2021

"A Code Red for Humanity": Judicial Relevance in a Time of Climate Emergency

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Citation Details

Margot Young, "A Code Red for Humanity": Judicial Relevance in a Time of Climate Emergency" (2021) 17:1 JL & Equality 1.

"A Code Red for Humanity": Judicial Relevance in a Time of Climate Emergency

Margot Young*

The nation is crumbling—at our government's own hand—into a wasteland.
— United Nations, Press Release, 9 August 2021[1]

Our prime gardeners are our courts. When someone calls for the gardener's help, the gardener should not be reluctant to come.
— Gerard J Kennedy and Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada"[2]

The *Washington Post* calls it the "the biggest political story in the world, a grinding global crisis in public view."[3] The *Globe and Mail*'s coverage is more muted, but its Editorial Board notes about this crisis that "[t]wo things have since changed: urgency and ability. The danger is growing closer, but so is humanity's capacity to avert disaster."[4] These statements reference the 9 August 2021 release by the Intergovernmental Panel on Climate Change (IPCC) of its Working Group I report, first instalment of the IPCC's Sixth Assessment due out in 2022.[5] The recent report, compiled by 234 authors

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* Margot Young is a professor at the Allard School of Law at the University of British Columbia. Thanks are owed to Martha Jackman for her constancy as helpful reviewer and colleague. Thank you also to the editors of this journal. The quotation in the title is taken from United Nations, "Secretary-General Calls Latest IPCC Climate Report 'Code Red for Humanity,' Stressing 'Irrefutable' Evidence of Human Influence," Press Release SG/SM/20847 (9 August 2021), online: United Nations Meeting Coverage and Press Releases <www.un.org/press/en/2021/sgsm20847.doc.htm> [https://perma.cc/N59Y-K8TD].

1 *Juliana v United States*, 947 F (3d) 1159 (9th Cir 2020) at 35, Staton J dissenting [*Juliana*].

2 Gerard J Kennedy & Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45:4 Fed Cts L Rev 707 at 723.

3 Olivier Knox, "The Daily 202: The Alarming Climate Report Is Also a Huge Politics Story," *Washington Post* (10 August 2021), online: <www.washingtonpost.com/politics/2021/08/10/daily-202-alarming-climate-report-is-also-huge-politics-story/> [https://perma.cc/JMD2-LDNQ].

4 Editorial Board, "Thirty-three Years Ago, the World Was First Warned of Global Warming. Is Talk Finally Turning to Action?," *Globe and Mail* (11 August 2021), online:<www.theglobeandmail.com/opinion/editorials/article-thirty-three-years-ago-the-world-was-first-warned-of-global-warming-is/> [https://perma.cc/52EK-93MG].

5 International Panel on Climate Change (IPCC), *Climate Change 2021: The Physical Science Basis: Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, edited by Valérie Masson-Delmotte et al (Cambridge, UK: Cambridge University Press, 2021), online (pdf): *IPCC* <www.ipcc.ch/

based on more than fourteen thousand studies from around the globe, is blunt. Stabilizing the climate requires immediate, rapid, and sustained reductions in human-caused greenhouse gas emissions: "It is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred."[6] The climate emergency is "crying out for action from leaders around the world."[7] What happens if our governments continue to fail to answer that cry? The outlook is, as the August IPCC report starkly details, catastrophic.

So far, the Canadian government has been largely missing in action on this existential challenge. This collection's lead article, "Coming of Age in a Warming World: The *Charter*'s Section 15(1) Equality Guarantee and Youth-Led Climate Litigation by Nathalie J. Chalifour, Jessica Earle, and Laura Macintyre," could not be clearer in its conclusion that "Canada has consistently failed to meet its emissions reduction commitments."[8] As the authors remind us, the Supreme Court of Canada itself acknowledges that "[c]limate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. … The only way to address the threat of climate change is to reduce greenhouse gas emissions."[9] The Court goes on: "[C]limate change is doubtless an emergency";[10] it will result in "irreversible harm … borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples."[11] This last statement begs for a constitutional challenge, and Chalifour, Earle, and Macintyre smartly deliver the specifics of what such a challenge under section 15 of the *Canadian Charter of Rights and Freedoms* demands.[12] Of course, as

report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf> [*IPCC Report*]. The IPCC was created in 1988 by the United Nations and is charged with assessing the science related to climate change. See "About the IPCC" (2021), online: *IPCC* <www.ipcc.ch/about/> [https://perma.cc/WBA3-QKHX]. The IPCC has three working groups: Working Group I, dealing with the physical science basis of climate change; Working Group II, dealing with impacts, adaptation, and vulnerability; and Working Group III, dealing with the mitigation of climate change.

