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Mathur v. Ontario: Grounds for Optimism about the Recognition of a Constitutional Right to a Stable Climate System in Canada?

Stepan Wood

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Résumé de l'article

En janvier 2024, la Cour d'appel de l'Ontario a entendu un appel du rejet par un tribunal inférieur du premier procès sur le climat mené par des jeunes à être jugé sur le fond. *Mathur c. Ontario* allègue que la législation, la cible, et le plan de l'Ontario portant sur le changement climatique contreviennent aux droits des jeunes en vertu des articles 7 et 15 de la *Charte canadienne des droits et libertés* en engageant la province à atteindre des niveaux dangereusement élevés d'émission de gaz à effet de serre (GES). Cet article soutient qu'il y a de bonnes raisons d'autoriser l'appel. Certaines conclusions favorables seront probablement confirmées, notamment la validation par la cour de la science du changement climatique, du budget carbone mondial, des objectifs mondiaux en matière de GES, de l'insuffisance du nouvel objectif de l'Ontario, des effets disproportionnés du changement climatique sur les jeunes et les peuples autochtones, son rejet de la défense *de minimis*, et sa conclusion que l'affaire dans son ensemble est justiciable. Cependant, il y a des motifs de rejeter les conclusions de la cour selon lesquelles la part de l'Ontario dans les réductions d'émissions mondiales de GES n'est pas justiciable, le préjudice allégué ne résulte pas de l'action étatique contestée, le droit revendiqué est positif plutôt que négatif, un droit positif n'est pas justifié dans ce cas, toute privation des droits conférés par l'article 7 respecte les principes de justice fondamentale, et l'action étatique contestée ne constitue pas une discrimination en raison de l'âge. L'article aborde également certaines questions laissées en suspens par le tribunal inférieur qui pourraient s'avérer importantes en appel. Quoi qu'il en soit, cette affaire constituera un précédent important pour les litiges relatifs aux droits de l'environnement au Canada.

Mathur v. Ontario: Grounds for Optimism about the Recognition of a Constitutional Right to a Stable Climate System in Canada?

Stepan Wood[*]

In January 2024, the Court of Appeal for Ontario heard an appeal from a lower court's dismissal of the first Canadian children's climate case to be decided on the merits. *Mathur v. Ontario* alleges that Ontario's climate change legislation, target and plan violate young people's rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* by committing the province to dangerously high levels of greenhouse gas (GHG) emissions. This article argues that there are good grounds to allow the appeal. Some favourable findings will likely be upheld, including the court's acceptance of climate change science, the global carbon budget, global GHG targets, the inadequacy of Ontario's new target, the disproportionate impacts of climate change on youth and Indigenous peoples, its rejection of a *de minimis* defence, and its conclusion that the case as a whole is justiciable. There are, however, grounds to reverse the court's holdings that Ontario's share of global GHG emission reductions is not justiciable, the alleged harm is not the result of the impugned state action, the claimed right is positive rather than negative, a positive right is not warranted in this case, any deprivation of section 7 rights accords with principles of fundamental justice, and the impugned state action does not constitute age discrimination. The article also addresses some issues left unresolved by the lower court that may prove important on appeal. Whatever happens, the case will set a key precedent for Canadian environmental rights litigation.

En janvier 2024, la Cour d'appel de l'Ontario a entendu un appel du rejet par un tribunal inférieur du premier procès sur le climat mené par des jeunes à être jugé sur le fond. *Mathur c. Ontario* allègue que la législation, la cible, et le plan de l'Ontario portant sur le changement climatique contreviennent aux droits des jeunes en vertu des articles 7 et 15 de la *Charte canadienne des droits et libertés* en engageant la province à atteindre des niveaux dangereusement élevés d'émission de gaz à effet de serre (GES). Cet article soutient qu'il y a de bonnes raisons d'autoriser l'appel. Certaines conclusions favorables seront probablement confirmées, notamment la validation par la cour de la science du changement climatique, du budget carbone mondial, des objectifs mondiaux en matière de GES, de l'insuffisance du nouvel objectif de l'Ontario, des effets disproportionnés du changement climatique sur les jeunes et les peuples autochtones, son rejet de la défense *de minimis*, et sa conclusion que l'affaire dans son ensemble est justiciable. Cependant, il y a des motifs de rejeter les conclusions de la cour selon lesquelles la part de l'Ontario dans les réductions d'émissions mondiales de GES n'est pas justiciable, le préjudice allégué ne résulte pas de l'action étatique contestée, le droit revendiqué est positif plutôt que négatif, un droit positif n'est pas justifié dans ce cas, toute privation des droits conférés par l'article 7 respecte les principes de justice fondamentale, et l'action étatique contestée ne constitue pas une discrimination en raison de l'âge. L'article aborde également certaines questions laissées en suspens par le tribunal inférieur qui pourraient s'avérer importantes en appel. Quoi qu'il en soit, cette affaire constituera un précédent important pour les litiges relatifs aux droits de l'environnement au Canada.

* Professor, Canada Research Chair in Law, Society & Sustainability, and Director, Centre for Law & the Environment, Allard School of Law, University of British Columbia. I am grateful to my colleagues Brian Bird, Nikos Harris and Margot Young, and participants in the conference "Constitutional Crossroads in Canada and Around the World" at the University of British Columbia in January 2023 for their valuable feedback. The usual disclaimers apply.

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Introduction

In April 2023, Justice Marie-Andrée Vermette of the Ontario Superior Court of Justice dismissed *Mathur v. Ontario* (*Mathur*),[1] the latest of three Canadian children's climate cases.[2] These cases allege that government conduct in relation to climate change violates the rights of children, youth, and future generations under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*).[3] *Mathur* was the first of these to be decided on the merits. Justice Vermette dismissed the case despite accepting the scientific evidence of the causes, trends, and impacts of climate change and finding that Ontario's climate change target "falls severely short of the scientific consensus as to what is required."[4] The applicants appealed. The Court of Appeal for Ontario heard the appeal in early 2024. The case matters not just for whether citizens can hold governments accountable for the harmful impacts of climate change laws and policies, but also for the unsettled question of whether the *Charter* includes a right to a healthy environment.

Part II provides some background to the case. In Part III, I critically assess the decision, starting with some favourable findings of fact about climate change and its impacts on youth and Indigenous peoples that will likely survive appeal. I then consider Justice Vermette's finding that the case is justiciable and argue that this finding should be affirmed, with the exception of one point she resolved against the applicants: that Ontario's share of GHG emission reductions is not justiciable. Turning to the merits, I criticize Justice Vermette's crucial holding that the harm alleged by the applicants is not the result of the impugned state action and show how the applicants can challenge it on appeal. I do the same for her conclusion that the applicants are advancing a positive rather than negative rights claim. Then, after briefly discussing the prospects for establishing a positive right on appeal, I challenge Justice Vermette's holdings that the applicants failed to prove that the deprivation, if any, of their section 7 rights contravenes principles of fundamental justice or that the impugned state action discriminates against them on the basis of age under section 15, both of which depend upon her conclusions that the applicants

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1 2023 ONSC 2316 at para 188 [*Mathur* 2023].

2 The other two are *Environnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885 [*Environnement Jeunesse* CS], aff'd on other grounds 2021 QCCA 1871 [*Environnement Jeunesse* CA], leave to appeal to SCC refused, 2022 CanLII 67615 (SCC); *La Rose v Canada*, 2020 FC 1008 [*La Rose* 2020], rev'd in part 2023 FCA 241 [*La Rose/Misdzi Yikh* 2023].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 *Mathur* 2023, *supra* note 1 at para 147.

are asserting positive rights and that the alleged harm is not the result of the impugned state action.

After this, I discuss three issues Justice Vermette left unresolved: whether the impugned actions limit young people's liberty, which implicates both sections 7 and 15; whether there is an unwritten constitutional principle of societal preservation or ecological sustainability; and whether the applicants have standing to sue on behalf of future generations. I then argue that her dismissal of the applicant's request for a declaration of unconstitutionality of the repeal of the previous government's climate change act, while technically correct, paints an inaccurate picture of the applicants' claim that may have affected her reasoning on other issues. I close with brief remarks about the case's significance for recognition of a constitutional right to a healthy environment and stable climate system in Canada.

I. Background

A. *The* Charter *and the Right to a Healthy Environment*

The idea that the *Charter* includes a right to a healthy environment has been advocated since its enactment.[5] Since then, multiple litigants have alleged, unsuccessfully so far, that a wide range of environmentally harmful activities violate their constitutional rights. These lawsuits have targeted landfill sites,[6] waste incineration,[7] nuclear accidents,[8] pesticides,[9]

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5 See e.g. Colin P Stevenson, "A New Perspective on Environmental Rights After the Charter" (1983) 21:3 Osgoode Hall LJ 390; Dianne Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora, ON: Canada Law Book, 1990) at 8–9; Andrew Gage, "Public Health Hazards and Section 7 of the Charter" (2003) 13 J Envtl L & Prac 1; Lynda M Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 Windsor Rev Leg Soc Issues 7 at 17–21; David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) at 176–185; Nathalie J Chalifour, "Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the Charter?" (2015) 28:1 J Envtl L & Prac 89; Lynda M Collins, "Safeguarding the *Longue Durée*: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR (2d) 519 at 528–33; Lauren Worstman, "'Greening' the *Charter*: Section 7 and the Right to A Healthy Environment" (2019) 28 Dal J Leg Stud 245; Larissa Parker, "Not in Anyone's Backyard: Exploring Environmental Inequality under Section 15 of the *Charter* and Flexibility after *Fraser v Canada*" (2022) 27 Appeal 19.

6 *Manicom v County of Oxford*, 52 OR (2d) 137, 1985 CanLII 2110 (ONSC).

7 *Coalition of Citizens for a Charter Challenge v Metropolitan Authority*, 108 DLR (4th) 145, 1993 CanLII 4582 (NSSC), rev'd 1993 CanLII 9386 (NSSC).

8 *Energy Probe v Canada (Attorney General)*, 58 DLR (4th) 513, 1989 CanLII 258 (ONCA); *Energy Probe v Canada (Attorney General)*, 17 OR (3d) 717, 1994 CanLII 7247 (ONSC).

drinking water fluoridation,[10] sour gas wells,[11] wind turbines,[12] and greenhouse gas (GHG) emissions.[13] Most have claimed violations of the right to life, liberty and security of the person under section 7 of the *Charter*. Some have invoked the right to equality under subsection 15(1)[14] or religious freedom under paragraph 2(a).[15] Many of these claims were rejected on procedural grounds or for want of evidence, not because the courts rejected the principle that the *Charter* protects a right to a healthy environment.[16]

After a long string of defeats, a 2012 decision raised hopes that Canadian courts would finally recognize a *Charter* right to a healthy environment. That year, a court refused to strike a claim brought by members of the Aamjiwnaang First Nation that the Ontario government's approval of increased air emissions from a facility in "Chemical Valley," Canada's largest concentration of petrochemical plants and a pollution hotspot, violated section 7 and discriminated against them based on their status as Indigenous persons living on reserve, in violation of section 15.[17] The case

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9 *Kuczerpa v Canada*, [1991] FCJ 1069, 29 ACWS (3d) 1169, aff'd [1993] FCJ No 217, 39 ACWS (3d) 388, leave to appeal to SCC refused, [1993] SCCA 194, [1993] 3 SCR vii; *Wier v Environmental Appeal Board*, 2003 BCSC 1441.

10 *Locke v Calgary (City)*, 1993 CanLII 7255 (ABQB); *Millership v British Columbia*, 2003 BCSC 82 [*Millership*].

11 *Kelly v Alberta (Energy and Utilities Board)*, 2008 ABCA 52; *Domke v Alberta (Energy Resources Conservation Board)*, 2008 ABCA 232.

12 *Fata v Director, Ministry of the Environment*, [2014] OERTD No 42, 90 CELR (3d) 37; *Mothers Against Wind Turbines Inc v Ontario (Director, Ministry of the Environment and Climate Change)* [2015] OERTD No 19, 2015 CanLII 26395 (ON ERT).

13 *Environnement Jeunesse* CS, *supra* note 2 at para 13; *La Rose* 2020, *supra* note 2 at para 3; *Misdzi Yikh v Canada*, 2020 FC 1059 at para 4 [*Misdzi Yikh* 2020]; *Mathur v Ontario*, 2020 ONSC 6918 [*Mathur* 2020], leave to appeal to Div Ct refused, 2021 ONSC 1624.

14 *Millership*, *supra* note 10 at para 6; *Lockridge v Director, Ministry of the Environment*, 2012 ONSC 2316 [*Lockridge*]; *Environnement Jeunesse* CS, *supra* note 2 at para 104; *La Rose* 2020, *supra* note 2 at para 7; *Misdzi Yikh* 2020, *supra* note 13 at para 4; *Mathur* 2020, *supra* note 13.

