

UN-*CHARTERED* TERRITORY: USING HUMAN RIGHTS LAW TO ADDRESS CLIMATE INEQUITIES IN CANADA

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ABSTRACT

This paper explores how human rights laws in Canada could address inequities arising from climate change. While climate change is increasingly recognized as a pressing human rights issue, no case brought under the *Canadian Charter of Rights and Freedoms* has yet succeeded on its merits. This paper examines whether human rights statutes—which aim to prevent discrimination in areas such as employment, housing, and services—could offer a more effective legal recourse. It proposes four potential human rights complaints related to climate change: (1) failing to implement adaptation measures for vulnerable groups, (2) providing accommodation for climate conscious individuals, (3) recognizing government climate mitigation efforts as a “service,” and (4) holding greenhouse gas-emitting corporations accountable. The paper concludes that while these complaints are supported by existing case law, legislative amendments would provide clearer guidance and enhance certainty in applying human rights laws to climate-related disparities.

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RÉSUMÉ

Cet article examine comment les lois en matière de droits de la personne au Canada pourraient remédier certaines inégalités liées au changement climatique. Bien que les changements climatiques soient désormais largement reconnus comme une question urgente de droits de la personne, aucun recours intenté en vertu de la *Charte canadienne des droits et libertés* n'a encore été accueilli sur le fond. Cet article examine si les lois sur les droits de la personne — qui visent à prévenir la discrimination dans des domaines tels que l'emploi, le logement et les services — pourraient offrir un recours juridique plus efficace. Il propose quatre plaintes potentielles en matière de droits de la personne liées au changement climatique : (1) le défaut de mettre en œuvre des mesures d'adaptation pour les groupes vulnérables, (2) la mise en place de mesures d'accommodement pour les personnes ayant une conscience climatique, (3) la reconnaissance des efforts de mitigation climatique du gouvernement comme un « service », et (4) la responsabilisation des entreprises émettrices de gaz à effet de serre. L'article conclut que, même si la jurisprudence actuelle permet déjà de fonder de telles plaintes, une intervention législative contribuerait à clarifier le cadre juridique applicable et à assurer une plus grande cohérence dans l'application des lois relatives aux droits de la personne aux disparités associées aux changements climatiques.

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INTRODUCTION

THIS paper examines whether and how human rights laws in Canada may be used to address certain inequities relating to climate change. Numerous recent studies both in Canada and around the world have explored the intersection between climate change and human rights.¹ Many conclude that climate change represents one of the most pressing human rights issues of our time.² It threatens the right to life, the right to self-determination, the right to development, the right to food, the right to water and sanitation, the right to health, the right to education, and the right to meaningful and informed participation.³ Additionally, because climate change impacts certain populations more gravely than others, it also undermines the right to equality and seriously threatens the rights of future generations.⁴ Recognizing these profound impacts, those who are and who will be adversely affected by climate change are increasingly leveraging various legal mechanisms to seek to uphold their rights, obtain redress for violations, and compel both state and private actors to take mitigating and adaptive measures related to climate change.

In Canada, efforts aiming to assert rights related to climate change have primarily focused on constitutional challenges under the *Canadian*

1 See e.g. *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UNHRC, 10th Sess, UN Doc A/HRC/10/61 (2009). For a list of UN studies on the impact of climate change on different human rights, see Office of the United Nations High Commissioner for Human Rights, “Reports on Human Rights and Climate Change” (last visited 3 February 2025), online: <ohchr.org> [perma.cc/MA6J-PR9K]. In Canada, see Library of Parliament, *Climate Change and the Right to a Healthy Environment: International and Canadian Development*, by Robert Mason, Catalogue No YM32-10/2023-12-2024E-PDF (Ottawa: Library of Parliament, 15 January 2024).

2 See John H Knox, “Climate Change and Human Rights Law” (2009) 50:1 Va J Intl L 163; David Hunter, “Human Rights Implications for Climate Change Negotiations” (2009) 11:2 Or Rev Intl L 331 at 332. See also *Climate Change and Poverty: Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UNHRC, 41st Sess, UN Doc A/HRC/41/39 (2019).

3 Office of the United Nations High Commissioner for Human Rights, “Understanding Human Rights and Climate Change: Submission to the 21st Conference of Parties to the UNFCCC” (Geneva: OHCHR, 2015) at 13–20, online (pdf): <ohchr.org> [perma.cc/W7WD-TBF4].

4 *Ibid* at 20–24.

Charter of Rights and Freedoms (Charter).⁵ So far, none of the cases brought forth have been successful on their merits, and all have faced significant procedural stalling. These discouraging outcomes and delays, often brought to my attention by disappointed but determined environmental lawyers seeking more promising legal avenues, have led me to reflect on whether human rights laws in Canada can offer a more hopeful legal recourse for those whose rights are or will be adversely impacted by climate change. This potential is what I will explore in this paper.

Human rights laws in Canada are meant to prevent and redress social disparities and to eradicate discrimination in our society.⁶ They are also how Canada implements at least some of its international human rights law obligations, particularly with respect to equality.⁷ Recently, human rights commissions across Canada have begun to recognize the relevance of climate change within their mandates, drawing connections between environmental degradation and discrimination.⁸ However,

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- 5 There are however climate related constitutional cases that are currently being litigated on their merits after surviving motions to strike. In Ontario, *Mathur v. Ontario* represents the first *Charter*-based climate change claim to proceed to a hearing on the merits. Although the Superior Court initially dismissed the application after a trial, the Court of Appeal remitted the matter for a new hearing (*Mathur v Ontario*, 2024 ONCA 762 [*Mathur*], leave to appeal to SCC refused, 2025 CanLII 38373 (SCC)). At the federal level, the Federal Court of Appeal has partially revived two challenges to Canada's climate policies and legislation by permitting the plaintiffs to amend their pleadings (see *La Rose v Canada*, 2023 FCA 241 at paras 2, 135 [*La Rose*]; *Misdzi Yikh v Canada*, 2020 FC 1059). For an up to date overview of climate litigation in Canada, see Columbia Law School Sabin Center for Climate Change Law, "Climate Change Litigation Databases: Canada" (last visited 3 February 2025), online: <climatecasechart.com> [perma.cc/4QW3-R8QM].
 - 6 For an overview of human rights laws in Canada and their history, see Canadian Human Rights Commission, *The Evolution of Human Rights in Canada*, by Dr Dominique Clément, Will Silver & Dr Daniel Trottier, Catalogue No HR4-19/2012E-PDF (Ottawa: CHRC, 2012), online (pdf): <publications.gc.ca> [perma.cc/VTE6-NK7S].
 - 7 *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at paras 436–55 [*Caring Society*].
 - 8 Canadian Human Rights Commission, *Stronger Together: The Canadian Human Rights Commission's 2021 Annual Report to Parliament*, Catalogue No HR1-4E-PDF (Ottawa: CHRC, 2021) at 13–14, online (pdf): <publications.gc.ca> [perma.cc/J8CY-RHM9]; Ontario Human Rights Commission, News Release, "OHRC Statement on Human Rights, Extreme Heat Waves and Air Conditioning" (19 August 2022), online:

human rights tribunals have not yet directly adjudicated cases involving inequities relating to climate change.

In light of this context, this paper explores whether and how human rights statutes could potentially address some of the social disparities related to climate change. I start by providing an overview of human rights statutes in Canada. As I will explain, these laws prohibit discrimination in the context of certain social areas—such as employment, services, and housing—and create a complaint mechanism for individuals who believe they have been discriminated against to seek redress. Then, I will examine what I believe to be four potential human rights complaints relating to climate change. First, a complaint could be brought against an employer, landlord, or service provider for failing to implement adaptation measures as part of its duty to accommodate members of protected groups, who are disproportionately affected by the impacts of climate change. Second, climate change activists, climate conscious individuals, or those who experience climate anxiety could file complaints asserting that they form a protected group under human rights laws and are therefore entitled to accommodation from employers, landlords, and service providers. Third, members of protected groups adversely affected by the impacts of climate change could argue that government mitigation efforts should be recognized as a “service” under human rights laws and the government must therefore aim to prevent such complainants from being disproportionately harmed by climate change. Finally, complaints could be filed against greenhouse gas-emitting corporations, asserting that they have a “public relationship” with members of protected groups who are disproportionately harmed by their actions. In my view, none of the legal avenues explored in this paper require legislative amendments as they are supported by existing case law. Despite this conclusion, I argue that legislative amendments are still desirable as they would enhance certainty and provide clearer guidance on the application of human rights laws to certain social inequalities relating to climate change.

I. OVERVIEW OF HUMAN RIGHTS REGIMES IN CANADA

In every territory and province in Canada, as well as at the federal level, a law exists that prohibits discrimination in specific social areas,

<ohrc.on.ca> [perma.cc/BT2Q-ARCT] [Ontario Human Rights Commission, “Extreme Heat Waves”].

typically within the context of residential and commercial accommodations, services, and employment.⁹ These laws, referred to as human rights laws or antidiscrimination statutes, generally define discrimination as the adverse treatment or differentiation based on a protected ground. These grounds generally include age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status, gender identity, and gender expression.¹⁰

To establish *prima facie* discrimination under human rights law, a complainant must show: (1) they have a characteristic protected from discrimination, (2) they have experienced an adverse impact, and (3) the protected characteristic was a factor in the adverse impact they have experienced.¹¹ Human rights laws also give rise to the duty to accommodate. This duty means that in areas where human rights laws apply—such as employment, housing, and service provision—individuals have a right to accommodation for needs arising from a protected ground unless it can be demonstrated that this would result in undue hardship.¹² Equality rights scholars have argued that the test to establish discrimination in human rights law, compared to section 15 of the *Charter*, is less stringent and thus easier for claimants to meet.¹³

9 *Alberta Human Rights Act*, RSA 2000, c A-25.5; *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]; *Charter of Human Rights and Freedoms*, CQLR c C-12; *Human Rights Act*, CSNu 2003, c H-70 [Human Rights Act Nu]; *Human Rights Act*, RSNB 2011, c 171 [Human Rights Act NB]; *Human Rights Act*, RSNS 1989, c 214 [Human Rights Act NS]; *Human Rights Act*, RSPEI 1988, c H-12 [Human Rights Act PEI]; *Human Rights Act*, RSY 2002, c 116 [Human Rights Act Y]; *Human Rights Act*, 2010, SNL 2010, c H-13.1 [Human Rights Act NL]; *Human Rights Act*, SNWT 2002, c 18 [Human Rights Act NWT]; *Human Rights Code*, RSBC 1996, c 210; *Human Rights Code*, RSO 1990, c H.19; *The Human Rights Code*, CCSM 1987, c H175 [Human Rights Code M]; *The Saskatchewan Human Rights Code*, 2018, SS 2018, c S-24.2 [Human Rights Code S].

