

Dark Innovations, Climate Justice, and the Canadian *Charter*

*Adebayo Majekolagbe**

What powers do judges have to actively participate in crafting climate responses? What vision of justice should they aim for when addressing questions about the non-existence or inadequacy of climate policies? This article addresses these questions. Climate change demands judicial innovation — the rethinking of legal norms and the creation of new ones by judges. The Charter, as a supple and regenerative construct — a metaphorical living tree — provides the required transformative space for such innovation. Nevertheless, the transformative space provided by the Charter is necessarily controlled given the legitimacy imperative of the decisions of courts. Hence, Canadian courts, while acknowledging their role as norm innovators, approach the task of innovation incrementally. Although judges in Canada have not made findings in climate litigation which are as “radical” as other jurisdictions, there is a steady growth in dark (under-the-radar) innovations in Canadian climate jurisprudence. Justice must, however, necessarily be the organizing principle of the innovations of courts given the justice essence of climate change. A comprehensive account of climate justice including substantive (distributive justice and wellbeing) and procedural components (procedural justice and recognition) is accordingly provided here. These orientations of climate justice are relevant in mapping the next phase of judicial innovation, particularly regarding issues surrounding locus standi, justiciability and cause of action, evidence, and forms of relief, in Charter climate litigation in Canada.

Des propositions d’inclure explicitement le droit à un environnement sain dans la Constitution du Canada ont été avancées depuis le début des années 1970, mais le Canada se trouve dans une impasse qui dure depuis des décennies et qui empêche tout amendement substantiel à la Constitution. Cet article utilise le cul-de-sac comme métaphore pour explorer les possibilités de reconnaissance juridique des droits environnementaux dans cette situation. D’abord, il examine les efforts passés qui ont essayé de constitutionnaliser les droits environnementaux généraux et autochtones, introduit des culs-de-sac métaphorique et réels et souligne l’ironie de la blague d’un commentateur en 2005 que ce sera « une journée chaude à Iqaluit » lorsque la Constitution du Canada aura des amendements importants. Il passe ensuite en revue des efforts actuels à établir un droit à un environnement sain par articles 7 et 15 de la Charte; les développements récents de la reconnaissance des droits environnementaux des autochtones par l’article 35 de la Constitution et par la Déclaration des Nations Unies sur les droits des peuples autochtones; l’incorporation du droit à un environnement sain dans les lois fédérales sur l’environnement; et les initiatives à reconnaître les droits des rivières. Il conclut que, tel qu’un cul-de-sac dans le monde réel, cela de la Constitution du Canada demande que les défenseurs d’un droit juridiquement exécutoire à un environnement sain prennent des routes plus longues et plus détournées vers les destinations insaisissables, et les pousse sur les rues surpeuplées des droits constitutionnels

* Assistant Professor, Faculty of Law, University of Alberta.

et des lois environnementales existants. Tout dit, les développements récents laissent espérer que les résidents de ce cul-de-sac pourraient atteindre un sens de communauté (avec tous les êtres), une interaction de bon voisinage (entre les ordres juridiques coloniaux et autochtones) et un environnement plus sûr et plus stable pour les jeunes (et les générations futures).

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“We must accept the fact that for better or for worse judges do make law, and tackle the question of how do they approach their task and how should they approach it.”¹

I. Introduction

The metaphor of the Canadian Constitution as a living tree is rooted in the decision of the Judicial Committee of the Privy Council in the *Persons Case*.² The Privy Council held that women come under the word “person” in section 24 of the *Constitution Act, 1867* despite the seemingly contrary intention in the qualifications to become a Senator in section 23 of the *Act*.³ This liberal interpretation of section 24 was a product of its time. As highlighted by the Privy Council, the exclusion of women from public offices (in this case, the Senate), an interpretation that the Supreme Court of Canada (“SCC”) had previously adopted,⁴ “[was] a relic of days more barbarous than ours.”⁵ Rejecting a “narrow and technical construction,” the Privy Council held that the Constitution is “a living tree capable of growth and expansion within its natural limits ... [and] subject to development through usage and convention.”⁶ The metaphorical description of the Constitution as a living tree has endured through the present day, despite its critics.⁷ It provides the primary conceptual frame for my reflections, in this article, on how Canadian courts have approached and determined climate cases before them. The pivotal question undergirding this inquiry is whether the Canadian Constitution is “living” enough to address the defining issue of this century — climate change. I make two claims in addressing this question.

First, the entrenched culture of liberal constitutional interpretation in Canada provides ample transformative space⁸ to innovate legal rules and norms

1 Lord Reid, “The Judge as Law Maker” (1972) 12 J Society Pub Teachers L at 22.

2 *Edwards v Canada (Attorney General)*, [1930] 1 DLR 98 at 112–113 [*Persons Case*].

3 *Ibid*.

4 *Reference re Meaning of the Word “Persons” in s 24 of the British North America Act, 1867*, [1928] SCR 276.

5 *Persons Case*, *supra* note 2 at 99.

6 *Ibid* at 106–107.

7 See Grant Huscroft, “The Trouble with Living Tree Interpretation” (2006) 25:1 UQLJ 3; Allan Hutchinson, “Living Tree?” (1992) 3:4 Const Forum Const 97.

8 Sustainability Transformation theorists understand “transformative spaces” as “collaborative environments where experimentation with new configurations of socio-ecological systems, crucial for transformation, can occur.” Such spaces “allow and enable dialogue, reflection and reflexive learning, while reframing issues in ways that allow solutions — or at the very least, attempts to experiment and trans-

to address climate change as the unique phenomenon that it is. Indeed, I show that there is already considerable albeit incremental innovation by Canadian courts regarding climate change. Second, although most Canadian climate litigants, to varying degrees, raise questions of substantive and procedural justice, Canadian courts have been, at best, muted in engaging with and addressing these issues of justice. Despite the general view that innovation is itself normatively neutral, climate change and its disproportionately distributed devastating impacts cannot afford the luxury of normative neutrality. The normative value of judicial innovation is, therefore, hugely dependent on its attention to justice.

My arguments under these two claims draw heavily on the decisions of the Quebec Superior Court and Quebec Court of Appeal in *Environnement Jeunesse v AG, Canada* (“ENJEU”) and the more recent decisions in *La Rose v Canada* (“La Rose”) and *Mathur v Ontario* (“Mathur”).⁹ The claims in *ENJEU*, *Mathur*, and *La Rose* are based on provisions of the *Canadian Charter of Rights and Freedoms* (“Charter”). Undoubtedly, there are other important decisions in Canada’s growing climate jurisprudence, including federalism-based decisions like the *References re Greenhouse Gas Pollution Pricing Act* (“GGPPA Reference”), and statutory and regulatory cases like *Sierra Club v British Columbia*, and *Sierra Club v Canada*.¹⁰ The impacts of climate change on individual and collective rights are, however, central to the causes of action in climate litigation. Globally, the most important cases on climate change, from the decision of the Netherlands Supreme Court in *Urgenda* to the German Federal Constitutional Court’s decision in *Neubauer* and the decision of the European Court of Human Rights (“ECtHR”) in *Verein*, are premised on human rights.¹¹ There

form — to be co-created and co-realized.” See Laura Pereira et al, “Transformative Spaces in the Making: Key Lessons from Nine Cases in the Global South” (2020) 15 Sustainability Science 161 at 162. With due regard for crucial bounds within which courts operate, I argue, in this work, that courts are “transformative spaces.” While often contentious and adversarial, the advocacy of parties before courts is a form of dialogue that has translated into real change in the Canadian society. The Canadian Supreme Court, on issues ranging from the role of women in government (*Persons Case*, *supra* note 2) to the rights of LGBTQ+ persons not to be discriminated against (*Egan v Canada*, [1995] 2 SCR 513 [Egan]), has clearly functioned as a “transformative space” on numerous occasions.

9 *Environnement Jeunesse v Attorney General of Canada*, 2019 QCCS 2885 [ENJEU QSC]; *Environnement Jeunesse v Attorney General of Canada*, 2021 QCCA 1871 [ENJEU QCCA]; *La Rose v Canada*, 2023 FCA 241 [La Rose]; *Mathur v Ontario*, 2023 ONSC 2316 [Mathur ONSC]; *Mathur v Ontario*, 2024 ONCA 762 [Mathur ONCA].

10 *References Re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [GGPPA Reference]; *Sierra Club of British Columbia Foundation v British Columbia (Minister of Environment and Climate Change Strategy)*, 2023 BCSC 74; *Sierra Club Canada Foundation v Canada (Environment and Climate Change)*, 2023 FC 849.

11 *Rechtbank Den Haag [District Court of The Hague, Chamber for Commercial Affairs]*, 24 June 2015, *Urgenda Foundation v The State of the Netherlands*, Case No. C/09/456689/HA_ZA 13-1396 (Netherlands), online (pdf): <climatecasechart.com/wp-content/uploads/non-us-case-documents/

is also an argument to be made that rights-based climate litigation has greater transformative potential than federalism-based cases. Rights-based litigation is less prone to the political dynamics and uncertainties that federalism-based cases are fraught with and could result in constitutional duties which federalism-based cases cannot compel.¹²

In part two of the article, I define judicial innovation and provide a framework for tracking the scope and level of the innovation of courts in climate cases. Further, I propose a composite description of climate justice drawing on the works of law and justice theorists. In part three, using the judicial innovation framework, I review the innovations of the courts in *Mathur*, *ENJEU*, and *La Rose* and the considerations that informed innovation or a lack thereof. Part four then argues that the next phase of judicial evolution regarding climate change must pay attention to distributive justice, justice as recognition, procedural justice, and the capability approach to justice. The implications of these justice orientations for how courts decide the types of claims they consider, the parties deserving of standing, the forms of evidence considered relevant, and the relief granted are also discussed.

II. Conceptualizing Judicial Innovation and Climate Justice

The question of whether courts have a role in actively fostering social change is a perennial debate in Canadian jurisprudence and legal scholarship.¹³ The reaction to the Privy Council's decision in the *Persons Case* was nearly uniformly negative, with the Council accused of having "altered the Constitution of the Senate of Canada" by judicial fiat.¹⁴ Many years after *Persons*, Justice McClung of the Alberta Court of Appeal in *Vriend v Alberta* did not hold back in exco-

2015/20150624_2015-HAZA-C0900456689_decision-1.pdf> [perma.cc/K5SH-YDBQ] [*Urgenda*]; *Neubauer et al v Germany*, [2021] [Federal Constitutional Court], March 24, 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, (Germany), online: <bverfg.de/ers20210324_1bvr265618en.html> [perma.cc/GQA6-UJ6J] [*Neubauer*]; *Verein Klimasenioren Shweiz and Others v Switzerland* (Application no. 53600/20, judgment delivered 9 April 2024) [*Verein*].

12 "[T]he debates engendered by [*Charter*] decisions are national debates, on issues that transcend the federal-provincial or regional differences that occupy so much of Canada's public debates. Charter issues do not call in question the legitimacy of Canada as a national political community. They assume that legitimacy, and they strengthen it by further assumption that on issues of human rights it is appropriate to have a single Canadian policy." Peter Hogg & Wade Wright, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2023) at 905–906.

