek a report on carbon emissions did not render his decision unreasonable. An application for leave to appeal to the Supreme Court of Canada was dismissed.

⁹⁶ Benjamin et al, *supra* note 8 at 10–11.

A. TRENDS IN REGULATORY COMPLAINTS: TARGETING FOSSIL FUEL ADVERTISING

In recent years, the content and existence of promotional campaigns and advertisements by energy companies have come under scrutiny both in Canada and globally, with critics of the industry likening energy advertising to tobacco advertising that was banned in Canada in 1988 over health concerns. Amsterdam became the first city in the world to impose a ban on ads from energy (fossil fuel) and aviation companies, banning ads in subway stations and the city centre in 2021,⁹⁷ and France became the first European country to ban advertisements for fossil fuels in August 2022.⁹⁸

Much of the effort to oppose fossil fuel campaigns and advertisements has been spearheaded by NGOs. In June 2022, the Canadian non-profit organization Canadian Association of Physicians for the Environment (CAPE) announced that it was launching the Fossil Fuel Ads Make Us Sick campaign, calling for a “comprehensive ban on advertising” related to fossil fuels by energy industries, products, and services, a “robust regulatory response to address misleading environmental claims” by energy companies, and regulations “mandating the disclosure of the health and environmental risks associated with fossil fuel production and use.”⁹⁹

One of the tools used by NGOs to curb fossil fuel advertisements, both in Canada and abroad, is to file complaints with the competition regulators who oversee not only competitive practices but truth in advertising complaints. In Canada, the Competition Bureau is the independent law enforcement agency tasked with protecting Canadian consumers by, among other things, ensuring truth in advertising and enforcing the *Competition Act*.¹⁰⁰

The *Competition Act* contains provisions that address false or misleading representations and deceptive marketing practices in promoting the supply or use of a product or any business interest, with all representations that are “false or misleading in a *material* respect” being subject to the *Competition Act*.¹⁰¹ In determining whether a violation of the *Competition Act* has occurred, the Competition Bureau assesses whether a representation is “material” by reference to whether the representation could influence a consumer to buy or use the product or service advertised. A determination as to whether a material representation is false or misleading is considered in light of the representation’s general impression as well as its literal meaning.¹⁰²

One of the earliest greenwashing complaints to the Competition Bureau against an energy company was issued in November 2021 by Greenpeace Canada against Shell Canada Limited (Shell Canada) over a news release on Shell Canada’s website and Twitter (as it then

⁹⁷ Hope Talbot, “Amsterdam to Become First City in the World to Ban this Type of Advert,” *euronews* (20 May 2021), online: [perma.cc/QL2C-P8VF].

⁹⁸ Rebecca Stewart, “Why France’s Fossil Fuel Ad Ban Matters” (29 August 2022), online: *Adweek* [perma.cc/6PQB-M7WL].

⁹⁹ Canadian Association of Physicians for the Environment, “Stand with Over Half a Million Canadian Health Professionals to Stop Fossil Fuel Advertising,” online: *Stop Fossil Fuel Ads* [perma.cc/8NFQ-2E2C].

¹⁰⁰ RSC 1985, c C-34.

¹⁰¹ *Ibid*, s 74.01(1) [emphasis added].

¹⁰² *Ibid*, s 74.011(4).

was) account announcing its “Drive Carbon Neutral” program.¹⁰³ According to Shell Canada, the premise of the Drive Carbon Neutral program was to allow Shell Canada’s customers to opt into the program when paying for fuel purchases, with Shell Canada “then [offsetting] customers’ emissions by purchasing independently-verified carbon credits generated from Canadian and international projects that protect or restore natural landscapes.”¹⁰⁴

Greenpeace complained that the publication of the Drive Carbon Neutral program on Shell Canada’s website and social media account contained false and misleading representations to the public because of the lack of “direct and accessible evidence” of Shell Canada’s claim that customers purchasing from the Drive Carbon Neutral program would wholly offset their emissions from the company’s fossil fuels, as well as concerns about shortcomings in forest-based offsets.¹⁰⁵ The Competition Bureau has yet to make a determination on Greenpeace’s complaint.

