North America
Canada

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(A) Introduction

19.01 Climate change has gradually emerged as the environmental issue in the eyes of the public in Canada over the past decade. It has also become one of Canada’s great political, social and economic challenges. This chapter provides a legal perspective on climate change developments in Canada. The chapter starts out with a brief introduction to the legal and political context for climate liability and litigation.\(^1\) This is followed with a selection of key public law issues that arise in the context of climate liability and litigation. Private law issues are then explored, followed by legal issues that do not neatly fit within the public/private law divide. Some concluding thoughts are offered on the potential for climate litigation in Canada.

The Canadian legal system

19.02 Canada operates under a federal system of government, with jurisdiction shared under the Constitution between the federal and provincial governments. The municipal level of government is not recognised constitutionally; rather, it derives its powers from the provinces through legislation. A fourth form, aboriginal governments, arises out of aboriginal self-government agreements between the federal and provincial governments and Canada’s aboriginal peoples, usually in the context of comprehensive land claim agreements.\(^2\)

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\(^1\) For a more detailed exploration of some of the issues raised in this chapter, see J. Terry and A. Smith, Chapter 16: ‘Litigation’ in D. Mahony (ed.), *The Law of Climate Change in Canada* (Aurora: Canada Law Book, 2010).

\(^2\) J. B. Laskin, J. Terry and A. Smith, Chapter 3: ‘Climate Change and the Canadian Constitution’ in Mahony, *ibid.*, pp. 3–22.
19.03 Aboriginal interests, however, are not only protected through the creation of aboriginal self-government. The Crown has fiduciary duties to protect the interests of aboriginal peoples, as specifically recognised under section 35 of the Constitution Act, 1982. Some of these fiduciary obligations arise out of treaties between the Crown and aboriginal peoples; others arise out of unextinguished aboriginal rights.

19.04 Jurisdiction over climate change is generally accepted to be shared and in some cases split between the federal and provincial governments. The exact limits of federal and provincial jurisdiction remain a matter of debate among governments and legal commentators. To date, most of the noteworthy climate legislation and regulations have been passed by provincial governments, but it is clear that both levels of government have jurisdiction to implement measures to mitigate and adapt to climate change and to resolve issues of liability. Some of these powers and responsibilities may be shared with or delegated to municipal and aboriginal governments.

19.05 Outside of Québec, Canada’s legal system is modelled on the common law tradition. Common law principles, such as negligence, nuisance and strict liability, are recognised and applied by courts in Canada, though their precise scope and application may differ in some respects from other common law jurisdictions. As discussed below in (C) Private law at para. 19.45 ff, one significant deviation from the common law tradition exists in the province of Québec, which has a civil code in place of common law tort principles. The Supreme Court of Canada’s decisions are binding in both systems.

3 Being Schedule B to the Canada Act 1982 (UK), 1982, c. 11. In Canada, as in the United Kingdom, there is no single document that embodies the Constitution (P. Hogg, Constitutional Law of Canada (Toronto: Thomson Carswell, looseleaf), pp. 1–3). The phrase ‘Constitution of Canada’ is defined in section 52(2) of the Constitution Act, 1982. It includes, most importantly, the Constitution Act, 1982 and the Constitution Act, 1867, (UK), 30 & 31 Victoria, c. 3 (formerly named the British North America Act).


5 Ibid.
Human rights are addressed in Canada in two ways. One is through the Charter of Rights and Freedoms, enshrined in Canada’s Constitution and binding on all levels of government in Canada. The other way is through provincial human rights legislation, which is generally applicable to private parties such as employers, landlords and many others. International human rights have been influential in shaping the development of human rights in Canada.

The governmental stance on climate change

Canada has ratified the FCCC and the Kyoto Protocol. However, there has not been a serious effort nationally to meet the FCCC commitment to return to 1990 levels of emissions by 2000. Furthermore, the Government does not seem poised to meet its Kyoto obligation to reduce emissions to 6 per cent below 1990 levels by 2012. Previous federal governments developed plans that could have enabled Canada to meet its Kyoto obligations through a combination of emission reductions and purchase of credits, but these plans were never fully implemented.

The current majority federal government has made it clear that it does not intend to meet Canada’s Kyoto emission reduction commitments. Opposition parties have passed two climate change Bills in the House of Commons, against the will of the then minority government, to ensure compliance. One of the Bills was also passed by the Senate and has come into force. However, neither Bill has had a measurable effect on government policy on climate change.

Most provincial governments have developed and are in the process of implementing climate change mitigation plans. These provincial plans are collectively not sufficient to get Canada to its Kyoto target, but they have resulted in significant reductions in some parts of Canada. A number of provinces are making

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6 The Charter is contained in sections 1–34 of the Constitution Act, 1982. Section 52 of the Constitution Act, 1982 provides that ‘The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.’


serious efforts to bring emissions under control, while others are only taking limited action.\(^9\)

19.10 Canadian scholars and most commentators generally consider Canada’s current international position to be weak and view it as hindering rather than assisting efforts toward an adequate and fair global effort.\(^{10}\) Canada has indicated a willingness to reduce its emissions to 17 per cent below 2005 levels by 2020. This commitment is considerably less than the average reductions from developed countries that are necessary to avoid a global average temperature increase of over 2°C.\(^{11}\) It is also less than Canada’s existing commitments, such as its FCCC commitment and its Kyoto obligation for the first commitment period. Finally, Canada’s proposed target for the post-2012 regime is considerably weaker than the targets offered by most other developed countries.\(^{12}\)

**National climate change risks**

19.11 Per capita greenhouse gas (‘GHG’) emissions in Canada are among the highest in the world – about double the average per capita emissions in developed countries. The USA and Australia are the only developed countries with higher emissions on a per capita basis. Total emissions in Canada represent about 3 per cent of global emissions, placing Canada currently seventh in total emissions per country.\(^{13}\)

19.12 The costs, benefits, risks and uncertainties surrounding climate change are distributed unevenly among Canadian provinces. In Alberta, Saskatchewan and Newfoundland, fossil fuel resources are considered to be integral to the provincial economy.

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\(^9\) Those making a serious effort to reduce emissions at the time of writing include British Columbia and Ontario. For an overview of provincial efforts, see generally Mahony, n. 1 above, pp. 5–1 to 11–40.


\(^{13}\) D. Mahony and T. Dyck, Chapter 4: ‘Federal Climate Change Law and Policy’ in Mahony, n. 1 above, p. 4–3.
Manufacturing is a key industrial sector in Ontario, notably the automobile industry. Manitoba, Québec and British Columbia have access to large-scale hydro power. A number of provinces have significant potential to develop wind, tidal, geothermal or solar power. These and other differences create very diverse provincial circumstances, both in terms of the economic impact of mitigating climate change and the opportunities available to achieve reductions.14

19.13 The combination of the division of powers between the federal and provincial governments and regional differences has contributed greatly to the complexity of implementing climate change policy in Canada. Differences in terms of energy sources, access to mitigation options, and economic dependence on fossil fuel related industries in particular have created a very complex political context for domestic mitigation efforts and for international leadership alike.15

19.14 Another important part of the context for climate liability and the potential for litigation in Canada is that the climate is already changing significantly in parts of the country, and based on current predictions, most parts of Canada will encounter more severe adverse effects in the future. Northern parts of the country are experiencing significant changes in temperature, precipitation and sea ice, which are affecting ecosystems and northern aboriginal populations in particular. Sea level rise and more extreme storms are major concerns in coastal areas. Reduced precipitation is a particular concern in the Prairie provinces (Alberta, Saskatchewan and Manitoba). Impacts on forests, agriculture, water supplies, species at risk and native cultures are among the many other concerns. Adaptation strategies are still in their infancy.16

In conclusion, the combination of high per capita emissions, Canada’s international position, its relative domestic inaction and the high potential impacts, particularly in northern regions, coastal areas and the Prairies, means that there are fairly distinct circumstances for the consideration of climate liability and the potential for litigation in Canada. This combination of high per capita emissions and high potential impacts on particular communities may create opportunities for litigation that are specific to Canada if not unique. Within this context, a range of possibilities for climate liability and litigation in Canada are considered in the following sections of the chapter.

(B) Public law

This section addresses the ways in which Canadian courts could strike down laws or reverse government decisions related to climate change. Canadian courts will strike down laws that violate the Constitution. A law is unconstitutional if it exceeds the legislative competence of the legislature that passed it, violates the Canadian Charter of Rights and Freedoms or unjustifiably infringes aboriginal rights protected by section 35 of the Constitution Act, 1982. Canadian courts could invalidate, reverse or otherwise alter government decisions or compel government action related to climate change by means of a process referred to as judicial review, which must be initiated by the application of an interested party.

Those affected by legislation or government decisions involving climate change may resort to public law climate change litigation. It could be initiated by, among others, an environmental group seeking to compel government action on GHG emissions; a provincial government seeking to challenge the validity of climate change legislation passed by the federal Parliament; an individual claiming that his/her right to security of the person is being unjustifiably compromised by governments’ failure to combat climate change; or a corporation seeking to challenge the validity of government action in respect of its interests.

17 See paras. 17.13–17.33 above.
**Grounds for judicial review**

19.18 This section reviews the substantive grounds for such court actions, beginning with legislative competence to pass laws in respect of climate change, an area that remains untested under the Canadian Constitution. The following sections address standing and costs.

**Constitutional challenges based on legislative competence**

19.19 Legislative authority is divided between Canada’s federal Parliament and the provincial legislatures by the Constitution Act, 1867. Legislation and its derivative regulations can be challenged on the basis that their subject matter falls outside of the legislative competence of the federal Parliament or provincial legislature that passed the legislation. The Constitution Act, 1867 divides legislative jurisdiction primarily by allocating the authority to legislate in respect of ‘matters’ enumerated in ‘classes of subjects’, which are regularly referred to as ‘heads of power’. For instance, the federal Parliament has exclusive jurisdiction to legislate in respect of matters that fall within its ‘trade and commerce’ power,\(^\text{18}\) while provinces have exclusive jurisdiction to legislate in respect of ‘property and civil rights within the province’.\(^\text{19}\) Any legislation that is related to climate change or has climate change implications could be challenged on the basis that the legislature did not have constitutional authority to pass that legislation.

19.20 The environment, which is at the core of climate-related legislation, is not an enumerated head of power under the Constitution. As a practical matter, the provinces have historically been the more dominant force in environmental regulation, relying primarily on their enumerated authority over property and civil rights within a province.\(^\text{20}\) Nonetheless, the Supreme Court of Canada has held that the environment is ‘a diffuse subject that

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\(^{18}\) The Constitution Act, 1867, n. 3 above, s. 91(2).

\(^{19}\) Ibid., s. 92(13).

\(^{20}\) The leading scholar on Canadian constitutional law has described property and civil rights as ‘by far the most important of the provincial heads of power’ (Hogg, n. 3 above, p. 21–1.)
cuts across many different areas of constitutional responsibility, some federal, some provincial,21 and that environmental protection is a ‘fundamental value in Canadian Society’.22 The Court has recognised the ‘all-important duty of Parliament and the provincial legislatures to make full use of the legislative powers respectively assigned to them in protecting the environment’.23 These powers are to be interpreted in a manner that ‘is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated.’24

19.21 Federal authority to regulate climate change may therefore be rooted in an enumerated head of federal power,25 or Parliament’s residual power ‘to make laws for the peace, order, and good government of Canada’, or some combination of these powers.26 If Parliament passed far-reaching climate change legislation, its constitutionality might be challenged by, among others, provincial governments seeking to protect, widen or clarify the scope of their legislative authority.

19.22 Jurisdictional challenges are becoming more likely as governments advance more initiatives related to climate change. The outcomes of such challenges will depend ‘on how statutory schemes are constructed and the particular language used’, and until the courts consider such legislation, constitutionality will remain ‘at least somewhat speculative’.27

**Constitutional challenges based on protected individual rights**

19.23 Canadian courts will strike down legislation that violates the individual rights protected by the Charter of Rights and Freedoms.

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25 Possibilities include the criminal law, trade and commerce or sea coast and inland fisheries powers.
Thus far, courts have not held that any government legislation related to climate change violates individuals’ Charter rights.  

One of the sections of the Charter likely to be considered in the context of climate change litigation is section 7, which provides that everyone has ‘the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’. Because climate change has the potential to endanger safety, legislation that threatens (or, conversely, fails to protect) individual Canadians from such effects could theoretically be challenged under section 7 of the Charter.

As the law currently stands, a section 7 analysis requires a finding that there has been a deprivation of the right to life, liberty or security of the person, as well as finding that the deprivation is contrary to the principles of fundamental justice. Almost without exception, the rights protected by section 7 have been connected to the criminal law. The Supreme Court of Canada has, however, split on whether section 7’s guarantee of life and security of the person is engaged by a prohibition against contracting for private health insurance in the context of excessive waiting times for treatment in the public system. By analogy, section 7 rights may eventually be found to be engaged by government

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28 Federal and provincial environmental assessment approvals are prerequisites for the construction of many high-emitting facilities and infrastructure projects, such as oil sands extraction facilities, coal-fired power plants, and new roads. It has been suggested that government approvals arguably permit the private conduct that contributes to CC, and that CC effects experienced by plaintiffs may therefore qualify as ‘state-sponsored environmental harm’ (L. M. Collins, ‘An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms’, Windsor Review of Legal and Social Issues, 26 (2009), 7–48 at 18); ‘Tort, Democracy and Environmental Governance: Crown Liability for Environmental Non-Enforcement’, Tort Law Review, 15 (2007), 107–26; and D. N. Scott, ‘Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution’, Osgoode Hall Law Journal, 46(2) (2008), 293–343.

29 Constitution Act, n. 3 above, at s. 7.


31 Chaoulli v. Québec (Attorney General), [2005] 1 S.C.R. 791 at para. 102. Three judges of the court, including the Chief Justice of Canada, held that ‘because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of security of the person is engaged’ (ibid., at para. 123). Where the lack of timely healthcare can result in death, the same was held to be the case with respect to section 7’s protection of life. One of the seven judges on the panel did not rule on this issue.
legislation in respect of climate change that endangers the lives or the security of the person of Canadians. It must be emphasised that this is not currently the state of the law, but development of this branch of the ‘living tree’ that is the Constitution would not necessarily be at odds with Canada’s constitutional tradition.\textsuperscript{32}

19.26 A further extension of the section 7 jurisprudence would involve the recognition of a positive right, constitutionally requiring action on the part of the State, to a natural environment devoid of the dangers to life and security of the person posed by climate change.\textsuperscript{33} It is somewhat difficult to envisage an appropriate fact scenario or to predict whether such a right would be recognised in the context of climate change litigation.

19.27 In addition to empowering courts to strike down legislation, the Charter provides that anyone whose rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances,\textsuperscript{34} including awarding monetary damages.\textsuperscript{35}


\textsuperscript{33} See Ontario v. Canadian Pacific, [1995] 2 S.C.R. 1031 at para. 55; and R v. Hydro-Québec, [1997] 3 S.C.R. 213 at para. 124. As was noted in Justice Arbour’s dissenting opinion in Gosselin v. Québec (Attorney General), ‘the grammatical structure of s. 7 seems to indicate that it protects two rights: a right, set out in the section’s first clause, to “life, liberty and security of the person”; and a right, set out in the second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice’ ([2002] 4 S.C.R. 429 at para. 340). The majority of the Court in Gosselin held that the first clause of section 7 does not impose a positive obligation on the State to protect the security of the person by, in that case, guaranteeing adequate living standards to those without other adequate sources of income. Chief Justice McLachlin, writing for the majority, was nonetheless careful to leave open the possibility that the development of the ‘living tree’ that is the Constitution might one day result in section 7 being ‘interpreted to include positive obligations’ (ibid., at para. 82). The door is thus ajar, at least in theory, to the judicial recognition of positive constitutional obligations on the State to protect individuals’ life and security of the person.

