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

Matthew Huys, Kaeleigh Kuzma, Paula Olexiuk, Ankita Gupta and Logan Aitken

INTRODUCTION

Climate change litigation is on the rise around the world. Plaintiffs are increasingly turning to the courts to address the multifaceted challenges posed by global warming. These legal actions are leveraging a variety of legal theories, including tort, nuisance, deceptive marketing, and corporate law, among others, in an attempt to hold both governmental and private entities accountable for their roles in contributing to climate change and to secure proactive remedies that promote decarbonization efforts.

The United States and Europe have been at the forefront of such litigation,[1] however in the last decade, Canada has witnessed a burgeoning growth in climate litigation. Recent Canadian cases have predominantly engaged with public law issues,[2] while private climate litigation is in its nascent stage. However, despite the relative infancy of private law climate litigation in Canada,

[1] Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot* (2024), online: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf> at 2 [*2024 Snapshot*].

[2] For a discussion of public law issues, see Colin Feasby, David DeVlieger & Matthew Huys, "Climate Change and the Right to a Healthy Environment in the Canadian Constitution" (2020) 58:2 Alb L Rev 213.

there is a palpable momentum building, with litigation proposed in parts of Canada seeking to hold multinationals liable for the costs of climate change mitigation and adaptation, and a growing number of cases challenging project approvals for failing to consider the effects of climate change. It is reasonable to expect this field to evolve as other anticipated legal actions and legislative changes emerge.

Private law claims against companies proceeding internationally demonstrate that courts are willing to entertain arguments that companies have an obligation to address climate change, but the extent or implementation of this obligation is uncertain. Such strategies include challenging representations about climate policies and emissions reporting, the incorporation of climate risk into financial decision-making, and the alignment of corporate governance practices with climate goals. There is also a growing category of claims brought against companies in tort. These claims face significant legal and evidentiary hurdles. However, courts have considered some claims to be justiciable, leaving the door open as to whether these claims will succeed on their merits.

Claims are also being brought internationally against the directors and officers of corporations relating to decision making about climate change. Canadian derivative action claimants could face similar challenges as litigants abroad, with courts finding that directors have not acted against corporate interests. In addition, Canada's competition laws were recently amended to include two explicit provisions aimed specifically at misleading statements and claims about the environmental attributes of a business, its products or its operations, with the possibility of private enforcement of these provisions available in June 2025. These changes have and can be expected to continue to result in greater scrutiny of climate representations made by companies.

This paper provides a comprehensive analysis of the types of private climate cases that have been initiated against corporations, the legal theories underpinning them, and the implications for corporate accountability in relation to environmental representations and climate change. The first

section of this paper will examine the types of claims initiated internationally and in Canada and the impact of the recent amendments to the *Competition Act* in Canada. The second section will address the challenges faced by litigants in pursuing private law claims related to climate change. The third and final section will offer strategic insights and best practices for managing and mitigating the risks associated with climate litigation.

PART I – CLASSES OF PRIVATE LAW CLIMATE CHANGE LITIGATION

The following section discusses various forms of private law claims relating to climate change, specifically those that would concern energy companies. The claims to be introduced largely seek to hold companies liable for alleged contributions to climate change, influence business decision making and limit the development of high-emitting projects, and ensure climate representations of businesses can withstand scrutiny. This section provides an overview of the types of claims being advanced, and notable examples in Canada and abroad.

The key forms of claims targeting fossil fuel companies in relation to climate change and their past and future emissions that we will discuss are those brought directly against directors and officers of corporations in relation to decisions affecting climate and business risk, actions brought in tort seeking damages for harms caused by emissions (typically grounded in nuisance or negligence), and judicial reviews challenging project applications and environmental assessments. This section will also discuss the private enforcement of environmental representations under the *Competition Act*.

Directors' duties in risk transition

A. Background

Climate change litigation concerning directors' duties examines whether corporate directors have adequately considered and managed climate-related risks within their fiduciary obligations. Canadian corporate law statutes require directors and officers to act honestly and in good faith

with a view to the best interests of the corporation, and exercise care, diligence and skill in their decision making.[3] Many jurisdictions impose comparable fiduciary duties.[4] Claims for breach of director and officers' duties are typically brought by shareholders or the corporation itself.[5] However, complainants can also apply to the court to bring a derivative action in the corporation's name against directors and officers where they have acted contrary to the corporation's best interests.[6] Given the increasing recognition of climate risks as material financial risks, courts are scrutinizing whether directors are fulfilling fiduciary obligations by integrating climate considerations into corporate governance and decision making, risk assessment, and disclosure practices.

Litigation in this area typically arises where directors are alleged to have failed to disclose material climate risks, misrepresented the company's exposure to climate-related financial threats, or neglected regulatory and market shifts that impact corporate viability. As legal frameworks evolve, directors may face heightened scrutiny from investors and advocacy groups, with litigation serving as a mechanism to enforce accountability.

Although there have been some United Kingdom cases on this issue that were unsuccessful, no cases framed in this manner have been advanced to date in Canada. Due to similarities in corporate law statutes and the discretion granted to directors and officers, Canadian litigants are likely to face similar challenges.

B. Notable claims abroad

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[3] *Canada Business Corporations Act*, RSC 1985, c C-44, s 122(1) [*CBCA*]. See also *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560 [*BCE*] and *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461 [*Peoples*]. Note that *CBCA* s 122(1.1) specifies that directors and officers may consider the environment in their decision making.

[4] For example: *Companies Act 2006* (UK), c 46 ss. 172, 174 (United Kingdom); Del Code Ann tit 8 §365 (1953) (Delaware); *Corporations Act 2001*, (Cth) ss. 180-181 (Australia).

[5] *CBCA, supra* note 3, s 238.

[6] *Ibid,* s 239(1).

This section discusses three cases to frame this form of action and demonstrate how arguments have been advanced and considered in different circumstances. Two United Kingdom cases provide helpful judicial discourse in understanding the potential and limitations of this form of claim, and a case filed in Poland has been selected for discussion as it applies a framing based on financial losses that may prove to be more successful than other arguments advanced to date.

1. *ClientEarth v Shell's Board of Directors*

A landmark derivative claim for breach of directors' duties was unsuccessfully advanced in *ClientEarth v Shell's Board of Directors* in 2023, with costs imposed by the U.K. High Court.[7]

In February 2023, ClientEarth, an environmental NGO headquartered in London, filed a derivative action in the High Court of England and Wales against the board of directors of Shell plc ("Shell"). ClientEarth alleged Shell's board of directors had breached its fiduciary responsibilities as a result of (i) the board's acts and omissions relating to Shell's climate change risk management strategy as publicly disclosed by Shell and (ii) the board's failure to cause Shell to comply with an order made by the Hague District Court on May 26, 2021, against Shell to reduce the aggregate annual volume of CO_2 emissions from its business operations and sold energy-carrying products by at least net 45% at the end of 2030, relative to 2019 levels (to be discussed below).[8]

ClientEarth brought the claim as a derivative action in its capacity as a (token) shareholder of Shell.[9] In order to proceed with its action, ClientEarth needed the Court's permission to pursue the

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[7] *ClientEarth v Shell and others*, [2023] EWHC 1897 (Ch) [*ClientEarth*]. On August 31, 2023, ClientEarth was ordered to pay Shell's costs in connection with all aspects of the action, including submissions and attendance during the prima facie stage. This departed from the ordinary rule in the UK that when a company attends an application for permission to bring a derivative claims voluntarily it will ordinarily not be allowed any costs; see *ClientEarth v Shell and others*, [2023] EWHC 2182 (Ch).

[8] *ClientEarth, supra* note 7 at paras 4, 39.

[9] Supportive institutional investors held over 12 million shares and included U.K. pension funds Nest and London CIV, Swedish national pension fund AP3, French asset manager Sanso IS, Belgian asset manager Degroof Petercam Asset Management (DPAM) and Danish asset manager Danske Bank Asset Management, as well as pension funds Danica Pension and AP Pension.

claim on behalf of Shell against its directors.[10] Under the U.K. *Companies Act*, a court is required to dismiss the application if it appears to the court that the application itself, and the evidence filed in support of it, do not disclose a *prima facie* case for giving permission.[11] If there is a *prima facie* case, Shell and the directors would be made respondents to a more substantive hearing.[12]

The Court accepted - as did Shell, in broad terms - that Shell faces material and foreseeable risks because of climate change that could have a material effect on the company.[13] However, the Court concluded that ClientEarth failed to demonstrate a *prima facie* case of actionable breach of duty as required.[14]

The Court found that ClientEarth's arguments were not enough to show that Shell's business was being managed in a way that could not properly be regarded by the directors as being in the best interests of Shell's members as a whole.[15] A "fundamental defect" in ClientEarth's claim was that it "ignores the fact that the management of a business of the size and complexity of that of Shell will require the Directors to take into account a range of competing considerations, the proper balancing of which is classic management decision with which the court is ill-equipped to interfere".[16]

The Court also assessed certain additional factors required in determining whether to grant leave, including whether the member was seeking the claim in good faith. The Court concluded that ClientEarth had an ulterior motive for pursuing its claim: to advance ClientEarth's policy agenda.

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[10] *ClientEarth, supra* note 7 at paras 4-5.

[11] *Ibid* at paras 8-10.

[12] *Ibid* at paras 8-10.

[13] *Ibid* at para 45.

[14] *Ibid* at paras 58, 99.

[15] *Ibid* at para 37.

[16] *Ibid* at para 66.

[17] The Court found that motive was the dominant purpose for making the claim and, but for that purpose, the claim would not have been brought at all.[18] As a result, the Court was not satisfied that the claim was brought in good faith.[19]

The Court ultimately concluded that ClientEarth had not made a *prima facie* case for its derivative claim against Shell. The Court therefore denied leave to permit the claim to continue.[20]

2. *McGaughey & Davies v Universities Superannuation Scheme Limited*

In contrast to claims directly challenging directors' decisions in relation to climate change and emissions, some litigants have challenged directors' decisions indirectly by challenging the flow of finance to projects that are not aligned with climate action. In *McGaughey & Davies v Universities Superannuation Scheme Limited*, the claimants advanced a claim against the current and former directors of one of the largest private occupational pension schemes in the United Kingdom.[21] Members of the scheme brought a derivative claim for breach of directors' duties, alleging among other things that the scheme continued to invest in fossil fuels although it aimed to be carbon neutral by 2050, and that the directors failed to form an adequate plan to deal with the investment risks.[22]

The claimants alleged the failure to take such steps had prejudiced the success of the company, and that the directors' breaches "put their own beliefs with regard to fossil fuels above the interests of the beneficiaries and the Company".[23] They sought an order requiring divestment and a

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[17] *Ibid* at para 92.

[18] *Ibid* at para 92.

[19] *Ibid* at para 92.

[20] *Ibid* at para 99.

[21] *McGaughey & Davies v Universities Superannuation Scheme Limited*, [2023] EWCA Civ 873 [*McGaughey*].

[22] *Ibid* at para 29.

[23] *Ibid* at para 31.

declaration that failure to act constituted a breach of duty.[24] The central legal question was whether the appellants had standing to bring a multiple derivative action.[25]

The England High Court (affirmed on appeal based on similar reasons) [26] found that the applicants did not have a sufficient interest in a derivative claim because their alleged losses as pension scheme members were not directly tied to any loss suffered by the scheme.[27] The claims did not qualify as derivative claims because they were seen as attempts to overturn decisions for the benefit of members, not the company.[28] The Court found that the directors had not improperly benefitted from the alleged breaches, there was no evidence of fraud on the minority, and further, even if the claims were valid, the proper remedy would have been through direct claims against the scheme rather than through a derivative action.[29]

3. *Enea v Kowalik et al*

Another example of a claim scrutinizing the decision-making of directors is *Enea v Kowalik et al.* Shareholders of the energy company Enea are pursuing a claim in Poland against its directors under the company's directors and officers liability insurance.[30] At a special general meeting, 87% of Enea's shareholders voted favorably to bring the claim seeking to hold directors accountable

[24] *Ibid* at paras 29-32.

