INVESTIGATING THE ROLE OF THE LEGAL SYSTEM IN HUMAN RIGHTS CLIMATE LITIGATION CASES AGAINST GOVERNMENTS

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1. INTRODUCTION

As of November 4, 2016, the Paris Agreement entered into force whereby 196 Parties at COP 21 in Paris agreed that it would be an international goal to limit global warming preferably to 1.5 degrees Celsius compared to pre-pandemic levels (United Nations Climate Change, n.d.). This landmark multilateral climate change agreement became a catalyst for greenhouse gas (GHG) emissions reduction efforts across the globe and has brought climate justice into the global spotlight. More countries and companies have begun to establish carbon neutrality targets, while low-carbon innovations and solutions are beginning to circulate in the markets (United Nations Climate Change, n.d).

However, although there has been an increase of positive movement towards fighting the climate crisis, there has also been an increase in non-state actors holding governments and corporations accountable for their inaction through climate litigation. The United Nations Environment Programme defines climate litigation to include "cases that raise material issues of law or fact relating to climate change mitigation, adaptation or science of climate change" (Burger & Metzger, 2020).

In the last three years alone, climate litigation cases have nearly doubled. In 2017, 884 cases were brought forward in 24 different countries, and as of 2020, there were at least 1,550 cases being filed in 38 countries (Burger & Metzger, 2020). This spike in climate litigation is a sign that the nature of climate justice is evolving.

Arnold Kreilhuber, Acting Director of UNEP's Law Division says, "Citizens are increasingly turning to courts to access justice and exercise their right to a healthy environment…Judges and courts have an essential role to play in addressing the climate crisis" (Burger & Metzger, 2020).

In terms of the arguments used to support the climate litigation cases that are increasingly being brought to courts around the world, human rights arguments are the ones seeing the most growth. Prior to 2015, there were only 5 rights-based cases filed in the world. Between 2015 and 2020, across 23 jurisdictions there were 36 rights-based lawsuits brought against states as well as four cases brought against corporations (Burger & Metzger, 2020).

The cases within this category of human rights climate litigation against governments all employ the same fundamental rationale claiming that government inaction or insufficient greenhouse gas (GHG) emissions targets violate citizens' fundamental human rights.

This paper will investigate prominent Canadian and international human rights climate litigation cases against governments to assess and uncover the similarities and differences between their legal rationale. Understanding these underlying patterns will inform the determination of common obstacles and success measures of human rights climate litigation cases. After diving into the individual cases, implications and conclusions on the main characteristics of this new wave of human rights climate litigation will be devised. This will detail the pattern of arguments and strategies used, common obstacles predicted for the future of climate litigation in Canada and an explanation for the gains in recent traction.

2. AN INVESTIGATION INTO HUMAN RIGHTS CLIMATE LITIGATION CASES AGAINST GOVERNMENTS

An investigation into both Canadian and international cases will be conducted. Comparing the legal rationale among Canadian cases themselves while also comparing them to international legal rationale will offer more instances of comparison to determine key characteristics and obstacles. The Canadian cases and the international cases cite different constitutional and legal documents as per their jurisdiction; however, it will be assessed how the underlying legal rationale

for government infringement on human rights in Canada is similar and different from the rationale used in countries internationally.

To start, prominent Canadian climate litigation cases using human rights arguments will be detailed, followed by key international cases.

CANADIAN CASES

a. Environnement Jeunesse (ENJEU) v. Canada ('ENJEU v. Canada')

Environment Jeunesse (ENJEU) is a non-profit organization dedicated to environmental education based in Montreal, Quebec. In November 2018, ENJEU filed a class-action lawsuit on behalf of Quebec youth aged 35 and under against the Government of Canada. The lawsuit argued that the government had failed in its obligations to reduce greenhouse gas emissions by failing to take sufficient action and set sufficient targets (Environnement Jeunesse v. Canada, 2019). These failures are claimed in the same applicant court document to be an infringement of citizens' fundamental rights, especially those of the younger generations whose life, security, quality of life and health are argued to become irreparably compromised as climate change becomes irreversible.

ENJEU, on behalf of the class action citizens, sought punitive damages and correctional action in accordance with the declaration that the Government has failed in its obligations under the *Canadian Charter of Rights and Freedoms ('Canadian Charter')* and the *Charter of Human Rights and Freedoms ('Quebec Charter')*. ENJEU claimed that the government's insufficient GHG emission targets violated the class members' right to life, inviolability and security protected by section 7 of the *Canadian Charter* and section 1 of the *Quebec Charter* (Environnement Jeunesse v. Canada, 2019).

In November 2019, the Court dismissed the motion for authorization to institute a class action; the judge in the decision court document claimed that the 35-year age cut-off was arbitrary and not objective enough to constitute a valid class action claim. This decision was appealed in August 2019, where it remains pending. However, an important facet of this case was that the Court ruled that ENJEU's claims regarding the government's choices and decisions relating to its GHG emissions targets were a *justiciable* matter (Environnement Jeunesse v. Canada, 2019).

The question of *justiciability* refers to evaluating whether the case at hand is one that the court is able to adjudicate and is within the scope of judicial authority (Hundal, 2019). Often, as will be demonstrated in subsequent cases below, a disagreement of justiciability arises when the subject matter of the case is too political in nature, and it is determined that the court's involvement is not appropriate (Hundal, 2019).

In the case of *ENJEU v. Canada*, the courts viewed the alleged violation of the members' Charter-protected rights as justiciable. The judge concluded in its decision court document that the impact of climate change on human rights is a justiciable issue and that the *Canadian and Quebec Charters* can apply to government actions in this area (Environnement Jeunesse v. Canada, 2019).

Even further, the judge claimed that "courts should not decline to adjudicate when the subject matter of the dispute remains within the limits of what is proper to them only 'because of its political context or implications'" (Environnement Jeunesse v. Canada, 2019). This view is evidence of the beginning of a change in the courts' legal opinion with respect to the justiciability of human rights arguments in climate litigation cases.

b. La Rose v. Her Majesty the Queen ('La Rose v. Her Majesty')

In October 2019, 15 youth from across Canada brought forward a lawsuit based on the claims that Canada's levels of GHG emissions are incompatible with that of a stable climate. The plaintiffs claimed that they as youth, along with the young generations to follow, will disproportionately be the ones to bear the burden of the consequences of this unstable climate that Canada is contributing to (La Rose v. Her Majesty the Queen, 2020). In light of this, the plaintiffs claimed that Canada's conduct had infringed upon their section 7 right to life, liberty and security, as well as their section 15 right that provides that every individual is equal under the law as protected under the *Charter of Rights and Freedoms*. The plaintiffs sought declaratory relief and an order requiring the government to adopt a Climate Recovery Plan that is consistent with sufficient GHG emissions reduction targets.

In addition to the argument of human rights infringements, the plaintiffs argued that the government violated their obligations under the *public trust doctrine* (La Rose v. Her Majesty the Queen, 2020). This doctrine indicates that the government has the obligation to protect natural resources held by the government in trust for the benefit and use of the citizens. More than two dozen climate litigation cases worldwide have been brought forth on the basis of *public trust* and the underlying argument is that one's fundamental right to life is inextricably tied to a healthy environment (Viglione, 2020).

