CACV No. 4674 of 2025

COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER BETWEEN:

SABRINA DYKSTRA, a minor by her litigation guardian CLAIRE DYKSTRA, JILL FORRESTER, RYAN HEISE, KAYLA HOPKINS, LYNN OLIPHANT, HAROLD PEXA, AMY SNIDER, and CLIMATE JUSTICE SASKATOON ORGANIZATION INC.

(APPELLANTS/APPLICANTS)

AND:

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

(RESPONDENTS)

FACTUM OF THE APPELLANTS, SABRINA DYKSTRA et al
(Appeal in part of the Judgment to Strike the pleadings)

Procido LLP
LEGAL + ADVISORY

Suite 200 – 165 3rd Avenue South │Saskatoon, SK │S7K 1L8
Attention: Glenn A. Wright │Telephone: (306) 380-2583 │Facsimile: (306) 664-1616
Email: glenn.wright@procido.com │Address for Service: Same as Above

TABLE OF CONTENTS

I. INTRODUCTION 1

II. JURISDICTION AND STANDARD OF REVIEW 5

III. SUMMARY OF FACTS 6

IV. POINTS IN ISSUE 13

V. ARGUMENT 14

Error 1: Incorrectly Qualifying the Impugned Action 14

Error 2: Misinterpreted/Misapplied the Jurisprudence 17

Error 3: The Impugned Actions are not "pure policy" 27

Error 4: Striking the Application Based on Remedies 29

Error 5: Overlooking international law arguments 30

Error 6: Mischaracterizing the *MRGHG Regulations* Claim 33

Error 7: Prohibiting amendments 36

VI. RELIEF 40

VII. TABLE OF AUTHORITIES 41

Case law 41

Statutes and Regulations 42

Secondary Sources, Government Documents, and International Materials 43

I. INTRODUCTION

1. Climate change is real.[1] It is happening now and is already impacting people's lives in Canada and around the world. Climate change caused by greenhouse gas emissions is one of the great existential issues of our time.[2]

2. Climate change threatens human rights. The environment is the foundation for human life, health, and well-being, and environmental protection is therefore a precondition for the enjoyment of human rights.[3] Degradation of our climate system has a range of adverse effects, including sea level rise, drought, desertification, and increased vector-borne diseases, significantly impairing the enjoyment of a range of legally protected human rights, including the rights to life and equality.[4]

3. Human rights law prescribes the minimum standards for protection of these rights rather than prescribing an optimal level of protection, and this role has extended to prescribing the minimum standards of environmental protection necessary for their enjoyment.[5] Courts and tribunals across the world have found that human rights prescribe the minimum standards for mitigation of greenhouse gas emissions to ensure continued enjoyment of these rights.[6] In doing so, they have carefully navigated the separation of

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[1] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 2 [*GGPPA SCC*].
[2] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 4.
[3] *Obligations of States in respect of Climate Change (Advisory Opinion),* [2025] International Court of Justice, United Nations, The Hague (Netherlands), released 23 July 2025, at para 373 online: https://www.icj-cij.org/case/187 (Dec 16, 2025) [*ICJ Opinion*].
[4] *ICJ Opinion,* at paras 375-386.
[5] Stefan Theil, "Part I – Introducing the Environmental Minimum" in *Towards the Environmental Minimum: Environmental Protection through Human Rights,* (Cambridge University Press, 2021) at pp 35-118 (excerpt provided as an appendix to this factum at Tab 3).
[6] Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment, 2025) at 26 online: https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2024-snapshot/ (7 January 2026).

powers between the legislative, executive, and judicial branches of government.[7]

4. From Canadian law's perspective on the separation of powers, courts have a duty to ensure laws enacted by legislatures are constitutional, but they endeavour to leave legislatures with reasonable room to manoeuvre in appropriate circumstances.[8] Courts typically achieve this balance by defining "constitutional minimums" through constitutional interpretation.[9] By treating the Constitution as protecting the floor rather than the ceiling for constitutionally compliant state action, courts provide legislatures reasonable room to manoeuvre and the two branches engage in constitutional dialogue.[10]

5. The latest appellate-level guidance in Canada[11] recognizes a vital role for our courts to preserve the rule of law by engaging in constitutional dialogue with federal and provincial governments regarding the implications of their greenhouse gas mitigation measures for human rights standards under the *Canadian Charter of Rights and Freedoms*.[12] The prescient reasoning in

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[7] Christina Eckes, Jasmina Nedevska & Joana Setzer, "Separation of Powers" in Margaretha Wewerinke-Singh & Sarah Mead, eds, *The Cambridge Handbook on Climate Litigation*, (Cambridge University Press, 2025) at pp 145-168. (excerpt provided as an appendix to this factum at Tab 2)

[8] *Manitoba Federation of Labour et al v The Government of Manitoba*, 2021 MBCA 85, leave to appeal dismissed 2022 CanLII 98950 (SCC), at para 106 [*Manitoba*], citing *R. v Chouhan*, 2021 SCC 26 at para 84.

[9] *Manitoba,* at para 108, citing *R v Stillman*, 2019 SCC 40 at para 148.

[10] *Manitoba,* at para 110, citing *R v Chouhan*, 2021 SCC 26 at para 134.

[11] *La Rose v Canada*, 2023 FCA 241 [*La Rose FCA*]; *Mathur v Ontario*, 2024 ONCA 762, leave to appeal dismissed 2025 CanLII 38373 (SCC) [*Mathur CA*].

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

these decisions now has additional support from the opinions of two key international courts on states' mitigation obligations released in 2025.[13]

6. The applicants Sabrina Dykstra et al ("Applicants") filed their Originating Application dated March 29, 2023, and amended it on May 31, 2024 (the "Application"). The Application claims, *inter alia*, that the Respondents have violated the Applicants' rights protected by the *Charter* in two key ways:

    a. by their actions to construct new unabated fossil-fuel fired electrical generation that causes and exacerbates the harm and intensity of dangerous climate change; and,

    b. that specific provisions of the *MRGHG Regulations*[14] allow increasing emissions in the compliance periods of 2018 – 2026 and that these emissions reduction targets are inconsistent with Saskatchewan's share of the minimum level of GHG reductions necessary to limit global warming to well below 2 °C.

7. The Respondent Government of Saskatchewan ("Government") and Respondents the Saskatchewan Power Corporation ("SaskPower") and the Crown Investments Corporation of Saskatchewan ("CIC") (collectively the "Crown") filed separate applications to strike dated September 13, 2023, and September 14, 2023 ("Strike Applications").

8. On October 27, 2023, the parties consented to setting the Strike Applications for a special hearing on March 8, 2024. At the request of

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[13] *ICJ Opinion, supra* note 3; *The Climate Emergency and Human Rights,* Advisory Opinion OC-32/25, Inter-American Court of Human Rights Series A No 32 (29 May 2025) online: https://www.corteidh.or.cr/docs/opiniones/seriea_32_en.pdf (6 January 2026).

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

counsel for the Government, the special hearing was adjourned by consent to April 5, 2024, and later adjourned again by consent to October 4, 2024, to provide time to both deal with an application to intervene by the Saskatchewan Environmental Society Inc. and to provide additional time requested by the Applicants.

9. A special Chambers hearing to consider the Strike Applications occurred on October 4, 2024, in Regina, SK, before the Honourable Justice Kuski Bassett of the Saskatchewan Court of King's Bench. The judgment of the Court was issued on October 10, 2025, (2025 SKKB 175 – hereinafter the "Judgment" or "*Dykstra*") and is the matter of this appeal.[15]

10. What this appeal is about is whether the *Charter* could possibly be interpreted as protecting rights to a safe climate system in this province. This appeal is in the context of a preliminary decision on a motion to strike which held that the Application could not possibly succeed.