13 Ian Holloway, "The Hollow Hope: Can Courts Bring About Social Change?" (1992) 15:2 Dal LJ 655; Martha Jackman, "Charter Equality at Twenty: Reflections of a Card-carrying Member of the Court Party" (2006) 20 NJCL 115.

14 Carissima Mathen captures some of the criticisms in the wake of the *Persons* case in her work. See Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019) at 136.

riating proponents of the dominant wave of activist interpretation of *Charter* rights.¹⁵ To read sexual orientation into Alberta's *Individual's Right Protection Act* ("IRPA") when legislators had deliberately chosen not to include it as a protected ground of discrimination, according to Justice McClung, would be "a debacle for the autonomy of ... provincial law-making."¹⁶ Taking the fight directly to "constitutionally-hyperactive judges," "crusading ... ideologically determined judges," and "the rights euphoric, cost-scoffing left," Justice McClung warned that courts must not "descend into collegial bodies that meet regularly to promulgate 'desirable' legislation."¹⁷

Justice McClung's position has not caught on in Canadian legal scholarship and jurisprudence. The debate is no longer whether courts can grow and groom the Constitution as a living tree, but what should be the "natural limits" within which such growth must occur. It is generally accepted that, unlike in the United States, there is at best a very loose notion of the separation of powers in Canada, within which the task of growing and grooming the constitutional "tree" falls considerably on the courts. In *Hunter v Southam* ("Hunter"), Dickson CJ, invoking the living tree metaphor, stated that the Constitution was drafted with "an eye to the future," and must be "capable of growth and development over time to meet new ... realities often unimagined by its framers."¹⁸ In a speech delivered at Dalhousie University a year prior to *Hunter*, Chief Justice Dickson charged Canadian judges with the task of fostering such growth, stating that "[w]hen the occasion cries out for a new law, let us dare to make it. Let us recognize that the law is a living organism, its purpose is to serve life, its vitality is dependent upon renewal."¹⁹

A. Judges as Innovators

Destin Sandlin's foreword to Trefil's *The Story of Innovation* begins with the words, "[i]nnovation is what makes us who we are as humans."²⁰ Quite simply, he describes innovation as "the human urge to take what the world presents us and change it."²¹

15 *Vriend v Alberta*, (1996) ABCA 87 [*Vriend ABCA*].

16 *Ibid* at para 19.

17 *Ibid* at para 46.

18 *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155 [*Hunter*].

19 Brian Dickson, "The Development of a Distinctively Canadian Jurisprudence", Faculty of Law, Dalhousie University, Halifax, 29 October 1983, vol 138, file 48 cited in Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2018) at 310.

20 James Trefil, *The Story of Innovation: How Yesterday's Discoveries Lead to Tomorrow's Breakthroughs* (Washington DC: National Geographic, 2017) at 7.

21 *Ibid*. See also Cameron SG Jefferies, Sara Seck & Tim Stephens, "International Law, Innovation, and Environmental Change in the Anthropocene" in Neil Craik et al, eds, *Global Environmental Change*

Joseph Schumpeter, the Austrian economist, is reputed to have coined the term “creative destruction.”²² Focusing on how capitalism works and evolves, Schumpeter showed how inventions and innovations “*incessantly* revolutionize ... the economic structure from within, *incessantly* destroying the old one, incessantly creating a new one.”²³ To Schumpeter, change in the capitalist system does not occur primarily because of “need,”²⁴ but from the introduction of new goods, new methods, new markets, and new forms of organization.²⁵ In other words, change begets change. The “chicken or egg” conversation on which comes first between “need” and “change” is not very relevant for the purposes of this article. Schumpeter has been cited to make the point that the renewal spoken about by Dickson CJ follows a similar process as Schumpeter’s creative destruction concept — an evolution in law through a system of simultaneous, albeit gradual and measured, destruction and creation of legal norms. In this article, the required change (judicial innovation) is a product of necessity (climate change).

Restraint and activism are common descriptors of the conservative and progressive tendencies of courts when conducting judicial review.²⁶ This binary distinction disregards the latent interflow of judicial restraint and activism. There is activism in restraint and restraint in activism. McClung’s opposition to reading the *IRPA* to include sexual orientation was, for example, in part based on his persuasion that such inclusion amounted to “rebutting ... millennia of moral teaching.”²⁷ That position was not a statement of law, but a policy position which found support in what McClung believed to be the sentiment of “many people in Western societies.”²⁸ McClung’s decision was as “result-oriented” as the subsequent decision of the Supreme Court of Canada

and Innovation in International Law (Cambridge: Cambridge University Press, 2018) at 7: “The general meaning of ‘innovation’ is the introduction of something new, or change to something that is established through the addition of new elements.”

22 Joseph Schumpeter, *Capitalism, Socialism and Democracy*, 1st ed (London: George Allen and Unwin, 1943) at 83.

23 *Ibid.*

24 *Ibid* at 82: “And this evolutionary character of the capitalist process is not merely due to the fact that economic life goes on in a social and natural environment which changes and by its change alters the data of economic action; this fact is important and these changes ... often condition industrial change, but they are not its prime movers.”

25 *Ibid.*

26 Keenan D Kmiec, “The Origin and Current Meanings of ‘Judicial Activism’” (2004) 92 Cal L Rev 1441 (Kmiec identifies five core meanings of judicial activism: invalidation of arguably constitutional actions of other branches; failure to adhere to precedent; judicial legislation; departure from interpretive methodology; and result-oriented judging).

27 *Vriend ABCA*, *supra* note 15 at para 32.

28 *Ibid.*

(“SCC”), which read sexual orientation into the *IRPA*.²⁹ There is also an argument to be made that court decisions, particularly the judgments of the SCC, rarely leave society in its pre-judgment state whether or not the court was “restrained” or “activist.” For example, while the SCC’s decision in *Reference re Impact Assessment Act* (“*IAA Reference*”) could be described as “restrained” as it shortened the long arm of federal impact assessment jurisdiction,³⁰ it made important albeit subtle contributions to Canadian impact assessment jurisprudence.³¹

The rhetorically-charged nature of the restraint–activism dichotomy also renders it unhelpful in understanding how courts address vital and complex policy questions. The language of innovation is, therefore, preferred. Innovation is generally classified as radical or incremental.³² An innovation is radical if it is highly novel, totally or substantially new, and disruptive.³³ It is, however, incremental if it is minimally novel, is gradual and iterative, merely modifies, and is primarily *status quo* enabling.³⁴ Dark innovation has recently been recognized to capture innovations “absent from our observations.”³⁵ Dark innovation is not readily measurable by conventional innovation metrics, is seemingly invisible, and generally goes on “below the radar.”³⁶ It includes incremental process innovations in factories in the Global South, innovations in the service sector, social innovations, and institutional innovations (including in courts).³⁷

The incremental development of the law is a well-trodden path in Canadian jurisprudence.³⁸ This is most visible in the development of the com-

29 *Vriend v Alberta*, [1998] 1 SCR 493.

30 *Reference re Impact Assessment Act*, 2023 SCC 23 at 215–216 [*IAA Reference*].

31 For example, it is now clear that projects wholly within a province can be included in the project list for assessment insofar as there are effects within areas of federal jurisdiction. Also, broad factors, including sustainability, can be considered when assessing a project. *Ibid* at paras 142, 157.

32 J Kasmire, Janne M Korhonen & Igor Nikolic, “How Radical is a Radical Innovation? An Outline for a Computational Approach” (2012) 20 *Energy Procedia* 346. Other modes of innovation include product innovation, process innovation, service innovation, and social innovation. See Mónica Edwards-Schachter, “The Nature and Variety of Innovation” (2018) 2:2 *Intl J Innovation Studies* 65.

33 Kasmire et al, *supra* note 32.

34 *Ibid*.

35 Ryan MacNeil, *Observing Dark Innovation: After Neoliberal Tools and Techniques* (Bristol: Bristol University Press, 2024) at 6. MacNeil points at the tools and techniques of knowledge production and scientific breakthroughs; public innovations in physical goods; and often ignored ‘bad’ innovations as examples of dark innovations.

36 Ben R Martin, “Twenty Challenges for Innovation Studies” (2016) 43:3 *Science & Pub Pol’y* 432 at 433–434.

37 *Ibid*.

38 “The process of judging inherently involves judicial law making. Judicial interpretation of legislation, both primary and subordinate, involves law making, although this is interstitial and incremental.” See

mon law through *Charter* values, which the SCC has emphasized to be “incremental revisions ... to have [the law] comply with the values enunciated in the *Charter*” and “the dynamic and evolving fabric of our society.”³⁹ It is also evident in the interpretation of the *Charter* where the SCC balances the need not to overshoot the purpose of a right as indicated in its text with the imperative of a purposive, progressive, and generous interpretation.⁴⁰ Even decisions which could be considered some of the most “radical” in Canada were facilitated through incremental development of the law. The SCC’s consequential decision in *Vriend*, for example, can be traced to a related development in *Egan* decided three years before,⁴¹ and *Egan* is itself traceable to *Andrews*, which was decided about five years prior.⁴² This reminds us that even when courts seem to endorse a *status quo* position, there is often “hidden,” “below the radar” innovation — dark innovation, as I will call it here — whether in its argumentation, adoption or rejection of procedural arguments, scoping of substantive relief, or in dissenting opinions which might become the law down the line.

Archibald Cox argues that not only do judges change the law from time to time as new conditions require and in keeping with changes in societal ideals, but also that, “the law books that guide them have always left judges important opportunities for choice.”⁴³ Dickson CJ echoed Cox’s view even more forcefully, noting the pointlessness of pretending that the courts have no mandate to effect change in the law, “when the legislature has itself given them this very mandate in enacting the *Charter*.”⁴⁴ Put differently, judicial innovation is not an oddity; it is a feature of the venture of law. The *Charter*, particularly, constitutes a potentially vibrant transformative space given its unique nature as a limitation on state power,⁴⁵ the deliberate broadness and vagueness of its provisions,⁴⁶ and its embodiment of overtly moral values (*Charter* values) that have made the *Charter* a viable tool for recrafting common law.⁴⁷ Nevertheless,

Brian J Preston, “The Contribution of the Courts in Tackling Climate Change” (2016) 28 J Envtl L 11 at 15.

39 *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 92 [*Hill*]. See also *R v Salituro*, [1991] 3 SCR 654.

40 *Quebec (Attorney General) v 9147-0732 Quebec Inc*, [2020] 3 SCR 426 at paras 8–13.

41 *Egan*, *supra* note 8.

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

43 Archibald Cox, “The Role of the Supreme Court: Judicial Activism or Self-Restraint” (1987) 47:1 Md L Rev 118 at 137.

44 Brian Dickson, “Madame Justice Wilson: Trailblazer for Justice” (1992) 15:1 Dal L J 1 at 18.

45 *Hunter*, *supra* note 18.

