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Intergenerational Environmental Justice and the Climate Crisis: Thinking with and beyond the *Charter*

Dayna Nadine Scott and Garance Malivel*

ABSTRACT

Inspired by the analysis developed in the article “Coming of Age in a Warming World: The Charter’s Section 15 Equality Guarantee and Youth-Led Climate Litigation,” by Nathalie Chalifour, Jessica Earle, and Laura Macintyre, this commentary explores the concept of intergenerational environmental justice in the climate crisis. Our central contribution is to advance a relational conception of intergenerational environmental justice, which we argue can overcome some common objections to thinking about justice and rights in “generational” terms. This analysis supports climate litigation efforts on Charter grounds, best conceived in our view as discrimination against young and future generations. Yet it also highlights the need to advance intergenerational environmental justice outside of a narrow constitutional focus and, hence, puts forward various institutional, legislative, and deliberative mechanisms designed to uphold long-term interests in environmental governance processes.

Even if we don’t have a clear sense of the exact solutions to fix the future, we should have a clear sense of how we want to feel in ourselves, in our relationships with each other, in community, and in relationship to the planet. Those feelings aren’t for the far-off future, they are guidance to what we must be seeding and practicing now, right now.

— adrienne maree-brown, “Additional Recommendations for Us Right Now from a Future”

I. INTRODUCTION

What happens, legally speaking, when we start to think about climate justice in generational terms? Mounting evidence has shown the disproportionate vulnerability of children and future generations to the impacts of climate

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change. As is the case between people in the global North and those in the global South, it is also true with respect to today's generations versus those of the future that those who face the most extreme burdens from climate change are those that bear the least responsibility for the emissions that cause it. But young people are speaking up and standing up. They are doing what Naomi Klein has said will be "this generation's" necessary work: "fight[ing] to protect the habitability of the planet."¹ As those being harmed and anticipating harm begin to turn to the courts for remedies, a question has emerged: are we "discriminating" against young people and future generations? If so, the instincts of lawyers trained in Canada may lead them to say: we should use the *Canadian Charter of Rights and Freedoms* to stop it.²

Inspired by the analysis developed in the article "Coming of Age in a Warming World: The Charter's Section 15 Equality Guarantee and Youth-Led Climate Litigation," by Nathalie Chalifour, Jessica Earle, and Laura Macintyre, this commentary explores the avenues for those of us in current generations to live up to our obligations (in the multiple ways they may be conceived) to young people and future generations.³ Chalifour, Earle, and Macintyre argue that government conduct related to climate change constitutes unjustifiable discrimination under section 15 of the *Charter*, whether that conclusion can be arrived at through thinking about climate injustice as age discrimination or as discrimination against young and future generations.

Beyond the tactical, evidentiary, and doctrinal considerations of launching challenges under various specific sections of the *Charter* (which we will leave to the litigators), we focus in this article on the broader implications of taking different tacks. What does it mean to think about climate justice in individual rights terms versus collective justice terms? Is it right to think about the interests of various generations as "competing" or "rival"? Is constitutional protection of future generations sufficient to redress intergenerational environmental injustices? We conclude that, while we support the general thrust of the youth claimants' cases and we know they must succeed, conceiving of the youth climate justice claims being brought forward today in collective terms—on behalf of "generations" rather than individuals—is a closer fit to the core of the justice problems that confront us. Conceiving of the problem as one of intergenerational

¹ Quoted in Colin Groundwater, "A Better Way to Think About Climate Change and the Kids Conundrum," *GQ Magazine* (26 February 2021), online: <www.gq.com/story/naomi-klein-on-climate-change-modern-lovers> [<https://perma.cc/3WG3-A6U4>].

² *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

³ Nathalie Chalifour, Jessica Earle & Laura Macintyre "Coming of Age in a Warming World: The Charter's Section 15 Equality Guarantee and Youth-Led Climate Litigation" (2021) 17:1 *JL & Equality* 1.

environmental justice is closer to “how we want to feel in ourselves, in our relationships with each other, in community, and in relationship to the planet,” to evoke adrienne maree brown’s words in the epigraph above.⁴

Further, we believe the intra-generational justice aspects of the climate crisis are at least as significant as the intergenerational ones. But the class-related injustice of climate change is an element that we have had to concede the *Charter* will not remedy, at least on the basis of jurisprudence to date. We do illuminate a path, however, for *Charter* jurisprudence to move towards a more relational account of intergenerational equity that opens up space for an integrated analysis of the intersecting axes of privilege and oppression on which the climate crisis gains momentum. In the end, we agree that explicitly recognizing the rights of young people and future generations under section 15 of the *Charter* is a necessary step—climate change is a justice issue, and the equality section is the tool we are holding. But, at the same time, we want to underscore the glaring insufficiency of using the *Charter* for fully addressing the scope and scale of the problem.

For this reason, we also look at tactics outside of *Charter* litigation. Here, we further contend that bolder action should be taken to inscribe intergenerational environmental justice into binding legislative and institutional frameworks. Building on growing international efforts to incorporate intergenerational equity principles into legislative and parliamentary processes, Part IV of this article seeks to envision some of these frameworks that could adequately complement the recognition of the rights of future generations under the *Charter*. We make these offerings generously in the spirit of contributing to an “unknown, multiplicitous future.”⁵ That is, we cannot know the world into which future generations will emerge, but we can nevertheless begin to build the legal infrastructure necessary to support life: this will take on new organic forms “that are not echoes of the old” but, rather, that emerge from the foundation we provide into unique forms based on the “work of future communities.”⁶ In our vision, these will be vital, plural, life-supporting, legal, and political infrastructures that focus as much on “responsibilities” as “rights” and

⁴ adrienne maree-brown, “Additional Recommendations for Us Right Now from a Future” (23 October 2020), online: *Center for Humans and Nature* <www.humansandnature.org/additional-recommendations-for-us-right-now-from-a-future> [<https://perma.cc/8S4W-EKKY>].

⁵ Catriona Sandilands, “Humus” in John Hausdoerffer et al, eds, *What Kind of Ancestor Do You Want to Be?* (Chicago: University of Chicago Press, 2021) 177 at 179.

⁶ *Ibid* at 180.

build capacity for restoring and nurturing the interconnected socio-ecological systems that support a stable climate for all.

The article proceeds in three parts. In Part II, we advance a relational conception of intergenerational environmental justice more in line with feminist and decolonial thinking about the future in a warming world. In Part III, we consider class, age, and future generations as available grounds or “boxes” under and in which a *Charter* claim is conceivable and as axes of discrimination on which climate change is acting. We conclude that a claim based on discrimination against young and future generations best captures the core of the climate justice problem, and we demonstrate that some common objections to thinking about justice and rights in “generational” terms (such as “non-reciprocity”) can be overcome with recourse to the relational account outlined in Part II. In Part IV, we broaden the discussion to consider implementation mechanisms that might, alongside or outside of litigation efforts, actualize the interests of future generations. To that end, we explore a set of institutional, legislative, and deliberative instruments elaborated in various countries to entrench long-term interests in environmental governance processes.

II. THINKING ABOUT JUSTICE IN GENERATIONAL TERMS

Legal discourse considering justice in generational terms has largely centred on the concept of “intergenerational equity” formulated by Edith Brown Weiss now over thirty years ago. In Brown Weiss’s conception, “each generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations.”⁷ The basic premise, heavily influenced by liberal political theory, is that the present generation is both entitled to benefit from the natural environment and obligated to preserve it for future generations.⁸ Having identified

⁷ Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Publishers, 1989) at 2 [Brown Weiss, *In Fairness*].

⁸ *Ibid* at 21. Brown Weiss relies on John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). See e.g. Christine M Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Lanham, MD: Rowman & Littlefield, 1997); Carol Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988); Susan Moller Okin, *Gender, Justice and the Family* (New York: Basic Books, 1989). For a discussion of intergenerational justice in the works of Rawls and other philosophers operating in the Rawlsian tradition, see David Heyd, “A Value or an Obligation? Rawls on Justice to Future Generations” in Axel Gosseries & Lukas H Meyer, eds, *Intergenerational Justice* (New York: Oxford University Press, 2012) 167.

“generations” as her core unit of analysis, Brown Weiss elaborates three core “principles” of intergenerational equity:

First, each generation should be required to conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and should also be entitled to diversity comparable to that enjoyed by previous generations. This principle is called “conservation of options.” Second, each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received, and should also be entitled to planetary quality comparable to that enjoyed by previous generations. This is the principle of “conservation of quality.” Third, each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations. This is the principle of “conservation of access.”⁹

Although we will complicate the question of whether “generations” really mark the most crucial axis of discrimination upon which climate change acts, we do not aim to undermine the normative thrust of intergenerational equity as an ideal. In fact, we agree with Jessica Eisen, Roxanne Mykitiuk, and Dayna Scott who have argued that “if prevailing modes of governance throughout the global North honoured [intergenerational equity] principles in practice, [it would represent] a significant improvement over the current state of affairs.”¹⁰ Nonetheless, also in line with these authors, we are sceptical that “an approach which treats intra- and inter-generational problems in separate silos will be capable of grounding the ethical and political orientation” necessary to

⁹ Brown Weiss, *In Fairness*, *supra* note 7 at 38.

¹⁰ Jessica Eisen, Roxanne Mykitiuk & Dayna Nadine Scott, “Constituting Bodies into the Future: Toward a Relational Theory of Intergenerational Justice” (2018) 51:1 UBC L Rev 1 at 22. Furthermore, we agree with Lynda M Collins’s argument that intergenerational equity must constitute a central feature of the “ecological constitutions” of the future. Lynda Collins, *The Ecological Constitution: Reframing Environmental Law* (Abingdon, UK: Routledge, Taylor & Francis Group, 2021). See also Dayna Nadine Scott, “Review of Lynda M Collins, *The Ecological Constitution*,” Ottawa L Rev (forthcoming).

face the climate crisis.¹¹ Only the third of Brown Weiss' three principles addresses "justice between generations and between members of the same generation."¹² As such, this conception of intergenerational equity presents only a limited opening for considering past, present, or future social conditions of difference, discrimination, and inequality as between members of the same generation.

Environmental law scholars have long been aware of the shortcomings in Brown Weiss's model with respect to the relative under-emphasis on intra-generational equity.¹³ The vast disparities of circumstances, resources, and interests within a given generation, especially as they correspond with histories of racism and colonialism, have been a central focus of the environmental justice movement, but they have not been given thorough treatment by scholars working under the banner of intergenerational equity. However, as Lynda Collins maintains, this critique does not have to be fatal to the larger project, and, here again, we agree.¹⁴ In fact, we see our work as involving the expansion and enriching of the concept through the explicit incorporation of equity concerns, aided by critical feminist, relational, and de-colonial approaches.

As Collins notes, the central difficulty is that "characterizing intra-generational equity as a component of intergenerational equity obscures the real potential for conflict between the present and future."¹⁵ Brown Weiss does consider, briefly, the possibility of such conflict. In one summary of her theory, Brown Weiss notes, first, that such conflicts may be illusory since "poverty is a major cause of ecological degradation" and that "meeting the basic needs of the poor" is essential to ensuring that "they will have both the desire and ability to fulfil their intergenerational obligations to conserve the planet."¹⁶ In cases of true conflict, Brown Weiss remarks only that "we need to develop appropriate mechanisms and allocate sufficient resources to maximize the ability to both 'alleviate poverty as quickly as possible' and

¹¹ Eisen, Mykitiuk & Scott, *supra* note 10 at 22.

