

# *Kivalina v. Exxonmobil:* A Comparative Case Comment

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*This article analyzes the recent appellate decision in the American case of Native Village of Kivalina v. ExxonMobil Corp., where an Inuk village sued the largest greenhouse gas emitters in the country for contributing to the public nuisance of climate change which is endangering their village. It also explores the treatment of a similar hypothetical Canadian case in relation to the jurisprudence of the Supreme Courts of both countries. It comparatively focuses on the ability of climate change litigants to rely on the common law to access the courts and how jurisprudential trends have and can evolve to enable climate change governance in the face of political inaction. The article has two main propositions.*

*First, Kivalina's recent defeat, now confirmed by the Supreme Court of the United States, could herald the end of environmental common law in the United States despite the absence of legislative damages remedies for climate change victims. Second, Kivalina-type claims are prime to migrate north due to recent political and legislative changes at the federal level in Canada. There, the differences in judicial treatment will likely have to do with the absence of applicable pre-existing legislation, the inexistence of federal common law over interprovincial pollution, obstacles to access to justice and additional constitutional grounds for such a lawsuit.*

*Cet article analyse la décision récente d'une cour d'appel américaine dans Native Village of Kivalina c. ExxonMobil Corp., où un village inuit poursuit les plus importants émetteurs de gaz à effets de serre du pays pour leur contribution à la nuisance publique des changements climatiques. Il explore aussi le traitement d'une cause hypothétique similaire au Canada en lien avec la jurisprudence des cours suprêmes des deux pays. Il met l'accent comparatif sur la capacité des victimes des changements climatiques à s'appuyer sur la common law pour accéder aux tribunaux et sur des tendances jurisprudentielles qui émergent et pourraient évoluer pour permettre la gouvernance des changements climatiques dans un contexte d'inaction politique. L'article a deux proposi-*

*tions principales. Premièrement, que la défaite de Kivalina récemment confirmée par la Cour Suprême des États-Unis pourrait signifier la fin de la common law environnementale aux États-Unis malgré l'absence de remèdes monétaires législatifs pour les victimes des changements climatiques. Deuxièmement, des causes similaires à Kivalina devraient migrer vers le nord en raison de changements politiques et législatifs au niveau fédéral au Canada. Là, les différences au niveau du traitement jurisprudentiel seraient dues à l'absence de loi préexistante applicable, l'inexistence de la common law fédérale concernant la pollution interprovinciale, les obstacles à l'accès à la justice et des motifs constitutionnels additionnels pour de telles causes.*

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“Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina’s dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law.”<sup>1</sup>

Hence concluded the judgment that nailed the coffin shut of one of the most important and interesting legal cases in recent history. It had the trappings of a David and Goliath battle, pitting a small Inuk village threatened by the rising seas of the rapidly warming Arctic against some of the largest multinational corporations.<sup>2</sup> Due to its fact situation and legal argumentation, *Native Village of Kivalina v. ExxonMobil Corp.*<sup>3</sup> was heralded as the ultimate refinement of climate change litigation strategy, the ultimate test case for climate justice relief.<sup>4</sup> So far, it has suffered three consecutive defeats on jurisdictional grounds.

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<sup>1</sup> *Native Village of Kivalina v ExxonMobil Corp*, 696 F 3d 849 at 11657 (9th Cir 2012) [*Kivalina Appeal*].

<sup>2</sup> The dramatic storyline even inspired a documentary about the litigation (*Kivalina v Exxon: The Most Dangerous Litigation in America* (2011) (film) (directed by Ben Addelman), online: Kivalina-Film <<http://www.kivalina-film.com>>).

<sup>3</sup> *Native Village of Kivalina v ExxonMobil Corp*, 663 F Supp (2d) 863, 868 (ND Cal 2009) [*Kivalina District*], when referring to the case as a whole: [*Kivalina v Exxonmobil*].

<sup>4</sup> Randall S Abate, “Public Nuisance Suits for the Climate Justice Movement: the Right Thing and the Right Time” (2010) 85 Wash Law Rev 197 at 223 (private litigation based on theories of public nuisance against the major power companies responsible for greenhouse gas emissions evolved in three stages in the United States, each stage building on and refining legal theories of the previous one); R Trent Taylor, “United States: The Death Of Environmental Common Law?: The Ninth Circuit’s Decision In Native Village Of Kivalina v. ExxonMobil Corp.” (8 October 2012), online: Mondaq <<http://www.mondaq.com>>.

Climate change may well be the most pressing global problem of our time.<sup>5</sup> Since the major impacts are only perceived to be far in the future, the governments arguably most responsible for climate change can refuse to enact comprehensive laws that would effectively govern the issue without incurring popular disapproval. When governments fail to act, the injurious status quo persists, and victims have no choice but to seek remedial action through the courts.<sup>6</sup>

How may North American judges, faced with an executive and legislative failure to govern the most complex and important problem mankind has ever faced, evaluate the claims of climate change victims?<sup>7</sup>

This comment undertakes a comparative analysis of the recent appellate decision in the American case *Kivalina v. Exxonmobil* and a hypothetical Canadian case, based on the Supreme Court jurisprudence of both countries. This comment focuses on the ability of climate change litigants to use the common law to access the courts, and on the evolution of jurisprudential trends enabling climate change governance in the face of political inaction. This comment suggests: (1) that *Kivalina's* recent defeat could herald the end of environmental common law in the United States, and (2) that Canada may offer a more welcoming legal climate for similar claims. Importantly, this comment does not speculate on the likelihood of success of climate litigants in either country.

## 2. CLIMATE CHANGE GOVERNANCE IN AMERICAN COURTS

### 2.1 KIVALINA, CLIMATE CHANGE AND THE COMMON LAW OF PUBLIC NUISANCE

While the world is experiencing increases in temperature due to greenhouse gas (“GHG”) emissions, the Arctic is warming at approximately twice the global rate. Villages across the Arctic are already facing problems of coastal erosion and thawing permafrost, which threaten the survival of many indigenous cultures. The peoples of the Arctic are therefore at the forefront of the global climate impacts that will affect the rest of the world in the future.<sup>8</sup>

*Kivalina* is a small village inhabited by approximately 400 Inupiat Eskimos that is situated at the tip of a peninsula north of the Arctic Circle in Alaska. In recent years, the sea ice that

<sup>5</sup> Heather Stewart & Larry Elliott, “Nicholas Stern: ‘I got it wrong on climate change – it’s far, far worse’ Author of 2006 review speaks out on danger to economies as planet absorbs less carbon and is ‘on track’ for 4C rise” *The Guardian* (26 January 2013), online: [The Guardian](http://www.guardian.co.uk) <<http://www.guardian.co.uk>>. See also Catherine Brahic, “Climate change diagnosed as biggest global health threat” *NewScientist* (14 May 2009), online: [NewScientist](http://www.newscientist.com) <<http://www.newscientist.com>>.

<sup>6</sup> For an example of the dynamics of political action and court claims on climate change in the United States, see Michael B Gerrard & Gregory E Wannier, “United States of America” in Richard Lord et al, eds, *Climate Change Liability* (Cambridge: Cambridge University Press, 2011) 556 at 585-586 [Gerrard, “USA”].

<sup>7</sup> For a review of difficulties involved in the social governance of climate change, see generally Kelly Levin et al, “Playing it Forward: Path Dependency, Progressive Incrementalism, and the “Super Wicked” Problem of Global Climate Change” (2009) 50 IOP Conf Ser: Earth Environ Sci, online: [IOP Science](http://iopscience.iop.org) <<http://iopscience.iop.org>>.

<sup>8</sup> See generally Susan Joy Hassol, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* (Cambridge: Cambridge University Press, 2004) online: [ACIA](http://amap.no/acia) <<http://amap.no/acia>>. See also P Crowley, “Interpreting ‘dangerous’ in the United Nations framework convention on climate change and the human rights of the Inuit” (2011) 11:1 *Regional Environmental Change* 265 at 265-266.

normally protects the coast around Kivalina has diminished, leaving the village increasingly exposed to winter storms. These storms erode the land under Kivalina, rendering it uninhabitable.<sup>9</sup> The entire village needs to relocate, at a cost estimated up to \$400 million.<sup>10</sup>

In February 2008, Kivalina instituted a lawsuit for monetary damages<sup>11</sup> against the twenty-four largest GHG emitters in the United States, a group composed of oil companies, power companies and utility providers<sup>12</sup> alleging that “emissions of carbon dioxide and other GHGs, by contributing to global warming, constitute a substantial and unreasonable interference with public rights, including, inter alia, the rights to use and enjoy public and private property in Kivalina.”<sup>13</sup>

Kivalina characterized climate change as a public nuisance, defined by the common law as an “unreasonable interference with a right common to the general public.”<sup>14</sup> Public nuisance is an ancient legal theory originating in the common law of England in the twelfth century. In 1536, it became a head of tort under which individuals could recover upon a showing of special damage.<sup>15</sup> Today, public nuisance is a tort based on a “balance of reasonableness” test under which liability can ensue without proof of fault or statutory breach. With claims for damages, harm can be found to be automatically unreasonable where there is severe physical damage to land,<sup>16</sup> such as the coastal erosion and permafrost subsidence currently taking place in the Arctic.

Beyond its role as a legal system, the common law is above all a “practised framework of practical reasoning” that draws on the unwritten law deposited in the experience, memory and

<sup>9</sup> *Complaint for Damages - Demand for jury trial from Kivalina*, (26 February 2008) at paras 16-17, online: Pawa Law <<http://www.pawalaw.com>> [*Complaint*].

<sup>10</sup> *Ibid* at para 1.