46 *Ibid.*

47 *Hill*, *supra* note 39.

this transformative space for judicial innovation is not boundless.⁴⁸ Internal constraints in the *Charter* including the specific wording of *Charter* rights and the requirement that governments' reasonable justifications of their laws be balanced against individual rights delimit how "radical" judicial innovations can be.⁴⁹ The obligation to follow judicial precedents,⁵⁰ respect for the principle of dialogue,⁵¹ and the importance of the legitimacy of court decisions are also important boundary markers.⁵² The bounded transformative space to innovate within the *Charter* means that the dominant mode of judicial innovation is incremental.

In this article, judicial innovation is placed on an incremental spectrum, ranging from dark innovation to overt innovation. Overt innovation is a culmination of dark innovations over time. Judicial innovation takes place at the procedural and substantive levels. In this article, I focus on the innovations of Canadian courts in the climate context with respect to the parties granted *locus standi*, the claims deemed justiciable, evidence admitted as relevant in proceedings, and the types of relief eventually granted by the courts.

48 Dickson, *supra* note 44 at 18: The court's mandate to effect change in the law "does not mean that courts can ignore the way in which they fit into our democratic system and the limits that their position in that system places, both on the kind of change they can realistically hope to effect and on the way in which they should seek to bring about change."

49 Additional constraints include concerns for personal reputation and bad press; the prospect of having a decision overturned on appeal or by a future court in the case of the SCC; and the possibility of a government using the notwithstanding clause to counter adverse court decisions.

50 While not bound by judicial precedents, the Supreme Court of Canada generally follows its own precedents except in exceptional situations. See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 42–44.

51 The principle of dialogue captures the response of the legislature to the decisions of courts in remaking laws in the light of judicial decisions, and the potential deference of courts to "remade" laws. See generally Peter Hogg, "Discovering Dialogue" in Grant Huscroft & Ian Brodie eds, *Constitutionalism in the Charter Era* (Ontario: Lexis Nexis, 2004) 3.

52 Dickson, *supra* note 44. On legitimacy, Dickson CJ makes the point that "if the *Charter* and the Courts, as interpreters of that document, are to have a meaningful place in society, one that is accepted by its citizens as legitimate and worthy of respect, then judicial analysis of the *Charter's* provisions must reflect that community's most fundamental norms" (at 17). It is worth emphasizing that the values are not the individual or personal values of the judge, but those of the society. It is in this sense (decisions reflecting community's fundamental norms) that the decisions of judges, even when deemed "activist," are still consistent with the tenets of democracy, in that they are a reflection of societal values — the values of the people. This is still "majoritarian" in a sense, only not majoritarian in the context of "representative governments" comprising persons voted for by a subset of the society (in many cases "citizens" who are age 18 and above, or to use Rawls's term, "transient majorities"). As Hayek points out, "it is when it is contended that "in a democracy right is what the majority makes it to be" that democracy degenerates into demagoguery." See Friedrich Hayek, *The Constitution of Liberty* (London: The University Chicago Press, 1960) at 172. Rawls makes a similar point noting that although the decision of a court overruling legislation might be antimajoritarian regarding "ordinary law," the court "is not antimajoritarian with respect to higher law when its decisions reasonably accord with the constitution itself." See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 235–236 [Rawls, *Political Liberalism*].

B. Climate Justice and the *Charter*

I have made the point that there is no room for normative neutrality in judicial innovation when dealing with climate change, and that the centering of justice in the venture of judicial innovation is a vital normative component. The case for normative valency in judicial innovation is even stronger in the *Charter* context. The *Charter* should be an instrument of justice. To borrow the more explicit words of Justice Bertha Wilson, “[t]he true test of rights is how well they serve the less privileged and least popular segments of society.”⁵³ Taken even further, justice, Anthony D’Amato declares, “is what law is for ... what lawyers should do ... what judges should render.”⁵⁴ Rawls, in describing the judiciary as the institutional exemplar of public reason, argues that the courts’ best interpretation is one that “best fits the relevant body of those constitutional materials, and justifies it in terms of the public conception of justice or a reasonable variant thereof.”⁵⁵ Thus, the emphasis of the judiciary should be on the “public conception of justice,” not a judge’s personal morality. The public conception of justice includes “the most reasonable understanding of the public conception and its political values of justice and public reason,” values that “all citizens as reasonable and rational might reasonably be expected to endorse.”⁵⁶

Justice is an amorphous concept; it takes the shape of its context. It is, therefore, more viable to ask the question “what is justice?” in a defined con-

53 Bertha Wilson, “The Making of a Constitution” (1988) 71:6 *Judicature* 334 at 338. *Vriend ABCA*, *supra* note 15: Contradicting Wilson’s position, McClung CJ made the point at para 45: “[W]e are told that the *Charter* is not everyone’s system. It belongs to Canada’s minorities and therefore the courts must invoke legislative powers because they are guardians of minority rights. Should this be inflexibly so? Why, when all Canadians must pay for the *Charter*’s disappointments ... as well as its triumphs ... the expense of the litigation which inevitably accompanies its debate, and the cost of the army of judges, lawyers and public servants who carry it out? Nor should it be ignored, as our experience to date has shown, that enthroned judicial solutions, even in *Charter* matters, are generally less responsive to daily societal problems than law and policy when they are made by either of the twin parliamentary levels of the Canadian polity.”

54 Anthony D’Amato, “On the Connection Between Law and Justice” (1993) 26:3 *UC Davies L Rev* 527.

55 In doing this, Rawls argues, judges are expected to appeal to “the political values of the public conception” which are implicitly or explicitly embodied in the Constitution. Here, the court’s role is “part of the publicity of reason and is an aspect of the wide, or educative, role of public reason.” Rawls, *supra* note 52 at 236. Of course, a valid retort would be “which public” — “the Canadian public,” “a North American public,” or “a Global public.” The immediate, albeit unsatisfactory answer would be “the Canadian public” as we are concerned here with Canadian courts and the Canadian *Charter*. However, when it is appreciated that the *Charter* is an articulation of globally endorsed values and the Supreme Court has, over time, endorsed and applied foreign decisions and international human rights law as relevant, persuasive, and supportive instruments when interpreting the *Charter*, a solely Canadian definition of “the public” loses salience.

56 Rawls, *Political Liberalism*, *supra* note 52 at 236.

text, rather than “what is justice?” writ large.⁵⁷ The justice question in the context of this article, therefore, is: what vision of justice should Canadian courts aim for when adjudicating climate matters, particularly ones involving *Charter* claims? I begin with two general propositions. First, the unique nature and central features of climate change must inform how the courts define and apply justice. Second, the court’s understanding of justice should accord with values that “reasonable and rational” citizens might reasonably expect to endorse.⁵⁸

Climate change is, fundamentally, a justice problem.⁵⁹ It is primarily caused by emissions of greenhouse gases (“GHG”) from a relatively small number of nations, persons, and entities,⁶⁰ while its impacts are mostly borne by persons, communities, and nations that emit the least.⁶¹ Persons, communities and countries that least contributed to global GHG emissions and bear the brunt of the impacts have the least capacity to adapt to climate impacts.⁶² Losses and damages from climate change are worsening global poverty and exacerbating socio-ecological vulnerabilities.⁶³ The boundaryless nature of GHG emissions and consequential climate impacts often leave persons most impacted outside the boundaries of major emitting States, without legal recourse given the dominant territorial nature of law. The cumulative nature of climate change and the difficulty of attributing impacts to emissions from specific source points make it easy for large emitters to deny climate liability.⁶⁴

57 Even seemingly general theorizations on justice are engaged within defined contexts, although contexts vary in scope. For example, Rawls emphasized that he was only “concerned with a special case of the problem of justice” — justice “for the basic structure of society conceived ... as a closed system isolated from other societies.” See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) at 7.

58 “The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant ... Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason. These are values they believe in good faith, as the duty of civility requires, that all citizens as reasonable and rational might reasonably be expected to endorse.” Rawls, *Political Liberalism*, *supra* note 52 at 236.

59 Jeremy Moss, “Introduction: Climate Justice” in Jeremy Moss, ed, *Climate Change and Justice* (Cambridge: Cambridge University Press, 2015) 1 at 1–2.

60 United Nations Environment Programme, “Emissions Gap Report 2023: Broken Record: Temperatures Hit New Highs, Yet World Fails to Cut Emissions (Again)” (2023) at 8–10, online (pdf): *UN Environment Programme* <unep.org/resources/emissions-gap-report-2023> [perma.cc/6SUQ-3DZF].

61 Hoesung Lee et al, “Climate Change 2023: Synthesis Report: Summary for Policymakers” (Intergovernmental Panel on Climate Change, 2023) at 5, online (pdf): <ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf> [perma.cc/D3RE-AW7W] [IPCC Report].

62 *Ibid* at 8.

63 *Ibid* at 5.

64 Andrew Gage & Margaretha Wewerinke, “Taking Climate Justice Into Our Own Hands: A Model Climate Compensation Act” (West Coast Environmental Law, December 2015) at 27, online (pdf): <wcel.org/sites/default/files/publications/cca_report_updated_web.pdf> [perma.cc/A7CN-PNNZ].

Effects of climate change on the most vulnerable are, however, not only in its sources and impacts, but also in the adverse impacts of its solutions, which are also majorly borne by the vulnerable.⁶⁵ Also, given that GHGs remain in the atmosphere for hundreds (e.g. carbon dioxide) to thousands of years (e.g. fluorinated gases), future generations will be immensely impacted by GHGs emitted today.⁶⁶

The global, cumulative, and asymmetric characteristics of climate change become quickly evident from the foregoing. Importantly, the centrality of justice in every dimension of climate change (cause, effect, and solution) is manifest. Hence, it is near impossible to address climate change, whether at the level of administrative policymaking, corporate decision-making, or legal adjudication, without directly or indirectly engaging with justice concerns. For example, the SCC's decision in the *GGPPA Reference* was decided on the narrow and technical issue of whether the federal government has the jurisdiction to set minimum national standards of GHG price stringency.⁶⁷ At various points in its judgment, the SCC referred to the "disproportionately high risk" the Canadian Arctic faces from climate change and, in particular, the serious effects of climate change "on Indigenous peoples."⁶⁸ The Court affirmed that climate change threatens Indigenous peoples' "ability to sustain themselves and maintain their traditional ways of life," and contributes to "grossly disproportionate" experiences of Canadian provinces and territories vis-à-vis their contributions to GHG emissions.⁶⁹ Concluding its background analysis, the Court noted that "the harmful effects of GHGs are, by their very nature, not confined by borders."⁷⁰

Although the SCC did not explicitly refer to climate justice, it is manifest that justice concerns weighed heavily on its reasoning in the *GGPPA Reference*. It is also arguable that these justice considerations align with values "reasonable and rational" Canadians will endorse. As the impact of climate change, from the melting permafrost and collapsing infrastructure in the North⁷¹ to the

65 IPCC Report, *supra* note 61 at 8: "There is increased evidence of maladaptation in various sectors and regions. Maladaptation especially affects marginalised and vulnerable groups adversely."

66 *Ibid* at 7.

67 *GGPPA Reference*, *supra* note 10.

68 *Ibid* at paras 11.

