

Agenda

1. Governmental Objectives
2. Canada's Regulatory System Objective
3. Outcome (Purposive) vs. Prescriptive Based Regulations
4. State Owned Enterprises
5. Sovereign Wealth Funds
6. Canada's Extractive Sector Transparency Measures Act
7. Whistleblowing
8. Case Studies



Governmental Objectives

- The world economy and the political international environment are characterized by the increasing interdependence of countries' economic systems and decisions linked to processes of capital accumulation.
- ***“All countries must step up their efforts to ensure that public policy truly reflects – and results in – more inclusive societies, in which boys, girls, men and women can all reach their true potential.”***

OECD, Report on the implementation of the
OECD Gender Recommendations, 2017.



Canada's Regulatory System Objective

- **To protect and advance the public interest in the following areas:**
 - **health;**
 - **safety and security;**
 - **the quality of the environment;**
 - **social and economic well-being of Canadians.**



Canada – 3 Principles for Regulatory Transparency and Accountability

- **Accessibility:** Information about how regulations are developed and managed should be:
 - publicly available
 - easily obtained
 - written in clear and concise plain language



Transparency and Accountability – Canada (cont'd)

- **Predictability:** Publicly available information on regulations should be:
 - timely
 - meaningful
 - accurate
 - up to date
- **Stakeholder Engagement:** Stakeholders should:
 - be made aware of the government's regulatory initiatives
 - have opportunities to provide their feedback
 - be notified of opportunities to influence regulatory development

- <https://bit.ly/2k2PBYq>



Prescriptive Regulations

- Prescriptive regulations detail the design and process of how to comply with regulations.
- One of the advantages of prescriptive regulations is that compliance is easily identifiable.
- Prescriptive regulations are easier to monitor and enforce, but they provide very little flexibility.



Outcome Based Regulations

- Outcome-based regulations, also known as performance-based regulations or results-based regulations are thought to be more flexible and less costly.
- Performance objectives or results are clearly outlined but the industry is able to decide for itself how it will achieve these results.
- This may encourage innovation; particularly if existing technologies cannot meet the new requirements, and this may reduce their compliance costs.



Benefits of Outcome-Based Regulations

- Public
 - The Public can trust that the health, safety and protection of the plant, animal and food supply are maintained, or improved, as regulated parties are afforded increased flexibility to continuously improve and innovate to meet standards consistently and effectively.
- Regulated Parties
 - Regulated parties have more flexibility to innovate and leverage the latest advancements in science and technology. They are able to choose the most efficient and effective manner to meet a required outcome while still meeting all health, safety and protection standards.
- Trade Partners
 - Many trading partners, such as Canada, United States, Australia, including the WTO, are adopting or have already adopted outcome-based approaches. The continued alignment of regulatory systems permits easy adoption of best practices.



State-Owned Enterprises (SOE)

- The ultimate purpose of state ownership of enterprises should be to maximise value for society, through an efficient allocation of resources.
- Policy for government ownership policy should define, inter alia:
 - Overall rationales for state ownership;
 - The state's role in the governance of SOE;
 - How the state will implement its ownership policy; and
 - The respective roles and responsibilities of those government offices involved in its implementation.
- Ownership policy should be subject to appropriate political accountability and disclosed to the general public.

OECD Guidelines on Corporate Governance
of State-Owned Enterprises, 2015 Edition



Sovereign Wealth Funds (SWF)

- SWF is “a pool of assets owned and managed directly or indirectly by governments to achieve national objectives”. Economic objectives of SWF are:
 - **Macroeconomic and fiscal stability**
 - **Economic capability and dynamism**
 - **Distributive justice**
- These objectives can change over time due to influential circumstances like financial turmoil or local public budget deficits.



