

Ontario's Court Rules undergo a significant overhaul

The Ontario Ministry of the Attorney General has made sweeping changes to the Superior Court of Justice's *Rules of Civil Procedure*. The primary objective of the revisions, which took effect January 1, 2010, is to make the judicial system more accessible and more affordable. Among the changes and additions, the new Rules will:

- ◆ integrate the concept of proportionality into Court procedures
- ◆ codify the duties of experts
- ◆ reform the often lengthy and costly discovery procedure
- ◆ provide ways to bring about an earlier disposition of matters.

Proportionality

To reduce the costs of litigation, the new Rules direct the Court to take into account the importance and complexity of the issues and the amounts involved when making orders (including orders for costs) or giving directions. Proportionality is exhibited in amendments that narrow the scope of oral and documentary discovery, increase the powers of the Court on a motion for summary judgment, and promote settlement at earlier stages of a proceeding.

The new Rules increase the amount of a claim which can be brought in the Small Claims Court from \$10,000 to \$25,000 and in the Simplified Procedure (under Rule 76) from \$50,000 to \$100,000. The higher limits, combined with more cost effective and streamlined processes, should encourage an increase in the number of claims brought in these forums.

New Rules for experts and their reports

New Rule 4.1, Duty of Expert, dictates that experts are to be impartial, fair and objective. Experts are to provide opinions only within their area of expertise and provide additional assistance to the Court if needed. These duties to the Court override any obligation the expert may have to the party who retains the expert.

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Other amendments relate to the production of expert reports. Reports are now to be delivered to opposing parties much earlier in a proceeding, and the Rules now describe in detail what is to be contained in all expert reports.

New Rules should reduce cost and scope of discovery

Major amendments to the Rules regarding discovery are designed to reduce the scope of the costly and often time-consuming process. “Proportionality in Discovery” gives the Court the discretion to consider the time, cost and effort required by a party to produce a document or answer a question, and to deny requests that are excessive to the amounts claimed in the proceeding.

Parties are now required to jointly agree to a Discovery Plan (Rule 29.1). Without a Discovery Plan, parties are prohibited from bringing discovery-related motions, such as compelling a party to produce documents, attend examinations for discovery or answer undertakings and refusals.

Amendments to the Rules also scope the extent of the exchange of documents. Previously, all documents that in any way related to the matters at issue were produced. Now, parties’ counsel must meet and confer and agree in their Discovery Plan about what types of documents are relevant to the action and need to be produced. This should reduce the number of documents exchanged and the time and cost to review those records.

New time limits have been imposed on how long a party may examine other parties in the litigation. A party is allotted only seven hours (basically one day) within which to examine all parties they wish to discover unless all parties agree to additional time or the Court orders otherwise.

Mandatory mediation should speed disposition

The Mandatory Mediation (Rule 24.1) provisions have been expanded to all actions commenced in Toronto, Ottawa and Essex County. Previously only Case Managed (Rule 77) and Simplified Procedure (Rule 76) actions were subject to this Rule. Mediations are to be held within 180 days of filing of the first defence. Parties may consent to postpone mediation, but mediation must still be held before an action can be set down for trial. Past studies have shown that mediation has been successful in quickly settling about 40 per cent of actions and helps to simplify or clarify issues in those actions that do not immediately settle at mediation.

Changes to the Summary Judgment rule are significant

In the past, summary judgment motions were limited to determining if the facts provide that there is a genuine issue for trial. New powers given to the Court now allow the motions judge to weigh evidence, evaluate credibility and determine questions of law. In addition, the motions judge may now order that a mini-trial, with oral evidence, be held on one or more of the issues. Further, the Court may impose a form of case management on an action, providing deadlines for the exchange of documents, requiring preparation of summary documents, and even requiring opposing experts to meet and confer to prepare a joint expert statement.

A further change to the summary judgment rule now eliminates the automatic risk of higher cost awards against an unsuccessful party. The Court still has the ability to impose higher cost awards, but only where a party has acted unreasonably for the purpose of delay.

The revisions to the Rules of Civil Procedure are based on the Civil Justice Reform Project undertaken by former Associate Chief Justice Coulter Osborne.

