ESG litigation and regulatory risks: Managing claims and liabilities for Canadian business

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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 ESG litigation and regulatory risk for Canadian companies making ESG claims. We also highlight some relevant cases as examples.

What you need to know

- Strong ESG performance is valued by many shareholders and consumers, and can be a way to differentiate your brand, although implementing ESG measures comes with risk.
- 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 their legal obligations with respect to disclosure of ESG information, as failure to comply can result in enforcement and other sanctions. However, adopting ESG measures can also lead to legal challenges, including by disgruntled shareholders or by groups who feel that the company has not lived up to its stated ESG policies.
- Companies should routinely audit, revise and update their ESG frameworks and disclosure to confirm that they reflect their current operations and ever-evolving industry best practices. Companies should 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.
- ESG disclosures should be entity-specific, measurable, and grounded in verifiable data.

ESG overview

Although akin 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, sustainability, forced labour and child labour (commonly referred to as "modern slavery"), and 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. Companies should proceed with caution: there has been a more recent trend of ESG backlash, and disgruntled stakeholders may challenge the company if they feel that ESG measures have gone too far.

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. Trends in Canada, and globally, include attempts to hold companies accountable for conduct by suppliers or subsidiaries in foreign jurisdictions[2] and to subject companies to litigation for the contribution of their greenhouse gas emissions to climate change.[3] However, on the flip side, sometimes companies engaging in active ESG measures risk challenges to their ESG policies for allegedly going too far.

Even if a company can successfully defend a claim on the merits, being forced to defend an ESG record or ESG policies 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 seek experienced legal assistance to review how they are addressing ESG issues while guarding against overstating their commitments and actions. Businesses should also consult with management, counsel, and relevant subject matter experts to help protect against claims that the ESG policies were not adopted in the business's best interests.

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 other corporate challenges, causing harm to a company's business.

A 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.

Although the impacts of Engine No. 1's activism within ExxonMobil are the subject of debate,[5] Engine No. 1's success in changing the board of 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 Nov. 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. On June 28, 2023, CEOs of eleven Canadian pension plan investment managers, representing approximately $2 trillion in assets under management, issued a joint statement calling on companies to embrace the new International Sustainability Standards Board (ISSB) disclosure framework, which we discuss further below.

Two leading proxy advisory firms, Glass Lewis and Institutional Shareholders Services (ISS) have publicly stated they may recommend voting against certain public company board members if a company does not adequately address or disclose ESG matters. As outlined in their 2024 Benchmark Policy guidelines, Glass Lewis will "generally recommend" voting against the governance chair of a company in the S&P/TSX

Composite index that does not to their satisfaction provide clear disclosure concerning board-level oversight afforded to environmental and/or social issues. Additionally, Glass Lewis strongly encourages companies whose greenhouse gas emissions are a financial material risk to provide thorough disclosure consistent with the Task Force on Climate-related Financial Disclosures (TCFD) guidelines. If the board member responsible for monitoring climate-related issues fails to ensure compliance with disclosure, Glass Lewis recommends voting against that member. 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.

Companies may face hurdles when trying to publicly list their securities or execute on ESG-related strategy. While the following are not Canadian examples, global trends often signal what is to come for Canadian businesses. In 2022, Ithaca Energy plc, an oil and gas producer, sought to be listed on the London Stock Exchange. During this process, it successfully submitted a prospectus for approval by the Financial Conduct Authority. ClientEarth, an environmental law charity, applied for permission to apply for judicial review of the Authority's approval of the prospectus on the basis that the prospectus failed to meet climate change risk disclosure standards; however, ClientEarth's claim was unsuccessful.[6]

In 2023, ClientEarth, as a minority shareholder in Shell, sought to bring a derivative action against Shell's board of directors, alleging they breached their duties under the U.K.'s *Companies Act 2006* by failing to adopt and implement an energy transition strategy that aligns with the Paris Agreement. ClientEarth successfully established a *prima facie* case that "Shell faces material and foreseeable risks as a result of climate change which have or could have a material effect on it". Nonetheless, ClientEarth's action was ultimately unsuccessful, as Shell's directors had a climate change plan in place and ClientEarth's real interest was "not in how best to promote the success of Shell for the benefit of its members as a whole".[7]

Even if ultimately unsuccessful, challenges like these can be costly, create delay, and cause reputational harm. All this suggests it may be prudent for companies to proactively undertake ESG measures. **However, any action on ESG measures must be informed and in the best interests of the company**.

