KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 175**

Date: **2025 10 10**
File No.: KBG-RG-00848-2023
Judicial Centre: Regina

BETWEEN:

SABRINA DYKSTRA, MINOR, BY HER LITIGATION GUARDIAN, CLAIRE DYKSTRA, JILL FORRESTER, RYAN HEISE, KAYLA HOPKINS, LYNN OLIPHANT, HAROLD PEXA, AMY SNIDER, and CLIMATE JUSTICE SASKATOON ORGANIZATION INC.

APPLICANTS

- and -

SASKATCHEWAN POWER CORPORATION, CROWN INVESTMENTS CORPORATION OF SASKATCHEWAN, and THE GOVERNMENT OF SASKATCHEWAN

RESPONDENTS

CORRECTED JUDGMENT: The text of the original judgment has been changed *per* the corrigendum released October 27, 2025. (A copy of the corrigendum is appended to this corrected judgment.)

Counsel:

Glenn Wright, Larry Kowalchuk, and Kaitlyn Harvey	for the applicants
Collin K. Hirschfeld, K.C., and Caroline C. Seshadri	for the respondents, Saskatchewan Power Corporation and Crown Investments Corporation of Saskatchewan
C. Elaine Thompson, K.C.	for the respondent, The Government of Saskatchewan

---

JUDGMENT
October 10, 2025

KUSKI BASSETT J.

I. INTRODUCTION

[1] This decision relates to the respondents' applications to strike the underlying originating application which advances a claim regarding concerns about electricity generation and greenhouse gas [GHG] emissions in Saskatchewan [Claim]. The respondents assert the issues raised in the Claim are not justiciable and do not give rise to a reasonable cause of action. In response, the applicants seek leave to amend the Claim.

[2] There are eight applicants who launched the Claim: Sabrina Dykstra (a minor by her litigation guardian, Claire Dykstra), Jill Forrester, Ryan Heise, Kayla Hopkins, Lynn Oliphant, Harold Pexa, Amy Snider, and Climate Justice Saskatoon Organization Inc. Together, these parties are referred to as the "Applicants."

[3] Three respondents are called upon to defend the Claim: Saskatchewan Power Corporation [SaskPower], Crown Investments Corporation of Saskatchewan [CIC], and the Government of Saskatchewan [Government]. They are referred to as the "Respondents."

[4] This decision does not consider the merits of the issues advanced in the Claim. It is limited to determining whether the Applicants may amend the Claim in the manner they propose, and whether the Claim should be struck, both of which are based on the contents of the pleading and not an evidentiary record.

II. BACKGROUND

[5] The Applicants have concerns about the adequacy of the Government's strategic direction in relation to SaskPower's electricity generation and related GHG emissions due to climate change dangers. They plead that the Respondents' construction of two new unabated fossil fuel-based generation assets [UFFGAs] (which

generate electricity without carbon capture and sequestration technology) and the Government's failure to impose sufficiently stringent GHG cumulative emissions caps [GHG Caps] in *The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations*, RRS c M-2.01 Reg 1 [*MRGHG Regulations*], have breached their rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*]. They claim that these government actions result in unacceptable GHG emissions that exacerbate the dangerous harms associated with climate change and therefore violate their protected *Charter* rights to life, liberty and security of the person, and to equality.

[6] In the Claim, the Applicants ask the Court to impose an exacting plan on the Respondents to combat climate change. For example, they seek a Court order directing the Government to prepare a "generation and asset management plan" that will provide and deliver "Net Zero electricity" by "the end of year 2035 or in the alternative by end of year 2040 at the latest" (para. 15(b)). They plead that, "given the urgency of the climate crisis and the pressing need for transformative action within the next 7 years, such an order is warranted" (para. 45). In the Claim, the Applicants state that "Net Zero means that GHG emissions produced by human activity are reduced sharply and that any remaining GHG emissions that cannot be eliminated are negated completely by implementing methods of absorbing carbon dioxide from the atmosphere to offset remaining GHG emissions" (para. 3).

[7] The parties to this dispute acknowledge the importance of protecting the environment. The Respondents do not suggest they are immune from constitutional scrutiny in relation to their approach to climate change. However, the Respondents assert the *Charter* claims are not appropriately advanced for constitutional scrutiny in this case and ought to be struck.

[8] For context, in *References re Greenhouse Gas Pollution Pricing Act*,

2021 SCC 11, [2021] 1 SCR 175, Chief Justice Wagner, writing for the majority of the Supreme Court of Canada, emphasized that global climate change is real, human activities are the primary cause, and the only way to address it is to reduce GHG emissions. He acknowledged that collective national and international action is required because the harmful effects of GHGs are not confined by borders.

[9] Overall, it can hardly be disputed that climate change is a serious and inherently global phenomenon with broad and varied local implications for each region of Canada and the world. It is a topic that has been described as "potentially almost as broad and diffuse as the topic of the environment itself" (Dennis Mahony, *The Law of Climate Change in Canada* (Toronto: Thomson Reuters Canada Limited, 2025) (WL) at para 3:16).

[10] With this background in mind, I proceed to determine the issues set out below.

III. ISSUES

[11] The issues to be decided are as follows:

A. Do the Applicants have leave to amend the Claim in the manner proposed?

B. Should the Claim be struck for failing to raise a justiciable claim or failing to disclose a reasonable cause of action?

1. What is the test that governs an application to strike a pleading?

2. Does the Claim raise a justiciable claim?

3. Does the Claim otherwise disclose a reasonable cause of action?

IV. ANALYSIS

A. Do the Applicants have leave to amend the Claim in the manner proposed?

[12] The Applicants seek leave to file their proposed amended Claim that was prepared in response to the Respondents' applications to strike. I address the amendments as a preliminary issue, so that the pleading is read in the manner most favourable to the Applicants in the context of the strike applications.

[13] The proposed amendments were crafted by the Applicants after they were served with the Respondents' written submissions (Briefs of Law) in relation to the applications to strike. For this reason, I infer they were well-informed of the legal and factual reasons why the Respondents assert the Claim does not advance a justiciable claim nor a reasonable cause of action. The Applicants took the opportunity to address any potential frailties in their pleading in the form of the proposed amendments filed June 4, 2024. In the result, I infer the proposed amendments are the Applicants' best foot forward from a pleadings perspective in this action.

[14] The law relating to pleading amendments is well-established.

[15] A chambers judge has discretion under Rule 3-72 of *The King's Bench Rules* to allow pleading amendments. This Rule requires parties to make amendments necessary to determine the real questions in issue and permits late amendments if they will not cause non-compensable prejudice to the opposing party.

[16] In *Cupola Investments Inc. v Zakreski*, 2021 SKCA 86 at para 65, Leurer J.A. (as he then was) confirmed the law "broadly favours allowing amendments if the result is a pleading that would have been proper in first instance…". He outlined three key principles that underpin the exercise of discretion in amendment applications. They are summarized as follows:

a) The overarching purpose for allowing amendments is to enable the court to determine the true points of controversy between the parties. Amendments are liberally granted when required for this reason (paras. 45-47);

b) An amendment must be a proper pleading. It should not be allowed if the result would be a pleading that could be struck pursuant to Rule 7-9(2) of *The King's Bench Rules* or would be "undone" for other reasons (para. 48); and

c) An amendment will not be allowed if material prejudice will be caused by the change in the pleading that cannot be sufficiently ameliorated by an award of costs or an adjournment (paras. 49-52).

[17] In *Kashuba v Wilton (Rural Municipality)*, 2022 SKCA 37 at para 27, 87 CPC (8th) 264, Leurer J.A. (as he then was) summarized the Court's earlier decisions that outlined principles to be considered in an application to amend. The principles include that amendments must comply with *The King's Bench Rules* which govern a proper pleading:

> [27] In *Alves v Sunquest*, 2011 SKCA 116 at para 13, 342 DLR (4th) 395, Richards J.A. (as he then was) stated, with reference to many authorities, that "an amendment under Rule 165 [now Rule 3-72] should not be allowed if the result would be a pleading that could be struck pursuant to Rule 173 [now Rule 7-9]". Justice Herauf turned this negative proposition into a positive one in *Rekken v Saskatchewan (Health Region #1)*, 2015 SKCA 36 at para 11, 384 DLR (4th) 174, when he stated that "a Chambers judge should only refuse to amend pleadings where the proposed amended pleadings can be struck under the predecessor to Rule 7-9[(2)]". See also, *Boart Longyear Inc. v Mudjatik Enterprises Ltd.*, 2016 SKCA 22 at para 24, 476 Sask R 58. I would add only that these statements of law assume that the proposed pleading otherwise complies with the *Rules* governing a proper pleading.
>
> [Emphasis added]

[18] The Respondents do not assert they will incur any non-compensable prejudice if the proposed amendments to the Claim are allowed. They oppose the amendments on the basis they are "immaterial, redundant, or unnecessarily lengthy" and improperly plead evidence such that they ought to be disallowed to the extent they result in a claim to be struck pursuant to Rules 7-9(2)(c) and 13-8(1)(c) of *The King's Bench Rules,* which read as follows:

> **Striking out a pleading or other document, etc., in certain circumstances**
>
> **7-9**(2) The conditions for an order [that all or any part of a pleading or other document be struck out] are that the pleading or other document:
>
> …
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> …
>
> **Pleadings: general requirements**
>
> **13-8**(1) Every pleading must:
>
> …
>
> (c) contain only a statement in summary form of the material facts on which the party pleading relies for the party's claim or defence, but not the evidence by which the facts are to be proved[.]

[19] To determine if the Applicants' amendments would result in a pleading to be struck, it is important to consider the purpose and function of pleadings as articulated in *The King's Bench Rules* and case law.

