Court File No. A-289-20

FEDERAL COURT OF APPEAL

BETWEEN:

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

APPELLANTS

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

MEMORANDUM OF FACT AND LAW OF THE APPELLANTS

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INDEX

PART **PAGE**

MEMORANDUM OF FACT AND LAW OF THE APPELLANTS

PART I. STATEMENT OF FACTS

A. Overview

1. The respondents ("Canada" or the "Crown") admit that GHG emissions are the primary driver of climate change, and that, if not addressed, the effects of climate change will be cataclysmic. Canada has known about this problem for decades but has continued to cause, contribute to and allow GHGs emissions at unsafe levels, thereby worsening the climate crisis. Climate change is now causing serious physical and psychological harm to the appellants. If emissions are not reduced urgently, catastrophic impacts will be inevitable.

2. Courts in Canada and internationally have found that governments can be held legally responsible for continuing GHG emissions at dangerous levels. The Motions Judge, however, held that Canada's role in causing climate change is a purely political issue, devoid of legal content.

3. The appellants claim that by continuing GHG emissions at levels that cause significant harm to the appellants, Canada breaches their rights under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and breaches its public trust duties to protect the integrity of certain resources held by the Crown for the common good. The appellants' s. 7 claim engages the Court in a single inquiry: whether exposing the appellants to physical and psychological harm by exceeding a total level of GHG emissions consistent with a Stable Climate System[1] breaches the appellants' rights to life, liberty, and security of the person in a manner inconsistent with the principles of fundamental justice. The s. 15 claim asks whether exceeding total GHG levels consistent with a stable climate disproportionately impacts children and youth because of their personal characteristics. These are legal questions that only the courts can answer.

4. The Motions Judge dismissed the *Charter* claims on a basis that would, if upheld, allow government to insulate its conduct that causes climate change from meaningful

[1] Statement of Claim, ¶63, Appeal Book ("AB") 64

judicial scrutiny by simply continuing emissions under a variety of legal instruments without enacting an overarching law or emissions target. Essentially, the Motions Judge held that because the sources of GHG emissions that cause harm to the appellants are broad and diffuse, the appellants' constitutional claims about Canada's conduct contributing to GHG emissions could not be adjudicated by the Court. This was a critical error. The justiciability of the appellants' claims turns not on how much state action might ultimately be implicated by the Court's ruling, or whether Canada has chosen to adopt a single legislated emissions target, but on whether the Court is being asked to apply a judicially discoverable standard to a discrete and manageable aspect of the government's conduct.

5. Further, by precluding a claim based on public rights over certain common resources and Crown trust duties, the Motions Judge not only closed a door that the Supreme Court of Canada deliberately left open, he ignored centuries of jurisprudence and juridical writing that affirm the vitality of such rights and duties. Further, his ruling hobbles the capacity of the common law to appropriately respond to the stark challenges we now confront.

6. Finally, the Motions Judge erred in dismissing the appellants' claims based on the remedies sought. Whether the relief sought is appropriate should only be determined after a full trial on the merits. The appellants are not asking the Court to examine the wisdom of the government's climate change policy nor to prescribe how climate change should be addressed. Rather the appellants' claims invoke the Court's duty to declare the scope of *Charter* rights and whether the respondent Canada has violated the *Charter*.

7. Climate change is real and is an existential threat to our society. That much is not in dispute. The children and youth appellants' life and security depend upon the stability of the climate system. The Motions Judge found that Canada has a role in causing GHG emissions that is more than speculative and acknowledged that Canada must be accountable and responsible for addressing climate change.[2] Yet by striking the claim in its entirety, without leave to amend, the Motions Judge made it impossible for the appellants to even test the legality of Canada's conduct.

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[2] Order and Reasons of Manson J. dated October 27, 2020 ("Reasons"), ¶¶48 and 75, AB 22 and 31

B. The Claim

8. For the purposes of the motion to strike, the facts stated in the Statement of Claim must be taken as true.[3]

9. Climate change is a "grave threat to humanity's future" and is already having significant impacts globally.[4] The effects of climate change are and will be "particularly severe and devastating in Canada."[5] The appellants are 15 children and youth from across Canada who have suffered specific harms from climate change, harms that interfere with their health and their physical and psychological security. Children and youth are particularly vulnerable to climate change impacts.[6]

10. Canada is one of the ten highest GHG emitters in the world.[7] While Canada has, since 1988, committed to various (modest) GHG reduction targets, it has never met any of them.[8] Canada has not legislated binding targets for GHG emissions, but has committed to reduce emissions to a certain standard, known as its nationally determined contribution ("NDC") under the *Paris Agreement*. Canada's NDC, however, is not based on scientific evidence about what is required to avoid catastrophic climate change and is inconsistent with maintaining a stable climate. Moreover, Canada is not expected to meet its NDC.[9]

11. The time to avoid dangerous climate change is quickly passing. GHG emissions are rapidly approaching a critical threshold which could lock-in catastrophic climate change impacts for the appellants and generations to come.[10]

12. The appellants' claim is that Canada, by continuing to cause, contribute to and allow a level of GHG emissions inconsistent with a Stable Climate System, has caused or contributed to the injuries they have suffered from climate change. These injuries

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[3] Many of the facts relied on by the appellants have also been accepted in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA Reference*]
[4] *GGPPA Reference*, ¶¶2, 9
[5] *GGPPA Reference*, ¶10
[6] Statement of Claim, ¶¶78-89, AB 67-70
[7] Statement of Claim, ¶3, AB 51
[8] Statement of Claim, ¶52, AB 62; *GGPPA Reference*, ¶13
[9] Statement of Claim, ¶¶58-62, AB 63-64
[10] Statement of Claim, ¶89, AB 70

constitute a breach of their rights under s. 7 of the *Charter*. They also claim that continuing to cause, contribute to and allow GHGs at a level likely to have catastrophic effects disproportionately impacts children and youth who are particularly vulnerable to climate change, contrary to s. 15 of the *Charter*. Canada has not pled that the alleged *Charter* breaches could be justified under s. 1 of the *Charter*.

13. The appellants also claim that the Crown's conduct breaches its public trust duties to protect public rights to use and benefit from certain resources that are fundamental to human life and liberties, especially in an era of climate change.[11] Canada has not pled that its common law duty to protect these public resources has been extinguished by legislation.

C. The Motions Judge's Reasons

14. The Motions Judge found that the *Charter* claims are not justiciable because they are too "political".[12] This was based on two reasons: the breadth and diffuse nature of the conduct impugned by the claim, and the remedies sought.[13] The Motions Judge found that the pleadings disclosed no reasonable s. 7 or s. 15 *Charter* claim for substantially the same reasons as he found the *Charter* claims to be non-justiciable.

15. The Motions Judge held that the existence of a public trust doctrine at common law or as an unwritten constitutional principle was a justiciable question, but that the appellants' public trust claims were doomed to fail because "the public trust doctrine is a concept that Canadian courts have consistently failed to recognize. It does not exist in Canadian law."[14] Further, he held that, the appellants did not plead material facts to support their public trust claims.

PART II. STATEMENT OF POINTS IN ISSUE

16. Did the Motions Judge err in: (a) finding that the *Charter* claims were non-justiciable; (b) finding that the *Charter* claims disclosed no reasonable cause of action; and (c) finding that the public trust claims disclosed no reasonable cause of action?

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[11] Statement of Claim, ¶¶238-48, AB 110-14
[12] Reasons, ¶40, AB 19
[13] Reasons, ¶41, AB 20
[14] Reasons, ¶93, AB 38

PART III. STATEMENT OF SUBMISSIONS

A. Standard of Review

17. The Motions Judge's decision must be reviewed with the correctness standard. A decision to grant a motion to strike is discretionary, and is subject to the *Housen v Nikolaisen* standard of review.[15] The Motions Judge did not make any findings of fact or weigh any evidence. The errors alleged are all errors of law.

