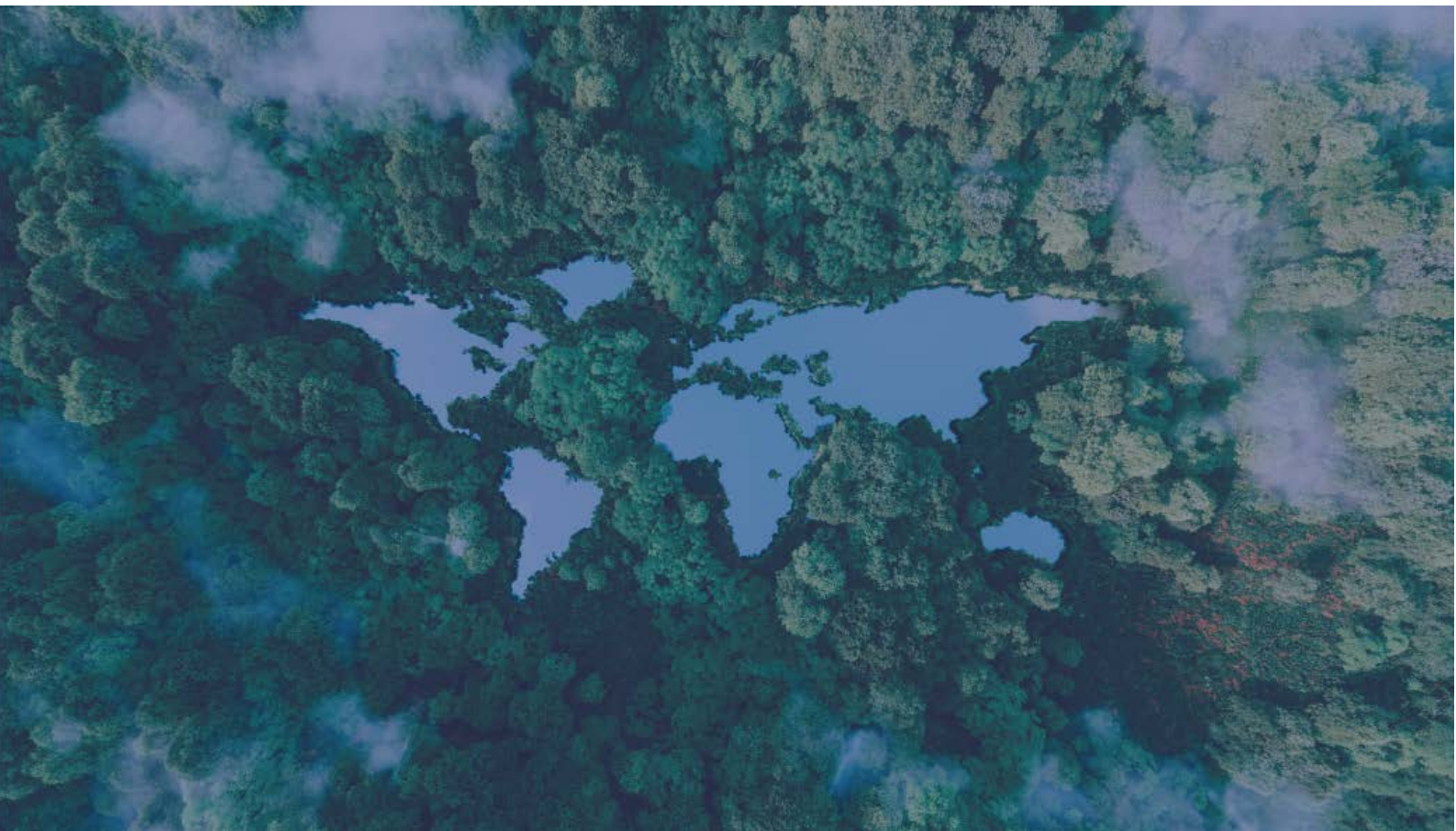




**British Institute of
International and
Comparative Law**

Global Perspectives on Corporate Climate Legal Tactics: Canada National Report

Professor Hassan M. Ahmad





**British Institute of
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Executive Summary

This report explores corporate climate litigation in Canadian courts. Part I examines available and potential causes of action through both statutory mechanisms and human rights frameworks. Various regulatory regimes and domestic statutes are also assessed, particularly the Canadian Environmental Protection Act (CEPA) and proposed amendments via the Strengthening Environmental Protection for a Healthier Canada Act. That Part also looks at the efficacy of instruments like the Canadian Net-Zero Emissions Accountability Act and the Greenhouse Gas Pollution Pricing Act in holding corporations liable for greenhouse gas emissions. It then addresses constitutional rights under the Charter of Rights and Freedoms, tort law doctrines, such as negligence and public nuisance, and equitable principles, such as unjust enrichment.

Next, it turns to an analysis of relevant company and financial laws. Directors' liability attempts to balance a duty to mitigate climate-related risks with the "business judgment rule." Otherwise, consumer protection laws ensure product safety and accurate information. Fraud laws, untapped to date in climate litigation, require false representation, knowledge, causation, and loss. And planning and permitting laws involve environmental assessments and regulatory frameworks, both subject to judicial review. Part I ends with a look at how Indigenous rights affect corporate climate-related obligations.

Part II delves into evidentiary and procedural aspects of corporate climate litigation in Canada. It outlines how plaintiffs may need to demonstrate factual causation through expert testimony and scientific consensus. The use of international instruments, such as IPCC reports and the Paris Agreement, is then discussed. Next, that Part explores procedural challenges that stem from class action certification. It then tackles potential arguments from plaintiffs as well as defendant corporations. In particular, plaintiffs will have to establish foreseeability and proximity in negligence claims. On the other hand, corporations may raise defences such as statutory authorization. Finally, Part II examines standing and justiciability issues, highlighting conditions under which public interest claims can proceed without the requirement to illustrate direct harm.

Part III discusses potential remedies available to plaintiffs in Canadian corporate climate change litigation. It reviews pecuniary remedies, including compensatory damages, punitive damages, nominal damages, and restitutionary damages. It also examines non-pecuniary remedies such as injunctions, declaratory relief, the retention of jurisdiction (structural injunctions), and the oppression remedy.

Abstract

This report provides an overview of the state of the law with respect to corporate climate change litigation in Canada. It examines the potential avenues for climate-related lawsuits against corporations, the implicated legal principles and arguments, the available remedies, and challenges plaintiffs have faced or will face. It does not address “anti-climate litigation,” which refers to cases where plaintiffs have sought to loosen climate protections or, otherwise, to challenge environmental regulations. It primarily concerns itself with potential legal recourse available to individuals and groups that have been impacted by corporate contributions to climate change.

Acknowledgements

This report was researched and prepared by Professor Hassan M. Ahmad, Peter A. Allard School of Law, University of British Columbia.

Professor Ahmad would like to thank all those who provided feedback and commentary on the research and for reviewing the Canadian report: Rudi Barwin; David Bullock; Barnali Choudhury; Alexandra Harrington; Tanya Jemec; Haadia Khalid; Steven Lorteau; Heera Sen.

1. Causes of Action

A. Climate Change Law/Environmental Law Statutory Provisions

Distinct from the statutory and common law sources detailed in other sections of this report, statutory provisions in Canada related to corporate climate impacts can be broken into regulatory regimes and domestic statutes that stem from international instruments.

i. Regulatory regimes

In Canada, regulatory regimes create the framework of rules that corporations must follow in the course of their operations. Regulations and regulatory frameworks are enforced by governmental bodies and frequently include monitoring and reporting requirements. Unlike private law where individuals can commence proceedings against corporations for some financial, environmental, or personal harm, regulatory proceedings are prosecuted by specialized governmental bodies.

As one example of a regulatory regime in Canada that concerns corporations' climate impacts, the *Canadian Environmental Protection Act, 1999* (CEPA) sets out the federal government's authority to regulate the environment, including toxic substances and emissions.¹ Under section 17(1) of CEPA, any Canadian resident of at least 18 years of age can apply to the Minister of the Environment and Climate Change for an investigation of any offence under the Act. Under section 22, individuals may bring an enforcement action where the Minister has failed to conduct an investigation within reasonable time or where the Minister's response was unreasonable. Under section 28(1), "[a] court may allow any person to participate in an environmental protection action in order to provide fair and adequate representation of the private and public interests involved."²

Bill S-5, the *Strengthening Environmental Protection for a Healthier Canada Act*, was introduced in the Senate in February 2022 and proposes amendments to CEPA.³ If passed, it will include a right to a healthy environment and require an implementation framework which would include "principles of environmental justice — including the avoidance of adverse effects that disproportionately affect vulnerable populations — the principle of non-regression and the principle of intergenerational equity."⁴

¹ *Canadian Environmental Protection Act*, SC 1999, c 33, ss 132, 135.

² *Canadian Environmental Protection Act*, SC 1999, c 33, s 28(1).

³ See Bill S-5, *Strengthening Environmental Protection for a Healthier Canada Act*, Parliament of Canada, 2022. Bill S-5 has completed review by the Senate and is in the final stages of review in the House of Commons. On March 22, 2023, it completed consideration by the Standing Committee on Environment and Sustainable Development.

⁴ *Ibid* at s 2(a).

ii. International Instruments

Canada has adopted the UN Framework Convention for Climate Change and the Paris Agreement. The *Canadian Net-Zero Emissions Accountability Act* requires the federal government to set targets to reduce greenhouse gas emissions by 2050 in accordance with the Paris Agreement.⁵ Where Canada fails to meet a target set out in the Act, the Minister of Environment and Climate Change must assess the reasons for that failure, the actions that have been and will be taken to address the failure, and any other appropriate information.⁶ Whereas the *Canadian Net-Zero Emissions Accountability Act* addresses federal government action to reduce greenhouse gas emissions, the *Greenhouse Gas Pollution Pricing Act*⁷ sets out how corporations will be held liable for their emissions through a carbon pollution pricing system.⁸ Under Part I of the Act, the Canada Revenue Agency administers a system where businesses that engage in particular activities must register and pay fuel charges with respect to 21 types of fuel and combustible waste.⁹ An investigation into the compliance with provisions of this Act can only be conducted by a CRA officer, member of the Royal Canadian Mounted Police, or by any person authorized to do so by the Minister of National Revenue.¹⁰

Under Part II of the Act, Environment and Climate Change Canada administers an output-based pricing system (OBPS) for industry greenhouse gas emissions. The Output-Based Pricing System Regulations (SOR/2019-266) set out the reporting and compliance requirements associated with the federal OBPS. Failure to register with the scheme, complete reporting requirements, provide information or answer demands can result in fines and loss of a facility's designation to emit greenhouse gases.¹¹ Provinces may choose to implement the federal carbon pricing system or may propose their own system. If a province does not create a pricing system or its system falls short of the federal standards, the federal system applies. Provinces are added or removed from the Act on the basis of whether a province is implementing a system that meets federal standards.¹²

⁵ Canadian Net-Zero Emissions Accountability Act, SC 2021, c 22.

⁶ See *ibid*, s 16.

⁷ SC 2018, c. 12, s 186.

⁸ See *ibid*, s 6(10).

⁹ *Ibid*.

¹⁰ *Ibid*, s 140.

¹¹ *Ibid*.

¹² See *ibid*, s 10(3).

B. Human Rights Law

The sources of human rights law in Canada can be found in provincial/territorial codes and the Canadian constitution, predominantly the *Charter of Rights and Freedoms* (the “Charter”).

i. Provincial and territorial codes

Under statutory human rights codes across Canadian jurisdictions, individuals can file discrimination claims.¹³ Constitutional protections limit recourse to claims against public actors. However, human rights codes allow for discrimination-based claims against private entities, such as corporations.¹⁴ Complainants must establish that they have faced discrimination as a result of belonging to an enumerated protected group under a code. Protected grounds vary by jurisdiction, but predominantly concern gender, sex, ethnic and racial identity, family status, religion, and age. Discrimination claims require a connection between the alleged conduct and the protected ground.

Climate-related claims can, in theory, be brought against corporations in the following three provinces and three territories:

- **Quebec:** The Quebec *Charter of Human Rights and Freedoms* provides that “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 law.”¹⁵ It is the only human rights code in Canada to include this right. Claims under the Quebec Charter are made to the Human Rights Tribunal of Quebec. Claimants can pursue injunctions and compensatory damages against a respondent corporation and even punitive damages when there is “unlawful and intentional interference” with any right or freedom recognized by this Charter,¹⁶ which includes the right to live in a healthy environment.
- **Ontario:** The Ontario Human Rights Commission has recognized that climate change disproportionately impacts groups protected under the *Ontario Human Rights Code*. It has called on the provincial government to expand human rights protection under the Code to account for this heightened impact on vulnerable groups.¹⁷ Additionally, Ontario’s Environmental Bill of Rights (EBR) provides for

¹³ See e.g. *Human Rights Code*, RSBC 1996, c 210 [BC Human Rights Code]; *Human Rights Code*, RSO 1990, c. H.19 [Ontario Human Rights Code].

¹⁴ See e.g. *Beaver v Dr. Hans Epp Dentistry Professional Corporation*, 2008 HRTO 282, Human Rights Tribunal of Ontario.

¹⁵ *Charter of Human Rights and Freedoms*, CQLR c C-12, s 46.1.

¹⁶ *Ibid*, s 49.

¹⁷ Ontario Human Rights Commission, “OHRC Statement on Human Rights, Extreme Heat Waves, and Air Conditioning” (19 August 2022), online: OHRC <https://www.ohrc.on.ca/en/news_centre/ohrc-statement-human-rights-extreme-heat-waves-and-air-conditioning>; Ontario Human Rights Code, *supra* note 13.