6 IPCC, "Summary for Policy Makers" in *IPCC Report*, *supra* note 5 at 5.

7 Knox, *supra* note 3. For thoughts on how environmental law developments spread, see Natasha Affolder, "Contagious Environmental Lawmaking" (2019) 31 J Envtl L 187.

8 Nathalie J Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The *Charter*'s Section 15(1) Equality Guarantee and Youth-Led Climate Litigation" (2021) 17:1 JL & Equality 1 at 19.

9 Chalifour, Earle & Macintyre, *supra* note 8 at 104, citing *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11 at para 2 [*GGPPA References*].

10 Chalifour, Earle & Macintyre, *supra* note 8 at 104, citing *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 202.

11 Chalifour, Earle & Macintyre, *supra* note 8 at 104, citing *GGPPA References, supra* note 9 at para 206.

12 *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*].

the authors note, climate emergency litigation based on section 15, and also section 7 of the *Charter*, are already in play, albeit with limited success to date.[13] But, as these cases proceed, and as new legal challenges are formulated, this article will be invaluable as a resource for litigators and judges.

It is hard to give up on the promise that *Charter* rights might hold for transformative change—it is the siren call of activist rights claims compelling recalcitrant "stuck" governments to do the right thing. True, assessments of that potential are increasingly more muted,[14] but, as new horizons of deep concern crystallize, commentators and litigators alike struggle to tell a tale of jurisprudence and doctrinal logic that keeps hope alive. We have seen this in terms of the poverty crisis, the inadequate housing and homelessness epidemic, and now the climate change emergency.[15] Chalifour, Earle, and Macintyre's article keeps the tradition going. Environmental rights are key pieces of the larger vision of social justice called for in this moment in human and planetary history.[16]

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[13] See discussion of the five Canadian cases involving youth challenges to government action on climate change: Chalifour, Earle & Macintyre, *supra* note 8 at 24–32 (citing *Environnement Jeunesse v Canada (Attorney General)*, 2019 QCCS 2885 [*Environnement Jeunesse*]; *La Rose v Canada*, 2020 FC 1008 [*La Rose*]; *Mathur v Ontario*, 2020 ONSC 6918 [*Mathur*]*; Misdzi Yikh v Canada*, 2020 FC 1059; *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 224). See also Margot Young, "Kids Facing Effects of Climate Change Are Taking Their Governments to Court," *The Conversation* (26 November 2019), online: <theconversation.com/kids-facing-effects-of-climate-change-are-taking-their-governments-to-court-126419> [https://perma.cc/2FJN-LPCY].

[14] See e.g. Fay Faraday, "The Elephant in the Room and Straw Men on Fire" (2021) 30:2 Const Forum Const 15; Richard Moon, "Comment on *Fraser v Canada (AG)*: The More Things Change" (2021) 30:2 Const Forum Const 85.

[15] Poverty was the focus in *Gosselin v Quebec (Attorney General)*, 2002 SCC 84. For a general commentary on this case and poverty rights under the *Charter*, see Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2008); Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of Gosselin" (2019) 39 NJCL 85; Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014); Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 SCLR 297. On housing, see *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, leave to appeal to SCC refused, 36283 (25 June 2015) [*Tanudjaja*]. For commentary on *Tanudjaja*, see Margot Young, "Temerity and Timidity: Lessons from *Tanudjaja v. Attorney General (Canada)*" (2020) 61:2 C de D 469; Margot Young, "Charter Eviction: Litigating Out of House and Home" (2015) 24 JL & Soc Pol'y 46. Environmental rights litigation is a "relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law." James R May & Erin Daly, "Ten Good Practices in Environmental Constitutionalism: Structure, Text and Justiciability" (2014) Widener Law School Legal Studies Research Paper No 14-39 at 2.

