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Canadian Legal Options Available for Individuals to Seeking Climate Change Mitigation and Adaptation: Full of Promise or Just Hot Air?

by

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Contents

Introduction

Unlike many countries, there is no form of environmental protection expressly listed in Canada's Constitution, including in its bill of rights - the Canadian Charter of Rights and Freedoms.[4] As a federation, the Canadian Constitution provides for the division of powers between the federal Parliament and the ten provincial legislatures,[5] yet there is no express delineation of authority over the "environment" to either the federal or provincial governments. Instead regulation over the environment is based on numerous listed powers. There are some powers that directly reference geographic features or natural resources that are used to enable environmental regulation, however most often, general powers such as the federal power over the criminal law and the provincial power over "property and civil rights" are used.[6] This has resulted in concurrent federal and provincial jurisdiction regulating the environment. Coupled with a high degree of uncertainty about specific regulatory authority, there is a *lacunae* in regulating many environmental areas, which includes regulation of greenhouse gases (GHGs).[7] There is the potential for further litigation to clarify the future scope of federal and provincial authority to regulate GHGs.[8]

Canada shares multiple legal systems. The province of Quebec has a civil law system inherited from France for provincial laws, whereas the rest of the Canadian provinces share the English

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[4] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 ["*Charter*"].

[5] The division of powers under sections 91 and 92 of the Constitution Act, 1867 (formerly called the British North America Act, 1867, 30-31 Vict., c.3 (U.K)).

[6] Federal powers that may touch on the environment include powers in section 91 over "the regulation of trade and commerce", "the raising of money by any mode or system of taxation", "navigation and shipping", "sea coast and inland fisheries", "ferries", "Indians, and lands reserved for the Indians", the "criminal law", and "laws for the peace, order, and good government of Canada, in relation to all unenumerated powers (section 91 preamble). Provincial powers in section 92 include "direct taxation within the province in order to [raise] revenue for provincial purposes", "the management and sale of public lands belonging to the province and the timber and wood thereon", "local works and undertakings", "property and civil rights in the province", "all matters of a merely local or private nature in the province, "exploration for non-renewable natural resources in the province" (section 92A(1)(a)), and the "development, conservation and management" of "non-renewable natural resources and forestry resources in the province" and "sites and facilities…for the generation and production of electrical energy"(section 92A(1)(b)-(c)). For reference to the roles of the federal "criminal law" and provincial "property and civil rights" powers, see ***R** v Hydro-Québec*, [1997] 3 SCR 213 (SCC), [1997] CanLII 318 (SCC) at para. 154. One appellate court found that "GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power", see *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 ["*Syncrude*"] at para. 62.

[7] GHGs include carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6).

[8] There is an ongoing dispute between the federal and provincial governments of Saskatchewan and Ontario over federal authority to implement a national carbon price that has led to a constitutional reference case, currently before the Saskatchewan Court of Appeal, to clarify the division of powers in relation to carbon pricing.

common law. Individuals in Quebec, however, like all other Canadians, remain subject to federal laws and provincial administrative laws which follow a more British tradition.[9]

Canada has a dark and complicated history regarding its relationship with its Indigenous peoples.[10] Since contact between the colonial powers and Canada's Indigenous peoples, oppression and indignity have occurred, the remnants of which are still pervasive in Canada today[11] though recently there have been efforts by the federal and provincial governments towards reconciliation.[12] One outcome of these efforts is that the Canadian Constitution now recognizes "existing aboriginal and treaty rights of the aboriginal peoples of Canada."[13] A Truth and Reconciliation Commission was also established, whose findings now act as a guide for Canadians in "reconciliation within Aboriginal families, and between Aboriginal peoples and non-Aboriginal communities, churches, governments, and Canadians generally."[14] Future reconciliation could involve the recognition of Indigenous cultural rights, customary law, and self-governance. Within this legal and cultural context, there is both opportunities and challenges for Canada to effectively respond to the global problem of climate change.

[9] Brun, Henri, Guy Tremblay and Eugénie Brouillet, 2014, pg. 1666.

[10] The term "Indigenous" is broadly used to classify people in international treaties such as the United Nations Declaration on the Rights of Indigenous Peoples' (UNDRIP) and the Paris Agreement despite not having consistent meaning internationally. In Canada, it refers to all First Peoples – First Nations, Metis, and the Inuit.

[11] Indigenous peoples were banned from practicing their culture, speaking their language, living on the land they had occupied for thousands of years, and their children were removed and sent to residential schools. The damages caused from being placed in residential schools resulted in Canada's largest class action settlement in history. See Indian Residential Schools Settlement Agreement. May 8 2006. GALLOWAY, Gloria, "Court approves class-action lawsuit for Indigenous students who say they were abused at day schools", The Globe and Mail, July 8, 2018, online https://www.theglobeandmail.com/canada/article-court-approves-class-action-lawsuit-for-indigenous-students-stripped.

[12] In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 ["*Daniels*"] at para. 37: "The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal."

[13] See section 35 of the Constitution Act, 1982.

[14] Truth and Reconciliation Commission of Canada. http://www.trc.ca/websites/trcinstitution/index.php?p=4.

In terms of its international scale of emissions, Canada is ranked 9th for emitting nations globally, contributing approximately 1.6% of global emissions.[15] Canada also ranks high globally in per capita emissions.[16] Table 1 represents Canadian GHG emissions for each provinces and territories.

Table 1 : GHG Emissions (provincial CO_2 equivalent emissions per capita – 2015)[17]

Province	Population	Emissions (Mt CO_2 equivalent)	Emissions per capita (tonnes CO_2 equivalent)	Percentage of Canadian Emissions (%)
British Columbia	4,694,700	61	12.99	8.46%
Alberta	4,177,500	274	65.59	37.98%
Saskatchewan	1,131,200	75	66.30	10.40%
Manitoba	1,295,400	21	16.21	2.91%
Ontario	13,789,600	166	12.04	23.01%
Quebec	8,254,900	80	9.69	11.09%
Newfoundland and Labrador	528,800	10.3	19.48	1.43%
New Brunswick	753,900	14	18.57	1.94%
Nova Scotia	941,500	16	16.99	2.22%
Prince Edward Island	146,800	1.8	12.26	0.25%
Yukon	37,300	0.3	8.04	0.04%
Northwest Territories	44,200	1.4	31.67	0.19%
Nunavut	36,600	0.6	16.39	0.08%
Canadian Total	35,832,400	721.4	20.13	100%

[15] See Canada, Environment and Climate Change & Environment and Climate Change Canada. "Global greenhouse gas emissions", (16 March 2012), online: <https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/global-greenhouse-gas-emissions.html>.

[16] In 2014, according to the World Bank, Canadian per capita emissions of 15.1 tons of CO_2 carbon equivalent ranked Canada 16th in per capita emissions. See "CO2 emissions (metric tons per capita) | Data", online: <https://data.worldbank.org/indicator/EN.ATM.CO2E.PC?year_high_desc=true>.

[17] Government of Canada, Statistics Canada. "Population by year, province and territory (Number)", (27 September 2017), online: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm and "National inventory submissions 2017", online: <http://unfccc.int/national_reports/annex_i_ghg_inventories/national_inventories_submissions/items/10116.php>.

This article will explore the paths available to individuals to promote positive climate outcomes through domestic legal mechanisms. It will describe the viability of actions against state agents and other private entities. It will also consider a variety of substantive legal areas and their relationship to climate change, including international law, constitutional and human rights law, judicial review using administrative law, and private law actions. Throughout each area of analysis, attention will be given to considerations unique to the English majority regions of Canada, the province of Quebec, and for Canada's Indigenous peoples.

1. Canada and the international climate change agenda

Canada's commitment to international treaties aimed at addressing climate change has been inconsistent. In 2002, Canada committed, through the Kyoto Protocol,[18] to cutting its total emissions of GHGs by an average of 6% below 1990 levels by 2012,[19] but in December 2011 the federal government officially notified the United Nations Framework on Climate Change (UNFCCC) that Canada would exercise its legal right to withdraw from the Kyoto Protocol.[20]Then, in 2016 a new federal government ratified the Paris Agreement[21] and with that committed to undertake GHG reductions of 30% below 2005 levels by 2030 - which represents a 291Mt reduction.[22]

The federal government has also ratified multiple important treaties or memorandum of understanding all contributing to the reduction of GHGs.[23] Following the Paris Agreement, Canada, Mexico, and the US, signaled their intent to reduce methane emissions from the oil and gas sector by 40 to 45 % below 2012 levels by 2025.[24]

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[18] United Nations / Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998).
[19] Government of Canada, 2018. http://www.climatechange.gc.ca/default.asp?lang=En&n=4D57AF05-1.
[20] Government of Canada, 2013. https://www.ec.gc.ca/Publications/default.asp?lang=En&n=EE4F06AE-1&xml=EE4F06AE-13EF-453B-B633-FCB3BAECEB4F&offset=3&toc=show.
[21] United Nations / Framework Convention on Climate Change (2015) Adoption of the Paris Agreement, 21st Conference of the Parties, Paris: United Nations.
[22] Government of Canada. http://www.gazette.gc.ca/rp-pr/p1/2017/2017-05-27/html/reg1-eng.html.
[23] These include the 1985 Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol,[23] which aim at controlling important GHGs, such as, CFCs, HCFCs, and HFCs.
[24] Memorandum of Understanding (MOU) with the Department of Energy of the USA and the Department of Natural Resources of Canada and the Ministry of Energy of the United Mexican States concerning climate and energy collaboration. Ratified on February 12th, 2016. The MOU does not impose any legally binding obligations (s.7). http://www.nrcan.gc.ca/energy/international/nacei/18102.

1.1. Action against government for non-compliance with international law

The international instruments cited above do not include any direct enforcement mechanisms for individuals to hold Canadian governments accountable for its commitments. Moreover, as with most Commonwealth countries, Canada is a dualist state where international treaties are not directly installed in national law by ratification of international instruments. There must be actions taken to incorporate international law within Canadian laws.[25] Except for international customary law, Canadian courts are not allowed to apply international law without its direct enactment domestically. As international climate change obligations are ultimately implemented through federal or provincial laws or regulations, individuals claiming violations of international treaties must challenge the legislation, regulations, policies, or actions of the regulating governments or their agents.

1.2. Case law involving international law obligations

Two judicial reviews attempted to force the federal government to fulfill its international obligations under the Kyoto Protocol A law implementing the Kyoto Protocol, the *Kyoto Protocol Implementation Act*,[26] had just been enacted in the following months, the case was stayed pending the outcome of the new act. In 2010, *Friends of the Earth* launched a lawsuit against the federal government, alleging a violation of the KPIA.[27] The KPIA mandated that the Minister of the Environment "shall" prepare a Climate Change Plan that includes measures to be taken "to ensure" that Canada meets its obligations under the Kyoto Protocol.[28] The Federal Court concluded that a court could enforce clear mandatory elements of the KPIA, such as delivering a Climate Change Plan, but that the term "to ensure" was not usually used to indicate an imperative and that the KPIA had created "a comprehensive system of public and Parliamentary accountability as a substitute for judicial review"[29]. But more importantly, the court also declared that, in any case, the federal

[25] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) ["*Baker*"] at para. 69.
[26] *Kyoto Protocol Implementation Act*, S.C. 20017, c. 30 ["KPIA"].
[27] *Friends of the Earth v. Canada* (FOE), 2008 FC 1183 ["FOE"].
[28] FOE at para. 32.
[29] Id at paras. 34 and 44.

government could not unilaterally ensure Kyoto compliance and that it had no control over provincial cooperation.[30]

In 2012, Daniel Turp, a professor of law, applied for judicial review of the decision made by the Government of Canada to withdraw from the Kyoto Protocol in accordance to its article 27.[31] As explained by the Federal Court: "under the royal prerogative, the conduct of foreign affairs and international relations, including the decision to conclude or withdraw from a treaty, falls exclusively under the executive branch of government".[32] The Court held that "the KPIA does not expressly alter the royal prerogative and that no provision or condition of the Act does so by necessary implication".[33] Further, the Court held that the withdrawal from the Protocol did not violate the separation of powers because the executive branch had maintained its prerogative to withdraw from the Protocol, and "this application of the prerogative is not justiciable (…) nor are issues regarding compliance with the Protocol".[34] The KPIA was later repealed by the federal Parliament.[35] Finally, the Federal Court also concluded that the withdrawal from the Protocol did not violate the democratic principle, because the federal government was not bound to consult the House of Commons before withdrawing from the Protocol.[36]

These two cases demonstrate that although within our legal system an individual could bring a case against the government for allegedly not complying with its international climate change obligations, the issue would be linked to the terms of the implementing domestic legal enactments and subject to the considerations of the justiciability of policy decisions around climate change and the royal prerogative of the federal government in international treaty-making.

2. Human rights in Canada and the international climate change agenda

The prime source of human rights obligations in Canada is the *Canadian Charter of Rights and Freedoms (Canadian Charter).* Enacted in 1982, the *Canadian Charter* forms the first part of the

[30] Id at paras. 35 and 45. The Federal Court of Appeal later affirmed this decision, in *Friends of the Earth v. Canada (Environment*), 2009 FCA 297, and the Supreme Court of Canada.
[31] *Turp v. Canada*, 2012 FC 893 ["*Turp*"].
[32] Id at para. 18.
[33] Id at para. 26.
[34] Id at para. 28.
[35] Id.
[36] Id at para. 31.

