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Negating Positive Rights: A Note on Mathur v Ontario

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I. Introduction

In 2019, twelve-year-old Sophia Mathur and six other youth (the "Applicants"/"Appellants") sued the newly elected Ontario government for replacing the previous government's GHG emissions target ("Target") with a more lenient one.[1] The Applicants sought declarations that, among other things, the new Target, which was required by the new government's *Cap and Trade Cancellation Act* ("*CTCA*"), violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").[2] The application judge held the claim failed because it was a positive rights claim. Reversing that decision, the Ontario Court of Appeal held "the application judge erred in viewing this case as a positive rights case."[3] The Court remitted the case for a new hearing, holding that the lower court had to consider the now-corrected analytical framework, and that fresh evidence was required for it to do so.[4] This decision has been celebrated as a victory for the Appellants, their ally organization, EcoJustice, and climate litigation activists.[5] The British Columbia Civil Liberties Association ("BCCLA"), for example, praised the Court

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1 *Mathur v Ontario*, 2024 ONCA 762 (CanLII) [*Mathur*].

2 *Cap and Trade Cancellation Act, 2018*, SO 2018, c 13 [*CTCA*]. Section 3(1) of the *CTCA* provides that: "The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario."

3 *Mathur*, *supra* note 1 at para 37.

4 *Ibid* at para 8.

5 Rachel Morgan, "Ontario youth celebrating historic victory in climate case against PC government" (22 October 2024), online: *City News* <https://www.ottawa.citynews.ca/2024/10/22/ontario-youth-celebrating-historic-victory-in-climate-case-against-ontario/> [https://perma.cc/DCF9-7BPF].

for its decision, and particularly for "not getting side-tracked by abstractions around whether there is a 'positive right' to government action."[6]

This note argues that the *way* the Court avoided "getting side-tracked" by positive rights is problematic. Part II defends the negative-positive rights distinction as conceptually cogent and important despite justified criticism of how it is deployed by courts. Part III demonstrates that in order to "side-step" that distinction the Court rejected the very possibility of positive rights. Part IV explains why that matters.

II. The Negative-Positive Rights Distinction

The BCCLA's "side-track" statement reflects a common concern among human rights advocates that the distinction between "negative" and "positive" rights — traditionally used to mark the difference between claims that governments *stop interfering* (negative) and claims that they *start protecting* (positive) — is problematic and should be avoided. That view is understandable in light of courts routinely relying on the distinction to impede or reject *Charter* claims. Which is precisely what the application judge did in *Mathur*. Another example is *Toronto (City) v Ontario (Attorney General)*,[7] where the Supreme Court of Canada ("Supreme Court") rejected a freedom of expression claim because it did not meet a uniquely high threshold for breach of a positive right.[8] Similarly, in *Gosselin v Québec (Attorney General)*, the Supreme Court rejected a section 7 claim because it was positive (though the Court suggested positive rights claims might someday succeed, just not yet).[9] In *Société casinos du Québec inc v Association des cadres de la Société des Société des casinos du Québec*[10] the Supreme Court held that thresholds for breach of section 2(d) are not higher for positive claims than for negative claims — "there is only one framework for evaluating whether legislation or government action infringes s. 2(d)," Jamal J wrote — but confirmed the *Toronto* ruling that they are higher for section 2(b).[11]

Canadian judges' wariness of positive rights is not surprising, especially in light of their tendency to view the *Charter* as echoing the negative cant of the US Constitution. As Justice La Forest describes it in *McKinney v University of Guelph*, "the US Constitution is the great constitutional exemplar," and teaches, by example, that "government requires to be constitutionally shackled to preserve the rights of the individual."[12] Shackling government — constraining it from acting rather than demanding it act — is, within this view, what constitutional

6 "BCCLA Reacts: Mathur Ontario Court of Appeal decision significant step forward in climate and constitutional accountability" (17 October 2024), online: *BCCLA* <https://www.bccla.org/2024/10/bccla-reacts-mathur-ontario-court-of-appeal-decision-significant-step-forward-in-climate-and-constitutional-accountability/> [https://perma.cc/MKV7-TX78].

7 *Toronto (City) v Ontario (Attorney General),* 2021 SCC 34 [*Toronto*].

8 See also *Bakan v Attorney General of Canada*, 2022 ONSC 7090, where a positive section 2(b) claim was rejected on the basis of *Toronto* in a motion to strike.

9 *Gosselin v Québec (Attorney General),* 2002 SCC 84 (CanLII) [*Gosselin*].

