Court File No. CV-19-00631627-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SOPHIA MATHUR, a minor by her litigation guardian Catherine Orlando,
ZOE KEARY-MATZNER, a minor by her litigation guardian ANNE KEARY,
SHAELYN HOFFMAN-MENARD, SHELBY GAGNON,
ALEXANDRA NEUFELDT, MADISON DYCK and LINDSAY GRAY

Applicants/Responding Parties

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondent/Moving Party

FACTUM OF THE APPLICANTS/RESPONDING PARTIES
(motion to strike returnable July 13, 2020)

June 15, 2020

STOCKWOODS LLP
Barristers
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto ON M5K 1H1

Nader R. Hasan (54693W)
Tel: 416-593-1668
naderh@stockwoods.ca

Justin Safayeni (58427U)
Tel: 416-593-3494
justins@stockwoods.ca

Spencer Bass (75881S)
Tel: 416-593-1657 (Direct)
spencerb@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

ECOJUSTICE
777 Bay Street
Suite 1910, PO Box 106
Toronto ON M5G 2C8

Fraser Andrew Thomson (62043F)
fthomson@ecojustice.ca

Danielle Gallant (BQ# 324967-1)
dgallant@ecojustice.ca

Tel: 416-368-7533
Fax: 416-363-2746

Lawyers for the Applicants (Responding Parties)

TO: **ATTORNEY GENERAL OF ONTARIO,**
CONSTITUTIONAL LAW BRANCH
720 Bay Street
4th Floor
Toronto ON M5G 2K1

S. Zachary Green (48066K)
Tel: 416-992-2327
Zachary.Green@Ontario.ca

Padraic Ryan (61687J)
Tel: 647-588-2613
Padraic.Ryan@Ontario.ca

Fax: 416-326-4015

Lawyers for the Respondent (Moving Party)

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PART I - INTRODUCTION

1. Climate change is an existential threat to all of us. The Applicants brought this claim because they know — like an increasing number of informed citizens around the world know — that the harms from failing to act now pose serious risks to the life and health of all Ontarians. They know that Ontario's response to this threat — setting a woefully inadequate greenhouse gas (**"GHG"**) emissions reduction target for 2030 (**"Target"**) pursuant to the *Cap and Trade Cancellation Act, 2018*, S.O. 2018, c. 13 (***"CTCA"***) — causes these impending harms. Further, Ontario is discriminating against youth and future generations on the basis of their age by subordinating their interests to those of older generations and forcing them to disproportionately bear the brunt of climate change's harms.

2. The Respondent, the Attorney General of Ontario (**"Ontario"**), does not deny that climate change is an existential threat. To the contrary, Ontario has repeatedly recognized the need for all governments around the world, including Ontario, to do their part to reduce GHG emissions and to fight this threat to humanity.

3. Despite acknowledging the dangers of climate change, Ontario argues that the courts are powerless to do anything about it. It argues that it is effectively immunized from constitutional scrutiny when it comes to examining how the government is dealing with arguably the most significant threat facing humanity today. This Court should reject such an emaciated view of the role of the judiciary in a constitutional democracy — as other courts in Canada and in countries around the world have already done.

4. Ontario's main argument is that this Application raises issues that are not justiciable. Truly non-justiciable cases are rare. This is not one of them. Unlike *Tanudjaja* (on which Ontario relies),

this Application takes aim at legislative and policy instruments that represent Ontario's "commitment" to overall GHG emission reductions. The relief sought is not unmanageable: it is based on scientific evidence and research, and affords Ontario significant discretion in how it may choose to achieve constitutionally compliant GHG reduction targets.

5. Ontario also argues that the facts alleged in this Application are "manifestly incapable of being proven". Far from meeting this high threshold, courts in Ontario and across the world, have *already* accepted the fact, causes, and dangers of climate change. Ontario speculates that the Target may change, or may not be met, or that GHGs may be offset by other factors, but none of these theoretical possibilities justify striking this Application. Accepting Ontario's position would be inconsistent with the standard of proof under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***"), which requires only a "sufficient causal connection" between government action and anticipated harm — one that may be satisfied by reasonable inferences and is flexible to the circumstances of the case.

6. Although courts have repeatedly held that claims should not be struck under Rule 21 because of their novelty, Ontario seeks to strike this Application because Ontario says it depends on the recognition of a novel, positive constitutional obligation. The Applicants do not agree with this characterization of this Application. But even if this framing were correct, the Supreme Court of Canada has expressly left open the possibility that s. 7 of the *Charter* protects certain positive constitutional rights. As such, a novel development in the law should not be prematurely foreclosed on this motion to strike. The same is true with respect to the Applicants' reliance on s. 15 of the *Charter* and unwritten constitutional principles. The novelty of these claims (to the extent they are even novel) is not a basis for denying the Applicants their day in court. These are arguments Ontario can make at the merits hearing.

