

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

Part 3 – The Appellate Decision: Nice Talk But No Action

December 21, 2024

Ontario Court of Appeal – October 17, 2024:

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

[63] ,, Ontario’s contribution to global warming is real, measurable, and not speculative.¹

The climate case known as *Mathur et al. v. Ontario* is a cautionary tale which began five years ago. The most recent decision in its tortuous saga has come from the highest court in the province, the Ontario Court of Appeal (OCA), and was issued on October 17, 2024. The result of the appeal might have been far worse, but it could have been much better. The seven young applicants, some of them Indigenous, waited nine months for the court to deliberate and render its decision after oral submissions (argument) by counsel at the appeal hearing in January 2024.

Ultimately, the court ordered that the April 2023 decision by Justice Vermette in the Superior Court of Justice (SCJ), which was rendered after a full hearing of evidence, be set aside. The case “must be considered afresh and through the correct analytical lens” (§75). A new hearing was ordered to “fairly determine whether the applicants’ rights were breached, or whether they are entitled to the relief that they seek” (§76).

The appeal court sent the entire matter back for a new hearing at the trial level before Justice Vermette, or if she is unavailable, by a different judge.

Why did the OCA decide not to remedy the monumental cancellation by the Ontario government

¹ From paragraphs 11 and 63 (symbol § is used hereafter to denote paragraph numbers) of the 36-page unanimous judgment of the Ontario Court of Appeal, cited as *Mathur v. Ontario*, 2024 ONCA 762. The full text is at <https://coadecisions.ontariocourts.ca/coa/coa/en/22746/1/document.do>.

of practically all provincial climate action? Although it may be uncommon for an appellate court to impose a remedy if that issue was not addressed by the decision under review, this is an extremely exceptional situation. With the current rate of quickly escalating climate warming, there is no spare time for additional rounds of hearings and appeals. Justice Vermette could have dealt with the issue of remedy one way or the other, but chose not to do so. At the very least, the OCA should have referred the issue of remedy back for an expedited rehearing solely focused on that single question.

One wonders why the applicants and some commentators seemed so upbeat about the outcome of the decision. Could it be that they were not expecting a big step forward by the court, or feared that they might lose the case altogether?

This commentary presumes that the reader has not read any of the three court decisions arising from this case, or other analysis of the litigation. It incorporates some of the information and themes discussed in the previous instalments of this series,² and attempts to highlight the history of *Mathur*, the court's view of the government's position,³ some good and bad news about the appeal decision, reactions to it by others, the plight of climate *Charter* litigation,⁴ the government's new appeal application, and where the case might go from here.

BACKGROUND

In 2018 the newly elected Conservative government of Ontario passed the *Cap and Trade Cancellation Act (CTCA)*, repealed the *Climate Change Mitigation and Low-carbon Economy*

² Part 1 is titled "Pre-Emptive Strike by the Government" (<https://seniorsforclimateactionnow.org/ontario-youth-take-the-government-to-task-in-court-part-1/>), and Part 2 is titled "An Anti-Climatic Verdict" (<https://seniorsforclimateactionnow.org/ontario-youth-take-the-government-to-task-in-court-part-2/>).

³ It was not part of the court's mandate to grapple with the fundamental and vexing ethical or moral question of why a democratic government would choose to enact environmental laws and adopt policies which will contribute to irreversible damage to the earth's atmosphere and harm the health and safety of its populace, especially younger generations. Accordingly, this issue is not addressed in the OCA's decision or discussed in this commentary.

⁴ A number of other climate cases in Canada, United States and elsewhere are discussed in articles posted at <https://seniorsforclimateactionnow.org/judicial-watch/>. The leader to this site states: "The courts have become a beacon of hope in the fight for substantial climate action in Ontario. As governments continue to drop the ball, activists are looking to judges to help make serious progress. This blog contains reporting on the complex, varied and significant cases under way both here and abroad."

Act which was enacted by the previous Liberal government, and significantly weakened provincial greenhouse gas emission (GHG) reduction targets.⁵ Among other things, this move did not comply with the emerging environmental principle of non-regression (i.e., current levels of environmental protection should be maintained and not weakened).

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 (the Target). Not only is this goal inadequate, but the Plan does not call for any reductions beyond 2030.

The OCA recognized that this Target established a much smaller GHG reduction goal than was prescribed under the previous government's climate action regime. Based on unchallenged expert testimony accepted by Justice Vermette, the new goal "falls short of the international scientific consensus of the reductions recommended to mitigate the most catastrophic effects of climate change" (§2).

The Applicants commenced proceedings in the Superior Court of Justice in November 2019 and claimed that their rights under the *Canadian Charter of Rights and Freedoms* were violated. 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 its weaker GHG Target on the basis of science. In her November 2020 decision, Justice C.J. Brown dismissed the Government's motion to stop the case from going forward.⁶ None of the Government's objections was accepted by her.⁷

⁵ As a side note, the government failed to apply the requirements of the Ontario *Environmental Bill of Rights* in several respects before it passed the *CTCA*. There is no indication that it considered the guiding principles of ecosystem approach, cumulative effects, sustainable development and precautionary science-based principle which are listed in and required by the Statement of Environmental Values of the Ministry of Environment, Conservation and Parks: <https://ero.ontario.ca/page/sevs/statement-environmental-values-Ministry-environment-and-climate-change>. In judicial review proceedings, Ecojustice successfully challenged the government's failure to consult with the public in advance, as required by the *EBR*, although this did not lead to a reversal of the *CTCA*.