The defendants in the suit brought forward to the Federal Court a motion to dismiss, which was granted. This decision was appealed by the plaintiffs and the appeal remains pending. However, the reasoning for granting the motion to dismiss highlights some of the biggest obstacles to rulings in favour of plaintiffs in climate litigation cases that many cases in the future will have to overcome to drive successful climate action.

Not justiciable: The first tenant of reasoning used in support of the judge's decision to grant the motion to dismiss was that the *Charter* claims are were justiciable. The judge claimed that the plaintiffs alleged "an overly broad and unquantifiable number of actions and inactions on the part of the defendants" (La Rose v. Her Majesty the Queen, 2020). In the judge's order, it was detailed how when considering justiciability, the issue of this matter being "so political that the Courts are incapable and unsuited to deal with them" arises (La Rose v. Her Majesty the Queen, 2020).

However, an important question to explore, is that why were the *Charter* claims in *ENJEU v. Canada* ruled to be a justiciable matter, whereas in *La Rose v. Her Majesty*, it was ruled that the same *Charter* claims were not justiciable? This question is important to consider especially since the judge's decision on *ENJEU v. Canada* was released on July 11, 2019, whereas the judge's order for the *La Rose v. Her Majesty the Queen* was made more than a year later on October 21, 2020.

No reasonable cause of action: The second tenant of reasoning to support the judge's decision to grant the motion to dismiss, was that he claimed the plaintiffs had no reasonable cause of action. He detailed how the plaintiffs pointed to "broad and diffused conduct by the government" and did not demonstrate a particular law passed by the Canadian government that burdens the youth in the way that they claimed (La Rose v. Her Majesty the Queen, 2020).

A Comparison Between *ENJEU v. Canada* and *La Rose v. Her Majesty*

ENJEU v. Canada and *La Rose v. Her Majesty* are two cases that seem very similar on the surface but resulted in the judges generating two very different opinions on the justiciability and viability of the *Charter* claims in regard to Canada's GHG emission reduction actions. If the legal landscape is moving in favour of climate litigation cases, why was *La Rose v. Her Majesty* so readily dismissed?

The defendant in *ENJEU v. Canada* argued that the plaintiffs' request to seek an order to stop the actions that violated their fundamental rights was not justiciable because it infringed upon the legislative's powers (Environnement Jeunesse v. Canada, 2019). The courts disagreed with the defendants in this regard. Therefore, on this basis of disagreement, the judge ruled that the issues in this case were not non-justiciable.

In *La Rose v. Her Majesty*, the Court ruled that the plaintiffs' claim was not justiciable because their analysis for a *Charter* review was not rooted in any legal component and was too broad (La Rose v. Her Majesty the Queen, 2020). The purpose of a *Charter* review is to ensure the constitutionality of laws and state action. However, the judge concluded in the decision document that the plaintiffs' claims required the court to review the cumulative efforts of the government's GHG emissions, instead of a specific law or state action that underpins these emissions claims. The doctrine of justiciability fails here because the assessment of the *Charter* infringement is not connected to a specific law or state action - the plaintiffs attempted to subject Canada's holistic policy response to climate change to a *Charter* review (La Rose v. Her Majesty the Queen, 2020).

Therefore, it is discovered that the key difference between the rulings on justiciability between these two cases is the difference in specific government action and legislation cited to underpin the core of the plaintiffs' *Charter* review. The plaintiff in *ENJEU v. Canada* cited Canada's ratification and commitments under the *UNFCCC* and *Kyoto Protocol*, as well as the March 2018 report of the Office of the Auditor General of Canada that revealed Canada missed two separate targets for GHG emissions reductions established by the *Copenhagen Accord*. However, the plaintiffs' statement of claim in *La Rose v. Her Majesty* revealed that their core argument that the government adopted targets that supported GHG emission levels incompatible with a stable climate system was not directly anchored to any law passed by the legislature or any

international commitment (La Rose v. Her Majesty the Queen, 2019). With no statutory reference, the courts cannot act within their role of considering the constitutionality of government action.

c. Mathur, et al, v. Her Majesty the Queen in Right of Ontario ('Mathur v. Ontario')

In November 2019, seven youth in Ontario brought forward a lawsuit alleging that the province of Ontario had violated their personal *Charter* rights by abdicating its responsibility to address climate change (Mathur, et al, v. Her Majesty the Queen in Right of Ontario, 2020). In support of this argument, the plaintiffs alleged that Ontario's current 2030 GHG reduction target of 30% emissions reduction below 2005 levels were inadequate to meet the goals laid out in the Paris Agreement and continued to lead to a dangerous level of climate change. Similar to *La Rose v. Her Majesty*, the plaintiffs in *Mathur v. Ontario* claimed that Ontario's emissions targets violated the rights of Ontario youth and future generations under sections 7 and 15 of the *Charter*. These sections protect citizens' right to life, liberty and security of person, and equal protection under the law, respectively.

In addition to the *Canadian Charter*, the plaintiffs also cited section 52 under the *Constitution Act, 1982* and claimed that the defendant violated the unwritten constitutional principle that "governments are prohibited from engaging in conduct that will, or reasonably could be expected to, result in the future harm, suffering or death of a significant number of its own citizens" (Mathur, et al, v. Her Majesty the Queen in Right of Ontario, 2020).

In response to this, the defendant filed a motion to dismiss claiming that the plaintiffs had shown no reasonable cause of action. This claim was meant to illustrate that the plaintiffs did not demonstrate a reasonable prospect to succeed at trial. However, in response to this claim, the Superior Court of Justice disagreed with the defendants and rejected their motion to dismiss. The

Court claimed that it was premature to find the plaintiffs' claims incapable of being proven as it is now being demonstrated how expert evidence is capable of providing scientific proof of such allegations (Mathur, et al, v. Her Majesty the Queen in Right of Ontario, 2020).

A Comparison Between *La Rose v. Her Majesty* and *Mathur v. Ontario*

Previously, analysis was conducted between *ENJEU v. Canada* and *La Rose v. Her Majesty* to determine the root cause of the differences between their rulings on justiciability. Now, with *Mathur v. Ontario,* and *La Rose v. Her Majesty* also drawing different rulings, it should be uncovered if this difference stems from alternative reasons or for the same reasons as identified in the previous analysis. Furthermore, the difference in legal reasoning when determining the reasonable cause of action between *La Rose v. Her Majesty* and *Mathur v. Ontario* should be considered. What is the underlying difference in *Mathur v. Ontario* that led to it being viewed favorably by the courts?

In *La Rose v. Her Majesty*, the judge claimed that the plaintiffs pointed to "broad and diffused conduct by the government" and did not demonstrate a particular law passed by the Canadian government that burdened the youth in the way that the plaintiffs claimed. In *Mathur v. Ontario*, since the judge specifically claimed that there was a way to demonstrate evidence in support of a reasonable cause of action, that lends itself to the conclusion that the plaintiffs in *Mathur v. Ontario* must have offered more specificity in their claim than the plaintiffs from *La Rose v. Her Majesty*.

