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2023 OSLER LEGAL OUTLOOK

A tempest of change: impact of climate-related litigation and regulation

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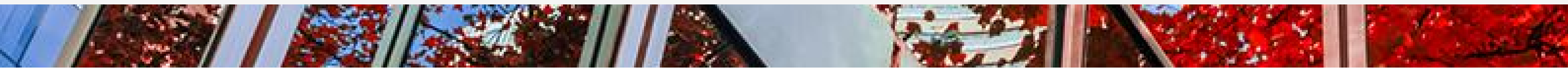

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Authors: Jennifer Fairfax, Lawrence E. Ritchie, John M. Valley, Andrew MacDougall, Ankita Gupta

It was a year of significant change for climate-related litigation and regulation in 2023. The volume of climate litigation increased significantly worldwide with mixed results for all parties involved. Disputes over governmental jurisdiction to pass environmental laws persisted. Governments also launched several legislative initiatives, some pro-ESG and others "anti-woke."

In light of the continued focus on climate change worldwide, we expect climate litigation and policy-making to increase in 2024. Going forward, businesses should prepare for an anticipated rise in lawsuits targeted at preventing perceived environmentally harmful development and investment activities, scrutinizing businesses' environmental disclosure and climate claims and targeting corporate boards and their decision making. Businesses can also expect enhanced legislative and regulatory action mandating disclosure regarding climate change matters by issuers.

To prepare for these developments, businesses will want to be proactive in implementing appropriate policies and procedures to ensure compliance and to mitigate risk.

Climate litigation

The 2023 *Global Climate Litigation Report* prepared by the United Nations Environment Programme and the Sabin Center for Climate Change at Columbia Law School revealed a stark increase in climate change litigation worldwide. Between July 2020 and December 2022, 630 climate change lawsuits were filed across the world, with Canada having the sixth highest number of climate-related actions filed during this period. These actions comprise a range of claims against a variety of corporate issuers, as well as several cases against governments.

Corporate climate litigation encompasses a wide range of legal actions against companies related to the environmental impact of their operations and their disclosure. There has been a marked rise in climate litigation internationally and at home. Canadian businesses can expect to see continued action against their activities, as plaintiffs seek to prevent development and investment activity that could adversely affect the environment. Actions may also be directed squarely at corporate boards, with activists seeking to hold directors liable for failing to exercise due oversight of the corporation's approach to climate change. Corporations can also anticipate initiatives from increasingly activist organizations seeking to challenge project approvals under environmental legislation for failing to address or consider the effects of climate change.

Courts to date have carefully scrutinized these claims and, for the most part, have been willing to defer to governmental and corporate decision making. Nonetheless, a recent American appellate court decision concluded that an environmental assessment that failed to quantify the effects of climate change was improper. In contrast, an English appellate court recently upheld an environmental review that did not take into account greenhouse gas (GHG) emissions, deferring to the judgment of the government. Similarly, in June 2023, Canada's Federal Court concluded that it was reasonable for the minister to approve an offshore oil development in Newfoundland and Labrador without considering downstream GHG emissions.

Corporations and their boards can also anticipate claims for alleged failures in their climate emission mitigation efforts. There have been a number of claims made along these lines around the world. Most of these actions seek to hold companies liable for the impact of downstream use of their products or services. While tort claims are difficult to bring in common law jurisdictions because of the general principle that a duty of care cannot be owed to an unlimited class of plaintiffs, this has not stopped governments around the world from filing such claims against businesses.

As of May 2023, 40 U.S. states and municipalities had commenced lawsuits against energy companies over their alleged contribution to the climate crisis. In addition, as we previously wrote, in February 2023, activist shareholders took a different approach by seeking permission to sue Shell plc's directors in the U.K. for allegedly failing to take sufficient actions to mitigate greenhouse gas emissions. Although the shareholders were ultimately unsuccessful, we may well see similar attempts in Canada and other jurisdictions. For additional discussion of the implications of this U.K. decision for directors, see our discussion in *Corporate Governance Focusses on the Who, What and How*.

