

CLIMATE CHANGE AND THE RIGHT TO A HEALTHY ENVIRONMENT IN THE CANADIAN CONSTITUTION

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This article discusses the first efforts of non-governmental organizations and Indigenous communities in Canada to force governments to move more aggressively to mitigate climate change through constitutional litigation. The claimants argue the failure of the Canadian government to implement adequate climate change policies violates the constitutionally protected rights under the Canadian Charter of Rights and Freedoms, such as the section 7 right to life and security of the person, and the section 15 right to equality. By comparing the developing Canadian actions to recent international jurisprudence in the Netherlands and the United States, the authors analyze the hurdles these claims will need to overcome to be successful at the Supreme Court of Canada — justiciability and whether the Charter even provides protection for environmental rights.

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I. INTRODUCTION

Climate change is a grave threat to life as we know it on Earth. Chief Justice Fraser observed in the *Reference re Greenhouse Gas Pollution Pricing Act* that “[t]he dangers of climate change are undoubted as are the risks flowing from failure to meet the essential challenge.”¹ Success in meeting the challenge requires government action — serious government action — coordinated across multiple countries. And in Canada, where responsibility for the environment is shared between the federal government and the provinces, it requires cooperation between the levels of government. Outside of a handful of leading countries, the global effort to reduce greenhouse gas (GHG) emissions has been desultory. Given the gravity of the problem and the tepid governmental responses in many countries around the world, it is no surprise that environmental organizations have turned to the courts in an effort to force governments to do the hard work of implementing GHG reduction measures. This article discusses the first efforts of environmental organizations in Canada to force governments to move more aggressively to mitigate climate change through constitutional litigation.

Between late 2018 and late 2019, four separate claims were commenced claiming that inadequate Canadian climate change policies breached individuals’ *Canadian Charter of Rights and Freedoms* right to life and security of the person.² Similar claims asserting that inadequate climate change policies breach constitutional rights have been advanced around the world in a coordinated effort to force governments to meet the *Paris Agreement*³ GHG reduction targets. The most famous of these cases, *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Urgenda Foundation*,⁴ resulted in the government of the Netherlands being ordered to adopt a more aggressive GHG reduction program in order to meet its *Paris Agreement* GHG reduction commitment.⁵ The constitutional climate change claims in Canada and around the world are part of a larger litigation effort by environmental organizations that includes significant tort suits against companies that produce fossil fuels.

The Canadian constitutional climate change claims are audacious; they seek to have courts declare that government climate change policies threaten the constitutionally protected rights to life and security of the person, and direct implementation of more stringent climate change policies that will see Canada achieve its *Paris Agreement* GHG reduction commitment. Many of the issues that will have to be resolved in the constitutional climate change claims are evident in decisions that have been rendered in similar claims in other countries. At one end of the spectrum is the decision of the Netherlands Supreme Court in *Urgenda*. The Court in *Urgenda* wrestled with the questions of whether the *Convention for the Protection of Human Rights and Fundamental Freedoms*⁶ guarantees positive rights, and whether it was

¹ 2020 ABCA 74 at para 1.

² Section 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

³ 22 April 2016, Can TS 2016/9 (entered into force 4 November 2016) [*Paris Agreement*].

⁴ ECLI:NL:HR:2019:2007, 19/00135 [*Urgenda*].

⁵ Jonathan Watts, “Dutch Officials Reveal Measures to Cut Emissions after Court Ruling,” *The Guardian* (24 April 2020), online: <www.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling>.

⁶ 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*ECHR*].

being asked to take on a legislative role in directing the government to fashion a GHG reduction plan that would meet the Netherlands' *Paris Agreement* commitment. The Netherlands Supreme Court determined that it was obliged to act, and crafted a remedy that it concluded maintained an appropriate distinction between the judicial and legislative branches. The Court in *Urgenda* found that the climate change policies of the government of the Netherlands were inadequate, and directed the government of the Netherlands to develop new policies that would ensure that the country's *Paris Agreement* commitment was met by the end of 2020.⁷ At the other end of the spectrum is the majority decision of the Ninth Circuit Court of Appeals in *Juliana v. United States*.⁸ The Court in *Juliana* observed that there was no explicit right to a stable climate system in the United States Constitution, and held that, even if such a right existed, the issue was not justiciable because the Court could not grant an effective remedy.

The Canadian constitutional climate change claims, though situated in a different legal system, raise many of the same issues as *Urgenda* and *Juliana*. Perhaps the most obvious questions can be lumped under the rubric of justiciability. In short, is the evaluation of legislation and policies adopted to implement international treaty obligations subject to review by a court, or is it exclusively within the legislative and executive domain? And can courts grant a meaningful remedy? If the justiciability hurdle can be cleared, then it must be asked whether the *Charter* provides protection for environmental rights. This issue cannot be separated from a larger question that has lurked on the periphery of *Charter* jurisprudence and in academic circles since its earliest days: does the *Charter* protect positive rights and, in particular, social and economic rights? The constitutional climate change cases, if pursued to a conclusion, will force courts to confront and perhaps resolve enduring questions of Canadian constitutional law.

This article proceeds on the assumption that climate change is a serious threat to the Canadian way of life. With the science of climate change taken as a given, the object of this article is to explore the legal issues raised by the constitutional climate change cases.⁹ No opinion on whether the constitutional climate change claims should succeed is offered. The question of whether the claims will succeed depends on, among other things, whether as a matter of fact Canadian climate change mitigation policies are adequate. An evaluation of the adequacy of Canadian climate change policy is beyond the expertise of the authors, so for the purposes of this article it is assumed that the factual question of the adequacy of Canadian climate change policies is a triable issue.

Part II of this article reviews the recent decisions of the Netherlands Supreme Court in *Urgenda* and the decision of the US Ninth Circuit Court of Appeals in *Juliana*. Particular attention will be given to how the Netherlands Supreme Court interpreted the right to life to include a right to be protected from environmental hazards including climate change, and to the different ways that the issue of justiciability was decided in *Urgenda* and *Juliana*. Part

⁷ *Urgenda*, *supra* note 4.

⁸ 947 F (3d) 1159 (9th Cir 2020) [*Juliana*].

⁹ For a contrasting approach that argues that courts should adapt their doctrine to facilitate the success of constitutional climate change claims, see Nathalie J Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation Under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42:4 Vermont L Rev 689.

III discusses the Canadian constitutional climate change claims and highlights the key points for consideration in this article. The last part of this article considers the most important constitutional issues raised by the constitutional climate change claims. This part starts by considering the issue of justiciability in Canadian law and, in particular, considers whether a declaratory remedy as in *Urgenda* might be appropriate. The discussion then contemplates how section 7 of the *Charter* may be interpreted, and finishes with an analysis of the approach of Canadian courts to positive rights claims.

II. INTERNATIONAL CONSTITUTIONAL AND HUMAN RIGHTS CASES

A. *THE NETHERLANDS V. URGENDA*

It should be no surprise that one of the most significant early cases regarding climate change comes from the Netherlands, a country where one third of the land lies below sea level. The *Urgenda* case was brought by an environmental organization on behalf of the young people of the Netherlands, who it is alleged, will bear a disproportionate burden of the consequences of climate change. The claim asserted that the Netherlands had failed to take aggressive enough action to reduce GHG emissions.¹⁰ This failure was alleged to be contrary to Articles 1, 2, and 8 of the *ECHR*.¹¹

ECHR Article 1 requires contracting states to secure within their jurisdiction the rights and freedoms provided for by the *ECHR*.¹² Article 2 provides for the right to life, and Article 8 provides for a right to respect for private and family life.¹³ The claim was successful at The Hague District Court¹⁴ and The Hague Court of Appeal.¹⁵ An appeal by the government of the Netherlands to the Supreme Court of the Netherlands was dismissed with costs on 20 December 2019. As a result, the government of the Netherlands is required to implement policies to achieve a 25 percent reduction in GHG emissions relative to 1990 levels by the end of 2020.¹⁶

Despite the different constitutional context, *Urgenda* should not be dismissed as being of limited relevance to Canada. The *ECHR*, though different from the Canadian constitution in many respects, has some similarities and *ECHR* jurisprudence has been referred to by the Supreme Court of Canada in interpreting the *Charter*.¹⁷ Moreover, many of the arguments advanced by the Netherlands in opposition to the claim in *Urgenda* are similar to arguments that can be expected to be advanced by governments in Canada against constitutional climate change claims.

¹⁰ *Urgenda*, *supra* note 4.

¹¹ *ECHR*, *supra* note 6, arts 1–2, 8.

¹² *Ibid*, art 1.

¹³ *Ibid*, arts 2, 8.

¹⁴ *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396 [*Urgenda Foundation*].

¹⁵ *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, ECLI:NL:GHDHA:2018:2610, 200.178.245/01.

¹⁶ *Urgenda*, *supra* note 4.

¹⁷ See e.g. *R v Oakes*, [1986] 1 SCR 103 at 132; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 636–37 referring to European Court of Human Rights case law considering the *ECHR* as a “valuable guide.” See also *R v Poulin*, 2019 SCC 47 at para 75 [*Poulin*], noting that some *ECHR* provisions provided inspiration for some *Charter* provisions.

Urgenda took place against a backdrop where both the claimant and the government of the Netherlands accepted the science of climate change, and that the Netherlands had committed to reduce its GHG emissions in the *Paris Agreement*. The *United Nations Framework Convention on Climate Change*¹⁸ Annex 1 lists countries, including the Netherlands, that must make a 25 to 40 percent GHG reduction from 1990 levels by 2020 in order to achieve the *Paris Agreement* target temperature increase. Based on *UNFCCC* Annex 1, the claimant contended that the Netherlands was required to reduce GHG emissions by 25 to 40 percent from 1990 levels by 2020, whereas the government took the position that the European Union (of which the Netherlands is a part) was only required to reduce GHG emissions by 20 percent from 1990 levels by 2020. The evidence before the lower courts indicated that the Netherlands was likely to achieve a 20 percent reduction in GHG emissions from 1990 levels, but was unlikely to achieve a 25 percent reduction by the end of 2020.¹⁹

There were a number of grounds of appeal which may be simplified and restated as follows:

- (a) Articles 1, 2, and 8 of the *ECHR* cannot be a foundation for an order compelling the government to implement policies to reduce GHG emissions because the threat of climate change is global in nature and not something specifically within the control of the state;
- (b) the Netherlands is not legally bound to achieve 25 percent GHG emission reductions relative to 1990 levels; and
- (c) the Court cannot order the state to create legislation as that is a matter in the political domain.²⁰

ECHR Articles 2 and 8 require a state to take positive actions to protect life, and private and family life within its jurisdiction. Articles 2 and 8 have been considered in the context of environmental hazards and environmental disasters, and it has been held that a state that is aware of a risk of environmental hazard or disaster is obliged to take appropriate steps to mitigate the risk.²¹ The mitigation measures must not place a disproportionate burden upon the state. The Netherlands submitted that climate change is different than normal environmental risks because it is a global phenomenon. The Court explained that “[t]he question is whether the global nature of the emissions and the consequences thereof entail that no protection can be derived from Articles 2 and 8 *ECHR*, such that those provisions impose no obligation on the State in this case.”²²

In seeking to answer this question, the Court looked to the *UNFCCC*. The *UNFCCC* is predicated on international cooperation and the responsibility of each state “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other

¹⁸ 12 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) [*UNFCCC*].

¹⁹ *Urgenda Foundation*, *supra* note 14 at para 4.6.

²⁰ *Urgenda*, *supra* note 4 at paras 3.1–3.6.

²¹ *Ibid* at paras 5.2.4–5.3.2.

²² *Ibid* at para 5.6.3.

States or of areas beyond the limits of national jurisdiction.”²³ The Court interpreted the *UNFCCC* principles to mean that each country has to do its part to solve the problem of climate change. In reaching this conclusion, the Court rejected “the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility.”²⁴ The Court went on to explain that “the assertion that a country’s own share in global greenhouse gas emissions is very small and that reducing emissions from one’s own territory makes little difference on a global scale, [cannot] be accepted as a defence.”²⁵

Having concluded that *ECHR* Articles 2 and 8 may require positive acts to be taken to address climate change, the Court went on to consider the question of how such a requirement should be interpreted in the context of international environmental commitments that are not legally binding. The Court pointed to *ECHR* Article 13, which provides that individuals whose *ECHR* rights and freedoms are violated have a right to an effective remedy.²⁶ Even though the *Paris Agreement* is not itself enforceable by courts, it provides a standard by which *ECHR* rights may be defined, and Article 13 requires an effective remedy which, in this case, happens to be the same standard as compliance with the Netherlands’ *Paris Agreement* commitments.

