

CLIMATE CHANGE LITIGATION

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A. INTRODUCTION

In recent years there has been increasing focus on the environment and the possibility of anthropogenic climate change both in the environmental movement and in the popular media. In both Canada and the United States there is public support for increased regulatory restrictions on major polluters and a growing public sentiment that government is not doing enough.

Environmental action is one of the public's largest concerns and is still growing.

In the face of perceived governmental inaction some have begun to turn towards litigation as a method of forcing change. Much of this action has been regulatory in nature, in that it attempts to use existing legislation to pursue environmental goals, for example by bringing a case to court to challenge a decision to allow oil drilling in a sensitive wilderness area because the environmental impact assessments required by legislation were not completed. Regulatory lawsuits do not rely on common law principles such as negligence, they instead look at the rule put into place by government and attempt to force compliance with those rules. These lawsuits do not seek damages or compensation; they seek to force some type of action.

Private litigation, those actions involving common law actions such as nuisance or negligence, are less common. These lawsuits seek injunctions, damages and compensation and, in the past few years, have been launched at an increasing pace, especially in the United States. Generally

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they seek damages from heavy polluters for the alleged effects global warming has had on property.

As global warming becomes more pronounced and better understood and the effects better documented and linked to their source, legal actions seeking damages caused to land will continue to increase. Those dealing with the purchase and sale of land should be acutely aware of the potential consequences of such litigation could have and those it could affect. It is likely that Canadian courts will see climate change based litigation in the near future. Nearly all geographic areas could suffer some form of damage, whether it be a loss of land due to rising ocean levels, drought caused by increased temperatures or loss of trees due to the pine beetle infestation, the spread of which has been partially blamed on unusually warm winters. The potential list of claimants is significant. Targeted defendants in the litigation potentially include these individuals engaged in the purchase and sale of real estate, and their clients. This paper looks at recent developments and potential developments that may be expected in this new and expanding area of law.

An example

An ocean front property built on a jagged cliff has stairs from the cottage at the top of the cliff to the bottom sandy beach. The beach is 40 feet wide. However, as a result of increasing worldwide temperatures the sea level has risen and the beach has become fully submerged. The waves now crash dangerously against the rock cliff, making swimming impossible. Every house along the beach has suffered the same fate. Some houses, built closer to sea level where there is no cliff are flooded. The road leading to the community runs along the beach but increased storm activity and higher waters often wash the road out. Greater temperature variations force constant repairs

to be made. The value of the property drops dramatically and houses become almost impossible to sell.

B. REGULATORY LAWS AIMED AT GLOBAL WARMING

All jurisdictions are subject to environmental regulation. Together, the federal government and the British Columbian governments have passed dozens of environmental acts and British Columbia itself has several environmental acts. The majority of these acts do not touch on global warming but apply to other environmental subjects. It is these acts that create the framework that regulatory litigation is based upon.

The primary federal act is the Canadian Environmental Protection Act (“CEPA”). The CEPA aims to prevent and manage the risks posed by toxic and other harmful substances and manages environmental and human health impacts of products of biotechnology, marine pollution, disposal at sea, vehicle, engine and equipment emissions, fuels, hazardous wastes, environmental emergencies and other sources of pollution and is administered by the minister of the environment. In 2005 6 major Greenhouse gases were added to the list of toxic substances, which enables the use of a variety of preventive or control actions under the act². In conjunction with the CEPA the CEPA Environmental Registry was created in order to provide ready access to all rules, order, permits, actions and all other matters related to the CEPA.

Currently, hard emissions reduction targets to combat global warming have not been implemented although the opposition parties have passed the *Kyoto Protocol Implementation Act*, 2007, C.30 requiring the government to develop a plan to deal meet Canada’s obligations

²2005-09-03 - Canada Gazette Part I, Vol. 139 No. 36.

under the Kyoto Accord. October 2006, the government published a Notice of Intent to regulate air emissions³. The plan that was developed has been released but is not yet in force⁴. Once this plan, or a plan, is in place an example of regulatory litigation that could be expected could be where the government is failing to enforce its own requirements.

Although British Columbia has an extensive environmental regulatory regime the government is not instituting steps to minimize Greenhouse Gases that lead to global warming. In *Weather, Climate and The Future: B.C.'s Plan*, the government stated, at p. 12, that it would support industry in dealing with Federal emissions regulations but would not impose its own regulation.⁵ The province is taking steps to decrease emissions in other ways, such as vehicle emission controls for vehicles and increasing standards for gasoline.