Ontario residents to participate in environmental decision-making, recognizing a right to a healthy environment in its preamble.¹⁸ The EBR allows Ontario residents to apply for ministerial review of existing law, policy or regulations subject to the EBR. Remedies can include the creation of a new instrument to protect the environment, an investigation into violations of any law or instrument, and an application for leave to appeal with Ontario's Ministry of the Environment, Conservation and Parks.¹⁹

- **British Columbia:** Under the *British Columbia Human Rights Code*, individuals living with medical conditions impacted by heat may be able to file complaints with the BC Human Rights Tribunal if their landlord, strata²⁰ or co-operative refuses to facilitate the installation of an air conditioner or other cooling device.²¹ With rising temperatures and more frequent heat waves, climate change poses heightened risks to disabled and elderly people. Remedies can include cease and refrain orders, compensatory damages, declaratory orders, steps or programs to address discrimination, compensation for expenses, injury or other losses and interest.²²
- **Nunavut:** The *Nunavut Environmental Rights Act* provides that any two residents of Nunavut who are at least 19 years of age can request an investigation into potential environmental contamination.²³ Section 6 creates "the right to protect the environment and the public trust from the release of contaminants by commencing an action in the Nunavut Court of Justice against any person releasing any contaminant into the environment."²⁴ The Act applies to corporations.
- **Northwest Territories:** The *Northwest Territories Environmental Act* asserts a right to a healthy environment and creates a right to apply for an investigation into "significant harm to the environment."²⁵ Under section 12 of the Act, "[a]ny adult resident in the Northwest Territories who believes, on reasonable grounds, that an offence has been committed under an enactment and that such an offence

¹⁸ *Environmental Bill of Rights*, 1993, SO 1993, c 28.

¹⁹ See *ibid*, s 74.

²⁰ Strata housing refers to a property arrangement where individuals own their specific units, such as apartments, duplexes, or single-family homes, and share ownership of common areas and assets through a strata corporation, which manages the communal aspects and adheres to specific bylaws and fee structures.

²¹ See e.g. *Macario v Strata Plan BCS 1296*, 2017 BCHRT 255 (CanLII).

²² See BC Human Rights Clinic, "Remedies," online: BCHRC <<https://bchrc.net/legal-information/remedies/#:~:text=The%20Tribunal%20can%20order%20a,for%20a%20job%20without%20discrimination.>>.

²³ *Environmental Rights Act*, RSNWT (Nu) 1988, c 83 (supp), s 4(2).

²⁴ *Ibid*.

²⁵ *Environmental Protection Act*, RSNWT 1988, c E-7, ss 2, 8(1).

has caused or is likely to cause significant harm to the environment, may lay an information in writing and under oath before a justice.”²⁶ Section 13 creates a right of action in the Supreme Court of the Northwest Territories on the basis of reasonable belief in significant harm to the environment, where an act or omission was not in compliance with existing law and standards.²⁷ An action can be brought against both natural and legal persons and explicit protections exist against retribution for employees making claims against an employer.²⁸

- **Yukon:** The *Yukon Environmental Act* likewise recognizes a right to a “healthful natural environment” (s. 6).²⁹ Section 8 creates a right of action as follows:³⁰

(1) Every adult or corporate person resident in the Yukon who has reasonable grounds to believe that

- a) a person has impaired or is likely to impair the natural environment; or*
- b) the Government of the Yukon has failed to meet its responsibilities as trustee of the public trust to protect the natural environment from actual or likely impairment*

Under section 179 of Yukon’s legislation, where a corporation violates the Act, “any officer, director, manager, or agent of the corporation who knowingly directed, authorized, assented to, acquiesced in, or participated in the commission of the offence is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.”³¹

In jurisdictions where health or environmental rights are recognized as protected grounds, human rights law is more readily available as a means of holding corporations accountable for acts that are alleged to contribute to climate change.³² Also, protected grounds may be combined in a claim. For example, a claim could be

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*, s 15.

²⁹ *Environment Act*, RSY 2002, c 76, s 6.

³⁰ *Ibid.*

³¹ *Ibid.*

³² In *Urgenda Foundation v The State of the Netherlands*, the court recognized the government’s failure to adequately address climate change posed a threat to the fundamental rights of its citizens, including the right to life and the right to a safe and healthy environment. In the context of corporate climate litigation, the connection between climate change and human rights becomes significant. Corporations, particularly those in high-emitting industries, can contribute to the violation of human rights through their greenhouse gas emissions, environmental degradation, and their impact on vulnerable communities. By drawing on *Urgenda* and the recognition of the government’s duty to protect fundamental rights in the face of climate change, corporate climate litigation can establish a similar duty for corporations. See Rechtbank Den Haag [District Court of The Hague, Chamber for Commercial Affairs], June 24 2015, *Urgenda Foundation v The State of the Netherlands*, Case No. C/09/456689/HA_ZA 13-1396 (Netherlands), online: <elaw.org/system/files/urgenda_0.pdf>.

based on violations to the right to health as well as disability, race or Indigeneity.³³ While untested, this may offer a means to bring claims in response to environmental racism where the impacts of climate change are disproportionately felt by racialized communities.³⁴ In jurisdictions where health or environmental rights are not recognized, claimants must prove that the discrimination faced is related to an existing protected category, such as discrimination on the basis of disability, race or Indigeneity. A perennial challenge in claims brought under human rights codes is establishing the connection between the alleged conduct, the adverse effect and membership in a protected group.

ii. Constitutional rights

Rights under Canada's Constitution do not have a horizontal effect, meaning that the norms and interpretation of private law must be consistent with certain legal norms applying in public law (as with EU Charter rights under EU law).³⁵ With that said, Charter values can be used in private law litigation to "guide incremental change to the common law."³⁶ For example, *Jones v. Tsige* recognized a common law tort for the invasion of privacy on the basis of common law and Charter jurisprudence.³⁷ Charter values include "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation for a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."³⁸ Charter values may be raised in order to support interpretations of law in corporate climate litigation that concern tort or human rights principles.

Canada's constitution does not specifically provide for environmental protections or a right to a healthy environment. Furthermore, it does not provide redress for harm committed by private actors, such as corporations. Pursuant to section 32(1), the Charter applies to all federal, provincial, and territorial governments and all matters

³³ See e.g. *RR v Vancouver Aboriginal Child and Family Services*, (No. 6), 2022 BCHRT 116.

³⁴ Examples of environmental racism in Canada include the widespread mercury poisoning in Grassy Narrows First Nation resulting from a pulp mills runoff into a river, or the health impacts of toxic waste in a dump in the African Nova Scotian community of Africville. See Ingrid Waldron, "Environmental Racism and Climate Change: Determinants of Health in Mi'kmaw and African Nova Scotian Communities", *Canadian Climate Institute* (21 July 2022), online: <<https://climateinstitute.ca/publications/environmental-racism-and-climate-change/>>; Jody Porter, "Children of the Poisoned River", *CBC*, online: <<https://www.cbc.ca/news2/interactives/children-of-the-poisoned-river-mercury-poisoning-grassy-narrows-first-nation/>>.

³⁵ *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at 97; *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para 175 [*Nevsun*].

³⁶ *McKitty v Hayani*, 2019 ONCA 805 at para 56; see also *Hill v Church of Scientology*, [1995] 2 SCR 1130, at paras 93-95 for a discussion of Charter values versus Charter rights.

³⁷ See *Jones v Tsige*, 2012 ONCA 32 [*Jones*] at paras 40-45.

³⁸ *R v Oakes*, [1986] 1 SCR 103 at para 64; see also Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 *Sup Ct L Rev* 391 at 403, online: <<https://canlii.ca/t/ss91>>.

under the authority of each of these jurisdictions. With that in mind, Crown corporations owned by the government fall under the Charter's purview if they were established by government to implement government policy.³⁹ However, it is insufficient as a basis for Charter application for a corporation to be created and governed by statute or to provide a "public service."⁴⁰

While it is thus not directly relevant to corporate climate litigation, constitutional law has been central to climate litigation as a whole in Canada.⁴¹ In particular, the Charter protects against infringements of political and civil rights by the Canadian government.⁴² Constitutional claims related to climate change primarily have been brought under section 7 of the Charter, which protects the right to life, liberty, and security of the person, as well as section 15 of the Charter, which protects equality rights.⁴³ To determine whether there has been a violation, section 7 involves a two-step analysis. The first step is to establish that there has been a deprivation of life, liberty or security of the person.⁴⁴ The second step requires a determination of whether the violation conforms with the principles of fundamental justice. There are two steps to the 'principles of fundamental justice' element of section 7. First, a court must determine a relevant principle of fundamental justice at issue, such as vagueness, arbitrariness, overbreadth, gross disproportionality, right to silence, minimum level of mens rea, and the right to full answer and defence.⁴⁵ Once the relevant principle(s) have been identified, a court must determine if the deprivation has occurred in accordance with the principle(s).⁴⁶

Section 15 provides a right to equality and protects against discrimination. To establish that section 15 has been violated, it is necessary to first establish whether a law or government action creates a distinction, either on its face or in its impact, on the basis of an enumerated or analogous ground.⁴⁷ Enumerated grounds are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Analogous grounds recognized thus far include non-citizenship,⁴⁸ marital status,⁴⁹ sexual

³⁹ *Douglas/kwantlen Faculty Assn. v Douglas College*, [1990] 3 SCR 570.

⁴⁰ See *Mckinney v University of Guelph* [1990] 3 SCR 229.

⁴¹ Climate litigation has also encompassed some cases centered around free expression issues. See e.g., *CCLA v Attorney General of Ontario*, 2020 ONSC 4838.

⁴² *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁴³ See e.g. *Environnement Jeunesse v Attorney General of Canada*, 2021 QCCA 1871.

⁴⁴ See *R v Malmö-Levine*, [2003] 3 SCR 571 at para 83.

⁴⁵ See *ibid*; *R v White*, [1999] 2 SCR 417 at para 38; *R v S(RJ)*, [1995] 1 SCR 451 at para 479.

⁴⁶ *R v Pontes*, [1995] 3 SCR 44.

⁴⁷ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [Andrews] at 171; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

⁴⁸ *Andrews, ibid*; *Lavoie v Canada*, [2002] 1 SCR 769.

⁴⁹ *Miron v Trudel*, [1995] 2 SCR 418; *Quebec v A*, 2013 SCC 5.

orientation⁵⁰ and Aboriginality-residence.⁵¹ The second step under section 15 is to determine whether the distinction is discriminatory.⁵²

While courts have not yet ruled on whether section 7 includes a right to a healthy environment, the plaintiffs in *Mathur v Ontario* and *La Rose v Canada* forwarded just that proposition.⁵³ In *La Rose*, the Federal Court rejected that argument as non-justiciable.⁵⁴ In *Mathur*, the Ontario Superior Court discussed the section 7 claim at length and concluded the plaintiffs did not establish a deprivation of their rights.⁵⁵

Although in *Mathur* the court did not find Ontario's target unconstitutional or order the government to set a new science-based target, the decision set important precedents for climate litigation in Canada. Justice Vermette agreed with the applicants on several key points, including the justiciability of the constitutional challenge, the inadequacy of Ontario's target in relation to scientific consensus, the global significance of emissions, and the reliability of reports by the Intergovernmental Panel on Climate Change (IPCC). However, the court found against the applicants on key legal points, including the violation of principles of fundamental justice under section 7 of the Charter and the interpretation of the case as seeking positive rights rather than negative rights. The court also affirmed that Canadian courts have the jurisdiction to hear and decide Charter-based cases challenging specific legislation or state action related to climate targets and plans.

The *Mathur* court recognized that Ontario's climate target fell significantly short of scientific consensus, increasing the risks to Ontarians' life and health and violating their section 7 rights to life and security of the person under the Charter. It rejected arguments that Ontario's emissions were globally insignificant, acknowledging the irreversible impact of every tonne of CO₂ emissions on global temperatures. The court endorsed the goal of the Paris Agreement to limit global warming to below 1.5 degrees Celsius and considered the Intergovernmental Panel on Climate Change (IPCC) reports as reliable and authoritative sources of scientific knowledge on climate change and its impacts. It criticized the quality of evidence presented by Ontario's experts, emphasizing the credibility and expertise of the IPCC. With that said, the court did not find Ontario's target to be arbitrary or grossly disproportionate, preventing a full Charter violation under section 7. It interpreted the case as seeking "positive rights" rather than recognizing it as a "negative rights" case, which would have established a more dependable precedent.

⁵⁰ *Egan v Canada*, [1995] 2 SCR 513.

⁵¹ *Corbiere v Canada* (Minister of Indian and Northern Affairs), [1999] 2 SCR 203.

⁵² *Fraser v Canada* (Attorney General), 2020 SCC 28.

⁵³ *Mathur v Ontario*, 2020 ONSC 6918; *La Rose v Canada*, 2020 FC 1008 [*Mathur*].

⁵⁴ *La Rose*, 2020 FC 1008 at paras 60-72, 102.

⁵⁵ *Mathur v Ontario*, 2023 ONSC 2316 at paras 118-171.

Toussaint v Attorney General (Canada) is an ongoing case that considers whether there is a constitutionally protected right to healthcare under sections 7 and 15 of the Charter. In February 2023, the Ontario Court of Appeal upheld the Ontario Superior Court's decision to reject a motion to dismiss made by the defendant, finding that the claim was not doomed to fail. The plaintiff brought the claim on the basis that denying healthcare on the basis of immigration status was discriminatory. The Court further found that her claims made under customary international law were not necessarily doomed to fail, given that customary international law is automatically incorporated into domestic law where the two do not conflict. While *Toussaint* itself does not involve a corporation, it is important to corporate climate litigation as it arguably expands the use of customary international law and international human rights law in Canadian proceedings.

iii. Due diligence

In March 2022, Bill C-262, the *Corporate Responsibility to Protect Human Rights Act*, was introduced in the House of Commons, based on the model legislation created by the Canadian Network on Corporate Accountability.⁵⁶ If passed, the Act would create mandatory human rights and environmental due diligence requirements. It would also create a duty for corporations to prevent adverse impacts on human rights including by its entities, affiliates, and in its business relationships.⁵⁷ Furthermore, the Act would create a private right of action in any Canadian provincial superior court against corporations that fail to meet due diligence requirements.⁵⁸ Private law claims would be available to those directly impacted, or those who have a "genuine interest in the matter."⁵⁹ Currently, Bill C-2621 has not progressed beyond the first reading in the House of Commons.

