UNOFFICIAL TRANSLATION

SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000955-183

DATE : July 11, 2019

IN THE PRESENCE OF: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

ENVIRONNEMENT JEUNESSE
Petitioner

v.

ATTORNEY GENERAL OF CANADA
Respondent

JUDGMENT

1- OVERVIEW

[1] The petitioner, Environnement Jeunesse ("Jeunesse"), seeks authorization to institute a class action against the respondent, the Attorney General of Canada, who is acting as the representative for the Government of Canada ("Canada").

[2] The proposed class action seeks a declaration by the Tribunal that the Government of Canada is violating the fundamental rights of group members by failing to put in place the necessary measures to limit global warming.

[3] The other conclusions sought by this action consist of an order to Canada to cease its infringements of the fundamental rights of the members of the group, an order to pay $100 per member in punitive damages, rather than compensatory, and, instead of the payment to members, an order for the implementation of remedial measures to help curb global warming, as well as any other relief that the Tribunal considers appropriate to impose on Canada in order to ensure compliance with fundamental rights of the putative group members.

2- CONTEXT

[4] Jeunesse describes itself as a non-profit organization, created in 1979, mainly constituted and animated by young people, dedicated to educating young Quebecers about environmental issues and whose mission is to give young people a voice in this field. It claims to have been working on the issue of climate change for almost 30 years.

[5] Since 2016, the Executive Director of Jeunesse has been Ms. Catherine Gautier (sic). In 2005, at the age of 16, and as a member of the Canadian delegation, she addressed the delegates of the Conference of the Parties to the United Nations Framework Convention on Climate Change ("UNFCCC").

[6] Two years later, Ms. Gauthier delivered a speech at the UN General Assembly. Subsequently, between 2007 and 2018, she participated in about nine international conferences on climate change.

[7] Jeunesse requests that it be granted the status of representative, with Catherine Gauthier as designated member, for the purpose of instituting a class action on behalf of the persons described as follows:

All Quebec residents aged 35 and under as of November 26, 2018.

3- RESPECTIVE POSITIONS OF THE PARTIES

A) Jeunesse

[8] Jeunesse argues that Canada disproportionately generates about 1.6% of the world's greenhouse gases (GHGs), even though Canada's population is only about 0.5% of the world's, thus being considered one of the largest GHG producer in the world.

[9] It claims that since 1992, after Canada ratified the UNFCCC, the Canadian federal government has never established adequate GHG emission reduction targets necessary to curb global warming and protect the life and the safety of future generations.

[10] Indeed, Jeunesse argues Canada's inability to meet its commitments under the 1997 Kyoto Protocol (sic).

[11] In its March 2018 report[1], the Office of the Auditor General of Canada confirms that Canada has already missed two separate targets for GHG emissions reduction and, moreover, that it "is likely to miss" the target for 2020 established in 2009 by the Copenhagen Accord.

[12] According to Jeunesse, even the targets adopted by Canada in the context of international agreements are inadequate and insufficient.

[13] It characterizes Canada's behaviour as grossly inadequate, irresponsible, negligent and wrongful. Also considering that Canada recognizes the risks and dangers of not taking action to reduce GHG emissions and limit global warming[2], its inaction constitutes bad faith and represents unlawful and intentional interference with fundamental rights

[1] Exhibit P-23.
[2] Exhibits P-5 and P-7.

protected by the *Canadian Charter of Rights and Freedoms*[3] ("Canadian Charter") and, in Quebec, the *Charter of Human Rights and Freedoms*[4] ("Quebec Charter").

[14] According to Jeunesse, this behaviour by Canada constitutes a fault in Quebec civil law to which the federal government subjected itself by adopting the Crown Liability and Proceedings Act[5] ("CLPA"). This alleged fault, it pleads, is intentional.

[15] Jeunesse therefore argues that, in the circumstances, its application meets the applicable criteria and that the Tribunal should authorize its class action.

B) The respondent

[16] The respondent first argues that a class action is not the appropriate procedural vehicle for a declaratory claim of this nature and that a single application by one person would have exactly the same effect, just as in cases of annulment of a municipal bylaw[6]. In other words, if a court were to find a violation of fundamental rights and order Canada to cease any violation, such an order requested by one person would be of equal benefit to all Quebeckers, without the need for them to act by class action.

[17] In support of its position, the respondent adds that the claim for punitive damages is manifestly ill-founded, since the allegations that Canada is in bad faith and that it intentionally violates fundamental rights are purely legal, not factual conclusions. Indeed, according to the respondent, there is no factual allegation in Jeunesse's application that could justify such conclusions.

[18] In addition, the respondent expresses the opinion that the Tribunal would not have jurisdiction to grant the orders sought, as this would be an interference with the political sphere, particularly with the legislative and executive branches of the Canadian state. In its opinion, the issues raised by the proposed action would be non-justiciable, and it is not because the application was based on the Charters that it would become justiciable.