Canada Constitution Act 1982. It applies to all levels of government.[37] Previously, in 1976, a quasi-constitutional law was enacted, in the province of Quebec called the *Quebec Charter of Human Rights and Freedoms* (*Quebec Charter*).[38] The *Quebec Charter* cannot contradict the *Canadian Charter*, but its provisions take precedence over all other Quebec laws unless clearly specified otherwise.[39] While the application of the *Canadian Charter* is limited to legislation and actions involving the state, the *Quebec Charter* applies to the public and private sectors.[40] It is notable that Canada has ratified many international human rights treaties, however, the obligations in those treaties are not directly applied, but rather implemented by Courts through the *Canadian Charter*'s and other human rights legislation's interpretation.[41]

2.1. Action against public or private entities for non-compliance with human rights obligations in international law

To date, there does not appear to be any successful actions against either a public or private party under human rights obligations found in international law. The attempt to hold Canada accountable for climate change harms in international fora has not succeeded as shown by the Arctic Athabaskan peoples petition to the Inter-American Commission on Human Rights.[42]

Recently, however, claims for civil damages resulting from a corporation's alleged breaches of customary international law and *jus cogens*, survived a procedural motion to strike. In *Araya*, an appellate Court affirmed that arguments based on corporate actors' violations of customary international law were not "bound to fail" and should proceed in the trial process.[43] If climate

[37] The *Canadian Charter* section 32 states that it applies to "the Parliament and government of Canada in respect of all matters within the authority of Parliament…and…to the legislature and government of each province in respect of all matters within the authority of the legislature of each province". Local governments are bound by the *Canadian Charter* as they derive their authority from provincial legislation.
[38] *Quebec Charter of Human Rights and Freedoms*, CQLR c C-12.
[39] *Quebec Charter*, art. 52 and 53.
[40] *Quebec Charter*, art. 54, 134 and 135.
[41] For a list of ratified treaties, see Heritage, Canadian & Canadian Heritage. "Human rights treaties", (23 October 2017), online: *aem* <https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html>. For the role of international law in the interpretation of the scope of rights in the *Charter*, see *Baker* at para. 70.
[42] Inter-American Commission on Human Rights, Arctic Athabaskan peoples petition, 2013.
[43] *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 ["*Araya*"] at para 197.

change human rights violations reach customary international law or *jus cogens* status, then potentially a new line of civil actions might arise.

2.2. Action against public or private entities for non-compliance with domestic human rights law

There have been no successful actions using the *Canadian Charter* or *Quebec Charter* that specifically deal with government climate change policies. Further, there have been no direct challenges brought seeking to utilize human rights obligations to compel further government action. The *Turp* decision notably alluded to the potential of *Canadian Charter* arguments being raised in the climate change policy context.[44] There are multiple different human rights grounds found in the *Canadian Charter*, Constitution, and *Quebec Charter* that could potentially find application in Canadian litigation to redress climate change.

i) Human rights directly protecting the environment

Quebec Charter, Article 46.1: Right to a healthful environment that preserves biodiversity

Environment protection is not a right recognized by the *Canadian Charter*, but it is in Article 46.1 of the *Quebec Charter*, which since 2006 specifically addresses the subject of the environment:

> "Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by the law."

Despite the recognition of a right to a "healthful environment," the implementation remains limited because the provision includes the limitation of "to the extent and according to the standards provided by the law." Further, the "right to a healthful environment" must be read in conjunction with the *Quebec Charter*'s article 52, which ensures the primacy of certain rights and freedoms. The "right to a healthful environment" is not included among those prioritized rights, as it is included in the "economic and social rights" section of the *Quebec Charter*. Therefore, the "right to a healthful environment" is not recognized as a fundamental right, which would be superior in its application to other provincial laws. However, article 46.1 has been used as a normative

[44] *Turp* at para. 18.

principle to interpret the application of Quebec laws and regulations in favor of the protection of the environment.[45]

Certain provinces and territories have legislation protecting procedural rights related to environmental decision-making.[46] Though these rights do not rise to the level of substantive rights to a health environment, as if found in the Quebec Charter's article 52, they nevertheless provide important rights that could help guide government policy on climate change.

There is recent climate change litigation filed by Greenpeace Canada and Ecojustice Canada against the Ontario government seeking to enforce the procedural rights under the Ontario *Environmental Bill of Rights.*[47] The new Progressive Conservative government under populist Premier Doug Ford has passed a regulation to end Ontario's cap and trade program, which is said to violate the consultation rights owed to every person in that province. The lawsuit seeks, amongst other remedies, to quash the regulation as *ultra vires* the purpose of the Ontario *Environmental Bill of Rights*.

ii) Other human rights indirectly protecting the environment

1. *Canadian Charter, Section 7; Quebec Charter, Article 1: Life, liberty and security of the person*

Section 7 of the *Canadian Charter* states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Article 1 of the *Quebec Charter* echoes this protection by stating: "Every human being has a right to life, and to personal security, inviolability and freedom". It is conceivable that future litigation could establish that environmental protections, and specifically climate change mitigation and adaptation, are necessary to prevent the loss of life, liberty, and human well-being. In Canada, litigation seeking to recognize this class of rights has been brought unsuccessfully in the contexts including nuclear energy, wind energy, noise pollution, waste

[45] *SM Construction inc. c. Directeur des poursuites criminelles et pénale*s, 2016 QCCS 4350.
[46] See the Ontario Environmental Bill of Rights, 1993, S.O. 1993, c. 28, the Northwest Territories *Environmental Rights Act*, R.S.N.W.T. 1988, c. 83, the Nunavut *Environmental Rights Act*, R.S.N.W.T. (Nu.) 1988, c. 83, and the Yukon *Environment Act*, R.S.Y. 2002, c. 76. See also Boyd, (2012), pg. 61.
[47] See Cornwell, Steven, "Greenpeace takes Ontario to court for unlawfully cancelling cap and trade program", Greenpeace Canada, September 11, 2018, online: https://www.greenpeace.org/canada/en/press-release/4414/greenpeace-takes-ontario-to-court-for-unlawfully-cancelling-cap-and-trade-program/.

incineration, and oil and gas extraction.[48] Pending actions before Canadian courts are attempting to establish section 7 claims relating to mercury pollution on the Grassy Narrows First Nation, air pollution in the Aamjiwnaang First Nation due to neighbouring chemical refineries in what is known as the "Chemical Valley", and potential for increased exposure to toxic industrial sulphur dioxide emissions in an ongoing environmental approval for a industrial project in Kitimat, British Columbia.[49] Many scholars consider section 7 to be a particularly viable route to the recognition of environmental rights in Canada.[50] Recent case law in Quebec, suggests that a person's rights to life, personal security and inviolability should also generate an obligation for the state to implement measures that actively ensure the protection of such rights.[51]

2. *Canadian Charter, Section 15; Quebec Charter, Article 10: Equality rights*

Sub-section 15(1) of the *Canadian Charter* states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Article 10 of the *Quebec Charter* states: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political

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[48] *Energy Probe v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449, 57 D.L.R. (4th) 513, 1989 CarswellOnt 390 (Ont. C.A.)["*Dixon v. Director, Ministry of the Environment*, 2014 ONSC 7404; *Dingeldein v. Ontario (Ministry of Environment and Climate Change),* [2015] O.E.R.T.D. No. 32 (Ont. Env. Rev. Trib.); *Mothers Against Wind Turbines Inc. v. Ontario (Ministry of the Environment and Climate Change)*, [2015] O.E.R.T.D. No. 19; *Gillespie v. Ontario (Ministry of the Environment and Climate Change)*, [2015] O.E.R.T.D. No. 3; *Fairfield v. Ontario (Ministry of the Environment),* [2014] O.E.R.T.D. No. 71; *Kroeplin v. Ontario (Ministry of the Environment*), [2014] O.E.R.T.D. No. 24; *Robillard c. Écoservices Tria inc.,* 2016 QCCS 6267; *Coalition of Citizens for a Charter Challenge c. Metropolitan Authority*, 103 D.L.R. (4th) 409,[1993] N.S.J. No. 182; *Manicom et al v. County of Oxford et al*, (1985), 52 OR (2d) 137 (Ont. Div. Ct.).; *Domke v. Alberta*, 2008 ABCA 232; *Kelly v. Alberta*, 2008 ABCA 52, appeal rejected 2009 ABCA 161.

[49] See "Grassy Narrows sues Ontario over mercury health threat from clearcut logging", Canadian Environmental Law Association, online: http://www.cela.ca/newsevents/media-release/grassy-narrows-sues-ontario-over-mercury-health-threat-clearcut-logging. On Aamjiwnaang, see *Lockridge v. Ontario (Director, Ministry of the Environment)*, ONSC 2316. On the Kitimat approval, see "The fight for clean air in B.C.'s Kitimat Valley", the Discourse, online: https://www.thediscourse.ca/uncategorized/the-fight-for-clean-air-in-b-c-s-kitimat-valley?utm_source=CELL+Mailing+List&utm_campaign=f21a9ccb78-CELL_e_Newsletter_2018_01_09_draft_COPY_01&utm_medium=email&utm_term=0_5fdbc5a596-f21a9ccb78-108631625

[50] See Klaudt (2018), p. 232, Collins (2015), p. 529, Jeffries (2015), p. 1402, and Nanda (2012), p. 110.

[51] Thériault and Robitaille, (2011), p.211.

convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap."

Building on principles from the environmental justice movement, namely that the distribution of environmental harms and benefits is unequal for certain disadvantaged social groups,[52] equality rights might present a viable climate litigation basis. To do so would require evidence that the negative impact of government failures, that contribute to environmental harm and climate change, specifically effects certain disadvantaged groups. These negative effects will have some connection with the vulnerable groups' status within a listed or analogous ground that is protected from discrimination. It will be necessary for litigants to show that government (in)action, around climate change mitigation or adaptation, has created some distinction that is based on one of the prohibited grounds of discrimination and that has the discriminatory impact of conveying or exacerbating a disadvantage for the group discriminated against.[53]

There are multiple grounds of discrimination that might lead to the creation or exacerbation of disadvantage caused by climate change. These include namely race, colour, ethnic or national origin, or social condition, as negative environmental burdens are generally inequitably distributed according to these markers. Another set of grounds are age and sex as negative environmental burdens are generally experienced with greater intensity depending on these markers. The inequalities themselves might take various forms such as different exposure to environmental burdens due to geographic location or proximity, different access to measures of environmental protection, different body burdens or effects on chronic pollution exposure, and different capabilities to engage with environmental decision-making processes and prevent negative exposures.[54]

The Aamjiwnaang First Nation has sought environmental protection with section 15 in the past, however, there remains no Canadian court decisions where section 15 equality rights have been successfully used for environmental protection.[55] Some other examples of potential litigants that may be well placed to bring an action include the Inuit, who could argue that inaction to mitigate

[52] See Chalifour, (2015), pgs. 94-95, Collins, (2015), pg. 529, Klaudt, (2018), pg. 221 Boyd, (2011), 110-117; Chalifour, (2013), p. 183; Collins, (2009), p. 43-44; and Thériault and Robitaille, (2011), p. 253-255.
[53] *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17.
[54] See Chalifour, (2015), pgs. 97-103, Klaudt, (2018), pgs. 222-227.
[55] *Lockridge* at para. 6.

GHGs conveys profound disadvantages on them as their Arctic homelands and cultural traditions disappear with the melting ice. Canadian youth might argue that inaction conveys greater disadvantages to them. Finally, elderly Canadians might argue that they face increased challenges to their equitable access to good health with rising temperatures from climate change.

The same reasoning applies with the *Quebec Charter*, once the conditions for the application of article 46.1 are met, article 10 equality rights could be used to challenge the prejudicial and inequitable effects of climate change on vulnerable groups. The scope of relief in the Quebec Charter may even be greater as it includes social condition, whereas the Canadian Charter does not, and those with socio-economic disadvantage are more likely to suffer climate change induced consequences.[56]

3. Quebec Charter, Article 6: Property rights

Unlike the *Canadian Charter*, the *Quebec Charter*, Article 6 provides that "every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by the law." Environmental pollution can infringe upon this right. For example, this may be the case when environmental degradation leads to the loss of real estate value, or other material goods. The right to the peaceful enjoyment of one's property has been successfully argued in Quebec courts to sanction illegally dumping of waste material on private land by a company,[57] toxic substance pollution,[58] and noise pollution.[59]

[56] Chalifour, (2015), pg. 93.
[57] *Consortium Delta inc. v. Aménagement et drainage Vincent inc*., 2012 QCCQ 6977.
[58] *Regroupement des citoyens du quartier St-Georges inc.* c. *Alcoa Canada ltée*, 2007 QCCS 2691, [2007] J.Q. no 5847; *Spieser* c. *Canada (Procureur général)*, 2007 QCCS 1207, [2007] J.Q. no 2291; *Spieser* c. *Canada (Procureur général)* , 2012 QCCS 2801, par. 700-711, [2012] J.Q. no 5980.
[59] Voir *Belmamoun* c. *Ville de Brossard*, 2017 QCCA 102; *Carrier* c. *Québec (Procureur général)*, 2011 QCCA 1231, [2011] J.Q. no 8278.

4. Canadian Charter, Section 2; Quebec Charter, Article 3: Freedoms of expression and religion

The *Canadian Charter* and *Quebec Charter* contain in section 2 and article 3, respectively, freedoms of both expression and religion.[60] Though neither freedoms have directly been argued in a climate change case, both remain potential avenues for a challenge, particularly given recent cases seeking to invoke their application in environmental matters. In the recent decision in *Ernst*, the Supreme Court of Canada rejected arguments that *Canadian Charter* damages must be protected from statutory exclusion, in the context of an individual seeking damages for breach of section 2(b) freedom of expression, alleged to have occurred when an energy regulator barred complaints.[61] In *Ktunaxa*, the Supreme Court of Canada rejected arguments that the approval of a ski resort by a government Minister violated Indigenous peoples' freedom of religion, as the land the ski resort was to be developed on was a site of religious significance.[62] Though both claims failed they signal potential areas that may be relitigated and interesting rights based tensions that could similarly arise relating to climate change.[63]

There is a considerable degree of protest and civil disobedience emerging in Canada over planned new pipeline projects. There have been arrests of protestors seeking to block development of these pipeline projects as such conduct is often contemptuous of court injunctions to prevent such disruptions.[64] A host of arguments might be raised that such arrests thwarting protest and civil disobedience might violate expressive freedoms. In an era where the climate crisis is so severe, courts may place greater future weight on exercises of expressive freedoms purporting to promote

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[60] Section 2: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association." Article 3: "Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of expression."

