



## Institutions for Effective Climate Action: An International & Comparative Perspective

December 1-2, 2023

Hosted by Queen's Faculty of Law

Donald Gordon Conference Centre (DGC)

Conference Room A

The need for effective climate action is clear. However, progress is slow and the window of opportunity to avoid the worst impacts of climate change is closing. The main objectives of our research exchange are to: i) generate better understanding of how legal institutions may be contributing to lagging climate action across a range of key policy areas, ii) to develop strategies for ways legal institutions might be better leveraged to enhance climate action, and iii) to create community and research connections. Thank you all for participating!

### **Schedule: (all sessions at DGC)**

#### **Friday, Dec. 1**

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|-----------------|--|
| 8:30-9:15 am    | Continental breakfast<br>Crush Area (Outside Room A)   |
| 9:15-9:25 am    | Land acknowledgement and welcome remarks<br>Dean Colleen M. Flood, Queen's Law   |
| 9:25-9:30 am    | Welcome remarks<br>Cherie Metcalf, Queen's Law   |
| 9:30 - 11:00 am | <b>Panel I: Pricing &amp; Trading Emissions</b> <ul style="list-style-type: none"><li>• "Carbon Pricing: a Review" - Shi-Ling Hsu (Florida State University College of Law)</li><li>• "Do market mechanisms undercut demand for environmental protection?" - Hajin Kim, (U Chicago Law)</li><li>• "Carbon pricing and tax floor mechanisms in federal nations" - Rory Gillis (UWO Law)</li></ul> |
| 11:00-11:30 am  | Refreshment break<br>Crush Area (Outside Room A)   |

11:30 am -1:00 pm **Panel II: Transforming Energy Infrastructure**

- “Outsourcing energy market design” - Joshua C Macey (U Chicago Law)
- “Climate Change, Energy Sustainability and Federalism in Canada” – Mark Winfield (York U, Faculty of Environment & Urban Change)
- “The Hybrid in Climate Change” - Vanessa Casado Perez (Texas A&M, School of Law)

1:00 – 1:45 pm Conference lunch  
Main Dining Room

1:45 – 2:15 pm Post Luncheon Speaker  
“Climate change in the North: Prediction, Observation, Mitigation, and Adaptation” - Élise Devoie (Department of Civil Engineering, Queen’s University)

2:15 - 3:45 pm **Panel III: Addressing Ecological Risks**

- “Indigenous Legal Institutions and Climate Change Response in Canada” - Lindsay Borrows (Queen’s Faculty of Law)
- “Building Psychologically Informed Climate Institutions” - Arden Rowell (Illinois Urbana-Champaign College of Law)
- “Green Colonialism at the “Critical” Minerals Frontiers: Towards a Just Energy Transition for Indigenous Peoples” - Sophie Thériault (U Ottawa)

3:45 - 4:00 pm Refreshment break  
Crush Area (Outside Room A)

4:00 – 5:30 pm **Panel IV: Adapting Communities for Climate Extremes**

- “Climate homesteading” - Stephanie M. Stern (U Arizona Law)
- “Adaptation federalism” – Katrina Wyman (NYU Law)
- “Institutions, perceptions & adaptation to extreme climate risks” – Cherie Metcalf (Queen’s Law)

6:30 pm Group Dinner at AquaTerra – Fort Henry Room  
1 Johnson St., Kingston, ON

**Saturday, Dec. 2**

8:30-9:00 am Continental breakfast  
Crush Area (Outside Room A)

9:00 – 10:30 am **Panel V: Climate Change Equity & Distributive Effects**

- “Just’ green transition: lessons from the EU’s Green Deal” - Josephine van Zeben, (Wageningen University Dept. of Law)
- “Equitable Energy Transition on Native American Lands” - Monika U. Ehrman (SMU Dedman School of Law)
- “Climate Policy: Impacts on Individuals with Disabilities” Sébastien Jodoin (McGill Law)

10:30-11:00 Refreshment break  
Crush Area (Outside Room A)

