Federal Court of Appeal | Cour d'appel fédérale

Date: 20231213

Dockets: A-289-20
A-308-20

Citation: 2023 FCA 241

CORAM: **RENNIE J.A.**
LASKIN J.A.
LEBLANC J.A.

Docket: A-289-20

BETWEEN:

CECILIA LA ROSE, by her guardian ad litem Andrea Luciuk, SIERRA RAINE ROBINSON, by her guardian ad litem Kim Robinson, SOPHIA SIDAROUS, IRA JAMES REINHART-SMITH, by his guardian ad litem Lindsey Ann Reinhart, MONTAY JESSE BEAUBIEN-DAY, by his guardian ad litem Sarah Dawn Beaubien, SADIE AVA VIPOND, by her guardian ad litem Joseph Conrad Vipond, HAANA EDENSHAW, by her guardian ad litem Jaalen Edenshaw, LUCAS BLAKE PRUD'HOMME, by his guardian ad litem Hugo Prud'homme, ZOE GRAMES-WEBB, by her guardian ad litem Annabel Webb, LAUREN WRIGHT, by her guardian ad litem Heather Wright, SÁJ MILAN GRAY STARCEVICH, by her guardian ad litem Shawna Lynn Gray, MIKAEEL MAHMOOD, by his guardian ad litem Asiya Atcha, ALBERT JÉRÔME LALONDE, by his guardian ad litem Philippe Lalonde, MADELINE LAURENDEAU, by her guardian ad litem Heather Dawn Plett and DANIEL MASUZUMI

Appellants

and

HIS MAJESTY THE KING IN RIGHT OF CANADA and THE ATTORNEY GENERAL OF CANADA

Respondents

Docket: A-308-20

AND BETWEEN:

DINI ZE' LHO'IMGGIN, also known as ALPHONSE GAGNON, on his own behalf and on behalf of all the members of MISDZI YIKH and DINI ZE' SMOGILHGIM, also known as WARNER NAZIEL, on his own behalf and on behalf of all the members of SA YIKH

Appellants

and

HIS MAJESTY THE KING IN RIGHT OF CANADA

Respondent

Heard by online video conference hosted by the Registry on February 14 and 15, 2023.

Judgment delivered at Ottawa, Ontario, on December 13, 2023.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: LASKIN J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Overview

[1] These reasons address two decisions of the Federal Court striking the appellants' statements of claim. I will refer to the appeals as either the *La Rose* appeal or the *Misdzi Yikh* appeal, as necessary.

[2] The appellants in the *La Rose* appeal are 15 children and youth (the youth appellants) who were between the ages of 10 and 19 at the time that they filed their statement of claim. They reside across Canada in seven provinces and one territory. Together, the youth appellants

initiated an action against Canada for its failure to address the problem of climate change. They sought remedies under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter), contending that the impacts of climate change "interfere with their physical and psychological integrity and their ability to make fundamental life choices" (youth appellants' statement of claim at para. 6). They assert that Canada's legislative response to climate change has a disproportionate effect on their generation and that they have suffered—and will continue to suffer—the consequences, given their vulnerability and age.

[3] The appellants in the *Misdzi Yikh* appeal are two Wet'suwet'en House groups that comprise the Likhts'amisyu (Fireweed) Clan, Misdzi Yikh (Owl House) and Sa Yikh (Sun House) and each of the House groups' *dini ze'* or Head Chief (the Dini Ze'). The Dini Ze' of each Wet'suwet'en House group embodies their House and is responsible for the protection of the House's members, possessions, and territories.

[4] The Dini Ze' launched their claim as a representative proceeding under Rule 114 of the *Federal Courts Rules*, S.O.R./98-106, contending that Canada has contributed to climate change in a way that poses a "threat to their identity, to their culture, to their relationship with the land and the life on it, and to their food security" (Dini Ze's statement of claim at para. 2). They say the legislative response to climate change and executive actions exacerbate the threat and violate their protections and rights under sections 7 and 15 of the Charter. They say that the legislation and regulations authorizing the current levels of greenhouse gas (GHG) emissions, along with the continued and past approvals of GHG-emitting projects, result in Canada breaching its

obligations under international law in the *Paris Agreement*, 12 December 2015, U.N.T.S. 3156 (p. 79) (*Paris Agreement*). This constitutes a breach of domestic law, as the targets in the *Paris Agreement* have been enshrined in section 7 of the *Canadian Net-Zero Emissions Accountability Act*, S.C. 2021, c. 22. In addition, they argue that Parliament has exceeded the general power under section 91 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 (the *Constitution Act, 1867*) to make laws for the peace, order and good government of the country (the general power).

[5] Canada responded to each of these actions with a motion to strike. Canada's position is that GHG-induced climate change is real, scientifically established and objectively measurable. GHG emissions are having demonstrable negative impacts on the Canadian environment, the economy and the health of Canadians, now, and will have grave consequences in the future unless urgently addressed. However, Canada contended that the appellants' claims were not justiciable, or, if they were justiciable, disclosed no cause of action on the basis that there is no nexus between the harm suffered and to be suffered and the impugned legislation.

[6] The Federal Court granted Canada's motions, striking the youth appellants' statement of claim (2020 FC 1008, *per* Manson J.) and the Dini Ze's statement of claim (2020 FC 1059, *per* McVeigh J.), both without leave to amend.

II. Decisions below

[7] I will first describe Manson J.'s decision, which relates to the *La Rose* appeal, and then turn to McVeigh J.'s decision in the *Misdzi Yikh* matter.

[8] Manson J. struck the youth appellants' statement of claim and, as noted, did so without leave to amend (*La Rose* Reasons at para. 101). He found that their claims under sections 7 and 15 of the Charter were not justiciable, as they were so political that they were not suitable for judicial determination. Manson J. held that the youth appellants' "approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of [Canada] does not meet [the] threshold requirement [that a policy response be translated into law or state action prior to constitutional review] and effectively attempts to subject a holistic policy response to climate change to *Charter* review" (*La Rose* Reasons at para. 40). He added that even if these claims were justiciable, they failed to disclose a sufficiently discrete instance of state action so as to permit any Charter analysis (*La Rose* Reasons at paras. 59, 61, 79). Manson J. also noted that the remedies sought by the youth appellants could not practically address any Charter violation, if proved (*La Rose* Reasons at para. 55).

[9] Importantly for the purposes of these appeals, Manson J. did not strike the youth appellants' claim under section 7 of the Charter on the basis that it asserted positive rights, noting the judiciary's reluctance to definitively cap the rights protected by section 7 in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 [*Gosselin*] and *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223, [2020] 2 F.C.R. 299 [*Kreishan*] (*La Rose* Reasons at paras. 67-70).

[10] In dealing with the youth appellants' argument that Canada has a duty to preserve and protect public resources, Manson J. determined that this public trust claim was justiciable but disclosed no reasonable cause of action (*La Rose* Reasons at paras. 58 and 87). He considered

British Columbia v. Canadian Forest Products Ltd., 2004 SCC 38, [2004] 2 S.C.R. 74 [*Canfor*] and *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, 464 N.R. 187 [*Burns Bog*], which the youth appellants argued showed the possibility that a public trust doctrine may exist at common law, but ultimately found that these authorities did not provide a legal foundation for the "breadth of the rights and actionable interests" raised in the youth appellants' claim (*La Rose* Reasons at paras. 88-92). Manson J. characterized the claim under the public trust doctrine as "reflective of an 'outcome' in search of a 'cause of action'" (*La Rose* Reasons at para. 88).

[11] In the Dini Ze's action, McVeigh J. granted Canada's motion and struck the Dini Ze's statement of claim for non-justiciability, without leave to amend (*Misdzi Yikh* Reasons at paras. 8 and 116). McVeigh J. concluded that the Dini Ze's proposed amendments to their statement of claim would not cure its defects (*Misdzi Yikh* Reasons at para. 114).

[12] McVeigh J. highlighted that the Dini Ze' were in essence arguing for an interpretation of the general power that would require Parliament to enact specific laws, and that this interpretation would impose a positive duty on Parliament previously unknown in Canadian law (*Misdzi Yikh* Reasons at para. 46). She disagreed that the general power could create such a duty and struck this claim (*Misdzi Yikh* Reasons at paras. 27, 84-85).

[13] Turning to the Dini Ze's Charter claims, McVeigh J. noted that the Dini Ze' had pled no specific laws or state actions that breached their section 7 or 15 Charter rights (*Misdzi Yikh* Reasons at paras. 50, 75, 91). She further held that, in any event, the Charter claims fell beyond the courts' institutional capacity due to the claims' broad political nature (*Misdzi Yikh* Reasons at

paras. 56-57, 72, 74, 77). She specifically noted that "[t]he issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government" (*Misdzi Yikh* Reasons at para. 77).