⁶ Cited as *Mathur v. Ontario* at 2020 ONSC 6918. The text of the 56-page decision is at <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc6918/2020onsc6918.pdf>.

⁷ That decision is discussed in more detail in Part 1 of this series.

The Government's appeal of Justice Brown's order was dismissed without reasons by the Divisional Court on March 25, 2021. The next step was a full hearing on the merits, including witnesses and an array of scientific evidence, which proceeded before Justice Vermette for three days in September 2022. Her decision was subsequently issued on April 14, 2023.⁸

Despite many positive and important factual and legal findings in that decision, the court dismissed all of the applicants' claims. For the most part, the factual determinations were supportive of the applicants' position, but the judge decided that established case law from higher courts prevented any of the claims from succeeding.⁹

The oral hearing of the applicants' appeal to the OCA was conducted in January 2024 and the decision was released the following October. Although the appeal was successful in many respects, the entire matter was remitted back for a new hearing of evidence. And now the government has applied to the Supreme Court of Canada (SCC) for leave to appeal the OCA decision.¹¹

Five years after launching their court application, the applicants have now been shunted back to the starting gate. There is no guarantee that the judge at the new hearing will not dismiss the application once again. Many factual findings made by Justice Vermette were very supportive of the youth applicants and cited by the OCA, but those determinations will not be binding on the judge at the next hearing.

Despite critical commentary contained in the three *Mathur* court decisions, business as usual continues on the climate front for the Ontario government, as does rising GHG emissions in the province. The delay in getting to the finish line in this case poses an enormous problem, as there is no time to spare. The climate crisis is continuing to worsen. Heat records are being broken

⁸ The 53-page decision is 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>.

⁹ Justice Vermette's decision is discussed in detail in Part 2 of this series.

¹¹ The government's 275-page application was filed on the last possible day for doing so, December 16, 2024. See <https://ecojustice.ca/wp-content/uploads/2024/12/2024-12-16Application-for-Leave-to-Appeal.pdf>.

and storms, floods, forest fires, winds and drought are increasing in frequency and intensity.¹² GHGs are reportedly rising world wide as well as in Ontario. The harmful changes to weather patterns are becoming irreversible.

Consider for example the fact that on April 4, 2022, a report issued by the United Nations' International Panel on Climate Change (IPCC) stated that in order to restrict global warming to a 1.5° C increase above pre-industrial levels (the goal of the 2015 Paris Agreement¹³) and avoid serious irreversible harm, world-wide GHGs must peak *before 2025* at the latest, and be reduced by 43% by 2030. Methane emissions will need to be reduced by about one third. To restrict warming to 2° C (instead of 1.5° C), the pre-2025 deadline still applies, although GHGs will need to be reduced by one quarter by 2030.¹⁴

Consider further new research by a team of 65 scientists across 20 countries and hosted by the Earth Commission. Published in October 2024, it concluded that “aiming for and maintaining the Paris Agreement’s 1.5° C temperature target is patently unjust.”¹⁵ It presented “evidence that this level of heating fails to protect human well-being now and in the future.” The research reinforces “studies dating back to 1990 by setting the ‘just’ boundary at 1.0° C or less of temperature rise - which corresponds with 350 parts per million (ppm) or less of atmospheric CO₂ - reinforcing that these long-standing boundaries remain the best scientific-based benchmarks for a safe and just climate system today.”

¹² Catherine McKenna, former federal Minister of Environment and Climate Change, has said that “what we thought were one-in-100-year floods are now happening every five years (or) in this case, every two years. We are living in a different world.” Source: *Between Doom & Denial, Facing Facts About Climate Change*, by Andrew Leach (Sutherland House, Toronto, 2023) at p.22.

¹³ The Paris Agreement (aka Paris Accords or Paris Climate Accords) is an international, binding treaty dealing with global warming and climate change mitigation, adaptation and finance. It was adopted by 196 Parties at the UN Climate Conference (COP 21) in Paris on December 12, 2015 and came into force on November 4, 2016.

¹⁴ If that is not frightening enough, according to Katharine Hayhoe, a Canadian climatologist: “If you compare climate predictions with what really happened over the past few decades, you will find that the scientific community gets the changes in global temperature right. But studies have found that it tends to underestimate other observed changes and their resulting impacts.” From *Saving Us: A Climate Scientist’s Case for Hope and Healing in a Divided World* (Simon and Schuster, 2021, at p.49 (as reported in Andrew Leach’s book at pp.2-3).