10 See e.g. CHRA, *supra* note 9, s 3(1).

11 *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33 [Moore].

12 *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, 1999 CanLII 652 at para 72 (SCC).

13 See e.g. Jennifer Koshan, “Under the Influence: Discrimination under Human Rights Legislation and Section 15 of the *Charter*” (2014) 3:1 Can J Human Rights 115 at 117. See also Claire Mummé, “At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases” (2012) 9 JL & Equality 103 at 104; A Wayne MacKay, “The Marriage of Human Rights Codes

Human rights laws also establish administrative bodies tasked with promoting equality and adjudicating discrimination complaints. For example, in Ontario, the human rights commission is responsible for advancing equality and ensuring compliance with the provincial *Ontario Human Rights Code*.¹⁴ Conversely, the Human Rights Tribunal of Ontario receives discrimination complaints—referred to as applications—adjudicates these cases, and issues remedial orders when a breach of the code is found.¹⁵ In Alberta, its human rights commission serves as the sole administrative authority for enforcing the *Alberta Human Rights Act*,¹⁶ thus fulfilling both the roles of promoting equality and adjudicating discrimination complaints.

Adjudicative bodies that hear complaints typically have broad remedial powers if they determine that allegations of discrimination are substantiated. They are empowered to grant systemic remedies designed to eliminate discrimination and prevent its future recurrence, as well as remedial orders aimed at restoring victims to their original position. These orders include compensation for their pain and suffering and for any losses or expenses incurred as a result of the discrimination they experienced.¹⁷ Informed by their expertise in equality, human rights tribunals regularly use their broad remedial powers to craft solutions that “strike at the heart of the problem, to prevent its recurrence and to require that steps be taken.”¹⁸ For example, human rights tribunals regularly order respondents found to have been engaging in discriminatory practices to develop and implement antidiscrimination policies and internal complaint mechanisms and to have their employees take part in human rights training.¹⁹ They also often remain seized of cases after making remedial orders to ensure that they are implemented effectively.²⁰ While human

and Section 15 of the Charter in Pursuit of Equality: A Case for Greater Separation in Both Theory and Practice” (2013) 64 UNBLJ 54 at 69.

14 *Supra* note 9, ss 27–31.

15 *Ibid*, ss 32–47.

16 *Supra* note 9, ss 16–17.

17 See e.g. *Canadian Human Rights Act*, *supra* note 9, s 53(2).

18 *Robichaud v Canada (Treasury Board)*, 1987 CanLII 73 at para 15 (SCC).

19 See e.g. *Hughes v Elections Canada*, 2010 CHRT 4 at para 100.

20 For an overview of the remedial powers of human rights tribunals, see generally Gwen Brodsky, Shelagh Day & Frances Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies” (2017) 6:1 Can J Human Rights 1.

rights tribunals have rendered decisions tackling social disparities and their root causes—such as services for First Nations children and family,²¹ housing for people with disabilities,²² and inequalities in income²³ and disability support programs²⁴—they have yet to address inequalities relating to climate change.

As both a practicing human rights lawyer and a professor engaged in teaching and research in the field, I firmly believe that antidiscrimination statutes remain among the most powerful legal tools in Canada for advancing social justice and promoting equality. While I recognize that they have significant shortcomings, human rights tribunals have unique institutional strengths that make them particularly well-suited to address the complexities of discrimination and provide meaningful redress for systemic inequities.²⁵

But year after year, my students—the product of an increasingly environmentally conscious generation, who view climate change as a fundamental threat to human rights and equality—are astonished to learn that these laws have yet to be leveraged to address climate-related inequalities. Their disbelief often leads them to question the usefulness and value of human rights laws in tackling the social disparities impacting their generation. My hope is that, through boldness and flexibility, we can envisage human rights laws in a way that meaningfully responds to what my students often tell me is the defining equality crisis of their time. This paper aims to offer some ideas on how that vision might be achieved.

From the outset, it is important to recall the unique interpretive principles of human rights laws when compared to other statutes. There is

21 *Caring Society*, *supra* note 7 at para 1.

22 *Disability Rights Coalition v Nova Scotia (Attorney General)*, 2021 NSCA 70, leave to appeal to SCC refused, 2022 CanLII 28618 (SCC).

23 *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593.

24 *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360.

25 Anne Levesque, “Unlocking the Potential of the CHRT for Social and Economic Justice”, CJWL [forthcoming in 2026]. For an overview of some of the shortcomings and vulnerabilities of human rights tribunals, see Tribunal Watch Ontario, “Statement of Concern – Under the Ford Government: Justice Delayed and Denied at the Landlord and Tenant Board, the Human Rights Tribunal of Ontario and the Licence Appeal Tribunal” (13 February 2025), online: <tribunalwatch.ca> [perma.cc/RS74-BTWY]. The statement highlights the extent to which human rights regimes are susceptible to political interference and neglect.

some case law supporting the notion that the living tree doctrine is of relevance when interpreting human rights laws. For example, in *Canada (Attorney General) v. Mossop*, Justice L'Heureux Dubé reasoned:

Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time. These codes leave ample scope for interpretation by those charged with that task. The “living-tree” doctrine, well understood and accepted as a principle of constitutional interpretation, is particularly well suited to human rights legislation. The enumerated grounds of discrimination must be examined in the context of contemporary values, and not in a vacuum. As with other such types of legislation, the meaning of the enumerated grounds in s. 3 of the Act is not “frozen in time” and the scope of each ground may evolve.²⁶

While there remains no binding authority from the Supreme Court of Canada endorsing this view,²⁷ courts and human rights tribunals have described human rights laws as quasi-constitutional as well as pre-eminent and unique in their nature compared to other statutes.²⁸ As such, they must be interpreted as least restrictively as possible and in a manner that best advances their purpose and that gives meaningful effect to the protection they are intended to confer.²⁹

With regard to inequalities relating to climate change, I believe these guiding principles support interpretations of human rights laws that favour recognizing and remedying the adverse impact of climate change on members of protected groups. Anchored in this perspective, I outline four categories of cases that, if brought before human rights tribunals, would likely succeed if their enabling statutes are interpreted in a manner that best advances their purpose and gives meaningful effect to the

26 [1993] 1 SCR 554 at 621–22, 1993 CanLII 164 (SCC) [*Mossop*].

27 For an insightful discussion of the theory of quasi-constitutional legislation, see Vanessa MacDonnell, “A Theory of Quasi-Constitutional Legislation” (2016) 53:2 Osgoode Hall LJ 508.

28 See *Ont Human Rights Comm v Simpsons-Sears*, 1985 CanLII 18 at para 12 (SCC); *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 at 339, 1992 CanLII 67 (SCC).

29 See *Ontario (Attorney General) v Ontario (Human Rights Commission)*, 2007 CanLII 56481 at paras 39–40 (ON Div Ct).

protection they are intended to confer.³⁰ The purpose here is to envision broadly how one could frame human rights complaints seeking to address certain disparities relating to climate change, identify some of the challenges that they may face, and opine on how to overcome them. As the intent is to initiate a conversation about the possible application of human rights laws to climate change–related inequalities and not engage in test case development, I will not delve in detail into issues such as potential complainants or even respondents. Similarly, I will leave discussions about the type of evidence that might be required in these different complaints to the environmental lawyers and advocates with whom I have had the privilege to discuss and learn from over the years—and who inspired me to write this article.

II. POSSIBLE HUMAN RIGHTS RECOURSES RELATING TO CLIMATE CHANGE

A. *Adaptation Measures in the Provision of Services and Housing*

The clearest potential human rights case relating to climate change concerns adaptation measures in the context of employment, accommodation (housing), and the provision of services. Adaptation measures can be described as “actions that help reduce vulnerability to the current or expected impacts of climate change like weather extremes and hazards, sea-level rise, biodiversity loss, or food and water insecurity.”³¹ It would be entirely consistent with established human rights jurisprudence to require adaptation measures to be designed and implemented in a manner that meets the needs of members of protected groups.³² Indeed, the

30 I have identified four possible climate related complaints that I think are viable but acknowledge there might be more.

31 United Nations Development Programme, “What Is the Climate Change Adaptation and Why Is It Crucial?” (30 January 2024), online: <climatepromise.undp.org> [perma.cc/6CF7-B372].

32 It is important to recognize that adaptation measures encompass not only short-term, immediate responses aimed at disaster preparedness, but also longer-term modifications to policies, programs, services, and physical infrastructure that address climate risks and strengthen resilience. This paper will explore only short-term and immediate responses aimed at disaster preparedness. How and whether human rights laws apply to longer-term modifications to policies, programs, services, and physical infrastructure ought to be explored but is beyond the scope of this paper.

obligation to ensure the integration and full participation of protected groups in employment, housing, and service provision aligns seamlessly with the well-established duty to accommodate under Canadian human rights law.

The Ontario Human Rights Commission (OHRC) has already put forward such an interpretation of the *Ontario Human Rights Code* in a public statement it issued during a heatwave.³³ Acknowledging that some code-protected groups were disproportionately affected by heatwaves, the OHRC emphasized the importance of access to air conditioning as an equality-affirming measure to ensure all individuals can benefit equally from their residential accommodation. Conversely, the OHRC warned that blanket bans on air conditioners could disproportionately harm members of these groups and therefore potentially violate the code. The OHRC also stressed that the Province of Ontario ought to put in place legislation protecting vulnerable code-protected tenants from eviction threats for using safely installed air conditioning units.

This obligation to implement adaptation measures, grounded in the duty to accommodate, extends to other contexts where human rights laws apply and when protected groups may be disproportionately affected by the harmful impacts of climate change. For example, residences and long-term care facilities for seniors must protect their residents from age- or disability-related vulnerabilities during heatwaves given the heightened risks these groups face.³⁴ Schools have a similar duty toward children, particularly those who are more vulnerable to extreme heat.³⁵

33 Ontario Human Rights Commission, “Extreme Heat Waves”, *supra* note 8.

34 Long-term care homes in Ontario are required to maintain designated cooling areas with air conditioning (see O Reg 246/22, ss 11, 23(1), 23(2)(d), 23.1(1)–(2)). Moreover, since June 2022 all resident bedrooms must be served by air conditioning. Some homes have not yet complied with this requirement however (see e.g. Liam Casey, “99% of Ontario Nursing Homes Now Have Air Conditioning in Residents’ Rooms: Minister”, *The Canadian Press* (26 May 2023), online: <cbc.ca> [perma.cc/B3JZ-RMUC]).

