

# ESG AND M&A IN 2023

**HEIDI REINHART, PARTNER AT NORTON ROSE FULBRIGHT,  
ON HOW ESG WILL AFFECT DEALS IN 2023**

**DESPITE MARKET** volatility fuelled by global economic and geopolitical uncertainties, Canadian M&A activity had a steady year in 2022. M&A practitioners and their clients continue turning their attention toward Environment, Social, and Governance (ESG)-related deal considerations.

A 2022 Harvard Law School publication noted acquirers continued to seek to quantify the pro forma ESG impact of their investments.

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“Market developments send across a message highlighting ESG’s potential to affect many core aspects of M&A for acquirers and targets alike and an encouragement to expect continued ESG activity in 2023,” says Heidi Reinhart, a partner at Norton Rose Fulbright.

In Canada, there are some key trends to note as ESG continues to wield increasing influence throughout the lifecycle of an M&A transaction and in the arena of shareholder activism.

## Due diligence

For commercial, reputational, and legal liability reasons, it is becoming increasingly

common for dealmakers to undertake due diligence specifically focused on ESG issues. The starting point for acquirers is often to request target ESG data and reporting, to the extent it exists, and, once received, to evaluate its reliability. Next, risks should be identified, including climate risk, human rights litigation, greenwashing claims, and other third-party and regulatory risks, all of which depend on the industry, jurisdiction, and nature of the deal. On the target side, by corollary, manage-

ment should be prepared to share and explain their ESG framework and standards and to make supporting information readily available. At the board level, for both acquirers and targets, ESG concerns may factor into board decisions on whether to support or reject a proposed transaction.

## Definitive agreement

While it is already typical for a Canadian M&A agreement to contain representations and warranties relating to, among other things, the environment, labour matters, anti-bribery and corruption matters, and anti-money laundering, we expect to see more tailored ESG-related references in representations and warranties, interim covenants, and indemnities – particularly to the extent that a specific, material ESG risk is identified during the diligence process. We may also see an increased focus on ESG in pre-closing covenants whereby targets will be required to adopt reporting

and remedial obligations to the benefit of the acquirer.

## Post-closing

After closing and during the integration process, acquirers will want to maintain a strong focus on ESG to ensure that ESG compliance and reporting continue to meet expectations and are aligned across the new corporate structure. Another key priority for an acquirer will be identifying and making the most of ESG-related opportunities presented by the target, such as implementing best practices across the combined organization.

## Shareholder activism

TCI Fund Management’s successful proposal to implement a “Say on Climate” vote at Canadian Pacific Railway in 2021 underscored the recent uptick in activist campaigns focused on ESG issues. In light of this mounting pressure, a growing number of issuers are actively reviewing their existing climate-change plans and associated disclosures to mitigate the risk of activism. It will be increasingly important for boards and management to conduct and be actively engaged in meaningful oversight of ESG-related matters on an ongoing basis to mitigate potential significant reputational risks and stay ahead of activist campaigns.

Overall, the momentum of ESG in Canadian M&A remains in flux as companies continually assess and revise their priorities to navigate the evolving regulatory and commercial landscape. It is clear that ESG considerations, including financial, social, reputational, and legal, are becoming more – not less – important in dealmaking. **■**

*Heidi Reinhart’s practice covers all aspects of securities and corporate law, with an emphasis on public and private mergers and acquisitions, corporate finance, and providing corporate governance and securities regulatory advice.*

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