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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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 (the "**TCFD**") disclosure framework and the work of the International Sustainability Standards Board (the "**ISSB**") in developing disclosure standards. Regulatory proposals for mandatory climate-related disclosure rules have been put out by the Canadian Securities Administrators (the "**CSA**") and the United States Securities and Exchange Commission (the "**SEC**"), in parallel with the development of the ISSB climate-related disclosure standard which is expected to be finalized in June 2023. This paper reviews these regulatory proposals, taking account of recent updates to May 31, 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

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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 paper discusses Canadian trends in greenwashing allegations, as well as recent regulatory actions and civil litigation claims in the United Kingdom (the "**UK**") and the United States (the "**US**"), 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 paper by certain often-used terms.

"**ESG**" (Environmental, Social and Governance) 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.[2] ESG is a methodology to help measure and report on an organization's impact through an environmental lens (e.g., waste management, air quality, climate change, biodiversity), a social lens (e.g., diversity, inclusivity, human rights, labor standards, safety) and a governance lens (e.g., board composition, executive compensation, ethics, lobbying).[3] 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

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[2] See "Sustainability vs ESG: What's the Difference and Why They Matter" (23 February 2023), online: *HSBC Business Go*: <www.businessgo.hsbc.com/en/article/demystifying-sustainability-and-esg>.

[3] See "ESG vs Sustainability: What's the Difference?" (24 May 2022), online: *FigBytes* <figbytes.com/blog/esg-vs-sustainability-whats-the-difference/>.

the long-term depletion of natural resources.[4] Examples of sustainability initiatives would be going paperless and working on energy efficiency.

"**Climate-related disclosure**" primarily lies within the "E" of ESG. In this paper, 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 (e.g., flooding) and chronic (e.g., 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; and 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]

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[4] See *Oxford English Dictionary*, sub verbo "sustainability", online: <oed.com>.

[5] See Task Force on Climate-related Financial Disclosures, "Recommendations of the Task Force on Climate-related Financial Disclosures" (15 June 2017), online (pdf): *FSB-TCFD.org* <assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf> [*TCFD Report*]. Refer to the discussion under the heading "*Voluntary vs. Mandatory Frameworks – Task Force on Climate-Related Financial Disclosures Recommendations*" below.

[6] See "About Us", online: *Greenhouse Gas Protocol* <ghgprotocol.org/about-us> [*GHG Protocol*].

[7] See "FAQ" (December 2022), online (pdf): *Greenhouse Gas Protocol* <ghgprotocol.org/sites/default/files/2022-12/FAQ.pdf>.

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 a company'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]

III. VOLUNTARY VS. 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.

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[8] See Lisa Benjamin, "Climate-Washing Litigation: Legal Liability for Misleading Climate Communications" (January 2022) at 4, online (pdf): *The Climate Social Science Network* <cssn.org/wp-content/uploads/2022/01/CSSN-Research-Report-2022-1-Climate-Washing-Litigation-Legal-Liability-for-Misleading-Climate-Communications.pdf> [*Climate-Washing Litigation*].

[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 "offset" as sustainable climate action" (November 2021), online (pdf): *Greenpeace Canada* <www.greenpeace.org/static/planet4-canada-stateless/2021/11/a7369fc0-driving-carbon-neutral-is-impossible-with-fossil-fuels.docx.pdf>.

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 (the "**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**") and its proposed Companion Policy 51-107 CP (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 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 (i.e., 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 March 7, 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. The Guideline is broadly based

on the requirements of the TCFD disclosure framework and generally consistent with the disclosure standards proposals being developed by the ISSB, 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.

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. 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.[10] This can be seen in the CSA, SEC and ISSB proposals discussed

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[1010] See *TCFD Report*, *supra* note 5 at 13.

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.

1. ***Governance.*** The TCFD recommends disclosure of the organization's governance around climate-related risks and opportunities. The supporting recommended disclosures are: (a) describe the board's oversight of climate-related risks and opportunities (e.g., is this primarily a board matter or are board committees involved); and (b) describe management's role in assessing and managing climate-related risks and opportunities.

2. ***Strategy.*** The TCFD recommends disclosure of the actual and potential impacts of climate-related risks and opportunities on the organization's business, strategy, and financial planning where such information is material. The supporting recommended disclosures are: (a) describe the climate-related risks and opportunities the organization has identified over the short, medium, and long term; (b) describe the impact of climate-related risks and opportunities on the organization's business, strategy, and financial planning; and (c) describe the resilience of the organization's strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario, in accordance with the TCFD's scenario analysis recommendations referenced below.

3. ***Risk Management.*** The TCFD recommends disclosure of how the organization identifies, assesses, and manages climate-related risks. The supporting recommended disclosures are: (a) describe the organization's processes for identifying and assessing climate-related risks;

(b) describe the organization's processes for managing climate-related risks; and (c) describe how processes for identifying, assessing, and managing climate-related risks are integrated into the organization's overall risk management.

