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Climate Change Class Actions in Canada

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Climate Change Class Actions in Canada

Jasminka Kalajdzic[*]

"[O]ur common future, that of every Canadian community, depends on a healthy environment."[1]

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I. Introduction

In January 2020, a divided 9th Circuit Court of Appeals dismissed the long-running case, *Juliana v. United States*.[2] The plaintiffs, 21 young citizens and an

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[*] Associate Professor, University of Windsor, Faculty of Law. I thank Sonya Molyneux (Class of 2020) and Daniel Macdonald (Class of 2021) for their excellent research assistance in a very short time, made more challenging by a pandemic. This paper was finalized in June 2020 and therefore does not discuss decisions released in the fall in three climate change cases: *La Rose v. Canada*, [2020] F.C.J. No. 1037, 2020 FC 1008 (F.C.), *Misdzi Yikh v. Canada*, [2020] F.C.J. No. 1109, 2020 FC 1059, and *Mathur v. Ontario*, [2020] O.J. No. 5061, 2020 ONSC 6918 (Ont. S.C.J.).

[1] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42, 2001 SCC 40 at para. 1 (L'Heureux-Dubé J.).

[2] *Juliana v. United States* (January 17, 2020), 18-36082, online: 9th Cir. <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/

environmental organization, had sued the U.S. president and various federal agencies, claiming that their continued authorization and subsidization of fossil fuels contributed to catastrophic climate change that was incompatible with sustained human life. They argued that these harms constituted a violation of their constitutional rights to due process and equal protection of the law, and sought declaratory relief as well as an injunction requiring the government to phase out fossil fuel emissions and draw down excess carbon dioxide emissions.[3] The appeals court, like the District Court below, agreed with the plaintiffs that the evidence filed "leaves little basis for denying that climate change is occurring at an increasingly rapid pace" and that "this unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked".[4] The Court also accepted the plaintiffs' expert evidence that "the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change".[5] In the end, however, the majority concluded that the claims were not justiciable in that it was beyond the power of the court to order, design or supervise the plaintiffs' requested remedy. The panel "reluctantly concluded that the plaintiffs' case must be made to the political branches or to the electorate at large".[6]

The majority decision was rife with ironies and pyrrhic victories. The panel agreed that the federal government had increased carbon dioxide emissions for five decades despite knowing about the risks of fossil fuel use; nevertheless, the majority found that the government was effectively immune from suit. The panel agreed that the political branches of government had ignored the pleas of the plaintiffs and those similarly situated to them[7] — but still contended that their only recourse was to be found in that very same political process. The defendant government did not dispute

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20200117_docket-18-36082_opinion.pdf> [hereinafter "*Juliana*"]. In March 2020, the plaintiffs and several interveners filed for an *en banc* rehearing.

[3] *Juliana v. United States* (January 17, 2020), 18-36082, at 12, online: 9th Cir. <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200117_docket-18-36082_opinion.pdf>.

[4] *Juliana v. United States* (January 17, 2020), 18-36082, at 14, online: 9th Cir. <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200117_docket-18-36082_opinion.pdf>.

[5] *Juliana v. United States* (January 17, 2020), 18-36082, at 11, online: 9th Cir. <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200117_docket-18-36082_opinion.pdf>.

[6] *Juliana v. United States* (January 17, 2020), 18-36082, at 5, online: 9th Cir. <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200117_docket-18-36082_opinion.pdf>.

[7] *Juliana v. United States* (January 17, 2020), 18-36082, at 31, online: 9th Cir. <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200117_docket-18-36082_opinion.pdf>.

the facts of the plaintiffs' claim at all, and still, the plaintiffs had no redress.[8] It is, as the dissenting judge noted, a decision that gives the government the "absolute and unreviewable power to destroy the Nation",[9] and to do so knowingly.

A decision by a Quebec judge six months earlier served a different kind of pyrrhic victory to a similar group of young citizen plaintiffs. In *Environnement Jeunesse c. Procureur général du Canada*,[10] a Montreal-based environmental organization commenced a proposed class action against the Canadian government in the name of all Quebecers under the age of 35, accusing the defendant of violating the sections 7 and 15 Charter[11] rights of an entire generation by failing to adopt greenhouse gas ("GHG") emission reduction targets sufficient to avoid cataclysmic climate change. Justice Morrison of the Quebec Superior Court rejected the federal government's argument that the plaintiffs' claim was not justiciable, stating that "the executive branch of the Canadian government has the obligation not to act in such a way as to harm the lives of individuals and the safety of their person".[12] In the end, however, Morrison J. denied certification on the basis that the action was not suitable for class-wide adjudication — in part, ironically, because limiting the class to those under 35 was arbitrary given that climate change affects everyone.

Juliana and *ENJEU* each reflect the precarious state of constitutional climate change litigation, the latest in a decades-long litigation agenda to hold governments and corporations accountable for contributing to GHG emissions, and to raise awareness about climate change as a key political and policy issue. The two cases reveal the difficulties in getting the courts to act as a backstop when governmental decision-making risks catastrophic injury to the entire planet. But they are not the whole story. In other parts of the world, constitutional climate change litigation has had more success and, doctrinally, persuasive arguments exist for their eventual embrace by courts in Canada.[13] Constitutional climate change litigation also shows the promise of what has been called the "next generation" of climate change litigation: litigation using a human rights framework that avoids some of the limitations of first-generation climate change litigation that was narrowly focused on

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[8] *Juliana v. United States* (January 17, 2020), 18-36082, at 16, online: 9th Cir. <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200117_docket-18-36082_opinion.pdf>.

[9] *Juliana v. United States* (January 17, 2020), 18-36082, at 33, online: 9th Cir. <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200117_docket-18-36082_opinion.pdf>.

[10] [2019] J.Q. no 5940, 2019 QCCS 2885 (Que. S.C.) [hereinafter "*ENJEU*"].

[11] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

[12] *Environnement Jeunesse c. Procureur général du Canada*, [2019] J.Q. no 5940, 2019 QCCS 2885, at para. 64 (Que. S.C.), relying on *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441, at para. 28 (S.C.C.).

[13] *Infra*, Part IV.2.

judicial review under environmental legislation.[14] This new breed of climate change litigation widens the constituency of climate justice advocates, raises the public profile of the climate change issue and further accustoms courts to climate change science. All of these outcomes increase the possibility of effecting transformative legal and political change, even when cases do not produce immediate victories.

If climate justice activists are increasingly looking to litigation to produce the policy changes that have eluded them in the political process, it is worth considering all of the procedural and substantive tools traditionally available to public interest lawyers. In this paper, I make a modest contribution to the growing literature on climate change litigation by discussing one such procedural device: the class action. Is a class action in this particular constitutional space viable? Might a collective form of redress be preferable to other forms of litigation, in light of the collective nature of the harm?

This paper proceeds in four parts. First and by way of background, I summarize the types and extent of climate change litigation in Canada and internationally. Second, I discuss Canadian class actions advancing constitutional claims, which have recently surged after two decades of limited use. Third, I argue that a climate change action founded on a breach of section 7 of the Charter would meet the test for certification of a class action. Finally, I discuss the comparative advantages and disadvantages of using the class action mechanism to combat climate injustice.

II. THE CURRENT STATE OF CLIMATE CHANGE LITIGATION

The existence and impacts of climate change are well documented, as is the scientific consensus that human activity is its primary cause.[15] Despite these facts, states have failed to take any meaningful steps, let alone the urgent action scientists have demanded to curb GHG emissions. Even admittedly weak emissions targets have not been met in practice.[16] Faced with widespread government intransigence,

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[14] Jacqueline Peel, Hari Osofsky & Anita Foerster, "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2017) 41:2 Melbourne U.L. Rev. 793.

[15] The most authoritative and non-partisan sources are the reports of the Intergovernmental Panel on Climate Change, the UN Panel for assessing the science of climate change that includes 195 member states. In one of its recent reports, the IPCC concluded that global warming is likely to reach 1.5°C above pre-industrial levels between 2030 and 2052 if it continues to increase at the current rate, resulting in extreme temperatures in many regions, increases in flooding in coastal regions and frequency of droughts in others: IPCC, *2018: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, online: <https://www.ipcc.ch/sr15/>.

[16] Nathalie J. Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation Under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42:4 Vermont Law Review 689, at 704.

some environmental activists turned to litigation as a tool to combat the climate change crisis.[17]

"Climate change litigation" is a broad term that refers to strategic litigation before domestic courts and international tribunals, all involving the use of various legal doctrines in order to compel the reduction of GHG emissions or obtain compensation from those responsible for climate change-related harms.[18] Beginning in the 1990s, the first generation of these cases focused on environmental assessment challenges to government decision-making for failing to take climate change considerations into account or sought to halt individual projects, like coal mining or fracking, by seeking injunctive relief against private companies.[19] These cases relied for their success on the strength of underlying environmental legislation or courts' receptiveness to common law nuisance claims, and resulted in modest improvements to compliance with environmental laws.

