Court File No. A-308-20
(T-211-20)

FEDERAL COURT OF APPEAL

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

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

REPRESENTATIVE PROCEEDING

APPELLANTS' MEMORANDUM OF FACT AND LAW

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TABLE OF CONTENTS

APPELLANTS' MEMORANDUM OF FACT AND LAW

PART I: The Facts

A. The Claim

1. The appellants claim that Canada is legally required to stop encouraging and permitting the emission of greenhouse gases ("GHGs") and this obligation must align with a specific standard. It is well established that average global warming in excess of the "well below 2°C above pre-industrial levels" standard will result in catastrophic climate changes.[1] Such changes will threaten the existence of the appellants as healthy individuals and as distinct legal, social and cultural indigenous entities.[2]

2. The appellants claim that by failing to use this legally required standard as a measure of its attempts to curb GHG emissions, Canada has contributed to and continues to contribute to catastrophic levels of global warming.[3] The appellants claim that Canada has thereby exceeded its power under s. 91 of the *Constitution Act, 1867* to make laws for the "Peace, Order and good Government of Canada."[4] This claim builds on recent jurisprudence unpacking the use of the "peace, order and good government" clause within constitutions.

3. The appellants also claim that by sanctioning high GHG emissions, Canada has contributed and will continue to contribute to an infringement of their rights.[5] They claim that global warming has already had a deleterious impact on their life, liberty and security of person to which they have a right under s. 7 of the *Canadian Charter of Rights and Freedoms* ("Charter"),[6] and on their equality rights under s. 15(1) of the Charter.[7] This negative

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[1] Statement of Claim, February 10, 2020, Applicant's Motion Record, Tab 4 ("Statement of Claim"), at para. 74 **(Appeal Book ["AB"], Tab 4, at 95-96)**.
[2] Statement of Claim at paras. 75-80 **(AB, Tab 4, at 96-97)**.
[3] Statement of Claim at para. 3 **(AB, Tab 4, at 78)**.
[4] *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3. Draft Amended Statement of Claim, September 10, 2020, Applicant's Motion Record, Tab 3 ("Draft Amended Statement of Claim") at paras. 81(b), and 84-85 **(AB, Tab 5, Schedule A, at 156)**.
[5] Statement of Claim at paras. 87, 88 and 91 **(AB, Tab 4, at 100-101, 101 and 102)**.
[6] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Statement of Claim at para. 87 **(AB, Tab 4, at 100-101)**.
[7] Statement of Claim at para. 91 **(AB, Tab 4, at 102)**.

impact will increase significantly in the absence of adequate emission reduction.

4. The appellant House groups, Misdzi Yikh (Owl House) and Sa Yikh (Sun House), comprise the Likhts'amisyu (Fireweed Clan) of the Wet'suwet'en people.[8] Each House holds possessions – histories, crests, names, territories – that give it identity and facilitate its relationships with other Wet'suwet'en Houses, with Houses of other northwestern British Columbia indigenous peoples and with non-indigenous entities.[9] The House group is the legal actor under Wet'suwet'en law.[10] It is responsible for all acts of its members and all acts on its territories.[11] The Dini Ze' or House Chief embodies the House in its dealings with other Houses.[12] But the Chief has no power of command over House members.[13] He or she is more a trustee of the House's possessions and members than a representative executive.[14] House decisions are made by all its members who wish to participate and are publicly announced and validated by other Houses at a *balhats* (feast or potlatch).[15] The distinct roles of the House, its members and its Chief are summarily reflected in the style of cause of this proceeding.

5. Global warming is the harmful result of human caused GHG emissions.[16] It has four characteristics that distinguish it from other adverse environmental effects:

    A. the earth's atmosphere is a common property resource: no one owns it. No single jurisdiction is responsible for regulating and enforcing its sustainable use;[17]

    B. within this global commons, the warming effects are being felt and will be felt by individuals and groups everywhere.[18] While the nature, intensity, and timing of

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[8] Statement of Claim at para. 9 **(AB, Tab 4, at 80)**.
[9] Statement of Claim at para. 14 **(AB, Tab 4, at 80-81)**.
[10] Statement of Claim at paras. 15, 16 and 19 **(AB, Tab 4, at 81-82)**.
[11] Statement of Claim at para. 2 **(AB, Tab 4, at 77-78)**.
[12] Statement of Claim at para. 16 **(AB, Tab 4, at 81-82)**.
[13] Statement of Claim at para. 17 **(AB, Tab 4, at 82)**.
[14] Statement of Claim at para. 16 **(AB, Tab 4, at 81-82)**.
[15] Statement of Claim at para. 20 **(AB, Tab 4, at 82)**.
[16] Statement of Claim at paras. 33 and 34 **(AB, Tab 4, at 85)**.
[17] Statement of Claim at para. 44 **(AB, Tab 4, at 87-88)**.
[18] Statement of Claim at paras. 33, 34 and 74 **(AB, Tab 4, at 85 and 95-96)**.

the effects will vary from place to place, they will be inescapable;[19]

C. GHG emissions are cumulative.[20] Limiting or even eliminating emissions may slow the rate of temperature increase to some plateau, but will not reverse it within a timescale of centuries, and will not halt positive feedback loops that may exacerbate global warming;[21]

D. global warming represents an urgent threat to humanity.[22] Its particular impacts to the appellants include extreme weather events, severe heatwaves, degradation of forest and fisheries resources, and decreased human physical health, mental health and life expectancy.[23]

6. In its recent decision on carbon pricing, *Reference re Greenhouse Gas Pollution Pricing Act* ("*Reference re GGPPA*"), the Supreme Court of Canada ("SCC") recognised that the reduction of GHG emissions must be understood in light of the seriousness of the underlying problem:

> All parties to this proceeding agree that climate change is an existential challenge. It is a threat of the highest order to the country, and indeed to the world… The undisputed existence of a threat to the future of humanity cannot be ignored.[24]

In the context of a province's failure to establish minimum national standards of GHG price stringency to reduce GHG emissions, the Court identified some of the major harms associated with climate change:

> [I]t is well-established that climate change is causing significant environmental, economic and human harm nationally and internationally with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain

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[19] Statement of Claim at para. 33 **(AB, Tab 4, at 85)**.
[20] Statement of Claim at para. 1 and 35 **(AB, Tab 4, at 77 and 85)**.
[21] Statement of Claim at paras. 4 and 35 **(AB, Tab 4, at 78 and 85)**.
[22] Statement of Claim at para. 33 **(AB, Tab 4, at 85)**.
[23] Statement of Claim at paras. 73-80 **(AB, Tab 4, at 95-97)**.
[24] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 ["*Reference re GGPPA*"] at para. 167.

themselves and maintain their traditional ways of life.[25]

7. It is for these reasons the appellants claim that global warming, if allowed to continue, is an existential and catastrophic threat.[26]

B. The Appeal

8. In response to the appellants' February 10, 2020 Statement of Claim, Canada brought a motion to strike on July 28, 2020. The Federal Court struck the appellants' claim in a November 16, 2020, Order and Reasons (the "Reasons") on the basis of the parties' written representations.

9. The appellants make three substantive rights claims: that s. 91 of the Constitution limits Canada's law-making powers such that laws that permit or encourage high GHG emissions are *ultra vires*; and that Canada deprives the appellants of their Charter s. 7 and their s. 15(1) rights by allowing such high emissions. The motions court erred in finding that none of the claims was justiciable and that none disclosed a reasonable cause of action.

