ORIGINAL RESEARCH ARTICLE

Enforcing National Instrument 51-107 Disclosure of Climate-related Matters

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Abstract: This contribution analyzes the Canadian Securities Administrators' Proposed National Instrument 51-107—Disclosure of Climate-Related Matters (NI 51-107), which introduces climate-related disclosure (CRD) rules for reporting issuers in Canada. These disclosure rules are intended to provide consistent, comparable, and decision-useful information to market participants. NI 51-107 was published in October 2021, and its comment period ended in February 2022. This article comes during the waiting period before the Canadian Securities Administrators finalize their CRD rules and after the United States Securities and Exchange Commission adopted their CRD rules.

This article aims to highlight the legal tools available to Canadian securities regulators and stakeholders to allow NI 51-107 to live up to its regulatory purpose. After NI 51-107 comes into force, it is likely that securities regulators will continue to rely heavily on existing regulatory, civil, and criminal liability regimes to ensure compliance, while building on past scholarship advocating for a balance between public and private enforcement of Canadian security regulatory norms. As climate risks materialize through business costs, and stakeholders and regulators increasingly demand CRD, Canadian issuers ought to know the regulatory disclosure rules that apply to them, along with the legal risks of improper disclosure. Consequently, Canadian issuers conducting transnational business should familiarize themselves with the global trend toward CRD and the pressure to link capital markets with comparable disclosures using select reporting standards.

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Introduction

Anthropogenic climate change has caused hotter temperatures, more severe storms, increased drought, melting glaciers and ice sheets, warming and rising sea levels, and intensified extreme weather events that cannot be explained by natural processes alone.[1] The cumulative effect of these impacts, which increase the likelihood of more potent and frequent wildfires, floods, and tropical storms, has generated unprecedented consequences. For example, in August 2023, for the first time ever, the National Hurricane Center issued a tropical storm watch for large parts of Southern California, where tropical rainfall is not common during the region's dry season.[2] Halfway into 2023, Canadian wildfire officials said that the 2023 wildfire season was "easily the worst ever recorded", with many international firefighters being mobilized to Canada to help address the monumental fires

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1 United Nations, "Causes and Effects of Climate Change" (last visited 2 April 2024), online: <un.org/en/climatechange/science/causes-effects-climate-change>.

2 Haley Thiem, "Former Hurricane Hilary Brought Southern California its First-ever Tropical Storm Watch" (21 August 2023), online: <climate.gov/news-features/event-tracker/former-hurricane-hilary-brought-southern-california-its-first-ever>.

raging across the country.[3] Climate change disrupts almost every aspect of life, including human health, welfare, biodiversity, and the economy.

Larry Fink, CEO of BlackRock, the world's largest asset manager, addressed BlackRock's longstanding view that climate risk poses an investment risk in his 2023 annual letter to investors, which provides insight on BlackRock's investor stewardship:

> For years now, we have viewed climate risk as an investment risk. That's still the case. Anyone can see the impact of climate change in the natural disasters in California or Florida, in Pakistan, across Europe and Australia, and in many other places around the world. There's more flooding, more wildfires, and more intense storms. In fact, it's hard to find a part of our ecology – or our economy – that's not affected. Finance is not immune to these changes. We're already seeing rising insurance costs in response to shifting weather patterns.[4]

Given BlackRock's approximately USD $9 trillion in assets managed, Fink's annual letters have a wide reach among public companies, market participants, and other stakeholders.[5] Fink's 2023 letter emphasizes changes in corporate governance in light of mounting environmental, social, and governance (ESG) concerns, as well as growing shareholder demands for public companies to focus on long-term growth and corporate social responsibility.

At the same time, wealth is transferring to a younger generation, who are more engaged in "ethical investing" and "conscious capitalism" than their predecessors.[6] In turn, fiduciaries, including BlackRock, are responding to wider stakeholder values. Many retail and institutional investors are demanding more information about company vulnerabilities to climate change and its multi-faceted disruptions when making investment decisions.[7]

In the Global North, securities regulators recognize that climate-related risks can pose significant financial risks to companies. In December 2021, the United Kingdom (UK) Financial Conduct Authority found that "[c]limate change is a relevant consideration for all companies and likely to

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3 John Paul Tasker, "Canada Reports Worst Wildfire Season on Record—and There's More to Come This Fall", *CBC News* (11 August 2023), online: <cbc.ca/news/politics/Canada-wildfire-season-worst-ever-more-to-come-1.6934284>.

4 Larry Fink, "Larry Fink's Annual Chairman's Letter to Investors", *Harvard Law School Forum on Corporate Governance* (17 March 2023), online (blog): <corpgov.law.harvard.edu/2023/03/17/larry-finks-annual-chairmans-letter-to-investors/>.

5 Betty Moy Huber & Paula H Simpkins, "BlackRock's 2021 CEO Letter", *Harvard Law School Forum on Corporate Governance* (14 February 2021), online (blog): <corpgov.law.harvard.edu/2021/02/14/blackrocks-2021-ceo-letter/>.

6 Mirjana Perkovic, "How Can Ethical Investing Drive Positive Change?", *Forbes* (2 June 2023), online: <forbes.com/sites/forbesbusinesscouncil/2023/06/02/how-can-ethical-investing-drive-positive-change/>.

7 Commissioner Allison Herren Lee, "A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC", *US Securities and Exchange Commission* (15 March 2021), online: <sec.gov/news/speech/lee-climate-change>.

be material for most".[8] The Canadian Securities Administrators (CSA), the umbrella organization for all provincial and territorial securities regulators, acknowledged that "disclosure of material climate change-related risks is important for investors to make informed investment decisions".[9] The United States' Securities and Exchange Commission (SEC) has recognized that "investors need reliable information about climate-related risk to make informed investment decisions."[10] According to the United Nations' Principles for Responsible Investment, climate change is currently the highest priority ESG-related issue facing investors.[11]

Capital markets in the Global North have been responsive to investor needs for climate-related disclosure (CRD). In the last five years, global standards and frameworks for greenhouse gas (GHG) reporting have helped inform CRD rules proposed by securities regulators across various jurisdictions, including Canada, the European Union (EU), New Zealand, Singapore, the UK, and the United States (US). Notably, the Task Force on Climate-Related Financial Disclosures (TCFD) framework, along with the Sustainability Accounting Standards Board and International Sustainability Standards Board standards, guide the creation of these emerging CRD rules.[12]

This article comes during the waiting period before the CSA finalizes their CRD rules and after the SEC adopted their CRD rules.[13] More specifically, this article focuses on the CSA's proposed CRD rules under National Instrument 51-107 *Disclosure of Climate-related Matters* (NI 51-107).[14] Taking a forward look at NI 51-107, I start with a general prescriptive argument before exploring specifics

8 United Kingdom, Financial Conduct Authority, *Enhancing Climate-Related Disclosures by Standard Listed Companies*, Policy Statement PS21/23 (London, UK: Financial Conduct Authority, 2021) at 4, online (pdf): <fca.org.uk/publication/policy/ps21-23.pdf>.

9 Canadian Securities Administrators, *CSA Staff Notice: 51-358 Reporting of Climate Change-related Risks* OSC SN 51-358 (1 August 2019) 42 OSCB 6617 at 1, online (pdf): <osc.ca/sites/default/files/pdfs/irps/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf> [CSA Staff Notice, August 2019].

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

11 Principles for Responsible Investment, "Climate Change" (last visited 25 April 2024), online: <unpri.org/sustainability-issues/climate-change>.

12 Canadian Securities Administrators, News Release, "Canadian Securities Regulators Consider Impact of International Developments on Proposed Climate-Related Disclosure Rule" (12 October 2022), online: <securities-administrators.ca/news/canadian-securities-regulators-consider-impact-of-international-developments-on-proposed-climate-related-disclosure-rule/> [CSA, Regulators Consider Impact of International Developments].

13 US Securities and Exchange Commission, Press Release, 2024-31, "SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors" (6 March 2024), online: <sec.gov/news/press-release/2024-31>.

14 Canadian Securities Administrators, *Consultation: Climate-Related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107* Disclosure of Climate-Related Matters (18 October 2021) at 2, online (pdf): <osc.ca/sites/default/files/2021-10/csa_20211018_51-107_disclosure-update.pdf> [CSA Consultation on NI 51-107].

regarding enforcing NI 51-107 through three concurrent liability regimes. Broadly, I anticipate NI 51-107 to serve as the Canadian yardstick for determining improper CRD. I argue that NI 51-107, by clarifying climate disclosure rules, will bring about increased scrutiny of CRD and detection of climate-related securities misrepresentation or fraud in Canada.

The enforcement of NI 51-107 will be supported by existing regulatory, civil, and criminal liability regimes. This article discusses the regulatory, civil, and criminal enforcement mechanisms that are available to bolster NI 51-107. First, I illustrate how sections 127 and 138.3 of Ontario's *Securities Act*[15] (*OSA*), which are related to public interest orders and statutory civil liability respectively, are conducive to addressing *ex ante* and *ex post* damages for climate-related misrepresentation. In turn, I foresee one of two behaviours from issuers: issuers will either enhance CRD to meet the applicable standards of materiality,[16] or depending on the type of offering and timing, face public interest orders by securities tribunals or class actions for misrepresentation by activist shareholders. Then, I discuss how section 380 of the *Criminal Code*[17] and the cases of *Olan, Théroux,* and *Zlatic* inform criminal liability related to fraudulent CRD.[18] As a result of NI 51-107, Canadian issuers should know, or reasonably ought to know, CRD rules that should be disclosed to stakeholders.

This article is organized in three parts: Part I, looking at the past, sets out the preliminaries, defines climate change risks, reviews the literature on climate change and securities law, and describes the CRD practices and ESG ratings that were in effect before the CSA CRD rules were drafted. Part II, looking at the present, focuses on NI 51-107, explaining its CRD rules and comparing the CSA and SEC CRD rules. Part III, looking to the future, considers how NI 51-107 can be enforced under existing regulatory, civil, and criminal laws, and whether improvements can be made to NI 51-107 as it currently stands.

I. The Wild West of Climate Risk

Part I of this article establishes the context for NI 51-107. Part I(1) outlines the materiality of climate-related risk, then highlights the costs of climate change events. Part I(2) situates this article within the extant literature, and summarizes climate-related reporting and securities regulation discourse from the early 2000s. Against this backdrop, Part I(3) details the current need for CRD regulation. Essentially, while early scholars saw CRD's potential to democratize investments and curtail climate litigation, new problems have emerged, partly due to disparate reporting practices. Consequently, securities regulators are attempting to harmonize leading disclosure frameworks to standardize CRD between issuers and across capital markets.

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15 *Securities Act*, RSO 1990, c S.5, ss 127, 138.8 [*OSA*].

16 See Part III(1) of this article. Periodic disclosure obligations for material facts are triggered by one of two materiality standards: (1) "move-the-market" or "market impact", and (2) "reasonable investor". When an issuer fails to meet either one of the two materiality standards, then the issuer may face liability in various forms set out in the *OSA*.

17 *Criminal Code*, RSC 1985, c C-46, s 380.

18 See *R v Olan et al*, 1978 CanLII 9 (SCC) [*Olan*]; *R v Théroux*, 1993 CanLII 134 (SCC) [*Théroux*]; *R v Zlatic*, 1993 CanLII 135 (SCC) [*Zlatic*]. These cases are addressed in Part III.

1. Climate-Related Risk is Material

One essential function of financial markets is to price risk to support informed and efficient capital-allocation decisions.[19] As stated by the Bank of Canada, "increases in the frequency and severity of extreme weather events and the transition to a low-carbon net zero economy pose significant risks to the financial system."[20] It is incumbent on regulatory authorities to manage the risks that climate change poses on the macroeconomy and price stability with the broad goal of promoting economic and financial welfare.