69 *Ibid* at paras 11–12, 187.

70 *Ibid* at para 12.

71 The Firelight Group, "The Impacts of Permafrost Thaw on Northern Indigenous Communities" (Firelight Research Inc for Canadian Climate Institute, 2022) at 16, 18, online (pdf): *Firelight Research Inc with the Canadian Climate Institute* <climateinstitute.ca/wp-content/uploads/2022/06/Impacts-permafrost-thaw-Climate-Institute-Firelight-Report.pdf> [perma.cc/7MGF-3X6Z].

ravaging wildfires in the South,⁷² increasingly touches every part of Canada, Canadians are awakening to climate change's disastrous potential. While the degree of conviction about how disastrous climate change is and how far we must go in addressing it might differ, there is growing national consensus that it is a problem that must be dealt with.⁷³ Whereas only about 65% of Canadians believed that there was solid evidence of a warming globe in 2015, 74% currently believe that extreme weather events are related to climate change, and the same percentage of Canadians believe that those who emit more should pay more to address climate change.⁷⁴ Concern about climate change is not limited to provinces typically considered as environmentally-aware in Canada. A slim majority (51-52%) of residents in Alberta, Saskatchewan, and Manitoba, provinces that have typically opposed ambitious climate actions, express worry about climate change.⁷⁵

For a more fulsome consideration of the justice concerns that flow from the unique nature of climate change and the public values that are evolving in accordance with these justice concerns, I have recast climate justice as entailing distributive, procedural, recognitive, and capability components. These components are premised on key justice orientations, have distinct justice emphases, and arguably accord with values Canadians are likely to endorse. Distributive justice addresses the issue of the fair allocation of the gains and costs of climate change and response measures.⁷⁶ It emphasizes differentiation: the allocation of climate responsibilities based on contribution to emissions, ability to respond, and socio-economic and ecological circumstances. The implicit reference of the SCC to justice concerns in the *GGPPA Reference* is an example of distributive climate justice. As shown above, the logic of distributive climate justice reso-

72 Richard Boyd & Anil Markandya, "Costs and Benefits of Climate Change Impacts and Adaptation: Chapter 6" in FJ Warren & N Lulham, *Canada in a Changing Climate: National Issues Report* (Ottawa: Government of Canada, 2021) at 352, 372.

73 72% of Canadians are worried about climate change: see Leger, "Extreme Weather Events: Survey of Canadians" (13 September 2023), online (survey report): <leger360.com/blogs/extreme-weather-events/> [perma.cc/AM94-TCRA] [Leger]. As of 2021, 69% of Canadians believed that the earth is warming and has been getting warmer, while only 65% believed that there was at least solid evidence of warming in 2015. David Coletto, "What Do Canadians Think About Climate Change and Climate Action?" (2021), online: *Abacus Data* <abacusdata.ca/climate-change-cop26-canada/> [perma.cc/YQ9Z-FTXQ]. It is, however, worth highlighting that climate change is often ranked lower by respondents when compared to other national challenges. In the Leger poll, for example, climate change ranks 6th after inflation, affordability, economy, rising interest rates, and healthcare.

74 Leger, *supra* note 73.

75 Leger, "Climate Change in Canada" (17 January 2024), online (survey report): <https://leger360.com/surveys/climate-change-in-canada/> [perma.cc/45C9-F8S6].

76 Elkanah O Babatunde, "Distributive Justice in the Age of Climate Change" (2020) 33:2 Can JL & Jur 263 at 263–264.

nates with Canadians — entities that emit more should bear more responsibility for climate change.

Procedural justice and justice as recognition emphasize inclusiveness, representation, and parity.⁷⁷ Procedural justice raises the questions of who is involved in making or informing climate policies and what processes are in place to ensure that decision-making leads to just outcomes.⁷⁸ When rights or interests are impacted, procedural justice requires that at the minimum, right-bearers and stakeholders are adequately informed, and depending on the degree of impact, consulted and accommodated.⁷⁹ Particularly, when Indigenous rights and interests are affected, procedural justice requires that consent be obtained.⁸⁰ Climate litigation brings up unique sets of procedural justice issues including questions on access and rights of action, and the type of evidence considered relevant and admitted by courts.

Justice as recognition infuses the dimensions of vulnerability and power dynamics into procedural justice. It emphasizes that fair processes for everyone — the central claim of procedural justice — is only a ruse unless misrecognition and social subordination are addressed.⁸¹ The reality of group differences and the unjust implications of not recognizing or of misrecognizing such differences, animate justice as recognition.⁸² As Fraser explains, misrecognition leads to the denial of the “status of a full partner in social interaction, as a consequence of institutionalized patterns of cultural values that constitute one as comparatively unworthy of respect or esteem.”⁸³

On the ground of misrecognition, people and communities are constructively excluded, wholly othered, made invisible, and constituted as inferior.⁸⁴ The SCC’s specific recognition of the distinct impacts of climate change on Indigenous communities in the *GGPPA Reference* aligns with justice as rec-

77 Robert Kuehn, “A Taxonomy of Environmental Justice” (2000) 30:9 *Envtl L Reporter* 10681 at 10688.

78 *Ibid.*

79 *Ibid* at 10688–10689.

80 Deborah McGregor, “Indigenous Environmental Justice and Sustainability” in Sumudu A Atapattu, Carmen G Gonzalez & Sara L Seck, eds, *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge: Cambridge University Press, 2021) 58 at 61.

81 Julian Agyeman, *Introducing Just Sustainabilities: Policy, Planning and Practice* (Zed Books, 2013) at 39; Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 2011) at 3.

82 David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford: Oxford University Press, 2009) at 13.

83 Nancy Fraser, “Rethinking Recognition” (2000) 3 *New Left Rev* 107 at 113–114.

84 *Ibid* at 113.

ognition.⁸⁵ However, justice as recognition demands even more disaggregation. It refuses to categorize Indigenous peoples as a monolithic consortium, but goes further to engage more specific differences like age, gender, disability, etc. It is also alive to the uniqueness and distinctiveness of Indigenous groups. Geographic boundaries are not a determinative scoping consideration for justice as recognition. In fact, artificially-drawn boundaries of states are an institutionalized pattern that constitutes peoples and communities as comparatively unworthy of respect. Take, for example, the rules of courts on *locus standi* and how such rules keep communities and persons in “other” countries impacted by climate change from litigating against emitting entities in home states (which are mostly developed countries). This is the case even in countries with high levels of judicial innovation in climate litigation. Take, for example, the refusal of the Hague District Court to permit claims against Royal Dutch Shell from communities, groups, and persons outside the Netherlands and the Wadden region (including parts of Germany and Denmark).⁸⁶

Again, the tenets of inclusiveness, representation, and group-sensitive parity emphasized by procedural justice and justice as recognition accord with the fundamental values of Canadian society. In *Oakes*, the SCC highlights equality and commitment to social justice, respect for cultural and group identity, and faith in institutions that enhance participation of groups and individuals in society as parts of the genesis of *Charter* rights and fundamental standards against which *limits* on rights must be measured.⁸⁷ Reflecting on Justice Bertha Wilson’s approach to the *Charter*, Chief Justice Brian Dickson noted that the *Charter* mandates judges to “ask themselves which groups are disadvantaged and therefore likely to be ignored by the majority.”⁸⁸ The values of equality, inclusion, and participation espoused in the values and principles underpinning *Charter* rights are constituents of what Rawls describes as “the higher law” which courts have the responsibility of protecting from “the legislation of transient majorities or ... organized and well-situated narrow interests skilled

85 *GGPPA Reference*, *supra* note 10 at para 11.

86 *Vereniging Milieudefensie et al v Royal Dutch Shell Plc*, 26 May 2021, ECLI:NL:RBDHA:2021:5339 (Rechtbank Den Haag) [*Milieudefensie*]. English translation: Uitspraken, “ECLI:NL:RBDHA:2021:5339” (26 May 2021), online: de Rechtspraak <en.milieudefensie.nl/news/verdict-climate-case-milieudefensie-shell-26-may-2021-1.pdf> [perma.cc/J88P-HNTF] at paras 4.2.4–4.2.5. The Court rejected ActionAid’s claim because its object does not particularly focus on the interest of Dutch residents, but “pertains to the world with a special focus on Africa ... Its operations in the Netherlands are geared towards developing countries, not Dutch residents.”

87 *R v Oakes*, [1986] 1 SCR 103 at 134.

88 Dickson, *supra* note 44 at 16: “[I]t is because the poor, the oppressed, the powerless and racial minorities, among other disadvantaged groups, are typically shut out of the political process that in assessing the rights of individuals who belong to these groups, one [judges] ha[ve] to be particularly vigilant.”

at getting their way.”⁸⁹ The global nature of climate change requires that these values are understood beyond the boundaries of the Canadian state. Indeed, although generally interpreted as a pan-Canadian instrument, nothing in the *Charter* constrains its application to only Canada or Canadians.

However, climate justice is not only about the equitable allocation of gains and costs (distributive justice) or just processes (procedural justice and justice as recognition). Equitable allocation and just processes are means not ends.⁹⁰ As Amartya Sen, the leading theorist on the capability approach to justice, notes, there is a difference between merely looking at the means of living and looking at the lives people manage to have.⁹¹ To determine whether society is just, Martha Nussbaum invites us to look at the outcomes justice produces; particularly, whether it secures central capabilities or opportunities to live a life with dignity.⁹² Improved and actualized wellbeing is the objective of the capability approach to justice; it is what other justice orientations should lead to. The prospect of actual reduced emissions is a wellbeing-consistent outcome of climate litigation around the world.⁹³ An even more concrete outcome, however, is legal relief for the impacts of climate change.

Courts around the world have generally shied away from considering impacts-based claims or granting compensatory reliefs.⁹⁴ Impacts-based claims and granting relief for such claims is important, because climate change is not just a future reality; it is a “now” phenomenon too. As the Supreme Court in the *GGPPA Reference* repeatedly emphasized, “the world is already experiencing more extreme weather events” and “the effects of climate change have been and

89 Rawls, *Political Liberalism*, *supra* note 52 at 236.

90 Adebayo Majekolagbe, “Just Transition as Wellbeing: A Capability Approach Framing” (2023) 14:1 *Ariz J Envtl L & Policy* 42 at 53–60.

91 Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009) at 227, 233.

92 Martha C Nussbaum, “Capabilities, Entitlements, Rights: Supplementation and Critique” (2011) 12:1 *J Human Development & Capabilities* 23 at 34; Martha C Nussbaum, “Capabilities as Fundamental Entitlements: Sen and Social Justice” (2003) 9:2-3 *Feminist Econ* 33 at 40.

93 For example, Germany increased its emissions reduction target from 55% to 65% by 2030 relative to 1990 levels, and brought its net zero target forward after the decision of the Federal Constitutional Court on the inadequacy of 65%. See *Neubauer*, *supra* note 11.