¹² Edith Brown Weiss, "Intergenerational Equity: A Legal Framework for Global Environmental Change" in Edith Brown Weiss, ed, *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992) 385 [Brown Weiss, "Intergenerational Equity"].

¹³ Lynda M Collins, "Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance" (2007) 30 Dal LJ 79 at 116 [Collins, "Revisiting the Doctrine"]. See also Catherine Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester: Juris, 1999) at 109, n 208.

¹⁴ *Ibid.*

¹⁵ Collins, "Revisiting the Doctrine," *supra* note 13 at 116.

¹⁶ Brown Weiss, "Intergenerational Equity," *supra* note 12 at 398.

‘protect the health of the planet for future generations.’”¹⁷ Thus, the mainstream intergenerational equity discourse has not moved beyond generalized exhortations that “all members of the present generation are entitled to equitable access to the legacy” of the environment and the insistence that “intragenerational justice requires wealthier communities to assist impoverished ones in realizing such access.”¹⁸

But the problem runs deeper. The crux of it is this: intergenerational equity, in the way it is conventionally conceived (and in the way it may be framed in order to ground a *Charter* claim), defines generations according to “rough averages across time,” which obviously glosses over the very significant disparities in how resources are distributed amongst members of a generation.¹⁹ In operationalizing the concept, one must imagine an aggregate measure of well-being for each distinct “generation.” The concept of “sustainable development” in international law, which is strongly influenced by the idea of obligations to protect the interests of future generations, is similarly compromised.²⁰ Thus, thinking in terms of generations has the effect of flattening the obscene disparities of wealth and power—and, thus, the capacities to both exacerbate and avoid climate crises—that characterize the collective of people inhabiting the planet at any given moment.

The tendency to define the interests of a generation as an aggregate of all individual interests is especially problematic in the context of the climate crisis, against which particularly situated individuals and communities will have starkly differential abilities to insulate themselves.²¹ In glossing over the disparities within generations, the concept thus fails to provide the analytical tools we need to think about how those disparities may persist across generations. Will they be exacerbated, mitigated, or erased as they transfer onto future terrain? Thus, the notion of intergenerational equity, while elegant and intuitive, is limited by its conjuring of a series of distinct and monolithic “generations,” with separate, identifiable, and competing interests. Do people living in one generation have more in common with their very differently situated contemporaries than they do with their (likely to have been very similarly situated) ancestors or their (likely to be similarly situated) descendants?

¹⁷ *Ibid.*

¹⁸ Brown Weiss, *In Fairness*, *supra* note 7 at 28.

¹⁹ Eisen, Mykitiuk & Scott, *supra* note 10 at 4.

²⁰ *Ibid.*

²¹ See Anna Grear, “Towards New Legal Futures? In Search of Renewing Foundations” in Anna Grear & Evadne Grant, eds, *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Cheltenham, UK: Edward Elgar, 2015) 283 at 286.

A. A Relational Account of Intergenerational Equity: Intergenerational Environmental Justice

Relational theory emerges from critiques of liberal legalism that show it to be founded on a fundamentally mistaken understanding of the human person as an “abstracted, disembodied, rational, universal rights bearing, contracting, possessive individual.”²² Relational theorists insist that everyone’s interests and capacities are “both *forged in relation* to other persons, and *realized through relations with* other persons.”²³ These include interpersonal relationships such as those with family, friends, or co-workers as well as institutional or structural relationships such as those defined by gender, class, race, or politics.²⁴ A relational view of the individual, then, is one in which their interests and capacities, even their obligations, can only be defined and understood in the context of the entire web of relations.

Indigenous intellectual traditions have long emphasized interconnection and relationships as central tenets. For example, legal scholar Gordon Christie describes the individual in Indigenous societies as being conceived as “interwoven into intricate webs of relationships, the self being defined in its relation to others.”²⁵ In this world view, individuals are seen as “*nodes* in these webs, as relatively *fixed and determined beings* connected by strands of the web. The identity of these individuals (and the various communities they collectively comprise) is provided by the responsibilities they have, which work to weave the web of which they are parts.”²⁶ Deborah McGregor’s

²² Roxanne Mykitiuk, *Legal Texts, Human Bodies: Reading Embodiment in the Biotech Age* (JSD thesis, Columbia Law School, 2003) at 79 [unpublished]. See also Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008) at 9.

²³ Eisen, Mykitiuk & Scott, *supra* note 10 at 26 [emphasis in original], drawing on Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011). See also Jennifer J Llewellyn & Jocelyn Downie, “Introduction” in Jennifer J Llewellyn & Jocelyn Downie, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2011) 1 at 4.

²⁴ Nedelsky, *supra* note 23 at 4.

²⁵ Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2:1 Indigenous LJ 67 at 109. Eisen, Mykitiuk & Scott point out some the crucial differences between these various relational accounts, noting that Christie describes “persons as ‘nodes’ or ‘fixed and determined beings’ rather than (as relational theorists would have it) as continuously constituted and reconstituted by their relationships ... and in describing persons as bound by things which they “must” do, as opposed to the relational conception of rights and responsibilities as being open to constant social contestation and redefinition.” Eisen, Mykitiuk & Scott, *supra* note 10 at 27, n 99.

²⁶ Christie, *supra* note 25 [emphasis in original].

scholarship on Anishinaabek law has also demonstrated a reciprocity to these relationships. Just as waters, understood as sentient beings, must “fulfil their responsibilities around giving and supporting life,” so will people, specifically Anishinaabe *kwe* (women) have obligations to protect those waters.²⁷

Relational theory provokes a similar challenge to the notion of the identifiable, separable, and undifferentiated “generations” of orthodox accounts of intergenerational equity. The circumstances and choices of people in previous generations manifest in the relational construction of today’s problems, as well as tomorrow’s problems, for which there is no better example than climate change, as Sara Seck has aptly demonstrated.²⁸ But, as we reject conceptions of discrete “generations” that have a separate set of interests from those that come before and after them, so we also must recognize the responsibilities that flow across those boundaries. As Angela Harris argues, “humans are dependent not only on one another but on a series of trans-human systems.”²⁹ On this account, states take on obligations to maintain ecological systems and processes necessary for human survival, as in the conventional conception of intergenerational equity, but without the need to construct the generations as separate and identifiable.

On this point as well, Indigenous legal traditions have long exposed the inadequacy of Western notions of intergenerational justice. As McGregor explains, current generations will be called on to “enact obligations to ensure that future generations would know the waters as healthy living entities.”³⁰ In her legal order, as well as in a variety of other distinct Indigenous legal orders, McGregor emphasizes that, in addition to existing within the web of all living beings, reciprocal relationships exist between ancestors and descendants.³¹ For example, in her Hul’qumi’num legal tradition, legal scholar Sarah Morales explains that “places *become* the ancestors; they serve as ‘living’ legal scholars.”³² WSÁNEĆ legal

²⁷ Deborah McGregor, “Indigenous Women, Water Justice and Zaagidowin (Love)” (2015) 30:2–3 *Can Woman Studies / Cahiers femme* 71 at 73.

²⁸ Sara L Seck, “Relational Law and the Reimagining of Tools for Environmental and Climate Justice” (2019) 31:1 *CJWL* 151.

²⁹ Angela P Harris, “Vulnerability and Power in the Age of the Anthropocene” (2014) 6:1 *Washington & Lee J Energy, Climate & Environment* 98 at 126.

³⁰ McGregor, *supra* note 27 at 74.

³¹ Deborah McGregor, “Indigenous Environmental Justice: Towards an Ethical and Sustainable Future” in Brendan Hokowhitu et al, eds, *Routledge Handbook of Critical Indigenous Studies* (London: Routledge, 2020) 405 at 413.

³² Sarah Morales, *Snuw’uyulh: Fostering an Understanding of the Hul’qumi’num Legal Tradition* (PhD dissertation, Faculty of Law, University of Victoria, 2014) at 144, online (pdf): [UVicSpace <hdl.handle.net/1828/6106>](http://hdl.handle.net/1828/6106) [<https://perma.cc/TU47-ZGY3>].

scholar Rob Clifford describes the belief that ancestors become islands in the territory, creating—in the present—obligations to care for places; those places represent both gift and obligation.³³ As Christine J. Winter says, the “focus is on the survival and continuity of the community, linking from past to present into the future.”³⁴

All of this leads us to question whether the interests of those in different generations are actually competing in a meaningful way. Are today’s and future generations really rivals? Or is it the case that people living today are invested for their own sake in a livable future for their descendants? Is there a more collective or generalizable social interest in the well-being of future generations beyond thinking of our own descendants? These tensions emerge as we turn to trying to capture the essence of climate injustice in available grounds under the *Charter*.

B. Capturing Climate Injustice in *Charter* Grounds

The *Canadian Charter of Rights and Freedoms* is a celebrated instrument of human rights law in Canada, credited with completely changing the legal landscape upon its entrenchment in the Constitution in 1982.³⁵ The *Charter*’s “equality guarantee” was a centrepiece of the *Charter*’s promise, but has largely failed to live up to expectations.³⁶ It recognizes various grounds of discrimination as “enumerated” in section 15(1), thus explicitly prohibiting discrimination on the basis of “race, national or

³³ Robert YEL KÁTTE Clifford, “WSÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL-(Goldstream River)” (2016) 61:4 McGill LJ 755, online: <doi.org/10.7202/1038488ar> [https://perma.cc/URC8-79BP].

³⁴ Christine J Winter, *Subjects of Intergenerational Environmental Justice: Indigenous Philosophy, the Environment and Relationships* (London: Routledge, 2022) at 16 [Winter, *Intergenerational Environmental Justice*].

³⁵ *Charter*, *supra* note 2; Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, “Introduction” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 1 at 5–7.

³⁶ Sonia Lawrence, “Equality and Anti-Discrimination: The Relationship between Government Goals and Finding Discrimination in Section 15” in Oliver, Macklem & Des Rosiers, *supra* note 35, 815 at 817, 839–40; Jennifer Koshan & Jonnette Watson Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNBLJ 19; Bruce Ryder, Cidalia C Faria & Emily Lawrence, “What’s Law Good For?: An Empirical Overview of Charter Equality Rights Decisions” (2004) 24 SCLR 103 at 112–18. See also Dayna Nadine Scott, “Environmental Justice and the Hesitant Embrace of Rights” in James R May & Erin Daly, *Human Rights and the Environment: Indivisibility, Dignity, and Legality, Encyclopedia of Environmental Law* (Cheltenham, UK: Edward Elgar and the IUCN Academy of Environmental Law, 2019) 447.

ethnic origin, colour, religion, sex, age, and mental or physical disability.”³⁷ The jurisprudence has also recognized various grounds as “analogous” to these express grounds, including citizenship, marital status, sexual orientation, and off-reserve Aboriginal status, and certain “embedded” or “intersectional”³⁸ grounds of discrimination as analogous for the purposes of section 15(1).