[25] *Ibid* at para 59.

[26] *Ibid* at paras 58, 187. The Court of Appeal found that the claim could not be characterized as a derivative action because there was no prima facie case of reflective loss to the company as a result of the alleged breach, and there was no evidence the directors' breaches furthered their own interests or put their own beliefs above the interests of the beneficiaries (*ibid* at paras 171-172). The Court deemed it an attempt to challenge the company's management and investment decisions without proper grounds (*ibid* at para 174).

[27] *Ibid* at para 58.

[28] *Ibid.*

[29] *Ibid.*

[30] "Polish energy giant sues former directors and insurer over failed coal power plant investment" (February 1, 2024), online: ClientEarth <https://www.clientearth.org/latest/press-office/press-releases/polish-energy-giant-sues-former-directors-and-insurer-over-failed-coal-power-plant-investment/>.

for a lack of due diligence over a coal power plant investment that lost the company more than US$160 million. Prior to beginning the project, economic analysts warned it would be unprofitable due to rising carbon prices, competition from cheaper renewables, the impact of European Union energy reforms and difficulties securing financing. Enea ultimately abandoned the project mid-construction in 2022 for economic reasons, and its investment was written off.[31] This claim is in its early stages and has not yet advanced to trial. The reasons why this claim may have a greater chance of success than others are discussed below in Part II below.

Claims in tort

A. Background

Another category of claim seeks to hold defendants liable in tort based on alleged contributions to harm caused by climate change, typically seeking damages for the cost of mitigation and adaptation. These claims are often brought by governments, but have also been advanced by individuals.[32] Currently, no oil and gas company has been held liable for damages resulting from contributions to climate change.[33] Typically, the claims include allegations that companies have engaged in deceptive conduct and made misrepresentations about alleged harms caused as a basis for establishing a breach of duty resulting in damages. As will be explained further, this allegation

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[31] Note that this is the second claim involving Enea and its proposed Ostrołęka C coal-fired power plant. ClientEarth successfully brought a claim under the Polish Commercial Companies Code against the company in August 2019. It argued that the shareholder resolution approving construction should be annulled because the plant would pose an indefensible financial risk to shareholders as it did not take climate change properly into account. The issue was whether the resolution granting consent to build a coal-fired power plant breached the board's members' fiduciary duties given climate-related financial risks. The court found the resolution null and void, and Enea's appeal was rejected. See "10 Landmark Climate Change Cases" (July 2022), online: ClientEarth <https://www.clientearth.org/media/q0jak2fr/10-landmark-climate-change-cases_clientearth_compressed.pdf>.

[32] See for example *Smith v Frontera Co-operative Group Limited*, [2024] NZSC 5 where New Zealand's Supreme Court allowed claims made by an individual in public nuisance and negligence to be brought against the country's seven largest emitters to proceed to trial. Other notable cases include those brought against "Carbon Majors" by the states of Delaware and California (see *2024 Snapshot, supra* note 1 at 31-32). Further examples are discussed below.

[33] "Big Oil in Court: The latest trends in climate litigation against fossil fuel companies" (September 12, 2024), online: Oil Change International <https://zerocarbon-analytics.org/wp-content/uploads/2024/09/Big_oil_in_court_09_2024.pdf> at 6.

seeks to support: (i) the causal link to damages; and (ii) claims of liability despite the diffuse nature of climate harm.

The two causes of action most likely to be advanced against fossil fuel companies in Canada are public nuisance and private nuisance.[34] Claimants have also advanced claims on the basis of negligence, to be discussed, as well as trespass, product liability, and failure to warn which will be referenced to a lesser extent.

B. Public nuisance

A plaintiff in a public nuisance claim in Canada must prove that the defendant's activities have resulted in an unreasonable interference with a public interest in questions of health, safety, morality, comfort, or convenience.[35] In determining whether an interference is unreasonable, the Court will consider several contextual factors such as the inconvenience caused by the activity, the difficulty in avoiding the risk, and the utility of the activity.[36]

A plaintiff could theoretically bring an action against one or several GHG emitters alleging they contributed to various damages, including those to public or private property and human health, constituting an unreasonable interference with the public interest. However, plaintiffs will encounter numerous challenges in advancing this type of claim (discussed below), including establishing standing to advance the claim, proving that the interference is unreasonable, and showing a causal link between the activity and alleged damages.

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[34] Negligence and trespass have also been advanced as having the potential to ground a climate change related claim. However, there are significant challenges with the application of those causes of action to climate change related litigation to be discussed. See Shi-Ling Hsu, "A realistic evaluation of climate change litigation through the lens of a hypothetical lawsuit" (2008) 79:3 U Colo L Rev 701 at 731.

[35] *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 52, 168 DLR (4th) 513 [*Ryan*].

[36] Lewis N Klar, Tort Law, 7th ed. (Toronto: Thomson/Carswell, 2017) at 900-901 [*Klar*].

C. Private nuisance

Private nuisance focuses on the interference with the use and enjoyment of private rights to land, unlike public nuisance which implicates rights of the general public.[37] To establish private nuisance in Canada, a claimant must demonstrate a non-trivial interference with enjoyment of their land, and that the interference is unreasonable in the circumstances.[38] Liability depends on the nature and extent of the interference to the plaintiff, and does not require intention or negligence.[39] The claimant must establish that the nuisance is caused by conduct traceable to the defendant.[40] Similar to public nuisance, in assessing whether or not the interference is "unreasonable", the Court conducts a broad reaching examination of the surrounding circumstances relating to the nuisance.

A claimant could potentially advance a claim in private nuisance against a fossil fuel company by alleging it caused substantial and unreasonable interference with enjoyment of the claimant's land; for example, due to increased flooding, wildfire risk and increases in smoke, drought, or extreme weather events. This may be of particular weight where a claimant relies on its property for agricultural or other economic purposes where the alleged interference would be of greater significance and tied directly to monetary losses.[41] However, claimants will face similar causation challenges as those relating to public nuisance.

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[37] *Ibid* at 897.

[38] *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at paras 19, 24, [2013] 1 SCR 594 [*Antrim Truck Centre*].

[39] *Ibid* at para 29.

[40] Klar, *supra* note 36 at 914.

[41] Note that although proof of damages is not required in a nuisance claim, where there are clear damages flowing from the interference it may make the assessment of unreasonableness more straightforward; see *Antrim Truck Centre, supra* note 38 at para 50 citing *Newfoundland (Minister of Works, Services and Transportation) v Airport Realty Ltd*, 2001 NFCA 45.

D. Notable claims abroad and proposed Canadian litigation

A litany of tort claims have been filed against companies globally in relation to climate change in many jurisdictions including the United States, Belgium, Germany, Ecuador, and New Zealand.[42] However, to date, none have succeeded on their merits. Many claims have involved significant argument at preliminary stages to determine the justiciability of the issues and the appropriate jurisdiction. While some have been dismissed, courts have allowed others to proceed to trial. This section discusses two leading examples, one case from Hawaii that is the first of its kind to be allowed to proceed to trial by a state appellate court, and another from a Netherlands appellate court overturning a landmark trial decision which ordered a corporation to reduce its emissions under a negligence-like claim. This section also discusses a proposed class action brought by British Columbia municipalities against fossil fuel giants.

1. *City of Honolulu v Sunoco LP*

In March 2020, the City of Honolulu and the Honolulu Board of Water Supply filed their tort claim against Exxon, Chevron, and Sunoco for allegedly engaging in nuisance, failure to warn, and trespass by knowingly concealing the dangers of fossil fuel products – leading to damages from forest fires, rising sea levels, and flooding.[43] The plaintiffs allege a traditional tort case, and that the defendants engaged in a deceptive promotion campaign and systematically misled the public about the dangers of using their oil and gas products.[44] The defendants claim that emissions and climate change are caused by "billions of daily choices, over more than a century, by governments,

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[42] Between 2015 and 2023 around 230 strategic climate-aligned lawsuits were initiated against companies and trade associations; see *2024 Snapshot, supra* note 1 at 19, 31-32.

[43] *City and County of Honolulu v Sunoco LP*, 153 Hawai'i 326, 2023 WL 7151875 (Hawai'i Sup Ct 2023) [*City of Honolulu*].

[44] *Ibid* at 1-2.

companies, and individuals" and that the plaintiffs cannot recover from a handful of defendants for the cumulative effect of worldwide emissions.[45] In April 2020, the defendants sought to have the case dismissed, arguing that the circuit court lacked specific jurisdiction over them and that the plaintiffs failed to state a claim.[46]

The lower Court denied the motions to dismiss.[47] It concluded it had specific jurisdiction because the plaintiffs' claims arose out of and related to the defendants' sales and marketing contracts in Hawaii.[48] Further, dismissal for lack of claim was unwarranted because the defendants could not demonstrate beyond doubt that the plaintiffs could not provide a set of facts that would entitle them to relief.[49] In October 2023, the Hawaii Supreme Court upheld the lower court's decision to dismiss the defendants' motions to dismiss the claim, allowing the lawsuit to proceed.[50] In March 2024, the defendants filed petitions with the US Supreme Court requesting review of the decision.[51] The petition was denied by an order with no reasons provided on January 13, 2025, allowing the case to proceed to trial.[52]

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[45] *Ibid* at 2.

[46] *Ibid* at 3, 6, 12.

[47] *Ibid* at 13.

[48] *Ibid* at 13.

[49] *Ibid* at 14.

[50] *Ibid* at 2.

[51] "Docket 23-947: *Sunoco LP v City and County of Honolulu*" (1 March 2024), online: Supreme Court of the United States <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-947.html> [*Sunoco* SCOTUS File]; "Petition for a writ of certiorari" (28 February 2024), online: Supreme Court of the United States <https://www.supremecourt.gov/DocketPDF/23/23-947/301676/20240228105935605_Sunoco_pet.pdf>.

[52] *Sunoco* SCOTUS File, *supra* note 51.

Given this is the first claim of this nature that has been allowed to proceed to trial by a state Court of Appeal, the Supreme Court's decision to deny the petition sets a precedent for other claims to follow the framing advanced in this case.

2. *Milieudefensie et al v Shell plc*

A recent leading decision that considered negligence-like arguments illustrates the challenges of imposing obligations on individual companies in combatting climate change. On November 12, 2024, the Hague Court of Appeal overturned a groundbreaking 2021 Dutch District Court of the Hague ruling which had ordered Shell to reduce its Scope 3 carbon dioxide emissions (those outside its direct operations but still a result of its activities) by 45% from 2019 levels by 2030.[53] The District Court found that Shell had violated the "social standard of care" in the Dutch Civil Code, which imposes a duty not to harm others by breaking "what according to unwritten law has to be regarded as proper social conduct".[54] The District Court interpreted this rule in light of international human rights law and the Netherlands' obligation to reduce greenhouse gas emissions under the Paris Accord.[55]

The Court of Appeal held that Shell did not have a legal obligation to reduce its greenhouse gas emissions and mitigate the effects of climate change.[56] The Court of Appeal declined to impose a specific emissions limit on Shell for two reasons.

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[53] *Milieudefensie et al v Shell plc*, ECLI:NL:GHDHA:2024:2100, Gerechtshof Den Haag, 200.302.332/01 (November 12, 2024) [*Milieudefensie*]. Milieudefensie has indicated that it plans to appeal the decision to the Hague Supreme Court, see "Why we're talking our Shell climate case to the Supreme Court" (11 February 2024), online: Milieudefensie <https://en.milieudefensie.nl/news/why-we2019re-taking-our-shell-climate-case-to-the-supreme-court>.

[54] *Milieudefensie et al v Shell plc*, ECLI:NL:RBDHA:2021:5539, Rechtbank Den Haag, C/09/571932/ HA ZA 13-379 (May 26, 2021) at para 4.4.1 [*Milieudefensie* DC].

[55] *Ibid* at para 4.3.

[56] *Ibid* at para 7.111.

