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Youth and Indigenous Voices in Climate Justice: Leveraging Best Practices from U.S. and Canadian Litigation

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**YOUTH AND INDIGENOUS VOICES IN CLIMATE JUSTICE:
LEVERAGING BEST PRACTICES FROM U.S. AND CANADIAN
LITIGATION**

Randall S. Abate*

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I. INTRODUCTION

Climate litigation has exploded around the world over the past two decades. A recent United Nations Environment Programme (“UNEP”) report confirmed that climate litigation nearly doubled worldwide from 2017 to 2020.¹ These cases began with the primary goal of compelling governments at the federal, state, or provincial level to regulate climate change more effectively. While 80% of these lawsuits have been filed against governments around the world,² a growing number of these suits have been filed against private sector entities seeking damages for their contribution to climate change adaptation costs.³

Also, climate litigation has blazed new trails of government accountability. Governments typically have discretion to determine whether to respond to social and environmental problems, and to what degree they will respond should they choose to act. This tradition is beginning to change, due in part to landmark climate litigation cases.⁴ In some instances, these lawsuits seek to raise the ambition of existing climate change regulation initiatives,⁵ whereas others seek to compel such

1. Michael Burger & Daniel J. Metzger, *Global Climate Litigation Report: 2020 Status Review*, UNITED NATIONS ENV'T PROGRAMME & SABIN CTR. FOR CLIMATE CHANGE LAW 1, 4 (July 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> [<https://perma.cc/3PEF-MUK8>]; Margot Young, *Kids Facing Effects of Climate Change Are Taking Their Governments to Court*, LAW NOW (Mar. 3, 2020), <https://www.lawnow.org/kids-facing-effects-of-climate-change-are-taking-their-governments-to-court/> [<https://perma.cc/4WNX-3EG7>] (this recent spike in activity enhances an active line of cases that traces its origins to 1990; the Sabin Center for Climate Change Law at Columbia Law School has confirmed at least 1,390 legal challenges to governments and fossil fuel corporations in more than 25 countries since 1990).

2. Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2020 Snapshot*, LONDON SCH. OF ECON. AND POLITICAL SCI. (July 2020), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf [<https://perma.cc/8GLC-2CZU>].

3. For a discussion of this recent line of cases filed by U.S. states, counties, and cities seeking recovery of damages from fossil fuel industry defendants for their contribution to climate adaptation costs, see Randall S. Abate, *Anthropocene Accountability Litigation: Confronting Common Enemies to Promote a Just Transition*, 46(S) COLUM. J. ENV'T L. 225, 255–60 (2021); see also *City of Hoboken v. ExxonMobil Corp.*, No. 2-CV-14243, 2021 WL 4077541 (D.N.J. Sept. 8, 2021) (granting City of Hoboken’s motion to remand to state court for trial on ExxonMobil’s potential liability for the city’s climate adaptation costs).

4. See, e.g., *Urgenda Found. v. Kingdom of the Netherlands*, ECLI:NL:HR:2019:2007 (HR, Netherlands Dec. 20, 2019).

5. See, e.g., *Mathur v. Her Majesty the Queen in Right of Ontario*, [2020] ONSC 6918.

initiatives when governments have chosen not to act.⁶ Many of these lawsuits seek government accountability in the wake of commitments made in the Paris Agreement in 2015.⁷

The United States and Canada are at the forefront of this surge in climate litigation, especially with respect to climate justice litigation.⁸ In the U.S., climate litigation was propelled by the success of the landmark case, *Massachusetts v. EPA*.⁹ In this case, the Supreme Court of the United States concluded that the state of Massachusetts had standing to seek to compel the Environmental Protection Agency (“EPA”) to regulate carbon dioxide emissions from new motor vehicles, even when the agency decided not to do so in an exercise of its administrative discretion.¹⁰ This victory was ensnared in litigation for an entire decade until it was finally implemented as part of the Obama Administration’s Clean Power Plan, only to be undercut by the Trump Administration shortly thereafter in the Affordable Clean Energy Rule.¹¹

Apart from the protracted implementation process in the wake of *Massachusetts v. EPA*, the hope that the case inspired for future climate litigation in the U.S. was undermined in a series of disappointing outcomes

6. See, e.g., *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020).

7. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

8. For purposes of this article, “climate justice litigation” refers to lawsuits filed by vulnerable communities that are disproportionately impacted by climate change and whose interests are inadequately protected under existing law. Although these suits have sought relief from both governmental and private sector defendants, the focus of this article is on suits against governmental defendants.

9. 549 U.S. 497 (2007).

10. *Id.* at 533–35.

11. For a discussion of this transition, see Jeff Brady, *Trump Administration Weakens Climate Plan to Help Coal Plants Stay Open*, NPR (June 19, 2019), <https://www.npr.org/2019/06/19/733800856/trump-administration-weakens-climate-plan-to-help-coal-plants-stay-open> [<https://perma.cc/NUT4-UHFL>]; but see Steven Mufson, *Federal Court Scraps Trump Administration’s Power Plant Rule*, WASH. POST (Jan. 19, 2021), <https://www.washingtonpost.com/climate-environment/2021/01/19/federal-circuit-court-scraps-trump-administration-power-plant-rules/> [<https://perma.cc/Y45L-T89D>] (this Trump-era rule was invalidated shortly thereafter in 2021).

in subsequent cases.¹² This line of cases sought injunctive relief and damages using a creative theory that combined public nuisance and the federal common law of interstate pollution. After efforts seeking injunctive relief against several leading power companies to reduce their carbon dioxide emissions proved unsuccessful,¹³ the focus of these cases shifted to damage actions brought by disproportionately impacted communities. During this transition, climate justice litigation was launched in the U.S.¹⁴

More recently, the focus of climate justice litigation in the U.S. has shifted back predominantly to claims that seek to compel governmental entities to protect vulnerable populations, such as Indigenous communities and “future generations,”¹⁵ in adapting to the disproportionate burdens they bear from climate change impacts.¹⁶ Notably, several climate justice cases are pending in state courts in the wake of the landmark case, *Juliana v. United States*.¹⁷ Of these, the most

12. The challenge of implementing landmark climate litigation victories is not limited to the U.S. *See, e.g.*, *Future Generations v. Ministry of the Env't*, No. 11001-22-03-000-2018-00319-01 (Sup. Ct. of Justice, Colombia Apr. 5, 2018), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf [<https://perma.cc/24A7-5MRQ>] (the Supreme Court of Colombia’s decision calling for an “intergenerational pact for the life of the Colombian Amazon,” which requires select federal agencies in Colombia to reduce deforestation in the Colombian Amazon to zero, is still being implemented more than three years after the decision was issued).

13. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 415 (2011).

14. Two prominent cases in this transition are *Comer v. Murphy Oil U.S.A.*, 585 F.3d 855 (5th Cir. 2009) and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). For a discussion of these cases, see *infra* Part II.A.

15. The term “future generations” has many definitions. For purposes of this article, this term refers to individuals who are 35 years old or younger and the unborn. For a discussion of competing theories and approaches to define “future generations,” see RANDALL S. ABATE, *CLIMATE CHANGE AND THE VOICELESS: PROTECTING FUTURE GENERATIONS, WILDLIFE, AND NATURAL RESOURCES* 43–50 (2019).

16. Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?* in *CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES* 545 (Randall S. Abate, ed. 2016).

17. 947 F.3d 1159 (9th Cir. 2020).

significant is *Held v. State*,¹⁸ which is proceeding to trial in Montana state court as of this writing.

Canada's climate justice litigation history also evolved in different stages or waves, with a trajectory that is similar to, yet different from, the U.S. experience.¹⁹ The first wave featured actions similar to *Massachusetts v. EPA*, seeking to compel the federal government to regulate climate change more effectively overall. More recent efforts have focused on youth and Indigenous litigants seeking more ambitious climate regulation to diminish the disproportionate burdens they bear from climate change impacts.

Part II of this article describes the evolution of youth and Indigenous climate justice litigation in the U.S. and Canada. Part III examines recent climate justice litigation in the U.S. and Canada and highlights the gains and setbacks in these cases. Part IV offers three recommendations to advance youth and Indigenous climate justice litigation in each country: (1) adjusting the type and scope of relief sought, (2) coupling the claims with rights-based arguments targeting laws at the federal and provincial levels in Canada and at the state level in the U.S.,²⁰ and (3) capitalizing on the intersectionality between youth and indigenous community claims.

II. EVOLUTION OF YOUTH AND INDIGENOUS CLIMATE JUSTICE LITIGATION

This section addresses the first wave of climate litigation in the U.S. and Canada. In the U.S., this line of cases involved federal common

18. *Held v. State*, No. CDV-2020-307, (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>]. For a discussion of the *Held* case, see *infra* Part III.A.

19. See 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*, 17 J. L. & EQUALITY 1, 24–25 (2021) (identifying a “first” and “second” wave of climate litigation in Canada, the latter focusing exclusively on Canadian Charter-based claims).

20. Courts have an opportunity to recognize what these provisions protect. It is possible for courts to read a right to a stable climate into the U.S. Constitution's Due Process Clause (like the *Juliana* plaintiffs sought), similar to when the U.S. Supreme Court read the right to same-sex marriage into the Due Process Clause in the *Obergefell* case. The existing rights-based protections under Canadian law and U.S. state law offer a stronger foundation on which to assert climate justice claims with respect to a specific climate change law at issue. *Juliana*, 947 F.3d at 1177; *Obergefell v. Hodges*, 574 U.S. 1118 (2015).

law claims that sought to compel more ambitious efforts to mitigate climate change or to secure damages from private sector entities in response to the disproportionate burdens of climate change impacts on vulnerable populations. Two of those vulnerable communities included victims of Hurricane Katrina²¹ and a small Native Alaskan community,²² both of which saw their claims dismissed as nonjusticiable on “federal displacement” grounds.²³ The first wave of Canadian climate litigation targeted federal laws and policies and sought to compel the government to address climate change more effectively. These claims were deemed to be too broad and imprecise.²⁴ Like the first wave of cases in the U.S., those cases also were dismissed as nonjusticiable.²⁵

A. The United States

In the U.S., environmental litigation has a long and proud history of creativity and persistence. These values are perhaps best illustrated in the federal common law line of climate litigation cases. Beginning in 2004, these cases involved a unique combination of public nuisance doctrine and the federal common law of interstate pollution to address climate change matters in federal court.²⁶ These efforts persisted for about one decade before ultimately transitioning to other legal theories to pursue climate justice in the courts.

