Justiciability issues in climate change litigation

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Climate change litigation often raises politically controversial claims and issues. Defendants may seek dismissal of these claims and issues on the ground that they are non-justiciable, being neither capable nor appropriate to be the subject of judicial resolution and relief. This article examines the concept of justiciability and how it has arisen in climate change litigation in three areas of the law: private law, administrative law, and constitutional and human rights law. This examination reveals that although non-justiciability has led to summary dismissal of some climate change-related claims, the modern judicial inclination is to find these claims to be justiciable.

The concept of justiciability

Justiciability refers to the capability and appropriateness of a claim made in a court, or an issue raised by the claim, being adjudicated by the court. Capability refers to the institutional capacity of the court to adjudicate the claim or issue. The claim or issue must be capable of being the subject of judicial resolution and relief.[1] This involves the claim or issue being capable of being considered legally and determined by the application of legal principles and techniques.[2] Appropriateness refers to the legitimacy of the court adjudicating the claim or issue. This involves the court considering whether it is appropriate for the courts to decide the claim or issue instead of deferring to the other branches of government, the legislature and executive.[3] As the Canadian Federal Court of Appeal pithily observed:

> "The question of institutional capacity asks what the court can do; the legitimacy question asks what the court should do. Courts decline to adjudicate issues that ask that they act beyond their institutional capacity or legitimacy."[4]

If a claim or issue is determined to be capable and appropriate to be decided by the court, it is said to be justiciable, if it is assessed not to be capable or appropriate to be decided by the court, it is said to be non-justiciable.[5]

McGoldrick observes that justiciability can be rationalized from procedural, institutional or substantive perspectives:

> "From a procedural perspective it can encompass elements of jurisdiction, standing, mootness, ripeness, admissibility of evidence and even the appropriateness of remedies. From an institutional perspective it can encompass elements of democracy and of the separation of powers and relative institutional competence within a particular constitutional system. Doctrines of justiciability commonly appear as attempts to determine the limits of judicial or quasi-judicial functions and to distinguish them from 'political' functions and processes. As

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[1] Kirk J, "Justiciability" in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 510.

[2] DM Walker, *The Oxford Companion to Law* (Clarendon Press, 1980) 694.

[3] Kirk, n 1, 510.

[4] *La Rose and Others v His Majesty the King in right of Canada and the Attorney General of Canada* 2023 FCA 241 at [24].

[5] McGoldrick D, "The boundaries of justiciability" (2010) 59 ICLQ 981, 983.

> such resort to justiciability can expressly or implicitly reveal the decision-makers' perception of the nature and limits of their role and function. … From a substantive perspective justiciability can encompass the complex or polycentric legal, political or policy nature of the right, interest, decisions or questions at issue. Cross-cutting elements within these three perspectives are whether the court has 'judicial or manageable standards' or the requisite 'expertise' to judge the issues, whether there would be embarrassment in foreign relations and the national or international ramifications of making a particular decision."[6]

As McGoldrick notes, an institutional rationale for justiciability stems from the doctrine of the separation of powers between the three branches of government: the legislature, the executive, and the judiciary. The doctrine of the separation of powers distinguishes between judicial or quasi-judicial functions to be exercised by the judiciary and 'political' functions to be exercised by the legislature and the executive. Justiciability is used as means to demarcate the claims and issues that are properly within the province of the judiciary to adjudicate from those that are not.[7]

In practice, however, the functions of the three branches of government overlap, which makes the separation of powers doctrine a good servant but a bad master in determining the justiciability of claims and issues.[8] Claims before a court may well raise political questions which might be seen properly to be addressed by the political branches of government, the legislature and the executive, but equally might also be seen to be appropriate to be addressed by the judiciary, provided those questions are capable of being considered legally and determined by the application of legal principles and techniques.

Courts in different jurisdictions have identified justiciability as involving this institutional capability of the dispute being determined by the application of legal principles and techniques. Three examples will suffice at this stage, one in each of the United Kingdom, the United States and Australia.

In the United Kingdom, the House of Lords in *Buttes Gas and Oil Co v Hammer (No 3)*[9] observed that the principle of justiciability is "not one of discretion" but rather "is inherent in the very nature of the judicial process."[10] The House of Lords characterised issues in a case as being non-justiciable if there are "no judicial or manageable standards by which to judge these issues".[11]

In the United States, the US Supreme Court in *Baker v Carr*[12] noted that "the nonjusticiability of a political question is primarily a function of the separation of powers."[13] Determining whether a question is non-justiciable involves determining "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."[14]

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[6] McGoldrick, n 5, at 985-986 (citations omitted).
[7] McGoldrick, n 5, at 985.
[8] Warnock C and Preston B J, "Climate Change, Fundamental Rights, and Statutory Interpretation" (2023) 35 JEL 47, 51.
[9] *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 888.
[10] *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 888 at 932.
[11] *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 888 at 938.
[12] *Baker v Carr* 396 US 186 (1962).
[13] *Baker v Carr* 396 US 186 (1962) at 210.
[14] *Baker v Carr* 396 US 186 (1962) at 198.

In Australia, courts have sought, in determining the justiciability of administrative decisions, to distinguish between policy and individualised decisions.[15] A policy decision is "a collective one with high policy ends" which only indirectly affects individual rights and interests, while an individualised decision is one which "involves a direct abrogation of individual rights".[16] Policy decisions invite a political solution; individualised decisions invite a judicial solution.[17] Where the decision directly affects the rights or interests of an individual, Australian courts are more likely to find the challenge to the decision to be justiciable, as legal criteria can be used to decide the claim, but where the decision is a policy one, judicial intervention is less likely, due to the absence of legal criteria to decide the claim.[18]

However, care ought to be taken not to overemphasize the presence of politically contentious issues in a dispute. As the Full Court of the Federal Court of Australia observed in *Century Metals and Mining NL v Yeomans & Anor*,[19] in considering whether a federal Minister's decision to accept the recommendation of an inquiry into proposals to reopen mining operations on Christmas Island:

> "We also accept that the assessment, and the decision to be made thereon, raised matters of public interest which were politically contentious. It does not follow that it is outside the competence of the Court to review the procedures which were applied to the assessment. Most decisions which are subject to review under the *Administrative Decisions (Judicial Review) Act* involve the public interest. Many of them are politically controversial. There is no general principle that decisions which are made in the public interest and/or which are politically controversial are immune from judicial review."[20]

It is not so much the presence of political questions in a dispute as the absence of legal principles and techniques for the court to resolve those questions that is the touchstone for determining the justiciability of the dispute. That is illustrated by the Full Court of the Federal Court of Australia's decision in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*.[21] The Federal Cabinet, in an exercise of prerogative power, had nominated an area of land in the Northern Territory, later included in Kakadu National Park, for inclusion on the World Heritage List under the World Heritage Convention. A mining company with interests in the area sought judicial review of the Cabinet's decision. A threshold question was whether Cabinet's decision was justiciable.