7. There is no dispute that the Applicants have public interest standing to bring this Application. Ontario challenges only their standing to do so on behalf of future generations, but its arguments do not withstand scrutiny: this case raises a serious justiciable issue, the Applicants have a real stake and genuine interest in its outcome, and this Application is a reasonable and effective means to bring this case to Court. Indeed, it is the *only* means to bring a case on behalf of future generations, who will bear the dangerous consequences of Ontario's conduct.

8. Finally, with respect to Ontario's alternative argument, this Court has jurisdiction to hear this Application. At its core, and as reflected in both the legal argument and the relief being sought, this case is a constitutional challenge — not an application for judicial review.

9. Courts on every continent (except Antarctica) have adjudicated similar questions relating to government responsibility for GHG emissions and, in many cases, have granted similar relief as what is being requested in the Application. This Court should afford the Applicants the same opportunity to bring their case and their evidence forward to a hearing on the merits.

PART II - SUMMARY OF FACTS

A. THE DEVASTATNG IMPACTS OF CLIMATE CHANGE FOR ONTARIANS

10. Climate change poses an existential threat to current and future residents of Ontario. In particular, if global warming exceeds 1.5°C above pre-industrial temperatures, devastating impacts on the health, lives, liberty, and livelihood of Ontarians will follow, including:

(a) an increase in the frequency and intensity of extreme heat events and heat waves, directly leading to increased deaths;

(b) an increase in the spread of serious infectious diseases, such as the West Nile virus and Lyme disease;

(c) an increase in the frequency and intensity of fire activity (including forest wildfires), flooding, and other extreme weather events;

(d) an increase in the spread of harmful algal blooms in water that Ontarians use for drinking and recreational purposes;

(e) an increase in exposure to contaminants such as mercury;

(f) an increase in harms to Indigenous peoples, including impacts on health, traditional activities, access to essential supplies, loss of livelihood and displacement; and

(g) an increase in serious psychological harms and mental distress.[1]

11. The United Nations' Intergovernmental Panel on Climate Change ("**IPCC**") — an intergovernmental body that draws on the world's leading experts to provide objective, scientific information relevant to understanding climate change[2] — has confirmed the devastating impacts of climate change in a world where global average temperatures rise to 1.5°C above pre-industrial levels, and that these impacts would be significantly worse if temperatures rise to and exceed 2°C.[3]

12. Temperatures rising to, and beyond, 1.5°C also increases the risk that large-scale singular events and/or natural feedback loops are triggered, which could lead to runaway and irreversible climate change that can no longer be controlled by humans.[4]

13. A global climate catastrophe can be avoided only if there are rapid reductions in GHG emissions by 2030 and net zero emissions by 2050. In a global effort to curb this threat, 194 countries and the European Union have signed the Paris Agreement within the United Nations Framework Convention on Climate Change, which commits parties to holding the increase in

[1] Notice of Application ("NOA"), at para. 46, Motion Record, Tab 2.
[2] See, for example, *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at para. 16; *Environnement Jeunesse c. Procureur Général du Canada*, 2019 QCCS 2885, at paras. 94-95.
[3] NOA, at para. 49, Motion Record, Tab 2.
[4] NOA, at para. 50, Motion Record, Tab 2.

global average temperature to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C" ("**Paris Agreement Temperature Standard**").[5]

14. In this context, all national and subnational governments around the world must do their part to reduce their share of GHG emissions to avoid the catastrophic impacts of climate change.

B. ONTARIO'S TARGET FOR GHG EMISSION REDUCTIONS FAILS TO PROTECT AGAINST THE DANGERS OF CLIMATE CHANGE

15. The focus of this Application is Ontario's 2030 GHG reduction target, as set under s. 3(1) of the *CTCA*, and articulated in "Preserving and Protecting our Environment for Future Generations, A Made-in-Ontario Environmental Plan" ("**Plan**"), which is to reduce GHG emissions by only 30% below 2005 levels by 2030.[6] The Target represents Ontario's allowable GHG emissions over the next 10 years across all sectors, actors, and individuals in the province.[7]

16. Ontario exercises authority over GHG emissions by setting the Target and by regulating the conduct and consequences of emitters and emissions under a variety of statutory and regulatory schemes.[8] As Ontario itself put it in a different proceeding, "Greenhouse gases are caused by an extremely wide range of activities that have always been provincially regulated."[9] Ontario also impacts GHG emissions through subsidies, spending programs, investments, tax exemptions and other incentives[10], and by emitting GHGs through its own facilities and activities.[11]