Recently, a shareholder derivative action was launched in Washington state challenging Starbucks' diversity, equity and inclusion (DEI) initiatives. The action was launched by a conservative advocacy group, which owns 56 shares of Starbucks stock and which is purportedly "engaged in a nationwide campaign to litigate against so-called 'woke' corporate practices concerning issues of [DEI]". The advocacy group demanded that Starbucks retract its DEI initiatives and subsequently filed a shareholder derivative action claiming for declaratory and injunctive relief for violations of federal and state law, including breach of fiduciary duty.

The action was ultimately dismissed as the advocacy group did not fairly and adequately represent the interests of Starbucks or its shareholders; instead, the action was filed to advance the group's own political and public policy agendas. The court also considered that Starbucks had engaged in careful deliberation before determining it should not retract the challenged initiatives, and thus the advocacy group failed to rebut the presumption that the Board had acted on an informed basis, in good faith, and in an honest belief that rejecting the group's demand to retract the DEI initiatives was in the best interests of Starbucks.[8]

Relatedly, a conservative-funded organization, Americans for Fair Treatment, filed an action in New York alleging that three pension funds breached their fiduciary duty when they decided to divest from fossil fuel holdings. The complaint alleges that the decision is "ineffectual" to address climate change and was made "without regard for whether [the sold-off] assets would produce a superior return" for the pension plans. The pension funds have applied to dismiss the claims.[9]

These cases demonstrate that companies must engage in a sound process before adopting ESG initiatives. If ESG initiatives go too far and are no longer defensible as being in the best interests of the company, the initiatives may be open to challenge by investors or other groups opposed to such policies.

2. Understand applicable mandatory reporting requirements

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.

Supply Chain Reporting Requirements

In Canada, there are a number of mandatory reporting obligations in place with respect to businesses' supply chains. Some of the most relevant reporting obligations that businesses in Canada should be aware of include:

- ***Modern Slavery Act* Reporting:** Canada has adopted a mandatory reporting regime for businesses with a Canadian nexus that produce, sell, distribute or import goods. The *Fighting Against Forced Labour* and *Child Labour in Supply Chains Act*, *2023* (*Modern Slavery Act*) came into force on January 1, 2024. The Modern Slavery Act applies to all public companies as well as private companies that meet certain size thresholds, provided that they deal in goods in some way. This includes producing, selling or distributing goods in Canada or elsewhere, or importing foreign goods into Canada. The *Modern Slavery Act* mandates that those entities 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, among other things. The *Modern Slavery Act* is similar, but not identical, to other mandatory reporting regimes in place in Australia[10] and the U.K..[11]
- **Federal Policy on the Ethical Procurement of Apparel:** Pursuant to this policy, federal suppliers must self-certify that they and their direct Canadian and foreign suppliers comply with human and labour rights standards. This includes ensuring their supply chains are free from child labour, forced labour, discrimination and abuse, as well as fair wages and safe working conditions. Moreover, a revised Code of Conduct by Public Services and Procurement Canada requires federal suppliers not to be engaged in any form of human and labour rights abuses.[12]
- ***Extractive Sector Transparency Measures Act:*** Companies in the oil, gas, and mining industries that are listed on a Canadian stock exchange or that have a nexus to Canada and meet certain financial thresholds must report annually on payments made to governments in Canada and abroad, pursuant to the *Extractive Sector Transparency Measures Act*.[13]
- **CUSMA:** Businesses involved in import and export must also be aware of the mandatory restrictions regarding forced labour and importation in the Canada-United States-Mexico Agreement. Under CUSMA, the importation of goods produced in whole or in part by forced labour is prohibited. In Canada, this is implemented as a prohibitory tariff under the *Customs Tariff*, 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 (OECD Guidelines). For Xinjiang-origin goods, importers who wish to receive services and support from the Trade Commissioner Service of Global Affairs Canada (TCS) must also 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 relatively new, similar measures in the United States have been in force since 2015. As of June 21, 2024, there are 41 active or partially active Withhold Release Orders in force in the United States relating to forced labour.[14] 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.

As well, increasingly, failure to abide by reporting requirements may result in a withholding of government services. Canadian companies should be aware of Canada's five-year responsible business conduct strategy (2022-2027). According to that strategy, Canada intends (subject to funding availability) to establish and implement a digital responsible business conduct attestation as a prerequisite for access to TCS services. The attestation will require companies to acknowledge the importance of responsible business conduct.[15] In addition, a Canadian company seeking advocacy support abroad will need to attest that they operate in accordance with the UNGPs and the OECD Guidelines; the company's responsible business conduct practices may be considered before support is provided; and the company might be required to sign an Integrity Declaration.[16] Along similar lines, Canadian firms must provide a declaration respecting their supply chain lines in order to receive services from the TCS and from Export Development Canada.[17]

Corporate Reporting Requirements

As well, under Canadian securities legislation and instruments, reporting issuers must disclose material information in their continuous disclosure documents and in other contexts.[18] ESG factors may already be material to an issuer, and may also be subject to specific existing or forthcoming disclosure obligations.

