COURT OF APPEAL FOR ONTARIO

CITATION: Mathur v. Ontario, 2024 ONCA 762
DATE: 20241017
DOCKET: COA-23-CV-0547

Roberts, Coroza and Gomery JJ.A.

BETWEEN

Sophia Mathur, a minor by her litigation guardian Catherine Orlando, Zoe Keary-Matzner, a minor by her litigation guardian Anne Keary, Shaelyn Hoffman-Menard, Shelby Gagnon, Alexandra Neufeldt, Madison Dyck and Lindsay Gray

Applicants (Appellants)

and

His Majesty the King in Right of Ontario

Respondent (Respondent)

and

Assembly of First Nations, British Columbia Civil Liberties Association, Canadian Association of Physicians for the Environment, the Canadian Civil Liberties Association, Canadian Lawyers for International Human Rights and Center for International Environmental Law, Citizens for Public Justice, David Asper Centre for Constitutional Rights, Environmental Defence Canada and West Coast Environmental Law Association, Friends of the Earth Canada, For Our Kids/For Our Kids Toronto, Grand Council of Treaty #3, 2471256 Canada Inc. (Greenpeace Canada) and Stichting Urgenda

Interveners

Nader R. Hasan, Justin Safayeni, Spencer Bass, Fraser Andrew Thomson, Danielle Gallant, Julia Croome and Reid Gomme, for the appellants

S. Zachary Green, Padraic Ryan and Sean Kissick, for the respondent

Nathalie Chalifour and Erin Dobbelsteyn, for the intervener, Friends of the Earth Canada

Sarah Beamish, for the interveners, Greenpeace Canada and Stichting Urgenda

Teagan Markin and Nadia Effendi, for the intervener, British Columbia Civil Liberties Association

Andrew Lokan and Danielle Glatt, for the intervener, Canadian Civil Liberties Association

Anna Johnston and Andrew Gage, for the interveners, Environmental Defence Canada and West Coast Environmental Law Association

Lara Koerner-Yeo and Karen Drake, for the intervener, Grand Council of Treaty #3

Ewa Krajewska, Brandon Anand Chung and Érik Arsenault, for the intervener, David Asper Centre for Constitutional Rights

Hassan M. Ahmad and Brooke MacKenzie, for the intervener, Citizens for Public Justice

Louis Century and Erica Cartwright, for the intervener, Canadian Association of Physicians for the Environment

Meaghan Daniel, for the interveners, For Our Kids and For Our Kids Toronto

Lacey Kassis, Stuart Wuttke and Adam Williamson, for the intervener, Assembly of First Nations

Nicolas M. Rouleau and Vibhu Sharma, for the interveners, Canadian Lawyers for International Human Rights and Center for International Environmental Law

Heard: January 15, 2024

On appeal from the order of Justice Marie-Andrée Vermette of the Superior Court of Justice, dated April 14, 2023, with reasons reported at 2023 ONSC 2316, 480 D.L.R. (4th) 444.

By the Court:

I. OVERVIEW

[1] This appeal involves the constitutionality of the greenhouse gas emission reduction target and plan enacted by the Ontario government ("Ontario") under climate change legislation. Specifically, can the alleged failure of Ontario to comply with its voluntarily imposed statutory obligations to combat climate change amount to a breach of the appellants' ss. 7 and 15 rights under the *Canadian Charter of Rights and Freedoms*?

[2] In 2018, Ontario enacted the *Cap and Trade Cancellation Act, 2018*, S.O. 2018, c. 13 ("*CTCA*"). Section 16 of the *CTCA* repealed the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, S.O. 2016, c. 7 ("*Climate Change Act*"), which had contained greenhouse gas emission reduction targets, and s. 3(1) required the government to set new reduction targets (the "Target"). The Target implemented by Ontario, which is articulated in the "Preserving and Protecting our Environment for Future Generations - A Made-in-Ontario Environmental Plan" (the "Plan"), calls for a 30% reduction of greenhouse gas emissions from 2005 levels by 2030. This is a much smaller reduction than prescribed under the *Climate Change Act* and, according to the unchallenged expert evidence filed that the application judge accepted, falls short of the international scientific consensus of the reductions recommended to mitigate the most catastrophic effects of climate change.

[3] The appellants are seven Ontario youth, some of whom are Indigenous. They brought an application for a declaration that Ontario's Target and the enacting provisions of ss. 3 and 16 of the *CTCA* are unconstitutional as they violate their rights under ss. 7 and 15 of the *Charter*. They seek an order declaring their *Charter* rights have been violated and requiring Ontario to set a science-based emissions reduction target and to revise its climate change plan in accordance with international standards.

[4] The application judge dismissed their application. While she concluded that the issue of whether the appellants' ss. 7 and 15 *Charter* rights were violated was justiciable, she characterized the application as a positive rights case. She concluded that any deprivation of the right to life or security of the person was not contrary to the principles of fundamental justice under s. 7 and that s. 15 of the *Charter* did not impose a positive obligation on Ontario to take any specific steps to combat climate change. As a result, she determined that the appellants' ss. 7 and 15 rights were not breached.