A second wave of climate change litigation looks to address climate change directly, but unmoored from any statutory obligation to protect the environment; rather, these claims use a rights-based approach to compel governments to mitigate climate change or take steps to protect vulnerable communities facing its impacts.[20] These strategies are necessary in light of the lack of a codified or common law

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[17] Some academics have suggested that climate change social movements turn to litigation when political opportunities are weak: Chris Hilson, "UK Climate Change Litigation: Between Hard and Soft Framing" in S. Farrall, T. Ahmed & D. French, eds., *Criminological and Legal Consequences of Climate Change* (Oxford: Hart Publishing, 2012), 47-61.

[18] Jacqueline Peel, Hari Osofsky & Anita Foerster, "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2017) 41:2 Melbourne U.L. Rev. 793, at 794. David Markell and J.B. Ruhl similarly define climate change litigation as any in which the "tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts": "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?" (2012) 64 Fla. L. Rev. 15, at 27. See also Chilenye Nwapi, "From Responsibility to Cost-Effectiveness to Litigation: The Evolution of Climate Change Regulation and the Emergency of Climate Justice Litigation" in Randall S. Abate, ed., *Climate Justice: Case Studies in Global and Regional Governance Challenges* (Washington, DC: Environmental Law Institute, 2016) 517, at 531-32.

[19] Jacqueline Peel, Hari Osofsky & Anita Foerster, "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2017) 41:2 Melbourne U.L. Rev. 793, at 803; Randall S. Abate, "Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?" in Randall S. Abate, ed., *Climate Justice: Case Studies in Global and Regional Governance Challenges* (Washington, DC: Environmental Law Institute, 2016) 517, at 546-47.

[20] International Bar Association, "Model Statute for Proceedings Challenging Government Failure to Act on Climate Change" (February 2020), at 3-5, online: <https://www.ibanet.org/Climate-Change-Model-Statute.aspx>.

substantive right to a sustainable environment, as is the case in Canada.[21] Much has been written on the human rights dimensions of climate change,[22] and there is explicit acknowledgment of the linkages between human rights and climate justice in various international documents, including the Paris Agreement.[23]

Climate change litigation of all types has proliferated across at least 25 jurisdictions, with the greatest number of cases filed in the United States.[24] Although the *Juliana* case represents a blow for second-wave climate change litigation, cases in other parts of the world have proven successful. The most notable: *Urgenda*, in which the Dutch court found the national government owed a duty of care to limit carbon emissions, and rejected the government's arguments that their ineffective action to reduce GHG emissions was non-justiciable or that their contribution to global climate change was negligible;[25] and *Leghari*, a novel action brought against the Pakistani government, alleging its inaction on climate change violated the constitutional rights — specifically, the right to life — of Pakistani citizens.[26] Citing domestic and international legal principles, the Lahore High Court determined that

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[21] Query the impact of the proposed *Climate Change Accountability Act* if it becomes law: Bill C-215, *An Act respecting Canada's fulfillment of its greenhouse gas emissions reduction obligations*, 1st Sess., 43rd Parl., 2020 (first reading February 24, 2020).

[22] The literature is vast. See, *e.g.*, Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2018); Jacqueline Peel & Hari M. Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7:1 Transnational Environmental L. 37; Damilola S. Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge: Cambridge University Press, 2016); Tracey Skillington, *Climate Justice and Human Rights* (Palgrave MacMillan, 2017); Sam Adelman, "Human Rights and Climate Change", in Gordon DiGiacomo, *Human Rights: Current Issues and Controversies* (Toronto: University of Toronto Press, 2016); David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (Vancouver: University of British Columbia Press, 2011); Stephen Humphreys, ed., *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010); Dinah Shelton, "Litigating a Rights-Based Approach to Climate Change" (2009) *Proceedings of the International Conference on Human Rights and the Environment* 211. See also reports published by the UN High Commissioner for Human Rights, online: <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx>.

[23] *Preamble, Paris Agreement*, UNFCC Conference of the Parties, 21st Sess., UN Doc. FCCC/CP/2015/10/Add.1 (December 12, 2015).

[24] As of March 2017, the UN Environment Report on climate change litigation identified 654 cases in the U.S.: United Nations Environment Program, *The Status of Climate Change Litigation: A Global Review* (2017), at 10.

[25] *Urgenda Foundation v. Netherlands (Ministry of Infrastructure and the Environment)*, Hague District Court, Chamber for Commercial Affairs, No C/09/456689 HA ZA 131396 (June 24, 2015), at para. 4.65; English translation available online: <http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf>.

[26] *Leghari v. Pakistan* (2015), WP No. 25501/201 (Punjab), at paras. 21, 24, 25.

the state's delay in implementing the Framework for the Implementation of Climate Change Policy offended the fundamental rights of citizens and then fashioned a novel remedy: the court first directed several government ministries to each nominate "a climate change focal person" to help ensure the implementation of the Framework, and to present a list of action points by a given date; it then created a Climate Change Commission composed of representatives of key ministries, NGOs and technical experts to monitor the government's progress.[27]

According to the Sabin Center,[28] 22 climate change cases have been filed in Canada, but this number includes regressive actions by industry and governments, such as cases challenging government authority to impose green regulations and three provinces' carbon tax litigation.[29] Of the 22 cases, only three employ a human rights approach: *ENJEU*; an action brought by two houses of Wet'suwet'en Indigenous groups;[30] and *La Rose*, a claim filed on behalf of 15 youth over the failure of the federal government to adopt a climate recovery plan.[31] Only *ENJEU* was brought as a proposed class action and is currently awaiting a hearing before the Quebec Court of Appeal. The strengths of the plaintiffs' appeal, and the likelihood that other climate change class actions could be brought successfully elsewhere in Canada, will be discussed in Part IV. Since such litigation will be premised on a Charter breach, however, it is worth first revisiting the capacity of the class action procedure to facilitate Charter litigation.

III. LITIGATING CONSTITUTIONAL CLAIMS AS CLASS ACTIONS

"At first blush", class proceedings appear to be an "ideal method of bringing

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[27] *Leghari v. Pakistan* (2015), WP No. 25501/201 (Punjab), at paras. 25-27. For a discussion of these and other climate change actions internationally, see Jacqueline Peel, Hari Osofsky & Anita Foerster, "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2017) 41:2 Melbourne U.L. Rev. 793.

[28] The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the public with up-to-date resources on key topics in climate law and regulation. It supports a climate change litigation database that tracks climate change litigation in the U.S. and worldwide: <https://climate.law.columbia.edu/>.

[29] The Supreme Court of Canada was scheduled to hear appeals of the Saskatchewan and Ontario Court of Appeal rulings in the carbon tax litigation on March 24 and 25, 2020, but the hearings were adjourned to mid-September 2020 due to the COVID-19 pandemic: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38663>.

[30] *Lho'imggin et al. v. Canada* (Statement of Claim), online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200210_NA_complaint-1.pdf>.

[31] *Misdzi Yikh v. Canada* (Statement of Claim), online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf> [hereinafter "*La Rose*"].

constitutional challenges to laws, practices or policies of general application".[32] By definition, constitutional challenges involve issues that are common to similarly situated plaintiffs. They also typically focus on the behaviour of the defendant or the systemic impact of government action. They can pit citizens against well-resourced governments — precisely the kind of power imbalance that class proceedings were designed to redress.[33]

Whatever the initial hopes of using class actions to advance claims on behalf of marginalized groups seeking systemic change, the reality of Canada's experience has been disappointing to many human rights activists. Of the 1,500 or so class actions commenced in Ontario since 1993, only 7 per cent involved cases against the Crown, of which Charter claims comprised only a small part.[34] Private law cases make up the vast majority of class actions.[35]

The reasons for the relative paucity of public law (specifically Charter-based) class actions are primarily threefold: policy, jurisprudence and pragmatic realities have stifled the development of constitutional class actions. First, some courts and commentators argue that class actions against the Crown distort sound public policy or are an end-run around administrative law and judicial review of government action.[36] Historical and cultural context goes some way to explaining this reticence toward private enforcement of public law: as compared to our American counterparts, Canada has placed greater faith in administrative agencies and tribunals to adjudicate human rights and other public law claims.[37]

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[32] Andre Lokan & Christopher Dassios, *Constitutional Litigation in Canada* (Toronto: Carswell, 2006), at 5-18.

[33] Joseph Arvay & David Wu, "Class Actions and the *Charter*" (Paper delivered at the 14th National Symposium on Class Actions, Toronto, April 6-7, 2017), at 1 [unpublished].

[34] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: July 2019), at 23. The "Crown Liability" category includes negligence claims, institutional abuse cases founded on common law duties, as well as allegations of Charter infringements: Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Consultation Paper* (Toronto: March 2018), at 49.