15 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 7 [*Ktunaxa Nation*].

16 Avnish Nanda, "Heavy Oil Processing in Peace River, Alberta: A Case Study on the Scope of Section 7 of the *Charter* in the Environmental Realm" (2015) 27 J Envtl L & Prac 109 at 125.

17 *Lockridge*, *supra* note 14.

was discontinued, however, after Ontario promised to change its approach to air pollution approvals.[18]

In 2017, the Supreme Court of Canada ruled that the approval of a ski resort on a sacred mountain did not violate the Ktunaxa Nation's freedom of religion, even if the project would drive away Grizzly Bear Spirit, which the Nation venerates. The Court held that the claim did not fall within the scope of paragraph 2(a), because the plaintiffs were still free to hold and manifest their religious beliefs even if Grizzly Bear Spirit departed.[19] This case was relevant to the right to a healthy environment insofar as it was aimed at preventing commercial development of a natural area.

The next major development in *Charter* environmental rights litigation was the launch of three cases by children and youth alleging that federal and provincial responses to climate change violate their constitutional rights. Before considering this development, it is necessary to introduce the global phenomenon of climate change litigation.

B. Global Climate Change Litigation

Litigation aimed at holding governments or industry accountable for their contributions to anthropogenic climate change has grown exponentially in the last decade.[20] The vast majority seeks to advance climate change mitigation by reducing GHG emissions. Relatively little pursues adaptation to the impacts of climate change or compensation for unavoidable losses, though such suits are on the rise.[21] Most cases are against governments; some target industry.[22] Their legal bases vary from tort law (e.g., negligence, nuisance, and similar doctrines)[23] to administrative law

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18 Ecojustice, "UPDATE: Lawsuit over air pollution in Chemical Valley discontinued" (15 December 2017), online: <ecojustice.ca/news/lawsuit-air-pollution-chemical-valley-discontinued/> [perma.cc/MBZ2-CCUJ].

19 *Ktunaxa Nation, supra* note 15 at paras 69–71.

20 Jacqueline Peel & Hari M Osofsky, "Climate Change Litigation" (2020) 16 Annual Rev L & Soc Science 21 at 21, 30 [Peel & Osofsky, "Climate Change Litigation"]. There are also many lawsuits opposing government measures aimed at reducing GHG emissions, but this article is concerned with lawsuits supporting action to tackle the climate crisis, not opposing it.

21 For example, dozens of subnational governments in the US have sued fossil fuel companies in tort to recover adaptation costs, but these have not yet proceeded to trial.

22 Joana Setzer & Catherine Higham, *Global trends in climate change litigation: 2023 snapshot* (London: Grantham Research Institute on Climate Change and the Environment & Centre for Climate Change Economics and Policy, 2023) at 3, 19, 21, 35.

23 See e.g. Hague District Court, The Hague, 26 May 2021, *Milieudefensie v Royal Dutch Shell plc*, C/09/571932, HA ZA 19-379 at paras 4.4.1–4.4.55, ECLI:NL:RBDHA:2021:5339 (Netherlands) [*Milieudefensie v Shell*] (holding Shell liable for

(e.g., failure to consider climate impacts in environmental assessment processes, to interpret or apply climate-related statutes properly, or to observe procedural fairness in regulatory decision-making),[24] to corporate, securities, financial, and consumer protection law (e.g., misrepresentation of climate science or risks to shareholders, investors, or consumers). A growing class of cases alleges human rights violations (e.g., rights to life, health, bodily integrity, a healthy environment, or respect for private and family life) by causing or failing to act on climate change. Rights-based climate litigation is experiencing a worldwide explosion.[25]

Common hurdles for climate cases include standing to sue (including for future generations), justiciability (especially whether claims are too political for judicial resolution), causation (including whether particular defendants' contributions are too small to matter legally, and whether particular impacts can be attributed to particular defendants), foreseeability of harm, and effectiveness of remedies. The first two hurdles tend to be lower for rights-based claims, as many courts conclude that claimants have standing to allege violations of their own rights and that human rights claims are appropriate for judicial resolution. The latter hurdles are shrinking for all types of climate litigation, as climate science becomes ever more definitive and precise (including drivers, impacts, attribution, and pathways out of climate catastrophe), societal and political consensus about the climate emergency becomes wider and firmer, and judges' grasp of both becomes more confident and sophisticated.

Success of climate change litigation can be measured in different ways, each more difficult to assess than the one before:[26] immediate outcomes (win/loss), jurisprudential development, changes in legislation and policies, modification of organizational or individual behaviour, and actual environmental change. Prominent victories include Dutch and German

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breaching civil standard of care); *Minister for the Environment v Sharma*, [2022] FCAFC 35 at paras 838–39, 869 (Austl) (refusing to recognize a common law duty of care on government to protect citizens from climate change).

24 See e.g. *Massachusetts v Environmental Protection Agency*, 549 US 497 at 533 (2007) [*Mass v EPA*] (ruling that the Environmental Protection Agency must regulate motor vehicle CO_2 emissions under the *Clean Air Act* if they were found to endanger public health and welfare); *Gloucester Resources Limited v Minister for Planning*, [2019] NSWLEC 7 (Austl.) [*Gloucester Resources*] (invalidating government approval of a coal mining project for failure to consider GHG emissions and climate change).

25 Jacqueline Peel & Hari M Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7:1 Transnational Envtl L 37; César Rodríguez-Garavito, "Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action" in César Rodríguez-Garavito, ed, *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge, UK: Cambridge University Press, 2022) 9.

26 See e.g. Peel & Osofsky, "Climate Change Litigation", *supra* note 20 at 32–33.

decisions holding that governments' climate change mitigation targets violate citizens' rights[27] and a Pakistani decision ruling that lacklustre government action on adaptation violates citizens' rights.[28] Moreover, a Dutch court recently held a major oil company liable for violating a civil duty of care to Dutch residents and ordered it to achieve steeper GHG emissions cuts across its worldwide operations.[29] At the international level, the UN Human Rights Committee has found that states have a duty to take adaptation measures to protect human rights.[30] Three challenges to states' climate change mitigation targets are pending before the European Court of Human Rights, while the International Court of Justice, International Tribunal for the Law of the Sea and Inter-American Court of Human Rights will all soon issue advisory opinions on states' legal obligations in relation to climate change.[31]

The most important development for our purposes is the emergence of rights-based climate change litigation by children and youth against governments, or rarely, industry.[32] Children and youth in the US have filed cases against the federal government and all 50 state governments claiming that governments' action and inaction on climate change violates the governments' public trust duties and the plaintiffs' constitutional rights.

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27 Supreme Court, The Hague, 20 December 2019, *Urgenda Foundation v Netherlands*, [2020] No 19/00135 at paras 5.7.9, 5.8, 7.5.1–7.5.3, ECLI:NL:HR:2019:2007 (Netherlands) [*Urgenda*]; Federal Constitutional Court, Karlsruhe, 24 March 2021, *Neubauer v Germany*, BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 at para 243, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618 (Germany) [*Neubauer*].

28 *Leghari v Federation of Pakistan* (4 September 2015), WP No 25501/2015 at para 8 (Lahore HC Pakistan) (order sheet).

29 *Milieudefensie v Shell*, *supra* note 23 at paras 4.4.1–4.4.3, 4.4.55, 5.3.

30 *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019*, UNHRC, 135th Sess, UN Doc CCPR/C/135/D/3624/2019 (2022) at para 5.2.

31 Setzer & Higham, *supra* note 22 at 5, 17–18. On April 9, 2024, as this article was going to press, the court issued its decisions in these three cases. In one case brought by an association of elderly Swiss women, the court ruled that the Swiss government's inadequate efforts to address climate change violated the complainants' right to respect for private and family life under the *European Convention on Human Rights*. The court dismissed the other two cases, one of which was brought by Portuguese youth against 32 European states, on procedural and jurisdictional grounds (European Court of Human Rights, "Grand Chamber Rulings in the Climate Change Cases" (9 April 2024), online: <echr.coe.int/w/grand-chamber-rulings-in-the-climate-change-cases> [perma.cc/CP3S-EKDX]).

32 Camille Cameron & Riley Weyman, "Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices" (2022) 34:1 J Envtl L 195 at 196; Elizabeth Donger, "Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization" (2022) 11:2 Transnational Envtl L 263.

In one, a federal judge declared on a preliminary motion that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[33] Most of these cases are at a preliminary stage or have been dismissed, but the first one went to trial in 2023. It scored a historic victory when the court ruled resoundingly that the state of Montana's approach to climate change violates the plaintiffs' constitutional right to a clean and healthful environment.[34] Also in 2023, a case in Hawaii survived a motion to dismiss and will now proceed to trial.[35]

Other children's climate cases have been launched in Argentina, Australia, Belgium, Colombia, Ecuador, Germany, India, Mexico, Norway, Pakistan, Peru, the Philippines, South Korea, Sweden, Uganda, the United Kingdom, the European Court of Justice, the European Court of Human Rights, and the UN Committee on the Rights of the Child.[36] A few—including challenges to deforestation in Colombia, gas flaring in Ecuador, and GHG emission reduction targets in Belgium and Germany—have succeeded.[37]

C. Canadian Children's Climate Cases

Children's climate litigation arrived in Canada with the launch of three climate change lawsuits against Canadian governments within one year, starting in November 2018.[38] That was when environmental group ENvironnement JEUnesse ("ENJEU")[39] began a class action in the Superior Court of Québec claiming that the federal government's inadequate action on climate change violated young Quebeckers' rights to life, liberty, security of the person and equality under the *Charter* and the Quebec *Charter of Human Rights and Freedoms*,[40] as well as their right to a healthy environment under section 46.1 of the Quebec *Charter*. ENJEU sought to represent a class composed of all Quebeckers 35 years old or younger.

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33 *Juliana v United States*, 217 F Supp (3d) 1224 at 1250 (D Or 2016), rev'd on other grounds 947 F (3d) 1159 (9th Cir 2020) [*Juliana*].

34 *Held v State of Montana*, No CDV-2020-307 (Mont Dist Ct 2023) [*Held*].

35 *NF v Department of Transportation*, No 1CCV-22-0000631 (Hawaii Cir Ct 2023).

36 Donger, *supra* note 32 at 286–89.

37 *Ibid* at 270. The latest success was the Swiss seniors' case, decided as this article was going to press. See European Court of Human Rights, *supra* note 31.

38 For a critical comparative assessment of these three cases at a preliminary procedural stage, see Cameron & Weyman, *supra* note 32 at 197–99.

39 "Enjeu" means "stake" or "issue" in English.

40 *Charter of Human Rights and Freedoms*, CQLR c C-12, s 1, 10.

In October 2019, 15-year-old Cecilia La Rose and 14 other young people from across Canada sued the federal government in Federal Court, claiming that its handling of GHG emissions and climate change is incompatible with a stable climate system and violates the section 7 and 15 rights of the plaintiffs and all present and future children and youth in Canada. *La Rose v. Canada* also alleges that the public trust doctrine is part of Canadian law and that the federal government is violating its public trust duties. The claimants point to a wide range of federal government conduct to support their case, including causing and authorizing GHG emissions, adopting inadequate GHG emission targets, failing to meet its own targets, and actively supporting and participating in fossil fuel industries and activities.[41]

Finally, in November 2019, 12-year-old Sophia Mathur and six other young Ontarians sued the Ontario government in the Ontario Superior Court of Justice after a newly elected government scrapped its predecessor's GHG emissions targets and cap-and-trade legislation. *Mathur v. Ontario* seeks declarations that an Ontario statute authorizing the province to replace its existing GHG reduction targets with more lenient ones, and the more lenient target it consequently set, violates sections 7 and 15 of the *Charter*; and an order that Ontario adopt a science-based GHG reduction target and plan consistent with its share of the GHG reductions necessary to limit global warming to the target agreed in the 2015 *Paris Agreement*,[42] namely below 1.5°C or in any case well below 2°C.[43]

Environnement Jeunesse v. Canada foundered in July 2019, when the Quebec court refused to authorize the class action. The court held that the claim raised cognizable constitutional issues and was therefore justiciable, but that the proposed class cut-off age of 35 was arbitrary and unfounded.[44] The Court of Appeal of Quebec agreed about the age cut-off, but not justiciability: it held the claim to be non-justiciable, because it would take the court into the legislative sphere of complex choices on issues of social and economic policy.[45] It also rejected the age discrimination claim, opining that climate change's disproportionate impacts on young people are not due to their age but "uniquely because they will suffer them, in

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41 *La Rose* 2020, *supra* note 2 at paras 6–8.