B. The Motions Judge Erred in Finding the *Charter* Claims Non-justiciable

i. Introduction

18. The Motions Judge's holding that the appellants' constitutional claims are not justiciable was grounded in his characterization of the claims as a challenge to a "public policy approach" and not to state action subject to *Charter* scrutiny. This is a fundamental error. The "Impugned Conduct" challenged in the claim, which leads to GHG emissions continuing at unsafe levels, is all state action that must comply with the Constitution. The claim addresses a range of government conduct because the harm suffered by the appellants arises from the cumulative effect of GHG emissions from a variety of sources – that is the nature of the problem of climate change. But that does not mean that the appellants are challenging the "wisdom" of an overall policy rather than the constitutionality of state conduct. The appellants' claim raises a discrete legal question that only the Courts can answer: does the Constitution constrain the federal government from acting in a manner that endangers children and youth through continuing GHG emissions at a level incompatible with a stable climate?

ii. The Motions Judge erred in finding the claim is a challenge to a policy that had not yet crystallized into state action

19. The Motions Judge characterized the claim as being about the Crown's "holistic policy response to climate change."[16] He suggested that the "crystallization" of this response into a "justiciable question", through translation into "law or state action", had

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[15] *Canada (Public Safety and Emergency Preparedness) v Gregory,* 2021 FCA 33, ¶7, citing *Housen v Nikolaisen*, 2002 SCC 33

[16] Reasons, ¶40, AB 19

not occurred.[17] As a result, he held that the claim was "so political" that the Court is "incapable" or "unsuited" to deal with it.[18]

20. In fact, the government's "approach" to GHG emissions has been "crystallized" or translated into state action in a variety of ways. The Impugned Conduct discussed in the Claim at ¶¶45-51, consisting of specific examples of how Canada causes, contributes to or allows GHG emissions in excess of what is consistent with a Stable Climate System, is all state action for the purposes of s. 32 of the *Charter*. Indeed the Motions Judge, in some portions of his analysis, acknowledges the claim does target state action.[19]

21. There is no "political question" doctrine in Canada.[20] Justiciability is not about assessing how far-reaching the political or societal ramifications of the resolution of a claim may be. The question is whether there is "a sufficient legal component to warrant intervention of the judicial branch."[21] A claim that raises only political issues, such as the wisdom of laws or policy, is not justiciable. But a challenge based on the conflict between state action and a state's legal obligation is always justiciable.

22. Where the constitutionality of state action or *Charter* rights are at issue, there is an *obligation* on the Court to address the claim.[22] Abdicating the Court's obligation to address a violation of *Charter* rights simply because it raises issues of significant societal concern or implicates a wide array of government action is contrary to the principle of constitutionalism and undermines the guarantee of constitutional supremacy.[23] As Justice

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[17] Reasons, ¶¶36-38, 40, AB 17-19
[18] Reasons, ¶40, AB 19
[19] Reasons, ¶¶42, 44, 46, AB 20-22
[20] Hogg, *Constitutional Law of Canada*, 5th ed. (loose-leaf), s. 36.6; *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec Secession Reference*], ¶27; *Operation Dismantle v The Queen*, [1985] 1 SCR 441 [*Operation Dismantle*], at 471j
[21] *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, at 545c
[22] *Operation Dismantle*, at 472h; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*], ¶107; *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, ¶67; *Mathur v Ontario*, 2020 ONSC 6918 [*Mathur*], ¶¶126-29; see also Lynda Collins & Lorne Sossin, "Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 *UBC L. Rev.* 293 at 308
[23] *Quebec Secession Reference*, ¶72

Wilson held in *Operation Dismantle*:

> .... 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. … I do not think it is open to [the Court] to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question"...[24]

23. The Motions Judge in this case, with respect, succumbed to the "temptation" that Wilson J. warned about. The appellants do not ask whether Canada's conduct with respect to GHG emissions is sound, but whether it violates the appellants' *Charter* rights. The Motions Judge erred by transforming this basic legal question into a political one.

24. Canadian courts have routinely weighed in on legal issues that may be perceived by some as political. The Motions Judge relied on *Chaoulli*, *PHS*, *Bedford* and *Carter*[25] but these are all cases in which the claims *were* justiciable and indeed successful. As in *PHS,* climate change is a complex issue which "attracts a variety of social, political, scientific and moral reactions."[26] Importantly, and as acknowledged by the Motions Judge, the appellants do not ask the Court to tell the Crown what measures to adopt to address climate change.[27] Thus, like *PHS*, this claim is not about whether the Crown's approach to climate change is good policy, but whether the Crown's action, which results in high levels of GHG emissions infringes the *Charter* rights of the appellants.

25. As the Supreme Court of Canada held in *Vriend*, the introduction of the *Charter* and

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[24] *Operation Dismantle*, at 471j [underlining in original; bold emphasis added]. See also Hogg, s. 36.6.
[25] *Chaoulli*, ¶107; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [*PHS*], ¶105; *Canada (Attorney General) v Bedford*, 2013 SCC 72, ¶5; *Carter v Canada (Attorney General)*, 2015 SCC 5, ¶98
[26] *PHS*, ¶105
[27] Reasons, ¶55, AB 25

the consequential remedial role of the courts was a choice of the Canadian people as part of a redefinition of our democracy. Since that time, the legislatures and executive must act in accordance with the *Charter* rights of the populace, and courts must scrutinize that work as part of their role as the trustee of those rights.[28] Courts do not overstep their function when they assess the constitutionality of state conduct, such as the conduct at issue in this case. The fact that the government action at issue is so widespread does not put it beyond the reach of the court. To the contrary, the pervasive nature of the government conduct makes it especially critical that the court fulfill its role.

iii. The Motions Judge's decision means the justiciability of Canada's conduct depends on the form, rather than the substance, of Canada's actions

26. Under the Motions Judge's analysis, if Canada had passed one piece of legislation (or perhaps two or three) setting out a target for GHG emissions, that legislation could presumably be challenged because it would have "crystallized" Canada's "overall policy" into one specific law. That is exactly what occurred in the *Mathur* case, where an Ontario court correctly refused to strike a claim that challenged legislation which set emissions targets as being contrary to ss. 7 and 15 of the *Charter*.

27. To permit a challenge to overarching legislation, while striking the appellants' claim, would be to deny the appellants their day in court entirely on a matter of form, not substance.[29] That is a critical error. Since the harms that arise from GHGs depend on their *cumulative* impact, the appellants' injuries are properly attributable to GHG emissions as a whole.[30] Thus the substance of the claim is the same regardless of whether Canada explicitly contemplates GHG emissions up to a certain limit pursuant to a single law (as in *Mathur*) or if it simply causes or enables excess GHG emissions without adverting to a specific limit. In either case, the *Charter* breach arises from Canada's actions in continuing to cause or enable total GHG emissions at a level inconsistent with a stable climate.

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[28] *Vriend v Alberta*, [1998] 1 SCR 493, ¶¶134-35
[29] Colin Feasby, David deVlieger and Matthew Huys, "Climate Change and the Right to a Healthy Environment in the Canadian Constitution", (2020) 58-2 *Alta L. Rev.* 213 [Feasby et al. "Climate Change"], at 248
[30] Statement of Claim, ¶32, AB 56

28. The justiciability of the constitutional claims cannot turn on whether the government has chosen to legislate a target or just continues emissions at unsafe levels. It is illogical to hold that jurisdictions that have enacted overarching climate change legislation and limits to GHG emissions are subject to *Charter* scrutiny, but governments that fail to do so will escape *Charter* review.