[5] In our view, the application judge erred in her analytical approach. This is not a positive rights case. The application does not seek to impose on Ontario any new positive obligations to combat climate change. By enacting the *CTCA*, Ontario voluntarily assumed a positive statutory obligation to combat climate change and to produce the Plan and the Target for that purpose. Ontario was therefore obligated to produce a plan and a target that were *Charter* compliant. The

application judge did not address whether Ontario failed to produce a plan and a target that was *Charter* compliant in accordance with its statutory mandate. As a result, the ss. 7 and 15 *Charter* issues raised by the appellants remain to be determined.

[6] The interveners raised relevant, important issues that were not determined by the application judge, either because they were not raised before her or did not affect her analysis, or because she declined to address them since they were not pleaded in the notice of application. They included whether the Target breached the *Charter* rights of Indigenous peoples in Ontario and their s. 35 rights under the *Constitution Act, 1982*; the integration of the public trust doctrine; the application of international law, including international environmental law, in the interpretation of *Charter* rights; the application of the best interests of the child principle; and the recognition and impact of certain unwritten constitutional principles, including societal preservation and ecological sustainability.

[7] For the reasons that follow, we allow the appeal. However, we decline to decide the application and to make the orders sought by the appellants in their notice of appeal. This court is not well placed to determine whether the declarations and directions sought should be granted. Although much of the expert evidence was uncontroverted, courts of first instance have a significant "institutional advantage in making the determinations necessary to a fair treatment" of ss. 7 and 15 claims: *Canadian Council for Refugees v. Canada (Citizenship and*

Immigration), 2023 SCC 17, 481 D.L.R. (4th) 581, at para. 176. Moreover, if the appellants wish to have the additional issues raised by the interveners adjudicated, they will have to obtain leave to amend their notice of application and the evidentiary record may have to be amplified.

[8] Consequently, while we clarify in these reasons the question that must be determined at a new hearing, we are careful not to decide that question or otherwise limit the analysis to be undertaken, including the application of s. 1 of the *Charter*, if pursued. Given the seriousness of these matters, the additional issues raised, and the potential need for further evidence, it would not be in the interests of justice nor practically feasible for this court to take on the role of finder of fact and conduct the required analysis: *Canadian Council for Refugees*, at para. 178. We therefore remit the application for a new hearing before the same or another justice of the Superior Court.

II. BACKGROUND

[9] To understand the issues on appeal, we will set out a summary of the legislative and evidentiary background and the application judge's factual findings with respect to the evidentiary record that informed her analysis and conclusions. The application record includes the legislative history leading up to the *CTCA,* the Plan and the Target, including international climate change conventions that informed them and the predecessor legislation that the *CTCA* repealed. It also includes the appellants' expert evidence on the deleterious effects of climate

change and proposed remedial action. While Ontario proffered its own expert evidence, it accepted that anthropogenic climate change is real and poses risks to human health and well-being. Further, Ontario did not argue the application of s. 1 of the *Charter*.

(a) Climate change legislation, international conventions, and uncontroverted evidence of harm

[10] In 1992, the United Nations adopted its *Framework Convention on Climate Change*, U.N. Doc. A/AC.237/18 (Part II)/Add.1, May 15, 1992 ("*UNFCCC*"), the objective of which was to stabilize greenhouse gas concentrations in the atmosphere. In 2015, the Paris Agreement, U.N. Doc. FCCC/CP/2015/10/Add.1, December 12, 2015, was adopted under the *UNFCCC*. Article 2 of the Paris Agreement calls on signatories to hold the increase in global average temperature to well below 2 degrees Celsius and pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels. Canada is a party to both the *UNFCCC* and the Paris Agreement. Canada's original target was set as a 30% reduction from 2005 greenhouse gas emissions by 2030. In 2022, Canada announced a target of a 40–45% reduction from 2005 greenhouse gas emissions by 2030.

[11] The global carbon budget means total cumulative global carbon emissions. Scientists use the concept of a global "carbon budget" to define how much more carbon dioxide can be emitted into the atmosphere before certain levels of global

temperature warming will be locked in and irreversible. As already noted, the scientific consensus at present is that the level of global temperature warming should be held to 1.5 degrees Celsius. Once the carbon budget is used up or exceeded, global temperatures could stabilize at a new dangerously high global temperature, even if measures are later taken to reduce global carbon dioxide emissions to net zero.

[12] The application judge accepted the expert evidence adduced by the appellants and found that it established the following:

- Warming in Canada is, on average, about double the magnitude of global warming;
- Deaths in Ontario are projected to increase significantly if global temperatures rise above 1.5 degrees Celsius;
- Heat waves are increasing in frequency, which will increase heat-related morbidity and mortality;
- Climate change has increased the burden of certain infectious diseases (i.e., through ticks and mosquitos, through food and waterborne disease, and through fungus and parasites) and this burden is likely to continue to increase;
- Climate change will increase the frequency and severity of wildfires in Ontario and across Canada, and smoke will cause increasing mortality and morbidity for Ontarians;

- Climate change will increase flooding frequency and magnitude, which will lead to health risks associated with the contamination of drinking water and food, exposure to mould and carbon monoxide poisoning, and mental health issues;
- Climate change will lead to further increases in cyanobacterial blooms in Ontario, which produce toxins harmful to human and wildlife health and threaten water quality and fish stocks;
- Above 2 degrees Celsius of warming, climate change will lead to increased mercury in Ontario aquatic ecosystems, including in fish, which has been linked to a range of neurodevelopmental, cardiovascular, and immunologic effects;
- Climate change has been linked to serious and wide-ranging negative mental health impacts, including emotional reactions, depression, anxiety, post-traumatic stress disorder, grief and loss, increased drug and alcohol use, social and family stress, increased suicidal ideation and suicide, loss of cultural knowledge and continuity, and deterioration and loss of place-based connection;
- With each additional degree of warming, there is an increase in probability of large-scale displacement, regional food security crises, and climate-related violence and conflict; and

- Every incremental increase in global temperature increases the likelihood of large-scale, devastating climate tipping points being crossed.