All three of the judges decided Cabinet's decision to nominate the area for inclusion on the World Heritage List was not justiciable. This was not because the decision was carried out in pursuance of a power derived from the common law or the prerogative rather than a statutory source, as such decisions are not immune from judicial review.[22] Rather, the reasons for non-

[15] Finn C, "The Justiciability of Administrative Decisions: A Redundant Concept?" (2002) 30(2) FL Rev 239, 245.
[16] Waye V, 'Justiciability' in Vicki Way and Michael Harris (eds), *Administrative Law* (The Federation Press, 1991) 56.
[17] Mason A, "Administrative Review: The Experience of the First Twelve Years" (1989) 18 FL Rev 122, 124.
[18] Waye, n 15, at 56.
[19] *Century Metals and Mining NL v Yeomans & Anor* (1989) 40 FCR 564.
[20] *Century Metals and Mining NL v Yeomans & Anor* (1989) 40 FCR 564 at 587.
[21] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.
[22] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 277, 278, 280, 301-304.

justiciability were the political subject-matter of the decision and the absence of legal criteria to review that decision. Bowen CJ and Sheppard J relied on the first reason. Bowen CJ noted:

> "However, the whole subject-matter of the decision involved complex policy questions relating to the environment, the rights of Aborigines, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests such as those of the respondents to this appeal. It appears to me that the subject-matter of the decision in conjunction with its relationship to the terms of the [World Heritage] Convention placed the decision beyond review by the court."[23]

Sheppard J agreed with Bowen CJ, adding as a reason that, as the decision was one made by Cabinet, which is essentially a political organisation, "it would be inappropriate for the court to interfere with what it does."[24]

Wilcox J focused less on the political nature of the decision and more on whether the decision affected the rights or interests of an individual and whether there were legal grounds for reviewing the decision. Justice Wilcox's test of justiciability drew on dicta of Lord Diplock in *Council of Civil Services Unions v Minister for the Civil Service*[25] and Mason J in *R v Toohey; ex parte Northern Land Council*:[26]

1. Does the claim affect some person other the decision-maker either by altering rights or obligations of that person which are enforceable by or against them in private law; or by depriving that person of some benefit or advantage which would otherwise reasonably be expected to continue?
2. Is the exercise of the particular prerogative power susceptible of review and on what grounds?[27]

Wilcox J held, applying these two questions in his test of justiciability, that the decision was not justiciable and contained a feature, being primarily involved with Australia's international relations, that made judicial review inappropriate.[28]

Justiciability in climate change litigation

Justiciability has arisen as a threshold question in climate change litigation. This is to be expected. Climate change litigation often concerns the public interest and raises politically controversial issues. Climate change is a complex, polycentric, value-infused, inter-disciplinary, trans-jurisdictional and multi-scalar problem. Greenhouse gas emissions in one jurisdiction have transboundary and global consequences, with the resultant climate change harming the environment in the source jurisdiction and the rest of the world alike. Climate change is legally regulated by overlapping jurisdictions, including international law, such as the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol and Paris Agreement; national law, such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and *Climate Change Act 2022* (Cth); and state law, such as the

[23] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 278-279.
[24] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 278-279.
[25] *Council of Civil Services Unions v Minister for the Civil Service* [1985] AC 374 at 408-409.
[26] *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170 at 219; [1981] HCA 74.
[27] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 302-304.
[28] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 307, 308.

Environmental Planning and Assessment Act 1979 (NSW), *Climate Change (Net Zero Future) Act 2023* (NSW) and *Climate Change Act 2017* (Vic).

Climate change litigation is often legally disruptive, seeking to change conceptions of the law which applies to the dispute at hand and the content of the applicable law, including the interplay between international and domestic law. Climate change poses challenges for the law and concepts in law, which were often formulated without climate change being brought to mind. An example is how climate change challenges conventional notions of causation in law. Developments in climate attribution science are driving a re-assessment of causation in law.[29]

Climate change litigation not only pushes the boundaries of the law, but also raises normative questions with strong socio-political-economic elements. Many of these normative questions go to the heart of a country's responsibilities and capabilities to take climate mitigation and adaptation action. These are questions that are capable and appropriate to be addressed by the political branches of government, the legislature and the executive, but are they also capable and appropriate to be addressed by the judicial branch of government? Concern is raised that too liberal recognition of the justiciability of climate change litigation challenging government action or inaction on climate change will open the floodgates, and risk infringing the separation of powers doctrine.

Climate change litigation is, therefore, challenging courts' conception of justiciability, leading to a re-evaluation of what claims and issues ought to be considered capable and appropriate of being adjudicated by courts. This re-evaluation of justiciability can be seen in three broad areas of domestic law: private law, administrative law, and constitutional and human rights law. I will explain how justiciability has been raised in climate change litigation in each of these areas and identify a modern judicial trend in climate change litigation to find that many, but not all, of the claims and issues in such litigation are justiciable.

Justiciability in private law

Justiciability has arisen in climate change litigation in private law in actions in tort and public trust. Tortious actions on the grounds of nuisance and negligence have primarily been brought in the United States, although more recently, claims have also been brought in the Netherlands, New Zealand, Australia and Canada. Public trust actions have been brought in the United States and Canada. I will deal first with the tortious actions in nuisance and negligence, then the public trust actions.

Tortious actions in the United States

The justiciability of climate litigation in the United States is assessed by reference to the tests enunciated by the United States Supreme Court in *Baker v Carr*.[30] Justice Brennan, delivering

[29] Marjanac S and Patton L, "Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?" (2018) 36 JERL 265; Burger M, Wentz J and Horton R, "The Law and Science of Climate Change Attribution" (2020) 45 Colum J Envtl L 57; Minnerop P and Otto F, "Climate Change and Causation: Joining Law and Climate Science on the Basis of Formal Logic" (2020) 27(1) Buff Envtl LJ 49; Rupert F Stuart-Smith et al, "Filling the evidentiary gap in climate litigation" (2021) 11 Nat. Clim. Change. 651-655; Minnerop P, 'Climate Causality: From Causation to Attribution' in Wewerinke Singh M and Meads S (eds) *Cambridge Handbook on Climate Change Litigation* (Cambridge University Press, forthcoming 2024).

[30] *Baker v Carr* 396 US 186 (1962) at 217.

the opinion of the Supreme Court, enumerated six factors that may identify a question in a case as a non-justiciable political question:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[31]

Justice Brennan explained how these factors are to be used in determining non-justiciability:

> "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a *bona fide* controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."[32]

These factors have been applied by United States courts in assessing the justiciability of questions raised in climate change litigation, whether in tort or public trust, administrative law or constitutional law.