10. The court erred by misconstruing the s. 91 claim as imposing a positive duty to legislate,[27]rather than limiting Canada's power to legislate. Moreover, it erred by refusing to consider arguments raised in a case before a UK court despite conceding that the decision there "allows for the possibility of a novel POGG power." [28] The court erred in finding the Charter claims non-justiciable because it considers GHG emissions to be policy matters properly left to the legislative and executive branches of government.[29] The court failed to consider Canada's 30-year record of insufficient action and the systemic inability of the political process, on its own, to address the delayed, irreversible, existential threat of global warming. The court also erred in finding that because no specific legislation is pleaded, neither a Charter s.7 fundamental justice analysis nor a s. 1 reasonable limits analysis is possible.[30] The court based its findings on its empirical observation that most

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[25] *Reference re GGPPA* at para. 187.
[26] Statement of Claim at paras. 1 and 4 **(AB, Tab 4, at 77 and 78)**.
[27] Order and Reasons of McVeigh, J at paras. 40 and 46 ["FC Reasons"] **(AB, Tab 2, at 19 and 21)**.
[28] FC Reasons at para. 40 **(AB, Tab 2, at 19)**.
[29] FC Reasons at paras. 19, 56 and 72 **(AB, Tab 2, at 12, 24 and 29)**.
[30] FC Reasons at paras. 89, 95 and 101 **(AB, Tab 2, at 33, 35 and 37)**.

Charter claims are based on a single law. It failed to properly analyse the s. 7 and s. 1 tests to see if they could be applied to a network of laws and actions such as are pleaded here. It also failed to apply the full range of causation tests to connect the impugned laws and actions with the appellants' rights deprivation.

11. The appellants filed their Notice of Appeal of the Federal Court's order on December 15, 2020.[31] Canada filed its Notice of Appearance on January 7, 2021.[32]

PART II: Points at Issue

12. The issues in this appeal are whether the appellants' claim is justiciable and whether it discloses a reasonable cause of action.

PART III: Statement of Submissions

A. The test on a motion to strike

12. Canada brought its motion to strike under Rule 221(1)(a) of the Federal Courts Rules:

> 221. (1) Motion to strike – On motion the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> > (a) discloses no reasonable cause of action or defence as the case may be…[33]

13. In *Imperial Tobacco*, the SCC summarised the principles and criteria for a motion to strike:

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action…
>
> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings weeding out the hopeless claims and ensuring that those that have some chance of success go to trial.…
>
> The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.
>
> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may

[31] AB Tab 1, at 3.
[32] AB Tab 3, at 43.
[33] Federal Courts Rules, SOR/98-106.

tomorrow succeed.[34]

14. Each of the appellants' causes of action is well established, although they are being applied to a novel, but urgent, issue. There is a reasonable prospect that their claims will succeed and therefore that the motion to strike was improperly granted.

B. Section 91 of the Constitution

15. Section 91 of the *Constitution Act, 1867* states:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming with the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated: that is to say,… (emphasis added)

i. Draft Amended Statement of Claim

16. The appellants seek leave to amend their Statement of Claim as it characterises their s. 91 relief and its legal basis. A draft Amended Statement of Claim was included in the appellants' Motion Record in the Court below and is reproduced in the Appeal Book.[35]

17. The Court below ordered that the appellants' claims be struck without leave to amend. The test under Rule 221(1) is that "[i]n order to strike a pleading without leave to amend, any defect in the pleading must be one that cannot be cured by amendment."[36] The amendments proposed, however, cure any defects in the s. 91 relief and its legal basis.

18. The original Statement of Claim sought a remedy that Canada has "a constitutional duty to maintain the peace, order and good government of Canada under s. 91 of the *Canadian Constitution* by acting to keep Canada's greenhouse gas emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels."[37] The draft

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[34] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17, 10, 20, 21 and 25.
[35] Draft Amended Statement of Claim **(AB, Tab 5, Schedule A, at 135)**.
[36] *Collins v Canada*, 2011 FCA 140 at para. 26.
[37] Statement of Claim at para. 81(b) **(AB, Tab 4, at 98)**.

amended expression of the relief sought is that Canada has "exceeded and continues to exceed its law-making powers under the "peace, order and good government of Canada" provision of s. 91 of the *Canadian Constitution* by failing to keep Canada's greenhouse gas emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels."[38]

19. Similarly, the original claim stated that the legal basis of the s. 91 relief was that Canada had "breached its duty to make laws for the 'peace, order and good government of Canada'…"[39] The draft amended expression of the legal basis is that Canada has "exceeded and continues to exceed its powers to make laws for the 'peace, order and good government of Canada'…"[40]

20. Finally, the original legal basis of the s. 91 relief was stated as: "The peace order and good government power imposes a positive obligation on the defendant to pass laws that ensure that Canada's GHG emissions are now, and will be into the foreseeable future, consistent with its constitutional duty to the plaintiffs and with its international commitments to keep global warming to well below 2°C."[41] The draft amended expression of this basis is that: "The peace order and good government power limits the defendant's powers to pass laws that are inconsistent with its constitutional duties to the plaintiffs and with its international commitments to keep global warming to well below 2°C."[42]

21. The motions court conceded that "it may be true that [the *Bancoult* decisions in the UK courts, discussed below] allows for the possibility of a novel [Peace, Order and good Government] power" but goes on to say that "those decisions are not binding on this Court." However, many of the decisions relied upon in Canadian courts originate from the UK. Whether any of them are binding on a court in this case will depend on the evidence and full argument presented at trial. As described above, the proper test on a motion to strike is whether the claim has a reasonable prospect of success. That test is met by the

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[38] Draft Amended Statement of Claim at para. 81(b) **(AB, Tab 5, Schedule A, at 156)**.
[39] Statement of Claim at para. 83 **(AB, Tab 4, at 99-100)**.
[40] Draft Amended Statement of Claim at para. 83 **(AB, Tab 5, Schedule A, at 158)**.
[41] Statement of Claim at para. 85 **(AB, Tab 4, at 100)**.
[42] Draft Amended Statement of Claim at para. 85 **(AB, Tab 5, Schedule A, at 158)**.

finding of the court below that the *Bancoult* decisions allow for the possibility of a novel understanding of the "Peace, Order and good Government" power.

22. In the Reasons, the motions court misconstrued the amended claim as pleading that the international treaties create a domestic legal duty for Canada.[43] The reference in the amended claim to Canada's international commitments to help keep global warming to well below 2°C is to identify a scientifically, internationally and parliamentary accepted standard to limit future global warming to non-catastrophic levels. It is not intended to base the appellants' claim on the principle that Canada's international agreements create a legal obligation enforceable in Canadian domestic courts. The appellants take no position on that issue in this proceeding.

