

Climate change, federalism, and the judiciary

Milan Ilnyckyj

2013-08-28

“Individuals and entire communities can be eaten up by those possessed by unrestrained appetites.”

Borrows, John. “Seven Generations, Seven Teachings: Ending the Indian Act.” 2008. p. 13

In the various countries where it structures politics, federalism is ordinarily confronted with problems that have existed for centuries. In Canada, these include regional variations in culture, religion, language, prosperity, economic structure, and so on. By contrast, environmental issues as a general category are quite modern, particularly global environmental problems. Issues like local air pollution would probably have been recognized as appropriate targets for public policy as far back as the beginning of industrialization, when pervasive coal smoke gave London its undeserved reputation for fog. Issues like local water management go back to the earliest roots of human civilization, and are indeed the subject matter of some of the earliest legal rule-making. Truly global environmental issues like stratospheric ozone depletion, the widescale over-exploitation of global fisheries, and climate change have only seriously come to the attention of policy-makers in the last fifty years. They constitute a novel challenge to federalism — not only because of their comparative recency, but because of the special features that distinguish them from other public policy problems and which generally make them challenging to solve. Unfortunately, the kind of actions that are generally capable of mitigating the seriousness of the climate change problem often involve unpopular restrictions on the behaviour of individuals and states.¹ Since federalism is often instituted as a mechanism for managing diversity within divided societies, it may be that developing, implementing, and operating effective

¹Memorably, British journalist George Monbiot wrote: “[T]he campaign against climate change is an odd one. Unlike almost all the public protests which have preceded it, it is a campaign not for abundance but for austerity. It is a campaign not for more freedom but for less. Strangest of all, it is a campaign not just against other people, but also against ourselves.”

climate change policies will be especially challenging within federalist states.

Climate change and ozone depletion are large-scale market failures in which socially optimal outcomes are not achieved because those causing the problem suffer only a small fraction of the total harm being created, as well as because of lags between impacts and effects, and because of incomplete information available to and comprehensible by policy-makers. They are also hugely challenging problems of coordination, in which the individual choices of people all over the planet must be coordinated if socially optimal outcomes are to be achieved. Individual rational actors with comparatively short lives will not make choices that best balance the benefits of energy use for their own generation with the costs associated with a destabilized climate for all the generations that will follow. Instead, they face a severe temptation to extract utility from the immediate use of fossil fuels, while imposing the enduring costs of that choice on absent others. Distinct from the costs of climatic destabilization taken to any ordinary extent, there is also the possibility that positive-feedback cycles in which an input magnifies the rate of its own increase could lead to abrupt and catastrophic scenarios that may threaten the very existence of human civilization.²³ Climate change and ozone depletion are distinguished from many other policy problems as a result of their potentially catastrophic nature; ozone depletion taken to the extent of permitting ultraviolet-C radiation to reach the Earth's surface would have devastating consequences for humanity and non-human nature, while climate change threatens to shift conditions all over the planet into a regime never experienced before by human beings.⁴ Imposing this kind of risk may be ethically distinguishable from imposing varying amounts of harm that are not likely to add to catastrophe. Moral philosopher Henry Shue equates our willingness to impose the risk of catastrophic or runaway climate change

²See: Whiteman, Hope, and Wadhams, "Vast costs of Arctic change".

³Hansen, *Storms of My Grandchildren*.

⁴For an instructive analysis of the global environmental politics of ozone depletion, see: Litfin, *Ozone Discourses: Science and Politics in Global Environmental Protection*.

on future generations as akin to playing Russian roulette with another person's head.⁵ Even if you pull the trigger and the hammer falls on an empty chamber, the person has strong grounds to object to the risk that you have imposed on them.

There are therefore several senses in which global environmental problems like climate change represent a novel challenge to federalist systems of government. These include the scientific novelty of the phenomena in question, the unprecedented degree of global cooperation required for their effective management, and the complexities associated with the risk of catastrophic outcomes. Together these novel factors influence how federalist states engage with global environmental problems, including in terms of their external relations with other states, their domestic politics, and the formulation and implementation of policy.

Kathryn Harrison's 1996 book *Passing the Buck: Federalism and Canadian Environmental Policy* includes important insights into the historical evolution and structural features of Canadian federalism, in the area of environmental policy. Harrison evaluates various explanations for the relative inactivity of the federal government in environmental protection, including constitutional constraints and provincial resistance.^{6,7} She concludes that neither of these explanations are particularly convincing, and that a better account focuses on a public choice analysis of costs and benefits within Canada's federal system:

Environmental protection typically involves diffuse benefits and concentrated costs, and thus offers few political benefits but significant political costs. One can expect opponents of environmental regulation to be better organized, informed, and funded than the beneficiaries. Moreover, since environmental protection typically involves the imposition of costs on business, strengthening environmental standards can run counter to voters' concerns about the econ-

⁵Shue, "Deadly Delays, Saving Opportunities", p. 152.

⁶Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*, p. 4.

⁷See also: Harrison and Sundstrom, *Global commons, domestic decisions: The comparative politics of climate change*.

⁸Fafard and Harrison, *Managing the environmental union: intergovernmental relations and environmental policy in Canada*.

omy and unemployment. Thus, the absence of electoral incentives, rather than constitutional constraints or provincial opposition per se, may explain why the federal government did not pursue a larger role in environmental protection throughout the 1970s and early 1980s.⁹

Harrison describes how, particularly during periods when the public is relatively uninterested in environmental issues, the two levels of government engage in “buck-passing” and the formulation of symbolic policies with little practical effect.¹⁰¹¹¹² The general public and the media go through cycles of engagement and disengagement when it comes to the environment, and while the peaks of those cycles drive political activity and institutional change, interest is not sustained for long enough to generate effective implementation.¹³¹⁴ By the time politicians and Canada’s bureaucratic machinery have begun to move in response to a public demand for stronger environmental protection, the level of public interest has generally fallen away, sometimes shifting toward contradictory priorities like boosting economic growth without consideration for environmental consequences.¹⁵

The structural factors identified by Harrison may be even more constrained in the present context, in relation to climate change. Moral philosopher Stephen Gardiner describes climate change as a “perfect moral storm”, with international, intergenerational, and theoretical dimensions.¹⁶ Each of these dimensions of the “storm” exacerbates the public choice problem: citizens of other states are not represented in Canada’s political institutions, members of future generations are similarly silent, and our political theories (particularly those involving political legitimacy) have not yet adequately incorporated the

⁹Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*, p. 5.

¹⁰For additional commentary on such “buck-passing”, see: Stevenson, “A New Perspective on Environmental Rights after the Charter”.