10 *Société casinos du Québec inc v Association des cadres de la Société des Société des casinos du Québec*, 2024 SCC 13 [*Société des casinos*]. The Supreme Court followed *Dunmore v Ontario (AG)*, 2001 SCC 94 [*Dunmore*].

11 *Société des casinos*, *ibid* at paras 7 and 42.

12 *McKinney v University of Guelph*, [1990] 3 SCR 229 at 262.

rights are, and should be, about.[13] From which it follows, at a minimum, that *Charter* claims must target a state actor and action to be intelligible. As the Federal Court of Appeal held in *La Rose v Canada*, a "challenge to a particular law, an application of the law, or government conduct is an archetypal feature of *Charter* jurisprudence."[14] Consequently (as examined more fully below), *freestanding* positive rights claims — which demand governments *take protective action* when they have not already acted, and when they are not the direct or sole cause of a *Charter*-relevant harm — are barred.[15]

All of which means that characterization of a rights claims as "positive" risks its being rejected by a court, which has become a reason for skepticism towards the negative-positive distinction itself. Justice Abella, for example, describes the distinction as "an unhelpful lens for adjudicating *Charter* claims";[16] "a jurisprudential sleight-of-hand that promotes confusion rather than rights protection,"[17] and that adds an "additional hurdle" to rights claims.[18] Martha Jackman criticizes courts for relying on the distinction to "dismiss … socio-economic rights claims" and to "refus[e] to remedy violations of the right to health, housing, social assistance and other socio-economic rights that are crucial to *Charter* guarantees of life, liberty, security of the person, and equality."[19] James Fowkes calls "flatly incorrect" the "stubbornly pervasive idea" that socioeconomic rights, which impose positive duties on governments, are "different in comparison to traditional, civil-political rights."[20]

Importantly, these critics focus on how the negative-positive rights distinction is deployed, not on its analytical cogency.[21] They highlight, for example, how courts wrongly characterize rights claims as positive, and then dismiss them on that basis, when, in fact, they are not positive. That is the basis for the Court of Appeal reversing the application judge in *Mathur*, for example, and also for Abella J's disagreement with the majority in *Toronto*.[22] Critics also target the idea that rights must be *either* negative *or* positive, correctly insisting, as Abella J does in

13 For a broader discussion of this prevailing view, see Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 2017), chapters 3 to 5.

14 *La Rose v Canada*, 2023 FCA 241 (CanLII) at para 126 [*La Rose*].

15 See, for example, *Tanudjaja v Canada* (Attorney General), 2014 ONCA 852 (CanLII) [*Tanudjaja*], discussed more fully below.

16 *Toronto*, *supra* note 7 at para 152 (Abella J, dissenting).

17 *Ibid* at para 155 (Abella J, dissenting).

18 *Ibid* at para 155 (Abella J, dissenting).

19 Martha Jackman, "*Charter* Remedies for Socio-economic Rights Violations: Sleeping Under a Box?" in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010) at 281.

20 James Fowkes, "Normal Rights, Just New: Understanding the Judicial Enforcement of Socioeconomic Rights" (2020) 68 Am J Comp L 722 at 723.

21 In addition to critiques by Abella J in *Toronto*, Jackman, and Fowkes, see Sandra Fredman, "Human Rights Transformed: Positive Duties and Positive Rights" (2006) 3 Public Law 498; Sandra Fredman, "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2020) 21 SAJHR 163; Jud Mathews, *Extending Rights' Reach: Constitutions, Private Law, and Judicial Power* (New York: Oxford University Press, 2018); Jamie Cameron, "Positive Obligations Under Sections 15 and 7 of the *Charter*: A Comment on *Gosselin v. Quebec*" (2003) 20 SCLR 65 at 71-72; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008) at 207; Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8:4 SAJHR 464.

22 *Toronto*, *supra* note 7 at paras 147-151

Toronto, that "rights and freedoms have both positive and negative dimensions."[23] Finally, critics argue it is wrong for judges to presume that the negative-positive rights distinction maps onto a law-policy distinction which, in turn, maps onto a distinction between what is legitimate for courts to adjudicate (law) and what is not (policy).[24]