[13] The application judge further accepted the expert evidence adduced by the appellants showing that climate change has disproportionate impacts on young people and Indigenous peoples, and made the following findings:

- Children are more sensitive to heat and respiratory and communicable diseases;
- Young people are especially at risk from the impacts of wildfire smoke, flooding, extreme heat, vector-borne diseases, and toxic contamination;
- Young people are more vulnerable to the impacts of climate change given increased reliance on caregivers for protection and adaptation;
- Climate change may differentially impact the mental health of children and youth;
- Indigenous youth face particular mental health challenges due to their strong ties to the land;
- Indigenous peoples in Ontario have already observed significant harmful effects from climate change, impacting food and water security and traditional and subsistence practices such as fishing, hunting, and plant harvesting;
- The loss of traditional foods and cultural practices is impacting Indigenous peoples' mental and physical well-being; and

- Indigenous peoples are particularly vulnerable to mental health impacts of climate change, which include anxiety, depression, grief, family stress, loss of identity, increased likelihood of substance usage, and suicidal ideation.

[14] The application judge concluded that: “Based on the evidence before [her], it is indisputable that, as a result of climate change, the [appellants] and Ontarians in general are experiencing an increased risk of death and an increased risk to the security of the person.”

[15] The application judge noted that there is no fixed scientific formula to determine exactly what reductions must be made by Ontario to correspond with its “fair share” to reduce global greenhouse gas emissions to the scientifically accepted international standard. However, a fair inference flows from her findings, including that the Target cannot be meaningless, that there is no question that Ontario must do something. The application judge found that Ontario’s greenhouse gases contribute to climate change in a way that is “real, measurable and not speculative” and that “[e]very tonne of [carbon dioxide] emissions adds to global warming and lead[s] to a quantifiable increase in global temperatures that is essentially irreversible on human timescales.”

[16] What Ontario is prepared to do at present is reflected in the *CTCA*, which was enacted in 2018. Section 16 of the *CTCA* repealed the former *Climate Change Act.* The repealed *Climate Change Act* provided for the following emission reduction targets in Ontario in s. 6(1):

> The following targets are established for reducing the amount of greenhouse gas emissions from the amount of emissions in Ontario calculated for 1990:
>
> 1. A reduction of 15 per cent by the end of 2020.
>
> 2. A reduction of 37 per cent by the end of 2030.
>
> 3. A reduction of 80 per cent by the end of 2050.

[17] The *CTCA*, in contrast, does not prescribe emissions reduction targets. Section 3(1) provides as follows: “The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time.” It accordingly does not itself set a new target but requires Ontario to do so.

[18] The Target is articulated in the Plan, which Ontario released a few months after the *CTCA* was enacted for consultation and public comment. The Plan states that it “reflects our government’s commitment to address [the] pressing challenges” Ontarians face and commits the government to “use the best science, real-time monitoring where available, and strong, transparent enforcement to protect our air, land and water, prevent and reduce litter and waste, support Ontarians to continue to do their share to reduce greenhouse gas emissions, and help communities and families prepare for climate change.”

[19] With respect to specifically addressing climate change, the Plan acknowledges the severe impacts of climate change:

> The climate is changing. Severe rain, ice and wind storms, prolonged heat waves and milder winters are

> much more common. Forests, waters and wildlife across the province are and will continue to be significantly impacted by these changes. People across the province – especially Northern communities – and all sectors of the economy are feeling the impacts of climate change and paying more and more for the costs associated with those impacts.

[20] The Plan further indicates that it fulfills the government's commitment under the *CTCA*: "The following chapter of our environment plan acts as Ontario's climate change plan, which fulfills our commitment under the [*CTCA*]" (emphasis added).

[21] The application judge accepted that the Plan set the Target and did not, as argued by Ontario before her and on this appeal, merely refer to a non-binding, aspirational goal. In the Plan, Ontario undertakes to reduce greenhouse gas emissions by 30% below 2005 levels by 2030 – which is consistent with Canada's commitment at the time when Canada signed on to the 2015 Paris Agreement, but a smaller reduction than under the repealed *Climate Change Act* and Canada's more recent commitment to reduce emissions by 40–45% from 2005 levels by 2030. The Plan states that:

> Ontario will reduce its emissions by 30% below 2005 levels by 2030.
>
> This target aligns Ontario with Canada's 2030 target under the Paris Agreement.
>
> This is Ontario's proposed target for the reduction of greenhouse gas emissions, which fulfills our commitment under the [*CTCA*]. [Emphasis deleted.]