Nuisance claims in the United States

One of the early climate change actions in nuisance was *Connecticut v American Electric Power*.[33] Eight US states representing the interests of more than 77 million people, and various environmental NGOs, sued the five highest-emitting electric power companies in the US. The plaintiffs sought a permanent injunction requiring the defendants to cap their CO_2 emissions and to commit to yearly reductions over at least ten years. On application by the defendants for summary dismissal, the US District Court assessed the threshold question of whether the complaints raised non-justiciable political questions beyond the limits of the Court's jurisdiction.[34] The Court determined that the claim did raise such questions and dismissed it on the grounds of non-justiciability. The Court held that the third *Baker v Carr* factor was particularly pertinent to the case, finding that it was impossible to decide the matter without making "an initial policy determination of a kind clearly for non-judicial discretion".[35] More generally, the Court held that "cases presenting political questions are consigned to the political branches that are accountable to the People, not to the Judiciary, and the Judiciary is without power to resolve them. This is one of those cases."[36]

The District Court's finding was overturned by the Court of Appeals (2nd Circuit),[37] which held that the plaintiffs' actions did not present any of the six non-justiciability factors set out in

[31] *Baker v Carr* 369 US 186 (1962) at 217.
[32] *Baker v Carr* 369 US 186 (1962) at 217.
[33] *Connecticut v American Electric Power* 406 F.Supp.2d 265 (US District Court, 2005).
[34] *Connecticut v American Electric Power* 406 F.Supp.2d 265 (US District Court, 2005) at 271.
[35] *Connecticut v American Electric Power* 406 F.Supp.2d 265 (US District Court, 2005) at 274.
[36] *Connecticut v American Electric Power* 406 F.Supp.2d 265 (US District Court, 2005) at 267.
[37] *Connecticut v American Electric Power* 582 F 3d 309 (United States Court of Appeals, 2nd Circuit, 2009).

Baker v Carr.[38] The Court of Appeals emphasised that the Supreme Court in *Baker v Carr* set a high bar for non-justiciability and that the political question doctrine must be cautiously invoked: "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence".[39] Regarding the third *Baker v Carr* factor, the Court of Appeals held that where the remedy sought by the plaintiffs is not provided for in the *Clean Air Act* or other air pollution statutes, the plaintiffs need not "wait for the political branches to craft a 'comprehensive' global solution to global warming" but rather "may seek their remedies under the federal common law. They need not await an 'initial policy determination' in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century."[40]

The Court of Appeals' findings on justiciability were not disturbed on appeal.[41] The Supreme Court did, however, reverse the Court of Appeals' decision, and remanded the case, on the basis that the federal *Clean Air Act* displaces the federal common law, public nuisance claims against CO_2 emitters sought by the plaintiffs.[42]

In *Native Village of Kivalina v Exxon Mobil*,[43] the native Inupiat village of Kivalina in Alaska brought a federal common law public nuisance suit against oil, power and coal companies, seeking monetary damages from the defendants for their contribution to climate change. The defendants contended that the claims were not justiciable under the political question doctrine. The District Court noted that: "The political question doctrine is a species of the separation of powers doctrine and provides that certain questions are political as opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary."[44] The District Court dismissed the claim, finding that the presence of the second and third *Baker v Carr* factors precluded judicial consideration. The Court was not persuaded that it could reach a resolution of the plaintiff's claim regarding climate change "in any 'reasoned' manner".[45] The claim required the judiciary to make a policy decision outside the scope of the judiciary's power, as "the allocation of fault – and cost – of "global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance."[46]

In 2012, the Court of Appeals (9th Circuit Court)[47] affirmed that decision, applying the Supreme Court's decision in *Connecticut v American Electric Power* that the *Clean Air Act* displaced the federal common law of nuisance, and not on the ground of non-justiciability.

Negligence claims in the Netherlands

[38] *Baker v Carr* 369 US 186 (1962) at 325, 330, 331, 332.
[39] *Baker v Carr* 369 US 186 (1962) at 217.
[40] *Connecticut v American Electric Power* 582 F 3d 309 (United States Court of Appeals, 2nd Circuit, 2009) at 331.
[41] *American Electric Power Co. v Connecticut* 564 U.S. 410 (Supreme Court of the United States, 2011).
[42] *American Electric Power Co. v Connecticut* 564 U.S. 410 (Supreme Court of the United States, 2011) at 415.
[43] *Native Village of Kivalina v Exxon Mobil* 663 F.Supp.2d 863 (United States District Court, ND Cal, 2009).
[44] *Native Village of Kivalina v Exxon Mobil* 663 F.Supp.2d 863 (United States District Court, ND Cal, 2009) at 871.
[45] *Native Village of Kivalina v Exxon Mobil* 663 F.Supp.2d 863 (United States District Court, ND Cal, 2009) at 876.
[46] *Native Village of Kivalina v Exxon Mobil* 663 F.Supp.2d 863 (United States District Court, ND Cal, 2009) at 877.
[47] *Native Village of Kivalina v Exxon Mobil* 696 F 3d 849 (9th Circuit Court, 2012).

In *Urgenda Foundation v The State of the Netherlands*,[48] the Dutch NGO, the Urgenda Foundation, and 886 co-plaintiffs sued the Dutch Government, alleging that by not adequately regulating and reducing Dutch greenhouse gas (GHG) emissions, the State was in breach of the duty of care in negligence under the Dutch Civil Code. The Hague District Court upheld Urgenda's claim, finding that "given the high risk of hazardous climate change, the State has a serious duty of care to take measures to prevent it."[49] The Hague District Court rejected the Dutch Government's argument on justiciability that allowing the claims would be "contrary to the State's discretionary power"[50] and "constitute an interference with the distribution of powers in our democratic system."[51] The Court held that:

> "In a general sense, given the grounds put forward by Urgenda, the claim does not fall outside the scope of the court's domain. The claim essentially concerns legal protection and therefore requires a 'judicial review'. This does not mean that allowing one or more components of the claim can also have political consequences and in that respect can affect political decision-making. However, this is inherent in the role of the court with respect to government authorities in a state under the rule of law. The possibility – and in this case even certainty – that the issue is also and mainly the subject of political decision-making is no reason for curbing the judge in his task and authority to settle disputes. Whether or not there is a 'political support base' for the outcome is not relevant in the court's decision-making process."[52]

The Hague District Court ordered the State to reduce annual GHG emissions to 25% below 1990 levels by 2020.[53]

The decision was upheld on appeal by The Hague Court of Appeal[54] and the Supreme Court of the Netherlands,[55] although on the ground of human rights rather than a duty of care. The appellant courts also rejected the Dutch government's arguments that the claims were non-justiciable. The appellant courts' decisions on the justiciability of the human rights claim are dealt with below.

