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### Legal Hurdles and Pathways: The Evolution (Progress?) of Climate Change Adjudication in Canada

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# Legal Hurdles and Pathways: the Evolution (Progress?) of Climate Change Adjudication in Canada

(2024) 47:2 Dal LJ (forthcoming)

## **1. Introduction**

“Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity’s future.”<sup>1</sup>

Citizens, civil society, and environmental organisations throughout the world are increasingly turning to courts to find solutions to the perils of climate change. In July 2023, the United Nations Environment Programme (“UNEP”) reported that as of November 2022, there were 2,180 climate change litigation cases underway throughout the world, that this number is 2.5 times higher than it was five years ago,<sup>2</sup> and that the number of jurisdictions involved has grown from 24 in 2017, to 39 in 2020, to 65 in 2023.<sup>3</sup> The authors of this report describe climate litigation as “a frontier solution to change the dynamics of what the UN Secretary-General has described as ‘the fight of our lives.’”<sup>4</sup> In both its 2020 and its 2023 reports, the Intergovernmental Panel on Climate Change (“IPCC”) concludes that “litigation is central to efforts to compel governments and corporate actors to undertake more ambitious climate change mitigation and adaptation goals”.<sup>5</sup>

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<sup>1</sup> *References Re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 2 [*GHG References*], cited in *Mathur v His Majesty the King in Right of Ontario*, 2023 ONSC 2316 at para 17, Vermette J [*Mathur Merits Hearing*]

<sup>2</sup> United Nations Environment Programme, *Global Climate Litigation Report*, 2023, at 13– 14 [*UNEP Report 2023*].

<sup>3</sup> *Ibid* at 15. The authors of this report relied on the Sabin Center’s Climate Change Litigation database to determine case numbers. See Sabin Center for Climate Change Law, “Climate Change Litigation Databases” (2024), online: <<https://climatecasechart.com>>.

<sup>4</sup> *Ibid* at IX.

<sup>5</sup> *Ibid* at 4.

Complex, high stakes litigation is often characterised by “waves”, and climate change litigation is no exception. This is why it is so often compared to tobacco litigation.<sup>6</sup> Various waves of tobacco litigation spanned decades, built alliances and networks, and created opportunities for new “theories of the case” to emerge, all with a view to turning failure into success and pushing back against determined and very well-resourced defendants.<sup>7</sup> An increasingly dominant wave of climate change litigation is one in which it is asserted that a government’s failure to take appropriate mitigation and adaptation steps violates claimants’ rights. Many of these cases are brought by young people in partnership with environmental justice organisations. They are brought both in domestic courts and to international adjudicative bodies.<sup>8</sup> The rights-based cases brought in domestic courts allege failures of governments to implement appropriate mitigation and adaptation strategies.<sup>9</sup> These cases have had greater success in countries other than Canada, where non-justiciability has been one of the main reasons for dismissal.

During such litigation waves, narratives are developed, networks grow, repeat players emerge as applicants or their legal representatives (with the added power that often comes with being a repeat player), and a transnational jurisprudence develops.

Climate litigation is thus a tool used by the global climate justice movement to gradually develop narratives of responsibility, science, right, and wrong. Above all else, it involves the building of narratives about time, the future, timelines for action and consequences, and the urgency with which societies should responsibly mitigate global warming, given the inevitable costs and difficult decisions that mitigation efforts will entail.<sup>10</sup>

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<sup>6</sup> See Martin Olszynski, Sharon Mascher & Meinhard Doelle, “From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability”, (2017) 30:1, *The Georgetown Environmental Law Review* 1 for an analysis of litigation and legislative developments relevant to the liability of the tobacco industry, and their utility in a climate change context.

<sup>7</sup> *Ibid.*

<sup>8</sup> See *UNEP Report 2023*, *supra* note 2 at 27–41.

<sup>9</sup> See *ibid* at 36–49 for a discussion of a sample of these cases from various jurisdictions.

<sup>10</sup> Phillip Paiement, “Urgent agenda: how climate litigation builds transnational narratives” (2020) 11:1–2 *Transnational Leg Theory*, 121 at 122, DOI: 10.1080/20414005.2020.1772617; Joanna Setzer & Rebecca Byrnes, “Global Trends in Climate Change Litigation: 2023 Snapshot” (June 2023), at 5, 31, online (pdf): [https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global\\_trends\\_in\\_climate\\_change\\_litigation\\_2023\\_snapshot.pdf](https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf).

In this article we will consider rights-based Canadian claims, with a focus on the Ontario Superior Court of Justice’s recent decision, *Mathur v Ontario*.<sup>11</sup> We will analyse the case both from the viewpoint of its place in transnational climate litigation and the extent to which it advances or hinders the development of climate litigation in Canada. An assumption informing our analysis is that climate change litigation is one necessary step in the attempts to address the “grave threat to humanity” posed by climate change.<sup>12</sup> A second, related, assumption informing our analysis is that a case does not have to be a success in the conventional sense to make a positive contribution to climate change jurisprudence.

We begin in Part 2 with a brief summary of the central issues in the *Mathur* case. In Part 3 we analyse the court’s finding that the applicants’ claims were justiciable – this is a first in Canadian rights-based climate change jurisprudence.<sup>13</sup> We then examine in Part 4 the role of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), and the manner in which they were pleaded by the applicants and dealt with by the court. These provisions are at the heart of any Canadian rights-based climate change claim. In Part 5 we look at the way in which Canadian and other courts are accepting and using international climate science, especially IPCC reports. We examine the collective action challenges that characterize climate change governance, and how courts are dealing with these challenges, in Part 6. We then conclude with some additional analysis and a summary of *Mathur*’s contributions to climate change jurisprudence.

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<sup>11</sup> *Mathur Merits Hearing*, *supra* note 1. The merits hearing was preceded by an unsuccessful motion to strike brought by Ontario: *Mathur v Ontario*, 2020 ONSC 6918 [*Mathur Motion to Strike*].

<sup>12</sup> *GHG References*, *supra* note 1. For a comparative analysis (Australia and the United States), of the ways in which climate change litigation can influence and induce regulatory change, see Jacqueline Peel & Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge, UK: Cambridge University Press, 2015) [Peel & Osofsky 2015]. For analysis of the potential direct and indirect positive impacts of climate change litigation, see also Phillip Paiement, *supra* note 10; Celeste Arrington, “The Mechanisms behind Litigation’s ‘Radiating Effects’: Historical Grievances against Japan” (2019) online:

<https://onlinelibrary.wiley.com/doi/10.1111/lasr.12392>; Jacqueline Peel & Hari M. Osofsky, “Climate Change Litigation” (2020) 16 *Annu Rev Law Soc Sci* 21; Joanna Setzer & Rebecca Byrnes, “Global Trends in Climate Change Litigation: 2020 Snapshot”, at pages 23–26, online (pdf): [https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation\\_2020-snapshot.pdf](https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf);

<sup>13</sup> *Mathur Motion to Strike*, *supra* note 11. In *Sierra Club of British Columbia Foundation v British Columbia (Minister of Environment and Climate Change Strategy)*, 2023 BCSC 74 (which was not a rights-based claim), the British Columbia Supreme Court ruled that the province’s reporting obligation under the province’s *Climate Change Accountability Act* was a justiciable issue.

## **2. Mathur – Brief background**

The *Mathur* applicants are Ontario residents between the ages of 12 and 24. Ecojustice, a Canadian environmental law advocacy group, is co-counsel for the applicants. The applicants sought declarations that the greenhouse gas (“GHG”) emissions target (“Target”) set by the province of Ontario under the *Cap and Trade Cancellation Act*, SO 2018, c 13 (“CTCA”) and articulated in the “Preserving and Protecting our Environment for Future Generations – A Made-in-Ontario Environmental Plan (“Plan”), was inadequate and set without regard to any science-based process, thereby violating the section 7 and 15 *Charter* rights of present and future generations. The Ontario Government moved to strike out the applicants’ claims on the basis that they had no reasonable prospect of success. Ontario submitted that the claims were not justiciable and were based on unprovable speculations about the future consequences of the impugned emissions target. Ontario also argued that it had no positive constitutional obligation to prevent the harms associated with climate change, and that the applicants could not seek remedies for future generations.<sup>14</sup> In her November 2020 decision, Justice Brown of the Ontario Superior Court of Justice rejected Ontario’s motion to strike.<sup>15</sup> The case was heard on the merits by Justice Vermette, who rendered a decision in April 2023.