[22] Ontario also undertakes that the Plan "will be reviewed on a four-year basis" and that Ontario "is committed to doing its part to address climate change. This includes leading by example". Ontario's then Minister of the Environment stated in the Plan that Ontario "will continue to do our share to reduce greenhouse gases" to achieve the Paris Agreement target, which the Plan notes "is to keep the increase in global average temperature to well below 2 [degrees Celsius] above pre-industrial levels, and pursue efforts to limit the increase even further to 1.5 [degrees Celsius], in order to reduce the risks and impacts of climate change."

[23] The application judge observed that the United Nations' Intergovernmental Panel on Climate Change ("IPCC") released a report the same year the Target was set stating that global net anthropogenic carbon dioxide emissions must be reduced by approximately 45% below 2010 levels by 2030 and must reach net zero by 2050 to limit global average surface warming to 1.5 degrees Celsius. She found that the reports produced by the IPCC were a reliable and comprehensive source on existing scientific knowledge about climate change and its impacts. Based on the IPCC report, the application judge observed that Ontario would have to reduce its 2005 emissions by approximately 52% (i.e., 22% more than the 30% Target) by 2030 to limit average global warming to 1.5 degrees Celsius. She found that the gap between the IPCC prescription and the Target is "large, unexplained and without any apparent scientific basis."

(b) The application judge's dismissal of the application

[24] The appellants sought a declaration that Ontario's Target and the legislative provisions under which it was set are unconstitutional in that the measures taken under those provisions violate ss. 7 and 15 of the *Charter*. They further requested:

> An order that Ontario forthwith set a science-based [greenhouse gas] reduction target under s. 3(1) of the *CTCA* that is consistent with Ontario's share of the minimum level of [greenhouse gas] reductions necessary to limit global warming to below 1.5 [degrees Celsius] above pre-industrial temperatures or, in the alternative, well below 2 [degrees Celsius] (*i.e.* the upper range of the Paris Agreement temperature standard).

[25] The application judge first considered the issue of justiciability. She found that the *Charter* issues raised by the appellants were justiciable: they challenged the Target and ss. 3(1) and 16 of the *CTCA*. However, she agreed with Ontario that the court did not have institutional capacity and legitimacy to determine Canada and Ontario's "fair share" of the remaining carbon budget. She declined to address the appropriateness of the relief sought at this stage.

[26] The core of the application judge's decision was her determination that the appellants' claim would require the court to recognize that they had positive rights. She interpreted their application as effectively seeking a more restrictive Target, not the right to be free from state interference. As a result, she saw Ontario's participation in the underlying harm as no different from its participation in social issues relating to poverty and homelessness. The central issue she had to resolve

was whether either s. 7 or s. 15 allows for the imposition on Ontario of the freestanding positive obligation to combat climate change. She also concluded that the Target does not authorize or incentivize greenhouse gas emissions but, rather, seeks to reduce them.

[27] For these reasons, the application judge dismissed the application.

III. ISSUES

[28] The appellants' principal submission is that the application judge erred in dismissing their ss. 7 and 15 *Charter* claims based on a mischaracterization of their application as seeking to impose freestanding positive obligations on Ontario to combat climate change.

[29] The appellants argue that they are not seeking to impose freestanding positive obligations on Ontario. Rather, the appellants maintain that they are seeking to have the court review the compliance of the Target and the Plan with constitutional standards. They argue that Ontario's response to climate change has been to set a target that commits the province to a dangerously high level of greenhouse gas emissions between now and 2030, knowing that it causes imminent harms to current and future generations of Ontarians. They say that Ontario is discriminating against youth and future generations on the basis of their age by forcing them to disproportionately bear the brunt of undisputed climate harms. The devastating impacts of climate change will be broadly felt, and youth,

future generations, and Indigenous peoples will be uniquely and disproportionately impacted.

[30] Ontario argues that the application judge was correct to dismiss the application and to conclude that Ontario's Target was not unconstitutional. Ontario argues that the central issue raised on this appeal is effectively how to plan to address the future adverse effects of global climate change, which is not a justiciable question. The appellants' request for an order directing that Ontario set a "science-based [greenhouse gas] reduction target" that is "consistent with Ontario's share" of a global budget for greenhouse gas emissions falls outside of the court's institutional capacity. Ontario submits that there is no judicially manageable legal standard for assessing a claim to a "science-based" emissions level for a "sustainable future" or for calculating Ontario's "fair share" of global emissions, and that it is beyond the competence of the courts to attempt to resolve these political questions.

[31] Ontario does not contest the fact of anthropogenic global climate change, its risks to human health and well-being, or the desirability of all nations taking action to mitigate its adverse effects. However, Ontario argues, the appellants' burden in this litigation was to prove with evidence that Ontario's Target will cause or contribute to those future harms, and they did not do so. Ontario argues that the worsening of the impacts of climate change are not caused by the Target, the Plan or the *CTCA* and that the impacts of climate change would worsen in their absence.

Ontario submits that the appellants have failed to show that the impacts are worsening because of the Target, the Plan or the *CTCA*.

[32] In our view, Ontario's framing of the appeal focusses too narrowly on the question of remedy and fails to address the question of whether the application judge erred by characterizing the application as a positive rights case rather than acknowledging that Ontario had undertaken a positive statutory obligation to combat climate change. Given Ontario has voluntarily assumed a positive statutory obligation under the *CTCA* to combat climate change and to produce the Plan and the Target, the question is whether the application judge should have considered whether Ontario's alleged failure to comply with its statutory obligation violated the appellants' *Charter* rights.

