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 THE RIGHT OF CANADA

Applicant

REPRESENTATIVE PROCEEDING

RESPONDENTS' MOTION RECORD
(Motion to Strike)
(Rule 369 of the *Federal Court Rules*)

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WRITTEN REPRESENTATIONS OF THE RESPONDENT

A. Overview

1. Canada 's motion seeks to strike the plaintiffs' Statement of Claim on the grounds that it:

    a. discloses no reasonable cause of action;

    b. discloses no facts to show that the defendant's acts or omissions would infringe on the plaintiffs' constitutional rights;

    c. alleges infringements that are too uncertain, speculative and hypothetical to sustain an action;

    d. seeks to adjudicate matter that are not justiciable; and

    e. seeks remedies that are not available.[1]

2. In its written representations, Canada condenses these grounds into three issues as to why the claim cannot succeed:

    a. the claim is not justiciable;

[1] Notice of Motion, July 28, 2020 at paragraph 3.

b. the claim discloses no reasonable cause of action; and

c. the remedies sought are not available.[2]

3. On the issue of justiciability, Canada's representations focus on the separate functions of the branches of government within the constitutional framework.[3] In brief, the plaintiffs respond that the judicial branch is authorised to consider cases that raise important constitutional issues that affect the other branches of government.

4. On the grounds of reasonable cause of action, Canada's representations focus on its allegations that the plaintiffs' claimed facts are based on assumptions and speculations.[4] In brief, the plaintiffs respond that global warming caused by greenhouse gas ("GHG") emissions and its effect on the plaintiffs' members and territories are no longer, if they ever were, assumptions and speculations that "are manifestly incapable of being proven."[5]

5. The plaintiffs will respond to Canada's arguments on justiciability and to the reasonable cause of action under each of the three constitutional grounds on which their claim is based. The law relating to those issues and the relevant facts differ in each ground.

6. In *Imperial Tobacco*, the SCC summarised principles and criteria for a motion to strike:[6]

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed… Therefore on a motion to strike, it is not determinative that the law has not yet recognised the particular claim. The court must rather ask whether, assuming the facts assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

7. Each of the plaintiffs' constitutional grounds can be characterised as claims that Canadian law has not yet recognised. Nevertheless, the plaintiffs submit that that there is a

[2] Applicant's Motion Record, July 28, 2020, Written Representations ("AMR-WR") at para. 11.
[3] AMR-WR at paras. 12 to 20.
[4] AMR-WR at paras. 21 to 25.
[5] *R v Imperial Tobacco (Canada) Ltd.*, 2011 SCC 42 ("*Imperial Tobacco*") at para. 21, **(Applicant's Book of Authorities ("ABA"), TAB 33)**.
[6] *Imperial Tobacco* at para. 21.

reasonable prospect that their claims will succeed. The claims are novel due, in part, to two unique circumstances. First, each of the two plaintiff Houses is an indigenous kinship group with distinct obligations to its members, its territories and to other Houses. Second, climate change is a real and existential threat to a global commons, to the survival of communities and to individual rights.

8. The plaintiff House groups are members, along with other Houses, of the Wet'suwet'en people.[7] Each House holds possessions – crests, names, territories – that give it identity and facilitates relationships with other Wet'suwet'en Houses, Houses of other northwestern British Columbia peoples and non-indigenous entities.[8] The House group is the legal actor under Wet'suwet'en law.[9] It is responsible for all acts on its territories.[10] The Dini Ze' or House Chief embodies the House in its dealings with other Houses.[11] But the Chief has no power of command over House members.[12] He or she is more a trustee of the House's possessions and members than a representative executive.[13] House decisions are made by all members who wish to participate and are publicly announced and validated by other Houses at a feast.[14] The distinct roles of the House, its members and its Chief are summarily reflected in the style of cause of this proceeding.

9. Global warming is the result of human GHG emissions.[15] Its existing and future harm has three characteristics that distinguish it from other adverse environmental effects. First, the earth's atmosphere is a common property resource. No-one owns it. No-one is responsible for regulating and enforcing its sustainable use. Second, within this global commons, the warming effects are and will be felt by individuals and groups everywhere.[16] While the nature, intensity, and timing of the effects will vary from place to place, they will be

[7] Statement of Claim, February 10, 2020, Applicant's Motion Record, Tab 4 ("Statement of Claim"), at para. 9.
[8] Statement of Claim at para. 14.
[9] Statement of Claim at paras. 15, 16 and 19.
[10] Statement of Claim at para. 2.
[11] Statement of Claim at para. 16.
[12] Statement of Claim at para. 17.
[13] Statement of Claim at para. 16.
[14] Statement of Claim at para. 20.
[15] Statement of Claim at paras. 33 and 34.
[16] Statement of Claim at paras. 33, 34 and 74.

inescapable.[17] Third, GHG emissions are cumulative.[18] Limiting or even eliminating emissions may slow the rate of temperature increase to some plateau, but will not reverse it within a timescale of centuries.[19]

10. It is for these reasons the plaintiffs claim that global warming, if allowed to continue, is an existential and catastrophic threat.[20]

11. The main body of the plaintiffs' response to Canada's motion is organised under the three claimed constitutional grounds: section 91 of the *Constitution Act, 1867*; section 7 of the *Charter of Rights and Freedoms*; and section 15(1) of the *Charter*.