23. The motions court also misconstrued the amended claim as pleading that s. 91 creates a positive duty for Canada to legislate reductions in GHG emissions.[44] The crux of the misconception is the Court's apparent acceptance of Canada's submission that the amended claim will "simply turn what was first pleaded as a positive duty to legislate into a negative one."[45]

24. Contrary to these misconceptions, the Amended Statement of Claim pleads that s. 91 limits federal law-making powers: it does not plead that Canada has a duty to legislate. Generally, a duty is the *obligation* to do or not do something; a power is the *authority* to do or not do something. A duty is obligatory – it must be done; a power is permissive – it may be done.[46] The appellants do claim that the words 'Peace, Order, and good Government of Canada' connote the wide law-making powers of a sovereign state, but that such legislative power is not wholly unrestrained. In the words of Lord Justice Laws of the UK High Court, "peace, order and good government may be a very large tapestry, but every tapestry has a

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[43] FC Reasons at paras. 5, 45, and 47 **(AB, Tab 2, at 12, 24 and 29)**.
[44] FC Reasons at paras. 5, 11, 27, 36, 40, 44, 46, 47, 64, 84, and 109-114 **(AB, Tab 2, at 7-8, 9, 15-16, 18, 19, 21, 26, 32 and 38-39)**.
[45] FC Reasons at para. 112 **(AB, Tab 2, at 39)**.
[46] See W.S. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L.J. 16 at 30.

border."[47]

ii. The Bancoult Decisions

25. The phrase 'peace, welfare and good government' has been used by the English Crown in royal prerogative orders to establish British colonies and their legislative assemblies since the late 17th century. In what is now Canada, the 18th century constitutions of the pre-confederation provinces all used this law-making phrase, including the Royal Proclamation of 1763. In the discussions leading up to confederation, the phrase was retained, but in the final draft of the 1867 *British North America Act*, it was changed to 'peace order and good government.'[48] In s. 91 of the Act, the phrase granted law-making power to the federal parliament in all matters not granted exclusively to the provinces under s. 92. The phrase was carried over in 1982 without amendment in the *Constitution Act, 1867*.[49]

26. A presumption of statutory interpretation requires that there be no superfluous words in legislation and that every feature of the text has a meaningful role in the legislative scheme.[50] Despite the presumption, British Imperial and Commonwealth jurisprudence has generally held that the phrase refers solely to a plenary grant of legislative power.[51]

27. In the 2000s, however, the UK courts examined the meaning of 'peace order and good government' more closely. A series of cases concerned an indigenous people's challenge to the British government's decision to not repatriate them to their homeland in the Chagos Archipelago in the middle of the Indian Ocean. The colony was ceded to Britain by France in 1814, and in 1971 the entire indigenous population was removed to allow for the building of a US military base. The legal basis of the expulsion was the use of the Crown's

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[47] *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 ["*Bancoult (No. 1)*"] at para. 55.
[48] Dara Lithwick, "'Welfare' of a Nation: The Origins of 'Peace, Order and Good Government" (2017) Library of Parliament, accessed August 23, 2020 at https://hillnotes.ca/2017/04/26/welfare-of-a-nation-the-origins-of-peace-order-and-good-government/.
[49] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[50] Ruth Sullivan, "Statutory Interpretation in Canada", in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Sydney: Judicial Commission of New South Wales, 2007) 105 at 117.
[51] *Bancoult (No. 1)* at paras. 53-55.

prerogative powers to turn the archipelago into a separate territory – the British Indian Overseas Territory ("BIOT") – and create first the BIOT Order 1965 and then, under it, the Immigration Ordinance 1971, which included the repatriation ban.[52]

28. In *Bancoult (No. 1)*, the UK High Court held that the 1971 Ordinance was unlawful on the ground that a power in the BIOT Order 1965 to legislate for the peace, order and good government of BIOT did not include the power to exile a people from their homeland.[53]

29. In the Court's 2000 decision, Gibbs J, said:

> The crucial question on the legality of the Ordinance is whether it can reasonably be described as "for the peace order and good government" of BIOT. In the case law cited, the interpretation of that expression most favourable to the [government] is that they "connote, in British constitutional language, the widest law-making powers appropriate to the sovereign". (Ibralebbe 1964 AC 900 at p.923) I am unable to accept that those words, even from such an authoritative source, compel this court [to] abandon the ordinary meaning of language, and instead to treat the expression "for the peace order and good government" as a mere formula conferring unfettered powers on the commissioner.[54]

The UK government immediately accepted the Court's ruling and did not appeal. It revoked the 1971 Ordinance. In June 2004, however, it made a Constitution Order and an Immigration Order that revoked the BIOT Order and granted a new constitution to prevent resettlement. This time, both the power to make laws (the constitutional authority) and the laws themselves (the legislative authority) were situated in prerogative orders.[55]

30. The Chagossians sought a judicial review of the 2004 Constitutional Order. They were successful in the High Court and in the unanimous Court of Appeal.[56] The government appealed to the House of Lords. The House divided 3:2 on the legality of this particular exercise of prerogative power; the majority held that the phrase "peace, order and good government" relates to the entire Crown realm and not just the inhabitants of the BIOT.[57]

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[52] *Bancoult (No. 1)* at para. 1.
[53] *Bancoult (No. 1)* at para. 57.
[54] *Bancoult (No. 1)* at para. 69.
[55] *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61, ["*Bancoult (No. 2)"*] at paras. 1 and 26.
[56] *Bancoult (No. 2)* at paras. 28-30.
[57] *Bancoult (No. 2)* at paras. 47-49 (Lord Hoffmann).

The two dissenting judges held that there was no power to exile a population and that the phrase "peace, order and good government" specifies a power "intended to enable the proper governance of a territory, at least, among other things for the benefit of the people inhabiting it. A constitution that exiles a territory's inhabitants is a contradiction in terms."[58]

31. The facts mentioned in the *Bancoult (No. 2)* decision indicate that the main practical reason the House of Lords denied the Chagossians' repatriation was the greater harm to their low-lying homeland by sea level rise due to global warming. The majority judgments echo Lord Hoffmann's view that, "the idyll of the old life on the islands appeared to be beyond recall."[59] Rather, his lordship considered that the case was less about "one of the most fundamental liberties known to human beings, the freedom to return to one's own homeland" and more about "a campaign to achieve a funded resettlement."[60]

32. With global warming above 2°C, the appellants face a harm that is of similar severity to the harm suffered by the exiled indigenous population of the Chagos Islands. In the words of Lord Laws: "In my judgment, for all these reasons, the apparatus of [the exiling provision] of the Ordinance has no colour of lawful authority. It was Tacitus who said: They make it a desert and call it peace… He meant it as irony; but here, it was an abject legal failure."[61]

33. In Canada, the authorities are clear that "parliamentary sovereignty allows the legislature to make and unmake any laws, subject to its constitutional authority, while parliamentary privilege provides that 'the law-making process is largely beyond the reach of judicial interference'" (emphasis added).[62]

34. Canada has made strong international and parliamentary commitments that, in effect, express its own understanding of "Peace, Order and good Government" in the context of

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[58] *Bancoult (No. 2)* at 157 (Lord Mance).
[59] *Bancoult (No. 2)* at para. 23 (Lord Hoffmann).
[60] *Bancoult (No. 2)* at paras. 54 and 55 (Lord Hoffmann). See also para. 110 (Lord Rodger) and para. 132 (Lord Carswell).
[61] *Bancoult (No. 1)* at para. 59.
[62] *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018] 2 SCR 765 at paras. 36 and 37.

limiting global warming. By signing the 2015 *Paris Agreement*, Canada committed to hold "the increase in global average temperatures to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels."[63] Parliament ratified the *Paris Agreement* in 2016[64] and, in 2019 passed a non-binding resolution declaring a national climate emergency and recommitting Canada to reduce its GHG emissions to meet the 1.5°C and 2°C goals.[65]

35. Canada thus conceded that catastrophe can be avoided only by taking measures that counter current emission trends.[66] By encouraging GHG emissions and permitting high-GHG emitting projects, Canada is not living up to its own standards of what good government requires. The appellants are not asking the Court to impose its conception of what good government requires over the conception developed by the elected government. They are asking the Court to hold the elected government to its own standards of good government. This is not an abuse of the courts' constitutional role.