11. It is trite law that claims cannot be struck solely on the basis that they are novel.[16] As there are many questions which have yet to be clearly asked or answered by the courts, and even the clearest of legal answers can evolve over time, the court's power to strike pleadings for having no reasonable prospect of success must be exercised with great caution.[17] While the common law itself has long been nourished through evolving interpretations and extensions to novel situations, this is even more important for our living tree constitution as it is not easily amended to keep pace with societal and environmental change in our world. A tree must be tended if it is to thrive

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[15] *Dykstra v Saskatchewan Power Corporation,* 2025 SKKB 175 [*Dykstra*].
[16] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at para 21.
[17] *Venture Construction Inc. v Saskatchewan (Highways and Infrastructure)*, 2015 SKQB 70 at para 11.

and the prime gardeners for tending to our constitutional tree are the courts.[18] In hearing this appeal, this court now has an opportunity to ensure our *Charter* continues to thrive in an era of unprecedented environmental stress.

II. JURISDICTION AND STANDARD OF REVIEW

12. The source of the Appellants' right of appeal and the Court's jurisdiction to consider the appeal is *The Court of Appeal Act*, SS 2000, c. C-42.1, s 7(2).

13. The proper standard of review depends on the issues at hand. The Supreme Court of Canada (SCC) summarizes the appellate standards of review in *Housen*, as recently followed by this court in *Abrametz v Law Society of Saskatchewan*:[19]

    a. Questions of law allow the appellate court to replace the trial judge's opinion through correctness review. This allows appellate courts to ensure the same legal rules apply in similar situations and to refine legal rules as part of the law-making role of appellate courts. Appellate courts have a broad scope of review in this regard.[20]

    b. Findings of fact are only reversed when the trial judge has made a "palpable and overriding error". We presume the trial judge is competent to limit the length of appeals, minimize duplication of judicial efforts, and protect the trial judge's autonomy.[21]

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[18] Gerald J. Kennedy and Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45 Federal Law Review 707 at 723, online: https://digitalcommons.osgoode.yorku.ca/scholarly_works/2671 (16 December 2025).
[19] *Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114.
[20] *Housen v Nikolaisen*, 2002 SCC 33 at paras 8-9 [*Housen*].
[21] *Housen,* at paras 10-11.

c. Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where an error occurs due to application of an incorrect legal standard or element, this may be an error of law to which the correctness standard applies. Where the error arises from interpretation of evidence, it is overturned only for a palpable and overriding error.[22]

14. Whether a pleading discloses a cause of action is a question of law that is reviewed for correctness.[23] If the law is correctly stated, the decision to strike the pleadings must be reasonable.[24]

15. As stated in *O'Connor,* "[to] the extent that there is discretion involved in amending pleadings, the decision will only be interfered with on appeal if it is based on an error in principle, or is wholly unreasonable." [25]

III. SUMMARY OF FACTS

16. Human activity, primarily the burning of fossil fuels, is the main cause of dangerous climate change.[26] GHG emissions from human activities have already heated the Earth more than 1.4 degrees Celsius above pre-industrial levels.[27] Ongoing and increasing GHG emissions serve to accelerate

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[22] *Housen,* at paras 26-28 and 36.
[23] *Mann Family Trust (Trustee of) v Hawkins*, 2011 SKCA 146 at para 23, and *R.L.T.V. Investments Inc. v Saskatchewan Telecommunications*, 2009 SKCA 83 at para 17.
[24] *O'Connor Associates Environmental Inc. v MEC OP LLC,* 2014 ABCA 140 at para 11 [*O'Connor*].
[25] *O'Connor,* at para 12.
[26] *GGPPA SCC, supra* note 1, at para 7. See also "Causes and Effects of Climate Change" United Nations, online: https://www.un.org/en/climatechange/science/causes-effects-climate-change (15 December 2025).
[27] "Global Temperature" The National Aeronautics and Space Administration (USA), online: https://science.nasa.gov/earth/explore/earth-indicators/global-temperature/ (15 December 2025).

dangerous climate change that will impact all species on the planet and damage the environment.

17. There is a causal relationship between cumulative anthropogenic GHG emissions and global warming.[28] Every additional tonne of GHG emissions will exacerbate the magnitude of these impacts. The failure to act in a timely way to reduce GHG emissions risks pushing the Earth system into abrupt and irreversible climate changes known as 'large-scale discontinuities' or 'tipping points.' Tipping points have high impacts and are interconnected across different biophysical systems that can lead to cascading effects and dangerous positive feedback. Many changes due to past and future greenhouse gas emissions will be irreversible for centuries if not millennia, especially changes in the ocean, ice sheets, and global sea level.[29]

18. We are living in an era of dangerous climate change, primarily caused by the burning of fossil fuels. This is a fact that is beyond reasonable dispute based on the best available science.[30]

19. Climate change poses an existential threat to humanity's future and greenhouse gas emissions must be reduced to address this threat. These are facts beyond reasonable dispute as well. As acknowledged by the SCC in 2021:

> Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions. [31]

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[28] *GGPPA SCC, supra* note 1, at paras 188-189.
[29] For more information on Global Tipping Points see here: https://global-tipping-points.org/ (15 December 2025).
[30] *ICJ Opinion, supra* note 3, at para 137.
[31] *GGPPA SCC, supra* note 1, at para 2.

20. It is also beyond any reasonable debate that an effective response to climate change requires cooperation between all levels of Canadian government. As acknowledged by the SCC in 2021:

> As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole. [32]

21. In 2015, Canada was one of 195 nations that adopted the Paris Agreement, a legally binding treaty on climate change, at the United Nations Climate Change Conference in Paris, France. The Paris Agreement commits its signatories to "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."[33]

22. In 2016, the United Nations Human Rights Council, which is the main intergovernmental body within the United Nations with responsibility for human rights, emphasized that:

> the adverse effects of climate change have a range of implications, which can increase with greater warming, both direct and indirect, for the effective enjoyment of human rights, including, *inter alia*, the right to life, the right to adequate food, the right to the enjoyment of highest attainable standard of physical and mental health, the right to adequate housing, the right to self-

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[32] *GGPPA SCC,* at para 190.

[33] United Nations Framework Convention on Climate Change, *Paris Agreement*, Adopted at the United Nations Climate Change Conference (COP21) in Paris, France, on 12 December 2015. Canada is a signatory to the international treaty and ratified the Paris Agreement on 5 October 2016. The Paris Agreement entered into force on 4 November 2016, online: https://unfccc.int/sites/default/files/english_paris_agreement.pdf (9 December 2025), at Article 2, s 1(a).

> determination, the right to safe drinking water and sanitation and the right to development […].[34]

23. The Intergovernmental Panel on Climate Change (IPCC) is the intergovernmental body set up by the United Nations in 1988 to provide all levels of government with scientific information they can use to develop climate policies. In 2023, the IPCC found with high confidence that "[l]imiting human-caused global warming requires net zero CO_2 emissions"[35] and "[p]athways that limit warming to 1.5°C and 2°C involve rapid and deep and, in most cases, immediate GHG emission reductions in all sectors this decade".[36] Net Zero refers to a state in which "anthropogenic emissions of greenhouse gases into the atmosphere are balanced by anthropogenic removals of greenhouse gases from the atmosphere over a specified period".[37]

24. The IPCC found with high confidence that Net Zero CO_2 energy systems will:

> … require a substantial reduction in overall fossil fuel use, minimal use of unabated fossil fuels, and use of carbon capture and storage in the remaining fossil fuel systems; electricity systems that emit no net CO_2; widespread electrification; alternative energy carriers in applications less amenable to electrification; energy conservation and efficiency; and greater integration across the energy system.[38]

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[34] Human Rights Committee, General Assembly resolution *70/1 - "Human rights and climate change"*, 32nd sess, UN Doc A/HRC/RES/32/33 (18 July 2016) [United Nations], Preamble.
[35] IPCC, 2023: Summary for Policymakers, in: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001 at s. B.5 [*IPCC 2023 Synthesis Report*].
[36] *Ibid* at s. B.6.
[37] *Canadian Net-Zero Emissions Accountability Act*, S.C. 2021, c 22 at s 2.
[38] *IPCC 2023 Synthesis Report, supra* note 20 at C.3.2.

