CLIMATE-RELATED LEGAL RISKS FOR FINANCIAL INSTITUTIONS:

Executive Brief

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Financial sector risk leaders, risk managers, and board risk committees are increasingly aware of climate-related legal risks to financial institutions. In Canada, the Office of the Superintendent of Financial Institutions (OSFI) has identified liability risk as a source of climate-related financial risk facing deposit-taking institutions, insurance companies, and pension funds. These risks include regulatory orders and/or fines, enforcement of securities disclosure and financial supervisory capital adequacy requirements, and lawsuits by investors alleging the directors failed in their fiduciary duties to manage material risk, among others.[1] Globally, financial risk arises for financial institutions as investors, government authorities, and civil society groups seek monetary damages from companies for alleged misrepresentation, breach of directors' duties, tort/nuisance liability, or violation of securities laws for failure to disclose material financial risks. In some cases, firms are being held to account for historic and current contributions to global warming.[2]

This executive note briefly examines a number of different types of liabilities that may arise for financial institutions, provides illustrative case examples, and offers ideas for effective governance.

Financial institutions face legal risks across operations and asset classes, which can manifest on the balance sheet.[3] For asset managers, there could be indirect losses from tort claims due to acute events involving portfolio assets.[4] Similarly, lenders face risks to their loan portfolios where debtor companies, particularly in high-carbon emitting sectors, are hit with large regulatory fines or damages awards that can result in loan default or even insolvency. Indirect impacts of legal action involving defendant companies can include loan defaults from financial stress created by the outcome of a lawsuit. There can also be broader consequences if the claim against one borrower catalyzes a revaluation of similar credit risks and underlying asset values.[5]

While Canada itself is not litigious compared with many jurisdictions, Canadian financial institutions are often cross-listed on United States (U.S.) exchanges, have subsidiaries or parent companies in the U.S., and may face demands for financial support from related entities that lose U.S. lawsuits. Of the over 1,700 climate cases brought to date, more than three-quarters are in the U.S.[6] Barker *et al* observe that risks include financial institutions paying monetary damages that can arise prior to or after the physical impacts of climate change manifesting, but that *ex ante* and *ex post* climate change litigation may influence efficient pricing of climate mitigation and adaptation finance.[7] They observe: "The science is changing, potential claimants' appetite for litigation is changing, the courts' appetite for hearing disputes involving climate issues are changing, and the underlying legislative and regulatory frameworks are changing".[8] Legal action in respect of long-tail risks can bring forward time horizons where the liability risk becomes material before the physical risk itself.[9] The foreseeability of such risks has increased with the recent release of the Intergovernmental Panel on Climate Change's Sixth Assessment Report, *Climate Change 2021: The Physical Science Basis*.

Risk of Regulatory Liability

There are risks to financial institutions from failure to comply with securities and financial services law disclosure requirements. Canadian securities regulators have cautioned that climate-related risks are material and need to be disclosed in financial statements.[10] Regulators have not yet actively enforced disclosure deficiencies; however, with the recent announcement by the U.S. Securities and Exchange Commission that it will begin enforcing material misstatements in disclosure of climate risks,[11] Canadian securities regulators are likely to follow suit. Failure to adequately disclose material risks in the financial statements and how they are being managed could lead to financial institutions facing administrative or regulatory sanctions.[12]

The value of investments may be impaired if investee companies unsuccessfully defend regulartory legal action. Financial institutions may also have portfolio assets affected when regulatory approvals are denied because climate impacts are not sufficiently accounted for.[13]

There may be liability risks associated with financial institution investments financing projects harmful to Indigenous rights, in violation of Canada's legislated commitment to the United Nations Declaration on the Rights of Indigenous Peoples.[14] These new rights and obligations are untested to date, and financial institutions will have to assess potential risks (and opportunities) on both sides of the balance sheet.

