

IN THE COURT OF APPEAL FOR SASKATCHEWAN
JUDICIAL CENTRE OF REGINA

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.**

Appellant/Prospective Appellant
(*Applicant*)

AND:

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

Respondents/Prospective Respondent
(*Respondent*)

**FACTUM OF THE RESPONDENT
GOVERNMENT OF SASKATCHEWAN**

MINISTRY OF JUSTICE AND ATTORNEY GENERAL
CONSTITUTIONAL LAW BRANCH
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S4P 4B3

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PART I: INTRODUCTION

- [1] This appeal seeks to overturn the decision in [Dykstra v Saskatchewan Power Corporation](#)¹ which struck *Charter*² claims against the Government, Saskatchewan Power Corporation, and the Crown Investment Corporation, for disclosing no reasonable cause of action under Rule 7-9(2) of the [King's Bench Rules](#).³ The King's Bench held the claims were not justiciable.
- [2] The criteria used to assess whether a matter is justiciable include: (1) the institutional capacity⁴ and legitimacy⁵ of the judicial process;⁶ (2) the constitutional separation of powers⁷ (3) the sufficiency of a legal component;⁸ and a manageable legal standard upon which adjudication can be undertaken.⁹
- [3] Contrary to the jurisprudence on justiciability, the Appellant contends that claims seeking judicial direction over broad and long-term executive policy decisions concerning the future of electricity generation in the province¹⁰ ought to be allowed to proceed, irrespective of a cognizable legal aspect, in the Applications¹¹ [Applications].

¹ 2025 SKKB 175.

² *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, (UK) 1982, c. 11 [*Charter*].

³ Sask Gaz December 27, 2013, 2684.

⁴ [Tanudjaja v Canada \(Attorney General\)](#) 2014 ONCA 852 (Application for leave to the Supreme Court dismissed on June 25, 2015 [No. 36283](#), at [para 21](#)).

⁵ ; [Highwood Congregation of Jehovah's Witnesses \(Judicial Committee\) v Wall](#), 2018 SCC 26, at p. 34;

⁶ [La Rose v Canada](#) 2023 FCA 241 at [para 24](#); [Dykstra v Saskatchewan Power Corporation](#) 2025 SKKB 175, at [para 61](#).

⁷ *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989 CanLII 73 \(SCC\)](#), [1989] 2 S.C.R. 49 at pp. 90-9; aff'd *Tanudjaja v Canada (Attorney General)* at [para 20](#); [Highwood Congregation of Jehovah's Witnesses \(Judicial Committee\) v Wall](#), 2018 SCC 26, aff'd in *La Rose*, at [para 24](#).

⁸ *KO v British Columbia (Ministry of Health)* 2023 BCCA 289, at [paras 56-59](#).

⁹ *Tanudjaja* at [para 33](#).

¹⁰ The Applications under the title "Relief Sought," at paras 15 and 16.

¹¹ Originating Application, issued March 31, 2023; Amended Originating Application, amendment dated July 14, 2023, at p.27; and the proposed Amended Originating Application, amendment dated, May 31, 2024, at p.32.

- [4] The Respondent submits that claims in the Applications are not legal claims. The claims do not articulate elements upon which adjudication can be undertaken.
- [5] As noted in the Factum of the Appellant at para 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."¹² This appeal is seeking the court's direction on what *Charter* claims might ground rights to climate stability.
- [6] The Chambers Justice determined in *Dykstra* that the Application disclosed no justiciable *Charter* claims.¹³
- [7] The Respondent submits that the Chambers Justice was correct.
- [8] What is possible for a court to analyse, and remedy, must be legally cognizable. A political claim must have a sufficient legal aspect to be justiciable.¹⁴
- [9] Some decisions are only suitable to political actors.¹⁵
- [10] The Respondent agrees with the submissions of Respondents, the Saskatchewan Power Corporation and the Crown Investments Corporation, with respect to the Application's justiciability.
- [11] The Respondent requests that the appeal be dismissed in its entirety for want of justiciability for failing to establish the legal criteria required to ground a *Charter* claim.

¹² Factum of the Appellant at para 10.

¹³ *Dykstra* at para 121.

¹⁴ *Reference re Secession of Quebec*, 1998 CanLII 793, [1998] SCR 217, [at para 28](#).

¹⁵ *Secession Reference* at [para 100](#).

PART II: JURISDICTION AND STANDARD OF REVIEW

- [12] The Respondent agrees with the Appellant that this Court has jurisdiction to hear and decide this appeal by virtue of s. 7(2) of [The Court of Appeal Act, 2000](#).¹⁶
- [13] The Respondent agrees with the Appellant that the standard of correctness applies to whether a pleading discloses a reasonable cause of action;¹⁷

¹⁶ SS 2000, c.C-42.1.

¹⁷ Appellant's factum at para 14.

PART III: SUMMARY OF THE FACTS

[14] The Respondent agrees with the Summary of the Facts in the Factum of the Respondents, Saskatchewan Power Corporation and Crown Investments Corporation of Saskatchewan.¹⁸

¹⁸ Respondent's factum at paras 14-30

PART IV: POINTS IN ISSUE

[15] The Respondent respectfully submits that whether it was plain and obvious that the Applications constituted no reasonable cause of action is the only question at issue.

[16] The Appellants cite the following grounds of appeal:

a) What constitutes a justiciable *Charter* claim;¹⁹

; and

b) The relevance of International law.²⁰

¹⁹ Notice of Appeal at paras 4(a)(i); (ii); (iii); (iv); (v); 4(b)(i)(ii).

²⁰ Notice of Appeal at para 4(a)(vi).

PART V: ARGUMENT

[17] The Respondent respectfully submits that the Chambers Justice was correct in finding that the Claims have no reasonable prospect of success under Rule 7-9(1) and (2)(a) of the [*King's Bench Rules*](#):

- a) The Applications seek a judicial response that is beyond the capacity and legitimacy of judicial process,²¹ insofar as the proposed response would effectively establish judicial authority over the Government's elected mandate in conflict with the separation of powers; and,
- b) the Applications fail to raise a question that can be resolved by application of law insofar as they do not impugn any law or specific action under law to ground a question that can be resolved by objective application of law.²²

I. THE CLAIMS ARE NOT JUSTICIABLE

A. JURISPRUDENCE

[18] Jurisprudence on justiciability assesses the role of courts when faced with political questions.

[19] In relation to *Charter* claims, it considers what elements are required to establish a claim for *Charter* rights *vis a vis* legislative or administrative state action.

[20] It inquires into what legal component is sufficient to ground a *Charter* claim, whether courts have the capacity to grant a remedy in relation to the separation of powers, or, whether a claim can be amended to address alleged deficiencies in pleadings.

²¹ *Dykstra* at [para 109](#).

²² *Dykstra* at [para 106](#).

[21] The following analysis provides an overview of Canadian jurisprudence on the role of the courts when addressing political questions.