¹¹Rutherford and Muldoon, “Designing an environmentally responsible constitution”.

¹²Estrin and Swaigen, *Environment on trial: a guide to Ontario environmental law and policy*.

¹³See also: Downs, “Up and down with ecology: The issue attention cycle”.

¹⁴Farber, “Politics and procedure in environmental law”.

¹⁵Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*, p. 171.

¹⁶Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change*.

special features of climate change. The temporal dimension of the “storm” may be especially challenging in the context of democratic politics. Not only are most of those who will be affected by today’s climate and energy choices voiceless members of future generations, but in order to be effective climate change policies must be sustained for many decades. You cannot have one government that imposes a carbon tax, followed by another that scraps it and goes back to subsidizing fossil fuel use. Politicians must therefore take actions which are not only primarily for the benefit of those who cannot vote, but which also risk being undermined by the choices of their successors.¹⁷

There are many ways in which the efforts of federalist governments to cope with climate change could be studied, ranging from examination of the parliamentary record to comparative analysis of climate policies adopted in various states.¹⁸ My intent here is partly to examine the history of climate politics in Canada, with a focus on federal-provincial relations. I will also examine some of the cases in which Canada’s courts have commented on climate change, along with a handful of precedents from the United States.

The value of looking at the activity of the courts relates closely to the special characteristics of climate change: namely, the need to develop new political arrangements in which obligations to control pollution are given concrete form and in which appropriate circumstances and mechanisms for compensating victims can be developed. The unfolding of law through judicial decisions can be seen as a kind of conversation with legislatures, in which some approaches are endorsed and re-affirmed in a form that is highly relevant for governmental and corporate actors, and in which other approaches are rejected as inadequate or

¹⁷Beyond the practical political issues that are associated with the temporal spread of climate change impacts and effects, Henry Shue has highlighted the intergenerational character of the problem as a key factor in climate ethics. Future generations have no means of harming us, but we have an almost unlimited capacity to impose harm upon them. To impose climate change upon future generations is to impose “damage or the risk of damage on the innocent and defenseless”. Shue, “Deadly Delays, Saving Opportunities”.

¹⁸For instance, forthcoming work by Hamish van der Ven will provide a comparative analysis of climate change policies adopted in ten Canadian provinces, including the broad-based carbon tax implemented in British Columbia in 2008 and the credit-based trading system implemented in Alberta in 2007.

misaligned with important precedents or principles. Judges are also representative of society's elites, and therefore the evolution of jurisprudence is demonstrative of the evolution of elite opinion. Harrison draws attention to how the judiciary occupies a specialized role within Canada's political architecture which may leave judges freer than other agents to pursue an agenda of environmental protection.¹⁹ This accords with Peter Russell's analysis in *The Judiciary in Canada: The Third Branch of Government*, in which he highlights the "adjudication role" with "exceptional constraints and normative expectations".²⁰ In cases where a conflict arises between different organs of government, or between competing rights-based claims, the task of clarifying the situation often falls to judges.

In Canada, the United States, and internationally, courts have increasingly been called upon to render judgment on issues relating to climate change, including upon the obligations of governments and other entities. So far, courts have not gone far in asserting substantive obligations to refrain from polluting for the sake of the climate, and have often deferred to the choices of democratic governments, even when they contradict pollution reduction targets that governments have established for themselves or are bound to under the law. The decision-making process of the courts is precedent-focused and backward-looking, defined by the principle of *stare decisis*. This may form an institutional impediment to rendering equitable decisions in areas where novel factors and phenomena are at work. Courts look to precedents to decide how to act and — at least in the case of climate change — they do not yet have a large body of decision-making to refer to.

1 Canada's conflicting targets

Evaluating the success of Canada's federal climate change policy is made more complicated by the contradictory targets that have been adopted. Canada is a signatory to the

¹⁹Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*, p. 173.

²⁰Russell, *The judiciary in Canada : the third branch of government*, p. 40.

1994 *United Nations Framework Convention on Climate Change* (UNFCCC), the objective of which is to “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.²¹ Stabilizing greenhouse gas (GHG) concentrations at any level requires cutting them to the level that can be continuously absorbed by slow processes like the weathering of rock. This requires the reduction of GHG pollution to a very small fraction of present levels.²² Subsequent to the UNFCCC, states including Canada widely endorsed a limit of 2°C above pre-industrial temperatures as the threshold at which climate change becomes “dangerous”.²³ Although it is challenging to identify precisely what carbon dioxide concentration corresponds with 2°C of warming, reasonable estimates are generally in the range between 350 parts per million (ppm) and 450 ppm. Global emission trajectories consistent with stabilization at such levels require much more aggressive and sustained pollution reduction than any state has achieved so far.

At the same time as it has endorsed these international targets, Canada’s federal government has established its own GHG targets. At present, it aims to reduce total GHG emissions to 17% below 2005 levels by 2020.²⁴ In order to stabilize global GHG concentrations at a level consistent with the 2°C target, global emissions must peak rapidly and fall quickly.²⁵²⁶²⁷ Even if Canada’s rate of reduction is to be the same in percentage terms as that of all other countries — an approach that is arguably deeply unfair, given Canada’s high historical and *per capita* emissions — the federal percentage target is not compatible

²¹ Article 2: Parties to the United Nations Framework Convention on Climate Change, *United Nations Framework Convention on Climate Change*.

²² Eby, Zickfeld, and Montenegro, “Lifetime of Anthropogenic Climate Change: Millennial Time Scales of Potential CO₂ and Surface Temperature Perturbations”.

²³ The Heads of State, Heads of Government, Ministers, and other heads of delegation present at the United Nations Climate Change Conference 2009 in Copenhagen, *Copenhagen Accord*.

²⁴ Environment Canada, *Canada’s Action on Climate Change*.

²⁵ Allison et al., *The Copenhagen Diagnosis 2009: Updating the World on the Latest Climate Science*, p. 7.

²⁶ See also: Hansen et al., *Target Atmospheric CO₂: Where Should Humanity Aim?*

²⁷ Hoffmann, “Global Climate Change”, p. 3.

with the temperature target. If on the basis of relative wealth, historical emissions, or *per capita* emissions Canada is to cut GHG pollution more rapidly than other states, as part of an equitable global distribution of effort, the 17% target is still-more inadequate.

Even deciding on the baseline to measure from is an area of contention. For instance, federal climate change policy has often been based on a ‘gapology’ approach, in which an economic model is used to project where emissions would go in the absence of any policy, with the target described as a reduction below that notional figure.²⁸ In other cases, targets have been selected that do not directly correspond to reductions in GHG pollution; for instance, ‘improvements’ in oil sands operations are often expressed in terms of reduced emissions per barrel of output, even as increasing output is substantially increasing total emissions. Fugitive emissions from methane leaks are also frequently excluded, and induced emissions from phenomena like arctic permafrost melting in response to warming are always excluded from national targets, despite having just as much impact on the physical climate as deliberate GHG release.