[35] In surveys of lawyers taken in 2009 and 2014, medical/pharmaceutical, *Competition Act*, product liability and securities cases accounted for over 60 per cent of all pending class actions. With the addition of the consumer product and mass tort categories, private law class actions account for at least 75 per cent of all cases. Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: University of British Columbia Press, 2018), at 17-18.

[36] L. Sossin, "Class Actions Against the Crown, or Administrative Law by Other Means" (2006) 43 C.B.L.J. 380; R. Douglas Elliott, "Fringe Benefits: Class Actions for Marginalized People in Canada" (2011) 53 S.C.L.R. (2d) 221, at 222.

[37] R. Douglas Elliott, "Fringe Benefits: Class Actions for Marginalized People in Canada" (2011) 53 S.C.L.R. (2d) 221, at 228. See also W.A. Bogart's discussion of American legal exceptionalism and reliance on private litigation in *Consequences: The Impact of Law and Its*

Second, several jurisprudential barriers to constitutional class actions developed early on in class action law. A line of cases starting with an *obiter* comment in *Guimond v. Quebec (Attorney General)* held that a class action was not appropriate where the main relief sought was a declaration of constitutional invalidity.[38] Courts have rejected class actions on this basis, stating that test case litigation would achieve the same ends at less cost and in shorter time.[39] Relatedly, the Supreme Court has also held that a section 52 remedy of a declaration of unconstitutionality could not be coupled with damages under section 24(1) of the Charter.[40] As explained below, the unavailability of damages renders such constitutional challenges financially non-viable for class action litigators who work on a contingency fee basis. And finally, the *Mackin* principle has created an effective immunity from civil liability flowing from the enforcement of law subsequently found to be unconstitutional; under this principle, "duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was clearly wrong, in bad faith or an abuse of power".[41]

Third, there are practical barriers to constitutional class actions. Class action litigation is inherently entrepreneurial; it depends on the willingness of lawyers to take on complex cases, almost always on a contingency fee basis, and to prosecute them against well-resourced defendants, with no guarantee of success. As a result, the size of the potential damage claim is a critical factor for determining which cases class counsel will take on, because the quantum is directly proportionate to the prospective contingency fee. This economic reality means that the public interest value of a potential action is not a controlling consideration for these specialist lawyers, and that Charter cases, where the availability of any damages is uncertain, have been particularly unattractive.[42]

The Supreme Court's 2010 decision in *Vancouver (City) v. Ward* was cause for

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Complexity (Toronto: University of Toronto Press, 2002), at 111-52.

[38] [1996] S.C.J. No. 91, [1996] 3 S.C.R. 347, 138 D.L.R. (4th) 647 (S.C.C.). See also Joseph Arvay & David Wu, "Class Actions and the Charter" (Paper delivered at the 14th National Symposium on Class Actions, Toronto, April 6-7, 2017), at 19-20 [unpublished]. The Supreme Court of Canada later tempered the rule in *Guimond*, by stating that courts have the discretion to allow a class proceeding in lieu of judicial review in *Manuge v. Canada*, [2010] S.C.J. No. 67, 2010 SCC 67 (S.C.C.), a s. 15 Charter case by members of the Canadian Forces.

[39] *Davis v. Canada (Attorney General)*, [2008] N.J. No. 280, 2008 NLCA 49 (N.L.C.A.); *Roach v. Canada (Attorney General)*, [2009] O.J. No. 737, 185 C.R.R. (2d) 215 (Ont. S.C.J.).

[40] *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1 (S.C.C.).

[41] *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. No. 13, 2002 SCC 13, at para. 78 (S.C.C.).

[42] For a discussion of the ramifications of the entrepreneurial model for access to justice, see Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: University of British Columbia Press, 2018), at 86-89.

renewed optimism regarding constitutional class actions because it held the promise of overcoming these economic barriers.[43] The Court for the first time held that compensatory damages may be awarded pursuant to section 24(1) of the Charter. In *Ward*, the Chief Justice outlined a four-step framework to determine the state's liability for Charter damages:

> The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.[44]

Once the plaintiff has established the first two steps (a Charter breach and the functional need for damages), the onus shifts to the defendant for the last two steps. "Countervailing factors" include the availability of another remedy to effectively address the Charter breach (such as a declaratory judgment) or concerns for good governance.[45] "Good governance" refers to any number of policy factors that will justify restricting the state's exposure to civil liability unless the state conduct meets a minimum threshold of gravity.[46] In determining the quantum of damages, courts are to arrive at a figure that is fair to both the plaintiff and the state, and "may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests".[47]

Ward was not a class action. The plaintiff was a lawyer who was unlawfully strip-searched and then ultimately awarded $5,000 under section 24(1). The Court's recognition of a "distinct remedy of constitutional damages",[48] however, created the financial incentive entrepreneurial class counsel needed to take on a Charter class action. In cases where large numbers of people are subject to the same conduct that is ultimately determined to violate their Charter rights, constitutional damages, even if individually modest, could be significant in the aggregate, and thus justify the risk and expense of a class action.

Post-*Ward* Charter class actions, however, have not been entirely predictable. The

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[43] [2010] S.C.J. No. 27, 2010 SCC 27 (S.C.C.) [hereinafter "*Ward*"].

[44] *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27, at para. 4 (S.C.C.).

[45] *Henry v. British Columbia (Attorney General)*, [2015] S.C.J. No. 24, 2015 SCC 24, at para. 38 (S.C.C.).

[46] *Henry v. British Columbia (Attorney General)*, [2015] S.C.J. No. 24, 2015 SCC 24, at para. 39 (S.C.C.); *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27, at para. 39 (S.C.C.).

[47] *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27, at para. 53 (S.C.C.).

[48] *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27, at para. 22 (S.C.C.).

most significant cleavage exists between the line of cases following the British Columbia Court of Appeal's decision in *Thorburn v. British Columbia (Public Safety and Solicitor General)*[49] and the Ontario Court of Appeal's decision in *Good v. Toronto (City) Police Services Board*.[50] In *Thorburn*, the court rejected a proposed class action by individuals who had been strip-searched pursuant to a policy at the Vancouver city jail on the basis that the section 8 Charter right is individual in nature and therefore not amenable to class-wide determination: "[A] finding of a s. 8 *Charter* violation as a result of an unreasonable search of one class member will not found a similar finding for another class member as a finding of an unreasonable search is dependent on a multitude of variable circumstances unique to each class member."[51] The argument that this, and perhaps all, Charter rights are individual would effectively immunize governments from class action lawsuits.

As both a matter of law and policy, the decision in *Thorburn* strikes many commentators as simply wrong.[52] Indeed, the reasoning of both the Divisional Court and Court of Appeal in *Good*, a certified Charter class action on behalf of G20 protestors, is persuasive and has been followed by courts in Ontario and elsewhere.[53] In *Good*, the courts confirmed that not all issues of liability have to be capable of class-wide resolution to justify certification; this is consistent with many other class actions involving negligence claims, where only some elements of the cause of action can be evaluated collectively.[54] More importantly, the courts held that Charter breaches caused by policies, rules or blanket orders are capable of class treatment because they focus on the conduct of the defendant. "When a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely

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[49] [2013] B.C.J. No. 2412, 2013 BCCA 480 (B.C.C.A.) [hereinafter "*Thorburn*"].

[50] [2014] O.J. No. 3643, 2014 ONSC 4583, at para. 45 (Ont. Div. Ct.), affd [2016] O.J. No. 1748, 2016 ONCA 250 (Ont. C.A.).

[51] *Thorburn v. British Columbia (Public Safety and Solicitor General)*, [2013] B.C.J. No. 2412, 2013 BCCA 480, at para. 42 (B.C.C.A.).

[52] Joseph Arvay & David Wu, "Class Actions and the *Charter*" (Paper delivered at the 14th National Symposium on Class Actions, Toronto, April 6-7, 2017), at 13-17; Iryna Ponomarenko, "The Devil is in the Scale: Revisiting the Commonality Requirement in *Charter* Class Actions" (2019) 57:1 Alta. L. Rev. 69, at 84-88; Allan Cocunato, "And (Judicially Economical) Justice For All: The Case for Class Proceedings as the Preferable Procedure in Mass Claims for *Charter* Damages" (2019) 14:2 Can. Class Action Rev. 339.

[53] *Good v. Toronto (City) Police Services Board,* [2014] O.J. No. 3643, 2014 ONSC 4583 (Ont. Div. Ct.), affd [2016] O.J. No. 1748, 2016 ONCA 250 (Ont. C.A.); *Francis v. Ontario*, [2020] O.J. No. 1714, 2020 ONSC 1644 (Ont. S.C.J.); *Brazeau v. Canada (Attorney General)*, [2016] O.J. No. 6412, 2016 ONSC 7836 (Ont. S.C.J.), affd [2020] O.J. No. 1062, 2020 ONCA 184 (Ont. C.A.); *Capital District Health Authority (c.o.b. East Coast Forensic Hospital) v. Murray*, [2017] N.S.J. No. 117, 2017 NSCA 28 (N.S.C.A.); *Ewert v. Canada (Attorney General)*, [2018] B.C.J. No. 155, 2018 BCSC 147 (B.C.S.C.).

