Court File No.: T-211-20

FEDERAL COURT

BETWEEN:

DINI ZE' LHO'IMGGIN also known as ALPHONSE GAGNON,
on his own behalf and on behalf of all the members of MISDZI YIKH and
DINI ZE' SMOGILHGIM, also known as WARNER NAZIEL,
on his own behalf and on behalf of all the members of SA YIKH

Respondents

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Applicant

APPLICANT'S MOTION RECORD
(Motion to Strike)
(Rule 369 of the *Federal Courts Rules*)

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NOTICE OF MOTION

TAKE NOTICE THAT the Attorney General of Canada, on behalf of the Defendant, Her Majesty the Queen in Right of Canada, will make a motion in writing pursuant to rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR:

1. An order striking out the Statement of Claim under rule 221 of the *Federal Courts Rules* without leave to amend on the basis that it discloses no reasonable cause of action and that the remedies sought from this Court are not available; and

2. Such further and other relief as Counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

3. The grounds for the motion are as follows:

    a. The Statement of Claim does not disclose a reasonable cause of action;

b. The Statement of Claim fails to disclose facts that would show that Canada's action or the inaction, as pleaded, could cause an infringement of the rights of the Dini Ze' under the *Canadian Charter of Rights and Freedoms* or the *Constitution Act, 1867*;

c. The alleged infringement of the rights of the Dini Ze' is too uncertain, speculative and hypothetical to sustain a cause of action;

d. The Statement of Claim seeks to adjudicate matters that are not justiciable;

e. The remedies sought by the Dini Ze' are not available; and

f. Rules 221(1)(a), 359, and 369 of the *Federal Courts Rules*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be presented for the disposition of the Notice of Motion:

4. Statement of Claim, filed February 10, 2020; and

5. Any further evidence the Court will permit.

Dated: July 28, 2020

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Applicant

WRITTEN REPRESENTATIONS OF THE APPLICANT

OVERVIEW

1. This is a motion to strike the Statement of Claim dated February 10, 2020 pursuant to rule 221(1)(a) of the *Federal Courts Rules* ("*Rules*") on the basis that it is plain and obvious that the Claim does not disclose a reasonable cause of action and has no reasonable prospect of success.

2. Dini Ze' Lho'Imggin and Dini Ze' Smogilhgim (the "Dini Ze'") seek declaratory and mandatory orders on behalf of two Wet'suwet'en House groups of the Likhts'amisyu (Fireweed) Clan: the Misdzi Yikh (Owl House) and Sa Yikh (Sun House) relating to Canada's policy objectives for the reduction of greenhouse gas ("GHG") emissions by the year 2030. The Dini Ze' are concerned that Canada's strategy to address climate change is insufficient and that the failure of Canada to enact more stringent legislation is contrary to common law principles and is a violation of their rights under ss. 7 and 15(1) under the *Canadian Charter of Rights and Freedoms* ("*Charter*").

3. Addressing climate change is the shared responsibility of a myriad of actors, including both governmental and non-governmental, at all levels of jurisdictions. This includes negotiations with foreign governments, extensive engagement between Canada and the provinces, territories, Indigenous groups and funding allocations within the Parliamentary budgeting process.

4. Canada acknowledges the concerns that underpin the Statement of Claim, but assert that it has no reasonable prospect of success as it is non-justiciable. First, the Claim's challenge to Canada's policies on climate change lacks a sufficient legal component to be adjudicated by this Court. Second, the orders sought mandating that Canada enact legislation fall outside the Court's proper function. Such orders would offend Canada's constitutional arrangement separating the judiciary from the legislature and the executive branches of government.

5. Canada has carefully considered the Statement of Claim and recognizes that engagement from all segments of society, including Indigenous groups and their youth, is a critical part of Canada's democracy and the shaping of public policy on climate change. However, the courts are not the proper forum for such engagement when the issues are not legal in nature.

PART I – STATEMENT OF FACTS

6. The Statement of Claim is brought as a representative proceeding under rule 114 of the *Federal Courts Rules* that names Dini Ze' (head chief) Lho'imggin (also known as Alphonse Gagnon) and Dini Ze' Smogilhgim (also known as Warner Naziel) (the "Dini Ze'") who bring this Claim on behalf of two Wet'suwet'en House groups of the Likhts'amisyu (Fireweed) Clan: the Misdzi Yikh (Owl House) and Sa Yikh (Sun House).[1]

[1] Statement of Claim, 10 February 2020, Applicant's Motion Record [AMR] Tab 4 at paras 9-10, 27, 29.

7. The Claim alleges that Her Majesty the Queen in Right of Canada ("Canada") has failed to fulfill its constitutional duty under s. 91 of the *Constitution Act, 1867* by failing to establish legislation and/or use existing environmental assessment legislation to reduce GHG greenhouse gas ("GHG") emissions to levels the Dini Ze' say would be consistent with Canada's international obligations under the *Paris Agreement*.[2]

8. The Statement of Claim also alleges that Canada has unjustifiably infringed the Dini Ze's individual rights under ss. 7 and 15(1) of the *Charter of Rights and Freedoms* ("*Charter*") on the basis that existing laws allow high GHG emitting natural resource projects to operate now and into the future. The Dini Ze' do not impugn any specific law. The allegations rely, in part, on the common law principles of "public trust" and "equitable waste," and what they refer to as the "constitutional principle of intergenerational equity." The Claim says that the violations under ss. 7 and 15(1) cannot be justified under s. 1 of the *Charter*.[3]

9. The Dini Ze' seek declarations that Canada has:
    a. a common law and constitutional duty to act consistently with keeping mean global warming to between 1.5°C and 2°C above pre-industrial levels;
    b. a constitutional duty to maintain the peace, order and good government of Canada under s. 91 of the *Constitution Act, 1867* by acting to keep Canada's GHG emissions consistent within a mean global warming of between 1.5˚C and 2˚C above pre-industrial levels;
    c. a constitutional duty not to infringe the Dini Ze' members' individual rights under s. 7 of the *Charter*, including the s. 7 rights of future members, by failing to act to keep Canada's GHG emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels; and
    d. a constitutional duty not to infringe on the Dini Ze' members' individual rights under s. 15(1) of the *Charter*, including the s. 15(1) rights of future members, by

[2] Statement of Claim, 10 February 2020, AMR Tab 4 at paras 82-85
[3] Statement of Claim, 10 February 2020, AMR Tab 4 at paras 86-96.

failing to act to keep Canada's GHG emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels.[4]

10. The Dini Ze' also seek the following mandatory orders:
    a. requiring Canada to amend all federal environmental assessment legislation that applies to extant high GHG emitting projects so as to allow the Governor in Council ("GIC") to cancel Canada's approval, under any of those statutes, of the operation of such a project in the event that Canada will demonstrably not be able to, or does not, meet its *Paris Agreement* commitment, or in the event that Canada considers global warming to be a national emergency;
    b. requiring Canada to prepare an annual account of Canada's cumulative GHG emissions in a format that allows a comparison to be made with Canada's fair carbon budget to meet a mean global temperature rise well below 2°C above pre-industrial levels, including emissions produced within Canada and emissions produced outside of Canada but imported into Canada in the form of tangible goods; and
    c. that this Court retain jurisdiction until Canada has complied with its orders.[5]

PART II – POINTS IN ISSUE

11. The issue on this motion is whether the Statement of Claim should be struck in its entirety, and without leave to amend, on the basis that is plain and obvious that the Claim cannot succeed because:
    a. the Statement of Claim is not justiciable;
    b. the Statement of Claim discloses no reasonable cause of action; and
    c. the remedies sought are not legally available.

PART III – SUBMISSIONS

[4] Statement of Claim, 10 February 2020, AMR Tab 4 at para 81(a)-(d).
[5] Statement of Claim, 10 February 2020, AMR Tab 4 at para 81(e)-(g).

A. The Statement of Claim is non-justiciable

12. A guiding principle of justiciability is that "all of the branches of government must be sensitive to the separation of function within Canada's constitutional matrix so as not to inappropriately intrude into the spheres reserved to the other branches."[6] While a court must ensure that government behaviour conforms with constitutional norms,[7] it must also remain sensitive to the separate function of the branches:

> 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.[8]

13. In determining whether a matter is justiciable, the court must ask whether the question is "purely political" in nature or whether it has a sufficient legal component to warrant judicial intervention:

> In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. . . . 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.[9] [Emphasis added.]

14. A court will not involve itself in the review of actions or decisions of the executive or legislative branches where the subject-matter of the dispute is either inappropriate for

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[6] *Friends of the Earth v Canada (Governor in Council)(FC)*, 2008 FC 1183 at para 25, affirmed 2009 FCA 297, leave to appeal to SCC refused, 2010 CanLII 14720 (SCC) [***Friends of the Earth***].
[7] *Committee for Monetary and Economic Reform ("COMER") v Canada*, 2013 FC 855 at para 68 [***COMER***].
[8] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 33 [***Doucet-Boudreau***].
[9] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 26 [***Reference re Secession of Quebec***].

judicial involvement or where the court lacks the capacity to resolve the dispute at hand.[10]

15. Some questions are simply not suitable for adjudication. The Supreme Court of Canada has held that no single rule defines whether a case is or is not justiciable. Rather, the court should ask "whether it has the institutional capacity and legitimacy to adjudicate the matter."[11]

16. Where asked to consider the appropriateness of judicial involvement in matters of public policy, Canadian courts have generally considered whether there is a sufficient legal component that can be resolved by application of a legal standard;[12] whether the court is being asked to express an opinion on the wisdom of a government decision;[13] whether there are moral or political dimensions to the case that are inappropriate for the court to decide;[14] whether the relief sought impinges on the policy-making responsibilities of the other branches of government;[15] and whether the relief sought will have any practical legal effect.[16]