[61] *Ernst v Alberta Energy Regulator*, [2017] 1 SCC 1 ["*Ernst*"] at paras 3 and 6.

[62] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* [2017] 2 SCC 54 at para 8.

[63] In *Ernst* the majority ruled on a narrow issue that one particular remedy for a *Charter* breach, *Charter* damages, was not necessary where an alternative remedy of judicial review was sufficient to uphold constitutional rights, see *Ernst*, *supra* n 61 at para 49.

[64] Recently, there have been a high volume of arrests of protestors seeking to block development work on the Kinder Morgan Trans Mountain pipeline. See "More than 150 protesters arrested so far at Kinder Morgan terminals in Burnaby, B.C.", The Globe and Mail, March 25, 2018, online: <https://www.theglobeandmail.com/canada/british-columbia/article-more-than-150-protesters-arrested-so-far-at-kinder-morgan-terminals-in/>.

climate positive outcomes. This could give rise to some interesting necessity defenses being raised to criminal charges brought against climate protestors.[65]

The negative impacts of climate change could also arguably affect lands and other natural features to such a great extent as to interfere with genuine religious practice by Indigenous peoples. This could be especially true for the northern Indigenous peoples, such as the Inuit, whose culture and traditions are under jeopardy due to a rapidly changing landscape.[66] Government authorizations that further contribute to climate change could infringe religious freedom much in the same way as was argued in *Ktunaxa*.

Freedom of expression has also arisen as a value for consideration in the context of defamation claims brought by a prominent climate scientist and politician against climate skeptics. Freedom of expression as a *Canadian Charter* value must be weighed against the "sense of self-worth, as an aspect of personality, [which] is related to the innate worthiness and dignity of [an] individual" which a good reputation fosters.[67] Defamation's core function is to protect and vindicate that good reputation from unjustified harm.[68] Where society increasingly recognizes the severity of the climate crisis, the expressive value of climate skepticism is likely to diminish and the likelihood of a successful defamation claim being brought against climate change detractors increases, when those detractors unjustifiably challenge climate science. The *Quebec Charter*'s religious and expressive freedoms could also be used in similar ways to promote climate positive outcomes in Quebec in similar situations of climate protest, protection of religious practices tied to nature, and protection of climate scientists' reputations (and arguably the underlying climate science itself) from defamation.

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[65] For example, the recent necessity defense successfully raised in Massachusetts court by pipeline protesters. See Buncombe, Andrew "Protesters found not guilty because 'climate change crisis' made it 'legally necessary' for them to commit civil disobedience", The Independent, March 27, 2018, online:http://www.independent.co.uk/news/world/americas/pipeline-protesters-boston-protest-not-guilty-climate-change-karenna-gore-mary-ann-driscoll-a8276851.html.

[66] See Watts, Jonathan. "Arctic warming: scientists alarmed by 'crazy' temperature rises", The Guardian, February 27, 2018, online:http://www.theguardian.com/environment/2018/feb/27/arctic-warming-scientists-alarmed-by-crazy-temperature-rises.

[67] *Weaver v Corcoran*, 2017 BCCA 160 at para. 62. See also *Weaver v Ball*, 2018 BCSC 205 at para.34.

[68] *Ibid*.

5. Constitution Act, 1982, Section 35: Aboriginal and treaty rights

Within the Canadian Constitution, but outside the *Canadian Charter*, exist section 35 rights uniquely held by Canada's Indigenous peoples.[69] Section 35(1) states that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". These constitutionally protected rights of Indigenous peoples take three forms. First, "Aboriginal rights" are recognized as those "practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with Europeans".[70] Examples of these judicially recognized "Aboriginal rights" have included the right to fish, hunt and trap.[71] Second, treaty rights are defined by section 35(3) to "include rights that now exist by way of land claims agreements or may be so acquired". These are rights acquired through negotiation of agreements and can take on various forms, depending on the specific terms of an agreement.[72] The third form of rights are those housed with "Aboriginal title". Aboriginal title is a cluster of rights and obligations inuring to Indigenous peoples around lands held in "'occupation' prior to assertion of European sovereignty".[73]

Flowing from these rights, Canadian governments are honour-bound by important duties when exercising their powers. Where a government has "actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by [government] conduct" the "duty to consult" is triggered.[74] The contexts in which concerns over the duty to consult often arise involve government or regulatory agency approvals of projects impacting on Indigenous lands and resources. The Supreme Court of Canada recently clarified that this duty

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[69] One practical significance of section 35 lying outside the *Canadian Charter* is that rights under this section are subject to a distinct justification test that differs from the justification test for rights found in section 1. For the section 35 justification test, see *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC) at paras. 71-83. For the section 1 justification test, see *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC).

[70] *R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 (SCC) at para. 44.

[71] *R. v Côté,* [1996] 3 SCR 139, 1996 CanLII 170 (SCC) at para. 95; *R. v Adams*, [1996] 3 SCR 101, 1996 CanLII 169 (SCC) at para. 50.

[72] There are multiple historic treaties negotiated prior to the enactment of section 35 as part of Canada's constitutional repatriation project, and governments have since continued to negotiate new agreements with various Indigenous groups. For example, see *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58.

[73] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 25. A multi-factor test for establishing this form of right was established based on the presence of three characteristics: sufficiency, continuity, and exclusivity of the occupation.

[74] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 4 at para. 25. The duty to consult seeks to protect these rights while also furthering reconciliation between Indigenous peoples and governments. The source of the obligation is government assumption of sovereignty over lands and resources formerly held by Indigenous peoples (see para. 19). The content of the duty ranges from limited to deep consultation, depending on the strength of the Indigenous peoples claim and the seriousness of the potential impact on their rights (see para. 20).

does not extend to situations where a government adopts legislation that has effects impacting on Indigenous rights.[75] The second duty involved is the fiduciary duty of government "to act in the best interests of Aboriginal people in certain specific circumstances".[76] Those circumstances include where the government "exercise[es] discretionary control over specific Aboriginal interest[s]".[77] The substance of this duty requires "duties of loyalty, good faith and full disclosure" and a "standard of care…of a man of ordinary prudence in managing his own affairs".[78]

Several authors have also stated that Indigenous rights contain elements of direct environmental protection rights.[79] These potential environmental protections could be applied to the climate change crisis, where substantial impacts to lands and resources housed within Indigenous rights, occur due to climate change. A failure to consider concerns raised by Indigenous peoples about climate changes effects on their interests, could trigger a violation of the duty to consult. If Canada's climate failures are found to contribute to a negative effect to the realization of an Indigenous right, government failure to respond to concerns raised with adequate mitigation or adaptation measures could lead to a constitutional violation and a potential judicial review.

In the recent *Clyde River* decision, the Supreme Court of Canada found there was defective consultation in the approval of seismic testing in waters adjacent to areas where the Inuit had treaty rights to harvest marine mammals.[80] The Court found that the consultation process was "significantly flawed…[h]ad the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different…[n]or were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life".[81] The failure of the process to

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[75] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.
[76] Sniderman, and Shedletzky (2014), pgs. 8-9.
[77] *Haida Nation v British Columbia (Minister of Forests)*, [2004] SCC 73 at para. 18.
[78] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 46. The government's honour-bound fiduciary duty bears some resemblance to the "public trust doctrine" found in the United States and other foreign jurisdictions.
[79] Collins, (2015). pg. 526"the existence of Aboriginal environmental rights in section 35… is now beyond dispute", those rights are "meaningless without the environment that has supported them since time immemorial" and that the application of environmental values by the Supreme Court of Canada such as the precautionary principle in *Haida* and intergenerational equity in *Tsilhqot'in* may "encompass a relatively broad right to environmental quality". Sniderman and Shedletzky argue that "Aboriginal peoples are among Canada's most vulnerable to climate change and are owed stringent duties from the federal government, which suggests courts are more likely to recognize climate change as a threat to rights with respect to Aboriginal litigants", see Sniderman and Shedletzky, supra n 76 at 1.
[80] *Clyde River*at paras. 4 and 7.
[81] Ibid at para. 52.

adequately assess the scientific impact on marine mammals was a critical flaw in the approval. Though the connection between harms to marine mammals and climate change is less localized than the understanding of the harm caused to the mammals by seismic testing, with time and scientific improvement, a case building on *Clyde River* might be made that climate change impacts on marine mammals must be considered where Indigenous hunting rights could be compromised.

Similarly, in the recent *Tsleil-Waututh Nation* decision, the Federal Court of Appeal found that the federal government had violated the duty to consult in multiple ways regarding its approval of the controversial Trans Mountain pipeline.[82] The consultation framework selected was "reasonable and sufficient",[83] however, in its execution it was "missing…a genuine and sustained effort to pursue meaningful, two-way dialogue".[84] The federal government failured to "discuss and consider possible flaws" in the environmental assessment process and "erroneous view that it could not supplement or impose additional conditions on Trans Mountain".[85] The multiple First Nations involved in the consultation had "quite specific and focused" concerns that would have been "quite easy to discuss, grapple with and respond to".[86] These specific and focused concerns related to the potential for oil spills from the pipeline and inadequate mitigation measures to respond.[87] In particular, the environmental assessment agencies failure to factor in potential risks related to project-related shipping of diluted bitumen was a valid concern.[88] Extending the principles from this decision, it may be possible to argue that where Indigenous peoples raise concerns about the specific climate effects of a pipeline (or other large project) the government must engage in a meaningful two-way dialogue and consider potential climate mitigation options. The frequency of Indigenous peoples raising these concerns will likely increase in the future given both their

[82] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras. 753-763.
[83] Id at para 753.
[84] Id at para. 756.
[85] Id at para. 760.
[86] Id at para. 763.
[87] Id at para. 649.
[88] Id at paras. 650-651 and 468-473. In addition to finding a violation of the duty to consult, the Federal Court of Appeal found that the exclusion of project-related marine shipping, as required by the *Canadian Environmental Assessment Act*, 2012, S.C 2012, C. 19 was an unjustifiable error, and lead to a failure to consider the *Species At Risk Act*, S.C. 2002, c. 29 and the likelihood of significant adverse effects on the endangered Southern resident killer whale. This second example of effects related to whales forming the basis of successful court challenges could be indicative that a challenge related to failures to mitigate climate change impacts on whales might be a viable route.

heightened susceptibility to negative climate impacts and the likely inclusion of climate change considerations as a factor in Canada's revised environmental impact assessment legislation.[89]

These are only two of many possible scenarios where climate change manifests damage to resources protected by Indigenous rights which now arguably warrant heightened consultation and mitigation and adaptation efforts by the federal government.

Another form of action that has arisen recently in Canada for the protection of Indigenous rights is cumulative impact claims. The arguments allege that the cumulative impacts of resource development, on lands where Indigenous rights are present, have "impaired the ability" "to meaningfully exercise Treaty rights".[90] This line of argument is novel and presently raised in the context of a challenge based on the duty to consult. The idea of cumulative impacts compromising the ability to exercise Indigenous rights, if recognized, could be applied more widely to secure environmental and climate positive outcomes. Where a government can be said to have permitted cumulative impacts that infringe on rights, it may be arguable that the core of the rights themselves are compromised and that government's fiduciary duty is triggered. Once a direct factual link is established between government actions permitting emissions leading to climate change and infringements on the Aboriginal rights, courts might apply novel remedies to ensure governments are honoring their fiduciary duties and protecting Indigenous interests in the lands and resources that the governments hold stewardship over.

There remains an open question to what extent Indigenous rights in the Constitution protect other notions beyond proprietary rights. It is arguable that to protect the "practices, traditions and customs central to the aboriginal societies", it will require further protections for cultural or self-governance practices of Indigenous peoples. In many Indigenous cultures, eco-centric paradigms and respect for the rights of non-human entities are utilized. Reconciliation with Indigenous peoples may require legislative or judicial recognition of these novel modes of legal thinking.

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[89]Bill C-69, *Impact Assessment Act*, 1st Sess, 42nd Parl. 2018 (third reading 20 June 2018)proposes to add as a factor for consideration in impact assessment and public interest assessment, "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitment in respect of climate change".

[90] *Blueberry River First Nation v British Columbia (Natural Gas Development)*, 2017 BCSC 540 ["*Blueberry River First Nation*"] at paras. 28 and 38.

A recent decision by the federal government to introduce new legislation that will give Indigenous peoples in Canada more control over resolving disputes,[91] may impact the legal landscape. This proposed legislation follows the federal governments' earlier commitment to follow the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the enshrinement of UNDRIP into federal legislation in 2018.[92]

Other international law, such as the Paris Agreement might also provide ammunition for Indigenous peoples to hold governments legally responsible for ensuring their voices are heard and that their rights are legally honored. Article 7.5 requires that "knowledge of [I]ndigenous peoples and local knowledge systems" should guide adaptation efforts.[93] Recognition of "the rights of indigenous peoples," has led to the creation of the International Indigenous Peoples' Forum on Climate Change (IIPFCC) and the newly adopted Local Communities and Indigenous Peoples' Platform (LCIPP)[94] under the Paris Agreement, which could further provide international fora for Canada's Indigenous peoples to voice their concerns about climate change..