42 *Adoption of the Paris Agreement*, UNFCCC, 21st Sess, UN Doc FCCC/CP/2015/10/Add.1, UNFCCC Dec 1/CP.21 [*Paris Agreement*].

43 *Mathur* 2023, *supra* note 1 at paras 2, 7.

44 *Environnement Jeunesse* CS, *supra* note 2 at para 123.

45 *Environnement Jeunesse* CA, *supra* note 2 at paras 40–42.

principle, for a longer time."[46] The Supreme Court denied leave to appeal.[47]

More than a year later, in October 2020, the Federal Court struck the claim in *La Rose*.[48] It held that even though *Charter* claims are usually justiciable, these ones "are so political that the Courts are incapable or unsuited to deal with them."[49] The key problem, in its view, was that this claim alleged an overly broad, diffuse and unspecified pattern of government conduct, effectively seeking judicial evaluation of Canada's overall policy response to climate change.[50] The court also held that even if justiciable, the *Charter* claims had no reasonable prospect of success since the plaintiffs failed to allege particular state actions or laws that could infringe their *Charter* rights.[51] The court concluded that this case was like *Tanudjaja v. Canada (AG)*, where the Court of Appeal for Ontario held a *Charter* challenge to housing policy non-justiciable because it implicated broad policy choices and did not challenge specific laws or actions.[52]

Two weeks later, *Mathur* became the first Canadian children's climate case to get the green light to be decided on the merits.[53] The case revolves around Ontario's *Cap and Trade Cancellation Act* (*CTCA*), enacted in 2018.[54] The *CTCA* repealed the previous provincial government's climate change statute and its legislated target of reducing emissions to 37% below 1990 levels by 2030.[55] This translates to 44–45% below 2005 levels.[56] The old act also authorized the government to set interim targets and to increase (but not decrease) the stringency of targets, having regard to the *Paris Agreement*'s temperature goals.[57]

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46 *Ibid* at para 43 [translated by author].

47 *Supra* note 2.

48 *La Rose* 2020*, supra* note 2 at para 101. This decision was overturned in December 2023, in a decision I will discuss in Part III.

49 *Ibid* at para 40.

50 *Ibid* at para 59.

51 *Ibid.*

52 2014 ONCA 852 [*Tanudjaja*], leave to appeal to SCC refused, 2015 CanLII 36780 (SCC).

53 *Mathur* 2020, *supra* note 13.

54 SO 2018, c 13 [*CTCA*].

55 *Ibid*, s 16, repealing the *Climate Change Mitigation and Low-Carbon Economy Act, 2016*, SO 2016, c 7 [*Climate Change Act*].

56 *Mathur v Ontario*, 2023 ONSC 2316 (Factum, Applicant at para 21 n 11) [*Mathur* 2023 AF].

57 *Climate Change Act*, *supra* note 55, ss 6(2)–6(4).

In place of these provisions, the *CTCA* requires the government to establish targets for GHG emission reductions in Ontario and prepare a climate change plan.[58] It also authorizes the government, in its discretion, to revise the targets and plan from time to time.[59] The government's new plan, also released in 2018, sets a GHG emissions reduction target of 30% below 2005 levels by 2030.[60] Not only is this target less ambitious than the previous one, there is no legislative requirement that targets be set with regard to the *Paris Agreement* or on any scientific basis.[61]

When Ontario moved to strike the claim, Justice Carole Brown sided with the applicants on all key issues. The question on a motion to strike is "whether it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action."[62] Applying this standard, she held that Ontario's climate change target and plan were governmental actions reviewable by the courts, the applicants' claims were capable of scientific proof, and the case was justiciable insofar as it alleged that specific state actions violated the *Charter*. She also decided that the applicants had adequately pleaded that they had been deprived of their right to life, liberty and security of the person contrary to principles of fundamental justice, and that the impugned government action discriminated against them on the basis of their age. Finally, she concluded that their assertion of a positive government obligation to act was not obviously doomed to fail, and they had standing to sue on behalf of future generations.

For the first time in a long time, prospects were looking bright for judicial recognition of a *Charter* right to a healthy environment in Canada. But a few weeks later, these prospects dimmed when the Federal Court dismissed the case of *Misdzi Yikh v. Canada*.[63] In that case, Indigenous plaintiffs alleged that Canada's failure to enact more stringent GHG emissions reduction legislation violated sections 7 and 15 of the *Charter*, a constitutional principle of intergenerational equity, common law principles of public trust and equitable waste, and a duty to legislate for peace, order and good government. The court granted the federal government's motion to strike the claim, holding it unjusticiable, because "[t]he issue of

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58 *CTCA*, *supra* note 54, ss 3(1), 4(1).

59 *Ibid.*

60 Ontario, Ministry of the Environment, Conservation and Parks, *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan* (Toronto: Queen's Printer for Ontario, 2018) at 21, online (pdf): *Environmental Registry of Ontario*, <ero.ontario.ca/notice/013-4208> [perma.cc/G5YL-5F8E].

61 *Mathur* 2023 AF, *supra* note 56 at para 23.

62 *Mathur* 2020, *supra* note 13 at para 3.

63 *Supra* note 13. This ruling was later overturned, in a decision I will discuss in Part III.

climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government."[64] The court also found that even if justiciable, the case disclosed no reasonable cause of action, because the federal government has no legal duty to legislate for peace, order and good government, the plaintiffs identified no specific laws or state actions that allegedly violated their rights, and they failed to plead facts that could establish a sufficient causal connection between the government's conduct and climate change.[65]

II. Case Dismissed: A Critical Assessment of the *Mathur* Decision

Mathur was heard on the merits by Justice Vermette in September 2022. The case proceeded as an application rather than a civil action and was therefore heard in chambers on the basis of affidavit evidence, with no oral testimony.[66] Even though the evidentiary record and the credibility of witnesses were not tested as thoroughly as they would have been in a trial, *Mathur* is nonetheless the first case to determine squarely, on the merits and with the benefit of evidence and argument, whether state action on climate change violates Canadians' *Charter* rights.

Justice Vermette accepted almost all the applicants' scientific evidence, ruled the case justiciable and found that Ontario's climate change target and plan were entirely inadequate to meet internationally agreed goals. Despite this, she found no violation of the *Charter*.[67] The applicants appealed her decision to the Court of Appeal for Ontario, which heard the case in January 2024.[68] A decision is expected imminently. The purpose of this article is to evaluate the grounds on which Justice Vermette's dismissal might be reversed on appeal.[69]

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64 *Ibid* at para 77.

65 *Misdzi Yikh* 2020, *supra* note 13 at paras 79–104.

66 *Rules of Civil Procedure*, RRO 1990, Reg 194, r 14.03(3)(g.1).

67 *Mathur* 2023, *supra* note 1 at paras 18–21, 96, 184.

68 Ben Cohen, "Young Ontario activists' climate lawsuit against province goes to Court of Appeal on Monday", *Toronto Star* (15 January 2024), online: <thestar.com/news/canada/young-ontario-activists-climate-lawsuit-against-province-goes-to-court-of-appeal-on-monday/article_df7cd0a4-b187-11ee-9601-4beaa06defbd.html> [perma.cc/TL72-PJL5].

69 I conducted this evaluation without reference to the grounds and arguments actually raised by the parties and interveners in the appeal. One reason for this was pragmatic: I was formulating my analysis at the same time that they were formulating their arguments. Another was principled: my goal was to provide an independent, standalone assessment of Justice Vermette's decision that might be helpful to the appeal court without being limited or influenced by the parties' and interveners' decisions about litigation strategy.

Whichever way the appeal is decided, this case will set an important precedent for similar climate change cases and for the right to a healthy environment generally in Canada. Several of Justice Vermette's holdings against the applicants are vulnerable to reversal on appeal, while her holdings that favoured them are likely to withstand appeal. I consider these holdings under the following headings: facts, justiciability, effect of the impugned state actions, positive versus negative rights, principles of fundamental justice, age discrimination, liberty, unwritten constitutional principles, standing for future generations, and repeal of prior legislation. Two threads run through the decision: that the harms alleged by the applicants are attributable to climate change, not to the impugned state actions; and that the applicants are essentially complaining about the government's failure to do enough to protect their rights, rather than its active interference with their rights. The court's dismissal of the case hinged on these two propositions. The success of the applicants' appeal depends largely on refuting them.

My analysis of these issues is informed by a key development that occurred after Justice Vermette's decision but before the hearing of the *Mathur* appeal. In December 2023, the Federal Court of Appeal reversed the lower court's decisions in *La Rose* and *Misdzi Yikh*, allowing these two cases to move forward, albeit on a narrower basis than initially pleaded.[70] While this landmark decision was made at a much earlier stage in the litigation—an initial motion to strike rather than adjudication on the merits after hearing the evidence—it is nevertheless relevant to the *Mathur* appeal and is interwoven throughout the analysis that follows.

A. Facts

Mathur joins a growing global judicial chorus in confirming that the facts of climate change are now more or less beyond dispute.[71] Government defendants increasingly choose not to challenge the international scientific consensus about the existence, causes, patterns, trajectories and impacts of climate change, or the global targets and timetables for GHG emission reductions.[72] In line with this trend, Ontario did not challenge most of the scientific evidence in *Mathur*, but it did dispute certain as-

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70 *La Rose/Misdzi Yikh* 2023, *supra* note 2.

71 For the leading Canadian example of this trend, see *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 2, 7–12 [*GGPPA References*].

72 See e.g. *Urgenda*, *supra* note 27; *Neubauer*, *supra* note 27; *Held*, *supra* note 34; *La Rose* 2020, *supra* note 2; and *Misdzi Yikh* 2020, *supra* note 13.

pects of it using evidence from experts aligned with the fossil fuel industry and climate denialism.[73]

Justice Vermette was having none of it.[74] She accepted the international scientific consensus regarding climate change, drawing heavily on the Supreme Court of Canada's 2021 decision in *References re Greenhouse Gas Pollution Pricing Act* (*GGPPA References*).[75] In that case, the Court recognized that climate change poses an existential threat to Canada and the world, is primarily human-caused, and has particularly severe and devastating effects in Canada, which are felt disproportionately by Indigenous peoples.[76] It also held that individual provinces cannot argue that they have no legal responsibility because their emissions are too small to matter on a global scale.[77]

Building on this foundation, Justice Vermette accepted the scientific evidence of the impacts of climate change in Ontario and Canada, the risk of passing irreversible climate tipping points, and the "carbon budget" approach to determining allowable future emissions.[78] Furthermore, she accepted the 2021 Glasgow Climate Pact's imperative to reduce global GHG emissions by 45% below 2010 levels by 2030. She found that to achieve this target, Ontario would have to reduce its emissions by 52% below 2005 levels by 2030.[79] She found that its actual target of 30% below 2005 levels "falls severely short of the scientific consensus as to what is required"[80] and "the gap between the Target and the reduction percentage that is required globally by 2030 is large, unexplained and without any apparent scientific basis."[81]

Justice Vermette also accepted the applicants' evidence that climate change has a disproportionate impact on young and Indigenous people. She found that children and youth are particularly sensitive to heat and

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73 *Mathur v Ontario,* 2023 ONSC 2316 (Reply Factum, Applicants at paras 4–6) [*Mathur* 2023 ARF].

74 *Mathur* 2023*, supra* note 1 at para 19.

75 *Ibid* at paras 16–17.

76 *GGPPA References, supra* note 71 at paras 2, 7, 10–11, 167.

77 *Ibid* at para 188.

78 *Mathur* 2023, *supra* note 1 at paras 22–24, 28–30. The carbon budget concept recognizes that it is not the ultimate target level of emissions that counts, but the total GHG emitted into the atmosphere on the way to the target. Hence, deferring deep cuts until shortly before the deadline is worse than making deep cuts early because it emits more total GHGs.

79 *Ibid* at paras 21, 144.

80 *Ibid* at para 147.

81 *Ibid* at para 146.

respiratory diseases; are especially at risk from wildfire smoke, flooding, extreme heat, vector-borne diseases and toxic pollution; are made more vulnerable by their reliance on caregivers for protection and adaptation; and may suffer more severe mental health impacts of climate change including anxiety, depression, fear, despair and post-traumatic stress.[82] She found that these impacts are magnified for Indigenous youth due to their greater exposure to the effects of climate change, their strong ties to the land, and the centrality of their traditional and subsistence practices to their individual and collective well-being.[83]

Justice Vermette also rejected Ontario's argument that its GHG emissions are too small to matter. This *de minimis* argument is increasingly discredited by courts around the world,[84] including the recent victorious children's climate case in Montana.[85] It claims that since the defendant is responsible for a tiny fraction of global GHG emissions, it does not cause, cannot be liable for, and can do nothing to avoid or remedy the alleged harms of climate change. Ontario argued that its GHG target and emissions will lead to an "unmeasurably small" temperature increase that is "vastly outweighed by emissions from other countries,"[86] and that "no judicial remedy sought in this Application will have any material effect on the impact of climate change on Ontario residents."[87] As the applicants pointed out,[88] this argument defies the global consensus that all emissions matter and that all jurisdictions must reduce their emissions,[89] not to mention the Supreme Court's recognition that climate change is an inherently global problem that requires collective action. The Supreme Court has rejected the argument that "each individual province's GHG emissions cause no 'measurable harm,'" saying that its underlying logic "would apply equally to all individual sources of emissions everywhere, so it must fail."[90]

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82 *Ibid* at para 25.

