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What Does *La Rose* Tell Us About Climate Change Litigation in Canada?

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Case Commented On: *La Rose v Canada*, 2023 FCA 241 (CanLII)

The last decade has seen an explosion of domestic climate change litigation around the world and an equally rich body of academic literature examining the case law from a variety of disciplinary perspectives. The Sabin Center for Climate Change Law maintains an excellent data base covering these developments. Important cases in other jurisdictions include the *Urgenda* decision (*Urgenda v Netherlands* (2019)) and *Shell* decision (*Milieudefensie et al v Shell* (2021)) in the Netherlands, and the 2021 decision of the German constitutional court (*Neubauer et al v Germany*). Australian environmental non-governmental organizations (ENGOs) have been particularly active in bringing climate change issues before the courts, especially in the context of proposed natural gas and coal projects, most famously in the *Sharma* case (*Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, appeal allowed, [2022] FCAFC 35).

These cases have different doctrinal and theoretical bases. Some are based on domestic constitutional law; some on the domestic implementation of international human rights treaties; and some, like *Sharma*, on principles of tort law. And while ENGOs have been met with significant successes, there have also been significant setbacks – perhaps most surprisingly in Norway (see *Nature and Youth Norway et al v The State* (2020)).

Within this broader global context, climate change litigation in Canada, especially rights-based litigation, has been slow to emerge, but with the *La Rose* decision of the Federal Court of Appeal (the subject of this post) and the *Mathur* case in the Ontario courts, we are starting to see some engagement. In *Mathur v Ontario*, 2020 ONSC 6918 (CanLII) and *Mathur v His Majesty the King in Right of Ontario*, 2023 ONSC 2316 (CanLII), the applicants challenged Ontario's greenhouse gas emissions reduction target as contrary to s 7 (the right to security of the person) and s 15 (the right to equality) of the *Canadian Charter of Rights and Freedoms* (*Charter*). The application was permitted to proceed to a hearing on the merits after surviving the Ontario government's motion to strike, but was unsuccessful at trial. Justice Marie-Andrée Vermette of the Ontario Superior Court of Justice ultimately concluded that there was no violation of s 7 since the "[a]pplicants have not demonstrated that any deprivation of their rights under section 7 of the Charter was contrary to the principles of fundamental justice …" (at para 171). Neither was there a breach of s 15, principally because any disproportionate impact that would be experienced by the applicants as youth would be caused by climate change itself and not by Ontario's greenhouse gas reduction target (at paras 177-183). The applicants' appeal was heard by the Ontario Court of Appeal in January 2024 and judgment was reserved.

The *La Rose* plaintiffs are 15 children and youth residing in seven provinces and one territory, including Sadie Vipond of Calgary. This time, the target is the federal government. The plaintiffs allege that the government's failure to address the problem of climate change constitutes a breach of ss 7 and 15 of the *Charter*. The *La Rose* plaintiffs also allege that Canada is in breach of its public trust duties, in particular its duty "to preserve and protect inherently public resources—bodies of water, the air, and the permafrost—so that current and future generations may access, use, and enjoy these resources" (*La Rose* at para 53). The plaintiffs' requests for relief – discussed in the Federal Court decision considering the government's motion to strike – included "an order requiring the Defendants to develop and implement an enforceable climate recovery plan that is consistent with Canada's fair share of the global carbon budget plan to achieve GHG emissions reductions compatible with the maintenance of a Stable Climate System" (2020 FC 1008 (CanLII) at para 12f). The plaintiffs referred to a Stable Climate System as a climate "capable of sustaining human life and liberties" (*ibid* at para 6). Justice Michael Manson of the Federal Court granted Canada's motion to strike principally on the basis that the claims were not justiciable. On appeal, in a unanimous judgment written by Justice Donald Rennie, the Federal Court of Appeal affirmed the motion to strike in relation to the s 15 claim, but allowed the appeal in respect of the plaintiffs' s 7 claim – at least to the extent that the Court gave the parties leave to amend their pleadings (at paras 21-22).