<sup>11</sup> *Ibid* at para 67. Whereas Kivalina mentions the expected costs of relocation, it seeks wider relief in the form of a “declaratory judgement for such future monetary expenses and damages as may be incurred by Plaintiffs in connection with the nuisance of global warming.”

<sup>12</sup> *Ibid* (defendants are ExxonMobil Corporation, BP P.L.C., BP Products North America, Inc., Chevron Corporation, Chevron U.S.A., Inc., ConocoPhillips Company, Royal Dutch Shell PLC, Shell Oil Company, Peabody Energy Corporation, The AES Corporation, American Electric Power Company, Inc., American Electric Power Services Corporation, DTE Energy Company, Duke Energy Corporation, Dynegy Holdings, Inc., Edison International, MidAmerican Energy Holdings Company, Mirant Corporation, NRG Energy, Pinnacle West Capital Corporation, Reliant Energy, Inc., The Southern Company and Xcel Energy, Inc.)

<sup>13</sup> *Ibid* at para 250. Kivalina brought claims in conspiracy and concert of action as well as state public and private nuisance, but the only claim to receive judicial consideration to date was public nuisance under federal common law. Although American jurisprudence consistently refers to “global warming” the term “climate change” will be used to describe the issue as it is more widely used outside the United States.

<sup>14</sup> *Petition for Rehearing En Banc from Kivalina*, (4 October 2012) at 12, online: Pawa Law <<http://www.pawalaw.com/cases/>> [*Petition*] (with reference to *Restatement (Second) of Torts* § 821B (1) (1979)).

<sup>15</sup> James W Shelson, “The Misuse of Public Nuisance Law to Address Climate Change” (2011) 78 Def Couns J 195 at 196; Gregory S Pun & Margaret I Hall, *The Law of Nuisance in Canada* (Markham: LexisNexis, 2010) at 50 (physical injury to land is generally accepted as constituting special damage in public nuisance in United States and Canada).

<sup>16</sup> Pun, *ibid* at 70; *Petition, supra* note 14 at 12.

ethics of judges.<sup>17</sup> As a body of law, the common law survives in the interstices of our expansive modern regulatory systems where the written law is silent or offers no solution to a dispute before the courts. Judges are thus invited to use traditional techniques of decision-making to fashion new legal solutions. This constantly evolving tradition is crucial to a world affected by climate change, a problem largely unaddressed in most legal systems.

Because GHG emissions are inherently interstate in nature,<sup>18</sup> Kivalina sought to rely on the federal common law of interstate air and water pollution, which has an established jurisprudence dating back to 1901.<sup>19</sup> Federal common law in the United States refers to subjects within the unexercised national legislative power, and develops “when courts must consider federal questions that are not answered by statutes.”<sup>20</sup>

The United States, Canada and Australia, the three developed countries with the highest per capita GHG emissions,<sup>21</sup> are all common law federal systems. The tradition of cross-jurisdictional dialogue amongst common-law judges means that judgments emanating from any common-law jurisdiction may be relevant in other common-law jurisdictions. The influence of the common law, like GHG emissions, defies national boundaries.

## 2.2 *KIVALINA V. EXXONMOBIL*, THE “DEATH OF ENVIRONMENTAL COMMON LAW”?

In September 2009, the defendants’ motion to dismiss Kivalina’s lawsuit was granted for lack of justiciability and standing. These reasons are briefly analyzed in Section Four of this comment.

In September 2012, Justice Thomas of the US Court of Appeals for the Ninth Circuit (Ninth Circuit) upheld the dismissal on a different basis, namely that Kivalina’s federal common law cause of action had been displaced by legislation. In May 2013, the United States Supreme Court (“USSC”) denied Kivalina’s petition for writ of certiorari without reason, leaving the Ninth Circuit’s decision standing. To analyze the brief decision, it is necessary to first understand the context of climate change litigation in the United States.

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<sup>17</sup> Gerald J Posterna, “Philosophy of the Common Law” in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 588 at 599.

<sup>18</sup> *Complaint*, *supra* note 9 at para 254.

<sup>19</sup> *Missouri v Illinois*, 180 US 208 (1901) (permitting suit by Missouri to enjoin Chicago from discharging untreated sewage into interstate waters); see *Complaint*, *supra* note 9 at para 254.

<sup>20</sup> *Kivalina Appeal*, *supra* note 1 at 11652.

<sup>21</sup> Meinhard Doelle, Dennis Mahony & Alex Smith, “Canada” in Richard Lord et al, eds, *Climate Change Liability* (Cambridge: Cambridge University Press, 2011) 525 at paras 19, 11.

### 2.3 SECURING CLIMATE MITIGATION THROUGH JUDICIAL REVIEW OF EXECUTIVE INACTION

Climate change has sparked extensive litigation in the United States,<sup>22</sup> possibly due to the country's failure to ratify the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ("Kyoto Protocol") and to enact comprehensive climate legislation at the federal level.<sup>23</sup> To date, two of these cases have reached the USSC.

The first of these cases, *Massachusetts v. EPA*,<sup>24</sup> reached the USSC in 2007. The State of Massachusetts petitioned for judicial review of the Environmental Protection Agency ("EPA")'s refusal to regulate GHG emissions.<sup>25</sup> The USSC held in *Massachusetts*<sup>26</sup> that GHGs constitute air pollutants under the broad definition of the *Clean Air Act*<sup>27</sup> ("CAA") and consequently granted the EPA the authority to regulate GHGs.<sup>28</sup> Relying on the mandatory language of the CAA,<sup>29</sup> the court held that the EPA did not have the discretion to decline its authority solely for reasons of policy expediency, but instead had to undertake a real determination of whether GHGs contribute to climate change and threaten public health and welfare.

Between the USSC's 2007 decision in *Massachusetts*, and its 2011 decision in *American Electric Power Co. Inc. v. Connecticut*,<sup>30</sup> the EPA slowly started to act under its freshly interpreted legislative mandate. After issuing an endangerment finding in December 2009, it started issuing climate regulation under the new EPA administrator appointed by President Obama.<sup>31</sup> The EPA also undertook to issue a final rulemaking on electric utilities, such as those operated by the defendants in *AEP* by May 2012.<sup>32</sup>

<sup>22</sup> For a full overview of all climate change-related litigation in the United States, see generally Michael B Gerrard & J Cullen Howe, *Climate Change Litigation in the U.S.* (6 December 2012), online: Climate Case Chart <<http://www.climatecasechart.com>> [Gerrard, "Chart"].

<sup>23</sup> H M Osofsky, "The Geography of Climate Change Litigation Part II: Narratives of *Massachusetts v EPA*" (2008) 8 Chicago J Int'l L 573 at 574; Gerrard, "USA", *supra* note 6 at 601.

<sup>24</sup> *Massachusetts v EPA*, 549 US 497 (2007) [*Massachusetts*].

<sup>25</sup> Environmental Protection Agency, Press Release, "EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles" (23 August 2003), online: US Environmental Protection Agency <<http://yosemite.epa.gov>>; Sean Mullen, "The Continuing Vitality of the Climate Change Nuisance Suit" (2011) 63 Rutgers L Rev 697 at 718; Shi-Ling Hsu & Austen L Parrish, "Litigating Canada – U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity" (2007) 48 VA J Int'l L 1 at 21-22.

<sup>26</sup> *Massachusetts*, *supra* note 24.

<sup>27</sup> *Clean Air Act*, 42 USC 85 (2012) [*CAA*].

<sup>28</sup> *Massachusetts*, *supra* note 24 at 30.

<sup>29</sup> CAA § 202(a)(1) provides: "The [EPA] Administrator shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles ... which in his judgment cause, or contribute to, air pollution ... ." [emphasis added].

<sup>30</sup> *American Electric Power Co Inc v Connecticut*, 131 S Ct 2527 (2011) [*AEP*].

<sup>31</sup> Mullen, *supra* note 25 at 700; Gerrard, "USA", *supra* note 6 at paras 20, 23; EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, online: US Environmental Protection Agency <<http://www.epa.gov>>.

<sup>32</sup> 75 CFR 82392 (2010); *AEP*, *supra* note 30 at 2545 (refers to a settlement regarding a petition for judicial review by some of the same plaintiffs in *AEP* against the EPA for failure to include greenhouse gas emission standards for stationary sources).

In 2004, Connecticut, along with a group of states, city and land trusts instituted a lawsuit under the federal common law of interstate public nuisance against American Electric Power Corporation and four other major electric companies that together constituted the largest GHG emitters in the country. In the absence of federal legislation mandating reductions in GHG emissions, the plaintiffs sought injunctive relief in the form of strict emission caps. When this case reached the USSC, justices had to determine whether the plaintiffs could, under the federal common law, obtain emission standards different from those to be set by the EPA under the *CAA*. The USSC rejected the plaintiffs' arguments, holding that "the [*CAA*] and the EPA actions it authorizes displace any federal common law *right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.*"<sup>33</sup>

The displacement test "for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue."<sup>34</sup> After a careful review of the *CAA*, the USSC found that that the means provided by the *CAA* to seek limits on GHG emissions from domestic power plants mirror the relief sought by the plaintiffs in *AEP*, and held there was "no room for a parallel track" under federal common law.<sup>35</sup>

Despite its rejection of the common law abatement action, in the author's opinion the USSC still left space for climate change mitigation governance through the courts. The USSC was concerned that a parallel track for abatement actions would lead to chaotic "ad hoc case-by-case injunctions".<sup>36</sup> In order to avoid the multiplication of emissions standards, the USSC established that post-*Massachusetts* plaintiffs seeking stricter GHG abatement standards must do so through the *CAA*-prescribed channel of judicial review rather than through the common law.<sup>37</sup> This holding effectively channels all GHG emission abatement actions to the District of Columbia Circuit Court of Appeals,<sup>38</sup> which will allow both greater jurisprudential coherence, and the development of judicial expertise of a single court over these complex cases.