The theory of combining the public nuisance doctrine and the federal common law of interstate pollution was first applied when eight states and New York City sued five major electric power corporations in *American Electric Power Company, Inc. v. Connecticut*.²⁷ At the time the complaint was filed, the defendants were the five largest emitters of carbon

21. *Comer v. Murphy Oil U.S.A.*, 585 F.3d 855 (5th Cir. 2009).

22. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 2000 (2013).

23. “Federal displacement” refers to dismissal of claims for federal common law relief as “displaced” because the plaintiffs should have sought relief under the applicable federal statutory framework, which in these cases is the federal Clean Air Act. For a discussion of *Comer* and *Kivalina* and the federal displacement grounds for dismissal in this line of cases, see Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 214–25 (2010).

24. *See infra* Part II.B.

25. *Id.*

26. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011); *Comer*, 585 F.3d 855; *Native Village of Kivalina*, 696 F.3d 849, *cert. denied*, 569 U.S. 2000 (2013).

27. 564 U.S. 410 (2011).

dioxide in the nation, collectively emitting approximately 25% of the nation's carbon dioxide from the electric power sector and approximately 10% of the nation's total carbon dioxide emissions.²⁸ The plaintiffs sought an injunction to compel the defendants to reduce their emissions by a specified percentage.²⁹ This case was dismissed on political question grounds in the U.S. District Court for the Southern District of New York,³⁰ but the U.S. Court of Appeals for the Second Circuit vacated that dismissal.³¹ The U.S. Supreme Court reversed, holding that “[t]he Clean Air Act and the EPA action the Act authorizes displace any federal common-law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants.”³²

While not a climate justice lawsuit in its own right, *American Electric Power* laid a foundation for subsequent efforts to retool the federal common law avenue for relief in the courts. Notably, climate justice communities filed suits in two significant cases, seeking recovery for damages from the disproportionate burdens of climate change that necessitated relocation of these communities. In *Comer v. Murphy Oil U.S.A.*,³³ victims of Hurricane Katrina filed suit against 34 energy companies seeking damages for the companies' collective contributions to global climate change, which contributed to the increased intensity of Hurricane Katrina that ultimately displaced the plaintiffs. The U.S. District Court for the Southern District of Mississippi dismissed the case on standing and political question grounds.³⁴ The U.S. Court of Appeals for the Fifth Circuit reversed the decision and offered compelling reasoning to explain why the case should not be barred on political question grounds.³⁵ Unfortunately, the case was later vacated on other grounds.³⁶

28. Complaint ¶ 2, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 1:04-cv-05669), 2004 WL 5614397.

29. *Id.* ¶ 186.

30. *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005).

31. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 315 (2d Cir. 2009).

32. *Id.* at 424.

33. 585 F.3d 855 (5th Cir. 2009).

34. *Id.* at 860.

35. *Id.* at 860, 870 (“[T]he Mississippi common law tort rules questions posed by the present case are justiciable, not political, because there is no commitment of those issues exclusively to the political branches of the federal government by the Constitution itself or by federal statutes or regulations.”).

36. *Comer v. Murphy Oil U.S.A.*, 607 F.3d 1049 (5th Cir. 2010).

Similarly, in *Native Village of Kivalina v. ExxonMobil Corporation*,³⁷ a federally recognized Native Alaskan Village of approximately 400 residents was unable to avoid the “federal displacement” reasoning from *American Electric Power* in its lawsuit against multinational oil and gas companies. The plaintiffs live on a remote and narrow strip of land 70 miles north of the Arctic Circle, situated between a sea and a lagoon.³⁸ This land is severely compromised by sea level rise and coastal erosion. The U.S. Army Corps of Engineers projected that the area would no longer be inhabitable within a few decades, and estimated the cost of relocating the community 10 miles inland at approximately \$95–\$125 million.³⁹ The U.S. Government Accountability Office estimated the relocation costs to range as high as \$400 million.⁴⁰ The plaintiffs filed suit against 22 leading multinational oil and gas companies; they sought damages for the companies’ contributions to global climate change, which, in turn, accelerated the demise of the Native Village of Kivalina.⁴¹ The U.S. Court of Appeals for the Ninth Circuit affirmed the U.S. District Court for the Northern District of California’s dismissal of the case, holding that the plaintiffs lacked standing and that the claim was nonjusticiable on political question grounds.⁴²

The outcome in *Kivalina* was disappointing for several reasons. First, the Ninth Circuit failed to distinguish this case from *American Electric Power* on the basis that the *Kivalina* plaintiffs were seeking damages rather than injunctive relief. In *Comer*, the Fifth Circuit recognized the importance of this distinction, but its decision was subsequently vacated on other grounds.⁴³ Second, the Ninth Circuit missed an opportunity to capitalize on *Massachusetts v. EPA* to recognize the unique capacity of the federally recognized Native Village of Kivalina as a quasi-sovereign entity.⁴⁴ The Native Village of Kivalina was denied the opportunity to benefit from the “special solicitude” reasoning from *Massachusetts v. EPA*, which could have allowed the village, as a sovereign Indian nation, to bring the case on behalf of its people and avoid

37. 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 569 U.S. 2000 (2013).

38. *Id.* at 868–69.

39. Complaint ¶ 186, *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (N.D. Cal. 2012) (No. 4:08-CV-01138).

40. *Id.*

41. *Native Village of Kivalina*, 696 F.3d at 853–54.

42. *Id.* at 853.

43. *Comer v. Murphy Oil U.S.A.*, 598 F.3d 208, 210 (5th Cir. 2010), *vacated*, 607 F.3d 1049 (5th Cir. 2010) (en banc).

44. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

dismissal on standing grounds.⁴⁵ Third, *Kivalina* may have been the right case at the wrong time. If the plaintiffs in that case had the benefit of the more advanced climate attribution science that supports climate litigation in 2022, the Ninth Circuit may not have had the causation concerns it expressed in dismissing the case on standing grounds in 2012.⁴⁶ Finally, one decade after dismissal, the Native Village of Kivalina remains without a remedy for the imminent forced displacement from its homeland that it faces as a result of climate change.

B. Canada

Much like the U.S. experience, climate litigation in Canada evolved in distinct stages. A “first wave”⁴⁷ of Canadian climate litigation consists of the following two cases: *Friends of the Earth v. The Governor in Council and Others*⁴⁸ and *Turp v. Minister of Justice and Attorney General of Canada*.⁴⁹

In *Friends of the Earth*, a Canadian environmental nongovernmental organization filed three applications for judicial review seeking declaratory and injunctive relief in connection with a succession of alleged breaches of duties from the Canadian government arising under the Kyoto Protocol Implementation Act (“KPIA”).⁵⁰ The applicant claimed that the Minister of the Environment breached his duty to comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change (“Kyoto Protocol”) as required under the KPIA because the Canadian government’s Climate Change Plan in 2007 did not embrace the targets set by the Kyoto Protocol.⁵¹ In response, the Canadian Government characterized many of its responsibilities as discretionary.⁵² In a unanimous ruling, the Federal Court of Appeal (“FCA”) ultimately dismissed the case on justiciability grounds because the KPIA involved

45. *Id.* at 536 (discussing special solicitude); *Native Village of Kivalina*, 696 F.3d at 858.

46. For a discussion of the positive impact of the IPCC’s August 2021 Sixth Assessment report on climate litigation, see *infra* Part IV.B.

47. See Chalifour, Earle & Macintyre, *supra* note 19, at 24–25 (identifying a “first” and “second” wave of climate litigation in Canada, the latter focusing exclusively on Charter-based claims).

48. [2008] FC 1183.

49. [2012] FC 893.

50. *Friends of the Earth*, [2008] FC at 2.

51. *Id.* ¶¶ 1–11.

52. *Id.*

matters of public policy and legislative choices pertaining to the executive branch of government, which were not subject to judicial scrutiny.⁵³

In 2011, almost three years after the *Friends of the Earth* decision, the Canadian Government decided to formally withdraw from the Kyoto Protocol. Shortly thereafter, the plaintiff in *Turp* sought judicial review of the government's decision to withdraw from the Kyoto Protocol on the basis of the "rule of law, the separation of powers principle, and the democratic principle."⁵⁴ Similar to *Friends of the Earth*, the FCA ultimately dismissed the case as nonjusticiable. The FCA emphasized that the government's decision to withdraw from an international treaty was a matter of foreign affairs within the royal prerogative, and thus exclusively within the executive branch of the government.⁵⁵

As the discussion above demonstrates, both "first wave" Canadian climate litigation cases involved justiciability barriers that litigants in the U.S. and several countries have faced in climate litigation. Challenges to governmental decisions or policies that are inherently discretionary and rest within the powers of the legislative or executive branches have been deemed outside the courts' adjudicative capacity.⁵⁶

The initial phase of climate litigation in the U.S. and Canada sought to use the courts as a vehicle to complete the work of the political branches where there was a failure to act or a failure to act sufficiently. While these efforts were laudable, it is not surprising that justiciability barriers barred their ability to proceed. In contrast, the *Urgenda Foundation v. Kingdom of the Netherlands*⁵⁷ case is among the few climate litigation cases in the world where these justiciability barriers did not bar the case from proceeding.

III. RECENT AND PENDING CASES IN THE U.S. AND CANADA

The unsuccessful efforts in the first phase of climate litigation in the U.S. and Canada prompted a flurry of retooled strategies in both

53. *Id.* ¶¶ 42–48.