The overarching goal of Justice Osborne’s review was to improve access to justice for both represented and unrepresented litigants. Central to his recommendations is the principle that the time and expense of any proceeding should be proportionate to the amount in dispute and the importance of the issues at stake.

A summary of Justice Osborne’s findings and recommendations was submitted to the Attorney General in November 2007. Consultation with the legal community was undertaken in 2008, and the recommendations were also considered by the Civil Rules Committee.

Changes to the Rules of Civil Procedure (R.R.O. 1990, Reg. 194) were made pursuant to O. Reg. 438/08, under the *Courts of Justice Act*, and published in *The Ontario Gazette* on December 27, 2008. Further amendments to the Rules were made October 16, 2009, through O. Reg. 394/09 and published in *The Ontario Gazette* on October 31, 2009.

e-Discovery – What you can't see can still 'byte' you

More and more of us create and store information and documents in electronic format. These new paperless practices are convenient, efficient and undoubtedly a little more environmentally friendly. However, the proliferation of electronic record-keeping innovations has made it increasingly challenging to interpret and apply disclosure obligations that were drafted back in the old 'hard copy' and paper-based days. New "e-discovery" provisions, that took effect on January 1, 2010, have updated the disclosure obligations of plaintiffs and defendants in civil actions.

Under the revised *Rules of Civil Procedure* parties to a civil action must disclose and produce (with some exceptions) documents "relevant to any matter in issue in the action" that are or have been in the possession, control or power of the disclosing party. Amendments to the Rules, which took effect on January 1, 2010, introduce a new regime for the discovery of electronically stored information or "e-discovery".

Under the amended Rules, the term "document" has been redefined broadly to reflect the evolving technological capacity to create, communicate and exchange data and now encompasses "data and information in electronic form" including electronic devices. On the other hand, the scope of discovery is more limited as of January 1, 2010, with a change from disclosure of all documents that have a "semblance of relevance" to those that are "relevant".

Parties to existing or new actions are now required to agree to a written Discovery Plan (Rule 29.1.03) that sets out how the parties will complete their respective discovery obligations under the relevant Rules. The purpose of a Discovery Plan is to resolve discovery issues early in an action by requiring parties to agree on the approach to discovery. It must include information to encourage "expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action" (Rule 29.1.03(e)).

In preparing the Discovery Plan, the parties are to consult and have regard to the guidelines set out in *The Sedona Canada Principles Addressing Electronic Discovery* (Rule 29.1.03(4)). This document (see page 4 of this issue) directs the parties to agree on the approach to disclosure and discovery of electronically-stored information in the circumstances of their particular action.

The Sedona Canada Principles were developed by a working group of lawyers, judges and IT experts, under the auspices of the Sedona Conference[®], a nonprofit think tank based in Sedona, Arizona, and dedicated to the study and development of law in the areas of complex litigation, antitrust law and intellectual property rights. A working draft was released for public comment in February 2007, and the final version of the Sedona Canada Principles was published in January 2008.

The 12 Sedona Canada Principles recognize that the discovery of electronically stored information is a factor in all civil litigation, whether routine or complex, large or small. The Principles provide guidance to parties and their lawyers on a number of key e-discovery issues, including the scope of discovery, proportionality, preservation of information and sanctions for failure to satisfy obligations.

E-discovery includes the discovery of electronically stored information, including e-mail messages, web pages, word processing files, information stored in computer databases, floppy disks, external drives, zip drives, DVDs, CDs, magnetic tapes and USB memory sticks. E-discovery also covers information on other electronic devices, such as cell phones, Blackberries, PDAs, voicemail systems, instant messaging clients, iPods, digital copiers and printers.

What are the 12 Sedona Canada Principles?

1. Electronically stored information is discoverable.
2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.
3. As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.
4. Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.
5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.
6. A party should not be required, absent agreement or court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.
7. A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.
8. Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.
9. During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronically stored information.
10. During the discovery process parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.
11. Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates that the failure was not intentional or reckless.
12. The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at different allocation of costs on an interim basis, by either agreement or court order.

Uncomplicating our limitation date calculations!