C. POTENTIAL PARTIES TO GLOBAL WARMING ACTIONS

a) Plaintiffs

There are an almost unlimited number of potential plaintiffs in tort actions based on global warming. The public in general has an interest in nuisance cases for general public damages, for example, damages to Highways and public utilities in Alaska due to melting permafrost, coastal erosion and land lost due to rising sea levels plus damages for the preventative measures taken to mitigate such loss and erosion. Individuals affected could include tour operators affected by the bleaching of coral reefs, fisherman affected by changes to fishing habitats due to rising waters,

³ Notice of intent to develop and implement regulations and other measures to reduce air emissions, Canada Gazette, Part I, October 21, 2006, Vol. 140, No. 42 at page 3351, available at www.ec.gc.ca/ceparegistry/documents/notices/g1-14042_n1.pdf.

⁴ Regulatory Framework for Air Emissions, Her Majesty the Queen in Right of Canada, represented by the Minister of Environment, 2007

⁵ British Columbia, 2004

farmers who are unable to grow crops due to drought and high heat or coastal homeowners who lose property to rising sea levels. The pool of potential claimants for private suits is enormous. The difficulty will be that such a lawsuit will require incredible manpower and capital, something that few injured individuals will have. Any serious private claim will either, as in the U.S., be brought by government or by way of class action.

b) Potential Defendants

In Canada, the top ten air polluters according to Pollution Watch, a collaborative project of Environmental Defence and the Canadian Environmental Law Association include 4 mining and processing plant operators, 5 power generators and one oil refinery⁶. As in the U.S. automobile makers could also be targeted. These entities represent the major emitters of GHGs and are the likely targets of litigation.

D. CANADIAN CASES

The Inuit Circumpolar Conference (“ICC”), which represents Inuit people in Canada and Alaska, recently filed a petition with the Inter-American Commission on Human Rights (“IACHR”). The IACHR is an organ of the Organization of American States and, in cooperation with the Inter-American Court of Human Rights, comprises the continent’s system for promoting and protecting human rights. The case has not yet been heard.⁷ The petition asks for “relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the US”.⁸ The petition alleges human rights violations stemming from

⁶ <http://www.pollutionwatch.org/>, viewed on September, 5, 2007.

⁷ According to case list found at IACHR’s website <http://www.cidh.org/casos.eng.htm>., viewed on Sept. 4, 2007

⁸ Page 1 of the petition, viewed at <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> on Sept. 4, 2007.

global warming such as the preservation of health, life, the rights to residence and movement and the inviolability of the home based on damage caused by melting permafrost. Unfortunately for the ICC, the IACHR has no coercive judicial power and its decisions are not binding.

In Canada, global warming litigation has been slower to get started. Currently, only two climate change based cases have been filed in Canada and neither has yet been heard. The first is an application for judicial review brought by the Friends of the Earth asking for a declaration that the government's failure to regulate greenhouse gases ("GHGs") will violate the *United Nations Framework Convention on Climate Change* and the *Kyoto Protocol*, which in turn violates section 166 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, which requires Canada to abide by its international agreements in preventing pollution. The second, filed on September 19, 2007, requests a declaration that the government has not complied with the *Kyoto Protocol*. It has also been brought by the Friends of the Earth.

E. UNITED STATES CASES

1. Regulatory Cases

The majority of the cases discussing global warming in the US have been regulatory in nature, typically involving claimants seeking to compel government agencies to include climate change in their considerations of environmental consequences of actions under their jurisdiction.

Regulatory actions can be expected to increase in Canada as well. For example, the *Canadian Environmental Protection Act* allows members of the public to request an investigation and to bring an action themselves in the event the Minister of the Environment fails to conduct an investigation and report within a reasonable time or the Minister's response to the investigation

is unreasonable. The act also provides a civil cause of action for violations of the act. Following is a description of climate changes from the United States and the court's treatment of the claims.

***Massachusetts, et al. v. Environmental Protection Agency*⁹ (the "EPA")**

Several states and environmental organizations challenged a decision of the EPA not to regulate GHGs. The EPA refused to do so, claiming that it had no authority to regulate CO₂ emissions under the CAA and even if it had such authority, it was within the EPA's discretion to choose not to regulate.

The Court held that "the harms associated with climate change are serious and well recognized" and that the erosion, inundation and temporary flooding of the Massachusetts' coast attributable to global warming constituted injury for purposes of standing. Given this statement the court appears to implicitly accept the reliability of the science behind global warming, however the court also noted that the evidence on global warming as based on affidavits of the petitioners that were uncontested¹⁰.

The Court ruled that the EPA has the statutory authority to regulate GHG emissions and that its reasons for refusing to do so were improper and not in accordance with the CAA. The Supreme Court directed the EPA to review its decision and did not make a suggestion on what decision should be made, only that it must be made in accordance with the CAA.

⁹ 126 S.Ct. 2960 (2006) [*Massachusetts*]

¹⁰ *Massachusetts*, supra note 2 at 28.