25. The IPCC also found with high confidence that "[e]nergy generation diversification (e.g., via wind, solar, small-scale hydropower) and demand-side management (e.g., storage and energy efficiency improvements) can increase energy reliability and reduce vulnerabilities to climate change".[39]

26. All of the IPCC's reports are subject to review and endorsement by IPCC member countries, including Canada, with member countries acknowledging these reports as authoritative assessments of the scientific knowledge on climate change that provide "a comprehensive, objective, and balanced view of the subject matter".[40]

27. In 2018, Parliament enacted the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 ("GGPPA"). The GGPPA imposes a minimum national standard pollution price that is scheduled to increase periodically arriving at $170/ton of CO_2e emitted by 2030. If SaskPower continues to rely on fossil fuel-based generation, rising pollution prices will undermine the ability of the CIC to control electricity rates for Saskatchewan residents and businesses as per the powers bestowed to the CIC under *The Crown Corporations Act, 1993*.

28. The federal government enacted the *Canadian Net-Zero Emissions Accountability Act* on June 29, 2021. This legislation enshrines in legislation the Government of Canada's commitment to achieve net-zero greenhouse gas emissions by 2050. In March 2022, the Government of Canada introduced Canada's 2030 Emissions Reduction Plan, which commits it to achieve 40-45% emissions reductions below 2005 levels by 2030. Evidence shows that provinces can undermine each other in their

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[39] *Ibid.*

[40] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, Advisory Opinion, International Tribunal for the Law of the Sea (21 May 2024) at para 49.

climate mitigation efforts, thereby holding Canada back in achieving its Net Zero obligations: "Illustrative of the collective action problem of climate change, between 2005 and 2016, the decreases in GHG emissions in Ontario, Canada's second largest GHG emitting province, were mostly offset by increases in emissions in two of Canada's five largest emitting provinces, Alberta and Saskatchewan".[41]

29. As outlined in the SaskPower 2021 - 2022 Annual Report, gross electricity supplied during the reporting period was 25,644 GWh, provided by fossil gas (42%), coal (37%), hydroelectricity (11%), wind (6%), imports (3%), and other sources (1%).

30. The Government of Saskatchewan first announced its commitment to achieve net-zero generation of electricity by 2050 on May 16, 2023, roughly one month after the Application was served upon the Respondents.[42] Prior to the net-zero announcement, the only stated goal of the Respondents was to reduce GHG emissions from SaskPower by 50% from 2005 levels by 2030. The goal to reduce emissions by 50% from 2005 by 2030 was first announced on April 22, 2021, and reflected increased ambition from the original goal of a 40% reduction from 2005 by 2030 that was first made in 2015.[43]

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[41] *GGPPA SCC, supra* note 1, at para 24.
[42] Government of Saskatchewan, *Premier Outlines Plans For Affordable, Reliable Power Production,* (Saskatchewan: 16 May 2023) online: https://www.saskatchewan.ca/government/news-and-media/2023/may/16/premier-outlines-plans-for-affordable-reliable-power-production (17 December 2025).
[43] SaskPower, *The Path to 2030: SaskPower Updates Progress on Renewable Electricity,* (SaskPower: Saskatchewan, 28 November 2017) online: https://www.saskpower.com/about-us/media-information/news-releases/2018/03/the-path-to-2030-saskpower-updates-progress-on-renewable-electricity (17 December 2025).

31. The Respondents have continued to expand and construct new unabated electrical generation assets that burn fossil fuels:

    a. The 353MW Chinook Power Station near Swift Current, SK was commissioned in November 2019;
    b. The 370MW Great Plains Power Station near Moose Jaw, SK was commissioned in 2024;
    c. The 46MW Yellowhead Power Station Expansion to add a fourth natural gas turbine began construction in July 2023;
    d. The 370 MW Aspen Power Station near Lanigan, SK began construction in April of 2024 and is expected to be fully built and operating in 2027;
    e. A 55MW natural gas power station is proposed in November 2025 to replace the existing 41MW natural gas power station near Meadow Lake, SK. This project is anticipated to be operational in 2029 or 2030.

32. To achieve a Net Zero electrical grid, utilities must rely on negative emissions technologies or offsets to provide a balance of emissions that equates to zero (Net Zero). More emissions from fossil fuel generation plants (particularly unabated power plants) will require more negative emissions technologies or offsets to achieve zero emissions by the deadline. This is termed a "total system equivalency" of Net Zero. Reasonable management and planning of SaskPower's generation future that is consistent with *Charter* rights should include a commitment to decarbonizing SaskPower's generation and a credible plan to achieve a total system equivalency of Net Zero.

IV. POINTS IN ISSUE

33. The Appellants respectfully submit that the lower court incorrectly held that the Application does not disclose a reasonable cause of action based on the following errors in law, reviewable on the correctness standard:

    a. The Court erred in concluding that the Application pleaded no judicially discoverable and manageable standard, sufficient legal component, or legal anchor for assessing the Applicants' *Charter* claims;

    b. The Court below erred by misinterpreting and misapplying leading jurisprudence on the justiciability of *Charter* claims for harms related to climate change and greenhouse gas emissions;

    c. The Court below erred in mischaracterizing the approval, development, and construction of new unabated fossil fuel-based generation assets as policy decisions rather than reviewable state action;

    d. The Court below erred in relying on remedies pleaded by the Applicants to dismiss their *Charter* claims without leave to amend; and

    e. The Court below failed to engage with the international law arguments pleaded by the Appellants in support of the justiciability of the Claim.

34. The Appellants respectfully submit there are also reviewable errors in mixed fact and law:

    a. The Court below erred by mischaracterizing the Appellants' proposed amendments as pleading evidence, not material facts;

b. The Court below erred in determining that no amendments could address the alleged deficiencies in the pleadings; and

c. The Court below erred by making a factual determination based on a misinterpretation of the pleadings without hearing argument as a basis for striking the Application.

V. ARGUMENT

35. The Court below described the law and jurisprudence on justiciability generally as follows:

a. Claims can be struck if it is plain and obvious the pleading fails to disclose a reasonable claim;[44] and,

b. Justiciability can be considered on a motion to strike.[45]

36. Justiciability is a question of whether the courts can and should deal with an application, i.e. (1) the court has institutional capacity,[46] (2) there is a proper balancing of the separation of powers,[47] and (3) the nature of the dispute involves a legal component.[48]

Error 1: Incorrectly Qualifying the Impugned Action

37. The Court below correctly pinpointed one of the core impugned actions from the Application: "obtaining approvals and constructing two new UFFGAs in Saskatchewan" (the "New UFFGAs").[49] However, the Appellants respectfully submit that the Court erred in determining that the

[44] *Dykstra supra* note 15 at para 27.
[45] *Dykstra,* at paras 49-51.
[46] *Dykstra,* at paras 61-62.
[47] *Dykstra,* at paras 63-69.
[48] *Dykstra,* at paras 70-78.
[49] *Dykstra,* at para 98.

