Climate Change and the Right to a Healthy Environment in the Canadian Constitution

Colin Feasby, David de Vlieger and Matthew Huys

I. Introduction

Climate change is a grave threat to life as we know it on Earth. Fraser CJA observed in the *Alberta Carbon Tax Reference* 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 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 activists 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 activists 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' *Charter*[2] right to life and security of the person. 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 *Paris Agreement*[3] GHG reduction targets. The most famous of these cases, *Urgenda v. The Netherlands*[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 activists that includes significant tort suits against companies that produce fossil fuels. The possibility of climate change tort suits in Canada is the subject of a companion article.[6]

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

[1] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at para 1 [*Alberta Carbon Tax Reference*].

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

[3] *Paris Agreement to the United Nations Framework Convention on Climate Change*, 2015; CTS 2016/9, TIAS No 16-1104 [*Paris Agreement*].

[4] *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, Hoge Raad, (2019) ECLI:NL 19-00135 [*Urgenda*].

[5] Jonathan Watts, "Dutch officials reveal measures to cut emissions after court ruling" *The Guardian* (April 24, 2020), online: <https://www.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling> .

[6] Colin Feasby, David de Vlieger and Matthew Huys, "●".

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 *European Convention on Human Rights*[7] guarantees positive rights and whether it was 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. 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 U.S. 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.

The second part of this article reviews the recent decisions of The Netherlands Supreme Court in *Urgenda* and the decision of the U.S. Ninth Circuit Court of Appeals in *Juliana*. Particular

[7] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (1950) [*ECHR*].

[8] *Juliana v United States*, 947 F3d 1159 [*Juliana*].

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

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 three reviews 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 s. 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

1. *Urgenda v. The Netherlands*

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. This failure was alleged to be contrary to Articles 1, 2, and 8 of the *European Convention on Human Rights* ("ECHR").[10]

ECHR Article 1 requires contracting states to secure within their jurisdiction the rights and freedoms provided for by the ECHR. Article 2 provides for the right to life and Article 8 provides for a right to respect for private and family life. The claim was successful at The Hague District Court[11] and The Hague Court of Appeal.[12] An appeal by the government of The Netherlands to the Supreme Court of The Netherlands was dismissed with costs on December 20, 2019. As a result, the government of The Netherlands is required to implement policies to achieve a 25% reduction in GHG emissions relative to 1990 levels by the end of 2020.

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*.[13] Moreover, many of the arguments advanced by The

[10] *ECHR*, *supra* note 7.

[11] *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, Rechtbank Den Haag, (2015) ECLI:NL C-09-456689.

[12] *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, Gerechtshof Den Haag, (2018) ECLI:NL 200-178-245-01.

[13] See, for example, *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 at paras 57-58. *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36 at paras 56-58 referring to European Court of Human Rights case law considering the ECHR as a "valuable guide". See also, *R v Poulin*, 2019 SCC 47, 438 DLR (4th) 1 at para 75 [*Poulin*], noting that some ECHR provisions provided inspiration for some *Charter* provisions.

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.

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 on Climate Change ("UNFCCC") [14] Annex 1 lists countries, including The Netherlands, that must make a 25-40% GHG reduction from 1990 levels by 2020 in order to achieve the *Paris Agreement* target temperature increase. Based on *UNFCC* Annex 1, the claimant contended that The Netherlands was required to reduce GHG emissions by 25-40% from 1990 levels by 2020 whereas the government took the position that the EU (of which The Netherlands is a part) was only required to reduce GHG emissions by 20% from 1990 levels by 2020. The evidence before the lower courts indicated that The Netherlands was likely to achieve a 20% reduction in GHG emissions from 1990 levels but unlikely to achieve a 25% reduction by the end of 2020.

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% 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.

ECHR Articles 2 and 8 requires 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.[15] The mitigation measures must not place a disproportionate burden upon the state. The Netherlands submitted that climate change was 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."[16]

In seeking to answer this question, the court looked to the UNFCCC. The UNFCCC is predicated on international co-operation and the responsibility of each state "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[17] The court interpreted the UNFCCC principles to

[14] UN General Assembly, *United Nations Framework Convention on Climate Change, 1992; CTS 1994/7* [*UNFCCC*].

[15] *Urgenda, supra* note 4 at paras 5.2.4 – 5.3.2.

[16] *Ibid* at para 5.6.3.

[17] *UNFCCC, supra* note 13.

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…."[18] The court went on to explain that "the assertion that a country's own share in global greenhouse 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."[19]

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. 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 general rule, "the courts should not intervene in the political decision-making process involved in the creation of legislation."[20] 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% 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.[21]

2. *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."[22] Among other things, the plaintiffs sought as a remedy a declaration and injunction requiring the U.S. government to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."[23] The plaintiffs also grounded their claim in the public trust doctrine. *Juliana* is in many respects a U.S.

