

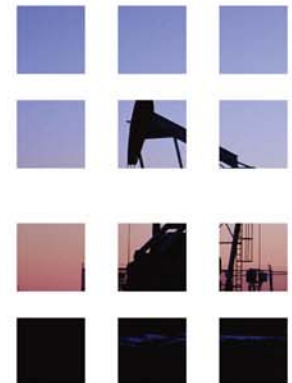


# Legal Issues in Climate Change Disclosure

## “Carbon: A Business of Political Issue?”

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# ***Outline Of Climate Change Disclosure Legal Issues***

- A. Financial Statement Disclosure (Corporate Law Requirements and Shareholder Initiatives)
- B. Public Company Disclosure (Securities Law and *OSC/ASC/SEC suggestions*)
- C. Environmental Law Disclosure
- D. Voluntary Disclosure

# ***Obligations Under the Canada Business Corporations Act (CBCA)***

## **1. Directors Duties**

### **-s. 20 (2) Directors Records**

- corporation must prepare and maintain adequate accounting records

### **-s. 155(1) Annual Financial Statements**

- directors must provide shareholders with financial statements, auditor's reports and any other information about the corporation's financial position

### **-s. 71 of Regulation to CBCA**

- financial statements must accord with GAAP

### **-s.158 Approval of Financial Statements**

- directors must approve a company's financial statements
- can't publish without auditor's report

# ***CBCA Obligations (cont'd)***

## **2. Auditor's Duties**

### **-s. 162 Appointment of an Auditor**

- need an auditor if a distributing corporation or all shareholders agree

## **3. Audit Committee**

### **-s. 171(3)**

- audit committee to review financial statements before approval by directors

Note re: *Provincial Business Corporations Act*

- similar provisions to above in Alberta, British Columbia and Ontario *Business Corporations Acts*

# *Shareholder Proposals*

- directors manage the business and affairs of corporations
- shareholders have limited powers: primarily to elect directors, pass or reject by-laws and otherwise provide guidance (which guidance may be accepted or rejected by directors)
- s.137 of CBCA permits shareholders proposals unless
  - to redress a personal grievance
  - clearly appears not to relate significantly to business and affairs of the corporation
- becoming more common in environmental context
- 2008 environmental proposals filed with Canadian companies include: Air Canada, WestJet, EnCana Corp., Teck Cominco Ltd, and Trans AT

# ***Content of Financial Statements***

- GAAP compliance is required
- both International Accounting Standards Board and the Financial Accounting Standards Board have withdrawn guidance on key technical points
- so see Christine Schuh's presentation!

# *Shareholder Proposals*

- In the US:
  - 65 climate change proposals (largest category of proposals) in 2008
  - from 2004 to 2007, support for climate change proposals grew to nearly 20%
  - Recent Chevron vote showed 25% support for a resolution designed to slow oil sands development in Canada
  - little to no success rate (ie: Exxon Mobil, ConocoPhillips), but voting support is generally up

# ***Withdrawals of Proposals***

- also becoming increasingly frequent
- in 2008, the highest proportion of withdrawals are in exchange for commencing sustainability reporting (22 different public companies)

# ***Environmental Disclosure Requirements***

## Reporting Obligations Under Environmental Statutes

### **A. Section 71 of Canadian Environmental Protection Act, 1999 (CEPA)**

- Minister can require a person to provide information or samples or to conduct tests
- *Environment Canada Reporting Notice:*
  - legal obligation to provide data on release of air pollutants, greenhouse gases and other toxics
  - also information on production
  - must provide information if in possession or are reasonably expected to have access (including estimates)

# ***Environmental Disclosure Requirements (con't)***

## **B. Alberta's *Climate Change and Emissions Management Act***

- Section 6: Mandatory Reporting
  - anyone who releases or permits the release of a specified gas\* into the environment or in excess of regulatory levels shall report such a release

\*"specified gas" means a greenhouse gas covered by the Kyoto Protocol.

## **C. Ontario**

- had requirement to file GHG emission reports but now incorporated into the federal government! National Pollution Reporting Inventory (NPRI)

# ***Voluntary Disclosure Requirements***

- directors are determining that disclosure is appropriate, despite lack of legal obligation
- increasing industry pressure to voluntarily report

From:

- (i) investors (shareholders, bondholders, banks, leasing companies)
- (ii) employers
- (iii) customers
- (iv) suppliers
- (v) communities in which facilities are located
- (vi) other stakeholders

- director's duty is to act in the best interest of the corporation

## **Responding to Carbon Disclosure Project**

- more and more companies are seeing the benefits of responding to the CDP questionnaire
- questionnaire helps companies begin the process of measuring and managing carbon emissions
- provides greater level of visibility and accountability to all stakeholders