Provincial and territorial securities regulators in Canada have also adopted national instruments and policies that set out specific disclosure requirements related to Canadian public company corporate governance practices.[19]

In Québec, the Autorité des marchés financiers published a notice highlighting how existing disclosure obligations on reporting issuers may be applied to disclose issues of forced labour or child labour.[20]

In the environmental sphere, the Canadian Securities Administrators (CSA) has released guidance on how issuers can determine what environmental and climate change information is material.[21] In late 2021, the CSA published proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (Proposed Instrument) and a companion policy for comment. The Proposed Instrument put forth proposed disclosure requirements for reporting issuers in line with the Task Force on Climate-related Financial Disclosures (TCFD) recommendations, with some modifications to address Canadian regulatory concerns. The Proposed Instrument was 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.[22] The Proposed Instrument was put on pause in 2023 as the ISSB, an independent, private-sector body developed by the International Financial Reporting Standards (IFRS) Foundation, published its inaugural IFRS Sustainability Disclosure Standards (the ISSB Standards) aimed at providing a baseline for sustainability-related disclosure for global capital markets. The CSA indicated it will conduct further consultations to adopt disclosure standards based on ISSB standards, and it will seek public comments when it publishes a revised rule on climate-related disclosure. However, as at the time of writing, the CSA has not finalized or revised the Proposed Instrument.

Similar developments are occurring in the U.S. In March 2024 the Securities and Exchange Commission adopted rules to enhance and standardize climate-related disclosures. The rules require companies to include certain climate-related disclosures in registration statements and periodic reports. However, the rules are subject to various court challenges, leading the SEC to announce in April 2024 that it was staying implementation of the rules, pending the outcome of these challenges. BLG has published a article detailing these developments.

Of relevance to the social and governance factors of ESG, public companies existing under the *Canada Business Corporations Act* (*CBCA*) must provide to shareholders information respecting diversity among the directors and members of senior management.[23] Forthcoming amendments to the *CBCA* will require disclosure relating to senior management compensation and the well-being of employees, retirees, and pensioners.[24]

ESG-related disclosure continues to advance rapidly in the investment fund industry. In 2024, the CSA published Staff Notice 81-334 (Revised), updating an earlier version published in 2022; the Staff Notice sets out the CSA's suggested best practices to enhance ESG-related fund disclosure and sales communications.

BLG and AUM Law provided a more detailed analysis of the update in two prior articles.[25] 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. In June 2022, the CFA Institute released its accompanying Global ESG Disclosure Standards for Investment Products Handbook, which explains the Standards and provides interpretative guidance. 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.

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.[26]

There are good reasons to consider voluntary ESG disclosures beyond what may be required by regulation. However, as discussed above, there are also some risks, including from shareholders and consumers opposed to the adoption of voluntary ESG measures. Companies should routinely audit and revise their ESG frameworks to confirm 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. It may also support a company's claims that any ESG statements or initiatives were undertaken in the best interests of the company.

There are a variety of respected ESG disclosure standards and frameworks that businesses might consider adopting. For example, the Global Reporting Initiative provides standards to measure social and governance issues, in addition to environmental factors. The UNGPs, the OECD Guidelines and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy provide internationally-recognized due diligence frameworks for human rights and social issues. The UN Sustainable Development Goals is another source for respected ESG framework standards.

However, businesses should be aware that a number of ESG standards have converged into the ISSB, which is intended to provide a global standard for sustainability disclosure. In June 2023, the ISSB issued their voluntary standards for sustainability-related risks and opportunities and climate-related disclosures, IFRS S1 and IFRS S2. They are consistent with IFRS accounting standards, and sustainability disclosures are meant to be connected with information in financial statements. The new standards incorporate the TCFD recommendations, and consolidate other disclosure frameworks, allowing companies to easily comply with both. A comparison of IFRS S2 and TCFD recommendations was released in July 2023.

The ISSB hopes these standards will be adopted across many jurisdictions with the help of a Transition Implementation Group, which will support companies that apply the standards.[27] It is likely that these standards will be adopted, in some form, in Canada: the Government of Canada has expressed support for the development and adoption of the standards and, in June 2023, Financial Reporting & Assurance Standards Canada finalized the membership of the Canadian Sustainability Standards Board (CSSB), which will partner with the ISSB to support uptake of the ISSB standards. Between March 13, 2024 and June 10, 2024, the CSSB invited consultation on its proposed Canadian Sustainability Disclosure Standards, which align with the ISSB standards. As well, as discussed above, the CSA has indicated it will conduct further consultations to adopt disclosure standards based on the ISSB standards, with modifications for the Canadian market. BLG provided a more detailed analysis of these new standards in a previous article.

