# DUTY OF VIGILANCE IN 2025: PATHWAYS FOR QUÉBEC

## SUMMARY OF THE REPORT

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Canada Climate Law Initiative | L'Initiative canadienne de droit climatique

## SUMMARY OF THE REPORT

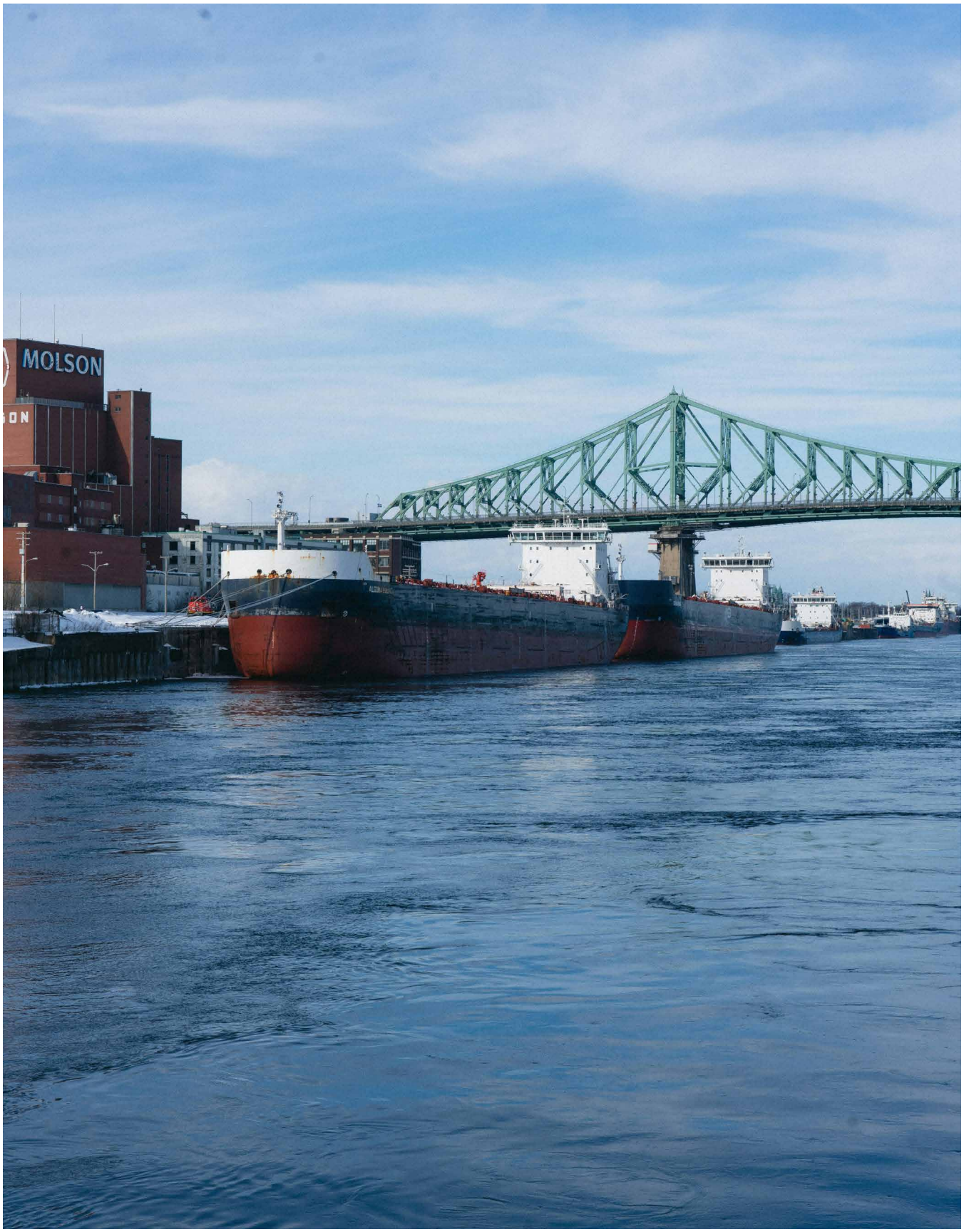
The *Duty of Vigilance* ("*devoir de vigilance*") concept, developed in France, has been one of the most influential avenues for the promotion of accountability in companies over the last ten years. This legal approach subjects large companies based in France to multiple obligations, intended to limit abuses perpetrated abroad by—or with the participation of—these companies, either directly or indirectly. The French approach has greatly influenced discussions at the European institutional level. After years of debate between civil society, industry representatives, politicians and other stakeholders, the *Corporate Sustainability Due Diligence Directive* (CSDDD) was adopted in June 2024 by the European Parliament, a key first step before its conversion into "domestic law" by member states.