[33] Moreover, Ontario's arguments that the Target, the Plan and the *CTCA* do not cause or worsen climate change are inconsistent with the application judge's findings about the impacts of Ontario's failure to comply with international greenhouse gas emission reduction standards, including at paras. 147 and 148 of her reasons, as follows:

> I find that Ontario's decision to limit its efforts to an objective that falls severely short of the scientific consensus as to what is required is sufficiently connected to the prejudice that will be suffered by the [appellants] and Ontarians should global warming exceed 1.5 [degrees Celsius]. By not taking steps to reduce [greenhouse gases] in the province further, Ontario is contributing to an increase in the risk of death and in the

> risks faced by the [appellants] and others with respect to the security of the person.
>
> In my view, other countries' contributions to climate change do not diminish the role of Ontario in increasing the risks to Ontarians' life and health. … As stated above, the impugned government action does not need to be the dominant cause of the prejudice suffered by the claimant for causation to be established. While Ontario's contribution to global warming may be numerically small, it is real, measurable and not speculative.

[34] While the appellants raise several grounds of appeal, the appeal turns on whether the application judge erred in finding that the application sought to impose a freestanding positive obligation on Ontario and in failing to address whether the execution of Ontario's statutorily imposed obligation to combat climate change was constitutionally compliant. As we shall explain, we conclude that she did.

IV. ANALYSIS

(a) Standard of review

[35] It is common ground that the standard of review for the constitutional questions raised in this appeal is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 55.

(b) Overview

[36] The application judge correctly noted at para. 106 of her reasons that the *Charter* applies to the Target and the *CTCA* and that, as a result, the *Charter* issues raised by the appellants are justiciable because "the Constitution requires

that courts review legislation and state action for *Charter* compliance when citizens challenge them, even when the issues are complex, contentious and laden with social values."

[37] However, the application judge erred in viewing this case as a positive rights case. Given the application judge's findings in para. 123 of her reasons that Ontario enacted the Plan and the Target further to the mandate in the *CTCA* and that they are not meant to be meaningless, there can be no question that Ontario has assumed a statutory obligation to do something about climate change and to enact a Target and formulate a Plan that would do something about climate change. The question should have been whether the execution of that voluntarily imposed statutory obligation was *Charter* compliant.

(c) Positive obligations v. statutory obligations

[38] It is helpful to explain the difference between the imposition of freestanding positive obligations, as the application judge characterized the relief sought by the appellants, versus the requirement that the execution of the government's voluntarily imposed statutory obligations be constitutionally compliant where it has chosen to enact a specific scheme.

[39] As the Supreme Court instructed in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 81, s. 7 of the *Charter* has not yet been interpreted to "place a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person", although the Supreme Court

did not rule out its application in the future. Similarly, the Supreme Court in *R. v. Sharma*, 2022 SCC 39, 165 O.R. (3d) 398, at para. 63, confirmed that "s. 15(1) does not impose the general, positive obligation on the state to remedy social inequalities or enact remedial legislation."

[40] However, where the state does legislate, it must do so in a constitutional manner that complies with the *Charter*. For example, McLachlin C.J., Major and Bastarache JJ. stated in a concurring opinion in *Chaoulli v. Québec (Attorney General)* 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 104,[1] that while the *Charter* does not confer a freestanding positive right under s. 7 of the *Charter* to insist on government action, in that case, in the realm of health care, "where the government puts in place a scheme" where it undertakes legislated actions, "that scheme must comply with the *Charter*." In the same way, with respect to s. 15(1) of the *Charter*, in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at para. 42:

> The result of finding that Quebec's amendments breach s. 15 in this case is not, as Quebec suggests, to impose a freestanding positive obligation on the state to enact benefit schemes to redress social inequalities. Nor does it undermine the state's ability to act incrementally in addressing systemic inequality. But s. 15 does require the state to ensure that whatever actions it *does* take do not have a discriminatory impact (*Vriend*; *Eldridge v.*

[1] McLachlin C.J., Major and Bastarache JJ. held that a prohibition on private health insurance in Quebec violated s. 7 of the *Charter*. They also agreed with Deschamps J., who wrote separately, that the prohibition violated the Quebec *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12. Binnie, LeBel and Fish JJ. dissented.

> *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 72-80). [Italics in original; underline added.]

[41] We do not agree with Ontario that the appellants effectively argue that the Target does not go far enough. The appellants are not challenging the inadequacy of the Target or Ontario's inaction, but rather argue the Target itself, which Ontario is statutorily obligated to make, commits Ontario to levels of greenhouse gas emissions that violate their *Charter* rights. We see the same distinction as the Supreme Court observed in *Chaouilli*, that it is not the constitutional compliance of the scheme that is challenged by the appellants, but the constitutional compliance of the government measures taken under the scheme that are in issue.

(d) Section 7 of the *Charter*

[42] Section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The Supreme Court formulated the analysis under s. 7 as a two-step test: first, claimants must show that the law interferes with, or deprives them of, their life, liberty or security of the person; and second, they must show that the deprivation in question is not in accordance with the principles of fundamental justice: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 55.