54. [2012] FC 893 at 6.

55. *Id.* at 8.

56. Compounding this jurisdictional barrier, the plaintiffs in the U.S. also have struggled to establish standing in such cases because they are deemed to be asserting generalized grievances that are not considered injuries specific to the plaintiffs—and because their concerns are deemed to be better addressed by the legislative branch. A discussion of standing issues is beyond the scope of this article; for a helpful analysis of standing barriers in climate litigation, see generally Ian R. Curry, *Establishing Climate Change Standing: A New Approach*, 36 PACE ENV'T L. REV. 297 (2019).

57. ECLI:NL:HR:2019:2007 (HR, Netherlands Dec. 20, 2019).

countries that has yielded a more productive second phase within the past five years. During this period, youth and Indigenous plaintiffs in both countries have filed significant cases with mixed results. Some valuable lessons emerged from the successes and shortcomings of these cases.

This section describes these recent and pending cases, focusing on common themes and distinctions in the theories and outcomes within and between the two countries. In the U.S., youth and Indigenous plaintiffs have filed promising lawsuits in several state courts; in Canada, suits have been filed primarily at the federal level, with one very promising suit in Ontario.⁵⁸ Canadian and U.S. plaintiffs in this line of cases share the common feature of being disproportionately burdened by climate change impacts in a variety of contexts, such as sea level rise, drought, wildfires, reduced access to natural resources, and the threat of climate change displacement.

A. *Juliana and Post-Juliana Cases in State Courts*

In the wake of the defeat of federal common law climate cases, climate justice litigation in the U.S. shifted its focus to a comprehensive effort spearheaded by the environmental nongovernmental organization, Our Children's Trust ("OCT").⁵⁹ OCT filed cases in all 50 states and against the federal government applying atmospheric trust litigation ("ATL") theory.⁶⁰ The most prominent of these cases is *Juliana v. United States*, which has attracted international attention. *Juliana* is the ambitious "wish list" case for youth plaintiffs seeking protection at the federal level. The youth plaintiffs asserted an expansive reading of the public trust doctrine (to include government stewardship of the atmosphere) and the U.S. Constitution (to recognize a right to a stable climate).⁶¹ *Juliana*

58. See, e.g., *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022), *reh'g denied* (Feb. 25, 2022); *Held v. State*, No. CDV-2020-307, (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>]; *Mathur v. Her Majesty the Queen in Right of Ontario*, [2020] ONSC 6918.

59. *Mission Statement, OUR CHILDREN'S TR.*, <https://www.ourchildrenstrust.org/mission-statement> [<https://perma.cc/G4WW-5KE5>] (last visited Apr. 1, 2022).

60. Professor Mary Wood of the University of Oregon School of Law pioneered the use of atmospheric trust litigation (defined in this article as "ATL") as a theory of climate justice relief. For a discussion of the conceptual foundations of ATL, see generally MARY CHRISTINA WOOD, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* (2013).

61. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

sought a comprehensive injunctive remedy based on these ambitious common law and constitutional law theories, whereas the post-*Juliana* state cases have relied on state law provisions that require protection for plaintiffs from the effects of inadequate state climate change laws and policies. This strategy has gained traction in seeking declaratory relief.

In 2016, Judge Ann Aiken's landmark lower court decision in *Juliana* offered great hope for ATL in both federal and state courts. In denying the federal government's motion to dismiss, Judge Aiken concluded that the atmospheric trust dimensions of the plaintiffs' arguments, and the rights-based arguments under the U.S. Constitution, deserved to proceed to trial.⁶² With the possible exception of *Urgenda*, Judge Aiken's reasoning to support her decision is perhaps the most whole-hearted embrace of the merits of a climate justice case anywhere in the world. Unlike many other climate justice cases in the U.S. and Canada, she held that the plaintiffs' concerns were justiciable, and that climate change regulation is not the exclusive domain of the political branches.⁶³ Judge Aiken also did not support dismissal of the case on standing grounds.⁶⁴

On the coattails of this zenith of climate justice litigation in the U.S., the years that followed Judge Aiken's decision were full of hope, albeit tinged with a growing sense of frustration and fatigue. *Juliana* was originally set for trial before the U.S. District Court for the District of Oregon in October 2018, but the federal government pursued every conceivable procedural tactic to prevent the case from getting to trial.⁶⁵ Unfortunately, those efforts ultimately prevailed in January 2020.⁶⁶

Despite this massive setback in *Juliana*, ATL state court cases have provided, and continue to offer, a valuable opportunity to secure climate justice relief.⁶⁷ Federal courts' failure to embrace ATL as a viable

62. *Id.*

63. *Id.* at 1262–63.

64. *Id.* at 1242–49.

65. For a detailed discussion of the federal government's relentless procedural maneuvers to seek dismissal of the *Juliana* case from 2016 through 2019, see ABATE, *supra* note 15, at 68–74.

66. *Juliana v. United States*, 947 F.3d 1159, 1173, 1175 (9th Cir. 2020) (dismissing the case on standing and political question doctrine grounds).

67. Anna Christiansen, *Up in the Air: A Fifty-State Survey of Atmospheric Trust Litigation Brought by Our Children's Trust*, 2020 UTAH L. REV. 867, 886–89 (2020).

theory has helped reshape and embolden these efforts.⁶⁸ State court litigation may offer more opportunities for success due to the flexibility of state doctrines and the plaintiffs' ability to focus on geographically narrower issues to support their requests for relief.⁶⁹ Although ATL claims at the state level have distinct strategic advantages compared to their federal court counterparts, the state cases have nonetheless faced many of the same obstacles at issue in federal ATL claims. This section considers recent developments in ATL in three states—Oregon, Alaska, and Montana—and the lessons they offer.

1. Oregon

In *Chernaik v. Kitzhaber*,⁷⁰ the plaintiffs sued the State of Oregon, alleging that the state failed to implement adequate emission limitations to protect public trust resources.⁷¹ The plaintiffs sought a declaration that the atmosphere is a public trust resource.⁷² The Oregon Circuit Court dismissed the case on political question grounds.⁷³ The Oregon Court of Appeals reversed, holding that the court is authorized to make a determination on the scope of public trust resources and whether Oregon is subject to a fiduciary obligation to protect public trust resources.⁷⁴

On remand from the appellate court, the circuit court ruled for Oregon, concluding that the plaintiffs' request should be directed to the political branches.⁷⁵ In 2019, the appellate court upheld the circuit court's decision.⁷⁶ Although it acknowledged that the public trust doctrine is flexible, the appellate court rejected the plaintiffs' request to recognize that: (1) the public trust doctrine includes protection of the atmosphere and

68. See *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 20 (D.D.C. 2012) (holding that the public trust doctrine is a doctrine held between state governments and their citizens); see also *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012) (“[T]he public trust doctrine remains a matter of state law.”).

69. Matthew Schneider, *Where Juliana Went Wrong: Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level*, 41 ENVIRONMENT & POLICY J. 47, 57–58 (2017).

70. 328 P.3d 799 (Or. Ct. App. 2014).

71. *Id.* at 801, 805.

72. *Id.* at 801–02, 808.

73. *Id.* at 803.

74. *Id.* at 808.

75. See *Chernaik v. Brown*, No. 16-11-09273, 2015 WL 12591229, *10 (Or. Cir. Ct. May 11, 2015).

76. *Chernaik v. Brown*, 436 P.3d 26 (Or. Ct. App. 2019).

other resources, and (2) the state has a fiduciary obligation to protect those public resources.⁷⁷

2. Alaska

Two cases in Alaska state courts show the promise of ATL theory when suits are coupled with state environmental rights amendments enshrined in state constitutions. In 2011, in *Kanuk v. Alaska*,⁷⁸ six youth plaintiffs from across the state sued Alaska's Department of Natural Resources. The plaintiffs sought a declaration that the Alaska Constitution's protection of natural resources included the atmosphere, and that Alaska's Department of Natural Resources failed to fulfill its obligation as trustee by not limiting greenhouse gas ("GHG") emissions.⁷⁹

Much like prior decisions involving ATL, the Alaska Superior Court found the decision to be a matter of policy and dismissed it on justiciability grounds.⁸⁰ On appeal, the Alaska Supreme Court held that the youth plaintiffs had standing and that the declaratory relief requested was justiciable.⁸¹ Although this decision was a valuable step forward for the youth plaintiffs, the Alaska Supreme Court dismissed the complaint because it found a declaratory judgment would neither advance the plaintiffs' nor the state's interests.⁸²

In 2017, the youth plaintiffs filed another suit, *Sinnok v. State*.⁸³ In *Sinnok*, the youth plaintiffs' complaint alleged violations of due process rights and the public trust doctrine.⁸⁴ Despite the additional claims for relief, the Alaska Superior Court dismissed the case in 2018 on the same grounds as in *Kanuk*.⁸⁵ Again, it expressed reluctance to move forward on the plaintiffs' claims because they presented political question doctrine

77. *Id.* at 35–36.

78. Order Granting State's Motion to Dismiss, *Kanuk v. Alaska Dep't of Nat. Res.*, No. 3AN-11-07474 CI (Alaska Super. Ct. Mar. 16, 2012), 2012 WL 8262431.

79. First Amended Complaint for Declaratory and Equitable Relief ¶¶ 3–4, *Kanuk v. Alaska Dep't of Nat. Res.*, No. 3AN-11-07474 CI (Alaska Super. Ct. July 21, 2011), 2011 WL 10843428.

80. *See* Order Granting State's Motion to Dismiss at *5, *Kanuk*, No. 3AN-11-07474 CI.

81. *Kanuk v. Alaska Dep't of Nat. Res.*, 335 P.3d 1088, 1099–100 (Alaska 2014).

82. *Id.*

83. Order Granting State's Motion to Dismiss, *Sinnok v. State*, No. 3AN-17-09910 CI (Alaska Super. Ct. Oct. 30, 2018), 2018 WL 7501030.

84. *Id.* at *1.