[16] For an example of this linkage, see Dayna N Scott, "Situating Sarnia: Unimagined Communities in the National Energy Debate" (2013) 25 J Envtl L & Prac 81.

The first development that Chalifour, Earle, and Macintyre seek is a clear acceptance by the courts that, "when constitutional rights are at play, it is the proper role of the judiciary to determine the legal standard that the government is required to meet." [17] The implication is that courts duck critical responsibility, manipulating justiciability and separation of powers concerns to avoid essential rights articulation. Courts' reluctance to allow challenges to wide swaths of government action, and inaction, and not the text of the *Charter* itself, is part of this problem.[18] Quite simply, in many cases seeking to forge new frontiers for substantive equality protections, courts have largely eschewed the review power that the *Charter* assigns.[19] The bugaboo of justiciability—cast variously as too diffuse targeting of government action, inappropriate claims against government inaction, and/or marking of political, not legal, concerns—surfaces again and again to defeat challenges at the preliminary stage, preventing substantive claims from being heard.[20] All of these formulations, in turn, derive from judicial wariness about overstepping the bounds of Canada's separation of powers between the judiciary and the two other branches of government: the legislature and the executive. In the words of Chalifour, Earle, and Macintyre, justiciability is "a critical hurdle for litigants to clear."[21] In the words of other scholars, justiciability doctrine "demarcates the scope of judicial review."[22]

More specifically, issues of justiciability and the framing of *Charter* challenges are both features of recent (or, in the words of Chalifour, Earle, and Macintyre, "second-wave") rejections of environmental justice

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[17] Chalifour, Earle & Macintyre, *supra* note 8 at 6.

[18] These are two points in a longer list of concerns set out in Chalifour, Earle & Macintyre, *supra* note 8 at 5.

[19] Most of these cases leverage a section 15 equality right challenge alongside challenges deploying the section 7 rights of life, liberty, and security of person. At its core, section 7 challenges to encode substantive equality concerns, albeit framed in non-comparative terms. See Margot Young, "The Other Section 7" (2013) 62 SCLR 3; Margot Young, "Section 7: The Right to Life, Liberty, and Security of the Person" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 778; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38:2 UBC L Rev 539.

[20] See, for example, the Ontario Superior Court of Justice decision in *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410; *La Rose*, *supra* note 13. This is not always the case. See *Mathur*, *supra* note 13; *Environnement Jeunesse*, *supra* note 13. For a discussion of these last two cases and how in each the relevant court held the claims justiciable, see Chalifour, Earle & Macintyre, *supra* note 8. For critical assessment of past judicial treatment of justiciability issues, see Martha Jackman & Bruce Porter, "Introduction: Advancing Social Rights in Canada" in Jackman & Porter, *supra* note 15, 1; Martha Jackman & Bruce Porter, "Rights Based Strategies to Address Homelessness and Poverty in Canada: The *Charter* Framework" in Jackman & Porter, *supra* note 15, 65.

[21] Chalifour, Earle & Macintyre, *supra* note 8 at 36.

[22] Kennedy & Sossin, *supra* note 2 at 709.

challenges. Quick and simplistic findings that a claim is non-justiciable, and a related suspicion of claims aimed at diffuse or complex government (in)action, will have a "potentially devastating effect" on access to the justice promised by the protected rights and guarantees of the *Charter*.[23] In the name of maintaining appropriate boundaries between key state institutions, such judicial reasoning and action threaten to undermine the proper functioning of Canada's separation of powers.