By contrast, we are also seeing claims for damages against governments for reversing previously adopted policies to transition away from fossil fuels being brought by businesses that made investments relying on such policies. In 2020, two American businesses lodged a $30 billion claim against Canada under the *North American Free Trade Agreement* (NAFTA) for damages resulting from Ontario's cancellation of its cap-and-trade program. In 2021, two Canadian oil companies filed a claim seeking $15 billion in damages from the American government under NAFTA following the 2019 cancellation of the Keystone XL oil pipeline.

As more businesses undertake to demonstrate to their customers and investors the environmental strength and sustainability of their products, operations or investments, they may face greater exposure to complaints for "greenwashing." Businesses need to be mindful of the disclosure they are issuing regarding their environmental practices to mitigate the risks that claims will be made that those disclosures are misleading. The number of claims alleging "greenwashing" has risen and we anticipate that this number will continue to rise.

For example, in 2023, a number of claims were filed against airlines around the world over their carbon neutrality claims, as well as the use and reliability of carbon offsets. In May 2023, consumers filed a class action lawsuit [PDF] against Delta Air Lines in California claiming the airline misrepresented its environmental impact by marketing itself as "the world's first carbon-neutral airline." Similar cases have been filed across Europe and in Australia, including a claim filed in June 2023 by a consumer protection group, the Bureau Européen des Unions de Consommateurs, against 17 European airlines.

In Canada, the Competition Bureau settled with Keurig in January 2022 for $3 million regarding allegations that Keurig had been making false or misleading representations about the environmental friendliness of its drink pods. Greenpeace has filed two greenwashing complaints with the Competition Bureau against Shell Canada [PDF] in relation to its "Drive Carbon Neutral" advertising campaign and against a trade organization [PDF] of six of Canada's largest oil and gas producers in relation to their "Let's clear the air" net zero advertising campaign. These complaints are currently under investigation by the Bureau.

Public law climate litigation

In light of actions taken to date in Canadian courts against governmental legislative and policy decisions, we anticipate further activity in this area going forward. To date, this activity has taken the form of challenges to legislation for being *ultra vires,* or outside the constitutional authority of the enacting legislature. Proceedings seeking remedies under the *Charter of Rights and Freedoms* have gained some traction, as competing political visions for climate action continue to be debated.

In April 2023, *Mathur,* an Ontario case, became the first *Charter* challenge against a government actor for actions taken related to climate change to reach a full hearing on its merits in any Canadian court. As we have previously written, for the first time, the court held that the applicants' claims that certain government activities related to climate change infringed their rights were justiciable. In other words, the claims were not subject to dismissal on the basis that they were directed at a policy decision outside of the purview of the courts. Although the plaintiffs were unsuccessful in convincing the court that the impugned government actions gave rise to a violation of the *Charter* on the merits, the court's ruling on justiciability departs from a series of prior *Charter* challenges where plaintiffs could not overcome this initial hurdle. This potentially sets the stage for further claims of this nature.

Apart from *Charter* challenges, there continues to be significant in-fighting between the federal and provincial governments over jurisdictional questions regarding the right to legislate to address climate-related matters. With so much at stake and competing visions for regulatory intervention, this likely is not going to go away. Unfortunately, uncertainties created by these ongoing challenges are likely to make it more difficult for businesses to implement longer term plans.

This has come to light very recently in the majority decision of the Supreme Court of Canada, which found in *Reference re Impact Assessment Act* that a portion of the federal *Impact Assessment Act* was outside Parliament's constitutional authority to enact, thus rendering it unconstitutional. This decision is in contrast to the prior *References re Greenhouse Gas Pollution Pricing Act*, where the Court found the federal government's GHG pricing standards were constitutional. In the *Impact Assessment Act* case, the Supreme Court discussed the complexities of legislative authority concerning the environment, given its diffuse nature and the geographic reach of climate-related effects. The Supreme Court's judgment in the *Impact Assessment Act* case very much puts in question the federal government's recent plans for a cap on oil and gas emissions and a clean electricity standard.