Finally, by extensively reviewing the enforcement provisions of the *CAA* and strongly reaffirming EPA's authority under this statute,<sup>39</sup> the USSC strengthened the EPA's authority in the numerous instances already challenging its regulation of GHGs.<sup>40</sup>

#### 2.4 DENYING ACCESS TO COURTS FOR CLIMATE VICTIMS IN NEED OF ADAPTATION

Following the USSC's decision in *AEP*, the Ninth Circuit dismissed Kivalina's appeal by extending the displacement holding in *AEP* to claims for damages: "When a cause of action is displaced, displacement is extended to all remedies ... Thus, *AEP* extinguished Kivalina's

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<sup>33</sup> *AEP, ibid* at 2544 [emphasis added].

<sup>34</sup> *Ibid* at 10 [references omitted].

<sup>35</sup> *Ibid* at 11.

<sup>36</sup> *Ibid* at 14.

<sup>37</sup> *Ibid* at 13.

<sup>38</sup> Gerrard, "USA", *supra* note 6 at paras 20, 26.

<sup>39</sup> *Ibid* at paras 20, 78.

<sup>40</sup> *Ibid* at paras 20, 26 (over ninety individual cases have been filed challenging EPA regulation of GHG emissions in the District of Columbia Circuit Court of Appeals constituting the largest set of climate litigation to date).

federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions.”<sup>41</sup>

Respectfully, this comment submits that the Ninth Circuit erred in extending displacement to damages claims. Conceptually, climate change governance implies both mitigation and adaptation, two necessary but independent pillars that require different legal remedies. The bulk of private climate change litigation in the United States, including *AEP*, seeks to judicially govern mitigation through injunctive relief seeking to abate GHG emissions.

In contrast to *AEP*, Kivalina’s lawsuit was instituted post-*Massachusetts* and specifically sought to avoid the displacement and justiciability issues raised by those cases. Not only would injunctive relief directly compete with the “new” regulatory function of the EPA, but it would also only minimally help Kivalina. For Kivalina’s residents, mitigation comes too late; the entire village already needs to relocate. Hence, Kivalina sought only damages to fund its climate adaptation needs, a common law remedy not provided for under the *CAA*.

The USSC must have been aware that such claims for damages were advancing through the judicial system<sup>42</sup> and therefore conducted a remedy-focused analysis and holding. In contrast to the USSC noting that the “reach of remedial provisions is important to [the] determination [of] whether [a] statute displaces federal common law,”<sup>43</sup> Justice Thomas for the Ninth Circuit panel held that the lack of an available damage remedy under the *CAA* was not dispositive.<sup>44</sup>

Relying in part on another USSC decision in *Exxon Shipping Co. v. Baker*,<sup>45</sup> Justice Thomas held that “the type of remedy asserted is not relevant to the applicability of the doctrine of displacement.”<sup>46</sup> This reasoning also conflicts with Justice Pro’s concurrence on the issue of severance of rights and remedies in a displacement context. Justice Pro, relying on the same decision, held that “severing rights and remedies is appropriate as between damages and injunctive relief in some circumstances.”<sup>47</sup> Indeed, according to *Kivalina Appeal*, Justice Thomas’ holding directly contradicts the USSC’s overall holding in *Exxon Shipping*, which stated that federal environmental legislation, in that case the *Clean Water Act*<sup>48</sup> (“*CWA*”), did not “eliminate *sub silentio* companies’ common law duties to refrain from injuring the bodies and livelihoods of private individuals.”<sup>49</sup>

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<sup>41</sup> *Kivalina Appeal*, *supra* note 1 at 11655.

<sup>42</sup> Both *Kivalina District*, *supra* note 3 and *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) [*Comer I*] had been heard by the time the USSC heard *AEP*. The Ninth Circuit withheld its judgement in *Kivalina Appeal*, *supra* note 1 until the USSC released *AEP*. Moreover, Matthew Pawa, counsel for Kivalina was also counsel to the plaintiffs in *AEP* (“Cases”, online: Pawa Law <<http://www.pawalaw.com/cases>>).

<sup>43</sup> *AEP*, *supra* note 30 at 2546.

<sup>44</sup> *Kivalina Appeal*, *supra* note 1 at 11655.

<sup>45</sup> *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008) [*Exxon Shipping*].

<sup>46</sup> *Kivalina Appeal*, *supra* note 1 at 11655.

<sup>47</sup> *Ibid* at 11665. Justice Pro, district judge sitting by designation, carefully reviewed a clear “tension in Supreme Court authority on whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim” (*Kivalina Appeal*, *supra* note 1 at 11658).

<sup>48</sup> *Clean Water Act*, 33 USC 26 (2012) [*CWA*].

<sup>49</sup> *Exxon Shipping*, *supra* note 45 at 2619.

As a result, *Kivalina v. Exxonmobil* could have dire implications for all potential climate litigation based on the federal common law, including recent proceedings based on the public trust doctrine.<sup>50</sup> More worryingly, Justice Thomas' broad reasoning could potentially signal the "death of environmental common law" in the United States.<sup>51</sup>

First, Justice Thomas' holding leaves "no exceptions or loopholes" to displacement,<sup>52</sup> and thus potentially extends to all federal actions seeking any remedy involving air pollution. Second, this could extend to similar actions concerning water pollution since displacement analysis is the same under the *CAA* and *CWA*.<sup>53</sup> Thirdly, since pre-emption is a "closely related concept,"<sup>54</sup> such a broad-stroke analysis could mean that state common law claims such as *Kivalina's*, in addition to claims flowing from federally-regulated air and water pollution, would be pre-empted by the *CAA* or *CWA*.<sup>55</sup>

This holding could have devastating consequences not only for climate change victims but for individuals affected by all types of air and water pollution. The United States is poised to develop its unconventional fossil fuel production in the face of great and often unknown environmental risks.<sup>56</sup> These projects, whilst bound to be authorized by statutes and regulations, may still result in public nuisances of all sorts. Victims of these environmental nuisances may be barred access to the courts, even where the executive and legislative branches of government offer them no relief.

Considering the above, this author cannot explain the USSC's denial of certiorari. The denial of certiorari is especially puzzling considering the interest the court has taken in climate change, an issue of "unusual importance"<sup>57</sup>, and the clear tension in the USSC's jurisprudence raised by Justice Pro concerning the question of displacement of monetary damage claims, which was not before it in *AEP*.<sup>58</sup>

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<sup>50</sup> Our Children's Trust is coordinating a legal campaign started in May 2011 which filed lawsuits against all state and federal governments based on the common law public trust doctrine (*Federal Lawsuit*, online: Our Children's Trust <<http://ourchildrenstrust.org>>). One court has already dismissed the action on the basis that *AEP* displaced the cause of action (*Alec v Jackson*, 863 F supp (2d) 11 (DC Cir 2012)). See also Gerrard, "Chart", *supra* note 22 on "Common Law Claims."

<sup>51</sup> Taylor, *supra* note 4.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Petition*, *supra* note 14 at 3.

<sup>54</sup> Taylor, *supra* note 4.

<sup>55</sup> Although the Ninth Circuit and the USSC explicitly left open the question of pre-emption of state claims, the re-filed complaint in *Comer v Murphy Oil USA*, 839 F Supp (2d) 849 at 36 (SD Miss 2012) [*Comer II*] was dismissed on March 20, 2012 on the basis that state common law claims for damages are pre-empted by the *CAA*.

<sup>56</sup> Keith Schneider, "A High-Risk Energy Boom Sweeps Across North America" *Yale Environment 360* (30 September 2010), online: *Yale Environment 360* <<http://e360.yale.edu>>.

<sup>57</sup> *Massachusetts*, *supra* note 24 at 2.

<sup>58</sup> Justice Pro, district judge sitting by designation, carefully reviewed a clear "tension in Supreme Court authority on whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim" (*Kivalina Appeal*, *supra* note 1 at 11658). See also Taylor, *supra* note 4.

### 3. CLIMATE NUISANCE CLAIMS MIGRATING NORTH TO CANADA?

It has been speculated that climate change litigation would spread from the United States to Canada due to the similarity of their common law systems<sup>59</sup> and positions on climate change. Both countries are amongst the world's ten largest GHG emitters and both have received the lowest rating of "very poor" on Climate Action's Climate Change Performance Index.<sup>60</sup>

Recent Canadian political developments indicate that such litigation may soon migrate North. Though the cause of action will likely resemble that of *Kivalina v. Exxonmobil*, the avenue for such an action would be quite different. First, the lack of pre-existing environmental law in Canada akin to the American *CAA* forecloses legislative judicial review on climate change, but opens the door to common law actions against the Canadian government. Other significant differences involve access to justice and the absence of a federal common law governing interprovincial pollution in Canada.

#### 3.1 CLIMATE CHANGE LITIGATION IN A LEGISLATIVE VACUUM

Since coming into power in 2006, the Conservative government led by Stephen Harper has undermined Canada's environmental legal regime and weakened Canada's role in climate change governance nationally and internationally.<sup>61</sup>

In 2007, as a minority government, the Harper administration proposed what would have been known as Canada's *Clean Air and Climate Change Act*,<sup>62</sup> a poorly drafted bill later amended by opposition parties into effective legislation, only to be later dropped.<sup>63</sup> The legislative history of the bill suggests that the Conservative Party was acting in line with a tradition of Canadian governments "treating the legislative process [dealing with environmental matters] as a public relations exercise" with only minimal enforcement.<sup>64</sup>

<sup>59</sup> Coop Jack & Kirby Daniel, "Increase in Climate Change Litigation in U.S. Courts Could Spill Over into Canada" (23 November 2009) at 5, online: Osler <<http://www.osler.com>>.

