First Nations **FINANCIAL MANAGEMENT BOARD** | **CONSEIL DE GESTION FINANCIÈRE** des Premières Nations

February 16, 2022

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Re: Comments on Proposed National Instrument 51-107 *Disclosure of Climate-related Matters* ("NI 51-107") and its companion Policy.

The First Nations Financial Management Board ("the FMB") is pleased to provide you with comments on the proposed NI 51-107.

Summary

There are two main points FMB conveys in this letter:

1. The jurisdictional matters that NI 51-107 is addressing are exclusive federal jurisdiction. The CSA does not have jurisdiction to enact NI 51-107. However, we view the proposed national instrument as a helpful and informative step towards the establishment of a more comprehensive federal regime.

2. In developing the National Instrument, the CSA has a requirement to cooperate and consult with Indigenous Peoples according to the United Nations Declaration on the Rights of Indigenous Peoples. GHG emissions and prospective GHG emission reporting will affect Indigenous Peoples and their rights, disproportionately more than the mainstream economy.

   GHG reporting will likely have a negative effect directly and indirectly on the Indigenous economy, but, at the same time, it will not include reporting on the value of Indigenous stewardship of traditional territories or "natural capital". The value of this stewardship is far in excess of GHG emission reporting penalties and additional costs that Indigenous businesses, individuals and governments may face.

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To ensure a just transition away from GHG emissions, the CSA should work in consultation and cooperation with Indigenous peoples by ensuring that Indigenous reporting is implemented with reporting issuers contemporaneously with GHG emission reporting. Further, CSA must ensure that capital markets participants, such as sustainability index providers and sustainability rating agencies, provide weight to Indigenous factors when rating and ranking sustainability reporting of corporate reporting issuers and investment products.

General Comments

Requirement to consult and cooperate with Indigenous Peoples—Ensuring a "Just Transition"

Requirement to consult and cooperate on matters or legislation that affects Indigenous peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states:

Article 18
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.

Article 19
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The governments of British Columbia (under the *Declaration on the Rights of Indigenous Peoples Act*) and Canada (under the *United Nations Declaration on the Rights of Indigenous Peoples Act*) must take all measures necessary to ensure their respective laws are consistent with UNDRIP and therefore must consult and cooperate with Indigenous peoples on decision making that affects their rights and laws that affect them.

Effect of Greenhouse Gases (GHG) (and its reporting) on Indigenous Peoples

Indigenous Peoples are critical actors in the fight against climate change and the mitigating of its detrimental impacts. The UN Intergovernmental Panel on Climate Change's recent reports have acknowledged with "high confidence" that adaptation efforts benefit from the inclusion of local and Indigenous knowledge[1]. Additional

[1] Bob Henson," Key takeaways from the new IPCC report", Yale Climate Connection (August 9, 2021). Available at: https://yaleclimateconnections.org/2021/08/key-takeaways-from-the-new-ipcc-report/

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studies show that ancestral lands and land under title by Indigenous Peoples are the most biodiverse and best conserved on the planet[2]

In *References re Greenhouse Gas Pollution Pricing Act*, in the context of greenhouse gas emissions and global climate change, the Supreme Court of Canada noted that climate change "has had particularly serious effects on Indigenous peoples, threatening the ability of Indigenous communities in Canada to sustain themselves and maintain their traditional ways of life" [para 11] and that "the effects of climate change are and will continue to be experienced across Canada, with heightened impacts in the Canadian Arctic, coastal regions and Indigenous territories." [para 12]

Furthermore, GHG emissions and prospective GHG emission reporting affect Indigenous Peoples and their rights, disproportionately more than the mainstream economy in the following ways:

- Canadian reporting issuers in the extractive, energy production and transmission, and agricultural sectors operate on land that is the traditional territory of Indigenous rights holders. These issuers must consult with and accommodate Indigenous rights-holders when seeking to develop in their traditional territory. Accommodation often includes benefits such as Indigenous equity ownership, employment and procurement contracting. GHG reporting that adversely impacts the business and financing of reporting issuers operating in traditional territories, or make projects untenable, will have a knock-on effect on the businesses and economies of Indigenous communities. Reporting on GHG may effectively strand resource assets and leave Indigenous communities with no pathway to economic development, despite them being the custodians or owners of counterbalancing "natural capital" (see below).
- A significant proportion of Indigenous communities and their businesses are in remote communities which currently require GHG-intensive electricity generation and transportation in order to operate. They have no real choice and little ability to find alternatives. GHG-reporting would have an adverse impact on the financing and operations of those Indigenous businesses, should they become reporting.
- Furthermore, Indigenous businesses that are suppliers in the value chain and whose GHG emissions may be reported on as part of Scope 3 emissions (or even Scope 2 emissions) of reporting issuers up the value chain may be refused contracts because of the higher GHG emissions, discussed in the previous paragraph.
- GHG reporting will also deter reporting issuers that finance Indigenous governments. Many of Canada's financial institutions, including banks and pension managers, have begun to measure and disclose the greenhouse gas emissions associated with their portfolio of loans and investments. This may deter these sources of capital from doing business with Indigenous governments, individual and businesses or would increase Indigenous cost of capital.
- GHG reporting will increase the cost of capital and drive up the costs of certain GHG-intensive goods and services used and needed in Indigenous communities. Many Indigenous communities will need to build infrastructure, including adequate housing, schools, health and wellness centres, and water

[2] Frontiers in Ecology and the Environment, "Importance of Indigenous Peoples' Lands For the Conservation of Intact Forest Landscapes," (January 6, 2020), Available at: https://esajournals.onlinelibrary.wiley.com/doi/full/10.1002/fee.2148

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> treatment facilities. Bridging this $25 billion infrastructure gap will become more costly under GHG reporting. The cost of necessities in remote communities is also already expensive due to the cost of transportation, often by airplane. As the cost of capital and operations for airlines or trucking companies becomes higher, the cost of living in these remote communities will also become higher.

Furthermore, GHG reporting, as drafted, will not include reporting on the value of Indigenous stewardship of traditional territories or "natural capital"[3]. For example, much of the land of the Northern Ontario and Manitoba and the Northwest Territories is peatland. Peatland covers only 3% of the earth but holds 30% of carbon trapped in soil. Indigenous nations hold land roughly the size of Manitoba, most of which is undeveloped and holding carbon. Ostensibly, the value of this stewardship is far in excess of GHG emission reporting penalties and additional costs that Indigenous businesses, individuals and governments may face.

Indeed, NI 51-107 GHG reporting in isolation may harm Indigenous peoples, their governments and their economies.

What is needed is a "just transition". The Paris Agreement on climate change called on signatories to consider "the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities."

The Government of Canada signed the COP26 *SUPPORTING THE CONDITIONS FOR A JUST TRANSITION INTERNATIONALLY* communique, agreeing that:

> We recognise that the effects of climate change disproportionately affect those in poverty, and can exacerbate economic, gender and other social inequalities, including those resulting from discriminatory practices based upon race and ethnicity; the transition towards net zero will affect, most acutely, those in workforces in sectors, cities and regions relying on carbon-intensive industries and production. With that in mind, we also recognise our role in climate change mitigation and adaptation action that is fully inclusive and benefits the most vulnerable through the more equitable distribution of resources, enhanced economic and political empowerment, improved health and wellbeing, resilience to shocks and disasters and access to skills development and employment opportunities. This should also display: a commitment to gender equality, racial equality and social cohesion; protection of the rights of Indigenous Peoples; [...]

To ensure a just transition, GHG reporting must be balanced with Indigenous ESG factors.