[22] The jurisprudence considers the appropriate breadth for s.7 protection *vis a vis* the separation of powers;²³ the need for a principled legal approach to legitimize court involvement in political questions;²⁴ the types of statutory obligations that are justiciable;²⁵ the breadth of court authority over decisions of executive government;²⁶ the need for specificity in characterizing law and state action to ground a claim;²⁷ the need for a claim to propose a manageable legal standard to ground the analytical framework for rights analysis;²⁸ and what executive action is amenable to review.²⁹

Separation of powers

[23] In [Operation Dismantle](#), the Supreme Court unanimously struck a claim asserting that Canada's decision to allow US cruise missile testing on Canadian soil infringed *Charter* rights to life, liberty, and security of the person. Wilson J.'s concurring decision in *Operation Dismantle* is now accepted as forming the basis for the Canadian jurisprudential approach to political questions.³⁰ The decision concerned the appropriate breadth of a *Charter* right in relation to broad policy decisions by executive government.

²³ [Operation Dismantle v The Queen](#) [1985] 1 SCR 441, [[Operation Dismantle](#)].

²⁴ in [Re BC Motor Vehicle Act](#), [1985] 24 DLR (4th) 536, [[Re BC Motor Vehicles](#)]; [R v Big M Drug Mart Ltd](#), [1985] 1 SCR 295 at p. 344 and [Reference re Secession of Quebec](#), 1998 CanLII 793 (SCC) [1998] SCR 217.

²⁵ [Friends of the Earth v Canada](#) 2008 FC 1183 [[Friends](#)], leave to appeal refused by the Federal Court of Appeal, [2009 FCA 297](#); and the Supreme Court, March 25, 2010 [No. 33469](#).

²⁶ [Smith v Canada \(Attorney General\)](#), [R v Imperial Tobacco Canada Ltd](#) [[Imperial Tobacco](#)], and [Tanudjaja v Canada \(Attorney General\)](#) 2014 ONCA 852 (Application for leave to the Supreme Court dismissed on June 25, 2015 [No. 36283](#)).

²⁷ [Tanudjaja](#) and [Operation Dismantle](#).

²⁸ [Kazemi Estate v Islamic Republic of Iran](#), 2014 SCC 62.

²⁹ [Democracy Watch v British Columbia \(Lieutenant Governor\)](#), 2023 BCCA 404; [46] [Lachance v Ontario \(Solicitor General\)](#), 2023 ONSC 7143 and [Citizens for Public Justice v Saskatchewan](#), 2026 SKKB 9 [[Citizens](#)].

³⁰ [La Rose v Canada](#) [2023 FCA](#) [[La Rose](#)] 241 at [para 34](#); [Schmidt v the Queen](#) 1987 CanLII 48 (SCC); [Gosselin v Quebec \(Attorney General\)](#) 2002 SCC 84 (Arbour J. in dissent) at para 330; [Finlay v Canada \(Minister of Finance\)](#) 1986 CanLII 6 (SCC) at para 33; [Canada \(Auditor General\) v Canada \(Minister of Energy, Mines and Resources\)](#)

- [24] In declining to recognize that the decision to allow cruise missile testing engaged a s.7 right, Wilson J. highlighted that there was no principled way for the court to distinguish between the particular risk of nuclear war and other risks posed to Canadians by other decisions concerning national defense policy.³¹
- [25] Wilson J.'s concern with extending broad rights protection (for all Canadians) to broad executive policy decision-making (a decision to allow cruise missile testing) had to do with the need to ensure that governments retain the flexibility to make policy decisions without the legal constraint of having to consider the risk of ancillary affects of executive decision-making on the *Charter* rights of all Canadians.
- [26] Specifically, Wilson J. explained that allowing the ambit of s. 7 protection to extend to broad executive decisions about international affairs could have a paralyzing effect on state governance in the international sphere:

I agree with Le Dain J. that the essence of the appellants' case is the claim that permitting the cruise missile to be tested in Canada will increase the risk of nuclear war. But even accepting this allegation of fact as true, which as I have already said I think we must do on a motion to strike, it is my opinion for the reasons given above that this state of affairs could not constitute a breach of s. 7. Moreover, I do not see how one can distinguish in a principled way between this particular risk and any other danger to which the government's action *vis-à-vis* other states might incidentally subject its citizens. A declaration of war, for example, almost certainly increases the risk to most citizens of death or injury. Acceptance of the appellants' submissions, it seems to me, would mean that any such declaration would also have to be regarded as a violation of s. 7. I cannot think that that could be a proper interpretation of the *Charter*.³²

1989 CanLII 73 (SCC); *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society* 2012 SCC 45 at para 40.

³¹ *Operation Dismantle* at [para 103](#).

³² *Operation Dismantle* at [para 103](#).

[27] Wilson J.'s conclusion concerning the cruise missile decision does not shield all executive action from *Charter* scrutiny. A claim's justiciability involves a question of proximity between the executive decision and the degree of impact on civil rights.

[28] Wilson J.'s conclusion stands for the proposition that s.7 protection should only be extended in cases where the proximity of the threat from state action constitutes a direct threat to a specific segment of the populace:

This is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of s. 7. If, for example, testing the cruise missile posed a direct threat to some specific segment of the populace--as, for example, if it were being tested with live warheads--I think that might well raise different considerations. A court might find that that constituted a violation of s. 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under [s. 1](#) of the [Charter](#). Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the Court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review. It is not, however, called into operation here since the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7.³³

The need for principled analysis

[29] While the Constitution does not preclude *Charter* scrutiny of political questions in Canadian jurisprudence, Canadian courts must still balance the need to protect citizens with the need for governments to make broad policy decisions.

[30] The way that courts do this is by application of a principled assessment of the impact of government action on individual rights.

³³ *Operation Dismantle* at [para 104](#).

[31] In [Re BC Motor Vehicle Act](#),³⁴ the Supreme Court again grappled with concerns about the legitimacy of constitutional adjudication under the *Charter*, and questions about constitutional interpretive techniques.³⁵ Lamer J. explained that the *Constitution Act, 1982*, extended the scope of constitutional adjudication to encompass a broader range of values,³⁶ but not to the extent that courts ought to decide on the appropriateness of policies underlying legislative enactments.³⁷ Courts are empowered and required to measure the content of legislation against constitutional guarantees.³⁸

[32] Confirming Wilson J.'s decision in *Operation Dismantle*, Lamer J. in *Re BC Motor Vehicles* explained that the task of ensuring the full benefit of *Charter* protections, while avoiding an assessment of the merits of public policy, can only be accomplished by a principled approach embodied by an analytic framework to determine the application of a *Charter* right that includes purposive analysis of legislation and objective and manageable standards.³⁹

The need for a sufficient legal component

[33] In [Friends of the Earth v Canada](#),⁴⁰ the Federal Court struck a claim for judicial review because it failed to identify a sufficient legal component upon which to assess the adequacy of the Minister of Environment's Climate Change Plan and the Governor in Council's

³⁴ [1985] 24 DLR (4th) 536, [*Re BC Motor Vehicles*]

³⁵ *Re BC Motor Vehicles* at [para 10](#).

³⁶ *Re BC Motor Vehicles* at [para 13](#).

³⁷ *Re BC Motor Vehilces* at [para 14](#).

³⁸ *Re BC Motor Vehicles* at [para 14](#), citing Dickson J. in *Amax Potash Ltd. v Government of Saskatchewan*, [1976 CanLII 15 \(SCC\)](#), [1977] 2 S.C.R. 576, at p. 590.

³⁹ *Re BC Motor Vehicles* at [para 21](#), citing *R v Big M Drug Mart Ltd*, at p. 344.

