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Hugh S. Wilkins*

The Justiciability of Climate Change:
A Comparison of US and Canadian
Approaches

Climate change-related disputes, which often include novel, complex, or politically sensitive matters, have experienced a mixed reception by the courts. Defendants both in Canada and the United States have raised the issue of justiciability—the question of whether a matter is of the quality or state of being appropriate or suitable for review by a court—with some success in attempts to have these cases summarily dismissed. The author reviews the types of climate change cases that have been launched, examines the US and Canadian laws of justiciability, analyzes the paths in which the caselaw regarding justiciability in these countries is headed, and suggests how these developments will impact future climate change cases. This paper finds that Canadian courts may be increasingly using justiciability as a means to avoid addressing climate change issues—just as US courts may be beginning to take a more progressive approach.

Les différends qui ont trait au changement climatique, qui soulèvent souvent des questions nouvelles, complexes ou délicates sur le plan politique, ont reçu un accueil mitigé par les tribunaux. Tant au Canada qu'aux États-Unis, les parties défenderesses ont soulevé la question de justiciabilité—question de savoir si une question a le caractère approprié ou convenable pour être examinée par un tribunal—et ont réussi jusqu'à un certain point dans leurs tentatives de voir les poursuites rejetées sommairement. L'auteur passe en revue les types de poursuites ayant trait au changement climatique qui ont été entreprises, examine les lois des États-Unis et les lois du Canada en matière de justiciabilité, analyse la direction que prend la jurisprudence relative à la justiciabilité dans ces pays et avance des hypothèses sur les incidences de ces développements sur les futures poursuites mettant en cause le changement climatique. Il constate que les tribunaux canadiens pourraient de plus en plus invoquer la question de justiciabilité comme moyen d'éviter de se pencher sur les questions ayant trait au changement climatique—alors que les tribunaux américains pourraient commencer à adopter une approche plus progressive.

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Introduction

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Introduction

A court is generally viewed as a forum in which disputes are adjudicated and justice is administered.¹ Thus, where there is harm caused by one person to another or where a person has not complied with the law, one would expect that a court would be an appropriate place for resolving the dispute and correcting wrongs.

Yet courts have traditionally been reluctant to engage on issues and to resolve disputes that are novel, complex, or may have political ramifications. For instance, in the context of scientific complexity, Justice Rehnquist of the US Supreme Court in *City of Milwaukee v Illinois* stated that the complexity of the environmental problems at issue made them unsuitable for the courts to address, and noted that the lower court had found that the expert testimony was “over the heads of all of us.”² Similarly, in the context of political sensitivity, Alexander Bickel in his review of the work of the US Supreme Court highlighted that courts can be sensitive to the political climate of the country and may make their judgments accordingly.³

Is it appropriate for courts to decline to engage on issues just because they are new, difficult, or politically hot? With time and familiarization, courts do develop the confidence and expertise to address new and emerging issues, which is evidenced by their adeptness in addressing technical and scientific issues in areas such as intellectual property law or medical malpractice. But why is there reluctance at the start?

1. For instance, Samuel Johnson defined “court” as “the hall or chamber where justice is administered.” See Samuel Johnson, *A Dictionary of the English Language* (London: W Strahan, 1778).

2. *City of Milwaukee v Illinois*, 451 US 304 at 325 (1981).

3. Alexander Bickel, “The Supreme Court 1960 Term, Forward: The Passive Virtues” (1961) 75 Harv L Rev 40, quoted in Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at 229.

This issue concerning the willingness of courts to engage on novel, complex, and sensitive matters is highlighted in the arena of climate change litigation. The doctrine of justiciability—the question of whether a matter is of the quality or state of being appropriate or suitable for review by a court⁴—has been raised by climate change defendants both in Canada and the US. With climate change liability and responsibility seen as novel, complex, and politically “hot button” issues, courts initially accepted justiciability arguments as bases for having these suits summarily dismissed.⁵ However, some courts in the US are now beginning to find climate change claims as justiciable.⁶

This possible movement away from findings of non-justiciability for climate change cases has not yet come to Canada. In *Friends of the Earth v Governor in Council*, the Canadian Federal Court found that the Canadian government’s non-implementation of federal climate change legislation was not an appropriate matter for the Court to review—despite apparently strict legislated deadlines and requirements for government action under the legislation in question.⁷ This is surprising given the traditional conception of Canadian rules on justiciability as being less strict than those in the US. Based on this case, the Canadian courts may be using justiciability more as a means to avoid addressing issues such as climate change—just at the time when US courts may be taking a more liberal approach.

Many courts are unfamiliar with and unprepared to take on the complexity of climate issues. Courts are traditionally reluctant to enter into new domains in which there is little precedent and they are often not

4. *Black’s Law Dictionary*, 7th ed, *sub verbo* “justiciability”.

5. Edna Sussman, “Climate Change Litigation: Past, Present and Future” (Paper delivered to the ABA Renewable Energy Resources Committee Programme, 21 June 2006) slides online: ABA <<http://www.americanbar.org>>; and see Prue Taylor, “Climate change litigation: A catalyst for corporate responses,” New Zealand Centre for Environmental Law [unpublished] at 1. Other challenges include difficult issues concerning choice of law, pre-emption (statutory remedies), redress, causation, apportionment of liability, separation of powers, and international comity. See Shi-Ling Hsu, “A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit” (2008) 79 U Colo L Rev 3 at 701. See also Christina Ross, Evan Mills & Sean B Hecht, “Limiting Liability in the Greenhouse: Insurance Risk-Management Strategies in the Context of Global Climate Change” (2007) 43A Stan J Int’l L 251 at 274. Sossin states that justiciability-related issues have been the greatest obstacles to climate change litigation to date. See Lorne Sossin, “Climate Change Litigation in the US and Canada” (5 October 2008) [unpublished] at 18.

6. The caselaw is, however, still developing. See, for example, *Native Village of Kivalina v ExxonMobil et al*, 663 F Supp 2d 863, 2009 US Dist Lexis 99563 (ND Cal 2009) (notice of appeal filed Nov 5 2009, No 09-17490) [*Kivalina*].

7. *Friends of the Earth v Minister of the Environment and Governor in Council*, [2008] FC 1183, [2009] 3 FCR 201. An appeal of this decision was denied by the Federal Court of Appeal; see *Friends of the Earth v Minister of the Environment and Governor in Council*, [2009] FCA 297, 313 DLR (4th) 767. Leave to appeal to the Supreme Court of Canada was refused.

inclined to develop environmental common law.⁸ This is especially the case where the ruling government opposes such developments, such as in Canada concerning climate change. The difficulties in bringing a climate change suit are still further increased by their complexity and novel nature, requiring litigants to think beyond conventional legal strategies in bringing these cases, which will often further dampen a court's enthusiasm.⁹

This paper focuses on the challenges of establishing justiciability in climate change suits. It reviews the types of climate change cases being launched, examines the laws of justiciability in Canada and the US, analyzes the direction in which each is going, and opines on how these developments will affect future climate change cases.

I. *Background on climate change suits*

The growth in climate change-related lawsuits over the past 5 years in the US has been extraordinary.¹⁰ Growing public awareness of the issue and the increasing evidence of the harm attributable to greenhouse gas (GHG) emissions are strengthening the bases for legal action.¹¹ In 2010, over 130 climate change cases were filed in the US alone.¹² Climate change cases can be based on either substantive or procedural grounds¹³ and, due

8. Philippe Cullet, "Liability and Redress for Human-Induced Global Warming: Towards an International Regime" (2007) 26A Stan Envtl LJ 99 at 110.