83 *Ibid*.

84 See e.g. *Mass v EPA*, *supra* note 24 at 523–25; *Gloucester Resources*, *supra* note 24 at paras 514–27; *Urgenda*, *supra* note 27 at paras 5.7.1, 5.7.7–7.8; *Neubauer*, *supra* note 27 at paras 202–03.

85 *Held*, *supra* note 34 at paras 236–37, 267–68 (Findings of Facts) & at paras 15–16 (Conclusions of Law).

86 *Mathur v Ontario*, 2023 ONSC 2316 (Factum, Respondent at para 76) [*Mathur* 2023 RF].

87 *Ibid* at para 14.

88 *Mathur* 2023 AF, *supra* note 56 at paras 65–69, 151–55; *Mathur* 2023 ARF, *supra* note 73 at paras 11, 33–35.

89 See e.g. *Urgenda*, *supra* note 27 at para 5.7.7.

90 *GGPPA References*, *supra* note 71 at para 188.

Justice Vermette agreed with the applicants on this issue:

> In my view, other countries' contributions to climate change do not diminish the role of Ontario in increasing the risks to Ontarians' life and health. … While Ontario's contribution to global warming may be numerically small, it is real, measurable and not speculative.[91]

She continued:

> I agree with the Applicants that "most jurisdictions could paralyze the required global effort by claiming that their emissions are of little consequence." Ultimately, Ontario's emissions contribute to climate change and the increased risks that it creates. Every tonne of CO_2 emissions adds to global warming and lead to an [*sic*] quantifiable increase in global temperatures that is essentially irreversible on human timescales.[92]

Justice Vermette concluded that "By not taking steps to reduce GHG in the province further, Ontario is contributing to an increase in the risk of death and in the risks faced by the Applicants and others with respect to the security of the person,"[93] and that this satisfied the requirement, under section 7 of the *Charter*, of a sufficient causal connection between the challenged actions and the alleged prejudice to the applicants.[94]

For any of these factual findings to be challenged—let alone reversed on appeal—would be a surprise, due to Ontario's failure to challenge most of them earlier and the global trend, epitomized in Canada by the *GGPPA References*, for courts to accept as authoritative the international scientific consensus on climate change, its impacts, and the importance of all emissions however small.[95] The recent decision in *Held v. Montana* reinforces this trend. It was the world's first children's climate case to be decided after a full trial with witnesses and cross-examination.[96] Judge Seeley found as fact that Earth is warming as a result of anthropogenic GHG

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91 *Mathur* 2023*, supra* note 1 at para 148.

92 *Ibid* at para 149.

93 *Ibid* at para 147.

94 For the sufficient causal connection requirement, see *Canada (AG) v Bedford*, 2013 SCC 72 at paras 75–76 [*Bedford*].

95 The "palpable and overriding error" standard for reversing a trier's findings of fact also weighs heavily in the applicants' favour (see *Housen v Nikolaisen*, 2002 SCC 33 at para 10); *Bedford*, *supra* note 94 at paras 48–49; *Benhaim v St-Germain*, 2016 SCC 48 at para 36 [*Benhaim*]. The *Housen* standard applies to applications (see *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43); for *Charter* cases, see also *R v Chang*, 2003 ABCA 293 at paras 7–8; *R v Coates,* 2003 CanLII 36956 at para 20 (ONCA).

96 Recall that *Mathur* is an application, not an action, and was not decided via a trial (see *Rules of Civil Procedure*, *supra* note 66 and accompanying text).

emissions, primarily from burning fossil fuels; dangerous impacts of climate change are already occurring; these impacts, both physical and psychological, are suffered disproportionately by children and youth; the state of Montana has authorized fossil fuel activities that generate GHG emissions, contribute to climate change and harm the plaintiffs; and its actions, though a small fraction of the global picture, have a real impact on global warming.[97] These factual findings can only reinforce the *Mathur* applicants' case on appeal.

The appeal decision in *La Rose/Misdzi Yikh* also reinforces Justice Vermette's factual findings, even though the facts of climate change were not squarely at issue in that case. The Federal Court of Appeal opined that it is "beyond doubt that the burden of addressing the consequences [of climate change] will disproportionately affect Canadian youth."[98] It reversed the lower courts' holding that a causal relationship between the impugned state conduct and deprivation of the claimants' rights is manifestly incapable of proof, since "there is a vast body of scientific knowledge dealing with climate change, GHG emissions, and their consequences on human health and the environment."[99]

B. Justiciability

The question of justiciability asks whether the court has the institutional capacity and legitimacy to adjudicate a matter.[100] This often comes down to whether the claim has a sufficient legal component to allow adjudication.[101] The courts have long held that the fact that claims are complex, controversial and laden with social values or policy questions does not, by itself, render them non-justiciable or allow courts to abdicate their constitutional responsibility to review legislation and other state action for *Charter* compliance.[102] But this has not stopped a succession of judges from ruling climate change claims non-justiciable.[103]

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97 *Held*, *supra* note 34 at paras 104; 236–37 (Findings of Fact).

98 *La Rose/Misdzi Yikh* 2023, *supra* note 2 at para 76.

99 *Ibid* at para 114.

100 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall,* 2018 SCC 26 at para 34.

101 *La Rose/Misdzi Yikh* 2023, *supra* note 2 at para 28.

102 See e.g. *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 89, 107–108 [*Chaoulli*]; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 105 [*PHS*].

103 See e.g. *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183, aff'd 2009 FCA 297, leave to appeal to SCC refused, 2010 CanLII 14720 (SCC); *Turp v Canada*,

In *Mathur*, Ontario relied on these rulings to argue that the applicants' claim lacked a sufficiently legal component, was too policy-laden for judicial resolution, and sought remedies (in particular, the order to set a new GHG reduction target) that had no judicially discoverable and manageable standards.[104] The applicants argued that the claim targeted specific governmental actions, engaged the court's well-established obligation to interpret and apply the *Charter*, and asked for remedies that can be determined judicially by reference to international standards and expert evidence.[105]

Justice Vermette (like Justice Brown on the earlier motion to strike)[106] held the case to be justiciable, because it asserts *Charter* violations and targets specific legislation and state actions: Ontario's *Cap and Trade Cancellation Act*[107] and the target and plan adopted pursuant to it.[108] She reaffirmed the courts' obligation to "review legislation and state action for *Charter* compliance when citizens challenge them, even when the issues are complex, contentious and laden with social values."[109] Indeed, the case law strongly favours justiciability of *Charter* claims that impugn specific government measures.[110]

Justice Vermette implicitly rejected Ontario's argument that the case really targeted the "enormously complex issue" of the province's overall climate change plans, a policy issue that Ontario maintained was inappropriate for judicial involvement and beyond the court's capacity to resolve.[111] An explicit holding to this effect would have been preferable, since this issue has sunk other Canadian climate change cases.[112] *Mathur* nonetheless supports the proposition that climate change cases are justiciable if they challenge specific state actions as infringing the claimants' constitutional rights, even if these cases implicate governments' overall

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2012 FC 893; *Environnement Jeunesse* CS, *supra* note 2; *La Rose* 2020*, supra* note 2; *Misdzi Yikh* 2020, *supra* note 13; Cameron & Weyman, *supra* note 32 at 201–03.

104 *Mathur* 2023 RF*, supra* note 86 at paras 46–66.

105 *Mathur* 2023 AF, *supra* note 56 at paras 120–27.

106 *Mathur* 2020, *supra* note 13 at paras 125–40.

107 *CTCA*, *supra* note 54.

108 *Mathur* 2023, *supra* note 1 at para 106.

109 *Ibid*.

110 See e.g. *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 472, Wilson J, 1985 CanLII 74 (SCC); *Chaoulli*, *supra* note 102 at paras 89, 107; *Hupacasath First Nation v Canada (Minister of Foreign Affairs and International Trade)*, 2015 FCA 4 at para 61.

111 *Mathur* 2023 RF, *supra* note 86 at para 49.

112 *Environnement Jeunesse* CA, *supra* note 2 at paras 40–42; *La Rose* 2020, *supra* note 2 at paras 43, 46; *Misdzi Yikh* 2020, *supra* note 13 at para 72.

climate change policy in the process. This proposition seems likely to survive appeal.

The appeal decision in *La Rose/Misdzi Yikh* can only help the applicants on this issue. First, it emphasized that claims can be justiciable even though they implicate governments' policy choices on deeply contentious issues:

> Political choice underlies all legislation and some exercises of executive discretion; both are invariably informed by a wide range of public policy considerations. But once the choices are made, the policy trade-offs considered and the legislative response crystallized, the law is not immunized from Charter scrutiny.[113]

Second, it ruled that the claims in both cases before it were justiciable even though they challenged a wide array of state actions and omissions on climate change. By linking the alleged *Charter* violations to particular legislation, regulatory instruments, cabinet orders and Canada's international commitments pursuant to the *Paris Agreement*, the claimants pleaded an objective legal basis against which the issues could be assessed.[114] This decision indicates that claimants can launch holistic challenges to a government's climate change policy, provided they link the alleged *Charter* violations to discrete state actions. The barrier erected by *Tanudjaja*, in which the Court of Appeal for Ontario dismissed a *Charter* challenge to federal and provincial housing policy as non-justiciable because it challenged the governments' overall policy approach rather than any particular laws or actions,[115] may not be so high as it once appeared. In any event, if even broad, holistic challenges like those in *La Rose* and *Misdzi Yikh* are justiciable, the narrowly tailored claims in *Mathur* must be all the more so.

The *La Rose/Misdzi Yikh* appeal decision also supports another aspect of Justice Vermette's justiciability analysis. Ontario argued that some of the remedies sought by the applicants—including an order directing Ontario to develop a science-based emissions reduction target and plan—rendered their claim non-justiciable. Justice Vermette disagreed, holding that it was premature to deal with the appropriateness of remedies at the justiciability stage. Instead, this issue should be dealt with if and when the claimants establish that they are entitled to relief.[116] This

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[113] *La Rose/Misdzi Yikh* 2023, *supra* note 2 at para 33, citing *PHS*, *supra* note 102 at para 105.

[114] *La Rose/Misdzi Yikh* 2023, *supra* note 2 at paras 36–45.

[115] *Supra* note 52.

[116] *Mathur* 2023, *supra* note 1 at para 109.

holding removed a major plank of Ontario's argument against justiciability.[117]

Some earlier decisions, including *Tanudjaja*[118] and the lower courts' decisions in *La Rose*[119] and *Misdzi Yikh*,[120] ruled challenges to government action non-justiciable partly because of the remedies requested, including declarations of governments' constitutional obligations and mandatory orders to develop and implement enforceable, evidence-based plans to fulfill those obligations.

In *Tanudjaja,* the court found a claim that the *Charter* required governments to implement effective strategies to eliminate homelessness and inadequate housing non-justiciable because "there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate."[121] Remedies were central to this holding:

> Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity.[122]

Similarly, the lower court in *Misdzi Yikh* held the declaratory and injunctive remedies sought by the claimants non-justiciable, because they would require the court to assume a supervisory role to ensure adequate legislation was passed and targets met for a complex and multifaceted problem.[123] The lower court in *La Rose* agreed, holding that the remedies requested in that case would inappropriately lead the court to interpret the *Charter* in the abstract, assume the role of a public inquiry, supervise the adequacy of climate change policy, and intrude into legislative and executive policy-making domains.[124]

The Federal Court of Appeal in *La Rose/Misdzi Yikh* joined Justice Vermette in departing from this line of reasoning. It held that, while there might be some cases in which the remedies sought are "so clearly offside that they taint the proceeding as a whole" due to the court's inabil-

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117 *Mathur* 2023 RF, *supra* note 86 at paras 49–57, 63.

118 *Tanudjaja*, *supra* note 52 at paras 33–35.

119 *La Rose* 2020, *supra* note 2 at paras 41, 49–56.

120 *Misdzi Yikh* 2020, *supra* note 13 at para 71.

121 *Tanudjaja, supra* note 52 at para 33.