The CSA should therefore work in consultation and cooperation with Indigenous peoples on this proposed National Instrument to ensure this just transition, by ensuring that Indigenous reporting is implemented with reporting issuers contemporaneously with GHG emission reporting. And ensure that capital markets participants, such as sustainability index providers and sustainability rating agencies, provide weight to

[3] https://www.theglobeandmail.com/business/article-is-it-time-to-make-natural-capital-an-asset-class/

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Indigenous factors when rating and ranking sustainability reporting of corporate reporting issuers and investment products.

Furthermore, given the profound negative effects on Indigenous peoples, under DRIPA, **the government of British Columbia (including the BCSC) must cooperate and consult with Indigenous people on the development of GHG reporting legislation.**

Constitutionality of NI 51-107

We assert, expanded upon more fully in the attached annex, that the jurisdictional matters that NI 51-107 is addressing, are exclusive federal jurisdiction and the CSA does not have jurisdiction to enact NI 51-107. In the alternative, we would see this National Instrument, revised and implemented as above, as a helpful step towards the establishment of a more comprehensive federal regime.

In the Supreme Court of Canada decision of *References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11* (*GHG Reference)*, the subject matter of the *Greenhouse Gas Pollution Pricing Act* (GGPPA), a federal law which set GHG emissions pricing, was found to be constitutional. The court recognized that federal legislation establishing minimum national standards of GHG price stringency designed to reduce GHG emissions was a matter of national concern that extended beyond provincial boundaries.

The goal of NI 51-107 is similar: to create standards of reporting consistent with international standards to enable investors and asset managers, both local and foreign, to make decisions as to whether to buy, sell or hold securities based on the amount of GHG emissions, with the goal to move the unpriced externality of GHG emissions to become a factor in pricing securities.

Or, more simply, the pith and substance of GGPPA is to "establish minimum national standards of GHG price stringency to reduce GHG emissions" [para 80] while the similar pith and substance of NI 51-107 is to establish minimal national standards of GHG emission reporting to reduce GHG emissions.

Similar to GGPPA, the nature of NI 51-107 meets the three tests of being under the national concern branch of the federal power of "peace, order and good government" (POGG).

Not adopting adequate GHG reporting standards will have significant and grave consequences extraprovincially; Canadian industry disproportionately contributes to GHG emissions worldwide and an incomplete or a patchwork of standards in Canada could lead to a race to the bottom globally.

Federal GHG Emissions Legislation—Next Steps

There must be federal GHG emissions reporting legislation.

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Any federal legislation would need to comply with *UNDRIPA* and, for the reasons outlined above, due to the significant effect such legislation would have on Indigenous rights and Indigenous peoples, there must be cooperation and consultation with Indigenous peoples.

Accordingly, **we suggest that the CSA immediately strike a working group with the Government of Canada, CPA Canada, and Indigenous rights holders and organizations (as required under *UNDRIPA*), in liaison with the ISSB, to develop federal GHG emissions disclosure reporting requirements, filing processes, compliance, enforcement, and assurance procedures.** The working group should intend to dovetail its work to coincide with the publication of the ISSB's new standards, and the adoption of those standards into Canadian GAAP and/or the adoption of the standards by a prospective Canadian Sustainable Standards Board. **In order to ensure that GHG emission disclosure reporting may be balanced with a just transition for Indigenous peoples, this working group should also have a mandate to contemporaneously develop Indigenous reconciliation-related reporting and other reconciliation-related regulation.**

Practically, we do not see why federal legislated standards could not be incorporated by reference into securities legislation in a similar manner to Canadian GAAP.

Comments on Specific Questions in Consultation Paper

Experience with TCFD recommendations

1. For reporting issuers that have provided climate-related disclosures voluntarily in accordance with the TCFD recommendations, what has been the experience generally in providing those disclosures?

As the FMB is not a reporting issuer, it is unable to comment on this question.

Disclosure of GHG Emissions and Scenario Analysis

2. For reporting issuers, do you currently disclose GHG emissions on a voluntary basis? If so, are the GHG emissions calculated in accordance with the GHG Protocol?

As the FMB is not a reporting issuer, it is unable to comment on this question.