9. Hari M Osofsky, "Climate Change Litigation as Pluralist Legal Dialogue?" (2007) 26A Stan Envtl LJ 181 at 236-237.

10. For a more in-depth review of cases, see Justice Brian J Preston, "Climate Change Litigation" (Paper delivered at the Judicial Conference of Australia Colloquium, 11 October 2008), [unpublished].

11. See Taylor, *supra* note 5 at 1.

12. Richard Ingham, "Billions of Dollars at Stake in Climate Change Litigation—Law's Latest Frontier", *Agence France Presse* (24 January 2011). Note that many of these cases were likely pre-emption cases aimed at dismantling regulatory actions to combat climate change. This is an increase from the estimated 200 such cases that were filed in the US between 2004 and 2009.

13. See Jonathon M Hanna, "Oncorhynchus spp: Climate Change, Pacific Northwest Tribes, and Salmon" (2007) 22 Nat Resources & Env't 13 at 15. An example of a claim based on procedural grounds is *Friends of the Earth v Watson*, 2005 US Dist Lexis 42335 (ND Cal 2005).

to the wide range of climate change impacts, can range in character tremendously.¹⁴

Domestic climate change litigation is generally a product of failed domestic policy efforts.¹⁵ It provides more than just relief to aggrieved plaintiffs. It often, whether intentionally or not, also compels stronger

14. See Graham Erion, "The Stock Market to the Rescue? Carbon Disclosure and the Future of Securities-Related Climate Change Litigation" (2009)18:2 RECIEL 164; see Matt Droz & Robert Wing, "The Alien Tort Claims Act Will Never be a Viable Vehicle for Addressing Climate Change" (12 April 2007), online: Holland and Hart LLP <<http://www.hhclimatechange.com>>; and Hanna, *supra* note 13. The focus of this article is on domestic litigation; however, there are various grounds for proceedings under public international law. Possible claims include those that address general principles of international law such as the no-harm rule. See Wil Burns et al, "Panel: Climate Change" (2007) 5 Santa Clara Journal of International Law 462 at 477. Proceedings under the *UN Convention of the Law of the Sea (UNCLOS)* or *UN Framework Convention on Climate Change (UNFCCC)* may also be possible. See Timo Koivurova, "International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects" (2007) 22 J Envtl L & Litig 267. It has also been argued that non-ratification of global climate agreements constitutes an illegal subsidy or a violation of *UNCLOS* or the *Straddling Fish Stocks Agreement*. See Joyeeta Gupta, "Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change" (2007) 16:1 RECIEL 76 at 78; and see Wil Burns, "Potential Causes of Action for Climate Change Impacts under the UN Fish Stocks Agreement" (Winter 2007) 7:2 Sustainable Development Law and Policy 34; and "Panel: Climate Change" at 474. Claims have also been threatened before Dispute Panels of the World Trade Organization (WTO), although nothing to date has materialized. See Glen P Peters & Edgar G Hertwich, "CO2 Embodied in International Trade with Implications for Global Climate Policy" (2008) 42:5 Environmental Science and Technology 1401; and J de Cendra, "Can Emissions Trading Schemes be Coupled with Border Tax Adjustments? An analysis vis-à-vis WTO law" (2006) 15:2 RECIEL 131. International human rights law could also be applied, as could proceedings under the World Heritage Convention. See Gupta, *ibid* at 78; Joseph Smith & David Shearman, *Climate Change Litigation: Analysing the law, scientific evidence and impacts on the environment, health and property* (Adelaide: Presidian Legal Publications, 2006) at 55; and Friends of the Earth, Press Release, "UNESCO: No decision on Everest, but investigation into the climate threat to sites" (13 July 2005) online: FOE <<http://www.foe.ao.uk>>.

15. Justin R Pidot, "Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues" (2006), online: Georgetown Environmental Law and Policy Institute <http://www.law.georgetown.edu/gelpt/current_research/documents/GWL_Report.pdf>. See also David Grossman, "Warming Up to a Not-so-Radical Idea: Tort-based Climate Change Litigation" (2003) 28:1 Colum J Envtl L 1 at 2.

government,¹⁶ private sector,¹⁷ and perhaps even international¹⁸ action. It also draws political and corporate attention to the issues at stake.¹⁹ Eric Posner explains that:

Litigation can generate press attention, mobilize public interest groups, galvanize ordinary citizens, and, ultimately, gain compensation for victims. At a minimum, it creates pressure that might generate wiser policy, as governments may finally enter treaties in order to reduce the risk of liability and the public relations costs of litigation.²⁰

Shi-Ling Hsu states that such cases are “potentially a means of regulation itself, as a finding of liability could have an enormous ripple effect, and send greenhouse gas emitters scrambling to avoid the unwelcome spotlight.”²¹ The symbolic value of a judicially sanctioned remedy is strong.²²

Generally, there are three main types of domestic litigation that attempt to combat climate change:²³

16. This is especially the case in jurisdictions where GHG emissions are not effectively regulated. See Smith & Shearman, *supra* note 14 at 11. See also Randall S Abate, “Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the US” (2006) 15 Cornell J L & Pub Pol’y 369 at 401; see also Pidot, *ibid* at 5. Others have been less enthusiastic, noting that litigation is both inefficient and expensive compared with alternatives (see Ross, Mills & Hecht, *supra* note 5 at 262) and that litigation does not necessarily lead to better policy than can be achieved through politics (see Eric A Posner, “Climate Change and International Human Rights Litigation: A Critical Appraisal” (2007) 155 U Pa L Rev 1925 at 1944).

17. Smith & Shearman provide a good example where they quote an insurance company, which announced that it would withdraw coverage of an oil company’s climate change liability claims if adequate risk management policies were not developed and applied. See Smith & Shearman, *supra* note 14 at 176.

18. Roda Verheyen asserts that the threat of climate change litigation may inspire the creation of a liability protocol under the UNFCCC, “rather than expose the private sector and governments to a variation of legal rules in different jurisdictions.” See R Verheyen, “Legal Opinion on whether Canada is currently in violation of, or is likely to violate, its obligations under the UNFCCC and/or the Kyoto Protocol” (30 October 2006), online: Climate Action Network <<http://climateactionnetwork.ca>>. See also Gupta, *supra* note 14 at 85.

19. Smith & Shearman note that plaintiffs to climate change suits are likely to fall into one of two general categories when grouped according to their objectives: firstly, those seeking compensation for harm caused by global warming and, secondly, those seeking to use litigation to prevent or reduce further global warming. See Smith & Shearman, *supra* note 14 at 12.

20. See Posner, *supra* note 16 at 1931-1932.

21. See Hsu, *supra* note 5 at 13.

22. Mini Kaur, “Global Warming Litigation under the Alien Tort Claims Act: What *Sosa v. Alvarez Machain* and its Progeny mean for Indigenous Arctic Communities” (2006) 13 Wash & Lee J Civ Rights & Soc J 155.

23. This is taken from Hsu, *supra* note 5. Hsu, however, includes a fourth category of “actions against governmental entities regulating greenhouse gas emissions by those adversely affected by such regulations.” As such cases do not aim to tackle the problem of climate change, they are not included here. See also Pidot, *supra* note 15.