B. Section 91 of the *Constitution*

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

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

Amended Statement of Claim

13. The plaintiffs oppose Canada's motion that their s. 91 claims be struck without leave to amend. The test under Rule 221(1) is that "[i]n order to strike a pleading without leave to amend, any defect in the pleading must be one that cannot be cured by amendment."[21] The plaintiffs seek leave to amend their Statement of Claim as it characterises their s. 91 relief

[17] Statement of Claim at para. 33.
[18] Statement of Claim at para. 1 and 35.
[19] Statement of Claim at paras. 4 and 35.
[20] Statement of Claim at para. 1 and 4.
[21] *Collins v Canada*, 2011 FCA 140 at para. 26, (**Respondent's Book of Authorities ("RBA"), TAB 4**).

and its legal basis.

14. In their Statement of Claim, the plaintiffs mischaracterise the relief sought under s. 91 by stating that Canada has "a constitutional duty under the 'peace, order and government of Canada' under s. 91 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."[22] The proper expression of the relief sought is that Canada has "exceeded and continues to exceed its law-making powers under the 'peace, order and government of Canada' provision of s. 91 by failing to keep Canada's greenhouse gas emissions consistent with a mean global warming of between 1.5°C and 2°C above pre-industrial levels."

15. Similarly, the plaintiffs mischaracterise the legal basis of the s. 91 relief by stating that Canada has "breached its duty to make laws for the 'peace, order and government of Canada'…"[23] The proper expression of the legal basis is that Canada has "exceeded and continues to exceed its powers to make laws for the 'peace, order and government of Canada'…"

16. Finally, the plaintiffs again mischaracterise the legal basis of the s. 91 relief by stating that: "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."[24] The proper expression of this basis is that: "The peace order and good government power limits the defendant's powers pass laws that are inconsistent with its constitutional duties to the plaintiffs and with its international commitments to keep global warming to well below 2°C."

[22] Statement of Claim at para. 81(b).
[23] Statement of Claim at para. 83.
[24] Statement of Claim at para. 85.

17. The above paragraphs show that the defects in the Statement of Claim can be cured by the proposed amendments. The amendments will facilitate the court's consideration of the true substance of the dispute. The defendant is not prejudiced as it has a right under Rule 396(3) to make representations in reply to the respondent's motion record and may also amend its Statement of Defence.

18. A draft Amended Statement of Claim is appended as part of the plaintiffs' Motion Record. The following representations are based on the draft Amended Statement of Claim.

Representations on the amended s. 91 claim

19. The plaintiffs' claim that the peace, order and good government power imposes limits to make laws that cumulatively are inconsistent with both its constitutional duties to the plaintiffs and its international commitments to keep global warning to well below 2* C because they fail to address the current and future catastrophic impacts of GHG emissions."[25]

20. The reference to Canada's international commitments to help keep global warming to well below 2˚C is to identify a scientifically, internationally and parliamentary accepted benchmark that may limit future global warming to non-catastrophic levels. It is not intended to base the plaintiffs' claim on the principle that Canada's international agreements create a legal obligation enforceable in Canadian domestic courts. The plaintiffs take no position on that issue in this proceeding.

21. The plaintiffs do claim that the words 'Peace, Order, and good Government of Canada' connote the wide law-making powers of a sovereign state but that such legislative power is not wholly unrestrained. In the words of Lord Justice Laws of the UK High Court, "peace, order and good government may be a very large tapestry, but every tapestry has a

[25] Statement of Claim at para. 85.

border".[26]

22. The phrase 'peace, welfare and good government' has been used by the English Crown in royal prerogative orders to establish British colonies and their legislative assemblies since the late 17th century. In what is now Canada, the 18th century constitutions of the pre-confederation provinces all used this law-making phrase, including the Royal Proclamation of 1763. In the discussions leading up to confederation, the phrase was retained, but in the final draft of the 1867 *British North America Act*, it was changed to 'peace order and good government'[27]. In section 91 of the Act, the phrase granted law-making power to the federal parliament in all matters not granted exclusively to the provinces under section 92. The phrase was carried over in 1982 without amendment in the *Constitution Act, 1867*.[28]

23. A presumption of statutory interpretation requires that there be no superfluous words in legislation and that every feature of the text has a meaningful role in the legislative scheme.[29] Despite the presumption, British Imperial and Commonwealth jurisprudence has generally held that the phrase refers solely to a plenary grant of legislative power.[30]

24. In the 2000s, however, the UK courts examined the meaning of 'peace order and good government' more closely. A series of cases concerned an indigenous people's challenge to the British government's decision to not repatriate them to their homeland in the Chagos Archipelago in the middle of the Indian Ocean. The colony was ceded to Britain by France in 1814 after the Napoleonic Wars. In 1971, the entire indigenous population was removed to allow for the building of a US military base on the main island of Diego Garcia. The legal basis of the expulsion was the use of the Crown's prerogative powers to turn the archipelago into a separate territory – the British Indian Overseas Territory ("BIOT") – and

[26] *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 (*Bancoult (No. 1)*) at para. 55, **(RBA at TAB 1)**.
[27] Dara Lithwick, "'Welfare' of a Nation: The Origins of 'Peace, Order and Good Government" (2017) Library of Parliament, accessed August 23, 2020 at https://hillnotes.ca/2017/04/26/welfare-of-a-nation-the-origins-of-peace-order-and-good-government/, **(RBA at TAB 8)**.
[28] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[29] Ruth Sullivan, "Statutory Interpretation in Canada", in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Sydney: Judicial Commission of New South Wales, 2007) 105 at 117, **(RBA at TAB 9)**.
[30] *Bancoult (No. 1)* at paras. 53 to 55.

