FEELING THE HEAT: CLIMATE LITIGATION UNDER THE CANADIAN CHARTER'S RIGHT TO LIFE, LIBERTY, AND SECURITY OF THE PERSON

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> Exercising my "reasoned judgment," I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.
>
> - *The Honorable Judge Ann Aiken, U.S. District Court for the District of Oregon*[1]

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1. Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) (internal citation omitted).

INTRODUCTION

Climate change has become one of the most serious challenges of our time. It has been characterized as a "super wicked problem" because of how complex it is to address at a policy level.[2] And time is of the essence: climate change is already affecting the planet and its inhabitants in unprecedented ways, and scientific consensus shows that the impacts we are experiencing today are just the beginning.[3] In addition, climate change has important social justice implications—it is often the people and communities who are already facing discrimination, marginalization, or other injustices that are most vulnerable to its effects. The case of indigenous communities living in Arctic regions offers a poignant example.[4] Failure to take serious action without delay to reduce the

2. *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009) (asserting this issue "defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution"); Kelly Levin et al., *Overcoming the Tragedy of Super Wicked Problems: Constraining Our Future Selves to Ameliorate Global Climate Change*, 45 POL'Y SCI. 123, 124 (2012) (explaining that "super wicked problems" include four features: "[1] time is running out; [2] those who cause the problem also seek to provide a solution; [3] the central authority needed to address them is weak or non-existent; and [4] irrational discounting occurs that pushes responses into the future").

3. *See, e.g.*, U.S. GLOB. CHANGE RESEARCH PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 10 (2017) (noting the effects of climate change and predicting 1–4 feet of sea level rise by 2100).

4. *See infra* notes 50–54 and accompanying text (discussing the challenges indigenous populations will face because of climate change).

greenhouse gas (GHG) emissions leading to climate change is a serious injustice to all, but especially to the most vulnerable.

Although the global community pledged in the 1992 United Nations Framework Convention on Climate Change (UNFCCC) to "prevent dangerous anthropogenic interference with the climate system," and developed nations committed to specific reductions under the Kyoto Protocol, global levels of the anthropogenic GHG emissions at the heart of climate change have continued to rise over the intervening years.[5]

Many hope the 2015 Paris Agreement marked a turning point in addressing what its 197 Parties consider to be an "urgent threat."[6] Under that Agreement, nations pledged to reduce their GHG emissions in an effort to keep global average temperatures from rising more than 1.5–2°C.[7] While this is an important step forward, it is insufficient since, even if all Parties fulfill their individual mitigation pledges, it will not be enough to keep warming from crossing the 2°C threshold.[8] It is also insufficient because there is growing evidence that a rise of 1.5–2°C will still result in dangerous levels of warming.[9] The U.S. plan to withdraw from the Paris Agreement creates even greater uncertainty, leaving a glaring hole in global accountability.[10]

Given the poor track record of most countries, including Canada, in meeting their past commitments to reduce GHGs (or failing to make adequate commitments in the first place), many citizens around the world

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5. United Nations Framework Convention on Climate Change, art. 2, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 3(1), Dec. 11, 1997, 37 I.L.M. 22 (entered into force Feb. 16, 2005) [hereinafter Kyoto Protocol]; *Canadian Environmental Sustainability Indicators: Global Greenhouse Gas Emissions*, ENV'T & CLIMATE CHANGE CAN. 5 (2017), https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/global-greenhouse-gas-emissions.html (last modified June 19, 2017).

6. United Nations Paris Agreement, pmbl., Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/10/Add.1 [hereinafter Paris Agreement].

7. *Id.* art. 2(1)(a).

8. Fiona Harvey, *World's Climate Pledges Not Yet Enough to Avoid Dangerous Warming – UN*, GUARDIAN (Oct. 30, 2015), https://www.theguardian.com/environment/2015/oct/30/worlds-climate-pledges-likely-to-lead-to-less-than-3c-of-warming-un.

9. Danny Harvey et al., Dangerous Anthropogenic Interference, Dangerous Climatic Change, and Harmful Climatic Change: Non-trivial Distinctions with Significant Policy Implications, 82 CLIMATIC CHANGE 1, 11 (2007); Joel Smith et al., Assessing Dangerous Climate Change Through an Update of the Intergovernmental Panel on Climate Change (IPCC) "Reasons for Concern," 106 PROC. NAT'L ACAD. SCI. 4133, 4134 (2009); James Hansen et al., Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature, 8 PLOS ONE 1, 3 (2013); James Hansen et al., Young People's Burden: Requirement of Negative CO2 Emissions, 8 EARTH SYS. DYNAMICS 577, 578 (2016). For a discussion on climate science, see *infra* Part II.A.

10. *See infra* notes 67–74 and accompanying text (discussing the Paris Agreement and the uncertainty regarding its ability to reduce GHG emissions).

are searching for ways to hold their governments accountable for reducing GHG emissions.[11] While climate lawsuits are not new, a recent set of successful cases has given momentum to those seeking to force governments to take the steps needed to reduce GHG emissions.[12] The watershed moment for climate litigation was the *Urgenda* decision, where a Dutch court held that the government has a legal duty to reduce its GHG emissions to the level that the Intergovernmental Panel on Climate Change (IPCC) stated developing (Annex I) countries would be required to meet to avoid dangerous levels of climate change—a reduction of 25–40% below 1990 levels by 2020.[13] Even though the Dutch government had a GHG-emissions reduction policy in place that aimed to reduce emissions by 20% below 1990 levels by 2020, the Court held it was insufficient since it was not at the level of ambition needed to avoid dangerous climate change.[14] On the heels of the *Urgenda* decision, a Pakistani court held the government accountable for failing to implement its climate commitments, and ordered the government to take steps to reduce GHG emissions and help communities adapt to climate change.[15] In North America, eyes are on a lawsuit by 21 youth and a scientist acting on behalf of future generations, who are suing the federal government for enabling harmful levels of GHG emissions.[16] The plaintiffs in the case (*Juliana v. United States*), have cleared a number of important pre-trial motions brought by the defendants, and the case is set to proceed to trial in May 2018.[17] These and other litigation successes have turned the tide, and climate lawsuits aimed at holding governments similarly accountable to do their share to address this

11. VANUATU ENVTL. LAW ASS'N, TAKING CLIMATE JUSTICE INTO OUR OWN HANDS: A MODEL CLIMATE COMPENSATION ACT 5 (2015), https://ssrn.com/abstract=2906252 (describing citizen demand to hold global companies and governments accountable for environmental harms).

12. *See infra* Part II.C (discussing climate-liability lawsuits that plaintiffs have filed worldwide).

13. Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, para. 4.83 (Urgenda Foundation/Netherlands) (Neth.). Note that the decision is under appeal. To read more, see *The Urgenda Climate Case Against the Dutch Government*, URGENDA, http://www.urgenda.nl/en/themas/climate-case/ (last visited May 4, 2018).

14. The Dutch government was on track to reduce emissions by 14–17% at the time the *Urgenda* case was being litigated. *Urgenda*, C/09/456689/HA ZA 13-1396 paras. 4.31, 4.33, 4.70, 4.84.

15. Leghari v. Pakistan, (2015) WP No. 25501/201 (Punjab) paras. 13, 19, 25 (Pak.) (discussing how the court first constituted the Climate Change Commission and then the Standing Committee on Climate Change because the Pakistani government failed to implement climate change action).

16. Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

17. *See, e.g.*, Opinion and Order, Doc. 83 at 51–52, 54, Juliana v. United States, No. 6:15-cv-01517-TC (D. Or. Nov. 10, 2016) (denying defendant's Motion to Dismiss because the defendant's actions "threaten plaintiffs' fundamental constitutional rights to life and liberty").

global problem are springing up in countries across the globe at a rapid pace.[18]

The question driving this Article is whether Canadian citizens could bring a successful lawsuit against the government to compel it to meaningfully reduce the country's GHG emissions in line with global commitments. While there are numerous possible strategies in both public and private law, this Article focuses on constitutional rights, specifically the right to life, liberty, and security of the person in section 7 of the Canadian Charter of Rights and Freedoms (the Charter).[19] It seems ludicrous to think that this right might not apply to a threat that is already causing death, injury, loss of land and culture, food insecurity, and psychological harm among Canadians—and estimated to lead to more of the same.[20] However, the reality is that section 7, and indeed all Charter rights, have been interpreted by courts in the context of rights violations of a very different nature than the infringements created by an unstable and unpredictable climate system.[21] The Charter does not contain any explicit environmental rights, such as the right to clean air, water, or a stable climate.[22] While

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18. U.N. ENV'T PROGRAMME, THE STATUS OF CLIMATE CHANGE LITIGATION 10–11 (2017), http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf.

19. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, s. 7 (U.K.); *see also* MEREDITH WILENSKY, CLIMATE CHANGE IN THE COURTS: AN ASSESSMENT OF NON-U.S. CLIMATE LITIGATION iii (2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/white_paper_-_climate_change_in_the_courts_-_assessment_of_non_u.s._climate_litigation.pdf (identifying environmental suits in Nigerian and Dutch courts for violations of human rights, including the right to life). *Contra* Stepan Wood, *Climate Change Litigation in Ontario: Hot Prospects and International Influences*, YORK U. (Mar. 18, 2016), http://ejsclinic.info.yorku.ca/2016/03/clinic-co-director-stepan-wood-speaks-on-climate-change-litigation-at-oba-institute-2016/ (noting there is no provision in the Canadian Charter of Rights and Freedoms that is analogous to the right to a healthful environment in Article 21 of the Dutch constitution).

20. *See generally* James Ford et al., *Adapting to the Effects of Climate Change on Inuit Health*, 104 AM. J. PUB. HEALTH e9, e9 (3d Supp. 2014) (noting that climate change is already risking human rights, livelihoods, and health); Jeremy Pittman et al., *Vulnerability to Climate Change in Rural Saskatchewan: Case Study of the Rural Municipality of Rudy No. 284*, 27 J. RURAL STUD. 83, 83 (2011) (depicting the effects of climate change on rural communities); Maureen G. Reed et al., *Linking Gender, Climate Change, Adaptive Capacity, and Forest-based Communities in Canada*, 44 CAN. J. FOR. RES. 995, 996 (2014) (analyzing the impacts of climate change on the forestry sector and forest-based communities); Johanna Petrasek MacDonald et al., *Protective Factors for Mental Health and Well-being in a Changing Climate: Perspectives from Inuit Youth in Nunatsiavut, Labrador*, 141 SOC. SCI. & MED. 133, 133–34 (2015) (analyzing the impacts of climate change on the mental health of indigenous populations); Debra J. Davidson & Michael Haan, *Gender, Political Ideology, and Climate Change Beliefs in an Extractive Industry Community*, 34 POPULATION & ENV'T 217, 229–30 (2012) (addressing how the availability of climate change information has impacted public awareness and political ideologies).

21. *See infra* Part III.B (analyzing the components of a section 7 challenge directed at climate change by using cases unrelated to climate change).

22. *See infra* Part III (noting the Charter does not protect environmental rights, but could still apply in a climate change challenge).

many scholars believe these rights are implicitly guaranteed in section 7 since they are precursors to life, Canadian courts have yet to endorse this interpretation.[23]

The question of whether the government's conduct in relation to climate change violates Canadians' right to life, liberty, and security of the person raises novel questions that are at the heart of one of Canada's central constitutional guarantees. We identify and discuss in depth three questions we think are the most significant to a climate Charter challenge. The first question centers around how to characterize the government action said to infringe section 7, because the harms from climate change arise from a series of government plans, policies, and decisions made over a number of years.[24] This means that a section 7 case could be framed in multiple ways, with ramifications for the analysis. For instance, claimants could challenge: (1) government decisions (such as authorizing pipelines to transport fossil fuels or subsidizing fossil-fuel extraction) that enable and encourage large-scale and lasting GHG emissions beyond agreed upon thresholds; (2) the 2030 GHG-reduction target as being insufficient to avoid dangerous levels of climate change; or (3) the Pan-Canadian Framework, which, according to the government's own models, will not meet its 2020 or 2030 GHG-reduction goals. We explore how a climate Charter challenge could be framed, what current jurisprudence suggests about how courts would respond, and how we think courts should respond. Although this discussion is focused on the characterization of government action in the context of establishing the rights violation, the framing is also relevant in analyzing whether the principles of fundamental justice can justify the infringement.

The second question relates to the issue of the evidentiary burden of ascertaining whether the state conduct infringes section 7 rights.[25] This requires both determining whether there is an infringement, and whether the state conduct is responsible for it. While both are important, we focus on the latter since establishing causation is often the thorn in the side of environmental cases. There are many reasons for this, including the nascent nature of science on phenomena like low-dose, cumulative impacts of

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23. *See, e.g.*, DAVID R. BOYD, THE RIGHT TO A HEALTHY ENVIRONMENT: REVITALIZING CANADA'S CONSTITUTION 212–15 (2012) [hereinafter BOYD, HEALTHY ENVIRONMENT] (discussing cases where courts failed to recognize that "environmental harms constituted a violation of section 7 of the *Charter*"); Lynda M. Collins, *An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms*, 26 WINDSOR REV. LEGAL SOC. ISSUES 7, 22 (2009) [hereinafter Collins, *Ecologically Literate Reading*] (describing cases where Canadian courts have failed to extend section 7 rights to include environmental harms).

24. *See infra* Part IV.A (discussing the choice of what government conduct to challenge for its infringement on section 7 rights).

25. *See infra* Part IV.B (discussing the challenges of evidence and causation that would arise in a section 7 climate change case).

contaminants and the fact that illnesses often show up many years after exposure to a pollutant. Unlike in many environmental cases, however, the state of climate science provides a rich evidentiary basis that shows how a certain level of GHG emissions leads to warming that causes harm. We discuss the evidentiary burden required in a Charter case and how this would be applied to the context of government conduct related to climate change. Within this discussion, we also consider the *de minimis* argument that the government will likely raise—that Canada should not be held responsible given that it only emits a small proportion of global GHG emissions (though it still ranks high among emitting countries).

The third question relates to justiciability of a Charter challenge.[26] This issue is important in a Canadian context because there have been two climate lawsuits against the federal government, and both were dismissed for being non-justiciable. We explain why we believe those cases are distinguishable from the kind of challenge contemplated in this Article.

There are many other questions that would arise in a climate Charter challenge. We address them as part of the section 7 analysis, but in less depth than the three central questions.[27] For example, we briefly address whether the Charter applies to GHG emissions and who might be the potential claimants. We consider whether courts might consider a section 7 infringement to be in accordance with the principles of fundamental justice or justified by section 1. We end our analysis of section 7 with a brief discussion of the appropriate remedy.

Throughout the Article we argue that, in determining how to handle this relatively uncharted terrain, a normative approach should guide the courts. In other words, courts should interpret the Constitution in light of the Constitution's purpose, overarching principles, as well as the evolving circumstances of climate change that pose serious risks to the future of life as we know it. The international community and Canadian governments have acknowledged the severity of the problem and the need to take urgent action to prevent dangerous levels of warming.[28] Ultimately, we believe courts should avoid using the unusual circumstances of climate change to justify a narrow, technical application of the Charter, and adapt their

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26. *See infra* Part IV.C (discussing the justiciability of a section 7 climate change case).

27. *See, e.g.*, *infra* Part III.C (discussing threshold questions in a section 7 climate change case, such as whether constitutional protections apply to GHG emissions and who might have standing to pursue a section 7 climate change case); *infra* Part IV.B (discussing whether principles of fundamental justice or section 1 of the Charter justify an infringement of section 7).

28. *See, e.g.*, GOV'T CAN., PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE 1–2 (2016) [hereinafter PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE] ("Taking strong action to address climate change is critical and urgent. . . . The international community has agreed that tackling climate change is an urgent priority . . . .").

reasoning to ensure the Charter achieves its purpose of guaranteeing the fundamental rights and freedoms of Canadians. Canadians are already adapting to the realities of climate change, and judges should do the same.

The Article is organized in five parts. Part I provides the background needed to conduct the section 7 analysis, including key conclusions of the scientific community on climate change (I.A); the policy response at the international and Canadian level (I.B); and litigation in other jurisdictions (I.C). Part II explains the section 7 analysis, considering first whether the Charter applies (II.A); whether potential claimants would have standing (II.B); who those claimants might be (II.C); then examining whether climate change infringes the right to life, liberty, and security of the person (II.D). Part III turns to the three central issues that arise in establishing a section 7 infringement in the climate context, namely: what state conduct to challenge (III.A); the evidentiary burden (III.B); and justiciability (III.C). Part IV considers whether an infringement, if found, would be in accordance with the principles of fundamental justice (IV.A–C); and, if so, whether the infringement could be saved by section 1 (IV.D); and, finally, what would be the appropriate remedy (IV.E).

It is important to note the limitations of discussing a climate Charter challenge in the absence of actual plaintiffs, defendants, and a specific claim of a violation of rights. We acknowledge that the analysis is necessarily constrained by this lack of specificity. However, we believe that it is still possible to achieve the central purpose of the Article, which is to unpack: (1) some of the challenges associated with mounting a Charter claim based on the impacts of climate change; and (2) the strengths and weaknesses of the different ways one could frame and argue such a case. We have, for the most part, assumed that the plaintiffs would be individuals directly impacted by climate change today who face the risk of serious future impacts, such as indigenous communities living in northern areas. In terms of defendants, we focus our discussion on the actions of the federal government, even though litigation could also be directed at provincial governments (especially any provinces that reject the Pan-Canadian Framework, as discussed below). Since the issue of how the litigation might be framed is so central to the section 7 analysis, we return to the implications of different scenarios throughout the Article. In the end, we hope the Article will reveal some of the shortcomings of section 7 jurisprudence when applied to the facts of climate change, and, by extension, will encourage courts to adapt their reasoning to the unusual, yet extraordinarily important, reality of climate change.

I. BACKGROUND

A. Science of Climate Change

The state of climate-change science is relatively easy to ascertain because of the work of the IPCC. The IPCC, which was created in 1988 to regularly review and report on the state of knowledge on climate change, includes members from 195 countries, and its reports are purposefully designed to reflect a range of views and expertise while remaining policy neutral.[29] The IPCC's reports are based on the contributions of thousands of scientists from around the world.[30] After multiple rounds of expert drafting and review, the IPCC's reports are endorsed by all member governments. Some reports, such as the Summary for Policymakers, are subject to a detailed, line-by-line review and sign-off by all member governments before they are published.[31] The result is that IPCC reports provide a uniquely rigorous and balanced perspective that reflects scientific and political consensus on the current state of climate-change science and its impacts.[32] In the context of litigation in adversarial systems, where judges draw their findings from the evidence of often dueling expert witnesses, it is difficult to imagine a more credible source of scientific evidence.[33] It is not surprising, then, that courts increasingly recognize, accept, and take judicial notice of the key scientific facts presented in IPCC reports.[34]

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29. *Organization*, IPCC [hereinafter *Organization*] , http://www.ipcc.ch/organization/organization.shtml (last visited May 4, 2018); *History*, IPCC, http://www.ipcc.ch/organization/organization_history.shtml (last visited May 4, 2018).

30. *Organization*, *supra* note 29.

31. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC FACTSHEET: HOW DOES THE IPCC APPROVE REPORTS? 1 (2013), https://www.ipcc.ch/news_and_events/docs/factsheets/FS_ipcc_approve.pdf.

32. *Id.*

33. Incidentally, the Canadian Government's Minister of Science at the time of writing, Kirsty Duncan, was a contributor to the IPCC, which would make a rejection of the IPCC's output hypocritical. *Meet Kirsty Duncan*, KIRSTY DUNCAN, https://kirstyduncan.liberal.ca/biography/ (last visited May 4, 2018).

34. *See generally* Juliana v. United States, 217 F. Supp. 3d 1224, 1247 (D. Or. 2016) (acknowledging scientific complexities in light of "irreversible climate change"); Juliana v. U.S. – *Climate Lawsuit*, OUR CHILDREN'S TRUST [hereinafter Juliana v. U.S. – *Climate Lawsuit*], https://www.ourchildrenstrust.org/us/federal-lawsuit/ (last visited May 4, 2018) (characterizing the Trump Administration's attempts to delay the proceedings as "drastic tactics . . . [to] keep science out of the courtroom"); Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, paras. 4.12, 4.22, 4.71–4.72 (Urgenda Foundation/Netherlands) (Neth.) (noting that the court and "European decision-making processes pertaining to the climate policies to be pursued are . . . based on the climate science findings of the IPCC"); *see also* BRENDA HEELAN POWELL & JOSEPHINE YAM, JUDICIAL NOTICE OF CLIMATE CHANGE 1, 3 (2015), http://www.cirl.ca/files/cirl/brenda_heelan_powell_and_josephine_yam-en.pdf (arguing that courts have been taking climate science into account in their decisions); *infra* Part II.C (cataloguing climate-change cases from the United States, India, and Canada).

According to the IPCC's latest assessment report, released in 2014, average global temperatures have been rising since the 1950s due to human emissions of GHGs like carbon dioxide (CO2), with total warming estimated at an average of 0.85°C.[35] The IPCC predicts that, if current emissions trends continue, the 1.5°C threshold will be exceeded by 2030, with the temperature increasing by about 4.8°C by 2100.[36] Continued GHG emissions will cause "long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems."[37] Sea levels are rising, oceans are acidifying, disease vectors are changing, and weather extremes are becoming more severe and frequent.[38] Harms include increased species extinction, undermined food security, exacerbated health problems, water scarcity, severe heat waves, slowed economic growth, flooding, damage to infrastructure, and increased displacement, among others.[39]

Unfortunately, "disadvantaged people and communities in countries at all levels of development" will be especially hard hit by climate change.[40] Research and experience increasingly shows that vulnerable populations bear more than their share of the climate-change burden—even though they have, in general, contributed less to the creation of the problem.[41] This is climate injustice. Increased frequency and severity of extreme weather events, such as droughts, floods, wildfires, heatwaves, and heavy precipitation, tend to affect marginalized communities the most.[42]

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35. IPCC, CLIMATE CHANGE 2014 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 2, 4 (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf [hereinafter CLIMATE CHANGE 2014 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS].

36. *Id.* at 10, 20, 24; *see also Climate Change Report Warns of Dramatically Warmer World This Century*, WORLD BANK (Nov. 18, 2012), http://www.worldbank.org/en/news/feature/2012/11/18/Climate-change-report-warns-dramatically-warmer-world-this-century (projecting the trend toward 4ºC of warming); *ETP 2017 Data Visualization*, INT'L ENERGY AGENCY, https://www.iea.org/etp/explore/ (last visited May 4, 2018) (providing a model of different temperature projections through 2060).

37. CLIMATE CHANGE 2014 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS, *supra* note 35, at 8.

38. *Id.* at 4, 8, 14.

39. *Id.* at 13, 15–16.

40. *Id.* at 13; *see also* Nathalie J. Chalifour, *Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the Charter?*, 28 J. ENVTL. L. & PRAC. 89, 99 (2015) [hereinafter Chalifour, *Environmental Justice and the Charter*] (stating that certain groups do not receive their fair share of environmental resources or benefits).

41. *See, e.g.*, Chalifour, *Environmental Justice and the Charter*, *supra* note 40, at 100 ("There is an emerging literature on the environmental injustices faced by the homeless, which may include claims of inadequate access to environmental services and benefits.").

42. *See* CLIMATE CHANGE 2014 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS, *supra* note 35, at 16 (describing how marginalized populations—without resources to mitigate harm—are at an increased risk of effect from extreme weather events).

While many of the impacts of climate change are projected to occur in the future, the world is already feeling the effects. For example, over 75% of the North Pole's summer ice has disappeared over the last 30 years, and every year seems to bring new record-setting extreme weather events.[43] In Canada, the average annual temperature has risen by 1.6°C since 1948—a rate of warming higher than in most other parts of the world.[44] Even though all regions in the country are experiencing warming, the most pronounced changes are in the far North, where temperatures are rising faster than expected.[45] The federal government's own research elaborates on climate risks, with a 2014 report outlining concerns related to natural resources, food production, industry, biodiversity, water, transportation infrastructure, and human health.[46] Warming will lead to changes across the country in the amount and distribution of rain, snow, and ice, increasing the risk of extreme weather events such as droughts, forest fires, heat waves, and heavy precipitation and related flooding.[47] The report also points to evidence of the wide range of health risks Canadians face due to climate change, including the northward movement of climate-sensitive diseases like Lyme disease, increased air pollution, and negative health effects from extreme weather events like floods and wildfires.[48] Impacts are summarized by the government as follows:

> In Canada and abroad, the impacts of climate change are becoming evident. Impacts such as coastal erosion; thawing

43. Hannah Hickey, *European Satellite Confirms UW Numbers: Arctic Ocean Is on Thin Ice*, U. WASH. NEWS (Feb. 13, 2013), http://www.washington.edu/news/2013/02/13/european-satellite-confirms-uw-numbers-arctic-ocean-is-on-thin-ice/; *see also* John Walsh & David Wuebbles, *Extreme Weather*, NAT'L CLIMATE ASSESSMENT, https://nca2014.globalchange.gov/report/our-changing-climate/extreme-weather (last visited May 4, 2018) (discussing extreme, record-setting heat events in the United States).

44. *Impacts of Climate Change*, GOV'T CAN., https://www.canada.ca/en/environment-climate-change/services/climate-change/impacts.html (last modified Nov. 27, 2015).

45. *See id.* ("Warming trends are seen consistently across Canada, but the regions showing the strongest warming trends are found in the far north."); ARCTIC MONITORING & ASSESSMENT PROGRAM, SNOW, WATER, ICE AND PERMAFROST IN THE ARCTIC 2–3 (2017), https://www.amap.no/documents/doc/Snow-Water-Ice-and-Permafrost.-Summary-for-Policy-makers/1532 (stating the Arctic is "warming more than twice as rapidly as the world as a whole").

46. GOV'T OF CAN., CANADA IN A CHANGING CLIMATE: SECTOR PERSPECTIVES ON IMPACTS AND ADAPTATION 3–5 (Fiona J. Warren & Donald S. Lemmen eds., 2014) [hereinafter Warren & Lemmen].

47. *Id.* at 9, 56, 69, 196; *see also* TEAM GREEN ANALYTICS, THE ECONOMIC IMPACTS OF THE WEATHER EFFECTS OF CLIMATE CHANGE ON COMMUNITIES 79, 83–85, 87 (2015), http://assets.ibc.ca/Documents/Studies/IBC-The-Economic-Impacts.pdf (analyzing potential costs of extreme wind events attributable to climate change in Halifax); Amanda Dean, *Extreme Weather*, CANADIAN UNDERWRITER (Jan. 1, 2016), https://www.canadianunderwriter.ca/features/extreme-weather/ (synthesizing a study that calculates an annualized loss expectancy of $18 million and estimates that an extreme wind event could cost Halifax $123–$126 million).

48. Warren & Lemmen, *supra* note 46, at 3–4, 196.

> permafrost; increases in heat waves, droughts and flooding; and risks to critical infrastructure and food security are already being felt in Canada. *The science is clear that human activities are driving unprecedented changes in the Earth's climate, which pose significant risks to human health, security, and economic growth*.[49]

There is ample evidence of how climate change is harming and will continue to harm the livelihoods and cultural rights of indigenous communities living in Canada, especially the Inuit living in the North.[50] For instance, research documents the physical impacts of climate change that will affect access to northern communities (e.g. through the melting of permafrost roads), water quality, costs of energy, and biodiversity (with concomitant impacts on hunting, fishing rights, and subsistence).[51] Related research tracks the vulnerability of Inuit food systems to climate change due to factors such as later freezing dates, lack of summer floating ice, displacement of caribou herds, and the rise of gastrointestinal illnesses due to inadequate refrigeration.[52] Research also shows the psychological impacts on indigenous communities—flowing from the loss of cultural rights, impacts on traditional knowledge, and loss of enjoyment of land—could contribute to mental health challenges, substance abuse, and domestic

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49. PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at 1 (emphasis added). The Pan-Canadian Framework is discussed in more detail in Part II.B.