11:00 am -12:30 pm **Panel VI: Credible Climate Commitments & Accountability**

- “The time has come: the intersection of law, time & climate change” – Andrew Green (U of T)
- “Climate change nuisance litigation in the U.S. and Canada: comparing prospects for success” – Jonathan R. Nash (Emory) (& Alyssa King (Queen’s Law)
- “Green Insurance Claims: How Liability Insurers can Propel Climate Change Action” – Erik Knutsen (Queen’s Law)

12:30- 1:30 pm Conference lunch  
Main Dining Room

1:30 - 2:30 pm **Panel VIII: Concluding Discussions**

- Cross-cutting themes, Knowledge gaps, Future Challenges

Co-sponsors



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## Abstracts

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**Lindsay Borrows**

### **Indigenous Legal Institutions and Climate Change Response in Canada**

For Indigenous peoples, the future of climate change is now. Indigenous peoples have lived experience with climate change over many generations given the inherent dynamism of geology and ecology, as well as human-caused changes resulting in species-loss, migrations, and environmental degradation. Indigenous peoples own legal institutions have continually adapted to respond to these climate challenges. With over 60 Indigenous legal orders in Canada, Indigenous peoples are contributing significantly to the ecological governance landscape including large-scale matters like climate change. Importantly, Indigenous legal institutions are non-state centred, and draw from precedent sourced in their stories, language(s), land-based practices, ceremonies, treaty practices and knowledge-keepers. These legal resources support nuanced responses to climate change and provide processes to work through internal and external conflicts that inevitably arise in the messy work of decision-making. Indigenous legal institutions are an important part of climate law and policy in Canada (and globally).

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**Monika U. Ehrman**

### **Equitable Energy Transition on Native American Lands**

Energy development on Native American lands is often contested and controversial. The ability to generate revenue for tribal members or community infrastructure is accompanied by concerns over potential corresponding environmental and social harms. While some tribes have been eager to develop their fossil energy resources, others have adamantly opposed development. Even within tribes, there is often considerable disagreement. Overlaying these issues is the complicated relationship between the tribes and state and federal governments. For example, federal oversight often interferes with a tribe's ability to make decisions about its energy future. These limitations on self-government and sovereignty may affect the ability of Native American communities to take full advantage of an energy transition. This paper, part of a project funded by the Alfred P. Sloan Foundation, will examine select issues related to the clean energy transition on Native American lands, with a focus on sovereignty, energy poverty, and environmental justice concerns.

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**Rory Gillis**

### **Carbon Pricing and Tax Floor Mechanisms in Federal Nations**

While there is near-consensus support for carbon pricing among environmental economists and policy experts, carbon pricing routinely encounters political obstacles, including opposition from political leaders, tepid public support, pleas for exemptions from politically-powerful industries,

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and time inconsistency problems related to changes in government. These problems are especially prominent in federal nations where divided legislative jurisdiction can result in numerous veto points. This article examines how federal nations use tax mechanisms in non-environmental contexts to set "tax floors" -- minimum effective rates for taxes that are highly susceptible to interjurisdictional "races to the bottom". It then uses Canada's carbon pricing regime, which imports some of these tax floor mechanisms, to illustrate how these mechanisms can be applied to carbon pricing and to assess their potential and limitations.

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**Andrew Green**

### **The Time Has Come: The Intersection of Law, Time and Climate Change**

Time poses a challenge to climate change law and policy -- how can we design our laws and institutions to induce sufficient action now to take account of past emissions and future harms? The relationship between the courts and the other main institutional players -- the legislature, the executive and the markets -- provides opportunities to foster delay or to build in commitment to action. Courts can use principles of deference and justiciability to alter the power of current judges, influence of past versus current legislators or administrative decision-makers. Legislators can promote future action through targets or accountability mechanisms or delay change through grandfathering. Market mechanisms like carbon pricing and subsidies also reflect whose view of time matters. This paper examines interplay between time and climate action, focusing on how policies and legal rules influences who has a say in the pace and stringency of action.