Justice Rennie's judgment also provides the Court's reasons for the appeal in the companion case of *Misdzi Yikh v Canada*. This was a case brought by two Wet'suwet'en House groups represented by their Dini Ze' (Head Chiefs) alleging that the federal government's actions in relation to climate change amounted to a breach of ss 7 and 15 of the *Charter* and a failure by Canada to make laws in relation to peace, order and good government. Justice Glennys McVeigh of the Federal Court had struck the *Misdzi Yikh* claim in its entirety (see *Misdzi Yikh v Canada*, 2020 FC 1059 (CanLII)). Justice Rennie found that the s 7 *Charter* claim could proceed with amended pleadings here too.

This post begins with, and focuses on, Justice Rennie's reasons for decision in the *La Rose* case but we also offer some comments on the *Misdzi Yikh* case.

The Test for a Motion to Strike

A claim should be struck if it is plain and obvious that the claim has no reasonable prospect of success. In applying this standard, "the facts are to be taken as proven unless they are manifestly incapable of proof", "the pleading must be read generously" and, "recognizing that the law is not static and evolves to address new and emerging situations" the court "must err on the side of permitting novel but arguable claims to proceed to trial …" (*La Rose* at para 19).

Justiciability

Justice Rennie noted several possible bases for striking the claims: non-justiciability, failure to disclose a reasonable cause of action, or a failure of the pleadings (at para 20). A claim is justiciable if a court has both the institutional capacity (what a court can do) and legitimacy to adjudicate the matter (what a court ought to do). A question is justiciable in a constitutional case if it concerns the validity of government (in)actions rather than the wisdom of the choices made by Parliament.

Questions as to the wisdom of actions or inactions are issues to be determined by the legislative or executive branches of government within a Westminster parliamentary system like ours, rather than the judicial branch (at para 26). A claim is not rendered non-justiciable just because it concerns matters that are politically sensitive or controversial so long as the claim has a sufficient legal component (at paras 33-36, drawing in particular on the concurring reasons of Justice Bertha Wilson in *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441).

In applying these tests in the *La Rose* case, Justice Rennie concluded that the plaintiffs' claims were justiciable. He noted that the question of climate change was not simply a matter of political choice since it had been crystallized into law. Here, Justice Rennie referenced (at para 32) the preamble of the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, which in turn references Canada's commitment to achieve its Nationally Determined Contribution under the Paris Agreement. Furthermore, "[i]t must not be forgotten that the target of the appellants' claims is legislation—existing laws, regulatory instruments and Orders in Council" (at para 33). It followed that there is, "therefore, a sufficient legal component to their claims, and the claims satisfy the legitimacy portion of a justiciability analysis" (at para 45).

In reaching this conclusion Justice Rennie was able to distinguish the decision in *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 (CanLII), aff'd *Friends of the Earth v Canada (Environment)*, 2009 FCA 297 (CanLII), application for leave to appeal dismissed 2010 CanLII 14720 (SCC). As Justice Rennie noted, *Friends of the Earth* was a case in which the conclusion as to non-justiciability largely turned on the determination that Parliament allocated the accountability mechanisms in the *Kyoto Protocol Implementation Act*, SC 2007, c 30 to Parliament itself and not to the courts. We agree with this assessment and also agree that *Friends of the Earth* cannot "stand for the proposition that all claims addressing climate change are inherently non-justiciable …" (*La Rose* at para 42).

While this analysis revealed a sufficient legal target, it was also necessary to assess whether that target was too diffuse and whether a court had the institutional competence to tailor "effective, enforceable remedies to meaningfully address the asserted harms" (at para 47). Here Justice Rennie cautioned that a court should be slow to conclude that the remedies sought might render a claim non-justiciable. After all, the courts have the capacity to issue a suspended declaration as a response to unconstitutional behaviour so as to afford the legislative branch the opportunity to respond (at para 48). In addition, climate change science has been evolving so as to allow "a science-based GHG reduction target," meaning that "a stable climate system could be established through expert evidence" at trial (at para 49, following the 2023 decision in *Mathur* at para 123). This is an important acknowledgement of the concept of a Stable Climate System even though Justice Rennie does not expressly refer to the idea of a carbon budget. Justice Rennie went on to note that requests for remedies are often amended in the course of litigation and while some of the plaintiffs' requests for remedies might be overly prescriptive or overly general, there would still be the opportunity to tailor remedies appropriately should a breach be found (*La Rose* at paras 51-52).