[20] *Harpold v Saskatchewan (Corrections and Policing),* 2020 SKCA 98, is an important authority. The Court explained that Rule 13-8 reflects the jurisprudence about the function of pleadings, which include: clearly defining the questions in issue; giving notice to the opposing party of the case asserted against them so they may

appropriately direct their evidence; and, establishing a record of the questions in issue to prevent future litigation.

[21] In *Mallard v Killoran*, 2005 SKQB 203 at para 26, then Chief Justice Gerein stated a pleading, "… should not be prolix, garrulous, argumentative or replete with opinions, speculation or descriptions of evidence." Passages of a pleading may be struck if it describes activity that constitutes evidence or contains speculative opinion which have, "… no place in a pleading" (para. 31).

[22] When considered in light of the foregoing legal principles, it is clear that some of the Applicants' proposed amendments contravene Rule 13-8 of *The King's Bench Rules* because they expressly describe contents of affidavit evidence. The following amendments are disallowed, together with their corresponding footnotes, because they plead evidence, not material facts:

a) Paragraph 13: "As outlined in the affidavits of the Personal Applicants".

b) Paragraph 27: "The affidavit of expert witness, Dr. James Hansen, outlines the evidence of fossil fuel emissions driving concentrations of GHG to unprecedented levels."

c) Paragraph 32: "Not only is Net Zero needed, but it is achievable, as described in the affidavit of expert witness, David Maenz."

d) Paragraph 37: "The affidavits of the Personal Applicants demonstrate that dangerous climate change has already directly impacted their lives at the local level here in Saskatchewan."

e) Paragraph 53: "Dr. Amber Fletcher outlines several disproportionate impacts climate change has on various distinct groups, including gender (women in particular). … which Dr. Katherine Arbuthnott focused on in

her affidavit. Dr. Lindsay Galway in her affidavit discusses how the rights of young people are affected by the growing impact of climate change."

f) Paragraph 62: "The affidavit of applicant Kayla Hopkins outlines how she has personally been impacted by dangerous climate change as a farmer in Saskatchewan at paragraphs 12 - 20 of her affidavit."

[23] In addition, the Applicants have included amendments in paragraphs 64-70 and 78-79 of the proposed amended Claim which sets out a legal argument with case law and academic articles – not facts. Argument has no place in a pleading. These paragraphs are struck.

[24] The remaining amendments are allowed. They fulfil the purpose and function of pleadings. They do not contravene *The King's Bench Rules*, result in a pleading to be struck pursuant to Rule 7-9(2), nor cause non-compensable prejudice. They further articulate the Applicants' assertions, provide additional material facts regarding the nature of the *Charter* breaches they allege against the Respondents, and/or correct or clarify the previous version of the Claim.

[25] I will proceed to determine the applications to strike by relying on the Claim with the allowed amendments set out above.

B. Should the Claim be struck for failing to raise a justiciable claim or failing to disclose a reasonable cause of action?

1. What is the test that governs an application to strike a pleading?

[26] The Respondents assert the Claim discloses no reasonable claim or cause of action. They ask this Court to strike it out in its entirety in accordance with Rules 7-9(1)(a), 7-9(2)(a), and 7-9(3) of *The King's Bench Rules,* which read as follows:

> **Striking out a pleading or other document, etc. in certain circumstances**
>
> **7-9**(1) If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:
>
> (a) that all or any part of a pleading or other document be struck out;
>
> …
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> (a) discloses no reasonable claim or defence, as the case may be;
>
> …
>
> (3) No evidence is admissible on an application pursuant to clause (2)(a).

[27] The legal test governing an application to strike turns on the court's assessment of whether it is plain and obvious the pleading fails to disclose a reasonable claim or cause of action (*Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980; *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 17, [2011] 3 SCR 45 [*Imperial Tobacco*]).

[28] In *Canada (Attorney General) v Merchant Law Group LLP*, 2017 SKCA 62 at paras 18-19, [2017] 10 WWR 664 [*Merchant*], Ryan-Froslie J.A. summarized the legal principles set out in *Imperial Tobacco*, supplemented with case law from Saskatchewan, as follows:

> [18] Chief Justice McLachlin, writing for the Supreme Court of Canada, in *R v Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 SCR 45 set out the principles governing such applications:
>
> (a) it is incumbent on a plaintiff to clearly plead the facts upon which it relies in making its claim (para 22);

> (b) such applications proceed on the basis that the facts pled are true, "unless they are manifestly incapable of being proven" (paras 22 and 23);
>
> (c) a claim will only be struck if it is plain and obvious it discloses no reasonable cause of action, that is, it has no reasonable prospect of success (para 17); and
>
> (d) "[t]he law is not static and unchanging", thus, the approach taken in applications to strike "must be generous and err on the side of permitting a novel but arguable claim to proceed" (para 21).
>
> See also *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 (CA) at para 16 [*Sagon*]; and *Filson v Canada (Attorney General)*, 2015 SKCA 80 at para 19, 388 DLR (4th) 66 [*Filson*].
>
> [19] In deciding an application to strike a claim on the basis it discloses no reasonable cause of action, a judge is limited to considering only the statement of claim, any document referred to therein, and any response to a request for particulars (*Sagon* at para 16; *Filson* at para 20). A judge is not permitted to consider affidavit or other extraneous evidence.

[29] The Applicants rely on paragraph 19 of *Merchant*, cited above, and submit that the 13 affidavits they have listed in paragraph 97 of the Claim (as materials filed in support of the action) are properly considered as "documents referred to" in the pleading. On this basis, they assert the contents of their 13 affidavits are to be taken to be true in the determination of the applications to strike.

[30] I am not persuaded by this submission. In *Lackmanec v Hoffman and Wall* (1982), 15 Sask R 1 (CA) at para 4, the Court of Appeal confirmed that documents referred to in a pleading that are "merely evidential," and from which the claim does not arise, are not properly reviewed in an application to strike. The Court said this:

> 4 In *Balacko v. Eaton's of Canada Limited* (1967), 60 W.W.R. 22, Disbery, J., examined the question of what material could be referred to on an application of this kind. I agree with the conclusion he reached, stated on page 26 as follows:
>
> In light of these authorities I am of the opinion that the

> only documents which are properly to be considered on an application to strike out a statement of claim on the ground that it discloses no reasonable cause of action are the notice of motion, the attacked statement of claim, the particulars furnished pursuant to a demand therefor, and any document which is referred to in the statement of claim upon which the plaintiff must rely for the establishment of his claim; for such a document is to be considered for the purposes of the application as forming part of the pleading: *Hogan v. Brantford (City)*, [1909-10] 1 O.W.N. 226. Other documents referred to in a statement of claim which are merely evidential and from which the plaintiff's claim does not arise should not, in my opinion, be considered; for to do so would be to admit evidence to support the attacked pleading, which is not permissible.

[31] In the Claim, the 13 listed affidavits contain the evidence the Applicants rely upon to support their Claim. The affidavits are not documents from which their claim arises. To consider the affidavits would be to admit evidence to support the impugned Claim which is not permissible in this determination. As identified above in the context of the application to amend, evidence has no place in a pleading. The listing of affidavits at the end of an originating application does not render them “documents referred to” in the pleading to be considered in an application to strike for failing to disclose a reasonable claim or cause of action.

[32] Examples of documents that are properly considered in an application to strike for failing to disclose a cause of action include a contract in the context of a breach of contract claim, or an invoice in the context of a claim for payment. These types of documents are those upon which a plaintiff’s claim may arise.

[33] In addition, it is well-established that pleadings based upon assumption and speculation are not to be taken as true for the purpose of assessing a strike application. This is because assumption and speculation are manifestly incapable of being proven. In *R v Operation Dismantle*, [1985] 1 SCR 441 at 455 [*Operation Dismantle*], Dickson C.J.C., writing for the majority, explained this principle as

follows:

> (c) <u>The Rule that Facts in a Statement of Claim Must be Taken as Proven</u>
>
> We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat* [*Attorney General of Canada v Inuit Tapirisat*, [1980] 2 SCR 735], *supra*, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

[34] Of course, pleadings must be read as generously as possible, erring on the side of permitting a novel but arguable claim to proceed to trial. The fact a claim survives an application to strike does not mean it will succeed at the hearing on the merits (*Imperial Tobacco* at para 21; *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para 19, [2020] 2 SCR 420 [*Atlantic Lottery*]; *Harsch v Saskatchewan Government Insurance*, 2021 SKCA 159 at paras 18-19, [2022] 2 WWR 675).

[35] The correct approach is to consider whether the pleadings, as they stand or may reasonably be amended, disclose a question that is not doomed to fail (*Atlantic Lottery* at para 90).

[36] It is important to note that the court's power to strike a pleading is a "valuable housekeeping measure" which facilitates the effective administration of justice. It allows the court to "weed out" claims that have no reasonable chance of success, as described in *Imperial Tobacco*, but it is a tool that must be used with care:

> [19] 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 on to trial.
>
> …
>
> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. […] The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[37] In the context of this legal framework, I will proceed to consider the applications to strike the Claim.

2. Does the Claim raise a justiciable claim?

[38] The first question to address is whether, even if everything pleaded in the Claim is taken to be true, there is no reasonable cause of action because the issues raised are not justiciable.

(i) Positions of the Parties

[39] The parties provided detailed written and oral submissions on the topic of justiciability. I have distilled my understanding of their arguments into the following brief overview.

The Respondents

[40] The Respondents assert the nature of the issues advanced in the Claim are not justiciable and otherwise do not disclose a cause of action, both in relation to the approval/construction of two new UFFGAs and the impugned *MRGHG Regulations.*

[41] The Respondents highlight that a precondition to constitutional analysis of a Claim is a legal foundation. They argue that if a specific legislative act is unconstitutional, then the law cannot stand under s. 52 of the *Charter*. In addition, if a

law is constitutionally valid, but government action in applying the law is coercive, then the court assesses the constitutional validity of that action. Either way – a law is required to ground the constitutional analysis. The Respondents assert the Claim is missing the required clear, legal component to allow for constitutional adjudication.

