Federal Court  Cour fédérale

Date: 20201116

Docket: T-211-20

Citation: 2020 FC 1059

Ottawa, Ontario, November 16, 2020

PRESENT: Madam Justice McVeigh

BETWEEN:

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

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

I. Introduction

[1] "Canada accepts that climate change affects everyone and will affect Canadians in the future. Canada's position is that this legal proceeding does not constitute an appropriate or

functional vehicle for these issues to be addressed by this Court.” This statement was made in the context of this motion by the Defendant, Her Majesty the Queen in Right of Canada [Canada], asking the Court to strike the Statement of Claim.

[2] The Plaintiff [Dini Zi’] declared that there is reasonable prospect that the claims will succeed despite the fact that “Each of the plaintiffs’ constitutional grounds can be characterised as claims that Canadian law has not yet recognised” (emphasis added). The claim, which relates to climate change, is brought by Dini Ze’ Lho Imggin and Dini Ze’ Smogilhgim on behalf of two Wet’suwet’en House groups of the Likhts’amisyu (Fireweed) Clan: the Misdzi Yikh (Owl House) and Sa Yikh (Sun House).

[3] At the parties request the Court rendered the decision without a hearing.

[4] The Dini Ze’s position is that Canada’s policy objectives for the reduction of greenhouse gas [GHG] emissions by 2030 are insufficient. As a result, they say Canada’s failure to enact stringent legislation is contrary to common law principles of: “public trust”, “equitable waste”, and the “constitutional principle of intergenerational equity”. The Dini Ze argued that there is a violation of their rights under sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*] and that the *Charte*r breaches are is not justified under section 1.

[5] The Dini Ze’ allege that Canada has breached its duty under section 91 of the *Constitution Act, 1867* by not ensuring low GHG emissions under the peace, order and good

government [POGG] powers. By doing so, Canada is generally violating their constitutional rights by not adhering to international environmental agreements that Canada ratified.

[6] The Dini Ze' seek wide ranging remedies in their application including declaratory, mandatory and supervisory orders to keep mean global warming to between 1.5˚C and 2˚C above pre-industrial level by reducing Canada's GHG emissions. These reductions relate to Canada's commitments made in the multi-national *Paris Agreement*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740 (entered into force 4 November 2016) [*Paris Agreement*].

[7] Canada asks that the Statement of Claim be struck because it is not justiciable, discloses no reasonable cause of action and the remedies are not legally obtainable.

[8] I will grant this motion and strike the Statement of Claim without leave to amend, as it is not justiciable for the reasons that follow.

II. Background

[9] The *Paris Agreement* is a multi-national agreement entered into by various nations in order to combat climate change and to work forward to sustain a low-carbon future. The agreement is a hybrid of both legally binding and non-binding provisions. Canada ratified the agreement on October 5, 2016 and the agreement entered into force on November 4, 2016. Canada is one of 189 countries to have ratified the agreement.

[10] The Dini Ze' claim that Canada has repeatedly failed, and continues to fail, to fulfil its duty. This includes the duty not to infringe on their constitutional rights because they have not implemented the laws, policies, and actions needed to ensure that Canada meets its commitment made in the *Paris Agreement* to keep mean global warming below 2˚C above pre-industrial levels. They claim that they have seen the effects of climate change through forest insect infestations, wildfires, and a decline in forest food animals and salmon on their territories. The Dini Ze' assert that as the climate situation worsens the predicted harms will increase.

[11] The Dini Ze' argue that there was a violation of their constitutional rights under sections 7 and 15 of the *Charter*, and that Canada has breached its duty under section 91 of the *Constitution Act, 1867* by not making laws under the POGG power.

[12] Their position is that their rights under section 7 of the *Charter* are violated because there is:

a. an increase of the risk of premature death from global warming, including air pollution, extreme weather events, and vector-borne disease;
b. a violation of their right to liberty by increasing the risk to their individual and collective autonomy, including their freedom to choose where to move and life on their territories and in their communities;
c. a violation to their right to security of the person by increasing the risk of injury, disease and mental health from global warming, including air pollution, extreme weather events, and vector borne diseases; and
d. an increased risk of psychological and social trauma.

[13] The Dini Ze' submit that the laws are contrary to the principles of fundamental justice because they do not accord with:

- the common law principles of public trust and equitable waste,
- international agreements and the laws governing them, and
- Canada's publicly declared objectives to comply with international agreements on climate change.

[14] The Dini Ze' assert that the violations of their rights under section 15(1) of the *Charter* are because of the denial to younger and future generations of equal protection and benefit of the law. This is, they argue, due to the current laws allowance of high GHG emitting current and future operating projects.

