File No. 42619

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

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.

APPLICANTS
(Appellants)

-and-

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

RESPONDENTS
(Respondents)

APPLICANTS' MEMORANDUM OF ARGUMENT

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Memorandum of Argument

PART I – OVERVIEW AND STATEMENT OF FACTS

The existential threat posed by climate change combined with its effect of worsening inequalities makes it one of the most important human rights issues of our time.[1]

…when a litigant alleges that government (in)action offends a particular law, whether statutory, common law, or a constitutional provision, the issue is justiciable.[2]

Overview: Justiciability and the Stunted Growth of Living Tree Constitutionalism

1. The Constitution of Canada has long been described as a living tree. If so, this would make the courts its prime gardeners.[3] The law of justiciability plays an important role in weeding out cases that are unsuitable for judicial resolution. But when courts are asked to strike *Charter*[4] claims at the pleadings stage, great care must be taken not to stunt the *Charter*'s growth and maturation by doing so. This metaphor is particularly fitting when Canadians are increasingly seeking shelter under the *Charter* against state actions and legislation that exacerbate the climate crisis, as in this case.
2. This appeal raises three inter-related questions of public importance. First, what standards govern the threshold justiciability of *Charter* claims? Second, must *Charter* claims that impugn state action or regulations be grounded in violations of legislated standards to be justiciable? Third, is international law relevant to the justiciability of *Charter* claims that invoke international law to establish constitutional minimums?
3. The first question is subject to divergent jurisprudence and opinion. The authors of the leading treatise on the law of justiciability in Canada indicate that merely pleading a

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[1] Nathalie J. Chalifour, *Climate Change and the Canadian Constitution: Federalism and Charter Rights in a Warming World*, (Toronto: University of Toronto Press, 2025) at 214.

[2] Lorne M. Sossin & Gerard Kennedy, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 3rd ed (Toronto: Thomson Reuters, 2024) at §8:6 (section title "Climate Change Litigation, Generally").

[3] Lorne Sossin & Gerard J. Kennedy, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45(4) Federal Law Review 707 at 723.

[4] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11 [*Charter*].

breach of the *Charter* should render such a claim justiciable.[5] This is no guarantee of the claim's success, but justiciability is about barring claims that are "untethered from any legal doctrine".[6] The Federal Court of Appeal has also been reluctant to determine that cases are not justiciable. Instead, it has described non-justiciable cases as "rare" and indicated that claims in which breaches of legal rights are pleaded fall well within the wheelhouse of the courts, drawing on Madam Justice Wilson's concurrence in *Operation Dismantle*.[7] In contrast in *Tanudjaja*, [8] the Ontario Court of Appeal opened the door to a more expansive approach by striking a *Charter* claim it deemed to be too broad and diffuse to be judicially determined. Now, strikingly, the decision of the Court of Appeal for Saskatchewan below takes that door right off its hinges, insisting *Charter* claimants must identify legislated standards to backstop their *Charter* challenges against state action and regulations and dismissing international law's relevance to the justiciability of *Charter* claims out of hand.

4. The Court of Appeal's insistence that legislated standards must be breached before *Charter* scrutiny of state action or regulations is justiciable risks turning the logic of constitutional review on its head. If legislators can avoid constitutional scrutiny of state action or regulations by simply amending enabling statutes or declining to put legislated standards in place, the *Charter* may no longer warrant being labelled the supreme law of Canada. Nevertheless, the Saskatchewan Court of Appeal's decision rests on this premise, attesting to the confused state of *justiciability* jurisprudence.
5. Whether international law is relevant to the justiciability of *Charter* claims is closely bound up with the first two issues. If legislated standards must be breached in order for *Charter* challenges against state action or regulations to be judicially determined, international law may be of little to no assistance unless it is incorporated into those legislated standards. But this logic does not hold if the *Charter* itself is understood to provide a sufficient legal standard for assessing the constitutionality of state action and regulations. When it comes to the constitutional minimums established by the *Charter* itself, "[c]ourts must presume that the *Charter* guarantees protections at least as broad as

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[5] Sossin & Kennedy, *supra* note 2, at §8:6.

[6] *Ibid.*

[7] *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at paras 69-70 [*Hupacasath*]; *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC) at paras 64-67 (per Wilson J, concurring) [*Operation Dismantle*].

[8] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 at paras 19-27 [*Tanudjaja*].

those afforded by similar international human rights documents that Canada has ratified".[9] The Supreme Court of Canada has also frequently relied on non-binding international law sources to assist in "delineating the breadth and content of *Charter* rights".[10] Nonetheless, the Saskatchewan Court of Appeal's decision below marginalizes international law as irrelevant to the justiciability of *Charter* claims unless it has been domesticated into legislated standards, further muddling the law in this area.

6. The justiciability of *Charter* claims requires attention from this Honourable Court. To explain how we got here, the trajectory of rights-based climate litigation in Canada needs to be outlined. Climate change poses an "existential challenge" as this Court has already acknowledged.[11] Faced with this urgent threat, Canadians are increasingly turning to the courts to enforce the rule of law against state-authorized contributions to climate change's catastrophic harms.[12] They deserve intelligible guidance on when they can expect to get their day in court and when (and why) they might be denied it.

