ESG claims: Managing risks and liabilities for Canadian businesses

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The concept of environmental, social and governance (ESG) has become almost ubiquitous. ESG generally refers to the environmental, social, and governance factors that can affect company value and investor decisions. In this article, we briefly outline some key considerations for managing litigation and regulatory risk for Canadian companies making ESG claims and highlight some relevant cases.

What you need to know

- Strong ESG performance is valued by many shareholders and consumers, and can be a way to differentiate your brand.
- Failure to take sufficient action on ESG matters can risk proxy contests and harm to a company's business. Businesses should be aware of and understand the legal obligations to disclose information relating to ESG, as failure to abide by them can result in enforcement and other sanctions.
- Companies should routinely audit and revise their ESG frameworks to ensure that they are up to date with their operations and ever-evolving industry best practices. Companies should ensure that they choose an appropriate ESG framework for their intended audience.
- To reduce the risk of misstatements or inconsistent statements, boards and management should have a proactive process for reviewing and approving ESG disclosure prior to its public release. A robust legal review is also advisable.
- Canadian businesses should be careful to scrutinize their ESG disclosure to ensure it aligns with their operations.
- ESG disclosures should be relevant to the specific entity, measurable, and grounded in verifiable data.

ESG overview

Although similar to the concept of corporate social responsibility, ESG relates to factors that are financially material to a company's business and includes such wide-ranging considerations as climate change, modern slavery, diversity, equity, and inclusion. Recent years have seen growing market and shareholder demand for businesses to implement and report on their ESG commitments and performance.

In response to this demand, companies are increasingly identifying, measuring, and disclosing ESG factors that are material to their operations. While in the past this disclosure was largely voluntary, recent years have seen many levels of government adopt ESG factors as part of their mandatory reporting requirements, which has inevitably led to an expanded risk of litigation and other attempts to hold companies accountable for their claims.

ESG litigation

ESG litigation and regulatory risks generally fall into two broad categories. The first category includes allegations of false ESG claims or misrepresentations in a company's ESG disclosure. Companies risk both regulatory action and consumer- or investor-led class actions related to alleged misrepresentations.[1] The second category of litigation risk includes claims directly challenging a company's ESG-related conduct or perceived lapses in ESG action. Recent trends in Canada, and globally, include attempts to hold companies accountable for conduct by suppliers or subsidiaries in foreign jurisdictions[2] and subject companies to litigation for the contribution of their greenhouse gas emissions to climate change.[3]

Even if a company can successfully defend a claim on the merits, being forced to defend an ESG record can be costly and lead to reputational harm. Historically, many ESG programs and reports have had little legal oversight or input. To manage the risk of litigation and regulatory or administrative sanctions, businesses should proactively involve experienced legal assistance to review how they are addressing ESG issues while guarding against overstating their commitments and actions.

Key considerations

1. Consider the risks of proxy disputes from inaction on ESG

Failure to take sufficient action on ESG matters can risk proxy contests and harm to a company's business.

The recent proxy contest between ExxonMobil and Engine No. 1 demonstrates the growing power of ESG to alter even the largest of public companies.[4] In May 2021, Engine No. 1, an activist hedge fund with only 0.02 per cent ownership in ExxonMobil, argued that there were shortcomings in oil and gas experience on ExxonMobil's board, slow strategic transitioning to a low carbon economy, and historic underperformance and overleverage relative to peers. Engine No. 1 proposed four board director candidates, three of whom were elected to the 12-member board, ousting three sitting board members. Engine No. 1's campaign gained the support of three large investors in ExxonMobil – Vanguard, BlackRock, and State Street.

Engine No. 1's success within ExxonMobil may be a harbinger of things to come for Canadian public companies, particularly those in natural resources sectors. Large institutional investors in Canada are increasingly expecting businesses to take action on ESG matters. On November 25, 2020, CEOs of eight Canadian pension plan investment managers, representing approximately $1.6 trillion of assets under management, issued a joint statement calling on companies to measure and disclose their performance on material and industry-relevant ESG factors.