<sup>60</sup> The United States and Canada rank respectively in 52nd and 54th out of 61 in global ranking based on emission trends, levels and national and international policies to address climate change (Jan Burck et al, *Climate Change Performance Index 2012* (December 2011) at 13, online: German Watch <<http://www.germanwatch.org/ccpi>>).

<sup>61</sup> However, Canada's environmental policy was deemed a miserable failure even before the Stephen Harper became Prime Minister (Rick Smith, Director of Environmental Defence, as cited in Lynda Collins, "Tort, Democracy and Environmental Governance: The case of non-enforcement" (2007) 15 *Tort L. Rev* 107 at 108). See also David Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003); Environmental Law Association, *Shattering the Myth of Pollution Progress in Canada: A National Report* (Toronto: PollutionWatch, 2004).

<sup>62</sup> *Bill C-30, An Act to Amend the Canadian Environmental Protection Act, 1999, the Energy Efficiency, and the Motor Vehicle Fuel Consumption Standards Act*, 1st Sess, 39th Parl, 2006 (Committee Report presented in the House of Commons 30 March 2007).

<sup>63</sup> See Elizabeth May, "The Saga of Bill C-30: From Clean Air to Climate Change" (1 May 2007), online: Green Party of Canada <<http://www.greenparty.ca>>.

<sup>64</sup> Collins, *supra* note 61 at 114.

The *Kyoto Protocol Implementation Act* (“*KPIA*”)<sup>65</sup> was subsequently passed by a coalition of opposition parties, and created a comprehensive system to ensure Canada’s compliance with its international obligations under the *Kyoto Protocol* and the *United Nations Framework Convention on Climate Change* (“*UNFCCC*”).<sup>66</sup> In 2012, Parliament, led by the re-elected Conservative majority government, repealed *KPIA*. As a result, the executive branch is no longer statutorily mandated to reduce national GHG emissions or to conduct independent reporting.

This repeal was only one of the many amendments instituted by *Bill C-38*, which overhauled over seventy distinct laws under the auspices of an omnibus “budget” bill, a move perceived by many as an affront to democracy.<sup>67</sup> Environmentalists estimate that 30% of its 420 pages were dedicated to undercutting Canada’s environmental scientific and legal frameworks (hereinafter collectively referred to as “environmental law vacuum”).<sup>68</sup>

Internationally, Canada has, for six consecutive years, received the Fossil of the Year award, an award given by environmental groups to the most obstructive country at the negotiation rounds of the Conference of the Parties to the *UNFCCC*.<sup>69</sup> In December 2011, Canada became the first and only country to withdraw from the *Kyoto Protocol*, the only internationally binding agreement mandating GHG reductions to date.

At present, Canada’s situation thus resembles that of the United States at the eve of its own climate litigation saga. Political inaction to govern climate change invites litigation.

### 3.2 *KIVALINA V. EXXONMOBIL-LIKE HYPOTHETICAL LAWSUIT: TUK V. OIL SANDS*

The cause of action used in a Canadian setting would practically mirror Kivalina’s. In Canada, the tort of public nuisance extends to “any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience.”<sup>70</sup> Still, Canadian plaintiffs may wish to add the Crown as a defendant in order to argue additional constitutional grounds.

The Canadian Arctic constitutes almost forty per cent of Canada’s national territory and has over one hundred thousand habitants, primarily Inuit, all of whom are extremely vulnera-

<sup>65</sup> *Kyoto Protocol Implementation Act*, SC 2007, c 30. This Act was repealed by *Bill C-38, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2012 (assented to 29 June 2012), c 19 s 699 [*Bill C-38*].

<sup>66</sup> *United Nations Framework Convention on Climate Change*, 19 June 1993, Can TS 1994 No. 7, 31 ILM 849 (entered into force 21 March 1994) [*UNFCCC*].

<sup>67</sup> *Bill C-38*, *supra* note 65; Andrew Coyne, “Voting endlessly oddly appropriate way to protest abuse of Parliament”, *National Post* (13 June 2012) online: National Post <<http://newcomment.nationalpost.com>>.

<sup>68</sup> David Suzuki, “Bill C-38: What you need to know” *David Suzuki Foundation* (May 2012), online: David Suzuki Foundation <<http://www.davidsuzuki.org>>; Elizabeth May, “Bill C-38, The Environmental Destruction Act” *Green Party of Canada* (9 May 2012), online: Green Party of Canada <<http://www.greenparty.ca>>; “C-38: Environment Devastation Act”, online: Green Party of Canada <<http://www.greenparty.ca/c-38>>.

<sup>69</sup> International Climate Network, “Canada and New Zealand Tie for the Infamous Colossal Fossil 2012 Award” (7 December 2012), online: ICN <<http://www.climate-network.org>>.

<sup>70</sup> *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 52.

ble to the impacts of climate change.<sup>71</sup> The Inuk village of TukToyakTuk, Northwest Territories (“Tuk”), which is already suffering from coastal erosion and permafrost subsidence, will serve as the plaintiff for this hypothetical case.<sup>72</sup>

As in *Kivalina v. Exxonmobil*, the defendants to Tuk’s actions would be composed of the largest emitters in Canada. As the projected expansion of Alberta’s oil sands is forecasted to make the oil sands the main source of GHG emissions in Canada, the oil and gas sector would figure prominently among these defendants. Tuk’s corporate defendants would most likely be operating in Alberta, as the exploitation of fossil fuel resources makes it the heaviest carbon-emitting province in Canada.<sup>73</sup> Were it a country, the province would have the highest rate of GHG emissions per capita in the world.<sup>74</sup>

Canada’s accounting methods used to project GHG emissions reductions have been heavily criticized by international experts.<sup>75</sup> Still, by the government’s own numbers, the not yet federally-regulated oil and gas sector will likely offset all the projected national reductions in regulated sectors like electricity generation and transportation.<sup>76</sup> Provincially, Albertan regulation of the oil sands only addresses the emission intensity of emitters; Alberta does not mandate an overall cap on GHG emissions by the oil and gas sector.<sup>77</sup> As the Federal Court noted, this regulatory approach does not adequately address the effects of GHG emissions on climate change: “The absolute amount of [GHG] pollution from oil sands development will continue to rise under intensity-based targets because of the planned increase in total production of bitumen.”<sup>78</sup> Importantly, measures to control the quantity of emissions from

<sup>71</sup> The three territories of the Yukon, Northwest Territories and Nunavut are used as a rough approximation of the Arctic (Statistics Canada, *Land and freshwater area, by province and territory* (2005), online: Statistics Canada <<http://www.statcan.gc.ca>>; Statistics Canada, *Population and dwelling counts, for Canada, provinces and territories, 2011 and 2006 censuses*, online: Statistics Canada: <<http://www.statcan.ca>>). See also, DS Lemmen et al, eds, *From Impacts to Adaptation: Canada in a Changing Climate* (Ottawa: Government of Canada, 2008) at 99-111, online <<http://www.nrcan.gc.ca>>.

<sup>72</sup> Charles J Hanley, “Arctic villagers have that sinking feeling: Changes tied to climate include permafrost melt, different wildlife” *Associated Press* (9 August 2008) online: MSN <<http://www.msnbc.msn.com>>.

<sup>73</sup> In 1990, Alberta was the second largest emitter of greenhouse gas in Canada, while Ontario was the largest emitter. Alberta became the largest emitter in 2010 (Environment Canada, *Greenhouse gas emissions by province and territory, Canada, 1990, 2009 and 2010*, online: Environment Canada <<http://www.ec.gc.ca>>).

<sup>74</sup> Tony Clarke et al, “The Bitumen Cliff: Lessons and Challenges of Bitumen Mega-Developments for Canada’s Economy in an Age of Climate Change” *Canadian Centre for Policy Alternatives* (February 21, 2013) at 29, online: Canadian Centre for Policy Alternatives <<http://www.policyalternatives.ca>>.

<sup>75</sup> See Stephen Leahy, “Canada ‘playing with numbers’ on carbon target claims” *The Guardian* (5 September 2012), online: The Guardian <<http://www.guardian.co.uk>>.

<sup>76</sup> Environment Canada, *Canada’s Emissions Trends 2012* (2012) at 20, online: <<http://www.ec.gc.ca>>; Marion Vieweg et al, *Governments still set on 3°C warming track, some progress, but many playing with numbers* (September 2012) at 11, online: Climate Analytics <<http://www.climateanalytics.org>>.

<sup>77</sup> *Specified Gas Emitters Regulation*, Alta Reg 139/2007, s 1(1)(h) (“‘emissions intensity’ means the quantity of specified gases released by a facility per unit of production from that facility”).