The TCFD divides climate-related risks to financial stability into two categories: "(1) risks related to the *transition* to a lower-carbon economy and (2) risks related to the *physical* impacts of climate change."[21] (see Figure 1)

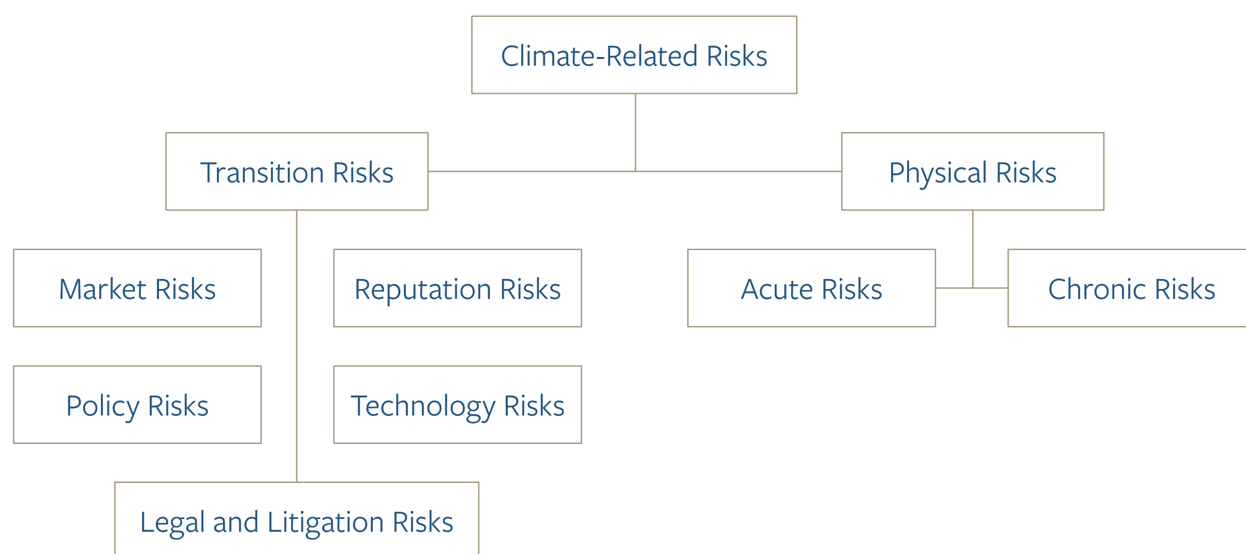

Figure 1: *Climate-related risks that impact financial stability as understood by the Bank of Canada,[22] the US Federal Reserve System,[23] and the Task Force on Climate-Related Financial Disclosures.[24]*

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19 CSA Consultation on NI 51-107, *supra* note 14 at ii, 61.

20 Bank of Canada, Press Release, "Bank of Canada Announces Climate Change Commitments for COP26" (3 November 2021), online: <bankofcanada.ca/2021/11/bank-canada-announces-climate-change-commitments-for-cop26/>.

21 Task Force on Climate-related Financial Disclosures, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (Basel: Task Force on Climate-related Financial Disclosure, 2017) at 5, online (pdf): <assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf> [TCFD].

22 Bank of Canada, *Annual Report 2020* (Ottawa: Bank of Canada, 2021) at 58, online (pdf): <bankofcanada.ca/wp-content/uploads/2021/04/Annual-Report-2020-Bank-of-Canada.pdf>.

23 Celso Brunetti et al, "Climate Change and Financial Stability", FEDS Notes (19 March 2021), online: <federalreserve.gov/econres/notes/feds-notes/climate-change-and-financial-stability-20210319.html>.

24 TCFD, *supra* note 21 at 5–6.

Transition risks arise as the economy moves from reliance on carbon-based energy toward using net zero carbon.[25] These risks include increased costs to keep up with the policy, legal, technology, and market changes related to mitigating and adapting to climate change.[26] Such transitions can result in some sectors facing shifts in asset values or higher costs of doing business.[27] Depending on the nature, speed, and focus of these changes, transition risks pose varying levels of financial and reputational risks to businesses because of the following factors, as stated by the TCFD:

- *Policy actions* that either attempt to constrain actions that contribute to the adverse effects of climate change or promote adaptation of climate change.[28]
- *Litigation* claims initiated by property owners, municipalities, states, insurers, shareholders, and public interest organizations, related to organizational failure to adapt to or mitigate against climate change impacts and insufficient disclosure around material financial risks.[29]
- *Technology improvements or innovations* that support the transition to a lower-carbon, energy-efficient economic system. As new technology displaces old systems, "creative destruction" changes competition and delineates winners and losers in the market.[30]
- *Market shifts* in supply and demand for certain commodities, products, and services as climate-related risk and opportunities are increasingly considered by consumers.[31]
- *Reputation risks* tied to changing customer or community perceptions of an organization's contribution to or detraction from the transition to a lower-carbon economy.[32]

Physical risks arise when certain environmental tipping points are crossed, leading to catastrophic outcomes for the climate and economy, and possibly irreversible harm.[33] Physical risks refer to those that are event-driven ("acute"), which include increased severity of extreme weather events, or to longer-term climate pattern shifts ("chronic"), which include sustained higher temperatures that

25 *Ibid*.

26 *Ibid* at ii–iii.

27 *Ibid*.

28 *Ibid* at 5.

29 *Ibid*. Some international guidance on climate-related disclosure may identify this risk as "liability risk", entailing risks that come from legal persons seeking compensation for losses suffered from physical or transition risks: see e.g. Bank of England, "Climate Change: What are the Risks to Financial Stability?" (last modified 10 January 2019), online: <bankofengland.co.uk/knowledgebank/climate-change-what-are-the-risks-to-financial-stability>.

30 TCFD, *supra* note 21 at 6. Coined by economist Joseph Schumpeter, "creative destruction" refers to the incessant product and process innovation mechanism by which new production units replace outdated ones: see generally Thomas K McCraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction* (Cambridge, MA: Harvard University Press, 2007).

31 TCFD, *supra* note 21 at 6.

32 *Ibid*.

33 Heather Boushey, Noah Kaufman & Jeffery Zhang, "New Tools Needed to Assess Climate-Related Financial Risk" (3 November 2021), online: <whitehouse.gov/cea/written-materials/2021/11/03/new-tools-needed-to-assess-climate-related-financial-risk-2/>.

may have environmental impacts.[34] Physical risks may have financial implications for corporations, including damage to assets and corporate premises, lower value of stranded assets, and supply chain disruption leading to indirect impacts.[35]

Indeed, McKinsey & Company have found that physical and transition risks increase corporations' vulnerability "to value erosion that could undermine their credit status", as well as compromise their capital and competitiveness.[36] As the effects of climate change continue to materialize, companies potentially face an increased default risk of loan portfolios, litigation, energy prices, business disruptions, and lower corporate profits, property value, asset values, and growth and productivity.[37] Without appropriate analysis and planning, climate-related risks can have profound financial implications for companies, including direct damage to assets, strains on insurance, creation of stranded assets, destruction of company premises, and disruptions to supply chains.[38]

Climate change alters the value of investments, as recent events in the US illustrate. In October 2018, California's largest utility, Pacific Gas and Electric (PG&E), was valued at US $25 billion.[39] Amid the fallout from the 2019 California wildfires, PG&E filed for Chapter 11 bankruptcy protection. The company faced 750 lawsuits with an estimated USD $30 billion in liabilities from wildfires purportedly caused by its power lines.[40] According to *The Wall Street Journal*, PG&E's bankruptcy marks a business milestone: "the first major corporate casualty of climate change".[41] PG&E's "climate-change bankruptcy" should serve as a case study for companies evaluating the financial risks of climate change.[42] Further, the case of PG&E highlights the corporate credit portfolio risks caused by the effects of climate change.[43]

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34 TCFD, *supra* note 21 at 6.

35 *Ibid*.

36 Joseba Eceiza et al, "Banking Imperatives for Managing Climate Risk" (1 June 2020), online: <mckinsey.com/business-functions/risk-and-resilience/our-insights/banking-imperatives-for-managing-climate-risk>.

37 Pierpaolo Grippa, Jochen Schmittmann & Felix Suntheim, "Climate Change and Financial Risk", *Finance & Development* (December 2019) at 27, online (pdf): <imf.org/external/pubs/ft/fandd/2019/12/pdf/climate-change-central-banks-and-financial-risk-grippa.pdf>.

38 TCFD, *supra* note 21 at 5–6.

39 Russell Gold, "PG&E: The First Climate-Change Bankruptcy, Probably Not the Last", *The Wall Street Journal* (18 January 2019), online: <wsj.com/articles/pg-e-wildfires-and-the-first-climate-change-bankruptcy-11547820006>.

40 *Ibid*.

41 *Ibid*.

42 *Ibid*; Grippa, Schmittmann & Suntheim, *supra* note 37 at 26.

43 The increased size of wildfires occurring across California in the last 50 years is attributable to climate change. Between 1972–2018, California experienced a fivefold increase in its annual burned area, mainly due to more than an eightfold increase in the extent of summer forest fires. The increase in summer forest fire area was likely caused by an increase in atmospheric aridity caused by warming. See A Park Williams et al, "Observed Impacts of Anthropogenic Climate Change on Wildfire in California" (2019) 7:8 Earth's Future 892 at 892, DOI: <10.1029/2019EF001210>.

In 2022, Munich Re, a leading global insurance provider, had to cover an astonishing USD $120 billion for natural catastrophes as the frequency, intensity, and impacts extreme weather worsened.[44] Natural catastrophes will drive up insurance prices and will have a huge impact on homeowners and businessowners, whose assets become too unaffordable to insure. As of 2022, "[i]ncluding uninsured losses, the total cost of storms, droughts, earthquakes, and fires … was [USD] $270 billion."[45] If this trajectory continues, the US housing market may see significant changes if people relocate to areas less affected by changing weather patterns.

To prevent an exodus from coastal zones and areas affected by extreme weather events, some local governments in the US have subsidized or replaced private insurance, like Munich Re.[46] Most flood insurance policies are underwritten by the US government's National Flood Insurance Program, which has had to borrow funds from the US Treasury and is currently USD $20.5 billion in debt.[47] Thus, strong economic growth is closely linked with appropriately managing and mitigating the risks of climate change while seizing the economic opportunities that come with transitioning to a carbon-neutral economy.[48] CRD rules aim to detail the methods for robust assessment and disclosure of climate-related risks to companies, which may inform future management and shareholder actions.

2. Climate Change and Securities Regulation

The 2015 United Nations Climate Change Conference (COP 21) led to the adoption of the *Paris Agreement*, currently the leading international climate change treaty.[49] Importantly, the private sector was more visible and active at COP 21 than at any previous COP.[50] The *Paris Agreement* was

44 Stephan Kahl, "Insured Losses Hit $120 Billion as Extreme Weather Spreads", *Bloomberg Law* (10 January 2023), online: <news.bloomberglaw.com/insurance/insured-losses-hit-120-billion-as-extreme-weather-upends-norms>.

45 *Ibid*.

46 Diane P Horn, "A Brief Introduction to the National Flood Insurance Program", *Congressional Research Service: In Focus* (last modified 29 March 2024) at 2, online (pdf): <sgp.fas.org/crs/homesec/IF10988.pdf>; Executive Office of the President of the United States, Office of Management and Budget, White Paper, *Climate Risk Exposure: An Assessment of the Federal Government's Financial Risks to Climate Change* (April 2022) at 9–10, 15, online (pdf): <whitehouse.gov/wp-content/uploads/2022/04/OMB_Climate_Risk_Exposure_2022.pdf>; Munich Reinsurance America, Inc, "Munich Re Continues its Flood Mitigation Work with Resilience Risk Transfer Solutions" (2020), online (pdf): <munichre.com/content/dam/munichre/mram/content-pieces/pdfs/Resilience-Risk-Transfer.pdf/_jcr_content/renditions/original./Resilience-Risk-Transfer.pdf>.