Such arguments provide good grounds for skepticism about how courts understand and deploy the negative-positive rights distinction. None of them, however, attacks the analytical cogency of the distinction itself. Indeed, the critics who make these skeptical arguments *rely* upon the distinction themselves. Justice Abella, for example, distinguishes rights claims "about freedom *from* government interference in order to exercise a right" from claims "*to* governmental action in order to get access to it."[25] Jackman critiques the Supreme Court's construction of the claim in *Chaoulli* as "clearly a negative rather than a positive one," and prescribes that the Supreme Court should have construed it in positive terms instead — as "requiring the government to take affirmative measures to ensure universal access to health care."[26] And Fowkes claims that the "apparent meaningfulness" of the distinction between positive and negative rights claims is misconceived by those who deploy it to reject positive claims, but he does not deny the cogency of the distinction itself.[27]

To be clear: no one disputes, nor reasonably should, that it is conceptually different to claim that a *Charter* right imposes a duty on the state to *stop interfering* than it is to claim that a *Charter* right imposes a duty on the state to *start protecting.* The argument is not, and cannot be, that these are the same. It is that the differences between them are not compelling reasons

23 *Ibid* at para 153. An example of this is the right to a fair trial, which demands invalidating rules of evidence that bar accused from properly making their cases (negative), and also state provision of sufficient judicial resources to ensure a fair trial is possible (positive): *La Rose*, *supra* note 14 at paras 101-102; Fowkes, *supra* note 20 at 728-731; Cameron, *supra* note 21 at 72-73. Other examples include the right to vote, which demands invalidating direct restrictions on voting (negative), and also state provision of polling stations (positive) — see Fowkes, *supra* note 20 at 731-732) — and freedom of expression, as stated by the majority in *Toronto*, *supra* note 7 at para 17: "In *Baier* … this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while section 2(b) typically 'prohibits gags' [negative], it can also, in rare and narrowly circumscribed cases, 'compel the distribution of megaphones' [positive] (para. 21, quoting *Haig*, at p. 1035)." For an inventory of *Charter* rights with prominent positive elements — including the rights to a fair trial and to vote — see *Gosselin*, *supra* note 9 at para 320 (Arbour J, dissenting).

24 This view, "that socioeconomic rights are uniquely demanding, whether in terms of the amount they cost or the broader positive effort by state mechanisms that they entail," is "the single most important idea driving the intuition of difference" between positive and negative rights according to Fowkes. Yet, as he argues, there is nothing *inherently* more policy-oriented about positive rights claims than negative ones. As the fair trial and voting examples demonstrate, whether a positive rights claim has more or less substantial implications for policy depends upon contingent, not inherent, factors about the nature and the context of the claim. See Fowkes, *supra* note 20 at 724. Martha Jackman makes a similar point in Jackman, *supra* note 19 at 283, and cites in support the following passage from a report of the United Nations Committee on Economic, Social and Cultural Rights: "Courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary."

25 *Toronto*, *supra* note 7 at para 152.

26 Jackman, *supra* note 19 at 288.

27 Fowkes, *supra* note 20 at 725.

to treat the former as normal and enforceable, and the latter as exceptional and beyond judicial reach. In short, criticism of the negative-positive rights distinction is about the significance and meaning that courts (and others) attach to the distinction, not about the analytical cogency of the distinction itself. This point is crucial for understanding why the Court gets it wrong in *Mathur* when it purports to "side-step" the negative-positive rights distinction.

III: The *Mathur* Decision

Two kinds of positive rights claims appear in pre-*Mathur Charter* jurisprudence. *Freestanding* claims — which are routinely rejected by Canadian courts — obligate state actors to take protective action in the face of *Charter*-relevant harm, regardless of whether: a) they have already taken some protective action, and b) they are directly responsible for the harm at issue. The idea behind such claims is that broad social, economic, or environmental conditions, which governments may contribute to, but do not directly or solely cause,[28] sometimes result in deprivation of rights-protected interests; and, when that happens, state actors are duty-bound to take action to protect those interests. In contrast, *non*-freestanding positive rights claims arise when a state actor has already taken some protective action, but that action falls short in a way that breaches a *Charter* right. That is, the state has acted inadequately, and the appropriate remedy is to extend the protective action so that it is adequate. In contrast to freestanding positive rights claims, non-freestanding claims have been recognized by the Supreme Court, most prominently in two section 15(1) cases, *Vriend v Alberta*[29] and *Eldridge v British Columbia (Attorney General)*,[30] and also in two section 2(d) cases (*Dunmore* and *Mounted Police Association of Ontario v Canada*[31]), and two section 2(b) cases (*Baier v Alberta*[32] and *Toronto*).