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[3] *The Constitution Act*, 1982, c. 11 (R.-U.) in R.C.S. 1985, app. II, No 44, Schedule B, *The Constitution Act*, 1982*,* Part I.
[4] CQLR, c. C-12.
[5] R.S.C. (1985), c. C-50.
[6] *Marcotte* v. *Longueuil (City)*, [2009] 3 S.C.R. 65, par. 27-28.

[19] Courts in Canada, it argues, would also have no jurisdiction to order the introduction of bills and their adoption by Parliament without contravening the principles of separation of powers and parliamentary sovereignty.

[20] In addition, the respondent argues that the environment is a matter of shared competency, not being exclusively attributed to the federal government by the Canadian Constitution.[7] According to the respondent, the two levels of government, federal and provincial, are called upon to act in concert at the legislative and regulatory levels, as they sometimes do in federal-provincial negotiations[8]. In this respect, Canada alone cannot stop the alleged human rights abuses.

[21] Finally, the respondent challenges the class action on the basis that the criteria applicable under section 575 C.C.P. would not be satisfied because of a variety of other reasons.

[22] For these reasons, it seeks the dismissal of the application for authorization to institute a class action.

4- APPLICABLE LAW TO THE AUTHORIZATION OF A CLASS ACTION

[23] The court authorizes the exercise of a class action and grants the status of representative if it is of the opinion that the criteria established by article 575 C.P.C. are satisfied. This article reads as follows:

> The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
>
> 1° the claims of the members of the class raise identical, similar or related issues of law or fact;
>
> 2° the facts alleged appear to justify the conclusions sought;
>
> 3° the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

[7] *R.* v. *Hydro-Québec*, [1997] 3 S.C.R. 213, par. 59.
[8] Exhibits PGC-1 to PGC-3.

4° the class member appointed as representative plaintiff is in a position to properly represent the class members.

[24] Class actions do not constitute an exceptional regime or substantive law, but rather a simple procedural means that promotes access to justice by a group in order to avoid, for the purposes of economy and proportionality, a multiplication of similar individual suits. The definition of the group and the identity of the putative members are important elements.

[25] The authorization of a class action is a filtering step. The Applicant bears a burden of demonstration, also described as a burden of logic, not one of evidence. It must establish a good colour of right, a prima facie right or a defensible cause. In *Infineon*[9], written by Justices Lebel and Wagner, the Supreme Court of Canada describes an applicant's burden as follows:

> As can be seen, the vocabulary may change from one case to another. But some well-established principles for the interpretation and application of art. 1003 of the *C.C.P.* can be drawn from the jurisprudence of this Court and of the Court of Appeal. First, as we mentioned above, the authorization process does not amount to a trial on the merits. It is a filtering mechanism. The applicant does not have to show that his claim will probably succeed. Also, the requirement that the applicant demonstrate a "good colour of right", an "*apparence sérieuse de droit*", or a "*prima facie* case" implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law.

[26] Therefore, at this procedural stage, the Tribunal does not decide upon the soundness of the action on the merits[10]. On the other hand, it refuses claims that are not defensible or that are frivolous,[11] manifestly ill-founded, unsustainable or without a good colour of right, all of these expressions basically meaning the same thing.

[27] As this is a stage where the applicant only bears a burden of demonstration, the alleged facts are held to be true.[12] It should be noted that only "facts" are thus held to be

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[9] *Infineon Techonologies AG* v. *Option consommateurs*, [2013] 3 S.C.R. 600, par. 65
[10] *Pharmascience inc*. v. *Option Consommateurs*, 2005 QCCA 437, par. 25.
[11] *Fortier* v. *Meubles Léon ltée*, 2014 QCCA 195, par. 70.
[12] *Infineon*, *supra* note 9, par. 67.

true and not inferences, conclusions, unverified assumptions, legal arguments or opinions[13].

[28] Moreover, the facts essential to the legal syllogism in demand must be alleged in a sufficiently precise manner to be held true. They cannot be vague, general or imprecise[14]. Where allegations are not sufficiently precise, they must generally be accompanied by some evidence in order to establish an arguable case.[15]

[29] The class action proposed by an applicant must also raise issues of law or fact that are identical, similar or related to those of the class members. That said, the case law demonstrates that this is not a very difficult requirement, since even the existence of a single question has been recognized as sufficient.[16]

[30] In addition, the composition of the group must justify a class action in comparison with individual actions, the Quebec legislator wanting to facilitate access to justice by avoiding procedural redundancy.

[31] Finally, the member who wants to act as a representative must be able to ensure adequate representation of members. This is not usually a difficult criterion to satisfy. That being said, that member, or in some cases the designated member, must show that he is part of the putative group and that his personal claim is a defensible cause.

[32] Let's move on to the analysis stage.

5- ANALYSIS: Nature of the class action proposed by Jeunesse

[33] Even before proceeding with the analysis of the criteria applicable under section 575 C.C.P., the Tribunal considers that it would be appropriate to deal with the question of the nature of the class action proposed by Jeunesse. Indeed, article 574 C.C.P. stipulates that the application for authorization must mention this.