Nuisance and negligence claims in New Zealand

In *Smith v Fonterra Co-operative Group Limited*,[56] a Māori elder, Smith, raised three causes of action in tort against seven of the largest New Zealand GHG-emitting companies for their contribution to climate change: public nuisance, negligence and a proposed new tort. The proposed new tort involved a duty to cease materially contributing to damage to the climate

[48] *Urgenda Foundation v The State of the Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7196, 2015.
[49] *Urgenda Foundation v The State of the Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7196, 2015 at [4.65], [4.83].
[50] *Urgenda Foundation v The State of the Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7196, 2015 at [3.3].
[51] *Urgenda Foundation v The State of the Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7196, 2015 at [4.94].
[52] *Urgenda Foundation v The State of the Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7196, 2015 at [4.98].
[53] *Urgenda Foundation v The State of the Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7196, 2015 at [5.1].
[54] *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal, Foundation ECLI:NL:GHDHA:2018:2610.
[55] *The State of the Netherlands v Urgenda Foundation*, the Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007.
[56] *Smith v Fonterra Co-operative Group Limited* [2020] NZHC 419.

system, dangerous anthropogenic interference with the climate system, and the adverse effects of climate change. This was termed the "proposed climate system damage tort."[57] Smith sought declaratory relief that the respondents had breached a duty owed to him, or caused or contributed to a public nuisance, and have caused or will cause him loss through their activities. Smith also sought injunctions requiring the companies to cause a peaking of their GHG emissions by 2025, a reduction in their emissions by the ends of 2030 and 2040, and net zero emissions by 2050. The public nuisance and negligence claims were dismissed by the New Zealand High Court as not being justiciable, although the High Court declined to strike out the proposed climate system damage tort claim.

The High Court's decision regarding the public nuisance and negligence claims was affirmed by the New Zealand Court of Appeal in *Smith v Fonterra Co-operative Group Limited,*[58] but the Court of Appeal went further to strike out all three causes of action. The Court of Appeal engaged in an analysis of "whether common law tort claims are as a matter of principle and policy an appropriate vehicle for addressing the problem of climate change."[59] The Court of Appeal came to the conclusion that "the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts. It is quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination."[60] The Court of Appeal gave four main reasons for its finding of non-justiciability. First, the claim was brought against a small subset of those responsible for the alleged harm. Recognising the duty would mean that the defendants would face an indeterminate liability.[61] Second, the scope of activity to be enjoined was not in the domain of tort law.[62] Third, there is no remedy available to the Court which can meaningfully redress the harm complained of.[63] Fourth, bringing proceedings against subsets of emitters is an inherently inefficient and ad hoc way of addressing climate change, which would open the floodgates to indefinite litigation.[64]

In 2024, the Supreme Court overturned the Court of Appeal's decision, allowing the trial to proceed on all three causes of action.[65] The Supreme Court held that the public nuisance claim did not meet the standard for strike out. The Court determined the public nuisance claim was not "bound to fail" and therefore should not be struck out by answering four questions:

> "(a) whether actionable public rights were pleaded;
> (b) whether independent illegality was required;
> (c) whether the 'special damage' rule was met or required; and
> (d) whether there was a 'sufficient connection' between the pleaded harm and the respondents' activities."[66]

[57] *Smith v Fonterra Co-operative Group Limited* [2024] 1 NZLR 134; [2024] NZSC 5 at [4].
[58] *Smith v Fonterra Co-operative Group Limited* [2022] 2 NZLR 284; [2021] NZCA 552.
[59] *Smith v Fonterra Co-operative Group Limited* [2022] 2 NZLR 284; [2021] NZCA 552 at [13].
[60] *Smith v Fonterra Co-operative Group Limited* [2022] 2 NZLR 284; [2021] NZCA 552 at [16].
[61] *Smith v Fonterra Co-operative Group Limited* [2022] 2 NZLR 284; [2021] NZCA 552 at [18]-[19].
[62] *Smith v Fonterra Co-operative Group Limited* [2022] 2 NZLR 284; [2021] NZCA 552 at [24].
[63] *Smith v Fonterra Co-operative Group Limited* [2022] 2 NZLR 284; [2021] NZCA 552 at [25].
[64] *Smith v Fonterra Co-operative Group Limited* [2022] 2 NZLR 284; [2021] NZCA 552 at [27].
[65] *Smith v Fonterra Co-operative Group Limited* [2024] 1 NZLR 134; [2024] NZSC 5.
[66] *Smith v Fonterra Co-operative Group Limited* [2024] 1 NZLR 134; [2024] NZSC 5 at [115].

As to the fourth question, the Supreme Court disagreed with the Court of Appeal that climate change cannot be appropriately addressed by common law tort claims:

> "It may indeed be beyond the capacity of the common law to resolve climate change in fact, but we are not presently convinced, at this stage of the proceeding, addressing only strike out, that the common law is incapable of addressing tortious aspects of climate change."[67]

As the primary cause of action in public nuisance was not struck out, the Supreme Court held that the other causes of action should generally not be struck out either.[68]

Common law duty of care claim in Australia

In *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*,[69] eight Australian children represented by their litigation representative claimed that the Federal Minister for the Environment owed them a duty of care when exercising her power under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to decide whether to approve an extension to a coal mine in New South Wales. The Minister contended that it was inappropriate for the Court to impose a common law duty of care in respect of the exercise of a statutory power involving public policy.[70] The Minister contended that:

> "…her statutory task was steeped in policy considerations appropriately dealt with by her without intervention by the common law. In that respect the Minister contended that how to manage the competing demands of society, the economy and the environment over the short, medium and long term, is a multifaceted political challenge. In the context of climate change, measures to manage those competing demands occur within the context of evolving national and international strategies. It was said that reducing greenhouse gas emissions while simultaneously managing the demands of society and the economy is a complex and nuanced task. The Minister contended that the imposition of a common law duty of care that, by contrast, would render tortious all activities that involve generating (or allowing someone else to generate) material quantities of greenhouse gases is a blunt and inappropriate response."[71]

At first instance, the Federal Court rejected the Minister's argument that the posited duty should be declined for policy reasons.[72] The Court observed that:

> "The elephant in the room may well be that the Minister's statutory task falls within the realm of a contested political issues as to, *first*, whether climate change is real and, *secondly*, if so, whose interests should take priority in addressing it."[73]

But this did not mean that it was inappropriate for the Court to determine legal issues raised by the claim:

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[67] *Smith v Fonterra Co-operative Group Limited* [2024] 1 NZLR 134; [2024] NZSC 5 at [154].
[68] *Smith v Fonterra Co-operative Group Limited* [2024] 1 NZLR 134; [2024] NZSC 5 at [174], [176].
[69] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) 248 LGERA 330; [2021] FCA 560.
[70] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) 248 LGERA 330; [2021] FCA 560 at [474], [477].
[71] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) 248 LGERA 330; [2021] FCA 560 at [478].
[72] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) 248 LGERA 330; [2021] FCA 560 at [489].
[73] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) 248 LGERA 330; [2021] FCA 560 at [483].