[42] In relation to the two new UFFGAs, the Respondents submit the construction followed a multi-faceted endeavour grounded in various levels of provincial and federal approvals in accordance with environmental protection legislation. The result is there is no law, specific decision pursuant to a law, or legislative action to be impugned, and therefore not a sufficient legal anchor to allow for constitutional adjudication in relation to the UFFGAs.

[43] For the impugned portions of the *MRGHG Regulations*, the Respondents argue that the Applicants are asking the Court to bind the Government to Canada's emissions targets that Canada committed to in the *Paris Agreement*, 12 December 2015, 3156 UNTS 79 [*Paris Agreement*] and later crystallized into law in the *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22. The Government has chosen not to take the same legislative action as Canada, and through the Claim the Applicants question the wisdom of Government's approach and invite the Court to substitute the Applicants' preferred legislative and regulatory plan in place of the Government's chosen policy course. The Respondents maintain there is no sufficient legal component or legal anchor to ground the requisite *Charter* analysis.

[44] The Respondents submit the Claim invites the Court to over-step into the policy-making function held by the executive and legislative branches. They highlight that climate change is a complex, controversial, and political issue that requires cooperation of all levels of government and the international community. While they acknowledge that policy and political questions do not always preclude judicial involvement, they rely on *Hupacasath First Nation v Canada (Foreign Affairs and*

International Trade Canada), 2015 FCA 4 at para 62, 379 DLR (4th) 737 [*Hupacasath*], for the proposition that, "some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and other branches of government." They assert that the Governments' response to climate change is an inherently political decision and requires continual balancing of various social, economic, and political factors by the legislative and executive branches. They emphasize that the decision how the Government contributes to the national and international fight against climate change is a political decision left to the democratically elected Government.

[45] Overall, the Respondents submit the Claim is not properly advanced for constitutional adjudication. They highlight that, through the nature of the remedies sought, the Applicants ask the Court to direct the enactment of new laws and engage in ongoing policy oversight to inappropriately invoke court-directed legislative reform and place the judiciary in the role of making political choices about climate policy.

The Applicants

[46] The Applicants submit the issue of justiciability is one to be decided only at a hearing on the merits and not in an application to strike. They rely on *La Rose v Canada*, 2023 FCA 241 at paras 28-29 and 48-51, 488 DLR (4th) 340 [*La Rose FCA*], to support their submissions that they are advancing a *Charter* claim which is, by its nature, a legal question. Their arguments include:

a) Climate litigation grounded on *Charter* rights cannot be categorically dismissed as non-justiciable simply because it is complex, political, or controversial;

b) Remedies are not relevant to the question of justiciability;

c) It is the role of the Court to determine the minimum GHG emissions standards required to ensure meaningful protection of the rights that are threatened by climate change; and

d) There is no sound jurisprudential basis to dismiss the Claim which implicates public policy.

[47] The Applicants maintain that the following actions of one or all of the Respondents constitute infringements of their *Charter* rights: constructing two new UFFGAs when other options for power generation exist; allowing the *MRGHG Regulations* to permit SaskPower's GHG "emissions reduction obligations" to increase in the 2020 to 2024 compliance period; failing to require, through *The Management and Reduction of Greenhouse Gases Act*, SS 2010, c M-2.01 [*MRGHG Act*] and the *MRGHG Regulations*, that SaskPower's GHG emissions be appropriately reduced; and, failing to commit to the Net Zero emissions target. They submit that these actions, all of which result in GHG emissions, are causing them harm for which the Respondents must be held accountable.

[48] Overall, the Applicants submit the Respondents have a legal and moral duty to do their part to reduce GHG emissions. They assert it is not plain and obvious, or beyond doubt, that the Claim is not justiciable and highlight the existential threat of climate change is caused by GHG emissions. The Applicants maintain they have appropriately advanced the Claim in a manner that pleads the UFFGAs emit GHGs, and the increasing GHGs in our atmosphere results in more dangerous climate change which causes, among other concerns, a medically proven disability known as ecoanxiety. In sum, they state their *Charter* protected rights to life, liberty, and security of the person, and to equality, are violated by the Respondents' completely inadequate, irresponsible, and harmful response to climate change.

(ii) Timing for Justiciability Determination

[49] In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 3d ed (Toronto: Thomson Reuters, 2024) [*Boundaries of Judicial Review*], Justice Lorne Sossin and Professor Gerard Kennedy provide multifaceted, informed guidance on the topic of justiciability. The learned authors state the question of justiciability may be determined on a motion to strike in the context of the pleadings being assumed to be true, and the reason a claim may have no reasonable chance of success could be on the basis of non-justiciability (pages 48, and 51-52).

[50] Indeed, a review of the case law makes it clear that courts have determined questions of justiciability in the context of motions to strike: see *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410, 116 OR (3d) 574, aff'd *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, 379 DLR (4th) 467 [*Tanudjaja*], application for leave to appeal to the Supreme Court of Canada dismissed, 2015 CanLII 36780 (SCC); *Mathur v Ontario*, 2020 ONSC 6918, 471 CRR (2d) 225 [*Mathur #1*], leave to appeal dismissed 2021 ONSC 1624; *La Rose v Canada*, 2020 FC 1008, 477 CRR (2d) 239, reversed, in part *La Rose FCA*; and *Misdzi Yikh v Canada*, 2020 FC 1059, 474 CRR (2d) 53, reversed, in part *La Rose FCA*.

[51] In the circumstances, I am satisfied it is appropriate to consider the question of justiciability in the context of the applications to strike.

(iii) Justiciability – The Legal Framework

[52] Before I set out the legal framework for justiciability, I briefly outline some foundational principles regarding the *Charter* and the government action to which it applies.

[53] The purpose of the *Charter* is to protect, "within the limits of reason, the enjoyment of the rights and freedoms it enshrines" (*Hunter v Southam*, [1984] 2 SCR

145 at 156). It is intended to constrain government action that is inconsistent with the protected rights and freedoms. It applies to Parliament and to the Government of Canada in respect of all matters within the authority of Parliament, as well as to the legislature and government of each province regarding all matters within the authority of each provincial legislature (s. 32).

[54] In *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at 598-599, McIntyre J. explained that the *Charter* applies to the actions of the legislative, executive and administrative branches of government. He said this:

> It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the *Charter* will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a *Charter* right or freedom. In this way the *Charter* will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.

See also *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at paras 40-45, 490 DLR (4th) 1.

[55] It is trite that the courts have a duty to guard constitutional rights and the rule of law, which includes holding the legislative and executive branches of government to account and protecting the rights and freedoms under the *Charter*.

[56] The concept of justiciability illuminates that although the *Charter* applies to government action, not all government decisions or actions are properly reviewable by the courts even when *Charter* rights are allegedly violated. See, for example, *Tanudjaja*. More about this later.

[57] The inquiry into justiciability was framed by Dickson C.J. as a "normative inquiry" in *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 90-91. He confirmed the nature of justiciability as it was addressed in *Operation Dismantle* on this topic:

> ... As I noted in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 459, justiciability is a "doctrine ... founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes", endorsing for the majority the discussion of Wilson J. beginning at p. 460. Wilson J. took the view that an issue is non-justiciable if it involves "moral and political considerations which it is not within the province of the courts to assess" (p. 465). An inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity.
>
> The most basic notion of justiciability in the Canadian legal process is that referred to in *Pickin* [*British Railways Board v Pickin*, [1974] AC 765 (HL)], *supra*, and inherited from the English Westminster and unitary form of government, namely, that it is not the place of the courts to pass judgment on the validity of statutes. Of course, in the Canadian context, the constitutional role of the judiciary with regard to the validity of laws has been much modified by the federal division of powers as well as the entrenchment of substantive protection of certain constitutional values in the various *Constitution Acts*, most notably that of 1982. There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

[58] In the context of climate change litigation, the Federal Court of Appeal

in *La Rose FCA* explained that there is no single set of rules that must be applied to determine justiciability, and climate change claims are not rendered non-justiciable simply because they may be complex, contentious, or laden with social values. Moreover, public controversy or the political context associated with impugned legislation cannot be a standalone ground to find a *Charter* claim is non-justiciable. The following passages from *La Rose FCA* are apposite:

> [28] No firm criteria for assessing justiciability exist, and the boundaries between justiciable and non-justiciable matters are not always clear. The issue often distills to a single question as to whether the claim has a sufficient legal component upon which a court can adjudicate. Here too, the answer to that question may be obscured by the moral, social or political dimensions of the case that make it inappropriate for a court to decide (*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, 379 D.L.R. (4th) 467 at para. 33 [*Tanudjaja*]; but compare: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 at 472 [*Operation Dismantle*]; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 at 545-546).
>
> [29] But we do know that claims are not rendered non-justiciable simply because they raise complex or controversial issues. Courts must be flexible in their approach to determining whether a matter is justiciable and consider the context of the claim in question (*Highwood* [*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26] at para. 34). On this point, the language of the Supreme Court is unequivocal: "The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it" (*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at para. 107 [*Chaoulli*]).
>
> …
>
> [34] Matters of public policy are within the exclusive domain of the executive and legislative branches, and are, on their own, demonstrably unsuitable for adjudication. Because of this, where a case engages only the underlying policy, a court will strike a pleading as not justiciable (Sossin, *Boundaries of*

> *Judicial Review* at 267-270). On the other hand, in concurring reasons on a point accepted by the majority, Wilson J. stated that a court cannot relinquish its jurisdiction over an issue merely because it raises a "political question" (*Operation Dismantle* at 459 and 472). She went on to distinguish, in the justiciability context, pure policy questions from legal questions with some policy aspect to them (*Operation Dismantle* at 472):
>
> > I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.
>
> [35] Public controversy or the political context associated with legislation cannot therefore be a standalone ground to deem the claim non-justiciable (*Operation Dismantle* at 472), and the "political question" doctrine found in the United States has never been accepted in Canada (D. Geoffrey Cowper & Lorne Sossin, "Does Canada Need a Political Questions Doctrine?" (2002) 16 S.C.L.R. (2d) 343 at 345). The Supreme Court has expressly rejected the doctrine, and, as just noted, when the claim is properly framed as a breach of Charter right (an important caveat and to which I will return), the court has an obligation to decide the matter (*Operation Dismantle* at 472). One hears in the reasons of the Federal Court a faint echo of the political question doctrine.

