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‘Troubling Incrementalism’: Is the Canadian Pension Plan Fund Doing Enough to Advance the Transition to a Low-carbon Economy?

Cynthia Williams

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Cynthia A. Williams

Osler Chair in Business Law, Osgoode Hall Law School
For the Canada Climate Law Initiative



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L'Initiative canadienne de droit climatique

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By Cynthia A. Williams for For the Canada Climate Law Initiative (CCLI)
September 2020

The views expressed in this report do not necessarily represent the views of the funders of CCLI or of any organizations with which the Author is associated.

About the Author

Professor Cynthia A. Williams writes in the areas of securities law, corporate law, corporate responsibility, comparative corporate governance and regulatory theory, often in interdisciplinary collaborations with professors in anthropology, economic sociology, and organizational psychology.

Professor Williams also engages in policy work through her board membership in the Climate Bonds Initiative, a London-based NGO creating a new asset class, Climate Bonds, to finance the transition to a low-carbon economy; the Commonwealth Climate and Law Initiative, part of the Oxford Sustainable Finance Programme, which is evaluating directors’ and trustees’ legal obligations to consider climate change risk in companies’ strategies and securities disclosure; and was the principal author of a petition submitted to the U.S. Securities and Exchange Commission in October, 2018, asking the SEC to engage in rule-making to require greater sustainability (environmental, social, and governance) disclosure.

Professor Cynthia Williams joined Osgoode Hall Law School on July 1, 2013 as the Osler Chair in Business Law, a position she also held from 2007 to 2009. Before coming to Osgoode, she was a member of the faculty at the University of Illinois College of Law and, prior to that, she practised law at Cravath, Swaine & Moore in New York City.

About the Canada Climate Law Initiative

The Canada Climate Law Initiative (CCLI) provides legal analysis, resources and tools to help corporate directors, officers, and pension fund trustees in Canada understand how director duties and fiduciary obligations relate to climate change risks and opportunities. CCLI is the Canadian partner of the Commonwealth Climate Law Initiative, established at Oxford University and with projects in Australia, Canada, Singapore, South Africa, and the United Kingdom. CCLI is led by Drs. Carol Liao and Janis Sarra of the Peter A. Allard School of Law, University of British Columbia, and Prof. Cynthia Williams of Osgoode Hall Law School, York University. In Canada, CCLI has established the Canadian Climate Governance Experts, a collaboration among leading lawyers, accountants, economists, capital markets experts, company executives, and governance experts across Canada to advise boards and pension fund trustees pro bono concerning their fiduciary responsibilities with respect to climate change.



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Introduction

The Canada Pension Plan (CPP) is one of the world's largest public pension funds, with \$409.5 billion in assets under management as of March 31, 2020. The mandate of the CPP Investment Board (CPPIB) is to manage the funds of the CPP in the best interests of Canadian Pension Plan contributors and beneficiaries, and to maximize investment returns without undue risk of loss.¹ As CPP Investments CEO and President Mark Machin has recently observed, “our investment mandate and professional governance insulate our decision-making from short-term distortions and gives us license to help shape the long-term future.”² (In 2020, CPPIB rebranded itself CPP Investments.³ Since CPPIB is the legal entity with the statutory authority to manage CPP assets, and since many of the quotes in this report or actions being described were taken prior to the rebranding, we will continue to use the term CPPIB in those quotes and in discussing those actions. We will use the term CPP Investments if we are specifically quoting from the 2020 Annual Report, where CPPIB uses the term CPP Investments, or if we are specifically referring to actions taken in 2020. Both “CPPIB” and “CPP Investments” refer to the asset management entity that has the statutory authority to invest CPP assets under the CPP Investment Board Act.)

The Canada Climate Law Initiative agrees with CEO Mark Machin's statement: the CPP has the license, and we would argue the responsibility, to help shape the long-term future in Canada. CPP Investment's recognition of this power to shape the future that Canadians will retire into is missing in most of its public communications, although it often emphasizes the advantages that accrue to a large, patient-capital investor. We have produced this Report to encourage CPP Investments to be more focussed on shaping the future we need in Canada. In specific, we urge CPP Investments to do more to support the transition to a low-carbon economy in Canada, both for purely financial reasons, and for reasons of intergenerational equity necessary to fulfil its fiduciary duties.

The context of this discussion is important. It is unlikely that at a portfolio level the CPP Fund's holdings in oil, gas, and coal are a substantial percentage of its total holdings. Looking only at Canada, however, it seems that oil and gas holdings may be disproportionately high; we have not looked at coal. It also seems that at the same time little is being done to support the transition to a low-carbon economy in Canada. We are necessarily tentative about those conclusions because it is not actually possible to know the answer to the questions central to this inquiry. In particular, CPP Investment's 2020 Annual Report shows that \$63.89 billion was invested in Canada as of March 31, 2020.⁴ In that Annual Report, only about half of that total investment in Canada is clearly identified—\$7.1 of public equity holdings, \$1.6 billion of private equity holdings, \$840 million of credit investments, and \$20.984 billion of real assets, for a total of \$30.524 billion. No further specific information concerning what those funds are invested in within those asset classes is clearly provided, although by working through six years of Annual

1 Canada Pension Plan Investment Board Act, S.C.1997, c.40, §§ 5(b) (“best interests of the contributors and beneficiaries”) & 5(c) (“maximum rate of return, without undue risk of loss”).

2 Mark Machin, Perspective: What Matters When Investing for Generations, January 20, 2020, available at <https://www.cppinvestments.com/insights/perspective-what-matters-when-investing-for-generations> (last visited Aug. 21, 2020).

3 CPP Investments Annual Report 2020 (hereinafter “CPP Inv. 2020 Annual Report”), p. 51, available at <https://www.cppinvestments.com/the-fund/our-performance/financial-results/annual-results>.

4 See CPP Inv. 2020 Annual Report, supra note 3, at 17.

Reports this Report has been able to identify transactions involving six companies in oil, gas, and associated infrastructure in the real assets division, each of which is described in this Report.⁵ Generally speaking, however, there is no information about how approximately half of CPP's invested capital in Canada is being invested, and most of the specific investments are not disclosed even in asset classes where total investments in Canada are identified.

While there may well be legitimate commercial reasons for being somewhat vague, it leaves contributors, beneficiaries, and researchers with more questions than answers. Is CPP Investments supporting the transition to a low carbon economy in any significant way? Is it, instead, engaging in crude industrial policy, disproportionately supporting the carbon-intensive resources in Canada that other investors and market actors are recognizing as high-risk, and leaving? We can see investments supporting the carbon-intensive resources on which Canada's economy is currently heavily dependent, and this report discusses those investments. It is not possible fully to put those investments in context, however, given data limitations. Perhaps in future years CPP Investments should specifically identify its Canadian investments in oil, gas, and coal, and associated infrastructure, versus those in the transition, much as companies subject to provincial securities acts need to disclose material facts. By such disclosure, CPP Investments would provide material information to its contributors and beneficiaries so they could evaluate the policy implications of its investments in Canada.

Legitimate questions can be raised about whether CPP Investments should have a role in supporting the transition, but the flip side of that question is equally true: Should CPP Investments be making investments that are supporting the Canadian economy as it is now, resource dependent and inconsistent with the low-carbon economy that is needed, with all the financial risks that approach entails? We contend that it is time to have a serious discussion of those questions and the role of a significant public pension fund in its home country.

Our view is that CPP Investments should be, and could be, making a substantial contribution to Canada's future economy by supporting new technologies, new companies, and the just transition to a low-carbon economy. We argue that doing so would be more consistent with its statutory mandate to manage the assets of the CPP Fund in the best interests of the twenty-million Canadian contributors and beneficiaries than is its current approach. It would also be more consistent with its common-law fiduciary duties, which require intergenerational equity. Thus, we urge CPP Investments to fundamentally re-evaluate its role in Canada in order to make that contribution.

To support our argument, we look first at the context of Canadian government policy regarding climate change, and the challenge to the Canadian economy that the transition to a low-carbon economy poses. We then discuss CPP Investments' stated understanding concerning the need to incorporate climate change risks and opportunities into its management of the funds of the CPP. Next, we discuss concerns raised by CPPIB's public equity investments in oil and gas in Canada and throughout the world. Then, we describe a number of private investments CPPIB has made within the last six years in which it has created companies to engage in hydraulic fracking in Ohio and Colorado, to expand oil sands extraction in Alberta and Saskatchewan, and to engage in oil development off the coast of Ireland. Together, these public and private investments give rise to questions about CPPIB's transition strategy. We conclude by arguing that these actions are neither in the best interests of beneficiaries and contributors, nor consistent with the requirements of intergenerational equity that are a constituent part of pension trustees' fiduciary obligations, and that they present undue risk of continuing financial loss.

5 See *ibid.*, at 54.

I. Policy Context

In December 2015, after years of negotiations pursuant to the United Nations Framework Convention on Climate Change, the world agreed to binding action to address climate change in an agreement concluded in Paris. The Paris Agreement commits the world's countries to actions designed towards "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change..."⁶ The Paris Agreement entered into force as of November 4, 2016, when countries representing 55% of global greenhouse gas (GHG) emissions, including Canada, had ratified the agreement.⁷ The Paris Agreement requires each country that has ratified it to develop goals to reduce their GHG emissions according to nationally determined contributions (NDCs).

In Canada, government policy to meet Canada's obligations under the Paris Agreement is set out in the Pan-Canadian Framework on Clean Growth and Climate Change, agreed between the federal government and all of the provinces and territories with the exception of Saskatchewan in December, 2016.⁸ That commitment is to reduce Canada's greenhouse gas emissions by 30% below 2005 levels by 2030.⁹ The federal government has now gone further in its ambitions, tasking the Minister of the Environment and Climate Change as of December, 2019, to "[i]mplement the Pan-Canadian Framework on Clean Growth and Climate Change, while strengthening existing and introducing new greenhouse gas reducing measures to exceed Canada's 2030 emissions reduction goal and beginning work so that Canada can achieve net-zero emissions by 2050."¹⁰

Subsequent to the adoption of the Pan-Canadian Framework, the federal government passed the Greenhouse Gas Pollution Pricing Act as one part of its implementation of the Pan-Canadian Framework. This Act provides for a back-stop price of carbon in provinces where the federal government finds the price does not meet federal benchmarks. A number of provinces have challenged this Act,¹¹ and its constitutionality is currently under review by the Supreme Court

6 Paris Agreement, article 2(1)(a), Dec. 12, 2015, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf ("Article 2(1) (a): Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;").

7 United Nations Framework Convention on Climate Change, *Paris Agreement: Status*, available at: <https://unfccc.int/process/the-paris-agreement/status-of-ratification>.

8 Pan-Canadian Framework on Clean Growth and Climate Change, December 9, 2016, available at <https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html>.

9 *Ibid.*

10 Prime Minister of Canada Justin Trudeau, Mandate Letter to Minister of Environment of Climate Change, Dec. 19, 2019, available at <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-environment-and-climate-change-mandate-letter>.

11 Alberta, Ontario, Manitoba and Saskatchewan have challenged the constitutionality of the Act in separate judicial proceedings. Anita Balakrishnan, *Ontario Files Appeal to SCC in Carbon Tax [sic] Case*, LawTimes, 28 Aug. 2019, available at <https://www.lawtimesnews.com/news/general/ontario-files-appeal-to-scc-in-carbon-tax-case/302815>.

of Canada.¹² Still, at this point in 2020, it is federal policy that Canada reduce its greenhouse gas emissions substantially by 2030, and that will remain its policy even if the backstop price of carbon is struck down as unconstitutional.

Reducing Canada's greenhouse gas emissions is not only an obligation for Canada to meet its obligations under the Paris Agreement. It is necessary to protect Canada's economy. In 2019 the Bank of Canada for the first time in its Annual Financial System Review discussed climate change as a vulnerability to both Canada's economy and financial system.¹³ The Financial System Review stated that:

The move to a low-carbon economy involves complex structural adjustments, creating new opportunities as well as transition risk. Investor and consumer preferences are shifting toward lower-carbon sources and production processes, suggesting that the move to a low-carbon economy is underway. Transition costs will be felt most in carbon-intensive sectors, such as the oil and gas sector. If some fossil fuel reserves remain unexploited, assets in this sector may become stranded, losing much of their value. At the same time, other sectors such as green technology and alternative energy will likely benefit.

Both physical and transition risks are likely to have broad impacts on the economy. Moving labour and capital toward less carbon-intensive sectors is costly and takes time. Global trade patterns may also shift as production costs and the value of resources change. The necessary adjustments are complex and pervasive and might lead to increased risk for the financial system. In addition to insurance companies, many other parts of the financial system are exposed to risks from climate change. Banks have loans to carbon-intensive sectors as well as to connected sectors—for example, those upstream or downstream in supply chains. *Asset managers hold carbon-intensive assets in and outside Canada.*¹⁴

This statement about asset managers holding carbon-intensive assets in and outside Canada is equally applicable to the Canada Pension Plan Fund, through the stewardship of CPP Investments. In this Report, we discuss whether and how climate is being considered by CPP Investments, particularly in some of its private investments establishing companies in the oil and gas industry, in both Canada and the United States, and exerting managerial authority at those companies.

12 The Courts of Appeal of both Ontario and Saskatchewan have upheld the Act as within Parliament's Peace, Order and good Government power within s. 91 of the Constitutional Act, 1967. *Reference re: Greenhouse Gas Pollution Pricing Act*, [2019] ONCA 544; *In the matter of the Greenhouse Gas Pollution Pricing Act*, [2019] SKCA 40. In contrast, the Court of Appeal for Alberta found the Act unconstitutional in a split decision. In the matter of the *Greenhouse Gas Pollution Pricing Act* [2020] ABCA 74. The Ontario and Saskatchewan opinions are on appeal to the Supreme Court of Canada. Hearings in March 2020 at the SCC were delayed due to the COVID 19 shutdown.

