The Story of *Mathur et al. v. Ontario*

Part 1 – Pre-Emptive Strike by the Government

> "This is a novel application. At its core, it is about whether the Respondent, Ontario, violated the Applicants' ss.7 and 15 rights by repealing the *Climate Change Act* through the *Cancellation Act* and by setting a target for the reduction of GHG emissions that is insufficiently ambitious."[1]

BACKGROUND:

In 2018 a newly elected, regressive Ontario Government, as one of the early steps in its environmentally hostile agenda, passed the *Cap and Trade Cancellation Act*. It thereby repealed the *Climate Change Mitigation and Low-carbon Economy Act* and terminated existing greenhouse gas emission (GHG) reduction targets: a reduction of 15% by the end of 2020, 37% by the end of 2030, and 80% by the end of 2050, as compared to GHG levels calculated in 1990. Based on 2005 GHG levels, the 2030 target had represented a 45% emissions reduction. The Conservatives replaced these goals with a single, significantly weaker target for 2030.

This was accomplished in the following manner. The Ontario Ministry of the Environment, Conservation and Parks published a plan titled *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan* in November 2018. The Plan calls for a reduction of GHG emissions by 30% below 2005 (not 1990) levels by 2030, referred to as the Target. This is the same as the goal adopted by Canada pursuant to the international climate Paris Agreement (2015), which is widely understood by climate scientists to be woefully inadequate.

The Plan does not call for any reduction beyond 2030.

COURT APPLICATION – NOVEMBER 2019:

As a result of this move, a group of seven brave, young people from across Ontario, some of whom are Indigenous, filed an application in the Superior Court of Justice in November 2019 to

---

[1] From paragraph 266 of the 56-page motion decision by Justice C.J. Brown issued on November 12, 2020.

challenge the Provincial Government's rollback of Ontario's GHG emissions reduction plan. As will be explained below, I believe that this is the most important climate litigation in Canada to date.

The Applicants claim the Government transgressed two sections of the *Canadian Charter of Rights and Freedoms*. Among other things they maintain that

a) the rollback for 2030 is 15% weaker than the previous standard;
b) the previous target of a 37% reduction by 2030/1990, if adjusted to the 2015 level, would result in a 45% target for decrease in GHGs;
c) the rollback decision was not scientific, sustainable or constitutional;
d) the climate crisis will harm young people more as they will live a larger proportion of their lives with a disintegrating climate, and are more vulnerable to the resulting health impacts;
e) they have "the right to a stable climate system capable of providing youth and future generations with a sustainable future" (from paragraph 31 of Justice C.J. Brown's motion decision);
f) the refusal to aim for emission targets considered necessary to avoid climate catastrophe, violates their right to life and security of the person under section 7[2] of the *Charter* and their equality rights under section 15[3];
g) the rollback "violates the unwritten constitutional principle that Governments are prohibited from engaging in conduct that will, or reasonably could be expected to, result in the future harm, suffering or death of a significant number of its own citizens" (par. 31).

In the following excerpt Justice Brown summarized the kind of impacts that the Applicants assert will result from global warming increases above 1.5° C (par. 142):

- An increase in the frequency and intensity of acute extreme heat events, resulting in an

[2] Section 7: "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."

[3] Section 15: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

increase in fatalities, serious illness, and severe harm to human health;

- An increase in overall temperatures and heat waves, resulting in an increase in fatalities, serious illness, and severe harm to human health;
- An increase in the spread of infectious diseases such as Lyme disease and West Nile Virus, resulting in an increase in fatalities, serious illness, and severe harm to human health;
- An increase in the frequency and intensity of fire activity (including forest wildfires), resulting in an increase in fatalities, serious illness, displacement, and severe harm to human health;
- An increase in the frequency and intensity of flooding and other extreme weather events, resulting in an increase in fatalities, serious illness, displacement, and severe harm to human health;
- An increase in the spread of harmful algal blooms in water that Ontarians use for drinking and recreational purposes, with a resulting increase in serious illness, loss of livelihood, and severe harm to human health;
- An increase in exposure to contaminants such as mercury through food webs, with a resulting increase in severe harm to human health and negative impact on food security and sovereignty of certain Ontario communities;
- An increase in harms to Indigenous peoples, including increased impacts on health, access to essential supplies, ability to carry out traditional activities, loss of livelihood, and displacement; and
- An increase in serious psychological harms and mental distress resulting from the impacts of climate change, including but not limited to, the impacts set out in the paragraphs above.