At the hearing on the merits, the applicants submitted that the inadequate GHG Target set by Ontario infringed the applicants’ life and security of the person interests protected under section 7 of the *Charter*. They chose to take this approach rather than argue that section 7 contains positive rights; they made a positive rights argument only as an alternative argument.<sup>16</sup> This was a strategic choice by the applicants to avoid a finding of non-justiciability, due to the weight of precedent against freestanding section 7 positive rights.<sup>17</sup> Notwithstanding the applicants’ approach, Vermette J found that their case raised positive rights issues.<sup>18</sup> She approached the case on that basis and found that by failing to reduce GHG emissions further than set out in the Target, “Ontario is contributing to an increase in the risk of death and in the risk faced by the

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<sup>14</sup> *Mathur Merits Hearing*, *supra* note 1 at para 32.

<sup>15</sup> *Mathur Motion to Strike*, *supra* note 11.

<sup>16</sup> *Mathur Merits Hearing*, *supra* note 1 at paras 48–56, 120–124.

<sup>17</sup> *Ibid* at paras 120–124. See also discussion below in Part 4.

<sup>18</sup> *Ibid* at paras 120–124.

Applicants and others with respect to the security of the person.”<sup>19</sup> However, while she found a causal connection between these section 7 impairments and Ontario’s inadequate GHG emissions Target, she also found the applicants had not demonstrated that any deprivation of their section 7 rights was contrary to the principles of fundamental justice (“PFJs”).<sup>20</sup>

The applicants’ section 15 submissions were that young people, as a result of their age, bear disproportionate health and other burdens of climate change now and into the future.<sup>21</sup> Vermette J ruled that while “young people are disproportionately impacted by climate change,”<sup>22</sup> these burdens and impacts are caused by climate change, not by Ontario’s Target, the Plan, or the CTCA.<sup>23</sup> Finding no causal connection between the alleged burdens and harms and the impugned legislation, she dismissed the section 15 claims.

The applicants have appealed this decision.<sup>24</sup>

### **3. The Role and Evolution of ‘Justiciability’ in Climate Change Litigation**

The barrier of justiciability is a central feature in transnational rights-based climate litigation.<sup>25</sup> *Mathur* is the first Canadian case in which such claims have cleared the justiciability hurdle at the preliminary motion to strike stage and at the hearing on the merits.<sup>26</sup> In her analysis of the

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<sup>19</sup> *Ibid* at para 147.

<sup>20</sup> *Ibid* at paras 152–171.

<sup>21</sup> *Ibid* at paras 68–74, 177.

<sup>22</sup> *Ibid* at para 178.

<sup>23</sup> *Ibid* at paras 178–183. Relying on the recent Supreme Court of Canada decision, *R v Sharma*, 2022 SCC 38 [*Sharma*], Vermette J stated: “As the [Supreme Court of Canada] stated in *Sharma* at paras 40 and 63, section 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation, and leaving a gap between a protected group and non-group members unaffected does not infringe section 15(1).” (*ibid* at para 178).

<sup>24</sup> The appeal was heard on January 15-16, 2024. See Ecojustice, “#GenClimateAction: Mathur et. al. v. His Majesty in Right of Ontario” (29 November 2019) online: <<https://ecojustice.ca/file/genclimateaction-mathur-et-al-v-her-majesty-in-right-of-ontario/>>.

<sup>25</sup> See *UNEP Report 2023*, supra note 2 at 40; Larissa Parker, “Let Our Living Tree Grow: Beyond Non-Justiciability For The Adjudication Of Wicked Problems” (2023) 81:1 Univ Tor Fac Law Rev 54; Camille Cameron & Riley Weyman, “Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices” (2022) 34:1 J Environ Law 195 <<https://doi.org/10.1093/jel/eqab026>>.

<sup>26</sup> The court found one aspect of the case to be non-justiciable – the choice of the appropriate approach to determine a jurisdiction’s “fair share” of the remaining carbon budget. See *Mathur Merits Hearing*, supra note 1 at para 109. Note that in *ENvironnement JEUnesse c Procureur général du Canada*, 2019 QCCS 2885, the judge hearing the

concept of justiciability, Vermette J stated that there is no applicable single set of rules that define its scope, that context is a relevant factor, and that a flexible approach is required.<sup>27</sup> She also noted that courts have a responsibility to review legislation and government action where a *Charter* breach is alleged,<sup>28</sup> relying on Supreme Court of Canada (“SCC”) comments in *Chaoulli* that “the fact that the matter is complex, contentious or laden with social values” or “may have policy ramifications” does not remove that responsibility.<sup>29</sup> *Mathur* reinforces previous Canadian jurisprudence to the effect that “the category of non-justiciable cases is very small”,<sup>30</sup> and is even smaller if violations of *Charter* rights are alleged.<sup>31</sup>

As the first Canadian climate change case to clear the justiciability hurdle at a merits hearing, *Mathur* can fairly be described, in the Canadian context, as ground-breaking. This success, however, came at a cost. The *Mathur* applicants, to avoid having their case struck out as non-justiciable, had to make strategic choices about how best to plead their case. Wary of the outcomes in cases like *La Rose v Canada*<sup>32</sup> (“*La Rose*”) and *Environnement Jeunesse v Attorney General of Canada*<sup>33</sup> (“*Enjeu*”), and keen to avoid the risks of a finding of non-justiciability, they chose to frame their case with reference to a specific piece of legislation—the CTCA—rather than as a broader positive rights case challenging a wide range of government action and inaction.<sup>34</sup> This was a wise strategic choice that made it possible to clear the justiciability hurdle, but it constrains the potential of litigation as an effective option in addressing the complex, “wicked” issues raised in these climate change cases.<sup>35</sup>

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preliminary certification motion found the claims were justiciable (see para 71); however, this finding was overturned by the Quebec Court of Appeal in 2021 QCCA 1871.

<sup>27</sup> *Mathur Merits Hearing*, *supra* note 1 at para 98, quoting *Highwood v Wall*, 2018 SCC 26 at paras 34–35.

<sup>28</sup> *Ibid* at para 100.

<sup>29</sup> *Ibid* at paras 100, 106; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 89 [*Chaoulli*]; Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2<sup>nd</sup> ed (Toronto: Carswell, 2012) at 294–295.

<sup>30</sup> *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at para 67.

<sup>31</sup> *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paras 61–62; *Mathur Merits Hearing*, *supra* note 1 at para 100, citing *Chaoulli*, *supra* note 29 at paras 107–108, 183–185.

<sup>32</sup> *La Rose v Canada*, 2020 FC 1008 [*La Rose FC*]. The *La Rose* case was dismissed at the motion to strike stage as non-justiciable. The applicants appealed and asked that the case be allowed to proceed to a hearing on the merits. This appeal was argued before the Federal Court of Appeal on February 14 and 15, 2023. In *La Rose v Canada*, 2023 FCA 241 [*La Rose FCA*], the Federal Court of Appeal found that the claims were justiciable. It allowed the appeal in part, ordering that leave to amend the pleadings be granted regarding the claim of a violation of section 7 of the *Charter* (at paras 23–52, 135).

<sup>33</sup> *Environnement Jeunesse v Attorney General of Canada*, 2021 QCCA 1871.

<sup>34</sup> *Mathur Merits Hearing*, *supra* note 1 at para 120.

<sup>35</sup> *Parker*, *supra* note 25.