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. The supporting recommended disclosures are: (a) disclose the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process; (b) disclose Scope 1, Scope 2, and Scope 3 GHG emissions, and the related risks; and (c) describe the targets used by the organization to manage climate-related risks and opportunities and performance against targets.

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 that organizations use a 2℃ or lower scenario in addition to two or three others that are most relevant to their circumstances. 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.[11]

[11] See *TCFD Report, supra* note 4 at 28.

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.

A. 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.[12] 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.[13] 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.[14]

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.[15] The CSA had previously provided guidance to issuers on existing continuous disclosure requirements related to environmental and climate-related matters, in three publications on

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[12] See "Who We Are" (2023), online: *Canadian Securities Administrators* <www.securities-administrators.ca/about/who-we-are/>.

[13] See "2022-2025 CSA Business Plan" (2022) at 3, online (pdf): *Canadian Securities Administrators* <www.securities-administrators.ca/wp-content/uploads/2022/10/2022_2025CSA_BusinessPlan.pdf>.

[14] *Ibid*.

[15] See *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 1 [*Climate-related Disclosure Notice*].

climate-related disclosures: CSA Staff Notice 51-333 in October 2010,[16] CSA Staff Notice 51-354 in April 2018,[17] and CSA Staff Notice 51-358 in August 2019.[18] 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 and incomplete risk disclosure.[19] 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.

Proposed CSA Rules

The CSA released its Climate Disclosure Proposals on October 18, 2021, publishing a CSA Notice and Request for Comment (the "**Notice**") on proposed NI 51-107 and Companion Policy 51-107CP.[20] 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.[21] The changes are also intended to align Canadian 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.[22] 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 (e.g., issuers that are

[16] See *CSA Staff Notice 51-333 – Environmental Reporting Guidance*, OSC CSA Notice, (2010) 33 OSCB 9943 at 9952.
[17] See *CSA Staff Notice 51-354 – Report on Climate Change-related Disclosure Project*, OSC CSA Notice, (2018) 41 OSCB 2759 at 2761.
[18] See *CSA Staff Notice 51-358 – Reporting of Climate Change-related Risks*, OSC CSA Notice, (2019) 42 OSCB 6615 at 6617.
[19] See *Climate-related Disclosure Notice*, *supra* note 15 at 34.
[20] See *Climate-related Disclosure Notice, supra* note 15 at 1.
[21] *Ibid* at 2.
[22] *Ibid*.

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.[23]

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 its board of directors' oversight of climate-related risks and opportunities and management's role in assessing and managing climate-related risks and opportunities.[24] 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**"). NI 51-107 would also mandate climate-related strategy, risk management, and metrics and targets disclosure.[25] 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.

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.[26] An issuer would also be required to disclose the

[23] *Ibid* at 2-3.
[24] See *Climate-related Disclosure Notice, supra* note 15 at 23.
[25] *Ibid* at 24.
[26] *Ibid*.

reporting standard it uses to calculate GHG emissions. If an issuer does not use the GHG Protocol,[27] 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.[28] 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.[29]

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.[30]

The comments received by the CSA in respect of the Climate Disclosure Proposals[31] demonstrate

[27] See *GHG Protocol*, *supra* note 6.
[28] 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.
[29] See *Climate-related Disclosure Notice, supra* note 15 at 25.
[30] See *Climate-related Disclosure Notice, supra* note 15 at 2.
[31] See *OSC Staff Notice 51-734 – Corporate Finance Branch Report 2022 Annual Report*, OSC Staff Notice 51-734 (1 December 2022), at 59 (The CSA received 131 submissions during the comment period with respect to the Climate Disclosure Proposals).

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.[32] 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.[33]

On October 12, 2022, the CSA published an update that it was "actively considering" the impact of international developments on its proposed climate-related disclosure rule.[34] In particular, the CSA noted the development of SEC proposals relating to climate-related information and ISSB proposals relating to a general standard for the disclosure of sustainability-related financial information and specific climate-related disclosure standard. The CSA is considering the differences between CSA, SEC, and ISSB proposals and TCFD recommendations and will be monitoring their evolution.[35]

The CSA's submissions as part of the ISSB proposals consultation may 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.[36] However, the CSA also made four

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[32] See *Climate-related Disclosure Notice, supra* note 15 at 39.

[33] See "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* <ccli.ubc.ca/summary-of-submissions-to-csa-51-107/>.

[34] See "Canadian securities regulators consider impact of international developments on proposed climate-related disclosure rule" (12 October 2022), online: *Canadian Securities Administrators* <www.securities-administrators.ca/news/canadian-securities-regulators-consider-impact-of-international-developments-on-proposed-climate-related-disclosure-rule/> [*CSA News Release*].