Application failed because the pleading "does not impugn any statute or other law pursuant to which these decisions were made." The Application **does** impugn government action (i.e. the New UFFGAs) pursuant to its enabling legislation (*The Power Corporation Act*).[50]

38. The Chambers Judge points out the following principles in the Judgment that support the justiciability of the Application (emphasis added):

a. "It is not sufficient for a claimant to impugn the overall approach of the government";[51]

b. "[I]t is only when policy is translated into law **or government action** (pursuant to a law) that *Charter* scrutiny may be engaged";[52]

c. *PHS* [53] and *Chaoulli* [54] were justiciable because the applicants "impugned a specific provision of legislation or **a decision made pursuant to a specific provision of legislation**";[55]

d. *La Rose FCA* "highlights that *Charter* claims relating to climate change legislation are not rendered non-justiciable simply because the legislation reflects a political choice";[56] and

e. In *Mathur #1,*[57] "On the topic of justiciability, the Superior Court explained that the Target and the Plan were government actions for

[50] *The Power Corporation Act*, RSS 1978, c P-19.
[51] *Dykstra, supra* note 15, at para 71.
[52] *Dykstra,* at para 75.
[53] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS*].
[54] *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].
[55] *Dykstra, supra* note 15, at para 76.
[56] *Dykstra,* at para 88.
[57] *Mathur v Ontario*, 2020 ONSC 6918, 471 CRR (2d) 225 [*Mathur #1*].

> the purpose of a *Charter* analysis because they were undertaken pursuant to authority in the *Cancellation Act*."[58]

39. The Applicants are not limited to only impugning a statute or other law. As made clear by the case law, and the Court of King's Bench itself, **state action** can also be the target of *Charter* claims.[59] The Court below fails to explain why the New UFFGAs are not state actions that are amenable to *Charter* challenge. Nor does it suggest these impugned actions are too broad or undefined, which was the major issue in *Tanudjaja*. In the Application, the Applicants allege *Charter* breaches as a result of the Respondents' decisions to build the New UFFGAs pursuant to *The Power Corporation Act*, s. 8(1)(j).[60] The New UFFGAs are specific state actions, like the decisions challenged in *PHS* and *Chaoulli*.[61]

40. A flexible approach is also taken to the establishment of a "sufficient causal connection" between the impugned government action or law and the limit on *Charter* rights. Government action, such as the New UFFGAs, need not be the only or dominant cause of the limit on *Charter* rights.[62]

41. For these reasons, the Court below erred in law by deciding the impugned decisions to build the New UFFGAs were not specific state actions that can be challenged based on their impact on the Applicants' *Charter* rights.

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[58] *Dykstra, supra* note 15*,* at para 91.
[59] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, 379 DLR (4th) 467 at paras 24 [*Tanudjaja*], leave to appeal to the SCC dismissed, 2015 CanLII 36780 (SCC); *Dykstra, supra* note 15*,* at para 75.
[60] Amended Originating Application of *Dykstra et al,* dated May 31, 2024, at paras 21-22 [*Application*].
[61] *Tanudjaja, supra* note 59, at para 27.
[62] *Canada (Attorney General) v Bedford,* 2013 SCC 72, [2013] 3 SCR 1101 at para 76.

Error 2: Misinterpreted/Misapplied the Jurisprudence

42. The Court below also erred by misinterpreting and/or misapplying leading appellate case law, largely by distinguishing their factual contexts rather than properly extracting and applying the legal principles they set out.

43. In particular, the Court below distinguished this case from other Canadian climate litigation cases that are proceeding to hearings on their merits on the basis that this Application does not impugn a failure to meet legislated standards whereas the others did. Specifically, the Court stated that unlike *La Rose FCA* and *Mathur CA*,[63] "the nature of the impugned approval and construction of the New UFFGAs is not grounded in any alleged breach of any statutory obligation or law".[64] Likewise, the Court stated that this case is distinguishable from *La Rose FCA* and *Mathur CA* because it "does not assert the Respondents have failed to comply with a statutory obligation to address climate change or have otherwise breached any statutory or legal standards, such as the GHG Caps, in violation of their *Charter* rights".[65] In doing so, the Court grossly mischaracterized or misunderstood their ratios.

44. As noted by environmental law scholar Nathalie Chalifour in her recent book, *Climate Change and the Canadian Constitution* (2025), this case is rooted in the same fundamental claim as other *Charter*-based climate litigation like *Mathur* and *La Rose*: "that the total GHG emissions sanctioned (and often facilitated) by a given government exceed the scientific threshold necessary to avoid harm and therefore infringe the

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[63] *La Rose v Canada*, 2023 FCA 241 [*La Rose FCA*]; *Mathur v Ontario*, 2024 ONCA 762, 502 DLR (4th) 663, leave to appeal dismissed 2025 CanLII 38373 (SCC) [*Mathur CA*].
[64] *Dykstra, supra* note 15, at para 108.
[65] *Dykstra, supra* note 15, at para 112.

constitutional rights of the claimants."[66] The sub-set of cases like *Mathur* in which "a government sets a target [and] claimants point to the target and argue it is insufficient relative to what the science says is required to limit harm" have been held to be justiciable.[67] At this level of generality, the Application's *Charter* challenge to the problematic targets set out in the *MRGHG Regulations* is indistinguishable from the framing of *Mathur*.

45. In *Mathur CA*, the Court of Appeal unanimously allowed an appeal in favour of a *Charter* challenge to Ontario's greenhouse gas emission reduction target and plan under climate change legislation based on alleged breaches of ss. 7 and 15. While the target and plan were enacted pursuant to an enabling statute, the *Cap and Trade Cancellation Act*, that statute does not prescribe their content with any legislated standard, nor does it explicitly reference any standards prescribed by international law. It does no more than stipulate that Ontario "shall" establish targets "for the reduction of greenhouse gas emissions in Ontario", as well as a plan, and may revise its targets and plan from time to time.[68] It is unclear how this statutory basis for Ontario's impugned target in *Mathur* is distinguishable from the provision underlying Saskatchewan's legislated targets that are impugned in this case.[69]

46. The Ontario Court of Appeal held that the Ontario provisions constitute "voluntarily imposed statutory obligations to combat climate change".[70]

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[66] Nathalie Chalifour, *Climate Change and the Canadian Constitution*, (Toronto: University of Toronto Press, 2025) at p 245 (excerpt provided as an appendix to this factum at Tab 1).
[67] *Ibid.*
[68] *Cap and Trade Cancellation Act*, 2018, SO 2018, c 13, ss 3, 4.
[69] *The Management and Reduction of Greenhouse Gases Act*, SS 2010, c M-2.01, s. 5: "The Lieutenant Governor in Council **shall** establish in the regulations a greenhouse gas emission **reduction** target for Saskatchewan for a year or years selected by the Lieutenant Governor in Council" [emphasis added].
[70] *Mathur CA*, *supra* note 63, at para 1.

However, it also made it clear that the constitutionality of Ontario's target and plan were to be assessed on whether they fell short of the scientific consensus as to the level of mitigation of GHG emissions required to avoid global warming in excess of 1.5°C.[71] If the plaintiffs succeed in a new hearing on the merits in *Mathur*, Ontario will be obliged to "set a 'science-based' target consistent with Ontario's share of the reductions necessary to limit global warming below 1.5 degrees Celsius above pre-industrial temperatures or, alternatively, well below 2 degrees Celsius".[72] The Court of Appeal accepted that this standard is sufficiently precise to be measured and calculated based on international standards to "inform what a constitutionally compliant Target and Plan should look like".[73] In other words, the justiciable standard for assessment of the constitutionality of Ontario's actions in *Mathur* is a question of fact that will be established through scientific evidence rather than one set out in statute. Contrary to the Chambers Judge's misinterpretation, *Mathur* is a *Charter* challenge to Ontario's alleged failure to meet a science-based constitutional minimum for mitigation through its target, not a failure to meet that legislated target.

