Climate Change Litigation: Potential Reasons Canada Lags Behind the United States

Morgan McDonald

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Morgan McDonald & Kristen Brewer
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Introduction

As has been well documented, human activity has disrupted the greenhouse effect such to create the phenomenon of climate change that looms as a threat to our environmental security.\(^1\) Yet, in the face of this overwhelming evidence governments remain inadequately inactive by having failed to enact comprehensive legislation regulating greenhouse gas (GHG) emissions. Since the political realm has failed to take necessary measures, vigilant climate litigants have turned to the judicial branch to force GHG reform. Although the US and Canada support similar GHG emitting corporations and have similar legal systems, their experience in climate litigation is strikingly different. US courts began seeing climate change litigation in 1989 under the NEPA. These claims continued at steady one or two cases per year until 2004 when climate actions surged. Since 1989 US courts have seen a total of 461 climate cases, with a record 170 cases filed in 2010, and just over 50 filed in 2011.\(^2\) In stark contrast, Canada has seen only two cases that really turned on climate change.\(^3\) The remarkable absence of climate litigation in Canada is concerning because these actions play an essential role in the overall

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\(^3\) Friends of the Earth v. Canada (Governor in Council) (Federal Court, 2008) and Pembina Institute for Appropriate Development, et al v. Canada (Attorney General) (Federal Court of Canada, 2008) are the lone climates action in Canada. Here, plaintiffs sought judicial review of a decision made by the Joint Review Panel under the Canadian Environmental Assessment Act (CEAA), which recommended approval of oil sands development on the basis that the Panel’s report failed to explain why the anticipated GHGs from the project were “insignificant.” The Federal Court granted the application, ruling that the Joint Panel reasons lacked any rationale “as to why the intensity-based mitigation would be effective to reduce the GHG emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance.” The Joint Panel subsequently issued an addendum to its reasons and provided the necessary rationale, before this could occur the Minister of Fisheries and Oceans retracted the federal Fisheries Act authorization, making the decision somewhat of a nullity.

Some lists include Citizens of Riverdale Hospital v. Bridgepoint Health Services (O.J. No. 2527, 2007); however, GHG emissions were far from the heart of the case where a citizen’s group requested judicial review of a decision allowing the demolition of a hospital in the City of Toronto for many environmental reasons. Further, some note Weaver v. Corcoran et al. (British Columbia Supreme Court, Canada, 2010); however, this case was truly a libel action by climate scientist Andrew Weaver against the National Post.
regulatory framework of the United States through their legal, economic, and socio-legal impacts: a role that is not being undertaken by anyone in Canada.

This paper compares and contrasts several differences between US and Canadian legal systems that could explain this significant distinction. The first section of this paper concerns potential reasons why Canadian courts have not seen climate litigation akin to the US. Reasons considered include: varying justiciability concerns and the corresponding doctrines that serve to limit entrance to the courts; differences between climate statutes and common law jurisprudence in each country; the effect of a judicial system that at times creates greater financial restrictions to judicial access; and divergent legal cultures that underlie each country’s jurisprudence. Further, section two contends that notwithstanding these barriers to Canadian climate litigants, litigation is an important tool in the kit of climate reform because it serves both litigation and supra litigation goals of the parties and larger affected society. Finally, this paper concludes that there are many differences between the US and Canadian legal systems that could account, on their own or in the aggregate, for Canada’s dearth of climate litigation. Even still, it argues that considering the many benefits of climate change litigation, Canada’s wait-and-see approach, in the absence of implementing comprehensive climate reform, invites a less than complete reform where those most deeply affected by climate effects will remain without an avenue for redress in the judicial system.

**Getting to Court: Justiciability Concerns**

**Standing**

Standing generally concerns whether the plaintiff is the appropriate party to bring a claim as well as whether the party from whom he seeks redress is appropriate. This doctrine does not address

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whether the actual claim asserted is appropriate or whether it is likely to succeed.\textsuperscript{5} Without a finding of standing, a court does not have jurisdiction to hear the case, and it will be dismissed before reaching its merits.\textsuperscript{6}

Although US climate litigants have the adjudicated the issue all the way up to the USSC, the standing doctrine remains a barrier to US climate litigation based on common law actions. Recently in \textit{AEP v. Connecticut} the court split along the same dissenting lines as in \textit{Massachusetts v. EPA}, finding that the state plaintiffs had standing under their \textit{parens patriae} role to protect its “quasi-sovereign” rights such as health and well-being- physical and economic- of citizens and territory.\textsuperscript{7} Looking forward, this case must be considered in conjunction with two more recent cases, which have dismissed finding no standing at the district court level.\textsuperscript{8} The Federal judiciary, under its current configuration, has recognized that States have \textit{parens patriae} standing to allege climate change injuries; however, all district courts considering the issue have rejected individual or environmental group standing as plaintiffs in climate based common law actions.\textsuperscript{9}

As opposed to the US, Canadian courts do not have a threshold constitutional or prudential test for standing that compares to that of \textit{Lujan v. Defenders of the Wildlife}.\textsuperscript{10} Canadian standing law emanates from common law as opposed to the constitution, but still poses several hurdles to litigants.\textsuperscript{11}

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\begin{itemize}
\item[\textsuperscript{6}] \textit{DaimlerChrysler Corp. v. Cumo}, 547 US 332 at 339-43.
\item[\textsuperscript{7}] \textit{See Massachusetts v. EPA}, 549 US 497 (2007).
\item[\textsuperscript{8}] \textit{See Amigos Bravos v. US Bureau of Land Management}, No 6:09-cv-00037-RB-LFG, (DC NM) (8/3/11) (holding that the Plaintiffs must show that BLM’s actions both increased the risk of environmental harm and that the plaintiffs either have a geographical nexus to or actually use the sites affected by the agency action) and \textit{Sierra Club v. US Defense Energy Support Center}, No 01:11-cv-41, (DC E.D. Va) (7/29/11).
\item[\textsuperscript{9}] \textit{Ibid}.
\item[\textsuperscript{10}] \textit{Lujan v. Defenders of Wildlife}, 504 US 555, 560-61 (1992) \textit{[Lujan]} Under an inquiry into constitutional standing requirements U.S. courts assess: (1) whether citizen plaintiffs can show that they have been injured or are likely to suffer an imminent injury; (2) whether these plaintiffs can show that the injury suffered is caused by the defendants alleged action; and (3) whether a favourable decision could adequately repair the harm complained of.
\end{itemize}
A plaintiff must have a “direct interest” in the outcome of the litigation. This precludes champerty and maintenance or frivolous and vexatious litigation. As the standing doctrine has proved to be a stumbling block for US litigants, absence of a constitutional threshold standing barrier to bringing a cause of action is good news for Canadian litigants. Remaining standing laws, however, seem in a state of flux at this juncture, which could put off any potential litigants.

Canadian courts have created a public interest standing exception to the high barrier of proving that one has a direct interest in the outcome of the litigation. Absent a direct interest, a plaintiff may meet public interest standing by meeting three hurdles: (1) there is a serious issue as to the validity of the (climate) law challenged; (2) the plaintiff was directly affected by the law, or if not, that he has a genuine interest in the law’s validity; and (3) there were no other reasonable and effective ways to address the issue. The last requirement could most difficult for climate change litigants in Canada because defendants could have a strong argument that applying to the Minister of the Environment for investigation may be considered a reasonable alternative. If this were the case, Plaintiffs could rebut that this application would be futile considering the government’s inadequacy in enacting federal legislation thus far.

Moreover, it has yet to be seen after the Supreme Court of Canada (SCC) granted plaintiffs public interest standing in Friends of the Earth, whether this will be extended to common law as opposed to just judicial review cases. Further, as this paper is being written major changes in public interest standing could be underway. The SCC is currently hearing an appeal in Downtown East Side Sex Trade Workers United Against Violence Society et al. v. AG (Canada), which could liberalize

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12 Giles v. Thompson, [1993] 3 All ER 321, 329.
13 As will be discussed below, Canadian public nuisance actions have a requirement similar to US prudential standing as plaintiffs must prove they have suffered “special damages” distinct from those suffered by the general population before the action continues to its merits. See Coop & Kirby, supra note 11.
14 The public interest trilogy summarized in Council of Churches v Canada (Minister of Employment and Immigration), 23 Jan. 1999 SCC (unreported).
15 Friends of the Earth v. Canada (Governor in Council) (2008), 2008 FC 1183, 39 CELR (3d) 191 [FOE].
public interest standing to consider more marginalized and vulnerable plaintiffs.\textsuperscript{16} Several environmental NGOs intervened in the case, presumably because this ruling would extend standing for the environmentally marginalized and vulnerable. This decision could prove to change the barriers to litigation in Canada.