In concrete terms, the present research seeks to map the status of the conversation and the trends surrounding the oversight of large companies (especially multinational corporations). As sources of economic development, large contracting companies with internationalized value chains have multiple impacts on the environment, biodiversity, and the rights of local communities. They can therefore undermine collective efforts to address climate change.

This report draws on legal analysis, comparative law, and other cross-disciplinary areas to analyze the challenges of regulating corporate social responsibility in Canada. Since the 2000s, numerous potential solutions (under both hard law and soft law) have been proposed to better regulate corporate practices, particularly their environmental impact. However, these have only resulted in marginal changes. The case law of federal and provincial courts show a reluctance to condemn Canadian companies for their actions abroad.

In this situation, it seemed pertinent to also seek to understand the state of the practices and of the conversation in Québec. Indeed, Québec could provide a suitable ground for further reflection and the identification of new ways to promote *vigilance* (a proactive, preventive and "reinforced" diligence) in companies. Québec's bijural approach (civil law and common law), combined with its specific cultural sensitivities linked to the protection of the territory and the environment, makes the province a well-suited place in which to promote greater corporate accountability in North America.

Note: This summary only contains potential paths to be considered in the coming years. For the full report, please click here.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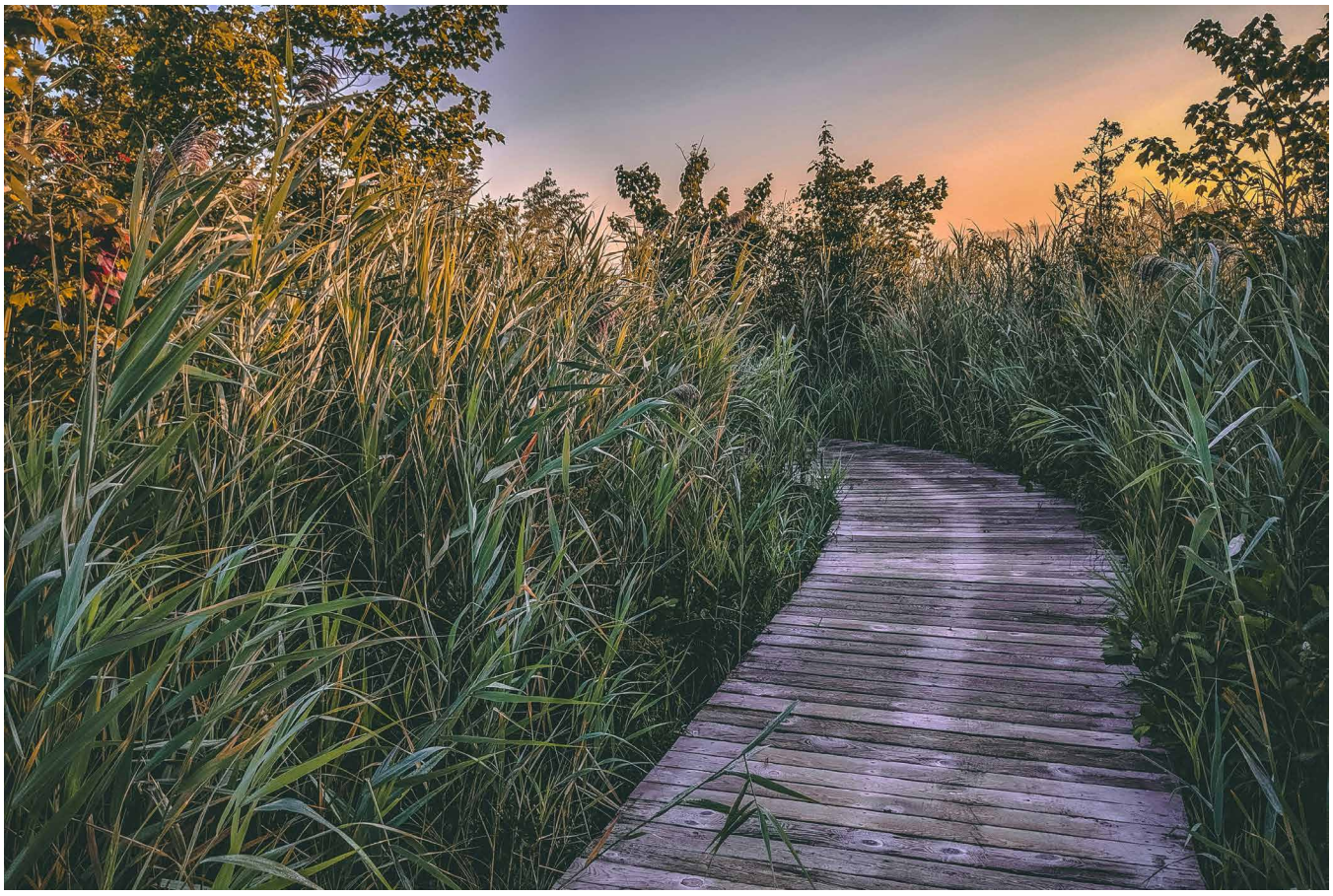