> "Courts are regularly required to deal with legal issues raised in the milieu of political controversy. A political controversy can never provide a principled basis for a Court declining access to justice."[74]

The Court upheld the plaintiff's claim, finding that a duty of care should be imposed.[75]

On appeal by the Minister, the Full Court of the Federal Court of Australia unanimously overturned the primary judge's decision and held that a common law duty of care should not be imposed.[76] Amongst other reasons, two of the judges held that it was not appropriate to impose a duty of care because to do so raises policy considerations about the proper response to climate change which makes it unsuitable for judicial determination.[77] The third judge found the posited duty of care was not owed because the plaintiffs did not establish the requisite sufficient closeness and directness,[78] not because the posited duty might give rise to policy questions, including concerning GHG emissions.[79]

Allsop CJ in particular discussed the "unsuitability" of the judicial branch to judge the legitimacy of the duty of care claimed by the plaintiffs. The problem was not that there can be no duty of care as to policy, but rather that "some questions of decision-making are not a legitimate or apposite or appropriate subject of curial judgment, such as were there is no criterion by reference to which a court can determine the reasonableness of the conduct."[80] Allsop CJ characterised the question of whether the task is suitable for judicial determination by reference to a legal standard not as a definitional question, but rather as one of "institutional inappropriateness or unsuitability."[81]

In doing so, Allsop CJ made clear that:

> "This is not an abrogation of judicial responsibility or the adoption of some governmental immunity. It is to recognise that decisions that involve certain types of policy and which may have important physical consequences upon the lives, health, well-being, property and economic interests of people may be made by government in its decision-making role in the interest of the polity which cannot be judged by a legal standard or the consideration of which cannot be reliably made in a curial environment of private litigation. There are choices to be made by government which may affect lives, health and property which are made by reference to expertise unavailable or less than satisfactorily available to courts, by reference to political and democratic choices involving relationships of interests incommensurable by reference to any legal standard and which are appropriate for democratic (that is political) accountability, not by reference to monetary compensation where a legal standard to judge the choice is absent or faint."[82]

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[74] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) 248 LGERA 330; [2021] FCA 560 at [484].
[75] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) 248 LGERA 330; [2021] FCA 560 at [513].
[76] *Minister for Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [7], [346], [748], [757].
[77] *Minister for Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [8]-[17], [233]-[266], [346] per Allsop CJ, [868] per Wheelahan J.
[78] *Minister for Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [748].
[79] *Minister for Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [549], [611], [633].
[80] *Minister for Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [237].
[81] *Minister for Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [237].
[82] *Minister for Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [238].

Allsop CJ found that the duty of care posited by the plaintiffs concerns matters of "core" policy, being "the evaluation of good or bad decision making about greenhouse gas emissions and the risks of global warming", which is "of the highest importance."[83] The making of core policy "is not, or is unlikely to be, the province of the Judiciary in its role of quelling private controversies or controversies between individuals and government."[84]

Public trust actions

The public trust doctrine conceives that ownership of common natural resources, such as the air, fresh water and the sea, is vested in the state as public trustee of a public trust for the benefit of the people. The state, as trustee, is under a fiduciary duty to deal with the trust property in a manner that is in the interests of the public.[85] The source of this duty can be the common law, statute law or constitutional law. Climate change litigation has been brought relying upon the public trust doctrine as a foundation for enforcing an obligation on governments and enterprises to mitigate GHG emissions. These actions have primarily been brought in the USA. Although earlier atmospheric public trust actions have been unsuccessful, there has been a recent breakthrough on the justiciability of public trust actions.

Examples of early unsuccessful climate change litigation grounded in public trust law in the United States, dismissed for non-justiciability, include *Kanuk v State of Alaska,*[86] *Sanders-Reed v Martinez*[87]and *Chernaik et al v Brown*.[88] The breakthrough came in *Held v State of Montana*.[89] Sixteen young people filed a lawsuit alleging that the State of Montana's fossil fuel-dependent state energy policy violates the State constitution. The plaintiffs sought declarations that the State energy policy violates the public trust doctrine and constitutional provisions that protect the right to a clean and healthful environment; the right to seek safety, health, and happiness; and the right to individual dignity and equal protection. On 14 August 2023, the Montana District Court upheld the plaintiffs' claims for declaratory relief, including in relation to a violation of the public trust doctrine. The Court held that these claims were justiciable and satisfied standing and redressability requirements.[90] In September 2023, the State filed an appeal to the Montana Supreme Court.[91]

In Canada, in *La Rose v Her Majesty the Queen,*[92] 15 children sued the Queen and Attorney General of Canada, alleging that Canada's excessive GHG emissions are a violation of their rights under sections 7 and 15 of the Canadian Charter of Rights and Freedoms, as well as a violation of the rights of present and future Canadian children under the public trust doctrine.

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[83] *Minister for Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [247].
[84] *Minister for Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [251].
[85] Preston B J, "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Asia Pacific" (2005) 9 APJEL 109, 203-210.
[86] *Kanuk v State of Alaska* 335 P.3d 1088 (Supreme Court of Alaska, 2014).
[87] *Sanders-Reed v Martinez* 350 P.3d 1221 (Court of Appeals of New Mexico, 2015).
[88] *Chernaik et al v Brown* (Case No. 16-11-09273, Circuit Court of the State of Oregon, 2015); (295 Or App 584 (2019), Court of Appeals of the State of Oregon) and (367 Or 143 (2020), Supreme Court in the State of Oregon).
[89] *Held v State of Montana*, CDV-2020-307 (Montana First Judicial District Court, 2023).
[90] *Held v State of Montana*, CDV-2020-307 (Montana First Judicial District Court, 2023) at pp 86-89.
[91] See State of Montana's Notice of Appeal, filed 29 September 2023 < https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230929_docket-DA-23-0575_notice-of-appeal-1.pdf>. In January 2024, the State's request to stay the ruling of the District Court was denied by the Supreme Court: *Held v State of Montana* DA23-0575 (Montana Supreme Court, 2024).
[92] *La Rose v Her Majesty the Queen* [2021] 1 F.C.R. D-14; 2020 FC 1008 (Federal Court of Canada, 2020).

The Federal Court held that although the claims under the Charter were not justiciable, the question in relation to the public trust doctrine was a justiciable issue.[93] The Court said that the defendants' justiciability arguments do not apply in the same manner to the public trust doctrine. The public trust doctrine, either as an unwritten constitutional principle or at common law, is "clearly a legal question, which the Courts can resolve", and "does not engage the same considerations in relation to the constitutional demarcation of powers".[94]

The Court held that the real question in relation to this particular claim was whether the public trust doctrine discloses a reasonable cause of action or had a reasonable prospect of success.[95] On this ground, the Court dismissed the lawsuit for failing to state a reasonable cause of action as the claim was too extensive.[96]

The plaintiffs appealed to the Federal Court of Appeal. The Federal Court of Appeal upheld the appeal in part, varying the orders of the Federal Court to provide that leave to amend be granted in respect of the claim that there had been a violation of section 7 of the Canadian Charter of Rights and Freedoms.[97] The Federal Court of Appeal found the claims under the Charter were justiciable. This aspect of the Federal Court of Appeal's decision will be discussed below in the section on constitutional and human rights law. The Federal Court of Appeal did not, however, uphold the appeal against the Federal Court's finding that the claim based on the public trust doctrine had no reasonable prospect of success.[98]

Justiciability in administrative law

Much of the climate change litigation brought around the world has involved judicial review of administrative decisions and action on grounds relating to climate change.[99] The grounds of judicial review can be grouped into three broad categories: illegality, irrationality and procedural impropriety.[100] Although climate change-related administrative law claims have raised one or more of these grounds of review, courts in some jurisdictions have dismissed the claims as being non-justiciable due to a strict application of the separation of powers doctrine and the notion that review of political decisions is not within the province of the judiciary.