When does the clock start ticking on the deadline to make an environmental claim? **Ontario's *Limitations Act, 2002* states that a proceeding shall not be commenced in the Court more than two years after a claim is discovered.** However, the concept of 'discoverability' can be tricky, especially for environmental claims. Determining when a claim could reasonably have been discovered necessitates a thorough factual investigation and thoughtful assessment of all facts.

Typically, environmental claims are based on acts or omissions arising from the discharge of a contaminant into the natural environment. The *Limitations Act, 2002* adopts the definitions of "contaminant", "discharge" and "natural environment" as defined in the *Environmental Protection Act*. A claim is 'discovered' and the limitations clock begins to tick when a plaintiff knows, or reasonably ought to have known, that:

- ◆ injury, loss or damage has occurred
- ◆ the injury, loss or damage was caused by or contributed to by an act or omission
- ◆ the act or omission was that of the person against whom the claim is made
- ◆ having regard to the nature of the injury, loss or damage, a legal proceeding would be an appropriate means to seek a remedy.

The *Limitations Act, 2002* creates an ultimate limitation period of 15 years. Regardless of when the claim was discovered or discoverable, no claim can be brought 15 years or more after the date of the act or omission on which the claim was based. The ultimate limitation period, however, does not apply to environmental claims until the claim is actually discovered.

This is significant since many environmental claims are not discovered for many years after the original contamination occurred. This passage of time creates an added dimension to litigation as memories can fade, witnesses can disappear, and documents can be lost, forgotten or discarded.

The expiry of a limitation period does not *automatically* make a claim go away. The defendant must plead the limitations defence in its Statement of Defence and the Court must adjudicate the issue to determine if the plaintiff's claim is out of time. All of this is perilous for aggrieved plaintiffs.

Two years is a short time. Parties can quickly run up against a limitation period while factual and environmental technical investigations are taking place. Technical investigations can assist in determining what contaminants may be impacting a property and the source of those contaminants.

Environmental claim resulting from past use

The leading decision on environmental limitation periods (*Cousins v. McColl-Frontenac Inc.*, [2006] N.B.J. No. 315 (N.B.Q.B.); [2006] N.B.J. No. 504 (N.B.Q.B.); [2007] N.B.J. No. 430 (N.B.C.A.); [2007] S.C.C.A. No. 598 (S.C.C.), leave to SCC granted but settled before hearing at SCC) involved the purchase of a service station property in 1986 that had closed because of a leak in an underground gasoline tank.

The calculation of a limitation period is a legal question based on factual information. An in-depth understanding of the facts surrounding an environmental claim is required to advise potential litigants about the applicable limitation period that applies in the particular circumstance.

The case study (on page 6) explains in general terms how to calculate the limitation period and expiration date in a typical groundwater contamination case. However, we urge all claimants not to try this at home, but to retain experienced counsel to opine about limitation periods.

Calculating a Limitation Period

Often environmental claims result from the migration of contamination across a property boundary. The following is an example of how to calculate a limitation period based on simple facts.

In early November 2009, you engaged an environmental consultant to complete a Phase 1 Environmental Site Assessment (ESA) at your property. The Phase 1 ESA report, dated November 30, 2009, identifies a dry cleaner, light industry and service station located nearby. Chemicals used at any of these nearby properties could potentially impact your property. Your environmental consultant recommends a Phase 2 ESA to obtain and analyze soil and groundwater samples to identify if there are contaminant impacts at your property.

On January 30, 2010, you receive a Phase 2 ESA report for your property. Your environmental consultant advises that the laboratory test results were e-mailed by the laboratory to your consultant on January 20, 2010. Your consultant's review of the laboratory test results shows tetrachloroethylene and petroleum hydrocarbons in groundwater above applicable Ministry of the Environment criteria.

In the Phase 2 ESA, your environmental consultant concludes that groundwater flows from west to east. Based on the direction of groundwater flow, your consultant identifies the dry cleaner and the gas station both located to the west as possible sources of tetrachloroethylene and petroleum hydrocarbons at your property.

