The Story of *Mathur v. Ontario*

Part 2 – An Anti-Climatic Verdict

Superior Court of Justice - April 14, 2023:

> [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.
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> [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.
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> [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.[1]

INTRODUCTION

This is a summary of the recent and painfully disappointing decision in *Mathur v. Ontario*, a climate case involving youth and young people.[2] Despite many positive and important factual and legal findings in the decision, the court dismissed all of their claims. It thereby permitted a gross reversal by the regressive Ontario Government of climate law and policy in this province, and will disproportionately harm youth and young people.

Climate litigation is complex, time-consuming, expensive, slow, frustrating and usually unsuccessful - probably the most difficult of all civil cases. On the other hand, advancing *Charter* cases does not depend on fickle voters choosing unreliable politicians.[3]

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[1] Paragraph numbers 3-5 (§ used hereafter to denote paragraph numbers) of the 52-page judgment of Justice Vermette, cited as *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316. The full text is at https://ecojustice.ca/wp-content/uploads/2023/04/Reasons-for-Judgment-Mathur-v.-His-Majesty-the-King-in-Right-of-Ontario.pdf.

[2] It is my understanding that in this proceeding 'youth' are a cohort under the age of 18 years, and 'young people' are a group that is older than that. I will use them interchangeably.

[3] The Applicants referred to "egregious government conduct resulting in harm, suffering or death of a significant number of its own citizens" and harm "on a scale that threatens the preservation of society" (§58). The following excerpt from *Small is Beautiful, a Study of Economics as if People Mattered* by E.F. Schumacher (Vintage

We do not yet have legislation in Ontario containing an enforceable right to a clean and sustainable environment. As a result, climate litigation is forced to rely primarily on the *Canadian Charter of Rights and Freedoms*, particularly the right to life and security of the person (section 7), in attacking the failure of the Ontario Government to do enough, or in some cases, anything at all. Claims by youth and young people also engage the issue of discrimination based on age, another *Charter* right (s.15).

The *Charter* was entrenched in the Canadian Constitution in 1982 in order to provide redress when governments trammel over the basic human rights of Canadians. The text in the *Charter* is straightforward, but the case law (jurisprudence) interpreting it is anything but. Decisions have incorporated intellectual constructs and protocols established by judges, making them somewhat difficult to understand.

BACKGROUND

The history of the *Mathur* litigation is discussed in Part 1 of this series of articles.[4] To recap, in 2018 the new Conservative Government of Ontario passed the *Cap and Trade Cancellation Act* (*CTCA*), repealed the *Climate Change Mitigation and Low-carbon Economy Act*, and significantly weakened provincial greenhouse gas emission (GHG) reduction targets. The 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. It called for a reduction of provincial GHGs by 30% below 2005 (not 1990) levels by 2030, referred to herein as the Target. This is widely understood to be woefully inadequate. In addition, the Plan does not call for any reduction beyond 2030.

As a result of this move, the Applicants commenced proceedings in the Superior Court of Justice in November 2019. They claim that their rights under the *Charter* were violated. In a pre-

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Books, London, 1973) at p.19, comes to mind: "One can go on for a long time deploring the irrationality and stupidity of men and women in high positions or low - 'if only people would realize where their real interests lie!' But why do they not realize this?" It is an echo perhaps from Shakespeare in "Midsummer Night's Dream" (1590s): "Lord, what fools these mortals be!"

[4] It was posted on the website of Seniors for Climate Action Now on May 1, 2023: https://seniorsforclimateactionnow.org/ontario-youth-take-the-government-to-task-in-court-part-1/.

emptive strike the Ontario Government filed a preliminary motion in 2020 to terminate the proceeding on the grounds that it disclosed no reasonable cause of action and had no prospect of success at a full hearing on the merits. The Government 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. In her 2020 decision, Justice C.J. Brown dismissed the Government's motion to terminate the proceedings.[5] None of the Government's objections was accepted.

Among other things the Applicants 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% decrease in GHGs;
c) the rollback decision was not scientific, sustainable or constitutional;
d) the widespread climate crisis will harm youth and 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 been denied "the right to a stable climate system capable of providing youth and future generations with a sustainable future";[6]
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 s. 7[7] of the *Charter* and their equality rights under s. 15[8];
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

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[5] 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.