47 Horn, *supra* note 46 at 2.

48 Boushey, Kaufman & Zhang, *supra* note 33.

49 World Bank Group, "Private Sector - An Integral Part of Climate Action Post-Paris" (30 December 2015), online: <worldbank.org/en/news/feature/2015/12/30/private-sector-an-integral-part-of-climate-action-post-paris>; *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015, UN Doc FCCC/CP/2015/L.9/Rev/1 [*Paris Agreement*].

50 World Bank Group, *supra* note 49.

one of the first international legal instruments explicitly calling on private sector participation.[51] While the signatories of the *Paris Agreement* were sovereign nations, stakeholders acknowledged that translating the agreement into action would require the ingenuity, cooperation, and finance of the private sector.[52]

In 2015, the Financial Stability Board, an international body that monitors and makes recommendations about the global financial system, created the TCFD to support the goals of the *Paris Agreement*.[53] The TCFD was mandated to develop a framework (the TCFD Framework) to help public companies improve and increase reporting of climate-related financial information.[54] In 2017, the TCFD recommendations were released to "solicit decision-useful, forward-looking information" that could be included in mainstream financial filings, importable to various jurisdictions.[55]

GHG emissions and climate-related financial disclosures would provide investors information necessary to assess a company's exposure to and management of climate-related risks,[56] including both the physical risks from more frequent or severe weather events on businesses and the transition risks from moving to a low-carbon economy.[57] Currently, many developed market jurisdictions, including the UK, the US, the EU, Canada, and Australia, have specific climate-related disclosure rules or proposed rules that are designed with the TCFD recommendations in mind.[58]

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51 *Paris Agreement*, *supra* note 49. Article 6(8)(b) of the *Paris Agreement* reads: "Parties recognize the importance of integrated, holistic and balanced non-market approaches being available to Parties to assist in the implementation of their nationally determined contributions, in the context of sustainable development and poverty eradication, in a coordinated and effective manner, including through, inter alia, mitigation, adaptation, finance, technology transfer and capacity building, as appropriate. These approaches shall aim to: ... Enhance public and private sector participation in the implementation of nationally determined contributions".

52 World Bank Group, *supra* note 49.

53 MSCI, "Task Force on Climate-related Financial Disclosures (TCFD)" (last visited 2 March 2024), online: <msci.com/tcfd>.

54 Task Force on Climate-related Financial Disclosures, "About" (last visited 2 March 2024), online: <fsb-tcfd.org/about/>. The TCFD disbanded on December 15, 2023, after the International Sustainability Standards Board's inaugural standards—IFRS S1 *General Requirements for Disclosure of Sustainability-Related Financial Information and IFRS S2 Climate-related Disclosures*—were released, marking the fulfillment of the TCFD's remit. The Financial Stability Board requested that the International Sustainability Standards Board assume responsibility for monitoring progress on the state of climate-related financial disclosures by companies as of 2024. However, the TCFD disbandment does not change the mandatory requirements with respect to the TCFD recommendations.

55 TCFD, *supra* note 21 at iii.

56 *Ibid* at iv.

57 *Ibid* at 5–6.

58 Lois Guthrie & Luke Blower, "Corporate Climate Disclosure Schemes in G20 Countries after COP 21" (Climate Disclosure Standards Board, 2017) at 18–21, online (pdf): <jstor.org/stable/pdf/resrep15540.pdf?refreqid=fastly-default%3A755063e8cdc5f704cde96b827aa4a290&ab_segments=&origin=&initiator=&acceptTC=1>.

Recent years have seen more and more ESG investing.[59] In Canada, as in other developed market jurisdictions, securities regulators have long recognized the need for companies to provide environmental disclosures that would be material to investor decision making.[60] A robust body of literature exists articulating the various factors for companies to consider in making CRD.

First, climate change and GHG emissions disclosures are covered by rules requiring public companies to publish information about the risks they face.[61] The disclosures relate to materiality. As outlined in Part I(1), climate change risks have material costs that inform investment decisions. Materiality is the bedrock of securities law and regulation in developed market economies.[62] A fact passes the materiality threshold and must be disclosed if "there is a substantial likelihood that a reasonable person would consider it important".[63] Increasingly, almost half of the investor community believe that tackling climate change should be a top five priority for business.[64]

Second, companies may avoid climate litigation by disclosing material risks to investors.[65] Climate change securities litigation involves investors or regulators suing public companies for failing to properly disclose risks and liabilities they face from climate change.[66]

59 Lauren Foster, "ESG Fund Assets Soared in 2021. They Still Have Room to Run.", *Barron's* (30 March 2022), online: <barrons.com/articles/esg-fund-assets-soared-in-2021-they-still-have-room-to-run-51648590122>.

60 See e.g. Sylvie Berthelot & Anne-Marie Robert, "Climate Change Disclosures: An Examination of Canadian Oil and Gas Firms" (2011) 5:2 Issues Soc & Envtl Account 106 at 107, DOI: <10.22164/isea.v5i2.61>.

61 *Ibid*. National Instrument 51-102 *Continuous Disclosure Obligations* (adopted by the OSC in 2004, as well as counterparts in other Canadian provinces) requires public companies to dedicate a portion of their MD&A to a description of the risks that can materially affect their future performance. See also *OSA*, *supra* note 15, s 75(1).

62 See e.g. David A Katz & Laura A McIntosh, "Corporate Governance Update: 'Materiality' in America and Abroad", *Harvard Law School Forum on Corporate Governance* (1 May 2021), online (blog): <corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/>.

63 *Ibid*. See also US Securities and Exchange Commission, *SEC Staff Accounting Bulletin: No. 99 – Materiality*, 17 CFR Part 211, (12 August 1999) Release No SAB 99, 64 FR 45150 at 45151, online: <sec.gov/interps/account/sab99.htm>; Ontario Securities Commission, *National Policy 51-201 Disclosure Standards* (12 July 2002) 25 OSCB 4492 at 4499–4501, online (pdf): <osc.ca/sites/default/files/pdfs/irps/pol_20020712_51-201.pdf>.

64 PWC, Press Release, "Investors Continue to Prioritise Climate Action Despite Lacking Trusted Information" (6 December 2022), online: <pwc.com/gx/en/news-room/press-releases/2022/investors-continue-to-prioritise-climate-action-despite-lacking-trusted-information.html>.

65 Mary Condon, "Rethinking Enforcement and Litigation in Ontario Securities Regulation" (2006) 32:1 Queen's LJ 1 at 38.

66 Graham Erion, "The Stock Market to the Rescue? Carbon Disclosure and the Future of Securities-Related Climate Change Litigation" (2009) 18:2 RECIEL 164 at 164, DOI: <10.1111/j.1467-9388.2009.00638.x>.

Third, even in the absence of a legal rule to do so, firms have incentives to adopt a good corporate governance practice like voluntary CRD. Applying Anita Anand's earlier work on companies adopting governance practices voluntarily, early movers of good corporate governance practices have flexibility in designing their own disclosure reports.[67] Furthermore, firms respond to investors' desires for information to remain competitive.[68]

Securities regulatory norms have been enforced through both public and private actions. Scholars have debated whether it is necessary to have a public enforcer of securities law in the form of an administrative agency, or whether it is best to rely on private parties to enforce their claims against market participants in court.[69] Ultimately, both mechanisms need to exist to achieve effective securities regulation: public enforcement is aimed at deterring violations and creating incentives for compliance, whereas private enforcement is aimed at compensating stakeholders.[70] Achieving the proper balance between public and private securities enforcement is critical for promoting investor confidence and robust capital markets.[71]

Little to no literature exists on how NI 51-107 will be enforced due its ripeness. This article therefore builds on past theories of Canadian climate law and securities regulation to consider this question through a CRD lens.

3. The Need for Regulating Climate-Related Disclosure

Currently, "[s]ecurities legislation in Canada requires reporting issuers to disclose the material risks affecting their business and, where practicable, the financial impacts of such risks."[72] However, without clear guidance on what constitutes material climate change risks, and in the absence of robust enforcement of accurate reporting, issuers operate in a regulatory grey area that enables greenwashing.[73]

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67 Anita Indira Anand, "An Analysis of Enabling vs. Mandatory Corporate Governance: Structures Post-Sarbanes-Oxley" (2006) 31:1 Del J Corp L 229 at 239.

68 *Ibid* at 241.

69 Condon, *supra* note 65 at 38; Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "What Works in Securities Law?" (2006) 61:1 J Finance 1 at 1; Poonam Puri, "Securities Litigation and Enforcement: The Canadian Perspective" (2012) 37:3 Brook J Intl L 967 at 967.

70 Condon, *supra* note 65 at 1.

71 Puri, *supra* note 69 at 967.

72 CSA Staff Notice, August 2019, *supra* note 9 at 1.

73 As Canadians grow increasingly concerned about the environment and climate change, there is a higher demand for "green" products and services. However, there has also been a rise in "greenwashing," which is the use of false or deceptive marketing strategies and statements about environmental benefits. "This practice harms competition and innovation because consumers are being mislead and are therefore unable to make an informed purchasing decision": Competition Bureau Canada, "Environmental Claims and Greenwashing" (last modified 27 June 2024), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/environmental-claims-and-greenwashing>.

Greenwashing undercuts the goal of ESG investing: to bolster the pace and scale of capital allocation needed to achieve tangible, long-term value, and transition to low-carbon economies.[74]

In this area, issuers' behaviours can range from innocent misunderstanding to intentionally misrepresenting climate-related risks. This results in variations in disclosure practices, with some issuers providing no disclosure at all, omitting necessary information, conveying misleading information, and/or leveraging boilerplate terms.[75] Indifference to climate change matters is potentially harmful to investors, who may be trading inaccurately priced securities that fail to account for climate change risks, which undermines confidence in capital markets and investor interests.[76]

Accurate and timely disclosures of current and past operating financial results and the corporate governance and risk management practices through which financial results are achieved are fundamental to assessing climate-related risks.[77] Thus, the current strategy around managing climate-related risks focuses on reducing information gaps to enable financial markets to price these risks.[78] This requires a two-step process: first, companies need to disclose material climate-related risks; second, the disclosure needs to be relevant, consistent, and comparable.

The number of companies reporting sustainability data has increased over the past decade amid the rise of socially conscious investing. By year-end 2019, 90 percent of companies in the S&P 500 index issued sustainability reports, an increase from about 20 percent in 2011.[79] In a September 2021 study prepared for the Toronto Stock Exchange (TSX), the percentage of Canadian corporate issuers listed on the S&P/TSX with dedicated ESG reports grew from 58 percent in 2019 to 71 percent in 2020.[80] The proportion of corporate issuers who released a dedicated ESG report was higher amongst the

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74 OECD, *ESG Investing and Climate Transition: Market Practices, Issues and Policy Considerations* (Paris, France: OECD, 2021) at 3, online (pdf): <oecd.org/content/dam/oecd/en/publications/reports/2021/10/esg-investing-and-climate-transition_711f702e/7b321b7a-en.pdf>.

75 *Ibid* at 2–3.

76 Concerns over financial stability and market integrity "arise when asset prices adjust rapidly to reflect unexpected realizations of transition or physical risks." Additionally, while "markets are partly pricing in climate change risks... asset prices may not fully reflect the extent of potential damage and policy action required to limit global warming to 2°C or less." Without proper attention to climate change matters, some investors will have little to guard themselves from unexpected shocks in the capital markets: Grippa, Schmittmann & Suntheim, *supra* note 37 at 27–28.