85. *Id.* at *7.

concerns by involving policy determinations reserved for the political branches.⁸⁶

The plaintiffs filed an appeal to the Alaska Supreme Court, and oral arguments were heard in October 2019.⁸⁷ The plaintiffs only asserted harms to Alaska's land and waters, thereby avoiding the need for a judicial declaration to include the atmosphere within the scope of the public trust.⁸⁸ Nevertheless, on January 28, 2022, the Alaska Supreme Court dismissed the case.⁸⁹

3. Montana

In the third and most important case study reflecting progress in state ATL cases, *Held v. State* is proceeding to trial as of this writing.⁹⁰ In *Held*, the youth plaintiffs sued the state of Montana and several state

86. *Id.*

87. Appellants' Statement of Points on Appeal, *Sinnok v. State*, No. 3AN-17-09910 CI (Alaska Sup. Ct. Nov. 29, 2018), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5c006c624d7a9c2d5799618e/1543531618994/Sinnok.Statement+of+Points+on+Appeal.Final.pdf> [<https://perma.cc/GZ3B-47EM>].

88. Order Granting State's Motion to Dismiss, *Sinnok*, No. 3AN-17-09910 CI. Another state ATL case, *Reynolds v. Florida*, also embraced the importance of narrowing the type and scope of relief sought and coupling the climate justice claim with the state constitution. In *Reynolds*, the youth plaintiffs sued Florida, alleging a breach of the public trust doctrine and violations of substantive due process rights under the Florida Constitution. First Amended Complaint, *Reynolds v. Florida*, No. 18-CA-000819 (Fla. Cir. Ct. Dec. 26, 2018), ECF No. 3. The suit identified unique harms, including loss of beaches due to hurricanes and rising sea levels, resulting from the state government's pursuit of a fossil fuel-based energy supply in the state. *Id.* The Florida Constitution strengthens the plaintiffs' claims by including a provision making it the policy of the state to conserve and protect natural resources. FLA. CONST. art II, § 7. In June 2020, a circuit court judge dismissed the case, holding that the claims were nonjusticiable. *Florida, OUR CHILDREN'S TR.*, <https://www.ourchildrenstrust.org/florida> [<https://perma.cc/W6KD-QY3J>] (last visited Apr. 1, 2022). However, the circuit court expressed reluctance in dismissing the case; it urged the youth plaintiffs to appeal. Unfortunately, on May 18, 2021, the First District Court of Appeals affirmed the dismissal of the case without a written opinion. *Id.*

89. *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022), *reh'g denied* (Feb. 25, 2022).

90. No. CDV-2020-307, (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>].

governmental entities,⁹¹ asserting that the state violated the plaintiffs' state constitutional rights to a clean and healthful environment, among other rights, by pursuing a fossil fuel-based energy system in the state, which exacerbates the climate crisis.⁹² The youth plaintiffs allege that the state's fossil fuel energy system is degrading Montana's constitutionally protected public trust resources, including the atmosphere, rivers and lakes, and fish and wildlife.⁹³

Montana is a particularly relevant state in which to bring this challenge for three reasons. First, Montana significantly contributes to carbon emissions as the sixth ranked state in the nation for per capita carbon emissions.⁹⁴ Second, Montana legislation expressly enables these significant emissions through a "statutory double-headed hydra, which on the one hand explicitly promotes increasing development and utilization of . . . coal . . . , oil, and gas, and on the other hand, facilitates defendants' willful blindness to Montana's contribution to the climate crisis."⁹⁵ Third, the Montana Constitution is among the few in the nation that recognizes a constitutional right to a "clean and healthful environment . . . for present and future generations,"⁹⁶ which is threatened by the state's policy of promoting the ongoing extraction and burning of fossil fuels.⁹⁷

91. *Id.* at 2 (the named defendants are the State of Montana, Governor Steve Bullock, the Montana Department of Environmental Quality, the Montana Department of Natural Resources and Conservation, the Montana Department of Transportation, and the Montana Public Service Commission).

92. Order Denying Motion to Dismiss at 2, *Held v. State*, No. CDV-2020-307 (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>].

93. *Id.* at 3.

94. *U.S. States by Carbon-Dioxide Emissions Per Capita*, WORLD ATLAS, <https://www.worldatlas.com/articles/us-states-by-carbon-dioxide-emissions-per-capita.html> [<https://perma.cc/UFV5-KSWZ>] (last visited Oct. 9, 2021).

95. *Judge Rules in Favor of Montana Youth Plaintiffs, Affirms Case Can Proceed to Trial*, W. ENV'T L. CTR. (Aug. 5, 2021), <https://westernlaw.org/judge-rules-favor-montana-youth-plaintiffs-affirms-case-can-proceed-trial/> [<https://perma.cc/M22U-WFZW>] (quoting plaintiffs' co-counsel, Roger Sullivan).

96. MONT. CONST., art. IX, § 1.

97. In addition to Montana, six other states have environmental rights amendments in their constitutions. Barry E. Hill, *Environmental Rights, Public Trust, and Public Nuisance: Addressing Climate Injustices Through State Climate Liability Litigation*, 50 ENV'T. L. REP., Dec. 2020, at n.40; Stacey Halliday et al., *New York Becomes the Third State to Adopt a Constitutional Green Amendment*, THE NAT'L LAW REVIEW (Dec. 10, 2021) <https://www.natlawreview.com/article/new-york-becomes-third-state-to-adopt-constitutional-green-amendment> [<https://perma.cc/MW2E-U4EU>].

On August 4, 2021, the youth plaintiffs in *Held* secured a landmark victory when Judge Kathy Seeley denied the state's motion to dismiss.⁹⁸ Judge Seeley first concluded that the youth plaintiffs had standing to bring the case.⁹⁹ Then, she dismissed the plaintiffs' request for injunctive relief, but allowed their claim for declaratory relief to proceed.¹⁰⁰

Held is significant because it is the first youth-led constitutional climate lawsuit to proceed to trial after dozens of efforts in U.S. federal and state courts during the past decade, most of which were dismissed as nonjusticiable. In *Held*, the combination of alleged harms, type of relief, scope of relief, and coupling of the claims with the state constitution appears to be the right recipe for progress. The complaint also asserts mental health impacts and embraces the intersectionality of youth and Indigenous plaintiffs.¹⁰¹

B. The New Wave of Canadian Climate Justice Litigation

A second phase of climate litigation in Canada asserts claims under §§ 7 and 15(1) of the Canadian Charter of Rights and Freedoms

98. Order Denying Motion to Dismiss, *Held v. State*, No. CDV-2020-307 (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>].

99. *Id.* at 7–22.

100. *Id.* at 21–22 (concluding that the plaintiffs' request that the court oversee defendants' implementation of a remedial plan to reduce GHG emissions to a constitutionally permissible level violates the political question doctrine).

101. For example, the complaint alleges that lead plaintiff Rikki Held “feels a heavy burden as a result of the climate crisis. She experiences stress and despair when thinking about how the State of Montana has known about climate disruption for decades and yet has chosen to continue to act in a way that threatens her home and property, her family's livelihood, and infringes upon her constitutional rights and future.” Complaint ¶ 20, *Held v. State*, No. CDV-2020-307 (Mont. 1st Dist. Ct. Mar. 13, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>]. Similarly, plaintiff Sariel S. “is increasingly worried that the impacts of climate change are threatening her opportunity and right to learn . . . [traditional and cultural] practices so that she might carry them on. The climate crisis has a profound emotional and psychological impact on Sariel, who stresses about the impacts her community is facing and will face in the near future. Sariel is distraught when thinking about her future and if she will have one.” *Id.* ¶ 28.

(“Charter”).¹⁰² These cases include challenges to a wide range of climate change laws and policies and several different forms of requested relief seeking to protect youth and Indigenous populations.¹⁰³ The first case in this line, *Environnement Jeunesse v. Attorney General of Canada*,¹⁰⁴ secured some gains, but failed to proceed. In this case, the Montreal-based environmental organization Environnement Jeunesse (“ENJEU”) sought authorization for a class action against the Canadian government on behalf of all Quebecers aged 35 and under.¹⁰⁵ ENJEU asserted that the Canadian government violated the rights of their generation under the Charter by failing to adopt GHG emission targets sufficient to combat climate change effectively.¹⁰⁶ ENJEU alleged that the federal government infringed the right to life, liberty, and security of the person under § 7 and the right to equality under § 15 of the Charter.¹⁰⁷ The issues before the court were: (1) whether ENJEU’s claims were justiciable, and (2) whether ENJEU was authorized to proceed as a class.¹⁰⁸

The case gained important ground because the Superior Court of Quebec (“QCSC”) concluded the claims were justiciable.¹⁰⁹ Although the issues concern powers within the scope of the executive branch, courts are within their jurisdiction to adjudicate those issues when Charter violations are alleged. However, the QCSC rejected ENJEU’s authorization to proceed as a class.¹¹⁰ The QCSC reasoned that the proposed cutoff of age 35 was arbitrary, inappropriate, and unjustified.¹¹¹ The QCSC stated that

102. *Canadian Charter of Rights and Freedoms*, §§ 7, 15(1) (1982) (Section 7 of the Charter provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Section 15(1) of the Charter provides: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).

103. *Environnement Jeunesse v. Attorney General of Canada* [2019] QCCS 2885; *Lho’imggin v. Her Majesty the Queen* [2020] FC 1059; *LaRose v. Her Majesty the Queen* [2020] FC 1008.

104. [2019] QCCS 2885.

105. *Id.* ¶ 1.

106. *Id.* ¶¶ 8–9.

107. *Id.* ¶ 104; Symposium, *Global Perspective on Climate Energy Justice*, 51 ENV’T L. REP. 10457, 10459 (2021) (Although ENJEU was a class action that alleged violations of the Canadian Charter, it was filed on behalf of *all* youth, and, therefore, did not allege disproportionate impacts on indigenous youth as in *Mathur*).

108. *Environnement Jeunesse*, [2019] QCCS ¶ 45.