[6] From §31 of Justice Brown's motion decision dated November 12, 2020.

[7] 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."

[8] 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."

harm, suffering or death of a significant number of its own citizens" (motion decision §31).

On behalf of their own generation and future generations of Ontarians, the Applicants seek, 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 1.5ºC above pre-industrial temperatures, or well below 2ºC which is the upper range established by the Paris Agreement (December 2015).[9]

Justice Brown's decision was the focus of discussion in Part 1 of this series. That decision established a high water mark for climate litigation in this country: it was the first time a Canadian court offered such broad support for a *Charter* violation case involving impacts from climate warming. It opened the door for the Applicants to proceed to a full hearing of the merits, although none of the preliminary determinations made by Justice Brown would be binding on the judge at the merits hearing. It also exposed hypocrisy and misinformation in some positions taken by the Government.

The Ontario Government's appeal of Justice Brown's order was dismissed without reasons by the Divisional Court on March 25, 2021. The merits hearing proceeded before Justice Vermette on September 12-14, 2022. It was the first time that any court in Canada has conducted a full hearing of a *Charter* climate case on its merits.

Several organizations were granted status to participate in the hearing as interveners: 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. The decision of Justice Vermette noted that their submissions generally supported the Applicants' case.

[9] The Paris Agreement (aka Paris Accords or Paris Climate Accords) is an international, binding treaty dealing with climate change mitigation, adaptation, and finance. It was adopted by 196 Parties at the UN Climate Change Conference (COP 21) in Paris on December 12, 2015 and came into force on November 4, 2016.

Details reported in the decision along with the Applicants' hearing briefs[10], the evidence filed by the Government, and the positions it took on various issues, provide yet more confirmation of the Conservatives' astonishing attitude towards the climate crisis. The following are some examples:

- The Government's factum "reflects many core tenets of 'climate denialism 2.0'" (Reply Factum §1).
- The Government asserted that it is desirable *but not necessary* to act in the face of climate change, but it is not Ontario's responsibility to do so.
- "Ontario's two experts - who are perhaps better known for their partisan connections that their scientific expertise - gave evidence outside of their areas of expertise. Their testimony also displays a lack of objectivity, the use of 'climate delay' tactics and the hallmarks of inappropriate advocacy such as cherry-picking data." (Reply Factum §4)
- The Government's expert witness, Dr. William van Wijngaarden, has "outlier views when it comes to climate change," and "questions the reliability of the IPCC's [Intergovernmental Panel on Climate Change] use of Global Climate Models" (Factum §43).
- None of his recent published work on climate science "has been published in a peer-reviewed scientific journal" (Factum §46).
- He is a member of the CO2 Coalition, which "informs the public about ... the net beneficial impact of carbon dioxide emissions on the atmosphere."
- He has signed a declaration indicating that "there is no climate emergency [and] therefore, there is no cause for panic and alarm."
- He even disagrees that science data supports the IPCC's conclusion that "human influence has warmed the atmosphere, ocean and land."
- He asserted that "any attempts by Ontario to reduce its GHG would be inconsequential" (Factum §68).
- He "claims that there is no significant increasing trend in area burned by fire in Ontario" (Factum §89).
- The other Government witness, Philip Cross, questioned "the significance and impact of

[10] The Factum (statement of fact and law) of the Applicants, dated August 23, 2022, is at https://ecojustice.ca/wp-content/uploads/2022/09/20220722-Ecojustice-factum-00375517xF838A.pdf. The Reply Factum of the Applicants, dated September 5, 2022, is at https://ecojustice.ca/wp-content/uploads/2022/09/2022-06-06-Reply-Factum-Applicants-00397669xF838A.pdf.

Ontario's emissions on Canadian and global GHG" (Factum §66).