Securities Law Litigation Risk

Investors can leverage the evidence underpinning regulatory sanctions into claims for damages due to misrepresentation.[15] Historical litigation outcomes are not indicative of future exposure. "Whether forward-looking liability risks are material to a borrower, book, portfolio or system will depend on a combination of internal factors to the entity," and financial impacts may include fines or damages, legal costs, reputational damage, valuation impacts, credit rating impacts, insurance coverage limitations, and tender process exclusions.[16]

There are hundreds of lawsuits in progress in the U.S., including class actions alleging directors violated U.S. securities law in making materially false and misleading disclosures; alleged failure to disclose internally generated reports concerning risk of stranded assets and materially overstating the value of reserves;[17] securities class actions by bond purchasers alleging misrepresentations made in offering documents;[18] shareholder proposal disputes;[19] and alleged misleading information on management of climate risks.[20] In *Abrahams v Commonwealth Bank of Australia*, shareholders alleged the bank failed to disclose risks that climate change poses to its business such that its annual report did not give a 'true and fair view of financial position and performance'.[21] The case was withdrawn after the bank agreed to provide extensive disclosure, now disclosing in alignment with the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD).[22]

There are indirect impacts to financial institutions through systemic risks if claims against carbon majors in 20 U.S. lawsuits result in master settlement agreements and they are unable to service their debts.[23] A significant finding of liability in one case will increase the liability risks for others, as it did in tobacco and asbestos tort cases. If successful, policyholder companies may be seeking compensation support from their insurers and there will be impacts on insurance pricing, coverage, and insurability more generally.[24] One indicator of potential damages is U.S. securities laws settlements: the average 2019 settlement was US$27.4 million, and 99 approved monetary class action settlements in 2020 amounted to US$3.26 billion in compensation to eligible claimants.[25]

Litigation Risk Regarding Fiduciary Duties

Shareholders may file personal or derivative actions against financial institution directors for their failure to appropriately manage climate-related risks to loan portfolios and investment assets. Challenges to directors' duties will likely include allegations that directors failed to act prudently and with the care, skill and diligence of a reasonable person in the circumstances.[26] Given the widespread acknowledgement of climate-related financial risks, 'reasonableness' assessed against an objective standard means that directors could be held personally liable for a breach of their duty of care.[27] Directors may also be vulnerable to oppression remedy suits from shareholders or secured creditors where directors unfairly disregard or unfairly prejudice the interests of securityholders in violation of their reasonable expectations. Given that there are not yet final judgments by courts that establish the parameters of liability for climate-related risk management and oversight, there is uncertainty in respect of liability risk. However, once

Canadian courts establish principles for assessing liability, insurers will be able to manage their risks and price the risks appropriately.[28] Portfolio values may be impaired if investee companies unsuccessfully defend litigation and damages awarded to investors for breaches affect the value of the financial institution's investment assets.[29] It should be noted that the content of fiduciary duties and shareholder derivative actions changes over time and as climate-related financial knowledge and data improve, so too will the risk of breach of such fiduciary duties and potential derivative actions.

An example of alleged breach of fiduciary duties was a lawsuit by a pension plan member against the Retail Employees Superannuation Trust in Australia.[30] Settled on the eve of trial, the court-approved settlement requires the fund to actively identify, quantify, and embed climate risk in its investment strategy and asset allocation mix; implement a net-zero carbon target; ensure that its investment managers are taking active steps to manage climate-related financial risks; and measure, monitor, and report outcomes towards a net-zero carbon footprint across all its investments.[31]

Implications for Professional Indemnity Insurance

Insurers may be faced with large claims to cover damages awards or settlements regarding accounting or other professional errors and omissions (E&O) or breaches that fall within director and officer (D&O) insurance policies.[32] There is litigation risk associated with disagreements as to the scope of indemnity obligations. Given pronouncements by securities and accounting standards regulators regarding the requirement to account for and disclose climate risks, financial and legal professionals may face litigation regarding failure to account for and address climate risks in their advice to companies, investors or other stakeholders.[33] Large damages awards could disrupt the D&O and E&O insurance market and create short-term cash flow issues and longer-term pricing risks. There is also risk of litigation over the scope of coverage under D&O and E&O policies, to date an untested area of litigation when it comes to climate-related damages.