13 See Bank of Canada (2019) Annual Financial System Review, Vulnerability 5, Climate Change, available at <https://www.bankofcanada.ca/2019/05/financial-system-review-2019/#Vulnerability-5-Climate-change>.

14 *Ibid.* (emphasis supplied).

II. CPP Investments Public Statements about Climate Change

CPP Investments is a large, complicated, globally-diversified investor, with 15.6% of the CPP Fund investments in Canada; 35.2% in the United States (US); 25% in Asia; 15.5% in the European Union (EU) and the United Kingdom (UK), 4% in Latin America, and 3% in Australia.¹⁵ Its investment mix as of March 31, 2020, is: Public market equities, 28.2%; private equities, 24.7%; fixed income, 23.3%; and real assets: 23.8%.¹⁶ The 15.6% of CPP Fund investments held in Canada is \$63.9 billion Canadian dollars, which represents significant potential for supporting the transition to a low-carbon economy.

Many of CPP Investment's statements suggest that the serious transition risks to the Canadian economy from climate change are being appropriately managed. Those transition risks are acute: 17% of the Canadian GDP in 2018 was tied directly or indirectly to the extraction, refining, transport and sale of oil, gas, coal; as well as mineral extraction and forestry, the latter of which contributed 1.4% to GDP.¹⁷ Transitioning away from these GHG-intensive sources of energy and economic inputs to the Canadian economy over the next decades will have effects on both producers and consumers; and could disproportionately affect particular provinces in Canada, notably Alberta, and particular people, such as those who work in the oil, gas, and coal industries. Thus, as the government has recognized, the transition needs to be carefully managed,¹⁸ and finance and investment play a key role in that management.

In its policy statements, CPP Investments recognizes the importance of environmental, social, and governance (ESG) factors in general, and climate change in specific. In its June 2020 Policy on Sustainable Investing, it sets out its general view that “[o]ver our long investment-horizon, environmental, social and governance (ESG) factors, including climate change, have the potential to be significant drivers of risks or opportunities to profitability and shareholder value”¹⁹ The policy states that CPP Investments “consider(s) and integrate(s) both ESG risks and opportunities into [its] investment analysis, rather than eliminating investments based on ESG factors alone.”²⁰ It also emphasizes its engagement with investee companies on ESG matters, and its expectation that investee companies will disclose financially material ESG factors in accordance with the standards established by the Sustainability Accounting Standards Board (SASB) and the Task Force on Climate-related Financial Disclosures (TCFD).²¹

15 See CPP Inv. 2020 Annual Report, *supra* note 3, at 11.

16 See *ibid.*, at 10 and 17.

17 Natural Resources Canada, *Ten Key Facts on Canada's Natural Resources*, available at <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/emmc/pdf/2019/2019-KFF-EN.pdf>.

18 See, for instance, Final Report by the Task Force on Just Transition for Canadian Coal Power Workers and Communities, Dec. 2018, available at <https://www.canada.ca/en/environment-climate-change/services/climate-change/task-force-just-transition/final-report.html>.

19 CPP Investments Policy on Sustainable Investing, 2, available at https://cdn2.cppinvestments.com/wp-content/uploads/2020/08/_CPP-Investments-policy-on-sustainable-investing-june-19-2020-en.pdf.

20 *Ibid.*

21 *Ibid.* at 3.

Regarding climate change specifically, CPPIB stated in its 2019 Annual Report that improving its understanding of opportunities and risks related to climate change was one of its key operational highlights for fiscal year 2019. It stated that it had:

“Accelerated our work on this issue with the creation of the Climate Change Program to oversee, guide and support our organizational efforts; delivered a framework that allows investment teams to efficiently and effectively identify, assess and price key climate change risks and opportunities that are likely to have an economic impact on their investments; and produced and published the first ever carbon footprint of the public equities portfolio, with specific metrics including total carbon emissions and carbon intensity.”²²

CPP Investments’ engagement with climate change risks and opportunities continued in fiscal year 2020, as would be expected. Further detail of CPP Investment’s general approach is provided in a two-page call-out box in the 2020 Annual Report. CPP Investments states that it is a strong supporter of the TCFD, and expects to fully incorporate that disclosure framework for its own reporting by the end of Fiscal Year (FY) 2021.²³ Using TCFD’s framework of governance, strategy, risk management, metrics and targets, CPP Investments provides details of its climate change management committee and work with top-management teams; its work streams to incorporate climate change risks and opportunities into the strategies of various of its asset divisions; its work to incorporate climate change risk into its general risk management framework; and its report in 2018 on the carbon footprint of its public equities holdings.²⁴ Further details on CPP Investments integration and management of climate change risks and opportunities is also provided in a Climate Change Brochure from late 2019 specifically discussing climate change and initiatives across the portfolio.²⁵

Altogether, the descriptions suggest a careful, comprehensive process by which a complex organization is starting to incorporate climate change risks and opportunities throughout the organization and within investment teams. That impression is supported by the statement in its Principles of Sustainability Investing that there is a Sustainable Investing group that “works across the organization to support investment analysis on the impact of ESG Factors, and conducts research on industry standards and best practices.”²⁶ That group has been working to integrate climate change risk analysis into significant investments, including “close to 100 transactions” in FY 2020, 30 of which entailed further climate change due diligence.²⁷ Richard Manley, who is Managing Director and Head of Sustainable Investing,²⁸ is also listed as part of CPP Investment’s Leadership Team on its website, although not a part of its Senior Management Team. There is no information provided on how many people comprise the Sustainable Investment team, however, or what, precisely, they do to “work to ensure that environmental, social and governance, including climate risks and opportunities, are incorporated into

22 See Canada Pension Plan Investment Board, *Investing for Generations*, Annual Report 2019 (“CPPIB 2019 Annual Report”), 31 available at <http://www.cppib.com/documents/2042/CPPIB-ANNUAL-REPORT-2019-ENG.pdf>.

23 CPP Inv. Annual Report 2020, *supra* note 3, at 30-31.

24 *Ibid.*

25 See CPP Investments, Climate Change Brochure, available at https://cdn3.cppinvestments.com/wp-content/uploads/2019/12/Climate_Change_Brochure.pdf.

26 CPP Investments Policy on Sustainable Investing, *supra* note 39, at 2.

27 CPP Inv. Annual Report 2020, *supra* note 3, at 78.

28 See Sustainable Investing, available at <https://www.cppinvestments.com/about-us/our-investment-teams/team-active-equities/active-equities-sustainable-investing> (access Aug. 25, 2020).

investment decision-making and asset management.”²⁹ The charts within the 2019 Climate Change Brochure do show the Sustainable Investing group as the “Operation Lead and Champion,” but it is difficult to discern the precise relationship between Sustainable Investing and the Climate Change Program.³⁰

Reading its Annual Reports (from 2014 through 2020) and many linked policy statements, it appears to this author that the CPP is being quite professionally managed. CPP Investments is obviously serious about its general financial responsibilities to Canadian beneficiaries. It is at the beginning of incorporating climate risk and opportunities into its analyses and portfolio development. How thoroughgoing that incorporation really is or will become cannot be determined from CPP Investments’ reports, however.

Of particular concern, since late 2014, CBBIB has been increasing its investments in the most carbon-intensive aspects of oil and gas production. There seems to be a troubling inconsistency—or potential inconsistency—between CPPIB’s general descriptions of climate change risk, and a number of actual transactions that CPPIB has initiated since 2014 in a division, Energy and Resources, that is growing rapidly. Moreover, in its discussion of the energy transition in its 2019 Annual Report, CPPIB suggests that continuing to develop oil and gas assets is its transition strategy.³¹ Each of these points will be elaborated upon below.

The Canadian Expert Panel on Sustainable Finance called the role of finance and investment “critical . . . in supporting the real economy through the transition” to a low-carbon economy. Whether CPP Investments is supporting that transition in Canada, where \$63.89 billion of the CPP Fund’s investments are held,³² seems doubtful. It certainly has not articulated supporting the transition as a goal, nor has it identified specific targets for investments in the transition in Canada. Rather, a number of CPP Investment’s capital allocations seem to rely on the idea that Canada and the world will not actually transition to a low-carbon economy in the time frame scientists have deemed necessary. Unfortunately, as a large, active investor, CPP Investment’s actions could have the effect of contributing to Canada’s failure to meet its international and domestic commitments to transition to a low-carbon economy.

29 *Ibid.*

30 *Ibid.*, at 5-6.

31 See text accompanying notes 58-66, *infra*.

32 See CPP Inv. 2020 Annual Report, *supra* note 3, at 17.

III. Questions Arising From the CPP Fund's Public Equity Holdings in Oil, Gas, and Coal

A. Data Gaps in Canadian Public Equity Holdings

CPP Investments is to be commended for listing the CPP Fund's public equity holdings on its website so that beneficiaries can be aware of some of its activities in this asset class. That said, there are significant data gaps. The list of Canadian public equities on CPP Investment's website shows a total of \$3.137 billion (Canadian) held in this asset class as of March 31, 2020,³³ while the 2020 Annual Report states that Canadian public equities holdings as of March 31, 2020 were \$7.1 billion.³⁴ The website does state that holdings being managed externally over which CPP Investments has no discretionary authority are not included in the list of public holdings, so that is perhaps part of the explanation for the \$3.963 billion of public equity holdings in Canada that are not identified. There is an additional \$5.6 billion of invested capital held in the S&P 50/TSX 60 Index Fund,³⁵ which is an index fund that is a composite of companies listed on the Toronto Stock Exchange, so that is perhaps where the remainder of the public equity holdings are, but even then the numbers don't add up: \$3.137 billion of identified holdings from the list of public equity holdings on the website, plus \$5.6 billion of index fund holdings in public markets in Canada is \$8.737 billion of public market holdings in Canada, not the \$7.1 billion stated in the 2020 Annual Report as of March 31, 2020. This inconsistency is part of a larger problem that recurs throughout this report and previous Annual Reports: the data, although contained in exhaustive reports, are just not sufficient to fully inform Canadians and other contributors to CPP (non-Canadians working in Canada) about how their funds are being used.

In any case, the public holdings that are listed on the website suggest a troubling incrementalism, at best, in CPP Investment's support for the transition to a low-carbon economy. We recognize that one of the world's largest investors cannot signal its intentions in advance, and so investment decisions supportive of the transition may be underway. We also recognize that in its Statement of Investment Policies, CPP Investments has emphasized engagement over divestment, and we have no specific information about what that engagement entails in the high-carbon oil, gas, and coal sectors. Altogether, however, the public equity portfolio gives rise to serious questions, notwithstanding these data gaps.

B. A Troubling Incrementalism

An academic analysis by Rowe et al. of the CPP Fund's public holdings as of March 31, 2019, both in Canada and globally, found 79 investments in the top 200 publicly-traded global

33 See CPP Investments, *Canadian Publicly Traded Equity Holdings*, as of March 31, 2020, available at https://cdn2.cppinvestments.com/wp-content/uploads/2020/08/Canadian-Public-Disclosure_ibfs_06_2020_en.htm.

34 See CPP Inv. 2020 Annual Report, *supra* note 3, at 54.

35 See CPP Investments, *Global Equity Index Exposure*, available at https://cdn2.cppinvestments.com/wp-content/uploads/2020/08/Global-Equity-Index-Exposure_ibfs_en_06_2020.htm.

companies in oil, gas, and coal, constituting investments in 41% of the world's largest coal producers and 38% of the world's largest oil and gas companies.³⁶ The authors' analysis concluded that these 200 companies have valued reserves of oil, gas, or coal that collectively comprise four times the world's extractible fossil fuel assets if we are to stay within 1.5°C warming above pre-industrial levels. Thus, these fossil fuel reserves are overvalued on companies' financial statements, and the stock prices also overvalued, if transition is taken seriously.³⁷

The Rowe et al. report concentrates on the CPP Fund's holdings in the top 200 publicly-traded companies in the world in oil, gas, and coal. Thus, their report understates this industry risk to the Fund's portfolio, since it excludes smaller oil, gas, and coal companies. A more comprehensive analysis from 2017 found that in addition to the CPP Fund's \$1.2 billion in investments in 41 large coal producers worldwide, for instance, it had an approximately \$ 4 billion more invested in smaller coal companies worldwide.³⁸ Presumably a similar analysis of the CPP Fund's global oil and gas holdings, looking at both smaller companies and associated infrastructure would be worthwhile to understand the full ambit of the CPP Fund's exposure to oil and gas.

Looking more specifically, and only, at its Canadian public equity holdings, it seems that CPP Investments has made a choice to be over-invested in oil and gas companies. Its S&P 500/TSX 60 investment of \$5.6 billion is already an investment that is as substantially exposed to oil and gas as is the Canadian market generally, given that the sector composition of that index will match the energy sector composition of the Canadian market.³⁹ In its non-index investments in Canadian public equity, as listed as of March 31, 2020, 19.5% of the \$3.137 billion listed, or \$605 million of holdings, are in oil and gas companies, including CPP's three largest public holdings by number of shares: Canadian Natural Resources, Ltd. (23.695 million shares); Seven Generations Energy (56.351 million shares); and Torc Oil and Gas (65.187 million shares). That this over-investment in oil and gas presents financial risks was clear in CPP Investment's discussion of its financial results in fiscal year 2020. Discussing the losses in its Canadian public equities, CPP Investments stated that "[i]n Canada, the decline in oil prices and its impact on the energy sector contributed to a further deterioration in Canadian equity performance, which returned -12.2% in the fiscal year."⁴⁰

The financial concern is the cumulative effect of oil, gas, and coal holdings on long-term investors such as the CPP Fund.⁴¹ Mercer, a consultant to \$10 trillion of institutional investors,

36 See James K. Rowe, Steph Glanzmann, Jessica Dempsey and Zoe Yunker, *Fossil Fuels: Canada Pension Plan's failure to respect the 1.5-degree Celsius limit*, Nov. 2019, at 12, available at <https://www.policyalternatives.ca/publications/reports/fossil-futures.pdf>. This author gave comments on an early version of that report.