- a. suits that aim to enforce the law;²⁴
- b. suits that aim to mainstream climate change in policy making;²⁵
and
- c. suits that seek to compel private sector action to address climate change.²⁶

Suits that aim to enforce the law are generally rare, but they are often the most successful. In fact, many of these cases have settled due to the difficulty for a government to avoid compliance with statutory provisions. They include situations where government has failed to comply with the laws in the areas of human rights,²⁷ freedom of information,²⁸

24. These include suits that apply legislation such as the US *Clean Air Act* and the *Endangered Species Act*, *Freedom of Information Act*, *Clean Water Act*, or the *Canadian Environmental Protection Act* and *Kyoto Protocol Implementation Act* in Canada. See Michael B Gerrard, "Survey of Climate Change Litigation" (2007) 238:63 NYLJ; and Sussman, *supra* note 5.

25. These are mostly environmental impact assessment (EIA) cases.

26. Such as tort suits in nuisance, negligence, and related litigation, including product liability and corporate liability.

27. For a good review of human rights-related climate change cases, see Marilyn Averill, "Linking Climate Change and Human Rights" (2009) 18:2 RECIEL 139. Cases include those in Nigeria regarding the effects of gas flaring (where the court found that flaring breached Nigerian constitutional rights to life, including a healthy environment, and dignity of the person). See *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd, Nigeria National Petroleum Corporation and Attorney General of the Federation*, (2005) AHRLR 152 (NgHC 2005). See also Gupta, *supra* note 14 at 82. They also include cases in India regarding the threats of floods caused by climate change, where the petitioners alleged a breach of their rights to physical integrity and security, life, and preservation of health due to the threats of floods caused by melting glaciers at an Indian UNESCO World Heritage Site. There are also cases in international law such as where Inuit petitioners brought proceedings before the Inter-American Commission on Human Rights alleging violations to, among other things, the right to their culture; see Gupta, *ibid* at 83.

28. Regarding access to information cases, these have focused on situations where a government that has a statutory obligation to disclose public documents on climate change has refused to do so. Prominent cases include *Center for Biological Diversity v Brennan*, 2007 WL 2408901 (ND Cal 2007) [*Brennan*] and *Citizens for Responsibility and Ethics in Washington v Council on Environment*, No 1:07CV00365 (DDC filed Feb 20 2007). See also Climate Justice Programme, Press Release, "Climate impacts of German export credits to be disclosed" (2006) online: <http://www.climatelaw.org/media/2006Feb03/>; and "German government sued over climate change" (2004) online: <http://www.climatelaw.org/media/2004June15/>; Germanwatch, News Release, "German government sued over climate change: briefing" (undated) online: <http://germanwatch.org/rio/herbpe04.pdf>.

pre-emption,²⁹ municipal law,³⁰ investment,³¹ transboundary pollution,³² and scientific research,³³ among others.³⁴

The second type of climate change case—suits that aim to mainstream climate change in policy making—are mostly environmental impact assessment (EIA) matters.³⁵ They have been the most common of the three types of climate change litigation, but also arguably the least effective.³⁶ The key issues that are addressed in these cases are the inclusion of impacts of climate change in environmental assessments and the determination of whether GHG emissions cause “significant environmental harm.”³⁷ These cases have been successful in that some courts have ordered that the

29. The US Supreme Court’s *Massachusetts v Environmental Protection Agency*, 127 S Ct 1438 (2007) decision had significant impacts on pre-emption challenges in several US states. These climate change cases generally address the question of whether US states have the power to adopt the strict California regulatory scheme for GHG emissions from motor vehicles or whether they are pre-empted from doing so by the *Clean Air Act*, and other US laws (see Pidot, “Global Warming in the Courts: The *Massachusetts v EPA* Decision and its Implications” (2007) Georgetown Environmental Law and Policy Institute 5). Since the *Massachusetts* decision, courts have been dismissing these pre-emption claims finding that “both EPA and California...are equally empowered through the *Clean Air Act* to promulgate regulations that limit the emissions of greenhouse gases...from motor vehicles”: see *Central Valley Chrysler-Jeep Inv v Goldstene*, 529 F Supp (2d) 1152 (filed 11 December 2007); *Green Mountain Chrysler Plymouth, et al v Crombie*, 508 F Supp 2d 295 (D Vt 2007); and *Lincoln Dodge Inc v Sullivan*, No 1:06CV00070 (DRI filed 13 Feb 2006). However, *Massachusetts v EPA* may raise barriers to plaintiffs seeking claims in nuisance as US federal statutes such as the *Clean Air Act* can displace the state and federal common law of nuisance. In other words, if the *Clean Air Act* addresses GHG emissions, then it may preclude any nuisance remedies. See Pidot, *ibid* at 5.

30. Tilde Herrera, “Land Use and Greenhouse Gas Emissions Intersect in the Courtroom” (6 August 2008), online: GreenBiz <<http://www.greenbiz.com/news/>>.

31. See *Platform, People and Planet, the World Development Movement v Commissioner of HM Treasury*, (2009) Env HC 5323 (Admin), online: People and Planet <<http://peopleandplanet.org/>>.

32. See *Friends of the Earth v Her Majesty the Queen et al*, (28 May 2007), Federal T-914-07 (FC) online: ecojustice <<http://www.ecojustice.ca/>> [parenthetical description of case]; and also C Elwell & G Boyle, “*Friends of the Earth v Minister of the Environment*: Does CEPA 166 require Canada to Meet its Kyoto Commitments?” (2008) 18:3 J Envtl L & Prac 253.

33. These include *Brennan*, *supra* note 28.

34. See Gerrard, *supra* note 24. Interestingly, as noted below, it is regarding compliance with specific statutorily mandated climate change obligations where these cases have been least successful.

35. There have also been a handful of non-EIA cases that fit in this category of climate change suits. In *Bridgepoint Health v Toronto (City)* (2007), 35 MPLR (4th) 208, proceedings were commenced against the municipality for, among other issues, failing to consider the climate change impacts of demolishing a hospital and building a new one in its place. See Elwell & Boyle, *supra* note 32 at 258. For an overview of US climate change and EIA cases, see Michael B Gerrard, “Climate Change and the Environmental Impact Review Process” (Winter 2008) 22:3 Nat Resources & Env’t 20.

36. There have been many climate change suits regarding appeals of EIA findings. See *Center for Biological Diversity v NHTSA*, 508 F 3d 508, 2007 US App LEXIS 26555 (9th Cir Cal 2007); *NRDC v Abraham* 388 F 3d 701 (2d Cir 2004); *Montana Environmental Information Center v EPA*, 2007 US App Lexis 5262, US Cir Ct of App D Col; *Friends of the Earth v Watson*, No C-02-4106 (ND Cal 2002); *Mayo Foundation v Surface Transportation Board*, 472 F 3d 545; 2006 US App LEXIS 31887; and *Border Power Plant Working Group v Department of Energy*, 260 F Supp 2d 997 (SD Cal 2003).