"Greenwashing" Litigation Risk

Investors or civil society organizations may also allege 'greenwashing' misrepresentation against companies in which financial institutions have debt or equity holdings.[34] An example is the consumer class action alleging that Volkswagen wrongfully misled purchasers into believing that diesel cars were 'cleaner' than they actually were, with the U.S. lawsuits settling for US$15 billion and court-awarded damages of $196.5 million to the Canadian government for emissions violations.[35] A recent German consumer action alleges that DekaBank's 'impact calculator', offered to retail investors to assess potential environmental impacts of their investments, is misleading.[36] A lawsuit against Exxon is alleging violations of the U.S. *Consumer Protection Act* for greenwashing, claiming it is using false marketing in representing that it has invested significantly in production of 'clean' energy and environmentally beneficial technology.[37] The Conservation Law Foundation has brought legal action against ExxonMobil for 'climate deceit' regarding its oil storage facilities that are vulnerable to flooding from storms and sea level rise.[38] A 2020 study found that 99 per cent of the statements to retail investors on environmental impact made by investment funds did not comply with regulatory guidelines requiring them to be specific and substantiated.[39] Financial institutions may face complaints for financing activities that contribute to climate impacts.

Commercial Contract Risk

Commercial contracts may give rise to climate-related litigation. For example, litigation arising out of the recent Texas storm resulted in the New York Supreme Court finding that a *force majeure* clause did not excuse a failure to supply.[40] The Court cited climate change explicitly, observing that a Federal Energy Regulatory Commission 2011 report warned of the need to take preventive measures by winterizing Texas turbines.[41]

Litigation Against Governments Can Have Indirect Impacts on Financial Institutions

Litigation against governments for failure to take sufficient measures on climate-related risk have now been successful at the Supreme Courts in the Netherlands[42] and Germany,[43] with other cases pending. In Canada, several cases denied on the basis of justiciability are under appeal,[44] and one Ontario class action has survived that hurdle and is proceeding on the merits.[45] Claims against governments have indirect effects on financial institutions because they may result in stronger regulation for mitigation and adaptation, changes in licensing for specific sectors, urban and rural planning regulation that affects portfolio investments, all of which involve financial costs to comply. Civil society groups are leveraging judgments against governments to commence lawsuits against companies and have now been successful in mandating increased scope 1, 2, and 3 emissions reductions through corporate policy, increasingly aimed at the financial sector.[46]

Insurers have started to alert governments that they may not be able to cover increasingly foreseeable damage due to flooding and other acute events. Taxpayers may bring lawsuits against governments for their failure to manage climate mitigation, and while governments are underwriters of last resort for harms caused by catastrophic climate events, there is litigation risk associated with possible legal disputes as to the allocation of payment for losses.[47]

A retail purchaser of government bonds sued the Commonwealth of Australia, alleging that the information memoranda associated with the bond was deceptive in its omission of climate-related risks to the country's economy, also alleging a breach of directors' duty of due care and diligence for failing to ensure that the disclosure documents presented a true and fair view of the financial risks associated with the bonds; the proceedings are at an interlocutory stage.[48]

Civil Lawsuits

Early climate-related tort lawsuits against U.S. companies were dismissed based on challenges to causation; however, development of attribution science has meant that litigants are increasingly adducing evidence that attributes proportional harms caused by the specific activities of carbon-emitting firms. For example, in *Lliuya v RWE AG*, the German Court of Appeals has allowed a case by a Peruvian farmer against Germany's largest electricity producer to move to the evidentiary phase of trial to determine how RWE's emissions may have contributed to threatened flooding/mudslides.[49]

Plaintiffs filed a complaint alleging that ANZ bank has breached its duties under the OECD Guidelines by remaining 'the biggest financer of fossil fuels' in Australia, alleging ANZ failed to disclose its indirect emissions and failed to prevent adverse environmental impacts.[50] The lawsuit represents another step towards holding financiers responsible for physical damage suffered because of lending practices.[51] A similar complaint was filed against the Belgian National Bank, alleging that the bank failed to meet environmental, climate, and human rights requirements pursuant to Article 11 of the Treaty on the Functioning of the EU and Article 37 of the EU Charter of Fundamental Rights by purchasing bonds issued by fossil fuel and GHG-intensive companies under a European Central Bank scheme to improve financing and lower debt costs.[52] ClientEarth is seeking to stop European central banks from using quantitative easing to benefit fossil fuel companies and high-emitting firms.[53]