In *Mathur*, both the Court and the application judge rejected the possibility of freestanding positive *Charter* rights. That was no surprise in light of previous jurisprudence. The surprise was that the Court also rejected *non*-freestanding positive rights. It did this, first, by eliding the difference between freestanding and non-freestanding positive rights, conceptually collapsing the latter into the former. The Court stated, for example, that "the core of the application judge's decision was her determination that the appellants' claim would require the court to recognize that they had *positive rights*," and, several lines later, it describes the key issue, from the application judge's perspective, as whether sections 7 and 15 impose on Ontario "the *freestanding positive* obligation to combat climate change."[33] This is representative of how throughout the judgment the Court conflates positive rights and freestanding positive rights, as did the application judge. The effect of this is to leave as unintelligible the possibil-

28 It is important to recognize here that the state is *always* involved in constituting social, environmental, and economic conditions that may harm *Charter*-relevant interests, though often in diffuse, background, and constitutive ways — such as by creating policies and laws that govern markets and economic actors — rather than in direct and singular ways. I have discussed this point in a different context in Joel Bakan, "The Invisible Hand of Law: Private Regulation and the Rule of Law" (2015) 48 Cornell Int'l LJ 279; and Joel Bakan, *The New Corporation: How "Good" Corporations are Bad for Democracy* (New York: Allen Lane, 2020) at chapter 4.

29 *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*].

30 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*].

31 *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3.

32 *Baier v Alberta*, [2007] 2 SCR 673.

33 *Mathur*, *supra* note 1 at para 26 (see also para 38).

ity of *non*-freestanding positive rights claims. Which, in turn, creates a binary choice for the Court: either the claim against the Target is a freestanding positive right; or it is not a positive right, and therefore must be a negative right. The Court holds it is the latter — its second conceptual move.

Before examining that second move, however, it is important to note the Court's unambiguous rejection of freestanding — and within its logic *all* — positive rights claims. The Court cites Supreme Court authority to do this:

> As the Supreme Court instructed in *Gosselin v. Québec (Attorney General)* … s. 7 of the *Charter* has not yet been interpreted to "place a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person", although the Supreme Court did not rule out its application in the future. Similarly, the Supreme Court in *R. v. Sharma* … confirmed that "s. 15(1) does not impose the general, positive obligation on the state to remedy social inequalities or enact remedial legislation."[34]

It follows that the Court agrees with the application judge that, as she describes it, there is "no freestanding positive obligation on the part of the state to ensure that each person enjoys life, liberty or security of the person … under section 7" (and the same for section 15).[35] And because, within its logic, all positive rights are effectively freestanding positive rights, for the claim against the Target to succeed, it must be a negative rights claim.

That is, as I have noted, the Court's second move — to conceptualize the claim against the Target as a negative rights claim. The application judge erred in conceiving the claim as a (freestanding) positive rights claim, the Court holds. "She interpreted the … application as effectively seeking a more restrictive Target" (in other words, *more protection*), rather than as claiming "the right to be free from state interference" (in other words, *less interference*).[36] For the Court, the claim could only succeed if understood as one against state interference, where the correlative duty is to *stop interfering* — a negative duty. In other words, the Court and application judge agree that if the claim is positive — if it imposes a duty on Ontario to *protect more* by creating a more restrictive Target — it has to fail. By that logic, to hold in favor of the Appellants, the Court *must* reject the application judge's conception of the claim as positive. Which it does, characterizing the claim as *not positive*, as a claim "to be free from state interference," a *negative* claim (though the Court nowhere explicitly describes it as such).[37]

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34 *Ibid* at para 39.

35 *Mathur v His Majesty the King in Right of Ontario*, 2023 ONSC 2316 (CanLII) at para 126 [*Mathur* ONSC].

36 *Mathur*, *supra* note 1 at para 26.

37 I am indebted to Stepan Wood for sharing his insights on this aspect of the *Mathur* decision. In his work, he makes two important related points. First, that the claim in *Mathur* is not *essentially* positive or negative, but rather that "the impugned state actions have a dual character: they manifest, on one hand, a failure to reduce GHGs below the target, and on the other, a commitment to cause or permit the release of the targeted amount of GHGs." See Stepan Wood, "*Mathur v. Ontario*: Grounds for Optimism about the Recognition of a Constitutional Right to a Stable Climate System in Canada" (2024) 69 McGill LJ 3 at 28. And, second, that though the applicant judge "declined … to decide there is such a [positive] right, because there is no clear legal standard for its existence … [she] found that if such a right exists, the claimants proved its deprivation. By failing to take steps to reduce GHG emissions further, Ontario has contributed in a real, measurable and non-speculative way to an increase in risks to human life, health and safety. The appeal court did not disturb this holding." See Stepan Wood, "A Hot Day in Iqaluit? Environmental Rights in Canada's Constitutional Cul-de-Sac" (Forthcoming, Rev Const Stud, 2025).