Bill S-211, *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, has passed through the Senate and is currently at its third and final reading in the House of Commons.⁶⁰ This Bill creates due diligence requirements regarding forced and child labour. Whereas Bill C-262 has stalled (likely because it includes a provision that would allow for a private law claim couched in tort principles), Bill S-211 appears likely to pass. This Bill does not provide for due diligence directly related to climate change, but it legislates due diligence requirements to be imposed on corporations that operate outside of Canada. As such, the Bill, in theory, represents a shift toward due diligence requirements more broadly.

⁵⁶ Bill C-262, *Corporate Responsibility to Protect Human Rights Act*, 1st Sess, 44th Parl, 2022.

⁵⁷ *Ibid*, s 6.

⁵⁸ *Ibid*, s 10(1).

⁵⁹ *Ibid*, s 10(3).

⁶⁰ Bill S-211, *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, 1st Sess, 44th Parl., 2022.

C. Tort Law

Tort law causes of actions relevant to corporate climate litigation in Canada include public and private nuisance, trespass, the public trust doctrine, negligence, and unjust enrichment. Those doctrines are largely applicable in Canadian common law jurisdictions. On the other hand, Quebec applies a concept known as extra-contractual liability.

i. Public and private nuisance

In Canada, public nuisance is defined as “any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience.”⁶¹ The conduct in question must unreasonably impact the lives of many people. A public nuisance claim requires the following elements:

- A defendant’s actions must have been unreasonable;
- The conduct must have taken place for an unreasonable period of time;
- A causal connection between the defendant and the nuisance claimed; and
- An injury or damage caused or threatened to be caused to the plaintiff.

Public nuisance claims include polluting public land or water or blocking the use of streets. They are made on behalf of the public on the basis of interference with public rights. As such, with the exception of the Special Injury Rule, a government entity, as representative of the Crown, serves as the plaintiff. In these instances, the government has *parens patriae* standing to pursue litigation in the public interest.

Standing has been a barrier in public nuisance claims for climate-related impacts.⁶² However, the Special Injury Rule provides an exception to the standing issue. Where plaintiffs can establish that the damage claimed is more specific to them than the general public, they may be able to bring a claim in public nuisance.⁶³ Other barriers around the use of public nuisance in climate litigation include causation, proximity and justiciability. For corporate climate litigation, establishing factual causation and proximity can be challenging. When relying on the Special Injury Rule, a plaintiff must establish a causal link between the corporation’s actions and the injury suffered.⁶⁴ For example, in allegations around toxic waste dumping, injury to those in immediate vicinity is more likely to be substantiated where the claim is made on the basis that dumping is a nuisance to the general public.

⁶¹ *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 52.

⁶² See e.g., David Bullock, “Public Nuisance and Climate Change: The Common Law’s Solutions to the Plaintiff, Defendant and Causation Problems” (2022) 85:5 Mod Law Rev 1136–1167, online: <<https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2230.12732>>.

⁶³ See e.g., “Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule” (2001) 28:3 Ecology LQ 755.

⁶⁴ *Ibid.*

Where a public nuisance claim is made on the basis that the government does not view a corporation's actions to be in the public interest, a court may be more persuaded when there is proximity between the corporation's actions and the harm to the environment. While there may be an evidentiary link between, for example, emitting or spilling toxic substances, and negative health outcomes or rising temperatures, a court may not find such a relationship is sufficiently proximate with respect to a corporate defendant and the victims involved. Furthermore, claims are unlikely to be successful where defendants have complied with all regulations. With that said, corporations can still be held liable in instances where they have complied with all regulations. In *Ryan v Victoria*, the Supreme Court of Canada held that hazard posed by a railway that complied with all regulations was not an "inevitable consequence" of compliance with statutory authority.⁶⁵ Corporate compliance with regulation remains a challenge in climate litigation. However, it can be overcome if plaintiffs can establish that the risk posed was greater than was "absolutely necessary."⁶⁶

Recent climate change litigation against governments, commenced on the basis that youth and future generations are particularly impacted by climate-related impacts, has not included public nuisance arguments.⁶⁷ Therefore, whether these individual plaintiffs have standing to bring public nuisance claims for widespread environmental damage remains untested, to date.

Private nuisance concerns interference with the use and enjoyment of one's own land, such as through smells, smoke, or noise emanating from one private property to another. This cause of action differs from public nuisance, which concerns interference with the rights of the public. Private nuisance follows a two-part test:

- 1) *Threshold test*: the interference in question must be substantial and unreasonable. Substantial interference is one that is non-trivial.
- 2) *Reasonableness analysis*: The non-trivial interference must be unreasonable in the circumstances.⁶⁸

Additionally, plaintiffs must be able to demonstrate that they have suffered harm. This may be material injury or interference with the reasonable use and enjoyment of land.⁶⁹ The reasonableness analysis involves balancing the public interest in the conduct, the utility of the activity, the reasonableness of land use, location, duration, and foreseeability.⁷⁰

⁶⁵ See *Ryan v Victoria*, *supra* note 61 at para 59.

⁶⁶ *Ibid* at para 56.

⁶⁷ *Mathur*, *supra* note 53; *La Rose*, *supra* note 54.

⁶⁸ *Antrim Truck Centre Ltd. v Ontario (Transportation)*, 2013 SCC 13 at para 19.

⁶⁹ *Helen's Smelting Co. v Tipping* (1865), 11 HLC 642, 11 ER 148.

⁷⁰ See e.g. *Antrim*, *supra* note 68 at para 38.

In *Thomas and Stellat'en First Nation v Rio Tinto Alcan Inc*, the BC Supreme Court found that Aboriginal rights and title can form the basis of a claim in private nuisance against private third parties, such as corporations.⁷¹ The court found that while Rio Tinto was responsible for erecting a dam that drastically reduced fish populations, they were immunized from liability because of the defence of statutory authority. As such, a remedy could only be sought from the government. The defence of statutory authority may be overcome where compliance with statute or regulation does not make injury inevitable.⁷² Following *Rio Tinto*, Indigenous communities may be able to bring private nuisance actions against corporations for climate change where public nuisance claims are unavailable.⁷³

Rylands v. Fletcher offers an additional means of action under strict liability for harm caused by the release of dangerous substances not natural to the land.⁷⁴ The case concerns a specific form of nuisance broader than public nuisance. It is not tied to the balancing of social utility, as in private nuisance cases. The test for *Rylands v Fletcher* nuisance claims requires that (1) the plaintiff brought a potentially dangerous substance onto the land that is not natural to it, and (2) that the substance accidentally escaped, the escape caused damage, and liability.⁷⁵ Exceptions to liability under the rule include acts of God, the plaintiff's consent to the substance and where the escape was caused by the plaintiff. The usefulness of *Rylands v Fletcher* for the purposes of environmental pollution was limited in *Smith v Inco Ltd*.⁷⁶ There, the plaintiff commenced litigation in response to high concentrations of nickel in soil in Port Colborne, Ontario caused by Inco. The claim could not be brought under private nuisance as there was no material injury. The loss of property value that resulted from the nickel resulted from public concern and not harms associated with the nickel itself. The claim also did not meet the *Rylands v Fletcher* strict liability test. The court found that Inco's release of nickel was not unnatural because it complied with zoning restrictions. Also, the release was intentional.

⁷¹ *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15.

⁷² *Ryan v Victoria*, *supra* note 61.

⁷³ *Thomas v Rio Tinto Alcan Inc*, 2022 BCCA 415.

⁷⁴ *Rylands v Fletcher*, (1868) LR 3 HL 330.

⁷⁵ *Ibid.*

⁷⁶ *Smith v Inco Ltd*, [2011] ONCA 62.

ii. Negligent failure to mitigate or adapt to climate change

Like other common law jurisdictions, negligence requires a duty of care, a breach of the standard of care, damages, and factual and legal causation.⁷⁷ In corporate climate change actions, proximity would likely be one barrier to a successful claim. Also, courts would likely conclude that corporations met the applicable standard of care where regulations are followed and due diligence requirements are fulfilled. Relatedly, corporations may argue that the standard of care around climate impacts differs by industry. In this regard, a heightened standard may manifest when companies fulfill applicable regulations, but fall short of industry practices. Moreover, foreseeability plays a central role in establishing the duty of care. Corporations with the knowledge of the potential adverse climate impacts of their practices may be expected to take reasonable measures to mitigate such foreseeable harms.

Burgess v Ontario Minister of Natural Resources and Forestry concerned a provincial government's failure to respond to a rise in flooding, despite knowing that water levels had reached dangerously high points.⁷⁸ While the plaintiff discontinued the action, a similar claim could be launched against a corporation that knew or should have known that its business practices are causing climate impacts. For example, in *Rio Tinto*, the plaintiffs could have argued that the corporation knew or should have known that its operations harmed the fish population.⁷⁹ There may be a viable argument that a corporation is negligent when it knows its emissions contribute to rising temperatures.

iii. Negligent or strict liability for failure to warn

A failure to warn is grounded in negligence law. It is similar to a failure to adapt or mitigate harm. For a failure to warn, a plaintiff must establish that a defendant: (1) knew or should have known of the risks; (2) failed to warn of the danger or risks, and (3) the plaintiff would have altered its behaviour had it been warned.⁸⁰ Where intermediaries are involved, a question arises as to whether they would have passed along a warning had they been aware of the risk.⁸¹ In Canada, tobacco companies previously faced litigation alleging that they knew or ought to have known that cigarettes harmed human health such that they should have warned the public about risks associated with smoking.⁸² The Supreme Court of Canada held Imperial Tobacco was negligent for failing to warn about smoking's public health risks after decades of scientific evidence.

⁷⁷ *Mustapha v Culligan*, 2008 SCC 27.

⁷⁸ *Ontario Public Service Employees Union v Ontario (Ministry of Natural Resources) (Burgess Grievance)*, [2004] OGSBA No 83.

⁷⁹ *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*].

⁸⁰ *Hollis v Dow Corning Corp*, [1995] 4 SCR 634 at paras 22, 36, 37.

⁸¹ *Ibid* at para 81.

⁸² *R v Imperial Tobacco* 2011 SCC 42; *British Columbia v Imperial Tobacco*, 2008 BCSC 419.

Analogously, fossil fuel companies may be held liable for their failure to warn the public about climate change given decades of evidence demonstrating fossil fuels contribute to climate change.

iv. Trespass

Trespass can apply when toxic substances are released. Trespass requires direct, intentional, and physical interference with a plaintiff's land.⁸³ Related to climate impacts, trespass can involve discharges of ash, smoke or other by-products, as well as runoff or aerial pesticides.⁸⁴ In theory, a new action arises each day interference occurs. With trespass, mistake is not a defence.⁸⁵ And unlike nuisance, there must be physical trespass onto the land. With that said, trespass does not require proof of harm. In corporate climate litigation, the difficulty with utilizing trespass is that the act must be intentional and there must be direct interference. Therefore, nuisance or negligence claims may be more appropriate.

In *Kerr v Revelstoke*, damages were awarded for the interference caused from machinery operations by a lumber company that was situated across the highway from the plaintiffs' motel.⁸⁶ The machinery emitted smoke, dust, flying ash and noise onto the plaintiffs' property. The defendant was found not to be negligent as he had attempted to mitigate the effect on the plaintiff's business. While tangential to corporate climate litigation, *Kerr v Revelstoke* provides insight into how Canadian courts deal with toxic torts with respect to industrial operations. A corporate climate litigation claim in trespass might claim that noxious substances or waste dumping that enters a plaintiff's land is harmful to the environment.

v. Impairment of public trust

The public trust doctrine arises from the Crown's fiduciary duty over natural resources that benefit the public.⁸⁷ In Canada, *parens patriae* standing traditionally provided the Attorney General a common law right to bring claims on the public's behalf. While the Crown has a right to manage and use natural resources, it is required to act in the common interests of the public. There is no public trust doctrine in Quebec but an

⁸³ See e.g. *Entick v Carrington*, [1765] EWHC KB J98.

⁸⁴ *Kerr v Revelstoke Building Materials Ltd.*, [1976] AJ No 637, 71 DLR (3d) 134; *Phillips v California Standard Co.* [1960] AJ No 8, 31 WWR 331; *Athwal v Pania Estates Ltd.*, [1981] BCJ No 1326, 11 CELR 17; *Friesen v Forest Protection Ltd.*, [1978] NBJ No 30, 22 NBR (2d) 146; *Pinder v Sanderson, Newman and Hough*, [1911] OJ No 728, 18 OWR 240.

⁸⁵ See e.g. *Boliden Ltd. v Liberty Mutual Insurance Co.*, 90 OR (3d) 274; *Huang v Fraser Hillary's Limited*, 2018 ONCA 527.

⁸⁶ *Ibid.*

⁸⁷ See e.g. *R v Lord*, [1995] 1 SCR 747; *R v Meyer*, 2022 YKTC 17.

analogous statutory duty over water management exists.⁸⁸ The doctrine has also been integrated into provincial and federal statutes.⁸⁹

To date, the public trust doctrine has largely been rejected in environmental claims.⁹⁰ However, there has been some progress in recent years. In 2004, the Supreme Court of Canada in *Canfor* opened the door to the doctrine's potential application in environmental and climate-related claims.⁹¹ The federal government sought damages for a large forest fire. Since the Crown was the landowner in *Canfor*, the Court did not need to consider its *parens patriae* standing. Therefore, the public trust doctrine was not directly at issue.