*Mathur* thus seems to be an example of heads you lose, tails you lose. The applicants had to plead strategically and narrowly to avoid a finding of non-justiciability, but in so doing they limited their ability to address what Vermette J described as “an increased risk of death and an increased risk to security of the person” as a result of climate change.<sup>36</sup>

Another potential pleadings conundrum was recently identified by the Federal Court of Appeal in *La Rose*.<sup>37</sup> The appeal court found that the lower court erred, ruled that the claims based on section 7 were justiciable, and allowed the appeal subject to the claimants amending their pleadings to provide “the focus necessary for constitutional analysis.”<sup>38</sup> The appeal court then asked whether, just as Canada had argued that the claims were too broad and unfocused, it might switch its approach and argue that the pleadings as amended were too narrow.

As the scope of the impugned state action narrows, it might be argued that the asserted unconstitutional action cannot be considered in isolation; or, Canada might argue that, due to foreign sources of GHG emissions, the narrower Charter claims are destined to fail because the nexus or link between the harm and Canada’s conduct cannot be established. Governments could effectively play a shell game, employing a ‘now you see me, now you don’t’ strategy and sheltering behind alternative objections that the claim raised is either too broad or too specific.<sup>39</sup>

The appeal court stated that the possibility of multiple causes of a harm does not bar a constitutional challenge and that, in any event, the issue whether there is a sufficient nexus between the harm and the impugned state action is a matter to be addressed at a hearing on the merits.<sup>40</sup>

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<sup>36</sup> *Mathur Merits Hearing*, *supra* note 1 at para 120.

<sup>37</sup> *La Rose FCA*, *supra* note 32 at paras 133–134.

<sup>38</sup> *Ibid* at para 133.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid* at paras 133–134.



The restrictive effects of conventional norms and strategic pleading are highlighted by the manner in which the *Mathur* court dealt with the *Charter* issues raised in that case. The applicants’ strategic decision to frame their claim as a challenge to the CTCA and Target limited the scope of government action the Court could consider when evaluating their *Charter* claims. When the applicants attempted to raise impacts from broader government action Vermette J concluded that the applicants were trying to do indirectly what they were unable, due to their strategic pleading choices, to do directly.<sup>41</sup> Vermette J explained:

Based on the evidence before me, it is indisputable that, as a result of climate change, the Applicants and Ontarians in general are experiencing an increased risk of death and an increased risk to the security of the person. However, this is not the relevant question in this case. The Applicants’ *Charter* challenge is specific to subsection 3(1) of the CTCA and the Target (*very likely in order to avoid the dismissal of their Application as non-justiciable*). Thus, the relevant question is whether subsection 3(1) of the CTCA and the Target impose an increased risk of death, directly or indirectly, and/or whether they negatively impact or limit the Applicants’ security of the person.<sup>42</sup>

While *Mathur* has shown that claimants can craft a justiciable claim by defining the issues within “safe” legal parameters, it also demonstrates the limitations of this approach. Climate change is complex, with profound local and global implications, which makes it challenging to address adequately within the confines of conventional legal definitions.<sup>43</sup>

#### **4. Charter Claims**

##### (a) Introduction

In this section we discuss the core *Charter* arguments raised in rights-based climate change cases in Canada, and some of the related legal issues and practical considerations, including whether

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<sup>41</sup> *Mathur Merits Hearing*, *supra* note 1 at para 135.

<sup>42</sup> *Ibid* at para 120.

<sup>43</sup> *Parker*, *supra* note 25.

*Charter* rights can impose positive obligations on a government to act in the face of climate change. This is still an open question in Canada and an issue that will likely need to be addressed by appellate courts. *Mathur* is the first rights-based climate case in Canada to reach a merits hearing, and Vermette J’s thorough *Charter* analysis is sure to influence future claimants, judges, and scholars.

In Canada, it is unclear whether environmental rights enjoy constitutional protection. Unlike the constitutions of over 145 countries around the world, Canada’s *Charter* does not provide for explicit environmental rights.<sup>44</sup> This has led plaintiffs litigating climate change claims to argue that environmental rights are implicit in the *Charter*’s section 7 rights to life, liberty, and security of the person, as well as section 15 equality rights.<sup>45</sup> Many scholars support this theory<sup>46</sup> and assert that climate change claims based on section 7 *Charter* violations are the claims most likely to succeed.<sup>47</sup> However, Canadian courts have not yet been willing to determine whether section 7 or other *Charter* rights include or protect environmental and climate rights.<sup>48</sup> Much of this

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<sup>44</sup> Cameron & Weyman, *supra* note 25 at 195, 203; Kevin Berk, “Fighting Climate Change with the Charter: An Inquiry into the Effects of Litigating the Right to a Healthy Environment” (2020) [unpublished LLM thesis at Osgoode Hall Law School 2020] at 4; David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada’s Constitution*, Law and Society Series (Vancouver: UBC Press, 2012) at 196; Lynda M Collins, “Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution” (2015) 71 *Supreme Court Law Rev* 519 at 537–538 <<https://canlii.ca/t/ss8k>>. See also Lauren Wortsman, “‘Greening’ the Charter: Section 7 and the Right to A Healthy Environment” (2019) 28 *Dal J Leg Stud* 245 at 246. Notably, in June 2023, the Government of Canada recognized that “every individual in Canada has a right to a healthy environment” in the *Canadian Environmental Protection Act, 1992*, SC 1999, c 33. While this is not constitutional recognition of the right to a healthy environment, it is a step in the right direction and towards greater environmental protection in Canada.

<sup>45</sup> Claimants, including those in *La Rose* are also advancing climate change claims grounded in the public trust doctrine. A cause of action based on a breach of the public trust doctrine has not yet been recognized to apply in Canadian law (see *La Rose FC*, *supra* note 32 at paras 59, 81–100; *La Rose FCA*, *supra* note 32 at paras 53–62). A discussion of the public trust doctrine is beyond the scope of this article.

<sup>46</sup> Nathalie J Chalifour & Jessica Earle, “Feeling the Heat: Climate Litigation under the Canadian Charter’s Right to Life, Liberty, and Security of the Person” (2018) 42:4 *Vt L Rev* 689 at 694.

<sup>47</sup> Dustin W Klautt, “Can Canada’s ‘Living Tree’ Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?” (2018) *JELP* 31:3 185, at 191, 232; Eliza Lynn Brown, “Class Actions, Climate Change, and the Charter: Is Success Possible in Common Law Canada,” (2020) 15:2 *Can Class Action Rev* 39 at 62; Colin Feasby, David DeVlieger & Matthew Huys, “Climate Change and the Right to a Healthy Environment in the Canadian Constitution” (2020) 58:2 *Alta L Rev* 213 at 222. For a full analysis of the potential for litigating a climate change case under section 7 of the *Charter* see generally Chalifour & Earle, *ibid*. For a full analysis of the potential for litigating a climate change case under section 15 of the *Charter* see generally Nathalie J Chalifour, Jessica Earle & Laura Macintyre, “Coming of Age in a Warming World: The *Charter*’s Section 15(1) Equality Guarantee and Youth-Led Climate Litigation” (2021) 17:1 *Journal of Law & Equality* 1.

<sup>48</sup> Chalifour & Earle, *supra* note 46 at 694; Feasby, DeVlieger and Huys, *ibid* at 215, 226, 248; *Mathur Motion to Strike*, *supra* note 11 at para 233; *Mathur Merits Hearing*, *supra* note 1 at para 126; Vasuda Sinha, Lorne Sossin, & Jenna Meguid, “Charter Litigation, Social and Economic Rights & Civil Procedure” (2017) 26 *JL & Soci Pol’y* 43 at 60.

reticence stems from the courts' aversion to settling whether *Charter* rights can impose positive obligations on the government to take steps to address harms or to prevent future harms.<sup>49</sup> While Vermette J noted the compelling case the applicants made “that climate change and the existential threat that it poses to human life and security of the person present special circumstances that could justify the imposition of positive obligations under section 7 of the *Charter*,” she ultimately found she could dispose of the case without determining the positive rights issue.<sup>50</sup> It is clear from various comments made by Vermette J throughout the judgment that she felt bound by precedent to the effect that sections 7 and 15 of the *Charter* do not contain positive rights. She noted the Ontario Divisional Court's caution in *Leroux* that “it is not for the lower courts to step outside the well-established line of precedent under Section 7.”<sup>51</sup>

#### (b) Positive Rights

Scholars, political theorists, and jurists often differentiate between “positive rights” and “negative rights.”<sup>52</sup> Positive rights require others—typically the government—to take action to prevent impeding an individual's enjoyment of their rights, whereas negative rights require others—typically the government—to refrain from interfering with an individual's rights. In practice, rights are not a binary concept—negative rights can often contain positive elements and vice-versa.<sup>53</sup>

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<sup>49</sup> For a thorough list of cases and contexts where positive rights challenges have been dismissed by Canadian courts see *La Rose FCA*, *supra* note 32 at para 93.