<sup>78</sup> *Pembina Institute for Appropriate Development v Canada (AG)*, 2008 FC 302 at para 78.

the oil sands alone could be sufficient to meet Canada's current international pledge under the *UNFCCC*.<sup>79</sup>

### 3.3 CROWN TORT LIABILITY FOR FAILURE TO GOVERN A PUBLIC NUISANCE

Tuk may also seek to implead the Albertan and federal governments as defendants. Indeed, it could be argued that the environmental law vacuum of late removes the obstacles of environmental science and laws in order to facilitate oil and gas development<sup>80</sup> which will likely result in an increase in GHGs and attendant climate impacts. Estimates indicate that the total projected development of the oil sands may overshoot the threshold necessary to limit the global temperature increase three-fold.<sup>81</sup> It has been alleged that the federal and Alberta governments are working to impede action on climate change under the influence of the oil industry.<sup>82</sup>

Although establishing Crown liability in this case would require a great extension of the current jurisprudence, policy reasons militate in favour of this extension. Both pervasive discretionary non-enforcement of environmental legislation by the executive branch<sup>83</sup> and recent legislative policy decisions refusing to govern climate change require judicial intervention.<sup>84</sup> However, *Massachusetts*-style constrained enforcement of action on climate change by the executive branch of government is not possible in Canada. In contrast to the mandatory language of the *CAA*, Canadian environmental statutes are characterized by pervasive discretion, giving

<sup>79</sup> Vieweg et al, *supra* note 76 at 11.

<sup>80</sup> Tony Clarke et al, *supra* note 74 at 39.

<sup>81</sup> Some forecast that the production capacity of the oil sands will triple its existing production levels, which would result in triple the GHG emissions projected in order to have a 50% chance of limiting the global temperature increase to 2 degrees Celsius under the scenario of the International Energy Agency 2010 World Energy Outlook (Lorne Stockman, "Tar sands planned growth is 3X climate limit" (1 November 2012), online: The Price of Oil <<http://www.priceofoil.org>>). By 2020, the Pembina Institute estimates that emissions from oil sands alone will exceed those of "all passenger transportation in Canada, all electricity generation in Canada and the total emissions of every province except Alberta and Ontario" (Marc Huot & Jennifer Grant, "Clearing the air on oil sands emissions: The facts about greenhouse gas pollution from oil sands development" (November 2012) at 12-13, online: Pembina Institute <<http://www.pembina.org>>).

<sup>82</sup> Shawn McCarthy, "Government accused of lobbying against action on climate change" *The Globe and Mail* (22 November 2010) online: The Globe and Mail <<http://www.globeandmail.com>>. See also Tony Clarke et al., *supra* note 74 at 32-37, for a description of the oil industry and government practices for what they termed "Petro-State". Interestingly, Kivalina included conspiracy allegations as a cause of action in its complaint, claiming that some of the defendants had a long established disinformation campaign to "mislead the public about the science of global warming" in order to enable these industries to continue emitting GHG unabated (*Complaint*, *supra* note 9 at paras 189-190). This is reminiscent of the litigation strategy that ultimately turned the tide in the decades-long tobacco litigation saga and could have had far reaching implications at the discovery phase if the case had proceeded to the merits (Harold V Cordry, *Tobacco: A Reference Handbook* (Santa Barbara, CA: ABC-CLIO, 2001)).

<sup>83</sup> Collins, *supra* note 61 at 110-111 ("pervasive culture of non-enforcement" of environmental legislation). For example, after 16 years of consultation, the Minister had still not indicated when it would release reports on mining waste as mandated by legislation (see *Great Lakes United v Canada (Minister of the Environment)*, 2009 FC 408 at para 124).

<sup>84</sup> The executive's decision to withdraw from the *Kyoto Protocol* was deemed a valid exercise of the royal prerogative in *Turp v Canada (AG)*, 2012 FC 893.

governments power to take action or meet standards but no duty to do so.<sup>85</sup> In 2008, the Federal Court declined to compel the federal government to regulate climate change (based on the now-repealed *KPIA*) due to the absence of mandatory language regarding the regulatory function in *KPIA*.<sup>86</sup> Moreover, in the wake of the vast changes imposed by *Bill C-38*, there are very few statutory provisions that could mandate governmental action on climate change, thus limiting the effectiveness of a judicial review application.<sup>87</sup> Lastly, Canada has no workable “citizen suit” provisions akin to American environmental legislations:

Given the obstacles to private prosecution and limited, unworkable citizen suit mechanisms, the public has no means of ensuring that environmental laws in Canada are enforced.<sup>88</sup>

This context of legislative leniency towards the executive in environmental matters is unlikely to change as long the Conservative Party maintains a majority, which effectively allows it to control both the legislative and executive branches of government. This leniency conflicts with the fact, often recognized by the Supreme Court of Canada (“SCC”) that environmental protection is primordial to Canadian society:

The question of compensation for environmental damage is of great importance. As the Court observed in *R. v. Hydro-Québec*, [1997] 3 SCR 213, at para 85, legal measures to protect the environment “relate to a public purpose of superordinate importance.” In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, the Court declared at p. 16 that “[t]he protection of the environment has become one of the major challenges of our time.” In *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031, “stewardship of the natural environment” was described as a fundamental value (para. 55 (emphasis deleted)). Still more recently, in 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 SCR 241, 2001 SCC 40, the Court reiterated at para. 1:

... our common future, that of every Canadian community, depends on a healthy environment.... This Court has recognized that “[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment ... environmental protection [has] emerged as a fundamental value in Canadian society.”<sup>89</sup>

Indeed, the SCC raised the possibility of “the Crown’s potential liability for *inactivity* [emphasis added] in the face of threats to the environment, [and] the existence or non-

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<sup>85</sup> David Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 231. See also Collins, *supra* note 61 at 110. See e.g. the permissive language of *Canadian Environmental Protection Act*, SC 1999, c 33 s 160(1) [*CEPA*] which underpins existing federal regulations on GHG: (“[t]he Governor in Council may, on the recommendation of the Minister, make regulations ...”) [emphasis added]; *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations* SOR/2010-201.

<sup>86</sup> *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 at paras 37-40 [*Friends of the Earth*].

<sup>87</sup> Except perhaps the mandatory language of *CEPA*, *supra* note 85 at s 166(1)(b) on international air pollution which was not considered in *Friends of the Earth*, *supra* note 86.

<sup>88</sup> David Boyd, *supra* note 85 at 248.

<sup>89</sup> *British Columbia v Canadian Forest Products Ltd.*, [2004] 2 SCR 74 at para 7 [*Canfor*].

existence of enforceable fiduciary duties owed to the public by the Crown in that regard.”<sup>90</sup> This reasoning opens the door to a determination that the government’s failure to govern an environmental public nuisance, such as climate change, could lead to liability on its part. Still, Canadian courts are generally reticent to infringe on executive policy discretion,<sup>91</sup> likely making the establishment of tort liability of the government under current jurisprudence “an exercise in frustration.”<sup>92</sup>

### 3.4 ADDITIONAL CONSTITUTIONAL GROUNDS FOR ACTION AGAINST THE FEDERAL CROWN

Proceeding against the Crown could also open up favourable constitutional causes of action. Tuk’s predicament could pose a constitutional question in the specific context of aboriginal peoples in Canada. Indeed, the SCC has developed ample jurisprudence concerning the Crown’s fiduciary duty towards aboriginal peoples, and recognized aboriginal rights protected under the *Canadian Charter of Rights and Freedoms* [“*Charter*”],<sup>93</sup> such as the right to natural resources and cultural rights.<sup>94</sup> Tuk would have to prove that the Crown’s failure to govern climate change, as a public nuisance, violates its constitutionally protected aboriginal rights.

The seriousness of the injury means that the federal government’s inaction could also potentially amount to a breach of s 7 of the *Charter* if this inaction endangers the life, liberty or security of the person of Canadians living in Tuk.<sup>95</sup> An aboriginal rights and/or *Charter* challenge could be a good additional or subsidiary recourse in Canada since courts may be more favourable to overturning discretionary decisions within the prerogative of the executive branch in a *Charter* context.<sup>96</sup> This highlights a significant difference between Canada and the United States, since Canadian courts may be better equipped to review executive and legislative decisions under the *Charter* than their American counterparts under the US *Constitution* and *Bill of Rights*.<sup>97</sup>

<sup>90</sup> *Ibid* at para 81 [emphasis in the original]. In *Canfor*, the Supreme Court was dealing with the tort of negligence but stated that the facts of the case also constituted a public nuisance (*ibid* at para 66).

<sup>91</sup> *Cooper v Hobart*, 2001 SCC 79 at para 38, [2001] 3 SCR 537 (“it is inappropriate for courts to impose liability for consequences of a particular policy decision ... because it is inappropriate for courts to second-guess elected legislators on policy matters”).

<sup>92</sup> Lewis Klar, “Falling Boulders, Falling Trees and Icy Highways: The Policy/Operational Test Revisited”, Case Comment on *Brown v British Columbia (Minister of Transportation & Highways)* and *Swinamer v Nova Scotia (AG)*, (1994) 33 Alta L Rev 167 at 167.

<sup>93</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35.

<sup>94</sup> See generally *R v Van der Peet*, [1996] 2 SCR 507; *R v Smokehouse*, [1996] 2 SCR 672; *R v Gladstone*, [1996] 2 SCR 723.

<sup>95</sup> See Doelle, Mahony & Smith, *supra* note 21 at para 19, 26 (such an interpretation of s 7 of the *Charter* is not the current state of the law, but authors have advanced it would not be at odds with Canada’s constitutional tradition).

<sup>96</sup> See e.g. *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 36–40, [2010] 1 SCR 44 [*Khadr*] (declaration of *Charter* infringement of the exercise of the executive prerogative over foreign affairs).

<sup>97</sup> See for a comparison David S Law & Mila Versteeg, “The Declining Influence of the United States Constitution” (2012) 87 NYUL Rev 762.

### 3.5 AVAILABILITY OF BOTH COMPENSATORY AND INJUNCTIVE REMEDIES

Since the federal government has failed to adequately govern both the mitigation and the adaptation<sup>98</sup> aspects of climate change, all potential remedies are open to Tuk. Tuk could claim damages for past and potentially future harm, as well as injunctions to limit future emissions, considering the projected expansion of the oil sands, increases in GHG emissions and their disastrous impact in the Arctic.<sup>99</sup> Tuk could also seek a declaratory order of unconstitutionality against the Crown<sup>100</sup> as well as damages under the *Charter*.