37. See generally, Albert Koehl, “EA and Climate Change Mitigation” (2010) 21 J Envtl L & Prac 181.

impugned assessments be sent back to EIA panels to have the impacts of climate change considered further. Rarely however have courts required mitigation.³⁸

The third type of suits encompasses those that seek to compel private sector action to address climate change. These are primarily tort cases.³⁹ Tort law aims to reduce the societal costs of human activities, compensate those who have been unduly harmed by those activities, and provide corrective justice. As noted by one commentator, “tort law is a residual locus for the airing of grievances when no...government actor is responsive to societal need.”⁴⁰ Climate change tort litigation aims to transfer the costs of climate change to emitters and compensate those who have been harmed.⁴¹ Climate change actions in private law include those in nuisance, negligence,⁴² breach of fiduciary duty by corporate officers or directors,⁴³ securities law,⁴⁴ civil conspiracy,⁴⁵ product liability,⁴⁶

38. Nicholas van Aelstyn, “Global Warming NEPA Challenges Likely to Increase” (April 2007) ABA Public Land and Resources Committee Newsletter 1, online: BD Law <<http://www.bdlaw.com/attorneys-98.html>>.

39. The other main type of suit in this category involves the enforcement of environmental statutes. With few climate change-related laws on the books, it is not surprising that statutory enforcement cases have been few to date. The few actions brought under statute include claims based on statutory duties of corporate officers or directors under federal securities law, and claims based on environmental liability statutes: see Ross, Mills & Hecht, *supra* note 5 at 254. An example is *Northwest Environmental Defense Center v Owens Corning*, 434 F Supp 2d 957 (D Or 2006). Some commentators have also suggested the use of criminal law (s 219 of the *Canadian Criminal Code*) to target criminally negligent climate change actors: see William E Rees, “Is Canada Criminally Negligent on Climate Policy?” (2009) online: The Tyee <<http://thetyee.ca>>.

40. See Douglas Kysar, “SCOTUS Grants Cert in *AEP v Connecticut*; Why the Threat of Tort Liability Should Remain as Part of the Balance of Powers” *American Constitution Society Blog* (6 December 2010), online: ACSLaw <<http://www.acslaw.org/acsblog/node/17837>> at para 2.

41. See Ross, Mills & Hecht, *supra* note 5 at 273.

42. Smith & Shearman, *supra* note 14 at 92-93; and see Thomas Trachsler, “Litigating Climate Change in Canada” *Emissions Trading and Climate Change Bulletin* (December 2006), online: McMillan Binch Mendelsohn <http://mcmillan.ca/Files/LitigatingClimateChange-Cda_1207.pdf>.

43. See Ross, Mills & Hecht, *supra* note 5 at 270. See also Howard C Kunreuther & Erwann O Michel-Kerjan, “Climate change, Insurability of Large-Scale Disasters, and the Emerging Liability Challenge” (2007) 155 U Pa L Rev 1795.

44. For a review of climate change-related securities law claims, see Erion, *supra* note 14.

45. See the *Kivalina* decision where the plaintiffs alleged that defendants “conspired to create a false scientific debate about global warming in order to deceive the public” and that some defendants had known the impacts of climate change for years having begun research on climate change in the early 1970s; *supra* note 6.

46. See David Hunter & James Salzman, “Negligence in the Air: The Duty of Care in Climate Change Litigation” (2007) 155 U Pa L Rev 1741 at 1785.

eco-labeling,⁴⁷ and damages caused by failure to adapt to climate change,⁴⁸ among others. The majority of tort cases to date have been in nuisance and almost all of them have been in the US.⁴⁹ To date, no climate change tort cases have emerged in Canadian courts.

II. *Uncertainty and justiciability*

Despite their recent growth in numbers, the novelty, complexity, and sensitivities with respect to climate change cases have made judges somewhat reluctant to become engaged in them. Courts are susceptible to viewing these matters as being more appropriate for political decision-makers than courts. Judges often believe that they lack the specialized skills that are needed to address highly scientific evidence.⁵⁰ They are more accustomed to relying on precedent and often less willing to address new and emerging issues, no matter what their public importance or national significance. These problems may be increased by judicial concerns regarding the political ramifications of applying climate change legislation and the enforceability of such decisions.

Some US and Canadian courts have used the issue of justiciability as a means to avoid dealing with climate change matters. As noted above, justiciability relates to the question of whether a matter is of the quality or state of being appropriate or suitable for review by a court. In Canada, justiciability issues encompass a number of inter-related doctrines including ripeness, mootness, and political questions.⁵¹ In the United States, questions of standing are also generally considered.⁵²

In the context of climate change litigation, the primary justiciability argument that has arisen has been with respect to political questions. The idea is that climate change is a political issue or, alternatively, has

47. One area in which there is little law or litigation is over the issue of misleading information and advertising concerning the climate impact of activities. It is an issue which is raised in *Kivalina* (*supra* note 6) and also in a recent complaint brought by the Australian Climate Justice Program and Greenpeace concerning the use of the term "clean coal" to describe a coal power plant that will emit over 2.4 million tonnes of GHGs annually. See Australian Climate Justice Program, Press Release, "HRL challenged over 'clean coal' claims" (20 July 2007).

48. See Sabrina A Gherbaz & Patricia A Koval, "Unexpected Effects" (2008) online: ReNew Canada <<http://renewcanada.net/2008/unexpected-effects/>>.

49. See Trachsler, *supra* note 43.

50. See Pidot, *supra* note 15 at 5-6.

51. See Sossin, *supra* note 3 at 24.

52. M Averill, "Getting into Court: Standing, Political Questions, and Climate Tort Claims" (2010) 19:1 RECIEL 122. It should be noted that in *Friends of the Earth v Minister of the Environment and Governor in Council*, *supra* note 7, the Canadian Federal Court viewed justiciability as a component of the test for public interest standing.

been designated as political by Parliament or Congress and should not be adjudicated upon by the courts.⁵³

Political questions generally concern moral, social or policy issues that are either ill-suited for determination through an adversarial process or which are inappropriate for judicial intervention. Sossin sets out a range of areas regarding which political questions may arise in Canada:

- a. matters that fail to raise legal issues, such as (i) purely political disputes, (ii) disputes related to the legislative process, or (iii) disputes over the wisdom or desirability of legislation or government policy;
- b. disputes regarding constitutional conventions;
- c. disputes regarding Parliamentary privileges and Crown prerogatives;
- d. disputes involving intergovernmental relations;
- e. disputes involving social or economic rights; and
- f. disputes involving the enforcement of international agreements, the application of international law or the actions of foreign states.⁵⁴

The most pertinent of these areas in relation to climate change issues in Canada concerns matters that are viewed as political disputes that fail to raise legal issues.

The issue of political questions has been addressed quite differently in Canada and the US. Traditionally, under the US “political questions doctrine,” American courts may decline jurisdiction where a matter is likely to be subject to political action, whereas in Canada, courts could not decline jurisdiction “as long as a matter raises a legal issue, even if in the context of a politically contentious debate.”⁵⁵

Before delving into how these issues apply in the context of climate change litigation in Canada, it is instructive to review how the political questions doctrine has been applied in the land of its birth—the United States.

53. See Sossin, *supra* note 3 at 25.

54. *Ibid.*

55. See Sossin, *supra* note 5 at 19; and see G Cowper & L Sossin, “Does Canada Need a Political Questions Doctrine?” (2002) 16 *Sup Ct L Rev* (2d) 343.

