

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 jurisdictions² 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

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

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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