[15] The relief sought in the action is wide-ranging and unique in some aspects. The Dini Ze' seek :

a. a declaration that the Defendant has a common law and constitutional duty to act consistently with keeping mean global warming to between 1.5˚C and 2˚C above pre-industrial levels;
b. a declaration that the Defendant has a constitutional duty to maintain the POGG of Canada under section 91 of the *Constitution Act, 1867* by keeping Canada's GHG emissions consistent with a mean global warming of between 1.5˚C and 2˚C above pre-industrial levels;
c. a declaration that the Defendant has a constitutional duty to not infringe on the Plaintiffs' section 7 *Charter* rights, including the future member's rights by failing to act to keep Canada's GHG emissions consistent with a mean global warming of between 1.5˚C and 2˚C above pre-industrial levels;
d. a declaration that the Defendant has a constitutional duty not to infringe on the Plaintiffs' section 15 *Charter* rights, including the future member's rights by failing to act to keep Canada's GHG emissions consistent with a mean global warming of between 1.5˚C and 2˚C above pre-industrial levels;
e. an order requiring the Defendant to amend each of its environmental assessment statutes that apply to extant high GHG emitting projects so as to allow the Governor in Council to

cancel Canada's approval, under any of those statutes, of the operation such a project in the event that the defendant will demonstrably not be able to, or does not, meet its *Paris Agreement* commitment to keep Canada's GHG emissions consistent with a mean global warming of between 1.5˚C and 2˚C above pre-industrial levels;

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

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

III. Issues

[16] The issues are:

A. Is the Claim justiciable?

B. Does the Statement of Claim disclose a reasonable cause of action?

C. Are the remedies sought legally available?

IV. Analysis

A. *Is the Claim Justiciable?*

(1) The Law on Justiciability

[17] Justiciability involves a court asking if an action is a subject matter that is appropriate for a court to decide. The Supreme Court of Canada [SCC] had to make this determination in *Highwood* and found that the ecclesiastical issues as raised were not justiciable (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wa*ll, 2018 SCC 26 at para 35 [*Highwood*]).

[18] I have not heard justiciability - a very complex issue - described more succinctly than by Justice Rowe, writing for the SCC, where he paraphrased Justice Wakeling's dissent from the Alberta Court of Appeal:

> By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding: Court of Appeal reasons, at paras. 82-84, per Wakeling J.A.
>
> (*Highwood* at para 35 paraphrasing *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 at paras 82-84)

[19] Not everything is suitable to be judged in a court of law. Generally, questions of policy, while not outside of the jurisdiction of the courts, should be left to the executive branches to determine, and law making to the legislature. It is hard to imagine a more political issue than climate change.

[20] However, just because it is a political issue does not mean that there cannot be sufficient legal elements to render something justiciable. Justiciability of a policy/political issue is not always a black and white determination. Blurring of these lines happens sometimes, and a court will intervene especially when the allegations are of the constitutionality of policy or law, or a breach of someone's constitutional rights. Canadian courts have ruled on matters of abortion (*R v Morgentaler*, [1998] 1 SCR 30; 44 DLR (4th) 385), physician assisted death (*Carter v Canada (AG)*, 2015 SCC 5), and even international border agreements (*Canadian Council for Refugees, et al v Canada*, 2020 FC 770).

[21] But, if policy choices are to be justiciable, they must be translated into law or state action (*Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 105).

[22] Justiciability continues to be grappled with by all levels of court. Justice Pardu in *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 (leave to appeal to SCC refused, 2015 CanLII 36780) [*Tanudjaja*], provides a good overview of justiciability in Canada. The Ontario Court of Appeal upheld the motion judge's conclusion that the action against the approach taken by the governments of both Canada and Ontario in regards to housing and homelessness was not justiciable:

> 20 As indicated in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.), at 90-91, "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity."
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> 21 Having analysed the jurisprudence relating to justiciability in Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), the author identified several relevant factors, at p. 162:
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> > **Political questions, therefore, must demonstrably be unsuitable for adjudication.** These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. **Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.**
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> **…**
>
> 22 **A challenge to a particular law or particular application of such a law is an archetypal feature of *Charter* challenges under s. 7 and s. 15.** As observed in *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), at p. 545:

> In considering its appropriate role the Court must determine whether the question is purely political in nature, and should therefore be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.

(*Tanudjaja* at paras 20-22 [emphasis added])

[23] Recently, the unanimous SCC in *Highwood* noted that:

> [t]here is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter…. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" [Boundaries of Judicial Review: The Law of Justiciability in Canada (2nd ed. 2012), at p. 7]

(*Highwood* at para 34)

[24] Separation of the branches of government often lead to a court finding a matter not justiciable:

> …the functional separation among the executive, legislative and judicial branches of governance has frequently been noted.…
>
> > Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper

> deference for the legitimate sphere of activity of the other.
>
> In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited.
>
> (*Doucet-Boudreau v Nova Scotia (Department of Education)* 2003 SCC 62 at paras 33-4 [*Doucet-Boudreau*], citing McLachlin J (as she then was) in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 389).

(2) Justiciability-Analysis

[25] The Dini Ze' indicated that they would respond to the justiciability arguments, as well whether there were reasonable causes of action under each of the three constitutional grounds: i) section 91 of the *Constitution Act, 1867*, and ii) sections 7 and iii) 15 of the *Charter*. So I will follow that order with no particular significance or importance attributed to the order.