Justiciability is defined by Chalifour, Earle, and Macintyre as concerning the question of whether an issue is appropriate for judges to decide.[24] This definition, for now, is as good as any. It allows that justiciability engages questions of judicial legitimacy and competency.[25] Informing these concerns are the notion of separation of powers and the assertion that the judiciary has a distinctive and bounded sphere of power. (We owe to eighteenth-century Baron de Montesquieu the idea that prevention of tyranny requires separation of the state's powers into three distinct branches: the executive, the legislature, and the judiciary.)[26] The separation of powers provides a "grammar of legitimation" for each of the branches and, thus, is important to acknowledge but also to unpack.[27]

The observation that, at the root of justiciability debates lies the spectre of judicial trespass, is neither novel nor analytically complex. But it warrants attention, as refraction of this fundamental hesitation into multiple categories of distinct judicial resistance diverts attention from the separation of powers as the animating villain in these cases. We see this refraction at play in the chart set out by Chalifour, Earle, and Macintyre.[28] I do not want to play an academic commentator version of "whack-a-mole"—it's not this, it's that—but, rather, to emphasize the theme that runs throughout each of the categories marked out in this chart. It bolsters the lead article's argument to be reminded of the cautions and prescriptions of earlier academic literature: overly facile judicial resort to justiciability to dismiss claims—

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[23] *Ibid* at 718.

[24] Chalifour, Earle & Macintyre, *supra* note 8 at 37.

[25] See *ibid* at 37, n 188 (citing *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 26, 161 DLR (4th) 385 [*Secession Reference*]). The Supreme Court of Canada stated that justiciability concerns focus on courts' adherence to their proper role in the constitutional framework and staying within judicial expertise: the interpretation of law.

[26] John D Richard, "Separation of Powers: The Canadian Experience" (2009) 47 Duq L Rev 731 at 731 (citing Baron de Montesquieu, *The Spirit of Laws*, translated by Thomas Nugent (New York: MacMillan Press, 1949). The United States's system of "checks and balances" owes much to this early discussion.

[27] Bruce Ackerman, "The New Separation of Powers" (2000) 113 Harv L Rev 633 at 642.

[28] Chalifour, Earle & Macintyre, *supra* note 8 at 42.

and, thus, too quick and un-nuanced invocation of the separation of powers—threaten to "undermine the development of *Charter* rights."[29]

Canada's Constitution, "similar in principle to the United Kingdom,"[30] assumes a foundational separation of powers, requiring "appreciation by the judiciary of its own position in the constitutional scheme."[31] Unlike the United States, however, the Canadian Constitution does not enshrine a strict separation of powers.[32] Blurred boundaries between exercises of power by the three branches of government are unremarkable. For example, Canadian constitutional law is peppered with instances of the executive authoritatively asking the judiciary for advisory opinions on domestic and international law.[33] Further, the fact that ministers of the Crown (Cabinet) typically also sit in the legislature is a key feature of responsible government and democratic accountability in our parliamentary system. One commentator describes this as a "fusion rather than separation" between the executive and the legislative branch.[34] More figuratively, Walter Bagehot wrote in the nineteenth century (in relation to the British parliamentary system) that "a cabinet is a combining committee—a hyphen which joins, a buckle which fastens, the legislative part of the state to the executive part of the state."[35] Judicial acceptance of permeable boundaries between branches is unremarkable—for example, the courts' acceptance of the notion of dialogue between courts and the executive and the legislature. In *Vriend v Alberta*, the Supreme Court of Canada wrote that "the *Charter* has given rise to a more dynamic interaction among the branches of governance."[36] In

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[29] Kennedy & Sossin, *supra* note 2 at 714 (although the focus in this comment is on judicial reasoning and action, Kennedy and Sossin direct similar cautions to government counsel in *Charter* cases: "[T]he model of the Crown as a zealous advocate also seems at odds with the mix of public interest, accountability, and rule of law imperatives operating in *Charter* settings" at 715).

[30] Preamble of the *Constitution Act 1867* (UK) 30 & 31 Vict, c 3, reproduced in RSC 1985, Appendix II, No 5.

[31] *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 91, Dickson CJC, 40 Admin LR 1.

[32] *Secession Reference*, *supra* note 25 at para 15.

[33] Kent Roach, "The Separation and Interconnection of Powers in Canada: The Role of Courts, The Executive and the Legislature in Crafting Constitutional Remedies" (2018) 25:2 J Intl & Comparative L 315 at 315. For illustration and discussion of the reference power, see *Secession Reference*, *supra* note 25 at para 15.

