# Emissions Trading & Climate Change Bulletin

## Litigating Climate Change in Canada

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Litigating Climate Change in Canada

1) Introduction

It’s only a matter of time before Canadian corporations are sued over their greenhouse emissions, experts in the investment field say … “There is a feeling of inevitability about that,” … “In some way, shape or form, that is going to happen.”

The idea that you could hold your local power plant or an oil company accountable for the weather seems astounding. It is only slightly less startling to think that a government could be sued for failing to stop climate change. Yet this idea has firmly taken hold in Canada and has led to concrete action in the U.S. and other countries. The purpose of this research paper is twofold: (a) to explore the legal basis for climate change litigation under Canadian tort law, and (b) whether such litigation could lead to positive effects in the larger struggle to curb the effects of global warming. While other legal tools may be available, this paper will analyze only two possible common law actions. The first is an action in negligence directed against the Government of Canada for its failure to adopt effective strategies to address the problem of global warming. The second is an action in public nuisance against one or several major industrial carbon dioxide polluters.

Section 2 will briefly describe the greenhouse effect and global warming’s anticipated effects in Canada. There is also a discussion of the major sources of greenhouse gas pollution in Canada as well as an outline of the Canadian government’s response to the problem of climate change. Section 3 will describe how the general goals of tort law appear to be adaptable to the global warming problem and it also contains a short description of the major climate change lawsuits that have been launched in the U.S. Sections 4 and 5 will analyze the legal requirements for the two proposed lawsuits. Section 6 will discuss the advantages and disadvantages of using litigation as a strategy in the broader struggle against global warming and why, given the slim chances of actually winning one of the tort actions described, those concerned with climate change may still be motivated to take their case to court.

2) Global Warming in Canada

a) The Greenhouse Effect

The basic mechanics of global warming have been widely described in many publications, including in reports backed by international organizations and Canadian government departments, as well as in the media. A brief description shall suffice for the purposes of this paper.

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1 Denis Bueckert, “Global warming lawsuits predicted” The Globe and Mail (30 October 2006) B3 (The quote is by Martin Whittaker, director of a private investment company involved in the global carbon market).

2 The public nuisance action has the advantage that it does not require the plaintiff to prove negligence of the defendant. Also, two of the major lawsuits in the U.S. are based on the U.S. common law of public nuisance and could serve as a model for any action considered in Canada.

3 The Intergovernmental Panel on Client Change (“IPCC”), established by the World Meteorological Organization and the United Nations Environment Programme has produced perhaps the most comprehensive and most widely recognized report on the subject of human induced climate change, see Intergovernmental Panel on Climate Change, IPCC Third Assessment Report – Climate Change 2001, online: United Nations Environment Programme <http://www.grida.no/climate/ipcc_tar/>. [IPCC TAR].

4 The Climate Impacts and Adaptations Program (“CIAP”) is a program of Natural Resources Canada which has produced Climate Change Impacts and Adaptations: A Canadian Perspective (2004), online: Natural Resources Canada <http://adaptation.nrcan.gc.ca/perspective/index_e.php> [CIAP Report]; see also Environment Canada, Climate Change, online: Environment Canada <http://www.ec.gc.ca/climate/overview_science-e.html>.

5 As one recent example, The Economist devoted a special report to climate change, see “The heat is on – A survey of climate change”, special report, The Economist (9 September 2006) [Economist].
Human activity has caused an increase in the atmospheric concentration of carbon dioxide of roughly 30% since the time before the industrial revolution. Concurrently, scientists have observed an increase of the earth’s average surface temperature of about 1 degree Fahrenheit in the last 100 years. The greenhouse effect provides an explanation that links these two facts. Much like the glass in a greenhouse, carbon dioxide and other greenhouse gases (along with other agents) trap part of the heat our planet absorbs from solar radiation. The higher the concentration of greenhouse gases in the atmosphere, the more heat is trapped and, as the delicate balance of heat absorption and dissipation is disturbed, the earth slowly gets warmer. According to the IPCC TAR, if the release of carbon dioxide from human sources is not curbed, global average surface air temperature will rise between 2.5 to 10.4 degrees Fahrenheit by 2100.

Without going into further detail, it is helpful to take note of the following propositions of the greenhouse effect: 1) global warming is attributable to human-induced emissions of greenhouse gases, the most important of which is carbon dioxide, 2) the greenhouse effect is global: all emissions contribute to the overall effect, regardless of where they occur, and 3) the concentration of greenhouse gases in the atmosphere is cumulative: the current level of concentration of carbon dioxide is a result of decades worth of human emissions.

b) The Effects of Global Warming in Canada

Since Canada is a northern country, where large parts of the land mass are only sparsely populated due to extreme cold, some commentators actually argue that global warming will produce significant benefits. The overall picture is far less encouraging. Global warming will likely lead to different problems for each region of Canada. Natural Resources Canada and Environment Canada have produced extensive reports detailing the possible consequences of climate change in Canada, and various environmental organizations track these risks on their websites. The following is a short summary of predicted effects most often mentioned in these sources:

Atlantic and Pacific coasts: Thermal expansion and melting ice caps are expected to cause a rise in sea levels, which would lead to inundation of low-lying areas, increased coastal erosion, higher storm-surge flooding, saltwater intrusion into freshwater aquifers and loss of coastal habitat. Global warming is also predicted to increase the frequency and intensity of sea storms. Possible impacts include massive damage to property and infrastructure, and loss of revenue for the tourism and fishery industries.

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7 Economist, ibid. at 3; Pawa & Krass, ibid. at 417.


9 Pawa & Krass, supra note 6 at 419.

10 Tim Ball, “Warmer is better” National Post (15 June 2006) FP23.


13 For a good overview of predicted effects on a global scale, see Pawa & Krass, supra note 6 at 421-28; for a detailed account, see Intergovernmental Panel on Climate Change, Climate Change 2001, Working Group II: Impacts Adaptation and Vulnerability, online: United Nations Environment Program <http://www.grida.no/climate/ipcc_tar/wg2/index.htm>.
Great Lakes – St. Lawrence River: Global warming is expected to decrease water levels in the Great Lakes and the St. Lawrence River, which would lead to water quality problems, water shortages, problems for ship navigation and damage to local ecosystems.

Urban centres: Cities are expected to experience more frequent and extreme heat waves and higher incidents of smog, which will likely produce various health-related problems.

Agricultural areas and forests: Though higher temperatures may have some positive effects on crop yields and extend boreal forests in the North, there are also a variety of problems associated with global warming, particularly crop damage due to extreme heat, more frequent and severe droughts in the Prairies and more frequent forest fires and insect infestations.