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[5] NOA, at paras. 3-4, Motion Record, Tab 2; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at para. 24 (emphasis added).
[6] NOA, at para. 5, Motion Record, Tab 2; Ontario, Ministry of the Environment, Conservation and Parks, *Preserving and Protecting our Environment for Future Generations, A Made-in-Ontario Environmental Plan*, ("Plan") Motion Record, Tab 3.
[7] NOA, at para. 32, Motion Record, Tab 2; Plan, at pp. 21-24, Motion Record, Tab 3.
[8] NOA, at para. 20, Motion Record, Tab 2.
[9] *Factum of Ontario*, *Reference re: Greenhouse Gas Pollution Pricing Act* (ONCA), at para. 57. See also paras 3, 12-20, 22, 57, 87, 90.
[10] NOA, at para. 22, Motion Record, Tab 2.
[11] NOA, at para. 23, Motion Record, Tab 2.

17. Previously, Ontario's response to climate change was governed by the *Climate Change Mitigation and Low-carbon Economy Act, 2016*[12] ("***Climate Change Act***"). Section 6(1) of the *Climate Change Act* established targets for reducing GHG emissions, including reducing emissions by 37% below 1990 levels by the end of 2030, as well as distinct targets for 2020 and 2050. The *Climate Change Act* permitted Ontario to *increase* targets, or set interim ones, having "regard to any temperature goals" recognized by the Paris Agreement.[13]

18. Ontario repealed the *Climate Change Act* through s. 16 of the *CTCA*. In place of the legislated targets in s. 6 of the *Climate Change Act*, s. 3(1) of the *CTCA* reads: "The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time". Further, pursuant to s. 4(1), the Minister of the Environment, Conservation and Parks is required to prepare "a climate change plan".

19. Further, the *CTCA*, unlike the previous legislation, does not require that Ontario have any regard to the Paris Agreement Temperature Standard, or any kind of science-based process, in setting GHG reduction targets.[14]

20. The Target serves as the GHG emissions reduction target under s. 3(1) and the Plan serves as the "climate change plan" under s. 4(1). The Plan itself states that the Target "fulfills our commitment under the [*CTCA*]".[15] By reducing the percentage of GHG emission reductions and changing the reference year from 1990 to 2005, Ontario has set a significantly weaker GHG reduction target that will allow an additional 190 megatonnes of GHGs into the atmosphere by 2030 and failed to provide any GHG reduction target for 2050. The Target thus represents a

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[12] S.O. 2016, c. 7.
[13] *Climate Change Act*, s. 6(2)-(4).
[14] NOA, at paras. 40-41, Motion Record, Tab 2.
[15] Plan, at p. 21, Motion Record, Tab 3.

significant *increase* in Ontario's allowable level of GHG emissions, running afoul of the non-regression principle that new targets must be at least as strong as previous ones. [16]

21. Regardless of how one calculates Ontario's 'share' of the GHG reductions required to avoid the catastrophic consequences of climate change, the answer is the same: Ontario is not doing enough and the Target is insufficient.[17]

C. THE APPLICANTS AND THE APPLICATION

22. The Applicants are seven Ontario residents, between the ages of 12 and 24.[18] They have demonstrated a longstanding commitment to fighting climate change in various ways.[19]

23. The relief sought in the Application includes:

(a) declarations, under s. 52(1) of the *Constitution Act, 1982*, s. 24(1) of the *Charter* and/or this Court's inherent jurisdiction, that:

the Target violates the rights of Ontario youth and future generations under sections 7 and 15 of the *Charter* in a manner that cannot be saved under s. 1, and is therefore of no force and effect;

the Target violates the unwritten constitutional principle that governments are prohibited from engaging in conduct that will, or reasonably could be expected to, result in the future harm, suffering or death of a significant number of its own citizens;

that section 7 of the *Charter* includes the right to a stable climate system, capable of providing youth and future generations with a sustainable future;

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[16] NOA, at paras. 35 and 37, Motion Record, Tab 2.
[17] NOA, at paras. 60 and 64-65, Motion Record, Tab 2.
[18] NOA, at para. 9, Motion Record, Tab 2.
[19] NOA, at paras. 10-17, Motion Record, Tab 2.

that ss. 3(1) and/or 16 of the *CTCA* violate sections 7 and 15 of the *Charter* in a manner that cannot be saved under s. 1, and are of no force and effect;

(b) An order that Ontario forthwith set a science-based GHG reduction target under s. 3(1) of the *CTCA* that is 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 or, in the alternative, well below 2°C;

(c) An order directing Ontario to revise its climate change plan under s. 4(1) of the *CTCA* once it has set a science-based GHG reduction target.[20]

