



## Climate Change Litigation

### A. INTRODUCTION

Over the past year the public, media and governments have devoted considerable attention to the issue of climate change and the warming of average global temperatures due to increases in greenhouse gas (GHG) concentrations from anthropogenic causes. Dusting off their ambulance-chasing hats, concerned public interest environmental lawyers and academics have set off, gumboots (still fresh with tobacco litigation) flapping, after this global tort in hopes that a case or two may drastically change industry and government practices. Some academics estimate that lawyers have already filed upwards of 25 cases worldwide.<sup>1</sup>

These cases can be classified in four categories:<sup>2</sup>

- (a) Actions against public agencies for acts or omissions that contribute to climate change;
- (b) Actions against public agencies to require consideration of climate change impacts in decision-making;
- (c) Civil lawsuits against private entities that emit greenhouse gases (primarily in nuisance, with some in negligence); and
- (d) Actions against public agencies regulating greenhouse gas emissions by the regulated entities.

The third category of cases – civil actions – offers the greatest potential for setting a precedent that could ripple through the corporate sector, drastically changing industrial processes because of fear of findings of liability for impacts caused by GHG emissions. However, even assuming a strong plaintiff (such as the Inuit who suffer both private and public nuisances) and a weak defendant (such as the electricity generating industry in most of North America) there are significant legal and scientific hurdles to overcome in such mass tort litigation. International law, for example through the International Court of Justice, does not hold much promise because it is unlikely to award a remedy that arguably infringes on the sovereignty of a nation-state, requiring it to take action. The remedies available through international law apply only when they are incorporated into federal or provincial legislation in Canada.<sup>3</sup>

The purpose of this background paper is to set out the primary legal challenges facing a civil law suit in Canada or the United States that seeks to impose tort liability for the harms caused by

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<sup>1</sup> This includes in the U.S., Australia, Germany, New Zealand, Canada and miscellaneous other forums. Shi-Ling Hsu, A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit (forthcoming, *University of Colorado Law Review*). At least 18 of those are in the U.S., see Gary Bryner, The Rapid Evolution of Climate Change Law 20 *Utah Bar Journal* 22, March/April 2007.

<sup>2</sup> Hsiu and Bryner, *ibid.*

<sup>3</sup> Nigel D. Bankes and Alastair R. Lucas, *Kyoto, Constitutional Law, and Alberta's Proposals*, 42 *Alta. L. Rev.* 355, 363 (2004).

climate change. Among the challenges associated with pursuing litigation of this kind include issues relating to jurisdiction, duty of care, causation, and apportionment of liability.

## **B. FACT PATTERN**

For the purposes of this paper and our ensuing discussions, we propose to posit a prospective climate change tort claim involving Canadian plaintiffs and American defendants. The posited plaintiffs represent one or more indigenous communities in B.C.'s North whose traditional territory has been adversely affected by the pine beetle infestation. It is currently projected that as a result of this infestation less than ten percent of the pre-existing forest ecosystem will remain, causing significant impact on traditional and contemporary activities on the land. The posited defendants are U.S.-based automakers and/or electricity generators located primarily in the Eastern United States. Collectively, these two sectors emit over eight percent of the global greenhouse gases. Science does provide a link between climate change (the warming of average global temperatures) and the pine beetle infestation. There is particular interest to litigate in a U.S. jurisdiction because U.S. lawyers who specialize in class action suits are exploring the possibility of a court case in nuisance or negligence, and U.S. law is arguably more favourable for public interest litigation.

## **C. ISSUES**

### **1. Jurisdiction**

A court's decision to take jurisdiction over a matter involves an analysis of whether it has jurisdiction *simpliciter* (that it *can* decide the case) and that its jurisdiction is the *forum conveniens* (that it *should* decide the case as the appropriate forum). If a court decides to accept jurisdiction then it also considers what law is appropriate to apply to the case at hand.

#### *a) Jurisdiction and Forum Non Conveniens*

Both U.S. and Canadian courts have accepted jurisdiction over defendants from the neighbouring country where the effects of a tortious action were visited upon plaintiffs within their own jurisdiction.<sup>4</sup> The basic test in determining whether a court has jurisdiction is whether there is a real and substantial connection between the forum and the parties or subject matter of the action. This analysis takes into account a wide range of factors, including where the tort occurred, where the loss occurred, the relationship of the plaintiff and defendant to the jurisdiction and to each other, and the jurisdictional advantages to each party.

