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Filling the Gaps in Canada's Climate Change Strategy: "All Litigation, All the Time...?"

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Filling the Gaps in Canada's Climate Change Strategy: "All Litigation, All the Time...?"

Cameron Jefferies

Abstract

This Article is organized into five parts. Part I situates Canada's climate change experience. In Part II, Canada's regulatory response to climate change and its gaps are positioned within a troubling ongoing federal retreat from the environmental arena that seems to favor resource extraction and export. Parts III to V discuss the possibility for increased human rights-based climate litigation in the Canadian context—even in light of past failures—and consider an emerging public law approach. The Article concludes by commenting on the prospect of the climate change problem playing out in Canadian courts.

KEYWORDS: Canada, Climate Change, Environmental Law, International Law, Litigation, Rights, Canadian Charter, Human Rights

ARTICLE

FILLING THE GAPS IN CANADA’S CLIMATE
CHANGE STRATEGY: “ALL LITIGATION, ALL
THE TIME . . .”?

*Cameron Jefferies**

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*“Everyone is aware that individually and collectively,
we are responsible for preserving the natural
environment.”*¹

-Justice Charles Gonthier, Supreme Court of Canada

*“We are the last generation that can fight climate
change. We have a duty to act.”*²

-Ban Ki-moon, United Nations Secretary-General

INTRODUCTION

Canada has the dubious honor of being voted “Fossil of the Year” an unprecedented seven times. This includes the ignominious lifetime “Colossal Fossil” award of 2013. These fossil awards are handed out annually at the conclusion of the United Nations Framework Convention on Climate Change³ (“UNFCCC”) Conference of the Parties’ (“COP”) to the State that has done the most to undermine or otherwise impede international progress towards combatting climate change, as voted on by a coalition of environmental groups.⁴ More tangibly, Canada is the first—and only—State to formally withdraw its Kyoto Protocol (“KP”) ratification.⁵ Explaining this may not require us to look much further than Canada’s extensive oil sand reserves, which are one of the most controversial unconventional oil and gas developments in the world.

On February 24, 2015, United States President Barack Obama exercised his executive authority to veto a bill from Congress that

1. See *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385, ¶ 55 (Can.).

2. See Ban Ki-moon, *We are the last generation that can fight climate change. We have a duty to act*, THE GUARDIAN (Jan. 12, 2015), <http://www.theguardian.com/commentisfree/2015/jan/12/last-generation-tackle-climate-change-un-international-community>.

3. See United Nations Framework Convention on Climate Change, Dec. 31, 1992, 31 I.L.M. 849 (1992), 1771 U.N.T.S. 107.

4. See *Canada Wins ‘Lifetime Underachievement’ Fossil Award at Warsaw Climate Talks*, CLIMATE ACTION NETWORK CANADA (Nov. 22, 2013), <http://climateactionnetwork.ca/2013/11/22/canada-wins-lifetime-unachievement-fossil-award-at-warsaw-climate-talks/>.

5. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, 37 I.L.M. 22 (1997), Dec. 10, 1997 [hereinafter Kyoto Protocol]; see also *Canada’s Withdrawal from the Kyoto Protocol*, ENVIRONMENT CANADA (Jun. 19, 2013), <http://www.ec.gc.ca/Publications/default.asp?lang=En&n=EE4F06AE-1&xml=EE4F06AE-13EF-453B-B633-FCB3BAECEB4F&offset=3&toc=show> [hereinafter ENVIRONMENT CANADA].

would have authorized the construction of the Keystone XL pipeline.⁶ This is another significant blow to the much-maligned project. First proposed in 2005 by TransCanada, the Keystone XL pipeline contemplates additions to existing pipeline infrastructure that, if fully implemented, would carry approximately 1.3 million barrels per day of light and/or heavy crude from Alberta's oil sands to two termination points: Port Arthur, Texas; and Steele City, Nebraska.⁷ In invoking his veto, President Obama identified the bill's conflict with executive procedures and the need to further investigate whether Keystone XL serves national interests.⁸ As 2015 progresses, those interested in the legal response to anthropogenic climate change will remain keenly focused on any progress being made by the international community on the road to UNFCCC COP 21 in Paris, where it is expected that the international community will agree to a comprehensive successor to the KP.

Sustainable development demands that we balance the economic, social, and environmental dimensions of any proposed development with the normative objective of enabling society to pursue "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."⁹ Keystone XL is just one example of the conflation of fossil fuels, climate change, and sustainability and of the difficult decisions that must be made regarding our continued reliance upon non-renewable resources; considerations that will inevitably dominate the negotiations in Paris. For the purposes of this Article, the events described above serve as an appropriate entrance point to a discussion of prominent gaps in Canada's climate change response, namely international inaction and domestic reluctance to regulate the oil and gas industry at the national scale.

The focus of this Article is one fairly narrow question that lingers in the Canadian context: can the readily identifiable gaps in Canada's national response to climate change be closed through the

6. Juliet Eilperin & Katie Zezmia, *Obama Vetoes Keystone XL Bill*, THE WASHINGTON POST (Feb. 24, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2015/02/24/keystone-xl-bill-a-k-a-veto-bait-heads-to-presidents-desk/>.

7. Mike Patton, *The Truth About the Keystone XL Pipeline*, FORBES (Nov. 24, 2014), <http://www.forbes.com/sites/mikepatton/2014/11/24/the-truth-about-the-keystone-xl-pipeline/>.

8. Eilperin, *supra* note 6.

9. NGO Committee on Education, Report of the World Commission on Environment and Development: Our Common Future ¶ 1 (1987) *transmitted to the General Assembly as an Annex to*, document A/42/427.

use of strategic litigation? Ultimately, this analysis posits that while litigation in its various forms is a valuable point of intervention that, to date, has been underutilized in the Canadian context, it is unlikely that a court would, even in the absence of a clear American-style Political Questions Doctrine, choose to weigh in on and/or order the sort of relief required to close the gaps in Canada's national strategy. While this conclusion may be unsatisfactory for those interested in securing an immediate robust climate change response from Canada's federal government, it does highlight the fact that changes are occurring and that litigation represents one of many important steps along the way towards a sustainable future.

This Article is organized into five parts. Part I situates Canada's climate change experience. In Part II, Canada's regulatory response to climate change and its gaps are positioned within a troubling ongoing federal retreat from the environmental arena that seems to favor resource extraction and export. Parts III to V discuss the possibility for increased human rights-based climate litigation in the Canadian context—even in light of past failures—and consider an emerging public law approach. The Article concludes by commenting on the prospect of the climate change problem playing out in Canadian courts.

I. *THE CANADIAN CLIMATE CHANGE EXPERIENCE*

Canada does not lead the world in absolute quantity of greenhouse gas (“GHG”) emissions¹⁰ nor is it positioned as one of the most vulnerable nations to the consequences of climate change. It is, however, host to one of the most contentious unconventional oil reserves in the world, and is currently experiencing quantifiable climate change-related impacts. This Part addresses each of these features of Canada's climate change experience in turn.

Known as the oil sands or, less affectionately as the tar sands, this natural mixture of sand, clay, other minerals, water, and bitumen—a heavy, viscous form of oil—is found in the northern

10. For example, in 2011 Canada was only responsible for 1.6% of total global emissions. See Environment Canada, *Canada's Emissions Trend 3* (2014) http://ec.gc.ca/ges-ghg/e0533893-a985-4640-b3a2-008d8083d17d/etr_e%202014.pdf [hereinafter *Canada's Emissions Trend*]. Still, Canada leads the world in per capita emissions. See Mengpin Ge, Johannes Friedrich & Thomas Domassa, *6 Graphs Explain the World's Top 10 Emitters*, WORLD RESOURCES INSTITUTE (Nov. 25, 2014) <http://www.wri.org/blog/2014/11/6-graphs-explain-world's-top-10-emitters>.

portion of the province of Alberta.¹¹ Sand bearing oil is not unique to Canada as similar-type reserves can be found in the United States, Venezuela, and Russia; however, the Canadian oil sands are distinct in their size. They contain some 168 billion barrels of oil, making this the third largest proven crude reserve in the world.¹²

The oil sands have gained international notoriety for their energy potential and for their pollution. From an economic standpoint, this reserve is Canada's economic engine. The Canadian Energy Research Institute estimates that between 2014-2038, oil sands production will result in: over CAD\$2,484 billion in revenue from existing and projected projects; a total Canadian Gross Domestic Product impact of CAD\$3,865 billion; a peak employment rate of 820,000 jobs; some CAD\$574 billion in federal tax monies; and approximately CAD\$600 billion in royalties for the province of Alberta over the next 25 years.¹³

While there are various significant environmental concerns associated with oil sands development, chief among them is the intensity of GHG emissions from surface mining and *in situ* extraction techniques used to access the bitumen and the subsequent upgrading required to transform bitumen into a usable type of fuel. The Pembina Institute's¹⁴ summary of existing literature suggests that oil sands extraction and upgrading is 3.2-4.5 times more GHG intensive, per barrel, than conventional crude from Canada or the United States and that over its 'well-to-wheels' lifecycle, oil sands GHG emission intensity is 8-37% greater than conventional crude.¹⁵ Other studies have focused on the uncertainties associated with

11. *What is Oil Sands*, ALBERTA ENERGY (last accessed Apr. 9, 2015), <http://www.energy.gov.ab.ca/oilsands/793.asp>; *Facts and Statistics*, ALBERTA ENERGY (last accessed Apr. 9, 2015), <http://www.energy.alberta.ca/oilsands/791.asp>.