In sum, the claims in *La Rose* were found to be justiciable and the same conclusion must presumably apply to the claims in *Misdzi Yikh.* This is a significant conclusion, fully in line with the case law in other jurisdictions and with *Mathur*. In our view, it would be a very strange and

unfortunate outcome if rights-based climate change cases were justiciable in other jurisdictions but not here in Canada.

Plain and Obvious and the Substantive Law

With the threshold issue of justiciability disposed of, Justice Rennie could turn to the substantive law underlying the specific claims of the plaintiffs to see if they would falter under the plain and obvious test for failing to disclose a reasonable cause of action. First up was the non-*Charter* public trust argument of the youth plaintiffs.

The Public Trust Claim

The public trust doctrine does not have the salience in Canadian law generally, or in Canadian constitutional law specifically, that it does in the United States. For this reason alone, it is hardly surprising that Justice Rennie declined to interfere with Justice Manson's conclusion that the plaintiffs' claim did not disclose a reasonable cause of action (at para 57). Justice Rennie found that the government's standing (or power) to act in the public interest did not translate into a general obligation for it to do so (at para 60). This does not mean that all public trust claims are doomed to failure, but any effort to apply such a doctrine across the whole of the federal government was a leap too far. Better to build this doctrine incrementally – the methodology of the common law – rather than proclaiming a brave new world.

The POGG Claim of the *Misdzi Yikh* Plaintiffs

The next issue Justice Rennie addressed was the claim of the *Misdzi Yikh* plaintiffs in relation to the federal government's peace, order and good government (POGG) powers. Similar to the public trust doctrine, the plaintiffs faced the challenge of converting a federal power to make certain types of laws into a duty to make a law co-extensive with the power (and a correlative right of the plaintiffs to see that such a law would be enacted). That is no small undertaking, and much like our comments above with respect to the public trust doctrine, this is not the case in which to try to use POGG to convert a legislative power into a justiciable duty to act. If there is such a duty, it must arise from the rights-conferring terms of the *Charter*, not from the language of the power to make laws or the principles of federalism. In other words, POGG does not supply a free-standing cause of action, but if the plaintiffs can establish a *Charter* basis for protective measures then it does seem possible that a court might be able to order federal action, even if that requires the federal government to rely on its POGG power. After all, insofar as it is provincial inability that feeds the POGG power (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII) at para 152 (*GGPPA Reference*)), the federal government might be the only government with the power to take the necessary protective action. But in this case the *Misdzi Yikh* plaintiffs do not seem to have expressly combined their POGG and *Charter* arguments.

Hence we agree with Justice Rennie's conclusions striking the POGG claim (at para 69) but we do caution that his comments with respect to reliance on comparative and international jurisprudence need to be interpreted in context, as we elaborate in the next paragraph.

The *Misdzi Yikh* plaintiffs based their case on the *Bancoult* or Chagos Islands decisions of the UK courts (see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2001] QB 1067 [*Bancoult (No 1)*] and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61 [*Bancoult (No 2)*]), which considered whether the British government's POGG powers extended to the executive's politically motivated removal of the inhabitants of the British Indian Ocean Territory. Justice Rennie dismissed any reliance on these cases in terms of the merits of the arguments but also more broadly reasoned as follows:

> In any event, constitutional analysis is principally informed by Canadian jurisprudence, which is in turn shaped by our political and social history and only draws upon decisions of foreign courts or principles of international or comparative law in exceptional circumstances (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426 at paras. 43-47). This practice is driven by the obvious reality that measures adopted in other contexts may be of scant relevance, a point particularly apposite in respect of the *Bancoult* decisions. (at para 74)