In this case the effects of the emissions are felt in Canadian jurisdictions, which may detract from a U.S. court's willingness to hear the case. It may still be the dominant position of both Canadian and U.S. courts they should exercise considerable restraint and respect

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<sup>4</sup> Hsu, *supra* note 1 at 46, cites *British Columbia v. Imperial Tobacco*, 2005 SCC 49 (Sup. Ct. Canada 2005) and Teck Cominco's pollution discharge felt in Washington State.

international comity before accepting jurisdiction over foreign defendants, however, there are some signals that this position is softening.

Even if a court concludes that it has jurisdiction to entertain a claim, it may decline to exercise that jurisdiction. *Forum non conveniens* is a common law doctrine, widely recognized by U.S. and Canadian courts, that confers a judicial discretion to dismiss an action where the court concludes that the forum chosen by a plaintiff, even though a proper venue, is inconvenient, and a foreign jurisdiction would be a superior or more appropriate forum for the case. The doctrine grants considerable discretion in courts to refuse to hear a case, and the outcome of applications based on *forum non conveniens* is relatively unpredictable.

U.S. courts are unwilling to hear cases where the plaintiff's forum will adequately canvas the issues. For example, they will not take jurisdiction based on the plaintiff's forum not acknowledging the market share doctrine and less favourable substantive or procedural law.<sup>5</sup> Thus, U.S. courts may not be willing to accept jurisdiction on the basis of avoiding adverse costs awards in Canada. While U.S. federal courts generally do not take into account plaintiffs' potential liability for defendants' costs in their analysis of *forum non conveniens*, it may be a factor, but not determinative, in states that do not follow federal rules.<sup>6</sup> Courts in the U.S. are more favourable to accepting jurisdiction based on convenience to the parties and expense.

#### *b) Applicable Law*

If Canadian plaintiffs bring tort claims against U.S. companies in a U.S. court, the court will need to decide whether U.S. or Canadian law will apply. Most U.S. state courts follow the principle that torts are governed by the local law of the state/province that has the most significant relationship to the harm and to the parties.<sup>7</sup> For harm to property, courts usually apply the substantive law of the state/province where the injury occurred. Courts will, however, apply the law of the court hearing the case to decide issues of judicial administration and procedure, such as the right of access to the courts, the method of assessing damages, and the admissible evidence.

Whether the court will apply the U.S. or Canadian rule to the issue of costs or using the market share doctrine (see issue 4 below) will depend on whether the court will hold the issue to be substantive or procedural. Even if Canadian law sees the "loser pays" rule as procedural in nature, U.S. courts may decide that it is a substantive law. Courts will consider four factors in making this determination: (1) whether the issue is one to which the parties are likely to have given thought in the course of entering into the transaction; (2) whether the issue is one whose resolution would be likely to affect the ultimate result in this case; (3)

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<sup>5</sup> *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001); *In re Factor VIII or IX Concentrate Blood Products Litigation*, CV-06-1427, 2007 WL 1297099, at \*4-5 (7th Cir. May 4, 2007).

<sup>6</sup> See *In re Factor VIII or IX Concentrate Blood Products Litigation*, 484 F.3d 951, 958 (7th Cir. May 4, 2007) and *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1201 (Del. 1997).

<sup>7</sup> See Rest. 2d Conflict of Laws § 145<sup>7</sup>; see also Rest. 2d Conflict of Laws § 6.

whether the precedents have tended consistently to classify the issue as ‘procedural’ or ‘substantive’ for choice-of-law purposes; and (4) whether an effort to apply the rules of the judicial administration of another state would impose an undue burden upon the forum.<sup>8</sup>

## 2. Duty of Care

The tort of negligence requires defendants to exercise a duty to take care to those who are foreseeably at risk from their behaviour. They owe this duty to a class or classes of people who are put at risk by negligent activity. This duty does not extend to those put at risk by secondary impacts from the negligent activity. The question in climate change litigation is how wide the duty of care net will be cast: how big is the zone of foreseeable risk. Arguably the defendants in global environmental tort cases a duty of care to all people in the world. The foreseeability of harm has increased dramatically in the past year as the scientific understanding of the impact of climate change has increased. At what point did it become foreseeable that emissions of GHGs would harm, for example, Northern peoples? Courts may also decline to impose a duty of care for public policy reasons, for example where the scale of liability is so large that it would destroy industry and thus is contrary to public policy.<sup>9</sup>

