The Rising Tide of Global Warming Claims
Insurance Coverage and Litigation Implications

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Introduction

The causes and effects of climate change are hot topics in social and political arenas. Who is to blame and who will pay the price for the costs associated with climate change are quickly becoming hot topics in the Canadian legal arena. Climate change litigation has come to Canada and is expected to follow, to some extent, the path being paved in the United States.

Climate Change Litigation is coming to Canada: Unique Canadian Risks

The permanent loss of ecological assets as a result of irreversible changes caused by climate change is not unique to Canada; however, there are some uniquely Canadian issues. Some examples include:

A. Permafrost degradation may contribute to increased exposure to liabilities connected with pollution. In northern Canadian communities with above-ground water and sewer systems, the melting permafrost could rupture the systems thereby causing widespread contamination. Owners of these water and sewer systems could be liable for compensatory and punitive damages, clean-up costs, and for the failure to upgrade existing infrastructure. Energy pipelines built over permafrost terrain could also be at risk of pipeline rupture and leakage resulting in serious contamination of land and water systems with extremely high clean up costs. Abandoned mining operations with containment structures such as tailings dams which rely on permafrost may also be at risk of breaching and releasing toxic tailings. Northern structures are also expected to sink and settle and northern roads and rail lines may fail as permafrost shifts and melts.

B. The melting of icecaps in Canada’s north is providing further options for oil exploration and deepwater oil drilling. The recent BP disaster in the Gulf Coast has brought the impact of such a catastrophe to the forefront, including: environmental costs to the affected area, the devastating impact on the local economy, and the financial costs associated with the cleanup. Environmental experts from across Canada agree that the environmental impact of a similar oil spill in Canada’s north would likely cause more loss and damage than that being experienced in the Gulf Coast largely due to the added challenges associated with the clean-up and the uniquely sensitive ecological landscape of the north.

C. New shipping lanes are emerging in the Northwest Passage. This may raise issues of marine liability. If a vessel carrying hazardous material or oil strikes ice or runs aground (as recently happened with a cruise ship) and releases toxic materials, the cleanup costs of fuel alone in the distant waters of Canada’s north would be extremely costly while the environmental, economic and social impact would be widespread. Increased tourism in Canada’s north and, specifically, through the Northwest Passage is also contributing to the growing risk of foundering ships which pose further challenges including potential liabilities and a shortage of rescue and evacuation efforts.

D. Seasonal businesses may be impacted as a result of climate change related environmental anomalies and may suffer corresponding business interruption losses. For example, could a ski resort bring a claim against power generators because there is not enough snow on the surrounding mountains?

E. Rising ocean temperatures are contributing to wide spread effects. Fish species are expected to migrate to colder waters or, alternatively, may disappear altogether. Traditional fishing grounds near communities which rely on fishing both as a food source and as part of the local economy are expected to be seriously affected. Reduced ice flows are purportedly making hunting more difficult and more dangerous for Canada’s Inuit. Hurricanes are becoming increasingly common and are growing in
severity along Canada’s eastern coast. The costs associated with extreme storms and hurricanes in the Maritime Provinces are expected to rise and begin to mirror (to a lesser extent) those experienced in the Gulf States.

F. Serious electrical storms combined with higher temperatures have caused a rash of serious wildfires in British Columbia and Ontario in 2010. Blackouts (and related property damage), a lack of clean running water, reduced air quality and widespread property damage are only some of the effects of the wildfires.

G. Changes in precipitation patterns are causing increased risks of flooding and droughts and corresponding property damage. In the Prairies, there is an increase in the risk of drought, which affects agricultural production, hydro-electric power generation and even oil sands development.

H. The oil sands in Alberta are becoming increasingly controversial as the environmental impact of oil exploration is being further understood. Litigation related to the oil sands is expected to be a growing trend in upcoming years.

Why is Climate Change Litigation Coming to Canada

There are 3 main reasons why climate change litigation is expected to become more prominent in Canada:

A. Climate change is real and is causing immeasurable damage. The risks associated with climate change cost millions of dollars to mitigate, adapt to and reverse (if even possible) and affect all Canadians.