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[13] *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201, par. 38.
[14] *Id.*, see also *Harmegnies* v. *Toyota Canada inc.*, 2008 QCCA 380, par. 44.
[15] *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 SCC 35.

[16] *Montréal (Ville de)* v. *Biondi*, 2013 QCCA 404.

[34] Generally speaking, the description of the nature of the action does not require a great deal of comment or debate at the analysis stage of a class action. In the present case however, it is the very nature of the claim that is at the heart of the legal debate.

[35] The proposed class action is not intended to invalidate some or all of a Canadian law or regulation. Nor is it intended to award compensatory damages.

[36] According to Jeunesse, the "main remedy sought" is declaratory in nature. As such, it requests that the Tribunal recognize that Canada has violated certain constitutional rights of the class members.

[37] And there is more.

[38] The proposed action is also injunctive and dissuasive in nature because it seeks an order to cease the alleged violation and an award for punitive damages.

[39] With respect to punitive damages, Jeunesse does not require that money be actually paid to members. Rather, it is a claim for $ 100 per member, with an estimated membership of more than 3 million. Recognizing that the payment of more than $ 300 million to members would be impracticable or too expensive, Jeunesse asks the Tribunal to order the implementation of a "restorative measure" to continue to curb global warming, without adding more details or terms.

6- ANALYSIS: The justiciability of the issues in dispute

[40] Before beginning the analysis, the Tribunal emphasizes the undoubted importance of the subject raised by Jeunesse's application, namely the protection of the environment, citing some passages from the 2001 decision of Justice Claire L'Heureux-Dubé in *114957 Canada Ltd. (Spraytech, Watering Corporation)* v. *Hudson (City)*[17]:

> 1 The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. (…) This Court has recognized that “[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment

[17] [2002] 2 S.C.R. 241, par. 1 and 3; *British Columbia* v. *Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, p. 88.

> . . . environmental protection [has] emerged as a fundamental value in Canadian society" (…).
>
> 3 La Forest J. wrote for the majority in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 127, that "the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels" (emphasis added).

[41] Some twenty years later, these statements have become more important and their message more urgent.

[42] While the Tribunal may fully share the above statements, its role at this stage is limited to determining whether the class action as proposed should be authorized in accordance with the applicable legal principles.

[43] Class action may, of course, be used as a procedure to ensure compliance with the laws and regulations in force in the environmental field and "*the implementation of the statutory protections against various environmental nuisances*".[18]

[44] But that does not mean that a class action should automatically be authorized whenever the important topic of environmental protection is raised in the proceedings. Authorization is not guaranteed only because the subject of the action is important.

[45] Therefore, the question to be asked is whether the class action as formulated should be allowed. In this case, the respondent's argument must first be analyzed and it must be determined whether the issues raised by this action are justiciable.

a) The violation of rights under the Canadian Charter

[46] The respondent argues that the Tribunal should not allow Jeunesse's application because it would raise non-justiciable issues that are immune from judicial review.

[47] In this respect, the respondent is correct in claiming that to choose the procedural vehicle of class action does not confer on the Superior Court a *rationae materiae* jurisdiction that it would not have otherwise.[19] The case law is unambiguous in this regard.

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[18] *Carrier* v. *Québec (Procureur général)*, 2011 QCCA 1231, par. 80.
[19] *Bisaillon* v. *Concordia University*, [2006] 1 S.C.R. 666, par. 19.

The exclusive jurisdiction to hear class actions is procedural and not substantive in nature.

[48] That being said, what is the doctrine of justiciability that the respondent argues?
[49] This doctrine raises the question of "the proper role of the courts and their constitutional relationship to the other branches of government".[20] It is based "upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes".[21] This doctrine is at the heart of the separation of constitutional powers and is distinct from that of immunity.

[50] In cases falling within the domain of the Canadian Charter, the justiciability of the questions in issue must be decided by the courts in accordance with section 1[22], which reads as follows:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[51] Therefore, in the context of the Canadian Charter, which is an integral part of the Constitution of Canada ("Constitution"), the courts must decide upon the limits of the justiciability of the issues. It is in this context that the adoption of the Canadian Charter has, to a large extent, brought the Canadian system of government "*from parliamentary supremacy to one of constitutional supremacy*"[23]. Thus, the Canadian Charter has a direct effect on the analysis of the question of justiciability.

[52] In this case, in the context of the alleged violation of the rights recognized by the Canadian Charter, we are therefore in the realm of constitutional supremacy.

[53] As mentioned, Jeunesse does not attack the validity of part or all of a law or regulation. What Jeunesse criticizes is the fact that Canada would have knowingly never set adequate GHG emission reduction targets necessary to curb global warming and protect the lives and safety of future generations. This is the essence of its request.

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[20] *Canada (Auditor General)* v. *Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, p. 53.
[21] *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441, p. 459; See also: *Canada (Attorney General)* v. *Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524, par. 39.
[22] *Canada (Auditor general)*, *supra* note 20, p. 91.
[23] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 72.