- He is an advisor to the federal Conservative leader, "advocates for more oil and gas development in Canada, ... defends the oil and gas industry against 'unfair demonization,'" and refused to "directly acknowledge the basic truth that climate change is an urgent threat to human societies and the planet."
- "[H]is opinions show a clear bias for fossil fuels and against measures to reduce GHG. He calls environmental objections to fossil fuels 'trivial', support for the transition to renewables 'trendy', and global concerns about climate change 'hypothetical.' ... His opinions, and affiliation with the fossil fuel industry and politicians unreservedly aligned with it, are part of an effort to obstruct climate action." (Reply Factum §9)
- Ontario's position on fairness in GHG target setting (i.e., doing its fair share of GHG reduction), if followed by other jurisdictions, would result in global warming of 3-5°C (Reply Factum §11).
- "Ontario criticizes the Applicants' reliance on the Paris Standard and IPCC prescriptions and reports" even though they "are recognized as being the leading state of climate science based on the consensus of the world's leading scientists" (Reply Factum §18).
- The Government claimed that scientific predictions about future impacts from climate change (e.g. more/worse forest fires, flooding, heat-related deaths and spread of infectious diseases) are based on an unreliable "chain of speculative assumptions" (Reply Factum §38).
- "Ontario argues that the catastrophic effects of climate change cannot be avoided or mitigated *at all* by *any* GHG target" (Reply Factum §42).
- The Government maintained that it had to "balance" environmental protection with maintaining a "healthy economy" (decision §155). But then "Ontario does not explain how the Plan or Target furthers any particular economic interest or has any positive economic impact on Ontario. Mr. Cross only makes general assertions based on his own uncorroborated theories. The record shows that Ontario rescinded a more ambitious target and a plan that were economically efficient and replaced them with a Target that will allow more costly GHG and an accompanying Plan that reduces emissions less efficiently." (Reply Factum §51)

It appears that the Government treated the hearing as just another partisan, political opportunity

to propagate climate misinformation and disinformation.[11] This despite some polling months before the hearing that found most Ontario residents were concerned about climate change and wanted the Government to do more.[12] And all of this Government denial despite the findings of the Supreme Court of Canada in 2021 that climate change "poses a grave threat to humanity's future", is "a threat of the highest order to the country" and constitutes "an existential threat to human life in Canada and around the world (Factum §142).[13]

In its court material, the Applicants warned the court that "climate change is an unprecedented threat, unlike anything seen in human history - and one that requires immediate action on a global scale in order to be avoided" (Factum §157). And further: "Simply put, the stakes could not be higher" (Factum §172) due to "the gravest existential threat in modern history" (Reply Factum §2).

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[11] The Conservatives' continuing propaganda campaigns try to block the public's understanding of how Government action and inaction have been contributing to the climate crisis. A current example of this is the Premier's response in the Legislature on June 7, 2023 to a question about the connection between anthropogenic climate change and the unhealthy, smokey air from dozens out-of-control forest fires in Ontario and Quebec. According to a Global News report on the same date, the Premier "is blaming campfires and lightning strikes for the ongoing wildfires." In addition, "[w]hen pressed on whether climate change is contributing to the current wildfire season, Ford dismissed the suggestion." The Premier also said: "They happen every single year similar to the floods. ... The wildfires start every single year." The Opposition Leader told the Legislature that on June 6 "the Minister of Natural Resources and Forestry refused to acknowledge a connection between the climate crisis and these forest fires."

If denial, misinformation and disinformation is not bad enough, the Government continues to ramp up GHG emissions by adopting more destructive policies. An example is the promotion of new gas-fired electricity generation stations, and most recently, by burning wood. It announced $19.6 million in new funding for a Forest Biomass Program. See Media Release on May 31, 2023 by Graydon Smith, Minister of Natural Resources and Forestry.

This involves harvesting and burning wood to generate electricity. According to a piece by David Robertson (Seniors for Climate Action Now!) in the June newsletter ("Connections") of the Ontario Climate Emergency Campaign (OCEC), the "Ford government has taken a climate threatening practice —burning wood to make energy - and has transformed it into a pillar of the new green economy." According to Mr. Robertson, the Government describes the initiative as "helping to reduce emissions and addressing climate change" and claims it will "position Ontario as a leader in the growing circular and green economy." In addition, it says "biomass innovations are a sustainable alternative to carbon intensive products and an exciting new frontier for Ontario's Forest sector." Mr. Robertson writes that the "Ford government's Forest Biomass Action Plan" is "staggering in its level of greenwashing and obfuscation."

