**CITATION:** Mathur v. His Majesty the King in Right of Ontario, 2023 ONSC 2316
**COURT FILE NO.:** CV-19-00631627-0000
**DATE:** 20230414

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **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 | ) | *Nader R. Hasan, Justin Safayeni, Spencer Bass, Fraser Andrew Thomson, Danielle Gallant, Julia Croome and Reid Gomme,* for the Applicants |
| Applicants | ) | |
| **– and –** | ) | |
| | ) | |
| HIS MAJESTY THE KING IN RIGHT OF ONTARIO | ) | *S. Zachary Green, Padraic Ryan and Dayna Murczek,* for the Respondent |
| Respondent | ) | |
| **– and –** | ) | |
| | ) | |
| ASSEMBLY OF FIRST NATIONS, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, FOR OUR KIDS, FRIENDS OF THE EARTH CANADA and INDIGENOUS CLIMATE ACTION | ) | *Adam Williamson and Jeremy Kolodziej,* for the Intervener Assembly of First Nations |
| | ) | *Louis Century and Erica Cartwright,* for the Intervener Canadian Association of Physicians for the Environment |
| | ) | *Ewa Krajewska and Meghan Pearson,* for the Intervener David Asper Centre for Constitutional Rights |
| Interveners | ) | |
| | ) | *Meaghan Daniel,* for the Intervener For Our Kids |
| | ) | *Nathalie Chalifour, Lynda Collins and Erin Dobbelsteyn,* for the Intervener Friends of the Earth Canada |
| | ) | *Nathaniel Read-Ellis,* for the Intervener |

) Indigenous Climate Action
)
)
)
)
)
) **HEARD:** September 12-14, 2022, with
) supplementary written submissions delivered
) on December 19, 2022

## REASONS FOR JUDGMENT

**VERMETTE J.**

[1] The focus of this Application is the greenhouse gas emissions ("**GHG**") reduction target adopted by the Respondent ("**Ontario**") to reduce GHG by 30% below 2005 levels by 2030 ("**Target**"). The Target was set by Ontario under section 3(1) of the *Cap and Trade Cancellation Act, 2018*, S.O. 2018, c. 13 ("***CTCA***"), and articulated in "Preserving and Protecting our Environment for Future Generations – A Made-in-Ontario Environmental Plan" ("**Plan**").

[2] The Applicants seek the following relief:

a. a declaration that the Target set pursuant to the *CTCA* is unconstitutional and violates the rights of Ontario's youth and future generations under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("***Charter***"), in a manner that cannot be saved under section 1 of the *Charter*;

b. a declaration that sections 3(1) and/or 16 of the *CTCA* are unconstitutional and violate sections 7 and 15 of the *Charter*, in a manner that cannot be saved under s. 1 of the *Charter*, to the extent that they allow for the imposition of the Target without mandating that it be set with regard to the Paris Standard (defined below) or any kind of science-based process;

c. an order directing Ontario to set a science-based target for the allowable levels of GHG under section 3(1) of the *CTCA* that is consistent with Ontario's share of the minimum level of GHG reductions necessary to limit climate change to the Paris Standard ("**Revised Target**"); and

d. an order directing Ontario to revise its climate change plan under section 4(1) of the *CTCA* once it has set the Revised Target.

[3] The Applicants are seven young Ontarians between the ages of 15 and 27. They are remarkable youth and young people who have demonstrated a longstanding commitment to fighting climate change. Some of the Applicants are Indigenous.

[4] 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. Nevertheless, it opposes this Application on numerous grounds, which are discussed below.

[5] While it would be difficult not to be sympathetic to the concerns expressed by the Applicants about their future in light of the evidence filed in this case, this Court cannot, based on the current state of the law, find violations of the *Charter* in this case. Consequently, the Application is dismissed.

## A. FACTUAL BACKGROUND

### 1. The United Nations Framework Convention on Climate Change and the Paris Agreement

[6] The United Nations Framework Convention on Climate Change ("**UNFCCC**") was adopted in New York on May 9. 1992. Canada is a party to the UNFCCC. The objective of the UNFCCC is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

[7] In 2015, the Paris Agreement was adopted under the UNFCCC. Canada is a party to the Paris Agreement. Article 2 of the Paris Agreement provides as follows:

> **Article 2**
>
> 1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels[1] and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
>
> (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

[1] Pre-industrial refers to the period 1850-1900.

> 2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

[8] The Applicants' reference to the "**Paris Standard**" is a reference to the "standard" set out in Article 2(1)(a) of the Paris Agreement.

[9] In March 2022, Canada submitted its most recent national GHG reduction targets under the Paris Agreement. Canada announced a target of 40-45% emission below 2005 levels by 2030. This national target aims for more stringent GHG reductions than Ontario's Target which, as stated above, aims to reduce GHG by 30% below 2005 levels by 2030.

## 2. The *CTCA*

[10] The *CTCA* was adopted in 2018. Sections 3, 4 and 5 of the *CTCA* read as follows:

> **Targets**
>
> **3** (1) The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time.
>
> **Public notice**
>
> (2) The Government shall make the targets and any revisions to them available to the public on a website of the Government or in such other manner as may be prescribed.
>
> **Climate change plan**
>
> **4** (1) The Minister, with the approval of the Lieutenant Governor in Council, shall prepare a climate change plan and may revise the plan from time to time.
>
> **Advisory panel**
>
> (2) The Minister may, for the purpose of taking any steps with respect to the climate change plan, appoint panels to perform such advisory functions as the Minister considers advisable.
>
> **Public notice**
>
> (3) The Minister shall make the plan and any revisions to it available to the public on a website of the Government or in such other manner as may be prescribed.
>
> **Status**
>
> (4) For greater certainty, the plan and any revisions to it are not undertakings within the meaning of the *Environmental Assessment Act*.

> **Minister's progress report**
>
> **5** (1) The Minister shall, on a regular basis, prepare reports in respect of the climate change plan.
>
> **Public notice**
>
> (2) The Minister shall make each report available to the public on a website of the Government or in such other manner as may be prescribed.

[11] Section 16 of the *CTCA* repealed the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, S.O. 2016, c. 7 ("***Climate Change Act***"). Subsection 6(1) of the *Climate Change Act* established targets for reducing GHG, including a reduction of 37% below 1990 levels by the end of 2030. This target was higher than the Target.

## 3. The Plan and the Target

[12] In November 2018, Ontario released the Plan for consultation and public comment. The message of the Minister of the Environment, Conservation and Parks included at the beginning of the Plan states, in part:

> I am pleased to present the following made-in-Ontario plan to keep our province beautiful by protecting our air, land and water, preventing and reducing litter and waste, supporting Ontarians to continue to do their share to reduce greenhouse gas emissions, and helping communities and families prepare for climate change.
>
> This plan will ensure we balance a healthy environment with a healthy economy, and will be reviewed on a four-year basis.
>
> This is a plan that represents a clean break from the status quo.
>
> We understand the pressure Ontarians feel with rising costs of living as well as skyrocketing energy costs that have hurt our economy and our competitiveness. They are understandably frustrated to see their hard-earned tax-dollars being put towards policies and programs that don't deliver results.
>
> That's why a cap-and-trade program or carbon tax that seeks to punish people for heating their home or driving their cars remains unacceptable to people of Ontario.
>
> When the government does invest in environmental programs, taxpayers should not have to watch their hard-earned dollars be diverted towards expensive, ineffective policies and programs that do not deliver results.
>
> The people of Ontario deserve recognition for the sacrifices they have made and the ones they continue to pay for.

> Our plan reflects our province's specific needs and opportunities, and it does not include a carbon tax. We will continue to do our share to reduce greenhouse gases and we will help communities and families prepare to address climate change. With hard work, innovation and commitment, we will ensure Ontario achieves emissions reductions in line with Canada's 2030 greenhouse gas reduction targets under the Paris Agreement.
>
> […]
>
> Our plan describes the actions Ontario is proposing to take and the ways we will enable industry, business, communities and people to continue to do their part.
>
> Ontario families understand that we have a personal responsibility to leave behind a province better off than the one we inherited; not just environmentally, but financially as well.
>
> I invite you to read our plan and join with us today, and every day, to create a better future for Ontario.

[13] The Plan states that one of its chapters (entitled "Addressing Climate Change") "acts as Ontario's climate change plan, which fulfills our commitment under the [*CTCA*]." One of the sections in this chapter is entitled "Continuing to Do our Share: Achieving the Paris Agreement Target". This section states, in part:

> One of the key ways we are defining our vision for climate action in Ontario is by setting an achievable greenhouse gas reduction target. This will help us focus our efforts and provide a benchmark for our province to assess its progress on the climate change mitigation components of our plan.
>
> **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*].
>
> Quick Fact: The Paris Agreement is an agreement within the United Nations Framework Convention on Climate Change. Its goal is to keep the increase in global average temperature to well below 2 ºC above pre-industrial levels, and pursue efforts to limit the increase even further to 1.5 ºC, in order to reduce the risks and impacts of climate change.
>
> This target takes into consideration the commitment the people of Ontario have already shown in reducing emissions, as well as our commitment to growing Ontario's economy while doing our part to tackle climate change.
>
> […]

> The government is committed to balancing emissions reductions and economic growth. Ontario's economy has been growing, even as emissions are declining.
>
> Tracking this improvement is an important part of Ontario's climate change plan. […]
>
> The below areas are where we will focus our initiatives and actions to tackle and be more resilient to climate change and to meet our balanced target. [Emphasis in the original.]

[14] In another section of the same chapter entitled "Doing our part: Government Leadership", it is reiterated that "Ontario is committed to doing its part to address climate change" and that "[t]his includes leading by example". In an earlier section of the Plan entitled "Doing our Part", it is stated that "[w]e will continue to do our share to address climate change and protect the environment" and "[w]e will do so in a way that protects our economy and respects the people."

[15] The Plan states that it will be reviewed and revised on a four-year basis. As of April 2022, based on public statements made by Ontario, the Target remained unchanged.

### 4. The *References re Greenhouse Gas Pollution Pricing Act*

[16] On March 25, 2021, the Supreme Court of Canada released its decision in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 ("***GHG Reference***") which holds that Parliament had the constitutional authority to enact the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186.

[17] While the context of the *GHG Reference* is different from this case (i.e., division of powers case vs. *Charter* case), the majority's decision contains a useful summary of background facts with respect to GHG and climate change, as well as a number of statements and findings that are relevant to this case. I note that these facts, statements and findings are generally supported by the evidence filed by the Applicants in this case. In light of the foregoing, it is helpful to reproduce some of the relevant paragraphs of the majority's decision below:

> [2] […] Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions. In the *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, December 12, 2015, states around the world undertook to drastically reduce their greenhouse gas emissions in order to mitigate the effects of climate change. […]
>
> [7] Global climate change is real, and it is clear that human activities are the primary cause. In simple terms, the combustion of fossil fuels releases greenhouse gases ("GHGs") into the atmosphere, and those gases trap solar energy from the sun's incoming radiation in the atmosphere instead of allowing it to escape, thereby warming the planet. Carbon dioxide is the most prevalent and recognizable GHG resulting from human activities. Other common GHGs include

methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and nitrogen trifluoride.

[8] At appropriate levels, GHGs are beneficial, keeping temperatures around the world at levels at which humans, animals, plants and marine life can live in balance. And the level of GHGs in the atmosphere has been relatively stable over the last 400,000 years. Since the 1950s, however, the concentrations of GHGs in the atmosphere have increased at an alarming rate, and they continue to rise. As a result, global surface temperatures have already increased by 1.0°C above pre-industrial levels, and that increase is expected to reach 1.5°C by 2040 if the current rate of warming continues.

[9] These temperature increases are significant. As a result of the current warming of 1.0°C, the world is already experiencing more extreme weather, rising sea levels and diminishing Arctic sea ice. Should warming reach or exceed 1.5°C, the world could experience even more extreme consequences, including still higher sea levels and greater loss of Arctic sea ice, a 70 percent or greater global decline of coral reefs, the thawing of permafrost, ecosystem fragility and negative effects on human health, including heat-related and ozone-related morbidity and mortality.

[10] The effects of climate change have been and will be particularly severe and devastating in Canada. Temperatures in this country have risen by 1.7°C since 1948, roughly double the global average rate of increase, and are expected to continue to rise faster than that rate. Canada is also expected to continue to be affected by extreme weather events like floods and forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise, and the spread of potentially life-threatening vector-borne diseases like Lyme disease and West Nile virus.

[11] The Canadian Arctic faces a disproportionately high risk from climate change. There, the average temperature has increased at a rate of nearly three times the global average, and that increase is causing significant reductions in sea ice, accelerated permafrost thaw, the loss of glaciers and other ecosystem impacts. Canada's coastline, the longest in the world, is also being affected disproportionately by climate change, as it experiences changes in relative sea level and rising water temperatures, as well as increased ocean acidity and loss of sea ice and permafrost. Climate change has also had a particularly serious effect on Indigenous peoples, threatening the ability of Indigenous communities in Canada to sustain themselves and maintain their traditional ways of life.