create first the BIOT Order 1965 and then, under it, the Immigration Ordinance 1971, which included the repatriation ban.[31]

25. In *Bancoult (No. 1)*, the UK High Court held that the 1971 Ordinance was unlawful on the ground that a power in the 1965 Order to legislate for the peace, order and good government of BIOT did not include the power to exile a people from their homeland. In the court's 2000 decision, Laws LJ said:

> S. 4 of the Ordinance effectively exiles the [Chagossians] from the territory where they are belongers and forbids their return. But the "peace, order, and good government" of any territory means nothing, surely, save by reference to the territory's population. They are to be governed: not removed.[32]

26. The second judge hearing the case, Gibbs J, said:

> The crucial question on the legality of the Ordinance is whether it can reasonably be described as "for the peace order and good government" of BIOT. In the case law cited, the interpretation of that expression most favourable to the [government] is that they "connote, in British constitutional language, the widest law-making powers appropriate to the sovereign". (Ibralebbe 1964 AC 900 at p.923) I am unable to accept that those words, even from such an authoritative source, compel this court [to] abandon the ordinary meaning of language, and instead to treat the expression "for the peace order and good government" as a mere formula conferring unfettered powers on the commissioner.[33]

27. The UK government immediately accepted the court's ruling and did not appeal. It revoked the 1971 Ordinance. A 2002 feasibility report concluded that resettlement would be economically marginal in the short-term, but "looming over the whole debate was the effect of global warming which was raising the sea level and already eroding the corals of the low lying atolls."[34]

28. In June, 2004, the government made a Constitution Order and an Immigration Order that revoked the BIOT Order and granted a new constitution to prevent resettlement. Here, both the power to make laws (the constitutional authority) and the laws themselves (the

[31] *Bancoult (No. 1)* at para. 1.
[32] *Bancoult (No. 1)* at para. 57.
[33] *Bancoult (No. 1)* at para. 69.
[34] *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 ("*Bancoult (No. 2)*") at para. 23, **(RBA at TAB 2)**.

legislative authority) were situated in prerogative orders.[35]

29. The Chagossians sought a judicial review of the 2004 Constitutional Order. They were successful in the High Court and in the unanimous Court of Appeal.[36] The government appealed to the House of Lords. While the House unanimously ruled that judicial review applied to prerogative legislation, it was divided 3:2 on the legality of this particular exercise of prerogative power. The majority held that the phrase 'peace, order and good government' relates to the entire Crown realm and not just the inhabitants of the BIOT.[37] The two dissenting judges held that there was no power to exile a population and that the phrase 'peace, order and good government' specifies a power "intended to enable the proper governance of a territory, at least, among other things for the benefit of the people inhabiting it. A constitution that exiles a territory's inhabitants is a contradiction in terms."[38]

30. The facts mentioned in the *Bancoult (No. 2)* decision indicate that the main practical reason to deny the Chagossians' repatriation was the greater harm to their homeland by sea level rise due to global warming. The majority judgments echo Lord Hoffmann's view that, "the idyll of the old life on the islands appeared to be beyond recall."[39] Rather, his lordship considered that the case was less about "one of the most fundamental liberties known to human beings, the freedom to return to one's own homeland" and more about "a campaign to achieve a funded resettlement."[40]

31. With global warming above 2˚C, the motion respondents face a harm that is of similar severity to the harm suffered by the exiled indigenous population of the Chagos Islands. In the words of Lord Laws: "In my judgment, for all these reasons, the apparatus of s. 4 of the Ordinance [the exiling provision] has no colour of lawful authority. It was Tacitus who

[35] *Bancoult (No. 2)* at paras. 1 and 26.
[36] *Bancoult (No. 2)* at paras. 28 to 30.
[37] *Bancoult (No. 2)* at paras. 47 to 49 (Lord Hoffmann).
[38] *Bancoult (No. 2)* at 157 (Lord Mance).
[39] *Bancoult (No. 2)* at para. 23 (Lord Hoffmann).
[40] *Bancoult (No. 2)* at paras. 54 and 55 (Lord Hoffmann). See also para.110 (Lord Rodger) and para. 132 (Lord Carswell).

said: They make it a desert and call it peace – *Solitudinem facient pacem appellant* (Agicola 30). He meant it as irony; but here, it was an abject legal failure."[41]

32. In Canada, the authorities are clear that "parliamentary sovereignty allows the legislature to make and unmake any laws, subject to its constitutional authority, while parliamentary privilege provides that 'the law-making process is largely beyond the reach of judicial interference.'" (emphasis added)[42]

33. Canada has made strong international and parliamentary commitments that express its own understanding of peace, order and good government. By signing the 2015 *Paris Agreement*, Canada committed to hold "the increase in global average temperatures to well below 2˚C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5˚C above pre-industrial levels."[43] Parliament ratified the *Paris Agreement* in 2016[44] and, in 2019, passed a non-binding resolution declaring a national climate emergency and recommitting Canada to reduce its GHG emissions to meet the 1.5˚C and 2˚C goals.[45]

34. Canada thus conceded that catastrophe can be avoided only by taking measures that counter current emission trends.[46] By taking insufficient measures, Canada is not living up to its own standards of what good government requires. The plaintiffs are not asking the court to impose its conception of what good government requires over the conception developed by the elected government. They are asking the court to hold the elected government to its own standards of good government. This is not an abuse of the courts' constitutional role.