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**Shi-Ling Hsu**

**Prof. Sébastien Jodoin**

### **The Distributive Implications of Climate Policies for People with Disabilities: A Case Study of the Intersections of Carbon Neutrality and Accessibility in Montreal**

Sébastien Jodoin, Juliette Bourdeau de Fontenay, Rose Paquet & Chloe Rourke

Although 15% of the population identifies as living with a disability, little is known about the distributive implications of climate mitigation efforts for this segment of the population. Drawing on semi-structured interviews with people with disabilities, policy analysis, and quantitative data, we provide an in-depth case study of whether and how the pursuit of climate neutrality has affected different people with disabilities in the city of Montreal. We focus on the distributive effects of initiatives aimed at: (1) promoting collective, active, and electric forms of transportation; (2) decarbonizing the built environment; and (3) increasing green spaces. Our findings highlight challenges and opportunities for ensuring that climate policies enhance, rather than undermine, efforts to make societies more inclusive of people with disabilities. They also emphasize the important contributions that the agency and knowledge of people with disabilities can make in the transition to decarbonization and the multiple co-benefits that are associated with universally accessible climate initiatives.

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**Hajin Kim**

### **Do market based regulations undercut demand for environmental protection?**

An oft-made objection to market-based regulations is that they commoditize pollution; they reduce the moral stigma of pollution because they make it just another product that is bought and sold. If true, the growing popularity of these instruments could reduce the public's care for the environment. This project tests whether regulatory form alters the moral stigma of polluting in general and polluting in compliance with or in violation of the law. I hypothesize that market-based tools can reduce the moral stigma of pollution through the expressive effect of law.

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But for some, the regulatory form might be considered a taboo trade-off that elicits moral outrage and greater moral stigma of pollution. In addition, the lower perceived efficacy of the

market-based tools may also lead people to express greater dismay at the pollution. While there may be a population-level null effect, reactions of sub-populations could contribute to polarization of environmental attitudes.

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**Alyssa King**

### **Climate change nuisance litigation in the U.S. and Canada: comparing prospects for success”**

We examine, compare, and contrast nuisance litigation brought against petroleum producers in the United States and Canada. Landowners, including municipalities, have brought suit against oil producers alleging nuisance and based on the effects of climate change. The trend began in the United States but has since been emulated in Canada. It seems that the Canadian litigation was consciously modeled on its U.S. counterparts. Although their substantive theories of case are likely to be quite similar, their procedural strategies may not be. Lawyers in both countries face some similar challenges, notably in establishing jurisdiction, but the driving force behind other elements of their litigation strategies is likely to diverge. In the United States, the availability of a state versus a federal forum is a primary concern. In Canada, cost shifting is more likely to shape litigation strategies, including forum choice.

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**Erik Knutsen**

### **Green Insurance Claims: How Liability Insurers can Propel Climate Change Action**

Liability insurance, as a social institution that spreads risk, has the potential to prompt public and private actors to address climate change issues. Liability insurance is also the backbone of the private law tort system. While tort liability can act as a behavioural incentive, the impact is muted by liability insurance. Insurance, however, also incentivizes climate responsive behaviour through both pricing and product conditions: less risky products are cheaper, and people alter their behaviour to remain within coverage. These incentives influence the

risk-based actions of policyholders, including public, governmental entities insured by private insurance. Policyholders are increasingly facing climate-based litigation for issues around emissions and pollution. With these "green torts" come "green claims": novel climate-change-based liability insurance claims. The response of liability insurers will affect legal doctrine, the range of available insurance products, disputes around causation and application of existing insurance to green claims and potentially spur innovation in insurance.

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**Josh Macey**

### **Outsourcing energy market design**

A basic principle of regulation to improve grid reliability and reduce power sector emissions is that market participants alter their behavior when regulations make socially harmful activities more expensive. A carbon tax assumes that higher costs of emitting GHGs will lead market participants to reduce energy consumption and switch to less GHG-intensive resources. But this assumption often does not apply to the electricity industry, because firms can pass the costs of climate and reliability rules onto captive ratepayers. The U.S. legal system has outsourced market design to private firms that will be financially harmed if state and federal regulators pursue deep decarbonization or aggressive grid reliability efforts. Given that regulatory environment, energy market rules often counteract climate and reliability regulations. These observations underscore that structural reforms such as full corporate unbundling, market liberalization, and governance reforms are needed to make climate and reliability policies more effective and easier to administer.