When does your limitation period start to run? If you said January 30, 2010, you are probably correct. However, to err on the side of caution in protecting your right to sue, the most conservative approach should be taken if possible when determining your limitation period.

The most conservative start date for your limitation period is November 30, 2009. This is the date of the Phase 1 ESA that identified potentially contaminating uses nearby. Whether a Phase 1 ESA provides all necessary information for you to have 'discovered' your claim may or may not be the case.

The next to most conservative start date for your limitation period is January 20, 2010. This is the date your environmental consultant (not you) received the laboratory certificates of analyses. Whether your consultant's knowledge about contamination at your property will be imputed to you and be the deemed date of 'discovery' may or may not be the case.

Arguably, the most likely start date for your limitation period is January 30, 2010. You received your consultant's Phase 2 ESA report on this date. The Phase 2 ESA provides factual information that led to 'discovery' of your claim:

- ◆ the presence of contamination in groundwater at your property
- ◆ the likely migration of contamination to your property from the up-gradient dry cleaner and gas station properties
- ◆ the presence of contamination from up-gradient properties that results in injury to your property and a resulting claim for damages.

Typically, the parties that owned and/or operated the dry cleaner and gas station can be determined from various historical searches.

On these simple facts, it is likely that a Court would determine that your receipt of the Phase 2 ESA report on January 30, 2010 triggers the start of the two-year limitation period. It is during this two-year period (by January 30, 2012) that you must issue a claim with the Court to protect against expiry of the limitation period.

The earlier you issue your claim with the Court, the greater the likelihood that you will preclude any argument about expiry of any limitation period. Don't Wait! Identifying a limitation date is fact-driven and often not clear cut. Be prudent and get legal advice early!

At the time of purchase, the plaintiff, Mr. Cousins, thought that the property would be safe for his intended purpose. Thereafter in 1993, Mr. Cousins arranged for construction of a donut shop on the property and was required to perform an environmental assessment. The environmental assessment found extensive gasoline contamination in the soil. The property was unusable for Mr. Cousins' purpose.

The Court concluded that despite Mr. Cousins' awareness prior to purchase about the former use of the property as a gas station, the limitation period began to run when Mr. Cousins first learned the results of the environmental assessment after closing in December 1993. The December 1993 environmental assessment confirmed that the contamination was so significant that Mr. Cousins could not build the donut shop.

Cross Border Litigation: Canadian companies can find themselves in American courts

Pollution does not respect international boundaries. Canada and the United States share the longest non-militarized border in the world, as well as the Great Lakes, Niagara Falls and the Rocky Mountains. We also share water and air pollution. Fortunately or unfortunately, we have recently seen many more cross-border environmental litigation disputes end up in Courts and before arbitrators on either side of the border.

In **Dow Agrosciences**, the company initiated arbitration against the Canadian government under NAFTA for the alleged unlawful ban on cosmetic use of the pesticide 2,4-D. The notice of intention to arbitrate alleges that the Province of Quebec banned the use of cosmetic pesticides without any scientific basis for doing so, but rather based on the "precautionary principle". The dispute is about whether the Government of Canada breached its Chapter 11 NAFTA obligations and, if yes, the quantum of compensation. Dow Agrosciences seeks \$2M in compensation. A ban on lindane-based seed treatments by Canada's federal Pest Regulatory Management Agency has resulted in a similar \$100M suit brought by U.S.-based **Chemtura Corporation**.

In February 2007, a private prosecution was launched under Canada's *Fisheries Act* against **DTE Energy**, the U.S. parent company of Detroit Edison. In January 2008, an Ontario Judge issued an order directing the Ontario Court of Justice to summon DTE Energy across the border to Canada to face charges for allegedly contaminating the St. Clair River with dangerous amounts of mercury from a coal-fired power plant operating in Michigan. Following issuance of the summons, DTE agreed to address its mercury emissions. Thereafter, the charges were withdrawn.

A recent water transfer ruling under the U.S. *Clean Water Act* is under fire in a U.S. Court where declaratory and injunctive relief is sought by the **Province of Manitoba and nine U.S. States**. The concern in this case is about the movement of large volumes of water from one water basin to another that could injure waters in Manitoba and elsewhere.