[18] *Urgenda, supra* note 4 at para 5.7.7.

[19] *Ibid*.

[20] *Ibid* at para 8.2.3.

[21] *Ibid* at paras 8.3.1 – 8.3.5.

[22] *Juliana, supra* note 8 at 11.

[23] *Ibid* at 11.

version of *Urgenda* and has, in turn, been an inspiration for similar claims elsewhere in the U.S. and now in Canada.[24]

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 favourable judicial decision."[25] 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.

There is no explicit right to a climate system capable of sustaining human life in the U.S. 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."[26] 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 U.S. 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 U.S. 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."[27] 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.

The perpetuity principle holds that the continuation of the Republic is an object of and is assumed by the U.S. Constitution. Justice Staton drew historical support for the perpetuity principle from

[24] See *Animal Legal Defense Fund, et al v United States of America*, 23 F3d 496: the plaintiffs claimed climate change and the government's failure to protect them from climate change effects is 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*, Docket Number 4:19-cv-00293 (Complaint filed 5 May 2019): 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 serious global warming situation that is dangerous to the life and liberty of all US Citizens. See also, *Clean Air Council v United States*, Docket Number 2:17-cv-04977 (filed 6 November 2017): 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.

[25] *Juliana, supra* note 8 at 18.

[26] *Ibid* at 21.

[27] *Ibid at* 37.

some of the iconic documents of U.S. 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. 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."[28] 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."[29]

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 plaintiff's 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."[30] 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.[31]

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 plaintiff's] injuries; and (2) within the district court's power to award."[32]

With respect to the first criterion, the majority observed that the plaintiff's 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."[33] The majority went on to note that the plaintiffs had conceded that the relief sought would not "alone solve global climate change"[34] presumably because the relief would only apply to the United States. 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 plaintiff's 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

[28] *Juliana, supra* note 8 at 40.

[29] *Ibid* at 42.

[30] *Juliana, supra* note 8 at 29.

[31] *Ibid* at 32.

[32] *Ibid* at 21.

[33] *Ibid* at 23.

[34] *Ibid* at 24.

"would likely have a real impact on preventing the impending cataclysm."[35] 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 plaintiff's] injuries."[36]

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."[37] 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 involve a broad range of policymaking."[38] 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."[39]

Justice Staton accused the majority of "deference-to-a-fault".[40] 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 non-justiciability, a court should not "abdicate" its responsibility to "enforce constitutional rights".[41] Indeed, she explained, a court should not be afraid of the "messy business of evaluating competing policy concerns" nor should it duck "the intimidating task of supervising implementation over many years, if not decades."[42] 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*[43] 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

[35] *Ibid* at 46.

[36] *Ibid* at 33.

[37] *Juliana, supra* note 8 at 25.

[38] *Ibid* at 26.

[39] *Ibid*.

[40] *Ibid* at 49.

[41] *Ibid* at 51.

[42] *Ibid*.

[43] *Brown v Board of Education*, 349 US 294 (1955).

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]."[44] Her rejoinder on this point was that the standard is "the amount of fossil-fuel emissions that will irreparably devastate our Nation" and that this is something that "can be established by scientific evidence…."[45]

III. Canadian Constitutional Climate Change Claims

Four recent actions have been commenced, 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 s. 7 of the *Charter* so the discussion that follows will mainly focus on the s. 7 arguments. 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 raised in *Urgenda* and *Julianna*.

1. *Environnement Jeunesse v. Canada*[46]

In late 2018, a claim was commenced by an environmental NGO called ENvironnement JEUnesse ("*ENJEU*") 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 the *Charter* and the Quebec *Charter* "by failing to put in place the necessary measures to limit global warming to 1.5 ºC"[47] and a payment of $100 in respect of each member of the class which was to be put toward restorative measures to reduce global warming. In particular, the claim asserted breaches of the *Charter* s. 7 right to life, the *Charter* s. 15 right to equality, and the Quebec *Charter* s. 46.1 "right to live in a healthful environment in which biodiversity is preserved…".[48]

ENJEU proceeded to a certification hearing in June 2019. On 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."[49] 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:

[44] *Juliana, supra* note 8 at 51.

[45] *Ibid* at 57.

[46] *Environnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885, 29 CELR (4th) 313 [*ENJEU*].

[47] *Ibid* at para 2.

[48] *Charter of Human Rights and Freedoms,* RLRQ c C-12.

[49] *ENJEU, supra* note 45 at para 23.

(1) justiciability; and (2) whether the factual allegations on their face could support a finding of a violation of the rights protected by the Canadian and Quebec *Charters*.

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. 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*."[50] He went on to conclude that the alleged violation of "*Charter*-protected rights is not, at this stage, non-justiciable."[51] 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".[52] 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 *ENJEU* 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."[53]

2. *La Rose v. Canada*[54] & *Mathur v. Ontario*[55]

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 plaintiff 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

[50] *ENJEU*, *supra* note 45 at para 69.

