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# Climate Change Is Very Real - And So Is the Risk of Litigation

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## Business

# Climate change is very real — and so is the risk of litigation | Cynthia Williams

By Cynthia Williams



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(December 21, 2017, 9:15 AM EST) -- According to a recent analysis, close to 900 climate-change cases have been filed in “24 countries and in the European Union, with 654 cases filed in the U.S. and over 230 cases filed in all other countries combined,” as of March 2017.

So far, many of these cases have been filed against government entities, either for their failures to regulate consistent with their rhetoric in international negotiations, or for failing to protect their citizens’ health and future prospects according to long-standing, common law public trust doctrines.

But one type of litigation should be of increasing concern to Canadian officers and directors: litigation targeting actions and inactions of company officials in evaluating their company’s strategies in light of a changing regulatory and physical landscape, or challenging failures in disclosing risks or opportunities for their company from those changes.

Consider some legal proceedings that have been initiated in the past six months alone:

- Kinder Morgan Canada’s public offering of securities was challenged for using overly optimistic projections for the future demand for oil.
- Global oil majors and their officers and directors, including Canadian company Encana, have been sued in California for their contributions to sea-level rise.
- ExxonMobil has been sued in a class action for overstating the value of its oil and gas reserves, given the global agreement in Paris to limit global temperature increases to 2 degrees Celsius or less.

What are the obligations of officers and directors in Canada in light of such developments? That is one of the questions that was explored at conferences in Vancouver and Toronto in October 2017, organized by the Commonwealth Climate and Law Initiative (CCLI), a project started at the University of Oxford’s Smith School of Enterprise and the Environment, and the Prince’s Accounting for Sustainability — and brought forward in Canada by this author and Dr. Janis Sarra of the Peter A. Allard School of Law at the University of British Columbia.

According to regulators and expert lawyers participating in the conferences, a number of factors suggest that *at the least*, officers and directors in Canadian companies in virtually every industry — not just oil, gas and coal — must be aware of the science of climate change; must evaluate risks and opportunities in their industry, and locations from physical changes and regulatory frameworks to address climate change; must evaluate their company’s strategies in light of those risks and opportunities; and must make informed decisions about what strategic changes, if any, their company needs to initiate.

While reasonable decisions in light of such board-level evaluation will be given the protection of the business judgment rule, unconsidered inaction will not be so protected. (See *Peoples*

*Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461.)

What are some of the factors that have led to this changed legal environment? First, the science of climate change and its anthropomorphic origins has become increasingly clear. Moreover, the science of attribution is improving: A recent peer-reviewed study has found that 90 carbon producers were responsible for 63 per cent of estimated global industrial emissions of CO<sub>2</sub> and methane between 1854 and 2010.

Second, agreements such as the global agreement in Paris in December 2015, to limit the warming of the Earth to “well under” 2 degrees Celsius compared to the pre-industrial era, and the Pan-Canadian Framework on Clean Growth and Climate Change, agreed to by the federal government and all of the provinces and territories, with the exception of Saskatchewan, in December 2016, show an increasing willingness by governments, including Canadian federal and provincial regulators, to meet the challenges of climate change.

Third, Bank of England governor Mark Carney, recognizing climate change as a “tragedy of the horizon” and source of systemic financial risk, motivated the G20’s Financial Stability Board to establish the industry-led Task Force on Climate-related Financial Disclosure (TCFD). The TCFD framework for companies’ climate-related disclosure is rapidly becoming a global norm for the kinds of strategic thinking, corporate governance approaches and specific actions to manage, measure and reduce companies’ contributions to climate change that investors and regulators expect companies to disclose.

And fourth is the proliferation of climate-change litigation itself.

Canadian officers and directors may think that the prospects of climate litigation are too remote to take the time to consider climate change among the other pressing matters on their agendas. Leading lawyers and law firms, such as those represented at CCLI conferences, think otherwise.

It is only a matter of time before activist NGOs and litigators in Canada will come forward to put climate complacent boards’ theories to the test.

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