35 Many human rights laws in Canada define “age” as eighteen years of age or older and therefore do not protect children from age-based discrimination. In practice, however, human rights tribunals can adjudicate allegations of age-based discrimination by individuals under eighteen by invalidating such underinclusive definitions for the purposes of the complaint due to lack of compliance with section 15(1) of the *Charter* (see *Arzem v R (Ontario)*, 2006 HRTO 17 at para 7 [*Arzem*]). This point will be discussed in further detail in the section on mitigation in Part II-C, *below*.

Employers, who also have the duty to accommodate, must also take measures to protect their employees who are members of protected groups who may be disproportionately impacted by heatwaves and other negative effects of climate change. These are all examples of cases that could be brought against respondents who fail to meet their duty to accommodate by developing and implementing adaptation measures to protect individuals who are more at risk of being harmed by climate change phenomena, such as heat waves.

Another critical aspect of adaptation that gives rise to obligations under human rights law concerns emergency responses. As emphasized by disability rights scholars, people with disabilities are among the most at risk in climate emergencies and experience significant barriers in accessing emergency assistance.³⁶ They explain:

[T]he additional dangers faced by disabled people in the context of natural disasters relate to the added vulnerabilities that accompany poverty, the accessibility of information about risk and hazard, the design of the built environment, and attitudes towards disabled people as “the least worth saving.”³⁷

In situations involving natural disasters—such as forest fires, heatwaves, floods, or other climate-related emergencies—service providers, like emergency responders, must ensure that their interventions consider and meet the needs of people with disabilities and members of other protected groups. This consideration requires a prior assessment of diverse needs—such as those of individuals with mobility issues, language barriers, and those accompanied by service animals—and a plan to meet them. The Disability-Inclusive Climate Action Research Program (DICARP) has already done extensive research examining emergency preparedness and response plans across Canada through a disability lens.³⁸ Their findings indicate that most disaster preparedness and adaptation policies in Canada do not adequately address the needs and rights of individuals with

36 Sébastien Jodoin, Nilani Ananthamoorthy & Katherine Lofts, “A Disability Rights Approach to Climate Governance” (2020) 47:1 *Ecology LQ* 73 at 82.

37 *Ibid*, citing David Abbott & Sue Porter, “Environmental Hazard and Disabled People: From Vulnerable to Expert to Interconnected” (2013) 28:6 *Disability & Society* 839 at 843.

38 Sébastien Jodoin et al, *Disability Rights in Canadian Climate Policies: Status Report* (Montreal: Centre for Human Rights & Legal Pluralism, 2022).

disabilities.³⁹ While plans and policies may not themselves qualify as “services” under human rights laws, they do play a crucial role in ensuring that accommodation measures are anticipated and are thus more likely to be provided during crises. Conversely, the absence of such plans or policies, or their failure to address the specific needs of protected groups, would constitute compelling evidence of systemic discrimination in a complaint where accommodation was not provided or was denied during emergency response services in a natural disaster. This scenario would underscore that the failure to accommodate was not an isolated incident but a symptom of widespread inadequacies requiring systemic remedies.

However, the issue of whether or not a given policy or plan sufficiently considers the needs of protected groups would not be of central importance in a potential complaint alleging discrimination in emergency response measures. Human rights laws are concerned with measures taken in practice and not on paper. As such, a human rights complaint with the greatest chances of success would need to focus not merely on the existence or absence of a human rights lens in a given emergency response plan or policy. It would need to focus on the actual measures that were or were not taken to consider and meet the needs of individuals relating to protected grounds—such as disability or age—during a natural disaster. Human rights laws clearly mandate that emergency responses must address the needs of individuals relating to various grounds of discrimination. If a tribunal finds that a respondent has failed to do this, it could order the respondent to adopt and implement some of the recommendations made by the DICARP research team, such as the development, implementation, and enforcement of a disability-sensitive climate adaptation policy aimed at enhancing the climate resilience of persons with disabilities.⁴⁰ In other words, proactively adapting and effectively implementing the DICARP research team’s recommendations helps mitigate the risk of discrimination while positioning organizations as leaders in upholding the values of equality and inclusion.

39 *Ibid* at 13.

40 *Ibid* at 13–15.

B. *Climate Consciousness as a Protected Ground of Discrimination*

While climate experts and activists rightly emphasize that addressing climate change requires systemic solutions beyond individual action, an increasing number of people are embracing significant lifestyle changes to reduce their carbon footprint.⁴¹ The commitment of climate conscious individuals to live more sustainably can give rise to tensions when they encounter policies, practices, and norms that contribute to climate change and are thus fundamentally incompatible with their core values. These tensions may arise in workplaces,⁴² service provision,⁴³ and housing⁴⁴—precisely the domains governed by human rights laws in Canada. Consequently, human rights legislation may offer a promising pathway for safeguarding the rights of these individuals and supporting their mitigation efforts.

But is there, for example, a duty for an employer to accommodate a climate conscious individual who does not wish to commute to work or fly to international conferences in order to reduce their carbon footprint? Must universities accommodate students who miss class to engage in climate protests? Can customers demand that they not be served with single-use plastics produced by petrochemicals? Can a tenant demand that their landlord provide a charging station for their electric car?⁴⁵ At first glance, the answer is obviously “No.” Climate consciousness is not a

41 In a 2018 Facebook post, Greta Thunberg urged individuals to tag their climate action. She stated that she had stopped flying and eats vegan, but emphasized that this alone was not the solution—political decisions are necessary (see Greta Thunberg, “After the COP24 I have been invited to speak ...” (30 December 2018), online: <facebook.com> [perma.cc/4XAU-NP42]).

42 See generally Leigh Stringer, *The Green Workplace: Sustainable Strategies that Benefit Employees, the Environment, and the Bottom Line* (New York: Palgrave Macmillan, 2009).

43 See e.g. Myriam Ertz, Fahri Karakas & Emine Sarigöllü, “Exploring Pro-Environmental Behaviors of Consumers: An Analysis of Contextual Factors, Attitude, and Behaviors” (2016) 69:10 J Bus Research 3971.

44 See e.g. United States Environmental Protection Agency, *Energy Efficiency in Affordable Housing: A Guide to Developing and Implementing Greenhouse Gas Reduction Programs*, Local Government Climate and Energy Strategy Series (Washington, DC: EPA, 2011), online (pdf): <epa.gov> [perma.cc/J4L4-A3XL].

45 Gabrielle Huston, “Is It a Tenant’s Right to Charge an EV at Their Rental?”, *CBC News* (last modified 14 November 2024), online: <cbc.ca> [perma.cc/D674-YLL8].

protected ground of discrimination in any human rights law in Canada, and, contrary to the *Charter*, human rights tribunals do not have the jurisdiction to “read-in” analogous grounds that are not expressly included in housing statutes.⁴⁶ However, as human rights laws are quasi-constitutional, and therefore to be interpreted as broadly as possible, human rights tribunals must consider whether climate consciousness is linked to other grounds of discrimination.⁴⁷ In my view, there are compelling arguments to be made that climate consciousness intersects with protected grounds of discrimination, such as creed, disability, and age.

1. Creed

Creed is a prohibited ground of discrimination in most jurisdictions in Canada.⁴⁸ In Ontario, recent case law reaffirmed the five-part test in order for a belief system to be protected as a creed under human rights law.⁴⁹ The elements are: (1) is sincerely, freely and deeply held; (2) is integrally linked to a person’s identity, self-definition and fulfillment; (3) does it address ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a Creator and/or a higher or different order of existence; (4) is a particular and comprehensive, overarching system of belief that governs one’s conduct and practices; and (5) has some nexus or connection to an organization or community that professes a shared system of belief.

One could argue persuasively that climate consciousness is fundamentally tied to this ground of discrimination. Indeed, the OHRC policy on creed, for example, emphasizes that the definition of creed should not only be limited to encompass religion but also “non-religious belief systems that ... substantially influence a person’s identity, worldview and

46 *Chan v MTY Tiki Ming Enterprises Inc*, 2013 HRT0 915 at para 41.

47 For example, even though language is not a protected group of discrimination in most jurisdictions, tribunals will still examine whether the characteristic is linked to other protected grounds such as race or ethnic origin (see *ibid*).

48 *Human Rights Act Nu*, *supra* note 9, s 7(1); *Human Rights Act NB*, *supra* note 9, s 2(1)(f); *Human Rights Act NS*, *supra* note 9, s 5(1)(l); *Human Rights Act PEI*, *supra* note 9, s 13; *Human Rights Act Y*, *supra* note 9, s 7(d); *Human Rights Act NL*, *supra* note 9, s 9(1); *Human Rights Act NWT*, *supra* note 9, s 5(1); *Human Rights Code O*, *supra* note 9; *Human Rights Code M*, *supra* note 9, s 9(2)(d); *Human Rights Code S*, *supra* note 9, s 2(1).

49 *Ortiz v University of Toronto*, 2022 HRT0 1288 at para 9.

way of life.”⁵⁰ Many climate consciousness individuals very likely believe that their efforts to reduce their carbon footprint are much more than mere environmentally-friendly lifestyle choices, but rather a foundational belief that is intricately tied to their identity and worldview. Such beliefs are not merely incidental preferences but form the bedrock of how they understand their place in the world and their responsibility to future generations. Furthermore, the fifth element of the test—whether the belief has a connection to a community—can be readily demonstrated as climate conscious individuals are part of a global movement committed to environmental protection and advocacy.⁵¹

The third element of the test—whether the belief addresses ultimate questions of human existence, such as the existence or non-existence of a Creator or a higher order of existence—is the one that poses the most significant challenge to recognizing climate conscious individuals as having a protected belief under human rights law. It is also this element that the Human Rights Tribunal of Ontario (HRTO) found was not satisfied for veganism in *Knauff v. Ontario (Natural Resources and Forestry) (Knauff)*.⁵² In an application in the context of employment, the HRTO held that ethical veganism did not constitute a creed within the meaning of the *Ontario Human Rights Code* because it did not “address the existence or non-existence of a Creator and/or a higher or different order of existence, as required by the third part of the test.”⁵³ If the meaning of creed is narrowly restricted to beliefs about the existence or non-existence of a Creator, as applied in the veganism case in Ontario, a discrimination complaint from a climate conscious individual, whose beliefs center on planetary

50 Ontario Human Rights Commission, *Policy on Preventing Discrimination Based on Creed* (Toronto: OHRC, 17 September 2015) at 1, online (pdf): <ohrc.on.ca> [perma.cc/67BC-VWB2].