SWF – Generally Stated Objectives

Mission	Objective	Description
Capital maximisation Building a capital base for the growth and preservation of national wealth	Balancing intergenerational wealth	Investing to create intergenerational equity e.g. transforming non-renewable assets into diversified financial assets for future generations.
	Funding future liabilities	Growing and preserving the real value of capital to meet future liabilities, such as contingent liabilities like pensions.
	Investing reserves	Investing excess reserves into potentially higher-yielding assets via financial strategies aiming at higher long-run returns, and reducing the negative carry costs of holding reserves.
Stabilisation Macroeconomic management and economic smoothing	Facilitating fiscal stability	Using counter-cyclical fiscal tools to insulate the economy from internal and/or external shocks, e.g. changes in commodity prices, to smooth consumption.
	Stabilising the exchange rate	Using the fund's resources to balance large capital inflows and outflows in the short-run (which may be caused by commodity price volatility) to prevent asset price bubbles and reduce price volatility. Using the fund to manage amount of capital entering the domestic economy over the long run, to ensure the exchange rate is maintained at a level to allow for other export activities, e.g. to prevent Dutch Disease.
Economic development Investment to boost a country's long-run productivity	Investing in hard infrastructure	Domestic development in capital assets, including but not limited to transport, energy, water management and communications.
	Investing in social infrastructure	Domestic development in soft infrastructure: human capital and the institutions that cultivate it. This includes socio-economic projects such as education and health.
	Pursuing industrial policy	Creating a diversified economy in order to reduce dependency on one resource source of funding. Official, strategic efforts by governments to boost productivity in specific sectors.



Operational Governance Best Practices

- **Accountability and Performance Evaluation**
 - Effective disclosure and transparency policies
- **Board Composition.**
 - Directors who are knowledgeable and have expertise relevant to the business and are qualified and competent, and have strong ethics and integrity, diverse backgrounds and skill sets, and sufficient time to commit to their duties
- **Commitment to Integrity and Ethical Dealing**
 - General culture of integrity in business dealing and of respect and compliance with laws and policies without fear of reprimand is critical



Operational Governance Best Practices

(cont'd)

- **Defined Roles and Responsibilities**
 - Establish clear lines of accountability among the Board, Chair, CEO, Executive Officers and management
- **Engage in Effective Risk Management**
 - Board directors oversee strategy and execution of both short- and long-term bases, and this includes attention to risk
 - Companies should regularly identify and assess the risks they face, including **financial, operational, reputational, environmental, industry-related, and legal risks**



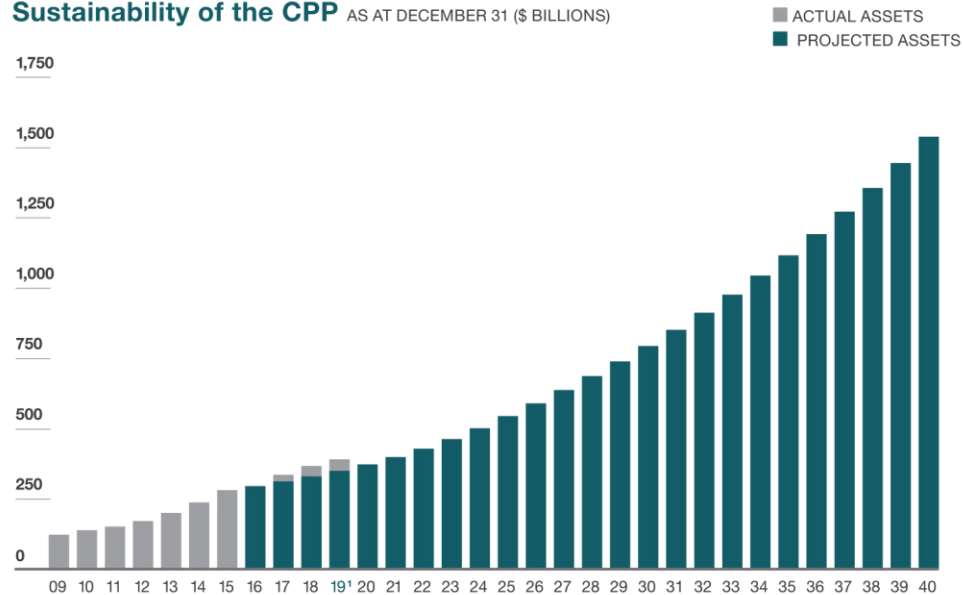
Case Study – Canada Pension Plan Investment Board Principles

- Objective is to **invest the assets** of the CPP to maximize investment returns **without undue risk of loss based on long horizon**, scale, and certainty of assets.
- **Arm's length operation** from governments, and guided by an **independent** highly qualified, professional Board of Directors.
- Investment analysis to **incorporate environmental, social and governance (ESG) factors** to the extent that they affect risk and return.
- **Disclosure** to allow investors to better understand, evaluate and assess potential risk and return, including the potential impact of ESG factors on a company's performance.



CPP Fund Performance

Sustainability of the CPP AS AT DECEMBER 31 (\$ BILLIONS)



The most recent triennial report by the Chief Actuary of Canada indicated that the CPP is sustainable over a 75-year projection period.