That is an awkward and unconvincing conceptualization. It requires understanding the Target as an *interference* with life, security of the person, and equality, when, in fact, far from interfering, the Target *protects* people (albeit incompletely) from harm due to climate change that threatens to interfere with their interests of life, security of the person, and equality. To obscure this awkwardness — of equating a protective measure to an interfering one — the Court negates the difference between the two. It does so by analogizing a *negative* rights case (*Chaoulli*) to two non-freestanding *positive* rights cases (*Vriend* and *Eldridge*) in order to draw out a principle that is so abstract it elides the negative-positive rights distinction altogether: namely, that once "the state … legislate[s], it must do so in a constitutional manner that complies with the *Charter*."[38]

While stating the obvious — that legislation must comply with the *Charter* — the principle also obfuscates the fact that compliance with *Charter* rights can demand the state to *protect* (as in *Vriend* and *Eldridge*), not only to *not interfere* (as in *Chaoulli*). By analogizing *Vriend* and *Eldridge* to *Chaoulli*, and viewing the cases as, together, supporting a must-not-interfere negative rights construction, the Court thereby belies the Supreme Court's explicit conceptualization of the claims in *Vriend* and *Eldridge* as non-freestanding *positive* rights claims for protection by state actors. In *Vriend*, for example, the Supreme Court clearly holds that "s. 32 is 'worded broadly enough to cover *positive obligations* on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority,'" and that "in some situations, the *Charter* might impose affirmative duties on the government to take *positive action*" (as it did in that case).[39] Similarly, in *Eldridge*, the Court held "that discrimination can accrue from a failure to take *positive steps* to ensure that disadvantaged groups benefit equally from services offered to the general public."[40] As Mark Tushnet observes about *Eldridge* and *Vriend*, "there is no doubt that both cases can only be understood as holding that the *Charter* imposes *some* positive obligations on legislatures."[41] Jamie Cameron similarly cites these cases (along with several others) as evidence that the Supreme Court recognizes (albeit unevenly and tentatively) positive *Charter* rights.[42]

By analogizing *Eldridge* and *Vriend* to *Chaoulli*, the *Mathur* Court negates the two cases' positive cant. Yet, that is precisely what the claim in *Mathur* is analogous to, and why it is distinguishable from *Chaoulli*. The Target was a protective action, taken in reference to a statutory obligation under the *CTCA*. It was, like the protective state actions in *Vriend* and *Eldridge*, inadequately protective to comply with *Charter* obligations. The appropriate remedy was, as in these two cases, to require the state to take more protective action — to extend its protective action. By stripping *Eldridge* and *Vriend* of the very element that distinguishes those cases from *Chaoulli* — an explicitly positive right cant — the Court avoided the obvious analogy with those cases, as positive rights cases, and the equally obvious distinction from *Chaoulli*'s negative rights orientation. On this point, the application judge's reasoning is preferable to the Court's, as she correctly observed *Chaoulli* was about *coercive* measures, "laws or state actions that aggravated risks to life, liberty or security of

38 *Mathur*, *supra* note 1 at para 40.
39 *Vriend*, *supra* note 29 at paras 60 and 64.
40 *Eldridge*, *supra* note 30 at para 78.
41 Tushnet, *supra* note 21 at 207.
42 Cameron, *supra* note 21 at 71-72.

the person,"[43] while the case before her was about a *protective* measure that did "not go far enough."[44]

Despite their differences, however, both the application judge and the Court hold that rights claims must be *either* freestanding positive *or* negative, and that positive rights of any kind are alien to the *Charter*. Missing from both judgments is the possibility of *non*-freestanding positive rights claims, as recognized in *Eldridge* and *Vriend* (and other cases as well). Yet, as noted, that is precisely what *Mathur* is, as revealed by comparing it to the key components of *Eldridge* and *Vriend*:

First, *a harm is caused by socioeconomic conditions, not by specific government actions*. In *Eldridge* the harm is ill health, in *Vriend* it is discrimination. By analogy, in *Mathur* it is the various harms caused by climate change.