A year later, in November 2022, the Competition Bureau confirmed that it had launched an inquiry into “alleged deceptive marketing practices” by the Canadian Gas Association (the CGA) as a result of a complaint launched by CAPE.¹⁰⁶ The complaint alleges that the CGA misled the public with its “Fuelling Canada” marketing campaign by representing that natural gas is “clean” and “affordable,” whereas CAPE alleges that “[t]he production and use of natural gas releases significant [GHG] emissions,” “[t]he use of natural gas for home heating and cooking causes indoor air pollution,” “[n]atural gas is less affordable than other energy options,” and “[t]he price of natural gas will increase due to climate policies and carbon pricing.”¹⁰⁷ CAPE has proposed that, at a minimum, the CGA should:

1. Remove all claims of “clean” and “affordable” or [similar terms] from its public communications about natural gas;
2. Issue a public retraction of these representations;
3. Pay a \$10 million fine, credited to the Environmental Damages Fund, and to be paid to a person or organization for the purposes of public climate education about clean fuels and health impacts related to fossil fuel use and climate change.¹⁰⁸

The Competition Bureau has yet to issue a determination on CAPE’s complaint.

¹⁰³ Greenpeace Complaint Against Shell, *supra* note 9; Shell Canada, News Release, “Canadian Drivers Set to Go Carbon Neutral with Shell” (12 November 2020), online: [perma.cc/72HR-WFCA] [Shell News Release].

¹⁰⁴ Shell News Release, *ibid*.

¹⁰⁵ Greenpeace Complaint Against Shell, *supra* note 9 at 9. Issues with forest-based offset projects include impermanence (“[a]ny benefits from offsetting carbon with forests are only as certain as the futures of the forest themselves”); timing (“[f]ossil fuel emissions happen immediately ... [while] tree growth takes decades”) and leakage (“protecting forests in one location can be counterproductive if it only serves to cause logging elsewhere”) (*ibid* at 6).

¹⁰⁶ “Canadian Gas Association Under Investigation Over its Claims Natural Gas Is ‘Clean,’” *CBC News* (10 November 2022), online: [perma.cc/9KSV-2B3F].

¹⁰⁷ Canadian Association of Physicians for the Environment, “Application for Inquiry Into the Canadian Gas Association’s False and Misleading Representations About Natural Gas” (September 2022) at 1–2, online (pdf): [perma.cc/ES7U-A89E] [emphasis omitted].

¹⁰⁸ *Ibid* at 2 [emphasis omitted].

More recently, in April 2023, the Competition Bureau confirmed it had commenced a formal inquiry into the marketing practices of Pathways Alliance.¹⁰⁹ The mandatory inquiry was initiated following a complaint from Greenpeace alleging that certain advertising claims made by the Pathways Alliance were false and misleading because they did not incorporate the lifecycle of their products, represented that a transparent plan was being followed to reduce emissions while continuing to expand production, and were “based on untenable and not established assumptions about future technologies.”¹¹⁰

Across the border, the US has also seen increasing numbers of complaints being made to competition and securities regulators regarding claims alleged to be misleading in advertising fossil fuel products and programs. Like the Competition Bureau, the American Federal Trade Commission (the FTC) is tasked with “[p]rotecting the public from deceptive or unfair business practices and from unfair methods of competition.”¹¹¹ Beginning in 1992, the FTC began publishing its “Green Guides” in order “to help marketers avoid making environmental claims that mislead consumers,” the most recent revision of which was made in 2012.¹¹² While the Green Guides do not bind the FTC or the public, they do contemplate the FTC taking enforcement action if a marketer makes environmental claims inconsistent with their guidance.¹¹³

In March 2021, the NGOs Earthworks, Global Witness, and Greenpeace USA jointly filed an FTC complaint against Chevron Corporation (Chevron) for what they alleged were “unlawfully deceptive advertisements [that overstated] investment in renewable energy and [Chevron’s] commitment to reducing fossil fuel pollution.”¹¹⁴ Among the target of the NGOs’ complaints was Chevron’s description of its purpose on its website “as a provider of ‘affordable, reliable, ever-cleaner energy to improve people’s lives and enable human progress’ while simultaneously investing a mere 0.2% of its capital expenditures in low-carbon energy sources from 2010–2018 and increasing its overall carbon emissions” from 2017 to 2019.¹¹⁵ The complaint is the first of its kind “to petition the FTC to use its Green Guides against a fossil fuel company for misleading consumers on the climate and environmental impact of its operations.”¹¹⁶

Regulatory complaints in the US over alleged greenwashing have not only been raised before the FTC but also with the SEC. On 1 February 2023, Global Witness (a shareholder