## POTENTIAL PATHS TO BE CONSIDERED IN THE COMING YEARS

The conversations of the last fifteen years on the oversight and regulation of large companies have certainly helped to shape Canadian public opinion. Such new awareness is now driving more direct political action in France, in the EU, and also in our country.

The entry into effect of the *European Green Deal*, which will be finalized around 2029, will have an impact on Canadian economic players. Indeed, the CSDDD and CSRD (Corporate Sustainability Reporting Directive) directives will also apply to companies outside the EU that meet the applicability thresholds. These companies will therefore have to become familiar with new European requirements, depending on the jurisdictions in which they operate. The sooner we seek to align our practices with practices emerging elsewhere, the better prepared and equipped our organizations will be to meet new international transparency requirements.

By building on the French approach to duty of vigilance and taking into account the lessons learned documented by French stakeholders in recent years, Québec could explore various avenues for

modernizing its law:

- The civil liability system applicable to the company should take into account all of the obligations outlined in the duty of vigilance (as opposed to a compliance approach focusing, for example, solely on the formal obligation to produce an annual report or plan).
- The accountability of the parent company should be strengthened so that the company is automatically held liable for the breaches of its subsidiaries.
- An explicit limitation of the grounds for exemption of liability and other defence mechanisms (based in particular on contractual guarantees entered into between the company and its indirect partners) should be included.
- Access to justice for victims should be ensured, in particular by facilitating access to evidence and explicitly reversing the burden of proof in order to restore some measure of equality between the injured parties and the company.
- Simplified mechanisms for class action for foreign victims should be considered.
- Consideration should be given to simplifying the procedures for obtaining court injunctions in cases where serious (irreversible) damage is caused abroad, particularly to the environment (in accordance with the precautionary principle), by a Québec company.
- The duty of vigilance could also apply to financial institutions, to ensure that awareness of environmental and social risks informs financial decision-making.
- Civil society participation must be planned and organized, with active monitoring by stakeholders promoting active accountability among corporate actors.

Another option would be to clarify, in the Civil Code and the QBCA (*Québec Business Corporations Act*), the duties and obligations of directors. Beyond the duty to act with *prudence and diligence, honesty and loyalty*, and in the interest of the corporation, directors could be required to take into account, in their decisions, the higher imperative of limiting the climate (or environmental) crisis and ensuring the best protection of human rights. This requirement could be directly incorporated into legislative texts. In the event of a lack of vigilance, such as risky decision-making on the part of directors (or failure to intervene), resulting in harm to a third party based abroad (e.g., a community and/or its natural ecosystem), directors should be automatically held accountable.[1] This (simple) legal presumption would act as a deterrent and ease the burden of proof for the complainant.