37 *Ibid.*, at 12-13.

38 See *ibid.*, at 13 & fn. 20, citing Friends of the Earth, "Canadian Coal Investment: Powering Past the Coal Alliance," December 2017, available at https://foecanada.org/en/files/2017/12/FoE_PowerPastTheCoalAlliance.pdf

39 See S&P Dow Jones Indices, *Overview S&P 500/TSX 60*, available at <https://www.spglobal.com/spdji/en/indices/equity/sp-tsx-60-index/#overview>.

40 See CPP Inv. 2020 Annual Report, supra note 3, at 53.

41 Some significant percentage of contributors and beneficiaries clearly care about these holdings for reasons well beyond their financial implications. A recent national poll found that 42% of Canadian adults think climate change is an emergency; another 20% think it is not yet one but will likely be one in the next few years, and 21% think it is a serious problem. David Coletto, Abacus Data, *Is Climate Change "an Emergency" and do Canadians Support a Made-in-Canada Green New Deal?*, Aug. 12, 2019, available at <https://abacusdata.ca/is-climate-change-an-emergency-and-do-canadians-support-a-made-in-canada-green-new-deal/>. Seventy-two percent of those surveyed support a Canadian green new deal, supporting workers in the transition and with government investing heavily to achieve its goals. *Ibid.*

published an analysis in 2019 of the risks and opportunities from climate change and from the transition to a low-carbon economy.⁴² It evaluated the effects on various portfolios, such as a growth portfolio and a sustainable growth portfolio,⁴³ under three different scenarios: one showing a 2°C increase in preindustrial temperatures by 2100, which would require “aggressive” climate action; one a 3°C increase by 2100, which assumes “some climate action but not transformative”; and the third a 4°C increase by 2100, which is Mercer’s estimate of the increases to be expected under today’s business-as-usual pathway.⁴⁴ Mercer relied on data and an analysis from Cambridge Econometrics that integrates “the treatment of economics, energy systems and the environment to capture linkages and feedbacks,” in order to evaluate the effects of the different scenarios on its model portfolios.

Mercer’s projections showed much stronger risks and opportunities at “an industry-sector level, with significant variation by scenario.” Under even the most optimistic scenario evaluated, which assumes the world takes “aggressive” action on climate and limits warming to 2°C by 2100, the potential effects on a long-term investor of holding oil, gas, and coal, or of not investing in equities using a sustainability theme, are devastating:

Industry or Asset Class	% p.a. to 2030 in 2°C scenario	% cumulative to 2030 in 2°C scenario	% p.a. to 2050 in 2°C scenario	% cumulative to 2050
Coal	-7.1	-58.9	-8.9	-100.0 (by 2041)
Oil and gas	-4.5	-42.1	-8.9	-95.1
Renewables	+6.2	+105.9	+3.3	+177.9
Electric utilities	-4.1	-39.2	-3.3	-65.7
Developed market equities	0.0	-0.5	-0.2	-5.6
Emerging market equities	+0.2	+1.8	-0.1	-4.0
All world equities—sustainability themed	+1.6	+21.2	+0.9	+32.0
Infrastructure	+2.0	+26.4	+1.0	+39.4
Infrastructure-sustainability themed	+3.0	+42.3	+1.6	+67.1

Source: Mercer, *Investing in a Time of Climate Change*, p. 10 (2019) (excerpted).

In its executive summary, Mercer concludes that “[i]nvestors need to consider both climate-related mitigation and adaptation in an active way to develop climate resilience in their portfolios,” not only for the financial and societal health of their beneficiaries, but in order to meet their fiduciary duties.⁴⁵ Mercer’s analysis suggests that an active investor such as CPP Investments, invested in a business-as-usual, diversified equity portfolio that is not sustainability themed, and with significant oil, gas, and coal holdings, risks “undue loss,” indeed

42 Mercer, *Investing in a Time of Climate Change: The Sequel 2019* (2019), available at <https://www.mercer.com/our-thinking/wealth/climate-change-the-sequel.html>.

43 *Ibid.*, Appendix 1, Portfolio Construction, p. 75.

44 *Ibid.*, Appendix 2, Methodologies, pp. 81-83.

45 *Ibid.*, at 7.

catastrophic loss in some asset classes, starting to eventuate over the next eleven years. Given that analysis, and other similar findings,⁴⁶ CPP Investments should be asked to explain how it could be meeting either its statutory mandate, or its fiduciary duties under statutory and common law, by maintaining its business-as-usual approach to investments in Canadian public equity.⁴⁷ Those questions take on particular urgency regarding CPP's private investments, the topic to be taken up next.

46 See, e.g., BNP Paribas Asset Management, *Wells, Wires, and Wheels: EROCI (Energy Recovered on Capital Investment) and the Tough Road Ahead for Oil*, Aug. 2019, available at <https://docfinder.bnpparibas-am.com/api/files/1094E5B9-2FAA-47A3-805D-EF65EAD09A7F> (calculating EROCI of oil versus renewables over the next 25 years for powering transportation, and finding that the combination of new solar or wind and electric vehicles will produce 6x to 7x the energy for powering light-duty vehicles, compared with oil powering internal combustion engines; and further calculating that to be cost competitive over the next twenty-five years oil must be sold at about \$10/barrel).

47 For a full discussion of pension trustees' fiduciary duties in Canada, see Janis Sarra, *Fiduciary Obligations in Business and Investment: Implications of Climate Change*, pp. 43-74, April 2018, available at https://ccli.ouce.ox.ac.uk/wp-content/uploads/2018/08/Janis-Sarra_Fiduciary-Obligation-in-Business-and-Investment.pdf. Dr. Sarra is co-principal investigator with this author and others in the Canada Climate Law Initiative, a project of the Commonwealth Climate and Law Initiative (CCLI), initiated by the Sustainable Finance program of the Smith School of Enterprise and the Environment, Oxford University.

IV. CPPIB's Private Investments and Direct Ownership Interests

CPP has close to one-quarter of its total holdings –24.7%-- in private equity investments, either direct ownership investments or as partners with other investors in private equity (PE) firms.⁴⁸ In addition, it has 11.3% of its portfolio in real estate investments; 8.6% in infrastructure; and 3.9% together in groups entitled Energy and Resources, and Power and Renewables, which are two relatively new investment groups.⁴⁹ For each of these departments, some transactions and partners are highlighted on the website, but there is no indication how representative those highlighted transactions are.⁵⁰ Thus, we do not know with much specificity what is being supported by about 40% of CPP's funds (Private Equity, 24.7%; Real Estate, 11.3%; Infrastructure, 8.6%; Energy and Resources and Power and Renewables, 3.9%).⁵¹

That said, a number of these CPP private transactions in Canada and the US are again in oil and gas, so problematic from the general “business as usual” contours of CPP Investment's approach. Transactions being made by the Energy and Resources division are particularly problematic, in that the purpose of this department is to invest in oil and gas. Moreover, in describing the Energy and Resources division in its 2019 Annual Report CPPIB first clearly stated its investment thesis regarding the needed transition to a low-carbon economy. We will first discuss that thesis. We will then describe two Energy and Resources' transactions in Canada substantially supporting the oil sands industry; three in U.S. shale oil fields; and one in natural gas off the coast of Ireland. These transactions are indicative of the types of transactions the Energy and Resources division was established to make.

The 2020 Annual Report states that 15 Energy and Resources investments have been made,⁵² and the website shows ten companies that Energy and Resources has either established and/or invested in.⁵³ We also see important investments in renewable energy projects being made through the Power and Renewables group, again with some information on the website about some of those investments.⁵⁴ The information on both website pages is inconsistent: sometimes including CPP's ownership percentage, sometimes not; sometimes including the amount of the investment, sometimes not. In at least two instances the amount of the investment stated on the website differs from the amounts of investments that have been described in prior annual reports.⁵⁵ We can conclude that contributors, beneficiaries and future beneficiaries of CPP need

48 See CPP Inv. 2020 Annual Report, *supra* note 3, at 10.

49 See *ibid.*

50 See, e.g., Private Equity, available at <https://www.cppinvestments.com/the-fund/our-investments/investment-private-equity>.

51 Real Assets (which includes Real Estate, Infrastructure; Energy and Resources; and Power and Renewables), available at <https://www.cppinvestments.com/the-fund/our-investments/investment-real-assets>.

52 See CPP Inv. 2020 Annual Report, *supra* note 3, at 89.

53 See CPP Investments, Our Investments: Real Assets: Energy and Resources, available at <https://www.cppinvestments.com/the-fund/our-investments/investment-real-assets>.

54 See CPP Investments, Our Investments: Real Assets: Power and Renewables, available at <https://www.cppinvestments.com/the-fund/our-investments/investment-real-assets>.

55 So, for instance, CPP's investment in Wolf Midstream on the website is stated as “\$1.7 billion committed,” visited September 1, 2020, whereas to date CPP has invested \$2.686 billion in Wolf Midstream, a company it created. See text accompanying notes 136-146, *infra*. For Crestone Peak Resources, CPP's investment on the website is listed as \$813 million, whereas the amounts of investment stated in Annual Reports into Crestone, a company CPP created, is \$882 million. See CPPIB 2017 Annual Report, p. 60 and CPP Inv. 2020 Annual Report, p 89, both available at <https://www.cppinvestments.com/the-fund/our-performance/financial-results>.

much clearer, much more specific information from CPP Investments about the investments in oil and gas and related infrastructure that it is making, and the relationship of those investments to its investments in renewable energy. With that information, a proper discussion of CPPIB's responsibilities to support the transition to a low-carbon economy can begin.

A. Energy and Resources Group and CPP Investment's Transition Thesis

The Energy and Resources Group of CPP Investment is a relatively new, small (\$7.3 billion in assets as of March 31, 2020) investment department. Yet it is growing rapidly, as indicated in the following chart, based on data in CPPIB's 2019 Annual Report:

Energy and Resources

Year	Assets under Management \$ billions
2006	0
2011	0.3
2016	1.4
2018	6.1
2019	8.2

Source: CPPIB 2019 Annual Report, page 25.

2006 is the year CPPIB started its active investment program. By March 31, 2020, the assets under management were down to \$7.3 billion, given losses of 23.4% in the group,⁵⁶ plus new investments of \$2.2 billion and exchange rate gains of \$400 million.⁵⁷

It is worth quoting from the description of the Energy and Resources division in the 2019 Annual Report, Management Discussion and Analysis, since it is here that we first see CPP Investment's (then named CPPIB) thesis with respect to the transition to a low-carbon economy:

"Energy & Resources

At year end, the Energy & Resources (E&R) portfolio consisted of 11 investments valued at \$8.2 billion compared with \$6.1 billion a year earlier. The growth in the portfolio was driven primarily by \$2.8 billion in new investment activity.

The macro environment during fiscal 2019 contributed to another active year for E&R. Volatile commodities and capital markets reacted to the increasing availability of renewable energy, faster adoption rates of electric vehicles and near-term supply shocks. Policy-makers, industry and investors are

⁵⁶ See CPP Inv. Annual Report 2020, *supra* note 3, at 53.

⁵⁷ *Ibid.*, at 89.

increasingly re-orienting themselves to a new world order focused on returns over growth and optimization over speed.

This dynamic created an attractive opportunity for patient and flexible capital that believes in the following key energy transition themes:

- Energy demand will grow globally;
- The world will decarbonize;
- Energy infrastructure will recalibrate globally; and
- Traditional energy sources will continue to be important.”⁵⁸

There are a number of points to make about CPPIB’s views as set out here. First, this paragraph does not clearly communicate what CPPIB is doing. What does it mean to say that “[p]olicy-makers, industry and investors are increasingly re-orienting themselves to a new world order focused on returns over growth and optimization over speed?” Where will “energy infrastructure be recalibrated globally”? To the United States, where the shale oil “revolution” is allegedly “turn[ing] the U.S. into an oil superpower”?⁵⁹ Is this the reason why CPP Investments is increasing its shale oil investments in the U.S. through this department? Will energy infrastructure be “recalibrated” to Canada’s oil sands? Is this the reason why CPP’s second largest public equity investment in Canada is in CNRL, a company with significant oil sands assets? How significant are CPPIB’s investments in those “recalibrations,” and will they help to frustrate global ambitions to reorient global economies to a low-carbon future?

Second, after having suggested in many places in this Annual Report and others that CPP Investments is taking climate seriously, we see here what CPP Investment’s transition strategy is: the world will decarbonize, yes, but “traditional” energy sources (by which it obviously means oil, gas, and possibly coal) “will continue to be important.” So, this new, rapidly growing department will buy shale oil assets in the US in the expectation that “patient and flexible capital” can hang on as the world tries, unsuccessfully (in its apparent view) to fully decarbonize, at which point its oil and gas assets will become extremely valuable. It will support the oil sands by providing the funds for critical pipeline infrastructure, collecting facilities, and controlling-shareholder investments for companies producing condensates to allow bitumen to move through pipelines (Seventh Generation), and for companies purchasing oil sands assets as global fossil fuel majors divest (Canada Natural Resources, Ltd.).⁶⁰ While these activities may be claimed to be portfolio diversification, it is not diversification away from the contribution of those “traditional” resources already to the Canadian economy,⁶¹ nor are these private company investments diversification away from the CPP Fund’s 20% investments in oil, gas, and coal in its identified Canadian public equity investments, and nor is it diversification away from the very real global risks that continued reliance on oil, gas, and coal produce, as evaluated by Mercer, discussed above.

58 CPPIB 2019 Annual Report, *supra* note 22, at 83-84, available at https://cdn1.cppinvestments.com/wp-content/uploads/2020/04/F2019-annual-report_-june-6-2019-EN.pdf.

