

CLIMATE LITIGATION HISTORY AND ITS EFFECT ON FIELDS OF LAW



UNIVERSITY OF TORONTO
FACULTY OF LAW



Future of Law Lab
University of Toronto Faculty of Law

June 5, 2023



About the Future of Law Lab

The Future of Law Lab is a platform for students, academics, lawyers, and other professionals to participate in collaborative initiatives exploring how the law will evolve in the future. We will dive into the intersection of law, technology, innovation, and entrepreneurship, with programming dedicated to each of these streams. As a hub of interdisciplinary activity, we are dedicated to bringing together individuals from all backgrounds to examine the changing face of the legal profession.



About the Climate Change Working Group

This report is written by Amy Ariganello, Declan Gemmill, and Noah Yabrov, first year students at the University of Toronto Faculty of Law, under the supervision of Arifah Razack and Janice Fung, upper-year student leaders of the group.

The Working Group's objective is to catalogue the impact that climate change is having on various fields of law, as well as help policymakers determine how a climate-forward policy can be implemented at the organizational and institutional level.



*Prepared by the Future of Law Lab's
Climate Change Working Group*

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FUTURE OF LAW LAB MEMORANDUM

To: Future of Law Lab, Climate Change Reform Working Group

From: Amy Ariganello, Declan Gemmill, Noah Yabrov

Date: January 15, 2023

Re: History of Canadian climate change litigation and its potential effect on various fields of law

Questions Presented

What is the history of climate litigation? How has the court's stance on climate change progressed over the past decade? How has climate change impacted different practice areas in the legal setting? How will it continue to impact these practice areas in the future?

Short Answer

Canadian climate change litigation remains in its infancy. Going forward, litigants may have more success through other innovative approaches for combating climate change. Needless to say, the future of climate change litigation remains very uncertain. Climate change also poses some potentially significant impacts on various legal fields, including criminal, family, property, tort, and bankruptcy law. These fields should be prepared to adapt to environmental changes in the future to ensure the law keeps pace with the surrounding world.

Analysis

1. The History of Canadian Climate Change Litigation

To predict the future of the climate litigation in Canada, it is first necessary to understand its history. Historically, this area of litigation has been quite marginal. Recently, however, courts have

been demonstrating a growing willingness to entertain certain climate-related claims. In what follows, this memorandum summarizes the history of the major cases and outlines emerging trends in climate change litigation. After distilling lessons from this historical overview, this memo proceeds to outline climate change's impact on several areas of legal practice.

i. History of climate change litigation over constitutional authority

Although the division of powers will always be heavily contested, the courts have recently clarified that the Government of Canada has certain powers to legislate with respect to climate change. Three cases have been decisive in shaping the current law.

To begin, one of the earliest cases was *Friends of the Earth v Canada (Governor in Council)*.¹ In this case, the *Federal Court* dismissed the Friends of the Earth's claim that the Government of Canada breached its duty to enact the Kyoto "obligations" pursuant to the *Kyoto Protocol Implementation Act* ("KPIA").² In reaching its conclusion, the court relied on standard methods of statutory interpretation to hold that the Government was not under a duty.³ Indeed, the statutory language simply did not imply a mandatory obligation.⁴ More generally, the court held that it had "no role to play reviewing the reasonableness of the government's response to Canada's Kyoto commitments within the four corners of the *KPIA*."⁵ This case reveals that courts are only likely to enforce a claim regarding noncompliance with government commitments if the statutory language directly binds the government.

¹[2008] FC 1183; [2009] FCA 297 [*Friends of the Earth*].

²S.C. 2007, c. 30 [*KPIA*].

³*Friends of the Earth*, *supra* note 1 at paras 39-41.

⁴*Ibid* at para 34.

⁵*Ibid* at para 46.