12. See *supra* note 11 and accompanying text.

13. CANADIAN ENERGY RESEARCH INSTITUTE, CANADIAN ECONOMIC IMPACTS OF NEW AND EXISTING OIL SANDS DEVELOPMENT IN ALBERTA (2014-2038) ix-x (2014) available at http://www.ceri.ca/images/stories/CDN_Economic_Impacts_of_New_and_Existing_Oil_Sands_Development_in_Alberta_-_November_2014_-_Final.pdf.

14. *About Pembina*, PEMBINA INSTITUTE <http://www.pembina.org/about/about-pembina> (last visited Apr. 9, 2015) (explaining that it is an "organization unlike any other working to protect Canada's environment today. We combine the research and technical capacity of a think tank with the values and advocacy of an environmental non-governmental organization (NGO) and the entrepreneurial and business sense of a for-profit consulting firm.").

15. *Oilsands 101: Climate Impacts*, PEMBINA INSTITUTE <http://www.pembina.org/oilsands/os101/climate> (last visited Apr. 9, 2015).

estimating oil sands GHG lifecycles, concluding that additional research and improved methodologies are required.¹⁶

The most recent consideration of oil sands' emissions was published in the renowned journal *Nature*. Authored by McGlade and Ekins of the University College London, Institute for Sustainable Resources, this Article considers the extent to which known oil and gas reserves should remain unused and unburned if we hope to limit global warming to two degrees Celsius.¹⁷ Their modeling exercise concludes that: "globally, a third of oil reserves, half of gas reserves and over 80 per cent of current coal reserves should remain unused from 2010 to 2050."¹⁸ It also indicates that meeting this target requires leaving the lion's share of Canada's oil sands in the ground:

Regarding the production of unconventional oil, open-pit mining of natural bitumen in Canada soon drops to negligible levels after 2020 in all scenarios because it is considerably less economic than other methods of production. Production by *in situ* technologies continues in the 2 °C scenario that allows CCS [carbon capture and storage], but this is accompanied by a rapid and total decarbonization of the auxiliary energy inputs required.

Although such a decarbonization would be extremely challenging in operation, cumulative production of Canadian bitumen is still only 7.5 billion barrels. 85% of its 48 billion barrels of bitumen reserves this remain unburnable if the 2 °C limit is not to be exceeded. When CCS is not available, all bitumen production ceases by 2040. In both cases, the RURR [remaining ultimately recoverable resources] of Canadian bitumen dwarfs cumulative production, so that around 99% of our estimate of its resources (640 billion barrels), remains unburnable.¹⁹

The reality is that the world is likely trending to pass the two degrees Celsius limit scenario that has been held on to as a best-case scenario.²⁰ An absence of consensus regarding the ultimate extent of global warming does not prevent investigation into its on-going

16. Alex Charpentier, Joule Bergerson & Heather MacLean, *Understanding the Canadian Oil Sands Industry's Greenhouse Gas Emissions*, 4 ENVTL. RES. LETT. 1, 9-11 (2009).

17. Christopher McGlade & Paul Ekins, *The Geographical Distribution of Fossil Fuels Unused when Limiting Global Warming to 2 °C*, 517 NATURE 187, 187 (2015).

18. *Id.*

19. *Id.* at 190.

20. IPCC, 2013: *Summary for Policymakers*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Stocker, et al. eds.).

effects. Natural Resources Canada, a department of the federal government, was the lead contributor on a recent assessment report titled *Canada in a Changing Climate: Sector Perspectives on Impacts and Adaptation*.²¹ Published in 2014, and contributed to by some 90 authors and 115 expert reviewers, this synthesis of 1500 publications offers a sobering account of the extent of the on-going effects of climate change-related changes.²² While it is beyond the scope of this Article to recount these changes in full, this synthesis is clear that Canada's air temperature, precipitation patterns, cryosphere, and ocean climate have all been impacted and altered by anthropogenic climate change.²³

Moreover, it is clear that Canada's Arctic region, where "warming [is] amplified compared to the global average," is disproportionately affected.²⁴ These changes are predicted to significantly impact the health and wellbeing of the more than 50,000 Inuit "who live in small, remote, mostly coastal communities scattered across approximately 31% of the country's landmass."²⁵ Consider the following assessment of direct threats to health and wellbeing:

. . . numerous health implications from climate change have already been documented, including the effects on personal safety, food and water security, and mental health. Changing temperature and precipitation regimes are projected to increase the probability, duration, and severity of extreme weather events and their outcomes (e.g., flooding, erosion) with implications for water quality, while creating newly hospitable environments for encroaching or introduced pathogens. Warmer, wetter seasons also have the potential to increase the risk and incidence of waterborne, foodborne, zoonotic, and vector borne diseases (e.g., *Escherchia coli*, campylobacteriosis, giardiasis, botulism, echinococcosis).²⁶

21. FJ WARREN & DS LEMMEN, EDS., *CANADA IN A CHANGING CLIMATE: SECTOR PERSPECTIVES ON IMPACTS AND ADAPTATION* (2014) [hereinafter *CANADA IN A CHANGING CLIMATE*].

22. *Canada in a Changing Climate: Sector Perspectives on Impacts and Adaptation*, NATURAL RESOURCES CANADA, <http://www.nrcan.gc.ca/environment/resources/publications/impacts-adaptation/reports/assessments/2014/16309>.

23. *CANADA IN A CHANGING CLIMATE*, *supra* note 21, at 25-57.

24. *Id.* at 37.

25. James D. Ford, et al., *Adapting to the Effects of Climate Change on Inuit Health*, 104 *AM. J. PUB. HEALTH* e9, e9 (2014).

26. *Id.*

Canada may not be the world's top emitter or most vulnerable State, but it is clearly positioned as a significant contributor to climate change and is definitely not immune to its affects. Canada's status as a developed democratic State would tend to suggest that it is well positioned to take a leadership role in responding to this collective threat; however, recent trends demonstrate otherwise.

II. *RECENT TRENDS IN CANADIAN ENVIRONMENTAL LAW*

Justice LaForest of the Supreme Court of Canada ("SCC") reminded us in *Canada v. Hydro Quebec* that: "...the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels."²⁷ Despite this recognition, the Canadian Constitution is silent with respect to the jurisdictional division of authority over the environment. This is not surprising given that the drafters of the British North America Act, 1867 (re-named the Constitution Act, 1867²⁸ in 1982) were not exposed to today's myriad of environmental problems. That said, the text clearly demonstrates that Canada's bountiful natural resources and issues involving trade were at the forefront during negotiations. Part VI (the "Distribution of Legislative Powers") provides the federal Parliament with legislative authority over "Navigation and Shipping" and "Sea Coast and Inland Fisheries" and the provinces with exclusivity respecting "exploration for non-renewable natural resources in the province;" "development, conservation and management of non-renewable natural resources;" and "development, conservation and management of [electrical generation and production] sites."²⁹

Authority is further complicated by the fact that municipal governments have also asserted some environmental regulatory power. Municipalities are not constitutionally recognized and derive their rule-making authority from provincial enabling legislation. Still, the SCC has confirmed the legitimacy of their contribution.³⁰ There is, of course, additional gloss and jurisprudential consideration of the scope and limit of these sections; however, this brief introduction is

27. *Canada (Procureure générale) c. Hydro-Québec*, [1997] 3 S.C.R. 213, ¶ 296 (Can.).

28. *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app II, no. 5 (Can.).

29. *Id.*

30. 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, ¶ 3 (Can.).

sufficient for the purposes of understanding recent developments relevant to Canada's regulatory approach to climate change.

A. *Federal Withdrawal from the Environmental Arena and Exporting Bitumen*

This section introduces two recent developments that bear directly on the status of Canada's regulatory response to climate change. The first is the general and ongoing retreat of the federal government from the environmental arena and the second is persistent efforts to export Alberta's bitumen.

The federal government's significant environmental regulatory withdrawal has taken a number of forms. The first and most significant manifestation was Parliament's passage of two omnibus budget bills.³¹ These omnibus bills have both primarily focused on budgetary issues but, and as their name suggests, budgetary issues have simply provided the core issue around which wide and seemingly disparate reforms to existing statutory law have also been made.³² Long-standing federal environmental laws were significantly impacted and, now that the dust has settled, it is clear that these amendments have had, *inter alia*, the following effects: (i) the scope and form of the federal environmental impact process has been re-written to significantly diminish the number of projects that will require federal assessment and to bolster the role of the provinces in this regard;³³ (ii) a significant section of the Fisheries Act that sought to protect fish habitat from permanent disruption or destruction has been narrowed in favor of focusing on the management of existing fisheries;³⁴ and (iii) the Navigable Waters Protection Act, which had evolved over time to ensure both environmental and navigation protection for Canada's watercourses, was amended to significantly

31. Jobs and Growth Act, 2012, S.C. 2012 (Can.), c. 31; Jobs, Growth and Long-Term Prosperity Act, S.C. 2012, c. 19 (Can.).

