Will climate change litigation cross the border into Canada?

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Against an international backdrop of political shifts, regulatory changes, emboldened activism and the United Nations’ landmark report on climate change, the landscape for climate change litigation in the United States and Canada is both clear and present.

Private law claims against fossil fuel producers are being brought by major U.S. cities. An investigation by the New York attorney general has resulted in a securities misrepresentation claim against Exxon Mobil Corp. In Canada, major class actions typically follow (and often copy) U.S. litigation. We expect it is only a matter of time before climate change is litigated in a Canadian court.

Environmentalists, municipalities and First Nations have led opposition to major oil sands projects and oil pipelines both on the picket lines and before the courts. Environmental groups have publicly discussed the prospect of Canadian climate change litigation. Some of the municipalities opposing pipeline projects before regulators and the courts are also writing to major fossil fuel producers demanding that producers pay for the cost of mitigating the local effects of climate change.

POTENTIAL COMMON LAW CLAIMS

Common law nuisance claims by U.S. cities seeking compensation for the costs of mitigating the effects of climate change seem destined to fail even though U.S. courts have accepted the scientific consensus of climate change. U.S. courts view climate change as a matter of regulation of greenhouse gas emissions—a political question that private law is ill-suited to address. Courts have held that the federal Clean Air Act and the ability of the U.S. Environmental Protection Act to set emissions limits have extinguished common law claims against fossil fuel producers.

There are reasons that Canada may be fertile ground for climate change litigation in the near future, in part because the common law of nuisance, trespass and negligence is similar in the U.S. and Canada. Canadian claims are far from assured success, as the theories on which claims by U.S. cities were preemptively dismissed may provide a basis for defending claims in Canada. Furthermore, causation and proof of loss are significant obstacles to the success of any climate change claim. Most emissions that critics attribute to fossil fuel producers are actually emissions made by end users of fossil fuel products. Furthermore, linking emissions from any individual fossil fuel producer to a specific climate effect or property damage is a daunting task.
Meanwhile, environmental activists, recognizing the legal hurdles to successful climate change claims, have lobbied sympathetic legislators to pass laws to make it easier for claims to succeed. We have seen this movement before when provincial governments across Canada demonstrated receptiveness to legislation facilitating claims to recover health care costs arising from tobacco-related illnesses and, more recently, opioid addiction. In 2018, two private members’ bills designed to modify the common law to facilitate climate change claims advanced to the committee stage in Ontario but, with a recent change in government leadership, both are unlikely to become law. Elections in the various provinces, and next year at the federal level, will continue to shift public policy and legislation, and it is reasonable to expect sooner or later that a province will enact such a law.

INVESTOR CLASS ACTIONS

Another possible source of climate change litigation is corporate and securities law. Environmental activists have prompted some public institutions to divest oil and gas holdings and have used shareholder proposals and other corporate governance tools to put pressure on oil and gas companies to address climate change. Increased disclosure around climate change risks and costs and scrutiny of that disclosure, in turn, have created the possibility of securities misrepresentation claims.

Public oil and gas companies are required to disclose their reserves in accordance with securities regulations and accounting standards. The size of oil and gas reserves that may be disclosed is determined by the economics of recovery. The cost of complying with environmental regulations affects the estimate of the size of oil and gas reserves. The claim by the New York attorney general against Exxon provides an example of what such a claim might look like. The attorney general claims that Exxon misrepresented how it accounted for the cost of complying with expected climate change regulations and, as a result, overrepresented the size of its reserves. A key element of the allegation is that Exxon’s failure to account for costs caused it to fail to write down its Canadian oil sands assets. Investigations by securities regulators and investor class actions premised on similar theories are possible under Canadian law.

FOREIGN COURT AWARDS

Climate change litigation in Canada could come in the form of attempts to enforce awards made by foreign courts in climate change cases against greenhouse gas emitters with assets in Canada. A precedent for this type of claim is *Yaiguaje v. Chevron*, in which individuals supported by environmental groups are attempting to enforce a multibillion-dollar judgment issued by an Ecuadorean court against Chevron. (My firm, Osler, Hoskin & Harcourt, is representing Chevron in the matter.)

The enforcement proceedings were dismissed by the Ontario Court of Appeal, but the plaintiffs have applied for leave to the Supreme Court of Canada. Environmental groups have publicly discussed the notion of bringing climate change claims against fossil fuel producers in jurisdictions with favorable laws and then attempting enforcement in Canada and other countries where assets reside.

The energy industry is moving quickly on climate change and most sophisticated participants are in favor of market-based policies to reduce emissions. Many enterprises have already accounted for the risk of climate change litigation both in their public disclosure and in the conduct of their business. Some leading industry players have adopted public policy positions that promote the reduction of emissions, such as Exxon’s championing of carbon taxation and Shell’s advocacy of renewable energy solutions.
Climate change is real and denial is not an option for energy industry players or the lawyers who represent them. That said, litigation is not a constructive solution to what is a multifaceted and multijurisdictional issue. The U.S. District Court for Northern California aptly observed in dismissing the city of Oakland’s claims that climate change “deserves a solution on a more vast scale than can be supplied by a district judge or jury.” The same can be said for Canadian courts.

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