1. *The American approach*

The US doctrine essentially stands for the proposition that a court should avoid adjudicating cases that (i) require an initial policy determination that necessitates political discretion, (ii) do not permit the application of judicially discoverable standards, or (iii) require it to interfere with another branch of government's constitutionally mandated dispute resolution functions.⁵⁶ The predominant US test for applying the doctrine is found in the US Supreme Court's 1962 decision in *Baker v Carr*, which sets out six possible constituents of a non-justiciable political question:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [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.⁵⁷

Any one of these six *Baker* factors can be determinative, however, it must be "inextricable from the case at bar."⁵⁸ It is important to note that despite the apparent latitude for application of these factors, relatively few cases that involve political debate have been found to be non-justiciable. US district courts have applied the doctrine, but the appeal courts have been less prone to do so.⁵⁹ The doctrine has only twice been applied by the US Supreme Court.⁶⁰

In *Connecticut v American Electric Power (AEP)*,⁶¹ the US District Court dismissed the plaintiffs' climate change claim in nuisance for

56. *Ibid* at 138.

57. *Baker v Carr*, 369 US 186 (1962) at 217 [numbers added].

58. *Connecticut v American Electric Power Co*, 582 F 3d 309 (2d Cir 2009) at 321 (quoting *Baker* at 217) [emphasis added] [*AEP*].

59. For instance, in *Massachusetts v Environmental Protection Agency*, *supra* note 29 at 1463, the Court made short work of this issue and found that the EPA had authority to regulate GHG emissions from mobile sources and, if it decided not to regulate these emissions, it "must ground its reasons for action or inaction in the statute."

60. These two cases are *Gilligan v Morgan* 413 US 1 (1973), and *Nixon v US* 418 US 683 (1974). Neither of these US Supreme Court cases involved either environmental issues or common law tort claims. For commentary, see *AEP*, *ibid* at 321-322, referring to Rachel E Barkow, "More Supreme than Court? The Role of the Political Question Doctrine & the Rise of Judicial Supremacy" (2002) 102 Colum L R 237 at 267-268; and also *Comer v Murphy Oil* 585 F 3d 855 (5th Cir 2009) at 873.

61. See *Connecticut v American Electric Power Co Inc et al*, (SDNY 2005) No 04 civ 5669 LAP and No 04 civ 5670 LAP at 15.

damages caused by coal-fired power plants, finding that climate change will have widespread implications for the US economy, foreign relations, and national security, and the remedies being sought were too broad and extensive.⁶² On granting summary judgment to the defendants, the Court relied on the second and third *Baker* factors. It stated: “none of the pollution-as-public-nuisance cases cited by the Plaintiffs has touched on so many areas of national and international policy. The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation.”⁶³

On appeal, the Second Circuit took a different view. Regarding the complexity of linking GHG emissions to climate change, the appeal court stressed that “federal courts have successfully adjudicated complex common law public nuisance cases for over a century.”⁶⁴ It observed that there is “a long line of federal common law of nuisance cases where federal courts employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented, based on a fully developed record.”⁶⁵ It also remarked that the plaintiffs had not asked for policy determinations, but only for a determination as to whether the defendants had engaged in a public nuisance that has contributed to the plaintiffs’ injuries. The Second Circuit found that complexity was an insufficient reason to deny jurisdiction and held that the political questions doctrine did not apply.⁶⁶ The proceedings were determined to be justiciable.

The Second Circuit decision was appealed to the US Supreme Court. Without dissent, the Court found that the US *Clean Air Act* and the EPA’s actions under it displace any US federal common law right to seek abatement from CO₂ emissions from fossil-fuel power plants, even if no such regulations are actually issued. The court reasoned that US federal common law is displaced because if the EPA does not establish regulations, states and private parties may petition for a rulemaking on the matter and the EPA’s response will be reviewable in federal court. The *Clean Air Act*, therefore, provides a means to seek limits on emissions from power plants,

62. *Ibid* at 19.

63. *Ibid* at 15.

64. *AEP*, *supra* note 58 at 326.

65. *Ibid* at 327. Note that in *Kivalina* the judge rejected the reasoning of the *AEP* court, asserting that “the evaluation of a nuisance claim is not focused entirely on the unreasonableness of the harm. Rather, the factfinder must also balance the utility and benefit of the alleged nuisance against the harm caused,” *supra* note 6 at 22-23.

66. *AEP*, *ibid* at 329-330.

which, arguably, is the same relief that the plaintiffs sought by using the US federal common law.⁶⁷

Importantly, the Supreme Court did not overturn the US Second Circuit Court's findings on justiciability and the political question doctrine. The Court was divided (4-4) on the issue of justiciability and whether the issues raised were political questions that are outside the scope of the federal court's jurisdiction. Because the Court was evenly divided, the decision of the Second Circuit on justiciability remains intact.

The case of *Comer v Murphy Oil* met a similar fate to *AEP* before the District Court, but this too was overturned on appeal.⁶⁸ The Fifth Circuit in *Comer* examined whether the claims in question, for damages caused by Hurricane Katrina, had been committed to a separate branch of government. The Fifth Circuit's decision does not discuss the second and third *Baker* formulations in detail, but observes that the defendants had not "shown the absence of judicially discoverable or manageable standards with which to decide this case."⁶⁹ The decision maintains that "the federal courts are not free to invoke the political question doctrine to abstain from deciding politically charged cases like this one, but must exercise their jurisdiction as defined by Congress whenever a question is not exclusively committed to another branch of the federal government."⁷⁰ The Fifth Circuit also noted that "[c]ommon law tort claims are rarely thought to present non-justiciable political questions."⁷¹

In *Kivalina*, the District Court did not follow the reasoning of the appeal court in *AEP* (the appeal decision in *Comer* had not yet been released) and instead relied on the second and third *Baker* factors to dismiss the claim, finding that the plaintiffs' case lacked judicially discoverable and manageable standards for resolving it.⁷² *Kivalina* involves a claim for damages to an Alaskan community resulting from sea-level changes and

67. *Connecticut v American Electric Power*, 131 S Ct 2527. The decision does not fully close the door on US climate change tort cases. Actions are still possible using state-based tort law. The decision will however most likely lead to the dismissal of the appeal in *Kivalina*, *supra* note 6.

68. See *Comer v Murphy Oil*, *supra* note 59.

69. *Ibid* at 875.

70. *Ibid* at 873.

71. *Ibid* at 873-874.

72. *Kivalina*, *supra* note 6. For a good analysis of these cases, see Averill, *supra* note 52. See also *California v General Motors Corporation et al*, No C06-05755 M11, where the suit was dismissed on summary judgment, with the Court finding that any determination would "require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court." See Matthew Skinner, Annette Hughes & Jonathon Pagan, "Climate Change Litigation: Courts Steer Clear of Climate Change Suits" (October 2007), online: Allens <<http://www.allens.com.au/pubs/cc/foccoct07.htm>>.

increased severe storm activity caused by climate change. The lower court judge in *Kivalina* found that the facts resulted in a situation in which it was impossible to decide the case without an initial policy determination which goes beyond judicial jurisdiction. As noted by Marilyn Averill, the Judge found that the claims in *Kivalina*

would require the factfinder to weigh the utility, reliability, and safety of various energy choices, and balance these against the risks of flooding due to global warming. Citing the global nature of the sources of GHGs and their impacts, the judge concluded that the 'Plaintiffs' global warming nuisance claim seeks to impose liability and damages on a scale unlike any prior environmental pollution case cited by Plaintiffs. These cases do not provide guidance that would enable the Court to reach a resolution of this case in any "reasoned manner."⁷³

The *Kivalina* District Court decision is presently under appeal before the US Ninth Circuit Court of Appeals.⁷⁴

Given these US court decisions, it would appear that the role of the political questions doctrine is quite limited. In fact, in *AEP* the Second Circuit concluded its political questions analysis by finding that:

given the nature of federal common law, where Congress may, by legislation, displace common law standards by its own statutory or regulatory standards and require courts to follow those standards, there is no need for the protections of the political question doctrine.⁷⁵

The US appeal courts rarely apply the doctrine and have a well-structured test in *Baker v Carr* when they do apply it.