[54] It adds that not only has Canada adopted insufficient and inadequate targets in the context of international conventions, but it has not even met such targets.

[55] Jeunesse's claims regarding Canada's choices and decisions appear, at this stage, to be directed to the exercise of executive power, whereas the order sought to stop any violation of fundamental rights, according to the respondent, appears to be related to the legislative process.

[56] In general, the courts do not interfere in the exercise of executive power. But in the case of an alleged violation of the rights guaranteed by the Canadian Charter, a court should not decline jurisdiction on the basis of the doctrine of justiciability.

[57] In *Operation Dismantle*,[24] Dickson CJ, speaking for the majority, puts it this way:

> 63. It might be timely at this point to remind ourselves of the question the Court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s. 91(7) of the *Constitution Act*, 1867 and that the federal executive has the powers conferred upon it in ss. 9 -15 of that Act. Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the *Charter*, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question":(original omits reference).

[58] Indeed, courts should not decline to adjudicate when the subject matter of the dispute remains within the limits of what is proper to them only "because of its political context or implications".[25]

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[24] *Operation Dismantle Inc.*, *supra* note 21, par. 63; See also: *Canada (Prime Minister)* v. *Khadr*, [2010] 1 S.C.R. 44, par. 40.

[25] *Operation Dismantle Inc.*, *Id.*, see also *Downtown Eastside Sex Workers United Against Violence Society*, *supra* note 21, par. 40.

[59] Even in the exercise of the Royal Prerogative powers, courts may intervene to decide whether there is a violation of the Canadian Charter because "all government power must be exercised in accordance with the Constitution".[26]

[60] The Tribunal considers at this point that this speaks in favor of the justiciability of the question regarding the existence of an infringement of the rights protected by the Canadian Charter.

[61] The respondent raises another argument. It argues that judicial review only applies in cases where the government acts and not where there is inertia or inactivity of the government.

[62] The Tribunal is of the view that this interpretation of the Canadian Charter is too narrow and limiting. Its interpretation must be liberal.

[63] Admittedly, it is not the role of the courts to comment on the wisdom of the exercise of executive power and to substitute its opinion for that of the latter.

[64] On the other hand, the executive branch of the Canadian government has the obligation not to act in such a way as to harm the lives of individuals and the safety of their person.[27] Indeed, the Cabinet "is duty bound to act in accordance with the dictates of the *Charter*"[28].

[65] Wilson J. in *Operation Dismantle* recognizes that "[a]ction by the state or, conversely, inaction by the state will frequently have the effect of decreasing or increasing the risk to the lives or security of its citizens."[29]

[66] In *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*[30], the Supreme Court of Canada teaches that constitutional protection and the power of courts to intervene for these purposes apply not only to positive government action but also in the case of inaction on its part.

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[26] *Canada (Prime Minister)*, *supra* note 24, par. 36 and 37.
[27] *Operation Dismantle Inc.*, *supra* note 21, par. 28.
[28] *Id.*
[29] *Id*., p. 488.
[30] [2003] 2 S.C.R. 3, par. 43.

[67] Consequently, the respondent's argument that the Tribunal should not intervene because the application concerns the inactivity of the Canadian government does not lead the Tribunal to conclude at this stage that the issues are not justiciable.

[68] Finally, the respondent argues that the courts should not intervene when the issues to be decided "involve moral and political considerations"[31], being non-justiciable issues.

[69] With respect, the Tribunal is of the view that this characterization of certain issues does not automatically and completely exclude court intervention in the application of the Canadian Charter. The courts have a duty to rise above the political debate and cannot refuse to act when it comes to a debate concerning a violation of the rights protected by the Charter.[32]

[70] As the Supreme Court teaches in *Chaoulli*[33], courts cannot evade the exercise of judicial review only because the issue is complex or controversial or because "it is laden with social values".

[71] In this case, the Tribunal is of the view that the question of the alleged violation of the members' Charter-protected rights is not, at this stage, non-justiciable.

[72] It must be emphasized that it is not the courts that impose the supremacy of the Canadian Charter on the federal government, but rather the Canadian legislature which gave priority to fundamental rights by enacting the Charter as an integral part of the Constitution and applying it, inter alia, to the Parliament and government of Canada.[34]

b) <u>The violation of rights under the Quebec Charter</u>

[73] The question to ask is whether the Quebec Charter applies to the Canadian government.

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[31] *Operation Dismantle Inc.*, *supra* note 21, p. 465.
[32] *Chaoulli* v. *Quebec (Attorney General)*, [2005] 1 S.C.R. 791, par. 89.
[33] *Id.*, par. 107.
[34] Section 32 (1) of the Canadian Charter.

[74] The Quebec Charter, in section 55, states that it is limited to "matters that come under the legislative authority of Québec". Therefore, the Charter as such does not apply to Canada.