Although it seems like the plaintiffs are making broad claims about Ontario's GHG emissions targets, upon closer inspection of the *Mathur v. Ontario* plaintiff complaint document, it is revealed that the plaintiffs are challenging a very specific government action and legislation.

By contrast, the plaintiffs in *La Rose v. Her Majesty* challenged Canada's overall approach to climate policy.

The plaintiffs in *Mathur v. Ontario* are challenging the policy decisions in the *Cap and Trade Cancellation Act, 2018 ('CTCA')* legislation which repealed crucial sections of the *Climate Change Mitigation and Low-carbon Economy Act, 2016 ('Climate Change Act')* that allowed for more lenient GHG emissions targets to be set without abiding by the Paris Agreement standards. The government's specific conduct in this regard is what was claimed to violate the plaintiffs' rights under the *Charter* (Mathur, et al, v. Her Majesty the Queen in Right of Ontario, 2020). Contrastingly, and as demonstrated previously, the plaintiffs in *La Rose v. Her Majesty* did not challenge any specific legislation or governmental action in this way (La Rose v. Her Majesty the Queen, 2019).

Therefore, it can be concluded that a crucial element of success in human rights climate litigation cases is for the plaintiffs to point to specific government conduct, and more specifically legislation, that violates *Charter* rights in order to effectively persuade on the matters of justiciability and reasonable cause of action.

d. Lho'imggin et al, v. Her Majesty The Queen ('Lho'imggin v. Her Majesty')

In February 2020, two houses of the Wet'suwet'en Indigenous group filed a legal challenge against the Canadian government alleging that its unwillingness to adopt sufficient climate change policies to adhere to its Paris Agreement commitment was a violation of the plaintiffs' constitutional rights and freedoms (Lho'imggin et al, v. Her Majesty the Queen, 2020). The plaintiffs were Lho'imggin (the Head Chief of Misdzi) and Smogilhgim (the Head Chief of Sa Yikh).

The plaintiffs claimed that the Canadian government's target to reduce annual GHG emissions by 30% below 2005 levels by 2030 was insufficient to meet its Paris Agreement commitments to hold global warming below 2 degrees Celsius and pursue efforts to keep warming to 1.5 degrees.

More specifically, the plaintiffs claimed that Canada's approval of high-emission fossil-fuel export projects, like those being approved on the plaintiffs' territory, were directly working against Canada's critical 2030 GHG emissions reduction target. They alleged that Canada had failed to use discretionary decision-making power to withhold the approval of GHG-emitting projects to help bring Canada's trajectory in line with the Paris Agreement targets (Lho'imggin et al, v. Her Majesty the Queen, 2020).

Therefore, the plaintiffs were seeking for the court to "declare as unconstitutional those statutory provisions that permit such projects to continue their high greenhouse gas emissions with no provision for rescission in the face of escalating global warming" (Lho'imggin et al, v. Her Majesty the Queen, 2020).

Similar to all the cases mentioned previously, the plaintiffs claimed that the government's conduct in this regard had violated their section 7 and 15 *Charter* rights. They also cited section 91 of the *Constitution Act, 1867 ('Constitution')* in their argument, which outlined the government's duty to make laws for the peace, order and good government ('POGG') of Canada.

The defendant filed a motion to strike the case in July 2020, for which the Courts granted in November 2020. The Federal Court claimed the case was not justiciable and had no reasonable cause of action. In terms of the issue of justiciability, the court claimed that the plaintiffs did not reference specific sections of the laws that caused the specific breaches of *Charter* rights and therefore did not have a sufficient legal component to anchor their analysis (Lho'imggin et al, v.

Her Majesty the Queen, 2020). Additionally, the court believed that the issue of climate change and GHG emissions belonged in the realm of the executive and legislative branches of the government.

An Analysis of the Legal Rationale Behind *Lho'imggin v. Her Majesty*

The court claimed that the plaintiffs did not specify any specific law or government action responsible for the violation of the Charter rights, but the complaint document revealed that they did: *The Canadian Environment Assessment Act, 2012 ('Assessment Act')*. Why was the specific reference to this Act not enough to satisfy the standard of justiciability for the courts?

To begin, the courts in their decision emphasized how there was no sufficient legal component to the plaintiffs' analysis and that the plaintiffs' interpretation of the POGG power incorrectly assumed that the government had a duty to legislate to a certain standard (Lho'imggin et al, v. Her Majesty the Queen, 2020). These claims will be unpacked and subsequently analyzed.

Through analyzing the legal arguments laid out in the plaintiffs' complaint document, it was discovered that the *Assessment Act* was not used to point to problematic government conduct in relation to the *Charter* infringements. Instead, it was specifically used to point to Canada's action of approving many high GHG-emitting infrastructure projects and how that violated their commitment to keeping GHG emissions consistent with warming well below 2 degrees Celsius above pre-industrial levels.

The plaintiffs did not specify any law or government action responsible for the section 7 and 15 *Charter* violations; their tie to the *Charter* violations was instead rooted in the claim that Canada was not upholding their Paris Agreement commitments (Lho'imggin et al, v. Her Majesty the Queen, 2020).

Furthermore, the plaintiffs claimed that the POGG power outlined in section 91 of the *Constitution* gave the government a duty to legislate for the good governance of Canada. More specifically, they argued that the government had breached their duty to make laws for the peace, order and good governance of Canada "by making laws that allow it to approve the construction and operation of high GHG-emitting projects" (Lho'imggin et al, v. Her Majesty the Queen, 2020). The laws the plaintiffs referred to in this claim were situated in the *Assessment Act*.

However, this assumption of Canada's duty to legislate under its POGG power was ruled by the Courts as incorrect - there is no recognized duty to legislate based on section 91 of the *Constitution* (Lho'imggin et al, v. Her Majesty the Queen, 2020). Therefore, the specific law that the plaintiffs did cite (the Assessment Act) holds no legal tie to the arguments made, which reveals support for the Court's decision to grant the motion to dismiss based on a lack of sufficient legal component to the analysis.

A Comparison Between *Mathur v. Ontario* and *Lho'imggin v. Her Majesty*

In attempts to uncover the underlying difference in legal rationale between *Lho'imggin v. Her Majesty* and other Canadian cases that have gained more success, a comparison to *Mathur v. Ontario* will be conducted. Why was the court's ruling on justiciability and reasonable cause of action different in *Lho'imggin v. Her Majesty* in comparison to *Mathur v. Ontario*?

The key difference to note with regards to *Lho'imggin v. Her Majesty* is the difference in relief sought. Upon closer inspection of the plaintiffs' complaint document, and by comparing it to the wording in the more successful *Mathur v. Ontario* plaintiff complaint document, it is revealed that there is an underlying difference in the reliefs sought with regards to the law specified. This offers supporting evidence as to why the courts ruled differently between them.

The plaintiffs in *Lho'imggin v. Her Majesty* requested an order from the courts requiring the defendant to amend each of its environmental assessment statutes that apply to the high GHG-emitting projects (Lho'imggin et al, v. Her Majesty the Queen, 2020). This amendment would allow for the cancellation of projects in the event that the defendant is not able to meet its Paris Agreement commitment to keep GHG emissions between 1.5 and 2 degrees Celsius above pre-industrial levels.