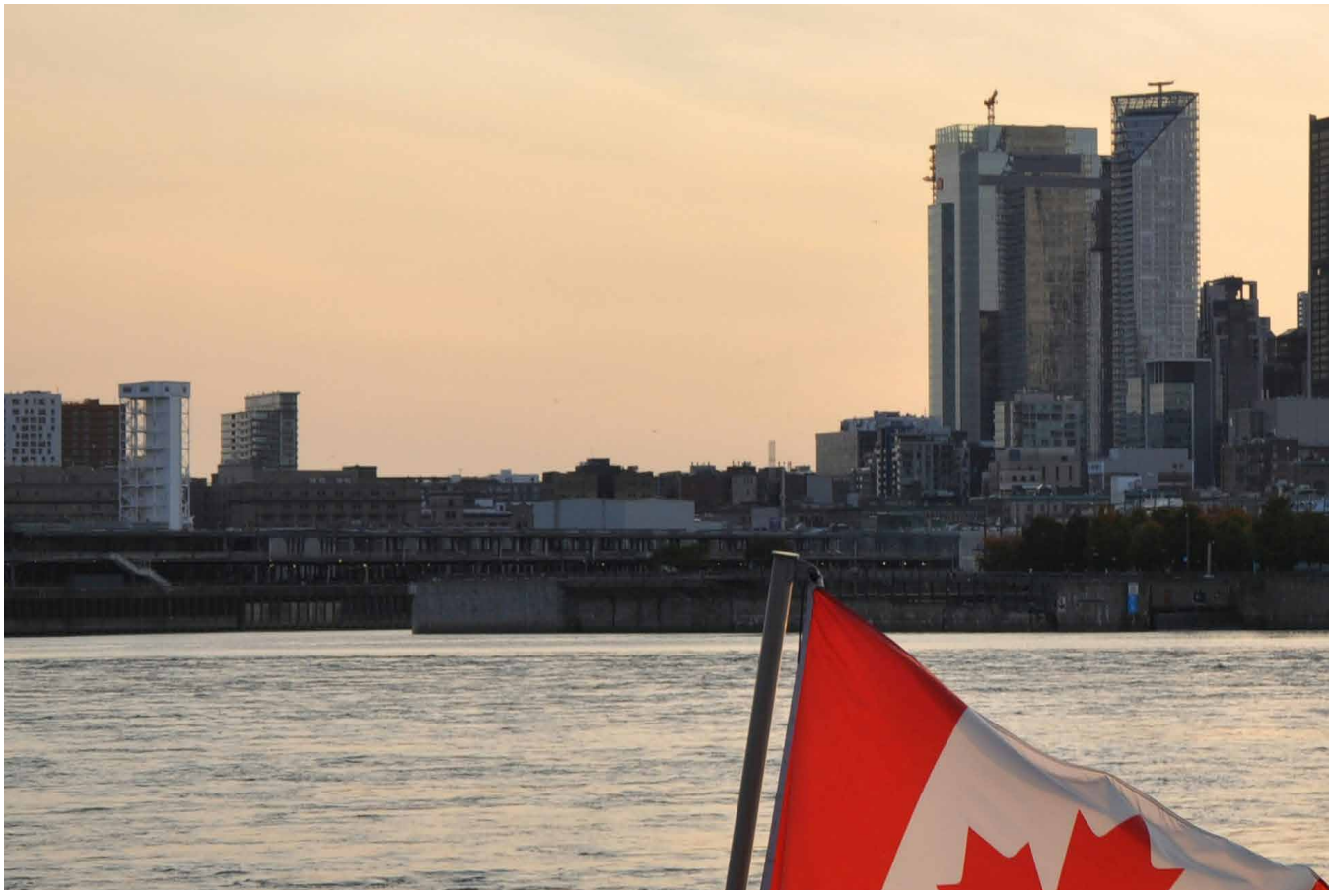
## TOWARD INNOVATIVE IMPLEMENTATION TERMS

One potential scenario for Québec would be to target all the companies incorporated in the province. This said, the requirements could vary according to the type of company (from a simple annual declaration for the smallest SMEs to a detailed and annual plan following strict guidelines for large companies). However, the priority would be to target large Québec companies operating abroad (the focus of this report), particularly contracting companies. It is possible to consider a "threshold-based" approach tiered according to revenue (% of absolute value) and/or number of employees, as well as a

gradual implementation of requirements over time to allow companies to prepare for this new paradigm.