[75] That being said, according to section 3 of the C.L.P.A.[35] Canada accepts in a certain manner to be assimilated to a person with respect to civil liability in the provinces. Article 3 reads as follows:

> 3 The Crown is liable for the damages for which, if it were a person, it would be liable
>
> (a) in the Province of Quebec, in respect of
>
> (i) the damage caused by the fault of a servant of the Crown, or
>
> (ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and
>
> (b) in any other province, in respect of
>
> (i) a tort committed by a servant of the Crown, or
>
> (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

[76] The Supreme Court of Canada, in *Hinse* v. *Canada (Attorney General)*, teaches that the reference to provincial law in the C.L.P.A encompasses not only extracontractual civil liability in Quebec but also remedies under the Quebec Charter, specifically the remedies for punitive damages provided for in this Charter.[36]

[77] Therefore, the Quebec Charter could apply in this case.

[78] For this reason and for those previously expressed with regards to the Canadian Charter, the Tribunal is of the opinion, at this stage, that the alleged violation of the rights protected by the Quebec Charter is also justiciable.

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[35] *Crown Liability and Proceedings Act*, *supra* note 5.
[36] [2015] 2 S.C.R. 621, par. 163.

c) The order to cease any violation

[79] The respondent argues that the conclusion seeking an order to stop any violation of fundamental rights is not justiciable, because it is a question of ordering what is at the heart of the legislative power, that is to legislate. Perhaps.

[80] However, the Tribunal considers that it does not have all the factual information necessary to conclude that the remedy sought is definitely not justiciable. It is not demonstrated at this stage that the only way to end the violation of the protected rights would be through the exercise of the legislative power.

[81] Therefore, the Tribunal is not currently in a position to reasonably conclude that the order sought raises a non-justiciable issue. A judge on the merits, with the benefit of evidence on this matter, would be in a better position to decide this question.

d) Punitive damages award

[82] Section 24 (1) of the Canadian Charter states as follows:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[83] As already mentioned, the Charter applies to Parliament and the Government of Canada in respect of all matters within the authority of Parliament pursuant to section 32 (1) (a).

[84] The Canadian legislature has decided to give the courts broad discretion as to the appropriate remedy contemplated by the Charter in the case of a violation of a right. The Supreme Court teaches in *Vancouver (City)* v. *Ward*[37] that "deterrence" is one of the purposes of section 24 (1) of the Charter, in order to deter employees and agents of the Crown from future harm and to influence the conduct of the government so that the state respects the Charter in the future.

[37] [2010] 2 S.C.R. 28, par. 29 to 31.

[85] With respect to the Quebec Charter, punitive damages in the second paragraph of section 49 are provided precisely for "unlawful and intentional interference".

[86] Having already found that the violation of a right protected by the two Charters is not, at this stage, non-justiciable, the Tribunal is also of the view that the claim for punitive damages could be characterized in the same way.

e) Conclusion as to justiciability

[87] The Tribunal considers that the doctrine of justiciability is not, in this case, an obstacle to the authorization of the class action that Jeunesse seeks to pursue.

[88] It remains to be decided whether the criteria described above, applicable to the authorization of a class action, are satisfied in this case.

7- ANALYSIS: The factual allegations concerning the alleged violation of the rights protected by the Charters

[89] As mentioned above, Jeunesse argues that Canada has failed to meet its obligations to establish GHG emission reduction targets that are adequate and necessary to curb global warming. The targets that have been adopted by Canada, it adds, are inadequate and insufficient.

[90] Other related allegations:

- Global warming is attributable to human activity;

- There is an international scientific and political consensus that action is urgently needed to prevent global warming from producing irreversible and dangerous effects;

- Significant climate impacts are already occurring at the current level of global warming. Any additional GHG increases exacerbate these impacts and increases the risk of additional severe and irreversible impacts;

- To avoid dangerous warming, the increase in temperature must be limited to a threshold well below 2°C;

- To avoid dangerous warming, the atmospheric concentration of CO^2 must remain well below 450 parts per million ("ppm").

[91] Canada does not dispute the importance of the issue of global warming.

[92] Indeed, the preamble to its Greenhouse Gas Pollution Pricing Act[38] ("GGPPA") confirms its vision in this regard:

> **Preamble**
>
> Whereas there is broad scientific consensus that anthropogenic greenhouse gas emissions contribute to global climate change;
>
> Whereas recent anthropogenic emissions of greenhouse gases are at the highest level in history and present an unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity;
>
> Whereas impacts of climate change, such as coastal erosion, thawing permafrost, increases in heat waves, droughts and flooding, and related risks to critical infrastructures and food security are already being felt throughout Canada and are impacting Canadians, in particular the Indigenous peoples of Canada, low-income citizens and northern, coastal and remote communities;
>
> Whereas Parliament recognizes that it is the responsibility of the present generation to minimize impacts of climate change on future generations;
>
> Whereas the United Nations, Parliament and the scientific community have identified climate change as an international concern which cannot be contained within geographic boundaries;
>
> Whereas Canada has ratified the United Nations Framework Convention on Climate Change, done in New York on May 9, 1992, which entered into force in 1994, and the objective of that Convention is the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system;
>
> Whereas Canada has also ratified the Paris Agreement, done in Paris on December 12, 2015, which entered into force in 2016, and the aims of that Agreement include holding the increase in the global average temperature to