⁴⁰ 2008 FC 1183 [*Friends of the Earth*], leave to appeal refused by the Federal Court of Appeal, [2009 FCA 297](#); and the Supreme Court, March 25, 2010 [No. 33469](#).

regulatory approach under the *Kyoto Protocol Implementation Act*,⁴¹ without intruding on the separation of powers.⁴²

[34] The Court in *Friends of the Earth* determined that the adequacy of the Climate Change Plan, and the regulatory discretion of the Governor in Council to establish regulations, were not amenable to review because the impugned duties in the *Kyoto Protocol Implementation Act* were intergovernmental obligations, as opposed to enforceable legal rights of individuals.⁴³ The Court explained that the assessment of whether an administrative obligation to government has been adequately met lies with the government, not the courts.⁴⁴

[35] In cases where an administrative statutory duty is unenforceable as a matter of law, the remedy lies with Parliament and not the courts.⁴⁵

[36] Like statutory obligations owed to Parliament, government decisions made in the public interest are also not generally amenable to review, unless they are translated into law.⁴⁶

The need for a law

[37] In *Smith v Canada (Attorney General)*,⁴⁷ the Federal Court concluded that a decision of federal authorities to decline to intervene on behalf of a Canadian imprisoned in the United States was a non-justiciable broad public policy decision constituting an exercise of the executive function. The Federal Court confirmed that while decisions of administrative

⁴¹ S.C. 2007 c. 30.

⁴² *Friends of the Earth*, at paras [24-25](#)

⁴³ *Friends of the Earth*, at [para 45](#)

⁴⁴ *Friends of the Earth*, at [para 25](#).

⁴⁵ *Friends* at [para 45](#).

⁴⁶ *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44 at para 105 cited in *Environnement Jeunesse c Procureur général du Canada*, 2021 QCCA 1871 at [para 37](#); and *La Rose*, at [para 33](#).

at para 37.

⁴⁷ 2009 FC 228.

character, which affect rights, privileges, and interests of an individual, are reviewable, decisions of broad public policy having to do with an exercise of executive function are generally not amenable to review.⁴⁸

[38] In *R v Imperial Tobacco Canada Ltd* [*Imperial Tobacco*],⁴⁹ the Supreme Court struck an application by tobacco companies to third party Canada in a claim for provincial health costs arising from the federal government's involvement in the promotion of the benefits of low tar cigarettes. *Imperial Tobacco* is relevant to this analysis on a at least three levels.

[39] First, the Court in *Imperial Tobacco* established that the question in a strike application is "whether considered in the context of the law and litigation process, the claim has no reasonable chance of succeeding".⁵⁰ This is the overarching question that frames this appeal.

[40] Second, *Imperial Tobacco* explained that establishing proximity, in cases where competing government policy objectives exist. will be impossible unless the asserted basis of proximity is grounded in specific state interaction with the individual right holder.⁵¹

[41] While *Imperial Tobacco* deals with the difficulty of establishing proximity in the context of a tort claim, the Supreme Court's comments on proximity are relevant to the proximity analysis required to establish the existence of a *Charter* right because the purpose of the proximity analysis in both types of claim requires a nexus between state action and the individual and includes a concern about unduly fettering executive decision-making.⁵²

[42] Third, *Imperial Tobacco* confirms that the weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of governments,

⁴⁸ at paras [28-29](#).

⁴⁹ 2011 SCC 42.

⁵⁰ *Imperial Tobacco* at [para 25](#).

⁵¹ *Imperial Tobacco* at [para 45](#).

⁵² *Imperial Tobacco* at [para 47](#)

not courts. A sufficiently proximate relationship between tobacco companies and Canada was determined to exist where the companies had acted in reliance on statements Canadian officials made about the advantages of light or mild cigarettes. But the claim was ultimately struck because the impugned state conduct was characterized as a matter of core policy.⁵³

The need for a manageable legal standard

- [43] The proposition that a government decision is not justiciable if it is based only on the weighing of social, economic, and political considerations, without a manageable legal standard, was borne out in [Tanudjaja v Canada \(Attorney General\)](#),⁵⁴ wherein the Court of Appeal for Ontario struck diffusely pleaded *Charter* claims based on s.7 and s.15 rights, concerning the adequacy of government action to address homelessness. The problem was that the pleadings articulated no "judicially discoverable and manageable standard" upon which the court could assess the adequacy of broad social policies by application of law.

...there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here, the court is not asked to engage in a "court-like" function, but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.⁵⁵

- [44] In [Kazemi Estate v Islamic Republic of Iran](#),⁵⁶ the Supreme Court rejected a proposed principle of fundamental justice, because the proposed principle would not be capable of providing a "manageable standard". To constitute a principle of fundamental justice, the

⁵³ *Imperial Tobacco* at [paras 87-88](#)

⁵⁴ 2014 ONCA 852 (Application for leave to the Supreme Court dismissed on June 25, 2015 [No. 36283](#))

⁵⁵ *Tanudjaja* [at para 33](#), cited in *La Rose v Canada*, 2023 FCA 241, at [para 28](#); *BM v Ontario* 2025 ONSC 4575 at para 57.

⁵⁶ 2014 SCC 62.

proposed principle must present a manageable standard that is sufficiently concrete in meaning to guarantee a predictable result.⁵⁷

- [45] In *Kazemi*, the majority concluded that a proposed principle of fundamental justice was not suitable because the definition of the principle proposed (what remedy would compensate for a violation of rights) was "an intensely personal and subjective matter".⁵⁸ On what constitutes a manageable standard in the context of a proposed principle of fundamental justice, the court had concerns that the proposed standard would not result in a predictable outcome, as opposed to an outcome that could be personal and subjective.

The need for a legal component when addressing political questions

- [46] In *Democracy Watch v British Columbia (Lieutenant Governor)*,⁵⁹ the Court of Appeal for British Columbia upheld a decision dismissing a judicial review of the Lieutenant Governor's decision to dissolve the legislature because the application impugned a political question that did not engage the application of legal rules or principles:

[79] The chambers judge described "a political question" as one that raises issues that are "multi-faceted, require controversial and open-ended consideration of the public interest, and do not engage the application of legal rules or principles": at para. 66. His reasons make it quite clear that he considered the question of the Premier's advice on dissolution to be purely political in nature. I see no error in his finding.⁶⁰

- [47] *Lachance v Ontario (Solicitor General)*⁶¹ confirmed that a right to disclosure did not exist in relation to an exercise of ministerial discretion concerning core policy decisions that were part and parcel of the policymaking process that engaged the accountability of the legislature in relation to where to build a correctional centre. The application was dismissed

⁵⁷ *Kazemi* at para [164-166](#).

⁵⁸ *Kazemi* at para [165](#).

⁵⁹ 2023 BCCA 404.

⁶⁰ *Democracy Watch* at [para 79](#).

⁶¹ 2023 ONSC 7143.

because the rationale for the decision was construed to engage the accountability of the legislature:

[25] The legal issue set out in the notice of application is the allegation that the Ministry's decision to build a correctional facility is in contravention of the Minister's obligations under [ss. 3\(5\)](#) and [6\(2\)](#) of the *Planning Act*. With respect, the site selection process belatedly raised by the applicants on this motion engages core policy decisions as to how many correctional institutions to build, how large the institutions should be, and where they should be situated. These are part and parcel of the policymaking process that engage the accountability of the legislature. They are not subject to judicial review.⁶²

B. APPLICATION

- [48] The foregoing jurisprudence confirms that rights protection cannot be extended to broad policy decisions concerning long term electricity generation policy, without a pleading that identifies a specific law or specific state action to ground the claim.
- [49] Plans to develop, decisions on how to construct, or decisions about where or whether to invest, or how much to allocate, are policy decisions, until they are translated into a law or specific legal act.
- [50] The courts assess constitutionality on the basis of legal frameworks and principles. The assertion that one side of a political debate founds rights, without identifying a legal component grounded in the form of a specific law or a specific state action under law, has never been recognized as a justiciable claim.
- [51] Decisions about how stringently emissions can be limited involve a polycentric balancing of competing policy objectives around feasibility, cost, jobs, the potential and time it will take to bridge to nuclear, or the basic need to ensure that people can afford the electricity they require to survive.