(a) *Justifiability of the Section 91-Peace, Order and Good Government (POGG) Claims*

[26] Section 91 of the *Constitution Act, 1867* states that:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces;…

[27] The permissive nature of the wording shows that the constitution allows for the construction of laws, and that it does not demand that particular laws be enacted for particular

ends, nor has it ever been interpreted to mean such. The POGG power is there to allow the federal government to legislate in particular circumstances, but does not create a duty on the government to legislate.

[28] The Dini Ze', in their response to this motion, argued that with amendments, defects in their section 91 claim would be cured. I disagree.

[29] In defence of the motion the Dini Ze' contend that Canada wrongly focuses their justiciability argument on the "….separate functions of the branches of government within the constitutional framework.… [The Dini Ze'] respond that the judicial branch is authorized to consider cases that raise important constitutional issues that affect the other branches of government." They say that the issues are novel in part because of the unique circumstances. The uniqueness comes from the fact the two plaintiff houses are an Indigenous kinship group with distinct obligations to a number of status holders. As well, they present that climate change is a real and threat to the global commons and to the survival of communities and their members.

[30] The Dini Ze' presented their arguments as :

> 19. The plaintiffs' claim that the peace, order and good government power imposes limits to make laws that cumulatively are inconsistent with both its constitutional duties to the plaintiffs and its international commitments to keep global warning to well below 2˚C because they fail to address the current and future catastrophic impacts of GHG emissions."
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> 20. The reference to Canada's international commitments to help keep global warming to well below 2˚C is to identify a scientifically, internationally and parliamentary accepted benchmark that may limit future global warming to non-catastrophic levels. It is not intended to base the plaintiffs' claim on the principle that Canada's international agreements create a

> legal obligation enforceable in Canadian domestic courts. The plaintiffs take no position on that issue in this proceeding.

[31] The Dini Ze' then go on to claim that "Peace, Order and good Government of Canada" indicate a wide law making powers of a state but not such that the legislative power is not "wholly restrained". They rely heavily on the UK's interpretation of the phrase in the two *Bancoult* cases: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 [*Bancoult 1*]; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 [*Bancoult 2*].

[32] Similarly, the Dini Ze' allege they face a harm like what was suffered by the Indigenous Chagossians when they were exiled by the UK government. The Dini Ze's position is that Canada is "not living up to its own standards of what good government requires", and that they are "not asking the court to impose its conception of what good government requires…[but to] hold the elected government to its own standards of good government. To do so they say is not an abuse of the courts' constitutional role".

(3) Conclusion of Justiciability-POGG

[33] The POGG power of the federal government is a tool to facilitate federalism in Canada. It is generally thought of as having three branches: The "gap" branch; the "national concern" branch; and the "emergency" branch (see Peter Hogg, *Constitutional Law of Canada*, 5th ed supplemented (Toronto: Thomson Reuters Canada, 2019) ch 17 generally).

[34] The “gap” branch is meant to fill gaps in the scheme of distribution of powers. Examples given by Professor Hogg is the power to incorporate companies or jurisdiction over offshore minerals. The “national concern” branch is for when matters that arise as provincial matters “attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws…” (*Ontario (Attorney General) v (Canada (Attorney General)*, [1896] AC 348, 5 Cart BNA 295).

[35] Finally, there is the “emergency branch” which has generally been used during wartime, but was used in 1976 to uphold a federal anti-inflation act as an emergency measure (Hogg; *Reference re Anti-Inflation Act, 1975*, [1976] 2 SCR 373, 68 DLR (3d) 452). These are all issues with the division of powers within Canada; that is, who has the *right* to enact a particular law.

[36] The POGG powers under section 91 empower the federal Parliament to enact laws in these situations. There is nothing in the law that suggests that it imposes a duty on the government, nor does the change in wording do anything to force Parliament to enact, change or repeal specific laws in the manner the Dini Ze’ suggests.

[37] The Dini Ze’ rely heavily on UK courts examination in the 2000s of the meaning of peace, order and good government. Both *Bancoult* cases (1 and 2) were actions brought by Indigenous people who challenged the British government’s authority to keep them from living in the Chagos Archipelago, their homeland, which was ceded to Britain from France in the Napoleonic Wars.

[38] As background, these cases related to the British government moving the indigenous population from Diego Garcia so that the United States could build a military base. In doing so, Britain turned the archipelago into the separate territory called the British Indian Overseas Territory [BIOT], and enacted the BIOT Order (1965) and the Immigration Ordinance 1971. The repatriation ban was in the Immigration Ordinance.

[39] The Dini Ze' argue that the decision in *Bancoult* 1 and *Bancoult* 2 provides authority for Canada's POGG power, under section 91 of the *Constitution Act, 1867* and permits a novel but arguable claim that the Crown's legislative powers are "not so wide as to permit Canada to contribute to an existential and catastrophic harm".