[12] A press release on March 3, 2022 by Clean Prosperity about a new Leger poll of 1,511 Ontario residents indicated that 74% were worried about the impact of the climate crisis, and a large majority thought the Ontario Government should do more to address climate change. See https://cleanprosperity.ca/new-poll-makes-strong-case-for-ontario-government-climate-action/.

[13] From *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at §2, 167 and 171.

THE JUDGMENT

The April 2023 decision is a thorough and necessarily complex braid of tangled factual, moral and legal issues. Although it contained some good news, the outcome was negative - all of the Applicants' claims were dismissed. After the high point of Justice Brown's progressive motion decision in 2020, this outcome was anticlimactic and anticlimate.

Although this decision seems generally sympathetic to the Applicants' cause, the court felt bound by its interpretation of certain aspects of *Charter* case law, including a recent split decision (5:4) of the Supreme Court of Canada.[14] Fortunately there were significant and helpful factual and legal rulings in the decision. The finding in §147 is an example:

> 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 1.5°C. 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. (emphasis added)

Some other factual determinations by the court are listed below:

- The Federal Government's current national GHG reduction target (March 2022) is 40-45% below 2005 GHG levels by 2030. This is significantly more stringent than Ontario's Target of reducing GHGs by 30% below 2005 levels by 2030 (§9).
- The scientific and technical reports published by the IPCC constitute "a reliable, comprehensive and authoritative synthesis of existing scientific knowledge about climate change and its impacts" (§19). The evidence of the Government's expert witness to contradict the IPCC was roundly rejected.
- Ontario's Target (reducing GHGs by 30% below 2005 levels by 2030) will need to increase

[14] *R. v. Sharma* was issued on November 4, 2022 and weighs in at 141 pages. It was mentioned at least four times in Justice Vermette's decision, excerpts from it were included, and a separate section was devoted to it (§82-93). Her decision announced near the outset that the Applicants' claims would be dismissed due to "the current state of the law" (§5). *Sharma* was about an unrelated subject matter, namely criminal law and sentencing of offenders. The Applicants submitted that this decision did not create additional judicial constraints which might hinder their case.

by 22% if we are to meet the goal of the IPCC and the Glasgow Climate Pact[15]: which is reduction of global net anthropogenic CO_2 emissions by 45% below 2010 levels by 2030, with net zero emissions by 2050 (§20).

- Climate warming in Canada is now double the level of overall global warming. Ontario will experience more heat waves and human death due to extreme heat.
- Climate-sensitive infectious diseases in Ontario (including those from insects such as ticks and mosquitos) are continuing to increase, as well as the increased risk of food and waterborne disease, fungal diseases and those caused by parasites.
- Physical and mental health impacts and deaths from floods (e.g., contaminated water and food, mold and CO poisoning) and fires (e.g., smoke inhalation) are increasing.
- Humans, wildlife, fish and water quality are under threat from the increasing incidence of harmful algae blooms.
- As warming exceeds 2°C increased mercury in the atmosphere will undermine fish stocks and threaten food security.
- The "serious and wide-ranging" impacts of climate change on mental health in Canada 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" (§23(g)).
- "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" (§23(h)).
- Ontario's claim that provincial GHG emissions are relatively small and inconsequential, and will have little impact on global climate change, the so-called *de minimis* argument (§61), was roundly rejected in the decision (§149). It was also rejected in the motion decision by Justice Brown.
- Each increase in global temperature increases the likelihood of crossing "large-scale, devastating climate tipping points" (§24).[16]

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[15] The IPCC goal of limiting global warming to 1.5°C was endorsed by states in the Glasgow Climate Pact adopted in November 2021.

[16] Tipping points were described by the Applicants' expert in part as follows (at §24): "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

- Climate warming has disproportionate and numerous negative impacts on the physical and mental health of youth and young people as well as Indigenous peoples for a variety of reasons (§25).
- "[B]y not taking steps to reduce GHG in the province further, Ontario is contributing to an increase in risks to human health, life and safety (§150).
- "[T]he Target falls short and its deficiencies contribute to increasing the risks of death and to the security of the person" (§160).

The court noted that most of the evidence related to the above points was unchallenged by the Government (§22). Some key issues and decision points are summarized below.