Legal action can arise before the materialization of the physical risk, bringing forward the time horizon in which such risks are material. For example, private well owners and U.S. local governments successfully won damages against ExxonMobil for claims alleging negligence in adding a chemical to its gasoline, which subsequently leaked from storage tanks into local drinking sources. The company was to pay for remediation and finance construction of water treatment plants. Damages were awarded even though contamination would not peak for another 20 years.[54] A citizen group filed a claim against ExxonMobil pursuant to clean water and conservation legislation alleging the defendants had failed to address climate change vulnerabilities they knew of when operating their marine distribution terminal that is vulnerable to increased magnitude and frequency of storm surges.[55]

In France, a group of municipal governments and non-governmental organizations filed a complaint against Total S.A., a major French oil and gas company, alleging violations of the French Commercial Code, which requires companies to adopt plans to identify and mitigate, *inter alia*, environmental risks from the operations of the company, and the duty of environmental care pursuant to the French Charter for the Environment.[56] The complaint seeks an order requiring the company to make a new 'plan of vigilance', as required by the Code, including identifying the risks due to GHG emissions it is generating, aligning itself with a direct and indirect GHG scope 1, 2, and 3 emissions reduction trajectory compatible with limiting warming to 1.5°C; and an order for Total's business activities to be made consistent with the Paris Agreement and reduce net emissions by 40 per cent by 2040 compared to 2019 levels.[57]

The U.S. Supreme Court recently rejected an appeal by major oil and gas companies, keeping in place a lower court procedural victory allowing local governments in California to continue their suit seeking to force the funding of climate adaptation infrastructure in response to sea-level rises due to climate change.[58]

Reinsurance May Not be Sufficient

Where different insurers have underwritten part of the insurance risks of particular projects or companies, there is litigation risk in respect of disputes arising as to which insurers will cover what percentage of the costs of damages from acute events or lawsuit liability judgments and/or disputes between insurers and reinsurers on what reinsurance actually covers. An example was the $147 million Cdn legal dispute between the insurer and its reinsurers arising out of the Fort McMurray wildfire, where the reinsurer refused to cover this amount under the reinsurance contract and ultimately won that dispute.[59]

Litigation Defences

Under Canadian corporate law, courts will defer to the business judgments of directors in their decisions, if they have acted with care, prudence, skill, and due diligence. It means that duly diligent directors that adopt proactive approaches to climate risk management, drawing on external advice and expertise as required, are unlikely to be found personally liable in hindsight for errors of judgment in their oversight of climate risk.[60] The Supreme Court of Canada has held that it will assess whether there has been a reasonable decision in light of the specific circumstances, and "although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination."[61] Canadian courts are more likely to find that directors have met their fiduciary duties where there is evidence that they have ensured their business has integrated climate risk management into business plans, strategies, and financial reporting, even where decisions are made on less than perfect information.[62]

Best Practice Tips

Climate-related legal risk is a fast-changing field that financial firms must proactively respond to. The following recommendations can help firms get started or deepen their climate legal risk management practice:

- Undertake a high-level assessment of litigation exposures across loan and policy books, investment portfolios, and operations.
- Embed management of climate-related risks as part of core business risk management, key to reducing litigation risk.
- Boards should review their skills matrix and governance mechanisms to ensure climate is adequately addressed.
- Investigate and disclose climate-related vulnerabilities in investment portfolios.
- Ensure risk assessment and pricing for D&O and E&O insurance appropriately accounts for increases in professional negligence claims associated with climate.
- Be proactive in directing resources towards mitigation and adaptation, rather than waiting for a lawsuit or regulatory action to require it, protecting reputation and sending market signals to loan book and policyholders.

- Build in appropriate assessments of probability and materiality into products and services, whether loan or insurance, particularly for higher carbon-emitting sectors such as mining, transportation, construction, and energy to protect investment portfolio values.