Western Alpine regions: Warmer temperatures are linked to shrinking glaciers, decreasing winter snow pack and increased risk of landslides and floods, which may negatively affect tourism, hydroelectric generation and local ecosystems.

The Arctic: The potential thawing of permafrost exposes Arctic Canada to a host of problems, including damage to property and infrastructure due to sinking ground, mudslides and increased coastal erosion, as well as potentially disastrous disruption of Arctic wildlife habitats.

Most of these effects are only expected to manifest themselves fully decades from now. However, some of the predicted damages are already occurring, including the effects of melting permafrost on Arctic communities, heat waves, droughts and floods, as well as forest fires. It is also quite clear that the distribution of these damages will be unfair. Canada’s Arctic communities contribute only miniscule amounts to the national total of carbon dioxide emissions, but arguably face the most fundamental and grave dangers.

c) The Evidence and the Sceptics

The science of climate change is complex and, although "most scientists are convinced that human emissions of greenhouse gases (GHGs) are the primary cause of such warming," scepticism remains. Not everyone agrees that the increased atmospheric concentration of greenhouse gases has caused a rise in global temperatures. Even though the earth’s average temperature has measurably increased and we have experienced many of the hottest years ever recorded in recent times, some sceptics point out that this may be due to natural variation or non-human factors. However, recent models that have taken into account these non-human factors lead to the conclusion that “[t]hese natural drivers alone … are unable to account for the increase in temperature and accompanying suite of climatic changes observed over the 20th century.”


16 Margaret Munro, “Climate change is here now, experts say: Floods, fires, drought, disease pose threats” Calgary Herald (3 October 2006) A6.


19 Mank, ibid. at 6; Pawa & Krass, supra note 6 at 417.


21 CIAP Report, supra note 4 at 3.
Other scepticism relates to whether rising temperatures will actually cause the physical harms described above. Critics call attention to the inherent frailty of any long-term predictions about a system as complicated as the global climate, and some even suggest that there are significant beneficial effects of global warming. Nevertheless, there is a growing body of recorded evidence that appears to prove many of the expected consequences of global warming. Among these are rising sea levels, shrinking glaciers and polar ice caps, increasing frequency and intensity of hurricanes in the Atlantic, record heat waves, and thawing permafrost. Despite the existence of some critical voices, there is substantial agreement among scientists that the causal relationships are real. Section 5 will explore how well they are likely to hold up when measured against legal concepts of causation.

### d) Major Sources of Greenhouse Gas Emissions in Canada

According to the latest National Greenhouse Gas Inventory, the largest proportion of greenhouse gases in Canada originates from the energy sector with almost 82% of total emissions. Facilities that emit 100 kilo tonnes or more carbon dioxide equivalent emissions are required to submit their emissions to the greenhouse gas reporting system set up by Environment Canada. The companies reporting under this registry account for about 36.8% of total national emissions and statistics emerging from this registry thus don’t reflect accurate percentages of the national total. Nevertheless, the registry does reveal the largest single emitters in Canada. The top ten polluters, which include mostly power generation and resource extraction companies, are responsible for 43.34% of the registered emissions.

With these tools it would be possible to identify some of the largest single polluters in Canada. However, the contribution of a single greenhouse gas polluter to global warming will probably be a contested issue, especially if one bears in mind that Canada as a whole contributes to only about 2% of global greenhouse gas emissions.

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22 Culley, supra note 20 at 103-05; Bertagna, supra note 20 at 414-416

23 Economist, supra note 5 at 9; Culley, ibid. at 99; Grossman, supra note 14 at 10; Mank, supra note 18 at 2; CESD Report, supra note 8 at 29.

24 Economist, ibid. at 9. Culley, ibid. at 99; Bertagna, supra note 20 at 430; Pawa & Krass, supra note 6 at 17; CESD Report, ibid. at 29.

25 Economist, ibid. at 9; Grossman, supra note 14 at 15; Bertagna, ibid. at 430.

26 Culley, supra note 20 at 95.

27 Grossman, supra note 14 at 15; Goldberg, supra note 14 at 228; Mank, supra note 18 at 7.

28 According to its commitments under the Kyoto Protocol, the Canadian government is required to prepare a yearly national inventory of human-induced greenhouse gas emissions, the latest of which covers the year 2004, see Environment Canada, Canada’s 2004 Greenhouse Gas Inventory – A Summary of Trends, online: Environment Canada <http://www.environment-canada.ca/pdb/ghg/inventory_report/2004/2004summary_ecfm>.

29 Ibid.

30 In order to allow for direct comparison, greenhouse gases other than carbon dioxide are usually multiplied by the appropriate factor to calculate the amount of carbon dioxide that would have an equivalent greenhouse effect.


33 If the registered emissions of the single largest polluter, Ontario Power Corporation, are compared to the national total, one would arrive at a contribution of about 3.28%.
e) The Government of Canada’s Response

Canada has signed and ratified both the United Nations Framework Convention on Climate Change (UNFCCC)\(^{34}\) and the related Kyoto Protocol.\(^{35}\) Under the Kyoto Protocol, Canada is required to reduce its emissions of greenhouse gases to a level that is six percent below 1990 levels by the end of 2012. However, successive Canadian federal governments have done little to achieve these targets.

Governments led by the Liberal party have adopted several fairly ineffective plans.\(^{36}\) Federal Environment Commissioner Johanne Gelinas summarized these efforts in her report to the House of Commons on September 28, 2006, in the following words.

> On the whole, the government’s response to climate change is not a good story. At a government-wide level, our audits revealed inadequate leadership, planning and performance. To date, the approach has lacked foresight and direction and has created confusion and uncertainty for those trying to deal with it. Many of the weaknesses identified in our audits are of the government’s own making. It has not been effective in leading and deciding on many of the key areas under its control. Change is needed.\(^{37}\)

By 2004, Canada’s greenhouse gas emissions had actually risen by 27 percent as compared to 1990 levels, 34.6 percent higher than the Kyoto Protocol requires.\(^{38}\) The current Conservative government has clearly given up on meeting Canada’s Kyoto targets.\(^{39}\)

The Conservative government presented a national plan to the public on October 19, 2006 by the introduction of the Clean Air Act\(^{40}\) in parliament. This plan promises to introduce mandatory fuel-efficiency targets for motor vehicles and mandatory limits on emissions by industrial air polluters. It sets a target of reducing greenhouse gas emissions by 45 to 65 percent from current levels by the year 2050.\(^{41}\) However, the plan was immediately criticized for its many shortcomings.\(^{42}\) There would first be a period of three years of consultations with industry before concrete mandatory limits are adopted. Furthermore, greenhouse gas reduction targets would be “intensity based” until at least 2020.\(^{43}\) Also, the target set by the government is likely not low enough. Even just stabilizing temperature increases at two degrees requires industrialized countries to reduce greenhouse gas emissions by 80 to 90 per cent from 1990 levels by 2050. The high end of the Canadian plan provides only for a 65 percent reduction from the current, higher levels during the same period.\(^{44}\)

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\(^{36}\) The “Action Plan 2000” (October 2000), the “Climate Change Plan for Canada” (November 2002), and “Project Green” (April 2005), see CESD Report, supra note 8 at 9.