59 See Bradley Olson, Rebecca Elliott, and Christopher M. Matthews, “Fracking’s Secret Problem—Oil Wells Aren’t Producing as Much as Forecast,” (“Fracking’s Secret Problem”), Wall St. J., Jan. 2, 2019, available at <https://www.wsj.com/articles/fracking-s-secret-problem-oil-wells-arent-producing-as-much-as-forecast-11546450162>.

60 See Rowe et al., *supra* note 36, at 14 (asserting that CNRL purchased the oil sands assets of Shell Oil as Shell divested of its oil sands holdings).

61 See *supra* note 17 and accompanying text (Canadian government sources state that 15.6% of Canada’s economy in 2018 came directly or indirectly from oil, gas, coal, and minerals).

Third, a serious question arises about the political responsibilities of the ninth largest public pension fund investor in the world, funded by the Canadian population. As will be shown below, in at least one of the Energy and Resources department's investments that we know about, \$607,000 USD were spent in 2018, in Colorado campaign contributions.⁶² We think it unlikely those contributions were from the CPP Fund, since that would be illegal under US federal law,⁶³ and we assume that CPPIB would not have risked such liability. Yet, they were made on behalf of a company that was established by CPPIB, is 95% owned by the CPP Fund, and with CPPIB, now CPP Investments, employees on the board of directors.⁶⁴ The purpose of those contributions was to try to overcome local opposition and bans on drilling affecting the shale oil assets in Colorado that the CPP Fund entity had purchased in 2015 from a Canadian company, Encana, at a time when local resistance to shale oil extraction—fracking—was growing.⁶⁵ In how many other instances has activist investor CPPIB, now CPP Investments, intervened to try to shape political and regulatory outcomes for the benefit of its oil, gas, and coal investments? As the over \$33 trillion of investors participating in Climate Action 100+ put pressure on traditional energy companies to encourage reductions in greenhouse gas emissions—a coalition that does not include CPP Investments⁶⁶-- how often has the CPP Fund come in to buy shares in non-transition energy companies, propped up “traditional” sources of energy, and helped to undermine market pressures and trajectories towards a renewed, low-carbon economy? Can such an investor as CPP Investments, with the heft of public funds of millions of involuntary participants, properly use those funds to keep the world on a tragic path, in a situation where participants cannot divest to show their perspectives on such recalcitrance? These are some of the serious economic and political questions to which CPPIB's stated “transition” views, and investment actions, give rise.

B. Power and Renewables Group

One context that is important to appreciate while considering the question of what responsibility CPP Investments—or any public pension fund—should have to support the needed transition to a low-carbon economy is to recognize that CPPIB did create a separate Power and Renewables department in late 2017,⁶⁷ which it has described as “better position[ing] the Fund to invest in climate change related opportunities.”⁶⁸

62 See Daniel Glick, The Story Group, *Oh Canada! How a Canadian pension fund is financing drilling along the Front Range*, Mar. 21, 2019, available at <https://www.boulderweekly.com/news/oh-canada/>. This transaction is discussed at text accompanying notes 74-107, *infra*. The Story Group is a project of Conservation Ink, a 501(c)3 nonprofit organization, and specializes in investigative journalism and multi-media projects, particularly covering environmental and natural resources issues in the Western U.S. See <http://thestorygroup.org/about/>. Versions of this article were licensed for publication online in Toronto Now, <https://nowtoronto.com/news/fracking-colorado-canada/> and Halifax's The Coast, <https://www.thecoast.ca/halifax/how-your-paycheque-supports-fracking-in-colorado/Content?oid=21027311>

63 *Ibid.* After this report was sent to CPP Investments as a courtesy, CPP Investments stated to this Author that the \$607,000 USD political contribution was from the company in Colorado that CPPIB had established, not from CPP itself.

64 See text accompanying notes 106-107, *infra*.

65 *Ibid.*

66 See Climate Action 100+ website, available at <https://climateaction100.wordpress.com/about-us/>. As of August 31, 2020, the list of participating investors did not include CPPIB.

67 See CPPIB 2018 Annual Report, 27, available at https://cdn4.cppinvestments.com/wp-content/uploads/2019/09/CPPIB_F2018_Annual_Report_English.pdf.

68 See CPPIB 2019 Annual Report, *supra* note 22, at 28.

Data in the Annual Report do show this department is also rapidly growing:

Power and Renewables

Year	Assets under Management \$ billions
2011	0
2016	0.9
2018	2.9
2019	5.1

Source: CPPIB 2019 Annual Report, page 25.

In fiscal year 2020, CPP Investments accelerated its investments in this division, adding \$3.5 billion in new investments and \$0.1 billion in income from operations in this division, for a total as of March 31, 2020 of \$8.7 billion.⁶⁹ These are important investments, including \$2.8 billion invested in Pattern Energy in 2020, which has 28 wind energy facilities in operations in North America and Japan, and 10 more under development; and \$2.25 billion invested in Enbridge in 2018 to form a joint venture to operate solar and wind energy facilities in Canada and the United States, and to develop offshore wind in Europe.⁷⁰

As with much of CPP Investment's private investing clarity is lacking, however. The Real Assets group has \$97.6 billion assets under management, and states that 17.3% of that total is held in utilities, which is \$16.88 billion in utilities.⁷¹ Using the information on the Power and Renewables web page, this Author can identify \$6.428 billion in renewable energy investments.⁷² We certainly support CPP Investment's diversification and investments in renewables, particularly given the Mercer projections discussed above showing renewables likely to increase in value by 105.9% by 2030.⁷³ Yet, these investments are not a sufficient answer to CPP Investment's apparent hedging on the global energy transition—and to its actions as an investor and even in politics that may have the effect of blunting private market signals towards that transition.

To substantiate our concerns, we now describe six specific CPP Fund investments within the Energy and Resources group about which transaction details have been given in Annual Reports.

69 See CPP Inv. 2020 Annual Report, *supra* note 3, at 91.

70 See CPP Investments. Website, Our Investments: Real Assets: Power and Renewables (Pattern Energy), *available at* <https://www.cppinvestments.com/the-fund/our-investments/investment-real-assets>.

71 See CPP Inv. 2020 Annual Report, *supra* note 3, at 87-88.

72 See CPP Investments. Website, Our Investments: Real Assets: Power and Renewables (Pattern Energy), *available at* <https://www.cppinvestments.com/the-fund/our-investments/investment-real-assets> (investments in Cordelia Power, \$740 million; Enbridge, \$2.25 billion; Pattern Energy, \$2.8 billion; Campanhia Energetica de Sao Paulo, \$231 million; and VTRM, Brazil, \$157 million).

73 See text accompanying notes 42-46, *supra*.

C. Identified Energy and Resources Transactions

1. Formation of Crestone Peak Resources, LLC

A particularly troubling set of circumstances to examine are those surrounding the formation and activities of Crestone Peak Resources, LLC (“Crestone”), 95% owned by CPP and 5 % owned by the Broe Group, a Denver-based private company invested in real estate, railroads, logistics, and oil and gas.⁷⁴ Once Crestone was formed, it agreed to purchase the Denver Julesberg (DJ) Basin shale oil and gas assets in Colorado from Canadian oil and gas energy company Encana.⁷⁵ Originally announced as a \$900 million acquisition in October, 2015,⁷⁶ by the time the transaction closed in July of 2016 the purchase price was \$609 million.⁷⁷ A number of factors explain the decline: well productivity was 30% less than when the transaction was initially being negotiated, the price of oil had dropped to \$34/barrel, Encana’s stock was down to \$5/share, and local communities’ resistance to shale oil and gas extraction—fracking—was intensifying.⁷⁸

In addition to the problems of shale economics, discussed with respect to the EAP/Utica Shale transaction below, this transaction has two additional problematic features. First, there are the relationships between Crestone; CPP as the 95% investor that established Crestone; and individual employees of the Energy and Resources department who designed the transaction and then ended up sitting on the board of Crestone. But Crestone is not unique in this regard, as individual employees, including top executives of Energy and Resources and former top executives of CPPIB itself, have ended up on the board of Crestone, and on the boards of other private companies that CPPIB has either formed or in which it is a billion-dollar investor. These board relationships are entirely to be expected in direct investing, but also indicate the extent to which CPPIB is exercising managerial authority in companies it has established, so cannot be thought of merely as an investor in those companies. Such relationships also create significant potential for conflicts of interest, as will be discussed below. Second, Crestone is intervening in the local and state politics in Colorado in order to protect CPP’s investment in shale oil, even as citizens in Boulder and Broomfield counties seek to stop Crestone’s fracking close to their homes, neighborhoods, and schools. We’ll discuss each point in turn.

74 In fact, eight different Crestone Peak Resources Delaware entities have been formed: Crestone Peak Resources Holdings LLC; Crestone Peak Resources CP Inc.; and Crestone Peak Resources Operating LLC, all formed on 10/5/2015; Crestone Peak Resources LP, formed on 10/6/2015; Crestone Peak Resources LLC, formed on 11/16/2015; Crestone Peak Resources Management LP, formed on 7/15/2016; Crestone Peak Resources Midstream LLC, formed on 8/30/2016; and Crestone Peak Resources Acquisition Company LLC, formed on 10/26/2017. See Delaware Secretary of State Website, Division of Corporations Entity Search, available at <https://icis.corp.delaware.gov/ECorp/EntitySearch/Status.aspx?i=5838884&d=y>.

75 See CPPIB, *People. Purpose. Performance*, 2016 Annual Report, p. 61, available at http://www.cppib.com/documents/1355/CPPIB_F2016_Annual_Report_-_ENGLISH_May_19_2016_G0UhjTk.pdf. (announcing Crestone Peak Resources formation and agreement to purchase DJ Basin shale oil and gas assets). See also CPPIB Press Release, *Canada Pension Plan Investment Board and the Broe Group Sign Agreement to Acquire DJ Basin Oil & Gas Assets from Encana for US\$900 million*, October 8, 2015, available at <http://www.cppib.com/en/public-media/headlines/2015/cppib-broe-2015/>.

76 *Ibid.*

77 See CPPIB, Press Release, *Canada Pension Plan Investment Board and The Broe Group Complete Acquisition of DJ Basin Oil & Gas Assets: Acquisition completed through jointly formed entity, Crestone Peak Resources*, July 29, 2016. See also CPPIB, *Investing for our Contributors and Beneficiaries*, 2017 Annual Report 60, available at https://www.cppib.com/documents/1591/2017_Annual_Report.pdf.

78 See Glick, *supra* note 62.

A. Crestone Board Relationships

In following the history of Crestone Peak Resources, it becomes clear that there is a certain coziness about the transaction. Encana was an Alberta-based, Canadian oil and gas corporation at the time of the transaction. It has now left Canada as its legal home and re-established itself in the United States under the name Ovintiv.⁷⁹ In October 2015, when the transaction between Encana, CPP (95% owner of purchaser Crestone), and the Broe Group (5% owner) was being negotiated, the oil and gas industry generally was experiencing financial difficulties caused by a drop in the price of oil.⁸⁰ Encana was losing money, ultimately losing \$5.165 billion, or \$6.28/share for the year, and it was determined to dispose of non-core assets.⁸¹

Encana's interests in disposing of assets that were not its highest-producing, strategic assets, was met by CPPIB's interests in expanding its investments in the energy sector. CPPIB then-CEO Mark Wiseman had evaluated the drop in oil prices globally, starting in 2014, as an opportunity for CPPIB. In an interview with the Globe and Mail in November, 2014, "Wiseman said the resulting decline in oil prices will put pressure on some of the less financially sound energy companies, potentially creating some opportunities for acquisitions."⁸² In that interview Wiseman focused on opportunities in Western Canada and Canadian energy companies generally, highlighting CPPIB's investments in Seven Generations Energy, Ltd.--CPPIB was that company's largest shareholder in 2014 when the company went public, as discussed in the interview--and private company Teine Energy Ltd., where CPPIB is currently a 90% shareholder on a fully diluted basis, so far as we know.⁸³ Wiseman was asked in the 2014 interview about Teine Energy's decision to "push off its IPO into 2015," and "declined to comment on the decision, adding that the pension fund manager is in no rush to monetize that investment. 'It's a wonderful position to be in,' he said," further explaining that "Canadian producers have been helped somewhat by the weaker Canadian currency because oil and gas is sold in U.S. dollars and their costs are largely in Canadian dollars."⁸⁴ Teine Energy has yet to go public as of August 2020. As will be discussed below, the 90%-owned CPPIB entity is the largest producer in Saskatchewan's Viking light oil assets, and a large owner in the Bakken heavy-oil area, having significantly expanded its acquisitions in both fields with CPPIB's investments since 2011.⁸⁵

Of course, while Canadian producers may have been helped "somewhat" by the weaker Canadian dollar in 2014, by 2015 oil and gas producers generally were under pressure from the decline in the price of oil. Encana's need to buttress its balance sheet led to the transaction whereby CPPIB's company, Crestone, agreed to purchase Encana's shale oil and gas assets in Colorado—even though at the time the deal was announced, October of 2015, there was

79 See Ovintiv, available at <https://www.ovintiv.com/>.

80 See Encana's 2015 Annual report, *passim*, available at https://www.annualreports.com/HostedData/AnnualReportArchive/e/NYSE_ECA_2015.pdf (discussing challenging environment caused by low price for oil during 2015).

81 See *ibid.*, at p. 4.

82 See Scott Devau, *Canada Pension Plan head sees investment opportunities in oil patch*, GLOBE & MAIL (online), Nov. 13, 2014, available at <https://www.theglobeandmail.com/globe-investor/canada-pension-plan-head-sees-investment-opportunities-in-oil-patch>

83 CPPIB, 2017 Annual Report, p. 60, available at https://www.cppib.com/documents/1591/2017_Annual_Report.pdf. states that CPPIB was a 90% owner as of March 31, 2017 when the Annual Report was published. We do not know whether CPPIB has increased its ownership since then, since Teine Energy is not emphasized in the 2018 or 2019 Annual reports.