[12] Climate change has three unique characteristics that are worth noting. First, it has no boundaries; the entire country and entire world are experiencing and will continue to experience its effects. Second, the effects of climate change do not have a direct connection to the source of GHG emissions. Provinces and territories with low GHG emissions can experience effects of climate change that

are grossly disproportionate to their individual contributions to Canada's and the world's total GHG emissions. In 2016, for example, Alberta, Ontario, Quebec, Saskatchewan and British Columbia accounted for approximately 90.5 percent of Canada's total GHG emissions, while the approximate percentages were 9.1 percent for the other five provinces and 0.4 percent for the territories. Yet the effects of climate change are and will continue to be experienced across Canada, with heightened impacts in the Canadian Arctic, coastal regions and Indigenous territories. Third, no one province, territory or country can address the issue of climate change on its own. Addressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders.

[13] Canada's history of international commitments to address climate change began in 1992 with its ratification of the *United Nations Framework Convention on Climate Change*, U.N. Doc. A/AC.237/18 (Part II)/Add.1, May 15, 1992 ("*UNFCCC*"). After failing to meet its commitments under multiple *UNFCCC* agreements, including the *Kyoto Protocol*, U.N. Doc. FCCC/CP/1997/L.7/Add.1, December 10, 1997, and the *Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/11/Add.1, December 18, 2009, Canada agreed to the *Paris Agreement* in 2015. Recognizing that "climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries", the participating states agreed to hold the global average temperature increase to well below 2.0°C above pre-industrial levels and to pursue efforts to limit that increase to 1.5°C: United Nations, Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session*, U.N. Doc. FCCC/CP/2015/10/Add.1, January 29, 2016, at p. 2; *Paris Agreement*, art. 2(1)(a). Canada ratified the *Paris Agreement* in 2016, and the agreement entered into force that same year. Canada committed to reducing its GHG emissions by 30 percent below 2005 levels by 2030.

[…]

[24] Despite the actions that had been taken, Canada's overall GHG emissions had decreased by only 3.8 percent between 2005 and 2016, which was well below its target of 30 percent by 2030. Over that period, GHG emissions had decreased in British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Yukon, but had increased in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Northwest Territories and Nunavut. Illustrative of the collective action problem of climate change, between 2005 and 2016, the decreases in GHG emissions in Ontario, Canada's second largest GHG emitting province, were mostly offset by increases in emissions in two of Canada's five largest emitting provinces, Alberta and Saskatchewan. Canada's remaining emissions reduction between 2005 and 2016 came from two of Canada's remaining five largest emitting provinces, Quebec and British Columbia, as well as from decreases in GHG emissions of over 10 percent — well above Canada's

3.8 percent overall GHG emissions reduction — in New Brunswick, Nova Scotia, Prince Edward Island and Yukon.

[…]

[167] […] All parties to this proceeding agree that climate change is an existential challenge. It is a threat of the highest order to the country, and indeed to the world. This context, on its own, provides some assurance that in the case at bar, Canada is not seeking to invoke the national concern doctrine too lightly. The undisputed existence of a threat to the future of humanity cannot be ignored.

[…]

[171] In summary, the evidence clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole. This matter is critical to our response to an existential threat to human life in Canada and around the world. […]

[187] Third, a province's failure to act or refusal to cooperate would in this case have grave consequences for extraprovincial interests. It is uncontroversial that GHG emissions cause climate change. It is also an uncontested fact that the effects of climate change do not have a direct connection to the source of GHG emissions; every province's GHG emissions contribute to climate change, the consequences of which will be borne extraprovincially, across Canada and around the world. And it is well-established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life.

[188] Furthermore, I reject the notion that because climate change is "an inherently global problem", each individual province's GHG emissions cause no "measurable harm" or do not have "*tangible* impacts on other provinces": Alta. C.A. reasons, at para. 324; I.F., Attorney General of Alberta, at para. 85 (emphasis in original). Each province's emissions are clearly measurable and contribute to climate change. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail.

[189] I note that similar arguments have been rejected by courts around the world. In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), for instance, the majority of the U.S. Supreme Court rejected the federal government's argument that projected increases in other countries' emissions

meant that there was no realistic prospect that domestic reductions in GHG emissions in the U.S. would mitigate global climate change. The Supreme Court reasoned that "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere": p. 526. Similarly, in *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, the Supreme Court of the Netherlands upheld findings of The Hague District Court and The Hague Court of Appeal that "[e]very emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere" and thus contributes to the global harms of climate change: para. 4.6. The Hague District Court's finding that "any anthropogenic greenhouse gas emission, no matter how minor, contributes to . . . hazardous climate change" was thus confirmed on appeal: *Stichting Urgenda v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196, at para. 4.79. In *Gloucester Resources Limited v. Minister for Planning*, [2019] N.S.W.L.E.C. 7, a New South Wales court rejected an argument of a coal mining project's proponent that the project's GHG emissions would not make a meaningful contribution to climate change. The court noted that many courts have recognized that "climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources": para. 516 (AustLII).

[190] While each province's emissions do contribute to climate change, there is no denying that climate change is an "inherently global problem" that neither Canada nor any one province acting alone can wholly address. This weighs in favour of a finding of provincial inability. As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole. […]

[206] […] Although this restriction may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada's coastal regions. In my view, the impact on those interests justifies the limited constitutional impact on provincial jurisdiction.

## 5. Intergovernmental Panel on Climate Change and the *Glasgow Climate Pact*

[18] The advancement of climate science knowledge is well documented by the reports that have been produced every 5 or 6 years since 1990 by the United Nations' Intergovernmental Panel on Climate Change ("**IPCC**"). The IPCC was founded in 1988 to produce periodic assessments of the state of climate science literature. The assessment reports published by the IPCC are written by several hundred of the world's leading climate change researchers. Material covered by the IPCC reports must also appear in the peer-reviewed scientific literature. The text of each IPCC report is itself subject to rigorous peer-review by both external subject-matter experts as well as government representatives. The "Summary for Policymakers" that is produced for each assessment report is additionally subject to word-by-word approval by government delegates from the 195 member countries of the UNFCCC, including Canada.

[19] Given the expertise of the IPCC author teams and the care and rigour that is applied to the review process, and based on the expert evidence before me, I find that the IPCC reports are a reliable, comprehensive and authoritative synthesis of existing scientific knowledge about climate change and its impacts. I reject any suggestion to the contrary by Ontario's experts (Dr. van Wijngaarden in particular) whose credentials do not measure up to those of the IPCC.

[20] In 2018, i.e., the year Ontario set the Target, the IPCC published a special report on the impacts of global warming of 1.5ºC entitled: *Global Warming of 1.5ºC. An IPCC Special Report on the impacts of global warming of 1.5ºC above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*. The IPCC reported that "[c]limate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5ºC and increase further with 2ºC." The IPCC also reported that global net anthropogenic $CO_2$ emissions must be reduced by approximately 45% below 2010 levels by 2030, and must reach "net zero" by 2050 in order to limit global average surface warming to 1.5ºC and to avoid the significantly more deleterious impacts of climate change. See *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para. 16. This finding of the IPCC was endorsed by states in the *Glasgow Climate Pact* which was adopted on November 13, 2021. Article 22 of the *Glasgow Climate Pact* reads as follows:

> *Recognizes* that limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around midcentury as well as deep reductions in other greenhouse gases;

[21] As stated above, the Target provides that Ontario will reduce its emissions by 30% below 2005 levels by 2030. In order to reduce its emissions by 45% by 2030 relative to the 2010 level, as endorsed by the IPCC and the *Glasgow Climate Pact*, Ontario would have to reduce its emissions by approximately 52% below 2005 levels by 2030, i.e., increase the Target by 22%.

## 6. Impacts of climate change for Ontario

[22] Some of the impacts of climate change were discussed by the Supreme Court of Canada in the *GHG Reference*. The Applicants have adduced extensive expert evidence in this case regarding the impacts of climate change. Most of this evidence is unchallenged by Ontario.

[23] The expert evidence shows the following:

a. 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 1.5ºC. There is a very strong trend towards increasing frequency of heat waves in Ontario. The significant increase in the number of sustained periods of extreme heat will increase heat-related morbidity and mortality.

b. The burden of climate-sensitive infectious diseases has increased in Ontario and Canada as a result of anthropogenic climate change and is likely to increase further in the future. Climate change has increased risk of infectious diseases due to insect vectors such as ticks in Ontario and Canada; is likely to have increased risk of disease due to mosquito vectors; is very likely to be contributing to increases in risk of food and waterborne disease; and is expected to increase the risk of a variety of other infectious diseases, including endemic mycoses (fungal diseases) and diseases caused by parasites with complex life cycles.

c. Climate change will increase the frequency and severity of wildfires across Canada (including Ontario) with area burned, fire season length and fire starts all increasing with warmer temperatures. It is expected that if global warming is kept to 1.5ºC, Ontario will experience a 33% increase in area burned by wildfire, a 2-week increase in fire season length and a 50% increase in wildfire starts. With each temperature increase, the future impacts will worsen. As wildfires increase, exposure to their smoke will cause increasing mortality and morbidity for Ontarians, including an increased number of respiratory infections among children.

d. The general view of scientists is that flooding frequency and magnitude is increasing with climate change. Climate change will increase the frequency of what were previously once in 100-year or 250-year floods in many Ontario cities. Although floods rarely lead to deaths in Canada, they can cause many impacts on physical health in the short, medium and long term, including health risks associated with the contamination of drinking water and food, exposure to mold and carbon monoxide poisoning. Individuals exposed to floods are significantly more likely to develop mental health issues, including depression, phobias, and generalized anxiety disorder.

e. Climate change will lead to further increases in the incidence, frequency, and severity of harmful cyanobacterial (previously called blue-green algae) blooms in

Ontario. Cyanobacterial blooms can be harmful principally because of their propensity to produce toxins that can have negative effects on human and wildlife health. They threaten water quality and fish stocks.

f. Current projections suggest that at >2ºC warming, climate change will lead to increased atmospheric inputs of mercury to aquatic ecosystems in Ontario. In the absence of countervailing ecosystem changes and all else being equal, increased inputs of mercury would lead to increased mercury concentrations in fish. Any increased mercury contamination in fish from climate change could pose risk for food security and food sovereignty for communities that rely on fish, including many Indigenous communities in Ontario. Even at low to modest doses, mercury exposure has been linked to a range of neurodevelopmental, cardiovascular and immunologic effects.

g. The various impacts caused by climate change have been shown, through strong evidence, to be leading to a range of serious and wide-ranging negative mental health impacts within Canada. These mental health impacts can range from mild to severe, and include: emotional reactions; psychosocial outcomes such as depression, anxiety, and post-traumatic stress disorder (PTSD); grief and loss; increased drug and alcohol use; social and family stress; increased suicide ideation and suicides; loss of cultural knowledge and continuity; and deterioration and loss of place-based connection.

h. The probability of large-scale displacements of people due to climatic hazards, regional food security crises, and increasing climate-related violence and conflict grows significantly with each additional degree of warming.

[24] In addition to these negative impacts, every incremental increase in global temperature increases the likelihood of large-scale, devastating climate tipping points being crossed. This is explained as follows by Professor Tim Lenton, one of the Applicants' experts:

> A "climate tipping point" is where a small change in climate (e.g. global temperature) makes a big difference to a large part of the climate system, changing its future state. The crossing of most tipping points is inherently hard to reverse. The resulting transition to a different state happens at different rates depending on the system in question (e.g. the atmosphere changes fast, the biosphere at an intermediate rate, and ice sheets change slowly). I consider the likelihood and impacts of 15 potential climate tipping points that could be crossed this century due to anthropogenic climate change. These are assessed based on scientific understanding, evidence of past tipping point behaviour, contemporary observations, detailed climate model projections, and published expert elicitation results.
>
> Below or at 1.5ºC above pre-industrial levels, it is very likely (90-100% probability) that most tropical coral reefs will be degraded, whereas it is unlikely (0-33% probability) or very unlikely (0-10% probability) that cryosphere or

> ocean-atmosphere tipping points will be passed, with the exception that part of the West Antarctic ice sheet may have passed a tipping point.
>
> Between 1.5ºC and well below 2ºC above pre-industrial levels it [is] as likely as not (33 to 66% probability) that key ice sheet tipping points will be passed, Arctic summer sea-ice will be lost, and deep convection in the Labrador Sea will collapse.
>
> Between 2ºC and 3ºC above pre-industrial levels it is likely (66-100% probability) that major ice sheet tipping points will be passed, and virtually certain (99-100% probability) that Arctic summer sea-ice and tropical coral reefs will be lost.
>
> Between 3ºC and 5ºC above pre-industrial levels it is very likely that major ice sheet tipping points will be passed, and as likely as not that there will be major reorganisations of ocean and atmosphere circulation.
>
> The direct impacts of climate tipping points on Canada and Ontario include increased sea-level rise especially along the North Atlantic coast, increased coastal erosion, increased warming, loss of snowpack, drying, negative impacts on agriculture, loss of major ecosystems and the carbon and biodiversity they contain, major impacts on forestry, increased fires posing risks to health, and loss of infrastructure, including land transport routes. The indirect impacts of climate tipping points on Canada and Ontario include amplified global warming, destabilisation of the global climate system, major shifts in global food production and prices, and hundreds of millions of displaced people (climate migrants) some of whom may seek to make a new home in Canada and Ontario.