¹⁵ Reported in The Lancet Planetary Health Commission, vol 8, issue 10, October 2024: [https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196\(24\)00042-1/fulltext](https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196(24)00042-1/fulltext), 2024.

This point is particularly important from the perspective of more vulnerable communities like youth, seniors, Indigenous peoples and those living on low incomes.¹⁶

DECISION OF THE COURT OF APPEAL

The applicants attacked provisions in the *CTCA* as unconstitutional for violating their rights under section 7 (life, liberty and freedom)¹⁷ and section 15 (equal treatment without discrimination based on age)¹⁸ of the *Charter*. The latter is explained as follows:

They argue that Ontario's response to climate change has been to set a target that commits the province to a dangerously high level of greenhouse gas emissions between now and 2030, knowing that it causes imminent harms to current and future generations of Ontarians. They say that Ontario is discriminating against youth and future generations on the basis of their age by forcing them to disproportionately bear the brunt of undisputed climate harms. The devastating impacts of climate change will be broadly felt, and youth, future generations, and Indigenous peoples will be uniquely and disproportionately impacted. (§29)

The applicants seek a declaration by the court that their *Charter* rights have been breached. The remedy they request is an order “requiring Ontario to set a science-based emissions reduction target and to revise its climate change plan in accordance with international standards” (§3).

● FACTUAL FINDINGS:

The OCA confirmed most of the factual findings of Justice Vermette, which were based on extensive evidence introduced at the full hearing in 2022. Among other things, this includes the following:

- She confirmed that global warming and climate change is having disproportionate

¹⁶ “Vulnerable population” is defined in s.3(1) of the *Canadian Environmental Protection Act, 1999* as “a group of individuals within the Canadian population who, due to greater susceptibility or greater exposure, may be at an increased risk of experiencing adverse health effects from exposure to substances.”

¹⁷ The OCA stated in §60 that with respect to s.7 claims, state action must be proven to contribute to an increased risk of death or security of the person.

¹⁸ With s.15 claims, state action must be proven to create or contribute to a disproportionate impact on the claimant group compared to other groups (§60).

impacts on young and Indigenous people.¹⁹

- The OCA noted that much of the expert evidence at the original hearing was uncontroverted (§7).
- The Target “permits emissions beyond what the scientific community deems acceptable” (§58). This evidence was not challenged by the government.
- The government’s failure to comply with international GHG reduction standards will have serious impacts. As indicated in §33 of the OCA decision, Justice Vermette stated:

[SCJ 147] ... 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.

[SCJ 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. ... 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.

- As noted by the OCA, Justice Vermette stated that every tonne of emissions adds to global warming, causing “a quantifiable increase in global temperatures that is essentially irreversible on human timescales” (§63).
- She found at §145 (of her decision) that it is appropriate “to assess the Target in light of global targets that are based on scientific consensus/findings of the IPCC” (OCA §72).
- She highlighted the gap between the Target and international standards:
 - GHGs must be reduced by 45% below 2010 levels by 2030 (§62);
 - the Target will only achieve 58% of this goal;
 - net zero GHG emissions must be reached by 2050 to limit global average surface warming to 1.5° C;
 - for Ontario to reduce 2010 GHG levels by 45% by 2030, it will need to reduce GHGs by 52% below 2005 levels by 2030;
 - to accomplish this, the Target must be increased by 73%.

¹⁹ The following is posted on the Ecojustice website at <https://ecojustice.ca/file/genclimate-action-mathur-et-al-v-her-majesty-in-right-of-ontario/>: “Young people are especially at risk when it comes to climate threats because these risks will increase in the coming years if greenhouse gas emissions are not reduced. It’s their lives and lives of everyone who comes after them that will be forced to bear the costs of climate inaction more than previous generations. Children and youth, and particularly Indigenous young people, are also more vulnerable to the physical and mental health impacts of climate change.”

The OCA took issue with some factual conclusions and omissions in Justice Vermette's decision, including the following:

- With respect to the s.15 claim, she failed to address whether the evidence established a causal link or nexus between the government's Target (which she found falls severely short of the scientific consensus as to what is required) and any disproportionate impact it might have on the applicants due to their age (§57-58).
- In her s.15 analysis, she concluded that it was climate change, not the Plan or Target, that is causing disproportionate impacts on young people (§64).
- Her conclusion that the applicants failed to prove causation for their s.15 claim is inconsistent with her findings about causation under s.7 (§59, 65).

Unfortunately the OCA decision did not make its findings binding on the judge who will conduct the new hearing.

● LEGAL RULINGS:

The following legal rulings contained in the hearing decision were confirmed by the OCA:

- The *Charter* issues under ss. 7 and 15 advanced by the applicants are “justiciable,” i.e., suitable for a court to determine (§25). Surprisingly, the OCA decision made no mention of the prior decision by the Federal Court of Appeal (FCA) in *La Rose v. Canada*, which included the same finding of justiciability. It appears that the FCA was the first appellate court in Canada to do so.²⁰
- The OCA agreed at §36 with Justice Vermette's statement (§106 of her decision) that “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.”

