On September 15, 2022, McMillan and GRI hosted a seminar on ESG Disclosure through the Lens of Litigation.

Typically, when one thinks about ESG and shareholder activism, one tends to think of it as a means by which shareholders use their power as owners to change corporate behaviour to be better from an Environmental, Social, and Governance perspective. However, in recent weeks we have seen a notable backlash in the U.S. against ESG activism across geographies (for example, in Texas and Florida) and from major shareholders, which is largely unprecedented. This big push is viewed to be largely a Republican move to protect traditional corporate interests. Furthermore, it is apparent that Blackrock has been identified as a clear target of the moment.

The implication for investors is that ESG investing matters to us as individuals as well as broadly to organizations. As consumers of investments, investors are making a case for ESG, proactively attaching their preferences/requests to buy orders. Furthermore, investors are using litigation in the right circumstances to help support the advancement of pressing and relevant ESG issues. With the increased momentum in ESG investing over the past number of months and years, it is clear that investing in ESG is becoming (and will continue to be) increasingly under attack. On a positive note, investors are proactively reacting to the backlash.

McMillan has represented clients in many pertinent cases relating to ESG, including Facebook/Meta and Fox News. An emerging area of debate in the ESG world focuses on the difference between engaging with corporations and using ESG as a tool to assess investments and one where specific outcomes are sought. In the case of Fox News, which occurred before the "Me Too" movement, and was followed by the blockbuster movie Bombshell and various documentaries, material social and ethical issues were brought to light and exposed.

McMillan also represented "First Energy" in 2020, which exposed a case of corporate bribery involving public officials. First Energy was facing reduced demand for nuclear power and diminishing corporate profits, threatening its existence. In a seemingly lucky and timely event, regulations were suddenly altered in First Energy's favour, allowing it to continue operations profitably. It was later uncovered that bribery of public officials motivated the regulation change, which served as a material governance issue upon which the litigation case was based.

In recent months, we also see that the "S" in ESG is becoming more focused from a litigation perspective. Diversity and other DEI initiatives are becoming front and centre, gaining senior executive-level attention. From a European standpoint, McMillan noted the following techniques are becoming best practices for corporations to substantiate their progress in the market: setting clear goals, following up on them, and having the results audited.

In terms of ESG Disclosures, this is becoming a growing issue for the SEC and other regulatory bodies in terms of striking the right balance for requirements of corporations while keeping cost in mind. OSFI, FSRA, and OSC appear to be more silent on the topic at this stage, but that will likely change in the near future. The market is also acutely aware of the negative impacts of Greenwashing, and accordingly, this issue must be taken into account in the context of establishing ESG disclosure requirements. At this stage, the SEC has two sets of draft disclosures: one relates to Greenwashing, and the other to Climate Risks. The SEC had reached out for comment from the market, and the comment period is now closed. It is expected that new rules will be in effect by 2023.

From a reporting perspective, there are three levels of ESG reporting for investors:
(i) Integrating fund: discloses ESG factors and non-ESG factors.
(ii) Focused fund – discloses specific outcomes
(iii) Impact fund – designed to achieve a specific impact.

On the climate side, reporting is currently more robust. SEC filings (10k and 10Q) are registered statements with existing governance and management of climate-related risks. Generally, reporting outlines the impact of short, medium and/or long-term significant climate events, as well as direct greenhouse gas emissions. The larger companies with more sophisticated climate reporting report on upstream and downstream GHGs.