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NOTHING BUT THE TRUTH: CREDIBLE NET ZERO COMMITMENTS AND ESG DISCLOSURES

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Articles

Net zero. It's a term that gets bandied about as businesses, municipalities and countries make commitments to cut greenhouse gas emissions to as close to zero as possible.

According to the United Nations, to keep warming to no more than 1.5ºC above pre-industrial levels (the level called for in the Paris Agreement) emissions must be reduced by 45 per cent by 2030 and reach net zero by 2050. Thus, net zero commitments tend to speak about the 2050 time horizon.

It's a laudable goal, but does it translate into action?

That was the question tackled in the Report from the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities ("the UN Expert Report"), released on November 8, 2022 . at the start of the recent COP27 in Egypt. This report was the outcome of the UN Secretary-General direction to a dozen experts to develop practical recommendations that bring integrity, transparency and accountability to net zero emissions by establishing clear standards and criteria.

The UN Expert Report is targeted at "non-state actors," such as businesses, financial institutions and local and regional governments, and provides them a roadmap to prevent net zero emissions from being undermined by false claims, ambiguity and greenwashing. This includes recommending that non-state state actors:

- Announce net zero pledges publicly;
- Set net zero targets (including short-term and interim targets) with concrete ways to reach net zero;
- Focus on cutting emissions across the value chain, instead of buying cheap carbon offset credits;
- Create a transition plan with actions to meet all targets (thereby aligning governance and capital expenditures); and
- Lobby for positive climate action, not against it.

Non-state actors should report publicly every year, and in detail, on their progress, including greenhouse gas data, in a way that can be compared with the baseline they set. Reports should be independently verified and added to the UN Framework Convention on Climate Change ("UNFCCC") Global Climate Action Portal.

Implications for net zero commitments and ESG disclosure in Canada

The UN Expert Report's recommendations also have implications for Canadian businesses.

Canada has already recognized the need for accountable net zero commitments through the Net Zero Emissions Accountability Act (Canadian Net-Zero Emissions Accountability Act, SC 2021, c 22), which establishes a domestic legal foundation to achieve net zero emissions by 2050, with required five-year carbon budgets and impact reports.

This Act means that Canada's net zero commitment is not a political promise without a plan. This has created greater regulatory certainty in the market, spurring Canadian companies to more rigorously pursue net zero goals themselves, disclose climate risk, and take on environmental, social and governance ("ESG") more broadly.

The UN Expert Report serves as a reminder, however, that businesses and financial institutions should guard against greenwashing as they pursue their ESG aims. Misrepresentations about ESG and climate-related risks can cause companies, and their officers and directors, to expose themselves to civil and regulatory liability.

Greenwashing concerns were recently recognized by Canadian Securities regulators. In particular, on November 3, 2022, the Canadian Securities Administrators ("CSA") released Staff Notice 51-365, Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2022 and March 31, 2021. In its Notice, the CSA notes issues of potentially misleading, unsubstantiated or otherwise incomplete claims about ESG, and warns reporting issuers on the risks of overly promotional disclosure relating to ESG matters. It also recommends that reporting issuers ensure climate-related disclosures are fact-driven and can be corroborated by corporate activities.

Furthermore, the CSA recommends consistency between mandatory disclosures and voluntary disclosures, such as annual sustainability reports. Businesses thus need to ensure their regulatory and marketing efforts are aligned and accurate.

Indigenous consultation: Not just ticking a box

Finally, the UN Expert Report speaks to the intersection between voluntary markets and indigenous rights, and recommends that "voluntary carbon markets need to be built on a rights-based approach, which fully respects, protects and takes into account the rights of Indigenous Peoples and local communities. This includes consultation with the Indigenous Peoples and local communities that are responsible for the stewardship of the forests and many other ecosystems used for offsetting projects."

This recommendation is particularly relevant in the Canadian context. Given Canadian courts' recognition of indigenous rights, the recommendations of the Truth and Reconciliation Commission, and Canada and BC's adoption of legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples, the corporate sector clearly has an important role to play when operating within Indigenous traditional territories. That role includes engaging in a meaningful, transparent, responsive, and ongoing manner in accordance with Indigenous Nations' specific protocols and customs, respecting Indigenous governance, and helping advance Indigenous rights recognition through corporate actions and decisions. Where project impacts are unavoidable, accommodations should also be carefully explored with Indigenous peoples to identify means to support the specific needs of their communities.

Notably, Indigenous rights recognition is not generally substantively addressed within existing ESG standards. This omission is reflected in the recent findings set out in PwC's review of Canadian ESG reporting, which found less than 30 per cent of companies report policies to attract and retain Indigenous employees, managers and board directors, and an even small number (less than 20 per cent of the top Canadian companies) currently disclose an Indigenous Truth and Reconciliation action plan.

ESG standards thus need to be expanded to capture the requisite Indigenous rights recognition for countries with Indigenous populations, such as Canada. Such expanded ESG+I (I = Indigenous) standards should ensure meaningful recognition of Indigenous rights, and promote the advancement of reconciliation. ESG+I standards could also include standards on the indigenization of corporations, compliance with Indigenous laws, preferential hiring of Indigenous employees and contracting Indigenous businesses, incorporation of traditional knowledge, Indigenous equity ownership, and performance indicators that are tied to socio-economic goals set by Indigenous communities.

Overall, ESG+I commitments and disclosure is now a business imperative. But, to avoid liability and reputational risks, integrity matters. Your shareholders, stakeholders and regulators want nothing but the truth, and corporate disclosures and publications must therefore be transparent and honest.

Related Energy, Financial Institutions & Services, Oil & Gas, Environmental, Social and Governance (ESG), Climate Change and Environmental Law, Environmental Litigation, Governance, Activism & Investigations, Indigenous Law, Municipal Law, Securities Litigation

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