122 *Ibid* at para 34.

123 *Misdzi Yikh* 2020, *supra* note 13 at paras 15, 64–66.

124 *La Rose* 2020, *supra* note 2 at paras 51–53.

ity to "tailor effective, enforceable remedies to meaningfully address the asserted harms,"[125] this was not true in the cases before it. The court urged judicial caution in characterizing remedies as non-justiciable, pointing out that courts have substantial discretion in crafting remedies to suit the circumstances, judicial remedies seldom supply the solution when legislation is found unconstitutional, courts can find judicially discoverable and manageable scientific or other standards for assessing complex, multilayered remedial issues, remedies are often amended in the course of litigation, and their appropriateness can often be assessed only after the nature, extent and source of the violation is established.[126] The court concluded: "Even if some of the remedies sought push the boundaries of the court's competence, a claim should not be characterized, *a priori*, as non-justiciable."[127]

Mathur was not all good news for justiciability, however. Justice Vermette held that the question of Ontario's fair share of GHG emission reductions was not justiciable because it lacked objective, science-based standards and the court lacked the institutional capacity and legitimacy to resolve it.[128] There are grounds to challenge this holding on appeal. The applicants offered principled, workable, evidence-based standards for determining whether the target and plan were both science-based and consistent with Ontario's share.[129] For science-based, they pointed to the work of the Intergovernmental Panel on Climate Change (IPCC), the intergovernmental scientific body whose assessments of peer-reviewed scholarly research are subjected to external peer review and vetted by 195 member governments of the United Nations Framework Convention on Climate Change (*UNFCCC*).[130] For Ontario's share, they pointed to the principles in the *UNFCCC* and the *Paris Agreement* requiring parties to reduce GHG emissions on the basis of equity and in accordance with countries' common but differentiated responsibilities and respective capabilities, in light of their differing national circumstances.[131]

On this basis, the applicants identified three approaches to the fair allocation of the remaining global carbon budget among countries: equal

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125 *La Rose/Misdzi Yikh* 2023, *supra* note 2 at para 47.

126 *Ibid* at paras 48–51.

127 *Ibid* at para 51 [emphasis in original].

128 *Mathur* 2023, *supra* note 1 at paras 109–110.

129 *Mathur* 2023 ARF, *supra* note 73 at paras 29–30.

130 *Mathur* 2023 AF, *supra* note 56 at paras 34–35.

131 *UN Framework Convention on Climate Change*, 4 June 1992, 1771 UNTS 107, art 3(1) (entered into force 21 March 1994, ratified by Canada 4 December 1992) [*UNFCCC*]; *Paris Agreement*, *supra* note 42, art 2(2); *Mathur* 2023 AF, *supra* note 56 at para 49.

shares per capita, historical responsibility, and national capacity. They argued that only the equal per capita approach would leave Canada with any share of the remaining budget at all, and any other method would be grossly unfair, due to Canada's large historical emissions and capacity to reduce emissions.[132] They applied this approach to calculate Canada's maximum fair share of the remaining global carbon budget as two billion tonnes of CO_2. They then proposed that a different fairness principle applies to the allocation of this share among provinces and territories. The applicants argued that grandfathering, or granting each province a share of the remaining carbon budget corresponding to its share of current emissions, though not appropriate internationally, is a fairer way to allocate emissions within Canada due to wealth equalization mechanisms and interprovincial variation in energy resource availability. On this basis, they calculated Ontario's share of the remaining global carbon budget for three different temperature goals (1.5°, 1.75° and 2° C), and showed that Ontario's emissions under the present target would exceed the province's share of emissions for all three temperature goals, by as much as 354%.[133] For the sake of completeness, they also showed that Ontario's target exceeds the province's share substantially even if provincial shares are allocated on an equal per capita basis[134] or by applying the Glasgow target of 45% below 2010 levels by 2030.[135] Under all scenarios, Ontario's current target would consume the province's entire remaining carbon budget well before or very shortly after 2030, requiring it to eliminate all GHG emissions abruptly thereafter.[136]

The applicants argued that *Tanudjaja* was distinguishable because the criteria proposed there were "infused with subjective considerations and unmoored from any standard that could be established through evidence."[137] Indeed, unlike that case, the evidence presented in *Mathur* demonstrated an overwhelming consensus about climate science, carbon budgets and GHG reduction targets and timelines. Combined with expert evidence about the allocation of shares, the applicants provide judicially discoverable and manageable standards to assess governments' climate change targets and plans for *Charter* compliance.

Unfortunately, Justice Vermette did not discuss the existence of judicially discoverable and manageable standards for determining whether

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132 *Mathur* 2023 AF, *supra* note 56 at paras 50–51.

133 *Ibid* at paras 52–55.

134 *Ibid* at para 56.

135 *Mathur* 2023 ARF, *supra* note 73 at para 17.

136 *Mathur* 2023 AF, *supra* note 56 at para 56.

137 *Ibid* at para 122 n 234.

the target and plan are science-based, and she agreed with Ontario that no such standards existed to determine Ontario's fair share of GHG emission reductions. Fortunately for the applicants, her reasoning is doubtful.

First, she held that the issue of a jurisdiction's share is not a scientific question,[138] but this is hardly the only basis for judicial discoverability and manageability. Second, she held that relevant factors in international climate change treaties, including equity, common but differentiated responsibilities, respective capabilities, and different national circumstances, "do not have a sufficient legal component."[139] Certainly, these principles are open-textured, but no more than many equitable and legal principles that courts apply routinely. Moreover, they are contained in binding international legal instruments.[140] The International Court of Justice has applied open-textured standards like these to international environmental disputes.[141]

Third, Justice Vermette emphasized the applicants' acknowledgement that "there is more than one way to divide up the carbon budget."[142] But most litigated disputes have multiple plausible solutions—that is why courts are called upon to adjudicate them. Fourth, Justice Vermette employed a straw person fallacy—the extreme example of a court being asked to adjudicate the fairness of not inviting a particular cousin to a wedding—to conclude that "fairness" alone is insufficient to make an issue justiciable.[143] Allocating emission reduction burdens cannot, however, seriously be equated with allocating wedding invitations. The latter is an entirely subjective, personal exercise undertaken in the private sphere of family life while the former is amenable to objective, rational determination and resides squarely in the public sphere where courts routinely operate.

Finally, despite holding the allocation of shares non-justiciable, Justice Vermette went on to hold that "it is appropriate in the context of this case to assess the Target in light of global targets that are based on scientific consensus/findings of the IPCC."[144] Her insistence that she was not

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138 *Mathur* 2023, *supra* note 1 at para 109.

139 *Ibid*.

140 *UNFCCC*, *supra* note 131, arts 3(1)–(2), 4(2)(a); *Paris Agreement*, *supra* note 42, arts 4, 7, 8, 10–12.

141 See e.g. *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7; *Case concerning Pulp Mills on the River Uruguay (Argentine v Uruguay)*, [2010] ICJ Rep 14.

142 *Mathur* 2023, *supra* note 1 at para 110.

143 *Ibid*.

144 *Ibid* at para 145.

thereby determining Ontario's fair share rings hollow. Effectively, she used the global target of 45% below 2010 levels by 2030 to determine whether Ontario was shouldering its share of the global emissions reduction burden. She did what she said the court could not do.

Another puzzle is Justice Vermette's silence on how the non-justiciable issue of Ontario's share could be separated from the justiciable issue of whether the *CTCA*, target, and plan violate the *Charter*. The notion of Ontario's share is integral to the applicants' case and it is hard to see how they can win without establishing it. Their goal on appeal should be, first, to fill the gap in Justice Vermette's reasoning by demonstrating that there are judicially discoverable and manageable standards for determining a science-based climate change target, and second, to show that Justice Vermette erred in holding that there were no such standards for determining Ontario's share of emissions.

C. Effect of the Impugned State Action

Having passed the justiciability threshold, the application foundered on the shoals of the *Charter*. The first obstacle was the effect of the impugned state action. The question was whether the *CTCA*, target, and plan, as opposed to GHG emissions or climate change, increased the risk of harm to the applicants' life and health (for the purpose of section 7) or had a disproportionate impact on people on the basis of age (for the purpose of section 15). Justice Vermette ruled against the applicants on both counts.[145] She rejected their contention that the effect of the *CTCA*, target, and plan is to authorize, incentivize, facilitate, create, and commit to emission of "the very level of dangerous GHG that will lead to the catastrophic consequences of climate change for Ontarians," even if other actions may be more directly responsible for the harm.[146]

"The Target does no such thing," she insisted.[147] She agreed with Ontario[148] that it does not authorize or incentivize GHG emissions, but is merely an objective towards which reduction efforts are directed.[149] She ruled that the applicants' position on this issue was "an attempt to bring through the back door unspecified state actions, programs and policies that have not been challenged in this Application."[150] In her view, the ap-

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145 *Mathur* 2023, *supra* note 1 at paras 118–22, 177–79.

146 *Ibid* at para 122, citing *Mathur* 2023 AF, *supra* note 56 at para 137.

147 *Mathur* 2023, *supra* note 1 at para 122.

148 *Ibid.*

149 *Ibid.*

150 *Ibid* at para 135.

plicants' real complaint was that the target was not stringent enough.[151] She also held that the disproportionate impacts on youth and the worsening of impacts over time are caused by climate change, not by the *CTCA*, target, or plan.[152]

The applicants can draw some comfort from the fact that Justice Vermette also rejected Ontario's argument that the target and plan were just a "glossy brochure"[153] without legal effect.[154] She refused "to accept that a legislative requirement, or that something that is required by law to be approved by the Lieutenant Governor in Council, is meaningless."[155] She held that the target and plan are "meant to guide and direct subsequent state actions with respect to the reduction of GHG in Ontario."[156] In effect, she agreed with the applicants that the *CTCA*, target, and plan govern and direct the province's actions on GHG emissions.[157] This is what Ontario itself had argued before multiple courts in the *GGPPA References*.[158]

There are several problems with Justice Vermette's reasoning here. One is how to square her holding that the challenged state actions do not cause the harms complained of with her holding, mentioned above, that the applicants established a sufficient causal connection between the challenged actions and the alleged harm.[159] The only basis for reconciling these holdings is that the latter holding was based on Ontario's *failure to act* to reduce GHG emissions below the chosen level, whereas the former holding was based on Ontario's *affirmative act* in adopting the *CTCA*, target, and plan. This is a distinction without a difference. The impugned state actions have a dual character: they manifest, on one hand, a failure to reduce GHGs below the target, and on the other, a commitment to cause or permit the release of the targeted amount of GHGs. Justice Vermette's holdings make sense only if you accept a categorical distinc-

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151 *Ibid* at para 122.

152 *Ibid* at paras 177–79.

153 Marco Chown Oved, "Ontario's Climate Plan is More of a 'Glossy Brochure' Than a Law. So Says the Government Itself", *Toronto Star* (14 September 2022), online: <thestar.com/news/canada/ontario-s-climate-plan-is-more-of-a-glossy-brochure-than-a-law-so-says/article_d7d40a0f-5574-5108-8eb5-507a591600eb.html> [perma.cc/N6MK-U6RW].

154 *Mathur* 2023, *supra* note 1 at para 123.

155 *Ibid*.

156 *Ibid*.

157 *Mathur* 2023 AF, *supra* note 56 at para 24; *Mathur* 2023 ARF, *supra* note 73 at paras 21–22.

158 *Mathur* 2023 ARF, *supra* note 73 at para 21, citing *GGPPA References*, *supra* note 71 (Factum, Appellant at para 15).

159 *Mathur* 2023, *supra* note 1 at paras 122, 147.

tion between positive and negative rights, which is an issue I discuss below.

Another problem is that there is no real difference between the applicants' contention that the *CTCA*, target, and plan authorize, incentivize, facilitate, create, and commit to the contemplated GHG emissions—which Justice Vermette rejected—and her holding that the *CTCA*, target, and plan guide and direct state actions respecting GHG emission reductions. What does it mean to guide and direct state actions if not to guide and direct the actions that authorize, incentivize, facilitate, and create GHG emissions (or, alternatively, regulate or prohibit them)? What difference is there between guiding and directing certain actions and taking those actions, especially when it is the same actor (the provincial government) doing both? To draw a criminal law analogy, a corporation charged with criminal negligence or nuisance for emitting GHGs in excess of its permitted limit could not avoid liability by showing that senior management did not perform the acts that caused the excess emissions but merely guided and directed them.[160]

Held offers a more direct analogy. In that case, the plaintiffs challenged a law that forbade the government from even considering GHG emissions or climate change in deciding whether to authorize fossil fuel activities. The court held that there was a reasonably close causal connection between this law, the state's allowance of GHG emissions from authorized fossil fuel activities, and the youth plaintiffs' injuries from climate change.[161] If a law that prohibits government from even considering GHGs and climate change causes or contributes to young people's climate-related injuries, surely a law that actually guides and directs government to cause or permit a target level of GHG emissions does so *a fortiori*.