In 2013, in *Nestlé Canada Inc. v Ministry of the Environment*, two public interest groups sought to challenge the Ministry of the Environment's decision to allow Nestlé to bottle groundwater.⁹² As has been common in cases where this argument has been invoked, the tribunal refused to apply the public trust doctrine on the basis that it is not recognized as law in Canada. But, when climate-related claims arose in *La Rose*, the Federal Court held that the argument that the government's inaction around climate change and greenhouse emissions violated the public trust doctrine was justiciable. However, the doctrine did not constitute a reasonable cause of action in the specific instance. The plaintiffs have appealed that decision to the Federal Court of Appeal.⁹³

Not an instance of climate litigation, the Nova Scotia Supreme Court in *Bancroft v Nova Scotia (Lands and Forestry)*⁹⁴ held that the public trust doctrine does not ground a duty of procedural fairness to an entire public when a government is contemplating to sell public land to a private actor. In the Court's view, such a broad procedural duty would turn the executive branch into a legislature, which is shielded from judicial review and correlative private claims. Echoing past decisions that refused to expand the doctrine's ambit from a property rule of title to one that would oblige institutional actors to maintain a healthy environment, Brothers J. wrote, "recognition of the public trust doctrine proposed by the applicants would not represent the kind of incremental change to the common law that this court is permitted to make."⁹⁵ For similar reasons to those

⁸⁸ Vladislav Mukhomedzyanov, "Canadian Public Trust Doctrine at Common Law: Requirements and Effectiveness" (2019) 32 J Envtl L & Prac 317; Craig E Jones, "The Attorney General's Standing to Seek Relief in The Public Interest: The Evolving Doctrine of Parens Patriae" (2007) 86 Can Bar Rev 121.

⁸⁹ *Ibid.*

⁹⁰ See *Burns Bog Conservation Society v Canada (Attorney General)*, 2012 FC 1024 at para 39: "No court in Canada has recognized a public trust which requires the Crown to protect the environment." Also see *Burns Bog Conservation Society v Canada (Attorney General) et al.*, 2014 FCA 170 at paras 43-47.

⁹¹ See Jones, *supra* note 88.

⁹² *Nestlé Canada Inc. v Ministry of the Environment*, [2013] OERTD No. 22, 75 CELR (3d) 242.

⁹³ *La Rose*, *supra* note 54.

⁹⁴ *Bancroft v Nova Scotia (Minister of Lands and Forestry)*, 2021 NSSC 234 [*Bancroft*] and *Bancroft v Nova Scotia (Minister of Lands and Forestry)*, 2022 NSCA 78. The Court of Appeal dismissed the case on mootness grounds.

⁹⁵ *Bancroft*, *ibid* at para 4.

offered by Manson J. in *La Rose*, the Nova Scotia Supreme Court in *Bancroft* concluded that the “substantial recasting” of the public trust doctrine, the kind for which the Applicants were arguing, would have ramifications “of which this court is not in a position to accurately predict.”⁹⁶ Specifically, expanding the public trust doctrine to encompass procedural rights owed to an entire society would give little reason for future courts to limit the doctrine’s scope in private law claims.

vi. Fraudulent misrepresentation

Corporations may also be liable pursuant to claims of fraudulent or negligent misrepresentation if they intentionally misrepresent the extent to which their business practices or products cause climate impacts. With companies increasingly marketing themselves as “green” and socially responsible, misrepresentation claims offer a means of accountability. Fraudulent misrepresentation requires the following elements:⁹⁷

- 1) a false representation made by the defendant;
- 2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
- 3) the false representation caused the plaintiff to act; and
- 4) the plaintiff’s actions resulted in a loss.

Negligent misrepresentation requires that:⁹⁸

- 1) there must be a duty of care based on a “special relationship” between the representor and the representee;
- 2) the representation in question must be untrue, inaccurate, or misleading;
- 3) the representor must have acted negligently in making said misrepresentation;
- 4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- 5) the reliance must have been detrimental to the representee in the sense that damages resulted.

In 2020, Greenpeace Canada filed a claim with the Competition Bureau against Shell Canada. Greenpeace claims that Shell’s Drive Carbon Neutral program and advertising have made false or misleading representations to the public that violate s. 52(1) or 74(1)(a) of the *Competition Act*.⁹⁹ The Competition Bureau has yet to issue a

⁹⁶ *Ibid* at para 153.

⁹⁷ *Combined Air Mechanical Services Inc. v Flesch*, 2014 SCC 8 at para 21; see also *Jasmur Holdings Ltd v Taynton Developments Inc.* 2016 BCSC 1902.

⁹⁸ *Queen v Cognos Inc.*, [1993] 1 SCR 87 at 110.

⁹⁹ Ecojustice, “Complaint to the Competition Bureau of Canada against Shell’s misleading promotion of forest-based “offsets” as sustainable, climate action”, online: <<https://www.greenpeace.org/static/planet4-canada-stateless/2021/11/a7369fc0-driving-carbon-neutral-is-impossible-with-fossil-fuels.docx.pdf>>.

decision. Possible remedies under the *Competition Act* include an order for Shell Canada to cease engaging in the implicated conduct or similar conduct, a public notice to inform those who may have been affected by the conduct, and monetary penalties up to \$10 million CAD and subsequently up to \$15 million CAD.¹⁰⁰

As in numerous other countries, a number of court actions were commenced in Canada claiming that Volkswagen diesel cars were programmed to falsely report a lower emissions rate in order to meet emissions standards.¹⁰¹ A consumer class action was certified in 2018 and settled in 2019.¹⁰² The action was brought on the basis of negligence design and negligent misrepresentation that the vehicles were environmentally-friendly. A securities class action, brought against Volkswagen investors, was dismissed on jurisdictional grounds.

Otherwise, the Association québécoise de lutte contre la pollution atmosphérique (Quebec Association for the Fight Against Atmospheric Pollution) and André Bélisle brought a claim on behalf of all Quebec residents claiming violations of sections 1 (right to life, liberty, and security) and 46.1 (right to a healthful environment) of the *Quebec Charter of Human Rights and Freedoms*. A Quebec court allowed the action to proceed on its merits solely for the purposes of punitive damages. Volkswagen argued the plaintiffs did not have standing to sue on behalf of all residents of the province because such a broad private law claim would usurp the provincial government's regulatory role. The Supreme Court of Canada denied Volkswagen's appeal of the decision that certified this class action.¹⁰³ Finally, Volkswagen was fined \$196.5 million for unlawfully importing vehicles that did not conform to Canadian emissions standards under 272(1)(a) of CEPA and for providing misleading information under 272(1)(k) of CEPA.¹⁰⁴

vii. Civil conspiracy

In Canadian law, the tort of civil conspiracy is articulated as having two distinct categories, as established by the Supreme Court of Canada in the case of *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*¹⁰⁵ The first is known as "lawful means" or "simple motive" conspiracy, which occurs when defendants engage in a course of conduct with the predominant purpose of causing injury to the plaintiff,

¹⁰⁰ *Competition Act*, RSC, 1985, c C-34, s 74.1.

¹⁰¹ RAND, "The Globalization of Mass Civil Litigation," at 9, online:

<https://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR917-1/RAND_RRA917-1.pdf>.

¹⁰² See *Quenneville v Volkswagen Group Canada Inc.*, [2018] OJ No 2117.

¹⁰³ See *Volkswagen Group Canada Inc. v Association québécoise de lutte contre la pollution atmosphérique*, 2019 SCC 53.

¹⁰⁴ *R v Volkswagen Aktiengesellschaft*, [2020] OJ No 3793.

¹⁰⁵ [1983] 1 SCR 452.

even if the conduct itself is legal and some damage to the plaintiff results.¹⁰⁶ The second is "unlawful means" or "unlawful conduct" conspiracy in which the plaintiff must demonstrate that two or more people acted in concert with unlawful conduct, directed towards the plaintiff, which they should have known was likely to result in injury, and , in fact, caused harm.¹⁰⁷

There have been no cases to date in Canada that have forwarded this tort in the area of climate change. These types of torts may become increasingly relevant though. For example, a lawful means conspiracy claim might arise if companies in the fossil fuel industry are alleged to have worked together with the primary intention of discrediting climate science to the detriment of the public or specific competitors in the renewable energy sector. An unlawful means conspiracy claim could also be grounded in allegations that companies colluded in illegal activities, such as the deliberate violation of environmental protection laws or fraudulent misrepresentation of emissions data, causing environmental harm.

As climate change litigation evolves, conspiracy-based torts could provide a legal basis for holding multiple parties accountable for concerted actions that contribute to climate impacts. Claims could potentially address coordinated efforts to, for instance, undermine environmental regulations, deceive the public on the impacts of greenhouse gas emissions, or engage in activities that harm the environment and public health. The successful application of these torts in the climate context would require clear evidence of conspiracy and damage resulting from such an agreement, setting a significant precedent for corporate responsibility in environmental matters.

viii. Product liability

Product liability claims may also be relevant when alleging corporate climate impacts. Common law product liability torts include negligent design, negligent manufacture, or a breach of the duty to warn.

In the context of climate change litigation, product liability could potentially be invoked if products are designed, manufactured, or marketed without due consideration for their environmental impact, leading to claims of negligent design or manufacture. Furthermore, failing to warn consumers and stakeholders about the significant climate risks associated with the use of products could establish a breach of duty to warn, thus grounding legal accountability for climate change contributions.

¹⁰⁶ *Ibid* at 468-471.

¹⁰⁷ *Agribands Purina Canada Inc v Kasamekas*, 2011 ONCA 460 at paras 31-38.

ix. Insurance liability

To date, there have been no climate-related insurance liability claims against corporations in Canada.

x. Unjust enrichment

Unjust enrichment is based in equitable principles. There are three elements to prove such a claim:¹⁰⁸

- 1) an enrichment or benefit to the defendant,
- 2) a corresponding deprivation to the plaintiff; and
- 3) an absence of a juristic reason.

In corporate climate litigation, unjust enrichment may be a possible cause of action as corporations have unjustly benefited by accruing profits at plaintiffs' expense, namely by being deprived of health and access to a clean and livable environment.

xi. Extra-contractual liability in Quebec

As Canada has a bijural system, tort law operates differently in Quebec's civil law system than in the rest of Canada's common law system. Extra-contractual liability in Quebec is governed by the *Civil Code of Quebec*.¹⁰⁹ A finding of civil liability requires:

- 1) Imputability
- 2) Fault
- 3) Damage
- 4) Causation

Additionally, section 1474 of the Code states that:¹¹⁰

A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.

He may not in any way exclude or limit his liability for bodily or moral injury caused to another.

xii. Customary international law

Customary international law is a body of legal principles and norms that derive from the consistent and general practice of states out of a sense of legal obligation (*opinio juris*).¹¹¹ It develops over time as states engage in certain practices and consider them to be legally binding. Once a customary rule has been established, it becomes binding on all states, regardless of whether they have explicitly consented to it. In *Nevsun*

¹⁰⁸ *Garland v Consumers Gas Co.*, 2004 SCC 25.

¹⁰⁹ *Civil Code of Québec*, CQLR c CCQ-1991.

¹¹⁰ *Ibid.*

¹¹¹ *Nevsun*, *supra* note 35 at paras 76-85.

Resources Ltd. v. Araya, the Supreme Court of Canada allowed a group of Eritrean workers to pursue tort claims based in customary international law against a Canadian mining company that was operating in Eritrea.¹¹² Prior to this case, customary international law, as interpreted by Canadian courts, was generally limited to state actors. The Court in *Nevsun* concluded that customary international law is part of Canadian common law and can be the basis for claims alleging breaches of international law.

It is plausible to argue that climate change mitigation efforts are becoming increasingly accepted as customary international law. The international community has made significant progress in recognizing the urgency and severity of climate change, leading to various legal frameworks and agreements.¹¹³ These agreements reflect a collective acknowledgement of climate change as well as a commitment to mitigating its impacts. If climate change mitigation is considered a principle of customary international law, then states have a positive obligation to reduce greenhouse gas emissions and limit global warming. Per *Nevsun*, parties may be able to commence tort-based claims around corporate contributions to climate change. With that in mind, an acceptance of climate change mitigation as customary international law would require widespread state practice and *opinio juris* to indicate that states view it as a legal obligation rather than a voluntary measure.

D. Company and Financial Laws

Securities legislation requires that companies report material risks of business operations as well as the financial impacts of these risks. To date, there are no standardized regulations or guidance on climate-related disclosures. In 2019, the Canadian Securities Administrator (CSA) issued a staff notice that clarified that disclosures requirements include those related to climate change,¹¹⁴ as stated in its 2010 Staff Notice 51-333 Environmental Reporting Guidance.¹¹⁵ In 2021, the CSA proposed mandatory climate-related disclosure requirements. The proposed instrument, National Instrument 51-107, would standardize climate-related disclosures across the country. The CSA has paused Canada's proposal until the International

¹¹² *Ibid.*

¹¹³ The United Nations Framework Convention of Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement are notable examples of international instruments aimed at addressing climate change.

¹¹⁴ Canadian Securities Administrators, CSA Staff Notice 51-358 (1 August 2019), *Reporting on Climate-Related Risks*, online: <https://www.asc.ca/-/media/ASC-Documents-part-1/Regulatory-Instruments/2019/07/5472091-FINAL_CSA_SN_51-358_for_publication_Aug_1.ashx>.

¹¹⁵ Canadian Securities Administrators, CSA Staff Notice 51-333 (27 October 2010), *Environmental Reporting Guidance*, online: <https://www.osc.ca/sites/default/files/pdfs/irps/csa_20101027_51-333_environmental-reporting.pdf> [CSA Staff Notice].

Sustainability and Standard Board and the U.S. Securities and Exchange Commission finalize their baseline standards for climate-related disclosures.¹¹⁶

The CSA's proposed disclosures outline the following:¹¹⁷

- 1) *Governance* – a board's oversight and management role in assessing and managing climate-related risks and opportunities.
- 2) *Strategy* – the short, medium, and long-term climate-related risks and opportunities an issuer has identified and the impact on its business, strategy, and financial planning, where such information is material. As a modification from the [Taskforce on Climate-related Financial Disclosure] recommendations, the proposed disclosure would not include the requirement to disclose "scenario analysis", which is an issuer's description of the resilience of its strategy within different climate-related scenarios, including a 2°C or lower scenario.
- 3) *Risk management* – how an issuer identifies, assesses, and manages climate-related risks and how these processes are integrated into its overall risk management.
- 4) *Metrics and targets* – the metrics and targets used by an issuer to assess and manage climate-related risks and opportunities where the information is material.