94 In their assessment of hundreds of climate cases filed outside the United States, Setzer & Higham find that about 14 cases are “failure to adapt” cases, while 17 cases are compensation cases. See Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023) at 23–24. While some of these cases are still in the early stages, decided cases have largely been rejected by courts. See e.g. *Baihua Caiga et al v PetroOriental SA* (2020), Family, Women, and Children Judicial Unit, Francisco de Orellana canton (Ecuador), online: <climatecasechart.com/non-us-case/baihua-caiga-et-al-v-petrooriental-sa/> [perma.cc/J7BQ-GY2E].

will be particularly severe and devastating.”⁹⁵ Lives and livelihoods are already being devastated.⁹⁶ Identities and cultures are already being lost.⁹⁷ Sadly, the impacts will only become worse due to already locked-in emissions.⁹⁸ In Canada and around the world, climate change is greatly undermining opportunities for people to live a life of dignity. What then is the recourse of people and communities, who are already some of the most vulnerable, when they are impacted by climate change? The capability approach to justice requires that, to do climate justice, courts should not just focus on climate mitigation, but also provide redress for the real impacts of climate change on the wellbeing of individuals and communities. This, again, is not inconsistent with Canadian values and principles which inform how courts interpret and apply the *Charter*. Human dignity — living lives with self-worth and self-respect, in accordance with laws sensitive to needs, capacities, and differences — is a fundamental *Charter* value.⁹⁹

Judges in Canada can and should advance climate justice as they innovate in their adjudication of climate matters. The transformative space that the *Charter* allows for incremental and controlled judicial innovation is expansive enough to accommodate distributive justice, procedural justice, justice as recognition, and wellbeing or capability-centric justice. In the remaining sections of this article, I reflect on how Canadian courts have already navigated the need for such innovation in *ENJEU*, *Mathur*, and *La Rose*, and how the questions of climate justice have been addressed.

III. Judicial Innovation, The *Charter*, and Climate Litigation in Canada

There is a global climate awakening of courts around the world. In 2020, the Netherlands’ Supreme Court affirmed the connection between human rights and the state’s climate policies, mandating the Netherlands to do more.¹⁰⁰ Two years later, a district court in the Netherlands found that Royal Dutch Shell has a human right-based obligation to up the ante on the reduction of emissions.¹⁰¹ That same year, Germany’s Federal Constitutional Court found that the German government has a climate obligation to future generations.¹⁰²

95 *GGPPA Reference*, *supra* note 10 at para 9.

96 IPCC Report, *supra* note 61 at 5–6

97 *Ibid.*

98 *Ibid.*

99 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 53.

100 *Urgenda*, *supra* note 11.

101 *Milieudefensie*, *supra* note 86. The Appellate Court has set aside the decision of the Hague District Court. It, however, affirmed the human rights obligations of corporations in the climate change context.

102 *Neubauer*, *supra* note 11.

Canadian courts have been slower to join this awakening, but there are nevertheless movements into new and unexplored terrains. In 2021, the Supreme Court had to un-shelf and dust-off the rarely applied national concern branch of the federal peace, order, and good governance (POGG) power to hold the *Greenhouse Gas Pollution Pricing Act intra vires* Parliament.¹⁰³ While the *GGPPA Reference* is Canada's best known climate change decision to date, particularly as it is the SCC's singular substantive climate-specific decision, federal and provincial superior courts have also played a key role, serving as Canada's centers of gravity for judicial innovation on climate change.

Canada joined the post-2015 climate litigation boom in 2018 when ENvironnement Jeunesse, a Quebec-based non-governmental organization ("NGO") that focuses on environmental education for youths, applied to initiate a class action suit against the Canadian government.¹⁰⁴ ENJEU complained that Canada's inadequate (GHG) reduction targets violate the *Charter* rights of "Quebec citizens" aged 35 and under.¹⁰⁵ The NGO sought the declaration of the Court that Canada was violating the rights of the class members, an order to Canada to cease its infringements, and punitive damages of \$100 per member for the implementation of remedial measures to address climate change.¹⁰⁶ Opposing the application, Canada argued that class action was not a proper procedural vehicle for ENJEU to advance their claims because a similar claim with similar objectives could have been initiated by an individual.¹⁰⁷ Canada further contended that there was no factual evidence to support the charge that Canada acted in bad faith and violated rights, and that the Court had no jurisdiction to grant the relief sought as it would amount to interfering in "the political sphere."¹⁰⁸

ENJEU is known as the first *Charter* challenge against Canada's failure to meet its Paris obligations. It "failed" at the Quebec Superior Court ("QSC") because of the improper constitution of the members of the class proposed to the Court.¹⁰⁹ The choice of 35 years old as the maximum age of the members, according to the Court, was perplexing.¹¹⁰ "But why choose 35? Why not 20, 30 or 40? Why not 60?" the Court inquired.¹¹¹ Apart from what it saw as the

103 *GGPPA Reference*, *supra* note 10.

104 *ENJEU QSC*, *supra* note 9.

105 *Ibid* at paras 13–14.

106 *Ibid* at para 3.

107 *Ibid* at paras 17–22.

108 *Ibid* at para 18.

109 *Ibid* at para 135.

110 *Ibid*.

111 *Ibid* at para 119.

under-inclusiveness of the 35-year cut-off, the QSC also found that the action over-included millions of children whose parents had not consented to their inclusion.¹¹² At the same time, though, the QSC made several other findings that are deserving of the appellation, “dark innovations.” For example, the QSC decision in *ENJEU* was the first time a Canadian court would find that *Charter*-based claims against inadequate climate actions are justiciable, and that punitive relief could be sought.¹¹³ Its innovative use of scientific and expert reports — including the report of the Intergovernmental Panel on Climate Change, and Collaborative Report from Auditors General — to show the impacts of climate change vis-à-vis the colour of rights engaged in the challenge is also deserving of mention.¹¹⁴

The Quebec Court of Appeal (“QCA”) overruled the decision of the QSC on justiciability, however.¹¹⁵ Rejecting the lower court’s liberal application of the *Charter*, the QCA held that “the nature of the issues, in the context described, requires the courts to leave it to the legislature to make the appropriate choices” and that the forms of relief sought invite the court “into the sphere of legislative power and complex social and economic policy choices.”¹¹⁶ In reaching this decision, the QCA quoted considerably from the decisions of the Federal Court in *La Rose* and *Misdzi Yikh*, which also found similar *Charter* challenges not justiciable.¹¹⁷ The QCA’s position on justiciability is now unpopular, however, as the Federal Court of Appeal subsequently reversed the Federal Court’s decisions in *La Rose* and *Misdzi Yikh*.¹¹⁸ Other than the QCA’s decision in *ENJEU*, Canadian courts have signalled their readiness to find *Charter*-based climate actions justiciable. The more liberal approach on the issue of justiciability is a testament to the incremental nature of judicial innovation in Canada, and to how a dark innovation in the QSC’s decision in *ENJEU* can become an overt innovation in decisions like *Mathur*, *La Rose*, and *Misdzi Yikh*.

It would, however, be incorrect to conclude that the QSC or the QCA in *ENJEU* failed to innovate on the issues they ruled unfavourably on (parties and justiciability). Rather, there is an argument to be made that the questions

112 *Ibid* at para 132.

113 *Ibid* at para 71.

114 *Ibid* at para 94–95.

115 *ENJEU QCCA*, *supra* note 9 at para 11.

116 *Ibid* at para 40.

117 *La Rose*, *supra* note 9; *Misdzi Yikh v Canada*, 2020 FC 1059 [*Misdzi Yikh*].

118 *Ibid*. According to the FCA, the fact that climate change is complex or that the legislation reflects a political choice on how to address the problem does not make a *Charter* claim not justiciable. “While the legislation may be controversial, this does not efface the fact that the debate has crystallized into law; legislative choices have been made.” *La Rose*, *ibid* at para 32.

raised by the QSC on the rationale of the selected age range (under 35) are themselves innovative. As far as I am aware, this was the first time a Canadian court engaged with these questions; questions that, could have been positively resolved if climate justice factored into the Court's reasoning. At a minimum, however, the questions raised by the Court provide indicators on how a more procedurally adept class or representative climate action could be initiated. For example, the strategic need of specifying an age range to bring an intergenerational equity climate action is very suspect. *Mathur*, for example, did not specify an age range of a broad class of people.¹¹⁹ Also, although the QCA held that the claims in *ENJEU* were not justiciable, it did not completely shut the door on the courts being called upon "to review the state's conduct with respect to global warming."¹²⁰ In this regard, the Court hinted that more specificity in the forms of relief sought, such that they can be implemented through enforceable orders, could have put *ENJEU*'s action on a stronger footing.

The dark innovations in *ENJEU* became even more overt in *Mathur*. As of the time of writing, *Mathur* is the only climate-based *Charter* challenge which has overcome procedural hurdles and been decided on the substance in Canada.¹²¹ It is a landmark decision that was initiated by seven Ontario residents between the ages of 12 and 24,¹²² two of whom were minors represented by their "litigation guardians." The litigants challenged Ontario's *Cap and Trade Cancellation Act* ("*Cancellation Act*"), which revoked Ontario's cap and trade programme, prohibited trading of emissions allowances, and repealed the province's *Climate Change Act*.¹²³ Under a plan made pursuant to the *Cancellation Act*, Ontario set an emissions reduction target of 30% below 2005 levels by 2030; a 15% decrease compared to the target under the repealed *Climate Change Act*.¹²⁴ The applicants in *Mathur* sought declarations that the *Cancellation Act* and the 30% target violates the section 7 (life, liberty, and security) and section 15 (equality) *Charter* rights of Ontario youth and future generations, and sought orders directing Ontario to set science-based emissions reduction targets consistent with Ontario's emissions share.¹²⁵ Ontario attacked the action on the grounds of their alleged non-justiciability, the lack of a positive constitutional obligation on the province to prevent climate harms, the unprovable nature of the applicants' speculations

119 *Mathur*, *supra* note 9.

120 *ENJEU QCCA*, *supra* note 9 at para 40.

121 *Mathur*, *supra* note 9.

122 *Mathur v Ontario*, 2020 ONSC 6918 at para 30 [*Mathur* 2020].

123 *Ibid* at paras 30–31.

124 *Ibid* at para 29.

125 *Ibid* at para 31.

on climate consequences of the province's target, and the lack of *locus standi* to seek remedies for future generations.¹²⁶ These kinds of issues — types of claim, parties, evidence, and relief — are what climate litigation essentially turns on.

On the justiciability of the claims, Brown J (the motion judge) invoked the dictum of McLachlin CJ in *Imperial Tobacco* that novelty is not a sufficient reason for a court to grant a motion to strike, and courts should be “generous and err on the side of permitting a novel but arguable claim to proceed to trial.”¹²⁷ Vermette J of the Ontario Superior Court (“OSC”) did just this by allowing the novel claims raised in *Mathur* to be resolved on the substance.¹²⁸ This is a marked evolution from the 2009 decision of the Federal Court in *Friends of the Earth*, which shut the judicial review door against a challenge to Canada's response to its commitments under the Kyoto Protocol.¹²⁹

Addressing the government's argument that the claims could not be proven given the unique causation challenge in climate litigation, the Court made recourse to the well-established and settled scientific facts on climate change.¹³⁰ Importantly, Ontario did not dispute that climate change is real, its impacts are devastating, and mitigation actions are important.¹³¹ It simply argued that the linkage between its target, future emissions reduction, and climate impacts on present and future generations, is unprovable.¹³²

An even more innovative finding of the Court was on the prospect of success of the claim that future generations face adverse effect discrimination under section 15.¹³³ Here, the Court held that the “adverse effects of climate change on younger generations ... may be considered self-evident” — societal patterns amenable to judicial notice.¹³⁴ In its judgment on the substantive matter, the OSC quoted extensively from the decision of the SCC in the *GPPA Reference* which, although decided in the division of powers context, considerably resolved the causation problem through a presumption of contribution

126 *Ibid* at paras 32, 41–42.