The inconsistency of Canada’s temperature and emission level targets can be interpreted in several ways, including as a negotiating position designed to encourage greater effort by other major emissions, or simply as demonstrative of a lack of seriousness about achieving the 2°C target. Hoffmann and others have characterized Canada alongside the United States and major oil producers, as a country that has “work[ed] to both reduce and slow the response to climate change and push for concomitant Southern actions”.²⁹ The government of Stephen Harper, in particular, has attributed primarily rhetorical effort to the task of environmental protection, while undertaking substantial legislative and regulatory changes to aid the growth of Canada’s hydrocarbon industries. If Canada at the federal level has never been serious about meeting its stated climate targets — much less those

²⁸See: Macdonald, Monstadt, and Kern, *Allocating Canadian greenhouse gas emission reductions amongst sources and provinces: learning from Germany and the EU*, p. v.

²⁹Hoffmann, “Global Climate Change”, p. 10.

consistent with the 2°C — it arguably becomes more challenging to evaluate the relationship between Canada’s system of government, the policies that have been promulgated, and the outcomes that have been produced.

2 The division of powers

The idea that individual activities like heating a home or traveling from place to place could, in aggregate, threaten the habitability of the entire planet could never have occurred to the authors of the 1867 British North America Act. Nonetheless, the division of powers established in that constitutional document and updated and interpreted across Canadian history is profoundly relevant to climate change policy. Section 92A of the Constitution Act, added in 1982, further reinforces provincial jurisdiction over natural resources, including their exploration, development, conservation, and management.³⁰³¹ The fundamental connection between burning fossil fuels and worsening climate change means that virtually any effective climate change regulation will arguably encroach upon this area of provincial jurisdiction. Furthermore, Canada’s recent history has involved efforts — notably Pierre Elliott Trudeau’s National Energy Program — which have been perceived by energy-exporting provinces as undue federal interference in their provincial economic base. That legacy of resentment produces special sensitivity in the area of energy policy-making.

Despite the extensive authority granted to the provinces in the area of natural resources, there are various legal mechanisms through which the federal government has the power (and sometimes the obligation) to be involved in environmental issues.³² These include

³⁰Government of Canada, *Constitution Act, 1982*.

³¹See also: Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*, p. 34.

³²Non-climate-related precedents concerning the federal government’s obligations to act on some environmental issues include the 1994 Supreme Court *Grand Council of the Crees* decision, as well as *Oldman Dam*. See: *ibid.*, p. 40.

the federal government's power to regulate fish habitat, the criminal law power, powers concerning agriculture, and the broad "Peace, Order, and Good Government" responsibility.³³ Indeed, the courts have sometimes compelled the federal government to take action on environmental protection, even when it would have chosen not to do so.³⁴

As a cross-cutting issue that touches upon everything from long-term investment planning to ecosystem integrity, climate change is of interest to a wide range of organizations within Canada's federal government. Donald Savoie identifies how:

Canada's climate-change strategy in 2004 involved fourteen departments and agencies managing a complex series of 250 programs involving, among others, the international community, public education, transportation, and industrial policies as well as a multitude of activities ranging from incentives to retrofit housing to regulations to ensure energy efficiency.³⁵

This complexity increases further when the role of provinces and municipalities is taken into consideration. The division of powers within Canada complicates issues associated with climate change in complex ways. For instance, George Hoberg identifies at least five dimensions across which proposed oil sands export pipeline projects vary, including cases where a "risk-benefit separation" exists between the provinces that would profit most from their operation and those that would bear the greatest burden of associated short-term risks.³⁶ This division is most acute in the case of the proposed Northern Gateway pipeline, which would run from Alberta to Kitimat, on the coast of British Columbia. One key argument employed by the government of British Columbia when it expressed its skepticism about the project to the National Energy Board was the fact that B.C. would bear 100% of the risk of marine spills and nearly 60% of the risk from spills on land, while nearly

³³See also: Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*, p. 37, 39, 42, 45, 66.

³⁴*Ibid.*, p. 53.

³⁵Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom*, p. 176–7.

³⁶Hoberg, *The Battle over Oil Sands Access to Tidewater: A Political Risk Analysis of Pipeline Alternatives*, p. 8.

70% of the total economic benefits associated with the project are expected to accrue to Alberta, compared with 17% for B.C.³⁷ In some cases, at least, the splits in authority characteristic of federalism may accidentally serve to advance environmental protection goals, in that export capacity restrictions are one of the few mechanisms constraining the growth in Canadian GHG pollution now.

Another important factor in explaining relatively weak outcomes in environmental protection is the way in which authority for such behaviour is often vested in environment ministries that have few allies within government. The very existence of a federal environment department charged with such matters as “preservation and enhancement of the quality of the natural environment, including water, air and soil quality” can prompt other departments to see such concerns as outside their purview and being effectively managed by someone else.³⁸ At the same time, influential ministries like the Department of Finance and Natural Resources Canada see opportunities to raise tax revenues, employment, and exports and pursue those opportunities in an effective and coordinated way, while the environment department fails to develop the authority and political capital required to achieve its mandate.

Douglas Macdonald, Jochen Monstadt, and Kristine Kern look to Australia, Germany, and the European Union for guidance on how Canadian GHG emissions reductions might be divided amongst provinces and pollution sources.³⁹ They conclude that two factors are critical for understanding Canada’s uncoordinated climate policies: “the weakness of the intergovernmental system used to develop co-ordinated federal-provincial policy” and “their failure to address the fact that reduction costs are much higher in some parts of

³⁷Hoberg, *The Battle over Oil Sands Access to Tidewater: A Political Risk Analysis of Pipeline Alternatives*, p. 14.

³⁸Government of Canada, *Department of the Environment Act*.

