Charter-Rights Class Action Approach to Climate Change Litigation in Canada: ENvironnement JEUnesse c. Attorney General of Canada

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Introduction

Climate change litigation is gaining momentum in Canada as in other jurisdictions around the world. The few Canadian cases so far have been in the context of specific project approvals and petitions affecting a particular industry sector. However, on November 26, 2018, a Quebec non-profit organization dedicated to environmental education, ENvironnement JEUnesse ("ENJEU"), filed a motion for authorization to institute a class action at the Quebec Superior Court (the "Petition") against the Government of Canada ("GOC") on behalf of Quebec residents aged 35 and under, found here. The Petition seeks, among other reliefs, a declaration that the GOC has failed in its obligations under the Canadian Charter of Rights and Freedoms ("Canadian Charter") and the Quebec Charter of Human Rights and Freedoms ("Quebec Charter"), to protect the fundamental rights of its citizens. ENJEU also seeks punitive damages as a deterrence for interference with such rights. The Petition has significant implications for major project development in Canada, especially when combined with the existing and proposed federal environmental climate change regime such as Bill C-69.

Background

In our previous blog, "From Social License to Class Action – Climate Change Litigation has come to Canada, Project Proponents Beware", we reviewed the status of climate change litigation in Canada, the challenges to its success and the risk it poses to development projects including interjurisdictional pipelines. About two years thereafter, the ENJEU has launched the first rights-based climate change legal challenge in Canada by way of a class action.

Orders Sought

The Petition seeks a declaration that the GOC, by adopting dangerous greenhouse gas reduction targets and by failing to put in place the necessary measures to limit global warming to 1.5°C, violates the following rights of class members contrary to the

Canadian Charter and the Quebec Charter: (a) life, inviolability and security; (b) live in a healthful environment in which biodiversity is preserved; and (c) equal exercise of their constitutional rights. Other reliefs sought include cessation of unlawful and intentional interference with the class members' rights by the GOC, payment by GOC to each member of the class the sum of $100 or alternatively implementation of a remedial measure to help curb global warming, and legal fees including expert fees.

Issues

The questions of fact and law that the Petition asks the Court to decide include: (a) whether the GOC has an obligation to implement measures to prevent global warming and thereby safeguard the constitutional rights of class members under sections 7 and 15 of the Canadian Charter and sections 1, 10 and 46.1 of the Quebec Charter; (b) whether the GOC failed to meet this obligation by not putting in place the necessary measures to limit global warming to 1.5°C; (c) whether the adoption by GOC of GHG reduction targets known to be harmful violates the right of class members to an equal exercise of their constitutional rights; and (d) whether the GOC is guilty of a civil intentional fault under Quebec' *jus commune*.

ENJEU's Arguments

ENJEU argues that the GOC has recognized in signed international instruments the urgency and the need to take measures to avoid the consequences of global warming on human health and wellbeing. It argues that by ignoring the scientific consensus, the GOC has set inadequate GHG reduction goals that it has never met. ENJEU argues that individuals aged 35 and under will systematically assume higher costs as a result of global warming, and that any short term economic cost is disproportionate to the gravity of the physical, moral and material harm that affects and will affect all class members in the short, medium and long term. It further argues that GOC's inaction constitutes an intentional fault committed in bad faith.

Implications

The Petition differs from other climate change cases by its rights-based, class action approach. The class action procedure requires that the action will have to be authorized by the Quebec Superior Court to ensure that it is within the *Code of Civil Procedure* and to authorize the representative of the class to pursue the action. A decision on the motion for authorization is expected within a year.

Such impacts include delay, increased financial costs capable of rendering a project uneconomic, and reputational cost among others. While we highlighted challenges to the success of climate change lawsuits founded on tort and other common law causes of action, ENJEU's Petition as a class action based on Charter rights is in a different genre.

Further, there have been significant changes in GOC's approach to climate change since 2016. The GOC adopted the Pan-Canadian Framework on Clean Growth and Climate Change with several initiatives to meet its Paris greenhouse gas ("GHG") emissions reduction commitments. One of those initiatives is Bill C-69 - *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the*

Navigation Protection Act and to make consequential amendments to other Acts, introduced on February 8, 2018.

This omnibus legislation has 4 parts. Part 1 enacts the Impact Assessment Act and repeals the Canadian Environmental Assessment Act, 2012. Part 2 enacts the Canadian Energy Regulator Act and repeals the National Energy Board Act. Part 3 amends the Navigation Protection Act and Part 4 makes consequential amendments to numerous other federal laws and regulations. Key proposed changes include a shift from environmental assessment to impact assessment. The focus will no longer be just the environment, but will include health, social and economic impacts and gender-based analysis. There will also be increased public participation and science-based decisions. There will no longer be "directly affected" standing test in impact assessment proceedings.

While these federal initiatives represent strong counter-arguments, the Petition is a Charter claim and will likely attract careful judicial consideration. More importantly, the existence of a climate change Charter-based class action, combined with the recent federal initiatives on climate change, increase the potential challenges facing new interjurisdictional pipeline development in Canada.

BLG will continue to monitor these issues and provide updates.

By

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