

Federal Court of Appeal Permits a Novel Climate Change Action Against the Government of Canada to Proceed (*La Rose v. Canada*)

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In *La Rose v. Canada*, 2023 FCA 241 (CanLII), the Federal Court of Appeal reversed two decisions of the Federal Court that had struck out climate change claims against the Government of Canada. The Federal Court of Appeal concluded that climate change issues may be justiciable. A claim of a right to a healthy and livable environment, though novel under section 7 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), was allowed to proceed. The claim was not doomed to fail. The Court held that the door has not shut on “positive rights” claims under section 7. The Court also held that such claims are not manifestly incapable of proof.

The appellants in the first decision (the “*La Rose*” appeal) were fifteen children and youth who were between the ages of 10 and 19 at the time they filed their statement of claim. They resided across Canada in seven provinces and one territory. Together, the youth appellants initiated an action against Canada for its failure to address the problem of climate change. They sought remedies under sections 7 and 15 of the *Charter*, contending that the impacts of climate change “interfere[d] with their physical and psychological integrity and their ability to make fundamental life choices.” They asserted that Canada’s legislative response to climate change has a disproportionate effect on their generation and that they have suffered—and will continue to suffer—the consequences, given their vulnerability and age.

The appellants in the second decision (the “*Misdzi Yikh*” appeal) are two Wet’suwet’en House groups that comprise the Likhts’amisyu (Fireweed) Clan, Misdzi Yikh (Owl House) and Sa Yikh (Sun House) and each of the House groups’ *dini ze’* or Head Chief (the Dini Ze’). The Dini Ze’ of each Wet’suwet’en House group embodies their House and is responsible for the protection of the House’s members, possessions, and territories. They contended that Canada has contributed to climate change in a way that poses a “threat to their identity, to their culture, to their relationship with the land and the life on it, and to their food security.” They alleged that the legislative response to climate change and executive actions exacerbate the threat and violate their protections and rights under sections 7 and 15 of the *Charter*. They stated in the claim that the legislation and regulations authorizing the current levels of greenhouse gas (“GHG”) emissions, along with the continued and past approvals of GHG-emitting projects, resulted in Canada breaching its obligations under international law in the *Paris Agreement*, 12 December 2015, U.N.T.S. 3156 (p. 79) (“*Paris Agreement*”). This constitutes a breach of domestic law, as the targets in the *Paris Agreement* have been enshrined in section 7 of the *Canadian Net-Zero Emissions Accountability Act*, S.C. 2021, c. 22.

The Court of Appeal noted Canada’s response:

Canada responded to each of these actions with a motion to strike. Canada’s position is that GHG-induced climate change is real, scientifically established and objectively measurable. GHG emissions are having demonstrable negative impacts on the Canadian environment, the economy and the health of Canadians, now, and will have grave consequences in the future unless urgently addressed. However, Canada contended that the appellants’ claims were not justiciable, or, if they were justiciable, disclosed no cause of action on the basis that there is no nexus between the harm suffered and to be suffered and the impugned legislation (at para.5).

The Court of Appeal surmised that the relevant inquiry on motions to strike a claim is whether it is plain and obvious that the pleaded claims have no reasonable prospect of success (see *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para 14 and *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61 at para. 18). The Court reiterated the three principles that set out the success test:

1. The facts are to be taken as proven unless they are manifestly incapable of proof.
2. The pleading must be read generously, and, recognizing that the law is not static and evolves to address new and emerging situations, a motions judge must err on the side of permitting novel but arguable claims to proceed to trial.
3. The onus is on the defendant who seeks to establish that there is no reasonable cause of action.

Both groups asserted additional grounds for their actions:

- The “public trust doctrine” – that Canada breached its public trust obligations (i.e., its duty to preserve and protect public resources);
- The “peace, order and good government/ general power doctrine” – that Canada’s power to make laws for the peace, order and good government imposed a positive obligation to enact laws that effectively reduced its GHG emissions;
- The “section 15 of the *Charter of Rights and Freedoms* doctrine” – that climate change has a rapidly unfolding effect on all Canadians and on northern and Indigenous communities in particular –and climate change affects youth disproportionately and legislation is discriminatory in breach of section 15.

The Federal Court of Appeal dismissed these additional grounds. The Court zeroed in on the justiciability issue and section 7 of the *Charter*.

The Court of Appeal did provide some insight into the development of the common law and cautions on novel issues at paras.119 and 120:

The law cannot remain stagnant. That said, courts must be cautious in spurring its development: too quick and the law becomes unpredictable and capricious, too slow and justice falls behind and loses its relevancy. Doctrines of law that are now well-established were, at their inception, the targets of motions to strike. Witness, for example, the history of the tort of conspiracy...; negligent misrepresentation...; the concept of neighbourhood and the duty of care ...; and the defence of non-infringing alternatives....

Therefore, the fact that a pleading raises a novel point of law, with few jurisprudential antecedents, cannot justify striking it out. Neither the length and complexity of the issues nor the potential for the defendant to raise a strong defence should prevent the plaintiff from having its case tried. It is, in the language of the Supreme Court, “[o]nly if the action is certain to fail because it contains a radical defect” that the claim should be struck out ... To the contrary, as the history of the common law demonstrates, it may be essential that a novel, but as-yet unprecedented argument proceed to an in-depth analysis. It is only in this way that the common law can evolve to respond to the challenges of modern society.

