Climate change litigation and disclosure implications during COVID-19

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In recent years, environmental considerations have become a key issue in corporate, political and social decision-making. As Canada has recognized the urgency and public interest in mitigating the impacts of climate change, it is unsurprising that the issue of climate change now has growing prominence in the Canadian legal sphere. Climate change litigation has traditionally focused on regulatory approvals for proposed projects and ongoing reporting requirements to manage site-specific and aggregate carbon emissions. However, a new wave of climate change litigation has arrived in Canada: climate change class actions.

Recent climate change class actions, including examples from Canada, the United States and Europe, demonstrate issues that may arise in asserting or resisting these actions. Such issues have implications for industries, which could potentially be influenced by the carbon emissions data collected during the current novel coronavirus (COVID-19) pandemic.

The recently announced Large Employer Emergency Financing Facility also signals that the issue of climate change remains a relevant consideration as Canada looks to re-open its economy. Although the oil and gas industry must now address immediate issues relating to business continuity, it should continue to be live to the impact current business operations and conduct may have on potential climate change litigation and regulatory compliance. In particular, oil and gas companies should consider the connection between their associated emissions and the evidentiary record and legal tests for climate change class actions.

Disclosure requirements for the large employer emergency financing facility

On May 11, 2020, the Federal Government introduced the Large Employer Emergency Financing Facility (LEEFF), to provide bridge funding for Canada's largest employers. Employers with annual revenues of at least $300 million, and whose credit needs are not being met by conventional financing, may be eligible. Although further details of the program are yet to be announced, the Federal Government has expressly included climate change considerations in the program. Recipients under LEEFF would be

required to publish annual climate-related disclosure reports in accordance with the recommendations of Financial Stability Board's Task Force on Climate-related Financial Disclosures. These disclosure obligations are in addition to public companies' existing disclosure obligations under securities legislation.[1] In the context of the increased risk of climate change litigation, data collected in the course of regulatory compliance and other policy requirements will almost certainly shape potential future litigation.

Key examples of climate change class actions

There are two broad categories for climate change class actions: lawsuits against the government and lawsuits against private entities. Class actions seeking recovery for climate change differ and present new issues for all stakeholders.

Urgenda Foundation v The State of the Netherlands

The District Court of The Hague's 2015 decision in *Urgenda Foundation v the State of the Netherlands*[2] marked the first time a court required a government to meet its greenhouse gas emissions reduction targets. Here, the District Court agreed with Urgenda Foundation, a Dutch environmental organization, and found that the State breached its duty of care under Dutch domestic law to protect its citizens from the imminent hazard of climate change. The Dutch government was ordered to reduce annual greenhouse gas emissions to 25 per cent of 1990 levels by 2020. This decision was upheld by The Hague Court of Appeal, which noted that the consequences of greenhouse gas emissions for global warming were well known and that the government's delay in taking action would result in requiring more significant and ambitious measures later. The Supreme Court of the Netherlands upheld the 25 per cent reduction target set out by the lower courts and dismissed the Dutch government's appeal, as outlined here. The Supreme Court found that the Dutch government had an obligation to protect its citizens' human rights, which were threatened by the risk of climate change, and that "[e]ach country is thus responsible for its own share".

Juliana v United States of America

The 2016 District Court of Oregon decision in *Juliana v the United States of America*[3] introduced climate change class actions to North America. That litigation was brought by 21 youth plaintiffs, Earth Guardians and "future generations" represented by climatologist James Hansen, as against the government of the United States of America. The plaintiffs argued that U.S. government's actions have caused climate change and violated their constitutional rights to life, liberty, property and public trust resources. In January 2020, the United States Court of Appeals for the Ninth Circuit issued a split decision that dismissed the case for lack of standing under Article III of the United States Constitution. The majority for the Ninth Circuit accepted there was "copious expert evidence" to establish the harm that would be caused by unchecked fossil fuel use and that the record reflected the federal government was aware of the risks of increased greenhouse gas emissions. However, the Ninth Circuit found that the plaintiffs' claims were not redressable by the constitutional powers of the Court and must be addressed by the executive and legislative branches of government. The plaintiffs have petitioned for a rehearing of this decision.

ENvironnement JEUnesse v Attorney General of Canada

Climate change class actions also recently came to Canada. In November 2018, ENvironnement JEUnesse (ENJEU), a Montreal-based non-profit organization, commenced a class action lawsuit against the government on behalf of all Québec residents ages 35 or younger. Like Urgenda Foundation, ENJEU argued the federal government has set insufficient targets for the reduction of greenhouse gas emissions, as well as failing to meet its actual targets. ENJEU argued this constitutes a breach of sections 7 (life, liberty and security of person) and 15 (the right to equality) of the *Canadian Charter of Rights and Freedoms*, and Québec's *Charter of Human Rights and Freedoms.* The Québec Superior Court refused to certify the proposed class action.[4] Although the Court found the relevant issues engaged rights protected by the Canadian Charter and the Québec Charter and were justiciable, it held that class action was not the appropriate vehicle. The Court was concerned the determination of the potential class members and, in particular, the proposed age limit of 35 for potential class members, was arbitrary. ENJEU indicated it would appeal this decision.