Similarly, the periodicity of the required information disclosures could vary (with a report every year or every two years, for example), depending on the internal expertise available within companies and the expertise actually available in Québec to carry out this type of analysis of vigilance mechanisms. Lastly, vigilance efforts should be coordinated with the efforts to improve non-financial reporting by the financial actors, particularly institutional investors, to ensure greater consistency and genuine alignment in the data requested and produced, in order to avoid duplication and administrative burden.

A second approach—which would ensure that Québec businesses are not placed at a competitive disadvantage vis-à-vis other Canadian businesses wishing to operate in the province—would be to consider that *Québec's duty of vigilance* applies to any business operating in Québec (i.e., registered locally, even if incorporated elsewhere). We are, in this case, following the European principle which imposes obligations even on extraterritorial entities. Of course, such an approach in a federal context will bring a certain degree of complexity, particularly due to the principle of equality before the law, and constitutional challenges[2] could be brought to contest a provincial law that imposes additional

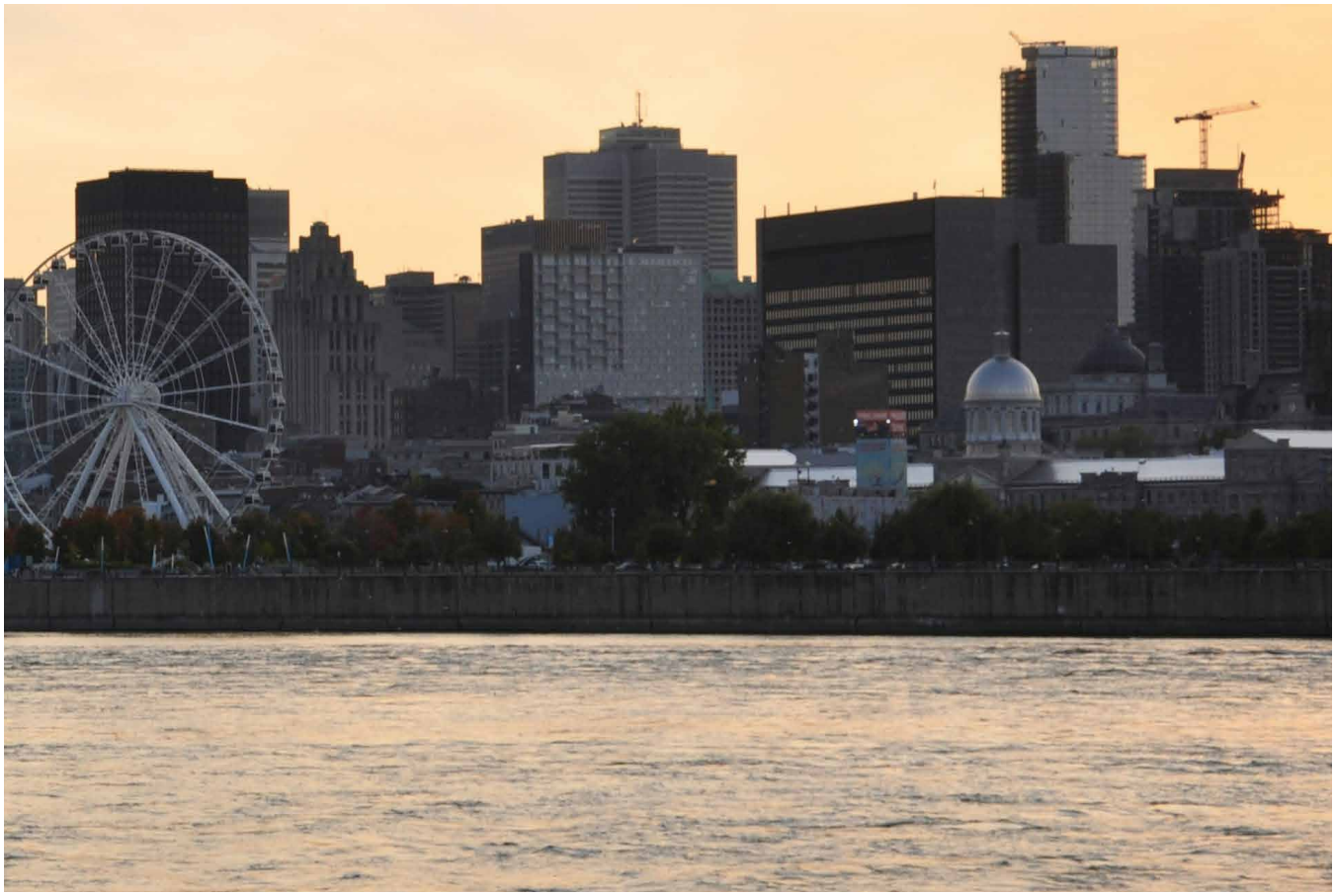


obligations on companies incorporated outside Québec, in provinces governed by common law. A specific analysis would then be necessary on this point.

**Based on the comparative analysis conducted, three initial paths could be part of the discussions aimed at defining and establishing a duty of vigilance in Québec:**

- **PATH 1:** Promoting corporate transparency, improving practices, and continuously changing behaviours (mapping the value chain, identifying ESG [environmental, social, governance] risks, preventing, mitigating).
- **PATH 2:** Facilitating access to justice and promoting the establishment of a liability system that protects victims of abuse abroad (and covers the breach of corporate social responsibility).
- **PATH 3** (would need to be explored): Promoting transparency with the public regarding out-of-court settlements.

In the tables below, possible **implementation elements** are outlined to support further reflection. A deeper analysis of feasibility or obstacles will be necessary; it could be the subject of future exploratory work.



## PATH 1: PROMOTING CORPORATE TRANSPARENCY, IMPROVING PRACTICES, AND CONTINUOUSLY CHANGING BEHAVIOURS (MAPPING THE VALUE CHAIN, IDENTIFYING ESG RISKS, PREVENTING, MITIGATING)

**Proposed tool:**
Production of an *Annual Vigilance and Transition Plan* (hereinafter referred to as *Plan*), whose content would be tailored to the size, type and/or sector of the company, as specified by the public authorities.