# ***Voluntary Disclosure Requirements (con't)***

## **Sustainability Reports; Environmental Health and Safety Reports and Carbon “Inventory” Reports**

- Sustainability reports and EHS reports focus internal and external commitments towards sound environmental management and sustainability activities
- can be PR/“greenwash” but increasingly the value of businesses is seen in intangibles and this addresses that issue

## **Registries**

- on the GHG front, use of GHG “inventory” registries is becoming popular
- Assists in the management of GHG emissions and helps establish work-plan elements to reduce emissions
- Climate Registry
- California based but all Canadian Provinces have agreed to support
- Clean Projects Registry
- CSA operated for project offsets
- other registries include:
  - Global Reporting Initiative
  - Global Framework for Climate Risk Disclosure
  - Voluntary Carbon Standard

# ***Securities Disclosure***

## **A. Specific Disclosure Requirements**

### **1. *Prospectus Requirements***

- full, true and plain disclosure of all material facts
- what is “material” is something that would make a difference to the investment decision of a reasonable investor
- GHGs are relevant to many businesses, particularly to “green” investors

# ***Securities Disclosure (con't)***

## Specific *Prospectus* Obligations:

- *Item 6.1(1) 4(h)*:
  - narrative description of the business must include the “financial and operational effects of environmental protection requirements” on capital expenditures (current and future effects)
- *Item 6.3 (1)(d)*:
  - issuers involved in mineral projects must disclose all environmental liabilities

# ***Securities Disclosure (con't)***

- *Item 20.1*
  - issuers must describe the risk factors material to the issuer that a reasonable investor would consider relevant, including environmental and health risks
  
- *Item 5.3*
  - issuers must disclose any trend or uncertainty known or reasonably expected to have a material impact on financial or operational results
  
- *Item 22*
  - issuers must disclose description of any legal proceeding affecting it or its subsidiaries

# *Securities Disclosure (con't)*

## *2. Continuous Disclosure Obligations*

- *National Instrument 51-102* requires issuers continue to disclose material changes i.e. changes in the business or capital of a public company that may reasonably be expected to be of significance in investors' decisions
- two areas of particular importance:
  - Annual Information Form (AIF)*
  - Management's Discussion and Analysis (MD&A)*

# ***Securities Disclosure (con't)***

## *i) Annual Information Form*

### *-Item 5.1 (4)*

-describe and explain the implementation steps for environmental policies fundamental to corporate operations

### *-Item 5.2*

-disclose all risks likely to influence an investor's decision to purchase securities, including environmental and health risks

### *-Item 12.1*

-describe any legal proceedings the company is party to or has property affected by

# ***Securities Disclosure (con't)***

## *ii) Management's Discussion and Analysis*

### *-Part 1.4 (d)*

-discuss company's operations, including factors that affect value of projects (inc. environment)

### *-Part 1(a)*

-discuss all information that may not be fully included or reflected in financial statements (i.e.: contingent liabilities)

### *-Part 1.2*

-discuss known trends or uncertainties that are reasonably likely to affect business

# ***Securities Disclosure (con't)***

## **B. US Comparison**

### *-Regulation S-K, Item 101*

-disclose material effects that compliance with environmental laws will have on earnings, competitive position and capital expenditures (current and future)

### **-Rule S-K:**

-Item 103: disclosure of legal proceedings (excess of \$100,000 is considered “material”)

-Item 303: disclosure of known trends or uncertainties that may have a material effect

# ***Securities Disclosure (con't)***

## **C. Comments from Regulators**

### **1) *Alberta Continuous Disclosure Review (2007)***

- boilerplate language of environmental policies, risks and estimates isn't good enough

### **2) *SEC Comments***

- In wake of Sept 18th, 2007 petition and letter from coalition of state officials and investors, SEC may be paying greater attention to environmental disclosure in public filings

# ***Securities Disclosure (con't)***

## ***3. OSC Staff Notice 51-716 – Environmental Reporting***

- made recommendations for environmental disclosure:
  - confirms “materiality” is determining factor re: disclosure
  - view is that both quantitative and qualitative factors to be considered
  - Points to requirement to provide an analysis of “critical accounting estimates” (i.e. if highly uncertain assumptions could have a material impact on statements)
  - discussions of potential and contingent environmental liability go in MD&A, whether or not in notes accompanying the statements
  - include description of environmental policies fundamental to operations and evaluate potential and actual impact as well as quantitative cost information where reasonably available
  - include a detailed discussion of environmental laws which pose any material risk to the issuer’s operations
  - boilerplate disclosure is insufficient!

# ***Securities Disclosure (con't)***

## ***Warning in Notice s1-716***

- Audit Committees' oversight of financial statements and MD&A includes reporting related to material environmental matters
  - *GET IT RIGHT!*
- CEO/CFOs certify that the financial statement, together with the AIF and MD&A, present fairly the issuer's financial condition and a meaningful discussion of material environmental matters in the MD&A and AIF is necessary to achieve this
  - *GET IT RIGHT!*

# THANK YOU

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