109. *Id.* ¶ 18.

110. *Id.* ¶ 140.

111. *Id.* ¶¶ 119–22.

capping the class's age excluded persons who share the increased burden of climate change.¹¹² Moreover, the QCSC stated that the proposed class inappropriately included children under the age of majority, whose parents may wish to exclude them from the class action.¹¹³ According to the QCSC, a third party such as ENJEU should not have the power to impose an obligation on millions of parents to exclude their children from a class action.¹¹⁴ Therefore, the QCSC concluded that the proposed class, all Quebecers aged 35 or under, was not authorized to proceed.¹¹⁵ On February 23, 2021, the Quebec Court of Appeal heard ENJEU's appeal;¹¹⁶ then, on December 12, 2021, it denied the justiciability of the issues at hand.¹¹⁷

In *Lho'imggin v. Her Majesty the Queen*,¹¹⁸ two Wet'suwet'en House Hereditary Chiefs asserted that Canada's policy goals for GHG reductions by 2030 were insufficient, and Canada's failure to enact stringent climate legislation is contrary to common law principles of public trust, equitable waste, and the constitutional principle of intergenerational equity.¹¹⁹ The plaintiffs also argued that the government violated their rights under §§ 7 and 15 of the Charter, and that it breached its duty under § 91 of the Constitution Act by failing to ensure low GHG emissions under the peace, order, and good government ("POGG") powers.¹²⁰ The plaintiffs sought declaratory, mandatory, and supervisory orders to keep global warming between 1.5°C and 2°C above pre-industrial levels by reducing Canada's GHG emissions.¹²¹ The court considered multiple issues including: (1) whether the action was justiciable, and (2) whether the suit articulated a reasonable cause of action and the remedies sought were legally available.¹²² The court dismissed the case, concluding that the action was not justiciable and that there was no reasonable cause of action.¹²³

112. *Id.* ¶¶ 125–27.

113. *Id.* ¶¶ 130–32.

114. *Id.*

115. *Id.* ¶ 140.

116. *See Youth vs Canada*, ENVIRONNEMENT JEUNESSE, <https://enjeu.qc.ca/en/justice/> (last visited Apr. 1, 2022).

117. *Environnement Jeunesse v. Attorney General of Canada* [2021] QCCA 1871.

118. [2020] FC 1059 (the *Lho'imggin* case is also referred to as *Misdzi Yikh* in scholarly literature).

119. *Id.* ¶¶ 2–4.

120. *Id.* ¶¶ 4–5.

121. *Id.* ¶ 6.

122. *Id.* ¶ 16.

123. *Id.* ¶ 79.

Regarding the justiciability of the case, the Federal Court (“FC”) concluded that the changes sought by the plaintiffs were more akin to a change in policy than a change in law, which was beyond the reach of judicial intervention.¹²⁴ Under § 91, the FC determined that POGG does not impose a positive duty on the government to act on climate change to address the plaintiffs’ concerns because enacting laws is within the jurisdiction of Parliament.¹²⁵ On the Charter claims, the FC concluded that there were no specific laws or state actions that breached the rights alleged in the complaint.¹²⁶ The plaintiffs’ claims that encompassed environmental assessment legislation were too “broad and diffuse” because they challenged governmental policy relating to GHG emissions, as opposed to specific laws.¹²⁷ The FC also refused to assume the supervisory role that the plaintiffs requested.¹²⁸ The FC reasoned that “the issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government.”¹²⁹

Importantly, for the purposes of this article, the plaintiffs’ § 15 argument asserted the intersectionality of youth and Indigenous concerns.¹³⁰ They argued that the government’s inadequate climate change laws disproportionately burdened Indigenous peoples, which deprived the youth and future members of their house group of their rights to “equal protection and benefit of the law.”¹³¹ In response, the FC focused on the plaintiffs’ failure to identify specific laws as an anchor for their claim.¹³² The requested relief included several declarations and an order requiring the government to prepare an account of cumulative GHG emissions in a

124. *Id.* ¶¶ 72–73.

125. *Id.* ¶ 46.

126. *Id.* ¶¶ 48–50.

127. *Id.* ¶ 54.

128. *Id.* ¶ 64.

129. *Id.* ¶ 77; see also Natalie Gillespie, *Litigating Greenhouse Gas Policy in Canada and the Limits of Justiciability: Misdzi Yikh, La Rose, and Mathur*, SKAEL (June 8, 2021), <https://www.skael.ca/?p=1599> [<https://perma.cc/MD4Q-9FMH>] (describing how the § 91 theories failed in *Lho’imggin*). For a discussion of how these theories could prevail in future climate justice litigation in Canada in light of two recently enacted laws, see *infra* Part III.B.

130. *Lho’imggin*, [2020] FC ¶ 14.

131. *Id.*

132. *Id.* ¶ 72.

format allowing the emissions to be set in the context of a global carbon budget.¹³³

Next, the case *LaRose v. Her Majesty the Queen*,¹³⁴ aptly referred to as the Canadian version of *Juliana*, concerned 15 youth plaintiffs from across Canada. The plaintiffs sued the federal government, alleging that climate change negatively impacted their well-being and threatened their futures. The plaintiffs alleged a particular vulnerability to climate change impacts on the basis of their age, and they sought to compel the government to implement an enforceable climate recovery plan.¹³⁵ The FC addressed two issues in the case: (1) whether the plaintiffs' claims were actionable under §§ 7 (right to liberty, freedom, and security of the person) and 15 (right to equality)¹³⁶ of the Charter; and (2) whether the public trust doctrine could be used to support the plaintiffs' arguments at trial.¹³⁷

The FC concluded that both Charter claims were not justiciable.¹³⁸ The plaintiffs' claims raised questions that were "so political that the Courts [were] incapable or unsuited to deal with them," including questions of public policy approaches or issues of societal concern that were better suited for the political branches of government.¹³⁹ Specifically, the FC held that the government conduct that the plaintiffs targeted is unquantifiable, and that the plaintiffs attempted to make the government's holistic policy response to climate change subject to Charter review.¹⁴⁰ The FC further found that the plaintiffs erroneously sought review of the cumulative effects of GHG emissions, rather than challenging definable laws and government action that underpinned such emissions.¹⁴¹ Moreover, the remedy that the plaintiffs sought—the implementation of an enforceable recovery plan—was deemed to be too broad and devoid of substance.¹⁴² The FC held that the § 7 Charter claim failed to identify a

133. *Id.* ¶ 15; see Jason Proctor, *Wet'suwet'en Chiefs Sue Ottawa to Force Crown to Act on Climate Change*, CBS NEWS (Feb. 12, 2020), <https://www.cbc.ca/news/canada/british-columbia/wet-suwet-en-climate-change-federal-court-1.5461273> [<https://perma.cc/E7V5-WSLJ>] (the case was appealed, and a hearing has not occurred as of this writing).

134. [2020] FC 1008.

135. *Id.* ¶ 12.

136. Young, *supra* note 1 (under § 15, the youth plaintiffs alleged discrimination on the basis of age and the Indigenous plaintiffs alleged discrimination on the basis of race).

137. *LaRose*, [2020] FC ¶ 14.

138. *Id.* ¶ 26.

139. *Id.* ¶¶ 40–41.

140. *Id.*

141. *Id.* ¶ 43.

142. *Id.* ¶ 51.

reasonable cause of action on the basis of the undue breadth and diffuse nature of the alleged government conduct.¹⁴³ Similarly, the FC held that the § 15 Charter claim could not proceed because the plaintiffs failed to identify a particular law bearing benefits or burdens as required under § 15.¹⁴⁴

Additionally, the FC held that the public trust doctrine claim could not proceed.¹⁴⁵ The plaintiffs asserted that they could enforce a common law public trust doctrine claim where the government fails to discharge its duties as trustee.¹⁴⁶ The FC concluded that the public trust doctrine did not support the duties that the plaintiffs asserted because such duties lack definable limits.¹⁴⁷ Further, the FC noted that Canadian courts have consistently refrained from recognizing the public trust doctrine; recognizing it in this case would undermine the incremental development of the common law.¹⁴⁸ On November 24, 2020, the plaintiffs filed a notice of appeal to the FCA.¹⁴⁹ As of this writing, the appeal is still pending.

Unlike the aforementioned cases in the recent line of climate justice litigation in Canada, the plaintiffs in *Mathur v. Her Majesty the Queen in Right of Ontario*¹⁵⁰ survived a motion to strike, and they are proceeding to trial as of this writing. The plaintiffs, Ontario residents between the ages of 12 and 24, allege that Ontario's target for the reduction of GHG emissions in the province by the year 2030, as outlined in Ontario's Plan to Reduce Greenhouse Gas Emissions ("Target and Plan"), is insufficiently ambitious, and that this failure to regulate climate change adequately infringes on the constitutional rights of youth and future generations.¹⁵¹ The plaintiffs seek relief based on §§ 7, 15, 24, and 52 of the Charter.¹⁵²

The issue before the Superior Court of Ontario ("ONSC") is whether the Notice of Application ("Application") should be struck on the grounds that the pleading has no reasonable prospect of success pursuant

143. *Id.* ¶ 59.

144. *Id.* ¶ 79; see also Dana Drugmand, *Court Tosses Youth Climate Lawsuit Against Canada*, DESMOG (Oct. 30, 2020), <https://www.desmog.com/2020/10/30/court-dismisses-youth-climate-lawsuit-canada-la-rose-juliana/> [<https://perma.cc/9ZBC-8EL9>] (noting similarities between *Juliana* and *LaRose* in summarizing the reasons for the dismissal of *LaRose*).

145. *LaRose*, [2020] FC ¶¶ 101–03.

146. *Id.* ¶ 82.

147. *Id.* ¶ 88.

148. *Id.* ¶¶ 93–95.

149. Notice of Appeal, *LaRose v. Her Majesty the Queen*, [2020] FC 1008.

150. [2020] ONSC 6918.

151. *Id.* ¶ 2.