[34] Maureen Covell, "The Separation of Powers in Canada and the European Union: Competing Democratic Imperatives" (2000) 29 Polish Political Science Yearbook 85 at 88. This is in contrast to the United States where law-making authority is separated across "democratically elected rivals." Ackerman, *supra* note 27 at 639.

[35] Walter Bagehot, *The English Constitution* (New York: Appleton & Company, 1908), cited in Warren J Newman, "The Rule of Law, the Separation of Powers, and Judicial Independence in Canada" in Oliver, Macklem & Des Rosiers, *supra* note 19, 1032 at 1041.

[36] [1998] 1 SCR 493 at para 138, 156 DLR (4th) 385.

sum, a range of interactions, like the ones detailed above, give the lie to the claim that the branches of government are neatly and sharply independent of each other.[37] Thus, another scholar, Kent Roach, writes of the "flexible and pragmatic" nature of Canada's separation of power.[38]

This does not mean that the concept of the separation of powers is unimportant to Canadian constitutional law. Canada's constitutional system recognizes the different core competencies of the courts, the executive, and the legislature. Thus, despite a less rigid character, the separation of powers is relied on to enforce such things as the judiciary's independence and jurisdiction.

But legal process and institutional transparency also structure guarantees of that independence rather than simply providing an insistence on watertight isolation: "[T]he flexible Canadian approach to the separation of powers thus resists bright lines. … It resists determining the proper role of each institution of government in the abstract, or for all time."[39] This approach acknowledges that "each institution is also interconnected and inevitably influenced by the other. Indeed, it is the totality of these interconnections and institutional interactions that comprise Canada's long-lived and evolving system of constitutionalism."[40]

Certainly, Canadian courts are critical to protecting our separation of powers: as constitutional referees, they maintain boundaries not only with respect to the separation of powers but also to the division of powers and, since 1982, between individuals' protected rights and state power.[41] But this is a complex responsibility—the judiciary must give careful consideration before foreclosing a *Charter* challenge. Courts are properly urged to attend to the connection between justiciability and access to constitutional rights.[42] Ironically, striking a claim on the basis of justiciability defeats an important facet of the separation of powers—namely, that the executive and legislative realms not be beyond judicial scrutiny under *Charter* obligations. Judicial review under the *Charter* may be "inherently controversial" for a parliamentary democracy, but this is the task that courts must take up under our post-1982 constitutional

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37 Roach, *supra* note 33 at 318.
38 *Ibid* at 325.
39 *Ibid* at 316.
40 *Ibid* at 319.
41 *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at 116.
42 Martha Jackman, "Separate but Not Apart: The Role of the Courts in Canada's Post-Charter Democracy" in Denis Magnusson & David Soberman, eds, *Canadian Constitutional Dilemmas Revisited* (Kingston, ON: Queens University / Institute of Intergovernmental Relations, 1997) 31.

democracy in accordance with the principle of the rule of law.[43] And Canada's judiciary is appropriately called to embrace the rights-enhancing opportunities that the legitimate tension between branches might allow.[44]

Bruce Ackerman posits three legitimating ideals for the separation of powers: democracy, professional competence, and protection of fundamental rights.[45] These are useful concepts for thinking about how courts should approach the often novel and complex challenges of "boundary maintenance" between the three branches of government. In essence, Canadian courts, in "refereeing" social and environmental justice claims, tend to underplay the importance of rights protection as part of why the separation of powers matters. Overly cautious, amplified concerns about justiciability threaten to produce a judiciary that undermines its own role in a constitutional democracy: a role that requires holding the executive and legislature to their constitutional boundaries by providing effective rights accountability. Such constitutional rights accountability requires an accessible process for hearing and adjudicating claims.[46] As our system of fundamental rights protection advances, so too must our "understanding of the role of courts … evolve ... and respond to new challenges and problems in relation to accountable governance and human rights."[47] Gerard Kennedy and Lorne Sossin up the ante, writing that "there is an overlapping sphere where justiciability and access to justice interact and reinforce one another[:] … litigation under the Canadian *Charter* represents one such overlapping sphere."[48]

Thus, the authors argue that justiciability concerns ought to extend beyond the issues of competency and legitimacy to also reference access to justice issues.[49] Broad rule of law concerns figure: too rigid or strict non-justiciability asssertion often means that "parties to disputes held to lie outside of the province of the courts to adjudicate are left without recourse to assure the rule of law is respected."[50] In the words of other

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[43] *Cooper v Canada*, [1996] 3 SCR 854 at para 2, Lamer CJC, 43 Admin LR (2d) 155.