51 However, the Federal Public Sector Labour Relations and Employment Board held that “creed” in a collective agreement was synonymous with the term “religion”, and that the grievor’s earth-based spirituality was not a religious belief (see *Frankovic v Treasury Board (Department of Transport)*, 2025 FPSLREB 19 at paras 4–5).

52 2023 HRTO 1729 at paras 18–19 [*Knauff*]. The applicant sought a judicial review of the decision. In a recent case, the Divisional Court of Ontario dismissed the application for mootness without considering whether the HRTO erred in its determination that ethical veganism was not a creed under the *Code* (see *Knauff v Human Rights Tribunal of Ontario*, 2025 ONSC 786 at para 8).

53 *Knauff*, *supra* note 51 at para 22.

preservation and the well-being of future generations rather than a deity, would almost certainly be dismissed.

With respect, in my view, *Knauff* was wrongly decided or, at the very least, should not be relied upon in cases involving climate conscious individuals. As the requirement that a belief must relate to the existence of a Creator is not explicitly set out in any human rights legislation in Canada, it should not be read into the meaning of creed. Moreover, this restriction is not supported by the plain meaning of the term, which, according to the *Canadian Oxford Dictionary* means “a set of principles or opinions.”⁵⁴ The *Merriam-Webster Dictionary* defines the term as meaning “a brief authoritative formula of religious belief” or a set of fundamental beliefs.”⁵⁵ Belief systems that address fundamental human concerns, such as the survival of the planet and the ethical imperative to combat climate change, are readily included in all of these definitions. This holds true particularly when the term is given the broadest meaning possible, as required in the interpretation of human rights laws.

The case against a restrictive interpretation of creed that is tied to the existence or not of a creator is all the more compelling in jurisdictions such as Nova Scotia where creed and religion are enumerated as separate grounds of discrimination in human rights laws.⁵⁶ As legislatures shun tautology and do not speak in vain, the inclusion of both creed and religion suggests that the two terms were intended to protect different characteristics. In these jurisdictions, the term creed must therefore be understood as encompassing something broader than, or at least distinct from, religion, which already protects beliefs centered on a Creator or God.⁵⁷ A

54 Katherine Barber, *The Canadian Oxford Dictionary*, 2nd ed (Oxford: Oxford University Press, 2005) sub verbo “creed”.

55 Merriam-Webster, “Merriam-Webster.com Dictionary” (last modified 9 June 2026) sub verbo “creed”, online: <merriam-webster.com> [perma.cc/3A5K-H6YB].

56 *Human Rights Act Nu*, supra note 9, s 7(1); *Human Rights Act NS*, supra note 9, ss 5(1)(k)–(l); *Human Rights Act PEI*, supra note 9, s 13; *Human Rights Act NL*, supra note 9, s 9(1); *Human Rights Act NWT*, supra note 9, s 5(1); *Human Rights Code S*, supra note 9, s 2(1). Consider also statutes that employ “creed or religion” to describe a category of prohibited grounds (see *Human Rights Act NB*, supra note 9, s 2(1)(f); *Human Rights Act Y*, supra note 9, s 7(d); *Human Rights Code M*, supra note 9, s 9(2)(d)).

57 In her reasons, L’Heureux Dubé explained that due to the inclusion of both marital status and family status in the *Canadian Human Rights Act*, it was reasonable to conclude that both terms had different meanings (see *Mossop*, supra note 26 at 619).

less restrictive interpretation of creed would enable the recognition of deeply held beliefs—such as those related to environmental protection, which are central to individuals’ identities and actions—even in the absence of belief in a Creator. More broadly, given the existential threat climate change poses to humanity, it is hard to deny that beliefs about environmental protection and sustainability are deeply tied to fundamental questions of human existence. These beliefs often shape individuals’ worldviews and their understanding of humanity’s role on Earth. All of these reasons support a broader interpretation of creed: one that recognizes climate consciousness as a deeply held belief system encompassed by creed and thus attracts legal protection.

2. Disability

Climate consciousness may also be associated with the ground of disability. As the urgency to combat climate change escalates, warnings from leading scientists have become increasingly alarming. These warnings have underscored the need for immediate global action but also heighten individual fears about the planet’s future leading to significant mental health impacts. Terms like climate anxiety and eco-anxiety describe this growing sense of environmental dread. Canadian courts have acknowledged the existence of psychological distress and climate-related anxiety.⁵⁸ This recognition raises a critical question for Canadian human rights law: Can existing legislation evolve to recognize climate anxiety as a mental disability requiring accommodation? The answer lies in the broad and evolving definition of disability. While eco-anxiety is not explicitly listed in human rights laws, it should not be excluded outright from consideration.

Consistent with existing case law, it is crucial to distinguish between occasional worrying, which would not attract human rights protection, and clinical anxiety whatever the cause.⁵⁹ Unlike general environmental worry, climate anxiety can be a disabling condition characterized by an intense and persistent fear of climate-related risks, often accompanied by symptoms such as irritability, insomnia, fatigue, and even panic attacks.

58 *La Rose*, *supra* note 5 at para 125; *Mathur*, *supra* note 5 at paras 12–13.

59 See e.g. *Dow v Summit Logistics and RWU Local 580*, 2006 BCHRT 158 at para 18; *Skytrain and CUPE, Local 7000 (Olsen)*, Re (2009), 2009 CarswellNat 6774 at paras 68–69 (Arbitrator: J Steeves Member).

These symptoms have already been deemed to amount to disabilities under human rights laws and ought to be considered as such when they are related to climate anxiety.⁶⁰

That said, recognizing climate anxiety and eco-anxiety as disabilities under human rights law ought to be approached with nuance and in a manner that aligns with the social model of disability, which has been widely embraced in human rights tribunals and the Supreme Court.⁶¹ The social model shifts the focus from the biomedical causes of an impairment to its social impacts such as marginalization and exclusion. As such, an inquiry into whether climate anxiety or eco-anxiety amounts to a disability in particular circumstances ought to be focused on the disabling effects rather than the biomedical causes or justifications. In other words, depression and anxiety linked to climate fears must be treated like any other impairment shaped by environmental, attitudinal, or structural barriers to societal participation. This approach avoids reinforcing harmful stereotypes that certain forms of depression are more justified than others. This is consistent with existing human rights law which rejects any hierarchy of disability or mental illness, requiring accommodation for any condition causing functional limitations regardless of its origin. This principle should be equally applied in cases involving climate anxiety. Seeing disability in this light would also address potential concerns about self-identification and the reluctance of some individuals to view climate anxiety as a disability on the grounds that it is a normal response to the climate crisis. This approach to disability is also consistent with the social model, which understands disability as a naturally occurring phenomenon, while locating the source of marginalization in social, structural, and attitudinal barriers rather than in individuals experiencing the impairment.

60 Thomas J Doherty, “Mental Health Impacts” in Barry S Levy & Jonathan A Patz, eds, *Climate Change and Public Health* (New York: Oxford University Press, 2015) 195 at 200.

61 *Hinze v Great Blue Heron Casino*, 2011 HRTO 93 at paras 19–22. See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27 at paras 76–77.

3. Age

There is also a strong connection between age, climate anxiety, and climate consciousness. Indeed, a growing body of research shows that children and young people are particularly vulnerable to climate anxiety as they have little power to mitigate its effects despite its significant impact on their health and future.⁶² A 2021 study published in *The Lancet Planetary Health* surveyed over ten thousand individuals aged sixteen to twenty-five years across ten countries and revealed widespread feelings of sadness, anxiety, anger, and helplessness. Nearly half reported that their climate-related distress negatively affected their daily lives with many experiencing persistent negative thoughts about the issue. A study conducted in the Canadian context yielded similar results.⁶³ In this study, over half of the survey respondents aged sixteen to twenty-five years expressed feelings of fear, sadness, anxiety, and powerlessness. Most respondents also stated that climate change negatively affected their mental health.

An initial challenge for such a complaint is that many human rights laws across Canada tacitly permit age-based discrimination against children because they define age as eighteen years of age or more.⁶⁴ This would not preclude youth over eighteen who are young adults and protected against age discrimination from filing such a complaint. An age-based discrimination complaint filed by children could proceed if a tribunal were to strike the narrow definition of age for the purposes of the complaint to include protection for individuals under eighteen as it has in the past.⁶⁵

Even in jurisdictions where age is not explicitly defined to exclude children and youth, complainants would face other obstacles. A key difficulty would be establishing a link between climate anxiety and age. Case law does not establish an exact statistical threshold for

62 See e.g. Caroline Hickman et al, "Climate Anxiety in Children and Young People and Their Beliefs About Government Responses to Climate Change: A Global Survey" (2021) 5:12 *Lancet Planetary Health* e863.

63 Lindsay P Galway & Ellen Field, "Climate Emotions and Anxiety Among Young People in Canada: A National Survey and Call to Action" (2023) 9 *J Climate Change & Health*, No 100204 at 3–5.

64 See e.g. *Arzem*, *supra* note 35 at paras 1, 7.

65 *Ibid* at paras 172–73.

demonstrating such a connection between a protected ground and an individual's characteristic.⁶⁶ As such, it remains uncertain whether the statistical evidence from studies on the impact of climate change on the mental health of younger populations would suffice to establish an inextricable link between youth and climate anxiety, or even what that threshold entails. In theory, the fact that not all children and young people experience climate anxiety or concern should not necessarily undermine such a complaint. As noted in *Janzen v. Platy Enterprises Ltd.*, “[i]t is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically.”⁶⁷ Despite this assertion, as we have seen in the context of section 15 of the *Charter*, even compelling evidence of statistical disparity has yielded mixed results in convincing judges of the necessary connection between a characteristic and a ground of discrimination.⁶⁸

In sum, both climate anxiety and climate consciousness do not fit neatly into an existing protected ground of discrimination. Establishing an inextricable link between climate anxiety and age, creed, and disability presents significant challenges. Because of this, a more viable approach may be an intersectional complaint considering multiple grounds. As equality scholars have noted, intersectionality helps expose discrimination that stems from multiple grounds, particularly where it is impossible to separate the impact of each ground, or where the discrimination can only be fully understood by looking at how two or more grounds

66 See *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 at paras 40, 100–03 [*Vancouver Area Network*], leave to appeal to SCC refused, 2019 CanLII 6022 (SCC).

