

# Climate Change Class Actions Come to Canada: Implications for Environmental Professionals

Presented By

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# Agenda

- **Emergence of Climate Change Litigation**
- **Types of Claims**
- **Key Examples**
- **Legal Issues**
- **Emerging Trends**
- **Implications**
- **Q&A**

# Emergence of Climate Change Litigation

- “Climate change litigation” or “climate litigation” – area of lawsuits in which the impacts of climate change constitute an important feature
- May be aimed at:
  - Mitigating the impacts of climate change
  - Challenging climate policies (whether to enhance measures against climate change or to reduce regulation)
  - Recovering climate change costs
- As of March 2017, there were a total of 884 climate change cases filed in 24 countries (25 if the EU is included), with 654 filed in the U.S.
- U.S. cases filed in 2019: 67
- Canadian cases: 16

# Types of Claims

- Two broad categories of claims:
  - Public law actions
    - Against the government, including public authorities
    - Involving constitutional law and administrative law principles
  - Private law actions
    - Against private entities, oftentimes oil and gas companies
    - Involving claims based on tort, fraud, and corporate law
- Two approaches to climate change litigation:
  - Strategic
    - Usually high-profile lawsuits that use the litigation to engage public discussion on climate change policy-making
  - Routine
    - Less well-known lawsuits involving climate change-related arguments

# Types of Claims

- Some examples include:
  - Public and private nuisance claims
  - Human rights claims / constitutional claims
  - Fraud and consumer protection
  - Challenges to climate change legislation and policies
  - Shareholder activism / securities claims

# Key Examples

- ***Urgenda Foundation v the State of the Netherlands***
  - Dutch environmental group, the Urgenda Foundation, and 900 Dutch citizens, used the Dutch government to require it to take more action to prevent or mitigate global climate change
  - The Urgenda Foundation sought an order to require the Dutch government to reduce the Netherlands' annual greenhouse gas emissions to 25% below 1990 levels by 2020
  - The District Court ordered the Dutch government to limit domestic greenhouse gas emissions to 25% below 1990 levels by 2020

# Key Examples

- ***Urgenda Foundation v the State of the Netherlands***
  - The District Court's decision was based on Dutch domestic law and the Netherlands' international commitments
    - The Dutch government breached its duty of care under Dutch domestic law to protect its citizens from the hazard of climate change
    - International commitments by The Netherlands included:
      - The European Council of March 2007
      - Reports issued by the UN Intergovernmental Panel on Climate Change – the Annex I countries (which include the Netherlands) must reduce their emissions by 20% to 40% compared to 1990 levels in order to limit global temperature increase
      - The European Convention on Human Rights

# Key Examples

- ***Urgenda Foundation v the State of the Netherlands***
  - The District Court's decision was upheld by the Hague Court of Appeal
    - The Court of Appeal found that the Dutch government breached its duty of care under the European Convention on Human Rights (the "ECHR") by not requiring a reduction of emissions by at least 25% by 2020
    - The Dutch government has an obligation under the ECHR to protect its citizens against climate change
  - The Court of Appeal's decision has been appealed to the Supreme Court of the Netherlands, which has not yet issued a decision



# Key Examples

## ○ *Juliana v United States of America*

- Brought by 21 youth Plaintiffs and on behalf of future generations (represented by climatologist James Hansen) against the U.S. government
- The Plaintiffs argue that the U.S. government's actions have caused climate change and violated their constitutional rights to life, liberty, property and public trust resources
- The U.S. government's motion to dismiss was unsuccessful. The District Court of Oregon stated that the judiciary may take a more active role in environmental litigation
- The U.S. District Court for the District of Oregon has not yet rendered its decision on whether the matter should proceed to trial

# Key Examples

- ***ENvironnement JEUnesse v Attorney General of Canada***
  - ENvironnement JEUnesse (“ENJEU”) commenced a class action on behalf of all Quebec residents aged 35 or younger against the Canadian government
  - ENJEU argues that the Canadian government has infringed the class members’ rights under the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Rights and Freedoms* by failing to take sufficient action to reduce greenhouse gas emissions
  - The Quebec Superior Court refused to certify the proposed class action
    - The issues raised by ENJEU engaged rights protected by the *Canadian Charter* and the *Quebec Charter*, and were justiciable
    - Proposed class action was not the appropriate vehicle

