

Climate change litigation arrives in Canada

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In this Update

- Two recent developments demonstrate that climate change litigation has arrived in Canada: the ENVironnement JEUnesse lawsuit in Québec and the City of Victoria's endorsement of a class action lawsuit against oil and gas producers for climate-related harms.
- Oil and gas producers may soon be faced with climate litigation. Further, the pressure created by litigation, regardless of its success or failure, may also affect the regulatory and operating environment for Canadian companies.
- Steps Canadian oil and gas producers should take to prepare for climate change litigation include analyzing their historical greenhouse gas emissions and carefully reviewing their climate change risk disclosure.

Heightened public awareness and a sense of global urgency around climate change-related risks and impacts, combined with the introduction of national laws and international commitments designed to combat such risks, have inspired a new type of legal action: climate change litigation. In a relatively short period of time, more than 1,000 climate litigation cases were filed worldwide, leaving many of us to speculate when this "trend" would come to Canada. Two recent developments demonstrate that climate change litigation has arrived in Canada. In November 2018, an action was filed by ENVironnement JEUnesse (ENJEU) in the Quebec Superior Court, followed shortly thereafter by the City of Victoria's (Victoria) endorsement of a class action lawsuit against oil and gas producers for climate-related harms.

Generally, climate change litigation has two broad categories:

1. **Suits Against Governments** — public law actions raising human rights, constitutional, and administrative law arguments; and
2. **Suits Against Corporations** — private law actions based in areas of law such as tort, fraud, planning, and company law.

ENJEU's action falls into the first category, and Victoria's falls into the second.

ENVironnement JEUnesse

Québec children's rights-based climate litigation claim

On November 26, 2018, a Québec non-profit organization dedicated to environment education, ENJEU filed a motion for authorization to institute a class action at the Quebec Superior Court against the federal government on behalf of Québec residents aged 35 and under. Among other relief, the claim seeks a declaration that the federal government has infringed rights protected by the *Canadian Charter of Rights and Freedoms* (Canadian Charter) and the *Québec Charter of Rights and Freedoms* (Québec Charter) by failing to take adequate action to prevent climate change. Specifically, ENJEU argues that the federal government's failure to adopt adequate emission targets violates the class members' right to:

- life and security of the person (Section 7 of the Canadian Charter and Section 1 of the Québec Charter);
- live in a healthy environment in which biodiversity is preserved (section 46.1 of the Québec Charter); and
- equality by disproportionately burdening younger generations with the future costs of climate change (Section 15 of the Canadian Charter and Section 1 of the Québec Charter).

As a proposed class action, the ENJEU claim requires authorization from the Quebec Superior Court before it can proceed. A decision on the motion for authorization is expected within a year.

Modelled after rights-based climate litigation around the globe

The ENJEU lawsuit mirrors claims filed in other jurisdictions, including the Netherlands and the U.S. Such actions involve claims against governments by groups that purport to represent a group of young citizens; they claim damages and/or declaratory relief due to government inaction on climate change.

In *Urgenda Foundation v. Kingdom of the Netherlands*, the Netherlands court accepted a rights-based argument and held the Dutch government accountable for failing to take sufficient action to prevent the threat posed by climate change. The decision was upheld by the Hague Court of Appeal on October 9, 2018.

In the U.S., similar lawsuits have been filed in several states. The most well-known case is the Oregon, Our Children's Trust lawsuit, *Juliana et al. v. United States of America*. That case recently received significant media attention after the Trump Administration was granted a stay of the trial (which had been scheduled for fall 2018). The case is currently stayed pending the resolution of interlocutory appeals.

Bellwether for future claims

While ENJEU's claim is novel and, at this point, its prospect for success is unclear, it signals that Canada is following the international trend of rights-based climate litigation.

B.C. municipalities class action

City of Victoria supports class action

On January 17, 2019, Victoria became the first municipality in Canada to endorse a class action lawsuit against oil and gas producers for climate-related harms. Victoria City Council resolved to support the class action and asked the Union of B.C. Municipalities (UBCM) to examine the possibility of initiating the lawsuit at their annual meeting in September.

The purported justification for the class action is to enable Victoria to safeguard the financial interests of its residents by recovering costs for climate-related harms from the oil and gas producers who profit from the burning of fossil fuels.