Two leading proxy advisory firms, Glass Lewis and Institutional Shareholders Services (ISS), have publicly stated they may recommend voting against certain board members if a company does not adequately address or disclose ESG matters. As outlined in their 2022 Policy guidelines, Glass Lewis will "generally recommend" voting against the governance chair of a company in the S&P/TSX 60 index that does not to their satisfaction provide clear disclosure concerning board-level oversight afforded to environmental and/or social issues. Likewise, ISS has stated that under "extraordinary circumstances" it will recommend voting against or withholding a vote for directors, committee members, or an entire board where there has been demonstrably poor risk oversight of environmental and social issues, including expressly climate change. Considering the guarded language used in these policy guidelines (i.e., "generally recommend" and "extraordinary circumstances"), there is a considerable grey area as to if, and when, they will be invoked. Nevertheless, the guidelines signify a shift and increased consideration of ESG by institutional advisors.

2. Understand applicable mandatory reporting requirements

Mandatory legal obligations to disclose information relating to ESG already apply to many Canadian businesses, and new disclosure obligations are forthcoming. It is imperative that businesses be aware of and understand these requirements, as failure to abide by them can result in enforcement and other sanctions.

For example, under Canadian securities legislation and instruments, reporting issuers must disclose material information in their continuous disclosure documents and in other contexts.[5] Environmental, social, and governance factors may already be material to an issuer, and may also be subject to specific existing or forthcoming disclosure obligations.

In response to the public company accounting crisis of 2002 and 2003, modern corporate governance rules and practices were developed and implemented. In the United States, the *Sarbanes-Oxley Act* was introduced, and in Canada, provincial securities regulators adopted a series of national instruments and policies including National Policy 58-201 – Corporate Governance Guidelines and National Instrument 58-101 – Disclosure of Corporate Governance Practices.

In the environmental sphere, the Canadian Securities Administrators (CSA) have released guidance on how issuers can determine what environmental and climate change information is material.[6] The CSA have also published a proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (Proposed Instrument) and a companion policy for a 90-day comment period. The Proposed Instrument would require some reporting issuers to disclose climate-related information in compliance with the Task Force on Climate-related Financial Disclosures (TCFD) recommendations, with some modifications. The Proposed Instrument is generally in line with initiatives of market regulators in other jurisdictions such as the United States, the European Union, Hong Kong, the United Kingdom, and New Zealand.[7]

Of relevance to the social and governance factors, public companies existing under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (CBCA) must provide to shareholders information respecting diversity among the directors and members of senior management.[8] This goes well beyond the current diversity disclosure requirements regarding women on boards under National Instrument 58-101 and Form 58-101F1. Forthcoming amendments to the *CBCA* will require disclosure relating to senior management compensation and the well-being of employees, retirees, and pensioners.[9]

ESG-related disclosure guidance has advanced rapidly in the investment fund industry over the past year. In November 2021, the CFA Institute released its Global ESG Disclosure Standards for Investment Products – the first voluntary global standards governing disclosure about how investment managers consider ESG issues in the objectives, investment process, and stewardship activities of their products. BLG provided a more detailed analysis of the standards, which are to help stakeholders better understand, compare and evaluate ESG investment products in a previous article. Soon after, on January 19, 2022, the CSA issued Staff Notice 81-334: ESG-Related Investment Fund Disclosure, which sets out the CSA's suggested best practices to enhance ESG-related fund disclosure and sales communications.