²⁰ Issued on December 12, 2023 and cited as 2023 FCA 241, that decision is discussed at <https://seniorsforclimateactionnow.org/important-development-in-two-federal-climate-cases-la-rose-and-misdzi-yikh-by-alan-d-levy/>. To my knowledge, the only other appeal-level decision in Canada involving similar claims, had ruled otherwise on the justiciability issue. It was made by the Quebec Court of Appeal (QCA) in December 2021: *ENVironnement JEUnesse v. Procureur General du Canada*. It was another youth climate case brought against the federal government that relied upon the *Charter*. On July 28, 2022, the SCC denied the plaintiffs' application for leave to appeal the QCA decision. As a result, the case proceeded no further.

The OCA disagreed with the following rulings in Justice Vermette's decision:

- Justice Vermette mis-characterized the matter as a positive rights case,²¹ as the applicants do “not seek to impose on Ontario any new positive obligations to combat climate change” (§5, 49). A freestanding positive obligation has not been claimed. Rather, the OCA ruled that enacting the *CTCA* led to the government voluntarily assuming a statutory obligation to combat the climate crisis, including production of a Climate Plan and GHG Target which must comply with the *Charter*.²²
- She agreed with the government's allegation that the real complaint by the applicants is that Ontario did not go far enough and did not aim sufficiently high when setting the new Target (OCA §41, SCJ §117, 132).
- The conclusion that the court does “not have institutional capacity and legitimacy to determine Canada and Ontario's ‘fair share’ of the remaining carbon budget” was incorrect (§25).²³
- Her assessment of the applicants' s.15 claim (equal treatment without age discrimination) was erroneous due to her mis-characterization of the application as a positive rights case (§56).²⁴

In *La Rose* the FCA noted the “widespread and grave” effects of climate change, including “injury and death,” and went on to say that it poses “a threat of the highest order to the country,

²¹ In *Charter* litigation, the courts have generally favoured negative rights claims (i.e., the state has done something to limit or violate a person's *Charter* rights). By contrast, a positive rights claim asserts that the state should take action, or do more than it has been doing, in order to advance the protection of a person's *Charter* rights.

²² The court noted that Justice Vermette's decision did not address whether or not there was *Charter* compliance, and the ss.7 and 15 claims “remain to be determined.”

²³ The term carbon budget was discussed in the OCA decision at §11: “The global carbon budget means total cumulative global carbon emissions. Scientists use the concept of a global ‘carbon budget’ to define how much more carbon dioxide can be emitted into the atmosphere before certain levels of global temperature warming will be locked in and irreversible. As already noted, the scientific consensus at present is that the level of global temperature warming should be held to 1.5 degrees Celsius.”

²⁴ On December 12, 2023, the Federal Court of Appeal in *La Rose* (cited previously) refused to overturn the dismissal of the plaintiffs' s.15 claim. It arose from a motion by the Canadian government to prevent the case from going forward to a full hearing. The FCA ruled that “there is no present harm [to the plaintiffs] to which the section 15 challenge can anchor itself” (§124). This conclusion appears to contradict §125 of that decision.

and to the future of humanity which cannot be ignored.” In addition, the decision states at §116 that “If these do not constitute special circumstances, it is hard to conceive that any such circumstances could ever exist.”²⁵

It is disconcerting that the OCA did not comment on whether this case falls into the so-called “special circumstances” exception referred to in the jurisprudence. The court could have seized the moment and ruled that a positive rights *Charter* challenge involving global warming and the climate crisis, falls into the category of special circumstances.

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.²⁶ Positive and negative rights are not referenced in the *Charter*; this is judge-made law. The text of sections 7 and 15 is straightforward and does not include a limitation related to positive or negative rights. Justice Vermette’s decision demonstrates why current judicial constructs and doctrinal protocols for applying the *Charter* are too restrictive and unsuitable for dealing with a life-destroying, existential emergency like climate warming.

A similar sentiment is found in the December 29, 2023, decision in *Juliana v. United States*, an American youth climate case.²⁷ Judge Aiken, in the U.S. federal District Court in Oregon, cited the following opinion of a legal scholar, Professor Mary Wood:

“Because no crisis is as ominous, imminent, and far reaching, the climate emergency must be considered *sui generis*,” that is, “in a class of its own.” The legal approach must “rise to the emergency rather than repeat a failed past

²⁵ The above-noted decision in *Juliana v. United States* referred at pp. 6-7 to an Australian appellate decision, *Sharma v. Minister for the Environment* [2021] FCA 560 1, which states that the “failure to curb climate change is ‘what might fairly be described as the greatest intergenerational injustice ever inflicted by one generation of humans upon the next.’”

²⁶ The *Charter* was Parliament’s second attempt to enshrine the overriding protection of human rights and fundamental freedoms. The *Canadian Bill of Rights* was passed in 1960 and still exists, though superceded by the *Charter* and no longer invoked. It too recognized the right of individuals to life, liberty and security of the person without discrimination. In the 22 years before the *Charter* was enacted in 1982, the *CBOR* was often cited by lawyers but courts rarely applied it with any effect. Unlike the *Charter*, it is not entrenched in the constitution and does not apply to provincial legislation. See Sharpe and Roach at pp.17-19.