⁶² *Lachance* at [para 25](#)

- [52] The Respondent does not dispute that emissions cause climate instability. The Respondent is taking measures to limit emissions, albeit not translated into law. But the Respondent cannot make decisions in a vacuum. It is responsible to balance many interests and policy objectives in the best interests of the people of Saskatchewan.
- [53] In a province with limited hydro-electric capacity, that can see temperatures south of minus 30 degrees Celsius, the Respondent has determined it is in the best interest of people in Saskatchewan to have affordable energy from power stations that emit greenhouse gases, until it is in a position to transfer power production to nuclear power sources.
- [54] The Respondent respectfully submits that the Applications are asking the court to embark on a course more resembling a public enquiry into the adequacy and wisdom of electricity generation policy rather than an assessment of *Charter* rights.

II. THE APPLICATIONS DO NOT ESTABLISH THE ELEMENTS TO FORM A REASONABLE CAUSE OF ACTION

C. JURISPRUDENCE

- [55] In [*Harpold v Saskatchewan \(Corrections and Policing\)*](#),⁶³ this Court confirmed the functions of pleadings:

While pleadings are no longer subject to precise, complex and occasionally oppressive requirements...they remain an important aspect of every lawsuit and must be framed with care...The function of pleadings is fourfold:

1. To define with clarity and precision the question in controversy between litigants.
2. To give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them. A defendant is entitled to know what it is that the plaintiff asserts against him; the

⁶³ 2020 SKCA 98.

plaintiff is entitled to know the nature of the defence raised in answer to his claim.

3. To assist the court in its investigation of the truth of the allegations made by the litigants.

4. To constitute a record of the issues involved in the action so as to prevent future litigation upon the matter adjudicated between the parties.⁶⁴

[56] In *Harpold*, this Court explained that the focus in dealing with an application to strike is on substance as opposed to form, insofar as the pleadings adequately serve their functional purposes.⁶⁵

[57] Pleadings must adequately define the issues in dispute and give fair notice to the responding party of what is claimed in relation to the cause of action.⁶⁶

[58] As noted by the Court of Queen's Bench, as it then was, in *Country Plaza Motors Ltd. v Indian Head*,⁶⁷ "where it is impossible to distill a disparate number of allegations into coherent and material facts on which a cause of action against the defendants can be based, the claim will be struck."

D. THE CLAIMS IN THE APPLICATIONS

[59] In addition to questions of justiciability having to do with the capacity of courts and the separation of powers, the Respondent submits that the Applications fail to articulate the elements required to establish the asserted *Charter* rights claims.

⁶⁴ *Harpold* at [para 29](#)

⁶⁵ *Harpold* at [para 32](#).

⁶⁶ *Yascheshen v Canada (Attorney General)* 2024 SKQB 63 at [para 38](#), citing *Harpold*, citing *Thirsk v Public Guardian and Trustee of Saskatchewan*, [2017 SKQB 66](#) at paras [21 and 23](#).

⁶⁷ 2005 SKQB 442, 272 Sask R 198, at [para 13](#), cited with approval in *Harpold* at paras 35 and 37.

[60] The s.7 claims fail to assert that a specific state action under a specific law impacts s.7 interests; and the s.15 claims fail to assert specific state action under a specific law impacts groups based disproportionately from the impact that a specific law or state action impacts other groups affected by the specific law or specific state action.

[61] The Applications seek remedies under s.52 and 24 of the *Charter* that confer constitutional recognition for an overarching state obligation to direct government policy and limit emissions according to the objectives of the [Paris Agreement](#),⁶⁸ without a legal path.

[62] No court in Canada has recognized positive obligations to legislate and no court in Canada has issued orders that wrest executive authority to determine the future course of provincial policy under the *Charter*.

[63] Section 92A of the [Constitution Act, 1867](#) confers exclusive authority on provincial governments to make laws in relation to "the development, conservation and management of sites and facilities in the province for the generation and production of electrical energy."

[64] Section 52 of the *Charter* establishes constitutional supremacy and confers constitutional authority on courts to declare unconstitutional legislation to be of no force or effect:

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[65] Section 24 confers broad judicial authority to remedy infringements of individual rights in a manner the court considers to be appropriate and just in the circumstances:

24 (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

⁶⁸ 12 December 2015, UNTS 3156 [the *Paris Agreement*].

[66] To establish a claim for a remedy under s.24 or s.52, the claimant bears the onus of establishing that constitutional rights have been breached.

[67] The Respondent submits that in failing to identify specific law or state action in the Applications, the Applications fail to establish a reasonable cause of action.

E. ENVIRONMENTAL RIGHTS JURISPRUDENCE

[68] A review of environmental rights claim jurisprudence is instructive in terms of what elements are required to establish a *Charter* rights claim and, specifically, the prerequisite need for a claim to identify a law or specific state action under a law that impacts individual rights.

[69] In the environmental context, specific state action and a sufficient legal component grounded the claims in [La Rose](#) (2023) and [Mathur v. Ontario](#).⁶⁹

[70] In *La Rose*, the constitutionality of Canada's alleged failure to meet specific positive statutory commitments to limit emissions according to the *Paris Agreement* standards, under the [Net-Zero Emissions Accountability Act](#),⁷⁰ grounded a reasonable cause of action based on a breach of s.7 rights. On this basis, the claim was construed to constitute a reasonable cause of action.

[71] In *Mathur*, the claim also involved an assertion that rights had been violated by a failure to meet statutory commitments. In *Mathur* youth claimants applied for a declaration that Ontario's emissions target and the provisions for enacting the target under the [The Cap and Trade Cancellation Act, 2018](#),⁷¹ violated ss. 7 and 15 of the *Charter*. The youths sought orders declaring ss. 7 and 15 rights violations, and orders requiring Ontario to set a science-based emissions reduction target along with revisions to its climate change plan, in

⁶⁹ 2024 ONCA 762 [*Mathur*].

⁷⁰ S.C. 2021, c. 22.

⁷¹ S.O. 2018, c. 13.

accordance with international standards.⁷² The application judge determined that the alleged deprivations of the right to life or security were justiciable, but dismissed the s.7 claim because the infringements were not contrary to the principles of fundamental justice under s. 7. The application judge in *Mathur* also dismissed the s.15 claim because it concluded that s.15 did not impose a positive obligation for Ontario to take steps to combat climate change.

[72] The Court of Appeal for Ontario concluded in *Mathur* that Ontario had voluntarily assumed positive statutory obligations to combat climate change and to produce a plan and emissions target for that purpose under the *CTCA* and that, accordingly, Ontario was obligated to produce a plan and emissions target that were *Charter* compliant.⁷³ As the application judge had not addressed the question of whether Ontario failed to produce a plan and target that was *Charter* compliant, in accordance with its statutory mandate, the ss. 7 and 15 *Charter* issues raised by the youths had not been determined by the applications judge and the Ontario Court of appeal ordered the matter to be remitted for determination at a new hearing.