[25] The expert evidence adduced by the Applicants also shows that climate change has disproportionate impacts on young people and Indigenous peoples. Among other things:

a. Children's physiological systems are not fully developed and create more body heat per body mass, making them particularly sensitive to heat and both respiratory (e.g. asthma) and communicable diseases.

b. Young people are especially at risk from the impacts of wildfire smoke, flooding, extreme heat, vectorborne diseases, and toxic contamination.

c. Young people are also more vulnerable to climate change-related impacts due to their increased reliance on caregivers for protection and adaptation.

d. Climate change may also differentially impact the mental health of children and youth through adverse experiences and post traumatic distress following climate-related emergencies, the psychosocial impacts of watching family members suffer, or due to a general sense of environmental hopelessness and fears over future security.

e. Indigenous youth face particular mental health challenges due to their strong ties to the land.

f. Indigenous peoples in Ontario have already observed significant harmful effects of climate change. These changes affect traditional and subsistence practices such as fishing, hunting and plant harvesting, with impacts on food and water security.

g. The loss of traditional foods and cultural practices is impacting Indigenous peoples' mental and physical well-being.

h. Indigenous peoples are particularly vulnerable to the mental health impacts of climate change. Climate impacts are leading to anxiety, depression, grief, family stress, loss of identity, increased likelihood of substance usage, and suicide ideation among Indigenous individuals.

## 7. Carbon budget

[26] One of the Applicants' expert, Dr. H. Damon Matthews, was asked to provide his opinion on approaches that exist for determining Canada's and Ontario's share of the remaining carbon budget. The summary statement of his opinion on this point reads as follows:

> While there are [a] number of methods available for determining Canada and Ontario's fair share of global emissions, most result in Canada having already exceeded its fair share of the global remaining carbon budget. I therefore conclude that the equal per capita allocation principle, which assigns Canada's fair share of available future emissions in proportion to our current share of global population, is the only method that respects some accepted principles of equitable allocation, while also allowing Canada to have any remaining carbon budget left to emit in the future.

[27] In his report, Dr. Matthews explains that a common approach to the allocation of available future emissions is "to allocate emissions on an equal per-capita basis, based on the fundamental equity principle that each individual should have equal access to the means of development". Dr. Matthews states that the equal-per-capita share principle can be applied in various ways. For instance, it can be applied to the remaining carbon budget only, or it can incorporate some quantity of historical emissions to account for historical responsibility when allocating future emissions. Other considerations include a country's capacity to mitigate, which takes into account factors such as a country's wealth or a country's access to inexpensive low carbon energy sources. Dr. Matthews concludes as follows:

> […] These different allocation frameworks would all result in different allocations for Canada's share of the global emissions budget. However, in Canada's case, as a country with high historical responsibility, high capacity and high access to renewable energy resources, all of these additional considerations would result in smaller "fair" allocations compared to the case of an equal-per-capita share of the remaining budget. […] However, I emphasize that this

> allocation is less "fair" compared to other allocation options in that it does not account for any amount of historical responsibility, nor does it acknowledge Canada's differential capacity relative to other nations.
>
> […]
>
> It is worth noting another commonly used allocation principle, whereby a country's share of the available global budget is calculated simply using the country's current share of global emissions. Applying this "grandfathering" allocation to Canada would grant us approximately 1.5% of the available future carbon budget, which represents our current (year-2018) share of global $CO_2$ emissions. Similarly, aligning Canada's national target with a particular global emissions target (such as 45% below 2010 levels by 2030), is also an example of the implementation of the grandfathering allocation principle. While this allocation principle is easy to apply, it is not aligned with any fairness principles, and is generally recognized (including by myself) as being explicitly "unfair" given the large disparities in historical emissions among countries. Consequently, setting Canada's target to be equal to a particular global emissions target such as 45% below 2010 levels by 2030, would not represent a fair target for Canada in light of the fairness principles discussed above. Accordingly, a fair target for Canada would be one that is more ambitious (achieving a larger percentage decrease in emission) than the global average.
>
> The conclusion of this analysis is that applying an equal-per-capita allocations principle to the remaining carbon budget from 2018 onwards (as reported by the IPCC 1.5ºC report) is the only allocation method that includes some aspect of the above fairness principles, but does not result in a zero (or indeed negative) allocation for Canada. Since this choice of allocation method does not account for any differential responsibility or capacity on Canada's part, it is less "fair" than any other fair allocation method. However, it is the only fair method that results in a national allocation that is not by definition impossible to avoid exceeding.

[28] I note that the factors identified by Dr. Matthews with respect to the issue of allocation are consistent with Article 2(2) of the Paris Agreement, which provides that the Paris Agreement will be implemented "to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

[29] According to Dr. Matthews while an equal-per-capita allocation principle is generally recognized as a fair method to divide the global budget among countries, this is not the case for allocations among provinces within Canada. This is because differences among provinces with respect to total or per-capita emissions do not generally reflect unequal access to the means of development, but, rather, different economic and energy generation choices that reflect regional differences in resource availability. In his opinion, an equal shares allocation approach represents both the simplest and fairest option for allocating Canada's national budget to individual provinces. Such an approach requires all provinces to achieve the same relative

emissions decreases as compared to an historic baseline, and therefore has the effect of distributing the required mitigation effort equally among provinces.

[30] Dr. Matthews' comparison of the allocation of future emissions under his proposed approach and under the Target is summarized as follows in his report:

> Respecting Canada's equal per capita allocation of the remaining carbon budget would require Canada's carbon dioxide emissions to decrease from current levels to zero by the years 2024 (for a 1.5ºC target), 2030 (for a 1.75ºC target) or 2036 (for a 2ºC target). These zero-emission dates are substantially earlier than those for the world as a whole on account of Canada's much higher current level of per capita emissions relative to other countries. Ontario could similarly respect its provincial share of the national budget by eliminating carbon dioxide emissions at the same rate, though their progress in decreasing emissions since 2005 could allow for a slightly later zero-emission date (e.g. by the year 2026 rather than 2024 for the 1.5ºC target) relative to other provinces whose emissions have not decreased over the past 15 years. In all scenarios, however, Canada and Ontario's current targets to reduce emission by 30% below 2005 levels by 2030 would lead to a quantity of emissions produced before 2030 that would exceed their fair carbon budget allocations for keeping temperature below 1.5, 1.75 and even 2ºC of global warming.

## 8. Motion to strike

[31] Earlier in this litigation, Ontario unsuccessfully brought a motion to strike out the Application under Rule 21 of the *Rules of Civil Procedure*. The motion was dismissed by Justice C.J. Brown on November 12, 2020: *Mathur v. Ontario*, 2020 ONSC 6918 ("***Mathur***").

[32] Ontario's position on the motion to strike was that the Application was certain to fail for four reasons (see *Mathur* at para. 41):

a. the Application was not justiciable;

b. the Application was based on unprovable speculations about the future climate consequences of the Target;

c. there was no positive constitutional obligation on Ontario to prevent harms associated with climate change; and

d. the Applicants had no standing to seek remedies for future generations.

[33] Justice Brown made the following findings on the motion, among others:

a. The Target and the Plan, as government action, are reviewable by the courts, whether or not they are considered "law" for the purpose of a *Charter* analysis.

b. At the very least, the Target and the Plan can be considered quasi-legislation or "soft law" that guide internal policy-making within the government. While the Target and the Plan may not directly control the emissions of greenhouse gases in Ontario, they do reflect the Province's intentions, which would presumably guide policy-making decisions.

c. It was not plain and obvious that scientific evidence could not be marshalled to establish that GHG cause harm.

d. For the purposes of the Rule 21 motion, Justice Brown was satisfied that the facts in the Applicants' pleadings were capable of scientific proof and that appropriate levels of global GHG could be established through scientific evidence, based on the past and projected emission levels.

e. The Application was *prima facie* justiciable. *Charter* challenges are justiciable and cases such as *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 ("***Tanudjaja***"); application for leave to appeal to the Supreme Court of Canada dismissed: 2015 CanLII 36780 (S.C.C.) and *La Rose v. Canada*, 2020 FC 1008 ("***La Rose***") are distinguishable because the Applicants in this case are challenging specific legislation (the *CTCA*) and governmental conduct (preparation of the Target and the Plan).

f. The Application, on its face, engages each of the section 7 rights: life, liberty and security of the person.

g. The Applicants have properly pleaded breaches of the principles of fundamental justice against arbitrariness and gross disproportionality.

h. It could not be said that the Applicants' claim under section 15 had no prospect of success.

i. A motion to strike was not the appropriate forum to make judicial findings on the complex issue of positive obligations as this issue should be decided on a full evidentiary record. It was not clear that a case for positive obligation could not be made out in the climate change context.

j. This case was not a clear case where the Court could find that the Applicants lacked standing on behalf of future generations.

k. The Application should not be struck simply because some of the relief sought would take this Court beyond its institutional capacity. The final decision as to any relief to be accorded rests with the application judge.

l. The Superior Court of Justice is the appropriate venue to hear this *Charter*-based constitutional challenge.

## B. POSITIONS OF THE PARTIES

### 1. Justiciability

#### *a. Position of the Applicants*

[34] The Applicants' position is that the questions raised in the Application are justiciable. They point out that the category of truly non-justiciable cases is very small, and is even smaller if violations of *Charter* rights are alleged.

[35] The Applicants submit that the cases relied upon by Ontario on this point are clearly distinguishable as the claimants in these cases had failed to identify either a specific emissions target, a legislative provision, or a government action. They argue that the Application is squarely aimed at the unconstitutional actions of Ontario (through the *CTCA* and the Plan) in implementing the Target, making this case very different. According to the Applicants, the questions raised in the Application concern the pressing threat to constitutional rights posed by Ontario's decision to implement the Target, which is the kind of issue that is not only within this Court's institutional capacity to adjudicate, but which engages this Court's obligation to interpret and apply the *Charter*.

[36] The Applicants state that the Target is a specific government action, mandated and taken pursuant to legislation. They argue that where policy choices are translated into law or state action, that resulting law or state action must not infringe constitutional rights.

[37] The Applicants submit that Ontario's argument that the Target is purely aspirational and without any kind of real force or impact when it comes to regulating provincial GHG fails to address the language of the Plan or Ontario's own characterization of the Plan in past court cases. They point out that the Plan sets out how government decision-making will achieve the Target by, for example, making climate change a cross-government priority and identifying sector-by-sector GHG reductions. The Applicants state that, even if the Target and the Plan are not strictly binding, they are properly subject to review by the courts as "quasi-legislation" or "soft law".

[38] The Applicants argue that this Application does not lack a judicially manageable standard and that it is asking for something concrete and cognizable that can be determined by this Court with reference to international standards and expert evidence. According to the Applicants:

> this Court can assess and rely on a judicially manageable standard based on Dr. Matthews' carbon budget evidence – or, alternatively, the IPCC's 45% global emissions reduction prescription – and use it to evaluate and examine a single instance of government action made pursuant to a specific legislative regime: Ontario's 2030 Target and Plan.

[39] The Applicants note that courts around the world have been willing to weigh into the complex issues surrounding climate change. They refer to decisions made in the Netherlands, Germany, Colombia, Ireland, France and other countries. Their position is that this Court also

possesses the institutional competency and expertise to adjudicate controversies relating to climate change.

[40] The Applicants submit that the remedies that they seek do not take this Court beyond its proper institutional bounds. They argue that recognizing constitutional violations and instituting a fair process to remedy those violations is well within this Court's core capacities in constitutional litigation.

***b. Position of the Respondent***

[41] Ontario's position is that this case is unsuitable for adjudication in court.

[42] Ontario relies, among other things, on the decision of the Court of Appeal for Ontario in *Tanudjaja*, which dealt with issues related to homelessness and inadequate housing. Ontario argues that climate change plans are even less suitable for judicial review than housing policy because while provincial housing policy is largely confined within provincial boundaries, climate change is planetary in scope.

[43] While Ontario acknowledges that the question of whether a statute infringes the *Charter* is ordinarily a question with a sufficient legal component to engage the decision-making capacity of the courts, it submits that this case is very different from most *Charter* cases because the remedies sought are not available or manageable. According to Ontario, no judicially manageable standard exists that could allow courts to determine under the Constitution whether a government plan or target is sufficiently "science-based". Ontario states that this is not a question that can be resolved by application of law.

[44] Ontario similarly argues that there are no judicially manageable standards that could allow the Court to determine the sufficiency of Ontario's target for the reduction of GHG by the year 2030. Ontario states that determining Ontario's share of global GHG requires the Court to determine what is a "fair" allocation of emissions among nations and their sub-national units on a global scale. Ontario submits that whether its share of global GHG should be determined based on population, gross domestic product, emissions since Confederation or over any other period of time, economic efficiency or diplomatic strategy is a question outside of the Court's institutional capacity.

[45] Ontario further argues that a finding that the Paris Agreement requires Ontario to set some particular sub-national target that is not contemplated in the Paris Agreement and that is in addition to Canada's national target would take this Court well beyond its institutional capacity.

[46] Ontario submits that the order requested by the Applicants amounts to asking the Court to impose a duty on the legislature to stipulate a prescribed process by which the executive formulates its climate change plan and target. Ontario argues that such an order would be an incursion into the policy-making functions of the executive and legislative branches in requiring the mandating of a specific process and would be tantamount to the court dictating to the legislative branch what legislation should be enacted to combat climate change.