¹⁰⁹ Letter from Josephine AL Palumbo, Deputy Commissioner of Competition, Competition Bureau Canada to Priyanka Vittal, Legal Counsel & Nola Poirier, Senior Researcher and Writer, Greenpeace Canada (25 April 2023), Notice of Inquiry Commencement, online: [perma.cc/TQ5K-6VJV]. The Pathways Alliance is an organization of companies operating approximately 95 percent of Canada’s oil sands production. It includes Canadian Natural Resources Limited, Cenovus Energy Inc, ConocoPhillips Canada Resources Corp, Imperial Oil Limited, MEG Energy Corp, and Suncor Energy Inc. (Greenpeace, “Application for Inquiry Into False and Misleading Representations Made by the Pathways Alliance About Their Climate Action and the Climate Impact of Their Business” (2023) at 1, online (pdf): *Climate Case Chart* [perma.cc/BB4P-J7YM] [Greenpeace Complaint Against Pathways]).

¹¹⁰ Greenpeace Complaint Against Pathways, *ibid* at 2.

¹¹¹ “About the FTC,” online: *Federal Trade Commission* [perma.cc/GP96-M7JM].

¹¹² “Green Guides,” online: *Federal Trade Commission* [perma.cc/4C6X-ZJJR].

¹¹³ US, Federal Trade Commission, *Guides for the Use of Environmental Marketing Claims*, 16 CFR § 260.1 (2012), online (pdf): [perma.cc/HXN2-2P5A].

¹¹⁴ Greenpeace, News Release, “Greenpeace Jointly Files FTC Complaint Against Chevron” (16 March 2021), online: [perma.cc/33VW-PDZ4] [Greenpeace Complaint Against Chevron].

¹¹⁵ Raquel Dominguez, “Why We’re Holding Chevron Accountable for its Greenwashing Campaigns” (22 March 2021), online (blog): *Earthworks* [perma.cc/ZN74-M2CC].

¹¹⁶ Greenpeace Complaint Against Chevron, *supra* note 114.

of Shell plc) submitted a complaint to the SEC’s Climate and ESG Task Force alleging that Shell plc “materially misstated its financial commitment to renewable sources of energy by inflating the content of its new ‘Renewables and Energy Solutions’ ... reporting segment with fossil fuel activities.”¹¹⁷ The complaint targeted Shell plc’s most recent annual report in which Shell plc reported that it directed 12 percent of its capital expenditure to Renewables and Energy Solutions in 2021 while Global Witness’ analysis suggested that Shell plc spent just 1.5 percent of its total capital expenditures on renewable sources of energy like wind and solar. Global Witness has asked the SEC “to examine whether including gas in [Renewables and Energy Solutions] without reporting how much spending Shell directs to gas has caused Shell to omit material facts necessary to its investors’ clear understanding of Shell’s purported energy transition” and whether Shell plc’s reported capital expenditures on Renewables and Energy Solutions “may include so much gas spending that labelling the segment ‘Renewables and Energy Solutions’ constitutes a materially misleading misstatement.”¹¹⁸ A determination has yet to be made by the SEC.

Regulatory complaints over advertisements by fossil fuel companies have also been filed in Europe. In December 2019, the environmental law charity ClientEarth filed a complaint against British Petroleum (BP) with the UK National Contact Point (UK NCP) for the Organisation for Economic Co-operation and Development (OECD).¹¹⁹ The specific subject of the complaint was an advertising campaign launched by BP in January 2019 across a multitude of media platforms under the titles “Keep Advancing” and “Possibilities Everywhere.”¹²⁰ The complaint noted that the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) “require clear, honest, accurate and informative communication between enterprises and the public,”¹²¹ and alleged that BP’s advertisements and communications with consumers were misleading in a number of ways:

- (1) False Impressions. The ads and communications gave “a false impression of the relative scale of renewable and low-carbon energy in BP’s business,” despite BP investing over 96 percent of its capital expenditure in fossil fuels and less than 4 percent on low-carbon technology.¹²²
- (2) Vague “Cleaner Burning” Claim. The ads claimed that gas was “‘cleaner burning’, without clarifying in what context, against which competing sources of energy and to what extent” this was the case.¹²³

¹¹⁷ Letter from Zorka Milin, Senior Advisor, Global Witness to Climate and ESG Task Force, Securities and Exchange Commission (1 February 2023) at 1, online (pdf): [perma.cc/34H3-QSFL] [Global Witness Complaint Letter]. See also “Shell Faces Groundbreaking Complaint for Misleading US Authorities and Investors on its Energy Transition Efforts” (1 February 2023), online: *Global Witness* [perma.cc/ZY2W-KB8K].