On behalf of their own generation and future generations of Ontarians, the Applicants sought, among other things, a court order requiring the Government to set a science-based GHG reduction target consistent with this province's share of GHG reductions needed to limit global warming to below 1.5 C above pre-industrial temperatures or well below 2 º C, which is the upper range established by the Paris Agreement.

GOVERNMENT'S MOTION TO STRIKE – APRIL 2020:

In a pre-emptive strike the Ontario Government filed a preliminary motion in April 2020 to terminate the proceeding on the grounds that it discloses no reasonable cause of action and has no prospect of success at a full hearing on the merits. The Conservatives did not try to justify their weaker GHG target on the basis of science. However they did raise a very broad array of

objections to the application, including the following:

1) The claims are not capable of proof.
2) The Target is merely an aspiration, not a legal obligation.
3) The Plan is nothing more than a press release or a "communications product," rather than a law.
4) The Government's weaker response to the climate crisis is a policy and political issue, and thus it is not appropriate for a court to intervene.
5) Since there was no legal requirement in Ontario for the enactment of climate protection measures in the first place, there cannot be a constitutional objection if the Government subsequently chooses to reduce or repeal them.[4]
6) The issues raised by the application are 'non-justiciable,' which means the case is not suitable for judicial intervention.[5]
7) Even if the claim is considered to be justiciable, and apart from whatever the evidence might establish, the Government nevertheless has no constitutional obligation to take positive steps to redress the future harms of climate change.
8) It is beyond the court's "institutional capacity" to order the Government to establish a "science-based GHG reduction target" that will provide a "stable climate system" and "sustainable future" (par. 254).
9) The Applicants' allegations about apprehended impacts from the climate crisis are incapable of proof.
10) These allegations are based on opinions.
11) Whether or not catastrophe will occur unless the Target is changed is speculative theory and cannot be proven with evidence.
12) GHG reduction is a global matter involving coordination with other countries. Evidence cannot predict how this will play out in the future.
13) Evidence cannot prove that catastrophic climate effects can be avoided or mitigated by any target that might be adopted now by the Government.

---

[4] Justice Brown noted at par. 225: "Ontario's line of reasoning assumes that the province is not constitutionally obliged to take positive steps to redress the future harms of climate change."

[5] This term refers to "a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life" and involves three criteria: "(1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court" (par. 103).

14) The discrimination claim is legally flawed. The Applicants claim that future residents will suffer more harm than those of the present or of the past, but this temporal distinction is not based on enumerated or analogous grounds in the *Charter*.
15) The Applicants do not have standing to sue on behalf of future generations, namely people who do not yet exist. That category is too unbounded to support a grant of public interest standing to the Applicants.
16) They did not explain how or why they are better placed than anyone else to represent the interests of future generations.
17) The proceeding should have been launched in a different court (namely the Divisional Court) because it involves a judicial review of the Plan and Target.

MOTION DECISION – NOVEMBER 2020:

In her decision issued on Nov 12, 2020, Justice Brown dismissed the Government's motion to terminate the proceedings.[6] Happily, none of the Government's array of objections was accepted. This decision establishes a high water mark for climate litigation in Canada, and is to be celebrated. To my knowledge it is the first time a Canadian court has offered such broad support for a *Charter* violation case involving impacts from the climate crisis. And hopefully it will not be the last.

It opened the door for the Applicants to proceed to a full hearing in front of another judge. Unfortunately, because of the nature of the motion none of the preliminary determinations made by Justice Brown would be binding on the judge at the hearing on the merits. Amongst the many significant matters identified in the decision, I found the following points to be particularly noteworthy:

- The decision referred to the paradoxical position taken by the Government in the *Carbon*

[6] Cited as *Mathur v. Ontario* at 2020 ONSC 6918. The text of the decision is at https://www.canlii.org/en/on/onsc/ doc/2020/2020onsc6918/2020onsc6918.pdf. As an educational tool, it is a relatively concise exposition of complex *Charter* jurisprudence (case law) that has built up over many decades.

Reference case,[7] where it opposed the federal carbon tax.[8] In that proceeding it claimed that there was no need for any federal intervention with respect to the GHG problem in this province since the Ontario Government had taken full control of the climate problem with its strong new Plan and Target.