[47] Ontario's view is that this Court should follow prior similar cases and hold that the Applicants' claim is non-justiciable. It points out that, on the motion to strike, the motion judge found only that it was not plain and obvious that the Application was not justiciable. Ontario notes that the plain and obvious standard does not apply at this stage of the proceedings, where the Court has had the benefit of full evidence and argument, which was not available to the motion judge.

### 2. Section 7 of the *Charter*

#### *a. Position of the Applicants*

[48] The Applicants argue that the Target effectively authorizes an overall amount of GHG that, in turn, will lead to section 7 deprivations. They state that the expert evidence adduced in this case confirms what many courts, including the Supreme Court of Canada, have already recognized: climate change poses dangerous and existential risks to the life and well-being of Ontarians and the world. They submit that this is sufficient to engage the life and security of the person interests protected under section 7 of the *Charter*.

[49] The Applicants' position is that the state conduct at the heart of this Application, i.e., Ontario's setting of the Target pursuant to the *CTCA*, has a sufficient causal connection to these section 7 deprivations. According to the Applicants, Ontario is authorizing, incentivizing, facilitating, and creating the very level of dangerous GHG that will lead to the catastrophic consequences of climate change for Ontarians. They note that the test for causation under section 7 does not require that Ontario be the sole or even a predominant source of global GHG. They also point out that the fact that other jurisdictions also emit GHG does not diminish Ontario's role in causing and contributing to the harms under the applicable legal test. The Applicants state that by contributing to and exacerbating global GHG in a manner inconsistent with its proportionate share, Ontario is contributing to dangerous climate change.

[50] The Applicants submit that this Court should reject Ontario's *de minimis* argument, i.e., that since it contributes only a small percentage of global GHG, it is not responsible for any resulting harms. The Applicants point out that global warming is a collective action problem and that all jurisdictions must do their fair share in order to avoid the catastrophic impacts of climate change. They note that foreign courts have found causal links between local government policies, emissions levels and increased risks of harm from climate change, regardless of the emissions of others. According to the Applicants, the *de minimis* argument fails to recognize that Ontario contributes to the section 7 deprivations resulting from climate change, regardless of the actions of other states. They argue that GHG released today pursuant to the Target will remain in the atmosphere for hundreds of years, with each additional molecule of GHG causing additional damage resulting from climate change.

[51] The Applicants state the following with respect to Ontario's arguments on causation:

> Finally, Ontario's approach to s. 7 causation would effectively immunize governments' role in causing climate change from *Charter* scrutiny. Ontario's position that the Target and the Plan do not have any binding effect would require

> that claimants instead challenge each and every single individual government decision that contributes to climate change – every road and building constructed, mining project approved, industrial license granted, energy project authorized, etc. Quite apart from such an approach being unprincipled, inefficient and unworkable, Ontario's *de minimis* argument would ensure that it would fail, since the impact of each of these individual decisions would be minor as compared to GHG from other global sources.

[52] The Applicants submit that Ontario's degree of involvement in authorizing, incentivizing, facilitating, and creating a level of dangerous GHG, and its entry into the realm of regulating overall GHG levels, is sufficient to dismiss concerns that this Application impermissibly seeks to advance "positive rights". The Applicants state that Ontario's participation in creating the underlying harms, and its creation of the Target and the Plan pursuant to the *CTCA*, trigger an obligation to ensure that the resulting scheme is constitutionally compliant.

[53] The Applicants recognize that the legislature is entitled to change its approach, but they argue that its actions still have to be constitutionally compliant and that the Target falls well short of that mark by committing Ontario to allowing dangerously high levels of GHG.

[54] The Applicants submit that, in any event, positive rights claims may be brought under section 7 in special circumstances and that this requirement is easily satisfied by the widespread and existential threat climate change poses to Ontario and the world. The Applicants point out that the issues and relief sought in this Application engage the very precondition to the enjoyment of all fundamental freedoms enshrined in Canada's constitutional order.

[55] The Applicants' position is that the Target violates the principles of fundamental justice against gross disproportionality and arbitrariness. With respect to gross disproportionality, the Applicants argue that however one chooses to characterize the objective of the Target, the seriousness of the section 7 deprivations that will result are totally out of sync with that objective.

[56] With respect to arbitrariness, the Applicants submit that the Target bears no relationship to, and is inconsistent with, the objectives of Ontario doing its share to reduce GHG and protecting the environment for future generations. They state that the Target allows for GHG far in excess of Ontario's share of the global carbon budget, leading to environmental destruction, not protection, and placing future generations at heightened risk of death, illness, and serious harm. The Applicants argue that even if this Court accepts Ontario's impermissibly vague framing of the objective of the Target (i.e., "balancing a healthy economy with a healthy environment"), Ontario's Plan and Target are arbitrary in that they are unnecessary to achieve, and inconsistent with, any economic interest. According to the Applicants, the evidence in this case shows that the Plan is vastly less economically efficient than the plan it replaced and the excess GHG it will cause will have significant negative economic impacts on Ontario.

[57] The Applicants argue that the section 7 deprivations in this case are also contrary to the principle of societal preservation as a government cannot engage in conduct that will, or could reasonably be expected to, result in the future harm, suffering, or death of a significant number

of its own citizens. They ask that this Court recognize societal preservation as a principle of fundamental justice. They state that this principle: (a) is a legal principle: (b) enjoys significant societal consensus that it is fundamental to the way the legal system ought fairly to operate; and (c) is sufficiently precise so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[58] In response to Ontario's argument (set out below) regarding the proposed principle of societal preservation, the Applicants point out that it is not just a prohibition against harm. They state that it concerns egregious government conduct resulting in harm, suffering or death of a significant number of its own citizens and that, as its name suggests, it is meant to address circumstances where the harm is on a scale that threatens the preservation of society. In the Applicants' view, the examples given by Ontario fall nowhere near this threshold.

### *b. Position of the Respondent*

[59] As stated above, 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 that it is not enough for the Applicants to lead evidence that global climate change will cause future harms to Ontario residents. According to Ontario, the Applicants must prove with evidence that the state action challenged in this Application, i.e., the Target, will cause or contribute to those future harms, and they have not done so.

[60] Ontario submits that this Court should reject the Applicants' argument that "Ontario is authorizing, incentivizing, facilitating, and creating the very level of dangerous GHG that will lead to the catastrophic consequences of climate change for Ontarians" and that there is a sufficient causal connection between the Target and the threat to the well-being of future Ontario residents posed by climate change. Ontario argues that there is no evidence that the Target and the Plan are "authorizing, incentivizing, facilitating, and creating" any level of GHG emissions at all, nor is there any evidence that the Target and Plan exacerbate such emissions. According to Ontario, the Target and the Plan are not regulatory schemes and do not authorize or permit any emissions. Ontario states the following in its Factum:

> The evidence demonstrates that hundreds of megatonnes of GHG were emitted in Ontario in the years and decades before the target and plan existed. Such emissions were plainly not caused by the impugned state action, since they long predate it. Moreover, the invalidation or revocation of the target and plan tomorrow would not prevent any *future* emissions of GHG in Ontario. And while the Applicants allege that Ontario causes or contributes to emissions in other ways (such as by licensing emitters or building highways), the Application does not challenge the validity of any of the laws or activities that actually permit or cause GHG emissions. No person's legal ability to emit any amount of GHG in Ontario would be affected by the remedies sought from the Court.

[61] Ontario argues that the Applicants have not proven a causal link between the Target and a material increase in the risk of catastrophic climate consequences. Ontario points out that the

Applicants have led no evidence to quantify or attempt to estimate the contribution of future emissions from Ontario to the predicted negative climate effects that future generations of Ontario residents will suffer. Ontario states that a complete cessation of Ontario's $CO_2$ emissions would reduce global warming by about 0.000092ºC per year, and that the changes caused by such action would be unmeasurably small and would be vastly outweighed by emissions from other countries.

[62] Ontario submits that the Application raises the same problems of proof as *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 as it rests on a chain of speculative assumptions about the future that have not been proven with evidence, including the following:

a. that the actual GHG in the Province of Ontario in the year 2030 will not be different from the current Target;

b. that the Plan and the Target will not themselves change before the year 2030;

c. that the climate policies of the Canadian federal government applicable in Ontario will have no ameliorative effect on GHG in Ontario or on the future impact of the climate on Ontario's residents;

d. that the impact on the climate of Ontario meeting its Target will not be offset (either positively or negatively) by the climate policies of and GHG from other jurisdictions in Canada and throughout the world;

e. that the catastrophic climate effects foretold by the Applicants for future generations can be avoided or mitigated at all by any target adopted today by Ontario; and

f. that the future impacts of climate change on the health and well-being of Ontario residents, considered in conjunction with all other factors affecting the future health and well-being of future residents (including advances in medicine, engineering and climate mitigation), can be predicted with reasonable accuracy today on the available evidence.

[63] Ontario argues that the Application is premised on the theory that Ontario is constitutionally obliged to take positive steps to redress the future harms of climate change and that no such constitutional duty exists. It points out that the Plan and the Target do not prevent anyone from doing anything or taking steps to protect themselves from the impacts of climate change or against the harms caused by others. According to Ontario, the Applicants' claim is that Ontario is not doing enough to prevent foreseeable harms caused by others, namely the transportation, industrial, building heating, agriculture and waste disposal activities that are responsible for the great majority of GHG in the Province.

[64] Ontario states that the Applicants' argument that the *CTCA* is constitutionally invalid because it repealed the previous statute but did not oblige Ontario to put in place targets that are at least as strong as those previously in place must be rejected. Ontario submits that, in the absence of a constitutional right that requires the government to act in the first place, there can be

no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values. It argues that unless there is a constitutional obligation to enact a provision, the legislature is free to return the provision to what it was before the enactment of a new provision because a change in the law or government policy alone does not constitute deprivation of a right even if the previous law provided greater life, liberty or security of the person.

[65] Ontario submits that if the Target or Plan deprives the Applicants of their life, liberty or security of the person, such deprivation is not contrary to the principles of fundamental justice. It states that the Target and the Plan are not arbitrary as even a law that modestly contributes towards achieving its objective is not arbitrary, unlike a law whose content is contrary or unrelated to the objective. Ontario also states that the Target and the Plan are not grossly disproportionate because they do not have a discernible negative impact on anyone. Ontario points out that the impact of the Target and the Plain is said to be "negative" only in the sense that the Applicants argue that a more stringent target and plan would be even more beneficial. According to Ontario, this approach is fundamentally inapt for the principle against gross disproportionality since it shows that the Applicants are not arguing that the government's objective is so minor as to not justify the law's negative impact on them.

[66] Ontario argues that this Court should not recognize the Applicants' proposed new principle of fundamental justice that governments are prohibited from engaging in conduct that will, or could reasonably be expected to, lead to future harm, suffering or death of a significant number of its own citizens. It submits that: (a) this principle is not a legal principle; (b) there is no societal consensus that governments must never permit or engage in conduct which will or could result in future harm, suffering or death of a significant number of its citizens; and (c) the proposed principle cannot be identified with sufficient precision to yield a manageable legal standard. Ontario points out that Canada has joined military alliances and deployed citizens to fight in military conflicts around the world, and that Canadian governments routinely permit or even encourage activities (such as the operation of motor vehicles and the sale of alcohol) that cause or contribute to a significant number of deaths each year.

[67] Ontario also submits that it is inherently contradictory to assert that a prohibition against harm is itself a principle of fundamental justice under the second step of the section 7 test since causing harm is the very thing that establishes a deprivation under the first step of the section 7 test. Ontario argues that the Applicants' new purported principle of fundamental justice would collapse the two-step inquiry under section 7 into a single question of whether the state has caused or could reasonably be expected to cause harm, and that such an approach would be contrary to the text of the *Charter* and binding authorities.

### 3. Section 15 of the *Charter*

#### *a. Position of the Applicants*

[68] The Applicants challenge what they say are the adverse effects discrimination flowing from the Target. They argue that the Target, in its effects, creates a distinction based on the enumerated ground of age because it imposes distinct burdens on different Ontarians based on

their age and when they were born. They point out that the nature of the age-based discrimination claim in this case is one based not only on age, but also on generation or birth cohort (i.e., discrimination that flows from when an individual was or will be born), and not a particular age cut-off or eligibility requirement.

[69] The Applicants state that while the Target and its enabling statutory regime does not distinguish between Ontarians of different ages or generations, youth and future generations will be impacted more acutely and more substantially due to their age. They make three arguments in this regard:

a. Young people are particularly susceptible to negative physical health impacts resulting from climate change, and youth will bear a disproportionate impact of the mental health impacts of climate change.

b. The catastrophic impacts of climate change will worsen over time as global temperatures continue to rise. By virtue of their age, youth and future generations will bear the brunt of these impacts as they live longer into the future.

c. Young people's liberty and future life choices are being constrained by decisions being made today over which they have no control.

[70] In the alternative, in the event that this Court concludes that the distinction in this case based on future generations is not one that is based on the enumerated ground of age, the Applicants submit that it is based on the analogous ground of "generational cohort". They argue that this ground bears very strong similarities to the enumerated ground of age and, therefore, it should benefit from section 15's protection.