29. Such result is not only absurd, but is also irreconcilable with the Motions Judge's acceptance that there were special circumstances that would allow the positive rights aspect of the appellants' claim to proceed.[31] In such a case, it cannot be fatal that the appellants do not identify one overarching law that constitutes the impugned state action. It is, in part, a failure to act that is at issue.

30. The Motions Judge erred in finding that because Canada uses a variety of legal instruments when it causes and contributes to GHG emissions, its conduct is shielded from *Charter* review. It does not matter whether Canada causes, contributes to, or allows those emissions under one statute or a hundred statutes; Canada is still responsible for them. The legal question is the same: does the government breach *Charter* rights when its acts and omissions lead to total GHG levels in excess of what is consistent with a Stable Climate System? It cannot be that the appellants have to wait for Canada to legislate an emissions target to have that question resolved.

iv. The Motions Judge should have found that the appellants' claim could proceed because it is based on the application of a judicially discoverable standard to a single element of the impugned Crown conduct

31. The difficulty that may be associated with challenging state action that is crystallized in a variety of statutes, instead of just one or two, has to do with whether the claim is judicially manageable. The Motions Judge acknowledged, as did the Court in *Tanudjaja*,[32] that challenges to a network of laws will be able to proceed in some circumstances. There is not some set number of laws which can be challenged at one time. Rather, the question is whether the claim can be appropriately dealt with by the court in a single proceeding.

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[31] Reasons, ¶¶65-72, AB 28-31
[32] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja*], ¶29

This will depend on whether: (a) the various forms of state conduct are being challenged on a single basis; (b) there is a judicially discoverable standard by which to measure the conduct; and (c) whether there is some reason why individual challenges are not feasible.

32. First, the appellants challenge only one aspect of the various forms of state conduct at issue – whether Canada's cumulative GHG emissions are too high to be consistent with its constitutional obligations. While undoubtedly GHG emissions do stem from a broad and diffuse number of sources, the appellants' claim is focussed on the Crown's failure to discharge one single, discrete duty – to ensure that Canada's *total* emissions do not cause the appellants harm by exceeding a level consistent with a Stable Climate System. Whether that is a breach of the *Charter* can be decided without assessing the constitutionality of each law or policy which results in GHG emissions because it is the *cumulative* effects of such laws and policies that cause the harm.

33. Second, the appellants' claim involves the application of a judicially discoverable and manageable standard (the level of emissions consistent with a stable climate) to a single number – the total emissions for which Canada is responsible. This case is distinguishable from *Tanudjaja* where there was no objective standard to measure the constitutionality of state conduct.[33] Here, the state's obligation to limit GHG emissions to avoid catastrophic climate change can be judged against quantifiable standards demonstrated through scientific evidence. The GHG emissions a government is responsible for are "clearly measurable".[34] The Court in *Mathur* accepted that what constitutes a "science-based GHG reduction target", and a "stable climate system" can be established through expert evidence in a trial on the merits as they are based on a globally-recognized body of science.[35]

34. The same applies in this case. The appellants are not asking the Court to rule on something amorphous and infused with subjective considerations such as whether the

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[33] *Tanudjaja*, ¶33
[34] *GGPPA Reference*, ¶188; Nathalie J. Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The *Charter*'s Section 15(1) Equality Guarantee and Youth-Led Climate Litigation" (2021) 17:1 J. Law. & Eq. 1 ("Coming of Age"), at 39-40
[35] *Mathur*, ¶123

government has given "insufficient priority" to homelessness.[36] The constitutionality of Canada's conduct with respect to GHG emissions can be assessed through the application of objective, science-based, and measurable standards.[37]

35. Finally, this case is further distinguishable from *Tanudjaja* because of the third factor set out above. In the absence of a national legislated target, the claim must be framed in systemic terms or it risks being evasive of review.[38] Any one instance of government conduct that contributes to climate change will itself only generate a small amount of GHG emissions. Therefore, the claim is necessarily framed in systemic terms.

36. Even if individual challenges were legally tenable, they are not feasible. The threat of climate change is urgent. The appellants do not have the luxury of time to take an incremental approach and challenge one state act, omission or law at a time. Moreover, requiring the appellants to challenge Canada's conduct in a piecemeal fashion would frustrate their access to justice, placing an impossible burden on appellants to obtain the resources to challenge Canada's role in contributing to GHG emissions one claim at a time. Access to justice is relevant to justiciability, especially in *Charter* litigation.[39] By dismissing the claim, the Motions Judge leaves the appellants with the impossible task of challenging Canada's conduct in a piecemeal fashion.

37. The claim differs from the archetypal *Charter* case due to its systemic reach, but it must be framed in this manner because of the unique nature of climate change. This is not fatal because the claim is nevertheless judicially manageable and based on discoverable standards, and no other approach is available to effectively challenge Canada's actions and omissions that cause the appellants' harm. The Motions Judge erred when he dismissed the claim without having regard to these considerations.

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[36] *Tanudjaja*, ¶19

[37] Even the most complicated and socially charged questions like what constitutes a reasonable wait time for healthcare can be determined with the proper evidence: see e.g. *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2020 BCSC 1310, ¶¶8-10, 1736-1806

[38] *Tanudjaja*, ¶29; *Mathur*, ¶119. The Motions Judge failed to respond to this argument. See Reasons, ¶48, AB 22.

[39] Gerald J. Kennedy & Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017), 45 *Fed. L. Rev.* 707 at 723

v. The decision is inconsistent with case law from Canada and around the world

38. Many cases have held that the question of whether there are constitutional constraints on government conduct relating to the cumulative amount of GHG emissions is justiciable, even though the sources of GHG are broad and diffuse and even though questions about *how* to achieve GHG reductions is one that must be left to the legislature. The Motions Judge's holding is also contrary to a large body of academic commentary on the justiciability doctrine.[40]

39. The Motions Judge found the *Youth Environment* case to be unpersuasive because of the differences in the breadth of conduct challenged,[41] but the cases are not distinguishable on that basis. Both involve allegations that Canada has infringed the rights of youths by generating a disproportionate amount of GHG emissions.[42]

40. The Motions Judge's reliance on *Friends of the Earth* suggests that he did not appreciate the significance of the constitutional nature of the case at bar.[43] *Friends of the Earth* was a judicial review involving the statutory interpretation of the *Kyoto Protocol Implementation Act*. Because of the language of the act, the Court found Parliament's intent was that the content of a climate change plan would not be subject to judicial scrutiny.[44] The Court made clear that the case was not a constitutional one.[45]

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[40] Coming of Age, at 47-48, 52-54; Feasby et al. "Climate Change" at 248; Nathalie J. Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42:1 *Vt L. Rev.* 689 at 753-57; Hugh S. Wilkins, "The Justiciability of Climate Change: A Comparison of US and Canadian Approaches" (2011) 34:2 *Dal L. J.* 529 at 549-50, 552; Andrew Stobo Sniderman & Adam Shedletzky, "Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy", (2014) 4:2 online: *UWO J Leg Stud* 1 at 3-4

[41] Reasons, ¶47, AB 22

[42] *Environnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885 [*Youth Environment*], ¶¶8-15

[43] *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 [*FOE*], ¶¶34-36, aff'd 2009 FCA 297. See *Mathur*, ¶135 questioning the correctness of *FOE*

[44] *FOE*, ¶¶31, 34

[45] *FOE*, ¶40. See also *Mathur*, ¶139; *Turp v Canada (Justice)*, 2012 FC 893, ¶18

41. *Mathur* was released after the Motions Judge's decision. It decided that a case brought by youths alleging a breach of *Charter* rights, due to Ontario's contribution to climate change from a myriad of Ontario's decisions, programs, and conduct could proceed.[46] The Court in *Mathur* distinguished the case at bar because *Mathur* identified a single piece of legislation. But as discussed above, this cannot be determinative. If it is, the appellants' case will become justiciable as soon as Canada adopts a legislated target. That is not a principled approach.