**Terms of the Plan:**
The *Plan* would be signed by the directors and executives, communicated to internal stakeholders (shareholders, employees, unions, etc.) and external stakeholders (suppliers, subcontractors, investors) upon request, and made available on the website (or by other means). An Annual Production Statement (or update) should be sent to the public authorities (an entity linked to the Québec government) to certify compliance and prove annual filing.

**Content of the Plan (non-exclusive):**
- Identification of risks based on a double materiality analysis of the value chain.
- Name of the manager/contact person within the company responsible for reporting on the *Plan*, and contact details of that person (for further enquiries).
- Explanation of the efforts undertaken to mitigate risks, and details of the follow-up measures that will be taken (particularly with partners).
- Description of the internal risk alert system put in place and explanation of this mechanism and of the procedures for following up on complaints.
- Documentation of transition efforts: identification by the company of its efforts to limit its impact on nature, particularly in terms of GHG (greenhouse gases), and to meet Québec's climate objectives.

**Interaction with the public and verification of the *Plan's* content:**
- To ensure proper compliance and filing of the *Plan*, it would be possible to involve two existing bodies at the *Annual Production Statement* stage: the Autorité des marchés financiers (AMF) for the reporting issuers, and the Registraire des entreprises (REQ) for other legal entities (closely-held ownership). These two bodies, which are well known to the general public, already require some organizations to submit annual reports (annual declarations for the REQ). Their role would then need to be expanded.
- A second option regarding the analysis of the *Plans*' content could be the creation of a *Corporate Vigilance Monitoring Centre* (Observatoire de la vigilance d'entreprise) in Québec, supported by civil society (non-profit and with collegial governance). Based on the French model, which actively involves civil society in the monitoring of corporate practices, the Monitoring Centre would be responsible for receiving the *Plans* (collected by public authorities) on an annual basis, analyzing them, and providing an opinion on their content and on the risk assessment. This Monitoring Centre could be composed of partner universities (research chairs, legal practitioners) as well as non-governmental organizations, trade unions, chambers of commerce, and government representatives. The Plans should be accessible to the public at all times, along with the Centre's opinions, on its website. The Monitoring Centre could serve—and be recognized—as a "legal expert" in corporate social responsibility (CSR) and ESG. Its opinions, along with the *Plans*, would be useful to the courts in determining the standard of care expected of companies. The Centre would also be in charge of collecting, compiling, and documenting international controversies involving entities governed by Québec law or doing business in Québec. The Monitoring Centre should be mentioned—along with its contact details—on the websites of Québec companies subject to the duty of vigilance.