Next, the only climate-related case to reach the Supreme Court of Canada (“*SCC*”) was heard in 2021. In *Saskatchewan et al. v. Canada re Greenhouse Gas Pollution Pricing Act*,⁶ the *SCC* held that the federal government’s backstop for regulating greenhouse gas emissions—colloquially known as the “federal carbon tax”—was *intra vires* the government of Canada pursuant to its residual powers under section 91.⁷ Simply put, this means that the *SCC* recognized that Ottawa is permitted to impose its pricing backstop. Apart from substantially modifying the national concern branch of the “Peace, Order, and Good Government” power,⁸ arguably making it much easier for the federal government to regulate provincial environmental affairs going forward, the *SCC* declared that climate change is “a truly global pollution problem with grave extraprovincial consequences.”⁹

Finally, it should be noted that there is an ongoing case that has been granted leave to appeal to the *SCC*. In 2022, in *Reference Regarding the Impact Assessment Act*,¹⁰ the majority of the *Alberta Court of Appeal* (“*ACA*”) held that the federal government does not have the power to enact an environmental impact assessment program for designated projects within a province.¹¹ Accordingly, it concluded that the federal *Impact Assessment Act* is unconstitutional.¹² Importantly, the *ACA* characterized the pith and substance of the act similarly to the dissent’s characterization in the *GGPPA*. Barring a complete reversal of its own ruling on the division of powers, the *SCC* is very likely to reiterate that the Government of Canada has the constitutional

⁶2021 SCC 11 [*GGPPA*].

⁷*Ibid* at para 207.

⁸It is beyond the scope of this memo to review this important change. For more, see Brown J’s dissent in *GGPPA* at paras 428 – 456.

⁹*GGPPA*, *supra* note 6 at para 211.

¹⁰2022 ABCA 165 [*Re Impact Assessment Act*].

¹¹*Ibid* at para 431.

¹²*Ibid*.

authority to legislate in this way regarding climate change. Therefore, the *SCC* is likely to overturn the *ACA*'s ruling.

ii. History of Canadian climate change Charter litigation

Very recently, lower courts have witnessed an explosion of climate change litigation involving the *Canadian Charter of Rights and Freedoms* (“**the Charter**”). Many of these cases have been class action lawsuits led by youngsters. These lawsuits have been predicated on the notion that since youngsters cannot vote, the only way for them to achieve their desired political goals is to pressure the courts. So far, however, the courts have not fully recognized *Charter* rights violations claims stemming from climate change. In fact, the courts have consistently shot down climate change *Charter* claims. To understand why, it is first necessary to briefly review the general process for making *Charter* challenges in Canada.

The *Charter* aims toward the “unremitting protection of individual rights and liberties.”¹³ When a law is challenged for infringing a right or liberty, the courts adopt a two-step process. The first step is to define the scope of the right using a broad, purposive interpretive method, and then to determine whether it has been infringed. The burden of proof rests with the claimant. If this threshold is met, then the government has the burden of proving that the infringement is “demonstrably justifiable in a free and democratic society.”¹⁴ How exactly has this framework been applied to climate-related challenges?

In 2020, in *Rose v Canada*,¹⁵ the *Federal Court* heard a claim brought by 15 children across Canada describing how “climate change has negatively impacted their physical, mental and social

¹³*Hunter v Southam*, [1984] 2 SCR 145 at page 155.

¹⁴*R v Oakes*, [1986] 1 SCR 103 at para 13.

¹⁵[1998] 3. S.C.R. 262 [*Rose*].

health and well-being.”¹⁶ The court held that their *Charter* claims pursuant to section 7 (right to life, liberty, and security) and 15 (equality rights) of the *Charter* were not justiciable¹⁷ because the applicants alleged an overly broad and unquantifiable number of impugned actions and inactions, which not only fails to meet the threshold requirement of justiciability but also “attempts to subject holistic policy response to climate change to *Charter* review.”¹⁸ As a result, the applicants’ claim was dismissed.

In the same year, in *Misdizi Yikh v Canada*,¹⁹ the *Federal Court* similarly dismissed different claimants’ argument that the Government’s failure to enact “adequate laws” to fulfill international obligations was unconstitutional.²⁰ Indeed, the court clarified that questions of policy are generally best left to the executive and legislative branches rather than the courts.²¹

One exception to this trend may be found in *Mathur v Ontario*.²² In this 2020 case, the *Ontario Superior Court of Justice* heard from applicants who sought relief on behalf of their generation and future generation of Ontarians.²³ The applicants sought several declarations from the court, including that section 7 of the *Charter* includes the right to a stable climate system capable of providing a sustainable future.²⁴ In response, the AG of Ontario brought a motion to strike out their application on the grounds that it was “certain to fail.”²⁵ Ultimately, the court

¹⁶*Ibid* at para 2.