Several youth-led climate lawsuits have now been filed in Canada, stretching back about two years, and most are still making their slow journey through the court system. While the specific arguments, targets, and tactics of the claims are distinct, most of the claims rely on section 15’s equality guarantee. A “common thread,” according to Chalifour, Earle, and Macintyre is the fact that “[t]he ‘present bias’ of public climate policies has depleted, and continues to deplete, Canada’s carbon budget for the twenty-first century, and there is irrefutable scientific evidence that, as a result, youth and future generations will bear a disproportionate burden of a destabilized climate simply by being born later in time.”³⁹ The core of the argument advanced in the youth climate litigation, then, is that “an inadequate or slow response by governments violates the equality rights of both youth and future generations.”⁴⁰ Decisions taken by governments today continue to allow and enable greenhouse gas (GHG) emissions to rise at a rate that is causing irreversible warming. As the authors correctly note,

[t]his warming creates a cascade of serious social, economic, and health consequences of both a physical and mental nature. These consequences are (and will continue to be) disproportionately borne by younger and future generations, both because of the length of time they will live their lives on an impacted planet and, in the case of children, because of their unique vulnerabilities to some of the impacts.⁴¹

Turning to the equality rights guarantee, then, is understandable. Section 15(1) of the *Charter* states that “[e]very individual is equal before and under the law and has the right to the equal protection and equal

³⁷ Lawrence, *supra* note 36 at 817–18; *Charter*, *supra* note 2.

³⁸ Rosalind Dixon, “The Supreme Court of Canada and Constitutional (Equality) Baselines” (2013) 50:3 *Osgoode Hall LJ* 637 at 644.

³⁹ Chalifour, Earle & Macintyre, *supra* note 3 at 1.

⁴⁰ *Ibid.*

⁴¹ *Ibid* at 4.

benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Chalifour, Earle, and Macintyre argue that children’s rights can be conceived of as individual rights within the present generation—for which the enumerated ground of age is adequate. The authors reason that children’s disadvantage, which stems in part from their “lack of independence and capacity for decision-making,” means that they rely almost entirely on the goodwill of others. The authors say that this fact makes them vulnerable “as a group” in a way that engages the *Charter* according to the jurisprudence.⁴² It gives them a “pre-existing disadvantage” in society, meaning (in the equality jurisprudence) that the state cannot now come along and treat them in a way that unfairly exacerbates that disadvantage.

As Chalifour, Earle, and Macintyre acknowledge, however, a claim under the enumerated ground of age can provide protection for present generations of young people, but not necessarily for generations to come. The authors acknowledge that it is unclear “whether Canadian courts will consider future generations to be part of the enumerated ground of age given that such claimants do not yet exist (and are therefore not currently experiencing discrimination).”⁴³ In our analysis, whether or not law’s “boxes” created under the *Charter* jurisprudence can neatly accommodate the claims of those harmed and expected to be harmed by climate change is somewhat beside the point. If we cannot remedy these harms and prevent expected harms with the current set of conceptual tools or categories, then we will need new categories.

As far as categories go, “class” would be a good one to consider in this context. Debate about class as an analogous ground under the *Charter* has not been part of mainstream *Charter* discourse for some time.⁴⁴ However,

⁴² *Ibid* at 74; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4.

⁴³ Chalifour, Earle & Macintyre, *supra* note 3 at 61. The *Charter* applies to “everyone” currently in Canada.

⁴⁴ In 2005, Margot Young called the poor in Canada “constitutional castaways” (drawing on the words of the former Supreme Court of Canada’s chief justice) on the basis of the largely disappointing *Gosselin* decision. *Gosselin v Quebec (Attorney General)*, 2002 SCC 84. For the more general point, see the Factum of the Intervenor Charter Committee on Poverty Issues in *Gosselin* at para 2 (<dx.doi.org/10.2139/ssrn.2306805> [<https://perma.cc/2E75-KN6M>]). More recently, in 2019, Martha Jackman argued that “Charter claimants in poverty cases continue to face prejudicial stereotypes and disproportionate evidentiary burdens.” She states that section 7 claims are “consistently reframed by the courts and then found to be non-justiciable” and that the Supreme Court of Canada has failed to revisit *Gosselin* or “even to grant leave to

it is increasingly recognized that the climate crisis is “at its core a class struggle.”⁴⁵ This is not only about major divergences in consumption; it is also about blame and responsibility.⁴⁶ An Oxfam report in 2015 found “extreme carbon inequality,” demonstrating that the richest 10 percent of people in the world were responsible for 50 percent of emissions, while the poorest 50 percent are responsible for only 10 percent.⁴⁷ Similarly, the impacts of climate change fall disproportionately on the poor and marginalized. This trend is likely to intensify in the future.⁴⁸

If current trajectories continue, all indications are that the most likely political future (without broad-based mass mobilization) is a concentrated liberal legalism in which the most privileged among us build, for themselves, a “ship” to survive the coming storm.⁴⁹ Dubbed a “climate leviathan” by Joel Wainwright and Geoff Mann, this trajectory sees the virtual abandonment of carbon mitigation efforts in favour of adaptation projects that allow the most advantaged “to stabilize their position amidst planetary crises.”⁵⁰ According to the authors, the need to act in this way will be deemed “an exception” proclaimed in the name of preserving life on Earth.

appeal in any poverty case since then, represents a serious failure of constitutionalism in Canada.” Martha Jackman, “One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin” (2019) 39:1 NJCL 85 at 85. Martha McCluskey puts it like this in the US context: “On the surface, modern U.S. constitutional law largely appears to abstain from taking sides in conflicts of economic class.” Martha McCluskey, “Constitutionalizing Class Inequality: Due Process in State Farm” (2009) 56:4 Buffalo L Rev 1035 at 1035. She goes on to explain that, since the turn of century, questions of economic inequality have been treated as matters of politics and policy but not as matters for judicial scrutiny.

⁴⁵ Matt Huber, “Race, Class and the Climate Crisis,” *Impakter* (25 May 2021), online: <impakter.com/race-class-climate-crisis/> [https://perma.cc/8PMW-9XHK].

⁴⁶ *Ibid.*

⁴⁷ Oxfam, “Extreme Carbon Inequality” (2 December 2015) at 1, online (pdf): *Oxfam* <www-cdn.oxfam.org/s3fs-public/file_attachments/mb-extreme-carbon-inequality-021215-en.pdf>. See also Lucas Chancel & Thomas Piketty, “Carbon and Inequality: From Kyoto to Paris” (3 November 2015), online (pdf): *Paris School of Economics* <piketty.pse.ens.fr/files/ChancelPiketty2015.pdf> [https://perma.cc/G6WW-TUZ2].

⁴⁸ Oxfam, *supra* note 47 at 3.

⁴⁹ Chalifour, Earle & Macintyre, *supra* note 3 at 29, n 142. See also Kyle Whyte, “Too Late for Indigenous Climate Justice: Ecological and Relational Tipping Points” (2020) 11:1 WIREs Climate Change 1.

⁵⁰ Joel Wainwright & Geoff Mann, *Climate Leviathan: A Political Theory of Our Planetary Future* (London: Verso Books, 2020) at 15.

The fight against climate change, which is already exacerbating existing disparities between people living on the planet now, is one in which meaningful responses require sacrifice. Who will make these sacrifices? The youth climate litigation is about demanding that current generations take on some of that burden by acting now to ease their suffering later. Further, the capacity of the wealthy, who benefit disproportionately from economic growth, to work against the conversion of our economies towards less carbon intensive alternatives is much greater than the capacities of the poor to work towards achieving it. This is a structural problem of the kind that liberal rights-based approaches have proven exceptionally inept at resolving. In this sense, the failure of our courts to date to find a *Charter* violation for these youth claimants holds much more weight than a claim based on simple age discrimination can bear. With this in mind, we advance the argument that not only is a collective claim on behalf of future generations the best fit for the actual justice problem that inheres in the climate crisis, but a relational account of intergenerational justice also provides a robust foundation for such a claim.

C. “The Future” Is Collective

Discrimination, as Joshua Sealy-Harrington says, “is a fluid mischief predicated on social context and hierarchy.”⁵¹ Future generations will come into being within increasingly disrupted socio-ecological systems: the latency effects of GHGs mean that decades of warming are already “locked in” and cannot be reversed.⁵² The Intergovernmental Panel on Climate Change (IPCC) released their sixth working group report in 2021, stating that action is urgently needed: if human societies fail to enact dramatic interventions in the coming decades, the earth system may cross what they term an “ecological tipping point” somewhere around the point of a two degrees Celsius increase in global average temperature.⁵³ Crossing this threshold will usher in a dangerous new world marked by extreme weather,

⁵¹ Joshua Sealy-Harrington, “The Alchemy of Equality Rights” (2021) 30:2 Const Forum Const 53 at 55.

⁵² John Branch & Brad Plumer, “Climate Disruption Is Now Locked In: The Next Moves Will Be Crucial,” *New York Times* (7 October 2021), online: <www.nytimes.com/2020/09/22/climate/climate-change-future.html> [<https://perma.cc/BXP3-DVR7>].

⁵³ Intergovernmental Panel on Climate Change (IPCC), “Summary for Policymakers” in V Masson-Delmotte et al, eds), *Climate Change 2021: The Physical Science Basis: Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, UK: Cambridge University Press, 2021) at 14 (the report notes: “Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO₂ and other greenhouse gas emissions occur in the coming decades”).

severe drought, drastic sea-level rise, unpredictable precipitation patterns, ocean acidification, and more.

In this section, we build on Chalifour, Earle, and Macintyre's proposal that courts interpreting section 15 of the *Charter* could establish a "generational instantiation of age," which would be novel and would require the courts to establish future generations as "an analogous ground closely linked to age."⁵⁴ In support of that proposal, and on the basis of the relational account of intergenerational equity that we term "intergenerational environmental justice," we make the argument that a conception of future generations as an analogous ground does not require that the interests of that "generation" are somehow completely separate and identifiable from others, nor does it require that the interests of those future generations be rival to the interests of those in the present generation.⁵⁵ Instead, not only are people living today invested for their own sake in a liveable future for others, but the act of defending the rights of future generations can improve environmental conditions today. In other words, there is an underlying reciprocity between present and future generations sufficient to create obligations. Further, if we interrogate the deeper assumptions about the nature of "time" that underpin orthodox accounts of intergenerational justice, drawing again on Indigenous intellectual traditions, we gain additional support for finding the necessary reciprocity between generations.

To begin, we reference Richard Hiskes's framing of environmental human rights as "emergent rights."⁵⁶ Environmental human rights have long been considered as group rights, despite long-standing objections from some philosophers who insist that rights can only attach to individuals. In Hiskes's conception, environmental human rights are "rights that we hold only because of our relationships with others that cause collective effects on our shared environment. That is, they are rights due us—not because of something in our individual nature—but because of the effects of our relationships with others.

⁵⁴ Chalifour, Earle & Macintyre, *supra* note 3 at 55.

⁵⁵ Indeed, following Christine Winter, we would argue that it need not and it should not treat the interests of "generations" as somehow separate and identifiable from others; that we need not and should not treat those as rival. As Winter states, we must decolonize the concepts that we hope will bring us to de-colonial outcomes. Winter, *Intergenerational Environmental Justice*, *supra* note 34.