Contrastingly, in *Mathur v. Ontario,* the plaintiffs challenged the policy decisions made in the *CTCA* legislation which repealed crucial sections of the *Climate Change Act.* The plaintiffs requested a declaration from the courts that the sections of the *Climate Change Act* that were repealed violated section 7 and 15 of the *Charter*, and were therefore of no force and effect (Mathur, et al, v. Her Majesty the Queen in Right of Ontario, 2020).

Based on this comparison, the main point of difference here can be identified as a difference in the requested role of the judiciary. In *Lho'imggin v. Her Majesty,* the plaintiffs were asking for the judiciary to order statutory policy amendments to an Act. In *Mathur v. Ontario*, the plaintiffs were asking for the judiciary to make a declaration that a statutory provision of an Act violated *Charter* rights. It can be seen how the reliefs sought by the plaintiffs in *Lho'imggin v. Her Majesty* can be argued to extend beyond the prescribed roles of the judiciary and begin to infringe upon the role of the legislative and executive branches. Therefore, it can be understood how the court in *Lho'imggin v. Her Majesty* was more hesitant to act than the court in *Mathur v. Ontario*.

INTERNATIONAL CASES

In switching lenses to the international stage, a pattern emerges of more climate litigation cases boasting favourable outcomes where the judge rules in favour of more effective climate

regulations (Setzer & Byrnes, 2020). According to the Climate Change Law of the World database, 58% of international and non-US cases (187 cases) had favourable outcomes to climate change action (Setzer & Byrnes, 2020). In order to gain a better understanding of what is holding back Canada's human rights-focused climate litigation cases, successful international cases will be investigated. Is there an element in foreign countries' domestic law that has made climate litigation cases against governments more successful?

a. Urgenda Foundation v. The State of the Netherlands ('Urgenda v. Netherlands')

In 2015, the Urgenda Foundation - a Dutch environmental group - along with 900 Dutch citizens sued the Dutch government, asserting that the Netherlands failed to take aggressive enough actions to sufficiently reduce GHG emissions (Urgenda Foundation v. The State of the Netherlands, 2018). This case went on to become a catalyst for dozens of subsequent human rights-focused climate litigation cases by setting a crucial precedent.

The plaintiffs in this case argued that the Dutch government's current GHG reduction pledge of 17% below 1990 levels was an insufficient amount in proportion to the Netherlands' fair contribution towards GHG emission reduction. At this point in time, the Paris Agreement was not yet developed and so the plaintiffs cited various other international climate change agreements as evidence for Netherlands' commitment to climate change action. These agreements included the *UN Framework Convention on Climate Change 1992*, the *Kyoto Protocol 1997* and *Doha Amendment 2012*. However, the *Cancun Agreements 2010* and *Durban 2011* were key in demonstrating specific commitments.

The *Cancun Agreements 2010* identified that Annex I Parties under the *Kyoto Protocol* were "required to reduce emissions in a range of 25-40 percent below 1990 levels by 2020"

(Urgenda Foundation v. The State of the Netherlands, 2018). *Durban 2011* noted with grave concern how countries' current 2020 GHG emissions reduction pledges were inconsistent with holding global average temperature increases below 2 or 1.5 degrees Celsius above pre-industrial levels. The UN Climate Change Conference ('COP21') in Paris that resulted in the Paris Agreement was held in response to the claims made at *Durban 2011*, which formalized these concerns into a new legally binding convention. Additionally, as further evidence of the material danger of climate change, the body of climate science that had been recently compiled by the Intergovernmental Panel on Climate Change ('IPCC') was cited.

The plaintiffs in *Urgenda v. Netherlands* also directly invoked Articles 2 and 8 of the European Convention on Human Rights ('ECHR'), claiming that the Dutch government's failure to implement aggressive GHG emissions reduction plans violated these rights. Article 2 and 8 outline European citizens' right to life and right to respect for private and family life, respectively. However, since Urgenda is a non-natural person, the rights outlined in the ECHR could not be directly applied in this case. Therefore, the plaintiff resorted to tort law and invoked Articles 2 and 8 on the basis of the state's duty of care.

Duty of Care: Duty of care refers to the legal obligation a person, organization or legal entity has to avoid acts or omissions that could reasonably cause harm to another. The government has an obligation to protect citizens' rights outlined under documents such as the Dutch Constitution and the ECHR, from real threats including climate change. Article 21 of the Dutch Constitution states that it is the government's responsibility to keep the country "habitable and to protect and improve the environment"; the plaintiffs claimed that the government violated its duty of care to uphold this right (Urgenda Foundation v. The State of the Netherlands, 2018).

2015 Ruling - Hague District Court: The court ruled that the Netherlands' current target was "below the norm of 25% to 40% for developed countries as deemed necessary in climate science and international policy" (Urgenda Foundation v. The State of the Netherlands, 2018). As a consequence of this, the court recognized that the government had violated the duty of care owed to its citizens by not doing enough to curb emissions in a way that would attempt to protect Dutch citizens from the danger of climate change.

Unlike some of the Canadian courts in its rulings, the Hague District Court claimed that the court had not entered the domain of politics with this ruling. They claimed that the judiciary must provide legal protection, even against the government (Urgenda Foundation v. The State of the Netherlands, 2018). However, in respecting the government's scope for policy making, the court kept their GHG emission reduction order along the lower limit of the 25%-45% threshold, at 25%.

This ruling was the first court decision in the world that dictated for a state to limit GHG emissions for reasons beyond statutory mandates. It was also the first case in the world to establish that a government had a duty of care obligation to reduce emissions above a certain amount (Urgenda Foundation v. The State of the Netherlands, 2018).

2018 Ruling - Hague Court of Appeal: The Dutch government appealed the District Court's ruling on 29 grounds of appeal. Among those, they argued that the lower court's decision constituted an "order to create legislation" and violated the "trias politica and the role of courts under the Dutch Constitution" (Urgenda Foundation v. The State of the Netherlands, 2018). This legal argument is important to understand in detail since a significant challenge with the human rights climate litigation cases in Canada seems to be the courts' belief that resolutions in this realm infringe upon the roles of the executive and legislative branches.

However, in the case of the *Urgenda v. Netherlands* appeal, the Court of Appeal affirmed that the courts have the obligation to apply the provisions of a treaty in which the Netherlands is a party, such as the ECHR.

2019 Supreme Court of Netherlands Ruling: The Dutch government appealed the decision once again, only for the Supreme Court of Netherlands to uphold the decision under Articles 2 and 8 of the ECHR.

A Comparison Between *Urgenda v. Netherlands* and Canadian Cases

What is fundamentally different between *Urgenda v. Netherlands* and the previous Canadian cases explored that were rejected because they were viewed to be beyond the scope of the judiciary and not justiciable? Article 2 of the ECHR outlines European citizens' right to life which is the same as section 7 of the *Canadian Charter* that outlines Canadian citizens' right to life. What differences exist in the procedures of the Canadian climate litigation cases that have made successful rulings less common?

As outlined by PhD student Karinne Lantz at Dalhousie University, in order for Canadian climate litigation cases to generate similar success to that of *Urgenda v. Netherlands*, the Canadian courts will need to decide similarly on the following issues (Lantz, 2020):

- Does the right to life under the *Canadian Charter of Rights and Freedoms* require the government to take specific action on climate change?
- Is it appropriate for courts to review climate change policies?