[43] The right to life is engaged where the impugned law or state action imposes death or an increased risk of death on a person, either directly or indirectly: *Carter*,

at para. 62. The right to security of the person is engaged when the impugned law or state action negatively impacts or limits the claimant's security of the person: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 58-60.

[44] The application judge found, correctly in our view, that based on the evidence before her, "it is indisputable that, as a result of climate change, the [appellants] and Ontarians in general are experiencing an increased risk of death and an increased risk to the security of the person". She framed the "relevant question" before her as follows: "whether subsection 3(1) of the *CTCA* and the Target impose an increased risk of death, directly or indirectly, and/or whether they negatively impact or limit the [appellants'] security of the person."

[45] She rejected the appellants' argument that the Target authorizes or creates the very level of greenhouse gases that will lead to the catastrophic effects of climate change for Ontarians because she found that the Target was aiming for the reduction of greenhouse gas emissions in Ontario and that the appellants' "real complaint" is that "Ontario did not aim sufficiently high when setting the Target." At the same time, she rejected Ontario's argument that the Target was meaningless and found that "[t]he setting of the Target was a state action taken pursuant to a statute" and "meant to guide and direct subsequent state actions with respect to the reduction of [greenhouse gases] in Ontario."

[46] The application judge concluded that "[b]ecause of the nature of both the Target and the [appellants'] complaint, the question of whether the Target imposes an increased risk of death and/or negatively impacts or limits the [appellants'] security of the person raises the issue of whether section 7 imposes positive obligations on the state." As a result, she concluded that "[the application] is seeking to place a freestanding positive obligation on the state to ensure that each person enjoys life and security of the person, in the absence of a prior state interference with the [appellants'] right to life or security of the person".

[47] While skeptical of the appellants' position that this is not a positive rights case, the application judge was nevertheless prepared to assume that, in the event positive obligations can be imposed on Ontario under s. 7 of the *Charter* in special circumstances, there is a sufficient causal connection between the impugned Target and the prejudice suffered because the failure to take further steps to reduce emissions contributes to an increase in the risks to Ontarians' life and health. However, she ultimately determined that any deprivations were not contrary to the principles of fundamental justice relied upon by the appellants.

[48] In our view, the application judge's mischaracterization of the issue before her caused her to err in her analysis of the whether the impugned measures deprived the appellants of life or security of the person and, if so, whether the deprivations suffered were in accordance with the principles of fundamental justice against arbitrariness and gross disproportionality.

[49] The application judge erred in treating this as a positive rights case. Although she concluded the appellants' rights to life and security of the person were engaged after assuming, without deciding, that positive obligations can be imposed under s. 7 in the special context of climate change, her incorrect framing of the application as a positive rights case coloured her analysis.

[50] This incorrect framing also affected the application judge's consideration of whether the deprivations she found were in accordance with the principles of fundamental justice. The application judge correctly noted that a law is arbitrary where "there is no connection between the effect of a provision and its purpose": *Sharma*, at para. 111; or "where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person": *Carter*, at para. 83. She defined the objective of the Target as: "To reduce [greenhouse gases] in Ontario to address and fight climate change."

[51] The application judge was unable to find that the Target was arbitrary because she erroneously considered the question through the lens of a positive claim case, stating: "In my view, the principle against arbitrariness is not well-adapted to a positive claim case under section 7 as it is premised on there being a state interference limiting the right to life, liberty or security of the person, and not a failure on the part of the state to do something." Although concluding that "the Target falls short and its deficiencies contribute to increasing the risks of death

and to the security of the person", the appellants' complaint was that "the Target does not go far enough".

[52] The application judge's analysis of the issue of gross disproportionality was similarly flawed. She correctly instructed herself that gross disproportionality asks whether the "seriousness of the deprivation is totally out of sync with the objective of the measure" by comparing the law's purpose, "taken at face value", with its negative effects on the rights of the claimant: *Carter*, at para. 89. However, she again mischaracterized the issue as the appellants' complaint that Ontario's Target did not go far enough concluding that "the principle against gross disproportionality cannot have any application in a case like this one where the issue under section 7 is that the government did not go far enough."

[53] The question before the application judge was not whether Ontario's Target did not go far enough in the absence of a positive obligation to do anything. Rather, she should have considered whether, given Ontario's positive statutory obligation to combat climate change that it had voluntarily assumed, the Target was *Charter* compliant. She erred by failing to consider the correct question.

(e) Section 15(1) of the *Charter*

[54] Section 15(1) of the *Charter* provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race,

> national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[55] Citing to para. 28 of *Sharma*, the application judge correctly stated the governing test to establish an infringement of s. 15(1) of the *Charter*: "[A] claimant has to demonstrate that the impugned law or state action: (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage."

[56] While correctly setting out the test, the application judge erred in her assessment of the appellants' s. 15(1) claim principally because she again viewed the issue as a positive rights case, citing to *Sharma*, at para. 63, and stating: "Section 15(1) of the *Charter* does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation. Were it otherwise, courts would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers."

[57] The application judge's overarching error that this was a positive rights case affected her causation analysis. She erred by failing to acknowledge that Ontario had imposed on itself a positive statutory obligation to execute constitutionally compliant measures to combat climate change through the Target, the Plan and the *CTCA.* She failed to address whether there was a link or nexus between the impact of the Target and the disproportionate impact based on a protected ground: *Sharma*, at paras. 44-45.