The last issue considered by the Supreme Court was whether it should refrain from issuing an order because it would be an intrusion into the political domain. Under Dutch law, as a general rule, “the courts should not intervene in the political decision-making process involved in the creation of legislation.”²⁷ A rationale for this principle is that legislation affects all residents of the country, including those who are not party to litigation. Courts should not grant as a remedy an order that the government create legislation, as non-parties to the litigation will be affected by the legislation even though they did not have an opportunity to make submissions in the case. The Court held that a declaration that the state is obliged to reduce GHG emissions by at least 25 percent from 1990 levels by the end of 2020 does not offend the principle of non-interference in the political domain, and does not mandate legislation that will affect non-parties to the litigation. The Supreme Court held that the rule of law requires the protection of human rights, and that the declaration it issued maintains the state’s discretion to achieve the objective of GHG emissions reduction through whatever policies it chooses.²⁸

B. *JULIANA V. UNITED STATES*

Juliana is a case brought by a number of children and an environmental organization called Earth Guardians. The plaintiffs asserted a constitutional right, mainly under the Due Process Clause of the Fifth Amendment, to a “climate system capable of sustaining human life.”²⁹ Among other things, the plaintiffs sought as a remedy a declaration and injunction requiring the US government to “phase out fossil fuel emissions and draw down excess

²³ *UNFCCC*, *supra* note 18, Preamble.

²⁴ *Urgenda*, *supra* note 4 at para 5.7.7.

²⁵ *Ibid.*

²⁶ *ECHR*, *supra* note 6, art 13.

²⁷ *Urgenda*, *supra* note 4 at para 8.2.3.

²⁸ *Ibid* at paras 8.3.1–8.3.5.

²⁹ *Juliana*, *supra* note 8 at 1164.

atmospheric [carbon dioxide].”³⁰ The plaintiffs also grounded their claim in the public trust doctrine. *Juliana* is, in many respects, a US version of *Urgenda* and has, in turn, been an inspiration for similar claims elsewhere in the US and now in Canada.³¹

Juliana came before the Ninth Circuit Court of Appeals on an application for summary dismissal on the grounds of a lack of standing under Article III. Article III requires that to have standing “a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision.”³² Both the lower court and the Ninth Circuit Court of Appeals found the first two requirements to have been met to the standard required to defeat a summary dismissal application. The harms asserted were sufficiently concrete and particularized, and GHG emissions were a plausible cause of the harms. The appeal centred on the third requirement for standing — whether the court can grant an effective remedy. On this question, the Court split, with the majority deciding that an effective remedy was not available and dismissing the claim, and the minority finding that a useful remedy could be granted.³³

There is no explicit right to a climate system capable of sustaining human life in the US Constitution. Instead, the plaintiffs asserted, the right is implicit and a necessary precondition for the existence of other constitutional rights. The majority avoided the question, observing that “[r]easonable jurists can disagree about whether the asserted constitutional right exists.”³⁴ The majority’s equivocation on the existence of the constitutional right was possible because of their conclusion on the question of redressability. The majority could assume the existence of the constitutional right for the purposes of their analysis because it did not matter in light of their conclusion that the Court could not provide a remedy.

Justice Staton, in dissent, confronted the question of whether the US Constitution guarantees a right to a climate system capable of sustaining human life. She explained that courts have found that fundamental rights that are not expressly provided for in the text of the US Constitution nevertheless exist and are protected. Citing the most famous example, the right to vote, she explained that “[s]ome rights serve as the necessary predicate for others; their fundamentality therefore derives, at least in part, from the necessity to preserve other fundamental constitutional protections.”³⁵ According to Justice Staton, the constitutional principle that protects a right to a climate system capable of sustaining human life is what she called the perpetuity principle.³⁶

³⁰ *Ibid* at 1164–65 [footnote omitted].

³¹ See *Animal Legal Defense Fund v United States*, 404 F Supp (3d) 1294 (D Or 2019): the plaintiffs claimed climate change and the government’s failure to protect them from climate change effects are a violation of their constitutional right to a safe and sustainable environment. The District Court of Oregon dismissed this claim. See also *Komor v United States*, (29 May 2019), Ariz D, 4:19-cv-00293 (complaint for declaratory and injunctive relief): the plaintiff filed an action in Federal Court in Arizona claiming that the defendants’ action or inaction around the production and consumption of fossil fuels has resulted in a serious global warming situation that is dangerous to the life and liberty of all US citizens. See also, *Clean Air Council v United States* (6 November 2017), Pa D, 2:17-cv-04977 (complaint for declaratory relief): the plaintiffs seek a declaration that the defendant cannot implement regulatory rollbacks that increase the effects of climate change based on the constitutional right to a life-sustaining climate change system and public trust doctrine.

³² *Juliana*, *supra* note 8 at 1168.

³³ *Ibid* at 1169–73.

³⁴ *Ibid* at 1169.

³⁵ *Ibid* at 1177.

³⁶ *Ibid* at 1179.

The perpetuity principle holds that the continuation of the Republic is an object of and is assumed by the US Constitution. Justice Staton drew historical support for the perpetuity principle from some of the iconic documents of US constitutional history, including George Washington’s Letter of Farewell to the Army, Alexander Hamilton’s Federalist No. 1, and Abraham Lincoln’s First Inaugural Address.³⁷ The perpetuity principle, Justice Staton stressed, is not a right to a clean environment that can be invoked in any case of pollution. Instead, the perpetuity principle is only engaged in cases that threaten “the willful dissolution of the Republic.”³⁸ As a pre-emptive response to the criticism that the perpetuity principle has never been enforced by a court, she explained “never before has the United States confronted an existential threat that has not only gone unremedied but is actively backed by the government.”³⁹

The closing section of the majority decision, presumably written after a draft of the dissent was circulated, responded to Justice Staton’s reframing of the plaintiffs’ assertion of a constitutional right to a climate system capable of sustaining human life. The majority explained that if the perpetuity principle exists, it is not justiciable. The standing requirement under Article III requires a discrete and particular injury to the plaintiff, whereas the survival of the state is a general harm felt by all citizens. The majority made an analogy to the Guarantee Clause which similarly “does not provide the basis for a justiciable claim.”⁴⁰ Though convinced that the government has been “deaf” to the need for climate change action and that elected representatives have a “moral responsibility” to act, the majority held firm in the view that for the Court to intervene would be for the Court to exceed its constitutionally assigned role.⁴¹

The justiciability of a claim under Article III depends on whether the injury is redressable. Redressability is assessed with respect to two criteria. The relief sought must be shown to be both: “(1) substantially likely to redress [the plaintiffs’] injuries; and (2) within the district court’s power to award.”⁴²

With respect to the first criterion, the majority observed that the plaintiffs’ expert evidence made it clear that the requested remedy would require a “fundamental transformation of this country’s energy system, if not that of the industrialized world.”⁴³ The majority went on to note that the plaintiffs had conceded that the relief sought would not “alone solve global climate change,”⁴⁴ presumably because the relief would only apply to the US. Despite expressing concerns about the effectiveness of any remedy, the majority did not make a final conclusion on the point because they found that the plaintiffs could not establish that the requested remedy was within the Court’s power to award. Justice Staton responded to the majority’s position on whether an order could redress the plaintiffs’ injuries by framing the issue differently. The issue, according to Justice Staton, was not whether global climate change could be solved, but whether a court order “would likely have a real impact on

³⁷ *Ibid* at 1178–79.

³⁸ *Ibid* at 1179.

³⁹ *Ibid* at 1180.

⁴⁰ *Ibid* at 1174 [citations omitted].

⁴¹ *Ibid* at 1175.

⁴² *Ibid* at 1170.

⁴³ *Ibid* at 1171.

⁴⁴ *Ibid*.

preventing the impending cataclysm.”⁴⁵ Much like the Dutch Court in *Urgenda*, Justice Staton was concerned with whether the Court’s direction could have an impact by making a contribution to the mitigation of climate change. Justice Staton explained that, in her view, having some impact on the problem was enough to meet the requirement to be “substantially likely to redress [the plaintiffs’] injuries.”⁴⁶

With respect to the second criterion — whether the order is within the court’s power — the majority focused on whether it was the appropriate role of the Court to endorse and compel what it may view as a desirable policy. The majority acknowledged that based on the evidence, it would be good for the government to adopt “a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular.”⁴⁷ The majority, however, explained that responsibility for the myriad decisions that go into formulating such a comprehensive policy is allocated to the legislative and executive branches of government, not the courts. Much like in *Urgenda*, the plaintiffs contended that the granting of an injunction would not offend the separation of powers because the details of implementation of the policy would be left to the discretion of the government. The majority rejected this submission, holding that the Court would inevitably be called upon to “pass judgment on the sufficiency of the government’s response to the order, which necessarily would entail a broad range of policymaking.”⁴⁸ Further, the majority continued, “given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government’s compliance with any suggested plan for many decades.”⁴⁹

Justice Staton accused the majority of “deference-to-a-fault.”⁵⁰ The majority, she explained, failed to appreciate the judicial branch’s role in holding the legislative and executive branches to account. Absent the government satisfying its burden to establish nonjusticiability, a court should not “abdicate” its responsibility to “enforce constitutional rights.”⁵¹ Indeed, she explained, a court should not be afraid of the “messy business of evaluating competing policy considerations,” nor should it duck “the intimidating task of supervising implementation over many years, if not decades.”⁵² To make her point that courts have taken on such a supervisory role on important matters in the past, she gave a nod to *Brown v. Board of Education of Topeka*,⁵³ the famous equal protection case that mandated racial integration of schools and which required the ongoing involvement of courts over many years. Further, Justice Staton observed that the majority had essentially avoided deciding the issue on the grounds that it was a political question without addressing the factors to be considered when applying the political question doctrine. On Justice Staton’s reading, the decisive political question doctrine factor for the majority was whether or not there was a “judicially discoverable and manageable [standard] for resolving [the problem].”⁵⁴ Her rejoinder on this point was that the standard is “the amount of fossil-fuel

⁴⁵ *Ibid* at 1182.

⁴⁶ *Ibid* at 1170.

⁴⁷ *Ibid* at 1171.

⁴⁸ *Ibid* at 1172.

⁴⁹ *Ibid*.

⁵⁰ *Ibid* at 1184.

⁵¹ *Ibid*.

⁵² *Ibid* at 1184–85.

⁵³ 349 US 294 (App Ct 1955).

⁵⁴ *Juliana*, *supra* note 8 at 1185.

emissions that will irreparably devastate our Nation,” and that this is something that “can be established by scientific evidence.”⁵⁵

III. CANADIAN CONSTITUTIONAL CLIMATE CHANGE CLAIMS

Four recent actions have been commenced in Canada, three by young people and another by two Indigenous groups, claiming that the Constitution requires the government to take steps to meet or exceed Canada’s international climate change commitments. Each of the claims frames the asserted constitutional right slightly differently, but for the purposes of this article we will describe the asserted right as being a “right to a healthy environment.” The claims site the claimed right in different parts of the constitution, but the most plausible location is section 7 of the *Charter*, so the discussion that follows will mainly focus on the section 7 arguments.⁵⁶ While all of these claims are at a very early stage, it is likely that one or more of them will proceed to the point where a court is required to decide whether a right to a healthy environment exists in the Constitution, and weigh the vexing issues related to the appropriate role of the courts in matters of policy as raised in *Urgenda* and *Juliana*.

A. *ENVIRONNEMENT JEUNESSE* C. *PROCUREUR GÉNÉRAL DU CANADA*⁵⁷

In late 2018, a claim was commenced by an environmental non-governmental organization called Environnement Jeunesse on behalf of a class comprised of all Quebec residents aged 35 and under. The claim sought declarations that the Government of Canada violated class members’ rights under both the *Charter* and the Quebec *Charter of Human Rights and Freedoms* “by failing to put in place the necessary measures to limit global warming”⁵⁸ to 1.5°C. A payment of \$100 in respect of each member of the class was requested to be put toward restorative measures to reduce global warming.⁵⁹ In particular, the claim asserted breaches of the *Charter* section 7 right to life,⁶⁰ the *Charter* section 15 right to equality,⁶¹ and

⁵⁵ *Ibid* at 1187.

⁵⁶ The argument that failure to take action on climate change breaches section 15 because children will be more affected by climate change is novel and conceptually flawed. Section 15 may be used to challenge legislation even if the discrimination is not evident on the face of the legislation so long as there is a discriminatory effect (see *Fraser v Canada (Attorney General)*, 2020 SCC 28). An example of a facially neutral rule that has a discriminatory effect based on age is a height restriction on a roller coaster. The claim for intergenerational equity made in the climate change suits is not about discrimination experienced by young people because they are young; it is about choices made now that will affect them in the future when they are adults. The discriminatory effect argued in the climate change claims is that because the claimants are young they will, in most cases, live longer than older people and will over the course of their lives suffer the effects of climate change for longer and more severely than older people. The problem with this logic is that all manner of policy choices — government borrowing or choosing to spend more on healthcare than education, for example — have different effects on different age cohorts of the population. Just because certain policies favour one age demographic over another does not give rise to a section 15 claim for discrimination. For discussion of a better way to address intergenerational inequities, see Colin Feasby, “Taking Youth Seriously: Reconsidering the Constitutionality of the Voting Age,” online (blog): <ablawg.ca/2019/06/11/taking-youth-seriously-reconsidering-the-constitutionality-of-the-voting-age/>.