In selecting a standard, a business should first consider its audience and then determine the appropriate disclosure framework for that audience. 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. However, businesses should be mindful of the trend towards adopting the ISSB standards as a unified, global standard when making their selection.

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, under provincial environmental legislation relating to greenhouse gas emissions reduction, Alberta recently filed charges against a carbon offset firm for providing false information related to their carbon offsets and for acting as a third-party assurance provider without the required qualifications. This marks the first time a Canadian province has charged a third party verifier or assurer, and signifies the importance of carefully verifying carbon offsets and using a qualified verifier. In total, Alberta Environment and Protected Areas filed 25 charges against Amberg Corp and Olga Kiiker for not following environmental legislation. Olga Kiiker pleaded guilty to one of the charges, and was sentenced to pay a $10,000 fine, prohibited from employment in that area for three years, and is required to prepare an article for publication in 2024 as part of a creative sentencing order.

Under Canadian securities legislation, issuers that make misrepresentations may be subject to civil liability for secondary market disclosure. For example, in 2021, the CSA, including the Ontario Securities Commission and British Columbia Securities Commission, 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. Following the ESG sweeps and the original publication of CSA Staff Notice 81-334, discussed above, BLG published a survey of best practices.

Under the Canadian *Competition Act*[28] 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. In 2022, the Competition Bureau 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 terminated its examination of the Drive Carbon Neutral representations after Shell removed them from its Canadian website and app. Greenpeace Canada made a similar complaint against Pathways Alliance, a syndicate of Canada's largest oil sands producers, including Canadian Natural Resources Limited, Cenovus Energy, ConocoPhillips Canada, Imperial, Meg Energy, and Suncor Energy. Greenpeace Canada took aim at Pathways Alliance's "Let's clear the air" marketing campaigns, alleging that the group's plan to reach net-zero greenhouse gas emissions by 2050 is misleading in that it does not account for the emissions produced when its fossil fuels are burned. In May 2023, the Competition Bureau announced that it would launch an investigation into the marketing practices of the Pathways Alliance.

The Competition Bureau also launched an inquiry against the Canadian Gas Association following six complaints alleging it made false and misleading representation that natural gas is "clean" and "affordable".

A similar inquiry against RBC has been launched regarding its messaging on climate action. The complaints allege that RBC has marketed itself as being aligned with the climate goals of the Paris Agreement while continuing to finance the fossil fuel industry. More recently, a complaint was filed with the Competition Bureau against Lululemon, alleging that Lululemon's "Be Planet" campaign, which highlights the use of recycled fabrics and pledges to reduce GHG emissions, is greenwashing. The Competition Bureau has yet to make a determination on these investigations and complaints.

In November of 2022, the federal government launched a review of the Canadian *Competition Act*.[29] On November 30, 2023, Bill C-59 was introduced in Parliament. The Bill proposed many amendments to the *Competition Act*, including increases to monetary penalties and the expansion of private actions. The Bill also introduced an explicit prohibition against greenwashing statements.[30] While the *Competition Act* already designated public misrepresentations as reviewable conduct, the amendments make explicit that representations about a product's or business activity's "benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change that [are] not based on an adequate and proper" test or substantiation are reviewable conduct. The Bill received royal assent on June 20, 2024.[31] The Bill's passing prompted Pathways Alliance to remove its website, social media and other communications, citing uncertainty in how Bill C-59 will be interpreted and applied.

In a recent development, the *Modern Slavery Act*, discussed above, includes liability for making a false or misleading statement in a report or other statement to the Minister in relation to the Act. As such, reporting entities and their directors and officers could face prosecution where they misrepresent or materially overstate the approach to supply chain due diligence.

The United States also provides a number of examples of regulatory action relating to false or misleading ESG claims. For example, the Attorney General of New York brought a lawsuit against ExxonMobil, alleging that ExxonMobil 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.[32] 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.[33]

Recently, the Supreme Court of the State of Hawaii permitted tort litigation by Honolulu government entities against oil and gas producers to proceed. The government entities allege the oil and gas companies "engaged in a deceptive promotion campaign and misled the public about the dangers of using their oil and gas products":[34] in other words, they allegedly engaged in a version of greenwashing where they used "'sophisticated disinformation campaigns to cast doubt on the science, causes, and effects of global warming'".