[35] *Ibid*.

[36] Stan Magidson, "CSA's response to International Sustainability Standards Board consultation on Exposure Drafts of IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and IFRS S2 Climate-related

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 work with other regulators developing reporting standards internationally with the goal of aligning disclosure standards for consistency.[37]

2. ISSB Proposed 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 (the "**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 is developing a voluntary disclosure standard. However, as will be discussed below, it is likely to have significant influence on the development of mandatory disclosure regimes.

Proposed ISSB Standards

After the release of the CSA's Climate Disclosure Proposals, in March 2022, the ISSB published

Disclosures" (25 July 2022) at 1, online (pdf): *Canadian Securities Administrators* <www.securities-administrators.ca/wp-content/uploads/2022/08/LEISSB_CSAComments20220725vf.pdf>.

[37] *Ibid.*

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. Through October, November and December 2022 and early 2023, the ISSB met to consider comments it received and provided regular updates on its deliberations.

The IFRS Foundation has indicated that it is working to have the ISSB's final climate-related and general sustainability disclosure standards issued in June 2023, with a view to having them adopted as "the global baseline" on issuance with the approval of the International Organization of Securities Commissions ("**IOSCO**").[38] 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 climate-related disclosure standard in the first year of implementation and the general sustainability disclosure standard in the second year of implementation, based on priorities expressed by investors.

On October 12, 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".[39]

[38] Members of the CSA participate in IOSCO and cooperate with other members to harmonize Canadian regulatory rules with global standards developed by IOSCO. See "Regulatory Cooperation" (2023), online: *Canadian Securities Administrators* <www.securities-administrators.ca/about/regulatory-cooperation/>.

[39] *CSA News Release*, *supra* note 34.

Given the likely finalization of the ISSB climate-related disclosure standard in 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.

References in this paper to the "**ISSB Proposal**" are to the proposed climate-related disclosure standard (S2) in the context of the general sustainability disclosure proposed standard (S1) and taking account of the update announcements from the ISSB on its deliberations.

The ISSB Proposal

Following are the key aspects of the ISSB Proposal:

1. The ISSB Proposal incorporates the TCFD disclosure recommendations and in a few cases goes beyond the TCFD recommendations.

2. The ISSB Proposal requires: (i) updating terms of reference, board mandates and other related policies to identify responsibilities for oversight of climate-related risks and opportunities; (ii) disclosing how the board and any relevant committees ensure that the appropriate skills and competencies are available to oversee strategies designed to respond to climate-related risks and opportunities; and (iii) disclosing how often the board and any relevant committees are informed about climate-related risks and opportunities.

3. The ISSB Proposal requires that appropriate board committee mandates be updated to cover climate-related risks and opportunities and that appropriate skills and competencies be represented on those committees.

4. The ISSB Proposal requires disclosure of how the board and its committees consider climate-related 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 climate-related risks and opportunities and subsequently monitor progress towards them.

5. The ISSB Proposal requires disclosure of management's role in assessing and managing climate-related risks and opportunities and how oversight is exercised over the relevant management positions.

6. The ISSB Proposal requires disclosure of processes by which climate-related risks and opportunities are identified, assessed and managed, and how these processes are integrated in an entity's overall risk management process. All of these types of issues are often overseen by an entity's audit committee, which supports the conclusion that the audit committee will have a significant role in overseeing climate-related risk and opportunities disclosure. The ISSB Proposal requires climate-related disclosure to be made with financial reporting where typically the audit committee has an approval role.

7. The ISSB Proposal requires that an entity disclose information that enables users of general-purpose financial reporting to understand the effects of significant 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 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 climate-related risks and opportunities, and planned sources of funding to implement strategy.

8. The ISSB Proposal contemplates that climate-related disclosure will be made with, and at the same time as, an entity's financial reporting, and on an annual basis unless applicable regulators determine more frequent disclosure is required. The connection between financial reporting and climate-related disclosure suggests that the disclosure would be made with (part of) an entity's annual MD&A, though the requirements are not express on this point.

9. The ISSB Proposal requires an entity to disclose significant climate-related risks and opportunities material to the entity itself, with materiality informed by its external inter-relationships. Disclosure of GHG emissions is required. In addition, an entity should disclose additional industry-based climate-related metrics specified in the ISSB Proposal that are based on the SASB standards. The SASB standards have now been rolled in to the IFRS Foundation, and these additional metrics are those material climate-related metrics considered relevant on an industry basis. Disclosure will be required that is material to investors in the entity.

10. The ISSB Proposal 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-relate 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.