\textsuperscript{34} Constitution Act, 1982, n. 3 above, at s. 24(1).

Constitutional challenges based on aboriginal rights

19.28 Section 35 of the Constitution Act, 1982 recognises and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. The recognition of aboriginal treaty rights does not amount to a guarantee of those rights; the Supreme Court of Canada has held that aboriginal rights can be infringed where the infringement is justified with reference to a broad range of ‘compelling and substantial’ legislative objectives. The test for justification of an infringement is that ‘a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s aboriginal peoples’.

19.29 One of the more important implications of constitutionally protected treaty rights is the obligation to consult with aboriginal peoples before decisions are made respecting aboriginal lands. Aboriginal peoples could therefore challenge federal or provincial climate change legislation that has an impact on aboriginal lands if that legislation unjustifiably infringed constitutionally recognised treaty rights or if the government, in making the legislation, failed to meet its duty to consult with aboriginal peoples.

19.30 Beyond the duty to consult, section 35 has the potential to reveal substantive duties on the Crown with respect to climate change mitigation, adaptation and liability. The starting point for any such legal argument is that under section 35 the Crown owes a fiduciary duty to aboriginal peoples in Canada. The scope of the Crown’s duty was first explored by the Supreme Court of Canada in \textit{R v. Sparrow} and has since been elaborated in a trilogy of

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36 The aboriginal rights thus recognised and affirmed are those that had not been extinguished by legislation as of the proclamation into force of the Constitution Act, 1982 on 17 April 1982. Rights subsequently acquired through land claims agreements (which are later-day treaty rights by another name) are also protected by section 35.


38 \textit{Ibid.}, at para. 1110.


cases: *R v. VanderPeet*,42 *R v. Smokehouse*43 and *R v. Gladstone*.44 This jurisprudence establishes that among the aboriginal rights to be protected by the Crown under section 35 are the rights to natural resources and cultural rights. Many of the resources that aboriginal peoples rely on for sustenance, culture and to earn a modest livelihood are threatened by climate change, especially for aboriginal peoples in northern Canada.

19.31 Given the Crown’s duty to protect these aboriginal rights, the most straightforward legal argument for a substantive duty concerning climate change would be to establish the existence of a duty to avoid actions that would worsen the impacts of climate change on aboriginal rights. Whether section 35 goes further to impose a legal obligation on the Crown to take action to prevent or minimise the impacts of climate change is an interesting and as of yet unanswered legal question. An extension of the latter approach to the Crown’s duty would be a responsibility to assist with adaptation to climate change and potential liability for the resulting impacts to vulnerable aboriginal peoples. Among the steps that could be required to comply with such a duty are active mitigation of emissions in Canada, the pursuit of international agreements for effective mitigation and assistance with adaptation. The case law in this area is still relatively new, making any firm prediction about its future direction difficult.45

Judicial review of regulatory decisions

19.32 In Canada, statutes enacted by the federal and provincial legislatures have created administrative authorities with powers to regulate, including matters related to climate change. As an example, new industrial projects require a variety of approvals from regulators, which often involve environmental assessments by specialised boards, commissions, tribunals or government officials. Depending on the nature of the project, it may require

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approval from both federal and provincial authorities. Where
governing legislation does not validly prohibit it, affected par-
ties can apply to have these decisions judicially reviewed. Applicants can in this way challenge regulatory decisions with climate change implications before the courts.

19.33 Regulatory decisions challenged on judicial review are afforded considerable deference by Canadian courts, largely on the basis that specialised regulatory bodies have expertise of a kind that courts do not possess. As a general matter, Canadian courts conducting judicial reviews of regulatory decisions are primarily concerned with ensuring that regulators act within the scope of their delegated authority, interpret the law correctly and do not make decisions based on erroneous assessments of the relevant facts.

19.34 The test applied by a court in evaluating a regulatory decision is called the standard of review. There are two standards of review that have been elaborated in the case law across a broad range of circumstances: correctness and reasonableness. The ‘reasonableness’ test is generally applied to fact-finding and questions of law within the ‘particular expertise’ of the tribunal, while the ‘correctness’ test is generally applied to questions of law ‘outside the adjudicator’s specialised area of expertise.’ Government decisions can also be reversed or set aside on the basis that they violate procedural fairness.

19.35 The most conceptually straightforward type of judicial review involves a challenge to the validity of a regulatory decision. Environmental groups recently brought such a challenge to a panel’s recommendation that a major development in the Alberta oil sands receive environmental approval from the federal Department of Fisheries and Oceans. The panel had concluded, among other things, that the mitigation measures proposed by the project’s proponents would make significant adverse

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46 The remedies available on judicial review include orders of certiorari and mandamus, injunctions and damages (D. P. Jones and A. S. de Villars, Principles of Administrative Law, 5th edn (Toronto: Carswell, 2009), pp. 10–13).
48 Ibid., at para. 54.
49 Toronto (City) v. C.U.P.E., [2003] 3 S.C.R. 77 at para. 62
50 Jones and de Villars, n. 46 above, p. 392.
environmental effects unlikely. On judicial review, the Federal Court of Canada held that the panel’s decision was not reasonable, because it had not provided a rationale for this conclusion. The court remitted the matter back to the panel and required that the panel explain how the project’s proposed mitigation measures would reduce GHG emissions to a level of insignificance. The panel subsequently articulated why it was not concerned about the environmental impact of the project, and the project proceeded.

19.36 In an appropriate legislative context, an applicant can seek, on judicial review, to compel a government to regulate. Judicial reviews of this kind have been brought in relation to climate change, notably in the US case of *Massachusetts v. Environmental Protection Agency*. In Canada, a comparable remedy was sought by the applicants in *Friends of the Earth v. Canada (Minister of the Environment)*. This judicial review was brought under provisions of the Kyoto Protocol Implementation Act (the ‘KPIA’), including a section requiring the Minister of the Environment to make regulations within 180 days that would ‘ensure that Canada fully meets its obligations’ under the Kyoto Protocol. The KPIA was a private members Bill supported by all opposition parties in a minority Parliament. It was the government’s stated policy that Canada should not attempt to meet its obligations under the Kyoto Protocol because doing so would severely damage the Canadian economy. The Federal Court of Canada held that it was not the intention of Parliament to create a justiciable duty to regulate, and expressed doubt that the Court had ‘any role to play in controlling or directing the other branches of government in

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51 *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 at paras. 73 and 79.
52 In the meantime, however, the Federal Court’s remittance of the decision invalidated another required approval and may have delayed its development.
53 549 U.S. 497 (2007). The United States Supreme Court held that Section 202(a)(1) of the Federal Clean Air Act, 42 U.S.C. § 7521(a)(1) required the Environmental Protection Agency to formulate a judgment as to whether certain emissions ‘may reasonably be anticipated to endanger public health or welfare’. The Court further held that if the EPA concluded there was an endangerment, the EPA was required to make regulations in respect of those emissions.
55 S.C. 2007, c. 30, s. 7(1)(a).
the conduct of their legislative and regulatory functions’ outside of the constitutional context. The Court was clearly mindful of the fact that the Members of Parliament in the opposition who passed the KPIA had the remedy of defeating the Government and bringing about an election if they so chose, and this political reality appears to have informed the Court’s construction of the statute. The Court also appears to have been influenced by the absence of an effective remedy that would actually lead to compliance with Canada’s Kyoto obligations.

19.37 A somewhat similar potential challenge relates to section 166 of the Canadian Environmental Protection Act. Among other obligations, the section requires the Minister to act when the Minister has reason to believe that a substance released from a source in Canada contributes to air pollution that violates an international agreement. The section would appear to create obligations on the Minister, if a sufficient link could be established between a source and Canada’s violation of the Kyoto Protocol. Issues of standard of review and justiciability similar to the *Friends of the Earth* case would undoubtedly arise if such a case were to be brought forward.

**Standing: who may challenge the constitutionality of legislation?**

19.38 In order to have standing to challenge the constitutionality of legislation, a person in Canada ‘need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court’.  

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56 2008 FC 1183 at para. 40.  
57 S.C. 1999, c. 33.  
58 Another similar remedy is provided by the Ontario Environmental of Bill of Rights, 1993 S.O. 1993, c. 28, s. 61(1) and (2), which creates a right to apply to the Environmental Commissioner for a review of a new or existing ‘policy, Act, regulation or instrument of Ontario’ in order to protect the environment. This legislation imposes an obligation on government ministries to respond meaningfully to such applications.  
Corporations can have standing to challenge legislative competence. While corporations have sometimes been granted standing to challenge the constitutionality of offences with which they have been charged, this does not necessarily mean that they can benefit from a finding that the provisions violate a natural person’s constitutional rights.\(^{60}\)

In certain circumstances, public interest organisations can challenge legislation on the grounds that it violates the Charter of Rights and Freedoms.\(^{61}\) Plaintiffs seeking public interest standing to bring a Charter challenge must show they are raising a serious issue about the validity of the impugned legislation, that the plaintiff has a genuine interest in the legislation’s validity, and that there is not another reasonable and effective way to bring the issue before the court. The courts, however, prefer to give standing to individuals (natural or corporate) and so will deny public interest standing if it can be shown on a balance of probabilities that a private litigant will challenge the legislation.\(^{62}\)

Organisations that are not parties to litigation involving Charter issues, but whose concerns may be affected by its outcome, can seek standing in the litigation as a friend of the court. To be recognised as a friend of the court, an organisation must show that its intervention will not prejudice the parties, offer a different perspective, and result in relevant and useful submissions that will help the court to fairly decide the issues before it.\(^{63}\)

**Costs**

In Canada, the general rule concerning costs is that the successful party in litigation is entitled to recover litigation costs from the unsuccessful party, but the amount recovered is

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\(^{61}\) See e.g. *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 at para. 70.

\(^{62}\) *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, n. 59 above, at p. 252. The Court stressed that ‘the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue’.

\(^{63}\) *Pinet v. Penetanguishene Mental Health Centre (Administrator)*, 2006 CanLII 4952 (ON S.C.) at para. 35.
subject to rules and the discretion of the court. Some of the factors that can be considered by courts in assigning costs include the apportionment of liability, the complexity of the proceeding, the importance of the issues and the conduct of the parties.

19.43 In Charter cases, the court can also consider the public interest in its determination regarding costs. Even an unsuccessful plaintiff may be awarded costs because he/she is ‘fulfilling a civil responsibility’ by bringing to the court’s attention a serious matter that he/she believes impacts on ‘the human rights of the members of the community’. Furthermore, there are avenues available in Canada for advanced cost awards in appropriate circumstances.

(C) Private law

19.44 This section addresses private litigation related to climate change that could be brought in Canada. Private law, as it is

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64 In Ontario, for instance, section 131(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43 provides that, subject to the court’s Rules of Civil Procedure, R.R.O. 1990, Reg. 194, the costs of a proceeding or a step in a proceeding ‘are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid’. Some courts, including Ontario’s, assign maximum amounts recoverable per hour on a rising scale based on the number of years the billing lawyer has been practising law. These maximum amounts can be considerably less than the amounts actually paid to counsel. In circumstances where the conduct of an unsuccessful party warrants it, costs may be awarded at a higher level. In Ontario, the higher costs scale, ‘substantial indemnity costs’, are one-and-a-half times the amount of regular ‘partial indemnity’ costs (Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.03(1)). In the Federal Court costs can be set with reference to a tariff table, but the Court retains ‘full discretionary power over the amount and allocation of costs’ (Federal Courts Act, R.S.C. 1985, c. F-7, s. 400(1) and (4)). For an example of the Federal Court disregarding the tariff amount, see Air Canada v. Toronto Port Authority and Porter Airlines, 2010 FC 1335 at paras. 14–16.

65 See Rules of Civil Procedure, n. 64 above, Rule 57.01.


67 It is generally recognised that courts have discretion to grant such orders under appropriate circumstances to litigants acting in the public interest. For a detailed discussion of the issue of costs in Canada, see C. Tollefson, ‘Cost in Public Interest Litigation: Recent Developments and Future Directions’, Advocates Quarterly, 35 (2009), 181–200.
understood here, ‘is concerned principally with the mutual rights and obligations of individuals’, including corporations. The private law actions considered in this section arise primarily in tort, but also in the context of securities law. Tort law in Canada is common (or judge-made) law, while securities law is shaped by legislation. This section also discusses the possibility of actions under the public trust doctrine.

**Tort litigation**

19.45 Outside of Québec, where the Civil Code of Québec governs, Canadian tort law is rooted in English common law. Certain English tort cases remain important, and in recent decades the influence of American jurisprudence has increased. However, the general trend has been towards increased Canadian judicial independence in this area, with the main features of Canadian tort law being shaped by the Supreme Court of Canada.

19.46 The Supreme Court has held that one of the goals of tort law is to create ‘a disincentive to risk-creating behaviour’, and this quasi-regulatory aspect of tort law could prove significant if a court concluded in the right circumstances that climate change was not adequately regulated. Climate change tort litigation actions could be brought in negligence, conspiracy, strict liability, or public or private nuisance. Such actions would raise common issues in respect of standing, causation, proximity and damages. Defendants could include oil sands developers, power companies and other large industrial emitters, including federal and provincial governments.

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69 The source of civil liability in Québec is the broadly worded duty not to cause injury established by Article 1457 of the Civil Code of Québec. The principles that inform the Article 1457 analysis in Québec are substantially similar to the principles that inform the common law analysis that is applied in the rest of Canada, and in both contexts the Supreme Court of Canada’s decisions are binding.

70 The decisions of the Supreme Court of Canada are binding on all Canadian courts.


72 For nuisance and negligence, see Chapter 17 at 17.42–17.50.
19.47 Plaintiffs in climate change tort litigation could include Inuit and First Nations groups; property owners suing under class action legislation to recover for damage to property that they believe is due to climate change attributable to major emitters of GHGs; public interest litigants concerned about the environmental consequences of climate change; or even the Crown in its capacity of *parens patriae*.  

Tort actions  

**Negligence: the Anns test in Canada**  

19.48 The tort of negligence imposes liability for harm caused as a result of unreasonable acts or omissions. Negligence is the primary means by which Canadian courts have recognised new forms of tort liability since the House of Lords’ 1932 decision in *Donoghue v. Stevenson*. The categories of negligence are never closed, and as a result of its evolving and expanding nature, negligence is the most important tort in Canadian society. Negligence would likely be pleaded in most climate change tort actions.  

19.49 The test for negligence in Canada requires that there be a duty of care owed by the defendant to the plaintiff, and that the defendant failed to meet the requisite standard of care. To determine whether there was a duty of care, a court must apply the two-stage *Anns* test as it has been developed by the House of Lords and subsequently elucidated by the Supreme Court of Canada. In stage one, a prima facie duty of care arises if the plaintiff can establish foreseeability and proximity; that is, the court determines whether the harm that occurred was a reasonably foreseeable consequence of the defendant’s act. The Supreme Court

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73 In *British Columbia v. Canadian Forest Products Ltd*, [2004] 2 S.C.R. 74 the Court characterised the Crown’s *parens patriae* jurisdiction as follows: ‘Since the time of de Bracton it has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable “public rights” in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their protection representing the Crown as *parens patriae*’ (ibid., at para. 76).

74 In *Cooper v. Hobart*, [2001] 3 S.C.R. 537, the Supreme Court of Canada unanimously held that the *Anns* test remained the law in Canada despite its abandonment by the House of Lords: see Chapter 17 at 17.46–17.50.