While we generally agree with this sentiment when it comes to questions of division of powers, and specifically the interpretation of POGG in the context of principles of Canadian federalism, we fundamentally disagree with this sentiment as applied to rights-based litigation (and the *Charter*) in the context of climate change litigation. Insofar as much of this litigation is rooted in an internationally shared set of human rights norms, we think that both international and comparative jurisprudence (as outlined in our introductory paragraphs) should be of considerable interest and value to Canadian courts. We note that both the Supreme Court of Canada in the *GGPPA Reference* (at paras 2, 7-13, 24, 167, 171, 187-190, and 206), and Justice Vermette in the *Mathur* case (see especially at paras 17 and 146) seem to be much more open to engaging with this jurisprudence.

There is also one more specific reason for engaging with international law in the context of Indigenous plaintiffs and climate law, and that is because of jurisprudence of the UN Human Rights Committee on article 27 (the minority rights provision) of the International Covenant on Civil and Political Rights. This jurisprudence is important because of the Committee's insistence that article 27 (even though framed negatively) may in some circumstances require a state party to take positive measures to ensure that Indigenous minorities continue to have access to the material elements of their culture (see in particular the Committee's General Comment on Article 27 and the Committee's decision in *Daniel Billy and others (Torrres Strait Islanders v Australia* (2022)). Given the judicial reluctance to interpret *Charter* rights as imposing a government duty to take positive protective measure to ensure the enjoyment of the right (see the discussion below), this jurisprudence supports a more generous reading of rights as more than just protections against the state.

***Charter* Claims**

This brings us to the plaintiffs' *Charter* claims. Justice Rennie began with the equality guarantee in s 15 and the youth plaintiffs' argument that climate change affects them disproportionately, with the lack of a robust legislative response amounting to adverse effects discrimination based on age. As noted by the Court, a violation of s 15 is assessed via a two-step test: (1) "whether the law or

state action creates a distinction [or has a disproportionate impact] based on an enumerated or analogous ground" and (2) "whether the law or state action imposes burdens or denies a benefit in a manner that perpetuates, reinforces, or exacerbates some disadvantage experienced by the group, either systemically or historically" (at para 79).

At the outset of his analysis, Justice Rennie recognized that "[c]limate change is having a dramatic, rapidly unfolding effect on all Canadians and on northern and Indigenous communities in particular" and that it is "beyond doubt that the burden of addressing the consequences will disproportionately affect Canadian youth" (at para 76). While accepting the principle that where the government has conferred a benefit or imposed a burden, it must do so without discrimination, Justice Rennie also noted that governments are "free to address inequality incrementally" and do not have a "freestanding positive obligation … to enact benefit schemes to redress social inequalities" (at para 81). He characterized the plaintiffs' claim as one related to future inequalities and intergenerational inequity, and found that it was not the proper role of the courts to address such harms (at paras 82-83; see also paras 123-124 and the comparison to the intergenerational cycle of imprisonment discussed in *R v Sharma*, 2022 SCC 39 (CanLII)). Justice Rennie noted that age discrimination claims are unique in that age is experienced universally and it is accepted that government actions "will, of necessity, affect different generations differently" (at paras 85-86). Although the international community is beginning to recognize youth climate rights and intergenerational equity, obligations such as those flowing from the *Convention on the Rights of the Child* did not factor into the s 15 framework to support the plaintiffs' argument (at para 87). Justice Rennie upheld the decision to strike the plaintiffs' s 15 claims without any leave to amend.

This left the s 7 claims, which were to be assessed on the basis of: (1) whether the law or state action deprived the plaintiffs of their life, liberty or security of the person, and (2) whether this deprivation was contrary to the principles of fundamental justice (at para 89). Justice Rennie also noted the need for the pleadings to draw a sufficient causal connection between the impugned state action and the prejudice suffered by the plaintiffs (at paras 90-91).