⁵⁷ 2019 QCCS 2885 [*ENJEU* cited to Unofficial Translation, online: <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190711_500-06-000955-183_decision-2.pdf>].

⁵⁸ *Ibid* at para 2.

⁵⁹ *Ibid* at para 3.

⁶⁰ *Charter*, *supra* note 2, s 7.

⁶¹ *Ibid*, s 15.

the Quebec *Charter* section 46.1 “right to live in a healthful environment in which biodiversity is preserved.”⁶²

ENJEU proceeded to a certification hearing in June 2019. In a certification hearing in Quebec, the Court will consider whether a class proceeding is the appropriate procedure, and will look at the merits of the case to determine whether “the facts alleged appear to justify the conclusions sought.”⁶³ The consideration of the merits of a claim at the certification stage only involves whether or not the claim is frivolous or obviously destined to fail; it does not take into account any defences. Justice Morrison first considered the merits of the case which he divided into two issues: (1) justiciability; and (2) whether the factual allegations on their face could support a finding of a violation of the rights protected by the *Charter* and Quebec *Charter*.⁶⁴

The federal government submitted that the issues raised in *ENJEU* were not justiciable because the issues were inherently political and outside the competence of the Court. The federal government further submitted that the issues were not justiciable because the allegation was government inaction.⁶⁵ In other words, the plaintiffs were asserting a positive rights claim. Justice Morrison rejected these arguments, explaining that characterizing an issue as political “does not automatically and completely exclude court intervention in the application of the Canadian Charter.”⁶⁶ He went on to conclude that the alleged violation of “Charter-protected rights is not, at this stage, non-justiciable.”⁶⁷ Once the justiciability hurdle was cleared, it was straightforward for Justice Morrison to find that the claim that the federal government’s climate policy breached constitutional rights was not frivolous.

Though successful on the substantive issues, at least on the superficial look given in certification hearings in Quebec, *ENJEU* failed on the mundane issue of procedure. Justice Morrison found the definition of a class of residents 35 years old and under to be without “factual or rational explanation.”⁶⁸ The arbitrary exclusion of older residents of Quebec who also desire action to address climate change was found to be inappropriate. Justice Morrison was further troubled by the fact that the class action would place a burden on parents to make litigation decisions for their children, and that Environnement Jeunesse was not an appropriate or representative plaintiff. In the final analysis, Justice Morrison concluded that “a class action is not the appropriate procedure in this case and that a single application by one person would have the same effect for all Quebec residents, if not all Canadians.”⁶⁹

⁶² CQLR c C-12, s 46.1 [Quebec *Charter*].

⁶³ *ENJEU*, *supra* note 57 at para 23.

⁶⁴ *Ibid* at para 45.

⁶⁵ *Ibid* at paras 46, 61.

⁶⁶ *Ibid* at para 69.

⁶⁷ *Ibid* at para 71.

⁶⁸ *Ibid* at para 117.

⁶⁹ *Ibid* at para 141.

**B. *LA ROSE V. HER MAJESTY THE QUEEN IN RIGHT OF CANADA*⁷⁰ AND
*MATHUR V. HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO*⁷¹**

Two claims, *La Rose* and *Mathur*, were filed in quick succession in late 2019. Each claim was filed by groups of individuals, thus avoiding the procedural difficulties encountered by the plaintiffs under the class action regime in *ENJEU*. *La Rose* and *Mathur* bear significant resemblance to one another. The key difference is that *La Rose* asserts that the federal government's climate policy infringes upon constitutional rights, whereas *Mathur* targets the Ontario government's climate policy. In particular, the allegations in *Mathur* focus on Ontario's cancellation of its cap and trade policy, and adoption of what the plaintiffs allege is a GHG reduction target that is inadequate.

La Rose was commenced by a group of children who live in different locations across Canada. *Mathur* follows form by being brought by children who live around Ontario. Many of the plaintiffs in these cases have unique personal characteristics that make them vulnerable to climate change, such as medical conditions, or they live in locations that are exposed to the most obvious effects of climate change such as wildfires, sea level rise, and insect-borne disease. Some of the plaintiffs are also members of Indigenous groups whose traditional ways of life are adversely affected by climate change. The claims assert breaches of common law and constitutional rights.

Both claims assert that section 7 of the *Charter* protects a right to a stable climate system. A stable climate system, it is contended in *La Rose*, is "connected to children's basic health and development (or security of the person) and to a child's survival (or life interest)."⁷² *La Rose* further asserts that the alleged deprivations of life and security of the person are contrary to the principles of fundamental justice for, among other reasons, they are contrary to Canada's international law obligations including the *Convention on the Rights of the Child*,⁷³ the *United Nations Declaration on the Rights of Indigenous Peoples*,⁷⁴ and the *International Covenant on Civil and Political Rights*.⁷⁵

La Rose and *Mathur* further assert a breach of the *Charter* guarantee of equality in section 15. The failure to take adequate action to prevent climate change is alleged to contravene section 15 in two main ways. First, the risks associated with climate change are claimed to fall disproportionately on children, and the costs of mitigating climate change are said to fall disproportionately on children.⁷⁶ Second, it is alleged that Indigenous youth are denied

⁷⁰ (25 October 2019), Vancouver, T-1750-19 (FCTD) (Statement of Claim), online: <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf> [*La Rose*].

⁷¹ (25 November 2019), Toronto, CV-19-00631627 (ONSC) (Application of the Plaintiffs), online: <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191125_CV-19-00631627_complaint.pdf> [*Mathur*].

⁷² *La Rose*, *supra* note 70 at para 224.

⁷³ 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, accession by Canada on 13 December 1991).

⁷⁴ GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007).

⁷⁵ 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada on 19 August 1976).

⁷⁶ *La Rose*, *supra* note 70 at para 6.

equality through the “risk of loss of cultural rights and practices, impacts on traditional knowledge, loss of enjoyment of and connection to the land and the threat of relocation.”⁷⁷

La Rose seeks declarations that Canada has constitutional obligations to ensure a “Stable Climate System” and that its failure to do so is a breach of constitutional rights.⁷⁸ *La Rose* goes on to seek mandatory orders compelling Canada to “prepare an accurate and complete accounting of Canada’s GHG emissions” and requiring Canada to “develop and implement an enforceable climate recovery plan that is consistent with Canada’s fair share of the global carbon budget plan to achieve GHG emissions reductions.”⁷⁹ *La Rose* asks that the Court maintain supervisory jurisdiction over the subject matter of the claim for as long as necessary to ensure compliance. *Mathur* seeks declaratory relief similar to *La Rose*, though applying to Ontario together with a mandatory order that:

Ontario forthwith set a science-based GHG reduction target ... consistent with Ontario’s share of the minimum level of GHG reductions necessary to limit global warming to below 1.5°C above pre-industrial temperatures or, in the alternative, well below 2°C (*i.e.* the upper range of the Paris Agreement temperature standard).⁸⁰

**C. *LHO’IMGGIN V. HER MAJESTY THE QUEEN
IN THE RIGHT OF CANADA***⁸¹

Lho’imggin was commenced in February 2020 at the height of tensions over the Coastal GasLink Pipeline blockades by two leaders of House groups of the Likhts’amisyu Clan of the Wet’suwet’en First Nation on behalf of themselves and their House groups, Misdzi Yikh (Owl House) and Sa Yikh (Sun House). *Lho’imggin* is different from *La Rose* and *Mathur* because it puts Indigenous concerns at the forefront rather than in a supporting role. Indeed, *Lho’imggin* portrays climate change as part of an ongoing narrative of colonial oppression. *Lho’imggin* is also notable because it is a tangible connection between Indigenous opposition to energy project development, particularly the Coastal GasLink LNG project, and climate change litigation.

The plaintiffs explain that the land and traditional lifestyle of their people has been, and will be, irrevocably altered and damaged by climate change. One example the plaintiffs highlight is that overfishing, pollution, forestry, and climate change have devastated the once abundant runs of sockeye salmon that their people depended on for sustenance, such that they have had to refrain from fishing for sockeye salmon since 2001 in an effort to help the species survive. The plaintiffs further plead that climate change induced wildfires and extreme weather events such as floods and droughts will have an adverse impact on the wild animals and fish upon which the Wet’suwet’en people depend. The plaintiffs assert that these impacts will be especially devastating to the Wet’suwet’en people who are vulnerable

⁷⁷ *Ibid* at para 232(e).

⁷⁸ *Ibid* at para 222(a).

⁷⁹ *Ibid* at paras 222(c)–(f).

⁸⁰ *Mathur*, *supra* note 71 at para 8(f).

⁸¹ (10 February 2020), Vancouver, T-2011-20 (FCTD) (Statement of Claim), online: <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/02/10_NA_complaint-1.pdf> [*Lho’imggin*].

because of the colonial history of oppression, including the legacy of the *Indian Act*⁸² reserve system, residential schools, the Sixties Scoop, and continuing racism.

The plaintiffs in *Lho'imggin* advance *Charter* sections 7 and 15 claims similar to *La Rose* and *Mathur*, and seek declarations requiring Canada to “act consistently with keeping mean global warming to between 1.5°C and 2°C.”⁸³ The legal basis of the claims in *Lho'imggin* diverge from *La Rose* and *Mathur* in two main ways. First, the plaintiffs advance a novel argument based on the *Constitution Act, 1867*.⁸⁴ Canada, it is contended, “has a constitutional duty to maintain the peace, order and good government of Canada,” and as such, must act “to keep Canada’s greenhouse gas emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels.”⁸⁵ Second, the plaintiffs seek an order requiring amendment of all “environmental assessment statutes that apply to extant high greenhouse gas emitting projects so as to allow the Governor in Council to cancel Canada’s approval ... of the operation [of] such a project in the event that the defendant will demonstrably not be able to ... meet its *Paris Agreement* commitment.”⁸⁶ No violations of Aboriginal or treaty rights are asserted pursuant to section 35 of the *Constitution Act, 1982*.⁸⁷

IV. CONSTITUTIONAL ISSUES

The recent Canadian constitutional climate change claims raise many of the same questions that the US Ninth Circuit and the Netherlands Supreme Court wrestled with in *Juliana* and *Urgenda*. Are GHG reduction commitments made in international agreements enforceable in national courts or is the subject matter fundamentally political and nonjusticiable? Do constitutions without explicit environmental rights implicitly provide for some form of environmental protection? To what extent are environmental rights positive rights and will courts recognize and enforce positive environmental rights? The answers to these questions are not obvious in Canadian constitutional law and engage issues that have been the subject of enduring debate.

A. POLITICAL QUESTIONS AND JUSTICIABILITY

The constitutional climate change claims are unquestionably political in the broad sense of the term, like so many important cases decided by courts. The threshold question is whether the constitutional climate change claims are of such a political nature that they cannot be decided by a court. Viewed at a distance, the constitutional climate change claims can be characterized as seeking to have courts take control of Canada’s climate change policy because of a perceived failure of democratically elected representatives to do what the plaintiffs believe is required to address the threat of climate change. The constitutional climate change claims seek as remedies declarations concerning Canada’s obligations under international agreements, and mandatory orders requiring the implementation of standards found in international agreements that it is contended Parliament and provincial legislatures

⁸² RSC 1985, c I-5.

⁸³ *Lho'imggin*, *supra* note 81 at para 81(a).

⁸⁴ (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

⁸⁵ *Lho'imggin*, *supra* note 81 at para 81(b).

⁸⁶ *Ibid* at para 81(e).

⁸⁷ Section 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

have failed to implement. The Courts in *Urgenda* and *Juliana* confronted similar questions, with the Netherlands Court finding that the political nature of the question was not an insurmountable obstacle to granting a remedy, while the majority in the Ninth Circuit concluded that the problem of mitigating climate change was intrinsically political and not one that could be addressed by the Court.

The majority in *Juliana* applied the US political question doctrine to avoid deciding what it acknowledged was a serious policy issue. The political question doctrine has its origin in *Marbury v. Madison*,⁸⁸ but was articulated in the modern era by the US Supreme Court in *Baker v. Carr*,⁸⁹ a case concerning the extent to which the Court could intervene in the redrawing of electoral boundaries in Tennessee. In finding that the post-census reallocation of seats in the Tennessee legislature was justiciable, the Court outlined certain questions a court should ask in determining whether cases with a political element were justiciable. The key questions, somewhat simplified, are: (1) is the issue one assigned to another branch of government?⁹⁰ (2) are there “judicially discoverable and manageable standards for resolving it”?⁹¹ and (3) is it impossible to decide “without an initial policy determination of a kind clearly for nonjudicial discretion”?⁹² Since *Baker*, the US political question doctrine has been invoked to avoid court intervention in the termination of international treaties,⁹³ the conduct of an impeachment by the Senate,⁹⁴ and most recently partisan gerrymandering.⁹⁵

Decisions in two judicial review proceedings seeking to enforce Canada’s international climate change obligations reflect Canadian courts’ reticence to engage with issues that appear to be political. The first case, *Friends of the Earth v. Canada*,⁹⁶ involved an effort to enforce compliance with Canada’s commitments under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*⁹⁷ as embodied in the *Kyoto Protocol Implementation Act*.⁹⁸ The second case, *Turp v. Canada (Justice)*,⁹⁹ sought to prevent Canada from withdrawing from the *Kyoto Protocol*. Both cases show Canadian courts’ uneasiness with politically charged cases, and ran aground on what may broadly be categorized as justiciability issues.