75 For a general discussion of negligence principles, see Chapter 17 at 17.46–17.50.


has held that ‘The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant.’\textsuperscript{78} In stage two, the court looks at ‘whether there are residual policy considerations outside the relationship of the Parties that may negative the imposition of a duty of care’.\textsuperscript{79}

To establish foreseeability in the context of an action related to climate change, the court will be called upon to determine ‘whether the plaintiff is so closely and directly affected by the emissions or other acts of the defendant that the defendant ought reasonably to have the plaintiff in contemplation as being affected by those acts’.\textsuperscript{80}

To establish proximity,\textsuperscript{81} a plaintiff can show that the case falls into one of the existing categories of negligence that recognise proximity.\textsuperscript{82} If the plaintiff’s case does not fall into an existing category of negligence, then a relationship of proximity can be established by showing that the law of negligence should be extended to recognise a newly proposed category of negligence based on the relationship existing between the plaintiff and the defendant. In this way, the proximity analysis allows for the expansion of the categories of negligence ‘to meet new circumstances and evolving conceptions of justice’.\textsuperscript{83}

Where a duty of care is established, the plaintiff must also show that the defendant failed to meet the standard of care applicable in the circumstances. The Supreme Court of Canada has characterised the standard of care as follows:

\begin{quote}
a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances.
\end{quote}

\textsuperscript{78} Cooper v. Hobart, n. 74 above, at para. 30.

\textsuperscript{79} Ibid.

\textsuperscript{80} Terry and Smith, n. 1 above, at p. 16–6. For a general discussion of foreseeability, see 17.66–17.71.

\textsuperscript{81} Proximity is ‘a broad concept which is capable of subsuming different categories of cases involving different factors’ (Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021, cited in Cooper v. Hobart, n. 74 above, at para. 35). The focus on the proximity analysis is ‘on the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer’s actions is appropriate?’ (Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129, at para. 23).

\textsuperscript{82} Cooper v. Hobart, n. 74 above, at para. 23.

\textsuperscript{83} Hill v. Hamilton-Wentworth Regional Police Services Board, n. 81 above, at para. 25.
The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.  

Each of these factors could be relevant in negligence actions brought in respect of climate change and influence the standard of care applicable.

19.51 A negligence claim in respect of climate change could be based on an existing or new category of negligence. No claim for damages resulting from climate change has been brought under an existing category of negligence, and no new category of negligence based on climate change has been argued to date before Canadian courts. Establishing proximity, which to some extent is an exercise in results-oriented reasoning on the part of courts, would likely be a crucial challenge for any claimant seeking a remedy for negligent contribution to climate change.

Conspiracy

19.52 The test for proving the tort of conspiracy requires agreement between two or more persons, an unlawful activity, the intent or likelihood that the unlawful activity would cause damage, and actual damage. The tort of conspiracy has not been pleaded in respect of climate change before Canadian courts, but such claims have been brought, so far without success, in the United States. Proving all elements of the tort could be challenging, but if proven, planned and deliberate wrongful conduct may lead to the imposition of punitive damages.

Private nuisance

19.53 Nuisance is ‘the unreasonable interference with the use of land’. In a decision of the Supreme Court of Canada under Québec civil law.

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86 Native Village of Kivalina v. ExxonMobil, Case No. CV-08–1138, filed 26 February 2008; Comer v. Murphy Oil USA, No. 07–60756 (5th Cir., 16 Oct 2009).
law, the court held that ‘nuisance is a field of liability that focuses on the harm suffered’\(^{89}\) and that no-fault liability ‘furthers environmental protection objectives’ and ‘reinforces the application of the polluter-pays principle’.\(^{90}\) An advantage of suing in nuisance rather than negligence is that plaintiffs would not need to establish that the defendant owed a duty of care and failed to meet the standard of care. No private nuisance claims have been brought in Canada in respect of damages allegedly due to climate change.

19.54 Private nuisance may be well-suited to environmental class actions.\(^{91}\) In a recent Ontario trial of the common issues in an environmental class action, the Ontario Superior Court of Justice ruled that plaintiffs had a cause of action in private nuisance arising from the defendant’s contamination of the soil on the plaintiffs’ property.\(^{92}\) A similar action could be brought in respect of climate change.

**Strict liability**

19.55 Strict liability will be imposed when the ‘non-natural use of land’ leads to the ‘escape’ of something that causes harm. The Supreme Court of Canada has held that non-natural use is ‘a flexible concept that is capable of adjustment to the changing patterns of existence’,\(^{93}\) but it is not clear how it would be applied in the context of climate change litigation.\(^{94}\)

**Public nuisance**

19.56 The tort of public nuisance allows the Crown, as *parens patriae*, to sue for relief from interferences with ‘the exercise of clear public rights, such as navigation, fishing or access to roads or

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\(^{89}\) *Ibid.*  
\(^{90}\) *Ibid.*, para. 80  
\(^{91}\) Class actions allow a class of plaintiffs to proceed against a defendant on issues common to the class, and are governed by legislation. See e.g. Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6. In order for a class to be certified under this legislation the court must conclude that a class action is the preferable procedure for resolving common issues, which is determined with reference to the ‘three accepted goals of a class proceeding: judicial economy, access to justice and behaviour modification’ (*Pearson v. Inco Ltd.*, *et al.*, 2006 CanLII 913 (ON C.A.) at para. 25, leave to appeal to the S.C.C. refused 265 D.L.R. (4th), vii).

\(^{92}\) *Smith v. Inco*, 2010 ONSC 3790 (certified as *Pearson v. Inco*).


\(^{94}\) See also 17.66.
The relief sought is generally injunctive relief: for instance, a defendant could be ordered to stop blocking a public highway. The Supreme Court of Canada has characterised public nuisance as ‘a poorly understood area of the law’, it has also characterised *parens patriae* as ‘an important jurisdiction that should not be attenuated by a narrow judicial construction’. The court has also suggested in *obiter dicta* that by suing in public nuisance, provincial governments may be able to win injunctive relief or compensation in respect of environmental damage to public lands.

No public nuisance suits in respect of climate change have been brought in Canada, but such suits have been brought in the United States.

**Issues of causation**

The usual test for causation is the ‘but for’ test: the plaintiff would not have suffered damages but for the actions of the defendant. Canadian courts will rely on a different test for causation, the material contribution test, where the following criteria are

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96 For a general discussion of public nuisance, see 17.42–17.45.

97 *Ryan v. Victoria (City)*, n. 95 above, at para. 52.


99 Ibid., at para. 81.

100 See *American Electric Power Co. v. Connecticut*, 564 U.S. (2011), in which the Supreme Court of the United States dismissed an action brought by several states and others to compel several large electric utilities to reduce their greenhouse gas emissions on the grounds that the emissions constituted a public nuisance. The court, which divided 4–4 on the issue, affirmed the Second Circuit court’s decision that at least some of the plaintiffs had standing to bring their claim, but unanimously held that the US *Clean Air Act* and the US Environmental Protection Agency’s implementation of that Act displaced any federal common law right to seek an abatement of emissions. Similarly, in *Comer v. Murphy Oil USA, Inc.*, No. 07–60756 (5th Cir., 16 October 2009), a class action brought by residents and property owners who had suffered damage as a result of Hurricane Katrina, the Fifth Circuit of the US Court of Appeals held that the plaintiffs had standing to assert a public nuisance claim. The *Comer* litigation is ongoing.

101 For a broader discussion of issues of causation, see Chapter 17, paras.17.54–17.65.

met: it must be impossible for reasons outside of the plaintiff’s control for the plaintiff to prove causation under the ‘but for’ test, and the plaintiff’s injury must be within the ‘ambit of the risk’ created by the defendant’s breach of the defendant’s duty of care to the plaintiff. Furthermore, a material contribution giving rise to liability must be beyond the de minimus range.

19.60 Because of the varying nature of weather in most cases it would be very difficult to prove causation of damages related to climate change under the ‘but for’ test. It is possible that courts could attribute causation to emitters on the basis of the ‘material contribution’ test.

Joint and several liability v. market share liability

19.61 While it can be argued that virtually all members of modern industrial societies are implicated in climate change, virtually no individuals and only a relatively small number of corporations are likely to be the target of climate change tort actions. Some might suggest that in these circumstances it would be unfair to make the likely targets of such litigation jointly and severally liable for the damage done to plaintiffs by industrial society as a whole. The market share theory of liability, which has been adopted in the United States, presumes that a defendant’s ‘contribution to the aggregate risk of harm should approximate the defendant’s output’. In addition to benefiting defendants by limiting their liability to their market share, market share liability also allows plaintiffs who have suffered loss to avoid the ‘tortfeasor identification problem’ that can arise in cases of highly fungible products such as generic drugs or perfectly fungible causal agents such as GHG emissions. Market share liability has not been adopted.

104 Athey v. Leonati, n. 102 above, at para. 15.
105 In certain cases it is sufficient to prove on the balance of probabilities that the negligence of the plaintiff contributed to the injury, rather than proving that the harm would not have occurred but for the negligent act of the defendant (Myers v. Peel County Board of Education, [1981] 2 S.C.R. 21 at p. 35).
106 See Sindell v. Abbot Laboratories (1980), 607 P.2d 924 (Calif.).
108 Ibid., p. 216.
by Canadian courts, and it is unclear what position they would take on this issue.

**Limitation issues**

19.62 Tort liability generally falls within provincial jurisdiction over property and civil rights. Limitation periods are governed by provincial limitations legislation, which sets out different limitation periods in different circumstances and for different actions. These can differ significantly from province to province and must be consulted in light of the circumstances of a proposed claim.

**Securities litigation**

19.63 Securities are subject to provincial jurisdiction, and there can be variation in the law from province to province on fine points, but the main features of the law are largely the same across Canada.

19.64 Securities litigation involving climate change is likely to be limited to claims that issuers have breached their timely disclosure obligations under provincial securities laws. Issuers of securities are required to make full, true and plain disclosure of all material facts related to securities before they are issued to the public and to report all material changes thereafter. As a result, issuers of securities may be required to consider risks related to climate change and discuss them in their disclosure filings. If management fail to do so, shareholders can bring a suit against the issuer and the directors and officers of the issuer.

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109 Constitution Act, 1867, n. 3 above, s. 92(13).
110 In Ontario, for instance, no limitation is placed on environmental claims that have not been discovered (Limitations Act, 2002, S.O. 2002, c. 24, s. 17).
111 This may change. Canada is one of the few jurisdictions in the world not to have a national securities regulator, and the Supreme Court of Canada recently heard a reference from the federal government respecting its ability to regulate securities: In the Matter of a Reference by Governor in Council concerning the proposed Canadian Securities Act, as set out in Order in Council P.C. 2010–667 (26 May 2010).
112 Canadian securities law is to some extent influenced by American jurisprudence, but also differs from American securities law in important respects.
113 See, for example, section 56(1) and the definition of ‘material change’ in section 1 of the Ontario Securities Act, R.S.O. 1990, c. S.5.
114 The Ontario Securities Commission’s National Instrument 51–102, Continuous Disclosure Obligations, requires issuer’s management to discuss known trends, demands,
The public trust doctrine

19.65 The public trust doctrine, which is rooted in Roman law, has come to play a significant role in US environmental law. It is based on the principle that the public has a right to use particular natural resources and the Government should maintain them for that purpose. In Canada, its influence has, until recently, been limited to jurisdictions that have taken steps to enshrine aspects of the principle in environmental statutes. In 2004, however, the Supreme Court of Canada appears to have opened the door to the common law public trust doctrine in Canada. While it did not apply the public trust doctrine in the case, it suggested that there would be no legal barrier to the use of the doctrine in an appropriately pleaded case. Since then, the Prince Edward Island Court of Appeal has also recognised this possibility by allowing a claim based in part on the public trust doctrine to proceed.

19.66 To date, there have not been any cases that have considered the substance of a public trust claim. This makes it impossible to predict what the scope of the doctrine might be in Canada. In the short term, therefore, initiating climate change litigation under the public trust doctrine in Canada is fraught with risk and uncertainty. In other jurisdictions, the doctrine was initially applied to public rights to navigation, water rights and water access. Only gradually has the doctrine been applied beyond these traditional subject matters. As the case law develops, it will become clear whether the doctrine follows a similar path, or whether it is immediately applied to a broad range of assets and resources considered to be held in the public trust.

commitments, events or uncertainties that are reasonably likely to affect the issuer’s business: Form 51–102F1, Part 2, Item 1.2. In some circumstances this would require management to discuss potential damages to the corporation’s assets due to CC. For example, the Yukon has included the public trust in its environmental statute; see Environment Act S.Y. 1991, c.5, s.7.

See British Columbia v. Canadian Forest Products Ltd, [2004] 2 S.C.R. 74. This is in contrast to the situation in England: see the proximity analysis involved at the first stage of the test in England, at Chapter 17, para. 17.48.

See Prince Edward Island v. Canada (Minister of Fisheries and Oceans), 2006 PEISCAD 27.

J. V. DeMarco et al., ‘Opening the Door for Common Law Environmental Protection in Canada: The Decision in British Columbia v. Canadian Forest Products Ltd’, Journal of Environmental Law and Practice, 15 (2005), 233–55. See also A. Gage, Asserting the Public’s Environmental Rights (Vancouver: BC Continuing Legal Education Society,
(D) Other issues

The role of public international law

19.67 Public international law has been very influential in shaping environmental law in Canada. International law influences domestic law in a variety of ways. Customary international law is generally accepted to be directly binding in Canada. This means customary international law can directly shape common law developments in Canada and it can affect the application of legislation. International treaties require implementation to be binding.

19.68 All sources of international law can be used as interpretive tools, regardless of the source or the state of implementation. With respect to legislation, for example, international law is recognised to be part of a contextual approach to interpreting legislation, in part based on a rebuttable presumption that legislation is designed to be in compliance with Canada’s international obligations. Many international principles and commitments have in fact been incorporated directly into domestic legislation. Soft law principles, such as precaution, polluter pays, public participation and environmental impact assessment, are all reflected in environmental legislation at the federal and provincial levels.119

The role of climate change in environmental assessment processes

19.69 The consideration of climate change in the environmental assessment (‘EA’) of projects in Canada is still in its infancy. Only gradually has climate change been recognised as a possible environmental effect in federal and provincial EA processes. Many

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processes are still designed around the concept of the significance of the effects of a single project in isolation from the impacts of other projects, though most EA processes in Canada do consider the concept of cumulative effects in some form. Guidance on how to incorporate climate change considerations into EA has been developed in cooperation between federal and provincial EA agencies. Whether existing EA regimes are sufficient to ensure a meaningful consideration of climate change remains to be seen.

19.70 One interesting legal question in this regard is how the significance of GHG emissions is to be determined. Should it be considered in absolute terms by looking at the total emissions of a project? Should it be considered in relative terms, such as the emissions of the project compared to best available technology (BAT) or the lowest available GHG emissions per unit of product or service to be delivered? In the latter case, would the relevant standard be the BAT within an industry sector such as the oil sands, or the lowest GHG emissions option for meeting the need that the project is designed to meet?