<sup>50</sup> *Mathur Merits Hearing*, *supra* note 1 at para 138.

<sup>51</sup> *Ibid* at paras 130, 138, citing to *Leroux v Ontario*, 2021 ONSC 2269 at paras 113–116. See also *ibid* at paras 134 and 178, and the discussion below in Part 4.

<sup>52</sup> Ran Hirschl, “‘Negative’ Rights vs. ‘Positive’ Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order” (2000) 22 Hum Rts Q 1060 at 1071; Feasby, DeVliieger & Huys, *supra* note 47 at 248; Isaiah Berlin, *Four Essays on Liberty* (London, UK: Oxford University Press, 1969) at 130–31; Sinha, Sossin & Meguid, *supra* note 48 at 60; Charles Fried, *Right and Wrong* (Cambridge, Mass: Harvard University Press, 1978) at 110; *Mathur Motion to Strike*, *supra* note 11 at para 191; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at paras 19, 25.

<sup>53</sup> Sinha, Sossin & Meguid, *supra* note 48 at 60; Feasby, DeVliieger & Huys, *supra* note 47 at 239; Wortsman, *supra* note 44 at 282–283; Parker, *supra* note 25 at 64–65; Jennifer Koshan, “Redressing The Harms of Government (In) Action: A Section 7 Versus Section 15 Charter Showdown” (2013) 22:1 Constitutional Forum 31 at 37; Cara Wilkie & Meryl Zisman Gary, “Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality” (2011) 30 Windsor Rev Legal Soc Issues 37 at 38. In *La Rose FCA*, *supra* note 32, the Federal Court of Appeal noted that “the line between positive and negative rights is at times difficult to draw”, that “some rights have both positive and negative elements” (para 101), that “[m]any rights exist on the margins” (para 102), and that “a right may be seen as negative or positive depending simply on the perspective taken” (para 103).

Section 7 and 15 *Charter* rights are generally considered negative rights.<sup>54</sup> Section 7 ensures the right to life, liberty, and security of the person and the right not to be deprived of those rights except in accordance with the PFJs. Section 15 ensures that every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination. The protection afforded by the *Charter* ensures that these rights are not infringed by the government.

The content of section 7 and 15 *Charter* rights, however, is not fixed. As Sinha, Sossin, and Meguid note, section 7 and 15 *Charter* jurisprudence shows that *Charter* rights can evolve significantly as they are litigated.<sup>55</sup> This is consistent with the understanding of the *Charter* as a “living tree.”<sup>56</sup> In *Gosselin*, then Chief Justice McLachlin of the SCC discussed the flexible nature of section 7 and explicitly left open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.<sup>57</sup> Courts in non-climate change cases have even indicated that a “climate rights” case could present the “special circumstances” required to recognize positive obligations under section 7.<sup>58</sup> The Federal Court of Appeal has recently stated, in *La Rose*:

Climate change’s current and potential effects are widespread and grave, they include loss of land and culture, food insecurity, injury and death. In the *GGPPA References* the Supreme Court noted that climate change is an existential challenge, a threat of the highest order to the country, and to the future of humanity which cannot be ignored.... If these do not constitute special circumstances, it is hard to conceive that any such circumstances could ever exist; however, this remains to be determined by the trial judge.<sup>59</sup>

In fact, Canadian courts have imposed limited positive obligations on the government under sections 7 and 15 in certain circumstances. Under section 7, this has been in response to a law or

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<sup>54</sup> Feasby, DeVlieger & Huys, *supra* note 47 at 241.

<sup>55</sup> Sinha, Sossin & Meguid, *supra* note 48 at 54.

<sup>56</sup> Klautt, *supra* note 47 at 187.

<sup>57</sup> *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at paras 81–83; *Mathur Merits Hearing*, *supra* note 1 at para 125.

<sup>58</sup> *Mathur Merits Hearing*, *ibid* at para 138, citing *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 139 [*Kreishan*]; *La Rose FC*, *supra* note 32 at paras 67, 69–72.

<sup>59</sup> *La Rose FCA*, *supra* note 32 at para 116.

government action that aggravated risks to section 7 interests. For example, in *Canada (Attorney General) v PHS Community Services Society*, the SCC ordered the federal government to grant Insite—a safe injection site—an exemption from a statutory prohibition that was found to engage the applicants’ right to life, liberty, and security of the person.<sup>60</sup> This remedy imposed a positive obligation on the federal government to give Insite an exemption from prosecution, but it was based on the finding that Canada’s law aggravated risks to the applicants’ life, liberty, and security of the person, not on a freestanding positive obligation under section 7.

Canadian courts have been more willing to recognize positive obligations under section 15 of the *Charter* in certain circumstances. In *Eldridge v British Columbia* (“*Eldridge*”), the SCC found that British Columbia breached the claimants’ section 15 rights by failing to provide deaf hospital patients with sign language interpretation services.<sup>61</sup> British Columbia had a positive obligation to remedy this gap in its health care service scheme by providing sign language services to deaf patients where it was necessary for them to communicate effectively with their doctors. Similarly, in *Nova Scotia (Workers' Compensation Board) v Martin* (“*Martin*”), the SCC found that Nova Scotia’s workers compensation scheme breached the claimants’ section 15 rights by excluding coverage for chronic pain.<sup>62</sup> Notably, however, both *Eldridge* and *Martin* were framed as challenges to gaps in existing programs—they were not based on a free-standing positive obligation on the government.<sup>63</sup> To date, no Canadian court has found that section 7 or 15 imposes a freestanding positive obligation on the government.<sup>64</sup>

### (c) *Mathur* and Positive Rights

*Mathur* offers the most thorough judicial analysis to date of a potential positive rights claim in the Canadian climate change context. While the applicants framed their section 7 and 15

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<sup>60</sup> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [*PHS*]; *Mathur Merits Hearing*, *supra* note 1 at para 126. For a detailed discussion of *PHS* see Koshan, *supra* note 53 at 35–37. See also *La Rose FCA*, *supra* note 32 at para 104.

<sup>61</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; Wilkie & Zisman Gary, *supra* note 53 at 52–53.

<sup>62</sup> *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54; Wilkie & Zisman Gary, *ibid* at 53–54.

<sup>63</sup> Wilkie & Zisman Gary, *ibid* at 53–54.

<sup>64</sup> *Mathur Merits Hearing*, *supra* note 1 at paras 126–129, 176, 178; *Sharma*, *supra* note 23 at para 63.

arguments as a negative rights challenge and only made positive rights arguments in the alternative, Vermette J “disagree[d] with the Applicants that this is not a positive rights case”<sup>65</sup> and analysed the applicants’ claim on the basis of positive rights. She found that she did not need to decide whether positive obligations should be imposed under section 7 because any deprivation of the right to life or security of the person is not contrary to the PFJs relied upon by the applicants.<sup>66</sup> Vermette J analysed the applicants’ claim “assum[ing] without deciding that positive obligations can be imposed under section 7 in the special circumstances of this case.”<sup>67</sup> She found that if positive obligations could be imposed under section 7 “in the special context of climate change, the Applicants’ rights to life and to the security of the person are engaged in this case as a result of Ontario’s failure to set a higher Target.”<sup>68</sup>

Vermette J’s decision highlights some of the difficulties with section 7 positive rights claims. One of the biggest difficulties is that the current framework of analysis is ill-suited for recognizing positive government obligations under section 7. Vermette J stated that if such obligations are to be recognized, a different framework of analysis would most likely need to be adopted.<sup>69</sup> This has already been done for positive rights claims under section 2 of the *Charter* and may be a necessary future step before a section 7 positive rights claim can succeed.<sup>70</sup> A key aspect of the section 7 test that may need to be adapted is the PFJ analysis. Vermette J highlighted this point before ultimately rejecting the applicants’ claim for failing to show that any potential deprivation was contrary to the PFJs the applicants relied on.<sup>71</sup> We discuss the PFJs below in this Part.