35. The *Bancoult* decisions provide authority to find that the phrase 'make laws for Laws for the Peace, Order and good Government of Canada' in s. 91 of the *Constitution Act, 1867*

[41] *Bancoult (No. 1)* at para. 59.
[42] AMR-WR at para. 28, citing *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018] 2 SCR 765 at paras. 36 and 37.
[43] Statement of Claim at para. 45.
[44] Statement of Claim at para. 47.
[45] Statement of Claim at para. 48.
[46] Statement of Claim at paras. 42 to 58.

permits a novel but arguable claim that the federal Crown's broad legislative powers are not so wide as to permit Canada to contribute to an existential and catastrophic harm[47] as great as global warming above 2˚C.

C. Section 7 of the *Charter*

36. 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.

37. Canada's motion identifies three requirements for a s. 7 claim to give rise to a reasonable cause of action:

    a. a real or imminent deprivation of life, liberty or security of person;[48]
    b. sufficient causal connection between the impugned laws and the s. 7 rights;[49] and
    c. identification of recognised principles of fundamental justice.[50]

1. Real or imminent deprivation

38. The plaintiffs' claim that global warming deprives them of their right to life by increasing the risk of premature death from, among other things, air pollution, extreme weather and disease; deprives them of their right to liberty by increasing the risk to their individual and collective autonomy, especially their collective identity, which is bound up with their particular territories; and deprives them of their right to security of person by increasing the risk of harm from air pollution, extreme weather and disease, as well as from trauma to already vulnerable individuals, families and societies.[51] These increased risks from even a 1.5 to 2˚C global temperature rise are well documented.[52] The temperature increases in Canada are projected to be twice the global mean[53] and are having and will have a particularly serious impact on indigenous communities.[54] The plaintiffs are already seeing

[47] Statement of Claim at paras. 1, 4 and 43.
[48] AMR-WR at paras. 37 and 39.
[49] AMR-WR at paras. 31 to 35, and 39.
[50] AMR-WR at paras. 41 and 42.
[51] Statement of Claim at para. 88.
[52] Statement of Claim at para. 74.
[53] Statement of Claim at para. 74.
[54] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at paras. 11 to 14, **(RBA at TAB 6)**.

impacts,[55] which can only increase in the future.

39. Canada contends that the plaintiffs have not established how Canada's climate change policies present a real and imminent deprivation of their s. 7 rights. The authorities cited by Canada in support of this contention are all criminal law cases where the courts accepted without discussion that loss of liberty was imminent and proceeded to the fundamental justice analysis.[56]

40. In *Operation Dismantle*, the court discussed the requirements to strike a claim by referring to the tests for declarations and injunctions. It cited *Solosky* to state that a declaration could issue to affect future rights where the dispute had already arisen.[57] In this case, the plaintiffs claim that they are already suffering harm as a result of Canada's climate laws and policies[58] and that the harm will intensify in the future.[59] As they are already suffering continuing harm, their s. 7 deprivation is real and imminent.

41. Canada denies it has a positive duty 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."[60] In their claim, however, the plaintiffs do not lay out a "preferred policy approach" in respect of their s. 7 rights. In respect of those rights, the plaintiffs seek relief in the form of:

    a. a declaration that Canada not infringe the rights by failing to keep its GHG emissions consistent with a mean global warming of between 1.5 and 2°C;[61]
    b. an order that Canada amend its environmental assessment legislation to allow the cabinet to cancel its approval of a high GHG-emitting project in order to meet the 1.5 and 2°C target;[62]

[55] Statement of Claim at para. 75.
[56] AMR-WR at para. 39.
[57] *Operation Dismantle v The Queen*, [1985] 1 SCR 441 ("*Operation Dismantle*") at page 457, citing *Solosky v The Queen*, [1980] 1 S.C.R. 821, (**ABA, TAB 30**).
[58] Statement of Claim, para. 75.
[59] Statement of Claim, paras. 76 to 80.
[60] AMR-WR at para. 40.
[61] Statement of Claim at para. 81(c).
[62] Statement of Claim at para. 81(e).

c. an order that Canada conduct and report an independent, annual monitoring of the country's GHG emissions relative to Canada's global temperature commitments;[63] and
d. an order that the court retain jurisdiction until Canada has complied with the court's orders.[64]

42. None of the remedies sought by the plaintiffs specify which policy approaches the government should take to achieve the GHG emission targets. Even the remedy seeking to amend the environmental assessment legislation only gives cabinet the power to cancel a high-emitting project, it does not require that cabinet do so.

43. The plaintiffs are not asking the government to put in place measures to make them safe.[65] Rather, they are asking the court to make declarations and to amend those legislative provisions that aggravate the risk of premature death, physical harm and psychological harm.[66]

2. Causal connection

44. Canada contends that there is insufficient causal connection between its laws and policies and the plaintiffs' deprivation of their s. 7 rights. Global warming due to greenhouse gas emissions is a common property issue. In the absence of a global authority to enforce GHG reductions, each jurisdiction is under no legal obligation to do so. In the short-term, it is to each country's absolute and relative economic and political advantage to continue high levels of emissions. It is a classic tragedy of the commons. While no jurisdiction, including Canada, is prepared to take legal responsibility for its share of global warming, the effects of rising temperatures will be felt by individuals across the planet, albeit manifested in various ways and at various intensities in different places.

