

The Impact of Climate Change Litigation and Recent Competition Act Amendments on the Canadian Energy Sector: Regulatory and Legal Developments Shaping the Path Forward

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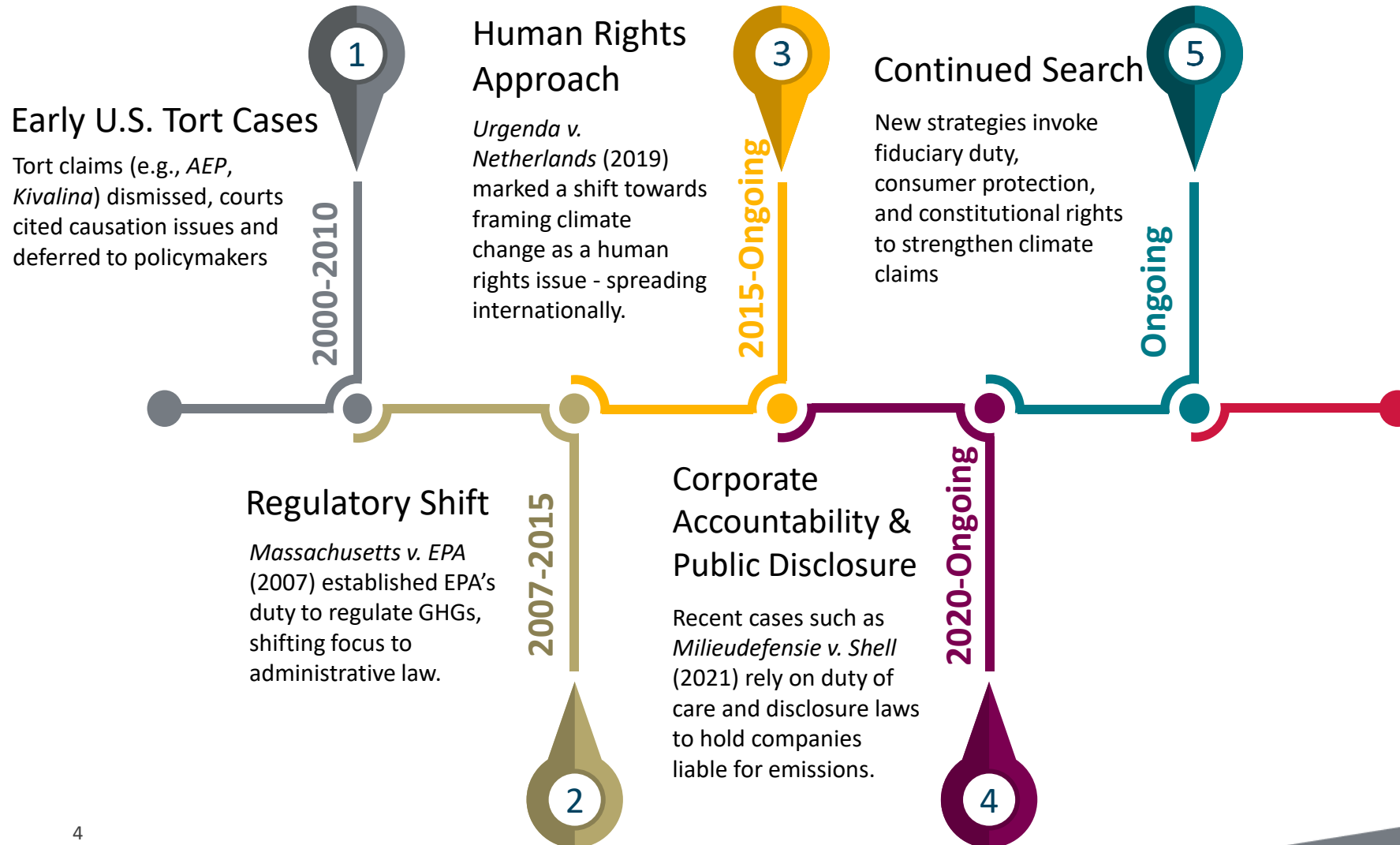
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Outline

1. Climate litigation claims (private law)
 - a) Types of claims
 - b) Challenges
 - c) Liability through legislation
2. Competition Act – greenwashing provisions
 - a) Overview of provisions
 - b) Private enforcement
3. Best practices in limiting liability