42. The Motions Judge's ruling is also inconsistent with decisions from around the world. This jurisprudence, including the leading case of *Urgenda*, was completely ignored by the Motions Judge. Since the Motion Judge's decision, *Urgenda*, has been noted and endorsed by the Supreme Court of Canada.[47] In *Urgenda*, the Netherlands Supreme Court held that the Netherlands was required to reduce GHG emissions to 25% below 1990 levels by 2020. There too it was argued that climate change was in the "political domain". The Court dismissed this argument holding that while authority over GHG emissions reductions was vested in government and parliament, and was one over which they possessed a "large degree of discretion", it was nevertheless "up to the courts to decide whether, in availing themselves of [that] discretion, the government and parliament have remained within the limits of the law by which they are bound."[48]

43. A number of other international decisions released before and since the Motions Judge's decision have recognized the importance of holding governments legally accountable for their GHG emissions, including by assessing the constitutionality of a government's conduct in relation to GHGs.[49] Most recently, the German Federal

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[46] *Mathur*, ¶119
[47] *GGPPA Reference*, ¶189; Coming of Age, at 47-48, 52-54
[48] *State of Netherlands (Ministry of Economic of Affairs and Climate Policy) and Stichting Urgenda*, ECLI:NL:HR:2019:2007 [*Urgenda*], ¶8.3.2
[49] *Urgenda*; *Gloucester Resources Limited v Minister of Planning*, [2019] NSWLEC 7; *Friends of the Irish Environment v Government of Ireland*, [2020] IESC 49; *Notre Affaire à Tous and Others v France*, TA Paris 14 (Feb. 3, 2021), No. 1904967, 1904968, 1904972, 1904976/4-1; *DG Khan Cement Co Ltd v Government of Punjab through its Chief Secretary*, Pakistan CA, No. C.P. 1290-L/2019 (April 15, 2021); BVerfG, Decision of the First Senate of March 24, 2021, 1 BvR 2656/18, Rn. 1-270

Constitutional Court held that the state's conduct in allowing high levels of GHG emissions through 2030 and insufficiently defining GHG emission reductions beyond 2030 was a violation of the rights of future generations. These cases demonstrate that the extent of a government's contribution to climate change is measurable and can be manageably reviewed by judges. There is no reason why Canada's constitutional framework should be interpreted as less robust or less capable of holding the federal government responsible for its part in responding to the global threat of climate change.

vi. The remedies sought are within the institutional capacity of the Court

44. The Motions Judge's findings on remedies were coloured by his prior holding that the claim was too broad and diffuse.[50] These findings are also premature and interfere with the "principled discretion" that trial judges should have to craft remedies that ensure the effective protection of *Charter* rights.[51] The appropriate remedy must be determined by a trial judge based on the evidence and in a manner that is responsive to the breaches that are found.

45. Focusing on remedies to determine justiciability places "undue and unwise limits on judicial oversight."[52] The claim should not be struck in its entirety even if some of the remedies sought may exceed the court's institutional capacity.[53] Remedies are often amended throughout a proceeding as the litigation develops, sometimes even during trial.

46. The Motions Judge did not address the test as to whether declaratory relief is appropriate and just under s. 24(1) of the *Charter*, including whether the remedy meaningfully vindicates the rights of the claimants.[54] Declarations of law that may not affect past conduct may still be useful in providing governments guidance for the future

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[50] Reasons, ¶50, AB 23
[51] *Ontario (Attorney General) v G*, 2020 SCC 38, ¶¶90-99
[52] Lorne Sossin, "The Unfinished Project of *Roncarelli*: Justiciability, Discretion and the Limits of the Rule of Law" (2010) 55:3 *McGill LJ* 661 at 686
[53] *Mathur*, ¶259
[54] *Vancouver (City) v Ward*, 2010 SCC 27, ¶¶20, 37; *Ewert v Canada*, 2018 SCC 30 [*Ewert*], ¶¶81, 88; *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2010 FC 1233, ¶¶167-252, substantially aff'd, 2012 FCA 40; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 [*BCCLA*], ¶267

and go some way to restore a claimant's dignity by acknowledging that their rights are violated.[55] Declarations address harms because of the presumption that governments will comply promptly and fully, recognizing that there is substantial leeway for governments to determine how best to ensure its conduct is in constitutional compliance.[56]

47. Given the unique circumstances of this case – the existential nature of the threat and the urgency of the situation, it may very well be that bare declarations will not be sufficient to satisfy the goals of s. 24(1). Hence the appellants claim additional relief. The Motions Judge offers contradictory criticisms of these orders: saying on the one hand that they are meaningless and devoid of content and on the other hand that they prescribe too much content and thereby intrude on the other branches of government.[57]

48. There is nothing about these remedies that justifies striking them in a preliminary motion and depriving a trial court of the extraordinarily wide discretion it would otherwise enjoy under s. 24(1).[58] *Doucet-Boudreau* does not limit unconventional or novel remedies to s. 23 of the *Charter*.[59] The Court is not being asked to prescribe *how* Canada should achieve emissions consistent with a stable climate. The relief sought respects the separation of powers by leaving Canada to determine the best means for meeting its constitutional duties.[60]

C. The *Charter* Claims Are Not Bound to Fail

49. The Motions Judge found that there is no reasonable prospect of success for the s. 7

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[55] See e.g. *Ewert*, ¶88; *BCCLA*, ¶267; *Operation Dismantle*, at 457d, citing *Solosky v The Queen*, [1980] 1 SCR 821; *A.H. v Fraser Health Authority*, 2019 BCSC 227 [*A.H.*], ¶176
[56] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*], ¶62; *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21, ¶65; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, ¶¶95-96; *Mahe v Alberta*, [1990] 1 SCR 342, at 392-93; *A.H.*, ¶176; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, ¶47
[57] Reasons, ¶55, AB 25
[58] *Doucet-Boudreau*, ¶52
[59] See e.g. *Williams v London Police Services Board*, 2019 ONSC 227 [*Williams*], ¶¶50-58; *Canada (Attorney General) v Jodhan*, 2012 FCA 161, ¶¶165-84; *Mathur*, ¶259
[60] See e.g. *Ardoch Algonquin First Nation v Canada (Attorney General)*, 2003 FCA 473, ¶47; see also *Urgenda*, ¶8.2.7

claim to succeed for the same reason that he found the claim was not justiciable – namely, that the claim is too broad and diffuse. Just as his finding of justiciability is in error, therefore, so too is his finding that there is no reasonable s. 7 claim.

50. The Motions Judge found that there is no reasonable cause of action under s. 15 of the *Charter* because the appellants did not pinpoint a "law" that was the source of the alleged discrimination. While the Motions Judge stated that s. 15 can apply to government action in a variety of forms, and not just legislation, he held that legislation must nevertheless be the source of the discriminatory distinction.[61]

51. This is a clear error of law. Section 15 does not require a statute to be the source of the discriminatory conduct.[62] As long as the discriminatory *impact* stems from *state action*, there can be a s. 15 claim. Indeed, in systemic and adverse discrimination situations, which the Supreme Court of Canada has recognized as the more prevalent kind of discrimination, there is often a combination of neutral practices, attitudes, policies, and procedures which create the discriminatory impact.[63] As in *Mathur*, the appellants intend to prove that the Crown's actions will have a disproportionate impact on youth and future generations by putting them at an increased risk of harm due to their age and Indigeneity.[64] The Supreme Court of Canada has noted the disproportionate impacts of climate change to Indigenous peoples.[65] The s. 15 claim is not bound to fail.