B. Scientific research and advancement on the causes, effects and implications of climate change is progressing at a remarkable pace. This research may reach the point where it can support allegations of liability for individuals, corporations, industries, provinces, and countries responsible for emitting greenhouse gases or who are affected by greenhouse gas emissions. It is also providing assistance to quantify the financial costs of climate change.

C. Climate change litigation in the United States is rapidly gaining momentum and is moving past the initial growing pains commonly associated with novel litigation. It is generally expected that this trend will move north to Canada; however, Canada does not share the litigious tendencies of our southern neighbour.
Where is Climate Change Litigation Heading

At this point we have identified six types of climate change cases which may find their way into Canadian Courts and administrative tribunals:

A. Climate change regulation litigation;

B. Regulatory actions commenced pursuant to the Canadian Environmental Protection Act, 1999 (1999, c. 33) (“CEPA”);

C. Actions against governmental agencies or officials seeking to compel them to enforce climate change legislation;

D. Actions aimed at industries and individual corporations that allegedly contribute to climate change and are based on traditional tort theories such as public and private nuisance and negligence; and

E. Litigation concerning the constitutionality of climate change legislation under the Canadian Charter of Rights and Freedoms (the “Charter”).

Climate Change Regulation Litigation

Areas of climate change regulation litigation in Canada include:

A. Litigation to compel government agencies to regulate: If a government authority fails to regulate a cause of climate change captured by the language of a statute, then a party with standing may bring the matter before the Court.

B. Regulatory enforcement litigation: This may arise where, for example, an enforcement agency may commence litigation against a regulated emitter for exceeding its emission allowance.

C. Judicial review of regulatory decisions: New industrial projects require regulatory approval and often environmental assessment. Where the governing legislation allows, a party can apply to have the decision of boards, commissions and tribunals subject to judicial review which allows the moving party to challenge the regulatory decision. This was the case the development of the Kearl Oil Sands project in Alberta by Imperial Oil.

Regulatory Actions: The Canadian Legislative Framework

Most legislation does not address global warming. The Canadian Environmental Protection Act 1999, (1999, c. 33) (“CEPA”) is the primary federal legislation which is designed to protect the Canadian environment and to “remove threats to biological diversity through pollution prevention, the control and management of the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes, and the virtual elimination of persistent and bioaccumulative toxic substances.”

Pursuant to Section 22 of CEPA, an individual may bring an Environmental Protection Action against a person who committed an offence under CEPA. The right arises where the Minister of Environment fails to respond to

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1 The Canadian Environmental Protection Act 1999, (1999, c. 33), Preamble.
a complaint by conducting an investigation and reporting pursuant to section 18 of CEPA within a reasonable amount of time or where the investigation is unreasonable. In an Environmental Protection Action, the moving party may seek relief pursuant to section 22(3) of CEPA which may include:

(a) a declaratory order;
(b) an order, including an interlocutory order, requiring the defendant to refrain from doing anything that, in the opinion of the court, may constitute an offence under this Act;
(c) an order, including an interlocutory order, requiring the defendant to do anything that, in the opinion of the court, may prevent the continuation of an offence under this Act;
(d) an order to the parties to negotiate a plan to correct or mitigate the harm to the environment or to human, animal or plant life or health, and to report to the court on the negotiations within a time set by the court; and
(e) any other appropriate relief, including the costs of the action, but not including damages.

Pursuant to section 23 of CEPA, an Environmental Protection Action may only be brought within a limitation period of two years from the date when the plaintiff became aware (or should have become aware) of the conduct on which the action is based. An Environmental Protection Action may not be brought against a person if that person was convicted of an offence under CEPA if environmental protection alternative measures within the meaning of CEPA were used to deal with the person in respect of the alleged conduct on which the action is based (section 25).

Section 30 of CEPA sets out the available defences in an Environmental Protection Action:

30(1) The following defences are available in an environmental protection action:
(a) the defence of due diligence in complying with this Act and the regulations;
(b) the defence that the alleged conduct is authorized by or under an Act of Parliament;
(c) except with respect to Her Majesty in right of Canada or a federal source, the defence that the alleged conduct is authorized by or under a law of a government that is the subject of an order made under subsection 10(3); and
(d) the defence of officially induced mistake of law.

(2) This section does not limit the availability of any other defences.