Friends of the Earth and *Turp* cannot be understood without an explanation of the unusual political backdrop. Canada signed the *UNFCCC* at the Earth Summit in Rio de Janeiro on 12 June 1992.¹⁰⁰ The *UNFCCC* committed Canada to the goal of stabilizing “greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic

⁸⁸ 5 US (1 Cranch) 137 (1803).

⁸⁹ 369 US 186 (1962) [*Baker*].

⁹⁰ *Juliana*, *supra* note 8 at 1185.

⁹¹ *Ibid*, citing *Baker*, *supra* note 89.

⁹² *Ibid*, citing *Baker*, *ibid*.

⁹³ *Goldwater v Carter*, 444 US 996 (1979).

⁹⁴ *Nixon v United States*, 506 US 224 (1993).

⁹⁵ *Rucho v Common Cause*, 139 S Ct 2484 (2019).

⁹⁶ 2008 FC 1183 [*Friends of the Earth*].

⁹⁷ 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005, accession by Canada 17 December 2002, withdrawal by Canada 15 December 2012) [*Kyoto Protocol*].

⁹⁸ SC 2007, c 30 [*KPIA*].

⁹⁹ 2012 FC 893 [*Turp*].

¹⁰⁰ “Compendium of Canada’s Engagement in International Environmental Agreements and Instruments,” online: *Environment and Climate Change Canada* <www.canada.ca/content/dam/eccc/documents/pdf/international-affairs/compendium/2020/batch-10/united-nation-framework-convention-climate-change-paris-agreement.pdf>.

interference with the climate system.”¹⁰¹ The *UNFCCC*, however, did not set any firm GHG reduction targets. The *Kyoto Protocol*, adopted on 11 December 1997, set out GHG reduction targets for Canada and other signatories.¹⁰² Canada and other industrialized countries agreed to reduce their GHG emissions to at least 5 percent below 1990 levels by 2012.¹⁰³ The House of Commons passed a motion supporting ratification of the *Kyoto Protocol* in 2002 and formal ratification followed shortly thereafter.¹⁰⁴ The minority Conservative government elected in 2006 indicated publicly that it did not support the *Kyoto Protocol* and had no intention of meeting its GHG reduction targets. In an effort to compel the new government to comply with the *Kyoto Protocol*, a private member’s bill, the *KPIA*, was passed with the support of the opposition parties over the government’s objection.¹⁰⁵ Among other things, the *KPIA* required that the government put forward a Climate Change Plan setting out how Canada would meet its *Kyoto Protocol* obligations.¹⁰⁶ The government issued a Climate Change Plan that was destined to leave Canada far short of its *Kyoto Protocol* GHG reduction target.

The government’s failure to propose a Climate Change Plan that would see Canada meet its *Kyoto Protocol* obligations was the subject of a judicial review application in *Friends of the Earth*. The applicant sought a declaration that the government was in breach of its obligations and an order compelling the government to put forth a Climate Change Plan that would see Canada meet its *Kyoto Protocol* GHG reduction targets. The Court held that the content of a Climate Change Plan under the *KPIA* required numerous “policy-laden considerations which are not the proper subject matter for judicial review.”¹⁰⁷ Justice Barnes further explained that there were “no objective legal criteria which can be applied” to determine whether compliance was achieved.¹⁰⁸ Since the content of the Climate Change Plan could not be subject to judicial review, Justice Barnes reasoned, “it would be incongruous for the Court to be able to order the Minister to prepare a compliant Plan where he has deliberately and transparently declined to do so for reasons of public policy.”¹⁰⁹ Justice Barnes concluded that while the Court might be able to require a Climate Change Plan to be prepared pursuant to the *KPIA*, “the Court has no role to play reviewing the reasonableness of the government’s response to Canada’s *Kyoto* commitments.”¹¹⁰ Justice Barnes’ decision was upheld by the Federal Court of Appeal in a three sentence judgment that indicated that the Court agreed with the result “substantially for the reasons he gave.”¹¹¹

Following Canada’s withdrawal from the *Kyoto Protocol*, the justiciability of climate change issues again came before the Federal Court in *Turp*. The plaintiff claimed that by reason of Parliament’s adoption of the *KPIA*, the executive did not have the right to withdraw

¹⁰¹ *UNFCCC*, *supra* note 18, art 2 [emphasis omitted].

¹⁰² *Kyoto Protocol*, *supra* note 97.

¹⁰³ *Ibid*, art 3.

¹⁰⁴ See *Turp*, *supra* note 99 at para 4.

¹⁰⁵ *KPIA*, *supra* note 98.

¹⁰⁶ *Ibid*, s 5(1).

¹⁰⁷ *Friends of the Earth*, *supra* note 96 at para 33.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* at para 36.

¹¹⁰ *Ibid* at para 46.

¹¹¹ *Friends of the Earth v Canada (Environment)*, 2009 FCA 297 at para 1, leave to appeal to SCC refused, 33469 (25 March 2010).

from the *Kyoto Protocol* without the permission of Parliament.¹¹² The Court affirmed that the “decision to conclude or withdraw from a treaty, falls exclusively under the executive branch of government.”¹¹³ The Court went on to observe that the question of the exercise of this prerogative power is only justiciable in cases where a breach of *Charter* rights is asserted, and no *Charter* breach was asserted in *Turp*.¹¹⁴

Despite what is observed in *Friends of the Earth, Turp*, and some other politically sensitive cases,¹¹⁵ Canada is often said to not have a political question doctrine.¹¹⁶ This is true to the extent that it is meant that Canada does not follow the US political question doctrine. The justiciability of political questions was first raised in the *Charter*-era in *Operation Dismantle v. The Queen*, where the Supreme Court of Canada heard a challenge by an organization seeking to prevent the Canadian government from allowing cruise missile testing by the US on Canadian territory on the basis that it contravened the section 7 right to “life, liberty and security of the person.”¹¹⁷ The US political question doctrine was rejected and the Supreme Court concluded that the issue was justiciable. The Supreme Court went on to dismiss the appeal because on the facts it would be impossible to link cruise missile testing over Canada to an increased threat of nuclear war. The majority agreed with Justice Wilson’s concurring reasons where she concluded that where a claim is framed as a breach of a *Charter* right, the court has an obligation to decide the case.¹¹⁸

Despite rejecting the US political question doctrine, Canada does have principles of justiciability that sometimes lead courts to decline to hear certain questions or cases.¹¹⁹ In *Reference re Secession of Quebec*, the Supreme Court of Canada was faced with an argument that the Supreme Court should decline to answer the reference questions concerning the principles applicable to the separation of Quebec on the grounds that they were inherently political.¹²⁰ The Supreme Court explained that there were two situations where a court may decline to decide a case:

- (i) [I]f to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
- (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.¹²¹

The Supreme Court explained these two criteria by reference to its earlier decision in *Reference re Canada Assistance Plan (B.C.)*, where it held that “the Court’s primary concern is to retain its proper role within the constitutional framework of our democratic form of

¹¹² Parliament repealed the *KPIA* after the commencement of *Turp*, *supra* note 99 but before the decision was rendered by the Federal Court.

¹¹³ *Turp*, *ibid* at para 18 [citation omitted].

¹¹⁴ *Ibid*; *Black v Canada (Prime Minister)* (2001), 199 DLR (4th) 228 (ONCA) at para 46 [*Black*]. See also *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 at paras 248–49, 259.

¹¹⁵ See *United States v Burns*, 2001 SCC 7. See also *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.

¹¹⁶ D Geoffrey Cowper & Lorne Sossin, “Does Canada Need a Political Questions Doctrine?” (2002) 16 SCLR (2d) 343 at 345.

¹¹⁷ [1985] 1 SCR 441 at 448 [*Operation Dismantle*].

¹¹⁸ *Ibid* at 450, 486.

¹¹⁹ Cowper & Sossin, *supra* note 116 at 345.

¹²⁰ [1998] 2 SCR 217.

¹²¹ *Ibid* at para 26.

government,” and explained that the question for the court is whether the question it is asked to decide “has a sufficient legal component to warrant the intervention of the judicial branch.”¹²² Lorne Sossin has suggested that the Supreme Court has, in effect, set out a three-part approach to political questions.¹²³ Does the case pose a legal question? Does the legal question have a significant extralegal aspect? Can the legal and extralegal elements be separated?¹²⁴ If the answer to either of the first two questions is “no,” then a court should answer. The only scenario where a court should decline to answer the question is where a case presents a question with a significant extralegal component that cannot be severed from the legal question. An example of a case found to be nonjusticiable on political grounds is *Tanudjaja v. Canada (Attorney General)*, where the applicant claimed that “Canada’s and Ontario’s failure to implement effective strategies to address homelessness and inadequate housing” constituted a breach of the section 7 rights to life, liberty, and security of the person.¹²⁵ The majority of the Ontario Court of Appeal held that there was “no sufficient legal component to engage the decision-making capacity of the courts.”¹²⁶ The majority went on to observe that the claims were “diffuse and broad,” and that “there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate.”¹²⁷ This last comment raises the question of whether the requirement for a “judicially discoverable or manageable standard” from the US political question doctrine has been imported into Canada’s law of justiciability.¹²⁸

The applicant in *Friends of the Earth*, unlike the claimants in *Tanudjaja*, did not seek an evaluation of government policy; it sought a direction requiring compliance with a statute. *Friends of the Earth* appears to be wrongly decided in that in the face of willful and uncontested non-compliance with the *KPIA*, Justice Barnes and the Court of Appeal declined to grant declaratory relief and failed to grant a mandatory order requiring the Minister to prepare a Climate Change Plan. The government’s failure to propose a Climate Change Plan as required by the *KPIA*, regardless of how the *KPIA* came to be enacted by Parliament, was a straightforward legal question that did not require the Court to stray outside its constitutional role or beyond its expertise. The fact that a government Minister chose not to comply with an Act of Parliament “for reasons of public policy” does not transform the simple legal question of compliance with a statute into an evaluation of government policy.¹²⁹ The trickier question is whether the content of any Climate Change Plan proposed by the Minister would have been justiciable. Rather than opine on this question in *obiter dicta* in the absence of a Climate Change Plan and based on a conclusion that the government had no intention of preparing a compliant Climate Change Plan, the Court should have simply ordered that a Climate Change Plan be prepared that met the requirements of the *KPIA*. If the matter was still disputed after a Climate Change Plan was prepared, the Court could have heard arguments on the justiciability of the content of the Climate Change Plan.

¹²² [1991] 2 SCR 525 at 545.

¹²³ Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Thomson Reuters Canada, 2012) at 195.

¹²⁴ *Ibid.*

¹²⁵ 2014 ONCA 852 at para 50 [*Tanudjaja*].

¹²⁶ *Ibid* at para 27.

¹²⁷ *Ibid* at paras 32–33.

¹²⁸ *Ibid.*

¹²⁹ *Friends of the Earth*, *supra* note 96 at para 27.

The constitutional climate change claims, though political, are framed as breaches of *Charter* rights in the same way that cruise missile testing was framed as a breach of *Charter* section 7 in *Operation Dismantle*. Whether government inaction on climate change violates the section 7 rights to life and security of the person, or even whether failure to take sufficient action on climate change discriminates against young people contrary to section 15, are legal questions that are within the court's area of expertise and would not offend the separation of powers. A court would certainly have jurisdiction to grant declaratory relief if a violation of a *Charter* right was found.¹³⁰ Perhaps the more vexing question is whether a declaration would be a constructive remedy. Constitutional responsibility for the environment is shared in between levels of government. The constitutional climate change claims as currently framed target either the federal government or a provincial government, and not both levels of government. A declaration in respect of one or the other level of government seems pointless when it is clear that adequate climate change mitigation measures cannot be implemented unilaterally by either level of government.¹³¹

The conduct of foreign affairs and, in particular, the decision of the executive to enter into a treaty is not justiciable.¹³² A *Charter* claim challenging the implementation of international agreements through domestic legislation, however, is justiciable.¹³³ But the constitutional climate change claims are not typical *Charter* challenges that target a limit on an individual's rights or freedoms. The constitutional climate change claims instead assert that the efforts of the governments of Canada and Ontario infringe *Charter* rights because they are insufficient to prevent climate change and fail to implement the *Paris Agreement*. The remedies sought in the constitutional climate change claims directly or indirectly seek to compel the government to implement policies sufficient to achieve *Paris Agreement* targets. The plaintiffs seek a finding that the constitutional rights asserted can only be protected by policies that implement the *Paris Agreement* targets. Such a finding would in effect constitutionalize an international agreement and usurp Parliament's and the executive's traditional role in determining how to realize Canada's international commitments.¹³⁴ Constitutionalizing an international agreement runs counter to protecting the executive's ability to conduct foreign affairs and, in particular, through exercising the right to exit international treaties. The constitutionalization of the *Paris Agreement* or its GHG reduction targets may effectively prevent the executive from exiting the *Paris Agreement* as it exited the *Kyoto Protocol*. Regardless of whether exiting the *Paris Agreement* is a desirable outcome or not, it is indisputably a matter reserved to the executive to decide.