²⁷ The decision is at <https://static1.squarespace.com/static/655a2d016eb74e41dc292ed5/t/6591f8df31959123a251b9ec/1704065249771/2023.12.29+Aiken+Deny+Motion+to+Dismiss.pdf>.

paradigm.” (p.6)

- REMEDY:

Justice Vermette made no decision with respect to the imposition of a judicial remedy. She considered it unnecessary because she dismissed the application without finding a *Charter* violation. However, in some cases where appeals are likely, judges provide their opinion on the remedy issue, so that it is available for review during the appeal process.

The OCA heard argument about potential remedies and disagreed with the government’s position that

- the remedy sought by the applicants is “impossible to order” (§67);
- the court has been requested to “assume judicial control over environmental and climate policy;”
- the request that the Target conform to scientific standards is vague and imprecise.

The appeal decision notes at §70 that the applicants did not request a court-ordered target:

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

The OCA held that in addition to the issue of *Charter* breach, the issue of remedy can be determined by the court at the rehearing (§74).

● REHEARING:

It is clear that the OCA was aware of the dire consequences of the climate crisis and the urgency for immediate reduction of GHGs. It is therefore difficult to accept its decision to send the entire matter back to the starting line to mount another lengthy hearing process. The court cited the following reasons for making this disposition:

- Justice Vermette’s decision did not make a determination of the issues under ss.7 and 15 of the *Charter* (§5).
- She did not make any determinations about the group of relevant and important issues raised by the six organizations participating as interveners at the 2022 hearing, or the fifteen interveners which participated at the subsequent appeal hearing (§6, 78). These issues include, among others:
 - did the Target breach *Charter* rights of Indigenous peoples, and their rights under s.35 of the *Constitution Act, 1982*;²⁸
 - whether the public trust doctrine is applicable;²⁹
 - role of international law in interpreting *Charter* rights;
 - application of the “best interests of the child” principle;
 - role of societal preservation and ecological sustainability as potential, unwritten constitutional principles (§77).
- To rely on these issues, the applicants will need leave from the court to amend their application, and “the evidentiary record may have to be amplified” (§7).
- The OCA “is not well placed to determine whether the declarations and directions sought should be granted” (§7). The judge at a full hearing has a significant institutional advantage in making all of the necessary determinations.
- The court has clarified the question that must be determined at the new hearing, namely whether the government’s Climate Plan and GHG Target are compliant with the *Charter*. Beyond that, “we are careful not to decide that question or otherwise limit the analysis to be undertaken” (§8).
- “Given the seriousness of these matters, the additional issues raised, and the potential need for further evidence, it would not be in the interests of justice nor practically feasible

²⁸ Section 35(1) provides: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

²⁹ In *La Rose* the FCA agreed with the decision by the motion judge to dismiss the part of the claim based on the public trust doctrine (§56-62 of that decision).

for this court to take on the role of finder of fact and conduct the required analysis” (§8).

- Justice Vermette did not “address the appropriateness of the relief sought” (§25).
- She concluded that “there was insufficient evidence to allow her to address the adverse effects distinction concerning young people’s liberty and future life choices that are being constrained by decisions being made today over which they have no control” (§76).

In some respects the OCA’s decision to send the entire matter back for a rehearing appears to be a win for the government. After the judgment was released, a government spokesperson was quick to point out that the OCA did not make any finding regarding the constitutionality of Ontario’s climate Plan or Target.³⁰

DELAY

Progress with this proceeding has been exceptionally slow due to no fault of the applicants. In practical terms, they seem no closer to the finish line now than when the court application was filed back in 2019.

The government’s unsuccessful dismissal motion and appeal to the Divisional Court added sixteen months to the litigation process. In addition, Justice Vermette’s factual findings about the significant harm caused by climate warming in Ontario, and irreversible changes due to increased GHG emissions, became available nineteen months ago when her decision was issued in April 2023. The government did not appeal her decision or challenge those findings. Nor has it attacked those findings in its application to the SCC for leave to appeal.

Yet the government has taken little or no concrete action with respect to preventing the increase of GHGs and starting work on climate mitigation. There is nothing tying or limiting provincial action while awaiting the final outcome of this case.

Before the new hearing can be scheduled, the government’s application to the highest court for leave to appeal must be decided. The issues raised by this application include the following:

- does the *Charter* require governments to combat climate change?
- if a government has established a GHG reduction target, is a minimum reduction level

³⁰ This comment was made by Jack Fazzari, press secretary for the Ontario Attorney General, to *Law Times* and reported a piece entitled “OCA revives claims that Ontario breached youths’ *Charter* rights with lackluster emissions goals” and written by Jessica Mach on Oct. 17, 2024.

required?

- if so, what is that level?
- must a government follow a particular process in establishing a target?
- what are the parameters of justiciability in climate change and *Charter* cases?
- is voluntary assumption of responsibility a legitimate exception to jurisprudence on positive rights?