11. The ISSB Proposal is intended to enable users of an entity's general purpose financial reporting to understand climate-related matters and so the disclosure is intended to be made with the financial reporting. The ISSB Proposal contemplates annual disclosure, leaving it to regulators to require any interim reporting. On introduction, the ISSB Proposal will contemplate a short transition period (as yet undefined) in which entities can make their annual climate-related disclosures with their second quarter filings.

12. The ISSB Proposal requires that an entity disclose its absolute Scope 1, 2 and 3 GHG emissions in accordance with the GHG Protocol Corporate Standard. For Scope 3 emissions, the ISSB Proposal contemplates that there will be transitional relief in the first year from the disclosure requirement to reflect general concerns around disclosure of Scope 3 emissions, including relating to the availability of data, and also safe harbour provisions to protect issuers from transitional data availability risks.

13. The ISSB climate-related disclosure standard will be adopted by CDP, meaning that CDP could start measuring and ranking disclosure against the ISSB standard 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 March 21, 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 Cary 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."[40]

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.[41]

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),[42] separately disclosed, expressed both by disaggregated constituent greenhouse gases and in the

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[40] "Press Release: SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors" (21 March 2022), online: *U.S. Securities and Exchange Commission* <www.sec.gov/news/press-release/2022-46>.

[41] "Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures", online 1-3 (pdf): *U.S. Securities and Exchange Commission* <www.sec.gov/file/33-11042-fact-sheet> [*SEC Fact Sheet*].

[42] "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (11 April 2022) at 21345, online (pdf): *U.S. Securities and Exchange Commission* <www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf> [*Proposed SEC Rule*].

aggregate, and in absolute terms, not including offsets, and in terms of intensity (per unit of economic value or production). Indirect emissions from upstream and downstream activities in the value chain (Scope 3)[43] 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.

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 (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,[44] 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.[45]

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

[43] *Ibid*.
[44] See *Proposed SEC Rule, supra* note 42 at 21346; *SEC Fact Sheet, supra* note 41.
[45] See Declan Harty, "SEC's Gensler weighs scaling back climate rule as lawsuits loom", *Politico* (4 February 2023), online: <www.politico.com/news/2023/02/04/sec-climate-rule-scale-back-00081181>; Michael Kapoor "Global ESG Rulemaker Says Investor Interests Are Paramount", *Bloomberg Law* (19 October 2022), online: <news.bloomberglaw.com/financial-accounting/global-esg-rulemaker-says-investor-interests-are-paramount>.

inherent uncertainty.[46] 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 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 and/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/advocacy groups, and the legal community—including the CSA—are all watching to 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.

Governance Best Practices

This section of the paper outlines what the Climate Disclosure Proposals mean for directors, boards and public company governance, as well as steps boards of directors (and any General Counsel or legal counsel advising boards of directors within their companies) should consider in preparing to

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[46] Letter to the Honourable Gary Gensler, Chair, US Securities and Exchange Commission, from Alphabet Inc., Amazon.com Inc., Autodesk, Inc., eBay Inc., Facebook, Inc., intel Corporation, and Salesforce.com Inc (11 June 2021), online (pdf): <www.sec.gov/comments/climate-disclosure/cll12-8907252-244227.pdf> [*Joint Response Letter to SEC*].

comply. This section also reflects on both the Climate Disclosure Proposals and the impact the ISSB Proposal will have in these areas.[47]

1. **Boards of directors should expressly establish oversight of climate-related risks and opportunities of the issuer.** This has already 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 Obliged to Address Climate Change Risk* (June 2020).[48] 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 available providing training for board members where existing corporate resources, or board expertise and knowledge may be lacking or requires additional support.

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

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[47] Bill Gilliland, "The CSA and ISSB climate-related disclosure proposals: Significant implications for directors, boards and public company governance, one year on" (2 January 2023), online: *Dentons Canada LLP Insights* <www.dentons.com/en/insights/guides-reports-and-whitepapers/2023/january/25/the-csa-and-issb-climate-related-disclosure-proposals>.

[48] Hansell McLaughlin LLP, "Putting Climate-Change Risk on the Boardroom Table" (June 2020), online (pdf): *Hansell McLaughlin Advisory Group* <www.hanselladvisory.com/content/uploads/Hansell-Climate-Change-Opinion.pdf>.

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.

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 is 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.

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 for it to fulfill its 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.

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"). [49] 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.

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

[49] See *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 4169 at 4205.

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.

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.

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

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.

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 that 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.

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 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.

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 paper, 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.

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, e.g., 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.

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.[50] 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."[51]

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."[52] Sustainability disclosures that are false, misleading, or unsubstantiated can, and have, formed the basis for both civil lawsuits and regulatory action across the globe.[53] 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

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[50] See *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 9393 at 9363, online: <www.osc.ca/sites/default/files/2022-11/csa_20221103_51-364_continuous-disclosure-review.pdf> [*CSA Staff Notice 51-364*].