\(^{37}\) CESD Report, ibid. at 10-11.

\(^{38}\) Ibid.


\(^{40}\) Bill Curry, “Tories will neither kill nor live up to Kyoto” The Globe and Mail (7 April 2006) A1 (While there is no concrete plan to withdraw from the Kyoto Protocol, the Conservative government has focussed its efforts on developing a “made-in-Canada” solution to address the problem of climate change).


\(^{42}\) Mike De Souza, “Critics say it’s smog & mirrors” Leader Post (20 October 2006) A1.

\(^{43}\) Intensity based targets only require a reduction of greenhouse gas emissions per unit of economic output, which means that polluters can meet their targets while at the same time continuing to increase their total emissions.

\(^{44}\) Mittelstaedt, supra note 41.
Given these limitations of the Clean Air Act, the federal government’s approach is arguably still not enough to address the threat of global warming. At the most recent U.N. climate conference in Kenya at the beginning of November of 2006, Canada was singled out by environmental groups as a “fossil” on climate change and it ranked very near the bottom in a survey of 56 countries on their climate change policy.\(^45\)

3) The Idea of Using Common Law Tort Actions

\(a\) Tort Law’s Objectives

Tort law has proven to be very flexible and has been adopted as an important tool for addressing a variety of environmental problems.\(^46\) A survey of the general objectives of tort law reveals that the notion of using tort law to address global warming is quite appealing.\(^47\)

**Compensation** – The damages of global warming will be unevenly distributed, and tort law can compensate those victims of global warming that have been disproportionately affected.\(^48\)

**Punishment** – Tort law can “express society’s disapproval of the conduct of wrongdoers who cause harm to other citizens.”\(^49\) This objective is less compelling for polluters that operate within the realms of law and good conscience. It could play a bigger role if it is proven that polluters have deliberately blocked climate-friendly innovations and initiatives. There is evidence that U.S. fossil fuel companies have expended considerable resources to challenge the scientific basis of global warming and to fight emission reduction efforts.\(^50\) Canadian energy companies have publicly denounced the Kyoto treaty.\(^51\) A recent study concluded that the oil-sands industry in Alberta, a major source of carbon dioxide pollution, could considerably reduce its emissions by adapting new technology.\(^52\) With regard to the federal government, some argue that it is unduly “soft” on the energy industry in the *Clean Air Act*, citing the fact that the energy industry will be exempted from mandatory regulation for at least three years.\(^53\) Is it possible to infer from this some kind of collusion between energy companies and the federal government in an effort to protect their profits and political fortunes respectively, all at the expense of those who suffer harm from global warming? Or is this merely reasonable resistance to largely unproven claims of global warming and a legitimate effort to balance the need for regulation of greenhouse gases with other goals, such as economic development? Depending on which storyline is more credibly advanced, tort law will be more or less acceptable as an appropriate remedy.

**Market deterrence or cost allocation** – Costs resulting from global warming damages are currently not fully absorbed by polluters or, in other words, they are “externalized”. Tort litigation would allow shifting these costs from victims to polluters. The cost of production would more adequately reflect a product’s potential to contribute to global warming and create an incentive for consumers and producers to reduce polluting activities or switch to environmentally friendly alternatives.\(^54\) The effect of this would be comparable to a tax on carbon dioxide emissions, only “tort law’s language of

\(^{45}\) Mike De Souza, “‘Fossil of the day’ award to Canada: Near the bottom in rating of 56 countries” *The Gazette* (14 November 2006) A2.

\(^{46}\) For a description of the various uses of tort actions and other civil actions in the environmental context, see e.g. J. Swaigen et al., *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths Canada Ltd., 1996).

\(^{47}\) Taken from Philip H. Osborne, *The law of torts*, 2nd ed. (Toronto: Irwin Law, 2003) at 12-18.

\(^{48}\) Grossman, *supra* note 14 at 3; Penalver, *supra* note 8 at 569, 574.

\(^{49}\) Osborne, *supra* note 47 at 14.

\(^{50}\) Penalver, *supra* note 8 at 576-78; Culley, *supra* note 20 at 101-03.


\(^{54}\) Penalver, *supra* note 8 at 571-73; Grossman, *supra* note 14 at 4-5.
forcing injurers to compensate victims of harm may provide a more palatable language for selling action on climate change to the … public than, for example, the language of taxation and regulation.” The rationale for market deterrence is particularly important in a public nuisance action, which does not require proof of negligence and where the objective of punishment only plays a minor role.

Education – Courts can work as public forums for the detailed examination of specific problems. “A court may be called upon to address a particularly contentious issue affecting a small group, to rule on the current practices of a profession or industry, to determine liability in a novel circumstance, or to rule on a test case that challenges the behaviour of a public or private institution.” The role of education and publicity is a highly motivating factor for potential climate change litigants.

The Ombudsman Role – In the political arena, relatively small organizations or individuals would find themselves pitted against powerful corporate and governmental actors in a struggle over global warming. The fact that litigation can be initiated by individuals and is adjudicated by an independent judiciary, leads some to conclude that it “is well placed to challenge the wrongful and harmful behaviour or the most powerful persons and institutions in Canada.”

At first glance, many of the traditional functions of tort law appear to readily apply to the global warming problem. Not surprisingly, the idea of using court litigation in the fight against global warming has already spawned a number of lawsuits in the U.S. and internationally.

b) Current Litigation Efforts in the U.S.

There are a number of court actions that have been launched around the globe regarding climate change. The following paragraphs will focus on three recent U.S. lawsuits, that have received considerable attention in the press and in legal publications, and that are most interesting for the analysis in this paper.