Section 39 of CEPA provides for injunctive relief. Section 40 allows for a civil cause of action for loss or damage as a result of conduct that contravenes any provision of CEPA. The plaintiff may bring an action to recover an amount equal to the loss or damage suffered and for compensation for the costs that the plaintiff incurs in connection with the matter and in proceeding under CEPA.
Actions seeking to compel government to enforce legislation

The first and only action so far seeking to compel government to enforce climate change legislation in Canada is Friends of the Earth v. Canada (Governor in Council), [2009] 3 F.C.R. 201. Friends of the Earth (FoE) brought three applications for judicial review each seeking a declaration and mandatory relief in connection with a succession of alleged breaches of duties said to arise under the Kyoto Protocol Implementation Act, S.C. 2007, c.30 (“KPIA”). At issue in this case was: (1) whether FoE had standing to bring the applications; (2) Whether section 5 of the KPIA imposed a justiciable duty upon the Minister of the Environment (the “Minister”) to prepare and table a Climate Change Plan that is Kyoto compliant; and (3) whether sections 7 and 8 of the KPIA imposed justiciable duties upon the Governor in Council (the “GIC”) (i.e. the Federal Cabinet) to make, amend or repeal environmental regulations within the timelines set in KPIA.

The KPIA was introduced as a private member’s bill (Bill C-288) and was supported by all three opposition parties which, together, had more seats in Parliament than the minority Conservative government. The KPIA was inconsistent with the stated government policy - that Canada could not meet its Kyoto obligations. It was an attempt by the opposition parties to compel the government to act in a manner that was at odds with its stated policy. The litigation ultimately raised the question of whether Parliament could compel the Minister to act in a manner contrary to the policy of the party forming the government. ²

Mr. Justice Barnes of the Federal Court dismissed the applications. He found that the issue of FoE’s standing was to be resolved solely on the basis of the justiciability of the substantive issues it raised. The justiciability of the issues was a matter of statutory interpretation of the KPIA directed at identifying whether Parliament intended that the statutory duties imposed under the KPIA upon the Minister and Cabinet were to be subjected to judicial scrutiny and remediation. Mr. Justice Barnes concluded that the Court has no role to play in reviewing the reasonableness of the government’s response to Canada’s Kyoto commitments within the four corners of the KPIA. He acknowledged that there may be some limited role for the Court in the enforcement of clearly mandatory elements of KPIA (as determined on the face of the KPIA relying on the principles of statutory interpretation); however, policy-laden considerations which include the necessary involvement of non-governmental parties are not the proper subject matter for judicial review. Mr. Justice Barnes explained that the KPIA creates a system of public and parliamentary accountability which is not open to substantive judicial review. While FoE’s applications raised important questions, these questions were “inherently political” in nature and could only be addressed in a political forum.

Mr. Justice Barnes’ decision was upheld by the Federal Court of Appeal³ and the application for leave to appeal to the Supreme Court of Canada was dismissed with costs, without reasons.⁴

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² Dennis Mahony, Climate Change in Canada (Aurora, Ontario: Canada Law Book, 2010) at 16.50.10.
⁴ 2009 S.C.C.A. No. 497 (S.C.C.)
Climate Change Tort Litigation

Climate change tort litigation is expected make its way into Canadian Courts; however, this move will not come without challenges.

Should tort law principles be applied to the problem of climate change in Canada?

Those who defend applying tort law principles to climate change maintain that tort law provides a useful framework to analyze the best ways to allocate costs associated harms arising from different sources. Others take the view that climate change is better left to regulation or taxation.

Who will be the parties to climate change tort litigation?

The pool of potential plaintiffs is large and may include the general public, individuals, cities and towns, First Nations, corporations, provinces, and countries. Because of the high costs that will inevitably follow climate change litigation, private claims may well be brought through class actions, provided that difficulties in the class certification process can be overcome by plaintiffs.

The pool of potential defendants is equally large and may include mining operations, power generators, oil refineries, automobile manufacturers, and governments.

Negligence

To establish negligence, a plaintiff must demonstrate either: (1) that the defendant owed the plaintiff a prima facie duty of care based on a category of negligence recognized by the Courts in the past or (2) that law of negligence should be extended to reach such a situation. In a climate change action, the plaintiff would have to create a new duty relationship which would require the plaintiff to go even further than this general test and demonstrate that there are no “residual policy considerations” that exist that “ought to negate or limit” the prima facie duty of care. Liability would only be imposed and a new category of negligence established if no such policy considerations were found.