⁵⁶ Richard P Hiskes, "The Right to a Green Future: Human Rights, Environmentalism, and Intergenerational Justice" (2005) 24:7 Hum Rts Q 1346 at 1351 [Hiskes, "Right to a Green Future"]. See also Richard P Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge, UK: Cambridge University Press, 2009).

If those relationships did not exist, neither would the rights.”⁵⁷ In other words, environmental human rights are “emergent” in the sense that they are the “product of distinctly modern human *interrelations and interactions* with the environment.”⁵⁸ We agree with Hiskes when he notes that conceiving of human rights as “the property of privately defined individuality is a logical incongruity,” and we would add that it is not compatible with feminist, relational, and de-colonial theory. Environmental human rights are emergent “because the human identity to which they attach is itself emergent from every individual’s relations with others.”⁵⁹

But can future generations hold environmental rights? Western philosophers have contested the idea that we could hold responsibilities to future generations analogous to the responsibilities we owe to fellow persons. They argue that there are moral, epistemological, and ontological considerations in thinking about future persons that are distinct from the considerations we have in thinking about our contemporaries. The widely discussed complications in thinking about future persons include their contingent existence, the unknowability that surrounds their conditions and identity, and the lack of reciprocity—traditionally deemed a condition for justice—in their relation to present individuals.⁶⁰ As Peter Laslett and James S. Fishkin say, “individuals are in reciprocal relationship with their contemporaries, but with their contemporaries only.”⁶¹ But Hiskes makes the counter-point:

The rights of future generations to a safe environment necessarily also strengthens the same rights for the living, because the health of the environment inherited by our successors depends upon actions taken by the living respecting the same rights that they hold. That is, defending the rights of the future makes the case for present rights even stronger by necessitating that action be taken now to enhance those rights; such action will also

⁵⁷ Hiskes, “Right to a Green Future,” *supra* note 56 at 1352.

⁵⁸ Richard P Hiskes, “Environmental Rights, Intergenerational Justice, and Reciprocity with the Future” (2005) 19:3 Public Affairs Q 177 at 178 [emphasis added].

⁵⁹ *Ibid* at 181.

⁶⁰ On the “non-identity” and the “non-reciprocity” problems, see Derek Parfit, *Reasons and Persons*, 3rd ed (Oxford: Oxford University Press, 1987); Edward A Page, “Fairness on the Day after Tomorrow: Justice, Reciprocity and Global Climate Change” (2007) 55 Political Studies 225.

⁶¹ Peter Laslett & James S Fishkin, “Introduction” in Peter Laslett & James S Fishkin, eds, *Justice between Age Groups and Generations* (New Haven, CT: Yale University Press, 1992) at 7.

obviously enhance the environmental rights of present generations as well.⁶²

A simple example demonstrating the relationship between GHG emissions and local, ground-level pollution should suffice. Coal-fired power plants emit high amounts of carbon dioxide emissions and are thus often marked as easy targets by governments seeking to take concrete climate action.⁶³ But coal-fired power plants also emit pollutants such as particulate matter, sulfur dioxide, and nitrogen dioxide that are major contributors to premature death and childhood asthma.⁶⁴ Therefore, an action taken to reduce GHG emissions causing climate—perhaps motivated politically by a concern for future generations—produces major health benefits to specifically situated people living today.

The idea that the interests of present and future generations are interacting in a way that enhances them both is appealing to feminists and also has resonance with de-colonial theory. As Dene political theorist Glen Coulthard explains, the Dene conception of identity locates individuals

as an inseparable part of an expansive system of interdependent relations covering the land and animals, *past and future generations*, as well as other people and communities. This self-conception demands that we conduct ourselves in accordance with certain ethico-political norms, which stresses, among other things, the importance of sharing, egalitarianism, respecting the freedom and autonomy of both individuals and groups, and recognizing the obligations that one has not only to other people, but to the natural world as a whole.⁶⁵

⁶² Hiskes, “Right to a Green Future,” *supra* note 56 at 1355.

⁶³ In 2003, coal represented approximately 25 percent of Ontario’s energy supply mix, and, by 2014, it had been completely eliminated. As the government of Ontario states: “The elimination of coal stands as the single largest greenhouse gas (GHG) emissions reduction action on the continent and was primarily responsible for Ontario achieving its 2014 emissions reduction target of 6% below 1990 levels.” Government of Ontario, “The End of Coal,” online: *Ontario* <www.ontario.ca/page/end-coal> [<https://perma.cc/23MM-Z5FS>].

⁶⁴ City of Toronto Public Health, “Path to Healthier Air: Toronto Air Pollution Burden of Illness Update” (April 2014), online (pdf): *City of Toronto* <www.toronto.ca/wp-content/uploads/2017/11/9190-tph-Air-Pollution-Burden-of-Illness-2014.pdf> [<https://perma.cc/CXL2-8EUE>].

⁶⁵ Glen Coulthard, “Place against Empire: Understanding Indigenous Anti-Colonialism” (2020) 4:2 *J Radical Theory, Culture & Action* 79 at 82 [emphasis added].

Similarly, Makere Stewart-Harawira says its “impossible to conceive of the present and future as separate and distinct from the past,” saying each is constitutive of the others.⁶⁶ Time, in Indigenous conceptions, does not “charge on a linear path into the future.”⁶⁷ It is this notion that prompts Christine J. Winter to ask: “[W]hat happens to our imaginings of intergenerational environmental justice if we think of generations living not in competitive sequences, but synchronically?”⁶⁸ She paints a picture of ancestors, the living and future generations as all integral to a “recurrent spiral of time and being-in-place.”⁶⁹ Once freed of the notion of a linear continuum with each generation marked by a singular point, it is obvious that the generations need not be constructed as rival. The actions we take when we conceive of ourselves as both ancestors and descendants, make us better ancestors and improve the living conditions of people living today—ideally, those most vulnerable to adverse climate impacts.

D. Adverse Treatment and the “Carbon Budget”

Chalifour, Earle, and Macintyre conduct a systematic review of the factors that courts consider in a section 15 analysis, and we do not repeat that review here. Particularly salient for this commentary is the fact that a crucial factor is whether the relevant group lacks “effective legal and political power.” As the authors explain, “governments are making decisions today that privilege current generations and foist the difficult, costly decisions (and harms) to a later time. This runs counter to young people’s best interests, reinforcing the view that children and youth are less worthy of political consideration than their older counterparts.”⁷⁰ This pattern of short-termism in a political system in which young people do not vote or exercise other levers of power is well entrenched and an obvious contributor to intergenerational inequities.

The idea of a finite amount of atmospheric “space” conjured by the concept of a “carbon budget,” as demonstrated by Chalifour, Earle, and Macintyre, is one way that advocates have tried to drive home the point that young people and future generations suffer discrimination in relation to the climate crisis. The governments’ irresponsible depletion of Canada’s finite carbon budget for the twenty-first century favours current generations to the

⁶⁶ Makere Stewart-Harawira, *The New Imperial Order* (Wellington: Huia, 2005) at 42.

⁶⁷ Winter, *Intergenerational Environmental Justice*, *supra* note 34 at 17.

⁶⁸ Christine J Winter, “Does Time Colonise Intergenerational Environmental Justice Theory?” (2020) 29:2 *Environmental Politics* 278 at 279.

⁶⁹ *Ibid.*

⁷⁰ Chalifour, Earle & Macintyre, *supra* note 3 at 87.

detriment of people who will live longer into the future. As the authors state, “[d]espite accepting incontrovertible evidence that youth and future generations will face extensive harm if GHG emissions are not rapidly reduced, governments continue to deplete their carbon budgets at an unsustainable pace, thereby prioritizing short-term objectives over what the evidence suggests are much more pressing long-term needs.”⁷¹ But the concept of a carbon budget tends to fuel the idea of a “zero-sum tug of war between the generations.”⁷² While helpful in the litigation context because it offers an evidence-based, concrete way of demonstrating discrimination, critics have pointed out that the “view of fundamentally conflicting interests is profoundly unhelpful and damaging and could promote bitter legacies of social division.”⁷³ In fact, it may further the notion of a “competitive sequence” of generations that does not adequately capture the mutuality of interests; it emphasizes entitlements rather than obligations to steward.

We agree with Chalifour, Earle, and Macintyre that courts will “need to be willing to engage in a flexible, context-based inquiry in applying section 15(1) to the circumstances of climate change and the novel issues that these actions present in claims by youth.”⁷⁴ These unique circumstances include the way that class, race/Indigeneity, and youth intersect to compound and exacerbate vulnerabilities to climate change. Commentators argue that the Supreme Court of Canada’s recent decision in *Fraser v Canada* provides a more flexible and generous approach to interpreting the existing grounds of discrimination.⁷⁵ In this case, the Court opted to adjudicate the equality claim on the existing ground of “sex” rather than considering whether to recognize parental or “family status” as an analogous ground. According to Justice Rosalie Abella, a “robust and intersectional analysis of gender and parenting” could be carried out under the existing enumerated ground of sex.⁷⁶ Similarly, as Chalifour, Earle, and Macintyre suggest, a robust and intersectional analysis of youth and future generations could be undertaken under the enumerated ground of age or with “youth” and “future generations” recognized as analogous grounds embedded within the enumerated ground of age.⁷⁷ A relational account of intergenerational equity

⁷¹ *Ibid* at 101.

⁷² Peter Lloyd-Sherlock, “Time to Rethink Generational Justice” (2021) 397:10268 *The Lancet* 21 at 21.

⁷³ *Ibid*.

⁷⁴ Chalifour, Earle & Macintyre, *supra* note 3 at 6.

⁷⁵ *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 116.

⁷⁶ *Ibid* at para 116.

⁷⁷ While we agree with Chalifour, Earle, and Macintyre that recognizing future generations’ collective right to a healthy environment does not mean that individual

aids in this analysis, emphasizing that we should identify discrimination here even if the interests of various generations are not completely identifiable or separate from others and even if the interests of those future generations are not truly “rival” to the interests of those of us living now.

To conclude this section, we agree that “substantive equality in the context of intergenerational climate rights requires that the judiciary find a way to bridge the temporal divide in order to better align present actions with just outcomes in the future.”⁷⁸ We further agree that “substantive equality” within and between generations is the end goal. To reach it, we need to also consider the processes by which we can acknowledge and overcome the barriers that have produced the inequalities in the first place. In this context, however, it is worth noting that environmental human rights are widely considered to be part of a human rights canon developed in the global North in an ostensibly universal, but decidedly Eurocentric, mode. As Carmen Gonzalez says, “[t]his canon favours civil and political rights over economic, social, and cultural rights ... [and] elevates individual rights over collective rights.”⁷⁹ And while we agree with Gonzalez that “it is necessary to expose the Northern biases of the human rights corpus,” we also point out that, with respect to climate justice claims as human rights claims, the calculus is perhaps unique.⁸⁰ In the usual case, it is common to point out that human rights discourses favour

the rights of specific individuals and communities on a case-by-case basis rather than challenging paradigms of economic development that impose disproportionate burdens on the planet’s most vulnerable communities. The case-by-case approach can implicitly legitimate the existing distributions of wealth and power by dealing with environmental injustice as aberrant rather than recognizing it as systemic. Tinkering with the discrete manifestations of injustice may divert attention from

members of the “future generations” cohort possess any “individual, stand-alone *Charter* rights (such as the right to free speech),” we differ with respect to whether “the cohort, as a group, possesses only the narrow right to a stable climate—nothing more and nothing less.” While Chalifour, Earle, and Macintyre would craft it narrowly, we might cast it more broadly than the right to stable climate, to include other elements encompassed in a right to a habitable or healthy environment, leaving the door open to future cases in respect of clean air or water or toxic contamination.