47. *La Rose FCA* is distinct. The impugned actions of the federal government in the original pleadings were a medley of "legislative and regulatory responses involving transportation, energy, methane emissions, mining of fossil fuels, export and import of fossil fuels, carbon pricing standards, financing of the fossil fuel industry and the acquisition of the Trans Mountain Pipeline".[74] The Federal Court of Appeal found that the matter was nevertheless justiciable in principle, but stated the pleadings needed to

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[71] *Mathur CA*, at paras 58, 62.
[72] *Mathur CA*, at para 70.
[73] *Mathur CA*, at para 70.
[74] *La Rose FCA, supra* note 63, at para 130.

be amended to ensure "the focus necessary for constitutional analysis".[75] In support of amendments, the Court of Appeal did point to a federal statute enacted in 2021, the *Canadian Net-Zero Emissions Accountability Act*.[76] But this statute post-dates the original pleadings and the Federal Court's decision to strike those pleadings in 2020.[77] While that Act could provide a more precise target for amended pleadings—and indeed it is now a key part of the plaintiffs' further revised pleadings[78]—the Court of Appeal still made it clear that the case would ultimately be decided based on facts derived from "a vast body of scientific knowledge dealing with climate change, GHG emissions, and their consequences on human health and the environment".[79] Again, the Court below seems to have mistaken this case in which the adequacy of a legislatively-backed mitigation target is being challenged under the *Charter* for a case in which non-compliance with existing targets is challenged. But *Mathur* was found to be justiciable specifically because "the Applicants are **not** alleging that Ontario failed to comply with the Target or the *CTCA* or another statutory duty. Their allegations are based on the *Charter*".[80]

48. The Court below appears to have conflated the idea of a "legal standard" with the "legal component" element of justiciability (emphasis added):

    a. "Paragraphs 36-38 of *La Rose FCA*… The legal component, **or objective legal standard**, was that Canada failed to meet its own GHG emissions standards…"[81]

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[75] *La Rose FCA,* at para 133.
[76] *La Rose FCA,* at para 114.
[77] *La Rose v Canada*, 2020 FC 1008.
[78] *Lho'Imggin v Canada*, 2025 FC 1586 at para 20 [*Lho'Imggin*].
[79] *La Rose FCA, supra* note 63, at para 114.
[80] *Mathur v His Majesty the King in Right of Ontario*, 2023 ONSC 2316 [*Mathur #2*] at para 105.
[81] *Dykstra, supra* note 15, at para 87.

b. "… as the Court noted, if an action does not engage **legally defined, objective standards** against which the *Charter* claim can be assessed, and seeks to direct a government how to fulfil its commitments, it may not be justiciable"[82]

c. "… Similar to *Tanudjaja*, the UFFGAs do not raise a question that can be resolved by application of law nor a claim that is otherwise tethered to a **legally defined, objective standard**."[83]

d. "… the Claim relating to UFFGAs is distinguishable from the claims advanced in *La Rose FCA* and *Mathur CA*. In *La Rose FCA*, the claimants asserted that Canada failed to meet its own emissions standards… which resulted in a breach of their *Charter* rights. That was the legal anchor for the action, **as there was a legally-defined standard** to assess the *Charter* claims." [84]

e. "Overall, the pleading regarding the two new UFFGAs lacks a sufficient legal component or legal anchor for the *Charter* claims to permit the Court to adjudicate this matter against **an objective legal standard**."[85]

49. Justiciability concerns do arise when a claim is too broad or it lacks a legal component so as to force the court into a pure policy-making role, which is improper. Policy questions cannot be answered by a court in the absence of any legal standard to apply to them. However, this must not be confused with the requirement for policy to be translated into either state action or legislation to be justiciable under the *Charter*, which is where the Court

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[82] *Dykstra,* at para 88.
[83] *Dykstra,* at para 106.
[84] *Dykstra,* at para 108.
[85] *Dykstra,* at para 110.

below seems to have fallen into error. From the standards of care prescribed in negligence law through to constitutional minimums prescribed in *Charter* litigation, sufficiently objective legal standards are regularly established through evidence at a hearing on the merits rather than prescribed by statute.

50. *PHS*, for example, did not involve a legislated standard, yet the case was nevertheless justiciable because of the legal components of the claim. In *PHS,* the applicants validly challenged not only specific provisions of the *Controlled Drugs and Substances Act*,[86] but the state's action pursuant to it (i.e. refusing to extend the exemption for a safe injection site, which they had the discretion to do pursuant to their enacting legislation). *PHS* states:

> They should not be denied a remedy… simply because it is the Minister's decision and not the statute that causes the breach…[87]
>
> If the Minister's decision results in an application of the CDSA that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally"[88]

51. The Appellants respectfully submit that this Application aligns with the circumstances in *PHS.* The Application challenges the constitutionality of government action against evidence-based standards under the *Charter*. There are clear legal components to the questions raised, and it properly falls on the courts to determine the Application's outcome. As in *PHS*, the Application pleads justiciable questions with required legal components.

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[86] *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*].
[87] *PHS supra* note 53 at para 116.
[88] *PHS,* at para 117.

52. The Court below also relied on *Tanudjaja* and *Jeunesse*[89] in support of striking the Application but did not properly apply the law in these cases.

53. *Jeunesse* was one of the earliest Canadian climate litigation decisions and was issued prior to *La Rose FCA*, which further clarified the law on justiciability. The Chambers Judge described *Jeunesse* as follows:

- a non-profit seeking "authorization to commence a class action in Quebec against the Government of Canada"[90]
- Proposed claim being that "Canada violated their sections 7 and 15 *Charter* rights by failing to adequately address climate change", i.e. the GHG reduction targets adopted by the Government of Canada "were inadequate, insufficient, not complied with, and violated their *Charter* rights"[91]
- "The claimants relied on Canada's *Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12, s 186 without contesting any of its provisions. They sought orders that would require Canada to implement remedial measures to address climate change"[92]
- The action failed because "the claimants did not challenge the validity of a specific law"; "In the context of the proposed class action, which did not impugn a specific law, the Court held that deference was appropriate because the legislative branch is better placed to weigh the

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[89] *Environnement Jeunesse c Procureur général du Canada*, 2021 QCCA 1871 [*Jeunesse*] unofficial translation online: https://enjeu.qc.ca/wp-content/uploads/2022/02/2021-12-13_ENJEUcCanada_unofficial_translation.pdf (15 December 2025).
[90] *Dykstra, supra* note 15, at para 80.
[91] *Dykstra,* at paras 80-81.
[92] *Dykstra,* at paras 81.

countless issues surrounding climate change in the national and international context".[93]

54. By analogy to *Jeunesse*, the Court below concluded this Application:

> does not impugn any statute or other law pursuant to which these decisions were made;[94] and,
>
> the Claim is grounded in requests for relief that would require the Court to disregard the time-honoured separation of powers and its proper role within Canada's constitutional framework so as to encroach on the roles of the legislative and executive branches by forcing the Respondents to make specific decisions for the power supply in this Province.[95]

55. The Court below, however, did not consider the relevance of the following comments that formed the core of the court's reasoning in *Jeunesse*:

- The fact that *Jeunesse*'s claim was grounded in the government's "bad faith" or "**inaction**"[96] (emphasis added);
- "It is difficult to imagine the courts, by means of a class action, dictating to the state, in the absence of legislative challenge **or affirmative action**, the course it should take"[97] (emphasis added);
- "Ordering an end to inaction is tantamount to forcing the government to act ... Moreover, even if it were to be found that the courts could do so, the generality of the findings sought is so imprecise as to give no means for their implementation through enforceable orders. … The Appellant offers nothing concrete, nothing specific."[98]

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[93] *Dykstra,* at para 83.
[94] *Dykstra,* at para 106.
[95] *Dykstra,* at para 109.
[96] *Jeunesse, supra* note 89, at para 9.
[97] *Jeunesse,* at para 31.
[98] *Jeunesse,* at para 42.