¹¹⁸ Global Witness Complaint Letter, *ibid* at 1–2 [emphasis omitted].

¹¹⁹ “Complaint Against BP in Respect of Violations of the OECD Guidelines” (3 December 2019), online (pdf): *ClientEarth* [perma.cc/AC2M-5S7F] [ClientEarth Complaint].

¹²⁰ *Ibid* at para 4.

¹²¹ *Ibid* at para 3.

¹²² *Ibid* at para 6.1.

¹²³ *Ibid* at para 6.2(a).

- (3) Overstated Gas Claims. The ads claimed that gas was “a ‘perfect’, ‘ideal’ or ‘smart’ partner to renewables, when in fact it has significant negative environmental impacts”;¹²⁴ and
- (4) Omission of Negative Impacts. The ads asserted that “increases in global primary energy demand [were] both desirable and inevitable,” while “omitting information about the predicted severe negative impacts of climate change caused by the continued, let alone increased, use of fossil fuel energy.”¹²⁵

As part of its request for relief from the UK NCP, ClimateEarth asked BP to withdraw and cease publication of the advertisements until revised to conform to OECD Guidelines, make a public statement explaining the withdrawal or correction, and “[e]nsure that all future advertising and public communications include a comment in the form of a warning or a disclaimer that the use of the company’s oil and gas products creates GHG emissions that contribute to global climate change.”¹²⁶

Prior to sending its response to ClientEarth’s complaint, BP issued a statement in February 2020 that it would “stop corporate reputation advertising campaigns and re-direct resources to promote well-designed climate policies,” and that its Possibilities Everywhere campaign would “come to an end and not be replaced.”¹²⁷ Following this announcement, the UK NCP determined that it no longer needed to continue with its initial assessment of ClientEarth’s complaint. Notably, the UK NCP indicated that “[h]ad the global corporate advertising campaign still been live at the time of this Initial Assessment, there may have been grounds to consider the issues raised further.”¹²⁸

B. GREENWASHING CLAIMS IN THE COURTS

Globally, there has been an upward trend in climate litigation, with the US being the environmental litigation capital of the world.¹²⁹ The strategies employed by plaintiffs in climate litigation are diverse, and include challenges to the implementation of climate targets, integration of climate standards into government decision-making, challenges to the flow of public money to projects that are not aligned with climate action, and challenges to government entities for failing to take impacts of climate change into account in developing policies.¹³⁰ To date, the majority of cases globally have sought to enforce climate standards by challenging policies developed without consideration of climate impacts, or challenging decisions to reduce targets in existing climate policies.¹³¹ However, in recent years, a wave of lawsuits alleging greenwashing and a corresponding breach of consumer protection laws by oil majors have been filed in the US.

¹²⁴ *Ibid* at para 6.2(c).

¹²⁵ *Ibid* at para 6.3.

¹²⁶ *Ibid* at para 215.

¹²⁷ UK National Contact Point for the OECD Guidelines for Multinational Enterprises, *Initial Assessment: ClientEarth Complaint to the UK NCP About BP* (Decision) (16 June 2020) at 10, online (pdf): [perma.cc/33U8-VYTY].

¹²⁸ *Ibid*.

¹²⁹ Dennis Mahony, *The Law of Climate Change in Canada* (Aurora: Cartwright Group, 2010) (loose-leaf), s 18:10; Setzer & Higham, *supra* note 92 at 2–3.

¹³⁰ Setzer & Higham, *ibid* at 18–19.

¹³¹ *Ibid* at 19, 21.