Further, like the US, Canadian common law recognizes the Crown Attorney General’s right as \textit{parens patriae} to seek equitable relief as well as damages from threats not only to the Crown’s proprietary or sovereign interests, but also threats to its quasi-sovereign interest in the general well being of its citizens.\textsuperscript{17} Scholars note that this also allows provincial attorney generals \textit{parens patriae} authority to bring environmental claims.\textsuperscript{18} Fortunately, \textit{BC v. Canfor} provides hope in its recognition that “[i]f justice is to be done to the environment, it will often fall to the attorney general, invoking both statutory and common law remedies, to protect the public interest.”\textsuperscript{19} \textit{Parens patriae} standing provides a lower threshold for sovereign plaintiffs, but applying this doctrine may pose a challenge to begin with because Canada does not have a well developed history of recognizing the provinces’ \textit{parens patriae} standing to protect quasi sovereign interest. The main barrier to the Province realistically invoking \textit{parens patriae} standing to bring GHG emitting corporations to task under common law theories is that the major Canadian emitters are Crown corporations, which would essentially require different branches of the Canadian government to argue both sides of the case.\textsuperscript{20} Finally, while the US has extended \textit{parens patriae} standing to negligence claims as well, Canada has not, making it difficult to bring these causes of action as alternatives.\textsuperscript{21}

\textsuperscript{18} \textit{Ibid}.
\textsuperscript{19} 2004 SCC 38 [2004] 2 SCR 74, at para 81; \textit{see also} AG Elgie Stewart & Anastasia M Litner, “The Supreme Court’s Canfor Decision: Losing the Battle but Winning the War for Environmental Damages” (2005) 98 UBC L Rev 223.
\textsuperscript{21} MacKay, \textit{supra} note 17 at 963.
Finally, comparable to the United States’ prudential standing requirements, Canadian plaintiffs do not have standing to enforce a public right under a public nuisance theory. Rather, the Attorney General must bring this case, which is unlikely due to the conflict of interest noted above. Alternatively an individual plaintiff may be conferred standing to bring a claim enforcing a public right if she is able to show an interference with a private right or that she suffers “peculiar” or “special” damages distinct from those suffered by the general population.22 As has been a major barrier to individual plaintiffs in the United States, showing the plaintiff has been harmed in a peculiar or special way is difficult because climate change affects the entire population.23

Finally, citizen suit provisions are rarely found in Canadian statutes as opposed to their prevalence in the US. This may be seen as another example of factors leading to the conclusion that Canada’s legal culture perhaps does not look to litigation as a means of righting a wrong.24

**Political Question**

Justiciability concerns whether the judiciary is the appropriate branch to hear the issue at hand. As its root are concerns for separation of powers between the three branches of a federalist government: the politically accountable legislative and executive branches, and the nonpolitical judiciary.25 While Canadian and US tripartite systems of government appear similar, this is merely at a superficial level. Rather, both countries approach separation of power concerns differently, which in turn affects their justiciability doctrines.

The United States adheres to a strict separation of powers enshrined in a constitution that was created in reaction to revolution against tyranny enabled by a concentration of power in British government. This strict separation of powers was the foundation for the modern test for political

24 Ibid at 163.
25 Sossin, supra note 4 at vi.
question in *Baker v. Carr*, which poses six scenarios where the issue could be found to be a non-justiciable political question and thus be outside of the appropriate jurisdiction of the courts. Baker’s six categories have provided a clear framework for future litigation and have forced the courts to articulate the exact reasons or factors that applied to the issue to make it non-justiciable. Thus, rather than wholesale the issue of climate change as too political or too policy laden, the court was required to actually explain its reasoning.

This section does not consider the wisdom of the political question doctrine’s application to climate change litigation. Rather, it notes that ultimately a coherent test provided a framework for climate plaintiffs to show that although climate change will have political effects, and will require difficult policy balancing, this alone does not make it a political question unsuitable for adjudication. In fact, under a tort or common law theory, these cases do in fact provide “judicially determinable and manageable standards” under the long-standing tests of nuisance, negligence, public trust, and trespass. Moreover, the justices have determined that climate change is not an issue that has been textually committed to any other branch nor is prudentially left to them; thus, preventing embarrassing multifarious decisions by different branches. This coherent framework also required the justices to articulate their reasoning under the test, enabling the litigants to argue cases like *AEP v. Connecticut* to the USSC who ultimately declined to find that the political question doctrine barred justiciability.

In contrast, Canada evolved from the UK system, keeping with it main tenets of the Westminster Parliamentary system, including its use of conventions. The text of Canada’s Constitution

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26 *Baker v. Carr*, 369 U.S. 186, 217 (1963). The *Baker* test lists six scenarios in which an issue will pose a non-justiciable political question: “prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment to the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Ibid.*


does separate responsibility between branches; however, the conventional machinery of responsible
government has shaped a functionally more integrated or fluid separation of powers. Since there is
not a strong ideal behind the importance of strict separation of powers, it makes sense that this system
simply did not encourage or require a clear political questions doctrine. Canadian courts are not
entirely opposed to finding issues non justiciable on the basis that they are so speculative as to be
incapable of proof or because through statutory interpretation, the legislation expressly delegates the
determination of the issue to a political branch. The Supreme Court of Canada has considered the US
political questions doctrine in obiter, but declined to adopt the US doctrine per se.

Accordingly, Canada operates on a more open-ended political question doctrine (or concerns),
which one would think would provide a more welcoming environment for climate litigants to argue
that the courts are the appropriate venue for climate change litigation. Interestingly, this has not been
the case. Rather, the lack of a clear political questions doctrine in Canada may actually be detrimental
to climate litigants. In Canada’s one main climate change case, Friends of the Earth v. Minister of
Canada, the Court dismissed the case as non justiciable but was not required under any test to articulate
reasons for its decision that the issue of climate change was too policy laden and too political.

Friends of the Earth, an environmental NGO, brought the action in federal court alleging the
federal government had violated Canadian law by failing to meet its international obligations to reduce
greenhouse gases, made binding on the government by KPIA, a private member’s bill, as well as §166
of CEPA, which states that Canada must abide by its international agreements in preventing pollution.

29 Peter W. Hogg, Constitutional Law of Canada, 5d ed, (Toronto: Carswell, 2007) at 1-22. (noting that although the
Constitution Act of 1867 confers textual separation of powers, the branches may only operate in accordance with the
convention of responsible government).
30 There is even disagreement over whether Canada has a political question doctrine. Hogg notes that there is none, but
Sossin contends that the court operates under the same basic concerns so this judgment should not be made so quickly.
31 Operation Dismantle v The Queen [1985] 1 SCR 441 [Operation Dismantle].
32 FOE, 2008 FC 1183, supra note 15.
33 See Operation Dismantle, supra note 31.
34 Friends of the Earth v. Canada (Governor in Council) [2009] 3 FCR 201.
35 FOE, supra note 15.

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The federal court dismissed the case on justiciability grounds holding that the provisions of KPIA were too policy-laden, permissive, and subject to parliamentary review that they did not evince legislative intention to impose absolute justiciable compliance obligations upon the government. After Plaintiffs appealed the trial court decision, the Federal Court of Appeal dismissed by substantially adopting the trial court’s reasoning. The effect of this case was to remove Canadian domestic requirements for compliance with Kyoto.

*Friends of the Earth* was a judicial review case, not a tort claim, but this is the only climate change case that has been brought in Canada. After spending four paragraphs setting out Canada’s muddled pseudo political questions doctrine, the court inevitably turned away from applying these cases, instead noting that “[j]usticiability of all of these issues is a matter of statutory interpretation directed at identifying parliamentary intent: in particular, whether Parliament intended that statutory duties imposed upon the Minister and upon the GIC by the KPIA be subjected to judicial scrutiny and remediation.” After determining that the legislature did not intend to be subject to judicial scrutiny, Barnes J. took an unnecessary step by admonishing that even if he were wrong about the justiciability of the claim, it would not matter because any decision he could render would not even be a drop in the bucket to end climate change.