Proposed lawsuit by municipalities

In January 2019, the City Council of Victoria voted to endorse a resolution to support a class action lawsuit on behalf of local governments in the Province of British Columbia against "major fossil fuel corporations" to recover costs incurred due to climate change. No action has been commenced to date. Victoria's proposal appears to follow the example set out by the City of New York in *City of New York v BP PLC et al*,[5] wherein New York filed an action against a number of energy companies to seek, among other things, recovery for past and future costs incurred to protect the city's infrastructure and property from the impacts of climate change. However, that action was dismissed by the District Court of New York, which held that "[g]lobal warming and solutions thereto must be addressed by the two other branches of government". The City of New York has appealed this decision and oral arguments were heard in November 2019.

Legal issues and considerations

If Canada follows the trend set out in the United States, we can expect to see new climate change cases by way of tort actions and individual *Charter* actions. Case examples show the trend toward an increasing number of plaintiffs in climate change litigation, signalling the move to class actions as the preferred approach. In Canada, class actions certainly appear to be the likely vehicle for future climate change litigation.

In anticipation of the expanding scope of climate change litigation from more traditional environmental litigation or regulatory administrative review, industry stakeholders and the government should carefully consider the increasing litigation risk associated with ongoing operations and capital projects in the energy industry. As the existing cases continue to move forward and new cases are commenced, there will be greater clarity to the Canadian courts' approach to climate change class action. For now, we anticipate the following list of potential issues and considerations to arise in this type of litigation:

- Whether the court can exercise its judicial authority to adjudicate the case and whether plaintiffs have standing;
- The identification of a proposed class and proposed common issues are critical to the likelihood of certifying a climate change lawsuit as a class action;

- The scope of parties to which a duty is owed in negligence may be limited or expanded by climate change actions;
- The government's adoption of certain standards may provide evidence for determining whether the government's actions accord with what it has previously endorsed as the appropriate thresholds for combating climate change; and
- Potential evidence may include not only business documents, but also scientific studies and government and non-government reports, as well as climate change-related data that have been collected and reported in satisfaction of disclosure requirements and other program eligibility requirements

Potential implications for the oil and gas industry

The increasing risk of litigation relating to climate change issues means that oil and gas stakeholders should more carefully consider its ongoing operations, proposed capital projects and business policies. The evolving circumstances relating to the COVID-19 outbreak have also introduced new considerations when assessing litigation risk. Reported greenhouse gas emissions have seen a significant decrease following the implementation of global countermeasures in response to the COVID-19 pandemic. Travel restrictions and work from home policies imposed in response to COVID-19 may be a significant factor in the reduction of greenhouse gas emissions.

Corporations that may be subject to potential climate change litigation should note that its business documents and reports created in the course of its business may be produced in later litigation. Notably, data on greenhouse gas emissions created at this time may serve as evidence in support of future climate change litigation in establishing causation between reduced industry activity and greenhouse gas emissions. As different jurisdictions prepare to re-open their economies, companies should carefully review their own greenhouse gas emissions data and such data available generally, from the commencement of restrictions imposed by their respective government in comparison to prior to those restrictions, to assess risks for future litigation.

The climate-related disclosure obligations in economic programs relating to COVID-19 confirm the Federal Government will continue to be guided in part by climate change considerations. Emissions data from the COVID-19 pandemic may well inform the government's future policy decisions. A public company may also consider disclosing the potential litigation risk and significant changes in the reported emissions as part of its public disclosure obligations. Directors and officers should also be aware of their corresponding exposure in relation to a company's climate change-related liability.

As part of the oil and gas industry's preparation for the long-term effects of the COVID-19 pandemic and current oil glut, it should consider potential climate change litigation as part of its risk profile. Oil and gas companies should manage their business operations with these long-term climate change litigation impacts in mind.

[1] BLG has previously written about the Canadian Securities Administrators' Staff Notice 51-358 on reporting of climate change risks.

[2] *Urgenda Foundation v the State of the Netherlands*, [2015] HAZA C/09/00456689 (June 24, 2015) (District Court of The Hague); aff'd (October 9, 2018) (The Hague Court of Appeal) [***Urgenda***].

[3] *Juliana v United States*, 217 F Supp (3d) 1224, (D Or 2016).

[4] *ENvironnement JEUnesse v Attorney General of Canada*, 2019 QCCS 2885.

[5] *City of New York v BP PLC et al*, 325 F Supp 3d 466 (SDNY 2018).

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