Whether the SCC will agree to hear the appeal is uncertain. But even if the applicants are not prevented by the Supreme Court from proceeding with a rehearing, expect the possibility of more motions and possible appeals to cause further delay. My guesstimate is that more than three years will pass before we will receive another OCA decision, this one arising from a likely appeal after the rehearing. And it, too, might also be appealed to the highest court.

This is not like a private dispute involving a party who can afford to litigate until the bitter end. There are huge impacts and costs, financial and otherwise, related to the delay in reaching the final outcome of this case.³¹

REACTIONS

Ecojustice spearheaded the applicants' case. The following is from an email to its supporters by lawyer Fraser Thomson on the day the OCA decision was released:

Today, for the first time, the highest court in Ontario has ruled that a government's climate response — in this case, its weak 2030 greenhouse gas emissions reduction target — is subject to the *Charter*.

In an ideal world, the Ontario Court of Appeal would have also ordered the province to set a science-based target. Instead, it has sent this case back to the lower court, where the Ford government will have to answer for its climate record.

While it's frustrating that (having found for us on almost every point), the court didn't go the next step of granting the remedy, today's decision sets us up for success.

³¹ For example, increases in global warming are occurring and they will soon become irreversible. More species are becoming extinct. Economic loss due to damage to property and infrastructure has spiralled. Human health is increasingly imperilled and rates of mortality are rising,

On the same date Alan Andrews, a climate director with Ecojustice, told the *Law Times*: “As we see climate policy coming under pressure on all fronts, both provincially and federally, this case should serve as a warning shot to governments who seek to backslide on climate action.”

The following day, a column published by the Gowling WLG law firm referred to the decision as “a significant development for climate litigation in Canada.”³² It “signals that rights-based climate litigation has a growing home in Canada, one where our courts are only just beginning to develop what will surely become a very rich jurisprudence.” It also stated that the OCA is “the first Canadian appellate court to consider rights-based climate litigation claims on the merits.”

A post by the law firm McCarthy Tetrault hailed the OCA decision as a “significant step in the development on the frontier of climate-related litigation in Canada.”³³ It also states that the decision “increases the likelihood of future climate change litigation against Canadian governments by enhancing the viability of rights-based arguments for reducing [GHG] emissions.” The post concluded with the following forecast:

Within Canada and globally, courts are increasingly willing to hear lawsuits against governments based on claims of climate inaction. The *Mathur* Appeal is likely a bellwether for a new wave of climate-related litigation against governments in Canada that will be heard on their merits, rather than dismissed at an early stage. This development opens up new avenues of litigation for environmental activists, and new risks for government and potentially the private sector, when developing strategies and policies on climate change. Time will tell how the substantive law will develop on apportionment of rights and responsibilities for the effects of climate change.

Comments made during a recent panel discussion, involving constitutional and international law experts and professors, were more somber for the most part.³⁴ Among other things the following viewpoints were expressed by the panelists. The categories listed below are not those of the

³² It is found at https://gowlingwlg.com/en-ca/insights-resources/articles/2024/onca-climate-change-litigation?utm_source=vuture&utm_medium=email&utm_campaign=vuture/.

³³ It is titled “Turning Up the Heat: Ontario’s Climate Case Reignites” and posted on October 29, 2024 at <https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/turning-heat-ontarios-climate-case-reignites>.

³⁴ This webinar, titled “Climate Justice: Court of Appeal decision in *Mathur et al. v. Ontario*,” was held on November 4, 2024, and convened by the Faculty of Law, University of Toronto: <https://www.youtube.com/watch?v=fjtoVyslh5s>,

panelists.

Optimism

- The OCA decision has opened the door for an analysis under s.35.
- The decision demonstrates a growing trend to consider international law. That said, the target in the Paris Agreement is not binding in international law, however, and nor are the GHG targets declared by individual nations.

Political Failure

- *Mathur* demonstrates the failure of the political process, both domestically and internationally. We are at risk of moving backwards politically, despite the evidence which calls for stronger action.
- The court's findings demonstrate the large gap between countries' emission targets and what is needed to create any hope of staying within the limit of a 1.5° C global temperature increase over pre-industrial levels. Rapid, deep and sustained emissions reductions are required.
- A serious problem with climate litigation is that governments tend to do nothing about mitigation and adaptation until the court has issued a final decision and all appeals have been exhausted.

Litigation

- There is a danger that the slow process of this litigation will make others reluctant to launch their cases.
- *Charter* litigation is extremely costly for applicants and interveners. Remitting the matter back for a new hearing exacerbates that financial barrier.
- Another deterrent to climate litigation is the fear of anti-regulatory and anti-climate judicial decisions which can create precedents that might bar other cases.
- Climate litigation is a last resort when all else fails.
- As a result, parties must pursue political engagement in addition to climate litigation.

Judicial Reluctance

- Canadian courts have been shy to respond to climate claims as compared to international courts.
- *Mathur* demonstrates how Canadian courts are too conservative and traditional to tackle governments on climate change.