This case was determined on a narrow issue of judicial review that likely would have been non justiciable under any political question-like concerns. However, the Courts’ ability to indiscriminately categorize climate change as generally not appropriate for the courts without articulating more has been

38 See Arnold & Palmer LLP, Climate Case Chart (Arnold & Palmer LLP, undated), online: http://www.climatecasechart.com. Some note *Imperial Oil Resources Ventures Limited v Pembina Institute for Appropriate Development et al*, 2008 FC 598; however, this case was not adjudicated over climate change specifically but rather concerned an environmental assessment under the Fisheries Act. *See id.*
40 “Even if I am wrong about justiciability, I would as a matter of discretion, still decline to make a mandatory order against respondents. Such an order would be so devoid of meaningful content and the nature of any response to it so legally intangible that the exercise would be meaningless in practical terms.” *Friends of the Earth v Canada (Government in Council)* [2009] 3 FCR 201 at para 47.
detrimental to climate litigants. This is because the decision seems to have cast a shadow over other climate litigation since plaintiffs are aware that the courts are not interested in dealing with the issue, but have no framework under which to argue that they should. No climate cases have been brought in Canada since.41

Preemption

Preemption concerns the invalidity of US state laws when they conflict with federal laws. Preemption operates under the Supremacy clause, which states that the US Constitution and all federal laws made pursuant to it are supreme.42 Federal preemption of state law may occur expressly when the federal statute expressly states Congress’s intent to preempt state law.43 Alternatively, preemption may be implied when and to the extent that state laws conflict with federal laws,44 or when the federal regulatory scheme is so pervasive as to occupy the area of law to such an extent that the courts may infer Congress did not intend for state laws to supplement it.45 No state GHG laws have yet to be preempted by the Clean Air Act.46 However, the Fourth Circuit’s emphasis on *International Paper Co v. Ouellette*47 in *North Carolina v. TVA*48 extended preemption under the CAA further than the courts have gone before by finding federalism policy arguments more compelling than the savings clause of the CAA.49

The Canadian doctrine of paramountcy is similar to US preemption and finds that where there is a conflict between provincial and federal laws, federal law will prevail to the extent of the conflict.50

To trigger paramountcy, the conflict must result in an “operational incompatability” between the laws,

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41 See Arnold & Palmer Chart, *supra* note 38.
42 Article VI, clause 2 of the US Constitution.
49 The savings clause allows states to regulate GHG emissions more strictly than the standard set by the federal floor.
50 *Smith v The Queen* [1960] SCR 776.
which is invoked when compliance under one law requires the breach of another.\textsuperscript{51} Further, the Court in 2005 expanded this doctrine to something akin to US implied preemption by holding that a provincial law must not frustrate the purpose of the federal law.\textsuperscript{52} Although several provinces have enacted, or are beginning to enact carbon taxes and other mechanisms, there is currently no comprehensive federal Canadian legislation to preempt any future provincial GHG reforms.

\textit{Displacement}

The US displacement doctrine concerns which branch of the federal government may create law concerning an issue as opposed to whether federal or state law should apply. A federal common law, for instance, will be displaced simply when the field has been occupied as opposed to when it has been occupied in a certain manner.\textsuperscript{53} The USSC in \textit{AEP v. Connecticut} dismissed the case holding that federal common law regarding GHG emissions has been displaced by Congress’s grant of authority to regulate GHGs to the EPA under the \textit{CAA}.\textsuperscript{54} Although the decision seemed to be a deafening blow to future climate litigants, the ruling’s effect is limited in several ways: first, this claim requested injunctive relief, so a case requesting damages may be distinguished; second, if Congress takes away the EPA’s authority to regulate GHGs, the federal common law will no longer be displaced; and finally, the Court clearly left the door open for state common law claims pursuant to the limitations note above.\textsuperscript{55} Thus, in finding that there was no room for a parallel track of regulation between the two branches, the Court reinforced its preference for a limited role in GHG reform, at least for the time being.

\textsuperscript{51} \textit{Multiple Access Ltd v McCutcheon}, [1982] 2 SCR 161.
\textsuperscript{52} \textit{Rothmans, Benson & Hedges Inc v Saskatchewan}, 2005 SCC 13, [2005] 1 SCR 188.
\textsuperscript{53} \textit{Milwaukee II}, 541 US 304, 324 (1981); see also \textit{AEP}, supra note * at 2537 (rejecting the argument that the regulatory needed to have actually acted to occupy the field, and instead stating that the test was whether a regulatory body merely had the authority to regulate over the field).
\textsuperscript{54} See \textit{AEP}, supra note 27.
In Canada there is currently neither comprehensive federal legislation nor a federal body tasked with regulating GHGs under which to consider displacement. Moreover, Canada does not have a clear displacement rule.\(^{56}\) Although this could be positive for litigants in that less judicial attention will be paid to this doctrine; Canadian displacement jurisprudence may have the same chilling effect on litigants as discussed above regarding the incoherence of a Canadian political questions doctrine.

**Class Actions**

Considering the great need for expert testimony and battles over threshold issues, climate litigation will prove too costly for individual victims, who may also not be as organized as to bring an action. The US has a vibrant history of class actions for toxic torts so it seems that it would be an easy transition to climate cases. Class actions in Canada are growing in popularity, but are still behind those of the US, which may provide a reason as to why claims are focused on the US as a more class action friendly forum. Recently, the Canadian decision *Climent dt St. Laurent v. Barrette et al* upheld right for citizens to launch environmental class actions; however, as has been a pattern throughout this paper, climate change may prove to be to radical an issue to set these new theories in motion.\(^{57}\)

**Jurisdiction**

A common law claim in climate change would also face jurisdiction issues. Canada seems to have appropriate plaintiffs to bring a cause of action. Similar to the victims of Alaska’s Native Village of Kivalina, there are Inuit in Northern Canada who will suffer the same plight from melting permafrost.\(^{58}\) Moreover, other arctic communities face having their traditional ways of life affected by changing weather, coastal erosion, and land lost to sea level rise; intensifying weather patterns will affect Canada’s breadbasket and agricultural economy; climate change could lead to water quality


\(^{57}\) *St. Lawrence Cement Inc v. Barrette*, 2008 SCC 64; see also EcoJustice Canada, “Landmark Supreme Court Victory for UOttawa Justice Clinic” December 10, 2009, online: <http://www.ecojustice.ca/cases/landmark-supreme-court-victory-for-uottawa-ecojustice-clinic> (noting that as a result of this ruling, future environmental nuisance claims will be more easily proven under a no-fault regime).

\(^{58}\) See Hsu, *supra* 23 at 119-23.
problems, shortages, and damages to ecosystems in the Great Lakes. The problem here may arise when choosing an appropriate defendant since Canadian emissions contributes only between 2-3.28% of global GHG emissions.\(^{59}\) Since any damages found would be reduced proportionately to reflect this, the cost may prove too prohibitive to bring the case.

Alternatively, if Canadian plaintiffs wanted to hold US emitters to task in a common law suit in Canada they would have to show they met the real and substantial connection between the foreign defendant and the forum for jurisdiction over foreign defendants.\(^{60}\) This requirement is based in the principle of comity, and respect for territorial jurisdiction. Either party can rebut a finding of jurisdiction, but courts have a great deal of discretion, so outcome is often unpredictable.\(^{61}\) Canadian courts have recognized an effects-based test for jurisdiction since the 1970s, such that courts will consider tort actions where damage was suffered within the jurisdiction, even if the defendant’s action took place elsewhere.\(^{62}\) However, courts have been reluctant to use this to exercise jurisdiction with respect to trans-boundary matters.\(^{63}\)

More recently, Canadian courts have indicated a greater willingness to assert jurisdiction over foreign defendants. In *British Columbia v. Imperial Tobacco*,\(^{64}\) the court upheld the application of provincial law to American defendants, holding them responsible for damages for health care costs associated with tobacco use. This suggests that it may become easier for prospective plaintiffs to bring actions in Canada against foreign defendants. The BC Court of Appeal further indicated its willingness to assert territorial jurisdiction ahead of comity in *Lloyd’s Underwriters v. Cominco Ltd*.\(^{65}\) There, the

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\(^{60}\) *Morguard Investment Ltd v De Savoye*, [1990] 3 SCR 1077 at para 51, 76 DLR (4th) 256; see also Hsu, *supra* note 24 at 159 (noting that while Canadian jurisdiction over a US defendant is not a forgone conclusion, concerns for judicial restraint and comity in Canadian courts will pose a barrier).


\(^{64}\) 2005 SCC 49, [2005] 2 SCR 473.

court refused to grant a stay of proceedings in deference to an ongoing action in a US court. Despite this, it is not certain that a court would assert jurisdiction over a foreign defendant in a climate litigation case. This barrier likely remains high, particularly for private individual plaintiffs, as opposed to government plaintiffs seeking to uphold legislation, as was the case in *Imperial Tobacco*.