[51] *Joint Response Letter to SEC, supra* note 46.

[52] *Ibid*.

[53] See Nneka Chike-Obi and Marina Petroleka, "ESG Litigation Risk" (15 February 2022), online (pdf): *Sustainable Fitch* <www.sustainablefitch.com/_assets/special-reports/esg-litigation-risk.pdf>.

surveys,[54] 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,[55] and targeting both private and public sector entities. 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* through the Government's contributions and causation of GHG emissions,[56] to whether permits in the natural resources sectors have been unlawfully extended.[57]

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.[58]

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[54] See *CSA Staff Notice 51-365*, *supra* note 50.

[55] See Joana Setzer, "Global Trends in Climate Change Litigation: 2022 Snapshot" (June 2022) at 3, online (pdf): *Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science* <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>.

[56] See generally *La Rose v Canada,* 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 *Canadian Charter of Rights and Freedoms*, 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 and public trust doctrine claims were not justiciable and otherwise disclosed no reasonable cause of action. The decision was appealed and a panel of the Federal Court of Appeal heard argument in February 2023.

[57] 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.

[58] See *Climate-Washing Litigation*, *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 has 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 in subway stations and the city centre in 2021,[59] and France became the first European country to ban advertisements for fossil fuels in August 2022.[60]

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 health and environmental risks associated with fossil fuel production and use.[61]

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 of 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,* RSC

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[59] See Hope Talbot, "Amsterdam to become first city in the world to ban this type of advert" (20 May 2021), online: *euronews* <www.euronews.com/green/2021/05/20/amsterdam-becomes-first-city-in-the-world-to-ban-this-type-of-advert>.

[60] See Rebecca Stewart, "Why France's Fossil Fuel Ad Ban Matters" (29 August 29 2022), online: *Adweek* <www.adweek.com/brand-marketing/why-frances-fossil-fuel-ad-ban-matters/>.

[61] See Canadian Association of Physicians for the Environment, "How fossil fuel ads make us sick", online*: Fossil Fuel Ads Make Us Sick* <www.stopfossilfuelads.ca/>.

1985, c. C-34 (the "***Competition Act***").

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 misleading or false in a material respect being subject to the *Competition Act*. 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.[62]

The earliest greenwashing complaint 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 account announcing its "Drive Carbon Neutral" program. 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.[63]

Greenpeace complained that the publication of the Drive Carbon Neutral program on Shell Canada's website and social media account contained false and/or misleading representations to the public because of the lack of "clear and accessible evidence" of Shell Canada's claim that

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[62] See *Competition Act*, RSC 1985, c C-34 at s 74.011(4).

[63] See Shell Canada, "Canadian drivers set to go carbon neutral with Shell" (12 November 2020), online: *Shell Canada* <www.shell.ca/en_ca/media/news-and-media-releases/news-releases-2020/shell-launches-drive-carbon-neutral-program-in-canada.html>.

customers purchasing from the Drive Carbon Neutral program would wholly offset emissions from the company's fossil fuels, as well as concerns about shortcomings in forest-based offsets.[64] 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.[65] 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 the production and use of natural gas releases significant GHG emissions, the use of natural gas for home heating and cooking causes indoor air pollution, natural gas is less affordable than other energy options, and the price of natural gas will increase due to climate policies and carbon pricing.[66] 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; and (3) pay a $10 million fine, credited to the Environmental Damages Fund,[67] 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. The Competition Bureau has yet to issue a

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[64] Issues with forest-based offset projects include impermanence (any benefits from offsetting carbon with forests are only as certain as the futures of the forest themselves); timing (fossil 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). See 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 "offset" as sustainable, climate action" at 5, online (pdf): *Greenpeace Canada* <www.greenpeace.org/static/planet4-canada-stateless/2021/11/a7369fc0-driving-carbon-neutral-is-impossible-with-fossil-fuels.docx.pdf>.

[65] See CBC News, "Canadian Gas Association under investigation over its claims natural gas is 'clean'" (10 November 2022), online: *CBC News* <www.cbc.ca/news/science/canadian-gas-association-competition-bureau-investigation-1.6647619\>.

[66] See 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), online (pdf): *Canadian Association of Physicians for the Environment* <cape.ca/wp-content/uploads/2022/09/2022-09-23-Final-CGA-complaint-to-Competition-Bureau.pdf>.

[67] *Ibid*.

determination on CAPE's complaint.