In July of 2004, the Attorney General (“A.G.”) of Connecticut joined forces with eleven other states, New York City and several environmental organizations to sue five major electric power companies based on the federal and state common law of public nuisance. According to the plaintiffs, the defendants are responsible for roughly 10 percent of all carbon dioxide emissions in the U.S. The plaintiffs allege that the defendant companies are major contributors to global warming, which will lead to substantial damage to the property and public health of the plaintiff states. These harms constitute a substantial and unreasonable interference with public rights. The plaintiffs sought a judgment holding each defendant jointly and severally liable for contributing to the public nuisance. The action was dismissed on September 15, 2005 without a discussion of the merits. The court found that the complaint was not within its jurisdiction, because “these actions present non-justiciable political questions that are consigned to the political branches, not the judiciary.”

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55 Penalver, ibid. at 570.
57 Osborne, supra note 47 at 17.
58 Ibid.
59 For a good overview, see Climate Justice, Cases already underway, online: Climate Justice <www.climatelaw.org/cases>.
61 These threats include health problems due to heat waves and smog, floods, disruption of water supplies and lower water levels in the Great Lakes as well as ecological damage.
62 Connecticut v. AEP, supra note 60 at 19.
One interesting aspect of Connecticut v. AEP is that the plaintiffs did not seek monetary damages from the court, but an injunction that would have required defendants to gradually reduce their carbon dioxide emissions over a number of years. They argued that this could be achieved by better use of technology. Canadian litigants could adopt this idea, since it highlights the fact that global warming can be addressed with measured and reasonable steps that need not cripple the individual defendants or the economy at large.

On September 20, 2006, the A.G. of the state of California filed a lawsuit against five major car manufacturers under the federal and state common law of public nuisance. The lawsuit alleges that the defendants knowingly contributed to global warming, which constitutes a substantial and unreasonable interference with public rights, "including public comfort and safety, natural resources and public property, and aesthetic and ecological values." According to the plaintiff, the defendants’ products are responsible for over 20 percent of all carbon dioxide emissions in the U.S. and over 30 percent in California. The plaintiff seeks to hold each of the defendants jointly and severally liable for damages incurred by the State of California and also requests a declaratory judgment "for such future monetary expenses and damages as may be incurred by California in connection with the nuisance of global warming."

In Massachusetts v. EPA, a group of U.S. states, led by Massachusetts and supported by three cities and various nongovernmental organizations, challenged a ruling by the Environmental Protection Agency ("EPA") that it lacks authority to regulate carbon dioxide. The plaintiffs failed when the court decided not to challenge the EPA’s administrative decision. The decision has been appealed to the U.S. Supreme Court and oral arguments were heard on November 29, 2006. This lawsuit is a statutory action and not based on common law. Nevertheless, it is interesting for the fact that the plaintiffs seek to compel a government agency to regulate the emission of carbon dioxide.

63 California (A.G.) v. General Motors Corp., No. 06-05755 (N.D. Cal. filed 9/20/06), online: at <http://ag.ca.gov/newsalerts/release.php?id=1338&PHESSSID=8c8f5d7b92fcb123ce89062c3f7a37d90>[California v. General Motors].

64 Ibid. at para. 59.

65 The complaint lists the following damages incurred by the State of California due to global warming: expenses for studying, monitoring and responding to global warming, harm to natural resources such as water, coastlines, air quality and wildlife, rebuilding of levees in response to rising sea levels, disruption of water resources, flood damage, and impacts on the health of Californians due to extreme heat and pollution.

66 California v. General Motors, supra note 63 at para. 71.


68 On August 28, 2003 the General Counsel of the EPA, Robert Fabricant, issued a memorandum declaring that the authority to regulate “air pollutants” under the Clean Air Act was not broad enough to permit regulation of greenhouse gases, given the fact that congress had already addressed the topic of climate change several times, but declined to impose mandatory limits for greenhouse gases. See Robert E. Fabricant, Memorandum from EPA General Counsel to Acting EPA Administrator Marianne L. Horinko (August 28, 2003), EPA’s Authority to Impose Mandatory Controls to Address Climate Change under the Clean Air Act, online: Massachusetts A.G. [http://www.ago.state.ma.us/sp.cfm?pageid=1234].

69 Two of three judges denied the petitioners’ challenge on different grounds. Randolph J. found it appropriate for the EPA to rely on policy considerations in exercising its discretion not to regulate greenhouse gases at this time, while Sentell J. denied that the plaintiffs had the necessary standing to bring the challenge. Tatel J., in dissent, did not accept the fact that the EPA based its decision on policy considerations that were unrelated to the danger to public health or welfare, as required by the language of the CAA. Tatel J. also held that the EPA had the necessary authority to regulate greenhouse gases, see Massachusetts v. EPA, supra note 67.

70 For a transcript of the oral arguments made before the U.S. Supreme Court, see Massachusetts v. EPA (29 November 2006), Docket-No.05-1120, online: Supreme Court of the United States [http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html].
4) Action in Negligence against the Government of Canada

a) Introduction

The first action to be analyzed is a negligence action against the Canadian federal government for failure to prevent or mitigate global warming by reducing emissions of greenhouse gases in Canada. Negligence is a very flexible legal concept and it is open to courts to adopt new categories of negligence if certain requirements are met. In a negligence action, the plaintiff must prove the following elements on a balance of probabilities: (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached the duty of care by failing to act according to the standard of care required of him or her, (3) the defendant caused the harm the plaintiff is alleging, and (4) the plaintiff suffered actual damage as a result of the defendant’s breach of standard of care.

Translated into the global warming context, a plaintiff might claim that (1) it is the federal government’s duty to adopt laws and regulations that limit greenhouse gas emissions in order to protect Canadian citizens from the dangers of global warming, (2) that the Canadian government’s actions fall far short of what is necessary, (3) and that the government’s inadequate actions have lead to higher atmospheric concentrations of greenhouse gases, thereby contributing to (4) the various damages associated with a rise in temperatures.

b) Public Authority Liability and Legislative Immunity

Where a duty of care does not fall into any previously recognized category, as is the case here, Canadian courts apply the two-stage Anns/Kamloops test.

At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant’s act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant … At the second stage of the Anns tests, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

This framework has been applied in various actions against governmental authorities. The first stage requires not only that the governmental action or inaction could foreseeably cause the harm alleged, but also a proximate relationship of the defendant to the plaintiff. Where the defendant’s act foreseeably causes physical harm to the plaintiff or his property, the proximity is recognized and a prima facie duty of care arises. Given the well-understood and scientifically supported causal connections, it appears reasonably foreseeable that inaction by the federal government exacerbates the effects of global warming, which include property damage and threats to human health. A court would likely find a prima facie duty of care in this case.