32. THE LEGISLATIVE PROCESS, <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?Sec=Ch16&Seq=4&Language=E> (last visited June 13, 2015).

33. The new federal environmental assessment process is found in Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19 (Can.). For an analysis of the impact of these reforms, see Robert B. Gibson, *In Full Retreat: the Canadian government's new environmental assessment law undoes decades of progress*, 30 IMPACT ASSESSMENT AND PROJECT APPRAISAL 179 (2012).

34. Fisheries Act, R.S.C. 1985, c. F-14. For an analysis of the impact of these reforms, see Jeffrey A. Hutchings, *Gutting Canada's Fisheries Act: No Fishery, No Fish Habitat Protection*, 38 FISHERIES 497 (2013).

reduce its environmental contribution and to also very significantly limit the number of watercourses that the amended scheme applies to.³⁵ In sum, these sweeping amendments have signaled the federal government's willingness to diminish its regulatory role—even in areas that have not, at least recently, been subject to jurisdictional scrutiny—in the name of economic efficiency.

A second form this retreat has taken is executive inaction. This is more subtle than omnibus reform but still significant. The most pertinent example is systemic ministerial delinquency pursuant to Canada's Species at Risk Act ("SARA").³⁶ SARA helps implement Canada's international commitments under the Convention on Biological Diversity³⁷ and operates ". . . to prevent wildlife species from becoming extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened."³⁸ SARA creates an independent and science-based body called the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") for classifying species considered to be at risk and the Minister of the Environment is charged with acting upon the resulting risk-assessment by recommending to the Governor in Council that the species be included on Schedule 1 of SARA, not listed, or returned to COSEWIC for re-assessment. Once listed on Schedule 1, SARA is clear: the competent Minister must prepare a proposed, and then final, recovery strategy in accordance with timelines prescribed by law. Importantly, recovery strategies are meant to identify the habitat that is deemed critical for listed species, and this habitat is then to be protected in accordance with SARA's requirements.

In *Western Canada Wilderness Committee et al v. Minister of Fisheries and Minister of the Environment*,³⁹ a group of public interest litigants pursued judicial review of Ministerial inaction and

35. Navigation Protection Act, R.S.C. 1985, c. N-22. For an analysis of the impact of these reforms, see Kimberly Shearon, *Breaking down yet another attack on Canada's environmental laws*, ECOJUSTICE, Feb. 17, 2015, available at <http://www.ecojustice.ca/breaking-down-yet-another-attack-on-canadas-environmental-laws/>.

36. Species at Risk Act, S.C. 2002, c. 29 (Can.) [hereinafter SARA].

37. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992), 1760 U.N.T.S. 79.

38. SARA, *supra* note 36, at s. 6.

39. *Western Canada Wilderness Committee et al. v. Minister of Fisheries and Oceans and Minister of the Environment*, 2014 FC 148 (Can.) [hereinafter *Western Canada Wilderness Committee*].

delays in producing the recovery strategies required under SARA at the Federal Court of Canada. Specifically, they sought declaratory relief and orders of *mandamus* compelling the production of recovery strategies for four target species: the Nechako White Sturgeon; the Pacific Humpback Whale; the Marbled Murrelet; and the Southern Mountain Caribou. The court noted that while the commencement of litigation prompted the Ministers to initiate the recovery strategy process, in each case the “recovery strategy was published *several years* after the expiry of the relevant statutory timeline.”⁴⁰ The Court granted the application for judicial review, characterized the Ministerial inaction as “egregious,”⁴¹ and declared that the Ministers’ failure to comply with the statutory timelines was unlawful.⁴² This decision also revealed the true extent of the problem given the “acknowledgement that there remain some 167 species at risk for which recovery strategies have not yet been developed. In this regard it is noteworthy that the Ministers acknowledge that they have not complied with the timelines for the preparation and posting of proposed recovery strategies for any of the other 167 species.”⁴³

Finally, the third form that this retreat has taken has been a general withdrawal from meaningful participation and cooperation in international efforts to combat climate change. Canada is a member State to the UNFCCC that signed the KP in 1998 and then ratified it in 2002. Canada’s targeted reduction was 6% compared to a 1990 baseline, achieved by 2012. These international commitments were made under a Liberal government, and were inherited by the Conservative government that came to power in 2006. Subsequently, the Kyoto Protocol Implementation Act (“KPIA”)⁴⁴ was introduced as a Private Member’s Bill in 2007 and passed through Parliament because, at this time, it was a minority Conservative government. The KPIA envisaged the production of future plans that would enable compliance, but this approach seemed doomed from its outset. First, as a Private Member’s Bill, the KPIA was not able to allocate public expenditures to climate change mitigation and second, it quickly

40. *Id.* at ¶ 4.

41. *Id.* at ¶ 6.

42. *Id.* at ¶¶ 93-94 (the court declined to issue *mandamus* relief as the relevant departments had begun creating the necessary plans at the time the case was heard. The court retained jurisdiction with respect to revisiting the need for further enforcement in the event of noncompliance).

43. *Id.* at ¶ 85.

44. Kyoto Protocol Implementation Act, S.C. 2007, c. 30 (Can.) (repealed).

became apparent that the Conservative government did not intend to fulfill Canada's international obligations.⁴⁵ Once the Conservatives achieved a majority government in 2011, Canada formally withdrew from the KP and repealed the KPIA.⁴⁶ This Article will return to these actions in due course when exploring failed attempts to litigate climate change.

The retreat outlined above has occurred during a time when Canada has furiously and actively been seeking new trading partners for Alberta's bitumen. The Keystone XL pipeline may have attracted the most international attention, but other significant and controversial pipeline proposals are ongoing. For example, Enbridge's Northern Gateway pipeline seeks to connect the oils sands with a port at Kitimat, British Columbia, and Kinder Morgan's Trans Mountain pipeline expansion that dramatically increases the amount of bitumen that is transported from the oil sands to Burnaby, British Columbia.

Arguably, one of the aims of the federal retreat has been to facilitate the approval and development of bitumen exports. For example, the amendments to long-standing federal environmental laws likely reduced the federal bureaucracy and approvals process associated with planning, developing, and constructing the necessary pipeline infrastructure. Similarly, the four species selected by the public interest applicants in Western Canada Wilderness Committee et al were strategically chosen based on the impact of their critical habitat not being identified and protected. As the court noted: The applicants are particularly concerned that the critical habitat of the four species is at risk from industrial development affecting the coast of British Columbia. As an example, the applicants cite Enbridge's proposed Northern Gateway pipeline development project which, they say, will have a negative impact on all four of the species at issue in these applications. I do not understand the respondents to take issue with this proposition, although they do deny that recovery strategies have been intentionally delayed in order to facilitate industrial development.⁴⁷

Finally, the case can be made that Canada's relative inaction with respect to federal climate change regulation and its

45. Peter Stoett, *Canada, Kyoto and the Conservatives: Thinking/Moving Ahead*, WILSON CENTER (2011), <http://www.wilsoncenter.org/sites/default/files/paperstoett1.pdf>.

46. See Kyoto Protocol, *supra* note 5; see also ENVIRONMENT CANADA, *supra* note 5.

47. Western Canada Wilderness Committee, *supra* note 39, at ¶ 57.

disassociation from the international process can be explained by the current emphasis on oil sands development, since meeting stringent international targets would require new regulatory controls exerted over the oil and gas industry. With this survey of the present retreat in mind, it is now appropriate to consider the scope of Canada's existing regulatory climate change response.

B. *Canada's Current Regulatory Response to Climate Change and its Lingering Gaps*

Since 2009, Canada's national regulatory climate change response has been aligned with that of the United States in at least two significant ways.⁴⁸ First, both States voluntarily pledged pursuant to the Cancun Agreements concluded at UNFCCC COP 16 to reduce their total annual economy-wide GHG emissions by 17% relative to a 2005 baseline, by 2020.⁴⁹ Second, Canada's federal government has opted to utilize America's sector-by-sector GHG emission reduction strategy, noting that "[g]iven the highly integrated North American economy, the Government of Canada is aligning its climate change approach with that of the United States, as appropriate for Canadian circumstances."⁵⁰ There is nothing wrong, *per se*, with pursuing a sector-by-sector regulatory approach to climate change, but this is premised on the assumption that such an approach does not *exclude* the most significant contributing sector(s), thereby frustrating effective action.

The federal pursuit of sector-by-sector GHG regulation is part of its overarching Clean Air Agenda⁵¹ and has taken a few forms. First,

48. This alignment has been fostered by the Clean Energy Dialogue ("CED") concluded between President Obama and Prime Minister Harper in February 2009. The CED coordinates interaction between high-ranking officials from both States, and primarily targets the development of strategies and action plans that clean energy production, distribution and use. See *United States-Canada Clean Energy Dialogue*, CANADA'S ACTION ON CLIMATE CHANGE (Dec. 11, 2014), <http://www.climatechange.gc.ca/dialogue/default.asp?lang=Enn=E47AAD1C-1>.

49. *Reducing Canada's Greenhouse Gas Emissions*, ENVIRONMENT CANADA (Feb. 15, 2013), <http://www.ec.gc.ca/dd-sd/default.asp?lang=En&n=AD1B22FD-1> (this voluntary target operates in the absence of any legally binding reduction target that would have been established for Canada pursuant to the second implementation phase of the KP).