In 2023, the U.S. Securities and Exchange Commission brought several enforcement actions to address ESG issues. This included charges against a Deutsche Bank subsidiary on the grounds that it had made materially misleading statements about its ESG policies: while the company purported to be a "leader" in ESG that had specific policies in place to ensure it considered ESG when making its investments, it allegedly failed to actually adopt and implement policies and procedures that would ensure these public statements were accurate. The company paid a $19 million penalty to settle the charges.

Actions for false or misleading claims may also be launched in response to inadequate ESG programs and initiatives aimed at the "S" (social) in ESG. Companies that inadequately address the social pillar of ESG run the risk of organizing greenwashing or social washing initiatives which may give rise to unintended legal and commercial consequences. For example, Oscar Wylee, an Australian eyewear chain, was fined $3.5 million for falsely advertising that it would donate a pair of glasses to charity for every pair sold. In court, the company admitted to only donating 3,181 frames without lenses to charity even though it had sold 328,101 pairs of glasses. Oscar Wylee's failed follow through on this social initiative resulted in legal repercussions, financial loss, and a tarnished reputation.

Canadian businesses would be well advised to review their ESG disclosures with these legal trends in mind.

In addition to regulatory action, companies that make ESG claims may find themselves subject to private litigation, including proposed class proceedings, and even claims from competitors.

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. For example, a class action claiming $1.5 billion in damages was certified against Ford Motor Company in relation to the EnerGuide labels affixed to Ford's 2013 and 2014 vehicles, though the claim was summarily dismissed in mid-2022.[35] Sometimes, companies face class actions in addition to competition complaints: for example, Keurig, despite its settlement with the Competition Bureau, is facing class actions in British Columbia, Ontario, and the Federal Court for alleged misleading or deceptive marketing practices relating to the K-Cup coffee pods.[36] Recently, in British Columbia an environmental group launched a lawsuit against FortisBC, accusing it of greenwashing its natural gas supply by exaggerating how much of its gas comes from renewable sources.

As well, in a landmark decision, a civil court in Italy granted a company an interim injunction against its competitor, ordering it to stop making "vague, false, and non-verifiable green claims".[37] Alcantara, a manufacturer of a microfiber product used in the automotive sector, sued Miko, one of its main Italian competitors that also markets a microfiber product, for making misleading "green claims" about its products. Miko claimed its products were "100 per cent recyclable", "100 per cent recyclable at the end of its lifecycle", "eco-friendly microfiber", "the first and only microfiber that guarantees environmental sustainability throughout the productive cycle", and more. The Court ruled that these statements were vague, generic, false, and non-verifiable, and needed to be immediately removed from all promotional materials. The Court also required Miko to publish the Court's decision on its website for 60 days. The orders were later appealed and overturned in March 2022 on the basis that Alcantara was unable to provide any evidence that Miko's environmental claims had resulted in a risk of loss of customers for Alcantara. Nonetheless, the case demonstrates the possible legal, financial, and reputational repercussions a company can face from making greenwashing statements.

Along similar lines, the District Court of Amsterdam recently ruled in favour of the campaign group Fossielvrij, which brought a greenwashing case against the airline KLM. The court found that KLM had engaged in misleading advertising in 15 of its 19 environmental statements, including its claims that the airline was moving towards a "more sustainable" future. The court did not issue any remedies, however, in part because KLM had already retracted the advertisements.[38]

In the fashion industry, companies have faced greenwashing claims from consumers. For example, in *Lizama et al v. H&M Hennes & Mauritz LP*, customers who purchased a sweater from H&M's "conscious choice" collection alleged the product was not actually environmentally friendly, such that the collection's name was a misrepresentation. While the customers sought to bring a class action, the claim was dismissed in 2023, with the court finding the actual statements were not false or misleading as they were carefully crafted to not overstate the extent to which the products were in fact sustainable.[39] Similarly, Allbirds, a shoe company, successfully dismissed a proposed class action by customers alleging that the company's environmental claims were misleading, as the court found that Allbirds' website made it clear how its metrics were calculated.[40] In both cases the claims were dismissed as the companies used careful language that was found not to overstate or misrepresent.

Public companies in the United States have also faced litigation from investors alleging misrepresentations in ESG-related statements. For example, in Texas a securities fraud class action was launched against ExxonMobil alleging that ExxonMobil had misled investors about certain oil and gas operations and about the proxy costs of carbon. In August 2023, the motion to certify the action was granted in part, in relation to the claims about ExxonMobil's alleged failures to properly account for and disclose losses related to certain bitumen and dry gas operations in Canada.[41] It is highly likely that Canada will soon see its own class actions based on alleged prospectus misrepresentation or secondary market representation claims related to ESG matters.