67 [1989] 1 SCR 1252 at 1289, 1989 CanLII 97 (SCC) [*Janzen*]. Justice Abella recently restated this quote from *Janzen* in *Fraser v. Canada (Attorney General)* (2020 SCC 28 at para 73 [*Fraser*]). Note, however, that Justices Côté, Brown and Rowe dissented on this issue, denying the nexus between “care-giving” and “sex-based” based on examples of hypothetical exceptions to the statistically significant pattern of gendered caring-giving (*ibid* at paras 230–56). See generally *Vancouver Area Network*, *supra* note 66.

68 For example, Justice Côté wrote in dissent that “the nature of statistics means that they are presented to courts frozen at a point in time, yet in reality, they are constantly shifting—it cannot be that the very same law that is constitutional one day is unconstitutional the next based solely on statistical evidence” (see *Fraser*, *supra* note 67 at para 245).

interact.⁶⁹ This remains an idea worth exploring further, especially as our understanding of climate-related mental health impacts deepens, and as climate consciousness and resistance become defining aspects of identity, particularly for youth and younger generations.

4. Explicit Addition of Climate Consciousness or Environmental Consciousness as a Ground of Discrimination

Given the challenges of linking climate consciousness or environmental consciousness with creed, disability or age, a more definite approach to extending human rights protection to such individuals would be to amend human rights laws to explicitly recognize these last as grounds of discrimination. Doing so would acknowledge the deep connection between environmental beliefs and fundamental questions of human existence. Ensuring that those who prioritize sustainability and planetary protection receive the same legal protections as other belief systems would be a fitting addition as individuals with strong ecological commitments—much like those in other protected categories—often face marginalization and exclusion, particularly in a capitalist society heavily reliant on fossil fuels, where they may encounter systemic resistance or hostility. And like other protected groups, climate consciousness is a characteristic that is alterable only at a profound cost to one's personal identity. Protecting climate consciousness would not only affirm the intrinsic social value and public interest in ecological beliefs and actions but also acknowledge the collective responsibility they embody. While a liberal interpretation of human rights laws should, in principle, reflect the strong connection between climate consciousness and existing prohibited grounds of discrimination, explicitly adding this ground would bring much-needed legal clarity and predictability for those seeking protection under the law.

Resistance to this idea is to be expected. Skeptics are likely to raise extreme hypothetical scenarios such as flight attendants refusing to attend work in an aircraft in order to reduce their carbon footprint, or oil and gas workers seeking exemptions from duties to avoid supporting a

69 Grace Ajele & Jena McGill, *Intersectionality in Law and Legal Contexts* (Toronto: Women's Legal Education and Action Fund, 2020) at 47, citing Dagmar Schiek, "On Uses, Mis-uses and Non-uses of Intersectionality before the Court of Justice (EU)" (2018) 18:2-3 Intl J Discrimination & L 82 at 83.

climate change-inducing industry. Fortunately, there is already a rich body of human rights case law offering strong rebuttals to similar gripes rooted in slippery slopes, whataboutisms, and hypothetical and highly improbable concerns about fraudulent claims for accommodation. Employers are not required to fundamentally alter working conditions but must, where possible, adjust the workplace or duties to enable an employee to perform their job.⁷⁰ The duty to accommodate does not extend to exempting individuals from essential job functions, nor is it limitless: it remains subject to the undue hardship standard.⁷¹ Hypothetical and extremely unlikely cases should not be wielded to undermine desirable evaluations in human rights case law. Instead, existing precedent provides a roadmap for how the accommodation of climate consciousness could be meaningfully implemented with ease. For example, the widespread implementation of scent-free policies to accommodate those with environmental sensitivities teaches us that it is entirely possible to accommodate individuals with eco-anxiety by prohibiting plastic bottles, which may trigger symptoms, in workplaces.

C. Government Efforts to Mitigate Climate Change as a Service

Around the world and in Canada, the effects of climate change disproportionately impact members of marginalized communities, exacerbating existing inequalities and creating new ones.⁷² These communities often face greater exposure to climate-related hazards and have access to fewer resources to adapt or recover.⁷³ In response, all levels of

70 *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at paras 14, 16.

71 *Pourasadi v Bentley Leathers Inc.*, 2015 HRTO 138 at paras 25–28.

72 The use of the word “vulnerable” is not meant to stereotype and stigmatize members of protected groups, but rather to recognise that structural barriers and forms of oppression increase the risk and harms they experience. For a feminist and post/decolonial critique of the language of vulnerability relating to climate change, see Monika Mayrhofer, “International Human Rights and Climate Change (Policies): Challenging the Concept of Vulnerability” (2024) 160 *Envtl Science & Pol’y*, No 103847.

73 For more on the disproportionate effect of climate change on marginalized communities, see e.g. Alexandra Lesnikowski et al, “Human Rights in Climate Change Adaptation Policies: A Systematic Assessment” (2024) 24:8 *Climate Pol’y* 1050; Assembly of First Nations, *Climate Change and Water: Impacts and Adaptations for First Nations Communities* (Ottawa: AFN, 2011); Ingrid Waldron, “Findings from a Series of

government in Canada are being called upon to take comprehensive measures aimed at mitigating climate change through the reduction of greenhouse gas emissions (GHGs). An emerging question is thus whether human rights laws are relevant when these measures fall short in protecting marginalized populations that face heightened risk, or who are disproportionately harmed by the impacts of climate change. For example, research shows that the targets set out in the *Paris Agreement* are insufficient to protect Arctic communities from the devastating impacts of climate change. While limiting global temperature rise to below 2°C above pre-industrial levels may be adequate to protect the Canadian south, it is expected to cause an eightfold increase in ice-free summers in the Arctic with profound consequences for all aspects of life in these communities.⁷⁴ This insufficiency raises the question of whether a complaint could be filed against the Government of Canada for implementing mitigation strategies that inadequately reduce the climate-related harms experienced by the Inuit of the Arctic on the basis of their race and/or ethnic origin.

For mitigation measures to fall within the purview of human rights laws, they must first be considered a “service” under these statutes. The initial determination of whether a treatment alleged to be discriminatory in a complaint qualifies as a service is critical in human rights law as it establishes whether the complaint falls within the jurisdiction of the

Workshops Entitled ‘In Whose Backyard?: Exploring Toxic Legacies in Mi’kmaw & Nova Scotian Communities’” (2015) 8:2 *Envtl Justice* 33; James D Ford et al, “Vulnerability of Aboriginal Health Systems in Canada to Climate Change” (2010) 20:4 *Global Env’tl Change* 668; Matthew Scott, *Climate Change, Disasters, and the Refugee Convention*, Cambridge Asylum and Migration Studies (Cambridge, UK: Cambridge University Press, 2020) at ch 2; Merrill Singer, *Climate Change and Social Inequality*, Routledge Advances in Climate Change Research (London, UK: Routledge, 2019); Salim Momtaz & Muhammad Asaduzzaman, *Climate Change Impacts and Women’s Livelihood*, Routledge Studies in Hazards, Disaster Risk and Climate Change (London, UK: Routledge, 2018); Kate Raworth, “Climate Wrongs and Human Rights: Putting People at the Heart of Climate-Change Policy” (2008) Oxfam International, Briefing Paper No 117; Sébastien Jodoin, Annalisa Savaresi & Margaretha Wewerinke-Singh, “Rights-Based Approaches to Climate Decision-Making” (2021) 52 *Current Opinion Env’tl Sustainability* 45; *A Critical Approach to Climate Change Adaptation: Discourses, Policies, and Practices*, ed by Silja Klepp & Libertad Chavez-Rodriguez, Routledge Advances in Climate Change Research (Abingdon, UK: Routledge, 2018).

74 Michael Sigmond, John C Fyfe & Neil C Swart, “Ice-Free Arctic Projections Under the Paris Agreement” (2018) 8:5 *Nature Climate Change* 404 at 404.

adjudicating body.⁷⁵ Human rights jurisprudence indicates that, once the state provides a benefit, it must do so in a non-discriminatory manner.⁷⁶ Jurisdiction becomes an issue where a state does not provide a benefit, as there is no service on which to focus the complaint. Perversely, this condition suggests that filing a complaint against a government for doing absolutely nothing to curb climate change may prove more challenging than attacking measures that are being taken. In cases where the government is taking no measures at all, it would be more difficult to frame their failure to provide a benefit as constituting a service under human rights laws. In contrast, when measures aiming to provide a benefit to the public are implemented, they are generally considered a service under human rights law and therefore fall under a social area in which these statutes generally apply.

Recent jurisprudence under the *Charter* highlights similar challenges. The Ontario Court of Appeal, for example, found that because the government of Ontario had voluntarily imposed statutory obligations to combat climate change, it was required to produce a plan and a target that were Charter compliant.⁷⁷ Experts in climate change and law have commented that:

This approach risks pushing governments into a race to the bottom, incentivized to operate in a legislative vacuum. Elected

75 Claire Mummé writes:

In *Ontario (Director, Disability Support Program) v Tranchemontagne*, the Ontario Court of Appeal entered on to the most recent battleground in the world of statutory human rights law—a challenge to the content of a statutorily created government program under the auspices of the *Ontario Human Rights Code* (OHRC) instead of under section 15(1) of the *Canadian Charter of Rights and Freedoms*. ...

In recent years, government services claims of the sort exemplified by *Tranchemontagne* have gained increasing visibility (*supra* note 13 at 103 [footnotes omitted]).

See also Frank Nasca, “Jurisdiction and Access to Justice: An Analysis of Human Rights Tribunal of Ontario-Issued Notices of Intent to Dismiss” (11 October 2022), online: <cba.org> [perma.cc/Rf4N-8RU8].

76 *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 at para 73 (SCC).

77 *Mathur*, *supra* note 5 at paras 5, 53. For a critique of the decision, see Joel Bakan, “Negating Positive Rights: A Note on *Mathur v Ontario*” (2025) 33:3 Const Forum Const 1.

officials should avoid prescribing any GHG reduction targets by statute to evade court challenges.