**In Court: Climate Litigation**

*Statutory Litigation*

Although not uniform or comprehensive, the United States has seen a plethora of statutory litigation under numerous acts relating the regulation of GHGs. Most pertinent is the *Clean Air Act* (CAA), under which the USSC found in *Massachusetts v. EPA* that by using sufficiently flexible language to allow for new climate threats, Congress had in fact provided regulatory authority over GHG regulations with the EPA under the CAA. Also of note are claims under the Regional Greenhouse Gas Initiative, the *Global Change Research Act of 1990*, and the *Endangered Species Act of 1973*.

While the US has provided a regulatory framework under which American litigants can bring statutory claims for climate change, the Canadian government has not yet passed any such federal climate act or even determined the most appropriate existing legislation under which regulation of GHGs could be achieved. Recently, the Canadian Government has made moves toward climate regulation. The *Canadian Environmental Protection Act’s (CEPA)* passenger automobile and light truck GHG emissions regulations came into force last year for 2011 vehicles. Moreover, Environment Canada made public its GHG reporting requirements for 2011 this fall. As above, it is

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66 See *Massachusetts*, supra note 7.
68 *Center for Biological Diversity et al v Dr. William Brennan et al*.
important to note that even once statutes are enacted, citizen suit provisions are rare in Canada, making public interest standing of suits under the provision difficult.\textsuperscript{72} Though these are modest movements, it seems that Canada is on the right track and will soon see myriad of legal challenges and judicial review applications once regulations are enacted. Until then, however, the lack of regulations explains the absence of statutory claims by climate litigants in Canada. Accordingly, since there are no statutes in Canada under which Canadian litigants could bring a statutory climate action, this paper focuses on climate actions based on the common law.

\textit{Common Law Actions}

Thus far, the Canadian government has failed to adequately account for climate change. Ideally, reform would be achieved through the ordinary political process; but environmental organizations have not yet been able to assert their voices into the traditional political process in a strong enough manner to influence government over industry’s loud voices.\textsuperscript{73} Climate litigation is an important tool in the climate reform kit for reasons that will be explained in section II. This paper does not attempt to canvas the myriad of hurdles climate change litigation could face on the merits.\textsuperscript{74} Rather, it simply seeks to consider potential explanations for the dearth of climate litigation in Canada. The most likely claim to be successful is nuisance, under which litigants argue that GHG emissions increase risk to public health and infrastructure through the effects of climate change, however, this paper will also briefly discuss negligence as a potential cause of action.\textsuperscript{75}

\textit{Nuisance}

requirements apply to facilities that emit 50,000 tonnes of CO2 equivalent or more of GHGs, and illustrate the Canadian Government’s effort to develop a harmonized reporting system to support development of new regulation.\textsuperscript{72} Hsu, \textit{supra} note 24 at 163 citing Randy Christiensen, “The Citizen Suit Submission Process Under NAFTA: Observations After 10 Years” (2004) 14 J Envt’l L & Prac 165 at 171-72.

\textsuperscript{73} The oil and gas industry has been exempted from mandatory reductions targets in proposed laws and Kyoto, with mere promises of negotiation between the government and these emitters to come in the future.

\textsuperscript{74} For an article discussing a more broad array of issues facing climate litigation, see Michael B. Gerrard, “What Litigation of a Climate Nuisance Suit Might Look Like” (2011) 121 Yale LJ Online 135, online: \texttt{<http://yalelawjournal.org/2011/09/13/gerrard.html>}).

\textsuperscript{75} Trespass will not be considered here as it requires a high showing of physical invasion of the plaintiff’s property.
In the US, private nuisance is the substantial,\textsuperscript{76} unreasonable\textsuperscript{77} interference with another private individual’s use or enjoyment of property that he actually possesses or to which he has a right of immediate possession.\textsuperscript{78} In balancing these respective interests, courts take into account that every person is entitled to use his own land in a reasonable way considering the neighbourhood, land values, and existence of any alternative courses of conduct available to the defendant.\textsuperscript{79} Public nuisance is an act that unreasonable interferes with the health, safety, or property rights of the community.\textsuperscript{80} Recovery by a private party is available for public nuisance only if the private party suffered unique damages not suffered by the public at large.\textsuperscript{81} Plaintiffs from more climate vulnerable areas such as low-lying coastal areas, arctic regions, or desert environments such as New Mexico could likely satisfy this requirement.

Both public and private nuisance require a balancing test to evaluate the unreasonableness of the complained of activity.\textsuperscript{82} Generally, as climate friendly technologies become more technologically and economically feasible, and the harms from climate change more pronounced, this balance should shift in favour of finding public nuisance liability. As of now, state attorney generals have brought two cases in public nuisance: \textit{California v. GM}, which Plaintiffs voluntarily dropped, and \textit{Connecticut v. AEP}, which displaced by Federal CAA authority.\textsuperscript{83} Two more cases involving public nuisance causes of actions were brought by private plaintiffs: \textit{Comer v. Murphy Oil} was dismissed originally as a

\textsuperscript{76} Interference is substantial when it is offensive, inconvenient, or annoying to the average person in the community but not simply because it is the result of the plaintiff’s hypersensitivity or specialized use of his property.

\textsuperscript{77} Interference is unreasonable when the severity of the inflicted injury outweighs the utility of the defendant’s conduct.

\textsuperscript{78} Restatement (Second) of Torts § 821 D.

\textsuperscript{79} Ibid.

\textsuperscript{80} Ibid. at § 821 B.

\textsuperscript{81} Restatement (Second) of Torts. at § 821 C.

\textsuperscript{82} Restatement (Second) of Torts § 826, cmt. a. An activity is unreasonable when the gravity of the harm outweighs the utility of the actors conduct.

\textsuperscript{83} \textit{California v. GM Corp.}, (N.D. Cal. 2006) (dismissed Sept. 2007) (appeal pending) Request for continuance of oral argument (Jan. 2009) Appeal voluntarily dismissed (June 2009) [CA v. GM]. Here, California sued six auto companies under public nuisance alleging that they were a substantial source of the greenhouse gas emissions, which caused climate change, resulting in damages to the state in the millions of dollars. The District Court dismissed as a non justiciable political question, and plaintiffs voluntarily dropped their appeal.); see also \textit{AEP}, supra note 27.
political question, reversed on an en banc hearing, then dismissed in an odd procedural twist;\(^{84}\) and \textit{Kivalina v. Exxon Mobile}, which dismissed as political question at the district level, and awaiting a decision from Ninth Circuit Court of Appeals.\(^{85}\)

Canadian nuisance law is strikingly similar to that of the US;\(^{86}\) however several distinctions may raise the barrier to litigation, explaining why there have not yet been any moves to bring cases. First, Canadian public nuisance jurisprudence has been slower to change with respect to who has standing to bring the case. Only the Attorney General may bring an action for public nuisance under their \textit{parens patriae} role.\(^{87}\) As noted above in regards to standing, however, the Attorney General will likely not bring these actions as the major emitters in Canada are Crown corporations. On a more uplifting note, the Courts decision in \textit{B.C. v. Canfor} stands for courts feeling that the Provinces and Crown should use \textit{parens patriae} rule to protect public environmental values, “signaling opportunities for the Crown to use its \textit{parens patriae} role to protect public values [and] to include a variety of heretofore externalized values in calculating damages in tort actions.”\(^{88}\)

Moreover, although the Attorney General may authorize private party standing, the plaintiffs must show that they have suffered a “special damage.”\(^{89}\) Special damages are hard to prove in climate

\(^{84}\) \textit{Comer v. Murphy Oil USA}, 585 F. 3d 855 (5\textsuperscript{th} Cir. 2009), rehearing en banc granted, 598 F.3d 208 (5\textsuperscript{th} Cir. Feb 26, 2010), order dismissing appeal, 607 F.3d 1049 (5\textsuperscript{th} Cir. May 28, 2010), petition for writ of mandamus denied, 131 S. Ct. 902 (2011) (complaint refiled May 2011). In this case, residents along the Mississippi Gulf Coast brought a class action in public nuisance against oil and energy companies alleging that their GHG emissions contributed to global warming, which caused sea levels to rise, exacerbating the intensity of Hurricane Katrina, destroying private and public property. The District Court dismissed on standing and political question grounds. On appeal, the Fifth Circuit initially reversed the District Court’s findings in an en banc hearing. In a procedural twist, however, the court was able to duck out of this decision on a lack of quorum, reinstating the District Court’s ruling and vacating the more activist Panel’s findings of justiciability. \textit{Id}.