In *Urgenda v. Netherlands*, the courts concluded that climate change poses a "real and immediate" threat to the Article 2 right to life under the ECHR and that the Dutch government had an obligation to address this threat (Lantz, 2020). Therefore, by comparison, the obstacle that has existed among Canadian cases is establishing the connection between the threat of climate change

and the Section 7 right to life article under the *Canadian Charter*. Establishing that climate change is a direct threat to this right to life, and by extension acknowledging that the government has a *positive* obligation to act, remains ambiguous in Canada.

Another key tenet of consideration between *Urgenda v. Netherlands* and the Canadian cases are the differences that exist in the interpretation of the role of the courts. In *Urgenda v. Netherlands*, the Dutch Supreme Court viewed that the courts have the power to review the reasonableness of laws and policies, while still leaving it up to the legislature to determine the specific laws and policies that would meet the ordered obligations (Lantz, 2020). Canadian courts also have this ability to review the reasonableness of laws and policies, but this power still remains a subject of interpretation when applied to Canadian climate litigation cases (Daly, 2015). For example, in *La Rose v. Her Majesty*, the government of Canada as the defendant in the case argued that the plaintiffs were requesting that the courts create climate change response policies, which was claimed to be outside the judiciary's function. The court, in their decision, agreed that the remedy sought by the plaintiffs infringed upon the policy making functions of the executive and legislative branches (La Rose v. Her Majesty the Queen, 2020).

Furthermore, through diving deeper into the plaintiff's argument in *Urgenda v. Netherlands* that the State had failed to fulfill its duty of care obligation, a key statute in the Dutch Constitution was discovered to be a pivotal underlying pillar of this argument. When making the argument that the State violated its duty of care obligation, the plaintiff cited Article 21 of the Dutch Constitution which states: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment" (Urgenda Foundation v. The State of the Netherlands, 2018). This constitutional element does not translate into Canadian law. Therefore, a lack of mention of environmental protection in the Canadian constitution seems to pose an

additional obstacle to Canadian climate litigation cases from applying a similar legal rationale to the *Urgenda v. Netherlands* case.

b. Leghari v. Federation of Pakistan ('Leghari v. Pakistan')

In April 2015, Ashgar Leghari - an agriculturalist and Pakistani citizen - challenged the Federal Government and Government of the Punjab for their inaction to effectively carry out the *National Climate Change Policy of 2012,* and the *Framework for Implementation of Climate Change Policy (2014-2030) ('Framework')*. With drastic temperature changes and severe water scarcity emerging in recent years, there is scientific proof that places Pakistan as a direct victim of climate change and therefore Leghari argued that it is the duty of the government to take effective action to cope with these disruptive climate patterns (Barrit & Sediti, 2019).

Leghari asserted that the threat that climate change poses to citizens' water, food and energy security, and the government's failure to act upon this threat offended Article 9 of the Constitution - the right to life. Leghari also argued that the government's lack of implementation of their climate change policies violated Article 14 of the Constitution - the right to human dignity (Leghari v. Federation of Pakistan, 2015).

A key fact to note is that the *Leghari v. Pakistan* case was decided by the Green Bench of the Lahore Supreme Court. The Green Benches are courts dedicated to addressing environmental issues (Colombo, 2017). In this context, the issue of *standing* is not specifically addressed. *Standing* refers to a plaintiff's ability to show that their personal interests have been compromised by the defendant; the plaintiff illustrates that they have a personal stake in the outcome of the suit (Colombo, 2017). In Pakistan, constitutional litigation does not require a certain threshold to be

met for *standing* - if an issue is substantive, such as with human rights violations, standing is automatically granted (Colombo, 2017).

The judge of the High Court of Lahore criticized the government's inaction and thus issued two orders in September that collectively mandated the creation of a Climate Change Commission to monitor progress on the implementation of the *Framework*, set expectations for the Commission, and issued the court supervisory jurisdiction over the activities of the Commission (Barrit & Sediti, 2019).

A Comparison Between *Leghari v. Pakistan* and Canadian Cases

It is crucial to note how the court, in this case, effectively played the role of a supervisory body to ensure the provisions in an enacted law were applied and citizens' rights were protected (Barrit & Sediti, 2019). As seen with many of the Canadian cases, the judiciary is constantly worried about overstepping into the realm of the legislative and executive when ruling on climate litigation cases where the relief sought would require policy changes or implementation changes. This case is evidence of the judiciary finding a balance with legislative oversight. However, what is at the crux of this balance? What is different about the relief sought in this case from Canadian cases where the judges ruled that the case was too political to rule on? How can the success of the *Leghari v. Pakistan* case be used as a guide to direct more success in Canadian climate litigation cases?

After closer examination of *Leghari v. Pakistan* and Canadian cases such as *La Rose v. Her Majesty* and *Lho'imggin v. Her Majesty,* the key difference that underlies their variance in success becomes clear. With *Leghari v. Pakistan*, the plaintiff argued that the government was not acting in accordance with its legal commitment outlined in the *Framework*. A law had been passed and the government was not upholding its legal obligation to uphold the provisions outlined in the

enacted law (Leghari v. Federation of Pakistan, 2015). However, with *La Rose v. Her Majesty* and *Lho'imggin v. Her Majesty*, the plaintiffs argued that Canada's climate change action plan itself was not stringent enough (La Rose v. Her Majesty the Queen, 2019) (Lho'imggin et al, v. Her Majesty the Queen, 2020). In these cases, the remedy requested would require the implementation of a new climate policy or a read-in of certain amendments to the existing policy. This can explain why the Canadian courts are more cautious of maintaining a separation of powers.

Similar to *Urgenda v. Netherlands*, the decision in *Leghari v. Pakistan* demonstrated the ability for the judiciary to enforce climate change policies by leveraging reasoning rooted in human rights and international environmental principles, along with constitutional provisions (Colombo, 2017). In both cases, the judges treaded the line between the separation of powers but held that providing legal protection from government authorities and actions was within the power of the judiciary. Although *Leghari v. Pakistan* holds some fundamental differences from the Canadian cases, it acts as a symbolic illustration of how courts around the world are starting to work in favour of climate litigants and are able to act as a protective body against government action. This symbolic illustration can be used by plaintiffs and courts in future Canadian human rights climate litigation cases to navigate the separation of powers obstacle that is hindering success and direct more favourable outcomes.

c. Notre Affaire à Tous and Others v. France ('Notre Affaire v. France')

In December 2018, four nonprofit organizations filed a suit against the French state for its failure to adequately address climate change by not implementing its international, national and European climate objectives. The plaintiff groups are Foundation pour la Nature et L'Homme, Greenpeace France, Notre Affaire à Tous and Oxfam France. The plaintiffs claimed that the French

government's failure to enact effective measures to meet its climate change obligations (including reducing GHG emissions, increasing renewable energy and limiting energy consumption) violated the government's statutory duty to act (Notre Affaire a Tous and Others v. France, 2021).