³⁹Macdonald, Monstadt, and Kern, *Allocating Canadian greenhouse gas emission reductions amongst sources and provinces: learning from Germany and the EU*.

the country, particularly Alberta and Saskatchewan, than in others”.⁴⁰ By contrast, the European Union has twice managed the challenging task of splitting up an emission reduction target between member states, in 1997–8 and in 2008. Macdonald et al. conclude that such an allocation task can be successfully carried out through a consensual decision-making process, like the one that exists in federal-provincial relations in Canada, that institutional strengthening can help, that issues of equitable cost-sharing must be introduced at the outset, and that the federal government cannot act unanimously in establishing a post-2020 target. The 18 recommendations they list may well be useful for a federal government with genuine determination to encourage progressive action on mitigating climate change through federal-provincial cooperation. Their applicability is less clear in the case of a government that has generally been dismissive of climate change concerns — except as a matter of public relations, and when fending off the imminent formation of a coalition of opposition parties — and which sees the acceleration of oil sands development as key to the national interest. As Skogstad and Kopas note, the history of environmental regulation in Canada has involved few efforts by provinces and the federal government to assert their authority in the aim of producing more effective environmental protection; more often, both federal and provincial governments have been willing to ignore problems of pollution.⁴¹

3 Judicial decisions

3.1 Canada

The Center for Climate Change Law at the Columbia Law School has assembled lists of U.S. and non-U.S. litigation related to climate change, including eight cases from Canada

⁴⁰Macdonald, Monstadt, and Kern, *Allocating Canadian greenhouse gas emission reductions amongst sources and provinces: learning from Germany and the EU*, p. v.

⁴¹Skogstad and Kopas, “Environmental policy in a federal system: Ottawa and the provinces”.

between 2007 and 2013.⁴²⁴³⁴⁴ These eight cases are not the only ones in Canada in which “climate change” or “global warming” is mentioned. A LexisNexus Quicklaw search of all Canadian court cases produces 35 results in which the phrase “climate change” occurs, including federal court judgments, Supreme Court of Canada rulings, and judgments in provincial and territorial courts. Similarly, the phrase “global warming” comes up in 15 precedents, from a variety of courts.

The eight cases noted by the Center for Climate Change Law are:

- *Citizens of Riverdale Hospital v. Bridgepoint Health Services* (2007),
- *Friends of the Earth v. The Governor in Council et al.* (2008),
- *Pembina Institute for Appropriate Development, et al v. Attorney General of Canada and Imperial Oil* (2008),
- *Weaver v. Corcoran and Others* (2010),
- *Re River District Energy Limited Partnership* (2011),
- *Re 2012-2013 Revenue Requirements and Rates In the Matter of the FortisBC Energy Utilities* (2012),
- *Turp v. Canada (Minister of Justice) et al.* (2012), and
- *In the Matter of FortisBC Energy Inc.: Amendment to Rate Schedule 16 on a Permanent Basis* (2013).

Not all of these cases led to positive action being taken in addressing climate change. In *Citizens of Riverdale Hospital v. Bridgepoint Health Services*, the Ontario Superior Court of Justice determined that CO₂ emissions had been adequately considered in plans to demolish a hospital.⁴⁵ Even here, the court implicitly endorses the view that CO₂ emissions are a

⁴²Gerrard et al., *Non U.S. Climate Change Litigation Chart*, p. 23.

⁴³Gerrard, Howe, and Barry, *Climate Change Litigation in the U.S.*

⁴⁴See also: Gerrard, *Global Climate Change and U.S. Law*.

⁴⁵Gerrard et al., *Non U.S. Climate Change Litigation Chart*, p. 111.

legitimate issue to be considered, both in public planning processes and in the deliberations of the judiciary.

In *Friends of the Earth Canada v. The Governor in Council et al.*, a federal court ruled that Canada's legislation to implement the *Kyoto Protocol* was "not justiciable" and that it could therefore not compel the government to follow it.⁴⁶⁴⁷ The Federal Court of Appeal affirmed the ruling of the lower court in 2009, and the Supreme Court of Canada declined to hear the appeal in 2010. A plausible motivation for these decisions is the historical hesitance of courts to engage themselves directly in matters of politics. The *Kyoto Protocol Implementation Act (KPIA)* of 2007 obligated the Minister of Environment to "prepare a Climate Change Plan that includes... a description of the measures to be taken to ensure that Canada meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol, including measures respecting... regulated emission limits and performance standards" within 60 days.⁴⁸ The law was passed by opposition parties during Stephen Harper's 2006–2008 minority parliament, over the objections of the Conservative government, which subsequently failed to lay out a plan to meet Canada's commitment under the *Kyoto Protocol*. Following the court's decision in 2008, a subsequent Harper government withdrew from the *Kyoto Protocol* in December 2011 and repealed the *KPIA* in June 2012. The whole episode highlights some of the awkwardness in the functioning of Canada's government during times of minority government. Under the principles of responsible government, only the government can obtain Royal Recommendations to introduce "involve the expenditure of public funds" into the House of Commons.⁴⁹ It is difficult to understand how the Government of Canada could produce and implement a plan for achieving its *Kyoto Protocol* targets without expending public funds. Coupled with the reluctance of the courts to

⁴⁶Gerrard et al., *Non U.S. Climate Change Litigation Chart*, p. 68.

⁴⁷See also: Ecojustice, *Canada facing legal challenge for breaking federal global warming law*.

⁴⁸Government of Canada, *Kyoto Protocol Implementation Act 2007 (Repealed 2012)*.

⁴⁹O'Brien and Bosc, *House of Commons Procedure and Practice, Second Edition*, Section 16. The Legislative Process - Structure of Bills.

impose a political decision on the government, this may help explain why the *KPIA* failed to produce *Kyoto Protocol* compliance on the part of Canada.

Turp v. Canada (Minister of Justice) et al. (2012) also concerns the *KPIA*.⁵⁰ This application for judicial review raised the questions of whether Canada's withdrawal from the *Kyoto Protocol* violated the *KPIA* and thus the rule of law; whether it violated the principle of the separation of powers; and whether it violated the democratic principle.⁵¹ The Federal Court dismissed the application.

In 2008 the Federal Court of Canada considered the case brought forward by the Pembina Institute that the environmental assessment conducted on Imperial Oil's Kearle project in the oil sands had been flawed and not taken climate change sufficiently into account.⁵² The court found Imperial Oil's claim that the "the adverse environmental effects of the greenhouse gas emissions of the Project would be insignificant" to be flawed, noting that:

According to Imperial Oil's EIA [Environmental Impact Assessment], the Project will be responsible for average emissions of 3.7 million tonnes of carbon dioxide equivalent per year, which equals the annual greenhouse gas emissions of 800,000 passenger vehicles in Canada, and will contribute 0.51% and 1.7% respectively, of Canada and Alberta's annual greenhouse gas emissions (based on 2002 data).⁵³

The court ordered limited action, calling for the matter to be remitted back to the panel which initially approved the project and directing them to "provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance".⁵⁴ In 2009, Imperial Oil announced the \$8 billion first phase of the Kearle Oil Sands project, producing

⁵⁰Gerrard et al., *Non U.S. Climate Change Litigation Chart*, p. 175.