77 TCFD, *supra* note 21 at ii.

78 Hugues Chenet, Josh Ryan-Collins & Frank van Lerven, "Finance, Climate-Change and Radical Uncertainty: Towards a Precautionary Approach to Financial Policy" (2021) 183:1 Ecol Econ 1 at 1, DOI: <10.1016/j.ecolecon.2021.106957>; CSA Consultation on NI 51-107, *supra* note 14 at 51–52.

79 Kristin Broughton & Mark Maurer, "Companies Could Face Pressure to Disclosure More ESG Data", *The Wall Street Journal* (6 December 2020), online: <wsj.com/articles/companies-could-face-pressure-to-disclose-more-esg-data-11607263201>.

80 Millani, *Millani's 5th Annual ESG Disclosure Study: A Canadian Perspective* (9 September 2021) at 2, online (pdf): <tsx.com/resource/en/2722>.

S&P/TSX60, growing from 73 percent in 2019 to 92 percent in 2020.[81] Most recently, the COVID-19 pandemic and Black Lives Matter (BLM) movement have spotlighted public companies' management of ESG issues in the US and Canada.[82] COVID-19 and BLM accentuated the importance of workforce, community, and customer relationships to a company's bottom line, increasing acknowledgement of the 'S' factor in assessing whether companies are prepared for future crises and unexpected events.

However, quantity is not the same as quality. In spring 2021, the CSA conducted a targeted review of current public disclosure practices of large Canadian issuers (Disclosure Review) from a diverse range of industries, primarily from the S&P/TSX, with respect to climate-related information.[83] The Disclosure Review revealed that only 59 percent of climate-related risks provided in issuers' continuous disclosures were "relevant, detailed, and entity specific, while the remaining risks were boilerplate, vague or incomplete".[84] The same review showed that while 68 percent of the risk disclosures provided a qualitative discussion of the related financial impacts, 25 percent did not address the financial impact at all, and no issuers quantified the financial impact of the identified risks.[85]

Further, the CSA notes a number of concerns about current CRDs, including that they may not be "complete, consistent, and comparable;" that "quantitative information is often limited and not necessarily consistent;" that "issuers may 'cherry pick' by reporting selectively against a particular voluntary standard and/or frameworks;" and that "sustainability reporting can be siloed and is not necessarily integrated into companies' periodic reporting structures."[86] These concerns underscore the fact that, without clear CRD rules, companies can strategically choose their reporting framework to produce a distorted picture.

Influential institutional investors like BlackRock and Vanguard publicly endorse Sustainability Accounting Standards Board (SASB) standards and TCFD recommendations to help standardize reporting made by the companies in which they invest.[87] However, information on climate reporting frameworks and standards exist from various other organizations, including the Global Reporting Initiative (GRI), the International Integrated Reporting Council, the Workforce Disclosure Initiative, the Carbon Disclosure Project, and the UN's Sustainable Development Goals.

81 *Ibid*. The S&P/TSX60 consists of the 60 largest corporations by market capitalization in the S&P/TSX Composite Index.

82 Maia Gez et al, "ESG Disclosure Trends in SEC Filings" (13 August 2020), online: <whitecase.com/publications/alert/esg-disclosure-trends-sec-filings>.

83 CSA Consultation on NI 51-107, *supra* note 14 at 3–4.

84 *Ibid* at 4.

85 *Ibid*.

86 *Ibid* at 2.

87 BlackRock, "Our Fiduciary Approach to Sustainability and the Low-Carbon Transition" (last visited 2 March 2024), online: <blackrock.com/corporate/sustainability/our-approach-to-sustainability>; Vanguard, "Vanguard's Approach to Climate Risk" (last visited 25 April 2024), online: <corporate.vanguard.com/content/corporatesite/us/en/corp/climate-change.html>.

This multiplicity of information results in some issuers not knowing which frameworks and standards to follow or what to disclose.[88] Additionally, issuers are less constrained in their ability to greenwash reports to appeal to investors, secure reputational advantage, improve credit ratings, invoke business confidence, or inflate share prices. On average, large Canadian issuers reference nearly three third-party frameworks in their voluntary reports, with the GRI framework being the most common, followed by the SASB and TCFD recommendations.[89] In turn, stakeholders are challenged with assessing credit and market risks under frameworks that are often not directly comparable.[90]

Some stakeholders turn to ESG ratings as an alternative means for assessing companies' climate-related risks, but ESG ratings do not provide a complete picture.[91] CRD is no doubt inextricably linked with ESG investing.[92] Essentially, CRD often provide the inputs for ESG ratings. Third-party ESG raters use indices to produce ESG scores to rank public companies based on their ESG risks.[93] However, different indices use different inputs, resulting in ESG raters providing different rankings across firms and emphasizing different aspects of the companies' behaviours.[94]

For example, among leading ESG raters, Thomson Reuters has 186 metrics and sub-metrics, Morgan Stanley Capital International (MSCI) has 34, and Bloomberg over 120. Consequently, correlation of a company's scores across ESG providers is relatively low.[95] As a case in point, Refinitiv ranked Wells Fargo & Company in the top 10 percent of all 917 tracked banking services companies, while MSCI gave the bank an average rating, and Sustainalytics ranked them poorly.[96] The methodology used

88 World Economic Forum, *Toward Common Metrics and Consistent Reporting of Sustainable Value Creation* (Geneva: World Economic Forum, 2020) at 6, online: <www3.weforum.org/docs/WEF_IBC_ESG_Metrics_Discussion_Paper.pdf>; KPMG, *Frontiers in Finance* (May 2020) at 48, online (pdf): <assets.kpmg.com/content/dam/kpmg/lk/pdf/2020/06/frontiers-in-finance-issue-62-may-2020.pdf>.

89 CSA Consultation on NI 51-107, *supra* note 14 at 3–4.

90 KPMG, *supra* note 88 at 48.

91 David F Larcker et al, "ESG Ratings: A Compass without Direction" (2022) Rock Center for Corporate Governance at Stanford University, Working Paper, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=4179647>; Brian Tayan, "ESG Ratings: A Compass without Direction", *Harvard Law School Forum on Corporate Governance* (24 August 2022), online (blog): <corpgov.law.harvard.edu/2022/08/24/esg-ratings-a-compass-without-direction/>.

92 Tayan, *supra* note 91.

93 *Ibid*.

94 Jack M Mintz, "Jack M. Mintz: ESG Rankings are a Mug's Game", *Financial Post* (8 July 2021), online: <financialpost.com/opinion/jack-m-mintz-esg-rankings-are-a-mugs-game>.

95 Riccardo Boffo & Robert Patalano, *ESG Investing: Practices, Progress and Challenges* (Paris, France: OECD, 2020) at 27–28, online (pdf): <oecd-ilibrary.org/finance-and-investment/esg-investing_5504598c-en>.

96 Shane Shifflett, "How ESG Stocks Perform Depends on Who Ranks Them", *The Wall Street Journal* (11 June 2021), online: <wsj.com/articles/how-esg-stocks-perform-depends-on-who-ranks-them-11623403803>.

by some ESG raters assigns scores relative to competitors in the same industry, while others assess absolute risk based on a company's material exposure to ESG issues.[97]

The underlying reason for disparate outcomes is because while ESG ratings are intended to measure "ESG quality", ESG quality itself does not have a single agreed-upon definition.[98] Similar to the pitfall of there being no CRD rules, ESG ratings also follow no standardized methodology. Different index compositions lead to different results. A triangulation of ratings may paint a more robust picture, but that process may undermine the neatness of a rating. Overall, reliance on voluntary CRDs and ESG rankings ought to be temporary, as the information can be piecemeal, variable, and incommensurable.

II. Mapping Climate-Related Disclosures

The concerns outlined in the CSA's Disclosure Review regarding incommensurable reporting between issuers and, more broadly, across capital markets, are not necessarily unique to Canada. Many securities regulators in the Global North, including the UK, the EU, and the US, are attempting to harmonize reporting frameworks across capital markets.[99] Securities regulators are proposing CRD rules to improve the comparability of information, aligning their domestic markets with the global movement towards consistent and comparable standards.[100] Harmonization intends to "address costs associated with reporting across multiple disclosure frameworks, improve access to global markets, and facilitate an equal playing field for issuers."[101]

Currently, the TCFD recommendations (which provides the Disclosure Framework) and the International Sustainability Standards Board guidance (which provides baselines for sustainability disclosure by incorporating industry-based disclosure rules derived from the Sustainability Accounting Standards Board Standards) act as the benchmark for this Global North movement. Canada's NI 51-107 is also largely based on these disclosure standards.[102]

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97 *Ibid*. For an overview on leading ESG report and rating providers and their methodologies, see Betty Moy Huber & Michael Comstock, "ESG Reports and Ratings: What They Are, Why They Matter", *Harvard Law School Forum on Corporate Governance* (27 July 2017), online (blog): <corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/>.

98 Tayan, *supra* note 91.

99 Huw Jones, "UK Adopts International Climate Disclosures to Bolster Global Investor Appeal", *Reuters* (2 August 2023), online: <reuters.com/world/uk/uk-adopts-international-climate-disclosures-bolster-global-investor-appeal-2023-08-02/>.

100 Canadian Securities Administrators, News Release, "Canadian Securities Regulators Seek Comment on Climate-Related Disclosure Requirements" (18 October 2021), online: <securities-administrators.ca/news/canadian-securities-regulators-seek-comment-on-climate-related-disclosure-requirements/>.

101 *Ibid*.

102 *Ibid*.

1. NI 51-107: Canada's New Mandatory Climate-Related Disclosure Rules

The CSA recognizes the prevailing demand for mandatory CRD that provides "consistent, comparable, and decision-useful information to market participants".[103] Following the CSA's Disclosure Review, the CSA proposed Canadian CRD rules (CSA CRD Rules) in October 2021, through NI 51-107 and its companion policy.[104] The CSA CRD rules require reporting issuers to disclose material information that investors can use to inform their investments and voting decisions.[105] Specifically, the disclosure rules intend to:

- Improve issuer access to global capital markets by aligning Canadian disclosure standards with the expectations of international investors;
- Assist investors in making better informed investment decisions by enhancing CRD;
- Facilitate an "equal playing field" for all issuers through comparable and consistent disclosure; and
- Remove the costs associated with navigating and reporting to multiple disclosure frameworks and reduce market fragmentation that demands different levels of disclosures.[106]

The specific rules regarding the nature and form of disclosure are provided in Form 51?107A concerning governance, and in Form 51-107B with respect to strategy, risk management, metrics and targets, and GHG emissions. The CSA CRD Rules applying to all reporting issuers in Canada, with limited exceptions, are outlined in Table 1.[107]

103 CSA Consultation on NI 51-107, *supra* note 14 at 2.

104 The CSA requested feedback on NI 51-107 by January 17, 2022. For the proposed Companion Policy 51-107CP, see Annex B of NI 51-107.

105 CSA Consultation on NI 51-107, *supra* note 14 at 2.

106 *Ibid*.

107 NI 51-107 would apply to all reporting issuers, other than investment funds, issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, certain exchangeable security issuers and certain credit support issuers: CSA Consultation on NI 51-107, *supra* note 14 at 6.