[14] McVeigh J. declined to permit the Charter claims to proceed to trial on the possibility that section 7 or 15 may come to encompass positive obligations (*Misdzi Yikh* Reasons at para. 58):

> *Gosselin* left the door slightly open regarding positive obligations that may be imposed on a government to remedy violations of the *Charter* being justiciable. However, this is not such a case. There is no impugned law or action to evaluate, there are no specific allegations of government actions, and the positive obligations (or limitations) sought by the Dini Ze' are vague and without the focus to affect the desired results.

III. Issues on appeal

[15] The youth appellants argue that Manson J. erred by concluding that their Charter claims were not justiciable based on the "broad and diffuse" nature of the asserted state conduct. They argue that, despite the breadth of their claims, the Federal Court would nevertheless be able to apply a "judicially discoverable standard to a discrete and manageable aspect of the government's conduct" (youth appellants' memorandum of fact and law at para. 4). They further argue that Manson J. erroneously concluded that their public trust claim was doomed to fail, as the Supreme Court has left open the possibility that such a claim may succeed, and that the cause of action marks only an incremental change to the common law as it presently exists. Finally, the youth appellants say that Manson J. prematurely assessed the viability of the remedies they sought, an assessment they say ought to have been left to a trial judge.

[16] The Dini Ze' appellants take a position similar to the youth appellants with respect to McVeigh J.'s decision to strike their Charter claims, arguing that the claims were in fact justiciable. They also submit that McVeigh J. misconstrued their claim under the general power in section 91 of the *Constitution Act, 1867* as asserting a positive duty to legislate. Similarly, the Dini Ze' appellants say that McVeigh J. overlooked what they describe as relevant decisions in the United Kingdom (the UK) that support their argument that the general power may be interpreted as a limitation on the government's ability to legislate.

[17] In response, Canada contends that the appellants' challenges to Canada's laws are so broad and diffuse that they disregard Canada's separation of powers—effectively asking the judiciary to undertake the function reserved to the legislature or the executive—and are accordingly unsuitable for judicial adjudication. Canada further contends that the appellants' section 7 and section 15 claims are positive rights claims, which would obligate Parliament to act affirmatively. Canada argues that positive obligations do not figure in any Charter jurisprudence to date and that the claims fail on that basis alone. Canada stresses that the appellants fail to specifically identify the particular laws or policies that breach their Charter rights, and that the claims fail for lack of particularity. Finally, Canada says that neither the youth appellants' public trust claim nor the Dini Ze's section 91 claim disclose a reasonable cause of action, given the absence of any jurisprudence in support of the asserted public trust or the proposed interpretation of the general power.

IV. Motions to strike

[18] The relevant inquiry on motions to strike is whether it is plain and obvious that the pleaded claims have no reasonable prospect of success (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420 at para. 14 [*Atlantic Lottery*]; *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61, 2023 CarswellNat 697 (WL Can) at para. 18, leave to appeal to SCC requested).

[19] Three ancillary principles inform the application of this test. First, the facts are to be taken as proven unless they are manifestly incapable of proof. Second, the pleading must be read generously, and, recognizing that the law is not static and evolves to address new and emerging situations, a motions judge must err on the side of permitting novel but arguable claims to proceed to trial (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 21 [*Imperial Tobacco*]; *Mohr v. National Hockey League*, 2022 FCA 145, 472 D.L.R. (4th) 413 at para. 48, leave to appeal to SCC refused, 40426 (20 April 2023)). Third, the onus is on the defendant who seeks to establish that there is no reasonable cause of action (*Edell v. Canada*, 2010 FCA 26, 399 N.R. 115 at para. 5).

[20] The question in these appeals lies in whether the claims fail on the basis of justiciability, the substantive law, the pleadings, or perhaps on all three grounds. If the issues raised in the claims are not justiciable, that is a complete answer to the matter—the claims must be struck. But if the claims are justiciable, the claims may also fail on either the second objection—namely, that they disclose no reasonable cause of action—or on the third, a failure of the pleadings. The

second objection, if successful, would normally be fatal; the third one, in appropriate circumstances, may be remedied by amendments.

[21] I will explain why the claims based on the general power, the public trust doctrine and section 15 of the Charter fail. They have no reasonable prospect of success and were properly struck without leave to amend.

[22] The section 7 claims are justiciable, but nevertheless should be struck, albeit with leave to amend. The section 7 claims fail, not because they are destined to fail in this context or have no reasonable prospect of success, but because the pleadings of the section 7 claims as framed are incompatible with constitutional adjudication. The section 7 claims fail not because they are destined to fail in this context or have no reasonable prospect of success, but because the expansive and diffuse scope of the pleadings as framed are incompatible with constitutional adjudication.

V. Justiciability

[23] I begin with justiciability. As noted, Manson and McVeigh JJ. took somewhat different approaches to the issue.

[24] Justiciability distinguishes claims suitable for judicial determination from those that are not. When assessing justiciability, "[t]he court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter" (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750 [*Highwood*] at para. 34, citing

Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012) at 7 and 294) [Sossin, *Boundaries of Judicial Review*]). The question of institutional capacity asks what the court can do; the legitimacy question asks what the court should do. Courts decline to adjudicate issues that ask that they act beyond their institutional capacity or legitimacy.

[25] Two considerations motivate the justiciability analysis. The first is constitutional, the second, more pragmatic.

[26] The constitutional consideration is the court's respect for its role in a Westminster parliamentary democracy. The wisdom of political and policy choices made by Parliament in response to social, economic and environmental problems is separate and apart from their constitutionality. Courts do not second-guess the wisdom of Parliament's choice; rather, they assess the validity of the resulting law and its application and must be mindful of the boundaries between the two. The justiciability inquiry involves a weighing of the appropriateness, as a matter of constitutional judicial policy, of the courts deciding a given issue or instead deferring to the other branches of government (*Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604 at 90-91).

[27] The pragmatic consideration arises from the limitations on a court's ability to fashion and implement remedies. This is a component of the institutional limitation.

[28] No firm criteria for assessing justiciability exist, and the boundaries between justiciable and non-justiciable matters are not always clear. The issue often distills to a single question as to whether the claim has a sufficient legal component upon which a court can adjudicate. Here too, the answer to that question may be obscured by the moral, social or political dimensions of the case that make it inappropriate for a court to decide (*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, 379 D.L.R. (4th) 467 at para. 33 [*Tanudjaja*]; but compare: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 at 472 [*Operation Dismantle*]; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 at 545-546).

[29] But we do know that claims are not rendered non-justiciable simply because they raise complex or controversial issues. Courts must be flexible in their approach to determining whether a matter is justiciable and consider the context of the claim in question (*Highwood* at para. 34). On this point, the language of the Supreme Court is unequivocal: “The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it” (*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at para. 107 [*Chaoulli*]).

[30] Courts have not shied away from addressing controversial issues that raise many layered and complex policy questions. Examples readily spring to mind: challenges to legislation reducing access to private medical treatment (*Chaoulli*); whether the waiting times for surgery infringe section 7 (*Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2022

BCCA 245, 473 D.L.R. (4th) 1); whether the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 with regard to prostitution infringe section 7 (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 [*Bedford*]); access to abortion (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385); the availability of supervised injection sites to improve the safety of drug use (*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 [*PHS*]); and the effects of prohibitions on physician-assisted dying (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 [*Carter*]).

[31] Here, the motions judges found that the claims were not justiciable because they would require the Court to adjudicate on broad and diffuse aspects of government conduct, involving matters of economics and foreign and trade policy, under programs administered by various departments. The question of climate change was “controversial” and “political” and therefore not one for the courts.

[32] I do not agree, respectfully, that the claims are not justiciable simply because the question of climate change is complex or because the legislation reflects a political choice on how to address the problem. While the legislation may be controversial, this does not efface the fact that the debate has been crystallized into law; legislative choices have been made. For example, the preamble of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 recognizes that the Government of Canada must, and will, take steps to alleviate the pressures of climate change, stating that “the Government of Canada is committed to achieving Canada’s Nationally Determined Contribution—and increasing it over time—under the Paris Agreement by taking

comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change".

[33] Political choice underlies all legislation and some exercises of executive discretion; both are invariably informed by a wide range of public policy considerations. But once the choices are made, the policy trade-offs considered and the legislative response crystallized, the law is not immunized from Charter scrutiny. As the Supreme Court held in *PHS*, "when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*" (*PHS* at para. 105). It must not be forgotten that the target of the appellants' claims is legislation—existing laws, regulatory instruments and Orders in Council.

[34] Matters of public policy are within the exclusive domain of the executive and legislative branches, and are, on their own, demonstrably unsuitable for adjudication. Because of this, where a case engages only the underlying policy, a court will strike a pleading as not justiciable (Sossin, *Boundaries of Judicial Review* at 267-270). On the other hand, in concurring reasons on a point accepted by the majority, Wilson J. stated that a court cannot relinquish its jurisdiction over an issue merely because it raises a "political question" (*Operation Dismantle* at 459 and 472). She went on to distinguish, in the justiciability context, pure policy questions from legal questions with some policy aspect to them (*Operation Dismantle* at 472):

> I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.