The notion of duty of care also finds expression in both Canadian and U.S. laws of public nuisance. Here the duty extends remedies to plaintiffs that receive special injury as the result of actions by a defendant that interfere with a right (health, safety, morality, comfort or convenience) common to the general public.<sup>10</sup> Courts in both countries use a balancing test that includes weighing the utility or reasonableness of the defendant’s activity and how the activity conforms to industry or sectoral norms. While U.S. courts are becoming more lenient about plaintiffs needing to show special damage, Canadian courts require strict adherence to showing injury that is different in both kind and degree.<sup>11</sup> For example, the court dismissed a case brought in public nuisance by a fishers’ group for a toxic spill that killed fish, finding that the group did not show their injury to be different in kind from that of the general public who enjoyed fishing as well.<sup>12</sup> Indeed, plaintiff injuries must be a direct, and not a consequential, result of the defendant’s action.

Finally, the defence of statutory authority or legislative authority in both Canada and the U.S. can impede claims in this area. Where legislatures are able to override common law doctrines by statute, defendants can use this defence of statutory authority to have courts sanction a range of activities that the government could have contemplated in passing a statute. See, for example, B.C.’s recent Bill 44 *Greenhouse Gas Reductions Targets Act* (at first reading).

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<sup>8</sup> Rest. 2d of Conflict of Laws § 122, Comment *a*.

<sup>9</sup> David Hunter and James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation* 155 *U. Pennsylvania Law Review* 1741 2007.

<sup>10</sup> Lewis N. Klar, *Tort Law*, 2<sup>nd</sup> ed. (Scarborough Ont: Carswell, 1996) at 525.

<sup>11</sup> Hsu, *supra* note 1 at 47.

<sup>12</sup> *Hickey v. Electric Reduction Co.* (1970), 21 D.L.R. (3d) 368 (Nfld. S.C.).

Duty of care analysis also plays a role in private nuisance imposing liability where a defendant interferes unreasonably with the use and enjoyment of another's property. In assessing the reasonableness issue, courts typically assess the nature, severity, foreseeability and reasonableness of the impugned interference. Emitting GHGs or the impact of those GHGs can be seen as a reasonable part of acceptable industrial action that generates economic activity. The question becomes at what level does the conduct become intentional and the interference unreasonable where the harm (environmental, economic and social) outweighs the benefit (economic and social)?

When considering duty of care, Hunter and Salzman conclude:<sup>13</sup>

Our analysis suggests that changes over time in our understanding of climate change impacts are increasing the foreseeable costs of GHG emissions. At the same time, alternatives to inefficient technologies or practices are increasingly well known, and the avoidance costs are declining. This suggests that the relative risk-utility balance of climate-changing activities is shifting, and with that shift comes an increased likelihood that a defendant's activities or products will be found to present an unreasonable risk of foreseeable injury. Whether under theories of negligence, nuisance, or products liability, such trends in the risk-utility ratio are moving toward a finding of liability.

The focus on duty also helps us to look beyond a sector-wide approach to defendants--for example, all utilities, oil and gas producers, or automobile manufacturers--to a focus on those companies within a sector that are lagging behind the industry leaders in responding to climate change. Although initial tort actions have been suits against broad groups of utilities or automobile manufacturers with little differentiation, the next generation of tort cases may take a more nuanced approach to naming defendants. In the future, those companies whose approach to climate change is behind that of others in their industry run the risk of being singled out in tort actions. Inquiries into the reasonableness of a company's operations or products turn into inquiries about how they compare to those of others. In this way, today's industry laggards may be tomorrow's climate defendants.

### 3. Causation

The traditional test requires the plaintiff to demonstrate on a balance of probabilities that, "but for" the defendant's conduct, the plaintiff would not have been harmed.<sup>14</sup> With multiple actors emitting GHGs over a century it is difficult to attribute specific causation for harms thousands of kilometers away to any particular industrial sector let alone specific corporate defendant. This is because the contribution of any one facility or identifiable

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<sup>13</sup> David Hunter and James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation* 155 *U. Pennsylvania Law Review* 1741 2007.

<sup>14</sup> *Snell v. Farrell*, [1990] 2 S.C.R. 311 at para. 15.

group of emitters is fairly insignificant (e.g. far below a 50 percent level) and thus will not be substantial enough for a court to find that “but for” its emissions the alleged harm would not have occurred. The impact of U.S. and Canadian industry on climate change is also relatively small and declining with the industrialization of China and India.