Under the second stage of the test, Canadian courts have developed a distinction between policy and operational decisions that can negate the prima facie duty found at the first stage. The courts refrain from interfering with policy decisions by imposing a common law duty of care, because:

Policy and planning decisions are discretionary decisions normally made at a high level of government dealing with the allocation of resources and the determination of priorities in respect of governmental

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72 Swaigen et al., supra note 46 at 73.


75 Ibid. at para. 36.
services. The decisions involve economic, social, and political considerations in deciding which statutory powers will be exercised, when they will be exercised, where they will be exercised, and how they will be exercised. These are uniquely governmental decisions and the remedy for bad government lies in the ballot box, not in the courts.76

The Supreme Court of Canada has repeatedly addressed the question of liability of statutory authorities for an alleged failure to properly inspect and maintain roads or buildings.77 The principles developed in these cases have also been applied to environmental damages.78 Imposing liability usually requires that a decision to inspect has been made and a legislative framework has been established. Courts will then only examine the operational conduct of public authorities, measured against the standard set out in that legislation. Where “a complaint is raised relating to the authority’s lack of due care in determining policy matters, for example, deciding whether and how to implement a program, then negligence law review … is not appropriate.”79

When the government’s action is in exercise of its legislative function, courts consider this a pure policy decision, which is not actionable in tort as it is protected by the principle of “legislative immunity”.80 The concerns about improper interference by courts in political processes are particularly pronounced in this case. “A public authority must be free to make its choices with an eye only to their political consequences, not to the possibility of being sued for damages.”81 Thus a challenge of a legislative act in tort is often summarily dismissed for failure to disclose a cause of action, because “[g]overnment, when it legislates, even wrongly, incompetently, stupidly, or misguidedly is not liable in damages.”82

Even the decision to refrain from passing legislation altogether has been held to be a pure policy decision, which is not reviewable in a negligence action. In *Kuczerpa v. Canada*,83 a plaintiff, who had suffered serious injuries to her health due to pesticide poisoning, wanted to hold the federal government accountable for failing to adopt laws and regulations with regards to these substances.84 However, the court held unequivocally that “a decision of the Government of Canada to pass or refrain from passing general legislative measures reflecting current policy cannot as a rule give rise to a cause of action in tort by a member of the general public.”85

The immunity of policy matters does not extend to decisions taken in bad faith. In *Kamloops*,86 the Supreme Court of Canada held that a building inspector who remained completely inactive in the face of various infractions did not exercise his discretion in a *bona fide* manner, and that he should have at least given the matter serious consideration.87 While it is not

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76 Osborne, *supra* note 47 at 199; similarly see also Swaigen et al., *supra* note 46 at 106.


79 Klar, *supra* note 56 at 272.


81 *A.O. Farms, ibid.* at para. 12.

82 *Ibid*.


84 The plaintiff cited three federal acts to support her claim that the government had acted negligently: (1) section 20 of the Pest Control Products Regulations, made pursuant to the *Pest Control Products Act*, which gave the Minister of Agriculture broad control to refuse to register a harmful product, (2) paragraph 2(a) and subparagraph 15(a)(ii) of the *Environmental Protection Act*, which requires the government to take the appropriate preventative measures to protect the environment and regulate toxic substances, and (3) paragraphs 4(a) and (b) of the *Food and Drug Act*, which prohibits the sale of food that contains harmful substances.

85 *Kuczerpa, supra* note 83 at 2.

86 *Supra* note 73.

87 Klar, *supra* note 56 at 273; Osborne, *supra* note 47 at 200; Swaigen et al., *supra* note 46 at 107.
clear whether this exception would apply to a government that disregards the global warming problem, it is not possible to accuse the Government of Canada of complete inaction after the introduction of the Clean Air Act. The government may have been especially lenient on the powerful, well-connected and highly polluting energy industry in the proposed legislation, but it could explain that this is a good faith effort, which resulted from weighing environmental protection with other legitimate concerns, such as economic disruptions, or a loss of Canada’s international competitiveness.

Given the unwillingness of Canadian courts to interfere with policy questions, a lawsuit alleging inaction or inadequate action of the Government of Canada in the area of global warming is very likely to fail at this stage. Clearly, the decision to adopt a national program to curb greenhouse gas emissions and the choice of what measures to adopt are policy matters of the highest level. They involve the balancing of many economic, social and political considerations and even a significant foreign policy component. The Canadian government has released a long-term plan with the proposal of the Clean Air Act, and its decisions in this regard would probably be protected by the concept of legislative immunity. No matter how appallingly inadequate the Clean Air Act may be in the eyes of many observers, it is almost certain that courts would decline to review it under the guise of a common law tort action.

Given the low chance of success, this paper will not discuss the other elements of a negligence action. The interesting problem of proving causation will be explored as part of the analysis of the public nuisance action.

c) The Public Trust Doctrine in Canada

The Supreme Court of Canada’s decision in British Columbia v. Canadian Forest Products Ltd. has sparked some discussion about whether Canadian courts may be open to accepting the so-called public trust doctrine, a well-established concept in the U.S. The idea is that the state holds certain resources that are available to everyone, including environmental resources, in trust for the public. This may entail both restrictions in the way the government manages the resource and may even require positive action to fulfil its fiduciary duty.

Writing in obiter, the Supreme Court discussed the public trust doctrine in Canfor, speculating about the “novel policy questions raised”, which “include the Crown’s potential liability for inactivity in the face of threats to the environment.” While this does not amount to an acceptance of the public trust doctrine in Canada, some commentators believe that “it suggests a positive or sympathetic attitude that may manifest itself more fully in a future case.”

Should Canfor be seen as an indication that courts will not close their eyes to governmental inaction, where the environmental threat is grave, and the government’s actions are wholly inadequate? It is a big step from a cautious approval of the public trust doctrine to a court interfering in legislative decisions of Parliament. It is unlikely that the principle of legislative immunity would be modified so radically in the near future, but Canfor may signal a trend or direction.