50. *See, e.g.*, James D. Ford et al., *Vulnerability of Aboriginal Health Systems in Canada to Climate Change*, 20 GLOBAL ENVTL. CHANGE 668, 670, 677 (2010) (discussing the challenges climate change will create for indigenous populations, particularly given Arctic environments' sensitivity to climate change and the remote nature of indigenous communities); Andrew Stobo Sniderman & Adam Shedletzky, *Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy*, 4:2 W. J. LEGAL STUD. 1, 1, 4 (2014) (discussing mounting evidence of the disruptive effects of Arctic climate change and its effects on indigenous resources).

51. *See* CTR. FOR INDIGENOUS ENVTL. RES., HOW CLIMATE CHANGE UNIQUELY IMPACTS THE PHYSICAL, SOCIAL AND CULTURAL ASPECTS OF FIRST NATIONS 4, 7, 8, 11, 30, 40 (2006), http://www.afn.ca/uploads/files/env/report_2_cc_uniquely_impacts_physical_social_and_cultural_aspects_final_001.pdf (discussing the impacts of climate change on native populations, including impacts on shipping routes, water quality, and energy costs); James D. Ford et. al., *Vulnerability to Climate Change in the Arctic: A Case Study from Arctic Bay, Canada*, 16 GLOBAL ENVTL. CHANGE 145, 146 (2006) (explaining that unusual changes in ice conditions negatively impact important infrastructure, indigenous hunting techniques, and culturally significant sites); *see also* James D. Ford & Barry Smit, *A Framework for Assessing the Vulnerability of Communities in the Canadian Arctic to Risks Associated with Climate Change*, 57 ARCTIC 389, 390 (2004) (describing the numerous impacts of climate change on indigenous communities).

52. *See* James D. Ford, *Vulnerability of Inuit Food Systems to Food Insecurity as a Consequence of Climate Change: A Case Study from Igloolik, Nunavut*, 9 REGIONAL ENVTL. CHANGE 83, 88–89, 92, 94 (2009) (describing the effects of later freezes, lack of floating ice, and displaced caribou herds on indigenous food systems); *see also* Sonia D. Wesche & Hing Man Chan, *Adapting to the Impacts of Climate Change on Food Security Among Inuit in the Western Canadian Arctic*, 7 ECOHEALTH 361, 366 (2010) (examining further problems with caribou, such as concerns about parasite infections).

violence.[53] The federal government "recognize[s] the unique circumstances of the North, including disproportionate impacts from climate change and the associated challenges with food security, emerging economies and the high costs of living and of energy."[54]

B. The International and Canadian Policy Responses

1. International Policy Response

The international community recognized the problems of a warming climate decades ago, creating in 1992 the UNFCCC.[55] The UNFCCC's main objective is to "prevent dangerous anthropogenic interference with the climate system."[56] As a Framework convention, the UNFCCC was followed by the Kyoto Protocol, which in 1997 established quantified emissions-reduction targets for developed countries (Annex I Parties) to meet between 2008 and 2012.[57] Although the Protocol was designed to be the instrument through which Parties would negotiate increasingly ambitious targets applied to a wider group of countries, this was not the Protocol's ultimate fate.[58] The United States never adopted Kyoto; Canada formally withdrew in 2011,[59] and other large emitters, such as Japan, New Zealand, and Russia, followed suit.[60]

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53. *See, e.g.*, Christopher Furgal & Jacinthe Seguin, *Climate Change, Health, and Vulnerability in Canadian Northern Aboriginal Communities*, 114 ENVTL. HEALTH. PERSP. 1964, 1968 (2006) (discussing health issues indigenous communities face due to climate change); GOV'T OF NUN., DEP'T OF ENV'T, CLIMATE CHANGE ADAPTATION RESOURCE GUIDE: NUNAVUT'S HEALTH AND CULTURE 2–3 (2014), http://climatechangenunavut.ca/sites/default/files/rg2_health_culture_0.pdf (emphasizing that climate change will impact the physical and mental health of indigenous populations); *see also* SUSAN CLAYTON ET AL., BEYOND STORMS & DROUGHTS: THE PSYCHOLOGICAL IMPACTS OF CLIMATE CHANGE 25 (2014), https://ecoamerica.org/wp-content/uploads/2014/06/eA_Beyond_Storm s_and_Droughts_Psych_Impacts_of_Climate_Change.pdf (listing some of the effects climate change will have on mental health, such as stress, anxiety, and substance abuse).

54. PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at 4.

55. *UNFCCC*, *supra* note 5, pmbl.

56. *Id.* art. 2.

57. Kyoto Protocol, *supra* note 5, art. 3(7).

58. *See generally* Jutta Brunnee, *Europe, the United States, and the Global Climate Regime: All Together Now?*, 24 J. LAND USE & ENVTL. L. 1, 2 (2008) (describing the initial five-year commitment period under the Kyoto Protocol and how parties would begin to consider new targets before that first commitment period ended).

59. *Bill Curry & Shawn McCarthy, Canada Formally Abandons Kyoto Protocol on Climate Change*, GLOBE & MAIL (Dec. 12, 2011), http://www.theglobeandmail.com/news/politics/canada-formally-abandons-kyoto-protocol-on-climatechange/article4180809/.

60. *See* Joanna Depledge, *The Legal and Policy Framework of the United Nations Climate Change Regime*, *in* THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY 27, 34 n.70 (Daniel Klein et al. eds., 2017) (listing the parties who did not sign on to a second set of targets). It is interesting to note that the Parties that stayed in the Kyoto Protocol achieved their commitments. *Id.* at 35.

Although Kyoto did not bear the GHG-reduction fruit it was designed to, negotiations under the institutional machinery of the UNFCCC continued and led to several important developments. First, the Parties to the UNFCCC translated the general commitment in Article 2 of the UNFCCC (to avoid dangerous, anthropogenic interference with the climate system) into a quantifiable target—avoiding average warming of more than 2°C with respect to pre-industrial levels.[61] Second, the scientific community identified the level of GHG-emissions reductions needed to avoid crossing the 2°C threshold.[62] To avoid crossing the 2°C threshold, the IPCC's 2007 report stated that developed countries would need to reduce their emissions 25–40% from 1990 levels by 2020, and 80–95% by 2050.[63] The Conference of the Parties to the Cancun meeting in 2010 endorsed this level of GHG-emissions reductions for developed countries (the IPCC 2020 benchmark).[64] The IPCC also translated the 2°C temperature goal into atmospheric GHG concentrations, stating that the world needs to stabilize concentrations of GHGs at 450 parts per million (ppm) by 2100 if we are to have a 66% chance of remaining at the 2°C threshold.[65] As of November 2017, atmospheric concentrations of CO2 were estimated to be 405 ppm, up from just over 300 ppm in the 1960s.[66]

The most recent milestone in international climate negotiations is the 2015 Paris Agreement, in which 197 Parties characterized climate change

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61. U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session*, 3, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011); *see also* Jane Bulmer et al., *Negotiating History of the Paris Agreement*, *in* THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY 50, 59 & n.40 (Daniel Klein et al. eds., 2017) (highlighting the pledges of 141 parties to the long-term goal of capping increasing temperatures at 2°C).

62. *See* CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE IPCC, *Technical Summary*, *in* CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE 25, 234 (2007) [hereinafter IPCC, *Technical Summary*] (describing the scientific community's focus on climate policies impacting various temperature targets, including GHG emissions).

63. *See* STATE OF WASH., DEP'T OF ECOLOGY, WASHINGTON GREENHOUSE GAS EMISSION REDUCTION LIMITS 16 (2016), https://fortress.wa.gov/ecy/publications/documents/1601010.pdf (citing to the IPCC report and acknowledging industrialized countries should reduce emissions 25–40% relative to 1990 levels by 2020 and 80–95% by 2050); U.N. Framework Convention on Climate Change, Rep. of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Sixth Session, pmbl., U.N. Doc. FCCC/KP/CMP/2010/12/Add.1 (Mar. 15, 2011) [hereinafter Report of the Conference of the Parties, Cancun] (citing to the IPCC and acknowledging that Annex I Parties must reduce emissions 25–40% below 1990 levels by 2020).

64. Parties were responding to the IPCC's recommendation that Annex I parties reduce emissions according to "the range indicated by Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change . . . ." Report of the Conference of the Parties, Cancun, *supra* note 63, ¶ 4; *see also* IPCC, *Technical Summary*, *supra* note 62, at 39 (displaying various scenarios with different global mean temperature increases above pre-industrial times and the corresponding change in CO2 emissions to limit warming to 2°C above pre-industrial levels).

65. IPCC, SUMMARY FOR POLICYMAKERS 4 & n.2, 10 (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf.

66. *Monthly CO2*, CO2 EARTH, https://www.co2.earth/monthly-co2 (last visited May 5, 2018) (showing atmospheric concentrations of CO2 based on data from the Mauna Loa Observatory).

as an "urgent threat" that is a "common concern of humankind."[67] Almost all Parties to the Agreement committed to specific targets for reducing their emissions in order to keep global average temperatures from rising more than 1.5°–2°C.[68] The inclusion of the more ambitious 1.5°C threshold reflects a growing scientific understanding that 2°C or 450 ppm is too high to avoid dangerous levels of climate change. To restore the Earth's energy balance, concentrations of atmospheric CO2 need to return to 350 ppm by 2100, which means limiting warming by 1°C by 2100.[69] Parties to the Paris Agreement have a legal obligation to "prepare, communicate and maintain" successive GHG-reduction targets that parties "intend[] to achieve," and "pursue domestic mitigation measures, with the aim of achieving the objectives" of their pledges.[70]

While the Paris Agreement is a step in the right direction, it remains to be seen whether and how nations will translate their commitments into reality, especially given past track records. As noted earlier, the global community committed to avoiding "dangerous anthropogenic interference with the climate system" in the UNFCCC in 1992, but little has changed in the intervening 26 years.[71] In addition, even if Parties to the UNFCCC Paris Agreement all meet their individual pledges (Intended Nationally Determined Contributions, or INDCs),[72] the world will not avoid the 2°C

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67. Paris Agreement, *supra* note 6, pmbl; *see also Status of Ratification of the Convention*, U.N. CLIMATE CHANGE, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (last visited May 5, 2018) (indicating that 196 states and one regional economic integration organization are parties to the Paris Agreement).

68. Paris Agreement, *supra* note 6, art. 2(1)(a); *Paris Climate Change Conference – November 2015*, U.N. CLIMATE CHANGE, https://unfccc.int/event/paris-climate-change-conference-november-2015 (last visited May 5, 2018); *see also UNFCCC*, *supra* note 5, art. 7 (providing for the establishment of the Conference of the Parties (COP), where all parties meet annually to assess progress toward the Convention's objective). The 21st COP was held in Paris from November 30–December 11, 2015. Paris Agreement, *supra* note 6, art. 29.

69. *See* Harvey et al., *supra* note 9. A lead author for the IPCC's Fifth Assessment Report has also cautioned that 2°C is too low a threshold. *See* Petra Tschakert, *1.5°C or 2°C: A Conduit's View From the Science-policy Interface at COP20 in Lima, Peru*, 2 CLIMATE CHANGE RESPONSES 1, 8 (2015) ("[A] 2°C danger level [is] utterly inadequate given the already observed impacts on ecosystems, food, livelihoods, and sustainable development, and the progressively higher risks and lower adaptation potential with rising temperatures, combined with disproportionate vulnerability.").

70. Paris Agreement, *supra* note 6, art. 4(2); *see also* Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMP. INT'L ENVTL. L. 142, 150 (2016) (concluding that the Paris Agreement creates a legal obligation for signatories); Harald Winkler, *Mitigation (Article 4)*, *in* THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY 141, 145 (Daniel Klein et al. eds., 2017) (stating the legal obligations under Articles 4.2–4.7 of the Paris Agreement to "prepare, communicate and maintain successive nationally determined contributions").

71. *See supra* note 5 and accompanying text (introducing the UNFCCC and discussing the upward trend of GHG emissions, despite the developed world's commitment to mitigation).

72. *What Is an INDC?*, WORLD RESOURCE INST., http://www.wri.org/indc-definition (last visited May 5, 2018). Countries first agreed to create INDCs at COP 19 in Warsaw. *See* UNFCCC, Rep. of the Conference of the Parties on Its Nineteenth Session, Addendum, *Part Two: Action Taken by the*

threshold, let alone the 1.5°C one.[73] Even more significantly, it is also increasingly doubtful that achieving even the 1.5°C temperature goal will prevent dangerous climate change and catastrophic climate-change-driven impacts for Canadians.[74]

2. Canadian Policy Response

It would be an understatement to say that Canada's history in dealing with climate change has been disappointing. Although Canada endorsed the UNFCCC from the beginning, the country's response to climate change has been characterized by much rhetoric and little action, with the federal government historically alternating between failing to meet its own targets and ratcheting them back to less ambitious levels.[75] For example, between 1990 and 2008, the beginning of the first Kyoto Protocol commitment period, GHG emissions in Canada grew by 24% relative to the 1990 baseline. This means that, rather than reducing emissions by 6% as promised in Kyoto, Canada allowed them to climb 31% higher than its Kyoto target.[76] With no plan in place to meaningfully change this trajectory, Canada became the first signatory country to withdraw from the Protocol in 2011.[77]

While the federal government continued to participate in UNFCCC proceedings after this withdrawal, its underwhelming climate change commitments continued. Under the Copenhagen Accord in 2010, Canada opted to lower the ambition of its target, committing to reduce emissions by

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Conference of the Parties at Its Nineteenth Session, ¶ 2, U.N. Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014) (inviting all members of the Conference of the Parties to begin work toward achieving INDCs); *see also Durban: Towards Full Implementation of the UN Climate Change Convention*, UNFCCC, http://unfccc.int/key_steps/durban_outcomes/items/6825.php (last visited May 5, 2018) (describing the process that led up to COP21).

73. Rep. of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions, ¶ 39, U.N. Doc. FCCC/CP/2015/7 (Oct. 30, 2015).

74. Hansen et al., *supra* note 9, at 4.

75. *See* OFFICE OF THE AUDITOR GEN. OF CAN., REPORT 1—PROGRESS ON REDUCING GREENHOUSE GASES—ENVIRONMENT AND CLIMATE CHANGE CANADA 15 (2017) [hereinafter PROGRESS ON REDUCING GREENHOUSE GASES], http://publications.gc.ca/collections/collection_2017/bvg-oag/FA1-26-2017-1-1-eng.pdf (reporting on an audit of the Canadian government regarding its progress toward reducing GHG emissions).

76. OFFICE OF THE AUDITOR GEN. OF CAN., *Climate Change Plans Under the Kyoto Protocol Implementation Act*, *in* 2011 OCTOBER REPORT OF THE COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT 16, 47 (2011) [hereinafter *Climate Change Plans*], http://publications.gc.ca/collections/collection_2011/bvg-oag/FA1-2-2011-1-eng.pdf.

77. *Canada to Withdraw from Kyoto Protocol*, BBC NEWS (Dec. 13, 2011), http://www.bbc.com/news/world-us-canada-16151310.

17% from 2005 levels by 2020 (the Copenhagen target).[78] This is not only less ambitious than the Kyoto target, but even further removed from the IPCC 2020 benchmark.[79] Canada's INDC, submitted prior to COP21, promised to cut GHG emissions 30% below 2005 levels by 2030 (the Paris target).[80] The Paris target translates to emissions of 523 Mt CO2e by 2030, a far cry from the 367–458 Mt by 2020 that the IPCC 2020 benchmark requires, as illustrated in Figure 1.[81]

Figure 1 – GHG-Reduction Targets[82]

Commitment Year	International Agreement	Levels of Emissions in Commitment Year (in Mt)	Target	Target Translated into Emissions (in Mt)
1992	Rio Earth Summit	621	Reduce emissions to 1990 levels	613

78. PROGRESS ON REDUCING GREENHOUSE GASES, *supra* note 75, at 11. With emissions in 2005 at 747 Mt, Canada's Copenhagen target translates to 622 Mt in 2020. *See* ENV'T & CLIMATE CHANGE CAN., CANADIAN ENVIRONMENTAL SUSTAINABILITY INDICATORS: PROGRESS TOWARDS CANADA'S GHG EMISSIONS REDUCTION TARGET 10 (2017), http://www.ec.gc.ca/indicateurs-indicators/CCED3397-174A-4F0E-8258-91DCFE295B34/ProgressTowardsCanadaGHGEmissionsTarget_EN.pdf (listing Canada's GHG-emission levels from 2005 to 2014 and projecting future levels through 2030).

79. *See* Report of the Conference of the Parties, Cancun, *supra* note 63, pmbl. (identifying the IPCC 2020 benchmark of 25–40% below 1990 levels).

80. Press Release, Gov't of Can., Government of Canada Announces 2030 Emissions Target (May 15, 2015) [hereinafter 2030 Emissions Target], https://www.canada.ca/en/news/archive/2015/05/government-canada-announces-2030-emissions-target.html.

81. *See 2017 Fall Reports of the Commissioner of the Environment and Sustainable Development to the Parliament of Canada: Report 1—Progress on Reducing Greenhouse Gases—Environment and Climate Change Canada*, OFFICE OF THE AUDITOR GEN. OF CAN. [hereinafter *Report 1*], http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201710_01_e_42489.html (last visited May 5, 2018) (showing Canada's greenhouse gas emissions in 1990 were 611 Mt); Gail Davidson & Rohan Shah, *Canada's Failure to Reduce Emissions: Unlawful or Above the Law?*, LAWYERS' RIGHTS WATCH CAN. (Sept. 28, 2015), https://www.lrwc.org/canada-canadas-failure-to-reduce-emissions-unlawful-or-above-the-law-report/ (identifying the IPCC reduction target of 25–40% below 1990 levels by 2020); PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at 5 (providing Canada's 2030 target of 523 Mt under the Paris Agreement). Reducing Canada's 1990 levels—611 Mt—by 25–40% by 2020 would mean emitting between 367 and 458 Mt of GHGs.

82. PROGRESS ON REDUCING GREENHOUSE GASES, *supra* note 75, at 7, 11 ("Targets in megatonnes are based on historical greenhouse gas emissions from 2014. These numbers are subject to change based on annual reviews published in Environment and Climate Change Canada's National Inventory Report."); Davidson & Shah, *supra* note 81 (stating that the IPCC determined a reduction target of 25–40% below 1990 levels by 2020 was necessary to avoid the effects of climate change); *Report 1*, *supra* note 81 (showing Canada's greenhouse gas emissions in 1990 were 611 Mt); *see* 2030 Emissions Target, *supra* note 80 (announcing Canada's INDC for the Paris Agreement).

			by 2000	
2005	Kyoto Protocol	738	Reduce emissions to 6% below 1990 levels by 2012	576
2010	Copenhagen Accord	701	Reduce emissions by 17% below 2005 levels by 2020	620
2010	IPCC Emissions Benchmark	701	Reduce emissions to 25–40% below 1990 levels by 2020	367–458
2015	Paris Agreement	722	Reduce emissions by 30% below 2005 levels by 2030	523

Between 1990 and today, the Canadian federal government has established seven national plans aimed at reducing the country's GHG emissions based on the target of the day.[83] Although the federal government enacted during that time some policies aimed at reducing GHG emissions, such as requiring greater fuel efficiency from vehicles,[84] requiring a minimum content of renewable fuel in gasoline and diesel,[85] and a commitment to accelerate the phase-out of traditional coal-fired electricity

83. PROGRESS ON REDUCING GREENHOUSE GASES, *supra* note 75, at 4.

84. Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations, SOR/2010-201 (Can.). For instance, the government passed regulations requiring emissions reductions from passenger vehicles and light trucks, as well as heavy-duty vehicles, by 50% in 2025 for the former, and 23% by 2018 for the latter. *See Reducing Canada's Greenhouse Gas Emissions*, ENV'T & CLIMATE CHANGE CAN., https://www.ec.gc.ca/dd-sd/default.asp?lang=En&n=AD1B22FD-1 (last updated Aug. 9, 2017) (announcing heavy-duty vehicles will reduce emissions by up to 23% by 2018); *see also* Kazi Stastna, *How Canada's Provinces Are Tackling Greenhouse Gas Emissions*, CBC NEWS (Apr. 14, 2015), http://www.cbc.ca/news/canada/how-canada-s-provinces-are-tackling-greenhouse-gas-emissions-1.3030535 (reporting that the government fuel-emission standards will ensure a 50% reduction for passenger cars by 2025).

85. Renewable Fuels Regulations, SOR/2010-189 (Can.) (requiring 5% renewable content for gasoline and 2% for diesel).

by 2030,[86] all seven national plans failed to achieve their goals. The country's emissions have risen by approximately 18% compared to 1990 levels, instead of falling to meet various commitments.[87] A comprehensive audit by the federal, provincial and territorial Auditors General in Canada recently concluded that Canada is not expected to meet its 2020 GHG-reduction target, and that "[m]eeting Canada's 2030 target will require substantial effort and actions beyond those currently planned or in place."[88]

Governments may point to a variety of factors to explain their repeated failure to implement their own climate change plans and meet their GHG-reduction commitments, including the complex nature of the division of powers over GHG emissions and the abundance of fossil fuel development in the country—including oil sands—and the changing ideologies in political leaders.[89] We will neither excuse nor discuss these here, though we will note that the level of response to climate change has varied across the country, with some provinces showing considerable leadership at a time when the federal government was winning "fossil of the year" awards in international negotiations.[90]

Following the election of Prime Minister Justin Trudeau and the renewed Canadian participation in international climate negotiations in Paris in 2015, the winds of federal climate policy changed. Shortly after the Paris Agreement, the Prime Minister met with his counterparts in the

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86. *The Government of Canada Accelerates Investments in Clean Electricity*, OFFICE MINISTER ENV'T & CLIMATE CHANGE (Nov. 21, 2016), https://www.canada.ca/en/environment-climate-change/news/2016/11/government-canada-accelerates-investments-clean-electricity.html.

87. *See* PROGRESS ON REDUCING GREENHOUSE GASES, *supra* note 75, at 11 (noting that Canada did not meet federal targets for GHG emissions from 1990 to 2015, and showing that greenhouse gas emissions rose from 613 Mt in 1990 to 732 Mt in 2014).

88. OFFICE OF THE AUDITOR GEN. OF CAN., PERSPECTIVES ON CLIMATE CHANGE ACTION IN CANADA–A COLLABORATIVE REPORT FROM AUDITORS GENERAL 4 (2018), http://www.oag-bvg.gc.ca/internet/English/parl_otp_201803_e_42883.html [hereinafter AUDITORS GEN. REPORT].

89. *See, e.g.*, Nathalie J. Chalifour, *Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions Through Regulations, a National Cap and Trade Program, or a National Carbon Tax*, 36 NAT'L J. CONST. L. 331, 333, 347, 384 (2016) [hereinafter Chalifour, *Canadian Climate Federalism*] (discussing the difficulties of balancing various interests regarding climate change when there are muddled jurisdictional pools); *see also* Kathryn Harrison, *The Struggle of Ideas and Self-interest in Canadian Climate Policy*, *in* GLOBAL COMMONS, DOMESTIC DECISIONS: THE COMPARATIVE POLITICS OF CLIMATE CHANGE 169, 169–71 (Kathryn Harrison & Lisa McIntosh Sundsrom eds., 2010) (arguing that Canada's political failure to adopt effective climate change policies could be attributed to electoral incentives, political institutions, and policymakers' own ideals).

90. *See* Chalifour, *Canadian Climate Federalism*, *supra* note 89, at 332–33, 341–44 (describing provincial leadership in the absence of federal action); PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at 1 (stating that multiple provinces have joined forces in an effort to reduce GHG emissions); *Canada Tagged as "Fossil of the Year,"* CBC NEWS (Dec. 18, 2009), http://www.cbc.ca/news/canada/canada-tagged-as-fossil-of-the-year-1.827062 (reporting that environmental groups at the Copenhagen conference labeled Canada the "Fossil of the Year").

provinces and territories and consulted with indigenous leaders to determine actions that would be taken to meet the Paris target.[91] The result was the Pan-Canadian Framework on Clean Growth and Climate Change (the Pan-Canadian Framework).[92] The Framework includes a range of investments, as well as commitments to phase out fossil fuel subsidies by 2025 and reduce methane emissions from the oil and gas sector by 40–45% below 2012 levels by 2025 (though note that the implementation of the methane regulations has been delayed by three years).[93] Perhaps most significantly, the Framework establishes a national benchmark carbon price equivalent to $10 per ton in 2018, rising by $10 per year to $50 per ton in 2022.[94] If provinces and territories do not implement a carbon tax or cap-and-trade program equivalent to the benchmark, the federal government will impose one in that jurisdiction.[95] Even with two provincial signatures missing, getting agreement on the Pan-Canadian Framework was in many ways a major achievement in Canada, given the intergovernmental dynamics at play.[96] However, there remain reasons for concern. Clearly, the Framework comes too late to reduce emissions in accordance with the IPCC 2020 benchmark.[97] Even more alarming is that the policies in the Framework are insufficient to meet Canada's Paris target.[98] Taking into consideration actions in place as of September 2017, GHG emissions are projected to be 722 Mt of CO2e in 2030.[99] With additional measures under

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91. *First Ministers Meeting: Vancouver Declaration on Clean Growth and Climate Change*, CANADIAN INTERGOVERNMENTAL CONFERENCE SECRETARIAT (Mar. 3, 2016), http://www.scics.ca/en/product-produit/vancouver-declaration-on-clean-growth-and-climate-change/. Note that the Pan-Canadian Framework has been criticized for failing to include indigenous communities as full partners in the framework. John Paul Tasker, *Indigenous Leaders Boycott "Segregated" Premiers Meeting in Edmonton*, CBC NEWS (July 17, 2017), http://www.cbc.ca/news/politics/indigenous-leaders-first-ministers-meeting-1.4208336.

92. *See generally* PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at 2 (outlining how the Pan-Canadian Framework developed after the Paris Agreement as a part of implementing commitments).

93. *Id.* at 51; Margo McDiarmid, *Federal Government Seeks to Push Back Methane Reduction Regulations by up to 3 Years*, CBC NEWS (Apr. 20, 2017), http://www.cbc.ca/news/politics/methane-emissions-regulations-changes-1.4078468.

94. PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at 50*; see also* ENV'T & CLIMATE CHANGE CAN., *supra* note 78, at 10 (projecting that Canada's greenhouse gas emissions will be 739 Mt in 2022).

95. ENV'T & CLIMATE CHANGE CAN., TECHNICAL PAPER ON THE FEDERAL CARBON PRICING BACKSTOP 4–5 (2017), https://www.canada.ca/content/dam/eccc/documents/pdf/20170518-1-en.pdf [hereinafter TECHNICAL PAPER ON THE FEDERAL CARBON PRICING BACKSTOP].

96. At the time of writing, Saskatchewan and Manitoba had yet to sign on. John Paul Tasker, *Trudeau Announces "Pan-Canadian Framework" on Climate—but Sask., Manitoba Hold off*, CBC NEWS (Dec. 9, 2016), http://www.cbc.ca/news/politics/trudeau-premiers-climate-deal-1.3888244.