Residual policy considerations which may negate a duty of care may include the following considerations:

a. Does the law already provide a remedy?

b. Would recognition of the duty of care create the potential for unlimited liability to an unlimited class?

c. Are there other reasons of broad policy that suggests that the duty of care should not be recognized?

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The standard of care demanded of the party owing the duty of care is based on an objective standard of what is considered reasonable in the circumstances. In formulating this standard, courts would have to inquire into the presence of a reasonably foreseeable risk and may consider a number of other factors including: the likelihood of damage occurring; the seriousness of the threatened harm; the cost of preventative measures; the utility of the defendant’s conduct; any circumstances of emergency compliance by the defendant with approved practice or custom; and the defendant’s post-incident precautions. In climate change litigation, the knowledge that will be attributed to the reasonable person expands with the development of human knowledge.

Public and Private Nuisance and Strict Liability

Nuisance focuses on the harm suffered rather than on prohibited conduct. There are two torts of nuisance: public nuisance and private nuisance. A public nuisance is a criminal or quasi-criminal offence which involves actual or potential interference with public convenience or welfare. It must materially affect the reasonable comfort and convenience of a substantial number of the public. There are two categories of public nuisance. The first category includes interferences with the rights and interests of the public which all persons share in common (i.e. polluting the air). The second category arises from widespread interference with the use and enjoyment of private land. In such a case, the public nuisance arises where the defendant’s activities have created multiple private nuisances that may be remedied either by each landowner as a private nuisance or cumulatively as a public nuisance. Private Nuisance is an unreasonable interference with the use of enjoyment of land by its occupier. There have been no private or public climate change nuisance actions in Canada.

Strict Liability offences may also be imposed where the Rule in Rylands v. Fletcher is met:

(a) is there a “non-natural use of land,” and
(b) an “escape” from the land of “something likely to do mischief if it escapes.

The rule in Rylands v. Fletcher may not be easily met for climate change litigation because most greenhouse gas emissions are now commonplace. Also, the term “escape” may be ill-suited to describe the release of greenhouse gases, which tend to move freely and are knowingly released.

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11 Osbourne, op. cit., p. 363.
Common Issues in Tort Actions

1. Causation: all potential tort actions involving climate change will require plaintiffs to prove that the actions of the defendants caused or materially contributed to the harm suffered and the damage caused.

2. Limitation issues: the limitation periods for various causes of action differ in most provinces. Reference should be made to the applicable provincial limitations legislation.

3. Damages: the plaintiff must prove that they suffered loss and damage by reason of the defendants’ negligence.

   (a) The doctrine of waiver of tort: the plaintiff elects to waive its claim for tort damages and instead requires that the defendant disgorge any gains flowing from its wrongful conduct. This doctrine has recently been considered by Canadian courts and there is uncertainty as to its application in tort claims mainly because courts are reluctant to move too far away from common law principles of causation and damages. The doctrine of waiver of torts has been considered, but not necessarily accepted, in a number of cases, including: Pro- Sys Consultants Ltd. v. Infineon Technologies AEG, 2008 BCSC 575; rev’d on other grounds 2009 BCCA 503; see Serhan v. Johnson & Johnson (2006), 85 O.R. (3d) 665; aff’g (2004) 72 O.R. (3d) 296. Leave to appeal to Court of Appeal refused, leave to appeal to SCC refused; Heward v. Eh Lily and Co. (2008), 295 D.L.R. (4th) 175; aff’g [2007] O.J. no. 404; Re: The Ford Motor Company et al., 2006 BCSC 712; Koubi v. Mazda Canada Inc., 2010 BCSC 650; and 321665 Alberta Ltd. v. Mobile Oil Canada Ltd., [2010] A.J. no. 922).

   (b) Natural Resource Damages: where affected parties sue for the cost to stop or clean up a problem and for the loss of recreational value. See British Columbia v. Canadian Forest Product Ltd.13 where the Supreme Court of Canada, in obiter, acknowledged that natural resource damages may be a proper head of damage, but refused to allow the damage in this case due to lack of proof.