We expect Canadian courts will continue to grapple with the issue as to which level(s) of government has the constitutional jurisdiction to pass environmental laws tackling climate change and related initiatives next year.

Further detail on the *Impact Assessment Act* reference can be found in our Osler Update. Additional detail on climate litigation can also be found in our State of Climate Litigation briefing.

Climate regulatory and legislative initiatives

Around the world, there has been a push toward increasing climate-related disclosure by businesses, with the stated objectives of increasing transparency regarding the environmental impacts from their business operations and addressing greenwashing concerns. With the work undertaken to date by various provincial, state, national and international organizations regarding climate-related disclosures, it is certain that issuers will be subject to increased climate-related disclosure requirements going forward.

In the United States, California's legislature passed two bills in the fall of 2023, SB-253 Climate Corporate Data Accountability Act and SB-261 Greenhouse gases: climate-related financial risk, that create mandatory climate-related reporting requirements for public and private companies carrying on business in California. In the European Union, the European Sustainability Reporting Standard was adopted in July 2023. The first phase of the initial industry-agnostic standards is expected to come into force on January 1, 2024. It will require EU and non-EU entities subject to the new regulation to publish sustainability statements, including information about various environmental, social and governance issues. In October 2023, it was announced that the implementation of sector-specific standards was being postponed until June 2024.

Meanwhile, the U.S. Securities and Exchange Commission (SEC) has taken steps to amend investment company rules to strengthen naming requirements for investment funds to ensure that 80% of a fund's portfolio matches the assets advertised by its name.

In contrast, other U.S. states are adopting anti-ESG legislation. Specifically, Florida, Montana, Kentucky and Texas [PDF] have enacted legislation requiring public pension plans to either (i) refrain from considering ESG factors when approaching investment strategy; or (ii) divest from and stop engaging with businesses and private funds that consider ESG factors in their investment strategy. The anti-ESG trend in parts of the U.S. poses legal, financial and operational risks for funds that integrate an ESG investment strategy.

Canadian regulators are also focused on increasing and improving climate-related disclosure. In October 2021, the Canadian Securities Administrators (CSA) published for comment *National Instrument 51-107 Disclosure of Climate-related Matters* (NI 51-107), which proposed mandated climate-related disclosure generally aligned with the Task Force on Climate-Related Financial Disclosures framework. Subsequently, in October 2022, the CSA suspended the proposal and indicated that it was "actively considering international developments" and their implications for NI 51-107.

In June 2023, the International Sustainability Standards Board (ISSB), a standard-setting body established by the International Financial Reporting Standards Foundation, released its first sustainability-based and climate-related disclosure standards for financial reporting – the IFRS S1 and IFRS S2 – which are expected to become effective in January 2024. Although these standards will be voluntary, mandatory disclosures are coming. Following the release of the ISSB standards, the CSA indicated that it welcomed the publication of these standards and commended the ISSB for "developing a global framework for investor-focused disclosure that is responsive to market demand for more consistent and comparable disclosures."

A number of observers are now awaiting the release by the SEC of its widely-anticipated revised proposed rule on climate-related disclosure and the release by the CSA of a revised NI 51-107. It is likely that the revised instrument will draw heavily on the ISSB standards.

Even in the absence of legislative change, regulators nevertheless remained active. In

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January 2022, the CSA issued guidance to investment funds regarding ESG reporting, highlighting the risks and consequences of greenwashing. Similarly, the Office of the Superintendent of Financial Institutions issued Guideline B-15: Climate Risk Management, which will require federally regulated financial institutions to report on climate-related risk management and disclosure beginning in fiscal 2024.

It is evident that there will continue to be further policy and regulatory initiatives relating to climate change, and continuing differences in the nature and extent of the approaches adopted. To navigate the evolving legal and regulatory environment, businesses should ensure they have considered not only the potential physical impacts of climate change on their operations, but also the climate-related risks associated with increased litigation and regulation. Businesses will want to ensure that they have established robust systems for monitoring new developments, assessing potential compliance gaps and evidencing due consideration of climate matters when making decisions.