⁷⁸ Chalifour, Earle & Macintyre, *supra* note 3 at 101.

⁷⁹ Carmen Gonzalez, “Environmental Justice, Human Rights, and the Global South” (2015) 13:1 Santa Clara J Intl L 151 at 173.

⁸⁰ *Ibid.*

efforts to challenge a failed development model based on the myth of unlimited economic growth and externalization of environmental and social costs.⁸¹

But, in the climate justice context, human rights claims brought by relatively privileged youth of the global North, such as Canada, could produce gains that help to protect the climate for everyone. These claims, if successful, further the rights of young people elsewhere and future generations of people everywhere. In other words, the youth litigants recognize that their interests are not rival to those of future generations but synchronous with them.

E. Good Ancestors

In the early summer of 2021, Twitter was flooded with a generation-bridging meme from *The Simpsons* as a deadly, record-breaking heat wave blanketed western Canada: when Bart complains that “[t]his is the hottest summer of his life,” Homer retorts that “[t]his is the coldest summer of the rest of your life.”⁸² The reality confronting young people today—of inevitable, yet unknowable, disruption of massive magnitude—forces us to see how “our” world will not be “their” world. In a recent collection of essays asking “[w]hat kind of ancestor do you want to be?” the editors argue that confronting this question

deepens our awareness of the roots and reach of all of our actions and non-actions. In every moment, whether we like it or not, and whether we know it or not, we are advancing values and influencing systems that will continue long past our lifetimes. These values and systems shape communities and lives we will never see. The ways we live create and reinforce the foundation of life for future generations.⁸³

The young people coming to the courts now in the wave of litigation swelling across Canada and internationally under the banner of youth

⁸¹ *Ibid* at 188–9.

⁸² M Özgür Nevres, “The Simpsons Meme about Global Warming” (1 July 2021), online: *Our Planet* <ourplanet.com/the-simpsons-meme-about-global-warming/> [<https://perma.cc/C9WD-ZERS>].

⁸³ John Hausdoerffer et al, “Introduction” in John Hausdoerffer et al, eds, *What Kind of Ancestor Do You Want to Be?* (Chicago: University of Chicago Press, 2021) 1 at 2.

climate justice or intergenerational climate justice are asking similar questions. They want to know: can their political leaders be expected to respond consciously and with integrity to the responsibility of creating a good foundation for their future lives and those of others to come? This can be framed in terms of the “rights” of those young people and future generations, or it can be framed as the “responsibilities” of all of us living now. “Good ancestors,” as Cate Sandilands says, “thoughtfully cherish and nurture the world and the liveliness of others as best we are able.”⁸⁴ Crucially, a good ancestor recognizes that our “gifts in the present may resonate in new ways in the future.”⁸⁵ And, conversely, we suppose, our oversights, our haste, our indulgences, our short-sightedness may all resonate in new and different ways in the future too.

We argue for a focus on root structural change, and this focus implies a prescriptive vision intimately concerned with the interests of all future persons. It demands an integrated, rigorous account of the intersecting set of factors that are making young people and future generations subject to, and vulnerable to, adverse climate impacts. Of course, this task involves a “more focussed and deliberate reckoning with the puzzles of intergenerational justice” than a *Charter* claim can accomplish.⁸⁶ To conclude this part, we suggest that a relational account of intergenerational equity—which we term intergenerational environmental justice—provides a solid foundation for a robust intersectional analysis that can ground a *Charter* claim on behalf of youth and future generations. In terms of both preventive action and remedial action, however, we need to look beyond the *Charter* and, indeed, beyond litigation. In the next part, we consider some innovative examples of institutional, legislative, and deliberative mechanisms that seek to systematically embed the consideration of future interests in environmental governance.

III. BEYOND CONSTITUTIONALISM: IMPLEMENTING A PRACTICE OF INTERGENERATIONAL ENVIRONMENTAL JUSTICE

A constitution without an ecological consciousness, Lynda Collins writes, “is a paper temple—an aspirational blueprint for political community with no real guarantee of its survival over time.”⁸⁷ Designed to guide government conduct beyond electoral mandates, constitutions intuitively seem to be well-suited instruments to enshrine principles of ecological

⁸⁴ Sandilands, *supra* note 5 at 185.

⁸⁵ *Ibid* at 179.

⁸⁶ Eisen, Mykitiuk & Scott, *supra* note 10 at 28.

⁸⁷ Lynda Collins, *The Ecological Constitution: Reframing Environmental Law* (Oxford: Routledge, 2021) at 118.

sustainability and intergenerational equity. Yet many legal scholars and political theorists have highlighted the limitations of constitutionalism alone to effectively improve states' environmental record. When it comes to protecting future generations, Jonathan Boston and Thomas Stuart observe that most existing constitutional provisions are aspirational and vague, thus providing little guidance for judges and little incentive for policy-makers to secure long-term environmental equity.⁸⁸ In this part, we broaden the scope of our commentary and take up Chalifour, Earle, and Macintyre's call to examine "what taking future generations into account means *in practice*."⁸⁹ If Canadian courts were to rule in favour of youth claimants in *Mathur v Ontario*, and to extend constitutional protection to future generations, how could the executive adequately secure for them the "equal benefit of the law" guaranteed under section 15(1) of the *Charter*?⁹⁰ In other words, what devices, beyond constitutional provisions, can be envisioned to effectively prevent and redress future generations' environmental disadvantage?

Building on recent research and policy developments, we explore a selection of institutional, legislative, and deliberative mechanisms that have sought to uphold long-term interests in environmental decision-making. Drawn from Wales, Finland, and Japan, the chosen case studies are not intended to provide an exhaustive account of the international efforts to further intergenerational sustainability or to be straightforwardly transposed to the Canadian context. Rather, we hope that they might offer situated and inspirational examples and stimulate further research on adequate policy developments in Canada. In line with relational theory scholars, and with adrienne maree-brown's opening epigraph, we maintain that working towards intergenerational environmental justice requires paying attention not only to the relations between individuals within and across generations but also between communities and their governance institutions. Hence, we start with a reflection on the role that institutional guardians for future generations can play in protecting long-term environmental interests before turning to the prospects offered by future-oriented legislative reforms and by public participation in environmental governance processes.

⁸⁸ Jonathan Boston & Thomas Stuart, "Protecting the Rights of Future Generations: Are Constitutional Mechanisms an Answer?" (2015) 11:2 Policy Q 60.

⁸⁹ Chalifour, Earle & Macintyre, *supra* note 3 at 62 [emphasis added].

⁹⁰ *Mathur v Ontario*, 2020 ONSC 6918 (the Ontario Superior Court refused to strike the application, finding "that it is not plain and obvious that the Application discloses no reasonable cause of action or that it has no reasonable prospect of success" at para 267). The case will be heard in 2022.

A. Governing for the Long Term: Institutional Guardianship for Future Generations

As previously observed, political short-termism has been a key contributor to intergenerational inequities in Western democratic systems. In the introduction to their book *Institutions for Future Generations*, Iñigo González-Ricoy and Axel Gosseries identify three determinants of short-termism: epistemic, motivational, and institutional.⁹¹ While epistemic determinants stem from citizens' and politicians' uncertainty about the future, motivational determinants concern the alleged preference of the former for the satisfaction of short-term needs and the tendency of the latter to seek re-election; underlying these trends, institutional determinants refer to the lack of institutional capacity to pursue and achieve long-term objectives.⁹² Since the 1990s, one of the most widely discussed propositions to offset political presentism has been the creation of a public body tasked with defending future interests—with scenarios ranging from the appointment of an individual guardian for future generations to multi-member national institutions and the nomination of a United Nations ombudsperson.⁹³

Several countries have since experimented with guardianship institutions, most of which did not last more than a few years. For instance, in Israel, a parliamentary Commission for Future Generations was active from 2001 to 2006 and soon dissolved after members of parliament raised concerns about its operating cost and its authority to interfere in their work.⁹⁴ In Hungary, an independent commissioner for future generations was elected in 2008 by Parliament, with the mandate to enforce the right to a healthy environment that was at the time enshrined in the country's

⁹¹ Iñigo González-Ricoy & Axel Gosseries, "Designing Institutions for Future Generations: An Introduction" in Iñigo González-Ricoy & Axel Gosseries, eds, *Institutions for Future Generations* (Oxford: Oxford University Press, 2016) 3 at 14.

⁹² *Ibid* at 14–15.

⁹³ See e.g. Ludvig Beckman & Fredrik Uggla, "An Ombudsman for Future Generations: Legitimate and Effective?" in González-Ricoy & Gosseries, *supra* note 91, 117; Edith Brown Weiss, "In Fairness to Future Generations and Sustainable Development" (1992) 8:1 *Am U Intl L Rev* 19; Maja Göpel, "Ombudspersons for Future Generations as Sustainability Implementation Units" (2012), online (pdf): *Earth System Governance* <www.ieg.earthsystemgovernance.org/ieg/sites/default/files/files/publications/Goepel_Ombudspersons%20for%20Future%20Generations.pdf> [<https://perma.cc/W4HB-WFJC>].

⁹⁴ Naama Teschner, "Official Bodies That Deal with the Needs of Future Generations and Sustainable Development: Comparative Review" (30 April 2013) at 3, online (pdf): *Knesset Research and Information Center* <main.knesset.gov.il/EN/activity/mmm/me03194.pdf> [<https://perma.cc/XU8E-DYFG>].

Constitution.⁹⁵ The commissioner's position was abrogated in 2012, following the victory of the right-wing populist party Fidesz. A few institutional innovations conducted in other countries were more successful, and, in the following sections, we outline the role that future-oriented commissions have played in Finland and Wales.

1. Finland's Committee for the Future

Established in 1993 in the Finnish Parliament (Eduskunta), the Committee for the Future is the longest-lived institution of its kind. Composed of seventeen members of parliament appointed for four years and supported by four staff members, the committee is tasked to "generate dialogue with the government on major future problems and opportunities."⁹⁶ By contrast with other standing committees within the Eduskunta, the Committee for the Future operates mostly outside of the ordinary parliamentary process, as a think tank with no legislative role. Its primary function is to prepare the Eduskunta's response to the government's *Future Report*, a document issued halfway through each electoral term that focuses on a topic with significant future implications. Past themes of the *Future Reports* published so far include Finland's place and role in the world, a carbon neutral future, sustainable growth, and the future of work.