Vermette J also rejected the applicants’ section 15 equality rights arguments.<sup>72</sup> She found the applicants failed to show a causal link between the impugned government action—the Target,

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<sup>65</sup> *Mathur Merits Hearing*, *supra* note 1 at para 134 (for section 7).

<sup>66</sup> *Ibid* at para 142. The applicants proposed a new PFJ of societal preservation. Vermette J rejected this proposal because societal preservation is neither a legal principle nor “fundamental to the way in which the legal system ought fairly to operate.” See *Mathur Merits Hearing*, *ibid* at paras 165–170.

<sup>67</sup> *Ibid* at para 142.

<sup>68</sup> *Ibid* at para 151. See also *ibid* at para 138.

<sup>69</sup> *Ibid* at para 139.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid* at para 140.

<sup>72</sup> *Ibid* at paras 177–183.

Plan, and CTCA—and the disadvantage the applicants allegedly face.<sup>73</sup> Central to Vermette J’s reasoning was the SCC’s recent decision in *R v Sharma* (“*Sharma*”), where that court found that section 15(1) of the *Charter* “does not impose a general, positive obligation on the government to remedy social inequalities or enact remedial legislation....”<sup>74</sup> She concluded that in light of *Sharma*, the court was unable to find an infringement of section 15 on the grounds alleged by the applicants.<sup>75</sup> Notably, the applicants argued that *Sharma* leaves intact previous SCC precedent that positive obligations may be imposed under section 15.<sup>76</sup> Vermette J, however, did not address this argument or previous precedent in her decision.

(d) Principles of Fundamental Justice (PFJs)

The PFJs reflect “the basic principles that underlie our notions of justice and fair process.”<sup>77</sup> The PFJ analysis is step two of the section 7 test. PFJs are a “qualifier” of section 7 rights—a section 7 challenge can only succeed if the deprivation is not in accordance with the PFJs.<sup>78</sup> The list of PFJs is not closed, but section 7 jurisprudence has evolved around three: arbitrariness, overbreadth, and gross disproportionality.<sup>79</sup> Courts may recognize new PFJs if the new principle “[is] a legal principle about which there is a significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.”<sup>80</sup> This is a stringent test and it is rare for Canadian courts to recognize a new substantive PFJ.<sup>81</sup>

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<sup>73</sup> *Ibid* at para 178.

<sup>74</sup> *Ibid* at paras 174, 176, 178, citing *Sharma*, *supra* note 23 at paras 40, 63.

<sup>75</sup> *Mathur Merits Hearing*, *ibid* at paras 178–179.

<sup>76</sup> *Ibid* at para 87.

<sup>77</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 19. See also *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 SCR 486 at para 31[*BC Motor Vehicle Act*].

<sup>78</sup> *BC Motor Vehicle Act*, *ibid* at para 24.

<sup>79</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 72. See also Suzy Flader, “Fundamental Rights For All: Toward Equality as a Principle of Fundamental Justice Under Section 7 of the *Charter*” (2020) 25 Appeal: Rev Current L & L Reform 43 at 47.

<sup>80</sup> *Mathur Merits Hearing*, *supra* note 1 at para 164, citing *R v Malmo-Levine*, 2003 SCC 74 at para 113; *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 87.

<sup>81</sup> See e.g. *Chaoulli*, *supra* note 29 at para 193, Binnie and Lebel JJ, dissenting.

In *Mathur*, the applicants claimed that the Target violates the PFJs against arbitrariness and gross disproportionality, and violates the societal preservation principle, which they argued should be recognized as a new PFJ.<sup>82</sup> In rejecting the applicants' arguments, Vermette J noted that arbitrariness and gross disproportionality are not well adapted to positive rights claims because they are not premised on government inaction or on action that falls short.<sup>83</sup> She held that the societal preservation principle does not meet the test to be recognized as a PFJ, as it is not a legal principle and does not relate to the legal system or its fair operation.<sup>84</sup> Despite rejecting their arguments, Vermette J identified the difficult task the applicants were faced with as they were forced to fit their novel climate claims into existing legal boxes. She noted that "some of the traditional principles of fundamental justice may need to be adapted when applied in a positive claim context, and new ones may be recognized."<sup>85</sup>

Scholars have similarly argued that the section 7 test—and more specifically the PFJ analysis—must evolve to enable courts to recognize positive rights. Suzy Flader argues that since the majority of the SCC's refusal to recognize positive section 7 rights in *Gosselin*, "[i]t is thus difficult, if not impossible, to imagine another case persuading a court to find a positive section 7 right using the current legal framework."<sup>86</sup> Flader's solution is for the courts to recognize equality as a new PFJ.<sup>87</sup> She acknowledges that this risks too much overlap between sections 7 and 15 of the *Charter*, but argues this approach would allow section 15 to serve its "unique *Charter* role", as sections 7 and 15 protect against "qualitatively different" harms.<sup>88</sup> While she was not writing in the context of climate change claims, this offers an intriguing potential fix for climate change cases, which are predominantly youth led and often include section 15 equality rights arguments. In the climate change context, the equality PFJ would apply to youth and future generations. Considering such a principle in the context of a case like *Mathur*, an equality-focused principle would allow for the balancing of competing equality interests between, for

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<sup>82</sup> *Mathur Merits Hearing*, *supra* note 1 at paras 55–57.

<sup>83</sup> *Ibid* at paras 160–162.

<sup>84</sup> *Ibid* at paras 165–170.

<sup>85</sup> *Ibid* at para 140.

<sup>86</sup> Flader, *supra* note 79 at 55, 57. See also Wayne MacKay, "Social and Economic Rights in Canada: What Are They, and Who Can Best Protect Them" (2009) 45 *Supreme Court Law Review* 385 at 409–411.

<sup>87</sup> See generally Flader, *ibid*. For an analysis of how equality meets the test to be recognized as a new PFJ see Kerri A Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2011) 42 *Ottawa L Rev* 411, 436–444.

<sup>88</sup> Flader, *ibid* at 59–60.



example, youth claimants on behalf of themselves and future generations, and a province with inadequate emissions reduction targets. Flader states that “this balancing ... should ultimately favour the party who faces the greater social and economic barriers.”<sup>89</sup> This approach might also, as Flader suggests, assist in facilitating novel claims, especially positive rights claims which have largely been unable to pass the PFJ part of the section 7 test.<sup>90</sup>

Chalifour and Earle propose a different option, suggesting that courts “attenuate the overbreadth principle.”<sup>91</sup> This would allow courts to use a modified version of the overbreadth PFJ in climate litigation and to consider claims based on government conduct that falls short or does not go far enough: “inadequate action would not be in accordance with the principles of fundamental justice because it bears no relation to the government’s goal of reducing GHG emissions.”<sup>92</sup> The current state of international climate science and the extent to which courts, including Vermette J, are increasingly accepting the accuracy and reliability of IPCC reports, adds force to such an argument.<sup>93</sup> Drawing on that science, Vermette J noted that “Ontario would have to reduce its emissions by approximately 52% below 2005 levels by 2030, i.e., increase the Target by 22%.”<sup>94</sup> In a case like *Mathur*, therefore, climate science could be relied on to support an argument that there is no relation between the goal, accepted by courts as legitimate and necessary, and the targets set by a province. Climate litigation is often premised on inadequate government action, which is not captured by the current conception of the overbreadth principle. Allowing courts to consider inadequate action under a variation of the overbreadth principle would make it easier for climate change litigants to satisfy the PFJ requirements of the section 7 test.

#### (e) Framing Charter Arguments

*Mathur* and other Canadian climate change cases highlight the importance of carefully framing *Charter* arguments in climate cases. Strategic framing is key to clearing the justiciability hurdle and it influences the arguments available to claimants. It also determines whether claimants can

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<sup>89</sup> *Ibid* at 58.