An alternative approach to the question of remedy, one that is not clearly sought on the face of the constitutional climate change claims, is that followed by the Netherlands Supreme Court in *Urgenda*. The Netherlands Supreme Court in *Urgenda* issued a declaration that the

¹³⁰ *Brown v Alberta*, 1999 ABCA 256 at para 16; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 46 [*Khadr II*].

¹³¹ This observation may be tested in the appeals of the Provincial carbon tax references which raise, among other things, the question of whether the federal government has authority under the emergency branch of the peace, order and good governance power to unilaterally implement climate change policies.

¹³² *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at para 68; *Black*, *supra* note 114 at para 52; *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*, [1989] 1 All ER 655 (CA) at 658.

¹³³ *Deegan v Canada (Attorney General)*, 2019 FC 960 at para 322 [citation omitted].

¹³⁴ See e.g. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 35 discussing the reluctance of courts to intervene in the legislative process.

Netherlands must reduce GHG emissions by 25 percent by the end of 2020 but declined to prescribe how that was to be done because that would be too much of an intrusion into the executive and legislative roles.¹³⁵ The plaintiffs in the constitutional climate change claims would have to concede that the *Paris Agreement* GHG reduction commitments are not enforceable in a domestic court. Instead, the argument would be that if the court finds that the government climate change actions or inactions infringe the *Charter* rights to life or security of the person, then a declaration can issue without offending the separation of powers. Furthermore, unlike in *Tanudjaja*, there is an obvious and judicially manageable standard to require the government to meet to remedy the breach; the standards accepted by Canada in the *Paris Agreement*. Such an approach resembles a combination of the Supreme Court of Canada's approach in the two *Khadr* cases.¹³⁶ In *Khadr I*, it was held that the standards under section 7 of the *Charter* were consistent with Canada's international commitments in the *Geneva Conventions*.¹³⁷ The Supreme Court of Canada then proceeded in *Khadr II* to grant a declaration that the conduct of Canadian officials had violated section 7, but left it to "the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*."¹³⁸ The value of *Khadr I* and *Khadr II* as precedents may be limited because, as will be discussed below, they related to procedural and legal rights which the *Charter* protects, and not to social and economic rights which have generally been found not to be protected by the *Charter*.

The final remedial issue is one that separates the *Urgenda* decision from the majority decision in *Juliana*. The majority in *Juliana* was unwilling to grant a remedy that was incapable of redressing the harm. Any order of the Court would be unable to solve the problem of global climate change because it is a multi-national problem that requires coordinated international action to solve. The Ninth Circuit concluded that because it did not have power over other countries, any remedy at its disposal could not redress the problem. The Netherlands Supreme Court recognized the limits of its authority and its remedy, but took the opposite approach, finding that it had the power to order the government to do its part to mitigate climate change. The question of redressability is not a feature of the Canadian law of justiciability in the same way that it is in the US. The issue in Canadian law would be framed as one of causation. A claimant in a *Charter* case must establish "a sufficient causal connection" between the challenged government action and the rights infringement.¹³⁹ As will be explained below in the discussion of the interpretation of section 7, in *Bedford* it was held that the government action need only have contributed to or exacerbated an underlying harm.¹⁴⁰ Where a causal connection is proved for the purpose of establishing a *Charter* breach, then it would be incongruous for a court to deny a remedy on

¹³⁵ *Urgenda*, *supra* note 4 at para 8.2.7.

¹³⁶ *Canada (Justice) v Khadr*, 2008 SCC 28 at para 25 [*Khadr I*]; *Khadr II*, *supra* note 130.

¹³⁷ *Khadr I*, *ibid* at para 25; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces of the Field*, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1951, accession by Canada 14 November 1965); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1951, accession by Canada 14 November 1965); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1965, accession by Canada 14 November 1965); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950, accession by Canada 14 November 1965).

¹³⁸ *Khadr II*, *supra* note 130 at para 47.

¹³⁹ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 75 [*Bedford*].

¹⁴⁰ *Ibid* at para 76.

the basis that the remedy could not completely redress the injury caused by the government action. In other words, if a *Charter* breach is established and is not justified, a remedy should be issued in respect of the impugned government action even if it does not solve the entire underlying social problem.

B. INTERPRETING SECTION 7 OF THE *CHARTER*

1. PURPOSIVE INTERPRETATION

The Supreme Court of Canada held in *Ontario v. Canadian Pacific Ltd.* that “environmental protection ... [is] a fundamental value in Canadian society.”¹⁴¹ Consistent with the intention of the drafters of the *Charter*, the Supreme Court further held that, “[l]egislators must have considerable room to manoeuvre in the field of environmental regulation, and s. 7 must not be employed to hinder flexible and ambitious legislative approaches to environmental protection.”¹⁴² The recognition of the importance of the environment and that the Constitution should not hinder environmental protection is a long way from finding that the *Charter* provides for the protection of a healthy environment or mandates measures to mitigate climate change. Would the Supreme Court of Canada take that leap to find that environmental rights exist within the section 7 rights to life and security of the person?

The Supreme Court of Canada’s approach to interpreting *Charter* rights is in flux.¹⁴³ The Supreme Court has at times endorsed a “full and generous interpretation”¹⁴⁴ or a “liberal and generous interpretation”¹⁴⁵ of *Charter* rights. Periodically, the Supreme Court has also reined in its impulse for generosity and emphasized that a generous interpretation of a *Charter* right may overshoot the purpose of the *Charter* right.¹⁴⁶ Recently, Justice Martin in *Poulin* explained that courts should not be “prioritizing generosity over purpose,” and emphasized that purposive interpretation is the correct approach to *Charter* rights.¹⁴⁷ She went on to endorse Peter Hogg’s view that the purpose of a right “can be obtained from the language in which the right is expressed, from the implications to be drawn from the context in which the right is to be found, including other parts of the *Charter*, from the pre-*Charter* history of the right and from the legislative history of the *Charter*.”¹⁴⁸ The Supreme Court’s renewed commitment to purposive interpretation, together with its interest in historical origins, is noteworthy but should not be overstated.¹⁴⁹ Justice Martin went on to explain that some

¹⁴¹ [1995] 2 SCR 1031 at para 55 [*Canadian Pacific*]. See also *R v Hydro-Québec*, [1997] 3 SCR 213 at para 127; *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 226.

¹⁴² *Canadian Pacific*, *ibid* at para 59.

¹⁴³ On constitutional interpretation generally, see Eric M Adams, “Canadian Constitutional Interpretation” in Cameron Hutchinson, *The Fundamentals of Statutory Interpretation* (Toronto: LexisNexis Canada, 2018) 129.

¹⁴⁴ *Reference re ss 193 & 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at 1178.

¹⁴⁵ *Ibid* at 1200.

¹⁴⁶ See *Poulin*, *supra* note 17 at para 55.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid* at para 57.

¹⁴⁹ Recently, there have been efforts to rehabilitate originalism in Canada and there are signs that courts may be more open to historical argument than they have been in many years. See Benjamin Oliphant & Léonid Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism?’” (2016) 42:1 *Queen’s LJ* 107; Léonid Sirota & Benjamin Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 50:2 *UBC L Rev* 505. See also Asher Honickman, “The Living Fiction: Reclaiming Originalism for Canada” (2014) 43:3 *Adv Q* 329.

Charter rights, like the section 11(i) right to the benefit of the lesser punishment where the punishment has changed between the time of commission and time of sentencing in issue in *Poulin*, “confer a particular, constant protection” whereas others “refer to evolving, open-ended standards,” and that the former rights are more likely to be defined by their origins.¹⁵⁰ Examples of evolving, open-ended standards given by Justice Martin include rights that use the words “reasonable” or “unreasonable” and “fundamental justice.”¹⁵¹ The rights to life and security of the person in section 7 are not narrow legal rights like section 11(i), as conceptions of life and security of the person change over time. At the same time, life and security of the person are not purely normative concepts like Justice Martin’s examples.

2. THE TEXT AND ORIGINS OF SECTION 7

The constitutional climate change claims are predicated on environmental rights that appear nowhere in the text of the *Charter*.¹⁵² In fact, an explicit commitment to a healthy environment was rejected by the Special Senate and House of Commons Committee responsible for drafting the *Charter* (“Special Joint Committee”).¹⁵³ The question of constitutional protection for environmental rights arose in the context of the debate over including property rights in section 7 of the *Charter*. One of the rationales offered for not including property rights in section 7 of the *Charter* was that property rights could potentially be raised as an obstacle to environmental protection legislation.¹⁵⁴ New Democratic Party members of the Special Joint Committee also raised the inequity of protecting property rights if there was to be no corresponding protection of social and economic rights, including environmental rights, in section 7 of the *Charter*.¹⁵⁵ Svend Robinson later moved to include a commitment to “the goals of a clean and healthy environment and safe and healthy working conditions”¹⁵⁶ in section 31 of the *Constitution Act, 1982* (as it was then proposed), but the amendment was rejected by the majority of the committee.¹⁵⁷ The committee debates over environmental rights show that the framers of the *Charter* shared an understanding that environmental rights, whether framed as a right to a healthy environment or otherwise, were not protected by the *Charter*.

The framers’ understanding of the *Charter* has been found to be of little significance in the interpretation of words in the *Charter*. The use of the framers’ views arose in *Re B.C. Motor Vehicle Act*,¹⁵⁸ where the issue was whether the words “fundamental justice” in section 7 of the *Charter* meant procedural fairness in the same way as the words “natural justice” are

¹⁵⁰ *Poulin*, *supra* note 17 at para 70.

¹⁵¹ *Ibid.*

¹⁵² The Supreme Court of Canada recently reaffirmed that the starting point for purposive constitutional interpretation is the text of the relevant section: *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at paras 8–13 [9147-0732 *Québec inc.*].

¹⁵³ On the Special Joint Committee, see generally Adam M Dodek, ed, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018).

¹⁵⁴ *Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 44 (23 January 1981) at 16 (Laurier Lapierre).

¹⁵⁵ *Ibid.* at 19 (Svend Robinson) and 21 (Lorne Nystrom). For further discussion, see Dwight Newman & Lorelle Binnion, “The Exclusion of Property Rights from the *Charter*: Correcting the Historical Record” (2015) 52:3 *Alta L Rev* 543 at 554.

¹⁵⁶ *Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 49 (30 January 1981) at 8.

¹⁵⁷ *Ibid.*

¹⁵⁸ [1985] 2 SCR 486.

understood, or whether they pointed to a more robust concept of substantive fairness. The Supreme Court of Canada held that the framers' views as expressed in the Minutes of the Proceedings and Evidence of the Special Joint Committee should only be given "minimal weight" in interpreting the *Charter*.¹⁵⁹ Justice Lamer, writing for the majority, explained that if "the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth."¹⁶⁰ *Re B.C. Motor Vehicle Act* leaves unanswered the question of whether history that explains the omission of rights from the *Charter* is any different than history that explains the meaning of words in the *Charter*.

The analogous grounds approach to the section 15 guarantee of equality is one example of how the Supreme Court has used purposive interpretation to extend the reach of the *Charter* beyond its text.¹⁶¹ Section 15 expressly prohibits discrimination on the basis of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."¹⁶² The Supreme Court has found that section 15 also prohibits discrimination on grounds that are analogous to the grounds expressly set out in the text. Justice Wilson, writing for the majority in *Andrews*, observed that "the discrete and insular minorities of tomorrow will include groups not recognized as such today," and explained that accordingly, the *Charter* must be "interpreted with sufficient flexibility" to allow for protection of those groups.¹⁶³ The interpretive approach to section 15 may not be applicable to a claimed right to a healthy environment in the context of section 7, as the text of section 15 may be read as providing a non-exhaustive list of prohibited grounds of discrimination that necessitates further elaboration by courts.

A claim that an existing *Charter* right like section 7 protects a right to a healthy environment is perhaps more analogous to the claim that freedom of association guaranteed by section 2(d) protects collective bargaining and the right to strike. When the question of the constitutional protection of collective bargaining and the right to strike first came to the Supreme Court of Canada, Justice McIntyre in a concurring decision in *Reference Re Public Service Employee Relations Act (Alta.)*,¹⁶⁴ focused upon what he considered to be the significance of the obvious omission of these rights from the *Charter*. Justice McIntyre explained that both the right to bargain collectively and the right to strike were discussed by the Special Joint Committee. He went on to note that a resolution to include a right to bargain collectively was proposed but not adopted, and that a resolution for a right to strike was never proposed. The Special Joint Committee, he concluded, did not intend for the right to strike to be protected by the *Charter*. Justice McIntyre observed that the constitutions of some other developed countries contained express provisions protecting the right to strike. He then reasoned that "[t]he omission of similar provisions in the *Charter*, taken with the fact that the overwhelming preoccupation of the *Charter* is with individual, political, and democratic rights with conspicuous inattention to economic and property rights, speaks strongly against any implication of a right to strike."¹⁶⁵ Justice McIntyre concluded that "if

¹⁵⁹ *Ibid* at 509.