6. Remedies available under the Canadian Charter and the Quebec Charter

A provision that violates the *Canadian Charter*, without justification, will be unconstitutional.[95] The *Canadian Charter*, sections 24 and 52 permit judges to use various remedies for unconstitutional rights violations, including declarations of constitutional invalidity, severance, reading or reading down of offending legislation, prohibitive or mandatory injunctions, or damages. The most common remedy for a constitutional violation is a suspended declaration of invalidity, that will delay the striking out of unconstitutional legislation for a period of time allowing governments to legislate constitutional solutions. As climate change is a problem often requiring positive action, a declaration of invalidity will not likely be of utility. Canadian litigants seeking relief will need to request remedies such as mandatory or structural injunctions to target

[91] Government of Canada to create Recognition and Implementation of Rights Framework. February 14, 2018. Government of Canada News release: https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework.
[92] Bill C-262, "An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples".
[93] Decision 1/CP.21, *Adoption of the Paris Agreement.* 2015. Article 7.5.
[94] Decision CP.23, *Local Communities and Indigenous Peoples' Platform*. 2017.
[95] *R v. Oakes*, [1986] 1 S.C.R. 103, 1986 CanLII 46 (S.C.C.) at paras. 65-67 and 80.

specific changes and force governments to take action.[96] Due to the likely complexity of a climate change action relying on human rights, it could be necessary for litigants to request that courts retain supervisory jurisdiction, so that government failures to implement court orders can be effectively monitored.[97] Finally, the *Canadian Charter* and the *Quebec Charter* article 49 also allow damages.[98] Where governments fail to mitigate or adapt to GHGs, damages might present a viable recourse both to compensate those whose rights are violated but also to add pressure for positive policy changes. The *Quebec Charter* which also applies to private parties, allows for similar remedies, however, it also leaves open the possibility of punitive damages, which are not available under the *Canadian Charter*,[99] that could be used against polluters or heavy emitters.[100] In Quebec, a recently authorized class action against Volkswagen Canada, concerning the diesel motor gas emission fraud scandal, is seeking punitive damages.[101]

3. Actions against private entities to promote the climate change agenda

There has only been one action in Canada directly against a private entity on the ground of climate change, *Volkswagen*, even though many other lawsuits might be indirectly related to climate change GHG mitigation or adaptation. Individual remedies against private entities rest mainly on common law, civil, and statutory law actions.

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[96] These remedies have been used in some instances where constitutional rights are of a more positive nature, such as the rights to minority language education under section 23 of the *Canadian Charter* or section 35 Aboriginal rights and title under the Constitution. See for example the structural injunction granted at trial in the recent minority language rights matter of *Conseil-scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2016 BCSC 1764 at para. 6836. See also the structural injunction sought in *Blueberry River First Nation* at para. 41.

[97] For examples of judge's retaining supervisory jurisdiction, see *Doucet- Boudreau v Nova Scotia*, 2003 SCC 62 at para. 88 and *L'Association des parents de l'École Rose-des-vents v Conseil scolaire francophone de la Colombie-Britannique*, 2012 BCSC 1614 at para. 161.

[98] *Vancouver (City) v Ward*, 2010 SCC 27 paras. 19-20.

[99] *Ward* at para. 56.

[100] *Quebec Charter*, art. 49: "Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom. In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages."

[101] *Association québécoise de lutte contre la pollution atmosphérique c. Volkswagen Group Canada Inc*., 2018 QCCS 174 [*Volkswagen*] at para. 5.

3.1. General common law and civil actions

i) Standing

To bring a common law or civil action forward in Canada, an individual must have the required interest or standing. In Quebec, this means a sufficient legal interest which is usually very restrictive such as requiring a direct, personal, existing and actual interest in the dispute.[102]

ii) Injunctions

An injunction is a court order that allows governments or individuals to prohibit a public or private actor from acting in a way or to mandate the performance of a specified act.[103] The applicants must demonstrate the need of an injunction to prevent an action or operation that violates or potentially violates the exercise of a right and to prevent serious or irreparable prejudice.[104]

iii) Quebec civil liability

In Quebec, individuals may use extra-contractual liability or sometimes contractual liability actions against private actors. Extra-contractual liability is defined as "every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another."[105] This liability rests on the proof of fault. A plaintiff would have to prove that the private actor has acted not in accordance with the normal behavior of a "prudent and diligent actor placed in the same circumstances."[106] Fault could be, for example, the default by an industry of buying, maintaining, and inspecting the necessary equipment to reduce air pollution, noise, and smells,[107] or the default for a municipality to maintain a dam.[108] A fault could also rest on an abuse of rights. According to the Quebec Civil Code, "no right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and

[102] Renno, 2017; *Noël c. Société d'énergie de la Baie James*, 2001 SCC 39; Quebec *Code of Civil Procedure*, C.Q.L.R., c. C-25.01, art. 85.
[103] For example, see Quebec *Code of Civil Procedure*, C.Q.L.R., c. C-25.01, art. 509.
[104] Id. art. 511.
[105] Id art. 1457.
[106] Baudoin, Deslauriers, and Moore, 2014, paras. 1-164.
[107] *Comité d'environnement de Ville-Émard (CEVE) v. Domfer Poudres métalliques ltée*, 2006 QCCA 1394.
[108] *Drouin v. Sainte-Agathe-des-Monts*, 2009 QCCS 603.

therefore contrary to the requirements of good faith".[109] In a climate change case, a plaintiff could raise various arguments including that GHG emitters have manipulated the scientific information, have spread false information or misleading advice, have voluntarily delayed green technologies, have put undue pressure on governments, or have abused of their rights to pollute. When many actors contribute to air pollution, including the victims themselves (as car users, for example), it is a difficult task for a judge to allocate each actors percentage or portion of the liability.

Once fault is established, a plaintiff then must prove damage. The actual and future damage must be certain and assessable.[110] Based on the words "injury to another", the Quebec Civil Code recognizes environmental damage when it is linked to the plaintiff or their property, such as contamination, inundation, or erosion. It does not explicitly recognize ecological damage like the disequilibrium of an ecosystem, the change in water quality,[111] or alterations of the climate unless direct personal repercussions are shown. Those damages are also generally not easily assessable. However, in Quebec and some common law provinces (Alberta and Ontario), the jurisprudence recognizes moral damages and allocates compensation for the sorrow and grief of survivors which are not as easy to assess.

The last component to prove, on the balance of probabilities, is the causal link between the fault and the damage. In a climate change case, it is without doubt the biggest pitfall. The plaintiff must prove that the GHG emitters are not only significant contributors to climate change but also that the plaintiff's damage is a result of climate change.

Contractual liability might also be invoked, particularly in cases where climate change adaptation is needed. For instance, there are in Canada many inundation servitudes that were signed in relation to the operation of dams. The non-respect of the negotiated water levels by dam-owners opens the way for potential judicial recourse.[112]

[109] *Civil Code of Quebec*, C.Q.L.R., c. CCQ-1991, art.7.
[110] *Civil Code of Quebec*, C.Q.L.R., c. CCQ-1991, art.1611.
[111] Yergeau and Cattaneo, 2005, pg. 303; *Olsen v. Quebec*, 2009 QCCS 2167, para. 109.
[112] Choquette, Guilhermont, and Goyette-Noël, 2010, p. 827.

iv) Common law liability outside Quebec - Tort Law

Similar to the Quebec civil law system, the common law in the rest of Canada allows for tort law which also provides compensation for individuals who have been injured or whose property has been damaged by the wrongdoing of others. Most tort law is judicially created through the common law, but it can also originate in statutes which vary by province. Tort law covers intentional harms and negligence. In negligence, one important concept is that fault is based on the standard of the "reasonable person" and the biggest challenge facing a climate litigant is also the question of causation, as in civil law. The tort of public nuisance could also be invoked in a climate change case. Even if actions involving public rights are usually brought by the Attorney General or a designated representative of the *patriae* role,[113] it can also be brought by an individual who has suffered "special harm",[114] which has traditionally been defined as a "particular, direct and substantial damage over and above that sustained by the public at large".[115] This raises the question of standing which has been criticized[116] and might need to be expanded in some environmental cases.[117] The "special harm" in a future climate change negligence case might be met by widespread property damage, the loss of life, or the damage to indigenous livelihoods or cultural practice. Proof of the causal link remains problematic in any event.

3.2. Special statutory remedies

i) Standing

Some environmental laws have enlarged the concept of court standing to favor environmental protection. For instance, the interest required to bring proceedings under the Quebec *Environment Quality Act* rests on "any natural person domiciled in Quebec frequenting a place or the immediate vicinity of a place in respect of which a contravention is alleged."[118] Under this article, the Quebec

[113] *Canadian Forest Products Ltd. v. BC*, 2004 SCC 38, at paras. 108 and 111; Trachsler, 2006, p.14.
[114] Gage, 2013, pg. 257.
[115] *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co.*, [1967] 1 A.C. 617 at 635 (P.C.) and [1970] 21 D.L.R. (3d) 368 (Nfld. T.D.).
[116] Elgie and Lintner, 2005, pg. 223.
[117] Gage, 2008, pgs. 47-51.
[118] Quebec *Environment Quality Act,* C.Q.L.R., c. Q-2, art. 19.3.

Superior Court has recognized standing for an individual cycling regularly in the vicinity of a metal recycling facility.[119] The Ontario *Environmental Bill of Rights* has also relaxed public nuisance standing to allow an individual to bring a public nuisance claim for economic loss even if the loss is not different from the loss suffered by the public at large.[120] Under specific conditions (see below), the *Canadian Environmental Protection Act* will allow any resident in Canada above age 18 to take action regarding any offence under that Act.[121]

ii) Injunctions

An injunction may be permitted by statute. The Quebec *Environment Quality Act* states that "a judge of the Superior Court may grant an injunction to prohibit any act or operation which interferes or might interfere with the exercise of a right conferred by section 19.1",[122] which is mainly the "right to a healthy environment and to its protection, and to the protection of the living species inhabiting it" to the extent provided by the law. [123] In 2014, an individual and environmental groups demanded an injunction against TransCanada Pipelines and Energy East regarding a drilling project in the Cacouna Bay in the St-Lawrence river.[124] More specifically, they requested the stoppage of drilling and the suspension or cancellation of the certificate delivered by the Quebec Ministry of the Environment, which authorized the exploratory activity for a future pipeline and harbor project in the Cacouna Bay.[125] The petitioners argued that an injunction should be applied, because the sounds from the exploratory work done by TransCanada in the bay would have serious impacts on the local beluga whale population.[126] The Quebec Superior Court granted an interlocutory injunction to temporary halt the drilling activity conducted by TransCanada based on the minister's unreasonable authorization.[127]

[119] *Association québécoise de lutte contre la pollution atmosphérique c. Compagnie américaine de fer et métaux*, 2006 QCCS 3949.
[120] Ontario *Environmental Bill of Rights*, S.O. 1993, c. 28, s. 103.
[121] *Canadian Environmental Protection Act,* 1999, S.C. 1999, c.33, s.17.
[122] Quebec *Environment Quality Act,* C.Q.L.R., c. Q-2, art. 19.2.
[123] Ibid at art. 19.1.
[124] *Centre québécois du droit de l'environnement c. Oléoduc Énergie Est ltée*, 2014 QCCS 4398
[125] Id at paras. 11 and 28.
[126] Id at para. 38.
[127] Id at para. 115.

This type of injunction may be sought for a challenge to any regulations adopted under the Quebec *Environment Quality Act* such as the *Regulation respecting greenhouse gas emissions from motor vehicles*[128] which prescribes maximum emission standards. In the instance of a failure to comply with such regulations, a person might bring an injunction against "the vehicle manufacturer or to the person who is entitled to use, in Quebec, the trademark, name or distinctive sign that identifies or is used to market the type of motor vehicle concerned" and demand a prohibition on selling the polluting cars in order to respect the norms.[129]

At the federal level, an individual who has suffered, or is about to suffer, loss or from a violation of the *Canadian Environmental Protection Act*, or its regulations, may seek an injunction.[130] Many regulations are related to climate mitigation and adaptation under this legislation.

iii) Liability

In January 2018, a class action suit against Volkswagen Canada was certified by the Quebec Superior Court on behalf of all citizens of the province of Quebec under the Quebec *Environment Quality Act* and the *Quebec Charter*.[131] According to the Court, there was no "appearance of right" for compensatory damages because the damage was either inexistent or hypothetical for non-owners of a diesel car.[132] However, since Volkswagen admitted intentional fault for exceeding regulated standards, punitive damages could be granted under the *Quebec Charter* , available for the general population.[133] It will be an interesting and breakthrough case to follow.