17. In *Friends of the Earth v. Canada*, this Court dismissed as non-justiciable a judicial review that sought to enforce Canada's commitments relating to the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ("*Kyoto Protocol*"). The applicant in that case sought similar declaratory and mandatory orders as in this case to enforce the execution of statutory duties relating to obligations under the *Kyoto Protocol*

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[10] *Friends of the Earth* at para 25.
[11] *Highwood Congregation of Jehovah's Witness (Judicial Committee) v Wall*, 2018 SCC 26 at paras 32-34.
[12] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 (CanLII) at para 33 [***Tanudjaja***].
[13] *Tanudjaja* at para 33; *Operation Dismantle v The Queen*, [1985] 1 SCR 441, p 472 [***Operation Dismantle***]; and *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525, p 567.
[14] *Operation Dismantle*, p 465; see also Canada *(Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49, p 90.
[15] *Tanudjaja* at paras 33-34; *Native Women's Association of Canada v Canada (Attorney General)*, [1994] 3 SCR 627, p 668.
[16] *Borowski v Canada (Attorney General)* [1989] 1 SCR 342, p 353; *Tanudjaja* at para 34.

to address the problem of global climate change. In dismissing the application, this Court concluded that "the Court has no role to play reviewing the reasonableness of the government's response to Canada's Kyoto commitments"[17] because measures "directed at ensuring compliance with Canada's substantive Kyoto commitments [are] through public, scientific and political discourse, the subject matter of which is mostly not amenable or suited to judicial scrutiny."[18]

18. The necessity of a sufficient legal component was examined by the Ontario Court of Appeal decision in *Tanudjaja v. Canada (Attorney General)*. There, the Court found that the allegation that the *Charter* obliges governments to "implement effective national strategies to reduce and eventually eliminate homelessness and inadequate housing" was non-justiciable and struck the claim. The applicants alleged that by not doing so, Canada and the province had infringed ss. 7 and 15(1) of the *Charter*. In striking the claim on the basis that it was non-justiciable, the Court said:

> [33] [T]here 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 bylaws, 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

[17] *Friends of the Earth* at para 46.
[18] *Friends of the Earth* at para 43.

> 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.[19]

19. In this case, the Court is being asked to perform a similar task as in *Friends of the Earth* and as in *Tanudjaja*, albeit in the realm of climate change policy, that is equally unsuitable for adjudication. Climate change policy, like housing policy, is polycentric and falls properly within the domain of the executive and legislative branches of government. This Court is not being asked to adjudicate a legal issue, but rather to embark on a public inquiry on the adequacy of Canada's response to global climate change.

20. The Statement of Claim does not raise a sufficient legal component that requires adjudication. It is not justiciable and should be struck on that basis alone.[20]

B. The Statement of Claim discloses no reasonable cause of action

21. The Court may at any time order that a pleading be struck without leave to amend on the ground that it discloses no reasonable cause of action or that the claim has no reasonable prospect of success.[21]

22. The applicable test for striking out a claim is whether it is "plain and obvious" that the claim discloses no reasonable cause of action.[22] A claim will not be struck out merely for

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[19] *Tanudjaja* at paras 33-36.
[20] In *Tanudjaja* at para 37, the Court declined to decide whether there was a *Charter* violation or explore the extent to which a positive obligation may be imposed on government to remedy violations of the *Charter* because the matter had been properly dismissed on the ground that it was non-justiciable.
[21] *Federal Courts Rules*, r 221; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 [***Imperial Tobacco***] at para 17.
[22] *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, p 980 [***Hunt***]; *Imperial Tobacco* at para 17.

presenting lengthy and complex issues, a novel cause of action, or that the defendant may present a strong defence.[23] Only if an action is certain to fail because it contains a "radical defect" should it be struck out at a preliminary stage.[24]

23. While courts are appropriately reluctant to strike claims on the basis of novel or unsettled legal issues, these concerns do not arise where the legal basis for the claims have been definitely resolved.[25]

24. When considering an application to strike out a claim, a court must take the facts as claimed as true.[26] However, a claim will have no reasonable prospect of success where it is based on allegations of fact that are "manifestly incapable of being proven."[27] This includes "bald conclusory statements of fact, unsupported by material facts."[28]

25. The Supreme Court of Canada opined on basing a claim on speculation regarding future harm in *Operation Dismantle v. The Queen* where the claimants argued that the federal government's decision to permit the testing of a cruise missile over Canadian airspace materially increased the risk of nuclear war with the Soviet Union, thereby depriving Canadians of their right to life, liberty and the security of the person under s. 7 of the *Charter*.[29] In upholding the decision striking the claim, the Court affirmed that it was not possible for it to do more than speculate about how a fundamentally global problem might be affected by changes to Canada's domestic policies. With respect to the future harm alleged by the plaintiffs, the Supreme Court explained that in order to succeed, the appellants in that case would need to demonstrate that the testing of the cruise missile would cause the increase in the risk of nuclear war, a harm that, in the Court's view, they could not establish:

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[23] *Hunt*, p 980.
[24] *Hunt*, p 988.
[25] *Holland v Saskatchewan*, 2008 SCC 42, [2008] 2 SCR 551 at para 9; *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para 145 [***Nevsun***].
[26] *Imperial Tobacco* at para 22.
[27] *Imperial Tobacco* at para 22.
[28] *Trillium Power Wind Corporation v Ontario (Natural Resources)*, 2013 ONCA 683 at para 31.
[29] *Operation Dismantle*, p 448.

> Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise and the results that the appellants allege could never be proven. …[30]
>
> …
>
> The point of this review is not to quarrel with the allegations made by the appellants about the results of cruise missile testing. They are, of course, entitled to their opinion and belief. Rather, I wish to highlight that they are raising matters that, in my opinion, lie in the realm of conjecture, rather than fact. In brief, it is simply not possible for a court, even with the best available evidence, to do more than speculate upon the likelihood of the federal cabinet's decision to test the cruise missile resulting in an increased threat of nuclear war.[31]
>
> …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.[32] (Emphasis added)

26. In this case, it is plain and obvious that the Statement of Claim raises no reasonable cause of action and should be struck in its entirety on the basis that:

    a. there is no duty to legislate arising from the "peace, order and good government" ("POGG") powers under s. 91 of the *Constitution Act, 1867*;

    b. the claims made under ss. 7 and 15(1) of the *Charter* are inherently speculative, hypothetical and lack a sufficient legal component to be adjudicated. Further, in the absence of any impugned law, there is no basis for the court to engage in a s. 1 *Charter* analysis;

    c. Canada's commitments under the *Paris Agreement* do not give rise to legally enforceable obligations in Canadian domestic law; and

    d. the relief sought by the Dini Ze' is not available.

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[30] *Operation Dismantle,* p 452.
[31] *Operation Dismantle*, p 454.
[32] *Operation Dismantle*, p 455.

(a) There is no duty to legislate arising from the "peace, order and good government" powers under s. 91 of the *Constitution Act, 1867*

27. Section 91 of the *Constitution Act, 1867* states that it "shall be lawful" for Canada to legislate for "peace, order and good government" in relation to matters not coming within the enumerated provincial heads of power.[33] However, the Dini Ze' claim that a duty exists under s. 91 of the *Constitution Act, 1867* that obliges Canada to create legislation to reduce GHG emissions under the POGG powers.[34] Such a duty to legislate is unknown in Canadian law.

28. Such an interpretation of s. 91 as set out in the Statement of Claim would provide the judiciary with the power to dictate how and when Canada must make laws. This runs contrary to the principles of parliamentary sovereignty, the separation of powers, and parliamentary privilege, which dictate "courts cannot supervise the legislative process."[35] Parliamentary sovereignty allows the legislature to make or unmake any laws, subject to its constitutional authority,[36] while parliamentary privilege provides that "the law-making process is largely beyond the reach of judicial interference."[37]

29. In *Ontario v. Criminal Lawyers' Association of Ontario*, the Supreme Court of Canada wrote that Canada's constitutional framework has long recognized the different roles prescribed for the executive, legislative and judicial branches that have been shaped by history and evolution of Canada's constitutional order:[38]

> [28] Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate

[33] *Constitution Act, 1867*, s 91.
[34] Statement of Claim, 10 February 2020, AMR Tab 4 at paras 83-84.
[35] *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018] 2 SCR 765 at para 32 [***Mikisew Cree***]; see also *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 53.
[36] *Mikisew Cree* at para 36; see also Peter W Hogg, Constitutional Law of Canada, 5th ed, (Toronto: Thomson Reuters, 2017), p 12-8.
[37] *Mikisew Cree* at para 37.
[38] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras 27-30.

> functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> [29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of assembly)*, 1993 CanLII 153 (SCC), [1993] 1 SCR 319, McLachlin J affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t 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 show proper deference for the legitimate sphere of activity of the other" (p. 389).
>
> [30] Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.

30. The Dini Ze' reliance on s. 91 of the *Constitution Act, 1867* is misplaced and does not raise a reasonable cause of action.

(b) The Statement of Claim does not disclose a reasonable cause of action under ss. 7 and 15(1) of the Charter – the claims are inherently speculative and hypothetical

31. The Statement of Claim alleges that Canada's legislative approach to addressing climate change will be inadequate to limit global warming and therefore amounts to a violation of the Dini Ze' members' individual rights under ss. 7 and 15(1) of the *Charter*. They do not impugn any specific law or government action.

32. Rather, the broad nature of the Claim sets out the Dini Ze' concerns relating to Canada's environmental assessment legislation and Canada's international obligations under the *Paris Agreement* to form the basis of their allegation that Canada will not meet its GHG targets.

33. In order to succeed at trial, the Dini Ze' would need to demonstrate a causal connection between Canada's climate change policy and the harms as alleged in the Statement of Claim. It is not possible to establish this causal link without speculation. The Dini Ze' could not prove in court on the balance of probabilities that Canada's current policy on GHG emissions reductions will lead to or materially increase the likelihood of the future consequences for the Dini Ze' or their future members that they allege.