84 See Deveau, *supra* note 82, at 2 of 4.

85 See Teine Energy Website, description of operations, available at <http://www.teine-energy.com/operations>.

a ban in place in a number of counties where some of Encana's DJ Basin assets were located, including Boulder and Broomfield counties, and there was growing local opposition to further expansion.⁸⁶ Avik Dey, Managing Director of Energy and Resources, who had been hired by CPPIB in 2014, had previously worked for Encana before moving to Houston.⁸⁷ We cannot know if the fact that Encana was a Canadian oil and gas company that was financially struggling at the time, and a former employer of Avik Dey, the head of Energy and Resources, affected the willingness of CPPIB to announce a \$900 million transaction to buy controversial Encana assets.

What we do know is that having used CPP's public funds to establish a private company, Crestone Peak Resources, a number of the CPPIB employees and executives that created the transaction put themselves on the board of directors, thus exercising managerial authority. The original three-person board included Avik Dey, currently (and from September of 2014 when he was hired at CPPIB) Managing Director of Energy and Resources. He was Chair of the Board of Crestone from its inception in October of 2015⁸⁸ through to June 12, 2018, at which point he became a regular member of the board.⁸⁹ The Crestone Board also included Roger Huang, a Principal at CPPIB in the Energy and Resources Group, "where he was the Group's first hire after inception, helped start the Group's NYC office, and grow assets under management to \$6.1 billion. During this time, he founded and led the investment into Crestone Peak Resources."⁹⁰ As of June 12, 2018, Mr. Huang transitioned to an executive role at Crestone, as Executive Vice President and Chief Development Officer, leaving the board.⁹¹

Other CPP Investments current employees with positions on Crestone's board, as identified on Crestone's website as of August 31, 2020, include:

David Chambers, who joined the Crestone board in 2018, "currently serves as Senior Principal with CPPIB in the Energy and Resources group. At CPPIB, Mr. Chambers oversees many of CPPIB's direct E&R investments. . . .Mr. Chambers also serves as a Director on the Board of Teine Energy, Encino Acquisition Partners, and Nephin Energy."⁹²

Waleed Elgohary, who joined the Crestone board in 2018, "joined CPPIB as Principal, Natural Resources Group."⁹³

86 See Glick, *supra* note 62, at 2.

87 See CPP Investments Leadership Team, available at <https://www.cppinvestments.com/about-us/our-leadership/leadership-team> (Avik Dey Bio). When Avik Dey was first hired the division was named Natural Resources. This text refers to the current name of the division, Energy and Resources, for simplicity.

88 Delaware Secretary of State Website, Division of Corporations Entity Search, available at <https://icis.corp.delaware.gov/Ecorp/EntitySearch/Status.aspx?i=5838884&d=y>, : Crestone Peak Resources Holdings LLC; Crestone Peak Resources CP Inc.; and Crestone Peak Resources Operating LLC, all formed on 10/5/2015.

89 Crestone Peak Resources, Press Release, *Crestone Announces Addition to Executive Team and Changes to Board of Directors*, Denver, June 12, 2018, available at <http://www.crestonepeakresources.com/crestone-announces-addition-to-executive-team-and-changes-to-board-of-directors>. The June 12 Press Release indicated that Mr. Dey was transitioning from being Chairman of the Board "to a role on the Board of Directors." He has at some time left that board, since an August 31, 2020 search of Crestone's website no longer lists him as a member of the board.

90 *Ibid.*

91 *Ibid.*

92 Crestone Peak Resources, <https://www.crestonepeakresources.com/leadership> (last visited August 31, 2020).

93 *Ibid.*

And, we also learn, one of CPPIB's former top executives is now on the board after retiring from CPPIB:

Benita Warmbold, who “joined the Crestone Peak Resources Board of Directors in 2017. Ms. Warmbold brings more than 30 years of strategic financial and operational experience to Cresone’s board. Before joining the board, she was the Senior Managing Director and Chief Financial Officer of CPPIB, where she was responsible for all aspect of finance, risk, performance, tax, internal, audit and legal.”⁹⁴

Crestone Peak Resources is a group of private companies that CPPIB established starting in October of 2015.⁹⁵ As a result, we have no information about how much compensation any of CPP Investment’s current employees, or its former executive Benita Warmbold, are receiving, if any, for taking up these positions—although it would be exceedingly odd to sit on a private company board pro bono. Presumably, current employees’ compensation is directed to CPP Investments. It is not at all unusual for a large investor to want representation on a board of directors in which it is invested, and a 95% investor such as CPP would certainly want such representation. What is concerning here, however, is that the Department which has conceived of these transactions, structured them, and received whatever management approvals are necessary at CPP Investments for billion dollar transactions has then put their own top employees on the boards of the companies they’ve created, or in which they’ve substantially invested. This exercise of managerial authority at a CPPIB subsidiary puts employees in a conflict of interest position. Rather than board representation, it would be possible for CPPIB to protect its investments by requiring certain kinds of regular, very specific disclosure and/or insisting on certain contractual rights.

i. Conflict of interest concerns

Generally speaking, employees of CPPIB who are also on the board of investee companies have potentially conflicting fiduciary duties—to CPPIB and to the investee company. Such a potential conflict was evidenced in the Mark Wiseman interview quoted above, where we learned that Teine Energy’s planned IPO for 2015 was scuttled, and that CPPIB was not interested in monetizing its investment—i.e., selling into an IPO—at the time the decision was made. If these two facts were connected, meaning the CPPIB directors voted against an IPO because it was not in CPPIB’s interests for there to be an IPO, that would be a breach of loyalty to Teine Energy, on whose board they sat. Being in a conflict of interest position gives rise to potential loyalty concerns that many firms would want to address by establishing clear procedures to minimize those concerns. CPP Investments may have such procedures as well, and we would expect so. There are no publicly available documents to determine how these positional conflicts are handled at CPP Investments, although its Code of Conduct does have general provisions on conflicts of interest and references a more specific conflict of interest policy that is not publicly available.⁹⁶

Other Energy and Resources “notable transactions” where CPPIB/CPP Investments’ employees ended up with board positions—thus exercising managerial authority-- include Encino Acquisition Partnership (EAP); Nephin Energy; Teine Energy; and Wolf Midstream. These

⁹⁴ *Ibid.*

⁹⁵ See footnote 74, *supra*.

⁹⁶ See CPPIB Code of Conduct, April 20, 2020, available at <https://cdn3.cppinvestments.com/wp-content/uploads/2020/08/CPPIB-Investments-code-of-conduct-april-20-2020-en.pdf>.

transactions and board relationships will be described below. Beyond any conflicts, these transactions are illustrative of how CPP Investments is using Canadian public resources to both participate in the “boom” oil and gas economy in the U.S. (Crestone, EAP), and support the “bust” oil sands industry in Canada (Teine Energy, Wolf Midstream) and more recently expand its direct oil and gas ownership outside North America (Nephtin Energy).

Avik Dey, who is a Managing Director and Head of Energy and Resources, is identified on CPP Investments Website as part of its Leadership Team, and member of its Real Assets and Real Estate Investment Committees.⁹⁷ These positions indicate at least two things: Mr. Dey is very well respected at CPP Investments. Indeed, he seems to be doing exactly what he was hired in 2014 to do: expand CPP Investment’s direct ownership investments in oil and gas and related industries such as pipelines. Second, these transactions—Crestone Peak Resources, EAP Acquisitions, Nephtin Energy, Teine Energy, Wolf Midstream, and Williams Ohio Valley (the latter five to be described below), all \$500 million to over \$1 billion in value, will clearly have been vetted at the highest levels of CPP Investment controls, through a Committee that Mr. Dey sits on, the Real Assets Investment Committee. What is unclear is how rigorously CPP Investment’s analysis of climate risk is being applied to these transactions, or will be applied to future transactions of this sort, given Mr. Dey’s position on the Investment Committee that approves such transactions, and his remit to expand oil and gas investments.

B. Crestone Peak Resources Political Interventions and Campaign Contributions

Assuming, as we do, that CPP Investments has clear policies on how employees on subsidiary entities manage potential conflicts, the more concerning issue that the establishment of Crestone Peak Resources raises is its involvement in Colorado politics, and specifically the 2018 election campaign. As stated above, at the time that CPPIB announced the \$900 billion purchase of shale oil and gas assets from Encana, there was a local ban on new drilling in Boulder and Broomfield Counties where a number of those assets are located. The legality of local control over drilling rights was being litigated at the Colorado Supreme Court.⁹⁸ Then, in May of 2016 the Colorado Supreme Court determined that control over drilling rights was exclusively a state function, invalidating all local control bans.⁹⁹ Thus, the transaction to purchase the Encana assets went forward, announced as having been completed in July 2016, with an effective date of the transaction of April 1, 2015.¹⁰⁰ So Crestone—owned 95% by CPP—became the owner of what one industry insider called “‘toxic assets’: oil and gas leases located in controversial territory scattered among housing developments.”¹⁰¹

Yet, political activity challenging shale oil and gas had continued while the bans were in place and the case was being litigated to the Colorado Supreme Court, and so “oil and gas issues figured prominently up and down the ballot, from the governor’s race to several ballot initiatives” in 2018.

97 See CPP Investments Website, Our Leadership Team, Biography of Avik Dey, available at <https://www.cppinvestments.com/about-us/our-leadership/leadership-team>.

98 See Glick, *supra* note 62, at 2.

99 *Ibid.*

100 See CPPIB Press Release, *Canada Pension Plan Investment Board and The Broe Group Complete Acquisition of DJ Basin Oil & Gas Assets*, July 29, 2016, available at <http://www.cppib.com/en/public-media/headlines/2016/cppib-broe-djbasin-2016/>.

101 See Glick, *supra* note 62, at 4, citing an “oil and gas engineer (who wishes to remain anonymous for fear his business would be affected by criticizing the industry).”

To quote from Daniel Glick's investigative journalism:

Crestone Peak contributed \$607,500 toward the tens of millions of dollars the industry contributed during Colorado's last election cycle to support groups that directly or indirectly opposed Proposition 112, the failed setback initiative that would have required new oil and gas development to be placed at least 2,500 feet from homes and schools. Crestone donated to the pro-industry group Protect Colorado, which campaigned to defeat Proposition 112, and other political groups supporting Republican state legislature candidates . . . \$300,000 of those contributions went to a group that supported Republican candidates for the state senate.¹⁰²

Crestone Peak Resources is a group of private companies, so it is impossible to know if the \$607,000 contributed in Colorado to pro-oil and gas development interests came from money earned in its operations in Colorado, or came directly from CPP resources. It was later confirmed to this Author that the funds came from Crestone's operations, not CPPIB.¹⁰³ Yet, at the time these decisions were being made Crestone's board included senior CPPIB leadership (Avik Dey, who was Chair of the Board until June 12, 2018), Energy and Resources employees (David Chambers, Senior Principal and Waleed Elgohary, Principal), and former CPPIB CFO Benita Warmbold.¹⁰⁴ CPPIB refused to answer investigative journalist Dan Glick's questions about this political intervention into Colorado state politics, referring all questions, including questions about CPPIB's policies, to Crestone.¹⁰⁵

Presumably this kind of political intervention into another country's elections, in order to protect oil and gas interests, is not what many Canadians would expect, or countenance, from CPPIB at the time, or CPP Investments now. At the least, it is activity incompatible with CPP Investment's stated position in its Code of Conduct that "[b]ecause of our public mandate, we must avoid any appearance of CPPIB favoring or disapproving of a particular political group, candidate, or political position."¹⁰⁶ The corporate law answer to this point is that CPP, as 95% owner, with either three or four of the seven-person board being current or former CPPIB Managing Directors or other highly-placed employees, is separate from its 95%-owned company, Crestone Peak Resources.¹⁰⁷ That is a perfectly correct statement of corporate law.

102 *Ibid.* at 5.

103 That the funds came from Crestone, not the CPP Fund, was confirmed in an e-mail from Jeffrey Hodgson, Director, Industry and Stakeholder Affairs, CPPIB, to Prof. Cynthia Williams, Sept. 14, 2020, e-mail on file with the Author.

104 See Crestone Peak Resources, Press Release, *Crestone Announces Addition to Executive Team and Changes to Board of Directors*, Denver, June 12, 2018, for information about Mr. Dey, available at <http://www.crestonepeakresources.com/crestone-announces-addition-to-executive-team-and-changes-to-board-of-directors>. Crestone's website as of August 8, 2019 lists Mr. Chambers and Mr. Elgohary as having joined the board in 2018, but is not specific about exactly when in 2018. Ms. Warmbold joined the board in 2017 when she retired from CPPIB, according to the Crestone website.

105 Mr. Glick states in his article that "[t]he CPPIB did not respond to multiple phone messages, email requests for an interview, or [to] a list of emailed questions sent over the course of more than a month . . . Just before deadline, Darryl Knynenbelt, CPPIB's director of global medial relations wrote in an email 'CPPIB declines to comment. We refer all questions to Crestone.'" The questions included specific questions about CPPIB's policies regarding contributing to foreign elections. See Glick, *supra* 62, at 6.

106 CPP Investments, *Code of Conduct*, § 2.9, "Political Activity," available at <https://cdn3.cppinvestments.com/wp-content/uploads/2020/08/CPPIB-Investments-code-of-conduct-april-20-2020-en.pdf>. The Code of Conduct, although updated to April, 2020, still refers to CPPIB in the text, presumably because CPPIB is still the legal entity established in by Canada Pension Plan Investment Board Act.