127 *R v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45 at para 21, cited in *Mathur 2020*, *supra* note 118 at 40.

128 The Court however held that it lacked the institutional capacity and legitimacy to determine Ontario's fair share of the remaining carbon budget compared to other provinces and Canada's share compared to other countries. *Mathur*, *supra* note 9 at para 109.

129 *Friends of the Earth v Canada*, 2008 FC 1183 [*Friends of the Earth*].

130 *Friends of the Earth v Canada*, 2020 ONSC 6918 at paras 95–97.

131 *Mathur 2020*, *supra* note 122 at para 89.

132 *Ibid*.

133 *Ibid* at para 186.

134 *Ibid* at para 187.

to harm approach.¹³⁵ Decisions from other jurisdictions, including the United States and the Netherlands, have similarly adopted the presumption that emissions from states and sub-national entities contribute to climate harm regardless of the ratio of local to global emissions, and whether or not climate harm can be specifically traced to a particular emission source.¹³⁶

The OSC in *Mathur* also applied the presumption of contribution to harm in concluding that Ontario's action is sufficiently connected to a possible violation of section 7 *Charter* rights.¹³⁷ This is based on the "scientific consensus" that Ontario should aim to reduce its emissions by approximately 52% below 2010 rates by 2030 to avoid deleterious climate impacts.¹³⁸ Although the finding seems inconsistent with the position of the Court on the non-justiciability of the claim to determine Ontario's fair share of the carbon budget,¹³⁹ it was the first (and as at the time of writing, only) time that a Canadian court would pronounce on what constitutes an appropriate emissions reduction target. The Court further noted that if a positive obligation was found under section 7 in the context of climate change, then section 7 rights would be engaged by the province's failure to set a higher emission reduction standard.¹⁴⁰ The Court, however, concluded that section 7, as interpreted so far by the Supreme Court, cannot accommodate a positive obligation in *Mathur's* context.¹⁴¹ The decision of the Court on positive rights sticks out like a sore thumb in an otherwise trail-blazing decision. The logical implication of the presumption of harm should have been that Ontario's reduced targets and climate policy reversals will lead to more emissions which will contribute to more climate harms including adverse impacts vis-à-vis the right to life, liberty, or security of the person. Indeed, the Court found this much,¹⁴² except that it did not find that Ontario has a positive obligation under section 7.

The liability of Ontario under section 7, however, has little to do with a positive obligation. It is more about the impacts of the actions of the province — ranging from inadequate climate targets to licencing regimes that actively permit activities with high emissions — on section 7 rights. The violation of

135 *GGPPA Reference*, *supra* note 10, cited in *Mathur*, *supra* note 9 at para 17.

136 *Urgenda*, *supra* note 11; *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007).

137 *Mathur*, *supra* note 9 at para 143.

138 *Ibid* at para 144.

139 Carbon budget is the maximum allowable emission to stay under dangerous levels of global GHG concentration defined under the Paris Agreement as emissions consistent with under 2°C or 1.5°C above pre-industrial levels.

140 *Mathur*, *supra* note 9 at para 144.

141 *Ibid* at para 129.

142 *Ibid* at para 147.

the rights should naturally flow from the Court's finding that a compelling case had been made that the impugned law and actions were sufficiently connected to the prejudice suffered. A similar rationale for the disconnect between the presumption of harm and the engagement of substantive rights was applied by the Court in respect of the section 15 *Charter* claims. The Court concluded that although young people are disproportionately impacted by climate change, the disproportionate impact was not by Ontario's target but by climate change.¹⁴³ This finding is inconsistent with the presumption of harm. If the required evidentiary standard is to show a direct connection between Ontario's actions and discriminatory effects under section 15, then it would be near impossible to find any such violation considering the cumulative nature of climate change. The Court concluded by effectively adopting the reasoning of the QSC in *ENJEU* holding that the effects of climate change will be experienced by all Ontarians and not just young people and future generations.

Irrespective of *Mathur's* bathos, the litigation, the interlocutory decision of the Court, and parts of the final judgment get us closer to even more overt judicial innovations on climate change. This again is consistent with the overall incremental approach of the Canadian judiciary to the nurture and growth of the constitutional "tree." The decision of the Federal Court of Appeal ("FCA") in *La Rose*, which was decided after *Mathur* and drew on it considerably, has already continued this march towards overt innovation, particularly on the question of positive rights under section 7 of the *Charter* in the climate change context.¹⁴⁴ Much like in *ENJEU*, no specific legislation, policy, or state action was challenged in *La Rose*, and like *Mathur* and *ENJEU*, the action was brought by and for youth and children appellants, in this case between the ages of 10 and 19. Acknowledging that the possibility of a finding of positive rights has been left open by the SCC in *Blencoe*, *Dunmore*, and *Gosselin*, the FCA noted the false dichotomy that at times exists between negative and positive rights.¹⁴⁵ The Court held that while the claim in *La Rose* appears positive, it was

143 *Ibid* at para 178.

144 While finding that the section 15 claims are not justiciable, the FCA held that the section 7 claims are justiciable but should be struck (with leave to amend), not because they have no prospect of success but because they are expansive, diffuse, and incompatible with constitutional adjudication. See *La Rose*, *supra* note 9 at para 22.

145 *Ibid* at para 103. Feasby et al make the point that the SCC's decision to retain the possibility of recognizing positive obligations under section 7 could 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 a roundabout way, the threat. To encroach upon the legislative domain may actually promote democratic resolution of failures to legislate." See 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 243.

brought about because “the state failed to refrain from breaching existing negative rights.”¹⁴⁶ It also highlighted the opening left by the SCC in *Gosselin* to accommodate positive obligations under section 7 of the *Charter* in “special circumstances,” noting that climate change is a textbook special circumstance.¹⁴⁷

More recently, the Ontario Court of Appeal (“OCA”) held that the OSC erred in characterizing *Mathur* as a positive rights claim and remitted the application to the OSC for a new hearing before the same judge.¹⁴⁸ There is much to be criticized in both the strategy of the applicants in *Mathur* to insist that the application was not a positive rights claim and the agreement of the OCA that the claim was simply about whether Ontario’s voluntary positive statutory obligation was *Charter* compliant. Regardless of the Court’s belaboured efforts to state otherwise, the case was a challenge to the adequacy of Ontario’s statutory target for reduction of carbon emissions. The applicants begged for the Court to compel the legislature to do more, which is clearly a variant of a positive rights claim. In my view, the growth of Canada’s *Charter* jurisprudence on climate change would have been better served if the applicants had made this a hill to die on. It is important to note that the OCA gave no indication that it would have reached a negative finding if the appeal had been fought on the ground that the lower court erred in finding that a positive section 7 claim was ill-suited for the principles of fundamental justice analysis. In fact, the Court went on to note that the lower court erred in its analysis of the principles of fundamental justice. Taken at face value, the current framing of the OCA means Ontario can repeal its law completely, thereby withdrawing from the statutory obligation it “voluntarily assumed” and taking away the anchor for a negative right claim.

Nevertheless, while *Mathur* at the OCA could have delivered more, the discrete movements that are locked within its interstices are valuable to the growth of Canadian *Charter* jurisprudence on climate change. For example, the OCA was open to the possibility of principles of fundamental justice —

146 *La Rose*, *supra* note 9 at para 102.

147 *La Rose*, *supra* note 9 at paras 115–116. See also 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 Vermont L Rev 689 at 741–42: “[C]limate change is a compelling special circumstance that should persuade the courts to find the government has a positive obligation. The evidence more than satisfies the standard set out in *Dunmore*, which cited Chief Justice Dickson in the *Alberta Reference* to find that ‘positive obligations may be required where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms.’ Because climate change poses a threat to human life as we know it, the phenomenon goes well beyond the required threshold of ‘substantially impeding’ the enjoyment of fundamental freedoms.”

148 *Mathur v Ontario*, 2024 ONCA 762.

arbitrariness and gross disproportionality — applying in the climate change context. Principles of fundamental justice are, however, not limited to arbitrariness, gross disproportionality, and overbreadth. The SCC has long recognized that the principles are both substantive and procedural,¹⁴⁹ and there is an argument to be made that environmental protection is a substantive principle of fundamental justice — even more so as it has been endorsed by the SCC in another context as “a fundamental and widely shared value ... a value which we will refer to as the right to a safe environment.”¹⁵⁰

Environmental protection is “a fundamental value of our society.”¹⁵¹ Environmental protection as a principle of fundamental justice satisfies the requirements to be so recognized as there is general acceptance of the principle among reasonable people, as noted in *Hydro Quebec*, and it is capable of being identified with some precision and applied to yield understandable results. Also, as an embodiment of judicially endorsed environmental principles like the precautionary principle, the polluter pays principle, and the no-harm principle, environmental protection is a legal principle. Hence, it satisfies the requirements for determining principles of fundamental justice.¹⁵² Applying environmental protection as a principle of fundamental justice in *Mathur*, Ontario would have to set a target that meaningfully contributes to the protection of the environment (and the climate).¹⁵³

149 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 65.

150 *R v Hydro Quebec*, [1997] 3 SCR 213 at para 124

151 *Ibid* at para 127.

152 *R v Malmö-Levine*; *R v Caine*, 2003 SCC 74 at paras 112–113.

153 It is not unreasonable to argue that “environmental protection” is unlike any principle of fundamental justice (PFJs) that has been recognized under section 7 of the *Charter*. This would, however, only be correct if PFJs were limited to procedural or structural principles like overbreadth, gross disproportionality, and arbitrariness. While noting the caution of the SCC in *Re BC Motor Vehicle Act* on the illusive dichotomy between procedural and substantive PFJs, the terms are relevant for this argument. The recognition of substantive PFJs takes the PFJ inquiry beyond the existence or scope of a positive law. The relevant inquiry for substantive PFJs is whether an action or inaction of the state resulting in or likely to result in the deprivation of life, liberty, and security aligns with “basic values underpinning our constitutional order.” While these values transcend the scope of the most used procedural and structural principles, they are not far removed from the substantive nature of the *mens rea* principle recognized in *Re BC Motor Vehicle Act* or solicitor-client privilege in *Canada v Solosky*, [1982] 1 SCR 860. While it is arguable that these principles are historical legal principles, the point is that they are exemplars of substantive PFJs. Nader Hasan has, further, noted that the principle of the dignity of human persons underpins an evolutionary approach to the determination of PFJs in Canada. He argues that cases like *R v Villancourt*, *R v Martineau*, *R v Morgentaler* etc were all influenced by this fundamental principle. According to Hasan, this evolutionary approach “focuses on evolving societal values and normative judgments about what rights, interests and values should be protected in a free and democratic society.” See Nader Hasan, “Three Theories of ‘Principles of Fundamental Justice’” (2013) 63:14 SCLR 339 at 363–365.