In Quebec, the Autorité des marchés financiers published a notice highlighting how existing disclosure obligations on reporting issuers may be applied to disclose issues of modern slavery.[10] On a national basis, Bill S-216, *An Act to enact the Modern Slavery Act and to amend the Customs Tariff* passed second reading in the Senate on March 30, 2021. If enacted, the Bill will mandate certain entities to report on the measures taken to prevent and reduce the risk that forced labour or child labour is used in any step in the production of goods in Canada or goods imported into Canada. The Bill mirrors similar mandatory reporting regimes in place in Australia[11] and the UK.[12]

Businesses involved in import and export must be aware of the mandatory restrictions regarding forced labour and importation. Under article 23.1 of the Canada-United States-Mexico Agreement, the importation of goods produced in whole or in part by forced labour is prohibited. In Canada, this is implemented by CBSA Memorandum D9-1-6, as well as targeted measures published by Global Affairs Canada for goods originating in China's Xinjiang province. Under these provisions, importers must carry out due diligence on imported goods, in line with the UN Guiding Principles on Business and Human Rights (UNGPs) or the OECD Guidelines for Multinational Enterprises. For Xinjiang-origin goods, importers who wish to receive services and support from the Trade Commissioner Service of Global Affairs Canada must sign an integrity declaration. The new customs controls could well lead to disputes with the CBSA and litigation at the Canadian International Trade Tribunal.

Although the Canadian measures are still new, similar measures in the United States have been in force since 2015. As of now, there are 53 active Withhold Release Orders in force in the United States relating to forced labour.[13] Some of these Withhold Release Orders are far-reaching. For example, one applies to "All… products produced in whole or in part with Turkmenistan cotton". As the Canadian practices develop, they may track developments south of the border.

Businesses should seek experienced legal assistance to make sure they stay on top of new and developing mandatory disclosure obligations.

3. Choose appropriate frameworks to measure and voluntarily report ESG

Strong ESG performance is valued by many shareholders and consumers, and can be a way to differentiate your brand. [14]

There are good reasons to consider voluntary ESG disclosures beyond what may be required by regulation. Companies should routinely audit and revise their ESG frameworks to ensure that they are up to date with their operations and ever-evolving industry best practices.

To help mitigate the risk of voluntary ESG disclosures, a company should carefully consider the framework it uses to measure and report ESG factors. Following industry best practices in ESG disclosure may support a company's claims that it acted with due diligence or met the appropriate standard of care in making ESG statements.

Businesses should be familiar with and consider adopting respected ESG disclosure standards and frameworks. The TCFD recommendations, Carbon Disclosure Project, and the Climate Disclosure Standards Board provide various frameworks for companies to report environmental and climate change-related information.[15] The Global Reporting Initiative provides standards to measure social and governance issues, in addition to environmental factors. The UNGPs, and the OECD Guidelines for Multinational Enterprises, provide internationally-recognized due diligence frameworks for human rights and social issues. The IFRS International Sustainability Standards Board, Value Reporting Foundation, and UN Sustainable Development Goals are other sources of respected ESG framework standards.[16]

With growing interest in ESG reporting, we can expect best practices to evolve, with possible convergence towards more unified global standards. In September 2020, five established framework and standard-setting institutions committed to working towards a comprehensive corporate reporting system that could complement financial generally accepted accounting principles. In June 2021, the Internal Integrated Reporting Council and the Sustainability Accounting Standards Board merged to form the Value Reporting Foundation, which now oversees the development of integrated reporting frameworks and industry-specific ESG standards and metrics. By June 2022, the Climate Disclosure Standards Board and the Value Reporting Foundation will be consolidating into the IFRS International Sustainability Standards Board.

A business should first consider its audience and then determine the appropriate disclosure framework for that audience. For example, if investors are the intended audience for ESG disclosure, a business may wish to choose a framework that is oriented towards financial materiality and risk, such as the SASB Standards published by the Value Reporting Foundation. On the other hand, if ESG disclosure is intended for stakeholders beyond investors, broader standards such as the Global Reporting Initiative or the UN Sustainable Development Goals may be apt. In selecting an appropriate disclosure framework, businesses should identify the ESG factors that present the most significant risks and opportunities to the issuer over the short, medium, and long term. This will involve consideration of the company's operations, supply chain, and broader industry trends.