[59] In *Boundaries of Judicial Review*, the learned authors explained there will always be a boundary between what courts should and should not decide, and the boundary should correspond to predictable and coherent principles. They outline three key factors for the court to consider when assessing whether the subject matter of a claim is justiciable at pages 3-4 as follows:

> The criteria used to make the determination as to whether a particular matter is justiciable pertain to several factors, notably: (1) the capacities and legitimacy of the judicial process; (2) the constitutional separation of powers; and (3) the nature of the dispute before the court, including the nature and text of the legal

instruments as the basis of the dispute.

[60] Each of the three factors enunciated in *Boundaries of Judicial Review* are expanded upon below, with reference to case law.

Capacities and Legitimacy of the Judicial Process

[61] The first factor, relating to the judicial process "capacities," refers to what the courts can do. The "legitimacy" refers to what it should do. In *La Rose FCA* at paragraph 24, the Federal Court of Appeal explained that "[c]ourts decline to adjudicate issues that ask that they act beyond their institutional capacity or legitimacy." It further explained that a component of the court's institutional limitation is "[t]he pragmatic consideration [that] arises from the limitations on a court's ability to fashion and implement remedies" (para. 27).

[62] Another way to frame this justiciability factor is to consider the "appropriateness" and the "ability" of the court to deal with a matter (*Hupacasath* at para 62). Generally, the question is whether the issue to be decided is one that is appropriate for a court to decide (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at paras 32 and 34, [2018] 1 SCR 750).

Separation of Powers

[63] The second factor relates to the separation of powers. It involves weighing the suitability of the court deciding a particular issue or deferring it to the other branches of government "as a matter of constitutional judicial policy" (*La Rose FCA* at para 26).

[64] There is a time-honoured separation of powers between the judicial branch of government on the one hand, and legislative and executive branches on the other, which is intrinsic to the Canadian constitutional system. In *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 at 469-470, Dickson C.J. described

Canada's separation of powers as follows:

> … There is in Canada a separation of powers among the three branches of government – the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.

[65] Each of the three branches has distinct institutional capacities and each plays a crucial and complementary role in our constitutional democracy. Each branch will be unable to fulfil its role if it is unduly encroached upon by the others (*New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 389 [*New Brunswick Broadcasting*]).

[66] The importance of the separation of powers has been described in various ways by the Supreme Court in different contexts. For example, in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 3, Lamer C.J. described the "web of institutional relationships between the legislature, the executive and the judiciary" as the "backbone of our constitutional system".

[67] In *New Brunswick Broadcasting* at 389, McLachlin J. described the separate roles and institutional capacities of Canada's branches of government:

> … Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

[68] At paragraphs 27 and 31 of *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3, Karakatsanis J. wrote:

> [27] This Court has long recognized that our constitutional

> framework prescribes different roles for the executive, legislative and judicial branches (see *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 49-52).
>
> …
>
> [31] Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options" (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 37).

[69] In *R v Chouhan*, 2021 SCC 26 at para 84, [2021] 2 SCR 136, in the context of considering whether amendments to the *Criminal Code*, RSC 1985, c C-46 were constitutional, Moldaver and Brown JJ. explained the court's role in conducting a *Charter* analysis. They stated the analysis requires the court to "protect against incursions on fundamental values" but "not to second guess policy decisions" of the legislature, because when "struggling with questions of social policy and attempting to deal with conflicting [social] pressures 'a legislature must be given reasonable room to manoeuvre'" (citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 194, per La Forest J. (concurring); and *Black v Law Society of Alberta*, [1989] 1 SCR 591 at 627).

Nature of the Dispute

[70] The third factor set out in *Boundaries of Judicial Review* is the nature of the dispute before the court including the nature and text of the legal instruments as its basis. *La Rose FCA* confirms the determination often turns on whether there is a sufficient legal component for the court to resolve (see paras. 24-28).

[71] In *Tanudjaja*, the Court emphasized there must be a sufficient legal component to anchor the court's analysis in order for a *Charter* claim to be justiciable. It is not sufficient for a claimant to impugn the overall approach of the government. Rather, a claimant must point to a particular law or the application of a particular law to ground a *Charter* claim (paras. 10, 22, and 35).

[72] In *Tanudjaja*, the claimants alleged that federal and provincial government actions and inactions resulted in homelessness and inadequate housing in the Province of Ontario and violated their sections 7 and 15 rights under the *Charter*. The Court noted that the claim was centred on assertions that the governments' revised legislation and related services caused homelessness. However, the claim did not impugn any specific legislation nor the application of any legislation. In the result, as set out below, the Court held that the claimants did not engage a sufficient legal component and therefore did not raise a justiciable issue.

[73] In paragraph 22 of *Tanudjaja*, the Court highlighted that a justiciable *Charter* claim must centre on a particular law or particular application of such a law and not on a political question:

> [22] A challenge to a particular law or particular application of such a law is an archetypal feature of *Charter* challenges under s. 7 and s. 15. As observed in *Re Canada Assistance Plan*, [1991] 2 S.C.R. 525, at p. 545:
>
> > In considering its appropriate role the Court must determine whether the question is purely political in nature, and should therefore be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.

[74] In terms of whether a question is political in the context of normatively assessing justiciability, the Court in *Tanudjaja* explained as follows:

> [20] As indicated in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 at

> 90-91, "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity".
>
> [21] Having analysed the jurisprudence relating to justiciability in Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), the author identified several relevant factors, at p. 162:
>
> > Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.
> >
> > ...
> >
> > [T]he political nature of a matter raises two related dilemmas for courts. The first is the dilemma of institutional capacity. Courts are designed to make pronouncements of law. Arguably, they accomplish this goal more effectively and efficiently than any other institution could. Where the heart of a dispute is political rather than legal, however, courts may have no particular advantage over other institutions in their expertise, and may well be less effective and efficient than other branches of government in resolving such controversies, as the judiciary is neither representative of the political spectrum, nor democratically accountable.

[75] *Tanudjaja* makes it clear that it is only when policy is translated into law or government action (pursuant to a law) that *Charter* scrutiny may be engaged. In dismissing the claim as non-justiciable, the Court distinguished two *Charter* cases that were justiciable: *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS Community*] and *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*]. The analysis in *Tanudjaja* provides guidance regarding the significance of the requisite government action in terms of a law or action taken pursuant to a law to ground a *Charter* claim.

[76] As set out in *Tanudjaja*, in *PHS Community*, the *Charter* claim was grounded in specific government action taken pursuant to legislation – the refusal of the federal Minister of Health to extend an exemption under s. 56 of the *Controlled Drugs and Substances Act*, SC 1996, c 19, for a safe injection facility. In *Chaoulli*, the *Charter* claim related to a specific law that prohibited private health insurance for services that were available in the public sector. Both cases were justiciable. As noted in *Tanudjaja* at paras 23-26, they impugned a specific provision of legislation or a decision made pursuant to a specific provision of legislation:

> [23] The Supreme Court discussed the difference between a political issue and a legal issue in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 and *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791. In both cases, the Attorneys General argued that the subject matter of the *Charter* challenge was immune from scrutiny, and the Supreme Court disagreed. Both cases are distinguishable.
>
> [24] In *Canada (Attorney General) v. PHS Community Services Society*, the Court observed, at para. 105:
>
> > 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 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: Chaoulli*, at para. 89, *per* Deschamps J., at para. 107, *per* McLachlin C.J. and Major J., and at para. 183, *per* Binnie and LeBel JJ.; *Rodriguez*, [[1993] 3 SCR 519] at pp. 589-90, *per* Sopinka J. The issue before the Court at this point is not whether harm 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*. [emphasis added]
>
> [25] In *Chaoulli v. Quebec (Attorney General)*, *supra*, the

> applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. At para. 107, McLachlin C.J. and Major J. said:
>
> > While the decision about the type of health care system Quebec should adopt falls to the legislature of the province, the resulting legislation, like *all laws*, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. [emphasis added]
>
> [26] Binnie and LeBel JJ. (dissenting on the merits in *Chaoulli*) also rejected the argument of the Attorneys General of Canada and Quebec that the claims advanced by the appellant were inherently political and therefore not properly justiciable by the courts. They pointed, at para. 183, to s. 52 of the *Constitution Act, 1982*, which "affirms the constitutional power and *obligation* of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution" [emphasis in original].
>
> [Italics and underline emphasis in original]

[77] In contrast to *PHS Community* and *Chaoulli*, the Court in *Tanudjaja* found that the claimants failed to advance a question of law, or an action taken pursuant to a law, to engage the Court's decision-making capacity under the *Charter*. Instead, they had impugned the overall approach of the governments and asked the Court to direct they implement a suitable housing policy and thereafter judicially supervise its implementation to ensure its adequacy. The Court ultimately concluded this was a matter that engaged the accountability of the legislatures and was non-justiciable:

> [33] Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.
>
> [34] Were the court to confine its remedy to a bare declaration

> that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity. All agree that housing policy is enormously complex. It is influenced by matters as diverse as zoning by-laws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing, not to mention the involvement of the private sector and the state of the economy generally. Nor can housing policy be treated monolithically. The needs of aboriginal communities, northern regions, and urban centres are all different, across the country.
>
> [35] I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107. Again, the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis.
>
> [36] The application here is demonstrably unsuitable for adjudication, and the motion judge was correct to dismiss it on the basis that it was not justiciable.
>
> [Emphasis added]

[78] Overall, justiciability relates to the subject matter of a dispute. It is concerned with the role of the courts as a matter of constitutional judicial policy and the demarcation of powers between the courts and the legislative and executive branches of government. It distinguishes claims that are suitable for judicial determination from those that are not. The central question in a *Charter* claim focuses on whether the nature of the question in issue centres on a law or the application of a law such that it is appropriate for the court to decide.