In making public statements and prospectus disclosures about ESG factors companies must confirm 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 and disclaimers. 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*, the Court of Appeal for Ontario upheld the rejection of a proposed class action brought in Ontario related to the collapse of a building in Bangladesh[42]. 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".[43]

Claims relating to alleged human rights abuses abroad have seen some limited success, at least at a preliminary stage. For example, in *Garcia v. Tahoe Resources Inc.*, 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.[44] Similarly, in the earlier case of *Choc v. Hudbay Minerals Inc.*, the Ontario Superior Court of Justice refused to dismiss a claim based on similar facts.[45] In *Nevsun Resources Ltd. v. Araya*, 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.[46] 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.[47] Recently, in *Milieudefensie*, the Hague District Court ordered Royal Dutch Shell PLC (Shell) to reduce CO_2 emissions of the Shell group by 45 per cent in 2030, compared to 2019 levels.[48] Shell has appealed the decision, and the appeal was heard in April 2024; a decision in the appeal is expected later this year. The *Milieudefensie* case is also noteworthy for its application of the UNGPs: the case referred to the UNGPs 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".[49] 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.

Climate change litigation has also been brought against, and by, governments.

Most climate change litigation in Canada has been directed against the government.[50] The claims in *Environnement Jeunesse*, *La Rose* and *Misdzi Yikh* failed at an early stage (with the courts refusing to authorize the proceeding as a class action in the first case, and striking the claims in the latter two), though the Federal Court of Appeal in *La Rose* and *Misdzi Yikh* determined that the applicants should be granted leave to amend their s. 7 *Charter* claims. More recently an Ontario case – *Mathur v. His Majesty the King in Right of*

Ontario – was decided on its merits.[51] In that case, a group of young Ontarians challenged the Ontario government's GHG reduction targets on the basis that the targets are unconstitutional and violate Ontario youth and future generations ss. 7 and 15 *Charter* rights. While their claim was dismissed, an appeal of the decision was heard in January 2024. The Court of Appeal's decision is under reserve.

Climate change litigation against governments has enjoyed more success abroad. For example, on April 9, 2024, the Grand Chamber of the European Court of Human Rights found Switzerland in breach of the European Convention on Human Rights for its failure to implement sufficient measures to combat climate change. The Court found that by failing to reduce greenhouse gas emissions and comply with its positive obligations under the Convention to combat climate change, the Swiss Government had violated Article 8, the right to respect for private life, family life, the home and correspondence, and article 6§1, access to court.[52]

Similarly, in *Urgenda Foundation v. State of Netherlands*, an environmental organization and a group of 900 Dutch citizens successfully sued the Dutch government to require it to reduce GHG emissions. The Hague District Court ordered the government to limit GHG emissions to 25 per cent below 1990 levels by 2020, finding that its existing pledge to reduce emissions by 17 per cent was insufficient to meet the Netherland's fair contribution towards the UN's goal of keeping global temperature increase within 2 degrees of pre-industrial conditions. This decision was upheld by the Hague Court of Appeal and the Supreme Court of the Netherlands under Article 2, the right to life, and Article 8, the right to respect for private life, family life, the home and correspondence, of the European Convention on Human Rights.[53]

However, sometimes it is the government that drives environmental litigation. On June 21, 2024, the Province of British Columbia commenced a national class action against manufacturers of perfluoroalkyl and polyfluoroalkyl substances (PFAS), otherwise known as "forever chemicals", to recover the costs of detecting and removing PFAS from drinking-water systems in Canada. The Province alleges the companies negligently designed defective products, negligently failed to warn of the risks, breached the *Competition Act*, and engaged in civil conspiracy.

West Coast Environmental Law has also launched a campaign to start a class action by local governments in British Columbia against oil and gas producers. As of June 20, 2024, some local governments (Gibsons, View Royal, Slocan, Qualicum Beach, Squamish, Burnaby, Port Moody and Sechelt) have made a commitment to the campaign.

There is also an increasing trend towards regulatory action targeting companies' ESG-related performance, or perceived lack thereof.

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 against 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. As of April 2024, there were 22 active complaints before the CORE. CORE's first final report was released on March 26, 2024. The report concluded that Uyghur forced labour was used at the Hatu gold mine in China, which is primarily owned by a Canadian mining company, and recommended that trade measures be applied against the company.[54]

Recently, after studying the environmental and human rights considerations regarding foreign operations of Canadian mining and mining exploration firms, a Report of the Standing Committee on International Trade recommended that the Government of Canada explore options to expand the mandate of the CORE. Witnesses who appeared before the Standing Committee in relation to the Report called for CORE to be given the authority to compel witnesses and documents.[55]

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* which codified that

directors and officers were permitted 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*.[56] 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. As well, these factors could also be relied on to defend against claims that directors and officers did not act in the company's best interests by adopting ESG measures.