A third problem is that Justice Vermette's holding puts the applicants in a Catch-22.[162] Children and youth cannot challenge the specific state actions that create a framework for authorizing and limiting GHG emissions, because the framework does not cause the emissions or the resulting harm. But neither can they challenge the overall assemblage of state

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[160] See e.g. Stanley David Berger, "The Future of Environmental Prosecutions in Ontario" (2006) 19 CELR (3d) 32.

[161] *Held, supra* note 34.

[162] In the eponymous novel, Catch-22 is a fictitious military rule with many manifestations including the paradox that soldiers may be excused from combat if they are insane, but they must apply to be excused from combat, and applying demonstrates that they are not insane since anyone must be insane to go into combat, thus making it impossible for anyone to be excused from combat (see Joseph Heller, *Catch-22* (New York: Simon & Schuster, 1961).

actions that actually do cause the emissions and the resulting harm, because this would fail to challenge specific state actions.

One solution to this dilemma is to refute Justice Vermette's holding for the reasons I have just discussed. Another is to take seriously the proposition accepted by both Justice Vermette and the Supreme Court of Canada, that there is no *de minimis* defence to climate change liability, and challenge a subset of government actions that unequivocally cause or permit GHG emissions—for example, licensing GHG-emitting facilities or building major highways. But even if the *de minimis* defence is out of play, this option is unattractive for two reasons. First, it requires litigants to tackle climate change on a highly piecemeal basis that is immensely costly, time-consuming, and inefficient for both litigants and courts.[163] Second, it could not be achieved through the suits currently before the courts (*Mathur* or *La Rose*), but would require litigants to launch different cases. In short, Justice Vermette's holding that the impugned state action does not have the effect of exposing the applicants to the alleged harms was fatal to the applicants' case, but incoherent with other aspects of her reasoning and questionable on multiple grounds.

The effect of state action for *Charter* purposes appears to be a factual issue or, at most, a question of mixed fact and law,[164] which means it is reviewable on the standard of palpable and overriding error. This standard will be a challenge for the applicants, but they may make the case that Justice Vermette's error on this point is both palpable—in that it is obvious that the harms alleged by the applicants are at least partially the result of the impugned state action—and overriding—in that it is clear that the error "goes to the very core of the outcome of the case."[165]

Unlike *Mathur*, the Federal Court of Appeal in *La Rose/Misdzi Yikh* agreed that government measures that permit dangerous levels of GHG emissions can be challenged as affirmative acts that create or exacerbate risks to life and health.[166] This holding could help the *Mathur* claimants on appeal. In any event, this issue is intertwined with the question of negative versus positive rights, to which I now turn.

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163 *Mathur* 2023 ARF, *supra* note 73 at para 36.

164 See e.g. *Alberta Union of Provincial Employees v Alberta*, 2021 ABQB 398 at para 57; *Pearson v Canada*, 2007 FCA 380 at para 10.

165 *Benhaim*, *supra* note 95 at para 38, citing *R v South Yukon Forest Corp*, 2012 FCA 165 at para 46.

166 *La Rose/Misdzi Yikh* 2023, *supra* note 2 at para 110.

D. Positive versus Negative Rights

One of Justice Vermette's most crucial holdings was that the applicants are asserting a positive, not negative, right under both sections 7 and 15.[167] The courts have interpreted section 7 as imposing a negative obligation to refrain from actions that interfere with life, liberty or security of the person, while leaving the door open to the possibility of a positive obligation to fulfill these interests.[168] The applicants argued that this is not a positive rights case: like a government that puts in place a legislative scheme to authorize commercial wind turbine farms,[169] the government has put in place a scheme that authorizes and commits to the emission of harmful levels of GHGs, thus violating the right to life, liberty and security of the person.[170] They stated that they are not asking the government to take positive action to address a problem it did not create. Rather, having participated in creating the harm and having decided to put in place a legislative and policy scheme to address it, the government must ensure that the scheme complies with the *Charter*.[171]

Ontario argued that the application "is premised on the theory that Ontario is constitutionally obliged to take positive steps to redress the future harms of climate change."[172] In its view,

> [The applicants] do not seek to be free from the plan or the target; instead, they seek a plan and a target that they prefer. At bottom, the Applicants assert the right to require the state to impose restrictions on the GHG emissions of their fellow Ontario residents. This is surely a positive rights claim.[173]

Ontario reinforced this argument by calling the lawsuit an attempt to restore an earlier legislative scheme,[174] which courts have rejected as a positive rights claim.[175] The applicants retorted that the province is free to

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[167] *Mathur* 2023*, supra* note 1 at paras 132–36, 178–79.

[168] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at paras 81–83.

[169] *Dixon v Director, Ministry of the Environment*, 2014 ONSC 7404.

[170] *Mathur* 2023 AF, *supra* note 56 at paras 164–65.

[171] *Ibid* at para 161, citing *Chaoulli*, *supra* note 102 at para 104.

[172] *Mathur* 2023 RF, *supra* note 86 at para 84.

[173] *Ibid* at para 86.

[174] *Ibid* at paras 87, 93–94.

[175] See e.g. *Ferrel v Ontario (Attorney General)*, 42 OR (3d) 97 at 110, 1998 CanLII 6274 (ONCA); *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140 at para 45 [*Barbra Schlifer*]; *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 32–33 [*Toronto*].

change its approach, but that whatever measures it puts in place must be constitutionally compliant.[176]

As the court intimated in *Barbra Schlifer*, the question boils down to whether the applicants' complaint is "that the state has intervened to create harm or to increase risk," or "that the state has intervened to ameliorate harm and to decrease risk, but not enough or not as much as before."[177] The former is a negative rights claim, the latter positive. The earlier *La Rose* and *Mathur* decisions both favoured the applicants on this point. The latter decision observed:

> It is of note that in *La Rose*, on this point, the court noted: "[…] when policy choices are translated into law or state action, that resulting law or state action must not infringe the constitutional rights of the Plaintiffs." In other words, once Ontario chose to translate policy choices into law and state action, which I have found to be the case here, Ontario has a responsibility to ensure that the same law and state action do not infringe the constitutional rights of Ontario residents.[178]

By contrast, Justice Vermette held that this case, like *Barbra Schlifer*, basically alleges that the state has intervened to ameliorate a problem but has done less than it once did.[179] She concluded:

> In my view, this Application is seeking to place a freestanding positive obligation on the state to ensure that each person enjoys life and security of the person, in the absence of a prior state interference with the Applicants' right to life or security of the person. As pointed out by Ontario, the Applicants are not seeking the right to be free from state interference, i.e., they do not seek to be free from the Target or the Plan. Rather, they would prefer a more restrictive Target and Plan, and this is what they seek.[180]

This conclusion mischaracterizes the applicants' claim. They *do* allege that the state has interfered with their right to life and security of the person by implementing a statute, target, and plan that direct and govern its actions and commit it to a dangerous level of GHG emissions. The applicants *do* seek to be free from this interference. The only way Justice Vermette could conclude otherwise was by holding that the *CTCA*, target,

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176 *Mathur* 2023 AF, *supra* note 56 at para 166, citing *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 36 [*Alliance*].

177 *Supra* note 175 at para 31.

178 *Mathur* 2020, *supra* note 13 at para 226, citing *La Rose* 2020, *supra* note 2 at para 45.

179 *Mathur* 2023*, supra* note 1 at para 133.

180 *Ibid* at para 132.

and plan do not themselves cause or contribute to harmful GHG emissions—a conclusion I have already critiqued.

The conclusion that the *CTCA*, target, and plan do not lead to any harm was also crucial to Justice Vermette's rejection of the applicants' assertion that the government's participation in creating the underlying harm and its creation of a legislative scheme to address it trigger an obligation to ensure the resulting scheme is constitutionally compliant.[181] She stated that the state's "participation" in creating the harm of climate change is no different than its "participation" (the scare quotes are hers) in creating problems of poverty, homelessness, *et cetera*.[182] But it is. Governments play a much more active and direct role in climate change by subsidizing oil and gas development (and renewable energy, for that matter), approving fossil fuel projects, licensing major emitters, building highways, setting fuel standards and electric vehicle quotas, emitting GHGs from their own activities, and the list goes on.[183]

Justice Vermette invoked the Supreme Court's dictum in *Chaoulli* that "The *Charter* does not confer a freestanding constitutional right to health care."[184] Yet, she conveniently omitted the next sentence: "However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."[185] Instead, she insisted that, while governments "may have been ordered to take positive steps under section 7 of the *Charter* in some cases, this was in response to laws or state actions that aggravated risks to life, liberty or security of the person, and not as a result of a freestanding positive obligation under section 7."[186] Again, she was able to distinguish those cases only by concluding that the state action in *Mathur* does not aggravate risks to life, liberty or security of the person.

Finally, on this point, Justice Vermette agreed with Ontario that the applicants' challenge to section 16 of the *CTCA*, which repealed the previous government's climate change law, reinforces the conclusion that they are advancing a positive rights claim. She emphasized that a claim to restore a particular legislative platform is a positive claim.[187] But the appli-

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[181] *Ibid* at para 134.

[182] *Ibid*.

[183] Activities like these have been held to violate First Nations' constitutional treaty rights (see e.g. *Yahey v British Columbia*, 2021 BCSC 1287). This logic could be applied by analogy to the *Charter*.

[184] *Mathur* 2023, *supra* note 1 at para 129, citing *Chaoulli*, *supra* note 102 at para 104.

[185] *Ibid*.

[186] *Mathur* 2023, *supra* note 1 at para 126.

[187] *Ibid* at para 136, citing *Toronto*, *supra* note 175 at paras 30, 32.

cants are not seeking to restore the earlier legislative scheme.[188] Rather, similarly to *Chaoulli*, they are seeking to ensure that whatever scheme the government enacts does not violate their constitutional rights by allowing GHG targets to be set without reference to science or internationally-agreed standards.

This case drives home the oft-noted artificiality and unhelpfulness of the positive/negative rights distinction,[189] which multiple Supreme Court justices (albeit dissenting) have called "unhelpful" and "a jurisprudential sleight-of-hand that promotes confusion rather than rights protection."[190] But for now, the applicants are stuck with it. Appellate courts routinely substitute their own view of the positive or negative character of a right without even mentioning a standard of review.[191] In fact, the application of a legal standard to the facts of a case is a question of law, reviewed for correctness.[192] The applicants need only show that Justice Vermette holding on this issue (that the applicants are advancing a positive rights claim) is incorrect, rather than a palpable and overriding error.

Having found that the applicants are claiming a positive right, Justice Vermette declined to decide whether this is an appropriate case to recognize such a right. The applicants argued that *Mathur* is the case many lawyers and litigants have been waiting for, where the court should finally step through the door left open by *Gosselin* and find a positive section 7 right. Drawing on the freedom of expression case *Dunmore*, they argued that the *Charter* imposes a positive obligation "where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms."[193] They said that *Mathur* is such a case:

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188 See *supra* note 171 and accompanying text.

189 See e.g. Nathalie J Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation Under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42:4 Vt L Rev 689 at 742; Emmett Macfarlane, "Positive Rights and Section 15 of the *Charter*: Addressing a Dilemma" (2018) 38:1 NJCL 147.

190 *Toronto*, *supra* note 175 at paras 152, 155, Abella J, dissenting, joined by Karakatsanis, Martin and Kasirer JJ.

191 See e.g. *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at paras 23–25 [*Dunmore*]; *Baier v Alberta*, 2007 SCC 31 at paras 34–42; *Toronto*, *supra* note 175 at paras 29–35; *Victoria (City) v Adams*, 2009 BCCA 563 at paras 90–97; *Scott v Canada (Attorney General)*, 2017 BCCA 422 at paras 86–89; *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at paras 135.

192 *R v Grant*, 2009 SCC 32 at para 43 (whether detention occurred is a question of law); *R v Shepherd*, 2009 SCC 35 at para 20 (whether police have reasonable and probable grounds is a question of law); *R v Le*, 2019 SCC 34 at paras 23–24 (when detention occurred is a question of law).

193 *Dunmore*, *supra* note 191 at para 25, citing *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 361, 1987 CanLII 88 (SCC).