- The Applicants submitted that the Government "cannot, in one proceeding at the Court of Appeal, rely on the Plan to argue that there is no need for a federal carbon tax due to its own Plan and Target, while in this proceeding argue that the Plan is just a 'glossy brochure,' as Ontario described the Plan during oral submissions" (par. 54).

- International climate case law cited by the Applicants included *Urgenda et al. v. Netherlands*, in which the Supreme Court of the Netherlands affirmed that reduction in emissions was necessary for the Dutch government in order to protect human rights. In that case the court recognized that "each additional molecule of GHG in the atmosphere causes a demonstrable increase in the harm, with a single molecule of carbon dioxide causing a warming effect" (par. 94).

- Not only are the Applicants' factual predictions capable of proof, they are also staggering. The following are some examples:

  - Ontario has warmed about twice as fast as the global average since the pre-industrial period, at approximately 1.7 degrees Celsius; Ontario will continue to experience the impacts of global warming at an above-average rate; ...

  - Canada's share of the remaining global carbon budget is (at most) 2,000 megatonnes of CO_2, in order to likely avoid the catastrophic consequences of global temperatures rising beyond 1.5 degrees Celsius above pre-industrial levels;

  - Under the Target, Ontario's total CO_2 emissions from now until 2030 will be 1,670

---

[7] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, 146 O.R. (3d) 65, Ontario Court of Appeal..

[8] It was established on June 21, 2018 when the Federal Government enacted the *Greenhouse Gas Pollution Pricing Act,* S.C. 2018, c. 12, s.186.

megatonnes, or between 250-363% greater than Ontario's share of the global carbon budget, and almost *all* of Canada's budget. (par.96)

- The IPCC is recognized by Canadian courts as the authoritative source of scientific evidence on climate data and predictions. It was referred to as "the leading world body for assessing the most recent scientific, technical, and socio-economic information produced worldwide relevant to understanding climate change, its impacts and potential future risks, and possible response options" (par.101).

- Future generations will be unable to bring the same claim against this Government for setting an inadequate Target, and this claim would not lie against a future government. In addition "the failure to reduce GHG emissions and consequent violations of their rights would already be 'locked in' before their lifetime even began" (par. 247).

- Putting it another way, "future generations are unlikely to be able to bring the same suit as the Applicants against current or future Ontario governments, as the state of the world will likely be different" then (par. 250).

- "This case is of public interest, in that it transcends the interests of all Ontario residents, not just the Applicants' generation or the ones that follow" (par. 250(ii)).

- "Given their age, the Applicants do bring a useful and distinctive perspective to the resolution of the issues on this Application. There could very well be other persons with different interests in the issues, but the Applicants will provide a unique perspective as young Ontarians." (par. 250(iii)).

DEVELOPMENTS SINCE 2020:

The Ontario Government appealed Justice Brown's order, but on March 25, 2021 a 3-judge panel of the Ontario Divisional Court dismissed the request for leave to appeal.[9] As is the custom for leave-to-appeal applications, no reasons were provided for the panel's decision. As a result, this case survived the Government's pre-emptive strike and was allowed to proceed to a full hearing

[9] Citation is 2021 ONSC 1624.

on the merits.

That hearing was held before Justice Vermette on September 12-14, 2022. It appears to mark the first time that any court in Canada has conducted a full hearing of a *Charter* climate case on its merits. Her decision was subsequently released on April 14, 2023.[10]

She accepted much of the Applicants' position with respect to factual evidence but departed from some of the legal guidance offered in Justice Brown's motion decision. The bad news: ultimately the application was dismissed on the basis that the Ontario Government's Plan and Target did not constitute a technical violation of the *Charter*. The good news: the Applicants have announced that they are appealing this decision.

Justice Vermette's decision will be the focus of Part 2 in this series.

■

Alan D. Levy has worked in the environmental field as a lawyer, adjudicator and mediator, and is a member of the SCAN! Legal Committee.

[10] The 52-page decision is cited as *Mathur v. His Majesty the King in Right of Ontario* at 2023 ONSC 2316. Text of the decision is at https://ecojustice.ca/wp-content/uploads/2023/04/Reasons-for-Judgment-Mathur-v.-His-Majesty-the-King-in-Right-of-Ontario.pdf.