In the First Nations case of **Pakootas v. Teck Cominco Metals, Ltd.**, a group of Aboriginal peoples in the State of Washington are seeking enforcement of a U.S. EPA administrative order made under the *Comprehensive Environmental*

Last year Canada and the U.S. celebrated the 100th anniversary of the *Boundary Waters Treaty of 1909*. The treaty imposes obligations on both countries to not pollute boundary waters. The treaty provides several means of addressing transboundary disputes. The treaty led to the creation of the International Joint Commission.

Since 1909, our two countries have entered into many environmental agreements. A more recent instrument for resolving transboundary disputes is a NAFTA side agreement – the North American Agreement on Environmental Cooperation (1994). The NAFTA side agreement is intended to address regional environmental concerns and to promote enforcement of environmental laws. The North American Commission on Environmental Cooperation was born out of NAFTA.

The International Joint Commission and the Commission on Environmental Cooperation now play a more limited role in dispute resolution. This very much has to do with limitations in their respective authority.

Response, Compensation and Liability Act (CERCLA) against a Canadian company that owns and operates a lead-zinc smelter in Trail, British Columbia. The smelter is located 12 kilometres north of the U.S.-Canada border. Heavy metals and mercury have been discharged into the Columbia River (in B.C.) and flushed downstream into the U.S. Pakootas is the first use of CERCLA to address cleanup of a “hazardous waste site” created by discharges that originated outside the United States.

Bilcon Inc., a U.S. based construction firm, launched a NAFTA arbitration claiming \$188M and alleging that a joint federal-provincial environmental review panel had an anti-foreign bias when it ruled against allowing a quarry in Nova Scotia. The New Jersey company proposed to quarry aggregate in Nova Scotia and ship it to the U.S.

There is one example of oppression remedies pleaded in an Ontario environmental case under Canadian business corporation statutes against U.S. parent companies, namely ***Manulife v. AFG***. The oppression remedy offers a novel approach to seek recovery of damages against foreign companies for the alleged environmental acts of a Canadian incorporated subsidiary.

While final judgment is pending in several of these cases, they should all serve as a warning to Canadian companies. There is obviously a need to comply with Canadian laws. However, there is also a growing need to understand what kinds of environmental implications Canadian operations may have beyond Canada's borders and to what extent environmental laws may apply.

Is climate change litigation blowing hot or cold?

In Canada, there is no federal nation-wide or regional carbon emissions trading system in place. There is an emissions trading system operating in the Province of Alberta and carbon taxes are levied in the Provinces of British Columbia and Quebec. Other provinces have introduced legislation regarding climate change and green energy, including Ontario's *Green Energy Act, 2009*.

What is next? Litigation, of course! Emitters should ready themselves for climate change litigation. It is heating up with emphasis on nuisance claims and charges of conspiracy to deceive the public. This is reminiscent of the tobacco wars that began in the 1990s. Let's look at a few key cases from both north and south of the 49th parallel.

Friends of the Earth v. Minister of the Environment

The environmental non-profit Friends of the Earth (FOTE) took the Canadian federal government to court for the government's failure to enforce Canada's greenhouse gas (GHG) emission obligations under the Kyoto Protocol. FOTE sought the Court's assistance to declare that the federal government should remedy breaches of the *Kyoto Protocol Implementation Act*, namely that:

- ◆ the Minister should prepare and table annual Climate Change Plans to ensure that Canada meets its obligations under the Kyoto Protocol
- ◆ the Governor In Council should make, amend or repeal the necessary regulations to ensure compliance with Kyoto Protocol obligations.

On October 20, 2008, the Federal Court dismissed Friends of the Earth's applications. The Court found that the government's compliance with the *Kyoto Protocol Implementation Act* is not a justiciable issue because:

- ◆ there was no clear obligation to comply in the Kyoto Protocol
- ◆ compliance with the Protocol was dependent on third party cooperation, including provincial authorities and industry
- ◆ the Act contemplates an ongoing process of review and adjustment and there may not be a requirement for strict compliance with Kyoto emission obligations
- ◆ parliamentary accountability is a sufficient substitute for judicial review
- ◆ the Court could not dictate what the Governor In Council should do to regulate compliance with the Protocol as this would constitute improper judicial interference with the executive branch of government.