[35] Public controversy or the political context associated with legislation cannot therefore be a standalone ground to deem the claim non-justiciable (*Operation Dismantle* at 472), and the "political question" doctrine found in the United States has never been accepted in Canada (D. Geoffrey Cowper & Lorne Sossin, "Does Canada Need a Political Questions Doctrine?" (2002) 16 S.C.L.R. (2d) 343 at 345). The Supreme Court has expressly rejected the doctrine, and, as just noted, when the claim is properly framed as a breach of Charter right (an important caveat and to which I will return), the court has an obligation to decide the matter (*Operation Dismantle* at 472). One hears in the reasons of the Federal Court a faint echo of the political question doctrine.

[36] As previously described, policy considerations are inherent to all government action, but that fact alone does not insulate the law from judicial scrutiny. What matters in an assessment of justiciability, instead, is the presence of a sufficient legal component or legal anchor to the claim. Justiciability, in the end, asks whether the court can adjudicate the issues against an objective legal standard. In this sense, justiciability analysis requires some understanding of the jurisprudence that underlies the claim, which in turn requires a somewhat probing examination of the substantive allegations of the claim.

[37] *Tanudjaja* is a good example of the requirement that a claim have a sufficient legal component in order to be justiciable. There, the appellants sought declarations that Ontario's failure to effectively address the problem of homelessness violated their rights under sections 7 and 15 of the Charter. The appellants challenged no law or application of law in particular—they simply challenged the governments' overall approach to the social problem. The claims lacked a

legal component required for judicial adjudication and therefore were not justiciable (*Tanudjaja* at paras. 19, 27, 35-56).

[38] Here, in contrast, the appellants link the section 7 deprivation to the failure of Canada to meet its commitments in the *Paris Agreement* (Nationally Determined Contributions), commitments ratified by Parliament, and hence legally defined, objective standards against which the Charter claims can be assessed. The claims do not seek to tell Canada how to fulfill its commitments. In this regard, the Federal Court mischaracterized the claims when it held the claims were challenges to policy.

[39] Canada relies on *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183, [2009] 3 F.C.R. 201 [*Friends of the Earth*] as authority for the proposition that the doctrine of justiciability precludes judicial intervention on climate change matters.

[40] In that case, the applicant sought declaratory and mandatory relief in connection with the alleged failures of the Minister of the Environment and the Governor in Council to comply with their duties under the *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30 (the KPIA). The applicant argued that the Minister was required under the KPIA to prepare a climate change plan that satisfied Canada's obligations under the Kyoto Protocol, and that the Governor in Council was required to take regulatory action to ensure that Canada would meet its Kyoto Protocol commitments (*Friends of the Earth* at paras. 3-5).

[41] The judicial review application was dismissed on the basis that it did not raise justiciable issues (*Friends of the Earth* at paras. 46 and 48). The Federal Court found that the KPIA did not impose duties on either the Minister or the Governor in Council that required strict compliance with the Kyoto Protocol, nor did the relevant portions of the KPIA contemplate an enforcement role for the court (*Friends of the Earth* at paras. 33-35, 38-45). *Mandamus* was refused because the Minister's obligation under the Act was to file a report to Parliament; no public duty was owed, and it was on this basis that the application was dismissed (see, as a recent application of the same principle, *Sierra Club of British Columbia Foundation v. British Columbia (Minister of Environment and Climate Change Strategy)*, 2023 BCSC 74, 54 C.E.L.R. (4th) 328).

[42] The Federal Court's conclusion on justiciability was guided entirely by the content of the KPIA; as the Federal Court noted, "[t]he justiciability of all of these issues is a matter of statutory interpretation directed at identifying Parliamentary intent" (*Friends of the Earth* at para. 31). *Friends of the Earth* does not, therefore, stand for the proposition that all claims addressing climate change are inherently non-justiciable; rather, the application was struck on the basis that the Minister's duties under the KPIA were owed to Parliament and that the legislation did not create a public duty enforceable by *mandamus*. Neither of these circumstances arise in the present appeals.

[43] To the extent that the Federal Court in *Friends of the Earth* addressed the substance of the government's report and its own ability to adjudicate on the government's degree of compliance with the Kyoto Protocol, the observations were both *obiter* and hypothetical, no report ever having been prepared.

[44] I also note the decision of the Ontario Superior Court of Justice in *Mathur v. Ontario*, 2020 ONSC 6918, 42 C.E.L.R. (4th) 124 [*Mathur 2020*]. There, like here, the underlying issue was a Charter challenge to the adequacy of a government's response to climate change. The Ontario Superior Court dismissed Ontario's motion to strike the applicants' application on the basis of non-justiciability, holding instead that the application had a reasonable prospect of success and that the claim properly challenged specific laws and specific government conduct (*Mathur 2020* at paras. 132, 139-140). Neither the complexity nor the controversial nature of the subject matter of the claim rendered it inherently non-justiciable.

[45] Here, the appellants have pled, in the legislation and Orders in Council, an objective legal basis or standard against which section 7 rights can be assessed. There is, therefore, a sufficient legal component to their claims, and the claims satisfy the legitimacy portion of a justiciability analysis. However, this is not a complete answer to the question of whether the appellants' claims, as pleaded, are justiciable; there remain the questions of institutional competence and remedies.

[46] Both motions judges ruled that the claims failed because they were overly broad and diffuse: they were based on multiple pieces of legislation, prior project approvals by way of Orders in Council, international agreements, domestic policy relating to climate change, and Canada's participation in industries and activities involving fossil fuels through subsidies, grants and tax measures. In *La Rose*, the Federal Court also reviewed some of the remedies sought and concluded that they overreached the institutional competence of the Court (*La Rose* Reasons at paras. 8-10, 40 and 46).

[47] In some cases, remedies sought may be so clearly offside that they taint the proceeding as a whole. Remedies must be capable of enforcement. If a court cannot tailor effective, enforceable remedies to meaningfully address the asserted harms, the claim may not be justiciable.

[48] But remedies, at least at the outset of litigation, are not necessarily determinative of justiciability. For example, declaratory relief is, on occasion, granted but suspended when enforcement is inconsistent with the role of the judiciary in the constitutional framework (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 [*Khadr*]). More to the point, however, is the fact that this argument, at least as framed before us, glosses over a recurring theme in constitutional jurisprudence; seldom do courts supply the solution when legislation has been found unconstitutional. Declarations are frequently suspended in order to allow the legislature time to craft a constitutionally compliant response (see, for example, *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1 at 722-725; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489 at paras. 60 and 66; *Bedford* at paras. 165 and 169; *Carter* at para. 128; Anne M. Turley and Zoe Oxaal, "The Significance of *R v. Albashir* in the Evolution of Constitutional Remedies" (2023) 108 S.C.L.R. (2d) 139).

[49] The need for caution in characterizing remedies as non-justiciable is reflected in *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316, 480 D.L.R. (4th) 444 [*Mathur 2023*]. There, the Court found that what constitutes a science-based GHG reduction target and a stable climate system could be established through expert evidence, as they are based on a globally recognized body of science (*Mathur 2023* at para. 123). Compare, as well with *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2020 BCSC 1310, 333 A.C.W.S.

(3d) 540 where the Court considered what constituted a reasonable wait time for health care, an equally multi-layered, complex melange of financial, medical, policy and management issues (at paras. 8-10, 1736-1806).

[50] There is also a relationship between the question of whether there is a Charter breach and whether the requested remedies are viable. It may be only when the nature, extent and source of the violation is identified that the appropriateness of the remedy can be assessed. As *Khadr* demonstrates, sometimes there may be no remedy to be enforced, but a declaratory remedy may be granted nonetheless (see also Feldman J.A. in *Tanudjaja* at para. 85). Declarations may serve to vindicate rights; *Khadr* is but one example of many (see also *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165 at para. 81; *Operation Dismantle* at 457; *David Suzuki Foundation v. Canada (Fisheries and Oceans)*, 2010 FC 1233, [2012] 3 F.C.R. 136 at para. 202, aff'd 2012 FCA 40, [2013] 4 F.C.R. 155).

[51] Even if some of the remedies sought push the boundaries of the court's competence, a claim should not be characterized, *a priori*, as non-justiciable. Overly focusing on remedies at the justiciability stage may place "undue and unwise limits" on judicial oversight of the law (Lorne Sossin, "The Unfinished Project of *Roncarelli*: Justiciability, Discretion and the Limits of the Rule of Law" (2010) 55:3 McGill L.J. 661 at 686). As a practical matter, remedies are often amended in the course of the litigation and judges are required, when granting constitutional remedies, to exercise a principled discretion (*Ontario (Attorney General) v. G*, 2020 SCC 38, 451 D.L.R. (4th) 541 at paras. 90-99). The remedies must be tailored to the breach, if a breach is ultimately found.