The OCA also provided multiple ways in which necessary judicial intervention can be balanced with the primary role of the government (legislature and executive) to make climate laws and policies. Here, the Court drew a line between declaratory and injunctive relief,¹⁵⁴ declaring that climate laws and policies are not *Charter*-compliant is not the same as mandating what amounts to *Charter*-compliant laws and policies. As noted by the SCC in *Khadr*, this approach is “respectful of the respectful of responsibilities of the executive and the courts.”¹⁵⁵ In other words, while courts can provide a framework for developing *Charter*-compliant climate laws, governments retain the power to determine what those laws and policies will be and how they will be implemented.

While the idea of incremental judicial innovation is, on its face, incompatible with the urgency and ambition that climate change demands, it is the only option possessed by courts which are normatively powered by the public perception of legitimacy. Incrementalism compels deliberateness and caution, but it should not be taken as a synonym for snail-like progression. Within five years (2018–2023), Canadian courts have moved from findings of non-justiciability to being more likely to find that climate cases involve justiciable *Charter* claims. Backed by the SCC’s decision in the *GGPPA Reference*, judicial notice is being taken of the science behind climate change, its anthropogenic nature, and its devastating impacts.¹⁵⁶ This is even so in the seemingly most climate skeptic of courts.¹⁵⁷

The issues of causation and traceability are no longer the behemoths they once were as the courts increasingly adopt the presumption of contribution to harm. The chances of a finding that section 7 rights are violated given the impacts of governments’ climate actions, whether this finding gives rise to positive or negative obligations, are brighter than ever. It is also more likely now that a climate action will scale the hitherto seemingly unscalable “motion to strike” hurdle. From *ENJEU* to *Mathur*, each court, at various levels, has added crucial pieces to the puzzle, making the *Charter* more and more relevant in the era of climate change.

154 *Mathur*, *supra* note 148 at para 69.

155 *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 47.

156 *GGPPA Reference*, *supra* note 10 at paras 7–12.

157 Despite adverse decisions against the Canadian *Greenhouse Gas Pollution Pricing Act* and the *Impact Assessment Act*, the Alberta Court of Appeal is clear that the detrimental effects of climate change are evident, that climate change constitutes “an existential threat to Canada,” and about “the need to act with urgency on this front undeniable.” See *Impact Assessment Act Reference*, 2022 ABCA 165 at paras 2, 6.

Even more needs to be done, though. No substantive climate challenge has succeeded in Canada, intergenerational equity claims under section 15 of the *Charter* are still generally rejected, parties still build cases around the impacts of climate change in Canada, and Western science is the sole basis for judicial determination. It is in respect to these issues that, as argued below, climate justice could contribute to making the *Charter* even more relevant to climate change.

IV. Incrementalism and *Charter* Climate Justice

After assessing various regimes of law, including human rights law, Stephen Humphreys concludes that “the law ... is not ready-made to deliver climate justice: it must evolve. The question that arises is whether it can.”¹⁵⁸ In the context of *Charter* claims, the potential of law to deliver climate justice is gradually becoming realized. Gaps, nevertheless, remain. The point has been made that if the courts primarily consider evolving societal values in defining and applying *Charter* rights, then fundamental orientations of justice (distributive, procedural, recognition, and capability) should inform the next phases of the evolution of courts’ decisions on *Charter* climate litigation. Here, I address four areas of possible evolution in the light of climate justice — distributive justice and the right of future generations; procedural justice and the standing of global litigants; “non-science-based” evidence and justice as recognition; and impacts-based relief and the capability approach to justice.

The courts in *ENJEU*, *Mathur*, and *La Rose* refused to endorse intergenerational equity claims under section 15 of the *Charter*. The FCA in *La Rose* held that section 15 jurisprudence, as it stands, cannot accommodate intergenerational equity and to find differently would result in the judiciary participating in policy choices around resource allocation, which is “the domain of the legislature and executive.”¹⁵⁹ Again, this position is difficult to accept given that decisions like *Eldridge* clearly impacted the decision of government on resource allocation.¹⁶⁰ There is also a strong argument to be made that despite the recently-imposed *Sharma* hurdles,¹⁶¹ state actions which contribute to children

158 Stephen Humphreys, “Climate Justice: The Claim of the Past” (2014) 5 J Human Rights & Env’t 134 at 141.

159 *La Rose*, *supra* note 9 at para 83.

160 See *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

161 In *Sharma*, the SCC re-stated, in more stringent terms, the section 15(1) framework. As noted in the dissenting judgment, the majority raised “the bars at each step of the test” — specifically by introducing a renewed focus on causation, replacing “created a distinction” in step 1 of the analysis with “created or contributed to a disproportionate impact,” and pre-emptively foreclosing the possibility of a “general, positive obligation.” See *R v Sharma*, 2022 SCC 39 at para 205.

and youths experiencing worse climate impacts meet the dual requirements under section 15(1).¹⁶² Such state actions contribute to disproportionate climate impacts based on an enumerated ground (age) or an analogous ground, like belonging to a future generation. It is important to emphasize that “intention” is not relevant in this analysis. It is not relevant that Canada or a province, in directly or indirectly facilitating GHG-emissions intensive activities, did not intend to distinctly adversely impact children and youths. A combination of judicially-noticed climate science and the presumption of harm is more than sufficient to satisfy *Sharma*’s emphasis on showing a causal link between state action and adverse impact.¹⁶³

Today’s children will bear the brunt of the worst impacts of climate change in the future. Children are, however, already in the eye of the climate storm. As a UNICEF report puts it, “the climate crisis is a child rights crisis.”¹⁶⁴ Ongoing state actions, which will worsen future climate impacts, will therefore “reinforce, perpetuate, and exacerbate” the climate disadvantage already foisted on children. The position of the FCA that “there is no present harm to which the section 15 challenge can anchor itself” is misguided. Heat and cold-related morbidity and mortality rates worsened by climate change are already highest in infants and young children.¹⁶⁵ Children in Canada with asthma and other respiratory conditions have suffered worse breathing problems from inhaling wildfire smoke particles with the risk of suffering long-term damage.¹⁶⁶ There is also evidence of increased climate-related emotional distress among children and youths in Canada.¹⁶⁷ Contrary to the finding of the FCA, these “present harms” will be exacerbated and perpetuated in the future in large part due to the contribution of Canadian governments (federal and provincial) to climate change.

The Court further noted that the section 15 intergenerational equity argument can hardly be made considering that the policy decisions of govern-

162 Nathalie 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 J L & Equality at 33–93.

163 Under *Sharma*, there is no requirement to demonstrate that the impugned state action is “the only or the dominant cause of disproportionate impact.” See *Sharma*, *supra* note 161 at para 73.

164 United Nations Children’s Fund (UNICEF), *The Climate Crisis is a Child Rights Crisis: Introducing the Children’s Climate Risk Index* (New York: UNICEF, 2021) at 6.

165 Irene Buka & Katherine M Shea, “Global Climate Change and Health in Canadian Children” (2019) 24:8 Paediatrics & Child Health 557 (“Heat-exposed infants are especially at risk because their temperature regulation systems are immature”).

166 UNICEF, *The Climate-changed Child: A Children’s Climate Risk Index Supplement* (New York: UNICEF, 2023) at 7.

167 Lindsay Galway & Ellen Field, “Climate Emotions and Anxiety among Young People in Canada: A National Survey and Call to Action” (2023) 9 J Climate Change & Health 1.

ment will affect generations differently.¹⁶⁸ This finding disregards the uniqueness of climate change and the implications of the actions of the state. The impacts of health care spending and major infrastructure projects, examples given by the Court, would indeed have different implications for different generations. The impacts are however neither as certain as deleterious climate effects nor as devastatingly consequential for future generations. This is a distributive justice issue — the distribution of the costs of climate change across generations.

A fundamental principle of distributive justice is that “unlike” should not be treated as “like.”¹⁶⁹ Failure to recognize the unjust allocation of climate costs treats unlike as like. This is anti-*Charter*, as the need for difference in recognition of peculiar disadvantages is explicitly recognized under section 15. Foreign jurisprudence is illuminating on this point, and continues to grow. In *Milieudefensie*, the Hague District Court recognized the serious threat of Shell’s emissions to the human rights of both current and “future generations.”¹⁷⁰ The German Federal Constitutional Court in *Neubauer* held that Germany has an objective obligation of intergenerational protection.¹⁷¹ More specifically, on discriminatory distribution of climate impacts, a District Court in the United States recently held that Montana’s energy policy discriminates against and disproportionately impacts future generations including children and youth.¹⁷² The FCA in *La Rose* signalled the possibility of a positive finding of climate

168 *La Rose*, *supra* note 9 at paras 76–80.

169 According to Rawl’s difference principle, within a framework of equal liberty and fair equality of opportunity, “the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society.” Rawls, *Political Liberalism*, *supra* note 52 at 65.

170 *Milieudefensie*, *supra* note 86 at para 4.4.54.

171 *Neubauer*, *supra* note 11 at para 146.

172 *Held v Montana*, (2023) CDV-2020-307 at 87. The unique adverse impacts of climate change on older generations have also been subjects of litigation before the courts. The ECtHR in *Verein*, *supra* note 11, upheld the claim of a group of women above 70 that Switzerland’s inadequate climate plans and actions have contributed to their exposure to climate impacts, thereby violating their rights. In reaching its decision, the ECtHR affirmed the positive obligation of the state to protect individuals from serious adverse impacts. These positive obligations include: adopting a general measure specifying target timelines for achieving carbon neutrality and overall carbon budget for the time frame; setting out intermediate GHG emissions reduction targets and pathways; providing evidence showing compliance with targets and timelines; due diligence update of targets; and acting in good time and in an appropriate and consistent manner. See *Verein*, *supra* note 11 at para 550. The positive obligation factors stated by the ECtHR recognized the “margin of appreciation” to be enjoyed by lawmakers in setting objectives and determining choice of means. The factors are, however, minimum conditions that should be satisfied in the exercise of discretion. Further, these factors are not novel. They are a re-statement of best practices and standards adopted and recognized across the world. In the Canadian context, these minimum positive obligations strike a balance between the policy-making role of elected representatives and administrators, and the role of the courts as guardians of *Charter* rights.

rights under section 15 of the *Charter* given that “the legal community is moving towards the recognition of youth climate rights and the promotion of intergenerational equity.”¹⁷³ This signal by the Court is in itself innovative and could very well be the next incremental addition of Canadian courts to climate *Charter* jurisprudence.