Clearly, the Court did not want to enter into the fray. On October 15, 2009, Canada's Federal Court of Appeal agreed with the lower court "substantially for the reason he [Justice Barnes] gave".

Pembina Institute v. Canada (Attorney General)

In this case, several environmental non-profit organizations challenged the Ministers of Fisheries & Oceans and Environment Canada and Imperial Oil over an environmental assessment for development of an oil sands project in Alberta. A review panel had concluded that proposed mitigation measures in the Environmental Impact Assessment would render the project "not likely to cause significant adverse environmental effects". The applicants brought an application for judicial review of the panel's decision, alleging that the environmental assessment did not comply with mandatory steps in the *Canadian Environmental Assessment Act* or with its own Terms of Reference.

The Court agreed with the applicants (in part). The Court ordered that the matter be remitted back to the review panel. The panel was asked to provide a rationale for its conclusion that the proposed mitigation measures would reduce the potentially adverse effects of the project's GHG emissions to a level of insignificance. In May 2008, the review panel delivered additional reasons and soon thereafter the Department of Fisheries and Oceans re-issued the key water permit for the site.

Massachusetts v. U.S. Environmental Protection Agency (USEPA)

This decision is perhaps the most well-known climate change litigation case. In 2005, numerous private organizations (joined by several states and local governments) brought a petition against the U.S. EPA to force the Agency to regulate GHG emissions from new motor vehicles under the U.S. *Clean Air Act*. The majority of the Supreme Court of the United States held that greenhouse gases are indeed "pollutants", and the EPA has the authority to regulate their emission. The majority's opinion was that the Agency's decision not to regulate GHG emissions was based on arbitrary and capricious considerations.

Center for Biological Diversity v. National Highway Traffic Safety Administration (NHTSA)

A regulatory body's rule-making power was similarly challenged in this case. Several states and public-interest organizations petitioned for a review of a NHTSA rule about fuel economy standards for light trucks. The petitioners

What is climate change?

Increased carbon dioxide levels exacerbate the heating effects of the sun's energy and increase the average temperature of the Earth's atmosphere and oceans. In simple terms, this describes climate change.

Climate change is a lot about long-term and significant changes in the expected patterns of average weather in a locale. It is about abnormal variations to the expected climate within the Earth's atmosphere and oceans.

We already see fiercer storms, heat stress and smog often from intense fires, variations in water supplies and rising ocean levels. We see change in the distribution and coverage of vegetation, among other impacts.

argued that NHTSA failed to look at the GHG implications in making the rule. A Circuit Court agreed with the petitioners and held that the rule was arbitrary and capricious. The Court ordered the NHTSA to promulgate new standards.

Indeck Corinth v. Paterson

Regulated entities are also turning to the Courts to challenge GHG regulation. A New York State power generator has challenged the Regional Greenhouse Gas Initiative (“RGGI”) on several grounds:

- ◆ RGGI constitutes a violation of due process and the equal protection clauses in the U.S. Constitution
- ◆ RGGI is void as a multi-state compact that does not have congressional approval
- ◆ the regulations would impose an unauthorized tax
- ◆ the regulations are inconsistent with and pre-empted by federal legislation.

The petition was filed in the Supreme Court of New York on January 29, 2009.

Friends of the Earth v. Mosbacher

The U.S. *National Environmental Policy Act* (NEPA) requires federal agencies to carefully consider detailed information about significant environmental impacts, as well as guarantee that the relevant information will be made available to the larger public audience.

At issue in *Friends of the Earth v. Mosbacher* is whether the Export-Import Bank of the United States and the Overseas Private Investment Corporation (both U.S. federal agencies) contravened NEPA by providing financing and insurance to fossil fuel projects without assessing the contribution that the projects will make to global warming or impact on the environment.

The proceeding settled. The Export-Import Bank agreed to consider GHG emissions in evaluating fossil fuel projects, and OPIC agreed to aim to decrease emissions associated with projects it is involved in. Worthy of note is that the target agencies were merely providing financing and insurance for projects, not directly regulating or carrying out the projects themselves.