First, the Court of Appeal found that there was no basis to quantify the emissions reduction target for Shell. The Court held that extensive European Union climate legislation incentivizes emission reductions but does not impose absolute reduction targets on individual companies.[57] It held applying a general global reduction target to Shell would not be appropriate without considering the specific reduction pathways for different sectors and regions.[58] Because there was no way to determine the required reduction in emissions on which to base an order by the civil courts against a specific company, the Court of Appeal concluded that the 45% figure lacked sufficient support.[59] Second, the Court of Appeal held that even if it imposed an emissions reduction requirement on Shell, there was no evidence that it would cause a reduction in global greenhouse gas emissions or lessen climate change.[60] The Court of Appeal reasoned that if Shell reduced the amount of oil and gas it sold to comply with the reduction requirement, other companies would step in to fill the same demand, creating the same greenhouse gas pollution.[61] Therefore, the emissions limit would be ineffective.

3. *Proposed British Columbia Municipalities Class Action*

Currently no tort claims against fossil fuel companies in relation to climate change have been advanced in Canada. "Sue Big Oil" is a campaign led by the public interest organization, West Coast Environmental Law ("WCEL"). WCEL is seeking the support of British Columbia municipalities in pursuing a class action lawsuit against multinational oil and gas companies including Chevron, Shell, Exxon, and Aramco. The proposed claim alleges the companies are

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[57] *Ibid* at para 7.46.

[58] *Ibid* at para 7.73.

[59] *Ibid* at para 7.81.

[60] *Milieudefensie, supra* note 53 at para 7.110.

[61] *Ibid* at para 7.110.

liable for increased costs to local governments from natural disasters like floods, wildfires, and heat waves, and the costs associated with climate change adaptation such as rebuilding stormwater systems.[62] WCEL's public framing of the claim suggests it may be brought in tort law, and would involve allegations that the companies attempted to deceive the public about the environmental risks of fossil fuels. Nine BC municipalities, representing roughly 370,000 residents, have voted to work together so far.[63] The municipalities have yet to appoint a representative plaintiff and formally retain counsel. However, as will be further discussed below, absent legislative intervention these claims are unlikely to succeed.

WCEL has suggested it may advance a class action in a similar manner to lawsuits against tobacco and pharmaceutical companies.[64] Pursuing a class action in British Columbia is a strategic decision that allows class members to save on legal fees through joint representation and is advantageous jurisdictionally because unlike some other provinces, British Columbia's class action rules do not require the losing parties to pay legal costs if their claim fails.[65]

Challenges to environmental impact assessments

A growing number of cases around the world are challenging project approvals made under environmental impact legislation such as Canada's *Impact Assessment Act* (replacing the Canadian *Environmental Assessment Act, 2012*)[66] or Ontario's *Environmental Assessment Act* for failing to

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[62] "How it Works" (N.D.), online: Sue Big Oil <https://suebigoil.ca/how-it-works/> [How it Works]; "Program Spotlight: Sue Big Oil" (August 7, 2024), online: West Coast Environmental Law <https://www.wcel.org/blog/program-spotlight-sue-big-oil>.

[63] "About Sue Big Oil" (N.D.), online: West Coast Environmental Law <https://www.wcel.org/about-sue-big-oil>. Populations estimated based on 2021 Census data. The municipalities are Cumberland, Qualicum Beach, Burnaby, Squamish, Gibsons, View Royal, Slocan, Sechelt and Port Moody.

[64] "Program Spotlight: Sue Big Oil" (August 7, 2024), online: West Coast Environmental Law <https://www.wcel.org/blog/program-spotlight-sue-big-oil>. See for example *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42.

[65] *Class Proceedings Act*, RSBC 1996, c 50, s 37.

[66] Since 1984, there have been four main federal environmental assessment regimes, the most recent being the *Impact Assessment Act,* SC 2019, c 28 [*IAA*]. The *IAA* mandates that certain "designated projects" undergo a federal

consider the effects of climate change. An important question for energy development is whether regulators are required to consider the downstream effects of fossil fuel combustion, such as global warming, when conducting environmental assessments.

The UK Supreme Court, for example, recently overturned a decision of the English Court of Appeal that upheld an environmental impact assessment ("EIA") on the construction of new oil wells which had not taken into account greenhouse gas emissions from the consumption of the oil to be pumped from the wells, deferring to the government's judgment.[67] In a narrow 3-2 decision, the UK Supreme Court found that the EIA conducted by Surrey County Council was flawed because it failed to consider the downstream greenhouse gas emissions resulting from the combustion of the extracted oil.[68]

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impact assessment before moving forward. The *Physical Activities Regulations* SOR/2023-60 [*Physical Activity Regulations*] sets out the list of designated projects (Project List) captured under the *IAA*'s designated project scheme. This Project List includes activities that the government has designated as major projects with the greatest potential for adverse effects on areas of federal jurisdiction related to the environment. Section 9 of the *IAA* also provides the Minister with the discretion to designate projects not otherwise set out in the Project List where the project may "cause adverse effects within federal jurisdiction or adverse direct or incidental effects". Once a project has triggered the application of the *IAA*, there are three levels of assessment: a planning phase, an impact assessment phase, and decision-making phase. Among other things, the overall assessment evaluates: (i) the impacts that the effects that are likely to be caused by the carrying out of that project may have on any Indigenous group and any adverse impact that those effects may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; (ii) the effects that are likely to be caused by the carrying out of that project contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change; and (iii) the extent to which the effects that are likely to be caused by the carrying out of that project contribute to sustainability. In September 2019, Alberta's provincial Cabinet referred the constitutional validity of the *IAA* and the *Physical Activity Regulations* to the Alberta Court of Appeal and argued that the *IAA* impermissibly intruded into provincial jurisdiction by enabling the federal government to conduct far-ranging inquiries into matters assigned exclusively to the provinces. In a 4-1 decision, the Court of Appeal found the *IAA* and *Physical Activities Regulation* to be unconstitutional. A 7-2 majority of the Supreme Court of Canada agreed in *Reference re Impact Assessment Act*, 2023 SCC 23. In particular, the Supreme Court criticized the broad of factors that a decision-maker could consider (detailed above). In April 2024, Parliament introduced surgical amendments in response to the Supreme Court of Canada's decision, but it remains uncertain whether they will result in meaningful changes to how the *IAA* will be administered.

[67] *R (on the application of Finch) on behalf of the Weald Action Group v. Surrey County Council and others*, [2024] UKSC 20 [*Surrey County Council*].

[68] *Ibid* at para 7.

The majority, led by Lord Leggatt, held that the EIA must include an assessment of both direct and indirect significant effects of the project on the environment, as required by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and the EIA Directive.[69] The majority emphasized that the purpose of extracting fossil fuels is to make hydrocarbons available for combustion, which inevitably leads to greenhouse gas emissions.[70] Therefore, the combustion emissions are a foreseeable and significant environmental effect of the project that must be assessed.[71] The majority rejected the argument that the emissions were too remote or speculative to be considered, noting that it was agreed that the oil extracted would be refined and eventually combusted, producing quantifiable greenhouse gas emissions.[72] The UK Supreme Court's decision highlights an expansion of environmental assessments that consider the full range of significant effects, including downstream emissions

Similarly, in the US, in March 2022, the Court of Appeals for the District of Columbia Circuit held that the Federal Energy Regulatory Commission ("FERC") had conducted an improper environmental assessment for a proposed natural gas pipeline because FERC's environmental assessment failed to account for the reasonably foreseeable indirect effects of the project, specifically the greenhouse gas emissions attributable to burning the gas carried in the pipeline.[73] The Court highlighted the necessity for regulatory bodies to account for the full spectrum of

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[69] *Ibid* at paras 53, 83, 101.

[70] *Ibid* at paras 2, 79, 172.

[71] *Ibid* at paras 7, 79, 85.

[72] *Ibid* at para 102. Lord Sales in dissent argued that the EIA Directive and the 2017 Regulations did not require the assessment of downstream emissions from the combustion of the oil. He contended that the scope of the EIA should be limited to the direct effects of the project and the immediate activities associated with it, being the extraction of oil, and held that the downstream emissions were too remote to be considered an indirect effect of the project.

[73] *Food & Water Watch and Berkshire Environmental Action Team v Federal Energy Regulatory Commission*, 22-1132 (DC Ct App 2022) [*Food & Water Watch, 2022*].

environmental impacts, including those that occur downstream, to ensure informed decision-making and greater accountability in mitigating climate change effects, opening the door to a range of broader considerations in environmental reviews.[74]

In a subsequent case, the same petitioners claimed that FERC's environmental assessment for the proposed pipeline failed to account for the increased emissions created by additional upstream drilling and downstream burning.[75] However, contrasting the 2022 decision, in June 2024, the Court of Appeals for the District of Columbia held that FERC had reasonably concluded that there was too much uncertainty about the upstream wells and sufficiently explained its decision to not give a quantitative estimate of the project's ozone production.[76]

The approach of Canadian courts is more closely aligned with the most recent US jurisprudence. In the case of *Forest Ethics Advocacy Association v National Energy Board*,[77] the plaintiffs argued that the National Energy Board's ("NEB") decision to exclude broader issues related to climate change in relation to the approval of a pipeline project known as the Line 9B Reversal and Line 9 Capacity Expansion Project was unreasonable.[78] Subsection 52(2) of the *National Energy Board Act* [*NEBA*] provided that the NEB, in approving a pipeline, should have regard to all considerations that appear to be directly related to the pipeline and to be relevant and may have regard to a number of other considerations including any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.[79] The NEB

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[74] *Ibid* at 22.

[75] *Food & Water Watch v Federal Energy Regulatory Commission*, 22-1214 (DC Ct App 2024) [*Food & Water Watch, 2024*].

[76] *Ibid* at 7, 11-12.

[77] *Forest Ethics Advocacy Association v Canada (National Energy Board),* 2014 FCA 245, [2015] 4 FCR 75 [*Forest Ethics*].

[78] *Ibid* at para 9.

[79] *Ibid*.

ruled that it would not consider the environmental and socio-economic effects associated with upstream activities, the development of the Alberta oil sands, and the downstream use of oil transported by the pipeline because these considerations were irrelevant.[80]

The Federal Court of Appeal upheld the NEB's decision, finding that more general issues such as climate change are more likely "directly related" to the environmental effects of facilities and activities upstream and downstream from the pipeline, not the pipeline itself.[81] The Court emphasized that the NEB's main responsibilities under the *NEBA* include regulating the construction and operation of interprovincial oil and gas pipelines, and nothing in *NEBA* expressly requires the NEB to consider larger, general issues such as climate change.[82]

The Court also noted that the NEB does not regulate upstream and downstream facilities and activities, which require approvals from other regulators.[83] If those facilities and activities are affecting climate change in a manner that requires action, it is for those regulators to act or, more broadly, for Parliament to act.[84] The Court held that subsection 52(2) of the *NEBA* was added to empower the Board to regulate the scope of proceedings and parties before it more strictly and rigorously, and the Board's decision was consistent with this objective.[85]

Ultimately, the Court concluded that the Board's task was a factual one based on its appreciation of the evidence before it, and the Board's decision to exclude the broader issue of climate change

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[80] *Ibid* at para 8.

[81] *Ibid* at para 69.

[82] *Ibid*. *NEBA* was replaced by the *Canadian Energy Regulator Act* (*CER Act*) in 2019. One of the changes included in the *CER Act* is the express addition of climate change (i.e., "the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change") as one of the many factors that to be considered by the Commission of the Canada Energy Regulator.

[83] *Ibid*.

[84] *Ibid*.

[85] *Ibid*.

was within a range of acceptability and defensibility on the facts and the law.[86]

More recently, in June 2023, Canada's Federal Court considered a similar case involving the environment minister's approval of the Bay du Nord Development Project off the coast of Newfoundland and Labrador in *Sierra Club Canada Foundation, et al v Minister of Environment and Climate Change*.[87] The applicants challenged the Minister's decision to approve the environmental assessment report, arguing that it was unreasonable because it failed to consider the downstream greenhouse gas emissions resulting from the oil to be produced.[88]

The Federal Court found that the exclusion of downstream GHG emissions from the impact assessment was reasonable. The project involved the extraction, production, and transportation of offshore oil resources, with an estimated recoverable 300 million barrels of crude oil and an operational lifespan of approximately 30 years.[89] The Court noted that the environmental assessment conducted by the Impact Assessment Agency of Canada had focused on the direct emissions from the project itself, such as those from construction and operation, but did not include the emissions from the eventual combustion of the oil.