36. In *Reference re GGPPA*, the SCC found that the purpose of the *GGPPA* was "not to limit the provinces' freedom to legislate, but to partially limit their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet the national [carbon-pricing] targets."[67] The Court acknowledged that this limit may interfere with a province's economic and environmental balance – in other words, its policy agenda. In the Court's view, the impact of "irreversible consequences for the environment, for human health and safety and for the economy" justifies the limited constitutional impact on provincial jurisdiction. The SCC thus carefully navigates its way through its traditional role of balancing Canadian federalism, but in the context of the irreversible harm of global warming.

37. In this case, the limits to federal law-making power the appellants' claim under the "Peace, Order and good Government of Canada" provision are not intended to restrict Canada's

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[63] Statement of Claim at para. 45 **(AB, Tab 4, at 88)**.
[64] Statement of Claim at para. 47 **(AB, Tab 4, at 88)**.
[65] Statement of Claim at para. 48 **(AB, Tab 4, at 88-89)**.
[66] Statement of Claim at paras. 42-58 **(AB, Tab 4, at 87-91)**.
[67] *Reference re GGPPA* at para. 206.

freedom to legislate emission reduction, but rather to limit its ability to legislate measures that permit and encourage GHG emissions beyond the "well below 2°C" warming standard. Such limits steer a course between the role of the legislative and executive branches of government to formulate policy, and the role of the judicial branch to uphold the Constitution in the context of global warming.

38. The *Bancoult* decisions provide authoritative legal reasons for a Canadian court to expand on the interpretation of the phrase 'to make Laws for the Peace, Order and good Government of Canada' in section 91 of the *Constitution Act, 1867*. They permit a novel but arguable claim that the federal Crown's broad legislative powers are not so wide as to permit Canada to contribute to an existential and catastrophic harm[68] as great as mean global warming above the "well below 2°C" standard.

C. Section 7 of the Charter

39. Section 7 of the Charter states:

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

40. There are three requirements for a s. 7 claim to give rise to a reasonable cause of action:

i. a real or imminent deprivation of life, liberty or security of person;[69]
ii. sufficient causal connection between the impugned laws and the s. 7 rights;[70] and
iii. the deprivation accords with recognised principles of fundamental justice.[71]

i. Real or imminent deprivation

41. The appellants claim that global warming deprives them of their right to life by increasing the risk of premature death from, among other things, air pollution, extreme weather and disease; deprives them of their right to liberty by increasing the risk to their individual and

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[68] Statement of Claim at paras. 1, 4 and 43 **(AB, Tab 4, at 77, 78 and 87)**. *Reference re GGPPA* at para 167.
[69] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 ["*Chaoulli*"] at para. 109.
[70] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 ["*Bedford*"] at para. 73.
[71] *Chaoulli* at para. 109.

collective autonomy, especially their collective indigenous identity which is bound up with their particular territories; and deprives them of their right to security of person by increasing the risk of harm from air pollution, extreme weather and disease, as well as from trauma to already vulnerable individuals, families and societies.[72] These increased risks from even a 1.5°C to 2°C mean global temperature rise are well documented.[73] The temperature increases in Canada are projected to be twice the global mean[74] and are having, and will have, a particularly serious impact on indigenous communities.[75] The appellants are already seeing impacts,[76] the severity of which will only increase in the future.

42. Real or imminent deprivation is when the harm either has occurred or will imminently occur.[77] In this case, the appellants claim that they are already suffering harm in part as a result of Canada's insufficient emission reductions[78] and that the harm will intensify in the future.[79] As they are already suffering continuing harm, the deprivation of their s. 7 rights is real and imminent. This aspect of the s. 7 analysis was not disputed by the motions court.

ii. Causal connection

43. In order to engage s. 7, there must be sufficient causal connection between the law or government action at issue and the deprivation of the Charter right. The appellants seek declarations to remedy the net effect of numerous laws and state actions that allow continuing high GHG emissions, and seek orders to remedy identified provisions in environmental assessment statutes that allow industrial projects to continue emitting significant GHGs even in the face of a global warming emergency.

a. Harm from the effect of numerous laws and actions

44. Where the source of the s. 7 deprivation is caused by numerous actors under numerous

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[72] Statement of Claim at paras. 87 and 88 **(AB, Tab 4, at 100-101)**.
[73] Statement of Claim at para. 74 **(AB, Tab 4, at 95-96)**.
[74] Statement of Claim at para. 74 **(AB, Tab 4, at 95-96)**.
[75] *Reference re GGPPA* at para. 187.
[76] Statement of Claim at para. 75 **(AB, Tab 4, at 96)**.
[77] *R v. White*, [1999] 1 S.C.R. 417 at para. 38.
[78] Statement of Claim at para. 75 **(AB, Tab 4, at 96)**.
[79] Statement of Claim at paras. 76-80 **(AB, Tab 4, at 96-97)**.

laws in numerous jurisdictions, the usual 'but for' causation test may not be applicable. The SCC in *Bedford* explicitly rejected the Attorney General's account of causality that relied solely on the traditional "but for" test qualified by foreseeability.[80] The Court maintained that this is but one way to show a causal connection engaging s. 7:[81]

> A sufficient causal connection does not require that the impugned government action be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference drawn on the balance of probabilities [citation omitted]. A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to speculative, link.

45. As argued above, the link between warming catastrophe and failure to keep GHG emissions to the "well below 2°C" standard is not speculative. In *Reference re GGPPA*, the SCC rejected the notion "that because climate change is 'an inherently global problem', each individual province's GHG emissions cause no 'measurable harm' or do not have 'tangible impacts on other provinces' [emphasis and citation omitted]. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail."[82]

46. The 'sufficient causal connection' test is analogous to the 'material contribution to risk' test in negligence law.[83] The Court below in this case concluded that this type of causation has never been recognised in Charter claims,[84] a conclusion that is contradicted by the SCC's decision in *Bedford*.

47. The lower court proceeded to hold that the appellants do not argue a sufficient causal connection or a material contribution,[85] and that they plead no facts to argue such a claim for Charter breaches.[86] The appellants argued the sufficient causal connection at length in

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[80] *Bedford* at para. 77.
[81] *Bedford* at para. 76, cited in FC Reasons at para. 96 **(AB, Tab 2, at 35)**.
[82] *Reference re GGPPA* at para. 188.
[83] *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R.181 at paras. 13 and 46, cited in FC Reasons at para. 97 **(AB, Tab 2, at 36)**.
[84] FC Reasons at para. 98 **(AB, Tab 2, at 36)**.
[85] FC Reasons at para. 100 **(AB, Tab 2, at 37)**.
[86] FC Reasons at para. 99 **(AB, Tab 2, at 36)**.

their written submissions on Canada's motion to strike.[87] Their argument was based on their pleadings that their s. 7 deprivation arose from the cumulative effect of numerous laws and government decisions affecting GHG emissions.[88]

48. Further, the Court found that the appellants "have provided no evidence that other states are breaching their *Paris Agreement* obligations, and because of that, there is contribution to the harm allegedly suffered."[89] However, in their claim, the appellants do plead facts to show other states' contributions to GHG emission reduction efforts are insufficient.[90]

49. The appellants claim that Canada has not met its past GHG emissions reduction targets and is significantly off course to meet its fair contribution[91] to emission reductions that will keep the average global temperature rise to well below 2°C.[92] In such a context at trial, a court may apply *Bedford* to find that Canada's sufficient causal connection to the risk of global warming permits an arguable claim of s. 7 rights engagement.

b. Harm from environmental assessment provisions

50. The appellants also seek an order for Canada to amend its environmental assessment laws to allow the federal Cabinet to cancel high GHG-emitting projects. They claim that the projects could jeopardise Canada's ability to keep its emissions consistent with a mean global warming of well below 2°C[93] and thus cause them further harm.