- Judges feel the weight of history in these cases, and their urgency. But they are conscious that decisions must be carefully crafted in order to avoid the risk of going too far and inciting political actors to pull back.
- There were sufficient and strong evidentiary findings made by Justice Vermette, such that the OCA could have ruled that the applicants' Charter rights were violated.
- *Mathur* is an example of why we cannot look to the courts for climate redress. The slow, incremental judicial decision-making process is taking too long to sort out.
- By the time this case has been through an appeal to the SCC and beyond, and the government begins to explore raising its emission Target, it will be too late.
- We cannot rely on judges to correct climate warming and make the problem "go away."
- The court failed to acknowledge that a simple declaration of a *Charter* violation will not be a sufficient disposition. Declaratory relief alone without a remedy can only lead to more follow-up litigation, additional delay and unacceptably slow progress. "Declaration plus" is required.
- Courts have been too reluctant to retain ongoing, supervisory jurisdiction over climate cases in order to speed the litigation process along. This can result in "remedial failure."

Jurisprudence

- The court's analysis of positive versus negative rights was over-simplified and too narrow.
- The decision's emphasis on the government's voluntary assumption of responsibility over GHG emissions can create a disincentive for governments to take more concrete steps to mitigate climate change.
- The voluntary assumption issue might encourage governments to rescind legislation in order to remove the hook needed to support more court challenges.

New Hearing

- The OCA raised the prospect of the need to admit additional evidence at the rehearing in order to deal with the issue of s.1 of the *Charter*.³⁵

³⁵ S.1 provides that *Charter* rights can be limited, and violations can be permitted in some circumstances. It states that the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." If the court determines that a right has been infringed or denied, a second stage analysis may consider whether the violation can be justified as a reasonable limit. See Sharpe & Roach at p.491.

SUMMATION

The OCA decision was a disappointment. Perhaps we should be more appreciative, as it had encouraging things to say about the evidence and climate *Charter* litigation, and it fixed some legal issues in Justice Vermette’s decision. But when the rubber hit the road, the court passed the entire file back to the judge who conducted the hearing in 2022, and instructed her to start over again. I do not recall any of the parties or interveners asking the court to do this. It made no mention of the urgency to reach a final outcome quickly.

Five years of litigation went up in smoke, and delay has provided cover for the government to continue doing relatively little about the climate emergency. There is no mention of delay in the decision. In my view, the OCA missed one of the last remaining opportunities to provide timely judicial support for climate action in Ontario. The court could have done more.³⁶

We can hardly afford to wait several more years for a final and binding court decision in Ontario. And when all is said and done, will the government utilize the legislative override provision in the *Charter*, commonly known as the notwithstanding clause, to delay taking action?³⁷

GHG emissions in Ontario have been increasing ever since this government came to power. Yet the IPCC warned that unless the growth of GHGs peaks before 2025 (i.e., within just a few days), and they are reduced by 43% by 2030, we will miss the 1.5° C target of the Paris Agreement. Once this tipping point occurs, very serious, irreversible harms will follow “even if measures are later taken to reduce global carbon dioxide emissions to net zero” (OCA §11). Moreover, new research cited above emphasizes that global warming above 1° C (350 ppm of atmospheric CO₂) is unsafe and unjust.

The applicants requested an order that the government set a science-based GHG reduction target

³⁶ There is a long tradition in the common law evolving to address emerging problems. The maxim *ubi jus ibi remedium* is loosely translated as where there is a right there must be a remedy. The following excerpt is from Sharpe and Roach at p.491: “It has long been a principle of our law that there can be no right without an effective remedy. A remedy is the operative element of a court’s order that translates the right into concrete form. There would be little point in claiming rights without effective and meaningful remedies for their violation.”

³⁷ The notwithstanding clause in s.33 of the *Charter* is infrequently relied upon by governments. It allows legislation to survive for an additional five years, and possibly longer, once a court has declared that it violates provisions of the *Charter*, including ss.7 and 15. For more on this see Sharpe and Roach at pp.101-106. This government has previously threatened to use s.33 in other matters.

consistent with Ontario's share of the minimum level of GHG reductions necessary to limit global warming to below 1.5 C above pre-industrial temperatures (§24). The 2022 hearing included evidence and submissions on the issue of remedy. Justice Vermette was aware of the extreme urgency in concluding the case, but nevertheless did not deal with remedy in her decision.

The OCA should have declared that the government has breached the applicants' *Charter* rights, based on Justice Vermette's mostly undisputed factual findings. Due to the dire circumstances of climate warming and lack of time for further delay, it could have also taken the uncommon step of imposing a remedy (i.e., the action needed to compel compliance). Applicants' counsel submitted to the OCA that if it was unwilling to make a determination on the appropriate remedy, it should at least send the case back to Justice Vermette for an expedited hearing to decide that issue

The appeal decision did neither of these things, even though the court understood the magnitude of irreversible damage which will result from delay.