[52] The Federal Court's perspective on remedies was understandably coloured by the broad and diffuse scope of the claims (*La Rose* Reasons at para. 50, *Misdzi Yikh* Reasons at para. 73). For this reason, perhaps, the Court did not consider the declarations sought or assess their viability against the jurisprudence. The Federal Court characterized the remedies as overly prescriptive, but simultaneously as vague and devoid of meaning. These criticisms are, in part, well-deserved. But they do not justify a pre-emptive decision to foreclose the possibility of remedies tailored to the breach.

VI. Public trust doctrine

[53] In their statement of claim, the youth appellants assert that Canada has breached its duty to preserve and protect inherently public resources—bodies of water, the air, and the permafrost—so that current and future generations may access, use, and enjoy these resources. They describe Canada's obligations in this regard as originating from a "public trust doctrine" (youth appellants' statement of claim at para. 239).

[54] Manson J. concluded that this claim had no reasonable prospect of success as "there [was] no legal foundation to suggest that the public trust doctrine, as described by the [youth appellants], discloses a reasonable cause of action" (*La Rose* Reasons at para. 87). Manson J. also noted that "the public trust doctrine is a concept that Canadian Courts have consistently failed to recognize" and stated that this doctrine "does not exist in Canadian law" (*La Rose* Reasons at para. 93).

[55] The youth appellants argue that the doctrine's lack of prior recognition by Canadian courts does not necessarily indicate that their public trust claims were doomed to fail. Further, they say that the Supreme Court in *Canfor* expressly left open the possibility that a public trust doctrine could be advanced, and that an extension of the common law in these circumstances would accord with a principled and incremental legal development of the law (*Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, [2016] 1 F.C.R. 446 at paras. 116-117, leave to appeal to SCC refused, 36471 (29 October 2015) [*Paradis Honey*]).

[56] The contours of the public trust doctrine as pleaded by the appellant are imprecise and fluid; the doctrine is described as a trust-like duty, an aspect of the Crown's *parens patriae* jurisdiction, a fiduciary obligation and an unwritten constitutional principle. The doctrine is said to impose specific, enforceable obligations on Canada to preserve and protect public resources such as the air, the atmosphere, navigable waters and territorial seas. The doctrine would require Canada to exercise continuous supervision and control over these resources, to protect the public rights to their use and enjoyment and to ensure their integrity for future generations. The youth appellants say that Canada owes these obligations to its citizens, who, as beneficiaries, can enforce the doctrine where Canada has not lived up to its responsibilities.

[57] I disagree that Manson J. erred as alleged by the youth appellants. The motions judge understood the jurisprudence with respect to both motions to strike and the public trust doctrine and applied it correctly.

[58] Manson J.'s conclusion was shaped not by the novelty of the public trust claims (*La Rose* Reasons at paras. 81-84), but by his analysis of two decisions dealing with public rights vested in the Crown, *Canfor* and *Burns Bog* (*La Rose* Reasons at paras. 88-92). Measuring the youth appellants' public trust claims against the existing case law, Manson J. identified the claims as resting on an entirely non-existent cause of action and accordingly determined that the claims had no reasonable prospect of success (*La Rose* Reasons at paras. 92-94, citing *Atlantic Lottery* at para. 19). I agree with the judge's reasons.

[59] *Canfor* establishes that the Crown may bring a tort action as a "representative of the public to enforce the public interest in an unspoiled environment" (*Canfor* at para. 64). Binnie J. determined that although the Crown was limited to suing in its capacity as a private party as landowner of the damaged forests, the Attorney General may have standing to bring an action on behalf of the general public in a proper case based on the *parens patriae* responsibilities of the Crown (*Canfor* at paras. 76 and 81). Binnie J. stated in *obiter* that this standing would raise important policy questions relating to "the Crown's potential liability for *inactivity* in the face of threats to the environment" and "the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources", but did not comment on the merits of these questions (*Canfor* at paras. 81-82).

[60] The Attorney General's presumptive standing to appear and act in the public interest, as established in *Canfor*, cannot be equated to a substantive, enforceable obligation owed to the public at large. The public trust doctrine provides an affirmative basis for the Crown to act; it is

an entirely different proposition to say that the Crown can be compelled to fulfill some form of a *parens patriae* jurisdiction which would be defined by the court.

[61] There are also a host of conceptual problems in imposing a fiduciary or trust-like obligation on the Crown, most notably the difficulty of reconciling the obligations of a trustee or fiduciary to act solely in the best interests of an identified person or group with the principles of Westminster parliamentary democracy. Parliament and Cabinet must act in what they consider to be the best interests of Canada as a whole (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 at paras. 44 and 50), and in accordance with the *Constitution Act, 1867*, which places most lands under provincial responsibility. This Court in *Burns Bog* interpreted *Canfor* to leave open the possibility that the public trust doctrine could apply, but confirmed that it would not apply where the Crown did not own the land in question (*Burns Bog* at paras. 44, 46-47). The youth appellants' claim is not targeted to land owned by Canada.

[62] Accepting that a public trust doctrine may some day be recognized in Canadian courts, I agree with the motions judge that "[*Canfor* and *Burns Bog*] do not approach the breadth of the rights and actionable interests that the [youth appellants] claim could exist at common law" (*La Rose* Reasons at para. 92). Neither *Canfor* nor *Burns Bog* support a claim that Canada has an affirmative, trust-like duty to protect public resources in the way that the youth appellants desire, no matter how sound their objectives or how genuine their motives. The principles that inform when trust-like duties may be imposed on the Crown are narrow. The public trust claim was therefore properly struck.

VII. Peace, order and good government / The general power

[63] The Dini Ze' initially claimed that Canada's power to make laws for the peace, order and good government of Canada under section 91 of the *Constitution Act, 1867* imposed a positive obligation on Parliament to enact laws that effectively reduced its GHG emissions. In response to Canada's motion to strike, the Dini Ze' sought leave to amend their statement of claim. They now describe section 91 as a provision that "limits [Canada's] powers to pass laws that are inconsistent with its constitutional duty to the [Dini Ze'] and with its international commitments to keep global warming to well below 2°C" (Dini Ze's amended statement of claim at para. 85).

[64] McVeigh J. rejected the Dini Ze's proposed amendments and struck their claim under section 91 of the *Constitution Act, 1867* without leave to amend (*Misdzi Yikh* Reasons at para. 114). She concluded that their proposed amendments presented only "a semantical change" that did not cure their characterization of the general power as a power dictating that the government enact specific laws (*Misdzi Yikh* Reasons at para. 46).

[65] The Dini Ze' argue that McVeigh J. misinterpreted their proposed amendments as imposing a positive duty on Canada, instead of a limitation on what Canada may legislate. They also say that their claim has a reasonable prospect of success given two UK decisions (*R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs,* [2001] QB 1067 [*Bancoult (No. 1)*] and *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61 [*Bancoult (No. 2)*]).

[66] These arguments are unpersuasive and I agree with the reasoning of McVeigh J.

[67] Decades of jurisprudence have described the contours of the general power under section 91: it serves as an important residual source of federal jurisdiction. The purpose of the general power is to ensure that every possible subject of legislation belongs to one or other of the federal Parliament or the provincial Legislatures. In this way, the general power facilitates the division of powers by authorizing Parliament to act where there are gaps in the distribution of powers, in matters of national concern, or in the face of emergencies (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 455 D.L.R. (4th) 1 at para. 115 [*GGPPA References*]; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 72; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, 107 D.L.R. (4th) 457 at 379; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, 110 D.L.R. (3d) 594 at 944-945; *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 at 403; Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Supp., vol. 1 (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2022, release 1), ch. 17 at 17-2).

[68] The Dini Ze'—pointing to Canada's enactment of legislation that effectively licenses GHG emissions and its approvals of high GHG-emitting projects by way of Orders in Council—claim that Canada is legislating outside of its constitutional authority by not promoting peace, order and good government. Despite their argument that their proposed claim under the general power focuses on a limitation rather than a duty, the Dini Ze' have nevertheless framed the claim in a way that rests on a requirement that Parliament legislate in a particular manner.

[69] There is no anchor for this proposition in the 156 years of Confederation. Section 91 is a source of Parliament's legislative power, not a limit; it is an unqualified grant of legislative

power, not an obligation. The general power is not an overarching obligation that requires Parliament to maintain a standard of "peace, order and good government of Canada" with every legislative decision. Whether the Dini Ze's argument is cast as a positive duty or a limit on Parliament's power is a distinction without a difference; the substance of the argument is that section 91 requires Parliament to enact laws that achieve what the judiciary determines to be necessary for the peace, order and good government of the country.