After receiving the report, the Committee for the Future consults relevant experts and helps orient its objectives and the government's agenda through a dialogue with the Prime Minister's Office.⁹⁷ Once approved by the Parliament, the committee's response is turned into instructions on what the Eduskunta wants the government to focus on. These resolutions stay in force until the committee revokes them, which are often past electoral terms, thus providing "a tool for genuine intertemporal policy-making."⁹⁸ In addition to its work on the *Future Reports*, the committee plays an advisory role to analyze future trends, develop future-oriented methodologies, and assess technological developments and their societal consequences. Since

⁹⁵ Martin Nesbit & Andrea Illés, "Establishing an EU 'Guardian for Future Generations': Report and Recommendations for the World Future Council" (September 2015) at 4–6, online (pdf): *Institute for European Environmental Policy* <http://ieep.eu/uploads/articles/attachments/0efe5bde-41ae-45a1-8ed4-5177361767c7/Establishing_an_EU_Guardian_for_Future_Generations_FINAL_Report_25.09.2015_with_logo.pdf?v=63664509914> [<https://perma.cc/AY8W-P4NU>].

⁹⁶ Vesa Koskimaa & Tapio Raunio, "Encouraging a Longer Time Horizon: The Committee for the Future in the Finnish Eduskunta" (2020) 26 *J Legislative Studies* 159 at 160.

⁹⁷ *Ibid* at 167.

⁹⁸ *Ibid* at 168.

2017, it has also served as a correspondent for the government's Agenda 2030 report on sustainable development.

Due to its “outsider status” within Parliament, the Committee for the Future enjoys a high degree of independence but has limited policy impacts.⁹⁹ The advisory nature of its work makes it difficult to quantify its influence on parliamentary processes and governmental decisions. However, recent interviews conducted with current and former members of the committee have suggested that, although the institution lacks traditional political influence, the knowledge and visionary outputs it generates have contributed to instil a culture of forward thinking among decisions-makers and to orient legislation and government programs.¹⁰⁰ Interestingly, four out of the six Finnish prime ministers appointed between 2000 and 2019 were former members of the committee, illustrating its capacity to train future leaders.¹⁰¹

In contrast with the limited power of the Finnish Committee for the Future—which may contribute to explain its longevity—the second institution we are turning to is endowed with a stronger prescriptive role and has so far survived six years of activity.

2. *Wales's Future Generations Commissioner*

A relatively small jurisdiction in the United Kingdom, Wales, in the words of former Minister for Environment Jane Davidson, shows greater innovative capacity than its larger neighbours.¹⁰² With two devolution referendums in 1997 and 2011 and the establishment of a National Assembly in 1998 and of an independent government in 2006, the country has progressively gained considerable autonomy from Westminster.¹⁰³ To date, it exercises devolved power over twenty subject areas including education, economic development, the environment, agriculture, and health. Marked by a long industrial history and poor health records, Wales was however the first Western nation to explicitly include a duty to promote sustainable development in its founding piece of legislation, the *Government of Wales Act 1998*.¹⁰⁴

⁹⁹ *Ibid* at 166.

¹⁰⁰ *Ibid* at 173-4.

¹⁰¹ *Ibid*.

¹⁰² Jane Davidson, *#futuregen: Lessons from a Small Country* (White River Junction, VT: Chelsea Green Publishing 2020) at 6.

¹⁰³ Senedd Cymru (Welsh Parliament), “History of Devolution” (17 December 2020), online: *Senedd Cymru* <senedd.wales/how-we-work/history-of-devolution/> [<https://perma.cc/4CQN-DQ53>].

¹⁰⁴ Davidson, *supra* note 102 at 26; *Government of Wales Act 1998* (UK), s 121.

After nearly two decades of efforts to consolidate environmental policies while the country was gaining greater law-making powers, the Welsh government appointed in 2006 its first future generations commissioner, a position since held by Sophie Howe. Unlike Finland's Committee for the Future, the office of the future generations commissioner for Wales is independent from both Parliament and the government. Instead of a multi-member commission, Wales opted for a seven-year individual appointment, although the work of the commissioner is supported by a team of twenty-two employees and an Advisory Panel of seven members chosen by the ministers.¹⁰⁵

The role of the Welsh commissioner has been established by the *Well-being of Future Generations (Wales) Act 2015*, an innovative piece of legislation further discussed in the next section of our commentary.¹⁰⁶ The commissioner's general duty as described in the Act is to "promote the sustainable development principle, in particular to act as a guardian of the ability of future generations to meet their needs."¹⁰⁷ Her mandate is closely tied to the delivery of the Act and involves a sustained collaboration with all of the country's public bodies to encourage them to account for the long-term impacts of their action.¹⁰⁸ More specifically, her oversight capacity includes: conducting reviews on the extent to which a public body is safeguarding the ability of future generations to meet their needs; providing assistance to public bodies in the achievement of the well-being objectives that they are required to set under the Act; undertaking research—in particular, on the extent to which the sustainable development principle is accounted for in national indicators; and making recommendations to ministers about national well-being goals and indicators.¹⁰⁹ The commissioner is also expected to publish a comprehensive *Future Generations* report, the first of which was released in 2020. Over a whopping eight hundred pages, the report covers the work

¹⁰⁵ Future Generations Commissioner for Wales, "Our Team" (2021), online: *Comisiynydd Cenedlaethau'r Dyfodol Cymru* <www.futuregenerations.wales/about-us/our-team/> [https://perma.cc/5CUJ-BFQZ]. Current to 10 August 2021.

¹⁰⁶ *Well-being of Future Generations (Wales) Act 2015*, (Wales) ANAW 2, Part 3 [Well-being of Future Generations Act].

¹⁰⁷ *Ibid*, Part 3, s 18(a).

¹⁰⁸ The forty-four public bodies subjected to the Act include, among others, the Welsh government, local authorities, health boards, the Natural Resources Body for Wales, national parks, local fire and rescue authorities, the National Library, and National Museum Wales. See *Well-being of Future Generations (Wales) Act 2015*, Part 1, s 6(1); Part 4 ch 1.

¹⁰⁹ *Well-being of Future Generations Act*, *supra* note 106, Part 3, ss 19-21.

performed by the commissioner to deliver on her mandate, the progress made since 2016 by public bodies to meet their well-being objectives, and future areas of focus and improvement for the years to come.¹¹⁰

The two institutional models provided by the Finnish Committee for the Future and the Welsh future generations commissioner both tackle, through different methods, the determinants of political short-termism. While the former relies on soft power and anticipatory thinking to emulate foresight among members of parliament and ministers, the latter has actionable legal powers that apply to a broader range of institutions and stakeholders. By contrast with the advisory role traditionally assigned to ombudspersons,¹¹¹ the *Well-being of Future Generations Act* indeed gives a binding character to the recommendations made by the Welsh commissioner to the government and all other public bodies.¹¹²

In 2016, the Canadian Standing Committee on Environment and Sustainable Development published a report reviewing the *Federal Sustainable Development Act*.¹¹³ Among the strategies outlined to address the flaws of the Act, the committee recommended that the federal government recognize intergenerational justice as an integral part of sustainable development and appoint an “advocate for Canada’s future generations.”¹¹⁴ This call remains unheeded. The shared jurisdiction of the federal and provincial governments over environmental matters in Canada represents a significant hindrance in the elaboration of a harmonized institutional framework supporting intergenerational environmental justice. Yet it can be argued that this jurisdictional challenge equally evidences the need for a future-oriented institution to guide environmental decision-making across the country. As mobilization on the ground and in

¹¹⁰Future Generations Commissioner for Wales, “The Future Generations Report 2020: At a Glance” (2020), online (pdf): *Comisiynydd Cenedlaethau'r Dyfodol Cymru* <www.futuregenerations.wales/wp-content/uploads/2020/07/At-A-Glance-FG-Report.pdf#page=3> [<https://perma.cc/QP93-3KPE>].

¹¹¹Beckman & Ugula, *supra* note 93 at 118.

¹¹²“A public body,” the Act reads, “must take all reasonable steps to follow the course of action set out in a recommendation made to it by the Commissioner.” Any public body refusing to comply is bound to detail in a published response the alternative course of action it proposes to take. *Well-being of Future Generations Act*, *supra* note 106, Part 3, s 22(1).

¹¹³*Federal Sustainable Development Act*, SC 2008, c 33.

¹¹⁴House of Commons, “Federal Sustainability for Future Generations: A Report Following an Assessment of the Federal Sustainable Development Act: Report of the Standing Committee on Environment and Sustainable Development” (June 2016) (Chair: Deborah Schulte), online: *House of Commons* <www.ourcommons.ca/Content/Committee/421/ENVI/Reports/RP8378128/envirp02/envirp02-e.pdf>.

the courts continues to implore Canadian governments to face responsibly the unfolding ecological crisis, the visionary institutions established in Finland and Wales represent important experiences to learn from, as does the pioneering legal path taken in Wales since 2016.

B. Inscribing the Rights and Well-being of Future Generations into Law

As mentioned before, most of the future-oriented institutions established so far have lacked capacity to effectively inform governmental decisions. Wales has overcome this pitfall by passing a law that entrenches long-term well-being objectives at all levels of government action, making it the “only country to legislate for the needs of future generations.”¹¹⁵ Jane Davidson, one of the architects of the *Well-being of Future Generations Act*, recounts in a recent book the elaboration of this groundbreaking legislation.¹¹⁶ In line with the provisions detailed in the *Government of Wales Act 1998*, several schemes were developed between 1999 and 2011 to promote sustainable development in the exercise of the newly established National Assembly of Wales. Yet, as Davidson notes, the regulatory approach prevailing in these schemes was insufficient; the government “needed to turn the law from a duty to ‘promote’ to a duty to ‘deliver’.”¹¹⁷ It was decided to draft a law making sustainable development and the well-being of future generations into the central organizing principle of public sector organizations and of the government itself. Davidson points out that laws are “explicitly created to live longer than the governments that create them,” thus giving them the potential to operate as intergenerational instruments.¹¹⁸ After three years of consultation and negotiation, the National Assembly of Wales eventually passed the *Well-being of Future Generations Act* in April 2015.

The Act builds on two main concepts. First, it translates the Brundtland report’s definition of sustainable development into law, ordering public bodies to act “in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future

¹¹⁵Future Generations Commissioner for Wales, “Strategic Plan 2017–2023” (3 January 2018) at 13, online (pdf): *Comisiyndd Cenedlaethau'r Dyfodol Cymru* <www.futuregenerations.gi/uploads/docs/1%20-2018-Strategic-Plan-FINAL.pdf> [<https://perma.cc/T24B-YG47>] [Future Generations Commissioner for Wales, “Strategic Plan”].

¹¹⁶*Well-being of Future Generations Act*, *supra* note 106.

¹¹⁷Davidson, *supra* note 102 at 65.

¹¹⁸*Ibid* at 74.

generations to meet their own needs.”¹¹⁹ The Act, however, expands the traditional understanding of sustainable development beyond environmental concerns by linking it to the broader notion of “well-being.” It highlights four dimensions of well-being: economic, social, environmental, and cultural—the latter being a first in the international legislative landscape.¹²⁰ Concretely speaking, the law outlines seven national well-being goals (a prosperous Wales, a resilient Wales, a healthier Wales, a more equal Wales, a Wales of cohesive communities, a Wales of vibrant culture and thriving Welsh language, and a globally responsible Wales) and requires each public body to set and publish their own well-being objectives in line with these national guidelines.¹²¹ While doing so, public bodies are expected to take an “integrated approach” to anticipate how their well-being objectives may impact each other or interfere with the objectives of other public bodies.¹²² They must also publish an annual report of the progress they have made towards meeting these well-being objectives.