56. The reasoning in *Jeunesse* clarifies that the issue was not that the plaintiffs failed to impugn a law, but that their action lacked any "legal component" and made open-ended demands for positive state action (to use the terminology that became popular in later cases) in context to a class action. The *Jeunesse* claim was overly broad, seeking to compel unspecified legislative action in the absence of any law or impugned government action (i.e. *Jeunesse* targeted inaction). *Jeunesse* and this Application are clearly distinguishable and are not "similar" as determined by the Judgment.[99] It is notable that *Jeunesse* was distinguished for this same reason in *Mathur*.[100]

57. The Court below erred similarly with *Tanudjaja*, understood as follows:

a. "… the claimants alleged that federal and provincial government actions and inactions resulted in homelessness and inadequate housing";[101]

b. "…the claim did not impugn any specific legislation nor the application of any legislation;"[102] and

c. "… the claimants did not engage a sufficient legal component and therefore did not raise a justiciable issue."[103]

58. The Court below drew the following analogies with this Application: "…like *Jeunesse* and *Tanudjaja*, their pleading does not impugn any statute or other law pursuant to which these decisions were made. Similar to *Tanudjaja*, the UFFGAs do not raise a question that can be resolved by

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[99] *Dykstra, supra* note 15, at para 109.
[100] *Mathur #2*, *supra* note 78, at paras 104-107.
[101] *Dykstra, supra* note 15, at para 72.
[102] *Ibid.*
[103] *Ibid.*

application of law nor a claim that is otherwise tethered to a legally defined, objective standard".[104]

59. The Court failed to explain why the specific government actions being challenged in this Application, made pursuant to enabling legislation, are not amenable to constitutional review. Instead, it erroneously created and applied an "objective standard" threshold test that assumes only legislated standards suffice. *Tanudjaja* is distinguishable here just as it was in *Mathur*:

> [139] … While the claim in *Tanudjaja* was based on the *Charter*, it failed to identify specific government conduct that led to a *Charter* violation. Rather, as the court pointed out, the application was largely focused on seeking recognition of an explicit positive obligation on the province to implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing. In *La Rose*, the plaintiffs did not challenge any specific legislation or governmental action. Leaving the question of positive obligations to later in these reasons, this Application is different, as it challenges specific government conduct (preparation of the Target and the Plan) and legislation (the Cancellation Act).
>
> [140] This Application is, therefore, based on the foregoing, *prima facie* justiciable. The focus must now shift to whether there is any reasonable prospect that the *Charter* claims made by the Applicants can succeed.[105]

60. For the same reasons, this Application is *prima facie* justiciable. *Tanudjaja* and *Jeunesse* are distinguishable as the Applicants in this case challenge specific legislation (the *MRGHG Regulations*[106]) and state action (the New UFFGAs) based on an alleged failure to uphold constitutional minimums.

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[104] *Dykstra,* at para 106.
[105] *Mathur #1, supra* note 57, at paras 139-140.
[106] *The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations*, RRS c M-2.01 Reg 1 [*MRGHG Regulations*].

Error 3: The Impugned Actions are not “pure policy”

61. Flowing from an incorrect determination that the challenge to the “new UFFGAs lacks a sufficient legal component or legal anchor,” the Court below erroneously concludes that determining the *Charter* challenges raised by the Application would “exceed the capacities and legitimacy of the judicial process”, treating the New UFFGAs as pure policy.[107]

62. The question of whether an impugned law or government action is a matter of policy and therefore outside the boundaries of the court is spectral. Rather than just asking whether an impugned action is policy or political, we should instead determine whether adjudicating a challenge to the impugned action exceeds the capacity of the court.

63. The institutional capacity of the court must be protected. Leading appellate jurisprudence does so by focusing its analysis of the justiciability of *Charter* challenges on the identification of a legal component within those challenges. There is no abstract, *a priori* determination of whether a claim is too political in nature or poses a challenge to policy. Nor can the mere fact that a challenged law or state action reflects policy or political choices distract from scrutiny of its legality.[108]

64. A *Charter* claim will only fall into a category of non-justiciable "pure policy” in the complete absence of any legal component. If the sufficiency of the claim's legal component is in doubt, the Applicants submit that such a claim should proceed to a full hearing to allow for a more in-depth consideration of the issue.

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[107] *Dykstra, supra* note 15, at para 110.
[108] See Theil, *supra* note 5, at pp 92 – 104 (excerpt provided as an appendix at Tab 3).

65. The Chambers Judge acknowledges this subtle difference in the Judgment quoting *La Rose FCA* at length (only summarized here):

> …[*Operation Dismantle*]…went on to distinguish, in the justiciability context, pure policy questions from legal questions with some policy aspect to them:
>
> > …if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.[109]

66. The Chamber Judge's conclusions about the Application being better suited for the legislative branch is a result of an attempt to determine whether the Application is too political as an isolated question. This is not a necessary step; it obscures the main purpose of addressing the legal components and (perhaps) inadvertently lead to erroneous conclusions.

67. Contrary to the Judgment, the Appellants submit that the *Charter* challenges raised by the Application do not exceed the capacities and legitimacy of the judicial process. *PHS* states that:

> [104] …policy is not relevant at the stage of determining whether a law or state action limits a *Charter* right. The place for such arguments is when considering the principles of fundamental justice or at the s. 1 stage of justification if a *Charter* breach has been established.
>
> [105] … when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter.*[110]

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[109] *Dykstra, supra* note 15, at para 58 (citing *La Rose FCA, supra* note 63, at para 34).
[110] *PHS, supra* note 53, at paras 104 – 105.

68. The Appellants respectfully submit that "policy considerations are inherent to all government action,"[111] and when government action violates the rights of citizens it is not only appropriate that the Court hear the matter, it is the Court's obligation to do so under the *Charter*.

Error 4: Striking the Application Based on Remedies

69. The Chambers Judge states:

> Through the remedies sought, the Applicants ask the Court to direct the enactment of new laws and engage in ongoing policy oversight, which is in essence court-directed legislative reform.[112]

70. The Federal Court in the *La Rose #1*[113] decision (court of first instance) likewise spent paragraphs 49-56 commenting on how they viewed the remedies as problematic and as a result, the requested remedies contributed to the finding of non-justiciability.

71. *La Rose FCA,* however, overturned the decision and confirmed the proper approach to remedies. *La Rose FCA* states:

> …remedies, at least at the outset of litigation, are not necessarily determinative of justiciability.[114]
>
> … Even if some of the remedies sought push the boundaries of the court's competence, a claim should not be characterized, *a priori*, as non-justiciable. Overly focusing on remedies at the justiciability stage may place 'undue and unwise limits' on judicial oversight of the law. As a practical matter, remedies are often amended in the course of the litigation and judges are required, when granting constitutional remedies, to exercise a principled discretion… The

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[111] *Dykstra, supra* note 15*,* at para 87, citing *La Rose FCA, supra* note 63, at para 36.
[112] *Dykstra,* at para 118.
[113] *La Rose v Canada*, 2020 FC 1008, at para 49-56 [*La Rose #1*].
[114] *La Rose FCA, supra* note 63, at para 48.