⁵¹Federal Court of Canada - Noël, J. *Turp v. Canada (Minister of Justice) et al.*

⁵²Gerrard et al., *Non U.S. Climate Change Litigation Chart*, p. 116.

⁵³Federal Court of Canada, *Pembina Institute for Appropriate Development, et al v. Attorney General of Canada and Imperial Oil.*

⁵⁴*Ibid.*

110,000 barrels a day of bitumen.⁵⁵ The company also announced plans to expand the project in two further phases, eventually bringing up production to 300,000 barrels per day. Nonetheless, the establishes that there is some obligation to consider GHG pollution in the environmental assessment process, and some onus on the proponents of a project to present and justify mitigation measures.

Some of the decisions have limited importance for climate change policy-making in Canada. For instance, in the 2010 *Weaver* precedent, Professor Andrew Weaver alleged that the National Post had published “unjustified libels” against him “based on erroneous information”.⁵⁶ The *Re River District Energy Limited Partnership* decision of the British Columbia Utilities Commission is somewhat more substantive, but still has limited practical importance. The British Columbia Utilities Commission is an independent regulatory agency of the Provincial Government that regulates natural gas and electricity utilities. It was established by and operates under B.C.’s *Utilities Commission Act*.⁵⁷ In 2011, it considered a proposal from River District Energy Limited Partnership to “construct and operate a District Energy Utility in southeast Vancouver”.⁵⁸⁵⁹ The decision considers British Columbia’s energy objectives, including GHG emission reduction targets for 2012, 2016, 2020, and 2050.⁶⁰ The commission granted a Certificate of Public Convenience and Necessity to construct and operate the facility, which is intended to use natural gas for fuel initially and eventually transition to using waste heat from a waste-to-energy facility as its primary energy source.⁶¹ The commission evaluates the climate change impact of the

⁵⁵Imperial Oil Ltd. *Imperial Oil Approves First Phase of Kearn Oil Sands Project*.

⁵⁶Gerrard et al., *Non U.S. Climate Change Litigation Chart*, p. 119.

⁵⁷Government of British Columbia, *Utilities Commission Act*.

⁵⁸Gerrard et al., *Non U.S. Climate Change Litigation Chart*, p. 168.

⁵⁹British Columbia Utilities Commission, *In the Matter of River District Energy Limited Partnership Certificate of Public Convenience and Necessity to Construct and Operate a District Energy System for the River District Development in Southeast Vancouver and Proposed Revenue Requirement, Rate Design, Levelized Rates and Revenue Deficiency Deferral Account for the First Five Years of Operation*.

⁶⁰*Ibid.*, Appendix B.

⁶¹*Ibid.*, p. 1.

proposal, noting that “the only real GHG benefit will be realized when the DEU [District Energy Utility] is supplied with a renewable energy heat source” and that “[e]ven without a renewable heat source there are sufficient reasons to find the project in the public interest as long as the source of energy costs is sufficiently cost-competitive with electricity”. At best, this precedent further establishes climate change to be a legitimate issue to be considered in planning processes, though it does not support any assertion that firms are positively obligated to take action in response to climate change.

In 2012, the B.C. Utilities Commission considered an application from FortisBC Energy Utilities which included a request for a rate increase, in part to provide funds to meet B.C.’s energy objectives by reducing GHG emissions.⁶²⁶³ The commission panel identifies the “[i]mportance of Intergenerational Equity” as one of the “three overriding issues which [they] believe have a direct impact on this Proceeding”.⁶⁴ This is taken here to refer to fairness in rate-paying and the receipt of benefits:

The goal is to have the appropriate share of costs that are incurred to provide services to ratepayers in a particular time period recovered from the ratepayers benefiting from the services in that same time period.⁶⁵

In the commission’s two-page discussion of the matter, intergenerational equity in terms of environmental impact is not considered, though the logic used bears interesting similarities to that of proponents of GHG pollution mitigation for the protection of future generations. The commission argues:

While there may be a temptation to defer costs to a future time period as a means of achieving lower rates, the view of the Panel is that where practical, both the cost and the benefits of a particular undertaking should be balanced over the same period.⁶⁶

⁶²Gerrard et al., *Non U.S. Climate Change Litigation Chart*, p. 172.

⁶³British Columbia Utilities Commission, *The FortisBC Energy Utilities 2012-2013 Revenue Requirements and Rates Decision*.

⁶⁴*Ibid.*, p. 1–2.

⁶⁵*Ibid.*, p. 22.

⁶⁶*Ibid.*, p. 23.

Concerning environmental ethics, Henry Shue argues:

[D]ecisions about climate policy are no longer properly understood as decisions entirely about *preferences of ours* but also crucially about the *vulnerabilities of others* — not about the question “How much would we like to spend to slow climate change?” but about “How little are we in decency permitted to spend in light of the difficulties and risks to which we are likely otherwise to expose people, people already living and people yet to live?”⁶⁷

Future generations may take objection to their interests being considered in the area of fair rate-setting, but not in terms of cumulative GHG emissions and their impact. In response to the request for “\$64.5 million for 2012 and 2013” for “Energy Efficiency Conservation Expenses” the commission approved “\$29.707 million in 2012 and \$36.204 in 2013”.⁶⁸

In its *FortisBC Energy Inc.: Amendment to Rate Schedule 16 on a Permanent Basis* decision of 2013, the B.C. Utilities Commission considered federal proposals relating to the firm’s liquified natural gas (LNG) business.⁶⁹⁷⁰ The decision highlights the view that LNG is an environmentally beneficial technology, since gas produces less GHG pollution per unit of energy output than some fossil fuels. This remains an area of some disagreement in the literature on climate change an energy, with critics highlighting how gas use involves unintended ‘fugitive’ emissions of methane which are much more potent per tonne than CO₂. Another counter-argument is that fossil fuel infrastructure of any sort simply perpetuates fossil fuel dependence; whenever new infrastructure of a particular kind is approved (fossil fuel production, transport, refining, use, etc) it contributes to the need for fossil fuel infrastructure of all other kinds, and diminishes the amount of capital available for investment in alternatives. Finally, some highlight how it is the total cumulative amount of coal, oil, and gas burned across all of history that determines how much climate change will take

⁶⁷Shue, “Deadly Delays, Saving Opportunities”, p. 146 (italics in original).

⁶⁸British Columbia Utilities Commission, *The FortisBC Energy Utilities 2012-2013 Revenue Requirements and Rates Decision*, p. 4.

⁶⁹Gerrard et al., *Non U.S. Climate Change Litigation Chart*, p. 189.

⁷⁰British Columbia Utilities Commission, *In the Matter of FortisBC Energy Inc.: Amendment to Rate Schedule 16 on a Permanent Basis*.

place. Rather than being a genuine alternative to burning coal or oil, burning gas could simply take place on top of those other activities. In any event, the BCUC took climate change-related considerations into account at several points in its decision.