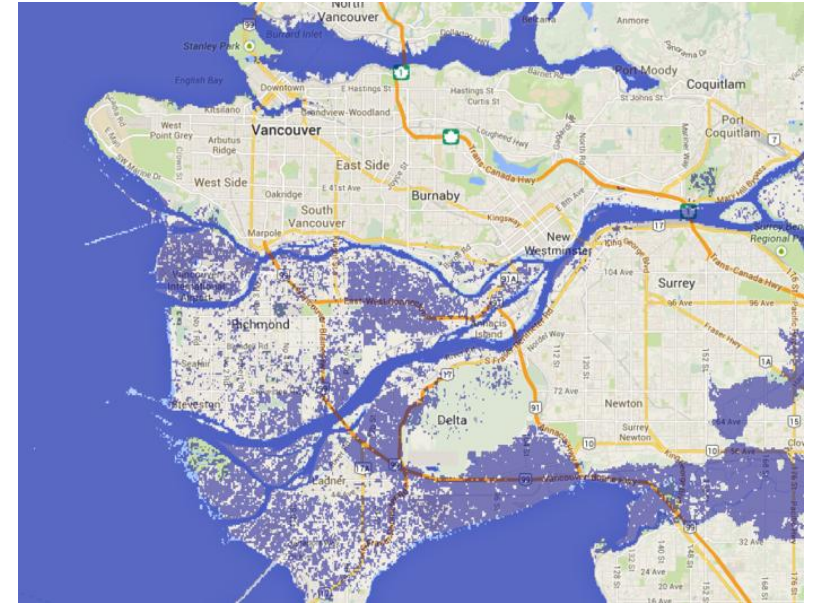
Climate Litigation Claims

An Evolving Litigation Landscape



Climate Tort Litigation

- City/state (province) tort suits over climate costs
- Advanced under torts of nuisance and negligence
- Deceit and misrepresentation interwoven
- Seek costs of mitigation and adaption to climate related harms



Climate Tort Litigation – Litany of tort suits:

- **Connecticut et al.** (New York) — *2004*
- **Native Village of Kivalina** (Alaska) — *2008*
- **County of Santa Cruz, County of San Mateo, Marin County, City of Imperial Beach** — *2016*
- **San Francisco** — *September 2017*
- **Oakland** — *September 2017*
- **New York City** — *January 2018*
- **Boulder, CO** — *April 2018*
- **Baltimore** — *July 2018*
- **Rhode Island** — *July 2018*
- **Honolulu** (City & County of Honolulu) — *March 2020*
- **District of Columbia (D.C.)** — *June 2020*
- **Minnesota** — *June 2020*
- **Delaware** — *September 2020*
- **Charleston, SC** — *September 2020*
- **Multnomah County, Oregon** — *June 2023*
- **California v. Big Oil** (State of California) — *September 2023*

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Climate Tort Litigation

- Claims have largely failed at a preliminary stage.
- Courts acknowledged the reality of climate change but ruled that climate change was a non-justiciable political question.
- *City of Honolulu v Sunoco LP* (US, 2023) – Hawaii Supreme Court denied motion to dismiss. Poised to become first climate tort lawsuit to proceed to trial.

Climate Tort Litigation

“Andrew Gage ... is developing cases where local governments who are effected [*sic*]... would sue the large fossil fuel producing companies... Essentially it’s a tort claim, a claim of negligence... or potentially a claim of nuisance.”

“West Coast Environmental Law and 50 community groups are urging municipalities to hold carbon-polluting companies accountable for the costs of adapting to climate change.”



Climate Tort Litigation

- Significant barriers to a successful claim
- Breach of standard of care / unreasonable interference
- Causation and proof of loss present challenges.
- Governments could adopt legislation to facilitate climate change litigation.

Directors' Duties Claims

- Claims by shareholders or the corporation (derivative action) against directors or officers for failing to consider/manage climate-related risks in breach of fiduciary obligations
- Typically allege director's breached fiduciary duties by failing to adopt and implement business strategy that takes into account climate change risks
- Barriers to successful claims include:
 - Business judgement rule
 - Lack of proof regarding financial losses

Directors' Duties Claims

ClientEarth v Shell's Board of Directors (UK, 2023)

- Court emphasized the wide discretion directors have in managing the company's affairs, including how they address climate risk. It declined to second-guess their business judgment absent clear evidence of bad faith or gross negligence

Enea v Kowalik et al (Poland, TBD)

- Shareholders allege that directors breached fiduciary duties by proceeding with a coal power plant investment
- Risk of asset being stranded given the E.U.'s climate policies
- Potentially precedent setting

Competition Act – Greenwashing Provisions

Background

- Enacted June 20, 2024
- Expanded private enforcement of civil provisions of the *Competition Act* as of June 20, 2025
- Mixed public reception
 - Uncertainty about enforcement and conflict with other requirements
 - Chilling effect
 - Constitutional challenge alleging s.2(b) violation
- Environmental marketing claims had previously attracted scrutiny under the *Act*; other existing avenues for enforcement

The Greenwashing Provisions

- Captures claims about the environmental benefits of a business or business activity
 - s.74.01(1)(b.1): makes a representation to the public in the form of a **statement, warranty or guarantee** of a **product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change** that is **not based on an adequate and proper test**, the proof of which lies on the person making the representation.
 - s.74.01(1)(b.2): makes a representation to the public with respect to the **benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change** that is **not based on adequate and proper substantiation in accordance with internationally recognized methodology**, the proof of which lies on the person making the representation

The Greenwashing Provisions (cont'd)

- Businesses/organizations have onus of demonstrating their claims are adequately substantiated
- Due diligence defence continues to be available
- Potential remedies for claimants:
 - Order prohibiting representation and similar ones from being made
 - Order requiring publication of corrective notices
 - Administrative monetary penalties
- Damages or other monetary relief not available to claimants