[40] While it may be true that *Bancoult* allows for the possibility of a novel POGG power, those decisions are not binding on this Court. Further, the decisions deal with the lawfulness of the orders regarding the BIOT, and not with a positive duty to legislate. I am not persuaded by the arguments of the Dini Ze'.

[41] The Dini Ze' also rely on *Mikisew Cree First Nation v Canada*, 2018 SCC 40 at paragraphs 36 and 37: "[p]arliamentary sovereignty allows the legislature to make and unmake laws subject to its constitutional authority", while parliamentary privilege provides that "the law-making process is largely beyond the reach of judicial interference." This, they argue, Canada conceded when Parliament ratified in 2016 the *Paris Agreement* and the 2019 non-binding resolution that the "catastrophe can be avoided only by taking measures that counter current emission trends." The Dini Ze' submit that "Canada not living up to its own standards of what

good government requires." To do so is asking the Court to "hold the elected government to its own standards of good government." They indicate that this novel claim is within the Court's constitutional role.

[42] The Dini Ze' claim that a restatement of their pleadings would change the positive obligation to enact laws into a limitation. Where Canada has "exceeded and continues to exceed its law-making powers under the [POGG] provisions of s. 91" which "limits [Canada's] powers [to] pass laws that are inconsistent with its constitutional duties to the plaintiffs and with its international commitments…"

[43] The Dini Ze' say that the laws passed breach section 91's POGG powers because they did not allow for the environmental protection that would satisfy Canada's obligations under the *Paris Agreement*, or that they permitted GHG producing industry though legislation.

[44] I find that this reformulation of the Statement of Claim does not create an obligation on Canada to legislate. Justice Rennie in *Kreishan v Canada (Minister of Citizenship and Immigration)*, 2019 FCA 223 (leave to appeal to SCC refused, 2020 CanLII 17609) [*Kreishan*], dealt with positive rights being asserted in a section 7 *Charter* claim regarding the safe third country agreement. Justice Rennie rejected the plaintiffs' arguments that there was a positive obligation on the state because the SCC has rejected this duty (*Kreishan* at para 136; *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 82 [*Gosselin*]). I find this jurisprudence applicable to the re-characterization of what the Dini Ze' now argues is a limitation.

[45] Further, the SCC in *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 [*Kazemi*] indicated that the "existence of an article in a treaty ratified by Canada does not automatically transform that article into a principle of fundamental justice" (*Kazemi* at 149). The only binding international law in a dualist legal system like Canada's would be a treaty plus conventional law, or proof of applicable customary international law (*Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 95, *Kazemi* at 149). So, treaties, such as the *Paris Agreement*, are only given effect through Canada's domestic law–making process through legislation.

[46] These are cases which deal with the *Charter*, not POGG; but the arguments transfer to the current argument of the Dini Ze'. I agree with Canada's position that this is a semantical change, and the substance of the argument is that they are asking for section 91 to dictate that the government enact specific laws, despite the proposed changes to the wording of their pleadings. There cannot be a positive duty imposed by international obligations on the peace, order and good government of Canada—the POGG power has never been used in such a way, and the language of the statute provides that even this novel attempt must fail.

[47] When the Dini Ze' are asking this Court to rule on the constitutionality of the failure to enact what they consider adequate laws to fulfil international obligations, they are really asking the Court to tell the legislature to enact particular laws. This is not the role of the Court and thus not justiciable. Enacting laws is within the jurisdiction of Parliament. If those laws violate the constitution, then there can be striking out, reading down, or reading in of provisions.

(4) Justiciability of the s. 7 *Charter* Claims & s. 15 *Charter* Claims

[48] Though the Dini Ze' argued the sections of the *Charter* separately regarding justiciability, I will deal with them together.

[49] The Dini Ze' indicate that the Statement of Claim meets the requirements for both sections 7 and 15 *Charter* claim in order to give a rise to a reasonable cause of action. There are no arguments regarding the justiciability of these claims in the Plaintiffs' Memorandum of Fact and Law.

[50] There is nothing inherently non-justiciable about the claims that the *Charter* sections 7 and 15(1) were breached because of government laws. There are, however, no specific laws or state actions that breach the rights of the Dini Ze' being pled (see *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 365).

[51] Similarly, this happened in *Tanudjaja* where there was no challenge to:

> …any particular legislation, nor do they allege that the particular application of any legislation or policy to any individual has violated his or her constitutional rights. They do not point to a particular law which they say :in purpose or effect perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15 (1), they do not identify any particular law which violates the s. 7 right to life, liberty and security of the person
>
> (*Tanudjaja* at para 10)

[52] The plaintiffs in *Tanudjaja* submitted that the general governmental approaches violated their rights to adequate housing. This is similar to the argument presented in the present case by the Dini Ze'. In *Tanudjaja*, Justice Pardu relied on the SCC in *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545, to determine if a question was purely political in nature and not suitable for the judicial branch. Justice Pardu said: "[a] challenge to a particular law or particular application of such a law is an archetypal feature of *Charter* challenges under s. 7 and s. 15" (*Tanudjaja* at para 22).