50. *Id.*

51. *Id.* (this policy was most recently revisited in 2011 and, as it currently stands, exists as a conglomerate that comprises "initiatives to reduce GHGs and improve air quality; advances in innovation for clean energy and transportation, and for improved indoor air

six GHGs were listed as toxic substances on Schedule 1 of the Canadian Environmental Protection Act, 1999 (“CEPA, 1999”) in 2005,⁵² and this listing enabled federal regulation of emissions from coal-fired electrical generation as an exercise of federal criminal law power.⁵³ Second, and also pursuant to CEPA, 1999, the federal government exercised its authority to regulate interprovincial and international trade to establish vehicle emission standards for passenger automobiles and light trucks⁵⁴ and heavy-duty vehicles.⁵⁵ Regulatory standards have also been set for renewable fuel content⁵⁶ and for coal-fired electrical generation.⁵⁷ Conspicuously absent in this sectoral response is national regulation of the oil and gas sector. In 2010, the federal Conservative government promised to regulate the oil and gas sector and to achieve the reductions pledged at Copenhagen.⁵⁸ On December 14, 2014, and in response to a question posed by a member of the official opposition regarding the government’s decision to break its promise to regulate the oil and gas sector, Prime Minister Harper stated to Parliament that: “frankly, Mr. Speaker, under the current circumstances of the oil and gas sector, it would be crazy, it would be crazy economic policy to do unilateral penalties on that sector. We’re clearly not going to do that.”⁵⁹

The absence of federal oil and gas regulatory standards will figure prominently in determining whether Canada meets its voluntary Copenhagen commitment to achieve a 17% reduction below 2005 emission levels by 2020, which translates into an emissions budget of 611 megatons (“Mt”) in 2020.⁶⁰ Environment

quality; [mechanisms] helping Canadians adapt to climate change; and, engagement with international partners”).

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

53. Penny Becklumb, *Federal and Provincial Jurisdiction to Regulate Environmental Issues 5-6* (2013), available at <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2013-86-e.pdf>.

54. *Id.*; Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations, SOR/2010-201.

55. Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations, SOR/2013-24.

56. Renewable Fuels Regulations, SOR/2010-189.

57. Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations, SOR/2012-167.

58. Robert Madondo, *Harper Breaks Promise to Regulate Oil and Gas Emissions*, THE CANADIAN PROGRESSIVE (Dec. 9, 2014), available at <http://www.canadianprogressiveworld.com/2014/12/09/harper-breaks-promise-regulate-oil-gas-emissions/>.

59. *Id.*

60. *Canada’s Emissions Trend*, *supra* note 10, at 18.

Canada's most recent assessment of Canada's progress clearly indicates that the current regulatory approach is insufficient. Specifically, while current measures are predicted to account for some 130 Mt in annual reductions by 2020, this will only secure an annual emission budget of 727 Mt, which falls some 116 Mt short.⁶¹ This assessment is clear that while emission reductions will occur in many sectors, "increased production in Canada's oil sands is expected to drive a rise in emissions from the oil and gas sector of 45 Mt (28% [increase]) between 2005 and 2020."⁶²

It is apparent that Canada's current regulatory response to climate change mitigation is deficient. In short, its two major gaps are: (i) that the federal executive decision to withdraw from the KP further solidifies Canada's position as an international outlier and ineffective participant, which ultimately calls into question Canada's willingness to contribute or participate towards securing a new, comprehensive agreement by the conclusion of 2015; and (ii) that the federal government's decision to exclude the oil and gas sector from national regulatory control means that achieving even voluntarily commitments is unlikely. The remainder of this Article will turn to consider whether or not litigation can play a meaningful role in helping fill these gaps.

III. WHY LITIGATION?

Arguably, the best-case scenario for Canadian climate change regulation remains a comprehensive national emission reduction

61. *Id.* at 18 (interestingly, Environment Canada recently released its post-2020 GHG reduction target, seeking a 30% reduction below 2005 levels by 2030, *see* Press Release, Government of Canada, Government of Canada Announces 2030 Emissions Target (May 15, 2015), available at <http://news.gc.ca/web/article-en.do?nid=974959>). The probability of attaining this target is similarly compromised by the absence of comprehensive regulations for the oil and gas sector.

62. *Id.* at 16 (this increase will occur despite Alberta's provincial response to regulating oil and gas emissions. Alberta's approach is focused on emissions intensity from large industrial emitters. Specifically, it requires those industrial emitters that contribute more than 100,000 tons of GHGs annually to achieve a 12% increase in emission efficiency over a set time period. In other words, there is no prescribed limit on the overall quantity of GHGs that can be reduced; rather, it is the amount of GHG per unit of production that must be enhanced over time. While this strategy does aim to reduce emissions by 50 Mt by 2020, the record suggests that this result is unlikely. This approach is prescribed by the Climate Change and Emissions Management Act, S.A. 2003, c. 16.7 and the Specified Gas Emitters Regulation, Alta. Reg. 139/2007). For a summary, *see Alberta and Climate Change*, ALBERTA ENVIRONMENT AND PARKS (Feb. 10, 2015), <http://esrd.alberta.ca/focus/alberta-and-climate-change/default.aspx>.

strategy that includes all major industries and is designed and implemented in a manner that demonstrates fidelity to negotiated international standards. It is clear that Canada is far from this best-case scenario and, as the trends identified above suggest, it is seemingly moving further in the opposite direction.

The principle of sustainable development and, by extension, its associated sustainability movement, both seem clear that globally coordinated action in the face of the progressive destruction of the global commons, including the Earth's atmosphere, is necessary to secure the balance, longevity, and intra- and inter-generational equities upon which they are premised. Both sustainable development and the sustainability movement also contain considerable room for sub-national contributions including local innovation and even individual action. Viewed this way, it is clear that the challenges presented by the federal government's retreat from the environmental arena can also present an opportunity for sub-national governance structures, administrative agencies, municipalities, and even individuals to experiment and innovate with novel climate change mitigation strategies.

Climate change is clearly a matter of collective responsibility in that we all impacted by the consequences of climate change and, to some extent, are all to blame. At the State level, this is represented by the principle of Common but Differentiated Responsibility, as articulated in the UNFCCC, which attempts to parse out the level of responsibility for climate change and the corresponding obligation to respond.⁶³ This exercise ultimately identifies those developed nations that have benefitted from carbon-intensive industrialization as bearing primary responsibility to lead mitigation efforts and facilitate deviation from this industrialization process.⁶⁴

63. The principle of Common but Differentiated Responsibility, as articulated in the UNFCCC, clearly captures this at the State level. Art 3(1) states: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."

64. This traditional conception of CBDR will likely have to bend if the global community is to successfully engage cooperation between today's top emitting States, since they are a mixture of developed and developing States that do not neatly fit into this categorization.

There is a growing body of literature that argues in favor of an individual's moral responsibility to combat climate change.⁶⁵ This emerging ethical responsibility can be organized around recognized dimensions of individual morality, such as the ethical obligation to avoid harming others, to avoid risking harm to others, or contributing to the risk of harming others.⁶⁶ The individual or community reaction to this responsibility can take many forms as experimentation and innovation can manifest in a number of ways. At one level, it is open to individuals to exercise their citizenship within prevailing democratic structures and to vote for those politicians who prioritize climate change action. At a different level, individuals can exercise personal autonomy and choose to reduce their own carbon footprint through green lifestyle choices, including consumer decisions, commuter decisions, and energy efficiency decisions. Finally, individuals can contribute to education and awareness initiatives, participate in community organizing, or engage in public demonstrations or acts of non-violent civil disobedience. Each of the above described actions qualify as a sustainability intervention—defined here as an action taken by a citizen or group of citizens in the face of perceived government failure with the goal of moving society (locally, regionally, or globally) towards a more sustainable state. To date, these interventions have failed to secure the necessary governmental response⁶⁷ and, consequently, it is necessary to consider the suitability of a more significant intervention.

In 2009, Professors William Burns and Hari Osofsky observed in *Adjudicating Climate Change*, that “[o]ver the course of the last few years, climate change litigation has been transformed from a creative lawyering strategy to a major force in transnational regulatory

65. See ELIZABETH CRIPPS, CLIMATE CHANGE AND THE MORAL AGENT: INDIVIDUAL DUTIES IN AN INTERDEPENDENT WORLD (2013); Marion Hourdequin, *Climate Collective Action and Individual Ethical Obligations*, 19(4) *Env. Values* 443 (2010); STEPHEN GARDINER, SIMON CAREY, DALE JAMIESON & HENRY SHUE, CLIMATE ETHICS: ESSENTIAL READINGS (2010).

66. See Walter Sinott-Armstrong, *It's Not My Fault: Global Warming and Individual Moral Obligations*, in PERSPECTIVES ON CLIMATE CHANGE: SCIENCE, ECONOMICS, POLITICS, ETHICS 293, 297-302 (Walter Sinott-Armstrong & Richard B. Howard, eds., 2006).