¹⁶⁰ *Ibid*.

¹⁶¹ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*].

¹⁶² *Charter*, *supra* note 2, s 15.

¹⁶³ *Andrews*, *supra* note 161 at 153.

¹⁶⁴ [1987] 1 SCR 313 [*Reference Re PSERA*].

¹⁶⁵ *Ibid* at 413.

s. 2(d) is read in the context of the whole *Charter*, it cannot ... support an interpretation of freedom of association which could include a right to strike.”¹⁶⁶

Chief Justice Dickson, writing for himself and Justice Wilson, took a different approach to the interpretation of section 2(d) of the *Charter* in dissenting reasons in *Reference Re PSERA*. Rather than focus on the omission of express language and the historical explanation for the omission, he looked to the purpose of the guarantee of freedom of association to find its meaning. His wide-ranging analysis looked to, among other things, Canada’s international law commitments which he described as “a relevant and persuasive source for interpretation of the provisions of the *Charter*.”¹⁶⁷ Chief Justice Dickson concluded that “effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services.”¹⁶⁸ Chief Justice Dickson’s dissenting reasons in *Reference Re PSERA* are the foundation for Justice Abella’s majority decision in *Saskatchewan Federation of Labour v. Saskatchewan*, which reversed the Supreme Court’s earlier conclusion that freedom of association did not protect the right to strike.¹⁶⁹ The Supreme Court of Canada’s eventual recognition of a right to strike in section 2(d) of the *Charter* despite the framers’ deliberate omission of an express right to strike suggests that the conscious omission of express environmental rights from the *Charter* is not an insurmountable obstacle to the eventual recognition of such rights.

3. SECTION 7

Existing jurisprudence suggests that a serious environmental threat to life and security of the person could be found to be a breach of section 7 of the *Charter*. The courts have indicated that the rights to life and security of the person may have a broader ambit than suggested by the text of section 7. The plurality decision in *Chaoulli v. Quebec (Attorney General)* concluded that a prohibition on private health care insurance combined with inadequate delivery of health care by the government interfered with the section 7 right to life.¹⁷⁰ The allegation in *Chaoulli* was not limited to life-saving medical care, and included complaints regarding the availability of hip and knee operations and the psychological effects of delayed medical care. Justices McLachlin and Major held, “[w]here lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness.”¹⁷¹ The Supreme Court’s finding in *Chaoulli* echoes earlier findings in *Rodriguez v. British Columbia (Attorney General)*¹⁷² and *Morgentaler*,¹⁷³ which held that restrictions on suicide and abortion respectively were held to violate the section 7 right to security of the person because, among other things, the restrictions caused intolerable psychological distress. The Supreme Court’s

¹⁶⁶ *Ibid.* Justice McIntyre cited the Special Joint Committee at 412, and used similar logic dissenting in *R v Morgentaler*, [1988] 1 SCR 30 [*Morgentaler*], concluding at 148 that “no right of abortion can be found in Canadian law, custom or tradition, and that the *Charter*, including s. 7, creates no further right.”

¹⁶⁷ *Reference Re PSERA*, *supra* note 164 at 349.

¹⁶⁸ *Ibid* at 371.

¹⁶⁹ 2015 SCC 4 at para 75 [*Saskatchewan Federation of Labour*].

¹⁷⁰ 2005 SCC 35 at para 124 [*Chaoulli*].

¹⁷¹ *Ibid* at para 123.

¹⁷² [1993] 3 SCR 519.

¹⁷³ *Morgentaler*, *supra* note 166.

conclusion in *Chaoulli* can only be understood to mean that the section 7 rights to life and security of the person include a measure of protection from serious threats to what may be called “quality of life.”¹⁷⁴ *Chaoulli* stands for the proposition that where the government fails to provide adequate healthcare, it cannot restrict citizens from seeking out private healthcare.¹⁷⁵ So while *Chaoulli* shows that the section 7 rights to life and security of the person are defined broadly, it does not affirm any entitlement to state action to provide healthcare.

The Supreme Court of Canada has shown an increasing willingness in recent years to use international law as an interpretive aid to help define the scope of *Charter* rights. As seen in *Saskatchewan Federation of Labour*, an expansive interpretation of a *Charter* right may be built on the foundation of Canada’s international commitments.¹⁷⁶ The Supreme Court held in *R. v. Hape* that “[i]n interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada’s binding obligations under international law where the express words are capable of supporting such a construction.”¹⁷⁷ This is consistent with other statements that suggest that Canada’s international agreements provide something like a floor in the context of human rights.¹⁷⁸ Several justices have observed that “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”¹⁷⁹ In the specific case of section 7, the Supreme Court found in *Khadr I* that “[t]he principles of fundamental justice are informed by Canada’s international human rights obligations.”¹⁸⁰ It follows, then, that the rights to life and security of the person may also take meaning from Canada’s international commitments. Even proponents of a constitutional right to a healthy environment concede that there is “no binding global treaty recognizing the right to a healthy environment.”¹⁸¹ If a right to a healthy environment is to be found in Canada’s international law commitments, it must be inferred from various bilateral and multilateral environmental commitments, and the commitment in the *International Covenant on Economic, Social and Cultural Rights* to take steps for the “improvement of all aspects of environmental and industrial hygiene.”¹⁸² This is too thin a foundation on which to build a constitutional right to a healthy environment.

Rather than discovering a free-standing right to a healthy environment in section 7, a more plausible approach for the courts would be to find that the particular phenomenon of climate

¹⁷⁴ *Chaoulli*, *supra* note 170 at para 42.

¹⁷⁵ See also *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 93 [PHS].

¹⁷⁶ *Saskatchewan Federation of Labour*, *supra* note 169 at para 157.

¹⁷⁷ 2007 SCC 26 at para 56.

¹⁷⁸ The Supreme Court of Canada recently reaffirmed the idea that the *Charter* is usually interpreted to guarantee at least as much protection as required by Canada’s binding international commitments and called it “the presumption of conformity” in 9147-0732 *Québec inc.*, *supra* note 152 at paras 30–34.

¹⁷⁹ *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 23; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 70. See also *Saskatchewan Federation of Labour*, *supra* note 169 at para 157.

¹⁸⁰ *Khadr I*, *supra* note 136 at para 29 [citation omitted].

¹⁸¹ David R Boyd, “Constitutional Recognition of the Right to a Healthy Environment: Making a Difference in Canada,” White Paper #1 (David Suzuki Foundation, 2013) at 14. For a discussion of the right to a healthy environment, *Charter* section 7, and climate change claims, see Cameron Jefferies, “Filling the Gaps in Canada’s Climate Change Strategy: ‘All Litigation, All the Time...?’” (2015) 38:5 *Fordham Intl LJ* 1371 at 1395–1404.

¹⁸² 19 December 1966, 993 UNTS 3, art 12(2)(b) (entered into force 3 January 1976, accession by Canada 19 May 1976).

change constitutes a serious threat to life and security of the person much like the Netherlands Supreme Court in *Urgenda*. Climate change in this sense is a danger like drug use in *PHS* or activities associated with prostitution in *Bedford*. Even though the government was not responsible for drug use or prostitution, the criminal law restrictions on those activities exacerbated risks or prevented the mitigation of risks of those activities. The Supreme Court accordingly found that the criminal restrictions in *PHS* and *Bedford* violated section 7 rights to life and security of the person. The Supreme Court in *Bedford* held that there need only be a “sufficient causal connection” between the impugned government action and the harm suffered by the claimant, and that this connection “is satisfied by a reasonable inference, drawn on a balance of probabilities.”¹⁸³ The Supreme Court also dismissed the government’s argument that the cause of the harm was actually the acts of third parties — pimps and johns.¹⁸⁴ In the context of climate change, this suggests that it may be enough that government action exacerbates the risk of climate change.

The alleged failings of Canada and Ontario in relation to climate change are not that the policies exacerbate an existing threat to life or security of person; it is that the policies are inadequate to address the problem. This is a different kind of allegation than was made in *Bedford* and *PHS*. The constitutional climate change claims more closely resemble *Tanudjaja*, where it was alleged that Canada and Ontario’s policies to mitigate homelessness were insufficient. The plaintiffs in the constitutional climate change claims are objecting to government inaction, not government action. In other words, the constitutional climate change claims are, in essence, positive rights claims. Whether or not the *Charter* protects positive rights, particularly social and economic rights, is one of the great unresolved questions in Canadian law.¹⁸⁵

C. THE CHARTER AND POSITIVE RIGHTS

The issue of whether the *Charter* section 7 rights protect a healthy environment — specifically in the context of climate change — was raised by protesters arrested for breaching a court order to remain away from sites for the construction of the Trans Mountain Pipeline.¹⁸⁶ The protesters raised the defence of necessity in response to their arrest, claiming that government inaction on climate change compelled them to breach the court order. Justice Affleck observed that the reason that the protesters’ freedom was at risk was not because of climate change, but because they had chosen to breach a court order. Nevertheless, he went on in *obiter dicta* to consider the protesters’ claim that section 7 protects a right to a healthy environment. Justice Affleck observed that “[the protesters] argue that government action must foster ‘a climate system capable of sustaining human life’ and that the enhancement of the Trans Mountain Pipeline is antithetical to that obligation. The jurisprudence does not support the conclusion that there is such a positive obligation.”¹⁸⁷ Whether or not Justice

¹⁸³ *Bedford*, *supra* note 139 at para 76 [citation omitted].

¹⁸⁴ *Ibid* at para 89.

¹⁸⁵ Vasuda Sinha, Lorne Sossin & Jenna Meguid, “*Charter* Litigation, Social and Economic Rights & Civil Procedure” (2017) 26 J L & Soc Pol’y 43 at 44.

¹⁸⁶ *Trans Mountain Pipeline ULC v Mivasair*, 2019 BCSC 50.

¹⁸⁷ *Ibid* at para 68. This point was not appealed: see *Trans Mountain Pipeline ULC v Mivasair*, 2020 BCCA 255 at para 17. While the British Columbia Court of Appeal did not hear the claim for a healthy environment, it recently considered a *Charter* section 7 positive rights claim in the context of veterans’ injury benefits alleged to be inadequate in *Scott v Canada (Attorney General)*, 2017 BCCA 422. The Court indicated that in its view “s. 7 of the *Charter* only deals with deprivations that result from

Affleck's *obiter* conclusion is correct, he has identified an important question. The question of whether the *Charter* provides for positive rights is one of the main conceptual issues that must be resolved if it is to be determined whether the *Charter* provides a right to a healthy environment.

Isaiah Berlin and other liberal political philosophers have made a distinction between negative liberties and positive liberties.¹⁸⁸ Negative liberties are those that require others to refrain from interfering with the individual rights holder. A classic example of a negative liberty is freedom of expression, which generally requires the state to refrain from limiting an individual's expressive activities. Positive liberties are those that require others to take action to realize the individual rights holder's liberty. An example of a positive liberty is a right to a basic income or welfare which requires a payment from the state. As with so many things, what once was portrayed as a black and white binary, when viewed with a post-modern eye is revealed to be painted in many shades of grey. Closer examination shows that negative rights sometimes require action and expenditure, while the realization of positive rights can require non-interference. Indeed, as Jeremy Waldron explained, "[o]ne and the same right may generate both negative and positive duties: some will require omissions while others will require actions and the expenditure of resources."¹⁸⁹ The definitional uncertainty around negative and positive rights, while real, exists mainly on the margins. When a requirement for definitional purity is set aside, it can be seen that, generally speaking, rights can be categorized as negative or positive in a rough way that most people understand. For example, expenditures on state measures required to facilitate or accommodate expression are orders of magnitude smaller than expenditures on social welfare programs such as universal healthcare. From a practical perspective, we can say that negative rights generally require the state to refrain from action and do not require material expenditures, whereas positive rights require state action and often entail material expenditures.

Constitutions in the liberal tradition typically provide for protection of negative rights, not positive rights.¹⁹⁰ Such constitutions are premised on the view that the complex policy questions raised by positive rights claims — including issues of taxation and expenditure — are the domain of legislatures, not courts. Allocating complex policy questions to legislatures is both a normative choice and one driven by practical considerations of institutional design. The choice is normative in the sense that many liberal theorists consider elected representatives to be the appropriate decision-makers in questions of the allocation of state resources. Foremost among practical reasons for allocating responsibility for spending decisions to legislatures is the fact that legislatures typically have significantly more resources to study and evaluate policy options, and have more flexible tools at their disposal to implement policy. Just as important, however, is that legislatures are responsible for both choosing policies and setting the levels of taxation necessary to fund those policies. Separation of policy-making and fundraising functions can be problematic, as Emmett Macfarlane explains: "[i]ncentives for managing and allocating resources in a society

government action" (at para 88).