¹⁷When determining justiciability, the “question to be decided is whether the Court has the institutional capacity and legitimacy to adjudicate the matter. Or, more generally, is the issue one that is appropriate for a Court to decide,” *Ibid* at para 29.

¹⁸*Ibid* at para 40.

¹⁹2020 FC 1059 [*Misdizi Yikh*].

²⁰*Ibid* at para 47.

²¹*Ibid* at para 19.

²²2020 ONSC 6918 [*Mathur*].

²³*Ibid* at para 31.

²⁴*Ibid*.

²⁵Such motions are authorized pursuant to Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

concluded that the motion was *not* “certain to fail,” and so strongly urged the parties to agree upon costs.²⁶ Given the nature of motion to strike actions, it is unclear how far to extend this holding.

More recently, in 2021, in *Environnement Jeunesse c. Procureur général du Canada*,²⁷ the *Québec Court of Appeal* held that the impact of climate change on human rights is not a justiciable issue. This is a very important development. Environment Jeunesse, an environmental non-profit, brought a climate change class action lawsuit against the Government of Canada on behalf of Québec citizens aged 35 and under on the grounds that the Government’s failure to enact a suitable greenhouse gas reduction plan violated the fundamental rights of youngsters.²⁸ The appeal court held that the relief sought by the appellants was tantamount to asking courts to demand legislative actions, which is not their role.²⁹ In other words, the court held that deference to legislative power in the context of climate change is necessary.³⁰ Perhaps more importantly, the court did not address whether the Government’s failure of omission violated *Charter* rights. At any rate, leave for appeal to the Supreme Court was dismissed.

At this stage, community leaders and climate activists reading this memo may be disappointed with our tour of climate change *Charter* litigation. However, they may find inspiration in other climate litigation trends. What other trends have taken place in climate litigation?

iii. Other trends in climate change litigation

²⁶*Mathur*, *supra* note 22 at para 269.

²⁷2021 QCCA 1871 [*Environnement Jeunesse*].

²⁸More precisely, Environment Jeunesse argued that the youths’ section 7 and 1 of the *Charter* rights were violated along with their *Quebec Charter* right to live in a healthful environment in which biodiversity is protected.

²⁹*Environnement Jeunesse*, *supra*, note 27 at para 32.

³⁰*Ibid* at para 33.

Increasingly, class action lawsuits directed by municipalities against oil and gas companies are used as weapons in the fight against climate change.³¹ For example, the Vancouver City Council was the first Canadian city to pass a motion that directed city staff to allocate up to \$1 per resident from its 2023 Operating Budget to fund a class action lawsuit.³² The lawsuit seeks to recover costs associated with climate change. Other municipalities are also seeking advice from legal experts on how to achieve their climate goals.³³ For example, FCM³⁴ and West Coast Environmental Law³⁵ have been key actors in prompting municipal climate change advocacy. This is an important development for Canada, which has all too often overlooked the potential of municipalities to address climate change.

A different—but arguably important—trend in climate change litigation has prevailed in other countries like New Zealand³⁶ and Colombia.³⁷ These countries have adopted a novel approach to protecting environmental entities like lakes, rivers, and forests by granting them personhood status.³⁸ In Canada, there is progress in this direction. For example, the Magpie River

³¹Laura Gill et al, “Canadian Municipalities Increasingly Support Climate Change Litigation Against Oil and gas Companies”, online: Bennett Jones <<https://www.bennettjones.com/Blogs-Section/Canadian-Municipalities-Increasingly-Support-Climate-Change-Litigation-Against-Oil-and-Gas-Companies#:~:text=To%20date%2C%20Canadian%20courts%20have,our%20previous%20insight%20Quebec's%20Superior>>

³²*Ibid.*

³³*Ibid.*

³⁴Federation of Canadian Municipalities, “Partners for Climate Protection,” online: FCM <<https://fcm.ca/en/programs/partners-climate-protection>>

³⁵West Coast Environmental Law, “Transforming the Legal Landscape, online: WCEL <<https://www.wcel.org/>>