> remedies must be tailored to the breach, if a breach is ultimately found.[115]

72. If the Chambers Judge did not find a reasonable cause of action based solely or largely on the remedies, this would be an error. As further stated in *La Rose FCA:*

> …The Federal Court characterized the remedies as overly prescriptive, but simultaneously as vague and devoid of meaning. These criticisms are, in part, well-deserved. But they do not justify a pre-emptive decision to foreclose the possibility of remedies tailored to the breach.[116]

73. The remedies sought in this Application may have been overly prescriptive, but this does not "justify a pre-emptive decision to foreclose the possibility of remedies tailored to the breach."

74. Furthermore, the Appellants note in passing that the context has changed given the extended duration of this litigation already. For example, when this Application was filed, the Respondents had no firm commitment to net-zero electricity in Saskatchewan. However, the Respondents have now affirmed that SaskPower will be net-zero by 2050. Therefore, one aspect of the requested remedies (overly prescriptive or not) has already been voluntarily addressed by the Respondents. This aligns with the common saying that "you can't get what you don't ask for" and perhaps explains why, at the outset, applicants often make such requests in their pleadings.

Error 5: Overlooking international law arguments

75. The Court below quickly dismissed the claim that Saskatchewan is bound by the *Paris Agreement* in its analysis, concluding that the Applicants were

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[115] *La Rose FCA,* at para 51.
[116] *La Rose FCA,* at para 52.

asking it to question the wisdom of the legislature.[117] This should have been addressed as a separate issue. The Court did not, for instance, address whether obligations from other sources of international law could form the basis of a *Charter* breach, such as treaties, norms, and principles (see: paragraphs 41-43 of the Application).

76. The role of international law in prescribing GHG mitigation standards in Canadian law is still in relatively early stages of development, but it will be further explored in fresh merits-based hearings in *La Rose* and *Mathur*. As articulated in *La Rose FCA*, "…recognizing that the law is not static and evolves to address new and emerging situations, a motions judge must err on the side of permitting novel but arguable claims to proceed to trial."[118]

77. International law's contribution to the evolution of Canadian jurisprudence is growing. As such, a more fulsome exploration of this topic is warranted. For instance, the Court below did not consider the decision of *Lho-Imggin*,[119] which was raised by counsel for the Government of Saskatchewan by email pursuant to the Court of King's Bench General Application practice directive #8 (s. 2(b)) on October 2, 2025, more than a week prior to the Judgment being issued.

78. *Lho'Imggin* was the first Canadian decision to consider the International Court of Justice's Advisory Opinion addressing the legal obligations of states to mitigate and adapt to climate change, which was issued on July 23, 2025. For further context on timing, the *Lho-Imggin* decision was issued on September 26, 2025, more than two weeks before the Judgment was issued.

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[117] *Dykstra, supra* note 15, at para 43.
[118] *La Rose FCA, supra* note 63 at para 19.
[119] *Lho'Imggin, supra* note 78.

79. The Federal Court in *Lho'Imggin* stated:

> [63] At a minimum, Canadian courts may consider the ICJ Opinion in this and other cases by interpreting the alignment of domestic law with international legal instruments and customary international legal principles (*Hape* at para 53; *R v Appulonappa*, 2015 SCC 59 at para 40). This is especially true in cases where environmental protection intersects with constitutional rights. International legal principles may legitimately be invoked in domestic litigation where claimants are affected by actions that contravene customary norms or international treaty obligations.[120]

80. This evolving body of jurisprudence on the relevance of international law to Canadian legal standards for environmental protection should prompt a motions judge to err "on the side of permitting novel but arguable claims to proceed to trial." The Judgment did not address the international law arguments pleaded by the Application. Instead, the Judgment accepted the Respondents' position that international law arguments are political, or questions of policy better left with the legislative branch following *Jeunesse* and *La Rose #1.* As discussed earlier in this factum, merely pointing out that impugned state action reflects "politics" or "policy" is not a sufficient basis to conclude that the matter would "exceed the capacities and legitimacy of the judicial process."

81. Consistent with the framing and reasoning in *Mathur CA* and *La Rose CA*, international law is essential to the basis for the alleged *Charter* breaches in this case. These arguments therefore warranted an express determination by the Chambers judge, particularly after the judge was directed to the *Lho'Imggin* case by counsel for the Government of Saskatchewan, and because *Lho'Imggin* suggests the minimum standard that courts "may

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[120] *Lho'Imggin,* at para 63.

consider the ICJ Opinion in this and other cases by interpreting the alignment of domestic law with international legal instruments and customary international legal principles."

Error 6: Mischaracterizing the *MRGHG Regulations* Claim

82. The Court below outlined its understanding of the Application with respect to the *MRGRG Regulations* as follows:

    a. "[T]he portion of the Claim that pleads the *MRGHG Regulations* permitted SaskPower to increase GHG emissions in the five-year (2020-2024) compliance period, rather than decrease them, is inaccurate."[121]

    b. SaskPower is required to reduce its GHG emissions from all facilities within specified compliance periods in accordance with the GHG Caps set out in Column 3 of Table 1 in Part 4 of the *MRGHG Regulations*…[122]

83. Section 16 of the *MRGHG Regulations* establish the obligatory emissions limits for the Respondents' fleet (including independent power producers as defined within the *MRGHG* Regulations) of electricity generation assets in the province.[123]

84. There are 4 separate compliance periods defined in the *MRGHG Regulations* and emissions are limited for each compliance period as set out in Column 3 of Table 1 of the *MRGHG Regulations.* The table is reproduced in the Judgment at paragraph 114.[124]

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[121] *Dykstra, supra* note 15, at para 113.
[122] *Dykstra,* at para 114.
[123] *MRGHG Regulations, supra* note 14, at s 16.
[124] *Dykstra, supra* note 15, at para 114.

85. The Court misinterpreted the Application as saying the emissions ***caps*** increased every year to allow more emissions. What the Application pleaded was that the emissions caps would not result in a reduction of emissions within the first two compliance periods (2018-2019 and 2020-2024). The Applicants respectfully submit that the Judgment clearly misinterpreted the pleadings with respect to the *MRGHG Regulations*, which obviously affected the outcome of the case – in other words, giving rise to a palpable and overriding error.

86. Actual emissions could be increased within the first two compliance periods because the Cumulative Emissions Cap for All Facilities in Saskatchewan in those compliance periods was much greater than the historic emissions reported by SaskPower for all facilities generating power for the province.

87. As disclosed in the annual reports from SaskPower, the greatest annual emissions (ever) for SaskPower occurred in 2017 at 15.28Mt. The five-year annual average emissions for SaskPower in the 5 years preceding the first compliance period of 2018 – 2019 were 14.43MT per year (2012-2017 average).

88. The emissions cap in the first compliance period of 2018-2019 was 33.5MT, or 16.75MT per year. Therefore, the emissions cap in the first compliance period allowed an additional 10% more emissions than the highest annual emissions ever reported by SaskPower, or 16% greater than the immediately preceding 5-year average.

89. Similarly for the second compliance period of 2020-2024, the emissions cap of 77MT equates to an average of 15.4MT per year in the second compliance period. This emissions limit permits an additional 1% more emissions than the highest annual emissions ever reported by SaskPower

and is still 7% more annual emissions than the 5-year average from 2012-2017.

90. The third compliance period (2025-2026) permits 29.4MT of emissions, or 14.7MT per year. It is noteworthy that even now, in the third compliance period, that average annual emissions are permitted to be greater than the average annual emissions of 2012-2017, which were 14.43MT/year on average.