[58] The application judge should have considered whether, in setting a Target that she found "falls severely short of the scientific consensus as to what is required", Ontario committed itself to a level of greenhouse gas emissions that will create or contribute to a disproportionate impact on the basis of an enumerated or analogous ground. The argument is that the Target permits emissions beyond what the scientific community deems acceptable, which evidence was not challenged by Ontario.

[59] The application judge's conclusion that the appellants had not proved causation for the purpose of their s. 15 *Charter* claim furthermore appears inconsistent with her evidentiary findings in her s. 7 causation analysis.

[60] The application judge correctly noted that, for the purpose of a s. 7 *Charter* claim, a claimant must first prove that the impugned state action contributes to an increase in the risk of death or the security of the person: *Bedford*, at para. 76. Under s. 15 of the *Charter*, a claimant must prove that the impugned state action creates or contributes to a disproportionate impact on the claimant group compared to other groups: *Sharma*, at paras. 42 and 45.

[61] The onus in each case is satisfied on a balance of probabilities. A claimant, in either a s. 7 or a s. 15 *Charter* claim, does not need to prove that the impugned state action is the only or the dominant cause of the prejudice suffered: *Bedford*, at para. 76; *Sharma*, at para. 45. In adverse impact claims, the inquiry at the first step of the s. 15(1) test is "not a preliminary merits screen" or "an onerous hurdle

designed to weed out claims on technical bases", but rather serves to exclude claims that have nothing do with substantive equality: *Alliance*, at para. 26; see also *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 41. A claimant's evidentiary burden in proving that a law has caused a disproportionate impact "cannot be unduly difficult to meet": *Sharma*, at para. 49.

[62] The application judge found that, if positive obligations could be imposed under s. 7 in the special context of climate change, the appellants had proved causation. That is, they showed that their rights to life and security of the person were engaged due to Ontario's failure to set a higher Target. She held that "Ontario's decision to limit its efforts to an objective that falls severely short of the scientific consensus as to what is required is sufficiently connected to the prejudice that will be suffered by the [appellants] and Ontarians should global warming exceed 1.5 [degrees Celsius]." As she explained, the reductions contemplated by the Target will only fulfil approximately 58% of the need to reduce greenhouse gases by approximately 45% below 2010 levels by 2030. By not taking more steps to reduce greenhouse gases in the province, Ontario is contributing to an increase in the risk of death and in the risks faced by the appellants and others with respect to the security of the person.

[63] The application judge observed that Ontario's contribution to global warming is real, measurable, and not speculative. Essentially, "[e]very tonne of [carbon dioxide] emissions adds to global warming and lead[s] to a quantifiable increase in

global temperatures that is essentially irreversible on human timescales." She rejected the suggestion that the province's greenhouse gases cause no measurable harm and do not have a tangible impact. Otherwise, such a notion would apply to all individual sources of emissions everywhere and would impede collective action and hinder a global resolution of climate change.

[64] Despite having found that the appellants met the first stage of the causation test under s. 7, the application judge found otherwise in analysing the appellants' s. 15 claim. As already noted, she agreed that young people are disproportionately impacted by climate change. She concluded, however, that this impact is not attributable in any way to the Plan, the Target, or the *CTCA*, but instead uniquely due to climate change itself.

[65] The application judge's conclusion about causation under s. 15 that climate change, and not the Target, the Plan or the *CTCA*, disproportionately impacts young people is difficult to reconcile with her conclusion about causation under s. 7, namely, that by failing to produce a Target that would further reduce greenhouse gas emissions, Ontario is contributing to an increase in the risk of death and in the risks disproportionately faced by the appellants and others with respect to the security of the person. The application judge did not explain this apparent inconsistency in light of her factual findings about the impact of climate change and Ontario's contribution to it that are necessarily the same under both issues. The judge hearing this matter afresh should be alive to this issue.

(f) The relief requested by the appellants in their application

[66] The appellants' application is premised on the argument that Ontario is statutorily obliged to take positive steps to redress the future harms of climate change. They ask that the Target be replaced with a constitutionally compliant Target. As the application judge found, there is an unexplained gap between international standards and the Target. The appellants argue that the reality of the Target is that it allows more greenhouse gases into the atmosphere than recommended under international standards.

[67] Ontario sees this case as requesting that the court assume judicial control over environmental and climate policy. Moreover, Ontario says that the appellants' request that the Target conform to scientific standards is vague and imprecise. As a result, the remedy requested by the appellants is impossible to order.

[68] We disagree.

[69] First, the appellants' requested relief includes declaratory relief, including a declaration that the Target violates their ss. 7 and 15 *Charter* rights, which may be ordered without the necessity of telling Ontario precisely what to do to make its Target *Charter* compliant. As the Supreme Court stated in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 47, a court can exercise its discretion to grant declaratory relief as a proper remedy and, "respectful of the responsibilities of the executive and the courts, … provide the legal framework for

the executive to exercise its functions and to consider what actions to take … in conformity with the *Charter*."