5) Public Nuisance Action against Major Polluters

90 Ibid. at 394.
91 Canfor, supra note 88 at para. 81.
92 See von Tigerstrom, supra note 89; Scott Kidd, “Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada” (2006) 16 J. Env. L. & Prac. 187 (Both authors conclude that the public trust doctrine has not been accepted in Canada).
a) Introduction

A plaintiff in a public nuisance action must prove that the defendant’s activities have caused an unreasonable interference with a public good.\textsuperscript{94} In the global warming context a plaintiff could bring an action against one or several major carbon dioxide producers, which are most likely to be found in the energy production and resource extraction industry in Canada. The basic argument would be that the defendant’s carbon dioxide emissions have caused, or at least significantly contributed to, various damages, including damages to public or private property and human health, and that this constitutes an unreasonable interference with a public good. The plaintiffs would face at least the following difficulties, which will be examined separately below: (1) what constitutes a public good and what constitutes unreasonable interference? (2) Who would have standing to bring the public nuisance action? (3) Can the plaintiff prove that the defendants’ activities are the cause of the alleged harm?

b) Unreasonable Interference with a Public Good

A public good includes the “public’s interest in questions of health, safety, morality, comfort or convenience.”\textsuperscript{95} Many of the possible consequences of global warming would easily qualify as interference with public interests. For example, inundation and coastal erosion caused by rising sea levels would affect both public land and numerous private properties. The same can be said for melting permafrost, which can damage both public infrastructure and countless private buildings.

Apart from these traditional damages, there is a danger that many ecosystems will be disrupted by global warming. It seems quite likely that such “pure” environmental harm also constitutes interference with a public good even if it is not associated with “traditional” property damage or personal injury. Courts have recognized the public’s right to unpolluted air and water, and even to protection of flora and fauna.\textsuperscript{96} Some comments made by the Supreme Court of Canada in \textit{Canfor}\textsuperscript{97} also confirm this trend. In \textit{Canfor}, the A.G. of British Columbia tried to claim, among other things, the ecological damage caused to environmentally sensitive areas by a forest fire in public nuisance. Though the court rejected the claim in this case, “the court went to great lengths to leave the door open for further cases with broader pleadings and more persuasive evidence,” which “signalled opportunities for the Crown to use its parens patriae role to protect public values, [and] to include a variety of heretofore externalized values in calculating damages in tort actions.”\textsuperscript{98} It would thus be appropriate to also claim an interference with the public right to protection of environmental resources.

In determining whether the interference is unreasonable, “a court must balance, in a general manner, the defendant’s right to engage in an activity, without undue restriction, against the public right to have its interest protected.”\textsuperscript{99} Factors used to make that determination include the severity of the interference, how easy it would be to avoid the harmful activity and the utility of the activity.\textsuperscript{100} An activity that has lead to property damage, especially given the scale of potential damages from global warming, would be considered very severe. Though the activities of energy production and resource extraction are of significant social importance, it could be argued that using improved technology could reasonably reduce the harmful emissions.\textsuperscript{101}

\textsuperscript{94} See e.g. Klar, \textit{supra} note 56 at 640.

\textsuperscript{95} Klar, \textit{ibid.} at 643; Swaigen et al., \textit{supra} note 46 at 51; \textit{Ryan v. Victoria (City)}, [1999] 1 S.C.R. 201.

\textsuperscript{96} Swaigen et al., \textit{ibid.} at 46-49.

\textsuperscript{97} \textit{Supra} note 90.

\textsuperscript{98} DeMarco, Valiante & Bowden, \textit{supra} note 93 at 237; see also Stewart A.G., Elgie & Lintner, Anastasia M. “The Supreme Court’s Canfor Decision: Losing the Battle but Winning the War for Environmental Damages” (2005) 98 U.B.C. L. Rev. 223.

\textsuperscript{99} Charles & VanderZwaag, \textit{supra} note 71 at 101; see also Klar, \textit{supra} note 56 at 643.

\textsuperscript{100} Klar, \textit{ibid.} at 644.

\textsuperscript{101} De Souza, “Oilsands could ease greenhouse effect, study says”, \textit{supra} note 52.
c) Standing

The public nuisance action is usually reserved for the A.G. The A.G. of a Canadian province, for example Ontario, could sue for damages caused to public property and expenses related to protecting it. As discussed above, the A.G. arguably would also be able to sue for environmental damage *per se*.

There are several reasons why the A.G. may not launch such an action, not the least of which is that some of the major greenhouse gas polluters, such as the Ontario Power Generation, may be Crown corporations. It is therefore important to know whether private parties, such as nongovernmental organizations, would be granted standing in a public nuisance action. Traditionally, public nuisance is only open to private parties, if they have received authorization from the A.G. or if they have suffered "special damage." Special damage is "particular, direct and substantial damage over and above that sustained by the public at large." One way to meet the special damage requirement is if the public nuisance has caused property damage or personal injury. The property damage caused by global warming could potentially affect many private property owners and these individuals would be given standing in a public nuisance suit. It is far less clear whether any private party could sue for environmental damages.

Since *Hickey v. Electric Reduction Co. of Canada Ltd.*[^106^], which confirmed the “special damage” rule in Canada, the Supreme Court of Canada has substantially expanded the scope of public interest standing in constitutional and administrative law, while at the same time increasingly recognizing the central importance of environment to the Canadian public. The special damages rule has been roundly criticized and some believe that it would be highly appropriate to allow public interest standing for environmental cases. Nevertheless, that step has not yet been taken and would present a significant obstacle.

In Ontario, section 103 of the *Ontario Environmental Bill of Rights, 1993 [EBR]*[^109^] has partially addressed this problem by abolishing the special damage requirement for “environmental harms” under the *EBR*. It allows a private party to bring an action for public nuisance causing environmental harm absent special injury if he or she “has suffered or may suffer direct economic loss or direct personal injury.” In order to avail him- or herself of this provision, a plaintiff must have suffered or expect to suffer some direct injury. It should also be noted that damage awards are not allowed under this section, and the plaintiff would be limited to seeking injunctive relief. It appears that, even in Ontario, a nongovernmental organization could not sue in public nuisance for environmental damages *per se*, since it is not likely to have suffered any direct damage itself.

In summary, the identity of the plaintiff determines to what extent public nuisance could be relied on in litigation for the damages of global warming. The A.G. could sue for damages to public property and, in its *parens patriae* capacity, for

[^102^]: E.g. lack of resources, political concerns, financial interests, see Elgie & Lintner, *supra* note 98 at 57.

[^103^]: Charles & VanderZwaag, *supra* note 71 at 101; Klar, *supra* note 56 at 647; Swaigen et al., *supra* note 46 at 52.


[^108^]: For an extensive discussion of the benefits of allowing public interest standing for environmental cases, see Elgie & Lintner, *supra* note 98 at para. 57-66.


[^110^]: *Grace v. Fort Erie, supra* note 105 at para. 84. (This would include any harm to animal or plant life or to ecological systems in Ontario, which would clearly be caused by e.g. a drop in water levels of the Great Lakes, one of the possible consequences of global warming).