³⁶Associated Press, “New Zealand River’s Personhood Status Offers Hope to Māori”, online: US News & World Report <https://www.usnews.com/news/world/articles/2022-08-15/new-zealand-rivers-personhood-status-offers-hope-to-maori#:~:text=__-,In%202017%2C%20New%20Zealand%20passed%20a%20groundbreaking%20law%20granting%20personhood,its%20physical%20and%20metaphysical%20elements>

³⁷Curtis Kline, “Recognizing the Rights of a River: Challenges and Opportunities from Colombia to Colorado”, online: Colorado State University, School of Global Environmental Sustainability <<https://sustainability.colostate.edu/humannature/rights-of-a-river-colombia-to-colorado/>>

³⁸Georgia Lloyd-Smith, “Rights for nature: how granting a river ‘personhood’ could help protect it”, online: The Conversation <<https://theconversation.com/rights-for-nature-how-granting-a-river-personhood-could-help-protect-it-157117>>

was the first river in Canada to be granted personhood status in 2021.³⁹ Despite its revolutionary potential, this strategy remains very marginal in Canadian climate change litigation.

Finally, it should be noted that *de facto* climate change litigation is increasingly being coupled with indigenous rights claims. These claims are usually directed toward preventing certain forms of infrastructure development, especially pipelines.⁴⁰ Leverage exerted by Indigenous actors in legal challenges has made them powerful actors in *de facto* climate change litigation.

iv. Conclusion

What lessons can we glean from the history of climate change litigation? First and foremost, Canadian climate change litigation remains in its infancy. With respect to federalism, it is becoming much easier for Ottawa to enact federal climate change policies. On the other hand, lower courts have maintained that climate change related rights violations are generally not justiciable. As we have seen, the courts have regularly held that climate change is mostly a political debate, which they would rather steer clear of. Going forward, litigants may have more success through other innovative approaches for combating climate change. Needless to say, the future of climate change litigation remains very uncertain.

2. Climate change impacts on various legal fields

Climate change poses some potentially significant impacts on various legal practice and the effect of these impacts on the future of these fields will be analyzed in this memorandum. These fields

³⁹Morgan Lowrie, “Quebec river granted legal rights as part of global ‘personhood’ movement”, online: CBC News <<https://www.cbc.ca/news/canada/montreal/magpie-river-quebec-canada-personhood-1.5931067>>

⁴⁰For a review of the role Indigenous peoples play in these activities, see Daniel Béland & André Lecours, “Federalism and the politics of oil and gas pipelines in Canada (Alberta) and the United States (Texas)” (2022) 50:3 Politics & Policy.

of law should be prepared to adapt to changes in the future to ensure the practice of law keeps pace with environmental changes and ensures meaningful redress for climate-based disputes.

i. Climate Effects on Practice of Criminal Law

Criminal law will likely require substantive adaptations to address multiple issues arising from climate change. Climate change will pose significant threats to the physical infrastructure tied to the criminal justice system, as well as affect the types of crimes committed and the defences used in court.⁴¹ If the current system does not evolve, it will be ill-prepared to address the increase of criminal conduct or the rise in crimes of necessity stemming from changes within the environment impacting vulnerable communities.

The physical infrastructure of the criminal justice system, including prisons, jails, and courtrooms, will likely be significantly affected by climate change because increasing global temperatures will lead to poor living conditions, increased violence among inmates, and higher financial burdens to reform these institutions.⁴² Heat-related illnesses and poor living conditions will become more pronounced as climate change effects increase and may result in constitutional challenges to the working and living conditions for both employees and inmates.⁴³ In addition, courthouses demolished by increasingly violent climate disasters will cause a serious backlog of cases. Levenson suggests that “portable” courts be designed for use when courthouses are rendered inoperable, and resources be put in place to host court remotely through video conferencing as used during the COVID-19 pandemic.⁴⁴

⁴¹ Laurie L Levenson, “Climate Change and the Criminal Justice System” (2021) 51:2 J Envtl L 333 at 340 [Levenson].

⁴² *Ibid* at 366.

⁴³ *Ibid*.

⁴⁴ *Ibid* at 365.