Table 1: *High-Level Summary of the CSA CRD Rules*[108]

	Form 51 107A	Form 51 107B			
	Governance	**Strategy**	**Risk Management**	**Metrics & Targets**	**GHG Emissions**
When to disclose	Mandatory	Only if material	Only if material	Only if material	Comply or explain
What to disclose	The board's oversight of climate-related risks and opportunities. Management's role in assessing and managing climate-related risks and opportunities.	The climate-related risks and opportunities the issuer has identified over the short, medium, and long term. The impact of climate-related risks and opportunities on the issuer's businesses, strategy, and financial planning.	The issuer's processes for identifying and assessing climate-related risks. The issuer's processes for managing climate-related risks. How processes for identifying, assessing, and managing climate-related risks are integrated into the issuer's overall risk management.	The metrics used by the issuer to assess climate-related risks and opportunities in line with its strategy and risk management process, where such information is material. The targets used by the issuer to manage climate-related risks and opportunities and performance against targets, where such information is material.	Scope 1, Scope 2, and Scope 3 GHG emissions,* and the related risks or the issuer's reasons for not disclosing this information.
Where to disclose	Proxy Soliciting Management Information Circulars. If the issuer does not send circulars, then disclose in Annual Information Form (AIF). If issuer does not file an AIF, then disclose in the Management Discussion and Analysis (MD&A) section of the issuer's annual report.	AIF. If the issuer does not file an AIF, then in its annual MD&A.	AIF. If the issuer does not file an AIF, then in its annual MD&A.	AIF. If the issuer does not file an AIF, then in its annual MD&A.	AIF. If the issuer does not file an AIF, then in its annual MD&A.

108 CSA Consultation on NI 51-107, *supra* note 14 at 7–9, 21.

* The CSA is also consulting on an alternative approach requiring issuers to disclose only Scope 1 GHG emissions, with disclosure of Scope 2 and Scope 3 GHG emissions not being mandatory. Issuers would have to disclose either their Scope 2 and 3 GHG emissions and the related risks, or the issuer's reasons for not disclosing this information.

The CSA and SEC join the likes of securities regulators in the EU, Singapore, Japan, New Zealand/Aotearoa, and the UK by incorporating TCFD recommendations within their proposed CRD rules.[109] The TCFD recommendations provide a framework to evaluate material climate-related risks and opportunities by assessing their projected short-, medium-, and long-term financial impacts on issuers.[110] This framework is based on four core elements, with each element offering two to three recommendations to provide a structure for the assessment, management, and disclosure of climate-related financial risk.[111] A summary of the four core elements, as provided by the TCFD, is as follows:

1. **Governance:** Disclose the organization's governance around climate-related risks and opportunities.

2. **Strategy:** Disclose the actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning, where such information is material.

3. **Risk Management:** Disclose how the organization identifies, assesses, and manages climate-related risks.

4. **Metrics and Targets:** Disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities, where such information is material.[112]

The CSA CRD Rules align neatly with the TCFD elements and vary in only two of the TCFD's eleven recommendations. First, under "Strategy", the CSA CRD Rules do not require issuers to describe the resilience of the organization's strategy, considering different climate-related scenarios, including a 2 degrees Celsius or lower global warming scenario.[113] Second, under "Metrics and Targets", unlike the TCFD recommendations, the CSA CRD Rules do not mandate the disclosure of Scope 1, Scope 2, and, *if appropriate*, Scope 3 GHG emissions and related risk. Instead, the CSA CRD Rules require issuers to disclose their GHG emissions and related risks for Scopes 1, 2, *and* 3 or, in the alternative, explain the reasons for not disclosing this information.

109 Bruno Caron & Annafaye Dunbar, "Hey Canadian Issuers, Your Neighbour is Up to Something: Disclosure of Climate-Related Matters" (3 May 2022), online (blog): <millerthomson.com/en/insights/securities-practice-notes/disclosure-climate-related-matters/>.

110 US Securities and Exchange Commission, "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (March 2022) at 35, online (pdf): <sec.gov/rules/proposed/2022/33-11042.pdf> [SEC, Climate-Related Disclosures].

111 *Ibid*.

112 Task Force on Climate-related Financial Disclosures, "TCFD Recommendations" (last visited 23 April 2024), online: <fsb-tcfd.org/recommendations/>.

113 CSA Consultation on NI 51-107, *supra* note 14 at 7.

The CSA initially specified December 31, 2022, as the earliest date the CRD Rules would come into force, with the comment period ending early in 2022. However, given international developments in CRD and the vast volume of comment letters received, timelines for the final CSA CRD Rules have been pushed back.[114] In March 2022, the SEC proposed its own CRD rules (SEC CRD Rules) through "The Enhancement and Standardization of Climate-Related Disclosures for Investors".[115] In June 2023, the International Sustainability Standards Board (ISSB), which the International Financial Reporting Standards established, released general standards for the disclosure of sustainability-related financial information.[116]

Given the CSA's emphasis on the role of "international consensus" in its decision-making process, it will likely collaborate with other securities regulators, including the SEC and ISSB, to reconcile the CSA CRD Rules and support a "comprehensive global baseline of sustainability disclosures".[117] This collaboration ensures that, relative to the SEC CRD Rules, the CSA CRD Rules are neither too weak nor costly, facilitating efficient trading across capital markets.

Timelines for the publication of the final rules were also pushed back in the US. Previously, the SEC addressed debates about the definition and application of Scope 3 emissions disclosures and dealt with the fallout from the US Supreme Court's June 2022 decision in *West Virginia v EPA* that limited federal regulation of power plant emissions.[118] In a 6-3 decision, the Supreme Court held that the Clean Air Act did not give the EPA the authority to set emissions limits for existing power plants. The case limited the EPA's options for regulating GHG emissions in the power sector and, in retrospect, was a precursor to the flurry of litigation sparked by the finalization of the SEC CRD Rules.

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114 CSA, Regulators Consider Impact of International Developments, *supra* note 12.

115 SEC, Climate-Related Disclosures, *supra* note 110.

116 International Financial Reporting Standards, "General Sustainability-related Disclosures (last visited 12 March 2024), online: <ifrs.org/projects/completed-projects/2023/general-sustainability-related-disclosures/>. The December 2023 disbandment of the TCFD did not change the mandatory requirements with respect to the TCFD recommendations. At the time of writing, the Financial Stability Board had stated its intention to update the TCFD recommendations to reference the ISSB standards once the ISSB standards are available for use in the UK. This will likely result in the finalized CSA CRD and SEC CRD rules citing to the ISSB standard-equivalents of the original TCFD recommendations.

117 CSA, Regulators Consider Impact of International Developments, *supra* note 12, quoting Stan Magidson, CSA Chair and Chair and CEO of the Alberta Securities Commission ("Climate-related disclosure standards that elicit consistent and comparable disclosure for investors and that support a comprehensive global baseline of sustainability disclosures are a priority for the CSA. We are working towards disclosure requirements that support the assessment of sustainability-related risks, reduce market fragmentation and contribute to efficient capital markets while considering the needs and capabilities of issuers of different sizes.").

118 *West Virginia et al v Environmental Protection Agency et al*, 597 US 697 (2022); see also Zach Warren, "Upcoming SEC Climate Disclosure Rules Bring Urgency to ESG Data Strategy Planning", *Reuters* (30 January 2023), online: <reuters.com/legal/legalindustry/upcoming-sec-climate-disclosure-rules-bring-urgency-esg-data-strategy-planning-2023-01-30>.

2. NI 51-107 across the Canada-US Border

Unsurprisingly, the CSA CRD Rules must be cognizant of the SEC CRD Rules given the closeness of Canadian and US capital markets and the colossal volume of cross-border business and partnerships.[119] As previously mentioned, developed market jurisdictions broadly converge on the TCFD recommendations to provide their baseline reporting frameworks. This convergence means that reporting costs will be reduced when issuers disclose across developed market jurisdictions, and stakeholders will be better able to make cross-market comparisons.

Despite general acceptance of the TCFD recommendations, granular differences exist where the TCFD recommendations allow for discretion. The main differences between the proposed regulations in Canada and the US are the Scope 3 GHG emissions reporting and identification of reporting companies. However, these differences will not impact most Canadian public companies because the SEC CRD Rules apply only to domestic US and foreign private issuers that do not report through the multijurisdictional disclosure system.[120] Instead, these differences are more impactful for foreign companies looking in.

First, the TCFD recommends that companies "should provide their Scope 1 and Scope 2 GHG emissions independent of a materiality assessment, and, *if appropriate*, Scope 3 GHG emissions and the related risks."[121] The language of "if appropriate" allows policymakers to exercise discretion on reporting Scope 3 GHG emissions. Further, "organizations" is not specifically defined by the TCFD. With this guidance in mind, Canada's proposed rules require reporting issuers "to disclose Scope 1, Scope 2, *and* Scope 3 GHG emissions, and the related risks or the issuer's reasons for not disclosing this information."[122]

Currently, the proposed SEC CRD Rules require listed companies to not only disclose risks that are "reasonably likely to have a material impact on their business, results of operations, or financial condition," but also "to disclose information about its direct greenhouse gas (GHG) emissions (Scope 1) and indirect emissions from purchased electricity or other forms of energy (Scope 2)", as well as certain types of GHG emissions "from upstream and downstream activities in its value chain (Scope 3), *if material or if the registrant has set a GHG emissions target or goal* that includes Scope 3 emissions." [123] This rule is slightly different from the CSA CRD Rules, which require issuers to disclose their Scope 1, 2, and 3 emissions and related risks or explain their reasoning for not making such disclosures.

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119 Puri, *supra* note 69 at 969.

120 Jeff Bakker et al, "CSA Provides Update on Proposed Climate-Related Disclosure Rules" (24 October 2022), online: <blakes.com/insights/acvm-mise-a-jour-des-obligations-d-information-l>.

121 Task Force on Climate-related Financial Disclosures, "Metrics and Targets" (last visited 12 March 2024), online: <tcfdhub.org/metrics-and-targets/> [emphasis added].

122 CSA Consultation on NI 51-107, *supra* note 14 at 7–8 [emphasis added].

123 SEC, Climate-Related Disclosures, *supra* note 110 at 41–43 [emphasis added].

In addition to subtle differences in Scope 3 disclosures, the two countries differ on who is subject to reporting rules. Canada's proposed rules will "apply to all reporting issuers, other than investment funds, issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, certain exchangeable security issuers and certain credit support issuers."[124] Meanwhile, the US's proposed rules will apply to all registrants with existing reporting obligations, which, unlike the Canadian rules, will include some foreign issuers that do not already report through a disclosure system.[125] This provision will likely help address foreign companies that engage in jurisdiction shopping to reduce their reporting obligations and business costs, among other conveniences.

Overall, given that most investors support the core tenets of the new disclosure rules, many expect the CSA and SEC CRD Rules to be finalized and published by early 2024.[126] On March 6, 2024, the SEC adopted their proposed CRD Rules. Shortly thereafter, on March 15, 2024, a US appellate court granted an administrative stay of the SEC CRD Rules while the court considered one of many lawsuits challenging the Rules.[127] On April 4, 2024, the SEC announced that it would voluntarily stay the SEC CRD Rules pending judicial review.[128] For its part, the CSA continues to analyze the slight differences between NI 51-107, the TCFD recommendations, the SEC CRD Rules, and the ISSB Drafts.[129] Thus, both the CSA and SEC CRD Rules are in a holding pattern at present.

3. NI 51-107 within Canadian Borders

Reporting material climate risks is not novel when it comes to securities regulation in Canada. In April 2018, CSA Staff Notice 51-354 put publicly traded issuers on alert when the CSA found climate change-related risks to be a conventional business issue affecting issuers in a wide range of industries and not solely a sustainability or environmental issue.[130] Subsequently, some issuers already began to track their GHG emissions, including financed emissions, using the GHG Protocol Corporate Standard, a GHG emissions reporting standard explicitly endorsed by NI 51-107. This information is then disclosed in periodic filings as per NI 51-102 *Continuous Disclosure Obligations*. Further, some climate-related

124 CSA Consultation on NI 51-107, *supra* note 14 at 6.

125 SEC, Climate-Related Disclosures, *supra* note 110 at 276.

126 US Securities and Exchange Commission, "Climate Change Disclosure", RIN 3235-AM87 (Fall 2023), online: <reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3235-AM87>.

127 Clark Mindock, "US Appeals Court Temporarily Pauses SEC Climate Disclosure Rules", *Reuters* (15 March 2024), online: <reuters.com/sustainability/us-appeals-court-temporarily-pauses-sec-climate-disclosure-rules-2024-03-15/>.