Water management is a very important issue directly related to climate change adaptation. In Canada, there is an impressive number of rivers, lakes, and reservoirs created by dams. Provincial laws usually provide for individuals to claim propriety damages from dam-owners when management faults are proven or even without proven fault. In the Quebec *Watercourses Act*, "the owner or operator of any work constructed in a watercourse…is liable for any damage resulting

[128] *Regulation respecting greenhouse gas emissions from motor vehicles*, RLRQ c Q-2, r. 17
[129] Id at s. 11.
[130] *Canadian Environmental Protection Act,*1999, S.C. 1999, c. 33, s. 39.
[131] *Association québécoise de lutte contre la pollution atmosphérique c. Volkswagen Group Canada Inc*., 2018 QCCS 174 at paras 85-86.
[132] Id at para. 38.
[133] Id at paras. 5 and 60. A sum of $35 per citizen living in Quebec between January 2009 and September 2015 is requested.

therefrom to any person, whether by excessive elevation of the flood-gates or otherwise…The damage shall be assessed and the damages shall be determined by the Administrative Tribunal of Quebec."[134] This law forces dam-owners to adapt water levels to the new reality of climate change. Very few laws allow for the compensation of ecological damages. The Quebec *Act to affirm the collective nature of water resources and to promote better governance of water and associated environments* recognizes water damages but only the Attorney General can use the statutory remedy, it is unavailable for individuals seeking recovery.[135]

At the federal level, an individual who has suffered loss or damage from misconduct contemplated in the *Canadian Environmental Protection Act*, or its regulations, may also bring a civil action against the responsible person to obtain compensatory damages.[136]

iv) Special actions

A very interesting type of action is the environmental protection action under the *Canadian Environmental Protection Act.*[137] Any Canadian resident of age, who has applied for a government investigation concerning an alleged offence under the *Canadian Environmental Protection Act* may bring an environmental protection action if " the Minister failed to conduct an investigation and report within a reasonable time; or the Minister's response to the investigation was unreasonable […] The action may be brought in any court of competent jurisdiction against a person who committed an offence under this Act that was alleged in the application for the investigation; and caused significant harm to the environment."[138] The action may seek: an interlocutory order; a declaratory order; an order to negotiate a plan to correct or mitigate the harm to the environment or to human, animal or plant life or health, and to report to the court on the negotiations; an order preventing continuation of an offence; or other appropriate relief, including

[134] Quebec *Watercourses Act*, C.Q.L.R., c. R-13, art.13. See Choquette, Guilhermont and Goyette-Noël, 2010, pg. 827.
[135] *Act to affirm the collective nature of water resources and to promote better governance of water and associated environments*, C.Q.L.R., c. C-62, art. 8.
[136] *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33, s.40.
[137] Id at s.22.
[138] Id at s.22.

the costs of the action, but not including damages.[139] Many regulations taken under the *Canadian Environmental Protection Act* touch climate change mitigation and adaptation.

Anti-competitive conduct may also be used in climate change cases. For example, in December 2015, Ecojustice, a Canadian non-profit organization promoting environmental protection, submitted a complaint to the Commissioner of Competition requesting an inquiry under section 9(1) of the federal *Competition Act*.[140] The complaint relied on civil and criminal prohibitions under sub-sections 52(1) and 74.01 of the *Competition Act* concerning false and misleading representations. According to the complainants, climate denial groups were using billboards, websites, and videos to disseminate misleading information about human-induced climate change to the Canadian population. The groups in question, Friends of Science Society, International Climate Science Coalition and Heartland Institute, are funded in parts by companies in the oil and gas industry. The complaint described how this misleading information sows doubt in the public climate change discourse and reduces competition for carbon-intensive economic activities.[141] In June 2017, the Commissioner discontinued the inquiry based, notably, on the available evidence and limited resources but was still "receptive to receiving any additional information" proving the anti-competitive conduct.[142]

4. Actions against public entities to promote the climate change agenda

There are few actions in Canada against a public entity on the ground of climate change, even though many lawsuits are indirectly related to climate change GHG mitigation or adaptation. Individual remedies against public entities rest on administrative law, statutory law and civil actions.

[139] Id at s.22.
[140] *Competition Act*, R.S.C., 1985, c. C-34.
[141] See letter from Charles Hatt, "Re: False and misleading representations about the reality, causes and consequences of global warming and climate change, in contravention of the Competition Act", Ecojustice, December 3, 2015, online: https://ecojustice.ca/wp-content/uploads/2015/12/2015-12-03-Application-to-Commissioner-of-Competition-re-Climate-science-misrepresentations-updated.pdf.
[142] See letter from Josephine Palumbo, "Re: Discontinuance of an inquiry relating to Friends of Science Society, International Climate Science Coalition and Heartland Institute", Competition Bureau Canada, June 29, 2017, online:https://www.ecojustice.ca/wp-content/uploads/2017/08/2017-06-29-Ltr-from-Comp-Bureau-re-Inquiry-discontinued.pdf.

4.1. Administrative Law Remedies

i) Judicial Review

For most projects with environmental risks in Canada, a provincial and/or a federal authorization must be issued either by the government or by the responsible minister depending on the importance or type of project.[143] Since March 2018, when authorizing a project, the Minister of the Environment in Quebec, for example, must take into consideration, in prescribed cases, the emission of GHGs attributable to a project as well as the mitigation measures that a project might need.[144] The Minister may also consider the anticipated risks and impacts of climate change on a project and the surrounding environment, the reduction measures that the project may need and the province's GHG reduction target commitment.[145] At the federal level, the new Bill C-69, the *Impact Assessment Act* specifies the impact assessment factors that must be taken into account which include: "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change."[146] When these requirements are not met, administrative law remedies could be pursued by individuals. For instance, they may seek in a court of general jurisdiction,[147] judicial review of a decision authorizing a project or an action.[148] Even though courts are generally deferential to the discretion of a governmental or ministerial decision authorizing a project, they will nevertheless examine the legality of the decision to certify if that the decision is reasonable. Reasonableness has been defined as: "the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[149] In 2014, the judge in *Centre québécois du droit de l'environnement* concluded that the petitioners gave sufficient evidence that the Quebec Environment Minister granted an unreasonable drilling

[143] For example, see the *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19ss.52 and 54; *Quebec Environment Quality Act*, C.Q.L.R., C. Q-2, ss.22 and 31.1.
[144] *Environment Quality Act*, C.Q.L.R., C. Q-2, art. 24.
[145] Id ; Quebec GHG reduction targets are: -20% of the 1990 level for 2020, -37.5% of the 1990 level for 2030 and -80% to -95% of the 1990 level for 2050. See Engagements du Québec : Nos cibles de réduction d'émissions des GES, Développement durable, Environnement et Lutte contre les changements climatiques, online: http://www.mddelcc.gouv.qc.ca/changementsclimatiques/engagement-quebec.asp.
[146] Bill C-69, *Impact Assessment Act*, 1st Sess, 42nd Parl. 2018 (third reading 20 June 2018), ss. 22 and 63.
[147] For example, the Superior Court in Quebec, see Quebec *Code of Civil Procedure*, C.Q.L.R., c. C-25.01 art. 528.
[148] Id at art. 529(2).
[149] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 47.

authorization based on a lack of adequate information on potential impacts on the beluga whale population of the Saint Lawrence river. The Minister failed to explain in a reasonable way how and why the decision was reached.[150] This pipeline project to transport the Alberta oil to the Atlantic Ocean was later abandoned. In *Voters Taking Action on Climate Change v. British Columbia (Energy and Mines)*, a case involving the authorization of an increase of coal storage, the British Columbia Supreme Court held that: "it does not engage the broader issue that the petitioner pursues: urging governments to take meaningful action to address climate change."[151] The judge decided not to apply the reasonableness test to the decision. In Canada there is no specialist environmental court so they are ill-equipped to assess scientific evidence of what constitutes "meaningful action".

At the federal level, under the *Canadian Environmental Assessment Act,* a review panel must "prepare a report with respect to the environmental assessment that sets out (i) the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program".[152] In 2008, the Federal Court in *Pembina Institute for Appropriate Development v. Attorney General of Canada* concluded that the Joint Review Panel, of both the federal and Alberta governments, erred in law by failing to provide an explanation or a rationale for its recommendation, which formed the basis for a later authorization by the Minister of Fisheries and Oceans, to approve Imperial Oil's Kearl Oil Sands project. According to the judge: "the Panel dismissed as insignificant the greenhouse gas emissions without any rationale as to why the intensity-based mitigation would be effective to reduce the greenhouse gas emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance. Without this vital link, the clear and cogent articulation of the reasons behind the Panel's conclusion, the deference accorded to its expertise is not triggered."[153]

In 2017, the Quebec Superior Court may have given individuals a new argument for judicial review of government authorization. In *Ressources Strateco inc v. Attorney General of Quebec,* the judge decided to invalidate a government authorization concerning a uranium mine project, that underwent an environmental impact assessment, due to the lack of "social acceptability" of the

[150] *Centre québécois du droit de l'environnement* c. *Oléoduc Énergie Est ltée*, 2014 QCCS 4398 at para. 109.
[151] *Voters Taking Action on Climate Change v. British Columbia (Energy and Mines)*, 2015 BCSC 471 at para 65.
[152] *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 43. (equivalent to s. 51 of Bill C-69, *Impact Assessment Act*, 1st Sess, 42nd Parl. 2018 (third reading 20 June 2018).
[153] *Pembina Institute for Appropriate Development v. Canada (Attorney General),* 2008 FC 302 para.78.

project within the surrounding communities (the Cree First Nations), even though that factor is not specified in Quebec law. [154] This important jurisprudential development could mean that any project related to climate change mitigation or adaptation might be rejected by a court if that project is not "accepted" by the local population or at least part of it. It is notable that some provinces in Canada, such as Newfoundland and Labrador and Nova Scotia, already have among their environmental impact assessment legislation, the factors for consideration of "public acceptability"[155] or "concerns expressed by the public and aboriginal people"[156] but to our knowledge no project has been rejected on this basis.

In other cases, individuals may also seek judicial review to "direct a person holding an office within a public body" to perform an act which they are by law required to perform.[157] For instance, the Quebec government "sets" an overall GHG reduction target for the province for each period it determines, using 1990 emissions as the baseline,[158] water withdrawal **"**must" be exercised so as to ensure the protection of water resources, particularly by fostering sustainable, equitable, and efficient management of the resources in light of the precautionary principle and the effects of climate change".[159] If these obligations have not been performed, the court can order the government to comply. However, many environmental laws in Canada give an important discretionary power to public authorities, reducing the possibilities for individuals to challenge their actions. For instance, the British Columbia *Water Sustainability Act* stipulates that: "the decision maker "may" review the terms and conditions of a licence taking into account … d) the effects of climate change."[160]

4.2. Civil actions

[154] *Ressources Strateco inc v. Attorney General of Quebec*, 2017 QCCS 2679 at paras. 3, 435, and 469.
[155] Newfoundland and Labrador *Environmental Assessment Regulations,* 2003*,* N.L.R. 54/03*,* s. 25(2)(a).
[156] Nova Scotia *Environmental Assessment Regulations*, N.S. Reg. 26/95, s. 12(c).
[157] Quebec *Code of Civil Procedure*, C.Q.L.R., c. C-25.01, art. 529(3).
[158] Quebec *Environmental Quality Act*, C.Q.L.R., C. Q-2, art. 46.4.
[159] Id at arts. 31.76 and 31.102.
[160] British Columbia *Water Sustainability Act*, s. 23.

i) Standing

In Quebec, "the interest of a plaintiff who intends to raise a public interest issue is assessed on the basis of whether the interest is genuine, whether the issue is a serious one that can be validly resolved by the court and whether there is no other effective way to bring the issue before the court".[161] The individual standing requirements are similar in all Canadian jurisdictions. Moreover, the sufficient interest in public law is more flexible than in private law.

ii) Injunctions

An injunction could be brought also against a public actor.[162] The same conditions, described in section 3.1 relating to injunctions against private actors, will then be applied.

iii) Law of torts and Quebec civil liability

Public liability might also be engaged in a climate change case. At the federal level, the *Crown Liability and Proceeding Act* establishes the foundation of such laibility.[163] At the provincial level, the Civil Code of Quebec defines the province's extra-contractual liability as: "A subordinate of the State or of a legal person established in the public interest does not cease to act in the performance of his duties by the mere fact that he performs an act that is illegal, beyond his authority or unauthorized, or by the fact that he is acting as a peace officer."[164] In common law provinces, public liability claims against governments may be based on negligence and provincial Crown liability statutes.[165] Courts are reluctant to hold governments liable for their decisions as compared to their acts or omissions. Multiple court decisions have held that policy choices benefit

[161] Quebec *Code of Civil Procedure*, C.Q.L.R., c. C-25.01 art.85 al. 2.
[162] For example, see the Quebec *Code of Civil Procedure*, C.Q.L.R., c. Q-2, art. 509.
[163] *Crown Liability and Proceeding Act*, R.S.C., 1985, c. C-50, s. 3: "The Crown is liable for the damages for which, if it were a person, it would be liable (a) in the Province of Quebec, in respect of (i) the damage caused by the fault of a servant of the Crown, or (ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and (b) in any other province, in respect of (i) a tort committed by a servant of the Crown, or (ii) a breach of duty attaching to the ownership, occupation, possession or control of property."
[164] *Civil Code of Quebec*, C.Q.L.R., c. CCQ-1991, art.1464. See also art. 1376: "The rules set forth in this Book apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them".
[165] See the Ontario *Proceedings Against the Crown Act,* R.S.O 1990, c. P.27.

from political discretion and should be left to elected officials.[166] So, in the absence of bad faith, irrationality or generally "lack or excess of jurisdiction," policy decisions as to whether or not to prosecute or regulate a particular polluter will likely remain immune from civil liability given the high degree of deference accorded by judges or by legislation.[167] It is important to make the distinction between a policy decision which is mostly immune and an operational decision (the execution of the policy decision) which has no immunity:

> "the fact that a municipal corporation makes a policy decision or refuses to do so does not entail its civil liability. If, however, the municipal corporation exercises its powers, discretionary or otherwise, so as to make its decision operational, subject to public law, it can be held liable for any damage caused to another through its fault, or through that of its employees in the course of their duties, unless the enabling legislation expressly excludes such liability or authorizes the municipal corporation to exonerate itself from liability."[168]

Since 2011, the distinction has been clarified in *R v. Imperial Tobacco Canada:*

> "I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being 'non-operational'"[169].

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[166] *Canada (Vérificateur général) v. Canada (Ministère de l'énergie, des Mines et des Ressources*, [1989] 2 CSC 49; *Renvoi relatif au Régime d'assistance publique du Canada (C-B)* [1991] 2 CSC 525. See also *Renvoi relatif à la sécession du Québec* [1998] 2 CSC 217, para. 26.