Beginning in 2024, federally regulated financial institutions will be required to make climate-related financial disclosures. This will be regulated by the Office of the Superintendent of Financial Institutions.¹¹⁸

Claims around corporate climate impacts may also be made to provincial security commissions. For example, Greenpeace recently requested the Alberta Securities Commission to freeze Kinder Morgan Canada's initial public offering, pending review. Alberta and Ontario Security Acts require public companies to disclose all information regarding their operations and business model. Greenpeace claimed that Kinder Morgan's prospectus had misleading and outdated information with respect to its oil

¹¹⁶ James Langton, "CSA may pause on climate disclosure" (13 June 2022), online: Investment Executive <https://www.investmentexecutive.com/newspaper_/news-newspaper/csa-may-pause-on-climate-disclosure/>.

¹¹⁷ Canadian Securities Administrators "Canadian securities regulators seek comment on climate-related disclosure requirements" (18 October 2021), online: Canadian Securities Administrators <<https://www.securities-administrators.ca/news/canadian-securities-regulators-seek-comment-on-climate-related-disclosure-requirements/>>.

¹¹⁸ Office of the Superintendent of Financial Institutions Canada, *Guidance on Climate Risk Management* (March 2023) No. B-15, online: <<https://www.osfi-bsif.gc.ca/Eng/Docs/b15-dft.pdf>>.

pipeline. After the Commission agreed to take the complaint, Kinder Morgan reissued its prospectus to account for the pipeline's potential environmental impacts.¹¹⁹

Corporate directors have a duty to act in the best interests of the corporation and its shareholders. As climate change poses an increasing material risk, directors must assess and address climate-related risks and opportunities within their fiduciary duties. Arguably, directors have a fiduciary duty to consider the financial implications of climate risks, including transition risks (policy changes, reputational damage, market shifts) and physical risks (rising sea levels, energy infrastructure damage).¹²⁰ They must identify and assess climate risks, with the business case for climate action supporting progressive measures. Failure to do so may result in liability.¹²¹ With that said, directors' liability cannot ignore the "business judgment rule," which is a legal principle that provides directors with a level of protection when making business decisions on behalf of a corporation.¹²² The rule recognizes that directors are often in the best position to make informed judgments and decisions for the company's benefit. Generally, it shields directors from personal liability if they act in good faith, exercise reasonable care, and make decisions that they reasonably believe are in the best interests of the corporation.

Internationally, cases related to directors' liability concerning climate change are on the rise. One prominent example is the recent derivative action filed by ClientEarth against Shell's Board of Directors alleging the directors have mismanaged material and foreseeable climate risks and, as such, breached their duties.¹²³ Under the UK *Companies Act*, Shell's board must manage risks that could potentially harm the company's future success.¹²⁴ The argument in the case is that in order to remain competitive in energy markets and respond to a global shift towards cheaper and cleaner energy sources, Shell must transition away from fossil fuels. Shell's current plan foresees fossil fuel production for decades, tying the company to financially unviable projects. This jeopardizes the company's long-term viability and undermines global environmental efforts. Inadequate climate planning on Shell's part could lead to a decline in company value, job losses, and significant financial losses for shareholders and investors. A similar argument can be forwarded against directors of Canadian-domiciled companies.

¹¹⁹ *In re Amended and Restated Preliminary Prospectus of Kinder Morgan Canada Limited's Initial Public Offering*, online: <https://www.climate-laws.org/geographies/canada/litigation_cases/in-re-amended-and-restated-preliminary-prospectus-of-kinder-morgan-canada-limited-s-initial-public-offering>.

¹²⁰ Lisa Benjamin, "The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties" (2020) *Utah Law Rev*, online: <<https://dc.law.utah.edu/ulr/vol2020/iss2/1/>>.

¹²¹ *Ibid.*

¹²² *Canada Business Corporations Act*, RSC 1985, c C-44, s 122.

¹²³ Client Earth Communications, "Our groundbreaking case against Shell's Board of Directors" (19 May 2023), online: <<https://www.clientearth.org/latest/latest-updates/news/we-re-taking-legal-action-against-shell-s-board-for-mismanaging-climate-risk/>>.

¹²⁴ *Companies Act 2006*, c 46.

E. Consumer Protection Laws

Consumer protection laws in Canada are regulatory in nature. As compliance with regulation and statute is an available defence to corporations, standards within consumer protection legislation are salient. The scope of consumer protection laws differs by level of government. Federal consumer protection laws apply to:¹²⁵

- 1) consumer product safety;
- 2) food safety;
- 3) consumer product packaging and labelling;
- 4) anti-competitive practices, such as price fixing and misleading advertising; and
- 5) privacy complaints.

Among others, provincial consumer protections laws apply to:¹²⁶

- 1) buying goods and services;
- 2) contracts;
- 3) the purchase, maintenance, or repair of motor vehicles; and
- 4) credit reporting agencies and the practices of collection agencies.

Corporations may violate consumer protection laws when they fail to provide safe products to consumers or mislead consumers about products. Corporations may be found liable for misrepresentation and failure to warn through the federal *Competition Act*. Cars and other vehicles must conform to the standards set by Transport Canada through the *Motor Vehicle Safety Act* and *Motor Vehicle Safety Regulations*. The *Motor Vehicle Safety Regulations* set safety and emissions requirements based on a vehicle's class.

F. Fraud Laws

Canadian corporate climate litigation claims have not yet been brought under allegations of fraud. In civil claims, fraud requires four elements:¹²⁷

- 1) a false representation by the defendant;
- 2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness);
- 3) the false representation caused the plaintiff to act;
- 4) the plaintiff's actions resulted in a loss.

¹²⁵ Government of Canada, Innovation, "Federal consumer protection legislation in Canada" (14 December 2021), online: <<https://ised-isde.canada.ca/site/office-consumer-affairs/en/federal-consumer-protection-legislation-canada>>.

¹²⁶ *Ibid.*

¹²⁷ *Hryniak v Mauldin*, 2014 SCC 7.

Fraudulent misrepresentation and negligent misrepresentation, as they relate to corporate climate litigation, are discussed above under fraudulent misrepresentation.

G. Contractual Obligations

To date, there has been no corporate climate-related litigation in Canada with respect to contractual obligations.

H. Planning and Permitting Laws

The Canadian Environmental Assessment Agency (CEAA) requires environmental assessment for all major projects that may impact areas of federal jurisdiction in order to assess whether a project is “likely to cause significant adverse environmental effects.”¹²⁸ The Canadian Environmental Assessment Agency, Canada Energy Regulator and Canadian Nuclear Safety Commission, as well as some provincial regulators, hold public hearing processes as part of project-approval, licensing and the development of regulatory frameworks. *The Impact Assessment Act* governs assessments on federal land or outside of Canada and requires that Canada may not carry out or provide financial support to carry out any project without determining that “the project is not likely to cause significant adverse environmental effects or... those effects are justified in the circumstances.”¹²⁹ It also requires that “impact assessment takes into account scientific information, Indigenous knowledge [of the Indigenous peoples of Canada] and community knowledge.”¹³⁰ In the albeit limited role of intervenor, these processes offer some means to utilize regulatory frameworks and enforcement mechanisms created by statute to advocate for corporate climate accountability. Regulators’ decisions may also be challenged through judicial review.¹³¹

Non-profits have been successful at utilizing judicial review as a means of challenging governmental approval of projects. For example, in 2008, the Federal Court found in favour of Ecojustice and several other NGOs who argued that an environmental assessment of Imperial Oil’s Kearl Tar Sands Project was incorrect and would cause more than insignificant environmental harm.¹³² The Federal Court held that the Panel that determined the project’s greenhouse gas emissions had not provided sufficient justification that the company’s proposed mitigation measures would be capable of

¹²⁸ Canadian Environmental Assessment Agency, “Operational Policy Statement: Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under CEAA 2012” (November 2015) ss 52(1), 5.

¹²⁹ *Ibid*, ss 82, 83.

¹³⁰ *Ibid*, s 6(1)(i).

¹³¹ *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18, 18.1.

¹³² See e.g. *Pembina Institute for Appropriate Development and Others v. Attorney General of Canada and Imperial Oil* [2008] FC 302.

reducing environmental harms to the extent claimed. The matter was remitted back to the Panel to provide a rationale for its conclusion.¹³³

Finally, *Sierra Club of British Columbia Foundation v British Columbia (Minister of Environment and Climate Change Strategy)* illustrates the effectiveness of judicial review in assessing compliance with environmental reporting requirements.¹³⁴ There, the BC Supreme Court ruled that reporting obligations under the Climate Change Accountability Act were justiciable, allowing for review of the Minister's compliance with statutory requirements. The court reviewed the Minister's compliance with reporting requirements, which it found were reasonably satisfied.¹³⁵

I. Other Causes of Action

i. Aboriginal law and Indigenous rights

Canada has adopted UNDRIP, as have some provincial legislatures, such as BC. In *Haida Nation* the court affirmed that the duty to consult is a constitutional duty under section 35(1).¹³⁶ Therefore, although Aboriginal title must be proven in order to be recognized, a duty to consult Indigenous nations exists on the basis of an assessment of the strength of that claim. This duty belongs only to the Crown, but may be delegated to industry.¹³⁷ While there is no duty to consult for industry, private law claims or judicial review may be sought against the Crown when it has failed to discharge its duty to consult. Injunctions against the Crown can, in turn, prevent corporations from continuing projects on Aboriginal land.

In *Tsleil-Waututh Nation*, the Federal Court of Appeal withdrew the approval of a pipeline on the basis of the government's failure to adequately consult Indigenous communities adjacent to it.¹³⁸ The court held that consultation requires meaningful "two-way dialogue" and involves "testing and being prepared to amend policy proposals in the light of information received, and providing feedback".¹³⁹ This case affirms that it is not enough for the Canadian government to have engaged in good faith consultation or to take note of the concerns of Indigenous nations at every step of the process. Where Indigenous nations bring specific concerns forward, the Crown must

¹³³ *Ibid* at para 80.

¹³⁴ *Sierra Club of British Columbia Foundation v British Columbia (Minister of Environment and Climate Change Strategy)*, 2023 BCSC 74.

¹³⁵ See also *Highlands District Community Association v British Columbia (Attorney General)*, 2020 BCSC 2135; *In the Matter of FortisBC Energy Inc.: Amendment to Rate Schedule*, 2012 Carswell BC 1061. For Not In My Backyard (NIMBY) challenges, see *Citizens for Riverdale Hospital v Bridgepoint Health Services*, [2007] OJ No 2527, 56 OMBR 129.

¹³⁶ See *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511.

¹³⁷ *Ibid* at para 53.

¹³⁸ See *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153.

¹³⁹ *Ibid* at para 501.

respond with equally detailed specific responses to address the concerns raised. Previously, post-regulatory phases of project approval were viewed as pro-forma, or largely courtesy. *Tsleil-Waututh Nation* confirmed the Federal Court of Appeal's ruling in *Gitxaala* that the duty to meaningfully consult does not end until a final decision is made.

Metlakatla First Nation are currently seeking to quash BC's approval of storage facility and gas turbines on the basis that their concerns about greenhouse gas emissions were not meaningfully addressed.¹⁴⁰ Metlakatla Chief Harold Leighton filed an application for judicial review in the Federal Court arguing that government authorities did not fully consider the environmental impacts of the project on Metlakatla First Nation. The application claims that within 50 years, the project would result in the loss of wetlands and over a hectare of old-growth forest. The application also claims that the project's impact would be significant enough to prevent the federal government from reaching its greenhouse gas reduction targets for 2030 and 2050.¹⁴¹

ii. Crown Corporations

Crown corporations are owned or controlled (in whole or in part) by the government. These corporations are established by the government to carry out specific functions or provide services on behalf of the state. They can operate in various sectors, such as energy, transportation, telecommunications, finance, and more. It has been argued that state-owned corporations owe greater obligations than private corporations.¹⁴² *Clean Train Coalition Inc v Metrolinx* concerned an application for judicial review of Metrolinx's decision to purchase diesel units for an air-rail link. The applicants argued that Metrolinx failed to conduct a feasibility study around electrification and improperly accepted the Minister of Transportation's direction.¹⁴³ While the court dismissed the application on administrative law principles, it recognized that Metrolinx, a governmental transportation authority, held a leadership role in the planning, development, and implementation of the regional transportation plans and policies. While this case does not concern climate litigation directly against Metrolinx, it provides insights into the decision-making process regarding transportation projects and their environmental impact. It underscores the need for Crown corporations to carefully examine environmental assessments and feasibility studies and adhere to plans and policies that mitigate climate impacts.

¹⁴⁰ "B.C. Climate News: 2022 was planet's fifth warmest on record, say scientists | Study says Exxon Mobil 'accurately' predicted global warming in 70s, while denying it", online: Vancouver Sun <<https://vancouversun.com/news/local-news/climate-news-to-jan-15-23>>.

¹⁴¹ *Ibid.*

¹⁴² Steve Lorteau, "The potential of international 'State-as-polluter' litigation" (2023) *Rev Eur Comp Int Environ Law*.

¹⁴³ *Clean Train Coalition Inc. v Metrolinx*, 2012 ONSC 6593.

More recently, in a case that highlights alleged inadequate efforts of Crown corporations and the government to address climate change, eight Saskatchewan applicants filed a lawsuit against SaskPower, Crown Investments, and the Saskatchewan Government.¹⁴⁴ The applicants argue that SaskPower's transition from coal to gas power generation insufficiently curtails climate change and, as such, is incompatible with achieving a net-zero electricity system. The plaintiffs claim that the government's expansion of gas-fired electricity generation violates their *Charter* rights and duty to mitigate emissions. This case will address doctrinal issues around climate responsibilities owed by Crown corporations in Canada.

¹⁴⁴ Brooke Kruger, "SaskPower accused of violating Charter rights, lawsuit filed" Global News, 25 April 2023, online: <<https://globalnews.ca/news/9649392/saskpower-accused-of-violating-charter-rights-lawsuit-filed/>>.