[70] As noted earlier, the appellants rely on two decisions from UK courts to support their interpretation of section 91.

[71] In *Bancoult (No. 1)*, the UK's Queen's Bench Division was tasked with determining whether an ordinance which prohibited the Indigenous people born in the British Indian Ocean Territory from returning to and residing in their homeland was unlawful for upsetting the "peace, order and good government" of the territory. The Queen's Bench decided that the executive's power to legislate for the "peace, order and good government" of the British Indian Ocean Territory did not extend so far as to permit the executive to remove the inhabitants of the territory for political reasons (*Bancoult (No. 1)* at 1104).

[72] In *Bancoult (No. 2)*, however, the UKHL upheld an Order in Council similar to the ordinance found to be *ultra vires* in *Bancoult (No. 1*). Lord Hoffman of the UKHL expressly disagreed with the Queen's Bench's interpretation of "peace, order and good government" at para. 50):

> [T]he words "peace order and good government" have never been construed as words limiting the power of a legislature. Subject to the principle of territoriality

> implied in the words "of the Territory", they have always been treated as apt to confer plenary law-making authority... The courts will not inquire into whether legislation within the territorial scope of the power was in fact for the "peace, order and good government" or otherwise for the benefit of the inhabitants of the Territory. So far as *Bancoult (1)* departs from this principle, I think that it was wrongly decided.

I note that the UKSC upheld the UKHL's decision in *Bancoult (No. 2)* in *R (on the application of Bancoult (No. 2)) v. Secretary of State for Foreign and Commonwealth Affairs,* [2016] UKSC 35.

[73] The *Bancoult* decisions do not therefore assist the appellants.

[74] In any event, constitutional analysis is principally informed by Canadian jurisprudence, which is in turn shaped by our political and social history and only draws upon decisions of foreign courts or principles of international or comparative law in exceptional circumstances (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426 at paras. 43-47). This practice is driven by the obvious reality that measures adopted in other contexts may be of scant relevance, a point particularly apposite in respect of the *Bancoult* decisions.

[75] I agree with McVeigh J.'s conclusion that the UK cases relied upon by the Dini Ze' were not instructive (*Misdzi Yikh* Reasons at para. 40) and her conclusion that "the POGG power has never been used in such a way, and… that even this novel attempt must fail" (*Misdzi Yikh* Reasons at para. 46). I would accordingly uphold her decision to strike this part of the claim without leave to amend.

VIII. Section 15 of the Charter

[76] Climate change is having a dramatic, rapidly unfolding effect on all Canadians and on northern and Indigenous communities in particular. In the *GGPPA References*, the Supreme Court recognized that climate change has had a "particularly serious effect" on Indigenous peoples and Indigenous territories, "threatening the ability of Indigenous communities in Canada to sustain themselves and maintain their traditional ways of life" (*GGPPA References* at paras. 11-12, 187, 206). Canada accepts this, noting that "[g]lobal climate change is… not a distant problem, but one that is happening now and that is having very real consequences on people's lives" (Canada's memorandum of fact and law in *Misdzi Yikh* appeal at para. 1). It is also beyond doubt that the burden of addressing the consequences will disproportionately affect Canadian youth.

[77] The question is whether it is reasonably arguable that this reality falls within the scope of section 15. The appellants' case is that climate change affects them disproportionately and that the legislation is not sufficiently robust to address this inequality. Their case is, therefore, one of adverse effect discrimination and whether the law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.

[78] Claims under section 15 of the Charter are assessed under a two-part test.

[79] The court is to first determine whether the law or state action creates a distinction based on an enumerated or analogous ground. If the law does not do this on its face, claimants must establish that a law has a disproportionate impact on members of a protected group (*Fraser v.*

Canada (Attorney General), 2020 SCC 28, 450 D.L.R. (4th) 1 [*Fraser*] at para. 52). Second, the court is to assess whether the law or state action imposes burdens or denies a benefit in a manner that perpetuates, reinforces, or exacerbates some disadvantage experienced by the group, either systemically or historically (*R. v. Sharma*, 2022 SCC 39, 420 C.C.C. (3d) 1 at para. 28 [*Sharma*]; *Fraser* at paras. 27 and 77).

[80] Claims under section 15 may be directed at the state's conduct in implementing a law or policy, as well as the law or policy itself (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 at para. 125; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at para. 30 [*Withler*]; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464 at para. 25 [*Alliance*]; *Fraser* at paras. 27 and 50). Where the state has chosen to provide benefits or impose burdens on the general population, the state is obligated to do so in a non-discriminatory manner under section 15.

[81] Section 15 is directed toward substantive equality, and ensures that legal benefits are provided and obligations imposed without discrimination on a protected ground (*Alliance* at para. 25; *Fraser* at para. 27). Section 15 does not, however, impose "a freestanding positive obligation on the state to enact benefit schemes to redress social inequalities" (*Alliance* at para. 42). In addition, the state is free to address inequality incrementally (*Sharma* at para. 64; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657 at para. 41 [*Auton*]; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 at paras. 72-73; *Alliance* at para. 42).

[82] The adverse or disproportionate effect that climate change is having on the appellants is not the kind of adverse effect that section 15 is to address. I accept the argument that the intergenerational considerations associated with climate change raise profound moral, social and economic questions; but, save as I will discuss later (at paras. 119-125) intergenerational equity is not within the scope of section 15, as the law currently stands.

[83] The underlying rationale for this is rooted in the separation of powers; if courts could adjudicate section 15 claims that allege discrimination caused by future inequalities, the judiciary would effectively be participating in the policy choices around resource allocation, the domain of the legislature and executive (*Sharma* at para. 63).

[84] I understand the youth appellants' argument that, as they have no vote or no voice in these decisions, the reach of section 15 ought to be extended. This, however, would be an unprecedented application of section 15, and not the kind of gradual, incremental change by which the law evolves.

[85] Age as a protected ground occupies a unique status, as age is universal: an individual at any given age has personally experienced all earlier ages, and expects to experience later ages. As La Forest J. noted in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 1990 CanLII 60 (SCC), "while we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits" (at 297).

[86] Choices made by Parliament or the executive will, of necessity, affect different generations differently. Decisions made today with respect to health care spending may, for example, largely benefit older Canadians, or decisions to invest in major infrastructure projects may largely benefit younger generations. Broad policy decisions by a government, such as the degree to which debt should be incurred, will affect different generations differently. As distinct from their section 7 claims, the true nature of the appellants' equality argument is about how the legislation will affect them when they are older.

[87] Notwithstanding the above, the international legal community is moving towards the recognition of youth climate rights and the promotion of intergenerational equity. A recent report from the United Nations Committee on the Rights of the Child urged states to take immediate action to address environmental degradation and climate change, as they challenge children's rights to life, survival, and development (*General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change*, United Nations Committee on the Rights of the Child, 93rd Sess., U.N. Doc. CRC/C/GC/26 (2023) at paras. 63-67). While Canada has ratified the Convention on the Rights of the Child and the Convention has been used many times by courts in interpreting domestic legislation (see, for example, *M.M. v. United States of America*, 2015 SCC 62, [2015] 3 S.C.R. 973 at para. 148, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 (SCC) at para. 71), this does not yet create a place in the framework under section 15 that would allow the youth appellants' claim to proceed.

[88] I would therefore uphold the motions judges' decisions to strike the section 15 claims without leave to amend.

IX. Section 7 of the Charter

[89] Section 7 of the Charter states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." To establish a breach of section 7, then, claimants must show that the "law interferes with, or deprives them of, their life, liberty or security of the person", and that this deprivation "is not in accordance with the principles of fundamental justice" (*Carter* at para. 55; see also *Chaoulli* at para. 109).

[90] Claimants must also demonstrate a causal connection between the impugned action or law and the prejudice they have suffered (*Bedford* at para. 75). However, claimants need not demonstrate that the state alone is accountable for the prejudice they have suffered (*Bedford* at para. 76):

> A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link.

[91] While I will return to the question of causal connection at the conclusion of these reasons when I discuss sufficiency of the pleadings, I want to foreshadow that there is a distinction between sufficient pleading of a causal link and a pre-emptive determination of fact that such a

causal link can never be established. Here, the motions judges based their decisions on a pre-emptive determination of fact and in so doing erred.

Characterization of claims/Positive rights

[92] Section 7 and the associated jurisprudence does not confer a right to any particular legislative regime that guarantees or maximizes the life, liberty and security of the person; rather, section 7 protects against the deprivation of these interests. Accordingly, the state has not, so far, been required to "act affirmatively to ensure that each person enjoys a minimum of life, liberty and security of the person" (*Kreishan* at para. 136; *Gosselin* at para. 81). To engage section 7, courts have required more than a harm that could be alleviated by state action—there must be a deprivation arising from the state action itself.