(iv) Justiciability in the Context of Climate Change Litigation

[79] The justiciability of government conduct in the context of climate change

litigation has been recently considered by the Quebec Court of Appeal, the Federal Court of Appeal, and the Ontario Court of Appeal. An analysis of these cases follows below.

[80] In *Environnement Jeunesse c Procureur général du Canada*, 2021 QCCA 1871 [*Jeunesse*], application for leave to appeal dismissed, 2022 CanLII 67615 (SCC), a non-profit organization sought authorization to commence a class action in Quebec against the Government of Canada. The proposed claim asserted, among other things, that Canada violated their sections 7 and 15 *Charter* rights by failing to adequately address climate change. The Quebec Court of Appeal dismissed the action on the basis it was not justiciable.

[81] The claimants in *Jeunesse* asserted the GHG reduction targets adopted by the Government of Canada in the context of international agreements were inadequate, insufficient, not complied with, and violated their *Charter* rights. They claimed that the targets, even if met, would contribute to an increase in GHG emissions beyond the levels that Canada itself deemed critical for protecting the lives and safety of future generations. The claimants relied on Canada's *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 without contesting any of its provisions. They sought orders that would require Canada to implement remedial measures to address climate change.

[82] The Court in *Jeunesse* acknowledged the undeniable concerns about global warming and that the solution requires the management of GHG emissions. In its justiciability analysis, the Court noted, in the absence of an impugned statutory provision, the constitutional review of government inaction by the courts is problematic. In that case, the claimants did not challenge the validity of a specific law. Rather, they asked the Court to direct Canada to legislate measures to reduce GHG emissions and give effect to its international commitments. The Court explained the separation of powers among the legislative, executive, and judicial branches is intrinsic

to the Canadian constitutional system. It concluded the relief sought would require it to force the legislature to act and to dictate the solutions to be adopted, which is beyond the court's role.

[83] The Court in *Jeunesse* commented on the capacities and legitimacy of the judicial process for addressing the dangers of climate change. It explained that justiciability requires asking whether it is appropriate for the courts, as a matter of constitutional policy, to decide a particular question or to defer it to other decision-making bodies within the public administration. In the context of the proposed class action, which did not impugn a specific law, the Court held that deference was appropriate because the legislative branch is better placed to weigh the countless issues surrounding climate change in the national and international context. It recognized that the search for solutions may require collaboration and negotiations among different governmental bodies. In addition, the assessment of scientific evidence in the context of weighing the impacts on matters such as health, transportation, economic and regional development, and budgetary considerations were beyond the court's capacities in this case.

[84] Overall, the Court in *Jeunesse* determined that the action as it was framed would require the Court to require the legislature to act, which is not the court's role. Without an impugned law to ground the claim, the issues of national and international significance were appropriately left to the democratically elected governments to respond to.

[85] In *La Rose FCA*, the Federal Court of Appeal partially overturned two decisions of the Federal Court that struck *Charter* claims against Canada because they were not justiciable and failed to disclose a reasonable cause of action. On appeal, the Court held they were justiciable.

[86] Both claims that were the subject of *La Rose FCA* were grounded in

Canada's response to climate change. The claimants asserted that Canada was exacerbating the climate change threat and violated their protections and rights under sections 7 and 15 of the *Charter*. The claims asserted that the legislation and regulations that authorized GHG emissions levels breached Canada's international law obligations and domestic law. In the lower court, the motions judges held that the claims were not justiciable for reasons including they would require the court to adjudicate on broad and diffuse aspects of government conduct, involving matters of economics and foreign and trade policy, under programs administered by various departments.

[87] Paragraphs 36-38 of *La Rose FCA* make it clear the claims advanced a sufficient legal component and were justiciable. The legal component, or objective legal standard, was that Canada failed to meet its own GHG emissions standards that were legislated in the *Canadian Net-Zero Emissions Accountability Act* following its commitment to the *Paris Agreement*, which grounded the alleged *Charter* rights violations. The Court explained as follows:

> [36] As previously described, policy considerations are inherent to all government action, but that fact alone does not insulate the law from judicial scrutiny. What matters in an assessment of justiciability, instead, is the presence of a sufficient legal component or legal anchor to the claim. Justiciability, in the end, asks whether the court can adjudicate the issues against an objective legal standard. In this sense, justiciability analysis requires some understanding of the jurisprudence that underlies the claim, which in turn requires a somewhat probing examination of the substantive allegations of the claim.
>
> [37] *Tanudjaja* [*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, 379 D.L.R. (4th) 467] is a good example of the requirement that a claim have a sufficient legal component in order to be justiciable. There, the appellants sought declarations that Ontario's failure to effectively address the problem of homelessness violated their rights under sections 7 and 15 of the Charter. The appellants challenged no law or application of law in particular – they simply challenged the governments' overall approach to the social problem. The

> claims lacked a legal component required for judicial adjudication and therefore were not justiciable (*Tanudjaja* at paras. 19, 27, 35-56).
>
> [38] Here, in contrast, the appellants link the section 7 deprivation to the failure of Canada to meet its commitments in the *Paris Agreement* (Nationally Determined Contributions), commitments ratified by Parliament, and hence legally defined, objective standards against which the Charter claims can be assessed. The claims do not seek to tell Canada how to fulfill its commitments. In this regard, the Federal Court mischaracterized the claims when it held the claims were challenges to policy.
>
> [Emphasis added]

[88] Overall, *La Rose FCA* highlights that *Charter* claims relating to climate change legislation are not rendered non-justiciable simply because the legislation reflects a political choice. In that case, the claimants asserted that Canada had breached its own statutory emissions targets, thereby violating *Charter* rights, which was a legally defined, objective question that was justiciable. However, as the Court noted, if an action does not engage legally defined, objective standards against which the *Charter* claim can be assessed, and seeks to direct a government how to fulfil its commitments, it may not be justiciable.

[89] The Ontario courts have also grappled with the justiciability of a *Charter* claim in the climate change context. In *Mathur #1*, the Superior Court dismissed the Attorney General of Ontario's motion to strike the action advanced by claimants who sought declaratory and mandatory orders relating to Ontario's actions to address GHG emissions. It held the questions raised in the action were *prima facie* justiciable.

[90] The subject matter in *Mathur #1* was the Ontario Government's decision in 2018 to repeal the *Climate Change Mitigation and Low-carbon Economy Act, 2016,* SO 2016, c 7 (rep) [*Repealed Act*], and replace it with the *Cap and Trade Cancellation Act, 2018,* SO 2018, c 13 [*Cancellation Act*]. The *Repealed Act* had set a range of GHG emissions reduction targets. Pursuant to the *Cancellation Act*, the Ministry of

Environment set new GHG emissions targets [Target] that required much smaller reductions than what had been prescribed in the *Repealed Act*. The Target was set in accordance with the *Cancellation Act* and was articulated in Ontario's November 2018 plan entitled, "Preserving and Protecting our Environment for Future Generations – A Made-in-Ontario Environmental Plan" [Plan]. Ontario argued the Target and Plan were not legal instruments akin to a statute or regulation but rather were an expression of the government's intentions and aspirations such that they were not subject to *Charter* review by the courts. The Court disagreed.

[91] On the topic of justiciability, the Superior Court explained that the Target and the Plan were government actions for the purpose of a *Charter* analysis because they were undertaken pursuant to authority in the *Cancellation Act*. Thus, the *Charter* claim was *prima facie* justiciable and the application to strike was dismissed. The ultimate disposition in *Mathur #1* reads as follows:

> [266] This is a novel application. At its core, it is about whether the Respondent, Ontario, violated the Applicants' ss.7 and 15 rights by repealing the *Climate Change Act* through the *Cancellation Act* and by setting a target for the reduction of GHG emissions that is insufficiently ambitious. As I have already found, both the preparation of the Plan and the repeal of the *Climate Change Act* by Ontario are governmental actions that are reviewable by the court for compliance with the *Charter*.
>
> [267] For the reasons given above, I find that it is not plain and obvious that the Application discloses no reasonable cause of action or that it has no reasonable prospect of success.

[92] The matter proceeded to a hearing on the merits: *Mathur v His Majesty the King in Right of Ontario*, 2023 ONSC 2316, 480 DLR (4th) 444 [*Mathur #2*]. The Superior Court initially confirmed that the *Charter* claim was justiciable. However, it ultimately found that the proper approach for determining Canada's and Ontario's fair shares of the carbon budget was not justiciable. It lacked the institutional capacity and legitimacy to determine Canada's share compared to other states and Ontario's share

compared to other provinces. The Court concluded, "[t]he selection of the appropriate allocation approach to determine a jurisdiction's fair share is an issue that should be determined in another forum, not in a domestic court in Ontario" and "this issue does not have a sufficient legal component to allow this Court to choose among competing approaches" (paras. 109-110).