67. One persuasive explanation for the failure of citizen action is that there is a fundamental disconnect between society's belief that we should act to mitigate climate change and its understanding of how the climate system works. See Sterman, J. & L. Booth Sweeney, *Understanding Public Complacency About Climate Change: Adults' Mental Models of Climate Change Violate Conservation of Matter*, 80 CLIMATIC CHANGE 213 (2007).

governance of greenhouse gas emissions.”⁶⁸ In the face of “regulatory insufficiency,” professor Osofsky observes that “[t]he combination of discontent with existing efforts and a wide range of legal mechanisms applicable to the crosscutting problem [of climate change] make the courtrooms and other quasi-judicial form important loci for dialogue among disparate actors across levels of governance about how to address climate change most appropriately.”⁶⁹ Osofsky’s point is premised on the fact that climate change litigation can take various forms. Claims based in tort, public trust, insurance, indigenous rights, and existing (or novel) substantive constitutional and/or human right obligations are all avenues available to prospective litigants.

Assuming that one accepts that an individual has a moral obligation to combat climate change, the question becomes whether or not this individual duty is weighty enough to oblige citizens to pursue litigation. This very question was explored in detail, in the United States context, by Professor Christopher Brown in *A Litigious Proposal: A Citizen’s Duty to Challenge Climate Change, Lessons from Recent Federal Standing Analysis, and Possible State-Level Remedies Private Citizens Can Pursue*.⁷⁰ Here, Brown explores the unique nature and scope of the climate change crisis in light of various theoretical critiques against elevating a moral duty in this way. He is aware of the practical concern that the outcome of litigation is difficult to predict and highly uncertain and that “the decision to instigate something as expensive, time-consuming, and emotionally trying as litigation should be left to the discretion of would-be litigants,” but asserts that regardless of the ultimate consequences of such litigation (i.e., its success in combating global climate change), there is a strong deontological basis that supports citizens pursuing this course of action.⁷¹

Building on this theoretical basis for pursuing litigation, there are a few other potential benefits associated with this approach. First, tort-based nuisance claims and other claims seeking damages awards

68. William C. G. Burns & Hari M. Osofsky, *Overview: The Exigencies That Drive Potential Causes of Action for Climate Change*, in *ADJUDICATING CLIMATE CHANGE* 1, 1 (William C. G. Burns & Hari M. Osofsky, eds., 2009).

69. Hari M. Osofsky, *Conclusion: Adjudicating Climate Change Across Scales*, in *ADJUDICATING CLIMATE CHANGE* 375, 382 (William C. G. Burns & Hari M. Osofsky, eds., 2009).

70. Christopher Brown, *A Litigious Proposal: A Citizen’s Duty to Challenge Climate Change, Lessons from Recent Federal Standing Analysis*, 25 *J. ENVTL. L. & LITIG.* 385 (2010).

71. *Id.* at 387, 393-94.

are able to compensate those that have been directly and severely impacted. Second, successful constitutional or human rights litigation has the potential to force legislative changes or executive actions, the benefits of which ultimately extend beyond those directly engaged in the litigation.⁷² In theory, successful litigation of this sort could prompt the action needed to close the existing gaps in Canada's climate change strategy.

A major difficulty of realizing these benefits is that those individuals whose rights are most significantly impacted by climate change and who are, therefore, in the best position to successfully advance the sort of litigation, are likely from a socio-economic strata that would be disproportionately impacted by the economic and personal costs associated with litigation. As the Canadian climate change experience demonstrates, this likely means those Inuit peoples in Canada's far north who are most vulnerable to climate change also bear the weightiest moral obligation to pursue litigation. Environmental justice recognizes that those within a lower socioeconomic-status are disproportionately exposed to the negative consequences of environmental degradation and demands that the costs of degradation be equally and equitably re-distributed. Arguably, requiring these vulnerable individuals to accept an additional moral responsibility to pursue litigation is highly inequitable and unjust. Put another way, is this not analogous to arguing that the CBDR principle that helps guide the international climate change response ought to be reformulated in a manner that shifts the onus from developed States to developing States, since they are experiencing the most significant effects of climate change? It is the position of this Article that the potential benefits of successful litigation are so significant that this option ought not to be frustrated by this concern. Rather, it falls to the environmental non-governmental organization community and not-for profit or charitable public interest law organizations⁷³ to work together to identify and

72. *Id.* at 405 (juxtaposing the potential benefits of successful litigation with the benefits gained from individual lifestyle changes, noting that "a successful citizen suit could have a different impact than the efforts of individuals to change their daily habits to decrease carbon emissions—not in the ultimate sense of solving the problem—but nevertheless significant").

73. Ecojustice is the primary Canadian organization positioned to take the lead. The organization's website asserts: "Ecojustice is leading the legal fight for a brighter environmental future. We are Canada's only national environmental law charity. We are 100% donor-funded and have a 25-year track record of winning legal victories for people and the

pursue strategic climate change-oriented litigation in a manner that institutionalizes and thereby alleviates some of the individual stress associated with this moral obligation. Certain individuals and groups in Canada have already accepted this obligation and have taken to the courts to litigate climate change. The following Part explores why these attempts have been unsuccessful and builds towards the assessment of whether other approaches have a chance of succeeding in light of these failures.

IV. *CLIMATE CHANGE LITIGATION WITH CANADIAN CONTENT*

Canada is not devoid of climate change litigation, but the Canadian experience pales in comparison to the United States litigation track record.⁷⁴ This section first introduces two international human rights petitions that engaged Canadian citizens and then turns to existing domestic Canadian jurisprudence.

A. *Petitions to the Inter-American Commission on Human Rights*

The Inter-American Commission on Human Rights (the “IACHR”) is an autonomous regional human rights body that exists under the Organization of American States.⁷⁵ Two petitions that claim human rights violations based climate change impacts have been lodged at the IACHR; both include Canadian Inuit petitioners.

The first petition was lodged against the United States by the Inuit Circumpolar Council (the “ICC,” then known as the Inuit Circumpolar Conference) on December 7, 2005.⁷⁶ This petition alleged that the United States, as the world’s largest GHG emitter, violated a number of human rights of the Arctic’s Inuit residents, including the rights to culture, property, life and security, health,

planet.” See *Who We Are*, ECOJUSTICE, <https://www.ecojustice.ca/approach/> (last visited June 22, 2015).

74. Michael B. Gerrard, J. Cullen Howe & L. Margaret Barry, *Climate Change Litigation in the U.S.*, ARNOLD & PORTER LLP (June 1, 2015), <http://www.arnoldporter.com/resources/documents/ClimateChangeLitigationChart.pdf> (providing a 769-page summary of existing climate change-related litigation in the United States).

75. *What is the IACHR?*, ORGANIZATION OF AMERICAN STATES <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Apr. 10, 2015).

76. Shelia Watt-Cloutier, *Petition to the Inter American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States* (2005), available at <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf>.

subsistence and inviolability of the home.⁷⁷ The petitioners sought, amongst other remedies and in light of a declaration that Inuit human rights were being violated, a recommendation that the United States establish new mandatory GHG emissions limits, the creation and implementation of a plan to protect Inuit culture and resources in the face of the impacts of climate change, and the creation and implementation of a plan to assist Inuit in adapting to the impacts of climate change.⁷⁸

It is striking that the vast majority of petitioners named in the Inuit Petition—49 of 63—were Canadian Inuit rather than American Inuit.⁷⁹ In attempting to hold the United States accountable for a broad range of alleged human rights violations throughout North America's Arctic, Professor Harrington suggests that "the petitioners ostensibly sought the Commission's [IACHR's] approval for a major extra-territorial extension of the scope of application of an international human rights without regard to the sovereign interests of other States in the Arctic, and without support from within international human rights law for such an extension."⁸⁰ The petition was ultimately rejected by the IACHR on the threshold issue of admissibility; however, the IACHR did hold a public hearing where the lawyers representing the ICC and supporting non-governmental organizations made their legal case to the IACHR in the absence of the United States or other interested parties.⁸¹

The second petition was lodged by the Arctic Athabaskan Council on April 23, 2013.⁸² This petition again utilizes both United States and Canadian petitioners—this time two individuals from each jurisdiction.⁸³ Canada rather than the United States is the target of this petition, and while it alleges similar rights violations,⁸⁴ the nexus presented by the petitioners is "black carbon, a component of sooty

77. *Id.*

78. *Id.* at 118.

79. *Id.* at 1.

80. Joanna Harrington, *Climate Change, Human Rights, and the Right to be Cold*, 18 *FORDHAM ENVTL. L. REV.* 513, 522 (2006-2007) [*hereinafter* Harrington].

81. *Id.* (discussing this public hearing and the implications of proceeding by this sort of *ad hoc* process).

82. *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada* (2013), available at http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf.

83. *Id.* at 8.

84. *Id.* at 57-78.

fine-particle pollution” that is a “potent climate agent” that disproportionately impacts high latitudes.⁸⁵ Canada emits 98,000 tons of black carbon annually,⁸⁶ and the petition asserts that the many regulatory measures available to Canada reduce these emissions. Specifically, Canada could: “require retrofitting [of] the existing fleet of on-road diesel vehicles with particle traps, which would reduce black carbon emissions by over 90 percent; eliminate high-emitting vehicles; require improved efficiency for residential heating with wood and coal; eliminate most gas flaring; and ban agricultural biomass burning.”⁸⁷ The petition requests that the IACHR investigate the claims, declare Canada’s human rights violations, and recommend those steps necessary to limit black carbon emissions and protect Athabaskan culture and resource use.⁸⁸ No decision on the admissibility of this petition has been made.