3. For reporting issuers, do you currently conduct climate scenario analysis (regardless of whether the analysis is disclosed)? If so, what are the benefits and challenges with preparing and/or disclosing the analysis?

As the FMB is not a reporting issuer, it is unable to comment on this question.

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4. Under the Proposed Instrument, scenario analysis would not be required. Is this approach appropriate? Should the Proposed Instrument require this disclosure? Should issuers have the option to not provide this disclosure and explain why they have not done so?

The FMB does not have any specific comments to share at this time.

5. The TCFD recommendations contemplate disclosure of GHG emissions, where such information is material.

- The Proposed Instrument contemplates issuers having the option to disclose GHG emissions or explain why they have not done so. Is this approach appropriate?

The FMB does not support this 'comply or explain' approach – at least not on an indefinite basis. It may be appropriate for an adequate transition period to be permitted to allow reporting issuers adequate time to create the necessary processes and systems to gather, record and analyse the data that will be needed.

- As an alternative, the CSA is consulting on requiring issuers to disclose Scope 1 GHG emissions. Is this approach appropriate? Should disclosure of Scope 1 GHG emissions only be required where such information is material?

The FMB does not support this alternative since it is unlikely to provide sufficient information to investors to evaluate the full impact of the reporting issuer's operations and products and services on our climate.

- Should disclosure of Scope 2 GHG emissions and Scope 3 GHG emissions be mandatory?

Yes – Scope 2 and Scope 3 GHG emission disclosure and reporting should be mandatory subject to reasonable transition periods.

- For those issuers who are already required to report GHG emissions under existing federal or provincial legislation, would the requirement in the Proposed Instrument to include GHG emissions in the issuer's AIF or annual MD&A (if an issuer elects to disclose these emissions) present a timing challenge given the respective filing deadlines? If so, what is the best way to address this timing challenge?

The FMB does not have any specific comments to share at this time.

6. The Proposed Instrument contemplates that issuers that provide GHG disclosures would be required to use a GHG emissions reporting standard in measuring their GHG emissions, being the GHG Protocol or a reporting standard comparable with the GHG Protocol (as described in the Proposed Policy). Further, where an issuer uses a reporting standard that is not the GHG Protocol, it would be required to disclose how the reporting standard used is comparable with the GHG Protocol.

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- As issuers have the option of providing GHG disclosures, should a specific reporting standard, such as the GHG Protocol, be mandated when such disclosures are provided?

The FMB supports the idea of requiring reporting issuers to use a high-quality internationally recognised GHG emissions reporting standard. We encourage the CSA to consider whether the soon-to-be issued climate focused standards by the ISSB will be the best option.

- Is the GHG Protocol appropriate for all reporting issuers? Should issuers be given the flexibility to use alternative reporting standards that are comparable with the GHG Protocol?

Please refer to our comments above.

- Are there other reporting standards that address the disclosure needs of users or the different circumstances of issuers across multiple industries and should they be specifically identified as suitable methodologies?

Please refer to our comments above.

7. The Proposed Instrument does not require the GHG emissions to be audited. Should there be a requirement for some form of assurance on GHG emissions reporting?

The FMB supports the idea of requiring some form of independent assurance or management attestation to provide confidence over the relevance and accuracy of inputs and assumptions used to develop GHG emission calculations and disclosures.

8. The Proposed Instrument permits an issuer to incorporate GHG disclosure by reference to another document. Is this appropriate? Should this be expanded to include other disclosure requirements of the Proposed Instrument?

The FMB supports the idea of permitting an issuer to incorporate GHG disclosure by reference to another document in an interim period. However, ultimately, GHG reporting should be standardized and reported in a standardized format.

We recommend that the GHG disclosures in the Proposed Instrument be expanded to include reporting on Indigenous reconciliation factors. Call to Action #92 in the Truth and Reconciliation Commissions Final Report should be specifically referred to and applied.

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In order to have a just transition, ESG funds, index providers and rating agencies must be regulated to not limit their inclusion or exclusion of reporting issuers as ESG-friendly based only on GHG emissions data but must also include Indigenous reconciliation reporting factors as well.