> [U]nlike the "frail" record in *Gosselin*, the extensive and largely unchallenged evidentiary record of multiple renowned experts demonstrates the death, disease, and serious harm that will result from climate change in Ontario if GHG are not reduced. … In this fundamental way, the issues and relief sought in this Application engage the very precondition to the enjoyment of *all* fundamental freedoms enshrined in Canada's constitutional order. That makes this case unlike any of the so-called "positive rights" cases that have been considered by Canadian courts to date. …
>
> Simply put, the stakes could not be higher. If the widespread, grave, and existential dangers of climate change do not qualify as "special circumstances", then the door for positive rights under s. 7 of the *Charter* that was left open in *Gosselin* may as well be slammed shut.[194]

Ontario did not even address this argument in its factum, though it had contested it on the earlier motion to strike. The courts in both *La Rose* and the earlier *Mathur* decision ruled that the claimants pleaded sufficient special circumstances supporting a positive obligation to survive a motion to strike.[195]

Justice Vermette thought that the applicant's case was strong. She wrote: "In my view, the Applicants make a compelling case that climate change and the existential threat that it poses to human life and security of the person present special circumstances that could justify the imposition of positive obligations under section 7 of the *Charter*."[196] But she held that such claims likely need a new, purpose-built framework, rather than section 2's *Dunmore* test—a framework she was unwilling to supply in the absence of detailed submissions on this point.[197] Ontario's decision not to make written submissions on this point seems clever in retrospect.

The Federal Court of Appeal's decision in *La Rose/Misdzi Yikh* offers the applicants further encouragement. There, the court accepted that the claimants in those cases assert negative rights, insofar as they allege that the impugned state actions—including enactment of inadequate standards, authorization of GHG emissions and subsidization of fossil fuel projects—create or exacerbate a risk to life, liberty or security of the person.[198] The court also ruled that the claimants' positive rights claim under section 7 should proceed. It acknowledged that the current and potential effects of climate change—including loss of land and culture, food insecu-

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194 *Mathur* 2023 AF, *supra* note 56 at paras 170, 172 [emphasis in original].

195 *La Rose* 2020, *supra* note 2 at para 72; *Mathur* 2020, *supra* note 13 at para 236.

196 *Mathur* 2023, *supra* note 1 at para 138.

197 *Ibid* at paras 139–42.

198 *La Rose/Misdzi Yikh* 2023, *supra* note 2 at paras 105–106, 110.

rity, injury and death—pose an existential threat to Canada and the world. While leaving the ultimate decision to the trial judge, the court was more emphatic than *Mathur* that climate change presents special circumstances justifying recognition of a positive section 7 right: "If these do not constitute special circumstances," wrote the court, "it is hard to conceive that any such circumstances could ever exist."[199]

E. Principles of Fundamental Justice

Another major holding that went against the applicants was that even if there was a section 7 deprivation in this case, it was not contrary to the principles of fundamental justice. I will not dwell on Justice Vermette's reasoning regarding arbitrariness and gross disproportionality, as this is well-trodden ground, except to note that her decision that the applicants are advancing a positive rights claim was crucial to her conclusions. She wrote that "the principle against arbitrariness is not well-adapted to a positive claim case under section 7 as it is premised on there being a state interference limiting the right to life, liberty or security of the person, and not a failure on the part of the state to do something."[200] Similarly, she held that "the principle against gross disproportionality cannot have any application in a case like this one where the issue under section 7 is that the government did not go far enough."[201] If the applicants can convince the appeal court that they are advancing a negative rights claim, Justice Vermette's reasoning will collapse.

I will focus on the applicants' contention that "societal preservation" is a principle of fundamental justice. They also argued that it is an unwritten constitutional principle, an issue I address later.[202] A principle of fundamental justice "must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person."[203]

The applicants argued that the principle of societal preservation prohibits a government from engaging in conduct "that will, or could reasonably be expected to, result in the future harm, suffering, or death of a sig-

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199 *Ibid* at para 116.

200 *Mathur* 2023*, supra* note 1 at para 160.

201 *Ibid* at para 162.

202 See Part III.H, *below*.

203 *Mathur* 2023, *supra* note 1 at para 164.

nificant number of its own citizens."[204] They insisted that this principle goes to the core of a government's *raison d'être*, is consistent with Indigenous laws and is the essential underpinning of Canada's entire constitutional order.[205] Justice Vermette did not disagree, but held that societal preservation is, if anything, a fundamental state interest or public policy, not a legal principle. It is not recognized as a basic tenet of the legal system, does not relate directly to the legal system or its fair operation, and is not part of "the inherent domain of the judiciary as guardian of the justice system."[206] She also expressed concerns about how violations of this principle would be measured and whether the principle would collapse the 2-step section 7 analysis.[207] This reasoning creates an irony: A principle so fundamental that it underpins the entire legal order is too fundamental to be a principle of fundamental justice. Whether the appeal court will find this irony problematic is anyone's guess.

F. Age Discrimination

Justice Vermette's next unfavourable holding was that the applicants failed to establish a violation of subsection 15(1). In *Sharma,* the Supreme Court reaffirmed the two-part test for the provision's violation: first, the impugned law or state action creates a distinction based on enumerated or analogous grounds, on its face or in its impact; second, it imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.[208] The Court emphasized that "[w]hile there may be overlap in the evidence that is relevant at each step, the two steps ask fundamentally different questions. As such, the analysis at each step must remain distinct from the other."[209] It also underlined that in adverse impact discrimination cases, step one requires demonstration that the impugned law creates or contributes to a disproportionate impact on a protected group, as compared to non-members of the group. Stated differently, "leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1)."[210] The same is true at step two: "Leaving the situation of a claimant group unaf-

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[204] *Ibid* at para 163, citing *Mathur* 2023 AF, *supra* note 56 at para 179.

[205] *Mathur* 2023 AF, *supra* note 56 at paras 182–84.

[206] *Mathur* 2023, *supra* note 1 at para 166, citing *United States v Burns*, 2001 SCC 7 at para 71.

[207] *Mathur* 2023, *supra* note 1 at paras 168–69.

[208] *R v Sharma*, 2022 SCC 39 at para 28 [*Sharma*].

[209] *Ibid* at para 30.

[210] *Ibid* at para 40 [emphasis in original].

fected is insufficient to meet the step two requirements."[211] Finally, the Court stressed that "s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation."[212]

The applicants argued that Ontario's climate change target and plan create a distinction based on age because (1) children and youth are more vulnerable to and will bear a disproportionate share of the physical and mental health impacts of climate change; (2) youth and future generations will bear the brunt of the worsening impacts of climate change since they will live longer into the future; and (3) young people's liberty and future life choices are constrained by decisions made today over which they have no control.[213] Justice Vermette rejected the first two contentions and declined to address the third.

Once again, she reasoned that it is climate change, not the *CTCA*, target or plan, that has disproportionate impacts on younger people. In her view, the impugned state action simply allows an existing gap between members and non-members of a protected group to persist. The action does not widen the gap or worsen the impacts. In so holding, she repeated *Sharma*'s admonition that subsection 15(1) does not impose a freestanding positive obligation on the state to remedy social inequalities or enact remedial legislation, and that leaving a gap between a protected group and others unaffected does not infringe subsection 15(1).[214]

Sharma itself contains the answer to Justice Vermette's holding. The fundamental problem in that case was that the claimant failed to produce any evidence that "the specific provisions she challenged created or contributed to a disproportionate impact on" a protected group.[215] If, by contrast, a claimant succeeds in showing that the impugned provisions create or contribute to a disproportionate impact on a protected group, no question of a freestanding positive obligation arises. Nor can the government claim that it is merely allowing an existing gap to continue unaffected. This reasoning underscores the importance of demonstrating, on appeal, that the *CTCA* target and plan themselves create or contribute to the disproportionate impact on young people.

Mathur also violates *Sharma*'s admonition against collapsing the two-part test for subsection 15(1) violations. Justice Vermette did not discuss each step separately and did not articulate conclusions on each step, mak-

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211 *Ibid* at para 52.

212 *Ibid* at para 63.

213 *Mathur* 2023, *supra* note 1 at para 177.

214 *Ibid* at paras 178–79.

215 *Sharma, supra* note 208 at para 73.

ing it difficult to determine whether she engaged in a two-step analysis at all.[216]

One aspect of Justice Vermette's section 15 analysis will be harder to challenge. She held that the second distinction alleged by the applicants, that youth and future generations will bear the brunt of the worsening impacts of climate change since they will live longer into the future, is a temporal rather than age-based distinction. The Supreme Court has held that a temporal distinction is not unconstitutional, since it is not based on an enumerated or analogous ground.[217] Justice Vermette wrote:

> The temporal nature of the distinction is shown by the fact that the impacts of climate change will be experienced by all age groups in the future. For instance, in 2050, the impacts of climate change will be experienced by all Ontarians who will be alive at that time, including people who are today in their 30s, 40s or 50s, as well as youth and young people and people yet-to-be-born.[218]

The Court of Appeal of Quebec took the same position in *Environnement Jeunesse*.[219]

The applicants argued alternatively that the court should recognize a new analogous ground of "generational cohort," in other words, the timing of one's birth, which they asserted is an immutable personal characteristic shared by people who lack political power and are vulnerable to having their interests overlooked or disregarded—namely, young people and future generations.[220] Justice Vermette declined to rule on this point because even if it were accepted as a ground, the applicants had proved no violation of section 15 for the same reasons that they had not proved age discrimination.[221]

Oddly, she did not discuss whether "generational cohort" was based on a temporal distinction, which is a more obvious line of attack.[222] Laws that treat people differently based on the time when something happens

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216 *Mathur* 2023*, supra* note 1 at paras 178–83.

217 *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 37. Enumerated grounds are the grounds explicitly listed in subsection 15(1): race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. The courts have also recognized as analogous grounds various personal characteristics that are immutable, difficult to change, or changeable only at unacceptable personal cost, such as citizenship, marital status and sexual orientation.

218 *Mathur* 2023, *supra* note 1 at para 180.

219 See e.g. *Environnement Jeunesse* CA, *supra* note 2 at para 43.

220 *Mathur* 2023 AF, *supra* note 56 at para 198.

221 *Mathur* 2023, *supra* note 1 at para 182.

222 *Mathur* 2023 RF, *supra* note 86 at para 110.

to them have been held to create temporal distinctions that do not violate the *Charter*. Examples include date of injury,[223] remarriage[224] or Hepatitis C infection.[225] But how this principle applies to the disproportionate impacts of climate change that young people and future generations will suffer because they will be alive farther into the future is not entirely clear. Unlike most "temporal distinction" cases, this distinction neither appears on the face of the law, nor is it created by a change in the law. The distinction the applicants are alleging is not created by the government's modification of its climate change laws, nor by some extraneous injury that the law seeks to remedy. It is created by the law's facilitation of, and commitment to, dangerous levels of atmospheric GHGs. The outcome of this issue on appeal is hard to predict. Ultimately, it is not crucial to the case, since the applicants also pleaded the clearly age-based distinction that children and youth are more vulnerable to and bear a disproportionate share of the physical and mental health impacts of climate change due to their age.

The Federal Court of Appeal's decision in *La Rose/Misdzi Yikh* will not help the applicants' appeal. It upheld the lower courts' decisions striking the section 15 claims with no opportunity to amend. The court characterized these claims, incorrectly, as concerned solely with intergenerational equity. It held that they focus on how the impugned state action will affect young people when they are older, and allege no "present harm to which the section 15 challenge can anchor itself."[226] This holding ignores the claimants' *intra*generational assertion that the impugned action is already having a greater impact on young people than adults and will do so at any given future time. *Inter*generational equity concerns differentiation among people living at different times; *intra*generational equity concerns differentiation among people living at the same time.[227] Aside from missing this distinction, the court opined that intergenerational equity is outside the scope of section 15 as presently understood and that the claimants are challenging choices reserved for the other branches of government about resource allocation between the present and future.[228]

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[223] *Downey v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 65 at para 31; *Vail & McIver v WCB (PEI)*, 2012 PECA 18 at para 25, leave to appeal to SCC refused, 2013 CanLII 8400 (SCC).

[224] *Bauman v Nova Scotia (Attorney General)*, 2001 NSCA 51 at para 65.

[225] *Guild v Canada (AG)*, 2006 FC 1529 at para 13, aff'd 2007 FCA 311.

[226] *La Rose/Misdzi Yikh* 2023, *supra* note 2 at para 124.

[227] See Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Dobbs Ferry, NY: Transnational, 1989).

[228] *La Rose/Misdzi Yikh* 2023, *supra* note 2 at paras 83, 123.