Coke Oven Environmental Task Force v. EPA¹¹

Three environmental groups, ten states, and two cities, filed suit asking the EPA to enforce reductions in air pollution for new stationary sources and requesting the EPA to standardize the maximum permissible amount of GHG emissions. This case was stayed pending the outcome of the *Massachusetts* decision dealing with the EPA's authority to regulate greenhouse gases.

Northwest Environmental Defense Center, et al. v. Owens Corning¹²

Various environmental organizations sued *Owens Corning* for building a facility without a preconstruction permit required under the Clean Air Act. The defendant's brought a motion for dismissal arguing that the organizations had no standing. The court felt that "individuals would suffer some direct impact from emissions entering into the atmosphere from Defendant's facility, as would the local ecosystem",¹³ however, it should be noted that the decision was based on a motion to dismiss where the court is required to assume the truth of the allegations. Thus, the court was not truly an opinion on the regarding global warming, it assumed the truth of those claims.

Border Power Plant Working Group v. Department of Energy¹⁴

Environmentalists challenged the Department of Energy's decision to grant permits for electric lines in the United States and across the US-Mexican border. The agency's environmental analysis was held to be inadequate for various reasons, including its failure to consider carbon

¹¹ 2006 U.S. App. LEXIS 23499 (D.C. Cir. 2006)

¹² 434 F. Supp.2d 957 (D.Or. 2006). [*Northwest*]

¹³ *Northwest*, Supra, note 5 at 14 [**emphasis added**].

¹⁴ 260 F. Supp. 2d 997 (S.D. Cal 2003)

dioxide emissions. The judge did not provide an opinion on global warming but decided that the potential effects of the line and power plants on global warming needed to be considered before granting the permit.

Center for Biological Diversity v. Abraham¹⁵

Environmental organizations alleged that federal agencies had not complied with several Energy Policy Act requirements, such as ensuring that a specified portion of their automobile fleets were comprised of alternative fuel vehicles. The court, in discussing whether the plaintiffs could bring their case, held that

“the concerns presented regarding global warming are too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing.”¹⁶

City of Los Angeles v. National Highway Traffic Safety Administration¹⁷

A group of cities, states, and environmental groups challenged a decision by the National Highway Traffic Safety Administration to not prepare an environmental impact statement considering global warming impacts of its relaxation of fuel economy standards applicable to certain vehicles. The court held that even the small increase in GHG emissions resulting from the NHTSA's decision was sufficient to confer standing on the plaintiffs said “the evidence in the record suggests that we cannot afford to ignore even modest contributions to global warming.”¹⁸

¹⁵ 218 F. Supp. 2d 1143 (N.D. Cal. 2002)

¹⁶ *Ibid.*, ¶ 7.

¹⁷ 912 F.2d 478 (D.C. Cir. 1990) [*NHTSA*].

¹⁸ *Ibid.*, at 501

The court noted that this was in the context of legislation designed to prevent environmental disasters before they occur. The court required the agency to explain why its calculations led it to conclude that the increased carbon dioxide would make an insignificant contribution to the global warming trend.”¹⁹

Friends of the Earth v. Watson²⁰

Environmental groups sued the Overseas Private Investment Corporation and the Export-Import Bank, two independent government corporations. The environmental groups claimed that OPIC and EIB did not consider the global warming impacts of their actions as required under the National Environmental Policy Act (NEPA) when it decided to fund oil development projects that would lead to increased CO₂ emissions. NEPA requires all federal agencies to evaluate the environmental impacts of certain significant actions. The defendant’s brought a motion for summary judgment to have the suit dismissed. The court denied their request and held that the plaintiffs could bring the suit because, among other things, they could show that “it is reasonably probable that the challenged action will threaten their concrete interests.” As with the *Northwest* case, this was a motion by the defendant for summary judgment, thus in considering the evidence provided by both sides the court said “the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favourable” to the environmental groups”.²¹ This was not a final adjudication or decision on the merits.

2. Actions By Industry

¹⁹ *Ibid.*

²⁰ No. C-02-4106 JWS, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. Aug. 23, 2005)

²¹ *Ibid.* at ¶ 4.

The administrative cases are not limited to the environmental movement. Industry has also been turning to litigation as a means to fight laws detrimental to their business. For example, a group of automobile manufacturers has challenged California's GHG laws which requires all vehicle sold in the state to meet rigid exhaust standards²². Similar legislation in Vermont and Rhode Island is also being challenged²³. These cases are currently stayed pending the *EPA* decision.