<sup>90</sup> *Ibid*.

<sup>91</sup> Chalifour & Earle, *supra* note 46 at 764.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Mathur Merits Hearing*, *supra* note 1 at para 19.

<sup>94</sup> *Mathur Merits Hearing*, *supra* note 1 at para 21.

make a negative rights or positive rights argument. However, as we have discussed above, *Mathur* shows us how the applicants' choice to narrowly frame their case as a challenge to the Target severely limited the scope of the government action they could rely on to prove their section 7 and 15 arguments.<sup>95</sup> This narrow framing was a strategic decision to clear the justiciability hurdle that plagued the *La Rose* claimants, but it ultimately proved detrimental to the *Mathur* case on its merits.<sup>96</sup>

The applicants' narrow framing in *Mathur* also hindered their section 15 arguments. Challenging the Target meant that the adverse impact on the claimant group must stem from the Target and not from climate change generally or other government action or inaction. Vermette J agreed with the applicants "that the evidence in this case shows that young people are disproportionately impacted by climate change. However, this disproportionate impact is caused by climate change, not by the Target, the Plan or the CTCA."<sup>97</sup>

While some narrow claims have succeeded and have led to positive change,<sup>98</sup> the complex nature of climate change challenges is such that narrow pleading can only take us so far. Finding the right balance between government conduct that is specific enough to be found justiciable, but broad enough to ground an infringement of *Charter* rights will continue to be one of the major challenges in climate change litigation. *Mathur* and other Canadian cases provide valuable insight into this challenge, but no case has found the right balance yet.

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<sup>95</sup> *Ibid* at paras 120, 135.

<sup>96</sup> Contrast *Mathur* with *La Rose FC*, where the claimants challenged a broad range of federal government conduct related to GHG emissions, which the Federal Court found was "an overly broad and unquantifiable number of actions and inactions" and therefore not justiciable (see *La Rose FC*, *supra* note 32 at paras 3, 40, 63). On appeal (*La Rose FCA*, *supra* note 32) the Federal Court of Appeal disagreed with the court below, finding that the section 7 claims were justiciable, notwithstanding their complexity, and that the applicants had "pled...an objective legal standard against which section 7 rights can be assessed" (at para 45). The appeal was allowed with leave to amend the pleadings to provide "the focus necessary for constitutional analysis" of the section 7 claims (para 133). See also Cameron & Weyman, *supra* note 25 at 201–202.

<sup>97</sup> *Mathur Merits Hearing*, *supra* note 1 at para 178.

<sup>98</sup> See, for example, *Victoria (City) v Adams*, 2009 BCCA 563, *PHS*, *supra* note 60, and the analysis of these cases in Koshan, *supra* note 53.

## **5. Climate Science and Adjudication**

A striking feature of *Mathur*, similar to other rights-based transnational climate change litigation, is the manner in which the court analysed and relied on international climate science, especially IPCC reports. In this section we will explore the contributions that *Mathur* makes to climate change litigation jurisprudence in its consideration and acceptance of international climate science.

Courts draw upon a range of sources in quantifying emissions. These include the IPCC, the United Nations Framework Convention on Climate Change (“UNFCCC”), and case law.<sup>99</sup>

Functioning as an independent body within the framework of the World Meteorological Organization and UNEP, the IPCC plays a central role in shaping the landscape of climate science by evaluating scientific, technical, and socioeconomic data crucial for comprehending the risks linked to anthropogenic climate change.<sup>100</sup> The credibility and reliability of IPCC reports is robust, instilling a high level of confidence globally, including among judges.<sup>101</sup> Drafting IPCC reports requires the collaboration of a globally diverse team of subject matter experts.<sup>102</sup> Once written, these reports undergo a stringent and global peer review process.<sup>103</sup>

Some evidence of the credibility of IPCC reports is the extent to which they are increasingly relied on by claimants and courts in transnational climate change litigation. In *Mathur*, Vermette J analysed the way in which IPCC reports are prepared, and concluded:

Given the expertise of the IPCC author teams and the care and rigour that is applied to the review process, and based on the expert evidence before me, I find that the IPCC

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<sup>99</sup> Intergovernmental Panel on Climate Change (IPCC), online: <<https://www.ipcc.ch/>>; United Nations Framework Convention on Climate Change (UNFCCC), “Introduction to Science in the UNFCCC” online: <<https://unfccc.int/topics/science/the-big-picture/introduction-science>>; *GHG References*, *supra* note 1.

<sup>100</sup> See IPCC-Procedures, online: <<https://www.ipcc.ch/documentation/procedures/>>, <<https://perma.cc/9YT7-GLUP>>; Eric Paglia & Charles Parker, “The Intergovernmental Panel on Climate Change: Guardian of Climate Science” in Arjen Boin, Lauren A Fahy & Paul ‘t Hart, eds, *Guardians of Public Value* (Palgrave Macmillan, Cham 2020) online <[https://link.springer.com/chapter/10.1007/978-3-030-51701-4\\_12](https://link.springer.com/chapter/10.1007/978-3-030-51701-4_12)>.

<sup>101</sup> Paglia & Parker, *ibid*; *Mathur Merits Hearing*, *supra* note 1 at paras 18–21.

<sup>102</sup> IPCC-Procedures, *supra* note 100; Paglia & Parker, *ibid*.

<sup>103</sup> IPCC-Procedures, *ibid*.

reports are a reliable, comprehensive and authoritative synthesis of existing scientific knowledge about climate change and its impacts. I reject any suggestion to the contrary by Ontario’s experts... whose credentials do not measure up to those of the IPCC.<sup>104</sup>

In the landmark Dutch Supreme Court decision, *Urgenda Foundation v The State of the Netherlands* (“*Urgenda*”),<sup>105</sup> the court took a similar approach, stating that IPCC reports “represent the current climate science” and that “the court – and also the Parties... considers these [IPCC] findings as facts.”<sup>106</sup>

The UNFCCC is an international treaty established to address climate change and its impacts.<sup>107</sup> The Conference of the Parties (“COP”), the “supreme decision-making body” of the UNFCCC,<sup>108</sup> encourages UNFCCC bodies to maintain close cooperation with the IPCC, with the aim of fostering an environment whereby parties can consult and engage with the authors of the IPCC reports.<sup>109</sup> In *Urgenda*, the Dutch courts relied on the UNFCCC and the country’s commitments under the Paris Agreement in ascertaining the levels of emissions emanating from the Netherlands.<sup>110</sup> This underscores the authoritative role the UNFCCC plays in informing legal determinations about emissions and climate commitments. In 2021, in *GHG References*, the SCC accepted as fact that “establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole” and is “critical to our response to an existential threat to human life in Canada and around the world.”<sup>111</sup> In doing so, the court relied on the text of the UNFCCC and the Paris Agreement.<sup>112</sup>

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<sup>104</sup> *Mathur Merits Hearing*, *supra* note 1 at 18–21.

<sup>105</sup> *Urgenda Foundation v The State of the Netherlands*, (2019) Supreme Court of the Netherlands, 19/00135 [*Urgenda*, *Supreme Court*]; *Urgenda v The State of the Netherlands*, (2015) Hague District Court, C/09/456689 [*Urgenda*, *District Court*].

<sup>106</sup> *Urgenda*, *District Court*, *ibid* at para 4.12.

<sup>107</sup> *Mathur Merits Hearing*, *supra* note 1 at 6–7.

<sup>108</sup> United Nations Climate Change, “Conference of the Parties (COP)”, online: <<https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop>>.

<sup>109</sup> United Nations Climate Change, “Cooperation with the IPCC|UNFCCC”, online: <<https://unfccc.int/topics/science/workstreams/cooperation-with-the-ipcc>>.

<sup>110</sup> *Urgenda*, *Supreme Court*, *supra* note 105 at para 2.1.

<sup>111</sup> *GHG References*, *supra* note 1 at para 171.

<sup>112</sup> *Ibid* at paras 174, 177.