97. Progress on Reducing Greenhouse Gases, *supra* note 75, at 12.

98. *Canada*, CLIMATE ACTION TRACKER, http://climateactiontracker.org/countries/canada.html (last updated Nov. 7, 2017).

99. AUDITORS GEN. REPORT, *supra* note 88, at 38; *see also* ENV'T & CLIMATE CHANGE CAN., *supra* note 78, at 11.

development but not yet implemented, those emissions will decrease to 641 or 583 Mt in 2030, with the latter including purchases of international allowances.[100] The bottom line is that under none of these scenarios will Canada meet its Paris target.[101]

These projections also assume full implementation, something that may be justifiably called into question given the government's consistently poor track record on implementing its past GHG-reduction plans.[102] Several elements of the framework have yet to be implemented at the time of writing, including the federal clean fuel standard and the national carbon price. Early indications suggest that adoption of the national carbon price will not be easy.[103] For instance, the province of Saskatchewan has promised to file a lawsuit challenging the constitutionality of the national carbon price.[104] Also, the province of Manitoba has released a plan that does not meet the carbon price benchmark.[105] In addition, the federal

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100. AUDITORS GEN. REPORT, *supra* note 88, at 34.

101. *Id.* at 88, at 38. Government projections released after the publication of the Pan-Canadian Framework show that, with full implementation of the policies in the Framework, Canada's emissions will decrease by 175 Mt of CO2e by 2030, leaving an emissions gap of 44 Mt. This estimate does not take into account the emissions reductions associated with investments in public transit, innovation, and green infrastructure, nor the potential increase in stored carbon in forests, soils, and wetlands. GOV'T OF CAN., CANADA'S 2017 NATIONALLY DETERMINED CONTRIBUTION SUBMISSION TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 5 (2017) [hereinafter CANADA'S NDC], http://www4.unfccc.int/ndcregistry/PublishedDocuments/Canada%20First/Canada%20First%20NDC-Revised%20submission%202017-05-11.pdf; *see also* Dale Marshall, *The Pan-Canadian Climate Framework: Historic and Insufficient*, ENVTL. DEF.: BLOG (Dec. 15, 2016), https://environmentaldefence.ca/2016/12/15/pan-canadian-climate-framework-historic-insufficient/ (arguing that the Framework's pricing structure for carbon must increase after 2022 to be effective).

102. *See* PROGRESS ON REDUCING GREENHOUSE GASES, *supra* note 75, at 4 (showing that, despite numerous plans for reducing GHG emissions, Canada's overall emissions increased between 1990 and 2015).

103. Ottawa released a discussion paper explaining its plan in May 2017. *See* TECHNICAL PAPER ON THE FEDERAL CARBON PRICING BACKSTOP, *supra* note 95, at 5 (describing the planned national carbon tax and carbon levy systems).

104. Jason Warick, *Sask. Alone in Threatening Carbon Tax Suit: Brad Wall*, CBC NEWS (Dec. 1, 2016), http://www.cbc.ca/news/canada/saskatoon/wall-threatens-legal-action-carbon-tax-1.3876489. Chalifour has argued that the national carbon price is within the federal government's constitutional jurisdiction. *See* Chalifour, *Canadian Climate Federalism*, *supra* note 89, at 394 (discussing the authority to regulate carbon emissions through the federal tax powers); Nathalie J. Chalifour, *Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes*, 22 NAT'L J. CONST. L. 119, 214 (2008) [hereinafter Chalifour, *Making Federalism Work for Climate Change*] (concluding that both the provincial and federal governments have the power to implement a carbon tax, and that the federal government has this authority under the peace, order, and good government power as well as under the criminal law and trade and commerce powers).

105. *Manitoba Thumbs Nose at Ottawa, Sets Own Carbon Tax Scheme*, CBC NEWS (Oct. 27, 2017), http://www.cbc.ca/news/canada/manitoba/climate-change-carbon-pricing-manitoba-1.4375005. The Manitoba government relied on a legal opinion it commissioned and made public on the constitutionality of the nationally imposed carbon price. *See* GOV'T OF MAN., MANITOBA'S RESPONSE TO THE PROPOSED FEDERAL BENCHMARK AND BACKSTOP FOR CARBON PRICING 8 (2017), https://www.gov.mb.ca/sd/climate/pdf/proposed_federal_backstop.pdf (stating that the province "will seek a formal legal opinion on the constitutionality of the federal government imposing the 'backstop'

government acknowledged that it will be delaying implementation of new methane gas regulations from 2018–20 to 2020–23.[106] Although the government maintains the delay will not jeopardize chances of reaching the target of reducing methane emissions by 40–45% by 2025, many are skeptical.[107]

Past experience and approvals of new oil and gas infrastructure, which create path dependencies for using fossil fuels for many years, suggest the right foot of government is walking forward while the left foot is stepping back.[108] Public skepticism about the likelihood of the federal government implementing its GHG-reduction targets is reasonable. Doubts of this nature in many countries have inspired citizens to take matters into their own hands and ask the courts to force their governments to take required action. We look at some of these examples next.

C. Legal Developments

Citizens around the world have long been searching for ways to hold their governments accountable for reducing GHG emissions.[109] The number and diversity of climate liability lawsuits in the U.S. alone is staggering.[110] Historically, few of these lawsuits have achieved their goals. The recent

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and 'benchmark' . . . on Manitoba"). *But see* Chalifour, *Canadian Climate Federalism*, *supra* note 89, at 344 (noting that Manitoba adopted a cap-and-trade program for large emitters); *see also* Chalifour, *Making Federalism Work for Climate Change*, *supra* note 104, at 214 (noting that the provincial government could justify a carbon tax if the tax is carefully designed).

106. Alex Ballingall, *Ottawa's Methane Gas Delay a "Real Blow" to Canada's Climate Targets*, TORONTO STAR (Apr. 21, 2017), https://www.thestar.com/news/canada/2017/04/21/ottawas-methane-gas-delay-a-real-blow-to-canadas-climate-targets.html.

107. *Id.*

108. *See generally* Levin et al., *supra* note 2, at 123, 144–45 (describing the role of government in creating path dependencies).

109. *See* David Estrin, CTR. FOR INT'L GOVERNANCE INNOVATION [CIGI], CIGI PAPERS NO. 101, LIMITING DANGEROUS CLIMATE CHANGE: THE CRITICAL ROLE OF CITIZEN SUITS AND DOMESTIC COURTS – DESPITE THE PARIS AGREEMENT 5 (2016), https://www.cigionline.org/publications/limiting-dangerous-climate-change-critical-role-citizen-suits-and-domestic-courts (discussing the effective use of citizen suits to compel governments to reduce GHG emissions in cases from the Netherlands, Pakistan, and the United States).

110. As of March 2017, the number of climate-change cases in the U.S. is over 600. U.N. ENV'T PROGRAMME, *supra* note 18, at 10; *see also* Mike Burger & Justin Gundlach, *Sabin Center and UN Environment Launch Joint Report on the State of Global Climate Change Litigation*, SABIN CTR. FOR CLIMATE CHANGE L.: CLIMATE L. BLOG (May 23, 2017), http://blogs.law.columbia.edu/climatechange/2017/05/23/sabin-center-and-un-environment-launch-joint-report-on-the-state-of-global-climate-change-litigation/ (announcing the launch of the global review on climate change litigation); *Climate Change Laws of the World*, GRANTHAM RES. INST. ON CLIMATE CHANGE & ENV'T, http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/ (last visited May 5, 2018) (listing climate-change litigation cases from 25 countries outside the United States). Note that there are many more lawsuits involving corporate plaintiffs targeting specific issues, rather than human-rights claims aimed at broad-scale climate accountability. GRANTHAM RES. INST. ON CLIMATE CHANGE & ENV'T, *supra*.

success story in the *Urgenda* case is giving momentum to those seeking to force governments to take the steps needed to reduce GHG emissions. As noted earlier in *Urgenda*, the Dutch court held the government has a legal duty to reduce its GHG emissions to the level needed to meet the IPCC 2020 benchmark.[111] Even though the Dutch government had a GHG-emissions-reduction policy in place to reduce emissions by 20% below 1990 levels by 2020, the Court held it was insufficient because it was not at the level agreed to be necessary to avoid dangerous levels of warming, as quantified by the IPCC 2020 benchmark.[112] Only a few months after *Urgenda* was decided, a Pakistani court ordered the government to implement its national climate plan on the basis of the risks posed by climate change to the fundamental rights of its citizens, particularly the weak and vulnerable.[113]

The successes in the Netherlands and Pakistan stand out because courts held government action on climate change to be inadequate and thereby unlawful, and found a positive duty on governments to act on climate change.[114] Not surprisingly, these decisions have created momentum and inspired new climate justice lawsuits, including the 2015 lawsuit by the Belgium group Klimaatzaak to compel the government to take serious action on climate change based on human rights and international law.[115] Similarly, a suit by a group of senior women in Switzerland alleged a violation of their human rights based on disproportionate impacts from climate-related heat waves.[116]

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111. *See* Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, paras. 4.65, 5.1 (Urgenda Foundation/Netherlands) (Neth.) (highlighting the court's decision that the Dutch GHG-emission reduction policy was insufficient).

112. *Id.* paras. 4.31, 4.65.

113. Leghari v. Pakistan, (2015) WP No. 25501/201 (Punjab) paras. 21, 24, 25 (Pak.) (noting the court's position on the importance of climate justice and how the current case adds to the environmental jurisprudence, and showing that the court dissolved the Climate Change Commission and initiated the Standing Committee on Climate Change to implement additional action).

114. *Urgenda*, C/09/456689/HA ZA 13-1396 paras. 4.65, 4.73, 4.83–4.84; *Leghari*, WP No. 25501/201 paras. 25, 27 (highlighting the court's order to facilitate action through a link between the Court and the Executive, namely the Standing Committee on Climate Change).

115. *See* Jennifer M. Klein, *Lawsuit Seeks to Force Belgian Government to Take Action Against Climate Change*, SABIN CTR. FOR CLIMATE CHANGE L.: CLIMATE L. BLOG (June 8, 2015), http://blogs.law.columbia.edu/climatechange/2015/06/08/lawsuit-seeks-to-force-belgian-government-to-take-action-against-climate-change/ (describing the Belgian lawsuit at its early stage).

116. *See* GIULIO CORSI, INT'L CTR. FOR CLIMATE GOVERNANCE, THE NEW WAVE OF CLIMATE CHANGE LITIGATION: A TRANSFERABILITY ANALYSIS 9 (2017) (outlining the claims of senior women that insufficient climate policy violates the European Convention on Human Rights and the Swiss Constitution); Suzanne Chew, *See You in Court: The Rise of Climate Justice*, ECO-BUSINESS (July 19, 2017), http://www.eco-business.com/opinion/see-you-in-court-the-rise-of-climate-justice/ (describing the senior women's complaint against the Swiss government for failing to provide adequate regulations targeting climate change).

In the United States, the organization Our Children's Trust has launched several climate justice lawsuits, including a case against the U.S. federal government on behalf of 21 youth plaintiffs, the organization Earth Guardians, and climate scientist James Hansen representing future generations.[117] In that landmark case, the plaintiffs allege that, although the government knew for decades that GHG emissions destabilize the climate system in a way that can significantly endanger the plaintiffs, the government "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels," thereby deliberately allowing atmospheric concentrations of CO2 to escalate.[118] The case has cleared a number of pre-trial hurdles and is set to go to trial in May 2018.[119]

A young girl in India has launched a similar challenge, seeking to compel the Indian government to implement its existing environmental laws and reduce its GHG emissions.[120] Grounded in notions of intergenerational equity and based on constitutional and human rights, these cases raise important questions about the extent to which governments can be held accountable for changing the planetary conditions of these youth's futures. Other recent successes are renewing efforts to use legal strategies to hold other governments similarly accountable to do their share to address the global problem of climate change.[121]

Within Canada, one of the biggest climate-change lawsuits challenged stalled action related to implementation of the Kyoto Protocol.[122] While the

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117. Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

118. *Id.*

119. *See* Juliana v. U.S. – *Climate Lawsuit*, *supra* note 34 (describing how plaintiffs overcame procedural hurdles such as motions to dismiss, a motion to intervene, and an interlocutory appeal of the order denying such motions); Opinion and Order, *supra* note 17, at 54 (denying defendants' motion to dismiss).

120. *See Nine-year-old Sues Indian Government over Climate Change Inaction*, GUARDIAN (Apr. 7, 2017), https://www.theguardian.com/environment/2017/apr/07/nine-year-old-ridhima-pandey-sues-indian-government-over-climate-change-inaction (summarizing the claims against the Indian Government for failing to implement climate-change regulations); Chloe Farand, *Nine-year-old Girl Files Lawsuit Against Indian Government over Failure to Take Ambitious Climate Action*, INDEPENDENT (Apr. 1, 2017), http://www.independent.co.uk/environment/nine-ridhima-pandey-court-case-indian-government-climate-change-uttarakhand-a7661971.html (stating plaintiff's cause of action: India's failure to implement promises made in the Paris Agreement). For additional information on this case's progress (No. 187/2017), use the National Green Tribunal's website: *Search All Case*, NAT'L GREEN TRIBUNAL, www.greentribunal.gov.in/search_all_case.aspx (last visited May 5, 2018).

121. *See, e.g.*, David Estrin & Patrícia Galvão Ferreira, CIGI, *Climate Change Order in the Philippines: The Increasing Relevance of Domestic Courts in the Fight Against Climate Change* (Aug. 11, 2016), https://www.cigionline.org/articles/climate-change-order-philippines-increasing-relevance-domestic-courts-fight-against (explaining the "continued relevance" of citizen suits in fighting climate change in Australia, the Netherlands, New Zealand, the European Union, Spain, and the United Kingdom).

122. *Canada Facing Legal Challenge for Breaking Federal Global Warming Law*, ECOJUSTICE (Jan. 13, 2010), https://www.ecojustice.ca/pressrelease/canada-facing-legal-challenge-for-breaking-

federal government made several high-level climate-change commitments and developed various plans, it implemented very few laws, regulations, or policies to meet its Kyoto commitments.[123] Because of this, the opposition parties succeeded in passing the Kyoto Protocol Implementation Act (KPIA) during a time when the federal government held only a minority.[124] The KPIA required the federal government to file a plan to meet its obligations under Kyoto.[125] When the federal government released a plan that was facially inadequate for meeting the Kyoto goals, the environmental organization Friends of the Earth brought a challenge.[126] In a confounding decision, Barnes J. held that the issue was non-justiciable.[127] As discussed in Part IV.C, the decision has been subject to criticism and is, in our view, distinguishable from the circumstances of a section 7 climate challenge.[128]

The government later decided to withdraw from Kyoto, and that decision was challenged. In *Turp*, the court upheld the decision to withdraw from Kyoto as part of Royal Prerogative, but—importantly for the purposes of our analysis—the decision noted that a Charter challenge would have rendered the matter justiciable.[129] We return to these cases and the issue of justiciability in Part IV.C. We now turn to the section 7 analysis.

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federal-global-warming-law-2/ (reporting on litigation initiated by the environmental organization Friends of the Earth for Canada's violation of the Kyoto Protocol Implementation Act).

123. *See id.* (noting that "Canada has failed to take any concrete action" under the Kyoto Protocol).

124. Kyoto Protocol Implementation Act, S.C. 2007, c 30, repealed by S.C. 2012, c 19, s. 699 (Can.); *see also* Bill Doskoch, *Canada and the Kyoto Protocol - A Timeline*, CTV NEWS (Dec. 5, 2011), https://www.ctvnews.ca/canada-and-the-kyoto-protocol-a-timeline-1.732766 (noting that Canada had a minority government under Prime Minister Harper in 2007 when the KPIA was passed). In Canada's parliamentary system, a minority government is in place when no one political party holds a majority of seats in the legislature. *Minority Government*, HISTORICA CAN., https://www.thecanadianencyclopedia.ca/en/article/minority-government/ (last visited May 5, 2018).

125. Kyoto Protocol Implementation Act, S.C. 2007, c 30, s. 5(1)(a) (Can.).

126. Friends of the Earth v. Canada (Governor in Council), 2008 FC 1183, paras. 2–3 (Can.), *aff'd*, 2009 FCA 297, *appeal denied*, 2010 CanLII 14720 (S.C.C.); *see also Canada's Kyoto Protocol Targets and Obligations*, GOV'T CAN., http://www.ec.gc.ca/doc/ed-es/p_123/s1_eng.htm (last modified July 6, 2010) (outlining the Canadian government's obligations under the Kyoto Protocol).

127. *Friends of Earth*, 2008 FC para. 34.

128. *See infra* Part IV.C (arguing the failure of the Canadian government to meet its GHG-reduction targets infringes Charter rights and is a legal decision that is justiciable).

129. Turp v. Canada (Att'y Gen.), 2012 FC 893, para. 18 (Can.); *see infra* Part IV.C (arguing the failure of the Canadian government to meet its GHG-reduction targets infringes Charter rights and is a legal decision that is justiciable); *see also* PETER HOGG, CONSTITUTIONAL LAW OF CANADA 1-18–1-19 (2017) ("The royal prerogative consists of the powers and privileges accorded by the common law to the Crown. . . . The term prerogative should be confined to powers or privileges that are unique to the Crown.").

II. APPLYING SECTION 7 TO CLIMATE

According to section 7 of the Charter, "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[130] As already noted, applying this guarantee to the facts of climate change raises more novel questions than a typical Charter challenge.[131] For instance, there is the threshold issue of whether the Charter applies, given that most GHG emissions are emitted from the private sector. There is also the issue of finding the most appropriate claimants who would have standing to bring the case, since there are multiple ways to do so and the analyses would vary in each instance. This Part runs through the section 7 analysis, beginning with the threshold issues of application of the Charter and the standing of potential claimants. We come back to the three central challenges flagged earlier (what state conduct to challenge, the evidentiary burden, and justiciability) in Part IV.

A. Does the Charter Apply?

One of the arguments raised by the Dutch government in response to the *Urgenda* claim was that GHGs are largely emitted by the private sector, rendering them outside the scope of constitutional protections.[132] The Dutch court rejected this argument because, not only does the Dutch government emit some GHG emissions directly, but the government also authorizes the majority of private sector emissions through a variety of permitting schemes.[133] As such, there was a sufficient public connection to ground the claim.[134]

The same logic works in the Canadian context. Section 32 of the Charter states that the Charter applies to "all matters within the authority of Parliament" and the legislature of each province.[135] The Supreme Court takes a broad approach to this provision, finding that the Charter applies not only to laws and regulations, but also to government policies, programs,

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130. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, s. 7 (U.K.).

131. *See infra* Part III.B (discussing potential standing problems for claimants in climate Charter cases).

132. *See* Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, paras. 4.42, 4.66 (Urgenda Foundation/Netherlands) (Neth.) (highlighting the court's decision that the Dutch government's GHG-emission-reduction policy was insufficient).

133. *Id.* para. 4.66.

134. *Id.*

135. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, s. 32(1) (U.K.).

practices, and decisions. For example, in *Vriend*, the Supreme Court held that, while pure "private activity" is not subject to the Charter, "laws that regulate private activity [. . .] obviously [are]."[136] Professor Peter Hogg adds that:

> [W]hen it is said that the Charter does not apply to "private" action, the word "private" is really a term of art, denoting a residual category from which it is necessary to subtract those cases where the existence of a statute or the presence of government does make the Charter applicable.[137]

In other words, actions of private actors can be subject to Charter scrutiny if there is a sufficient nexus between the action and government policy.[138] What matters is that there is a "direct and . . . precisely-defined connection" between a government's policy and the third party's impugned conduct.[139] In *Suresh*, for instance, the Supreme Court held that the Canadian government could not escape application of the Charter in extraditing a refugee to a place where there was risk of torture, even though the actual violence would be committed by a third party:

> At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.[140]

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136. Vriend v. Alberta, [1998] 1 S.C.R. 493, para. 66 (Can.) (internal quotations omitted).

137. HOGG, *supra* note 129, at 37-32. Andrew Gage also finds support for this proposition at the Ontario Court of Appeal, which, in *Energy Probe*, "appear[ed] to accept without consideration that third party actions arising from government action can form the basis of a challenge to the government action . . . ." Andrew Gage, *Public Health Hazards and Section 7 of the Charter*, 13 J. ENVTL. L & PRAC. 1, 24 (2003); *see also* Energy Probe v. Canada (Att'y Gen.), [1989] 68 O.R. 2d 449, paras. 45–46 (Can. Ont. C.A.) (providing that government conduct enabling third-party actions that increase the future risk of harm—such as the development of nuclear reactors—can form the basis of a cause of action against the government conduct).

138. *See* Eldridge v. British Columbia (Att'y Gen.), [1997] 3 S.C.R. 624, paras. 50–51 (Can.) (stating that, when private actors provide services resembling government actions, they cannot evade Charter obligations).

139. *Id.* para. 51. It should be noted that, in *Eldridge*, the hospital was seen as an agent of the government because it provided a specific medical service set out by statute, such that the provision of the service was an "expression of government policy." *Id.* In the climate change context, by contrast, industry polluters do not act as agents of the government, but the government directly regulates the level of pollution allowed to be emitted by those private actors, clearly bringing it within Charter scrutiny. *See id.* para. 20 (providing that remedies are available for the actions of a "delegated decision-maker," e.g., a private entity, when its actions violate constitutional rights).

140. Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, para. 54 (Can.).

While the majority of GHG emissions in Canada are created by private parties,[141] most of these emissions are directly or indirectly authorized by government through permits, licenses, or regulatory standards for fossil-fuel extraction, development, transportation, or sale.[142] In some cases, the projects responsible for the emissions are directly or indirectly subsidized by the government.[143] The reality is that federal, provincial, and territorial governments authorize, enable, and facilitate the majority of GHG emissions in Canada: private actors would not be able to emit GHGs to the extent they do *but for* the active permission of the government.[144] The fact that the government itself does not emit the majority of GHGs is not a barrier to a Charter challenge.[145] What matters is that the government's policies allow, enable, and often encourage those emissions.[146]

B. Standing

In order to bring a lawsuit claiming a violation of his or her constitutional rights, a claimant would need to show that she or he is directly affected.[147] Individuals and organizations can also gain public

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141. The federal government tracks its own GHG emissions across 15 departments, and estimates that it emitted approximately 986,000 tons of CO2 during the 2016–17 fiscal year. *Government of Canada's Greenhouse Gas Emissions Inventory*, GOV'T CAN. [hereinafter *Canada's Greenhouse Gas Emissions*], https://www.canada.ca/en/treasury-board-secretariat/services/innovation/greening-government/government-canada-greenhouse-gas-emissions-inventory.html (last modified Dec. 18, 2017).

142. For instance, the federal government recently approved several pipeline projects, including the Pacific Northwest Liquefied Natural Gas Facility, the Trans Mountain Pipeline Expansion, and the Line 3 Pipeline Replacement program, as well as the Woodfibre LNG Project, the NOVA Gas Pipeline, and the Ridley Island Propane Terminal. JIM CARR, NATURAL RESOURCES CANADA: 2017–18 DEPARTMENTAL PLAN 2 (2017), https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/plansperformancereports/rpp/2017-2018/pdf/NRCan_RPP_2017-18-eng.pdf.

143. For instance, the IISD estimates that the Canadian government provides approximately $3.3 billion in fossil-fuel subsidies through direct infusions of cash to companies and tax measures, such as reductions in property taxes and other special tax deductions for industry (e.g. the federal Canadian Exploration Expense and the provincial Deep Drilling Tax Credit). *Unpacking Canada's Fossil Fuel Subsidies*, INT'L INST. FOR SUSTAINABLE DEV. [hereinafter IISD], http://www.iisd.org/faq/unpacking-canadas-fossil-fuel-subsidies/#can-you-tell (last visited May 5, 2018).

144. The claim by youth plaintiffs in *Juliana v. United States* is based on the allegation that the federal government knowingly created and enhanced the dangers of climate change through fossil-fuel extraction, production, consumption, transportation, and exportation. Juliana v. United States, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016).

145. *See infra* notes 344–62 and accompanying text (arguing further that Canada should not be able to avoid responsibility because it is one of many global contributors to climate change).

146. *Compare Canada's Greenhouse Gas Emissions*, *supra* note 141 (showing that the government emitted 986,000 tonnes of carbon dioxide in the 2016–17 fiscal year), *with* IISD, *supra* note 143 (estimating Canadian government fossil-fuel subsidies at $3.3 billion CAD).

147. *See, e.g.*, Energy Probe v. Canada (Att'y Gen.), [1989] 68 O.R. 2d 449, para. 45 (Can. Ont. C.A.) (holding no injury needs to have been committed for standing so long as the claimant can show a potential injury affected him or her).

interest standing if she or he (or the organization being represented) has a genuine interest in the issue as a citizen, and there is no other reasonable and effective way that the issue may be brought before the court.[148] In deciding whether to grant standing of this nature, the courts must be guided by a purposive analysis that balances the rationale for limiting standing (e.g., proper allocation of scarce judicial resources) with the critical role of courts in evaluating the legality of government conduct.[149] Judges are instructed to look at three interrelated factors in a holistic or cumulative way: whether (1) the litigation raises a serious issue; (2) the party bringing the case has a personal stake in the matter or a genuine interest in the validity of the legislation; and (3) the challenge is a reasonable and effective means to bring the issue before the court.[150]

While the section 7 analysis will differ based on the characteristics of the claimant(s), standing is not likely to present a significant barrier in most cases. A private citizen would have standing to bring a claim if the government's conduct impacts her directly. Several of the examples listed above meet this criterion.[151] Further, if a public interest organization were to challenge the government's conduct in relation to climate change, it would likely have little difficulty showing that it has a stake in the matter or a genuine interest in the constitutionality of the government's conduct given the grave consequences of climate change. Those grave consequences would also make it difficult for a court to dismiss the issue as trivial or frivolous, or not sufficiently serious to warrant the court's attention.

A public-interest claimant may, however, be challenged over whether the issue raised is justiciable, an issue we address in Part III.C.[152] In the past, public interest organizations often struggled to convince courts that there was no other reasonable and effective way to bring the issue to the Court.[153] The Supreme Court has since clarified that the question is rather whether, in all of the circumstances, the claim is a reasonable and effective means to bring the issue before the court.[154] Factors that can be considered in evaluating this question include whether the case transcends the interests of those most directly affected and whether it "may provide access to

148. Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236, 249–51 (Can.).

149. *Id.*

150. *See* Canada (Att'y Gen.) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, paras. 19, 37 (Can.) (refining the public-interest test first articulated in Minister of Justice Canada v. Borowski, [1981] 2 S.C.R. 575 (Can.)).

151. *See infra* Part II.C (listing climate-change cases from the United States, India, and Canada where plaintiffs have demonstrated direct impacts from government conduct).

152. *See infra* Part III.C (outlining the justiciability requirement in climate-change claims).

153. Downtown Eastside Sex Workers, 2012 SCC paras. 37, 44.

154. *Id.*

justice for disadvantaged persons in society whose legal rights are affected."[155] It is hard to imagine a problem more transcending than climate change, which is a problem on a planetary scale. A public-interest challenge stands to provide justice for disadvantaged persons, given that climate change is known to have disproportionate impacts on vulnerable populations. As noted by the Pakistani court in the landmark *Leghari* decision, the "dramatic alterations in our planet's climate system" are "[o]n a legal and constitutional plane . . . [a] clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society . . . . "[156]

In conclusion, there is a broad range of potential claimants and means of effectively addressing standing. As such, climate change litigants are unlikely to encounter difficulties at this stage, as long as they adopt a well-thought-out approach in choosing who should be the public face of their constitutional challenge.