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**Cherie Metcalf**

### **“Institutions, Perceptions & Adaptation to Extreme Climate Risks” (with Amanda Nurse)**

Until very recently, Canada and other countries around the world have focused on meeting climate mitigation targets under the UN FCCC’s Paris Agreement. While this effort aims to stem the worst predicted effects of climate change, evidence of the impacts of climate change is

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becoming hard to ignore. A rise in extreme events has led to costly and disruptive destruction from fires, floods, drought, extreme precipitation, and storms. However, countries continue to prioritize mitigation and lag behind in tackling adaptation. Canada released its first national adaptation strategy in November 2022. The goals of this research are two-fold: first, to help explain the current state of adaptation failure and second to suggest strategies that could effectively drive the needed change. The focus is on residential infrastructure and communities, given the vulnerability and costs from threats to peoples' homes. The paper reviews key adaptation strategies, the policy levers used to implement them, and identifies factors that help explain the lack of progress to date, considering both institutional and perceptual / political barriers. Public support and engagement will be crucial to the successful adaptation policy.

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**Jonathan Nash**

### **Climate Change Nuisance Litigation in the U.S. and Canada: Emulation and Divergence**

This paper examines nuisance litigation against oil producers in the US and Canada. Landowners, including municipalities, have brought suits against oil producers alleging nuisance based on the effects of climate change. The trend began in the United States but has been emulated in Canada. There are, however, important differences. The United States relies on judicial federalism: each state has a court system, with a separate federal judiciary. Litigants are often afforded a choice of forum; both plaintiffs and defendants can have input on that choice. Forum choice has figured prominently in U.S. litigation of climate nuisance cases. In Canada opportunities for forum selection and shopping are fewer. The test for personal jurisdiction also varies between the countries. New U.S. limitations may limit the ability of courts to assert proper jurisdiction over defendant corporations. The Canadian test for personal jurisdiction differs from its U.S. counterpart, opening different possibilities for climate litigation.

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**Vanessa Casado Pérez**

### **The Hybrid in Climate Change**

Climate change is a problem that requires us to employ everything but the kitchen sink. Regulatory (public) solutions are indeed essential. Market responses are too (private). The dichotomy between private and public is a well-ingrained fiction in the legal discourse. Either regulation fails and private, often market-based, solutions work or the reverse. This essay will focus on hybrid institutions, where the private and the public meet, that have been repurposed (or proposed) to deal with environmental matters and that can improve our responses in climate change adaptation and mitigation. Case studies will include: 1) "community energy" projects where citizens not only use but also own or participate in the production of clean energy, often together with a public utility and 2) common interest community governance structures, such as Homeowner Associations, as environmental regulators.

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**Arden Rowell**

### **Building Psychologically Informed Climate Institutions**

Research in law and psychology suggests that the harms of climate change may be difficult for humans to perceive, understand, and value. These challenges flow both from the general environmental quality of many climate injuries---which tend to be diffuse across space and time, complex, and nonhuman in character---and from the distinctively global and systemic impacts of climate change, which may trigger psychological phenomena that undermine processing of extreme-magnitude and foreign impacts. A psychological account of climate neglect may help clarify how and why legal institutions have generally under-responded to climate threats; how private actors may sincerely if inaccurately underestimate their own role in causing climate harms; and how private citizens may even generally underestimate their own vulnerability (while simultaneously underperceiving threats to others). Recognizing these challenges may help in structuring future institutions and institutional response with a greater chance of success.