4. Ensure the accuracy of ESG statements

Globally there has been increased regulatory action and litigation related to false or misleading ESG claims. In recent years, **regulators in the United States and Canada have been actively pursuing companies for alleged misstatements and deceptive claims.**

For example, the Attorney General of New York brought a lawsuit against ExxonMobil, alleging that Exxon Mobil was publishing a misleading proxy cost of carbon. The lawsuit was dismissed, but a similar case brought by the Massachusetts Attorney General and shareholders continues to proceed.[17] In California, then-Attorney General Kamala Harris brought "greenwashing" lawsuits against companies for alleged misrepresentations about products being recyclable. Private parties in the United States and internationally are now filing greenwashing lawsuits of their own against companies.[18] Canadian businesses would be well advised to review their ESG disclosures with these legal trends in mind.

Under Canadian securities legislation, issuers that make misrepresentations may be subject to legislative provisions regarding forward-looking information and civil liability for secondary market disclosure. The CSA, including the Ontario Securities Commission and British Columbia Securities Commission, recently conducted desk reviews or "sweeps" of ESG practices and claims of select investment fund managers, portfolio managers, and exempt market dealers identified as participants in ESG investing. This follows a similar review by the United States Securities and Exchange Commission.

Under the *Canadian Competition Act*, R.S.C. 1985, c. C-34, and provincial consumer protection laws, businesses can face regulatory action and civil liability for false, misleading, or deceptive ESG claims. The Competition Bureau has been active in investigating and imposing fines for false or misleading environmental claims. The Competition Bureau recently settled with Keurig respecting false or misleading claims about the recyclability of single-use Keurig K-Cup pods. As part of the settlement, Keurig agreed to pay a $3 million penalty, donate $800,000 to a charitable organization focused on environmental causes, pay $85,000 for the Bureau's costs of investigation, change its claims and packaging, publish corrective notices, and enhance its corporate compliance program.

As another example, in November 2021, Greenpeace Canada filed a complaint with the Competition Bureau concerning Shell Canada's Drive Carbon Neutral program, arguing that the claims made by Shell under the "program" constituted "greenwashing". The Competition Bureau has yet to make a determination on Greenpeace Canada's complaint.

In addition to regulatory action, companies that make ESG claims may find themselves subject to private litigation, including proposed class proceedings. For example, carmakers have been subject to class proceedings in Canada and other jurisdictions arising from environmental statements about emissions from diesel vehicle engines. These class proceedings against carmakers have generally included allegations of breaches of the *Competition Act*, consumer protection legislation, negligence, and unjust enrichment. Public companies in the United States have also faced litigation from investors alleging misrepresentations in ESG-related statements. It is highly likely that Canada will soon see its own class actions based on alleged prospectus misrepresentation or secondary market representation claims.

In making public statements and prospectus disclosures about ESG factors companies must ensure that these statements do not contain misrepresentations or contradict other disclosures. Where possible, ESG disclosures should be relevant to the specific entity, measurable, and grounded in verifiable data, while adding any necessary caveats. To reduce the risk of misstatements or inconsistent statements, boards and management should have a robust process for reviewing and approving ESG disclosure prior to its public release. A robust legal review is also advisable.

5. Be ready to defend your ESG-related performance, at home and abroad

In addition to litigation and regulatory action based on allegedly false or misleading ESG statements, **there is an increasing international trend towards litigation targeting companies' ESG-related performance**, or perceived lack thereof.