51. The motions court made no findings respecting the sufficiency of a causal connection between the impugned environmental assessment legislation and the appellants' s. 7 rights. It does, however, seem to deny this remedy[94] on the basis that there is insufficient specificity claimed to 'read in' the remedial amendment.[95]

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[87] Written Representations of the Respondents, at paras. 44-49 **(AB, Tab 4, at 118-120)**.
[88] Statement of Claim, paras. 38-58, 81(c) and 87 **(AB, Tab 4, at 144-149, 156 and 159)**.
[89] FC Reasons at para. 101 **(AB, Tab 2, at 37)**.
[90] See Statement of Claim at para. 50 **(AB, Tab 4, at 89)**.
[91] A fair contribution would be emission reduction targets based on an equity-based carbon budget as described in the Statement of Claim at para. 37 **(AB, Tab 2, at 86)**.
[92] Statement of Claim at paras. 42-58 **(AB, Tab 4, at 87-91)**.
[93] Statement of Claim at para. 81(e) **(AB, Tab 4, at 98-99)**.
[94] FC Reasons at paras. 70 and 71 **(AB, Tab 2, at 29)**.
[95] FC Reasons at para. 69 **(AB, Tab 2, at 28)**.

52. The appellants say there is sufficient specificity in their claim for a court to determine if reading in is an appropriate remedy. Each of the relevant statutes is identified,[96] the defects in the legislation are identified,[97] and an appropriate remedy is specified.[98]

53. The judge also noted that the 1992 and the 2012 Canadian Environmental Assessment Acts are no longer in force. Approvals under the 2012 Act, however, are deemed approved under the currently in force 2019 *Impact Assessment Act*.[99] Though neither the *Impact Assessment Act* nor the *Canadian Environmental Assessment Act, 2012*[100] deem federal approvals under the 1992 Act to be continued, Canada considers that unbuilt, high-GHG emitting proposals approved under the 1992 Act to be valid. [101]

iii. Fundamental justice

54. The principles of fundamental justice recognized to-date by the courts in relation to s. 7 are arbitrariness, overbreadth and gross disproportionality.[102] *Bedford* acknowledges that there may be considerable overlap among them. Before these principles can be applied, however, two questions concerning the Charter rights at issue must be addressed:

    i. whether the appellants' rights' deprivation results from policy considerations rather than from laws or state actions, and
    ii. whether it matters that their deprivation results from numerous laws rather than a single, identified law.

a. Policy versus Law

55. In the Reasons, the motions court concluded that the appellants' s. 7 claims "are more akin to a change in policy than a change in law."[103] It found that Canada's policy objectives lie

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[96] Statement of Claim at para. 41 **(AB, Tab 4, at 87)**.
[97] Statement of Claim at paras. 59-61 **(AB, Tab 4, at 91-92)**.
[98] Statement of Claim at para. 81(e) **(AB, Tab 4, at 98-99)**.
[99] *Impact Assessment Act*, S.C. 2019, c. 28, s.1 at s. 184.
[100] *Canadian Environmental Assessment Act, 2012* S.C. 2012, c.19, s. 52.
[101] For example, see the Kitimat LNG Terminal Project. A proposed expansion of this unbuilt, previously approved project is currently being reviewed by British Columbia and Canada: Statement of Claim at paras. 66 and 67 **(AB, Tab 2, at 93)**.
[102] *Bedford* at paras. 110-123.
[103] FC Reasons at para. 57 **(AB, Tab 2, at 24)**.

within the realm of the other two branches of government.[104]

56. These conclusions misconstrue the appellant's claim. The claim does not challenge Canada's temperature objective as expressed in its *Paris Agreement* commitment to keep global warming "to well below a 2°C rise above pre-industrial levels." This commitment was subsequently ratified by Parliament and restated in its climate emergency declaration.[105] None of the remedies sought by the appellants specifies which policy approaches the government should take to achieve the GHG emission reduction required to meet its temperature commitment. Even the remedy seeking to amend the environmental assessment legislation only gives the federal Cabinet the power to cancel its approval of high-emitting projects; it does not require that Cabinet do so.[106] The claim does, however, challenge Canada's ongoing failure to meet those objectives and claims that this failure deprives the appellants of their Charter rights.[107]

57. The Reasons noted that "[i]t is hard to imagine a more political issue than climate change."[108] This conclusion leads the Court to find that "this matter is not justiciable as it is in the realm of the two other branches of government."[109] First, it should be recognised that politics is the art of compromise, where oftentimes worthy social objectives compete for scarce resources such as government budget allocations.[110] In this case, however, as in *PHS Community Services Society* ("*PHS*"), government has declared an emergency and there is overwhelming scientific evidence both of present and future harm and of credible means to reduce that harm.[111] When policy decisions breach Charter rights, they are the realm of the courts.

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[104] FC Reasons at para. 72 **(AB, Tab 2, at 29)**.
[105] Statement of Claim, at paras. 47 and 48 **(AB, Tab 4, at 88-89)**.
[106] Statement of Claim, at para. 81(e) **(AB, Tab 4, at 98-99)**.
[107] Statement of Claim, at paras. 81(c) and 88 **(AB, Tab 4, at 98 and 101)**.
[108] FC Reasons at para. 19 **(AB, Tab 2, at 12)**.
[109] FC Reasons at para. 72; see also paras. 24, 73, and 77 **(AB, Tab 2, at 29; see also 14-15, 29 and 30)**.
[110] See, for example, *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 ["*Tanudjaja*"], leave to appeal to SCC refused 2015 CarswellOnt 9613 (adequate housing); *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 (adequate social assistance); *Chaoulli*, (health care).
[111] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 ["*PHS*"] at paras. 11 and 12.

58. Second, global warming has four characteristics that render its measures to keep global temperature rise well below 2°C unsuitable to leave completely to the political realm without judicial guidance:

    i. the decades-long time-lag between emissions of GHGs and the global warming harm these emissions cause;[112]
    ii. GHGs' cumulative effects result in centuries-long, irreversible warming;[113]
    iii. global warming's existential and catastrophic consequences;[114] and
    iv. Canada's ineffective GHG emission reduction since the global issue emerged on the political stage over 30 years ago.[115]

59. Canada's legislative and executive realms have demonstrated a systemic inability, by themselves, to sufficiently curb GHG emissions to prevent the country from contributing to catastrophic global warming. This systemic inability results from the time-lag between emissions and their dire effects, combined with the structural inability of governments to forgo immediate economic and political benefits for the common good decades hence.