In addition, the Act includes provisions specific to governmental planning. Among them, Welsh ministers are required to publish during the first year following a general election a “future trends report” to anticipate potential developments in the economic, social, environmental, and cultural well-being of Wales.¹²³ This report must take into account the predicted impacts of climate change as communicated by the UK government as well as the actions taken by the United Nations in relation to the Sustainable Development Goals. As briefly mentioned earlier, the *Well-being of Future Generations Act* also orders Welsh ministers to publish before the Parliament, and after consulting the future generations commissioner, a set of national indicators and milestones allowing the measurement of progress towards the achievement of the well-being goals.¹²⁴ These indicators and milestones must be accounted for in the annual well-being reports published by each minister.

The wide-ranging accountability mechanisms featured in the Act reflect law-makers’ intention to make it into an actionable tool to durably transform

¹¹⁹ *Well-being of Future Generations Act*, *supra* note 106, Part 2, s 5(1). For comparison, see United Nations, World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 41 (“[s]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs”).

¹²⁰ Future Generations Commissioner for Wales, “Strategic Plan,” *supra* note 115 at 23.

¹²¹ *Well-being of Future Generations Act*, *supra* note 106, Part 2, ss 3-4.

¹²² *Ibid*, Part 2, s 5(2).

¹²³ *Ibid*, Part 2, s 11.

¹²⁴ *Ibid*, Part 2, s 10.

political cultures and governance practices. As Jonathan Boston observes, governing for the long-term indeed requires building future-oriented objectives into the very core of institutions. Boston writes that the future “must be brought more comprehensively, systematically, and continuously into the heart of decision-making.”¹²⁵ By contrast with constitutional provisions that generally frame the protection of future generations as a negative right (not to be discriminated against), the legal approach taken by Wales has created a positive obligation to prioritize environmental and social sustainability at all levels of governmental action. Although it is too early to assess the long-term outcomes of this legal innovation, the Welsh Act is already seen as a model to tackle political short-termism. Walking in the footsteps of its neighbour, the UK Parliament is currently reviewing a private member’s bill for the well-being of future generations, which has garnered broad public support.¹²⁶ An increasing number of countries, including New Zealand and Italy, are considering taking similar paths.¹²⁷ Further research initiatives would be welcome to explore the possibility of crafting and implementing such a law in Canada.

C. Cultivating Intergenerational Solidarity through Public Participation

The institutional and legal reforms we have examined so far have essentially addressed the determinants of short-termism at the level of policy-makers. However, governing for the long term not only requires a shift in political stakeholders’ culture and priorities but also the external drivers that inform their decisions, such as public opinions and preferences.¹²⁸ In this last section, we turn our attention to the procedural dimension of

¹²⁵ Jonathan Boston, “Assessing the Options for Combatting Democratic Myopia and Safeguarding Long-Term Interests” (2021) 125 *Futures* 1 at 11.

¹²⁶ Future Generations Commissioner for Wales, “Pressure Mounts on UK Government to Follow Welsh Government and Back the Well-being of Future Generations Bill” (30 June 2021), online: *Comisiynydd Cenedlaethau'r Dyfodol Cymru* <www.futuregenerations.wales/news/pressure-mounts-on-uk-government-to-follow-welsh-government-and-back-the-well-being-of-future-generations-bill/> [<https://perma.cc/N5YE-EJ8H>].

¹²⁷ New Zealand, The Treasury (Te Tai Ōhanga), “The Wellbeing Budget” (30 May 2019), online: *The Treasury* <www.treasury.govt.nz/sites/default/files/2019-05/b19-wellbeing-budget.pdf> [<https://perma.cc/34TX-WGDL>]; Future Generations Commissioner for Wales, “Future Generations August 2021 Newsletter” (August 2021) at 12, online (pdf): *Comisiynydd Cenedlaethau'r Dyfodol Cymru* <www.futuregenerations.wales/wp-content/uploads/2021/08/Future-Generations-August-2021-Newsletter.pdf> [<https://perma.cc/3F4U-4LRG>].

¹²⁸ Boston, *supra* note 125 at 8.

intergenerational justice: what role might the public play in the development of future-oriented governance models and whose knowledge and needs should be accounted for as we plan for the generations to come?

As Chalifour, Earle, and Macintyre have noted, one of the central claims in ongoing youth-led climate litigations is based on young and future people's inability to influence environmental decision-making, despite the irreversible impacts it may have on their lives.¹²⁹ This claim also holds true at the intra-generational level since, owing to historical class-, gender-, and race-based discriminations, the social groups that are the most impacted by environmental harms are underrepresented in decision-making processes and, more broadly, in political and legal institutions.¹³⁰ The concerns, experiences, and knowledges of front-line communities are hence being discounted—a form of “epistemicide” that puts their livelihood at even greater risk.¹³¹ We hold that enabling greater public involvement in environmental governance might offer levers to disrupt these intergenerational cycles of exclusion and harm. Lacking the space to reflect two decades of scholarship on the “representation” of future generations, or the expanding literature on participatory governance practices, we limit our analysis here to two empirical cases that have experimented with public deliberation to foster intergenerational solidarity at national and local scales respectively.

1. A Collective Definition of the Future in Wales

Beyond the innovative character of Wales's *Well-being of Future Generations Act* and the future generations commissioner, a less often discussed aspect of the country's comprehensive reform is the role given to the public in the development of its future-oriented governance model. As Jane Davidson highlights, “greater engagement in the democratic process, a stronger citizen voice and active participation in decision making are fundamental to the well-being of future generations.”¹³² Public participation in Wales has taken different forms. First, civil society's input has nurtured the elaboration of the *Well-being of Future Generations Act*. A broad national conversation, *The Wales We Want*, was launched in

¹²⁹ Chalifour, Earle & Macintyre, *supra* note 3 at 87.

¹³⁰ See among other recent publications Ingrid Waldron, *There's Something in the Water: Environmental Racism in Indigenous and Black Communities* (Winnipeg: Fernwood Publishing 2018); Dina Gilio-Whitaker, *As Long as Grass Grows: The Indigenous Fight for Environmental Justice, from Colonization to Standing Rock* (Boston: Beacon Press 2019).

¹³¹ Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide*, 2nd ed (Abingdon-on-Thames, UK: Routledge 2016) at 92.

¹³² Davidson, *supra* note 102 at 85.

February 2014 with a two-fold objective: mainstreaming the idea of a law to protect future generations among a potentially sceptical public and collecting communities' visions and aspirations for Wales by 2050.¹³³ Thousands of people, schools, and civil society organizations took part in the conversations, surveys, and events organized across the country. A network of 150 "Future Champions" was also created to represent different geographic groups and communities of interest. The national consultation led to the publication in 2015 of "The Wales We Want Report: A Report on Behalf of Future Generations," which helped define the seven well-being goals outlined in the Act.¹³⁴ The report also highlighted the differences between people's visions and the values that the government had or had not prioritized: climate change, for instance, appeared as the single most critical issue for participants, while the government had originally failed to make it a top priority.¹³⁵

Second, public participation in Wales is inscribed in the delivery of the *Well-being of Future Generations Act*. The section of the law that focuses on "improving local well-being" requests that all local public service boards assess the state of economic, social, environmental, and cultural well-being of communities in their area and, accordingly, set specific local well-being objectives.¹³⁶ To do so, public service boards must work in partnership with community councils¹³⁷ and must consult representatives of residents, local professionals, trade union representatives, and, when relevant, people involved in the maintenance of local natural resources.¹³⁸ In order for the well-being objectives to account for the needs of a diverse population, the Act additionally encourages public service boards to include in their assessments a specific analysis of the well-being not only of vulnerable or disadvantaged people but also of children and young people looked after by local authorities.¹³⁹ Just like Wales's public bodies, the public service boards and the community councils subjected to the Act can seek the advice of the future generations commissioner on how to meet their local well-being objectives, and they must publish an annual report on the progress made in doing so.

¹³³ *Ibid* at 83.

¹³⁴ Commissioner for Sustainable Futures, "The Wales We Want Report: A Report on Behalf of Future Generations" (2015), online (pdf): *Cynnal Cymru* <cynnalcymru.com/wp-content/uploads/2021/04/The-Wales-We-Want-Report-English-Final.pdf> [<https://perma.cc/F7TU-AXB8>].

¹³⁵ *Ibid* at 85.

¹³⁶ *Well-being of Future Generations Act*, *supra* note 106, Part 4, ch 2, s 36(2).

¹³⁷ *Ibid*, Part 4, ch 1, s 32.

¹³⁸ *Ibid*, Part 4, ch 2, s 38(1).

¹³⁹ *Ibid*, Part 4, ch 2, s 37(6).

Lastly, and beyond the *Well-being of Future Generations Act*, recent legal developments have sought to further youth political representation and participation in Wales. This effort started in 1999 with the creation of the Education and Youth Engagement Service that provides opportunities for younger generations to learn and engage in the work of the country's National Assembly.¹⁴⁰ In 2014, the assembly additionally signed a *Young Person's Charter*, committing to further account for young people's opinions.¹⁴¹ In the same year, the Campaign for the Children and Young People's Assembly for Wales was launched, and, two years later, lawmakers approved the creation of a dedicated Welsh Youth Parliament.¹⁴² The new institution counts sixty members aged eleven to eighteen who have been elected for a two-year term.¹⁴³ During their mandate, youth representatives focus on three main themes identified through a national survey.¹⁴⁴ The output of their work is discussed with relevant ministries as well as within the National Assembly. In line with these innovative reforms, Wales has in 2020 extended the right to vote in parliamentary elections to youth aged sixteen and seventeen.¹⁴⁵ Only a dozen countries around the world have lowered the voting age under eighteen, and the topic remains hotly debated, including in Canada.¹⁴⁶

What is particularly striking in Wales is the broad range of methods embraced to enhance public participation at various levels of lawmaking and policy-making processes. This effort to include a diversity of voices in the definition of the country's future has particularly focused on the creation of opportunities for youth to get educated, trained, and durably

¹⁴⁰ Welsh Youth Parliament (Senedd Ieuencid Cymru), "Our History" (17 May 2021), online: *Welsh Youth Parliament* <youthparliament.senedd.wales/about/our-history/> [https://perma.cc/629W-L5QA].

¹⁴¹ Senedd Cymru | Welsh Parliament, "Your Assembly: Your Say, Your Way: Presiding Officer Unveils National Assembly Charter for Youth Engagement" (30 July 2014), online: *Senedd Cymru | Welsh Parliament* <senedd.wales/senedd-now/news/your-assembly-your-say-your-way-presiding-officer-unveils-national-assembly-charter-for-youth-engagement/> [https://perma.cc/8KNQ-PQ6E].

¹⁴² *Ibid.*

¹⁴³ Welsh Youth Parliament, "About" (2021), online: *Welsh Youth Parliament* <youthparliament.senedd.wales/about/> [https://perma.cc/F2N9-MDHN].