Justice Rennie's analysis of positive versus negative rights here focused on the idea that s 7 protects against the deprivation of life, liberty, and security of the person by the state, rather than providing a right to a legislative regime or state action that furthers these interests (at para 92). That said, he acknowledged that the Supreme Court and lower courts have left the door open on the argument that s 7 might encompass positive rights claims in special circumstances, an approach that is particularly important for recognizing Canada's international human rights obligations (at paras 96-99). Justice Rennie also noted that it is well accepted that the dividing line between positive and negative rights can be difficult to draw (at para 101) and that the positive/negative orientation of a right might simply depend on the perspective taken (at para 103). He used an excellent example to illustrate this point, referring to the right to accessibility for persons with disabilities who require assistive devices, "but only because the state has constructed inaccessible programs and infrastructure" (at para 102).

In the environmental law context, it is useful to recall that, prior to the expansion of the modern environmental state, the common law's position was that "[p]ollution is always unlawful and, in itself, constitutes a nuisance" (*Groat v Edmonton (City)*, 1928 CanLII 49 (SCC), [1928] SCR 522 at 532). Subsequently, modern environmental laws were passed to broadly prohibit environmental

harms in one breath, but also to open the door to regulatory (i.e., statutory) authorization of such harms in the next. In other words, like the disability example where Justice Rennie noted the state's construction of inaccessible programs and infrastructure, so too has the state authorized climate-destabilizing industries and activity that now threaten the plainitffs' *Charter* rights.

Justice Rennie also found that the requirement that the state expend funds to redress a breach is not fatal to s 7 claims (at para 104).

With this background established, Justice Rennie held that the courts below had erred in striking the s 7 claims on the basis that they were claims for the recognition of positive rights. The *Misdzi Yikh* claim alleged a direct and ongoing deprivation of security of the person related to specific state actions that affected their food security, culture, and economies (at para 105). While the youth plaintiffs' claim was more prospective in nature, it could be read to allege deprivations of "the fruits of Canada's legislated commitments" towards climate change, causing psychological distress (at paras 106, 125). Although in *Mathur* (ONSC) the ONSC found that any deprivation of life, liberty, or security of the person in Ontario's response to climate change was not shown to be contrary to the principles of fundamental justice, this ruling followed a full trial on the merits (at paras 111-112). Citing the Supreme Court's *GGPPA Reference* at para 167, Justice Rennie noted that climate change constitutes "an existential challenge, a threat of the highest order to the country, and to the future of humanity which cannot be ignored" (*La Rose* at para 116). This amounted to the type of "special circumstance" that should allow a s 7 claim to proceed (at para 116), albeit with amendments to the pleadings required (see discussion at paras 128-134).

Justice Rennie also disagreed with the government's argument that "a causal relationship between the legislation and the deprivation of a section 7 interest is 'manifestly incapable of being proven'" (at para 113). The task is not to prove that "the challenged law or government action [is] the sole or dominant course (*sic*) of the alleged deprivation," but more simply that there is "a real as opposed to speculative link" (*ibid*, citing *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII) at para 76). This is important bearing in mind the proliferation of *Charter*-based climate litigation in *several* provinces, including most recently in Saskatchewan. No single government's legislation and related GHG emissions – whether federal or provincial – will be the sole or even dominant cause of climate change. But as noted by the Supreme Court in the *GGPPA Reference*, each "province's emissions are clearly measurable and contribute to climate change" (at para 188).

Justice Rennie's handling of s 7 is commendable, but we are disappointed in his reasons on s 15, and indeed the two sets of reasons are difficult to reconcile. Under s 7, it is the current and ongoing impact of climate change in the form of psychological distress that allows the claim to proceed (at para 125), and this perspective could also have been applied to s 15. If we accept that it is at least arguable that serious anxiety about government (in)action on climate change is experienced disproportionately by youth, or that youth experience qualitatively different distress than the rest of the population, this should have been sufficient to allow the s 15 claim to proceed (for a discussion of quantitative versus qualitative harms under s 15, see here).