In the past there was a disappointing era when litigants unsuccessfully attempted to rely upon the *Canadian Bill of Rights*. The climate movement has been hoping that *Charter* litigation might help to remove political obstacles standing in the way of progress. But is the *Charter* now proving to be a similarly ineffective tool with respect to climate action?

It is of some solace that the highest court in Ontario has added more weight to the growing record of criticism about this government's inadequate and regressive approach to climate action. It is also reassuring to be reminded that public interest environmental litigation can play an educational role in raising concerns. The media often follow such cases closely. Losing a sympathetic court case can generate public backlash. People may question why their government would oppose a proceeding that seeks to protect the environment. An illustration of this is the historic and successful fight to save the iconic sand dunes located around Sandbanks Provincial Park near Picton, Ontario.³⁸ In the battle to protect the environment, winning in the court of

³⁸ In 1968 the Conservative government of Ontario signed a lease with a cement company to allow unlimited removal of sand from dunes around the park's boundary. Counsel at the Canadian Environmental Law Association (CELA) relied on the public trust doctrine in litigation (i.e., private prosecution) brought against the government to expose the permanent and widespread harm that would result. However, the High Court of Justice (part of the Supreme Court of Ontario at that time) ruled that this doctrine did not apply (among other things) and dismissed the case: *Green v. Province of Ontario*

public opinion can lead to victory.

It is important to recognize that parties must continue to vigorously pursue political engagement in addition to prosecuting climate litigation. One of the academic panelists referred to above, commented that we cannot rely on judges to correct climate warming and make the problem go away. It seems fair to suggest that litigation can never be relied upon as the primary tool to spur government action on pressing issues of the day.

That said, the courts constitute the third wing of our system of parliamentary democracy (in addition to the executive and legislative branches of government), and judges are generally well respected and viewed as independent and objective. Well reasoned, thorough and thoughtful decisions can carry great weight with the public. The judiciary has an important role to play in the fight for timely climate action.

It is encouraging that the principle of a right to a healthy environment (RTHE) is gaining traction in Canadian domestic law.³⁹ The following excerpt is from a recent paper published by the Library of Parliament:

The right to a healthy environment has gained widespread international recognition, and is increasingly invoked in litigation, both internationally and in various national jurisdictions. While this right has a range of possible applications involving pollution, biodiversity loss and other environmental issues, its rapid acceptance on the international stage has coincided with increasing concerns about climate change, and some of the most significant litigation has

(1972), 34 DLR (3d) 20. The judge also ruled that members of the public do not have standing to sue where a park is being exploited, even if this activity is contrary to law. But widespread media focus on the court proceedings mobilized public condemnation to the extent that the government soon backed down and cancelled the lease. As a result, the sand dunes were preserved and exist to this day. The public lost the court battle but won the war. See p.286 of *Environment On Trial - a Guide to Ontario Environmental Law and Policy* (3rd edition) by David Estrin and John Swaigen, former CELA staff lawyers (Emond Montgomery, 1993).

³⁹ The preamble of the Ontario *Environmental Bill of Rights* recognizes the “right to a healthful environment.” The right to a healthy environment was added to the *Canadian Environmental Protection Act, 1999* in June 2023. Among other things, the preamble in *CEPA* states that the “Government of Canada recognizes that every individual in Canada has a right to a healthy environment,” and s.2(1)(a.2) mandates the federal government to “protect the right of every individual in Canada to a healthy environment.” For more information, see <https://seniorsforclimateactionnow.org/harnessing-climate-litigation-with-the-legal-right-to-a-healthy-environment-by-alan-levy/>.

sought to apply the [RTHE] in that context.

Recognition of the [RTHE] appears to have resulted in seemingly stronger environmental laws in some countries, as well as greater scrutiny from courts in decisions that have climate impacts.

The [RTHE] is a rapidly developing area of international and Canadian law. Its recent inclusion in *CEPA* is part of an ongoing process to define the scope and limits of this right in Canada, including in the context of climate change.⁴⁰

In addition to the RTHE, other valuable, progressive principles, including the concept of environmental justice, have been gaining recognition and were also added to *CEPA* last year.⁴¹ Hopefully, they will be considered by judges as they adjudicate climate cases such as *Mathur*.

The applicants and their legal team were stoical about the OCA decision, and put on a brave face in their public statements. And now they face the possibility of an additional drawn-out appeal process at the Supreme Court level. However, by all accounts they are determined to soldier on. The public should be extremely grateful for their contribution to climate action in Ontario.



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⁴⁰ From p.12 of “Climate Change and the Right to a Healthy Environment: International and Canadian Developments” (January 15, 2024), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/HillStudies/PDF/2023-12-E.pdf>. Robert Mason, the author, is an analyst in the International Affairs and Integrated Services Division of the Library of Parliament.

⁴¹ They are found in s.5.1(2)(a) and include the avoidance of adverse environmental effects that disproportionately affect vulnerable populations, non-regression (current levels of protection should be maintained and not weakened), and intergenerational equity (meeting needs of the present generation without compromising the ability of future generations to meet their own needs). This part of *CEPA* focuses on the development of an implementation strategy for the RTHE amendments.