### 3.6 OBSTACLES TO ACCESS TO JUSTICE IN MULTIJURISDICTIONAL LITIGATION

A lawsuit pitting vulnerable remote communities against very powerful interests raises significant issues of access to justice. Unlike the United States, where each party typically bears its own fees and costs,<sup>101</sup> there is a presumption in Canadian law that the successful party is entitled to have the losing party pay its costs.<sup>102</sup> This general “loser pays” rule, in conjunction with the significant costs of litigation, constitutes a major deterrent to public interest litigation seeking to hold governments and private entities accountable for the environmental harm or human rights violations resulting from the allocation and regulation of rights in public resources.<sup>103</sup> Tuk could seek to be recognized as a public interest litigant,<sup>104</sup> and thus petition a court for relief from paying the opposing party’s costs, and for an order to have its own costs covered in advance,<sup>105</sup> on the basis that levelling off is necessary considering the vastly different financial resources of the parties. Such orders are only granted in exceptional cases of public importance, often in *Charter* cases.

Still, establishing the jurisdiction of an appropriate court for an interprovincial lawsuit could present even bigger obstacles. If Tuk chooses to institute proceedings in a provincial superior court, the Canadian courts of general jurisdiction, difficulties over jurisdiction and

<sup>98</sup> While there is significant action on adaptation by provincial and municipal governments, the federal government has yet to produce a national strategy, let alone legislation, and only modestly supports local efforts. See Thea Dickinson & Ian Burton, “Adaptation to Climate Change in Canada: A Multi-level Mosaic” in JD Ford & L Berrang-Ford, eds, *Climate Change Adaptation in Developed Nations: From Theory to Practice* (New York: Springer Science+Business Media, 2011) 103.

<sup>99</sup> Pun, *supra* note 16 at 209, 234-235 (damages for future harm are more rarely awarded).

<sup>100</sup> *Khadr, supra* note 96 at para 46 (declaration of unconstitutionality is an appropriate remedy that respects the prerogative power of the executive).

<sup>101</sup> See Gerrard, “USA”, *supra* note 6 at paras 20, 56.

<sup>102</sup> Doelle, Mahony & Smith, *supra* note 21 at paras 19, 43.

<sup>103</sup> Chris Tollefson, “Costs in Public Interest Litigation: Recent Developments and Future Directions” (2009) 35 *Advocates’ Q* 181 at 181-182, 193.

<sup>104</sup> For a discussion on the framework of determination of “public interest litigant” status based on jurisprudence of Ontario courts, see Graham Mayeda, “Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings and Costs Awards on Environmental Protestors and First Nations” (2010) 6 *JSDLP* 145.

<sup>105</sup> For a review of policy considerations to grant advance cost awards to aboriginal band protecting local environments, see e.g. *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paras 30-31.

choice of law may arise.<sup>106</sup> Under the real and substantial connection test for interprovincial torts, two presumptive factors, namely the residence and business presence of the defendants, would likely give jurisdiction to Albertan courts.<sup>107</sup> Alberta may be an inconvenient forum for remote Arctic plaintiffs who may also fear an unfavourable reception given the province's economic reliance on oil sands<sup>108</sup> and its potentially more limited belief in anthropogenic climate change as compared with other provinces.<sup>109</sup>

Determining the situs of the tort, the third presumptive factor, would itself present difficulties considering that the act (GHG emissions) and the harm (climate impact) occur in different jurisdictions. Still, this factor appears to favour the Northwest Territories as the place of injury,<sup>110</sup> in accordance with an antiquated common law precedent to the effect that "an action in tort for damage to real property must be brought where the property is located."<sup>111</sup> Though the plaintiffs would likely benefit from a court more sensitive to climate impacts in the North, the defendants would surely institute a motion to dismiss based on *forum non conveniens*,<sup>112</sup> which could develop into a lengthy court battle. Further, proceeding in the Northwest Territories for activities taking part in Alberta could raise constitutional issues<sup>113</sup> and the plaintiffs would probably be barred from suing the Crown of Alberta.<sup>114</sup>

<sup>106</sup> See generally Hsu & Parrish, *supra* note 25 (transboundary litigation presents more obstacles in Canada than it does in the United States); Jean-Gabriel Castel, "Back to the Future! Is the 'New' Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 Osgoode Hall LJ 35 (discussion of choice of law jurisprudence in interprovincial torts).

<sup>107</sup> For an iteration of the common law 'real and substantial connection' jurisdictional test for interprovincial tort, see *Club Resorts Ltd v Van Breda*, 2012 SCC 17 [*Van Breda*].

<sup>108</sup> Doelle, Mahony & Smith, *supra* note 21 at para 19, 12.

<sup>109</sup> See e.g. Jennifer Graham, "Two per cent of Canadians don't believe climate change is happening, poll shows" (15 August 2012) online: Canada.com <<http://o.canada.com>> ("[a]ccording to the survey, Prairie respondents are least likely to believe that climate change is occurring due to human activity").

<sup>110</sup> *Tolofson v Jensen*, [1994] 3 SCR 1022 at 1050, [1995] 100 BCLR (2d) 1, Laforest J [*Tolofson*] ("There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role"). See also *Van Breda*, *supra* note 107 at 88-89.

<sup>111</sup> *British South Africa Co v Companhia de Moçambique*, [1893] AC 602 HL (Eng), *rev'g* [1892] 2 QB 358 (CA).

<sup>112</sup> See generally *Amchem Products Inc v British Columbia Worker's Compensation Board*, [1993] 1 SCR 897 for an explanation of the doctrine.

<sup>113</sup> *Tolofson*, *supra* note 110 at 1065 ("the courts would appear to be limited in exercising their powers to the same extent as the provincial legislatures (...) Thus an attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns" [references omitted]).

<sup>114</sup> *Athabasca Chipewyan First Nation v British Columbia*, 2001 ABCA 112 [*Athabasca*] (Alberta provincial court does not have jurisdiction over the Crown of British Columbia in an action for nuisance over a transboundary river where the injury happened in Alberta).

Conversely, *Kivalina v. Exxonmobil*, like all other private suits for climate change nuisance so far, was filed in the United States federal courts. Likewise, Canadian plaintiffs would wish to institute proceedings before the Federal Court of Canada (“FCC”) for its many advantages over provincial courts in interprovincial proceedings. The FCC can sit throughout Canada, at a location convenient for the parties, and subpoena witnesses and documents from any location within the country. Moreover, a decision would be automatically nationally enforceable.<sup>115</sup>

However, federal courts are statutory courts of limited jurisdiction in both the United States and Canada, which means that the language of their constituting statutes is fully determinative of their jurisdiction.<sup>116</sup> Unfortunately, the statutory grant of jurisdiction of the FCC under the *Federal Courts Act*<sup>117</sup> is not as welcoming to inter-provincial private litigants as compared to its American peer.<sup>118</sup> In Canada, the inter-provincial nature of such private litigation would not in itself fall within the jurisdiction of the FCC,<sup>119</sup> unless Tuk could show that emissions in Alberta causing extra-provincial injury suffice to qualify the oil sands operation as an “undertaking ... extending beyond the limits of a province.”<sup>120</sup>

Alternatively, proceeding against the federal Crown as well as private parties would have the added benefit of securing the statutory jurisdiction of the FCC.<sup>121</sup> The jurisdiction of the

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<sup>115</sup> It is to be noted that enforcement may be limited in the civil law province of Quebec.

<sup>116</sup> *Roberts v Canada*, [1989] 1 SCR 322 at 331 [*Roberts*].

<sup>117</sup> *Federal Courts Act*, RSC 1985, c F-7 [FCA]; *ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at 766 [*ITO*] (requirement of statutory grant of jurisdiction).

<sup>118</sup> American federal courts have a much wider statutory grant of jurisdiction over private disputes. *Kivalina* tried to assert federal question jurisdiction (*Kivalina Appeal*, *supra* note 1). The other case involving damage claims for climate change public nuisance, *Comer I*, was filed in federal court under Mississippi state nuisance law on the basis of diversity jurisdiction (jurisdiction over any dispute if the litigants come from multiple states and have put over \$75,000 at issue) (*Comer I*, *supra* note 42 at 860). See e.g. *District Courts: Jurisdiction*, 28 USC 85 §§1331-1332, 1367 (2012).

<sup>119</sup> *FCA*, *supra* note 117, s 19. The FCC would only have jurisdiction if the Attorney General of the province with affected communities were to take up the public nuisance case, against, for example, the Crown of Alberta as owner of tar sands concessions and if both provinces had passed legislation granting the FCC jurisdiction over such controversies. This is not a completely frivolous scenario. The SCC is very favourable to the *parens patriae* jurisdiction of the Attorney General in cases of public nuisance involving environmental damage (*Canfor*, *supra* note 89 at para 76). Hypothetically, the Attorney General of Quebec could institute such a case on behalf of Northern communities to strengthen its position in negotiations with Alberta regarding the reversal of pipelines to bring oil eastward for exports (Tommy Chouinard et al, “Québec soumettra le projet Enbridge à une consultation” *La Presse* (14 November 2012) online: [La Presse <http://www.lapresse.ca>](http://www.lapresse.ca)).

<sup>120</sup> *FCA*, *supra* note 117, s 23(c).