The types of crimes committed will likely evolve and the occurrence of crime is predicted to increase because of diminishing resources and displacement caused by worsening weather conditions. Individual assaults, looting, and fraud are predicted to occur more frequently as affordable resources become scarce, emergency conditions cause panic among the public, and fraudulent relief organizations scam vulnerable populations.⁴⁵ Migrant smuggling is also expected to increase as certain countries become uninhabitable due to extreme weather conditions. It is recommended that the Canadian government expand the humanitarian protected persons class to include climate migrants who face serious climate-induced risks in their country and allow them safe refuge in Canada.⁴⁶ Additionally, studies have shown that higher temperatures increase human irritability and leads to the commission of more aggressive crimes.⁴⁷ If warm weather occurs for longer periods of the year, more street crimes can be expected to occur when people are outside frequently. In extreme cases, dangerous weather conditions may encourage people to seek prolonged shelter indoors which would lead to a decrease in crimes of opportunity.⁴⁸

The nature of defences used by lawyers and their applicability will likely change because of the overwhelming occurrence of crimes of necessity. The defence of necessity can exculpate actors for conduct that would otherwise be a crime when they act in order to prevent something worse from occurring.⁴⁹ Lawyers will likely need to use the defence of necessity more frequently when dealing with resource-related crimes such as theft of food and medical supplies and fraudulent applications for government or charitable aid. Actions such as looting will have to be reframed based upon the contextual circumstances to show that the actor(s) had no other legal

⁴⁵ *Ibid* at 354.

⁴⁶ Canadian Association of Refugee Lawyers, “2021 Report on Climate Migrants” (2021) at 13, online (pdf): *Canadian Association of Refugee Lawyers* <carl-acaadr.ca/report/carls-2021-report-on-climate-migrants/>.

⁴⁷ Rob White, *Climate Change Criminology* (Chicago, IL: Bristol University Press, 2018) at 58.

⁴⁸ *Ibid* at 59.

⁴⁹ *Levenson, supra* note 1 at 373.

option to preserve their well-being.⁵⁰ Communities which are most vulnerable to the effects of climate change or have a limited access to resources can expect to require this defence most frequently. Through social support programs, the government can better allocate resources within communities to reduce the application of the necessity defence.⁵¹

The United Nations has proposed the international criminalization of corporate actions contributing to climate change.⁵² By imposing criminal sanctions upon corporations, the advancement of the effects of climate change can potentially slow or stop altogether. Slowing the development of climate change could prevent the previously mentioned effects on the criminal law system. It would also provide the government with more time to implement solutions to counteract these aforementioned impacts on the legal system.

ii. Climate Effects on Practice of Family Law

Family law will likely not require major transformations to adapt to climate change, but the factors considered when determining the best interests of a child will likely expand to focus on the impacts of climate change. Family law has not frequently been identified as an area of law that will be significantly impacted by climate change because it relies upon social assumptions of the definition of a family and requirements for protection of children.⁵³ Climate change most commonly creates biophysical changes and any social or economic effects resulting from those changes are not typically relevant to the practice of family law.⁵⁴ However, the idea that family law is

⁵⁰ *Levenson, supra* note 1 at 374.

⁵¹ *Ibid.*

⁵² United Nations Office on Drugs and Crime, “Crimes that Affect the Environment and Climate Change” (2022) at 6, online (pdf): *UNODC Publications & Resources* <unodc.org/unodc/en/environment-climate/resources.html>.

⁵³ JB Ruhl & James Salzman, “Climate Change Meets the Law of the Horse” (2013) 62:5 *Duke LJ* 975 at 993.

⁵⁴ *Ibid.*

“exceptional” and would likely not be affected by climate change is not necessarily true.⁵⁵ Environmental changes may affect the financial stability and migration pattern of families, which could lead to increasingly dangerous situations for children.