[167] *Pearson v Inco* (2002), 115 ACWS (3d) 564; see also *Quebec Code of Civil Procedure*, C.Q.L.R., art. 81: "The courts cannot order a provisional measure or a sanction against, or exercise the power of judicial review over, the Government or a minister of the Government or any person, whether or not a public servant, acting under their authority or on their instructions in a matter relating to the exercise of a function or the authority conferred on them by law. An exception to this rule may be made if it is shown to the court that there was a lack or excess of jurisdiction."

[168] *Laurentide Motels Ltd. v. Beauport* [1989] 1 SCR 705; See also *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66 at para. 27: "The fact that the federal Crown is subject to Quebec's rules of extracontractual civil liability where damage allegedly caused by the fault of its agents is concerned does not preclude it from invoking its immunity. For example, it remains open to the federal Crown to argue that a particular decision was made by its agents acting in a policy rather than an operational capacity, which would not normally attract liability."

[169] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, para 90.

Negligence (and to a certain extent the extra-contractual liability) includes the elements of duty of care, breach of the relevant standard of care, factual causation, proximate causation, and actual loss. The elements of causation and actual loss are similar in government negligence actions to suits involving private actors. Generally, in assessing whether there is a duty of care, a judge will first determine whether there is a *prima facie* duty owed by the government to the plaintiff based on the criteria of foreseeability of harm and proximity, and second, whether such duty should be negated or limited due to policy considerations.[170] Given the consistent view in the Canadian jurisprudence not to interfere with policy issues, a climate change action based on the negligence of public actors has limited chance of succeeding.[171]

iv) Public trust doctrine

In the face of concerning government inaction and wrongdoing damaging the environment and natural resources, the public trust doctrine offers an interesting possibility to hold governments accountable for their inaction and/or inappropriate actions concerning climate change mitigation and adaptation. According to this doctrine, the government, or the Crown, holds environmental resources, including the air and water, in trust for public uses. Even if not commonly used, the public trust doctrine has gradually become more integrated in Canadian federal and provincial statutory law.[172] When laws and regulations clearly state the elements of the public trust doctrine that must be protected such as, the guaranteed access to shorelines, navigable water, or fishing, courts become less reluctant to intervene in the process of any given agency.[173] With trust-like statutory language,[174] Canadian judges will be empowered with stronger legislative interpretation tools to enforce the application of the public trust doctrine, and ensure government "accountability through decision-making that creates a fiduciary duty in law regarding the management of resources."[175] Although, "some of the most dynamic developments in Canadian public trust law have resulted from legislative action",[176] Canadian courts do have the opportunity to delve deeper

[170] See the *Anns/Kamloops* test based on *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K.H.L.); *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2. See also *Cooper v Hobart* 2001 SCC 79.
[171] Trachsler, 2006, pg.12.
[172] Laitos, Zellmer, and Wood, 2012, pgs. 5-6.
[173] *Ibid* at 339.
[174] Lund, 2012, p. 125.
[175] Hendriks, 2010, pg. 23.
[176] Lund, 2012, pg. 125.

into the application of this doctrine, especially since the *Charter* has more recently changed the role of the judiciary in supervising the exercise of legislative and regulatory power.[177]

Canadian courts have long applied the public trust doctrine rather strictly[178] and even denied its existence in relation to environmental protection: "the defendants cannot be subject to obligations under a public trust because no such trust exists in Canadian law…no court in Canada has recognized a public trust which requires the Crown to protect the environment".[179] Such application of the classical trust law to the public trust claim was fairly criticized "for failing to take into account the uniqueness of the relationship between the Crown and the public, 'as it relates to public resources.'"[180]

Could the Canadian government be held liable for failing to protect the atmosphere? Even if public trust litigation remains in its preliminary steps in Canada, some decisions do suggest an opportunity for breaking new ground.[181] In 2004, the Supreme Court of Canada in *British Columbia v. Canadian Forest Products*[182] acknowledged, in *obiter*, that public rights in the environment were vested in the Crown[183] but recognized that along with this assertion came questions about "the Crown's potential liability for *inactivity* in the face of threats to the environment, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources, and the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage."[184] Unfortunately, the court did not answer those questions and many authors are skeptical of a radical change in courts' attitudes toward their deference to the principle of legislative immunity.[185]

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[177] Laitos, Zellmer, and Wood, 2012, pg. 5.
[178] For an example, see *Green v. Ontario,* 34 D.L.R. (3d) 20, 1972 Carswell Ont 438 (H.C.).
[179] *Burns Bog Conservation Society v. Canada (Attorney General),* 2012 FC 1024 at para 39.
[180] Lund, 2012, pg. 127.
[181] DeMarco, Valiante and Bowden, 2005, pg. 252.
[182] *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38. The Canadian government was suing a private logging company for damages done by a fire that destroyed 1 491 hectares of public forests.
[183] Id at para. 76*:* "Since the time of de Bracton it has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable "public rights" in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their protection representing the Crown as *parens patriae*. This is an important jurisdiction that should not be attenuated by a narrow judicial construction."
[184] Id. at para. 81.
[185] Trachsler, 2006, p.12; Kidd, 2006, pg. 187.

Even though we did not find any law concerning air protection that directly integrated the principles of the public trust doctrine, some laws concerning other resources could be used in relation with climate change adaptation actions. Among those statutory laws is the British Columbia *Islands Trust Act*[186] which identifies "lands vulnerable to development pressure and provides that land use planning and decision making must be done in a manner that 'preserves and protects' the resource."[187]

In Quebec, there is no public trust doctrine. However, water management legislation stipulates: " As the State, as custodian of the interests of the nation in water resources, must be vested with the powers required to protect and manage those resources".[188] Since analogies can be drawn amongst the common law *parens patriae* theory, the public trust doctrine, and this legislation, a public duty of care could exist in favor of water protection and with it, an implicit corollary right (an expectation of protection) in favor of the beneficiaries of the 'collective resource' and its 'common heritage'[189], that is, for the benefit of the citizens of Quebec.[190] Climate change could be affecting water through chemical and physical modifications leading to salinity, temperature, and acidity increases.[191]

Although actions against regulators for public liability may prove difficult, climate change cases should still be considered, particularly where regulators are both failing to protect environmental quality and affirmatively authorizing harmful pollution.[192] But even with the duty of care is met and damages are proven, further evidence will need to link the unreasonable conduct of the State with the resulting harm on a balance of probabilities which may be highly difficult to demonstrate if the specific government action or policy is large-scale or general in nature.

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[186] *Islands Trust Act*, RSBC 1996, c. 239, s. 33
[187] Brandes and Christensen, 2010, pg. 4.
[188] Preamble of the *Act to affirm the collective nature of water resources and to promote better governance of water and associated environments*, C.Q.L.R., c. C-6.2. See also, art.8: "If damage to water resources, including impairment of their physical, chemical or biological properties, ecological functions or quantitative status, is caused by a person or through a person's fault or illegal act, the Attorney General may institute an action against that person, in the name of the State as custodian of the interests of the nation in water resources, with a view to obtaining one or more of the following…"
[189] Id at art. 1 and the preamble.
[190] Choquette and Gilles, 2016, pg.27.
[191] *Synthèse des connaissances sur les changements climatiques au Québec*, OURANOS, 2015, online : https://www.ouranos.ca/synthese-2015/.
[192] Heelan Powell and Yam, 2015, pg.7.

4.3. Special Statutory Remedies

As seen above, dam-owners are responsible for damages due to water level mismanagement. In Canada, local and provincial governments own most dams. In 2016, a class action was launched, claiming significant property damages resulting from the Ontario government's failure to adequately manage the water levels of the Muskoka lakes. The plaintiffs argue that the province had to implement the Muskoka River Water Management Plan to prevent flooding but failed to follow the standards established by the Plan and its duty of care toward the affected population which constitute a breach of its statutory duty.[193]

Some laws offer individuals specific remedies that can be useful to prompt better adaptation measures to climate change. For example, the British Columbia *Water Sustainability Act* allows a decision-maker to review the conditions and terms of a water licence in order to take into account the effects of climate change.[194] At the same time, it also allows riparian owners to appeal the decision to an appeal board.[195]

5. Actions against public pension funds managers with climate change unfriendly portfolios

Canada is among the five largest oil producers in the world.[196] Finding public pension funds whose shareholdings do not include firms that produce emissions may prove difficult. For instance, the *Caisse de dépôt et placement du Québec* (CDPQ) which manages most public funds in Quebec may according to the law "acquire and hold any or all of the shares or other securities of a legal person a) whose principal activity consists in acquiring, holding or investing in mineral, oil or gas resources, in administering such resources and in developing them through third persons".[197] In 2016, 6.2% of its global portfolio was composed of shares in oil, natural gas, and coal.[198] Recently, the CDPQ announced its investment strategy to address climate change which includes a 50%

[193] *Burgess v Ontario*, Statement of Claim, Ontario Superior Court of Justice, September 14, 2016. This action was recently discontinued, see MNR Class Action Discontinued, Oatley Vigmond, August 7, 2018, online: https://oatleyvigmond.com/mnr-class-action-discontinued/.
[194] British Columbia *Water Sustainability Act,* SBC 2014, c. 15, s. 23.
[195] British Columbia *Water Sustainability Act,* SBC 2014, c. 15, s. 105.
[196] The World's Top Oil Producers of 2017, Investopedia, 2018, online: https://www.investopedia.com/investing/worlds-top-oil-producers/.
[197] *Act respecting the Caisse de dépôt et placement du Québec*, C.Q.L.R., c. C-2, art. 37.1.
[198] Shields, Alexandre, Les énergies fossiles séduisent la Caisse de dépôt, Le Devoir, 25 mai 2017.

increase in low carbon investments by 2020 and a reduction of 25% in GHG emissions per dollar invested by 2025.[199] The CDPQ has also committed itself in signing the Montreal Carbon Pledge to measure and disclose the carbon footprint of their investment portfolios in an annual report to the PRI[200] as well as in the CDPQ annual report concerning its responsible investment.[201] There is, however, no binding legal obligation to reach the CDPQ targets nor other environmental or social objectives so far. At the federal level, the Public Sector Pension Investment Board (PSP Investments) have the mandate of managing the federal pension funds.[202] Even though PSP Investments report annually on their responsible investments, there is no specific climate change strategy involving low-carbon objectives. There are however engagements such as monitoring portfolios in respect of climate change and performing climate change risk assessments.[203] Moreover, PSP Investments are a signatory to the CDP Program,[204] seeking appropriate disclosure on environmental, social and governance (ESG) issues from the entities they invest in.[205] Here again, individual actions to force divestment from high-carbon shares seem unlikely. As stated by the Pension Investment Association of Canada, "when PIAC members invest in the financial sector (banks, funds, etc.), the focus is generally not on a company's carbon footprint, but rather on a) its processes to identify, mitigate and manage climate-related financial risks and b) the level of transparency regarding emissions disclosures within portfolios".[206]

[199] *Our investment strategy to address climate change*, Caisse de dépôt et placement du Québec, 2017, online : https://www.cdpq.com/sites/default/files/medias/pdf/en/investment_strategy_climate_change.pdf.
[200] The Montréal Carbon Pledge, PRI/ Montreal Pledge, online: http://montrealpledge.org.
[201] Politique – Investissement responsable, CDPQ, online : https://www.cdpq.com/sites/default/files/medias/pdf/fr/politique_investissement_responsable_fr.pdf.
[202] We are PSP: Global institutional investors on the cutting edge, PSP, online: http://www.investpsp.com/en/index.html.
[203] 2017 Annual Report, PSP Investment Report at pg. 21, online: https://www.investpsp.com/media/filer_public/03-our-performance/01-reports/content-2/PSP-AR-2017-complete.pdf.
[204] About Us, CDP Disclosure Insight Action, online: https://www.cdp.net/en.
[205] 2017 Annual Report, PSP Investment Report at pgs. 20-21, online: https://www.investpsp.com/media/filer_public/03-our-performance/01-reports/content-2/PSP-AR-2017-complete.pdf..
[206] Comments with regard to the public consultation on Draft Recommendations from the Financial Stability Board's Task Force on Climate-Related Financial Disclosures released on December 14, 2016, at pg. 2, Pension Investment Association of Canada, February 10, 2017, online: https://www.piacweb.org/public-statements.html.

Conclusion

Climate change mitigation and adaptation poses tremendous challenges at both individual and state levels. Economic, legal, political, and social incentives are now coalescing globally into the movement to reduce GHGs and to adapt to climate change, but, Canada remains a laggard with inconsistent climate action. There are multiple developing trends that could embolden individuals to litigate to ensure that reluctant targets keep GHGs on a necessary downward trend. Though Canada has committed to the international scheme in the Paris Agreement and has set a nationally determined contribution, certain domestic political developments threaten the achievement of actual GHG reductions.

The retrenchment from the Paris Agreement and GHG reductions by the United States under President Donald Trump, have led to delays and adjustments to Canada's own reduction goals out of fear of losses of competitive advantage. The federal government presses forward with plans for a mandatory carbon tax while several provinces backtrack on their own commitments and seek to challenge federal constitutional authority to do so.[207] The federal government is similarly guilty of inconsistency, committing internationally to reduce GHGs all the while approving new major oil and gas projects, including the controversial Kinder Morgan Trans Mountain pipeline expansion, that appear certain to thwart the achievement of those commitments.[208] At the same time the heavy polluting Canadian energy industry, long a staple of the Canadian economy, continues to profit while some of Canada's most vulnerable suffer from heightened negative consequences and

[207] The Pan Canadian Framework on Clean Growth and Climate Change, Government of Canada, September 26, 2018, online: https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html and Part 5 of Bill C-74, *Budget Implementation Act*, 2018, No. 1, 1st Session, 42nd Parl, 2018 (assented to 21 June 2018). Despite carbon pricing once enjoying the support of nine of ten provinces, now only two appear willing to maintain their own price. See The Canadian Press, "Canadians voted for a carbon tax, Trudeau says as provincial blowback grows", JWN, October 9, 2018, online: https://www.jwnenergy.com/article/2018/10/canadians-voted-carbon-tax-trudeau-says-provincial-blowback-grows/. This back-tracking by the provinces is likely due to the rise and election on several new populist politicians skeptical of climate change, chief amongst them new Ontario Premier Doug Ford.