107 Crestone's press releases are not clear on the timing of Mr. Dey leaving the board, and Mr. Chambers and Mr. Elgohary joining it in 2018, and so it is not clear if there were three or four CPPIB employees and nominees (Ms. Warmbold included) on the Crestone board in 2018 when the decisions to contribute substantial funds to U.S. election campaigns were being made.

That is an imperfectly correct answer to the ethical questions about CPPIB using its heft, based on the involuntary monetary contributions of millions of citizens and other people working in Canada, to try to shape politics to support its oil and gas investments, in Colorado, even as the Government of Canada has committed to working to transition to a low-carbon economy.

2. Acquisition of Chesapeake Oil's Utica Shale Assets

CPPIB's 2019 Annual Report set out the facts of this acquisition as follows:

CPPIB “[a]cquir[ed] all of Chesapeake Energy’s Utica Shale oil and gas assets in Ohio via Encino Acquisition Partners (EAP), for US\$2.0 billion. EAP was formed in 2017 between CPPIB and Encino Energy to acquire large, high-margin oil and gas production and development assets in the U.S. CPPIB invested approximately US\$1.0 billion in EAP and owns 98% of the partnership.”¹⁰⁸

While CPPIB expects to invest only in “high-margin” oil and gas production and development assets through the EAP partnership, shale oil and gas investments are challenging even without considering the transition and climate change aspects. First, shale oil and gas promoters are notorious for making over-optimistic projections about future oil and gas production. An analysis undertaken by three Wall Street Journal reporters, published in January 2019, found that “two-thirds of estimates by companies between 2014-2017 [of their projected output] in four of U.S. ‘hottest’ areas are overoptimistic from 10% to 40%.”¹⁰⁹ Second, even meeting production projections has not been enough to create profitable companies, since the industry as a whole is characterized by (1) high levels of debt, (2) a dependence on debt and hedging for growth, (3) years of negative free cash flow,¹¹⁰ and (3) notably steep decline rates in well productivity, constantly necessitating drilling new wells to maintain levels of production.¹¹¹ This latter point is particularly important. A characteristic of the shale industry is that each well’s production rate decreases steeply year-on-year. Indeed, production rates decline for a typical shale well at 70–90% over the first three years, with much of the decline in the first year.¹¹² These rates of decline means payback of well drilling costs must be achieved in the first few years. Further, it means that if payback is not achieved, new wells must continually be drilled just to maintain production levels and pay back the previous investors.¹¹³

108 See CPPIB 2019 Annual Report, *supra* note 22, at 84.

109 Bradley Olson, Rebecca Elliott, and Christopher M. Matthews, “Fracking’s Secret Problem—Oil Wells Aren’t Producing as Much as Forecast,” (“Fracking’s Secret Problem”), Wall St. J., Jan. 2, 2019, available at <https://www.wsj.com/articles/fracking-s-secret-problem-oil-wells-arent-producing-as-much-as-forecast-11546450162>.

110 An article in the Wall Street Journal in January, 2018, stated that “[s]hale gas companies spent \$265 billion more than they generated from operations since 2010.” Bradley Olson, Frackers Could Make More Money Than Ever in 2018 if They Don’t Blow It, Wall St. J. Jan. 22, 2018, available at: <https://www.wsj.com/articles/frackers-could-make-more-money-than-ever-in-2018-if-they-dont-blow-it-1516536000>.

111 Amir Azam, Reserve Base Lending and the Outlook for Shale Oil and Gas Finance (Columbia Center on Global Energy Policy, May 2017), available at https://energypolicy.columbia.edu/sites/default/files/Reserve_Base_Lending_Outlook_For_Shale_Oil_Gas_Finance_May2017.pdf.

112 *Ibid.*

113 *Ibid.* See also Olson et al., Fracking’s Secret Problem, *supra* note 109 (stating that “[t]he Journal’s findings suggest current production levels may be hard to sustain without greater spending because operators need to drill more wells to meet production targets,” yet operators are under pressure from investors to cut costs).

EAP, which is 98% owned by CPPIB, expects to avoid these types of financial losses by its hiring of experienced Utica Shale operators from Range Resources Corporation,¹¹⁴ but data from Morningstar Research shows that Range Resources lost money five out of six quarters in 2017 and 2018.¹¹⁵ So did the operator from whom EAP purchased the assets, Chesapeake Energy Corporation.¹¹⁶ How “high-margin” the assets are that CPPIB’s company purchased is thus open to question.

EAP might avoid financial losses now because of the backing of CPPIB, however, which an industry publication referred to as “a frequent energy investor.”¹¹⁷ Encino’s COO Ray Walker, who came out of retirement from Range Resources to join the EAP team, told the Ohio Oil and Gas Association in March, 2019, that the company “has plans to ‘play a big role’ [in Ohio] given CPPIB’s long-term investment strategy. ‘That’s one of the main things that really attracted me to Encino and the whole project, is the ability look at this over multiple, multiple years, if not decades.’”¹¹⁸ CPP Investment’s long investment horizon is emphasized throughout its investments in oil, gas, and fossil fuel infrastructure.

Current CPPIB leadership and employees on the board of EAP are:

David Chambers, Senior Principal in the Energy and Resources Group.

Michael Hill, identified on CPPIB’s website as part of the CPPIB Leadership Team, who is a Managing Director in Energy and Resources, having joined CPPIB in 2016, “focusing on direct private equity investment opportunities in the Natural Resources area.”¹¹⁹

3. Nephin Energy Holdings, Ltd.

As described in CPPIB’s 2018 Annual Report, CPPIB:

“signed an agreement with Shell Overseas Holdings Ltd to acquire 100% of Shell E&P Ireland Limited, which holds Shell’s 45% interest in Corrib Natural Gas Field in Ireland, for a total initial cash consideration of €830 million, with additional payments of up to €250 million between 2018–2025, subject to gas price and production.”¹²⁰

114 See Jamison Cocklin, *Encino Plans ‘Big Role’ in Ohio as Work Begins on New Utica Portfolio*, Natural Gas Intelligence (March 8, 2019), available at www.naturalgasintel.com/articles/117657-encino-plans-big-role-in-ohio-as-work-begins-on-new-utica-portfolio.

115 See Clark Williams-Derry, Kathy Hipple & Tom Sanzillo, IEEFA and Sightline Institute, *Energy Market Update: Red Flags on US Fracking Disappointing Financial Performance Continues*, Oct. 2018, available at http://ieefa.org/wp-content/uploads/2018/10/Red-Flags-on-U.S.-Fracking_October-2018.pdf (analysis based on financial data compiled from Morningstar Research).

116 *Ibid.*

117 See Cocklin, *supra* note 114 (writing that Houston-based Encino Energy LLC “formed Encino Acquisition Partners in 2017 to acquire and operate the Ohio asset with the backing of a frequent energy investor, the Canada Pension Plan Investment Board.”).

118 Cocklin, *supra* note 114, quoting COO Ray Walker on why he came out of retirement from “Appalachian heavyweight Range Resources Corp.” to join EAP.

119 See CPPIB Website, *Our Leadership Team*, Biography of Michael Hill, available at <https://www.cppinvestments.com/about-us/our-leadership/leadership-team>.

120 See CPPIB 2018 Annual Report, *supra* note 120, at 66.

This transaction was organized through Nephin Energy Holdings, Ltd., described as CPPIB's "wholly-owned, indirect subsidiary" by Irish competition authorities approving the transaction.¹²¹ It was also described as Energy and Resource's "first European acquisition" in CPPIB's 2019 Annual Report.¹²²

The Competition Commission stated as follows about the rationale for the transaction, taken from the parties' submissions:

The Proposed Transaction represents the exit of Shell from the upstream gas sector in Ireland. The sale of SEPIL [Shell E&P Ireland Ltd.] with the associated 45% interest in the Corrib Field is part of Shell's current three –year \$30 billion divestment programme worldwide. . . .

As a result of the Proposed Transaction, CPPIB hopes to further its strategy of investing in high-quality natural resources assets alongside highly regarded and experienced operating partners such as [Canadian company] Vermilion. Vermilion has a strong operational track record in both onshore and offshore projects. The Corrib Field fits with CPPIB's strategy to make direct, long-term investments in top tier assets. Natural resources are an attractive sector for CPPIB because it believes that investments in this sector deliver strong risk adjusted returns over the long-term time horizon of the CPP Fund.¹²³

Shell's press release announcing the transaction on July 12, 2017, indicated that "the Shell share of the Corrib gas venture's production represented approximately 27,000 barrels of oil equivalent/day."¹²⁴ Press reports at the time the transaction was completed, November 30, 2018, also mentioned another aspect of Shell's divestment: that it ends Shell's "involvement in the most controversial infrastructure project in the history of the [Irish] State. . . .Discovered 21 years ago, the Corrib gas field was dogged by years of opposition before natural gas started to flow from the field in December 2015."¹²⁵

Nephin Energy, created by CPPIB, is now Ireland's largest producer of natural gas, according to its website.¹²⁶ The Nephin Energy board includes:¹²⁷

David Chambers, Senior Principal in the Energy and Resources Group.

Michael Hill, identified on CPPIB's website as part of the CPPIB Leadership Team, who is a Managing Director in Energy and Resources, having joined CPPIB in 2016.

Megan Hansen, Principal in the Energy and Resources Group.

121 See Competition and Consumer Protection Committee (Ireland) ("Competition Determination"), *Determination of Merger Notification M/18/061 Canada Pension Plan Investment Board/Shell E&P Ireland, Ltd.*, 5 September 2018, available at <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2018/08/M-18-061-Determination-CPPIB-SEPIL.pdf>.

122 See CPPIB 2019 Annual Report, *supra* note 22, at 84.

123 Competition Determination, *supra* note 121, at 4.

124 Shell, Press Release, *Shell to divest Upstream interests in Ireland for up to \$1.23 billion*, July 12, 2017, available at <https://www.shell.com/media/news-and-media-releases/2017/shell-to-divest-upstream-interests-in-ireland.html>.

125 Colin Gleeson, Shell counting the cost as sale of Corrib gas field completed, Irish Times, Nov. 30, 2018, available at <https://www.irishtimes.com/business/energy-and-resources/shell-counting-the-cost-as-sale-of-corrib-gas-field-completed-1.3715864>.

126 See Nephin Energy Website, available at www.nephinenergy.com.

127 See Nephin Energy Website, Board of Directors, available at <https://www.nephinenergy.com/board-of-directors>.

4. Teine Energy

The outline of CPPIB's relationship with Teine Energy is described in CPPIB's 2017 Annual Report as a "notable transaction" as follows:

"Natural Resources invested additional equity into Teine Energy Ltd. to support Teine's acquisition of Penn West Petroleum's oil and gas assets in Saskatchewan for \$975 million. Since 2010, we have invested approximately \$1.3 billion in Teine and hold approximately 90% of the company on a fully diluted basis."¹²⁸

Teine's website describes the company as follows:

"Teine Energy Ltd. (Teine) is a privately-held company focused on investing in low-risk, geographically concentrated conventional oil assets through a strategic partnership with Canada Pension Plan Investment Board (CPPIB). We are the largest producer in the Saskatchewan Viking play with more than 5,000 low-risk, repeatable drilling locations identified on our 800,000 net acres of land. This represents over 15 years of drilling at current activity levels and positions Teine to continue expanding profitability through efficiencies in cost structure, increasing well productivity, and improved reservoir recovery. Our Saskatchewan Bakken heavy oil position is a low viscosity oil ideally suited for water and polymer flooding, providing low decline production with minimal maintenance capital requirements."¹²⁹

A chart on the same page shows the barrel of oil equivalents per day (BOE/D) increasing by about 30% per year since 2011 (soon after CPPIB began supporting the company to lease the land), and is by today 28,483.¹³⁰ The website further states that to date only about 2% of the oil projected to be in the ground in the Viking "play" has been recovered, and so a continuing 15 years of further productivity is expected from that asset.¹³¹ Regarding the Bakken heavy oil, we learn that about 7,000 BOE/D of the 28,483 stated is from the Bakken region, that 98% of the region is under water, and that a "polymer flood pilot is achieving positive response," with the potential to expand throughout the region.¹³² As with each of the private companies this Report has discussed, Teine Energy emphasizes the importance of its financial backing from CPPIB, as indicated in the first sentence of the quote above, from the first page of its website.

Current CPPIB leadership and employees on the board of Teine Energy are:

David Chambers, Senior Principal in the Energy and Resources Group.

Avik Dey, Managing Director, Head of Energy and Resources Group.

128 CPPIB, 2017 Annual Report, p. 60, available at https://cdn4.cppinvestments.com/wp-content/uploads/2020/04/2017_Annual_Report-1.pdf.

129 See Teine Energy Website, Corporate Profile, available at <https://www.teine-energy.com/about/corporate-profile.html>.

130 *Ibid.*

131 See Teine Energy Website, Operations, available at <https://www.teine-energy.com/operations>.

132 *Ibid.*

A former top executive of CPPIB is also on the board of Teine Energy:

Nicolas Zelenczuk: His experience at CPPIB is described as follows on the Teine Energy website. “Mr. Zelenczuk has served on Teine’s Board of Directors since 2012. From 2013 to May 2018 he was the Senior Managing Director and Chief Operations Officer for the Canada Pension Plan Investment Board (CPPIB). Prior to that he was the Chief Financial Officer for CPPIB for 4 years.”¹³³

5. Williams Ohio Valley Midstream

What seems to be CPP Investment’s most recent foray into U.S. shale oil was its investment in Williams Ohio Valley Midstream. In the 2020 Annual Report, the transaction was described as follows:

“[E&R] Closed the formation of a US\$3.8 billion joint venture with The Williams Companies, Inc. The joint venture includes Williams’ 100% owned Ohio Valley Midstream system and 100% of the Utica East Ohio Midstream LLC system. E&R invested US\$1.3 billion for a 35% ownership stake in the joint venture with Williams retaining a 65% interest.”¹³⁴

The project is described as follows on CPP Investment’s website:

Ohio Valley Midstream JV includes 100% of both the Utica East Ohio and Ohio Valley Midstream systems, which provide natural gas gathering, processing and fractionation services in Ohio, West Virginia and Pennsylvania.