Facts: Climate Change and the Turn to the Courts

7. Human activity is the main cause of climate change, primarily through the burning of fossil fuels.[13] Greenhouse gas emissions are accelerating a climate crisis that severely impacts what the future of humanity and all other species will look like. This is a fact that is beyond reasonable dispute based on the best available science.[14]

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[9] *Taylor v Newfoundland and Labrador*, 2026 SCC 5 at para 82 [*Taylor SCC*].

[10] *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at 36.

[11] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 167 (see also paras 2, 171, and 187) [*GGPPA Reference*].

[12] Julien O. Beaulieu, Patricia Turcotte, William Gabriel Rioux, Emily Bradeen & Renaud Gignac, "Taking Stock of Climate Litigation in Canada" Sherbrooke, Canadian Climate Litigation Observatory, 2026 [Taking Stock Report].

[13] *GGPPA Reference*, *supra* note 11, at para 7. See also "Causes and Effects of Climate Change" United Nations, online: https://www.un.org/en/climatechange/science/causes-effects-climate-change (31 October 2026).

[14] *Obligations of States in respect of Climate Change (Advisory Opinion)*, [2025] International Court of Justice, United Nations, The Hague (Netherlands), released 23 July 2025, at para 137 [*ICJ Opinion*], online: https://www.icj-cij.org/case/187 (31 October 2026); *GGPPA Reference*, *supra* note 11, at paras 188-189.

8. As this Court has acknowledged, the "only way to address the threat of climate change is to reduce greenhouse gas emissions."[15] Law authorizes and encourages many of the emissions that are driving the climate crisis. But it can also regulate and restrict them.

9. At the UN Climate Change Conference in Paris, France in 2015, Canada was one of 195 nations that unanimously adopted a legally binding treaty on climate change known as the Paris Agreement. It commits its signatories to "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."[16] Canada is a signatory to the international treaty and ratified the Paris Agreement on 5 October 2016.

10. As the climate crisis deepens, courts across the world are increasingly being asked to assess whether governments' authorization and encouragement of these dangerous emissions breaches their human rights obligations. The theory is that because the environment is the foundation for human life, health, and well-being, its protection forms a necessary precondition for the enjoyment of human rights.[17] A growing number of courts across the world have embraced this theory and they look to the scientifically established and politically endorsed targets for emissions reductions in the Paris Agreement for a clear and objective yardstick as to whether human rights standards have been breached.[18]

11. Canadian courts are no strangers to litigation centred on climate change, but the rate at which these claims are being initiated is in a state of rapid acceleration.[19] In several cases, Canadians have invoked the *Charter* to shield themselves from state-authorized contributions to the climate crisis, relying on the same basic theory that has succeeded in a growing list of human rights-based climate cases from across the globe.

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[15] *GGPPA Reference*, *supra* note 11, at para 2.

[16] United Nations Framework Convention on Climate Change, *Paris Agreement*, Adopted at the United Nations Climate Change Conference (COP21) in Paris, France, on 12 December 2015, at Article 2, s 1(a) [Paris Agreement]. The Paris Agreement entered into force on 4 November 2016, online: https://unfccc.int/sites/default/files/resource/english_paris_agreement.pdf (31 October 2026).

[17] *ICJ Opinion*, *supra* note 14, at para 373.

[18] Chalifour, *supra* note 1, at 259, citing, inter alia: Supreme Court of the Netherlands, Den Haag, 13 January 2020, *Urgenda Foundation v the State of Netherlands* (2020), 19/00135 (Netherlands) at paras 5.2.3, 6.2, 7.2.11, 7.3.6, and 7.5.1.

[19] Taking Stock Report, *supra* note 12.

Facts: Saskatchewan Regulations allowed increasing emissions

12. Saskatchewan law dictates that "[t]he Lieutenant Governor in Council shall establish in the regulations a greenhouse emission reduction target for Saskatchewan for a year or years selected by the Lieutenant Governor in Council".[20] The Respondent Government of Saskatchewan has prescribed "emission reduction obligations" in *The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations*[21] (the "Regulations") for four compliance periods between 2018 and 2029 in response. The first two compliance periods implement the Respondent Government's "reduction obligations" by authorizing significantly expanded emissions from the generation of electricity by the Respondent Saskatchewan Power Corporation ("SaskPower"), which is Saskatchewan's principal electricity utility and a Crown corporation.
13. The greenhouse gas emissions generated by the Respondent SaskPower can be inferred from data publicly disclosed in its annual reports. Although explicit annual emissions from SaskPower have not been consistently published in its annual reports, the five-year annual average emissions for SaskPower from 2013 to 2017 were nearly 15MT per year.[22] This was the five-year period immediately preceding the first compliance period for which the Regulations prescribe an emissions cap: 2018 – 2019, set at 33.5MT or 16.75MT per year. This first emissions cap authorized an increase of annualized emissions by more than 11% compared to prior average annual emissions over the preceding five years.
14. The second compliance period emissions cap for 2020 – 2024 was set to 77MT, equating to an average of 15.4MT per year. Emissions in this compliance period also permitted SaskPower to increase its emissions compared to the five-year average immediately preceding the proclamation of the Regulations.[23] The third compliance period for 2025 –

[20] *The Management and Reduction of Greenhouse Gases Act*, SS 2010, c M-2.01, s 5 [*MRGHG Act*].

[21] *The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations*, RRS c M-2.01 Reg 1, s 16 [*Regulations*].

[22] The actual emissions for years 2012, 2013, and 2016 are not explicitly disclosed in the SaskPower annual reports but may be estimated from the disclosed data. The average annual emissions from SaskPower for 2013 – 2017 falls between 14.5 – 14.9 MT per year.