[38] S.C. 2018, c. 12, art. 186, in force on June 21, 2018.

well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

Whereas 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;

Whereas it is recognized in the Pan-Canadian Framework on Clean Growth and Climate Change that climate change is a national problem that requires immediate action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians;

Whereas greenhouse gas emissions pricing is a core element of the Pan-Canadian Framework on Clean Growth and Climate Change;

(…)

[93] With respect to the health consequences of climate change and global warming, on its website, Canada states as follows:

> Climate change, is affecting health, and will continue to pose challenges in the future. Because of Canada's large land mass, Canadians can expect a wide a range of impacts which will vary from one region to another.
>
> The extent of these effects depends on how quickly our climate changes, and how well we adapt to the new environmental conditions and risks to health.[39]

[94] The Intergovernmental Panel on Climate Change (IPCC), which counts 195 countries party to the UNFCCC and stands as the main international body conducting the climate change assessments, summarizes in an assessment report of the working group[40] that the following risks are linked to the increase in Earth's temperature:

> a) Risk of death, injury, ill-health, or disrupted livelihoods in low-lying coastal zones and small island developing states and other small islands, due to storm surges, coastal flooding, and sea level rise
>
> b) Risk of severe ill-health and disrupted livelihoods for large urban populations due to inland flooding in some regions.

[39] Exhibit P-7, dated August 17, 2018.
[40] Exhibit P-5.

c) Systemic risks due to extreme weather events leading to breakdown of infrastructure networks and critical services such as electricity, water supply, and health and emergency services.

d) Risk of mortality and morbidity during periods of extreme heat, particularly for vulnerable urban populations and those working outdoors in urban or rural areas.

e) Risk of food insecurity and the breakdown of food systems linked to warming, drought, flooding, and precipitation variability and extremes, particularly for poorer populations in urban and rural settings.

f) Risk of loss of rural livelihoods and income due to insufficient access to drinking and irrigation water and reduced agricultural productivity, particularly for farmers and pastoralists with minimal capital in semi-arid regions.

g) Risk of loss of marine and coastal ecosystems, biodiversity, and the ecosystem goods, functions, and services they provide for coastal livelihoods, especially for fishing communities in the tropics and the Arctic.

h) Risk of loss of terrestrial and inland water ecosystems, biodiversity, and the ecosystem goods, functions, and services they provide for livelihoods.

[95] In this regard, Canada recognizes that the scientific information provided by the IPCC is "robust, comprehensive and relevant" and is essential for global discussions and action.[41]

[96] Jeunesse argues that the foregoing facts are sufficient at this stage to demonstrate the urgency of action and the targets that Canada must meet to avoid dangerous global warming.

[97] On the other hand, according to Jeunesse, since 1992 Canada has never established reduction targets of its GHG necessary to meet its international obligations and in accordance with the rights guaranteed by the Charters.

[98] The *Collaborative Report from Auditors General* about perspectives on climate change action in Canada, issued in March 2018 and involving the Northwest Territories and almost all provinces, confirms the following[42]:

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[41] *Id.*
[42] Exhibit P-23, p. 2 of 38; Quebec did not participate.

> Canada has missed two separate emission reduction targets (the 1992 Rio target and the 2005 Kyoto target) and is likely to miss the 2020 Copenhagen target as well[43]. In fact, emissions in 2020 are expected to be nearly 20 percent above the target.

[99] Indeed, with respect to the 2011 Kyoto Protocol (sic), Canada withdrew from it and allegedly was the only country to do so.

[100] The failure complained of by Jeunesse also appears to have been confirmed in the spring of 2019 by the Commissioner of the Environment and Sustainable Development of Canada. In her report to Parliament[44], the Commissioner states as follows:

> For decades, successive federal governments have failed to reach their targets for reducing greenhouse gas emissions, and the government is not ready to adapt to a changing climate. This must change.

[101] Notwithstanding the objective of the 2015 Paris Agreement to contain the rise in average temperature to 2°C and attempt to limit it to 1.5°C, the preamble of the GGPPA confirms that in 2015, Canada had indicated its intention to reduce before 2030 its GHG emissions by 20% from 2005 levels, which remains, it seems, still the target of Canada.

[102] Jeunesse argues that this is a grossly inadequate target. According to Jeunesse, this target in no way fulfills Canada's commitment to reduce its emissions sufficiently. It argues that Canada must reduce its emissions to between 362 and 452 megatons in 2020 or 347 megatons in 2030.

[103] Jeunesse claims that by choosing such an inappropriate target and keeping it in place since 2015, Canada is committing willful misconduct and acting in bad faith.

[104] The fundamental rights violated as a result of Canada's behaviour, according to Jeunesse, are as follows:

(a) the right to life, integrity and security of the person;

(b) the right to a healthful environment in which biodiversity is preserved; and

(c) the right to equality.