[54] See, *e.g.*, *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924, 73 O.R. (3d) 401 (Ont. C.A.).

proper to use a class proceeding that focuses on the alleged wrong."[55] Subsequent cases on behalf of incarcerated persons subject to blanket policies of either strip searches or administrative segregation, all seeking Charter damages, applied *Good* and were certified.[56]

Good and its progeny thus breathe life back into the Charter class action as a tool of public interest litigation. More to the point, they create opportunities to structure constitutional climate change litigation as class proceedings.

IV. CONSTITUTIONAL CLIMATE CHANGE CLASS ACTIONS

There is a rich and diverse scholarship on the use of domestic courts and constitutional arguments to enforce climate justice.[57] The unwinding of environmental regulations by some states and toothless commitments to curb emissions by others, coupled with the inability to hold states accountable at the international level, have led to increasing recourse to the courts. As Fournier succinctly notes, "climate change litigation in national courts provides the possibility for individuals with substantially less power to be on an equal footing with the state".[58]

This notion of using court processes to level the playing field between the haves and the have-nots is familiar to class action scholars and lawyers. In its seminal *Report on Class Actions*, the Ontario Law Reform Commission explained the need for a class action procedure in our highly complex, interdependent society characterized by "mass manufacturing, mass promotion, and mass consumption", all

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[55] *Dennis v. Ontario Lottery and Gaming Corp.*, [2013] O.J. No. 3468, 2013 ONCA 501, at para. 53 (Ont. C.A.).

[56] *Capital District Health Authority (c.o.b. East Coast Forensic Hospital) v. Murray*, [2015] N.S.J. No. 77, 2015 NSSC 61 (N.S.S.C.), affd [2017] N.S.J. No. 117, 2017 NSCA 28 (N.S.C.A.); *Johnson v. Ontario*, [2016] O.J. No. 4413, 2016 ONSC 5314 (Ont. S.C.J.); *Ewert v. Canada (Attorney General)*, [2018] B.C.J. No. 155, 2018 BCSC 147 (B.C.S.C.); *Brazeau v. Canada (Attorney General)*, [2016] O.J. No. 6412, 2016 ONSC 7836 (Ont. S.C.J.), affd [2020] O.J. No. 1062, 2020 ONCA 184 (Ont. C.A.). *Murray* has settled, the class in *Brazeau* was successful on summary judgment, and the other two cases are ongoing.

[57] In addition to the books cited in note 22 above, there are hundreds of articles. Many are listed in the International Bar Association's *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change* (February 2020), at note 18. See also Michael C. Blumm & Mary C. Wood, "'No Ordinary Lawsuit': Climate Change, Due Process, and the Public Trust Doctrine" (2017) 67:1 Am. U. L. Rev. 1; Sam Varvastian, "The Human Right to a Clean and Healthy Environment in Climate Change Litigation" (April 10, 2019), Max Planck Institute for Comparative Public L. & Intl L. (MPIL) Research Paper No. 2019-09; Annalisa Savaresi & Juan Auz, "Climate Change Litigation and Human Rights: Pushing the Boundaries" (2019) 9:3 Climate L. 242.

[58] Louise Fournier, "The Cost of Inaction: The Role of Courts in Climate Change Litigation" (LL.M. Global Environment and Climate Change Law, University of Edinburgh, 2017), at 40, online: <https://www.researchgate.net/publication/320045038_The_Cost_of_Inaction_The_Role_of_Courts_in_Climate_Change_Litigation>.

of which can injure large numbers of people.[59] In the wake of such misconduct, "the individual is very often unable or unwilling to stand alone in meaningful opposition".[60] Class actions, the report concluded, serve an important social and access to justice function: by overcoming barriers to the courts, class actions may "provide an antidote to the social frustration that exists where neither courts nor administrative agencies are able to protect the rights of citizens on an individual basis".[61] Chief Justice McLachlin echoed these sentiments in *Western Canadian Shopping Centres Inc. v. Dutton*, when she proclaimed that "[w]ithout class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims".[62]

Despite its ambition, however, the class action mechanism has not been effective in pursuing environmental claims anywhere in Canada except Quebec.[63] In Ontario, for example, only 16 environmental class actions were filed between 1993 and 2018; six failed, eight settled and two are ongoing.[64] By comparison, 67 environmental class actions were filed in Quebec in roughly the same time period, and all but 15 were certified. The biggest impediments are issues of underlying substantive law and evidence.[65] In the common law provinces, litigants often found their claims on negligence, nuisance and trespass and seek the tort measure of damages.[66] From the perspective of class action procedure, tort causes of action force courts to focus on individual aspects of the problem, making certification more difficult.[67] Moreover, proof of harm can be very difficult in cases of toxic torts, and the evidentiary challenges of individualized assessments of damages will usually defeat certifica-

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[59] OLRC, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982), at 3.

[60] OLRC, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982), at 3.

[61] OLRC, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982), at 130. See also Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: University of British Columbia Press, 2018), at 54.

[62] [2000] S.C.J. No. 63, 2001 SCC 46, at para. 28 (S.C.C.).

[63] Christine Kneteman, "Revitalizing Environmental Class Actions: Québecois Lessons for English Canada" (2010) 6:2 Can. Class Action Rev. 261 at 278.

[64] Andre Durocher, *Environmental Class Actions in Canada* (Toronto: Thomson Reuters, 2018), at 1097.

[65] Heather McCleod-Kilmurray, "Hollick and Environmental Class Actions: Putting the Substance into Class Action Procedure," (2002-2003) 34 Ottawa L. Rev. 363.

[66] Hailey Laycraft, "Trends in Environmental Class Actions in Canada" (2019) 15:1 Can. Class Action Rev. 75, at 83-85.

[67] It was for this reason that claims for personal injury caused by nickel contamination were abandoned in *Smith v. Inco Ltd.*, [2011] O.J. No. 4386, 2011 ONCA 628 (Ont. C.A.). The claim for property damage was certified but ultimately failed at trial. *Smith v. Inco Ltd.*, [2010] O.J. No. 2864, 2010 ONSC 3790 (Ont. S.C.J.).

tion.[68]

So why would climate change class actions fare any better? The key is in the framing of these cases as constitutional challenges rather than environmental law violations or tort claims.[69] The rights turn in climate change litigation[70] is precisely what makes these cases amenable to collective action.

To proceed as a class action rather than an individual test case or multi-party action, the plaintiff must move for certification. The certification test is essentially the same in all provinces in that five requirements must be met: (a) the pleadings must disclose a cause of action; (b) there is an identifiable class; (c) there are common issues of fact or law; (d) a class action would be preferable to other alternative methods of resolving the common issues; and (e) there is an adequate representative plaintiff to represent the interests of the class.[71] Despite the plaintiffs' defeat in *ENJEU*, there are good reasons to believe that certification of a climate change class action is possible.

1. Justiciability

As with other Charter-based litigation, justiciability is an immediate concern in a climate change class action. Justiciability is ultimately concerned with "the appropriate role of courts as the forum for the resolution of different types of disputes".[72] The doctrine is susceptible, however, to being relied upon to avoid addressing issues that are novel, complex or politically controversial.[73]

The question of whether the federal government's actions to combat climate

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[68] *Plaunt v. Renfrew Power Generation Inc.*, [2011] O.J. No. 4361, 2011 ONSC 5777 (Ont. S.C.J.), *Dumoulin v. Ontario*, [2005] O.J. No. 3961, 19 C.P.C. (6th) 234 (Ont. S.C.J.) and *MacDonald (Litigation guardian of) v. Dufferin-Peel Catholic District School Board*, [2000] O.J. No. 5014, 20 C.P.C. (5th) 345 (Ont. S.C.J.) were all unsuccessful on this basis.

[69] Dustin Klaudt expands on this point in "Can Canada's 'Living Tree' Constitution and Lessons from foreign Climate Change Litigation Seed Climate Justice and Remedy Climate Change?" (2018) 31 J. Env. L. & Prac. 185, at 227-31.

[70] I borrow this phrase from Jacqueline Peel & Hari M. Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7:1 Transnational Environmental L. 37.

[71] See, *e.g.*, Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5. Almost identical provisions exist in the other common law provinces. Preferability is not part of Quebec's test but there is a requirement that the "facts alleged appear to justify the conclusions sought": *Code of Civil Procedure*, CQLR, c. C-25.01, art. 575.