[93] The Court of Appeal overturned *Mathur #2* and remitted the matter for a new hearing: *Mathur v Ontario*, 2024 ONCA 762, 502 DLR (4th) 663 [*Mathur CA*], leave to appeal dismissed 2025 CanLII 38373 (SCC). It held that Ontario voluntarily assumed a positive statutory obligation to combat climate change by enacting the *Cancellation Act* and producing the Plan and Target for that purpose. Ontario was therefore required to produce a Plan and Target that were compliant with *Charter* rights, in accordance with that statutory mandate. The issue to be determined was whether Ontario failed to comply with its statutory obligation to combat climate change, thus violating the claimants' *Charter* rights. The Court explained as follows:

> [1] This appeal involves the constitutionality of the greenhouse gas emission reduction target and plan enacted by the Ontario government ("Ontario") under climate change legislation. Specifically, can the alleged failure of Ontario to comply with its voluntarily imposed statutory obligations to combat climate change amount to a breach of the appellants' ss. 7 and 15 rights under the *Canadian Charter of Rights and Freedoms*?
>
> …
>
> [32] … Given Ontario has voluntarily assumed a positive statutory obligation under the *CTCA* [*Cancellation Act*] to combat climate change and to produce the plan and the target, the question is whether the application judge should have considered whether Ontario's alleged failure to comply with its statutory obligation violated the appellants' *Charter* rights.
>
> [Emphasis added]

[94] In *Mathur CA*, the claimants did not challenge the inadequacy of the

Target nor request an order for a particular emissions reduction target:

> [41] … The appellants are not challenging the inadequacy of the target or Ontario's inaction, but rather argue the target itself, which Ontario is statutorily obligated to make, commits Ontario to levels of greenhouse gas emissions that violate their *Charter* rights. We see the same distinction as the Supreme Court observed in *Chaoulli*, that it is not the constitutional compliance of the scheme that is challenged by the appellants, but the constitutional compliance of the government measures taken under the scheme that are in issue.
>
> [Emphasis added]

[95] Within this governing legal framework and the recent jurisprudence in the climate action realm, I proceed with the justiciability analysis on the facts before me.

(v) Analysis

(a) Impugned Government Action

[96] A broad, generous review of the Claim illuminates there are two matters that are subject to the justiciability analysis.

[97] While the Applicants' submissions centre on the UFFGAs as the impugned government action that grounds their *Charter* Claim, a broad reading of the pleading indicates they also challenge the *MRGHG Regulations*. For this reason, I not only analyse the Claim with respect to the UFFGAs, but also consider the *MRGHG Regulations*, as the impugned government actions in the context of assessing justiciability.

[98] First, the Applicants assert the Respondents' actions – which entail obtaining approvals and constructing two new UFFGAs in Saskatchewan – violate their sections 7 and 15 *Charter* rights. They claim the generation of electricity in this manner produces GHGs, and GHGs contribute to the dangerous effects of climate change which

violates their right to life, liberty and security of the person, and their right to equality.

[99] Second, the Applicants assert the *MRGHG Regulations* violate these same *Charter* rights because they permitted SaskPower to increase its GHG emissions in the 2020 to 2024 period and otherwise do not commit SaskPower to "Net Zero" emissions nor a decarbonized electrical supply.

(b) The Claim

[100] The following passages of the Claim provide context for the Applicants' concerns:

> 3. All levels of government have the duty to reduce the [GHG] emissions causing dangerous climate change. A stable climate requires that we quickly and dramatically reduce emissions from human activity to achieve Net Zero. …
>
> 4. To achieve Net Zero, the most credible and impactful path is to stop burning fossil fuel by replacing fossil energy, largely with electricity, and decarbonizing our electrical support. Therefore, decarbonization of the electrical supply needs to be one of the highest priorities on the path to achieving Net Zero.
>
> …
>
> 6. The [Government], as owner of SaskPower, is exacerbating dangerous climate change by constructing new [UFFGAs] ("Impugned State Actions") – namely the Great Plains Power Station in Moose Jaw, Saskatchewan, and the Aspen Power Station near Lanigan, Saskatchewan. Construction of the Great Plains Power Station commenced in 2021 and the plant is anticipated to begin operating in 2024. The construction of the Aspen Power Station is anticipated to begin in 2024.
>
> 7. Through this application, the Applicants are asking the Court to consider their *Charter* rights and whether those rights are breached by the actions of the [Government] and the provincial Crown corporations responsible for providing and delivering electricity to Saskatchewan residents and businesses as it relates to approving new electrical generation assets. The Applicants ask that the Court direct the Respondents to prepare

> formal plans to decarbonize the provincial electrical grid. If this Court finds that the Applicants' Charter rights are being breached by ongoing development of new [UFFGAs], the Applicants respectfully ask this Court to grant remedies that would mitigate or eliminate the harms caused by the Respondents.
>
> …
>
> 31. … Given the evolution of climate science and the certainty of causes and impacts of dangerous climate change, the [Government's] expansion of [UFFGAs] infringes the Applicants' *Charter* rights.

[101] Relevant statements in the Applicants' approximately 30-page Claim include:

a) "SaskPower currently has no firm commitment to achieve Net Zero emissions" (para. 5);

b) "The Applicants ask that the Court direct the Respondents to prepare formal plans to decarbonize the provincial electrical grid" (para. 7);

c) "The converging science on dangerous climate change, the impacts, and causes thereof must inform the Court's consideration of whether state action to build new [UFFGAs] is consistent with the Applicants' *Charter* rights" (para. 30);

d) "The Applicants are asking for the Court to find that the Respondents have an obligation to set a Net Zero target for the Crown electrical system and demonstrate that any new fossil fuel-based generation assets are compatible with that target" (para. 31);

e) "Alternatively, the Applicants ask this Court to direct the Respondent to set emissions reduction targets in the *MRGHG Regulations* that serve to reduce absolute emissions related to

electricity generation within the province" (para. 31);

f) "The Applicants submit that current state-sanctioned GHG emissions are serving to exacerbate dangerous climate change" (para. 40);

g) "The [Government] has obligations under [the *MRGHG Act*] to establish a GHG reduction target for Saskatchewan [which] compels prescribed regulated emitters to reduce GHG emissions as prescribed by [the *MRGHG Regulations*]. SaskPower is a "prescribed regulated emitter" and s. 16 of the *MRGHG Regulations* limits SaskPower to 77,000,000 tonnes of cumulative emissions for the 2020-2024 compliance period and 64,500,000 tonnes for the 2025-2029 compliance period" (para. 44);

h) "The Applicants submit that the "Emission Reduction Obligations" prescribed in the *MRGHG Regulations* are not, in fact, targets to reduce emissions with respect to the 2020-2024 compliance period. The average annual emissions of SaskPower, as disclosed in its annual reports over the past three years (2019-2021) are 14.5 MT/yr. The *MRGHG Regulations* target of limiting cumulative emissions for SaskPower from 2020-2024 equate to an average annual emission of 15.4 MT/yr. Therefore, the effect of the *MRGHG Regulations* is to allow SaskPower to *increase* emissions in the short term [emphasis in original]" (para. 45);

i) "Ongoing action by the Respondents to continue to finance, develop, and approve unabated fossil fuel electrical generation infrastructure serves to increase the GHG emissions that are causing dangerous climate change and exacerbates the mental condition of

ecoanxiety" (para. 51);

j) "All citizens' s. 7 *Charter* rights to life and security of person are infringed by government action that increases GHG emissions via unabated fossil-fuel electrical generation" (para. 52);

k) "… state action to increase GHG emissions has the effect of imposing disadvantage on those with the enumerated and analogous grounds listed above and … this ongoing action is inconsistent with substantive equality enshrined by the *Charter* at s. 15 over and above the s. 7 infringements impacting all citizens" (para. 54);

l) "If SaskPower continues to rely on fossil fuel-based generation, rising pollution prices will undermine the ability of the CIC to control electricity rates for Saskatchewan residents and businesses as per the powers bestowed to the CIC under *The Crown Corporations Act, 1993* [SS 1993, c C-50.101]" (para. 86);

m) "Renewable energy from solar and wind is proven and ready to deploy at scale now. Numerous methods of electrical storage exist and could be implemented in Saskatchewan to support intermittent generation from renewables like solar and wind" (para. 89);

n) "… the Respondents could commit to building gas-fired generation equipped with Carbon Capture and Storage to mitigate the harmful pollution with the best available technology" (para. 90);

o) "The reason Saskatchewan does not yet have a Net Zero plan for our electrical grid is not because it is impossible – it was simply a choice not to bother" (para. 92); and

p) "A decarbonized electrical grid is a prerequisite for a Net Zero society. There are enough renewable energy resources to meet Saskatchewan's energy demands. By electrifying sectors that were previously not electrified, it becomes easier to balance the grid" (para. 93).

[102] The relief sought by the Applicants includes:

a) An order declaring the Respondents' ongoing development and expansion of UFFGAs violates their rights under ss. 7 and 15 of the *Charter* in a manner than cannot be saved under s. 1 of the *Charter*;

b) An order declaring the GHG Caps in the *MRGHG Regulations* breach the Applicants' ss. 7 and 15 *Charter* rights;

c) An order directing the Government to prepare a generation and asset management plan to provide Net Zero electricity by the end of 2035, or the end of 2040 at the latest [Net Zero Plan], "given the urgency of the climate crisis and the pressing need for transformative action" (para. 46);

d) An order directing the Government to set SaskPower's GHG Caps in the *MRGHG Regulations* at an amount "consistent with Saskatchewan's share of the minimum level of GHG reductions necessary to limit global warming to well below 2 [degrees Celsius] (i.e. the upper range of the *Paris Agreement* temperature standard)" (para. 15(c));

e) An order directing the Respondents to discontinue the development, construction, planning, and investment in UFFGAs unless they can demonstrate how they can be incorporated within the Net Zero Plan

or revised *MRGHG Regulations* to be imposed;

f) An order directing the Government to compel the directors of the CIC and SaskPower to prepare the Net Zero Plan to justify and rationalize any ongoing expansion of UFFGAs within the context of that Plan;

g) An order directing the Government to ensure the directors of CIC and SaskPower fulfil their statutory or common law duties to set SaskPower's GHG Caps beginning in the year 2027, and periodic targets thereafter, that demonstrate a credible path to achieving the Net Zero Plan or revised *MRGHG Regulations* to be imposed; and

h) An order declaring that ongoing development and expansion of UFFGAs constitutes a breach by the directors of SaskPower and CIC of their statutory and common law fiduciary duties owed to all Saskatchewan residents.