Williams is a premier provider of large-scale infrastructure connecting U.S. natural gas and natural gas products to growing demand for cleaner fuel and feedstocks. Headquartered in Tulsa, Oklahoma, Williams is an industry-leading, investment grade C-Corp with operations across the natural gas value chain including gathering, processing, interstate transportation and storage of natural gas and natural gas liquids. With major positions in top U.S. supply basins, Williams owns and operates more than 30,000 miles of pipelines system wide and handles approximately 30 percent of U.S. natural gas.¹³⁵

6. Wolf Midstream

The major outlines of CPPIB’s creation of Wolf Midstream are set out as follows, quoting CPPIB’s Annual Reports.

2017: In fiscal 2016, Wolf Infrastructure, the Natural Resources (NR) group’s first platform investment [of \$1.0 billion], was established as a midstream energy infrastructure investment focused on opportunities in Western Canada. In fiscal 2017, Wolf closed its first acquisition of a 50% ownership

133 See Teine Energy Website, About Us, available at <https://www.teine-energy.com/about/> (members of the board listed including David Chambers, Avik Dey, and Nicholas Zelenczuk).

134 CPP Inv. 2020 Annual Report, *supra* note 3, at 89.

135 See CPP Investments, Real Assets, Energy and Resources, available at <https://www.cppinvestments.com/the-fund/our-investments/investment-real-assets>.

interest in Access Pipeline from Devon Energy Corp for \$1.4 billion with an equity investment of \$683 million from CPPIB. The Access Pipeline system includes pipelines that transport blended bitumen and diluent within Alberta. This is a strategic cornerstone asset for the Wolf vehicle from which management expects to build a broader midstream business over time.¹³⁶

The 2018 Annual Report notes that an additional \$703 million was invested in Wolf Midstream.¹³⁷ The 2019 Annual Report describes additional investments in Wolf Midstream as a “notable” Energy and Resources transaction as follows:

Entering into a long-term service agreement for the construction and operation of the Alberta Carbon Trunk Line via Wolf Midstream, which is 99% owned by CPPIB. CPPIB invested approximately C\$300 million in the project.¹³⁸

From the portions quoted, we can see \$2.686 billion being invested in creating a company 99% owned by CPP, Wolf Midstream. Wolf is now the 100% owner of the Access Pipeline in Alberta, which transports oil sands bitumen to two major storage facilities, the Sturgeon and Stonefell Terminals.¹³⁹

That this investment is important in expanding oil sands production and transport in Alberta was emphasized in this quote by Wolf’s CEO, Gord Salahor:

As the Access owner and Operator, Wolf now has a tremendous opportunity to expand Access Pipeline’s capacity for bitumen blend and diluent to serve both MEG and Devon as well as third parties. We are pleased that this transaction has positioned MEG as an anchor tenant for solvent service on the unutilized Access 16-inch pipeline and prompted additional interest among both natural gas liquids suppliers and oil sands producers.¹⁴⁰

Another of Wolf Midstream’s investments is in carbon capture and storage, the Alberta Carbon Trunk Line (“ACTL”). CPP Investments put \$300 million into that specific project of Wolf Infrastructure.¹⁴¹ The ACTL is described as follows on Wolf’s website:

Wolf is the owner and operator of the system’s compression facilities at two independent capture sites, as well as the 240-kilometre ACTL pipeline that safely transports CO₂ from the capture sites to mature oil fields in Central Alberta for secure storage and enhanced oil recovery (EOR) projects. . . . Designed as the backbone infrastructure needed to support Alberta’s lower carbon transition, ACTL is capable of transporting up to 14.6 million tonnes

136 CPPIB 2017 Annual Report, *supra* note 128, at 59. A “platform investment” is described as “an investment vehicle, which allows us to achieve scale in a defined market or geography, by leveraging the investment’s management expertise (e.g., deal origination or execution, specialized expertise, relationships), in the most resource efficient manner.” *Ibid.*

137 CPPIB 2018 Annual Report, *supra* note 67, at 65.

138 CPPIB 2019 Annual Report, *supra* note 22, at 84.

139 See Wolf Midstream Website, Our Operations, available at <https://www.wolfmidstream.com/operations/>. See also Wolf Midstream Press Release, *Wolf Midstream Completes Acquisition of Remaining 50% Interest in Access Pipeline*, March 22, 2018, available at <https://www.wolfmidstream.com/wolf-midstream-completes-acquisition-of-remaining-50-interest-in-access-pipeline/>.

140 Wolf Midstream Press Release, *supra* note 139.

141 See CPPIB 2019 Annual Report, *supra* note 22, at 84.

of CO₂ per year. This represents approximately 20% of all current oil sands emissions or equal to the impact of capturing the CO₂ from more than 2.6 million cars in Alberta.¹⁴²

Although designed to handle that much carbon, the website also indicates it has unused capacity at this point, August 31, 2020.¹⁴³

While this use of CO₂ will increase light oil recovery from “mature oilfields,” it will also capture carbon from industrial facilities in Alberta, and thus contribute to reducing greenhouse gas emissions. How those emissions reductions compare to the emissions from the expanded oil sands development allowed by the Access pipeline is not clear. Moreover, CPP’s contribution to the ACTL was \$300 million,¹⁴⁴ versus its \$2.3 billion investment developing Wolf and providing capital for Wolf to purchase the Access pipeline. In other words, its investment in carbon reductions was 13% of its investment in expanded oil sands production. It is not surprising that the CEO of CPP Investments, Mark Machin, emphasized CPP’s investment in the ACTL in a recent op ed on the importance of taking climate change seriously.¹⁴⁵ By not mentioning CPPIB/CPP Investment’s far more substantial role in establishing Wolf Midstream and giving it the capital to also purchase the Access pipeline, his statement does not convey an accurate view of CPP Investment’s activities in the oil sands through this company, however.

The following current CPPIB leadership and employees are on the board of Wolf Midstream:

Michael Hill, who is a Managing Director in Energy and Resources, having joined CPPIB in 2016, “focusing on direct private equity investment opportunities in the Natural Resources area.”¹⁴⁶

Robert Mellema, is described as follows on Wolf’s website: “Robert Mellema is a Senior Principal in the Natural Resources Group at the Canadian Pension Plan Investment Board (CPPIB), based in Toronto. Since joining CPPIB in 2008, he has been involved in evaluating investment opportunities across a broad range of sectors including financial services, building products, business services, hospitality and consumer products as a member of the Direct Private Equity Group. Since dedicating his time more fully to Natural Resources, Robert has played an integral role in many important CPPIB natural resources investments in upstream oil and gas and energy infrastructure including Teine Energy, Seven Generation Energy, Black Swan Energy and Wolf Midstream. He is a member of CPPIB’s Sustainable Investing Committee . . .”¹⁴⁷

142 *Ibid.*, Alberta Carbon Trunk Line, available at <https://www.wolfmidstream.com/ab-carbon-tl/>.

143 *Ibid.*

144 See CPPIB 2019 Annual Report, *supra* note 22, at 84.

145 See Mark Machin, *There is a crisis beyond COVID-19 that we can’t afford to ignore: climate change*, Toronto Star Aug. 22, 2020, available at <https://www.thestar.com/business/opinion/2020/08/22/there-is-a-crisis-beyond-covid-19-that-we-cant-afford-to-ignore-climate-change.html>.

146 See CPP Investments Website, Our Leadership Team, Biography of Michael Hill, available at <https://www.cppinvestments.com/about-us/our-leadership/leadership-team>.

147 Wolf Midstream website, Biography of Directors, Robert Mellema, available at <https://www.wolfmidstream.com/about-wolf/board-of-directors/> (last visited August 31, 2020).

D. Summary

There is much of concern in this pattern of investments from a climate change perspective. These are all investments in expanding fossil fuel technologies and producing more oil and gas at a time when every scientifically credible analysis shows the world needs to be transitioning away from oil and gas. CPPIB could use its decades-long investment horizon, and its substantial secure funding from the Canadian public, both of which it emphasizes in announcing these transactions and in its annual reports,¹⁴⁸ to be a “platform investor” in the transition to a low-carbon economy. It is not subject to short-term pressures from capital markets, as it also emphasizes, and so could support newer, riskier technologies and research. It could invest its patient capital in bringing new technologies to market and supporting the necessary scaling up of existing renewable and storage technologies. It could be a leader in supporting transition strategies and innovative approaches to business. Instead what we see is increasing support for renewables, to be sure, but also doubling down on oil and gas, a sector to which the Canadian economy is already substantially over-exposed. This choice presents lost opportunities at a time when a transition to a low-carbon economy is a global, and Canadian, imperative. It is a choice, moreover, fraught with legal risk. It is to that topic that this analysis now turns.

148 There are frequent references throughout CPPIB’s Annual Reports to its advantages as an investor: its scale, certainty of assets given contributors’ required payments, and long investment horizon. The following language from the opening pages of the 2015 Annual Report is typical: “The certainty of cash inflows from contributions means we can be flexible, patient investors able to take advantage of opportunities in volatile markets when others face liquidity pressures. . . . [O]ur exceptionally long investment horizon is an increasingly important competitive strength. We can assess and pursue opportunities differently and stay the course when many cannot. Further, CPPIB’s long-term perspective makes patient capital available for direct commitments that can create value for the Fund over many years to come.” CPPIB 2015 Annual Report, at 2, available at https://cdn3.cppinvestments.com/wp-content/uploads/2019/09/CPPIB_F2015_AR_ENG_May_21_2015_JSvEY0.pdf. See also CPPIB 2016 Annual Report, *supra* note 75, at 2.

V. The Legal Risks of the CPPIB Approach

A number of questions about CPPIB's strategies have been raised throughout this Report. The over-arching policy question is whether public pension funds such as CPP do have, or should have, responsibilities in their home country to support the transition to a low-carbon future, in light of the climate imperative and government policies recognizing that imperative.

There are a number of legal considerations that could inform answers to that policy question. As a fiduciary, CPP Investments has fiduciary obligations to its current and future pension beneficiaries, based on both common-law fiduciary standards,¹⁴⁹ and its statutory obligations. We'll start with a discussion of CPPIB's statutory obligations.

A. CPPIB's Statutory Mandate

The statute that established CPPIB to manage the Canadian Pension Plan's assets, the Canada Pension Plan Investment Act, defines CPPIB's mandate as follows:

Section 5: Objects and Powers

The objects of the Board are:

- (f) To assist the Canada Pension Plan in meeting its obligations to contributors and beneficiaries under the Canada Pension Plan;
- (g) To manage any amounts transferred to it under sections 108.1 and 108.3 of the Canada Pension Plan, and its right, title or interest in any designated securities, in the best interests of the contributors and beneficiaries under that Act; and
- (h) To invest its assets with a view to achieving a maximum rate of return, without undue risk of loss, having regard to the factors that may affect the funding of the Canada Pension Plan and the ability of the Canada Pension Plan to meet its financial obligations on any given business day.¹⁵⁰

CPPIB's understanding of its mandate is clear: "CPPIB invests the assets of the CPP with a singular objective – to maximize returns without undue risk of loss taking into account the factors that may affect the funding of the CPP."¹⁵¹ Yet, as the statutory language indicates, CPPIB has a dual mandate. Its investment mandate is set out in section 5(c), but the statute also includes a management mandate in section 5(b), which is to "manage [the CPP assets] in the best interests of the contributors and beneficiaries" to the Canada Pension Plan.

149 Excellent discussions of pension trustees' fiduciary duties in Canada can be found in Murray Gold & Adrian Scotchmer, *Climate Change and the Fiduciary Duties of Pension Funds Trustees in Canada* (2015) and Janis Sarra, *Fiduciary Obligations in Business and Investment: Implications of Climate Change* (2018), available at <https://ccli.ubc.ca/>.

150 *Canada Pension Plan Investment Act*, [http://laws-lois.justice.gc.ca/eng/acts/C-8.3/, § 5 \(2019\)](http://laws-lois.justice.gc.ca/eng/acts/C-8.3/, § 5 (2019)).

151 See CPPIB, *How we Invest*, available at <http://www.cppib.com/en/how-we-invest>, quoting Canada Pension Plan Investment Act, *supra* note 370, § 5(c).

By the plain language of the statute, Section 5(b) sets out a broader duty than the Section 5(c) investment mandate, particularly given the use of the plural term “the best interests of the contributors and beneficiaries.” A statutory interpretation that collapses “the best interests of the contributors and beneficiaries” into the investment mandate of Section 5(c) renders Section 5(b) meaningless, which is inconsistent with core principles of statutory interpretation. Those “best interests” today must include the need for investing consistent with the Government’s commitments to the Paris Agreement, at the least, and probably even investing consistent with its more recent commitment to net zero emissions by 2050.

What is missing in most of CPPIB’s public communications is some recognition that as a large, patient-capital investor of the public’s money, CPPIB has the potential to shape the future that its contributors and beneficiaries will retire into. Its CEO has recognized that potential in 2020, and we welcome his partnership in thinking carefully about how that should be done.¹⁵² Certainly, CPP Investments has that potential in Canada. It will be shaping that future badly, by default, without a more thorough-going appreciation for how it is—or isn’t—contributing to the transition to a low-carbon economy.