34. This is not to say that the risks posed by climate change and global warming are speculative. Canada fully accepts that climate change and global warming exists and pose a pressing threat to our society. However, the speculation lies in the causal connection the Dini Ze' seek to make between Canada's policy choices to combat climate change and the alleged harms to themselves and their members. Combatting climate change requires the participation, and depends on the choices, of local, provincial and international actors. The inherent uncertainties and speculation mean that a causal connection between Canada's policy on climate change and the alleged harms cannot be proven. The underlying assumptions and speculation therefore cannot be taken as true by the Court when considering this motion to strike.

35. As explained at paragraphs 12 to 19 above, the allegations of *Charter* violations made in this Claim are non-justiciable as they do not contain any legal components that would engage the adjudicative competence of the court. The allegations remain in the realm of international and domestic policy involving governments and other bodies, and is for policy-makers to resolve.

36. However, and as set out further below, even if the Court were to assess the Dini Ze' claims in relation to ss. 7 and 15(1) of the *Charter*, it is plain and obvious that these claims should be struck as not raising a reasonable cause of action.

Section 7 of the *Charter*

37. An analysis of a claim under s. 7 of the *Charter* has three stages: (1) a determination of whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of those interests; (2) an identification and definition of the relevant principle(s) of fundamental justice; and (3) a determination of whether the deprivation has occurred in accordance with the relevant principles.[39]

38. The Statement of Claim alleges that Canada's failure to legislate effectively to reduce GHG emissions constitutes a breach of their individual rights under s. 7 of the *Charter* and those of their members, including future members. They argue that this failure engages life, liberty and security of the person in that it increases the risks of injury, disease, mental health and premature death from air pollution, extreme weather events and vector-borne disease; and the risk to their individual and collective autonomy to choose where to move and live on their territories.[40]

39. As set out at paragraphs 30 to 35 above, the Statement of Claim has not established how the consequences of Canada's climate change policy present a real or imminent deprivation of the Dini Ze's individual s. 7 rights to life, liberty and the security of the person. In order for s. 7 of the *Charter* to be engaged, a claimant needs to demonstrate a "sufficient causal connection" between the impugned law or state action and deprivation of life, liberty or security of the person; mere "speculation will not suffice to establish causation."[41] In this regard, the SCC's decision in *Operation Dismantle* is dispositive:

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[39] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General*, 2004 SCC 4 at para 175; *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 83 [***Malmo-Levine***]; *R v White*, [1999] 2 SCR 417 at para 38; *R v S (RJ)*, [1995] 1 SCR 451, p 479.
[40] Statement of Claim, 10 February 2020, AMR Tab 4 at para 88.
[41] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 75-78.

> Section 7 of the *Charter* cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and security of the person could be proven to result from the impugned government act.[42]

40. Seen in another way, the Statement of Claim amounts to an argument that there is a positive duty on the part of Canada to adopt the Dini Ze's preferred policy approach for reducing GHG emissions in order to avoid the perceived risk of harm to their s. 7 rights. In short, the Dini Ze' disagree with Canada's climate change approach and ask this Court to enforce their approach. The Courts have repeatedly interpreted s. 7 not as imposing a positive duty on the state to ensure that each person enjoys life, liberty or security of the person but rather as restricting the state's ability to deprive people of these.[43]

41. In addition, the Statement of Claim does not clearly identify any recognized principle of fundamental justice against which the alleged deprivation can be assessed. In order to be a principle of fundamental justice, a rule or principle must be (1) a legal principle, (2) about which there is a significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and (3) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[44]

42. It is plain and obvious that none of the principles relied on in the Statement of Claim meet the above standard as principles of fundamental justice. While the Dini Ze' refer to the "common law principles" of public trust and equitable waste in their arguments under

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[42] *Operation Dismantle*, pp 455-456.
[43] *Gosselin v Québec (Attorney General)*, [2002] 4 SCR 429 at para 81; *Kreishan v Canada*, 2019 FCA 223 at para 136, leave to appeal to SCC dismissed, 38864 (5 March 2020).
[44] *Malmo-Levine* at para 83; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 8; *R v DB*, 2008 SCC 25 at para 46.

s.7,[45] the public trust doctrine is not a recognized principle of Canadian common law [46] and the Claim fails to articulate how equitable waste – a harm relating to the reversionary interest in land that a prudent person would not cause,[47] could be regarded properly as a "principle of fundamental justice" in the *Charter* context.

43. In addition, the mere existence of international obligations, such as in the *Paris Agreement*, is not sufficient to establish a principle of fundamental justice.[48] If commitments made in international agreements were to be equated to principles of fundamental justice, "we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy."[49]

44. The Statement of Claim does not demonstrate how Canada's climate change policy or its environmental assessment legislation deprives the Dini Ze' of their s. 7 *Charter* rights to life, liberty or security of the person in a manner that is contrary to the principles of fundamental justice. Therefore, it is clear and obvious that in this case the s. 7 *Charter* claim does not give rise to a reasonable cause of action.

Subsection 15(1) of the *Charter*

45. Subsection 15(1) of the *Charter* states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular,

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[45] Statement of Claim, 10 February 2020, AMR Tab 4 at para 89.
[46] *Burns Bog Conservation Society v Canada (Attorney General)*, 2012 FC 1024 at para 40; upheld in *Burns Bog Conservation Society v Canada*, 2014 FCA 170 at para 44.
[47] "Equitable waste" refers to an action which may be brought against a tenant for causing damage to the reversionary interest of a property by doing things that are permitted in law but would not be done by a prudent person (such as felling ornamental trees), see Anger & Honsberger, Law of Real Property, 3rd edition (Toronto: Thomson Reuters, 2019) at 4:40.20.
[48] *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 149 [***Kazemi***].
[49] *Kazemi* at para 150.

> without discrimination based on race, nation or ethnic origin, colour, religion, sex, age or mental or physical disability.[50]

46. The Statement of Claim argues that Canada's legislative and policy choices relating to climate change have deprived the Dini Ze' of their right to equal protection and equal benefit of the law based on the age of their younger members and their future generations under s. 15(1) of the *Charter*.[51] Although it is not clearly pleaded, the implication is that the harm caused will manifest in the future and therefore affect the younger and future members to a greater extent than those of older generations. The Claim alleges that the deprivation suffered by the Dini Ze's younger and future members is "disproportionate."[52] The Claim does not, however, identify any comparator group or explain the disproportionality.

47. It is well established that there are two parts to the test for assessing a s. 15(1) *Charter* claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[53]

48. The Supreme Court of Canada wrote in *Withler v. Canada (Attorney General)*, that the two steps reflect that not all distinctions are, alone, contrary to s. 15(1) of the *Charter*:

> [31]…Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. Accordingly, in order to establish a violation of s.15(1), a person "must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory" (*Andrews*, at p. 182; *Ermineskin Indian Band*, at para. 188; *Kapp*, at para. 28).[54]

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[50] *Canadian Charter of Rights and Freedoms*, s 15(1).
[51] Statement of Claim, 10 February 2020, AMR Tab 4 at para 91.
[52] Statement of Claim, 10 February 2020, AMR Tab 4 at paras 92-93.
[53] *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 30 [***Withler***]; *R v Kapp*, 2008 SCC 41 at para 17; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-20 [***Kahkewistahaw***].
[54] *Withler* at para 31.

49. Under the first limb of the test, an unlawful discriminatory distinction occurs when either (1) burdens, obligations, or disadvantages are imposed on an individual or group defined by a prohibited ground that are not imposed on others, or (2) when limits are placed on an individual or a group's access to opportunities, benefits, or advantages that are available to others.[55]

50. Similar to the s. 7 claim, the s. 15(1) claim is inherently speculative as it alleges detrimental effects on their members that will result from global warming or that Canada's climate change policy and related legislation will "disproportionately" affect their younger and future members.[56] However, the Claim does not allege that any specific law, measure or government action has imposed a burden on the Dini Ze' and/or their members, or that has denied them equal protection or benefit of the law as compared to others.

51. Nor does the Statement of Claim identify a distinction in treatment by Canada of their younger and future members. Instead, the Dini Ze' assume one and ask the Court to do the same.[57] This is not an acceptable approach to advancing an equality rights claim as it is not possible to know whether younger and future members will be affected more than others by climate change. While the evidentiary burden is not onerous, s. 15(1) *Charter* claims must be based on more than just a "web of instinct."[58]

52. The Federal Court decision in *Reid v. Canada* is instructive in this case. In *Reid*, minor children and their parents acting as litigation guardians sought to bring an action against Canada alleging that deficit financing violates the children's s. 15(1) *Charter* rights by

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[55] *Withler* at para 62.
[56] Statement of Claim, 10 February 2020, AMR Tab 4 at paras 72-80 and 92.
[57] See also *Symes v Canada*, [1993] 4 SCR 695, pp 764-765 where the Court stated: "If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision."
[58] *Kahkewistahaw* at paras 33-34.

allegedly imposing a future financial burden on the children in order to benefit adults in the present. In dismissing the claim on a motion to strike, the Court wrote:

> The alleged breach of s. 15 can be disposed of on two grounds. First, the Plaintiffs have failed to make out any case for discrimination contrary to s. 15 of the *Charter*. Such an infringement must be supported by material facts which establish a law whose benefit or protection is not conferred equally on an individual by reason of discrimination based on age. The Plaintiffs simply state, in paragraph 49 of their submissions:
>
> > The delayed taxation through deficit financing, on its face, imposes a significant burden, obligation and disadvantage on minors because the monies have been used to accumulate wealth and give opportunities, benefits and advantages to adult citizens which are not received by minor citizens.
>
> No material facts are pleaded to support this statement. As noted by Dickson, J. in *Operational Dismantle v. The Queen* [1985] 1 S.C.R. 441, at p. 455, although the material facts pleaded in a statement of claim are to be taken as true for the purpose of an application under Rule 419, "It does not require that allegations based on assumptions and speculations be taken as true." The above-quoted assertion to the effect that deficit financing benefits adult citizens to the detriment of minors is pure speculation, and I do not accept it as true for purposes of this application.
>
> Secondly, even if I was to assume that the infant Plaintiffs are being discriminated against as a result of deficit financing, it is apparent from the Plaintiffs' submissions that this would only arise upon the children reaching the taxpaying age. The Plaintiffs are seeking a remedy today for an alleged future violation of their rights. Clearly, the link between the actions of the government and the alleged infringement of equality rights is "too uncertain, speculative and hypothetical to sustain a cause of action." [59]

53. In relation to the second limb of the s. 15(1) test, substantive inequality may be established by showing that "the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group."[60] The Dini Ze' have not explained how Canada's policies and legislation relating to climate change perpetuate discrimination or stereotyping of their younger and future members. Without having plead the material facts, the allegations under s. 15(1) do not raise a reasonable cause of action.