[23] Amended Originating Application, dated March 28, 2023, amended May 31, 2024, **TAB 3**.

2026 SaskPower emissions is 29.4MT, or 14.7MT per year, which is nearly the same as its average annual emissions before these "reduction obligations" were set.

15. The Applicants have sought to challenge these emissions caps as alleged infringements of their rights under ss 7 and 15 of the *Charter*. Importantly, the Applicants have sought to do so on the theory that by authorizing a further acceleration of dangerous emissions from SaskPower's generation of electricity, the Respondents are violating constitutional minimum standards under the *Charter*, not simply breaching a statutory obligation to reduce emissions through these caps. The increasing emissions permitted by the Regulations embody specific targets for the *Charter* claims and demonstrates that the Applicants are seeking to shield themselves from state-authorized harm and not asserting positive rights to state action. In other words, the Applicants seek to argue that it is the minimum standards under the *Charter* that are being breached, in addition to the breach of the provincial legislated obligations pursuant to the *MRGHG Act*.

16. Over the past 15 years, the Government of Saskatchewan has also publicly committed itself to reducing greenhouse gas emissions with an escalating level of ambition. In 2011 it acknowledged the dangers of greenhouse gas emissions and committed to installing carbon capture and sequestration on coal thermal generation plans within the province. In 2015 it announced a goal of reducing annual emissions by 40% from 2005 levels by 2030.[24] In 2021 it raised this target to a 50% reduction from 2005 levels by 2030. Finally, in 2023, roughly six weeks after the Applicants' originating application was served on the Respondents, the Government of Saskatchewan announced that it was committed to achieving net-zero generation of electricity by 2050.[25]

17. Yet in spite of these commitments to reduce greenhouse gas emissions, the Respondents have continued to approve, construct, and operate new unabated fossil fuel generation assets ("UFFGAs")[26] that contribute to the province's growing emissions, including:

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[24] SaskPower, *The Path to 2030: SaskPower Updates Progress on Renewable Electricity*, (SaskPower: Saskatchewan, 28 November 2017).

[25] Government of Saskatchewan, *Premier Outlines Plans For Affordable, Reliable Power Production,* (Saskatchewan: 16 May 2023).

[26] "unabated" throughout this application refers to power generation not equipped with Carbon Capture and Sequestration technology (CCS) that would otherwise reduce or abate the pollution intensity associated with fossil-fuelled electrical generation.

a. The 370MW Great Plains Power Station near Moose Jaw, SK was commissioned in 2024; and
b. The 370MW Aspen Power Station near Lanigan, SK began construction in April of 2024 and is expected to be fully built and operating in 2027.[27]

18. If the Government of Saskatchewan plans to achieve a net-zero electrical grid, then SaskPower must rely on negative emissions technologies or offsets to provide a balance of emissions that equates to zero. More emissions from fossil fuel generation plants will inevitably require more negative emissions technologies or offsets to achieve zero emissions by the deadline. This is termed a "total system equivalency" of net-zero.

19. Although the Respondents have committed to achieving net-zero electricity generation by 2050, no credible plan has been released by the Respondents for how they hope to achieve this objective. On the contrary, the Respondents have committed to refurbishing and recertifying all unabated coal fired generation plants in the province as part of the *Saskatchewan First Energy Security and Supply Plan*, released 20 October 2025.[28]

20. In the underlying originating application, the Applicants have sought to challenge the Respondents' approval, construction, and operation of two of these new UFFGAs—the Great Plains Power Station and the Aspen Power Station—invoking their rights under ss 7 and 15 of the *Charter* as the source of legal standards against which the constitutionality of these state actions can be assessed.

21. The *Charter* claims of the Applicants closely parallel those in other Canadian cases that challenge governments' contributions to dangerous emissions. The government defendants in these cases have routinely challenged the justiciability of the issues that they raise, arguing that they involve impermissible claims to positive rights under the *Charter* or impugn such a broad and diffuse range of state actions and inactions as to make them unworkable for judicial determination.[29] But when other claimants have challenged *specific* laws or state actions that authorize emissions and framed their arguments as *negative* rights claims, appellate courts have generally allowed the cases to proceed to be

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[27] This list is merely a subset of new or expanded UFFGAs for the relevant period.

[28] Government of Saskatchewan, *Government Releases the Saskatchewan First Energy Security Strategy and Supply Plan,* (Saskatchewan : 20 October 2025).

[29] See e.g. *Environnement Jeunesse c Procureur général du Canada*, 2021 QCCA 1871 [*Environnement Jeunesse*], leave to appeal dismissed *Environnement Jeunesse v Attorney General of Canada*, 2022 CanLII 67615 (SCC); *Lho'Imggin v Canada*, 2026 FC 943.

heard on their merits, as seen in the leading examples of *La Rose v Canada* and *Mathur v Ontario*.[30] While the Applicants followed these precedents in pleading their own claims, the decisions of the Saskatchewan Court of King's Bench and the Saskatchewan Court of Appeal have either misunderstood or disregarded them.