[51] *Ibid* at para 71.

[52] *Ibid* at para 117.

[53] *Ibid* at para 141.

[54] *La Rose v Her Majesty the Queen*, (filed on October 25, 2019) FC, T-1750-18 (Statement of Claim of the Plaintiffs), online <http://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*].

[55] *Mathur, et al. v. Her Majesty the Queen in Right of Ontario*, (filed on November 25, 2019), ONSC, CV-19-00631627 (Application of the Plaintiffs), online <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191125_CV-19-00631627_complaint.pdf> [*Mathur*].

policy and adoption of what the plaintiffs allege is a GHG reduction target that is inadequate to meet the objectives of the *Paris Agreement*.

La Rose was commenced by a group of children who live in different locations across Canada. *Mathur* follows form 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 asserts that s. 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)."[56] *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 UN *Convention on the Rights of the Child*[57], the *UN Declaration on the Rights of Indigenous Peoples*[58], and the *International Covenant on Civil and Political Rights*.[59]

La Rose and *Mathur* further assert a breach of the *Charter* guarantee of equality in s. 15. The failure to take adequate action to prevent climate change is alleged to contravene s. 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. Second, it is alleged that indigenous youth are denied 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 threat of relocation."[60]

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. *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…."[61] *La Rose* asks 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

[56] *La Rose, supra* note 53 at para 224.

[57] 20 November 1989, 1577 UNTS 3 (entered into force on 2 September 1990), ratified by Canada on 13 December 1991).

[58] GA Res 61/295, UNGAOR, UN Doc A/61 (2007).

[59] 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976), accession by Canada on 19 May 1976).

[60] *La Rose, supra* note 53 at para 232(e).

[61] *Ibid* at para 222(f).

with Ontario's share of the minimum level of GHG reductions necessary to limit global warming to below 1.5ºC above pre-industrial temperatures or, in the alternative, well below 2ºC (*i.e.* the upper range of the Paris Agreement temperature standard)."[62]

3. *Lho'imggin v. Canada*[63]

Lho'imggin was commenced in February 2020 at the height of tensions over the Coastal Gas Link 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, Misdi 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 Gas Link 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 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 because of the colonial history of oppression including the legacy of the *Indian Act* reserve system, residential schools, the Sixties Scoop, and continuing racism.

The plaintiffs in *Lho'imggin* advance *Charter* s. 7 and s. 15 claims similar to *La Rose* and *Mathur* and seek declarations requiring Canada to "act consistently with keeping mean global warming to between 1.5ºC and 2ºC."[64] 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*. Canada, it is contended, "has a 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 1.5ºC and 2ºC above pre-industrial levels."[65] Second, the plaintiffs seek an order requiring amendment of all "environmental 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

[62] *Mathur*, *supra* note at 54 para 8(f).

[63] *Lho'imggin et al. v. Her Majesty the Queen*, (filed on February 10, 2020) FC, online < http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200210_NA_complaint-1.pdf> [*Lho'imggin*].

[64] *Ibid*. at para 81.

[65] *Ibid*.

not be able to … meet its *Paris Agreement* commitment…."[66] No violations of aboriginal or treaty rights are asserted pursuant to s. 35 of the *Charter*.

IV. Constitutional Issues

The recent Canadian constitutional climate change claims raise many of the same questions that the U.S. Ninth Circuit and Netherlands Supreme Court wrestled with in *Julianna* and *Urgenda*. Is the enforcement of GHG reduction commitments made in international agreements enforceable in national courts or is the subject matter fundamentally political and non-justiciable? 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.

1. 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 have failed to implement. The courts in *Urgenda* and *Julianna* 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 *Julianna* applied the U.S. 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*[67] but was articulated in the modern era by the U.S. Supreme Court in *Baker v. Carr*[68], a case concerning the extent to which the court could intervene in the re-drawing 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?[69] (2) are there "judicially

[66] *Ibid.*

[67] *Marbury v Madison*, 5 US (1 Cranch) 137.

[68] *Baker v Carr*, 369 US 186 (1962).

[69] *Juliana, supra* note 8 at 51.

discoverable and manageable standards for resolving it"?[70] and (3) is it impossible to decide "without an initial policy determination of a kind clearly for nonjudicial discretion"?[71] Since *Baker v. Carr*, the U.S. political question doctrine has been invoked to avoid court intervention in the termination of international treaties[72], the conduct of an impeachment by the Senate[73], and most recently partisan gerrymandering.[74]

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 (Governor in Council)*,[75] involved an effort to enforce compliance with Canada's commitments under the Kyoto Protocol as embodied in the *Kyoto Protocol Implementation Act* ("*KPIA*").[76] The second case, *Turp v. Canada*,[77] 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 June 12, 1992.[78] The *UNFCCC* committed Canada to the goal of stabilizing "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system…."[79] The *UNFCCC*, however, did not set any firm GHG reduction targets. The Kyoto Protocol adopted on December 11, 1997 set out GHG reduction targets for Canada and other signatories. Canada and other industrialized countries agreed to reduce their GHG emissions to at least 5% below 1990 levels by 2012. The House of Commons passed a motion supporting ratification of the Kyoto Protocol in 2002 and formal ratification followed shortly thereafter. 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.[80] Among other

[70] *Ibid*.