<sup>121</sup> The FCC would have concurrent original jurisdiction over the dispute under s 17(1) “in all cases in which relief is claimed against the Crown”, s 17(2)(d) “the claim is for damages under the *Crown Liability and Proceedings Act*” (*Crown Liability and Proceedings Act*, RSC, 1985, c C-50 s 2 (“liability ... means ... liability in tort”)) or under s 17(4) “proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims” (*ibid*).

FCC could be established over all the parties if the claims against the private and public parties are “inextricably linked”.<sup>122</sup>

Still, the SCC has adopted a very restrictive approach to FCC jurisdiction for fear of infringing on the provincial courts of general jurisdiction.<sup>123</sup> The effects on the administration of justice can be deplorable.<sup>124</sup> Commenting on his lack of jurisdiction over a multijurisdictional tort involving private and public parties not unlike Tuk’s case, Collier J. lamented “the jurisdictional perils must be, to all those potential plaintiffs, mystifying and frightening.”<sup>125</sup>

### 3.7 THE BIRTH OF THE FEDERAL COMMON LAW OF INTERPROVINCIAL POLLUTION IN CANADA

The prerequisite that there be an existing and applicable federal body of law, whether statute, regulation or common law, which is necessary for the resolution of the dispute restricts the FCC’s jurisdiction.<sup>126</sup> Since neither legislation nor regulations offer remedies to Tuk, it must turn to the federal common law to establish the subject-matter jurisdiction of the FCC.

In contrast to the long history of federal common law of interstate pollution in the United States, Canada has no established history of litigation over interprovincial environmental harm. However, the SCC has stated that interprovincial pollution would fall under the exclusive authority of the federal government over interprovincial concerns.<sup>127</sup> This is not to say that this authority would automatically constitute federal common law, since the existence of an unwritten law “co-extensive with the federal legislature’s unexercised legislative jurisdiction”

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<sup>122</sup> *Roberts, supra* note 116 at 333, Wilson J:

*Marshall* seems to strike an appropriate balance by requiring the claim or claims against the private litigant to be inextricably linked with those against the Crown. In addition, where such link exists serious problems of *res judicata* which could arise in subsequent litigation in the provincial courts are avoided.

<sup>123</sup> Ian Bushnell, *The Federal Court of Canada: A History 1875-1992* (Toronto: University of Toronto Press for The Osgoode Society of Canadian Legal History, 1997) at 299.

<sup>124</sup> *Ibid* at 278 (citing Justice Joyal of the Federal Court of Appeal, “lack of jurisdiction in certain instances was hard to accept, and prevented the effective administration of justice”).

<sup>125</sup> *Ibid* at 253 (quoting Collier J); *ibid* at 310 (citing John Evans and Brian Slatterly commenting on the jurisprudence on FCC jurisdiction and concluding that this area of law was in “shambles”).

<sup>126</sup> *ITO, supra* note 117 at 766 (here the overlapping second and third parts of the test have been collapsed to simplify the analysis). See e.g. *Canadian Forest Products Ltd v Canada (AG)*, 2005 FCA 220 (the FCC had jurisdiction over principal dispute but not over third party proceedings instituted by the Crown defendant against plaintiffs in the principal action because the claims were in pith and substance based on provincial common law).

<sup>127</sup> *Interprovincial Co-operatives Ltd et al v R*, [1976] 1 SCR 477 [*Interprovincial Co-op*] (Manitoba’s legislative recovery scheme for residents of Manitoba injured by interprovincial river pollution coming from defendants in Ontario and Saskatchewan is *ultra vires* the province. Licensings by Ontario and Saskatchewan of activities with interprovincial effects are also *ultra vires* those provinces).

has been rejected,<sup>128</sup> partly in order to respect the bi-juridical nature of the Canadian federal system.<sup>129</sup>

Whereas Kivalina sought to extend the established theory of interstate public nuisance to climate change in the United States, Tuk would seek to create afresh the field of federal common law of interprovincial nuisance in Canada. Still, Justice Wilson's approach to federal jurisdiction in *Roberts v. Canada* leaves space for courts to recognize the existence of a federal common law in specific circumstances.<sup>130</sup> This comment suggests important considerations of justice militate in favour of recognizing the existence of federal common law over interprovincial pollution such as GHG emissions.

The federal government has clearly refused to exercise its exclusive legislative jurisdiction over interprovincial pollution in the context of climate change.<sup>131</sup> Recognizing federal tort law, with its quasi-regulatory nature, could be of great use in creating a "disincentive to risk-creating behaviour"<sup>132</sup> and address the current twin problems of under-deterrence of GHG emissions and under-compensation of climate change victims.

Recent American jurisprudence analyzing and recognizing the existence of federal common law for interstate air pollution on the basis of public nuisance<sup>133</sup> offers a strong comparative law argument to the effect that the existence of this federal common law may be necessary for the "better administration of the laws of Canada", the stated *raison de vivre* of the FCC.<sup>134</sup> The SCC already refers to common law concepts developed by American jurisprudence for persuasive guidance in the context of public nuisance over environmental damage.<sup>135</sup> In the Canadian

<sup>128</sup> *Roberts, supra* note 116 at 339, Wilson J with reference to *Quebec North Shore Paper Co v Canadian Pacific Ltd*, [1977] 2 SCR 1054. See also *R v McNamara Construction*, [1977] 2 SCR 654; *R. v Thomas Fuller Construction Co (1958) Ltd*, [1980] 1 SCR 695 for the proposition that federal common law is currently restricted to specific federal matters such as maritime law and aboriginal title. See also France Allard, *The Supreme Court of Canada and its Impact on the Expression of Bijuralism* (Ottawa: Department of Justice, 2001), online: Justice Canada <<http://www.justice.gc.ca>>.

<sup>129</sup> The two founding legal systems of Canada are the civil law of Quebec and the common law in all other provinces. Provincial law, rather than federal common law, complements federal law and informs its interpretation for all areas falling under federal legislative authority (Allard, *ibid*).

<sup>130</sup> *Roberts, supra* note 116 at 334. Wilson J held that the *FCA, supra* 117, s 17(3)c (now s 17(4)) was a valid basis for the jurisdiction of the federal court in a trespass action between two Indian bands where the federal Crown had clearly sided with the defendants. There was no specific federal legislation at issue. The obligations of the Crown resulted from the very nature of aboriginal title which he held to be federal common law.

<sup>131</sup> Still, the existence of this exclusive federal jurisdiction is recognized in the new *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52. However, the *Act* severely restricts the previously expansive definition of environmental effects to the components of the environment within the exclusive jurisdiction of the federal government jurisdiction (s 5), including s 5(b)(ii) "a change that may be caused to the environment that would occur ... in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out."

<sup>132</sup> *Resurfice Corp v Hanke*, 2007 SCC 7 at para 6, [2007] 1 SCR 337 [*Hanke*].

<sup>133</sup> See *Kivalina Appeal, supra* note 1 at 11651-11654 for a detailed discussion of the history and utility of federal common law in the United States.

<sup>134</sup> *Constitution Act, 1867* (UK), 30&31 Vict, c 3, s 101, reprinted in RSC 1985, App II, No 5.

<sup>135</sup> *Canfor, supra* note 89 at paras 78-80.

context, this author argues there is a “demonstrated need for a federal rule of decision,” which, according to the USSC opined is the test allowing federal judges to fashion federal common law rules.<sup>136</sup>

Furthermore, practical considerations concerning the “need for the expeditious resolution of litigation at reasonable cost”<sup>137</sup> in Tuk’s case also support recognizing a federal common law in this domain. Indeed, one can ponder whether the inexistence of federal common law and FCC jurisdiction is responsible for the lack of litigation over interprovincial harm in Canada as compared to the United States, considering the inconvenience and constitutional impossibility, as described in *Tolofson* and *Athabasca*, of proceeding in provincial courts, at least when it comes to the Crown of another province.

Finally, concerns over respecting the bijuridical nature of Canadian federalism are minimal since the SCC found the two legal systems quite similar in embracing the polluter-pays principle as well as a scheme of no-fault liability in nuisance.<sup>138</sup>

Recognizing a federal common law is a necessary gateway to the judicial reasoning essential to the administration of justice in Canada concerning interprovincial environmental harm generally and climate change specifically.

### 3.8 ENVIRONMENTAL COMMON LAW STANDS UNIMPEDED BY LEGISLATION

In contrast to the Ninth Circuit’s reasoning, it is very unlikely a Canadian court would exclude common law remedies *sub silentio*. The SCC stated recently in an air pollution nuisance case that “[w]hen the legislature excludes the application of the ordinary law, it generally does so expressly.”<sup>139</sup> Moreover, compared to the American *CAA*, arguably the “most comprehensive environmental statute in the world”<sup>140</sup> which was found to displace the common law, Canada’s dearth of federal environmental legislation would be unlikely to justify displacement of the Canadian common law.

It is also unlikely that compliance with existing regulation in general would serve as a statutory immunity defense to a nuisance action. In the context of a class action against a cement factory under the no-fault liability regime of neighbourhood disturbances under Quebec civil law, the SCC held the defendant was liable to compensate neighbours for emissions of dust and particles even if its emissions were compliant with the applicable legislation and regulations. Moreover, the SCC held that a special act authorizing the plant did not grant it statutory immunity.<sup>141</sup>

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<sup>136</sup> *AEP*, *supra* note 30 at 2536.

<sup>137</sup> *Roberts*, *supra* note 116 at 333, Wilson J.

<sup>138</sup> *St Lawrence Cement Inc v Barrette*, 2008 SCC 64, [2008] 3 SCR 392 at paras 79-80 [*Barrette*]. This case offers a good example of comparative reasoning which could lead to the formulation of a federal ‘common’ law of public nuisance which would respect both systems.