\(^{85}\) \textit{Native Village of Kivalina v. ExxonMobile Corp.}, 663 F. Supp 2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9\textsuperscript{th} Cir.).

\(^{86}\) A similar balancing test in Canada requires the judge consider the following factors in determining the gravity of harm: type, severity, duration of harm (the harm must be substantial and not trivial; the character of the local; and the sensitivity of plaintiff’s use. In determining the utility of the conduct, courts consider: the social utility and character of defendant’s conduct balanced against the harm to plaintiff; and the degree of awareness the defendant had of the harm.

\(^{87}\) Trachsler, \textit{supra} note 59 at 14.


\(^{89}\) \textit{Hickey v Electric Reduction Co of Canada} (1970), 21 DLR (3d) 368, 372 (Nfld SC) [\textit{Hickey}].
change cases as the phenomena is felt globally, but perhaps plaintiffs who have suffered property
damage or who have lost their homes to rising seal levels would satisfy this requirement. While US
jurisprudence is much more lenient about plaintiffs needing to show special damages, Canadian courts
require adherence to showing injury that is different in kind and degree. Hickey also requires the
public nuisance private plaintiff to show that their injury is a “direct and consequential result of
defendants actions.”

It is important to note that the courts have recognized the Hickey special
damages rule as too limiting in environmental claims. Rather, a relaxed standing in public interest for
environmental cases has gained great momentum, but is not in place yet. This confusion plagues
Canadian public nuisance jurisprudence, and may currently be a factor discouraging private litigation
and public interest lawsuits.

Furthermore, scholars have discussed the problematic reality that Canadian Courts have
considered the reasonableness of the defendant’s action, which effectively raises the nuisance standard
to a negligence plus standard lowering any chances for plaintiff success. In contrast, the US generally
adopts a wider zone of foreseeability, thus is more comfortable in imposing a further reaching duty for
defendants than a negligence-plus standard would impose.

Notably, the Ontario Supreme Court recently decided an appeal in Smith v Inco, which will
likely have an effect on future climate change cases even though it was based on alleged public
nuisance from a nickel refinery. The trial judge found that concerns of the level of nickel caused
widespread public concern and adversely affected the appreciation of value of the properties.

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90 Hsu, supra note 23 at 47, 160-61.
91 Hickey, supra note 89 at 372.
92 See Elgie & Lintner, supra note 19.
93 Trachsler, supra note 59 at 14.
94 See Hsu, supra note 24 at 161; see also Beth Bilson, The Canadian Law of Nuisance (Butterworths 1991) at 58.
95 Hsu, supra note 24 at 161.
96 Andrews minority- all plaintiffs are foreseeable thus within the zone of danger. See Palsgraf v Long Island Railroad Co,
248 N.Y. 339, 162 N.E. 99 (N.Y. 1928) [Palsgraf].
97 Dianne Saxe, “Canada: More Thinking About Smith v Inco” 08 November 2011, online:
98 Smith v Inco, 2010 ONSC 3790 [Smith].

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appeal decision overturned a ruling ordering Inco to pay $36 million and set the tone for strict requirement of actual harm in public nuisance cases when it declared that actual harm is required, and simply the perception of harm will not be sufficient.\textsuperscript{99} This indicates that the court is unwilling to compromise its requirement of an actual injury for environmental nuisances. Moreover, although discussed in \textit{Snell v. Farrell}, Canada has not adopted the use of market share liability used in the US to allow plaintiffs to prove causation by canvassing the emitters by their share of GHG emissions.\textsuperscript{100}

Finally, differences in the jurisdictions’ use of the statutory authorization defense may explain the lack of litigation in Canada. In the United States, an activity authorized by a zoning law will be shielded from liability as a public nuisance, but may not be a strong defense against a claim for private nuisance.\textsuperscript{101} The statutory authorization defense is much broader in Canada than the United States. First, the Canadian defense immunizes a range of actions that Parliament may have considered in determining an ordinance as opposed to shielding only the particular activities zoned as in the US.\textsuperscript{102} Second, as a corollary of this broader interpretation, the defense may apply to shield both public and private nuisance liability.

\textit{Negligence}

In the US, a prima facie case of negligence under the 2\textsuperscript{nd} Restatement of Torts is the breach of a duty on the part of a defendant to conform to a specific standard of conduct for protection of the plaintiff against an unreasonable risk of injury.\textsuperscript{103} No US climate cases based on common law have reached a decision on their merits as they have been dismissed on justiciability standards. Moreover, it is unlikely that a negligence claim will be successful anytime soon as negligence requires a showing of unreasonable conduct by plaintiffs. The act of emitting GHGs is not the sort of clearly unreasonable conduct that the courts feel comfortable imposing a duty on emitters for. Perhaps this view will shift

\begin{itemize}
\item \textsuperscript{99} \textit{Ibid.}.
\item \textsuperscript{100} \textit{Snell v Farrell}, [1990] 2 SCR 311 at para 16; see also Hsu, \textit{supra} note 23 at 152.
\item \textsuperscript{101} Restatement (Second) of Torts § 828 (1965).
\item \textsuperscript{102} See Hsu, \textit{supra} note 24 at 162-63, citing \textit{Maykut v. Pinosco}, 365 A.2d 114, 118 (Conn. 1976).
\item \textsuperscript{103} Restatement (Second) of Torts § 315.
\end{itemize}
and excessive GHG emissions will be considered unreasonable with time and increases in scientific evidence, awareness of the harms, foreseeability, and decreasing costs of mitigation and abatement. As such, negligence could well become a viable cause of action in the future; however, this is unlikely to happen any time soon.104

The prima facie case in Canada is similar to that of the US, requiring the plaintiff to show that the parties were in a requisite proximity, that they type of damage was foreseeable, and that it is fair, just, and reasonable to impose a duty of care.105 Regarding foreseeability, although not a huge departure from US case law, Canadian environmental cases at common law have established that hindsight must not be considered in assessing the foreseeability of defendants’ actions causing plaintiffs’ harms.106 Rather, foreseeability must be determined by the factual and technical state of knowledge that the defendant could have reasonably have been expected to have the date the cause of action arose.107 Again, as awareness of climate change is increasing, the notion that GHG emissions contribute to climate change causing harmful effects can only become more foreseeable.

Since GHG emitters acting within their capacity as plants or producers owe no special duty to plaintiffs, plaintiffs must convince the court that a duty exists under which to judge the emitters actions. In creating a new duty relationship, the plaintiff would have to demonstrate that there are no “residual policy considerations” that “ought to negate or limit” the duty of care.108 Under Cooper v. Hobart, liability would only be imposed and a new category established if no such policy considerations found. These residual policy considerations include: 1) whether the law already provides a remedy; 2) whether recognizing a duty of care could create the potential for unlimited liability to an unlimited class; and 3)

104 See Hsu, supra note 24 at 131; see also David Hunter and James Salzman, “Negligence in the Air: The Duty of Care in Climate Change Litigation” 156 U PA L Rev 1741, 1776-80 (2007).
106 R v MacMillan Bloedel Ltd [2002] BCI No 2083, 2002 BCCA 510 (finding no liability where the particular event that caused the contravention of the Fisheries Act was not foreseeable).
107 Ibid.
whether there are reasons of broad policy suggesting that a duty should not be recognized.\textsuperscript{109} Public policy reasons in Canada may push the court to decline to extend this duty. For example, British Columbia is built on a thriving mining and resource extraction, which is a huge emitter. Accordingly, the B.C. courts are likely unwilling to put the whole industry at risk for such great liability in a claim that needs some legal stretching to begin with.

Further, in cases holding the Canadian Government accountable as a defendant, courts have repeatedly declined to find the Canadian Government liable in negligence for failing to pass legislation. This is because the courts note that these decisions are considered pure policy decisions, which are not reviewable in negligence.\textsuperscript{110} Moreover, although it has not created effective legislation to reform GHG emissions, the courts will likely not find that the government has been completely inactive in the area of climate change since it did introduce the \textit{Clean Air Act} into Canadian legislation.\textsuperscript{111} Considering the nature of climate change, the potential for unlimited liability to a more conservative court, in addition to a general feeling that this is first and foremost a political issue may pose barriers to imposing a duty in Canada.