[44] Roach, *supra* note 33 at 332. See also Bruce Porter, "Inclusive Interpretations: Social and Economic Rights and the Canadian *Charter*" in Helena Alviar Garcia, Karl Klare & Lucy A Williams, eds, *Social and Economic Rights in Theory and Practice: Critical Enquiries* (New York: Routledge, 2014) 215.

[45] Ackerman, *supra* note 27 at 640.

[46] Aoife Nolan, Bruce Porter & Malcolm Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" (2007) Center for Human Rights and Global Justice Working Paper No 15 at 3 online: <socialrightscura.ca/documents/publications/justiciability-social-econ-rights-updated-appraisal.pdf> [https://perma.cc/WG29-GXRH].

[47] *Ibid*.

[48] Kennedy & Sossin, *supra* note 2 at 710.

[49] *Ibid*.

[50] *Ibid* at 709. See also Lorne Sossin, "The Unfinished Project of *Roncarelli*: Justiciability, Discretion and the Limits of the Rule of Law" (2010) 55 McGill LJ 661.

scholars, "[t]here must be somewhere to go to be heard."[51] The perspective that Kennedy and Sossin urge upon Crown counsel is equally relevant to judges: "[J]usticiability needs to be understood through the lens of the lived experience of those who seek judicial remedies."[52] If the rights of marginalized populations are at stake, if the harms claimed are serious (like, say, the end of the world as we know it), preliminary dismissal of a claim may be the wrong judicial response to justiciability concerns. Justiciability certainly requires recognizing the limits of judicial power, but it also entails ensuring that, at the same time, the rule of (constitutional) law is not impaired. The dissenting judgment in the South African 2001 case *Minister of Health v Treatment Action Campaign (No. 2)* caps this argument: "Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether, in formulating and implementing such policy, the state has given effect to its constitutional obligations. … In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."[53]

Justiciability ought not to be a mechanism of Crown immunity from rights obligations: "Justiciability, in this sense, is a multi-dimensional set of boundaries, closely related to access to justice concerns more generally, not a one-dimensional inquiry into the subject-matter of a dispute."[54] Refusal to take up the task of rights adjudication—including, especially, new and evolving forms of rights recognition—threatens the subversion of the principles informing the separation of powers. As Aoife Nolan, Bruce Porter, and Malcolm Langford detail, constitutional rights review by Canada's judiciary appropriately results in a "flow of power" to the judiciary, ensuring a proper balance of powers in a democracy with constitutionally protected human rights.[55] To exclude categories of rights from judicial review is, the authors continue, "in essence to allocate the judicial role … to the legislature."[56] Thus, there are significant separation of powers issues raised by judicial abdication of the job of rights review. It goes both ways.

Concerns about the separation of powers—more specifically, the legitimate use of judicial power—are often better dealt with at the remedial stage. This stage of a *Charter* case provides a court with room to manoeuvre. Indeed, the range of remedies engineered during the *Charter*

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[51] Nolan, Porter & Langford, *supra* note 46 at 4.
[52] Kennedy & Sossin, *supra* note 2 at 714.
[53] *Minister of Health v Treatment Action Campaign (No 2*), [2001] IESC 86 (17 December 2001) at para 140, per Denham J.
[54] Kennedy & Sossin, *supra* note 2 at 723.
[55] Nolan, Porter & Langford, *supra* note 46 at 12.
[56] *Ibid.*

era shows the care and creativity possible in mediating the tension between the court's constitutional duty to rights enforcement and the boundaries of judicial power. For example, in *Canada (Prime Minister) v Khadr*,[57] where, as Roach notes, the case was accepted for review, the Supreme Court of Canada used its remedial discretion to respect government concerns about insulating foreign policy decisions from judicial meddling.[58] This observation echoes earlier statements from the Supreme Court in *Doucet-Boudreau v Nova Scotia*, where the majority wrote, "The essential point is that the courts must not ... depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes."[59] Chalifour, Earle, and Macintyre[60] reference the dissent in *Juliana v United States*,[61] a climate rights challenge from the United States, as guidance for how courts might carefully plot their role without abandoning key responsibility. The dissenting judge at the 9th Circuit Court of Appeal reminds us that courts "routinely grant plaintiffs less than the full gamut of requested relief."[62]