In discussing the issue of justiciability, the Court of Appeal noted that two considerations motivate the justiciability analysis. The first is constitutional, the second more pragmatic. The constitutional consideration is:

... the court’s respect for its role in a Westminster parliamentary democracy. The wisdom of political and policy choices made by Parliament in response to social, economic and environmental problems is separate and apart from their constitutionality. Courts do not second-guess the wisdom of Parliament’s choice; rather, they assess the validity of the resulting law and its application and must be mindful of the boundaries between the two. The justiciability inquiry involves a weighing of the appropriateness, as a matter of constitutional judicial policy, of the courts deciding a given issue or instead deferring to the other branches of government (at para.26)

Justiciability distills to a single question as to whether the claim has a sufficient legal component upon which a court can adjudicate. The Court of Appeal disagreed with the lower court that the claims are not justiciable simply because the question of climate change is complex or because the legislation reflects a political choice on how to address the problem. The Court of Appeal noted that the appellants linked section 7 of the *Charter* to the failure of Canada to meet its commitments to the *Paris Agreement*. The claims did not seek to tell Canada how to fulfill its commitments.

The pragmatic consideration arises from the limitations on a court’s ability to fashion and implement remedies. There is a relationship between the question of whether there is a *Charter* breach and whether the requested remedies are viable. It may be only when the nature, extent and source of the violation is identified that the appropriateness of the remedy can be assessed. Sometimes there may be no remedy to be enforced, but a declaratory remedy may be granted nonetheless. Even if some of the remedies sought push the boundaries of the court’s competence, a claim should not be characterized, *a priori*, as non-justiciable. As a practical matter, remedies are often amended in the course of the litigation and judges are required, when granting constitutional remedies, to exercise a principled discretion. The remedies must be tailored to the breach, if a breach is ultimately found.



The Court of Appeal found that the lower courts erred in concentrating on the remedies and finding that the remedies were overly prescriptive, vague and devoid of meaning.

In discussing the issue of the application of section 7 of the *Charter*, the Court of Appeal noted at para. 89:

Section 7 of the Charter states that “[e]veryone 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.” To establish a breach of section 7, then, claimants must show that the “law interferes with, or deprives them of, their life, liberty or security of the person”, and that this deprivation “is not in accordance with the principles of fundamental justice...”

The lower courts looked at the claims as positive rights claims under the *Charter*. The Court of Appeal, as set out below, noted that this analysis was incorrect.

The Court of Appeal noted at paras. 90 and 92:

[90] Claimants must also demonstrate a causal connection between the impugned action or law and the prejudice they have suffered ... However, claimants need not demonstrate that the state alone is accountable for the prejudice they have suffered...

...

[92] Section 7 and the associated jurisprudence does not confer a right to any particular legislative regime that guarantees or maximizes the life, liberty and security of the person; rather, section 7 protects against the deprivation of these interests. Accordingly, the state has not, so far, been required to “act affirmatively to ensure that each person enjoys a minimum of life, liberty and security of the person” ...To engage section 7, courts have required more than a harm that could be alleviated by state action—there must be a deprivation arising from the state action itself.

The Court of Appeal held that the motions judges erred in striking the claims on the basis that they were positive rights claims, holding at para.105 that:

...The Dini Ze’s pleadings speak to a direct deprivation of their security of the person. They describe, in considerable detail, the effects of climate change on their food security, culture and economies. They attribute this to specific state action including deficient legislative standards and permissive licensing of GHG-emitting projects. Their claim speaks to a current and ongoing deprivation.

In regard to the youth appellants’ claim in the *La Rose* appeal, the Court noted that the claims were less specific, noting:

[106] ...The youth appellants’ claim speaks prospectively; it speaks to the consequences of permissive regulation in the future, and has at its foundation the premise that the plaintiffs have a Charter protected right to live in a world with a stable climate system. However, the youth appellants’ claim, read generously, does refer to deprivations: Canada has consistently missed the emissions targets it has set for itself under the *Paris Agreement* (enshrined domestically in the *Canadian Net-Zero Emissions Accountability Act*) and is similarly on track to miss its future emissions targets. Canada’s failures are deprivations in that they deprive the appellants of the fruits of Canada’s legislated commitments and compromise the appellants’ section 7 interests.

The Court allowed the youth appellants to amend their claim to plead the same specificity as the *Misdzi Yikh* claim.

It will be interesting to see if the claims are established beyond the pleadings stage in the two actions. It appears the door is now open for climate change actions.

The two actions targeted the Canadian Government. Will corporations be the next target for climate change actions? The federal and provincial legislatures have, and will be, implementing legislation addressing climate change with which corporations will need to comply. Actions based on these legislations will meet the requirement for justiciability.

For example, British Columbia has enacted climate action legislation that outlines B.C.’s approach to reducing emissions and transitioning to a low-carbon economy. The legislation targets various industries. For example, in the transportation sector the *Zero-Emissions Vehicles Act* requires automakers to meet an escalating annual percentage of new light-duty zero-emission vehicle (ZEV) sales and leases, reaching 10% of light-duty vehicle sales by 2025, 30% by 2030 and 100% by 2040. The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* requires that all gasoline and diesel fuel have a minimum amount of renewable content. The Act also sets a low carbon fuel standard that requires fuel suppliers to reduce the carbon intensity of these fuels.



In Ontario, Bill 120 which is in first reading, enacts the *Liability for Climate-Related Harms Act, 2023*. The Act provides that a fossil fuel producer is strictly liable for climate-related harms that occur in Ontario if the producer is responsible for GHG emissions at a globally detectable level. The Act contains a definition of “climate-related harms”. Certain evidentiary matters are provided for.

It remains to be seen whether claims under section 7 of the *Charter* will now follow, in addition to any remedy provisions in the legislation. A PDF version is available for download [here](#).

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