The plaintiffs argued that the government has legal duties to act on climate change and they established those duties by citing the following. The *French Charter for the Environment* identifies how citizens have a constitutional right to live in a "healthy and ecologically balanced environment" and that the government has a duty of care obligation to take necessary actions to protect this right in the face of climate change. Additionally, as in *Urgenda v. Netherlands*, the plaintiffs pointed to Articles 2 and 8 of the ECHR and how the state has the obligation to take action against climate change to uphold these rights.

In establishing the state's general obligations, the plaintiffs also cited a claim on a *general principle of law* that provides citizens with a right to a preserved climate system. They argued that this general principle of law emerged from national legal sources (such as the Charter for the Environment) and international legal sources (such the World Charter for Nature, the Paris Agreement and more) (Notre Affaire a Tous and Others v. France, 2021).

General Principle of Law: Leveraging a general principle of law especially in climate change litigation cases is a rich and useful tool to drive success. The Centre for Law and the Environment at the Allard School of Law at UBC hosted a speaker series featuring Dr. Natalie Oman who discussed the use of general principles of international law in climate cases. General principles are one of the five sources of international law and, according to Oman, it is internationally recognized that norms can be elevated to the status of human rights and human rights protection norms without the ascent of states (Oman, 2021). The right to a preserved climate system is a norm established through domestic law and international treaties and, as the plaintiffs

argue, has become elevated to customary international law (Notre Affaire a Tous and Others v. France, 2021).

Although it can be believed that judges would be hesitant to cite principles that are not rooted in statutory law, the *Urgenda v. Netherlands* case illustrated how the Hague Court explicitly made references to general principles regarding the right to a preserved climate system, and it was an important guide in reaching the final decision (Urgenda Foundation v. The State of the Netherlands, 2018). Dr. Oman further detailed how general principles of international law will become a very useful tool to leverage in Canadian climate litigation cases as its practice and application gains traction on the international scale through prominent cases such as *Urgenda v. Netherlands* and *Notre Affaire v. France*.

In February 2021, the Administrative Court of Paris recognized the ecological damage caused by the government of France's inaction to combat climate change and issued the plaintiffs in *Notre Affaire v. France* their requested symbolic compensation for moral prejudice, at one euro. However, the Court deferred its decision on whether to issue an injunction that would order the government of France to enact stronger measures to achieve its climate goals.

Finally, in October 2021, the Court issued its order for the government of France to take "immediate and concrete actions to comply with its commitments on cutting carbon emissions and repair the damages caused by its inaction by December 31, 2022" (Notre Affaire a Tous and Others v. France, 2021).

The Legal Rationale Behind *Notre Affaire v. France* and a Comparison to Canadian Cases

A key point to understand with regards to *Notre Affaire v. France* is how the government's duty to act was established and how a similar method of legal rationale would pose challenges to Canadian climate litigation cases if applied.

An explicit right to live in a "healthy and ecologically balanced environment" is outlined in the *French Charter for the Environment* which gives the government an unambiguous and direct duty to protect this right. This right being embedded in statute is similar to the circumstances in *Urgenda v. Netherlands*. In the Dutch Constitution, there is a provision that outlines that it is the concern of the authorities to protect and improve the environment. Therefore, it can be said that having an explicit right to live in a healthy environment aids in the likelihood and success of establishing a government's duty to act regarding the protection of the environment.

Contrastingly, with Canadian cases, since there is no explicit right tied to the environment in the *Charter* or Constitution, plaintiffs have relied on indirect arguments where they claim that an unhealthy and inhabitable environment violates their section 7 right to life. It can be seen how this indirect argument leaves more room for interpretation and argument, which can be used to explain why success among Canadian climate litigation cases has been slow and infrequent.

3. MAIN CHARACTERISTICS OF THIS WAVE OF HUMAN RIGHTS CLIMATE LITIGATION

This section will dive into some of the common patterns of arguments and strategies that exist among the Canadian and international cases investigated, along with the main hurdles identified with each strategy used.

a. Establishing governmental duty to act

Based on the human rights climate litigation cases examined both nationally and internationally, a common pattern in the arguments raised appears to be how the plaintiffs go about establishing their respective governments' duty to act and protect their citizens' rights from the adverse effects of climate change. Among the cases investigated, there tend to be two types of governmental human rights obligations established.

The first government obligation established are those guaranteed by national constitutions and subsequent laws (Romaniszyn, 2020). For example, this obligation is identified when plaintiffs bring forth the argument that their government's actions have violated their constitutional or *Charter* rights, such as their right to life. In *ENJEU v. Canada*, the plaintiff claimed that the government's insufficient GHG emission targets violated the class members' right to life, inviolability and security protected by section 7 of the *Canadian Charter.* In both *La Rose v. Her Majesty* and *Mathur v. Ontario* the youth plaintiffs claimed that Canada's conduct had infringed upon their section 7 right to life, as they would be the ones to bear the disproportionate burden of the consequences of an unstable climate. In addition to the violations of the aforementioned *Charter* rights, the plaintiffs in *Lho'imggin v. Her Majesty* also cited section 91 of the *Constitution Act* to leverage the government's duty to "make laws for the peace, order and good government of Canada " in their arguments.

The international cases also abide by this pattern of establishing a governmental duty to act by citing national constitutions and subsequent laws. In *Urgenda v. Netherlands*, the plaintiff cited Article 21 of the Dutch Constitution that established the government's duty of care and responsibility to keep the country "habitable and to protect and improve the environment." In *Leghari v. Pakistan*, the plaintiff leveraged Articles 9 and 14 of the Constitution that protected citizens' rights to life and human dignity, respectively. In *Notre Affaire v. France,* the plaintiffs cited the French Charter for the Environment to establish the government's explicit duty to protect the environment.

The second way that a government's human rights obligations are established by plaintiffs in climate litigation cases arises by the plaintiffs citing provisions embodied in international and regional acts and mechanisms (Romaniszyn, 2020). This second category appears more prevalent

in European climate litigation cases as they are able to leverage the European Convention on Human Rights (ECHR) to establish governmental duty, in addition to leveraging their national constitutions. Both *Urgenda v. Netherlands* and *Notre Affaire v. France*, cited Articles 2 and 8 of the ECHR that outline European citizens' right to life and right to respect for private and family life, respectively.

Additionally, it is being seen how newer and more novel cases are beginning to utilize general principles of international law to establish a government's duty to act (Romaniszyn, 2020). As seen in *Notre Affaire v. France* and *Urgenda v. Netherlands*, both courts recognized the general principle regarding the right to a preserved climate system and this principle was leveraged in reaching the final court rulings in both cases (Notre Affaire a Tous and Others v. France, 2021) (Urgenda Foundation v. The State of the Netherlands, 2018). This tool of having internationally recognized norms become elevated to the status of human rights and human rights protection norms without the ascent of states poses a rich and useful tool to drive future success of human rights climate litigation cases.

However, we are still able to see this second category of government obligations being established in Canadian cases as well. In *ENJEU v. Canada* the plaintiffs not only used the *Canadian Charter* to establish the government's duty to act and protect citizens' rights from harm, but they also cited the *Quebec Charter of Human Rights and Freedoms* to dually establish the government's duty to the Quebec plaintiffs themselves (Environnement Jeunesse v. Canada, 2019). By citing the *Quebec Charter*, the plaintiffs in *ENJEU v. Canada* cited a regional act that falls under this second category.