The Canadian test of “material contribution” is the only significant departure from the traditional approach in recognition that the “but for” test is unworkable in some circumstances.<sup>15</sup> To date, courts have provided little guidance on what makes a contributing causal factor “material”. In one of the few cases to address this question, the SCC has opined (unhelpfully) that a cause may qualify as material if it “falls outside the *de minimus* range”. Once a factor has been identified as materially contributing to the harm, the defendant cannot escape full liability simply because other tortious and non-tortious factors also played a role in creating the harm that was suffered.

It is critical to bear in mind, however, that the Supreme Court of Canada has emphasized that the “but for” approach to causation should be presumptively applied in all but the most exceptional of cases. In this vein, in a 2007 negligence case, it has stipulated that the material contribution test should only be applied when two requirements are met:

First, it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test. The impossibility must be due to factors that are outside of the plaintiff’s control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff’s injury must fall within the ambit of the risk created by the defendant’s breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the “but for” test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a “but for” approach.<sup>16</sup>

As such, the suggestion that a material contribution approach to causation should apply on the present facts is likely to meet with significant judicial resistance given floodgates concerns and the presumptive applicability of the “but for” test. Moreover, even if a trial court was inclined to apply a material contribution test, it is unclear how substantial a causative factor would need to be (i.e. how much beyond the *de minimus* range) to satisfy the test.

The only remaining alternative basis for establishing causation would involve invocation of a “market share”-based theory of causation. This approach has found favour in the United States and has recently been approved by the English House of Lords in a tort claim against

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<sup>15</sup> *Athey v. Leonati*, [1996] 3 S.C.R. 458.

<sup>16</sup> *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 25.

asbestos manufacturers.<sup>17</sup> In Canada, however, while the doctrine has been statutorily adopted in BC legislation enacted to seek compensation for health related impacts from tobacco companies, no court has adopted it. The SCC referred to *Sindell v. Abbott Labs* in *Snell v. Farrell* as an example of a challenge to the traditional approach to causation,<sup>18</sup> but gave it no further consideration. The doctrine has only been referred to in passing by the Ontario Superior Court of Justice,<sup>19</sup> the British Columbia Supreme Court,<sup>20</sup> and the Saskatchewan Court of Appeal.<sup>21</sup>

In summary, for causation to be established on the current facts -- assuming Canadian and not American law applies -- it will be necessary either to establish causation on the basis of “material contribution” or “market share” both of which would appear to be difficult arguments.

#### **4. Remedies: Apportionment of Liability**

As noted above, some courts in the U.S. have allowed the apportionment of liability based on a doctrine of market share.<sup>22</sup> The percentage of market share that a corporation holds in a particular industry will be the amount of damage for which it will be held liable. Each defendant is liable for his or her share of the contribution to the harm. In the climate change context this could mean that defendants are liable to the extent of their historic emissions of GHGs.

In B.C. defendants are held joint and severally liable under the *Negligence Act*.<sup>23</sup> Plaintiffs may recover 100 percent of the damages from one or more tortfeasors as an indivisible harm, even if other tortfeasors are not joined in the suit.<sup>24</sup> Defendants may then recover from each other in accordance with the proportion of harm for which they have been deemed responsible. Because all defendants in climate change litigation are likely to have deep pockets, this doctrine is less likely than usual to lead to a single defendant being responsible for the entire judgment. However, given this possibility, courts may be even more reluctant to find any particular emitter liable.

### **C. DISCUSSION**

In a recent article assessing the prospects of litigating in what he contends is the best case scenario for a tort-based climate change lawsuit (i.e. brought by the Inuit against the U.S.

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<sup>17</sup> *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] 3 All E.R. 305, [2002] 3 W.L.R. 89, [2002] UKHL 22 (H.L.).

<sup>18</sup> *Snell v. Farrell*, at para. 16.

<sup>19</sup> *Gariépy v. Shell Oil Co.* (200), 51 O.R. (3d) 181, 1 C.P.C. (5th) 120, [2000] O.J. No. 3804 at para. 11.

<sup>20</sup> *Insurance Corp. of British Columbia v. Leland*, [1999] B.C.J. No. 2073, 1999 CarswellBC 1998.