D. The Motions Judge Erred in Concluding that the Appellants' Public Trust Claims Should be Struck

52. The Motions Judge struck the public trust claims on the basis that the appellants failed to show that Canadian caselaw recognizes the existence of "the public trust doctrine" in

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[61] Reasons, ¶77, AB 32
[62] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, ¶¶108-41. The headnote summarizes this point succinctly: "The source of the s. 15(1) *Charter* violation is not the Customs legislation itself." e.g. *BCCLA*; *Williams*; see also Coming of Age, at 47-48
[63] *Fraser v Canada (Attorney General)*, 2020 SCC 28, ¶35; *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 at 613-14
[64] *Mathur*, ¶189
[65] *GGPPA Reference*, ¶¶11-12, 187, 206

Canada. This was an error. The real question before the Motions Judge was whether the appellants could establish at trial that the Crown had breached its duty to protect public trust resources in the particular context of climate change. There is a long history of cases in Canada affirming public rights and correlative Crown's duties in relation to such resources. The burden was on the Crown to show it was plain and obvious that these cases could not provide a foundation for the appellants' public trust claims. The appellants were under no burden to show that "the public trust doctrine", as recognized in U.S. caselaw,[66] is part of or should be imported into Canadian law. Accordingly, the Crown's motion to strike should have been tested against the appellants' claims with the respect to these public trust resources, regardless of whether the various public rights and Crown duties they have pleaded are collectively recognized as "the public trust doctrine."

53. Accordingly, the Motions Judge erred as follows: (i) by concluding that the status of the public trust doctrine in Canadian law was determinative of the motion to strike; (ii) by, in any event, concluding that the public trust doctrine does not exist in Canadian law; and (iii) in failing to consider whether the appellants have pleaded a reasonable cause of action based on common law public rights and Crown trust duties.

i. The Motions Judge erred by concluding that the status of the public trust doctrine in Canadian law was determinative of the motion to strike

54. The appellants' public trust claims do not depend on whether "the public trust doctrine", as recognized in U.S. caselaw, exists in Canadian law. Whether such a doctrine exists in Canadian law is a very different question from the one properly before the Motions Judge – namely, whether it was plain and obvious that the appellants' public trust claims were doomed to fail.

55. The appellants' claims are founded upon public trust rights and Crown duties that attach to certain resources that are by their nature common and inherently public.[67] They plead that the Crown is under a duty to preserve and protect these resources, upon which

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[66] Waters, Donovan W.M. ed., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at 602-03

[67] Statement of Claim, ¶¶238-48, AB 110-14

human life and liberties rely. All the resources they so identify (defined in the claim as "Public Trust Resources") fall within federal ownership and/or jurisdiction. They claim that the Crown's duty as trustee to protect these Public Trust Resources arises at common law and is an unwritten constitutional principle. They also claim that, through the Impugned Conduct, the Crown has breached its public trust duties.

56. The Crown does not deny that these Public Trust Resources are, at least in part, within federal ownership and/or jurisdiction.[68] Nor does it claim that the Crown's duties with respect to these Public Trust Resources have been extinguished by statute. Nor does it allege that the appellants failed to plead material facts in support of their public trust claim. The main thrust of the Crown's argument – and the decision of the Motions Judge – is that "the public trust doctrine" has not been recognized and does not exist in Canadian law.[69]

57. The Motions Judge held he was "unconvinced" that these claims should proceed because the appellants have failed to show that "the public trust doctrine", a concept that he says "Canadian courts have consistently failed to recognize", exists in Canadian law.[70] Ultimately, he held that the doctrine "does not exist in Canadian law" and therefore there is no "legal foundation" for the appellants' claim.[71]

58. Whether "the public trust doctrine" exists in Canadian law is not dispositive of the motion. What matters is whether it is plain and obvious that the public rights and Crown duties in part or in whole as pleaded by the appellants disclose a reasonable cause of action.[72] On a motion to strike, it is the "substance of the pleadings" rather than the "legal labels" that are used to describe the cause of action that are determinative.[73]

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[68] Statement of Defence, ¶¶107-08, AB 154-55
[69] Statement of Defence, ¶107, AB 155
[70] Reasons ¶93, AB 38
[71] Reasons ¶87, AB 35
[72] *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980; *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, ¶17; *Nevsun Resources Ltd. v Araya*, 2020 SCC 5, ¶¶64-132; *Paradis Honey Ltd. v Canada*, 2015 FCA 89 [*Paradis Honey*], ¶117, leave to SCC refused 2015 CanLII 69423
[73] *Paradis Honey*, ¶114

59. The appellants' pleadings do not rely on the existence of "the public trust doctrine", as recognized in U.S. law or otherwise. Rather, their claim is based on stand-alone public rights and Crown duties that exist regardless of whether collectively these rights and duties constitute an organizing principle[74] or overarching doctrine. The trial judge in this matter may or may not choose to opine on the existence of "*a*" or "*the*" public trust doctrine. Adjudication of appellants' claims at trial does not require such a determination. And it was unnecessary and premature for the Motions Judge to decide the issue.[75]

60. The Motions Judge further erred in ruling that the appellants failed to plead material facts to support a claim based on "the public trust doctrine", since this doctrine was not the basis of their claim. In any event, having pleaded without registering objection, the Crown is now foreclosed from relying on this alleged deficiency as a basis for upholding the Motions Judge's decision.[76] Further, the Statement of Claim readily satisfies the legal standard set out in *Mancuso*.[77] It includes all the material facts that identify who, when, where, how and what gave rise to the Crown's liability, and the Crown has not suggested otherwise. Lastly, the Motions Judge held that the appellants had failed to plead the material facts to support the Crown's public trust duties as an unwritten constitutional principle.[78] Whether these legal duties constitute an unwritten constitutional principle is a matter of law, not a pleading of fact.[79]

ii. The Motions Judge erred by concluding that the public trust doctrine does not exist in Canadian law

61. The Motions Judge also erred in concluding that the public trust doctrine "does not

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[74] See *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin*]

[75] Instead the appellants invited him to remit the matter to trial with respect to this issue *inter alia* "to assess the existence of and the boundaries" of such a doctrine, and allow them to "make their case about how this *sui generis* doctrine may apply in the specific and unprecedented context of climate change.": Reasons, ¶85, AB 35

[76] *Paradis Honey*, ¶153

[77] *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, ¶19

[78] Reasons, ¶98, AB 39

[79] See *British Columbia (Attorney General) v Christie*, 2007 SCC 21, ¶28; see also, *Quebec Succession Reference*; see also, McLachlin, The Rt. Hon. Beverley. "Unwritten Constitutional Principles: What is going on?" (2006) 4 *N.Z. J. Pub. & Int'l L.* 147

exist in Canadian law." This conclusion is unprecedented: no Canadian court has ever before held that the "public trust doctrine" does *not* exist. Indeed, in *Canfor* the Supreme Court of Canada quite deliberately left open this very question,[80] as has this Court.[81] Both courts are agnostic as to whether "*the* public trust doctrine", as recognized in U.S. caselaw, is part of or should be imported into Canadian law. Moreover, neither has prejudged the potential that "*a* public trust doctrine" may be recognized in Canadian law.

62. A key reason why the Court in *Canfor* declined to grapple with the status of the public trust doctrine within Canadian law was that answering this question required the Court to grapple first with a series of "important and novel policy questions."[82] In the Court's view, the "groundwork" necessary to tackle these questions had not been done.[83]

63. While *obiter*, the reasons of the majority in *Canfor* are persuasive and deserve respect.[84] They confirm that public rights and Crown duties in relation to public trust resources are deeply embedded in our legal DNA. They confirm that surrounding these public rights and Crown duties are "important and novel" questions.[85] They confirm that "groundwork" needs to be done to consider and provide answers to these questions before the status of a public trust doctrine and related concepts such as *parens patriae* can be judicially determined. And they confirm that this groundwork must be done based on a proper legal and evidentiary record.