Canadian jurisprudence presents a problem for negligence in a Canadian forum.\textsuperscript{112} The Supreme Court of Canada has found that the “but for” test applies in all but the most exceptional cases.\textsuperscript{113} In 2007, the SCC stipulated that the “material contribution” test should only be applied (for example in a case where more than one emitter caused the harm felt by plaintiffs) in place of the “but for” test if two requirements are met: 1) it must be impossible for the Plaintiff to prove causation using the but for test (for example for reasons outside of the plaintiffs’ control like the level of scientific

\textsuperscript{109} \textit{Ibid}
\textsuperscript{110} See Kuczerpa \textit{v Canada}, [1992] FCJ No 217 (FCA) (holding in a case regarding pesticide regulation that “a decision of the Government of Canada to pass or refrain from passing general legislative measures reflecting current policy cannot as a rule give rise to a cause of action in tort by a member of the general public.”)
\textsuperscript{111} Trachsler, \textit{supra} note 59 at 12.
\textsuperscript{112} Causation will also pose a problem for the success of nuisance claims as well.
\textsuperscript{113} \textit{Resurface Corp v Hanke}, [2007] 1 SCR 333, 2007 SCC 7 at para 25. [\textit{Resurface Corp.}]
knowledge); and 2) that it must be clear that the defendant breached a duty of care owed to Plaintiff.\textsuperscript{114} Ultimately, although this lower standard of causation could potentially be applied to climate cases, this will likely be met with resistance as the court may feel extensive pressure from industry not to lower the standard simply because this simply requires plaintiffs to prove less.\textsuperscript{115} Causation may also be problematic compared to cases against US emitters because Canadian defendants have simply contributed less to the global emissions causing climate change.\textsuperscript{116}

In Canada, strict liability can be imposed to find causation where the rule in \textit{Rylands v. Fletcher} is met: a) a non-natural use of the land and b) something likely to do mischief escapes from the land.\textsuperscript{117} This theory is hard to apply to GHG emissions because these emitting plants and factories have become common place or are so commonplace in an area as to have an entire industry set up in one location. Moreover, GHGs do not “escape” in the sense of a wild animal or fugitive dredge. Rather, they are knowingly released. Finally, the appellate decision in \textit{Smith v. Inco} set a bleak tone for the application of \textit{Rylands v. Fletcher} to climate change cases as it reiterated that what is unnatural must be considered in relation to time, place, and manner of use. Accordingly, coal operated power plants will likely be considered natural as the court reiterated that the purpose of \textit{Rylands v. Fletcher} is not to impose liability for intended consequences of reasonable activities that are incompliance with current law. For these reasons, in Canada as well as the US, strict liability will likely not apply.

Even if it is applied, strict liability in Canada is subject to the due diligence defense under which the defendant will usually escape conviction where the defendant took all reasonable steps to prevent the commission of an offense, or reasonably believed in a mistaken set of facts that would have justified his action/inaction.\textsuperscript{118} What constitutes due diligence will be determined on a case-by-case

\textsuperscript{114} \textit{Ibid}.
\textsuperscript{115} “Climate Litigation” Backgrounder, Environmental Law Center, University of Victoria, December 3\textsuperscript{rd}, 2007, at 6.
\textsuperscript{116} Trachsler, \textit{supra} note 59 at 14.
\textsuperscript{117} [1868], LR 3 HL 330.
Although this is a high standard, there could be enough reason for defendants to argue they were waiting for clearer scientific evidence and were taking time to develop adaptation strategies in the midst of debate over the appropriate steps to take that the due diligence defense could preclude liability.

Finally, regarding remedies for negligence in Canada, insofar as British Columbian actions are concerned the British Columbia Negligence Act does allow joint and several liability. This is good for plaintiffs because it allows them to sue one contributory defendant for the whole of the damage, often leaving the defendants to fight amongst themselves to determine the tricky element of causation. However, considering the magnitude of imposing liability under a joint and several scheme, this increased potential for unlimited liability may put extra pressure on the courts.

Although these negligence claims are generally similar on either side of the border, there are enough differences that we can determine that US negligence standards are perhaps less rigid than those of Canada. Thus creating a less favourable environment for tort actions, which could be another factor explaining the dearth of climate change litigation in Canada.

Public Trust

The plaintiffs’ bar has recently brought cases under the public trust doctrine alleging that federal officials have a fiduciary duty to hold the country’s natural resources in trust for present and future citizens. This argument previously held strong in the US for to push the government to regulate water bodies; however has not yet been met with enthusiasm by courts regarding climate change. Essentially, the litigants argue that the federal government has a mandatory duty to affirmatively preserve and protect the atmosphere from damage or loss, not to use the atmosphere in a manner to damage future interests held by trust beneficiaries. Litigants allege that by failing to act, the

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119 Ibid.
120 Negligence Act, RSBC 1996, c 333.
121 Our Children’s Trust has recently filed numerous actions: Alec L. v. Jackson (N.D. Cal., filed May 2011) (federal complaint); Barhaugh v. State (Montana Sup. Ct. denied June 2011); In re Kids v. Global Warming (Iowa Dept. of Nat. Resources June 2011); In re Bonser-Lain, (Texas Comm. on Env. Quality June 2011)
government has allowed too many GHG emissions, which have in turn had a direct impact on the atmosphere.\textsuperscript{122}

US courts extended the public trust doctrine to environmental protection in the early 1980’s in the Mono Lake case; however, the doctrine has not yet been applied specifically to the atmosphere as the subject of the trust.\textsuperscript{123} Recently, environmental organizations have undertaken the public trust doctrine as a new path to adjudication and have acted together to bring cases against all 50 states and several federal agencies. These suits ask the courts to issue a declaratory judgment affirming the fiduciary duty and to provide injunctive relief by requiring the government to make qualitative reductions in GHG emissions. Importantly, this theory of liability could potentially have worldwide application.

Several law professors have filed an amicus brief in support of the plaintiffs’ claims, arguing that the public trust doctrine “properly applies to protect the nations air and atmosphere” and so creates a fiduciary obligation by the federal government to take immediate action to abate GHG pollution.\textsuperscript{124} This is a novel claim, but if the courts agree and find that the atmosphere is subject to a public trust, several issues will have to be considered going forward. For example: whether private parties require states to act affirmatively; what standing requirements are required to meet to bring a suit; and what level of knowledge the fiduciary states will be held to? These cases were filed early in the summer of 2011 and await decisions from the district courts.\textsuperscript{125}


\textsuperscript{123} Nat’l Audubon Society et al. v. The Superior Court of Alpine County, et al., 33 Cal 3d. 419 (1983) [Mono Lake].


\textsuperscript{125} See Arnold & Palmer LLP, supra note 38.
Canada has a limited history of applying the public trust doctrine, but only to the traditional areas of public access for navigation, fishing, and commerce.\textsuperscript{126} Unlike the US in \textit{Mono Lake}, Canadian courts have not yet accepted the public trust doctrine regarding environmental concerns; although it was briefly discussed in \textit{BC \textasciitilde Canfor}.\textsuperscript{127} The Supreme Court decision began the discussion over whether Canada could accept the public trust doctrine. The case noted that use of the public trust doctrine would raise novel policy concerns but certainly sets the court’s sympathetic tone and appropriateness of the Province taking on a duty to protect.\textsuperscript{128} Notably, a PEI trial court relied on \textit{Canfor} to find that the public has standing to sue the government when it fails to adequately protect the public interest under a public trust.\textsuperscript{129} This could signal a trend for Canadian courts, but may remain a one-off case. Since the doctrine does not have a rich history in Canada, it is unlikely that its first application will be to apply trust duties to something so abstract and dramatic as the atmosphere, which may account for why these cases have not been filed in Canada; however, the Courts’ concerned tone in \textit{Canfor} provides hope.

\textbf{Political Culture & Other Forces Affecting the Decision to Litigate}

\textit{Costs and the Expense of Litigation}

The process of litigation is extremely expensive in both Canada and the United States, yet this expense does not seem to prevent environmental litigation, specifically in relation to climate change, from being brought in the US. While many parties seek to bring actions in the US in order to take

\textsuperscript{126} Michael C. Blumm & R.D. Guthrie, “Internationalizing the Public Trust Doctrine: Natural Law & Constitutional & Statutory Approaches to Fulfilling the Saxion Vision” (2012) 44 UC Davis L Rev _.
\textsuperscript{128} See DeMarco, Valiante, & Bowden, supra note 88 at 252.
\textsuperscript{129} \textit{PEI et al \textasciitilde Canada (Fisheries \& Oceans)} 2005 PESCTD 57, para 37 (“If a government can assert its right, as a guardian of the public interest, to claims against a party causing damage to that public interest, then it would seem that in another case, a beneficiary of the public interest ought to be able to claim against the government for a failure to properly protect the public interest. A right gives rise to a corresponding duty.”) \textit{Id.}
advantage of more generous damages awards,\textsuperscript{130} there are also economic deterrents to bringing climate actions in Canada.