60. The motions court conceded that "just because it is a political issue does not mean there cannot be sufficient legal elements to render something justiciable" and that "a court will intervene especially when the allegations are of the constitutionality of policy or law, or a breach of someone's constitutional rights."[116] To be justiciable, the policy choices must be translated into law or state action.[117]

61. The motions court found this principle in *PHS,* in which the state action was to not renew an exemption from prosecution for a supervised safe injection site for users of illegal street drugs. In *PHS* the SCC goes on to say:[118]

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for

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[112] Statement of Claim, at paras. 5, 6, and 92 **(AB, Tab 4, at 78-79 and 102)**.
[113] Statement of Claim, at paras. 1, 8, 35, 36 and 44 **(AB, Tab 4, at 77, 79-80, 85-86 and 87-88)**.
[114] Statement of Claim, at paras. 1, 4, 84 and 89 **(AB, Tab 4, at 77, 78, 100 and 101-102)**.
[115] Statement of Claim, at paras. 6 and 42-71 **(AB, Tab 4, at 79 and 87-95)**.
[116] FC Reasons at para. 20 **(AB, Tab 2, at 12)**.
[117] FC Reasons at para. 21 **(AB, Tab 2, at 13)**.
[118] *PHS* at para. 105.

> disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter* [citations omitted]. The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.

62. The issue before the Court in this case is not to determine the best policies to reduce GHG emissions; rather it is simply whether by encouraging emissions and permitting high-GHG emitting projects, Canada has limited the rights of the appellants in a manner that does not comply with the Charter.

b. No specific law or state action pleaded

63. Citing *Borowski*, the motions court found that the appellants plead no specific laws or state actions.[119] That decision, however, can be distinguished from the present case on the basis that Mr. Borowski challenged no legislation but was, in the words of the Court, seeking to "turn this appeal into a private reference."[120]

64. The motions court then noted that the Ontario Court of Appeal ("ONCA") in *Tanudjaja* also found that there was no challenge to any particular legislation.[121] The Court in that case held that with no specific law challenged it is impossible to compare legislative means and purpose to decide if the deprivation was arbitrary.[122] In its decision, the motions court quoted *Tanudjaja* to say that, "[a] challenge to a particular law or a particular application of such a law is an archetypal feature of Charter challenges under s. 7 or s.15."[123]

65. The term 'archetypal' means 'very typical'. The Court in *Tanudjaja* therefore states an empirical observation, not a legal principle. The statistic merely shows that in most Charter cases, the claimants identified a particular law as depriving them of their rights and not because this is required by legal principles. *Tanudjaja* provides no authority or legal

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[119] FC Reasons at para. 50 **(AB, Tab 2, at 22)**.
[120] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at 365.
[121] FC Reasons at para. 51 **(AB, Tab 2, at 22)**, citing *Tanudjaja*.
[122] *Tanudjaja* at para. 28 referring to, but not citing, *Chaoulli*.
[123] FC Reasons at para. 52 **(AB, Tab 2, at 23)**, quoting *Tanudjaja* at para. 22.

reasoning to say why courts may consider only a specific law for Charter review.

66. *Tanudjaja* leaves the door open on this issue by stating, "[t]his is not to say that constitutional violations caused by a network of government programs can never by addressed, when the issue may otherwise be evasive of review."[124] Unfortunately, this statement does not help judges resolve other cases that may be evasive of review. It does not identify the legal principles whereby a court may address such violations or why the plaintiffs in *Tanudjaja* did not meet those principles.

67. There is an overarching principle of justice at issue here that neither the motions court in this case nor the appeal court in *Tanudjaja* address. Their decisions effectively say that it is lawful for the state to do by a thousand cuts what it cannot do in one fell swoop. This result is patently unfair and arbitrary. In *Reference re Agricultural Products Marketing Act*, the SCC said:

> It is axiomatic in constitutional law that the courts will look through any scheme in order to strike down all attempts to do indirectly what cannot be done directly: regard must be had to the substance and not to the mere form of the enactment, so that "you cannot do that indirectly which you are prohibited from doing directly".[125]

68. The motions court, in purportedly striking down the appellants' claim because it is based on many laws and state actions, failed to look through a legislative scheme that attempts to do indirectly what cannot be done directly. The number and specificity of the laws and actions are the mere form. The constitutional substance is whether the claimed Charter deprivations can be analysed under the principles of fundamental justice (s. 7) and reasonable limits prescribed by law (s. 1). In this case they can, as will be shown below.

69. The motions court stated that the appellants' claims are similar to those made in *Tanudjaja*, implying that the ONCA's conclusions apply here.[126] As the majority decision in *Tanudjaja* on this point is not derived from legal principles and is patently unfair, the requirement that there be a particular law or a particular application of a law in order to

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[124] *Tanudjaja* at para. 29
[125] *Reference re Agricultural Products Marketing Act (Canada)*, 1978 CarswellOnt 606F, [1978] 2 S.C.R. 1198 (SCC), at para. 149.
[126] FC Reasons at para. 52 **(AB, Tab 2, at 23)**.

make a fundamental justice analysis is not a reason to declare the claim non-justiciable. Indeed, it is in part because this gap in the law exists that this case should proceed to a hearing on the merits.

c. Applying the fundamental justice test

70. The test for whether a law or state action is in accordance with the principles of fundamental justice has two steps. The first step is to identify the objectives of the laws. The second step is to identify the relationship between those objectives and the impugned statutory provisions or state actions under them.[127]

71. Here, the types of federal laws and decisions under them that result in high GHG emissions include regulation of road vehicles, electricity generation and offshore and territorial fossil-fuel projects[128], as well as subsidising of fossil fuel production and use, approval of fossil fuel production and transportation, and the direct purchase of fossil fuel infrastructure.[129] The provisions of these laws and the state actions under them that engage the Charter are those that cumulatively allow GHG emissions to exceed Canada's fair contribution to the standard of keeping the rise in mean global warming to well below 2°C.

72. In *Chaoulli*, the SCC laid out one approach to determine whether the deprivation of the Charter right was arbitrary: to ask if the deprivation was necessary to further the law in question's objectives.[130] When, as in this case, the deprivation will result in existential and catastrophic harm to the appellants and globally, it is inconceivable that such harm would be necessary to further any relevant law's objectives.

73. The fundamental justice principle of gross disproportionality "describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to <u>any</u> legitimate government interest" (emphasis added).[131] The appellants submit that allowing GHG emissions to exceed the "well below 2°C rise" standard, when Canada is aware of the catastrophic effects that will result, is so extreme as to be disproportionate to any relevant

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[127] *PHS* at paras. 129 and 130.
[128] Statement of Claim, at para. 39 **(AB, Tab 4, at 19)**.
[129] Statement of Claim, at para. 40 **(AB, Tab 4, at 19)**.
[130] *Chaoulli* at paras. 131 and 132.
[131] *PHS* at para. 133.

law's objectives.

74. In summary, in the context and the pleaded facts of this case, identification of the s. 7 Charter deprivation as flowing from a multitude of laws and actions does not prevent a proper fundamental justice analysis of the appellants' claim.