This petition, like the Inuit Petition, seeks extra-territorial application of human rights principles by utilizing United States petitioners to challenge Canadian action. Further, while enhanced regulation of black carbon may be another important step in comprehensively managing climate change, this petition does not seek to close either of the two major regulatory gaps identified in this Article. Further, it must be noted that even if this petition is deemed admissible and proceeds to an assessment of its merits, the IACHR lacks capacity to issue a legally binding decision—a feature of this sort of human rights organization that questions its utility in ever being able to help fill the sorts of gaps at question here.⁸⁹ Nevertheless, and regardless of whether the Arctic Athabaskan Claim is ultimately deemed admissible, the lasting value of these petitions is their ability to raise the public profile of important aspects of the climate change discussion.⁹⁰

85. *Id.* at 2.

86. *Id.*

87. *Id.* at 6.

88. *Id.* at 7, 86.

89. *See* Harrington, *supra* note 80, at 532 (noting in the context of State consent in the international legal system and the ability of the IACHR to force the United States to ratify the Kyoto Protocol, that: “A human rights petition to a non-binding part-time regional body cannot force a State to ratify a treaty—especially a treaty unrelated to the competence of that particular body.”).

90. *See* Harrington, *supra* note 80, at 521 (noting that “for publicizing the impact of global warming on the indigenous peoples of the Arctic, the launching of the ICC Petition receives full marks, but the petition rightly fails on its legal arguments”).

B. *Domestic Canadian Climate Change Litigation*

Compared to the IACHR petitions introduced above, litigation advanced in Canada's domestic courts seems better suited to help fill the lingering gaps in Canada's national climate change strategy. First, in *Friends of the Earth v. The Minister of the Environment*, the applicant, "a Canadian not-for profit organization with a mission to protect the national and global environment," brought three applications for judicial review of executive action pursuant to the KPIA and sought declaratory and mandatory relief from the Federal Court that would enforce Canadian compliance with its KP commitment.⁹¹ Then, four years later in *Turp v. Minister of Justice and Attorney General of Canada*, the applicant sought judicial review of the executive decision to withdraw from the KP, alleging that such an action is "illegal, null, and void as it in violation of the KPIA, the principle of the rule of law, the principle of the separation of powers, and the democratic principle."⁹² Despite the fact that in both cases the applicants were unsuccessful and the application for judicial review was dismissed, certain key takeaways from each decision help inform the possibility of similar litigation succeeding in the future.

Friends of the Earth turned on statutory interpretation of the action-forcing sections of the KIPA. Having already introduced the controversial nature of the KPIA, it is not surprising that its statutory obligations were less than clear. At its core, the applicants argued that the KPIA is unambiguous and mandatory in its legal obligations requiring the government to produce a KP-compliant Climate Action Plan and to publish proposed regulations within a set time frame and then ultimately "make, amend or repeal regulations necessary to ensure that Canada meets its obligations under . . . the Kyoto Protocol."⁹³ The Court's justiciability analysis led it to conclude that it "has no role to play in reviewing the reasonableness of the government's response to Canada's Kyoto commitments within the four corners of the KPIA."⁹⁴

91. *Friends of the Earth v. Canada (Governor in Council)*, 2008 F.C. 1183, 39 C.E.R.L. (3d) 191 (Can.) (appeal to the Federal Court of Appeal denied in *Friends of the Earth v. Canada (Governor in Council)*, 2009 F.C.A. 297).

92. *Daniel Turp v. Minister of Justice and Attorney General of Canada*, 2012 F.C. 893 (Can.).

93. *Friends of the Earth*, 2008 F.C. 1183 at ¶¶ 3-6.

94. *Id.* at ¶ 46.

Canadian courts do not subscribe to the American Political Questions doctrine,⁹⁵ nor does Canada have a strict constitutionally entrenched separation of powers. Rather, the justiciability analysis turns on an assessment of whether the issue at hand “possesses a sufficient legal component to warrant a decision by a court”;⁹⁶ importantly, this does not preclude “largely political questions.”⁹⁷ As one might expect, the question of what is sufficiently legal remain uncertain as does the level deference required from the courts to the other branches of government within “Canada’s constitutional matrix so as not to inappropriately intrude into the spheres reserved to the other branches.”⁹⁸ The Court in *Friends of the Earth* reminds us that if “either the subject matter of the dispute is inappropriate for judicial review or . . . the court lacks the capacity” to resolve it, then it is generally non-justiciable.⁹⁹ Because the Court dismissed the application for judicial review, it might be tempting to construe the Court’s reasoning in *Friends of the Earth* to conclude that climate change is now recognized as a non-justiciable issue. Such an interpretation is erroneous. Rather, *Friends of the Earth* stands for the narrower proposition that the KPIA, as drafted, relied on “public, scientific and political discourse, the subject matter of which is mostly not amenable or suited to judicial scrutiny” and “public and Parliamentary accountability” rather than judicial enforcement through judicial review to move Canada towards KP compliance.

In *Turp*, the Federal Court was provided with another opportunity to assess justiciability in the climate change context. Here, the court was less concerned about whether the duties contemplated by the KPIA were justiciable and instead focused on the applicant’s contention that the KIPA rendered Canada’s withdrawal from the KP illegal and void. It is clear in Canadian constitutional law that the federal executive has authority to conduct foreign affairs and

95. The Political Questions Doctrine, as originally articulated by Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803), provides that: “Questions, in their nature political, or which, by the constitution and laws, submitted to the executive, can never be made in this court.” This doctrine has always held a close connection to the separation of powers. For a discussion on Political Questions Doctrine in American climate change litigation, see Jill Jaffe, *The Political Question Doctrine: An Update in Response to Recent Case Law* 38 *ECOLOGY L. Q.* 1033 (2011).

96. Reference Re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, ¶ 7 (Can.).

97. *Id.* at ¶ 24.

98. *Id.* at ¶ 25 (citing to *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 S.C.C. 62, ¶¶ 33-36 (Can.)).

99. *Id.*

international relations and that this authority is rooted in the executive's Royal prerogative power. It is also clear that the Royal prerogative is a vestigial source of authority that can be altered and even abolished by Parliament. The Court dismissed the applicant's argument that the KPIA limited the executive's Royal prerogative authority to withdrawal from the KP in accordance with the mechanism for such action that the treaty itself provides in Article 27.¹⁰⁰ The Court also proceeded to dismiss the applicant's contention that Canada's withdrawal violated the constitutional principles of separation of powers or democracy.¹⁰¹

The fact that domestic litigation has, thus far, been unsuccessful should not dissuade future litigants from pursuing this course of action. These decisions, and especially *Turp*, approach the sort of actions that could prompt the sort of judicial intervention necessary to help correct Canada's climate change trajectory. In addition to the profile that this litigation can gain for climate change, *Friends of the Earth* and *Turp* have shed light on what is and what isn't justiciable, which helps inform the scope of future action from those citizens who choose to litigate climate change.

IV. POSSIBLE NOVEL APPROACHES TO CLIMATE CHANGE LITIGATION, INCLUDING LITIGATION PURSUANT TO SECTION 7 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Support for litigating climate change in Canada continues to gain traction in scholarly literature, if not the courtroom. This progression can largely be attributed to the fact that Canadian environmental lawyers, academics, and non-governmental organizations groups are now pushing to "green" Canada's Constitution by focusing on the nexus between environmental rights and existing human rights framework.¹⁰² The human rights linkage to climate change litigation was introduced earlier in this Article in the discussion of the Indigenous IACHR petitions, and this approach makes sense given

100. See *Daniel Turp v. Minister of Justice and Attorney General of Canada*, 2012 F.C. 893 (Can.) at ¶ 25.

101. See *id.* at ¶¶ 27-31.

102. See Charlie Smith, *David Suzuki Aims to Change Canada's Constitution with Blue Dot Tour*, THE GEORGIA STRAIGHT (Oct. 29, 2014), <http://www.straight.com/news/760246/david-suzuki-aims-change-canadas-constitution-blue-dot-tour>.

how climate change and human rights interact.¹⁰³ As enunciated by Oliver De Schutter, United Nations Special Rapporteur on the right to food:

Climate change represents an enormous threat to a whole host of human rights: the right to food, the right to water and sanitation, the right to development. There is therefore huge scope for human rights court and non-judicial human rights bodies to treat climate change as the immediate threat to human rights that it is. Such bodies could therefore take government policy to task when it is too short-sighted, too unambitious, or too narrowly focused on its own constituents at the expense of those elsewhere. Fossil fuel mining, deforestation, the disturbance of carbon sinks, and the degradation of the oceans are developments that can be blocked on human rights grounds.¹⁰⁴

Before exploring the Canadian human rights-climate change nexus in more detail, it is important to acknowledge that future climate change litigation need not be limited to this form. A recent Canadian policy paper entitled *Payback Time? What the Internationalization of Climate Litigation Could Mean for Canadian Oil and Gas Companies*, authored by lawyer Andrew Gage and Professor Michael Byers, identifies a number of innovative litigation-based approaches to combating climate change.¹⁰⁵ In addition to recognizing the availability—and controversy—associated with applying traditional tort principles to the pursuit of climate change damages,¹⁰⁶ Gage and Byers also introduce two other approaches. The first utilizes recent research on historical emissions to estimate the corporate exposure for five Canadian companies based on on-going climate change-related damages in foreign jurisdictions. Based on this, laws facilitating damages recovery are likely to be enacted in

103. See Marilyn Averill, *Linking Climate Litigation and Human Rights*, 18 *RECIEL* 189 (2009) (exploring the advantages and disadvantages of litigating climate change using human rights).