2. *The Canadian approach*

With respect to policy-related issues, the law of justiciability in Canada is often viewed as fragmented. There are two general streams of Canadian caselaw concerning political questions that have been described in the literature. The first stream stems from the Supreme Court of Canada decisions in *Operation Dismantle v the Queen*⁷⁶ and *Finlay v Canada (Minister of Finance)*.⁷⁷ In *Operation Dismantle*, then Chief Justice

73. See Averill, *ibid* at 124.

74. See "Eroding Alaska Village Appeals Lawsuit Dismissal", *New York Times* (28 January 2010) online: The New York Times <<http://www.nytimes.com/aponline/2010/01/28/us/AP-US-Global-Warming-Erosion.html>>.

75. See *AEP*, *supra* note 58 at 332. The District Court judge in *Kivalina* seemed to want "the political branches to set policy in order to provide standards for the courts to apply in climate cases, while the judges in *AEP* and *Comer* regard a nuisance claim as a way to resolve disputes in the absence of federal policy." See Averill, *supra* note 52.

76. *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441 [*Operation Dismantle*].

77. *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 [*Finlay*].

Dickson stated that “disputes of a political or foreign policy nature may be properly cognizable by the Courts.” Madam Justice Wilson added that courts are “called upon all the time to decide questions of law, principle and policy” and that “the Courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state.”⁷⁸ Based on this and similar reasoning in *Finlay*, it has been generally argued that a court should not decline to hear a case just because its political dimensions could be more effectively addressed by another branch of government.⁷⁹ Some, including Peter Hogg, have found this to mean that “there is no political questions doctrine in Canada.”⁸⁰ The rationale here is that the US political questions doctrine arises due to the unique US separation of powers, which is distinct from the situation in Canada.⁸¹

The second stream is based on the Supreme Court of Canada’s decisions in *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* and *Reference Re Canada Assistance Plan (BC)*, where the Court found that matters that are “purely political” or do not raise a “sufficient legal component” should not be decided by the courts, but instead should be left for politicians to address.⁸² Based on this reasoning, if a case does not present a genuine legal argument or is inextricably bound up with political questions, then it is not justiciable.⁸³

The two streams start from distinct positions when addressing the justiciability of policy-related matters. The *Operation Dismantle* stream starts from the position that, with some exceptions, most policy-related matters should be justiciable, while the *Auditor General* stream starts from the position that most policy-related matters should be left to the

78. See Sossin, *supra* note 3 at 148; and *Operation Dismantle*, *ibid* at 459, 465, and 471-472.

79. See Sossin, *supra* note 3 at 153. In *Finlay*, Le Dain J stated that the court should not:
...decline to determine it on the ground that because of its policy context or its implications it is better left for review and determination by the legislative or executive branch of government;

supra note 77, at 632.

80. See P Hogg, *Constitutional Law in Canada*, 3d ed (Toronto: Carswell, 1997) at 33.5.

81. Note however that although the US doctrine is rooted in the US constitutional balance of powers, its principles arguably may be universally applied by courts in democratic societies. See Sossin, *supra* note 3 at 139. As in the United States, Canadian courts must retain their “proper role within the constitutional framework of our democratic form of government” and determine whether a matter has a “sufficient legal component to warrant the intervention of the judicial branch.” See *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545.

82. See Sossin, *ibid* at 171-172; and see *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 [*Auditor General*] and *Reference re Canada Assistance Plan (BC)*, *ibid*.

83. See Sossin, *ibid*.

legislature. In regard to references, the Supreme Court of Canada in *Reference Re Secession of Quebec* stated:

the circumstances in which the Court may decline to answer a reference question on the basis of non-justiciability include:

- (i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
- (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.⁸⁴

This open-ended test essentially brings the two Canadian streams together but does not provide the range of considerations and guidance that *Baker v Carr* provides and, thus, lacks clarity as to the scope of the court's discretion. This test advocates for pragmatism and flexibility by judges when determining justiciability, asserting that judges must exercise discretion in regulating their own jurisdiction subject to the priorities of the legislature.⁸⁵ But if given too much pragmatism, the rule of law and the provision of access to justice may suffer. This is evidenced when non-legal considerations, such as political consequences or unfamiliarity with the legal and policy issues, come into play.

The weaknesses inherent in the Canadian use of judicial discretion and pragmatic considerations in determining justiciability are evident in the Canadian Federal Court's 2008 decision regarding the implementation of Canada's climate change legislation. In *Friends of the Earth Canada v Minister of the Environment and Governor in Council*, the open-ended Canadian approach to determining the justiciability of policy-related matters allowed the Court to use its discretion to steer clear of the climate change issue, which a more principled approach such as that in *Baker v Carr* would have likely compelled it to tackle.

84. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 26. Sossin argues that using this approach, a court first determines if there is a legal question posed. If so, the court determines if the legal question has a significant extralegal component. If it does, then the court must determine whether it can sever the extralegal component and answer the legal question narrowly. If so, the matter is justiciable; if not, the matter is not justiciable. See Sossin, *ibid* at 155. This test may only apply to references.

85. See Sossin, *ibid* at 199. See also Robert Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" in R Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) at 330.

In June 2007, the Canadian Parliament passed the *Kyoto Protocol Implementation Act (KPIA)*.⁸⁶ Its passage was opposed by the ruling minority government, but it was passed in the House of Commons and Senate by the opposition parties. The *Act* sets mandatory obligations and deadlines that the federal government was required to meet including the publication of a “climate change plan” setting out measures that ensure that Canada meets its *Kyoto* commitments, the publishing of draft regulations, the holding of public consultations on the draft regulations, and the enactment of final regulations. After these deadlines passed, a Canadian non-governmental organization, Friends of the Earth Canada, filed judicial review applications seeking declaratory and mandatory relief to compel the government to take more effective measures to combat climate change and to comply with the *Act*. Friends of the Earth requested the court to determine whether Canada had fulfilled three specific duties established under the *Act*.⁸⁷ It based its arguments on the position that the government had ignored the rule of law and the will of Parliament.⁸⁸

The Federal Court (Trial Division) heard the case in June 2008. Without the benefit of a principled test providing guidance for determining whether the matter was justiciable, the Court undertook an analysis of Parliament’s intent in making the legislation, assessing: the discretion given to the executive in implementing the *Act*, the interconnected nature of the policy and legal attributes of the *Act*, and its enforceability.⁸⁹ Finding that the *Act* uses permissive language, deals with discretionary matters, and provides an alternative remedy in its reporting requirements, the Court concluded that the *KPIA* was not an appropriate matter to be adjudicated by the Court.⁹⁰ It held that Parliament’s intent must have been

86. *Kyoto Protocol Implementation Act*, SC 2007, c 30 [*KPIA*]. In December 2011 the Canadian government formally announced Canada’s withdrawal from the *Kyoto Protocol* and in April 2012 it announced its intention to repeal the *KPIA*.