**Penalties:**

- In the event of repeated failure to produce the *Plans*, or of other breaches provided for by law (such as repeated risky behaviour), an administrative penalty may be imposed (% of revenue or a fixed amount). A portion of the administrative penalty should go directly toward the creation of a collective fund (described below), with a view to deterrence and to ensuring access to justice.

**Potential implementation procedures:**

Passing a thematic law on the duty of vigilance and on abuses committed abroad by companies, which would aim to amend the Civil Code and the *QBCA* (among others), and whose content would include:

- The ongoing obligation to identify, prevent, remedy, and redress abuses committed abroad in relation to the environment and human rights. This obligation would apply to the value chain and should also include commercial relationships with third parties of the company (as the contracting authority), if these cause damage during the performance of the contract or in the execution of its activities.
- A formal obligation to produce an annual *Plan* (vigilance and transition).
- The strengthening of the directors' obligations with regard to risky decisions or decisions that may have an impact on the climate and human rights. The texts (the Civil Code and the *QBCA* in particular) will need to include clarification regarding what is expected of directors (mandatory *prudence and diligence* also toward stakeholders/third parties, and systematic analysis of climate impacts).
- The (re)affirmation of the obligation for the company (legal entity) to act in alignment with national frameworks (values promoted in the Charters) and international frameworks (UN, ILO, ISO 26000).
- The invalidation of contractual liability exemption clauses when abuses are directly related to human rights and the environment (moral, physical, and material damage).
- The introduction of explicit offences for directors and executives who do not sign the *Plan*, or who sign it but show a significant lack of vigilance in the face of proven risks of abuse abroad.

## PATH 2: FACILITATING ACCESS TO JUSTICE AND PROMOTING THE ESTABLISHMENT OF A LIABILITY SYSTEM THAT PROTECTS VICTIMS OF ABUSE ABROAD

**Observation:**
Legal representation in Canada is very costly and complex, and the risk of declination of jurisdiction remains high.

**Avenues to be explored:** Launching a doctrine project to evaluate the following possibilities

- Unlocking the *forum non conveniens* doctrine, no longer making the place of damage an exclusionary criterion, but systematically applying an approach based on the principle of access to international justice. Denying the option of declination of jurisdiction when the risks to the environment and human rights appear to be proven, serious, or irreversible.
- Clarifying what could constitute grounds for legal action for failure to comply with Québec's duty of vigilance (scope, legal basis).
- Reversing the burden of proof (to the defendant), if the *prima facie* analysis shows a significant risk to the environment and to human rights, and facilitating the disclosure of evidence to the plaintiff.
- Confirming, in general, the legal scope of soft law standards (international frameworks, corporate codes of conduct, and the vigilance and transition *Plan* mentioned above) as de facto benchmarks that are recognized and can be systematically used by the Court to analyze the standard of conduct of an economic actor and the gap between its commitments and the alleged misconduct.
- Confirming the possibility of obtaining express and preventive court orders against a Québec company, in order to stop ongoing damage abroad and ensure direct and automatic communication of the decision between the Québec judicial authorities and the judicial authorities of the jurisdiction where the abuse (or harm) is committed.
- Confirming the possibility for (foreign) victims to be represented by NGOs, human rights advocacy organizations, and/or Québec unions.
- Facilitating collective action mechanisms (limiting the time required for authorization by the Superior Court or even considering a fast track) when the victims are foreign nationals and the risk is linked to the environment or human rights (serious/irreversible harm).