C. Potential Claimants

In light of the impacts of climate change and the above requirements for standing, it is possible to imagine a broad range of potential claimants for a section 7 climate challenge. Consider the following examples:

> - An Inuit woman living in a northern community experiencing severe stress due to the inability to access (or leave) her community because of melting ice and permafrost roads;
>
> - A First Nations man whose ability to hunt and provide food for his family and community is significantly compromised by changing weather and wildlife migratory patterns;
>
> - A senior woman living in a large urban area experiencing respiratory disease and other health problems as a result of extreme heat waves;
>
> - A woman experiencing PTSD after going into labor while stranded in her car alone during a catastrophic flood;
>
> - The wife of a farmer who committed suicide after a period of depression brought on by repeated crop failure associated with extreme drought conditions;

155. *Id.* para. 51.
156. Leghari v. Pakistan, (2015) WP No. 25501/201 (Punjab) para. 11 (Pak.).

> - A coastal community, such as Lennox Island First Nation, where a receding coastline is threatening the community's homes, cultural rights, and future livelihoods; or
>
> - A group of youth and a representative of future generations, similar to the plaintiffs in *Juliana*.[157]

This list of potential claimants is extensive and diverse. A claim could be brought on behalf of one or a combination of such plaintiffs, or even by a public interest organization representing everyday citizens, as was the case in the *Urgenda* litigation (where the plaintiffs were 900 citizens and a public interest organization).[158] As illustrated by cases such as *Bedford* and *Carter*, the ideal claimant is often a combination of a public interest group and a mixed group of individuals experiencing harms.[159]

The choice of claimant will ultimately depend on many factors, including the willingness of plaintiffs to participate, the litigation strategy, and the nature of the harms alleged.[160] This list is intended only to illustrate the scope of potential claimants. It is worth underlining the strength that indigenous claimants would have in bringing a section 7 climate challenge. As Andrew Sniderman and Adam Shedletzky argue, the courts may be "more likely to recognize climate change as a threat to rights with respect to Aboriginal litigants" given the abundant research documenting the extent to which First Nations and Inuit communities are being negatively impacted by climate change.[161] The strongest claimants are likely to have intersecting claims, such as an indigenous person who is also part of another vulnerable group (such as youth), or pregnant or senior women alongside a public interest organization.

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157. *See generally* Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016) (describing claims made by youth and a representative for future generations); Juliana v. U.S. – *Climate Lawsuit*, *supra* note 34 (summarizing the constitutional climate lawsuit filed by youth plaintiffs in *Juliana*).

158. Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, paras. 2.1–2.2 (Urgenda Foundation/Netherlands) (Neth.).

159. *See* Carter v. Canada (Att'y Gen.), 2015 SCC 5, paras. 11–14, 62 (Can.) (describing the plaintiff who suffered from ALS and desired a physician-assisted suicide when she lost her independence, reached a bedridden state, and wanted to avoid an "ugly death"); Canada (Att'y General) v. Bedford, 2013 SCC 72, paras. 8–14 (Can.) (describing the plaintiffs, who were prostitutes challenging the constitutionality of a statute that prevented them from implementing safety measures in their work, as well as public-interest-group interveners); *see also* Canada (Att'y Gen.) v. PHS Community Services Society, 2011 SCC 44, paras. 21, 135 (Can.) (showing a successful lawsuit by a public interest group and private individuals).

160. *See infra* note 157 and accompanying text (discussing potential claimants for section 7 climate challenges).

161. Andrew Stobo Sniderman & Adam Shedletzky, *supra* note 50, at 1, 5.

D. The Section 7 Analysis

A section 7 analysis typically proceeds in two steps. First, has the claimant's right to life, liberty, or security of the person been violated?[162] If so, is the deprivation in accordance with the principles of fundamental justice?[163] According to the courts, a deprivation can relate to one or more of the three interests at once.[164] However, for ease, we will examine each in turn.

1. Life

At its core, the right to life is the "right, freedom or ability to maintain one's existence."[165] The Supreme Court recently offered an expansive definition of the life interest, holding that the right is engaged "where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly."[166] For example, the Court found that premature death because of lack of timely healthcare, or deprivation of potentially lifesaving medical care, is sufficient to invoke this dimension of section 7.[167] Though not in the context of the Charter, the Supreme Court has accepted that "certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health."[168] The Federal Court of Appeal has also unequivocally recognized the harms of GHG emissions, stating in the context of a division of powers case that "[i]t must be recalled that it is uncontroverted that

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162. Blencoe v. British Columbia (Human Rights Com.), 2000 SCC 44, para. 47 (Can.).

163. *Id.*

164. *Carter*, 2015 SCC para. 55.

165. DEBORAH L. CURRAN ET AL., ENVIRONMENTAL LAW: IN THE PUBLIC INTEREST § 6.2.11(D)(I)(a) (2008).

166. *Carter*, 2015 SCC para. 62.

167. Canada (Att'y Gen.) v. PHS Community Services Society, 2011 SCC 44, para. 91 (Can.); *see also* Chaoulli v. Québec, 2005 SCC 35, paras. 38, 50 (Can.) (finding that low quality healthcare implicates section 7 of the Canadian Charter); *id.* para. 123 (McLachlin, C.J., concurring) (noting that not every difficulty impacts the security of the person, but lack of healthcare reaches such a level); *id.* paras. 191, 200 (Binnie, J., dissenting) (noting that, in some instances, the Québec health system implicated section 7 rights). In *Carter*, "[t]he trial judge found that the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. On that basis, she found that the right to life was engaged." *Carter*, 2015 SCC para. 57. As a result, the court in *Carter* saw "no basis for interfering with the trial judge's conclusion on this point." *Id.* para. 58.

168. LAW REFORM COMM'N OF CAN., *Crimes Against the Environment* 8 (Working Paper No. 44, 1985) [hereinafter LAW REFORM COMM'N]; R. v. Hydro-Québec, [1997] 3 S.C.R. 213, para. 124 (Can.) (quoting LAW REFORM COMM'N, *supra*, at 8); Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, para. 55 (Can.) (quoting LAW REFORM COMM'N, *supra*, at 8).

GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power."[169]

The scientific record on the impacts of climate change on human health is extensive. There is consensus that climate change will lead to increased rates of mortality and injury because of extreme weather events like heat waves, floods, wildfires, storms, increased pollution, an expanding range of vector-borne diseases, and contaminated water supplies.[170] Experts predict extreme heat waves will become more frequent, intense, and longer-lasting, thereby exacerbating cardiovascular illness, respiratory illness, heat stroke, dehydration, diabetes, and strokes.[171] According to Toronto Public Health, annual premature deaths associated with hot weather could more than double in Montréal, Toronto, Ottawa, and Windsor by 2050 and triple by 2080.[172]

Climate change is also expected to lead to more deaths and illnesses because of reduced air quality, since higher temperatures will accelerate the chemical reactions that generate air contaminants.[173] This is significant, given that health authorities estimate air pollution was already to blame for the premature deaths of an estimated 21,000 Canadians in 2008.[174] A ground-breaking study recently published in the Lancet medical journal showed that one out of every six deaths worldwide is attributable to pollution.[175] While Canada fared better overall than many other countries in terms of its pollution levels, the Lancet report flagged areas and populations of concern in Canada, including First Nations communities disproportionately affected by pollution around the oil, gas, and chemical

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169. Syncrude Can. Ltd. v. Canada (Att'y Gen.), 2016 FCA 160, para. 62 (Can.).

170. CLIMATE CHANGE 2014 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS, *supra* note 35, at 6, 14 fig.SPM.8, 15.

171. Mohammad Baaghideh & Fatemeh Mayvaneh, *Climate Change and Simulation of Cardiovascular Disease Mortality: A Case Study of Mashhad, Iran*, 46 IRAN J. PUB. HEALTH 396, 403 (2017).

172. DAVID MCKEOWN, TORONTO PUB. HEALTH, CLIMATE CHANGE AND HEALTH STRATEGY FOR TORONTO 3 (2015), http://www.toronto.ca/legdocs/mmis/2016/py/bgrd/backgroundfile-97359.pdf.

173. Warren & Lemmen, *supra* note 46, at 197. The authors write that climate change "will exacerbate existing health risks associated with poor air quality through heat and other meteorologically-related increases in ambient air pollutants . . . , aeroallergens, and biological contaminants and pathogens . . . ." *Id.*; *see also* Howard Frumkin, *Bumps on the Road to Preparedness*, 40 AM. J. PREVENTIVE MED. 272, 272 (2011) (describing life-saving subsidies for air conditioning during high temperatures); Amy Greer et al., *Climate Change and Infectious Diseases in North America: The Road Ahead*, 178 CAN. MED. ASS'N J. 715, 717 (2008) (noting that climate change may cause harmful air pollutants to increase); PAULA SCHENK ET AL., CTR. FOR INDOOR ENV'TS & HEALTH, UNIV. OF CONN. HEALTH CTR., CLIMATE CHANGE, INDOOR AIR QUALITY AND HEALTH 4 (2010) (describing the health risks associated with poor indoor air quality caused by extreme temperatures).

174. Warren & Lemmen, *supra* note 46, at 197.

175. PHILIP J. LANDRIGAN ET AL., THE LANCET COMMISSION ON POLLUTION AND HEALTH 9 (2017), https://doi.org/10.1016/S0140-6736(17)32345-0.

industries.[176] Climate change is expected to lead to increased rates of asthma, chronic respiratory disease, and cardiovascular disease.[177] In drier climates, there will be more dust and fine particulate matter, in part because of an increased frequency of forest fires.[178] Wetter climates, meanwhile, will experience increased molds and allergens, which can cause or worsen a number of respiratory diseases.[179]

The combination of higher temperatures, heavy rainfall, and drought is also expected to increase water-borne and vector-borne illness outbreaks, such as blue-green algae and Lyme disease.[180] Floods, storms, and increased rates of precipitation in certain areas are expected to contaminate water sources by picking up surface pollutants and chemical contaminants like pesticides and carrying them into local water sources.[181] All of these factors contribute to increased risks of injury, negative human health impacts, and death.[182]

Given these impacts, the federal government's conduct in relation to climate change can be said to contribute to unsafe levels of climate change, which violates the life interest of Canadians: some are experiencing

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176. *Id.* at 29.

177. *See, e.g.*, Ford, *supra* note 52, at 670 (stating that climate change will cause increased asthma, respiratory disease, and cardiac disease in aboriginal populations). The National Round Table on the Environment and the Economy (NRTEE) estimates that this will result in annual costs of $3 million and $11 million per year in Toronto alone. NAT'L ROUNDTABLE ON THE ENV'T & THE ECON., CLIMATE PROSPERITY NO. 04, PAYING THE PRICE: THE ECONOMIC IMPACTS OF CLIMATE CHANGE FOR CANADA 93 (2011) [hereinafter PAYING THE PRICE] (concluding that "respiratory illness due to climate change . . . could add between 50 cents and $1.60 per person per year to public health care costs" by the 2050s).

178. Warren & Lemmen, *supra* note 46, at 197. Fine particulate matter (PM2.5) is produced by vehicles, forest fires, and waste burning. *Id.* "Research suggests that PM is linked to morbidity through a range of adverse effects including restricted activity days, respiratory symptoms, bronchitis (both acute and chronic), asthma exacerbation, as well as respiratory and cardiac impacts, which result in increased emergency room visits, hospital admission, and premature mortality." *Id.* (internal citation omitted).

179. *Id.* at 198. Canada has experienced progressively earlier summers. *Id.* This invariably has led to an increase in pollen, corresponding respiratory problems, and, invariably, hospital visits. *Id.* Ragweed season, "responsible for approximately 75% of seasonal allergy symptoms . . . increased by 27 days in Saskatoon and . . . 25 days in Winnipeg." *Id.* (internal citation omitted). "Increased aeroallergen formation has been associated with exacerbation of respiratory diseases, such as asthma and chronic obstructive pulmonary disease (COPD) leading to increased hospital admissions." *Id.* (internal citations omitted).

180. Blue-green algae, technically known as cyanobacteria, produces various toxins in drinking and recreational water and contaminates fish and shellfish. *Id.* at 200. "Globally, increases in algal blooms are attributed to nutrient enrichment and warming weather." *Id.* at 201 (internal citation omitted). Lyme disease is a bacterial infection caused by tick bites that can lead to partial facial paralysis, joint pain, severe headaches, and heart palpitations. *Id.* Tick abundance is expected to increase markedly with climate change. *Id.* Further, authorities suggest Canada could be at risk of "exotic" vector-borne diseases such as malaria. *Id.* at 203.

181. *See generally* P. Edwards, *Climate Change: Air Pollution and Your Health*, 92 CAN. J. PUB. HEALTH 1, 4 (2001) (noting the impact of rainfall on health and food security).

182. *See, e.g.*, Anna Yusa et al., *Climate Change, Drought and Human Health in Canada*, 12 INT'L J. ENVTL. RES. PUB. HEALTH 8359, 8367 (2015) (discussing the impact of extreme rainfall, in combination with drought, on increasing frequencies of pathogens and diseases).

premature death because of increased exposure to phenomena like extreme heat waves, water contamination, air pollution, and vector-borne diseases.[183] Specific cohorts are particularly vulnerable, such as the elderly, children, and individuals with already compromised immune systems or existing health challenges such as asthma.[184] Importantly, the evidence indicates that the number of premature deaths associated with climate change will continue to rise sharply in the future, meaning the government's failure to meet its national GHG-reduction targets (and/or continuing to authorize and enable GHG emissions well beyond what is needed to avoid dangerous levels of warming) is directly contributing to premature death of Canadians as a whole, and at-risk cohorts in particular.[185] In sum, there is a compelling argument that the government's actions on climate violate the right to life. We return in Part IV to the issue of how to frame the government conduct that would be at the heart of the claim.[186]

The Supreme Court has historically interpreted the life interest narrowly, holding that, if the matter at issue can be characterized as pertaining to "autonomy and quality of life," it is appropriate to proceed through liberty and security of the person interests.[187] We therefore consider these next. However, since the Court has held that the section 7 interests can be considered together, at minimum, the life interest could be argued to reinforce the liberty and/or security interests.[188]

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183. *See id.* at 8360, 8377 (explaining that vector- and water-borne diseases are more common due to drought caused by climate change, which increases the susceptibility of certain populations).

184. Ki-Hyun Kim et al., *A Review of the Consequences of Global Climate Change on Human Health*, 32 J. ENVTL. SCI. & HEALTH, PART C ENVTL. CARCINOGENESIS & ECOTOXICOLOGY REVS. 299, 300, 303 (2014).

185. *See, e.g.*, *id.* at 300 (noting that expanding disease ranges will have negative impacts on mortality for all groups, but will be especially detrimental to vulnerable populations); *see also supra* Part I.B.2 (discussing the Canadian response and noting the lack of steps taken to meaningfully reduce emissions).

186. *See infra* Part IV.A (describing the strategy behind framing the government infringement of section 7 rights).

187. Carter v. Canada (Att'y Gen.), 2015 SCC 5, para. 62 (Can.). A paradigmatic section 7 life-interest case, for example, is the extradition of criminals to countries that may invoke the death penalty. *See, e.g.*, Canada v. Schmidt, [1987] 1 S.C.R. 500, 521, 531–32 (Can.) (stating that a woman's extradition on kidnapping charges would trigger section 7 review); Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, 781 (Can.) (noting that extradition to countries that would torture or execute a person would seriously affect a person's right to liberty and security); United States v. Burns, 2001 SCC 7, paras. 59–60 (Can.) (noting that section 7 analysis is triggered by the potential consequence of extradition).

188. *Carter*, 2015 SCC para. 64. The Canadian Supreme Court stated that the permissibility of assisted suicide in the case of a terminally ill patient who could not end her own life raised issues of "individual autonomy and dignity." *Id.* Since these concepts pertained to both liberty and security of the person, the Court found that these two interests could be looked at together. *Id.* No further comment was offered as to when rights can be looked at together, or whether the life interest can ever be looked at in combination with other section 7 interests. *Id.*

2. Liberty

Section 7's liberty interest is about more than physical freedom. Rooted in concepts of "human dignity, individual autonomy, and privacy,"[189] the liberty interest "protects 'the right to make fundamental personal choices free from state interference.'"[190] From this vantage point, the interest "encompasses . . . those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."[191]

At first glance, the case law's emphasis on "fundamental personal choices" seems at odds with the phenomenon of climate change, which is in many ways a collective experience.[192] In *Carter,* for instance, the Court found that the claimant's desire to end her life "represent[ed] [a] deeply personal response to serious pain and suffering" and was a decision with which the government should not interfere.[193] Although current and future generations will have no choice but to live with the many consequences of climate change, some people's lives and cultures will be especially impacted, such as indigenous communities living in the North. There is increasing evidence of climate change impacting the ability of indigenous communities to leave or access their communities because of melting permafrost roads and ice.[194] The reduced access impacts not only the people, but also the transportation of essential goods such as food, gas, and building and medical supplies.[195] An indigenous person's liberty interest may be violated when she is stranded for weeks because of melting ice and snow, or when factors such as later freezing dates, lack of summer floating ice, and displacement of caribou herds threaten food security to the point of

189. Godbout v. Longueuil (City), [1997] 3 S.C.R. 844, para. 65 (Can.); *see also* Blencoe v. British Columbia (Human Rights Com.), 2000 SCC 44, para. 49 (Can.) (noting that section 7 of the Charter "protects an individual's personal autonomy," and not merely an individual's "freedom from physical restraint").

190. *Carter*, 2015 SCC para. 64 (quoting *Blencoe*, 2000 SCC para. 54); *see also* R. v. Malmo-Levine, 2003 SCC 74, paras. 85–87 (Can.) ("Liberty . . . means more than freedom from physical restraint.").

191. *Godbout*, 3 S.C.R. para. 66.

192. *Carter*, 2015 SCC para. 64 (quoting *Blencoe*, 2000 SCC para. 54).

193. *Id.* para. 68.

194. *See* Dan Levin, *Ice Roads Ease Isolation in Canada's North, but They're Melting Too Soon*, N.Y. TIMES (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/world/canada/ice-roads-ease-isolation-in-canadas-north-but-theyre-melting-too-soon.html (describing the impact of warmer temperatures and more frequent storms on ice roads used to bring supplies to isolated communities in northern Canada).

195. *See* Carol Goar, *Welcome to Sandy Lake*, TORONTO STAR (Aug. 28, 2009), https://www.thestar.com/opinion/2009/08/28/welcome_to_sandy_lake.html (describing the high cost of basic grocery staples and poor infrastructure in a First Nation community in Ontario's Far North).

forcing relocation.[196] In *Godbout v Longueuil (Ville)*, the Supreme Court held that the section 7 liberty interest captures the right to choose where to establish one's home since that choice is an inherently personal one linked to personal autonomy.[197]

David Wu argues that the liberty interest is particularly promising for environmental rights claimants because, unlike life and security of the person, this interest does not require claimants to prove they have suffered a threshold level of harm.[198] He argues, for instance, that proving "a violation to one's home life (e.g., through the need to relocate) [would be] considerably easier than proving a cause and effect relationship between an environmental source and an increased risk of physical harm."[199] Following this logic, an indigenous community facing the prospect of losing its ancestral home because of climatic disruptions could frame a claim as an infringement of liberty. Claimants can use uncontroverted evidence that climate change is at the root of melting permafrost roads and demonstrate the grave impact on their personal liberty.

3. Security of the Person

Grounded in the idea of personal autonomy, the security of the person interest protects both physical and psychological integrity. "[I]t is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering."[200] With respect to physical security, the courts underline the importance of respecting a person's bodily integrity, noting that actions that invade the body—such as strip searches, body cavity

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196. *See* Hilary Fergurson, *Inuit Food (In)Security in Canada: Assessing the Implications and Effectiveness of Policy*, 2 QUEEN'S POL'Y REV. 54, 59 (2011) (describing how climate change leads to food insecurity for Inuit tribes).

197. Godbout v. Longueuil (City), [1997] 3 S.C.R. 844, para. 66 (Can.).

198. *See* David W.-L. Wu, *Embedding Environmental Rights in Section 7 of the Canadian Charter: Resolving the Tension Between the Need for Precaution and the Need for Harm*, 33 NAT'L J. CONST. L. 191, 205, 210 (2014) ("Liberty . . . does not revolve around direct notions of physical or psychological injury. Therefore, it is a promising interest to utilize to alleviate the evidentiary burden on the claimant in the causation stage.").

199. *Id*.

200. Carter v. Canada (Att'y Gen.), 2015 SCC 5, para. 64 (Can.) (internal citation omitted); *see also* New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, para. 58 (Can.) ("For a restriction of security of the person to be made out, . . . the impugned state action must have a serious and profound effect on a person's psychological integrity."); Blencoe v. British Columbia (Human Rights Com.), 2000 SCC 44, paras. 55–57 (Can.) (emphasizing that psychological harm must be state imposed and serious to violate security of the person); Chaoulli v. Québec, 2005 SCC 35, para. 43 (Can.) (discussing the Court's decision in *Rodriguez*, which found that state-imposed suffering in the form of delays impinged on section 7 rights to security of the person); *id.* para. 119 (McLachlin, C.J., concurring) (noting that treatment delays resulting in psychological or physical suffering trigger section 7 protections of the security of the person).

searches, and removing blood or tissue from a person—can violate the security of the person.[201] Similarly, courts uphold a person's right to refuse medical treatment, since to do otherwise may violate that person's right to determine what happens to her body.[202]

In order to trigger protection under the psychological branch of security of the person, claimants must provide evidence that people of reasonable sensibility in their position would experience "greater than ordinary stress or anxiety," though their mental state "need not rise to the level of nervous shock or psychiatric illness . . . ."[203] The courts have found a violation of psychological security of the person in several cases, including: (1) through delays in accessing health care;[204] (2) restricted access to abortion;[205] (3) matters seriously affecting the parent-child relationship;[206] and, more recently, (4) limitations on physician-assisted suicide.[207]

There is a growing body of evidence documenting the psychological impacts of climate change. The psychological toll of climate change can be partially attributed to displacement, loss of property, and associative loss of place and belonging, not to mention the sheer stress of actual or anticipated episodes of extreme weather.[208] The American Psychological Association explains that climate change will impact mental health in a number of ways, including increasing the incidence of stress, anxiety, and depression, as well as substance abuse and post-traumatic stress disorder (PTSD).[209] Psychological impacts may occur in the wake of climate-related disasters, but also from the more gradual effects of rising temperatures and changing landscapes.[210] Knowing you are likely to experience more extreme weather more often, yet not knowing what this will look like or how you will cope, is highly stressful. The possibility that the nature of your home or local environment could change dramatically and even permanently can cause significant anxiety. The report by the American Psychological Association highlights a number of factors that can increase individual and community

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201. *See Carter*, 2015 SCC paras. 30, 68 (stating that restricting control of the plaintiff's bodily integrity violated the security of the person); GOV'T OF CAN., *Section 7 – Life, Liberty, and Security of the Person*, http://www.justice.gc.ca/eng/csj-sjc/charter-charte/check/art7.html (last visited May 6, 2018) (arguing that security of the person has both a physical and psychological element).

202. *Carter*, 2015 SCC para. 67 (citing Ciarlariello v. Schacter, [1993] 2 S.C.R. 119 (Can.)).

203. *G. (J.)*, 3 S.C.R. para. 60.

204. *Chaoulli*, 2005 SCC para. 43.

205. R. v. Morgentaler, [1998] 1 S.C.R. 30, 34–35 (Can.).

206. Winnipeg Child and Family Services v. K.L.W., 2000 SCC 48, paras. 5–6 (Can.).

207. *Carter*, 2015 SCC para. 68.

208. CLAYTON, *supra* note 53, at 18, 29, 40.

209. *Id.* at 6.

210. *Id.*

vulnerability to the psychological impacts of climate change, such as low education levels, high levels of poverty, low levels of social cohesion, and outdated infrastructure.[211] It also underlines the particular vulnerability of women, children, the elderly, and people whose livelihoods are especially affected, such as farmers impacted by drought and indigenous communities.[212]

In Canada, Health Canada acknowledges that extreme weather events can lead to a variety of psychological impacts ranging from anxiety and depression to irritability and drug or alcohol abuse.[213] A 2014 report underlines the particular vulnerability of rural and remote northern communities to mental health stresses.[214] In the Canadian North, the lives of people in indigenous communities are intimately tied to the land, and seasonal access to many communities depends upon the condition of ice and permafrost.[215] Many communities are experiencing increased levels of stress due to, among other things, unpredictability of the weather, shorter freezing periods for roads, higher food prices, and even disappearing traditional territory.[216]

A study that looked at the impact of the 2011 flood in Manitoba, which displaced 1,932 people for 18 months, found individuals affected by the disaster showed increased rates of stress, violence, substance abuse, and other psychosocial challenges in its aftermath.[217] Researchers have noted that exposure to natural disasters can lead to concentration and memory loss, anxiety, depression, and sleep disorders.[218] Fears about the potential

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211. *Id.* at 16.

212. *Id.* at 21–23.

213. CAN., CHIEF PUB. HEALTH OFFICER, REPORT ON THE STATE OF PUBLIC HEALTH IN CANADA 2014: PUBLIC HEALTH IN THE FUTURE 19 (2014), http://www.phac-aspc.gc.ca/cphorsphc-respcacsp/2014/assets/pdf/2014-eng.pdf.

214. *Id.*

215. *See* Aynslie Ogden & Peter Johnson, *Climate Change Impacts and Adaptation in Northern Canada*, SENATE CAN. (Dec. 5, 2002), https://sencanada.ca/content/sen/committee/372/agri/power/north-e.htm ("From building winter roads on frozen lakes and rivers to the migration of caribou herds, climate is an important factor in the management, development and conservation of natural resources, and in the sustainability of northern communities.").

216. The short documentary *Lament for the Land* explains the experience of the Inuit community in Nunatsiavut and the psychological impacts of the changes to the landscape. *See* LAMENT FOR THE LAND, http://www.lamentfortheland.ca/ (last visited May 6, 2018) (showcasing a documentary about 24 people from Nunatsiavut, Labrador and their stories of surviving climate change in the Northern region of Canada). The First Nations community of Lennox Island, on Prince Edward Island, faces the loss of a large portion of its land as a result of rising sea levels. *Facing The Change: 50% of Lennox Island, P.E.I., Could Be Underwater in 50 Years*, CBC NEWS (Nov. 22, 2016), http://www.cbc.ca/news/canada/lennox-island-pei-water-ocean-sea-levels-1.3756916.

217. Warren & Lemmen, *supra* note 46, at 209. "The term 'psychosocial' relates to the psychological, social and livelihood aspects of an individual's life, and acknowledges the interplay and co-dependencies that exist between individual and community well-being." *Id.* at 208.

218. *Id.* at 208–09.

harm of climate change—regardless of whether impacts actually materialize—are associated with feelings of despair and a sense of powerlessness.[219] Research also shows that exposure to repeated natural disasters tends to exacerbate negative mental health symptoms, which is concerning since the frequency of natural disasters is on the rise.[220]

Climate-change claimants could also build on a distinct stream of cases holding that security of the person includes the right to control what substances do and do not enter one's body. For example, the Supreme Court found the ban on assisted suicide deprived a woman with Lou Gehrig's disease of control over her bodily integrity, with the result that the claimant was left to endure "intolerable suffering" impinging on her security of the person.[221] An Alberta court also accepted that an order forcing a 16-year-old Jehovah's Witness to receive a blood transfusion despite her objection on religious grounds engaged her security of the person and life interests.[222]

Climate claimants could use the work of several scholars who argue it logically follows that the "intrusive presence of harmful levels of toxic substances . . . in a person's body could also be considered a violation of the [security of the person]."[223] In a climate context, the argument would be that the claimants do not—and have never—consented to the high levels of GHG emissions, which are leading to increased toxins such as air pollution and contaminated water supplies. These increased toxins are unconstitutionally permeating their bodies, thereby negatively affecting both their physical and mental health. As noted by Lynda Collins, experiencing the effects of pollution may violate the psychological security of the person, since one's health and the health of one's family suffers substantially when faced with the prospect of illness or death.[224] The

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219. AM. PSYCHOLOGICAL ASS'N, PSYCHOLOGY & GLOBAL CLIMATE CHANGE: ADDRESSING A MULTI-FACETED PHENOMENON AND SET OF CHALLENGES 77, 79–80 (2009).