91. Taking these facts as true (as required at a motion to strike stage), the effect of the *MRGHG Regulations* was to permit **increases** in the Respondents' fleet emissions for at least the first three compliance periods.

92. It is also important to note that the *MRGHG Regulations* were revised in December of 2024, more than 19 months **after** the Application was filed. Prior to December 2024, there were only three compliance periods, but the revised version of the *MRGHG Regulations* bifurcated the last compliance period of 2025-2029 into two separate compliance periods (2025-2026 and 2027-2029).

93. The Government of Saskatchewan's alleged failure to comply with the *MRGHG Act*, which requires a greenhouse gas reduction program, is pleaded as a violation of the Appellants' *Charter* rights.

94. The facts clearly indicate that the emissions caps defined absolute emissions limits in compliance period 1 and 2 (spanning 7 years) of the *MRGHG Regulations*. These absolute emissions limits could not be characterized as a reduction program because the limits allowed SaskPower to increase its annual emissions. Furthermore, under the

revised *MRGHG Regulations*, SaskPower is permitted to increase its annual emissions over a 9-year period (2018-2026).

95. The Court below correctly identified that the Emissions Reduction Obligations schedule does reflect a declining cumulative emissions cap for SaskPower over the period of 2018 – 2029 as shown in Table 1 in Part 4 of the *MRGHG Regulations.* However, the Court failed to appreciate what the Appellants had pleaded – that the actual emissions of SaskPower in all years prior to the compliance periods of 2018 through to 2024 were historically much lower than the emissions cap. Based on the revised *MRGHG Regulations,* the emissions caps in the 2018-2026 compliance periods actually permit increases in the cumulative emissions from SaskPower, fully nine years past the proclamation of the regulations which were supposed to "manage" and "reduce" GHG emissions.

96. The Applicants submit that this misinterpretation of the pleadings with respect to the *MRGHG Regulations* obviously affected the Judgment and represents a palpable and overriding error that should be reviewed by this Honourable Court.

Error 7: Prohibiting amendments

97. The Court below mischaracterized the proposed amendments at paragraph 22 of the Judgment as pleading evidence, not material facts.

98. The Appellants recognize the obligation to plead the material facts they rely upon for the Application. The amended pleadings merely direct the reader to the evidence. The amended pleadings are pleading facts which clearly define the questions in issue and give notice to the opposing party of the case asserted against them.

99. The amended pleadings represent a "summary form" of the material facts and direct the reader to the affidavits for supporting evidence. The Appellants can accept the Judgment's ruling that affidavit evidence is not to be considered on an application to strike pursuant to rule 7-9(2)(a), but these summary statements of material fact represent proper pleadings as per Rule 13-8 of *The King's Bench Rules* and should not have been disallowed.

100. Assuming that the claim can be struck, the court may allow an amendment. This is a question of reasonableness since the decision to disallow an amendment is one of discretion:[125]

> [22] It is nonetheless clear that the decision to refuse leave to amend pleadings following a successful application to strike involves an exercise of discretion. As was explained in *Watchel*:
>
> > [29] A judge's decision whether to permit an amendment rather than striking the claim is an exercise of discretion: *Jones v. Bank of Nova Scotia*, 2018 BCCA 381 at para. 35. Similarly, a judge's decision whether to reopen a hearing where a final order has been pronounced but not entered is also an exercise of discretion: *Grewal v. Grewal*, 2016 BCCA 237 at para. 70. A discretionary decision of a lower court is only reversible if the court misdirected itself or if the decision is so clearly wrong that it amounts to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.
>
> [23] Justice Willcock elaborated on this point in *Jones v. Bank of Nova Scotia*, 2018 BCCA 381 (B.C. C.A.) [Jones]:
>
> > [35] Determining whether to permit an amendment is . . . preferable to dismissal of inadequate pleadings requires the exercise of a discretion by a trial judge. The exercise of that discretion may require consideration, including the degree to which the pleadings are deficient, of the extent to which the

[125] *Kindylides v Does*, 2020 BCCA 330.

> deficiencies may be addressed by an obvious or straightforward amendment, the apparent merit of the claim that may be made out with amendment and the prejudice that may be incurred by dismissing the claim. The exercise of that discretion requires consideration of the factors set out in Rule 1-3:
>
> > (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
> >
> > (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
> >
> > > (a) the amount involved in the proceeding,
> > > (b) the importance of the issues in dispute, and
> > > (c) the complexity of the proceeding.

101. The Court below concludes, "The Applicants have already amended their pleading to avoid having the Claim struck. Given the wholesale transformation that would be required for the pleading to advance a justiciable claim, I see no tenable basis to grant leave to further amend in the circumstances."[126]

102. The Applicants submit that the lower court misdirected itself with respect to the errors discussed above in this factum. The Applicants argue that it is unreasonable to be denied leave to further amend the pleadings. The discretionary decision of the lower court to deny further amendments to the pleadings is reversible because the court misdirected itself and the decision amounts to an injustice.

103. The Appellants submit that any deficiencies could be addressed with straightforward amendments, particularly with respect to the requested

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[126] *Dykstra, supra* note 15, at para 121.

remedies. As mentioned previously in this factum, the context has changed dramatically since the Application was filed (and also since the Application was last amended.) The Appellants wish to highlight that they have only appealed the Judgment in part, indicating they accept that other deficiencies were fairly adjudicated, such as the claim related to the statutory duties of care and fiduciary duties of directors should be withdrawn.

104. In closing, the Applicants respectfully remind the Court that this appeal is in the context of a preliminary decision on a motion to strike which held that the Application could not possibly succeed. The issues raised in this case are novel and important. It is trite law that claims cannot be struck solely on the basis that they are novel. The court's power to strike pleadings for having no reasonable prospect of success must be exercised with great caution. The Applicants submit that this is not a case that should be struck, particularly because it engages the supreme law of the constitution and the necessary evolution of the "living tree" principle.

105. This case is about whether the *Charter* could possibly be interpreted as protecting rights to a safe climate system in this province. The Applicants urge this court to seize the opportunity to ensure that our *Charter* continues to thrive in an era of dangerous climate change. As the unanimous court in *Hunter v Southam* stated:

> **A constitution, […] is drafted with an eye to the future.** Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. **It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in**

> **interpreting its provisions, bear these considerations in mind.** Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".[127]
>
> [emphasis added]

VI. RELIEF

106. The Appellants request that this honourable court grant this appeal of the judgment of Justice Kuski Bassett dated October 10, 2025.

107. The Appellants seek an order:

   a. granting leave to further amend the pleadings; and

   b. directing the Court of King's Bench to a trial on the merits of the amended pleadings in an expedited manner.

108. The Appellants seek no order for costs and ask that no order for costs be made against them as this is a matter of public interest that supports the rule of law and the evolution of constitutional *Charter* rights within Saskatchewan and Canada, for the benefit of all citizens.

All of which is respectfully submitted this 15th day of January, 2026.

PROCIDO LLP

Per: _____

Glenn Wright, Kaitlyn Harvey, and Larry Kowalchuk, Solicitors for the Appellants

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[127] *Hunter et al. v Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 SCR 145.

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CONTACT INFORMATION AND ADDRESS FOR SERVICE

If prepared by a lawyer for the party:

Name of firm:	PROCIDO LLP
Name of lawyer in charge of file:	GLENN A. WRIGHT
Address of legal firm:	Suite 200 – 165 3rd Ave S, Saskatoon, SK, S7K 1L8
Telephone number:	306-380-2583
Fax number (*if any*):	306-664-1616
E-mail address (*if any*):	glenn.wright@procido.com