Usefulness and benefits of disclosures contemplated by the Proposed Instrument

9. What climate-related information is most important for investors' investment and voting decisions? How is this information incorporated into these decisions? Is there additional information that investors require?

The FMB does not have any specific comments to share at this time.

10. What are the anticipated benefits associated with providing the disclosures contemplated by the Proposed Instrument? How would the Proposed Instrument enhance the current level of climate-related disclosures provided by reporting issuers in Canada?

The FMB does not have any specific comments to share at this time.

Costs and challenges of disclosures contemplated by the Proposed Instrument

11. What are the anticipated costs and challenges associated with providing the disclosures contemplated by the Proposed Instrument?

The FMB does not have any specific comments to share at this time.

12. Do the costs and challenges vary among the four core TCFD recommendations related to governance, strategy, risk management, and metrics and targets? For example, are some of the disclosures more (or less) challenging to prepare?

The FMB does not have any specific comments to share at this time.

13. The costs of obtaining and presenting new disclosures may be proportionally greater for venture issuers that may have scarce resources. Would more accommodations for venture issuers be needed? If so, what accommodations would address these concerns while still balancing the reasonable information needs of investors? Alternatively, should venture issuers be exempted from some or all of the requirements of the Proposed Instrument?

The FMB does not have any specific comments to share at this time.

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Guidance on disclosure requirements

14. We have provided guidance in the Proposed Policy on the disclosure required by the Proposed Instrument. Are there any other tools, guidance or data sources that would be helpful in preparing these disclosures that the Proposed Policy should refer to?

The FMB does not have any specific comments to share at this time.

15. Does the guidance set out in the Proposed Policy sufficiently explain the interaction of the risk disclosure requirement in the Proposed Instrument with the existing risk disclosure requirements in NI 51-102?

The FMB does not have any specific comments to share at this time.

Prospectus Disclosure

16. Form 41-101F1 Information Required in a Prospectus does not contain the climate-related disclosure requirements contemplated by the Proposed Instrument. Should an issuer be required to include the disclosure required by the Proposed Instrument in a long form prospectus? If so, at what point during the phased-in implementation of the Proposed Instrument should these disclosure requirements apply in the context of a long form prospectus?

Yes. If the disclosure is relevant for investors for continuous disclosure, then it is relevant for the prospectus.

Phased-in implementation

17. The Proposed Instrument contemplates a phased-in transition of the disclosure requirements, with non-venture issuers subject to a one-year transition phase and venture issuers subject to a three-year transition phase. Assuming the Proposed Instrument comes into force December 31, 2022 and the issuer has a December 31 year-end, these disclosures would be included in annual filings due in 2024 and 2026 for non-venture issuers and venture issuers, respectively.

- Would the transition provisions in the Proposed Instrument provide reporting issuers with sufficient time to review the Proposed Instrument and prepare and file the required disclosures?

The FMB believes that the transition provisions in the Proposed Instrument provide reporting issuers with sufficient time to review the Proposed Instrument and prepare and file the required disclosures. However, the CSA may want to consider that the ISSB may have adopted standards by the time the requirements would be effective for most issuers.

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- Does the phased-in implementation based on non-venture or venture status address the concerns, if any, regarding the challenges and costs associated with providing the disclosures contemplated by the Proposed Instrument, particularly for venture issuers? If not, how could these concerns be addressed?

The CSA may want to interview the accounting/audit firms and other consultants as to their degree of readiness to do the work for 2,000-odd issuers and how much time and cost would be involved.

Future ESG considerations

18. In its comment letter to the IFRS Foundation's consultation paper published in September 2020, the CSA stated that developing a global set of sustainability reporting standards for climate- related information is an appropriate starting point, with broader environmental factors and other sustainability topics to be considered in the future. What broader sustainability or ESG topics should be prioritized for the future?

