

ESG CLASS ACTIONS AND OTHER LAWSUITS “SUSTAINABLE” INTO 2023

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McMillan is authoring a number of articles to assist clients in navigating the quickly developing legal landscape surrounding ESG. Among other developments, regulators have confirmed that regulating ESG claims and combatting greenwashing will be a top priority in 2023. In addition to the actions taken by regulators, there has also been a rise in private ESG litigation.

This article focuses on recent ESG litigation developments in Canada and also looks to the United States for what we can expect to see here in the near future. For our introductory article, read: [Green or Grey: Regulators Target Greenwashing, Misleading Environmental, Social and Governance \(ESG\) Claims](#).

Misrepresentation and “Greenwashing” Litigation

Businesses may face private lawsuits related to greenwashing on various grounds, including misrepresentation in their marketing materials or corporate disclosure. The issue of greenwashing isn't small: the International Consumer Protection and Enforcement Network (ICPEN) has reported that over 40% of business websites reviewed contained green claims that were “exaggerated, false or deceptive.”^[1]

Canadian competition, securities and consumer protection legislation all include private rights of action with respect to deceptive statements and many class actions have been brought in Canada under misrepresentation legislation in the last few decades.

It is an offence under the *Competition Act* to knowingly or recklessly make representations to the public that are false or misleading in a material respect for the purpose of promoting the supply or use of a product or a business interest. And any person who has suffered loss as a result of conduct in breach of that prohibition has a statutory private right of action.

The Competition Bureau's focus on greenwashing has grown in recent years. For example, Ecojustice filed an application under the *Competition Act* in 2019, alleging that Keurig Canada (“**Keurig**”) made false or misleading claims regarding the recyclability of their infamous K-Cup coffee pods. Following Ecojustice's application, Keurig entered into a consent agreement with the Competition Tribunal.^[2] The Commissioner concluded that

the Keurig's representations regarding the recyclability of its K-Cup pods were false and misleading and did not meet standard practices. As part of the consent agreement, Keurig agreed to pay \$3.8 million in financial penalties and to create new templates for K-Cup packaging within 60 days.

Following the conclusion of the Competition Tribunal proceedings, there have been at least four class actions commenced against Keurig alleging misleading or deceptive marketing in describing the company's coffee pods as "recyclable".^[3] The Ontario Superior Court recently stayed one of the Ontario actions and allowed another to continue.^[4]

In the Spring of last year, the Ontario Superior Court heard summary judgment motions in a certified class action alleging false or misleading advertising relating to Ford Canada's fuel consumption estimates for certain vehicles.^[5] Ford succeeded in dismissing the class action while the plaintiff's motion for summary judgment was dismissed.

More recently, Greenpeace Canada submitted a complaint to the Competition Bureau alleging that Pathways Alliance, a coalition of six of Canada's largest oil sands producers, made false and misleading representations to the public through its "Let's clear the air" advertising campaign. Greenpeace alleged that Pathways' claims that they are reducing emissions are false and misleading given that Pathways is expanding fossil fuel production, lobbying against climate action, and failing to meet its own emission targets by not taking into account lifecycle emissions.^[6] In response, the Competition Bureau confirmed that it was launching an investigation into Greenpeace's complaints, the results of which can be expected in the coming months.^[7]

As noted, Ontario's *Securities Act* also creates a statutory cause of action for investors who suffer losses in the secondary market in connection with misrepresentations or omissions by a company, its management or certain other actors. Since the statutory causes of action for secondary market losses were introduced 17 years ago, there have been 127 statutory secondary market class action cases in Canada. Read McMillan's Bulletin for more on statutory causes of action under the Ontario *Securities Act* [here](#).

ESG Litigation

In addition to misrepresentation claims, there are a number of legal proceedings that can be brought relating to other ESG issues.

For example, there are currently in Canada at least 35 climate change cases, according to a review of global climate litigation by Columbia Law School.^[8] Canadian litigants have also pursued judicial reviews under administrative law and claims based on alleged infringement of the *Charter of Rights and Freedoms* (the "**Charter**") rights in relation to ESG issues.

On September 12, 2022, the Ontario Superior Court held a full merits hearing in *Mathur v. Ontario*, the first

climate-related lawsuit based on an alleged infringement of Charter rights. The claim was brought by seven young Canadian adults, supported by Ecojustice, against the province of Ontario based on revisions to the Ontario government's climate targets. The Superior Court ultimately dismissed the claim, finding that, although the claim raised justiciable issues, the applicants had not established any violations of their Charter rights. While the Court acknowledged that young people are disproportionately impacted by climate change, the Court found that this disproportionate impact was caused by climate change, not by the Ontario government's climate targets.^[9] Ecojustice has since appealed the lower court's decision.^[10]

In relation to other types of ESG-related proceedings, a number of environmental groups in 2021 brought an application for judicial review of a regional assessment of exploratory oil and gas drilling east of Newfoundland and Labrador.^[11] The federal Minister of Environment and Climate Change relied on the regional assessment to enact regulations excluding certain activities^[12] from the process stipulated in the *Impact Assessment Act*. The environmental groups were also seeking judicial review of the regulation itself. The Court dismissed the application as it found that the regional assessment was not justiciable, meaning that it could not be challenged in court as it, in itself, affects no legal rights and carries no legal consequences. The Court also found that the regulation met the test of reasonableness.

In another case, the Canadian federal government recently filed a motion seeking dismissal of a proposed class action lawsuit filed by Black civil service employees for infringement of their individual Charter rights. The proposed class action alleges systemic racism, discrimination and employee exclusion. The government is seeking a dismissal on the basis of court's alleged lack of jurisdiction over the claim.