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[59] *Reid v Canada*, [1994] FCJ No 99 (FCTD), pp 7-8.
[60] *Withler* at para 36.

54. The Statement of Claim purports to draw support for their s. 15(1) arguments from a common law and constitutional principle of "intergenerational equity."[61] The principle of "intergenerational equity" is a general concept of fairness between generations found in economic, social and environmental policy.[62] It is not a principle recognised as giving rights in Canadian common law, it is not a principle of the Canadian constitution nor is it recognized under either ss. 7 or 15(1) of the *Charter*. To Canada's knowledge, the only unwritten constitutional principles recognized by the Supreme Court of Canada are judicial independence,[63] democracy, federalism, constitutionalism, the rule of law, the protection of minorities[64] and legislative supremacy.[65]

55. Canada fully accepts that climate change affects everyone and will affect Canadians in the future. However, the Claim fails to explain how the individual rights of the Dini Ze' under s. 15(1) *Charter* are engaged by Canada's actions in the climate change context. As such, there is no reasonable cause of action to be derived from this section of the *Charter*.

Section 1 of the *Charter*

56. The Court cannot carry out a proper analysis under s. 1 of the *Charter* because the Statement of Claim does not identify a specific law that the Dini Ze' say infringe their individual rights under ss. 7 and 15(1).

57. In the absence of any impugned law, there is no basis for the court to engage in a s. 1 *Charter* analysis.[66] Any analysis under the *Charter* requires the Court to focus on an

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[61] Statement of Claim, 10 February 2020, AMR Tab 4 at para 94.
[62] Edith Brown Weiss, "Intergenerational Equity" (last updated February 2013), online: *Oxford Public International Law* <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421> at para 1.
[63] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at para 163.
[64] *Reference re Secession of Quebec* at para 49.
[65] *Nevsun*, at para 225.
[66] *Tanudjaja* at para 32.

impugned law in order to measure whether it unjustifiably limits the rights of the claimant.[67] At a basic level, this inquiry requires a specific impugned law and an examination of its purpose through analysis of the law's text, context and history.[68]

(c) Canada's commitments under the Paris Agreement do not give rise to a cause of action

58. The Claim pleads that Canada is bound, as a party to the *Paris Agreement*, to reduce its GHG emissions to a level that would 'fairly contribute' to the Agreement's goal of limiting global warming by 2030 to well below 2˚C above pre-industrial levels.[69] The Dini Ze' plead that Canada has "common law and constitutional duties" to act consistently with this goal of the *Paris Agreement* but do not specify the source of these duties.

59. The Statement of Claim is based on an incorrect legal presumption that the *Paris Agreement* creates binding duties in the domestic sphere. International treaties do not, on their own, create entitlements under domestic law.[70] In order to be enforceable in Canadian courts, the treaty provisions must first be specifically incorporated into domestic law.[71] The *Paris Agreement* has been ratified by Canada but the obligations therein do not have any binding force in domestic law. Further, the *Paris Agreement* does not confer any rights for the Dini Ze' to rely on and does not compel this Court to order Canada to take any action it is not already taking.

60. In the international sphere, the *Paris Agreement* commits Canada to setting its own nationally determined contribution ("NDC") and reporting on its efforts to achieve its NDC. While international law binding on Canada may be a relevant and a persuasive

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[67] *R v Oakes*, [1986] 1 SCR 103, pp 135-136.
[68] *R v Appulonappa*, 2015 SCC 59 at para 33; *R v Moriarity*, 2015 SCC 55 at para 29.
[69] Statement of Claim, 10 February 2020, AMR Tab 4 at paras 42-58.
[70] *Kazemi* at para 149.
[71] *Ahani v Canada (Attorney General)* (2002), 58 OR (3d) 107 at para 31 [***Ahani***]; see also *Nevsun* at para 85.

source for interpreting the *Charter*, it cannot be used to rewrite the text of the Constitution to add new rights.[72]

(d) The remedies sought are not available legal remedies

61. The Dini Ze' seek declaratory and mandatory orders that would require this Court to make complex policy decisions that are the sole domain of the legislative and executive branches and are so ill-defined and wide in scope as to be non-justiciable.

62. The Dini Ze' ask for declarations from the Court to determine that Canada has common law and constitutional duties generally, and under s. 91 of the *Constitution Act, 1867* and ss. 7 and 15(1) of the *Charter* specifically, to act to keep Canada's GHG emissions "consistent with a mean global warming of between 1.5˚C and 2˚C above industrial levels".[73] However, the Dini Ze' fail to explain how such consistency could be identified or verified by the Court. Mean global temperatures will depend on the actions of countless global states and non-state actors apart from Canada. Identifying either compliance or failure on the part of Canada alone with this outcome would be impossible. The declarations sought fail on practical grounds alone.

63. Further, the Dini Ze's claims are based on speculation regarding future alleged harms. Such claims are not the proper subject of declaratory judgements by the courts. Declaratory relief is a discretionary remedy that will not be granted where the dispute is theoretical in nature and is based on future harm.[74]

64. In *Operation Dismantle*, the Supreme Court of Canada, having commented on the ability to base a claim on speculation regarding future harm (as set out above at paragraph 25), explained the unavailability of declaratory relief in such a context:

[72] *Ahani* at para 31.
[73] Statement of Claim, 10 February 2020, AMR Tab 4 at para 81(a)-(d).
[74] *SA v Metro Vancouver Housing Corporation*, 2019 SCC 4 at para 60.

> The principles governing remedial action by the courts on the basis of allegations of future harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. And an action cannot be said to cause such deprivation where it is not provable that the deprivation will occur as a result of the challenged action. I am not suggesting that remedial action by the courts will be inappropriate where future harm is alleged. The point is that remedial action will not be justified where the link between the action and the future harm alleged is not capable of proof.
>
> The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, *The Declaratory Judgment Action* (1971), at p. 5:
>
> > 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
> >
> > 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.[75]

65. As in *Operation Dismantle,* it is not possible for this Court to do more than speculate upon the likelihood that the effects of climate change, as pleaded, will materialize. Therefore, the sought after declaratory relief is unavailable to the Dini Ze'.

66. In regards to the mandatory orders sought, and as set out above at paragraphs 26-29, the Court does not have the authority to direct Canada to create legislation. Under Canada's system of government, the executive and legislative branches are free to make and unmake laws as dictated by their own policies, and without direction from the judiciary.[76] The court may, however review legislation to ensure that it conforms with constitutional

[75] *Operation Dismantle*, p 456.
[76] *Mikisew Cree* at paras 2 and 118; see also *Chief Mountain v HMTQ in Right of Canada*, 2000 BCCA 260 at para 5.

norms.[77] A court-imposed duty to enact legislation would constitute an impermissible constraint on parliamentary sovereignty and parliamentary privilege.[78]

67. In addition, the Court cannot mandate that Canada prepare an annual report of Canada's cumulative GHG emissions. The Dini Ze' seek a reporting system in their preferred format and without regard for Canada's international and domestic reporting commitments.

68. Finally, the Dini Ze' also seek an order that this Court retain jurisdiction over the matter until it is satisfied that Canada has complied with its orders. In practical terms, it would be impossible for the Court to supervise compliance with an order that relies on achieving a limit to global average temperature rise. Such an order fails to respect the separation of powers between the judicial, executive and legislative branches of government. A supervisory order constitutes an extraordinary and intrusive measure that will only be issued in the most extraordinary circumstances.[79] It would be impossible in practical terms for the Court to supervise compliance with an order that relies upon achieving a limit to global average temperature rise. As the court noted in *Doucet-Boudreau,* a claim regarding a delay in building French language schools:

> [120] …The judiciary is ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation. This Court has recognized that courts possess neither the expertise nor resources to undertake public administration. …[80]

PART IV – ORDERS SOUGHT

69. Canada seeks the following orders:

    a. that the Statement of Claim be struck in its entirely without leave to amend; and
    b. any further relief as Canada may submit and this Court will permit.

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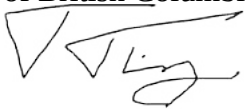
[77] *COMER* at para 68.
[78] *Mikisew Cree* at paras 36-37.
[79] *Canada (Attorney General) v Jodhan*, 2012 FCA 161 at paras 167-170.
[80] *Doucet-Boudreau* at para 120.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Vancouver, in the Province of British Columbia this 28th day of July, 2020.