Canadian companies have faced lawsuits alleging negligence or misconduct by subsidiaries and suppliers in foreign jurisdictions. For the most part, these lawsuits have been unsuccessful to date. For example, in *Das v. George Weston Limited*, 2018 ONCA 1053, the Ontario Court of Appeal upheld the rejection of a proposed class action brought in Ontario related to the collapse of a building in Bangladesh. One of the businesses operating in the building was a sub-supplier that was producing garments for a Canadian clothing retailer at the time. In rejecting the proposed class action, Justice Perell of the Ontario Superior Court of Justice stated, "…[T]he imposition of liability is unfair given that the Defendants are not responsible for the vulnerability of the plaintiffs, did not create the dangerous workplace, had no control over the circumstances that were dangerous, and had no control over the employers or employees or other occupants of Rana Plaza".[19]

Claims relating to alleged human rights abuses abroad have seen some limited success, at least at a preliminary stage. For example, in *Garcia*, the British Columbia Court of Appeal overturned the stay of a claim against Tahoe Resources in British Columbia based on the alleged actions of private security personnel employed by a mine in Guatemala owned by one of its subsidiaries. Similarly, in the earlier case of *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, the Ontario Superior Court of Justice refused to dismiss a claim based on similar facts. In *Nevsun*, three Eritrean workers brought a claim against Nevsun Resources in British Columbia alleging they were conscripted into forced labour at a mine owned and operated by an Eritrean corporation of which Nevsun was 60 per cent owner. Although, as in Garcia, the case settled prior to any decision on its merits, the Supreme Court of Canada in *Nevsun* confirmed that parent companies can be held liable for breaches of customary international law for actions of their subsidiaries abroad.

In other jurisdictions, companies have been subject to litigation endeavouring to hold them liable for the climate-change impacts of their greenhouse gas emissions. In the United States, these efforts have been unsuccessful to date, although that has not stopped plaintiffs from trying to bring new and creative claims.[20] Very recently, in *Milieudefensie*, the Hague District Court ordered Royal Dutch Shell PLC (Shell) to reduce CO2 emissions of the Shell group by 45 per cent in 2030, compared to 2019 levels.[21] This case is also noteworthy for its application of the UNGPs, which it referred to as "an authoritative and internationally endorsed 'soft law' instrument", and found that they were "suitable as a guideline in the interpretation of the unwritten standard of care".[22] Given the status of the UNGPs as a benchmark for human rights and ESG due diligence, it is possible that similar reasoning could be adopted by a common law court in formulating the standard of care in negligence.

Businesses in the garment, mining, and oil and gas sectors should also be aware of the possibility of a complaint being made to the Canadian Ombudsperson for Responsible Enterprise (CORE). The CORE has a mandate to review human rights complaints about Canadian companies operating abroad, make findings about their conduct, and make recommendations to the Minister for International Trade and the company concerned. This can result in the loss of trade support services, as well as reputational losses where reports are published.

Finally, directors and officers in corporations incorporated under the *CBCA* may face increased pressure from investors and other stakeholders to consider ESG factors in exercising their powers and discharging their duties on behalf of the corporation. In 2019, Parliament enacted s. 122(1.1) of the CBCA to permit directors and officers to consider the interests of various stakeholders, the environment, and the long-term interests of the corporation when acting with a view to the best interests of the corporation. These amendments codify some of the principles relating to directors' duties set out in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. While the factors in s. 122(1.1) may not be mandatory, directors and officers may need to consider taking these factors into account when exercising their fiduciary duties or risk allegations they have breached those duties.

Subsection 122(1.1) of the *CBCA* may represent a stepping stone towards a future statutory duty to consider ESG-related factors, as has occurred for directors in the United Kingdom.[23] In Canada, some companies may already voluntarily choose to mandate consideration of ESG factors in their operations. Companies that choose to achieve “B Corporation” certification are required to amend their articles to include a requirement that directors consider factors that mirror the ones listed in s. 122(1.1) of the *CBCA*. Similarly, benefit companies under the *British Columbia Business Corporations Act*, S.B.C. 2002, c. 57, must include in their articles a commitment to conduct their business in a “responsible and sustainable manner”, which is a defined term under the Act. Although “B Corporation” and “benefit company” status are voluntary, they may raise investor expectations for other companies.

This trend towards increasing attempts to hold companies liable for their ESG-related performance is likely to continue. Canadian businesses should be prepared to defend their environmental, social, and governance actions, at home and abroad.