The form of conduct should not serve as an escape hatch through which governments can avoid *Charter* scrutiny. When there is a clear, ascertainable standard, the judiciary should assess the evidence and determine whether the standard is met, regardless of the shape the government's conduct takes.⁷⁸

Just as in *Charter* law, where governments may be incentivized to avoid legislating to evade court challenges, existing human rights jurisprudence could similarly discourage the adoption of climate plans or emissions targets. Implementing such plans or targets is more easily classified as a service and thus subject to anti-discrimination norms. In contrast, complete inaction on mitigation is less readily characterized as falling within the jurisdiction of tribunals. Doing absolutely nothing can difficultly be characterized as a provision of a service. Furthermore, the mere adoption of a climate plan or emission targets—however unambitious or potentially harmful to members of protected groups they may be—may not qualify as a service under human rights laws and therefore falls outside the jurisdiction of relevant adjudicative bodies. Laws, regulations, and policies generally do not, in themselves, constitute services.⁷⁹

All of these challenges can be surmounted by drafting a human rights complaint focused on the *tangible benefits* conferred by climate plans and targets rather than plans or targets themselves. Measures taken to mitigate climate change or to lower emission targets, including

78 Nathalie Chalifour, Jessica Earle & Laura Macintyre, "Detrimental Deference: One of Two Recent Rulings Sets a Worrying Precedent for Future Youth Climate Challenges", *National Magazine* (18 November 2020), online: <nationalmagazine.ca> [perma.cc/297M-Q7PX].

79 *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 96. On the tribunal's decision that the *implementation* of a policy that aimed to provide police services to First Nations communities was a service under the CHRA, see also *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v Public Safety Canada*, 2022 CHRT 4 at para 229 [*Dominique* CHRT], leave to appeal to FC refused, *Canada (Attorney General) v Pekuakamiulnuatsh First Nation*, 2023 FC 267 [*Dominique* FC]). In its reasons upholding the CHRT's decision, the Federal Court emphasized that the complaint was focused on Canada's interpretation and application of its policies and not the policies themselves (see *Dominique* FC, *supra* note 79 at para 74, *aff'd* *Canada (Attorney General) v Dominique*, 2025 FCA 24).

monitoring and ensuring accountability, would more easily meet the criteria of a service under human rights laws because they aim to provide the benefit of safeguarding the public against the detrimental impacts of climate change.⁸⁰ A human rights complaint could be filed relating to insufficient or ineffective measures alleging that they deny certain groups the equal benefit of protection from climate-related harms.

But a complaint about the benefit provided by such measures would face other hurdles. First, government lawyers often carp about broadly formulated complaints claiming that such cases are too complex and wide-ranging to be adjudicated, and that the complainants are essentially seeking a royal commission, which exceeds the tribunals' jurisdiction.⁸¹ This issue closely ties into a second legal challenge that a complaint relating to the benefits provided by mitigation measures would inevitably encounter: the difficulty of establishing a link between the benefits provided by high-level government measures and the harm experienced by individual victims. In *Moore v. British Columbia (Moore)*, for example, the Supreme Court held that the Province of British Columbia was not liable for the discrimination experienced by a dyslexic student even though it had implemented a block-funding mechanism that did not provide additional funding to support the special education needs of all students with disabilities. According to the Court, the connection between the province's funding cap and the closure of the Diagnostic Centre, which the claimant required to equally benefit from education, was too remote, given that a range of other factors led to the school district's budgetary crisis.⁸² Suggesting that the province could not be held liable for discrimination because other actors could have intervened to prevent the funding formula from adversely impacting students with special needs, the Court wrote, "There is no particular reason to think that these funding mechanisms could not be retained in some form while still ensuring that Severe Learning Disabilities students receive adequate support."⁸³ Applying this reasoning to a potential human rights complaint against a government,

80 The CHRT, for example, found that the monitoring of a program, provision of assistance, and implementation of accountability measures amounted to a service under the CHRA (see *Dominique CHRT*, *supra* note 79 at para 203).

81 See e.g. *Moore*, *supra* note 11 at paras 64, 68–70.

82 *Ibid* at para 65.

83 *Ibid*.

which concerns insufficient mitigation measures causing adverse impacts on members of protected groups, would mean that the case is destined to fail. Linking the adverse impact experienced by members of a protected group during a climate change-related natural disaster to a specific inadequate measure of a climate plan of a particular level of government would be next to impossible.⁸⁴ Worse still, applying a threshold, as suggested in *Moore*, that requires a complaint to establish that the adverse impact of insufficient mitigation measures on protected groups cannot be prevented by other factors or actors would be insurmountable given the nature of climate change and its complex and multiple causes.

Yet, more recent human rights jurisprudence could help overcome these challenges. The Canadian Human Rights Tribunal's decision on the merits in *First Nations Child and Family Caring Society of Canada v. Canada (Caring Society)* is instructive.⁸⁵ In that case, the Canadian Human Rights Tribunal (CHRT) accepted to adjudicate and upheld a broadly formulated complaint targeting Canada's First Nations child welfare system, including its policies, its oversight, and its funding formulas, as well as its definition and implementation of Jordan's Principle. The CHRT (and the Federal Court on judicial review) expressly rejected the Attorney General's reliance on *Moore* and its contention that the complainants were attempting to turn the hearing into a "roving commission of inquiry."⁸⁶ According to the CHRT, Canada's entire child and family services for First Nations and its implementation of Jordan's Principle created a public relationship between Canada and First Nations children. Together, these conferred the benefit of seeking to improve outcomes for First Nations children and families and were therefore a service under the *Canadian Human Rights Act (CHRA)* and within Canada's jurisdiction.

A similar analysis would be useful in a complaint focused on the adverse impact of the insufficient mitigation measures taken by Canada

84 This challenge is not unique to human rights law. Legal scholars specializing in various areas of public and private law frequently highlight the doctrinal limitations that make legal frameworks poorly equipped to address climate change-related harms, given the complexity, interconnectedness, and diverse stakeholders and factors involved.

85 *Supra* note 7 at para 458.

86 This argument was made by the Attorney General but rejected by the Federal Court on judicial review (see *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at paras 144–74).

under the Emission Reduction Plan on groups protected under the *CHRA*. Measures taken by Canada under its climate plan and its emissions targets can be said to create a public relationship between it and Canadians in which a benefit is conferred. Indeed, Canada's own Emission Reduction Plan sets out the various benefits relating to maintaining a stable climate conferred to Canadians by this relationship.⁸⁷

The CHRT's analysis in *Caring Society* would also be helpful in addressing the issue of remoteness in a potential human rights complaint against a government relating to mitigation.⁸⁸ Unlike in *Moore*, the CHRT in *Caring Society* did not ask whether other factors could have prevented the respondent's actions from resulting in negative outcomes for victims: In this case, whether other factors could have prevented Canada's First Nations services and implementation of Jordan's Principle from resulting in negative outcomes for children. Rather, the tribunal held that the involvement of other actors, including other levels of government, in the provision of child and family services for First Nations was not determinative of the service issue and did not shield Canada from human rights scrutiny.⁸⁹ Accordingly, the CHRT examined whether Canada's child and family services and its implementation of Jordan's Principle were compliant with the *CHRA*. In doing so, the tribunal asked not whether the adverse impacts of Canada's treatment could have been prevented by other factors or actors, but whether it perpetuated the historical disadvantages of First Nations families and children. The fact that it did was sufficient to establish a connection between the service and the discrimination experienced by victims. Similarly, applying an equality analysis

87 This is similar to the framing that Nathalie Chalifour and Jessica Earle have recommended for a constitutional challenge relating to the inadequacies in GHG reductions. They suggest that focusing on a constellation of government decisions that collectively lead to harm would be a strategically compelling way to proceed with a *Charter* challenge (see Nathalie J Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42:4 Vt L Rev 689 at 736–38).

88 Another critique of *Moore* is that it erroneously imported principles of private law in the human rights analysis which courts have cautioned against (see Sophie Bisping, "Confronting Our Failures: Tensions in Remediating Systemic Discrimination in Canada" (2024) 24:4 Intl J Discrimination & L 314 at 321–22).

89 *Caring Society*, *supra* note 7 at para 39. For a recent adoption of the reasoning in *Caring Society*, see *Dominique* CHRT, *supra* note 79 at para 54. The Federal Court affirmed this reasoning (see *Dominique* FC, *supra* note 79 at para 77).

akin to that used in the *Caring Society* case, a human rights complaint related to the mitigation measures taken under Canada's climate plan and emissions target ought to assess whether they perpetuate or reduce historical disadvantages faced by members of protected groups.

In my view, the most apparent and likely winnable discrimination complaint related to mitigation would be on the basis of race, disability, or age. For example, a potential human rights complaint filed by Inuit communities could allege that measures taken under Canada's climate plans and targets not only fail to provide them with the same protection against the adverse impacts of climate change as non-Inuit communities, but also that they perpetuate their historical disadvantages. A disability-based complaint could allege that a climate plan or GHG reduction target fails to take into account the distinct needs of individuals with impairments that cause them to be more severely impacted by the effects of climate change.⁹⁰ For example, individuals with respiratory conditions are disproportionately affected by deteriorating air quality resulting from climate change-related wildfires. Like in *Caring Society*, the fact that other factors may contribute to the adverse impacts experienced by protected groups related to climate change should not be determinative of the issue or shield Canada, or any other level of government, from liability.

A complaint about the inadequate mitigation measures of a government could also be brought by children alleging age-based discrimination.⁹¹ While pertaining to section 15 of the *Charter*, the groundbreaking academic work of Nathalie J. Chalifour, Jessica Earle, and Laura Macintyre on age-based climate-related claims provides valuable guidance on how such a complaint could be framed.⁹² One option would be to

90 *Analytical study on the promotion and protection of the rights of persons with disabilities in the context of climate change: Report of the Office of the United Nations High Commissioner for Human Rights*, UNHRC, 44th Sess, UN Doc A/HRC/44/30 (2020).

91 In Canada, many human rights laws define "age" as being eighteen years or older, meaning they do not explicitly protect children from age-based discrimination. However, in practice, human rights tribunals can hear complaints of age discrimination involving children by giving no effect to definitions of age that exclude children contrary to section 15(1) of the *Charter*. For an example of a tribunal addressing this issue, see *Arzem*, *supra* note 35.