220. *Id.* at 80.

221. Carter v. Canada (Att'y Gen.), 2015 SCC 5, para. 66 (Can.).

222. H. (B.) (Next Friend of) v. Alberta (Director of Child Welfare), 2002 ABQB 371, paras. 1, 51 (Can. Alta.). In this case, no violation of fundamental justice was found. *Id.* para. 51; *see also* B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, paras. 43, 87 (Can.) (recognizing, in a split decision, that a child-welfare law that "deprived the appellants of their right to decide which medical treatment should be administered to their infant" actually "infringed upon the parental 'liberty' protected in [section] 7 of the *Charter*").

223. BOYD, HEALTHY ENVIRONMENT, *supra* note 23, at 178; *see* Gage, *supra* note 137, at 4–5 (describing how the injection of arsenic into an individual's body violates her right to life, and analogizing this principle to toxins injected into the environment); Dayne Nadine Scott, *Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution*, 46 OSGOODE HALL L.J. 293, 301–02 (2008) (describing the intrusive and harmful effects that pollution has on humans); *see also* R. v. Stillman, [1997] 1 S.C.R. 607, para. 87 (Can.) ("Any invasion of the body is an invasion of the particular person.").

224. Lynda Collins, *Security of the Person, Peace of Mind: A Precautionary Approach to Environmental Uncertainty*, 4 J. HUM. RTS. & ENV'T 79, 96–98 (2013); Chalifour, *Environmental Justice and the Charter*, *supra* note 40, at 116–17.

Supreme Court's decision in *R v. Smith* supports this argument, which essentially upheld the accused's right to choose in what form cannabis derivatives enter the body (e.g., oral ingestion versus inhaling).[225]

Since many of the harms associated with climate change have yet to materialize, claimants may wish to address rights violations that will occur in the future. While there may be present physical harm (e.g., victims of heat waves or extreme weather) and present psychological harm, future harms would likely be the basis of some claims. The Supreme Court has already acknowledged that the security of the person encompasses the right to be free from prospective harm. As such, the right guarantees "freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself."[226] In this vein, Collins argues that, when government action increases an individual's or community's risk of illness or death, there is a prima facie violation of section 7.[227]

Claimants mounting this argument may find courts are hesitant to stretch the cause-and-effect relationship too far into the future. The case law is currently unclear on the applicable temporal standard. Several judgments follow *White* in finding that "imminent deprivation" of security of the person is required to trigger section 7.[228] In its defense, the government could therefore argue that the requirement for imminent harm is fatal to the "slow violence" engendered by climate change.[229]

However, *Mortgentaler* and *Chaoulli*, released before and after *White*, respectively, relax the requirement for imminence in certain contexts, namely when government conduct creates delays in providing time-sensitive medical services.[230] This increases the risk of physical and psychological suffering.[231] Additionally, the Court in *Suresh* found that the future risk of torture created a present-day psychological harm, which was

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225. *See* R. v. Smith, 2015 SCC 34, para. 21 (Can.) ("We conclude that the prohibition on possession of non-dried forms of medical marihuana limits [the] liberty and security of the person, engaging [section] 7 of the *Charter*.").

226. Singh v. Minister of Employment & Immigration, [1985] 1 S.C.R. 177, 207 (Can.).

227. Collins, *Ecologically Literate Reading*, *supra* note 23, at 24.

228. R. v. White, [1999] 2 S.C.R. 417, para. 38 (Can.); *see, e.g.*, R. v. Malmo-Levine, 2003 SCC 74, paras. 219–20 (Can.) (finding that, under the standard outlined in *White*, "the possibility of imprisonment . . . engages the [section] 7 liberty interest of the appellants"); Canadian Foundation for Children, Youth & Law v. Canada (Att'y Gen.), 2004 SCC 4, para. 175 (Can.) (applying the imminent-danger standard from *R. v. White*).

229. The term "slow violence" was used by Rob Nixon in the context of the U.S. environmental justice movement. ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2–3 (2011). We argue the concept also works in the context of harmful actions that contribute to climate change. *See* Wu, *supra* note 198, at 199–200 (explaining that the gap "between cause and effect, both spatially and temporally, is often a hallmark of environmental harm").

230. Chaoulli v. Québec, 2005 SCC 35, paras. 105–06 (Can.); R. v. Morgentaler, [1998] 1 S.C.R. 30, 57–59 (Can.).

231. *Chaoulli*, 2005 SCC paras. 105–06; *Morgentaler*, 1 S.C.R. at 57–59.

sufficient to infringe upon the claimant's security of the person.[232] By creating conditions in which the claimant had to face the risk of torture, the government breached security of the person in a way that was not in accordance with principles of fundamental justice.[233] The Court clarified that it must consider not only immediate threats, "but also possible future risks."[234] Furthermore, since the Supreme Court has cautioned that judges "should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of [section] 7 of the *Charter*," courts could take a flexible approach to the imminence requirement (if it is still considered a requirement) to account for the insidious nature of climate change.[235]

III. CENTRAL ISSUES TO A SECTION 7 CLIMATE CHALLENGE

As the preceding discussion demonstrated, climate change does and will continue to cause serious harm to Canadians. Yet those harms do not fit neatly into the grooves of typical section 7 analyses. In this Part, we discuss three central questions that will require the courts to be flexible and purposeful in their adjudication of a section 7 climate Charter challenge.

A. What State Conduct to Challenge

A critical strategic issue in a section 7 climate claim is determining what government conduct created the infringement. In many section 7 cases, this is a simple issue because there is a single provision (e.g., a provision from the Criminal Code) or a single government decision or action that allegedly violates someone's right to life, liberty, or security of the person.[236] A climate claim is more complicated because plaintiffs have many ways to frame the infringement, and the choice of framing may determine the outcome of the case.

For example, plaintiffs could take a conventional approach and challenge a single, specific decision (e.g., the authorization of a major fossil-fuel extraction project or the building of a fossil-fuel pipeline), which they would argue leads to harmful levels of GHG emissions. However, governments might escape responsibility if plaintiffs only challenge a single decision by pointing to the limited impact of that one decision.

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232. Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, paras. 5, 6, 44, 129 (Can.).

233. *Id.* paras. 44, 54, 56.

234. *Id.* para. 88.

235. Blencoe v. British Columbia (Human Rights Com.), 2000 SCC 44, para. 188 (Can.).

236. *See, e.g.*, Carter v. Canada (Att'y Gen.), 2015 SCC 5, paras. 5, 68 (Can.) (finding sections 241(b) and 14 of the Criminal Code infringe on the right to liberty and the security of the person).

It would be more compelling to focus attention on the network of policies, plans, and decisions that cumulatively cause harm. For instance, the Canadian government routinely grants permits and licenses authorizing activities that emit GHGs, such as oil and gas extraction projects, refineries, and pipelines.[237] The government has a long history of financing a wide range of fossil-fuel activity, including exploration, development, extraction, production, consumption, and exportation.[238] Plaintiffs could frame the lawsuit around a series of government decisions to authorize, allow, enable, encourage, and subsidize fossil-fuel exploration, development, and exploitation at a level that collectively and over time has the effect of contributing to harmful levels of emissions. This is similar to the plaintiffs' approach in *Juliana*.[239] Professor Lynda Collins's description of the potential for these types of decisions to constitute "state-sponsored environmental harm" offers a tidy way to characterize a variety of overt government decisions that could be the basis of a section 7 violation.[240]

Plaintiffs could also frame the claim as a failure on the part of the federal government to meet its international and national commitments to reduce GHG emissions and avoid dangerous levels of warming. Relatedly, plaintiffs could orient the claim around the federal government's repeated failure to meet its own GHG-reduction targets—especially when those targets are already less than what the IPCC has said was necessary for developed countries to avoid dangerous levels of warming.[241] A claim might also focus on the government's ineffective implementation of GHG-reduction plans.[242] This would be similar to the claims made in *Urgenda* or *Leghari*, which focused on the inadequacy of the government's response to climate change.[243] Framing a Charter challenge in terms of government inaction, however, adds a level of difficulty to the claim.

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237. *See supra* note 142 and accompanying text (discussing GHG-emitting programs receiving direct or indirect government support).

238. *See supra* notes 143–44 and accompanying text (illustrating Canada's long history of enabling and facilitating GHG emissions through special tax deductions).

239. Juliana v. United States, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016).

240. Lynda M. Collins, *Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution*, 71 SUP. CT. L. REV. 519, 524–26 (2015).

241. *Missing the Target: Canada's Deplorable Record on Carbon Emissions*, SERENDIPITY (Oct. 18, 2016), http://www.easterbrook.ca/steve/2016/10/missing-the-target-canadas-deplorable-record-on-carbon-emissions/.

242. *See* Gail Davidson & Rohan Shah, *Canada's Failure to Reduce Emissions: Unlawful or Above the Law?*, LAW. RTS. WATCH CAN. 1, 4 (2015), http://www.lrwc.org/ws/wp-content/uploads/2015/09/Canadas-Failure-to-reduce-Carbon-Emissions.LRWC_.8.Oct_.15.pdf (noting that Canada has not complied with the UNFCCC in implementing GHG-emission-reduction policies).

243. *See generally* Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, para. 4.1 (Urgenda Foundation/Netherlands) (Neth.) (noting that the initial case arose because the government did not pursue an adequate climate policy and therefore acted contrary to

Finally, plaintiffs could argue that governments have a positive duty to take actions necessary to provide a stable climate or avoid dangerous levels of GHG emissions. However, this opens up the Pandora's box of debate around positive obligations and the inclusion of socio-economic rights in the Charter.

We discuss each option in turn.

1. Challenging Specific Decisions

The advantage of challenging a single specific law or decision made by the government is that it is the path of least resistance, since courts are accustomed to analyzing Charter violations in relation to one law or decision.[244] The downside is that it may be difficult to identify one decision that, in and of itself, will lead to a level of GHG emissions that is harmful, or will on its own cause emissions to go beyond the government's target.

One option would be to follow the approach taken in *Urgenda* and frame the challenge around the Canadian GHG-reduction target. The plaintiffs in *Urgenda* successfully challenged the Dutch government's GHG-reduction target, which—while far more ambitious than the Canadian one—was inferior to the IPCC's 2020 emissions benchmark.[245] Canadian claimants could take a similar approach, alleging that the federal government's GHG-reduction target to reduce emissions 30% below 2005 levels by 2030 is inadequate to combat climate change.

A related approach would be to frame the challenge around the Pan-Canadian Framework. The Framework sets out the mitigation policies for the participating federal, provincial, and territorial governments, and yet the government admits that these policies—even if fully implemented—will not sufficiently reduce emissions to meet the Paris target. The Framework could be characterized as a government policy that infringes section 7 rights.[246]

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its duty of care toward the Dutch people); Leghari v. Pakistan, (2015) WP No. 25501/201 (Punjab) para. 3 (Pak.) (Lahore High Court Green Bench, 2015) (discussing how substantial work has been done to implement the government's climate-change framework).

244. Wu, *supra* note 198, at 194–95, 198, 202 (describing court decisions analyzing Charter challenges to administrative laws that use looser scrutiny standards than other decisions subject to full Charter scrutiny).

245. *See Urgenda*, C/09/456689/HA ZA 13-1396 para. 4.31 (discussing that the IPCC's 2020 threshold is 35–40% below 1990 levels, as compared to the Dutch reduction target, which was on track to be 14–17% below 1990 levels).

246. Wu, *supra* note 198, at 194–96 (outlining administrative and legislative decisions that were subject to less scrutiny, but noting that "[s]tronger environmental rights are created when decisions can be closely reviewed").

Plaintiffs could also target decisions that directly threaten the government's ability to reach its GHG-reduction targets. For instance, the federal government approved two major oil pipeline projects in November 2016.[247] In combination, the Line 3 and Trans Mountain pipelines will transport over 1.65 million barrels of crude oil per day[248] and will enable the release of 41–56 Mt of emissions per year once they become fully operational.[249] Plaintiffs could underline the fact that these estimates are limited to upstream emissions (the emissions from point of extraction to the pipeline), and do not even take into account downstream emissions.

Plaintiffs could challenge other decisions, including the pre-existing approval of Keystone XL, or the National Energy Board's approval of the Pacific NorthWest liquid natural gas (LNG) plant in B.C.[250] The Canadian Environmental Assessment Agency said the Pacific NorthWest project would release roughly 6.5–8.7 Mt of GHG emissions each year, making it one of the largest GHG emitters in the province.[251] Many scholars and journalists express doubts as to how Canada will fulfill its Paris

247. John Paul Tasker, *Trudeau Cabinet Approves Trans Mountain, Line 3 Pipelines, Rejects Northern Gateway*, CBC NEWS (Nov. 29, 2016), http://www.cbc.ca/news/politics/federal-cabinet-trudeau-pipeline-decisions-1.3872828; *see also Line 3 Replacement Project*, NAT. RES. CAN., https://www.nrcan.gc.ca/energy/resources/19188 (last modified July 24, 2017) (stating that the upgraded pipeline is subject to 37 binding conditions); *Trans Mountain Expansion Project*, NAT. RES. CAN. [hereinafter *Trans Mountain Expansion Project*], https://www.nrcan.gc.ca/energy/resources/19142 (last modified July 24, 2017) (showing the government approved the pipeline upgrade).

248. *Trans Mountain Expansion Project*, *supra* note 247 (showing that the Trans Mountain project will transport 890,000 barrels per day); ENV'T & CLIMATE CHANGE CAN., ENBRIDGE PIPELINES INC. - LINE 3 REPLACEMENT PROGRAM: REVIEW OF RELATED UPSTREAM GREENHOUSE GAS EMISSIONS ESTIMATES 5 (2016) [hereinafter LINE 3 REPLACEMENT PROGRAM], https://www.ceaa-acee.gc.ca/050/documents/p80091/116489E.pdf (stating the Line 3 project will transport 760,000 barrels a day).

249. LINE 3 REPLACEMENT PROGRAM, *supra* note 248 (noting the upstream GHG emissions from the Line 3 replacement pipeline amount to 21–27 Mt of carbon dioxide equivalent per year and that the pipeline will transport 760,000 barrels per day); ENV'T & CLIMATE CHANGE CAN., TRANS MOUNTAIN PIPELINE ULC-TRANS MOUNTAIN EXPANSION PROGRAM: REVIEW OF RELATED UPSTREAM GREENHOUSE GAS EMISSIONS ESTIMATES 5 (2016), https://ceaa-acee.gc.ca/050/documents/p80061/116524E.pdf (providing that the Trans Mountain pipeline system will transport 890,000 barrels a day, and the associated upstream GHG emissions could range between 21–26 Mt of carbon dioxide equivalent each year). Note that this estimate is for upstream emissions, and opposition to pipelines is often based on concerns about pipelines enabling downstream emissions. *See* John Gibson, *Politicians Spar over Energy East as NEB Suspends Pipeline Review*, CBC NEWS (Sep. 8, 2017), http://www.cbc.ca/news/canada/calgary/national-energy-board-energy-east-review-trans-canada-alberta-halt-suspend-review-1.4281060 (stating the National Energy Board would expand its review to include downstream GHG emissions to provide more visibility in evaluating risks associated with oil spills).

250. John Paul Tasker, *Federal Government Approves Liquefied Natural Gas Project on B.C. Coast with 190 Conditions*, CBC NEWS (Sept. 28, 2016), http://www.cbc.ca/news/politics/pacificnorthwest-lng-project-1.3780758.

251. *Id.*

commitments in light of such decisions, stating that "the math does not add up."[252]

Another option would be to target the subsidies given by the federal government to the oil and gas industry. For instance, the *Income Tax Act* allows oil and gas companies to deduct 100% of their Canadian exploration expenses and up to 30% of their Canadian development expenses.[253] According to a report by the International Institute for Sustainable Development (IISD), combined with a few other federal tax incentives, these subsidies are worth roughly $1.6 billion a year.[254] The report argues that these subsidies are hindering the effectiveness of carbon-pricing mechanisms, suggesting the approach is akin to "raising taxes on cigarettes to discourage smoking, while also giving tobacco companies a tax break so they can make more cigarettes."[255]

Yet another option would be to target the federal government's decision to delay the implementation of its methane-emissions-reduction regulations by up to three years.[256] Though Ottawa insists it will meet its target to reduce methane emissions from the oil and gas sector by up to 45% by 2025,[257] several critics are unconvinced given the delay.[258] It is estimated that the delay in regulations will amount to an additional 55 million tons of methane being released into the environment.[259]

One could also point to similar decisions at the provincial level. For instance, although Saskatchewan has committed to reducing its GHG emissions,[260] the province's Auditor General reports that it has no official

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252. *See* Amy Minsky, *Canada's Emissions Targets Now a Pipe Dream Following Pipeline Approvals: Environmentalists*, GLOBAL NEWS (Nov. 30, 2016), http://globalnews.ca/news/3098242/pipeline-approval-line-3-kinder-morgan-emissions-paris-agreement-canada/ (citing Dale Marshall, the national program director with Environmental Defence, who argues that, absent any major emissions-cutting measures, Canada will not meet its obligations).

253. Income Tax Act, RSC1985, c 1, s. 66.1(2); Wesley R. Novotny & Greg M. Johnson, *Budget 2017: Changes to Canadian Exploration and Expense and Flow-Through Shares*, BENNETT JONES (Mar. 24, 2017), https://www.bennettjones.com/Publications%20Section/Updates/Budget%202017%20Changes%20to%20Canadian%20Exploration%20Expense%20and%20Flow-Through%20Shares.

254. IISD, *supra* note 143.

255. *Id*.

256. *See* Margo McDiarmid, *Federal Government Seeks to Push Back Methane Reduction Regulations by up to 3 Years*, CBC NEWS (Apr. 23, 2017), http://www.cbc.ca/news/politics/methaneemissions-regulations-changes-1.4078468 (describing how the Canadian government delayed the implementation of its methane-reduction plan because it would be too difficult for Canada to meet its targets).

257. *Id*.

258. Ballingall, *supra* note 106.

259. McDiarmid, *supra* note 256.

260. *See Climate Change: Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy*, GOV'T SASK., https://www.saskatchewan.ca/business/environmental-protection-and-sustainability/climate-change-policy (last visited May 6, 2018) ("SaskPower has also committed to increasing its target. . . . This will reduce GHG emissions by approximately 40 per cent below 2005 levels by 2030."); *see also* GOV'T OF SASK., MINISTRY OF THE ENV'T, PRAIRIE RESILIENCE: A MADE-

2020 or 2030 emission target nor any mitigation plan.[261] Yet the government's economic plan calls for a 10-million-barrel crude oil production increase for 2017–18.[262] The plan offers many financial benefits to the oil and gas sector, including drilling and petroleum-research incentives.[263] Moreover, Saskatchewan struck an accord with the federal government to keep one or more coal power plants operational past 2030,[264] and recently increased tax deductions for potash companies.[265] The government's decisions are enabling an increase in that province's GHG emissions.

Likewise, the province of Alberta is projecting growth in its GHG emissions. Alberta's 2017 budget anticipates new oil production will increase by 600,000 barrels of oil per day over the next two years with an additional 150,000 barrels per day added by 2020.[266] Alberta has expressed a need to expand pipeline infrastructure to support the industry's growth.[267] Although the Alberta government set a 100 Mt CO2 cap on the oil sands, established a carbon levy and committed to reducing methane emissions by 45% by 2025, a growth in GHG emissions is possible because the 100 Mt

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IN-SASKATCHEWAN CLIMATE CHANGE STRATEGY 2 (2013), http://www.publications.gov.sk.ca/redirect.cfm?p=88202&i=104890 (stating that, to achieve Canada's environmental goals, provincial leaders met for the Vancouver Declaration on Clean Growth and Climate Change in March 2016).

261. AUDITORS GEN. REPORT, *supra* note 88, at 8.

262. *See* GOV'T OF SASK., MINISTRY OF THE ECON., PLAN FOR 2017–18, at 4 (2017), http://publications.gov.sk.ca/documents/15/101566-english.pdf (stating that the goal for 2017 and 2018 is to produce 174 million barrels of crude oil); GOV'T OF SASK., MINISTRY OF THE ECON., PLAN FOR 2016–17, at 4 (2016), http://publications.gov.sk.ca/documents/15/101604-EconomyPlan1617.pdf (noting Saskatchewan's goal to produce 164.5 million barrels of crude oil in 2016).

263. *See Drilling Incentives*, GOV'T SASK., https://www.saskatchewan.ca/business/agriculture-natural-resources-and-industry/oil-and-gas/oil-and-gas-incentives-crown-royalties-and-taxes/drilling-incentives (last visited May 6, 2018) (summarizing Saskatchewan's volume-based drilling incentives and exploratory-gas-wells incentives, both subject to a maximum royalty rate of 2.5%); *Apply for the Saskatchewan Petroleum Research Incentive*, GOV'T SASK., https://www.saskatchewan.ca/business/agriculture-natural-resources-and-industry/oil-and-gas/oil-and-gas-incentives-crown-royalties-and-taxes/apply-for-the-saskatchewan-petroleum-research-incentive (last visited May 6, 2018) (encouraging "research, development and demonstration of new technologies that expand production of Saskatchewan's oil and natural gas resources").

264. Shawn McCarthy, *Saskatchewan, Ottawa Strike Accord on Coal-fire Power Generation*, GLOBE & MAIL (Nov. 28, 2016), https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/saskatchewan-reaches-deal-with-ottawa-on-future-of-coal-fired-power-plants/article33068106/.

265. *Contra* Press Release, Gov't of Sask., Government Makes Interim Changes to Potash Taxes, Announces Review (Mar. 18, 2015), https://www.saskatchewan.ca/government/news-and-media/2015/march/18/budget-economy-potash (advising that, while overall tax deduction declined, the new budget provides for two new tax incentives for job creation and capital investment).

266. JOE CECI, ALTA. PRESIDENT TREASURY BD. & MINISTER FIN., FISCAL PLAN 2017–2020, at 73 (2017), http://finance.alberta.ca/publications/budget/budget2017/fiscal-plan-complete.pdf.

267. *Id.* at 74–75.

cap is set well above current levels of oil sands emissions (which are approximately 70 Mt).[268]

Although Ontario has several policies that have contributed to important emissions reductions, such as the closing of coal-fired power plants and an emissions-trading system, it recently reneged on its plans to sign another $3.8 billion in renewable energy contracts.[269] These contracts would have provided up to 1,000 megawatts of power from renewable energy resources.[270] Farther west, British Columbia has had a carbon tax in place since 2008, coupling this with many other climate initiatives; however, British Columbia continues to offer roughly $271 million[271] per year to gas companies via the Natural Gas Deep Well Credit.[272] In other words, even the provinces that are seen as leaders on climate policy continue to support activities that will make it challenging to successfully reduce GHG emissions to the level required.

Overall, there is a confounding disconnect between the country's high-level policy commitments to reduce GHG emissions—which are already insufficient—and the on-the-ground decisions that affect or encourage significant emissions of GHGs.

2. Challenging a Constellation of Decisions

The preceding subsection illustrates that there are numerous decisions that fly in the face of GHG-reduction commitments and lead to harmful levels of emissions. While plaintiffs could opt to challenge one or more of these decisions, it may be more strategically compelling to challenge the overall policy and network of decisions that cumulatively lead to harm. In this way, claimants would ask the courts to take an integrative approach by looking at how several laws, policies, and decisions interact in a way that collectively leads to harm. They could point to the constellation of government decisions authorizing and subsidizing fossil-fuel extraction,

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268. *Climate Leadership Plan*, ALTA. GOV'T, https://www.alberta.ca/climate-leadership-plan.aspx (last visited May 6, 2018); ENV'T CAN., CANADA'S EMISSIONS TRENDS 64 (2013), https://www.ec.gc.ca/ges-ghg/985F05FB-4744-4269-8C1A-D443F8A86814/1001-Canada%27s%20Emissions%20Trends%202013_e.pdf (estimating that emissions in Canada could rise as much as 74 Mt or as little as 58 Mt between 2005 and 2020).

269. Rob Ferguson, *Ontario Government Scraps Plan for $3.8 Billion in Renewable Energy Projects*, TORONTO STAR (Sept. 27, 2016), https://www.thestar.com/news/queenspark/2016/09/27/ontario-liberals-scrap-plans-for-38-billion-in-renewable-energy-projects.html.

270. *Id.*

271. IISD, *supra* note 143.

272. *Credits*, GOV'T B.C., http://www2.gov.bc.ca/gov/content/taxes/natural-resource-taxes/oil-natural-gas/oil-gas-royalty/reduce/credits#natural-gas-deep-well-credit (last visited May 6, 2018); Diane Toomey, *How British Columbia Gained By Putting a Price on Carbon*, YALEENVIRONMENT360 (Apr. 30, 2015), http://e360.yale.edu/features/how_british_columbia_gained_by_putting_a_price_on_carbon.

development, transportation, and infrastructure that, together, lead to unacceptable levels of GHG emissions.[273] As already noted, this is the approach taken by the plaintiffs in *Juliana*, which has challenged the U.S. government's ongoing authorization and enabling of fossil-fuel exploitation, production, and combustion that deliberately allowed atmospheric concentrations of CO2 to escalate to unprecedented levels.[274]

Although most Charter cases deal with a single provision or decision, there are examples of plaintiffs framing their claims using an integrative approach. For instance, the Supreme Court in *Chaoulli* considered whether a prohibition on health insurance created by the combined application of two legislative provisions violated section 7.[275] In *R. v. Smith*, the Supreme Court considered whether the blanket prohibition on medical access to marijuana created by the combined effect of the Controlled Drugs and Substances Act and related regulations created an infringement.[276] In two separate cases, British Columbia courts examined the combined effect of a collection of bylaws on the section 7 rights of homeless plaintiffs.[277] Although not a Charter case, the Beaver Lake Cree Nation alleged that the government infringed its treaty rights by making a number of decisions after the signing of Treaty 6, which authorized extensive non-Aboriginal uses of land in its core territory.[278]

In a highly publicized Ontario Court of Appeal decision, the Court acknowledged that Charter violations caused by a network of government programs could be addressed in the right circumstances, even if the challenge was not successful in that case.[279] In *Tanudjaja*, claimants argued that both the federal and Ontario governments violated claimants' section 7 and 15 rights by "creat[ing] and sustain[ing] conditions which lead to,

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273. IISD, *supra* note 143.

274. Juliana v. United States, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016).

275. These were section 15 of the Health Insurance Act and section 11 of the Hospital Insurance Act. Chaoulli v. Québec, 2005 SCC 35, para. 2 (Can.).

276. R. v. Smith, 2015 SCC 34 (Can.).

277. Abbotsford (City) v. Shantz, 2015 BCSC 1909, paras. 2, 4 (Can. B.C. C.A.); Victoria (City) v. Adams, 2009 BCCA 563, para. 1 (Can. B.C. C.A.).