[73] In [*Environnement Jeunesse c Procureur général du Canada*](#), [*Jeunesse*],⁷⁴ the Quebec Court of Appeal dismissed an application to certify a class action against Canada, on behalf of Quebec residents aged 35 and under, that claimed that Canada's failure to establish adequate federal GHG emissions targets breached fundamental rights of persons and of future generations to life, liberty, security of the person, and equality, because they were inconsistent with Canada's obligations under international law.

[74] The *Jeunesse* claim proposed a declaration that Canada had failed to protect fundamental rights to life, liberty, security of the person, and equality; an order that these impacts must cease; and, an order for the government to pay 100 dollars on behalf of each class member

⁷² *Mathur* at para 3.

⁷³ *Mathur* para 5.

⁷⁴ 2021 QCCA 1871. Application for leave to appeal dismissed July 28, 2022, No. [40042](#) .

to invest in a fund to establish restorative measures to contribute to curbing climate warming.

[75] The Quebec Court of Appeal construed the claim in *Jeunesse* as a plea to oblige the federal government to legislate and implement measures to reduce emissions in fulfillment of Canada's international commitments as *ultra vires* the court's role.

[76] The Quebec Court of Appeal explained that in the absence of a challenge to a specific law, constitutional control of government action by courts is problematic.⁷⁵ It observed that

[77] [*Hupacasath First Nation v Canada \(Foreign Affairs and International Trade Canada\)*](#), supported Canada's proposition in *Jeunesse*, that a claim may not be amenable to judicial process or suitable for judicial analysis in cases where exercises of executive power are suffused with ideological, political cultural, social, moral and historical concerns.⁷⁶ And, that assessing whether the executive has acted within a range of acceptability and defensibility may be beyond the court's role within the separation of powers in such cases.

[78] *Jeunesse* explained that the abstract assertions in the *Jeunesse* pleadings sought analysis, without identifying a legal context, that was beyond the court's authority and capacity, in that the pleadings proposed remedies based on polycentric analysis considering scientific factors, health impacts, transportation, economic and regional development, employment, and government budgetary priorities, prioritizing measures to address climate change at the expense of other government spending priorities.⁷⁷

[79] In a similar decision rendered last year, in [*Lho'Imggin v. Canada*](#), the Federal Court dismissed s.7 *Charter* claims for environmental rights because it concluded that the Federal

⁷⁵ *Jeunesse* at [para 25](#).

⁷⁶ 2015 FCA 4 at [para 66](#)

⁷⁷ *Jeunesse* at [para 36](#).

Court had no authority to adjudicate on an infringement of Canada's obligations under the [Paris Agreement](#).⁷⁸

- [80] The pleadings in *Lho'Imggin* asserted that Canada had obligations under s.7 to comply with international commitments under the *Paris Agreement*, as identified in the International Court of Justice [ICJ]'s [Advisory Opinion](#) entitled "Obligation of States in Respect of Climate Change [Opinion]". The Federal Court observed that the Opinion imposes no legal obligations on states and explained that although the Opinion outlines key principles that might affect state conduct,⁷⁹ and may impact how courts interpret domestic laws in relation to constitutional rights and international obligations,⁸⁰ the pleaded claim, as proposed, was not justiciable because the pleadings did not provide sufficient legal context to ground the *Charter* analysis.
- [81] The *Lho'Imggin* claim asserted that the content of multiple statutes supported a finding that Canada was offside international commitments under the [Paris Agreement](#) and the [United Nations Declaration on the Rights of Indigenous Peoples](#).⁸¹ It also asserted that Canada's action, in the facilitation of the development and operation of high GHG-emitting projects supported finding an infringement of s.7 rights because the combined effect of power projects, and legislative acts contributed to detrimental affects of climate change on Lho'Immgin territories. The claimants anticipated increasing impacts from climate consequences, including adverse health effects to peoples from decreased food security to increased exposure to air pollution and weather events.⁸²

⁷⁸ 2025 FC 1586.

⁷⁹ *Llo'Immgin* at para 42.

⁸⁰ *Llo'Immgin* at para 44.

⁸¹ GA Res 61/295, UN Doc A/RES/61/295 (2007).

⁸² *Lho'Immgin* at [para 23](#).

[82] Despite reference to international law in the pleadings, *Charter* claims in *Llo'Immgin*, and *Jeunesse* were both struck because the pleadings failed to provide sufficient legal context, in the form of law or state action under a law, to ground the *Charter* analysis.

F. SCOPE OF SECTION 7 PROTECTION

[83] As in *Lho'Immgin* and *Jeunesse*, the Applications assert infringements of life, liberty, and security of the person, under s.7 of the *Charter* relying on international agreements and opinions, without providing a sufficient legal context in the form of a specific impugned Canadian law or specific state action under law.

[84] Section 7 states:

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

[85] The first step in assessing whether s.7 rights are infringed, is to establish that the interest in respect of which the claim is asserted falls within the ambit of s.7.

[86] If the interest in the claim falls within the ambit of s. 7 protection, then the right is said to be "engaged."

[87] If a right is engaged, the court will continue to the second step of the analysis, which is, to assess whether the degree of the deprivation of the s.7 right accords with the principles of fundamental justice.⁸³

[88] If the individual interest asserted does not fall within the ambit of s.7 protection, then no s.7 right is engaged and the analysis is complete, and no claim is made out.⁸⁴

⁸³ *Blencoe v British Columbia Human Rights Commission (Blencoe)*, 2000 SCC 44 at [para 47](#);; most recently *R v Ndhlovu* 2022 SCC 38 at [para 51](#).

⁸⁴ *Janvier v Saskatchewan Workers Compensation Board*, 2021 SKCA 170, at paras [23-24](#); and *Herold Estate v Sidhu*, at para [123-124](#).

[89] The s.7 interests alleged to be engaged in the Applications are life, liberty, and security of the person, accordingly this analysis will begin by assessing the scope of each of these interests to ascertain whether the Applications allege sufficient supporting facts to engage s.7 protection.

Life

[90] The right to life protects an individual from state action that increases the risk of death in a manner that is inconsistent with the principles of fundamental justice.

[91] In *Operation Dismantle*,⁸⁵ the Supreme Court struck a claim alleging that state action of permitting cruise missile testing on Canadian soil posed a threat to the lives of Canadians, within the meaning of s.7, because it sought protection for the rights of all Canadians from the risks of nuclear war due to the government's decision to allow cruise missile testing.

[92] The majority decision in *Operation Dismantle* concluded that the link between the cabinet decision permitting testing and the increased risk of nuclear war was incapable of proof because it was impossible to ascertain, by proof, how foreign actors might react to cruise missile testing.⁸⁶ While the majority chose not to strike the claim on justiciability, the majority opinion expressly endorsed Justice Wilson's conclusion that the Canadian doctrine of justiciability is founded on the appropriate role of the courts as the forum for the resolution of disputes.⁸⁷

[93] Wilson J.'s decision in *Operation Dismantle* concurred with the majority opinion in result only. In declining to recognize a right of all Canadians to protection for life from the cabinet decision, Wilson J. emphasized that the proposed breadth of the s. 7 claim, a right of all Canadians to be protected from an executive decision to allow testing, created a problem for courts because no principled way existed for the court to distinguish between the particular risk (of nuclear war)

⁸⁵ 1985 CanLII 74.