G. Liberty

Justice Vermette also declined to decide whether Ontario is discriminating against young people by constraining their liberty and future life choices via decisions made today over which they have no control.[229] The applicants put it this way:

> Young people have no ability to vote and are thus limited in their ability to shape public policy. By the time they come of age, it may be too late to mitigate climate change, or they may face additional burdens and limits to their freedom related to extreme measures needed if Ontario has already exceeded its share of the Carbon Budget. Poor choices being made by today's adults will hamstring future generations for years to come.[230]

In declining to rule on this issue, Justice Vermette wrote that it was in effect an attack on the voting age, the record was inadequate, and the impugned state action did not deprive young people of control over decisions. She concluded that the alleged deprivation pre-exists the state action and the state action merely leaves it unaffected.[231]

In my view, Justice Vermette misapprehended the applicants' claim. They argue that the *CTCA* target and plan—not the voting age—limit young people's future freedom of choice and their future ability to address the climate crisis, by offloading the burden of drastic GHG reductions and catastrophic climate impacts to the future. Young people's ineligibility to vote, and their lack of control over many decisions that affect them, is an aspect of their disproportionate vulnerability to the negative physical and mental health impacts of climate change.

This logic was crucial to a decision holding that Germany's inadequate targets violate young people's rights by constraining their future freedom:

> [T]he Federal Climate Change Act offloads significant portions of the greenhouse gas reduction burdens … onto the post-2030 period. Further mitigation efforts might then be necessary at extremely short notice, placing the complainants under enormous (additional) strain and comprehensively jeopardising their freedom protected by fundamental rights. Practically all forms of freedom are potentially affected because virtually all aspects of human life involve the emission of greenhouse gases … and are thus potentially threatened by drastic restrictions after 2030.[232]

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[229] *Mathur* 2023*, supra* note 1 at paras 177, 181.

[230] *Mathur* 2023 AF*, supra* note 56 at para 196 [footnotes omitted].

[231] *Mathur* 2023*, supra* note 1 at para 181.

[232] *Neubauer*, *supra* note 27 at para 117.

The German court went on to say that "[c]limate action measures that are presently being avoided out of respect for current freedom will have to be taken in future – under possibly even more unfavourable conditions – and would then curtail the exact same needs and freedoms but with far greater severity."[233] It held that the state must "treat the natural foundations of life with such care and … leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence."[234]

Climate change targets that offload major GHG reductions to the future have the effect of substantially constraining young people's future life choices, including how to earn a livelihood, where to live and work, how to stay warm or cool, how to shelter from the elements, what kind of food to eat, and where and how to move around—in short, "virtually all aspects of human life."[235] These effects clearly engage the section 7 liberty right: the freedom to make decisions of fundamental personal importance that go to the core of individual dignity and autonomy.[236] While the applicants chose to focus their argument in this connection on section 15 age discrimination, it also supports their claim that the target violates section 7.

H. Unwritten Constitutional Principles

As noted earlier, the applicants in *Mathur* argued that societal preservation is an unwritten constitutional principle. An intervener argued the same for ecological sustainability. The court said there was no need to decide these points, because the only role of these principles would be to help interpret sections 7 and 15, yet no such help was needed.[237] This holding was a missed opportunity that could be taken up on appeal.

Unwritten constitutional principles are the baseline principles implicit in the creation and operation of Canada's constitutional architecture[238] and include parliamentary sovereignty, federalism, democracy, constitu-

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[233] *Ibid* at para 120.

[234] *Ibid* at para 193.

[235] *Ibid* at para 117.

[236] See e.g. *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66, 1997 CanLII 335 (SCC); *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 54; *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at paras 85–86; *R v Clay*, 2003 SCC 75 at paras 31–32; *R v Ndhlovu*, 2022 SCC 38 at paras 45, 51.

[237] *Mathur* 2023*, supra* note 1 at para 187.

[238] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC); *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 1985 CanLII 33 (SCC).

tionalism, the rule of law, the separation of powers, judicial independence, minority protection, parliamentary privilege, the honour of the Crown, the duty to consult and the doctrine of paramountcy.[239] Courts use them for various interpretive and gap-filling purposes, but not as standalone grounds to invalidate state action.[240]

It is not clear why the applicants chose to advocate the principle of societal preservation rather than, say, non-regression, environmental protection, or ecological sustainability. The principle of non-regression would create a constitutional ratchet that prevents rollback of the level of environmental protection provided by law. The principle is recognized to varying degrees in international human rights law, international environmental law, North American trade law, and the constitutional law of several countries.[241] The principle of environmental protection or ecological sustainability, for its part, finds support in numerous Supreme Court decisions and probably enjoys widespread societal consensus.[242] All three have been proposed by leading writers.[243]

To be fair, the applicants gave Justice Vermette very little to work with, devoting only two short paragraphs of their factum to the issue of unwritten constitutional principles.[244] This issue is not critical to the application's success. Therefore, although it would be interesting to see what the appeal court does with it, I am not holding my breath.

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239 Vanessa A MacDonnell, "Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making" (2019) 65:2 McGill LJ 175 at 178–79.

240 *Toronto, supra* note 175.

241 Lynda M Collins & David R Boyd, "Non-Regression and the Charter Right to a Healthy Environment" (2016) 29 J Envtl L & Prac 285 at 295–300.

242 *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 16, 1992 CanLII 110 (SCC); *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 55, 1995 CanLII 112 (SCC); *R v Hydro-Québec*, [1997] 3 SCR 213 at para 85, 1997 CanLII 318 (SCC); *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1; *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 7; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 167, 171; *Reference re Impact Assessment Act*, 2023 SCC 23 at para 1.

243 Collins & Boyd, *supra* note 241; Lynda M Collins, "Safeguarding the *Longue Durée*: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR 519 (environmental protection); Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 UBC L Rev 293 (environmental protection).

244 *Mathur* 2023 AF, *supra* note 56 at paras 214–15.

I. Standing for Future Generations

A final unresolved issue is whether the applicants have standing to seek remedies on behalf of future generations. This issue is novel in Canada, but is not crucial to the outcome of the case, since no one disputes that the applicants have standing in their own right. One interesting question is whether granting standing to represent future generations would prejudice later claims by more directly affected parties—namely, future Ontarians. On the motion to strike, Justice Brown held that it would not, since future generations would be unable to travel backward in time and bring the same claim against the current government, nor could they bring it against future governments since circumstances would have changed.[245] In the applicants' view, by the time future generations are able to bring their own claim, it will be too late to secure meaningful remedies.[246] If standing for future generations is denied, the applicants argue the government will "effectively be allowed to escape review for violating the *Charter* rights of future generations, since those violations would already be locked in before their lifetime even began."[247]

Ontario did not even address standing in its factum. This is odd, given the novelty of the applicants' claim. The applicants nevertheless anticipated one counterargument: that standing for future generations opens the door to standing for unborn fetuses. They retorted that all they seek is "to ensure that those in future generations *who will be born* are not deprived of their constitutional rights as a result of Ontario's contributions to climate change, simply because of when they were born."[248]

Courts in the Philippines, the Netherlands, and Colombia have granted parties standing to represent current and future generations in environmental claims.[249] In 1993, The Supreme Court of the Philippines famously held:

> We find no difficulty in ruling that [the plaintiffs] can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility. … [E]very generation has a responsibility to

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245 *Mathur* 2020, *supra* note 13 at paras 250, 253.

246 *Mathur* 2023 AF, *supra* note 56 at paras 132–33.

247 *Ibid* at para 135.

248 *Ibid* at para 134 [emphasis in original].

249 *Urgenda*, *supra* note 27 at paras 3.3, 5.3.1 (allowing the trial court's ruling to this effect to stand); Supreme Court, Manila, 30 July 1993, *Minors Oposa v Secretary of the Department of Environment and Natural Resources*, 33 ILM 173, No 101083 (Philippines) [*Oposa*]; Corte Suprema de Justicia [Supreme Court], Bogotá, 5 April 2018, *Future Generations v Ministry of the Environment*, No STC4360-2018 at 13–14 (Colombia).

> the next to preserve [the] rhythm and harmony [of nature] for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[250]

Justice Vermette ignored this issue, as did the courts in *Environnement Jeunesse* and *La Rose*, which also advanced claims on behalf of future generations.[251] These foreign authorities, and the climate emergency's distinctive characteristic of threatening to foreclose future claims, make the *Mathur* appeal a plausible case for finding standing on behalf of future generations. That said, the implications of such a holding for the putative rights of the unborn deserve careful attention, especially in the context of debates about reproductive choice. Given the political sensitivity of both climate change and reproductive choice, I would not place money on the outcome of this issue.

J. Repeal of Prior Legislation

Finally, Justice Vermette summarily dismissed the applicants' request for a declaration that section 16 of the *CTCA*, which repealed the previous government's climate change law, is unconstitutional. This outcome was probably correct, but the court's reasoning mischaracterizes the applicants' claim. Justice Vermette dismissed this claim on the ground that "[a] mere change in the law cannot be the basis for a *Charter* violation,"[252] even if the previous law provided greater protection.[253] She insisted, correctly, that "the focus of the analysis must be on the impugned provisions and whether they are discriminatory when assessed on their own, regardless of the prior legislative scheme."[254]

What she failed to appreciate was that the applicants do not allege a mere change in the law. They do not challenge the repeal *per se*. They seek a declaration that subsection 3(1) (which mandates the establishment of GHG emission reduction targets) and section 16 (which repealed the earlier legislation) of the *CTCA* are unconstitutional "to the extent that they allow for the imposition of the Target without mandating that it be set with regard to the Paris Standard … or any kind of science-based

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[250] *Oposa*, *supra* note 249 at 185.

[251] *Environnement Jeunesse* CS, *supra* note 2; *La Rose* 2020, *supra* note 2.

[252] *Mathur* 2023, *supra* note 1 at para 114, citing *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538 at para 104.

[253] *Mathur* 2023, *supra* note 1 at para 116, citing *ETFO v Her Majesty the Queen*, 2019 ONSC 1308 at paras 138–139.

[254] *Mathur* 2023, *supra* note 1 at para 115.

process."[255] This request brings the applicants' claim within the Supreme Court's holding in *Alliance* that, although every modification of remedial legislation does not amount to a constitutional violation, the new provisions can nevertheless have "a discriminatory impact because, assessed on their own and regardless of the prior legislative scheme, the impugned provisions perpetuate the pre-existing disadvantage of" the protected group.[256]

Justice Vermette was probably right to rule out a declaration that section 16 itself is unconstitutional, since section 16 merely repeals the earlier law. But in her haste, she painted an inaccurate picture of the applicants' claim that may have affected her reasoning more generally.

Concluding Remarks

Mathur raises important issues of justiciability, standing, constitutional law, climate change science, and the existence of a right to a healthy environment in the *Charter*. The appeal will be watched closely by constitutional and environmental lawyers alike. Some key favourable findings of fact will likely survive appeal, including the court's rejection of a *de minimis* defence and its acceptance of climate change science, the global carbon budget, global GHG targets and timetables, the woeful inadequacy of Ontario's new target, and the disproportionate impacts of climate change on youth and Indigenous peoples. Justice Vermette's overall conclusion that the case is justiciable will also likely withstand appeal, and the applicants have a good chance of reversing her holding that Ontario's share of the carbon budget is not justiciable.

There are solid grounds to appeal several other adverse holdings, including Justice Vermette's conclusions that the alleged harm is not the result of the impugned state action, the claimed right is positive rather than negative, a positive right is not established in this case, any deprivation of the applicants' section 7 rights accords with principles of fundamental justice, and the impugned state action does not discriminate against the applicants on the basis of age under section 15. Several unresolved issues may also prove significant on appeal, including whether the impugned state action infringes young people's liberty, whether societal preservation or ecological sustainability is an unwritten constitutional principle, and whether the applicants have standing to sue on behalf of future generations. Finally, Justice Vermette's dismissal of the applicants' request for a declaration that the repeal of previous legislation was

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[255] *Ibid* at para 2.

[256] *Sharma*, *supra* note 208 at para 63, citing *Alliance*, *supra* note 176 at para 33.

unconstitutional, while technically correct, paints an inaccurate picture of the claim, which may have tainted her reasoning on other issues.

Whatever happens on appeal, *Mathur* will set a key precedent for constitutional environmental rights in Canada. It is an opportunity for Canadian courts to recognize, for the first time, that the *Charter* protects a right to a stable climate as an essential component of a healthy environment, and that government laws and policies that authorize, incentivize, facilitate, create and commit to dangerous levels of GHG emissions infringe this right. Whatever the result, the case will help clarify several crucial aspects of such a right, including what sorts of questions are justiciable, what types of governmental action can infringe the right, what (if anything) differentiates a negative from a positive environmental right, whether a positive right to environmental quality exists, whether ecological sustainability or societal preservation is a principle of fundamental justice or unwritten constitutional principle, whether disproportionate environmental impacts on children and youth create age-based or merely temporal distinctions, whether environmental policy decisions that severely constrain people's future life choices deprive them of their right to liberty, and whether people alive today have standing to sue on behalf of future generations.