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ONTARIO AND B.C. COURTS ALLOW CLAIMS AGAINST THE GOVERNMENT FOR CHANGED OR STALLED DEVELOPMENT PROJECTS TO PROCEED

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While it may not qualify as a trend, over the past month courts in both Ontario and British Columbia have refused to strike claims against the government for frustrating development projects through delays or changes in policy. It is too early to tell whether the plaintiffs will successfully meet their high evidentiary burden of establishing misfeasance in the Ontario case of *Capital Solar Power Corp. v Ontario Power Authority (2015) ONSC 2116* and negligence and misfeasance in the B.C.case of *Carhoun & Sons Enterprises Ltd. v Canada (Attorney General) 2015 BCCA 163*. That will be a matter for trial. However, it should be of interest to both developers and regulators alike that the courts continue to give serious consideration to claims which arise out of the economic impact of delays and/or changes in regulatory approvals. Plaintiffs have their work cut out for them. If they can't prove that the regulator was negligent in carrying out its statutory mandate they will need to show bad faith. The Ontario Court of Appeal late in 2013 in *Trillium Power Wind Corporation v Ontario (Natural Resources) 2013 ONCA 683* permitted a claim to proceed after the Ontario government cancelled Trillium's off-shore wind farm project. Interestingly in that case, the Court permitted the action to proceed only on the very narrow ground that the suspension or cancellation was specifically targeted at Trillium in order to injure it by crippling its financial capacity. "We would not permit (the action) to continue in conjunction with what we would call the 'political/electoral expediency' allegations." (at par.42) According to the Court, decisions reached on the basis of political expediency did not, on their own, constitute bad faith for the purposes of the tort of misfeasance in public office.(at par.51) Ministerial policy decisions responding to public pressure, even where they are designed to shore up the government's electoral base, are part and parcel of the policymaking process.(at par.54)

Capital Solar Power Corp. v Ontario Power Authority ("OPA") The plaintiff developed and sold solar energy under the "microFIT" program. This program encouraged small business, homeowners and farmers to develop small renewable energy projects. Developers were paid a fixed price for the electricity over a 20 year contract. The OPA, as agent of the government of Ontario, established rules for the program and determined whether an application met the eligibility requirements for a contract. The rules for changing the price and program required notice of the amendment before its effective date. In September 2011, the plaintiff invested a substantial amount of time and money recruiting MicoFIT customers. Approximately 275 of these customers applied for the program that month and 175 of those obtained an offer to connect from a Local Distribution Company; a precondition under the microFIT rules in place at the time for any Conditional Offer of a contract. In October 2011 the OPA announced that it was reviewing the program and would develop new rules and prices. In April 2012 the Minister gave a new direction to the OPA that the solar roof-top price of 80.2 cents per kilowatt hour was reduced to 54.9 cents effective August 31, 2011. Partly as a result of the retroactively reduced price, the plaintiff lost all its customers including those 175 who had received offers to connect. It sued the OPA based on misfeasance in public office, claiming loss of potential profit associated with these customers and the loss of significant resources in recruiting them. In July 2012 it laid-off all its employees. The tort of misfeasance requires proof of deliberate unlawful conduct and awareness that the conduct is unlawful and likely to injure the plaintiff. The plaintiff's pleadings alleged that the OPA amended the program without giving notice on its website before the effective date and therefore acted deliberately and unlawfully. The OPA countered that when the Minister made its directive, the OPA could disregard its own rules. The judge, applying the test for striking a claim, held that it wasn't plain and obvious that the OPA's rules had become irrelevant just because of the relationship between the OPA and the Minister (at par.22)

Carhoun & Sons Enterprises Ltd. v Attorney General of Canada The respondent, a property developer who proposed to fill ravines as part of its planned development, applied for authorization to be exempted from s.35 of the *Fisheries* Act R.S.C. 1985, c.F-14. The exemption could not be granted at that time without conducting an environmental assessment under the then applicable provisions of the *Canadian Environmental Assessment* Act S.C. 1992, c.37 ("CEAA") and the *Law List Regulations* S.O.R. /94-636 thereunder. The Department of Fisheries and Oceans ("DFO") refused the authorization and initially refused to conduct an environmental assessment which was a precondition to granting the authorization. After two subsequent requests by the developer, the DFO conducted a screening assessment and issued an authorization with conditions. However by then the developer's financing had collapsed and it sued Canada for misfeasance and negligence. The Court considered that the developers' case at its highest, alleged that the government had been negligent in carrying out its statutory duties under both the *Fisheries* Act and CEAA. Canada contended that the exercise of its

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statutory powers involved a difficult and delicate discretionary decision involving public policy, commanding deference and negating a duty of care. The developer argued that a relationship of sufficient proximity between Canada and the developer existed through the direct interactions and communications between the parties and that the only barrier to a finding of proximity would be an express or implicit statutory prohibition on Canada considering its economic interests. The Court found that there were several features of the legislative scheme which were consistent with a private duty of care toward the developer. For example, the legislative scheme was directed at individual applications for an exemption and individual consideration by the Minister or delegated officials. The Regulations imposed specific timelines for various stages of the CEAA screening process and these timelines demonstrated a recognition of a proponent's interest in the approval process being moved along the chain expeditiously. The Court did acknowledge that the Minister was charged with protecting the fishery and the environment, responsibilities that were to be carried out in the public interest. The Court could not conclude however, at this stage of the proceedings, that it was plain and obvious that Canada and Carhoun were not in a sufficiently proximate relationship since the legislation respected both private and public interests which weren't irreconcilable. The onus on Canada to establish that there were residual policy reasons for negating the duty of care had not yet been met. The delay could amount to a true policy decision, but it had been pleaded that the CEAA screening process was incompetently carried out, such that it took longer than it should have. This would amount to operational negligence and during a motion to strike the pleadings had to be accepted as true.

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