[105] The right to life, liberty and security is protected by both Charters.

[106] Section 7 of the Canadian Charter reads as follows:

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[43] Exhibit P-22.
[44] Exhibit P-32.

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[107] Section 1 of the Quebec Charter reads as follows:

> Every human being has a right to life, and to personal security, inviolability and freedom. (...).

[108] Jeunesse argues that environmental protection has become "a fundamental value in Canadian society."[45] This is, as the Supreme Court of Canada teaches, "[a] public purpose of superordinate importance"[46], and "one of the major challenges of our time"[47]. The Quebec Court of Appeal similarly affirms that the protection of the environment is "une valeur fondamentale au sein de la société canadienne" [a fundamental value in Canadian society][48].

[109] On the other hand, and as mentioned above, the protection of the environment, despite its importance, does not guarantee that the action will be authorized.

8 - ANALYSIS: The issue of authorization

[110] In this case, the Tribunal, for reasons that will become apparent, believes that the analysis must begin with the definition of the group.

[111] It is important to emphasize the importance of the description of the group contemplated by any application for class action. It is at the very heart of the class action.

[112] According to the first paragraph of section 571 C.C.P, the very definition of a class action reads as follows:

> A class action is a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class and to represent the class.

[113] In addition, section 576 C.C.P. stipulates that the authorization judgment "describes the class".

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[45] *British Columbia*, *supra* note 17, par. 1 (sic).
[46] *R* v. *Hydro-Québec*, *supra* note 7, par. 85
[47] *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.
[48] *St-Luc-de-Vincennes* v. *Compostage Mauricie*, 2008 QCCA 235.

[114] The importance of this description lies in the legal principle that "members will be bound by the class action judgment"[49], namely those who did not opt-out.[50]

[115] In this case, and as mentioned above, the proposed group is described as follows:

> All Quebec residents aged 35 and under as of November 26, 2018.

[116] Given the nature of the class action that Jeunesse wants to exercise and the nature of the alleged infringements on the rights of putative members, the choice of 35 years old as the maximum age of the members leaves the Court perplexed.

[117] The application for authorization does not provide a factual or rational explanation for this choice.

[118] In response to a question from the Tribunal in this regard, Jeunesse did not explain the reasonableness of this choice. One of the arguments advanced by Jeunesse in this regard is that the youngest residents of Quebec will suffer more infringements of their human rights and, furthermore, Canada has already confirmed that the present generation must act to protect future generations. Jeunesse argues that for younger residents, experiencing more infringements than other residents is, in itself, a violation of their right to equality.

[119] But why choose 35? Why not 20, 30 or 40? Why not 60? Insert to this question any other age.

[120] In the context of the alleged violations to fundamental rights that have already taken place due to the global warming allegedly felt in Quebec, which of the millions of Quebecers should be excluded from the group? How to explain or justify their exclusion?

[121] Surely, the authorizing judge may change the definition of a group. In this case, should the Tribunal simply change the group by eliminating the limit on the age of 35 to include all Quebecers who have reached the age of majority? In this regard, it would be useful to recall the principle stated by the Supreme Court in *Hollick* that the definition of the group should not be accomplished by the arbitrary exclusion of persons with the same interest in common issues.[51] And in doing so, the group would be made up of all Quebecers of the age of majority, about 7 million people.

[122] And if some of the alleged infringements have not yet occurred but could someday, there is a risk that the debate be only theoretical. And even in such circumstances, the Tribunal does not understand the rationality of this maximum choice of 35 years.

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[49] Article 576(1) C.C.P.
[50] Article 591(1) C.C.P.
[51] *Hollick* v. *Toronto (City)*, [2001] 3 S.C.R. 158, par. 21; *Citoyens pour une qualité de vie/Citizens for a Quality of Life* v. *Aéroports de Montréal*, 2007 QCCA 1274, par 115, majority judgment.

[123] The facts alleged do not support this choice of 35 years as the limit. Legally, it is an arbitrary and therefore inappropriate choice.

[124] And there is more.

[125] The problem in this case is not limited to the maximum age of the putative members, but also to the age of those who have not yet reached the age of majority.

[126] The definition of the members proposed by Jeunesse also includes children born since November 26, 2018, thus all those who were minors at that date.

[127] In this regard, in Quebec, the age of majority is set at eighteen years old.[52] It is only at this age that a person "has the full exercise of all his civil rights"[53]. This is substantive law. It must be reminded that a class action is only a procedural vehicle.

[128] According to Jeunesse, in 2017, Statistics Canada estimated the Quebec population aged 35 years and under to be 3,471,903 residents and citizens.[54] Without specific figures, we can assume for the purposes hereof that as of November 26, 2018, approximately 1,500,000 residents had not yet reached the age of majority.

[129] This is a significant proportion of the group for which Jeunesse claims $100 per person in punitive damages, thus possibly around $150,000,000.