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PART V – LIST OF AUTHORITIES

Tab **STATUTES AND LEGISLATION**

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

2. *Constitution Act, 1867*

3. *Federal Courts Rules*, SOR/98-106

JURISPRUDENCE

4. *Ahani v Canada (Attorney General)* (2002), 58 OR (3d) 107, 2002 CanLII 23589 (ON CA)

5. *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342

6. *Burns Bog Conservation Society v Canada (Attorney General)*, 2012 FC 1024

7. *Burns Bog Conservation Society v Canada*, 2014 FCA 170

8. *Canada (Attorney General) v Bedford*, 2013 SCC 72

9. *Canada (Attorney General) v Jodhan*, 2012 FCA 161 (CanLII)

10. Canada *(Auditor General) v Canada (Minister of Energy, Mines and Resources*, [1989] 2 SCR 49

11. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4

12. *Chief Mountain v HMTQ in Right of Canada*, 2000 BCCA 260, [2000] BCJ No 8 (CanLII)

13. *Committee for Monetary and Economic Reform ("COMER") v Canada*, 2013 FC 855

14. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62

15. *Friends of the Earth – Les Ami(e)s de la Terre v Minister of the Environment and Governor in Council*, 2010 CanLII 14720 (SCC)

16. *Friends of the Earth v Canada (Environment)*, 2009 FCA 297

17. *Friends of the Earth v Canada (Governor in Council)*(FC), 2008 FC 1183

18. *Gosselin v Québec (Attorney General)*, 2002 SCC 84

19. *Highwood Congregation of Jehovah's Witness (Judicial Committee) v Wall*, 2018 SCC 26

20. *Holland v Saskatchewan*, 2008 SCC 42, [2008] 2 SCR 551

21. *Hunt v Carey Canada Inc*, [1990] 2 SCR 959

22. *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30

23. *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62

24. *Kreishan v. Canada*, 2019 FCA 223

25. *Kreishan v. Canada*, leave to appeal to SCC dismissed, 38864 (5 March 2020)

26. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40

27. *Native Women's Association of Canada v Canada (Attorney General*), [1994] 3 SCR 627

28. *Nevsun Resources Ltd. v Araya*, 2020 SCC 5

29. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43

30. *Operation Dismantle v The Queen*, [1985] 1 SCR 441

31. *R v Appulonappa*, 2015 SCC 59

32. *R v DB*, 2008 SCC 25

33. *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45

34. *R v Kapp*, 2008 SCC 41

35. *R v Malmo-Levine; R v Caine*, 2003 SCC 74

36. *R v Moriarity*, 2015 SCC 55

37. *R v Oakes*, [1986] 1 SCR 103

38. *R v S (RJ)*, [1995] 1 SCR 451

39. *R v White*, [1999] 2 SCR 417

40. *Reference re Canada Assistance Plan (B.C.)*, [1991], 2 SCR 525

41. *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3

42. *Reference re Secession of Quebec*, [1998] 2 SCR 217

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

44. *SA v Metro Vancouver Housing Corp*, 2019 SCC 4

45. *Symes v Canada*, [1993] 4 SCR 695

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

47. *Tanudjaja, et al v Attorney General of Canada, et a*l (June 25, 2015), Docket No 36283 (SCC)

48. *Trillium Power Wind Corporation v Ontario (Natural Resources)*, 2013 ONCA 683

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

SECONDARY SOURCES

50. Anna Warner La Forest, *Anger & Honsberger, Law of Real Property*, 3rd ed (Toronto: Thomson Reuters, 2019), ch 4 at 4:40.20

51. Peter W Hogg, *Constitutional Law of Canada* 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2019) at 12.3(a)

52. Edith Brown Weiss, "Intergenerational Equity" (last updated February 2013), online: *Oxford Public International Law* <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421>

Court File No.: T-211-20

FEDERAL COURT

BETWEEN:

DINI ZE' LHO'IMGGIN also known as ALPHONSE GAGNON,
on his own behalf and on behalf of all the members of MISDZI YIKH and
DINI ZE' SMOGILHGIM, also known as WARNER NAZIEL,
on his own behalf and on behalf of all the members of SA YIKH

Respondents

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Applicant

DRAFT ORDER

WHEREAS the Applicant, Her Majesty the Queen in Right of Canada, has filed a Motion to Strike for an Order pursuant to rule 221(1)(a) of the *Federal Courts Rules* striking out the Statement of Claim without leave to amend; and

UPON reading the Notice of Motion, Written Representations and materials filed herein;

IT IS ORDERED that the Applicant's motion is granted and:

(a) the Statement of Claim is struck without leave to amend; and

(b) the parties will bear their own costs of this motion.

DATED at _____, this _____ day of _____, 2020.

_____
Justice Glennys L. McVeigh
Case Management Judge

Court File No.: T-211-20

Court File No. T-_____

FEDERAL COURT

Between

DINI ZE' LHO'IMGGIN, also known as ALPHONSE GAGNON,
on his own behalf and on behalf of all the members of MISDZI YIKH and
DINI ZE' SMOGILHGIM, also known as WARNER NAZIEL,
on his own behalf and on behalf of all the members of SA YIKH

PLAINTIFFS

and

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

DEFENDANT

REPRESENTATIVE PROCEEDING

STATEMENT OF CLAIM

FACTS

A. Overview

1. Global warming is an existential threat to all human societies and to many other life forms worldwide. It is caused by the cumulative release of greenhouse gases by human activity in the industrial era, principally from the burning of fossil fuels. The effects of global warming are not merely hotter lands and seas but include a host of extreme weather and climate effects ranging from droughts and wildfires to floods and rising sea levels.

2. The plaintiffs are Wet'suwet'en House groups of the Likhts'amisyu Clan governing themselves and their *yintah* or land territories under their own indigenous laws. The plaintiffs experience global warming in two ways – as a

threat and as a responsibility. It is a threat to their identity, to their culture, to their relationship with the land and the life on it, and to their food security. It is a responsibility because large fossil-fuel infrastructure projects are proposed to cross their territories. Under the Wet'suwet'en legal order, a House group is responsible to other Wet'suwet'en, to other peoples and to the spirit in the land for all acts on its territories.

3. The defendant Crown in the right of Canada has repeatedly failed, and continues to fail, to fulfil its constitutional duty to not infringe on the plaintiffs' constitutional rights and freedoms due to its unwillingness to establish and to implement the laws, policies and actions needed to ensure that Canada meets its international commitment made in Paris in 2015 to keep mean global warming well below 2°C above pre-industrial levels.

4. Since at least 1988, the defendant has assured the plaintiffs and all Canadians that it would establish laws and policies to meet its international climate commitments to keep global warming to tolerable levels. Such laws and policies were either not implemented, were not enforced, or were overruled causing Canada's emissions of greenhouse gases to rise alarmingly. The level of accumulated gases in the earth's atmosphere is now so high that only drastic emission reductions can keep the warming below catastrophic levels.

5. Like many indigenous peoples in Canada and across the globe, the Likhts'amisyu Houses' identity, culture, legal order and sustenance is bound up with their land and fishing territories. They cannot be who they are at some other place. Already, as the result of changing climate they have seen forest insect infestations, wildfires, and a decline in forest food animals on their territories. They have seen a decline in their salmon fishery that was the heart of their food security such that they have not been able to fish their preferred salmon species for nearly two decades. These harms are predicted to increase as the earth's climate continues to warm beyond the current 1°C above pre-

industrial levels.

6. The defendant can meet its *Paris Agreement* commitment to keep Canada's fair share of greenhouse gas emissions within levels that contribute to the global temperature rise of well below 2°C above pre-industrial levels in several ways. Because of the defendant's inaction on climate change over the last three decades, these options are now difficult and are made even more difficult with the defendant's approval of high-emission fossil-fuel export projects such as those proposed for the plaintiffs' territories. These projects and their related infrastructure are not only allowed to emit copious amounts of greenhouse gases, the permits and approvals given to them by the defendant will allow them to continue emitting for at least 40 years, thus blasting their way past Canada's critical reduction target in 2030 and its net zero emission target in 2050.

7. The plaintiffs therefore seek a court order declaring as unconstitutional those statutory provisions that permit such projects to continue their high greenhouse gas emissions with no provision for rescission in the face of escalating global warming. In particular, the plaintiffs ask the Court to declare that if the defendant is unable to meet its international global warming obligations and, in particular, its *Paris Agreement* commitment to keep Canada's greenhouse gas emissions consistent with a mean global warming of well below 2°C above pre-industrial levels, or in the event that the defendant considers global warming to be a national emergency, the defendant may withdraw its approval for the continued operation of such projects.

8. The plaintiffs also seek an order requiring the defendant to establish an ongoing independent accounting of Canada's cumulative greenhouse gas emissions to inform the defendant whether it is meeting its *Paris Agreement* commitments.

B. The Parties

9. The plaintiffs, Misdi Yikh and Sa Yikh, are each a *yikh* or House group under Wet'suwet'en indigenous law. The two Houses comprise the Wet'suwet'en Likhts'amisyu *didikhni* or Fireweed Clan. The plaintiff Lho'imggin is the *dini ze'* or Head Chief of Misdzi Yikh. The plaintiff Smogilhgim is the *dini ze'* or Head Chief of Sa Yikh. Each dini ze' speaks for his House and is responsible for the welfare of his House members and for the protection of his House's possessions, including its territories. The membership of a Wet'suwet'en House and the responsibilities of its Chief and members arise out of the interaction of kinship and contractual relationships.

Kinship

10. Every Wet'suwet'en person is born into his or her mother's lineage, which will belong to one of five Clans: C'ilhts'ekhyu (Big Frog); Likhsilyu (Small Frog); Gidimt'en (Wolf/Bear); Likhts'amisyu (Fireweed); and Tsayu (Beaver).

11. A person may also be adopted as a child or as an adult from one lineage into another lineage, usually of the same Clan.

12. A person may not marry a member of his or her own Clan. Marriage is thus a contractual relationship that is not only an alliance between two individuals, but is also an alliance between two lineages, each from a different Clan.

13. A House is comprised of one or more lineages.

14. The House has a unique set of possessions under Wet'suwet'en law, which it manages for the benefit of the House as a whole. These possessions and attendant responsibilities include:

    a. exclusive land and riverine fishing territories;

b. a set of *cin k'ikh* or oral histories, which record the House's identity, its relationships with other Wet'suwet'en and foreign groups, and how it acquired its other possessions, including its territories;

c. a set of *nitsiy* or crests, which are images depicted on poles, on worn regalia, and on other articles, and which encapsulate events recorded in the oral histories;

d. a set of feast names, which the House may bestow on qualified members and will announce at an appropriate feast hosted by the House and the Clan to be witnessed and validated by the guests from Houses of the other Clans.