[71] The Applicants submit that the Target imposes burdens on young people and future generations in a manner that reinforces, perpetuates, and/or exacerbates their historic disadvantage. They state that young people are a group lacking in political power and, as such, vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They argue that legislators frequently discount or disregard their interests in favour of furthering the interests of others with greater political and economic power, and that these concerns apply with even stronger force to future generations.

[72] According to the Applicants, the Target reinforces, perpetuates, and exacerbates these disadvantages in at least two ways:

a. The Target exacerbates the disproportionate burden young people already bear from environmental hazards leading to preventable illness and death, as well as the existing mental health crisis among youth. The Applicants state that by contributing to climate change and the attendant significant physical and psychological harms that will result, the Target will make this existing disproportionate burden on young people and future generations an even heavier one, reflecting an abdication of the state's role to protect and shield them from the worst possible harms. They argue that in so doing, Ontario is sending the

message that the lives and health of these already disadvantaged groups are less worthy of protection, particularly when compared to the interests of older generations.

b. Ontario's actions reinforce, perpetuate, and exacerbate the disadvantages experienced by young persons and future generations by making fundamental decisions regarding the world that they will be forced to inhabit without their input and without taking their needs and interests into account. According to the Applicants, this propagates the patterns of powerlessness and paternalism to which young persons and future generations are already subjected in our society.

[73] The Applicants argue that by condemning young people and future generations to bear the brunt of climate change's harms and burdens – through no fault of their own, due only to when they happen to be born – Ontario has drastically widened the gap between this historically disadvantaged group and the rest of society, rather than narrowing it. They submit that this is discrimination.

[74] The Applicants state that the discriminatory effects of the Target will be felt even more acutely by Indigenous young people and future generations. They point out that the disproportionate impact of climate change on Indigenous peoples has been recognized by the Supreme Court of Canada. The Applicants submit that the discriminatory effects of the Target are uniquely amplified for Indigenous young people and future generations due to their intersecting group membership, and that the Target serves to further widen the gap between some of our society's most disadvantaged members and those who do not share these intersecting identities.

### *b. Position of the Respondent*

[75] Ontario submits that section 15 of the *Charter* does not place a positive obligation on government to eliminate inequity.

[76] Ontario argues that the Applicants have failed to establish a distinction based on enumerated or analogous grounds because their theory of discrimination on the basis of "generation or birth cohort" is based on a temporal distinction. It points out that if the Applicants were correct that a distinction in treatment over time was tantamount to a distinction on the basis of age, then every change in the law would create such a distinction because every change in the law creates a distinction between those who were governed by the law before the change and those who are governed by the new law.

[77] For the same reasons, Ontario submits that the Applicants' proposed new analogous ground of "generational cohort" should be rejected. It states that recognition of such a ground would take the courts beyond their institutional competence into questions of generational fairness which are better left to the elected branches of government.

[78] I note that Ontario has not advanced any argument under section 1 of the *Charter*.

## 4. Unwritten constitutional principle of societal preservation

### *a. Position of the Applicants*

[79] The Applicants submit that, in addition to being a principle of fundamental justice, the societal preservation principle is also an unwritten constitutional principle, for the same reasons that it should be recognized as a principle of fundamental justice. The Applicants argue that the societal preservation principle supports their interpretation of sections 7 and 15 of the *Charter*, i.e., an interpretation that recognizes that the *Charter* must protect against state conduct with a sufficient causal connection to the catastrophic impacts of climate change, which will disproportionately impact youth and future generations.

[80] In its Factum, the Intervener Friends of the Earth Canada argues that an unwritten constitutional principle of ecological sustainability should be recognized, which it defines as "the long-term viability or well-being of ecological systems, including human communities". According to Friends of the Earth Canada, the principle of societal preservation is a "related principle".

### *b. Position of the Respondent*

[81] Ontario submits that the proposed principle of societal preservation should be rejected as it is simply a broader version of the qualified right to life provided in the text of the *Charter*. Ontario argues that accepting such a principle would be contrary to the express text of the written Constitution (in the form of section 7 of the *Charter*), which permits the state to deprive a person of life, liberty and security of the person so long as that deprivation is in accordance with the principles of fundamental justice.

## 5. Submissions with respect to *R. v. Sharma*

[82] After the Supreme Court of Canada released its decision in *R. v. Sharma*, 2022 SCC 39 ("***Sharma***"), I invited the parties to make written submissions with respect to this decision.

### *a. Position of the Applicants*

[83] According to the Applicants, *Sharma* has not changed any relevant aspects of the section 15 (or section 7) analysis in this case, and simply reaffirmed the fundamental legal principles that ground the Applicants' section 15 arguments.

[84] The Applicants submit that they have satisfied their modest evidentiary burden with respect to causation under the first part of the test under section 15 of the *Charter*. They reiterate that by allowing for dangerously high levels of GHG that go well beyond its fair share (even using the most lenient metrics), Ontario's conduct in establishing the Target contributes to levels of global warming far beyond the Paris Standard, an outcome which will have a disproportionate impact on youth and future generations on account of their age.

[85] The Applicants argue that their case tracks the principles from *Sharma* with respect to the second stage of the analysis under section 15.

[86] The Applicants agree that Parliament is not bound by its past policy choices. They submit that the issue is not whether Ontario is entitled to change its approach, but whether its new approach is constitutionally compliant. In their view, the Target falls well short.

[87] The Applicants state the following regarding the issue of positive obligations:

> With respect to **positive obligations**, *Sharma* states that s. 15 "does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation". The Applicants do not rely on such an obligation and never have. Again, this case does not require "positive rights", given Ontario's direct involvement in causing, authorizing, facilitating and regulating GHG. But even if this case were construed as one involving positive rights, *Sharma* does not say such obligations are never required under s. 15. Indeed, *Sharma* leaves intact previous Supreme Court precedent that positive obligations may be required under s. 15. [References omitted. Emphasis in the original.]

[88] The Applicants submit that the discussion of incrementalism in *Sharma* has no application in this case. In their view, the Target is not an incremental step towards addressing inequality, but is a leap backwards that has reversed progress to reduce GHG and would fully consume Ontario' s fair share of the global carbon budget by 2030. The Applicants state that Ontario residents do not have the luxury of time when it comes to the devastating impacts of climate change.

#### *b. Position of the Respondent*

[89] Ontario submits that *Sharma* supports Ontario's arguments that the Application should be dismissed.

[90] Ontario states that the Supreme Court's analysis of arbitrariness supports Ontario's submissions on arbitrariness. It argues that even if it were true that the Target and Plan left a "gap" unaddressed by not aiming for further reductions in emissions, the existence of a gap does not speak to arbitrariness as arbitrariness only exists where there is no connection between the effect of a provision and its purpose.

[91] Ontario points out that *Sharma* confirmed that a remedial scheme is not discriminatory merely because it contains limits, is not as remedial as a previous policy, or does not go as far as the claimant would like. According to Ontario, this is a complete answer to the Applicants' contention that Ontario's Target and Plan infringe the *Charter* because they do not go far enough to reduce emissions or are not as ambitious as previous laws or policies.

[92] Ontario notes that *Sharma* also confirmed that section 15 does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation. Ontario submits that this is fatal to the Applicants' arguments that the repeal of Ontario's previous climate change target was a violation of section 15 as if there is no obligation to enact remedial legislation, there can be no obligation to maintain remedial legislation.

[93] Ontario states that *Sharma* confirmed the importance of distinguishing between adverse impacts "caused" or "contributed to" by the impugned law and those which "exist independently of the impugned provision or the state action". Ontario argues that the Applicants have failed to prove that Ontario's Plan and Target cause or contribute to the harms they fear from global climate change.

### 6. Interveners

[94] The following organizations were granted leave to intervene in this Application: Assembly of First Nations, Canadian Association of Physicians for the Environment, David Asper Centre for Constitutional Rights, For Our Kids, Friends of the Earth Canada and Indigenous Climate Action. While I have reviewed and considered all of them, I will not summarize their respective submissions, which generally support the Applicants' positions.

[95] The Intervener Assembly of First Nations has raised issues under section 35 of the *Constitution Act, 1982* that were not pleaded by the Applicants in their Notice of Application or Notice of Constitutional Question. I agree with Ontario that these new issues cannot properly be considered in this Application, the scope of which is defined by the Notice of Application. I also note that some of the submissions made by the intervener Indigenous Climate Action similarly go beyond the scope of this Application and are not supported by proper evidence.

## C. DISCUSSION

[96] As set out below, I find that this Application raises justiciable issues. However, I ultimately conclude that the Applicants have not established any violation of sections 7 and/or 15 of the *Charter*.

### 1. Justiciability

#### *a. General principles*

[97] Justiciability relates to the subject matter of a dispute. It is a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. If a subject matter is held to be suitable for judicial determination, it is said to be justiciable. Conversely, if a subject matter is held not to be suitable for judicial determination, it is said to be non-justiciable. The general question is whether the issue is one that is appropriate for a court to decide. See *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 26 at paras. 32-33 ("***Highwood***").

[98] In *Highwood*, the Supreme Court of Canada stated the following with respect to justiciability (at paras. 34-35):

> There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court

> would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).
>
> By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding: Court of Appeal reasons, at paras. 82-84, per Wakeling J.A.

[99] In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, a primary concern for the court is to retain its proper role within the constitutional framework of our democratic form of government. In considering its appropriate role, the court must determine whether the question is purely political in nature and should, therefore, be determined in another forum, or whether it has a sufficient legal component to warrant the intervention of the judicial branch. See *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 545.

[100] One important factor to consider when determining whether an issue is justiciable is the responsibility vested in the courts by the Constitution to review legislation and state action for *Charter* compliance when they are challenged by citizens. When policies developed by the legislature infringe rights that are protected by the *Charter*, "the courts cannot shy away from considering them": see *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 89 ("***Chaoulli***"). The Supreme Court of Canada explained this responsibility as follows in *Chaoulli* at paras. 107-108:

> While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. As this Court has said on a number of occasions, "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 497, *per* Lamer J. (as he then was), quoting *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, *per* Dickson J. (as he then was).
>
> The government defends the prohibition on medical insurance on the ground that the existing system is the only approach to adequate universal health care for all Canadians. The question in this case, however, is not whether single-tier health care is preferable to two-tier health care. Even if one accepts the government's goal, the legal question raised by the appellants must be addressed: is it a

> violation of s. 7 of the *Charter* to prohibit private insurance for health care, when the result is to subject Canadians to long delays with resultant risk of physical and psychological harm? The mere fact that this question may have policy ramifications does not permit us to avoid answering it.

See also *Chaoulli* at paras. 183-185.

[101] Similarly, the Supreme Court stated the following in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 105 ("***PHS***"):

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*: *Chaoulli*, at para. 89, *per* Deschamps J., at para. 107, *per* McLachlin C.J. and Major J., and at para. 183, *per* Binnie and LeBel JJ.; *Rodriguez*, at pp. 589-90, *per* Sopinka J. The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.

[102] Subsequent cases have held that in order to be justiciable, challenges under the *Charter* have to involve specific legislation and/or state action. In *Tanudjaja*, the Court of Appeal for Ontario found that an application that alleged that Canada's and Ontario's actions and inaction had resulted in homelessness and inadequate housing was not justiciable as there was no sufficient legal component to engage the decision-making capacity of the courts. The applicants did not challenge any particular legislation or state action in that case. Their position was that the social conditions created by the overall approach of the federal and provincial governments violated their rights to adequate housing. Although it found that this particular application was not justiciable, the Court of Appeal stated the following at para. 29:

> This is not to say that constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may otherwise be evasive of review.

[103] In *La Rose*, the Federal Court found that an action commenced by fifteen children and youth against Canada in relation to climate change was not justiciable because of the undue breadth and diffuse nature of the impugned conduct and the inappropriate remedies sought by the plaintiffs. The Federal Court stated as follows at para. 40:

> The Plaintiffs' position fails on the basis that there are some questions that are so political that the Courts are incapable or unsuited to deal with them. These include questions of public policy approaches – or approaches to issues of significant societal concern. As found in *PHS*, above at paragraph 105, and *Chaoulli*, above

> at paragraph 107, to be reviewable under the *Charter*, policy responses must be translated into law or state action. While this is not to say a government policy or network of government programs cannot be subject to *Charter* review, in my view, the Plaintiffs' approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of the Defendants does not meet this threshold requirement and effectively attempts to subject a holistic policy response to climate change to *Charter* review.[2]

[104] Similar conclusions were reached on the same basis in other proceedings dealing with climate change: see *Misdzi Yikh v. Canada*, 2020 FC 1059 at paras. 55, 58, and *Environnement Jeunesse v. Procureur général du Canada*, 2021 QCCA 1871 at paras. 25-26.

[105] Ontario also relies on the case *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183 ("***Friends of the Earth***"); aff'd by 2009 FCA 297; application for leave to appeal dismissed: 2010 CanLII 14720 (S.C.C.). This case involved applications for judicial review seeking declaratory and mandatory relief in connection with alleged breaches of duties under the *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30. It did not involve a *Charter* challenge. As acknowledged by the court in that case, the justiciability of the issues was a matter of statutory interpretation: see *Friends of the Earth* at para. 31.[3] In my view, the reasoning in *Friends of the Earth* does not apply to this Application as the Applicants are not alleging that Ontario failed to comply with the Target or the *CTCA* or another statutory duty Their allegations are based on the *Charter*.