[71] *Ibid*.

[72] *Goldwater v Carter*, 444 US 996 (1979).

[73] *Nixon v US*, 506 US 224 (1993).

[74] *Rucho v Common Cause*, 139 S CT 2484 (2019).

[75] *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183, [2009] 3 FCR 201 [*Friends of the Earth*].

[76] *Kyoto Protocol Implementation Act*, SC 2007, c 30 [*KPIA*].

[77] *Turp v Canada*, 2012 FC 893, [2014] 1 FCR 439 [*Turp*].

[78] Environment and Climate Change Canada, "Compendium of Canada's Engagement in International Environmental Agreements and Instruments" (January 2020) online <https://www.canada.ca/content/dam/eccc/documents/pdf/international-affairs/compendium/2020/batch-10/united-nation-framework-convention-climate-change-paris-agreement.pdf>.

[79] *UNFCCC, supra* note 13, art 2.

[80] *KPIA, supra* note 75.

things, the *KPIA* required that the government put forward a Climate Change Plan setting out how Canada would meet its Kyoto Protocol obligations. 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."[81] Justice Barnes further explained that there were no objective legal criteria that could be applied to determine whether compliance was achieved. Since the content of the Climate Change Plan could not be subject to judicial review, Barnes J. 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."[82] 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…."[83] 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 "for substantially the reasons he gave."[84]

Following Canada's withdrawal from the Kyoto Protocol, the justiciability of climate change issues again came before the Federal Court in *Turp v. Canada.* The plaintiff claimed that by reason of Parliament's adoption of the *KPIA*, that the executive did not have the right to withdraw from the Kyoto Protocol without the permission of Parliament.[85] The court affirmed that the "decision to conclude or withdraw from a treaty, falls exclusively under the executive branch of government."[86] 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*.[87]

[81] *Friends of the Earth*, *supra* note 74 at para 33.

[82] *Ibid* at para 36.

[83] *Ibid* at para 46.

[84] *Friends of the Earth v Canada (Environment)*, 2009 FCA 297. Leave to appeal to the Supreme Court of Canada was denied: *Friends of the Earth v Canada (Minister of the Environment)*, [2009] SCCA 497.

[85] Parliament repealed the *KPIA* after the commencement of *Turp*, *supra* note 76 but before the decision was rendered by the Federal Court.

[86] *Turp, supra* note 76 at para 18.

[87] *Ibid*; *Black v Canada (Prime Minister)*, (2001) 199 DLR (4th) 228 (ONCA), 105 ACWS (3d) 239 at para 46 [*Black*]. See also, *R (Miller) v Secretary of State of Exiting the European Union*, [2017] 1 AII ER 593, [2018] AC 61 at paras 248, 249, 259.

Despite what is observed in *Friends of the Earth*, *Turp*, and some other politically-sensitive cases[88], Canada is often said to not have a political question doctrine.[89] This is true to the extent that it is meant that Canada does not follow the U.S. political question doctrine. The justiciability of political questions was first raised in the *Charter*-era in *Operation Dismantle* 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 U.S. on Canadian territory on the basis that it contravened the s. 7 right to "life, liberty and security of the person".[90] The U.S. political question doctrine was rejected and the court concluded that the issue was justiciable. The 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 Wilson J.'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.[91]

Despite rejecting the U.S. political question doctrine, Canada does have principles of justiciability that sometimes lead courts to decline to hear certain questions or cases.[92] In *Reference re Secession of Quebec* the Supreme Court of Canada was faced with an argument that the 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.[93] The court explained that there were two situations where a court may decline to decide a case:

> (i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
>
> (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.[94]

The 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 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."[95] Lorne Sossin has suggested that the Supreme

[88] See *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283. See also, *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 172 DLR (4th) 1.

[89] D Geoffrey Cowper & Lorne Sossin, "Does Canada Need a Political Questions Doctrine?" (2002) 16 Osgoode Hall LJ 343 at 345 [Cowper & Sossin].

[90] *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 18 DLR (4th) 481 at para 4 [*Operation Dismantle*].

[91] *Ibid* at paras 38, 67.

[92] Cowper & Sossin, *supra* note 88 at 345.

[93] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 *[Reference re Secession of Quebec]*.

[94] *Ibid* at para 26.

[95] *Reference re Canada Assistance Plan*, [1991] 2 SCR 525, 83 DLR (4th) 297 at para 33 [*Reference re Canada Assistance Plan*].