[53] The motions judge in *Tanudjaja* had found that with section 7 that there were no positive *Charter* rights, which required the defendants to provide affordable, adequate, accessible housing, and there had been no identifiable principles of fundamental justice. Also, regarding the alleged section 15 breaches, the court found that "the actions and decisions complained of do not deny the homeless a benefit Canada and Ontario provide to others or impose a burden not levied on others, meaning there can be no breach of s. 15 of the Charter." (*Tanudjaja* at para 17). The motions judge found that the homelessness and inadequate housing were not "analogous grounds under s. 15." The motions judge concluded that the issues were not justiciable given that the implementation would cross into the institutional boundaries reserved for the legislators. This conclusion that the matter was not justiciable was upheld by the Ontario Court of Appeal with a dissent, but leave to the SCC was denied (*Tanudjaja* at para 19).

[54] Canada rightly notes that the Dini Ze' have made "'broad and diffuse' claims that encompass environmental assessment legislation…the approvals of natural resource projects that

were subjected to federal and/or provincial review, and international agreements and domestic policy relating to climate change".

[55] With no specific law pointed to, and the broad claims made by the Dini Ze', it is difficult to find sufficient legal elements in the *Charter* claims for them to be justiciable. The reason being that there is no impugned law or action to make a comparison necessary to do an analysis under section 1 (*R v Oakes*, [1986] 1 SCR 103).

[56] Complexity itself does not mean that the Court cannot adjudicate an issue; but when the issue spans across various governments, involves issues of economics and foreign policy, trade, and a host of other issues, the courts must leave these decisions in the hands of others. The majority in *Doucet-Boudreau*, while upholding the order of the trial judge, offers in their conclusion a warning, and reminds us "courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities" (*Doucet-Boudreau* at para 87).

[57] Further, the remedies sought to attempt to simplify a complex situation in a way that would be ineffective at actually addressing climate change given the polycentric and international nature of the problem. The changes being ask for are more akin to a change in policy than a change in law.

[58] *Gosselin* left the door slightly open regarding positive obligations that may be imposed on a government to remedy violations of the *Charter* being justiciable. However, this is not such a case. There is no impugned law or action to evaluate, there are no specific allegations of

government actions, and the positive obligations (or limitations) sought by the Dini Ze' are vague and without the focus to affect the desired results.

(5) Justiciability of Remedies

[59] The remedies sought are at paragraph 15 (above).

[60] Canada said that it is not possible to do a section 1 *Charter* analysis because the pleadings do not identify a specific law that infringes the Dini Ze's sections 7 and 15 rights. In this action, where no specific law is identified, and a number of government departments and programs allegedly are infringed, it is difficult to construct an appropriate remedy. The jurisprudence has not completely closed that door to a declaration but it is not necessary to go there given the other issues related to remedies as outlined below.

[61] The Dini Ze' cite *Khadr v Canada*, 2010 SCC 3 [*Khadr*] to stand for the proposition that a section 1 analysis is not always necessary when seeking declaratory relief. They quote paragraphs 39 and 46:

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

[62] *Khadr* concerned foreign affairs and the violation of a Canadian citizen while being detained by a foreign government. In that case, Mr. Khadr was alleging a specific government action (the conduct of Canadian state officials), and the relief sought was done so because the Court correctly left it to the executive branch to engage in diplomacy with a foreign government. The declaratory relief granted in *Khadr* was of the nature that a breach had been committed, whereas the relief sought in the present case is of a forward-looking nature. The Dini Ze' do allege existing harm, but there are causation issues with those claims, as explained elsewhere in these reasons. In order to meaningfully analysis the *Charter* issues raised by the Dini Ze' in this case, the Court would need specific laws to evaluate under section 1 to determine the constitutionality of the alleged breach.

[63] In Canada, any real effect on Canada's GHG emissions will be dependent on the co-operation of the provincial governments. This Court does not have the statutory jurisdiction to mandate any such co-operation between the different levels of government meaning that any remedies would quite possibly be ineffective.

[64] The Dini Ze', in remedy "g" (above at paragraph 15), asked the Court to assume a supervisory role to ensure that the laws are passed. I find that remedy not appropriate in this case. If the Court granted this remedy, it would assume an almost a regulatory or tribunal role to ensure legislation was passed and targets are met by that legislation. That is not the role of the Court (see *Canada (Attorney General) v Jodhan*, 2012 FCA 161 [*Jodhan*]).

[65] In contrast, the courts have ruled that sometimes it is appropriate for them to take on advisory roles, such as in *Doucet-Boudreau*. In *Doucet-Boudreau,* a slim majority did uphold the trial judge's order of reports from the government and for the Court to retain jurisdiction, much as the Dini Ze' are asking in this case. However, that decision was about noting the progress of building schools that were constitutionally required. The difference is that there is a straight line between the breach of language rights in *Doucet-Boudreau* and the building of the schools; there is no such straight line in this case. Climate change is a complex and multifaceted problem, with a host of provincial, municipal and international actors making supervision impossible or meaningless in this case. While it is possible that type of remedy is appropriate in some cases, this is not the case.