45. Canada is saying in effect that the plaintiffs are unable to prove that "but for" Canada's inadequate climate laws and polices they would not be suffering harm. The "but for" test

[63] Statement of Claim at para. 81(f).
[64] Statement of Claim at para. 81(g).
[65] AMR-WR at para. 40.
[66] *Canada (Attorney General) v Bedford*, [2013] 3 S.C.R. 1101 ("*Bedford")* at para. 88, (**ABA, TAB 8**).

is, of course, the usual causation test in negligence actions. In some circumstances, however, Canadian courts have recognised a "material contribution to risk" test where multiple independent causes bring about a single harm.[67] In such cases, a defendant must show globally that but for the negligent acts of one or more defendants the harm would not have occurred. Where it is impossible for a plaintiff to prove that any one defendant caused the injury, the "material contribution to risk" test applies and each defendant who has contributed to the risk may be liable.[68]

46. The reasoning applied by the Supreme Court of Canada in its analysis of the negligence tort cases in *Clements* applies equally to the global warming tragedy of the atmospheric commons. Canada admits that the risks posed by global warming are not speculative and pose a pressing threat to society but says that causal connection is speculative because there are so many actors contributing to the harm: "combatting climate change requires the participation, and depends on the choices, of local, provincial and international actors."[69] This suggests that any actor failing to adequately curb emissions is off the hook as a cause. The logical conclusion of the applicant's reasoning is that if all jurisdictions fail to curb their emissions, they are all blameless. Fortunately, the law says otherwise.

47. The court held in *Clements* that in cases "where it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it… the defendant [should] not be permitted to escape liability by pointing the finger at another wrongdoer."[70]

48. The application of a "sufficient causal connection" standard similar to the "material contribution to risk" test is supported in s. 7 cases by the court in *Bedford*:[71]

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

[67] *Clements v Clements*, 2012 SCC 32 ("*Clements*") at para. 25, **(RBA at TAB 3)**.
[68] *Clements* at paras. 39 and 40.
[69] AMR-WR at para. 34.
[70] *Clements* at para. 13.
[71] *Bedford* at para. 76.

case and insists on a real, as opposed to speculative, link.

49. The plaintiffs claim that Canada has not met its past GHG emissions reduction targets and is significantly off course to meet its fair contribution to emission reductions that will keep the average global temperature below 2˚C.[72] Neither the existence of global warming nor its impact on the plaintiffs can be said to be speculative. In such circumstances, a court may find that Canada's material contribution to the risk of global warming permits a novel but arguable claim of s. 7 rights infringement.

3. Fundamental justice

50. One of the principles of fundamental justice developed by the courts in relation to s. 7 is arbitrariness, which it defines as "where there is no connection between the effect and the object of the law."[73] *Bedford* acknowledges that there may be considerable overlap among the principles of arbitrariness, overbreadth and gross disproportionality.[74]

51. Canada says that the plaintiffs' claim does not identify any recognised principle of fundamental justice against which the alleged deprivation can be assessed.[75] The plaintiffs claim that Canada's laws and policies are contrary to its publicly declared objectives to comply with its international agreements on global warming.[76] While Canada has some emission-reduction laws and policies, they are an insufficient contribution to Canada's fair share of the global effort to keep warming well below 2˚C. The pleadings state the facts in support of this claim.[77]

52. In particular, the plaintiffs claim that under its environmental assessment legislation Canada has approved high GHG-emitting liquefied natural gas export projects in which there was no connection between the relevant legislative objective and the effect of the

[72] Statement of Claim at paras. 42 to 58.
[73] *Bedford* at para. 98.
[74] *Bedford* at paras. 110 to 123.
[75] AMR-WR at paras. 41 to 43.
[76] Statement of Claim at para. 89(c).
[77] Statement of Claim at paras. 42 to 58.

law.[78]

53. In the case of the Canada LNG project, for example, the principle legislative objective of the *Canadian Environmental Assessment Act, 2012* was, "to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project."[79] The Canada LNG assessment found that the project would produce carbon dioxide emissions that it considered would have a significant residual effect in the context of global GHG emissions. Canada, through a cabinet decision, nevertheless approved the project, saying that the significant adverse environmental effects were "justified in the circumstances" without identifying those circumstances or providing reasons.[80] *CEAA, 2012* does not provide for the revocation of Canada's approval of a project for any reason. The project has a *National Energy Board* export licence for 40 years.[81]

54. The provision in *CEAA, 2012* allowing cabinet's approval of a significant GHG emitter to remain in effect indefinitely with no statutory power to withdraw it in the face of Canada's inability to meet its emission commitments has no relation to its environmental protection purposes. The harm will affect the plaintiffs and future members of the plaintiff Houses for generations despite the statute's objective to protect the environment.

55. The plaintiffs' claim shows a real or imminent deprivation of life, liberty or security of person, shows sufficient causal connection between the impugned laws and the s. 7 rights;[82] and identifies recognised principles of fundamental justice.[83] While these claims may be novel, they are arguable and the approach must be generous and err on the side of permitting them to proceed to trial.