1. JUSTICIABILITY:

The court held that the *Charter* issues raised by the Applicants are justiciable[17], despite objections by the Government. There is "nothing novel, unwieldy, or unsound" (to use the words of the minority in *Sharma*) about subjecting climate law "to constitutional scrutiny." This finding of justiciability is very important, as some other Canadian climate cases have been decided differently on this point.

That said, the Judge decided otherwise on the question of calculating the fair share for Canada and Ontario with respect to allocating the 'carbon budget':

> [109] ... This Court does not have the institutional capacity and legitimacy to determine Canada's share compared to other states and Ontario's share compare to other provinces. I note that, as admitted by Dr. Matthews [an expert witness testifying for the Applicants], the issue of a particular country's share is not a "science question" that can be

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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."

[17] This means that based on rules established by judges in previous case law, these issues are suitable for judicial intervention. Determining justiciability involves a consideration of several criteria, including the capacity and legitimacy of the judicial process, and the constitutional separation of powers.

> 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. ...
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> [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.

2. GOVERNMENT'S DUTY TO ACT:

The Applicants described the Government's action/inaction as "a leap backwards that has reversed progress to reduce GHG" (§88), thereby "committing Ontario to allowing dangerously high levels of GHG" (§53). But the judgment characterized the Applicants' "real complaint" as the Government's failure to "aim sufficiently high when setting the Target."

Justice Vermette held that the Ontario Government is under no legal obligation to do anything about the climate disaster, and this despite her finding that the climate situation is quickly getting worse and will continue to destroy many more lives in this province if not contained. Based on this premise, she concluded there was nothing improper about the Conservatives' decision to terminate the previous government's extensive efforts to help fight climate change.

3. SECTION 7:

The jurisprudence related to s.7 has established a two-step process which involves first determining whether the right to life, liberty and personal security has been violated, and if so, considering whether or not the violation has been in accordance with principles of fundamental justice. There are several components to this analysis.

a) LIFE & SECURITY OF THE PERSON

The decision states that the relevant question for determination here is whether s. 3(1)[18] 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" (§120). The court accepted that the Applicants' right to life and security under s.7 of the *Charter* was compromised by the escalating climate crisis.

The court also found that the Government's approach of waiting until the risks to human health, life and safety are realized, before taking appropriate action, "would seriously undermine the rights protected by section 7" (§150). That said, the court appeared to indicate that the Target has little or nothing to do with the risk of reaching dangerous GHG levels that could lead to "catastrophic consequences of climate change for Ontarians" (§122).

b) POSITIVE OBLIGATION

Throughout more than five pages (pp. 38-43) the decision discussed whether s.7 can impose "a positive obligation on the part of the state to [take active steps to] ensure that each person enjoys life, liberty or security of the person" (§126). This is a familiar theme in many *Charter* decisions. The judgment resolved this issue by deciding not to decide it. It assumed "without deciding, that positive obligations can be imposed under s. 7 in the special circumstances of this case" (§142).

c) CAUSATION

The question of whether "causation" has been proven was decided in the Applicants' favour. The court concluded that there is sufficient connection between the Government's actions (i.e., replacing the previous program with the Target) and the prejudice suffered by the Applicants to establish a causal connection. The Government's claim that the evidence on this point was too speculative, was solidly rejected (§150). The court's findings are very significant for this case and will hopefully assist with other matters in future:

[18] Section 3(1) of the *CTCA* requires the Government to "establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time."

> [144] ... [T]his 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°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. (emphasis added) ...
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> [146] ... [T]he gap between the Target and the reduction percentage that is required globally by 2030 is large, unexplained and without any apparent scientific basis. ...
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> [149] ... [T]he 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. ... 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 [sic] to an [sic] quantifiable increase in global temperatures that is essentially irreversible on human timescales.
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> [150] ... 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 ... 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*.

d) FUNDAMENTAL JUSTICE

Section 7 of the *Charter* directs that people should not be deprived of the right to life, liberty and security "except in accordance with the principles of fundamental justice."[19] The case law has identified a few substantive and procedural principles of fundamental justice. The *Mathur* decision addressed two of these principles (§152): the rule against arbitrariness (absence of any connection between the purpose of a law or state action and how it limits a person's right to life, etc.) and the rule against gross disproportionality (restrictions created by state action go too far) and overbreadth. A law is overbroad if it imposes limits not rationally connected to its purpose.