128 US Securities and Exchange Commission, "Order Issuing Stay: In the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors" (4 April 2024), online (pdf): <sec.gov/files/rules/other/2024/33-11280.pdf>; Matthew Bultman, "SEC Climate Rule Pause Creates Path for Faster Court Decision", *Bloomberg Law* (8 April 2024), online: <news.bloomberglaw.com/securities-law/sec-climate-rule-pause-creates-path-for-faster-court-decision>.

129 Bakker et al, *supra* note 120.

130 Canadian Securities Administrators, *CSA Staff Notice 51-354: Report on Climate Change-related Disclosure Project*, OSC SN 51-354 (5 April 2018) 41 OSCB 2759 at 16, online (pdf): <osc.ca/sites/default/files/pdfs/irps/csa_20180405_climate-change-related-disclosure-project.pdf>.

information is already required in other securities regulations, including National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, National Instrument 52-110 *Audit Committees,* National Instrument 58-101 *Disclosure of Corporate Governance Practices*.[131]

More than ever before, NI 51-107 will likely make CRD part of many issuers' business-as-usual reporting if they do not already have a business case for CRD, since NI 51-107 integrates with current disclosure systems and practices. For example, CRD can consist of financial and non-financial information relevant to a company's periodic filings, including management's information circular, proxy-related material, and annual information forms. Therefore, with NI 51-107, an issuer can incorporate its GHG emissions data by referencing another document if the issuer clearly identifies the reference document or its excerpt and such information is filed on the System for Electronic Document Analysis and Retrieval (SEDAR) prior to or concurrently with NI 51-107 disclosure.

Importantly, NI 51-107 does not modify any of the aforementioned rules.[132] Instead, the CSA believes that the CRD rules contained in NI 51-107 will provide clarity to issuers on required disclosures alluded to by earlier instruments.[133]

III. Enforcing NI 51-107

The Ontario Securities Commission (OSC) previously described securities fraud as "one of the most egregious securities regulatory violations", and stated that "fraudulent activity causes direct and immediate harm to its victims, many of whom entrust a substantial portion of their savings to those who abuse that trust."[134] Arguably, the harm is magnified in the case of CRD-related fraud because it undermines the urgent need to take collective action to address the climate crisis. Issuers who commit fraud in their disclosure are not only abusing victims' trust but are doing so when the window to prevent irreversible damage from climate change is continuously shrinking, hence the global emphasis on 2030 and 2050 targets, as discussed further below.

It remains to be seen how NI 51-107 will be enforced by provincial securities regulators, or how the relevant legal provisions that provide NI 51-107 more bite may be treated. Part III(1) explores the regulatory and civil avenues provincial securities regulators can use to enforce NI 51-107 through sections 122(1)(c), 127, and 138.3 of Ontario's *Securities Act*. Part III(2) explores the criminal avenues for enforcement, namely through section 380 of the *Criminal Code*, and through the Supreme Court trilogy of *Olan*, *Théroux*, and *Zlatic*.[135] Part III(3) raises the potential issue of provincial securities regulators coordinating efforts to enforce NI 51-107, as opposed to federal securities regulation. Part III(4) reflects on whether NI 51-107 is the best disclosure framework.

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131 CSA Consultation on NI 51-107, *supra* note 14 at 3.

132 *Ibid*.

133 *Ibid* at 2.

134 *Meharchand* (*Re*), 2019 ONSEC 7 at para 51 [*Meharchand*]. In *Meharchand*, the Ontario Securities Commission found that "fraud is 'one of the most egregious securities regulatory violations'" because of these harms (at para 51).

135 *Olan*, *supra* note 18; *Théroux*, *supra* note 18; *Zlatic*, *supra* note 18.

Securities regulation falls within provincial or territorial jurisdiction.[136] Consequently, I examine Ontario's regulatory and civil avenues to enforce NI 51-107. The focus on Ontario is because it is home to a majority share of Canadian market participants, Canada's major stock exchange (the TSX), and Canada's largest capital markets regulator (the OSC).[137] Therefore, focusing on Ontario will set an important example of enforcement mechanisms for other provinces and territories.

1. Regulatory and Civil Enforcement

I anticipate section 127 of the *OSA* (related to public interest orders) and section 138.3 (related to statutory civil liability) will be the main provisions used to address *ex ante* and *ex post* damages for climate-related misrepresentation. As demand for climate action heightens, one of two behaviours from issuers is foreseeable—issuers will either enhance CRD to meet the "reasonable investor" and "market impact" standards of materiality, or issuers, depending on the type of offering and timing, will face public interest orders by securities tribunals or class actions for misrepresentation by activist shareholders.

As NI 51-107 is couched in existing securities rules and regulatory frameworks, enforcement will likely be through existing regulatory and civil enforcement mechanisms. Once a company becomes a reporting issuer, it is subject to continuous disclosure obligations, which fall into two categories: periodic disclosure of material facts and timely disclosure of material changes.[138] The periodic disclosure obligations for material facts are triggered by one of two materiality standards: "move-the-market" or "market impact", and "reasonable investor". Periodic disclosure must be made at regular intervals, typically through the regular provisions of documents such as proxy circulars, financial statements, and insider trading reports. In these regularly issued documents, companies must disclose all material facts.

Meanwhile, timely disclosure obligations are imposed only when there has been a material change in the issuer's affairs.[139] Since NI 51-107 contemplates disclosures in Annual Information Forms (AIFs) and Management Discussion and Analysis (MD&A) sections within a company's annual report, climate-related risks likely qualify as material facts, not necessarily material changes. Under section 1(1) of the *OSA*, "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities" is considered to be material.[140]

When an issuer fails to make the required disclosure of material facts or misstates them, then the issuer may face liability in various forms set out in the *OSA*.[141] I will not address the possibility of quasi-criminal liability for misrepresentation, mainly because there have been no instances of the

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136 *Reference re Securities Act*, 2011 SCC 66.

137 Government of Ontario, Ministry of Finance, "Ontario's Capital Markets" (last modified 22 April 2022), online: <ontario.ca/page/ontarios-capital-markets>.

138 *Theratechnologies Inc v 121851 Canada Inc*, 2015 SCC 18 [*Theratechnologies*].

139 *Ibid*.

140 *OSA*, *supra* note 15, s 1(1).

141 *Ibid*, ss 127 (regulatory liability), 122(1)(c) (quasi-criminal liability), 138.3 (statutory civil liability).

OSC commencing an action for that purpose. The OSC has historically refrained from exercising its quasi-criminal powers, with only seven instances reported in 2022, each resulting in fraud charges.[142] In the last three years, only two quasi-criminal proceedings resulted in jail terms.[143] Though section 122(1)(c) is a possible avenue to bring an action against a company for climate-related fraud; the OSC will more likely turn to section 127 public interest orders, or shareholders will resort to class action lawsuits under section 138.3 for improper CRD.

Regulatory liability can arise from a failure to meet the reasonable investor standard. The reasonable standard asks if a reasonable investor's decision to buy, sell, or hold securities of the issuer would likely be influenced or changed if the information in question was omitted or misstated.[144] If so, then the information is likely material. The regulatory liability under the reasonable investor standard is founded on *OSA*, section 127(1) public interest jurisdiction. The OSC's public interest jurisdiction is animated in its purposes, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair, efficient and competitive capital markets and confidence in capital markets".[145]

Civil liability can arise from a failure to meet the move-the-market standard. The move-the-market standard asks if the information would be reasonably likely to affect the market price or value of the security.[146] Civil liability for misrepresentation in continuous disclosure documents can be established through section 138.3 of the *OSA*, which provides a statutory cause of action to claim damages, based on the common law tort of negligent misrepresentation, concerning shares trading in the secondary market.

Securities regulators impose these two standards because they serve different purposes. Section 127(1) is a regulatory provision, where the orders or sanctions are preventive in nature and prospective in orientation, rather than punitive. Thus, as the Supreme Court of Canada (SCC) found in *Asbestos*, "s. 127(1) cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals."[147] Civil liability is appropriately based on

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142 Ontario Securities Commission, *Annual Report 2021-2022: Responding to Change, Preparing for the Future* (Toronto: Ontario Securities Commission, 2023) at 37, online (pdf): <osc.ca/sites/default/files/2023-07/Publications_rpt_2022_osc-annual-rpt_0.pdf>.

143 Lawrence E Ritchie, Hannah Davis & James Smith, "Tools of the Trade: OSC Criminal and Quasi-criminal Charges Result in Jail Terms for Convicted Securities Fraudsters" (20 December 2021), online (blog): <osler.com/en/blogs/risk/december-2021/tools-of-the-trade-osc-criminal-and-quasi-criminal-charges-result-in-jail-terms-for-convicted-secur>.

144 *Ontario Securities Commission v Biovail Corporation et al* (30 January 2009), 32 OSCB 1094 (settlement hearing), online (pdf): <osc.ca/sites/default/files/pdfs/proceedings/rad_20090126_biovail.pdf>.

145 *OSA*, *supra* note 15, s 1.1.

146 *Re Rex Diamond Mining Corporation et al* (2 December 2009), online (pdf): <osc.ca/sites/default/files/pdfs/proceedings/rad_20091202_rexdiamond.pdf>.

147 *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario* (*Securities Commission*), 2001 SCC 37 at para 45 [*Asbestos*].

the move-the-market standard, since only a market impact can cause damages. In *Danier*, the SCC discussed that a failure to disclose under sections 56 to 58 of the *OSA* imposes civil liability under section 130(1), if the omission amounts to a material change.[148]

Similar to section 130, sections 138.1 to 138.14 establish a presumption that investors relied upon a misrepresentation if they bought or sold their shares between its publication and when it was publicly corrected.[149] If liability is found based on this misrepresentation in the secondary market, then damages are calculated pursuant to sections 138.5 to 138.7, which considers the lesser of "the difference between the average price paid for those securities … and the price received upon the disposition of those securities"; versus "the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities."[150]

The OSC is more concerned with good disclosure by a particular issuer and fostering improved disclosure practices across issuers annually, not merely with disclosure that causes damages. Thus, the reasonable investor standard of materiality supplements the move-the-market standard and establishes a lower threshold for materiality. The OSC acknowledged that it is up to the courts, not securities regulators, to punish past conduct. Meanwhile, securities regulators target, to the best of their abilities, "future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient."[151] This role was affirmed in *Asbestos*, where the SCC held that securities regulators "should consider the protection of investors and the efficiency of, and the public confidence in, capital markets generally."[152] The SCC further stated that "[t]he permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case" with this purpose in mind.[153]

The reasonable investor standard is broader and captures more information than the move-the-market standard. A statement important to an investor in making an investment decision may not necessarily significantly affect the market price or value of a security. Consequently, section 127(1) can be used for actions that do not amount to breaches of the statutory misrepresentation standard for disclosure but that are contrary to public interest.[154] This distinction is fundamental for CRD

148 *Kerr v Danier Leather Inc*, 2007 SCC 44 at paras 38, 41.

149 *OSA*, *supra* note 15, ss 138.1–138.14.

150 *Ibid*, s 138.5(1).

151 *Re Mithras Management Ltd* (1990), 13 OSCB 1600 at 1610–11 [*Mithras*].

152 *Asbestos*, *supra* note 147 at para 45.

153 *Ibid* at para 39.

154 *Mithras*, *supra* note 151 at 1610–11. The Commission states that "the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all."

proponents because failure to disclose or misstate climate-related targets under Form 51-107B, such as interim goals at 2030 on route to net-zero by 2050, might not yet move the market because 2030 and 2050 are so far away.