Several of the greenwashing lawsuits have been precipitated, in part, by a number of investigative reports published in 2015, one of which concluded that Exxon Corporation (the predecessor corporation to Exxon Mobil Corporation, or ExxonMobil) had conducted climate research decades ago and then “manufacture[d] doubt about the reality of global warming” that its scientists had confirmed.¹³² A subsequent study published in August 2017 in the scientific journal *Environmental Research Letters* concluded that there was a discrepancy between what ExxonMobil’s scientists and executives discussed about climate change privately and in academic circles, and what it presented to the general public. The study concluded that ExxonMobil’s “advertorials” — paid, editorial-style advertisements — had in the past misled the public about climate change by “overwhelmingly [expressing] doubt about [climate change] as real and human-caused, serious, and solvable,”¹³³ whereas the peer-reviewed papers and internal reports authored by Exxon Corporation’s employees by and large did not.¹³⁴

A lawsuit filed by the Commonwealth of Massachusetts in October 2019 against ExxonMobil is an example of the claims that have arisen against oil majors on the basis of state consumer protection laws (the Massachusetts Lawsuit).¹³⁵ The Massachusetts Lawsuit has alleged that ExxonMobil misled investors and consumers for decades about the role of fossil fuels in climate change and made a strategic decision to lead a “consumer deception campaign, repeatedly taking public positions . . . that contradicted the climate science Exxon itself had helped to develop.”¹³⁶ ExxonMobil’s actions are alleged to have been in violation of Massachusetts General Law Chapter 93A, a consumer protection law prohibiting “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”¹³⁷ Among the targets of the lawsuit are ExxonMobil’s representations that “consumer use of its Synergy™ and ‘green’ Mobil 1™ products reduces [GHG] emissions, at most a half-truth” on the basis that ExxonMobil failed “to disclose that the production and consumer use of fossil fuel products like Synergy™ and ‘green’ Mobil 1™ are a leading cause of climate change that endangers public health and consumer welfare.”¹³⁸ The lawsuit further alleges that the “deceptive nature of ExxonMobil’s greenwashing misrepresentations and omissions is compounded by the Company’s long history of intentionally sowing doubt and confusion in the minds of consumers about the link between fossil fuel use and climate change.”¹³⁹

¹³² Neela Banerjee, Lisa Song & David Hasemyer, “Exxon’s Own Research Confirmed Fossil Fuels’ Role in Global Warming Decades Ago” (16 September 2015), online: *Inside Climate News* [perma.cc/6BYT-T9KF].

¹³³ Geoffrey Supran & Naomi Oreskes, “Addendum to ‘Assessing ExxonMobil’s Climate Change Communications (1977–2014)’” (2020) 15:11 *Environmental Research Letters*.

¹³⁴ *Ibid* at 13.

¹³⁵ *Commonwealth of Massachusetts v Exxon Mobil Corporation* (22 June 2021), Mass 1984-CV-03333-BLS1 (Mass Sup Ct) [Massachusetts Decision June 2021].

¹³⁶ *Ibid* (Complaint received 24 October 2019, Commonwealth of Massachusetts) [Massachusetts Complaint].

¹³⁷ *Commonwealth of Massachusetts v Exxon Mobil Corporation*, 462 F Supp 3d 31 at 38 (D Mass 2020); MGL c93A, § 2(a).

¹³⁸ Massachusetts Complaint, *supra* note 136 at para 644.

¹³⁹ *Ibid* at para 825.

In June 2021, ExxonMobil unsuccessfully brought a motion to dismiss the Massachusetts Lawsuit pursuant to the State's "anti-SLAPP" law.¹⁴⁰ The decision was affirmed on appeal by the Massachusetts Supreme Judicial Court in May 2022, which concluded that the anti-SLAPP statute did not apply to civil enforcement actions by the Massachusetts Attorney General.¹⁴¹

The Massachusetts Lawsuit is one of a number of lawsuits filed against ExxonMobil and other oil majors by American municipalities and states, all of which allege historic and ongoing greenwashing, and all of which are at varying stages of the litigation process short of trial. Other claims include a lawsuit filed on 22 April 2021, by the City of New York against ExxonMobil, Shell, BP, and the American Petroleum Institute for alleged violations of New York City's consumer protection laws through false advertising and deceptive trade practices.¹⁴²

Thus far, defences by energy companies, specifically oil majors, in the US have largely focused on the issue of jurisdiction, and whether lawsuits alleging harms caused by emissions associated with the use of fossil fuels are properly brought in state courts as opposed to federal courts. Federal court has traditionally been seen as a more advantageous forum for defendant energy companies in which to litigate, due at least in part to concerns of "open[ing] the door to countless potentially conflicting state-court lawsuits applying state ... law to claims seeking redress for the global phenomenon of climate change."¹⁴³ The jurisdiction defence was dealt a significant blow on 24 April 2023, when the US Supreme Court declined to hear five appeals of lower court decisions which had determined that various greenwashing lawsuits brought by states, municipalities, and counties belonged in state court.¹⁴⁴ While the lower courts' decisions on the issue of jurisdiction are unlikely to make issues such as causation easier to prove for plaintiffs, they do open the door to increasing numbers of lawsuits being filed in state court.