4. Conspiracy to injure by unlawful means

A conspiracy to injure by unlawful means arises where two or more persons agree to act unlawfully and either the predominant purpose of the activity is to harm the plaintiff or the conduct is directed at the plaintiff and the defendants should have known that harm was likely to result.14 “Unlawful” includes independent tortious acts such as nuisance and negligence. Allegations of conspiracy relating to climate change have not come before Canadian courts.

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13 British Columbia v. Canadian Forest Product Ltd. 2004 SCC 38
Litigation concerning the constitutionality of climate change litigation under the Canadian Charter of Rights and Freedoms (the “Charter”).

A Charter challenge may not be advanced against an individual or corporation. The Charter applies to Parliament and the government of Canada and to the legislatures and governments of the Provinces. The Charter may apply to non-governmental actors where such actors are under a contract or authority to perform a government act.  

Four potentially significant areas where the Charter and environmental law may intersect are: (1) environmental laws that “target” particular groups and in doing so, potentially infringe equality rights under section 15 of the Charter; (2) regulatory schemes with substantive requirements which infringe section 7 rights to “life, liberty and security of the person” contrary to the “principles of fundamental justice” in the absence of enhanced procedural fairness rights; (3) absolute/strict liability offences which are arbitrary or unfair and infringe section 7 rights to liberty and security of the person; and (4) investigative processes established by environmental statutes which infringe Charter rights under section 8 (unreasonable search and seizure), section 9 (arbitrary detention or imprisonment), section 10(b) (the right to retain and instruct counsel), section 11(c) (the right not to be compelled to be a witness in a proceeding against oneself), section 11(d) (the presumption of innocence) and section 13 (the witness’s right to protection against self-incrimination).  

16 Dennis Mahony, Climate Change in Canada (Aurora, Ontario: Canada Law Book, 2010) at 3:20.40.
Insurance Coverage for Climate Change Litigation

The risks associated with climate change are numerous and have the potential to represent an unprecedented challenge to the insurance industry in terms of the exposure for losses under past, current and future insurance policies. First party claims will be faced with the rudimentary question whether losses arising from natural occurrences but which may be otherwise associated with climate change are covered by insurance policies. The outcome of third party claims which allege that emitters of greenhouse gas may be responsible for injuries or damages caused or exacerbated by climate change will ultimately depend on the outcome of climate change litigation.

Duty to Defend

Climate change raises important coverage issues regarding an insurer’s duty to defend. The duty to defend arises where there is a “mere possibility” that the claim made against the insured is covered. The onus is on the insured to establish that, on a balance of probabilities, the allegations made by the plaintiff, if proved, bring the claim within the four corners of the relevant policy. If that threshold is met, the onus then shifts to the insurer to show that the claim made falls outside the coverage provided by the policy because of an applicable exclusion clause. If there is an exception to the exclusion clause, the insured bears the burden of establishing that the exception applies.

The Supreme Court of Canada in *Monenco Ltd. v. Commonwealth Insurance Co.*, reviewed the principles applicable to a duty to defend and confirmed that the insurer’s duty to defend will arise where, on a reasonable reading of the pleadings, a claim within coverage has been made. In this regard, all parties must carefully interpret the policy, and in particular the exclusion clauses, which will confirm whether a duty to defend arises in the circumstances.

Principles of Contractual Interpretation that apply to Insurance Policies

When interpreting an insurance policy, the court will examine the particular policy and the surrounding circumstances to determine if the loss or damage is within the coverage. In doing so, the following rules should be observed:

1. the contra proferentum rule - ambiguities in insurance contracts are to be interpreted against the drafter of the policy;
2. the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
3. where the policy is ambiguous, give effect to the reasonable expectations of the parties.

In any claim, the insured party will face several hurdles.

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Hurdle 1: Fortuity

**Principle:** To determine if damage falls within a policy, the court must determine its cause by looking at all of the events which gave rise to the damage. The damage is covered if it is fortuitous, meaning that the damage would not have occurred “but for” or without an act or event which was not to be expected in the ordinary course of things: *C.C.R. Fishing Ltd. v. British Reserve Insurance Co.*, [1990] 1 S.C.R. 814 (S.C.C.) The insured bears the onus to demonstrate that the loss was fortuitous.