### *b. Application to this case*

[106] In light of the applicable case law, I conclude that the *Charter* issues raised by the Applicants are justiciable. Contrary to the situation in most of the cases relied upon by Ontario, the Applicants are challenging specific state action and legislation, i.e., the Target and sections 3(1) and 16 of the *CTCA*. As stated in *Chaoulli* and *PHS*, 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. I note that, in this case, Ontario concedes that the *Charter* applies to the Target (and, obviously, the *CTCA*).

---

[2] The Federal Court also found that the statement of claim did not disclose a reasonable cause of action under sections 7 and 15 of the *Charter*. It held that the undue breadth and diffuse nature of the impugned conduct could not sustain a section 7 *Charter* analysis, and that the plaintiffs had failed to disclose a distinction on the basis of state action or law required for the purposes of a section 15 *Charter* analysis. However, the Federal Court did not accept the defendants' arguments that the plaintiffs' claim disclosed no reasonable cause of action because: (a) section 7 does not confer positive rights, and (b) the claim was speculative and incapable or proof owed to the cumulative and global nature of climate change.

[3] I note that the Federal Court found that there may be a limited role for the court in the enforcement of the mandatory elements of the statute, but that such elements were not at issue before the court in the applications for judicial review: see *Friends of the Earth* at para. 46.

[107] Challenges under sections 7 and 15 of the *Charter* have a sufficient legal component to warrant the intervention of the judicial branch. The legal tests applicable under these two provisions of the *Charter* are well-established in the case law.

[108] In my view, it is premature to deal with the appropriateness of the relief sought by the Applicants at this stage of the analysis. At this time, I only note that the relief sought by the Applicants includes declarations of unconstitutionality, and that courts have the institutional competence to grant such declaratory relief. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. See *Canada (Prime Minister) v. Kadhr*, 2010 SCC 3 at para. 46. Until and unless the Applicants establish that they are entitled to relief on this Application, it is unnecessary to determine whether some of the other relief sought by the Applicants is appropriate or not.

[109] While I conclude that the Application is generally justiciable, there is one aspect of the Applicants' case which is not. I agree with Ontario that the issue of the proper approach for determining Canada's and Ontario's "fair" shares of the remaining carbon budget is not justiciable. This Court does not have the institutional capacity and legitimacy to determine Canada's share compared to other states and Ontario's share compared to other provinces. I note that, as admitted by Dr. Matthews, the issue of a particular country's share is not a "science question" that can be determined based on scientific evidence. The factors that have been identified by Dr. Matthews as relevant to the determination of a country's or province's fair share – population, historical responsibility, wealth, access to inexpensive low carbon energy sources, economic and energy generation choices – as well as the factors referred to in Article 2(2) of the Paris Agreement – equity, common but differentiated responsibilities, respective capabilities and different national circumstances – do not have a sufficient legal component to warrant the judicial intervention of an Ontario court. The selection of the appropriate allocation approach to determine a jurisdiction's fair share is an issue that should be determined in another forum, not in a domestic court in Ontario.

[110] The Applicants argue that it is proper for this Court to determine Ontario's fair allocation of the remaining carbon budget because "fairness is what courts do." They acknowledge, however, that there is more than one way to divide up the carbon budget. As stated above, it is my view that this issue does not have a sufficient legal component to allow this Court to choose among competing approaches. Further, reliance on the broad concept of "fairness" is insufficient, in itself, to engage the judicial branch. To use an example referred to in *Highwood*, the issue of whether it is unfair not to invite a particular cousin to a wedding is not a justiciable question.

[111] The fact that this Court is not in a position to determine Ontario's exact share of the remaining carbon budget is not, however, fatal to the Applicants' case, as discussed below in the context of the section 7 analysis.

[112] In light of the foregoing, I reject Ontario's argument that the Applicants' claim is non-justiciable.

### 2. Challenge to section 16 of the *CTCA*

[113] As stated above, section 16 of the *CTCA* repealed the *Climate Change Act*. Among other things, the Applicants seek a declaration that section 16 is unconstitutional and violates sections 7 and 15 of the *Charter*. In my view, this part of the Application is ill-conceived and can be determined quickly.

[114] A mere change in the law cannot be the basis for a *Charter* violation: see *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 at para. 104. In the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values: see *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 at para. 94 (Ont. C.A.).

[115] The *Charter* does not bind the legislature to its current policies. Under section 15, the focus of the analysis must be on the impugned provisions and whether they are discriminatory when assessed on their own, regardless of the prior legislative scheme. See *Sharma* at paras. 63, 82 and *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at paras. 33, 60 ("***Alliance***").

[116] Similarly, a change in the law or government policy alone does not constitute deprivation of a right under section 7, even if the previous law provided greater life, liberty or security of the person. See *ETFO v. Her Majesty the Queen*, 2019 ONSC 1308 at paras. 138-139 (Div. Ct.) ("***ETFO***").

[117] The Applicants have not argued or established that Ontario had a constitutional obligation to enact the *Climate Change Act* and that no other approach could meet Ontario's constitutional obligation. The *Charter* does not constitutionalize a single legislative model for addressing climate change: see *Alliance* at para. 60. The issue of whether Ontario has a constitutional obligation to take steps to reduce GHG in the province at a rate higher than the Target is the issue underlying the Applicants' challenge to subsection 3(1) of the *CTCA* and the Target. Challenging section 16 of the *CTCA* does not add anything to the analysis. As a result, the analysis below focuses on the Target and subsection 3(1) of the *CTCA*.

### 3. Section 7 of the *Charter*

[118] Under section 7 of the *Charter*, 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.

[119] The right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly: see *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 62 ("***Carter***"). Similarly, the right to the security of the person is engaged when the law or state action negatively impacts or limits the applicant's security of the person – for instance, when it increases the risks faced by the applicant with respect to their security of the person. See *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 58-60 ("***Bedford***").

[120] Based on the evidence before me, it is indisputable that, as a result of climate change, the Applicants and Ontarians in general are experiencing an increased risk of death and an increased risk to the security of the person. However, this is not the relevant question in this case. The Applicants' *Charter* challenge is specific to subsection 3(1) of the *CTCA* and the Target (very likely in order to avoid the dismissal of their Application as non-justiciable). Thus, the relevant question is 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 Applicants' security of the person.

[121] Under the *CTCA*, the government is required ("shall") to establish targets for the reduction of GHG in Ontario and to make them publicly available. The Target was included in the Plan which, pursuant to subsection 4(1) of the *CTCA*, must be approved by the Lieutenant Governor in Council. The Plan must be publicly available, and the Minister is required to prepare progress reports regarding the Plan. The Target, as set out in the Plan, states that Ontario will reduce its GHG by 30% below 2005 levels by 2030.

[122] I disagree with the Applicants' characterization of the Target, i.e., that through the setting of the Target pursuant to the *CTCA*, "Ontario is authorizing, incentivizing, facilitating and creating the very level of dangerous GHG that will lead to the catastrophic consequences of climate change for Ontarians." The Target does no such thing. As required by subsection 3(1) of the *CTCA*, the Target is a target for the reduction of GHG in Ontario – no more, no less. It does not authorize or incentivize GHG. A "target" is "an objective or result towards which efforts are directed": see *Oxford Dictionary of English*. In my view, the Applicants' real complaint in this case is that Ontario did not aim sufficiently high when setting the Target.

[123] At the same time, I also disagree with Ontario's submission that, in effect, the Target is meaningless. I am not prepared to accept that a legislative requirement, or that something that is required by law to be approved by the Lieutenant Governor in Council, is meaningless. The setting of the Target was a state action taken pursuant to a statute. As a target, it is meant to guide and direct subsequent state actions with respect to the reduction of GHG in Ontario. The requirements for publicity and progress reports also contradict the suggestion that the Target and the Plan are meaningless. As stated above, Ontario concedes that the *Charter* applies to the Target.

[124] Because of the nature of both the Target and the Applicants' complaint, the question of whether the Target imposes an increased risk of death and/or negatively impacts or limits the Applicants' security of the person raises the issue of whether section 7 imposes positive obligations on the state.

### *a. Positive obligations under section 7 of the Charter*

[125] In *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at paras. 81-83 ("***Gosselin***"), the Supreme Court of Canada discussed the issue of whether section 7 could be interpreted to include positive obligations on the part of the state. McLachlin C.J. stated the following:

[81] Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.

[82] One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

[83] I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support. [Emphasis in the original.]

[126] So far, no freestanding positive obligation on the part of the state to ensure that each person enjoys life, liberty or security of the person has been recognized under section 7. While the government may have been ordered to take positive steps under section 7 of the *Charter* in some cases, this was in response to laws or state actions that aggravated risks to life, liberty or

security of the person, and not as a result of a freestanding positive obligation under section 7. In *PHS*, for instance, the government was ordered to grant an exemption under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. This was in response to a statutory prohibition that was found to engage the right to life, liberty and security of the person of the applicants. The Supreme Court stated the following at para. 93:

> Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out: *Morgentaler* (1988), at p. 59, *per* Dickson C.J., and pp. 105-6, *per* Beetz J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 589, *per* Sopinka J.; *Chaoulli*, at para. 43, *per* Deschamps J., and, at paras. 118-19, *per* McLachlin C.J. and Major J.; *R. v. Parker* (2000), 188 D.L.R. (4th) 385 (Ont. C.A.). Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer.

See also *Chaoulli* at paras. 103-106, 110-111 and *Bedford* at para. 88.

[127] Another example can be found in the extradition context where the Supreme Court required the government to seek assurances from a foreign jurisdiction in respect of the death penalty when making an extradition order: see *United States v. Burns*, 2001 SCC 7 ("***Burns***").

[128] In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 ("***G.(J.)***"), a positive constitutional obligation to provide state-funded counsel was imposed on the government under section 7 in relation to proceedings initiated by the state (in that case, child custody proceedings) where an individual's right to life, liberty or security of the person was at stake and the provision of counsel was necessary to ensure a fair hearing: see *G.(J.)* at paras. 105-107. See also *R. v. Rowbotham*, 1988 CanLII 147 at para. 156 (Ont. C.A.) with respect to criminal proceedings.

[129] Thus, positive obligations have been imposed on the state under section 7 only after the state had interfered with an applicant's right to life, liberty or security of the person, either by enacting a statute, making an order or initiating a proceeding. No freestanding positive obligations have been found under section 7. In *Chaoulli*, for instance, the Supreme Court of Canada stated that "[t]he *Charter* does not confer a freestanding constitutional right to health care": see *Chaoulli* at para. 104.

[130] The Divisional Court recently stated the following on the issue of positive obligations under section 7 in *Leroux v. Ontario*, 2021 ONSC 2269 at paras. 113-116 ("***Leroux***"):

> [113] In *Gosselin*, the majority said, however, at para. 81 and following, that even if s. 7 could be read to encompass economic rights, s. 7 concerns the right not to be deprived of life, liberty and security of the person. Nothing in the jurisprudence suggested that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. That said, the majority cautioned that it would be dangerous to freeze the development

> of this part of the law and that the Supreme Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the Charter.
>
> [114] It remains the case, almost twenty years later, that nothing in the jurisprudence places a positive obligation on the state to ensure the enjoyment of life, liberty or security of the person.
>
> [115] Indeed, at least two Ontario Court of Appeal decisions (and many other courts in Ontario and elsewhere) have confirmed that Arbour J.'s dissent in *Gosselin* is not the law. In *Wynberg*, after referring to Arbour J.'s dissent, the Court of Appeal stated, at para. 220, "[h]owever, to date s. 7 of the *Charter* has been interpreted only as *restricting* the state's ability to deprive individuals of life, liberty or security of the person." In *Flora*, the Court of Appeal, at para. 108, likewise rejected an invitation to expand the reach of s. 7, holding, that it is constitutional for governments to place limitations on financial benefits that are not otherwise required by law.
>
> [116] Furthermore, an approach similar to the motion judge's analysis on this issue (that by virtue of the door having been "left open" by the Supreme Court in *Gosselin* and the possibility that, someday, the courts might recognize positive obligations and condemn mere inaction under s. 7, it is not plain and obvious the claim will fail) was specifically rejected by this court in *Cosyns v. Canada (Attorney General)*, 1992 CanLII 8529 at para. 18 and by Lederer J. in *Tanudjaja* at para. 59. This Court in *Cosyns* held that the mere possibility of a future change in the law is not an invitation for the lower courts to reconsider the issue every time it is pleaded. Similarly, Lederer J. held that the law on the scope of government obligation to ameliorate disadvantageous conditions is established. There is no positive obligation on Ontario to put in place programs to ameliorate the Plaintiff's circumstance. This has been the law since the early days of the *Charter* and s. 7 jurisprudence. It is not for the lower courts to step outside this well-established line of precedent.

[131] In *ETFO*, the Divisional Court also stated that the absence of measures aimed at reducing an existing risk of harm did not amount to deprivation within the meaning of section 7 of the *Charter*: see *ETFO* at para. 140.

[132] In my view, this 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 Applicants' right to life or security of the person. As pointed out by Ontario, the Applicants are not seeking the right to be free from state interference, i.e., they do not seek to be free from the Target or the Plan. Rather, they would prefer a more restrictive Target and Plan, and this is what they seek.