The fundamental theme underlying family law of protecting the best interests of the child by finding “stability” for them will likely need to adapt because of the unstable effect of climate change upon families. Family law will typically consider if child has lived in the same place for an extended period of time or has a regular routine as important factors for stability, which can be difficult for parents to provide in some cases.⁵⁶ The increased need for migration from climate-stricken countries and the potential lack of stable housing when making a far move can cause temporary instability despite the parents acting in the best interests of the child. Fundamental assumptions in family law will likely need to shift to stop treating all forms of instability as disqualifying factors for state-recognized kinship and create solutions for responding to instability caused by climate change.⁵⁷ Non-traditional structures of family could be considered as an increasingly important factor in establishing stability for a child. Through having multiple generations of family or friends sharing childcare responsibilities, a flexible idea of “stability” is promoted, and a more sustainable method of living can emerge while still focusing on upholding the best interests of the child.⁵⁸

Supports for families displaced by climate change will likely need to be established by the government to prevent instability during migration and maintain the best interests of the child. While migrating, whether voluntarily or by necessity, there is a higher risk of abuse, violence,

⁵⁵ Janet Halley & Kerry Rittich, “Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism” (2010) 58 Am J Comp L 753 at 754.

⁵⁶ Jessica Rizzo, “The Children’s Hour: Climate Change, Law, and the Family” (2021) 27:2 Hastings LJ 79 at 81.

⁵⁷ *Ibid* at 90.

⁵⁸ *Ibid* at 93.

trafficking, and exploitation for children due to a myriad of factors including unstable forms of transportation and lack of resources.⁵⁹ Under the current system of family law, this instability could disqualify the state-recognized kinship rights of parents even when migration was essential. Government assistance programs to support families fleeing from climate disasters can alleviate the effects of these issues to ensure stability is provided when migration occurs. Children can easily become separated from their parents when entering a new state and suffer instability for a prolonged period of time while settling within their new home. Family law may need to consider the risk posed by climate change in the family's place of origin versus the risk posed by instability caused by migration when determining if a child's best interests are being protected.⁶⁰

Family law will likely have to increasingly consider the disproportionate effects of climate change on women and children in determining the best interests of children because of the higher risks posed to their health and wellbeing. Climate change can result in adverse pregnancy outcomes as well as increased rates of asthma, lung cancer, heart disease, heart attacks, strokes, and dementia among women. Both women and children also have an increased risk of infectious disease, malnutrition, and death as a result of climate disasters.⁶¹ Due to this increased risk, it may be in the best interest of a child to migrate to a location where the effects of climate change are less severe, despite the stability offered in their home.⁶² Family law may need to adapt to include surrounding environmental conditions as a key factor in the determination a child's best interests.

iii. Climate Effects on Property and Tort Law

⁵⁹ United Nations Children's Fund, "Guiding Principles for Children on the Move in the Context of Climate Change" (2022) at 14, online (pdf): *Office of Global Insight & Policy* <[unicef.org/globalinsight/reports/guiding-principles](https://www.unicef.org/globalinsight/reports/guiding-principles)> [UNICEF].

⁶⁰ Katharina Ruppel-Schlichting, Sonia Human & Oliver C Ruppel, *Climate Change: International Law and Global Governance*, vol 1, (Baden-Baden, EU: Nomos Publishing House, 2013) at 360.

⁶¹ UNICEF, *supra* note 19 at 14.

⁶² *Ibid* at 21.

Although legislation, regulation and administrative avenues dominate the legal protection of environmental and conservation interests, private law – specifically property and property-related-torts law – offer great potential for addressing environmental challenges.

The common law may expand on two different fronts to continue protecting against climate change. The first is recognising new things as property. The second is expanding property rights to better protect environmental interests.

a. New Things as Property

Property law governs how rights are determined but have lagged developments and innovations to reduce carbon emissions. Environmentally friendly solutions, such as solar and hydroelectric power, are critical to reduce reliance on non-renewable energy sources that harm the environment. The law must develop solutions to protect ownership and rights associated with these renewable energy sources to facilitate increased adoption.

Societies interests in things have expanded to include the movement of air, water, and protons. Historical property law is well equipped to deal with resources situated on land, such as oil and gas, but is yet to realize property in movement.⁶³ For example, in-stream hydropower – known as kinetic hydropower – converts water movement into energy but the existence of multiple projects on one stream of water may adversely impact one another. If the water is flowing from north to south, the project located further north (the upstream project) may influence the water movement and impact the project located further south (the downstream project).

⁶³ Gregory Sergienko, “Property Law and Climate Change” (2008) 22: 3 NR&E 25 at 25.

Each project desires a claim in the resource – the movement of the water – but traditional property law does not recognise this as property. Without doing so, investment in these projects may be curbed as the owners have no legal protection to the resource.