87. These duties are set out in sections 5, 7, and 8 of the *KPIA*, *ibid*.

88. For an overview of the *KPIA* and the judicial proceedings, see Robert Dufresne, “*Kyoto Protocol Implementation Act: Implementation and Consequences*” (Ottawa Parliamentary Information and Research Service, 2008) (PRB 07-40E), online: <<http://amicus.collectionscanada.gc.ca>>.

89. In this regard, the Court examined whether (i) some *KPIA* compliance measures were “policy-laden considerations” and outside the realm of judicial review; (ii) the *Act* contemplates an ongoing process of review and adjustment; (iii) cooperative initiatives would be required that are not within the complete control of the government; and (iv) the *Act* itself recognizes that the implementation of any given climate change plan may not be accomplished in any given year. See *Friends of the Earth v Minister of the Environment and Governor in Council*, *supra* note 7 paras 33-35.

90. See Dianne Saxe, “Why Should the Government be Above the Law?” (2010) *Journal of Parliamentary and Political Law*, for a critique of the decision, also available online: SLAW <<http://www.slaw.ca>>.

for Parliament to monitor and enforce the *Act* on its own⁹¹ through censure or non-binding resolutions⁹² and that this provided an adequate alternative remedy to using the courts to enforce the *Act*.⁹³

To reach this finding, the Court undertook a contextual analysis of the *KPIA*. It reasoned, in essence, that as some subsections of the *KPIA* appeared as discretionary in their manner of implementation, implementation of other—apparently mandatory—aspects of the *Act* were also discretionary.⁹⁴ This logic essentially leads to the premise that the mere existence of discretionary elements in a statute may mean that compliance with other aspects of the statute is non-justiciable. This is difficult to follow, particularly in a case where the exercise of such discretion runs counter to the objects and purposes of the *Act*.⁹⁵

91. This reasoning was based on the fact that the *KPIA* includes several public monitoring and reporting requirements. However, public reporting provisions are found in other environmental legislation and these provisions have never been found to be a bar to justiciability. In fact, reporting requirements are typical features of environmental statutes and other public welfare legislation. See, for example, *Canadian Environmental Assessment Act*, SC 1992, c 37, ss 16.3, 19(3), 19(9), 22, 36, 40(4), 55; *Canadian Environmental Protection Act 1999*, SC 1999, c 33, ss 2, 3, 4, 5, 7, 10, 11; *Federal Sustainable Development Act*, SC 2008, c 33, ss 3, 7; *Department of the Environment Act*, SC 1985, ss 5, 8. The court's finding in *Friends of the Earth* that reporting requirements in a statute oust the jurisdiction of the courts raises issues of broad application regarding the interpretation and justiciability of such statutes.

92. Interestingly, the justiciability of the *Act* was discussed in detail in the Canadian Senate with a Government Senator predicting judicial review under the *KPIA* if the *Kyoto* targets were not met. See *Debates of the Senate*, 39th Parl, 1st Sess, 143:43 (28 March 2007) at 1510; and Senate, Proceedings of the Standing Senate Committee on Energy, the Environment and Natural Resources, 39th Parl, 1st Sess, No 18 (8 May 2007). However, even if the *Act* was regarded as creating a "duty owed to Parliament" that would not usually negate judicial review. See *R v Secretary of State for the Home Department*, [1995] 2 All ER 244 (HL) at 272, per Lord Lloyd.

93. Concerning the finding that alternative remedies existed, the court found that the *KPIA*'s provisions on reporting on progress on implementation to the public and Parliament set up a regime for accountability, which was intended to exclude any recourse to the courts. The court relied on *Canadian Union of Public Employees (CUPE) v Canada (Minister of Health)*, [2004] FCJ 1582 at paras 35 and 36, where the Federal Court found that the Minister's obligation to report to Parliament was an issue for Parliament to enforce rather than the courts. In that case, the respondent's statutory responsibilities were owed solely to Parliament and the respondent had discretion over what to report. In the *Friends of the Earth* case, the respondents had additional public reporting obligations, and the *Act* has strict requirements concerning what to report to the public with strict deadlines for doing so, in order to facilitate public comment. See *KPIA*, *supra* note 86, ss 5(3), 8, 9(2), 10(2), and 10.1(2).

94. *Friends of the Earth v Minister of the Environment*, *supra* note 7 at para 33.

95. See *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, *supra* note 94 at paras 94-95; *Padfield v Minister of Agriculture, Fisheries and Food*, [1968] AC 997 (HL) at 1030. In fact, the court never attempted to ascertain the objects and purposes of the *KPIA*, *supra* note 86, ss 3, 5(1)(a), and 7. See *Re: Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21. Canada's international law commitments (such as the *Kyoto Protocol*) should be seen as a guide to "inform the contextual approach to statutory interpretation and judicial review." See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70. See also *R v Hape*, 2007 SCC 26 at paras 53-54, where the Supreme Court of Canada found that courts should "strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result."

Section 3 of the *KPIA* states that the purpose of the *Act* is:

to ensure that Canada takes effective and timely action to meet its obligations under the *Kyoto Protocol* and help address the problem of global climate change.⁹⁶

Although the relevant operative provisions in the *KPIA* also use apparently mandatory language, stating that the government shall set out measures that “ensure” that Canada meets its *Kyoto* obligations, the court found that the use of the word “ensure” in this context was not mandatory. It reasoned that the obligations on the government to address failings in its climate change measures are not compliance tasks, but an indication of a need for a gradual and incremental approach to addressing climate change.

Friends of the Earth had argued that the issues at stake were limited to questions of statutory compliance and the rule of law, stressing that although policy decisions formed part of the backdrop of the case, the court was not required to decide any political or policy issues. In its eyes, the focus of the dispute was whether the government had complied with specific requirements of the *KPIA*, which is a question of statutory interpretation and is therefore justiciable.⁹⁷ The Court, however, found that the *KPIA* “couples the responsibility of ensuring *Kyoto* compliance with a series of stated measures some of which are well outside the proper realm of judicial review.”⁹⁸ It found it inappropriate to parse the legislation into justiciable and non-justiciable components.

It can be argued that this approach contradicts the reasoning of the Supreme Court of Canada in *Re: Secession of Quebec* in which the full court stated⁹⁹:

As to the ‘legal’ nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this

96. *KPIA*, *supra* note 86, s 3.

97. See *Reference re Canada Assistance Plan (BC)*, *supra* note 80 at para 28. See also Saxe, *supra* note 91, who notes that the Court was not asked whether Canada should comply with the *Kyoto Protocol* (that question was answered twice by Parliament through ratification of the *Protocol* and then by passing the *KPIA*), nor was the Court asked to decide how Canada should comply with its *Kyoto* commitments (which under the *KPIA* is left to the government to decide), but instead it was narrowly asked whether Canada had complied with its specific obligations under sections 5, 7, and 8 of the *KPIA*.

98. *Friends of the Earth v Minister of the Environment*, *supra* note 7 at para 33.