The FMB believes that ESG in Canada should be viewed as ESGI so that the views of Indigenous rights holders are fully reflected. The United Nations Declaration of the Rights of Indigenous Peoples ("UNDRIP") must be a key component of any Canadian and international ESG Standards.

If the rights of Indigenous Peoples, as codified in UNDRIP, are not adequately captured in ESG, and thus in investment decisions, greater systemic risk will exist in markets, particularly with respect to natural resource development projects. UNDRIP recognizes the necessity of gaining the Free, Prior, and Informed Consent ("FPIC") from Indigenous communities when economic activity will affect the traditional territories of those peoples. As Canada and other jurisdictions have learned, the risks of not receiving FPIC from affected communities are substantial — the stalling of projects for years in litigation and protest, increasing the cost of capital, and raising systemic risk in the capital markets. These are precisely the kinds of risks that quality ESG ratings are supposed to help investors better understand and address.

We would encourage the CSA to view any ESG related standards or regulations as a tool that can help drive economic reconciliation between Indigenous communities and reporting issuers and corporate Canada more broadly. It is our view the ESGI can help Canadian businesses in the extractive, energy production and transmission, and agricultural sectors obtain FPIC from rights holders.

On behalf of First Nations Financial Management Board
Per: Geordie Hungerford, CFA, CAIA, MBA, LLB
Chief Executive Officer

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Annex A:

Constitutionality of NI 51-107

We assert that the jurisdictional matters that NI 51-107 is addressing, relying on the recent case law in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (*GHG Reference*), are exclusive federal jurisdiction and the CSA does not have jurisdiction to enact NI 51-107. However, we would view this instrument as a helpful and informative step towards the establishment of a more comprehensive federal regime.

In *GHG Reference*, the subject matter of the *Greenhouse Gas Pollution Pricing Act* (GGPPA), a federal law which set GHG emissions pricing, was found by the Supreme Court of Canada to be constitutional. The court found that establishing minimum national standards of GHG price stringency to reduce GHG emissions was of a national concern.

The goal of NI 51-107 is similar: to create standards of reporting consistent with international standards to enable Canadian capital market participants, both local and foreign, to make decisions as to whether to buy, sell or hold securities based on the amount of GHG emissions, with the ultimate goal to move the unpriced externality of GHG emissions to become a factor in pricing securities.

Or, more simply, the pith and substance of GGPPA is to "establish minimum national standards of GHG price stringency to reduce GHG emissions" [para 80] while the similar pith and substance of NI 51-107 is to establish minimal national standards of GHG emission reporting to reduce GHG emissions.

Similar to GGPPA, the nature of NI 51-107 meets the three tests of being under the national concern branch of the federal power of "peace, order and good government" (POGG). The three tests for nation concern and their analysis follow:

(1) Threshold question

The matter of GHG reporting is clearly of sufficient concern to Canada to warrant consideration in accordance with the national concern doctrine. The impact of climate change, which is driving the need for disclosure, impacts Canada and all Canadians from coast to coast to coast. The Supreme Court of Canada acknowledged that "all of the parties agree that global climate change is real. It's caused by greenhouse gas emissions resulting from human activities and it poses a grave threat to the future of humanity."

(2) Singleness, Distinctiveness and Indivisibility from a Provincial Concern

At 157, the Court, in the majority reasons, explained the test:

> "there are two principles that apply in relation to singleness, distinctiveness and indivisibility: first, federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to

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> deal with the matter. Provincial inability will be established only if the matter is of a nature that the provinces cannot address either jointly or severally, because the failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing it, and if a province's failure to deal with the matter within its own borders would have grave extraprovincial consequences."

The regulation of GHG reporting is qualitatively different from matters of provincial concern—it is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects. GHG reporting and the effects of GHG emissions are without question of a global and international nature, driving the creation of an International Sustainable Standards Board to develop international reporting standards that combat the global, international effects of climate change and harmonize expectations of issuers and investors. The purpose of GHG emission reporting is ultimately to combat **global** climate change.