2. Procedures and Evidence

A. Actors Involved

i. Plaintiffs

Potential groups that would bring corporate climate claims in Canadian courts include youth, NGOs, municipalities, attorneys general, and Indigenous nations. As most climate litigation has thus far been brought against governments under constitutional principles, it remains speculation at this point as to which actors will bring claims against corporations. Previous cases around environmental harm against corporations have been brought by governmental bodies. For example, in *Canfor* the BC government successfully held a logging company liable for causing a large forest fire. Brought in public nuisance, the claim was made by the BC Attorney General.¹⁴⁵

Municipal governments have begun to consider taking climate action in the courts against corporations, but there is little basis to believe these efforts will result in any tangible results. For example, Vancouver-based campaign Sue Big Oil, led by Westcoast Environmental Law, is seeking financial support from BC municipalities to bring a class action on behalf of the cities' residents against large oil companies.¹⁴⁶ Municipalities would contribute the equivalent of \$1/resident to support litigation. Several municipalities also sought compensation for climate-related expenses from corporations by sending letters requesting funds. Vancouver's City Council rejected a proposal to allocate funds for the campaign, citing concerns about costs.¹⁴⁷ However, in Gibsons, the town council unanimously voted to join a class action lawsuit against fossil fuel companies, becoming the first rural community to commit funds.¹⁴⁸ While legal action has been considered by municipalities in BC and Ontario, nothing has been filed to date.¹⁴⁹

Recent mass tort actions against governments, such as *La Rose* and *Mathur*, have been brought by groups comprised of youth and future generations.¹⁵⁰ In both cases, the plaintiffs have alleged that the government's conduct with respect to climate change

¹⁴⁵ *British Columbia v Canadian Forest Products Ltd.*, 2004 SCC 38 [*Canfor*].

¹⁴⁶ Andrew Gage, "Suing Fossil Fuel Giants," (June 2022), online: *Sue Big Oil* <<https://suebigoil.ca/wp-content/uploads/2022/06/SuingFossilFuelGiants-Intro.pdf>>.

¹⁴⁷ Kenneth Chan, "Vancouver City Council rejects funding for lawsuit against oil firms" (1 March 2023), online: *Daily Hive* <<https://dailyhive.com/vancouver/sue-big-oil-lawsuit-vancouver-funding-rejection>>.

¹⁴⁸ Connie Jordison, "Gibsons commits to the Sue Big Oil campaign" (10 March 2023), online: *Coast Reporter* <<https://www.coastreporter.net/local-news/gibsons-commits-to-the-sue-big-oil-campaign-6681409>>.

¹⁴⁹ David Rider, "Toronto considering legal action to make big polluters pay costs of climate change" (25 April 2019), online: *Toronto Star* <https://www.thestar.com/news/city_hall/2019/04/25/toronto-considering-legal-action-to-make-big-polluters-pay-costs-of-climate-change.html>; <https://www.princegeorgecitizen.com/local-news/municipalities-brace-for-north-south-split-on-climate-change-lawsuits-3737969>>.

¹⁵⁰ See *La Rose*, supra note 54; *ENVironnement JEUnessé v. Canada*, supra note 43; *Mathur*, supra note 53.

has violated their fundamental rights under section 7 of the Charter and their right to equality under section 15 of the Charter. In *La Rose*, the youth plaintiffs also alleged a breach of the public trust doctrine. The plaintiffs in both actions have been engaged in advocacy and activism around climate change.¹⁵¹

Indigenous nations have brought actions against provincial and federal government bodies seeking accountability for climate change, as well as to prevent harmful extraction and development projects from continuing.¹⁵² Lawsuits against governmental bodies seek to prevent extraction projects from progressing and violating Indigenous rights. In 2020, two hereditary chiefs of the Wet'suwet'en nation filed a claim against the federal government for failing to meet Canada's international commitments to reduce greenhouse gas emissions. The *Misdzi Yikh* claim stated that Canada's "failure to enact stringent legislation to reduce greenhouse gas emissions is contrary to common law principles of: 'public trust', 'equitable waste', and the 'constitutional principle of intergenerational equity.'"¹⁵³ This case also made a novel argument that Canada had breached section 91 of the Constitution Act, 1867 "by not ensuring low GHG emissions under the peace, order and good government powers."¹⁵⁴ Otherwise, like *Mathur* and *La Rose*, the plaintiffs argued that sections 7 and 15 of the Charter were violated by government inaction. The Federal Court held that the claim was not justifiable because section 91 does not impose a positive duty to legislate.

NGOs have also been prominent actors.¹⁵⁵ As one example, Ecojustice is supporting six individuals in a complaint to the Competition Bureau alleging that the Royal Bank of Canada has misled the public in its advertising about its climate change commitments.¹⁵⁶ To successfully pursue claims in courts, NGOs must establish public interest standing. In *Ecology Action Centre v. Nova Scotia (Environment)*, two NGOs were deemed as appropriate parties to bring an environmental claim against the Nova Scotia government, but had their claim denied on the basis that the impact did not constitute a cognizable harm. NGOs may be successful in obtaining public interest standing in future climate litigation. However, courts are liable to reject public interest

¹⁵¹ Mathur, *supra* note 53.

¹⁵² See e.g. *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.

¹⁵³ *Ibid* at para 4.

¹⁵⁴ *Ibid* at para 5.

¹⁵⁵ See e.g. *World Wildlife Fund Canada et al. v Minister of Natural Resources et al.; Raincoast Conservation Foundation et al. v Canada (Attorney General) et al.*, 2019 FCA 224; *Ecology Action Centre v Nova Scotia (Environment)*, 2022 NSSC 104.

¹⁵⁶ Ecojustice, "Application for inquiry regarding the Royal Bank of Canada's apparent false and misleading representations about action on climate change while continuing to finance fossil fuel development" (10 June 2022) online: Ecojustice <https://ecojustice.ca/wp-content/uploads/2022/07/2022-06-10-Complaint-to-Competition-Bureau-re_-RBC-climate-representations-Final.pdf>.

standing if there is one or more individuals who would be in a better position to pursue such a claim.

Lastly, plaintiffs who have been harmed by Canadian companies operating abroad have commenced claims in Canadian courts.¹⁵⁷ This indicates that corporate climate litigation on behalf of foreign plaintiffs against Canadian-domiciled companies may be possible in the future.

ii. Defendants

Thus far, the majority of climate change and environment claims in Canada have been brought against governments rather than corporations. While few, if any, lawsuits have been filed against corporations, other mechanisms have been used to hold corporations accountable, such as judicial reviews¹⁵⁸ or complaints to regulatory bodies.¹⁵⁹ In Canada thus far, corporate-related actions in courts and administrative tribunals that have some relation to the environment have been brought against automobile manufactures,¹⁶⁰ oil and gas companies,¹⁶¹ logging/forestry companies,¹⁶² and mining companies.¹⁶³

iii. Third-party intervenors

Common intervenors in cases related to climate change include Indigenous nations, governments, NGOs, federal or provincial governments, municipalities, religious groups, industry associations, and corporations. In *ENVironnement JEUnesse v. Canada*, Amnesty International intervened before the Quebec Court of Appeal. In *Canfor*, the intervenors before the Supreme Court were the following:¹⁶⁴

- *Government bodies*: Attorney General of Canada and Forest Practices Board,
- *Industry associations*: Coast Forest & Lumber Association, Council of Forest Industries, and Forest Products Association of Canada,
- *NGOs*: Sierra Club of Canada and David Suzuki Foundation.

MiningWatch Canada v. Canada, a judicial review of a mining project application, included the following intervenors:¹⁶⁵

¹⁵⁷ *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414; *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39; *Nevsun*, *supra* note 35.

¹⁵⁸ See e.g. *Pembina Institute for Appropriate Development and Others v Attorney General of Canada and Imperial Oil*, [2008] FC 302.

¹⁵⁹ See e.g., *Canada v Shell*, Competition Bureau, online: <<http://climatecasechart.com/non-us-case/greenpeace-canada-v-shell-canada/>>.

¹⁶⁰ See *Quenneville v Volkswagen Group Canada Inc*, [2018] OJ No 2117.

¹⁶¹ *Supra* note 187.

¹⁶² See e.g. *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2022 BCCA 26.

¹⁶³ See e.g. *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2.

¹⁶⁴ *ENVironnement JEUnesse*, *supra* note 43.

¹⁶⁵ *MiningWatch Canada*, *supra* note 163.

- *Industry associations:* Mining Association of British Columbia, Association for Mineral Exploration British Columbia,
- *NGOs:* Canadian Environmental Law Association, West Coast Environmental Law Association, Sierra Club of Canada, Quebec Environmental Law Centre, Friends of the Earth Canada, and Interamerican Association for Environmental Defense.

In *Mivasair*, Ecojustice Canada and Greenpeace Canada applied for intervenor status in support of two protesters' appeal of their criminal contempt charges.¹⁶⁶ The protesters were found to have internationally breached a court order that prohibited them from interfering with the expansion of the Trans Mountain Pipeline. The NGOs argued that the defence of necessity should be extended to civil disobedience during environmental protests. The BC Court of Appeal rejected that Greenpeace and Ecojustice had a "unique and different perspective that will assist the Court in the resolution of the issues."¹⁶⁷ As such, their intervention requests were denied.

In *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, a logging company appealed a lower court's refusal to grant an injunction against blockages at Fairy Creek seeking to prevent their logging of old-growth forests. In this case, Huu-ay-aht First Nations successfully intervened but did not support either side.¹⁶⁸ In *Ktunaxa*, an Indigenous nation unsuccessfully argued that the building of a ski resort on a mountain with spiritual significance would violate section 2(a) of the Charter by infringing its freedom of religion. The case included the following intervenors:¹⁶⁹

- *Religious organizations:* Kootenay Presbytery (United Church of Canada), Evangelical Fellowship of Canada, Christian Legal Fellowship, Alberta Muslim Public Affairs Council, Canadian Muslim Lawyers Association
- *Indigenous nations and organizations:* Central Coast Indigenous Resource Alliance Te'mexw Treaty Association, Shibogama First Nations Council, Council of the Passamaquoddy Nation at Schoodic, Katzie First Nation, West Moberly First Nations, and Prophet River First Nation
- *Governments:* Attorney General of Canada and Attorney General of Saskatchewan
- *Non-profits and legal organizations:* Amnesty International Canada, South Asian Legal Clinic of Ontario, British Columbia Civil Liberties Association
- *Industry organizations:* Canadian Chamber of Commerce

¹⁶⁶ *Trans Mountain Pipeline ULC v Mivasair*, [2020] BCJ No 11.

¹⁶⁷ *Ibid* at para 3.

¹⁶⁸ *Teal Cedar Products*, *supra* note 162.

¹⁶⁹ *Ktunaxa*, *supra* note 152.

B. Other procedural issues

i. Standing

Via public interest standing, corporate climate change cases may be brought by NGOs or by collectives of individuals, either through mass tort claims or class actions.¹⁷⁰ An organization does not need to establish direct impact when a court grants it public interest standing.

In *Ecology Action Centre v. Nova Scotia (Department of Environment and Climate Change)*, public interest standing was granted after initially being denied at the Supreme Court of Nova Scotia.¹⁷¹ The applicants were Ecology Action Centre and New Brunswick Anti-Shale Gas Alliance, two environmental NGOs. The applicants sought to challenge the approval of a highway realignment project resulting from the Goldboro LNG Project. Both participated in the public consultation process and then subsequently brought a joint application for judicial review when the project was approved. The Nova Scotia Supreme Court applied the three-part test for public interest standing from *Finlay*: i) whether there is a serious, justiciable issue raised; ii) whether the plaintiff has a real stake or genuine interest in the matter; and iii) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.¹⁷² While the plaintiffs succeeded on the last two prongs, the court held there was no serious issue to be tried.

The Court of Appeal allowed for public interest standing with respect to the Minister's decision. It held the lower court judge made an error in principle by concluding that there was no serious issue at hand.¹⁷³ A serious issue is said to arise when the question raised is a "substantial constitutional issue" or an "important one."¹⁷⁴ The claim should also be "far from frivolous" and should not be so unlikely to succeed that the outcome appears to be predetermined or a "foregone conclusion."¹⁷⁵ The claim should also not be a "marginal case" as that would be insufficiently serious for public interest standing.¹⁷⁶ The emissions from the LNG project at issue in the case were found to constitute a serious issue and the public interest plaintiffs were allowed to challenge the highway realignment.

¹⁷⁰ See *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, *aff'd British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27.

¹⁷¹ *Ecology Action Centre v Nova Scotia (Environment)*, 2023 NSCA 12.

¹⁷² *Ibid* at para 83.

¹⁷³ *Ibid* at para 73.

¹⁷⁴ *Ibid* at para 73.

¹⁷⁵ *Ibid* at para 83.

¹⁷⁶ *Ibid* at para 74.

ii. Justiciability

Justiciability is a significant barrier in Canadian climate litigation, whether it be against governments or corporations. A court must determine that it has powers to adjudicate a claim, rather than the subject of it being left to the elected branches of government. Where a case is non-justiciable, a court will determine that it is not appropriate for it to make a ruling. Canadian courts will not hear cases on political questions or where the issues are too speculative and hypothetical for a court to decide. In *Canada (Auditor-General) v. Canada (Minister of Energy, Mines & Resources)*, the Supreme Court of Canada noted the following:

*[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision-making institutions of the polity.*¹⁷⁷

Where climate change cases have argued that the government has violated Canadian's constitutional rights, courts have ruled that they cannot impose a positive obligation on the government to legislate in response to climate change.¹⁷⁸ Canadian cases have been dismissed in their preliminary stages on the basis that they raise non-justiciable issues.¹⁷⁹ In contrast to other cases brought by youth plaintiffs (*i.e.* *ENVironnement JEUnesse*), *Mathur* focused on specific legislative actions that were reviewable by the courts.¹⁸⁰ By making a narrow claim, *Mathur* became one of the first climate litigation cases to be heard on its merits, overcoming previous barriers around justiciability. In the initial dismissal motion, the Ontario Superior Court in *Mathur* differentiated the claims there from that of previous non-justiciable cases, such as *La Rose*, *Friends of the Earth*, and *Tanudjaja*. In its decision on the case's merits, the court affirmed it was justiciable.¹⁸¹

Unlike *La Rose*, the plaintiffs in *Mathur* based their claim on a specific and reviewable government action: The plaintiffs argued that Ontario's government violated sections 7 and 15 of the *Charter* by repealing the *Climate Change Act* through the *Cap and Trade Cancellation Act*, and by setting an insufficient target and plan for reducing greenhouse gas emissions.¹⁸² The court affirmed that "[p]olicy choices must be translated into law

¹⁷⁷ *Canada (Auditor-General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49, 1989 CanLII 73.