As a result of transnational courts relying on and gradually accepting these climate change facts, they are well-known and easily provable. Instead of relying exclusively on expert evidence in the conventional sense, judges have turned to the IPCC. This approach integrates the reliable and well-established climate science from the IPCC into legal decisions, a significant advantage in time-sensitive and expensive cases.<sup>113</sup>

Notwithstanding the credibility that IPCC reports and science have earned in courts throughout the world, some observers advocate that the IPCC should switch its focus from its longstanding commitment to being “policy-relevant and yet policy-neutral, never policy-prescriptive”<sup>114</sup> to “incorporate more diverse, even contradictory views and values, or even begin to advocate for specific solutions.”<sup>115</sup> Since its establishment in 1988, the IPCC has successfully changed its structure and approach in an effort to remain relevant.<sup>116</sup> Its adaptability is one of the reasons for its success and its recognition as a reliable source on matters related to climate change science. However, there are calls for the IPCC to expand its natural sciences focus to one that more fully embraces social sciences expertise, and to become more diverse and inclusive.

Because climate science and policy are ever more polycentric, the IPCC must open up to new groups of stakeholders, not just scientific experts and delegates from UNFCCC parties. Many observers are calling for better representation of civil society, industry

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<sup>113</sup> A departure from this approach occurred in an ongoing climate change class action in Australia brought on behalf of Indigenous Torres Strait Islanders against the Australian Government, when government lawyers, during cross examination of expert witnesses, “highlighted single sentences from expert reports and asked the scientists to explain the basis for each view.” See Lisa Cox, “‘It’s not viable any more’: global heating sparks first climate class action by Indigenous Australians”, *The Guardian* (11 November 2023), online:

<<https://www.theguardian.com/environment/2023/nov/12/its-not-viable-any-more-global-heating-sparks-first-climate-class-action-by-indigenous-australians#:~:text=The%20lead%20plaintiffs%20in%20the,cutting%20greenhouse%20gas%20emissions%20>>.

<sup>114</sup> Jasmine Livingston, “Reports”, in K De Pryck & M Hulme, eds, *A Critical Assessment of the Intergovernmental Panel on Climate Change*, (Cambridge, UK: Cambridge University Press, 2022) 39–48

<doi:10.1017/9781009082099.007>; Kari De Pryck, “Why the IPCC Can’t Escape Climate Politics” (30 March 2023), online: *Green European Journal* <<https://www.greeneuropeanjournal.eu/why-the-ipcc-cant-escape-climate-politics/>>; IPCC, “Organization” online: <<https://archive.ipcc.ch/organization/organization.shtml>>; Arthur Nelson, “We need power to prescribe climate policy, IPCC scientists say”, *The Guardian* (11 December 2023), online: <<https://www.theguardian.com/environment/2023/dec/07/we-need-power-to-prescribe-climate-policy-ipcc-scientists-say>>.

<sup>115</sup> Adam Standring, “Climate politics is more complex and urgent than ever – is the IPCC fit for the purpose?”, *The Guardian* (5 September 2023), online: <<https://www.theguardian.com/commentisfree/2023/sep/05/climate-politics-ipcc-emergency>>. In the words of an IPCC vice-chair, “As climate change becomes worse and worse, it is becoming more difficult to be policy relevant without being prescriptive” – see Nelson, *ibid*.

<sup>116</sup> De Pryck, *supra* note 114.

professionals, local authorities, indigenous communities, ordinary citizens, women and young people. As a result, the IPCC will have to rethink its role in climate governance.<sup>117</sup>

Changes that have been suggested range from increasing diversity but leaving other structures and processes more or less as is, to embracing “a wholly new role as an advocate for change.”<sup>118</sup> Such changes would be responsive to these calls and to the polycentric and political nature of climate change, but they also run the risk of undermining the reputation and the reliability of the IPCC as an authoritative and independent source of climate science expertise.

## **6. Collective Action Challenges**

Climate change and the harmful effects of GHGs are global issues. Regardless of the efforts that a province or a country makes to reduce emissions, that province or country can still suffer effects of climate change that are “grossly disproportionate to their individual contributions.”<sup>119</sup> Canada, with its provinces and territories, is a microcosmic example of these global collective action challenges. This was captured well in *Mathur* with Vermette J’s description of GHG emissions increases and reductions over time in Canadian provinces.<sup>120</sup>

Illustrative of the collective action problem of climate change, between 2005 and 2016 the decreases in GHG emissions in Ontario, Canada’s second largest emitting province, were mostly offset by increases in emissions in two of Canada’s five largest emitting provinces, Alberta and Saskatchewan.<sup>121</sup>

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<sup>117</sup> *Ibid*; Standing, *supra* note 115. Standing states that while the IPCC is “the most authoritative global source of knowledge on climate breakdown”, sufficient diversity is lacking and “scientists from the global south, social scientists and researchers in the humanities, indigenous voices and alternate knowledge systems make up a minority of the assessment participants.”

<sup>118</sup> Standing, *ibid*.

<sup>119</sup> *Mathur Merits Hearing*, *supra* note 1 at para 17, citing *GHG References*, *supra* note 1 at para 12.

<sup>120</sup> *Mathur Merits Hearing*, *ibid*, citing *GHG References*, *ibid* at para 24.

<sup>121</sup> *Ibid*.

Vermette J noted the SCC’s comments in *GHG References* that among the unique characteristics of climate change are that it has no boundaries, that no single province or country can address the issue on its own, and that “collective national and international action” is required.<sup>122</sup>

The SCC in *GHG References* also rejected the argument that because of the global nature of climate change, the GHG emissions of one province cause no measurable harm.

Each province’s emissions are clearly measurable and contribute to climate change. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail.<sup>123</sup>

In rejecting this argument, the SCC referred to cases from Australia, the United States and the Netherlands.<sup>124</sup> In *Urgenda*, for example, the Supreme Court of the Netherlands upheld the findings of the lower courts that any GHG emission, no matter how minor, contributes to “the global harms of climate change.”<sup>125</sup> The SCC added that one dimension of the global nature of climate change is that far from nullifying any individual province’s responsibility to reduce its own emissions, provinces must do so, so as not to impair Canada’s efforts in international negotiations to encourage global efforts to reduce GHG emissions.<sup>126</sup>

In addition to the governments of Alberta in *GHG References* and Ontario in *Mathur*, other governments have advanced similar arguments, including the federal governments in *Massachusetts v EPA* and *Urgenda*. A more recent statement along these lines was made by a spokesperson for the Montana Attorney General in response to the decision in *Held v Montana*: “Montanans can’t be blamed for changing the climate.”<sup>127</sup> Vermette J, relying on *GHG References* and quoting the applicants’ submissions, stated in *Mathur* that “most jurisdictions

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<sup>122</sup> *Mathur Merits Hearing, ibid*, citing *GHG References, ibid* at para 12.

<sup>123</sup> *GHG References, ibid* at para 188, quoted by Vermette J in *Mathur Merits Hearing, ibid*.

<sup>124</sup> *GHG References, ibid* at para 189, citing *Urgenda, Supreme Court, supra* note 105.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid* at para 190. They also noted at para 206 that the irreversible harm caused by failure to act would be especially damaging for “vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada’s coastal regions.”

<sup>127</sup> David Gelles & Mike Baker, “Judge Rules in Favour of Montana Youths in a Landmark Climate Case”, *The New York Times* (14 August 2023), online: <<https://www.nytimes.com/2023/08/14/us/montana-youth-climate-ruling.html>>.

could paralyze the required global effort by claiming that their emissions are of little consequence.”<sup>128</sup>

These collective action dimensions of climate change are relevant to determining whether there is a causal connection between the impugned law or government action and the harm suffered sufficient to engage section 7 of the *Charter*. Ontario argued in *Mathur* that the global nature of climate change, and Ontario’s comparatively small contribution to that global problem, negated any causal connection between its impugned Target and climate change harms. Vermette J rejected this submission.