64. In summary, the Motions Judge erred by prematurely deciding whether "the public trust doctrine" exists within Canadian law. For the same reasons the court did so in *Canfor*, he ought to have deferred the answer to that question to future courts to allow the appropriate groundwork for that determination to be undertaken.

iii. The Motions Judge erred in failing to consider whether the appellants have pleaded a reasonable cause of action based on common law

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[80] *British Columbia v Canadian Forest Products Ltd.*, 2004 SCC 38 [*Canfor*], ¶¶81-82
[81] *Burns Bog Conservation Society v Canada*, 2014 FCA 170, ¶44
[82] *Canfor*, ¶81
[83] *Canfor*, ¶82
[84] *R v Henry*, 2005 SCC 76, ¶57
[85] *Canfor*, ¶81

public rights and Crown trust duties

65. By focussing solely on the question of whether "the public trust doctrine" exists within Canadian law, the Motions Judge failed to turn his mind to the essential question on the motion – whether the appellants' pleadings asserting public rights and Crown duties in relation to Public Trust Resources disclose a reasonable cause of action.

66. Properly understood, the appellants' claims both rely on well-established common law rights and Crown duties and, to the extent that they "extend" the common law, do so in a manner that is consistent with the prudential standard set out in *Paradis Honey*. At a minimum, and in any event, the Crown has not shown it is plain and obvious that the appellants' claims are inconsistent with that standard.

1. The appellants' public trust claims build on a well-established common law foundation of public trust-related rights

67. The public rights relied on by the appellants have been part of Canadian legal tradition since pre-Confederation times. Indeed, as discussed in *Canfor*, they form part of a legal tradition that extends back to Roman and English law. Many of the leading Canadian cases were decided shortly before or soon after Confederation.[86]

68. Justice Binnie's judgment in *Canfor* provides a helpful historical roadmap. He described how the concept of "public rights in the environment" residing in the Crown as trustee goes back to Roman law, where the *Institutes of Justinian* provided that "[b]y the law of nature these things are common to mankind – the air, running water, the sea."[87] He also opined that similar notions are deeply rooted in European legal systems, including the French *Civil Code*, in relation to public resources such as navigable rivers and streams, beaches, ports and harbours.[88]

69. In 13th century England, public trust rights were further developed by Henry de Bracton in his seminal work *De Legibus et Consuetudinibus Angliae* (*On the Laws and*

[86] See cases discussed in ¶¶72-78
[87] *Canfor*, ¶74
[88] *Canfor*, ¶75

Customs of England). This work drew heavily on the Roman concept of common property as decreed in the *Institutes* to explain and recognize public rights in England in the sea and seashore for fishing and navigation.[89]

70. De Bracton's work was elaborated upon by Sir Matthew Hale who introduced the theory of *jus publicum* into common law.[90] According to Hale, while the Crown enjoys a form of private title or ownership over certain common resources (*jus privatum*) and may alienate that interest, it is constrained from acting in a manner that would prejudice the public rights to access and use that resource (*jus publicum*). The *jus publicum* cannot be destroyed or alienated and the Crown is entrusted to protect the *jus publicum* for the benefit of current and future citizens.

71. When English common law was received in British North America, courts continued to develop and extend the common law of public rights. The first North American case to introduce the term "public trust" was an 1842 decision of the U.S. Supreme Court in *Martin v Waddell*, which held that the government's title over "the shores and rivers and bays and arms of the sea and the land under them [were held] as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery."[91]

72. During this period, Canadian courts also began to rely on the public trust concept, in some instances, expanding public trust rights beyond what had existed at English common law. For instance, in a 1853 decision *The Queen v Meyers* it was held that "streams which are in fact navigable, and which empty into them in these provinces, must be regarded as vested in the Crown in trust for the public uses for which nature intended them."[92]

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[89] Lynda L. Butler, "The Commons Concept – An Historical Concept with Modern Relevance" (1981) 23 *Wm. & Mary L. Rev.* 835 ("The Commons Concept"), at 858-63

[90] The Commons Concept, at 858-63

[91] *Martin v Waddell*, 41 US (16 Pet.) 367 (1842) at 413: In this case, the court held that pre-Independence Crown land grant did not defeat the people's common right to fish along the seashore.

[92] *The Queen v Meyers* (1853), 3 UCCP 305 (Upper Canada Court of Common Pleas) at 357 *per* McLean concurring. Significantly, *Meyers* held that in Canada, unlike in England, public rights of navigation exist even in non-tidal waters, a question revisited and confirmed in *Fort George Lumber Co. v Grand Trunk Pacific Ry.* (1915), 24 DLR 527 (BCSC) [*Fort George Lumber*].

73. The nature and origins of these public trust rights, as judicially understood at this juncture, is aptly captured in *R. v Lord*, an 1864 judgment of the PEI Supreme Court:

> The right of property in the sea, and the soil at the bottom, and also in the land between high and low water marks, is in the Sovereign, but, though the **King has the property, the people have the necessary use**.… These public rights are said to exist of common right, which is only another epithet for Common **Law**. With respect to these public rights, viz., navigation and fishery, the King is, in fact, nothing more than a **trustee of the public**, and has no authority to obstruct, or grant to others any right to obstruct, or abridge the public in the free enjoyment of them. But subject to these public rights the King may grant the soil of the shore and all the private rights of the Crown with it. Yet, until he does so, he holds the soil clothed with the ***jus publicum***, and while the soil thus remains the King's, no unnecessary or injurious restraint upon the public, in the use of the shore, would be imposed by the King, the *parens patriae*.[93]

74. Following Confederation there was a flurry of public rights cases including a trio of cases decided between 1913 and 1916.[94] Most influential of these is *Reference re BC Fisheries*. At issue was whether the Province could regulate fishing rights in the open sea or tidal waters. The Supreme Court of Canada declared that these common law rights belonged to the public at large and "must so remain until the Dominion parliament signifies otherwise."[95] The Judicial Committee of the Privy Council agreed, holding that this was a right arising from "immemorial antiquity" that over time "came to be recognized as establishing a legal right enforceable in the Courts", and could not "be taken away without competent legislation."[96] This case continues to be cited with approval.[97]

75. Despite *Reference re BC Fisheries*, it remained uncertain whether in Canada there

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[93] *The Queen v Lord* (1864), 1 PEI 245 (PEI SC), ¶¶257-58 (emphasis added), a case involving an indictment for a nuisance brought against a riparian owner

[94] *British Columbia (Attorney General) v Canada (Attorney General)* (1913), [1914] AC 153 (PC) [*Reference re BC Fisheries* (PC)], affirming (1913), 11 DLR 255 (SCC) [*Reference re BC Fisheries* (SCC)]; *Fort George Lumber*; *Re JF Brown & Co Ltd and City of Toronto* (1916), 29 DLR 618 (ONCA), aff'd (1917), 37 DLR 532 (SCC) [*Brown*]