¹⁸⁸ Isaiah Berlin, *Four Essays on Liberty* (London, UK: Oxford University Press, 1969) at 130–31.

¹⁸⁹ Jeremy Waldron, "Rights in Conflict" (1989) 99:3 *Ethics* 503 at 511.

¹⁹⁰ See Lawrence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23:1 *Const Forum Const* 41 at 42.

become warped in a context where the body that dictates spending is not the same as the body that collects public funds.”¹⁹¹

The US Constitution, particularly the Bill of Rights, is an artifact of late enlightenment thinking crafted in the aftermath of revolution. As such, the US Constitution is generally understood to only protect negative rights. Judge Richard Posner famously observed that: “the Constitution is a charter of negative rather than positive liberties.... The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.”¹⁹² Canada’s *Charter*, though a much more modern constitution, is in the liberal tradition favoured by its driving force, Pierre Trudeau, and is accordingly framed primarily in terms of negative rights. Positive rights in the *Charter* stick out as obvious exceptions: the rights to vote and to stand for election;¹⁹³ rights to information in the criminal context;¹⁹⁴ the right “to be tried within a reasonable time”;¹⁹⁵ the right to an interpreter in criminal proceedings;¹⁹⁶ and the right to minority language education.¹⁹⁷ Most of the express positive rights in the *Charter* may be characterized in one way or another as procedural and not requiring the provision of a social program.¹⁹⁸ The government expenditures required in the context of legal rights and democratic rights are expenditures to ensure a fair legal process and a fair democratic process. The obvious exceptions are the minority language education rights in section 23, which require the provinces to deliver minority language education programs.¹⁹⁹

Even though the *Charter* is, for the most part, framed in terms of negative rights, the Supreme Court of Canada has allowed that even the most negative of *Charter* rights may have positive dimensions that require state action. The Supreme Court of Canada has set out an approach in the context of the section 2 fundamental freedoms that first asks whether the asserted right is a positive right and then applies criteria to determine when a positive right will be found to be protected. The Supreme Court’s criteria for determining whether a positive right is protected by the *Charter* may be stated as follows,

- (1) that the claim is grounded in a fundamental freedom ... rather than in access to a particular statutory regime;
- (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with [the fundamental freedom]; and
- (3) that the government is responsible for the inability to exercise the fundamental freedom.²⁰⁰

¹⁹¹ Emmett Macfarlane, “Positive Rights and Section 15 of the *Charter*: Addressing a Dilemma” (2018) 38 NJCL 147 at 150.

¹⁹² *Jackson v Joliet*, 715 F (2d) 1200 at 1203 (7th Cir 1983) [citations omitted].

¹⁹³ *Charter*, *supra* note 2, s 3.

¹⁹⁴ *Ibid*, ss 10(a), 11(a).

¹⁹⁵ *Ibid*, s 11(b).

¹⁹⁶ *Ibid*, s 14.

¹⁹⁷ *Ibid*, s 23. See also *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*]; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13.

¹⁹⁸ Another way to put this is that the positive rights in the *Charter* are consistent with the “judicial role,” see David, *supra* note 190 at 45.

¹⁹⁹ *Charter*, *supra* note 2, s 23.

²⁰⁰ 2007 SCC 31 at para 30 [*Baier*]; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at paras 24–26.

Typically, these criteria have been considered in the context of legislative schemes alleged to be underinclusive rather than in claims that the government has failed to legislate at all. The Supreme Court in *Baier* hinted that these criteria might also apply to a situation where the government has failed to legislate. The Supreme Court explained that whether a rights claim is a positive rights claim depends on whether the claim is that “the government must legislate or otherwise act to support or enable an ... activity.”²⁰¹

The distinction between claims arising from underinclusive legislative regimes and claims of failure to legislate is also seen in section 15 jurisprudence. Courts are comfortable deploying section 15 to address discriminatory legislative omissions. Perhaps the most notable example of this is *Vriend v. Alberta*,²⁰² where Alberta omitted sexual orientation from the grounds protected in its *Individual’s Rights Protection Act*.²⁰³ The Supreme Court found the omission discriminatory, and remedied it by reading the words sexual orientation into the text of the legislation. What is less clear is how the Supreme Court would have dealt with the question of the failure of a legislature to provide any human rights protection at all. Could section 15 be interpreted to require the enactment of human rights codes? Justice La Forest observing generally of *Charter* jurisprudence wrote that “[i]t has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open.”²⁰⁴

Positive rights issues have also arisen in the context of section 7 of the *Charter*. The use of section 7 as the basis for a positive rights claim against the government to compel action may strike many people as inconsistent with the common understanding that section 7 is a negative right that protects against government encroachment on personal freedom. Indeed, as Chief Justice McLachlin has noted, “[n]othing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state’s ability to *deprive* people of these.”²⁰⁵ Several cases stick out as obvious opportunities where the Supreme Court of Canada could have endorsed a positive rights approach to section 7 but declined to do so. The Supreme Court in *Gosselin* considered a claim that section 7 guaranteed a right to “a level of social assistance sufficient to meet basic needs.”²⁰⁶ In *British Columbia (Attorney General) v. Christie*, the Supreme Court considered whether a right to access the courts, based on the principle of the rule of law and the legal rights in the *Charter*, included a right to counsel in all proceedings, effectively seeking a constitutionalization of legal aid.²⁰⁷ The expansive positive rights claims in both *Gosselin* and *Christie* were dismissed. The Supreme Court of Canada also conspicuously declined to grant leave in *Tanudjaja*, despite a dissenting judgment in the Ontario Court of Appeal finding that Ontario’s and Canada’s allegedly ineffective homelessness policies contravened section 7.²⁰⁸ Despite these prominent failures of positive rights claims under section 7, the Supreme Court

²⁰¹ *Baier*, *ibid* at 35.

²⁰² [1998] 1 SCR 493 [*Vriend*].

²⁰³ RSA 1980, c I-2.

²⁰⁴ *Vriend*, *supra* note 202 at para 64.

²⁰⁵ *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 81 [*Gosselin*] [emphasis in original].

²⁰⁶ *Ibid* at para 76.

²⁰⁷ 2007 SCC 21 [*Christie*].

²⁰⁸ *Tanudjaja*, *supra* note 125 at para 62.

of Canada has repeatedly affirmed that it has no intention of foreclosing the possibility of a successful positive rights claim in the future.²⁰⁹ Chief Justice McLachlin, writing for the majority in *Gosselin*, stated that she was keeping “open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.”²¹⁰ Justice Arbour, in dissent, made the case that section 7 guarantees a positive right to the basic means of subsistence. She concluded that “far from resisting this conclusion, the language and structure of the *Charter* — and of s. 7 in particular — actually *compel* it.”²¹¹ The juxtaposition of the Supreme Court’s words and outcomes on positive rights in the context of section 7 make it hard to know what the Supreme Court really thinks about positive rights claims.

A slightly different positive rights question is whether the state has a duty to create background conditions for the exercise of rights through legislation or otherwise. This is, in essence, the question raised by Justice Staton in *Juliana* when she wrote about unwritten fundamental rights that are a necessary predicate for the existence of other rights. For Justice Staton, the right to a healthy environment was a fundamental requirement for the existence of the state and, by extension, the foundation of all other constitutional rights. One could imagine it being argued in the Canadian context that a healthy environment is a precondition to the right to life and security of the person in section 7. A similar argument was put forward in *Christie*, where it was contended that the right to counsel was a “precondition” to the rule of law.²¹² Many *Charter* rights as we understand them today take for granted the underlying conditions that make the exercise of those rights possible. For example, the apparatus of the modern state provides many of the basic conditions for the exercise of *Charter* rights. This is certainly the case with the right to collective bargaining and right to strike recognized to be contained within freedom of association, but it may also be said of other rights. For example, Chief Justice Dickson mused in *Reference Re PSERA* whether freedom of expression and freedom of the press might require government regulation to prevent monopolization of ownership of the press.²¹³

Even in a hypothetical reality where the *Competition Act*²¹⁴ does not exist, it is difficult to imagine a claim pursuant to section 2(b) of the *Charter* to the effect that freedom of the press is infringed by concentration of media ownership. And it is still harder to imagine the courts in such a hypothetical reality requiring Parliament to enact antimonopoly legislation or otherwise take action in respect of a concentration of media ownership. Would it be any different if the court was faced with a scenario where the government ceased to provide universal healthcare, and it was claimed that public healthcare was a precondition for the right to life or security of the person? It is both possible to acknowledge the fundamental nature and importance of a healthy environment or universal healthcare, and to question whether under the rubric of the *Charter* a court would order Parliament to fashion an

²⁰⁹ See *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 180. See also *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 188.

²¹⁰ *Gosselin*, *supra* note 205 at para 83.

²¹¹ *Ibid* at para 309 [emphasis in original].

²¹² *Christie*, *supra* note 207 at para 18.

²¹³ *Reference Re PSERA*, *supra* note 164 at 361.

²¹⁴ RSC 1985, c C-34.

environmental protection regime or universal healthcare program from whole cloth.²¹⁵ If requiring governments to institute significant legislative programs is unthinkable, then why has the Supreme Court been so consistent in leaving the question of its power to do so open? An answer may be unknowable, but it may be ventured that the Supreme Court of Canada's choice to leave open the question of its power under the *Charter* to remedy a failure to legislate — even if it is never exercised — may be a conscious or unconscious institutional strategy to encourage or subtly threaten legislatures to ensure that they provide adequate programs to facilitate the realization of *Charter* rights. In this roundabout way, the threat to encroach upon the legislative domain may actually promote democratic resolution of failures to legislate.

V. CONCLUSION

The constitutional climate change claims raise a serious issue that is worthy of judicial consideration. The success of one or more of these claims depends on whether Canadian courts, and ultimately the Supreme Court of Canada, move away from the historical aversion to adjudicating social and economic rights and, in particular, what may be broadly described as positive rights. The constitutional climate change claims seek to have Canada's and Ontario's legislation and policy declared inadequate, and require the implementation of measures sufficient to meet the *Paris Agreement* GHG reduction targets. This is not very different from the *Charter* challenge to housing and homelessness legislation and policies in *Tanudjaja* or the claim that the *Charter* protects welfare in *Gosselin*. An advocate seeking to distinguish the constitutional climate change claims from these earlier failures to establish *Charter* protection for social and economic rights might point out that climate science and the *Paris Agreement* provide judicially manageable standards by which to measure the adequacy of government actions to mitigate the problem. The constitutional climate change cases may also be distinguished on the basis that they require legislation, and do not necessarily require significant government expenditure in the way that welfare or social housing necessarily require. Distinguishing the constitutional climate change cases on these bases is fair, but misses the real reason that earlier social and economic rights cases failed; fundamentally those cases failed because courts were unwilling to tread in the territory of the legislature and executive. Significant environmental legislation that will see Canada meet its *Paris Agreement* targets may require significant measures affecting industrial production of energy and the consumption of that energy by individuals. Such measures require expertise to develop, involve the balancing of many competing interests, and may engage the taxation power. Developing a comprehensive plan to meet the challenge of climate change is an exercise no more suited to courts than housing and homelessness policy. If a Canadian court were to overcome the traditional resistance to vindicating social and economic rights claims, the only appropriate remedy would be akin to that issued in *Urgenda* where the Court issued a declaration that the government of the Netherlands was required to reduce GHG emissions by 25 percent by 2020, and left it to the government to choose the means by which to achieve this objective. The remedy in Canada would be to declare that Canada, with both levels of government working together, is obliged to implement policies to achieve GHG reductions

²¹⁵ See e.g. *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 571: "section 7 of the Charter's guarantees of life, liberty and security of the person do not include the positive right to state funding for health care."

of 30 percent below 2005 levels by 2030, and that the government is free to determine how to meet that objective. Although such an outcome may seem unlikely today, if years pass without meaningful progress on mitigation of climate change and cooperation between levels of government, the case for courts to intervene to break a deadlock or force legislative action on climate change may become more compelling.²¹⁶

VI. EPILOGUE: CONFLICTING DECISIONS ON JUSTICIABILITY IN *LA ROSE* AND *MATHUR*

After this article was presented to the CELF Conference and shortly before the *Alberta Law Review* went to press, decisions on motions to strike in *La Rose* and *Mathur* were released in short succession by the Federal Court and Ontario Superior Court of Justice.²¹⁷ The decisions in the two cases weigh the issues discussed in this article on a preliminary basis appropriate to the context of a motion to strike. Both decisions find the existence of positive environmental rights under sections 7 and 15 to be triable issues which means, in *Mathur* at least, those claims will get full consideration in due course. Accordingly, this Epilogue will not focus on the questions of the interpretation of sections 7 and 15 or positive rights.²¹⁸ Notably, however, the decisions diverge on the question of justiciability. The Federal Court dismissed the claims in *La Rose* on the grounds that they were political and put into issue a complex network of policies, actions, and inactions ill-suited to adjudication by a court. The Ontario Court, in contrast, concluded that *Mathur* was more narrowly focused on the Ontario climate plan and GHG reduction target and was accordingly appropriate for judicial scrutiny.

