

ESG litigation risk

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Legal proceedings related to environmental, social, and governance (ESG) issues are increasingly common in Canada, the United States, and elsewhere.

ESG litigation can take many forms and can be brought through the court system, administrative tribunals, and before non-judicial bodies. These claims generally involve novel applications of the law. They are often brought for strategic purposes—without regard for potential legal hurdles—and may be advanced even where there is a low chance of legal success. For this reason, organizations should carefully consider ESG factors when assessing litigation risks.

In this article, we discuss three areas of ESG litigation risk that organizations should consider.

1. Liability for foreign operations

Businesses may face tort claims in Canada for incidents occurring at their foreign operations. Common law tort claims based on alleged harms suffered in a foreign jurisdiction will generally be determined under the law of the foreign jurisdiction. Under Canada's conflict of laws rules, a Canadian court can hear such a case and apply the substantive law of the foreign jurisdiction.

In addition to tort liability, the Supreme Court of Canada's decision in [Nevsun Resources Ltd. v. Araya](#), released last year, allows Canadian companies to be sued in Canada for violations of customary international law—an area of law that had previously been restricted to sovereign states. As a result, the plaintiffs, Eritrean workers who claimed they were conscripted to work in an Eritrean mine co-owned by a Canadian company, may sue in Canada for breaches of customary international law that allegedly occurred in Eritrea, including prohibitions against slavery, forced labour, cruel, inhuman or degrading treatment and crimes against humanity.

Claims that may be advanced by stakeholders can relate to a variety of ESG issues, including efforts to address diversity and inclusion in organizational leadership, and failure to properly prepare for the future impacts of climate change.

Outside of the courts, complainants may seek to advance ESG issues related to organizations' foreign operations through bodies such as the Canadian Ombudsperson for Responsible Enterprise, which investigates human rights issues, and the Canadian OECD National Contact Point, which is responsible for enforcing the OECD Guidelines for Multinational Enterprises—a comprehensive international standard on responsible business conduct.

The trend towards holding companies accountable domestically for their foreign operations is reflected in legislation recently proposed in the Canadian Senate. If enacted, the legislation would require certain businesses to report on steps taken to reduce and prevent the risk of forced labour or child labour in their operations. Read our analysis of the impact of the proposed legislation [here](#).

2. Director and officer liability for ESG issues

Claims may be advanced against an organization's directors and officers, in relation to an organization's efforts to address ESG issues internally. These types of claims may be based on corporate law concepts related to the best interests of stakeholders and may take the form of derivative actions against a company's officers and directors in their personal capacities. Similar claims may also be advanced in negligence.

The range of claims that may be advanced by stakeholders is wide and can relate to a variety of ESG issues, including efforts to address diversity and inclusion in organizational leadership, and failure to properly prepare for the future impacts of climate change.

Derivative actions against directors and officers related to ESG issues are common in the United States, and it is only a matter of time before similar lawsuits begin to emerge in Canada. For example, the corporate boards of several prominent U.S. technology companies are facing discrimination-based class actions brought by shareholders who allege a failure to address lacking gender and racial diversity in senior leadership has harmed shareholders and the companies. Separately, Exxon's board of directors has faced a series of derivative lawsuits alleging a failure to mitigate the anticipated impacts of climate change on the company's long-term business prospects, and misleading shareholders on these issues.

Organizations should regularly review how ESG issues are addressed internally, including, where applicable, through robust training and meaningful grievance protocols. Organizations should also review their D&O insurance policies to determine whether ESG related claims are covered.

3. Disclosure claims related to statements about ESG issues

Public statements organizations make about ESG issues create other litigation risks. Activist litigants may seek to use securities laws or other disclosure obligations to either compel companies to make firm ESG commitments, or to hold companies accountable for their existing ESG commitments.

Companies may face claims related to disclosure made in securities filings or other statements, including public commitments to advance ESG issues. For example, in a recent series of class actions, a California utility company is facing allegations the company failed to take steps to prevent wildfires, contrary to commitments it made in public statements about the issue.

Organizations may also face disclosure claims related to the ESG conduct of the companies in which they invest. For example, an Australian pension fund recently settled a lawsuit seeking to compel the fund to disclose how climate change issues are considered in investment decisions.

Recent recommendations by Ontario's Capital Markets Modernization Taskforce include mandated enhanced disclosure related to climate change risk. These could result in increased disclosure-based climate litigation against publicly listed companies in Ontario.

Conclusion

Appropriate consideration of ESG factors is an essential component of managing litigation risk. Companies can mitigate the risks of ESG litigation by adopting regular audits of foreign operations, internal training, and meaningful grievance and remediation protocols. Investors should also consider engaging in ESG-specific due diligence to ensure

risks are proactively identified in advance of a transaction.

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