152. *Id.* ¶ 31.

to Rule 21 of the Canadian Rules of Civil Procedure.¹⁵³ The ONSC did not strike the motion because it was not plain and obvious that the Application failed either the “reasonable cause” or “reasonable prospect of success” requirements.¹⁵⁴ Unlike in *LaRose*, the ONSC concluded that the applicants in this case are challenging specific governmental actions and legislation.¹⁵⁵ Moreover, the Target and Plan are not pure policy decisions, but involve allegations of Charter breaches. The Application is thus *prima facie* justiciable.¹⁵⁶

The ONSC considered the Target and Plan as reviewable government action because they: (1) are mandated by the Ontario Legislature, (2) resemble quasi-legislation—or “soft law”—due to their imposition of sanctions, and (3) have the force of law with mandatory effects.¹⁵⁷ Moreover, the facts in the plaintiffs’ pleadings (i.e., GHG emissions cause harm) were accompanied by scientific proof:¹⁵⁸ expert evidence demonstrates that temperatures in Canada will continue to rise at greater levels than the rest of the world.¹⁵⁹

The ONSC also concluded that the plaintiffs’ claims under the Charter had a reasonable prospect of success.¹⁶⁰ Regarding § 7, this case concerns the right to life because the applicants argue that setting an inadequate target may increase the risk of death of Ontario’s youth and future generations.¹⁶¹ These findings are backed by scientific proof.¹⁶² Similarly, the plaintiffs’ § 15 argument has a reasonable prospect of success because, by virtue of their age, the plaintiffs do not have a right to vote and are disproportionately vulnerable to the impacts of climate change.¹⁶³ Their claim is based on adverse impact discrimination (i.e., indirect discrimination).¹⁶⁴ While evidentiary challenges of proving adverse impact discrimination exist, the ONSC concluded that it was not apparent that the claim had no reasonable prospect of success.¹⁶⁵

The court in *Mathur* also observed that Ontario has a responsibility to ensure that law and state action do not infringe on the

153. *Id.* ¶¶ 1–3.

154. *Id.* ¶ 267.

155. *Id.* ¶ 139.

156. *Id.* ¶¶ 139–40.

157. *Id.* ¶¶ 63–65.

158. *Id.* ¶ 77.

159. *Id.* ¶ 97.

160. *Id.* ¶ 75.

161. *Id.* ¶ 153.

162. *Id.* ¶ 171.

163. *Id.* ¶ 178.

164. *Id.* ¶ 180.

165. *Id.* ¶¶ 186, 237.

constitutional rights of Ontario residents.¹⁶⁶ Given that a motion to strike is not the appropriate forum to make judicial findings on the complex issue of positive obligations, the ONSC determined that the applicants should be given the chance to make full submissions at a merits hearing.¹⁶⁷ Finally, the ONSC concluded that the plaintiffs meet the test for standing on behalf of future generations because: (1) the case raised a serious justiciable issue and substantial constitutional issue, (2) the plaintiffs demonstrated that they have a real stake and genuine interest in the Application's outcome, and (3) the proposed suit was a reasonable and effective means to bring the dispute to court.¹⁶⁸

IV. PATHWAYS TO ADVANCE YOUTH AND INDIGENOUS CLIMATE JUSTICE LITIGATION

Part IV addresses strategies to leverage best practices from the U.S. and Canadian youth and Indigenous climate justice litigation experience. Two categories of lessons emerge from these cases: (1) how to avoid justiciability concerns, and (2) how to capitalize on the intersectionality between youth and Indigenous communities. Justiciability concerns involve the need to assess the nature and scope of the remedy sought and the need to pair requests for relief with rights-based foundations. Regarding intersectionality, cases in both countries often involve youth and Indigenous cases on parallel tracks without efforts to collaborate. Youth and Indigenous communities in the U.S. and Canada are uniquely vulnerable and disproportionately burdened by climate change. Collaboration between these movements within each country can offer opportunities for mutual gain.

166. *Id.* ¶ 226.

167. *Id.* ¶ 227.

168. *Id.* ¶ 250. For a helpful discussion of the conflicting outcomes in the Canadian climate justice cases, see Colin Feasby et al., *Climate Change and the Right to a Healthy Environment in the Canadian Constitution*, 58 ALBERTA L. REV. 213 (2020); Michael Theroux et al., *Are Climate Change Claims Based on Charter Rights Justiciable? Canadian Courts Render Conflicting Decisions*, BENNETT JONES BLOG (Dec. 17, 2020), <https://www.bennettjones.com/Blogs-Section/Are-Climate-Change-Claims-Based-on-Charter-Rights-Justiciable> [<https://perma.cc/LY34-7288>]; Nathalie Chalifour et al., *Detrimental Deference*, NAT'L MAGAZINE (Nov. 18, 2020), <https://nationalmagazine.ca/en-ca/articles/law/opinion/2020/detrimental-deference> [<https://perma.cc/Q69Z-3X45>].

A. Justiciability

There are two subparts to the justiciability recommendations. First, litigants need to reconsider the *type of remedy* sought and narrow the *scope of the targeted government action or inaction*. Cases in both countries have faced obstacles in securing their chosen remedies on the ground that the requested relief is beyond the capacity of the judiciary to resolve. Second, climate justice theories of relief are more likely to succeed when *coupled with rights-based foundations* in asserting violations of laws at the state level in the U.S. and at the federal or provincial levels in Canada.

1. Type and Scope of Remedy

The U.S. climate litigation experience shows that seeking injunctive relief can be problematic because it triggers political question doctrine concerns. Two illustrative examples are *American Electric Power* and *Juliana*. The plaintiffs in *American Electric Power* sought an injunction compelling the defendants to reduce their carbon dioxide emissions by a specified percentage.¹⁶⁹ While this laudable objective would have been an important and much-needed step in the nation's effort to address climate mitigation, the U.S. Supreme Court dismissed the case. The Court held this type of relief was more appropriately secured in the political branches of government and not in the courts; it reasoned the Clean Air Act provided a mechanism through which relief for climate change concerns could be addressed, so federal common law actions outside of that framework were deemed to be "displaced."¹⁷⁰

In *Juliana*, political question doctrine obstacles similarly encumbered the plaintiffs' requested relief. The Ninth Circuit's justiciability concerns were grounded in the plaintiffs' request for the Ninth Circuit to do too much and implement a remedy that was too broad and abstract.¹⁷¹ The plaintiffs wanted the Ninth Circuit to require the federal government to develop a climate recovery plan to decarbonize the atmosphere to 350 ppm of carbon dioxide.¹⁷² This remedy would be incredibly difficult, if not impossible, for the Ninth Circuit to administer. First, it is unclear what a stable climate entails. Second, it is also unclear how much control the federal government has over this problem for a court

169. Complaint ¶¶ 1–6, 186, *Connecticut v. Am. Elec. Power Corp., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 1:04-cv-05669), 2004 WL 5614397.

170. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011).

171. *Juliana v. United States*, 947 F.3d 1159, 1172, 1175 (9th Cir. 2020).

172. *Id.* at 1165, 1170–73.

to effectively require and oversee its implementation.¹⁷³ The Ninth Circuit concluded that such a remedy violates the political question doctrine.¹⁷⁴

Declaratory relief is a more effective avenue for climate justice remedies in the courts. As the post-*Juliana* cases have demonstrated, it is an incremental and more reliable potential pathway to expand the scope of governments' public trust-based stewardship duties. To overcome barriers of justiciability and advance climate justice litigation, declaratory relief should be as narrowly focused as possible. Post-*Juliana* cases in state courts have showed promising results in this effort.

For example, in *Chernaik*, the plaintiffs sought a declaration that exceeded the Oregon Circuit Court's responsibility to interpret the law.¹⁷⁵ In other words, the plaintiffs were correct to seek declaratory rather than injunctive relief, but they erred in the scope of the remedy that the declaration sought. The plaintiffs in *Kanuk* moved a step closer toward securing relief. The Alaska Supreme Court held that the declaratory relief requested was justiciable but dismissed the complaint because it concluded that a declaratory judgment would neither advance the plaintiffs' nor the state's interests.¹⁷⁶ Finally, in *Held*, the court determined that the plaintiffs' request for declaratory relief could proceed to trial.¹⁷⁷ Relying on *Juliana*, a Montana District Court denied the plaintiffs' request for injunctive relief.¹⁷⁸ The youth plaintiffs sought injunctive relief remedies similar to those sought in *Juliana* (a climate recovery plan to reduce GHG emissions to a permissible level and an accounting of GHG emissions).¹⁷⁹ The district court dismissed that requested relief on political question doctrine grounds as in *Juliana*.¹⁸⁰ Despite the dismissal of the injunctive relief request, however, the district court held that the declaratory relief request could proceed.¹⁸¹

173. *Id.* at 1171–73.

174. *Id.* at 1171 (holding that the requested relief would require the court to oversee decision-making that should be left to the “wisdom and discretion of the legislative and executive branches.”).

175. *Chernaik v. Kitzhaber*, 328 P.3d 799, 803 (Or. Ct. App. 2014).

176. *Kanuk v. Alaska Dep't of Nat. Res.*, 335 P.3d 1088, 1091, 1099–100, 1103 (Alaska 2014).

177. Order Denying Motion to Dismiss at 21–22, *Held v. State*, No. CDV-2020-307 (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>].

178. *Id.* at 24.

179. *Id.* at 21–22.