[72] *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441, at para. 38 (S.C.C.); Louise Fournier, "The Cost of Inaction: The Role of Courts in Climate Change Litigation" (LL.M. Global Environment and Climate Change Law, University of Edinburgh, 2017), at 14, online: <https://www.researchgate.net/publication/320045038_The_Cost_of_Inaction_The_Role_of_Courts_in_Climate_Change_Litigation>.

[73] Hugh Wilkins, "The Justiciability of Climate Change: A Comparison of US and Canadian Approaches" (2011) 34 Dal. L.J. 529 at 531.

change violate the Charter is undoubtedly novel, complex and politically charged. The Supreme Court of Canada has determined, however, that as long as an issue has a legal component, and is therefore not a purely political question, the dispute will be considered justiciable.[74] In the absence of a privative clause that explicitly ousts judicial review, it is for the courts to determine the justiciability of a particular issue.[75]

In *ENJEU*, Morrison J. rejected the Attorney General's justiciability arguments because the plaintiffs sought a finding that the failure of Canada to act sufficiently to regulate GHGs was a violation of their Charter rights to life, liberty and security of the person. The claim that the government's actions engaged section 7 was determinative of the justiciability question:

> Jeunesse's claims regarding Canada's choices and decisions appear to be, at this stage, aiming at the exercise of executive power, while the order sought to stop any violation of fundamental rights, according to the respondent, seems to be linked to the legislative process.
>
> Courts generally do not interfere in the exercise of executive power. But in the case of an alleged violation of the rights guaranteed by the Canadian Charter, a court should not decline jurisdiction on the basis of the doctrine of justiciability.
>
> . . .
>
> Even in the exercise of the Royal Prerogative powers, courts may intervene to decide whether there is a violation of the Canadian Charter because "all government power must be exercised in accordance with the Constitution".[76]

Justice Morrison added that judicial review in the Charter context should not be restricted only to government *acts* – it can potentially include instances of government *inactivity* as well. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,[77] for example, the Supreme Court of Canada intervened as a result of government inaction. On this basis, to the extent that a plaintiff's main allegation is that the government has not done enough to combat climate change, the claim remains justiciable. In any event, both *ENJEU* and the two non-class climate change

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[74] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385, at para. 26 (S.C.C.).

[75] *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] S.C.J. No. 80, [1989] 2 S.C.R. 49 (S.C.C.). Note that there is no privative clause in the proposed *Climate Change Accountability Act* if it becomes law. Bill C-215, *An Act respecting Canada's fulfillment of its greenhouse gas emissions reduction obligations*, 1st Sess., 43rd Parl., 2020 (first reading February 24, 2020).

[76] *Environnement Jeunesse c. Procureur général du Canada*, [2019] J.Q. no 5940, 2019 QCCS 2885 at paras. 55-56, 59 (Que. S.C.), citing *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, [2010] 1 S.C.R. 44, at para. 36 (S.C.C.). See also *Black v. Canada (Prime Minister)*, [2001] O.J. No. 1853, 54 O.R. (3d) 215, at para. 46 (Ont. C.A.).

[77] [2003] S.C.J. No. 63, 2003 SCC 62 (S.C.C.) ["*Doucet-Boudreau*"].

actions (the Wet'suwet'en action[78] and *La Rose*[79]) all allege that the federal government's *actions* cause, contribute to and allow a level of GHG emissions incompatible with a sustainable climate. Specifically, it is alleged that the defendants "actively participate in and support the development, expansion and operation of industries and activities involving fossil fuels that emit a level of GHGs incompatible with a Stable Climate System".[80]

There are good justiciability arguments, therefore, for a climate change action brought on the basis that government activity contributes to the dangerous destabilization of the climate, thereby depriving the proposed class members of their rights under the Charter.

2. Cause of Action

In addition to justiciability, a certification motion judge must be satisfied that the pleadings disclose a cause of action. No evidence is admissible on this part of the test. Courts use the same approach as on a motion to strike: assuming all facts pleaded to be true, is it plain and obvious that the plaintiff's claim cannot succeed.[81] This criterion is not a high hurdle. Courts are to take a generous approach and have ruled consistently that "the novelty of the cause of action will not militate against the plaintiff".[82]

Quebec's certification test includes a slightly different criterion: the court must be satisfied that the action bears a "serious colour of right".[83] The requirement is one of pleading — the factual allegations must be sufficiently specific to support a *prima facie* case against the defendant.[84]

The central contention in a constitutional climate change action is that the "stability of the climate system is profoundly connected to children's basic health

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[78] *Lho'imggin et al. v. Canada* (Statement of Claim), online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200210_NA_complaint-1.pdf>.

[79] *La Rose et al. v. Canada* (Statement of Claim), online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf>.

[80] *La Rose et al. v. Canada* (Statement of Claim), at para. 5, online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf>.

[81] *Pro-Sys Consultants Ltd v. Microsoft Corp.*, [2013] S.C.J. No. 57, 2013 SCC 57, at para. 63 (S.C.C.).

[82] W.K. Winkler *et al.*, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014), at 73.

[83] *Guimond v. Quebec (Attorney General)*, [1996] S.C.J. No. 91, [1996] 3 S.C.R. 347, 138 D.L.R. (4th) 647, at para. 10 (S.C.C.).

[84] *Regroupement des citoyens contre la pollution c. Alex Couture inc.*, [2007] J.Q. no 3468, 2007 QCCA 565 (Que. C.A.).

and development (or security of the person) and to a child's survival (or life interest)".[85] There is scientific consensus about the existence, causes and impacts of climate change (including death, illness, loss of land, food insecurity and psychological injury), and the role of states in generating GHGs. These impacts are exacerbated for Indigenous persons who rely on a stable climate to meaningfully engage in traditional practices and cultural rights and who are disproportionally and more seriously affected than the general population.[86] These section 7 arguments have been thoroughly and persuasively canvassed by Nathalie Chalifour and Jessica Earle,[87] David Wu,[88] and Lynda Collins,[89] among others. Their arguments confirm that, for the purposes of certification, it is "not plain and obvious" that the plaintiff's claim cannot succeed.

3. Identifiable Class

The second criterion for certification is that there is an identifiable class of two or more persons to be represented by the representative plaintiff.[90] The evidentiary burden for this and the remaining certification criteria is much lower than the balance of probabilities; the plaintiff must merely show "some basis in fact" that the criterion has been met.[91] The class definition will determine the size of the class and

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[85] *La Rose et al. v. Canada* (Statement of Claim), at para. 224, online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf>.

[86] *La Rose et al. v. Canada* (Statement of Claim), at para. 227, online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf>.

Several authors have made the argument that Indigenous claimants have particularly strong ss. 7 and 15 arguments given their unique relationships to the land and their location in areas that are especially vulnerable to climate changes: Andrew Stobo Sniderman & Adam Shedletzky, "Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy" (2014) 4 W.J. Legal Stud. 1, at 2-3; Cameron Jefferies, "Filling the Gaps in Canada's Climate Change Strategy: All Litigation, All the Time" (2015) 38 Fordham Intl. L.J. 1371, at 1393-95.

[87] Nathalie J. Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation Under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42:4 Vermont L. Rev. 689, at 704.

[88] David Wu, "Embedding Environmental Rights in Section 7 of the Canadian Charter: Resolving the Tension Between the Need for Precaution and the Need for Harm" (2014) 33 N.J.C.L. 191, at 205.

[89] Lynda M. Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) 71:20 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*.

[90] Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(b); *Code of Civil Procedure*, CQLR, c. C-25.01, art. 571.

[91] *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2013] S.C.J. No. 58, 2013 SCC 58, at paras. 52-76 (S.C.C.).

who is bound by the litigation. It is interconnected with the proposed common issues and influences the manageability of the action. The class definition must be objective and cannot arbitrarily exclude people who share the same interest in the resolution of the common issues.[92]

Although the identifiable class criterion is usually not an onerous requirement and few class actions are rejected on this criterion alone,[93] it is what caused the Quebec court to refuse to certify ENJEU. While Morrison J. did not dispute that Quebec youth will suffer greater violations of their rights than older generations, he found the cut-off of 35 years old to be arbitrary.[94] The plaintiffs chose this definition, however, because it corresponded with the definition of youth used by Statistics Canada.[95] In addition, there is a rational connection between the proposed class and the central factual issue in both the section 7 and section 15 Charter claim: global warming is likely to reach 1.5°C above pre-industrial levels between 2030 and 2052 if it continues to increase at the current rate, resulting in extreme temperatures in many regions, increased flooding in coastal regions and greater frequency of droughts in others.[96] Thus, it is plausible to argue that the government's contributions to this trend disproportionately impact the lives, liberties and security of younger generations, and to identify the class as such.

Justice Morrison also rejected the class definition on another basis: he stated that class members under the age of 18 are not fully capable of exercising their civil rights, and that their parents, therefore, would have to act on their behalf in the litigation. He concluded that a representative plaintiff does not have the authority to

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[92] W.K. Winkler *et al.*, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014), at 90-93.