*GHG emissions as ‘releases’ under provincial legislation*

19.71 Some provincial environmental statutes contain general provisions prohibiting the release of a substance that may cause an adverse environmental effect. Releases specifically authorised under an approval are typically exempt from these prohibitions. For activities that involve significant releases of GHG emissions that are not specifically authorised, these sections open the door to possible prosecutions, including the possibility of private prosecutions. Private prosecutions can be brought

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122 Nova Scotia Environment Act, SNS 1994–95, c. 1, ss. 67 and 68.
by individuals in Canada; however they can be taken over by government prosecutors at the discretion of the responsible Attorney General.¹²³

**Climate change and species at risk**

19.72 Climate change is predicted to significantly increase the number of species at risk. Canada currently has legislation at the federal and provincial levels designed to identify and protect species at risk. The process in most jurisdictions involves a scientific listing process with some level of political oversight. Once listed, most species-at-risk legislation in Canada affords protection to the listed species in the form of prohibitions against interference with the species and its critical habitat. This means, for property owners and proponents of activities with the potential to interfere with the recovery of a species at risk, that the ability to continue to engage in the activity may be curtailed either directly through government action or indirectly as a result of judicial review applications brought by individuals or organisations concerned with the protection of species at risk.¹²⁴

**Greenwashing**

19.73 Another area of potential litigation relates to so-called ‘greenwashing’ efforts by companies which claim that either the company as a whole or some of its products or services are more climate-friendly than they actually are. There are at least three possible litigation options available in cases of such false claims. First, greenwashing could constitute a negligent misrepresentation under tort law. Second, in situations where the statement is made to induce a person into purchasing a product or service, greenwashing may also constitute an innocent or fraudulent misrepresentation under contract law. Third, false statements about the climate change record of a company or its products or services could run afoul of anti-competition laws under the Competition Act.¹²⁵


¹²⁵ Competition Act, R.S., 1985, c. C-34, ss. 36 and 52.
Citizen submissions under NAAEC

19.74 The North American Free Trade Agreement’s (‘NAFTA’) citizen submission procedure is a key component of the North American Agreement on Environmental Cooperation (‘NAAEC’), the environmental side agreement to NAFTA. Under Article 14 of the NAAEC, any resident of Canada may file a submission claiming that Canada ‘is failing to effectively enforce its environmental laws’. Assuming that the submission complies with the procedural requirements in Article 14(1), the NAAEC Secretariat then considers whether the submission warrants requesting a ‘response’ from Canada.

19.75 Criteria considered include whether the matter deserves ‘further study’ and whether the submitter has pursued ‘private remedies’ available under Canadian law. Once the Secretariat has received and considered the response from Canada, it may then recommend to the Council that a ‘factual record’ be prepared. When completed, the factual record is delivered to the Council, which then decides whether to release some or all of its contents to the public.

19.76 The utility of this mechanism is limited by two key factors. One is that there are only limited environmental laws in Canada dealing with climate change. The second limitation is that while the process brings important public attention to failure to effectively enforce laws, it does not require countries to remedy the problem.¹²⁶

Petitions to the Commissioner for Sustainable Development

19.77 Another avenue available outside the court system in Canada to encourage the federal government to effectively implement and enforce its environmental laws is the petition process offered by the Commissioner for Sustainable Development (‘CSD’). The

process is open to anyone concerned about the effective implementation or enforcement of federal environmental laws. Once a petition is filed, the Commissioner will ask the federal department or agency responsible to respond to the questions raised in the petition. The department or agency is required to respond, but no further action is required. Issues raised elsewhere in this chapter, such as compliance with section 166 of CEPA, could be the subject of a petition under this process.

(E) Conclusion

19.78 Climate change litigation in Canada is in its infancy, which means there are still many opportunities to explore the extent of liability in the context of public and private law. Particularly as the federal and provincial governments take on more responsibilities to address climate change, there will be more potential for litigation aimed at ensuring accountability. Some areas explored in this chapter, such as tort law and judicial review, already have well-developed foundations. Others, including aboriginal rights, Charter challenges and public trust cases, are based on less-entrenched principles. In the end, the success of any climate litigation will turn on the factual basis that can be established. While it is unlikely that Canada will compete with the US in terms of the number and range of climate cases, climate litigation in Canada is clearly on the rise.
(A) Introduction

20.01 The prospect of carbon liability in the United States is a relatively recent phenomenon. It is only in the last decade that US environmental lawyers and policy-makers have begun to turn their attention to climate change, as climate-related litigation has surged, government action on several fronts has begun, and climate change has generally been recognised as a factor to consider in decision-making across the economy. This chapter lays out existing options to establish liability for greenhouse gas (‘GHG’) emissions along legislative, regulatory and judicial channels.

The United States legal system

20.02 The United States of America (‘USA’) was founded as a constitutional democracy. Its primary document is the US Constitution, which establishes the absolute rules for how the federal government functions. It has a three-part system: the bicameral legislature (House of Representatives and the Senate, which together form the Congress) passes legislation; the President signs and implements such laws; and the federal court system, guided by the Supreme Court, determines the legality of federal (and some other) activities. In order to execute the law, the President relies heavily on a federal bureaucracy of administrative agencies, which utilise their technical expertise to implement congressional mandates through regulations and thereby create a set of legal rules subsidiary to statutes (laws). In addition to this, federal courts work in a common law system, and so are able to set laws through judicial decision-making.
The Constitution also lays out the USA’s strong federalist structure, whereby power is apportioned between the national government and its several states. States are given broad power, via the 10th Amendment, over all policy areas not explicitly granted to the federal government or prohibited. The federal government has power via the Constitution’s Commerce Clause to legislate on any policy issue that affects interstate commerce, effectively giving it power over GHG emissions (which have effects beyond a single state). In the absence of comprehensive federal activity, however, some states have begun to adopt climate-related laws.

Constitutional and major statutory rights

The Constitution does not explicitly grant a right to environmental protection. However, it is famously concise, and so this should not be read as showing hostility to environmental protection. The major environmental statutes in effect today also do not include explicit language on substantive rights: instead, they speak of ‘primary goals’. The Constitution confers the right to ‘due process’, and numerous federal and state statutes confer procedural rights.

Federal stance on climate change

Major international treaties

The USA has ratified the United Nations Framework on Climate Change. On the eve of the 1997 Conference of the Parties in Kyoto, the US Senate, by a vote of 95–0, adopted a resolution opposing ratification of any climate treaty that did not impose binding obligations on the rapidly developing economies comparable to those to be imposed on the USA.¹ Though President William Clinton and Vice President Albert Gore supported the Kyoto Protocol and the USA became a signatory before the Clinton Administration left office, they did not submit it to Senate for ratification, knowing that it would be defeated. When George W. Bush became President in January 2001, he explicitly repudiated the Kyoto Protocol. His successor, Barack Obama, who was inaugurated in January 2009, supports US participation.

in international climate negotiations, but he has presented no climate treaty to the Senate for ratification. By way of context, it is useful to bear in mind that the USA is also not a signatory to the UN Conference on Law of the Sea,\(^2\) which also would have binding effect; however, it often adopts domestic legislation that carries out the substantive terms of multinational environmental agreements.

20.06 The USA is among the States that have associated themselves with the Copenhagen Accord, and also endorsed the agreements reached at Cancun. As such, it has taken on commitments to contribute to a potential $100-billion-per-year climate action fund to be given by developed countries to developing countries.\(^3\) It has also been involved with much of the institutional structuring that has occurred at both meetings, including agreeing in principle: to contribute to a $100-billion-per-year climate fund that the developed world has collectively pledged to establish by 2020; to help accelerate transfers of relevant green technologies;\(^4\) and individually to reduce emissions around 17 per cent below 2005 levels by 2020, ‘in conformity with anticipated US energy and climate legislation, recognising that the final target will be reported to the Secretariat in light of enacted legislation’ (and with further reductions thereafter).\(^5\) However, neither of these agreements includes any binding limits on emissions or other legally binding international commitments, and the legislation that was then anticipated was never enacted.

Negotiating position

20.07 The current national Administration under President Obama recognises the severity of climate change and has committed to reducing the country’s GHG emissions. Obama has pledged to battle GHG emissions, and has said that the USA is ‘determined’ to take action.\(^6\) The President has also taken steps to

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\(^3\) Copenhagen Accord, paragraph 8, 18 December 2009, FCCC/CP/2009/L.7 18.

\(^4\) Ibid.

\(^5\) Letter from Todd Stern, United States Special Envoy for Climate Change, to Yvo de Boer, Executive Secretary, United Nations Framework Convention on Climate Change (28 January 2010), available at http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/unitedstatescphaccord_app.1.pdf.

\(^6\) Barack Obama, ‘Remarks by the President at United Nations General Secretary Ban Ki-Moon’s Climate Change Summit’ (22 September 2009); available at www.un.org/wcm/
begin regulating GHG emissions in the executive branch based on existing authorities, especially the Clean Air Act of 1970.

20.08 A strongly partisan atmosphere currently prevails in Washington. President Obama is a Democrat, as is a majority of the Senate. The House of Representatives was controlled by the Democrats until January 2011. The House passed a comprehensive climate Bill in June 2009 based on an economy-wide cap-and-trade system, but the Bill died in the Senate, whose current rules require affirmative votes of sixty of its one hundred members to enact legislation. The Republicans took control of the House in January 2011, and their leadership is strongly opposed to climate regulation and is attempting to block President Obama’s efforts. The next national election will be in November 2012; whether President Obama is re-elected, and the composition of the House and the Senate, will be determined then. Meanwhile, this political situation has hampered the President’s ability to make climate-related commitments in the international arena.

*Industrial and natural resources (emissions sources and energy mix)*

20.09 The USA has been the largest energy consumer in the world according to the Energy Information Administration (‘EIA’), using 94.6 quadrillion British Thermal Units (qBTUs) of energy in 2009.\(^7\) However, its use is almost identical to China’s use over the past few years,\(^8\) and the International Energy Agency (‘IEA’) has calculated that China overtook the USA in total consumption in 2008.\(^9\) Over a third of this energy usage is from petroleum (35.3 qBTUs), largely in the transportation and industrial sectors. Another 20 to 25 per cent each comes from natural gas and coal, with coal primarily going to satisfy electricity needs and natural gas fairly split among industrial and residential heating, and


\(^8\) Energy Information Administration, China Energy Data, Statistics and Analysis – Oil, Gas, Electricity, Coal, available at www.eia.doe.gov/cabs/China/Profile.html.

electricity generation. Under 10 per cent of energy needs are met each by nuclear power (which exclusively creates electricity), and by renewable sources (used mostly for electricity but also across other sectors). See Figure 20.1 for a graphical summary of energy sources and end-uses in the US economy.

20.10 The electricity market itself is dominated by coal, which provides about half of the national market. Natural gas and nuclear power also comprise about 20 per cent each. Natural gas is surging in importance, however, and will account for over half of all installed capacity from 2011–14.\(^{10}\) This leaves renewable sources as constituting 11 per cent of the market.\(^{11}\) Traditional hydropower provides over three-quarters of renewable electricity, largely in the northwest and northeast but also scattered across the south.\(^{12}\) Biomass is mostly used for non-electric heating, but is also a reasonably important source of electricity, while the remaining resources constitute less than 10 per cent of the renewable market each. Among these, wind power is the fastest-growing source of electricity, and is on track to outpace all power sources except natural gas in new installed capacity in 2011.\(^{13}\) However, this number is forecast to drop off from 2012–14 in the face of regulatory uncertainty.\(^{14}\)

20.11 Although transportation and electricity together use about two-thirds of the USA’s energy, industrial activities and residential/commercial uses are also important, and are fuelled largely by petroleum and natural gas resources. Heavy manufacturing is an important part of the US economy, particularly in the midwest and parts of the south,\(^{15}\) while the northeast and


\(^{11}\) Ibid.


\(^{13}\) EIA 2009 Power Report, above n. 10, at 18 tbl. 1.4.

\(^{14}\) Ibid.


\textit{National climate change risks}


Rising sea levels affect much of the US eastern seaboard and Gulf Coast region, including large swathes of Florida, and the major cities of New York, Boston and New Orleans.\footnote{CCSP report, above n. 17, at 43.} Water supplies have tended in the past fifty years to tighten in the south and southwest, while increasing in the north and northeast.\footnote{CCSP Report, above n. 17, at 46–8.} This will be particularly problematic in the southwest, where water supplies will be further strained as winter snow packs melt earlier and thereby provide less water runoff.\footnote{GCRP Report, above n. 18, at 139.} Meanwhile, more precipitation has led to more numerous and extreme precipitation events in the northeast,\footnote{GCRP Report, above n. 18, at 135.} and could contribute to increased flooding.\footnote{CCSP Report, above n. 17, at 53–62, 73–5; GCRP Report, above n. 18.} This precipitation in the northeast will help contribute to more severe snowstorms in the winter, while the Gulf Coast region could see a higher incidence of tropical storms and hurricanes.\footnote{Ibid., at 68–73.} Meanwhile, more intense wave activity has already begun to erode coastlines along the Pacific northwest, and in the South Atlantic.\footnote{Ibid., at 68–73.}
These impacts have already affected communities in the Gulf region, and in Alaska, which has led to climate litigation (see para. 20.63 below). In addition, crop and livestock production is particularly at risk from water stresses, the health industry could be strained by new tropical and waterborne diseases and increased heat stress, and numerous ecosystems, which provide valuable services to society, are severely threatened.

(B) Public law

Overview

Judicial activity on climate-related issues is a relatively recent phenomenon: the USA has seen a large surge in recent litigation activity, from only one climate-related case brought in 2003, to over a hundred cases in 2010. During the presidency of George W. Bush (January 2001 to January 2009), most climate-related litigation was brought by environmental groups seeking to force GHG regulation, and challenging specific projects on GHG-related grounds. Since Barack Obama took office in January 2009, there has been a surge of litigation brought by industry and by states that oppose regulation, seeking to stop the federal regulatory activity instituted by the Obama Administration.

Types of judicial review

Statutory challenges

One way to attempt to block federal action is to challenge an underlying statute that grants certain powers. In such a challenge, a plaintiff alleges that a given law violates the provisions of the Constitution (i.e. it is unconstitutional). Constitutional challenges to the text of environmental statutes (as opposed to their enforcement) have rarely succeeded. States are also subject to challenges based on lack of constitutional authority. In particular, the Dormant Commerce Clause prohibits states from interfering purposefully or excessively in interstate commerce. Plaintiffs seldom succeed in such challenges.

26 Ibid., at 89.  
27 Ibid., at 79–88.  
28 See Fig. 20.2 below.
This type of constitutional challenge is not relevant today at the federal level with respect to climate, largely because there is no national climate change law to challenge. Most federal activity on climate change has occurred under the auspices of the Clean Air Act, a statute that is generally accepted as constitutional today. At the state level, there has been more activity, most notably in California under Assembly Bill 32 (‘AB 32’), which established a comprehensive climate regulatory regime for that state. However, challenges to AB 32 have thus far been limited to its implementation, and not to the authority of the statute itself.

Regulatory challenges

Many of the statutes enacted by Congress authorise federal agencies to adopt regulations implementing them. If the underlying statute is deemed constitutional, parties may also challenge those regulations which have been passed pursuant to those statutes. The agencies must follow the Administrative Procedure Act, which requires the agencies to publish draft regulations, provide explanatory background information, invite public comment, and then publish the final regulations. At that point, the regulations may be challenged in federal court by anyone who will be adversely affected by them. Interested parties may also petition agencies to adopt regulations, and sue the agencies if they fail to do so.

These challenges will generally allege that the regulation goes against the text or intent of its underlying statute, or that proper procedures were not followed, or (less commonly) that applying the statute in a particular way is unconstitutional. Within the set of federal administrative challenges, they can be national in scale, based on statutory interpretation; or more local and project-based, based on both statutory and regulatory interpretation.

Grounds for judicial review

Clean Air Act

Statutory basis

The Clean Air Act of 1970 (‘CAA’) is by far the most important basis for climate regulation, and by extension carbon emissions liability. The main section, for regulation of stationary
sources, was designed to achieve certain standards of air pollution necessary to protect the public health and welfare. The basic design for most pollutants is that the Environmental Protection Agency (‘EPA’) is entrusted to set National Ambient Air Quality Standards (‘NAAQS’), which represent the safe concentration of a variety of pollutants. The EPA is then required to establish State Implementation Programs (‘SIPs’), subject to EPA approval, to achieve these NAAQS. If the SIP does not satisfy the EPA, it may instead impose a Federal Implementation Plan (‘FIP’) on that state. All major emission sources must get Title V permits that delineate emissions allowances for individual facilities based on state or applicable federal requirements. In addition, major new emissions sources are subject to New Source Review (‘NSR’), under which technology standards are set depending on whether the area is in attainment with NAAQS. These standards are also determined by states, subject to EPA approval. The EPA may also set nationwide technology standards under the New Source Performance Standard program.