⁸⁶ *Operation Dismantle*, at [para 25-30](#).

⁸⁷ *Operation Dismantle* at [para 38](#).

and risks other states might pose to all Canadians *vis a vis* other Canadian national defense policy decisions.⁸⁸

- [94] In [*Canada \(Attorney General\) v PHS Community Services Society*](#),⁸⁹ the Supreme Court confirmed that a specific prohibition against drug possession under the [*Controlled Drug and Substances Act*](#)⁹⁰ engaged the rights of addicted clients of a safe injection site because the statutory prohibition had the effect of prohibiting health professionals from providing supervised life-saving services at the injection site; thereby, effectively depriving clients of health-protecting and life-saving services. The legislative prohibition was determined to be constitutional, however, because it conferred discretion on the Minister to exempt people from the prohibition.
- [95] The minister's decision to deny the exemption to the safe injection site was determined to be a state act that founded the unconstitutional breach of the addicted persons' rights to life and security of the person, and the court ordered the Minister to grant an exemption from the CDSA prohibition.
- [96] In [*Canada \(Attorney General\) v Bedford*](#),⁹¹ the Supreme Court struck specific Criminal Code provisions which engaged the life interest, and interests in liberty and security, of persons. The impugned Criminal Code prohibitions aimed at preventing public nuisance and the exploitation of sex workers. In regard to the bawdy house prohibition, the court explained "A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House, while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose." In regard to the prohibition on communicating in public for the purposes of prostitution, the Court alluded to increased risk to life in its comment: "If

⁸⁸ *Operation Dismantle*, the Wilson J. opinion, at [para 103](#).

⁸⁹ 2011 SCC 44.

⁹⁰ S.C. 1996, c. 19, [CDSA] ss. 4(1), [\(3\)](#) to [\(6\)](#), [5\(1\)](#), [10\(1\)](#), [55](#), [56](#).

⁹¹ 2013 SCC 72.

screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established."⁹²

[97] As with all *Charter* jurisprudence on s.7, the claims in *Operation Dismantle*, *PHS* and *Bedford* concerned the impact of specific legal acts (cabinet decision, a specific state act in the form of a minister's decision, or, specific legal prohibitions in the *Criminal Code*) on risks to a s. 7 interest.

Liberty

[98] The scope of the liberty right protects an individual's personal autonomy. It includes protection for freedom from physical restraint and is central to the right not to be arbitrarily detained: *R v Harrison*.⁹³ The liberty right is also engaged where state compulsion or prohibitions affect important fundamental life choices:⁹⁴

The purpose of affording constitutional protection against the deprivation of liberty is to safeguard the entitlement to 'make decisions of fundamental importance free from state interference'.⁹⁵

[99] As with the life interest, the jurisprudential framework for assessing whether the liberty interest is engaged orients around the impact of identified statutory provisions or specific acts of state compulsion under a law.

[100] In *R v Morgentaler*,⁹⁶ specific criminal prohibitions on abortion deprived women of the fundamental choice to terminate pregnancy in breach of the liberty interest, according to Wilson J.'s opinion. Wilson J. characterized the choice to terminate pregnancy as a decision with profound psychological, economic, and social consequences for a woman, involving:

⁹² 2013 SCC 72 at para 158.

⁹³ 2009 SCC 34 at [para 53](#).

⁹⁴ *Blencoe v British Columbia Human Rights Commission*, 2000 SCC 44.

⁹⁵ *Harrison*, citing *Blencoe*, at [para 53](#)

⁹⁶ [1988] 1 SCR 30.

“...powerful consideration militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound and ethical one as well. Her response to the decision to terminate a pregnancy will be the response of the whole person” (*Morgentaler* at p.171).

- [101] Specific legislative provisions which had the effect of depriving parents of the decision to decline lifesaving medical treatment for an infant, engaged parental liberty in *B(R) v Children’s Aid Society of Metropolitan Toronto*.⁹⁷
- [102] In *R v Clay*,⁹⁸ the liberty interest was described as an interest touching on “the core of what it means to be an autonomous human being blessed with dignity and independence in matters that can properly be characterized as fundamental and inherently personal”⁹⁹ and was determined not to include protection for a person's lifestyle choice to smoke recreational marijuana.
- [103] In *AC v Manitoba (Director of Child and Family Services)*[AC],¹⁰⁰ the Supreme Court determined that specific legislative provisions that deprived mature minors of the choice to decline medical treatment, until the age of 16, engaged the liberty right because the impugned provisions deprived all minors from making a fundamental decision about whether to undergo medical treatment, irrespective of their capacity to understand the consequences of their decision.
- [104] In *Carter v Canada (Attorney General)*,¹⁰¹ the Supreme Court determined that a specific criminal prohibition on assistance in dying effectively deprived competent individuals of any choice over their bodily autonomy, and engaged rights to physical and psychological liberty, because it condemned people who were grievously and irremediably ill to a life of severe and intolerable suffering with a cruel choice between taking their own life

⁹⁷ [1995] 1 SCR 315.

⁹⁸ 2003 SCC 75.

⁹⁹ *Clay* at [para 31](#).

¹⁰⁰ 2009 SCC 30.

¹⁰¹ 2015 SCC 5.

prematurely, often by violent and dangerous means, or suffering until death from natural causes.¹⁰²

[105] A specific regulatory prohibition on the possession of non-dried forms of medical marihuana infringed the liberty rights of medical marihuana users to make “reasonable medical choices” without the risk of imprisonment,¹⁰³ in *R v Smith*.¹⁰⁴

[106] An instance of state-caused procedural delay in a human rights proceeding did not engage the liberty interest because there was no evidence that the state-caused delay in question prevented the claimant from making any fundamental personal choices in *Blencoe*.¹⁰⁵

[107] All cases on liberty, as life, involve an analysis based on the impact of a specific legislative provisions or specific state action in the form of legislative provisions posing risks to physical liberty or fundamental choices, or specific instances of state action interfering with physical liberty or fundamental choice.

Security of the Person

[108] The right to security of the person protects "a notion of personal autonomy involving control over one's bodily integrity free from state interference,"¹⁰⁶ The right to security of the person is engaged by state interference with "an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering."¹⁰⁷

¹⁰² *Carter* at [para 4](#)

¹⁰³ *Smith* at [para 17](#)

¹⁰⁴ 2015 SCC 34.

¹⁰⁵ *Blencoe* at [para 54](#).

¹⁰⁶ *Carter* at [para 64](#).

¹⁰⁷ *Carter* at [para 64](#).