[133] The nature of the Applicants' claim is, in many respects, similar to the claim that was rejected in *Barbra Schlifer Commemorative Clinic v. Canada (Attorney General)*, 2014 ONSC

5140 ("***Barbra Schlifer***"). The following passage from *Barbra Schlifer* (at para. 31) applies to this case:

> Unlike in *PHS* and *Bedford*, where government blocked access to risk-reduction mechanisms, here the government created the risk-reduction mechanism and is now modifying it. The applicant's complaint is not that the state has intervened to create harm or to increase risk; instead, it is that the state has intervened to ameliorate harm and to decrease risk, but not enough or not as much as before.

[134] I disagree with the Applicants that this is not a positive rights case because "Ontario's participation in creating the underlying harm, and its creation of the Target and the Plan pursuant to the *CTCA* triggers an obligation to ensure the resulting scheme is constitutionally compliant." The nature of Ontario's "participation in creating the underlying harm" in this case is no different than the state's "participation" in creating a number of social issues faced by our society in relation to poverty, homelessness, etc. Despite this, the Supreme Court found in *Gosselin* that section 7 does not impose a positive state obligation to guarantee adequate living standards, even in circumstances where the government had created a social assistance scheme.

[135] Further, the Applicants' argument that "Ontario is actively creating, incentivizing and facilitating GHG through its various agencies, programs, and policies" is an attempt to bring through the back door unspecified state actions, programs and policies that have not been challenged in this Application. The Applicants have made the strategic choice to challenge only the Target and subsection 3(1) of the *CTCA* in this Application and, consequently, they cannot shift the analysis from these impugned actions to other state actions. While the Court of Appeal in *Tanudjaja* left the door open with respect to "constitutional violations caused by a network of government programs", particularly when the issue may otherwise be evasive of review, this is not how this Application was structured.

[136] The fact that the Applicants have challenged the repeal of the *Climate Change Act* through section 16 of the *CTCA* supports the conclusion that the Applicants are advancing a positive claim. In *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para. 30 ("***City of Toronto***"), the Supreme Court of Canada stated that a claim seeking to restore the status quo or an earlier statutory platform revealed "a straightforward positive claim". The seeking of a particular platform is a positive claim: see *City of Toronto* at para. 32.

[137] In the alternative, the Applicants argue that if the Application is found to advance positive rights, it does so in special circumstances that warrant the claim being allowed. As set out above, the Supreme Court expressly recognized in *Gosselin* "the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances." The Applicants submit the following:

> Some guidance as to what constitutes "special circumstances" can be found in *Dunmore*, where the Supreme Court observed that positive obligations "may be required where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms." This is such a case: unlike the "frail" record in *Gosselin*, the extensive and largely unchallenged evidentiary

> record of multiple renowned experts demonstrates the death, disease, and serious harm that will result from climate change in Ontario if GHG are not reduced. The basic thrust of this evidence – that climate change poses a grave and existential threat – has been accepted by the Supreme Court and the IPCC. In this fundamental way, the issues and relief sought in this Application engage the very precondition to the enjoyment of all fundamental freedoms enshrined in Canada's constitutional order. That makes this case unlike any of the so-called "positive rights" cases that have been considered by Canadian courts to date.
>
> […]
>
> Simply put, the stakes could not be higher. If the widespread, grave, and existential dangers of climate change do not qualify as "special circumstances", then the door for positive rights under s. 7 of the *Charter* that was left open in *Gosselin* may as well be slammed shut.

[138] In my view, the Applicants make a compelling case that climate change and the existential threat that it poses to human life and security of the person present special circumstances that could justify the imposition of positive obligations under section 7 of the *Charter*. While I am mindful of the Divisional Court's caution in *Leroux* that it is not for the lower courts to step outside the well-established line of precedent under section 7, this statement was made in the context of a motion to strike, not in a proceeding based on a complete record. I also note that in *ETFO*, which was an application for judicial review, the Divisional Court considered whether that case fell into the special circumstances category: see *ETFO* at paras. 144-146. Further, the Federal Court of Appeal has recognized that section 7 is not frozen in time and that, some day, it may evolve to encompass positive obligations, possibly in the domain of "climate rights", among others: see *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223 at para. 139. See also *La Rose* at paras. 67, 69-72.

[139] However, if positive state obligations are to be recognized under section 7 of the *Charter*, it is very likely that a different framework of analysis would need to be adopted for such claims. I note that a different test was adopted for positive claims under section 2 of the *Charter*: see *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at paras. 24-26; *Baier v. Alberta*, 2007 SCC 31 at para. 30; and *City of Toronto* at paras. 16-26. The test under section 2(b) of the *Charter*, as clarified in *City of Toronto* at para. 25, is as follows: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression?

[140] While some of the general concepts underlying the test developed under section 2 with respect to positive claims may also be relevant under section 7, it is my view that the test applicable under section 2 cannot simply be applied under section 7, without at least some adaptations. For example, some of the traditional principles of fundamental justice may need to be adapted when applied in a positive claim context, and new ones may be recognized.

[141] Given that the Applicants' primary position was that they were not seeking the imposition of positive obligations under section 7 of the *Charter*, they did not address in any detail the issue of the appropriate test under section 7 with respect to a positive claim (although reference was made to the applicable test under section 2).

[142] Ultimately, I do not need to decide whether positive obligations should be imposed under section 7 in this case because I have concluded that any deprivation of the right to life or security of the person is not contrary to the principles of fundamental justice relied upon by the Applicants. Therefore, for the purpose of the analysis below, I will assume without deciding that positive obligations can be imposed under section 7 in the special circumstances of this case.

***b. Causation***

[143] In order for section 7 to be engaged, an applicant must show that the impugned law or state action is sufficiently connected to the prejudice suffered. This sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant. While a sufficient causal connection is sensitive to the context of the particular case, it requires a real, as opposed to a speculative, link. This standard is satisfied by a reasonable inference, drawn on a balance of probabilities. See *Bedford* at para. 76.

[144] In my view, section 7 is engaged in this case, more particularly the right to life and the right to the security of the person. While, as stated above, 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 GHG must be reduced by approximately 45% below 2010 levels by 2030, and must reach "net zero" by 2050 in order to limit global average surface warming to 1.5$^{o}$C and to avoid the significantly more deleterious impacts of climate change. As stated above, in 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 GHG by approximately 45% below 2010 levels by 2030.

[145] While Dr. Matthews' opinion is that using a global target to assess Canada's and Ontario's efforts is not a fair allocation and has the effect of grandfathering their current share of global emissions, this appears to be the approach that Canada and Ontario have taken so far when setting targets with respect to GHG reductions. This supports the conclusion 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.

[146] Although, as set out above, there are different ways in which a jurisdiction's "fair" share can be calculated, such "fair" share does not need to be calculated to conclude that the gap between the Target and the reduction percentage that is required globally by 2030 is large, unexplained and without any apparent scientific basis. While this Court is obviously not bound by decisions of foreign courts made in the context of different legal systems, I note that the Supreme Court of the Netherlands adopted a similar reasoning in a similar case, which I find

persuasive: see *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, ECLI:NL:HR:2019:2007 at paras. 6.1-6.4, 6.6, 7.2.11 and 7.5.1.[4]

[147] 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 Applicants and Ontarians should global warming exceed 1.5ºC. By not taking steps to reduce GHG in the province further, Ontario is contributing to an increase in the risk of death and in the risks faced by the Applicants and others with respect to the security of the person.

[148] 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. See *Bedford* at para. 89. 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.

[149] As stated above, the sufficient causal connection standard under section 7 is sensitive to the context of the particular case. This is a flexible standard which allows the circumstances of each particular case to be taken into account. See *Bedford* at paras. 75-76. In the context of climate change, the "collective action problem" has to be taken into consideration when assessing causation. As stated by the Supreme Court of Canada in the *GHG Reference* at para. 188, the notion that a province's GHG cause no measurable harm and do not have a tangible impact should be rejected. Such an argument, if accepted, would apply to most jurisdictions and all individual sources of emissions everywhere. It would impede collective action and hinder the solving of global problems. Given that only five countries individually emit more than 2% of global GHG, I agree with the Applicants that "most jurisdictions could paralyze the required global effort by claiming that their emissions are of little consequence." Ultimately, Ontario's emissions contribute to climate change and the increased risks that it creates. Every tonne of $CO_2$ emissions adds to global warming and lead to an quantifiable increase in global temperatures that is essentially irreversible on human timescales.

[150] I do not accept Ontario's argument that the points set out in paragraph 62 above make the causal connection too speculative in this case. In my view, it is Ontario who is raising speculative points. In order to meet the causal connection standard under section 7, the Applicants do not have to prove beyond a reasonable doubt or even on the balance of probabilities that the harm that they are alleging will occur. Rather, the Applicants have to establish on a balance of probabilities that the impugned state action contributes to an increase in the risk of death or in the risks faced by the Applicants with respect to the security of the person. None of the points raised by Ontario can disturb the conclusion that, by not taking steps to reduce GHG in the province further, Ontario is contributing to an increase in risks to human health, life and safety because none of these points can be established at this time, while an

[4] The Supreme Court of Canada referred to this decision in the *GHG Reference* at para. 189.

increase in risks can be established. Ontario's proposed approach is that no step should be taken until the risks are realized. Such an approach would seriously undermine the rights protected by section 7 of the *Charter*.

[151] In light of the foregoing, I conclude that, in the event positive obligations can be imposed under section 7 in the special context of climate change, the Applicants' rights to life and to the security of the person are engaged in this case as a result of Ontario's failure to set a higher Target. Consequently, I now turn to the issue of whether such deprivations are in accordance with the principles of fundamental justice.

### *c. Principles of fundamental justice against arbitrariness and gross disproportionality*

[152] The Applicants argue that the section 7 deprivations in this case are contrary to the principles of fundamental justice against arbitrariness and gross disproportionality.

[153] **Arbitrariness.** The principle of fundamental justice that forbids arbitrariness targets the situation 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, i.e., where the law exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law. Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. A law that imposes limits on the interests protected by section 7 in a way that bears no connection to its objective arbitrarily impinges on those interests. The ultimate question is whether the evidence establishes that the law violates basic norms because there is no connection between its effect and its purpose. This standard is not easily met and it is a matter to be determined on a case-by-case basis, in light of the evidence. An arbitrary effect on one person is sufficient to establish a breach of section 7. See *Bedford* at paras. 98-100, 108, 111, 119, 123; *Carter* at para. 83; and *Sharma* at para. 86.

[154] The Supreme Court of Canada stated the following in *Sharma* at paras. 87-88, 91 with respect to the issue of defining the purpose of the impugned law under section 7:

> [87] As the law's purpose is the principal reference point, its proper identification is crucial to the s. 7 analysis. Indeed, identifying a law's purpose may be determinative of its constitutionality. It is important to characterize the purpose of a law at the appropriate level of generality. At one end of the spectrum lies an abstract purpose akin to the animating social value. At the other extreme is a "virtual repetition of the challenged provision, divorced from its context". A proper framing of purpose lies somewhere between these two poles, and is precise and succinct.
>
> [88] The most significant and reliable indicator of legislative purpose would, of course, be a statement of purpose within the subject law. Beyond that, generally, courts seeking to identify legislative purpose look to the text, context, and scheme of the legislation and extrinsic evidence, which can (subject to the

> caution we offer below) include Hansard, legislative history, government publications and the evolution of the impugned provisions.
>
> […]
>
> [91] Having reviewed whatever sources are available, courts should strive to arrive at a precise and succinct statement that faithfully represents the legislative purpose of the impugned provision. Overly broad, multifactorial statements of purpose can artificially make impugned provisions unassailable to arguments of overbreadth or arbitrariness. In *Safarzadeh-Markhali*, the Court defined the purpose of denying enhanced credit for pre-sentence custody as "enhanc[ing] public safety and security by increasing violent and chronic offenders' access to rehabilitation programs". In *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, the purpose of the law was "to combat people smuggling". Courts must then use this same precise and succinct statement of purpose within the subsequent analysis. The statement of the purpose should be maintained and not change throughout the analysis. [References omitted.]

[155] The Applicants submit, based on the Plan, that Ontario's purpose in establishing the Target was to do its share to reduce GHG and protect the environment for future generations. In contrast, Ontario submits, also based on the Plan, that the object of the Target and the Plan is to balance a healthy economy with a healthy environment.

[156] Section 3 of the *CTCA* only states that the government shall establish targets for the reduction of GHG emissions in Ontario. This cannot be adopted as the purpose of section 3 or the Target as it would be a "virtual repetition of the challenged provision". Given that the *CTCA* does not include a preamble or statement of purpose, I agree with the parties that the best source to determine the purpose of section 3 and the Target is the Plan.

[157] In my view, Ontario's proposed definition of the purpose is too broad, multifactorial and insufficiently related to the Target and climate change. I find that part of the Applicants' definition of the purpose, in particular "to protect the environment for future generations", is too broad as well. Further, while the Plan refers several times to Ontario doing its share or its part with respect to climate change and reduction of GHG, I disagree with the Applicants that this should be included in the definition of the purpose of the Target. This is principally because it is not possible to determine what the references to "share" and "part" in the Plan were intended to mean. Referring to Ontario doing its share in the definition of the purpose would inject imprecision in the analysis.

