Canadian Perspectives on Environmental Information Obligations: The Precariousness of a Fragile Balance

Perspectives canadiennes sur les obligations d'information en matière environnementale : la précarité d'un équilibre fragile

William Gabriel Rioux
Avocat au Barreau du Québec et candidat au doctorat en droit
Université de Montréal et Université Paris I Panthéon Sorbonne

Abstract:
In spring 2017, the Canadian Securities Administrators (CSA) launched a major review of information provided by reporting issuers on climate-related risks. The review exposed several concerns, leading the CSA to demand greater and – most importantly – more uniform disclosure by companies of their action regarding environmental matters. Consequently, the CSA published the Proposed National Instrument 51-107 *Disclosure of Climate-related Matters* ("NI 51-107") in fall 2021. Considering the adoption of the Corporate Sustainability Reporting Directive (CSRD) in Europe, this article aims to paint a succinct portrait of the Canadian context for non-financial reporting and to illustrate the delicate balance between the current climate crisis and Quebec and Canadian securities legislation.

Keywords: Canada – Quebec – Securities – Financial Markets – Efficiency – Governance – Regulation – Environment – Climate crisis.

Résumé :
Au printemps 2017, les Autorités canadiennes en valeurs mobilières (ci-après, les « ACVM ») ont lancé un projet d'envergure visant à examiner l'information fournie par les émetteurs assujettis sur les risques associés aux changements climatiques. Au terme de cet examen, les ACVM ont mis en lumière plusieurs constats préoccupants et exhortent une divulgation plus accrue et surtout plus uniforme des stratégies d'action mises de l'avant par les entreprises en matière environnementale. C'est dans ce contexte qu'à l'automne 2021, le Projet de Règlement 51 107 sur l'information liée aux questions climatiques a été publié. À la lumière de l'adoption de la Corporate Sustainability Reporting Directive *en Europe, cet article vise à brosser un bref portrait du contexte canadien en matière de divulgation d'information non financière et à soulever le fragile équilibre entre la crise climatique actuelle et le contexte législatif canadien en valeurs mobilières.*

Mots-clés : *Canada – Québec – Valeurs mobilières – Marchés Financiers – Efficience – Gouvernance – Réglementation – Environnement – Crise climatique.*

Focus on the climate issue has heightened rapidly both in Canada and globally in recent years. The traditional view that companies are simply vehicles for maximizing profits has lost ground, giving way to the concept of socially responsible business.[1] In spring 2017, the Canadian Securities Administrators (CSA) launched a

1 Note: Corporate social responsibility is based on the idea that a company should consider the environmental and social impact of its decisions and thus play a positive role in the community. Closely linked to sustainable development – the creation of economic, social, and environmental value – and to environmental, social and governance practices, corporate social responsibility emphasizes nonfinancial factors which companies are asked to consider in their decision-making. Corporate social responsibility can include a wide range of approaches and initiatives, from sustainable practices to community involvement that increasingly expects responsible behaviour from companies.

major review of information provided by reporting issuers on climate-related risks.[2] The review exposed several concerns, leading the CSA to demand greater and – most importantly – more uniform disclosure by companies of their action regarding environmental matters. Consequently, the CSA published the Proposed National Instrument 51-107 *Disclosure of Climate-related Matters*[3] ("NI 51-107") in fall 2021. The aim is to impose a mandatory disclosure framework for climate-related risks.

Despite the imperative nature of these measures, some members of the Canadian business and legal community denounce the regulatory and financial pressure new obligations would create for reporting issuers. Furthermore, the Final Report of the Capital Markets Modernization Taskforce[4] recently highlighted the need for Canadian provinces to make their legal environment more conducive to entrepreneurship and business development. As a result, questions regarding the balance between environmental issues and the objectives underlying securities legislation are inevitable. Considering the adoption of the Corporate Sustainability Reporting Directive (CSRD) in Europe, this article aims to paint a succinct portrait of the Canadian context for non-financial reporting and to illustrate the delicate balance between the current climate crisis and Quebec and Canadian securities legislation.

