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Implications from the Boardroom to the Courtroom

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AS A NEW DECADE begins, and the global business community faces the twin crises around public health and the economy, corporations are examining their role within our socio-economic system. With a renewed focus on human, social, and natural capital, in addition to financial performance – otherwise known as the "triple bottom line" (people/profit/planet) – corporations are having to position themselves within a sustainability framework as they adapt to a changing world.

The global mining industry is no exception and is under increasing pressure to address the impacts of their operations from a sustainability perspective. Stakeholders are demanding greater accountability from boards and management teams in key areas, including environmental, business and human rights, and operational integrity and transparency; and companies are subject to an increased level of scrutiny and liability in these areas through the use of the courts by proponents of ESG.

The term "ESG" refers to environmental (E), social (S), and governance (G) factors that impact companies and their sustainability over the long term.

ESG

Environmental
GHG Emissions • Climate Change • Renewable Energy • Resource Depletion • Pollution • Waste Management • Water Use

Social
Labour Standards • Human Rights • Diversity • Freedom of Association • Freedom of Expression • Health & Safety • Controversial Weapons • Supply Chain Management

Governance
Board Structure, Size, Diversity, Independence, and Skill Sets • Business Ethics / Anti-Corruption • Shareholder Rights • Stakeholder Relations • Internal Processes and Controls (ESG Management Systems -- Strategy, Policy, Implementation, and Audit) • Business Strategy (Carbon Neutral / Innovation)

Figure 1. ESG factors that mining companies need to evaluate.

ESG factors represent both business risks and opportunities for companies, their shareholders, and their other stakeholders. In view of the nature of the industry, mining companies face particular scrutiny in respect of the environmental and social impacts of their business both at home and abroad. Governance structures become key as both boards and capital providers assess risk and investment priorities, and as industry stakeholders and proponents of ESG factors turn to the courts to hold companies accountable for the impact of their business operations.

Although there is no definitive definition of "ESG", and relevant ESG factors will be informed by the industry in which they are applied, Figure 1 highlights certain factors of the "E", "S" and "G" that mining companies and natural resource groups generally will need to evaluate.

The disclosure of a company's specific ESG performance, and related ESG metrics, is, with a few exceptions, where, to date, little formal regulatory guidance has been given. The metrics are not currently standardized which has given rise to a host of recommended "best practices" and industry guidelines. Some examples of the more established global frameworks and/or standards are the Global Reporting Initiative (GRI), the Sustainability Standards Accounting Board (SASB), the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) and the widely known United Nations Sustainable Development Goals (SDGs). In 2019, the World Economic Forum launched an initiative to identify a core set of ESG metrics and disclosures that could be used globally and across industries. This initiative has culminated in the release by the World Economic Forum, in 2020, of a consultation paper[1] entitled, *"Toward Common Metrics and Consistent Reporting of Sustainable Value Creation."*

The mining industry has also seen a proliferation of frameworks, including GRI's G4 Mining and Metals Sector Disclosures, SASB's Metals and Mining Sustainability Accounting Standard, and the Initiative for Responsible Mining Assurance. Each is attempting to bring some recognized forms of disclosure to bear. "Good" ESG disclosure will comply with legal requirements where applicable, incorporate industry best practices, be drafted to achieve a purpose, and take an appropriate form – whether that, from a public company perspective, be in the form of an annual information form (AIF) or management discussion and analysis (MD&A) disclosure, sustainability reports, stakeholder engagement plans, or

otherwise. Given the numerous stakeholders evaluating a company's ESG performance, and the implications to a company of "ESG ratings" in their ability to attract capital, it is no wonder that there are increasing calls for both regulatory guidance and industry standardization.

The role of ESG performance indicators is not limited to disclosures and informing investor risk assessment policies. A mining company's business performance and actions in its operations, particularly as it endeavours to maintain its social license to operate, may also give rise to certain obligations and liabilities as courts take an increasingly-aggressive approach towards ensuring that companies, whether operating at home or abroad, remain accountable for their actions.

In the last week of February 2020, the Supreme Court of Canada (SCC) issued a judgement in Nevsun Resources Ltd. v. Araya that is likely to have a significant impact on the ESG conduct of mining operations abroad. In this case, Nevsun, a publicly traded company incorporated in British Columbia, had, through a series of intervening subsidiaries, a controlling stake in the Bisha Mining Share (BMS) Company in Eritrea that operated the Bisha mine. The BMS Company subcontracted with Segen (owned by Eritrea's ruling party) to assist in the operation of the Bisha mine.

Three Eritreans have alleged in British Columbia court that Nevsun violated Customary International Law (CIL) norms against slavery and forced labour purportedly occurring at the Bisha mine. The three claimants alleged that while Segen used forced labor and slavery, Nevsun owns the BMS Company that operates the mine and so is liable for the claimed violations of these CIL norms. Without ruling on the merits of the claim, which have recently been settled under terms that are confidential, the SCC ruled that CIL norms against forced labour and slavery are a part of Canadian law no different than contract or labour law. Therefore, such norms can be used to initiate a civil action in Canada for damages. The SCC also said that these CIL norms apply to everyone, including companies. This means that corporate ESG conduct claimed to be in breach of these CIL norms can give rise to a claim in damages in Canadian courts. In sum, under the Nevsun ruling, corporate ESG conduct committed abroad that violates CIL norms like those prohibiting forced labour may be used to make a claim in damages in Canada against the company.

This ESG prism is being used in other countries' courts. The United Kingdom Supreme Court decision in Vedanta Resources v. Lungowe is a case on point. It involved a claim in damages in the UK for the actions of a Zambian subsidiary of a UK company. The ESG conduct at issue was the claimed lax environment standards by Vedanta's subsidiary, Konkola Copper Mines, that allegedly resulted in toxic discharges into waterways from Konkola's copper mine in Zambia. The UK Court did not rule on whether violations of CIL can be used to make a claim in damages. But it did say that Vedanta was sufficiently responsible for its subsidiary that it could be liable to a claim in damages in UK courts for the ESG conduct of its subsidiary Konkola in Zambia.

With the added use of courts by proponents of ESG and heightened expectations on the part of institutional investors, regulators, and broader civil society in respect of their ESG performance, companies in Canada and internationally face challenges of further integrating ESG into their governance and operational frameworks. In addition, far from dampening the interest in ESG, COVID-19 appears to have reinforced the interest in ESG amongst institutional investors and stakeholders generally; this being in part because COVID-19 is a stark reminder to investors of the potential impact of non-financial risks.

Should any questions remain as to the importance of ESG, the Joint Statement issued on November 25, 2020 by the CEOs of eight of Canada's leading pension plan investment managers, calling on companies and investors to provide "consistent and complete" ESG information and stating that the pension plans they manage will "allocate capital to investments best placed to deliver long term sustainable value creation" provided a clear direction. The industry is being asked to "build back better" as it emerges from the COVID-19 pandemic and continues to address its role in our global environment.

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Reference

1. https://www.weforum.org/whitepapers/toward-common-metrics-and-consistent-reporting-of-sustainable-value-creation