The Court found that the exclusion from the impact assessment of the greenhouse gas emissions resulting from the oil to be produced from the development was reasonable because "[i]t is not possible to determine how much of the downstream use, if any, will be within Canada".[90] As a result, the Court stated that the Minister "would merely be speculating in considering the

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[86] *Ibid*.

[87] *Sierra Club Canada Foundation, et al v Minister of Environment and Climate Change*, 2023 FC 849 [*Sierra Club*].

[88] *Ibid* at para 2.

[89] *Ibid* at para 9.

[90] *Ibid* at para 67.

environmental effects of downstream GHG emissions", given the uncertainty about the oil's final destination and use.[91]

Consequently, the Court upheld the Minister's decision, emphasizing that the environmental assessment was conducted in accordance with the *Canadian Environmental Assessment Act, 2012*, and that the exclusion of downstream emissions was justified under the circumstances.[92] The applicants have appealed the Federal Court's decision. The Federal Court of Appeal heard the appeal in November 2024 and reserved its decision.[93]

***Competition Act* greenwashing provisions**

A. Background and Context

The June 20, 2024 enactment of new greenwashing provisions under the *Competition Act*[94] reflect a growing emphasis on truthfulness and substantiation in environmental representations.[95] Of particular note is the expansion of private enforcement of the civil provisions of the *Competition Act*, which will for the first time allow private parties to seek leave to bring applications before the Competition Tribunal ("Tribunal") in respect of deceptive marketing practices, including greenwashing.[96] This section provides background on the new provisions, public and stakeholder responses, and the broader context in which these changes have been introduced.

The greenwashing provisions attracted significant public commentary. On the same day that the

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[91] *Ibid*.

[92] *Ibid* at para 69.

[93] "Court File Number A-238-23: *Sierra Club Canada Foundation et al. v. MECC et al.* (Appeal (S.27 – Final) – Application for Judicial Review)" (18 November 2024), online : Federal Court of Appeal <https://www.fca-caf.ca/en/pages/hearings/court-file-database>.

[94] RSC, 1985, c C-34 [*Competition Act*]; Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2024 (assented to on June 20, 2024) [Bill C-59].

[95] *Competition Act*, *supra* note 94, s 74.01(1); Bill C-59, *supra* note 94, s 236(1).

[96] Bill C-59, *supra* note 94, ss 238-239.

amendments came into force, the Alberta government characterized them as being "part of an agenda to create chaos and uncertainty for energy investors for the purpose of phasing out the energy industry altogether".[97] In July, the Competition Bureau ("Bureau") initiated an expedited consultation process, during which they received a record number of responses from a variety of stakeholders. While some applauded the new provisions as a step in the right direction, many commentators raised concerns such as the use of undefined and vague terminology, the possible conflict with reporting obligations of other legislative regimes, and the risk of a wave of unmeritorious litigation targeted largely at participants in Canada's energy sector. Some also commented that the amendments would result in a chilling effect on environmental representations and related public discourse more generally, which in turn is likely to reduce the investment required to further innovative environmental and sustainability efforts in Canada. In December 2024, a constitutional challenge was filed, alleging that the greenwashing provisions violate the right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.[98] That same month, the Bureau released for consultation draft enforcement guidelines.[99]

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97 Danielle Smith and Rebecca Schulz, "Provincial Response to Bill C-59 Passing: Joint Statement" (20 June 2024), online: Government of Alberta <https://www.alberta.ca/release.cfm?xID=905472A7D3AA6-01DF-FBA9-5CB957AE15E78114>.

98 *Alberta Enterprise Group and Independent Contractors and Businesses Association v Canada (Attorney General)* (4 Dec 2024), Calgary 2401 17448 (ABKB) (Statement of Claim, Plaintiffs). Whether this challenge will be successful remains to be seen. The *Competition Act* provisions requiring adequate and proper testing for performance claims were previously subject to constitutional challenge. In *Chatr*, the respondent challenged the constitutionality of the deceptive marketing practices provisions of the *Competition Act*, claiming that it violated their freedom of expression under the *Canadian Charter of Rights and Freedoms* and that the AMP (then a maximum of $10 million) was unconstitutional because it amounted to a penal sanction. The court rejected these arguments. *Canada (Commissioner of Competition) v Chatr Wireless Inc.*, 2013 ONSC 5315 at paras 475-588.

99 Competition Bureau, *Environmental claims and the Competition Act* (Gatineau: ISED, 2024), online: Government of Canada <https://competition-bureau.canada.ca/en/how-we-foster-competition/consultations/environmental-claims-and-competition-act> [Draft Guidelines].

Notwithstanding the public response to the greenwashing provisions and the pending private enforcement under the *Competition Act*, it is important to recall that misleading advertising has and continues to be actionable in other forums including under provincial consumer protection legislation and at common law; the *Competition Act* is just one tool available to potential litigants seeking redress for alleged misrepresentations.[100] Regarding the *Competition Act* specifically, it has always required that representations not be misleading and that performance claims be substantiated by adequate and proper tests.[101] Moreover, the Bureau has previously investigated and has ongoing investigations regarding environmental claims.[102] As commented by the Commissioner of Competition ("Commissioner") several months after the provisions came into force:

> While these changes are significant, it is important not to overlook the reality that prohibitions against greenwashing and unsupported performance claims already existed in our laws.
>
> The *Competition Act* has long had provisions prohibiting false or misleading claims to promote a product or a business interest. Case in point, look at the action we took against Keurig Canada in 2022. There, our investigation concluded the company's claims about the recyclability of its single-use coffee pods were false or misleading. Keurig agreed to pay a $3 million penalty.
>
> Similarly, performance claims not based on adequate or proper testing have been prohibited in Canada since the 1930s. By extension, the Bureau has long advised businesses that these provisions apply to environmental claims. Not only have we published guidance and warnings for many years, we've also taken enforcement action in high-profile cases.
>
> With our past track record for context, you can see that these new provisions are an evolution—not a revolution—in addressing deceptive marketing practices. It

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[100] While outside of the scope of this paper, it is important to note that the *Competition Act* has criminal provisions for deceptive marketing practices and, as with all criminal provisions of the *Competition Act*, private parties can commence an action on an individual or class basis based on an alleged violation of the criminal provisions addressing false or misleading representations. Over the years, the courts have certified numerous class actions brought under these provisions.

[101] For decades, the *Competition Act* has contained both civil and criminal provisions addressing deceptive marketing practices. The primary civil provisions are found in section 74.01(1).

[102] Over the years, the Bureau has settled multiple matters related to alleged false or misleading environmental claims using the general deceptive marketing practices provisions in the *Competition Act*. The Bureau's enforcement approach has historically focused on product specific claims, but a significant portion of the complaints received, particularly those from activist public interest groups, involve more general or forward-looking environmental claims about a business' activities related to the environment.

> means that advertisers are expected to have a foundation for their environmental claims, so that they're not deemed false or misleading for consumers.[103]

In December 2024, the Bureau issued for consultation draft guidelines which set out their enforcement priorities regarding the greenwashing provisions.[104] The Draft Guidelines are discussed in further detail below, but as an initial observation the Bureau has taken a pragmatic approach in respect of several key areas raised by stakeholders during the initial consultation process.

Of course, Bureau guidelines are just that – guidelines. While guidelines are persuasive, ultimately they are not binding on the courts or the Tribunal. Moreover, private parties may test their scope by seeking remedial orders for conduct that falls outside of the guidelines. In any event, the greenwashing provisions signal that heightened scrutiny will be applied to environmental claims and that organizations must be ready to substantiate and support their claims. This is exacerbated by the fact that the maximum administrative monetary penalties ("AMPs") were increased in 2022 and that, as a result of Bill C-59, private parties can soon seek remedial orders directly at the Tribunal rather than rely solely upon the enforcement discretion of the Commissioner, resulting in increased litigation risk for organizations and businesses.

B. The Greenwashing Provisions

The greenwashing provisions capture environmental claims about a product or service and environmental claims about the benefits of a business or business activity, specifically:

- Section 74.01(1)(b.1) of the *Competition Act* provides that reviewable conduct occurs where a person 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

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[103] Competition Bureau, *The New Era of Competition Enforcement in Canada* by Matthew Boswell (26 September 2024), online: Government of Canada <https://www.canada.ca/en/competition-bureau/news/2024/09/the-new-era-of-competition-enforcement-in-canada.html>.

[104] Draft Guidelines, *supra* note 99.

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.

- Section 74.01(1)(b.2) of the *Competition Act* provides that a person engages in reviewable conduct where they make 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 establish a reverse onus. In practice, what this means is that the business or organization must demonstrate on a balance of probabilities that the representation is properly tested or substantiated rather than requiring the Commissioner (or the private party) to demonstrate that it is not. Unlike the general deceptive marketing practices provisions, the greenwashing provisions do not require the applicant to establish that the representation is materially false or misleading in any respect. In effect, where an environmental representation is not properly tested or substantiated it is deemed to be misleading. This reverse onus approach is the same as that found within the pre-existing general performance claims provisions of the *Competition Act*,[105] and therefore is not a wholly new concept within the scheme of the *Competition Act*.

Where a business or organization is unable to demonstrate the requisite elements, the following remedies are available: an order prohibiting the representation and similar representations; an order requiring the publication of corrective notices; and/or an order imposing an AMP that is the greater

[105] *Competition Act*, *supra* note 94, s 74.01(1)(b).

of: (1) $10 million (or $15 million for a subsequent order); and (2) three times the value of the benefit derived from the conduct or, if this amount cannot be calculated, 3% of annual worldwide gross revenues.[106]

Separate from the implementation of the greenwashing provisions, in June 2022 numerous provisions of the *Competition Act* were amended to increase the maximum criminal fines and civil AMPs available. Consistent with amendments made to the abuse of dominance provision of the *Competition Act* at that time, the maximum AMP for deceptive marketing practices was increased to take into consideration a value that is calculated with reference to the benefit derived from the conduct or 3% of annual worldwide gross revenues.[107] When these amendments came into force, the Bureau commented that the increased fines and AMPs "play an important role in ensuring compliance with the *Competition Act* by providing a financial incentive for businesses to comply with the law".[108] Notably, the *Competition Act* provides that the purpose of an AMP is to promote compliance with the law and is expressly not to punish.[109] The *Competition Act* also sets out certain non-exhaustive mitigating and aggravating factors that are to be considered when determining the quantum of an AMP.[110] When private parties can seek leave to commence an application in June

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106 *Ibid*, s 74.1. Importantly, restitution is only available under the general deceptive marketing practices provisions in section 74.01(1)(a); it is not available for performance claims in section 74.01(1)(b) or the greenwashing provisions in sections 74.01(1)(b.1) and (b.2).

107 Prior to June 2022, the AMP for deceptive marketing practices was capped at $10 million (or $15 million for a subsequent order). Amendments to the *Competition Act* that received Royal Assent as part of Bill C-19 under the *Budget Implementation Act, 2022, No 1,* SC 2022, c 10 increased the maximum AMP to the current maximum.

108 Competition Bureau, *Guide to the 2022 Amendments to the Competition Act* (Gatineau: ISED, 2022), online: Government of Canada <https://competition-bureau.canada.ca/en/guide-2022-amendments-competition-act#sec02>.

109 *Competition Act*, *supra* note 94, s 74.1(4).

110 *Ibid*, s 74.1(5).