The CAA has an entirely different section for the regulation of motor vehicles. The EPA may directly regulate motor vehicle emissions. These rules supersede state motor vehicle standards, except that the State of California may promulgate its own standards, subject to EPA approval, and other states may adopt the California standards.

For a pollutant to be subject to CAA requirements, it must first be deemed by the EPA to endanger the public health and welfare. Once so listed, a pollutant will become subject to various CAA provisions, depending on the EPA’s subsequent regulations.

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29 42 U.S.C. § 7409 (2006). The original goal was for such standards to be met by 1975, although later amendments (in 1977 and 1990) pushed back this date.

30 If the area where a new facility is being built is not in attainment, then the facility is subject to Non-Attainment (‘NA’) standards, which require that the technology used result in the Lowest Achievable Emissions Rate (‘LAER’). If the area is in attainment, or if a NAAQS has not yet been set, then the facility need only reach the Prevention of Significant Deterioration (‘PSD’) standards, which are the Best Available Control Technology (‘BACT’); a less stringent requirement than LAER. 42 U.S.C. §§ 7470–509 (2006).

Finally, the ability to sue under the CAA is given both to the EPA to enforce compliance with its regulations, and to members of the public, either to enforce compliance with the statute, or to challenge the EPA’s failure to undertake any non-discretionary duty. This is the so-called ‘citizen-suit’ provision of the Act, and allows private individuals to sue the Government or private actors (facility managers) who may violate the Act.

Regulatory activity

In 2007 the US Supreme Court issued a seminal decision, *Massachusetts v. EPA*, finding that the EPA could not decline to regulate GHGs purely for reasons of policy or expedience; it had to make a real determination of whether these gases contribute to global climate change, which is a threat to public health and welfare. This led to some limited EPA activity where the EPA began researching ways it could regulate GHGs; but no major regulation occurred until President Obama took office and appointed Lisa Jackson as the new EPA Administrator in 2009.

Under Administrator Jackson, the EPA has issued four major and interrelated climate regulations, which together impose a national system of carbon liability on regulated sectors. In order to justify any regulatory activity, the EPA first had to issue an Endangerment Finding, which determined that GHG emissions from moving vehicles are ‘reasonably likely’ to threaten public health and welfare, and thus certified six GHGs as pollutants subject to the CAA. Next, the Vehicle Tailpipe Rule sets GHG emission standards for Light Duty Vehicles under the moving source regulatory provisions in the CAA.

The final two rules work in conjunction to regulate stationary sources. First, the Timing Rule, or Reconsideration Decision, interprets the Clean Air Act’s language to conclude that the Vehicle Tailpipe Rule will also mandate that stationary sources be subject to technology standards. The Tailoring Rule then

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32 42 U.S.C. § 7604 (2006); see 42 U.S.C. § 307 (2006) for a summary of which courts will hear different cases; generally, national regulations must be challenged in the District of Columbia Circuit Court of Appeals, while other actions will be heard in regional federal courts.
limits these regulatory requirements to emitters of 100,000 tons of CO₂ equivalent (CO₂ eq) per year. This limitation was deemed to be necessary because the CAA normally applies to facilities emitting 250 or more tons per year, but given the volume of GHG emissions emitted compared to other pollutants, this is an unreasonable number. These national rules went into effect on 2 January 2011 (except the Endangerment Finding, which was already in effect).

Current and recent litigation
20.26 The largest set of climate litigation currently underway relates to the EPA’s recent national climate regulations under the CAA. Over ninety individual cases have been filed against the four rules listed above, from more than thirty-five distinct parties. Just two of these parties have called for more stringent regulation (those from the Sierra Club and the Center for Biological Diversity). The cases split roughly evenly among challenges to the four major EPA regulations (listed above). Because these challenges are to the EPA’s national implementation of the CAA, they are in the District of Columbia Circuit Court of Appeals (the ‘DC Circuit’). The Court will hear these challenges in 2011 or 2012. The Court has denied a motion to stay implementation of the EPA’s regulations pending decisions on these challenges.

20.27 The DC Circuit tends to be deferential to administrative actions that are well-documented and well-explained in the record, but it also tends to strike down rules that are contrary to the plain words of a statute. Under this light, the Endangerment Finding and the Tailpipe Rule may be in good shape, especially since the motor vehicle industry, the industry that is directly affected by the Tailpipe Rule, has accepted it. But the Tailoring Rule is on shakier ground because on its face its numerical thresholds differ


34 Much of the information compiled here and below can be accessed from the CCCL Climate Litigation Chart, available at www.climatecasechart.com.
from those in the statute, and the fate of the Timing Rule seems to be linked to that of the Tailoring Rule.

Clean Water Act

Statutory basis

20.28 Although the CAA is the main source of regulatory activity (and by extension, litigation), several other statutes provide possible angles to address climate change and establish carbon liability. The Clean Water Act (‘CWA’), passed in 1972, provides for the regulation of pollutants into waterways. One portion of the statute functions by requiring states to set Water Quality Standards subject to EPA approval under §303(c). Once established, states must promulgate lists (under §303(d) of the CWA) of waterways that fail to meet these standards.\(^{35}\) These lists form the basis for eventual development of Total Maximum Daily Loads (‘TMDLs’), which set acceptable pollutant levels for certain waterways and open the door for water quality-based effluent limitations designed to preserve these TMDLs, under the National Pollutant Discharge Elimination System (‘NPDES’).\(^{36}\) All of these actions must be approved by the EPA.

20.29 The CWA has a citizen suit provision similar to that in the CAA; any adversely affected party may sue a private actor for violating statutory or regulatory mandates, or the EPA itself for failing in its duties to administer the statute.\(^{37}\)

Regulatory activity

20.30 Although water regulation does not generally relate to climate, the EPA issued a memorandum on 15 November 2010, asking twenty-three coastal states and five coastal territories to seriously consider ocean acidification problems (which have been directly linked to GHG levels in the atmosphere\(^ {38}\)) in their future monitoring activities under the CWA.\(^ {39}\) The EPA noted that all coastal

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\(^{36}\)  Ibid., § 1311, 1342 (2006).
\(^{37}\)  Ibid., § 1365 (2006).
states already have established appropriate pH ranges of 6.5 to 8.5 for their ocean areas, and that states ‘should’ list waters that do not meet these criteria on their §303(d) lists. The EPA has not pushed hard here, and its actions thus far focus on data collection, suggest rather than mandate, and are self-consciously subsidiary to efforts under the CAA.\textsuperscript{40} However, recognition of ocean acidification may open the door for future action under the CWA. Much of the states’ administration of the CWA is subject to federal approval, so the EPA could enforce its views. Further, EPA guidance under the CWA sets a maximum of eight to thirteen years before TMDLs should be developed for all bodies of water placed on a §303(d) list. The EPA’s efforts to gather data on the federal level, and help individual states in this regard, could give a boost to these activities; the more states know about this issue the sooner they may find themselves compelled to address it. As such, the EPA ‘recognizes that the §303(d) program under the CWA has the potential to complement and aid in [CAA climate regulation efforts]’\textsuperscript{41}

NEPA

Statutory basis

20.31 The National Environmental Policy Act, enacted in 1970, aims to influence federal agencies’ decision-making process by requiring that they consider the environmental ramifications of their actions. Agencies must issue Environmental Impact Statements (‘EISs’) for major federal actions significantly affecting the environment.\textsuperscript{42} This is a procedural requirement without substantive bite. The NEPA applies to almost all discretionary actions of federal agencies, including permit approvals of private facilities. Several courts have ruled that


\textsuperscript{40} Envtl. Prot. Agency, Questions and Answers on Ocean Acidification and the Clean Water Act § 303(d) Program (2010).

\textsuperscript{41} Ibid., at 3. \textsuperscript{42} 42 USC § 4332(2) (2006).
GHG emissions are appropriate topics for consideration under the NEPA.  

20.32 To help implement the NEPA, Congress also established the Council on Environmental Quality (‘CEQ’) within the Executive Office of the President (not within the EPA). Under the NEPA, the CEQ is charged with adopting regulations to guide agency actions and to help determine what must be done to satisfy NEPA standards.

20.33 Several states have also passed their own statutes similar to the NEPA designed to accomplish the same goals for state agencies. Among the more notable such statutes are the California Environmental Quality Act (‘CEQA’) and New York’s State Environmental Quality Review Act (‘SEQRA’). The CEQA in particular has more substantive bite than the NEPA.

Regulatory activity

20.34 On 18 February 2010, the CEQ issued a draft guidance document requiring that agencies consider the direct and indirect GHG emissions resulting from their contemplated actions, as well as the effect of climate change itself on their projects. The guidance sets a threshold for when GHG emissions should be considered, noting emissions of 25,000 metric tons or more might be ‘an indicator that a quantitative or qualitative assessment may be meaningful to decision makers and the public’. Although it has received public comments on the draft, the CEQ has so far yet to issue a final guidance.

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43 See, e.g., Center for Biological Diversity v. National Highway Traffic Safety Administration, 538 F.3d 1172 (9th Cir. 2008); Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520 (8th Cir. 2003).
47 Ibid.
Current and recent litigation

20.35 Unlike other major environmental statutes, the NEPA has no citizen suit provision: instead, challengers can bring claims as outlined by the Administrative Procedure Act (‘APA’).\(^{49}\) Numerous NEPA cases have concerned climate change impacts; a total of forty-four such cases had been brought as of March 2011 under the NEPA.\(^{50}\) As above, several leading decisions have invalidated environmental impact reviews for failing to consider climate change.\(^{51}\) States have been a heavy area of litigation activity as well: another thirty-five challenges were filed to state NEPA equivalents, with the large majority of these challenges (about 80 per cent) filed in California under the CEQA.\(^{52}\)

20.36 This litigation has also targeted international activity. In particular, one NEPA lawsuit was brought against two federal corporations, the Overseas Private Investment Corporation (‘OPIC’) and the Export-Import Bank (‘Ex-Im’), based on their failure to consider the impact of GHG emissions of over $32 billion in financing and political risk insurance they had provided to several fossil fuel projects around the world. In settling the case, both entities pledged to consider GHG emissions and release more information in the future. They also each established $250 million funds to finance clean technology projects.\(^{53}\)

Statutory basis

20.37 The Endangered Species Act of 1973 (‘ESA’) was passed to ensure preservation of biodiversity. Under the ESA, two federal bureaux\(^ {54}\) are responsible for listing plant and animal species as endangered (facing possible extinction), or threatened

\(^{50}\) See Fig. 20.2 below.
\(^{51}\) See, e.g., Center for Biological Diversity v. National Highway Traffic Safety Administration, 538 F.3d at 1172; Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d at 520.
\(^{52}\) See below, Fig. 2.
\(^{54}\) The Fish and Wildlife Service (‘FWS’) and National Marine Fisheries Service (‘NMFS’).
(‘likely to become an endangered species within the foreseeable future’),\textsuperscript{55} without taking economic considerations into account.\textsuperscript{56} Once a species is listed, the Secretary of the Interior or Commerce must determine its critical habitats, as well as a recovery plan for the species as a whole (including setting certain restrictions on activities within the habitat).\textsuperscript{57} Endangered species are additionally protected from any projects that would constitute a ‘taking’ (harming individuals in the population).\textsuperscript{58} However, there are a number of exceptions, most commonly for projects where developers take steps to ‘minimize or mitigate’ their detrimental impact on a given listed species; a comprehensive permitting programme exists for projects impacting critical habitat.\textsuperscript{59}

20.38 The ESA has a citizen suit provision under which adversely affected parties may sue private actors or the Government for violating statutory or regulatory mandates.\textsuperscript{60}

Regulatory activity

20.39 The past few years have seen a large debate about the role of the Polar Bear, which may face extinction primarily due to climate change, in the ESA’s structural protections. This debate has revolved around three key agency decisions. First, during the Administration of President George W. Bush, the Department of Interior listed the Polar Bear as a ‘threatened species’ on 14 May 2008.\textsuperscript{61} Six months later, it issued a ‘special rule’ stating that this listing could not be used to impose permitting requirements based on GHG emissions outside Alaska.\textsuperscript{62} Importantly, this ‘special rule’ only applies to the Polar Bear so long as it is listed as a ‘threatened’ (and not ‘endangered’) species. Under the Obama Administration, the Department of the Interior continues to

\begin{footnotesize}
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\item \textsuperscript{55} 16 U.S.C. §§ 1532(6), (19) (2006).
\item \textsuperscript{56} Ibid., §§ 1533(a)–(b) (2006).
\item \textsuperscript{57} Ibid., §§ 1533(c), (f) (2006).
\item \textsuperscript{58} Ibid., § 1538(a) (2006).
\item \textsuperscript{59} Ibid., §§ 1539(a) (2006).
\item \textsuperscript{60} Ibid., §§ 1540(g) (2006).
\end{itemize}
\end{footnotesize}
stand by its original rulings, but it has also designated critical habitat for the Polar Bear.

Current and recent litigation

20.40 Both of the above 2008 rules were immediately challenged in federal court on two fronts: by environmentalists who argue that the Polar Bear should be listed as endangered and that the ‘special rule’ is invalid; and by industry groups who challenged that the Polar Bear should not be listed at all and that the special rule arbitrarily excludes Alaska. These challenges are currently pending.

20.41 Some have argued that the ESA might be used to combat GHG emissions. However, the structure of the ESA is generally seen as ill-suited for this purpose. The ESA focuses on harm to individuals and populations in limited regions, and can stop development within or affecting critical habitats, but the greatest damage to the habitat of the Polar Bears, for example (that of shrinking sea ice), comes from projects originating outside the Arctic, over which it would be much more difficult, both administratively and politically, to impose ESA permitting requirements.

SEC

20.42 On 8 February 2010 the Securities and Exchange Commission (‘SEC’) issued a Guidance that clarified climate disclosure obligations for US public companies. It noted that companies should report effects on their business from four sources: (i) the impact of legislation and regulation; (ii) the impact of international accords; (iii) indirect consequences of regulation or business trends; and

65 A federal court recently asked EPA to clarify its listing decision to help the judicial review process, holding that EPA’s previous stated reasons were insufficient. In re: Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation, 2010 WL 4363872 (D.D.C. 2010). Arguments over the ‘special rule’ will be heard after the listing decision is resolved.
(iv) physical impacts of climate change.\textsuperscript{67} This guidance has had some effect: only 17 of the 151 companies examined in the study that filed a 2009 10-K failed to mention climate change at all.\textsuperscript{68} Most disclosures focused on the impact of legislation and regulation; only a third to half of companies discussed the other three topics, with climate impacts being the least-discussed factor that businesses considered in their operations.\textsuperscript{69} In 2008 the Attorney General of New York launched an investigation of the securities disclosures of several coal-burning electric utilities, but there has been no other litigation against companies concerning GHG disclosures in securities filing.\textsuperscript{70}

\textit{Barriers to judicial review}

20.43 Although multiple avenues exist to potentially challenge government and other activities for violating statutory provisions, there are also several barriers to such review. The principal barriers are laid out below.