In recent years, investors and other stakeholders have homed in on possible climate-related risks for Canadian reporting issuers. This increased interest has led to the creation of voluntary guidelines for issuers willing to disclose information on climate change. Good examples include the framework of the Task Force on Climate-related Financial Disclosures (TCFD) set up by the Financial Stability Board,[5] recommendations by the Global Reporting Initiative (GRI), and the Sustainability Accounting Standards Board (SASB).[6]

2 See : *Canadian securities regulators announce climate change disclosure review project,* CSA (March 21, 2017), online: https://www.securities-administrators.ca/news/canadian-securities-regulators-announce-climate-change-disclosure-review-project/

3 *Draft Regulation 51-107 respecting Disclosure of Climate-related Matters,* CSA (October 18, 2021), online: https://lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/51-107/2021-10-18/2021oct18-51-107-avis-cons-en.pdf

4 Ontario Securities Commission, *Task Force on Capital Markets Modernization: Final Report* (Ontario, 2021), online: https://www.ontario.ca/document/capital-markets-modernization-taskforce-final-report-january-2021

5 Canada, Financial Stability Board, *Recommendations of the Task Force on Climate-related Financial Disclosures: Final Report* (June 15, 2017), online: https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf

6 See: https://www.sasb.org/standards/download/ & https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-french-translations/

Canadian reporting issuers are currently required to disclose "material risks" in their periodic disclosure documents, including climate-related risks. The CSA provided guidance on this in CSA Staff Notice 51-333 *Environmental Reporting Guidance* in 2010.[7] Canadian securities legislation requires reporting issuers to provide information on "significant risks" affecting their business and, where possible, on the potential financial repercussions of these risks.[8] Information is considered "material" when a reasonable investor's decision to buy, sell, or hold the issuer's securities would be different if the information were not disclosed or misstated.[9]

More recently, in 2019, the CSA published CSA Staff Notice 51-358 *Reporting of Climate Change-related Risks*[10] reiterating the importance of climate-related risks disclosure and providing further guidance on the subject. These guidelines are in addition to the disclosure requirements already set out in National Instrument 51-102 *Continuous Disclosure Obligations*,[11] National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*,[12] National Instrument 52-110 *Audit committees*[13], and National Policy 58-201 *Effective Corporate Governance*.[14]

Unlike other major financial markets, Canada does not have a federal securities regulator. Each province and territory has its own securities regulator with its own securities laws, regulations, and policies. The 13 provincial and territorial securities regulators work together to harmonize regulations across the country through laws called "national regulations" or "national instruments". They also teamed up to form the CSA which is primarily tasked to establish a national harmonized process for securities regulation. The CSA brings together provincial and territorial securities authorities to discuss and work towards designing uniform policies and regulations to ensure the Canadian securities industry runs smoothly.

7 *Environmental Reporting Guidance,* CSA Staff Notice 51-333 (October 27, 2010), online: https://www.osc.ca/sites/default/files/pdfs/irps/csa_20101027_51-333_environmental-reporting.pdf

8 See: *Regulation 51-102 respecting continuous disclosure obligations*, CQLR c. V-1.1, r. 24.

9 Note: To assist issuers in determining what is considered "material" environmental information, the CSA have established guiding principles. Some of these principles are taken from *National Policy 51-201, Disclosure Standards*, which became effective July 12, 2002, while others are inspired by decisions rendered by the CSA after the *National Policy 51-201*, including the decision of the Ontario Securities Commission in *Re YBM Magnex International Inc*. (2003), 26 OSCB 5285. The full set of guidelines can be found in *CSA Staff Notice 51-333 – Environmental Reporting Guidance.*

10 *Reporting of Climate Change-related Risks*, CSA Staff Notice 51-358 (August 1, 2019) online: https://www.osc.ca/sites/default/files/pdfs/irps/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf

11 *Regulation 51-102 respecting continuous disclosure obligations*, CQLR c. V-1.1, r. 24.

12 *Regulation 52-109 respecting Certification of Disclosure in Issuers' Annual and Interim Filings*, CQLR c. V-1.1, r 27.

13 *Regulation 52-110 respecting audit committees*, CQLR c. V-1.1, r. 28

14 *Policy Statement 58-201 to Corporate Governance Guidelines,* AMF (June 30, 2005), online: https://lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/58-201/2005-06-30/2005juin30-58-201-ig-vadmin-en.pdf

Many Canadian issuers have taken stakeholder concerns into account in response to the creation of voluntary guidelines and CSA environmental initiatives. They have integrated information about the main climate-related risks for their activities, consequent opportunities, and the possible impact in their continuous disclosure documents. This is usually a separate report about sustainability, or a similar topic published on their website.