D. Section 15(1) of the Charter

75. Section 15(1) of the Charter states:

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

76. The motions court in this case did not address the equality aspects of the appellants' claim. In *Withler*, the SCC said that the central issue in equality cases is whether the impugned law violates the animating norm of substantive equality: "To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong."[132]

77. In *Withler*, the Court sets out the substantive, two-step s. 15(1) equality analysis:

i. Does the law create a distinction based on an enumerated or analogous ground? and

ii. Does the distinction create disadvantage by perpetuating prejudice or stereotyping?[133]

i. Distinction based on age

78. The appellants claim equal protection on the enumerated basis of age.[134] The courts have considered age discrimination in two ways: a distinction based on existing legislation that does not provide current equal protection or equal benefit based on the claimant's present age;[135] and a distinction based on existing legislation that will not provide future equal

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[132] *Withler v Canada (Attorney General)* 2011 SCC 12 ["*Withler*"], at para. 2.
[133] *Withler* at paras. 30 and 61.
[134] Statement of Claim at para. 91 **(AB, Tab 4, at 102)**.
[135] For example, *Withler* at para. 1.

protection or equal benefit of the law based on the claimant's present age.[136]

79. This second category of age distinction has been termed 'intergenerational equity' and has been recognised by Canadian courts in a number of legal and factual settings other than s. 15(1): mandatory retirement,[137] pension benefits,[138] utility rate regulation,[139] and estates.[140]

80. The appellants' claim in this case falls into the second type of age discrimination, which might be considered a ground analogous to age. While the Federal Court in *Reid* did strike that claim for future equal protection, it did so for reasons other than that the infringement of the appellants' future rights based on their current age was not an enumerated or analogous ground.[141] In fact, the Court seemed to accept that the claim was brought on this basis.

81. Scientists cannot precisely determine the nature, location, timing and intensity of future warming effects. They have determined, however, that these effects will be more intense, more widespread and more damaging across the globe. Younger and future members of the appellant Houses by virtue of their age will carry a burden that current Canadians, as a whole, do not.[142] Their burden is disproportionate to present generations.

ii. Distinction creating disadvantage

82. The second step of the equality analysis is the inquiry "whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances."[143] In *Withler,* the Court goes on to quote with approval Wilson J. in *Turpin*:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or the group, it is important to look not only at the impugned legislation which has created a distinction that

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[136] For example, *Reid v Canada*, [1994] FCJ No. 99 (FCTD) ["*Reid*"], at para. 15**.**
[137] *Dickason v. University of Alberta,* [1992] 2 S.C.R. 1103 at 1135 and 1136.
[138] *B.C. Nurses' Union et al v. Municipal Pension Board of Trustees et al*, 2006 BCSC 132 at para. 206.
[139] *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132 at paras. 23 and 48.
[140] *Saugestad v. Saugestad*, 2008 BCCA 38 at para. 30.
[141] *Reid* at paras. 17 and 18.
[142] Statement of Claim at para. 74 **(AB, Tab 4, at 95-96)**.
[143] *Withler* at para. 65.

> violates the right to equality but also to the larger social, political and legal context.[144]

83. The larger context includes the critical importance each appellant House group attaches to having healthy territories and to having healthy future generations of its members. Both of these are necessary to sustain its identity and status as a kinship group in Wet'suwet'en society and under Wet'suwet'en indigenous law.[145] Each appellant House is thus an intergenerational entity. Past history and future prospect are integral to its present existence.

84. The larger context also includes, unhappily, the trauma associated with past colonial laws, policies and actions, including those taken by Canada, in the process of colonisation and attempted assimilation of indigenous peoples. Particularly relevant are those discriminatory acts that were directed at children and young people, including removing them from their families to residential schools and to non-indigenous foster homes.[146] Canada's laws and policies allowing global warming emissions perpetuate such past disadvantage.

85. Finally, the larger context includes the disenfranchisement of children from the right to vote and to freely and democratically participate in current, irreversible decisions that will affect their future lives. In this respect, they are not full citizens. In *Andrews*, Justice Wilson writing for the majority on the Charter rights of non-citizens said:[147]

> Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending" [citation omitted]. Non-citizens, to take only the most obvious example, do not have the right to vote... I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15 [emphasis added].

86. The record to-date on the level of GHG emissions in Canada shows that elected officials have little apparent interest in attending to the needs and wishes of children and future

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[144] *Withler* at para. 66; see also para. 39.
[145] Statement of Claim at paras. 2, 5, 14, 16 and 19 **(AB, Tab 4, at 77-78, 78-79, 80-81, 80-82 and 82)**.
[146] Statement of Claim at para. 79 **(AB, Tab 4, at 97)**.
[147] *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143 at 152.

generations.[148] These future generations are a group lacking political power and as such vulnerable to having their rights to equal concern and respect violated.

87. The severe, delayed and irreversible effects of global warming necessarily mean current laws and policies enacted by Canada will have a greater impact on future generations of the appellant Houses than on current generations. A trial is required to tender complete, relevant evidence and make full representations on these substantive equality issues.

E. Section 1 of the Charter

88. Section 1 of the Charter states: "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."

89. The motions court found that a proper s. 1 analysis cannot be carried out because the Statement of Claim fails to identify a specific law that infringes the appellants' ss. 7 and 15(1) rights.[149]

90. Generally, in order to justify infringement of a Charter right under s. 1, the government must show that: first, the impugned law has a pressing and substantial objective that warrants overriding the claimed rights and freedoms; and second, the means chosen are rationally connected to, are minimally impaired by, and do not outweigh that objective.[150] The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited.[151]

91. In this case, the deprivation of the appellants' Charter rights arises from the cumulative effect of numerous federal laws and the means chosen to implement them. This deprivation could result in existential and catastrophic harm to the appellants and globally. It is inconceivable that such a "threat of the highest order"[152] could be rationally connected to, or outweigh, any relevant law's objective.[153] If arbitrariness were to be made out in the s. 7

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[148] Statement of Claim at para. 52 **(AB, Tab 4, at 89)**.
[149] FC Reasons at para. 55 **(AB, Tab 2, at 24)**.
[150] *R. v Oakes*, [1986] 1 SCR 103 ["*Oakes*"] at 138-139.
[151] *Oakes* at 137.
[152] *Reference re GGPPA* at para. 167.
[153] See paras. 72-77 of this memorandum.

principles of fundamental justice analysis, the relevant laws and actions would never meet the rational connection test.[154]

F. Remedies

92. The motions judge concluded that the remedies sought by the appellants were not appropriate or justiciable.[155] The SCC, however, has registered its dissatisfaction when asked to determine appropriate constitutional remedies, whether under s. 24 or s. 52(1), "in a factual vacuum" without evidence from a trial on the merits.[156] Given a trial judge's wide discretion to fashion remedies, they can be amended in light of the evidence produced up to and during the trial. It is inappropriate, therefore, to strike a claim based on the non-justiciability of the relief sought. In this case, the declarations and orders sought by the appellants are appropriate at this preliminary stage.

i. Declarations

93. The courts have been grappling with claims involving Charter breaches which are the result of a constellation of government laws and policies. In *Tanudjaja*, the applicants sought both declarations and an order that Canada and Ontario had taken inadequate measures to protect the homeless and those most at risk from homelessness. The majority of the ONCA held that the claim was not justiciable on the basis that a specific state action or law was not challenged.

94. Justice Feldman, the dissenting judge in *Tanudjaja*, accepted that the court would not be exceeding its authority if it granted declaratory relief in that case:[157]

> Although the amended notice of application seeks, as one remedy, an order requiring the governments to implement strategies to reduce homelessness and inadequate housing and to consult with affected groups, under court supervision, the court need not make such a wide-ranging order if it finds a breach of the *Charter*. It may limit itself to granting declaratory relief only, as was done in *Canada (Prime Minister) v Khadr*, 2010 SCC 3.