Decisions that mention climate change but which have not been examined by the Center for Climate Change Law include *Tsilhqot'in Nation v. British Columbia*, in which the Supreme Court of British Columbia acknowledged the contribution of climate change to B.C.'s mountain pine beetle epidemic, as well as its general impact on biodiversity.⁷¹ *Halalt First Nation v. British Columbia (Minister of Environment)* acknowledges climate change as a factor likely to alter the state of water resources.⁷²

Taken all in all, there is little evidence that Canada's courts have compelled meaningful behaviour in response to climate change so far. The courts have been deferential toward the executive at the federal level, agreeing that the *KPIA* did not compel the development of a credible climate plan. In other cases, courts have demonstrated a willingness to consider evidence related to climate change — and even to demand that it be considered in environmental assessments — but not to prevent decisions or projects that contribute to bad climatic outcomes.

There may be legitimate cause to hope for further pressure from Canadian courts to take meaningful action on climate change. Particularly since the *Charter of Rights and Freedoms* entered into force, Canada's courts have been called upon to arbitrate between the protected rights of citizens and the legislative will of governments. Sometimes these judgments have touched upon core features of democracy. For instance, in *Sauvé v. Canada* (2002), the court found that the right of prisoners to vote was protected under section 3 of the *Charter*, and could not be saved under the “reasonable limits” doctrine in section 1. In so doing, the court struck down part of the *Canada Elections Act*, which had been

⁷¹Supreme Court of British Columbia, *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, p. 358, 406.

⁷²Supreme Court of British Columbia, *Halalt First Nation v. British Columbia (Minister of Environment)*.

duly passed by the House of Commons and the Senate, and granted Royal Assent. The court explicitly rejected the idea that “denying the right to vote to penitentiary inmates requires deference because it is a matter of social and political philosophy is rejected”, asserting that “deference... is not appropriate on a decision to limit fundamental rights”. It does not seem entirely unreasonable to suppose that some of the rights threatened by climate change may have similar importance. By threatening the emergence of a new era in which all human civilization is destabilized by a rapidly changing climate, unmitigated climate change arguably poses a risk to “life, liberty and security of the person”. This possibility remains relatively tenuous, however, due to the reluctance of the courts to involve themselves directly in politics, and their willingness to be deferential to elected governments.

Another major avenue through which Canada’s courts could drive more aggressive climate change policy-making is in response to lawsuits from Canada’s aboriginal population. Section 91 of the *Constitution Act* places “Indians, and Lands reserved for the Indians” within “the exclusive Legislative Authority of the Parliament of Canada”.⁷³ Numerous decisions of the Supreme Court of Canada and other courts have determined that Canada’s federal government has an obligation in law to address aboriginal issues, as well as a fiduciary duty toward aboriginal groups. This clearly established jurisdiction could conceivably help avoid some of the problematic dynamics analyzed by Harrison, including joint decision traps, possible ‘races to the bottom’ between jurisdictions, and ‘buck passing’ between levels of government that are similarly unwilling to take action on an issue. In June 2013, the Court of Appeal of Alberta ruled in favour of the Lac La Biche-area Cree, allowing them to proceed with a lawsuit against the Canadian federal government and the Government of Alberta.⁷⁴ The Cree allege that the cumulative impacts of 300 operating

⁷³Government of Canada, *Constitution Act*, 1982.

⁷⁴See: Tait and Cryderman, *Alberta First Nations band wins right to trial over oil sands’ effect on treaty rights*.

oil sands projects impact their rights to hunt and fish under Treaty 6.

3.2 The United States

Michael Gerrard's table of U.S. climate change pages runs across more than 500 pages, covering statutory claims, common law claims, public international law claims, cases involving climate protestors and scientists, and cases involving climate change adaptation.⁷⁵⁷⁶

The 2007 Supreme Court decision *Massachusetts v. Environmental Protection Agency* may be the most significant in the U.S. to date, in terms of having a court compel action by another arm of government.⁷⁷ Here, the U.S. Environmental Protection Agency (EPA) was challenged by a coalition of 12 states and several cities over its decision not to regulate CO₂ under the *Clean Air Act*.⁷⁸ The court found that the expressed rationale from the EPA for not regulating greenhouse gasses as pollutants was inadequate.

The *Massachusetts v. EPA* precedent was weakened in several future U.S. decisions. In 2008, a U.S. district court decided that the native village of Kivalina, Alaska could not sue fossil fuel companies for damage caused by climate change. The court concluded that the issue was fundamentally political, not legal, and it was therefore up to Congress or the administration to act on it. The Ninth Circuit Court of Appeals declined to hear an appeal, as did the U.S. Supreme Court in 2013.⁷⁹ In *Center for Biological Diversity v. U.S. Department of Interior* (2009), the District of Columbia Circuit Court of Appeals determined that *Massachusetts v. EPA* did not empower individuals to sue to stop projects, due to concern about climate change.⁸⁰ In 2011, the U.S. Supreme Court decided *American Electric Power Company v. Connecticut*, affirming unanimously that corporations cannot be sued for GHG

⁷⁵Gerrard, Howe, and Barry, *Climate Change Litigation in the U.S.*

⁷⁶For a more detailed history of climate litigation in the U.S. see: Pidot, *Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues*.

⁷⁷United States Supreme Court, *Massachusetts et al. v. Environmental Protection Agency et al.*

⁷⁸Gerrard, Howe, and Barry, *Climate Change Litigation in the U.S.*

⁷⁹Appeals, *Native Village of Kivalina v. ExxonMobil Corporation et al.*

⁸⁰Gerrard, Howe, and Barry, *Climate Change Litigation in the U.S.* p. 191.

emissions, specifically because they are supposedly regulated by the EPA.⁸¹ The assertion by eight states that GHG pollution constituted a ‘nuisance’ which courts could be called upon to address was rejected.

4 Conclusions

Hoffmann highlights how the multilateral approach to responding to climate change globally, manifest in the *Kyoto Protocol* and associated market mechanisms, has failed in its basic purpose of driving global emission reductions.⁸²⁸³ He explains that:

The multilateral process has always been founded on an understanding of climate change as a global (read universal and international) problem of negotiating emissions reductions. Treating climate change as this kind of problem had tangible consequences — namely political dynamics focused on the distribution of costly action and the emergence of particular market-oriented policy options.⁸⁴

It may well be that the multilateral approach ends up drawing attention to the difficult problem of getting states to make costly commitments to reducing emissions, but it is not clear that there could be any approach that avoids this central element of the climate problem. Hoffmann is convincing in arguing that complex voluntary collaborations between actors of different kinds generates a rich field for experimentation, but it isn’t clear how or why such coalitions would drive emission reductions far or fast enough to avoid the worst impacts of climate change. Individuals and firms face an even starker version of the temptation to impose the harm from their choices on others, when compared with

⁸¹United States Supreme Court, *American Electric Power Co., Inc. et al. v. Connecticut et al.*

⁸²For another critique of the *Kyoto* process, see: Prins and Rayner, *The Wrong Trousers: Radically Rethinking Climate Policy*.