Main Hurdles Identified with This Strategy

A common defensive argument brought forth by governments in these cases is that governments do not have a *positive* legal duty to fight climate change and prevent such infringements on human rights in this context.

For example, in the case of *Lho'imggin v. Her Majesty,* the plaintiffs cited how section 91 of the *Canadian Constitution Act* outlines the government's duty to make laws for the peace, order and good governance of Canada. The plaintiffs asserted that this gives the government the duty to legislate for the good governance of Canada (Lho'imggin et al, v. Her Majesty the Queen, 2020). However, the courts ruled this claim was incorrect and stated that there was no recognized positive duty to legislate (Lho'imggin et al, v. Her Majesty the Queen, 2020). Therefore, it can be seen how despite the plaintiffs using the argumentative strategies outlined above to establish the government's duty to act, it is not an exact science and obstacles like the one in *Lho'imggin v. Her Majesty* can commonly arise.

However, to combat this, some plaintiffs rely on the principles of duty of care, or the doctrine of public trust outlined in civil law and common law, respectively, to attempt to establish a positive legal obligation (Romaniszyn, 2020).

To illustrate this, take the Canadian case of *La Rose v. Her Majesty.* The plaintiffs argued that the government's conduct violated their obligations under the public trust doctrine (La Rose v. Her Majesty the Queen, 2019). In the Canadian context, public trust is not formally embedded in statute - only Yukon, Quebec and British Columbia have formally engaged in statutory recognition of the public trust doctrine in their legislations (Legal Aid Manitoba, 2015). In other provinces, the public trust doctrine is a common law principle and hasn't gained much traction in Canadian courts.

The defendant in *La Rose v. Her Majesty* argued that since the principle was common law and an unwritten constitutional principle, it could not be argued (La Rose v. Her Majesty the Queen, 2020). However, although the judge found the case not justiciable based on the section 7 and 15 Charter claim, the judge did find that the public trust doctrine was a justifiable matter (La Rose v. Her Majesty the Queen, 2020). Despite *La Rose v. Her Majesty* not being successful, it still inhibits the characteristics of this new wave of climate litigation and opens the door for more public trust doctrine arguments to become successful in future cases.

b. Establishing a causal link and attributing accountability

A second key characteristic of human rights climate litigation cases is that they all strive to establish a causal link between the environmental degradation resulting from climate change and subsequent negative impacts it has on human health, and the violation of traditional human rights (Romaniszyn, 2020). In order to establish this causal link and therefore attribute accountability to the respective governments, definitive science of climate change and its effects is often cited. For example, plaintiffs in many of the cases cite the climate reports created by the Intergovernmental Panel on Climate Change (IPCC) which outline scientific evidence for things such as how much each state has contributed to climate change and what GHG emission reduction level is needed to reach a certain temperature pathway. These reports, and similar sources of climate science, are therefore key tools used to help prove a state's contribution to climate change and the causality between the effect of their emission reduction or mitigation actions and the impact it has on the lives of citizens.

For example, in *Urgenda v. Netherlands*, in order to offer empirical evidence to support their claims, the plaintiff cited the IPCC reports. They claimed that the Dutch government's current

GHG emissions reduction plans were not enough to mitigate the harm caused by climate change (Urgenda Foundation v. The State of the Netherlands, 2018). The court rejected the defendant's argument regarding the fact that Netherlands' emissions were small relative to the global scale, and cited the reports to justify it (Urgenda Foundation v. The State of the Netherlands, 2018). The court sided with the plaintiff and ruled that the Dutch government's current mitigation measures of reducing emissions by 20% by 2020 were scientifically not enough. The plaintiffs in *Notre Affaire v. France* leveraged the findings in the IPCC report in a similar way (Notre Affaire a Tous and Others v. France, 2021).

The plaintiffs in *La Rose v. Her Majesty* cited an IPCC report when asserting that Canada's current targets for emission reduction by 2020 and 2030 were not enough to satisfy the GHG emission reduction commitments agreed to in the 2010 Cancun Agreement, Copenhagen Accord and 2015 Paris Agreement (La Rose v. Her Majesty the Queen, 2020). The plaintiffs in *ENJEU v. Canada* applied the same line of reasoning (Environnement Jeunesse v. Canada, 2019).

The plaintiffs in *Mathur v. Ontario* and *Lho'imggin v. Her Majesty* both indirectly referred to the climate science of the IPCC reports by outlining the targets, scientific evidence and necessary commitments within the 2015 Paris Agreement (Mathur, et al, v. Her Majesty the Queen in Right of Ontario, 2020) (Lho'imggin et al, v. Her Majesty the Queen, 2020).

Main Hurdles Identified with This Strategy

Although leveraging climate science to establish a causal link and attribute accountability has proven to be successful in many of the international climate litigation cases, the causal establishment has proven to be more difficult among Canadian cases. Among the international cases investigated, there is often a specific legislation that outlines a protected environmental right which makes establishing the connection between insufficient GHG emissions reduction and

human rights violations direct and easier to establish. In the *Urgenda v. Netherlands* case, the Dutch constitution outlined the government's responsibility to keep the country "habitable and to protect and improve the environment" (Urgenda Foundation v. The State of the Netherlands, 2018). Similarly, with the *Notre Affaire v. France* case, the French Charter for the Environment outlines the constitutional right to live in a "healthy and ecologically balanced environment" (Notre Affaire a Tous and Others v. France, 2021).

However, there is no specific environmental right protected among the Canadian constitution and *Charter*. Therefore, the violation of human rights becomes an indirect consequence of insufficient GHG emissions. Although climate science is established and cited, the standard of linking the negative consequences of climate change to an infringement of citizens' human rights becomes higher and harder to achieve in the eyes of the Canadian courts.

c. The relief sought and the question of separation of powers

A third key characteristic of human rights climate litigation cases is that the plaintiffs usually attempt to get the courts to issue orders for new and more ambitious climate change policies to be adopted by their respective governments (Romaniszyn, 2020). The types of reliefs sought vary, but the most common pattern that arises are twofold: reliefs that request declaratory rulings or compensation, and reliefs that request the adoption of new targets or mitigation measures.

The reliefs that request declaratory rulings or compensation are often sought for the symbolic purpose of having the defendants and court acknowledge the "risks and unlawfulness" of the omission levels and actions of the government (Romaniszyn, 2020). In *ENJEU v. Canada,* the plaintiff sought a declaratory ruling that the Canadian government, by adopting dangerous GHG reduction targets and failing to adopt measures that would limit global warming to 1.5

degrees Celsius, violated the class members' right to life, contrary to the *Canadian Charter* and the *Quebec Charter* (Environnement Jeunesse v. Canada, 2019). In *Mathur v. Ontario*, the plaintiffs sought a declaration that the Target violated the rights of Ontario youth and future generations under section 7 and 15 of the *Charter*, and was therefore of no force and effect (Mathur, et al, v. Her Majesty the Queen in Right of Ontario, 2020).