¹⁴⁴ Welsh Youth Parliament, "Tell Us the Three Issues of Importance That Matter Most to You!" (8 December 2021), online: *Welsh Youth Parliament* <youthparliament.senedd.wales/blog/tell-u-the-three-issues-of-importance-that-matter-most-to-you/> [https://perma.cc/569M-DY74].

¹⁴⁵ *Senedd and Elections (Wales) Act 2020*, Part 3, s 10.

¹⁴⁶ Aaron Wherry, "Old Enough to Choose: The Case for Letting Younger Canadians Vote" (8 December 2021), online: *CBC News* <www.cbc.ca/news/politics/voting-age-canada-mcphedran-1.6277881> [https://perma.cc/26EF-2U25].

involved in Wales's political life. More research is needed to assess how the age of elected representatives, and of voters, affects intergenerational thinking and the representation of future interests. Nonetheless, accounting for younger people's opinions is a matter of procedural justice not only between present and future generations but also within the current generation. Indeed, among 148 national parliaments recently surveyed by the Inter-Parliamentary Union, the average age of parliamentarians was 50.5 years, while half of the global population today is under the age of thirty.¹⁴⁷ Incidentally or not, women represent only 25.77 percent of the total number of members of parliament in respondent countries.¹⁴⁸ In line with Hiskes' observations on the reciprocal relation between present and future environmental justice,¹⁴⁹ we hold that working towards intergenerational equity starts with the redress of present, intersectional inequities. As a settler state, Canada gathers exceptionally diverse communities, and it would be advised to learn from the participatory experiences developed in countries like Wales if it were to enable the collective definition of a just and sustainable future. Besides the participatory mechanisms developed in national political settings, other experiences to learn from include experimentations conducted in local governance processes, as in the last case to which we now turn.

2. "Intergenerational" Negotiations on the Future of a Japanese Town

Over the last two decades, a number of studies have supported the idea of representing the interests of future generations through contemporary "proxies." Bernice Bovenkerk argues that such mechanisms would provide future generations with a political voice and ensure that long-term interests consistently remain on the public agenda.¹⁵⁰ Scenarios abound—from the idea of reserving a number of seats in parliament for "future" proxy candidates, to the introduction of parliamentary quotas for youth as trustees for future generations, and to the institutionalization of deliberative mini-publics concerned with future-sensitive issues.¹⁵¹

¹⁴⁷ Inter-Parliamentary Union, "Youth Participation in National Parliaments" (2021) at 7, online (pdf): *Inter-Parliamentary Union* <www.ipu.org/youth2021> [<https://perma.cc/6JXM-3LKX>].

¹⁴⁸ *Ibid* at 24.

¹⁴⁹ Hiskes, "Right to a Green Future," *supra* note 56.

¹⁵⁰ Bernice Bovenkerk, "Public Deliberation and the Inclusion of Future Generations" (2015) 6:3 *Jurisprudence* 494.

¹⁵¹ Andrew Dobson, "Representative Democracy and the Environment" in WM Lafferty & J Meadowcroft, eds, *Democracy and the Environment: Problems and Prospects* (Cheltenham, UK: Edward Elgar, 1998) 125; Juliana Bidadanure,

Developed in theory more than in practice, most of these propositions have lacked empirical grounding. The case we are focusing on is to our knowledge one of the first experiments that included future proxies in an actual political setting. Mobilizing participants' sense of anticipation and imagination, it offers an original way to address the epistemic and motivational determinants of intergenerational injustices.

The experiment took place as part of a study developed in partnership between researchers at Osaka University, the Research Institute for Future Design at Kochi University, and city officials in Yahaba, a Japanese town of twenty-seven thousand inhabitants. In line with the work of municipal officers to prepare a policy document addressing population decline and the revitalization of the local economy, researchers conceived of a "future design workshop" aimed at creating a collective vision for the town in 2060.¹⁵² Based on role play and participatory deliberation methods, the series of workshops held in 2015 gathered twenty Yahaba residents as well as eight facilitators including four town hall employees. Participants were divided into four groups, two of which were asked to assume that they had time-travelled to 2060, in order to represent the town's future generation.¹⁵³ Over five sessions, the groups were first introduced to the evolution of Yahaba since 1970, before being invited to separately discuss and craft policy proposals for the town in 2060. Towards the end of the workshop, twelve proposals from the present generation groups and twelve from the future generation groups were selected by organizers; each group was then asked to rank the ten proposals they found to be the most important. During the last session, researchers paired up the present and future generation groups and asked them to elaborate, through an "intergenerational process of negotiation and consensus building," a final list of ten priority measures.¹⁵⁴

As an increasing number of jurisdictions are seeking to equip themselves with future-oriented governance mechanisms, this study provides interesting insights on the potentials of anticipatory deliberative methods. Among the ten final policy measures chosen by the workshop participants, more than half had been formulated by the future generation groups, revealing that the "intergenerational" negotiation "made the

'Youth Quotas, Diversity, and Long-Termism: Can Young People Act as Proxies for Future Generations?' in González-Ricoy & Gosseries, *supra* note 91, 265; Simon Niemeyer & Julia Jennstål, "The Deliberative Democratic Inclusion of Future Generations" in González-Ricoy & Gosseries, *ibid*, 247.

¹⁵² Keishiro Hara et al, "Reconciling Intergenerational Conflicts with Imaginary Future Generations: Evidence from a Participatory Deliberation Practice in a Municipality in Japan" (2019) 14 Sustainability Science 1605.

¹⁵³ *Ibid* at 1610.

¹⁵⁴ *Ibid* at 1612.

present-generation groups more aware of, and sympathetic to the thinking of the future generation.”¹⁵⁵ Moreover, the researchers highlight the fact that the proposals formulated by the future generations groups reflected a greater sensitivity to a reasoned use of local resources as well as to future technological, physical, and social issues. Overall, they note, “the present generation regarded the future as an extension of the present time, so they created visions that resolved present challenges within existing institutions and constraints”; future generation groups, by contrast, “were more creative and worked to depict the future from the values and lifestyles they envisioned for the year 2060, and tended to give priority to the resolution of problems that were the most complicated and time-consuming.”¹⁵⁶

The “future design workshop” conducted in Yahaba provides an empirical example of how thinking intergenerationally can enhance a sense of solidarity between present and future generations and help strike a balance between the satisfaction of short-term needs and a concern for longer-term societal challenges. It additionally shows that public participation and pluralism make it possible to avert the “tunnel vision” often induced by technocratic governance and expert decision-making.¹⁵⁷ In 2019, a new study developed by the Research Institute for Future Design (Kochi University) mobilized a similar methodology to address solid waste management in Kathmandu, Nepal.¹⁵⁸ The outcome of the field experiment once again confirmed that the use of future proxies in public deliberations can broaden participants’ temporal considerations and inform their choices towards more sustainable options.¹⁵⁹ While such anticipatory methodologies are still in their infancy, it is tempting to contemplate the perspectives they might offer in the reform of local environmental governance practices in domains such as urban planning or environmental impact assessments.

Developing a practice of intergenerational environmental justice will take a comprehensive toolbox more than a single tool. The model developed in Wales clearly illustrates that a whole-of-government approach to sustainability is more likely to uphold intergenerational equity than a piecemeal focus on environmental regulations. As the institutional, legal, and deliberative experimentations outlined in the last part of our

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* at 1614.

¹⁵⁷ Bovenkerk, *supra* note 150 at 511.

¹⁵⁸ Arpana Pandit et al, “Taking the Perspectives of Future Generations as an Effective Method for Achieving Sustainable Waste Management” (2021) 27 *Sustainable Production & Consumption* 1526 at 1526.

¹⁵⁹ *Ibid* at 1534.

commentary have shown, crafting farsighted governance practices requires not only incremental cultural change in political stakeholders and the broader public but also the increased representation of communities—living and future—that have traditionally been overlooked in environmental decision-making. In Canada, developing the conditions for intergenerational environmental justice will go hand in hand with redressing the intergenerational injustices perpetuated by the extractive logics and violence of settler colonialism. In the words of Leanne Betasamosake Simpson, this involves visioning “our way out of the cognitive box of imperialism” and accounting for Indigenous knowledges and legal traditions as we elaborate future-oriented political institutions and practices.¹⁶⁰ Doing so, and honouring the fundamental rights of all future beings, entails transforming our material and governance infrastructures as much as our knowledge and imagination infrastructures.

IV. CONCLUDING REFLECTIONS

The warnings recently issued by the IPCC on the imminence of irreversible impacts of climate change, highlight the specific responsibilities of Canada—one of the “worst performers of all G7 nations”—towards the international community as much as towards the communities that live under its laws.¹⁶¹ Irreversibility of impacts would seem to harken directly back to the core of Brown Weiss’s concern that action taken by today’s generations does not “unduly restrict” the options of future generations. Developing a detailed proposal for Canada to implement actionable and robust mechanisms to protect the interests of future generations falls outside of the scope of this commentary, but we suggest that the time is past due to reopen discussions building on the Standing Committee on Environment and Sustainable Development’s recommendation to appoint an advocate for future generations. Our hope is that the questions and experiences explored in Part IV of this article further illustrate concrete ways that a relational account of intergenerational environmental justice could be operationalized.

¹⁶⁰ Leanne Betasamosake Simpson, *Dancing on Our Turtle’s Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg: ARP Books, 2011) at 81.

¹⁶¹ Canada, Commissioner of the Environment and Sustainable Development, Office of the Auditor General of Canada, *Report 5: Lessons Learned from Canada’s Record on Climate Change* (2021) at 8; IPCC, *supra* note 53; Marieke Walsh, “Canada’s Emissions Record Worst in the G7, Watchdog Says,” *Globe and Mail* (26 November 2021), online: <www.theglobeandmail.com/politics/article-contradictory-spending-slow-pace-trouble-trudeau-governments-emissions/> [<https://perma.cc/UK3Q-SQAX>].

Everyone's interests are forged in relation to others and realized through a broader set of institutional and structural relations. These relations are for us to remake, as adrienne maree brown says, not in the "far off future" but now.

We need to begin a broad-ranging public engagement on how to best represent in our collective decision-making the interests of future generations and the different social groups and knowledge systems that coexist in Canada. Constitutional recognition of rights for young and future generations is a worthy goal, as argued, and these claims must at the very least succeed. But constitutional recognition will not be sufficient. There is no "silver bullet" to attend to intergenerational injustices, and a plurality of tools and approaches are required to enable adequate responses.¹⁶² Further, the acceptability of future-oriented policies depends on cultural changes at the level of both policy-makers and their constituents. We will need to focus on cultural and social change in addition to legal and institutional reforms and to engage a broad and diverse set of communities in this journey. Process and outcomes are intertwined; focusing on just relations today will go a long way into the future. We wish to stress our finding that the best fit with the core of the climate justice problem is to approach generational rights (and environmental rights) as collective rights. The task falls to us to begin the work of building the institutional, legal, and cultural framework to shape resilient ecosystems and communities tomorrow and, along the way, to become better neighbours and ancestors today.

¹⁶²González-Ricoy & Gosseries, *supra* note 91 at 20; Boston & Stuart, *supra* note 88 at 70.