[^111^]: Swaigen et al., *supra* note 46 at 61.

[^112^]: Charles & VanderZwaag, *supra* note 71 at 104.
private injuries suffered by the citizens of the province. The A.G. could probably also sue for environmental damages per se. A private individual can rely on public nuisance if he or she has suffered direct property damage or personal injury. Section 103 of the EBR may allow that individual to also seek an injunction to prevent environmental damages. A non-governmental organization that has not suffered any particular damage could only sue for environmental harms if courts are prepared to accept public interest standing in public nuisance claims for environmental protection.

d) Causation

One of the most challenging aspects of any climate change action, be it in negligence or nuisance, is proving the causal link between the activity of the defendant and the alleged damage. A plaintiff in public nuisance would have to demonstrate a causal connection between the defendant’s carbon dioxide emissions and the event that constitutes the interference with the public good, e.g. the inundation, drought or heat wave. The global warming problem features many of the same judicial challenges, and more, that have already been identified in the “toxic tort” cases. It is a perfect example of the “transformation in the character of the environmental crisis” that has proven difficult to resolve with traditional regulatory tools and judicial rules. Global warming possesses at least the following features that complicate the proof of causation:

- The greenhouse effect is not directly observable nor can it be easily tested or proven by experimentation.
- The connection between higher global temperatures and some of its possible consequences is obscure and difficult to prove.
- The global climate is complex and subject to significant natural variation. It is difficult to ascertain whether higher temperatures or an increased frequency of hurricanes are simply manifestations of natural variation or “abnormal” and connected to man-made causes.
- Even if the general effects of global warming are accepted as provable, it is even more difficult to prove that a single event is causally connected to global warming (“specific causation”). It is one thing to show that an increasing pattern of hurricanes is tied to the greenhouse effect, but quite another to prove that one particular hurricane is caused by carbon dioxide emissions. On the other hand, where the alleged effect is not a recurring natural phenomenon, but a gradual departure from a previous constant, as is the case for rising sea levels and thawing permafrost, specific causation is more easily found.
- Climate change is global in cause and effect: there are innumerable industrial and non-industrial sources of greenhouse gas pollution around the world, and the effects of global warming will also manifest themselves globally.
- Greenhouse gases work cumulatively: the current concentration of atmospheric carbon dioxide is a result of over 200 years of excessive pollution and today’s emissions will contribute to the global warming problem for decades to come.

It quickly becomes evident that the general “but for” test is not workable in this context. How could it be proven that, but for the emissions of one or even several defendant polluters, the alleged injury would not have occurred, given the

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113 For an example where the scientific proof of causation and damage was highly complex, so that the plaintiff was not able to convince a judge to grant an injunction against the spraying of pesticides in a nuisance action, see Palmer v. Nova Scotia Forest Industries, [1983] N.S.J. No. 534; 60 N.S.R.(2d) 271 (S.C.).

114 For an overview, see Charles & VanderZwaag, ibid. at 109-130.


116 For extensive discussions of causation problems in global warming suits, see Bertagna, supra note 20 at 438-39; Merrill, supra note 60 at 297-99; Grossman, supra note 14 at 22-29; Drabick, supra note 60 at 523-24; Penalver, supra note 8 at 578-87.

117 Penalver, ibid. at 568.

118 “If it can be proved, on the balance of probabilities, that the plaintiff’s injury would not have occurred but for the defendant’s negligent conduct, the causal connection is established.” Klar, supra note 56 at 389.
fact that there have been so many other polluters across both space and time. The best evidence available would probably be statistical evidence about the occurrence of certain effects of global warming that would allow a court to draw the conclusion they are more likely to be caused by global warming than any other cause. Courts have recognized the inadequacy of the but-for test in difficult cases and have developed alternative approaches. Where more than one factor is part of the cause of the injury, it is sufficient that the defendant’s activity “materially contributed” to bringing about the injury. The Supreme Court of Canada has also stated in Snell v. Farnell that “the principles of proof must not be applied too rigidly” and that “causation is a practical question of fact, which can best be answered by ordinary common sense.” The court accepted that, in certain circumstances, an inference of causation can be drawn, even where scientific evidence is not able to prove that the connection between the defendants activity and the injury is probable.

This would appear to give considerable flexibility to courts to fashion creative solutions if there are strong arguments that fairness requires so. One of the most famous legal devices was crafted in Sindell v. Abbott Laboratories, where a cancer victim sued the manufacturers of a drug that was linked to her illness. The drug was produced by numerous companies using the same formula, which made it impossible for the plaintiff to identify who was responsible. She sued the largest producers, making up about 80% of the total market in the drug, and the court awarded her damages, which were apportioned to the defendants according to their market share. The case remains controversial and “market share liability” has never been adopted in Canada. Some commentators have advocated resorting to a similar version of proportional liability in global warming cases.

As previously mentioned, there are significant arguments that support shifting the costs of some of the damages of global warming onto large-scale polluters. It would be a reflection of the polluter-pays principle and an avenue to internalize some of the costs of climate change. This would generate incentives for producers to adopt more efficient technology, would make the development of alternative energy sources relatively more attractive and would promote conservation. These considerations, plus a general sense that compensation should be available for those disproportionately affected by global warming, could encourage a court to develop novel approaches to causation. However, there remain many difficulties that make it unlikely that any Canadian court would venture that far.

Even if some of the top industrial polluters in Canada could be joined as defendants in an action, they would still only make up a minor share of total greenhouse gas emissions in Canada, and a much smaller share of total global emissions. That share becomes ever smaller if one considers that greenhouse emissions of the past also contribute to the problems of the present. At what point would the contribution of the defendants in question cease to be “material” and what would their approximate “market share” be? Courts would also likely consider the fairness to the defendant. Can the defendants be held responsible for the entire damage of every storm surge or drought? What criteria would one use to limit that liability? Perhaps most importantly, a court will be discouraged to intervene in an area that requires difficult balancing of scientific, social, and political considerations. It is unlikely that courts would want to impose tort liability in such difficult circumstances.