278. *See* Lameman v. Alberta, 2013 ABCA 148, paras. 1–5 (Can. Alta.) (discussing the Beaver Cree Nation's Statement of Claim, which alleged that government authorizations of development on tribal land violated Treaty No. 6). The Court ruled that whether or not Alberta and Canada had fiduciary obligations to the Nation with respect to development authorizations "is an argument for trial, not an application to strike." *Id.* para. 54. An update on this case was posted by the RAVEN Trust Organization on November 3, 2017. Laurie McKenzie, *Fall Harvesting with the Beaver Lake Cree*, RAVEN TRUST (Nov. 3, 2017), https://raventrust.com/2017/11/03/fall-harvesting-with-the-beaver-lake-cree/. A trial has yet to be scheduled. *See Tar Sands Trial: BLCN vs. Alberta and Canada*, RAVEN TRUST, https://raventrust.com/tar-sands-trial/ (last visited May 6, 2018) (discussing how the Beaver Lake Cree nation has brought a claim against Canada and Alberta to stop development of their homeland and its resources).

279. Tanudjaja v. Canada (Att'y Gen.), 2014 ONCA 852, para. 29 (Can. Ont.).

support and sustain homelessness and inadequate housing."[280] Their challenge did not target any particular statute or action taken by the government, but rather attacked the failure of both levels of government "to undertake appropriate strategic coordination to ensure that government programs effectively protect those who are homeless or most at risk of homelessness."[281] The court was uncomfortable with this approach, pointing to the fact that it is "an archetypal feature of *Charter* challenges under [section] 7 and [section] 15" to root a challenge in a particular law.[282] However, the majority offered the following important qualification: "This is not to say that constitutional violations caused by a network of government programs can never be addressed, *particularly when the issue may otherwise be evasive of review*."[283] As such, the majority judgment seems to indicate that the fact that an application is not tethered to a particular law or government action is not, on its own, fatal. It is worth noting that the *Tanudjaja* decision has been subject to considerable criticism (as discussed in the next section), with many favoring the dissent's more flexible approach.[284]

If litigants were to frame a climate Charter challenge on a network of decisions, they would want to emphasize that substance, not form, should govern Charter analysis; otherwise, governments could avoid accountability for Charter infringements due to a narrow, technical approach.

3. Inaction or Insufficient Action

Another strategy would be for plaintiffs to allege that government inaction, or insufficient action, on climate change infringes upon a claimant's section 7 rights. This could be framed as the inadequate implementation of past climate plans, which have led to current levels of GHG emissions, or the insufficiency of the government's current target and legislation, which allow emissions to continue beyond levels that the IPCC

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280. *Id*. para. 9 (citing paragraph 14 of the appellants' Amended Notice of Application).

281. *Id.* Specifically, the claimants argued that both governments diminished access to affordable housing in a number of ways, such as by cancelling funding earmarked for construction of new social housing, failing to implement a rent-supplement program comparable to the ones that exist in other countries, and diminishing income-support programs. *Id.* para. 11.

282. *Id.* para. 22. The court pointed to several cases as examples. *Id.* paras. 22–23 (citing In re Can. Assistance Plan, [1991] 2 S.C.R. 525, 545 (Can.); Canada (Att'y Gen.) v. PHS Community Services Society, 2011 SCC 44, para. 105 (Can.); Chaoulli v. Québec (Att'y Gen.), 2005 SCC 35, para. 107 (Can.)). The court held that, "[i]n this case, unlike in *PHS Community Services* (where a specific state action was challenged) and *Chaoulli* (where a specific law was challenged) there is no sufficient legal component to engage the decision-making capacity of the courts." *Id.* para. 27.

283. *Id.* para. 29 (emphasis added).

284. See *infra* notes 373–77 and accompanying text (discussing the *Tanudjaja* dissent and criticism of courts relying on justiciability to avoid complicated policy arguments).

has identified as necessary to avoid dangerous levels of warming. In the case of jurisdictions like British Columbia, which has legislated its GHG-reduction targets, claimants could frame the case around infringement caused by the failure to implement the legislation.[285]

This is also where the somber consequences of delaying action are worth underlining, because the longer we take to reduce emissions, the more difficult and costly it will be to do so, and the more severe the impacts of climate change will be.[286] For example, research has estimated that the cost of climate change in Canada will increase from approximately $5 billion annually in 2020 to between $21 billion to $43 billion annually by 2050.[287] The cost associated with delayed mitigation efforts will compound economic stress. According to the IPCC, failure to act early enough will "substantially increase the difficulty of the transition to low longer-term emissions levels and narrow the range of options . . . ."[288] The United Nations Environment Program reiterates this finding in its *Emission Gaps Report 2013*, holding that, if states wait until after 2020 to start reducing emissions, they "will have to rely on more difficult, costlier and riskier means of meeting the target" with a positive correlation between length of delay and increase in costs.[289]

The Court in *Urgenda* recognized the importance of acting quickly, and underlined that any delays in mitigating GHG emissions reduce the

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285. Greenhouse Gas Reduction Targets Act, S.B.C. 2007, c 42, s. 2–4 (Can. B.C.).

286. *See infra* notes 415–18 and accompanying text (describing the principle of gross disproportionality and its relationship to a section 7 claim).

287. PAYING THE PRICE, *supra* note 177, at 40. Unfortunately, no cost estimates were produced in the event Canada fails to mitigate climate change. *Id.* at 36. In order to account for variability in economic development and demographic change, the report created economic models that looked at four different scenarios: (1) low climate change and slow growth; (2) low climate change and rapid growth; (3) high climate change and slow growth; and (4) high climate change and rapid growth. *Id.* at 41.

288. IPCC, SUMMARY FOR POLICYMAKERS 12 (2014), http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf.

289. UNEP, THE EMISSIONS GAP REPORT 2013, at xi, 13–15 (2013), http://web.unep.org/sites/default/files/EGR2013/EmissionsGapReport_2013_high-res.pdf. The "gap" is the difference between the desired emissions level in a certain year and the level of emissions anticipated for that year based on the reduction goals pledged by the countries concerned. *Id.* at xi. UNEP officials further state that:

> [L]ater-action scenarios have several implications compared to least-cost scenarios, including: (i) much higher rates of global emission reductions in the medium term; (ii) greater lock-in of carbon-intensive infrastructure; (iii) greater dependence on certain technologies in the medium-term; (iv) greater costs of mitigation in the medium- and long-term, and greater risks of economic disruption; and (v) greater risks of failing to meet the 2° C target. For these reasons later-action scenarios may not be feasible in practice and, as a result, temperature targets could be missed.

Id. at xiii.

likelihood that we will be able to avoid the 2ºC threshold.[290] In light of the severity and irreversibility of the risks of climate change, the Court found that the Dutch government was obligated to mitigate GHG emissions "as quickly and as much as possible."[291]

In Canada, framing the claim around inaction, or insufficient action, is admittedly more difficult as it takes courts out of their comfort zone. Yet it is a pervasive pattern of government inaction (or inadequate action) that has led to the current problem. There is support for the Charter applying to inaction or underinclusive government policies. For instance, the Supreme Court in *Dunmore,* a labor rights case examining freedom of association, held that "underinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms."[292] In *Vriend*, provincial human rights legislation was found to violate the Charter's equality guarantee because it was underinclusive (it did not include sexual orientation as a ground for discrimination).[293] In *PHS*, the Supreme Court of Canada held that the failure of the federal Minister of Health to extend a safe injection site's exemption from a set of criminal provisions violated section 7.[294]

Climate plaintiffs could make an analogy to these cases by arguing that the government's overall approach to climate mitigation is underinclusive in that it does not offer protection to those most vulnerable to the impacts of climate change (such as Inuit communities living in the North). This underinclusion suggests grave injustice when we remember that those communities bear little responsibility for the GHG emissions that have caused warming. In our view, this is where the importance of taking a normative approach matters most. To shield the Canadian government's conduct from Charter scrutiny—because it requires courts to consider the impact of a constellation of decisions or an omission—would be to allow the government to infringe on rights through a legislative vacuum. Put another way, form rather than substance would dictate whether someone's Charter rights were protected. Surely this is not what was intended.

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290. Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, paras. 4.65, 4.71 (Urgenda Foundation/Netherlands) (Neth.).

291. *Id.* para. 4.73.

292. Dunmore v. Ontario (Att'y Gen.), 2001 SCC 94, para. 26 (Can.).

293. Vriend v. Alberta, [1998] 1 S.C.R. 493, para. 82 (Can.); *see also* Brooks v. Can. Safeway Ltd., [1989] 1 S.C.R. 1219, 1239–40 (Can.) (holding that an employee-benefits program was discriminatory on the basis that it denied certain benefits to pregnant employees). One of the employers argued that its plan was not discriminatory, but merely a decision to compensate some risks and exclude others. *Id.* at 1239. The Supreme Court of Canada rejected this argument, noting that underinclusion may simply be a back-handed way of permitting discrimination. *Id.* at 1240.

294. Canada (Att'y Gen.) v. PHS Community Services Society, 2011 SCC 44, para 3 (Can.).

4. Positive Duty

Finally, plaintiffs could argue that the government has a duty to take meaningful action to reduce GHG emissions to the level determined by science to be necessary to avoid dangerous levels of warming. While the courts have been cautious to date about reading into the Charter an explicit positive right, such as the right to adequate housing or to health care, they have also been careful not to close the door on this possibility in the right circumstances, preferring to examine each case on its merits.[295] *Gosselin* provided an opportunity for the judiciary to hold that section 7 created a right to provide for basic needs.[296] While the Supreme Court refused to do so in this case, it nonetheless made it clear that such a possibility exists.[297] In the words of Chief Justice Beverley McLachlin:

> One day [section] 7 may be interpreted to include positive obligations. . . . It would be a mistake to regard [section] 7 as frozen, or its content as having been exhaustively defined in previous cases. . . . The question therefore is not whether [section] 7 has ever been—or will ever be—recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of [section] 7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not. . . . I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.[298]

Given the strength of evidence of the impacts of climate change on life, liberty, and security of the person, we argue climate change is a compelling special circumstance that should persuade the courts to find the government has a positive obligation. The evidence more than satisfies the standard set out in *Dunmore*, which cited Chief Justice Dickson in the *Alberta Reference*

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295. *See supra* notes 228–29, 280–84 and accompanying text (describing the "imminent deprivation" requirement to trigger section 7 claims involving the security of the person and discussing the Court's reluctance to find that there was an affirmative right to adequate housing).

296. Gosselin v. Québec (Att'y Gen.), 2002 SCC 84, para. 75 (Can.).

297. *Id.* para. 82; *see also* Martha Jackman & Bruce Porter, *Rights Based Strategies to Address Homelessness and Poverty in Canada: The* Charter *Framework*, *in* ADVANCING SOCIAL RIGHTS IN CANADA 65, 65 (Martha Jackman & Bruce Porter eds., 2014) (acknowledging the overlap between socioeconomic rights in international human rights treaties ratified by Canada and the Canadian Charter of Rights and Freedoms); HAMISH STEWART, FUNDAMENTAL JUSTICE: SECTION 7 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 54–55 (2012) ("[T]he possibility that inaction might count as state action for *Charter* purposes, and for section 7 purposes in particular, has always been left open.").

298. *Gosselin*, 2002 SCC paras. 82–83.

to find that "positive obligations may be required 'where the absence of government intervention may in effect *substantially impede* the enjoyment of fundamental freedoms.'"[299] Because climate change poses a threat to human life as we know it, the phenomenon goes well beyond the required threshold of "substantially impeding" the enjoyment of fundamental freedoms.[300]

Scholars have criticized the characterization of rights and duties as being either negative or positive, noting that the distinction is far more subtle since no right can exist without some form of corresponding obligation to do or not do something.[301] Relatedly, the Supreme Court also acknowledges that the distinction between government action and inaction is often illusory, with the majority in *Vriend* characterizing the attempt to create an artificial distinction as "very problematic."[302] Although this criticism was made in the context of section 32, which relates to the applicability of the Charter, the court was clear in noting that a choice by a legislature *not* to act is relevant in (1) the section 1 analysis, and (2) determining the appropriate remedy, and did not render such a choice outside the scope of Charter scrutiny.[303]

Framing the obligation in a climate Charter claim as a duty by government to take action to meaningfully reduce GHG emissions to avoid harm, rather than as a free-standing right to a stable climate, might increase the chances of success because it would not force Canadian courts to confront their fear of finding the existence of social and economic rights. It would also bring the climate claim closer to existing precedents in the jurisprudence where courts have found a duty to act. In *Eldridge*, for instance, the Supreme Court found the failure to provide services to deaf clients at a hospital was an omission that violated the claimant's Charter rights, and required provision of that service.[304] In *Doucet*, the Court interpreted the language rights in section 23 of the Charter as creating a

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299. Dunmore v. Ontario (Att'y Gen.), 2001 SCC 94, para. 25 (Can.) (quoting Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, 361 (Can.) (emphasis added)).

300. *See* PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at 1 (outlining the threat to human health posed by climate change).

301. *See* Martha Jackman & Bruce Porter, *Introduction: Advancing Social Rights in Canada*, *in* ADVANCING SOCIAL RIGHTS IN CANADA 1, 14 (Martha Jackman & Bruce Porter eds., 2014) ("When they are conceived solely as negative rights, broadly framed guarantees, such as rights to life and security of the person, are whittled down to freedom from government interference and stripped of their social rights content."); STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 36–40 (1999) (questioning whether the distinction between positive and negative rights "helps illuminate reality").

302. Vriend v. Alberta, [1998] 1 S.C.R. 493, para. 53 (Can.).

303. *See id.* (rejecting the proposition that courts must defer to a decision of the legislature not to enact a provision, as restricted by the Charter).

304. Eldridge v. British Columbia (Att'y Gen.), [1997] 3 S.C.R. 624, para. 80 (Can.).

positive obligation for the federal government to mobilize resources and pass laws to create the institutional structures required to fulfill those rights.[305]

If the courts were to find a positive duty, the government could make a reasonable case that its actions in establishing the Pan-Canadian Framework and related policies (such as the national carbon-price regulations, the zero-emissions-vehicle strategy, and clean fuel requirements) fulfill that duty. However, the Trudeau government is criticized for having an insufficiently ambitious target (one that the Liberals themselves argued was inadequate under the previous Harper administration), and the government's own analysis shows that the policies captured within the Framework will not, even if perfectly applied, meet the target.[306] If the courts provide a declaration mandating strong action in order to avoid violating the section 7 rights of Canadians, the Trudeau government would be given legal cover that justifies quick and decisive action, even in light of resistance from private sector interests and some provincial governments. A judgment of this nature would also help protect against retrenchment of climate policies in the event of a change in government.[307]

The Dutch government had an even more ambitious climate target and plan than the Canadian one.[308] Yet the claimants were still successful in holding the government accountable to the more ambitious IPCC 2020 benchmark.[309] A positive duty may be more compelling in the context of a government that more or less ignores climate policy altogether, as was the Harper government's approach. However, in our view the current context does not weaken the argument that the courts should find the current government legally required to take more robust action.

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305. Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62, para. 28 (Can.).

306. Shawn McCarthy, *Canada's Greenhouse Gas Policies to Fall Short of Target, Sources Say*, GLOBE & MAIL (Mar. 24, 2017), https://www.theglobeandmail.com/news/politics/canadas-greenhouse-gas-policies-to-fall-short-of-target-sources-say/article31110846/; *see also* James Fitz-Morris & Catharine Tunney, *Justin Trudeau Promises "Canadian Approach" to Climate Change*, CBC NEWS (Nov. 23, 2015), http://www.cbc.ca/news/politics/trudeau-first-ministers-meet-climate-change-1.3331290 ("The Liberal government hasn't unveiled a national emission reduction target yet but Trudeau has said he hopes to set a more ambitious target than that proposed last spring by the Harper government . . . .").

307. For a discussion of the principle of non-regression and the Charter, see Lynda M. Collins & David Boyd, *Non-Regression and the* Charter *Right to a Healthy Environment*, 29 J. ENVTL. L. & PRAC. 285, 298–300 (2016) (explaining the doctrine of non-regression and concluding that it may "reasonably be viewed as a component of a *Charter* right to environment in Canada").

308. Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, para. 2.6 (Urgenda Foundation/Netherlands) (Neth.).

309. *Id.* para. 4.31.

To summarize, there are many considerations at play in framing a climate Charter challenge. However plaintiffs shape the claim, the courts will be challenged to interpret section 7 guarantees through a purposive lens. It is well accepted that courts should interpret the Charter in a generous, expansive manner in order to fulfill the Charter's purpose and ensure that rights holders enjoy its full benefit and protection.[310] It is also important to "safeguard a degree of flexibility in the interpretation and evolution of [section] 7 of the *Charter*."[311] The facts of climate change call upon the courts to be flexible in determining whether the government's actions have infringed upon section 7 rights; to do otherwise would use a narrow, technical approach that thwarts Charter rights.

B. The Evidentiary Burden and Causation Challenge

Causation has been a challenge in many environmental cases. However, the same problems that arise in establishing causation in those cases may not arise in the context of a climate challenge. We begin by describing the challenge of establishing causation in environmental cases and discussing the outcomes of past section 7 environmental cases. Next, we analyze how causation would apply to harm connected to climate change in the context of a Charter analysis.

1. The Challenge of Establishing Causation in Environmental Cases

In evaluating the issue of causation, courts must remember that the burden of proof is a balance of probabilities, meaning claimants are only required to prove that it is more likely than not that the government's actions or lack of action is causing climate change harm.[312] The causation threshold in Charter cases is lower than the but-for causation test used in torts cases.[313] Chief Justice McLachlin underlined the importance of being flexible in applying the evidentiary thresholds for section 7, noting that all that is required is a sufficient causal connection, as this is "a fair and

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310. *Doucet-Boudreau*, 2003 SCC 62, para. 23 (Can.) ("It is well accepted that the *Charter* should be given a generous and expansive interpretation and not a narrow, technical, or legalistic one." (internal citations omitted)).

311. Blencoe v. British Columbia (Human Rights Com.), 2000 SCC 44, para. 188 (Can.); Gosselin v. Québec (Att'y Gen.), 2002 SCC 84, para. 82 (Can.) (quoting *Blencoe*, 2000 SCC para. 188); *see also* Haig v. Canada, [1993] 2 S.C.R. 995, 1035 (Can.) (explaining that freedom of expression is nearly absolute, except if the reason can be justified in accordance with the Charter).

312. *Balance of Probabilities*, IRWIN L., https://www.irwinlaw.com/cold/balance_of_probabilities (last visited May 7, 2018).

313. *See* Canada (Att'y Gen.) v. Bedford, 2013 SCC 72, para. 75 (Can.) (holding that the causation test in Charter cases is the "sufficient causal connection" standard).

workable threshold for . . . the port of entry for [section] 7 claims."[314] The Court recognized that holding otherwise would risk barring meritorious lawsuits.[315]

While it is true that environmental rights cases under section 7 have, to date, failed on causation, a closer look suggests causation is not the barrier it might appear to be.[316] First, there are not many examples of section 7 environmental rights cases that actually proceeded to trial, and those that did proceed were decided before the sufficient-causal-connection standard was developed. For instance, in *Energy Probe*, the trial judge dismissed the case on the basis that Energy Probe had not established a causal link between the increased use of nuclear power and an increased risk to the security of the person.[317] One case alleging environmental harm under section 7 that proceeded to trial since the development of the sufficient-causal-connection test is *Dixon*, and that case failed because the evidence of harm (human-health impacts from wind turbines) was very weak.[318]

Several scholars have also argued convincingly that the causation test in environmental cases should be attenuated to account for several challenges involved in providing evidence of harm.[319] One challenge relates to the insidious nature of environmental harm. Invisibility and disconnection between cause and effect are often trademarks of environmental harm, which makes it exceptionally difficult for claimants to prove that the negative effects they experience are attributable to

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314. *Id.* para. 78

315. *Id*.

316. *See, e.g.*, BOYD, HEALTHY ENVIRONMENT, *supra* note 23, at 212–15 (identifying section 7 cases that were dismissed on grounds besides causation); Collins, *Ecologically Literate Reading*, *supra* note 23, at 42, 46 (stating causation is the primary challenge for plaintiffs in environmental cases under section 7); Wu, *supra* note 198, at 200–01 (highlighting section 7 cases where courts have dismissed on grounds other than causation).

317. Energy Probe v. Canada (Att'y Gen.), [1994] 17 O.R. 3d 717, paras. 143, 158, 201 (Can. Ont.); *see also* Gage, *supra* note 137, at 10–11 (reviewing the court's decision, which found "that Energy Probe had failed to prove that increased use of nuclear power translated into an increased risk to security of the person or that increased liability would result in an increased standard of care").

318. *See* Dixon v. Ontario (Ministry of the Environment), 2014 O.N.S.C. 7404, paras. 48, 50, 60, 74, 136 (Can. Ont.) (agreeing with the court below that the expert evidence proffered for harms to human health from wind turbines was insufficient to draw an inference of causation because "[s]peculation, allegations and mere concerns do not suffice" for section 7 Charter claims).

319. *See* Collins, *Ecologically Literate Reading*, *supra* note 23, at 31–32, 46 ("[W]hen there is substantial scientific uncertainty about the risks and benefits of a proposed activity, policy decisions should be made in a way that errs on the side of caution with respect to the environment and the health of the public." (internal quotation omitted)); Wu, *supra* note 198, at 196–97, 199 (suggesting how courts could address the problems in requiring section 7 plaintiffs to prove causation); Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 899 (describing different requirements for a showing of harm in modern environmental law); Chalifour, *Environmental Justice and the Charter*, *supra* note 40, at 117–18 (identifying the challenge of overcoming the causal element of justiciability for causes of action alleging serious harm to human health).

government action.[320] For example, individuals who experience chronic exposure to low doses of pollutants over a long period of time are subject to harm with long latency periods.[321] This allows defendants to point to any number of possible intervening causal events.[322] Claimants often try to surmount this evidentiary hurdle by spending considerable time and money on epidemiological studies, even though this research, by its very nature, can typically only show a correlation between particular illnesses and contaminants and not direct causation.[323]

Additionally, as lucidly articulated by Andrew Gage, in the context of public hazards there is strong evidence of risks to health, but there is often no definitive way of knowing precisely: (1) who will experience harm in the future; (2) how this harm will manifest itself; and (3) when this harm will occur.[324] In these cases, the evidence therefore depends on statistical materials relating to risk and probable harm—not conclusive proof of causation and harm, which the courts prefer when adjudicating section 7 claims.[325] If the courts demand too high an evidentiary standard in light of these realities, the implication is troublesome because it goes against the preventative nature of environmental rights: individuals must actually wait to suffer harm or death before judges are willing to intervene.[326]

Another challenge relates to timelines. While environmental protection requires preventing harm, legal remedies are typically retrospective and compensatory, requiring proof of unjustifiable harm once the damage is done.[327] In David Wu's words, "[e]nvironmental harm is often the result of myopic decision-making that overvalues current benefits without adequately assessing long-term costs."[328]

It is important to keep in mind that these challenges have largely arisen in the context of tort claims, thus requiring a tort standard of causation. In order to better understand how the issue of causation should be handled vis-à-vis environmental rights claims, the next two sections look at the judicial progression towards a flexible standard and how the principles behind this more flexible approach can be applied to the issue of climate change.

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320. Wu, *supra* note 198, at 199.
321. Scott, *supra* note 223, at 294, 301.
322. *Id.* at 302.
323. *Id.* at 302–03.
324. Gage, *supra* note 137, at 2.
325. *Id.* at 4–5.
326. *See id.* (describing an implied shift from precautionary efforts to after-the-fact compensation when evidentiary burdens on plaintiffs are too high).
327. *See* JEAN-LOUIS BAUDOUIN & ALLEN M. LINDEN, TORT LAW IN CANADA 89 (2010) (stating that the general remedy for torts is money damages, and plaintiffs must prove harm).
328. Wu, *supra* note 198, at 221.

2. Environmental Rights Cases Under Section 7

Operation Dismantle, one of the earliest section 7 cases to reach the Supreme Court, demonstrates how Canada's highest court wrestled with the standard to apply to causation.[329] The case related to whether the federal government violated the public's section 7 rights by allowing the United States to perform cruise-missile testing on Canadian territory, arguably increasing the risk of nuclear war.[330] Chief Justice Dickson wrote for the majority and dismissed the case, reasoning that the allegations of threats to life and security of the person were speculative presumptions about how cruise-missile testing would impact the military decisions of foreign states.[331]

Some critics argue this judgment started a trend of judges using causation, together with the "guise of justiciability," as a means of extricating themselves from politically contentious cases.[332] However, many courts have since adopted Justice Wilson's opinion in *Operation Dismantle*, which takes a more flexible approach to the evidence required to prove causation.[333] She held that, while "[r]eal facts" can be proven by direct evidence, "[i]ntangible facts" must at times be proven by inference from real facts or through the testimony of experts.[334] In *Coalition for a Charter Challenge*, for example, the motions judge found section 7 interests are engaged when there is a "probability" of harm, such that a claim filed by individuals about the alleged negative health effects engendered by living next to a waste incineration plant was a serious issue to be tried.[335] Additionally, two public water fluoridation cases were able to proceed to trial on this basis, though they were ultimately dismissed because the claimants failed to prove their harm resulted from consumption.[336] In

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329. *See* Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441, 455–56 (Can.) (finding that Canada's grant of permission to the United States to test cruise missiles did not violate section 7 of the Charter because the plaintiffs failed to prove that a heightened risk of war would be more than a mere speculation).

330. *Id.* at 442.

331. *Id.*

332. *See, e.g.*, Murray Rankin & Andrew J. Roman, *Constitutional Law—A New Basis for Screening Constitutional Questions Under the Canadian Charter of Rights and Freedoms—Prejudging the Evidence?:* Operation Dismantle Inc. et al. v. The Queen et al., 66 CAN. B. REV. 365, 377 (1987) ("By dwelling upon issues of causation, the court has neatly sidestepped a central dilemma in the post-Charter era: the legitimacy of judicial involvement in matters that are more overtly 'political' in nature than the court has addressed in the past.").

333. *Operation Dismantle*, 1 S.C.R. at 479.

334. *Id*. at 478.

335. Coalition of Citizens for a Charter Challenge v. Metropolitan Authority, [1993] 122 N.S.R. 2d 1, paras. 7, 65, 70 (Can. N.S.).

336. *See* Locke v. Calgary (City), [1993] 15 Alta. LR 3d 70, paras. 4, 23–24, 38 (Can. Alta. Q.B.) (relying on the City's expert witness report, the court held that "[w]ater fluoridation at

Energy Probe, the Ontario Court of Appeal went on to distinguish *Operation Dismantle*, holding an NGO may be able to prove the government's lax liability standards provided nuclear power operators with a perverse incentive to increase production of reactors at the expense of greater risk of harm to the public.[337]

Environmentalists also recorded a rare victory in *Kelly*.[338] The Alberta Court of Appeal granted leave on the question of whether the Alberta Energy and Utilities Board (AEUB) violated the section 7 rights of residents living near sour gas wells by imposing on them a choice: the residents could either voluntarily relocate, or continue living in their homes and be exposed to an unacceptable level of risk during the drilling and completion of the wells.[339] The AEUB explicitly acknowledged that eight of the families involved in the lawsuit lived in areas of "above average risk," with the administrative body accepting that the claimants faced an increased threat of death or injury because of potential explosions and escape of gases that could be fatal even at very low concentrations.[340]

When applicants tried to challenge the AEUB's finding of acceptable risk levels in another sour gas well case, however, leave to appeal was denied.[341] In *Domke*, the court held that the actual risk assessment conducted by government bodies is entitled to "substantial deference" and is in fact "unassailable."[342] Read in light of *Domke*, *Kelly* suggests that the courts are willing to entertain environmental Charter claims only when the government or its administrative bodies breach their own standards of permissible harm. Of course, the inference, as suggested elsewhere by Professor Dayna Nadine Scott, is that whoever gets to define the risk also gets to define what constitutes a rational course of action.[343]

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approximately 1 part per million is . . . safe, effective, practical and economic . . . ."); Oral Reasons for Judgment at 2, 8, Millership v. British Columbia, 2004 B.C.C.A. 9 (Can. B.C.) (explaining that the original action was dismissed after a 15-day summary trial).