Relying more heavily on the reasonable investor standard is not necessarily a shortcoming, because the move-the-market standard is likely not a good fit for enforcing CSA CRD Rules for four reasons. First, the decades-long time lag between GHG emissions causing climate change effects may make accounting for damages impossible. A climate-related statement made today by an issuer may have a market impact forty years later when the statement is found to be untrue and climate-related damages driving investor losses transpire. In this hypothetical, it is unclear how to calculate damages across forty years while controlling for confounding variables. Second, there are difficulties in knowing what gains were made from the marketing and reputational benefits of going "green", unlike comparing the profit margins for a drug company before and after regulatory approval of a new drug. Third, some climate-related damages are incommensurable. Contrary to the efficient market hypothesis, the depreciation of an issuer's securities might not reflect all value-relevant information available to the market after the untrue statement is brought to light. In turn, what shareholders will be getting for damages might not accurately reflect the value of the securities in terms of environmental costs. Fourth, the shareholders who will be rewarded damages are likely not the original shareholders who made investment decisions based on the statement that was made forty years ago.

While the reporting issuer may not face a class action lawsuit for failing to disclose or misstating their Form 51-107B rules, the OSC may pursue the issuer for a section 127(1) proceeding based on the disclosure not meeting the reasonable investor standard. Regulatory enforcement can promote compliance with the CRD Rules, prevent harms from occurring, and avoid the problem of quantifying damages from diffuse harms. With a lower threshold for liability, I envision regulatory enforcement of NI 51-107 to come before public interest enforcement.

Where CRD does not meet the reasonable investor standard, the OSC can still make one or more orders listed under section 127(1), including an order that a release, report, informational circular, or any other document be provided by a market participant to a person or company or be amended, an order to pay an administrative penalty of not more than CAD $1 million, and an order to disgorge to the OSC any amounts obtained as a result of non-compliance. The flexibility in choosing to intervene and make orders with terms in the public interest makes section 127(1) a powerful enforcement tool, allowing the OSC to regulate markets by signalling a regulatory position on certain market practices without any rule or express legislative prohibition.[155] With so many tools, the OSC must proactively enforce NI 51-107 for the CRD Rules to be meaningful.

155 See e.g. *Ontario Securities Commission v Richard Bruce Moore* (8 April 2013) (settlement agreement) at paras 30–31, online (pdf): <osc.ca/sites/default/files/pdfs/proceedings/set_20130408_moorerb.pdf>.

2. Criminal Enforcement (*Olan*, *Théroux*, and *Zlatic*)

Criminal enforcement of NI 51-107 will likely be less frequent than civil enforcement, largely due to criminal law's higher burden of proof and the limitations in criminal penalties. Nevertheless, dishonest acts of selectively framing, reporting, and omitting climate risks and deprivation of material information may give rise to criminal liabilities. Investigating and litigating alleged securities fraud "represent[s] an attempt to ensure that investors have access to critical information about the true value of their holdings."[156]

In Canada, fraud can be prosecuted under the *Criminal Code* or under provincial *mens rea* offences. Fraud is defined in section 380 of the *Criminal Code*.[157] The legal test for fraud in criminal law is outlined in the SCC trilogy of *Olan*, *Théroux*, and *Zlatic*. Fraud is also defined in section 126.1 of the *Securities Act*.[158]

To establish fraud, the prosecution must prove the existence of a dishonest act and deprivation, or risk of deprivation, and that the defendant knew about the prohibited act and the risk of, or actual deprivation.[159] In *Olan*, Dickson J clarified that the *actus reus* of the offence has two elements: "dishonesty" and "deprivation".[160] Subsequently, *Théroux* recognized that *Olan* broadened the law of fraud by overruling previous authority that characterized deceit as an essential element of fraud and clarifying that economic loss was not essential to the offence:[161] "the imperilling of an economic interest is sufficient even though no actual loss has been suffered."[162]

The dishonest act is established by proof of deceit, falsehood, or other fraudulent means. In contrast, deprivation is shown by "proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim" caused by the dishonest act.[163] Dishonesty connotes "an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs."[164] Dishonest conduct is that "which ordinary, decent people would feel was discreditable as being clearly at

156 Roshaan Wasim, "Corporate (Non)Disclosure of Climate Change Information" (2019) 119:5 Colum L Rev 1311 at 1311.

157 See *Criminal Code*, *supra* note 17, s 380(1): "Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service".

158 See *OSA*, *supra* note 15, s 126.1(1): "A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know, (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest of a derivative; or (b) perpetrates a fraud on any person or company".

159 *Olan*, *supra* note 18 at 1182.

160 *Ibid* at 1182–88.

161 *Théroux*, *supra* note 18 at para 14.

162 *Ibid*.

163 *Théroux*, *supra* note 18 at para 13.

164 *Zlatic*, *supra* note 18 at para 19.

variance with straightforward or honourable dealings".[165] Deceit and falsehood can consist of either positive acts or omissions. Dishonest acts perpetrated through other fraudulent means encompass a wide range of dishonest commercial dealings, including "non-disclosure of important facts".[166] In other areas of law, nondisclosure of important facts can include silence, omissions, half-truths, and lies.[167]

NI 51-107 outlines what information is required for disclosure, such that depriving stakeholders of relevant GHG emissions data may amount to fraud. NI 51-107 allows securities regulators to scrutinize the CRD from reporting issuers. In turn, issuers actively greenwashing their reports to appeal to investors and other stakeholders, omitting material climate-related risks, or mislabelling such risks with boilerplate language can be found to have committed dishonest acts.

Deprivation can also arise from investors having lost money from undisclosed or misstated climate-related risks by relying on the issuer's misrepresentations, or having lost the opportunity to invest in a climate-conscious corporation. This line of thinking follows *Théroux*, which recognized that an investor who is falsely promised profits is also the victim of deprivation. The creation of a false certainty as to attainable profits results in deprivation because the victim gives up property in vain, which they could have invested elsewhere.[168]

The *mens rea* of fraud is established by "proof of subjective knowledge of the prohibited act, and by proof of subjective knowledge that the performance of the prohibited act could have as a consequence the deprivation of another".[169] Deprivation may consist of knowing that the victim's pecuniary interests are at risk.[170] Where the conduct and knowledge are established, the accused is guilty whether they intended the prohibited consequence or was reckless as to whether it would occur.[171]

As the doctrine of wilful blindness imputes knowledge,[172] once NI 51-107 is in force, issuers can no longer claim ignorance over what to include in their CRD and what reporting frameworks to use. NI 51-107 stipulates CRD obligations for reporting issuers in Canada. Further, its phased-in implementation gives issuers sufficient notice to know or reasonably ought to know about the new reporting rules. For instance, had the CSA CRD Rules come into force before the end of 2023, based on the original published guidance, non-venture issuers would have provided their initial disclosures

165 *Ibid*.

166 *Théroux*, *supra* note 18 at para 15.

167 For discussions on nondisclosure of important facts concerning contract law and the duty of honest performance, see *CM Callow Inc v Zollinger*, 2020 SCC 45; for discussions on nondisclosure of important facts concerning professionalism and ethics, see *Ahuja* (*Re*), 2017 LSBC 26.

168 *Théroux*, *supra* note 18 at para 21.

169 *Ibid* at para 24.

170 *Ibid*.

171 *Ibid* at para 25.

172 *R v Briscoe*, 2010 SCC 13 at para 21.

under the rules in respect of the year ending December 31, 2024, in 2025.[173] Over time, NI 51-107 allows Canadian securities regulators to detect and crackdown on climate-related misreporting by providing a yardstick for proper CRD.

3. Is Canada too provincial?

Canada is unique in having provincial securities regulators. While the US has the SEC, the UK has the Financial Conduct Authority, and Australia has the Australian Securities and Investments Commission, the CSA is the body closest to a federal securities agency in Canada. Yet, the CSA is not analogous to the SEC.[174] The CSA is the umbrella organization for all ten provincial and three territorial securities regulators, and is primarily responsible for developing a nationwide harmonized approach to securities regulation.[175]

Provincial and territorial securities regulators operate independently. Each province has its own *Securities Act*, conducts its own investigations, and answers to its own tribunal. The analysis in Part III(1) focused on Ontario, the OSC, and the *OSA*, but similar agency and regulatory configurations exist in each province, such as the British Columbia Securities Commission and its *Securities Act*,[176] and Quebec's Autorité des marchés financiers and its *Securities Act*.[177]

Unlike our developed market counterparts, enforcement of CRD rules must be undertaken through the shared efforts of provincial and territorial securities regulators. The CSA can certainly continue to play a facilitating and coordinating role, bringing provincial and territorial securities regulators together to operationalize consistent regulations across Canada.[178] Yet, each region's regulators and stakeholders are ultimately responsible for demanding compliance with NI 51-107. How regional enforcement of NI 51-107 compares to federal enforcement is unclear. Arguably, Canadian securities regulators generally do not have the same bite as the SEC.[179]

In *Reference re Securities Act*,[180] the SCC dealt with the issue of whether the power to legislate securities lies with the federal government. The Court considered the argument that a single national regulator "provides for a single set of laws and rules designed to permit uniform regulation and

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173 CSA Consultation on NI 51-107, *supra* note 14 at 30.

174 Puri, *supra* note 69 at 967.

175 Canadian Securities Administrators, "Who We Are" (last visited 12 March 2023), online: <securities-administrators.ca/about/who-we-are/>

176 *Securities Act*, RSBC 1996, c 418.

177 *Securities Act*, RSQ 1982, c 48.

178 Canadian Securities Administrators, "Who We Are", *supra* note 175.

179 Tara Gray & Andrew Kitching, *Reforming Canadian Securities Regulation*, PRB 05-28E (Ottawa: Library of Parliament, 2005) at 16, online (pdf): <publications.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0528-e.pdf>; Tyler Hamilton, "Why the OSC So Rarely Gets Its Man", *Toronto Star* (1 December 2007), online: <thestar.com/business/why-the-osc-so-rarely-gets-its-man/article_0049fb79-af85-51b3-ac78-3711db377886.html/>.

180 *Reference re Securities Act*, 2011 SCC 66.

enforcement on a national basis, thus fostering the integrity and stability of Canada's capital markets at a national level."[181] On the other hand, the Court also recognized that "local regulation manifests itself most prominently in areas of local enforcement and policy."[182] Ultimately, the SCC did not decide the issue based on the best option from a policy perspective.[183] Instead, it focused on the text of the constitutional powers under sections 91 and 92 of the *Constitution Act, 1867*.[184] The Court ruled that the federal government's proposed national security regulator was unconstitutional, explaining Canada's current set up of regional securities regulators.[185]

Following the decision in *Reference re Securities Act*, some scholars doubted the effectiveness of provincial enforcement. A key concern is a province's power to leave an interprovincial regime at any time, undermining the regime's ability to address collective concerns.[186] For example, the possibility that the OSC or the Alberta Securities Commission fails to enforce NI 51-107, dropping below the level of support shown by the CSA, can undermine the effectiveness and purpose of CRD rules.

Another fundamental concern is that provincial regulators lack credibility in enforcement.[187] In one comparative study looking at SEC and the OSC enforcement data, the authors concluded that "the enforcement in Ontario was pathetic."[188] Professor Poonam Puri describes Canadian securities regulators as "assum[ing] a low profile in their securities enforcement activities and emphasize deterrence over punitive sanctions... foster[ing] a belief that Canada is lax in comparison to the United States".[189] Where securities regulators have begun to rely heavily on deterrence as the guiding principle for public interest-based orders, scholars have noted concerns about bias in enforcement decisions and in the severity of punishments.[190] Therefore, while there are legal avenues to enforce NI 51-107 and probe into CRD, there is reason to be concerned about whether provincial securities regulators will go far enough. Amid our climate crisis, Canadian securities regulators cannot delay giving teeth to NI 51-107.

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181 *Ibid* at para 30.

182 *Ibid* at para 52.

183 *Ibid* at para 90.