99. See also Sossin, *supra* note 3, who states at 155:

If the question does have a significant extralegal component, and the Court can answer the question narrowly, severing the extralegal aspects of the question, then it should answer the question; however, if the extralegal component cannot be severed, the Court should decline to answer the question.

is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.¹⁰⁰

In *Re: Secession of Quebec*, the Supreme Court found that adherence to the constitutional principle of democracy required that a “clear majority” of Quebecers answering a “clear question” in a referendum would need to be achieved in order for Quebec to secede from Canada. However, the precise percentage of votes needed and the precise language used in the referendum question were political questions that were beyond the remit of the court to determine.¹⁰¹ Thus, it was the interpretation of the legal framework for determining how secession could be achieved that was justiciable. Similarly, in *Friends of the Earth* the questions posed to the Court were not how compliance could be achieved but an interpretation of the law to determine whether the government was required to take the steps to facilitate political decisions on how to achieve compliance. Although the case did not require the Court to engage in a public policy debate or to determine what actions must be taken, the Court elected to engage in just such a debate. The Court appeared to place significant reliance on the government’s predictions that compliance with the *Kyoto Protocol* would lead Canada into an economic recession. Rather than answering the question of statutory interpretation that was before it, the Court questioned the wisdom of Parliament and delved into the pros or cons of the implementation of the *Act*. In sum, the Court based its decision on the political nature of the government’s response to the *KPIA*, rather than determining whether the questions had a sufficient legal component to be answered by the court.

Finally, the Court conflated the concepts of justiciability and enforceability by analyzing whether Parliament intended the *KPIA* to be enforced by the courts. Sossin emphasizes that justiciability and enforceability are two distinct concepts.¹⁰² In his analysis of the decision, he states that:

Justiciability, [in the view of the Court in the *Friends of the Earth* decision], is tied not only to the subject matter of a dispute but to the court’s remedial reach. This approach, however, ignores important principles from other spheres of Canadian public law. Courts have articulated the scope of constitutional conventions in significant detail, for example,

100. *Reference re Secession of Quebec*, *supra* note 84 at para 28.

101. See Sossin, *supra* note 3 at 156.

102. *Ibid* at 7.

while noting that such standards are unenforceable. Additionally, it is always open to a court to issue a declaratory remedy when the scope of intervention is limited. In my view, the focus on remedies, like the focus on rights, places undue and unwise limits on judicial oversight for potential abuse of discretionary authority, including the fettering of discretion where an oversight jurisdiction is conferred but not exercised by the appropriate government officials.¹⁰³

In other words, it appears the Court considered its ability to *enforce* the *KPIA*, in the sense of imposing intrusive remedies, to be a central consideration in determining justiciability. But the key issue when assessing justiciability is whether there is a sufficient legal component to the issue before the court, not whether Parliament intended the courts to enforce the *Act* with specific or intrusive remedies.

The wide discretion used by Canadian courts in determining the justiciability of policy-related issues may allow courts to become more influenced by the political ramifications and enforceability of their decisions than by the need for maintaining the rule of law. As noted above, this is highlighted by Alexander Bickel, who, writing in the context of civil rights litigation in the United States, noted that courts may sometimes be sensitive to the political climate of the country and make their judgments accordingly.¹⁰⁴

If too much judicial discretion and pragmatism is used in the determination of justiciability, significant problems arise in the application of key foundational principles in our system of law including the rule of law and access to justice. Justiciability is a heavy weapon in the judicial arsenal, which ought to be used sparingly and not to obstruct the proper administration of justice. It would thus be appropriate for Canadian courts to adopt a more principled test for addressing issues of justiciability along the lines of the US approach in *Baker v Carr*. A more principled approach would focus on ensuring legal accountability for legal determinations and political accountability for political determinations. Interpreting statutes has a legal component notwithstanding what the political implications might be. As long as courts have the functional capacity to adjudicate (i.e., the matter is not predicated on judgments which are not suited to the judicial process such as matters of faith, or matters not amenable to evidence, etc.), the courts would have, under this approach, the obligation to adjudicate.

103. Lorne Sossin, "The Unfinished Project of *Roncarelli*: Justiciability, Discretion and the Limits of the Rule of Law" (2010) 55:3 McGill LJ 661.

104. See Bickel, *supra* note 3 at 174, quoted in Sossin, *supra* note 3 at 229.

This more principled approach should address the issue from the standpoint adopted in *Operation Dismantle* that most policy-related matters are justiciable, with certain exceptions. Based on *Baker v Carr*, these exceptions should be enumerated to include:

- a. a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- b. a lack of judicially discoverable and manageable standards for resolving it;
- c. the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- d. the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- e. an unusual need for unquestioning adherence to a political decision already made; or
- f. the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁰⁵

The test in *Re: Secession of Quebec* provides a basis for analysis of political questions, but it opens the door to pragmatism and flexibility which should be constrained through a more principled approach. This would help ensure that courts are given sufficient guidance on how to approach justiciability and avoid outcomes such as that in the *Friends of the Earth* case.

Conclusions

Justiciability addresses whether a court should adjudicate on a matter or not. Courts will consider the intent of the legislature, the place of the court in the constitutional context, and the nature of the problem before the court.¹⁰⁶ Without a strong test providing the courts with guidance on how to exercise their discretion in determining justiciability, Canadian courts have produced an undisciplined range of decisions touching on these issues. Although Canadian courts have traditionally been viewed as less receptive to non-justiciability arguments than those in the US, the opposite may be becoming true.

105. *Baker v Carr*, *supra* note 57 at 217 (numbers added).

106. See Sossin, *supra* note 3 at 230.

A more definitive idea of the direction that the political questions doctrine is taking in the context of climate change cases in the US will be known after the Ninth Circuit Court addresses the issue in the *Kivalina* appeal. In Canada, where climate change legislation is not on the horizon and the test for the justiciability of policy-related issues provides little guidance to courts on the exercise of discretion, the timing of the resolution of these issues is less certain. A more principled approach to the justiciability of policy-related issues is needed in Canada. As noted above, this could be structured based on the exceptions set out in *Baker v Carr*.

Some commentators have made analogies between climate change litigation and the tobacco lawsuits in the 1990s. It is interesting to note, as elaborated by Farber, that US litigation against the tobacco and asbestos industries proceeded cautiously at first, then over time gained traction with the courts.¹⁰⁷ The current climate change cases are “paving the way” by getting courts familiar with addressing climate change issues and adjusting to the complexities of these cases, thereby laying the foundations for future litigation where the courts may be more amendable to tackling these types of issues. As the harm caused by climate change becomes more prevalent, climate change claims are likely to increase in the future,¹⁰⁸ necessitating that the courts develop the expertise and willingness to effectively adjudicate these matters. But the courts will only be in a position to make these changes once the barriers of the justiciability of climate change matters are resolved.

107. Daniel A Farber, “Basic Compensation for Victims of Climate Change” (2007) 155 U Pa L Rev 1606 at 1616.

108. Daniel J Grimm, “Global Warming and Market Share Liability: A Proposed Model for Allocating Tort Damages Among CO₂ Producers” (2007) 32 Colum J Envtl L 209 at 210. Some commentators predict that the payouts from climate change suits will make the damages ordered in the tobacco and asbestos cases of the past look like “pocket money.” See, for example, Ingham, *supra* note 12.