Private ESG litigation against Canadian companies has also grown in recent years. For example, in 2020, the Supreme Court of Canada ruled in a landmark decision regarding a Canadian mining company's alleged use of exploitive labour overseas.^[13] In that decision, the Supreme Court held that customary international law forms part of Canadian common law automatically, thus opening the door to claims against Canadian companies arising from breaches of international human rights, labour or environmental law. This is likely to act as a significant spur to an even greater variety of ESG related lawsuits.

ESG Litigation South of the Border

In the U.S., there has also been an increase in proceedings against companies based on alleged false and misleading ESG related claims. For example, in July 2022, a class action was commenced in the US against the clothing retailer H&M alleging false environmentally-friendly and sustainable clothing claims. In the spring of last year, a New York court granted a motion to dismiss a class proceeding against a footwear company for allegedly misleading environmental and sustainability related claims.^[14]

In Texas, a court denied a motion to dismiss a claim against an egg producer. The claim alleged that the egg

producer's statements on packaging that eggs were "ethical" and "certified humane" were false.^[15] The court found that aspirational statements and statements certified by third party organizations can still be misleading on a plain reading. This is a good reminder that these types of claims, even if aspirational, should always be verifiable and substantiated.

There have also been a number of climate change class actions in the US against oil and gas companies, based on the environmental impacts of fossil fuels, including lawsuits based on public nuisance, private nuisance, failure to warn, negligent failure to warn, trespass, deceptive and misleading advertising, and fraud. The majority of cases have so far turned on preliminary issues such as whether the plaintiff's claims are properly tried in federal or state court. So far, defendant companies have not been successful in obtaining summary dismissal of such claims.

In one example, the Massachusetts' High Court dismissed Exxon Mobil Corp.'s motion to dismiss the state's lawsuit against the company for allegedly misleading consumers and investors about climate change and fossil fuels.^[16] Exxon Mobil Corp. and its former officials were defendants in a securities fraud class action in which shareholders alleged materially false and misleading statements relating to climate change.

In some instances, certain industries that have historically had a reputation for causing negative impacts to the environment or contributing to climate change (whether fairly or not) will attract ESG litigation on account of their historical impacts on climate, the environment, consumer health and other matters.

Looking Forward

As companies continue to promote ESG attributes in their products, actions or ways of doing business, we can expect greenwashing and ESG lawsuits, including class actions and shareholder activism litigation, to continue to develop in Canada. We can also expect to see a rise in corporate governance and D&O proceedings based on ESG issues, including derivative actions and oppression remedy claims. ESG litigation and regulatory proceedings increasingly represent a substantial risk to the corporation and its management and directors.

Sound Risk Management

It is thus imperative that companies actively risk manage these issues and attempt to head off ESG related claims before they are brought. The place to start is to review the companies' public statements (including aspirational ones) as well as packaging, advertising and marketing statements (such as labelling a raw material, product or practice as being "eco-friendly", "biodegradable", or "recycled", all terms with notoriously elastic meanings) to ensure they are clear and unambiguous, verifiable and well-grounded in fact/science. Such an exercise may also need to involve consideration of raw materials used, waste generated and potential emissions not only in connection with the company but also in connection with its supply chain partners.

Where ESG related claims are made, companies should ensure as far as practicable that they are based on the sound advice or findings of experts who have independently assessed the accuracy, completeness and reliability of such claims and, where available, also on guidance issued by trade associations and regulators. Where a company proposes to use or rely on certifications available by third parties, it should consider how and what information the third parties rely on (or disregard) before referring to the third party assessment in its own public claims.

Be wary of making unsupportable predictions, setting unrealizable targets and making unfair comparisons. In relation to climate-change claims, an area fraught with difficult judgment calls and technically complex assessments, be clear and careful about the base-year to be used in any comparisons and about any carbon-footprint determinations. These must be accurate, supportable and capable of withstanding scrutiny by any stakeholder.

While different industries will obviously have greater or lesser exposure to ESG based litigation and regulatory proceedings, no company will go wrong in making sure that its public-facing statements and claims relating to sustainability align with its actions, both internal and external.

[1] International Consumer Protection and Enforcement Network, "Screening of websites for 'greenwashing': half of green claims lack evidence", <[online](#)>.

[2] [Keurig Canada Inc. Registered Consent Agreement](#).

[3] See [Buis v. Keurig Canada Inc.](#); *Dolo v. Keurig Dr. Pepper Inc. et. al*; [Finch v. Keurig Canada Inc.](#); and [Gordon v. Keurig Canada Inc. et. al](#).

[4] *Buis v. Keurig Canada Inc.*, [2023 ONSC 87](#).

[5] *Rebuck v Ford Motor Company*, [2022 ONSC 2396](#).

[6] Greenpeace Canada Application for Inquiry into false and misleading representations made by the Pathways Alliance about their climate action and the climate impact of their business, <[online](#)>.

[7] Competition Bureau Canada, Notice of Inquiry Commencement, <[online](#)>.

[8] Columbia Law School, Sabin Center for Climate Change Law, Canadian Climate Litigation cases, <[online](#)>.

[9] *Marthur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316 at [para 178](#).

[10] [Notice of Appeal](#) dated May 15, 2023.

[11] *Ecology Action Centre et al v Canada*, [2021 FC 1367](#).

[12] New offshore exploratory drilling projects that meet the conditions imposed by the regulation, among others.

[13] *Nevsun Resources Ltd. v. Araya*, [2020 SCC 5](#).

[14] *Dwyer v Allbirds, Inc.*, 598 F.Supp.3d 137.

[15] *Usler et al v Vital Fars Inc. et al*, 2022 WL 1491091.

[16] *Commonwealth v. Exxon Mobil Corp.*, [489 Mass. 724](#).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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