[95] *Reference re BC Fisheries* (SCC), ¶2

[96] *Reference re BC Fisheries* (PC), ¶¶13, 15

[97] In *R. v Gladstone*, *Reference re BC Fisheries (PC)* was cited for the principle that "[s]ince the time of the *Magna Carta*, there has been a common law right to fish in tidal waters that can only be abrogated by enactment of competent legislation.": [1996] 2 SCR 723, ¶67

was a common law public right to navigation in non-tidal waters.[98] This question was answered in *Fort George Lumber*, which held that, with respect to non-tidal waters, Canadian law departs from that of England in recognizing that "a public right, paramount to the title of any private grantee of the Crown, if not to the Crown's title itself, has always existed to make such use as was possible of the natural waterways, nontidal and tidal, as a means of travel and transportation; in other words, that such waterways are public highways."[99] In reaching this conclusion, the BC Supreme Court noted that such an interpretation aligned with the Crown's interest in promoting exploration, settlement, travel and transportation within the "British Colonies in North America" taking judicial notice of the river's status as a "well known highway for the traders of the Hudson's Bay Co., and for early explorers."[100]

76. The third case in this early trio is the decision of the Ontario Supreme Court (App. Div.) in *Brown v Toronto*, which likewise turned on the special status of "highways" at common law. At issue was whether a municipality could construct a public work that obstructed a public highway under its sole ownership and control. Both majority judgments held that it could not. In relation to highways and streets, municipalities "have always been and are still trustees for them for the public."[101] As such, the municipality's title was a "qualified" one to be exercised as "trustees for the public."[102] The Court also opined that the "right of the public to free passage over a highway is… substantially identical in principle with the right of the public to uninterrupted passage over navigable waters."[103]

77. This same conception of public rights in relation to highways is echoed in *Burchill*.[104] Here, the Supreme Court of Canada emphasized that, while statutes may purport to convey fee simple title to highways and other public property to municipal governments, the title

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[98] In *Reference re BC Fisheries,* the SCC had opined that such rights existed, but the reasons of the JCPC were silent on the question.
[99] *Fort George Lumber*, at 529-30
[100] *Fort George Lumber*, at 532-32
[101] *Brown*, at 631 *per* Lennox J.
[102] *Brown*, at 655 *per* Masten J.
[103] *Brown*, at 655 *per* Masten J.
[104] *City of Vancouver v Burchill*, [1932] SCR 620 [*Burchill*]

conveyed is always a qualified one subservient to common law public rights.[105]

78. Well before the mid-20th century, therefore, drawing on both English and Canadian authority, key principles had emerged in our public trust caselaw: (1) public rights exist as a burden on Crown title that can only be abrogated by legislation; (2) these rights impose a trustee-like duty upon the Crown *and* its delegates; (3) these rights attach to the public's use of commonly held resources including the right to fish at sea and in tidal areas, and the right to navigate upon navigable waters, foreshores and highways; and (4) these rights are not frozen in time but rather must be interpreted and developed mindful of the social context in which they are invoked.

2. The appellants' public trust claims are responsible, incremental and rely on accepted pathways of legal reasoning

79. The history recounted above speaks to the longstanding foundations, within Roman, English and Canadian law, of the public trust rights the appellants seek to advance at trial. To the extent that the appellants' claims rest on rights of use to the territorial seas and the foreshore, the right to fish or the right to navigate upon navigable waters, foreshores and highways, these claims are well-founded on common law precedent.[106]

80. The appellants recognize, however, that their claims also invite the court to extend the common law in ways that reflect contemporary knowledge of and concern about the need to protect Public Trust Resources essential to human life and liberty that are imperilled by climate change.[107] To this extent, the Crown has failed to show it is plain and obvious that the relevant parts of the appellants' pleadings do not represent a responsible, incremental development of the common law through "accepted pathways of legal reasoning."[108]

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[105] *Burchill*, at 625-26
[106] Statement of Claim, ¶¶240(a)&(c), 241-42, 243(a), 244(a)-(c), 247(a), 248(a)&(b), in relation to navigable waters, foreshores, territorial sea, and permafrost (as public highways), AB 110-13
[107] Statement of Claim, ¶¶240(b), 241-42, 243(b)-(c), 244(d), 245-46, 247(b), 248(c)-(d), in relation to air and atmosphere, and other Public Trust Resources in their carbon sequestration and other ecological functions, AB 110-14
[108] *Paradis Honey*, ¶117

81. In applying the *Paradis Honey* test, it is critical to identify the legal pathway or pathways upon which the claim is travelling. Whether it is a recognizable one, and whether it is littered with conflicting or irreconcilable decisions helps inform a judgment as to whether the claim is responsible and incremental. In the current case, the pathway of legal reasoning stretches back in time to the very origins of our legal tradition. Not only is it a well-travelled legal pathway, it is a pathway that has lent support to judicial innovation in times past. Whether by expansively interpreting the notion of "highway" for the purposes of navigation rights, in recognizing the need in the Canadian setting to expand the definition of navigable waters beyond tidal ones, or in imposing the Crown's public trust duties upon delegate entities such as municipalities, Canadian courts have by no means approached the common law of public trust as a petrified forest.

82. It is also relevant that the appellants' claims do not conflict with any decided authority. On the contrary, many of the questions in this case are ones that the court in *Canfor* observes are "important and novel" capable of resolution only once the appropriate groundwork has been done.[109] Indeed, to the extent that public rights and Crown duties have been considered or argued in more recent cases, particularly in the motion to strike context, similar pathways of legal reasoning to those relied on here have been invoked.

83. Above we have canvassed the development of the public trust caselaw from pre-Confederation times to the 1930s. In the ensuing years, the caselaw – some of which is canvassed in *Canfor* – has continued to evolve. In two significant cases involving challenges to federal fisheries policy, public trust arguments were mounted and immediately faced motions to strike. In both cases, the courts dismissed the motions. In *Mann*, the plaintiffs relied on *Reference re BC Fisheries* to claim that changes in commercial catch quotas violated the public trust. Citing passages from that case, the court concluded the motion should fail, holding that the "excerpts satisfy me the public trust issue raises fundamental constitutional questions."[110]

84. A similar result arose in *Prince Edward Island v Canada (Minister of Fisheries &*

[109] These questions are elaborated in *Canfor*, ¶81.
[110] *Mann v Canada*, 1990 CarswellBC 1834 (BCSC in chambers), ¶28

Oceans).[111] The plaintiffs had commenced an action claiming that the cumulative effect of various government laws and actions over time was that the defendant had violated its obligations under the *Charter* and the public trust. The Crown applied to strike arguing, *inter alia*, that the matter should have been brought in Federal Court, and that the public trust claim disclosed no reasonable cause of action. The motions judge, Campbell J., dismissed both arguments. On the public trust claim, he opined:

> … involve issues regarding the fundamental character of the relationship between the government and those who are governed. In recent years, governments have been called upon to provide leadership and assume responsibility with respect to an ever-increasing range of public interests and concerns. As well, governments have been held accountable in ways never imagined a half century ago.[112]

85. After quoting from Binnie J.'s reasons in *Canfor*, Campbell J. concluded that "a beneficiary of the public interest ought to be able to claim against the government for a failure to properly protect the public interest. A right gives rise to a corresponding duty."[113]

86. A notable trend in the caselaw has been to recognize common law public trust rights in new settings particularly in relation to Crown-owned properties used by the public. In an Ontario Court of Appeal decision, relied on in *Canfor*, the Court upheld a municipality's right to seek damages for destruction of trees on the basis that "the municipality is, in a broad general sense, a trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large."[114]

87. That certain kinds of public property regularly accessed or relied on by the public can vest the Crown with special trust-like duties was also asserted in *Committee Commonwealth of Canada v Canada*.[115] In this case, Lamer C.J.C. opined that with respect to certain kinds of Crown property "government is not in the same position as a private

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[111] *Prince Edward Island v Canada (Minister of Fisheries & Oceans)*, 2005 PESCTD 57 (*PEI TD*), rev'd 2006 PESCAD 27 on grounds unrelated to the public trust
[112] *PEI TD*, ¶35
[113] *PEI TD*, ¶37
[114] *Scarborough (Borough) v R.E.F. Homes Ltd.*, 1979 CarswellOnt 1588 (ONCA), ¶5. This case was cited by both the majority in *Canfor*, ¶73, and by L'Heureux-Dubé J. in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, ¶27
[115] *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 [*Com. Commonwealth*]

owner."[116] In respect of these properties, "[t]he very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns."[117]