¹⁷⁸ See e.g., *Misdzi Yikh v Canada*, 2020 FC 1059; see also *Mathur*, *supra* note 53.

¹⁷⁹ Lisa Benjamin & Sara L Seck, "Mapping human rights-based climate litigation in Canada" (2022) 13:1 J Hum Rts Env 178 at 194, online: <<https://www.elgaronline.com/view/journals/jhre/13/1/article-p178.xml>>.

¹⁸⁰ "Erratum to: Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices" (2022) 34:3 J Env'tl L at 551–551, online: <<https://academic.oup.com/jel/article/34/3/551/6454857>>.

¹⁸¹ *Mathur*, *supra* note 53 at para 106.

¹⁸² See *Mathur*, *supra* note 53 at para 41 ("Charter-based cases will continue to have an easier time with justiciability as "Charter-based claims thus also benefit from a presumption of justiciability.").

or state action in order to be amenable to Charter review and otherwise justiciable.”¹⁸³ As such, *Mathur* arguably clarified that *La Rose* did not close the door to the review of government policy that contributes to climate change.

The review of specific government action differs from challenges to “impugned conduct” that was at issue in *La Rose*. The plaintiffs in *La Rose* based their claim on the following broader government action:

- Continuing to cause, contribute to and allow a level of greenhouse gas emissions incompatible with a Stable Climate System;
- Adopting greenhouse gas emission targets that are inconsistent with the best available science about what is necessary to avoid dangerous climate change and restore a Stable Climate System;
- Failing to meet the Defendants’ own greenhouse gas emission targets; and
- Actively participating in and supporting the development, expansion, and operation of industries and activities involving fossil fuels that emit a level of greenhouse gases incompatible with a Stable Climate System.¹⁸⁴

Whereas *Mathur* was allowed to proceed to trial, *La Rose* was found to be non-justiciable because of the “undue breadth and diffuse nature of the Impugned Conduct.”¹⁸⁵

Recently, the Sierra Club of BC challenged the BC government’s 2021 Climate Change Accountability Report on the basis that it does not meet the standards set out in the *Climate Change Accountability Act*.¹⁸⁶ BC’s government argued that the claim was non-justiciable. The BC Supreme Court ruled that it has the ability to enforce the government’s reporting requirements on climate change.¹⁸⁷ However, while the requirements in the Act are justiciable, the legislation does not require reporting to be public. The court noted that BC has a “consistent history of missing its targets.” This decision is particularly important since previous decisions found climate targets, such as those under the Kyoto Agreement, as being non-justiciable.¹⁸⁸

¹⁸³ *La Rose*, *supra* note 54 at para 45.

¹⁸⁴ *Ibid* at para 8.

¹⁸⁵ *Ibid* at para 41.

¹⁸⁶ *Sierra Club of British Columbia Foundation v Minister of Environment and Climate Change Strategy* (2020), online: <<http://climatecasechart.com/non-us-case/sierra-club-of-british-columbia-foundation-v-minister-of-environment-and-climate-change-strategy/>>.

¹⁸⁷ *Sierra Club of British Columbia Foundation v British Columbia (Minister of Environment and Climate Change Strategy)*, 2023 BCSC 74.

¹⁸⁸ *Friends of the Earth v Canada*, 2008 FC 1183 (CanLII); (appeal dismissed, 2009 FCA 297 (CanLII)).

iii. Jurisdiction

Canadian courts have determined that jurisdiction over environmental law is shared between the federal and provincial governments.¹⁸⁹ Per the *Constitution Act, 1867*, the federal government has jurisdiction over criminal law, fisheries, and peace, order, and good government while provincial legislatures have jurisdiction over property and civil rights and matters of a purely local nature. In Canada's territories, environmental law powers are derived from federal legislation and land claim agreements. In *Reference re Greenhouse Gas Pollution Pricing Act*, the Supreme Court found that it was constitutional for the federal government to impose national minimum standards for greenhouse gas emissions as "a matter of national importance."¹⁹⁰ This affirmed that greenhouse gas emissions can fall under the jurisdiction of the federal government, because of the significant and cross-border nature of climate change.

The corporate veil provides one barrier to successful corporate climate litigation, particularly for harms that take place abroad. In *Chevron*, the Supreme Court of Canada stated that "overcoming the doctrine of separate legal personality may be challenging in Canadian courts."¹⁹¹ In an Ecuadorian court, Chevron was ordered to pay the Ecuadorian plaintiffs for environmental damages. However, Chevron no longer had assets in Ecuador. Therefore, the order was unenforceable there. The plaintiffs first filed for enforcement against Chevron's parent company in New York and then against its Canadian subsidiary in Ontario. The plaintiffs claimed that, on the basis of 'just and equitable grounds,' they should be able to pierce the corporate veil and recover damages from Chevron's Canadian subsidiary.¹⁹² The court's majority held that veil piercing cannot occur on equitable grounds absent allegations of fraud. The minority concurred that the veil could not be pierced, but concluded that veil piercing may be possible in other transnational scenarios.¹⁹³

iv. Group litigation / class actions

To foster access to justice, Canada has adopted a "generous approach" to class actions certification.¹⁹⁴ Despite Canada's approach to class actions, environmental class actions have, on a whole, enjoyed minimal success.¹⁹⁵ Class actions litigation is governed by provincial legislation and thus differs by jurisdiction. Requirements for class certification can be found in provincial class actions statutes. In Ontario for instance,

¹⁸⁹ *In Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Reference re Greenhouse Gas*].

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid* at 206; *Chevron Corp. v Yaiguaje*, 2015 SCC 42 [*Chevron*].

¹⁹² *Chevron*, *ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ Michael Molavi, "Access to Justice and the Limits of Environmental Class Actions in Ontario" (2020) 35:3 *CJLS* 391 at 394, online: <<https://www.proquest.com/docview/2473719084/abstract/875ACC53A5D14730PQ/1>>.

¹⁹⁵ *Hollick v Toronto (City)*, 2001 SCC 68 at 36.

class certification requirements are set out under section 5 of the *Class Proceedings Act*:¹⁹⁶

5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2 [plaintiff's class proceeding], 3 [defendant's class proceeding], or 4 [classing defendants] if,

- (a) the pleadings or the notice of application discloses a cause of action;*
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;*
- (c) the claims or defences of the class members raise common issues;*
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and*
- (e) there is a representative plaintiff or defendant who,*
 - (i) would fairly and adequately represent the interests of the class,*
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding, and*
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.*

In *ENVironnement JEUnesse v. Canada*, a group of youth sought an order that would require the Canadian government to adopt a greenhouse gas emissions reduction framework that would respect the plaintiffs' fundamental rights.¹⁹⁷ This Quebec claim was subject to the *Act Respecting the Fonds d'aide aux Actions Collectives*.¹⁹⁸ The youth claimed that government inaction with respect to climate change violated their right to life, liberty and security of the person. The Quebec Court of Appeal denied class certification, finding that the class definition that provided for a cut-off age of 35 was arbitrary. On appeal, the Quebec Court of Appeal upheld the dismissal on the basis that the claim was non-justiciable as the judiciary was effectively being asked to legislate climate impacts.¹⁹⁹

v. Apportionment

With the exception of Quebec, Canada takes a "fault-based approach" to apportionment and assesses fault on the basis of harm caused. Where multiple defendants are jointly and severally liable, plaintiffs may bring claims against any defendant. The following factors are considered in apportioning liability:²⁰⁰

- 1) The nature of the duty owed by the tortfeasor to the injured person;
- 2) The number of acts of fault or negligence committed by a person at fault;

¹⁹⁶ *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

¹⁹⁷ *ENVironnement JEUnesse*, *supra* note 43.

¹⁹⁸ *Act respecting the Fonds d'aide aux actions collectives*, CQLR c F-3.2.0.1.1.

¹⁹⁹ *ENVironnement JEUnesse*, *supra* note 43.

²⁰⁰ *Mayne v Mayne*, 2009 SKQB 329.

- 3) The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault;
- 4) The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy. Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis;
- 5) The extent to which the conduct breaches statutory requirements;
- 6) The gravity of the risk created;
- 7) The extent of the opportunity to avoid or prevent the accident or damage;
- 8) Whether the conduct in question was deliberate, or unusual or unexpected; and
- 9) The knowledge one person had or should have had of the conduct of another person at fault.

In Canada, contributory negligence allows defendants to seek contribution and indemnity from other parties.²⁰¹ This is particularly important as climate change is attributable to multiple actors and it is often difficult to isolate the contribution of any one actor.²⁰² Additionally, corporations can be held liable for pollution where they have significantly contributed to it, even when they polluted in conjunction with other mitigating factors.²⁰³

vi. Costs

Alongside the parties and procedures that would be involved in corporate climate change in Canada, this report has largely focused on public and private law doctrines that can, in theory, be invoked against Canadian-domiciled corporations that are alleged to have caused unlawful climate impacts. Aside from doctrinal and procedural considerations, there are practical ones that raise questions about the viability and efficacy of Canadian corporate climate litigation. One significant challenge is the financial burden that accompanies class action and mass tort lawsuits in Canada. This burden is often borne by plaintiff-side lawyers and law firms that may have limited resources and are unable to secure third-party governmental or private funding to sustain years-long litigation against well-resourced corporate defendants.

²⁰¹ Law Reform Commission of Saskatchewan, *Contributory Fault and Apportionment Among Wrongdoers* (2020) at 40.

²⁰² Andrew Gage & Michael Byers, "Payback Time? What the Internationalization of Climate Litigation Could Mean for Canadian Oil and Gas Companies" (October 2014), online: *Centre for Policy Alternatives* <https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/10/Payback_Time.pdf>.

²⁰³ See e.g. *McKinnon Industries v Walker*, [1951] WN 401 Privy Council at 767; *Gauthier et al v Nanef et al*, 14 D.L.R. (3d) 513, [1971] 1 O.R. 97.

Like other jurisdictions, social justice litigation on behalf of predominantly marginalized groups in Canada requires an economic impetus to sustain it. Lawyers tend to take on these types of claims on a contingency basis and, as such, are not compensated periodically throughout the duration of a case. There has to be a substantial payout for plaintiff-side lawyers and even NGOs that are representing plaintiffs to continue to be involved in climate change litigation. That payout can occur after a court has made a merits-based decision for the plaintiffs or, more likely, after a confidential settlement. It may be trite to mention that success in these types of cases (that, to date, involve novel and untested legal arguments) is not guaranteed. As such, plaintiffs and litigants may be dissuaded from bringing these claims because Canada continues to operate under a “loser pays” costs system in which an unsuccessful party is required to pay at least some of the winning party’s legal costs.²⁰⁴ Moreover, even not-for-profit funding entities might be discouraged by the prospect of exposure to large adverse costs in case of failure at trial.²⁰⁵ The financial and temporal challenges of corporate climate lawsuits require careful consideration when determining the most suitable approach to litigation.

C. Defences

i. Arguments

Since the Charter and other aspects of the Canadian constitution only apply in claims against governmental actors, plaintiffs in putative corporate climate change litigation will be relegated to common law tort and equitable principles that can be pleaded in provincial superior courts or, otherwise, provincial/territorial human rights statutes. The latter option is practically infeasible since compensation amounts at human rights tribunals across Canadian provinces remain well under \$1 million CAD. Therefore, potentially viable corporate climate litigation will be brought in provincial superior courts under tort and equitable principles.

A potentially potent set of arguments for climate change plaintiffs against corporate defendants is couched in negligence and public nuisance principles. Plaintiffs will face barriers around the duty of care (namely proximity) and causation. And even if those barriers are overcome, plaintiffs will have to be able to demonstrate that they or a class of individuals have some tangible personal or financial harm that is compensable. As public nuisance does not have the same stringent requirements around, for instance, the duty of care and foreseeability, those types of claims may have a greater likelihood of success.

²⁰⁴ Jasminka Kalajdzic, "Climate Change Class Actions in Canada" (2021) 100:1 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 31.

²⁰⁵ *Ibid.*

Otherwise, Canada may be in a place to recast the historical public trust doctrine and utilize it in the same way that it has recently been used by American courts in climate change litigation.²⁰⁶ If the doctrine is essentially taken to mean that governments hold natural resources in trust for current and future generations, there may be a basis for provincial and federal governmental bodies to commence claims against corporations that are thought of as significant contributors to climate change. As mentioned, the public trust doctrine was pleaded but rejected in *La Rose*. Whether as a cause of action against government or corporate actors, it may be too early to assume that the doctrine is completely inapplicable in climate change litigation as *La Rose* was an instance in which the plaintiffs were unable to target specific government conduct.

ii. Defences

Corporate defendants may argue in climate litigation that their conduct has been in accordance with existing laws and regulations. In *Ryan v Victoria*, the Supreme Court of Canada held that defendants may still be liable when the injuries were not “absolutely necessary.”²⁰⁷ Otherwise, corporations may assert that government, not industry, should be held responsible as the government is responsible for regulating industrial standards around carbon emissions. Moreover, they may argue that governments are the sole parties responsible for negotiating and agreeing to international instruments that attempt to combat climate change, such as the Paris Agreement. Furthermore, corporations may argue that climate change is too diffuse to be attributed to one or more individual corporations.