The Decisions Below

22. The Saskatchewan Court of King's Bench struck the underlying originating application on the basis that it raised non-justiciable issues, giving the following reasons in support:

    a. The Applicants have not impugned any statute or other law governing the decision to approve, construct, and operate the two new UFFGAs.[31]

    b. The Applicants have not pleaded that the new UFFGAs breach any law.[32]

    c. The Claim seeks remedies that courts cannot provide.[33]

    d. As for the Regulations, the Claim does not make out a breach of the government's statutory obligations.[34]

23. A majority of the Court of Appeal largely confirmed the lower court's reasoning. It faulted the Applicants for failing to plead a *Charter* challenge to "any specific law or application of a law regarding the new UFFGAs."[35] It also held that "the state action consisting of the approval, construction, and operation of the UFFGAs … is more akin to a broad public policy decision, which is generally not amenable to *Charter* scrutiny."[36] The majority held that "for the portions of the Claim regarding the approval, construction, and operation of the UFFGA's, there is no legally defined objective standard to be used in assessing whether this state action was *Charter* compliant."[37]

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[30] See discussion in *La Rose v Canada*, 2023 FCA 241; *Mathur v Ontario*, 2024 ONCA 762; *Mathur v Ontario*, 2026 ONCA 561.

[31] *Dykstra v Saskatchewan Power Corporation*, 2025 SKKB 175 at para 106.

[32] *Ibid* at paras 107-108.

[33] *Ibid* at para 109 (for the UFFGAs) and paras 117- 118 (for the Regulations).

[34] *Ibid* at para 112.

[35] *Dykstra v Saskatchewan Power Corporation*, 2026 SKCA 99 at para 55 [*Dykstra SKCA*].

[36] *Ibid* at para 56 (citations omitted).

[37] *Ibid* at para 62.

24. As for the Appellant's challenge to the emissions caps in the Regulations, a majority of the Court of Appeal held that "[there] is no law which constrains the Government of Saskatchewan in setting the limits that it did in the *Regulations*."[38] It concluded that:

> [while] the appellants submit that the Court of King's Bench should establish a constitutional minimum with respect to mitigating GHG emissions, there is an insufficient legal component and no manageable legal standard that would support the contention that this aspect of the Claim is justiciable.[39]

25. In dissent, Justice Drennan of the Court of Appeal opined that the Applicants' *Charter* challenge to the emissions caps in the Regulations could not be distinguished from the claims in *La Rose* and *Mathur* that have been held justiciable by the Federal and Ontario Courts of Appeal and are now allowed to proceed to hearings on their merits.[40] She also acknowledged that "the jurisprudence does not require that a *Charter* claim assert or demonstrate a government's breach of [a] statutory obligation or legal standard in order to be justiciable".[41] Nevertheless, she still focused on the Applicants having pleaded that the Government of Saskatchewan is failing to comply with the legislated standard of setting emission "reduction" targets under the enabling statute, emphasizing this as an objective, manageable or discoverable legal standard that would make this particular *Charter* claim justiciable.[42] In the absence of any analogous legal standard for the approval, construction, and operation of the UFFGAs, Justice Drennan joined in the majority's decision to strike that portion of the originating application.[43]

PART II – QUESTIONS IN ISSUE

26. This Application raises the following issues of national and public importance:

ISSUE ONE: What standards govern the threshold justiciability of *Charter* claims? How should novel proposed interpretations of *Charter* rights be treated at the pleadings stage?

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[38] *Dykstra SKCA, supra* note 35 at para 83.
[39] *Ibid* at para 85.
[40] *Ibid* at paras 110-133.
[41] *Ibid* at para 108.
[42] *Ibid* at paras 123, 125, 130-132.
[43] *Ibid* at para 91.

ISSUE TWO: Must *Charter* claims that impugn state action or regulations be grounded in violations of legislated standards to be justiciable? If so, how can the need for a legislated backstop be reconciled with the *Charter*'s status as the supreme law of Canada?

ISSUE THREE: Is international law relevant to the justiciability of *Charter* claims that invoke international law to establish constitutional minimums? Does it matter whether a province has legislated to domesticate international law when it is invoked to support the interpretation of *Charter* rights that apply uniformly across the country?

PART III – STATEMENT OF ARGUMENT

ISSUE ONE: What standards govern the threshold justiciability of *Charter* claims?

27. This Honourable Court has not weighed in on the limits of justiciability for *Charter* claims since *Operation Dismantle v The Queen*.[44] In that case, the majority upheld a decision to strike a *Charter* challenge to the Canadian government's decision to permit American cruise missile testing in Canada, but it did so on the basis that the claim was not amenable to proof of causation, not because it was not justiciable.[45]

28. Justice Wilson further probed the question of justiciability in her concurring reasons, coming to the same conclusion that this matter was justiciable. Her reasons imply that pleading a *Charter* breach is sufficient in and of itself to render the claim justiciable:

> […] the question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. […][46]

29. In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 3rd ed (2024), authors Justice Sossin and Professor Kennedy describe the limits of justiciability in equally monochromatic terms with specific reference to climate litigation:

> […] when a litigant alleges that government (in)action offends a particular law, whether statutory, common law, or a constitutional provision, the issue is justiciable. Concerns about the judicial role may be relevant to concluding that the provision has not been violated and/or the legal instruments, such as the *Charter*, do not protect the right to a healthy environment […]. Such considerations may also be considered in determining remedy. But that is a far cry from holding that a matter is on its face non-justiciable. At the same time, if a litigant brings a claim

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[44] *Operation Dismantle*, *supra* note 7.

[45] *Ibid* at para 38 (per Dickson J).