337. Energy Probe v. Canada (Att'y Gen.), [1989] 68 O.R. 2d 449, paras. 40–43 (Can. Ont. C.A.).

338. Reasons for Decisions of The Honourable Mr. Justice Ronald Berger, Kelly v. Alberta, [2008] A.B.C.A. 52, para. 15 (Can. Alta.).

339. *Id.* paras. 1, 11, 15, 19.

340. *Id.* para. 15.

341. Kelly v. Alberta (Energy Resources Conservation Board), [2011] A.B.C.A. 325, para. 1, 27 (Can. Alta.).

342. Domke v. Alberta (Energy Resources Conservation Board), [2008] A.B.C.A. 232, para. 27 (Can. Alta.).

343. Scott, *supra* note 223, at 310–11 (arguing that scientists who study risk have historically defined it in a way that reflects internal biases).

3. Causation in a Climate Case

Given the Supreme Court's emphasis on flexibility and drawing inferences, we are of the view that causation should not be a major hurdle in climate cases. Even if the more stringent standard from *Operation Dismantle* is used, claimants would likely succeed. In contrast to fear of missile testing leading to nuclear war, there is clear evidence that GHG emissions cause harm. As noted earlier, there is a thorough and robust evidentiary record, signed off on by governments, which clearly outlines the science of climate change and its impacts. For instance, the IPCC's latest assessment report shows that: (1) climate change is caused by anthropogenic GHG emissions; (2) those emissions are leading to warming of average surface temperatures; (3) this warming has many impacts, including rising sea levels, ocean acidification, and increased severity and frequency of extreme weather events, from wildfires to droughts to floods; and (4) these impacts will have many negative implications, including increased mortality and negative human health effects.[344] The causal connection between GHG emissions and harm is thus clearly established in the IPCC's reports.

Claimants have an even stronger chance of succeeding if the more flexible standard articulated in *Bedford* is used, which allows judges to consider strong statistical data and expert evidence to make the link between global warming and harm. As per *Kelly* and *Domke*, claimants would have a particularly strong case because the government's own documents outline the level of unacceptable climate-change risk, while the government itself engages in action and inaction that exacerbates this risk.[345]

The federal government has essentially laid the evidentiary foundation for climate claimants since it explicitly recognizes its responsibility to reduce GHG emissions and has articulated its obligations in the form of specific mitigation targets, yet repeatedly failed to meet this target while still underscoring the grave risks and harms that climate change causes.[346] Additionally, the federal government has selected a mitigation target that is

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344. CLIMATE CHANGE 2014 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS, *supra* note 35, at 2, 8, 13.

345. *Kelly*, [2011] A.B.C.A. paras. 17, 19, 21–25 (holding the Alberta Energy Resources Conservation Board's analysis of whether the respondents were "directly and adversely affected" was not reasonable because it failed to fully consider the risk inherent in the proffered medical evidence and evacuation plan).

346. PAUL BOOTHE & FÉLIX-A. BOUDREAULT, LAWRENCE NAT'L CTR. FOR POLICY & MGMT., BY THE NUMBERS: CANADIAN GHG EMISSIONS 4, 8–10, 13 (2016), https://www.ivey.uwo.ca/cmsmedia/2112500/4462-ghg-emissions-report-v03f.pdf.

below the threshold required for Canada to do its part in avoiding crossing the global 2ºC threshold.[347] The Dutch court in the *Urgenda* decision relied upon a similar set of evidence to hold the government accountable, and we believe Canadian courts should use this threshold as well since it quantifies what Canada must do to avoid dangerous levels of climate change.[348]

In addition, the Supreme Court has made clear that claimants establish a section 7 breach when they present prima facie evidence that government action exposes them to substantial risk of harm.[349] As such, there is no requirement that the claimant provide proof that the harm will actually occur. Translated into a climate change context, claimants will meet their burden of proof when they show that the government's conduct, both over the last 25 years and in the present, exposes them to a substantial risk of harm; they do not need to meet the more difficult burden of showing a direct cause-and-effect relationship between government action and specific harm that has already taken place. Notably, government conduct does not have to be the only or dominant cause of the harm, which is important for a climate case because all nations contribute to the problem.[350] We return to this issue shortly in the context of a potential *de minimis* defense by government.

Governments have endorsed the findings of the IPCC at both the international and national levels. The court in *Urgenda* relied upon the rich evidentiary basis provided by the IPCC and the Dutch government's own analyses to establish the facts.[351] In the *Juliana* litigation, Justice Coffin points out: "the government has admitted that, yes, climate change is a reality and that, yes, it's induced by human activity, and they admit that CO_2 right now is at a level of 400 parts per million, which . . . is the highest level in millions of years."[352]

The Canadian government explicitly endorses the findings of the IPCC in its own reports.[353] Additionally, its own climate change framework begins by acknowledging the serious impacts of climate change:

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347. *Id.* at 4.

348. Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, paras. 4.31, 4.79 (Urgenda Foundation / Netherlands) (Neth.).

349. *See, e.g.*, Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, paras. 5–6, 127 (Can.) (discussing that substantial risk of harm establishes a section 7 violation).

350. Canada (Att'y General) v. Bedford, 2013 SCC 72, para.76 (Can.).

351. *Urgenda*, C/09/456689/HA ZA 13-1396 paras. 2.22–2.24, 4.11, 4.13–4.16.

352. Transcript of Proceedings at 14, Juliana v. United States, No. 6:15-cv-01517-TC (D. Or. Feb. 7, 2017).

353. *Intergovernmental Panel on Climate Change (IPCC)*, ENV'T & CLIMATE CHANGE CAN., https://www.ec.gc.ca/international/default.asp?lang=En&n=7AF6BA3C-1 (last modified Aug. 10, 2017).

> Taking strong action to address climate change is critical and urgent. The cost of inaction is greater than the cost of action: climate change could cost Canada $21–$43 billion per year by 2050 . . . . In recent years, severe weather events have cost Canadians billions of dollars, including in insured losses. Indigenous Peoples, northern and coastal regions and communities in Canada are *particularly vulnerable and disproportionately affected*. Geographic location, socio-economic challenges, and for Indigenous Peoples, the reliance on wild food sources, often converge with climate change to put pressure on these communities.[354]

Even with the strong evidentiary foundation for climate change, there are two arguments that the government would likely raise to avoid a finding that it has violated the Charter. First, in cases concerning extreme weather events, it could argue that, while climate change contributes to increased severity and frequency of storms, it is impossible to conclusively say that any one particular flood or storm was attributable to climate change (the attribution problem). Second, it could argue that Canada contributes only a small proportion of global GHG emissions, and thus it is not responsible for resulting harm (the *de minimis* argument).

While it is clear that climate change is causing more frequent and severe weather, and that the science is rapidly evolving, it may still be challenging to definitively tie one particular event to climate change since some extreme weather events would have happened even in the absence of warming temperatures.[355] However, there is very clear science showing that the probability of extreme weather events and their severity have both increased as a result of GHG emissions. As such, a plaintiff whose claim is based on the harm caused by one particular extreme weather event might have a greater challenge establishing causation than a plaintiff whose claim is based on the harms caused by more systemic, widespread damage such as rising sea levels, overall patterns of change in weather, or serious risks to physical and psychological health (e.g., children who are not yet harmed but for whom the risk of harm is serious). However, as the weather attribution science matures, this evidentiary threshold will become easier to meet.

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354. PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at 1 (emphasis added).

355. Dim Coumou & Stefan Rahmstorf, *A Decade of Weather Extremes*, NATURE CLIMATE CHANGE 1–5 (2012) https://www.researchgate.net/publication/233727849_A_Decade_of_Weather_Extremes.

The argument that the Canadian government should be able to avoid responsibility because it is only one of many contributors to the global problem of climate change should also fail. The Dutch government raised this *de minimis* argument in the *Urgenda* case, suggesting that it should not be forced to reduce its emissions because doing so would have a trivial impact on a global scale.[356] The Court rejected this argument, finding "that a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch living climate."[357] The Court emphasized that there is political consensus with regards to the 2ºC threshold for preventing "hazardous climate change" and held that the Netherlands must make mitigation efforts that contribute to avoiding this threshold.[358] As such, because the Dutch GHG emissions were contributing to climate change, the State's actions were part of the problem, which was sufficient to establish fault.[359] This approach in some ways mirrors the way tort law addresses the problem of multiple causal agents, holding that, in cases involving scientific uncertainty, a wrongdoer may be held liable on proof of a material contribution to the risk of harm that ultimately befell the plaintiff.[360] This risk-based approach meshes well with jurisprudence that has already recognized that section 7 of the Charter may be violated by serious state-sponsored risk to life or health.[361]

We argue Canadian courts should adopt a similar tack in deciding a climate-change Charter challenge. Although at 1.6%, Canada's emissions as a proportion of global emissions might be argued to be relatively small and thus insignificant, Canada is still among the top ten global emitters of GHGs on an absolute basis, and in the top three on a per capita basis.[362] Cast in this light, any argument that Canada's contribution is so minor that it should absolve the country of its responsibility to do its share to mitigate emissions and solve a global problem is irresponsible and unjust. It would be unconscionable for a wealthy, privileged nation that bears responsibility for creating the problem of climate change—a problem that is wreaking

356. *Urgenda*, C/09/456689/HA ZA 13-1396 para. 4.78.

357. *Id.* para. 4.90.

358. *Id.* paras. 4.83, 4.84.

359. *Id.* para. 4.90.

360. This is known as the material-contribution-to-risk test. *See* LYNDA COLLINS & HEATHER MCLEOD-KILMURRAY, THE CANADIAN LAW OF TOXIC TORTS 132–33, 135, 137–39 (2014) (outlining the material-contribution-to-risk test, which requires that a plaintiff, "through no fault of her own, [be] unable to show that any one of the possible tortfeasors in fact was the necessary or 'but for' cause of her injury, because each can point to one another as the possible 'but for' cause of the injury, defeating a finding of causation").

361. *See, e.g.*, Chaoulli v. Québec, 2005 SCC 35, para. 107 (Can.) (recognizing the Court's duty to assess legislative choices that may fall afoul of section 7).

362. BOOTHE & BOUDREAULT, *supra* note 346, at 4.

havoc in small island states and less developed countries—to argue that it is not accountable to do its part in addressing climate change. This argument would also fly in the face of public statements made by the Canadian government about the importance of taking action.[363]

In response to the *de minimis* argument, the *Urgenda* Court acknowledged that the result might be different if there was evidence to show that the reduction target of 25–40% was so disproportionately burdensome economically that it would present a potential danger to that country; however, this evidence was not provided.[364] In fact, the Court emphasized that it is more efficient to mitigate to prevent climate change now than to postpone measures, and that the State has a duty to "mitigate as quickly and as much as possible."[365] There is research showing that Canada can reduce its GHGs without major economic repercussions, and that doing so sooner rather than later is much more cost effective.[366] Canadian courts should thus reject this kind of economic argument, whether it is made in the context of the section 7 or section 1 analysis.[367] To do otherwise would be to absolve a government from responsibility unless it is the sole causal agent, which is an impossible standard.

C. Justiciability

When courts are asked to adjudicate matters of complex public policy, the question of whether the issue is even justiciable may arise. At its core, a determination of justiciability involves asking whether a claim contains a sufficient legal component to warrant judicial intervention. The reality is that, in Canada, even largely political questions can be reviewed if they possess a sufficient legal component to warrant a decision by a court.[368]

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363. Nicole Gaouette, *Canada's Trudeau Issues Rallying Cry for Climate Fight and Takes a Dig at the US*, CNN (Sept. 21, 2017), https://www.cnn.com/2017/09/21/politics/trudeau-canada-unga-remarks/index.html (describing Canadian Prime Minister Justin Trudeau's "rallying cry" that Canada has "a responsibility to future generations" to uphold the Paris Agreement); *Addressing Climate Change and Air Quality*, GOV'T CAN., https://www.canada.ca/en/services/environment/conservation/sustainability/federal-sustainable-development-strategy/2015-progress-report/climate-change-air-quality.html (last updated June 28, 2017) ("The Government has committed to work with provincial and territorial leaders to develop a pan-Canadian framework for addressing climate change.").

364. Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, para. 4.86 (Urgenda Foundation/Netherlands) (Neth.).

365. *Id.* para. 4.73.

366. *See infra* Part IV.B (describing the principle of gross disproportionality and its application in a climate-change context).

367. *See infra* Part IV.D (discussing section 1 of the Charter).

368. *See* Reference Re Canada Assistance Plan, [1991] 2 S.C.R. 525, 526–27, 544 (Can.) (providing that the Lieutenant Governor of British Columbia's questions regarding the Canada Assistance Plan were reviewable by the Court because, although the provincial obligations involving social welfare and expenditures were political in nature, each question was brought pursuant to section 1

There is no political-question doctrine in Canada, and indeed it is rare for issues to be held non-justiciable.[369]

The Hague District Court in the *Urgenda* case offers a strong example of how judges can weigh into the merits of a case while still respecting the proper roles of the judiciary and executive branches. According to the panel, the role of the judge is to "provid[e] legal protection from government authorities," while simultaneously respecting the fact that the government retains "full freedom, which is pre-eminently vested in it, to determine how to comply with the order concerned."[370] The panel reasoned that it was not entering the domain of politics with its holding, but providing legal protection by basing its decision on an internationally and nationally agreed-upon threshold required to mitigate harm (the IPCC emissions benchmark). The court also pointed to the fact that it exercised restraint by limiting the reduction order to 25%, the lower limit of the 25–40% norm, and that it did not attempt to tell the government how to reach that target.[371] This suggests that an important distinction exists between the courts (1) determining a duty exists, and (2) telling the government how it must go about fulfilling that duty.

Unfortunately, some Canadian judges may rely upon justiciability incorrectly to avoid weighing into difficult policy areas, in turn leaving claimants without the protection of the courts.[372] This is what happened in *Tanudjaja*, with the majority finding the courts did not have the institutional competence to determine whether the government had "given insufficient priority to issues of homelessness and inadequate housing."[373] Justice

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of the Constitutional Question Act and had a sufficient legal component); *see also* LORNE SOSSIN, BOUNDARIES OF JUDICIAL REVIEW: THE LAW OF JUSTICIABILITY IN CANADA 2 (1999) (defining the scope of justiciability).

369. *See* Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 3, 3–4, 7–9, 16, 20–21, 24–25, 27, 40 (Malcolm Langford ed., 2008) (arguing that courts give deference in social rights jurisprudence, as seen through the political question doctrine, which comes down to a question of whether the court is the appropriate forum to hear a case). *But see* D. Geoffrey Cowper & Lorne Sossin, *Does Canada Need a Political Questions Doctrine?*, 16 SUP. CT. L. REV. 343, 344, 351, 353–57, 360 (2002) ("A Canadian political questions doctrine already exists, although not labelled or acknowledged as such.").

370. Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, paras. 4.97, 4.101 (Urgenda Foundation/Netherlands) (Neth.). This echoes the Supreme Court's words in *Chaoulli* that, "[w]hile the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of the violation of Quebeckers' right to security." Chaoulli v. Québec, 2005 SCC 35, para. 97 (Can.).

371. *Urgenda*, C/09/456689/HA ZA 13-1396 paras. 2.61, 4.86.

372. ENVTL. LAW CTR., STANDING IN ENVIRONMENTAL MATTERS 15 (2014), http://elc.ab.ca/media/98894/Report-on-standing-Final.pdf.

373. Tanudjaja v. Canada (Att'y Gen.), 2014 ONCA 852, paras. 19, 35 (Can. Ont.). *Contra* Re *Canada Assistance Plan*, 2 S.C.R. at 546 (finding that the court did have institutional competence to decide the legal issues since the two questions presented "raise[d] matters that are justiciable").

Feldman penned a strong dissent, reasoning that, since the Supreme Court held that a similar Charter claim for social and economic rights in *Gosselin* was justiciable, it was inappropriate to part with this finding in the case at bar.[374] In *Gosselin*, the claim failed because of lack of evidence. Since the claimants in *Tanudjaja* came armed with a "16-volume record, totalling nearly 10,000 pages," Justice Feldman found the claimants had a right to make their case on the merits.[375] In her view, although the case law is clear that it is not for the courts "to determine the level of assistance that government should provide, that does not mean it cannot determine whether there is a constitutional obligation on government to provide some level of assistance."[376] As such, Justice Feldman seemed to accept that the court would be operating within its institutional boundaries if it limited itself to granting declaratory relief, as was done by the Supreme Court in *Khadr*.[377]

Two climate cases have also been thrown out of Canadian courts for non-justiciability. The first was a challenge that the environmental organization Friends of the Earth brought against the government's submission of a climate-change plan under the KPIA because that plan did not comply with Kyoto obligations.[378] The second was a challenge to the government's withdrawal from Kyoto.[379]

Although these two cases suggest justiciability might pose a significant hurdle for climate litigants, they are distinguishable from the kind of challenge this paper discusses, as neither involved Charter rights. The federal court in *Friends of the Earth* dismissed the challenge, holding that, "[w]hile the failure of the Minister to prepare a Climate Change Plan may well be justiciable, an evaluation of its content is not."[380] The court based its findings on the fact that the law used permissive language, addressed

374. *Tanudjaja*, 2014 ONCA para. 81 (Feldman, J., dissenting).

375. *Id.* paras. 66, 88.

376. *Id.* para. 80; *see also* David Wiseman, *Taking Competence Seriously*, *in* POVERTY: RIGHTS, SOCIAL CITIZENSHIP, AND LEGAL ACTIVISM 263, 273 (Margot Young et al. eds., 2007) (explaining the issue of judicial underestimation of institutional competence); Gosselin v. Québec (Att'y Gen.), 2002 SCC 84, paras. 141–42 (Can.) (L'Heureux-Dubé J., dissenting) (indicating that, although the courts generally defer to the legislature to implement social policies, other actors may aid in determining the minimum level of assistance); *id.* paras. 330–31 (Arbour, J., dissenting) (arguing that, even though legislatures are better equipped to make social policy decisions, courts are not absolutely foreclosed from hearing claims related to such policies).

377. *Tanudjaja*, 2014 ONCA para. 85 (Feldman, J., dissenting); *see* Canada (Prime Minister) v. Khadr, 2010 SCC 3, paras. 24, 26, 46 (Can.) (holding that the level of assistance provided by Canadian officials did not conform to the principles of justice required by section 7 of the Charter when Mr. Khadr was detained at Guantanamo Bay, but—out of respect for "the prerogative powers of the executive"—determining that the proper remedy was declaratory relief).

378. Friends of the Earth v. Canada (Governor in Council), 2008 FC 1183, paras. 2–3 (Can.), *aff'd*, 2009 FCA 297, *appeal denied*, 2010 CanLII 14720 (Can. S.C.C.).

379. Turp v. Canada (Att'y Gen.), 2012 FC 893, para. 13 (Can.).

380. *Friends of the Earth*, 2008 FC para. 34.

discretionary matters, and provided an alternative remedy in reporting.[381] Many believe the case was wrongly decided, however, since the plain language of the legislation specifically stated that the government's plans had to ensure compliance with the Kyoto Protocol.[382] The court seems to have conflated concepts of justiciability with enforceability.[383] Furthermore, following the court's logic could lead one to conclude that the existence of discretionary elements could render other aspects of the law non-justiciable.[384]

In the second case, *Turp*, the claimants had challenged the federal government's decision to pull out of the Kyoto Protocol and alleged that this decision was contrary to the KPIA (in force at the time) and principles such as the Rule of Law, separation of powers, and democracy.[385] The court upheld the government's decision on the basis that it had acted pursuant to royal prerogative, which gives the executive branch the power to conduct foreign affairs—including entering into or withdrawing from a treaty.[386] The judgment pointed out that the KPIA could have limited the royal prerogative with clear language, but that it did not do so.[387] The separation of powers was not infringed upon since the executive had the authority to withdraw.[388]

When the Charter is at play, it is less likely that a court would hold that an issue is non-justiciable. When someone alleges her Charter rights have been violated, the courts are obliged to determine whether that is so. As eloquently summarized in *Operation Dismantle*, "it is not only appropriate that [a court] answer the question; it is our obligation under the *Charter* to do so."[389] A court may need to defer to the legislature or the executive's

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381. Hugh S. Wilkins, *The Justiciability of Climate Change: A Comparison of US and Canadian Approaches*, 34 DALHOUSIE L.J. 529, 546 (2011).

382. *See* Christine Elwell & Grant Boyle, Friends of the Earth v. the Minister of the Environment*: Does CEPA 166 Require Canada to Meet Its Kyoto Commitments?*, 18 J. ENVTL. L. & PRAC. 253, 255 (2008) (describing states' duties to ensure that their activities do not harm the environment of other states); Wilkins, *supra* note 381, at 548 (discussing the court's interpretation of Canada's obligation to "ensure" compliance with Kyoto standards); *see also* Lorne Sossin, *The Unfinished Project of* Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law*, 55 MCGILL L.J. 661, 685 (2010) ("Justice Barnes [in *Friends of the Earth*] rejected an approach that would have him separate the *KPIA* policy imperatives into justiciable and nonjusticiable components.").

383. *See* Elwell & Boyle, *supra* note 382, at 273 (discussing the Environment Ministers' discretion under the Kyoto Protocol to implement appropriate legislation); Wilkins, *supra* note 381, at 548, 550 (noting that the responsibility of ensuring compliance with Kyoto is outside the realm of judicial review).

384. Wilkins, *supra* note 381, at 548, 550.

385. Turp v. Canada (Att'y Gen.), 2012 FC 893, para. 13 (Can).

386. *Id.* para. 25.

387. *Id.* para. 26.

388. *Id.* paras. 27–28.

389. Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441, 472 (Can.).

interpretation of a Charter right, but that is deference—not non-justiciability.

Indeed, this is perhaps what most distinguishes *Friends of the Earth* and *Turp*, since neither involved a Charter challenge. While the court upheld the federal government's decision to withdraw from the Kyoto Protocol under the royal prerogative, it noted explicitly that a Charter challenge to that decision to withdraw from Kyoto would have rendered it justiciable.[390]

In sum, courts and scholars have emphasized the importance of interpreting the standard of justiciability narrowly, underlining that justiciability means no more and no less than assessing whether a matter so lacks a legal component that it is unsuitable for adjudication. The jurisprudence strongly suggests that finding a Charter challenge non-justiciable is difficult. While the claimants in *Tanudjaja* did base their action on the Charter, the central reason why that case was dismissed was because it failed to identify (to the satisfaction of the Court) specific government conduct that led to a Charter violation; rather, the claimants sought recognition of an explicit positive obligation to implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing.[391]

It is the proper role of Canadian courts to hold the government accountable to meet its GHG-reduction targets when failing to do so infringes upon the Charter rights of Canadians. This is a justiciable, legal decision. Judges can avoid venturing into political turf by limiting their remedy to a declaration that the rights of the claimants have been violated, leaving it to the government to determine the best means of redress.

IV. IS THE INFRINGEMENT IN ACCORDANCE WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE?

Section 7 only allows the right to life, liberty, and security of the person to be infringed upon if in accordance with the principles of fundamental justice.[392] The purpose and requirements of fundamental

390. *Turp*, 2012 FC para. 18.

391. Tanudjaja v. Canada (Att'y Gen.), 2014 ONCA 852, paras. 15, 32–33 (Can. Ont.).

392. The most common view today is that section 7 confers a single right—not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice. *See, e.g.*, Reference re s 94(2) of Motor Vehicle Act (BC), [1985] 2 S.C.R. 486, 487 (Can.) (reasoning "principles of fundamental justice" is not a protected right, rather it qualifies the protected right of "life, liberty and security of the person"). While waning in popularity, some see section 7 as conferring two rights: (1) a right to "life, liberty and security of the person" that is unqualified, except by section 1 (the limitation clause) of the Charter; and (2) a right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice. Winnipeg Child and Family

justice remain somewhat foggy despite their importance and the number of applicable judgments from the Supreme Court. This is perhaps not surprising because, as Hogg notes, the principles of fundamental justice "did not have a firmly established meaning in Anglo-Canadian law" when the Charter was adopted in 1982.[393] In accounting for the wide variety of outcomes in section 7 cases, Hogg points to the "enormous discretion that the Supreme Court of Canada has assumed for itself under the rubric of fundamental justice."[394]

In spite of this variation, a common thread that ties the case law together is the treatment of fundamental justice as a normative concept. Professor Hamish Stewart compellingly argues that fundamental justice is ultimately a normative inquiry about the function of law, requiring the courts to engage in "a process of determining the values that are sufficiently fundamental to restrain the exercise of state power when the subject's most vital interests—life, liberty, and security of the person—are at stake."[395] He argues, rightly in our view, that this stage of the section 7 inquiry, instead of being empirical or historical, is deeply principled in nature because "the decisive question is what role the principle plays in a legal order that is committed to the values expressed in the *Charter*."[396]

Each time the courts accept—or are asked to accept—a new principle of fundamental justice, they are adjudicating whether a proposition is sufficiently foundational to the core values enshrined in the Charter to warrant restraining or directing the actions of government.

In *Malmo-Levine*, the Court articulated three defining characteristics for principles of fundamental justice, noting that: (1) they must be legal in nature (thereby ensuring courts avoid adjudication of policy matters); (2) there must be "significant societal consensus that [the principle] is fundamental to the way in which the legal system ought fairly to operate"; and (3) they must be capable of being "identified with sufficient precision to yield a manageable standard . . . ."[397] The Court in *Bedford* emphasized that principles of fundamental justice ensure the means the state uses to attain its objectives are not fundamentally flawed, e.g., "arbitrary, overbroad, or . . . grossly disproportionate to the legislative goal."[398] In

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Services v. K.L.W., 2000 SCC 48, para. 70 (Can.); *see also* Gosselin v. Québec (Att'y Gen.), 2002 SCC 84, paras. 338–41 (Can.) (Arbour, J., dissenting) (explaining that, although section 7 is often misinterpreted as conferring a single right because most courts only address the second clause of section 7, the two clauses must be read as conferring separate rights).

393. HOGG, *supra* note 129, at 47-19.

394. *Id.* at 47-26–47-27.

395. STEWART, *supra* note 297, at 103–04.

396. *Id.* at 109.