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

contend that children's bodies are more susceptible to the impacts of climate change compared to adults, and that measures taken pursuant to Canada's current climate plan and targets do not provide them with equitable protection.⁹³ Another possibility would be to focus on the disproportionate burden children will bear over time as a result of inadequate mitigation measures. As explained by Chalifour, Earle, and Macintyre:

[B]ecause younger people have longer to live, they will have to contend with the accumulative harms of climate change and be exposed to far greater harms over a longer period of time than older generations. Climate science is clear about the fact that harms are worsening over time and that certain irreversible thresholds are being crossed, such as the rising sea levels triggered by melting glaciers.⁹⁴

As the authors highlight, the case law is divided on whether "young and future Canadians" fall within the meaning of age as a prohibited ground of discrimination under the Québécoise *Charte des droits et libertés de la personne* and the Canadian *Charter*.⁹⁵ This lack of consensus in *Charter* case law could impact a potential human rights complaint related to mitigation, advancing a broader understanding of age as a protected ground in human rights law in different ways.

On one hand, precedents like the 2020 Ontario Superior Court of Justice decision on the motion to strike in *Mathur*, allowing the claim on younger and future generations to survive could be relied upon in support of a human rights complaint on this ground.⁹⁶ Indeed, the Supreme Court is clear that antidiscrimination laws must provide at least the same level of protection as section 15 of the *Charter*.⁹⁷ In practice, this means that courts' recognition that, under section 15 of the *Charter*, age is a ground of discrimination, and thus includes protection against the

93 *Ibid* at 58.

94 *Ibid* at 59.

95 *Ibid* at 54–55. The German Constitutional Court has recognized that the government's failure to enact an effective legal framework for rapid greenhouse gas reduction creates a drastic reduction burden and exposes their lives to serious losses of freedom on subsequent generations.

96 *Mathur v Ontario*, 2020 ONSC 6918 at paras 187–89, leave to appeal to ON Div Ct refused, 2021 ONSC 1624.

97 *Vriend v Alberta*, 1998 CanLII 816 (SCC).

adverse treatment of younger generations compared to older ones, must inform the interpretation of human rights laws. In jurisdictions where age is expressly defined as meaning eighteen years or older, a tribunal could simply strike the narrow definition of age in its enabling statute for the purpose of the complaint before it to ensure compliance with the *Charter* as it has in other age-based discrimination complaints filed by children in the past.⁹⁸

On the other hand, judicial decisions endorsing more restrictive interpretations of the meaning of age, whether it be in the context of the Québecoise or Canadian charters, should not be used to limit the scope of human rights protections, particularly in jurisdictions where it is not expressly defined as eighteen and older. As feminist scholars have argued, restrictive understandings of equality under the *Charter* should not be imported into human rights law.⁹⁹ To put it differently, while human rights laws are constitutionally required to protect from discrimination at least the same groups enumerated or recognized as analogous under section 15, the *Charter* serves as a floor rather than a ceiling. As such, antidiscrimination laws may extend to broader categories of individuals beyond those protected by the *Charter*. This means that even a clear decision of a binding court finding that “future generations” are not included within the meaning of age under section 15 would not necessarily restrict the interpretation of the term in human rights laws in jurisdictions in which no limiting definitions are provided.

Setting aside the technical aspects of the interpretation of age, any human rights tribunal adjudicating a discrimination complaint by children and youth ought to look to the CHRT’s child-sensitive and child-

98 *Arzem*, *supra* note 35.

99 See Leslie A Reaume, “Postcards from *O’Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 373; Andrea Wright, “Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate” in Faraday, Denike & Stephenson, *supra* note 99 at 409; Anne Levesque, “Gaming the [Human Rights] System?: A Critical Look at Discrimination Complaints Involving Government Services” (2020) 9:1 Can J Human Rights 37 at 40. See also Koshan, *supra* note 13 at 142.

friendly approach in *Caring Society* as a model to follow.¹⁰⁰ While the case concerned allegations of race-based discrimination, the victims of adverse treatment were First Nations children and their families. In this context, the CHRT incorporated “the best interest of the child” in its legal interpretation of the *CHRA* and its understanding of non-discrimination for First Nations children. In particular, the tribunal found that for Canada to meet its obligations under the *CHRA* towards First Nations children and their families, it must take their best interests into account when designing and providing services.¹⁰¹ This is particularly significant as the *CHRA* and other human rights legislation in Canada do not explicitly mention the best interests of the child. Yet, this approach is consistent with article 3(1) of the *Convention on the Rights of the Child*, which states that in all matters concerning children, the best interests of the child must be a primary consideration, whether the action is taken by public or private institutions, courts, administrative authorities, or legislative bodies.¹⁰² Human rights tribunals adjudicating allegations of discrimination involving children and young people, including potential complaints related to climate mitigation, ought to aim to meet the standard set by the CHRT in *Caring Society* and meaningfully consider the principles of the convention. This means prioritizing the best interests of the child when evaluating whether government respondents comply with antidiscrimination obligations under domestic human rights laws involving children and youth.

D. GHG Emissions as a Service

A final possibility I have considered is whether and how human rights laws can hold high carbon-emitting corporations accountable for the harm they inflict on marginalized communities.¹⁰³ Given that these

100 Anne Levesque & Malorie Kanaan, “Are the Kids Alright?: Why Canada Must Urgently Step Up to Ensure Children’s Rights”, *The Conversation* (27 June 2022), online: <theconversation.com> [perma.cc/8A8T-8JZ7].

101 See *Caring Society*, *supra* note 7 at paras 3, 482. See also *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2021 CHRT 41 at para 142.

102 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, art 3(1) (entered into force 2 September 1990, accession by Canada 13 December 1991).

103 Outside of Canada, corporations have been held accountable for their emissions through different legal recourses (see Commission on Human Rights of the

corporations are major contributors to climate change, human rights laws, if applicable, could be a powerful tool for members of protected groups who are adversely impacted by their actions. This approach would also enable a more direct legal challenge relating to some of the more significant root causes of the issues and potentially give way to binding orders to attack them. The broad remedial powers of human rights tribunals, which can order respondents to cease discriminatory practices and implement measures to prevent future harm when there has been a finding of discrimination, make this possibility particularly compelling.¹⁰⁴ However, this approach hinges on a critical preliminary question: Do human rights tribunals have the jurisdiction to address such matters?

Applying human rights law to such cases presents challenges due to how “services” and “public relationship” have been defined in jurisprudence. In *Gould v. Yukon Order of Pioneers (Gould)*, the Supreme Court of Canada established a two-step analysis for determining what constitutes a service.¹⁰⁵ The first step involves identifying the actual service as a matter of fact.¹⁰⁶ This factual determination is made by identifying the benefit that is provided.¹⁰⁷ The second step assesses whether the service establishes a public relationship between the service provider and the service user.¹⁰⁸

The application of this two-step analysis to high-emitting corporations and their harmful impact on protected groups is not immediately

Philippines, *National Inquiry on Climate Change Report* (Quezon City: CHRP, 2022) at 110–14). See also *Rectbank Den Hague* [District Court of the Hague], 26 May 2021, *Milieudefensie v Royal Dutch Shell plc*, ECLI:NL:RBDHA:2021:5339 at paras 4.4–4.4.55 (Netherlands). On appeal, the Hague Court of Appeal held that while corporations were required to act to curb climate change, Shell could not be obliged to comply with a specific standard (see *Gerechtshof Den Haag* [Court of Appeal of the Hague], 12 November 2024, *Milieudefensie v Royal Dutch Shell plc*, ECLI:NL:GHDHA:2024:2099 at para 7.111 (Netherlands)). The decision is being appealed before the Supreme Court of the Netherlands.

104 For a rigorous review of the remedial powers of human rights tribunals, see Brodsky, Day & Kelly, *supra* note 20.

105 1996 CanLII 231 at para 68 (SCC) [*Yukon Gould*].

106 *Ibid.*

107 *Ibid* at para 80.

108 *Ibid* at para 68.

apparent. A producer of crude oil, for example, is in a public service relationship with individuals who seek the benefit from its product by purchasing it (even in circumstances where it is purchased indirectly through various intermediaries). These individuals are therefore part of the public towards which producers of crude oil have obligations under human rights laws. Conversely, since a service relationship stems from the benefit being provided and not the indirect effects of delivering that service, there is not, at first blush, an apparent direct public service relationship between these corporations and the individuals who are adversely impacted by their emissions. Indeed, even the most determined environmental lawyer would be reluctant to contend that large producers of crude oil seek to provide to the public the benefit of a stable climate or safeguarding against the harmful impacts of climate change. Human rights laws recognize obligations only towards the public that benefits from the service that is provided and do not apply outside that public relationship. As such, human rights tribunals would not have jurisdiction over the indirect consequences of the provision of the service that adversely impacts other individuals outside the producer-purchaser relationship.

There are at least two possibilities to overcome these initial challenges, both of which would be supported by a liberal interpretation of human rights laws. The first possibility would be to emphasize that, though the primary benefit emitting corporations provide is the production and sale of crude oil, they also engage in other activities that could also constitute service under human rights law. While high carbon-producing corporations in Canada are currently reluctant to publish certain information on their websites due to recent changes in the *Competition Act* that seek to avoid greenwashing, they have in the past held themselves out to be taking measures to help realize certain climate objectives.¹⁰⁹ Human rights jurisprudence acknowledges that the same entity can simultaneously engage in multiple activities that can give rise to obligations towards different individuals.¹¹⁰ As such, a cleverly drafted human

109 See e.g. Suncor Energy Inc, *2023 Annual Report* (Calgary: Suncor Energy Inc, 2024) at 43, online (pdf): <suncor.com> [perma.cc/FT85-Q525].

110 For example, in *Yukon Gould*, the majority emphasized that the Yukon Order of Pioneers was providing historical materials of the Order and its members to the public (*supra* note 105 at paras 12–14). The complaint relating to the exclusion of women in the Order failed due to an explicit exception in the Human Rights Act in the context

rights complaint could focus on the activities of a high-emitting corporation aiming to meet certain climate objectives and lower its emissions and the benefits that these corporations seek to achieve. A successful complaint framed in this way would require a factual record of a corporation establishing the nature of these activities and, ideally, that its intended beneficiaries include members of protected groups, who can be shown to be adversely impacted by climate change.¹¹¹

In practice, focusing on high-emitting corporations, which are also actively implementing measures to achieve climate objectives and reduce emissions, may lead to counterproductive outcomes. Much like a potential human rights complaint against a government relating to mitigation, a complaint against high-emitting corporations could create a paradoxical situation whereby a corporation that takes no action whatsoever on climate change may face less human rights liability than one that is taking at least some measures to lower its emissions. In the latter case, the measures taken could be considered a service, thereby attracting potential human rights scrutiny. Conversely, corporations that entirely abstain from addressing climate change would escape the scope of application of human rights laws despite their greater contributions to the problem.