[70] Second, the appellants are not requesting the court to order Ontario to set a particular target. As set out above, they seek an order directing Ontario to set a "science-based" target consistent with Ontario's share of the reductions necessary to limit global warming below 1.5 degrees Celsius above pre-industrial temperatures or, alternatively, well below 2 degrees Celsius. The unchallenged international standards and scientific consensus about global warming and climate change and the remaining carbon budget in the evidence on this application is not imprecise. If a breach of the appellants' *Charter* rights is declared, there are clear international standards based on accepted scientific consensus that can inform what a constitutionally compliant Target and Plan should look like. The international standards and the scientific evidence produced by the parties on the application clearly indicate how acceptable levels of greenhouse gas emissions are measured and calculated. Notably, this evidence also suggests that the amount of greenhouse gases that Ontario emits into the atmosphere can be calculated and that the level of reduction of gases that scientific experts opine should be implemented in order to conform with international standards are measurable.

[71] Finally, and importantly, Ontario's argument that ordering a "science-based" target would be "so devoid of content as to be effectively meaningless" is belied by

its choice stated in the Plan to align its Target to Canada's 2030 target under the international standard of the Paris Agreement.

[72] In para. 145 of her reasons, the application judge noted that "it is appropriate in the context of this case to assess the Target in light of global targets that are based on scientific consensus/findings of the IPCC". The application judge noted the gap between the Target and international standards as follows:

> While…it is not this Court's role to determine how Ontario's "fair" share of the remaining carbon budget should be calculated, this Court can rely on the scientific consensus that [greenhouse gas emissions] must be reduced by approximately 45% below 2010 levels by 2030, and must reach "net zero" by 2050 in order to limited global average surface warming to 1.5 [degrees Celsius] and to avoid the significantly more deleterious impacts of climate change. …[I]n order to reduce its emissions by 45% by 2030 relative to the 2010 level, Ontario would have to reduce its emissions by approximately 52% below 2005 levels by 2030. This would require a 73% increase of the Target. Put differently, the reductions contemplated by the Target will only fulfil approximately 58% of the need to reduce [greenhouse gas emissions] by approximately 45% below 2010 levels by 2030.

[73] The application judge did not determine the question of remedy because of her dismissal of the application.

[74] If the application is ultimately successful, the question of remedy can be determined by the court. While we do not wish to foreclose the range of potential remedies that may be appropriate, we note that ordering Ontario to produce a constitutionally compliant Plan and Target, for instance, is no different than in

Khadr, where the Supreme Court left it to Canada to determine the precise *Charter* compliant steps it needed to take. Similarly, in *Chaoulli*, while finding *Charter* breaches, McLachlin C.J., Major and Bastarache JJ. did not order what exact measures the Quebec government was required to implement in order to render its health care scheme *Charter* compliant.[2] Whether a similar or different remedy would be appropriate in this case if the application is successful is best left for the judge hearing the application.

V. DISPOSITION

[75] For these reasons, the appeal is allowed and the application judge's order, including her costs disposition, is set aside. The issues raised on the application must be considered afresh and through the correct analytical lens.

[76] As noted above, we decline to decide the application and instead remit the matter for a new hearing. In doing so, we acknowledge the court of first instance's institutional advantage in making the findings necessary to fairly determine whether the appellants' rights were breached or whether they are entitled to the relief that they seek: see *Canadian Council for Refugees*, at para. 176. For instance, the application judge indicated that there was insufficient evidence to allow her to address the adverse effects distinction concerning young people's

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[2] As noted above, McLachlin C.J., Major and Bastarache JJ. concurred in the reasons of Deschamps J., who wrote separately and concluded that the prohibition on private health insurance in Quebec violated the Quebec *Charter of Human Rights and Freedoms.* Deschamps J. also did not prescribe what steps the government had to take to remedy the breach.

liberty and future life choices that are being constrained by decisions being made today over which they have no control.

[77] The application judge further held that it was unnecessary for her to determine whether societal preservation or ecological sustainability are unwritten constitutional principles because they would not affect her analysis under ss. 7 and 15 of the *Charter*. Given our disposition of the appeal, it is also unnecessary for us to decide this issue. However, how this issue may inform the question of whether the Target and Plan are *Charter* compliant because of the statutory obligation to combat climate change that Ontario has imposed on itself is another question that may require reconsideration at the new hearing.

[78] Further, as earlier indicated, the interveners have raised issues that were not determined by the application judge. We agree with the application judge that if the appellants wish to pursue these issues, they should be properly pleaded. As a result, the appellants may wish to consider whether they should seek to amend their pleadings.

[79] We therefore remit the application for a new hearing before the application judge, as her sitting schedule permits. If she is unavailable to hear the application, then it shall be heard by another judge of the Superior Court, as assigned.

[80] It will be open to the parties to determine whether, given the issues as now framed or upon any amendment to the pleadings, including the above noted issues raised by the interveners, and any further issues the parties wish to pursue,

including the application of s. 1 of the *Charter*, the evidentiary record will require amplification; whether the application should be converted into an action; or whether there should be a trial of an issue or issues. We recommend the parties seek case management to define the next steps and a timetable for their execution in these proceedings.

[81] The appellants were successful on this appeal and are entitled to their costs of the appeal on a partial indemnity basis. If the parties cannot agree on the amount, they shall deliver brief written submissions of no more than two pages, plus a costs outline, within ten days of the release of these reasons.

[82] The disposition of the application costs is remitted for determination at the new hearing.

Released: October 17, 2024 “L.B.R.”

“L.B. Roberts J.A.”
“S. Coroza J.A.”
“S. Gomery J.A.”