However, without a single prevailing information standard, the content of the reports differs from one issuer to another. Some have chosen to follow the TCFD framework, while others follow the GRI or SASB recommendations. As a result, investors, and more particularly institutional investors, are demanding more transparent and uniform information on climate-related risks to facilitate comparison. Insufficient disclosure of these risks and their consequences can lead to poor investment decisions, asset write-downs, and persistently inefficient business practices.[15] As a result, Canadian regulators are under increasing pressure to provide a framework for the disclosure of climate-related risks and opportunities.

In spring 2021, the CSA carried out a targeted review of the information provided by reporting issuers on climate-related risks and their financial repercussions.[16] They also analyzed comparative developments in international regulations. The review exposed several concerning findings. The CSA observed that climate-related information disclosed by issuers is not always complete, consistent, and comparable, and that quantitative information was often limited and not necessarily consistent.[17] The review also showed that issuers are generally selective in their disclosure which follows a voluntary standard and/or optional framework. It was also observed that sustainability information was often produced in isolation and not necessarily integrated into the company's periodic information structures.

This motivated the CSA to publish NI 51 107 for consultation, which aims to impose a mandatory disclosure framework for climate-related risks. The draft regulation responds to stakeholder concerns by proposing a single framework, based mainly on the TCFD version, to facilitate comparison of climate-related information disclosed by reporting issuers.[18] The envisaged obligations would facilitate compar-

15 On the question of disclosure, see notably: S. Bainbridge, "Mandatory Disclosure: A Behavioral Analysis" (2000), 68, *U Cin L Rev*, 1023.

16 *Canadian securities regulators seek comment on climate-related disclosure requirements,* CSA (October 18, 2021), online: https://www.securities-administrators.ca/news/canadian-securities-regulators-seek-comment-on-climate-related-disclosure-requirements

17 See notably :*Climate-related Disclosure Update,* CSA (October 18, 2021), online: https://lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/51-107/2021-10-18/2021oct18-51-107-avis-cons-en.pdf

18 Note: The proposed national instrument provides for reporting issuers' disclosure of information relating to the four central elements of the TCFD recommendations: *Governance* – Supervision of climate-related risks and opportunities by the issuer's board of directors and management's role in their assessing and treatment; *Strategy* – The short, medium, and long-term climate-related risks and opportunities identified by the issuer and their potential impact on its business, strategy, and financial planning, if the information is material. Unlike the TCFD recommendations, the draft

ison of the information provided by issuers, improving the quality of information about climate change, and helping investors to make more informed investment decisions. The obligations also aim to avoid the costs of complying with multiple disclosure frameworks, to improve access to global markets, and to level the playing field for issuers.[19]

The CSA received 131 submissions commenting on the proposed NI 51-107 during the four-month public comment period following publication: 123 from organizations and 8 from individuals. The Canadian Climate Law Initiative (CCLI) published a report summarizing all the submissions in spring 2022.[20] The report identifies two recurring themes in the vast majority of comments. Professor Janis Sarra, co-author of the report noted that: "All users of financial statements need reliable, relevant, clear, and comparable information on climate-related risks and opportunities aligned with the Financial Stability Board's Taskforce on Climate-related Financial Disclosures." She added that: "the CSA must act quickly to strengthen and finalize NI 51-107 to create effective disclosure standards aligned with international regulatory developments so that Canadian issuers can effectively compete in domestic and global capital markets."

Important international developments with respect to climate-related information have occurred since publication of the proposed National Instrument on February 16, 2022, and the end of the comment period, which was extended by 30 days. For example, the Securities and Exchange Commission (SEC) released a proposal to amend certain climate-related disclosure regulations on March 21, 2022.[21] On March 31, 2022, the International Sustainability Standards Board (ISSB), the environmental, social, and governance (ESG) body established by the International Financial Reporting Standards (IFRS) Foundation for setting standards, proposed two international standards for ESG-related disclosure: (i) IFRS S1 – *General Requirements for Disclosure of Sustainability-related Financial Information*;[22] and

regulations do not provide for the obligation to present a "scenario analysis", i.e. a description of the resilience of the issuer's strategy in different climate-related scenarios, including a scenario of 2°C or less; *Risk Management* – How an issuer identifies, assesses, and manages climate-related risks and how these processes are integrated into overall risk management and *Metrics and Targets* – The metrics and targets used by an issuer to assess and manage climate-related risks and opportunities, if the information is material.