- Create an action plan to reduce scope 1, 2, and 3 carbon emissions, setting specific targets, assigning managerial responsibility, and ensuring that the board receives ongoing reports of progress towards targets and revises strategies accordingly, all of which can be strong evidence of the financial institution's due diligence in addressing climate-related financial risk.

- Work with municipal governments on data generation, infrastructure, and zoning requirements that prevent large loss claims and associated litigation and encourage adaptation.

ENDNOTES

1. Janis Sarra, Roopa Davé, Meghan Harris-Ngae, and Ravipal Bains, *Audit Committees and Effective Climate Governance, A Guide for Boards of Directors*, (December 2020), Canada Climate Law Initiative, at 37, https://law-ccli-2019.sites.olt.ubc.ca/files/2020/12/CCLI-Guide-for-Audit-Committees-on-Effective-Climate-Governance.pdf (hereafter Audit Committees).

2. For a detailed discussion, see Janis Sarra, *From Ideas to Action, Governance Paths to Net Zero* (Oxford, 2020, Oxford University Press), chapter 7, (hereafter Sarra, From Ideas to Action).

3. Janis Sarra, *Life, Health, Property, Casualty: Canadian Insurance Company Directors and Effective Climate Governance* (CCLI, February 2021), at 32, Life-Health-Property-Casualty-Canadian-Insurance-Company-Directors-and-Effective-Climate-Governance.pdf (ubc.ca) (Hereafter Sarra, Insurance Company Directors).

4. J. Sarra, *Duty to Protect: Corporate Directors and Climate-Related Financial Risk* (CD Howe Institute, 2021) at 2, citing a number of studies.

5. Sarah Barker, Joshua Dellios and Ellie Mulholland, *Legal action as a driver and consequence of climate-related physical risk adaptation, Liability risk and adaptation finance* (Minter Ellison and UN Environment Programme and Finance Initiative, April 2021) at 20. Retrieved from https://www.unepfi.org/wordpress/wp-content/uploads/2021/04/UNEPFI-MinterEllison-Climate-Change-Litigation-Report.pdf (hereafter Barker et al)

6. Joana Setzer and Rebecca Byrne, *Global Trends in Climate Litigation: 2020 Snapshot* (July 2020) LSE, Grantham Research Institute of Climate Change and Environment, Columbia Law School, Centre for Climate Change Economics and Policy. Retrieved from https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf; Maryam Golnaraghi, Joana Setzer, Nigel Brooke, Wynne Lawrence and Lucia Williams. *Climate Change Litigation – Insights into the evolving global landscape* (April 2021), The Geneva Association. Retrieved from https://www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf_public/climate_litigation_04-07-2021.pdf

7. Barker et al, note 5 at 10.

8. *Ibid* at 10, 14.

9. *Ibid* at 17.

10. Canadian Securities Administrators, *CSA Staff Notice 51-358 Reporting of Climate Change-Related Risks* (2019), CSA Staff Notice 51-358 Reporting of Climate Change-related Risks- (gov.on.ca) (hereafter CSA SN 51-358).

11. U.S. Securities and Exchange Commission, SEC, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (2021), SEC. (2021). SEC Announces Enforcement Task Force Focused on Climate and ESG Issues. Retrieved from https://www.sec.gov/news/press-release/2021-42

12. Sarra, *Insurance Company Directors*, note 3 at 34.

13. See for example, *Gloucester Resources Ltd v Minister for Planning* (2019) NSWLEC 7, and *Plan B Earth v Secretary of State for Transport* (2020) EWCA Civ 214, UK CA, discussing in Sarra, *From Ideas for Action*, note 2 at 241, 244.

14. Sarra, *Insurance Company Directors*, note 3 at 33, citing *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. Retrieved from www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html; *British Columbia Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44; and Canadian Parliament, *United Nations Declaration on the Rights of Indigenous Peoples Act*, 2021, c 14, proclaimed in force 21 June 2021.