[46] *Ibid* at para 63 (per Wilson J, concurring).

untethered from any legal doctrine, justiciability is a threshold less likely to be met.[47]

30. The Federal Court of Appeal has also endorsed a brightline approach to justiciability. In *Hupacasath v Canada*, the Court of Appeal was faced with a claim that a decision of the Government of Canada to enter into a free trade agreement was in breach of the Crown's duty to consult.[48] The respondent argued that a government's decision to sign a treaty is non-justiciable. While the Court of Appeal agreed that this kind of decision is not amenable to judicial review based on its policy wisdom, it noted that the claim was instead framed around a breach of legal rights, making it clearly justiciable.[49]
31. In *Tanudjaja*, the Ontario Court of Appeal opened the door to weeding out *Charter* claims on the basis of non-justiciability.[50] There, the Court of Appeal grappled with a *Charter* challenge that did not impugn any particular statute or particular application of any statute or policy to any individual. Instead, it was premised on the idea that "the social conditions created by the overall approach of the federal and provincial governments violate[d] their rights to adequate housing".[51] In response, a majority of the Court of Appeal held that the claim was not justiciable as it was too "diffuse and broad" to permit the necessary analysis under s. 1 of the *Charter* and it lacked a "judicially discoverable and manageable standard" to assess the adequacy or sufficiency of the impugned housing policy.[52]
32. The Ontario Court of Appeal's reasoning in *Tanudjaja* has since been followed in cases where courts have been faced with *Charter*-based climate litigation that appears to be similarly "diffuse and broad" in scope. For instance, the Quebec Court of Appeal rejected a proposed class action that sought constitutional review of the Government of Canada's inaction without targeting any specific legislation and with demands for relief that the Court of Appeal saw as vague and general in *Environnement Jeunesse c Canada*.[53] The Federal Court has also repeatedly struck the pleadings in *Lho'Imggin v Canada* where it was estimated that even after the plaintiffs twice amended their pleadings, they still sought to "impugn at least 1,800 provisions, 40 schedules, and an indeterminate number

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[47] Sossin & Kennedy, *supra* note 2, at §8:6.
[48] *Hupacasath, supra* note 7.
[49] *Hupacasath, supra* note 7, at para 70.
[50] *Tanudjaja, supra* note 8.
[51] *Ibid* at para 10.
[52] *Ibid* at paras 32-33.
[53] *Environnement Jeunesse*, *supra* note 29 at paras 25, 42.

of permits and licences".[54] Whether these concerns with the scale and tractability of the pleadings are properly classified as issues of justiciability or not, these cases do provide intelligible guidance to *Charter* claimants with respect to the need to ground their claims in challenges to specific legislation or state action. The Quebec Court of Appeal expressly acknowledged that "the situation would be different if the appellant were challenging the validity of a specific statute enacting measures targeting GHG emissions".[55]

33. Other *Charter*-based climate cases that have followed this guidance challenging either specific statutes or the targets and plans enacted pursuant to them have been allowed to proceed to hearings on their merits. These more specific alleged infringements can be tested against the legal standards of the Constitution, such as the section 1 test for their justification. In *La Rose*, for example, which has gone to trial before the Federal Court, the plaintiffs seek an order declaring that:

> the *Canadian Net-Zero Emissions Accountability Act*, S.C. 2021, c. 22, including the 2030 Plan promulgated under that Act, unjustifiably infringes the plaintiffs' rights to life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* by continuing a trajectory of greenhouse gas emissions that is inconsistent with what the best available science says is required to restore and maintain a climate system that is capable of sustaining human life, liberties and security of the person.[56]

34. The plaintiffs in *La Rose* are targeting a specific plan under specific legislation, but they seek to test those impugned instruments against a novel standard under the *Charter* that is informed by evidence of the best available science.

35. Similarly, in *Mathur*, the plaintiffs take aim at the constitutionality of the greenhouse gas emission reduction target and plan that the Ontario government has enacted under an emissions reduction statute, challenging them as infringements of the plaintiffs' rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.[57] The plaintiffs are arguing that the enabling legislation for the target and plan oblige Ontario to take positive steps to redress the future harms of climate change, but the steps that Ontario has

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[54] *Lho'Imggin v Canada*, 2026 FC 943 at para 16.

[55] *Environnement Jeunesse*, *supra* note 29 at para 26.

[56] *La Rose v His Majesty the King*, (Fed Ct) Further Amended Statement of Claim to the Defendants, January 13, 2025, Court File No. T-1750-19 at para. 1(a), online: https:/www.climatecasechart.com/documents/la-rose-v-his-majesty-the-king-points-of-claim_13a9 (31 October 2026).

[57] *Mathur v Ontario*, 2024 ONCA 762 at para 1.

taken authorize "more greenhouse gases into the atmosphere than recommended under international standards".[58]

36. The Court of Appeal rejected Ontario's challenge to the justiciability of the *Mathur* claim in a summary fashion, similar to *Hupacasath* and *Operation Dismantle*:

> The application judge correctly noted at para. 106 of her reasons that the Charter applies to the Target and the [*Cap and Trade Cancellation Act, 2018*, SO 2017, c 13] and that, as a result, the *Charter* issues raised by the appellants are justiciable because "the Constitution requires that courts review legislation and state action for *Charter* compliance when citizens challenge them, even when the issues are complex, contentious and laden with social values."[59]

37. The Court of Appeal in *Mathur* also accepted that the plaintiffs' *Charter* claims were properly characterized as negative rights claims as they challenge the target and plan on the basis that they "commi[t] Ontario to levels of greenhouse gas emissions that violate their *Charter* rights".[60] But it is also clear that the plaintiffs seek to establish a novel standard under the *Charter* based on expert evidence that Ontario is failing to comply with "international greenhouse gas emission reduction standards".[61] In short, the basic framing of the case is closely analogous to *La Rose*: specific state actions are targeted; but the alleged *Charter* breaches are premised on constitutional minimums that are informed by evidence of the best available science and international norms.