More often, and more importantly, the plaintiffs in these climate litigation cases seek relief from the courts in the form of an order to adopt new GHG emission targets or adequate climate change mitigation measures. In *ENJEU v. Canada,* the plaintiff applied for an injunction to adopt measures that would curb climate change. In *La Rose v. Her Majesty,* the plaintiffs sought an order from the courts requiring the government to adopt a Climate Recovery Plan that was consistent with sufficient GHG emissions reduction targets. In *Notre Affaire v. France,* the plaintiffs requested an order that the government employ actions to effectively reduce their GHG emissions to be in line with the 1.5 degrees Celsius global temperature threshold. Even more specifically, in *Urgenda v. Netherlands*, the plaintiff sought a relief that would legally bind the Dutch government to an emission reduction rate of 25-40% by the year 2020 - the courts granted this relief but specified a 25% reduction threshold.

Main Hurdles Identified with This Strategy

The main hurdle with this characteristic of climate litigation doubles as one of the biggest hurdles facing the human rights climate litigation space currently. When plaintiffs in these cases seek reliefs in the form of new targets and climate mitigation measures, this raises the key question of whether the courts have the jurisdiction and power to grant orders that would require the creation or modification of government policies. It is the opinion of many courts that the decision to set targets and create policy is entirely a political responsibility and that if the judiciary were to grant

these orders, it would violate the separation of powers between the judiciary, legislative and executive branches. From the Canadian cases investigated in this paper, it is evident that this hurdle is very prominent in the Canadian human rights climate litigation space.

For example, the plaintiffs in *Lho'imggin v. Her Majesty* requested the courts to order statutory policy amendments to *The Canadian Environment Assessment Act*. This was viewed by the courts as extending beyond the prescribed role of the judiciary and into the powers under the other two branches (Lho'imggin et al, v. Her Majesty the Queen, 2020). The courts in the *La Rose v. Her Majesty* similarly claimed that Canada's overall response to climate change was a political matter belonging under the jurisdiction of the legislative and executive branches (La Rose v. Her Majesty the Queen, 2020).

However, legal proceedings worldwide are beginning to illustrate how the courts can walk the line between the separation of powers effectively and still make positive contributions to the matters of climate change. In *Urgenda v. Netherlands*, the Hague District Court ruled that the Netherlands' current GHG emissions target was the norm deemed necessary in climate science. The court emphasized how this ruling did *not* infringe upon the domain of politics as they viewed the judiciary as having the role of providing legal protection, even against the government (Urgenda Foundation v. The State of the Netherlands, 2018). To balance the government's role of policy making, the court had kept their order along the lower limit of the percentage threshold.

The courts in the *Leghari v. Pakistan* illustrated similar reasoning. In this case, a law had been passed and the government was not abiding by its legal obligation to uphold the provisions outlined in the enacted law. The decision by the courts to enforce climate change policies was therefore the judiciary providing legal protection from government authorities and actions (Leghari v. Federation of Pakistan, 2015).

4. AN EXPLANATION FOR RECENT GAINS IN TRACTION

This section will offer a few potential explanations as to why human rights climate litigation cases have been gaining traction nationally and internationally.

Firstly, according to a recent report from the United Nations Environment Programme, there has been a "growing number of national and sub-national laws that address climate change directly" (Leuschen, 2019). Including provisions governing broad government actions related to climate change in legal statutes provides a key foothold for non-state actors to hold governments accountable for their climate-related actions. This foothold can be used to explain why more plaintiffs have launched human rights climate litigation cases against governments and why this category of climate litigation has been gaining traction.

The following statistics are effective at illustrating the increase in national and sub-national laws that address climate change directly. By 2012, 39% of countries accounting for 73% of the population and 67% of GHG emissions had climate law and strategies in place (Somanathan, Sterner, & Sugiyama, 2014). These 2012 metrics represent a large increase from the metrics in 2007, where only 23% of countries accounting for 36% of the population and 45% of GHG emissions were covered by climate law and strategies (Somanathan, Sterner, & Sugiyama, 2014).

Secondly, the Paris Agreement brought into effect in 2015 offered a new legal basis and standard in which to assess climate change actions by governments. The adequacy of national laws and policies with regards to GHG emissions reductions could be more dynamically assessed due to the Agreement's greater flexibility and greater accuracy of national contributions to climate change (Romaniszyn, 2020). However, there have been climate litigation cases in the past that have attempted to cite similar international climate agreements to support their arguments, like the Kyoto Protocol, but have not gained similar success to the cases in the new wave of human rights climate litigation. For example, in the case *Friends of the Earth v. The Governor in Council and*

Others, the plaintiff claimed that the Canadian government had breached its duties under the *Kyoto Protocol Implementation Act, 2007* (KPIA) by failing to publish regulations and missing deadlines (Friends of the Earth v. Canada, 2009). While the plaintiff sought a declaration that the government failed to meet its legal requirements under the KPIA, the court ruled that the legislation was not justiciable (Friends of the Earth v. Canada, 2009). By comparing the Paris Agreement to the Kyoto Protocol a few key differences stand out that could possibly explain why the Paris Agreement has been more successful at offering support for climate litigation cases.

The Paris Agreement outlined a system where country targets would be reassessed over time to bring the world closer to its target pathway (Denchak, 2021). This provision resulted in the requirement for countries to announce their new GHG emission reduction targets every five years, which is known as the country's nationally determined contributions (NDCs). The Kyoto Protocol aimed to achieve this dynamic objective but had no specific requirement in the agreement to do so (Denchak, 2021). This requirement creates a greater responsibility for countries to adhere to which offers another strong foothold for plaintiffs to leverage when launching their human rights climate litigation lawsuits and can further explain the category's recent gains in traction.

Finally, the recent surge in human rights climate litigation cases can also be attributed to the growth in the youth climate movement. The passion and rigor in which the youth support climate activism has revitalized the energy surrounding climate litigation. In Canada, the cases of *ENJEU v. Canada, La Rose v. Her Majesty* and *Mathur v. Ontario* all involved youth plaintiffs standing up to their governments in court. Internationally, the youth climate action movement follows a similar pattern. The cases of *Juliana v. U.S*, *Ali v. Federation of Pakistan, Do-Hyun Kim et al. v. South Korea*, and *Neubauer, et al. v. Germany* are just a few examples of international cases with youth plaintiffs. The youth in these cases are all able to establish standing in these cases

by arguing that they are the ones who will be disproportionately affected by a world destroyed by the climate crisis if governments do not take adequate action now to curb its effects.

5. CONCLUSION

Human rights-focused arguments have prominently entered the climate litigation spotlight both on the Canadian and international stage. This paper investigated Canadian and international human rights climate litigation cases against governments and uncovered the similarities and differences that existed between their legal rationale and pattern of arguments. After diving into the individual cases, conclusions on the main characteristics of these cases were devised and the hurdles to the prosperity of these cases were analyzed. Finally, possible explanations for why human rights climate litigation cases have been gaining recent traction were explored.

The trends, patterns and characteristics discovered through this paper have made it appear hopeful that human rights climate litigation cases will continue to move positively towards greater success. Although Canada has experienced many legal hurdles and obstacles compared to the international cases investigated, the changing nature of the legal environment and system internationally poses hope for the Canadian system to make similar progress.

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