An example in Canada is *Friends of the Earth v Canada (Governor in Council).*[101] Friends of the Earth alleged that the Canadian Government had failed to comply with its duties under the *Kyoto Protocol Implementation Act 2007* (the Act) by not preparing a Climate Change Plan or

[93] *La Rose v Her Majesty the Queen* [2021] 1 F.C.R. D-14; 2020 FC 1008 (Federal Court of Canada, 2020) at [26], [102].
[94] *La Rose v Her Majesty the Queen* [2021] 1 F.C.R. D-14; 2020 FC 1008 (Federal Court of Canada, 2020) at [57]-[58].
[95] *La Rose v Her Majesty the Queen* [2021] 1 F.C.R. D-14; 2020 FC 1008 (Federal Court of Canada, 2020) at [58].
[96] *La Rose v Her Majesty the Queen* [2021] 1 F.C.R. D-14; 2020 FC 1008 (Federal Court of Canada, 2020) at [102].
[97] *La Rose v His Majesty the King in right of Canada and the Attorney General of Canada* 2023 FCA 241 at [135].
[98] *La Rose v His Majesty the King in right of Canada and the Attorney General of Canada* 2023 FCA 241 at [52], [58], [62].
[99] See Peel J, Osofsky H and Foerster A, "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2017) 41(2) MelbULawRw 793.
[100] See, for example, *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410-411, per Lord Diplock.
[101] *Friends of the Earth v Canada (Governor in Council)* [2009] F.C.R. 201; 2008 FC 1183 (Canadian Federal Court).

proposing regulations adequate to meet Canada's Kyoto Protocol obligations.[102] The Canadian Government asserted that the statutory duties the subject of the applications were not justiciable as they were not properly suited or amenable to judicial review.[103] The Federal Court assessed, as a threshold question of law, whether or not the Act imposed any justiciable duties upon the Minister.[104] The Federal Court found that the claims were not justiciable. The decision-making process under the Act requires the taking into account of "policy-laden considerations which are not the proper subject matter for judicial review. That is so because there are no objective legal criteria which can be applied and no facts to be determined which would allow a Court to decide whether compliance had been achieved."[105] The Court found the Act creates a comprehensive system of public and Parliamentary accountability, instead of the imposition of a justiciable duty on the Minister to prepare and table a climate change plan that is compliant with Canada's obligations under the Kyoto Protocol.[106] This decision was upheld by the Federal Court of Appeal.[107]

In a later case, *La Rose v His Majesty the King in right of Canada and the Attorney General of Canada*,[108] the Federal Court of Appeals observed that the Federal Court's decision in *Friends of the Earth v Canada (Governor in Council)* turned on the terms in which the duties were framed in the Act. *Friends of the Earth* does not, the Court found, "stand for the proposition that all claims addressing climate change are inherently non-justiciable"; instead, that case was struck out as the Act did not create a public duty but instead contained duties which the Minister owed to Parliament.[109]

In contrast, the New Zealand High Court in *Thomson v The Minister for Climate Change Issues*[110] found that a challenge to the adequacy of New Zealand's 2030 and 2050 GHG emissions reduction targets, on the grounds of illegality, unlawfulness and irrationality, to be justiciable. The High Court rejected the Minister's contention that the claim was not justiciable as it involved a "political question" as to what were the appropriate policies. The Court held that the Minister's decision setting the 2050 target pursuant to the *Climate Change Response Act 2002* was justiciable, however no remedy was necessary because of the election of a new government that intended to set a new target.[111] The Minister's decision setting the 2030 target pursuant to the Paris Agreement was justiciable because the Dutch courts' decisions in *Urgenda*,[112] among other cases, illustrates that "it may be appropriate for domestic courts to

[102] *Friends of the Earth v Canada (Governor in Council)* [2009] F.C.R. 201; 2008 FC 1183 (Canadian Federal Court) at [2]-[6].
[103] *Friends of the Earth v Canada (Governor in Council)* [2009] F.C.R. 201; 2008 FC 1183 (Canadian Federal Court) at [7].
[104] *Friends of the Earth v Canada (Governor in Council)* [2009] F.C.R. 201; 2008 FC 1183 at [18].
[105] *Friends of the Earth v Canada (Governor in Council)* [2009] F.C.R. 201; 2008 FC 1183 at [33].
[106] *Friends of the Earth v Canada (Governor in Council)* [2009] F.C.R. 201; 2008 FC 1183 at [42].
[107] *Friends of the Earth v Canada (Governor in Council)* (2009) 93 Admin LR (4th) 72); 2009 FCA 297(.
[108] *La Rose v His Majesty the King in right of Canada and the Attorney General of Canada* 2023 FCA 241.
[109] *La Rose v His Majesty the King in right of Canada and the Attorney General of Canada* 2023 FCA 241 at [42].
[110] *Thomson v The Minister for Climate Change Issues* [2018] 2 NZLR 160; [2017] NZHC 733 (New Zealand High Court).
[111] *Thomson v The Minister for Climate Change Issues* [2018] 2 NZLR 160; [2017] NZHC 733 (New Zealand High Court) at [178].
[112] *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and the Environment)* Hague DC C/09/456689/HA 2A 13-1396 (Chamber for Commercial Affairs, 24 June 2015).

play a role in Government decision making about climate change policy".[113] Whilst justiciable, the Court held it could not intervene in the 2030 decision, because the Paris Agreement does not stipulate any specific criteria or modelling for how a country is to set its target.[114]

Justiciability in constitutional and human rights law

Constitutions or statutes may enshrine certain rights, such as the right to life or the right to a healthy environment. Such rights can provide a basis for climate change litigation. To the extent that constitutional and human rights are enshrined in constitutions or statutes, and afforded largely to all persons, justiciability has been less of a barrier for climate change litigation brought on constitutional and human rights law grounds. This is illustrated by human rights based, climate change litigation in the United States, the Netherlands, Australia and Canada.