⁸³Rabe comments: “The Kyoto Protocol failed because it is the wrong type of instrument (a universal intergovernmental treaty) relying too heavily on the wrong agents exercising the wrong sort of power to create, from the top down, a carbon market.” Rabe, “Beyond Kyoto: Climate Change Policy in Multilevel Governance Systems”.

⁸⁴Hoffmann, “Global Climate Change”, p. 11.

states. Only states have the coercive power necessary to produce the kind of reductions compatible with keeping temperature increase under 2°C, or even with meeting much less ambitious targets. Hoffmann highlights the decentralized efforts of cities, corporations, and other entities as a potential route forward, but he also recognizes how is far from clear that such coalitions will ever undertake action on a suitable scale, and even more doubtful that they will do so with the kind of urgency required to avoid ‘dangerous’ climate change as presently defined by the international community.

Harrison’s public choice analysis provides a compelling explanation for the relative inaction of governments on climate change, at least relative to the degree of effort necessary for achieving their stated goals. While there are some examples of courts driving a greater degree of action — notably, *Massachusetts v. Environmental Protection Agency* — the record in Canada to date is uninspiring. That being said, court decisions from around the world have increasingly shown judges to be willing to consider GHG pollution as legally relevant and an input to their decision-making. It is possible that international developments will encourage Canadian judges to be more willing to see acting on climate change as a legal duty for governments and firms, as well as more willing to order positive action (or abstention from planned action) in cases where it would be unusually injurious climatologically.

Unfortunately, there is no assurance that climate change will be ‘solved’ to any appreciable extent by the actions of private actors, courts, or governments. Given the physical characteristics of the problem, by the time any set of climatic outcomes have been observed directly, substantially more severe impacts have already been locked-in for decades ahead. On the world’s present trajectory of fossil fuel use and GHG production, there seems to be every chance of substantially overshooting the socially optimal level of pollution and imposing a far greater degree of harm upon future generations than is equitable or justifiable. Our “unrestrained appetites” remain threatening to those in the future, both despite

and sometimes because of the structures and processes of federalism.

References

- Allison, I. et al. *The Copenhagen Diagnosis 2009: Updating the World on the Latest Climate Science*. 2009. URL: http://www.cccrc.unsw.edu.au/Copenhagen/Copenhagen_Diagnosis_LOW.pdf.
- Appeals, Ninth Circuit United States Court of. *Native Village of Kivalina v. ExxonMobil Corporation et al.* 2012. URL: <http://caselaw.findlaw.com/us-9th-circuit/1612125.html>.
- Borrows, John. *Seven Generations, Seven Teachings: Ending the Indian Act*. Research Paper for the National Centre for First Nations Governance. 2008. URL: http://fngovernance.org/ncfng_research/john_borrows.pdf.
- British Columbia Utilities Commission. *In the Matter of FortisBC Energy Inc.: Amendment to Rate Schedule 16 on a Permanent Basis*. 2012. URL: http://www.bcuc.com/Documents/Proceedings/2013/DOC_34851_06-04-2013_FEI%20-Rate-Schedule-16-WEB.pdf.
- *In the Matter of River District Energy Limited Partnership Certificate of Public Convenience and Necessity to Construct and Operate a District Energy System for the River District Development in Southeast Vancouver and Proposed Revenue Requirement, Rate Design, Levelized Rates and Revenue Deficiency Deferral Account for the First Five Years of Operation*. 2011. URL: http://www.bcuc.com/Documents/Proceedings/2011/DOC_29396_12-19-2011-RiverDistrictEnergy-CPCN-Decision-WEB.pdf.
- *The FortisBC Energy Utilities 2012-2013 Revenue Requirements and Rates Decision*. 2012. URL: http://www.bcuc.com/Documents/Proceedings/2012/DOC_30355_04-12-2012-FEU-2012-13RR-Decision-WEB.pdf.
- Downs, Anthony. “Up and down with ecology: The issue attention cycle”. In: *Public interest* 28.1 (1972), pp. 38–50.

- Eby, M., K. Zickfeld, and A. Montenegro. "Lifetime of Anthropogenic Climate Change: Millennial Time Scales of Potential CO₂ and Surface Temperature Perturbations". In: *Journal of Climate* 22 (10 2009). URL: <http://journals.ametsoc.org/doi/abs/10.1175/2008JCLI2554.1>.
- Ecojustice. *Canada facing legal challenge for breaking federal global warming law*. 2009. URL: <http://www.ecojustice.ca/media-centre/press-releases/canada-facing-legal-challenge-for-breaking-federal-global-warming-law-1>.
- Environment Canada. *Canada's Action on Climate Change*. URL: <http://www.climatechange.gc.ca/default.asp?lang=En&n=72F16A84-1>.
- Estrin, David and John Swaigen. *Environment on trial: a guide to Ontario environmental law and policy*. Emond Montgomery Publications, 1993.
- Fafard, Patrick and Kathryn Harrison. *Managing the environmental union: intergovernmental relations and environmental policy in Canada*. Institute of Intergovernmental Relations, 2000.
- Farber, Daniel A. "Politics and procedure in environmental law". In: *Journal of Law, Economics and Organization* 8 (1992), p. 59.
- Federal Court of Canada. *Pembina Institute for Appropriate Development, et al v. Attorney General of Canada and Imperial Oil*. 2008. URL: <http://decisions.fct-cf.gc.ca/en/2008/2008fc302/2008fc302.html>.
- Federal Court of Canada - Noël, J. *Turp v. Canada (Minister of Justice) et al*. 2012. URL: http://law.mlb.nb.ca/build3/DocWriter7?ref=http://search.mlb.nb.ca/isysquery/299c24fe-fd62-4308-9ade-fd72aa3ee365/1/doc/&title=Turp%20v.%20Can.%20%282012%29,%20415%20F.T.R.%20192%20%28FC%29&wp=/isysquery/299c24fe-fd62-4308-9ade-fd72aa3ee365/1/doc/TURP__FT.415&name=e:\database\FTR\FTR_3\TURP__FT.415&path=/isysquery/299c24fe-fd62-4308-9ade-fd72aa3ee365/1/doc/&names=TURP__FT.415&CFID=5214444&CFTOKEN=91e5f3bc15457a-CC5EC315-E30C-18A5-CDD823D3BB9C6D72.