In climate litigation, courts will have to weigh the utility of potentially reducing the rate of climate change as it currently stands and the impact that such changes will have on the Canadian economy, including jobs, personal income, and affordability. Because both of these competing interests are largely viewed by courts as public interest considerations, issues of justiciability have arisen.²⁰⁸ In *Mathur*, Ontario relied on *Tanudjaja*, to assert that global climate change is not suited to judicial review.²⁰⁹ In *Tanudjaja*, the Supreme Court held that provincial housing policy was not subject to judicial review.²¹⁰ As such, the defendants in *Mathur* argued that climate change is even less amendable for consideration by the courts. Whereas housing policy can be defined by provincial borders, climate change is “notoriously planetary in scope.”²¹¹ The Superior Court in *Mathur* rejected that argument. There, it held that *Mathur* was distinguishable from previous non-justiciable cases because it challenged specific

²⁰⁶ *Foster v Wash. Dep’t of Ecology*, 2015 Wash Super LEXIS 1034, No 14-2-25295-1 SEA.

²⁰⁷ *Ryan v Victoria*, *supra* note 61 at para 59.

²⁰⁸ *Reference re Greenhouse Gas*, *supra* note 189 at para 44.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Mathur*, *supra* note 53 at para 118.

government conduct, namely the Ontario government’s decision to repeal the *Climate Change Act*.

As mentioned above, establishing a duty of care—whether against government or corporate defendants—will be a challenge. In 2020, the Supreme Court of Canada in *Maple Leaf Foods* held that “there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss.”²¹² This ruling may increase the difficulty to establish a duty of care in negligence claims. For example, in February 2022, the Alberta Court of Appeal overturned the certification of a class action that sought compensation from an oil spill.²¹³ The claim was commenced by two property owners whose properties were near the site of an oil spill, but not directly impacted by it. The plaintiffs alleged “relational economic loss” on the basis of strict liability, negligence, vicarious liability, nuisance, trespass, and breach of the Alberta *Environmental Protection and Enhancement Act, RSA 2000, c. E-12*. The court found that the Supreme Court ruling in *Maple Leaf Foods* “significantly changed the likelihood that the...claim for pure economic loss could be successful.”²¹⁴

D. Evidence and procedure related to causation

i. Elements of causation

In negligence claims, plaintiffs must establish factual and legal causation. Factual causation is assessed by a “but for” test where plaintiffs must demonstrate that if not “but for” the defendant’s action or omission, that harm would not have occurred.²¹⁵ Where factual causation is established, plaintiffs must establish legal causation, which requires balancing the scope of liability and considering the foreseeability of the harm at issue.²¹⁶ A defendant will not be liable for a plaintiff’s harm if that harm is too remote. For remoteness enquiries, courts ask whether the harm is so unrelated to the defendant’s conduct to fairly constitute liability.²¹⁷

In negligence claims in which a plaintiff is unable to show that an impugned tortfeasor is the “but for” cause of the injury, a “material contribution” test may be used.²¹⁸ The material contribution test may be useful in corporate climate litigation, which requires the following elements: i) a plaintiff’s loss would not have occurred but for the negligence of two or more tortfeasors who are possibly responsible for the loss, and ii) a plaintiff is unable to show that any one of the possible tortfeasors is necessary or but

²¹² 1688782 *Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35.

²¹³ *Rieger v Plains Midstream Canada ULC*, 2022 ABCA 28.

²¹⁴ *Ibid* at para 51.

²¹⁵ *Resurfire Corp. v Hanke*, 2007 SCC 7.

²¹⁶ *Mustapha v Culligan*, 2008 SCC 27.

²¹⁷ *Ibid*.

²¹⁸ *Resurfire Corp.*, *supra* note 211 at para 39; *Clements v Clements*, 2012 SCC 32.

for the cause of the injury sustained. If a plaintiff can establish these elements, it is not necessary to apportion fault.

Additionally, a trier of fact may infer causation in the absence of conclusive scientific evidence by drawing inferences from available facts.²¹⁹ For corporate climate litigation, this approach may be useful where it is impossible to attribute the conduct of any one corporation as contributing to climate change or to the harm suffered by the claimant.²²⁰ With that said, plaintiffs are likely to face challenges in establishing causation in corporate climate litigation since scientific uncertainties may not allow plaintiffs to meet the tests for causation.²²¹

ii. Evidentiary sources

Given that few claims have been commenced against corporations to date, there is little guidance with respect to the (in)effectiveness of distinct forms of evidence. With that said, if and when climate-related disclosures become mandatory, they will serve as an additional source of evidence in corporate climate litigation.²²²

In climate litigation, governmental reports around putative progress in meeting greenhouse gas emissions reduction targets can provide key evidence upon which plaintiffs will rely.²²³ Scientific and environmental monitoring reports and expert testimony also offer important evidence and can equally be utilized in corporate climate litigation.²²⁴ With that in mind, improved scientific evidence for harms demonstrably attributable to climate change will be required to successfully pursue private law claims in Canadian courts against corporations.²²⁵

E. Limitation Periods

Limitation periods are governed by provincial statutes and thus vary by province. The general limitation period in civil claims among most Canadian provinces is two years. A limitations period begins from the day that harm is discoverable. Ultimate limitation periods describe the maximum amount of time to bring a claim, regardless of when an injury is discovered.

²¹⁹ *Snell v Farrell* [1990] 2 SCR 311; *Benhaim v St-Germain*, 2016 SCC 48.

²²⁰ *Benhaim*, *ibid.*

²²¹ Michael Molavi, "Access to Justice and the Limits of Environmental Class Actions in Ontario" (2020) 35:3 C.J.L.S. 391 at 399.

²²² CSA Staff Notice, *supra* note 115.

²²³ *Ibid.* But note, in *Mathur* the applicants filed 17 expert reports (with several other supplementary and reply reports).

²²⁴ Michael Burger, Jessica Wentz & Radley Horton, "The Law and Science of Climate Change Attribution" (2020) 45:1 Colum J Envtl L 57.

²²⁵ Robert Stuart-Smith et al., "Attribution science and litigation: facilitating effective legal arguments and strategies to manage climate change damages" (2021) at 2, online:

<<https://www.smithschool.ox.ac.uk/sites/default/files/2022-03/attribution-science-and-litigation.pdf>>.

Limitation periods across Canadian provinces are as follows:

- Alberta: general, 2 years; ultimate, 10 years²²⁶
- British Columbia: general, 2 years; ultimate, 15 years²²⁷
- Manitoba: general, 2 years; ultimate, 15 years²²⁸
- New Brunswick: general, 2 years; ultimate, 15 years²²⁹
- Newfoundland and Labrador: general, 2 years; ultimate, 15 years²³⁰
- Northwest Territories: general, 6 years; ultimate, 30 years²³¹
- Nova Scotia: general, 2 years; ultimate, 15 years²³²
- Nunavut: general, 6 years; ultimate, 10 years²³³
- Ontario: general, 2 years; ultimate, 15 years²³⁴
- Prince Edward Island: general, 6 years²³⁵
- Quebec: general, 3 years; ultimate, 10 years²³⁶
- Saskatchewan: general, 2 years; ultimate, 15 years²³⁷
- Yukon: general, 6 years²³⁸

The argument of continuous harm is a legal concept that posits that if a defendant's wrongful conduct is ongoing, the limitation period for bringing a claim may extend until the conduct ceases. This is rooted in the principle that a continuation of the harm can constitute a new breach, renewing the limitation period. *Hole v Chard Union*²³⁹ establishes the legal test for continuous harm: there must be repetitive acts or omissions of the same kind as the original wrongful act that initiated the claim.²⁴⁰ *Manitoba v Manitoba (Human Rights Commission)*²⁴¹ further clarified that continuous contravention requires present, separate acts of discrimination, not just one act with continuing effects.²⁴²

²²⁶ *Limitations Act*, RSA 2000, c L-12.

²²⁷ *Limitation Act*, RSBC 1996, c 266.

²²⁸ *The Limitation Act*, CCSM c L150, ss 1, 6.

²²⁹ *Limitation of Actions Act*, SNB 2009, c L-8.5.

²³⁰ *Attorney General Statutes Amendment Act*, 2009, SNL 2009, c 30.

²³¹ *Limitation of Actions Act*, RSNWT (Nu) 1988, c L-8, ss. 2, 45.

²³² *Limitation of Actions Act*, Ch 35 of the Acts of 2014 as amended by 2015, c. 22, NS.

²³³ *Limitation of Actions Act*, RSNWT (Nu) 1988, c L-8.

²³⁴ *Limitations Act*, 2002, S.O. 2002, c. 24.

²³⁵ *The Limitations Act*, C.C.S.M. c. L150, ss. 1, 6.

²³⁶ *Civil Code of Quebec*, S.Q. 1991, c. 64, art. 2925.

²³⁷ *The Limitations Act*, SS 2004, c L-16.1.

²³⁸ *Limitation of Actions Act*, RSY 2002, c 139.

²³⁹ [1894] Ch. 293 (CA).

²⁴⁰ *Ibid* at 295.

²⁴¹ 1983 CanLII (MBCA), 25 Man R (2d) 117 (Man CA).

²⁴² *Ibid* at para 19.

In the context of environmental and climate change litigation, where a corporation's climate impacts are ongoing, plaintiffs might argue that the harm is continuous. Thus, the limitation period could be extended. For instance, if a corporation continuously emits pollutants that cause ongoing environmental damage, each emission could potentially be seen as a new act of harm, resetting the limitation period. However, simply characterizing damages as ongoing does not necessarily extend the limitation period.²⁴³ There must be a clear, factual basis for claiming a series of acts or omissions. In a scenario involving ongoing corporate climate impacts, the corporation's consistent emission of pollutants might be construed as a series of separate acts, potentially extending the limitation period for each new act. This would be particularly relevant if the actions are in clear violation of environmental regulations or standards and if each act is deemed to have caused separate and identifiable harm.

²⁴³ *Tyszko v St. Catharines*, 2023 ONSC 2892 at para 45.

3. Remedies

A. Pecuniary remedies²⁴⁴

In Canada, possible pecuniary damages include:

- 1) compensatory damages for injury, economic loss, restoration, or loss of use (expectation and consequential damages)²⁴⁵
- 2) punitive damages
- 3) nominal damages²⁴⁶
- 4) restitutionary damages²⁴⁷

To provide some examples of how pecuniary damage has been pleaded in environmental claims, in *Canfor* the Crown claimed the following damages for losses from a forest fire caused by the corporate defendant: 1) expenditures for suppressing the fire and restoring the burned-over areas; (2) losses of stumpage revenue from trees that would have been harvested; and, (3) losses from trees that would have been set aside for various environmental reasons.²⁴⁸ The Crown though was only awarded damages under the first category. In *ENVironment Jeunesse*, a claim brought pursuant to the Quebec *Charter*, the plaintiffs did not seek general and special damages, but rather requested the cessation of the violation at issue as well as punitive damages in the amount of \$100/member.²⁴⁹

B. Non-Pecuniary Remedies

Possible non-pecuniary remedies include:

- 1) injunctions
- 2) declaratory relief
- 3) the retention of jurisdiction (structural injunction); and ²⁵⁰
- 4) the oppression remedy²⁵¹

²⁴⁴ See generally, Kent Roach, “Judicial Remedies for Climate Change” (2021) 17:1 J Law Equal 105–150.

²⁴⁵ *Canfor*, *supra* note 145.

²⁴⁶ *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19.

²⁴⁷ *International Corona Resources Ltd. v LAC Minerals Ltd.*, [1989] 2 SCR 574.

²⁴⁸ *Canfor*, *supra* note 145 at para 3.

²⁴⁹ *Ibid* at para 10.

²⁵⁰ See e.g. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62.

²⁵¹ *Wisser v CEM International Management Consultants Ltd*, 2022 ABQB 414. The oppression remedy is “the right to apply to the court, without obtaining leave, in order to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant.” See *Rea v. Wildeboer*, 2015 ONCA 373 at para. 19.

The plaintiffs in *La Rose* are seeking orders declaring that the government has a “common law and constitutional obligation to act in a manner compatible with maintaining a Stable Climate System” and a declaration that the government’s conduct infringed the plaintiffs’ fundamental rights and equality rights under the constitution, and violated the public trust doctrine.²⁵² They have also sought orders that would require the federal government to accurately and completely account for greenhouse gas emissions and to develop and enforce a new climate recovery plan. And they have requested the Federal Court to maintain jurisdiction over the defendants until “there is reasonable assurance that the defendants will continue to comply in the future absent continuing jurisdiction.”²⁵³

Similarly, the plaintiffs in *Mathur* have sought declaratory orders that the government violated the plaintiffs’ rights under the Canadian constitution. The plaintiffs there have also requested the Ontario Superior Court to issue an order requiring Ontario to revise its climate change plan and implement a science-based greenhouse gas reduction target.²⁵⁴ Finally, the plaintiffs in *Misdzi Yikh* have sought “a court order declaring as unconstitutional those statutory provisions that permit such projects to continue their high greenhouse gas emissions with no provision for rescission in the face of escalating global warming.” They have also requested an ongoing and independent accounting of Canadian greenhouse gas emissions.²⁵⁵

²⁵² *La Rose*, *supra* note 54 at para 222.

²⁵³ *Ibid.*

²⁵⁴ *Mathur*, *supra* note 53 at para 8.

²⁵⁵ *Misdzi Yikh*, *supra* note 178 at para 7.

Conclusion

This report has illuminated the dynamic and multifaceted arena of corporate climate change litigation in Canada, reflecting on the interplay between law and environmental accountability. It underscores the legal community's efforts to harness various legal doctrines and statutory tools in addressing corporate contributions to climate change. The challenges and intricacies of litigation are many—from evidentiary burdens to the procedural rigors of class actions—yet, there exists significant potential for judicial remedies that may shape corporate behaviors and policies. As Canadian jurisprudence on climate change evolves, it will likely serve as a harbinger for environmental responsibility, shaping how corporations engage with the urgent imperatives of climate change. This legal evolution, in concert with international principles and domestic statutes, will be instrumental in steering the course towards a more sustainable and legally accountable corporate landscape.

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