15. Sarra, *Insurance Company Directors*, note 3 at 34, 51.

16. Barker et al, note 5 at 26.

17. *Ramirez v Exxon Mobil Corporation et al*, No 16- cv- 3111, Northern District of Texas, Judge Kinkeade denied Exxon's

motion to dismiss, finding 'accounting violations are sufficient to plead material misstatements', and adequately pleaded that misrepresentations were made with scienter as to the company and three of its senior officers. *AG State of New York et al v Exxon Mobil Corp* (2019) Sup Crt State of New York held that the New York Attorney General failed to establish by a preponderance of evidence that Exxon Mobil made any material misstatements or omissions that misled any reasonable investor about its practices.

18. York County v Rambo, (2019) 3:19-cv-00994 US District Court for the Northern District of California, alleging misrepresentations made in offering documents; for $4 billion of bonds and resulting financial losses when it was discovered PG&E failed to follow applicable laws around vegetation management, did not properly maintain equipment, and had poor wildfire safety practices and misrepresented these practices in the bond offering. Case ongoing.

19. *New York City Employees' Retirement System v TransDigm Group,* Inc 2018 SDNY. Lawsuit by New York City pension funds that company unlawfully excluded from its proxy materials their shareholder proposal requesting that the company adopt a management plan for GHG emissions in violation of SEA. Lawsuit settled.

20. Client Earth v BP; however, the UK National Contact Point for the OECD Guidelines for Multinational Enterprises (NCP) assessed the complaint as being material and substantiated, despite the complaint not proceeding; Client Earth, *BP greenwashing complaint sets precedent for action on misleading ad campaigns* (June 2020), BP greenwashing complaint sets precedent for action on misleading ad campaigns | ClientEarth.

21. Barker et al, note 5 at 30.

22. *Ibid*.

23. Sarra, *From Ideas to Action*, note 2 at 232-238, discussing State of *Rhode Island v Chevron Corp et al*, US District Court for the District of Rhode Island (22 July 2019), CA No 18-395 WES and other cases, all of which have final outcomes pending. In *State of Rhode Island v Chevron Corp et al,* the fossil fuel companies filed a petition for writ of certiorari in December 2020 seeking review of the First Circuit's decision affirming the remand order in the climate change case brought by Rhode Island, Rhode Island v. Chevron Corp.- Climate Change Litigation (climatecasechart.com).

24. Sarra, *Insurance Company Directors*, note 3.

25. Barker et al, note 5 at 26, citing Cornerstone Research, Securities Class Action Settlements: 2019 Review and Analysis (2020) at 1; ISS Securities Class Action Services, The Top 100 US Class Action Settlements of All-time (2021) at 2.

26. *Sarah von Colditz and Gail Walker, Derivatively on Behalf of Exxon Mobil Corp, v Woods et al US Dist Crt Northern District of Texas*, consolidated derivative actions alleging breach of fiduciary duty, violations of federal securities laws, waste of corporate assets, and unjust enrichment. Alleges that Exxon directors intentionally misled public and investors concerning impact of climate change has on Exxon's reserve values and long-term business prospects. *Ostrołęka C: Energa and Enea Court in Poland*, shareholder successfully challenged a decision to proceed with development of Ostrołęka C coal plant. Shareholder alleged that directors had breached their fiduciary duty to the company in decision to proceed, which posed unjustifiable financial risk as it was a stranded asset in the making. Court reasoning based on decision process was legally invalid.

27. For a discussion, see Sarra, *From Ideas to Action*, note 2, chapter 7.

28. *Ibid.*

29. Sarra, *Insurance Company Directors*, note 3 at 34.

30. *Ibid* at 51.

31. McVeigh v Retail Employees Superannuation Trust 2018 NSD1333/2018 Federal Court of Australia and McVeigh v Retail Employees Superannuation Trust, settlement statement, (2 November 2020), Microsoft Word- Statement from Rest 2 November 2020.docx (columbia.edu).

32. Sarra, *Insurance Company Directors*, note 3 at 33-34.

33. *Ibid*.

34. Also alleged violations of the OECD Guidelines for Multinational Enterprises (2011). Retrievd from https://www.oecd.org/daf/inv/mne/48004323.pdf.

35. See for example, Volkswagen class action settlement, (2017), Volkswagen Diesel Class Action Lawsuit Settlement | Class Action. Nicole Thompson, 'Volkswagen ordered to pay $196.5M in emissions scandal (22 January 2020), CTV News, Volkswagen ordered to pay $196.5M in emissions scandal | CTV News | Autos.