More recently, in April 2023, the Competition Bureau confirmed it had commenced a formal inquiry into the marketing practices of Pathways Alliance.[68] 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 un-established assumptions about future technologies.[69]

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 protecting the public from deceptive or unfair business practices and from unfair methods of competition.[70] 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.[71] While the Green Guides do not bind the FTC or the public, they do contemplate the FTC taking enforcement action if a marketer

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[68] Competition Bureau, Letter to Greenpeace re Notice of Inquiry Commencement (25 April 2023), online (pdf): *Greenpeace.org* <www.greenpeace.org/static/planet4-canada-stateless/2023/05/db0803da-dcpalumbo-inquiry-confirmation-2023-4-25-greenpeace.pdf>. The Pathways Alliance is an organization of companies operating approximately 95% 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.

[69] 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), online (pdf): <climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230304_19066_complaint.pdf>.

[70] See Federal Trade Commission, "About the FTC", online: *Federal Trade Commission* <www.ftc.gov/about-ftc>.

[71] See Federal Trade Commission, "Green Guides", online: *Federal Trade Commission* <www.ftc.gov/news-events/topics/truth-advertising/green-guides>.

makes environmental claims inconsistent with their guidance.[72]

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.[73] Among the target of the NGO's 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 0.2% of its capital expenditures in low-carbon energy sources from 2010-2018 and increasing its overall carbon emissions from 2017 to 2019.[74] 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.[75]

Regulatory complaints in the US over alleged greenwashing have not only been raised before the FTC but also with the SEC. On February 1, 2023, Global Witness (a shareholder 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.[76] The complaint targeted Shell PLC's most recent annual report in which Shell PLC

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[72] See Federal Trade Commission, "Part 260 – Guides for the Use of Environmental Marketing Claims", s 260.1, online (pdf): *Federal Trade Commission* <www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>.

[73] See Ryan Schleeter, "Greenpeace jointly files FTC complaint against Chevron" (16 March 2021), online: *Greenpeace* <www.greenpeace.org/usa/news/greenpeace-jointly-files-ftc-complaint-against-chevron/> [*Greenpeace Complaint against Chevron*].

[74] See Raquel Dominguez, "Why we're holding Chevron accountable for its greenwashing campaigns" (22 March 2021), online: *Earthworks* <earthworks.org/blog/why-were-holding-chevron-accountable-for-its-greenwashing-campaigns/>.

[75] See *Greenpeace Complaint against Chevron*, *supra* note 73.

[76] See Global Witness, "Shell faces groundbreaking complaint for misleading US authorities and investors on its energy transition efforts" (1 February 2023), online: *Global Witness* <www.globalwitness.org/en/campaigns/fossil-gas/shell-faces-groundbreaking-complaint-misleading-us-authorities-and-investors-its-energy-transition-efforts/>.

reported that it directed 12% of its capital expenditure to "Renewables and Energy Solutions" in 2021 while Global Witness's analysis suggested that Shell PLC spent just 1.5% 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 PLC directs to gas has caused Shell PLC to omit material facts necessary to its investors' clear understanding of Shell PLC's energy transition, and whether Shell PLC's reported capital expenditures on Renewables and Energy Solutions can include so much gas spending that labeling the segment "Renewables and Energy Solutions" constitutes a materially misleading statement. A determination has yet to be made by the SEC.

Regulatory complaints over advertisements by fossil fuel companies have also been filed in Europe, and have arguably met with success for NGOs there. 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 Organization for Economic Cooperation and Development ("**OECD**"). 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". 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, and alleged that BP's advertisements and communications with consumers were misleading in a number of ways:

1. ***False Impressions.*** Gave a false impression of the relative scale of renewable and low-carbon energy in BP's business, despite BP investing over 96% of its capital expenditure in fossil fuels and less than 4% on low-carbon technology.

2. ***Vague "Cleaner Burning" Claim.*** 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.

3. ***Overstated Gas Claims.*** Claimed that gas was "perfect," "ideal" or a "smart" partner to renewables when gas had significant negative environmental impacts; and

4. ***Omission of Negative Impacts.*** Asserted that increases in global primary energy demand were desirable and inevitable, while omitting information about predicted severe negative impacts of climate change caused by the increased use of fossil fuel energy.[77]

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 and/or correction, and ensure that all future advertising and public communications included a comment in the form of a warning or a disclaimer that the use of the company's oil and gas products created GHG emissions that contribute to global climate change.[78]

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. 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

[77] See Sophie Marjanac, "Complaint against BP in respect of violations of the OECD Guidelines" (December 2019), online: *ClientEarth* <www.clientearth.org/media/4npme1i1/ncp-complaint-clientearth-v-bp-complaint-submission-and-annex-a-ce-en.pdf>.

[78] *Ibid*.

indicated that had the global corporate advertising campaign still been alive at the time of the initial assessment, "there may have been grounds to consider the issues raised further."[79]

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.[80] 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, 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.[81] 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.[82] 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.