38. At this basic level, the theory underlying the originating application in *Dykstra* is indistinguishable from the theory animating the *La Rose* and *Mathur* cases. Yet the Court below appears to have either misunderstood or disregarded the basic framing of the pleadings in *La Rose* and *Mathur* in distinguishing these cases from *Dykstra*.

39. More importantly, from the perspective of whether this raises an issue of broader public importance, the Court of Appeal for Saskatchewan majority has fashioned an onerous new test for *Charter* claimants to meet before their claims will be deemed justiciable. Claimants must show both: (a) a sufficient legal component to their claim; and (b) a manageable legal standard.[62] If constitutional minimums under the *Charter* are acceptable as manageable legal standards, this statement is not objectionable. But it is clear from the Saskatchewan Court of Appeal's reasoning that the manageable legal standard they have

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[58] *Mathur v Ontario*, 2024 ONCA 762 at para 60.
[59] *Ibid* at para 36.
[60] *Ibid* at para 41.
[61] *Ibid* at para 33.
[62] *Dykstra SKCA*, *supra* note 35 at paras 44(c), 85.

in mind must be legislated and cannot be defined by *Charter* interpretation that is aided by reference to international law and the best available science, leading to two more issues of public importance requiring guidance from this Court.

ISSUE TWO: Must *Charter* claims that impugn state action or regulations be grounded in violations of legislated standards to be justiciable?

40. The *Charter* has been described as a "unifying", "nation-building" instrument as it provides "uniform judicial protection of rights" and sets "a standard for rights across Canada".[63] As this Court has acknowledged, the *Charter* promotes national unity and identity "by protecting a common set of rights and freedoms for all Canadians".[64]

41. Yet if the *Charter* protects a common set of rights across the country, its standards cannot possibly be dependent on the vagaries of provincial statutes or programs. As the Federal Court of Appeal has forcefully stated:[65]

> The content and reach of the *Charter* do not expand or contract according to the will of provincial legislatures; otherwise, this would lead to the inconsistent application of *Charter* rights across the country, a consequence inimical to the *Charter* itself.

42. Contrary to this unifying vision of the *Charter*, the Saskatchewan Court of Appeal decision reimagines *Charter* standards as varying from one province to the next based on the legal standards that provincial legislatures have implemented from time to time. It does so by accepting the general premise that *Charter* scrutiny of emissions reduction legislation is possible but restricting this to cases in which that *Charter* scrutiny is based on independent legislated standards within the legislation itself. This turns the basic notion of constitutional review of legislation on its head.

43. Recall that in this case, the Applicants pleaded two specific infringements of their rights by the Respondents: 1) the approval, construction, and operation of two new UFFGAs; and 2) provisions of the Regulations that permit further increases in the Respondent SaskPower's level of emissions over the period of 2018-2026 compared to its historic rate of emissions. These are specific allegations based on a negative rights theory of liability where the *Charter* is raised as a shield against regulations and state action that exacerbate

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[63] *Taylor SCC*, *supra* note 9 at para 139, citing: Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 *Can. Bar Rev.* 30 at 31; and, Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 36:3).

[64] *Taylor SCC*, *supra* note 9 at para 140.

[65] *Canada v Whaling*, 2025 FCA 140 at para 51.

the climate crisis through growing emissions. Consistent with the claims in *La Rose* and *Mathur*, the Applicants pleaded science-based and politically endorsed international targets as an objective benchmark against which the courts can assess the constitutionality of the impugned regulations and state action.

44. A majority of the Court of Appeal for Saskatchewan in *Dykstra SKCA* held that:

> while the state action consisting of the approval, construction, and operation of the UFFGAs is facially narrow, the nature of the governmental decisions regarding the approval, construction, and operation of natural gas-fired electrical generation facilities, as opposed to other means of generating or obtaining electricity, is more akin to a broad public policy decision, which is generally not amenable to *Charter* scrutiny.[66]

The Saskatchewan Court of Appeal distinguished this aspect of the Applicants' originating application from the claims in *La Rose* and *Mathur* as those invoke other specific enactments.[67]

45. This would be a fair distinction between the cases if the majority had been focused on the nature of the alleged *Charter* breach, in which case the claimants in *La Rose* and *Mathur* are indeed challenging state actions taken under enabling statutes aimed at emissions reductions. Yet the majority goes on to hold that *La Rose* and *Mathur* are distinguishable because "the key part of each of those decisions is that there were legislated standards or targets that had been adopted by the governments, which would permit the courts to examine the claims based on a legally defined objective standard."[68]

46. As outlined above, this is incorrect. The claims in *La Rose* and *Mathur* are premised on the theory that constitutional minimums under the *Charter* can be established from expert evidence on the best available science and international mitigation standards and that those minimums are being violated. They do not simply allege breaches of legislated standards. Notably, at least one example of climate litigation premised on an alleged breach of legislated standards is before the Federal Court as well, but the *Charter* is not referenced in that claim as it is unnecessary where a breach of statute is pleaded and the vires of the state action is at issue.[69] The Court of Appeal in *Dykstra* conflates these distinct ways of legally challenging state action under statute.

