

Climate Change and the Law: Issues and Opportunities

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Canadian
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- ▶ “Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity’s future.” – Chief Justice Richard Wagner in the Supreme Court of Canada’s judgment in References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11

Introduction

- ▶ CELA was founded in 1970 & is a specialty legal aid clinic; we represent low-income persons & vulnerable/disadvantaged communities in courts & enviro tribunals



Overview of Presentation

- ▶ Review different types of climate change litigation
- ▶ Discuss key cases in Canada, USA, & other jurisdictions
- ▶ Identify relevant legislative developments
- ▶ Provide resources for tracking climate change cases

Why use the law?

- ▶ As the planet heats up, so is climate change litigation – but there are different types of cases, remedies, legal doctrines, parties, etc.



1. Cases that ensure Climate Change is Considered in Enviro Decisions

- ▶ Some laws specify that climate change shall be considered during enviro planning & approval processes for large-scale projects
- ▶ If this factor is not considered adequately, litigants may go to court to quash or set aside the decision & remit the matter back to the decision-maker for further consideration

2. Tort Cases Involving Climate Change Impacts

- ▶ Persons incurring loss/harm/expenses due to climate change may bring claims against corporations or governments based on common law torts (civil wrongs) such as private nuisance, public nuisance, negligence, trespass, etc.
- ▶ Plaintiffs can request compensation, injunctions, & other relief

3. Consumer/Investor Protection Cases

- ▶ Some statutes prohibit deceptive and/or misleading public communications or unfair business practices; if this occurs in the climate context (e.g., misrepresenting climate science, failing to adequately disclose climate-related risks, etc.), then civil monetary penalties may be imposed

4. Cases Based on International Climate Targets

- ▶ Litigation may be brought against governments or corporations to compel timely/effective climate action to meet the Paris Agreement goal of limiting global temperature increases to 1.5 – 2 degrees C
- ▶ Sometimes these cases invoke human rights and/or constitutional rights (Charter?)

Examples of Key Climate Cases around the World

- ▶ Over the past 5 years, over 1,000 new climate change cases have been commenced, mostly in the USA but also in Canada & other countries

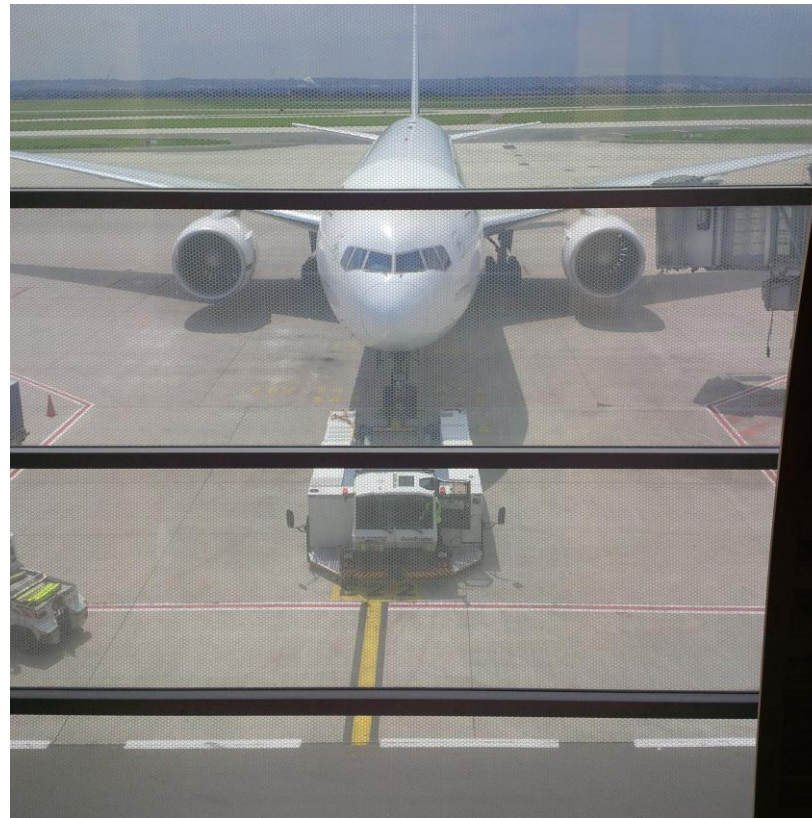


Barriers to Climate Change Litigation

- ▶ Climate change litigants often face several daunting legal, technical & factual issues: justiciability; standing; costs; causation (attribution science), etc.
- ▶ These issues may be raised by defendants' pre-trial motions to summarily dismiss the legal proceeding at an early stage without a full hearing (mixed success)