The second issue I take up has to do with how environmental rights—and often, other social justice claims—are framed.[63] Chalifour, Earle, and Macintyre rightly point to this as the often necessary "breadth and diffuse nature of the government conduct" that is targeted by a claim.[64] The article handles well the reasons why this complex characteristic of some important claims should not impede review by courts.[65] The authors conclude: "If governments violate *Charter* rights through a constellation of decisions, rather than through a single decision, or insufficient action, the end result is still a violation. The form of the violation should not create an escape hatch for the government to evade *Charter* scrutiny."[66] A recent BC Supreme Court case dealing with section 35 rights, *Yahey v British Columbia*, reinforces this point.[67] In this case, the Blueberry River First Nations, whose territory is located in northeastern British Columbia, successfully claimed that the cumulative effects of industrial development resulted in the infringement of their Treaty 8 rights. This case is the first time a Canadian court has found a treaty infringement resulting from the cumulative effects

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57 2010 SCC 3.
58 Roach, *supra* note 33 at 325.
59 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 56.
60 Chalifour, Earle & Macintyre, *supra* note 8 at 22.
61 *Juliana*, *supra* note 1 at 33, Staton J dissenting.
62 *Ibid* at 61.
63 See e.g. *Tanudjaja*, *supra* note 15.
64 Chalifour, Earle & Macintyre, *supra* note 8 at 102.
65 *Ibid* at 46–8.
66 *Ibid* at 52.
67 2021 BCSC 1287.

of various government policies and permitted projects over decades rather than as a result of a specific action or project. As the BC Supreme Court underscores in *Yahey*, "[t]he allegations of infringement are not focused on one piece of legislation, let alone one regulatory regime."[68] The logic in *Yahey* supports Chalifour, Earle, and Macintyre's arguments about the desirability of judicial tolerance of claims that deal with harms that are so significant, far-reaching, and diverse that a broad range of government actions and inactions necessarily ground the claim. Recognition of systemic rights violations requires this expanded lens.

Commentators also note the challenge of crafting an environmental rights claim: "There are no generally accepted standards for identifying or vindicating these interests as rights in part because, in straddling every familiar category of rights, environmental constitutionalism defies easy classification." [69] For Canadian claimants, sections 7 and 15 are obvious choices, but arguments based on them will unavoidably push for expanding judicial definition of the interests those rights protect. Indeed, environmental rights cases offer courts the opportunity to enrich *Charter* protection, recalibrating the governments' social contract with present and future generations.[70]

In conclusion, I return to where I began: the August IPCC report. The *New York Times* notes that the report leaves no doubt about what humans have done to the climate and that the report is also clear about a way out of an extreme catastrophe. The *New York Times* concludes: "[T]he uncertainty now, and it's huge, is whether humans will act soon enough and fast enough to heed what the scientists have said."[71] Will our courts sit by and see devastation happen? Constitutional scholars get caught up in the intricacies of justiciability—what it does and does not entail in a constitutional democracy such as Canada. These are consequential questions, and judicial recitation of separation of power concerns too often lags behind evolution in the interests that human rights must capture and reflect. Allowing environmental harms to nuance rights of equality, for example, seems overdue in this moment. I end with the words of Chalifour, Earle, and Macintyre: "What was once primarily a scientific and political debate now belongs squarely in the legal realm."[72]

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[68] *Ibid* at para 1843.

[69] May & Daly, *supra* note 15 at 10.

[70] *Ibid* at 15.

[71] Henry Fountain, "A Future with a Dangerous Warming Locked In," *New York Times* (11 August 2021) online: <www.nytimes.com/2021/08/11/climate/a-future-with-dangerous-warming-locked-in.html>.

[72] Chalifour, Earle & Macintyre, *supra* note 8 at 6.