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 "manufactured doubt" about the scientific consensus that its scientists had

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[79] UK National Contact Point for the OECD Guidelines for Multinational Enterprises, "Initial Assessment: ClientEarth Complaint to the UK NCP about BP" (16 June 2020), online: *Government of the United Kingdom* <www.gov.uk/government/publications/client-earth-complaint-to-the-uk-ncp-about-bp/initial-assessment-clientearth-complaint-to-the-uk-ncp-about-bp>.

[80] See Dennis Mahony, "Law of Climate Change in Canada" (electronic: looseleaf), s 18:10.

[81] See Joana Setzer & Catherine Higham, "Global Trends in Climate Change Litigation: 2022 Snapshot" (2022) at 18—19, online (pdf): *Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science* <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>.

[82] *Ibid* at 21.

confirmed.[83] 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, whereas the peer-reviewed papers and internal reports authored by Exxon Corporation's employees by and large did not.[84]

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**").[85] 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 […]"[86] ExxonMobil's actions are alleged to have been in violation of Massachusetts General Law Chapter 93A, a consumer protection law prohibiting unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.[87] Among the targets of the lawsuit are ExxonMobil's representations that consumer use of its Synergy™ and "green" Mobil 1™ products

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[83] See 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* <insideclimatenews.org/news/16092015/exxons-own-research-confirmed-fossil-fuels-role-in-global-warming/>.

[84] See Geoffrey Supran & Naomi Oreskes, "Assessing ExxonMobil's climate change communications (1977-2014)" (2020), online (pdf): *Environmental Research Letters* <iopscience.iop.org/article/10.1088/1748-9326/aa815f/pdf>.

[85] See *Commonwealth of Massachusetts v ExxonMobil Corporation*, Superior Court Civil Action 1984-CV-03333-BLS1.

[86] Complaint, *Commonwealth of Massachusetts v Exxon Mobil Corporation* (24 October 2019), online: <climatecasechart.com/wp-content/uploads/sites/16/case-documents/2019/20191024_docket-1984CV03333_complaint.pdf> at para 13 [*Massachusetts Complaint*].

[87] See D.J. Young, Memorandum of Decision, Civil Action No. 19-12430-WGY (28 May 2020) at s 5, online: <casetext.com/case/massachusetts-v-exxon-mobil-corp>.

reduce GHG emissions, described as "at most a half-truth" on the basis that ExxonMobil failed to disclose that production and consumer use of fossil fuel products like Synergy™ and "green" Mobil 1™ "are a leading cause of climate change and endanger public health and consumer welfare."[88] The lawsuit further alleges that the "deceptive nature of Exxon Mobil'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."[89]

In June 2021, ExxonMobil unsuccessfully brought a motion to dismiss the Massachusetts Lawsuit pursuant to the State's "anti-SLAPP" law.[90] 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.[91]

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 April 22, 2021, by the City of New York against ExxonMobil, ExxonMobil Oil, Royal Dutch Shell PLC, BP, and the American Petroleum Institute for alleged violations of New York City's consumer protection laws through false advertising and deceptive

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[88] *Massachusetts Complaint*, *supra* note 86 at para 644.

[89] *Ibid* at 825.

[90] "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. See Commonwealth of Massachusetts, "Massachusetts Law About Anti-SLAPP" (2023), online: *Commonwealth of Massachusetts* <www.mass.gov/info-details/massachusetts-law-about-anti-slapp#print-sources->.

[91] See Memorandum of Decision, *Commonwealth of Massachusetts v Exxon Mobil Corporation*, SJC-13211 at 2, online: <climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220524_docket-SJC-13211_opinion.pdf>.

trade practices.[92]

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 "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."[93] The jurisdiction defence was dealt a significant blow on April 24, 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. 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 there are clear indications that the scope of the parties who may be named as defendants in litigation against such issuers has the potential to expand. On February 9, 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. The lawsuit, which gained international headlines as being the first attempt to pursue a derivative action

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[92] See City of New York, "New York City Sues ExxonMobil, Shell, BP, and The American Petroleum Institute for Systematically and Intentionally Deceiving New Yorkers" (22 April 2021), online: *City of New York* <www.nyc.gov/office-of-the-mayor/news/293-21/new-york-city-sues-exxonmobil-shell-bp-the-american-petroleum-institute-systematically>.

[93] *Suncor Energy (USA) Inc et al., Petitioners v Board of County Commissioners of Boulder County, et al on Petition for a Writ of Certiorari to the US Court of Appeals (10th Cir),* at 30, online (pdf): <subscriber.politicopro.com/eenews/f/eenews/?id=00000181-44b7-def0-abb5-4fb7d6090000>.

against a board of directors for failing to properly prepare for an energy transition, was filed in the High Court of England and Wales.[94]

Significantly, in May 2023 the English High Court denied ClientEarth's application for permission to continue its derivative action against the Shell Board.[95] 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. 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 their judgment as to how best to achieve the results that were in the best interests of members as a whole, needed to be respected. 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. Although a UK decision, the deference accorded to the business judgment rule,[96] 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.