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[19] The principles of fundamental justice are "found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system." Supreme Court of Canada decision in *United States v. Burns*, 2001 SCC 7 at §70.

The decision noted the submission by the Province that governmental action or inaction routinely permits or even encourages activities "that cause or contribute to a significant number of deaths each year" (§66). The court concluded that deprivations caused by climate change do not violate these principles of fundamental justice. Several steps were followed in making this determination.

i) Purpose of Plan & Target. The Applicants maintained that the intent of the Plan and Target is for the province "to do its share to reduce GHG and protect the environment for future generations," whereas the Government submitted that the purpose is "to balance a healthy economy with a healthy environment" (§155). The Judge rejected both positions and determined that a more accurate statement of purpose is to "*reduce* GHG in Ontario to address and *fight* climate change" (§158, emphasis added). This became the measuring stick for the Judge's analysis.

ii) Arbitrariness. The court concluded that the Target is not arbitrary, since it aims to do something about GHGs, although not enough: "Incrementalism and imprecision, as opposed to no rational connection, do not lead to a conclusion of arbitrariness" (§160).

iii) Gross Disproportionality. The court indicated the gross disproportionality rule can be satisfied only in "extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the [law]" (§161). In addition, the judgment referred to the case law principle that 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" (§161). The Judge found that gross disproportionality does not apply here since the Government did something, even though it "did not go far enough" (§162).

iv) Societal Preservation.[20] The Applicants also claimed that the impact of the Government's action or virtual inaction on their right to life and security is contrary to the principle of societal preservation, and that this should be recognized as another principle of fundamental justice. It is defined by the Applicants as follows: "a government cannot engage in conduct that will, or could reasonably be expected to, result in the future harm, suffering, or

[20] This is also discussed in section 5 below.

death of a significant number of its own citizens" (§163).

This point was dismissed by the court because "it is not a legal principle" (§165): "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." And further, this principle "is not fundamental to the way in which the legal system ought fairly to operate," as it "does not relate to the legal system or its fair operation" (§167).

The decision states that the term 'societal protection 'did not turn up on a computer search of a CanLII, a national website containing legislation and court decisions. It cited case law to the effect that "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" (§165).

The court determined that preservation of society is of no interest in the legal system: "the principal of societal preservation is not part of 'the inherent domain of the judiciary as guardian of the justice system'" (§166). The Judge also expressed concern about whether a societal preservation principle "is sufficiently precise to yield a manageable standard against which to measure deprivations of life, liberty or security of the person" (§168).

4. SECTION 15:

With respect to s.15 of the *Charter,* since the Plan and Target purport to treat everyone the same (i.e., there is no "facial" distinction against youth and young people), the Applicants' age discrimination claim is regarded as an "adverse impact" type of case. In such cases claimants must demonstrate there is a disproportionately negative impact on them as members of a group covered by s.15.

The decision indicates that this aspect of the claim has three different components (§177), all of which were rejected by the court. I will refer to two of them. The first component is: "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." Although the court held that the evidence established that "young people are disproportionately impacted by climate change", it concluded that this harm was caused by

climate change, not the *CTCA*, Plan or Target (§178).

The second component of the Applicants' s.15 claim is as follows:

> 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 (emphasis added).

The court rejected this ground for much the same reason as it dismissed the first component:

> 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*. (§179)

a) TEMPORAL DISTINCTION

The Government's position on temporal distinction, which was adopted by the Judge, is explained as follows:

> [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.

The Applicants did not suggest that all Ontarians will not experience more impacts of catastrophic climate change in future. Rather, they claim that as temperatures and negative impacts keep increasing, the younger generation suffer more as they are more vulnerable and have longer to live than older people (§177). The following excerpt is from the submissions portion of the decision:

> 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. (§73)

The court accepted evidence indicating that the public has already been negatively impacted by climate warming. But the court also accepted the Government's submission that the claim related to worsening adverse effects in future is based on "a temporal distinction" rather than age:

> 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. (§180)

5. UNWRITTEN CONSTITUTIONAL PRINCIPLES:

The Applicants also claimed that *societal preservation*[21] should be recognized as an unwritten constitutional principle to aid with interpreting s.7 and s.15.[22] Similarly, Friends of the Earth Canada, an intervener in the hearing, submitted that *ecological sustainability* should be recognized as another unwritten constitutional principle.