104. Oliver De Schutter, *Climate Change is a Human Rights Issue – and That’s How We Can Solve It*, *THE GUARDIAN*, Apr. 24, 2012, <http://www.theguardian.com/environment/2012/apr/24/climate-change-human-rights-issue>.

105. Andrew Gage & Michael Byers, *Payback Time: What the Internationalization of Climate Litigation Could Mean for Canadian Oil Companies*, *WEST COAST ENVIRONMENTAL LAW* (Oct. 9, 2014), <http://wcel.org/resources/publication/payback-time>.

106. *Id.* at 16-17 (this assessment engages the work of climate researcher Richard Heede in *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010*, 122 *CLIMATE CHANGE* 221 (2014), which has attributed 63% of the total GHG emissions between 1751 and 2010 to 90 major industrial emitters. Gage and Byers suggest this apportionment can be used to help address lingering causation concerns).

developing States where fossil fuel emissions are relatively low and climate change damage is particularly pronounced, such as Vietnam, Ghana, and India.¹⁰⁷ Damage awards obtained in these countries could then be enforced as debts in Canada, subject to any conflict of laws hurdles.¹⁰⁸ Second, Canadian provinces could enact a new legislated liability scheme that creates a cause of action against large industrial emitters, enabling recovery of public expenditure made to rectify climate change damage.¹⁰⁹ Such schemes could be based on the approach taken by provinces to recoup the expenses incurred by public health care because of tobacco product use.¹¹⁰ The SCC confirmed the constitutional validity of this approach in *British Columbia v. Imperial Tobacco Canada Ltd*,¹¹¹ which has since been adopted in every province.¹¹² These innovative approaches definitely help drive the climate change litigation discussion but because they largely focus on damage recovery from corporate polluters, they are not well-suited to directly challenge the lingering gaps in Canada's climate change strategy.

The most promising opportunity to use the courts to prompt government action to fill these gaps rests with innovative human rights-based litigation. The Canadian Charter of Rights and Freedoms ("Charter")¹¹³ has been in force since April 17, 1982 and as a constitutionally entrenched rights-bearing document it serves to protect citizens and constrains government action. The Charter is applicable to all matters that are within the authority of the federal Parliament or provincial legislatures.¹¹⁴ This analysis is most interested with the possibility of engaging strategic climate change litigation using section 7 of the Charter, which provides that: "Everyone has the right to life, liberty and security of the person and

107. Gage & Byers, *supra* note 105, at 40-41.

108. *Id.* at 23-29, 44.

109. *Id.* at 35.

110. *Id.* at 34-35.

111. *British Columbia v. Imperial Tobacco Canada Ltd*, [2005] 2 S.C.R. 73, 2005 SCC 49 (Can.).

112. Gage & Byers, *supra* note 105, at 35 (noting that despite the availability of this approach in all the provinces, law suits have only been initiated in British Columbia, Ontario, and New Brunswick; moreover, tobacco companies have predictably "aggressively" fought such action despite their constitutionality having been confirmed).

113. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Charter].

114. *Id.* at s. 32.

the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹¹⁵

Section 7 is most frequently employed in the criminal law context but has proved relevant elsewhere, figuring prominently in recent SCC decisions addressing the constitutionality of private health care insurance,¹¹⁶ safe injection site restrictions,¹¹⁷ and doctor-assisted suicide.¹¹⁸ It is primarily perceived as embodying a negative right that limits State action; however, the SCC has not closed the door to the possibility that “a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.”¹¹⁹ Moreover, while section 7 is often utilized to challenge legislative action/inaction it has also been utilized to challenge executive action/inaction, including discretionary decision-making.¹²⁰

The two-part test employed to evaluate section 7 claims reads: “claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that section 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice.”¹²¹ With respect to the first part of the test and the scope of potential rights deprivation, existing section 7 jurisprudence recognizes the right to life as the “right, freedom, or ability to maintain one’s existence,” the right to liberty as crucial and personal choices that implicate personal independence and dignity, and the right to security as the recognition of one’s personal

115. Charter, *supra* note 113.

116. *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 (Can.).

117. *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134, 2011 SCC 44 (Can.).

118. *Carter v. Canada (Attorney General)*, 2015 SCC 5 (Can.).

119. *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, ¶ 83 (Can.); *see also Vriend v. Alberta*, [1998] 1 S.C.R. 493, ¶ 60, where the court observes in the context of a challenge to Alberta’s provincial human rights legislation, which purposefully did not include sexual orientation in its prohibited grounds of discrimination: There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is “worded broadly enough to cover positive obligations on a legislature such that the Charter will be engaged even if the legislature refuses to exercise its authority” (*The Sounds of Silence: Charter Application when the Legislature Declines to Speak* (1996), 7 *Constitutional Forum* 113 at 115). The application of the Charter is not restricted to situations where the government actively encroaches on rights.

120. *Vriend*, [1998] 1 S.C.R. 493, ¶ 60; *PHS Community Services Society*, *supra* note 117, at ¶ 117. Still, it is far less common for section 7 to be used to challenge government inaction.

121. *Carter*, *supra* note 118, at ¶ 55.

autonomy and physical and psychological integrity.¹²² With respect to causation, the SCC has indicated that what is required is “a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant];” this standard is flexible and contextual.¹²³ Additionally, it “does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant.”¹²⁴ Turning to the second part of the test, recent jurisprudence cements that this assessment turns on whether the impugned action is arbitrary, overbroad, or has consequences that are grossly disproportionate to its objective.¹²⁵ Finally, even if both elements can be proved, the government may still avail itself of the infringement through section 1 of the Charter, which provides that rights guarantees are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹²⁶ However, section 1 is infrequently used to validate section 7 violations.¹²⁷

Perhaps the most tantalizing aspect of pursuing a section 7 claim against the government in the climate change context is the range of enforcement remedies available to the court in the event it concludes that a section 7 violation exists that is not saved by section 1. Section 24(1) of the Charter provides that anyone whose guaranteed rights have been infringed may apply to the courts to “obtain such remedy as the court considers appropriate and just in the circumstances;”¹²⁸ this includes “damages, costs, declarations, injunctions and other mandatory remedies,” as appropriate.¹²⁹ To date, courts have not had to consider the sort of enforcement remedy that would be appropriate in an environmental context because every attempt to use section 7 to challenge environmental harm has been unsuccessful.¹³⁰ While the

122. DAVID BOYD, *THE RIGHT TO A HEALTHY ENVIRONMENT* 178 (2012) (summarizing the scope of Section 7’s key terminology).

123. *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, 2013 SCC 72, ¶ 75 (Can.) (citing favorably to *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (Can.)).

124. *Id.* at ¶ 76.

125. *Carter*, 2015 S.C.C. 5 at ¶ 72.

126. Charter, *supra* note 113, § 1.

127. See BOYD, *supra* note 122 at 180 (considering section 1 in the context of justifying an environmental hazard that contravened section 7).

128. Charter, *supra* note 113, § 24(1).

129. Kent Roach, *Enforcement of the Charter—Subsections 24(1) and 52(1)*, 62 S.C.L.R. 473, 474 (2013).

130. See BOYD, *supra* note 122, at 180-81.

“track record of failure may appear discouraging . . . this reflects the evolutionary process of the law” that may require a number of setbacks prior to success.¹³¹ So, is it possible that a section 7 challenge could be utilized to fill existing gaps in Canada’s climate change policy?¹³²

Sniderman and Shedletzky have explored the possibility that members of Canada’s indigenous community could use section 7 to successfully challenge Canada’s decision to withdraw from the KP or its legislative inaction with respect to mandating GHG reduction.¹³³ They assert that members of Canada’s northern indigenous populations are likely the most suitable litigants to advance a section 7 Charter challenge, owing to the heightened impact of climate change at high latitudes and its consequences for physical and psychological security.¹³⁴ Further, they argue that Canada’s withdrawal from the KP likely passes the justiciability threshold in this constitutional context¹³⁵ and also that “[i]f it could be shown that

131. See BOYD, *supra* note 122, at 181.

132. The following analysis utilizes and builds upon the section 7 analysis found in Andrew Stobo Sniderman & Adam Shedletzky, *Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy*, 4 W. J. LEGAL STUD. 1, 3-4 (2014).

133. *Id.* at 3-4.

134. *Id.* at 4-5 (these projected impacts resonate well with the content of both petitions brought before the IACHR).