19 Note: The CSA have made many efforts since 2017 to reduce the regulatory burden on reporting issuers. CSA Consultation Paper 51-404 is a good example: *Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers*, CSA Consultation Paper 51-404, online: https://www.osc.ca/sites/default/files/pdfs/irps/csa_20170406_51-404_considerations-for-reducing-regulatory-burden.pdf

20 J. Sarra, M. Irish et J. Copithorne, *Summary of Submissions to Canadian Securities Administrators on Proposed National Instrument 51-107 Disclosure of Climate-related Matters*, Canada Climate Law Initiative (mars 2022), online: https://ccli.ubc.ca/wp-content/uploads/2022/03/CCLI-Summary-of-submissions-to-CSA.pdf

21 *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, RIN 3235-AM87, Securities and Exchange Commission (21 mars 2022), online: https://www.sec.gov/rules/proposed/2022/33-11042.pdf

22 *General Requirements for Disclosure of Sustainability-related Financial Information – IFRS*

(ii) IFRS S2 – *Climate-related Disclosures*[23] (known collectively as the ISSB Drafts). The CSA indicated they are closely monitoring international work, including the SEC and ISSB projects, to determine the impact on the NI 51-107 proposal. They pointed out that the SEC and ISSB drafts, like the NI 51-107 proposal, are based on the TCFD framework, but substantive differences between the three drafts are still under CSA review. The CSA further noted the progress made by the ISSB in developing globally established baseline parameters for sustainability disclosure, describing it as an important step forward[24].

The CSA initially indicated that the Proposed National Instrument would be applied from December 31, 2022, at the earliest. Considering the extent of international developments in climate-related information obligations and the number of comments received in response to the proposed National Instrument, the new application date is yet to be set. The CSA is likely to revise the Proposed National Instrument to mitigate the substantive differences identified in their update. The CSA invoked that international consensus would play a role in the decision-making process, suggesting they will seek to collaborate with other regulators. Given the significant influence that the three regulators have in developing ESG disclosure standards, it is highly likely the CSA will work closely with the SEC and ISSB to develop global baseline parameters for sustainability reporting.

New information obligations on climate issues are a concern given increasing pressure on companies regarding compliance and risk management requirements. Recent efforts by the CSA to promote simplified communication of information only provide superficial relief that does not meet the objectives underlying current securities legislation and environmental issues. This raises the question regarding the ideal forum for these new obligations and the capacity of Canadian securities legislation to integrate them. Levine and La Porta posit that the legal environment has a significant impact on business growth and development.[25] The existing heavy regulatory burden on reporting issuers compromises the consideration of cli-

S1, International Financial Reporting Standards (March 2022), online : https://www.ifrs.org/content/dam/ifrs/project/general-sustainability-related-disclosures/exposure-draft-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information.pdf

23 Climate-related Disclosures – *IFRS S2,* International Financial Reporting Standards (March 2022), online: https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf

24 *Canadian securities regulators consider impact of international developments on proposed climate-related disclosure rule,* CSA (October 12, 2022), online: https://www.securities-administrators.ca/news/canadian-securities-regulators-consider-impact-of-international-developments-on-proposed-climate-related-disclosure-rule

25 See: R. Levine & S. Zervos, "Stock Market Development and Long-Run Growth" (1996), 10:2, *World Bank Econ Rev*, 323 and R. La Porta, Fl. Lopez-de-Silanes & A. Shleifer, "Law and Finance" (1998), 106:6, *J Polit Econ*, 1113.

mate-related risks and the integration of new obligations. This may deter business creation and development, contributing to a drop in the number of initial public offerings and consequently negatively impact the Quebec and Canadian economy.[26] The Canadian government's recent commitments to move towards mandatory disclosure of ESG factors and climate risks for federally regulated organizations by 2024 indicates the pressing importance of this reflection for Quebec and Canada.[27]

26 See notably: M. Magnan & B. Campbell, « Le premier appel public à l'épargne et les sociétés québécoises : état de la situation » (2014) CIRANO, Rapport de projet 2014RP-09.

27 Note: On April 7, 2022, the Canadian federal government committed to move towards mandatory disclosure of environmental, social and governance factors and climate risks for different actors in the economy, according to the international framework of the GIFCC. Federally regulated institutions (financial institutions and insurance companies) will be required to publish climate disclosures based on the GIFCC framework by 2024 under the supervision of the Office of the Superintendent of Financial Institutions. This commitment comes a few months after the G7 approved a possible mandatory disclosure of information related to climate change. The group had declared its support "for the mandatory adoption of climate-related financial disclosure that provides market participants with consistent and useful information for decision-making" based on the GIFCC recommendations.