ESG litigation and regulatory risks: Managing claims 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 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

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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