Justice Rennie stated that the question before him was "whether it is reasonably arguable that this reality [of the adverse impact of climate change on the plaintiffs] falls within the scope of section 15" (at para 77). He did not apply the two-part test for assessing s 15 claims that he had set out to

determine if the claim was within the scope of s 15 (at para 79). Instead, he held that the adverse impact of climate change on the plaintiffs "is not the kind of adverse effect that section 15 is to address" and that "intergenerational equity is not within the scope of s 15 as the law currently stands" (at para 82). These are conclusions rather than reasons. Justice Rennie did provide a reason, but it was an "underlying rationale" for excluding this claim from s 15's scope rather than a failure to meet the test for assessing s 15 claims: the separation of powers (at para 83). This is an underlying rationale that sounds a lot like justiciability, which Justice Rennie had already dealt with (at paras 23-52). He had already decided that the claim was justiciable, which means he had decided that the court did have the institutional capacity and legitimacy to adjudicate the claim. His conclusion on the justiciability issue is difficult to reconcile with his stated reason for finding that it was not reasonable to argue that this claim fell within the scope of s 15.

In addition, his reliance on the judiciary's inability to participate "in the policy choices around resource allocation" depended on the discrimination being caused solely by future inequalities (at para 83). It is disconcerting to see the prejudice the claimants have suffered accepted under their s 7 claim as current harm (at para 90) while it was characterized as anticipated future harm in the s 15 analysis. In particular, the pleadings in *Misdzi Yikh* described "a direct deprivation of the security of the person" happening today (at para 105) and not simply concerns about how the legislation would affect them when they are older, which was how Justice Rennie framed the s 15 claim (at para 86).

In the same vein, it is troubling to see the government's obligations downplayed under s 15 while being accepted as arguable under s 7, which is unfortunately a result of recent jurisprudence on positive obligations under s 15 (for a critique see here). At the same time, the Supreme Court of Canada recently recognized that s 15 claims have often taken a backseat when multiple *Charter* sections are raised, and directed courts that "[t]he *Charter* should not be treated as if it establishes a hierarchy of rights in which s. 15 occupies a lower tier" (see *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 (CanLII) at para 180). This principle should have allowed the s 15 claim to proceed to trial. To the extent that Justice Rennie found "there are often solid grounds" for the government to treat different age groups differently (at para 85), these are considerations for s 1 of the *Charter*. A trial would have been the appropriate forum for the government to justify its climate-related (in)actions.

Finally, Justice Rennie seems to have been unduly dismissive of the principle of intergenerational equity, suggesting that it need not be taken seriously, apparently because of his perception of the limited recognition of the principle (at paras 82 and 87). This is misleading. The principle is referenced in numerous international instruments, including the Framework Convention on Climate Change (at article 3(1)), as well as federal law: see *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 at s 2(1)(a.3)). Thus it is far from clear how he so readily reaches the conclusion that this acceptance "does not yet create a place in the framework under section 15 that would allow the youth appellants' claim to proceed" (at para 87).

Conclusion

We end by repeating the Supreme Court of Canada's observation in the *GGPPA Reference* that climate change presents "an existential challenge, a threat of the highest order to the country, and

to the future of humanity which cannot be ignored" (at para 167, quoted in *La Rose* at para 116). And yet, given short-term election cycles, governments are often reluctant to take stringent measures where the burden falls on the current generation of voters. It is far easier to punt the issue to future generations of voters (see *Neubauer* at para 206). The question at the heart of climate change litigation is the question of whether it is lawful for governments to sit on their hands or to prescribe half-hearted measures. Or, as Justice Vermette put it in *Mathur*, "[t]he issue [is] whether Ontario has a constitutional obligation to take steps to reduce GHG in the province at a rate higher than the [current statutory target]" (at para 117). We applaud the Federal Court of Appeal for recognizing that this issue engages s 7 of the *Charter*, and only wish it had gone further to recognize the equality rights engaged by the claims in *La Rose* and *Misdzi Yikh*.

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