Key Aspects of Bureau's Guidelines

“Representation to the Public”

- Enforcement will focus on marketing representations and not representations made solely for other purposes or that are regulated by other government agencies

“Adequate and Proper”

- Substantiation should be suitable to the claim and sufficiently rigorous
- Should be consistent with recent evidence and practices
- May call for 3rd party verification where required by the chosen methodology

“Internationally Recognized Methodology”

- No prescribed list of recognized methodologies
- Methodology need only be adopted in 2+ countries (need not be adopted by governments)
- Treatment of methodologies required or recommended by federal or provincial programs

A New Era of Private Enforcement?

- Private claimants must obtain leave by way of a “public interest test” to bring claims under the greenwashing provisions
 - The *Act* does not define what is considered “in the public interest”
 - Existing public interest standing tests may not be analogous to claims under the *Act*
- Impact of Guidelines on private enforcement and Tribunal decisions
- Leave will not be granted where the Commissioner of Competition has commenced an inquiry, brought an application, or reached a settlement in regards of a claim
- Pre-existing modes of private access remain the only route for private claimants to receive monetary compensation

Best Practices for Regulatory Compliance and to Limit Liability

Best Practices for Regulatory Compliance and to Limit Liability

1. Environmental claims should be appropriately calibrated and substantiated
 - Representations must be **“based on adequate and proper substantiation in accordance with internationally recognized methodology”**.
2. Maintain and implement credible plans for reducing carbon emissions
 - Set realistic and achievable targets and develop specific strategies and timelines for emissions reduction.
 - Avoid statements that over promise on environmental outcomes, performance and benefits or overstate the impact of carbon offsets. Focus on direct emission reductions achieved through operational changes and technology and innovation.
 - Include substantiation source and maintain accurate substantiation records to respond to challenges.
 - Develop internal processes such as tip sheets to assess environmental claims.
 - Involve legal counsel in drafting and reviewing environmental representations.
 - Conduct periodic audits (such as annual reviews) of environmental claims.

Best Practices for Regulatory Compliance and to Limit Liability (cont'd)

3. Proactively assess risk of private law litigation claims and implement governance practices to reduce exposure to claims
4. Directors and officers should conduct appropriate due diligence and be prepared to justify decisions that have environmental consequences
 - Keep clear records, discuss climate change considerations, follow established due diligence frameworks and be prepared to justify decisions that have environmental consequences or risk compliance with company's emissions targets.
 - Seek impartial expert advice where necessary and document opinions and how they influence decision making.
 - Assign responsibility for climate-related issues to specific directors or committees, ensure board members are educated on climate risks and opportunities and document climate-related discussions in board meetings and minutes.
5. Frequently review liability and directors' and officers' insurance policies to ensure adequate coverage – watch for policy exclusions!

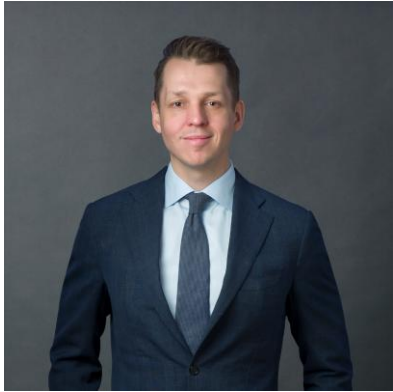
Best Practices for Regulatory Compliance and to Limit Liability (cont'd)

Remain vigilant and adaptable in your approach to climate risk management to respond to an evolving climate change legal landscape.

- Reevaluate and update climate risk management strategies upon the release of updated guidance from the Competition Bureau or judicial decisions to ensure ongoing regulatory compliance and mitigate litigation risk.

Questions?

Lawyer Profiles



Matthew Huys is a partner in Osler's National Disputes Department. Matthew practices complex commercial litigation, with an emphasis on energy, construction, and securities disputes. Matthew regularly advises energy companies on risks related to environmental and climate change litigation. He frequently speaks and writes about these issues in Canada and abroad.



Kaeleigh Kuzma is a partner in Osler's Competition/Antitrust and Foreign Investment Group. She is an expert in all areas of competition- law, including mergers and acquisitions, strategic alliances and joint ventures, abuse of dominance, and marketing and advertising, among other areas. Kaeleigh also provides strategic advice on foreign investment matters under the *Investment Canada Act*. Kaeleigh represents clients across a broad range of industries, including energy, mining, consumer products, entertainment, and technology. She is a published author and speaker on competition and foreign investment law topics and is recognized by several legal publications.

Lawyer Profiles



Paula Olexiuk is a partner in Osler's Commercial Department. Her practice focuses on energy and infrastructure projects in Canada and internationally, with a particular focus on renewable energy and energy transition projects and carbon credits transactions. Paula has experience in various power and renewable energy transactions, project development, engineering, and contracts related to asset purchase and sale, commodity purchase and sale, and construction agreements.

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