Court has, in effect, set out a three-part approach to political questions.[96] Does the case pose a legal question? Does the legal question have a significant extralegal aspect? Can the legal and extralegal elements be separated? 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 non-justiciable 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 s. 7 rights to life, liberty, and security of the person.[97] 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."[98] The majority went on to observe that the claims were "diffuse and broad" and that "there is no judicially discoverable or manageable standard for assessing in general whether housing policy is adequate…."[99] This last comment raises the question of whether the requirement for a "judicially discoverable or manageable standard" from the U.S. political question doctrine has been imported into Canada's law of justiciability.

The applicant in *Friends of the Earth,* unlike the claimants in *Tanudjaja,* did not seek an evaluation of government policy; they 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*, Barnes J. 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. 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 complaint Climate Change Plan, the court should have simply ordered that a Climate Change Plan be prepared as required by 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.

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* s. 7 in *Operation Dismantle.* Whether government inaction on climate change violates the s. 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 s. 15 are legal questions that are within the court's area of expertise and would not offend the separation of powers for the court to decide. A court would certainly have jurisdiction to grant declaratory relief if a violation of a *Charter* right was

[96] Lorne Sossin, *The Law of Justiciability in Canada,* 2nd ed, (Thomson Reuters: Toronto, 2012) at 195.

[97] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, 123 OR(3d) 161 at para 50 [*Tanudjaja]*.

[98] *Ibid* at para 27.

[99] *Ibid* at paras 32 - 33.

found.[100] 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.[101]

The conduct of foreign affairs and, in particular, the decision of the executive to enter into a treaty is not justiciable.[102] A *Charter* claim challenging the implementation of international agreements through domestic legislation, however, is justiciable.[103] But the constitutional climate changes 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.[104] 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 Netherlands must reduce GHG emissions by 25% 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. 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 courts. Instead, the

[100] *Brown v Alberta*, 1999 ABCA 256, 177 DLR (4th) 349 at para 16; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at para 46 [*Khadr II*].

[101] 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 POGG power to unilaterally implement climate change policies.

[102] *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 DLR (4th) 737 at para 68; *Black, supra* note 86 at para 52; *R v Secretary of State for Foreign and Commonwealth Affairs, Ex. P. Everett*, [1989] 1 All E.R. 655 at 690.

[103] *Deegan v Canada (Attorney General)*, 2019 FC 960, 308 ACWS (3d) 214 at para 320.

[104] See, for example, *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765 at para 35 discussing the reluctance of courts to intervene in the legislative process.

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. In *Khadr I* it was held that the standards under s. 7 of the *Charter* were consistent with Canada's international commitments in the *Geneva Conventions*.[105] The Supreme Court of Canada then proceeded in *Khadr II* to grant a declaration that the conduct of Canadian officials had violated s. 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*."[106] The value of *Khadr I & 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 U.S. 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. As will be explained below in the discussion of the interpretation of s. 7, in *Bedford v. Canada* it was held that the government action need only have contributed to or exacerbated an underlying harm.[107] 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 the basis that the remedy could not redress the injury caused by the government action. In other words, if a *Charter* breach is established and is not justified, a remedy should issue in respect of the impugned government action even if it does not solve the entire underlying social problem.

2. Interpreting Section 7 of the *Charter*

i. Purposive Interpretation

The Supreme Court of Canada held in *Ontario v. Canadian Pacific Ltd.* that "environmental protection … [is] a fundamental value in Canadian society…."[108] Consistent with the intention of the drafters of the *Charter*, the court further held that, "[l]egislators must have considerable room

[105] *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125 at para 25 [*Khadr I*].

[106] *Khadr II*, *supra* note 99 at para 47.

[107] *Bedford v Canada (Attorney General)*, 2013 SCC 72, [2013] 3 SCR 1101 at para 76 [*Bedford*].

[108] *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031, 125 DLR (4th) 385 [*Canadian Pacific*] at para 55. See also, *R v Hydro-Quebec*, [1997] 3 SCR 213, 151 DLR (4th) 32 at para 127 and *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38, [2004] 2 SCR 74 at para 226.

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."[109] 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 exists within the s. 7 rights to life and security of the person?

The Supreme Court of Canada's approach to interpreting *Charter* rights is in flux.[110] The court has at times endorsed a "full and generous interpretation" or a "liberal and generous interpretation" of *Charter* rights.[111] Periodically, the 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.[112] Recently, Justice Martin in *R. v. Poulin* explained that courts should not be "prioritizing generosity over purpose" and emphasized that purposive interpretation is the correct approach to *Charter* rights.[113] She went on to endorse Professor 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*."[114] The court's renewed commitment to purposive interpretation, together with its interest in historical origins, is noteworthy but should not be overstated.[115] Justice Martin went on to explain that some *Charter* rights, like the s. 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 *R. v. 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.[116] Examples of evolving, open-ended standards given by Justice Martin include rights that use the words "reasonable" or "unreasonable" and "fundamental justice."[117] The rights to life and security of the person in s. 7 are not narrow legal rights like s. 11(i) as conceptions of life and security of the person change

[109] *Canadian Pacific, supra* note 107 at para 59.