**Proposing innovations in the penalties:**
In the event of a proven breach of the duty of vigilance, considering, in addition to compensation (damages), a fixed amount or a percentage to be paid into a collective fund (mentioned in Path 1). This collective fund, administered by the justice system, would aim to support victims of environmental and/or human rights abuses in the payment of legal fees in Québec. The application for financial assistance could be submitted jointly with a local Québec organization (NGO, human rights organization or union) and filed with the clerk's office or some other designated justice authority.

**Establishing a common understanding of this effective accountability regime:**

- Fostering, among legal professionals, a common understanding of the duty of vigilance AND of climate transition risks (understanding climate science and economic consequences). This involves, among other things, regular training for judges and other legal stakeholders (as well as lawyers), and even the creation of a specific chamber for disputes connected to climate abuse and human rights, as is the case in France.

## PATH 3: TRANSPARENCY WITH THE PUBLIC REGARDING OUT-OF-COURT SETTLEMENTS

**Observation:**
Out-of-court settlements are deemed effective solutions because they are often faster and much less costly than legal proceedings (which involve attorney and expert fees, as well as the risk of being ordered to pay legal costs). However, this mechanism, also used to settle class actions, does not contribute to the creation of positive law (there is often no admission of guilt), and the content of the agreement is generally not disclosed, thus preventing the public from being kept informed of abuses and damages caused abroad.

**Avenues to be explored:**
- Requiring that any settlement of a class action arising from a dispute that involves a failure to comply with the duty of vigilance—or a breach of environmental or human rights—be made public and published in the Gazette (or another appropriate platform), given its nature as a matter of public interest.[3]
- Giving the aforementioned Monitoring Centre a role consisting in collating out-of-court settlements and conducting an analysis on the parties involved, the facts in dispute, and the damages claimed.
- Ensuring that a report by the Monitoring Centre (frequency to be determined) is provided to the judicial authorities and made public, with recommendations on possible improvements to positive law and to access to justice.
- The existence of this report would facilitate the identification of companies that are repeatedly subject to legal action (repeated failure to comply with their duty of vigilance) and that favour out-of-court settlements. This could play a motivating role, since the reputation of economic actors plays a significant role in changing corporate behaviour.


QUEBEC

# FOOTNOTES

1. The liability of directors and/or shareholders is occasionally upheld in case law; see, in particular, the decision in Lanoue v. Brasserie Labatt ltée, (1999) QCCA.
2. For comparison purposes, it may be interesting to look at some of the legal actions taken by companies against Law 96. These companies deemed some provisions to be unconstitutional. Osler, "Superior Court suspends the upcoming obligation for legal persons to produce French certified translations, introduced by Bill 96, pending final adjudication of a constitutional challenge" (August 18, 2022) <https://www.osler.com/en/insights/updates/superior-court-suspends-the-upcoming-obligation-for-legal-persons-to-produce-french-certified-trans/?pdf=1>

- For example, a mechanism proposed in France, the "conventions judiciaires d'intérêt public (CJIP) (...), relatives au parquet européen, à la justice environnementale et à la justice pénale spécialisée" instituted in 2020.

  For the French State, "The latter constitutes a transactional mechanism enabling the efficient and rapid handling of proceedings brought against legal entities. This alternative to prosecution applies to legal entities accused of active and passive corruption and influence peddling, tax fraud, money laundering, and any related offenses (...)", but also of environmental offenses.

  "This agreement allows one or more of the following obligations to be imposed on the legal entity:
  paying a public interest fine to the Treasury, the amount of which is to be set in proportion to the benefits derived from the breaches identified. This fine may be up to 30% of the annual revenue of the signatory legal entity,
  implementing a compliance program lasting up to three years, under the supervision, according to the situation, of the French Anti-Corruption Agency or the relevant departments of the ministry responsible for the environment,
  compensation for the damage caused to the victim or the ecological damage."

  The CJIPs can be consulted on the AFA website. The CJIP agreements concluded are also published on the website of the ministère de l'Économie, des Finances et de la Relance (Ministry of Economy, Finance, and Recovery) or on the website of the ministère de la Transition écologique (Ministry of Ecological Transition).

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