[93] It can be discerned from the history of the section 7 jurisprudence that the Supreme Court, indeed all courts, are cautious about opening the door to positive rights claims. Positive rights challenges have been dismissed in a multiplicity of contexts in diverse fora across Canada (*PHS* at para. 92; *Bedford* at paras. 60 and 75; *Carter* at para. 55; *Chaoulli* at paras. 103-104; Emmett Macfarlane, "Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the Charter of Rights and Freedoms" (2017) 49 Ottawa L. Rev. 107 at 121). They have been dismissed in actions concerning social welfare benefits (*Masse v. Ontario (Minister of Community and Social Services)*, 134 D.L.R. (4th) 20, 1996 CanLII 12491 (ONSCDC) at paras. 73 and 172; *McMeekin v. Government of the Northwest Territories*, 2010 NWTSC 27, 209 C.P.R. (2d) 243 at paras. 27-31; *Lacey v. British Columbia*, 1999 CanLII 7023 (BCSC), 1999 CarswellBC 3078 (WL Can) at paras. 4-6; *Conrad v. Halifax*

(County), 124 N.S.R. (2d) 251, 345 A.P.R. 251 (NSSC) at paras. 90-96), health care (*Chaoulli* at para. 104; *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, [2013] 1 F.C.R. 374 at para. 77, leave to appeal to SCC refused, 34446 (5 April 2012)), autism programs (*Sagharian v. Ontario (Education)*, 2008 ONCA 411, 172 C.P.R. (2d) 105 at paras. 52 and 57, leave to appeal to SCC refused, 32753 (4 December 2008); *Wynberg v. Ontario* (2006), 269 D.L.R. (4th) 435, 82 O.R. (3d) 561 (ONCA) at paras. 219-220), witness protection (*John Doe v. Ontario*, 162 C.R.R. (2d) 186, 2007 CarswellOnt 6478 (WL Can) (ONSC) at para. 113, aff'd 2009 ONCA 132), unlawful detention (*Good v. Toronto Police Services Board*, 2013 ONSC 3026, 43 C.P.C. (7th) 225 at para. 143), refugee asylum claims (*Kreishan* at paras. 135-141), and climate change (*Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 50, 427 C.R.R. (2d) 212 at para. 68).

[94] Two recent cases of the British Columbia Court of Appeal exemplify this approach.

[95] *Scott v. Canada (Attorney General)*, 2017 BCCA 422, 417 D.L.R. (4th) 733 [*Scott*] dealt with a section 7 claim brought by members of the Canadian Forces which alleged that the government's compensation scheme for injured veterans was insufficient. The Court struck the claim since there was no deprivation imposed by the government—the legislation was just a "benefit-conferring program" (*Scott* at para. 89). More recently, the British Columbia Court of Appeal struck a claim brought by an individual who alleged that the Minister of Health's failure to consider his application to access a medical drug violated his section 7 rights. Willcock J.A., writing for the Court, pointed to the consistent line of jurisprudence holding that a government's failure to provide a financial benefit alone cannot ground a section 7 claim (*Chung v. British*

Columbia (Minister of Health), 2023 BCCA 294, 2023 CarswellBC 2045 (WL Can) at paras. 65-67).

[96] This does not mean that the door to positive rights under section 7 is closed. As early as 2000, the Supreme Court recognized the role of section 7 in reflecting and safeguarding the public's evolving values (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 188, *per* LeBel J):

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

[97] In 2002, in *Gosselin*, McLachlin C.J. endorsed LeBel J.'s observation. There, she noted that "[o]ne day s. 7 may be interpreted to include positive obligations", and that "[i]t would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases" (*Gosselin* at para. 82). The Chief Justice elaborated that the question of whether positive rights arise under section 7 is one that courts must assess based on the case before them (*Gosselin* at para. 82):

> The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

[98] Rumblings of positive rights have continued to sound since *Gosselin*. The Court of Queen's Bench of Alberta, for example, dismissed a claim under section 7 challenging

inadequate workers compensation benefits, but noted that interference with economic rights alone could ground a positive rights claim if it were to result in "serious stress, stigma and anxiety that substantially affect a person's security of the person" (*Schulte v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2015 ABQB 17, 605 A.R. 210 at para. 130, aff'd on appeal (without comment on this point) at 2016 ABCA 304, [2017] 3 W.W.R. 694). This Court has as well acknowledged the possibility that section 7 may some day impose positive obligations on the state, and noted that this may arise in the context of climate litigation (*Kreishan* at para. 139).

[99] There is also a significant body of academic analysis supporting the recognition of positive rights under section 7. Martha Jackman and Bruce Porter, for example, advocate for the recognition of positive rights under the Charter, as it would "ensur[e] effective implementation of international human rights through the interpretation and application of domestic law", and would allow "Canada's legal culture [] to better align with the views and expectations of civil society and Indigenous peoples" (Martha Jackman & Bruce Porter, "Social and Economic Rights in Canada" in Peter Oliver, Patrick Macklem, & Nathalie Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution* (New York, Oxford University Press, 2017) at 860; see also Martha Jackman, "*Charter* Remedies for Socio-Economic Rights Violations: Sleeping Under a Box?", in Robert J. Sharpe and Kent Roach (eds.), Taking Remedies Seriously (Ottawa: Canadian Institute for the Administration of Justice, 2010) at 284-285).

[100] However, the recognition of positive rights under section 7 is not without critics. James Hendry, for example, argues that the section 7 framework does not lend itself to positive rights,

as the rights protected under section 7 are inherently non-comparative and must be determined "at large" (James Hendry, "Section 7 and Social Justice" (2009-2010) 27 N.J.C.L. 93 at 106). Critics also contend that courts are simply not competent to adjudicate the complex policy issues that would follow the recognition of positive rights under section 7 (Colin Feasby, David DeVlieger & Matthew Huys, "Climate Change and the Right to a Healthy Environment in the Canadian Constitution" (2020) 58:2 Alta. L. Rev. 213 at 239).

[101] Regardless of which side of the debate is to be preferred, there is one point on which there is agreement: the line between positive and negative rights is at times difficult to draw. The traditional distinction asserts that positive claims require positive governmental action, whereas negative claims require the government to refrain from acting in some way (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 462 D.L.R. (4th) 1 at para. 20 [*Toronto (City)*]). However, some rights have both positive and negative elements; others have gone further in writing that "no right can exist without some form of corresponding obligation to do or not do something" (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 Vt. L. Rev. 689 at 742).

[102] Many rights exist on the margins. Take, for example, the right to a fair trial, which requires the state to *refrain* from breaching certain procedural guarantees, but also to *provide* an adequate court system. Consider also the right to accessibility: an individual with disabilities requires an assistive device, but only because the state has constructed inaccessible programs and infrastructure. The right at issue appears positive, but it was only brought about because the state

failed to refrain from breaching existing negative rights. (See Sandra Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", [2006] P.L. 498 at 502; see also Vasuda Sinha, Lorne Sossin, & Jenna Meguid, "Charter Litigation, Social and Economic Rights & Civil Procedure" (2017) 26:3 J. L. & Soc. Pol'y 43 at 60).

[103] This at times false dichotomy has been recognized judicially. Abella J.'s dissent in *Toronto (City)* noted that "[a]ll rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus" and that "[a]ppropriate verbal manipulations can easily move most cases across the line" (*Toronto (City)* at para. 153, citing S. F. Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 U. Pa. L. Rev. 1293, at 1325); put otherwise, a right may be seen as negative or positive depending simply on the perspective taken. The majority in *Toronto (City)* relied on the distinction between state action and state restraint for the purposes of their freedom of expression analysis, but they too acknowledged that the distinction between positive and negative entitlements is "not always clearly made, nor… always helpful" (*Toronto (City)* at para. 20, citing *Haig v. Canada*, [1993] 2 S.C.R. 995, 1993 CanLII 58 (SCC)).

[104] Mactavish J. (as she then was) acknowledged the difficulty in characterizing a claim as either "exclusively positive or exclusively negative" in the context of a section 7 analysis in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, [2015] 2 F.C.R. 267 at para. 520 [*Canadian Doctors*]. Mactavish J. noted that "section 7 jurisprudence has demonstrated that the fact that a particular claim may involve a request that the government spend money in a particular way is not necessarily fatal to the claim" (*Canadian Doctors* at

para. 522). Indeed, the Supreme Court has found section 7 rights violations within this blurred zone. For example, the right to state-funded counsel was recognized in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, 1999 CanLII 653 (SCC); and the right to be exempted from prohibitive legislation in *PHS*. Both may be conceptualized depending on the perspective taken, as positive rights claims.

[105] Here, the motions judges erred in striking the claims on the basis that they were positive rights claims. The Dini Ze's pleadings speak to a direct deprivation of their security of the person. They describe, in considerable detail, the effects of climate change on their food security, culture and economies. They attribute this to specific state action including deficient legislative standards and permissive licensing of GHG-emitting projects. Their claim speaks to a current and ongoing deprivation.