2025, they will be limited to these same remedial orders; damages or other monetary relief will not be available.[111]

C. Key Terminology

1. *Representation to the Public*

"Public" is very broadly defined in the *Competition Act*[112] and the courts have also taken a broad approach to defining the public.[113] Moreover, the *Competition Act* specifies that it is not necessary that the representation be made in a place to which the public had access, nor is it necessary to establish that any member of the public to whom the representation was made was within Canada.[114]

One issue raised by multiple stakeholders during the Bureau's initial consultation is the extent to which the deceptive marketing practices provisions may be used to challenge representations that are not squarely advertising or marketing, such as statements made to shareholders. Some stakeholders requested that the Bureau create safe harbours similar to those that exist for forward-looking statements in the context of securities disclosures, or defer more generally to securities legislation regarding disclosures.[115]

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111 While the broader amendments to the *Competition Act* resulting from Bill C-59 created a new form of monetary relief including a form of collective recovery for certain civil provisions of the *Competition Act,* these amendments do not extend to the deceptive marketing practices provisions.

112 Section 74.03(3) of the *Competition Act* deems certain conduct to be a representation to the public, such as a private communication between a salesperson and a consumer.

113 For example, in *R v Shell Canada Ltd.*, [1972] OJ No 290 at para 6, 5 CPR (2d) 217 (Ont Co Ct), a letter written by Shell to holders of its credit card was considered to be a representation made to the public. See also *R v Independent Order of Foresters*, [1989] I.L.R. 1-2420, 26 C.P.R. (3d) 229; *Canada (Commissioner of Competition) v Premier Career Management Group Corp.*, 2009 FCA 295, 2009 CAF 295.

114 *Competition Act*, *supra* note 94, ss 74.03(4)(b) and (c).

115 See for example TMX Group, *Public Consultation on Competition Act's New Greenwashing Provisions* (27 September 2024), online: Government of Canada <https://competition-bureau.canada.ca/sites/default/files/documents/GW-TMX-Group.pdf>; Canadian Association of Petroleum Producers, *Consultation on Competition Act's New Greenwashing Provisions* (5 September 2024), online: Government of Canada <https://competition-bureau.canada.ca/sites/default/files/documents/GW-Canadian-Association-Petroleum-Producers.pdf>.

The Draft Guidelines clarify that, at least from the Bureau's perspective, enforcement is focused on representations made in marketing and promotional materials. The Draft Guidelines explicitly state that the Bureau is not focused on "representations made for a different purpose, such as to investors and shareholders in the context of securities filings" (with the caveat that if information used in these other materials are then used in promotional materials, the Bureau will view such representations as marketing).[116]

A related point is the use of the term "business activity" in section 74.01(1)(b.2). The Draft Guidelines state that business activity captures "any activity carried on by a business, including but not limited to manufacturing, transporting, storing, acquiring, or otherwise dealing in articles and services, as well as raising funds". Notably, the definition of "business" in section 2 of the *Competition Act* expressly includes "the raising of funds for charitable or other non-profit purposes". Accordingly, the Draft Guidelines reinforce that the greenwashing provisions apply to environmental claims made while fundraising (such as those made by public interest groups to support their initiatives).

2. *Adequate and Proper*

Environmental claims about a product or service must be based on adequate and proper testing, and environmental claims about the benefits of a business or business activities must be based on adequate or proper substantiation. Existing case law provides guidance on the phrase "adequate and proper testing" in the context of general performance claims and such jurisprudence can be expected to apply in the context of the new greenwashing provisions relating to environmental claims about a product or service.[117]

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116 Draft Guidelines, *supra* note 99.

117 *Canada (Commissioner of Competition) v Imperial Brush Co Ltd*, 2008 Comp Trib 2, 2008 Trib conc 2 at para 128. See also *Canada (Commissioner of Competition) v Chatr Wireless Inc.* 2013 ONSC 5315 at para 344, [2013] OJ No 3748 where the court confirmed that "the law permits a flexible and contextual analysis when assessing whether a claim has been adequately and properly tested, but there must be a test" [*Chatr Wireless*].

In contrast, the phrase "adequate and proper substantiation" is new to the *Competition Act* and therefore has not yet been judicially considered. The Draft Guidelines state as follows:

> Businesses should choose substantiation that is suitable, appropriate and relevant to the claim, and sufficiently rigorous to establish the claim in question. Often, this will require substantiation that is scientific in nature. Third party verification will be required in circumstances where it is called for by the internationally recognized methodology relied upon for adequate and proper substantiation.[118]

Therefore, best practices include ensuring that environmental claims are appropriately calibrated and substantiated in a way that is consistent with the most recent evidence using an appropriate methodology with well recognized expertise in the applicable field, with third party verification occurring when required by the selected methodology.

3. *Internationally Recognized Methodology*

The reference in section 74.01(1)(b.2) to "internationally recognized methodology" garnered significant scrutiny. During the Senate Debates just prior to the amendments coming into force, it was remarked that while the expression "internationally recognized methodology" may appear vague, the words should be interpreted in accordance with their ordinary meaning.[119] It was also commented that an analysis of a representation should consider federal and other Canadian best practices, such as those set out by Environment and Climate Change Canada.[120]

As the *Competition Act* is principle-based rather than prescriptive, it is not surprising that the Draft Guidelines do not identify specific acceptable internationally recognized methodologies. Indeed, the Draft Guidelines comment that "the Bureau does not tell businesses what they can or cannot say. It only offers principles to help businesses assess whether their environmental claims are in

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[118] Draft Guidelines, *supra* note 99.

[119] *Debates of the Senate (Hansard),* 44th Parl, 1st Sess, vol 153, issue 214 (18 June 2024), online: <https://sencanada.ca/en/content/sen/chamber/441/debates/214db_2024-06-18-e> at 1530.

[120] Senate of Canada, *Observations to the seventeenth report of the Standing Senate Committee on National Finance (Bill C-59)* (13 June 2024) (Chair: Claude Carignan), online: Parliament of Canada <https://sencanada.ca/en/committees/NFFN/Report/133052/44-1>.

line with the requirements of the Act."[121] To that end, the Draft Guidelines take a pragmatic approach to the term "internationally recognized methodology", stating that the Bureau "will likely consider a methodology to be internationally recognized if it is recognized in two or more countries. Further, the Bureau is of the view that the Act does not necessarily require that the methodology be recognized by the governments of two or more countries."[122]

The Draft Guidelines also address the issue of substantiating claims regarding benefits that involve new technologies. Specifically, the Draft Guidelines state that if there is no methodology designed for testing a claim regarding a new technology, reference may be made to other internationally recognized methodologies that "together can create substantiation for the claim, or that are used for substantiating similar claims."[123] The Draft Guidelines also state that if an internationally recognized methodology that is directly relevant to the claim is later developed, the business should substantiate the claim in accordance with that methodology. The Draft Guidelines go on to state that if the business ultimately concludes that the claim cannot be substantiated, even with reference to other available methodologies, the claim should not be made.

D. Due Diligence Defence

The *Competition Act* continues to contain an explicit due diligence defence that applies to the civil deceptive marketing practices provisions. Section 74.1(3) states that where it is demonstrated that a firm took all reasonable steps to avoid the misrepresentation the remedies available against them are limited to only a prohibition order.

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121 Draft Guidelines, *supra* note 99.

122 *Ibid*.

123 *Ibid.*

There is existing case law regarding the application of the due diligence defence. In *Canada (Commissioner of Competition) v Chatr Wireless Inc.*,[124] the court held that the respondent's claims regarding its cellular network – specifically claims that the respondent's network had fewer dropped calls than competitors – were not misleading; however, the court held that the respondent had failed to conduct adequate and proper testing in respect of its performance claims in certain geographic markets. In deciding upon the appropriate remedy regarding this aspect of the application, the court held that in determining whether a respondent has shown due diligence, the court must consider whether, despite the failure to perform adequate and proper testing, the respondent: (1) took all reasonable steps appropriate for their business to avoid publicly making the unsupported claim without adequate and proper testing; or (2) reasonably believed in a mistaken set of facts that, if true, would have meant they had adequately and properly tested the claim.[125] In *Chatr*, the court pointed to evidence which undermined the ability of the respondent to rely upon the due diligence defence[126] and therefore an AMP was imposed.

To rely upon the defence, businesses must establish that they exercised due diligence to prevent the reviewable conduct from occurring by, for example, taking appropriate measures to ensure the veracity of the claim and implementing and following an effective compliance program.

E. Treatment of Aspirational and Future Claims

One area of significant commentary is the treatment of environmental claims about the future, such as net zero initiatives undertaken in support of the federal government's Net Zero Emissions by 2050 Action Plan, enshrined in the *Canadian Net-Zero Emissions Accountability Act*

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124 *Chatr Wireless, supra* note 117.

125 *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2014 ONSC 1146 at para 27, 238 ACWS (3d) 334.

126 *Ibid* at paras 28-49.

("*CNZEAA*").[127] Many stakeholders including those in the energy industry expressed concern that the greenwashing provisions will lead to "greenhushing" (choosing to not report on environmental efforts and goals so as to mitigate litigation risk) which in turn will have a chilling effect on investments necessary to further important innovation efforts in the environmental and sustainability space such as carbon capture and storage technology.[128] Participants in various sectors have devoted significant time and resources to research and implement innovative technologies intended to improve their own environmental performance and in some cases that of their industry more broadly. While the greenwashing provisions do not impact the ability to undertake such research, the greenwashing provisions increase litigation risk for representations and claims regarding the expected outcomes and benefits of such innovation activities, particularly with the 2022 increased maximum AMPs and the introduction of private enforcement resulting from Bill C-59.

The Draft Guidelines are clear that prior to making future claims, businesses should have: (1) a clear understanding of what needs to be done to achieve what is being claimed; (2) a concrete, realistic and verifiable plan in place to achieve the objective, with interim targets; and (3) meaningful steps underway to accomplish the plan.[129] Accordingly, as with other types of environmental claims, businesses should be mindful of statements regarding innovation efforts and new technology, and ensure that such statements are appropriately calibrated and do not over

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[127] SC 2021, c 22; Environment and Climate Change Canada, *Net-zero emissions by 2050* (Gatineau: ECCC, 2024), online: Government of Canada <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050.html>; Environmental and Clime Change Canada, *2030 Emissions Reduction Plan* (Gatineau: ECCC, 2022), online: Government of Canada <https://publications.gc.ca/collections/collection_2022/eccc/En4-460-2022-eng.pdf>.

[128] See for example Canadian Association of Petroleum Producers, *Consultation on Competition Act's New Greenwashing Provisions* (5 September 2024), online: Government of Canada <https://competition-bureau.canada.ca/sites/default/files/documents/GW-Canadian-Association-Petroleum-Producers.pdf>.

[129] Draft Guidelines, *supra* note 99.

promise on environmental outcomes, performance and benefits. Regarding the use of disclaimers, the Bureau's general position is that while a disclaimer can provide additional context for a representation, a disclaimer does not cure an otherwise misleading representation.[130]

F. A New Era of Private Enforcement?

For decades, enforcement of the civil deceptive marketing practices provisions of the *Competition Act* has been the exclusive domain of the Commissioner, with a sharpened focus on environmental claims in recent years. Bureau investigations of environmental claims have been predominantly triggered by informal or formal complaints, and the Bureau has the obligation to investigate, in at least a preliminary matter, every complaint received.[131] Where based on a preliminary investigation the Commissioner has reason to believe that reasonable grounds exist for an order under the civil reviewable practices provisions of the *Competition Act*, the Commissioner may commence an inquiry under section 10.[132] It can often take at least one year (and sometimes longer) from the time at which the Bureau commences an initial investigation until the point at which the Commissioner comes to a view as to whether enforcement action is required. To date, most of the enforcement action under the civil deceptive marketing practices provisions have resulted in

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130 See *ibid*; Competition Bureau, *The Deceptive Marketing Practices Digest Volume 1* (Gatineau: ISED, 2015), online: Government of Canada <https://competition-bureau.canada.ca/en/deceptive-marketing-practices-digest-volume-1#s2_0>.

131 A formal complaint is made through a statutory process set out in section 9 of the *Competition Act*. Where a section 9 complaint is made the Commissioner is compelled to commence an inquiry under section 10. This statutory process has been used by activist public interest groups to compel inquiries into allegedly deceptive environmental claims.