135. In order for a claim to proceed to a consideration of its merits, the court must be satisfied that the issue it raises is justiciable. The case on point here is *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, which involved a section 7 challenge to the federal executive’s decision to conclude an agreement with the United States allowing cruise missile testing in Northern Canada during a time of heightened Cold War tension. The peace groups that initiated this litigation alleged that Canada’s decision to allow weapons testing in Canada increased the threat of nuclear war and attacks on Canada, which, in turn, increased the threat to Canadian lives. This executive action was a valid exercise of the Royal prerogative to conduct foreign affairs and national defense, and the federal government requested that the applicants’ statement of claim be struck for “disclosing no reasonable cause of action” (¶ 1). The majority opinion of the Supreme Court of Canada authored by Dickson J. concluded that the statement of claim ought to be struck because “the causal link between the actions of the Canadian government, and the alleged violation of appellants’ rights under the *Charter* is simply too uncertain, speculative and hypothetical to sustain a cause of action” (¶ 3). The majority did not embark on a justiciability analysis, except to note that they “agree[d] in substance” (¶ 38) with the reasons of Madam Justice Wilson, who concurred in result only and authored an opinion that assessed justiciability and the proper role of the courts. Wilson J. dismissed the argument that claims of this sort are “inherently non-justiciable” because of evidentiary concerns or concerns about the appropriateness of the subject matter (¶ 63). In so doing, she dismissed the application of the American Political Questions Doctrine in the Canadian context to conclude that when the Court is “being asked to . . . decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so” (¶ 64).

government inaction on reducing greenhouse gas emissions caused section 7 violations, courts could intervene.”¹³⁶ These authors conclude that causation presents the greatest obstacle for meeting the first step of the section 7 test, even in light of the contextual and flexible standard endorsed by the SCC, given that GHGs are well mixed in the atmosphere and Canada’s “historical contribution . . . is a relatively small fraction of the whole.”¹³⁷ Moving to part two of the section 7 test, and assuming that the causation obstacle can be surmounted, Sniderman and Shedletzky identify gross disproportionality as the “most promising argument” available to claimants to assert Canada has not complied with fundamental principles of justice in its approach to climate change.¹³⁸ Finally, and with respect to remedies, these authors question whether a court would be so bold as to declare something like a withdrawal from the KP unconstitutional or whether they would opt to identify a remedy that helps prevent section 7 breaches moving forward, such as recommending “additional measures to help northerly communities adapt to climate change.”¹³⁹ Adding to their discussion of remedies, it is important to note that even in the unlikely event that a clear section 7 violation is found in the climate change context, the courts are likely to exercise their discretion in crafting a remedy that shows considerable deference to the executive and/or legislative branches of government given how politically charged and complex the issue is.¹⁴⁰ For example, consider the remedy given by the SCC in response to Omar Khadr’s petition to the courts for judicial review of the Prime Minister’s decision not to formally request Khadr’s repatriation from the United States, where he was being held at Guantanamo Bay Naval Base on war crime and terrorism charges.¹⁴¹ The SCC was satisfied that Khadr’s section 7 rights had been violated as a result of Canada’s participation in his interrogation, but instead of giving a specific remedy, the Court stated:

[W]e conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr’s s. 7 rights, and to leave it to the government to decide how best to

136. Sniderman & Shedletzky, *supra* note 132, at 4.

137. Sniderman & Shedletzky, *supra* note 132, at 6.

138. Sniderman & Shedletzky, *supra* note 132, at 6-7.

139. Sniderman & Shedletzky, *supra* note 132, at 7.

140. Arguably, this amounts to an informal or partial application of something akin to the Political Questions Doctrine.

141. *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44 (Can.).

respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*.¹⁴²

These conclusions are directly relevant to the ability of section 7 litigation to close the gaps identified in this Article. Specifically, the sort of legislative/executive inaction that has excluded the oil and gas sector and also consistent executive reluctance to pursue (meaningful) international cooperative action are analogous to the case studies considered by Sniderman and Shedletzky. It is true that successful section 7 litigation is unlikely at this point in time,¹⁴³ which means that any prospective litigants (including public interest environmental organizations) that might be considering challenging Canada's decision to not participate in any successor agreement to the KP, or the politically charged decision to continue to exclude the oil and gas sector from national regulatory standards, faces a significant uphill battle. But what if our understanding of the content of section 7 evolves or changes to reflect the centrality of a healthy environment in our day-to-day lives and its connection to basic human rights?

Section 7 has emerged as the centerpiece of the discussion surrounding new Canadian environmental rights. Leading Canadian environmental law practitioner and scholar David Boyd has identified this shortcoming as one of the areas where the Charter, and Canada's Constitution more generally, lags compared to the rest of the world. He notes that "[a]s of 2012, 147 out of 193 national constitutions incorporate environmental rights and/or responsibilities."¹⁴⁴ Boyd presents the case for "greening" Canada's Constitution by including the right to a healthy environment in the Charter, identifying the following mechanisms for achieving this: (i) direct political amendment of the Charter; (ii) a judicial reference initiated by the government (federal or provincial) to the courts requesting that they consider whether the constitution contains an implicit right to a healthy environment; or (iii) strategic litigation advanced to make the case for an implicit right to a healthy environment.¹⁴⁵ Given Canada's current political climate, the most likely option is the use of strategic

142. *Id.* at ¶ 39.

143. Sniderman & Shedletzky, *supra* note 132, at 15 (stating that "[a]t present, our proposed litigation strategies are likely to fail").

144. BOYD, *supra* note 122, at 88.

145. BOYD, *supra* note 122, at 171.

litigation to secure a judicial interpretation that recognizes this environmental right as being implicit in section 7.

I am not convinced that climate change offers the appropriate substance for this sort of strategic litigation; however, in the event that an appropriate fact scenario that can sustain such a claim presents itself, this would present an opportunity for the courts to modernize Charter rights. If the courts are ever going to accept the argument that the right to a healthy environment is implicit to section 7, it will likely occur in the context of a traditional pollution problem that does not suffer from the same causation frailties. For example, Ecojustice is currently representing two members of the Aamjiwnaang First Nation who live in Sarnia, Ontario's so-called "Chemical Valley" in a Charter challenge against the Government of Ontario.¹⁴⁶ Initially filed in 2010, this application for judicial review is based on these claimants' ongoing health problems and the observation that their community has been experiencing a skewed female-male birth ratio for some time.¹⁴⁷ Their challenge asks the court to declare that

an order issued by Ontario's Ministry of the Environment that allows Suncor Energy Products to increase production at part of its Sarnia refinery violated their Charter rights. [Ecojustice's] clients believe that the government's failure to take into account the cumulative effects of pollution from all the industrial activity around their community violates . . . basic human rights under sections 7 and 15 of the Canadian Charter of Rights and Freedoms – their rights to life, liberty and security of the person, and the right to equality.¹⁴⁸

In the event this case, or a similar one, succeeds in convincing a court that Canadian citizens do have the right to a healthy

146. *Lockridge v. Ministry of the Environment (Director)*, Notice of Application to Ontario Divisional Court for Judicial Review, Court File No. 528/10 (Oct. 19, 2010); *Defending the rights of Chemical Valley residents – Charter challenge*, ECOJUSTICE (May 21, 2015), <http://www.ecojustice.ca/case/defending-the-rights-of-chemical-valley-residents-charter-challenge/> [hereinafter *Ecojustice Charter Challenge*].

147. *See Environmental Rights: Human Rights and Pollution in Sarnia's Chemical Valley*, ENVIRONMENTAL LAW CENTRE: UNIVERSITY OF VICTORIA 2 (2011).

148. *Ecojustice Charter Challenge*, *supra* note 146. Note that this case is ongoing. In *Lockridge v. Director, Ministry of the Environment*, 2012 ONSC 2316, the court dismissed the government's motion to have their application dismissed. For an analysis that provides the ways in which the court might approach this case in the context of the right to a healthy environment, see Catherine Jean Archibald, *What Kind of Life? Why the Canadian Charter's Guarantees of Life and Security of the Person Should Include the Right to a Healthy Environment*, 22 TUL. J. INT'L & COMP. L. 1 (2013-2014).

environment, it is likely that in the course of coming to this conclusion, the court would provide a novel approach to understanding justiciability, causation, and the fundamental principles of justice in the environmental harm context. This, in turn, might just increase the likelihood that individuals would then be able to hold the government accountable for a wider range of environmental harms, including those caused by climate change.

CONCLUSION

Unfortunately, this analysis must conclude that the prospect of successfully closing the significant gaps in Canada's climate change strategy through litigation is, at least for the time being, quite slim. What is clear, though, is that there is considerable room to pursue different types of litigation in the face of climate change, even despite past failures. Moreover, each time a court is confronted with an aspect of this complex and dynamic issue, there is a possibility that something unexpected may happen. Alternatively, if one subscribes to the belief that the impact of litigation transcends the ultimate success or failure of any one case, it is possible to frame "a loss at trial . . . [as] a political victory for climate change activists—by framing climate change as a threat to rights and by requiring the government to justify its ongoing failure to reduce Canada's greenhouse gas emissions."¹⁴⁹ Even unsuccessful litigation has the effect of raising awareness and attracting considerable media attention to difficult societal issues. So, while "all litigation, all the time" is not a suitable rallying call for those impacted by climate change and those who oppose continued government inaction, litigation must not be discarded since it might play an important role moving forward.

There is no panacea to the complex and multi-faceted climate change problem. Accepting this reality can be quite difficult because it is clear that time is of the essence. Still, we must remain focused on the actions that can be taken individually, or as members of a larger community. Each positive action represents a step forward towards a more sustainable future and helps maintain the hope that our elected officials and the international community will finally respond in kind. This is our burden and our obligation.

149. Sniderman & Shedletzky, *supra* note 132, at 16.