Claims against energy companies have thus far shown no signs of abating, and the scope of the parties who may be named as defendants in such litigation is not limited to issuers. On 9 February 2023, ClientEarth, as a minority shareholder of Shell plc, filed a lawsuit against the board of directors of Shell plc (the Shell Board) "for failing to manage the material and foreseeable risks posed to the company by climate change."¹⁴⁵ The lawsuit, which gained international headlines as being the first attempt in Europe to pursue a derivative action

¹⁴⁰ Massachusetts Decision June 2021, *supra* note 135. "SLAPP" is an acronym for Strategic Litigation Against Public Participation. Anti-SLAPP legislation allows defendants who believe they have been targeted in a lawsuit because of the exercise of their rights (for example, freedom of speech) to file a motion to dismiss a lawsuit early in the process: "Massachusetts Law About Anti-SLAPP" (2023), online: *Commonwealth of Massachusetts* [perma.cc/G7L4-KV8A].

¹⁴¹ *Commonwealth of Massachusetts v Exxon Mobil Corporation* (24 May 2022), Mass SJC-13211 (Mass High Ct) at 18.

¹⁴² City of New York, News Release, "New York City Sues ExxonMobil, Shell, BP, and the American Petroleum Institute for Systematically and Intentionally Deceiving New Yorkers" (22 April 2021), online: [perma.cc/PGK2-2TRS].

¹⁴³ *Suncor Energy (USA) Inc v Board of County Commissioners (Boulder County)*, (10th Cir 2022) (Petition for a writ of certiorari at 30, online: [perma.cc/2Q4E-7D37]).

¹⁴⁴ *Suncor Energy Inc v Board of County Commissioners (Boulder County)*, 598 US __ (2023).

¹⁴⁵ ClientEarth, Press Release, "ClientEarth Files Climate Risk Lawsuit Against Shell's Board with Support from Institutional Investors" (9 February 2023), online: [perma.cc/7BKZ-FXRW].

against a board of directors for failing to properly prepare for an energy transition, was filed in the High Court of England and Wales.¹⁴⁶

Significantly, in May 2023 the High Court of England and Wales denied ClientEarth's application for permission to continue its derivative action against the Shell Board.¹⁴⁷ The Court was not satisfied that ClientEarth had demonstrated a case against the Shell Board for several reasons, one of which was the lack of evidentiary foundation from any witness on behalf of ClientEarth with "expertise in climate science, macro-economics, oil and gas price forecasting, accounting, carbon pricing, [or] carbon markets."¹⁴⁸ The Court further noted that while there were "fundamental disagreements" between ClientEarth and the Shell Board as to the way to achieve certain emissions reductions targets, the autonomy of the decision-making of the Shell Board on commercial issues, and its judgment "as to how best to achieve results which [were] in the best interests" of members as a whole, needed to be respected.¹⁴⁹ The Court's decision was particularly notable for questioning whether ClientEarth's derivative claim was brought in good faith, given the small number of shares ClientEarth held in Shell plc.¹⁵⁰ Although a UK decision, the deference accorded to the business judgment rule,¹⁵¹ and the Court's clear concern that the derivative action reflected the policy agenda of a small shareholder rather than a genuine concern about the Shell Board's balance of competing interests, will be important defences for any board facing similar litigation threats.

Notwithstanding the relative infancy of greenwashing claims, and though not specifically involving the energy industry, the recent victory of the wool shoe manufacturer Allbirds, Inc. (Allbirds) in defending against a greenwashing claim also offers some insight as to how such claims can be successfully defended in the future. In *Dwyer v. Allbirds, Inc.*¹⁵² the plaintiff sued Allbirds over its advertising claims, which focused on Allbirds' environmental impact with representations such as "Sustainability Meets Style," "Low Carbon Footprint," "Environmentally Friendly," "Reversing Climate Change," and "Our Sustainable Practices."¹⁵³ A central cause of action in *Dwyer* was New York General Business Law sections 349 and 350, which prohibit deceptive acts or practices and false advertising in the conduct of any business, trade, or commerce.¹⁵⁴

Among the practices that the plaintiff took issue with were Allbirds' use of a life cycle assessment (LCA) tool and the Higg Material Sustainability Index (the Higg MSI) to calculate the carbon footprint of its products. The plaintiff criticized the LCA tool on the

¹⁴⁶ *Ibid.*

¹⁴⁷ *ClientEarth v Shell Plc*, [2023] EWHC 1137 (Ch) at para 71. On 24 July 2023, ClientEarth issued a press release announcing its decision to appeal the dismissal of its derivative action against the Shell Board. See "ClientEarth to appeal High Court decision in case against Shell's Board" online: *ClientEarth* [perma.cc/T6VN-GPU5].