There is also provincial inability to deal with the matter similar to *GHG Reference*, quoting from the majority decision at para 182:

> "...the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. The situation here is much like the one in the *2018 Securities Reference*, in which the provinces would be able to enact legislation to address national goals relating to systemic risk but could not do so on a sustained basis, because any province could choose to withdraw at any time: para. 113; see also *2011 Securities Reference*, at paras. 119-21. In the instant case, while the provinces could choose to cooperatively establish a uniform carbon pricing scheme, doing so would not assure a sustained approach to minimum national standards of GHG price stringency to reduce GHG emissions: the provinces and territories are constitutionally incapable of establishing a binding outcome-based minimum legal standard — a national GHG pricing floor — that applies in all provinces and territories at all times ... a failure to include one province in the scheme would jeopardize its success in the rest of Canada."

This analysis applies equally to the GHG emissions reporting scheme. Indeed, the fact that TCFD standards are not fully adopted and there is significant flexibility in how to comply creates an inference that NI 51-107 is the result of compromises amongst the provinces that are watering down full implementation of the internationally recognized TCFD standards.

Not adopting adequate GHG reporting standards will have significant and grave consequences extraprovincially; Canadian industry disproportionately contributes to GHG emissions worldwide and low standards in Canada could lead to a race to the bottom globally.

To wit, the observations made by the majority of the court in *GHG Reference* at paragraphs 187 and 190, and the analysis would be the same for NI 51-107:

> "..[I]t is well-established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and

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> severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life. [...]
>
> "While each province's emissions do contribute to climate change, there is no denying that climate change is an "inherently global problem" that neither Canada nor any one province acting alone can wholly address. This weighs in favour of a finding of provincial inability.

(3) Scale of Impact

Given the targeted focus of GHG emissions reporting, although any prospective federal legislation would have a direct impact on provincial jurisdiction over securities disclosure, its impact on the provinces' freedom to legislate and on areas of provincial life that would fall under provincial heads of power, including general securities disclosure, is qualified and limited. The following remains true: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para 128, "the basic nature of securities regulation [...] remains primarily focused on local concerns of protecting investors and ensuring the fairness of the markets through regulation of participants".

Provinces would still be able to regulate investor protection and market fairness.

Therefore, by meeting the three-pronged POGG test, the jurisdiction that the CSA is looking to enact this instrument is federal jurisdiction, a matter of national concern.

Whither Double Aspect...

Therefore, because this is federal jurisdiction, the CSA may only legislate NI 51-107 if there is a "double aspect". Again, from the majority reasons in *GHG Reference* at paragraph 125, The double aspect doctrine "recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power": *Desgagnés Transport*, at para. 84. If a fact situation can be regulated from different federal and provincial perspectives and each level of government has a compelling interest in enacting legal rules in relation to that situation, the double aspect doctrine may apply: ibid., at para. 85."

The Supreme Court indicated that for jurisdiction under national concern it is possible to have a double aspect, but that this would depend on the respective fact scenario; simply because it can apply does not mean it will apply..

In *GHG Reference*, the majority of the Court relied on the fact that the federal legislation was limited to minimum national standards of GHG pricing stringency and that the provinces could still legislate about different matters related to pricing.

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Here, however, there is not a dual aspect to GHG emission reporting. Any federal standard would have the same aspect and intent as NI 51-107, as analyzed above in the discussion of pith and substance and on a review of the purposes of NI 51-107 in PART 2 – Substance and Purpose of the Proposed Instrument of the Consultation Notice:

- improve issuer access to global capital markets by aligning Canadian disclosure standards with expectations of international investors;
- assist investors in making more informed investment decisions by enhancing climate-related disclosures;
- 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 as well as reducing market fragmentation.

In other words, the aspect would be the same: creating uniform Canadian standards based on consensus global disclosure standards in order to create an even playing field for world markets. There is no room for the provinces to create a separate aspect to this matter of uniform basic standards (though conceivably they could create additional requirements).

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