180. *Id.*

181. *Id.*

Similar lessons regarding the type and scope of the remedy requested are evident in Canada's climate justice litigation jurisprudence. First, almost all the cases faced justiciability obstacles because the litigants wanted courts to engage in climate change policymaking rather than allowing those responsibilities to remain the exclusive domain of the political branches. Examples of this concern are reflected in *Lho'imggin*, where the FC noted that the litigants' claims that encompass environmental assessment legislation are too "broad and diffuse" because they challenged governmental policy relating to GHG emissions, as opposed to specific laws.¹⁸²

Another justiciability problem that plagues Canadian plaintiffs, much like U.S. plaintiffs, is requesting a court to do too much in the scope of the remedy sought. For example, in *LaRose*, the plaintiffs sought to have the court review the cumulative effects of GHG emissions, rather than definable laws and government action that underpinned those emissions.¹⁸³ Moreover, the plaintiffs' requested remedy—an enforceable recovery plan—was deemed to be too broad and devoid of substance.¹⁸⁴ The § 7 and § 15 claims under the Charter in the case failed on the basis of the undue breadth and diffuse nature of the alleged government conduct.¹⁸⁵

As in the U.S. with *Held*, Canada has a case that strikes the right balance in the remedy sought: *Mathur*. The geographic context for *Mathur* was the provincial level (Ontario), much like the state level (Montana) in *Held*.¹⁸⁶ The plaintiffs in *Mathur* relied on § 7 and § 15 of the Charter to ground their concerns regarding a specific law that failed to adequately protect the plaintiffs from climate impacts.¹⁸⁷ Unlike the unsuccessful efforts in other Canadian climate justice cases that alleged similar Charter violations, the plaintiffs in *Mathur* did not challenge policy decisions reserved for the political branches or seek to expand the scope of a law's protections. Their strategy resembled that of the plaintiffs in *Held*, where the plaintiffs sought protection under Montana's constitution's right to a clean and healthful environment provision in contesting a statutory

182. *Lho'imggin v. Her Majesty the Queen* [2020] FC 1059 ¶¶ 54, 72–73.

183. *LaRose v. Her Majesty the Queen* [2020] FC 1008 ¶¶ 3, 39, 43, 74.

184. *Id.* ¶ 51.

185. *Id.* ¶¶ 59, 79.

186. *Mathur v. Her Majesty the Queen in Right of Ontario*, [2020] ONSC 6918 ¶¶ 1–2.

187. *Id.* ¶¶ 2, 31, 253. The specific law at issue in *Mathur* is Ontario's target for the reduction of GHG emissions in the province by the year 2030, known as "Ontario's Plan to Reduce Greenhouse Gas Emissions" (defined as "Target and Plan" in this article).

provision, namely the climate change exception of the Montana Environmental Protection Act, which they argued ultimately exacerbated their vulnerability to climate change impacts.¹⁸⁸

2. Coupling Claims with Rights-Based Foundations

In the U.S. experience, cases such as *Held* reveal climate justice claims that are coupled with state constitutional environmental rights amendments (“ERA”), as in Alaska and Montana, have a better chance of success. In related contexts, ERAs have helped the plaintiffs overcome standing barriers in Illinois,¹⁸⁹ enhanced citizens’ efforts to secure

188. *Held v. State*, No. CDV-2020-307, (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>]. Similarly, in a May 2021 decision, the Federal Court of Australia recognized that the Australian Government owes a duty of care to protect future generations from climate harm in a case involving requested approval of a proposed coal mine. No injunctive relief was issued; however, the court did grant declaratory relief, which is consistent with the progress toward securing declaratory relief in *Held* and *Mathur*. *Sharma v. Minister of the Env’t* (2021) 248 LGERA 330; see also Adam Morton, *Australian Court Finds Government Has Duty to Protect Young People From Climate Crisis*, THE GUARDIAN (May 27, 2021), https://www.theguardian.com/australia-news/2021/may/27/australian-court-finds-government-has-duty-to-protect-young-people-from-climate-crisis?utm_campaign=Hot%20News&utm_medium=email&_hsmi=130138346&_hsenc=p2ANqtz-8ftKvUxUR5ExONx7Fc5kVLZRt98A2zKDK.

189. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 962 N.E.2d 956, 968 (Ill. 2012) (holding “Section 2 of article XI does not create any new causes of action but, rather, does away with the ‘special injury’ requirement typically employed in environmental nuisance cases.”).

protection of natural resources in Pennsylvania,¹⁹⁰ and aided the enforcement of environmental laws in Hawaii.¹⁹¹

Similar to the U.S. experience, only one case in the line of Canadian climate justice cases discussed in this article is proceeding to trial, *Mathur*. As in *Held*, the plaintiffs in *Mathur* included a rights-based foundation by alleging violations of the Charter.¹⁹² Although other cases in this line of Canadian climate justice cases alleged similar violations of the Charter, those alleged violations were not tied to a specific law. Targeting a discrete and narrow law at the provincial level, where more climate change laws exist as compared to the federal level, appears to be a viable path to potential success on the Canadian side.

Two recently enacted laws at the federal level in Canada may provide compelling substantive and procedural rights foundations for Indigenous plaintiffs to succeed in future climate justice litigation. First, Canada recently enacted the United Nations Declaration on Indigenous Peoples (“UNDRIP”) Act,¹⁹³ which provides a framework to implement the provisions of UNDRIP into Canadian law.¹⁹⁴ The UNDRIP Act requires the Government of Canada to “take all measures necessary to ensure the laws of Canada are consistent with the Declaration, prepare and implement an *action plan* to achieve the Declaration’s objectives, and [prepare] an annual report on progress to align the laws of Canada and on the action plan.”¹⁹⁵ This action plan includes measures to “address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination against Indigenous peoples, including elders, youth,

190. *See, e.g.,* *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (concluding that Pennsylvania’s Environmental Rights Amendment created an “obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action.”); *see also* Rachel McDevitt, *In Boost for Environmental Rights, Supreme Court Rules Drilling Revenues From State Forests Must be Used for Conservation*, STATE IMPACT PA (July 28, 2021), <https://stateimpact.npr.org/pennsylvania/2021/07/28/in-boost-for-environmental-rights-supreme-court-rules-drilling-revenue-from-state-forests-must-be-used-for-conservation/> [<https://perma.cc/RLV7-29G9>].

191. *In re Application of Maui Elec. Co., Ltd.*, 408 P.3d 1, 16 (Haw. 2017) (“Article XI, section 9 thus guarantees to ‘[e]ach person’ an individual, private right to share in the benefit of environmental laws – regardless of whether the regulation describes a ‘tangible property interest.’”).

192. *Mathur v. Her Majesty the Queen in Right of Ontario*, [2020] ONSC 6918 ¶¶ 31, 58, 65.

193. *United Nations Declaration on the Rights of Indigenous Peoples Act*, DEP’T OF JUSTICE CAN., <https://www.justice.gc.ca/eng/declaration/about-apropos.pdf> [<https://perma.cc/BB4Q-CHC5>] (last visited Apr. 1, 2022).

194. *Id.* at 1.

195. *Id.* (emphasis added).

children, persons with disabilities, women, men and gender-diverse and two-spirit persons.”¹⁹⁶ The anti-discrimination measures in this action plan could strengthen the foundation of Indigenous peoples’ claims alleging inadequate protection from climate impacts in climate justice litigation.

The UNDRIP Act’s primary goal is to “support Indigenous peoples’ exercise of the right to self-determination.”¹⁹⁷ Given this central purpose, the theories advanced in *Lho’imggin* could prevail if framed in connection with the protections of this new law. This recognition of Indigenous self-determination in a binding legal instrument could bolster Indigenous communities’ claims that the Government of Canada has breached its POGG duties and failed to fulfill other duties to protect Indigenous communities from climate change harms.¹⁹⁸

Additionally, procedural rights can also bolster these climate justice claims. In 2019, Canada enacted a new impact assessment law (“IAA”).¹⁹⁹ The IAA’s purposes can be interpreted to support consideration of climate change impacts and the disproportionate burdens of these impacts on Indigenous communities. For example, some of the purposes identified in § 6 of the IAA are: “foster sustainability”;²⁰⁰ “protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project”;²⁰¹ “ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by [§] 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act”;²⁰² and “encourage the assessment of the cumulative effects of physical activities in a region and the assessment of federal policies, plans or programs and the consideration of those assessments in impact assessments.”²⁰³ Taken together, these objectives reflect a sensitivity to Indigenous communities’ rights, an acknowledgement of the potential threat that climate change poses to

196. *Id.*

197. *Id.* at 5.

198. See generally Gillespie, *supra* note 129 (describing legal theories that failed in *Lho’imggin*).

199. Impact Assessment Act, S.C. 2019, c. 28, s. 1.

200. *Id.* at s. 6(1)(a).

201. *Id.* at s. 6(1)(b).

202. *Id.* at s. 6(1)(g).

203. *Id.* at s. 6(1)(m).

sustainability, and the creation of an opportunity to consider climate change as a cumulative impact under the IAA.²⁰⁴

Pursuant to the IAA, the Canadian Government prepared a “Strategic Assessment of Climate Change,” which provides guidance on how climate impacts are to be considered under the IAA.²⁰⁵ The Strategic Assessment of Climate Change is designed to “enable consistent, predictable, efficient and transparent consideration of climate change throughout federal impact assessments.”²⁰⁶ One component of the impact assessment process for proposed projects is the “extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its commitments in respect of climate change such as the Paris Agreement, Canada’s 2030 target and the goal of Canada achieving net-zero emissions by 2050.”²⁰⁷ This powerful language can support youth and Indigenous plaintiffs’ climate justice litigation theories. To the extent a proposed project may place Canada beyond the limits of its carbon budget, the Strategic Assessment of Climate Change could support an argument that the project should be rejected. A landmark decision from the New South Wales Land and Environment Court applied

204. *But see* Robert B. Gibson, *An Initial Evaluation of Canada’s Sustainability-Based Impact Assessment Act*, 33 J. ENV’T L. & PRAC. 1, 19 (2020) (noting that while the IAA’s “language of commitment to Indigenous rights, interests and engagement, and its provisions for partnerships and engagement are considerably stronger and more comprehensive than in the earlier legislation,” the Act does not appear to “go much beyond what is now required in Constitutional law, as clarified by the continuing succession of court rulings confirming Indigenous peoples’ rights in law.”).

205. *Strategic Assessment of Climate Change*, GOV’T OF CAN. (last updated Oct. 2020), <https://www.canada.ca/en/services/environment/conservation/assessments/strategic-assessments/climate-change.html#toc0> [<https://perma.cc/QZX3-ZENX>].