The second possibility would involve arguing that the *process of creating a benefit* should be included within the definition of “service” and thus advocating for a broader interpretation of both the service relationship and the scope of the “public” who benefit from protection of human rights laws. This would extend human rights obligations to a broader public, including all members of protected groups potentially adversely impacted by the entire oil production process — which includes stationary fuel combustion, venting, flaring, leakage, on-site transportation, industrial processes, product use, as well as waste and wastewater management. This argument would help resolve the paradox presented above, ensuring that human rights laws effectively address climate-related social inequalities exacerbated by corporate actions. Although this approach requires a departure from the current jurisprudential understanding of

of membership (*ibid* at paras 16–17). See also *Chester v City of Toronto Economic Development Corporation* *as Toronto Port Lands Company*, 2015 HRTO 785 at para 71.

111 The issue of remoteness, as discussed above, would remain a challenge in this situation.

“service” and “public,” it best serves the objectives of these statutes while recognizing the evolving context in which they are applied.

There is some case law that suggests that the process of creating a benefit is not to be excluded from the meaning of a “service” under human rights law and is therefore outside of their area of application. In *Gould*, the Supreme Court was called to determine whether and how the *Yukon Human Rights Act* (YHRA) applied to a fraternal order involved in the collection and the preservation of the literature and incidents of the territory’s history. The Order of Pioneers was open only to men, but the historical materials it collected were made available to all members of the public, including women. Madeleine Gould filed a human rights complaint after being denied membership to the order because of her sex. The majority, with Justice La Forest providing concurring reasons, held that the complaint was outside the purview of the YHRA. Both sets of reasons held that the benefit provided to the public by the Order of Pioneers was the end product—namely historical data or documents produced—and did not contravene with the YHRA because it was available to all.¹¹² In contrast, the collection *process*, which excluded women, was not a service and therefore not within the area of coverage of the YHRA.¹¹³ The case potentially undermines a proposed human rights complaint against a high-emitting corporation because it could be interpreted as standing for the proposition that the process by which one creates a benefit is not a service under human rights law. If it is not unlawful to directly discriminate in the process of creating a benefit by prohibiting women from participating, one can certainly contend that the adverse impact of the production of a benefit, such as harmful emissions caused by the extraction to produce crude oil, is also outside the scope of human rights laws.

However, I see a few ways to distinguish Justice La Forest’s dissent in *Gould* from a potential human rights complaint against a high-emitting

112 It is worth mentioning that the only two women on the court at the time, Justice L’Heureux-Dubé and Justice McLachlin, dissented (see *Yukon Gould*, *supra* note 105 at paras 96–175).

113 It is noteworthy that the YHRA prohibited discrimination “in connection with any aspect of membership” relating to livelihood and economic relationships but not social or cultural ones. It is on this basis that the majority found that the YHRA did not apply in this case and held that the complaint ought to be dismissed. The majority’s reasons will not be discussed because the provision in the legislation does not relate to the topic discussed herein (see *ibid* at paras 11–12).

corporation that is adversely impacting members of protected groups. Justice La Forest's reasons emphasized that the process of collecting historical data and documents was of a purely private nature. His analysis of what constitutes a "public relationship" relied heavily upon the private/public distinction in American case law in circumstances involving conflicts between state antidiscrimination legislation and the constitutional freedom of association of members of a "private organization."¹¹⁴ For Justice La Forest, the fact that the public was not involved in any way in the collection and recording of history was of crucial importance to his determination that this facet of the order's activities was not meant to be covered by the *YHRA*. The activity took place in a private facility and only a small, limited group of individuals was involved. Nothing about the process of this activity impacted or involved the broad public in any way. It is likely that the creation of a benefit would not have been excluded if not for the private nature of the Order of Pioneers' exclusivity and selectiveness. Indeed, one's participation in generating and producing historical documents would have fallen under the social area of employment, and the *YHRA* would have clearly applied had these activities been remunerated.

Returning to a potential complaint against a high-emitting corporation, it is clear that emitting significant levels of GHGs is not a private activity. On the contrary, GHG emissions have an inherently public dimension, as they directly affect air quality, climate, health, and overall quality of life. The fact that GHG emissions are already subject to extensive regulation further underscores their public nature and the significant public interest involved. Unlike the scenario in *Gould*, where retired men were collecting historical documents in a private area and in a manner that could remain entirely unknown to the public, GHG emissions have widespread and perceptible impacts on the public at large, rather than on a selective or exclusive group.

I do concede that such an interpretation would mark an expansion of the scope of application of human rights laws. However, it would be supported by existing case law, which has cautioned against allowing respondents to narrowly define "services" or "public" in ways that can justify or permit discrimination. For example, in *British Columbia (Ministry of Education) v. Moore*, the respondents argued that their failure to

114 *Ibid* at para 61.

accommodate the complainant's learning disability was not discriminatory because the service in question was special education rather than education more broadly.¹¹⁵ Had this argument been accepted, it would have permitted schools and districts to eliminate all special education services for students with disabilities by framing them as separate from the education system, and targeting a distinct public. Similarly, corporations should not be permitted to harm members of protected groups by narrowly defining their activities or excluding the people they harm from their conception of the public.

Likewise, the CHRT's reasoning in *Caring Society* reinforces the principle that the terms "benefits" and "services" in a complaint should be defined broadly. Rather than narrowly defining the benefit in question as child and family services for First Nations, the CHRT examined whether, more broadly, Canada's approach to funding First Nations child and family services and related provincial/territorial agreements adversely impacted First Nations.¹¹⁶ Notably, in its decision on the merits, the tribunal found that Canada's "*design, management and control*" of the First Nations Child and Family Services Program adversely impacted First Nations children and their families.¹¹⁷ Accordingly, its remedial orders addressed not only the dollar amount of funding allocated to these services but also the design, negotiation, and implementation of funding agreements. This further supports my contention that "services" ought to encompass not just the final product or benefit but also the processes by which they are designed, created, and delivered.

One predictable challenge to this argument is that it significantly expands the scope of individuals to whom human rights obligations are owed, potentially increasing the number of complainants against corporations. Here, it is crucial to distinguish human rights law from tort law. Unlike tort law — which focuses on compensating individuals harmed by wrongful conduct and often limits duties of care to specific relationships — human rights law is primarily concerned with promoting equality and eradicating discrimination in our society. As such, courts have warned that principles of tort law must be applied in a human rights

115 2008 BCSC 264 at para 81.

116 *Caring Society*, *supra* note 7 at para 383.

117 *Ibid* at para 458 [emphasis added].

context with caution.¹¹⁸ Concerns about the fairness of paying compensation can be addressed at the remedial stage, where systemic orders may be granted without financial compensation if appropriate.

Much like in the other potential complaints discussed, the most reliable means of ensuring that this interpretation prevails would be through legislative amendments. This assurance could be achieved by expressly expanding the scope of the social area of “goods, services, and facilities.” In the context of the *CHRA*, for instance, this expansion could involve the inclusion of language such as: “It is a discriminatory practice in the creation, production, provision, or distribution of goods, services, facilities, or accommodation customarily available to the general public.” Furthermore, an addition to section 5(c) could stipulate that it constitutes a discriminatory practice to create, produce, or distribute a good, service, facility, or accommodation in a manner that adversely impacts individuals or groups protected under prohibited grounds of discrimination. While the appropriate language would support the proposed interpretation, a legislative amendment would provide greater certainty and predictability for both potential complainants and respondents.

Corporations—and governments with priorities aligning with corporate interests—would likely contend that this approach is impractical, represents a significant departure from existing jurisprudence, and exceeds the intended scope of human rights statutes. Indeed, this interpretation would extend the application of these statutes beyond the parameters originally envisioned at the time of their conception. However, such an evolution aligns with the purposive approach that courts have adopted in the interpretation of human rights legislation. Ensuring that human rights laws hold service providers accountable for the adverse impacts of their benefit-generating processes is crucial for maintaining the relevance and responsiveness of these statutes to contemporary social inequalities—inequalities that likely were not considered when these laws were first enacted.

From a policy standpoint, it is worth questioning the rationale and fairness of subjecting some aspects of commercial activities to antidiscrimination laws and not others. For example, as it stands, a small business (such as a family-run corner store) is required to accommodate an

118 *Canada (Attorney General) v Morgan (CA)* (1991), [1992] 2 FC 401 at 414–15, 1991 CanLII 13184 (FC).

indefinite number of customers with specific needs, while a large corporation may evade accountability for harm inflicted on protected groups because these individuals are not the intended beneficiaries of its activities. If the concept of “service” is broad enough to encompass various aspects of corporate operations—such as recruitment practices, advertising, and employee compensation—should it not also extend to the processes by which corporations produce their goods or services that are known to adversely impact members of protected groups? To remain effective in addressing modern threats to equality, human rights laws must evolve beyond a narrow, transactional understanding of service relationships as was commonplace decades ago when these laws were conceived and adopted. Such an evolution is essential to tackling the complex and systemic inequalities that today’s corporate practices can reinforce.

CONCLUSION

This paper argues that human rights laws in Canada offer several promising legal avenues to assert human rights and address inequities relating to climate change. As discussed, I see four key opportunities for this. First, tribunals must recognize that human rights laws apply to adaptation measures. For example, landlords and service providers have a legal obligation to implement adaptation measures that protect members of protected groups from the disproportionate impacts of climate change, aligning with the duty to accommodate. During climate-related disasters, emergency response service providers also have an obligation to ensure that the specific needs of members of protected groups are considered and met. Second, tribunals ought to recognize the link between climate consciousness and other protected grounds of discrimination. This means that individuals committed to reducing their carbon footprint and those who suffer from climate anxiety should be entitled to accommodation in their workplaces, housing, and when receiving services. This could also be done by legislative amendments by adding climate consciousness as a protected ground of discrimination, while providing greater certainty and predictability in the law. Third, mitigation efforts aimed at reducing greenhouse gas emissions ought to be considered as services under human rights law. This interpretation would allow marginalized communities to file complaints against governments for inadequate mitigation strategies when they are disproportionately impacted by the harms caused by climate change. Finally, high-emitting corporations ought to

face human rights scrutiny for the harm they inflict on members of protected groups through their greenhouse gas emissions. This scrutiny would require a broader understanding of the service relationship to include activities relating to the processes of producing a benefit by which corporations contribute to climate change and the members of protected groups who are adversely impacted by them as the public. All of these four cases would be supported by a context-driven interpretation of human rights laws, which recognizes that climate change is one of the most significant threats to equality today, that best promotes their purpose.