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U.S. CLIMATE CHANGE LITIGATION

Introduction

The United States remains the centre of international focus as many countries, including Canada, adopt a 'wait-and-see' approach to the implementation of domestic climate change legislation based on U.S. developments. In addition to monitoring U.S. legislative developments, large emitters of greenhouse gases in Canada should consider the potential impacts of recent judicial decisions in the U.S. Given recent judicial decisions by three American courts, a comprehensive business strategy for large Canadian emitters should take into account the potential role of the courts as well as the impact of future climate change litigation.

What the U.S. Courts Said

Each of these U.S. decisions arose from litigation against large energy and power companies, with the plaintiffs alleging that the companies' activities contributed to climate change, which in turn caused actionable injuries.

In *State of Connecticut v. American Electric Power Company* (2nd Cir. N.Y. September 21, 2009), eight states, three land trusts and the City of New York sought injunctive relief against five large public utilities in the District Court for the Southern District of New York. The Plaintiffs sought to force the utilities to abate their alleged contributions to climate change by reducing their emissions of greenhouse gases. The trial level court dismissed the Plaintiffs' action on the basis that it was a political question and, accordingly, not an issue that could be determined by a court. Following an appeal to the Court of Appeals for the 2nd Circuit, the District Court's decision was overturned, paving the way for a new trial on the merits, and permitting climate change litigation to proceed in each of the states over which the 2nd Circuit has jurisdiction (New York, Connecticut and Vermont). The Court held that the lower court erred by equating a political case with a political question. In other words, while climate change is presently a politically charged issue, it should not necessarily be

held to be a non-justiciable matter. The Court opined that the judiciary is adept at addressing "new and complex problems", concluding that "[w]ell settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs' claims and federal courts are competent to deal with these issues". Relying on earlier cases involving air and water pollution, the Court held that contribution to climate change was sufficient to attach liability to the defendants. The Court vacated the lower court's decision and remanded the matter for further proceedings.

Released only nine days after *Connecticut v. AEP*, the District Court for the Northern District of California reached a very different result in *Native Village of Kivalina v. ExxonMobil* (N.D. Cal., September 30, 2009). While the District Court is a lower court in the American federal judiciary system, it is not bound by decisions of a Circuit Court of Appeals other than its own (California is in the 9th Circuit, which includes Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington). The Plaintiffs, the Native Village of Kivalina, and the City of Kivalina, sued 24 large energy and power companies, including ExxonMobil, British Petroleum, Chevron, Royal Dutch Shell, and ConocoPhillips. The Plaintiffs sought compensation for injuries allegedly suffered as a result of receding Arctic ice due to climate change, resulting in the erosion of land on which residents lived, forcing them to relocate. While the Court acknowledged the decision in *Connecticut v. AEP*, it declined to adopt the 2nd Circuit's approach, finding instead that the issues presented raised a political question, which the courts were ill-equipped to address. The Court distinguished the air and water pollution cases relied on by the 2nd Circuit from climate change cases, noting that the former cases could be confined to discrete geographic areas, while the latter could not. Conversely, the Court stated that the "Plaintiffs' global warming claim is based on the emission of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere". The Court also noted problems with the Plaintiffs' standing, including the problem of causation and the inability to trace the Defendants' conduct to the Plaintiffs' claimed injuries. The Court dismissed the Plaintiffs' action.

The last in the chronology of recently released cases is **Comer v. Murphy Oil USA (5th Cir. Miss. October 16, 2009)**, a decision of the Court of Appeals for the 5th Circuit. The Plaintiffs, property owners along the Gulf Coast who suffered property damage as a result of Hurricane Katrina, sued a number of large energy and power companies for compensatory and punitive damages allegedly caused by greenhouse gases emitted from their operations in Mississippi. The Plaintiffs alleged that the Defendants' emission of greenhouse gases contributed to global warming, which caused sea levels to rise and contributed to the magnitude of Hurricane Katrina. Similar to **Connecticut v. AEP**, the 5th Circuit overturned the lower District Court's holding that the subject matter was non-justiciable on the basis of it being a political question. The Court found that the matters were justiciable since there was no basis to find that the subject matter was exclusively within the domain of a federal political branch. Following a similar line of reasoning to **Connecticut v. AEP**, the 5th Circuit held that it was sufficient that the Plaintiffs could demonstrate that the Defendants' emissions of greenhouse gases contribute to climate change. The 5th Circuit noted that while it arrived at its decision independently, it was consistent with what the 2nd Circuit's decision was in **Connecticut v. AEP**. Accordingly, the 5th Circuit vacated the lower court's decision and remanded the matter for further proceedings.

The thrust of the **Connecticut v. AEP** and **Comer v. Murphy Oil USA** decisions is to pave the way for climate change litigation to proceed against emitters of greenhouse gases in the United States. These two cases suggest that alleged contribution to climate change and resulting effects of global warming is sufficient to sustain a claim at the preliminary stage. Furthermore, these two cases did not view the subject matter of climate change to be a non-justiciable political question. This is in contrast to **Kivalina**, where the District Court held that contribution was insufficient to attach liability to the defendants, and that climate change was more appropriately addressed by political branches of government.

On November 6, 2009 the Plaintiffs in **Kivalina** appealed the lower court decision to the Court of Appeals for the 9th Circuit. If the 9th Circuit decides to hear the case, it will be of great interest whether it will decide the case in a similar fashion to the 2nd and 5th Circuits. If a split occurs among the Circuit Courts, the likelihood of this question reaching United States Supreme Court increases.

Effect of Legislation on Climate Change Litigation

As of the date of this publication, the United States has not enacted comprehensive climate change legislation. While the House of Representatives has passed the **American Clean Energy and Security Act of 2009** and the Senate is currently deliberating the **Boxer-Kerry Bill**, neither piece of legislation can become law until it is passed by the other chamber, following which it must be signed into law by President Obama. Both the **American Clean Energy and Security Act of 2009** and the **Boxer-Kerry Bill** contemplate a cap and trade system. Under a cap and trade system, an overall cap would be established and pursuant to such cap, companies would be permitted to emit under their prescribed allowance. The presence of a comprehensive federal scheme on emissions could prove to be important for greenhouse gas emitting companies. In addition to providing regulatory certainty, such legislation has the potential to preempt climate change litigation based on federal or state common law claims. Under the U.S. constitutional doctrine of preemption, a clear Congressional intent to create a comprehensive scheme addressing greenhouse gas emissions, including penalties and remedies, could prevent would-be plaintiffs from bringing actions based on federal common law, state statutes, or state common law. In contrast, in Canada any federal scheme would have to expressly revoke a common law cause of action.

Application in Canada

While the decisions discussed above involve U.S.-specific claims, owing in large part to the United States Constitution, the cases raise certain legal principles that are universally relevant. While climate change litigation would be novel in Canada, it could ostensibly be based on similar principles of tort law available in the U.S., including the common law claim of nuisance. Although the political question and standing doctrines do not flow from the Constitution in Canada (as they do in the United States) they are the subject of fundamental common law principles. Consequently, any actions brought in Canada would invariably need to address the suitability of the court system to resolve climate change litigation. Additionally, courts would need to grapple with the concept of contribution and whether a defendant's contribution to a worldwide problem is in itself sufficient to result in liability, when the defendant is one of many worldwide emitters of greenhouse gases.

CONTACT US

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