6. Don’t let your ESG Disclosure be used against you

Even where ESG-related statements are accurate, they may be used as evidence in litigation about whether a company has fulfilled its legal obligations.

For example, in *Milieudefensie*, discussed above, the Hague District Court referred to Shell’s environmental commitments and public statements as evidence that Shell had not taken sufficient steps to meet its unwritten standard of care under the Dutch Civil Code. In *Das v. George Weston Limited*, also discussed above, the plaintiffs relied on the company’s voluntarily-adopted Corporate Social Responsibility Standards, incorporated into its Supplier Code of Conduct, to argue that the company should be held responsible for its suppliers’ actions in Bangladesh. Although unsuccessful, it serves as a warning that a company’s ESG promises and commitments may be scrutinized by courts when determining whether the company should be held legally responsible for alleged misconduct.

Recent case law in Canada and the United Kingdom suggests that public ESG statements may provide a basis for plaintiffs to bypass the “corporate veil” and sue a parent company directly for the actions of its subsidiaries. If a parent company is sued for the actions of subsidiaries abroad, it should be familiar with the substantive laws of the foreign jurisdiction, which may apply in tort claims brought in Canada.

In *Choc v. Hudbay Minerals Inc.*, the plaintiffs alleged that security personnel working for a Canadian parent company’s subsidiaries committed human rights abuses in Guatemala. The parent company had made public statements about its adoption of the *Voluntary Principles on Security and Human Rights* and implementation of these principles for its personnel and contractors in Guatemala. The Ontario Superior Court of Justice considered these public statements, among other factors, to indicate a relationship of proximity between the defendants and the plaintiffs. The case has not been decided on the merits, but the Court allowed the plaintiffs’ claims in negligence to proceed.

Two recent decisions by the United Kingdom Supreme Court confirm the trend towards ESG statements as providing some basis for liability of parent companies. In *Vedanta Resources PLC & Anor v Lungowe & Ors*, [2019] UKSC 20 (*Vedanta*), and *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2021] UKSC 3 (*Okpabi*), the plaintiffs sued parent companies based in the United Kingdom for the actions of subsidiaries in Zambia and Nigeria, respectively. To connect the defendants to alleged harms abroad, the plaintiffs in each case pointed to published statements and policies of the parent companies.

In both *Vedanta* and *Okpabi*, the United Kingdom Supreme Court allowed the plaintiffs’ claims to proceed to trial. The Court held that the liability of parent companies to third parties affected by subsidiaries in foreign jurisdictions is to be determined by the ordinary, general principles of tort. A parent company may owe a duty of care to third parties where, in published materials, it holds itself out as exercising a particular degree of supervision and control of its subsidiaries, even if it does not in fact do so. Neither case has been decided on its merits, but the Ontario Court of Appeal has already cited *Vendanta* and *Okpabi* in considering potential liability in tort for parent companies.[24]

In light of plaintiffs using companies' ESG statements and commitments in court in an attempt to base liability for corporate actions or inaction, **Canadian businesses should be particularly careful to scrutinize their ESG disclosure to ensure it aligns with their operations**. Similar to the auditing of due diligence programs, an early legal review of ESG disclosure may be beneficial.

Conclusion

Businesses need to think critically about the accuracy and structure of their ESG claims to protect against possible legal challenges and regulatory action. Businesses should clearly define the scope of their commitments to ESG, while ensuring they meet legal obligations and market expectations for disclosure. Companies should also review their insurance policies to determine whether ESG-related claims are covered.

Heightened awareness of the importance of ESG brings many benefits, but businesses will need to navigate new dimensions of legal liability and litigation risk. Experienced legal counsel can help businesses to do this with confidence.

To learn more about how to structure and define your businesses ESG claims, or for additional questions about how ESG impacts value and investor decisions, please reach out to any of the authors or key contacts listed below.