Constitutional standing

20.43A One of the principal restrictions on litigation is termed ‘standing’. The United States Constitution confers jurisdiction over ‘cases’ and ‘controversies’, and this has been interpreted to mean that a plaintiff must show a ‘concrete and particularized’ injury-in-fact, which must be ‘actual or imminent, not conjectural or hypothetical’.\textsuperscript{71} This injury must be to the litigants directly, and not merely to the environment at large.\textsuperscript{72} In addition, the injury must be shown to result fairly directly from the challenged activity (‘causation’), and court action here must be able to remedy litigants’ injuries in some palpable way (‘redressability’).\textsuperscript{73}

\textsuperscript{68} For more information on corporate SEC disclosures, see Columbia Law School, Climate Change Securities Disclosures Resource Center, at www.law.columbia.edu/centers/climatechange/resources/securities#catalog.
\textsuperscript{69} Ibid.
Injury-in-fact may present a difficult barrier for parties seeking to address widespread rather than localised conditions. Environmental groups often base challenges on injuries suffered by particular members and their property. Companies and industry groups opposed to environmental regulations have less difficulty because they typically can show specific economic injury.

The global and cumulative nature of anthropogenic climate change pose challenges for plaintiffs attempting to link particular emissions (such as those from a set of power plants or even an entire industrial sector) to a particular weather event (such as a hurricane). When emissions abatement is sought, it can also be difficult to show redressability – i.e. that abating specific emissions will itself have a discernible effect on the climate.

The case for environmental standing was helped by the 2007 Massachusetts v. EPA decision in the Supreme Court, where the Court held by a 5–4 decision that the Commonwealth of Massachusetts had standing to challenge the EPA’s failure to regulate GHG emissions from vehicles. In this decision, the Court acknowledged that ‘The harms associated with climate change are serious and well recognized.’ It also noted that contribution to an injury may be sufficient to ground standing: the defendant need not be the sole contributor to the petitioner’s harm to be held responsible for its activities (‘small incremental steps’ also justify judicial review). In that case, Massachusetts alleged that its coastline was being harmed as a result of climate change. Additionally, redressability is satisfied so long as a judicially mandated change would ‘slow or reduce’ the stated injury (the injury does not have to disappear entirely). However, the longer-term impact of this ruling remains uncertain: the Court noted specifically that states are ‘entitled to special solicitude in [the Court’s] standing analysis’.

Prudential standing

After establishing constitutional standing, litigants must also demonstrate prudential standing within the particular statute at

74 CCSP Report, above n. 17, at 53–68.
76 Ibid., at 523–4. 77 Ibid., at 525. 78 Ibid., at 520.
issue. This test examines whether or not the interest alleged is ‘arguably within the zone of interests to be protected or regulated by the [statutory provision] or constitutional guarantee in question’.\(^7\)

Importantly, the test is ‘not meant to be especially demanding’, excluding only those whose interests are ‘marginally related to or inconsistent with the purposes implicit in the statute’.\(^8\)

20.48 Prudential standing requirements should not present a barrier to most existing challenges, which are primarily brought either by environmental interests or by regulated parties (states and industry). Instead, where this test has been applied in the environmental context it has eliminated tangential interests that indirectly benefit or lose from market changes caused by the regulation.\(^9\)

Ripeness and finality

20.49 In addition to showing that they are the right parties to sue, litigants must also show that they are not suing too early. The ripeness doctrine seeks to ‘prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies … [until their] effects [are] felt in a concrete way’.\(^10\) In such an inquiry, courts consider (i) ‘the fitness of the issues for judicial decision’ and (ii) ‘the hardship to the parties of withholding court consideration’.\(^11\) A case may be considered ‘fit’ for a court when the issue presented is purely legal, and there is relatively little utility from observing practical applications of the challenged activity.\(^12\) This is less likely to be true when the agency retains considerable discretion in how to apply


\(^12\) For applications of this test, see Cement Kiln Recycling v. E.P.A., 493 F.3d 207, 216 (D.C. Cir. 2007) (‘When a challenge to an agency document … turns only on whether the document on its face … purports to bind both applicants and the Agency with the force of law-[sic]the claim is fit for review.’); Miller v. Brown, 462 F.3d 312 (4th Cir. 2006); Texas v. U.S., 497 F.3d 491 (5th Cir. 2007).
a new rule. When examining ‘hardship’, the emphasis is often on whether the petitioners face an imminent choice of expensive compliance or penalised non-compliance with a regulation.\[^{85}\]

20.50 The finality requirement is related to ripeness, and limits judicial review to final agency actions, where the decision-maker has reached a definitive conclusion to take the harm-causing action (‘an agency rule, order, license, sanction, relief’ or equivalent).\[^{86}\] To be final, an action must mark ‘the consummation of the agency’s decision-making process’; and it must determine ‘rights or obligations’ from which ‘legal consequences’ will flow.\[^{87}\]

Exhaustion

20.51 Litigants must exhaust administrative channels before they can seek judicial review. If there is an opportunity to submit comments on a proposed rule, for example, they must do so. This requirement helps ensure that agencies are aware of objections before they take final action, and protects them against ambush.

Mootness

20.52 Finally, a challenge may become moot, and therefore no longer be appropriate for judicial resolution, where the alleged injury is no longer felt. However, the Supreme Court has held that a lawsuit does not become moot simply because a polluter has ceased polluting, if it could thereafter resume its original activities.\[^{88}\] Mootness may also bar actions that seek to prevent an irreparable injury (such as the destruction of a forest), and the injury takes place before a final decision is rendered (at least if plaintiffs did not seek a preliminary injunction to block the action).

Remedies

Injunctive relief

20.53 The available remedies for a lawsuit depend on the nature of the challenge and the identity of the defendant. As discussed below,


the United States Supreme Court rejected a claim for injunctive relief in a case, *American Electric Power v. Connecticut*, that concerned the power of the federal courts to direct electric utilities to reduce their GHG emissions. The decision was a narrow one, however, based entirely on the conclusion that the Clean Air Act has directed the EPA to regulate GHGs, leaving no remaining role for injunctive actions under the common law.

20.54 If a statute is declared to be unconstitutional on its face, it is not automatically stricken from the code but it may become ineffective. If a court declares an agency regulation to be invalid, it may vacate the rule, or it may instead choose to allow the rule to remain in effect while the agency corrects the defects. Some courts have run a two-part test to determine whether to vacate the EPA's rules: ‘the seriousness of the order’s deficiencies … and the disruptive consequences of an interim change’.89 Particularly, where a ‘rule has become so intertwined with the regulatory scheme that its vacatur would sacrifice clear benefits to public health and the environment’, courts may choose merely to remand regulations.90

20.55 If a litigant successfully demonstrates that an agency has improperly failed to undertake some mandatory activity, as occurred in *Massachusetts v. EPA* in 2007,91 the court will ordinarily direct the agency to take that action. Specific time limits are usually not imposed, but the litigants may return to court to seek redress for unreasonable delays.

**Litigation costs**

20.56 In the USA, each party to litigation typically bears its own fees and costs; there is no general ‘loser pays’ rule. However, several statutes provide that prevailing plaintiffs may receive attorney’s fees. The CAA, CWA, and ESA explicitly allow fees to be granted to successful petitioners in citizen suits where ‘appropriate’.92 Such fee awards have been a significant source of financing for some environmental litigation. The NEPA does not have a similar

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89 *Allied-Signal, Inc. v. Nuclear Regulatory Comm’n*, 998 F.2d 146, 150–1 (D.C. Cir. 1993); see also *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (reducing to a remand an earlier vacatur issued in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008)).

90 *North Carolina*, 550 F.3d at 1178–9.

91 *Mass. v. EPA*, 549 U.S. at 497.

provision, but successful plaintiffs can claim these fees under the Equal Access to Justice Act.\[^{93}\] Except under extraordinary circumstances, unsuccessful plaintiffs are not liable for defendants’ legal fees.

**Energy litigation activity**

20.57 As the largest source of US GHG emissions, energy projects, and particularly electricity power plants, have become a large source of litigation. In particular, the Sierra Club, a US environmental NGO, is leading a coordinated litigation campaign by environmental groups to challenge all new coal-fired power plants.\[^{94}\] These campaigns utilise administrative procedures and litigation to challenge several aspects of these facilities under a wide array of legal theories: GHG emissions, conventional air pollutant emissions, cooling water discharges, ash disposal, land acquisition, railway lines to carry fuel, public utility commission approvals, and others. Similarly, the environmental community is litigating against coal mining activities, especially focusing on mountaintop removal. Many of these challenges have been successful.\[^{95}\] The litigation costs and judicial uncertainty, coupled with possible GHG regulations, have created a major cloud of uncertainty over all proposed coal-fired power plants.

20.58 There are also a significant number of legal challenges to renewable energy projects. These lawsuits are not coordinated, however, and not based on any unifying principle. Instead they arise from local parties protesting aesthetic harms (wind farms have been particularly challenged as being unsightly),\[^{96}\] or from


\[^{94}\] Sierra Club, ‘Stopping the Coal Rush’, at www.sierracclub.org/environmentallaw/coal.


environmentalists concerned with other environmental harms (certain large solar projects may pose a threat to desert ecology, and some wind projects have been alleged to threaten a species of endangered bats, for example). Although this local litigation does not target the industry as such, it can be a significant problem for specific projects. As such, some have argued that a federal statute should be passed to pre-empt such litigation (along the lines of the federal law that inhibits local laws against telecommunications towers). There has been no recent legislative action to enact this statute, however.

(C) Private law

Overview

20.59 In addition to challenging specific governmental actions, interested parties may also attempt to utilise the US’s private law system as a springboard to provide a basis for climate-relevant complaints. There are relatively few legal mechanisms available here, largely because the USA does not constitutionally or statutorily recognise a right to a non-polluted environment. However, several lawsuits have been brought that explore the use of these theories.

20.60 Attempts to base carbon liability in private causes of action could be displaced by climate legislation, or possibly by regulation or perhaps even the possibility of regulation under existing law (principally the CAA). However, even without such displacement, such lawsuits face multiple challenges, as described below.

Bases for liability

20.61 These claims sound in tort, which is defined as ‘a civil wrong … for which a remedy may be obtained’. Two kinds of tort theories have been advanced in the climate change context – public

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nuisance and fraudulent misrepresentation (the latter, linked with conspiracy).

Public nuisance

20.62 Public nuisance on the national level is a common law injury, defined not by any national statute, but by the courts. On the state level, it can be either court-defined or legislated. The basic test for this (applicable in federal law, although it may vary slightly from state to state) is an ‘unreasonable interference with a right common to the general public’. This definition includes significant interference with the public health, safety, morals, peace, or comfort, as well as conduct ‘of a continuing nature’ that is detrimental to a public right. However, this test is infamously malleable, and so courts often decide what constitutes a nuisance on a case-by-case level. The right interfered with must be common to the public as a class, and not merely a right held by one person or even a group of citizens; although the harm must remain individualised. Under the common law, public nuisance is a no-fault tort, meaning that no maliciousness or negligence need be shown to establish liability.

20.63 In the USA, state courts have a long history of applying common law public nuisance doctrine to compensate pollution victims in the absence of sufficient environmental protections. The federal court system has also done so under federal common law since before the turn of the twentieth century. This doctrine has

100 Repealement (Second) Of Torts § 821A (1979).
101 Ibid., § 821B.
102 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1055 (1992) (J. Blackmun, dissenting) (‘one searches in vain … for anything resembling a principle in the common law of nuisance’).
103 Repealement (Second) Of Torts § 821C(2)(c) (1979) (allowing a citizen to sue ‘as a representative of the general public’).
104 Ibid., § 821C(1).
106 Baltimore & P. R. Co. v Fifth Baptist Church, 108 U.S. 317 (1883) (applying equitable common law norms to impose liability for private nuisance); Missouri v. Illinois, 180 U.S.
been used by private and governmental parties (particularly state governments) to control pollution that is beyond their legislative control. However, federal common law nuisance actions are designed only to address gaps where neither state law, nor federal legislation or regulations, apply. In particular, ‘separation-of-powers concerns create a presumption in favor of pre-emption of federal common law whenever it can be said that Congress has legislated on the subject’. Courts have also tended to limit liability to the direct owners of properties that cause harm, even if the original toxic pollutants arrived from elsewhere.

Public nuisance has become the largest source of climate-relevant private litigation today. In total, four major cases have been filed claiming that various parties have caused a public nuisance through their GHG emissions. California v. General Motors Corp., involving the State of California suing a group of car companies for money damages resulting from GHG emissions, was dismissed and is concluded. Comer v. Murphy Oil

208, 241 (1901) (compelling one state to restrict activities that imposed a ‘public nuisance’ on another).

107 See, e.g., State of Ga. v. Tennessee Copper Co., 206 U.S. 230 (1907) (granting the state of Georgia an injunction preventing emissions from plants located across the border in the state of Tennessee).

108 City of Milwaukee v. Illinois, 451 U.S. 304, 314 n. 7, 315 (1981) (noting that ‘if state law can be applied, there is no need for federal common law’ and that ‘[w]here Congress has so exercised its constitutional power … courts have no power to substitute their own [judgment]’); see also Diamond v. Gen. Motors Corp., 97 Cal. Rptr. 639, 642–6 (Ct. App. 1971) (denying a public nuisance claim because ‘plaintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards … and enforce them’).


110 City of Bloomington v. Westinghouse Electric Corporation, 891 F.2d 611, 614 (7th Cir. 1989).


112 Cal. v. GM, 2007 WL at 15–49. California subsequently withdrew its appeal to the 9th Circuit, citing advancements made by the Obama Administration as having satisfied its concerns. Motion for Appellee, No. 07–16908 (9th Cir. 2009) (motion to withdraw appeal).
seeks damages from a large group of GHG emitters for injury caused by Hurricane Katrina, which was allegedly intensified by global warming. This case was dismissed after a rather convoluted appellate history, in which the court granted en banc review and vacated the panel decision, and then lost a quorum for en banc review but left the panel decision vacated. Native Village of Kivalina v. ExxonMobil Corp. is a suit by an Alaskan village against a group of GHG emitters for the cost of relocating; it was dismissed by the trial court and is now under appeal before the Ninth Circuit. Most importantly by far, on 20 June 2011 the Supreme Court ruled in American Electric Power v. Connecticut. That decision is discussed in detail below.

American Electric Power v. Connecticut

20.64 By way of background, in 2004, at a time when environmentalists were frustrated at the refusal of Congress and President George W. Bush to regulate greenhouse gases (GHGs), two suits were brought against six electric power companies that run fossil fuel plants in a total of twenty states. One suit was brought by eight states and New York City; the other suit was brought by three land trusts. The plaintiffs in both cases claimed that the GHGs from the power plants constitute a common law nuisance, and they asked the court to issue an injunction requiring the plants to reduce their emissions.

20.65 In 2005, Judge Preska of the US District Court for the Southern District of New York dismissed the cases on the grounds that they raise non-justiciable political questions. The Second Circuit heard oral argument in June 2006. As the third anniversary of that argument passed, the Second Circuit’s long delay in deciding became one of the great mysteries in climate change law. Meanwhile, the Supreme Court issued the landmark decision in Massachusetts v. Environmental Protection Agency, and later one of the three members of the panel that heard the arguments in the Connecticut case was elevated to the Supreme Court – Judge Sotomayor. Finally in September 2009 the two remaining

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113 Comer, 585 F.3d at 860. This appeal to the Supreme Court was dismissed on 10 January, 2011. Comer, 607 F.3d, cert. denied (U.S. Jan. 10, 2011) (No. 10–8168).
114 Kivalina, 663 F. Supp. at 869.
members of the panel issued the decision – Judge McLaughlin, an appointee of the first President Bush, and Judge Hall, appointed by the second President Bush.\textsuperscript{116}

20.66 The Second Circuit decision was a major win for the plaintiffs. First, the panel found that the case was perfectly justiciable and did not raise political questions as that concept has been interpreted by the Supreme Court.\textsuperscript{117} Second, though it did not need to, the panel found not only that the states had standing to sue – which was already known from the Massachusetts decision – but also that the private land trusts had standing because they alleged that their property was being harmed by climate change.\textsuperscript{118} This would potentially open the courthouse doors to broad classes of people and entities beyond states. Third, the panel found that the federal common law of nuisance applied, and that it had not been displaced by the Clean Air Act and EPA actions under that statute.\textsuperscript{119} Thus the Second Circuit remanded the case to the district court for further proceedings.