15. Each Wet'suwet'en House is also responsible for any harm that may come to others because of the actions of House members or of third parties on its territories.

16. Each Wet'suwet'en House group has a dini ze' or Head Chief who has a duty, among other things:

a. to protect the welfare and health of House members;

b. to protect the House's possessions, including its territories;

c. to speak for the House to other Wet'suwet'en Houses, to other indigenous groups, and to non-indigenous entities;

d. to ensure that the House meets its legal obligations; and

e. to enhance the House's standing among the Wet'suwet'en and other peoples.

17. A Head Chief does not have a power of command over the members of his or her House. He or she leads by example, showing generosity, restraint and good judgement. For major decisions, a Head Chief may embark on a consensus-building process within the House, including consulting with other Chiefs within the House, known as Wing-chiefs. The Head Chief cannot, however, breach his or her duty to protect House members and House possessions.

18. If a Head Chief speaks or acts on matters contrary to the House interests, he or she will lose support of the House's members at the feast and the House will lose standing within the Wet'suwet'en. For repeated disregard of the House interests or for breach of the duty to protect the House members and territories, a House may remove a holder from the Head Chief position.

19. There is no overarching authority in Wet'suwet'en law above that of the House through its Head Chief and other Chiefs of the House. Where a House's actions effect its whole Clan or Wet'suwet'en Houses of other Clans, they will be consulted. There are no Clan Chiefs and there is no Chief or council governing the Wet'suwet'en as a people.

20. A House's consensus decision may be validated by the Wet'suwet'en Houses as a whole at a *balhats* or feast. A feast is a publicly-announced gathering to which the members and, particularly, the Head Chiefs of other Houses are specifically invited. The feast itself is a public event usually hosted by a particular House, supported by the other Houses in its Clan. The hosts provide food and gifts to the members of the guest Houses from the other Clans. The host House announces the particular decision it has made. The guest Houses, through their Head Chiefs or speakers, will then formally speak to validate the host's legal ability to make and act on its announced decision. Those guests

who do not speak validate the host House's decision by accepting the food and gifts offered by the hosts.

21. In practice, before any feast, there are a many informal and semi-formal meetings at which ideas are introduced, discussed and a consensus built within the host House and among the other Wet'suwet'en Houses.

22. The most common feast currently held among the Wet'suwet'en is the announcement of a House's decision to appoint a successor to its Head Chief name after the death of the previous holder of the name. For the succession to a Head Chief's name, a series of public feasts may be held, beginning with the funeral feast of the deceased name-holder and culminating with the new Head Chief assuming his or her full range of duties.

23. Once a House's decision has been validated by the Houses of the other Clans, it cannot be revisited except at a subsequent feast.

Alliances

24. One form of contractual alliance between lineages and between Houses is marriage that, as noted above, is properly between members of different Clans, thus cross-cutting matrilineal descent lines.

25. A practical result of the marriage alliance is that each child of the marriage is born into the lineage, House and Clan of their mother. The father's lineage, House and Clan contribute to that person's status, education, and assist the person's House and Clan at the feasts on the person's death.

26. In addition, both the spouses and the children of a House member may be granted use rights on the House's territories and fishing sites.

The Likhts'amisyu Houses

27. The succession of Alphonse Gagnon to the name of Lho'imggin, Head Chief of Misdzi Yikh (Owl House) of the Likhts'amisyu Clan was validated by the Houses of the other Wet'suwet'en Clans at a feast in Witset (formerly Moricetown) on October 5, 1998.

28. Misdzi Yikh has one land territory, Tselh Tse K'iz, located on the south side of the western end of Francois Lake.

29. The succession of Warner Naziel to the name of Smogilhgim, Head Chief of Sa Yikh (Sun House) of the Likhts'amisyu Clan was validated by the Houses of the other Wet'suwet'en Clans at a feast in Witset on October 15, 2016.

30. Sa Yikh has five land territories:

    a. Cas Nghen, located in the Suskwa River watershed;

    b. Ggusgi Be Wini, located north of Houston;

    c. C'idi To Stan, located in the lower Morice River watershed;

    d. Lho Kwah, located in the upper Clore River watershed; and

    e. Misdzi Kwah, located on the north side of the western end of Francois Lake.

31. In addition to river and lake fishing sites on its land territories, each Likhts'amisyu House holds discrete fishing sites on the main stem Bulkley-Morice river, especially at the canyon at Witset. Here, the river's narrowing causes migrating salmon to swim near the canyon walls and thus be susceptible to shore-based fishing methods. All salmon species are caught here, but the

Wet'suwet'en have preferred sockeye due to their nutritious oil content and their superior flavour.

The defendant

32. The defendant, Her Majesty the Queen in the Right of Canada, is named as prescribed by s. 48(1) of the *Federal Courts Act* and its Schedule. The defendant is referred to as Canada in this Statement of Claim, which may refer to Parliament or the executive depending on the context.

C. Global Warming

33. Global climate change is an urgent threat to humanity. Greenhouse gases ("GHGs") in the atmosphere enable global warming, causing climate change and creating national and international risks to human health and well-being.

34. Burning fossil fuels releases GHGs into the earth's atmosphere, which cause global climate change. GHGs trap solar energy in the earth's atmosphere. Higher levels of GHGs trap more energy, increasing air and water temperatures, which are significantly affecting global climate. Carbon dioxide (CO_2) is the most abundant GHG emitted by human activity. Atmospheric CO_2 levels are higher now than at any time in the last 400,000 years – and are still climbing. GHG emissions create a risk to human health and the environment upon which life depends.

35. The climate effects of long-lived GHGs, such as CO_2, are proportional to the cumulative emissions of those gases. The long-term effects of CO_2 emissions therefore depend only on the cumulative amount of those emissions and not on the rate or the intensity of the emissions at any particular time or in any particular period.

36. A carbon budget defines the total CO_2 that can be emitted over all times in order to limit warming to a mean global temperature target. To limit global

warming to below 2°C, total cumulative CO_2 emissions need to remain below about 2,800 billion tonnes. About 2000 billion tonnes of CO_2 have already been emitted globally during the industrial era and remain in the atmosphere.

37. Canada's share of the remaining global carbon budget may be allocated on the basis of Canada's share of current global emissions (called an emissions-based carbon budget) or, more equitably, allocated on the basis of Canada's share of the world's population (called an equity-based carbon budget). Canada's allocation of the global carbon budget – its Cumulative Emissions Target – is the most accurate measure of the country's contribution to limiting global warming.

D. Canada allows GHG emissions that cause global warming

Canada has jurisdiction to regulate GHGs

38. Parliament has the jurisdiction to legislate for the peace, order and good government of Canada under s. 91 of the *Constitution Act, 1867*. The cumulative effect of GHG emissions is a matter of national concern under s. 91 because, regardless of their origin, GHG emissions have Canada-wide and global impacts.

39. Canada has direct jurisdiction to regulate GHG emissions from road vehicles, fossil-fueled electrical generation, and fossil fuel developments offshore, in the Arctic and in the Northwest Territories.

40. Canada has indirect jurisdiction to regulate GHG emissions by:

    a. subsidising or taxing fossil fuel production and fossil fuel use;

b. approving the construction and operation of oil and gas processing facilities and pipelines that fall under federal jurisdiction; and

c. purchasing fossil fuel infrastructure.

41. In particular, Canada has had, and continues to have, the jurisdiction to approve many high GHG-emitting projects such as natural gas pipelines and liquefied natural gas (LNG) infrastructure through its environmental assessment legislation, including the *Canadian Environmental Assessment Act,* S.C. 1992, c. 37, the *Canadian Environmental Assessment Act, 2012,* S.C. 2012, c. 19, s. 52 ("*CEAA, 2012*"), and the *Impact Assessment Act,* S.C. 2019, c. 28, s. 1 ("*IAA*"). None of these statutes, however, enable the government executive to unilaterally withdraw or fundamentally alter its approval of a project in the face of a climate emergency.

Canada has failed to meet its international commitments to reduce GHGs

42. Canada has repeatedly failed to effectively implement its international commitments to reduce or limit its GHG emissions, including those made at the 1988 International Conference on the Changing Atmosphere, the 1992 United Nations Framework Convention on Climate Change, the 1998 Kyoto Protocol, the 2009 Copenhagen Accord, and the 2010 Cancun Agreement.

43. None of Canada's international commitments listed above, even if met, would have or will enable it to make its equitable contribution to reducing global warming to non-catastrophic levels.

44. In December, 2015, Canada and 194 other countries adopted the *Paris Agreement* in which they committed to strengthen the global response to the threat of climate change. The parties formally recognised "that climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response,

with a view to accelerating the reduction of global emissions."

45. The central aim of the *Paris Agreement* is to hold "the increase in global average temperatures to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels." Each party must report and account for its progress towards achieving a nationally determined contribution to reduce its annual GHG emissions by 2030 ("Nationally Determined Contribution"). The *Paris Agreement* requires each party's Nationally Determined Contribution to "reflect its highest possible ambition."

46. The *Paris Agreement* thus establishes two main commitments for each signatory. The first is to hold global temperature increases to between 1.5°C and 2°C – what might be called a Temperature Target. The second commitment is for each signatory to establish and follow its Nationally Determined Contribution – what might be called an Annual Emissions Target. The use of an Annual Emissions Target is a less accurate and less fair measure of a country's contribution to meeting the Temperature Target than the Cumulative Emissions Target or carbon budget described above in paragraphs 36 and 37.

47. On October 5, 2016, Parliament ratified the *Paris Agreement*. Canada confirmed that its Nationally Determined Contribution is to reduce its annual GHG emissions by 30 percent below 2005 levels by 2030.