Example 1: Challenging Projects on Climate Grounds

- ▶ *Plan B Earth*: Two NGO's challenged expansion of Heathrow Airport due to inadequate consideration of climate change commitments under the Paris Agreement; lost at first instance; won on appeal; lost in Supreme Court (2020)



Example 2: Tort Cases

- ▶ *San Francisco v. BP*: City filed action in 2017 against fossil fuel companies based on public nuisance to recover funds for climate adaptation costs (i.e., seawall construction to address rising sea levels); Oakland filed a similar claim
- ▶ *Sharma*: Youths filed class action in 2020 to stop Australia from approving a coal mine expansion that will exacerbate climate change; the Federal Court held in 2021 that the government owes a duty to take reasonable care to avoid personal injury to children as a result of climate change

Example 3: Consumer/Investor Cases

- ▶ *Ramirez v. Exxon Mobil*: Plaintiff filed securities fraud class action in 2016 on behalf of shareholders who allege that the company's public statements were materially false, misleading, and failed to disclose climate change risks
- ▶ *Commonwealth v. Exxon Mobil*: Massachusetts Attorney General filed action in 2019 under consumer protection law; alleged that the company committed deceptive practices against investors and consumers, including by failing to disclose climate change risks

Example 4: Cases based on International Climate Targets

- ▶ *Urgenda* (2019): After considering IPCC findings, the Dutch Supreme Court held that the government's inadequate GHG reduction measures contravened the human rights of Dutch citizens; the court ordered the government to reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990
- ▶ *Milieudefensie* (2021): After considering the Paris Agreement, the Hague District Court ordered Shell to reduce GHG emissions by 45% by 2030 compared to 2019 levels; Shell is appealing; plaintiff sent demand letters to 30 other corporations asking for the same GHG reductions

Example 4 (cont.) “Made in Canada” Cases

- ▶ *ENVironnement JEUnesse*: NGO filed class action on behalf of Québec citizens aged 35 & younger; argued that Canada’s climate plan was inadequate & breached their rights under Canadian Charter & Québec Charter; appellate court ruled in 2021 that the claim was not justiciable
- ▶ *La Rose*: 15 youths sued Canada & argued that federal climate inaction contravened their Charter rights & the public trust doctrine; in 2020, a judge struck the claim for not disclosing a reasonable cause of action; now under appeal

“Made in Canada” Cases (cont.)

- ▶ *Misdzi Yikh*: Indigenous persons sued Canada on the basis that the federal approach to climate change does not meet international commitments & violates their constitutional and human rights; in 2020, a judge found that climate change is “inherently political” & struck the claim for not being justiciable; now under appeal
- ▶ *Mathur*: 7 youths filed a legal application alleging that Ontario’s climate inaction contravened their Charter rights; in 2020, a judge refused to strike the claim, which will now go to a full hearing in September 2022

Recent Legislative Measures in Canada

- ▶ The 2018 *Greenhouse Gas Pollution Pricing Act* sets a minimum federal “backstop” for carbon pricing across Canada (SCC upheld constitutionality of the law)
- ▶ 2019 *Impact Assessment Act* lists Canada’s “commitments in relation to climate change” as factors for info-gathering & decision-making (ABCA?)
- ▶ 2021 *Canadian Net-Zero Emissions Accountability Act* sets GHGE reduction targets & reporting duties

Future Legislative Measures in Canada?

- ▶ Other potential areas for new or amended laws in the climate change context:
 - “Build back better” infrastructure & energy laws
 - Strengthening securities regimes to mandate full disclosure of climate risks & development of net-zero plans by lenders
 - public right to clean/healthy environment in CEPA (CO₂ is listed as a “toxic substance” under CEPA)
 - enhancing access to the courts for tort claims re climate change impacts (BC legislation re tobacco lawsuits?)

Resources for Tracking Climate Cases

- ▶ United Nations Environment Program & Sabin Center for Climate Change Law, [Global Climate Litigation Report: 2020 Status Review](#)
- ▶ [Sabin Center for Climate Change Law](#)
- ▶ Joana Setzer & Catherine Higham, [Global Trends in Climate Change Litigation: 2021 Snapshot \(July 2021\)](#)
- ▶ Climate Social Science Network, [Research Report 2022](#)
- ▶ [Climate Change Litigation Databases](#)

Questions?