Projections of the CPP Fund, being the combined assets of the base and additional CPP accounts, are based on the nominal projections from the 29th Actuarial Report supplementing the 27th and 28th Actuarial Reports on the Canada Pension Plan as at December 31, 2015.

¹ Represents actual total Fund assets as at March 31, 2019.

CPP Fund is ranked as one of the 10 largest retirement funds in the world

A long investment horizon – investment for the next quarter century, not the next quarter

CPP Fund Value \$440 Billion as at June 30, 2019

10-year annualized rate of return is 10.5%

Canada's Extractive Sector Transparency Measures Act (ESTMA)

- Canada's ESTMA came into effect on June 1, 2015.
- ESTMA is Canada's latest step in the global fight against corruption.
- It is in line with similar initiatives in the United States, the United Kingdom and other European Union countries.
- ESTMA is designed to complement Canada's existing anti-corruption regime in the Corruption of Foreign Public Officials Act (CFPOA) by creating greater transparency over payments to a government by entities engaged in the extractive sector — mining, oil and gas.



Canada – Private Enterprise

- Most major Canadian projects are operated by private enterprise.
- Public involvement is indirect
 - Permits + conditions (e.g. National Energy Board)
 - Financing + Conditions (e.g. Business Development Bank)
- Regulation is by Laws of General Application



Laws of General Application

- Constitution Act, 1982 , S. 35 (Duty to Consult)
- Human Rights Act (Non-Discrimination)
- Employment and Labour Legislation
- Pay Equity Program (to eliminate gender-based wage discrimination)
- Access to Information Act (Disclosure)
- Corporate and Securities Legislation (Disclosure)
- Private Rights of Action (Stakeholders, Intervenors)



Extractive Industries Transparency Initiative

- *EITI* was established in 2002 to support **improved governance** in resource-rich countries through the **verification, reconciliation and full publication of extractive company payments made** to host country governments and the corresponding government revenues received from oil, gas, and mining.
- Initiative aims to strengthen governance by improving transparency and accountability in the extractives sector.
- Assist in fostering debate about how government revenues are spent, and in helping build the capacity of communities to hold their government to account.
- Canada has participated in the EITI as a supporting country since 2007, and is an EITI Board member for the 2013-2015 cycle.



ESTMA Application

- *ESTMA* applies to companies that are engaged in the commercial development of oil, gas or minerals in Canada or abroad that are either:
 - (i) are listed on a stock exchange in Canada or
 - (ii) have a place of business in Canada, do business in Canada, or
 - have assets in Canada and meet at least two of the following size thresholds:
 - C\$20 million in assets
 - C\$40 million in revenue; or
 - Employ an average of at least 250 employees.



Annual Reporting Requirements

- ESTMA requires annual government reporting and public disclosure of certain types of payments made by the extractive sector to governments (and government officials) both domestically and abroad, eventually including aboriginal governments in Canada.
- A director, officer, independent auditor, or accountant must attest that the information contained in an *ESTMA* report is **true**, **accurate**, and **complete**.



What must be reported

- ESTMA requires reporting of payments:
 - To a “payee” (e.g., government)
 - That total, in aggregate, over C\$100,000
 - Fall within one of the following categories:
 - Taxes (other than consumption taxes and personal income taxes)
 - Royalties
 - Fees (including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licences, permits or concessions)
 - Production entitlements
 - Bonuses (including signature, discovery and production bonuses)
 - Dividends (other than dividends paid as ordinary shareholders)
 - Infrastructure improvement payments
- Reportable payments can be either monetary or in kind. Where a payment has been made in kind, its value is the cost to the company, or if that cannot be determined, the fair market value of the goods or services provided.



Non-compliance is an Offence

- Non-compliance with *ESTMA* is an offence under the Act.
- Additionally, *ESTMA* contains an anti-avoidance provision that makes it an offence to structure any payment, or other financial obligation or gift, to avoid reporting requirements.
- Entities and directors guilty of an offence under *ESTMA* can avoid conviction by establishing that all reasonably prudent measures were implemented to ensure the offence was not committed.



Penalties

- Conviction of failure to adhere to *ESTMA* is punishable by a fine of \$250,000 for each day that an entity is non-compliant with *ESTMA*.
- This penalty can be imposed on an entity or any officer, director, or agent who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence, even if the entity has not been prosecuted or convicted.