Second, *a voluntarily assumed state action is aimed at protecting people from that harm*. In *Eldridge*, it is public health insurance, in *Vriend* anti-discrimination legislation. By analogy, in *Mathur* it is the Target for reducing GHG emissions, which was Ontario's execution of a "voluntarily assumed … positive statutory obligation [in the *CTCA*] to combat climate change."[45]

Third, *that protection is inadequate in ways that fall short of Charter compliance*. In *Eldridge* it was the exclusion of hearing-impaired people from equal health protection, in *Vriend*, the exclusion of LGBTQ+ people from anti-discrimination protection. By analogy, in *Mathur* it was the exclusion of young (regarding the section 15 claim), and arguably all (regarding the section 7 claim), people from adequate climate change protection.

Fourth, *there is a resulting positive duty on the state to cure the inadequacy by extending or expanding the existing protection*. In *Eldridge* provision of interpreters was required, in *Vriend* the addition of sexual orientation as a prohibited ground in anti-discrimination legislation. By analogy, in *Mathur* there would be a duty on government to make the Target more restrictive and therefore more protective.

As we have seen, however, the Court took a different analytical path in *Mathur*, insisting the claim was about interference with rights, not inadequate protection of them. Conceptually, the result of its reasoning is to eliminate the category of *non*-freestanding positive right claims, and therefore, in light of its reasoning, of all positive rights claims. Despite the Supreme Court's explicit recognition of positive dimensions to rights in *Eldridge* and *Vriend* (and other cases too), within the Court's logic, for a *Charter* claim to have any prospect of success, it must be articulated in negative terms — as a right to be free *from* state interference, rather than *to* state protection.

IV: Why It Matters

To this point, the argument has criticized the Court for characterizing the claim in *Mathur* as a negative rights claim rather than a non-freestanding positive right claim — in other words, for

43 *Mathur* ONSC, *supra* note 35 at para 126.
44 *Ibid* at paras 91, 160, 162.
45 *Mathur*, *supra* note 1 at paras 5, 32, 53.

holding the claim could only succeed if conceived as one "to be free from state interference," rather than to be protected by "a more restrictive Target."[46] The decision means that, to succeed within its terms, *Charter* claims to *more protection* (non-freestanding positive rights claims) must be articulated as claims for *less interference* (negative rights claims). A claim articulated as non-freestanding positive will be conceived as a freestanding positive rights claim, and because freestanding positive claims are destined to fail, the net result of *Mathur* is to negate all positive rights from *Charter* jurisprudence.

Mathur thereby impedes the evolution of *Charter* jurisprudence towards robust protection of positive rights, including freestanding ones. That is not something to celebrate, despite the putatively favourable result in the case. Notably in this regard, Canada is already a laggard in respect to constitutional positive rights. Freestanding positive rights — to a healthy environment, and also housing, social security, education, and safe and healthy workplaces — are a mainstay in comparative and international legal systems, and have been for decades. As Martha Jackman wrote in 2006 (and little has changed since), "Canadian courts and tribunals stand out in terms of their continuing conservatism in regards to the recognition and enforcement of socioeconomic rights set out under the International Covenant on Economic, Social and Cultural Rights (ICESCR)." The *Mathur* Court's rejection of positive rights affirms this dubious distinction.

Mathur can thereby be understood as a lost opportunity, especially in light of the Supreme Court's consistent refusal to outright reject freestanding positive rights. In *Vriend*, for example, that Court held:

> [While] it is … unnecessary to consider whether a government could properly be subjected to a challenge under s. 15 of the *Charter* for failing to act at all, in contrast to a case such as this where it acted in an underinclusive manner … the possibility has been considered and left open in some cases.[47]

One of the cases mentioned where the possibility of recognizing freestanding positive rights is left open is *Eldridge*.[48] There, Justice La Forest states:

> It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality … Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; … In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons.

Then, there is *Gosselin*, where the Court rejects freestanding positive rights in the present, but imagines they might be possible in the future. According to Chief Justice McLachlin:

> Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at

46 *Ibid* at para 26.

47 *Vriend*, *supra* note 29 at paras 63 and 64.

48 The other cases mentioned are *McKinney*, *supra* note 12 (Wilson J, dissenting), and *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995.