**Supreme Court decision**

20.67 Eight justices participated in the deliberations of AEP; Justice Sotomayor was recused. The decision was unanimous, 8–0, and was written by Justice Ginsburg. The decision reversed the Second Circuit and found that the federal common law nuisance claims could not proceed.\textsuperscript{120} The sole reason was that the Clean Air Act, as interpreted in Massachusetts, gave the EPA the authority to regulate greenhouse gases, and the EPA was exercising that authority. This displaced the federal common law of nuisance. The Court declared, ‘Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.’\textsuperscript{121} Thus it is not for the federal courts to issue their own rules.

20.68 This may be the most intriguing paragraph in the opinion: “The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least

\textsuperscript{116} Connecticut, 582 F.3d at 309.
\textsuperscript{117} Ibid. at 321. \textsuperscript{118} Ibid. at 332. \textsuperscript{119} Ibid. at 371.
\textsuperscript{120} Connecticut, 2011 WL 2437011 at 4.
\textsuperscript{121} Ibid. at 10.
some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA’s refusal to regulate greenhouse gas emissions; and further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit’s exercise of jurisdiction and proceed to the merits.”  

20.69 Though unnamed in the opinion, clearly the four justices who find standing, and no other obstacles to review, are Justices Ginsburg, Breyer, Kagan and Kennedy. The four who disagree are Chief Justice Roberts and Justices Scalia, Thomas and Alito. The Ginsburg group thus apparently rejects the political question defense as well as the standing argument. Should another case come up on which Justice Sotomayor was not recused, there might be a 5–4 majority to allow climate change nuisance litigation, but for the Clean Air Act displacement. So this aspect of the Supreme Court decision did not set precedent in the technical sense, but it may give an indication of how the Supreme Court as presently constituted would rule in another case where states sued on public nuisance grounds about GHGs, but where displacement was not operating.

20.70 On the other hand, the paragraph quoted above (when considered in conjunction with *Massachusetts*) may hint that Justice Kennedy believes that only states would have standing. Thus there might be a 5–4 majority against any kinds of GHG nuisance claims (and maybe other kinds of GHG claims) by non-states.

State claims left unresolved

20.71 The Court explicitly did not decide whether the Clean Air Act pre-empted state public nuisance litigation over GHGs. Thus some plaintiff group will probably press state common law claims, perhaps on the remand in *AEP v. Connecticut*. The defendants would certainly argue that the Clean Air Act displaced state common law nuisance claims as well. The plaintiffs would no doubt counter that the Clean Air Act has provisions that explicitly say that

common law claims are not pre-empted, at least by certain parts of the Clean Air Act.\textsuperscript{123} In the next volley, the defendants would quote Justice Ginsburg’s statement in AEP that ‘judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order … Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures’.\textsuperscript{124} Where this ball stops, only time can tell.

20.72 It is also possible that plaintiffs will forum shop – they will look for the district or the circuit where they are most likely to prevail in their non-pre-emption argument.

20.73 Pressing state common law nuisance claims will raise several additional complications. One of them is which state’s law will apply. If relief is sought against a particular facility, it might well be the law of the state where the facility is located. The Fourth Circuit recently considered common law nuisance claims against facilities in several states in a case concerning conventional air pollutants, not GHGs. The court found that the laws of the states where the plants were located specifically allowed the activities – in other words, the facilities were operating pursuant to and in compliance with state permits – and therefore nuisance actions were precluded.\textsuperscript{125} If the same doctrine applied to the defendants’ facilities in a new case about GHG, the plaintiffs would face a tough burden in proving that the plants were not operating in accordance with state law.

20.74 Another complication with state common law nuisance claims is that some states would act to bar such claims. On 17 June 2011, Governor Rick Perry of Texas signed a Bill providing that companies sued for nuisance or trespass for GHG emissions would have an affirmative defense if those companies were in substantial compliance with their environmental permits.\textsuperscript{126}

20.75 Since the AEP opinion was based entirely on displacement by congressional designation of EPA as the decision-maker on GHG

\textsuperscript{123} 42 U.S.C.A § 7604(e).
\textsuperscript{124} Connecticut, 2011 WL 2437011 at 11.
\textsuperscript{125} N. Carolina, ex rel. Cooper v. Tennessee Valley Auth., 615 F.3d 291 (4th Cir. 2010).
\textsuperscript{126} SB 875 (to be codified at Tex. Water Code Ann. § 7.257).
regulation, if Congress takes away EPA’s authority to regulate GHGs but does not explicitly bar federal common law nuisance claims, these cases will come back. Thus this interestingly changes the political dynamic a bit – success by opponents of GHG regulation in their efforts to take away EPA’s authority could swiftly bring back the common law claims, unless they are also able to muster enough votes to go further and explicitly pre-empt the federal and state common law claims.

**Damages vs injunctive relief**

20.76 Another question left open is whether the Supreme Court’s decision bars all federal common law nuisance claims, or only those like AEP that sought injunctive relief. This particular question may be litigated very soon, perhaps in the two other public nuisance cases for GHGs that are currently pending. *Village of Kivalina v. Exxon Mobil* was put on hold pending the decision in AEP, but now that the case is off hold the plaintiffs are arguing that AEP affects only suits for injunctive relief, not their own suit for money damages. Meanwhile, *Comer v. Murphy Oil* was refiled on 27 May 2011 after its procedurally convoluted dismissal (see para. 20.63 above); it, too, is seeking money damages, not an injunction.

20.77 None of these cases has come close to the merits. There has been no discovery in any of them, or litigation of such difficult issues as how a district court would determine what is a reasonable level of GHG emissions from a myriad of industrial facilities, or (in the cases seeking money damages) what defendants would be liable, what plaintiffs would be entitled to awards, what defendants would have to pay what share of the award, and what plaintiffs would enjoy what share of the award. Among the other issues that would have to be addressed are extraterritorial jurisdiction over foreign entities; the impossibility of attributing particular injuries to particular defendants; and the effect of the fact that most of the relevant emitting facilities were presumably operating in accordance with their governmentally issued emissions permits.

20.78 Everything else aside, *AEP* appears to be a reaffirmation of EPA authority. That is shown by two things. First, the language of the decision itself is quite strong on EPA’s power under the Clean Air
Act. For example, the Court stated: ‘It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.’

Second, Justices Alito and Thomas wrote a concurring decision saying the opinion assumed that Massachusetts governed and could not be distinguished; they did not necessarily agree with it, but no party had raised that issue. But, perhaps significantly, Chief Justice Roberts and Justice Scalia did not join in that concurrence. Therefore it seems that there may now be a 7–2 majority in favour of keeping Massachusetts and its finding that the EPA has strong authority to regulate GHGs under the Clean Air Act. This, in turn, may have somewhat strengthened the EPA’s hand in the multiple litigations now pending in the US Court of Appeals for the District of Columbia Circuit challenging the EPA regulations.

Fraudulent misrepresentation and conspiracy

Attempts have also been made to hold GHG emitters liable by accusing them of fraudulent misrepresentation to the government and public for private gain. There is no federal cause of action for this, but most states have their own causes of action, and utilise some version of the following test: ‘One who: 1) fraudulently makes a misrepresentation of fact, opinion, intention, or law; 2) for the purpose of inducing another to act or to refrain from action in reliance upon it; 3) is subject to liability to the other in deceit for pecuniary loss caused to him; 4) by his justifiable reliance upon the misrepresentation.’ Most states add that if the statement is ‘material’, or if the party making the representation has reason to know that the plaintiff is likely to regard it as important in making a decision, then the reliance need not be justifiable. To be actionable, a fraudulent misrepresentation generally must concern fact rather than mere opinion, judgement, expectation, or probability.

An attempt could be made to utilise the conspiracy claim as an alternative basis for liability for climate misinformation.

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128 Ibid. at 13.  
129 Restatement (Second) Of Torts § 525 (1979) (element demarcation added).  
130 Ibid. (case citations).  
131 Ibid. (Comment d).
campaigns. There is a federal conspiracy statute that addresses attempts to defraud the US government, but it only applies to federal offences.\textsuperscript{132} However, conspiracy has also been defined in the federal common law, as ‘a combination “of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage”’.\textsuperscript{133} Generally, conspiring parties must have ‘reached a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement’.\textsuperscript{134} Several states also have their own (similar) conspiracy rules.

20.81 Plaintiffs have used fraudulent misrepresentation and conspiracy claims in the past as part of an effort to hold industries accountable for alleged attempts to misdirect scientific research on an important issue for financial gain. The most famous example comes from a series of lawsuits against the tobacco industry.\textsuperscript{135} Although none of these cases ever reached a decision on the merits, the industry eventually agreed to a $206 billion settlement with all plaintiffs.\textsuperscript{136} In addition, the federal government filed a suit under the Racketeer Influenced and Corrupt Organizations Act (‘RICO’).\textsuperscript{137} The Government successfully established legal fault in that case, but the remedies were limited to injunctive relief (no damages were awarded).\textsuperscript{138}

20.82 Attempts to impose similar liability for funding bad climate science face significant hurdles. The plaintiffs in the tobacco case

\textsuperscript{133} Vieux v. E. Bay Reg’l Park Dist., 906 F.2d 1330, 1343 (9th Cir. 1990).
\textsuperscript{134} Gilbrook v. City of Westminster, 177 F.3d 839, 856 (9th Cir. 1999) (en banc) (quotation omitted).
\textsuperscript{138} United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006), order clarified, 477 F. Supp. 2d 191 (D.D.C. 2007); see generally Civil Division, United States Department of Justice, Tobacco Litigation, at www.justice.gov/civil/cases/tobacco2/index.htm (‘DOJ Tobacco Litigation Listing’). Appeals on both sides were unsuccessful.
had very strong facts using (by then) uncontroversial science, and
still only succeeded after certain insider revelations.\textsuperscript{139} Climate
science is much more complicated, and in the USA particularly
it is much more controversial; scientists still exist, though over-
whelmingly outnumbered, who question fundamental aspects of
the scientific basis for climate change, which could undermine
attempts to label any one party as ‘hiding the truth’. To establish
liability in climate cases, litigants might have to prove that these
companies believed climate change presented dangers, and none-
theless began a coordinated industry effort to obfuscate the facts.
They then might have to show that this obfuscation actually hurt
them; or that the Government’s climate regulation efforts were
significantly affected by reliance on corporate-funded climate
research.\textsuperscript{140} Finally, given that the nature, sources and impacts
of climate change are subjects of vigorous political debates in the
USA, attempts to impose liability for advocacy in one direction
or the other raise important issues under the free speech and free
press clauses of the First Amendment to the US Constitution.

20.83 Two GHG lawsuits have raised such conspiracy claims: \textit{Comer}
and \textit{Kivalina}. \textit{Comer} additionally made a fraudulent misrepre-
sentation claim under Mississippi state law. As with the public
nuisance cases, none of these claims have been heard on the mer-
its: in \textit{Kivalina}, this claim was dismissed with the public nuisance
claim without discussion; and \textit{Comer}’s two claims were separated
out from public nuisance early on and dismissed as a ‘generalised
grievance’.\textsuperscript{141}

\textit{Barriers to judicial review}

20.84 Before even reaching the merits of these tort theories, plaintiffs
would have to overcome several barriers to judicial review, as
summarised below.

\textsuperscript{139} Insiders gave accounts of industry meetings developing strategies to mislead the public
and active manipulation of datasets. Richard Ausness, ‘Conspiracy Theories: Is There
a Place for Civil Conspiracy in Products Liability Litigation?’, \textit{Tenn. L. Rev.}, 74 (2007),

\textsuperscript{140} These findings are context-specific elements of fraud, which is defined legally as ‘[a]
knowing misrepresentation of the truth or concealment of a material fact to induce
another to act to his or her detriment’. \textit{Black’s Law Dictionary}, 9th edn (2009), 731.

\textsuperscript{141} \textit{Comer}, 585 F.3d at 868 (quoting \textit{Allen v. Wright}, 468 U.S. 737 (1984)).
Constitutional standing

20.85 Standing here is similar to the standing question discussed above under the statutory claims; the test is essentially the same. Unsurprisingly then, many of the concerns with establishing standing (particularly looking at causation of climate change and redressability if emissions are reduced) are similar. As with public litigation, plaintiffs will need to demonstrate a real, tangible harm being protected. This makes property owners, and particularly states (in light of Massachusetts v. EPA and its ‘special solicitude’ for states), best suited to bring a case for private nuisance.

20.86 Particular issues arise with causation associated with fraudulent misrepresentation. The chain of causation is even more attenuated, as plaintiffs may not only have to show that GHG emissions led to their particularised injuries, but also that alleged conspiracies to misinform the Government and public actually affected policy.

Political question doctrine

20.87 The political question doctrine is a court-created doctrine that prevents courts from hearing cases that may interfere with the proper functioning of the other two federal branches. The classical form of the political question doctrine has its origins in Marbury v. Madison, a foundational court decision that in 1803 introduced the idea that the court system should limit itself to resolving cases involving individual rights and injuries: ‘[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court’. Courts have applied this doctrine not just in the face of clear jurisdictional conflict, but also where needed to preserve the legitimacy of the judiciary, or to avoid conflict with other branches of government. In either case, the goal is generally to ‘restrain the Judiciary from inappropriate interference’ with the other branches’ affairs. Where applied, the political

question doctrine generally follows a multi-factor test laid out in *Baker v. Carr*.145

20.88 Public nuisance claims for GHGs are particularly vulnerable to allegations that insufficient judicial tools exist to resolve many important questions, including what level of emissions qualifies something as a public nuisance; how to deal with the fact that the challenged actions (such as extracting oil and coal, and building automobiles) were not only lawful but were encouraged by the Government over a period of many years; how to apportion damages that resulted from the activities of millions of companies all over the world for a period of more than a century; and how to distribute money damages, when the victims number in the billions, are all over the world, and include many who are deceased and many more who are unborn. However, as noted above, the Supreme Court in *American Electric Power* split 4–4 on whether the political question doctrine impedes common law nuisance claims for GHGs, and most observers believe that if Justice Sotomayor had not been recused from that case, she would have sided with the plaintiffs, leading to a 5–4 majority rejecting the political question doctrine in this context.

Causation

20.89 All common law tort claims, whether federal or state, require a showing that the alleged wrong actions in fact caused plaintiffs’ harm (cause-in-fact), and that the wrong actions are sufficiently related to the injury to be legally recognised as responsible (proximate cause). As with the foundational torts, causation inquiries vary from state to state, and so there is no unified standard. However, most states utilise some variation of this bifurcation,

145 *Baker v. Carr*, 369 U.S. 186, 217 (1962) (laying out a test of six factors, any one of which is sufficient to justify avoiding judicial resolution: 1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; 2) a lack of judicially discoverable and manageable standards for resolving it; 3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; 4) the impossibility of a court’s undertaking independent resolution without expressing the lack of the respect due coordinate branches of government; 5) an unusual need for unquestioning adherence to a political decision already made; or 6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question’.)
explained below. For both of these inquiries, the plaintiff will generally bear the burden of proving causation.146

20.90 Factual causation is established when ‘the harm would not have occurred absent the conduct’.147 However, the defendant need not be the sole cause: if multiple actors, acting independently, each could have caused this harm, then any of them can be considered the factual cause.148 The courts have yet to decide whether these black letter doctrines apply in the climate change situation, with its millions of potential defendants, dispersed over time and space.