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 (U.K.).[57] In the U.K., under the *Companies Act 2006*, directors must consider, among other things, the interests of the company's employees, the impact of the company's operations on the community and the environment, and the need to foster good business practices with suppliers and customers.[58] As we can see, the U.K. already requires directors to continually assess ESG issues facing the company.

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*[59] 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" statuses 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, or as evidence that a company has run afoul of other legal requirements.

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 (unsuccessfully) 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. More recently, ClientEarth filed a complaint with the US National Contact Point for the OECD Guidelines against Cargill. Based on a review of Cargill's policies and procedures, ClientEarth alleges that Cargill has failed to conduct adequate environmental due diligence.

These types of cases serve 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 pierce 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.[60] In *Vedanta Resources PLC & Anor v Lungowe & Ors* (*Vedanta*), and *Okpabi & Ors v Royal Dutch Shell Plc & Anor* (*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. Though neither case has been decided on its merits,[61] *Vedanta* and *Okpabi* opened the door to English courts accepting jurisdiction against English companies in claims relating to environmental harm caused by overseas subsidiaries outside the jurisdiction. For example, *Vedanta* and *Okpabi* paved the way for *Município de Mariana v BHP Group Pic*, a claim against a parent company, BHP Billiton, in the English courts for approximately £5 billion in damages for its subsidiary allegedly being responsible for the Fundão dam collapse in Brazil in 2015.[62] That case is set to go to trial in October 2024.[63] These cases have piqued the interest of law firms and litigation funders and may encourage similar claims in the English courts and other jurisdictions. In Canada, the Court of Appeal for Ontario has already cited *Vendanta* and *Okpabi* in considering potential liability in tort for parent companies.[64]

However, ESG statements may not only be used to litigate a company's perceived failure to uphold ESG commitments. In November 2022, five U.S. senators wrote to 51 law firms explaining that pursuing ESG initiatives might result in antitrust violations. In particular, the letters highlighted that ESG group initiatives, to the extent that they can affect competition, are relevant to the U.S. Federal Trade Commission (FTC). Law firms were cautioned that "Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG" and warned to "preserve relevant documents" in anticipation of FTC and Department of Justice investigations. Canadian businesses should be aware of this political backlash in the U.S., as such sentiments could migrate into Canada, and should confirm that their ESG initiatives comply with the *Competition Act*.

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 confirm it aligns with their operations and any applicable laws. 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. Consulting with legal counsel and other experts before adopting new ESG initiatives is also well advised, as doing so provides a foundation for demonstrating that any initiatives undertaken are justifiable from a legal and business perspective. 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 Andrew Ross Sorkin et al, "Reassessing the Board Fight That Was Meant to Transform Exxon" *New York Times* (31 May 2023).

6 *ClientEarth, R (On the Application Of) v. Ithaca Energy Plc*, [2023] EWHC 3301 (Admin).

7 *ClientEarth v. Shell Plc & Ors (Re Prima Facie Case)*, [2023] EWHC 1137 (Ch).

8 *National Center for Public Policy Research v. Schultz*, No. 2:2022cv00267, 2023 U.S. Dist. LEXIS 161680, (E.D. Wash.).

9 A. Roy, R. Skinner, "NYC Pension Case Tees Up First Test of GOP Fiduciary Duty Theory", *Harvard Law School Forum on Corporate Governance* (18 December 2023).

10 *Modern Slavery Act 2018* (Cth).

11 *Modern Slavery Act,* 2015 c. 30.

12 For an overview of the Government of Canada's efforts on protecting human rights in federal procurement, see Government of Canada, "Protecting human rights in federal procurement" (May 24, 2024), online: < Protecting human rights in federal procurement - Canada.ca>.

13 S.C. 2014, c. 39.

14 United States Customs and Border Protection, "Withhold Release Orders and Findings List".

15 Government of Canada, *Responsible Business Conduct Abroad: Canada's Strategy for the Future* (2021) at p. 13, 17.

16 Government of Canada, *Responsible Business Conduct Abroad: Canada's Strategy for the Future* (2021) at p. 13.

17 House of Commons, *Canadian Mining and Mineral Exploration Firms Operating Abroad: Impacts on the Natural Environment and Human Rights – Report of the Standing Committee on International Trade* (September 2023): (Chair: Hon. Judy A. Sgro) at pg. 17.

18 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.

19 For example, National Policy 58-201 – *Corporate Governance Guidelines* and National Instrument 58-101 – *Disclosure of Corporate Governance Practices*.

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

21 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).