> bar … One day s. 7 may be interpreted to include positive obligations … It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases.[49]

Mathur cites *Gosselin* to support its rejection of freestanding positive rights while, yet again, acknowledging such rights may be possible in the future, but not now. In this, the Court's decision fits well within an established pattern from the above cases — namely, as Margot Young describes it, "teas[ing] substantive and material content to the rights of security of the person and equality" while rejecting it when "that possibility presents itself."[50]

The problem with *Mathur* runs deeper than that, however. Not only does it fail to develop positive rights jurisprudence in a robust direction. It effectively eliminates the openings in current *Charter* jurisprudence to do so. By refusing to conceive the Target as inadequately *protecting* rights and insisting instead that it be understood only to *interfere* with rights, the Court negated the possibility of a non-freestanding positive right and, along with it, the prospect that *Charter* rights *could* impose positive duties on the state to protect people from harms (like climate change) that governments do not directly or solely cause. Despite its own acknowledgement that the Target "commits Ontario to levels of greenhouse gas emissions that violate their *Charter* rights" — thereby acknowledging that *GHG emissions*, not the Target, violate rights — the Court insists the Target's wrong is that *it* interferes with rights, rather than that it *inadequately protects* people from interference with those rights by GHG emissions.

It may reasonably be asked, however: do these conceptual issues really matter? After all, the Court held the Target violated the *Charter*; does it matter that it got there by expanding a negative right conception rather than recognizing a positive right? The short answer is "yes." Concepts matter in legal reasoning, and the potential loss of non-freestanding positive rights and duties, as concepts, matters a lot. What such rights and duties signal — and what the *Mathur* decision effectively denies — is that *Charter* rights and freedoms *can* impose positive duties on the state to protect people from *Charter*-relevant harm; that, in Tushnet's above-noted words, "the *Charter* imposes some positive obligations on legislatures."[51] In short, non-freestanding positive rights signal that *Charter* rights and freedoms are not *inherently* negative. Their recognition means positive duties to protect people from harm have a place in *Charter* jurisprudence. It is a more limited place than freestanding conceptions of positive rights would require, but it's a place nonetheless.

The Court's decision in *Mathur* denies any place for positive rights and duties. It conceptualizes *Charter* rights as inherently *not* positive, and implies that a positive cant to a rights claim is sufficient reason for it to fail. That is a step backwards in a *Charter* jurisprudence that currently recognizes non-freestanding positive rights, and explicitly imagines future possibilities for freestanding positive rights. Within that jurisprudence a positive cant to a rights claim cannot, in itself, be reason to reject it. There must be other reasons than that fact alone. Which opens a debate about what those reasons might be, how convincing they are, and therefore, more generally, whether there are persuasive reasons for courts *not* to embrace more robust positive rights. By treating positive rights — freestanding and non-freestanding — as inher-

49 *Gosselin*, *supra* note 9 at paras 81 and 82.

50 Margot Young, "Temerity and Timidity: Lessons from *Tanudjaja v. Attorney General (Canada)*" (2020) 61:2 C de D 469 at 491.

51 Tushnet, *supra* note 21 at 207; see also, Cameron, *supra* note 21 at 71.

ently alien to the *Charter*, *Mathur* shuts down that debate, a real loss in light of the fact that debate has already been underway for some time.

In *Gosselin*, for example, Justice Arbour challenged McLachlin CJ's holding that a right cannot be *deprived*, for the purpose of section 7, without some coercive action by the state.[52] While the state may deprive when it "active[ly] tak[es] away, divest[s], or dispossess[es]" the rights holder of a right, she reasoned, it might also deprive by "'keep[ing] out *of* [or] debar[ring] *from*'" or "withholding" some benefit or protection.[53] Justice Arbour's approach seems right, and is, at a minimum, a robust challenge to McLachlin CJ's reasons on this point. To take an example, a provincial government that failed to provide education to residents in the official language of their choice would *deprive* those residents of their section 23 right, not by coercive action, but by inaction that withholds a constitutionally guaranteed benefit.[54] That would seem to be exactly the kind of deprivation that McLachlin CJ's conception of the concept excludes, and Arbour J's includes. Section 23 is, of course, explicitly positive, while sections 7 and 15 are not, but it should make no difference *in principle* to the question of whether a positive right has been "deprived" that that right is rooted in an authoritative judicial interpretation of section 7 or 15 rather than, as with section 23, an explicit enumeration.