\textbf{Loser Pays System}

In Canada, an unsuccessful litigant must pay a proportion of the successful litigant’s legal fees. This contrasts with the American approach, which presumes each party shall bear their own costs.\textsuperscript{131} The “loser pays” system is intended to deter frivolous claims and encourage settlement, while partially indemnifying successful litigants. While the system may deter frivolous litigation, it may also deter legitimate claims by parties who cannot bear the risk of unpredictable costs consequences.\textsuperscript{132} For example, public interest environmental litigators interviewed about the development of public interest costs jurisprudence in Canada identified “the specter of being liable for an adverse costs award” as their primary access to justice concern.\textsuperscript{133} This is a significant barrier to parties bringing an action on a test-case basis, or bringing an action when the legal outcome is uncertain, as it currently is for common law causes of action in regards to climate change.

\textbf{Financing Litigation}

Climate litigants in the US are not only free from potential liability for their opposing party’s costs, but also may have other financial support in bringing their case. Public interest claimants in the US benefit from “private attorney general” provisions in numerous statutes and laws.\textsuperscript{134} These provisions enable private citizens and public interest groups to commence enforcement actions against any person alleged to be in violation of the relevant statute or regulation, or to sue the government where it is alleged to have failed to perform non-discretionary duties. If successful, courts may order

\textsuperscript{132} Ibid at 115.
\textsuperscript{133} Chris Tollefson, “The Implications of Okanagan Indian Band for Public Interest Litigants: A Strategic Discussion Paper” Commissioned by the Court Challenges Program of Canada, November 17, 2005, online: Court Challenges Program of Canada <www.ccppcj.ca/documents/tollefson-e.html>.
\textsuperscript{134} These are also known as “Citizen suit provisions.”
the defendant to reimburse the individual for litigation costs, including “reasonable” attorney fees. The Equal Access to Justice Act\textsuperscript{135} expands this one-way benefit to any non-tort action brought against a federal government department or agency if there is not a specific provision\textsuperscript{136}

In Canada, since the demise of the Court Challenges Program, there is no support for individuals bringing public interest applications against the government\textsuperscript{137}. For public interest claims, it may be possible to apply for an order for interim costs if the party can demonstrate: the litigation would be unable to proceed if the order were not made, that the claim is prima facie meritorious, and that the issues raised are of public importance\textsuperscript{138}.

For private litigation, contingency fee models are commonly used to pursue large actions in the US. While Canada allows contingency fees, they are limited in several provinces, and are generally not as common. Third party litigation funding is another source of financial support that is more common in the US than in Canada. Recently, however, an Ontario judgment\textsuperscript{139} provided support for the use of third party funding as a potential financing avenue for litigants: there, the Court accepted a litigation funding agreement to be used by a group of plaintiffs in a proposed class proceeding.

**Smaller Damages Payout**

For a claimant seeking damages for a common law claim, there is further incentive to bring an action in the US instead of Canada. Canada is not known for the large compensatory damages awards more common in American tort cases. Since 1978, non-pecuniary damages in Canada have been

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\textsuperscript{135} Equal Access to Justice Act, 5 USC 504; 28 USC § 2412.
\textsuperscript{137} Ibid. at 487. Until 2006, the Court Challenges Program provided funding for individuals bringing equality rights Charter challenges. Funding is now only available in respect of language claims. While this would not have applied to environmental issues under current jurisprudence, there have been some suggestions that protection from environmental harm could be argued as a Charter right. (For example, see Lynda Margaret Collins, “An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms” (2009) 26 Windsor Rev. of Legal and Social Issues 7.)
\textsuperscript{139} Dugal v. Manulife Financial Corporation, 2011 ONSC 1785.
\end{flushright}
Adjusted for inflation, the limit in 2010 was approximately $330,000. While Canadian lawyers have sought to increase recovery of pecuniary damages to make up for this cap, litigation in the US remains more lucrative. In addition, the role of punitive damages is far more limited in Canada than in the US, where punitive damages are used to punish a defendant for systematic misbehaviour or to force industry to change their behaviour through economic persuasion. In the case of climate litigation where economic pressure may be an important objective, this is a relevant consideration.

Limited Funding for Environmental Defense

American environmental groups may be able to pursue litigation more frequently not only due to greater financial support and incentive, but because they simply have more funding. From a review of Annual Reports published by American and Canadian environmental non-profit groups, this appears to be true, to some extent.

The Centre for Biological Diversity is one of the largest environmental non-profit litigation groups in the United States, and reported a 2010 income of over $8 million, with $685,981 in legal returns. Of $5.4 million in program services spending, $1.1 million was spent on a climate program. The WildEarth Guardians reported a 2010 total income of $1,649,279, of which $153,545 was legal returns. They spent $1,201,928 on their conservation programs. As a much larger player, the Environmental Defense Fund reported a 2010 total income of $64,754,689. Their program services expenses were $83,503,464, of which $44,650,876 went to the climate program. Numerous other organizations report budgets similar or slightly below that of the WildEarth Guardians, and many of those organizations are involved in litigation either alone, or in cooperation with other groups.

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In Canada, resources for funding environmental litigation are more modest. One significant player in environmental litigation in Canada is Ecojustice. In 2010, the group reported a total income of $4,490,713 (of which $160,738 came from cost awards and recoveries), having spent a total of $235,398 on litigation and program support.¹⁴⁵ West Coast Environmental Law (with support from the Law Society of BC) distributes approximately $200,000 per year through the Environmental Dispute Resolution Fund.¹⁴⁶ The Canadian Environmental Defense Fund reported a 2010 revenue of approximately $3.5 million, with similar expenses, but did not clarify the amount spent on climate initiatives or litigation.¹⁴⁷ Unlike the US, there are not many other organizations with budgets of over $1 million (though this is difficult to determine, due to different financial reporting requirements in Canada). Most Canadian environmental organizations appear to use what funding they have to support advocacy outside of the courts, such as education, lobbying, and public participation. It is not clear whether this is out of necessity, or for some other reason.

**Canadian Legal Environment**

A recurring explanation for the lack of climate litigation in Canada is that Canadians are simply less litigious than our American neighbours. This commonly accepted belief is grounded in the distinction between the US “rights based” model and the Canadian “participatory” model. While litigation is becoming more common in Canada, a desire to avoid fostering litigiousness is seen in our legislative process,¹⁴⁸ and in our rules of civil procedure more generally.

This difference is highlighted in the example of provision for citizen suits in Canadian environmental legislation. As discussed above in relation to the United States, a citizen suit is an action brought by a member of the public against a party who has breached a statutory or regulatory

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requirement. The only federal environmental legislation that provides for citizen suits is the *Canadian Environmental Protection Act 1999* (CEPA).¹⁴⁹ No similar provision exists in the *Species at Risk Act*, for example. The citizen suit provisions available under CEPA, as well as the few available under provincial environmental legislation, have substantial procedural requirements. As a result, they are infrequently used. Boyd stated in 2003 that citizen suit provisions had *never* been used successfully in Canada,¹⁵⁰ and no examples were found of recent successful cases. Given the occurrence with which organizations in the US (such as the Centre for Biological Diversity) bring citizen suit actions for protection of endangered species, this distinction has likely prevented litigation from being a standard tool for Canadian environmental groups.

When environmental actions have been brought, public interest litigants have often been faced with judicial prioritization of private interests, and deference to government decision makers. This perspective is shifting, as courts become increasingly aware of “the legitimate role and importance of public interest litigation.”¹⁵¹ Unfortunately, any optimism for the possibility of climate related litigation was seriously damaged by *Friends of the Earth v. Canada (Governor in Council)*, in which, as noted above, the Court concluded that it had “no role to play in reviewing the reasonableness of the government’s response to Canada’s Kyoto commitments…” and that regardless of justiciability, it would “still decline to make a mandatory order against the respondents.”¹⁵² This decision reflects a judicial wariness with respect to climate issues, and suggests that courts may be unwilling to interfere (or appear to be interfering) with the executive or legislative branch on how to address climate change.

Other procedural aspects of the Canadian legal system serve to further stifle public involvement, and potential environmental legislation. For example, Quebec is the only Canadian province with legislation to prevent strategic lawsuits against public participation (SLAPPs). SLAPPs

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¹⁴⁹ *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, ss 22-38.
¹⁵¹ Ibid, at 267.
¹⁵² FOE, supra note 16 at para 46, 47.
are civil actions with little merit advanced with the intent of stifling participation in public policy and decision-making.\textsuperscript{153} While these should be prevented under rules of civil procedure, those rules are only effective if a party is able to dispute the claim.