397. R. v. Malmo-Levine, 2003 SCC 74, para. 113 (Can.).

398. Canada (Att'y Gen.) v. Bedford, 2013 SCC 72, para. 105 (Can.).

2015, the Court in *Carter* added that principles of fundamental justice are "the minimum constitutional requirements that a law that trenches on life, liberty or security of the person must meet."[399]

To determine whether any of these three principles have been violated, the courts must clearly define the objective of the challenged state conduct.[400] The objective of deterring prostitution, for instance, was held in *Bedford* to be insufficiently precise.[401] Similarly, in *Carter*, the Court found the objective of preserving life to be too broad, as compared to the goal of "preventing vulnerable persons from being induced to commit suicide at a time of weakness," which is sufficiently precise.[402] Importantly, the inquiry is specific to the violations of the claimants' rights in a given case, and not a broader inquiry. In other words, "[t]he question under [section] 7 is whether *anyone's* life, liberty or security of the person has been denied" and the "effect on one person is sufficient to establish a breach of [section] 7."[403]

The Supreme Court also made it clear in *Carter* that courts are not to consider the competing social interests or public benefits that the government might confer when assessing whether a deprivation of rights is in accordance with principles of fundamental justice.[404] These broader issues are more appropriately considered in the section 1 analysis.[405] To do otherwise would be to impose the section 1 burden on section 7 claimants.[406]

Over the course of the Charter's existence, three central principles have emerged: arbitrariness,[407] overbreadth,[408] and gross disproportionality.[409] Analyzing each of these principles requires first identifying the goal of the government action that causes harm under section 7. The principles-of-fundamental-justice (PFJ) analysis will thus vary based on how the decision

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399. Carter v. Canada (Att'y Gen.), 2015 SCC 5, para. 72 (Can.) (citing *Bedford*, 2013 SCC para. 94).

400. *Id.* paras. 73, 78.

401. *Bedford*, 2013 SCC para. 131.

402. *Carter*, 2015 SCC para. 78.

403. *Bedford*, 2013 SCC para. 123.

404. *Carter*, 2015 SCC para. 79.

405. *Id.*

406. *Bedford*, 2013 SCC para. 127.

407. Rodriguez v. British Columbia (Att'y Gen.), [1993] 3 S.C.R. 519, 619–21 (Can.) (McLachlin, J., dissenting) (reasoning that arbitrariness of the law violates fundamental justice).

408. *Carter*, 2015 SCC para. 46; *Bedford*, 2013 SCC para. 127.

409. *Carter*, 2015 SCC para. 89; *Bedford*, 2013 SCC para. 125. The standard is high: the law's objective and its impact may be incommensurate without reaching the standard for *gross* disproportionality. *See Bedford*, 2013 SCC para. 127 (stating that a claimant must prove a law infringes upon rights "in a manner that is grossly disproportionate to the law's object"); Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, para. 47 (Can.) (stating the test for proportionality is "whether the government's proposed response is reasonable in relation to the threat").

is framed. However, in cases where the courts considered whether the combined effects of multiple legislative provisions created an infringement, they treated the combined effect of the legislative acts as one prohibition or decision for the purposes of the PFJ analysis.[410] As such, in the case of a climate Charter challenge framed around a set of decisions that lead to harmful levels of GHG emissions, the Courts would likely seek to identify the overall policy goal driving the decisions, which might be to provide convenient and inexpensive sources of energy. While the government might be tempted to underline the economic and social benefits of facilitating production of fossil-fuel energy, the jurisprudence is clear that these benefits are not part of the PFJ analysis, but must be reserved for section 1. The question would then be whether the state's conduct in authorizing, enabling, and investing in activities that lead to harmful levels of GHG emissions is arbitrary, overbroad, or grossly disproportionate relative to the purpose of such authorizations and investments. If the case was framed around the government's failure to reduce emissions in accordance with its target, the PFJ analysis would need to be applied flexibly, as elaborated in the following discussion.

A. Arbitrariness

A law is considered to be arbitrary if it affects section 7 interests for no valid reason.[411] In other words, an arbitrary law is one that undermines its own purpose or where there is no rational connection between its purpose and the limit it imposes on rights.[412] The government thus breaches section 7 when it "exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law."[413] As Hogg and Stewart note, *Carter*'s conception of fundamental justice requires first

410. For instance, in *Chaouilli*, the court treated the prohibition on private health insurance created by two distinct pieces of legislation as one provision for the purposes of the PFJ analysis. In both homeless shelter cases, the court analyzed the combined effect of three bylaws on PFJ. *See* Abbotsford (City) v. Shantz, [2015], 392 D.L.R. 4th 106 paras. 19–21, 124, 127, 188, 203, 221–22 (Can. B.C. Sup. Ct.) (analyzing the impact of multiple bylaws on homeless populations as an issue to be analyzed under the principles of fundamental justice); Victoria (City) v. Adams, [2009], 313 D.L.R. 4th 29 paras. 1, 37–40, 84, 88, 116 (Can. B.C. C.A.) (using the combined impact of bylaws on homeless persons to determine if the bylaws violated principles of fundamental justice).

411. *Carter*, 2015 SCC para. 83; *Bedford*, 2013 SCC para. 111; *see also* Hamish Stewart, Bedford *and the Structure of Section 7*, 60 MCGILL L.J. 575, 584 (2015) ("The defect of an arbitrary law is that it affects the section 7 interests for no reason.").

412. *Bedford*, 2013 SCC para. 111.

413. *Carter*, 2015 SCC para. 83. For example, the Court found that, since a complete ban on physician-assisted suicide achieved the objective of protecting the vulnerable from ending their lives in times of weakness, the rights of affected individuals were not limited arbitrarily. *Id.* para. 84.

looking to ensure that the chosen means of policy is capable of achieving the statutory goal ("instrumental rationality").[414]

If climate claimants targeted decisions that authorize and enable fossil-fuel extraction and development, the question would be whether the purpose of these decisions—presumably to promote the development of fossil-fuel energy, a resource of economic and social utility—is rationally connected to the harms they cause to the plaintiffs. Framed in this way, it would be possible to argue convincingly that there is no rational connection between the purpose of promoting fossil-fuel activities and the harms caused by GHG emissions. How can a government justify loss of life, liberty, and security of the person to promote an already pampered industry whose assets are increasingly stranded because the market knows we are headed into a decarbonized future?

The argument of arbitrariness would be even stronger, however, if the lawsuit was framed around the overall GHG-reduction target. Claimants could point to Canada's goal of reducing GHG emissions to the level required to avoid 2ºC warming: action it has characterized as urgent and critical to avoid the dire consequences of failing to reduce emissions.[415] Claimants would need only to point to the irrationality of continuing to approve major fossil-fuel infrastructure, like pipelines and liquefied natural gas terminals that will lead to significant increases in GHG emissions to demonstrate the arbitrariness of such government decisions. As noted earlier, Environment Canada's own models show that, even with full implementation of the policies in the Pan-Canadian Framework, Canada's emissions will still be 44 Mt over its 2030 target.[416] Ongoing decisions to approve fossil-fuel infrastructure that will lead to long-lasting and

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414. STEWART, *supra* note 297, at 151; Peter W. Hogg, *The Brilliant Career of Section 7 of the Charter*, 58 SUP. CT. L. REV. 195, 209 (2012). Hogg writes:

> A law that restricts life, liberty or security of the person, when subjected to an evidence-based review of its operation, may be shown to be not in fact fulfilling the law's objective, or even to be undermining the law's objective by doing more harm than good. That was the thrust of the evidence in the abortion, drug addiction, assisted suicide, prostitution and health care cases.

Hogg, *supra*, at 209.

415. *See* PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at 1 (characterizing the reduction of GHG emissions as a "critical and urgent" goal).

416. *See id.* at 5 (providing Canada's 2030 target of 523 Mt under the Paris Agreement); *supra* notes 100–01 and accompanying text (showing Canada's GHG emissions—currently projected to be 742 Mt of CO2 in 2030—need to be cut by 219 Mt to meet the Paris target of 523 Mt, and that, after fully implementing the Pan-Canadian Framework, Canada's emissions will decrease by 175 Mt of CO2 to 567 Mt by 2030—44 Mt more than the Paris target). This estimate does not take into account the emissions reductions associated with investments in public transit, innovation, and green infrastructure, nor the potential increase in stored carbon in forests, soils, and wetlands. CANADA'S NDC, *supra* note 101, at 5.

significant GHG emissions are therefore not only arbitrary, but patently foolish.

Another way claimants could frame their argument would be to point to evidence that the Canadian government's decisions and policies are fundamentally incompatible with the goal of meeting the IPCC 2020 emissions benchmark, which would require Canadian emissions to be 367–458 Mt CO2e in 2020,[417] or the Canadian government's own 2020 GHG-emissions-reduction targets of 622 Mt CO2e.[418] Once again, the government's decisions to enable GHG emissions could be seen as arbitrary relative to its own GHG-reduction commitments.

As such, there is considerable merit to the argument that the government's conduct in continuing to authorize and subsidize GHG emissions is, relative to its objective of reducing GHG emissions, arbitrary in a way that offends fundamental justice.

B. Gross Disproportionality

The principle of gross disproportionality is "infringed if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure."[419] Climate litigants could argue that the violation of their rights to life, liberty, and security of the person as a result of climate change is grossly disproportionate to the government's conduct in making decisions that lead to harmful levels of GHG emissions. This argument would be especially compelling for a group of youth indigenous claimants since the deprivation undermines all section 7 interests for an entire generation and likely multiple future generations.

If we consider (1) the government's statement that taking strong action to address climate change is critical and urgent and (2) its 2020 goal of reducing GHG emissions by 17% and 2030 goal of reducing emissions by 30%, the state's conduct in authorizing, enabling, and investing in activities that lead to harmful levels of GHG emissions certainly appears grossly disproportionate to the violations of section 7 rights.[420] The government explicitly acknowledges that "the costs of inaction are much greater than the costs of addressing climate change," meaning it recognizes the

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417. *See supra* notes 81–82 and accompanying text (calculating Canada's target under the IPCC 2020 benchmark).

418. *Canada's Emission Projections in 2020 and 2030*, GOV'T CAN., http://ec.gc.ca/ges-ghg/default.asp?lang=En&xml=8BAAFCC5-A4F8-4056-94B1-B2799D9A2EE0 (last modified Jan. 29, 2016).

419. Carter v. Canada (Att'y Gen.), 2015 SCC 5, para. 89 (Can.).

420. *See supra* notes 78–82 and accompanying text (outlining Canada's emissions-reduction goals for 2020 and 2030).

repercussions of delaying action to reduce GHG emissions.[421] To continue to make decisions that undercut the national commitment to GHG reductions is to say that the individual section 7 rights of Canadians are less important than the economic rights of fossil-fuel companies, many of which are foreign owned. Even if the government raised the social benefits of fossil-fuel development (something that is meant to be part of the section 1 analysis, rather than PFJ), the claimants could argue that, although energy development is important to Canadians, fossil fuels are not the only means of producing energy. In fact, the growth in renewable energy is so great that countries that fail to transition to clean forms of energy in a timely manner risk being left in a cloud of (fossil-fuel) dust.[422] If we boil down the issue to its core—that the government is prioritizing short-term economic interests over the future of human life as we know it—the only rational conclusion is that it is a grossly disproportionate choice.

C. Overbreadth

A law will be considered overbroad if it "goes too far by denying the rights of some individuals in a way that bears no relation to the object" of the law.[423] In other words, a law is overbroad if it has the effect of targeting conduct that bears no relation to its purpose. The Supreme Court in *Carter* found the prohibition on assisted suicide was too broad since it applied to all people, not just those who were vulnerable (the group of people the law was designed to protect).[424] Similarly, in *Bedford*, the Supreme Court held that the prohibition against living on the avails of prostitution was overbroad since it had the effect of punishing anyone who earned a living through a relationship with a prostitute, such as drivers and bodyguards, rather than just those who might exploit them.[425] Even though it can be challenging to define the target group (such as those vulnerable to assisted suicide or prostitutes who might be exploited), that does not justify overly broad legislation.

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421. *Economic Analysis of the Pan-Canadian Framework*, GOV'T CAN., https://www.canada.ca/en/services/environment/weather/climatechange/climate-action/economic-analysis.html (last updated Dec. 22, 2016). The Framework cites research by the National Roundtable on the Environment and the Economy (NRTEE), which estimated that, without action, the cost of climate change would increase from approximately $5 billion annually in 2020 to between $21 and $43 billion by 2050. PAYING THE PRICE, *supra* note 177, at 40.

422. *See, e.g.*, TONY SEBA, CLEAN DISRUPTION OF ENERGY AND TRANSPORTATION 22 (2014) (explaining that solar power is growing at a global compound annual growth rate of 43%, all part of a "fast disruptive transition" from resource-based energy production to renewables).

423. *Carter*, 2015 SCC para. 85 (citing Canada (Att'y Gen.) v. Bedford 2013 SCC 72, paras. 101, 112–13 (Can.)).

424. *Id.* para. 86.

425. *Bedford*, 2013 SCC paras. 143–44.

The overbreadth argument is more cumbersome to make in the context of climate change, since claimants would need to find some conduct that bears relation to the government's purpose of reducing GHG emissions. Given that the stated purpose of the Pan-Canadian Framework is to "develop[] a concrete plan which, when implemented, will allow [the government] to achieve Canada's international commitments," climate litigants could argue that the effect of the Canadian government's decisions to authorize and subsidize fossil-fuel extraction are too broad in relation to the goal of reducing emissions.[426] However, this is a more awkward argument than those under arbitrariness and gross disproportionality.

Perhaps it would be more interesting for courts to attenuate the overbreadth principle, which addresses laws that go too far, to consider laws or state conduct that do not go far enough and thereby infringe on section 7 rights. In this way, courts could squarely address a claim of infringement due to inadequate government action: inadequate action would not be in accordance with the principles of fundamental justice because it bears no relation to the government's goal of reducing GHG emissions.

D. Section 1

Charter rights are subject to section 1, which states that "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[427] The Supreme Court underlines that "[i]t is difficult to justify a [section] 7 violation . . . ."[428] However, it is not impossible, as recently illustrated in *R. v. Michaud*.[429]

In order to justify an infringement of section 7 rights under section 1 of the Charter, the government "must show that the law has a pressing and substantial object and that the means chosen are proportional to that object."[430] A law is proportionate if: (1) the means adopted are rationally

426. PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, *supra* note 28, at i.

427. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, s. 1 (U.K.).

428. *Carter*, 2015 SCC para. 95; *see also* Charkaoui v. Canada (Minister of Citizenship and Immigration), [2007] 1 S.C.R. 350, para. 66 (Can.) ("Section 1 may . . . successfully come to the rescue of an otherwise violation of [section] 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like." (quoting Reference re s 94(2) of Motor Vehicle Act (BC), [1985] 2 S.C.R. 486, 518 (Can.))).

429. R. v. Michaud, 2015 ONCA 585, para. 145 (Can. Ont.) (upholding speed-limit legislation for trucks under section 1 of the Charter, although the legislation infringed on the section 7 rights of truck drivers).

430. *Carter*, 2015 SCC 5, para. 94.

connected to that objective; (2) it minimally impairs the right in question; and (3) the deleterious and salutary effects of the law are proportionate.[431]

As noted earlier, during the section 7 analysis, the Court only considers the impact of the impugned action on the claimants.[432] In other words, the fact that there may be public policy reasons why the government is infringing a person's section 7 rights is not the focus of analysis at that stage. In contrast, under section 1, the government can raise these broader issues and justify its infringement of Charter rights on the basis that the infringement is necessary in order to meet a given objective.[433] In the context of a climate claim, the federal government could argue, for example, that infringement of the claimants' rights is necessary to meet Canada's growing energy needs or to ensure industry competitiveness. These arguments are unlikely to hold up given the evidence that Canada can in fact meet its energy needs without increasing GHG emissions,[434] and that the competitive risks of moving to clean energy are generally over-exaggerated.[435] However, it is worth examining them since the federal government would almost certainly raise them if challenged.

The Supreme Court's approach to section 1 has three advantages and one potential drawback for climate claimants. On the positive side, judges may not consider competing societal interests until the section 1 analysis; this should make it much easier for claimants to prove the government's action is not in accordance with the principles of fundamental justice because claimants are released from the burden of showing that these values are "not overridden by a valid state or communal interest in these circumstances."[436] Another advantage is that, as already noted, it is very difficult for the government to justify a section 7 violation. The Supreme Court once remarked that a section 1 argument overriding section 7 should succeed only in "exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[437] Lastly, while courts are more

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431. New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, para. 95 (Can.).

432. *Carter*, 2015 SCC paras. 79, 95; Canada (Att'y General) v. Bedford, 2013 SCC 72, paras. 123, 125 (Can.); *Charkaoui*, 1 S.C.R. paras. 21–22.

433. R. v. Malmo-Levine, 2003 SCC 74, paras. 129, 179–81 (Can.).

434. "Given Canada's relatively cheap and clean electricity generating portfolio, [. . . .] clean electricity is a comparative advantage for Canada." GOV'T OF CAN., CANADA'S MID-CENTURY LONG-TERM LOW-GREENHOUSE GAS DEVELOPMENT STRATEGY 33–35 (2016), https://unfccc.int/files/focus/long-term_strategies/application/pdf/can_low-ghg_strategy_red.pdf. Thus Canada is able to meet energy needs and reduce GHG emissions by the further electrification of Canada's power use. *Id.* at 33.

435. *See* GOV'T OF CAN., CANADA IN A CHANGING GLOBAL ENERGY LANDSCAPE 8–11 (2016) (showing that advances in technology and cost reductions make electricity a viable energy source).

436. *Carter*, 2015 SCC para. 80 (citing Thomas J. Singleton, *The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter*, 74 CAN. B. REV. 446, 449 (1995)).

437. Reference re s 94(2) of Motor Vehicle Act (BC), [1985] 2 S.C.R. 486, 518 (Can.).

deferential when the government protects competing Charter values, economic interests are not protected by the Constitution, and therefore theoretically warrant less deference.[438]

This last advantage could also be a potential barrier given that, in practice, courts are reluctant to interfere with the government's economic policy decisions. Judges may be tempted to defer to government arguments framed in this light. However, if the government attempted to rely on an economic argument to support inaction on climate change, it would likely fail since strong evidence shows that the costs of inaction are far higher than the costs of action.[439] Although there will be short-term costs to the economy, and particular industries will undoubtedly face some challenges, the mid- to long-term costs of inaction are far greater than taking action now. The longer we wait, the greater the costs will be. The Dutch court was very clear about this in the *Urgenda* decision, emphasizing the negative implications of delay.[440] As such, the government would mount a weak argument in claiming that the extraction of fossil fuels justifies infringing on the rights of Canadians when we know there is an urgent need to decarbonize and that further fossil-fuel development will jeopardize the government's ability to reduce GHG emissions.

Section 1 has, until recently, never justified a section 7 infringement. The only case where section 1 justified an infringement dealt with safety regulations, and was in part a response to the finding in *Bedford* that only one individual's section 7 right needed to be infringed upon for a violation to occur.[441] Because of the ease with which some section 7 infringements may now be found, the need for balancing in section 1 may have become more important.[442]

In our view, it is still unlikely that economic objectives would be the rationale that would convince the courts to justify the violation, especially when government actions infringe many Canadians' section 7 rights. The Supreme Court has offered the type of exceptional circumstances that might

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438. Canada (Att'y Gen.) v. Bedford, 2013 SCC 72, para. 121 (Can.) (quoting *Malmo-Levine*, 2003 SCC para. 181).

439. *See supra* note 409 and accompanying text (discussing the principle of gross disproportionality).

440. Rb. Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, paras. 4.58, 4.65, 4.71 (Urgenda Foundation/Netherlands) (Neth.).

441. R. v. Michaud, 2015 ONCA 585, paras. 79, 149 (Can. Ont.) (noting the court's reluctance to hold that a speed-limit law violated section 7, but finding that a strict application of *Bedford* required such an interpretation).

442. *See* Stewart, *supra* note 411, at 584 ("The defect of an overbroad law is that the section 7 interests of some (though not all) people it applies to are affected for no reason.").

justify an infringement, such as natural disasters, wars, or epidemics.[443] Climate change fits better into the type of exceptional circumstance that could justify infringing someone's rights, rather than a circumstance that could justify a section 7 infringement. In sum, we think it would be quite difficult to justify infringing a claimant's right to life, liberty, and security of the person based on section 1.

E. Potential Remedies

Section 24(1) of the Charter states that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[444] Judges have interpreted this section as providing them with a great deal of discretion to determine what remedy is appropriate in a given circumstance.

In *Urgenda*, the Dutch claimants sought only a declaration that the government's existing plan was inadequate in light of its obligations.[445] Canadian climate litigants may similarly wish to focus on obtaining a declaration that the government's conduct in relation to GHG emissions violates section 7 rights and—without prescribing the specifics of how to achieve this—clarify what GHG reduction is required in order to respect section 7 rights. The Dutch court was careful to avoid prescribing how the Dutch government should meet its target, specifying only the level of reduction required.[446] Similarly, Canadian courts would want to avoid telling the government how to achieve its target, but could legitimately, in our view, state what level of reduction is required to avoid violating the Charter.

After finding that the government's inaction in implementing its Climate Change Policy Framework offended the fundamental rights of its citizens, the court in the *Leghari* decision issued several directives: a directive (1) requiring several government ministries to nominate a Climate Change Focal Person to support implementation; (2) requiring an accounting of action points by a specific date; and (3) creating a Standing

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443. *See* Reference re s 94(2) of Motor Vehicle Act (BC), [1985] 2 S.C.R. 486, 518 (Can.) ("Section 1 may . . . successfully come to the rescue of an otherwise violation of [section] 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.").

444. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, s. 24(1) (U.K.).

445. *Urgenda*, C/09/456689/HA ZA 13-1396 paras. 2.6, 4.104.

446. *Id.* paras. 4.29, 4.31–4.32, 4.65, 4.71–4.73 ("The court has deduced from the various reports submitted by the Parties that mitigation can be realised in various ways.").

Committee on Climate Change to assist the court in monitoring progress on implementation of the Framework.[447] Canadian courts may resist going this far for a climate claim, and while it would indeed be unusual, it would not be unprecedented. In response to a long history of non-compliance with French-language rights, the Supreme Court upheld the decision of a trial judge requiring the Nova Scotia government to report back to the court at regular intervals.[448] More recently, in *R v. Jordan*, the Supreme Court established timelines with meaningful consequences for delays in the criminal justice system.[449] Given that the Canadian government is batting 1000 in failing to implement its climate change plans and meet its GHG-reduction targets, perhaps this is an appropriate case for establishing some accountability through the courts.

The majority in *Tanudjaja* suggested that a mere declaration that government is required to develop a housing policy would not have been meaningful in that case.[450] The dissent was unconcerned with this, noting that it is entirely appropriate for a court to limit itself to declaring that the Charter has been breached.[451] Justice Feldman pointed to the *Khadr* case as an example where the Supreme Court balanced the protection of Charter rights with Crown prerogative by simply declaring that Mr. Khadr's rights had been violated and leaving it to the government to determine how to remedy that breach.[452] The Supreme Court went further in *Eldridge* when it not only declared the claimant's rights had been violated, but also established parameters for what would be needed to remedy the violation and a timetable for required government responses.[453]

We suggest that a similar approach would be appropriate in a climate claim, with a court declaring that current government conduct violates section 7 rights. Some might argue that, with the current administration, such a declaration is unnecessary. However, at minimum, a declaration would arm the government with the political cover to protect vulnerable communities and future generations and counter any lobbying efforts from

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447. *See* Leghari v. Pakistan, (2015) WP No. 25501/201 (Punjab) paras. 19, 25, 27 (Pak.) (noting that the court established the Standing Committee on Climate Change to implement certain climate-change actions on a schedule).

448. Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62, paras. 83–84 (Can.).

449. R v. Jordan, [2016] 1 S.C.R. 631, 632 (Can.). The Court established a "presumptive ceiling" of 18 months for cases tried in the provincial court, and 30 months for cases in the superior court. *Id.* Beyond these presumptive ceilings, the court will presume delay to be unreasonable. *Id.*

450. Tanudjaja v. Canada (Att'y Gen.), 2014 ONCA 852, para. 34 (Can. Ont.).

451. *Id.* para. 85 (Feldman, J., dissenting).

452. *Id.*; *see also* Canada (Prime Minister) v. Khadr, 2010 SCC 3, paras. 21, 33–34 (Can.) ("[T]he decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations.").

453. Eldridge v. British Columbia (Att'y Gen.), [1997] 3 S.C.R. 624, paras. 94–96 (Can.).

fossil fuel and other industry interests to avoid more ambitious levels of emission reductions. Even more importantly, the declaration could become very important in the event of a change in government with less interest in addressing climate change. The court would leave discretion to the government to determine how to remedy that breach, but the claimants could argue that the exceptional nature of the threat posed by climate change, combined with a long history of inaction, warrants imposing some parameters and a timeline for what would be required.

CONCLUSION

Climate change poses grave risks for current and future generations in Canada and around the world. Given the slow progress of elected officials in addressing the problem, the number of lawsuits to compel governments to act more quickly and decisively is rapidly rising. It is only a matter of time before a similar suit arises in Canada. This Article has examined the potential for such a case under section 7 of the Charter.

Canada has failed to take the steps needed to reduce emissions to the extent deemed necessary by the international scientific community to avoid dangerous levels of climate change. The government has even repeatedly failed to reduce emissions in accordance with its series of inadequate national targets. Instead, laws and policies have enabled GHG emissions to continue rising, largely unabated, and the government has continued to make decisions that lock in long-term and large-scale GHG emissions. Canada has made these decisions with full knowledge of emission impacts on rising average temperatures for present and future generations of Canadians. In doing so, as our analysis showed, the government's conduct violates the Charter rights of its citizens.

Compelling evidence demonstrates that the government's conduct has resulted—and will continue to result—in devastating physical and psychological impacts on human health, impaired cultural and subsistence rights for indigenous peoples, and the very future of human life, especially youth. Courts are mandated, as the guardians of the Constitution, to safeguard Canadians' interests in life, liberty, and security of the person. In the context of climate change, this means recognizing that Canadians' section 7 rights are being infringed, and compelling the government to reduce the country's GHG emissions in line with what science requires to avoid catastrophic climate change.

This Article examined some of the issues that are likely to arise in a claim that the Canadian government's conduct, in relation to GHG emissions, violates the Charter's section 7 right to life, liberty, and security

of the person. Our analysis revealed that courts presented with a section 7 climate challenge would need to grapple with novel questions since the jurisprudence has not evolved in a way that easily fits with the unique characteristics of climate change. We discussed three issues in some depth, namely how to frame the challenged government conduct, the evidentiary burden for claimants, and the justiciability of a climate Charter challenge. We found that a climate Charter claim would be justiciable and that claimants should easily satisfy the evidentiary burden under existing section 7 jurisprudence. The strong scientific evidence published by the IPCC and the Canadian government's own documents create a solid evidentiary foundation to establish a violation of section 7 rights. The magnitude of the impacts makes it difficult to justify government conduct as being in accordance with the principles of fundamental justice.

However, courts will need to be flexible for a section 7 claim to succeed, allowing the claim to consider the impact of a constellation of government decisions, versus one particular law. Judges are not accustomed to assessing section 7 infringements in these ways, but refusing to do so would allow the government to do an end-run around Charter rights. It would be akin to a judge exempting someone from liability because that person caused a death by a thousand cuts rather than one wound. As this example shows, what should matter in the end is overall impact.

Given the strong evidence of the repercussions of climate change on life, liberty, and security of the person, we argue climate change is the kind of compelling, special circumstance that should persuade the courts to find the government has a positive obligation to reduce emissions. However, courts could also find in favor of section 7 claimants without the need to find a positive obligation, since there is plenty of government conduct in the form of decisions, plans, and policies that enable large-scale, long-term GHG emissions.

Although some will urge the courts to shield the government from responsibility because of the global nature of the problem, or even its magnitude, these arguments should fail. It is exactly because of the collective, dire nature of climate change that judges need to enforce the Constitution, adapting Charter jurisprudence to respond to dangerous new environmental realities. If the courts fail to do so, we will continue to operate in a legal vacuum in which the government infringes upon the rights of Canadians. The severity of climate change consequences demands bold action. We are counting on our judiciary to be wise and brave.