[130] Admittedly, as members in an authorized class action, the minors would not really be parties per se to the class action. On the other hand, as members, they would not be foreign to it.[55] Their status would be "beaucoup plus de celui d'une partie" [much closer to that of a party][56] or a "quasi-party"[57].

[131] In response to a question from the Tribunal in this regard, Jeunesse raises the possibility that parents of all such minors may decide to exclude their children from the class action.

[132] With respect, the Tribunal is of the view that a third party, such as Jeunesse, should not be recognized as having the power to impose on millions of parents the obligation to

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[52] Article 153 C.C.Q.
[53] *Id.*
[54] Application for authorization, par. 3.2.
[55] *Société des lotteries du Québec* v. *Brochu*, 2006 QCCA 1117.
[56] *Imperial Tobacco Canada Ltd* v. *Létourneau*, 2012 QCCA 2013, par. 39.
[57] *Belley* v. *TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2018 QCCA 1727, par. 30

act to exclude their children from a class action. It is not a statutory entity created by a legislature to protect the rights of minors or to act on their behalf.

[133] Indeed, the Court considers that acting in the manner suggested by Jeunesse is not in the best interest of Quebec minors. While their presence significantly increases the amount claimed for punitive damages and the deterrent effect that may be created, the Tribunal is of the view that this is not the role to be attributed to all Quebec minors.

[134] In certain previous decisions concerning class actions in Quebec, no distinction was made regarding the identity of members based on their young age. Often, there was no serious debate in this regard. But in this case, the age of the members is an important element because of the description of the group advanced by Jeunesse. This is at the heart of their request.

[135] In the opinion of the Tribunal, Jeunesse's decision to cap the age of members at 35, to exclude millions of other Quebecers because of their age and to include almost all Quebec minors represents a purely subjective and arbitrary choice. No objective and rational explanation has been provided. Is it a choice linked to its rules of "membership" as suggested without detail by Jeunesse at the hearing? Is it a choice made to fulfill its mission to give voice to "young people" on environmental issues?

[136] Although the mission and objectives of Jeunesse are admirable on the socio-political level, they are too subjective and limiting in their nature to form the basis of an appropriate group for the purpose of exercising a class action. Jeunesse can give a "voice" to young people, but it does not have the authority to change the legal status and powers of minors.

[137] The need for a legally constituted group that is objective and non-random, with a rational foundation, has already been confirmed by the courts.

[138] The Supreme Court of Canada, in *Western Canadian Shopping Centers Inc*.[58], teaches these principles, which are also applied by the Quebec Court of Appeal[59].

[139] In such circumstances, how could the Tribunal modify the definition? The latter has no tools to modify in a reasonable fashion the maximum age of members. Arbitrariness

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[58] *Western Canadian Shopping Centres Inc.* v. *Dutton*, [2001] 2 S.C.R. 534, par. 38.
[59] *George v.* Québec (Procureur général), 2006 QCCA 1204, par. 37; *Paquin* v. *Compagnie de chemin de fer Canadien Pacifique*, 2005 QCCA 1109.
[59] *George v.* Québec (Procureur général), 2006 QCCA 1204, par. 37; *Paquin* v. *Compagnie de chemin de fer Canadien Pacifique*, 2005 QCCA 1109.

is not an appropriate tool. All residents of Quebec who have reached the age of majority could qualify to create a group, but one that could not “strike a balance between efficiency and fairness"[60].

[140] The fact that it is impossible for the Tribunal to reasonably identify, in this case, a group that could reconcile effectiveness and fairness objectively and rationally confirms that a class action is not the appropriate procedural vehicle in this case and, therefore, that the class action proposed by Jeunesse should not be authorized.

[141] Indeed, and as mentioned above, the respondent argues that a class action is not the appropriate procedure in this case and that a single application by one person would have the same effect for all Quebec residents, if not all Canadians. In other words, the class action as a procedure is useless.

[142] Canada’s analogy with claims regarding the annulment of municipal bylaws is relevant. As recognized by the Supreme Court in *Marcotte*,[61] applications for class actions in this regard are constantly refused in Quebec because of their uselessness.

[143] The *erga omnes* effect of a judgment regarding the legal debate raised by Jeunesse is beyond doubt, even if the proceeding is brought by only one person, without the need to proceed as a class action. The Tribunal considers that, in this case, the class action’s procedural vehicle is unnecessary.

[144] Given that another claim may possibly be brought forward, the Tribunal is of the view that it would be inappropriate to further comment on the other criteria applicable pursuant to section 575 C.C.P., particularly whether the facts alleged appear to justify the conclusions sought, including the question of punitive damages.

FOR THESE REASONS, THE TRIBUNAL:

DISMISSES the application for authorization to institute a class action;

THE WHOLE with legal costs.

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Gary D.D. Morrison, J.S.C.

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[60] *Western Canadian Shopping Centres Inc.*, *supra* note 58, par. 45.
[61] *Marcotte* v. *Longueuil (City)*, [2009] 3 S.C.R. 65, par. 27-28.

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