[103] Overall, the Applicants' apparent objective in advancing the Claim is to have the Court mandate that power be generated in Saskatchewan with Net Zero GHG emissions by 2035, or 2040 at the latest. To achieve this, the Applicants ask the Court to require the Government to legislate the Net Zero Plan, to dictate how the GHG Caps be identified in the *MRGHG Regulations* (in accordance with the *Paris Agreement* even though Saskatchewan is not a party to it), and to direct how power may be generated in Saskatchewan.

[104] While I have copied only some passages from the Claim above, I have considered the pleading as a whole, assuming all passages to be true unless manifestly incapable of being proven, to assess justiciability.

(c) The UFFGAs

[105] For reasons that follow, I conclude the Claim as it relates to the two new UFFGAs does not raise a justiciable issue.

[106] First, the Applicants object to the approval, development, and construction of the two UFFGAs for electricity generation because they emit GHGs into the atmosphere, GHGs cause climate change, with the result their *Charter* rights are breached. However, like *Jeunesse* and *Tanudjaja*, their pleading does not impugn any statute or other law pursuant to which these decisions were made. Similar to *Tanudjaja*, the UFFGAs do not raise a question that can be resolved by application of law nor a claim that is otherwise tethered to a legally defined, objective standard.

[107] Second, the Applicants do not assert the UFFGAs will result in SaskPower failing to comply with the GHG Caps set out in the *MRGHG Regulations* or other provincial laws, and/or any emissions standards mandated by Canada, and/or any other statutory requirement regarding the parameters within which SaskPower may generate electricity. Unlike *La Rose FCA*, there is no assertion the Respondents are failing to meet the GHG Caps as a result of the UFFGAs or for any reason at all. In other words, the legal anchor in *La Rose FCA* is not present in this case.

[108] Third, the Claim relating to UFFGAs is distinguishable from the claims advanced in *La Rose FCA* and *Mathur CA*. In *La Rose FCA*, the claimants asserted that Canada failed to meet its own emissions standards set out in the *Canadian Net-Zero Emissions Accountability Act* which resulted in a breach of their *Charter* rights. That was the legal anchor for the action, as there was a legally-defined standard to assess the *Charter* claims. As described above, similar circumstances do not exist in this case. In contrast to *Mathur CA*, the Applicants do not allege that the Respondents, in approving and constructing the UFFGAs, have failed to comply with any statutory obligation that could ground their claims of *Charter* violations. In other words, the nature of the

impugned approval and construction of the UFFGAs is not grounded in any alleged breach of any statutory obligation or law such that, unlike *La Rose FCA* and *Mathur CA*, there is no sufficient legal component to permit constitutional adjudication.

[109] Fourth, like *Tanudjaja*, the Applicants seek relief in relation to the UFFGAs that does not engage the Court in a "court-like" function. Rather, they call upon the Court to embark on a course that more closely resembles a public inquiry into the appropriateness of the UFFGAs in the context of global warming. Notwithstanding the apparent competing economic, social, budgetary, and political factors that are engaged in the context of any response to climate change, the Applicants seek to have this Court conduct the required contextualized analysis of information and dictate specific measures to be taken by the executive and legislative branches regarding electricity generation in the context of climate change. For example, as indicated above, they ask the Court to step into the shoes of the legislative branch and require the Respondents to develop a Net Zero Plan relating to SaskPower's GHG emissions by the end of 2035 or 2040 at the latest, and to direct UFFGAs are only permissible if they demonstrate how they are utilized in the context of the Net Zero Plan. Similar to *Jeunesse*, the Claim is grounded in requests for relief that would require the Court to disregard the time-honoured separation of powers and its proper role within Canada's constitutional framework so as to encroach on the roles of the legislative and executive branches by forcing the Respondents to make specific decisions for the power supply in this Province. This is beyond the capacities and legitimacy of the judicial process.

[110] Overall, the pleading regarding the two new UFFGAs lacks a sufficient legal component or legal anchor for the *Charter* claims to permit the Court to adjudicate this matter against an objective legal standard. It raises questions for which deference is owed to the Respondents who are better placed to weigh the various considerations relating to the use of UFFGAs for the generation of electricity in Saskatchewan. Defining, imposing, and monitoring the solutions to be adopted by the Respondents are

matters that exceed the capacities and legitimacy of the judicial process, and these policy decisions are appropriately made by the democratically elected branches of government in accordance with the separation of powers in our constitutional democracy.

(d) The *MRGHG Regulations*

[111] For reasons that follow, I conclude the Claim as it relates to the asserted "unreasonably inadequate government action" relating to the GHG Caps for SaskPower in the *MRGHG Regulations* is not justiciable.

[112] First, similar to my reasons relating to the lack of justiciability for the two new UFFGAs, this aspect of the Claim is also distinguishable from *La Rose FCA* and *Mathur CA.* The Claim does not assert the Respondents have failed to comply with a statutory obligation to address climate change or have otherwise breached any statutory or legal standards, such as the GHG Caps, in violation of their *Charter* rights. In specific contrast to *Mathur CA*, the Applicants here do request an order for specific GHG emissions limits and are challenging the inadequacy of the GHG Caps in the *MRGHG Regulations*.

[113] Second, the portion of the Claim that pleads the *MRGHG Regulations* permitted SaskPower to increase GHG emissions in the five-year (2020-2024) compliance period, rather than decrease them, is inaccurate. This is apparent on a plain reading of the *MRGHG Regulations*.

[114] SaskPower is required to reduce its GHG emissions from all facilities within specified compliance periods in accordance with the GHG Caps set out in Column 3 of Table 1 in Part 4 of the *MRGHG Regulations*, which is set out below:

PART 4

Emission Reduction Obligations

TABLE 1

[*Subsection 16(2)*]

Column 1	Column 2	Column 3
Compliance Period	**Compliance Period - Years**	**CO2e Cumulative Emissions Cap for All Facilities in Saskatchewan**
1	2018-2019	33 500 000 tonnes
2	2020-2024	77 000 000 tonnes
3	2025-2026	29 400 000 tonnes
4	2027-2029	35 000 000 tonnes

[115] The Applicants impugn the above-noted GHG Caps in the Claim on the basis they permitted SaskPower to increase its emissions in 2020-2024 compared to prior years. On this basis, they plead the GHG Caps are not targets to reduce GHG emissions, contrary to the objective of the *MRGHG Act* to reduce GHG emissions. However, Table 1 in Part 4 of the *MRGHG Regulations* shows this is a flawed factual statement in the pleading because:

a) The GHG Cap for the two-year period 2018-2019 was 33,500,000 tonnes, which averages to 16,750,000 tonnes per year for each of 2018 and 2019.

b) The GHG Cap for the five-year period 2020-2024 was 77,000,000 tonnes, which averages to 15,400,000 tonnes per year for each of these five years, and represents an average annual reduction following 2019 of 1,350,000 tonnes;

c) The GHG Cap for the two-year period 2025-2026 is 29,400,000 tonnes, which averages 14,700,000 tonnes per year for 2025 and 2026, and

represents a further average annual reduction; and

d) The GHG Cap for the three-year period 2027-2029 is 35,000,000 tonnes, which averages 11,666,667 tonnes per year and a further average annual reduction.

[116] Based on the flawed factual foundation pleaded for this aspect of the *Charter* claim, I consider it to be manifestly incapable of being proven and do not accept it as true that the *MRGHG Regulations* allowed SaskPower to increase, instead of decrease, its GHG emissions in 2020-2024.

[117] Third, in the Claim, the Applicants question the wisdom of the Government's approach to climate change because they have not legislated a commitment to combat climate change to achieve Net-Zero emissions by any date nor legislated the emissions standards set out in the *Paris Agreement*. Similar to *Jeunesse*, they seek to invoke the authority of the Court to direct the legislature to act. For example, and as indicated above, they ask the Court to step into the shoes of the legislative branch and force it to legislate requirements on the Respondents to deliver Net Zero electricity by the end of 2035 or 2040 at the latest. Moreover, they seek an order directing the Government to set the GHG Caps in the *MRGHG Regulations* for SaskPower to be consistent with our Province's share of the minimum level of GHG reductions necessary to limit global warming to well below 2 degrees Celsius (which they plead is the upper range contemplated in the *Paris Agreement*). Like the circumstances in *Jeunesse*, there is no Saskatchewan legislation adopting the *Paris Agreement* standards in our Province in order to ground this aspect of the Claim.

[118] In the circumstances, I agree with the submissions made by the Respondents. The issues in the Claim are not properly advanced for constitutional adjudication. Through the remedies sought, the Applicants ask the Court to direct the enactment of new laws and engage in ongoing policy oversight, which is in essence

court-directed legislative reform. The Applicants are dissatisfied with what they regard as the Respondents' completely inadequate, irresponsible, and harmful response to climate change, and they ask the Court to direct the legislative branch and control Government choices around electricity delivery in the province for years to come. In my view, to do so would require the Court to disregard the time-honoured separation of powers in our constitutional democracy in a manner that exceeds its institutional capacity and legitimacy.