36. *Baden-Württemberg Consumer Centre v Dekabank*, Regional Court of Frankfurt, discussed in Linklater, "German fund company sued for "greenwashing"" (February 23 2021), German fund company sued for "greenwashing"- Lexology. "On the website of the fund company, potential investors can enter an investment amount into a so-called "impact calculator" determining the environmental impact of any investment, saying it provides specific figures on, for example, how much CO_2 can be saved or how much renewable energy can be generated by an investment. For an investment of EUR10,000, the calculator indicates, inter alia, that more than 42,000 litres of water can be saved, 830 kilowatt hours of renewable energy can be generated, and EUR1,145 can be contributed to investments in the health sector. The fund company describes these figures on its website as 'possible positive effects' of a sustainable investment."

37. *Beyond Pesticides v Exxon Mobil Corp Beyond Pesticides v Exxon Mobil Corp*, Complaint filed with the Superior Court of the District of Columbia Civil Division (March 2020), a jury trial is being sought.

38. Conservation Law Foundation, 'Exposing ExxonMobil's Dangerous Campaign of Deceit and Denial (2021), Putting ExxonMobil On Trial | Conservation Law Foundation (clf.org). Appeal of a stay of proceedings in this case is ongoing; Conservation Law Foundation v ExxonMobil Corp, Docket 20-1456, http://climatecasechart.com/case/conservation-law-foundation-v-exxonmobil-corp/.

39. 2 Degrees Investing Initiative, "EU Retail Funds' Environmental Impact Claims Do Not Comply with Regulatory Guidance" (March 2020), EU Retail Funds' Environmental Impact Claims Do Not Comply with Regulatory Guidance- 2DII (2degrees-investing.org) [survey of 4,000 funds].

40. *Stephens Ranch Wind Energy, LLC et al v. Citigroup Energy Inc. et al,* Supreme Court of New York, judgment April 2021.

41. *Ibid.* Citi spent $113 million buying up electricity itself from Texas's grid operator, at the hugely inflated price; and sent SR a bill to cover cost of its nonperformance; SR refused to pay. Court ruled against SR paving the way for Citi to seize its assets as redress for its loss.

42. *In Urgenda Foundation v The Netherlands,* the Dutch Supreme Court held that the government has obligations to urgently reduce emissions in line with its human rights obligations, and directed it to reduce GHG emissions by 25% by the end of 2020 compared to 1990.

43. Kate Connolly, "'Historic' German ruling says climate goals not tough enough" *The Guardian*, (29 April 2021), 'Historic' German ruling says climate goals not tough enough | Germany | The Guardian. Germany's Supreme Constitutional Court (Karlsruhe) in March 2021 ruled that the government's climate protection measures are insufficient to protect future generations, after a complaint brought by environmentalist groups. The Court held that the government had until the end of 2022 to improve its Climate Protection Act and to ensure it met 2030 greenhouse gas reduction goals more immediately. The Court said it was unconstitutional for emission reduction targets to have been postponed for so many years and stated that the law was not detailed enough about how reductions would happen. See also Greenpeace v Spain, in which Greenpeace filed a suit against the Spanish Government, alleging a violation of Regulation (EU) 2018/1999, which requires the Spanish Government to approve a National Energy and Climate Plan containing adaptation and mitigation strategies. After proceedings began, the Government issued its Long Term Decarbonisation Strategy for 2050. Greenpeace amended the suit alleging lack of a 2030 plan, the matter now before the Supreme Court.

44. Lho'imggin v Her Majesty the Queen, Lho'imggin et al. v. Her Majesty the Queen- Climate Change Litigation (climatecasechart.com). In Lho'imggin v Her Majesty the Queen, two houses of the Wet'suwet'en indigenous group alleged the Canadian Government for failing to meet its Nationally Determined Contribution under the Paris Agreement and for failing to use environmental legislation to reject applications for greenhouse gas emitting projects, the plaintiffs alleging significant warming effects on their territories and seeking more stringent adaptation measures. The Federal Court dismissed the plaintiffs' claims, but plaintiffs have appealed to the Federal Court of Appeal, DINI ZE' LHO' IMGGIN et al v HMTQ, Federal Court of Appeal Case file A-308-20, the memoranda of fact and law has been filed and the court is in the process of setting hearing dates as of 21 July 2021, Federal Court of Appeal- Proceeding Queries- Recorded entry(ies) for A-308-20 (fca-caf.gc.ca).