132 The decision as to whether an inquiry should be commenced has been held to be a purely administrative decision, rather than a judicial or quasi-judicial decision (see *Stevens v Canada (Restrictive Trade Practices Commission)*, [1979] 2 FC 159, 98 DLR (3d) 662; *Gauthier v Canada (Consumer & Corporate Affairs)*, [1991] FCJ No 1002, 139 NR 77 (FCA)). Regardless of whether an inquiry is commenced by the Commissioner's own initiative or compelled by a section 9 complaint, the Commissioner has complete discretion to close an inquiry.

settlements.[133] Where a settlement is reached, it is memorialized in a consent agreement which is then registered with the Tribunal and has the force of a Tribunal order.[134]

Private parties will soon be able to seek leave to commence an application at the Tribunal under the deceptive marketing practices provisions of the *Competition Act*, including the greenwashing provisions. To bring an application, the private party must obtain leave on the basis of a public interest test.[135] The *Competition Act*, however, does not define or elaborate on the meaning of the phrase "public interest" and it has not previously been a basis upon which private access has been granted under other civil provisions. Public interest standing is well-established in the context of constitutional litigation, requiring the applicant to meet a three-part test: (1) there is a serious justiciable issue raised; (2) the applicant has a genuine interest in the matter; and (3) the proposed application is a reasonable and effective manner in which the issue may be brought before the court.[136] However, these principles are not clearly analogous to a private access regime under the *Competition Act* for at least two reasons: the Commissioner has existing powers to bring proceedings and there may be other third parties such as competitors or customers who have a direct interest in the matter. In any event, possible considerations in determining whether public interest exists may include whether there are realistic alternative means which favour a more efficient or effective use of judicial resources, whether the applicant has raised issues of public

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133 The Tribunal recently heard and decided *Commissioner of Competition v Cineplex Inc.*, 2024 Comp Trib 5, 2024 Trib. conc. 5. The Tribunal found that Cineplex had engaged in drip pricing contrary to the deceptive marketing practices provisions by adding a mandatory $1.50 online booking fee to ticket prices, and imposed a record $38.9-million penalty against Cineplex. The entire matter took more than two years from investigation to decision. Cineplex Inc. is appealing the decision to the Federal Court of Appeal. *Cineplex Inc. v Commissioner of Competition* (22 October 2024), FCA A-346-24 (Notice of Appeal, Cineplex Inc.).

134 *Competition Act, supra* note 94, s 74.12.

135 Bill C-59, *supra* note 94, s 254(4).

136 *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27, [2022] 1 SCR 794; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.

importance, and the potential impact of the proceedings on the rights of others. As a result of the new private access regime, the Tribunal will be placed in a role as gatekeeper in assessing whether proposed proceedings are "in the public interest".

Notably, private enforcement will be unavailable where the Commissioner has already brought an application to the Tribunal challenging the claim, has commenced an inquiry regarding the claim or has already reached a settlement regarding the claim.[137] In addition, in considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter.[138] Similarly, where leave is granted, the Tribunal may not draw an inference from the fact that the Commissioner has or has not taken any action in respect of the matter.[139]

Perhaps the most significant threshold issue for private enforcement of the greenwashing provisions is the meaning of public interest access in this context. Stakeholders can be expected to watch with interest as the Tribunal establishes the bounds of this new private access framework. From a substantive perspective, it remains to be seen whether private parties and the Tribunal will adopt the Bureau's enforcement posture on various issues, such as the Bureau's position on representations in regulatory filings and the meaning of the phrase "internationally recognized methodology". That being said, we would anticipate the Bureau's guidelines to inform the Tribunal's determination of whether to grant leave on a public interest basis and, where leave is granted, a determination of an application on the merits. Moreover, the Commissioner has a statutory right to intervene in circumstances where a private party is granted leave on a public

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137 *Competition Act*, *supra* note 94, s 103.1(4).

138 *Ibid*, s 103.1(11). Despite this statutory prohibition – which existed prior to the establishment of a "public interest" threshold for leave – as a practical matter if the facts show that the Commissioner considered the claim and refrained from taking any action, it is challenging to understand how this would not factor into a public interest assessment.

139 Bill C-59, *supra* note 94, s 239(4).

interest basis,[140] and the Draft Guidelines confirm that the Bureau will have regard to its own guidelines when electing to do so.

Lastly (but not insignificantly), the remedial orders available to private parties under the greenwashing provisions do not include any form of monetary relief payable to private parties. Unlike most other provisions of the *Competition Act*, private parties have been able to challenge misleading representations under provincial consumer protection laws and at common law, and have done so with success for some time. There is also the pre-existing criminal deceptive marketing practices regime within the *Competition Act* which provides for private actions based on an alleged violation of the criminal provisions.[141] If a private party wants their own monetary relief or damages, they will need to follow these pre-existing routes to such recourse. However, the lack of monetary relief may not be a deterrent for public interest applicants and some view such organizations as those most likely to seek private enforcement of the new greenwashing provisions when it becomes available in June 2025.

PART II – CHALLENGES IN ADVANCING DIFFERING FORMS OF PRIVATE LAW CLIMATE CHANGE LITIGATION

In this section, we discuss legal challenges that exist in advancing the above types of private law climate litigation claims.

Tort claim issues in standing, proof, causation, damages, and potential defences

To date no claim has successfully been proven against any fossil fuel company internationally in tort for harms caused by greenhouse gas emissions. This section discusses the challenges that apply to litigants advancing some or all types of tort claims. Litigants face such significant barriers that absent governments implementing legislation to surmount these issues, it is highly unlikely that

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140 *Ibid*, s 255.

141 *Competition Act*, *supra* note 94, s 36.

claimants will be successful. However, the trend is that courts appear to at least be considering these issues on a more substantive basis.

A. Issues in nuisance

A plaintiff claiming in public nuisance will have difficulty establishing whether they have standing, demonstrating the defendant's activities resulted in an unreasonable interference with a public interest, and establishing causation. A claimant in private nuisance will not face issues in establishing standing, however, they will equally face challenges in proving an unreasonable interference with the enjoyment of its property and proving causation. Note that issues in causation will also apply to negligence claims, and as such will be discussed more generally below.

1. *Standing*

A threshold issue with public nuisance claims is whether the plaintiff has standing.[142] Claims in public nuisance are typically brought by the Attorney General in its *parens patriae* capacity.[143] The Attorney General of a Canadian province, for example, could sue for damages caused to public property and expenses related to protecting it. However, the Attorney General may be reluctant to launch this type of action due to political considerations as advancing this type of litigation may expose crown corporations, some of which are significant GHG emitters, to litigation.

It is questionable whether municipalities, which as seen in the proposed case in British Columbia, may have greater motivations and less political reasons for avoiding litigation, could have standing to advance a public nuisance claim. The Supreme Court of Canada suggested in *obiter* in *Canfor*

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[142] Stepan Wood, "Climate Change Litigation in Ontario: Hot Prospects and International Influences", *Ontario Bar Association Institute* (2016), online: Environmental Justice and Sustainability Clinic <https://ejsclinic.info.yorku.ca/files/2016/03/S-Wood-OBA-Institute-2016-climate-change-litigation.pdf> at 3.

[143] *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 67, [2004] 2 SCR 74 [*Canfor*].

that municipalities may have a role to play in defence of public rights[144], however it was not at issue in that case and remains an open possibility.

Private parties (including environmental advocacy organizations) only have standing to advance public nuisance claims if they have suffered "special damages".[145] Special damages are damages which are particular, direct, and substantial over and above that sustained by the public at large.[146] In practice, establishing special damages has proven to be difficult to the point of making public nuisance a particularly ineffective private law remedy.[147]

2. *Proving an unreasonable interference*

Claimants may also face challenges in proving the defendants' activities result in an unreasonable interference with the public interest.[148] Plaintiffs are likely to point to the alleged impacts of climate change and argue the interference is substantial. However, defendants could argue the interference is not unreasonable due to the fact that fossil fuel products are legal and regulated by legislation, governments have promoted developments of the products through project approvals, incentives and tax policy, the government owns corporations to facilitate the consumption of fossil fuel products, and the consumption of fossil fuels has been an ordinary, if not vital, part of Canadians' lives for centuries pivotal in maintain our standard of living.[149] Similar arguments would apply regarding private nuisance as traditionally courts assess in broad terms whether the

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[144] *Canfor, supra* note 177 at para 73 citing *Scarborough v REF Homes Ltd* (1979), 9 MPLR 255 (Ont CA) at 257, 1979 CarswellOnt 1588.

[145] *Ryan, supra* note 35 at para 52.

[146] Klar, *supra* note 36 at 907 citing *McRae v British Norwegian Whaling Co*, [1927-31] Nfld LR 274 (Nfld SC) at 283.

[147] *Canfor, supra* note 177 at para 68 citing Klar, *supra* note 36 at 905 (adjusted to reference newest edition). See also discussion below on proving damages generally in climate-related tort claims.

[148] *Ryan, supra* note 35 at para 52; *Canfor, supra* note 177 at para 68.

[149] Note the "utility of the activity" may be considered regarding reasonableness; see *Ryan, supra* note 35 at para 53.

interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances.[150] In the case of private nuisance, the key question is whether the interference is greater than the individual should be expected to bear in the public interest without compensation.[151] It is arguable that damages resulting from the consumption of fossil fuels should be accepted by an individual as a cost of living in an organized society, rather than viewed as a cost of "running the system" that should be borne by the public generally which would mitigate against finding unreasonableness.[152]

B. Issues in negligence

A successful action in negligence requires that the plaintiff demonstrate that (1) the defendant owed him or her a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant's breach.[153] Climate-related claims brought in negligence likely have a lower chance of succeeding in Canada than nuisance claims due to the significant challenges posed in proving all of the above. Challenges unique to negligence will be analyzed in this section, and issues in causation and proving damages will be discussed more generally below.

1. *Establishing a duty of care*

Obligations similar to the duty in the Dutch Civil Code considered in *Milieudefensie* to obey "proper social conduct" could be argued to be found in Canada's common law of negligence, which requires everyone to take reasonable care of "those whom they ought reasonably to have in

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[150] *Antrim Truck Centre, supra* note 38 at para 26. Note that although the focus is on whether the interference suffered by the claimant is unreasonable, not on whether the nature of the defendant's conduct is unreasonable, the nature of the defendant's conduct is not an irrelevant consideration; *Antrim Truck Centre* at paras 28-29. A finding of reasonable conduct will not necessarily preclude a finding of liability, even a very important public purpose does not simply outweigh the individual harm to the claimant; *Antrim Truck Centre* at paras 29, 31.

[151] *Ibid* at paras 34, 45.

[152] *Ibid* at para 38.

[153] *Rankin (Rankin's Garage & Sales) v JJ*, 2018 SCC 19 at para 71, [2018] 1 SCR 587 [*Rankin*].

contemplation as being at risk when they act".[154] However, a more nuanced assessment of the principles grounding a duty of care indicate several challenges in surmounting this hurdle.

To establish a novel duty of care, the plaintiff must show that the harm was reasonably foreseeable and that there is sufficient proximity between the parties; if successful, a *prima facie* duty of care arises.[155] The defendant may then show residual policy considerations negate that duty.[156]

Reasonable foreseeability requires that the defendant ought objectively to have foreseen the particular type of harm suffered by the plaintiff.[157] In *Rankin*, the Court emphasized that it is insufficient merely to foresee some general risk (such as vehicle theft). Instead, the specific harm, namely personal injury, must have been reasonably foreseeable.[158] Proximity involves a "close and direct" relationship that makes it fair and just to impose an obligation on the defendant to consider the plaintiff's interests.[159] There must be some specific circumstance tying the risk of harm to the defendant's conduct.[160]

These requirements highlight the challenges plaintiffs face in pursuing claims against fossil fuel companies for harms allegedly caused by direct or indirect emissions. First, foreseeability of the precise harm to a particular plaintiff is difficult to establish. Climate harms are often global, cumulative, and uncertain, rather than traceable to a single defendant. Second, proximity is also

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[154] *Ibid* at para 16. See also *Civil Code of Québec*, CQLR c CCQ-1991, s 1457, which states that "[e]very person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another".