[119] For the foregoing reasons, I conclude that even upon a generous reading of the Claim, it is plain and obvious it does not advance a justiciable claim and therefore, it has no reasonable cause of action and no reasonable chance of success. Taking all of the statements in the pleading to be true, there is no judicially discoverable and manageable standard, sufficient legal component, or legal anchor for assessing the *Charter* claims that centre on the approval of UFFGAs and the allegedly insufficient *MRGHG Regulations*. In all of the circumstances, I am satisfied this is one of the very rare cases where the questions raised in the Claim and the related relief sought from the Court are not resolved by the application of law or other objective standard, but rather by democratic accountability.

[120] Although I have determined the Claim is not justiciable, the material importance of protecting the environment remains. This decision is not to be interpreted as suggesting the Respondents are immune from constitutional scrutiny in appropriate circumstances regarding their climate change response. However, the concept of justiciability is a foundational component in Canada's constitutional democracy that cannot be overlooked even when the subject matter raises crucial issues from a local, national, or international scale.

[121] My determination on the lack of justiciability of the *Charter* claims advanced in the Claim is a full adjudication of the merits of the applications to strike

(*La Rose FCA* at para 20). The Applicants have already amended their pleading to avoid having the Claim struck. Given the wholesale transformation that would be required for the pleading to advance a justiciable claim, I see no tenable basis to grant leave to further amend in the circumstances.

3. Does the Claim otherwise disclose a reasonable cause of action?

[122] In addition to the *Charter* claims, the Applicants plead that the directors of SaskPower and the CIC owe all Saskatchewan residents a duty of care under section 46 of *The Crown Corporations Act, 1993,* SS 1993, c C-50.101, section 117 of *The Business Corporations Act, 2021*, SS 2021, c 6, and the common law. The Claim states that "reasonable and prudent directors would recognize and acknowledge that CIC and SaskPower have an obligation to commit to Net Zero emissions by 2035 or 2040 at the latest" (para. 24).

[123] The Claim also asserts that SaskPower and CIC, as Crown corporations, owe statutory and common law duties of care to the Applicants. The Applicants plead that SaskPower and CIC do not have the discretion to build new UFFGAs because to do so is contrary to their duties of care.

[124] Relevant passages from the Claim include:

> 16. The Applicants seek the following remedies … :
>
> …
>
> d. Additionally, or in the alternative, an order declaring that ongoing development and expansion of unabated fossil fuel based electrical generation constitutes a breach of the statutory duty of care of the CIC directors and the SaskPower directors as prescribed by s. 46 of *The Crown Corporations Act, 1993*, s.9-23 of *The Business Corporations Act, 2021*, and the common law fiduciary duty of the directors of SaskPower and the CIC to all residents of Saskatchewan and that such ongoing action is not in

good faith with a view to the best interests of the CIC or SaskPower as per s. 48(1)(a) of *The Crown Corporations Act, 1993*; and

e. Additionally, or in the alternative, an order directing the Respondent government of Saskatchewan to ensure the directors of CIC and SaskPower deliver on their statutory and common law fiduciary duties to set interim targets for emissions reduction related to electricity generation beginning in the year 2027, and periodic targets thereafter, that demonstrate a credible path to achieving the SK NZ [Saskatchewan Net Zero] Electricity Plan or the revised *MRGHG Regulations* emissions limits requested above;

…

24. … The Applicants submit that reasonable and prudent directors would recognize and acknowledge that CIC and SaskPower have an obligation to commit to Net Zero emissions by 2035 or 2040 at the latest.

25. … [R]easonably prudent people exercising care and diligence as directors would not expand [UFFGAs] and would create a Net Zero plan to decarbonize the provincial electrical grid.

…

33. Should this Court decide not to order the Respondents CIC and SaskPower to prepare a Net Zero target with a deadline, in the alternative, the Applicants suggest that these Respondents have statutory and common law duties of care and the Applicants ask this Court to find that the CIC and SaskPower do not have discretion to engage in building of new unabated polluting electrical generation because that is contrary to their statutory and common law duties of care. Given the findings of the most recent IPCC [Intergovernmental Panel on Climate Change] Sixth Assessment Reports, any new fossil fuel generation assets proposed should only be built with pollution abatement technology (such as Carbon Capture and Sequestration) to manage the GHG emissions causing dangerous climate change.

[Footnotes omitted]

[125] The Claim is not properly advanced against the directors because they are not named as respondents in this action. The passages in the Claim that relate to the directors are struck on this basis alone.

[126] If the claims against the directors were properly advanced, I would have determined it is plain and obvious they have no reasonable chance of success and would have struck them for the following reasons.

[127] First, the statutory duty of care owed by the directors of SaskPower and the CIC is to their Crown corporations, not to the public at large. The duty requires the directors to act honestly and in good faith with a view to the best interests of SaskPower or CIC, as the case may be. This statutory duty is not owed to members of the public (*Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461).

[128] Second, only certain categories of relationships give rise to common law fiduciary obligations. For example, the solicitor-client relationship is one where a fiduciary duty is generally owed by the lawyer to the client (*Galambos v Perez*, 2009 SCC 48 at paras 36-37, [2009] 3 SCR 247 [*Galambos*]).

[129] The legal test for assessing whether a fiduciary duty is owed includes that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary (*Galambos* at paras 66, 71, and 77-78). In *Galambos*, the Court noted that "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her" (para. 75).

[130] In *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261 [*Elder Advocates*], the Supreme Court explained a party may establish the existence of an *ad hoc* fiduciary duty. In addition to the existence of vulnerability arising from the relevant relationship, the party must demonstrate: (a) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or

beneficiaries; (b) a defined person or class of persons (the beneficiary or beneficiaries) vulnerable to the fiduciary's control; and (c) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control (at paras. 27, 36). In addition, compelling a fiduciary to put the best interests of the beneficiary before their own is essential to such a relationship (para. 44).

[131] In this case, the directors of SaskPower and CIC owe a statutory (fiduciary) duty to their Crown corporations. The Applicants have not plead facts necessary to meet the legal test to establish they also owe a common law fiduciary duty to all Saskatchewan residents. Moreover, the directors' complete loyalty is owed to their respective Crown corporations. To assert they owe the same loyalty to the Applicants and/or all residents of Saskatchewan would result in the directors having divided loyalty which is entirely contrary to the concept of fiduciary duty.

[132] In relation to the Crown Corporations owing a common law fiduciary duty, *Elder Advocates* is instructive. The Court in that case considered when governments, as opposed to individuals, may be bound by a fiduciary duty. It noted that state actors have been held to owe a fiduciary duty in only limited and special circumstances, such as in discharging the Crown's special responsibilities towards Aboriginal peoples and where the Crown is acting in a private capacity, as in its role as the public guardian and trustee.

[133] In *Elder Advocates*, the Court explained that fiduciary duty is a doctrine originating in trust which requires that one party (the fiduciary) act with complete loyalty toward another party (the beneficiary) in managing the beneficiary's affairs. Compelling a fiduciary to put the best interests of the beneficiary before their own is essential to such a relationship, and imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole (para. 44). In

addition, the Court noted that public law duties, which require the exercise of discretion, do not typically give rise to a fiduciary relationship (para. 37). Ultimately, the Court in *Elder Advocates* made it clear that "no fiduciary duty is owed to the public as a whole" by the Crown (paras. 50-54).

[134] There is no factual basis in the Claim to ground the bald assertion that SaskPower and CIC, as Crown corporations, owe a fiduciary duty to the Applicants or the Saskatchewan public at large. There is no pleading that can be taken to be true that either of the Crown Corporations has undertaken to act in the best interests of the Applicants. There are no facts pleaded to the effect that SaskPower and CIC are to secure the paramountcy of the Applicants' interests. Quite simply, there is nothing in the Claim to ground the cause of action that contemplates SaskPower and CIC having a duty as claimed.

[135] In the circumstances, I find that it is plain and obvious that the causes of action grounded in the alleged statutory or common law duty of directors of SaskPower and CIC, and/or the Crown Corporations, have no reasonable chance of success and there is no reasonable amendment that could cure this defective pleading. These causes of action in the Claim are struck.

V. CONCLUSION

[136] For the reasons set out above, the *Charter* claims in the Claim are not justiciable and are struck without leave to amend. The claims based on alleged duties owed by SaskPower, CIC, and their directors are struck for failing to disclose a reasonable cause of action without leave to amend. The Claim is struck in its entirety.

[137] There shall be no order for costs.

J.

H.A. KUSKI BASSETT

KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 175**

Date: **2025 10 27**
Docket: KBG-RG-00848-2023
Judicial Centre: Regina

BETWEEN:

SABRINA DYKSTRA, MINOR, BY HER LITIGATION GUARDIAN, CLAIRE DYKSTRA, JILL FORRESTER, RYAN HEISE, KAYLA HOPKINS, LYNN OLIPHANT, HAROLD PEXA, AMY SNIDER, and CLIMATE JUSTICE SASKATOON ORGANIZATION INC.

APPLICANTS

- and -

SASKATCHEWAN POWER CORPORATION, CROWN INVESTMENTS CORPORATION OF SASKATCHEWAN, and THE GOVERNMENT OF SASKATCHEWAN

RESPONDENTS

Counsel:

Glenn Wright, Larry Kowalchuk, and Kaitlyn Harvey	for the applicants
Collin K. Hirschfeld, K.C., and Caroline C. Seshadri	for the respondents, Saskatchewan Power Corporation and Crown Investments Corporation of Saskatchewan
C. Elaine Thompson, K.C.	for the respondent, The Government of Saskatchewan

---

CORRIGENDUM to JUDGMENT
DATED October 10, 2025
October 27, 2025

KUSKI BASSETT J.

---

[57] The last sentence of para. 44 should read as follows:

They emphasize that the decision how the Government contributes to the national and international fight against climate change is a political decision left to the democratically elected Government.

[58] Para. 115(d) should read as follows:

The GHG Cap for the three-year period 2027-2029 is 35,000,000 tonnes, which averages 11,666,667 tonnes per year and a further average annual reduction.

J.
H.A. KUSKI BASSETT