Hurdle 2: Exclusion Clauses

**Principle:** Coverage provisions should be construed broadly and exclusion clauses narrowly.

Waves Exclusion clauses:

Example:

“Waves, tides, tidal waves, and the rising of, the breaking out or the overthrow of, any body of water, whether natural or man-made”.


**Seepage, rain, snow, hail and humidity exclusions**

Examples:

“by seepage, leakage or influx of water derived from natural sources through basement walls, doors, windows or other openings, therein, foundations, basement floors, sidewalks, sidewalk lights, or by the backing up of sewers, sumps, septic tanks or drains, unless concurrently and directly caused by a peril not otherwise excluded in Clause 5.B hereof.”

or

“by the entrance of rain, sleet or snow through doors, windows, skylights or other similar wall or roof openings unless through an aperture concurrently and directly caused by a peril not otherwise excluded in Clause 5.B hereof.”

or

“by dampness or dryness of atmosphere, changes of temperature, freezing, heating, shrinkage evaporation, loss of weight, leakage of contents, exposure to light, contamination, pollution, change in colour or texture or finish, rust or corrosion, marring, scratching or crushing, but this exclusion does not apply to loss or damage caused directly by “Named Perils”, rupture of pipes or breakage of apparatus not excluded under paragraph (m) of Clause 5.A. hereof, theft or attempt thereof or accident to transporting conveyance. Damage to pipes caused by freezing is insured provided such pipes are not excluded in paragraph (m) of Clause 5.A. hereof”
“loss or damage caused by cold weather, rain, sleet, snow, sand or dust, unless same shall enter the building through an aperture concurrently broken therein by a wind or hail storm. …”


Faulty workmanship or design and wear and tear and gradual deterioration exclusions

Example:

“With respect only to property in the course of construction, installation or erection: faulty workmanship, faulty materials, faulty construction or error in design, unless physical damage not otherwise excluded by this policy results, in which event this policy shall not cover such resulting damage.”

or

“Damage which can be reasonably and accurately described as day to day wear and tear or gradual deterioration (but this exclusion shall not be construed to void any replacement cost evaluation provided in this policy); inherent vice or latent defect in any part of the insured property or normal settling, normal shrinkage or normal expansion of buildings or foundations.”

or

“wear and tear, gradual deterioration, latent defect, inherent vice, or the cost of making good faulty or improper material, faulty or improper workmanship, faulty or improper design, provided, however, to the extent otherwise insured and not otherwise excluded under this Form, resultant damage to the property is insured.”

Insurance Coverage for Climate Change Litigation

Flood exclusions

Example:

“...by flood, including waves, tides, tidal waves, tsunamis, and the rising of, the breaking out or the overflow of, any body of water, whether natural or man-made...”

or

"(t)he discharge, backing up or overflow of water from ... a sewer ... (or) (s)eepeage or influx of surface or ground water derived from natural sources" through a basement or windows "unless concurrently and directly caused by a peril not otherwise excluded ..."


Mechanical or electrical breakdown exclusions

Example:

“mechanical or electrical breakdown or derangement in or on the ‘premises;’


Pollution exclusions

Example:

bodily injury or property damage arising out of the “actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants”

Hurdle 3: Limitation issues and the Policy Period

**Principles:** The Plaintiff bears the onus of establishing that the loss occurred within the policy period and within the two year limitation period prescribed under *The Insurance Act*. Statutory Condition 14 of the Act\(^{20}\) provides:

> 14 Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract shall be absolutely barred unless commenced within two years next after the loss or damage occurs.

(emphasis added)

The Policy provides coverage for a defined period of time. The event upon which the obligation to indemnify must occur during this time period.\(^{21}\)

The obligation to indemnify typically arises where there is “direct physical loss of or damage to the property insured”.

The so-called “Trigger Theories”:

1. Manifestation theory: this theory holds that injury or damage does not occur until it becomes apparent or manifests itself (i.e. the clock starts running when the damage is apparent)

2. Exposure theory: pursuant to this theory, the loss is fixed at the time the insured property becomes exposed to a peril insured against which then later causes damage (i.e. the clock starts running when the property is exposed to the risk). Canadian and English Courts are almost unanimous in applying the exposure theory.\(^{22}\) A loss may be said to occur when the insured peril operates upon the subject matter of the insurance, and the fact that the full extent of the loss is no discovered until after the expiration of the policy is immaterial. This may be subject to one exception: the policy may, however, make it clear that the event upon which the insurer has engaged to pay the assured is not the occurrence of a loss caused by a peril insured against.