[93] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: July 2019), at 39-40.

[94] *Environnement Jeunesse c. Procureur général du Canada*, [2019] J.Q. no 5940, 2019 QCCS 2885, at para. 135 (Que. S.C.).

[95] Statistics Canada, "A Portrait of Canadian Youth: March 2019 Updates" (May 8, 2019), online: <https://www150.statcan.gc.ca/n1/pub/11-631-x/11-631-x2019003-eng.htm#a1>.

[96] The most authoritative and non-partisan sources are the reports of the Intergovernmental Panel on Climate Change, the UN Panel for assessing the science of climate change that includes 195 member states. In one of its recent reports, the IPCC concluded that global warming is likely to reach 1.5°C above pre-industrial levels between 2030 and 2052 if it continues to increase at the current rate, resulting in extreme temperatures in many regions, increases in flooding in coastal regions and frequency of droughts in others: IPCC, *2018: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, online: <https://www.ipcc.ch/sr15/>.

force millions of parents to do so.[97] To impose as a precondition to class membership that children have litigation guardians, however, is to effectively exclude children from the class action device altogether. This blanket exclusion is contrary to the central access to justice objective of class actions, inconsistent with the jurisprudence in the rest of Canada, and not supported by a plain reading of the class action provisions of the *Code of Civil Procedure*.[98]

The Supreme Court has recognized that non-economic barriers to justice make litigation all but impossible for some vulnerable groups, such as persons with disabilities or psychological injuries.[99] Children, *by virtue of being children*, face unique barriers to justice that a representative action can overcome. Precisely because they cannot engage in the political process — but will bear the consequences of voters' choices now — children need access to the court system more than most. They should not be forced to bring individual lawsuits, any more than institutional abuse survivors should be forced to bring their own claims. Justice Morrison's decision to deny certification, in part, *because* the action involves children may violate Canada's international legal commitments.[100]

Moreover, the decision in *ENJEU* is inconsistent with class action precedent. Class actions often include class members who are minors or without capacity. For example, lawsuits that include subclasses for siblings and children with *Family Law Act* claims for loss of care, guidance and companionship are routinely certified.[101] Institutional abuse cases and actions against child welfare authorities have been

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[97] *Environnement Jeunesse c. Procureur général du Canada*, [2019] J.Q. no 5940, 2019 QCCS 2885, at paras. 125-136 (Que. S.C.). At para. 127, Morrison J. states that in Quebec the age of majority is 18 and that only at that age is a person able to "fully exercise all civil rights". At para. 132, he further states that the representative plaintiff, an environmental organization, does not have the power "to impose on millions of parents the obligation to act to exclude their children from an action collective. [*sic*] It is not a statutory entity created by a legislator to protect the rights of minor or to act on their behalf."

[98] Article 571 of the *Code of Civil Procedure*, CQLR, c. C-25.01 provides that, "[i]n addition to natural persons, legal persons established for a private interest, partnerships and associations or other groups not endowed with juridical personality may be members of the class". There is no exclusion of minors from the definition of "natural persons".

[99] In *Rumley v. British Columbia*, [2001] S.C.J. No. 39, 2001 SCC 69, at para. 39 (S.C.C.), the Court described the particular vulnerabilities of the survivors of sexual abuse at the Jericho Hill School for the Deaf. "Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members" (at para. 39).

[100] Amnesty International was granted intervener status in the *ENJEU* appeal: *Amnistie internationale Canada c. Environnement Jeunesse*, [2020] J.Q. no 770, 2020 QCCA 223 (Que. C.A.). Its submissions invoke international instruments, including the *Convention on the Rights of the Child*, to argue that the certification test must be interpreted in a manner that does not deprive children of effective and accessible remedies.

[101] See, *e.g.*, *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.).

certified on behalf of class members who, if they were named plaintiffs, would need litigation guardians.[102] In 2016, an Ontario court certified on consent an action where the proposed class consisted of the 6,200 children who resided at or were inpatients of the Children's Psychiatric Research Institute up to 2011.[103] In none of these actions did the court refuse to certify on the basis that the class was partially comprised of people not legally competent to sue on their own.

There are also practical reasons to doubt the correctness of Morrison J.'s decision. The nature of a representative action is such that class members do not have the full panoply of litigation rights that named parties possess. While it is true that a representative plaintiff must be legally competent, and therefore have a litigation guardian if they lack the capacity to sue on their own, a class member is not a "party" to the litigation.[104] Class members do not have the right to hire, fire or instruct counsel; to participate in settlement negotiations; or to appeal approved settlements.[105] The representative plaintiff is the true client of class counsel, charged with protecting the best interests of the class. It is redundant, therefore, to impose as an additional layer of representation the requirement that minor class members all have litigation guardians as a precondition to certification. And while Morrison J. is correct that the representative plaintiff is "forcing" parents to act on their children's behalf if they wish to exercise any of the limited litigation rights possessed by class members, this is the consequence of all opt-out class action systems. Individuals who fall within the definition of the class are compelled to act in order to remove themselves from the litigation, but are automatically bound by the action if they do nothing. The number of class members who opt out of Canadian class actions is negligible,[106] and Morrison J.'s concern about imposing on parents, therefore, is theoretical at best.

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[102] *Dolmage v. Ontario*, [2010] O.J. No. 5187, 2010 ONSC 1726 (Ont. S.C.J.); *S. (C.H.) v. Alberta (Child, Youth and Family Enhancement Act, Director)*, [2010] A.J. No. 70, 2010 ABCA 15 (Alta. C.A.).

[103] *Templin v. HMQ Ontario*, [2016] O.J. No. 6612, 2016 ONSC 7853 (Ont. S.C.J.).

[104] "[F]or the purposes of the applicable rules of civil procedure and with respect to appeal rights, a class member is technically not a party to a class proceeding": W.K. Winkler *et al.*, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014), at 194 [references omitted].

[105] *Bancroft-Snell v. Visa Canada Corp.*, [2019] O.J. No. 5247, 2019 ONCA 822 (Ont. C.A.), leave to appeal refused [2019] S.C.C.A. No. 501 (S.C.C.). For a discussion of the *sui generis* status of class members, see Jasminka Kalajdzic, "Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis" (2011) 49 Osgoode Hall L.J. 1.

[106] According to a study of 159 cases, less than 1 per cent of class members opt out: Theodore Eisenberg & Geoffrey Miller, "The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues" (2019) 57 Vand. L. Rev. 1529, at 1532. Data on Canadian numbers is not available but in my experience is consistent with the rates reported by American scholars.

4. Common Issues

Class action legislation requires class members to raise common issues of fact or law. An issue is not "common" unless it is a "substantial ingredient" of each class member's claim.[107] The class action device is justified when it will avoid duplication of fact-finding or legal analysis.[108] The common issues need not resolve the litigation to justify class treatment, nor does the existence of many individual issues (such as the assessment of damages) preclude certification.[109]

As previously discussed, some constitutional class actions have floundered on the common issues test because courts concluded that Charter rights are inherently individual in nature and that violations and remedies, therefore, cannot be determined on a common basis.[110] Recent successes in the G20 and administrative segregation cases, however, suggest that courts are prepared to find that alleged breaches of section 7 and other rights raise common issues because they relate to the operational methods and policies of the government. "[T]he case law offers many examples where class actions have been certified to determine claims where all class members are exposed to the same conduct of the defendant."[111]

In some ways, climate change raises quintessentially common issues. The focus of the plaintiffs' charge is solely on the defendant government's conduct. Climate change is devastating precisely because it is not localized. While the impact on class members may vary in degree based on geography, economic status, Indigeneity or health, there is a baseline of harm common to all. Although *Ward* held that section 24(1) damages depend on the facts of each case, non-pecuniary damages can still be assessed in the aggregate, as is expressly permitted under class proceedings legislation.[112]

It is true that the jurisprudence on the availability of damages is complicated. *Schachter v. Canada*[113] provides that damages under section 24(1) are not normally

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[107] Heather McCleod-Kilmurray, "Hollick and Environmental Class Actions: Putting the Substance into Class Action Procedure" (2002-2003) 34 Ottawa L. Rev. 363, at para. 18.

[108] *Western Canadian Shopping Centres Inc. v. Dutton*, [2000] S.C.J. No. 63, 2001 SCC 46, at para. 39 (S.C.C.).

[109] Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 6; W.K. Winkler *et al.*, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014), at 108.

[110] See discussion in Part III above, referring to *Thorburn v. British Columbia (Public Safety and Solicitor General)*, [2013] B.C.J. No. 2412, 2013 BCCA 480 (B.C.C.A.).

[111] *Good v. Toronto (City) Police Services Board*, [2014] O.J. No. 3643, 2014 ONSC 4583, at para. 45 (Ont. Div. Ct.), citing *Dennis v. Ontario Lottery and Gaming Corp.*, [2013] O.J. No. 3468, 2013 ONCA 501, at para. 53 (Ont. C.A.).