<sup>139</sup> *Ibid* at para 98.

<sup>140</sup> Hsu & Parrish, *supra* note 25 at 41.

<sup>141</sup> *Barrette*, *supra* note 138. See also Gerrard, “USA”, *supra* note 6 at paras 20, 73 (recent developments in the United States suggest that US courts would reach an opposite decision on this particular issue of legislative immunity).

Finally, it is unlikely that Alberta's regulation would displace or serve as a defence against a common law action for an injury occurring outside of Alberta: "it does not appear to me that a province can validly license on its territory operations having an injurious effect outside its borders so as to afford a defence against whatever remedies are available at common law in favour of persons suffering injury thereby in another province."<sup>142</sup>

#### 4. WHERE TO FROM HERE? CLIMATE CHANGE AND COMMON LAW JUDGES

##### 4.1 COMPARATIVE FEDERAL COMMON LAW OF TRANSBOUNDARY NUISANCE

The USSC has successfully compelled at least minimal climate change mitigation when the legislative and executive branches of government were politically unwilling to do so. This mitigation was enabled by comprehensive legislation on air pollution containing broad mandatory language that removed the need to resort to federal common law to abate the nuisance.

However, the unbridled extension of this reasoning to the context of climate change adaptation, that is, to displace the federal common law remedy of monetary damages, not only denies justice for climate victims but could also risk extinguishing all of environmental common law in the United States. Such a result is an acute injustice for nuisance victims who do not benefit from legislative remedies.

In Canada, climate change law and policy has backtracked to a situation analogous to the Bush administration in the United States, which spurred climate change litigation in the United States. The notable difference is the absence of pre-existing comprehensive and mandatory environmental legislation in Canada, which could serve to enforce executive action on climate change mitigation or adaptation. This should open the tort liability of the federal and provincial Crown along with that of private defendants. Arguably, Tuk would face more obstacles in accessing justice, but would benefit from further constitutional grounds to support its cause of action.

Such a case would invite the FCC to revisit problematic areas of jurisprudence such as the jurisdiction of the FCC over cases involving multijurisdictional private and public parties, the tort liability of the Crown for failure to govern interprovincial pollution under its exclusive jurisdiction and explore how climate change affects constitutionally protected human rights. It is hoped that Canadian courts will follow the example set by the USSC, albeit in a different form, and compel climate change governance despite the categorical refusals of the executive and legislative branches to act.

##### 4.2 OBSTACLES AHEAD IN CLIMATE CHANGE LITIGATION

If all of the above progressive interpretations of the case law were to materialize, it still would not signify victory for either Kivalina or Tuk, but simply the right to have their substantive

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<sup>142</sup> *Interprovincial Co-op*, *supra* note 127 at 511, Pigeon J.

claims be heard in a court of law.<sup>143</sup> Climate change victims face considerable substantive obstacles concerning the justiciability of climate change and the attribution of losses, two issues that plagued Justice Brown Armstrong, the trial judge who dismissed Kivalina's action in first instance.

#### 4.3 JUSTICIABILITY: THE THIN LINE BETWEEN LAW AND POLITICS

There is no doubt that establishing climate change liability approaches the controversial frontier between law and policy-making. Indeed, Judge Brown Armstrong held that Kivalina's cause of action was not justiciable because it presented a political question beyond the purview of the judiciary.<sup>144</sup> Conversely, the appellate courts for the Second and Fifth Circuits had reached a contrary conclusion and held that climate nuisance claims are justiciable.<sup>145</sup>

Though US courts and scholars continue to disagree on the justiciability of climate change, some argue that the USSC either rejected the political question argument or would do so in the future if a case such as *Kivalina v. Exxonmobil* were to be heard by the entire court.<sup>146</sup>

In Canada, a comparative lack of jurisprudence on justiciability in the climate change context makes it difficult to assess this issue. *Friends of the Earth*, the only case to date to rule that substantial compliance with mandated GHG reductions was not justiciable, would probably not have a heavy bearing on the matter as the statute grounding that action, *KPIA* has been repealed. Further, the political reality which informed the court's opinion that Parliament had the remedy of defeating the minority conservative government could not be more different now that it has achieved an elected majority.<sup>147</sup>

#### 4.4 ATTRIBUTING LOSS IN A WORLD OF VICTIMS AND PERPETRATORS

Establishing causation and apportioning liability in a world of emitters and potential victims equally presents daunting difficulties under the current state of tort law. The proximate causation inquiry based on Newtonian ideas of cause and effects is ill-equipped to address emerging scientific understandings of complex systemic problems brought about by modern civiliza-

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<sup>143</sup> That is, if they can also establish standing which was denied in both *Kivalina District*, *supra* note 3 and the concurring judgment in *Kivalina Appeal*, *supra* note 1. It may be easier for Tuk to establish standing since the SCC suggested that even municipalities can sue in public nuisance as public trustees in *Canfor*, *supra* note 89 at para 73.

<sup>144</sup> *Kivalina District*, *supra* note 3 at 15.

<sup>145</sup> *Connecticut v American Electric Power Company*, 406 F Supp (2d) 265 at 267–68 (SDNY 2005) (political question), *rev'd* 582 F (3d) 309 (2d Cir 2009); *Comer I*, *supra* note 42; see Matthew Edwin Miller, "The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims" (2010) 109 Mich L Rev 257.

<sup>146</sup> Gerrard, "USA", *supra* note 6 at paras 20, 88 (Gerrard analyses a mysterious passage in the latest climate change decision of the USSC in *AEP*, *supra* note 30 at 2535). Justice Sotomayor, believed to be favourable to climate change litigation, was recused in *AEP* because she had heard the case at the appellate level before being appointed to the. By the same analysis, it may be that there would be a 5-4 majority against finding standing for non-state plaintiffs.

<sup>147</sup> *Friends of the Earth*, *supra* note 86 at para 44; Doelle, Mahony & Smith, *supra* note 21 at paras 19, 36.

tion.<sup>148</sup> Causation inquiries are bound to evolve as the scientific knowledge of probabilistic attribution of climate change events to anthropogenic sources continues to advance.<sup>149</sup> This evolution goes beyond the limits of this case comment, but suffice it to say courts of common law jurisdictions have started to fashion new contributory theories of causation, which could be applicable in a climate change context.

In the United Kingdom, the House of Lords established causation using a theory of material increase of risk without proof of factual causation, thus openly rewriting the rules of liability.<sup>150</sup> In the United States, contributory tests are already applied for environmental pollution under federal legislation. Justice Brown Armstrong distinguished these in *Kivalina District* due to the lack of geographical nexus between the polluters and the victims, and held that Kivalina had failed to satisfy the causation requirement of standing under American constitutional law.<sup>151</sup>

In Canada, the SCC recognized the exceptional application of the material contribution test of causation where the defendants exposed the plaintiffs to an unreasonable risk of injury and it would be impossible for plaintiffs to prove causation under the “but for” test for reasons beyond their control, such as limited scientific knowledge.<sup>152</sup> More recently, the SCC upheld the constitutionality of a provincial statute to recover damages from tobacco manufacturers based on market-share liability and statistical evidence.<sup>153</sup> Canada is likely to be at the forefront of these judicial developments, since the Chief Justice of the SCC herself predicted change in this area:

Why are courts now asking questions that for decades, indeed centuries, did not pose themselves, or if they did, were of no great urgency? I would suggest that it is because too often the traditional “but-for” all or nothing, test denies recovery where our instinctive sense of justice—of what is the right result for the situation—tells us the victim should obtain some compensation.<sup>154</sup>

## 5. CONCLUSION

Courts are understandably wary of addressing climate change governance, a politically explosive international issue of unprecedented complexity. But here again, the common law offers guidance. When deciding to drastically extend tort liability to a new cause of action brought about by modern modes of production, Lord Atkin transformed the moral imperative to “love

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<sup>148</sup> Jamie Cassels & Craig Jones, *Law of Large Scale Claims: Product Liability, Mass Torts and Complex Litigation in Canada* (Toronto: Irwin Law, 2005) at 206-207.

<sup>149</sup> See e.g. MR Allen, “The scientific basis for climate change liability” in Richard Lord et al, eds, *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2011).

<sup>150</sup> *Fairchild v Glenhaven Funeral Services Ltd*, [2002] UKHL 22, [2002] 1 WLR 1052.

<sup>151</sup> *Kivalina District*, *supra* note 3 at 20.

<sup>152</sup> See *Hanke*, *supra* note 132 at paras 24-25.

<sup>153</sup> *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473.

<sup>154</sup> Beverley M McLachlin, “Negligence Law: Proving the Connection” in Nicholas J Mullany & Allen M Linden, eds, *Torts Tomorrow: A Tribute to John Fleming* (Riverwood: LBC Information Services, 1998) at 16 cited in Cassels & Jones, *supra* note 148 at 206.

thy neighbour” into a legal duty not to harm those who may foreseeably be injured by our actions or omissions by asking: Who, in law, is my neighbour?<sup>155</sup>

In the context of climate change, this answer is a quandary—everyone on the planet is the proverbial neighbour. Still, in this context of political inaction, fear of the fabled floodgates of litigation cannot justify denying climate victims access to the courts, which would effectively condemn them to be displaced by the sea without redress. It is hoped that common law judges in the United States and Canada will turn to their age-old tradition and enter into a cross-jurisdictional dialogue to start developing the principles of fundamental justice that will help humanity navigate these uncharted waters.

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<sup>155</sup> *Donoghue v Stevenson*, [1932] All ER Rep 1, [1932] AC 562 HL (Eng) at 580, Lord Atkin.