Motions to strike are an important tool for courts to dispose of meritless claims without a full trial. The legal test for striking claims is well established: the court must take the pleaded allegations as true and ask “whether it is plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success.”²¹⁹ The Federal and Ontario Courts both stated the correct test and identified the applicable case law. The divergent outcomes of the two cases, however, is foreshadowed in the emphasis on different aspects of the motion to strike case law. The Federal Court explained that “[d]isposing of novel claims that are doomed to fail is ‘critical to the viability of civil justice and public access.’”²²⁰ The Ontario Court in *Mathur* acknowledged this point, but went on to quote *R. v. Imperial Tobacco Canada Ltd.* for the premise that “[t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.”²²¹ The preceding quotations capture the difference in tone of the two decisions; the Federal Court in *La Rose* is skeptical of what it sees as a sprawling and overtly political pleading whereas the Ontario Court approaches the pleading in *Mathur* from an open and

²¹⁶ See generally Edward J. Waitzer & Douglas Sarro, “Climate Change: A Template for Judicial Activism in Response to Systemic Risks” (2019) 62:2 Can Bus LJ 149.

²¹⁷ *La Rose v Canada*, 2020 FC 1008 [*La Rose FC*]; *Mathur v Ontario*, 2020 ONSC 6918 [*Mathur SC*].

²¹⁸ *La Rose* also dismissed the Plaintiffs’ claim based on the alleged public trust doctrine. The Court found the question of the public trust doctrine was justiciable but that it does not exist in Canadian law (*La Rose FC*, *ibid* at para 100).

²¹⁹ *Ibid* at para 16, citing *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980.

²²⁰ *La Rose FC*, *ibid* at para 25 citing *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 19.

²²¹ *Mathur SC*, *supra* note 217 at para 40 quoting *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 21.

generous standpoint. This tension is an obvious theme in the motion to strike case law, but it rarely plays out with parallel claims in different courts at the same time.

A. *LA ROSE*

The Attorney General of Canada's primary ground of attack on the claim in *La Rose* was that it was not justiciable. The claim, according to the Attorney General, was overbroad, diffuse, and sought inappropriate remedies. In particular, the Attorney General focused on the fact that the Plaintiffs assert that the constitutional breach is what they call Canada's "Impugned Conduct." Impugned Conduct is defined by the Plaintiffs as a variety of acts, omissions, and policies affecting GHG emissions, including the acquisition of the Trans Mountain Pipeline.

Justice Manson reviewed the case authorities on justiciability and determined that "[t]he question to be decided is whether the Court has the institutional capacity and legitimacy to adjudicate the matter."²²² The Court went on to explain that the issue of capacity and legitimacy was synonymous with the question of appropriateness and ability. Neither the complexity of the claim nor its political sensitivity, the Court observed, was a bar to judicial involvement.²²³ To be justiciable, a matter of policy "must be translated into law or state action"²²⁴ and *Charter* review must be "connected to specific laws or state action."²²⁵

The Plaintiffs asserted that minute examination of every state act and omission in relation to GHGs was unnecessary and that the claim was really aimed at the cumulative effects of those acts and omissions.²²⁶ The Court interpreted the Plaintiffs' attempt to characterize the claim as being about the cumulative effects of Canada's acts and omissions in respect of GHG emissions to "put Canada's overall policy choices at issue."²²⁷ The Court explained that, "the Plaintiffs' approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of the Defendants ... effectively attempts to subject a holistic policy response to climate change to *Charter* review."²²⁸ The determination of policy to address important societal issues like climate change "fall more appropriately on the legislative and executive branches of government."²²⁹ The Court explained, "there are some questions that are so political that the Courts are incapable or unsuited to deal with them."²³⁰

The Federal Court concluded that the declaratory relief sought by the Plaintiffs was inappropriate. The Court held that the Plaintiffs were seeking "a legal opinion on the interpretation of the *Charter*, in the absence of clearly defined law or state action that brings the *Charter* into play."²³¹ The Court went on to consider the Plaintiffs' request for an accounting of GHG emissions and an order directing the Canadian government to prepare a climate action plan that would see Canada meet its *Paris Agreement* targets. Justice

²²² *La Rose* FC, *supra* note 217 at para 29.

²²³ *Ibid* at para 33.

²²⁴ *Ibid* at para 38.

²²⁵ *Ibid* at para 43.

²²⁶ *Ibid*.

²²⁷ *Ibid* at para 46.

²²⁸ *Ibid* at para 40.

²²⁹ *Ibid* at para 44.

²³⁰ *Ibid* at para 40.

²³¹ *Ibid* at para 51.

Manson compared the remedies sought to the remedies sought to address homelessness in *Tanudjaja* and the attempt to force the Canadian government to produce a plan to meet *Kyoto Protocol* GHG targets in *Friends of the Earth*; in both cases the Court dismissed the remedies as nonjusticiable.²³² Justice Manson also noted that the remedies sought by the Plaintiffs would require ongoing judicial supervision and distinguished *Doucet-Boudreau* where the Court undertook the supervision of the construction of French-language schools on the basis that the supervisory role was limited and the case was decided pursuant to *Charter* section 23 which provides for minority language education rights.²³³ Though it is not articulated well, the Court seems to be suggesting that the task of supervising a national response to climate change is orders of magnitude more complicated than supervising the construction of several schools and accordingly beyond the institutional competence of the Court.

B. *MATHUR*

Mathur, as explained previously, is set against a backdrop of the Conservative Government cancelling Ontario's GHG cap and trade program. Following cancellation, Ontario adopted a plan called "Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan" (the Plan) and a GHG reduction target consistent with the *Paris Agreement* (the Target), though less ambitious than the target it replaced.²³⁴ The Applicants in *Mathur* seek declarations that the Plan and the Target are unconstitutional pursuant to *Charter* sections 7 and 15 and a declaration that *Charter* section 7 includes the right to a stable climate system.

Ontario asserted that the Plan and the Target were not law and were merely "an expression of the provincial government's intentions and aspirations" and accordingly not subject to judicial scrutiny.²³⁵ Ontario pointed to similar aspirational statements in other instruments including the goal to reduce child poverty by 25 percent found in the *Poverty Reduction Act* which it asserted were of no legal effect and not capable of judicial review.²³⁶ Ontario further submitted that the Plan and the Target were not law and not susceptible to judicial review because they do not affect how people use energy and create GHG emissions as such things are regulated through other statutes and regulations.²³⁷

The Applicants in *Mathur* responded to Ontario by asserting the Plan and the Target were law and that transit authority policies governing the advertising on buses had been found to be law for the purpose of satisfying the prescribed by law requirement in section 1 of the *Charter*.²³⁸ The Court explained that the question of whether or not the Plan and Target are law is "misguided" because the preparation and promulgation of the Plan and Target are state action that is subject to judicial review.²³⁹ Justice Brown further explained that Plan and Target are legislatively mandated and sub-delegated to the Ministry of the Environment,

²³² *Ibid* at paras 53–54.

²³³ *Ibid* at para 56.

²³⁴ *Mathur SC*, *supra* note 217 at paras 28–29.

²³⁵ *Ibid* at para 48.

²³⁶ *Ibid*; *Poverty Reduction Act*, 2009, SO 2009, c 10.

²³⁷ *Mathur SC*, *ibid* at para 50.

²³⁸ *Ibid* at paras 55–56; *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31.

²³⁹ *Mathur SC*, *ibid* at paras 60–62.

Conservation and Parks and ultimately adopted by Cabinet. She observed that the adoption of the Plan and Target did not differ in kind from the Cabinet decision to permit cruise missile testing in *Operation Dismantle* that was found to be properly subject to judicial scrutiny.²⁴⁰

The Court explained that the Plan and Target can be subject to judicial review because they are soft law or quasi-legislation and that there is a long line of cases where policies and guidelines issued by governments and government agencies have been subjected to judicial review.²⁴¹ According to Justice Brown, this is entirely appropriate because official government policies and guidelines inform and sometimes determine the decision-making of government officials. Citing *Friends of the Oldman River Society v. Canada (Minister of Transport)*, Justice Brown suggested that the Plan and the Target may even have the force of law.²⁴² She further noted that Ontario's position that the Plan and Target were not law was inconsistent with Ontario's reliance on the Plan and the Target in the *Reference re Greenhouse Gas Pollution Pricing Act* as a justification for why the federal carbon tax and related climate policies should not apply to Ontario.²⁴³

Ontario relied on *Tanudjaja* and *Friends of the Earth* for the proposition that the issues before the Court were not justiciable. *Tanudjaja*, Ontario argued, was instructive because it was held that a broad pleading assailing a homelessness policy — not a specific statute or regulation — as unconstitutional was not justiciable. Ontario further contended that *Friends of the Earth* was authority for the proposition that the content of plans are not justiciable. Justice Brown dismissed these submissions noting that unlike *Tanudjaja*, the Applicants were attacking specific policies, the Plan and Target, and unlike *Friends of the Earth*, the *Charter* was pleaded.²⁴⁴ Justice Brown went on to distinguish *La Rose* on the ground that in *Mathur* the Applicants assailed the Plan and the Target as being unconstitutional as opposed to broadly defined Impugned Conduct.²⁴⁵

Justice Brown did not consider the question of remedy under the rubric of justiciability. Nevertheless, her remarks are relevant to the broader question of the institutional capacity of the Court to deal with the claims asserted in *Mathur*. Much as suggested in the main body of the article, Justice Brown cited *Khadr II* as an example of how the Court could grant declaratory relief in a way that is consistent with the separation of powers. Justice Brown explained that “it is possible for courts to avoid venturing into questions of public policy ... by limiting the available remedy to declarations and by leaving it to the government to determine the best means forward.”²⁴⁶ She went on to explain that remedy was a matter in the discretion of the application judge and not grounds to strike the claim pre-emptively.²⁴⁷

²⁴⁰ *Ibid* at para 63.

²⁴¹ Though not considered by Justice Brown, it may be argued that laws are best understood as plans and that the Plan and Target are a master plan that informs and guides other planning (law-making). For a discussion of the planning theory of law, see: Scott J Shapiro, “The Planning Theory of Law” (2017) Yale Law School, Public Law Research Paper No 600, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2937990> and Scott J Shapiro, *Legality* (Cambridge, Mass: Harvard University Press, 2011).

²⁴² *Mathur SC*, *supra* note 217 at paras 64-70; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

²⁴³ *Mathur SC*, *ibid* at para 66; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.

²⁴⁴ *Mathur SC*, *ibid* at para 139.

²⁴⁵ *Ibid*.

²⁴⁶ *Ibid* at para 257.

²⁴⁷ *Ibid* at para 259.

C. COMMENT

Can the divergent results in *La Rose* and *Mathur* really be explained by how the two claims are pleaded? The reasons in the two cases seemingly turn on the distinction between Plaintiffs in *La Rose* alleging that the federal government's Impugned Conduct was unconstitutional and the Applicants in *Mathur* alleging that the Ontario government's Plan and Target were unconstitutional. But this is a distinction without a difference. A closer examination of the defined term "Impugned Conduct" in the *La Rose* pleading reveals that it is concerned with the federal government's GHG emissions targets and the failure to meet those targets. In this way, the claim in *La Rose* is no different than that in *Mathur*. The balance of the Impugned Conduct in the *La Rose* pleading could generously be understood to be describing an inadequate climate plan or the consequences of not having a climate plan. Should it really make a difference to the question of justiciability whether government policies are packaged together and labelled as a capital "P" plan? Our view is that the specificity of the pleading is a matter of form over substance and a distraction from the real difference between the *La Rose* and *Mathur* decisions.

The real difference between the two decisions can be seen in the implications of positive rights claims for the question of justiciability. Justiciability analysis requires the court to identify an extricable legal question. What is a legal question depends significantly on assumptions about the proper role of courts. Much of the justiciability case law implicitly assumes that the court's role is to enforce negative rights. Positive rights claims, by their very nature, take the court outside its conventionally understood institutional role and challenge assumptions about the separation of powers. Positive rights claims almost inevitably involve remedies that require judicial supervision and trespass on traditional legislative territory.

Our conclusion was that the claims in *La Rose* and *Mathur* were justiciable but that ultimately *Charter* section 7 is unlikely to be found to contain the asserted positive environmental rights. This conclusion was based on many of the same things that Justice Manson in *La Rose* considered under the rubric of justiciability. Justice Manson's approach to justiciability, however, sits uncomfortably with the Supreme Court of Canada's repeated statements that it has not foreclosed the possibility of positive rights. So long as the Supreme Court of Canada keeps the door open to the possibility of positive rights claims in the context of *Charter* sections 7 and 15, the claims in *La Rose* and *Mathur* meet the low bar to avoid a motion to strike. Our view is that it is preferable from the perspective of increased clarity in the law that the long unsettled question of the existence of positive environmental rights in the *Charter* be resolved after a full trial, as will be the case in *Mathur*, rather than summarily dismissed on the grounds of justiciability, as in *La Rose*.