184 *Ibid*.

185 *Ibid* at paras 128–29.

186 See e.g. Dee Pham, "*Reference re Securities Act*: What are the Remaining Options for a National Securities Regime?" (2013) 44:3 Ottawa L Rev 561.

187 Keith Marquis, "'Responsive' Securities Regulation: An Assessment of the Enforcement Practices of the Ontario Securities Commission", Regulatory Governance Initiative, Regulation Papers (1 October 2009) at 17, online: <ssrn.com/abstract=1532366>.

188 Utpal Bhattacharya, "Enforcement and its Impact on Cost of Equity and Liquidity of the Market" (1 May 2006) at 22, online: <ssrn.com/abstract=952698>; Hamilton, *supra* note 179.

189 Puri, *supra* note 69 at 979.

190 Condon, *supra* note 65 at 22.

One way to address the potential weakness of public or OSC enforcement is to promote private or stakeholder-led enforcement mechanisms.[191] Legal scholar Mary Condon finds that public and private mechanisms may be interdependent and can together achieve robust securities regulation.[192] Condon advocates for both because their aims differ: public enforcement is about punishing market actors or producing markets that operate with integrity, while private enforcement is about compensating the investors.[193] Puri also sees the greatest value in a regulatory system that allows public and private enforcement to work together with an ultimate common objective.[194] Thus, all regulatory, civil, and criminal enforcement options should be explored over time to bolster the effectiveness of NI 51-107.

As mentioned in Part I(1), transition risks include reputational risks and legal and litigation risks, each associated with some business costs. Businesses often use cost-benefit analysis to compare the projected or estimated costs and benefits associated with the decision.[195] In other words, business costs must rise to a certain threshold for an action to make "business sense". The Honourable Anita Anand, legal scholar and current Member of Parliament and President of the Treasury Board, previously noted this rational behaviour in discussing voluntary good corporate governance practices:

> [F]irms may see proposed regulation as a fait accompli and move to implement the proposed rules ... however ... firms would be unlikely to implement standards voluntarily if the costs of doing so exceed the net benefits. So simply attempting to comply with impending regulation seems a plausible but insufficient explanation of firms' voluntary behaviour.[196]

Part of why enforcement of NI 51-107 is important is because enforcement increases the transitional risk costs for reporting issuers. Enforcement needs to be sufficient for compliance to make business sense.

After NI 51-107 comes into effect, a study should examine how securities regulators manage NI 51-107 across the country. This article leaves unanswered the question of whether the costs associated with the various risks flowing from possible regulatory, civil, and criminal enforcement actions will be high enough to nudge companies into good faith CRD and overall compliance with NI 51-107.

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191 *Ibid* at 4.

192 *Ibid* at 44.

193 *Ibid* at 4.

194 Puri, *supra* note 69 at 1010.

195 Tim Stobierski, "How To Do a Cost-Benefit Analysis & Why It's Important", *Harvard Business School* (5 September 2019), online (blog): <online.hbs.edu/blog/post/cost-benefit-analysis>.

196 Anand, *supra* note 67 at 239.

4. The Future of NI 51-107 and its Alternatives

Getting GHG to net zero by 2050 is an increasingly common corporate goal.[197] Many prominent reporting issuers in Canada have pledged net zero emissions between 2030 and 2050. In 2021, six of Canada's largest banks joined the Net-Zero Banking Alliance. Also in 2021, Air Canada announced its "Leave Less" climate action plan for net zero by 2050, with the interim goals of "30 percent GHG net reductions from ground operations compared to … [the] 2019 baseline" and "20 percent GHG net reductions from air operations by 2030".[198] As the interim dates approach and companies' targets come to the limelight, there will be a stronger case for stakeholders to claim misrepresentations under the move-the-market standard. This is because those future stakeholders will be closer to the market-moving issues and living more intimately with the exacerbated environmental effects related to the misrepresentation.

Essentially, to keep global warming to no more than 1.5 degrees Celsius and curb climate catastrophe, as called for in the *Paris Agreement*, emissions need to be reduced by 45 percent by 2030 and reach net zero by 2050. With 2030 often cited by the United Nations as the year when climate changes become irreversible, shareholders will increasingly demand CRD and base their investment decisions on a company's climate risk mitigation or adaption strategies as the benchmark approaches.

However, making net zero pledges and disclosing Scope 1, 2, and 3 emissions is not a universal corporate practice. Many less prominent issuers are overwhelmed by CRD rules and do not necessarily have the internal infrastructure to report efficiently or effectively.[199] At the end of 2022, only 41.6 percent of S&P/TSX Composite Index companies provided any Scope 3 disclosures.[200] This reality raises the question of whether the rules under NI 51-107 are appropriate.

By having NI 51-107 apply to all reporting issuers with some exceptions, the OSC will be triggering a plethora of CRD. This raises the risk that shareholders will be buried "in an avalanche of trivial information," the import of which may not be clear to many, and the presentation and content of which will be novel—"a result that is hardly conducive to informed decisionmaking."[201] Worries about burdening smaller issuers and generating excessive disclosure may be remedied by limiting the scope of reporting issuers by company size, or to GHG-intensive industries.

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197 Jeffrey Jones, "Which Canadian Companies Have Pledged Net Zero Carbon Emissions, and By When?", *The Globe and Mail* (10 April 2021), online: <theglobeandmail.com/business/article-net-zero-emissions-pledges-by-canadian-companies/>.

198 Air Canada, *Citizens of the World: 2021 Corporate Sustainability Report* (Air Canada, 2021) at 73, online (pdf): <aircanada.com/content/dam/aircanada/portal/documents/PDF/en/corporate-sustainability/2021-cs-report.pdf>.

199 Warren, *supra* note 118.

200 Sean Cleary & Shuyi Hui, *An Update on Canadian Corporate Performance on GHG Emissions Disclosures and Target Setting* (Queen's University, Institute for Sustainable Finance: May 2022) at 9, online (pdf): <smith.queensu.ca/centres/isf/pdfs/tsx-emitters-report-2022.pdf>.

201 *Theratechnologies*, *supra* note 138 at para 55.

To deal with the potential issue of information overload, the UK requires mandatory TCFD-aligned CRD only for its largest companies and financial institutions. From April 2022, over 1,300 of the largest UK-registered companies and financial institutions must disclose climate-related financial information on a mandatory basis.[202] While this number of reporting registrants seems quite high, it is narrow in scope, considering that the Financial Conduct Authority sets specific standards for around 17,000 registrants.[203] CRD rules only apply to UK-registered companies with securities admitted to trading on a UK-regulated market with more than 500 employees and/or a turnover of more than £500 million.[204] In comparison, the OSC oversees 2,954 public companies.[205] A narrower scope of reporting issuers under NI 51-107 can reduce the volume of CRD for the OSC, making it easier for the OSC to investigate filings and stakeholders to compare meaningful CRD, access decision-useful information, and engage with companies generating the greatest climate-related risk. This targeted approach may also reduce the compliance burden for smaller companies.

Another method for streamlining reporting under NI 51-107 is to target reporting by industry. Having NI 51-107 apply only to large GHG emitting industries or requiring additional disclosures from carbon-intensive issuers, such as mining and fossil fuel businesses, could mitigate overall compliance burdens and promote a greater sense of fairness. The OSC already imposes additional industry-specific disclosure rules on the mining, oil and gas, and cannabis industries through National Instrument 43-101 *Standards of Disclosure for Mineral Projects*,[206] National Instrument 51-101 *Standards of Disclosure for Oil & Gas Activities*,[207] CSA Staff Notice 51-357 Staff Review of Reporting Issuers in the Cannabis Industry,[208] and CSA Staff Notice 51-352 (Revised) Issuers with US Marijuana-Related Activities.[209]

202 United Kingdom, Department for Business, Energy & Industrial Strategy, *Mandatory Climate-related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and LLPs* (February 2022), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf>.

203 United Kingdom, Financial Conduct Authority, "About the FCA" (last modified 26 April 2024), online: <fca.org.uk/about/what-we-do/the-fca>.

204 United Kingdom, Department for Business, Energy & Industrial Strategy, *supra* note 202 at 7.

205 Ontario Securities Commission, "About Us" (last visited 31 March 2024), online: <osc.ca/en/about-us>.

206 *Standards of Disclosure for Mineral Projects*, OSC NI 43-101, (2011) 34 OSCB 7043, online (pdf): <osc.ca/sites/default/files/pdfs/irps/ni_20160509_43-101_mineral-projects.pdf>.

207 *Standards of Disclosure for Oil and Gas Activities*, OSC NI 51-101, (2003) 26 OSCB 6615, online (pdf): <osc.ca/sites/default/files/pdfs/irps/rule_20030926_51-101_rule.pdf>.

208 Canadian Security Administrators, *CSA Staff Notice 51-357: Staff Review of Reporting Issuers in the Cannabis Industry*, OSC SN 51-357, (10 October 2018) 41 OSCB 7877, online (pdf): <osc.ca/sites/default/files/pdfs/irps/ csa_20181010_51-357_staff-review-reporting-issuers-cannabis-industry.pdf>.

209 Canadian Security Administrators, *CSA Staff Notice 51-352 (Revised): Issuers with U.S. Marijuana-Related Activities*, OSC SN 51-352, (8 February 2018) 41 OSCB 1273, online (pdf): <osc.ca/sites/default/files/pdfs/irps/ csa_20180208_51-352_marijuana-related-activities.pdf>..

If the purpose of securities regulation is indeed to protect investors from unfair, improper, or fraudulent practices and contribute to reducing systemic risks, disclosure rules must be manageable to support those ends. NI 51-107's scope may be too wide and not calibrated to target the most significant issuers. Worryingly, the colossal amount of CRD may not all be useful to stakeholders, and small- to medium-sized issuers may be overburdened.

Conclusion

As of July 2021, Canada beat the US and the EU as the world's fastest growing market for ESG assets.[210] Climate-related securities fraud will concern global ESG assets that are tracked to exceed USD $53 trillion by 2025, representing more than a third of the USD $140.5 trillion in projected total assets under management.[211] In Canada, ESG assets grew from CAD $2.1 trillion at the end of 2017 to CAD $3.2 trillion at the end of 2019, representing a 48 percent increase.[212] During the same two-year period, the US saw a 42 percent increase in ESG assets.[213] Therefore, getting CRD right in Canada is consequential for stabilizing capital markets, maintaining investor confidence, achieving net zero by 2050, and supporting the transition economy. The CSA's NI 51-107 will likely serve as the Canadian yardstick in determining improper CRD.

This article primarily argued that after NI 51-107 is implemented, securities regulators will rely on existing regulatory, civil, and criminal liability regimes to ensure compliance. Importantly, this article showed how *OSA* section 127 (public interest order) and section 138.3 (statutory civil liability) could address misrepresentations in CRD. To avoid both regulatory and civil liabilities, issuers should make disclosures that meet both the reasonable investor and move-the-market standards. To do so, many issuers ought to enhance their CRD practices.

The environmental and financial repercussions of climate-related securities fraud will be titanic, given the boom in sustainable finance. NI 51-107 provides a legal instrument that can help promote climate-friendly corporate behaviour before the 2050 tipping point. With climate change delineating irreparable environmental harms, any possibility of getting ahead warrants our attention.

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210 Financial Post, "Canada Beats U.S. and Europe to Emerge as World's Fastest Growing Market for ESG Assets", *Financial Post* (18 July 2021), online: <financialpost.com/pmn/business-pmn/sustainable-investments-account-for-more-than-a-third-of-global-assets>.

211 Adeline Diab & Gina Martin Adams, "ESG Assets May Hit $53 Trillion by 2025, a Third of Global AUM" (23 February 2021), online: <bloomberg.com/professional/insights/markets/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum//>.

212 Financial Post, *supra* note 210.

213 *Ibid.*