[66] In *Jodhan* the Federal Court of Appeal [FCA] was well aware of the role of the judicial branch. *Jodhan* was a judicial review where it was alleged that blind Canadians were denied equal access to benefit from online government information and services. They alleged that this was discrimination based on physical disability, and thus violated her section 15 *Charter* rights. The FCA found that the supervisory order granted by the trial judge should be overturned because "…such a remedy in the present matter is not a just and appropriate remedy in the circumstances" (*Jodhan* at para 177). The argument presented by the Attorney General in *Jodhan* was that this supervisory order "does not respect the division of powers between the courts and the executive", and thus was not an "appropriate and just" remedy under the *Charter* (*Jodhan* at para 165). The FCA found among other reasons that there was no legal or factual basis to justify the supervisory order and overturned it, including that "…the Judge's remedy ventures in to the

realm of the executive" (*Jodhan* at para 179). I find that the situation in the present case is analogous and not within my position in the judicial branch.

[67] Though not in their list of remedies, the Dini Ze' in their written submissions sought the remedy of reading in. Granting this remedy is also problematic. The Dini Ze' argue it is appropriate because they have identified sufficiently the specific laws in the Statement of Claim being *Canadian Environmental Assessment Act*, SC 1992, c 37, *The Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s52 and the *Impact Assessment Act*, SC 2019, c28, s1 [*Impact Assessment Act*]. The Dini Ze' indicate that the principle purpose of each statue is such that it is consistent with the claims in the Statement of Claim.

[68] Though the *Impact Assessment Act* is in force, the *Canadian Environmental Assessment Acts* are not. Reading in to legislation that is no longer in force is not a remedy that should be granted.

[69] Reading into the remaining act without further specificity is also not a remedy that is appropriate given the alleged causes of action regarding policy decisions. Reading in must be done with respect to the division of powers. As Iacobucci J (as he then was) noted:

> Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for

> the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
>
> (*Vriend v Alberta*, [1998] 1 SCR 493 at para 136 [*Vriend*])

[70] The Dini Ze' in the present case have not invited a dialogue, or explained how the reading in of a provision (the exact nature of which is unspecified) would foster "mutual respect" for the other branches of government, and their intent (*Vriend* at para 137). If the Court is to read in to the legislation, there must be specificity in the relief sought.

[71] Cumulatively all of the issues regarding the remedies sought add to this not being justiciable.

(6) Conclusion on Justiciability

[72] I find that this matter is not justiciable as it is the realm of the other two branches of government. This broad topic is beyond the reach of judicial interference. I do not find that there is a sufficient legal component to anchor the analysis as this action is a political one that may touch on moral/strategic/ideological/historical or policy-based issues and determinations within the realm of the remaining branches of government.

[73] In the present case, not only is there not sufficient legality, but the remedies sought are not appropriate remedies, but rather solutions that are appropriate to be executed by the other branches of government.

[74] Looking to the guidance from *Highwood*, this Court does not have the institutional capacity to adjudicate this matter, and a set of declarations and orders flowing from this Court would not be an "economical and efficient investment of judicial resources" that would have a real effect on climate change. There are also vast economic, social, and international elements to any decision on the limitation of industry and trade.

[75] Further, the Dini Ze' in this case are asking the Court to make serious changes to legislation, without directing the Court to specific violations in the law. This request is not as comparatively simple as striking down (*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295), severance (*R v Morales*, [1992] 3 SCR 711), reading in (*Vriend*) or reading down (*R v Grant*, [1993] 3 SCR 223) provisions or laws.

[76] I cannot say it any better than Justice Barnes did in *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183. Justice Barnes' decision was fully adopted by the FCA (2009 FCA 297, leave to appeal to SCC refused, 2010 CanLII 14720). That case considered whether the Minister had a duty to prepare a climate change plan that was compatible with the *Kyoto Protocol Implementation Act*, SC 2007, c 30:

> All of the above measures are directed at **ensuring compliance with Canada's substantive Kyoto commitments through public, scientific and political discourse, the subject matter of which is mostly not amenable or suited to judicial scrutiny.**
>
> (*Friends of the Earth v Canada (GIC)*, 2008 FC 1183 at para 43)

[77] The issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government.

[78] For the reasons above, I find that the claim is not justiciable.

B. *Does the Statement of Claim disclose a reasonable cause of action?*

[79] My finding that the matter is not justiciable is determinative of the matter, but if I am wrong, I will examine whether I would strike the claim without leave to amend because of it being plain and obvious that there is no reasonable cause of action.

[80] The test for striking claims is whether it is plain and obvious, assuming the facts plead to be true, that the Dini Ze's claims disclose no reasonable cause of action (*Federal Courts Rules* SOR/98-106 r 221; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]). The facts pled are assumed to be true, unless they are manifestly incapable of being proven (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 87 [*Atlantic Lottery*]).