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[94] See ClientEarth, "ClientEarth files climate risk lawsuit against Shell's institutional investors" (9 February 2023), online: *ClientEarth* <www.clientearth.org/latest/press-office/press/clientearth-files-climate-risk-lawsuit-against-shell-s-board-with-support-from-institutional-investors/>.

[95] See *ClientEarth v Shell Plc et al*, [2023] EWHC 1137 (Ch).

[96] The business judgment rule is the principle that courts look to see that a director made a reasonable decision, not a perfect decision. So long as the decision taken is within a range of reasonableness, the court should not substitute its opinion for that of the board. See *Kerr v Danier Leather Inc*, [2007] 3 SCR 331 at para 54.

("**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.* ("***Dwyer***")[97] 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".[98] A central cause of action in *Dwyer* was New York General Business Law §§ 349 and 350, which prohibits deceptive acts or practices and false advertising in the conduct of any business, trade, or commerce.

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 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.[99]

In April 2022, Allbirds was successful in striking the plaintiffs' claim. In support of its motion, Allbirds filed evidence enclosing, among other things, documents from Allbirds' website detailing the methodology used to calculate their carbon footprint. In finding in favour of Allbirds, the

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[97] *Dwyer v Allbirds, Inc*, Opinion & Order, United States District Court Southern District of New York, Case 7:21-cv-05238-CS, filed April 18, 2022, at 2, online (pdf): <climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20220418_docket-721-cv-05238_opinion-and-order.pdf> [*Dwyer*].
[98] *Ibid*.
[99] *Ibid* at 3.

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 any factors were included that really were not.

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." 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 November 3,

2022.[100]

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.[101] Similar guidance has been issued from the United Kingdom Competition and Markets Authority (the "**UK CMA**"),[102] 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. In particular, the UK CMA is focusing on how claims made 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 goods and services, and whether consumers are misled by an absence of information about the environmental impact of products and services.[103]

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. Only make statements that can be supported by facts and corporate activities.[104]

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

[100] *CSA Staff Notice 51-364*, *supra* note 50.
[101] See Competition Bureau of Canada, "Environmental claims and greenwashing" (2 December 2021), online: *Government of Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/environmental-claims-and-greenwashing> [*Competition Bureau*].
[102] See United Kingdom Competition and Markets Authority, "CMA Guidance on Environmental Claims on Goods and Services" (20 September 2021), online (pdf): Government of the United Kingdom <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018820/Guidance_for_businesses_on_making_environmental_claims_.pdf> [*CMA Guidance*].
[103] See United Kingdom Competition and Markets Authority, "Misleading environmental claims" (26 January 2023), online: *Government of the United Kingdom* <www.gov.uk/government/collections/misleading-environmental-claims>.
[104] See *CSA Staff Notice 51-365*, *supra* note 50 at 9363—9364.

materially, material factors or assumptions used to develop the forward-looking statement, and policies for updating the information.[105]

3. Avoid broader, more general or absolute claims which are much more likely to be seen as inaccurate or to mislead. Terms like "green," "sustainable", or "eco-friendly", especially if used without explanation, are likely to be seen as suggesting that a product, service, brand, or business as a whole has a positive environmental impact, or at least no adverse impact.[106]

4. Where claims are only true if certain conditions or caveats apply, those conditions or caveats should be clearly stated.[107]

5. If vague claims such as "environmentally friendly", "ecological", and "green" are used, they should be reserved for products or services whose life cycles have been thoroughly examined and verified.[108]

6. Any details provided to substantiate claims should include how particular aspects of sustainability are being measured and evaluated.[109]

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 should be clear as to what specific set of criteria the rating is based on and what, if any, third party certified the rating.[110]

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[105] *Ibid*.
[106] See *CMA Guidance*, *supra* note 102 at s 3.9; *Competition Bureau*, *supra* note 101.
[107] See *CMA Guidance, supra* note 106 at s 3.10.
[108] See Competition Bureau of Canada, "Environmental Claims: A guide for Industry and Advertisers" (June 2008), online: *Government of Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/environmental-claims-guide-industry-and-advertisers#s4_4>.
[109] See *CSA Staff Notice 51-365*, *supra* note 50 at 9364.
[110] *Ibid*.

8. Claims should not imply endorsement by third-party organizations if no such endorsement exists.[111]

9. Issuers should review advertisements with marketing, scientific, and legal teams that factor in net-zero commitments or other climate pledges, as well as the negative impacts on climate that the company causes.[112]

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 paper 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) are 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.

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[111] See *Competition Bureau, supra* note 101.
[112] See *Climate-Washing Litigation, supra* note 8.