

Jul 05, 2019

Climate Change Litigation: Urgenda Update

By Christian Nianiaris and Zoë Thoms

In *Urgenda Foundation v. The State of the Netherlands* (2015) (Urgenda), the State of Netherlands was found by the court to have an affirmative duty toward its citizens to take action against climate change (see previous posts on the topic here and here). Since the initial decision, plaintiffs in other jurisdictions have used it as a framework to bring court challenges alleging their respective governments' failure to mitigate the deleterious effects of greenhouse gas (GHG) emissions.

The Original Urgenda Decision Works Its Way Through the Courts

The Dutch Urgenda - "Urgent Agenda" - Foundation was founded in 2007 to promote sustainability, including calling for 100% sustainable energy in the Netherlands by 2030 (Report 2030). Representing 886 Dutch citizens at the Hague District Court in June 2015, the Urgenda Foundation successfully argued that the Dutch government had failed to implement GHG mitigation policies that would achieve the goal of decreasing a 2°C rise in global temperatures, thereby acting hazardously negligent toward its citizens. The plaintiff had to first establish that the government owed a duty of care, then determine the standard of that duty.

The court analyzed domestic and international law to come to its conclusion, including Article 21 of the Dutch Constitution, the UN Climate Change Convention, the international "no-harm" principle, the EU Emissions Trading System directive and Articles 2 and 8 of the European Convention on Human Rights (ECHR) - all of which import obligations on the government that the plaintiffs argued were more than mere formalities. The court did not find the ECHR to be applicable, but did find that an interpretation of the Dutch court's case law shows an increasing "awareness of a link between the protection of the rights and freedoms of individuals and the environment." The court held that the government breached their duty when it implemented improper GHG reduction measures.

The government appealed on all grounds to the Court of Appeal. The Urgenda Foundation cross-appealed on the grounds that they should have been able to rely on Articles 2 (the right to life) and 8 (the right to respect for private and family life) of the ECHR. Siding with Urgenda, the Court of Appeal held that "the State [was] acting unlawfully (because in contravention of the duty of care under Articles 2 and 8 [ECHR]) by failing to pursue a more ambitious reduction as of end-2020, and that the State should reduce emissions by at least 25% by end-2020." [para 76].

The government appealed that decision to the Supreme Court of Netherlands. Arguments were heard on May 24, 2019. The Dutch government argued that the Appeal Court's decision improperly "limits the state's freedom of choice in establishing policy on the scope of this reduction" which could have 'significant consequences' for government freedom to make climate policy in other areas." The court has not yet released its decision.

Urgenda's Global Impact

Despite appealing the decision, the Dutch government followed the District Court's original order to take steps to reduce GHG emissions to limit the global temperature rise to 2°C. This recommendation is in line with the Intergovernmental Panel on Climate Change's (IPCC) Fourth Assessment Report 2007, which the Netherlands had signed on to. Among other things, the report states that in order to avoid a 2°C rise in global temperatures, the total GHG emissions by countries, including the Netherlands, must be 25-40% lower than 1990 levels by 2020.

The Centre for International Governance Innovation - a leading Canadian research organization focused on international governance - released a report which discusses the unique potential for influence that

international treaties and precedents have in climate change litigation in other jurisdictions. For example, the fact that a national government has adopted the IPCC Reports (which both the Netherlands and Canada have) makes it difficult for them to contest a plaintiff's claim that certain levels of GHG emissions must be met because these governments have previously agreed on the appropriate levels in these Reports. Although plaintiffs "cannot directly derive rights from treaty provisions or resolutions that have been adopted during the various climate change conferences, these provisions and resolutions can help – by means of the open standard of a socially responsible duty of care – in defining the duty of care standard that a government must practise in judicial matters."

The International Implementation of the Urgenda Framework

The approach used by the Urgenda Foundation has been taken up by plaintiffs in other jurisdictions, including New Zealand, India, Switzerland, Ireland, Belgium, United States, Germany, France, United Kingdom, Colombia, European Union, Pakistan, and Canada. We highlight a few of these cases below.

Canada

In November 2018, an environmental group called ENvironment JEUnesse (ENJEU) applied to the court to authorize a class action against the Canadian government on behalf of Quebecers aged 35 and under. Like Urgenda, ENJEU claims that Canada's GHG emissions targets are insufficient to avoid the impacts of climate change.

The motion for authorization to institute a class action brought by ENJEU seeks a declaration that by adopting dangerous GHG emissions targets, the Canadian government is violating the class members' Charter rights and is not ensuring that the class members live in a safe climate, thereby shirking their duty to act against climate change. The class members are seeking \$100 each, amounting to \$340 million total - all of which would be placed into a fund for the implementation of anti-climate change measures.

The Canadian government argues that claim goes beyond the bounds of justiciability. The government's lawyers argue that "this class action asks the court to interfere in the legislative and the executive branches," and the "courts cannot dictate to the federal government a way forward."

The Quebec Superior Court justice heard arguments in early June from ENJEU and the Canadian government on the threshold issue of authorizing the class action proceeding. The court has not yet released its decision.

United States

In *Juliana v. United States*, a number of youth filed a climate lawsuit in 2015 against the U.S. government. Lower courts have been allowing the proceedings to continue, but sustained motions by the U.S. government and an enjoinder of the proceedings in 2018 by the Supreme Court of the United States, have meant that the case has not progressed.

The complaint accuses the U.S. government of causing climate change, thereby breaching the government's duty of care toward its citizens by violating their constitutional rights to life, liberty and property, and failing to protect public trust resources. The plaintiffs are asking for the government to be required to "develop a plan to reduce CO2 emissions so that atmospheric CO2 concentrations will be ... consistent with the goal of limiting global warming to 1.5°C."

The U.S. government argues that:

- the plaintiffs do not have standing because their grievance is universally shared and generalized;
- there is no fundamental right to a "stable climate system" as put forward by the plaintiffs; and
- that there is no federal public trust doctrines which creates a right to particular climate conditions.

On June 4, the Ninth Circuit Court of Appeal heard oral arguments from both sides on a procedural motion that will decide whether this case will go to trial. No decision has been released yet. You can see the timeline of the proceedings along with additional information [here](#) and [here](#).

What's Next?

Although the outcome of the most recent Urgenda appeal will be closely watched by those seeking to launch their own climate change litigation, it has already spawned litigation around the world, including in Canada. It will be interesting to see if Urgenda's original success can be repeated outside of the Netherlands.

Authors



Christian Nianiaris
Summer Student
T 416.863.1500



Zoë Thoms
Associate
T 416.865.7755
zthoms@airdberlis.com

This communication offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.