There are financial institutions and pension funds of a comparable size that understand their responsibilities far differently than CPPIB. In adopting a systematic, firm-wide, global sustainability approach to managing the € 436 billion of assets on behalf of its clients, BNP Paribas Asset Management (BNPP AM) stated as follows:

BNPP AM’s approach is also fully in line with the [BNP Paribas] Group’s leadership on sustainable finance. The Group aims in particular to finance the economy in an ethical way, promote the development of its employees, support initiatives with a social impact and play a major role in the transition toward a low carbon economy. It thereby wants to be a major contributor to the UN Sustainable Development Goals.¹⁵³

Similarly, ABP, the large (€ 456 billion) Dutch pension plan for 2.9 million government employees and retirees, stated as follows about its responsibilities as it updated its sustainable and responsible investment policy in 2015:

As a pension fund, good investment returns are crucial to us if we are to fulfil our current and future pension commitments. We focus on controlling costs and managing risks associated with investment. But our responsibilities do not end there. One out of six Dutch citizens is currently either receiving or accruing pensions via ABP. Our size makes us an important player in the Dutch economy and the wider society. It brings with it a huge responsibility for the long term, too. This responsibility is not only financial, it is also societal. We believe it is important to generate our returns sustainably and responsibly. We want to contribute to a more sustainable economy that respects people and the environment.¹⁵⁴

152 See text accompanying note 2, *supra*, quoting CEO and Chair of CPP Investments Mark Machin.

153 Press Release, BNP Paribas Asset Management, *BNP Paribas Asset Management takes a step further in its commitment to sustainable investment and launches ambitious, firm-wide sustainability strategy*, March 20, 2019, available at: <https://group.bnpparibas/en/press-release/bnp-paribas-asset-management-takes-step-commitment-sustainable-investment-launches-ambitious-firm-wide-sustainability-strategy> (emphasis supplied).

154 ABP, *ABP’s Approach to Societal Considerations as part of its Responsible Investment*, 1 (2017), available at https://www.abp.nl/images/Position_Paper_EngSocConFinal.pdf.

As part of its contributions to shaping the world of the future, APB stated that:

Another aim of our new [as of 2015] policy is to invest a greater portion of our assets in activities that actually contribute to solutions to sustainability issues. Our experience as an investor has taught us that generating an attractive financial return can be compatible with working on solutions to social issues. For several years, we have been actively seeking investments that combine both goals. By early 2015, already we invested €29 billion in these types of investments. [By 2016, € 41 billion had been so invested.]¹⁵⁵ Specifically, this relates to investments in activities that contribute to solutions to social and environmental issues such as climate change, water shortages, flooding, air pollution, loss of natural habitats, the extinction of species and the need for micro-financing. Investments in pharmaceutical companies that contribute to accessible health care in countries with a low average income are also included in this category.¹⁵⁶

Specifically regarding climate change, ABP had also committed, in 2015, to reduce the greenhouse-gas emissions of its portfolios by 25% by 2020.¹⁵⁷ That goal was well underway by 2016, with reductions of 16%.¹⁵⁸ Those reductions were part of a suite of actions ABP is taking regarding climate change, because it perceives its responsibilities as follows:

Pension funds have a responsibility with regard to combating climate change, not least because climate change can have a huge impact on the value of their investments but also, especially, because they have to take a longer view. Our youngest participants will not be drawing their pensions until the closing decades of this century. We want them to be able to enjoy retirement in a world that is still a pleasant place to live. To help in ensuring that this is so, we need everything to be done in order to restrict global warming to well below 2°C and to attempt to limit the rise to 1.5°C. In addition, we as a pension fund invest in such a way as to contribute to the sustainability of the planet.¹⁵⁹

CPP Investments is increasing its investments in one important area of the transition to a low-carbon economy, and that is renewable energy, specifically wind and solar energy. Outside of renewable energy, however, there is little evidence of it having any ambitions comparable to ABP or BNP Paribas AM to shape the future into which its current contributors will retire. It is instead interpreting the “best interests of its contributors and beneficiaries” in purely financial terms. That approach leads to a second series of questions: is an investor of CPP’s public heft meeting its fiduciary responsibilities by adopting a business-as-usual approach in light of the climate imperative?

155 See Sarra, *supra* note 149, at 64.

156 ABP, *supra* note 154, at 3.

157 ABP, *ABP’s Approach to Climate Change and Energy Investments*, 3, available at https://www.abp.nl/images/ABP_on_climate_change.pdf.

158 See Sarra, *supra* note 370, at 64, citing ABP, *Pensioenfondsvoor overheid en onderwijs*, “ABP on course with sustainable investments”, 8 May 2017, available at <https://www.abp.nl/images/press-release-sustainable-and-responsible-investment-report-2016.pdf>.

159 See ABP, *supra* note 154, at 1.

B. CPPIB's Fiduciary Obligations

The common-law fiduciary duties of pension trustees are to act according to the duties of prudence (care) and loyalty.¹⁶⁰ There is also a developing understanding that pension fiduciaries have a duty of impartiality to act fairly between generations, so not to prioritize short-term investment benefits at the expense of longer-term risks and liabilities.¹⁶¹ The duty of prudence requires trustees and their delegated agents to make decisions on an informed basis, after reasonable investigation.¹⁶² The duty of loyalty requires actions in good faith, in the best interest of the fund and its beneficiaries, and avoiding conflicts of interest.¹⁶³ These duties have been directly incorporated into the statute that established the CPPIB, the Canada Pension Plan Investment Board Act ("CPPIB Act") as follows:

Section 14: Duty of Care

(14)(1) Every director and officer of the Board in exercising any of the powers of a director or an officer and in discharging any of the duties of a director or an officer shall:

- (i) act honestly and in good faith with a view to the best interests of the Board; and
- (j) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.¹⁶⁴

These same duties apply to CPPIB's employees, by virtue of their legal position as agents of the board, and by the CPPIB Act:

Section 15: Duty to comply

15(1) Every director, officer and employee of the Board shall comply with this Act and the by-laws.

CPPIB's Annual Reports and other communications make clear that it is a careful manager of this very large pool of public assets, using sophisticated risk management across the entire portfolio.¹⁶⁵ Its Responsible Investment materials indicate awareness of the increased risks of climate change.¹⁶⁶

¹⁶⁰ *Hodgkinson v. Simms*, [1994] 3 SCR 377, at 419.

¹⁶¹ See James Hawley, Keith Johnson, and Ed Waitzer, *Reclaiming Fiduciary Duty Balance*, 4:2 Rotman Int'l J. of Pension Mngmt. 4-17 (2011) (discussing pension funds' intergenerational duty of impartiality).

¹⁶² See Gold & Scotchmer, *supra* note 149, at 10; Sarra, *supra* note 149, at 52.

¹⁶³ *Ibid.*

¹⁶⁴ Although this statutory section is entitled the "duty of care," section 14(a)(1) is the statutory articulation of the common-law duty of loyalty, and section 14(a)(2) is the duty of care. The same language as applied to incorporated entities in Section 122(a)(1) & (2) of the *Canada Business Corporations Act* (CBCA) was construed by the Supreme Court of Canada as follows: "The first duty has been referred to in this case as the 'fiduciary duty'. It is better described as the 'duty of loyalty'. . . . This duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the 'duty of care'. Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs." *Peoples v. Wise*, [2004] 3 SCR 461, para. 32.

¹⁶⁵ See CPPIB 2019 Annual Report, *supra* note 22, at 46-51 (discussing CPPIB's risk management framework).

¹⁶⁶ CPPIB, *2019 Report on Sustainable Investment: Climate Change*, 1-3, available at http://www.cppib.com/documents/2131/Climate_Change_Brochure.pdf.

It also states that it aims to be:

“a leader among asset owners and managers in understanding the investment risks and opportunities presented by climate change. This aligns with our legislative mandate, recognizing we must act in the best interests of current and future beneficiaries. Investments and assets must be properly priced to reflect risks and offer sufficiently attractive potential returns.”¹⁶⁷

Yet, the facts discussed in this Report give rise to a number of questions about whether CPP Investment’s stated approach to climate change in 2020 is being incorporated in a thorough-going manner, across all of its asset classes, consistent with a large, public pension fund’s fiduciary duties. There are a number of reasons to be concerned.

First, with respect to its public equities investments in Canada, Mercer’s analysis discussed above¹⁶⁸ suggests that an active investor such as CPP Investments, invested in a business-as-usual, diversified equity portfolio that is not sustainability themed,¹⁶⁹ and with significant oil, gas, and coal holdings, risks “undue loss,” indeed catastrophic loss in some asset classes, starting to eventuate over the next eleven years. Thus, given that analysis, and other similar findings,¹⁷⁰ CPPIB needs to explain how it could be meeting either its statutory mandate, or its fiduciary duties under statutory and common law, by maintaining its business-as-usual approach to those investments.

Second, of greater concern is the “doubling-down” on oil and gas through CPPIB’s establishment and substantial funding of new companies to engage in fracking in the U.S., to support oil and gas development in Saskatchewan and Alberta, and to take on additional off-shore oil and gas commitments off the coast of Ireland. Given how exposed the Canadian economy is to the oil and gas industry, adding investments in these areas is both risky, and difficult to square with fiduciary obligations of prudence. These private company investments also give rise to the troubling questions of potential conflicts of interest discussed above.

Third, the political contributions of Crestone Peak Resources are deeply troubling. If investigations were to show that the \$607,000 that was contributed to U.S. elections came in any way from CPPIB itself, rather than from the operating income of Crestone itself (given that many of its wells were not operating in 2018 due to on-going litigation and restrictions), that

¹⁶⁷ *Ibid.*

¹⁶⁸ See *supra* footnote 42,

¹⁶⁹ There is nothing in CPPIB’s 2019 Annual Report, or CPP Investment’s 2020 Annual Report, to suggest that its substantial public equity holdings are being invested with a sustainability theme. Rather, its description of its Sustainable Investment approach emphasizes engagement over divestment; and using proxy voting power and other engagement strategies to encourage better disclosure from the companies that it holds. That said, incorporating climate change as a material financial risk is recognized by CPPIB, see CPPIB 2019 Annual Report, *supra* note 22, at 28, 40, 73, *inter alia*, and it states that it has just begun to add climate risk analysis to CPPIB’s direct private equity investments. *Ibid.* at 40. Thus, it could be that these substantial financial risks from holding public equity portfolios that are not sustainability themed, in conjunction with significant oil, gas, and coal holdings, will be ameliorated over time, but time is at a premium given the state of the climate imperative. And note that Mercer’s analysis shows overwhelming losses to oil, gas, and coal investments to 2030.

¹⁷⁰ See, e.g., BNP Paribas Asset Management, *Wells, Wires, and Wheels: EROCI (Energy Recovered on Capital Investment) and the Tough Road Ahead for Oil*, Aug. 2019, available at <https://docfinder.bnpparibas-am.com/api/files/1094E5B9-2FAA-47A3-805D-EF65EAD09A7F> (calculating EROCI of oil versus renewables over the next 25 years for powering transportation, and finding that the combination of new solar or wind and electric vehicles will produce 6x to 7x the energy for powering light-duty vehicles, compared with oil powering internal combustion engines; and further calculating that to be cost competitive over the next twenty-five years oil must be sold at about \$10/barrel).

would be both embarrassing and illegal. Even if not illegal, at the time the contributions were made CPPIB employees made up a majority of the Crestone board, as described above. Does CPPIB think that this kind of electoral involvement in another country is acceptable? Would most Canadians think it was acceptable?

Finally, fiduciary obligations are not static, but evolve with changing understandings of financial (and other) risks and opportunities. Does such a fiduciary as CPP Investments have heightened responsibilities in 2020, given its size, its captive contributors, its long-term obligations, and the climate imperative? Thoughtful analyses of pension funds' fiduciary obligations would suggest yes.¹⁷¹

XI. Conclusion: A Positive Role for CPP Investments and the Fund

Over the past months, a number of promising studies have been published showing significant economic and environmental opportunities in Canada from investments in a circular economy, and investments in a resilient recovery from the covid-19 lock-down. Circular economy opportunities span the economy, from agriculture and food production, automotives, construction, electronics, forestry, minerals and metals, plastics and used oil.¹⁷² The Task Force for a Resilient Recovery has published a preliminary report with specific ideas for investments in innovations in buildings, zero-emissions vehicles and infrastructure, energy, nature, and clean competitiveness.¹⁷³ A report entitled *Building Back Better with a Bold Green Recovery* similarly has compiled ideas for supporting the transition to a low-carbon economy that identifies significant investment opportunities.¹⁷⁴ These are all resources identifying areas where CPP Investment's financial sophistication and assets could well be brought to bear in service of developing new opportunities while supporting the transition to a low-carbon economy

We invite CPP Investments to engage with contributors to and beneficiaries of CPP in a thoughtful, careful discussion of what its responsibilities are to support the government's transition policies. CPP Investment's contributions to the future that Canada needs could be profitable, could unlock purely private capital through de-risking and co-investment strategies, and could provide the kinds of venture capital long missing in the Canadian economy. We urge it to take seriously its power to reshape the Canadian economy for the good.

171 See, e.g., among others, Doug Sarro & Ed Waitzer, *Fiduciary Society Unleashed: The Road Ahead for the Financial Sector*, 69:4 BUS. LAWYER 1081, 1093 (2014); Gold & Scotchmer, *supra* note 149; Sarra, *supra* note 149.

172 See Smart Prosperity Institute, *Driving a Circular Economic Transition—Policy and Innovation Approaches*, available at <https://institute.smartprosperity.ca/sites/default/files/5-driving-circular-economy-transition-policy-and-innovation-approaches.pdf>.

173 See Task Force for a Resilient Recovery, *Preliminary Report of the Task Force for a Resilient Recovery*, July 22, 2020, available at <https://www.recoverytaskforce.ca/>.

174 See Ralph Torrie, Céline Bak & Toby Heaps, *Building Back Better with a Bold Green Recovery*, June 2020, available at https://www.corporateknights.com/wp-content/uploads/2020/07/Building-Back-Better-with-a-Bold-Green-Recovery_2020-1.pdf.



Canada Climate Law Initiative
L'Initiative canadienne de droit climatique