None of the points raised by Ontario can disturb the conclusion that, by not taking steps to reduce GHG in the province further, Ontario is contributing to an increase in risks to human health, life and safety ... Ontario’s proposed approach is that no step should be taken until the risks are realized. Such an approach would seriously undermine the rights protected by section 7 of the *Charter*.<sup>129</sup>

This clarity offered by *Mathur*, *GHG References*, and other transnational climate change cases is an excellent example of “the contributions of this emerging jurisprudence to transforming the collective action problem that is climate change.”<sup>130</sup>

## **7. Further Discussion and Conclusions**

Canada has not yet seen a successful rights-based climate change litigation case against a government. However, success or failure should be understood beyond the actual outcome when dealing with novel and complex litigation.<sup>131</sup> Even where claimants might not achieve the desired outcome in court, benefits can emerge from the litigation process. One such benefit is raising awareness about the perils of climate change. Another is sparking other forms of

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<sup>128</sup> *Mathur Merits Hearing*, *supra* note 1 at para 149.

<sup>129</sup> *Mathur Merits Hearing*, *supra* note 1 at para 150.

<sup>130</sup> Catalina Vallejo and Siri Gloppen, “The quest for butterfly climate judging”, (11 August 2020), online: *Open Global Rights* <<https://www.openglobalrights.org/quest-for-butterfly-climate-judging/>>.

<sup>131</sup> *Ibid.*



mobilization.<sup>132</sup> Additionally, as more cases proceed through the litigation process, there is an accumulation of scientific certainty, seen, for example, in the increasing acceptance of IPCC reports in transnational climate change litigation. This can facilitate future litigation,<sup>133</sup> and the increased certainty resulting from preceding cases can also inform claimants' legal strategy choices.<sup>134</sup> As Vallejo and Gloppen suggest, the bottom-up regulatory framework of the Paris Agreement provides a foundation for domestic courts to engage in "butterfly judging",<sup>135</sup> meaning that "seemingly minor interventions in the legal realm can have a butterfly effect that generates major social and cultural transformations...one case at a time."<sup>136</sup> Celeste Arrington makes a similar point, referring to the "radiating effects" of litigation, even litigation that is unsuccessful in the conventional sense.<sup>137</sup> One of these radiating effects is that courts adapt legal norms and doctrines to address novel climate issues, such as justiciability, and explore new approaches, shaping climate jurisprudence case by case. The radiating effects of climate change litigation contribute to broader efforts in addressing climate change and driving climate action within Canada and globally. As the number of climate change litigation cases grows, there is a continuous progression toward achieving more accessible judgments. Additionally, raising awareness about the urgency and gravity of the climate change problem through litigation can influence public opinion, bring pressure for policy changes, foster accountability, and create legal precedents that contribute to national and transnational jurisprudence.

One of *Mathur*'s key contributions is its strong statement on the justiciability of rights-based climate change claims. *Mathur* supports the findings in previous Canadian jurisprudence and the

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<sup>132</sup> See, e.g. Arrington, *supra* note 12.

<sup>133</sup> Lisa Vanhala, "Why ideas and identity matter in climate change litigation", (28 June 2020), online: *Open Global Rights* <<https://www.openglobalrights.org/why-ideas-and-identity-matter-in-climate-change-litigation/>>.

<sup>134</sup> This can be a benefit but, as we explained above in Parts 3 and 4, it can also unduly constrain litigant choices, stymying rather than nurturing the development of effective judicial responses to deal with novel and "wicked" problems like climate change. For a discussion of "wicked problems" in the climate change context, see Larissa Parker, *supra*, note 25.

<sup>135</sup> Vallejo & Gloppen, *supra* note 130.

<sup>136</sup> *Ibid*. See also Catharine A MacKinnon, *Butterfly Politics*, (Cambridge, MA: Harvard University Press, 2019). MacKinnon uses the "butterfly effect" concept as an organising metaphor for "butterfly politics", meaning that "the right small intervention in an unstable political system can sooner or later have large complex reverberations" (*ibid* at 1). See generally *ibid* at 1–8.

<sup>137</sup> Arrington, *supra* note 12. See also Paiement, *supra* note 10; Peel & Osofsky 2015, *supra* note 12, especially Chapter 6, for a discussion of the role of litigation in shaping social norms related to climate change; Lynda Collins, "Judging the Anthropocene: Transformative Adjudication in the Anthropocene Epoch," in Louis J Kotzé, ed, *Environmental Law and Governance for the Anthropocene*, (Portland: Hart Publishing, 2017) at 309–327.

arguments advanced by the applicants that the category of non-justiciable cases is very small,<sup>138</sup> especially if violations of *Charter* rights are alleged.<sup>139</sup> Further, we have the court’s endorsement of comments in *Chaoulli* and *PHS* that judicial review in such cases is required “even when the issues are complex, contentious and laden with social values.”<sup>140</sup>

Another contribution that *Mathur* makes to climate change jurisprudence is to reinforce the SCC’s comments in *GHG References* that provinces have a responsibility to reduce their own GHG emissions. The argument that the GHG emissions of one province cause no measurable harm because climate change is global and provinces’ emissions are comparatively small has been rejected in Canadian and international climate change jurisprudence.<sup>141</sup>

*Mathur*’s most significant contribution, in our view, is the attention the court paid to the applicability of section 7 of the *Charter* in a rights-based climate change claim. While a positive rights framing was not, for reasons we have explained, a direction the applicants chose in presenting their case, the court’s detailed analysis on this issue brings into sharp relief the need for a new approach to section 7 if we are to make any headway in dealing with the complexities, perils, and imperatives of climate change. We have discussed several possible approaches. First, as the law now stands, a section 7 claim has to be inconsistent with a PFJ. This is difficult because PFJs were largely recognized and developed in negative rights contexts. Existing PFJs need to be adapted to make it easier to bring forward a positive rights claim in a climate change case. Courts should be open to modifying existing PFJs and more willing to recognise new PFJs. Second, the section 7 analysis should be revised to make it easier for a positive rights claim to succeed, in a manner similar to the approach that has been developed for positive claims under section 2 of the *Charter*.<sup>142</sup> Canadian courts have opened the door slightly to recognize the

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<sup>138</sup> *Hupacasath First Nation*, *supra* note 30 at paras 66–67.

<sup>139</sup> *Mathur Merits Hearing*, *supra* note 1 at paras 34, 100; *Chaoulli*, *supra* note 29; *Hupacasath First Nation*, *supra* note 30. See also *supra*, notes 30–31, and related text.

<sup>140</sup> *Mathur Merits Hearing*, *ibid* at para 106.

<sup>141</sup> In *La Rose FCA*, *supra* note 32 at para 134, the Federal Court of Appeal made similar comments, stating that “the possibility that there are other causes or sources of the asserted infringement or harm does not constitute a barrier to a constitutional challenge...To hold otherwise would effectively immunize legislation from constitutional scrutiny.”

<sup>142</sup> *Ibid* at paras 139–140.

possibility of a section 7 positive rights claim, in one case even suggesting that a climate change case might be the “just right” case to justify pushing that door fully open.<sup>143</sup>

*Mathur* offers a lesson for the future of climate change litigation. It underscores the importance of finding a balance between legal pragmatism and acknowledging the immense scale and complexity of the climate crisis. It prompts a broader conversation about how to navigate the tensions between legal feasibility and the actual scope of climate change challenges. In rights-based litigation in a Canadian context, we endorse the reminders from scholars and courts to view the *Charter* “as a living tree capable of growth and expansion within its natural limits.”<sup>144</sup> Ultimately, and consistent with the narrative-building nature of much similarly complex litigation, the case serves as a stepping-stone, showing that while progress is being made, there is still a long way to go in framing climate change litigation effectively without inadvertently limiting its utility as a tool for addressing climate change and the “existential threat” that it poses.<sup>145</sup>

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<sup>143</sup> *Ibid* at para 138, citing *Kreishan*, *supra* note 58 at para 139; *La Rose FC*, *supra* note 32 at paras 67, 69–72.

<sup>144</sup> *Mathur Merits Hearing*, *supra* note 1 at para 82; Parker, *supra* note 25.

<sup>145</sup> *Mathur Merits Hearing*, *ibid* at para 138; *GHG References*, *supra* note 1.