

Securities Class Action Risk Arising From Environmental And Climate-Related Disclosures



Canadian issuers have recently come under heightened scrutiny in relation to environmental and climate-related securities disclosure. Responding to growing public awareness of climate issues, many Canadian companies have sought to provide greater transparency in their environmental, social, and governance commitments. However, in the absence of a unified disclosure framework, issuers can face significant regulatory and litigation risk.

Although climate-related disclosure is not yet mandatory under Canadian securities legislation, a basic rule remains: public companies must disclose all information that is material to investor decision-making. To the extent that climate change matters have a current material impact on an issuer's business, information about these impacts must be disclosed: failure to do so may expose issuers to regulatory risk with their primary securities commission and class action risk under provincial *Securities Acts*. For an in-depth analysis of the current state of climate disclosures, read our 2024 climate disclosure report.

A recent example of a class action related to environmental disclosure occurred in *Nseir c. Barrick Gold Corporation*¹. The

plaintiff alleged that Barrick Gold Corporation misrepresented to its investors that the Pascua-Lama mine, a multibillion-dollar project located in the high Andes of Chile and Argentina, was carried out in compliance with environmental requirements imposed by the Chilean authorities. However, Chilean courts found that Barrick had failed to comply with certain regulatory requirements. As a result, Barrick's board of directors decided to suspend all activities at the mine site, and Barrick's share values dropped.

In 2022, the Québec Court of Appeal authorized a secondary-market securities class action against Barrick and two officers based on the Québec *Securities Act* in relation to certain alleged misrepresentations regarding the water management system at the Pascua-Lama mine. The Court of Appeal concluded that the plaintiff had sufficient evidence to support granting leave to proceed with claims that Barrick's public statements with respect to the water management system were misleading: these public statements were material representations as they related to an essential aspect of the mining project, and the plaintiff's evidence was sufficient to show a reasonable possibility of success at trial.

The Pascua-Lama project also resulted in a class action before the Ontario Superior Court of Justice, where environmental disclosure was again at issue. In *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, the plaintiffs sought leave to commence a \$3 billion secondary market securities class action against Barrick and several officers, alleging misrepresentations with respect to, among other things, a failure to disclose material facts relating to serious environmental non-compliance². The Ontario Superior Court's findings were similar to the Québec Court of Appeal regarding the water management system. An appeal was subsequently brought before the Ontario Court of Appeal; however, the findings pertaining to the water management system were not at issue³.

The case of *Markowich v. Lundin Mining Corporation* may soon provide further clarity on the requirement to disclose potential environmental impacts. While the case does not explicitly deal with climate-related or environmental disclosure, the plaintiff alleged that Lundin Mining Corporation failed to disclose in a timely manner instability in the walls of one of its open pit mines, which allegedly resulted in a rockslide. Adopting a “more generous” interpretation of what constitutes a material change according to the facts of each case⁴, the Ontario Court of Appeal granted leave to commence a securities class action on the basis that “a broad range of changes within a company”⁵ may qualify as a material change affecting the company’s shares value⁶.

In March 2024, the Supreme Court of Canada granted leave to appeal to Lundin⁷. The Supreme Court’s ruling will provide guidance on what constitutes a “material change”, which may result in higher scrutiny and increased disclosure of potential risks, including environmental risks, that may materially impact the business, operations or capital of a company.

Climate-related disclosure requirements are on the horizon

While Canadian securities law is reasonably well adapted to allegations falling under the more traditional rubric of material misrepresentations about historic business operations and regulatory compliance, there are also growing pressures on Canadian issuers to provide forward-looking disclosures about climate transition planning, climate change scenario analysis, anticipated carbon emissions and environmental targets.

The Canadian Securities Administrators (CSA) have prepared draft disclosure requirements relating to climate change, but these requirements are not yet in force and have largely been

on hold since 2021 pending the outcome of the work of the Canadian Sustainability Standards Board (CSSB). Several other initiatives are underway to create or adapt international standards for use in Canada—and while these initiatives promise greater standardization and access to international capital markets, they also have the potential to expose Canadian issuers to liability for disclosures they were not previously required to make.

Most notably, the CSSB recently approved⁸ its new Canadian Sustainability Disclosure Standards 1 (General Sustainability-Related Financial Information) and 2 (Climate-Related Disclosures). The new CSSB Standards, which mirror International Financial Reporting Standards Standards S1 and S2, are slated to be published in December 2024 and enter into force on a voluntary basis in January 2025⁹. The CSA has signaled its intention to incorporate some or all of the CSSB Standards into its draft mandatory rule¹⁰.

In addition to the new CSSB Standards, in October the Government of Canada announced its intention to create a new “sustainable investment taxonomy” to facilitate the labelling of financial instruments based on a set of objective criteria, and to amend the *Canada Business Corporations Act* to add mandatory climate-related financial disclosure for large federally incorporated private companies (excluding small and medium-sized businesses).

While these initiatives are in the early stages, the increased regulatory burden represents further regulatory and litigation risk. Whether obligatory or not, climate and other disclosures will continue to be sources of potential securities class action risk.

Practical takeaways

Climate and environmental disclosure litigation has and will

continue to grow rapidly as a potential risk for Canadian issuers, particularly in the resource, manufacturing, automotive, and transportation industries, as well as other energy-intensive industries such as artificial intelligence and cryptocurrencies. Canadian issuers must take proactive steps to keep abreast of a rapidly changing regulatory environment, and to prepare for new and potentially creative climate-related claims.

Until Canadian regulators provide comprehensive guidance on climate-related disclosures, Canadian issuers should remain mindful of the ongoing obligation to disclose risks that are reasonably likely to affect their operations. This may or may not include climate-related information, depending on the nature of their business, the potential severity of the impact, and a range of other factors that may guide the materiality assessment. Ultimately, accurate and defensible disclosures of current climate and environmental targets and compliance, and prompt disclosure of new information, will mitigate the risk of class actions on behalf of disgruntled shareholders.

Footnotes

1. *Nseir c. Barrick Gold Corporation*, 2022 QCCA 1718.
2. *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160.
3. *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104 (leave to appeal to the Supreme Court of Canada denied: *Barrick Gold Corporation, et al. v. Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund, et al.*, 2021 CanLII 66411).
4. *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359, at para. 82.
5. *Ibid.*, at para. 83.
6. *Ibid.*, at para. 88.

7. *Lundin Mining Corporation, et al. v. Dov Markowich*, 2024 CanLII 25743.
8. Canadian Sustainability Standards Board, [CSSB Decision Summary – October 1 and 4, 2024](#). Financial Reporting and Assurance Standard Canada (2024).
9. Canadian Sustainability Standards Board, [In Brief – A plain and simple overview of the recently issued Exposure Drafts, “Canadian Sustainability Disclosure Standard \(CSDS\) 1, General Requirements for the Disclosure of Sustainability-related Financial Information” and “CSDS 2, Climate-related Disclosures](#), Financial Reporting and Assurance Standard Canada (March, 2024).
10. Ontario Securities Commission, [Canadian securities regulators issue statements on proposed sustainability disclosure standards and ongoing climate consultation](#) (March 13, 2024).

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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