¹⁴⁸ *Ibid* at para 46.

¹⁴⁹ *Ibid* at para 47.

¹⁵⁰ *Ibid* at paras 61–65.

¹⁵¹ The business judgment rule is the principle that "[t]he court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board": *Kerr v Danier Leather Inc*, 2007 SCC 44 at para 54.

¹⁵² *Dwyer v Allbirds, Inc*, 598 F Supp (3d) 137 (SD NY 2022) [*Dwyer*].

¹⁵³ *Ibid* at 144.

¹⁵⁴ NY Gen Bus Law, c 20, art 22-A, §§ 349–50.

basis that it did not capture the carbon footprint from sheep farming overall, and that Allbirds' published carbon footprint figures would have been significantly higher had it done so. The plaintiff also criticized Allbirds' use of the Higg MSI, a standard developed by the Sustainable Apparel Coalition to measure the environmental impact of apparel materials, on the basis that it lacked standards for comparing different materials and that it was unsuitable "for public disclosure or comparative assertions" according to independent researchers.¹⁵⁵

In April 2022, Allbirds was successful in striking the plaintiff's claim. In support of its motion, Allbirds filed evidence enclosing, among other things, documents from Allbirds' website detailing the methodology used to calculate its carbon footprint. In finding in favour of Allbirds, the Court noted that the company had described the exact components of how its carbon footprint was calculated, while the plaintiff had provided no fact suggesting that Allbirds had not calculated the carbon footprint as advertised. The Court further noted that Allbirds' website provided "consumers with details regarding the LCA tool's methodology and the categories used in its calculation," and that Allbirds did "not mislead the reasonable consumer because it [made] clear what [was] included in the carbon footprint calculation, and [did] not suggest that any factors [were] included that really [were] not."¹⁵⁶

The Court also dismissed the plaintiff's allegation that Allbirds' reliance on the Higg MSI to calculate the carbon dioxide equivalent emissions of its materials would have materially misled a reasonable consumer, noting that the critique was one of methodology. The claim did not allege that the calculations were wrong or that Allbirds had falsely described the way in which it undertook those calculations. The Court noted that while there "may well be room for improvement in the Higg MSI ... that does not suggest that reliance on the current standard is deceptive."¹⁵⁷ The *Dwyer* lawsuit serves as an important reminder that transparency with respect to data and methodology through publicly available resources such as company websites, even if disputes as to methodology exist, can be an effective strategy in defending against greenwashing allegations.

VI. BEST PRACTICES TO MITIGATE AGAINST GREENWASHING ALLEGATIONS

Following an observed increase in potentially misleading, unsubstantiated, or otherwise incomplete claims included in disclosure documents, in tandem with increasing disclosure by reporting issuers on ESG considerations, the CSA issued Staff Notice 51-364 on 3 November 2022.¹⁵⁸

Like the CSA, and perhaps unsurprisingly given the nature of the complaints that have arisen in recent years, the Competition Bureau has also published guidance on environmental claims and greenwashing.¹⁵⁹ Similar guidance has been issued by the United Kingdom

¹⁵⁵ *Dwyer*, *supra* note 152 at 145.

¹⁵⁶ *Ibid* at 150 [emphasis omitted].

¹⁵⁷ *Ibid* at 151.

¹⁵⁸ *CSA Staff Notice 51-364*, *supra* note 87.

¹⁵⁹ Competition Bureau of Canada, "Environmental Claims and Greenwashing" (2 December 2021), online: *Innovation, Science and Economic Development Canada* [perma.cc/MZP8-ACRK] [Competition Bureau].