48. On June 17, 2019, Parliament passed a non-binding declaration that "Canada is in a national climate emergency which requires, as a response, that Canada commit to meeting its national emissions target under the Paris Agreement and to making deeper reductions in line with the Agreement's objective of holding global warming below two degrees Celsius and pursuing efforts to keep global

warming below 1.5 degrees Celsius."

49. Canada's Nationally Determined Contribution will be insufficient to meet its 1.5°C to 2°C Paris commitment. To fairly contribute to its temperature-based Paris commitment, Canada would have to reduce its GHG emissions to 327 million tonnes of CO_2 equivalent (Mt CO_2e) a year by 2030. Instead, Canada decided that its Nationally Determined Contribution will be to reduce emissions to only 513 Mt CO_2e a year, leaving a 186 Mt CO_2e a year deficit.

50. The Paris Conference noted in 2015 that the participants' collective nationally determined contributions were insufficient and that much greater emission reduction efforts will be required than those associated with the intended nationally determined contributions in order to hold the increase in the global average temperature to less than 2°C above pre-industrial levels.

51. If proportionally followed by other countries, Canada's Nationally Determined Contribution would result in cumulative GHG emissions sufficient to cause a 2° C to 3°C warming above pre-industrial levels.

52. Canada also appears unlikely to meet its Nationally Determined Contribution commitment under the *Paris Agreement*. Canada's GHG emissions in 2005, the target's baseline, were 732 million tonnes of CO_2 equivalent (Mt CO_2e). The Nationally Determined Contribution target is 513 Mt CO_2e/year by 2030. Under current policies and measures that may not yet be fully implemented, Canada projects that the country's GHG emissions will decrease to 616 Mt CO_2e/year by 2030. Projections in 2018 by an independent NGO were that Canada's 2030 emissions will be in the 630 to 763 Mt CO_2e/year range. Both of these projections do not include any positive or negative effects from land use and forests.

53. Canada's 2019 National Inventory Report states that Canada's 2016 emissions were 704 Mt CO_2e and that its 2017 emissions, the most recent dataset publicly available, were 716 Mt CO_2e.

54. In October, 2016, the federal government presented a pan-Canadian benchmark for carbon-pricing, which it said was a foundational element of Canada's approach to fighting climate change. Canada has estimated that the annual GHG emissions reduction due to carbon-pricing throughout the country will be 50 to 60 Mt CO_2e a year by 2022.

55. Carbon-pricing is insufficient for Canada to meet its Nationally Determined Contribution. Complementary GHG emission reduction measures are outlined in the *Pan-Canadian Framework on Clean Growth and Climate Change* agreed among federal, provincial and territorial governments in December, 2016. Proposed reduction measures include: phase-out of coal-fired electrical generation; energy-efficient buildings and industrial processes; vehicle emission standards; and fugitive methane reduction. None of these measures have mandatory targets or detailed GHG accounting to show how they might collectively achieve the Nationally Determined Contribution.

56. The critical commitment made by Canada under the *Paris Agreement* is to help limit global warming to well below 2°C above pre-industrial levels. The best measure of this commitment is Canada's fair share of the remaining global carbon budget or global Cumulative Emissions. Instead, Canada and the other parties to the Agreement chose the less transparent Annual Emissions as the target and reporting metric.

57. Further, the use of the carbon dioxide equivalent metric for GHG emissions masks the short-term importance of methane. Methane is the most common GHG after carbon dioxide and is some 86 times more potent than CO_2 as a source of atmospheric warming. On the other hand, it has about a 20-year

lifespan as opposed to centuries for carbon dioxide. Reducing methane emissions is therefore a highly effective way to slow near-term global warming. The short-term benefits of methane reduction are not reflected in the CO_2e metric, which is based on a 100-year time horizon.

58. In summary: halfway through the 2005 to 2030 GHG emission reduction period contemplated in Canada's Nationally Determined Contribution, the 2017 reduction is 16 Mt CO_2e/year or less than a tenth of the way towards the target. Further, there are no existing or planned legislative or policy initiatives, including carbon-pricing, would enable the remaining nine tenths of the required annual GHG emission reduction to be achieved by 2030.

Environmental Assessment as a GHG reduction mechanism

59. Canada has jurisdiction to manage high GHG-emitting fossil fuel infrastructure developments through its environmental assessment legislation. The oil and gas sector accounts for 27 percent of Canada's current territorial GHG emissions and Canada projects that the sector's emissions under current policies will increase from the 2005 Nationally Determined Contribution baseline by 37 Mt CO_2e a year by 2030. Much of the oil and gas sector emissions will be of fugitive methane from fracked natural gas production. Its management therefore presents a powerful lever in meeting Canada's Paris commitment to bring its cumulative GHG emissions in line with a mean global 1.5°C to 2°C temperature rise.

60. The defendant has not used its discretionary decision-making power under its environmental assessment legislation to withhold approval of high GHG-emitting projects that would help bring Canada's GHG emissions in line with a mean global 1.5°C to 2°C temperature rise.

61. The defendant has fettered its law-making power to meet its Paris temperature commitment by failing to pass environmental assessment legislation that would

allow the executive branch to cancel or significantly amend its approval of a high GHG-emitting project in the event that Canada can demonstrably not meet its international global warming commitments or its obligations to the citizens of Canada.

62. Liquefied natural gas export schemes are among the higher GHG-emitting oil and gas developments in Canada. Elements of two such extant LNG schemes are currently proposed for the Likhts'amisyu Houses' territories. They have undergone environmental assessments under both British Columbian and Canadian legislation. They are the LNG Canada Export Terminal Project located at Kitimat and fed by the Coastal GasLink Pipeline Project, and the Kitimat LNG Terminal Project similarly located at Kitimat and fed by the Pacific Trail Pipeline Project. A proposed expansion of the Kitimat LNG project is currently being assessed by British Columbia and Canada through the provincial environmental assessment process.

63. Canada's Governor in Council approved the LNG Canada Export Terminal Project under s. 54 of *CEAA, 2012* through a June 17, 2015, Decision Statement. The environmental assessment was carried out by the British Columbia Environmental Assessment Office under a substitution agreement with Canada and reported in a May 6, 2015 Assessment Report. The Assessment Report found that the LNG Canada facility would produce 4 Mt CO_2e/year, which it considered to be a significant residual adverse effect in the context of existing global GHG emissions. Canada's Decision Statement found that the significant adverse environmental effects were "justified in the circumstances," without identifying those circumstances or providing reasons.

64. On May 27, 2016, LNG Canada received under s. 117 of the *National Energy Board Act* a National Energy Board order to extend the term of its export licence from 25 to 40 years.

65. Canada did not require the Coastal GasLink Pipeline Project to undergo a federal environmental assessment. The Office of the Wet'suwet'en actively participated in the British Columbia review on behalf of all Wet'suwet'en House groups. A British Columbia assessment report found that the pipeline project would produce about 3.5 Mt CO_2e/year, which it considered to be a "significant residual adverse effect on GHG emissions." On October 23, 2014, British Columbia approved the pipeline project, acknowledging that significant adverse effects in respect to GHG emissions would occur.

66. The Kitimat LNG Terminal Project was originally assessed in 2005-2006 as an LNG import facility. Canada's Minister of Environment approved the project on August 1, 2006. In 2008, the proponent requested an amendment to its B.C. environmental assessment certificate to include the use of liquefaction facilities; that is, to allow the construction and operation of an LNG export facility with a 5 million tonnes a year (MTPA) LNG capacity. Because the export facility would use electrically-driven rather than natural gas-driven liquefaction compressors, the facility GHG emissions were projected to be 0.11 Mt CO_2e/year. The defendant decided this change did not require a further environmental assessment. In 2013, Canada approved a doubling of production capacity to 10 MTPA. In July, 2019, the proponent requested its certificate be further amended to expand its LNG production capacity to 18 MTPA. British Columbia is currently conducting an environmental assessment of the Kitimat LNG Expansion Project on behalf of both British Columbia and Canada under a substitution agreement.

67. On April 1, 2019, Kitimat LNG applied for a National Energy Board order to extend the term of its export licence from 25 to 40 years for the expanded facility. A decision on this application is pending.

68. The Pacific Trail Pipeline Project was assessed by British Columbia. The Office of the Wet'suwet'en actively participated in the British Columbia review

on behalf of all Wet'suwet'en House groups. Neither the proponent's application nor the May 12, 2008 British Columbia assessment report reported the amount of GHG emissions likely to be released from pipeline operations. British Columbia appeared to accept the proponent's assessment of GHG emissions using the criterion of whether the project's emissions would have a global climate effect that could be measured on a local or regional scale. The assessment report found that the pipeline would not result in significant adverse effects on the atmospheric environment.

69. In January, 2016, Canada issued a policy document (the "Interim Approach") to its environmental assessment of major projects. It included five principles that it said would guide its discretionary environmental assessment decision-making. One of these principles states that, "Direct and upstream greenhouse gas emissions linked to the projects under review will be assessed." In the case of LNG liquefaction facilities, upstream GHG emissions would include those from natural gas extraction and collection, gas-fuelled pipeline compression stations, and fugitive methane emissions from all these operations.

70. Canada has applied its Interim Approach to one west coast LNG proposal – the now abandoned Pacific NorthWest LNG Project. Canada's September, 2016 environmental assessment report found that the project's GHG emissions to be 4.5 Mt CO_2e/year and that the associated upstream emissions, including pipeline operations, to be about 9 Mt CO_2e/year, for a total of 13.5 Mt CO_2e/year. The assessment report concluded that the Pacific NorthWest LNG Project would likely cause significant adverse environmental effects as a result of GHG emissions. In September, 2016, Canada approved the project, stating that the significant adverse environmental effects were "justified in the circumstances" without identifying those circumstances or providing reasons.