Whistleblowing

- “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”

Louis Brandeis (Justice of the USSC),(1914),
“What Publicity Can Do”,
in *Other People's Money and
How the Bankers Use It*”



Global Imperative

- The UN Convention against Corruption (UNCAC) (Article 33)
- Council of Europe Civil Law Convention on Corruption (Article 9)
- Inter-American Convention Against Corruption (Article 3)
- African Union Convention on Preventing and Combating Corruption (Article 5)
- Anti-Corruption Action Plan for Asia and the Pacific (Pillar 3)
- Southern African Development Community Protocol Against Corruption (Article 4)



Definition

- Whistleblowing is the act of **drawing public attention**, or the attention of an authority figure, to perceived wrongdoing, misconduct, unethical activity within public, private or third-sector organisations.
- Corruption, fraud, bullying, health and safety violation, cover-ups and discrimination are common activities highlighted by whistleblowers.
- Whistleblowers often face **reprisals** from the person impacted, who may suffer reputational damage as a result of the whistle being blown, or from colleagues who may have been involved in the illicit activities.



EU - Whistleblowing Directive (15 April 2019)

- EU Member States will have two years from the date of publication to incorporate **new EU-wide common minimum standards** ensuring effective whistleblower protection set out in the Directive.
- Directive applies to reports from employees, shareholders, interns, volunteers and the self-employed.
- Disclosure covers a breach or abuse of EU law in any of the following issues:
 - public procurement, financial services, prevention of money laundering and terrorist financing, product safety, transport safety, protection of the environment, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data and security of network and information systems, protection of the financial interests of the Union, breaches of internal market rules, including competition and State aid rules or tax avoidance issues.

http://www.europarl.europa.eu/doceo/document/A-8-2018-0398-AM-155-155_EN.pdf



Whistleblowing Incentive Reward - USA

- Idea of rewards for blowing the whistle originated in the US during the Civil War, to prevent the sale of fraudulent military supplies.
- *False Claims Act* is considered one of the original laws on whistleblowing worldwide and applies to government contracts with third parties.
- In 1986, FCA amended to grant whistleblowers the capacity to act as proxy prosecutors for the government.
- The law allows whistleblowers to collect a 15%–30% share of awarded damages for cases where they originally blew the whistle.



Case Study – Botswana Pula Fund

- Objective of the Pula Fund is to preserve part of the income from diamond exports for future generations, while also managing foreign exchange reserves that are in excess of expected needs over the medium term.
- Fiscal policy follows the “Budget Sustainability Ratio” or “Sustainable Budget Index.”
- This implicit self-disciplinary rule aims to maintain recurrent non-health and non-education spending equal to or less than non-mineral revenue. Mineral revenues are supposed to finance recurrent spending on health and education.



Case Study - Norway

- The great majority of companies where the State owns shares are **organized according to the Norwegian Law on Joint-Stock Companies**; the Law which also regulates privately owned commercial corporations.
- **They pay tax along the same lines as private companies**, have to answer to the same competition regulations, etc.
- The **Shareholders' General Assembly** – where the Minister or a Department official (usually) vote the State's shares – **elects the Board of Directors**, which in its turn has the power to appoint, and if necessary dismiss, the General Manager.



Norway, (cont'd.)

- The General Assembly decides on the **Articles of Association and the broad commercial purpose of the company**, and supplies the share capital.
- The Ministry or its officials do not take part in the day-to-day running of the company where the State owns shares. Ministry officials do not sit on the Board.
- **Ministry does not influence** production, marketing or the other ordinary economic or commercial activities of the companies. These are matters for the Board and the Management. They are also responsible for the company's general financing and lending arrangements.
- Norwegian Government policy is that **at least 40 per cent of Board members should be female**.



Norway – Governance 10 Principles

1. **Equal treatment** of all shareholders.
2. There shall be **transparency** in the State's ownership of companies.
3. Ownership decisions and resolutions shall be made at the General Meeting.
4. The **State may set performance targets** for each company together with other owners. The Board is responsible for meeting these targets.
5. The capital structure of the company shall be consistent with the objective of the ownership and the company's situation.



Norway – Governance Principles

6. The **composition of the Board** shall be characterised by **competence, capacity and diversity** and shall reflect the distinctive characteristics of each company.
7. Compensations and incentive systems shall promote the **creation of value** in the companies and shall be generally regarded as reasonable.
8. The **Board** shall exercise an **independent control** of the of the company's management on behalf of the owners.
9. The Board must **adopt a plan for its own work**, and shall work actively with development of its own competence. The Board's **activities shall be assessed**.
10. The company shall recognise its **responsibilities to all shareholders and stakeholders** in the company.

<https://bit.ly/2IUUKCm>