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[66] *Dykstra SKCA*, *supra* note 35 at para 56.

[67] *Ibid* at para 59.

[68] *Ibid* at para 62.

[69] *Maltais v Canada (Environment and Climate Change)*, 2026 CanLII 97613 (Fed Ct).

47. As for the Applicants' challenge to the Regulations, this claim more closely parallels those in *La Rose* and *Mathur* as it challenges targets set under emissions reduction legislation that imposes a voluntary obligation on the Respondent Government to take positive action to reduce emissions from electricity generation in the province and it is the constitutionality of this positive state action that is impugned. Nevertheless, a majority of the Saskatchewan Court of Appeal held that this claim was not justiciable as there was no clear statutory obligation on the Respondent Government to set caps for "immediate" emissions reductions.[70] Implicit in this position is the idea that *Charter* standards can vary from one province to the next based on the vagaries of provincial legislation, which is inimical to the vision of the *Charter* as a set of uniform rights for Canadians.
48. In dissent, Justice Drennan held that there is a sufficient legal component to this claim given the specific statutory obligation pursuant to which the targets were set. Justice Drennan held that the Respondent Government's breach of its own statutory duty is a manageable legal standard on which to assess the claim.[71] While this dissenting position supports the justiciability of this portion of the Applicants' underlying application, it nonetheless echoes the majority's reasoning that a parallel violation of statute is needed to backstop the Applicants' *Charter* challenge to the Regulations as the source for a manageable legal standard on which to assess their claim. Notably, Justice Drennan distinguishes this breach of statute theory for *Charter* liability from an alternative theory based on "measur[ing] the emissions reduction obligations against international standards", implicitly dismissing the Applicants' primary argument in favour of a parallel statutory theory of unconstitutionality.[72]
49. In sum, the Court of Appeal for Saskatchewan's decision in *Dykstra* has sought to clarify the threshold justiciability of *Charter* claims based on a two-pronged test that requires both a sufficient legal component and a manageable legal standard. Yet in doing so, they appear to have introduced a requirement that *Charter* claimants point to a parallel breach of statute to backstop their *Charter* claims, inverting the relationship between the *Charter* and legislation and opening the door to provincial statutes setting *Charter* standards that vary from one province to the next.

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[70] *Dykstra SKCA, supra* note 35 at paras 79-80, and 84.
[71] *Ibid* at paras 116, 125.
[72] *Ibid* at para 125.

ISSUE THREE: Is international law relevant to the justiciability of *Charter* claims that invoke international law to establish constitutional minimums?

50. The rights set out in the *Charter* provide independent legal standards against which to measure the constitutionality of legislation and state action. Interpreting *Charter* rights requires careful attention to the purposes of these rights, the text through which they are embedded in the *Charter*, their historic origins, and the entirety of the *Charter* so as to unite its underlying values and ensure its internal coherence.[73] In addition, courts look to international law and comparative constitutional law as other relevant indicators of the interests underlying *Charter* provisions.[74] Of special importance, "[c]ourts must presume that the *Charter* guarantees protections at least as broad as those afforded by similar international human rights documents that Canada has ratified".[75] This same presumption of conformity applies with respect to binding international rules grounded in customary international law.[76] In addition, non-binding sources of international law can also assist in "delineating the breadth and content of *Charter* rights".[77]

51. In context to *Charter*-based climate litigation like *La Rose*, *Mathur*, and *Dykstra*, the Federal Court's 2025 decision in *Lho'Immgin* succinctly sets out the relevance of the Paris Agreement and the International Court of Justice (the "ICJ")'s advisory opinion on the *Obligations of States in Respect of Climate Change*.[78] Importantly, the ICJ has held that climate change treaties like Paris Agreement, customary international law, and international human rights law impose obligations on States to protect the environment and climate system.[79] While rejecting the notion that Canadian courts would be a proper forum for adjudicating breaches of international legal obligations directly, the Federal Court did acknowledge the relevance of these obligations to *Charter*-based litigation:

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[73] *Taylor SCC*, *supra* note 9 at paras 76-81.

[74] *Ibid* at para 82.

[75] *Ibid*.

[76] *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430 at para 62, leave to appeal granted *Chief Gold Commissioner of British Columbia, et al. v. Sm'ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of the Smgyigyetm Gitxaala, and Gitxaala Nation, et al.*, 2026 CanLII 47879 (SCC).

[77] *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at 36 (per Brown and Rowe JJ), at para 99 (per Abella J).

[78] *Lho'Imggin v Canada*, 2025 FC 1586 at paras 40-46, 51, 55-64.

[79] *ICJ Opinion*, *supra* note 14 at para 172 (see also paras 116-121 (climate treaties), 131-142 (customary international law), 143-145 (international human rights law).