In *Juliana v United States of America*,[115] a group of young plaintiffs sought relief from federal government action and inaction in regulating CO_2 pollution allegedly violating the plaintiffs' constitutional rights and the public trust doctrine. The US government and industry interveners sought to summarily dismiss the action on grounds including that the claims did "not provide a cognizable federal cause of action".[116]

In assessing the justiciability of the complaint, the US District Court found that none of the six factors in *Baker v Carr* were inextricable from the merits of the case and thus the political question doctrine did not apply as a barrier to the plaintiff's claims:[117]

> "There is no need to step outside the core role of the judiciary to decide this case. At its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights".[118]

The Court stated that, "[s]hould plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy." However, speculation about this "could not support dismissal at this early stage."[119]

On appeal, the Court of Appeals (9th Circuit) reversed the District Court's decision and remanded the matter back to the District Court on the ground that the plaintiffs lacked Article III standing (under the Constitution) and thus their claims could not be adjudicated by the court.[120] The majority found that although the plaintiffs had established injury in fact and

[113] *Thomson v The Minister for Climate Change Issues* [2018] 2 NZLR 160; [2017] NZHC 733 (New Zealand High Court) at [133].
[114] *Thomson v The Minister for Climate Change Issues* [2018] 2 NZLR 160; [2017] NZHC 733 (New Zealand High Court) at [139]-[141].
[115] *Juliana v United States of America* 217 F Supp 3d 1224 (US District Court for the District of Oregon, 2016).
[116] *Juliana v United States of America* 217 F Supp 3d 1224 (US District Court for the District of Oregon, 2016) at 1264.
[117] *Juliana v United States of America* 217 F Supp 3d 1224 (US District Court for the District of Oregon, 2016) at 1236-1242.
[118] *Juliana v United States of America* 217 F Supp 3d 1224 (US District Court for the District of Oregon, 2016) at 1241.
[119] *Juliana v United States of America* 217 F Supp 3d 1224 (US District Court for the District of Oregon, 2016) at 1241-1242.
[120] *Juliana v United States of America* 947 F.3d 1159 (United States Court of Appeals, 9th Circuit, 2020).

causation, two of the criteria for standing,[121] their claims lack redressability. The majority heldthat:[122]

(a) ordering the federal government to adopt "a comprehensive scheme to decrease fossil fuel emissions and combat climate change" would exceed a federal court's remedial authority; and

(b) "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan… any effective plan would necessarily require a host of complex policy decisions entrusted… to the wisdom and discretion of the executive and legislative branches."

The majority "reluctantly" concluded that "the plaintiffs' case must be made to the political branches or to the electorate at large" and "[t]hat the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes."[123] The majority drew a close link between Article III standing and non-justiciability: "we do not 'throw up [our] hands' by concluding that the plaintiffs' claims are nonjusticiable... Rather, we recognize that 'Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges.'"[124]

The dissenting judge found that the plaintiffs' claims were justiciable and critiqued the majority for not purposefully assessing all of the *Baker v Carr* factors:

> "a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution."[125]

In June 2023, the US District Court granted the plaintiffs' motion for leave to file a second amended complaint.[126] By omitting the "specific relief" that the Court of Appeals majority found to be outside the power of an Article III court, the District Court held that the amended complaint was enough to establish redressability and legal standing for their claims. In May 2024, however, the Court of Appeals (9th Circuit) granted the government's petition of mandamus, ordering the District Court to dismiss the complaint on the basis that the plaintiffs lack the required standing to bring even a repleaded claim.[127]

In the *Urgenda* litigation in the Netherlands, The Hague Court of Appeal and the Supreme Court of the Netherlands upheld Urgenda's human rights claims, rejecting the Dutch government's argument that these claims were non-justiciable. In *State of the Netherlands v Urgenda Foundation*,[128] The Hague Court of Appeal upheld Urgenda Foundation's challenge to the adequacy of the State's mitigation policies on grounds that the State contravened Article

[121] *Juliana v United States of America* 947 F.3d 1159 (United States Court of Appeals, 9th Circuit, 2020) at 1175, as the US Supreme Court held in *Lujan, Secretary of the Interior v Defenders of Wildlife* 504 US 555 (1992).
[122] *Juliana v United States of America* 947 F.3d 1159 (United States Court of Appeals, 9th Circuit, 2020) at 1171.
[123] *Juliana v United States of America* 947 F.3d 1159 (United States Court of Appeals, 9th Circuit, 2020) at 1175.
[124] *Juliana v United States of America* 947 F.3d 1159 (United States Court of Appeals, 9th Circuit, 2020) at 1174.
[125] *Juliana v United States of America* 947 F.3d 1159 (United States Court of Appeals, 9th Circuit, 2020) at 1175.
[126] *Juliana v United States* Civ. No. 6:15-cv-01517-AA (United States District Court, Oregon, 2023).
[127] *Julian v United States* No. 24-684 (United States Court of Appeals, 9th Circuit, 2024).
[128] *State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal, ECLI:NL:GHDHA:2018:2591, 2018.

2 (right to life) and Article 8 (right to respect for private and family life and home) of the European Convention of Human Rights (ECHR).[129] The Court of Appeal held that Articles 2 and 8 impose positive obligations on the government to protect against the real threat of dangerous climate change.[130]

The State argued that "the system of the separation of powers should not be interfered with, because it is not up to the courts but to the democratically legitimised government as the appropriate body to make the attendant policy choices."[131] The Court of Appeal rejected this for two reasons: first, the state was violating human rights which called for the provision of measures to remedy the violation and, second, argument the order of the District Court to reduce emissions still gave the State sufficient room to decide how it could comply with the order.[132]

On appeal to the Supreme Court,[133] the State argued that the District Court's order to reduce GHG emissions, upheld by the Court of Appeal, was impermissible because, first, the order amounts to an impermissible order to create legislation and, second, it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions.[134]

The Supreme Court rejected the State's first ground for non-justiciability, holding that if the government has a legal duty to do something, as in this case under Articles 2 and 8 of the ECHR, it is appropriate for it to be ordered by the courts to comply with this duty.[135] The consideration that courts should not intervene in the political decision-making process involved in the creation of legislation "does not mean that courts cannot enter the field of political decision-making at all".[136] The District Court's order, upheld by the Court of Appeal, did not amount to an order to take specific legislative measures, but rather left the State free to choose the measures to be taken in order to achieve the 25% reduction in greenhouse gas emissions by 2020.[137]

Regarding the State's second ground for non-justiciability, the Supreme Court held that the climate change policy that the State has pursued since 2011 "is clearly not in accordance with" the goals of the Paris Agreement or the State's duty under Articles 2 and 8 of the ECHR. The

[129] *State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal, ECLI:NL:GHDHA:2018:2591, 2018 at [45], [53], [73].
[130] *State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal, ECLI:NL:GHDHA:2018:2591, 2018 at [45] and see also [41]-[43].
[131] *State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal, ECLI:NL:GHDHA:2018:2591, 2018 at [67].
[132] *State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal, ECLI:NL:GHDHA:2018:2591, 2018 at [67].
[133] *The State of the Netherlands v Urgenda Foundation* (The Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 2020).
[134] *The State of the Netherlands v Urgenda Foundation* (The Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 2020) at [8.1].
[135] *The State of the Netherlands v Urgenda Foundation* (The Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 2020) at [8.2.1]-[8.2.2].
[136] *The State of the Netherlands v Urgenda Foundation* (The Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 2020) at [8.2.3]-[8.2.4].
[137] *The State of the Netherlands v Urgenda Foundation* (The Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 2020) at [8.2.7].