[155] *Rankin, supra* note 153 at paras 16-19.

[156] *Ibid* at para 20.

[157] *Ibid* at paras 25-26.

[158] *Ibid* at paras 34-35, 41.

[159] *Ibid* at paras 23-24.

[160] *Ibid* at paras 60-61.

challenging where there is no direct interaction between emitter and plaintiff, making it unclear how the defendant should have had the plaintiff "in mind".[161]

Even if a *prima facie* duty was found, the second stage of the Anns/Cooper test would require courts to address broad policy implications that could undermine establishing a duty, including concerns about indeterminate liability, the many sources of emissions, and the public's longstanding and continued reliance on fossil fuel products.

2. *Demonstrating a breach of the standard of care*

Even if a duty of care was established, litigants could face significant challenges in establishing a breach of a standard of care. As *Mileudefensie* demonstrates, it is difficult to translate any general duties corporations owe individuals regarding climate issues into specific requirements on corporations to reduce greenhouse gas emissions. This challenge would likely exist in examining whether a company had departed from a standard of care in Canadian law, as a breach is tied to the conduct of a reasonable person.[162] Based on the rationale discussed above that companies will argue they were reasonable in producing, distributing, and marketing fossil fuels due to its legality, authorization, and public utility it is unlikely they would have departed from the standard of "reasonableness" undertaking those activities alone. For this reason, claims are frequently tied to allegations that companies engaged in deceptive marketing or strategic behaviors deliberately designed to mislead the public about the dangers of fossil fuels. If such calculated behaviour were to be substantiated, there may be a greater chance of finding a breach of the standard of care.

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[161] *Ibid* at para 43.

[162] *R v Côté et al*, [1976] 1 SCR 595 at 604, 51 DLR (3d) 244.

C. Proving causation

Tort claims advanced in nuisance and negligence both require demonstrating a causal link between the activity of the defendant and damage. This is likely to prove to be the most challenging aspect of any climate action.[163]

In climate change litigation, there are at least two types of causation that need to be proven. First, the plaintiff must prove that the defendant's actions materially contributed to climate change. Although the causal link between GHG emissions and climate change can likely be proven at trial, individual contributions by a GHG emitter in Canada, even if very large, are insignificant compared to the global emissions that are causing climate change. Second, the plaintiff must demonstrate that the particular damage or harm complained of is causally linked to climate change. While it can likely be established that climate change increases the frequency of extreme weather events, it may be difficult to establish that any given weather event is linked to rising climate change.[164]

It quickly becomes clear that the general "but for" test is not workable in this context. We are all to some extent responsible for rising of global temperatures; our economic system and its growth has been based on energy largely obtained by burning fossil fuels.[165] Climate change involves multiple contributors from various sources, making it difficult to attribute specific local impacts to companies - much less prove legal causation on a balance of probabilities.[166] There is often a significant delay between emissions and their climate impacts, complicating the establishment of

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[163] Andrew Gage, "Climate Change Litigation and the Public Right to a Healthy Atmosphere" (2013) 24 J Envt'l L & Prac 257 at 261.

[164] *Ibid* at 262.

[165] *Ibid* at 261.

[166] In *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11 at para 12, [2021] 1 SCR 175, the Supreme Court of Canada noted the effects of climate change do not have a direct connection to the source of GHG emissions.

causation.[167] Another challenge illustrated by *Milieudefensie* is that companies may deny causation by arguing their contributions to climate change are a result of energy demands and that others would have filled in any gaps had that company not developed fossil fuels. Once again, it is for this reason that claims are often tied to deceptive marketing practices, alleging that consumers would have made different choices had they been aware of climate impacts.[168]

D. Proving damages

With respect to damages, determining which climate-related costs should be included in the claim, such as infrastructure damage and health impacts, and how to quantify them, is complex. This is especially true considering the uncertainty associated with estimating future climate-related expenses, which would also require expert opinion.

One of the most advanced climate cases on attribution is *Luciano Lliuya v. RWE AG*.[169] A Peruvian farmer filed claims in Germany against RWE, its largest electricity producer, alleging it knowingly contributed to climate change by emitting GHGs and should be held responsible in-part for melt of the Palcaraju Glacier, leading to the drastic increase in the size of a lake above his town. He is seeking 0.47% of the costs authorities are expected to incur from setting up flood protections; the same percentage as RWE's estimated contribution to global GHGs. His claim was initially dismissed, with the Court finding no linear causation could be discerned due to the complex

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[167] Katharine L. Ricke and Ken Caldeira, "Maximum warming occurs about one decade after a carbon dioxide emission" (2014), 9:123002, Environmental Research Letters.

[168] Note in its 2022 National Inquiry on Climate Change Report, the Philippines Commission on Human Rights noted that in many jurisdictions courts evaluate evidence linking actors to climate-related losses using the stringent standards of legal causation, disregarding the work of climate and attribution science and causing climate injustice. It recommended the judiciary take judicial notice of developments in the science of attribution when considering legal causality in assessing climate change impacts and damages. Commission on Human Rights of the Philippines, "National Inquiry on Climate Change Report" (2022), online: Republic of the Philippines Commission on Human Rights <https://chr2bucket.storage.googleapis.com/wp-content/uploads/2022/12/08152514/CHRP_National-Inquiry-on-Climate-Change-Report.pdf> at 613.

[169] Sabin Center for Climate Change Law, "Luciano Lliuya v. RWE AG" (2025), online: Climate Change Litigation Databases <https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/>.

relationship between particular emissions and climate change impacts. However, on appeal the case was allowed to proceed with the Court recommending a phase to gather evidence.

Luciano provides some perspective on how a claim for damages could be framed and the type of evidence that a court would consider: attempting to attribute a proportion of global emissions resulting from a particular company to a specific share of predicted losses using expert evidence. One potential challenge is that the claimant has calculated this proportion based on emissions *since the beginning of industrialization* (from 1751 onwards). The connection between CO_2 concentration increases and increases in Earth's atmospheric warming was not established until 1938.[170] Therefore, it is arguable that prior to 1938, companies could not have knowingly been contributing to climate change and not have departed from any standard of care. Beyond that, the claim is largely performative and seeks to hold the company liable for a negligible amount (€21,000). Even if this claim sets a successful precedent, seeking damages in proportion to an individual company's contributions to emissions in this manner would recover only a fraction of actual losses caused by climate change and would be extremely uneconomic, especially when having to prove each action with costly expert evidence.

E. Potential defences

In addition to the numerous challenges in proving claims, plaintiffs' allegations may also be defeated by the operation of defences. There are two primary defences which may be advanced in climate change related litigation: (1) statutory authority; and (2) limitations.

The defence of statutory authority has proven to be narrow in practice. For example, *Ryan* was a case of public nuisance dealing with dangerous railway tracks running down the centre of a street that created the risk of the accident suffered by the plaintiff. The defendant argued that it was not

[170] GS Callendar, "The artificial production of carbon dioxide and its influence on temperature" (1938) 64:275, Quarterly Journal of the Royal Meteorological Society 223.

liable because the railway track was statutorily authorized, and it had complied with all rules and regulations in respect of it. The Court held that the tracks were a public nuisance and, on the facts, the statutory authorization was no defence.[171] To establish the defence of statutory authority, the defendant must prove that it was practically impossible to avoid creating a nuisance. It is not sufficient to show that reasonable care has been taken. The nuisance must be shown to be an inevitable and unavoidable result of the authorized activity. Since the tracks could have been designed differently to prevent the accident, the defence failed.[172]

Applying this reasoning to fossil fuel production (which is an activity authorized by statute), it is likely that some amount of emissions are the inevitable result. However, it's uncertain what level of emissions would amount to the inevitable result of oil extraction – would a court consider all of a company's emissions to be such, or alternatively would it only consider the emissions that would have been emitted if the best carbon reduction technology was employed as inevitable? Further, would the cost of such technologies be a consideration? These questions pose novel policy questions that require the court's consideration to determine the applicability of this defence.

Defendants may also be able to rely on limitations arguments to defend claims. Most provinces require claims to be brought within two years from the date the claim was discoverable.[173] In addition, most provinces also apply an ultimate limitation period which applies irrespective of discoverability. The ultimate limitation period typically applies to bar claims that are brought either 10 or 15 years after the day on which the act or omission on which the claim is based took

[171] *Ryan, supra* note 35 at para 59.

[172] *Ibid* at para 56.

[173] See for example*: Limitations Act*, RSA 2000, c L-12, s 3(1)(a) (Alberta); *Limitation Act*, SBC 2012, c 13, s 6 (BC); *Limitations Act*, 2002, SO 2002, c 24, Sch B, s 4 (Ontario).

place.[174] In the climate change context, a limitation defence may apply to bar a portion of claims against companies relating to historical harms and/or emissions. The potential for this defence is supported by the fact that the causal connection between greenhouse gas emissions and climate change has arguably been recognized for decades.

F. Liability through legislation

To overcome the above challenges, governments may implement legislation to recover from companies for harm caused by emissions. Governments have enacted such legislation to create direct and distinct causes of action against manufacturers and wholesalers of opioid and tobacco products to recover for the increased costs of health care benefits caused by those products.[175]

In 2018, the Ontario New Democratic Party introduced a private members bill (Bill 21, later introduced as Bill 37) seeking to provide for civil liability for fossil fuel producers for climate-related harms titled "An Act respecting civil liability for climate-related harms".[176] Bill 37 sought to impose strict liability on fossil fuel producers for harms relating to climate change. The main opponents of the Bill raised concerns that it would unfairly punish fossil fuel companies without requiring proof of intent or negligence, potentially driving away investment and jobs. Opponents

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[174] In Alberta, a claimant has 10 years from the date the claim arose, per s 3(1)(b), *Limitations Act*, RSA 2000, c L-12 In BC and Ontario, claimants have a 15-year ultimate limitation period: s 21(1), *Limitation Act*, SBC 2012, c 13, and s 15(2), *Limitations Act, 2002*, SO 2002, c 24, Sch B.

[175] See for example *Opioid Damages and Health Care Costs Recovery Act*, SA 2019, c O-8.5 (Alberta); *Opioid Damages and Health Care Costs Recovery Act*, SBC 2018, c 35 (BC) (recently declared constitutional in *Sanis Health Inc v British Columbia*, 2024 SCC 40 where the Supreme Court of Canada found that a multi-Crown class action initiated by the Province of British Columbia against opioid manufacturers, marketers and distributors and enabled by a special opioid-costs recovery statute is constitutional); *Opioid Damages and Health Care Costs Recovery Act*, 2019, SO 2019, c 17, Sched 2. Note similar legislation relating to tobacco products; *Tobacco Damages and Health Care Costs Recovery Act*, 2009, SO 2009, c 13.

[176] Bill 21, *Liability for Climate-Related Harms Act*, 3rd Sess, 41st Parl, 2018 [Bill 21]. Note that it was reintroduced in the 42nd Parliament as Bill 37, *Liability for Climate-Related Harms Act*, 1st Sess, 42nd Parl, 2018 [Bill 37]. It lost on a vote on division at the second reading.

also argued the Bill was overly broad, legally vague, and economically harmful, and preferred technological innovation over litigation as a climate strategy.[177]

Another notable example of a government taking proactive legislative approaches to collect funds for climate mitigation and adaptation comes from Vermont. In May 2024, Vermont passed Act 122: *An Act relating to climate change cost recovery* - otherwise known as the "Climate Superfund Act".[178] The legislation allows the state to collect money from companies that emitted more than 1 billion tons of carbon-dioxide between 1995 and 2024. The funds are to be used to upgrade infrastructure like stormwater drainage systems, roads and bridges. Other states including Maryland, Massachusetts and New York are considering similar approaches.[179]

Due to challenges in otherwise holding companies accountable for climate-related harms despite a growing appetite to do so, this form of legislation is likely to receive greater attention and continue to evolve - posing future risks to fossil fuel companies.