California v. General Motors (GM)

In some climate change cases, the defendant is a private party rather than the government or a regulator. These sorts of cases present a host of obstacles for a plaintiff, particularly in fitting the cause of action within a conventional tort framework, and in proving causation. In *California v. GM*, the state of California sought damages against several car manufacturers for public nuisance (namely, global warming) with damages sought to compensate for significant environmental impacts to California’s natural resources and infrastructure.

The court dismissed the claim, stating that the issue was non-justiciable because it was a political question. The State of California appealed but voluntarily dismissed its appeal on June 19, 2009.

Connecticut v. American Electric Power Company Inc.

In this case, several U.S. states, the City of New York and three land trusts sued several electric power companies responsible for a large proportion of the nation’s carbon dioxide emissions. The plaintiffs framed their case as a

Where are we now with climate change litigation?

In Canada, non-profits are probably riding the coattails of their cohorts in the U.S. by letting the U.S. courts decide the first test cases. There has been some push-back against two government decisions or non-decisions and with some success in the Pembina case.

Our neighbours to the South have more experience with non-profits having some success in pursuing nuisance claims and where the claims are scoped to something considerably less than trying to resolve the climate change challenge by a single lawsuit.

common law action in public nuisance, alleging that defendants are responsible for the “public nuisance of climate change”. The plaintiffs sought to require the defendants to reduce their GHG emissions by a specified amount over a set time. The defendants were looking to strike the claims.

On September 21, 2009, the District Court ordered that the claims for public nuisance could continue on the premise that the plaintiffs are not asking the Court to fashion a far-reaching solution to global climate change. Rather, the plaintiffs are asking the Court to decide the narrower question whether air emissions from six domestic coal-fired electricity plants are causing a public nuisance and injury.

Kivalina v. ExxonMobil Corp.

One of the most notorious climate change lawsuits was issued in the California Court in the case of *Native Village of Kivalina and City of Kivalina v. ExxonMobil Corp.* The suit was filed in U.S. federal court in San Francisco against 24 oil, coal and electric companies.

The plaintiffs alleged that the defendants’ emissions are partially responsible for coastal destruction in Kivalina, Alaska. The plaintiffs pled nuisance, and concert of action and civil conspiracy to deceive the public about the GHGs they emit that contribute to global warming that threatens the community's existence. The lawsuit claimed damages of \$400 million, representing the cost to relocate the citizens of Kivalina.

On September 30, 2009, the Court dismissed the plaintiffs’ claim because the claim sought to impose liability and damages on a scale unlike any prior environmental pollution case and for which there is no guidance available to the Court. For this reason, the Court held that the issue was non-judicial.

Comer v. Murphy Oil, USA

Comer v. Murphy Oil was brought by victims of Hurricane Katrina against oil, gas and electric companies for their contributions to climate change. Like *California v. General Motors*, the claim was dismissed by the lower court on two grounds: the claims were non-justiciable as a political question, and a lack of standing of the plaintiffs (the harm suffered was found not to be traceable to individual defendants).

On October 16, 2009, the Court of Appeals partly reversed the lower court dismissal to permit the claims pleaded in private and public nuisance, trespass and negligence to proceed as they are justiciable. The dismissal of the claims for unjust enrichment, civil conspiracy and fraudulent misrepresentation was upheld on appeal.

What kind of climate change litigation can we expect in the future?

- ◆ **Constitutional challenges where there is a clash between federal and provincial/state jurisdiction to regulate climate change**
- ◆ **Misrepresentation and oppression claims brought by investors and shareholders concerning the non-disclosure or incomplete disclosure of carbon emissions by public companies**
- ◆ **Suits about adaptation to a changing environment due to climate change where the change in the environment was not properly taken into account in the siting of buildings and the design of built structures**
- ◆ **Suits challenging insurance policy exclusions relating to changes in local weather patterns, acts of God and climate change *per se*.**

ENVIRONMENTAL LAW MOOT COURT COMPETITION

Saturday, February 19, 2011
Ontario Court of Appeal
130 Queen Street West, Toronto, Ontario

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