71. The need for a federal environmental assessment to consider sources of direct and upstream GHG emissions to a project may continue under the *Impact*

Assessment Act, S.C. 2019, c. 28, s.1, which replaced *CEAA, 2012* in August, 2019. The *IAA* requires that a review consider, "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change." A 2018 draft of Canada's policy paper, *Strategic Assessment of Climate Change*, does prescribe the assessment of upstream GHG emissions. The final version of this policy document is due to be released in early 2020.

E. Global Warming Impacts on the Plaintiffs

72. Present mean global temperature has risen about 1°C above pre-industrial levels. Global warming impacts in Canada, however, are already significant. While climate change encapsulates far more than warming temperatures, it is predicted that Canada's temperatures will continue to rise at a faster rate than the world as a whole.

73. Existing and anticipated impacts of climate change in Canada include:

    a. changes in extreme weather events such as droughts, floods, longer wildfire seasons, and increased frequency and severity of heat waves;

    b. degradation of soil and water resources; and

    c. expansion of the ranges of vector-borne diseases.

74. Adverse impacts will become more serious as mean global temperature rises to 1.5°C and 2°C. It is projected there will be a global increased risk to unique and threatened ecosystems, of extreme weather events, of distribution of impacts, and of large-scale, singular events. Observed and projected mean temperature increases in Canada are about twice the global mean. Even greater increases are projected for northern Canada in winter, resulting in more

frequent floods, reduced snowpack, less predictable stream flows, stream temperature regimes, and stream nutrient regimes, and shifts in salmon distribution and productivity.

75. Already, the plaintiffs have experienced significant warming effects on their territories. These effects include pine bark beetle infestations, forest fires, and salmon population declines, in part attributable to climate change.

76. The anticipated effects of global warming on the plaintiffs' yintah include reduction of their forest cover due to increased wildfire and insect infestations. These climate effects will be exacerbated by past and current clearcut logging practices and land-clearing. The forest-cover reductions will, in turn, lead to lower populations of forest fur-bearing animals and forest food-animals, such as moose.

77. The anticipated effects of global warming on the plaintiff's salmon fisheries will reduce the run numbers, their predictability and fish size due to sea temperature rise, ocean acidification, long-term shifts in the marine distribution of salmon prey and predators, freshwater temperature rise, and more frequent and more intense precipitation events. These climate effects will be exacerbated by the high by-catch of Bulkley-Morice sockeye in the marine commercial fishery that targets enhanced Babine Lake sockeye stocks. Since 2001, the plaintiffs and the other Wet'suwet'en Houses have voluntarily not fished for Bulkley-Morice sockeye for food as part of their effort to restore those stocks to their former abundance.

78. In addition to adverse effects on Likhts'amisyu territories and on their salmon fisheries, global warming is anticipated to cause illness and premature death to the plaintiff's members. These adverse health effects include:

a. increased exposure to air pollution from wildfires damaging the heart, lungs, and other organs;

b. increased frequency and severity of extreme weather events;

c. increased heatwaves, floods and droughts;

d. decreased food security, particularly of forest food animals and salmon stocks.

79. The links between climate change and mental health are highly socially and culturally mediated. For the plaintiffs, as for other indigenous peoples in Canada, their social and cultural context is the aftermath of the imposition of the *Indian Act* reserve system, of the banning of the potlatch, of land-speculator theft of their farmland and destruction of their farm homes, of the removal of children from their families into residential schools, of the removal of children from their families into non-indigenous foster homes (known as the Sixties Scoop), and ongoing racial discrimination. This previous conduct was in part by, or facilitated by, the defendant. It makes the plaintiffs particularly vulnerable to further psychological and social trauma caused by global warming.

80. Global warming, including further losses of the Wet'suwet'en salmon fishery, changes to land and aquatic ecosystems, destructive alteration of land territories by wildfire, forest insect infestations and floods, and effects on individuals' physical health will exacerbate the erosion of the plaintiffs' individual and social sense of identity, cohesion and well-being.

F. Relief Sought

81. The plaintiffs therefore claim as follows:

a. a declaration that the defendant has a common law and constitutional duty to act consistently with keeping mean global warming to between 1.5°C and 2°C above pre-industrial levels;

b. a declaration that the defendant has a constitutional duty to maintain the peace, order and good government of Canada under s. 91 of the *Canadian Constitution* by acting to keep Canada's greenhouse gas emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels;

c. a declaration that the defendant has a constitutional duty to not infringe on the plaintiffs' members' rights under s. 7 of the *Charter*, including the s. 7 rights of future members, by failing to act to keep Canada's greenhouse gas emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels;

d. a declaration that the defendant has a constitutional duty to not infringe on the plaintiffs' members' rights under s. 15 of the *Charter*, including the s. 15 rights of future members, by failing to act to keep Canada's greenhouse gas emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels;

e. an order requiring the defendant to amend each of its environmental assessment statutes that apply to extant high greenhouse gas emitting projects so as to allow the Governor in Council to cancel Canada's approval, under any of those statutes, of the operation such a project in the event that the defendant will demonstrably not be able to, or does not, meet its *Paris Agreement* commitment to keep Canada's greenhouse gas

emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels, or in the event that the defendant considers global warming to be a national emergency;

f. an order requiring the defendant to cause to be prepared a complete, independent and timely annual account of Canada's cumulative greenhouse gas emissions in a format that allows a comparison to be made with Canada's fair carbon budget to meet a mean global temperature rise well below 2°C above pre-industrial levels, including emissions produced within Canada and emissions produced outside of Canada but imported into Canada in the form of tangible goods;

g. an order for this Court to retain jurisdiction until the defendant has complied with all the Court's orders;

h. costs, including special costs;

i. such further and other relief that this Court deems just.

G. Legal Basis

The defendant has breached its duty under section 91 of the Canadian Constitution

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

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

83. The defendant has breached its duty to make laws for the peace, order and good government of Canada by making laws that allow it to approve the construction

and operation of high GHG- emitting projects and that allow such projects to continue operating through future decades with the result that Canada will be unable to comply with its constitutional duty to protect the plaintiffs and all Canadian citizens from the effects of global warming and will be unable to meet its international commitments to keep global warming to non-catastrophic levels.

84. The law-making powers under the peace, order and good government provisions of section 91 have generally been interpreted as the residual jurisdiction to the federal Parliament for the areas of law not otherwise set out in sections 91 and 92. While this residual jurisdiction is broad, it is not unlimited. Because of the defendant's and other countries' unwillingness to enact laws and implement policies to lower GHG emissions, global warming is now harming the plaintiffs and their territories, as well as posing an imminent existential risk to all human and other life on earth. Such an existential threat cannot be for the peace, order and good government of Canada.

85. The peace, order and good government power imposes a positive obligation on the defendant to pass laws that ensure that Canada's GHG emissions are now, and will be into the foreseeable future, consistent with its constitutional duty to the plaintiffs and with its international commitments to keep global warming to well below 2°C.

The defendant has infringed the plaintiffs' rights under section 7 of the Charter

86. Section 7 of the *Charter* states:

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

87. The defendant has deprived the plaintiffs of their right to life, liberty and security of person by making laws that allow high GHG- emitting projects to operate now and into the future in breach of Canada's fair contribution to keep

global warming to non-catastrophic levels.

88. All current projections of global warming based on the defendant's laws and policies deprive the plaintiffs;

    a. of their right to life by increasing the risk of premature death from global warming, including air pollution, extreme weather events, and vector-borne disease;

    b. of their right to liberty by increasing the risk to their individual and collective autonomy, including their freedom to choose where to move and live on their territories and in their communities; and

    c. of their right to security of person by increasing the risk of injury, disease and mental health from global warming, including air pollution, extreme weather events, vector-borne disease, and psychological and social trauma to already vulnerable societies and communities.

89. These impugned laws are contrary to the principles of fundamental justice because they do not accord with the existential effects of global warming on the plaintiffs' members, their autonomy as groups under their indigenous laws, and the integrity of their territories and their salmon-fishery. In particular, the defendant's laws and policies are contrary to its obligations under:

    a. the common law principles of public trust and equitable waste;

    b. international agreements and the laws governing them; and

c. the defendant's publicly declared objectives to comply with its international agreements on global warming.

The defendant has infringed the plaintiffs' rights under sub-section 15(1) of the Charter

90. Section 15(1) of the *Charter* states:

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

91. The defendant has deprived the plaintiffs of their right to equal protection and equal benefit of the law based on the age of the plaintiffs' younger members and future generations by making laws that allow high GHG- emitting projects to operate now and into the future in breach of Canada's fair contribution to keep global warming to non-catastrophic levels.

92. All current projections of global warming based on the defendant's laws and policies disproportionately deprive the plaintiffs of the right of their child members, youth members, and future generations to good health, to knowledge of their territories, fisheries, social relations and laws, to fully participate in their society's institutions and decision-making, and to develop their full potential as heirs to their millennia-old culture and society;

93. Such disproportionate deprivations will perpetuate the trauma caused by existing and historical attempts by the defendant to subjugate the plaintiffs' identity, culture, laws and practices. These attempts were and are intended to assimilate the plaintiffs' members as individuals into the Canadian mainstream.

94. The equality provisions pleaded by the plaintiffs for their children and youth under sub-section 15(1) of the Charter are consistent with the common law and constitutional principle of intergenerational equity.

The defendant's conduct cannot be justified under section 1 of the Charter

95. Section 1 of the *Charter* states:

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

96. The infringements of the plaintiffs' section 7 and sub-section 15(1) rights cannot be justified under section 1 of the *Charter*. The defendant has the burden of proof to show such justification.

Statutory provisions relied on by the plaintiffs

97. The plaintiffs rely on sections 24 and 32 of the *Charter of Rights and Freedoms*, section 52 of the *Constitution Act, 1982*, sections 17 and 48 of the *Federal Courts Act*, and other statutory provisions such as Counsel shall advise and this Honourable Court shall permit.

The plaintiffs propose that this action be tried in Vancouver, British Columbia.

Dated the 10th day of February, 2020

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