[208] The pipeline is projected to range between 13 and 15 mega-tonnes of carbon dioxide equivalent per year. See Trans Mountain Pipeline ULC – Trans Mountain Expansion Project: Review of Related Upstream Greenhouse Gas Emissions Estimates, Environment and Climate Change Canada, November 2016, online: https://www.ceaa.gc.ca/050/documents/p80061/116524E.pdf at pg. 5. That is approximately the entire annual provincial emissions of Nova Scotia, a province of 941,500 people (Canada's 7th largest in population). See Table 1: GHG Emissions (provincial CO_2 equivalent emissions per capita – 2015 at pg. 5 of this article).

adaptation costs of climate change. All the while, Canada in striving to seek reconciliation with its Indigenous peoples and must recognize both their unique vulnerabilities to climate change and their traditional knowledge's potential for solutions to climate change. Their views, long absent from Canadian policy,[209] must now be invited into the climate change discourse.

Canada lies at a critical juncture in its climate change life cycle, where it could continue with the global efforts to reduce emissions, or pivot once again on climate policy and remain out of step with the rest of the world and the dire reality of climate change. The conditions are in place for climate change litigation to heat up in the future, where individuals may turn to the judiciary to ensure that Canadian governments, industry, and individuals keep Canada on the path towards assisting with the global fight to halt catastrophic climate change, which appears increasingly likely as GHG reductions fail to materialize.

[209] Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada The Truth and Reconciliation Commission of Canada, 2015, p. 53.

Bibliography

Treaties

Memorandum of understanding among the Department of Energy of the USA and the Department of Natural Resources of Canada and the Ministry of Energy of the United Mexican States

United Nations / Kyoto Protocol to the United Nations Framework Convention on Climate Change,
UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998)

United Nations / Vienna Convention for the Protection of the Ozone Layer (1985)

The Montreal Protocol on Substance that Deplete the Ozone Layer (1987)

United Nations / Framework Convention on Climate Change (2015) Adoption of the Paris Agreement, 21st Conference of the Parties, Paris: United Nations

Legislation

Federal legislation

Bill C-69, *Impact Assessment Act*, 1st Sess, 42nd Parl. 2018 (third reading 20 June 2018)

Bill C-74, *Budget Implementation Act*, 2018, No. 1, 1st Sess, 42nd Parl, 2018 (assented to 21 June 2018)

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19

Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33

Competition Act, R.S.C., 1985, c. C-34

Crown Liability and Proceeding Act, R.S.C., 1985, c. C-50

Kyoto Protocol Implementation Act, S.C. 2007, c. 30

Species At Risk Act, S.C. 2002, c. 29

Provincial and territorial legislation

British Columbia

Energy Efficiency Act

Environmental Management Act

Clean Energy Act

Greenhouse Gas Reduction Targets Act (GGRTA)

Islands Trust Act, RSBC 1996, c. 239

Local Government (Green Communities) Statutes Amendment Act

Water Sustainability Act, S.B.C. 2014, c. 15

Ontario

Environmental Bill of Rights, S.O. 1993, c. 28

Proceedings Against the Crown Act, R S O 1990 c P 27

Newfoundland and Labrador

Environmental Protection Act, S.N.L. 2002, c. E-14.2

Environmental Assessment Regulations, 2003, N.L.R. 54/03

North West Territories

Environmental Rights Act, R.S.N.W.T. 1988, c. 83

Nunavut

Environmental Rights Act, R.S.N.W.T. (Nu.) 1988, c. 83

Nova Scotia

Environment Act, S.N.S. 1994-95, c. 1

Environmental Assessment Regulations, N.S. Reg. 26/95

Quebec

Act to affirm the collective nature of water resources and to promote better governance of water and associated environments, C.Q.L.R., c. C-6.2

Act to increase the number of zero-emission motor vehicles in Québec in order to reduce greenhouse gas and other pollutant emissions, C.Q.L.R., c. 33.02

Act respecting the Caisse de dépôt et placement du Québec, C.Q.L.R., c. C-2

Civil Code of Quebec, C.Q.L.R., c. CCQ-1991

Environment Quality Act, C.Q.L.R., c. Q-2

Regulation respecting greenhouse gas emissions from motor vehicles, R.L.R.Q. c. Q-2, r. 17

Quebec Charter of Human Rights and Freedoms, C.Q.L.R., c. C-12

Quebec *Code of Civil Procedure*, C.Q.L.R., c. C-25.01

Watercourses Act, C.Q.L.R., c. R-13

Yukon

Environment Act, R.S.Y. 2002, c. 76

Jurisprudence

Anns v. Merton London Borough Council, [1978] A.C. 728 (U.K. H.L.)

Association québécoise de lutte contre la pollution atmosphérique c. Compagnie américaine de fer et métaux, 2006 QCCS 3949

Association québécoise de lutte contre la pollution atmosphérique c. Volkswagen Group Canada Inc., 2018 QCCS 174

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 CanLII 699 (SCC)

Belmamoun c. Ville de Brossard, 2017 QCCA 102

Blueberry River First Nations v. British Columbia (Natural Gas Development), 2017 BCSC 540

Burgess v Ontario, Statement of Claim, Ontario Superior Court of Justice, September 14, 2016.

Burns Bog Conservation Society v. Canada (Attorney General), 2012 FC 1024

British Columbia v. Canadian Forest Products Ltd., 2004 SCC 38

Canada (Vérificateur général) v. Canada (Ministère de l'énergie, des Mines et des Ressources, [1989] 2 CSC 49

Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada, 2010 SCC 66

Carrier c. Québec (Procureur général), 2011 QCCA 1231

Centre québécois du droit de l'environnement c. Oléoduc Énergie Est ltée, 2014 QCCS 4398

Clyde River (Hamlet) v Petroleum Geo-Services Inc, 2017 SCC 4

Coalition of Citizens for a Charter Challenge v. Metropolitan Authority, 103 D.L.R. (4th) 409,[1993] N.S.J. No. 182

Comité d'environnement de Ville-Émard (CEVE) v. Domfer Poudres métalliques ltée, 2006 QCCA 1394

Commission scolaire St-Jean-sur-Richelieu c. Commission des droits de la personne du Québec, [1994] RJQ 1227

Consortium Delta inc. v. Aménagement et drainage Vincent inc., 2012 QCCQ 6977

Cooper v Hobart 2001 SCC 79

Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12

Dingeldein v. Ontario (Ministry of Environment and Climate Change), [2015] O.E.R.T.D. No. 32 (Ont. Env. Rev. Trib.)

Dixon v. Director, Ministry of the Environment, 2014 ONSC 7404

Domke v. Alberta, 2008 ABCA 232

Doucet- Boudreau v. Nova Scotia, 2003 SCC 62

Drouin v. Sainte-Agathe-des-Monts, 2009 QCCS 603

Dunsmuir v. New Brunswick, 2008 SCC 9

Energy Probe v. Canada (PG), (1994) 17 OR (3e) 717 (Div. Gén. Ont.)

Energy Probe v. Canada (Attorney General) (1989), 68 O.R. (2d) 449, 57 D.L.R. (4th) 513, 1989 CarswellOnt 390 (Ont. C.A.)

Fairfield v. Ontario (Ministry of the Environment), [2014] O.E.R.T.D. No. 71

First Nation of Nacho Nyak Dun v. Yukon, 2017 SCC 58

Friends of the Earth v. Canada, 2008 FC 893

Friends of the Earth v. Canada (Environment), 2009 FCA 297

Gillespie v. Ontario (Ministry of the Environment and Climate Change), [2015] O.E.R.T.D. No. 3

Gosselin v. Québec (Attorney General), 2002 4 R.C.S. 429

Green v. Ontario, 34 D.L.R. (3d) 20, 1972 Carswell Ont 438 (H.C.)

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73

Hickey v. Electric Reduction Co. of Canada Ltd, [1970] 21 D.L.R. (3d) 368 (Nfld. TD).

Iredale v. Mont-Tremblant (Ville de), 2011 QCCS 760

Iredale v. Mont-Tremblant (Ville de), 2013 QCCA 1348

Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2

Kelly v. Alberta, 2008 ABCA

Kelly v. Alberta, 2009 ABCA 161

Kroeplin v. Ontario (Ministry of the Environment), [2014] O.E.R.T.D. No. 24

Kuczerpa v. R., (1993) 48 FTR 274 (F.C.T.D.)

L'Association des parents de l'École Rose-des-vents v. Conseil scolaire francophone de la Colombie-Britannique, 2012 BCSC 1614

Laurentide Motels Ltd. v. Beauport, [1989] 1 SCR 705

Locke v. Calgary (City), 147 A.R. 367, 15 Alta. L.R. (3d) 70 (Q.B.)

Lockridge v. Ontario (Director, Ministry of the Environment), 2012 ONSC 2316

Manicom et al v. County of Oxford et al, (1985), 52 OR (2d) 137 (Ont. Div. Ct.)

Mikisew Cree First Nation v. Canada (Governor General in Council), 2018 SCC 40

Millership v. Kamloops (City), 2003 BCSC 82

Mothers Against Wind Turbines Inc. v. Ontario (Ministry of the Environment and Climate Change), [2015] O.E.R.T.D. No. 19

Noël c. Société d'énergie de la Baie James, 2001 SCC 39

Olsen v. Quebec, 2009 QCCS 2167

Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co., [1967] 1 A.C. 617; [1970] 21 D.L.R. (3d) 368 (Nfld. T.D.)

Pearson v. Inco (2002), 115 ACWS (3d) 564

Pembina Institute for Appropriate Development v. Canada (Attorney General), 2008 FC 302

Poulin v. Fleury, 2014 QCCS 6165

Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17

R. v. Adams, [1996] 3 SCR 101

R. v. Côté, [1996] 3 SCR 139

R v. Hydro-Québec, [1997] 3 SCR 213

R v. Imperial Tobacco Canada Ltd, [2011] 3 SCR 45

R v. Oakes, [1986] 1 S.C.R. 103

R v. Sparrow, [1990] 1 SCR 1075

R. v. Syncrude Canada Ltd., 2010 ABPC 229

R v. Van der Peet, [1996] 2 SCR 507

Regroupement des citoyens du quartier St-Georges inc. c. Alcoa Canada ltée, 2007 QCCS 2691

Ressources Strateco inc v. Attorney General of Quebec, 2017 QCCS 2679

Renvoi relatif au Régime d'assistance publique du Canada (C-B) [1991] 2 CSC 525

Renvoi relatif à la sécession du Québec [1998] 2 CSC 217

Robillard v. Écoservices Tria inc., 2016 QCCS 6267

SM Construction inc. v. Directeur des poursuites criminelles et pénales, 2016 QCCS 4350

Spieser c. Canada (Procureur général), 2007 QCCS 1207

Spieser v. Canada (General Attorney), 2012 QCCS 2801

Syncrude Canada Ltd v. Canada (Attorney General), 2016 FCA 160

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

Tsleil-Waututh Nation v. Canada (Attorney General), 2018 FCA 153 at paras. 753-763.

Turp v. Canada (Justice), 2012 FC 893

Vancouver (City) v. Ward, 2010 SCC 27

Voters Taking Action on Climate Change v. British Columbia (Ministry of Energy and Mines) 2015 2015 BCSC 471

Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4

Books and Papers

BAUDOIN, Jean-Louis, Patrice DESLAURIERS and Benoit MOORE, La responsabilité civile, 8e éd., Cowansville, Éditions Yvon Blais, 2014

BÉLANGER, Alexis, *Canadian Federalism in the Context of Combating Climate Change*, 20 Constitutional Forum constitutionnel 21 (2011)

BOYD, David R., « No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada », (2011) 57:1 R.D. McGill 81

BOYD, David R., "The Right to a Healthy Environment", Vancouver, UBC Press, 2012

BRAËN, André, *Droits fondamentaux et environnement: actes du colloque "Regards croisés sur les rapports entre les droits fondamentaux et l'environnement: perspectives de la Belgique, du Canada et de la France,"* tenu à la Section de droit civil de l'Université d'Ottawa le 25 janvier 2013, Montréal, Wilson & Lafleur, 2013

BRANDES, Olivier M. and Randy CHRISTENSEN, *The Public Trust and a Modern BC Water Act,* POLIS Water Sustainability Project- The Future of Water Law and Governance Series at 4, http://poliswaterproject.org/sites/default/files/public_trust_brief_2010-1.pdf

BRUN, Henri, Guy TREMBLAY and Eugénie BROUILLET, Droit constitutionnel, 6e edition. Cowansville: Éditions Yvon Blais, 2014, pg. 166

CAISSE DE DÉPÔT ET PLACEMENT DU QUÉBEC, Our investment strategy to address climate change, 2017, 14p. https://www.cdpq.com/sites/default/files/medias/pdf/en/investment_strategy_climate_change.pdf

CANADA, Environment and Climate Change & Environment and Climate Change Canada. "Global greenhouse gas emissions", (16 March 2012), online: https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/global-greenhouse-gas-emissions.html

CHALIFOUR Nathalie, « Environmental Discrimination and the Charter's Equality Guarantee : The Case of Drinking Water for First Nations Living on Reserves », (2013) 43 R.G.D. 183

CHALIFOUR, Nathalie, "Earth vs. Emissions. The Rising Tide of Climate Litigation," *Corporate Knights*, Summer 2017 Issue, May 29, 2017, online: http://www.corporateknights.com/channels/climate-and-carbon/earth-v-emissions-14960304/