The proposed suit may be structured as a class action with municipalities in B.C. (such as Victoria) as class members. The rationale for bringing the suit as a class action is two-fold: (1) it will allow class members to save legal fees through joint representation; and (2) B.C.'s class action rules (unlike some other provinces) do not require the losing parties to pay legal costs if their claim fails.

The lawsuit will be launched against the world's largest fossil fuel producers and will seek to hold those corporations liable for the municipalities' climate adaptation costs (e.g., flood prevention measures). The claimants will seek to quantify the individual and historic greenhouse gas (GHG) emissions from major GHG-emitting corporations (including downstream emissions). Liability will be apportioned between the defendants based on their percentage share of cumulative historical GHG emissions. For example, where research performed by the Climate Accountability Institute attributes a percentage of global GHG emissions between 1751 and 2013 to a producer, the municipalities will argue that the producer is responsible for that percentage of their climate adaptation costs.

West Coast Environmental Law campaign

This proposed B.C. municipalities class action is part of a larger campaign by West Coast Environmental Law (WCEL) (an environmental advocacy group). For several years, WCEL has promoted a campaign to demand accountability from fossil fuel companies. WCEL continues to encourage other B.C. municipalities to join in this class action.

As a preliminary step, the WCEL campaign has had municipalities in B.C. send demand letters to oil and gas companies requesting compensation to cover the costs of alleged climate-related harms. The Resort Municipality of Whistler's letter to oil and gas companies in the fall of 2018, which resulted in significant backlash, was part of this campaign.

Modelled after U.S. litigation

The B.C. municipalities class action will be the first of its kind, but it is inspired by similar suits in the U.S. Municipalities in the U.S., including the City of New York and a number in California, have launched climate-related suits against major oil and gas producers. The lawsuits seek billions to cover the infrastructure costs associated with preparing for climate change impacts and allege that the producers were aware of the risk of climate change from their product, but sought to conceal those risks from the public.

Claimants in the U.S. have relied on the common law causes of action of nuisance, trespass, and negligence in these lawsuits. Given the similarities between these causes of action in Canada and the U.S., Canada is a fertile ground for these claims. However, the Canadian claims are far from assured success. Several of the U.S. claims have been preemptively dismissed. U.S. courts view climate change as a political question that private law is ill-suited

to address. Theories on which claims by U.S. cities were preemptively dismissed may provide a basis for defending claims in Canada.

Implications

Climate litigation has arrived in Canada. Oil and gas producers may soon be faced with climate litigation. Further, the pressure created by litigation, regardless of its success or failure, may also affect the regulatory and operating environment for Canadian companies. These developments reinforce the importance for Canadian companies to take adequate steps to plan and prepare for climate change litigation, as well as an evolving regulatory and operating landscape. Specific steps Canadian oil and gas producers should take include:

- **Analysis of historical GHG emissions** — The B.C. municipalities class action, like similar actions in the U.S., is based on a company's total historical GHG emissions. Claimants have relied on the same analysis to quantify cumulative GHG emissions. This analysis can be found [here](#) [PDF]. Oil and gas producers should review this list, identify if they are listed, and, if applicable, take steps under the supervision of legal counsel to assess the accuracy of the GHG emissions figures attributed to them.
- **Climate change disclosure** — Oil and gas producers should also carefully review their climate change risk disclosure to understand how it will be used in climate change litigation and to ensure it meets securities disclosure requirements:
 - Use in climate change litigation — Companies should assume that their disclosure will be used by claimants and themselves in litigation. Claimants will argue that portions of the disclosure constitute an admission (e.g., an acknowledgement of the causal link between GHG emissions and climate change). Alternatively, oil and gas producers will argue the disclosure evidences that they operate in a reasonable manner and as a responsible corporate citizen (which is a relevant consideration in the nuisance/negligence analysis). Climate change disclosure should balance these competing considerations while complying with relevant disclosure obligations.
 - Securities disclosure — Recent events in the U.S. demonstrate that Canadian oil and gas issuers must ensure their disclosure accurately accounts for climate change-related contingencies. The Attorney General of New York State's recent securities fraud action against Exxon Mobil Corporation — which focuses on, among other things, the accounting treatment of climate change costs in relation to oil sands — highlights this risk. Canadian oil sands producers should be aware of climate change securities disclosure related issues and ensure that their disclosure is compliant with applicable securities laws.

For further information about climate change litigation and risk mitigation strategies, please contact:

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