[110] On constitutional interpretation generally, see: E. Adams, "Canadian Constitutional Interpretation" in C, Hutchinson, *The Fundamentals of Statutory Interpretation,* (LexisNexis Canada, Toronto: 2018) 129.

[111] See *Reference re ss 193 & 195.1(1)(c) of the Criminal Code,* [1990] 1 SCR 1123, 4 WWR 481 [1990] at paras 68, 105.

[112] See *Poulin, supra* note 12 at para 55.

[113] *Ibid.*

[114] *Ibid* at para 57.

[115] 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 & Leonid Sirota, "Has the Supreme Court of Canada Rejected Originalism?" (2016) 44:1 Queens LJ 107; Leonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50 UBC L. Rev. 505. See also Asher Honickman, "The Living Fiction: Reclaiming Originalism for Canada" (2015) 43 Advoc Q 329.

[116] *Poulin, supra* note 12 at para 70.

[117] *Ibid* at para 70.

over time. At the same time, life and security of the person are not purely normative concepts like Justice Martin's examples.

ii. 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*. 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").[118] The question of constitutional protection for environmental rights arose in the context of the debate over including property rights in s. 7 of the *Charter*. One of the rationales offered for not including property rights in s. 7 of the *Charter* was that property rights could potentially be raised as an obstacle to environmental protection legislation.[119] NDP 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 s. 7 of the *Charter*.[120] Svend Robinson later moved to include a commitment to "the goals of a clean and healthy environment and safe and healthy working conditions" in s. 31 of the *Charter*, but the amendment was rejected by the majority of the committee.[121] 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*[122] where the issue was whether the words "fundamental justice" in s. 7 of the *Charter* meant procedural fairness in the same way as the words "natural justice" are 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 Special Joint Committee* should only be given "minimal weight" in interpreting the *Charter*.[123] Lamer J., 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."[124] *Re B.C. Motor Vehicle Act* leaves

[118] On the Special Joint Committee, see generally, A. 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*, (University of Toronto Press, Toronto: 2018).

[119] *Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No 44 (January 23, 1981) at 16 (per Laurier Lapierre).

[120] *Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No 44 (January 23, 1981) at 19 (per Svend Robinson) and 21 (per Lorne Nystrom). For further discussion, see Dwight Newman & Lorelle Binnion, "The Exclusion of Property Rights from the *Charter*: Correcting the Historical Record" 52 Alta L Rev 543 at 554.

[121] *Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No 49 (January 30, 1981) at 8.

[122] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 [*Re BC Motor Vehicle Act*].

[123] *Ibid* at para 52.

[124] *Ibid* at para 53.

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 s. 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.[125] Section 15 expressly prohibits discrimination on the basis of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The court has found that s. 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 v. Law Society of British Columbia*, 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.[126] The interpretive approach to s. 15 may not be applicable to a claimed right to a healthy environment in the context of s. 7 as the text of s. 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 s. 7 protects a right to a healthy environment is perhaps more analogous to the claim that freedom of association guaranteed by s. 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, McIntyre J. in a concurring decision in *Reference Re Public Service Employee Relations Act (Alta.)*[127], 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*. McIntyre J. 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."[128] McIntyre J. concluded that "if 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."[129]

Chief Justice Dickson, writing for himself and Justice Wilson, took a different approach to the interpretation of s. 2(d) of the *Charter* in dissenting reasons in *Reference Re Public Service*

[125] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*].

[126] *Ibid* at 52.

[127] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 38 DLR (4th) 161 [*Reference Re Public Service Employee Relations Act]*.

[128] *Ibid* at para 180.

[129] *Ibid*. McIntyre J. cited the Special Joint Committee (at 143) and used similar logic dissenting in *R. v. Morgentaler*, [1988] 1 SCR 30 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."

Employee Relations Act (Alta.). 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*."[130] Dickson C.J. 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…."[131] Dickson C.J.'s dissenting reasons in *Reference Re Public Service Employee Relations Act (Alta.)* are the foundation for Justice Abella's majority decision in *Saskatchewan Federation of Labour v. Saskatchewan* which reversed the court's earlier conclusion that freedom of association did not protect the right to strike.[132] The Supreme Court of Canada's eventual recognition of a right to strike in s. 2(d) of the *Charter* despite the framers' deliberate omission of an express right to strike from the *Charter* suggests that the conscious omission of express environmental rights from the *Charter* is not an insurmountable obstacle to the eventual recognition of such rights in the *Charter*.

iii. 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 s. 7 of the *Charter*. The court has indicated that the rights to life and security of the person may have a broader ambit than suggested by the text of s. 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 s. 7 right to life.[133] 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."[134] The court's finding in *Chaoulli* echoes earlier findings in *Rodriguez*[135] and *Morgentaler*[136] which held that restrictions on suicide and abortion respectively were held to violate the s. 7 right to security of the person because, among other things, the restrictions caused intolerable psychological distress. The court's conclusion in *Chaoulli* can only be understood to mean that the s. 7 rights to life and security of the person include a measure of protection from serious threats to what may be called "quality of

[130] *Reference Re Public Service Employee Relations Act (Alta), supra* note 124 at para 60.