CHOQUETTE, Catherine, « L'État québécois est-il vraiment un « gardien » pour notre patrimoine hydrique ?» in HALEY, Paule and Julia SOTOUSEK, *L'environnement, un patrimoine commun et son État gardien - Aspects juridiques nationaux, transnationaux et internationaux*, Montréal, Éditions Yvon Blais, 2012

CHOQUETTE, Catherine and David GILLES, Loi affirmant le caractère collectif des ressources en eau et visant à renforcer leur protection, 2016 Jurisclasseur, Fascicule 18

CHOQUETTE, Catherine, Edith GUILHERMONT et Marie-Pier GOYETTE-NOËL, « La gestion du niveau d'eau des barrages-réservoirs au Québec: Aspects juridiques et environnementaux» (2010) 51 *Les Cahiers de Droit* 827

COLLINS, Lynda, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms," 26 Windsor Review of Legal and Social Issues 7 (2009), online: https://www.researchgate.net/publication/228203357_An_Ecologically_Literate_Reading_of_the_Canadian_Charter_of_Rights_and_Freedoms

COLLINS, Lynda. "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) 71:1 The Supreme Court Law Review, online: http://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/20

DEMARCO, Jerry V., Marcia VALIANTE and Marie-Ann BOWDEN, "Opening the Door for Common Law Environmental Protection in Canada: The Decision in *British Columbia v. Canadian Forest Products Ltd.*" (2005) 15 J. Env. L. & Prac. 233

DEPARTMENT OF JUSTICE - Federal Legislation and the Private Law of the Canadian Territories: An Argument for Complementarity", (31 May 2013), online: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/gaudr/territories/p1.html

ELGIE, Stewart A.G. and Lintner, Anastasia M. "The Supreme Court's Canfor Decision: Losing the Battle but Winning the War for Environmental Damages" (2005) 98 U.B.C. L. Rev. 22

ENVIRONMENTAL LAW CENTER OF THE UNIVERSITY OF VICTORIA, "Climate Change Litigation," Backgrounder on Climate Change Litigation prepared for ELC Associates teleconference (Cohort 1- December 3, 2007), online: http://www.elc.uvic.ca/publications/climate-change-litigation-backgrounder-c1/

GAGE, Andrew Three Arguments for First Nations Public Nuisance Standing, 17(1) IJL 39 (2008)

GAGE, Andrew Climate change litigation and the public right to a healthy atmosphere, 24 *Journal of Environmental Law and Practice* (2013) 257

GOURDE, Karine, *Le droit à un environnement de qualité au Québec: une réponse aux problèmes de pollution diffuse?*, Université de Montréal, Mémoire présenté à la Faculté de droit en vue de l'obtention du grade de Maîtrise en droit, 2010

GOVERNMENT OF CANADA, *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act- May 2010*, July 6, 2010, online: http://www.climatechange.gc.ca/default.asp?lang=En&n=4D57AF05-1

HEELAN POWELL, Brenda and Josephine YAM, "Judicial notice of climate change, » *Symposium on Environment in the Courtroom, March* 6 and 7 2015, University of Calgary

HENDRIKS, Elizabeth., Common Law – Implementing the Public Trust Doctrine in British Columbia, (2010) Water Canada 23, 23

Honoring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada The Truth and Reconciliation Commission of Canada. 2015

JEFFERIES, Cameron, Filling the Gaps in Canada's Climate Change Strategy: All Litigation, All the Time, 38 Fordham Int'l L.J. 1371, 1404 (2015)

KIDD, Scott, "Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada" (2006) 16 J. Env. L. & Prac. 187

KLAUDT, Dustin W., "Can Canada's 'Living Tree' Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?" (2018) 31 J. Env. L. & Prac. 185

LAITOS, Jan G., Sandi B. ZELLMER, and Mary C. WOOD, Natural Resources Law 326 (West Publishing, 2nd ed. 2012)

LUND, Anna, "Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties & Substantive Review", (2012) 23 J. Env. L. &Prac. 135

MATTHEWS GLENN, Jane, "Crown Ownership of Water in situ in Common Law Canada: Public Trusts, Classical Trusts and Fiduciary Duties," *Les Cahiers de Droit*, Vol. 51, Num. 3-4, sept., dec. 2010, p. 493-519, online: https://www.erudit.org/fr/revues/cd1/2010-v51-n3-4-cd4010/045721ar/

NACHMANY, Michael *and al.*, *The 2015 Global Climate Legislation Study*, 2015, online: http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/Global_climate_legislation_study_20151.pdf

NANDA, Avnish, "Heavy Oil Processing in Peace River, Alberta: a Case Study on the Scope of Section 7 of the Charter in the Environmental Realm" (2012) 27 J. Env. L. & Prac. 109

Pan-Canadian Framework on Clean Growth and Climate Change. Canada's Plan to Address Climate Change and Growth in the Economy. http://publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf

Parliament of Canada, *The Courts and Parliaments: Balancing the Roles* (July 7, 2004), http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/tips/tip87-e.htm

Principles Respecting the Government of Canada's Relationship with Indigenous Peoples. Canada Department of Justice. 2017. http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html

PRP Investments, 2017 Annual Report

PETRINKO, Emma, *Juge national et changement climatique: de la justiciabilité à la justice climatique*, Thèse de Maîtrise en droit de l'environnement, développement durable et sécurité alimentaire (LL.M.) et Master 2 recherche droit de l'environnement, 2016

Principles Respecting the Government of Canada's Relationship with Indigenous Peoples. Canada Department of Justice. 2017. http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html

RENNO, Karim, « Fascicule 11- Audiences, délais, intérêt pour agir, représentation devant les tribunaux et certaines conditions pour agir» dans Pierre-Claude LAFOND, dir., Jurisclasseur du Québec, Droit civil- Procédure civile I , 2e éd., Montréal, LexisNexis

SAMSON, Mélanie et Christian BRUNELLE, « Nature et portée des droits économiques, sociaux et culturels dans la Charte québécoise : Ceinture législative et bretelles judiciaires » dans dans Pierre Bosset et Lucie Lamarche, dir, *Droit de cité pour les droits économiques, sociaux et culturels : La Charte québécoise en chantier*, Cowansville (Qc), Yvon Blais, 2011

SLATTERY, Michael, "Pathways from Paris: Does Urgenda Lead to Canada?," 30 *Journal of Environmental Law and Practice*, Issue 2, 2017

SNIDERMAN, Andrew Stobo and Adam SHEDLETZKY. "Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy" (2014) 4 W J Legal Stud at 8-9

THERIAULT, Sophie and David ROBITAILLE, "Les droits fondamentaux dans la *Charte des droits et libertés de la personne* du Québec : Pistes de réflexion, » (2011) 57:2 *McGill LJ* 211

TORRES, Gerald, "*Who Owns the Sky?*", (2002) 19 PACE ENVTL. L. REV. 515

TRACHSLER, Thomas, "Litigating Climate Change in Canada," *Emissions Trading & Climate Change Bulletin*, McMillan Binch Mendelsohn, December 2006

Truth and Reconciliation Commission of Canada. http://www.trc.ca/websites/trcinstitution/index.php?p=4

TURMEL, André, « Changements climatiques au Canada et au Québec: quels défis pour le droit de l'environnement ?, » *Développements récents en droit de l'environnement*, Service de la formation permanente du Barreau du Québec, Montréal, 9 mai 2003

WILKINS, Hugh.S., "The Justiciability of Climate Change: a Comparison of US and Canadian approaches," 34 *Dalhousie Law Journal* 529 (2011)

WOOD, Mary C., "Advancing the sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift," 39 *ENVT'L L.* 43, 89 S. V.B.

WOOD, Mary C., "Atmospheric Trust Litigation Across the World," *Fiduciary Duty and the Atmospheric Trust*, Ken COGHILL, Charles SAMPFORD, Tim SMITH, eds., Ashgate Publishing, January 2012

WOOD, Mary C., "Atmospheric Trust Litigation: Defining Sovereign Obligations in Climate Recovery," *The Fletcher Forum of World Affairs*, March 27, 2017, online: http://www.fletcherforum.org/home/2016/8/22/atmospheric-trust-litigation-defining-sovereign-obligations-in-climate-recovery

YERGEAU, Michel and Nadia CATTANEO, « Les préjudices écologiques », (2005) 39 R.J.T. 303

Online resources

2017 Annual Report, PSP Investment Report at pg. 21, online: https://www.investpsp.com/media/filer_public/03-our-performance/01-reports/content-2/PSP-AR-2017-complete.pdf

About Us, CDP Disclosure Insight Action, online: https://www.cdp.net/en

BUNCOMBE, Andrew "Protesters found not guilty because 'climate change crisis' made it 'legally necessary' for them to commit civil disobedience", The Independent, March 27, 2018, online: http://www.independent.co.uk/news/world/americas/pipeline-protesters-boston-protest-not-guilty-climate-change-karenna-gore-mary-ann-driscoll-a8276851.html

Comments with regard to the public consultation on Draft Recommendations from the Financial Stability Board's Task Force on Climate-Related Financial Disclosures released on December 14, 2016, at pg. 2, Pension Investment Association of Canada, February 10, 2017, online: https://www.piacweb.org/public-statements.html

CORNWELL, Steven, "Greenpeace takes Ontario to court for unlawfully cancelling cap and trade program", Greenpeace Canada, September 11, 2018, online:

https://www.greenpeace.org/canada/en/press-release/4414/greenpeace-takes-ontario-to-court-for-unlawfully-cancelling-cap-and-trade-program/

Engagements du Québec : Nos cibles de réduction d'émissions des GES, Développement durable, Environnement et Lutte contre les changements climatiques, online: http://www.mddelcc.gouv.qc.ca/changementsclimatiques/engagement-quebec.asp

GALLOWAY, Gloria, "Court approves class-action lawsuit for Indigenous students who say they were abused at day schools", The Globe and Mail, July 8, 2018, online: https://www.theglobeandmail.com/canada/article-court-approves-class-action-lawsuit-for-indigenous-students-stripped

"Grassy Narrows sues Ontario over mercury health threat from clearcut logging", Canadian Environmental Law Association, online: http://www.cela.ca/newsevents/media-release/grassy-narrows-sues-ontario-over-mercury-health-threat-clearcut-logging

HATT, Charles, "Re: False and misleading representations about the reality, causes and consequences of global warming and climate change, in contravention of the Competition Act", Ecojustice, December 3, 2015, online: https://ecojustice.ca/wp-content/uploads/2015/12/2015-12-03-Application-to-Commissioner-of-Competition-re-Climate-science-misrepresentations-updated.pdf.

MNR Class Action Discontinued, Oatley Vigmond, August 7, 2018, online: https://oatleyvigmond.com/mnr-class-action-discontinued/

Our investment strategy to address climate change, Caisse de dépôt et placement du Québec, 2017, online : https://www.cdpq.com/sites/default/files/medias/pdf/en/investment_strategy_climate_change.pdf

PALUMBO, Josephine, "Re: Discontinuance of an inquiry relating to Friends of Science Society, International Climate Science Coalition and Heartland Institute", Competition Bureau Canada, June 29, 2017, online:https://www.ecojustice.ca/wp-content/uploads/2017/08/2017-06-29-Ltr-from-Comp-Bureau-re-Inquiry-discontinued.pdf

Politique – Investissement responsable, CDPQ, online : https://www.cdpq.com/sites/default/files/medias/pdf/fr/politique_investissement_responsable_fr.pdf

SHIELDS, Alexandre, Les énergies fossiles séduisent la Caisse de dépôt, Le Devoir, 25 mai 2017.

Synthèse des connaissances sur les changements climatiques au Québec, OURANOS, 2015, online : https://www.ouranos.ca/synthese-2015/

The Montréal Carbon Pledge, PRI/ Montreal Pledge , online: http://montrealpledge.org.

The Pan Canadian Framework on Clean Growth and Climate Change, Government of Canada, September 26, 2018, online: https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html

The Canadian Press, "Canadians voted for a carbon tax, Trudeau says as provincial blowback grows", JWN, October 9, 2018, online: https://www.jwnenergy.com/article/2018/10/canadians-voted-carbon-tax-trudeau-says-provincial-blowback-grows/

The Canadian Press, "More than 150 protesters arrested so far at Kinder Morgan terminals in Burnaby, B.C.", The Globe and Mail, March 25, 2018, online: https://www.theglobeandmail.com/canada/british-columbia/article-more-than-150-protesters-arrested-so-far-at-kinder-morgan-terminals-in/

"The fight for clean air in B.C.'s Kitimat Valley", the Discourse, online: https://www.thediscourse.ca/uncategorized/the-fight-for-clean-air-in-b-c-s-kitimat-valley?utm_source=CELL+Mailing+List&utm_campaign=f21a9ccb78-CELL_e_Newsletter_2018_01_09_draft_COPY_01&utm_medium=email&utm_term=0_5fdbc5a596-f21a9ccb78-108631625

The World's Top Oil Producers of 2017, Investopedia, 2018, online: https://www.investopedia.com/investing/worlds-top-oil-producers/

Trans Mountain Pipeline ULC – Trans Mountain Expansion Project: Review of Related Upstream Greenhouse Gas Emissions Estimates, Environment and Climate Change Canada, November 2016, online: https://www.ceaa.gc.ca/050/documents/p80061/116524E.pdf

WATTS, Jonathan. "Arctic warming: scientists alarmed by 'crazy' temperature rises", The Guardian, February 27, 2018, online: http://www.theguardian.com/environment/2018/feb/27/arctic-warming-scientists-alarmed-by-crazy-temperature-rises

We are PSP: Global institutional investors on the cutting edge, PSP, online: http://www.investpsp.com/en/index.html.