20.91 Legal causation limits liability to ‘harms that result from the risks that made the actor’s conduct tortious’.149 Put another way, a party is only liable for expected harms from their bad conduct. Where the action is intentional or reckless, this liability extends even to harms that were unlikely.150 Conversely, if the action is merely negligent, then trivial contribution to a larger event that actually caused the injury will not establish liability. The standard of care to be applied retroactively to historic GHG emitters is very much an open question.

(D) Other law

State laws

20.92 As stated above, the USA is a federalist system; individual states have the power to set their own laws and policies in many areas. Many states have done so, with commitments to reduce their GHG emissions into the future.

20.93 California in particular has led the way in climate policy, most notably with its passage of Assembly Bill 32 (‘AB32’) in 2006, which commits California to achieving 1990 levels of emissions by 2020. To implement this programme, the California Air Resources Board (‘CARB’) is empowered to take a wide variety of measures, most notably a cap-and-trade programme, but also including new building codes, clean energy financing measures,

146 Restatement (Third) of Torts: Physical & Emotional Harm § 28 (2010).
147 Ibid., § 26. 148 Ibid., § 27.
149 Ibid., § 29. 150 Ibid., § 33.
grid restructuring, clean vehicle rules, and other measures that would inevitably impose liability across the economy.\textsuperscript{151} California’s cap-and-trade programme is scheduled to take effect in 2013.

20.94 Other than California, no states have active plans to implement cap-and-trade programmes. The State of New Mexico’s Environmental Improvement Board approved a cap-and-trade system on 2 November 2010, but the incoming governor fired the entire Board on 5 January 2011, and attempted to prevent the cap-and-trade rule from being published.\textsuperscript{152} This action was in turn overturned by the New Mexico Supreme Court, but the situation there remains in flux.\textsuperscript{153}

\textit{Regional laws}

20.95 In addition to individual state activities, three groups of states have also joined forces to establish cap-and-trade systems that have the potential to impose emission limitations within their boundaries. In the northeast, the Regional Greenhouse Gas Initiative (‘RGGI’) comprises nine states,\textsuperscript{154} caps power sector emissions at 10 per cent below 2005 levels by 2018, and has a functioning market in place to accomplish this.\textsuperscript{155} RGGI has the only mandatory cap-and-trade system for GHGs now operating in the USA. In the west, the Western Climate Initiative (‘WCI’) has brought together eleven US states and Canadian provinces\textsuperscript{156} and has a goal of reducing 2005 emissions by

\begin{itemize}
\item \textsuperscript{151} For more information on specific plans, see California Air Resources Board, ‘Climate Change Program’, at www.arb.ca.gov/cc/cc.htm.
\item \textsuperscript{152} Margot Roosevelt, ‘New Mexico Threatens a U-Turn on Environmental Regulations’, L.A. Times, 5 January 2011.
\item \textsuperscript{154} Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island and Vermont. Additionally, Pennsylvania and the Canadian Provinces of Québec, New Brunswick and Ontario are observers. New Jersey was a full member, but the governor recently withdrew from the programme; however, New Jersey’s implementing legislation has yet to be repealed.
\item \textsuperscript{155} See Regional Greenhouse Gas Initiative, CO$_2$ Budget Trading Program, at www.rggi.org/home.
\item \textsuperscript{156} WCI includes seven US states (Arizona, California, Montana, New Mexico, Oregon, Utah and Washington) and four Canadian provinces (British Columbia, Manitoba,
15 per cent by 2020, though it is not scheduled to go into effect until 2012 (with full implementation in 2015) and, except for California, state action remains uncertain. Finally, the midwest established the Midwestern Greenhouse Gas Reduction Accord (‘MGGRA’) with seven states and provinces, which has set an 18 to 20 per cent reduction goal below 2005 levels by 2020, though very little activity has occurred to date. All three regions also include several observers. However, the November 2010 election brought Republican opponents of climate regulation to power in certain states, which is leading several of these states to consider dropping out.

20.96 If the federal government were to adopt comprehensive climate legislation, these regional agreements would likely be folded into the national programme. Otherwise, any federal laws or regulations could either ignore the regional programmes (leaving them relatively intact), or they could pre-empt these programmes via the Supremacy Clause, which holds that the United States Constitution and federal statutes are ‘the supreme law of the land’.

Criminal law

20.97 Criminal liability in the USA is founded on violations of federal or state statutes. No existing or foreseeable statute makes it a crime to emit GHGs. Criminal liability could attach for the filing of false reports with the Government, but no such charges have been brought related to GHGs.

Public trust

20.98 Some scholars have suggested that public trust principles present an opportunity for judges to hold governments accountable for

Ontario and Québec). Additionally, six Mexican states, six additional US states, and four additional Canadian provinces, are observers. Arizona’s membership does not include participation in WCI’s cap-and-trade programme.

157 See Western Climate Initiative, at www.westernclimateinitiative.org.
158 Six US states (Illinois, Iowa, Kansas, Michigan, Minnesota and Wisconsin) and one Canadian province (Manitoba). Observers include Indiana, Ohio, South Dakota and the Province of Ontario.
160 See Fig. 3 for a graphical depiction of the states involved in each of these three initiatives.
161 U.S. Const. art. VI, cl. 2.
their emissions. Public trust doctrine in the environmental context holds that governments necessarily hold all of their natural resources in trust for their citizens, and as such carry a fiduciary duty to preserve these resources for present and future use.\textsuperscript{162} Under such a hypothetical ‘atmospheric trust’ theory, the atmosphere could be characterised as a national asset, which would then impose upon the Government an obligation to prevent waste to that asset.\textsuperscript{163} Citizens could bring a suit either as a beneficiary of that trust, based on harms (health impacts etc.) felt from the Government’s failure to preserve the property; or as co-tenants of the trust, for failure by the Government to pay to preserve the property.\textsuperscript{164}

20.99 In May 2011 several lawsuits were filed simultaneously in states around the country based on the public trust doctrine and GHGs. These cases raise some of the same issues of separation of powers and judicial competence as are present in American Electric Power, but these issues will presumably be litigated under the new lawsuits.

\textit{International law}

Treaty liabilities

20.100 The USA has been and continues to be reluctant to subject itself to international laws in the environmental field. As stated above, it has not ratified the Kyoto Protocol or UNCLOS. It also withdrew recognition of the International Court of Justice’s (‘ICJ’) general jurisdiction in 1985, following a decision with which it disagreed.\textsuperscript{165} The USA continues to grant specific jurisdiction to the ICJ in certain circumstances, and under certain treaties. Also, US courts often follow treaty mandates even when such treaties

\begin{footnotes}


\item[164] Ibid.

\end{footnotes}
lack binding effect. However, a treaty can impose mandatory treaty authority over the US court system, meaning that judges must abide by the provisions of the treaty in interpreting the law, only ‘[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative’. The USA is not currently a Party to any environmental treaties that would impose such a binding obligation with respect to GHG emissions.

20.101 The country is a Party to the FCCC and, as noted above, has endorsed the Copenhagen and Cancun agreements. No FCCC-specific claims have been brought forward in any US tribunal to date.

Foreign judgments

20.102 The USA is relatively friendly to recognising and enforcing foreign judgments. However, it does not do so on the basis of any treaties; instead recognition is governed by state law, on three separate bases. First, the Uniform Foreign Money Judgment Recognition Act of 1962 grants enforceability to judgments ‘granting or denying recovery of a sum of money’ other than taxes, penalty, or familial support, unless the foreign court used faulty procedure. It is recognised by thirty states. Second, the Uniform Foreign-Country Money Judgments Recognition Act of 2005 updates the 1962 law by clarifying certain points, and adding a statute of limitations. This update has been recognised by thirteen states. Importantly, several of the forty-three states above have included reciprocity requirements on foreign states to take advantage of these Acts. Nineteen states do not recognise

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170 Dhooge, above n. 168, at 3.
172 Dhooge, above n. 168, at 3. 173 Ibid., at 27.
either Act, but rely on the comity doctrine. This doctrine holds that ‘[n]o sovereign is bound … to execute within his dominions a judgment rendered by the tribunals of another state; [but rather is free] to give effect to it or not, as may be found just and equitable’.174 The result of these three different types of recognition is that the law of recognition of foreign judgments remains uncertain.175

20.103 As this is written, Ecuador is pursuing civil litigation against Chevron for oil contamination. The case was originally brought in the US courts but then dismissed on forum non conveniens grounds.176 Proceedings then took place in Ecuador, and that country’s courts awarded a judgment for the plaintiffs of $9 billion in damages against Chevron.177 However, Chevron had alleged various improprieties in the conduct of that litigation, including successfully subpoenaing documents related to potential tampering with judicial independence;178 and at its request a US federal court on 7 March 2011 issued a preliminary injunction against the enforcement in the US courts of any judgment rendered by the courts of Ecuador in this litigation.179

OECD

20.104 The USA is a member of the OECD and it is thus possible to bring a complaint if a business fails to comply with the OECD Guidelines calling for ‘responsible business conduct consistent with applicable law’. Such a complaint might look similar to one brought in Germany, as described in Chapter 17 at para. 17.99.180

174 Hilton v. Guyot, 159 U.S. 113, 166 (1895); see also Dhooge, above n. 168, at 24, n. 143.
180 Germanwatch, ‘Complaint against Volkswagen AG under the OECD Guidelines for Multinational Enterprises (2000) – Request to the German National Contact Point (Federal Ministry of Economics and Technology) to initiate the procedures for the
(E) Practicalities

Jurisdiction

Domestic activities
20.105 In order to hear a case, a federal court must have both personal jurisdiction (over the parties to the suit) and subject-matter jurisdiction (over the subject of the suit). Personal jurisdiction ensures that the party being sued has significant ties with the USA that justify bringing them to US courts. This has historically protected some foreign-run companies, although having business within the USA would be enough to ground jurisdiction. Subject-matter jurisdiction can come either if the question presented is primarily based on federal laws (federal-question jurisdiction), or if the litigants come from multiple states and have put over $75,000 at issue (diversity jurisdiction). Most of the litigations detailed above have federal-question jurisdiction, because they are based on federal statutes or federal common law. Comer v. Murphy Oil relied instead on diversity jurisdiction.

20.106 If the federal court does not have jurisdiction, then claims must be brought under state courts; and indeed, many cases of national significance are litigated in state courts. Also, even if a federal court has jurisdiction, parties may still bring their claims in state courts unless federal law provides exclusive jurisdiction to federal courts. This exclusive jurisdiction is provided for in most of the main environmental statute citizen provisions, including the CAA, CWA and ESA.

Foreign activities
20.107 Jurisdiction over foreign activities by US entities is primarily established by the Alien Tort Claims Act (‘ATCA’), passed with the first Judiciary Act in 1789. This act says quite simply that ‘[t]he [federal] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’.  


The ATCA was used heavily in the mid-1990s to hold corporations liable for contributing to human rights violations by foreign governments. These lawsuits never resulted in an actual monetary judgment, but did yield several large settlement payments. However, in 2010 an appellate court ruled in Kiobel v. Royal Dutch Petroleum that corporations cannot be held liable under the ATCA. This case has garnered widespread attention, and will likely be appealed to the Supreme Court. However, the decision also explicitly leaves room for officers of corporations to be sued in their individual capacities if they ‘purposefully aid and abet’ a violation of international law.

Looking at climate litigation, this Act is limited in at least two ways. First, it only applies to treaties and customary law that the USA recognises, which explicitly excludes, for example, any climate liability established by the Kyoto Protocol. Second, the Supreme Court has expressed ‘great caution’ in allowing cases to be brought under the ATCA, and specifically has limited its applicability to violations recognised in 1789, and some reasonable number of new claims of similar character and specificity as that original list. These limitations would make it very difficult to use the ATCA as a jurisdictional hook to impose carbon liability.

Enforcement

The USA has a strong history of enforcing domestic judicial decisions, giving its judicial system a particularly large amount of power in the overall government structure. There is also a strong culture of enforcing existing statutory obligations; most relevant federal statutes (including all but one listed above) have citizen suit provisions that allow individuals to sue for enforcement of these laws.

184 Ibid., at 2.
185 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010).
186 Bellinger, above n. 183, at 3.
187 Kiobel, 621 F.3d at 122.
189 Ibid., at 725.
Obtaining information

20.111 The Freedom of Information Act (‘FOIA’), passed in 1966, is the most effective source of information on government activities. This Act requires federal agencies to make available to the public any agency rules, orders, records and opinions, with limited exceptions (mostly pertaining to national security, staff issues and ongoing litigation). To accomplish this, they must set in place procedures for any party to petition for such information, and must respond to all requests within twenty business days (though this deadline is often missed). In addition, each state has its own version of the FOIA, which can be used for those agencies. Although delays are not uncommon in this process, it has been a key source of information in environmental litigation efforts.

20.112 In addition, discovery rules during litigation mandate access to all relevant non-privileged documents by both parties. The USA has a strong discovery process, which will prove useful if any private law claims (particularly conspiracy claims) are allowed to move forward (discovery is normally unavailable during the pendency of a motion to dismiss.) However, administrative litigation rarely gets to discovery beyond the FOIA because those cases are almost all based on record review, and administrative records are automatically disclosed.

Government immunity from litigation

20.113 The national government is technically immune from litigation unless it consents to the lawsuit. However it has waived this sovereignty for most tort claims, and this immunity does not extend to challenges to legislative or regulatory actions. State governments are immune from suits by citizens of other states and foreigners under the 11th Amendment. In addition, the Supreme Court has read the ‘structure of the original Constitution’ as providing sovereign immunity against lawsuits brought by citizens

of their own state.\textsuperscript{194} However, several exceptions exist; most notably, state officers can be sued for unconstitutional acts,\textsuperscript{195} although only injunctive relief is available.\textsuperscript{196} Also, states can be sued by other states, the federal government, or for other specific charges. The main effect of these rules is that (absent certain contractual waivers) states cannot be sued for damages in federal courts, though injunctive relief remains available. States may be sued for damages in state courts.

(F) Conclusion

20.114 Carbon liability in the USA is characterised by the absence of comprehensive climate legislation on the federal level. Given this absence, the primary relevant federal activity will be the EPA’s continuing efforts to apply the CAA to problems of climate change and GHG emissions. Meanwhile, several states and groups of states have also stepped into this gap to make emission reduction commitments in various policy forums, and establish regional cap-and-trade markets. The recent group of private lawsuits claiming damages based in public nuisance and/or conspiracy to misinform the public are similarly enabled by this lack of legislative activity, although they face serious challenges in a court system that has largely been reluctant to step into this policy gap. (See para. 20.64 above for The United States Supreme Court’s decision in \textit{American Electric Power v. Connecticut}.)

20.115 The Congress that was elected in November 2010 will clearly not enact a programme of climate regulation, and many of its members are attempting to block the EPA’s efforts to utilise its existing statutory authority over GHGs. The congressional and presidential elections of November 2012 will determine the course of US climate regulation in the years to follow. Whatever the outcome of these elections, it is likely that the courts will continue to play a central role.

\textsuperscript{194} \textit{Alden v. Maine}, 527 U.S. 706 (1999).
\textsuperscript{195} \textit{Ex parte Young}, 209 U.S. 123 (1908).
Figure 20.1\textsuperscript{197} Graphical summary of energy sources and end-uses in the US economy

Figure 20.2a\textsuperscript{198} Types of climate cases filed (393 total cases as of 11 March 2011)

\textsuperscript{197} EIA 2009 \textit{Energy Report}, above n. 7, at 37.

\textsuperscript{198} Figs. 20.2a and 20.2b courtesy of Arnold & Porter LLP; more detail available at www.ClimateCaseChart.com.
Figure 20.2b  Climate litigation: filings (X axis: year; Y axis: number of cases)

Figure 20.3  Regional initiatives