# Key Examples

## ○ ***ENvironnement JEUnesse v Attorney General of Canada***

- The Quebec Code of Civil Procedure provides that class action authorization requires the following:
  - The claims of the class members raise identical, similar or related issues of law or fact;
  - The facts alleged appear to justify the conclusions sought;
  - The composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
  - The class member appointed as representative plaintiff is in a position to properly represent the class members.
- The Court was concerned with the age limit chosen by ENJEU
  - *“Given the nature of the class action that Jeunesse wants to exercise and the nature of the alleged infringements on the rights of putative members, the choice of 35 years old as the maximum age of the members leaves the Court perplexed.” (2019 QCCS 2885 (unofficial English translation) at para 116)*

# Key Examples

- ***ENvironnement JEUnesse v Attorney General of Canada***
  - *“Although the mission and objectives of Jeunesse are admirable on the sociopolitical level, they are too subjective and limiting in their nature to form the basis of an appropriate group for the purpose of exercising a class action.” (2019 QCCS 2885 (unofficial English translation) at para 116)*

# Key Examples

## ○ ***City of Victoria's Proposed Class Action***

- The City of Victoria endorsed a resolution to support a class action on behalf of local governments in British Columbia against “major fossil fuel corporations”
- The proposed class action would likely provide for B.C. municipalities as class members
- The City of Victoria appears to be following the examples set out by New York City
  - The New York action was dismissed on the basis that the matter should be addressed by the executive and legislative branches of government. This decision is under appeal

# Key Examples

- ***Oakland's and San Francisco's Lawsuits Against Oil and Gas Companies***
  - In 2017, San Francisco and Oakland filed suit against BP, Chevron, ConocoPhillips, ExxonMobil and Shell for public nuisance
  - The cities sought funding for infrastructure necessary to adapt to the impacts of global warming
  - Chevron brought a third-party claim against Statoil ASA
  - Cases were moved to the Federal Court
    - *“Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable. This is not to say that the ultimate answer under our federal common law will favor judicial relief. But it is to say that the extent of any judicial relief should be uniform across our nation.” (The People of the State of California v BP PLC et al, United States District Court for the Northern District of California, Order dated February 27, 2018 at 5)*

# Key Examples

- ***Oakland's and San Francisco's Lawsuits Against Oil and Gas Companies***
  - The Federal Court requested a “tutorial” on climate change
  - The Defendants applied to dismiss the lawsuits
    - Common law claim for public nuisance was displaced by the enactment of the *Clean Air Act*
    - Common law claim for public nuisance could not be made out
    - The lawsuits constituted a violation of the separation of powers by seeking to have the court usurp the functions of the legislative and executive branches
  - The Federal Court dismissed the nuisance lawsuits

# Key Examples

- **Oakland's and San Francisco's Lawsuits Against Oil and Gas Companies**
  - *“This order fully accepts the vast scientific consensus that the combustion of fossil fuels has materially increased atmospheric carbon dioxide levels, which in turn has increased the median temperature of the planet and accelerated sea level rise. But questions of how to appropriately balance these worldwide negatives against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate. Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus.” (The People of the State of California v BP PLC et al, United States District Court for the Northern District of California, Order dated June 25, 2018 at 12)*



# Legal Issues

- **Justiciability**
- **Certification**
- **Causation, Proximity and Foreseeability**
- **Standard of Care**
- **Evidentiary Issues**
- **Fiduciary Duties of Directors and Officers**

## ○ **Securities Disclosure**

- Canadian Securities Administrators Staff Notice 51-358: *Reporting of Climate Change-related Risks*
  - Staff Notice does not create any new legal requirements nor does it modify existing legal requirements
  - Disclosure is still driven by materiality
  - Categories of risks and opportunities
    - Acute vs. chronic
    - Transition risks (reputational, market, regulatory, policy, legal and technology)
    - Opportunities with respect to resource efficiency and cost savings, enhancement of low-emission processes, access to new markets

# Implications for Environmental Professionals

- Increased risk of litigation
- Disclosure of climate change risks and impacts
- Data collection relating to climate change impacts
- Canada's international commitments
- Goal-setting and commitments by private actors



Questions?

# Thank You

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