

# ESG - Climate change litigation and disclosure requirements: Recent developments in Canada

The presentation will begin shortly.

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# ESG – Climate change litigation and disclosure requirements: Recent developments in Canada

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12 – 1 p.m. ET



# Presenters



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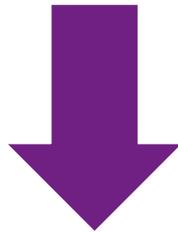
# Public Interest Litigation

David Konkin

# Public Interest Litigation

## Introduction

90 countries constitutionally recognize a right to a healthy environment



*Urgenda Foundation v State of the Netherlands*

- European Convention on Human Rights
  - Right to life & right to private life, family life, home and correspondence

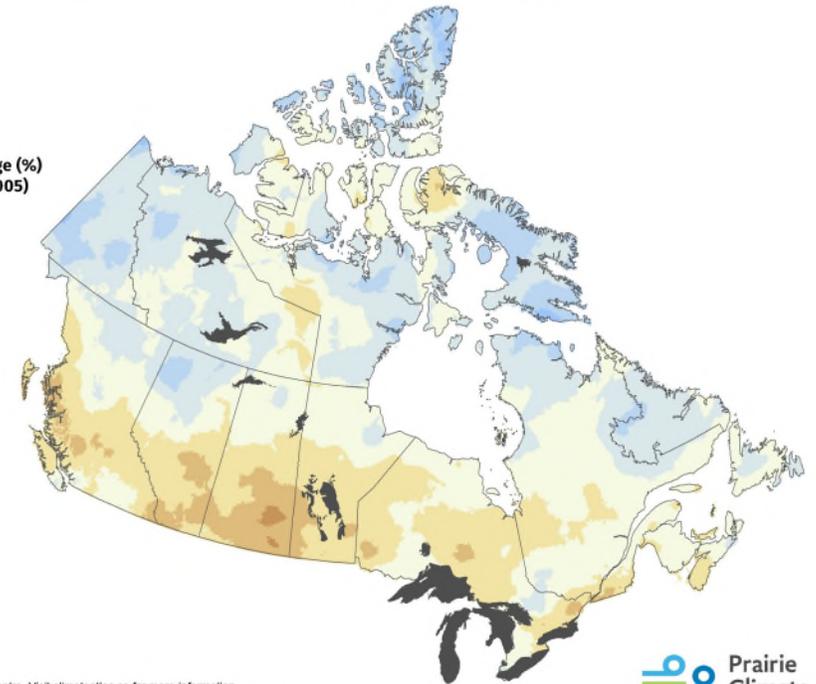
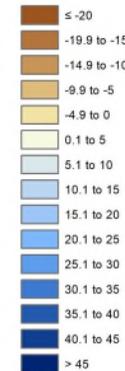


## Meanwhile in Canada

- Parliament has declared a climate crisis
- *References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11:*
  - *“As a result of the current warming of 1.0°C, the world is already experiencing...negative effects on human health, including heat-related and ozone-related morbidity and mortality.”*
  - *“Canada is also expected to continue to be affected by extreme weather events like floods and forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise, and the spread of potentially life-threatening vector-borne diseases like Lyme disease and West Nile virus.”*

2021-2050 Projected Change in Total Precipitation: July  
Under the RCP4.5 scenario, relative to a baseline of 1976-2005

Precipitation Change (%)  
(Relative to 1976-2005)



© 2017 by the Prairie Climate Centre. Visit [climateatlas.ca](http://climateatlas.ca) for more information.  
Map Data: Ensemble of 12 CMIP5 models (BCSD Statistically Downscaled Climate Scenarios)  
provided by the Pacific Climate Impacts Consortium, University of Victoria ([pacificclimate.org](http://pacificclimate.org)).

# Public Interest Litigation

## Canada – current cases

*Lho'imggin et al. v. Her Majesty the Queen*

*ENVironnement JEUnesse v. Canada*

*La Rose v. Her Majesty the Queen*

*Mathur v. Ontario*

# Public Interest Litigation

## Canada – Justiciable?

### *Mathur v. Ontario*

- Claim following repeal of the *Climate Change and Low Carbon Economy Act*
- Charter challenge
- Motion to strike dismissed – proceeding to hearing

### *La Rose v. Canada*

- Broad claim against Canada on series of actions, including project appeals, that contribute to climate change
- Childrens' claims are based on sections 7 and 15 of the Charter
- Federal Court granted a motion to strike, which has now been appealed, pending hearing

# Private Sector Litigation

Kelly Osaka

# Private Sector Litigation

## Trends in International Climate Change Litigation

There has been a significant increase in the number and scope of litigation proceedings falling within “climate change litigation” since 2015

There are over **1500 cases concerning climate change litigation** the majority of which were filed in the U.S.

Most of these claims are against governments, but several **target private sector organizations:**

- Claims seeking to establish corporate liability and damages to pay for infrastructure improvements to adapt to climate change
- Claims accusing companies of misrepresenting climate change efforts or “**greenwashing**”
- Claims seeking to recognize **corporate responsibility for human rights** or failing to meet climate change targets



# Private Sector Litigation

## Shell Challenged on Emission Reduction Plan

In 2019, a group of seven Dutch NGOs and over 17,000 individual claimants, filed a suit against Royal Dutch Shell in the Netherlands alleging it had an obligation arising from the standard of care under the Dutch Civil Code to reduce its emissions.