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

23 R.S.C. 1985, c. C-44, s. 172.1; *Canada Business Corporations Regulations*, 2001, S.O.R./2001-512, s. 72.2.

24 *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 142, 143(3), as amended by 2019, c. 29, s. 151(3).

25 The prior article by BLG can be accessed here and the prior article by AUM Law here.

26 See discussion in ESG best practices and lessons learned from the 2021 legal summit.

27 "ISSB issues inaugural global sustainability disclosure standards", (26 June 2023) online: *IFRS* < www.ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2>.

28 R.S.C. 1985, c. C-34.

29 R.S.C. 1985, c. C-34.

30 Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess., 44th Parliament (2023-2024), cl. 236(1) (royal assent 20 June 2024).

31 S.C. 2024, c. 15.

32 Updates about the Massachusetts Attorney General's Office Lawsuit against ExxonMobil are available online.

33 One example includes *Kathleen Smith v. Keurig Green Mountain, Inc.* U.S. District Court (Northern District of California) No. 4:18-cv-06690-HSG, in which the Court approved a class action settlement requiring Keurig to pay an aggregate of $10 million to class members, among other remedies.

34 *City and County of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Hawaii Sup. Ct. 2023).

35 See *Rebuck v. Ford Motor Co.*, [2018] O.J. No. 6709; *Rebuck v. Ford Motor Company*, 2022 ONSC 2396, aff'd 2023 ONCA 121.

36 See *Buis v. Keurig Canada Inc.*, 2023 ONSC 87, at para. 2.

37 *Alcantara SpA v Miko Srl*, 712/2021, Ordinary Court of Gorizia.

38 RB-Amsterdam, 20 March 2024, *Stichting ter Bevordering van de Fossielvrij-beweging v. Koninklijke Luchtvaart Maatschappij N.V.*, NJF 2024/199, No. C/13/719848/ HA ZA 22-524 (Netherlands).

39 *Lizama v. H&M Hennes & Mauritz LP*, No. 4:22 CV 1170 RWS, 2023 U.S. Dist. LEXIS 83704 (E.D. Mo.).

40 *Dwyer v. Allbirds, Inc.*, 598 F. Supp. 3d 137 (S.D. N.Y. 2022).

41 *Ramirez v. Exxon Mobil Corp.*, No. 3:16-CV-03111-K, 2023 U.S. Dist. LEXIS 146043 (N.D. Tex.).

42 2018 ONCA 1053.

43 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 Court of Appeal for Ontario 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.

44 2017 BCCA 39.

45 2013 ONSC 1414.

46 2020 SCC 5.

47 *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.

48 Shell has filed an appeal. However, the Court made its decision provisionally enforceable, meaning Shell will is required to meet its reduction obligations even as the decision is appealed.

49 *Milieudefensie,* at para 4.4.11.

50 See, e.g., *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316; *Environnement Jeunesse c. Procureur general du Canada*, 2021 QCCA 1871; *La Rose v. Canada*, 2020 FC 1008, appeal allowed in part 2023 FCA 241; *Misdzi Yikh v. Canada*, 2020 FC 1059, appeal allowed in part 2023 FCA 241.

51 2023 ONSC 2316.

52 *Case of Verein Klima Seniorinnen Schweiz and Others v. Switzerland*, No. 53600/20 (9 April 2024).

53 HR [Supreme Court], 20 December 2019, *Nederlanden (Ministerie van economische zaken en klimaat) v. Stichting Urgenda*, ECLI:NL:HR:2019:2006, 19/00135 (Netherlands).

54 Canadian Ombudsperson for Responsible Enterprise, "CORE Investigation Finds Human Rights Abuse by Canadian Mining Company" (26 March 2024); Canadian Ombudsperson for Responsible Enterprise, *Final Report: Investigation for a Complaint Filed by a Coalition of 28 Organizations About the Activities of Dynasty Gold Corporation* (March 2024).

55 House of Commons, *Canadian Mining and Mineral Exploration Firms Operating Abroad: Impacts on the Natural Environment and Human Rights – Report of the Standing Committee on International Trade* (September 2023): (Chair: Hon. Judy A. Sgro).

56 2008 SCC 69.

57 *Companies Act 2006*, c. 46, s. 172.

58 *Companies Act 2006*, c. 46, s. 172.

59 S.B.C. 2002, c. 57.

60 *Vedanta Resources PLC & Anor v. Lungowe & Ors*, [2019] UKSC 20; *Okpabi & Ors v. Royal Dutch Shell Plc & Anor*, [2021] UKSC 3.

61 The *Vedanta* case settled after the Supreme Court ruling.

62 [2022] EWCA Civ 951.

63 [2023] EWHC 1134 (TCC) at para. 83.

64 *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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