Four common law principles underlie the recognition of property that support including environmentally friendly relevant things as property.⁶⁴

The first principle is promoting capturing the resource for productive use because society benefits. There are clear societal benefits to encouraging the use of renewable energy to combat climate change.

Second, the failure to protect these interests would deter investment, spending, and innovation because these operations would lack predictability. Without legal protection, someone setting up an in-stream hydropower project would bear the risk of another investing in a project upstream from their project.

Third, without developing the law, those who first access the resource may have inferior rights to later participants. A subsequent project may be located further upstream and would import superior rights to the downstream project who was located first as the upstream project would ‘touch’ the resource first.

Finally, duplicative efforts create waste and social harm. These concerns are seen in oil and gas law, where duplicative efforts are discouraged to reduce social harm that arises from those efforts. With the in-stream hydropower example, it is duplicative to have two projects fighting for the same water movement.

⁶⁴ *Ibid* at 26.

For property lawyers, the underlying principles may offer a series of arguments that may support recognition of expanded property rights for renewable energy resources to protect against climate change.

b. Protection of Property Rights

Property law and torts law offer legal recourse, remedies, and protection to facilitate environmental protection from private law. These areas of private law are well positioned to combat climate change issues because their rights and protections are dynamic and evolve over time. The 1982 decision by the Wisconsin Supreme Court in *Prah v Maretti* illustrates how the law evolves to protect rights based on societal interests.⁶⁵ The court held the neighbour's building was a nuisance because it interfered with the plaintiff's solar panels and the access to sunlight for solar energy was protected.

In its current form, tort law's protection of property rights is poised to address environmental issues in private disputes. The below will highlight two laws in which this is true.

Trespass to Land

Trespass to land is the intentional physical invasion of another person's property.⁶⁶

In the United States, the courts held environmental contaminants settling on another person's property is trespassing. This lays the foundation for recognising climate-related trespassing.⁶⁷

⁶⁵ *Prah v Maretti*, 321 NW 2d 182, 108 Wis 2d 223 (Sup Ct 1982).

⁶⁶ David Grinlinton, "The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges" (2017) 62 McGill LJ 633.

⁶⁷ *Ibid* at 655.

In Canada, trespass to land has been held to not require physical contact with the land in some instances. This opens the door for airborne toxic materials that cause harm to a property, irrespective of if contacts with the land, to be held to be trespassing.⁶⁸

In the United Kingdom, the failure to remove an object or structure may constitute trespass, so this may be expanded to rehabilitation and restoration projects.⁶⁹

These decisions illustrate environmental protection available under the common law tort of trespass to land.

Nuisance

Historically, nuisance has been regarded as the main environmental tort. Nuisance protects against interference with one's use and enjoyment of their land.

The Ontario Court of Appeal in *Smith v Inco* considered the argument that a nickel refinery was a nuisance because it contaminated the plaintiff's soil. Although the court held it was not a nuisance, it seriously engaged with the argument and failed it on insufficient evidence to illustrate actual and substantial physical injury to the land. This decision illustrates the opportunity to bring claims under nuisance law for environmental harm caused.⁷⁰

c. Property Law Potential

Property rights are acting as the foundation for new solutions to address environmental challenges.

Regulatory Quotas and Management Systems

⁶⁸ *Ibid* at 656.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

Regulatory quotas and management systems are becoming more prominent to address climate change. For instance, fishing licenses and quota systems have successfully been used to limit fishing to protect ecosystems and fish populations in many countries. These quotas are protected by property rights and tradeable securities allowing the government to regulate the industry.⁷¹

Quota systems may continue to expand past fisheries to include other goods, such as fresh water, geothermal energy, and clean air.

Tradeable Economic Instruments

Tradeable economic instruments have emerged as another manner to support sustainable outcomes. Theoretically, they work in comparable manners to quotas. The regulatory body issues tradeable instruments that caps certain activities, such as greenhouse gas emissions. Those with the instruments are permitted to trade to others, but the total activities are limited based on the output of instruments by the regulatory body.⁷²

Thus far, economic instruments have been unsuccessful in curbing activities. The regulatory bodies have been too lenient with the activities it permits. For instance, the instruments allowing greenhouse gas emissions permits too much production of greenhouse gas emissions that are toxic to the environment. The regulatory bodies have been hesitant to change the levels and reduce them because of the threat of political backlash.⁷³ As such, the benefit arising from these instruments has been minimal.