[112] The Court of Appeal in *Good* found that a base amount of s. 24 damages for each class members would be appropriate. *Good v. Toronto (City) Police Services Board*, [2016] O.J. No. 1748, 2016 ONCA 250, at para. 75 (Ont. C.A.).

[113] [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1 (S.C.C.).

available in an action for a declaration of invalidity. *Mackin v. New Brunswick (Minister of Finance)*[114] states that there is an exception for conduct that is "clearly wrong, in bad faith or an abuse of power". Under the *Ward* test, a government could argue that a multi-billion-dollar damage award would be inconsistent with good governance. On the other hand, a significant damage award is precisely what is required to vindicate the harm done to society and to deter future breaches by state actors (two of the three objectives of constitutional damages).[115] That the plaintiff in *ENJEU* specifically requested that any assessed damages be paid *cy-près* to the government for the purpose of funding climate change initiatives makes the case for commonality stronger, since there is then no need to identify and locate each individual class member.[116] Ultimately, however, certification is not a test of the merits of the case but only a determination of whether there are common issues justifying representative litigation. Issues of liability alone would be sufficient to satisfy commonality.

5. Preferable Procedure

The fourth certification criterion, preferability, has two components. The motion judge assesses whether the proposed class action: (1) would be a fair, efficient and manageable method to advance the claim; and (2) would be preferable to other reasonably available means to resolve the common issues.[117] This analysis must include reference to the accepted goals of class actions: judicial economy, access to justice and behaviour modification.[118] Of the stated goals of class actions, modification of the wrongful behaviour of the defendant and those similarly situated is particularly apposite in the climate change context.

Arguments that a class action is not an efficient method of advancing the claims are unlikely to be successful. The complex science of climate change could be more efficiently mounted in a single action than in a multitude of individual ones. While there may be individual issues relating the impact of climate change on different

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[114] [2002] S.C.J. No. 13, 2002 SCC 13 (S.C.C.).

[115] *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27, at paras. 25-29 (S.C.C.).

[116] The *cy-près* doctrine in class action law permits the distribution of class members' compensation to a third party when it is impracticable to direct the payment to class members themselves. Such a distribution is to indirectly benefit the class and is thought to advance the deterrence function of class actions. For an empirical and critical analysis of *cy-près*, see Jasminka Kalajdzic, "The 'Illusion of Compensation': *Cy-près* Distributions in Canadian Class Action" (2014) 92:2 Can. Bar Rev. 173.

[117] W.K. Winkler *et al.*, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014), at 128. As a result of amendments to Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6 in effect as of October 1, 2020, additional criteria of predominance and superiority are now requirements in the preferability analysis: s. 5(1.1).

[118] *AIC Ltd. v. Fischer*, [2013] S.C.J. No. 69, 2013 SCC 69, at paras. 16, 22 (S.C.C.).

members of the class, the resolution of several factual issues (*e.g.*, whether the government has failed to meet GHG reduction targets and the consequences of this failure) and legal ones (*e.g.*, whether the failure to put in place necessary measures to limit global warming to 1.5°C constitutes a violation of section 7) will substantially advance each member's claim. Thus, the manageability branch of the preferable procedure test should be met.

The comparative branch of the analysis may be more challenging. Here, the court will look at alternative processes that are "realistically" available to the class members.[119] The government's main argument is likely to be that a test case would be more efficient and achieve the main objective, declarations of constitutional violations. Permissive public interest standing rules would allow environmental groups, for example, to bring Charter claims seeking systemic remedies.[120] Plaintiffs have successfully resisted this argument in other class actions on the basis that, unlike in a test case, compensation is available in a class action.[121] The Court of Appeal for Ontario has also held that the combination of remedies — a declaration of a Charter violation *and* damages — "would be stronger instruments of behaviour modification".[122] *ENJEU*'s unusual request that the damages awarded be used instead for measures to curb global warming[123] will have an uncertain impact on preferability. A court could either interpret the requested relief as a more explicit form of behaviour modification (thus consistent with *Good*) or proof that declaratory relief, not compensation, is the class members' true objective. The plaintiff will have to address whether quantifying a sum of money that must be spent on climate initiatives, without dictating precisely how it is to be done, is sufficiently respectful of the separation of powers.

6. Representative Plaintiff

The final certification criterion is the determination that there is a suitable representative plaintiff to bring the action on behalf of class members. The proposed representative must not have any conflicts of interest on the common issues, must have a workable litigation plan, and must be willing to vigorously and capably

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[119] *AIC Ltd. v. Fischer*, [2013] S.C.J. No. 69, 2013 SCC 69, at para. 23 (S.C.C.).

[120] Joseph Arvay & David Wu, "Class Actions and the *Charter*" (Paper delivered at the 14th National Symposium on Class Actions, Toronto, April 6-7, 2017), at 19-20 [unpublished], citing *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, 2012 SCC 45 (S.C.C.).

[121] *Canada (Attorney General) v. Hislop*, [2007] S.C.J. No. 10, 2007 SCC 10 (S.C.C.); *Howard Estate v. British Columbia*, [1999] B.C.J. No. 585, 32 C.P.C. (4th) 41 (B.C.S.C.).

[122] *Good v. Toronto (City) Police Services Board*, [2016] O.J. No. 1748, 2016 ONCA 250, at para. 87 (Ont. C.A.).

[123] *Environnement Jeunesse c. Procureur général du Canada*, [2019] J.Q. no 5940, 2019 QCCS 2885, at para 3.

prosecute the interests of the class.[124] In Quebec, public interest groups like ENvironnement JEUnesse are permitted to stand as representative plaintiffs.[125] In the rest of Canada, the representative must be a juridical person with a cause of action against the defendant.[126]

This criterion is not difficult to meet and rarely results in rejection of the class proceeding. In a public interest case like climate change litigation, it would be especially easy to satisfy a judge that the proposed representatives have the motivation and will to vigorously prosecute the action. Youth climate actions consistently rely on a dozen or more plaintiffs who are diverse and representative of the many communities impacted by climate change: Indigenous, living in coastal regions or drought zones, impacted by wildfires or flooding, and suffering from illnesses caused by extreme heat and polluted air.[127] A similar cross-section of proposed representative plaintiffs represented by capable class counsel would almost certainly satisfy the final component of the certification test.

V. COMPARATIVE ADVANTAGES AND DISADVANTAGES OF USING THE CLASS ACTION MECHANISM

With climate change litigation ramping up in Canada, it is likely that many procedures and theories will be tested. There are advantages to including class actions in this multi-pronged litigation strategy. What follows is a brief discussion of the comparative advantages and disadvantages of class actions relative to traditional public interest litigation.

1. Advantages

There are both legal and practical advantages to using class actions. The legal advantages relate to the unique provisions of class action statutes that permit the use of statistical evidence and assessment of aggregate damages. A court may dispense with calculating individual damages for each class member by authorizing an aggregate assessment of the defendant's liability, and then determining how the aggregate award is to be distributed.[128] Class action legislation in most provinces

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[124] W.K. Winkler *et al.*, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014), at 145-46.

[125] Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s 5(1)(b); *Code of Civil Procedure*, CQLR, c. C-25.01, art 571.

[126] See, *e.g.*, *Hughes v. Sunbeam Corp. (Canada) Ltd.*, [2002] O.J. No. 3457, 61 O.R. (3d) 433, at para. 15 (Ont. C.A.), leave to appeal refused (2003), 224 D.L.R. (4th) vii (note) (S.C.C.).

[127] See, e.g., the statement of claim in *La Rose et al. v. Canada* (Statement of Claim), online: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf>, which names 15 youths as plaintiffs and details the climate change impacts on each of them.

[128] W.K. Winkler *et al.*, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014), at 263-64.

also allows the use of statistical evidence that would otherwise not be admissible in order to determine an appropriate way to distribute any monetary award.[129] The aggregate damage provision was successfully invoked by the class in *Good.*[130]

As discussed in the preceding section, the availability of *cy-près* distributions of damages also obviates the need to seek an order requiring the government to make budget allocations, relief that would likely be denied as not justiciable.[131] Although the difference between the two forms of relief is subtle, if not semantic, a class action judge familiar with the use of *cy-près* might be amenable to the argument.

Finally, in some provinces and in the Federal Court, class actions operate on a no-costs basis.[132] The risk of adverse costs has stalled environmental class actions in Ontario. Litigating in the Federal Court or in a province where there is no such risk is a distinct advantage over traditional test case litigation, where advance costs orders or relief from adverse costs can be unpredictable.[133]

There are also distinct *practical* advantages to a class action. These cases are financed by sophisticated lawyers working on contingency fees.[134] Engaging class action specialists widens the pool of lawyers doing public interest work. The evidentiary burden at the certification motion is low, but the benefits of achieving certification can be significant. For one, the mere fact of certification raises public awareness of the case and its claims. Second, certification increases settlement leverage exponentially.[135] Settlements of class actions are not limited by the relief that a court has the jurisdiction to grant; many high-profile class action settlements have included apologies, the creation of foundations and truth commissions, and the compensation of novel claims. In effect, settlement negotiations offer unique

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[129] See, *e.g.*, Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 23(1).

