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Update on Climate Change Litigation

By Christian Nianiaris and Zoë Thoms

The decision in *Urgenda Foundation v. The State of the Netherlands (2015)* set the framework for climate change litigation across the globe. Since our last post about climate change litigation directly following the Urgenda decision, substantial developments have occurred and there have been a large number of new cases. Over the next few weeks, we will highlight a number of interesting climate change cases taking place in Canada and around the world, including an update on the Urgenda decision, information on litigation taking place against oil and gas producers, and legal challenges to environmental review and permitting processes.

The Urgenda Decision

Urgenda, a non-profit environmental organization, represented 886 citizens in a civil suit against the Dutch government. Urgenda argued that the Dutch government was acting in a hazardously negligent manner towards society by failing to take measures to reduce GHG emissions to avoid a dangerous and imminent 2°C change in atmospheric temperature. The court ruled in favour of Urgenda and held that the government owed a duty of care to its current and future generations of citizens to mitigate the effects of climate change. This decision was recently affirmed on appeal at the Hague Court of Appeal and was heard at the Dutch Supreme Court on May 24, 2019.

The Urgenda decision is being used as a model for similar climate change litigation in Ireland and elsewhere. The Columbia Law School's Sabin Centre for Climate Change Law maintains a database of climate change cases brought before the courts and regulators around the world. Since 2005, they have identified over one thousand cases in the United States and three hundred internationally.

Trends of Climate Change Litigation

In 2017, the United Nations Environment Programme (UNEP) in cooperation with the Sabin Centre released a report on the Status of Climate Change Litigation. The authors identified five key trends in the area of climate change litigation:

1. "Holding governments to their legislative and policy commitments." International agreements such as the Paris Agreement have provided a "scientific reference point as well as a legally definitive constraint" for groups to attempt to enforce their country's commitment under the treaty. [pg. 14]
2. "Linking the impacts of resource extraction to climate change and resilience." There is a continuing focus on mining and oil & gas companies and the effect that the extraction and use of their products have on global GHG emissions levels. [pg. 18]
3. "Establishing that particular emissions are the proximate cause of particular adverse climate change impacts." Many of the litigation disputes come down to issues of causation – identifying which specific GHG emissions cause a particular climate change-related adverse impact is difficult, to say the least. Nonetheless, groups continue in their attempt to make this connection. [pg. 19]
4. "Establishing liability for failures (or efforts) to adapt to climate change." Plaintiffs are litigating against companies and governments alleging that they have either exacerbated or failed to mitigate predictable adverse effects of climate change. This includes seeking redress for property damage purportedly caused by climate change-related floods and other similarly catastrophic weather events. [pg. 22]
5. "Applying the public trust doctrine to climate change." The public trust doctrine (PTD) provides that the government of a particular jurisdiction is a trustee of public trust resources (wildlife, fish and waterways for example) for the benefit of those resources and for current and future generations. Some plaintiffs

have argued that the PTD places a positive obligation on governments to act toward the benefit of their citizens with respect to climate change. [pg. 23]

Climate Change Litigation Has Come to Canada

Canada is not immune to the growing trend of climate change litigation. The Sabine Centre database currently lists 17 such lawsuits. As well, municipalities are publicly considering whether to bring climate change litigation (see here and here).

In Quebec, an environmental educational organization called ENvironnement JEUnesse (EJ) filed an application for a class action lawsuit against the federal government. EJ's website states that this action is "on behalf of all young Quebecers aged 35 and under against the Government of Canada for their inaction on climate change." They are attempting to "demonstrate that [their] collective action is necessary to defend the rights of young people."

Greenpeace Canada filed suit against the Ontario government in 2018, claiming that the Ontario government failed to follow public consultation requirements for environmental policies and legislation before cancelling the provincial cap and trade program. The suit recently survived a motion to quash brought by the Ontario Minister of the Environment in 2019.

In addition, a number of provincial governments have brought their own climate change-related lawsuits challenging the federal carbon pricing legislation (see our recent posts here and here).

Stay tuned to EnergyInsider.ca in the coming weeks for further details about these and other climate change cases.

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