Court of Appeal was, therefore, allowed to rule that the State is in any case obliged to achieve the proper reduction of at least 25% by 2020.[138]

The Supreme Court therefore upheld the Court of Appeal's decision and the justiciability of the human rights claim, holding that:

> "the courts can assess whether the State, with regard to the threat of a dangerous climate change, is complying with its duty... under Articles 2 and 8 ECHR [European Convention of Human Rights] to observe due diligence and pursue good governance."[139]

In Australia, the justiciability of a human rights contention arose in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*.[140] Youth Verdict and the Bimblebox Alliance objected to Waratah Coal's applications for a mining lease and an environmental authority for a proposed coal mine development in the Galilee Basin in central Queensland on the basis that the decision to grant the lease and environmental authority would be unlawful under s 58(1) of the *Human Rights Act 2019* (Qld). Waratah Coal applied to strike out the human rights objections that relied on the *Human Rights Act* or, in the alternative, obtain a declaration that the Land Court of Queensland did not have jurisdiction to consider those objections.[141]

The Land Court rejected Waratah Coal's application and held that human rights considerations apply to the Land Court in making its recommendations on applications for a mining lease and an environmental authority. The Court held that its recommendation on an application for a mining lease or environmental authority is both a "decision"[142] and an "act",[143] as those terms are used in s 58(1) of the *Human Rights Act.* As s 58(1) applied to the Court making a recommendation on applications for a mining lease and an environmental authority, the Court necessarily had jurisdiction to consider objections based on the *Human Rights Act* in making its recommendations.[144] In any event, whether an objector raises a human rights objection or not, the Court would be required, as a public entity, to itself consider in a human rights in deciding what recommendation to make on the applications.[145] The Court further held that the objectors could rely on s 58 of the *Human Rights Act*, without seeking a remedy or separate relief under s 59.[146]

In Canada, in *La Rose and Others v His Majesty the King in right of Canada and the Attorney General of Canada*,[147] the Federal Court of Appeal upheld an appeal from the Federal Court, which had struck out the claimants' claim that Canada's inadequate response to climate change breached their rights under section 7 of the Canadian Charter of Rights and Freedoms,[148] on

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[138] *The State of the Netherlands v Urgenda Foundation* (The Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 2020) at [8.3.4]-[8.3.5].
[139] *The State of the Netherlands v Urgenda Foundation* (The Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 2020) at [6.5].
[140] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33.
[141] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [3].
[142] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [54], [64], [92].
[143] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [60], [62], [64], [92].
[144] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [77].
[145] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [76], [86], [93].
[146] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 at [91]-[94].
[147] *La Rose and Others v His Majesty the King in right of Canada and the Attorney General of Canada* 2023 FCA 241.
[148] The Canadian Charter of Rights and Freedoms is in Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK).

the ground of non-justiciability.[149] 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." The youth claimants contended that:

> "the impacts of climate change 'interfere with their physical and psychological integrity and their ability to make fundamental life choices'… They assert that Canada's legislative response to climate change has a disproportionate effort on their generation and that they have suffered – and will continue to suffer – the consequences, given their vulnerability and age."[150]

The Federal Court held that the claim under s 7 of the Charter was not justiciable, as it raised questions of public policy approaches "that are so political that the Courts are incapable or unsuited to deal with them."[151] The Federal Court of Appeal disagreed, finding that claims are not non-justiciable "simply because the question of climate change is complex or because the legislation reflects a political choice on how to address the problem".[152] The Court recognised that:

> "Political choice underlies all legislation and some exercises of executive discretion; both are invariably informed by a wide range of public policy considerations. But once the choices are made, the policy trade-offs considered and the legislative response crystallized, the law is not immunized from Charter scrutiny. As the Supreme Court held … 'when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*' …. It must not be forgotten that the target of the appellants' claims is legislation—existing laws, regulatory instruments and Orders in Council."[153]

The Federal Court of Appeal observed that "a court cannot relinquish its jurisdiction over an issue merely because it raises a 'political question'…"[154] and that "[p]ublic controversy or the political context associated with legislation cannot therefore be a standalone ground to deem the claim non-justiciable."[155] The Federal Court of Appeal emphasised that what matters in an assessment of justiciability is not the presence of policy considerations but rather the presence of legal criteria to adjudicate the claim. The Federal Court of Appeal continued by stating that:

> "Justiciability, in the end, asks whether the court can adjudicate the issues against an objective legal standard. In this sense, justiciability analysis requires some understanding of the jurisprudence that underlies the claim, which in turn requires a somewhat probing examination of the substantive allegations of the claim."[156]

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[149] *La Rose and Others v Her Majesty the Queen in right of Canada and the Attorney General of Canada* [2021] 1 F.C.R. D-14; 2020 FC 1008.
[150] *La Rose and Others v His Majesty the King in right of Canada and the Attorney General of Canada* 2023 FCA 241 at [2].
[151] *La Rose and Others v Her Majesty the Queen in right of Canada and the Attorney General of Canada* [2021] 1 F.C.R. D-14; 2020 FC 1008 at [40].
[152] *La Rose and Others v Her Majesty the Queen in right of Canada and the Attorney General of Canada* [2021] 1 F.C.R. D-14; 2020 FC 1008 at [32].
[153] *La Rose and Others v Her Majesty the Queen in right of Canada and the Attorney General of Canada* [2021] 1 F.C.R. D-14; 2020 FC 1008 at [33].
[154] *La Rose and Others v Her Majesty the Queen in right of Canada and the Attorney General of Canada* [2021] 1 F.C.R. D-14; 2020 FC 1008 at [34].
[155] *La Rose and Others v Her Majesty the Queen in right of Canada and the Attorney General of Canada* [2021] 1 F.C.R. D-14; 2020 FC 1008 at [35].
[156] *La Rose and Others v Her Majesty the Queen in right of Canada and the Attorney General of Canada* [2021] 1 F.C.R. D-14; 2020 FC 1008 at [36].

The Federal Court of Appeal noted that the claim under s 7 of the Charter did have a legal anchor, being the failure of Canada to meet its Paris Agreement commitments which had been ratified by Parliament and therefore were "legally defined, objective standards against which the Charter claims can be assessed". [157] The Federal Court of Appeal found that there was a "sufficient legal component to their claims, and the claims satisfy the legitimacy portion of a justiciability analysis". [158]

Conclusion

Justiciability is a multifaceted threshold question, requiring consideration of all surrounding circumstances of the particular claim or issue raised by a claim before the court. Due to the complexities and 'political nature' of climate change-related claims, justiciability has created barriers for climate change-related litigation. Whilst non-justiciability has led to summary dismissal of some climate change-related claims the modern judicial inclination is to find climate change-related claims as being appropriate and capable of being the subject of judicial resolution and relief. This involves a recognition that the function of resolution of climate change issues is a shared one.[159] Whilst the legislature and executive have clear responsibilities to resolve the broader issues relating to climate change by taking appropriate legislative and policy action, the judiciary has a responsibility to resolve particular issues of climate change raised in legal claims where there are legal standards to adjudicate them.

[157] *La Rose and Others v Her Majesty the Queen in right of Canada and the Attorney General of Canada* [2021] 1 F.C.R. D-14; 2020 FC 1008 at [38].
[158] *La Rose and Others v Her Majesty the Queen in right of Canada and the Attorney General of Canada* [2021] 1 F.C.R. D-14; 2020 FC 1008 at [45].
[159] McGoldrick, n 5, 983, 1016, 1018-1019.