[81] Further the pleadings must be read "as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies" (*Operation Dismantle v The Queen*, [1985] 1 SCR 441, at 451 [*Operation Dismantle*]).

[82] The threshold for striking is high, but:

> [a]t times, a proposed cause of action is so obviously at odds with precedent, underlying principle, and desirable social consequence that regardless of the evidence adduced at trial, the court can say with confidence that it cannot succeed. But this is not often the case, and our common law system generally evolves on the basis of the concrete evidence presented before judges at trial.
>
> (*Atlantic Lottery* at para 88)

[83] Canada claims that the Dini Ze' based the facts in the Statement of Claim on assumptions and speculations. In contrast, the Dini Ze' say the cause of global warming is the GHG emissions and the effect on them are not speculative or "manifestly incapable of being proven."

(1) POGG claim

[84] I find that it is plain and obvious that the POGG cause of action will fail. The justiciability section dealt with the Dini Ze's POGG argument and those same arguments are applicable. In summary, there is no recognized duty to legislate based on section 91 of the *Constitution Act, 1867*, and hence there is no cause of action on that basis.

[85] Despite the high threshold, I find that it is plain and obvious that this cause of action will not succeed.

(2) *Charter* Claims (s. 7 & 15)

[86] Canada argues that the alleged breaching of sections 7 and 15(1) of the *Charter* is inherently speculative and hypothetical, and therefore it is "plain and obvious" that the Statement of Claim does not disclose a reasonable cause of action.

[87] In support of this, they cite *Operation Dismantle*, where the plaintiffs in that case argued that there was heightened danger from permitting the testing of a missile over Canadian airspace, which would allegedly increase the threat of nuclear war, and potentially deprive Canadians of their section 7 rights (*Operation Dismantle* at 448).

[88] The SCC in *Operation Dismantle* rejected the claim because it was inherently speculative. They found that there were too many future contingent events to link the government action with the potential breach. As Dickson J said: “the causal link between the actions of the Canadian government, and the alleged violation of appellants' rights under the Charter is simply too uncertain, speculative and hypothetical to sustain a cause of action” (*Operation Dismantle* at para 3).

[89] *Operation Dismantle* is a case where the speculation is clear, there is, however, little doubt that the effects of climate change are real, and both sides readily admit this fact. While there is a causal link between the emissions of GHG to climate change, because of the myriad of provincial and international actors, proving a causal link between specific Canadian laws and the effects felt because of climate change would be near impossible given the specific laws are not pled.

[90] That is not to say that *Operation Dismantle* is a perfect fit for this case—there is a major difference between concluding that the dangers of nuclear war are heightened because of the testing of a cruise missile, and the proposition that section 7 *Charter* breaches can come from a government’s environmental policy. Connecting the dots from that policy to the alleged harm is decidedly more difficult. This causal connection issue discussion is below starting at paragraph 93.

[91] Another problematic area results from the Dini Ze' not specifying any specific law or government action responsible for the violation of sections 7 or 15(1) of the *Charter*. Without the specific law or government action pointed to, there can be no reasonable cause of action.

[92] The FCA noted in a recent decision that:

> All *Charter* analysis begins with an informed understanding of the legislation in question. The legislation must first be interpreted according to the accepted principles of statutory interpretation (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21). And in examining the effects of the legislation, as is necessary when applying the *Charter*, we must understand how it operates against the backdrop of accepted common law and administrative law principles (see, e.g., *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385 at 1049; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555 at paras. 43-45; *R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204 at para. 78; *Ruth Sullivan, Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) at 315).
>
> (*Brown v Canada (Minister of Citizenship and Immigration)*, 2020 FCA 130 at para 21 [*Brown*])

[93] In *Brown*, the applicant was pointing to specific provisions within a statutory scheme: the *Immigration and Refugee Protection Act*, and the *Immigration and Refugee Protection Regulations*. The breach of the *Charter* rights alleged spanned more than one provision, but there were specific allegations made to specific laws. Without the Dini Ze', in the present case, pointing the Court to specific legislation or government action allegedly infringing on their *Charter* rights, it is an impossible task to evaluate an alleged breach of the *Charter*.

[94] The Dini Ze' do, in their Statement of Claim, list some legislation which they see as having a goal to "encourage or permit emissions" and those with the goal to "reduce emissions". However, without reference to specific sections and their role in causing specific breaches of the *Charter* this is akin to asserting that Canada's legislation governing crime and punishment, such as (but not limited to) the *Criminal Code*, the *Canada Evidence Act*, and the *Firearms Act*, and arguing that it violates a client's *Charter* rights, and that the courts must order the federal government to fix the problem. This is not how *Charter* claims work.

[95] While it hypothetically might be true that there is legislation which is causing *Charter* breaching harm to the Dini Ze', on the facts of this case the relationship to any breach is "manifestly incapable of being proven", as referenced in *Atlantic Lottery*, above.