3. Continuous trigger theory: pursuant to this theory, damage which develops over time represents a continuous series of new injuries triggering every policy in effect from the first exposure to the manifestation of the damage. This theory is very rarely applied by Canadian courts.

4. Injury in fact theory: this theory requires a determination of the date the damage occurred as a matter of fact. There is no need to find the exact date on which the damage occurred, just whether the damage occurred before or after the effective date of the policy.

If the manifestation theory applied, the policy would have read as follows: “the discovery of direct physical loss of or damage to the property insured” or “manifestation of direct loss”.

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\(^{20}\) *The Insurance Act, C.C.S.M. c. 140*

\(^{21}\) *University of Saskatchewan v. Fireman’s Fund Insurance Co. of Canada* [1998] 5 W.W.R. 276.

\(^{22}\) *University of Saskatchewan, supra.*
The manifestation theory conflicts with the fundamental concept of “risk”. A risk is a hazard or chance of misfortune or loss at some time in the future. If the loss has already occurred, it follows that the loss is no longer a risk. An all-risk policy provides insurance coverage for events that may occur in the future. The manifestation theory would require an insurer to pay for loss and damage which occurred before it came on the risk. To place such a burden on an insurer would defeat the principles of indemnity and would instead require an insurer to warrant or guarantee the condition of the property insured against hidden damage.

Conclusion

The Canadian landscape is one of the most pristine in the world; however, climate change is leaving a devastating and possibly irreversible mark. Climate change litigation has only just made its way into Canadian Courts, but there is every indication that it represents a new wave of litigation that will make a unique mark on the Canadian judicial landscape. Insurers and risk managers are and will have to continue to assess the risks associated with global warming claims to determine how to respond to key issues including, coverage, insurer’s duty to defend claims, application of exclusions, and assessing loss and damage that may be claimed in often complicated and unique claims.
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Bailey was the recipient of the D.A. Thompson Prize for the highest standing in Employment Law and the Robert I. Soronow Q.C. Prize in Dispute Resolution (Theory and Practice).
Full-Service Capabilities, Boutique Style Expertise

Thompson Dorfman Sweatman LLP (TDS) is one of the leading full-service business, employment and civil litigation law firms in Manitoba, with over 120 years of history providing legal services to its clients locally, nationally and globally across 20+ areas of practice. With a core focus on litigation, labour and employment and corporate commercial law, our team of over 80 lawyers offers services in seven languages including French and Spanish, and has the expertise necessary to help clients take advantage of every opportunity and to develop creative solutions to legal challenges experienced in their business in a timely and cost-effective way.

While assisting business, government, institutional and individual clients with their Canadian legal needs, wherever and whenever they may arise, TDS, its lawyers and staff are committed to supporting their community. Many TDS lawyers hold positions of leadership in community service support of the arts, legal education and in the legal profession.

National Recognition

TDS has long been recognized as a centre of excellence in the areas of business law, labour relations law, employment law, civil litigation and dispute resolution.

For the third consecutive year, Lexpert®, The Business Magazine for Lawyers has recognized TDS as the leading Manitoba corporate law firm, placing TDS at the centre of its 2010 “Bull’s-Eye” ranking of corporate/commercial law practices in Winnipeg. TDS is the only firm that hits the centre of the target on the current “Bulls-Eye” ranking for Winnipeg corporate law firms. TDS has also long been recognized as a centre of excellence in the areas of labour relations, employment law and civil litigation. A number of our Partners have been recognized by Lexpert® and The Best Lawyers in Canada® as leaders in their particular areas of practice.

Global Connections

TDS is one of the founding members of Lex Mundi, the world’s leading association of independent law firms. As the exclusive Manitoba member firm of Lex Mundi, TDS has worldwide connections to quality representation, at preeminent law firms across 560 offices. Lex Mundi’s members represent every province of Canada, every state of the United States and 100 countries throughout the world and practice in more than 50 areas of law. In order to qualify for and maintain membership in Lex Mundi, member firms must meet strict quality control criteria.