Directors' duties

To date, no litigants have succeeded in claims on their merits against directors for their mismanagement of climate-related risks. *ClientEarth* illustrates a considerable barrier demonstrating judicial reluctance to interfere with director decision making: the longstanding business judgement rule. This business judgment rule is a cornerstone of Canadian corporate law. If a director's decision is a reasonable one in light of all the circumstances about which the director

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[177] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, No 41 (25 October 2018) at 1900-1903.

[178] US, AB S 259, *An act relating to climate change cost recovery*, 2023-2024, Reg Sess, Vt, 2024 (enacted).

[179] Martin Lockman & Emma Shumway, "State "Climate Superfund" Bills: What You Need to Know" (14 March 2024), online: Columbia Climate School Sabin Center for Climate Change Law <https://blogs.law.columbia.edu/climatechange/2024/03/14/state-climate-superfund-bills-what-you-need-to-know/#:~:text=The%20four%20Climate%20Superfund%20bills%20currently%20under%20consideration%20in%20Maryland,will%20face%20immediate%20legal%20challenges>.

knew or ought to have known, courts will not interfere with that decision.[180] Under the *CBCA*, directors and officers may consider the environment in their decision making.[181] However, as *ClientEarth* demonstrates, that does not mean it must be considered or should be a sole consideration. This is particularly true where there is no financial loss proven as in *ClientEarth* and *McGaughey*. The *Enea* case poses an example where shareholders may be able to substantiate financial losses as a result of poor director decision making in face of policy adjustments motivated by climate change, potentially overcoming this challenge. A decision in that case will provide an opportunity to learn if a court will hold directors accountable for not considering financial risks associated with climate change.

ClientEarth also demonstrates that although directors are required to consider the community and environment in managing business risks, this does not necessarily mean decisions that do not further climate objectives will constitute action against the company's best interests as a whole amounting to a breach of directors' duties. Canadian derivative action claimants making comparable arguments are almost certain to be fraught with similar challenges. While under the *CBCA* directors are entitled to consider the environment in decision making, the Supreme Court of Canada has clearly established that the best interests of the corporation are not to be confused with the interests of any other stakeholders.[182]

Administrative Law Actions

The potential for administrative law actions in Canada, particularly challenges to projects on the basis that they do not consider the downstream effects of climate change, remains an evolving area of environmental law. To date, Canadian courts have shown a tendency to afford significant

[180] *BCE, supra* note 3 at para 40.

[181] *CBCA, supra* note 3, s 122(1.1).

[182] *Peoples, supra* note 3 at para 43.

deference to decision-makers such as the NEB and the Minister of Environment and Climate Change, rooted in the recognition of the expertise and specialized mandate of these regulatory bodies. In *Forest Ethics,* for example, the Federal Court of Appeal upheld the NEB's decision to exclude broader climate change issues from its assessment of a pipeline project. Similarly, in *Sierra Club,* the Federal Court upheld the exclusion of downstream greenhouse gas emissions from the environmental impact assessment, emphasizing the speculative nature of determining the final use of the oil and the global distribution of emissions. Both of these decisions illustrate the Canadian judiciary's pragmatic approach, focusing on the direct and immediate impacts of projects while acknowledging the complexities and jurisdictional challenges of global emissions accounting.

However, recent cases from the United States and the United Kingdom suggest a potential shift in how environmental assessments might be possible in the future. In *Food & Water Watch* and *Surrey County Council* the courts underscored the importance of including downstream emissions in environmental impact assessments and highlighted the necessity for comprehensive environmental reviews that consider the impacts of climate change. While these decisions reflect a more expansive view of environmental accountability, their applicability in Canada would require a significant shift in administrative and/or judicial interpretation and regulatory practice and possibly require legislative amendments to the scope of environmental assessments.

PART III – REGULATORY COMPLIANCE AND BEST PRACTICES IN LIMITING LIABILITY

In this section, we outline key best practices that companies can adopt to mitigate the risk of greenwashing allegations and reduce exposure to climate-related litigation, with a focus on ensuring accuracy, transparency, and legal defensibility in environmental claims and governance practices.

Environmental claims should continue to be appropriately calibrated and substantiated. Representations should align with the latest evidence and methodologies endorsed by independent third-party organizations with recognized expertise in the relevant field.

Maintaining and implementing credible plans for reducing carbon emissions may also mitigate litigation risk. We recommend companies create internal roadmaps that set realistic and achievable targets aligned with scientific consensus and government goals, such as Canada's objective to be net-zero by 2050 under the *CNZEAA*. Companies should outline specific strategies and timelines for emissions reduction and other goals, include regular progress assessments and updates, and consider both direct emissions and those from the company's value chain. Businesses should be mindful of how such plans and milestones are communicated to the public to limit creating additional risk under the greenwashing provisions, avoiding statements that over promise on environmental outcomes, performance and benefits. Companies should also be cautious to not overstate the impact of carbon offsets. These offsets should not be portrayed as a means to fully cancel out or neutralize operational emissions. Instead, the focus should be on direct emission reductions achieved through operational changes and innovation.

Where feasible, the substantiation source (such as the methodology underlying a claim) should be included alongside the representation itself. Moreover, companies should maintain accurate substantiation records so they can respond promptly if challenged on the grounds that a claim is not properly supported. Considering ongoing developments, companies should re-evaluate their environmental claims upon the release of updated guidance from the Bureau or relevant judicial decisions. This includes reviewing the sources and methodologies used to substantiate claims to ensure continuing compliance with the *Competition Act*.

In terms of implementing internal processes, companies should develop and consistently use a "dos and don'ts" or tip sheet to assess environmental claims and involve internal legal counsel in

the drafting and review of environmental representations. These steps can both help evaluate risk and establish a due diligence defence if environmental claims are questioned by the Bureau or other parties. Lastly, it is advisable to conduct periodic audits—such as annual reviews—of environmental claims to ensure that ongoing or active representations remain compliant.

While the above strategies help ensure *Competition Act* compliance, they also limit the risk of a successful tort claim. As discussed above, claims are frequently tied to deceptive marketing practices due to causation issues. By ensuring the truthfulness and accuracy of claims, supported by evidence and documentation, companies can be prepared to argue against such allegations. As part of preparing to defend against claims, companies should also maintain comprehensive records of climate-related actions and disclosures.

Given the growing prevalence of private climate litigation, organizations should: (i) assess their risk of being named in private law climate litigation claims; and (ii) proactively implement robust governance practices to reduce their exposure to claims related to environmental impacts and climate-related governance.

The companies at greatest risk of being targeted by litigation are likely multinational upstream oil and gas companies viewed as the largest emitters, and actors who mislead the public about their climate action or consideration of climate risks.[183] However, strategic litigation is also being brought against less visible actors that are crucial for the functioning of the value chain for high emitting activities such as financial institutions that provide the capital or insurance for development projects.[184]

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[183] *2024 Snapshot, supra* note 1 at 22. Note for example WCEL proposes targeting Chevron and Exxon which are both defendants in the *City of Honolulu* claim, and Shell which has been discussed in multiple examples throughout this paper.

[184] *Ibid*.

We also suggest that directors and officers conduct appropriate due diligence in decision-making. They should keep clear records, discuss climate change considerations, follow established due diligence frameworks, and be prepared to justify decisions that could have environmental consequences or risk compliance with company emissions targets. Directors and officers are encouraged to seek impartial expert advice where necessary, and document opinions and how they influence decision making. It is also recommended that companies 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.

Companies should also frequently review both liability and directors and officers insurance policies to ensure adequate coverage in the event of a lawsuit.[185] Insurers are currently developing forward-looking strategies to mitigate potential exposure from climate litigation claims, and the challenges that climate litigation poses as an underwriting risk – which may evolve into changes in policy exclusions. Canada's Office of the Superintendent of Financial Institutions has highlighted the importance for insurers to prepare for climate-related claims under their policies.[186] By implementing best practices, companies can reduce their exposure to private law claims related to climate change. However, it is important to note that as the legal landscape continues to evolve, organizations must remain vigilant and adaptable in their approach to climate risk management.

CONCLUSION

As Canada continues to grapple with the legal, regulatory, and policy implications of climate change, private law litigation is emerging as a pivotal mechanism to hold companies accountable

[185] See "Insurance Law and Climate Change" (ND), online: University of Cambridge Centre for Climate Engagement <https://climatehughes.org/law-and-climate-atlas/insurance-law-and-climate-change-2/>.

[186] "Climate Risk Management: Guideline B-15" (7 March 2025), online: Office of the Superintendent of Financial Institutions < https://www.osfi-bsif.gc.ca/en/print/pdf/node/571>.

for contributions to climate change and their representations. While still in its formative stages, private climate change litigation in Canada signals a significant shift in how climate-related risk, conduct, and representation are addressed within the legal frameworks governing the energy sector.

International precedent demonstrates that, while such litigation faces formidable procedural and substantive challenges, courts are increasingly willing to engage with claims targeting corporate misrepresentations, failures to mitigate emissions, and deficient climate risk governance. Though the outcomes in these cases have, thus far, been largely adverse to plaintiffs, they have served to shape the legal discourse on fiduciary obligations, corporate accountability, and justiciability in climate claims.

Directors and officers also face a changing legal landscape. The jurisprudence suggests that failure to appropriately account for climate risk may eventually constitute a breach of fiduciary duty, particularly if it leads to material financial harm or regulatory exposure. Although Canadian law has not yet produced a successful claim in this area, the convergence of investor pressure, regulatory guidance, and litigation abroad may influence Canadian courts to take a more expansive view of directors' obligations in this context. Decisions discussed illustrate that while courts are prepared to recognize the relevance of climate-related risk, they remain cautious about intruding on corporate discretion, particularly where duties to shareholders are concerned and where policy-making responsibility lies more appropriately with legislatures or regulators.

The situation is similar in tort law. Nuisance and negligence claims have yet to succeed in imposing liability on fossil fuel companies for their contributions to global warming, but courts have demonstrated a willingness to entertain such claims and, in some cases, to allow them to proceed to trial. Nevertheless, formidable barriers remain in establishing standing, proving causation, and overcoming defences rooted in remoteness and policy immunity. Unless legislatively addressed,

these hurdles will continue to constrain the scope of tort law as a climate accountability mechanism in Canada.

In addition, recent amendments to the *Competition Act* represent a more immediate shift in the legal environment governing climate-related representations. The explicit codification of greenwashing provisions - particularly the requirement that environmental claims be substantiated by "adequate and proper" testing or "internationally recognized methodologies" - has heightened both the regulatory burden and the litigation risk for energy companies. These changes mark a material evolution in Canadian law: while the underlying legal standard may be consistent with prior jurisprudence, the statutory clarity, expanded enforcement tools, and introduction of private applications before the Tribunal collectively usher in a new era of climate-related legal scrutiny.

This evolution carries both risk and opportunity. On the one hand, companies in the Canadian energy sector face growing exposure to claims grounded in deceptive marketing and misleading environmental representations. These may come not only from government regulators or enforcement agencies, but also from competitors, consumers, and advocacy groups empowered by the new private enforcement mechanism. On the other hand, the clear articulation of substantiation standards offers a path forward: energy companies that rigorously test and verify their claims, align with recognized methodologies, and maintain robust compliance frameworks will be better positioned to defend against challenges and may even gain a reputational advantage in the increasingly competitive and climate-conscious marketplace.

For Canadian energy companies and their boards, the implication is clear: climate risk is no longer solely a policy or reputational issue. It is a legal issue with tangible liability implications. Best practices now extend beyond public relations and into the core of corporate governance, legal compliance, and operational decision-making. This includes the careful vetting of environmental claims, the integration of climate risk into enterprise risk management, and the adoption of science-

based targets that are not only aspirational but also defensible under the scrutiny of regulators, courts, and the public.

In sum, while the pathway for private climate change litigation in Canada remains uncertain and contested, the legal and regulatory trajectory is unmistakable. The convergence of common law innovation, statutory reform, and global precedent is reshaping the expectations placed on energy companies, their executives, and their advisors. Legal frameworks are evolving in response to climate issues, and those in the Canadian energy sector who anticipate and respond to these shifts by embedding climate integrity into their business practices will be better equipped to navigate this new legal frontier.