[78] Statement of Claim at paras. 59 to 71.
[79] *Canadian Environmental Assessment Act, 2012* S.C. 2012, c.19, s. 52 ("*CEAA, 2012")* at s.4(1).
[80] Statement of Claim at para. 63.
[81] Statement of Claim at para. 64.
[82] AMR-WR at paras. 31 to 35, and 39.
[83] AMR-WR at paras. 41 and 42.

D. Section 15(1) of the *Charter*

56. 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.

57. In *Withler*, the SCC said that the central issue in equality cases is whether the impugned law violates the animating norm of substantive equality:[84]

> To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong.

58. The Court sets out the substantive, two-step s. 15(1) equality analysis in *Withler*: "(1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create disadvantage by perpetuating prejudice or stereotyping?"[85]

1. Distinction based on age

59. The plaintiffs' claim equal protection on the enumerated basis of age.[86] The courts have considered age discrimination in two ways: a distinction based on existing legislation that does not provide current equal protection or equal benefit based on the claimant's present age;[87] and a distinction based on existing legislation that will not provide future equal protection or equal benefit based on the claimant's present age.[88]

60. The second type of discrimination might be considered a ground analogous to age. The Federal Court in *Reid* did strike a claim for future protection on this second ground but did so on the basis that the plaintiffs failed to plead the material facts in support of the claimed discrimination, and on the basis that the link between the government action and the claimed infringement was too speculative and hypothetical.[89] The s. 15(1) claim in *Reid* was not struck on the basis that future infringement of the plaintiffs' rights based on their

[84] *Withler v Canada (Attorney General)* 2011 SCC 12 ("*Withler*"), at para. 2 **(RBA, TAB 10)**.
[85] *Withler* at paras. 30 and 61.
[86] Statement of Claim at para. 91.
[87] For example, *Withler* at para. 1.
[88] For example, *Reid v Canada*, [1994] FCJ No. 99 (FCTD) ("*Reid*"), at para. 15 **(ABA, TAB 43)**.
[89] *Reid* at paras. 16 to 18.

current age was not an enumerated or analogous ground.

61. The plaintiffs' claim in this case falls into the second type of age discrimination. Here, the issue is about equal protection from future irreversible, adverse environmental effects due to global warming caused by current and past GHG emissions.

62. Canada asserts that the plaintiffs' claim does not identify any comparator group or explain the claimed disproportionality.[90] In *Withler*, the court held that the idea of "distinction" is that the claimant is treated differently than others:[91]

> Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds. It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination.

63. Canada further asserts that "it is not possible to know whether younger and future members will be affected more than others by climate change."[92] The global warming effect of GHG emissions is cumulative, lasting many centuries.[93] This means that although emission reduction and even elimination may eventually level global warming, it will not reverse it in the foreseeable future.[94] As Canada and other countries continue to allow significant GHG emissions, it follows that global warming will have a greater effect in the future than it does at present.

64. While the nature, location, timing and intensity of future warming effects cannot be precisely determined, there is little doubt that the younger and future members of the plaintiff Houses by virtue of their age will carry a burden that current Canadians do not.[95] Their burden is disproportionate to present generations.

[90] AMR-WR at para. 46.
[91] *Withler* at paras. 62 and 63.
[92] AMR-WR at para. 51.
[93] Statement of Claim at paras. 1, 35, and 74.
[94] Statement of Claim at para. 44.
[95] Statement of Claim at para. 74.

65. Finally, Canada asserts that the claim does not allege any specific law, measure or government action that has imposed a burden on the plaintiffs.[96] The specific government laws and policies at issue are outlined in paragraphs 51 to 54 above.

2. Distinction creating disadvantage

66. The second step of the equality analysis is the inquire "whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances."[97] In *Withler*, the Court goes on to quote with approval Wilson J. in *Turpin*: "In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or the group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context."[98]

67. The larger context includes the critical importance each plaintiff Likhts'amisyu House group attaches to it having healthy territories and to it having healthy future generations of its members. Both of these are necessary to perpetuate its identity and status as a group in Wet'suwet'en society and under Wet'suwet'en indigenous law.[99]

68. The larger context also includes, unhappily, the trauma associated with past colonial laws, policies and actions, including those taken by Canada, in the process of colonisation and attempted assimilation. Particularly relevant are those discriminatory acts that were directed at children and young people, including removing them from their families to residential schools and to non-indigenous foster homes.[100] Canada's laws and policies allowing global warming emissions perpetuate such past disadvantage.

69. The severe, delayed and irreversible effects of global warming, necessarily means current laws and policies enacted by Canada will have a greater impact on future generations of the

[96] AMR-WR at para. 50.
[97] *Withler* at para. 65.
[98] *Withler* at para. 66. See also *Withler* at para. 39.
[99] Statement of Claim at paras. 2, 5, 14, 16 and 19.
[100] Statement of Claim at para. 79.

plaintiff Houses than on current generations. A trial is required to tender complete, relevant evidence and make full representations on this substantive equality issue.

E. Section 1 of the *Charter*

70. Section 1 of the *Charter* states:

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

71. Canada argues that the court cannot carry out a proper s. 1 analysis because the Statement of Claim fails to identify a specific law that infringes the plaintiffs' s. 7 and s. 15(1) rights.[101]

72. Generally, in order to justify infringement of a *Charter* right under s. 1, the government must show that the impugned law has a pressing and substantial objective and that the means chosen are rationally connected to, are minimally impaired by, and do not outweigh that objective.[102] Where a specific law is identified, it can be readily identified, a s. 1 analysis may be carried out and, if the right is maintained, an order made to remedy the infringement. Where a network of government programs is identified making a s. 1 analysis difficult, a wide-ranging order may be inappropriate and a court may limit itself to granting declaratory relief only.