[106] The youth appellants' claim, in contrast, is less specific than that of the Dini Ze'. The youth appellants' claim speaks prospectively; it speaks to the consequences of permissive regulation in the future, and has at its foundation the premise that the plaintiffs have a Charter protected right to live in a world with a stable climate system. However, the youth appellants' claim, read generously, does refer to deprivations: Canada has consistently missed the emissions targets it has set for itself under the *Paris Agreement* (enshrined domestically in the *Canadian Net-Zero Emissions Accountability Act*) and is similarly on track to miss its future emissions targets. Canada's failures are deprivations in that they deprive the appellants of the fruits of Canada's legislated commitments and compromise the appellants' section 7 interests.

[107] In *Leroux v. Ontario*, 2023 ONCA 314, 481 D.L.R. (4th) 502 [*Leroux*] the Ontario Court of Appeal allowed a section 7 claim to proceed to trial, even though it "sail[ed] close to asserting a positive constitutional obligation". The claimants in *Leroux* alleged that the government's inadequate provision of supports for persons with developmental disabilities violated section 7. The Court distinguished the claim from other failed positive rights claims under section 7 since the claimants in this case had already been approved for government support which was effectively denied in its implementation.

[108] In allowing the claim to go forward, the Court cited the principle that claims should be struck with care, noting that this principle may apply with particular force "for novel Charter claims that explore the scope of a right, as such claims often require a trial and an evidentiary record to fully understand the nature of the impugned state action and the harms experienced by claimants" (*Leroux* at para. 86, citing Lorne Sossin and Gerard J. Kennedy, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada", (2017) 45:4 Fed. L. Rev. 707, at 719).

[109] I return at this point to where I began. The claim of a right to a healthy and livable environment, and the legislative sanctioning of something less, explores the scope of section 7 and tests its boundaries. The argument is novel, but it is not doomed to fail. Courts should be cautious in striking claims at an early stage. It is trite law that novel but arguable claims should be allowed to proceed so as to not inhibit the development of the common law (*Imperial Tobacco* at para. 21). The law is not static and unchanging—actions that were deemed hopeless

yesterday may succeed tomorrow. It is for this reason that courts must be cautious about striking claims and err on the side of allowing novel but arguable claims to proceed.

[110] The necessary element of deprivation in section 7 has been found in circumstances where legislation or executive actions create or exacerbate a risk to life, liberty or security of the person (*Bedford*; *PHS*). In essence, this is the theory, or one of the theories, that underlies the appellants' case, and the analogy to the case at bar is obvious. The appellants argue that the legislation and Orders in Council, permitting, as they do, GHG emissions, deprive them of their section 7 interests. Just as the prostitution provisions of the *Criminal Code* made the lives of the sex-workers more precarious, so too does the suite of federal laws challenged here. The Federal Court therefore erred in reasoning that the appellants' section 7 claims were positive rights claims and accordingly had no reasonable prospect of success.

[111] Recently, in *Mathur 2023*, the Ontario Superior Court dismissed a section 7 challenge to a target set pursuant to Ontario legislation that seeks a 30% reduction in GHG emissions from 2005 levels by 2030. The applicants argued that this target was not high enough to avoid the severe effects of climate change. The Court ruled that, even if the target had deprived the applicants of their rights to life, liberty and security of the person, these deprivations would not have been contrary to the principles of fundamental justice (*Mathur 2023* at para. 171). More specifically, the Court found that Ontario's target was not arbitrary in relation to the law's objective of reducing GHG emissions, nor was it disproportionate relative to the law's objective of reducing GHG emissions. The applicants in fact agreed with the legislation's objective, and

instead argued that Ontario should pursue its goal of addressing climate change more aggressively (*Mathur 2023* at paras. 162 and 171).

[112] Importantly for the purpose of these reasons, the Court arrived at this conclusion after a trial. The question there was whether the applicants had in fact made out their section 7 claim on the merits, not whether a section 7 claim of this nature should be allowed to be argued. The Court was able to apply the elements of a section 7 analysis—nexus, causation, deprivation as well as arbitrariness and proportionality.

[113] The Federal Court erred in presumptively concluding that a causal relationship between the legislation and the deprivation of a section 7 interest is "manifestly incapable of being proven." As the *Mathur 2023* decision demonstrates, the arguments are not fanciful or incapable of being assessed against a body of evidence. It is sufficient to say, for the purposes of these appeals, that while the challenged law or government action need not be the sole or dominant course of the alleged deprivation, there must be a real as opposed to speculative link (*Bedford* at para. 76). While this link may not be made on the pleadings as they stand, this does not mean that the claim under section 7 is so doomed to fail that it cannot proceed in any renewed form. I will address this at the conclusion of these reasons.

[114] There is no reason to conclude that harms flowing from climate change and climate-related legislation are manifestly incapable of proof, as did the Federal Court. While the pleadings require amendment, there is a vast body of scientific knowledge dealing with climate change, GHG emissions, and their consequences on human health and the environment. These

harms have been acknowledged by the Canadian government itself: the *Canadian Net-Zero Emissions Accountability Act* states in its preamble that "climate change poses significant risks to human health and security" and that "the science clearly shows that human activities are driving unprecedented changes in the Earth's climate". The *Canadian Net-Zero Emissions Accountability Act* goes on to enshrine certain GHG targets, including net-zero emissions for 2050 (*Canadian Net-Zero Emissions Accountability Act*, s. 6). One of the purposes of the Act is stated in section 4 to be "requir[ing] the setting of national targets for the reduction of GHG emissions based on the best scientific information available".

[115] I return to *Gosselin*, where the Court held that a positive rights claim could be advanced in "special circumstances" (at para. 83). There is no guidance in the jurisprudence as to what those circumstances might be. The appellants contend that the circumstances before the Court constitute special circumstances warranting a novel application of section 7 and that the Federal Court erred in closing the door on this argument.

[116] Climate change's current and potential effects are widespread and grave, they include loss of land and culture, food insecurity, injury and death. In the *GGPPA References* the Supreme Court noted that climate change is an existential challenge, a threat of the highest order to the country, and to the future of humanity which cannot be ignored (*GGPPA References* at para. 167). If these do not constitute special circumstances, it is hard to conceive that any such circumstances could ever exist; however this remains to be determined by the trial judge.

[117] I have explained the analytical limits of positive/negative rights dichotomy and why the claims before us can be taken to assert elements of both. Subject to what follows, there is, nevertheless, a sufficient pleading of a section 7 violation in its orthodox understanding to survive a motion to strike. Where novel Charter claims test the boundaries of a right, such claims may require a trial in order to understand the nature of the legislation, executive action or regulation and the harm experienced by claimants. This is one of those cases.

[118] This is not to say that all section 7 claims require a trial; far from it. Pleadings that use section 7 to address broad, systemic social problems detached from a particularized legislative scheme constituting the deprivation, such as in *Tanudjaja*, remain the proper target of a motion to strike. Here, in contrast, the deprivations of the section 7 interests are anchored in legislation, Orders in Council and executive action, albeit obscured by an effusive and broad pleading.

X. A note on precedent

[119] The law cannot remain stagnant. That said, courts must be cautious in spurring its development: too quick and the law becomes unpredictable and capricious, too slow and justice falls behind and loses its relevancy. Doctrines of law that are now well-established were, at their inception, the targets of motions to strike. Witness, for example, the history of the tort of conspiracy (*Frame v. Smith*, [1987] 2 S.C.R. 99, 1987 CanLII 74 (SCC); *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 [*Hunt*]); negligent misrepresentation (*Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575, [1964] AC 465); the concept of neighbourhood and the duty of care (*Donoghue v. Stevenson*, [1932] All E.R. Rep. 1, 1932

CanLII 536 (FOREP)); and the defence of non-infringing alternatives (*Merck & Co., Inc. v. Apotex Inc.*, 2012 FC 454, 106 C.P.R. (4th) 325).

[120] Therefore, the fact that a pleading raises a novel point of law, with few jurisprudential antecedents, cannot justify striking it out. Neither the length and complexity of the issues nor the potential for the defendant to raise a strong defence should prevent the plaintiff from having its case tried. It is, in the language of the Supreme Court, "[o]nly if the action is certain to fail because it contains a radical defect" that the claim should be struck out (*Hunt* at 960). To the contrary, as the history of the common law demonstrates, it may be essential that a novel, but as-yet unprecedented argument proceed to an in-depth analysis. It is only in this way that the common law can evolve to respond to the challenges of modern society.