206. *Id.* at i.

207. *Id.* For a detailed evaluation of the IAA’s potential to address climate change concerns, see generally Flavia Vieira de Castro, *Canada’s Climate Change Mitigation Commitments and the Role of the Federal Impact Assessment Act*, 33 J. ENV’T L. & PRAC. 211 (2020). For a compelling discussion of another potential vehicle for asserting Indigenous climate justice claims in Canada, see Mari Galloway, *The Unwritten Constitutional Principles and Environmental Justice: A New Way Forward?*, 52 OTTAWA L. REV. 1, 1 (2021) (examining how Canada’s “unwritten constitutional principles” such as ecological sustainability, substantive equality, the public trust doctrine, and recognition of Indigenous peoples’ relationship to land and resources can help address environmental injustices that Indigenous peoples experience).

similar reasoning in 2019 to reject a proposed coal mine in part because it would place the country outside its carbon budget.²⁰⁸

B. Intersectionality of Youth and Indigenous Claims

In tracing the progression of the U.S. and Canadian cases and outcomes, the right formula for success in avoiding justiciability concerns has emerged. A similar progression can be traced regarding the value of intersectionality of youth and Indigenous concerns in these claims. On the U.S. side, *Kivalina* asserted only Indigenous community vulnerability and was dismissed;²⁰⁹ next, *Juliana* asserted a mix of youth and Indigenous vulnerability, but it was dismissed on justiciability grounds;²¹⁰ finally, *Held* struck the right balance of youth and Indigenous intersectionality, and a request for declaratory relief is proceeding to trial.²¹¹

On the Canadian side, in *ENJEU*, the plaintiffs only sought to protect youth as a class of individuals aged 35 and under²¹² and did not pair those claims with Indigenous concerns. The case was dismissed.²¹³ In *LaRose* and *Lho 'imggin*, the plaintiffs used the intersectionality argument to frame the shared youth and Indigenous concerns, but the cases were dismissed on justiciability grounds regarding the nature of the remedy sought.²¹⁴ Ultimately, *Mathur* struck the right balance by capitalizing on youth and Indigenous intersectionality coupled with the assertion of a remedy connected to a specific law.

This progression suggests that the ideal claim needs to: (1) target a specific and narrow law (preferably at the state or provincial level), (2) allege youth and Indigenous intersectionality in identifying disproportionate climate change impacts, and (3) couple the claim with a

208. See *Gloucester Res. Ltd. v. Minister for Planning* (2019) NSWLEC 7 ¶¶ 699–700; see also *ABATE*, *supra* note 15, at 197–201 (discussing the reasoning in *Gloucester Res. Ltd.* and its implications).

209. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012).

210. *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

211. *Held v. State*, No. CDV-2020-307, (Mont. 1st Dist. Ct. Aug. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>].

212. *Environnement Jeunesse v. Attorney General of Canada* [2019] QCCS 2885 ¶ 7.

213. *Id.* ¶¶ 140–44.

214. *LaRose v. Her Majesty the Queen* [2020] FC 1008 ¶¶ 6–7; *Lho 'imggin v. Her Majesty the Queen* [2020] FC 1059 ¶¶ 72–73.

rights-based foundation like the Canadian Charter or IAA, or rights-based protections in U.S. state constitutions like ERAs.

Two other sources of support enhance the value of youth and Indigenous intersectionality. First, the reference to mental health impacts in the *Held* complaint is a valuable dimension of asserting how the climate crisis impacts not only the physical environment of vulnerable populations, but also their capacity to adapt and endure mentally and spiritually, or see hope for the future in the face of such grave threats.²¹⁵ Second, as marginalized populations, youth and Indigenous plaintiffs can find mutual benefit in relying on the disturbing projections for future climate change impact scenarios in Working Groups I and II's contribution to the UN Intergovernmental Panel on Climate Change's ("IPCC") Sixth Assessment Report.²¹⁶

Another significant recent decision in Canada indirectly supports the viability of youth and Indigenous intersectionality in future climate justice litigation in Canada. In *Reference re Greenhouse Gas Pollution*

215. See Complaint ¶¶ 178–80, *Held v. State*, No. CDV-2020-307 (Mont. 1st Dist. Ct. Mar. 13, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [<https://perma.cc/T634-4HE7>]; see generally Caroline Hickman et al., *Climate Anxiety in Children and Young People and Their Beliefs About Government Responses to Climate Change: A Global Survey*, 5 *THE LANCET* 863 (2021).

216. *Assessment Report 6*, UNITED NATIONS INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Aug. 9, 2021), <https://www.ipcc.ch/assessment-report/ar6/> [<https://perma.cc/GW6G-WNGL>]. For a compelling discussion of how the U.S. federal government exacerbated this climate crisis for decades, which can be a useful resource for youth and Indigenous plaintiffs in framing future theories of relief in climate justice lawsuits, see JAMES GUSTAVE SPETH, *THEY KNEW: THE U.S. GOVERNMENT'S FIFTY-YEAR ROLE IN CAUSING THE CLIMATE CRISIS* (2021).

Pricing Act,²¹⁷ the provinces of Ontario, Saskatchewan, and Alberta contested the validity of minimum national GHG pricing standards—a narrow and specific regulatory mechanism—on division of powers grounds. The Canadian Supreme Court held that the Greenhouse Gas Pollution Pricing Act (“GGPPA”) was constitutional based on the national concern doctrine of the POGG power.²¹⁸ The Canadian Supreme Court reasoned that establishing minimum standards of GHG price stringency confirm a federal role in carbon pricing, thereby reflecting a distinctly national matter.²¹⁹

Although this case is not specifically related to youth and Indigenous climate justice litigation, the Canadian Supreme Court nonetheless acknowledged that “[c]limate change has had a particularly serious effect on Indigenous peoples, threatening the ability of Indigenous communities in Canada to sustain themselves and maintain their traditional ways of life.”²²⁰ This case also reflects the Canadian Supreme Court’s willingness to fully acknowledge the realities of climate change as a global problem requiring interprovincial and international efforts. Chief Justice Wagner warned that the effects of climate change have no boundaries, pose “a grave threat to humanity’s future,”²²¹ and are acknowledged as a “threat of the highest order to the country, and indeed to the world.”²²² This reference to climate change as a threat to humanity’s future is a bold and important statement regarding the need to protect

217. Reference re Greenhouse Gas Pollution Pricing Act, [2021] SCC 11 ¶¶ 1–5. For an analysis of the GHG pricing case and its implications, see Bo Kruk, *Boundaries of Power: Courts’ Critical Role in 21st Century Federalism*, LAWYERS DAILY (Apr. 8, 2021), <https://www.thelawyersdaily.ca/articles/25874/boundaries-of-power-courts-critical-role-in-21st-century-federalism-bo-kruk> [https://perma.cc/U6FK-5Q6F]; Bernise Carolino, *SCC Carbon Tax Decision Alters Landscape for Canada’s Climate Law*, LAW TIMES (Apr. 7, 2021), <https://www.lawtimesnews.com/practice-areas/environmental/supreme-court-of-canadas-carbon-tax-decision-alters-landscape-for-canadas-climate-law-queens-law/354735> [https://perma.cc/5W3U-6HMM]; Catherine Flood, *In Split Decision, Supreme Court of Canada Upholds Federal Greenhouse Gas Pollution Pricing Act*, BLAKES (Mar. 29, 2021), <https://www.blakes.com/insights/bulletins/2021/in-split-decision-supreme-court-of-canada-upholds> [https://perma.cc/ME4N-KF33]; Julia Schabas, *A Matter of National Concern: SCC Rules Parliament’s Greenhouse Gas Pollution Pricing Act is Constitutional*, THE COURT (Mar. 28, 2021), <http://www.thecourt.ca/a-matter-of-national-concern-scc-rules-parliaments-greenhouse-gas-pollution-pricing-act-is-constitutional/> [https://perma.cc/J6AP-W58B].

218. [2021] SCC ¶¶ 208–11.

219. *Id.* ¶ 205.

220. *Id.* ¶ 11.

221. *Id.* ¶ 2.

222. *Id.* ¶ 167.

vulnerable youth and Indigenous populations from climate change impacts.

V. CONCLUSION

Youth and Indigenous climate justice litigation in the U.S. and Canada is on the rise. After a series of unsuccessful efforts, a winning formula in these lawsuits is starting to crystallize on both sides of the border. This article seeks to illuminate how, given these common but different experiences, practitioners can capitalize on recent progress and leverage best practices for youth and Indigenous climate justice plaintiffs for mutual gain.

The first lesson is to adjust the type and scope of relief sought. As ambitious as the claims need to be against the backdrop of the urgency of the climate crisis, seeking injunctive relief has, without exception, triggered justiciability concerns in both countries. Declaratory relief, by contrast, offers valuable relief to youth and Indigenous plaintiffs in ascertaining the rights they possess in seeking action in legislative arenas without overstepping the courts' role. In addition, the claims must be focused on specific laws addressing climate change rather than seeking to compel action on discretionary government policies relating to climate change.

Second, coupling claims with rights-based arguments targeting laws at the federal or provincial level in Canada and at the state level in the U.S. has proven productive in recent cases in both countries. In the U.S., the rights-based foundations in state constitutional ERAs are showing promise in gaining leverage for youth and Indigenous climate justice claims challenging specific climate change-related statutes. In Canada, reliance on the Charter or the IAA can offer a sound foundation for youth and Indigenous climate justice claims when connected to government action or inaction in connection with climate change statutes.

Finally, capitalizing on the intersectionality between youth and Indigenous community claims has proven valuable to provide a broader common foundation of physical and mental health vulnerability to climate change impacts in these populations. Recent developments confirming this shared vulnerability as reflected in the IPCC's Sixth Assessment Report and language in the Supreme Court of Canada's GGPPA also can enhance the viability of future youth and Indigenous climate justice claims.