Footnotes

[1] See discussion of the Competition Bureau of Canada's (**Competition Bureau**) recent settlement with Keurig Canada Inc. (**Keurig**), discussed below.

[2] See *Garcia v. Tahoe Resources Inc., 2017 BCCA 39* (Garcia) and *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (Nevsun). Both Garcia and Nevsun were settled before any decisions on their merits.

[3] *Milieudefensie* et al. v. Royal Dutch Shell PLC ECLI:NL:RBDHA:2021:5339 (*Milieudefensie*).

[4] Rusty O'Kelley and Andrew Droste, *Harvard Law School Forum on Corporate Governance*, "Why ExxonMobil's Proxy Contest Loss is a Wakeup Call for all Boards" (July 5, 2021).

[5] See, e.g., National Instrument 51-102 – Continuous Disclosure Obligations; *Securities Act*, R.S.B.C. 1996, c. 418, s. 85; *Securities Act*, R.S.A. 2000, c. S-4, s. 146; and *Securities Act,* R.S.O.1990, c. S.5, s. 75.

[6] CSA Staff Notice 51-333: Environmental Reporting Guidance (October 27, 2010) and CSA Staff Notice 51-358: Reporting of Climate Change-related Risks (August 1, 2019).

[7] IOSCO, *Report on Sustainability-related Issuer Disclosures Final Report* (June 28, 2021).

[8] CBCA, s. 172.1 and *Canada Business Corporations Regulations*, 2001, S.O.R./2001-512, s. 72.2.

[9] *Budget Implementation Act*, 2019, No. 1, s. 143(3).

[10] Autorité des marchés financiers, Notice relating to modern slavery disclosure requirements (September 4, 2018).

[11] *Modern Slavery Act* 2018 (Cth).

[12] *Modern Slavery Act*, 2015 c. 30.

[13] United States Customs and Border Protection, "Withhold Release Orders and Findings List".

[14] See discussion in ESG best practices and lessons learned from the 2021 legal summit.

[15] To be combined with the Value Reporting Foundation into the IRFS' International Sustainability Standards Board by June 2022.

[16] To be combined with the Climate Disclosure Standards Board into the IRFS' International Sustainability Standards Board by June 2022.

[17] See also Attorney General's Office Lawsuit Against ExxonMobil.

[18] One example includes Kathleen Smith v. Keurig Green Mountain, Inc. U.S. District Court Northern District of California No. 4:18-cv-06690-HSG. The parties in this case recently reached an agreement in principle to resolve all claims raised by the plaintiff and class.

[19] 2017 ONSC 4129, at para. 457. Borden Ladner Gervais LLP was counsel to George Weston Limited, Loblaws Companies Limited, Loblaws Inc., and Joe Fresh Apparel Canada Inc. before the Ontario Superior Court of Justice, the Ontario Court of Appeal, and in responding to an application for leave to appeal to the Supreme Court of Canada, which was denied. While Justice Perell held that the claim could not succeed under the law of either Bangladesh or Ontario, the Ontario Court of Appeal held that the law of

Bangladesh applied and that the claim could not succeed under that law. The Court did not have to decide whether the claim would have been viable under the law of Ontario.

[20] *Village of Kivalina v. Exxon Mobil Corp, 696 F.3d 849,* (9th Cir. 2012). See also in New Zealand, *Smith v. Fonterra Co-Operative Group Limited*, [2020] NZHC 419.

[21] In a public statement on July 20, 2021, Shell stated that it plans to appeal the Hague District Court's decision.

[22] *Milieudefensie*, at para. 4.4.11.

[23] See Companies Act 2006, s. 172.

[24] *Avedian v. Enbridge Gas Distribution Inc. (Enbridge Gas Distribution)*, 2021 ONCA 361. In *Das*, issued before the United Kingdom Supreme Court's decisions, the Ontario Court of Appeal cited the lower court decisions in *Vendanta* and *Okpabi*.

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