[131] *Ibid* at para 97.

[132] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 at para 75 [*Saskatchewan Federation of Labour]*.

[133] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 124 [*Chaoulli*].

[134] *Ibid* at para 123.

[135] *Rodriquez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

[136] *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

life".[137] *Chaoulli* stands for the proposition that where the government fails to provide adequate healthcare, it cannot restrict citizens from seeking out private healthcare.[138] So while *Chaoulli* shows that the s. 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.[139] The 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"[140] This is consistent with other statements that suggest that Canada's international agreements provide something like a floor in the context of human rights. 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."[141] In the specific case of s. 7, the court found in *Khadr* that "[t]he principles of fundamental justice are informed by Canada's international human rights obligations."[142] 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."[143] 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."[144] 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 s. 7, a more plausible approach for the courts would be to find that the particular phenomenon of climate 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 Community Services Society* or activities associated with prostitution in *Bedford*. Even though the government

[137] *Chaoulli*, *supra* note 130 at para 42.

[138] See also, *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 at para 93.

[139] *Saskatchewan Federation of Labour*, *supra* note 129 at para 157.

[140] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 at para 56 [*Hape*].

[141] *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR 157 at para 23; *Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 at para 70. See also, *Saskatchewan Federation of Labour*, *supra* note 129 at para 157.

[142] *Khadr I*, *supra* note 104 at para 29.

[143] 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.

[144] *International Covenant on Economic, Social and Cultural Rights*, 1966, CTS 1976/46, art 12(2)(b).

was not responsible for drug use or prostitution, the criminal law restrictions on those activities exacerbated risks or prevented mitigation of risks of those activities. The court accordingly found that the criminal restrictions in *PHS Community Services Society* and *Bedford* violated s. 7 rights to life and security of the person. The 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 the balance of probabilities."[145] The court also dismissed the government's argument that the cause of the harm was actually the acts of third parties – Pimps and Johns.[146] 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 policies are inadequate to address the problem. This is a different kind of allegation than was made in *Bedford* and *PHS Community Services Society*. 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.[147]

3. The *Charter* and Positive Rights

The issue of whether *Charter* s. 7 protects 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. 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 s. 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."[148] Whether or not Justice 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

[145] *Bedford*, *supra* note 106 at para 76.

[146] *Ibid* at para 89.

[147] V Sinha, L Sossin, & J Meguid, "*Charter* Litigation, Social and Economic Rights & Civil Procedure" (2017) 26 J Law & Social Policy 43 at 44.

[148] *Trans Mountain Pipeline ULC v Mivasair*, 2019 BCSC 50, 304 ACWS (3d) 87 at para 68. *Trans Mountain Pipeline ULC v. Mivasair* is under appeal, so it remains to be seen whether the B.C. Court of Appeal will engage with the protesters' argument that s. 7 includes a right to a healthy environment or Justice Affleck's *obiter*. The B.C. Court of Appeal considered a *Charter* s. 7 positive rights claim in the context of veterans' injury benefits alleged to be inadequate in *Scott v. Canada (Attorney General)*, 2017 BCCA 422, 417 DLR (4th) 733. The B.C. Court of Appeal indicated that in its view "s. 7 of the *Charter* only deals with deprivations that result from government action."

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.[149] 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."[150] 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.[151] 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 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 fund-raising functions can be problematic as Emmett Macfarlane explains: "[i]ncentives for managing and allocating resources in a society become warped in a context where the body that dictates spending is not the same as the body that collects public funds."[152]

[149] Isiah Berlin, *Four Essays on Liberty* (Oxford, England: Oxford University Press, 1969) at 130-131.

[150] J Waldron, "Rights in Conflict" (1999) 99 *Ethics* 503 at 511.

[151] See Lawrence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23 Const F 41 at 44 and 44 [David, A Principled Approach].

[152] Emmett Macfarlane, "Positive Rights and Section 15 of the Charter: Addressing a Dilemma" (2018) 38 N.J.C.L. 147 at 150.

The U.S. constitution, particularly the Bill of Rights, is an artifact of late enlightenment thinking crafted in the aftermath of revolution. As such, the U.S. 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."[153] 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[154]; rights to information in the criminal context[155]; the right to be tried within a reasonable time[156]; the right to an interpreter in criminal proceedings[157]; and the right to minority language education[158]. 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.[159] 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 exception are the minority language education rights in s. 23 which require the provinces to deliver minority language education programs.