[96] Causation is important in this analysis. If there can be no causation proven, then there can be no chance of success. Discussion of the necessary causal connection for the engagement of section 7 of the *Charter* is found in *Canada (AG) v Bedford* 2013 SCC 72 [*Bedford*]. In *Bedford* the relatively low standard of "sufficient causal connection" is required for section 7 of the *Charter* to be engaged. *Bedford* explains that:

> A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link.
>
> (*Bedford* at para 76)

[97] The parties disagree what the appropriate standard is for causal connection. The Dini Ze' asked the Court to consider a novel use of the negligence standard of "material contribution". They cite *Clements v Clements*, 2012 SCC 32 [*Clements*]. That decision describes the law of material contribution in negligence as follows:

> (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
>
> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.
>
> (*Clements* at para 46)

[98] Only in exceptional circumstances has this type of causation been recognized in tort but **never** in *Charter* claims.

[99] The Dini Ze' argue that the novelty of the claim should not be a reason to strike it. It is true that novelty alone is not a reason to strike a claim but at the same time, it does not mean that novel claims will never be struck (*Atlantic Lottery* at para 19). There must be some basis in fact to argue that there could be a material contribution claim for *Charter* breaches, and that does not exist in this case.

[100] The Dini Ze' simply stated that this would be the appropriate standard of causation that ought to be applied because "[t]he reasoning applied by the Supreme Court of Canada in its analysis of the negligence tort cases in *Clements* applies equally to the global warming tragedy of the atmospheric commons." While there could be a "but-for" argument resulting from two or more actors because of GHG emissions, the Dini Ze' are not arguing that. They argue that not legislating in line with the *Paris Agreement* is the cause of the breach of section 7 of the *Charter*.

[101] This argument does not succeed. Firstly, no other states' laws are subject to the *Charter*, so no other states' lack of legislating in line with the *Paris Agreement* could be a *Charter* breach. Secondly, the Dini Ze' have provided no evidence that other states are breaching *Paris Agreement* duties, and because of that, there is contribution to the harm allegedly suffered.

[102] Therefore, while the Dini Ze' could potentially have a *Charter* claim for government laws allowing for breaches of the *Charter*, this is not possible on the facts and pleadings of this case.

[103] See above: Justiciability- sections 7 and 15 of the *Charter* reasons for the integrated findings regarding sections 7 and 15 of the *Charter* also applicable in this section.

[104] I find that it is plain and obvious that there is no cause of action with regards to the sections 7 and 15 alleged *Charter* breaches, for the above reasons.

C. *Are the remedies sought legally available?*

[105] The issues related to remedies are in the reasons in the justiciability section.

(1) Amendment to the Statement of Claim

[106] The Dini Ze' in their responding motion attached an Amended Statement of Claim as an exhibit and then based their defence of this motion on the Amended Statement of Claim. However, Canada's motion was based on the original Statement of Claim but, in their reply, they addressed their arguments to the proposed Amended Statement of Claim.

[107] The FCA in *Collins v Canada*, 2011 FCA 140 at paragraph 26, notes that "In order to strike a pleading without leave to amend, any defect in the pleading must be one that cannot be cured by amendment."

[108] The Dini Ze', for this motion, amended their Statement of Claim to characterize their section 91 relief sought and their legal basis after they said they had mischaracterized it in the original.

[109] The Dini Ze' submit that their amendment to the Statement of Claim that removed any claim that the Government has a positive obligation under the POGG rules, will cure any defects.

[110] Canada sees these amendments as asking the Court to "embark on a public inquiry on a selection of Canada's environmental assessment legislation, approvals of certain natural resource projects and Canada's overall policy on climate change…"

[111] Canada states that the proposed amendments expand the claim. They allege that the amendments still fail to offer a sufficient legal component to prevent the claim from being struck, and does not make the claim the "…appropriate or functional vehicle for these issues to be addressed by this Court".

[112] Canada's position is that the amendment is not a substantive change to the argument, and that it will "simply turn what was first pled as a positive duty to legislate into a negative one." They assert that they "cannot be found to have acted in an *ultra vires* manner by not acting".

[113] In this case, the Court does not have to speculate on what the amendments would be to the Statement of Claim because the Dini Ze' actual amendments and arguments are in front of the Court. The Court did scrutinize in the reasons how the Amended Statement of Claim would stand up to on a Motion to Strike.

[114] These amendments will not cure the action. I do not see changes in the substance of the arguments so that the action is justiciable or that the causes of action are no longer plain and obvious that they will fail. I will strike the claim without leave to amend the Amended Statement of Claim.

(2) Conclusion on Cause of Action

[115] Despite the high threshold, I find that it is plain and obvious that this cause of action will not succeed.

V. Conclusion

[116] I will grant the motion and strike the Statement of Claim without leave to amend.

[117] No costs were sought by Canada and none will be awarded.

ORDER IN T-211-20

THIS COURT ORDERS that:

1. The statement of claim is struck without leave to amend.

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-211-20
STYLE OF CAUSE:	DINI ZE' LHO'IMGGIN ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MCVEIGH J.
DATED:	NOVEMBER 16, 2020

WRITTEN REPRESENTATIONS BY:

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