In May 2021, the Hague District Court held that RDS had an obligation to limit its contributions to the dangers of climate change.

This case was one of the first times that the effect of climate change on human rights was successfully argued against a private corporation.





# Private Sector Litigation

## Trends in Canada

### Business Risks Associated with Climate Change

- Class action lawsuit filed by the resident of Lytton against two railway companies for damages caused by forest fires
- Claims of negligence and nuisance against the defendants for continuing operations while Lytton was facing record high temperatures

### Municipalities and Potential Claims

- Victoria was the first municipality to endorse a climate change lawsuit against energy companies
- Other BC and ON municipalities have considered lawsuits

# Private Sector Litigation

## Corporations suing governments

- Claims have been commenced by corporations against governments seeking damages for losses caused by the implementation of climate related policy measures
- A German energy company brought a claim for compensation against the Dutch government for its plans to ***phase out all coal power plants by 2030***
- Other cases challenge denials of development permits or approvals:
  - Regulator in California ***rejected an all-time high of fracking permits*** causing an energy association to sue alleging that the denial of fracking permits were beyond the state administration's authority
  - Utica Resources Inc. filed a lawsuit against the Quebec government after it announced it will ***stop issuing permits for exploration or drilling*** and rejected the company's application for an exploratory drilling license

# Disclosure Requirements

Thomas O'Leary

# Disclosure Requirements

## Introduction

Public companies have seen an increase in stakeholder demands with respect to disclosure of climate-change related matters.

In 2017 UN Task Force (“TCFD”) publishes climate change related disclosure standards to serve as global model.

In March 2021, the US Securities and Exchange Commission released a statement asking for public input from investors, registrants, and other market participants regarding climate change disclosure requirements.

In October 2021, the Canadian Securities Administrators published its proposed climate disclosure requirement for public comments.



# Disclosure Requirements

Under the CSA's proposed requirements, issuers would be required to make climate risk disclosures in four areas:

Key Areas	Requirement
Governance	Board/Management oversight of climate risks / opportunities
Strategy	Short, medium and long term to address climate risks (not scenario specific)
Risk management	Processes for identifying, assessing and managing climate risks
Metrics and targets	For assessment and management of risks

# Disclosure Requirements

## Background

Increasing volume of stakeholder claims outside Canada under existing legal frameworks based on failure to disclose climate related risks:

- Role in creating climate change
- Climate change related risks to asset values, ability to access capital, reputation, etc.
- Risks of potential climate change litigation

Canadian disclosure requirements have been unclear – no broadly accepted standard.

Recent moves by legislatures/regulators to set specific disclosure standards:

- CSA proposals based on 2017 UN TCFD recommendations



# Disclosure Requirements

## Litigation Risks

CSA, SEC and other governing institutions seek to broaden and clarify scope/nature of required climate disclosure:

- Broadened disclosure broadens litigation risks
- Clarified disclosure requirements may allow better management of related litigation risks
- Influence of potential real-world impacts, sociopolitical forces on litigation risks difficult to predict

Disclosure of climate related risks will be carefully scrutinized by potential litigants:

- Supply chain and operational disruptions
- Environmental compliance costs/non-compliance liabilities
- Reputational impacts due to environmental conduct, climate risk exposure
- Ability to access capital
- Particular industry/sector sensitivities

# Disclosure Requirements

## Litigation Risks

- Trend of climate issues having increased influence on share, asset, enterprise valuations
- Trend of increased focus on corporate securities disclosure as basis for strategic litigation to modify behaviour
- Heightened litigation risks relating to climate related disclosures result
- Exxon experience as example:
  - Accused by AGs in NY and Mass lawsuits of misleading investors re climate change role
  - NY action dismissed (no misleading, no reliance) and Mass action still pending
  - Ongoing Texas class action on behalf of investors alleging securities fraud re climate change disclosure



# Disclosure Requirements

## Litigation Risks – Canada

Kinder Morgan using 2017 IPO to raise money for the expansion of Trans Mountain Pipeline.

Greenpeace alleged incomplete disclosure of climate-related risks by Kinder Morgan in Canada and asked Alberta Securities Regulator to pause Kinder Morgan's Initial Public Offering until proper disclosure regarding their climate change impact was made to investors.

In 2018, the ASC agreed to review the complaint – results not disclosed as Kinder Morgan re-issued IPO.

Case illustrates another potential approach to impugn climate risk disclosures.





# Disclosure Requirements

## Conclusions re Litigation Risks

More disclosure-based climate litigation can be expected in Canada:

- Broad scope of proposed disclosure requirements extends far beyond energy sector
- Enforcement actions, regulatory complaints, class proceedings may be available for breach
- Precedents of effective tobacco, asbestos litigation strategies based on non-disclosure
- Specific disclosure requirements will provide clearer grounds to allege wrongdoing
- Disclosure related claims allow strategic litigants to avoid major barriers to success in public interest and tort litigation

**Questions?**

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# Thank you



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