88. This same generous approach to public rights in relation to public property is illustrated by *Oro-Medonte (Township) v Warkentin*, where the Ontario Superior Court of Justice held that "governmental ownership of property open to the public carries no private benefit to the owner but it does carry with it the duty to deal with such property as property held for the benefit of the public and for their use."[118]

89. Also instructive to the question of "acceptable legal pathways" is how provincial and federal Crown have themselves characterized public rights and Crown duties in relation to public resources. For example, in *Walpole Island First Nation*, Canada and Ontario applied to strike an aboriginal title claim to the lake beds of Lake Erie and Georgian Bay. Canada sought dismissal of the claim on the basis that it conflicted with "the ancient and fundamental common law right of public navigation."[119] Ontario argued that the claim conflicted with the sovereign duty of the Crown, in whom "title to the Great Lakes and navigable rivers is vested" to discharge its trusteeship duties to the public.[120] While the motions judge found the Crowns' submissions "persuasive", he concluded that the plaintiffs "should have the right to develop their position in a trial."[121]

90. Which pathways are considered "acceptable" must take account of our rich and diverse legal heritage. The appellants plead that the Crown's duty to protect the integrity of these resources "reflects the multi-jural nature of the Canadian legal system including our common law, civil law and Indigenous legal traditions."[122] In *Canfor*, these civil law

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[116] *Com. Commonwealth*, at 155
[117] *Com. Commonwealth*, at 154
[118] *Oro-Medonte (Township) v Warkentin*, 2013 ONSC 1416, ¶113
[119] *Walpole Island First Nation et al. v Canada (Attorney General)*, 2004 CanLII 7793 (ONSC) [*Walpole Island First Nation*], ¶8
[120] *Walpole Island First Nation*, ¶9
[121] *Walpole Island First Nation*, ¶¶16-17
[122] Statement of Claim, ¶239, AB 110

traditions are specifically considered.[123] Indigenous legal traditions likewise deserve consideration as "acceptable pathways of legal reasoning" in helping to shape the common law as it evolves.[124] In an era of Reconciliation, Canadian courts can and must engage with these legal traditions as custodians of the common law.

91. Further, in cases where it is suggested that the common law should be developed to keep pace with the needs and interests of society, courts regularly and appropriately consider the trajectory of the common law in comparable jurisdictions.[125] An obvious comparator is the U.S. where, as in Canada, public trust rights played a key role in that nation's settlement, and have later served as a vehicle for the protection of essential natural resources including wildlife, lands and the air and the atmosphere.[126] The U.S. approach conceives of the trusteeship duties in procedural terms imposing duties to take the public trust into account in decision-making, to protect the public trust wherever feasible, and to supervise the management of public trust resources.[127]

92. In summary, in relation to those elements of the appellants' case that invite an extension of the common law, the Crown was required to show it is plain and obvious these claims are not "responsible", nor "incremental" nor pursued through "accepted pathways of legal reasoning." They failed to do so before the Motions Judge and they cannot do so here. The appellants' claims follow a well-travelled pathway that extends back to the earliest days of our legal tradition. It is a pathway along which our courts have not shied from embracing change. It is a pathway that continues to raise questions our Supreme Court deems "important and novel" and, to date, not one that has generated

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[123] Civil law traditions are regularly relied on in the development of the common law. See, *e.g. Bhasin*, where Quebec civil law was considered when deciding whether "good faith contractual performance" is an "organizing principle of common law": ¶83.
[124] Instructive examples of how courts are integrating Indigenous law into the common law include: *Takamore v Clarke*, [2012] NZSC 116; *Ellis v The Queen*, [2020] NZSC 89.
[125] See, *e.g.*, *Bhasin*, where the Court considered Roman and English law, the *Civil Code of Québec*, and U.S. and Canadian common law: ¶¶35-93.
[126] The lodestar case for public trust law in the U.S., which was cited in *Canfor*, is *Illinois Central Railroad Company v Illinois*, 146 US 387 (1892).
[127] *National Audubon Society v Superior Court of Alpine County*, 33 Cal. 3d 420 (1983). The procedural duties set out in this case have been echoed in ¶241, AB 110-11 of the Statement of Claim.

authority in conflict with the claims advanced here. It is a pathway that common law courts in other jurisdictions have and will continue to travel. And it is a pathway forward that calls upon our courts to redouble their efforts to interpret the public trust rights and Crown duties in a manner that robustly reflects the multi-jural nature of our legal system.

93. For these reasons, and given the existential nature of the climate challenge we are facing and importance of these Public Trust Resources to the outcome of that challenge, the appellants submit, to the extent that the prudential standard in *Paradis Honey* is applicable here that it is simply not plain and obvious that the standard should foreclose these claims from proceeding to trial.

E. Conclusion

94. Climate change is causing unprecedented harm to children and youth in Canada. While the claims here differ from those advanced previously under the *Charter* and public trust caselaw, this is because the claims are shaped by the unique problem being addressed. They pose a question that only courts can answer – does the law protect the appellants from climate-related harm arising from state action? Courts in Canada and around the world have permitted claims to proceed which seek to hold governments responsible for their role in contributing to this existential threat. These appellants should be allowed to test the ability of the *Charter* and the common law to protect them from Canada's conduct, conduct that Canada knows is causing them significant, serious and irreversible harm.

PART IV. ORDERS SOUGHT

95. The appellants seek an order allowing the appeal and restoring their claim, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 3, 2021

Catherine Boies Parker, Q.C., David W. Wu,
Christopher Tollefson and Anthony Ho
Solicitors for the Appellants

PART V. LIST OF AUTHORITIES

STATUTORY PROVISIONS

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APPENDIX A

***Canadian Charter of Rights and Freedoms*, ss. 1, 7, 15, 23, 24(1) and 32, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the "*Charter*"); *Charte Canadienne des Droits et Libertés*, art. 1, 7, 15, 23, 24(1) et 32, La Partie I de la *Loi Constitutionnelle de 1982*, constituant l'annexe B de la Loi de 1982 sur le *Canada (Royaume-Uni), 1982*, ch. 11**

Rights and freedoms in Canada **1** 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.	**Droits et libertes au Canada** **1** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
Life, liberty and security of person **7** 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.	**Vie, liberte et securite** **7** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
Equality before and under law and equal protection and benefit of law **15 (1)** Every individual is equal before and under the law and has the right to the 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. **Affirmative action programs** **(2)** Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**Egalite devant la loi, egalite de bénéfice et protection egale de la loi** **15 (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques. **Programmes de promotion sociale** **(2)** Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de

	leur âge ou de leurs déficiences mentales ou physiques.
Language of instruction 23 (1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province. **Continuity of language instruction** (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language. **Application where numbers warrant** (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and	**Langue d'instruction** 23 (1) Les citoyens canadiens : a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident, b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province, ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue. **Continuité d'emploi de la langue d'instruction** (2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction. **Justification par le nombre** (3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province : a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.	b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.
Enforcement of guaranteed rights and freedoms **24 (1)** 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.	**Recours en cas d'atteinte aux droits et libertes** **24 (1)** Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.
Application of Charter **32 (1)** This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. **Exception** **(2)** Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.	**Application de la charte** **32 (1)** La présente charte s'applique : a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest; b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature. **Restriction** **(2)** Par dérogation au paragraphe (1), l'article 15 n'a d'effet que trois ans après l'entrée en vigueur du présent article.