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 s. 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 court's criteria for determining whether a positive right is protected by the *Charter* may be stated as follows:

(1) The claim must be grounded in a fundamental freedom rather than in access to a particular statutory regime;

(2) The claimant must demonstrate that exclusion from a statutory regime has the effect of a substantial interference with the fundamental freedom; and

[153] *Jackson v City of Joliet*, 715 F2d 1200 (7th Cir, 1983) at para 8.

[154] *Charter*, *supra* note 2, ss 3, 4.

[155] *Ibid*, ss 10(a), 11(a).

[156] *Ibid*, s 11(b).

[157] *Ibid*, s 14.

[158] *Ibid*, s 23. See also, *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13.

[159] Another way to put this is that the positive rights in the Charter are consistent with the "judicial role". See David, A Principled Approach, supra note 148 at 45.

(3) The government is responsible for the inability to exercise the fundamental freedom.[160]

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 v. Alberta* hinted that these criteria might also apply to a situation where the government has failed to legislate. The 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."[161]

The distinction between claims arising from underinclusive legislative regimes and claims of failure to legislate is also seen in s. 15 jurisprudence. Courts are comfortable deploying s. 15 to address discriminatory legislative omissions. Perhaps the most notable example of this is *Vriend v. Alberta*[162] where Alberta omitted sexual orientation from the grounds protected in its *Individual Rights Protection Act.*[163] The 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 court would have dealt with the question of the failure of a legislature to provide any human rights protection at all. Could s. 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…."[164]

Positive rights issues have also arisen in the context of s. 7 of the *Charter*. The use of s. 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 s. 7 is a negative right that protects against government encroachment on personal freedom. Indeed, as McLachlin CJ 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."[165] Several cases stick out as obvious opportunities where the Supreme Court of Canada could have endorsed a positive rights approach to s. 7 but declined to do so. The court in *Gosselin v. Québec (Attorney General)* considered a claim that s. 7 guaranteed a right to "a level of social assistance to meet basic needs".[166] In *British Columbia (Attorney General) v. Christie*[167] the court considered whether a right to access the

[160] *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 at paras 24-26; *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 at para 30 [*Baier*].

[161] *Baier, supra* note 157 at 35.

[162] *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*].

[163] RSA 1980, c I-2.

[164] *Vriend, supra* note 159 at para 64.

[165] *Gosselin v Quebec (Attorney General)*, 2002 SCC 48, [2002] 4 SCR 429 at para 81 [*Gosselin*].

[166] *Ibid* at para 76.

[167] *British Columbia (Attorney General) v Christie*, 2007 SCC 21, [2007] 1 SCR 873 [*Christie*].

courts, based on the principle of the rule of law and the legal rights in the *Charter*, included a right counsel in all proceedings effectively seeking a constitutionalization of legal aid. 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 s. 7.[168] Despite these prominent failures of positive rights claims under s. 7, the Supreme Court of Canada has repeatedly affirmed that it has no intention of foreclosing the possibility of a successful positive rights claim in the future.[169] McLachlin CJ, 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."[170] Justice Arbour, in dissent, made the case that s. 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."[171] The juxtaposition of the court's words and outcomes on positive rights in the context of s. 7 make it hard to know what the 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 *Julianna* 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 s. 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.[172] 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 Public Service Employee Relations Act (Alta.)* whether freedom of expression and freedom of the press might require government regulation to prevent monopolization of ownership of the press.[173]

Even in a hypothetical reality where the *Competition Act* does not exist it is difficult to imagine a claim pursuant to s. 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 court in such a hypothetical reality requiring Parliament to enact anti-monopoly legislation or otherwise take action in respect

[168] *Tanudjaja, supra* note 96 at para 62 .

[169] See *Reference re Provincial Electoral Boundaries*, [1991] 2 SCR 158, 81 DLR (4th) 16 at para 18. See also, *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at para 188.

[170] *Gosselin, supra* note 162 at para 83.

[171] *Ibid* at para 309.

[172] *Christie, supra* note 164 at para 18.

[173] *Reference Re Public Service Employee Relations Act (Alta), supra* note 166 at para 77.

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 environmental protection regime or universal healthcare program from whole cloth.[174] 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 moves 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 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% by 2020 and left it to the government to choose the means by which to achieve this objective. The remedy in Canada would

[174] See, for example, *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651, 244 ACWS (3d) 73 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 healthcare."

be to declare that Canada, with both levels of government working together, is obliged to implement policies to achieve GHG reductions of 30% 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.[175]

[175] See, generally, Edward J. Waitzer & Douglas Sarro, "Climate Change: A Template for Judicial Activism in Response to Systemic Risks" (2019) 62 C.B.L.J. 149.