- [109] In the criminal context, the risk of penal sanctions engages security of the person because specific penal sanctions create a risk that individuals will be imprisoned. Specific Criminal Code prohibitions on assisting suicide and abortion have been determined to interfere with physical and psychological integrity of individuals in breach of the security of the person interest.¹⁰⁸
- [110] Legislative provisions conferring the authority to obtain an order for state imposed medical treatment engage security of the person because the provisions contemplate state-imposed interference with a person's bodily integrity. The Supreme Court concluded that security of mature minors was engaged by specific legislative provisions that authorized the state to obtain a custodial order to impose life-saving medical treatment on persons under the age of 16, without consent, without regard to a mature minor's capacity to decline medical treatment.¹⁰⁹
- [111] Child custody hearings constitute specific state action that engage security of the person. State separation of families resulting from a custody hearing are recognized to constitute a direct state interference with psychological integrity of the parent amounting to a "gross intrusion" into the private and intimate sphere of the parent-child relationship.¹¹⁰
- [112] A ministerial decision not to grant an exemption from a prohibition on drug possession at a safe injection facility, under specific provisions of the *Controlled Drug and Substances Act*, constituted state action that engaged the security of the clients of a safe injection site by depriving them of potentially life saving medical care.¹¹¹
- [113] All *Charter* claims for security of the person, as with claims for life or liberty, orient around an impugned law or a specific instance of impugned state action.

¹⁰⁸ see *Morgentaler* at p 56 and [Rodriguez re British Columbia \(Attorney General\)](#) [1993] 3 SCR 519 at p 587.

¹⁰⁹ [AC v Manitoba \(Director of Child and Family Services\)](#), 2009 SCC 30.

¹¹⁰ [New Brunswick \(Minister of Health and Community Services\) v. G. \(J.\)](#), 1999 CanLII 653 (SCC), [1999] 3 SCR 46 ; [Winnipeg Child and Family Services v. K.L.W.](#), 2000 SCC 48

¹¹¹ [PHS](#) at [para 91](#)

G. EQUALITY RIGHTS

[114] A s. 15 claim must allege facts that, if accepted, support the conclusion that a protected group is being deprived of substantive equality before or under the law on the basis of a protected group characteristic.

[115] “Adverse impact discrimination” occurs where the impact of a seemingly neutral law or state action, in the administration of a specific legal framework, disproportionately affects members of protected groups on the basis of an enumerated or analogous grounds, by indirectly singling out members of the group for differential treatment.¹¹²

[116] Demonstrating a s.15 infringement based on adverse impact poses more hurdles than a claim for direct legislative discrimination, because the claimant bears the onus of establishing that although the specific law purports to treat everyone the same way, the application of the law has a disproportionately negative impact on a group, or individual, that can be identified by factors relating to enumerated or analogous grounds.¹¹³

[117] To demonstrate a breach of s. 15 by law, or state conduct under a law, a claimant must establish that the law or state conduct:

Create[s] a distinction that is based on enumerated or analogous grounds, on its face or in its impact; and impose[s] a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.¹¹⁴

[118] In *Sharma*, the majority emphasized that each step of the framework for s. 15 analysis must be assessed independently. “The conclusion that an impugned law has disproportionate impact on a protected ground does not automatically lead to a finding that a distinct impact is discriminatory”.¹¹⁵

¹¹² *R v Sharma*, 2022 SCC 39 at [para 29](#).

¹¹³ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para 64, cited at [para 42](#) of *Sharma*.

¹¹⁴ *Sharma*, at [para 28](#).

¹¹⁵ *Sharma* at [para 31](#).

[119] To establish the first step of a discrimination claim, there must be evidence that the impugned law affects one group differently from the effect the impugned law has on other people to whom the law applies.

[120] The first step asks whether the impugned action "creates or contributes to" a disproportionate impact on a claimant group based on a protected ground, in relation to a non-claimant group.

[121] This first step, therefore, entails alleged facts in a claim, that, if accepted, give the court the ability to compare the impact of the impugned law on the complainant group and the impact of the impugned law on other groups or the general population.¹¹⁶

Causation of s.15 deprivation at step 1

[122] On the element of causation, at the first step of s.15, it is important to distinguish between an impugned law (or specific state action) that "causes or contributes to" an adverse impact and an adverse impact that exists independently of impugned law.

[123] While the impugned law need not be the only or even the dominant cause of disproportionate impact, specific law (or specific state action) must be demonstrated to contribute to the alleged adverse impact, at the first stage of the analysis, for a claim to succeed.¹¹⁷

[124] Evidence that Indigenous offenders were disproportionately represented in the prison system was not sufficient to establish that the specific provisions of the *Criminal Code* contributed to a disproportionate impact on indigenous offenders on the basis of indigeneity, in *Sharma*. The claimant's failure to lead evidence of how the specific

¹¹⁶ *Sharma* at [para 31](#).

¹¹⁷ *Sharma* at [para 45](#).

impugned provision affected non-Indigenous offenders, in comparison to its effect on indigenous offenders, was fatal to the claim in *Sharma*.¹¹⁸

[125] The requirement of evidence enabling a comparison between the impugned law's impact on the asserted group and a comparator group was also dispositive of a discrimination claim under human rights legislation in *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*.¹¹⁹

[126] While the court in *VANDU* accepted that Indigenous people, disabled people, and racialized people were disproportionately represented in the contingent of homeless individuals affected by the impugned program, the discrimination claim failed because no evidence demonstrated that protected grounds were a factor in the adverse treatment that these groups experienced, as compared with individuals who were affected by the program who did not have protected characteristics.

[127] Both *Sharma* and *VANDU* establish that claims for state discrimination require allegations that specific laws (or specific state action under a law) impact groups with protected characteristics, in a manner that differs in degree from, the way the same specific law or specific state action under a law, impacts other people, and that the difference in impact is based on the protected characteristic.

[128] To establish the second step in the s. 15 analysis there must be evidence that the impugned law perpetuates discrimination. The second step asks whether the impact imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage.

¹¹⁸ *Sharma* at [para 71](#).

¹¹⁹ 2018 BCCA 132, (*VANDU*) (application for leave to appeal to the Supreme Court dismissed, January 31, 2019, [No. 38157](#)).

H. THE ELEMENT OF STATE ACTION

[129] The *Charter* applies to state action in the form of legislative action (law) or state action (application of a law) under a legal framework.

[130] Section 32 of *The Constitution Act, 1982* states that:

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[131] Section 24(1) establishes a remedy for state infringement of an individual's *Charter* rights:

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[132] Section 52 establishes the principle of constitutional supremacy and the authority for courts to address unconstitutional laws:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[133] In *Big M*, Dickson J. explains that s.24 establishes potential for courts to confer remedies for individuals whose rights have been infringed by impact of legislative implementation. Whereas, s.52 sets out the principle of constitutional supremacy, protecting against unconstitutional laws.¹²⁰

¹²⁰ *Big M* at paras [37-38](#).

- [134] For remedial capacity of courts to be triggered, under ss. 52 or 24, a law or conduct must first be identified to ground the analysis.
- [135] What policy choice is in the best interests of the people of Saskatchewan is a question of democratic governance, not law.
- [136] The Government has constitutional authority over electricity generation and regulatory design under s.92A of the *Constitution Act, 1867*.
- [137] All *Charter* jurisprudence orients around an allegation that a specific legal provision or a specific state act has infringed an individual's *Charter* right to protection.

I. APPLICATION

- [138] The Applications impugn no specific legal provision or specific state act under legislation, they impugn the wisdom how the Government plans to construct two power plants and the adequacy of how the Government has chosen to exercise its discretion to limit greenhouse gas emissions over a four-year period.
- [139] The Applications cite provisions of the [*Power Corporation Act*](#)¹²¹ and [*The Crown Corporations Act, 1993*](#)¹²² for the purpose of establishing the legal relationship between the Government, Crown Investment Corporation, and SaskPower¹²³ and for the purposes of asserting duties owed by directors of crown corporations.¹²⁴
- [140] The Applications also refer to the [*Management and Reduction of Greenhouse Gases Act*](#), [Act]¹²⁵ and [*Management the impact of Reduction of Greenhouse Gases \(General and*](#)

¹²¹ RSS 1978, c P-19.