73. In this case, the *Charter* relief sought falls into two categories:

    a. declarations under each *Charter* right aimed at the network of government programs that infringe the particular right; and
    b. an order aimed at curing deficiencies in the environmental assessment legislation that infringes the *Charter* rights.

[101] AMR-WR at paras. 56 and 57.
[102] *R. v Oakes*, [1986] 1 SCR 103, at pages 138 to 139 **(ABA, TAB 37)**.

a. Declarations

74. The network of federal government programs that regulate or otherwise affect Canadian GHG emissions include those with a goal to encourage or permit emissions[103] and those with a goal to reduce emissions.[104] The net affect of this network of programs can be measured against the Canada's attempts to meet its international and national commitments to meet emission reduction targets.[105]

75. The courts have been grappling with claims where a *Charter* breach is the result of a constellation of government laws and policies.

76. In *Tanudjaja*, the applicants sought declarations and an order that Canada and Ontario had taken inadequate measures to protect the homeless and those most at risk from homelessness. The majority of the Court of Appeal of Ontario held that the claim was not justiciable on the basis that a specific state action or law was not challenged. But they did not rule out that "constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may be evasive of review." (emphasis added)[106]

77. Justice Feldman, the dissenting judge in *Tanudjaja*, accepted that the court would not be exceeding its authority if it granted declaratory relief in that case:[107]

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

78. In *Khadr*, the court found that Mr. Khadr's detention and torture by the U.S. military in Guantanamo Bay involved Canadian officials and thus violated his s. 7 *Charter* rights.

[103] Statement of Claim at paras. 38 to 41.
[104] Statement of Claim at paras. 59 to 71.
[105] Statement of Claim at paras. 42 to 58.
[106] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 ("*Tanudjaja*") at para. 29, **(ABA at TAB 46)**.
[107] *Tanudjaja* at para. 85.

The court did not conduct a s. 1 analysis. It found that the deference, within constitutional limits, to the Crown's prerogative power to conduct foreign policy and the state of its negotiations with the American government were together too uncertain for it to make a satisfactory order to remedy the breach of his *Charter* rights. Instead, the court concluded that:[108]

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

79. In this case, the laws, policies and programs needed to sufficiently reduce GHG emissions are many and complex. As such, an identification of specific laws may not be possible for a s. 1 analysis. Generally, the declarations sought are appropriate remedies for the claimed constitutional rights. The remedial orders for a court-supervised, independent GHG monitoring and reporting process reflect the plaintiffs' focus on the outcome of the government's response to the declarations and not on the details of their operation.

b. Legislation-amending order

80. The plaintiffs also seek an order to "read in" a clause to Canada's environmental assessment legislation[109] that would allow the executive to withdraw its regulatory approval of high GHG-emitting projects in the event it cannot otherwise meet its emission commitments.

[108] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras. 39 and 46, **(RBA at TAB 5)**.
[109] The statutes under which existing or planned high GHG-emitting projects have been approved are identified in the Statement of Claim at para. 41 and are the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("*CEAA,* 1992"), the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 ("*CEAA, 2012*"), and the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 ("*IAA*").

81. The stated objectives of the relevant environmental statutes are consistent with the claims in this case.[110] The absence of any mechanism in the statutes to curb or halt emissions as the slow-moving, global warming disaster unfolds is unrelated to their stated legislative objectives.

82. In summary, for the purposes of s. 1 of the *Charter*, the trial court does not require specific laws to be identified for it to properly grant the declarations being sought. For the order to "read in" a provision to the environmental assessment statutes, the specific laws, their objectives and their effect have been adequately identified.

F. Remedies

83. Canada asserts that the remedies sought by the plaintiffs are non-justiciable because:

a. the declarations and mandatory orders sought would require the court to make complex policy decisions reserved for the legislature and executive;
b. the declarations requiring Canada to keep its GHG emissions consistent with global warming between 1.5 and 2˚C fail because such consistency cannot be identified or verified;
c. the declarations are based on speculative future harm;
d. the court cannot order Canada to enact legislation;
e. the court cannot order monitoring and reporting of Canada's GHG emissions and retain jurisdiction over that reporting process.

a. Complex policy decisions

84. The plaintiffs' claim does not require the court to make complex policy decisions. The claim is directed solely at requiring Canada to reduce GHG emissions to a level consistent

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

with a mean global warming of between 1.5 and 2˚C. The laws and polices whereby Canada achieves that level is up to Parliament and the executive.[111]

b. Emission metrics

85. Measures of each country's efforts to reduce its GHG emissions consistent with keeping global warming to between 1.5 and 2˚C is well-accepted in international climate change policy discussions. The metric derives from the concept of a global carbon budget. This is the total amount of GHGs that can be cumulatively emitted in the future, taking into account the GHGs already in the earth's atmosphere from past human activities. Each country can then assume a share of the global carbon budget based on its population. Such metrics and temperature-based targets can be easily identified and verified. [112]

c. Speculative future harm

86. The response to Canada's contention that the link between its climate laws and policies and harm to the plaintiffs is speculative has already been given in the *Charter* s. 7 "causal connection" discussion above.[113] That response may be restated here by considering principles of declaratory relief cited by Canada in its representations:[114]

> 3. The remedy [of declaratory relief] is generally not available where the controversy is not presently existing but merely possible or remote; the action is not maintained 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.