Competition and Markets Authority (the UK CMA),¹⁶⁰ which announced in January 2023 that it was “undertaking work to understand better how consumer protection legislation can be used to tackle false or misleading environmental claims that affect consumers.”¹⁶¹ In particular, the UK CMA is focusing on “how claims about the environmental impact of products and services are made,” “whether such claims are supported by evidence,” “whether such claims influence peoples’ behavior when purchasing such goods and services,” and “whether consumers are misled by an absence of information about the environmental impact of products and services.”¹⁶²

Taken as a whole, the guidance from these organizations suggests that reporting issuers should take the following into consideration in mitigating the greenwashing litigation risk associated with their ongoing voluntary and mandatory disclosure:

- (1) Make only statements that can be supported by facts and corporate activities.¹⁶³
- (2) Support any forward-looking statements, such as plans to be carbon-neutral by a particular year, with an identification of “material risk factors that could cause actual results to differ materially,” material factors or assumptions used to develop the forward-looking statement, and policies for updating the information.¹⁶⁴
- (3) Avoid “[b]roader, more general or absolute claims” which are much more likely to be seen as inaccurate or to mislead.¹⁶⁵ “Terms like ‘green,’ ‘sustainable,’ or ‘eco-friendly,’ especially if used without explanation, are likely to be seen as suggesting that a product, service, process, brand or business as a whole has a positive environmental impact, or at least no adverse impact.”¹⁶⁶
- (4) “Where claims are only true if certain conditions or caveats apply, those conditions or caveats should be clearly stated.”¹⁶⁷
- (5) If vague claims such as “environmentally friendly,” “ecological,” and “green” are used, they “should be reserved for products/services whose life cycles have been thoroughly examined and verified.”¹⁶⁸
- (6) Any details provided to substantiate claims should include how particular aspects of sustainability are being measured and evaluated.¹⁶⁹

¹⁶⁰ United Kingdom, Competition and Markets Authority, *CMA Guidance on Environmental Claims on Goods and Services: Helping Businesses Comply with Their Consumer Protection Law Obligations* (20 September 2021), online (pdf): [perma.cc/M7BP-N7XM] [*CMA Guidance*].

¹⁶¹ United Kingdom, Competition and Markets Authority, “Misleading Environmental Claims” (26 January 2023), online: *Government of United Kingdom* [perma.cc/DJ3G-R894].

¹⁶² *Ibid.*

¹⁶³ *CSA Staff Notice 51-364*, *supra* note 87 at 9363–64.

¹⁶⁴ *Ibid.*

¹⁶⁵ *CMA Guidance*, *supra* note 160, s 3.9; see also Competition Bureau, *supra* note 159.

¹⁶⁶ *CMA Guidance*, *ibid.*

¹⁶⁷ *Ibid.*, s 3.10.

¹⁶⁸ Competition Bureau of Canada, “Environmental Claims: A Guide for Industry and Advertisers” (June 2008), online: *Innovation, Science and Economic Development Canada* [perma.cc/F9ST-ZRL8].

¹⁶⁹ *CSA Staff Notice 51-364*, *supra* note 87 at 9364.

- (7) To the extent any ratings agency is used to measure a particular issuer's exposure to ESG risk, "the actual rating should be disclosed and it should be clear what specific set of criteria the rating is based on and what, if any, third party certified the rating."¹⁷⁰
- (8) Claims should not imply endorsement by third party organizations if no such endorsement exists.¹⁷¹
- (9) Issuers should "[r]eview advertisements with marketing, scientific and legal teams that take into consideration net-zero commitments or other climate pledges ... as well as the negative impacts on climate that the company causes."¹⁷²

VII. CONCLUSION

Whether making voluntary climate-related disclosures, or preparing to make future regulated climate-related disclosures, energy companies should continue to be mindful of their compliance and litigation risks. While it is anticipated that Canada will soon release its next iteration of the Climate Disclosure Proposals, the contents will be heavily influenced by international developments, including potential litigation in the US related to Scope 3 emissions and greenwashing litigation risk. This article sought to provide insight into the governance implications and best practices for energy companies that are currently making voluntary disclosures or that will make regulated disclosures in the future, but as the landscape around international climate-related disclosure continues to mature, so, too, do the strategies used by energy companies. It is also clear that the substantive content of climate-related disclosures (voluntary and perhaps regulated) is being examined carefully by NGOs, shareholders, and other market participants. Energy companies need to be increasingly aware that any climate-related disclosures they make could subject them to greenwashing litigation risk.

¹⁷⁰ *Ibid.*

¹⁷¹ Competition Bureau, *supra* note 159.

¹⁷² Benjamin et al, *supra* note 8 at 15.