The standing of global litigants has so far not been an issue in Canadian climate cases. The likelihood that standing will be granted is, however, low given the current state of the law. Generally, the *Charter* does not have transboundary effects.¹⁷⁴ An exception seems to be in respect of the violation of peremptory customary international norms — *jus cogens*.¹⁷⁵ Benjamin and Seck have suggested that the *jus cogens* argument can be carried over into the climate context.¹⁷⁶ The limited recognition of the application of environmental customary international norms (e.g. the transboundary harm principle) in the climate context, however, makes such possibility unlikely. The near impossibility of persons and communities bearing the brunt of climate change around the world initiating actions against Canadian state and non-state entities who are responsible for climate change is procedurally unjust. It is also inconsistent with the inherently global nature of climate change. This is yet another area where law must conform to the nature of climate change to be relevant in a climate change era.

There is an argument to be made that the *Charter* is engaged extraterritorially given the transboundary impacts of Canada’s actions, and more so because of Canada’s failure to meet its Paris commitments, which is a breach of Canada’s international obligations.¹⁷⁷ It is noteworthy that despite the SCC’s narrow interpretation of section 32 on the application of the *Charter*, nothing in the provision restricts the *Charter* to solely apply within Canada. The use of descriptors like “everyone” and “every individual” in sections 7 and 15, without an “in Canada” qualification, further supports the argument for a more liberal approach to defining who can come under *Charter* protection. The grant of standing to global litigants is still in its infancy in climate jurisprudence around the world, however.¹⁷⁸ The certified action brought by a Peruvian farm-

173 *La Rose*, *supra* note 9 at para 87.

174 *Kindler v Canada*, [1991] 2 SCR 779.

175 *Nevsun Resources Ltd v Araya*, 2020 SCC 5.

176 Lisa Benjamin & Sara L Seck, “Mapping Human Rights-based Climate Litigation in Canada” (2022) 13:1 J Human Rights & Env’t 178.

177 Breach of international obligation is an exception to the general rule that the Canadian *Charter* has no extra-territorial application. See *Canada v Khadr*, (2008) 2 SCR 125.

178 For example, in rejecting a case brought by children and youth in Portugal against Portugal and 32 other European countries, the ECtHR held that the claimants were not within the jurisdiction of the

er against Germany's largest utility company, *RWE*, in a German court is the most recognized example.¹⁷⁹

The overwhelming endorsement and acceptance of climate science as authoritative and compelling evidence in climate litigation is a positive development. The limits of Western science are well documented and climate science is not immune from these weaknesses.¹⁸⁰ The courts have particularly accepted the reports of the Intergovernmental Panel on Climate Change (IPCC) as the gold standard of climate science.¹⁸¹ And yet, according to the IPCC, climate science is still not accepted as 100% kosher, but has been criticized for political interference in its processes, for its watered-down and highly-qualified findings in the search for consensus, and for the so-called "climategate."¹⁸²

An additional, distinct issue is that the pre-eminence conferred on climate science by some courts above other forms of knowing is consistent with the

-
- 32 other European countries. Hence, they cannot be challenged under the European Convention on Human Rights even though the claimants are adversely impacted by the actions of the countries. See *Duarte Agostinho and Others v Portugal and 32 Others*, (Application no. 39371/20, decided 9 April 2024).
- 179 *Luciano Lliuya v RWE AG*, Case No. 2 O 285/15 Essen Regional Court. An alternative is for litigants to initiate actions before international and regional courts and tribunals, for example, the denied 2005 petition to the Inter-American Commission on Human Rights against the United States for its contribution to climate change. See *Petition To The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States*, online: <climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/> [perma.cc/6PDL-7VL9]. There are ongoing complaints in several international and regional forums as at the time of writing. See e.g. Vanuatu ICJ Initiative, "The Republic of Vanuatu is leading the initiative at the UN International Court of Justice for an Advisory Opinion on the Obligations of States Relevant to Climate Action", online (blog): *Vanuatu ICJ Initiative* <<https://www.vanuatuicj.com>> [perma.cc/K7BW-GJ2U]. These cases, however, generally lack the enforcement advantage possessed by decisions of domestic courts.
- 180 Wenceslao J González, ed, *The Limits of Science: An Analysis from "Barriers" to "Confines"* (Leiden: Brill, 2016); Gerhard Shipley & Deborah Williams, "Limitations of the Western Scientific Worldview for the Study of Metaphysically Inclusive Peoples" (2019) 9:3 *Open Journal of Philosophy* 295.
- 181 See e.g. *Mathur*, *supra* note 9 at para 18: "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 reports are a reliable, comprehensive and authoritative synthesis of existing scientific knowledge about climate change and its impacts."
- 182 Kari De Pryck, "Why the IPCC Can't Escape Climate Politics" (30 March 2023), online: *Green European Journal* <greeneuropeanjournal.eu/why-the-ipcc-cant-escape-climate-politics/> [perma.cc/C73B-X6C9]; Kristoffer Tigue, "Corporate Interests 'Watered Down' the Latest IPCC Climate Report" (28 March 2023), online: *Inside Climate News* <insideclimatenews.org/news/28032023/corporate-interests-watered-down-the-latest-ipcc-climate-report-investigations-find/> [perma.cc/U9ZH-A82B]; Robin McKie, "Climategate 10 Years On: What Lessons Have We Learned" (9 November 2019), online: *The Guardian* <theguardian.com/theobserver/2019/nov/09/climategate-10-years-on-what-lessons-have-we-learned> [perma.cc/A72J-CERA].

western emphasis on empiricism as the dominant way of knowing. This is an issue of unjust misrecognition; misrecognition that the knowledge generated through climate science is more credible than, for example, Indigenous ways of knowing. There are instances where Indigenous knowledge should be considered relevant and apposite,¹⁸³ while Western science collaborates as applicable. For example, in *Misdzi Yikh*, decided alongside *La Rose* at the FCA, Indigenous communities claimed that Canada's contribution to climate change threatens their "identity," "culture," "relationship to the land," and "food security."¹⁸⁴ If there was ever a time that Indigenous knowledge should be centered, it was in respect of these claims. The Court, however, wielded the same scientific evidentiary wand in determining the claims in *La Rose* and *Misdzi Yikh*. While climate science will mostly be relevant, its role in addressing climate claims should not always be dominant. Paying attention to the recognition dimension of climate justice will be useful to courts in not conferring *de facto* superiority on specific ways of knowing rooted in Western epistemology.

Judicial innovation, however, rarely begins with the courts. An important component of judicial restraint is that courts generally only resolve issues and pronounce on arguments raised before them. Litigants and lawyers are therefore integral in the ecosystem of judicial innovation. The non-consideration of the issues raised in this section goes to how pleadings and claims are made by litigants. Of course, there are many strategic considerations dealt with by litigants to position their claims for "success." But success in climate litigation is relative. The engagement of the courts with issues, their reasoning on the issues, and their eventual decisions, even when "adverse," all constitute progress. This is even more so if litigation and the adjudication of the court is considered as part of the public discourse. Neither *ENJEU* and *Mathur*, nor *La Rose*, included claims pertaining to adaptation or loss and damage. Climate change already impacts the wellbeing of people, communities, and ecosystems, and a failure to adapt would worsen an already dire situation leading to even more loss and damage. It should be possible to find respite under the law, but this will not happen unless litigants bring such issues before the courts.

183 Deborah McGregor, "Indigenous Knowledge Systems in Environmental Governance in Canada" (2021) 5:1 Knowledge Creation, Dissemination, and Preservation Studies 1; Laura Cameron, Ian Mauro & Kevin Settee, "A Return to and of the Land: Indigenous Knowledge and Climate Change Initiatives Across the Canadian Prairies" (2021) 41:3 Journal of Ethnobiology 363; Jan Petzold et al, "Indigenous Knowledge on Climate change Adaptation: A Global Evidence Map of Academic Literature" (2020) 15 Environmental Research Letters 1; Kirsten Vinyeta & Kathy Lynn, *Exploring the Role of Traditional Ecological Knowledge in Climate Change Initiatives* (United States Department of Agriculture, 2013).

184 *Misdzi Yikh*, *supra* note 117 at paras 10–12.

V. Conclusion

The incremental nature of judicial innovations in *Charter*-based climate litigation raises valid questions about whether this approach is misaligned with climate change, a phenomenon that demands drastic, urgent, and ambitious actions in all areas of human endeavour. Further arguments can be made that unlike human rights regimes in other jurisdictions (e.g. Western Europe), the Canadian *Charter* simply does not and cannot take us far enough. It does not apply to private actors; it leaves out corporations, which are major contributors to climate chaos; and there is a built-in justification mechanism that could potentially allow climate rights violation where found. Worse still, both sections 7 and 15, which litigants have relied on in bringing climate *Charter* challenges, are subject to the notwithstanding clause (section 33) of the *Charter*, through which governments can override rights, renewable, every five years.

To each of these valid points, there is at least a partial response. The potential of *Charter* values and how these can help reframe common law in various regimes (tort, contract, etc.) to address the climate liability of corporations is, for example, under-discussed.¹⁸⁵ Again, using *Charter* values to interpret and develop the common law in the climate context will not be a radical development. Such development only aligns with and advances the dark innovations in the SCC's *Charter* jurisprudence. For example, while holding that the *Charter* does not generally apply to the common law in private disputes in *Dolphin Delivery*, a case decided shortly after the enshrinement of the *Charter* in the Canadian Constitution, the SCC left open various opportunities for the indirect application of the *Charter* to private parties.¹⁸⁶ In particular, the Court noted that the judiciary should develop "the principles of common law in a manner consistent with the fundamental values enshrined in the Constitution."¹⁸⁷ Years after, in a similar factual scenario as *Dolphin Delivery*, the SCC revised the common law rules on secondary picketing to render them more consistent with the *Charter* value of free expression.¹⁸⁸

185 The potential of applying *Charter* values in the contract context was recently pronounced on by the Ontario Superior Court in *Cool World Technologies Inc v Twitter Inc*, 2022 ONSC 7156. In dismissing a motion to strike a challenge against Twitter's refusal to allow the publication of an advert, the court endorsed the argument of the applicants that Twitter's policies (constituting terms of contract) were against public policy because they undermined the freedom of expression.

186 The *Charter* applies to common law if such common law principles are codified in legislation or if the private dispute is connected to governmental actions based on common law. See *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 34–39.

187 *Ibid* at 39.

188 *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8.

The transformative potential of the *Charter* in the climate change context is being cautiously explored by Canadian courts. Courts are subliminally constrained by the legitimacy imperative, compelling judges to “stay in their lane.” However, the *Charter*-paved judicial lane is expansive even though delineated and circumscribed. There is no inherent barrier in section 7 of the *Charter* limiting the recognition and protection of climate-related rights. Section 7 can be interpreted in a manner that compels governments in Canada to meet minimum standards for the protection of life, liberty, and security of the person, while accommodating the policy-making role of elected representatives. The current analytical framework of section 15 is also not fundamentally misaligned with the demands of intergenerational equity. For those concerned about the potential distortion of parliamentary democracy and sovereignty, comfort can be taken in *Charter*-based (e.g. sections 1 and 33) and normative (decisions of courts reflecting societal values) guardrails.