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**Professor Stephanie M. Stern**

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## Climate Homesteading

Shifting residential settlement from climate risk zones for wildfire, flooding, and drought to safer locations is imperative for public health and climate adaptation, but also political dynamite for governments. I advocate incentives for climate-safe location as the most politically viable policy approach. Specifically, I propose a "climate homesteading" framework of relocation incentives. Climate homesteading seeks to encourage settlement in targeted areas (i.e., low climate risk locations). Because the U.S. lacks government land in low climate risk locations, climate homesteading must be a package of reforms that motivate voluntary settlement or relocation. I suggest several legal reforms, including affordable rental "homesteading" where tenants obtain discounted, long-term leaseholds for public or subsidized housing in climate-safe areas, land grants of federal or state land for Tribes and vulnerable communities, reforming homeownership and developer tax subsidies to deliver higher benefits for climate-safe housing, and providing housing navigators and psychological support workers to facilitate relocation.

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## Sophie Thériault

### Green Colonialism at the “Critical” Minerals Frontiers: Towards a Just Energy Transition for Indigenous Peoples

In Canada, as in other countries, energy transition strategies to address the climate crisis have led to increased interest in ‘critical’ or ‘strategic’ minerals – such as graphite, cobalt, lithium, and nickel – needed for batteries, electric vehicles, solar panels, and wind turbines. Many of Canada’s ‘critical-mineral-rich’ areas are located in the northern part of the country, home to several Indigenous communities that are already disproportionately affected by climate change and the legacy of past and present mining activities. This chapter examines the ways in which dominant governmental and industry discourses on ‘critical’ or ‘strategic’ minerals as an imperative for ‘green’ energy transitions reproduce and reinforce pre-existing settler colonial processes of dispossession. We argue that ‘just’ energy transitions should respond efficiently to the climate crisis in ways that promotes the territorial rights and self-determination of Indigenous peoples according to their own legal orders and conceptions of environmental justice.

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## Josephine van Zeben

### Just Green Transition: Lessons from the EUs Green Deal

The European Union Green Deal (GD) emphasizes a just and inclusive transition towards net zero. Basic goals include: reducing social and regional inequalities in terms of environmental health hazards, access to ecosystem services, and social inclusion; the prevention of disproportionate burdens on vulnerable households; and overall positive effects on employment opportunities, especially for negatively impacted regions. The aim of a just transition is politically sensitive and economically complex: the GD will have winners and losers. Decisions on which factors, areas, sectors and timelines to include will heavily influence the resulting policy decisions and can't be viewed as politically neutral. Thus far, the GD seems to focus narrowly on financial solidarity through the European Green Investment Plan. Questions remain about the impact of the Green Deal. Lessons learned in the EU with their just **transition may prove helpful for other large economies with multilevel structures such as Canada and the US.**

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## Mark Winfield

### A Sustainable Energy Transition for Canada - key opportunities and barriers

Within a transitions theory framework, this presentation would examine the key ideational, institutional, societal and landscape level barriers to the sustainable decarbonization of energy systems in Canada, and assess the potential drivers for a successful transition. The presentation will begin with a discussion of normative frameworks informing the concept of a 'green,' 'clean' or sustainable energy transition. It will then explore the impact of institutional factors, particularly

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the role of federalism in Canadian energy and climate change policy, and the roles of non-state actors and factors in the transition, including incumbent economic interests, civil society organizations, and public opinion. Finally consideration will be given to shifting landscape level factors, including technological developments in the energy sector, the increasingly evident impact of a changing climate, and the impact of the War in Ukraine on Canada's energy and climate policies.

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**Katrina Wyman**

### **Adaptation Federalism**

Climate adaptation has new priority, as visible climate change effects (heat domes, wildfires, flooding) have become more common. Adaptation policy is thought to have a different economic structure than the challenge of limiting it. Mitigation presents a global collective action problem, but individual jurisdictions, including cities, have robust incentives to adapt since their populations both reap most of the benefits and feel the costs of failure. Yet, adaptation efforts continue to lag at the local and national levels, even in comparatively

well-resourced areas. This paper uses New York City's halting adaptations to emphasize the difficulties that local jurisdictions in the U.S. face in making their populations more resilient to the effects of warming. Some are due to uncertainties around climate change impacts. However, federal and state laws and institutions also complicate efforts to prepare communities for a warming world. New legal frameworks will be necessary to facilitate adaptation.

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