<sup>21</sup> *Valleyview Hotel Ltd. v. Montreal Trust Co.* (1985), 33 C.C.L.T. 282, 39 Sask R. 229 at para. 14.

<sup>22</sup> *Sindell v. Abbott Labs*, 607 P.2d 924 (Cal. 1980).

<sup>23</sup> *Negligence Act*, R.S.B.C. 1996, c. 333.

<sup>24</sup> See *G. (E.D.) v. Hammer* (1998), 53 B.C.L.R. (3d) 89, [1998] B.C.J. No. 992; affirmed by 2001 BCCA 226; affirmed by 2003 SCC 52, [2003] 2 S.C.R. 469.

electrical generating industry), Professor Hsu offers a relatively gloomy assessment for establishing liability in Canadian courts:

In short, Canadian courts can be expected to be considerably less friendly to an Inuit lawsuit against the U.S. electricity generating industry. Public interest litigation simply does not enjoy the storied tradition in Canada as it does in the U.S. Following the British system of fees, Canadian courts as a default rule require the loser to pay for the attorneys' fees of the winning party. This is a double-edged sword, of course, but for relatively underfunded environmental plaintiffs, it is a significant bar to the courthouse doors...What I can safely conclude, however, is that Canadian courts offer no better, and probably offer a much worse venue for the Inuit hoping to obtain some redress for climate-change-related harms from the U.S. electricity generating industry.

While his assessment of the prospects for litigating this scenario in U.S. courts is less pessimistic, Hsu does not grapple with the complex conflict of laws issues that present themselves on the current facts. And while there appears to be a strong appetite on the part of some experienced lawyers – both north and south of the border – to consider seriously the potential for bringing such litigation, to date only very preliminary analysis of these conflicts issues and a variety of other doctrinal, scientific and practical issues associating with mounting litigation of this kind has been undertaken.

This paper is a modest attempt to identify some, but by no means, all of these issues.

With this in mind, we would invite Associates to consider the following questions at our next teleconference on Monday December 3 from 4pm to 6pm:

1. What further research questions need to be undertaken to elucidate the jurisdictional/conflicts issues?
2. If it appears clear that the case would ultimately be litigated under Canadian law is it still worth proceeding? To what extent would your conclusion depend on whether it was litigated in Canada or the United States?
3. In addition to the issues adverted in this memo, what additional issues (procedural or substantive) deserve consideration when considering whether and how to proceed?
4. Assuming that the case were filed in U.S. courts by a team of lawyers that included a U.S.-based firm acting on a contingency fee basis, what issues arise for Canadian public interest law organizations that may seek to be part of the litigation team?

## **For More Information:**

### *Scientific*

Jim Hansen, The Threat to the Planet, 53 *The New York Review* 12 (July 13, 2006)  
[http://pubs.giss.nasa.gov/docs/2006/2006\\_Hansen.pdf](http://pubs.giss.nasa.gov/docs/2006/2006_Hansen.pdf)

Intergovernmental Panel on Climate Change, Climate Change 2007: Impacts, Adaptation and Vulnerability, Summary for Policymakers (April 2007) <http://www.ipcc.ch/>

Intergovernmental Panel on Climate Change, Climate Change 2007: The Physical Science Basis; Summary for Policymakers (Feb. 2007) <http://www.ipcc.ch/>

### *Legal*

Gary Bryner, The Rapid Evolution of Climate Change Law 20 *Utah Bar Journal* 22, March/April 2007.

Shi-Ling Hsiu, A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit (forthcoming, *University of Colorado Law Review*)  
<http://ssrn.com/abstract=1014870>

David Hunter and James Salzman, Negligence in the Air: The Duty of Care in Climate Change Litigation 155 *U. Pennsylvania Law Review* 1741 2007

Inuit Circumpolar Conference, Petition to the Inter American Commission on Human Rights Seeking Relief from Violation Resulting from Global Warming Caused by Acts and Omissions of the United States <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>

Province of British Columbia, Bill 44 – 2007, Greenhouse Gas Reduction Targets Act  
[http://leg.bc.ca/38th3rd/1st\\_read/gov44-1.htm](http://leg.bc.ca/38th3rd/1st_read/gov44-1.htm)

Mary Christina Wood, Atmospheric Trust Litigation (Draft for Comment Purposes) 2007 (see e-mail from Mark Haddock to the Associates' Listserv with article attached).