[121] A motion to strike is a valuable tool in ensuring that litigation is efficient and fair, and that the common law remains within reasonable bounds—but it must be used with care (*Imperial Tobacco* at paras. 20-21). As Stratas J.A. noted in *Paradis Honey* at para. 116, the common law is not a "petrified forest"; it is "in a continual state of responsible, incremental evolution". This incrementalism provides a sensible pathway for development of the law, based on reason and doctrine, not simply a sense for what is "appropriate and right" (*Paradis Honey* at para. 117).

[122] The careful line that courts must tow as described by Stratas J.A. is exemplified by the appellants' section 91, public trust and section 15 claims. As discussed, there is not a glimmer of support for the appellants' argument in the extensive jurisprudence with respect to the general power. In fact, the appellants' argument fundamentally recasts it into something unrecognizable;

it becomes a threshold or standard which all legislation must cross. Similarly, the public trust doctrine bears no resemblance to its jurisprudential antecedents. The *parens patriae* responsibility of the Attorney General to act to preserve public resources is modified to be an affirmation obligation enforceable by the citizenry.

[123] The appellants' section 15 claims have no jurisprudential root and they are conceptually outside the scope of section 15, at least as it has been understood to date. Section 15 has evolved from a search for substantive discrimination at its inception (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 1989 CanLII 2), to a comparator group analysis (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 1999 CanLII 675) only to return to a search for substantive discrimination (*Withler*). Subject to what I say below, not once in the jurisprudential journey has the question of whether intergenerational equity falls within the scope of section 15 arisen. To the contrary, the jurisprudence points away from broad societal reconciliation seeking equity between generations towards a focus on substantive discrimination arising from a particular legislative context. The appellants' section 7 claims, in contrast, even if construed as positive rights claims, still rest on doctrine, albeit relatively unexplored doctrine and have a reasonable prospect of success.

[124] The dissenting reasons in *Sharma* sought to employ section 15 to remedy the intergenerational cycle of imprisonment in Indigenous populations. However, while the harms in *Sharma* to Indigenous populations were prospective, they were also retrospective and current: the over-representation of Indigenous women in prison brought about by historical disadvantage, often leads to their children falling into that same criminal justice system (*Sharma* at paras. 233-

235). Here, in contrast, the section 15 breach alleged by the appellants is prospective. The environmental consequences will be dire if action is not taken now, but unlike in *Sharma*, there is no present harm to which the section 15 challenge can anchor itself.

[125] That said, the youth appellants do claim a form of present harm: that the impending climate crisis causes psychological distress. This distress is no doubt real, ongoing, and burdensome. However, such distress finds its better home under a section 7 challenge as a threat to the security of the appellants' persons. This distinction between present but self-perpetuating harm and harm that lies in wait (even if causing current psychological distress) may one day be irrelevant, and both may be able to sustain a cause of action under section 15—but that is not the current state of the law.

XI. The role of pleadings

[126] Charter claimants must plead an existing law or government conduct that is unconstitutional. A challenge to a particular law, an application of the law, or government conduct is indeed an archetypal feature of Charter jurisprudence.

[127] McVeigh J. acknowledged that while the Dini Ze' challenge specific legislation, it was without reference to specific sections and the role the provisions might play in causing the alleged breach. Similarly, Manson J. found that the broad and diffuse nature of the youth appellants' claims could not sustain a section 7 argument, and the failure to identify any particular law that allegedly burdens the youth appellants in a discriminatory manner was fatal to their section 15 claim.

[128] Herein lies the fundamental problem with the appellants' section 7 claims. While the appellants have identified laws and conduct by state actors that they say encourage or permit emissions, their section 7 claims are overly broad, and fail to zero in on the specific provision or provisions which constitute a deprivation. The pleadings effectively put the entirety of Canada's response to climate change up for scrutiny. They challenge laws, regulations, Orders in Council, and policy. They look both prospectively and retrospectively, describing the infringing conduct to include all actions that have caused, contributed to or allowed a level of GHG emissions incompatible with a stable climate system (Dini Ze's statement of claim at para. 3). While there are, as I have described, occasional glimmers of an asserted nexus and deprivation, they are obscured by the fog of the pleadings.

[129] The appellants respond to this critique by saying that they cannot adopt a piecemeal approach to the issue. They say that Canada will, in the face of a more focused pleading, point to other causes of climate change. This claim, however broad, distils to a single proposition—that Canada's total emissions exceed the requirements of a stable climate system and that a breach of the Charter cannot be determined without assessing the constitutionality of each and every law, regulation and Order in Council which results in GHG emissions. This is because it is the cumulative effects of the laws that give rise to the breach.

[130] The claims fall short of meeting the threshold standard in constitutional litigation that specific laws or actions be targeted. The youth appellants' statement of claim illustrates this well; the impugned conduct in that appeal includes legislative and regulatory responses involving transportation, energy, methane emissions, mining of fossil fuels, export and import of fossil

fuels, carbon pricing standards, financing of the fossil fuel industry and the acquisition of the Trans Mountain Pipeline. The Dini Ze' appellants cite, for example, as the source of the alleged violations, a list of Canada's public statements declaring its intention to comply with its international agreements on climate change, a list of oil and gas projects that have gone through federal environmental assessments, three pieces of federal environmental assessment legislation, a policy paper entitled *Strategic Assessment of Climate Change* and a select list of Canada's international commitments relating to GHG emissions (Dini Ze's statement of claim at paras. 41-42, 55, 59-71, 89(c)).

[131] The statements of claim in these cases do not limit themselves to the requirement to plead material facts and not evidence, nor do they separate contextual facts from those related to the breach. Manson J. acknowledged that a claim under section 7 could be advanced, but not on the pleadings, given their "diffuse and unconstrained nature" (*La Rose* Reasons at paras. 63-67). Similarly, McVeigh J. concluded that while the Dini Ze' *could* have a Charter claim, it was not viable on the pleadings (*Misdzi Yikh* Reasons at paras. 58 and 102). McVeigh J. predicated her decision on the point that the claim was simply unmanageable, too diffuse and broad and lacked the necessary focus of challenge to a particular law with a nexus to a section 7 right. "This is not how *Charter* claims work", wrote McVeigh J. at paragraph 94 of the *Misdzi Yikh* reasons. I agree.

[132] The basic requirements of pleadings are not relaxed simply because a Charter claim is involved (*Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, 476 N.R. 219). While the appellants cited specific decisions, conduct and legislative provisions, any potential for

a manageable trial and informed Charter analysis is compromised by the unconstrained scope of the claim. It is not the role of the motions judge to separate the wheat from the chaff.

[133] These pleadings fail on the basis that they lack the focus necessary for constitutional analysis. That is the substance of Canada's argument, which the Court accepts. But, assuming that the pleadings are amended so as to address this lack of focus, can Canada, as defendant, rely on the opposite argument to shield itself from liability? As the scope of the impugned state action narrows, it might be argued that the asserted unconstitutional action cannot be considered in isolation; or, Canada might argue that, due to foreign sources of GHG emissions, the narrower Charter claims are destined to fail because the nexus or link between the harm and Canada's conduct cannot be established. Governments could effectively play a shell game, employing a "now you see me, now you don't" strategy and sheltering behind alternative objections that the claim raised is either too broad or too specific.

[134] There are several answers to this concern. As previously noted, the possibility that there are other causes or sources of the asserted infringement or harm does not constitute a barrier to a constitutional challenge (*Bedford* at para. 76; *Khadr* at para. 21; *Kreishan* at para. 82; *Revell v. Canada (Citizenship and Immigration)*, 2019 FCA 262, [2020] 2 F.C.R. 355 at para. 60). To hold otherwise would effectively immunize legislation from constitutional scrutiny. In modern, complex societies, problems seldom, if ever, have a singular cause or simplicity of focus; rather, they arise from a host of social, economic, legal, and practical influences, some of which might be beyond the control of the particular level of government defending the claim. The second answer to this argument is that these considerations engage at the trial stage, when the court

examines whether there is a sufficient constitutional nexus between the harm and the asserted state action as a factual matter.

XII. Conclusion

[135] I would therefore allow the appeals in part. I would vary the orders of the Federal Court to provide that leave to amend be granted in respect of the claim that there has been a violation of section 7 of the Charter. As no orders for costs were sought, none should be awarded.

"Donald J. Rennie"
J.A.

"I agree.
Laskin J.A."

"I agree.
LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-289-20 AND A-308-20
DOCKET:	A-289-20
STYLE OF CAUSE:	CECILIA LA ROSE ET AL. v. HIS MAJESTY THE KING IN RIGHT OF CANADA and THE ATTORNEY GENERAL OF CANADA
AND DOCKET:	A-308-20
STYLE OF CAUSE:	DINI ZE' LHO'IMGGIN, ALSO KNOWN AS ALPHONSE GAGNON, ON HIS OWN BEHALF ET AL. v. HIS MAJESTY THE KING IN RIGHT OF CANADA
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
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CONCURRED IN BY:	LASKIN J.A. LEBLANC J.A.
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