6) The Desirability of Using Litigation

a) The Institutional Inadequacy of Courts

There are a number of principled objections to climate change litigation, regardless of the likely outcome of such actions. Not surprisingly, industry representatives in the U.S. believe that litigation is counterproductive, and would undermine

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119 Penalver, supra note 8 at 582.
121 Snell v. Farnell, (1990), 72 D.L.R. (4th) 289 at 299.
122 607 P. 2d 924 (U.S. Cal, 1980).
123 Penalver, supra note 8 at 593; Lipanovich, supra note 60 at 459-62; Grossman, supra note 14 at 32.
cooperative approaches that have already resulted in voluntary reductions of carbon dioxide. Even some A.G.’s in U.S. states that are not directly involved in the current litigation efforts have stated their preference for a more careful and reasoned approach. It is often questioned whether courts as an institution are competent to deal with the complexities of global warming. Litigation necessarily focuses on a particular set off plaintiffs and defendants, whereas the global warming problem basically implicates the entire society and even future generations, both in terms of who is a polluter and who is a potential victim. This suggests that any solutions should originate in the political rather than the legal arena. "Private litigation, relying on happenstance of a motivated and financially able plaintiff, cannot replace the need for long-term planning processes." Beyond that, there is a significant international component to greenhouse reduction efforts that arguably cannot be addressed by one country alone, let alone by a handful of companies.

Potential climate change litigants thus not only have to overcome difficult legal hurdles, they must also operate in a forum that has significant limitations. This begs the question what would motivate anyone to pursue such a course of action in the first place.

b) Litigation as a Last Resort or as a Strategic Tool?

Climate change litigation is largely driven by frustration over government inaction. One of the A.G.’s behind Massachusetts v. EPA says it was a “lawsuit I wish I didn't have to bring.” An important goal of global warming litigation is clearly to increase the political pressure on governments to make effective greenhouse gas control an urgent political cause. It is sometimes compared to earlier litigation efforts that have led to government regulation, such as lawsuits regarding the dangers of smoking or acid rain. It should be noted that the litigation against tobacco companies was in large part driven by A.G.’s and used to pressure tobacco companies into large settlements for the benefit of the public purse. One of the possible lawsuits described in this paper would see the victims of global warming and the Government of Canada pitted against each other and not acting in concert. Clearly it would be difficult in that case to exert the same amount of pressure on the defendants.

There is another set of possible benefits of global warming lawsuits that apply even where the action itself is almost certain to fail. Litigation may serve as a “wake-up call” to corporations to take their environmental responsibility more seriously. The publicity of a lawsuit may have a negative effect on investor confidence and stock prices of a company, which provides a powerful financial incentive that may force executives to address the environmental performance of their company, especially if combined with shareholder activism on the same point.

The publicity associated with a trial against powerful corporate interests would also provide an opportunity to educate the public at large about the dangers of global warming. As expressed by one of the A.G.’s supporting Massachusetts v. EPA: "if we accomplish nothing else … American people will learn a lot about the dangers and damage done by carbon dioxide." One of the most interesting aspects of climate change litigation is that it has the potential to change the “narrative” of the global

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124 Drabick, supra note 60 at 508.
125 Ibid. at 508-09.
126 Grossman, supra note 14 at 6.
127 Charles & VanderZwaag, supra note 71 at 87.
128 Baker, supra note 60 at 547.
129 A.G. Panel, supra note 67 at 339.
130 A.G. Panel, ibid. at 343; see generally Lipanovich, supra note 60.
131 Harper, supra note 8 at 696.
133 A.G. Panel, supra note 67 at 341.
warming issue. Much of the current discussion about global warming revolves around the certainty or uncertainty of the underlying scientific evidence, the threats to the economy and job market that could result from strict restrictions, the cost of regulation to ordinary consumers, and the loss of general competitiveness of the national economy. In this storyline, the threat of global warming is vague and regulatory responses to it have a tendency to appear heavy-handed and highly disruptive. A court case could reveal a different perspective. It might feature a powerless minority, which is fundamentally threatened, as the plaintiff. This could be a Northern community grappling with the effects of melting permafrost or a coastal community facing inundation. This could be contrasted with evidence of industries actively resisting change and governments unwilling to confront private interest groups, despite being fully aware of the dangers of inaction. Litigation thus has the potential to make global warming more tangible and concrete and can expose the unfairness created if government and industry don’t respond.

c) Conclusion

The complexity, reach and novelty of the global warming problem present significant difficulties for potential plaintiffs in a climate change tort action. The concept of legislative immunity is firmly established in Canadian law and almost absolutely protects government action before it reaches the operative stage. Yet it is clearly the policy decisions taken by the Canadian government that have so far been lacking and that actors concerned with climate change seek to influence. As emphasized in the case law, this should ideally be achieved in the ordinary political process. However, there is ample indication that environmental organizations currently are more or less excluded from the political decision-making process on climate change. By way of example, the current Government of Canada has exempted the industries that are responsible for a large part of Canada’s rise in greenhouse gas emissions, the oil and energy industries, from mandatory reduction targets for the time being. It promises to only introduce such limits after “consultation” with these same industries. A primary goal in a climate change lawsuit against the federal government could thus be to introduce an important perspective into the debate on climate change, a voice that is finding it difficult to assert itself in the traditional political processes. However, given the strength of the principle of legislative immunity, there is a distinct possibility that a lawsuit would fail without a court having to deal with the merits of the claim.

A public nuisance action against major greenhouse gas polluters also faces significant obstacles, but precedents show that there is some flexibility in the principles of tort. A court would likely have to examine and address the scientific evidence behind global warming closely. There would be sufficient room for a plaintiff to present a compelling case in a way that may attract significant public attention. Ideally, one would hope for a well-funded plaintiff, such as an A.G., who also has access to a wide range of data to underpin possible damage claims. While some may dismiss the current litigation efforts in the U.S. as a publicity stunt, there is also a real financial concern driving these actions. As the effects of global warming become more pressing, it will over time be perceived as a real economic cost, and not merely a lamentable environmental concern. A point may be reached, where Canadian provincial governments feel compelled to try to recoup public costs from somewhere, and industrial polluters are one possible target. A lawsuit driven by private litigants would likely be smaller in scope, but might send an important signal to potential defendants: if they do not actively confront the problem of rising emissions, there will be increasing public and private pressure to hold them accountable for their actions.

It must be said that the common law actions analyzed in this paper are in many ways imperfect tools in the struggle against global warming, and they don’t promise to lead to direct success. They could however have a role to play, alongside other legal instruments, in a broader strategy to mount public pressure against large polluters and against an inactive government. Tort law’s aspiration to restore a fair balance between the victims and perpetrators of damage adds a new perspective that could make a valuable contribution to the public debate on climate change.

Written in December 2006 by Thomas Trachsler

134 Baker, supra note 60 at 539-43.
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LEGISLATION


*Environmental Protection Act*, R.S.C., 1985, c. 16.


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