¹²² SS 1993, c. C-50.101.

¹²³ Pleadings at para24.

¹²⁴ Pleadings at para 8.

¹²⁵ SS 2010, c M-2.01.

Electricity Producer) Regulations,¹²⁶[Regulations] for the purpose of demonstrating that the Government has chosen to allow increased emissions targets for short term periods during four-year compliance periods.¹²⁷

[141] The Application also refers to the Regulations to support an assertion that the titular reference to "Management and Reduction of Greenhouse Gases" establishes that the Act and the Regulations are designed with the purpose of managing and reducing greenhouse gases.

[142] More particularly, the Applications assert that s. 7(2) of the Regulations is non-compliant with "the precautionary principle" (which the Pleadings propose as a principle of fundamental justice), insofar as the Regulations confer discretion on the minister to promote the reduction of greenhouse gas emissions and the sequestration of greenhouse gases", as opposed to a positive obligation to limit emissions in accordance with the *Paris Agreement* standards.¹²⁸

[143] Decisions on long term electricity generation policy and decisions on what emission limits are achievable in a given compliance period are not specific state action as contemplated by *Charter* jurisprudence, they are executive decisions made by the state to balance polycentric policy objectives, about what is in the best interests of the people of Saskatchewan.

[144] Decisions on the whether to construction a power station, or how a power station is to be constructed, or the stringency of emissions limits in a given year, are subject to many policy considerations, and many laws and regulatory limits.

[145] The implementation of electricity generation requires a myriad of state actions and decisions under laws.

¹²⁶ M-2.01 Reg.

¹²⁷ Originating Application at para 44.

¹²⁸ Proposed Amended Originating Application, May 2024 at paras 75 and 77.

- [146] Permits and licences are required, environmental legislation must be complied with, many decisions, based on the advice of economists, scientist, engineers and other experts, inform a multitude of smaller decisions that, in turn, inform decisions on how best to, or whether to, invest in specific types of electrical power generation facilities, or what emissions limits will be feasible in view of anticipated power supply demand. and affordability, or whether nuclear power poses a viable alternative, not to mention competing policy objectives and statutory compliance concerning the labour force and employee safety.
- [147] The requisite element of a specific legal act of state to found a claim under the *Charter* is not reflected in the Applications.
- [148] Since the first *Charter* decision of the Supreme Court of Canada, in [Law Society of Upper Canada v Skapinker](#),¹²⁹ the legal framework to assess *Charter* compliance has oriented around the constitutionality of a law or specific state action under a law.
- [149] At its broadest, the law grounding a *Charter* claim may be authority conferred on the legislature under the *Constitution Act, 1867*.¹³⁰
- [150] [La Rose](#)¹³¹ concerned the alleged impact of the federal government's conduct in relation to obligations under the *Canadian Net-Zero Accountability Act*, and *Mathur* concerned the alleged impact of legal conduct on rights in relation to the *Cap and Trade Cancellation Act*.¹³²
- [151] The point is, that the framework for courts to assess constitutionality of government action requires the pleading to identify a specific statutory framework under which state action is taken.

¹²⁹ 1984 CanLII 3; [1984] 1 SCR 357.

¹³⁰ *Operation Dismantle*

¹³¹ 2023 FCA 241[*La Rose*].

¹³² S.O. 2018, c. 13.

J. THE ELEMENT OF STATE ACTION IS REQUIRED TO ASSESS THE IMPACT OF INTERNATIONAL LAW

[152] The Applications challenge the Respondent's decision to allow increased emissions during a compliance period, but they provide no legal authority for why a short-term allowable increase in emissions is illegal, beyond a vague reference to international norms.

[153] The Respondent submits that international norms are irrelevant because the Applications do not establish a reasonable cause of action for *Charter* rights.

[154] It is only if a claim exists, that international law affects the interpretation of rights.

[155] International law and norms may influence government action. In cases where a Charter right is engaged, international law may influence the interpretation of *Charter* rights.

[156] Customary international law that is *jus cogens*, such as prohibitions on crimes against humanity or torture, are incorporated into Canadian common law, absent conflicting law,¹³³ but Canada's international treaty commitments do not bind provinces, unless the province in question has committed to meet those commitments,¹³⁴ as occurred in *Mathur* and *La Rose*.

[157] The impact of international law on a claim is irrelevant, however, if a pleading, does not establish that a *Charter* right is engaged.

[158] At their core, the Applications assert impact and propose remedies without identifying the requisite element of a cognizable state action under a law to found a *Charter* rights claim.

[159] The impact of long-term policy decisions on people in Saskatchewan, concerns democratic governance not law.¹³⁵

¹³³ [Nevsun Resources Ltd v Araya](#) 2020 SCC 5, at [para 94](#).

¹³⁴ *Nevsun* at [para 85](#).

¹³⁵ [Citizens for Public Justice v Saskatchewan](#) at [paras 24-26](#).

[160] *Charter* rights are legally limited every day. Laws are and state action under laws are coercive and individuals are impacted, psychologically, and physically, by laws and their administration. Limits on individual freedom and legal impact on individuals is allowed and required in a democracy, so long as the laws or action taken by the state under laws is demonstrably justifiable in a free and democratic society.

[161] Before a state is required to justify its conduct under s.1, rights must be demonstrated to exist, and existing rights must be demonstrated to have been infringed.

III. CONCLUSION

[162] Without identifying an impugned law or state action under law, the Applications fail to define the controversy in questions with clarity and precision.

[163] Without identifying an impugned law or state action under law, the Applications fail to give fair notice of the claim which has to be met by the Respondent so that the Respondent may direct its evidence to the issues disclosed.

[164] The Respondent's entitlement to know what it is that the Applications assert against the respondent is not legally clear because the Applications fail to identify an impugned law or state action. Thus, the Respondent's right to know the nature of the defence it can raise in answer to the claim has not been met by the Applications.

[165] Nor do the Applications assist the court in investigating the truth of the allegations, because the Applications fail to articulate the elements required to ground a *Charter* rights claim.

[166] Beyond justiciability in relation to the separation of powers, the Applications are also non-justiciable, as a reasonable cause of action, because they fail to articulate the element of a law, or a specific action under a law, that is required to provide the court with a measurable legal standard upon which *Charter* analysis can be undertaken

[167] Without impugning a law or specific state action under law, the Applications provide the defendants with no cognizable legal case to defend.

[168] The Applications set out a claim based on policy with no legal component.

[169] Within the separation of powers, it is the legislature's role is to legislate ([*Hunter et al. v Southam Inc.*](#)

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.¹³⁶

[170] At their core, the Applications seeks broad ranging and long term court supervision of the executive and legislative bodies without establishing the requisite elements of state action required to ground a *Charter* rights claim.

¹³⁶ [1984] 2 SCR 145 at p. 659

PART VI: NATURE OF RELIEF REQUESTED

[171] For the reasons given, above, the Respondent submits that the Court should dismiss the appeal of *Dykstra*.

[172] The Respondent does not seek costs on this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 14th day of February, 2026.



C. Elaine Thompson K.C.
Senior Crown Counsel

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