- Gardiner, Stephen. *A Perfect Moral Storm: The Ethical Tragedy of Climate Change*. Oxford University Press, 2011.
- Gerrard, Michael B. *Global Climate Change and U.S. Law*. American Bar Association, 2007.
- Gerrard, Michael B., J. Cullen Howe, and L. Margaret Barry. *Climate Change Litigation in the U.S.* 2013. URL: <http://www.climatecasechart.com/>.
- Gerrard, Michael B. et al. *Non U.S. Climate Change Litigation Chart*. 2013. URL: <http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Resources/Non-US-Climate-Change-Litigation-Chart/non-U.S.%20litigation%20chart%20%28current%20version%20-%20update%20this%20file%29.pdf>.
- Government of British Columbia. *Utilities Commission Act*. 1996. URL: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96473_01.
- Government of Canada. *Constitution Act, 1982*. 1982. URL: <http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-38>.
- *Department of the Environment Act*. 1985. URL: <http://laws-lois.justice.gc.ca/eng/acts/E-10/page-1.html>.
- *Kyoto Protocol Implementation Act 2007 (Repealed 2012)*. 2007. URL: <http://laws-lois.justice.gc.ca/eng/acts/K-9.5/20070622/P1TT3xt3.html>.
- Hansen, James. *Storms of My Grandchildren*. Bloomsbury USA, 2010.
- Hansen, James et al. *Target Atmospheric CO₂: Where Should Humanity Aim?* 2008. URL: http://www.columbia.edu/~jeh1/2008/TargetCO2_20080407.pdf.
- Harrison, Kathryn. *Passing the Buck: Federalism and Canadian Environmental Policy*. University of British Columbia Press, 1996.
- Harrison, Kathryn and Lisa MacIntosh Sundstrom. *Global commons, domestic decisions: The comparative politics of climate change*. The MIT Press, 2010.

- Hoberg, George. *The Battle over Oil Sands Access to Tidewater: A Political Risk Analysis of Pipeline Alternatives*. In press. 2013.
- Hoffmann, Matthew J. "Global Climate Change". In: *The Handbook of Global Climate and Environment Policy*. Ed. by Robert Falkner. Wiley-Blackwell, 2013.
- Imperial Oil Ltd. *Imperial Oil Approves First Phase of Kearl Oil Sands Project*. 2009. URL: http://www.downstreamtoday.com/news/article.aspx?a_id=16506&AspxAutoDetectCookieSupport=1.
- Litfin, Karen. *Ozone Discourses: Science and Politics in Global Environmental Protection*. Columbia University Press, 1994.
- Macdonald, Douglas, Jochen Monstadt, and Kristine Kern. *Allocating Canadian greenhouse gas emission reductions amongst sources and provinces: learning from Germany and the EU*. 2013. URL: <http://www.environment.utoronto.ca/AllocatingGHGReductions2013/docs/AllocatingGHGReductions2013.pdf>.
- Monbiot, George. *Heat: How to Stop the Planet from Burning*. London: Allen Lane, 2006.
- O'Brien, Audrey and Marc Bosc. *House of Commons Procedure and Practice, Second Edition*. 2009. URL: <http://www.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid=7C730F1D-E10B-4DFC-863A-83E7E1A6940E&sbpid=CAF791AA-CC05-499A-87EC-8E4FFE38572B&Language=E&Mode=1>.
- Parties to the United Nations Framework Convention on Climate Change. *United Nations Framework Convention on Climate Change*. 1992. URL: <http://unfccc.int/resource/docs/convkp/conveng.pdf>.
- Pidot, Justin R. *Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues*. 2006. URL: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695720.
- Prins, Gwyn and Steve Rayner. *The Wrong Trousers: Radically Rethinking Climate Policy*. 2007. URL: <http://eureka.bodleian.ox.ac.uk/66/>.

- Rabe, Barry G. "Beyond Kyoto: Climate Change Policy in Multilevel Governance Systems". In: *Governance* 20 (3 2007). URL: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0491.2007.00365.x/abstract>.
- Russell, Peter. *The judiciary in Canada : the third branch of government*. Scarborough, Ontario: McGraw-Hill Ryerson, 1987.
- Rutherford, Barbara and Paul Muldoon. "Designing an environmentally responsible constitution". In: *Alternatives* 18.4 (1992), pp. 26–33.
- Savoie, Donald. *Court Government and the Collapse of Accountability in Canada and the United Kingdom*. Toronto: University of Toronto Press, 2008.
- Shue, Henry. "Deadly Delays, Saving Opportunities". In: *Climate Ethics: Essential Readings*. Ed. by Stephen Gardiner. New York: Oxford University Press, 2010.
- Skogstad, Grace and Paul Kopas. "Environmental policy in a federal system: Ottawa and the provinces". In: *Canadian Environmental Policy* (1992), pp. 43–59.
- Stevenson, Colin. "A New Perspective on Environmental Rights after the Charter". In: *Osgoode Hall Law Journal* 21 (1983), p. 390.
- Supreme Court of British Columbia. *Halalt First Nation v. British Columbia (Minister of Environment)*. 2007. URL: <http://csc.lexum.org/decisia-scc-csc/scc-csc/scc-l-csc-a/en/item/13173/index.do>.
- *Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700*. 2007. URL: <http://www.courts.gov.bc.ca/jdb-txt/sc/07/17/2007bcsc1700.pdf>.
- Tait, Carrie and Kelly Cryderman. *Alberta First Nations band wins right to trial over oil sands' effect on treaty rights*. 2013. URL: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/alberta-first-nations-band-wins-right-to-trial-over-oil-sands-effect-on-treaty-rights/article12353571/>.

The Heads of State, Heads of Government, Ministers, and other heads of delegation present at the United Nations Climate Change Conference 2009 in Copenhagen. *Copenhagen Accord*. 2009. URL: <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf>.

United States Supreme Court. *American Electric Power Co., Inc. et al. v. Connecticut et al.* 2011. URL: <http://www.supremecourt.gov/opinions/10pdf/10-174.pdf>.

– *Massachusetts et al. v. Environmental Protection Agency et al.* 2007. URL: <http://www.supremecourt.gov/opinions/06pdf/05-1120.pdf>.

Whiteman, Gail, Chris Hope, and Peter Wadhams. “Vast costs of Arctic change”. In: *Nature* 499 (2013). URL: <http://www.nature.com/nature/journal/v499/n7459/pdf/499401a.pdf>.