> In a section 7 *Charter* challenge where it is argued that environmental harms arising from Canada's actions and omissions amount to an infringement of the right to life, liberty, and security of the person, the Court may use the ICJ's reasoning to inform its interpretation of the extent of climate protection guaranteed by the *Charter*. The principles of fundamental justice at issue must be considered in light of the international norms which they reflect […].[80]

52. As binding and non-binding sources of international law support courts' interpretation of the scope of *Charter* protections, its potential relevance to the novel constitutional minimums that are pleaded by the Applicants should be manifestly clear. Nevertheless, the Court of Appeal for Saskatchewan was convinced that international law can have no relevance to the threshold question of justiciability unless Saskatchewan has enacted legislation through to domesticate international legal standards into provincial law.[81] It distinguished the Applicants' claims from those in *Mathur* on this basis in spite of the fact that Ontario's legislative framework makes no reference to international law.[82]

53. If the law imposes a high bar for finding *Charter* claims non-justiciable, consistent with *Operation Dismantle*, *Hupacasath*, and *Mathur*, then it would be correct to state that international law need not be considered at this stage of the proceedings. The fact that the Applicants' originating application pleads breaches of the *Charter* ought to suffice. The relevance of international law to the scope and content of the *Charter* rights that they have invoked in their pleadings should be tested on its merits at a hearing. Yet by insisting that the Applicants must meet an additional burden of pleading an independent manageable legal standard outside the *Charter* itself, the Court of Appeal's approach has made international law relevant to its more onerous inquiry into justiciability since it demands a further inquiry into the legal standard that governs the Applicants' claims.

54. The Court of Appeal also implies that international legal standards will only be relevant to the interpretation of *Charter* rights where provinces have domesticated these legal standards.[83] This once again inverts the relationship between the *Charter* and provincial legislation, raising the spectre of *Charter* rights that vary from one province to the next by

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[80] *Lho'Imggin v Canada*, 2025 FC 1586 at para 64.

[81] *Dykstra SKCA*, *supra* note 35 at paras 63-66.

[82] *Cap and Trade Cancellation Act, 2018*, SO 2018, c. 13 (no mention of international law or the Paris Agreement is contained within).

[83] *Dykstra SKCA*, *supra* note 35 at paras 64.

reference to the preferences of each provincial legislature. As noted by Justice Ball of the Court of King's Bench for Saskatchewan in *Saskatchewan v Saskatchewan Federation of Labour*, a decision that was eventually upheld by this Honourable Court, "[w]hether or not Canada's international obligations directly bind the Government of Saskatchewan, they are nonetheless highly important in assessing whether provincial […] legislation is *Charter* compliant."[84]

Conclusion**:** the justiciability of *Charter* claims is a clear matter of public importance

55. This appeal offers a critical opportunity for this Honourable Court to clarify what legal standards govern the threshold justiciability of *Charter* claims for the first time since its reasons in *Operation Dismantle* were released in 1985. It does not require this Court to weigh in directly on whether the *Charter* protects a right to a healthy environment or a stable climate as those questions have yet to be considered on the merits by the courts below. Nevertheless, the Saskatchewan Court of Appeal decision in *Dykstra* has muddied the waters for all *Charter*-based climate cases that seek to test the *Charter*'s scope and content in this way, including those that are already proceeding to trial. A clarification of the threshold justiciability of these cases would therefore be opportune at this time.

56. The Applicants acknowledge that this Honourable Court has declined applications for leave to appeal from the Ontario Court of Appeal's decision in *Mathur* and the Quebec Court of Appeal's decision in *Environnement Jeunesse*, implicitly leaving the complex issues these cases raise to be further developed by lower courts before intervening.[85] As *Environnement Jeunesse* explicitly left the door open to future *Charter*-based climate litigation that targets more specific legislation and state action and the *Mathur* matter has been remitted for a rehearing on its merits, it is easy to see the case for taking a 'wait and see' approach to how lower courts grapple with these *Charter* claims on their merits. However, the Court of Appeal for Saskatchewan's decision in *Dykstra* upsets this area of law's incremental development by misconstruing the existing jurisprudence and redefining the test for justiciability of *Charter* claims more generally. This ought to

[84] *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62 at para 114.
[85] *Environnement Jeunesse v Attorney General of Canada*, 2022 CanLII 67615 (SCC); *His Majesty the King in Right of Ontario v Sophia Mathur, a minor by her litigation guardian Catherine Orlando, et al.*, 2025 CanLII 38373 (SCC).

distinguish the present application for leave to appeal from those in past *Charter*-based climate cases that were not yet deemed fit for this Court's intervention and guidance.

57. The Court of Appeal for Saskatchewan's decision in *Dykstra* has sought to clarify the law of justiciability as applied to *Charter* claims at the pleadings stage. However, in doing so, the decision introduces new complex barriers to *Charter* litigants with highly problematic implications for *Charter* jurisprudence as a whole. By insisting on parallel breaches of legislated standards to backstop *Charter* challenges to state action and regulations, it makes an otherwise uniform and nation-building set of rights vulnerable to the vagaries of provincial legislation and standards. By insisting that international law is irrelevant to whether *Charter* litigants have been able to plead a manageable legal standard on which to assess their claims and looking to provincial statutes for evidence of international law's domestication in this context, the decision risks further muddling the jurisprudence that all Canadians must navigate before they can hope to have their *Charter* claims heard on their merits. For Canadians who recognize that the climate crisis is an existential threat to their *Charter* rights, it may be difficult to point to any issue of greater public importance than this.

PART IV – SUBMISSIONS ON COSTS

58. The Applicants seek no order for costs and ask that no order for costs be made against them.

PART V – ORDERS SOUGHT

59. The Applicants request an order granting leave to appeal to this Honourable Court from the decision of the Court of Appeal of Saskatchewan.

All of which is respectfully submitted this 4th day of November, 2026.

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Per: _____

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