87. The plaintiffs claim that the effects of global warming are already being felt by their members, on their territories and on their salmon fisheries.[115] It is "presently existing." Future intensification of those effects is not "merely possible", remote, conjectural,

[111] See paragraphs 41 to 43 above.
[112] Statement of Claim at paras. 35 to 37 and 49.
[113] See paragraphs 44 to 49 above.
[114] AMR-WR at para. 64, citing *Operation Dismantle* at page 456, citing S.W. Eager, *The Declaratory Judgment Action*, (Buffalo, N.Y.: Dennis & Co., 1971) at page 5.
[115] Statement of Claim at paras. 72 to 73 and 75.

speculative, feigned or one-sided.[116]

d. Court-ordered legislation

88. Canadian courts have the power to amend legislation by virtue of s. 52(1) of the *Constitution Act, 1982*, which states that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." In *Schachter*, the Supreme Court included court-ordered legislation (reading in) as a remedial option under s. 52(1): "Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in."[117] Subsequently, the Supreme Court has read in provisions to unconstitutional legislation, most famously in *Vriend*.

e. Court-supervised reporting

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

90. In *Doucet-Boudreau*, the SCC upheld a trial judge's order in a case where the Nova Scotia government was dragging its heels in providing facilities and programs to implement francophone parents' *Charter,* s. 23 rights to have their children educated in French-language schools.[118] Delay in providing francophone schools would increase the likelihood that French-speaking children would be assimilated into the English-speaking mainstream.[119] Mindful of the assimilation factor and mindful of the government's past delays, the Supreme Court upheld the trial judge's order under s. 24(1) of the *Charter* to retain jurisdiction to hear reports on the status of the government's "best efforts" to provide schools.[120]

[116] Statement of Claim at paras. 74, and 76 to 80.
[117] *Schachter v Canada*, [1992] 2 SCR 679 at 695, **(RBA at TAB 7)**.
[118] *Doucet-Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62 ("*Doucet-Boudreau*"), **(ABA at TAB 14)**.
[119] *Doucet-Boudreau* at paras. 38 to 40.
[120] *Doucet-Boudreau* at paras. 87 and 88.

91. The trial judge in *Doucet-Boudreau* considered that a simple declaration by itself would be an ineffective remedy given the government's history of delay in implementing the parents' *Charter* rights. He chose court-supervised reporting as a remedy that reduced the risk that the rights "would be smothered in additional procedural delay."[121] In this case, Canada's efforts to reduce its GHG emissions to be consistent with global non-catastrophic levels have been smothered in procedural and other delays for over three decades.[122] It is therefore necessary and just that the plaintiffs ask for an order that Canada report its reduction efforts and results in a court-supervised process.

G. Orders sought

92. The plaintiffs/respondents seek the following orders:

a. that the applicant's motion be dismissed;

b. that the respondents be granted leave to amend the Statement of Claim, filed February 10, 2020; and

c. that the respondents serve and file the draft amended Statement of Claim, dated September 10, 2020, appended as Schedule "A" to this Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Penticton, in the Province of British Columbia, the 10th day of September, 2020

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[121] *Doucet-Boudreau* at para. 67.
[122] Statement of Claim at paras. 42 to 58.

To: Tim Timberg, Sarah Bird, Adrienne Copithorne, Rumana Monzur, Counsel for the Attorney General of Canada

LIST OF AUTHORITIES
(not listed in the Applicant's Motion Record)

TAB	JURISPRUDENCE
1.	*R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2001] QB 1067.
2.	*R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61.
3.	*Clements v Clements*, 2012 SCC 32.
4.	*Collins v Canada*, 2011 FCA 140.
5.	*Canada (Prime Minister) v Khadr*, 2010 SCC 3.
6.	*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.
7.	*Schachter v Canada*, [1992] 2 SCR 679 at 695.
8.	*Withler v Canada (Attorney General)*, 2011 SCC 12.
	SECONDARY SOURCES
9.	Dara Lithwick, "'Welfare' of a Nation: The Origins of 'Peace, Order and Good Government" (2017) Library of Parliament.
10.	Ruth Sullivan, "Statutory Interpretation in Canada", in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Sydney: Judicial Commission of New South Wales, 2007).

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 THE RIGHT OF CANADA

Applicant

REPRESENTATIVE PROCEEDING

DRAFT ORDER

WHEREAS the Applicant, Her Majesty the Queen in the Right of Canada, has filed a Motion to Strike for an Order pursuant to Rule 221(1)(a) of the *Federal Court 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 denied and:

(a) leave is granted for the Respondents to amend the Statement of Claim;
(b) the Respondents shall serve and file the Amended Statement of Claim attached as a draft as Schedule "A" to the Respondents' Motion Record; and
(c) each party will bear its own costs of this motion.

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

_____

Judge of the Federal Court

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

PLAINTIFFS

and

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

DEFENDANT

REPRESENTATIVE PROCEEDING

AMENDED 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~~ exceeded and continues to exceed its law-making powers under the 'peace, order and good government of Canada' provision of s. 91 by failing to keep Canada's greenhouse gas emissions consistent with a mean global warming of between 1.5˚C and 2˚C above pre-industrial levels;

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~~ exceeded and continues to exceed its powers 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~~ limits the defendant's powers to pass laws that are inconsistent 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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