⁷¹ *Ibid* at 670.

⁷² *Ibid* at 673.

⁷³ *Ibid*.

Like quotas, instruments are a viable option that builds off property rights – the right associated with owning the tradeable instrument – but their current implementation leaves much to be desired in terms of positive impact.

Indigenous Property Rights

In Canada, indigenous property rights have been a mode to reduce environmental harm. Indigenous property rights have been retested or increased for those communities to protect areas from harmful activities.

For instance, in remote areas of Northern Canada, more property rights and influence over activities have been granted to indigenous communities. The hope is these communities will protect these vulnerable resource-dense areas from damage arising from development and extraction practices.⁷⁴

d. Inherent Duty Incident to Ownership

Property rights are only externally limited by common law or statutory restrictions. These restrictions include the application of environmental and resource management laws. Without any restrictions, property owners are generally seen as having unfettered rights arising from ownership.

An emerging viewpoint suggests sustainability should be an inherent responsibility to property ownership.⁷⁵ This would represent a significant shift from the existing property law by creating a generic obligation arising strictly from ownership of property. It is not, however, a novel perception in light of historical development of property. This idea captures the longer-term duty

⁷⁴ *Ibid* at 674.

⁷⁵ *Ibid* at 681.

to society and to future generations and draws parallel to the doctrine of waste in leases. The doctrine of waste in leases ensures that those using property through a lease cannot cause lasting alterations to the property that would harm subsequent property users.⁷⁶ Similarly, recognising sustainability as inherent to property owners involves protecting property for the use of future generations.

Although this is in direct contradiction to existing property law principles whereby ownership grants individual rights only fettered by laws restricting them, it recognises the idea that private property rights may sometimes be curbed for the greater public benefit.

A shift of this significance would require both legislative and judicial support. The judiciary can justify this through the application of existing legal principles. The common law is informed by statutes. The common law evolves with statutes to property capture the values of society. The importance of sustainability and climate change is being incorporated into legislation and statutes and can thus be incorporated into common law as well.

iv. Bankruptcy Law

Environmental policy is an important class of economic policy. In bankruptcy law, this was incorporated into insolvency proceedings through the Supreme Court of Canada decision in *Orphan Well Association v Grant Thornton*.⁷⁷

In *Orphan Well*, an oil and gas company went through bankruptcy proceedings and wanted to sell their valuable assets to distribute to creditors and ignore their clean-up costs on abandoned

⁷⁶ *Ibid* at 682.

⁷⁷ *Orphan Well Association v Grant Thornton*, 2009 SCC 5 [Orphan Well].

assets. The court held legislation requiring the bankrupt company to extinguish their clean-up cost obligations before liquidating assets for distribution to creditors.⁷⁸

Prior to Orphan Well, environmental obligations were unsecured and remained inferior to secured credits. This decision signals the court's willingness to protect the environment and creates an exception – based on the statutes wording – for provincial legislation to enforce environmental compliance.⁷⁹ The implication may be increased legislation on enforcing clean-up obligations for insolvent companies.

v. Conclusion

Climate change will likely pose significant threats to the physical infrastructure tied to the criminal justice system, as well as affect the types of crimes committed and the defences used in court. However, the criminalization of climate crimes can potentially diminish the burden placed on criminal law to mitigate the effects of climate change by preventing them altogether.

Family law will also likely require an expansion of the factors considered when determining the best interests of a child to account for a new definition of “stability,” an increased risk to children during migration, and the disproportionate effect of climate change on women and children.

In property law, the two will likely expand to incorporate more types of property to protect the environment. Further, the use of torts law to protect property interests will also likely expand to facilitate interests in property.

⁷⁸ Anna Lund, “Elaborate Imaginings: Rethinking Environmental Obligations in Canadian Insolvency Law” (2021) 71 U. Toronto LJ 301 at 303.

⁷⁹ *Ibid.*

Finally, bankruptcy law is recognising the importance of prioritising environmental obligations, even in the context of insolvency proceedings.

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