These limitations on Canadian environmental litigation suggest that even if legislation governing climate issues existed in Canada, it would be difficult for citizens to enforce it through litigation. The lack of a history of environmental litigation generally may mean that parties seeking to bring a tort claim against private companies or the government have limited jurisprudence to rely on.

\textbf{Value of Litigation as a Tool to Address Climate Change: Litigation and Supra Litigation Goals}

Given these limitations to pursuing climate change litigation in Canada, many potential litigants may attempt to bring their claim in a US jurisdiction, or more likely, simply give up on the claim. However, litigation has a number of additional benefits and possible objectives that should not be overlooked by groups considering the strategies to use in addressing climate change. These benefits may arise directly through the process of adjudicating a tort claim, or may be indirectly related to the pursuit of the claim itself, referred to as supra litigation goals.

At its most basic, tort law aims to provide compensation to parties who are injured as a result of the actions of others.\textsuperscript{154} The purposes of tort law include aims of compensation, justice, deterrence, and education and development of law. In addition, tort law is used as a means of applying “pressure upon those who wield political, economic, or intellectual power.”\textsuperscript{155} Given these purposes, many argue that tort law is well suited to address climate change grievances, and so should be actively pursued as a valuable tool in reform efforts. In circumstances where governments are not progressing with the speed or enthusiasm that may be warranted, and where there are limited administrative means of


\textsuperscript{154} Klar, \textit{supra} note 141 at 1.

\textsuperscript{155} \textit{Ibid} at 17, see also 11-17.
holding governments or parties to their obligations, tort law may provide one of the few options for forcing action.

Of the anticipated costs of climate change, many will involve damage to property as a result of changing sea levels or weather patterns. It is now accepted that climate change is occurring at least in part as a result of human action, and that the effects of climate change will be distributed unevenly, with certain groups bearing a much greater proportion of the resulting harm. Communities or nation states that have a particularly acute exposure to present and future climate impacts are described as “climate vulnerable”. 156 Grossman argues that the tort law framework may be used in these circumstances to minimize the costs associated with the harms, to determine the appropriate allocation of the costs of these harms, and to provide corrective justice. 157 Grossman contends that producers of fossil fuels are in a better position than victims or potential victims to reduce the costs of climate change “accidents.” Those most affected by climate change cannot effectively organize to bargain with or force emitters to reduce their emissions, due to the vast numbers of potential victims, the disparate nature of effects, and a lack of public knowledge. 158 As a result of this, emitters are able to externalize the costs of climate change. Emitters, on the other hand, have greater resources with which to carry out a cost-benefit analysis comparing the benefit of their activity with the “accident costs” their emissions will create, and thereby internalize those costs, eventually resulting in a more efficient system. 159 Therefore, in order to minimize the accident costs of climate change, those costs should be allocated to emitters and producers. This allocation is supported by conceptions of equity and corrective justice, which suggest that those who have been harmed by another’s actions should be compensated in some way.

158 Ibid at 4.
159 Ibid at 5.
Indeed, tort litigation may be the only way for the parties most vulnerable to climate change to achieve corrective justice. While regulatory suits may be considered more effective at actually reducing the impacts of climate change if they result in greater restrictions on GHG emissions, they provide limited opportunities for victims to obtain redress.\textsuperscript{160} Even assuming sufficient political support, the issue of climate justice is a difficult one to address through a regulatory framework, due to the unique nature of the harm felt by each community or group.\textsuperscript{161} Burkett argues that the US Supreme Court’s decision in \textit{AEP v. Connecticut} deprives climate justice plaintiffs of the ability to seek corrective justice for injuries to life and property that occur as a result of climate change.\textsuperscript{162} The Plaintiffs in \textit{Kivalina} are an example of a group who are highly vulnerable to climate change despite having produced insignificant emissions: for communities such as this, regulatory schemes for emissions reduction do not fulfill the need for specific relief in the form of funding for physical relocation.\textsuperscript{163} Burkett argues that justice demands at least some avenue for remedy be available to the climate vulnerable who have been wronged.\textsuperscript{164}

Climate tort litigation, if successful, may also have distinct value as a deterrence mechanism. If private companies are held to be liable for their contribution to climate change, it is likely that other companies would take significant action to protect themselves by curbing emissions. Even current concern over “litigation risk” as a financial concern has been noted as influencing discussions around corporate climate policies.\textsuperscript{165} Particularly in Canada, fines for regulatory environmental offences are usually minimal, and are infrequently imposed or enforced. In this way, private tort litigation may be a more effective deterrent (despite the limitations to damage awards in Canada).

\textsuperscript{160} Hari Osofsky, “\textit{AEP v. Connecticut’s Implications for the Future of Climate Change Litigation}” (2011) 121 Yale LJ Online 101 at 106.
\textsuperscript{161} \textit{Ibid} at 106.
\textsuperscript{162} Burkett, \textit{supra} note 156 at 116.
\textsuperscript{163} \textit{Ibid} at 117.
\textsuperscript{164} \textit{Ibid} at 118.
\textsuperscript{165} Salzman & Hunter, \textit{supra} note 104 at 135.
Beyond deterring entities from continuing harmful actions in the future, the adjudication of tort claims can have a powerful educational effect, helping to set norms for socially desirable behaviour, and influencing legislative development. The tort goals of justice and influence of laws and procedures coincide where Ewing and Kysar identify common law tort adjudication as an important “pleading and prodding” tool. They argue that the discourse that arises from judicial engagement on the merits of climate tort suits “promotes consideration of the underlying visions of right, responsibility, and social order that are adopted (or implied) by judicial decisions. Such adjudication ensures the continued availability and operation of tort law as a critical forum for the articulation of public understandings of morality.” They highlight the duty of the courts to interact with other branches of government to identify gaps between common law and government action – through this, the basic ideal of protection from harm can be more closely fulfilled.

Aside from these specific tort-related goals, there are many less immediate supra-litigation reasons to bring concerns before the courts. In the face of failed political policy and non-existent political will, litigation is a means of encouraging legislative and executive action. Until those branches of governments enact effective regulatory mechanisms to address not only climate change but also climate justice issues, litigation is likely to play “an essential role in the overall regulatory framework.” On the basis that “doing something is better than doing nothing,” litigation may be a way to attempt to leverage other strategies, encourage negotiation, influence policy making, and to articulate the concerns of marginalized groups who may not be party to the litigation, while

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167 Ibid at 356.
168 Ibid at 357.
170 Hsu & Parish, supra note 63 at 61.
maintaining the issue in public awareness and on the political agenda. By focusing on specific injuries and harms as is required in tort litigation, it may be easier to build awareness and political support.\textsuperscript{172} Through the stories of victims, an increased urgency for legislative change and mitigation is felt.

Finally, Grossman suggests that an increase in climate litigation, even if unsuccessful, may help pave the way for future cases. Broad declarations with little legal effect may serve to “get the concept of climate change harms into the courts and …bolster their comfort and familiarity with the idea.”\textsuperscript{173} Hsu and Parish allude to this in the context of increasing familiarity and acceptance of lawyers and policy makers with the extraterritorial application of Canadian laws to address transboundary environmental issues.\textsuperscript{174} At a more abstract level, the development of tort law may also play a significant role in helping to establish standards of foresight and responsibility with respect to climate change adaptation needs.\textsuperscript{175} These developments will hopefully benefit future environmental tort outcomes.

**Conclusion**

Canadians widely recognize the future threats posed by climate change; however, Canada still lags behind many industrial nations in terms of implementing legislation to deal with climate effects at the mitigation or adaption level. It is interesting to note that US climate litigants in the face of less than effective reform have turned to the courts as another avenue to change; however, this has not happened in Canada despite the countries’ similar industries and legal systems. Although it will not provide the “silver bullet” to climate change, climate litigation is essential to a comprehensive GHG reform for the many reasons discussed above. In comparing and contrasting the legal systems of Canada and the United States, this paper finds many differences that may account to the stark

\begin{itemize}
\item \textsuperscript{172} Hsu & Parish, \textit{supra} note 63 at 60.
\item \textsuperscript{173} Grossman, \textit{supra} note x at 61.
\item \textsuperscript{174} Hsu & Parish, \textit{supra} note 63 at 60.
\end{itemize}
distinction between the viable climate litigation culture in the United States and the essential absence of these claims in Canada. While these factors along with many others may contribute to this difference, climate litigants should not sit idly by while the threats of climate change loom closer. Rather, litigants should act to undertake climate actions because they are worthy tools to push reform, provide redress, and present the problem to the public in a concrete and tangible light.