[158] Based on the Plan, with a particular focus on the section of the Plan that deals with climate change and sets out the Target, I find that the objective of the Target is as follows: "To reduce GHG in Ontario to address and fight climate change." I note that the section of the Plan that contains the Target is entitled "Addressing Climate Change". Further, the Plan contains numerous references to addressing, tackling, fighting and combating climate change.

[159] Thus, for the purpose of the arbitrariness analysis, I will use the purpose set out in the preceding paragraph as the object of the Target and section 3 of the *CTCA*.

[160] 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. Based on this principle as currently defined, I am unable to find that the Target or its effects are arbitrary. The Target is furthering the public good that is said to be the object of the law, i.e. to reduce GHG to fight climate change. The Applicants' complaint is that the Target does not go far enough. While the Target falls short and its deficiencies contribute to increasing the risks of death and to the security of the person, it cannot be said that the effects of the Target bear no connection to its objective. The Target's objective is not to eradicate completely the effects of climate change. Incrementalism and imprecision, as opposed to no rational connection, do not lead to a conclusion of arbitrariness. As pointed out by the Supreme Court, the standard of arbitrariness is not one that is easily met: see *Bedford* at para. 119.

[161] **Gross disproportionality.** The principle of gross disproportionality is infringed if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure. Gross disproportionality asks a different question from arbitrariness, i.e., whether the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes, taken at face value, that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society. Thus, the law's object and its impact may be incommensurate without reaching the standard for gross disproportionality. Gross disproportionality under section 7 does not consider the beneficial effects of the law for society. Rather, it balances the negative effect on the individual against the purpose of the law, not against the societal benefit that might flow from the law. A grossly disproportionate effect on one person is sufficient to establish a breach of section 7. See *Bedford* at paras. 103-105, 120-123, and *Carter* at para. 89.

[162] In my view, 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. I agree with and adopt the following passage in Ontario's Factum:

> The Applicants claim that the target and plan have a negative impact on them, but they do not mean – as in those cases where the principle against gross disproportionality has been violated – that they would be better off if the target and plan did not exist at all. Rather, the impact of the plan and target is said to be "negative" only in the sense that the Applicants argue that a more stringent target and plan would be even more beneficial. This approach is fundamentally inapt for the principle against gross disproportionality, since it shows that the Applicants are not arguing that the government's objective is so minor as to not justify the law's negative impact on them. They wholeheartedly agree with the

objective of reducing GHG emissions and simply want Ontario to pursue that goal more aggressively.

### *d. Proposed new principle of fundamental justice: societal preservation*

[163] The Applicants argue that the section 7 deprivations in this case are contrary to the societal preservation principle, which they submit should be recognized as a principle of fundamental justice. They define this principle as follows: "a government cannot engage in conduct that will, or could reasonably be expected to, result in the future harm, suffering, or death of a significant number of its own citizens".

[164] In order to constitute a principle of fundamental justice for the purposes of section 7, a rule or principle must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. See *R. v. Malmo-Levine*, 2003 SCC 74 at para. 113 and *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para. 87 ("***Federation of Law Societies***")

[165] In my view, the principle of societal preservation put forward by the Applicants does not meet the test to be recognized as a principle of fundamental justice. First, it is not a legal principle. In the context of the test to recognize a principle of fundamental justice, the definition of legal principle distinguishes between, on the one hand, "an important state interest" and "the realm of general public policy" and, on the other hand, a "normative legal principle" and "the basic tenets of our legal system". See *Federation of Law Societies* at para. 89. While societal preservation may be an important public policy and/or state interest, it is not a normative legal principle or a basic tenet of our legal system. If one searches the expression "societal preservation" on CanLII, there is no hit. As noted in *Federation of Law Societies* at para. 91, an important indicator that a proposed principle is a legal principle is that it is used as a rule or test in common law, statutory law or international law. This is not the case for the societal preservation principle.

[166] The decision of the Supreme Court of Canada in *Burns* also supports the conclusion that the societal preservation principle is not a legal principle. At paragraph 71, the Court discussed the content of the "principles of fundamental justice" and noted the distinction between "general public policy" and "the inherent domain of the judiciary as guardian of the justice system". The Court stated that the death penalty controversy had both "broader aspects" – including the sanctity of human life – and "narrower aspects". It concluded that only the narrower aspects of the death penalty controversy engaged the responsibilities of judges as guardians of the justice system. Similarly, the principle of societal preservation is not part of "the inherent domain of the judiciary as guardian of the justice system".

[167] Second, leaving aside the issue of "significant societal consensus", the principle of societal preservation is not fundamental to the way in which the legal system ought fairly to operate. It does not relate to the legal system or its fair operation.

[168] While the points above are sufficient to conclude that the societal preservation principle should not be recognized as a principle of fundamental justice under section 7, I also note that there are potential issues as to whether this proposed principle is sufficiently precise to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. For instance, the proposed definition of the principle raises a number of issues, including:

a. the required causal connection under the proposed principle (e.g., is it as "relaxed" as the "sufficient causal connection" described in *Bedford*?);

b. the meaning of "a significant number of its own citizens"; and

c. how this principle would apply where any or most courses of action could result in suffering for a significant number of people (e.g., in the context of a pandemic).

[169] I also share some of the concerns expressed by Ontario to the effect that the societal preservation principle has the potential to collapse the two-step inquiry under section 7 of the *Charter*. As noted by the Supreme Court of Canada in *Carter* at para. 71, section 7 does not promise that the state will never interfere with a person's life, liberty or security of the person as "laws do this all the time". It is problematic to assert that a prohibition against causing certain types of harm is a principle of fundamental justice under the second step of the section 7 test where causing harm is the very action that establishes a deprivation under the first step of the section 7 test. Recognizing the principle of societal preservation (as defined by the Applicants) as a principle of fundamental justice would be especially problematic with respect to the two-step test under section 7 if a very flexible causation standard is applied to this principle (e.g., no requirement that the state action be the dominant cause of the harm suffered, indirect causation, etc.).

[170] In light of the foregoing, I find that the societal preservation principle should not be recognized as a principle of fundamental justice under section 7 of the *Charter*.

[171] Given that the Applicants have not demonstrated that any deprivation of their rights under section 7 of the *Charter* was contrary the principles of fundamental justice, I conclude that no violation of section 7 of the *Charter* has been established.

## 4. Section 15 of the *Charter*

### *a. General principles*

[172] In order to establish an infringement of section 15(1), 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. See *Sharma* at para. 28.

[173] While the two steps in the section 15(1) test are not watertight compartment, and there may be overlap in the evidence that is relevant at each step, the two steps ask fundamentally

different questions and, as a result, the analysis at each step must remain distinct from the other: see *Sharma* at para. 30.

[174] In adverse impact cases, the inquiry at the first step of the section 15(1) test is whether the impugned provisions create or contribute to a disproportionate impact on the claimant group based on a protected ground as compared to other groups. The requirement to show disproportionate impact necessarily introduces comparison into the first step. Leaving a gap between a protected group and non-group members unaffected does not infringe section 15(1). See *Sharma* at paras. 40, 41 and 50. In order to discharge their burden of proof at the first step of the test, claimants must present sufficient evidence to prove that the impugned law, in its impact, creates or contributes to a disproportionate impact on the basis of a protected ground. The impugned law need not be the only or the dominant cause of the disproportionate impact. See *Sharma* at paras. 42, 45.

[175] If a claimant establishes that the law or state action creates or contributes to a disproportionate impact, the court should proceed to the second step. At the second step, courts must examine the historical or systemic disadvantage of the claimant group. Leaving the situation of a claimant group unaffected is insufficient to meet the second part of the test. Factors such as stereotyping, prejudice and arbitrariness may assist a judge in determining whether claimants have met their burden at the second step. Judicial notice and inferences can play a role at this step. The claimant need not prove that the legislature intended to discriminate. See *Sharma* at paras. 52-53, 55.

[176] 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. See *Sharma* at para. 63.

***b. Application to this case***

[177] As stated above, the Applicants allege that, in its effects, the Target creates a distinction based on the enumerated ground of age in three different ways:

a. Young people are particularly susceptible to negative physical health impacts resulting from climate change, and youth will bear a disproportionate impact of the mental health impacts of climate change.

b. The catastrophic impacts of climate change will worsen over time as global temperatures continue to rise. By virtue of their age, youth and future generations will bear the brunt of these impacts as they live longer into the future.

c. Young people’s liberty and future life choices are being constrained by decisions being made today over which they have no control.

[178] With respect to ground (a), I agree with the Applicants that the evidence in this case shows that young people are disproportionately impacted by climate change. However, this disproportionate impact is caused by climate change, not by the Target, the Plan or the *CTCA*.

As the Supreme Court stated in *Sharma* at paras. 40 and 63, section 15(1) of the *Charter* does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation, and leaving a gap between a protected group and non-group members unaffected does not infringe section 15(1). In light of these recent statements of the Supreme Court, this Court is unable to find an infringement of section 15 based on this ground.

[179] The same can be said with respect to ground (b). The worsening of the impacts of climate change are not caused by the Target, the Plan or the *CTCA*. The impacts of climate change would worsen in the absence of the Target, the Plan or the *CTCA* and such impacts are not worsening more because of the Target, the Plan or the *CTCA*. Again, section 15(1) of the *Charter* does not impose a positive obligation on the state to remedy social inequalities or enact remedial legislation, and leaving a gap between a protected group and non-group members unaffected does not infringe section 15(1).

[180] Further, and in any event, I agree with Ontario that the adverse effects distinction alleged by the Applicants in ground (b) is not a distinction based on age, but, rather, a temporal distinction. A temporal distinction does not violate section 15 because it is not based on an enumerated or analogous ground. See *Canada (Attorney General) v. Hislop*, 2007 SCC 10 at para. 39 and *Vail & McIver v. WCB (PEI)*, 2012 PECA 18 at para. 25. The temporal nature of the distinction is shown by the fact that the impacts of climate change will be experienced by all age groups in the future. For instance, in 2050, the impacts of climate change will be experienced by all Ontarians who will be alive at that time, including people who are today in their 30s, 40s or 50s, as well as youth and young people and people yet-to-be-born.

[181] I decline to address the alleged adverse effects distinction set out in ground (c) above. To the extent that it adds anything to ground (b), it is, in effect, an attack on the age limit on the right to vote. The record before me is woefully inadequate to deal with this issue. Further, the Target is not the reason why young people do not have control over decisions that are made today by the government and it leaves this "gap" unaffected.

[182] In the event this Court concludes that the distinction regarding future generations is not based on the enumerated ground of age, the Applicants argue that such distinction is based on the ground of "generational cohort" which should be recognized as an analogous ground under section 15(1). I do not need to determine whether "generational cohort" should be recognized as an analogous ground as the reasoning above based on the recent statements of the Supreme Court in *Sharma* – that section 15(1) does not impose a positive obligation on the state to remedy social inequalities or enact remedial legislation, and that leaving a gap between a protected group and non-group members unaffected does not infringe section 15(1) – would equally apply to any alleged disproportionate impact based on the ground of generational cohort.

[183] Accordingly, I find that the Applicants have not established any violation of section 15(1) of the *Charter*.

[184] Given my conclusion that there is no violation of section 7 or section 15 of the *Charter*, I do not need to deal with the issue of the appropriateness of the remedies sought by the Applicants.

### 5. Unwritten constitutional principle

[185] The Applicants submit that the societal preservation principle should be recognized as an unwritten constitutional principle and that it should be used in the interpretation of sections 7 and 15 of the *Charter* in this case. The Intervener Friends of the Earth Canada argues that an unwritten constitutional principle of ecological sustainability should be recognized.

[186] Unwritten constitutional principles cannot serve as bases for invalidating legislation and may assist courts in only two ways. First, they may be used in the interpretation of constitutional provisions. When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing the character and the larger objects of the *Charter* itself, the language chosen to articulate the specific right or freedom, and the historical origins of the concepts enshrined. Second, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent. See *City of Toronto* at paras. 54-56, 63.

[187] I find it unnecessary to determine whether societal preservation and/or ecological sustainability are unwritten constitutional principles. If these principles were recognized as unwritten constitutional principles, their only legitimate role in this case would be to assist in the interpretation of sections 7 and 15 of the *Charter*. However, these principles would have no impact on my analysis above. This Court is bound by extensive case law from higher courts dealing with sections 7 and 15 and the applicable tests applicable under these provisions.

## D. CONCLUSION

[188] Accordingly, the Application is dismissed.

[189] If costs cannot be agreed upon, the Respondent shall deliver submissions of not more than four pages (double-spaced), excluding the bill of costs, by April 28, 2023. The Applicants shall deliver their responding submissions (with the same page limit) by May 12, 2023. The submissions of all parties shall also be sent to my assistant by e-mail and uploaded onto CaseLines.

**Vermette J.**

**Released:** April 14, 2023

**CITATION:** Mathur v. His Majesty the King in Right of Ontario, 2023 ONSC 2316
**COURT FILE NO.:** CV-19-00631627-0000
**DATE:** 20230414

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**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

**– and –**

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

**– and –**

ASSEMBLY OF FIRST NATIONS, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, FOR OUR KIDS, FRIENDS OF THE EARTH CANADA and INDIGENOUS CLIMATE ACTION

Interveners

---

**REASONS FOR JUDGMENT**

---

Vermette J.

**Released:** April 14, 2023