A second, and related, argument made against freestanding positive rights is that positive rights target state *inaction* rather than *action*, and thereby fall short of section 32 requirements for *Charter* application. However, that argument is effectively countered by the Supreme Court's holding in *Vriend* that "s. 32 is 'worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority.'"[55] While *Vriend* is a non-freestanding positive rights case, it is difficult to see how that same logic would not apply to a freestanding positive rights claim. Returning to section 23, which articulates a freestanding right to minority language education, an argument that

52 *Gosselin*, *supra* note 9 at para 81. Jamie Cameron (*supra* note 21) describes how Arbour J effectively creates a positive rights jurisprudence by emphasizing the language and structure of the *Charter*, the fact the Supreme Court had "consistently chosen" to leave open the possibility of a positive right to subsistence under section 7, and by deconstructing previous jurisprudential moves to avoid positive rights. "To call it radical would not overstate Arbour J.'s interpretation of section 7," writes Cameron. "[H]er version of the guarantee would allow individuals to claim positive entitlements, including, in Gosselin's case, the right to minimum welfare benefits."

53 *Gosselin*, *supra* note 9 at para 321.

54 Section 23 of the *Charter* provides as follows: "(1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province. (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language(3) The right of citizens of Canada under sections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds."

55 *Vriend*, *supra* note 29 at para 60.

a province's failure to provide minority language education was not subject to the *Charter* because of section 32 would be absurd. And, again, it should make no difference whether a positive right is a result of an authoritative judicial interpretation of section 7 or 15 or, as with section 23, explicit enumeration in the *Charter*.

A third argument against freestanding positive rights is that they are inherently non-justiciable because they obligate state actors to create laws and policies rather than challenging the laws and policies state actors have already created. As such, the argument goes, freestanding positive rights lack a "sufficient legal component to engage the decision-making capacity of the courts,"[56] and belie the "archetypal feature of *Charter* jurisprudence" that claims must assume the form of "challenge[s] to a particular law, an application of the law, or government conduct."[57] The effect of this argument is to bar freestanding positive rights claims altogether. Within its terms, such claims can only be non-justiciable.[58] However, the argument is refutable, and is indeed powerfully countered by cases from comparator jurisdictions. In these cases, courts consider justiciability issues within, rather than as reasons to automatically reject, freestanding positive rights claims, finding the necessary *legal* element for justiciability in the duty of courts to interpret and apply constitutional provisions, and avoiding judicial policy-making by limiting courts' roles to articulating broad principles, and leaving other branches of government responsible for formulating policies to realize those principles.[59]

Justice Arbour articulates this kind of approach to justiciability in her dissenting opinion in *Gosselin*. She acknowledges that freestanding positive rights claims (like the one in that case) raise justiciability issues, because they "require courts to dictate to the state how it should allocate scarce resources, a role for which they are not institutionally competent."[60] Nonetheless, "the role of courts as interpreters of the *Charter* and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims."[61] The solution, she suggests, is to imagine a division of labour between courts articulating principles, and other branches of government formulating policies guided by those principles. "One can in principle answer the question of whether a *Charter* right exists — in this case, to a level of welfare sufficient to meet one's basic needs — without addressing how much expenditure by the state is necessary in order to secure that right," Justice Arbour reasons. "It is only the latter question that is, properly speaking, non-justiciable."[62]

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56 *Tanudjaja*, *supra* note 15 at para 27.

57 *La Rose, supra* note 14 at para 126.

58 Margot Young makes this argument in "Temerity and Timidity", *supra* note 50.

59 See, for example, these two cases interpreting and applying Articles 2 and 8 of the European Convention on Human Rights: *KlimaSeniorinnen v Switzerland* (2024) and *Urgenda et al v The State of the Netherlands (Ministry of Infrastructure and the Environment), 19/00135 (Hoge Raad)* (2019).

60 *Ibid* at para 330.

61 *Ibid* at para 332.

62 *Ibid*. Here, Cameron's critique of Arbour J's dissent as having "eliminated limits on the scope of the [section 7] guarantee, but showed little or no concern about the institutional implications of doing so" arguably misses the mark. Arbour J is clear in her discussion of justiciability that institutional boundaries need to be respected, and, in order to do so, courts should concern themselves with matters of principle while leaving policy matters to other branches of the state.

The point of canvassing these arguments around positive rights is not to *make* them in full, but rather to highlight current debates in *Charter* jurisprudence, and show how they potentially favor expanding positive *Charter* rights, and even embracing freestanding positive rights. The problem with *Mathur* is that it shuts down these debates. Positive rights are jettisoned from *Charter* jurisprudence *because* they are positive rights, not because of arguable points about the correct meaning of "deprivation," or the implications of section 32, or concerns about justiciability. *Mathur*'s categorical holding leaves nothing to debate (except perhaps the degree to which a particular non-freestanding positive claim might be reconceived as a negative claim). It does not just "side-step" positive rights. It negates them.