According to the decision, unwritten constitutional principles cannot be used to invalidate legislation (§186). However, they may be used a) in "the interpretation of constitutional provisions," b) "to develop structural doctrines unstated in the written Constitution," and c) to "fill gaps and address important questions on which the text of the Constitution is silent." The Judge disposed of this issue by ruling that even if these two principles were adopted, she would

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[21] This principle is also discussed above at section 3(d)(iv).

[22] Four unwritten but "fundamental and organizing principles of the Constitution" were first recognized by the Supreme Court of Canada in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217. They include federalism, constitutionalism and the rule of law, respect for minorities, and democracy. These principles "inform and sustain the constitutional text" and are "the vital unstated assumptions upon which the text is based." They "represent the 'major elements of the architecture of the Constitution itself and are as such its lifeblood.'" As such they "infuse our Constitution and breathe life into it." From *The Charter of Rights and Freedoms*, Robert Sharpe and Kent Roach, 7th edition (2021, Irwin Law), at p.21.

nevertheless be bound by higher court decisions with respect to applying s.7 and s.15 (§187).

CONCLUSION

> In the past few years, British Columbia experienced a deadly heat wave, flooding has ripped through several provinces, and last year, my hometown of Ottawa was hit by a disastrous storm.
>
> Many of these events have been record-breaking. How many of these records must be broken, how many communities uprooted, or how many lives must be endangered before governments take action to halt the climate emergency? This is why I, and six other young people, are continuing our landmark court case against Doug Ford by appealing to the Court of Appeal for Ontario to hold his government accountable for climate action.[23]

As with other monumental issues in the past (marriage equality, for example), the Applicants had no choice but to resort to the courts for redress. However, the recent decision in *Mathur* demonstrates why judicial constructs and doctrinal protocols for applying the *Charter* are too restrictive and unsuitable for dealing with a life-destroying, existential crisis on the scale of the global climate catastrophe, referred to by the Applicants (and noted previously) as "an unprecedented threat, unlike anything seen in human history" (Factum §157).

The UN Secretary General, Antonio Guterres, has just announced that the era of global warming has now ended and "the era of global boiling has arrived."[24]

Given the Conservatives' intransigent and incomprehensible opposition to meaningful climate action, and their pattern of making the problem even worse by increasing GHG emissions, the courts have been the only beacon of hope and possibly our last bulwark.[25] But while the court

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[23] From an opinion piece by Alexandra Neufeldt, one of the Applicants, entitled "Wildfire Smoke Proof Young People Must Take Action," published in the *National Observer* on June 19, 2023.

[24] Reported in *The Guardian*, "'Era of global boing has arrived,' says UN chief as July set to hottest month on record," Ajit Niranjan, July 27, 2023.

[25] The Intergovernmental Panel on Climate Change (IPCC) reported on April 4, 2022 that a serious tipping point in the climate crisis is just around the corner. Its title is *Climate Change 2022: Mitigation of Climate Change, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. A related IPCC press release states:

> [L]imiting warming to around 1.5°C (2.7°F) requires global greenhouse gas emissions to peak

dismisses climate proceedings due to a restrictive approach in applying the *Charter*, Rome (in this case, Ontario) is burning and smoke fills the air.

It is imperative that our courts urgently change their approach to deciding climate *Charter* claims.

This has been the hottest month ever recorded, and likely the hottest month in 120,000 years.[26] Meanwhile, the Applicants' appeal of this landmark decision is not expected to be heard by the Ontario Court of Appeal before sometime in 2024, and its decision will follow several months later. By that point the harmful impacts of the climate crisis will be even worse.

The next part in this series will discuss the appeal. July 28, 2023

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before ***2025*** at the latest, and be reduced by **43%** by 2030; at the same time methane would also need to be reduced by about a third. ... [L]imiting warming to around 2°C (3.6°F) still requires global greenhouse gas emissions to peak before 2025 at the latest, and be reduced by a quarter by 2030. [emphasis added]

[26] "July is Hottest Month Ever Recorded on Earth," Andrea Thompson, *Scientific American*, July 27, 2023.