[130] *Good v. Toronto (City) Police Services Board*, [2016] O.J. No. 1748, 2016 ONCA 250 (Ont. C.A.).

[131] *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, 2002 SCC 84, at para. 292 (S.C.C.).

[132] Ontario, New Brunswick, Nova Scotia, Saskatchewan and Alberta have a cost-shifting rule. Quebec's rule limits costs awards to a modest tariff. The rest of Canada, including the Federal Court, has a no-costs rule.

[133] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, 2007 SCC 2 (S.C.C.).

[134] Arvay and Wu have made the same observation: Joseph Arvay & David Wu, "Class Actions and the *Charter*" (Paper delivered at the 14th National Symposium on Class Actions, Toronto, April 6-7, 2017), at 20 [unpublished].

[135] Lorne Sossin, "Revisiting Class Actions Against the Crown" (2011) 53 S.C.L.R. (2d) 35, at 37. See also *Holmes v. London Life Insurance Co.*, [2000] O.J. No. 3621, 50 O.R. (3d) 388, at para. 16 (Ont. S.C.J.). In practice, most class actions settle before trial: Molly Reynolds, James Gotowiec & Davida Shiff, "Class Actions In Canada, Part I" (October 24, 2017), *Torys Quarterly*, online: <https://www.torys.com/insights/publications/2017/10/class-actions-in-canada-part-1-class-proceedings-101>.

opportunities for climate justice lawyers to fashion remedies that would normally be associated with the political process.

2. Disadvantages

The novel use of *cy-près* proposed in *ENJEU* is the main legal risk to using class actions that is not present in ordinary litigation. *Cy-près* usually involves the distribution of class action settlement funds to a third party like a charitable organization. In effect, the plaintiffs in *ENJEU* are seeking to give the money back to the defendant, albeit earmarked for climate change initiatives. Such relief is unprecedented.[136] A judge could not dictate exactly how the money must be spent without running afoul of the caution in *Doucet-Boudreau* that courts must not "depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes".[137] While a negotiated settlement would give the parties the freedom to craft a plan to utilize funds for climate change mitigation purposes, a judge awarding damages at trial might not have the authority to do so. This uncertainty, coupled with the still-nascent remedy of constitutional damages, creates further risk for class action litigators performing a cost-benefit analysis in their selection of cases.

There are also two main practical disadvantages to pursuing climate change litigation by way of a class action. The first is that a class action requires a motion for certification, an additional procedural step that is expensive and time-consuming. Success, of course, is not guaranteed. Second, the novelty of climate change litigation in Canada creates risk for class action specialists, so they may prefer to have a source of third party funding (commercial or the non-profit alternatives in Quebec and Ontario[138]) than to self-finance. Commercial funders may also be dissuaded by the uncertainty of large damage awards in climate change litigation. While not-for-profit funding entities would be attracted to the public interest value of such litigation, the significant cost of expert evidence and the prospect of

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[136] A judge recently made a similar order in *Brazeau*, ordering Charter damages to be distributed "in the form of additional mental health or program resources for structural changes to penal institutions as the court on further motion may direct": *Brazeau v. Canada (Attorney General)*, [2019] O.J. No. 1451, 2019 ONSC 1888, at para. 456 (Ont. S.C.J.). An appeal was granted from this decision on the basis that the judge made his order on his own motion and ought to have heard from counsel about the appropriate distribution of the damage award: [2020] O.J. No. 1062, 2020 ONCA 184, at paras. 106-113 (Ont. C.A.). When the damages issues was remitted back to the motion judge, he ordered the defendant to pay $20 million to the class: *Brazeau v. Canada (Attorney General)*, [2020] O.J. No. 2399, 2020 ONSC 3272 (Ont. S.C.J.).

[137] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, 2003 SCC 62, at para. 56 (S.C.C.).

[138] Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: University of British Columbia Press, 2018), at 149-65.

exposure to large adverse costs in the event the case fails at certification or trial would be weighty considerations.

VI. CONCLUSION

There is an axiom in class action law that class proceedings are procedural and do not alter the substantive law. It is no longer gospel, however, as increasingly commentators and judges observe that class actions have substantive law implications.[139] As Karakatsanis J. noted in her dissent in a price-fixing class action:

> [W]hile class actions are a procedural vehicle, they are not *merely* procedural. They make possible claims that are very complex or could not be prosecuted individually, not only because it would be inefficient or unaffordable, but also because it may be extremely difficult to prove individual claims. The *CPA* does have substantive implications: it creates a remedy that recognizes that damages to the class as a whole can be proven, even when proof of individual members' damages is impractical, and that is available even if those who are not members of the class can benefit.[140]

Justice Karakatsanis was referring to the availability of *cy-près* distributions in class action settlements where it is not possible to allocate or pay compensation to individual class members. While some critics complain that permitting class members' compensation to be paid to a third party is the equivalent of a civil fine and creates a remedy that is not available in non-class litigation, courts routinely approve such payments in order to further the deterrence objective of class actions.[141] Charter damages and climate change litigation also share this fundamental objective. These are the synergies tapped by a constitutional climate change class action.

The concept of a class proceeding as an altogether different kind of litigation — not just a tool for aggregating many individual claims — is under-theorized in Canada.[142] Climate change litigation exposes the need for re-conceptualizing the class action to facilitate "collective rights that cannot be vindicated solely by

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[139] Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: University of British Columbia Press, 2018), at 6; Iryna Ponomarenko, "The Devil is in the Scale: Revisiting the Commonality Requirement in *Charter* Class Actions" (2019) 57:1 Alta. L. Rev. 69, at 88-90.

[140] *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2013] S.C.J. No. 58, 2013 SCC 58, at para. 107 (S.C.C.) [emphasis in original].

[141] For a rebuttal to this criticism, see Jasminka Kalajdzic, "The ''Illusion of Compensation': *Cy-près* Distributions in Canadian Class Action" (2014) 92:2 Can. Bar Rev. 173.

[142] Litigation procedure in Latin and South American countries has already shifted the paradigm by moving beyond "group entitlements, which concern a determinate — though potentially enormous — collectivity, to that of diffuse entitlements, which generally pertain to society as a whole". Ángel R. Oquendo, "Upping the Ante: Collective Litigation in Latin America" (2009) 47 Colum. J. Transnat'l L. 248.

upholding individual rights".[143] In the meantime, however, there are good reasons to pursue climate change litigation using the Charter class action vehicle, despite its current shortcomings. Recent successes in Ontario and the continued development of constitutional damages as a remedy bode well for climate change class actions using a Charter framework. As mapped out in Part IV, the arguments for certifying such an action have a realistic chance of success.

The certification of a climate change action is not a guarantee that the case will succeed on the merits. A certified class action faces the same doctrinal and policy challenges as any other form of climate change litigation. But, certification itself is an important victory. It improves the power disparity between citizens and the state and focuses the trial on a set of discrete factual and legal common issues. Successful findings on any one of these issues advances the cause of climate justice. Moreover, certified class actions yield considerable settlement leverage and tend to generate more media attention and public awareness than a typical judicial review application or individual test case.[144] These are not insignificant advantages in a climate change litigation agenda, in which the basic goal is to create political pressure to generate wiser climate policy.

I began this paper by pointing out the ironies of the decisions in *Juliana* and in *ENJEU*. There is, of course, a bigger irony in climate change itself — that "those who have done the least to cause climate change are the ones facing its most dire impacts".[145] The failure of states to take meaningful steps to curb GHG emissions leaves citizens with few options, and accounts for the rise of rights-based climate change litigation in recent years. As Canadian advocates join with their international counterparts in deploying a litigation strategy, Canada's robust class action procedure may be a useful addition in the pursuit of collective climate justice.

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[143] Douglas Sanders, "Collective Rights" (1991) 13 Hum. Rts. Q. 368, at 382.

[144] Lorne Sossin, "Revisiting Class Actions Against the Crown" (2011) 53 S.C.L.R. (2d) 35.

[145] Mary Robinson Foundation for Climate Justice, "Principles of Climate Justice" (2017), as cited in Louise Fournier, "The Cost of Inaction: The Role of Courts in Climate Change Litigation" (LL.M. Global Environment and Climate Change Law, University of Edinburgh, 2017), at 5, online: <https://www.researchgate.net/publication/320045038_The_Cost_of_Inaction_The_Role_of_Courts_in_Climate_Change_Litigation>.