3. Private Law Cases

*Comer v. Nationwide Mutual Insurance Co.*²⁴

A group of property owners filed a class action suit against insurance companies after the insurance companies refused to reimburse them for property damage caused by Hurricane Katrina. They also sued three chemical companies based on allegations that their emissions have increased the frequency and intensity of hurricanes and were therefore a proximate cause of Katrina's severity. The court separated the action against the insurance companies from the action against the chemical companies and in doing so commented on the tort action saying:

Without in any way expressing an opinion on the merits of the plaintiff's claims...there exists a sharp difference of opinion in the scientific community concerning the caused of global warming, and I foresee daunting evidentiary problems for anyone who undertakes to prove...the degree to which global warming is caused by the emissions of greenhouse gasses, the degree to which the actions of any individual oil company, any individual chemical company, or the

²² Central Valley Chrysler-Jeep v. Witherspoon, No. CV-04-6663 (E.D. Cal. 2006)

²³ *Green Mountain Chrysler v. Torti* No. 05-CV-302; Association of International Automobile Manufacturers v. Sullivan, No. 06-CV-69

²⁴ 2006 U.S. Dist. LEXIS 33123 [*Comer*]; now *Comer v. Murphy Oil, U.S.A.*, Case No. 1:05cv436 LTS-RHW (S.D. Miss. Sept. 20, 2005)

collective action of these corporations contribute, through the emission of greenhouse gases, to global warming; and the extent to which the emission of greenhouse gases by these defendants, through the phenomenon of global warming, intensified or otherwise affected the weather system that produced Hurricane Katrina.”²⁵

Connecticut v. American Electric Power, Inc.²⁶

Eight states and New York City brought a claim in public nuisance against owners of power plants that are large emitters of carbon dioxide. The plaintiffs allege that the defendants’ are the five largest emitters of carbon dioxide in the United States and that global warming will cause irreparable harm to property and threatens the health safety and well-being of the residents and will cause sea levels to rise, more frequent and intense weather conditions, adverse impacts on state agriculture and on water supply, and harm to tourism and the very fabric of state ecology. The plaintiffs were seeking an order holding each of the defendants joint and severally liable for contribution to an ongoing public nuisance and enjoining each to cap and then reduce its emissions by a specified percentage each year. The court dismissed the complaint as a political question that should not be decided by the courts, finding that resolution of the issues involved in the case would require “identification and balancing of economic, environmental, foreign policy, and national security interests.”²⁷ The plaintiffs appealed and argument held on June 7, 2006.

State of California v. General Motors Corp²⁸

²⁵ *Ibid.*, at 5.

²⁶ 406 F.Supp. 2d 265 (S.D.N.Y. 2005)

²⁷ *Ibid.*, at 19.

²⁸ No. C06-05755, (N.D. Cal., filed Sept.20, 2006)

California's Attorney General filed suit against the "Big Six" auto manufacturers, alleging that the automakers have created a public nuisance by producing millions of vehicles that collectively emit massive quantities of carbon dioxide. However, unlike the *Connecticut* case, instead of seeking a court order to force the manufacturers to cap and reduce emissions, California is requesting compensation for their current and future expenditures related to global warming.

Korsinsky v. United States E.P.A.²⁹

Korsinsky brought a claim against the EPA and New York City, among others, alleging public nuisance in that the defendants contributed to global warming by annually emitting large amounts of carbon dioxide and by failing to implement systems to reduce emissions. The only reduction option identified in the complaint is plaintiff's own invention. Korsinsky sought an order holding defendants jointly and severally liable for their contributions to global warming, enjoining them from contributing further to global warming and an order requiring defendants to make use of his invention.

He first asserted that he was more vulnerable to pollution than the general population and secondly, that he suffered from a mental illness from fear of the danger of global warming. Neither of these alleged injuries was sufficient to confer standing. Such allegations fall within the realm of the hypothetical and conjectural than the actual or imminent and therefore are insufficient for purposes of standing. His appeal was dismissed.³⁰

²⁹ 2005 WL 24144744 (S.D.N.Y.), not reported in F. Supp.2d., appeal dismissed by 192 Fed.Appx. 71 (C.A.2 (N.Y.))

³⁰ 192 Fed.Appx. 71 (C.A.2 (N.Y.))

F. CONCLUSION

Although the challenges facing the plaintiffs in bringing these actions are significant, it is likely such actions will increase, partially in the hopes of winning but partially to bring the issue to the forefront and to pressure companies and organizations into change. As can be seen from the descriptions above, no court has yet pronounced on the realities of global warming after hearing contested evidence and no claimant has been forced to prove causation related to an injury.

Although in many of the cases described, global warming claims were dismissed, the courts are not hostile to the claims despite their generality. Given current moderate acceptance in courts, it is possible the trend could be towards greater acceptance in the future, especially since courts are beginning to accept that the general scientific consensus is that global warming is occurring.

With the effects of global warming being felt almost everywhere the future could hold large numbers of property owners who have suffered damage due to the effects.