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[154] *Chaoulli* at para. 155.
[155] FC Reasons at paras. 70 and 73 **(AB, Tab 2, at 29)**.
[156] *Schachter v Canada*, [1992] 2 SCR 679 ["*Schachter*"] at 695; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 ["*Doucet-Boudreau*"] at para. 52.
[157] *Tanudjaja* at para. 85.

95. In *Khadr*, the Court found that Mr. Khadr's detention and torture by the U.S. military in Guantanamo Bay involved Canadian officials and thus violated his s. 7 Charter rights. The Court did not conduct a s. 1 analysis. It found that the deference, within constitutional limits, to the Crown's prerogative power to conduct foreign policy and the state of its negotiations with the American government were together too uncertain for it to make a satisfactory order to remedy the breach of his Charter rights. Instead, the Court concluded that:[158]

> [T]he appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*…
>
> A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

96. In this case, changes to the laws, policies and programs needed to stop encouraging GHG emissions and permitting high-GHG emitting projects are many and complex. Generally, the declarations sought are appropriate remedies for the claimed constitutional rights, leaving it to government to decide best how to respond.

ii. Legislation-amending order

97. The appellants also seek an order to 'read in' a clause to Canada's environmental assessment legislation[159] that would allow the executive to withdraw its regulatory approval of high GHG-emitting projects in the event Canada cannot otherwise meet its emission commitments. The motions court found that this remedy lacked specificity.[160]

98. The stated objectives of the relevant environmental assessment statutes are consistent with

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[158] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras. 39 and 46.
[159] The statutes under which existing or planned high GHG-emitting projects have been approved are identified in the Statement of Claim at para. 41 and are: the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ["*CEAA,* 1992"]; the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 ["*CEAA, 2012*"]; and the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 ["*IAA*"].
[160] FC Reasons at para. 69 **(AB, Tab 2, at 94)**.

the claims in this case.[161] The absence of any mechanism in the statutes to curb or halt emissions as the global warming catastrophe unfolds is unrelated to those legislative objectives.

99. Canadian courts have the power to amend legislation by virtue of s. 52(1) of the *Constitution Act, 1982*. In *Schachter*, the SCC included court-ordered legislation (reading in) as a remedial option under s. 52(1): "Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in."[162] Subsequently, the SCC has read in provisions to unconstitutional legislation, most notably in *Vriend*.[163]

100. In summary, the trial court in this case does not require specific laws to be identified for it to properly grant the declarations being sought. For the order being sought to 'read in' a provision to the environmental assessment statutes, the specific laws, their objectives and their effect relative to the claimed rights deprivation have been adequately identified.

iii. Court-supervised reporting

101. In constitutional cases, Canadian courts have required governments to comply with their orders within specified time limits, to prepare reports on government compliance with their orders, and have retained jurisdiction to hear those reports.

102. In *Doucet-Boudreau*, the SCC upheld a trial judge's order in a case where the Nova Scotia government was delaying its obligation to provide facilities and programs to implement francophone parents' Charter s. 23 rights to have their children educated in French-language schools. Delay in providing francophone schools would increase the likelihood that French-speaking children would be assimilated into the English-speaking

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[161] The principal purpose of each statute is: "to ensure that such projects do not cause significant adverse environmental effects" (*CEAA*, 1992 at s. 4(1)(a)); "to protect components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project." (*CEAA, 2012* at s. 4(1)(a)); "to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project" (*IAA* at s. 6(1)(b)).
[162] *Schachter* at 695.
[163] *Vriend v. Alberta,* [1998] 1 SCR 493.

mainstream.[164] Mindful of the assimilation factor and of the government's past delays, the SCC upheld the trial judge's order under s. 24(1) of the Charter to retain jurisdiction to hear reports on the status of the government's 'best efforts' to provide schools.[165]

103. The trial judge in *Doucet-Boudreau* considered that a simple declaration by itself would be an ineffective remedy given the government's history of delay in implementing the parents' Charter rights. He chose court-supervised reporting as a remedy that reduced the risk that the rights "would be smothered in additional procedural delay."[166] In this case, Canada's efforts to reduce its GHG emissions to be consistent with global non-catastrophic levels have been smothered in procedural and other delays for over three decades.[167] It is therefore necessary and just that the Court order Canada to account for its annual cumulative GHG emissions in a court-supervised process.

PART IV: Orders sought

104. The appellants seek the following orders:

iii. that the appeal be upheld and the motion to strike be dismissed;

iv. that the appellants be granted leave to amend their Statement of Claim, filed February 10, 2020; and

v. that the appellants serve and file their Draft Amended Statement of Claim, dated September 10, 2020, appended as Schedule 'A' to the Motion Record in the court below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Penticton, in the Province of British Columbia, the 29th day of April, 2021,

Richard J. Overstall, Erin Gray
Counsel for the Appellants

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[164] *Doucet-Boudreau* at paras. 38-40.
[165] *Doucet-Boudreau* at paras. 87 and 88.
[166] *Doucet-Boudreau* at para. 67.
[167] Statement of Claim at paras. 42-58 **(AB, Tab 4, at 87-91)**.

PART V: List of Authorities

TAB	LEGISLATION
1.	*Canadian Environmental Assessment Act*, S.C. 1992, c.37.
2.	*Canadian Environmental Assessment Act, 2012* S.C. 2012, c.19, s. 52.
3.	Federal Courts Rules, SOR/98-106.
4.	*Impact Assessment Act*, S.C. 2019, c. 28, s.1.
	JURISPRUDENCE
5.	*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
6.	*B.C. Nurses' Union et al v. Municipal Pension Board of Trustees et al*, 2006 BCSC 132.
7.	*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342.
8.	*Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132.
9.	*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.
10.	*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.
11.	*Canada (Prime Minister) v Khadr*, 2010 SCC 3.
12.	*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791.
13.	*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R.181.
14.	*Collins v Canada*, 2011 FCA 140.
15.	*Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103.
16.	*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62.
17.	*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84.
18.	*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40.
19.	*R v Imperial Tobacco Canada Ltd.*, 2011 1 SCC 42, [2011] 3 S.C.R. 45.
20.	*R v. Oakes*, [1986] 1 S.C.R. 103.

21. *R v. White*, [1999] 2 S.C.R. 417.

22. *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2001] QB 1067.

23. *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61.

24. *Reference re Agricultural Products Marketing Act (Canada)*, 1978 CarswellOnt 606F, [1978] 2 S.C.R. 1198 (SCC).

25. *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

26. *Reid v Canada*, [1994] FCJ No. 99 (FCTD).

27. *Saugestad v. Saugestad*, 2008 BCCA 38.

28. *Schachter v Canada*, [1992] 2 SCR 679 at 695.

29. *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852.

30. *Tanudjaja, et al v. Attorney General of Canada et al* (June 25, 2015), Docket no. 36283 (SCC).

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

32. *Withler v Canada (Attorney General)*, 2011 SCC 12.

SECONDARY SOURCES

33. W.S. Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale L.J. 16.

34. Dara Lithwick, “’Welfare’ of a Nation: The Origins of ‘Peace, Order and Good Government” (2017) Library of Parliament.

35. Ruth Sullivan, “Statutory Interpretation in Canada”, in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Sydney: Judicial Commission of New South Wales, 2007).