45. *Mathur v Ontario*, 2020 ONSC 6918, motion for leave to appeal dismissed, *Mathur v Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1624 (Ont SCJ (Div Crt)).

46. *Milieudefensie et al v Royal Dutch Shell plc* 2019, Hague Court of Appeals. Retrieved from https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339. Milieudefensie/Friends of the Earth Netherlands and co-plaintiff 17,000 citizens leveraged the findings against the Netherlands government to bring a lawsuit against Royal Dutch Shell alleging that its contributions to climate change violate its duty of care under Dutch law and human rights obligations, seek a court ruling directing Shell to reduce its carbon emissions by 45% by 2030 compared to 2010 levels and to zero by 2050. The case was heard by the district court in The Hague on December 2020 and judgment delivered on 26 May 2021. In finding for the plaintiffs, the court directed Shell to reduced Scope 1, 2, and 3 emissions by 45% by 2030 compared to 2019 levels. This case undoubtedly sets a global precedent, likely encouraging similar lawsuits in Canada and elsewhere.

47. Sarra, *Insurance Company Directors*, note 3 at 34.

48. O'Donnell v Commonwealth of Australia as discussed in Barker et al, note 5 at 31.

49. *Lliuya v RWE AG*, (2015) No 2 O-28, German Court of Appeals, discussed in Sarra, *From Ideas to Action,* note 2 at 227.

50. Barker et al, note 5 at 44.

51. *Ibid*.

52. *ClientEarth v Belgian National Bank*, ClientEarth v. Belgian National Bank – Climate Change Litigation (climatecasecharts.com)

53. ClientEarth, *Why ClientEarth is suing the central bank of Belgium for climate failings* (13 April 2021), Why ClientEarth is suing the central bank of Belgium for climate failings | ClientEarth. The lawsuit against Belgium's central bank was filed in Belgian courts, but ClientEarth is asking for the question of the European Central Bank's purchasing programme to be referred to the European Court of Justice, recommending that the programme should immediately exclude companies whose activities are clearly incompatible with achieving the Paris Agreement goals or are associated with high transition risk, such as coal and unconventional oil and gas; the ECB should cease or restrict purchases of bonds from carbon intensive companies if they do not adopt by January 2023 a credible Paris-aligned strategy to achieve net zero emissions; and it should set a comprehensive strategy on how it will align its monetary policy portfolios and activities with the Paris goals, reporting annually to TCFD framework.

54. *Ibid*.

55. Conservation Law Foundation v ExxonMobil Corp, cited in Barker et al, at 29, the case is ongoing. See also *Okpabi v Royal Dutch Shell Plc* (2021) UKSC 3 (12 February 2021). Oguru v Shell Plc (2021) ECLI: NL: GHDHA: 2021: 132 (29 January 2021). See also S Varvastian and F Kalunga, 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v Lungowe' (2020) Transnational Environmental Law, 9(2),323-345. doi:10.1017/S2047102520000138.

56. *Notre Affaire à Tous and Others v Total*, Notre Affaire a Tous and Others v. Total – Climate Change Litigation (climatecasechart.com), relying on Article L. 225-102-4.-I of the Commercial Code and the Charter for the Environment, France. Retrieved from http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200128_NA_complaint.pdf.

57. *Ibid* at 49.

58. *Chevron Corporation, et al., Petitioners v. City of Oakland, California, et al.*, US Supreme Court (18-16663). Retrieved from https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1089.html

59. Discussed in Sarra, Insurance Company Directors, note 3 at 24.

60. *Audit Committees*, note 1 at 37.

61. *BCE Inc v 1976 Debentureholders*, (2008) 3 SCR 560 (SCC) at para 155.

62. Sarra, *Insurance Company Directors*, note 3 at 35.