24. The Application alleges that Ontario's repeal of the *Climate Change Act*, and replacement of the legislated targets through the *CTCA* and the Target, have violated the rights of Ontarians under sections 7 and 15 of the *Charter*.[21] In short, these actions by Ontario will cause or contribute to a higher level of GHG emissions, leading to, *inter alia*, increased death, serious illness, and severe harm to human health. These deprivations of life, liberty, and security of the person are arbitrary and grossly disproportionate. The Application also claims that these deprivations violate a novel principle of fundamental justice: the "societal preservation" principle, which prohibits governments "from engaging in conduct that will contribute to, or reasonably could be expected to, lead to future harm, suffering or death of a significant number of its own citizens".[22]

25. Furthermore, because Ontario's youth and future generations will disproportionately bear the brunt of climate change's impacts, the Applicants claim that Ontario's actions are also discriminatory on the basis of age, in violation of s. 15 of the *Charter*.[23]

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[20] NOA, at para. 8, Motion Record, Tab 2.
[21] NOA, at paras. 67-76, Motion Record, Tab 2.
[22] NOA, at para. 75, Motion Record, Tab 2.
[23] NOA, at para. 77, Motion Record, Tab 2.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

26. The primary issue on this motion is whether the Application should be struck under Rule 21.01(1)(b) of the *Rules of Civil Procedure* for disclosing no reasonable cause of action. Based on how Ontario has framed this question, the Applicants will respond as follows:

(a) The Application is justiciable;

(b) The claims in the Application are capable of scientific proof;

(c) The Application does not require recognizing a positive constitutional obligation and, in any event, it is not plain and obvious such an obligation does not exist; and

(d) This Court should recognize the Applicants' public interest standing to allege constitutional violations of the rights of future generations.

27. If the Application is not struck, then Ontario argues that it should be transferred to Divisional Court. The Applicants submit that this Court has jurisdiction to hear the Application.

A. THE TEST ON A MOTION TO STRIKE

28. On a motion to strike under Rule 21.01(1)(b), the burden on the moving party is "a stringent one", "significant", and "very high".[24] A claim can only be struck "if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action"[25] — in other words, where a claim is "certain to fail because it contains a radical defect".[26] The Notice of Application must be "read generously"[27]. The facts, as pleaded in the Notice, must be accepted as true unless they are "manifestly incapable of being proven".[28]

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[24] *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at para. 15; *Biladeau v. Ontario (Attorney General)*, 2014 ONCA 848, at para. 15; *Fraser v. Canada (Attorney General)* (2005), 51 Imm. L.R. (3d) 101 (ONSC), at para. 54.
[25] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17.
[26] *Hunt v.Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 36; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at para. 15.
[27] *Trillium Power Wind Corp. v. Ontario (Natural Resources)*, 2013 ONCA 683, at para. 30.
[28] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 22.

29. Neither complexity, nor novelty, justifies striking a claim.[29] As McLachlin C.J. explained: "The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed." The threshold is "whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial".[30] The Supreme Court recently reiterated this principle, refusing to strike novel claims where the law was "unsettled".[31] Where constitutional rights are involved, the threshold for striking claims is "particularly high".[32]

30. Finally, this Court has noted that motions to strike applications (as opposed to actions) "should be granted sparingly". Given judicial economy concerns and the summary procedure for most applications, the most efficient way is "often to simply argue the application".[33]

B. THIS APPLICATION IS JUSTICIABLE

31. The questions raised in the Application are well within this Court's institutional capacity. They concern the pressing threat to constitutional rights posed by Ontario's failure to act in order to protect its population from climate change. Far from being non-justiciable, this is precisely the type of issue that engages this Court's obligation to interpret and apply the *Charter*.

(i) Non-Justiciable Cases Are Rare, Especially When Charter *Rights Are Involved*

32. Questions are justiciable when they have a "sufficient legal component" to warrant judicial intervention.[34] The category of truly non-justiciable cases is "very small"[35]. It is even smaller if

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[29] *Hunt v.Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 36; *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683, at para. 30.
[30] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 21 (emphasis added).
[31] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at paras. 69, 113-14.
[32] *Fraser v. Canada (Attorney General)* (2005), 51 Imm. L.R. (3d) 101 (ONSC), at para. 54. See also *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at para. 145 (*per* Brown and Rowe JJ, partially dissenting): "But there also are some questions that the court *could* answer on a motion to strike, but ought not to. They include, for example, questions related to the interpretation of the *Canadian Charter of Rights and Freedoms*…".
[33] *Canadian Civil Liberties Association v. Canada*, 2016 ONSC 4172, at para. 60.

violations of *Charter* rights are alleged: "The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it".[36] In such circumstances, it is the court's *obligation* to decide the matter.[37] The Federal Court of Appeal has stated that "*Charter* cases are justiciable regardless of the nature of the government action".[38]

(ii) This Application is Fundamentally Different From Tanudjaja

33. Ontario's main submission on the issue of justiciability is that the Application does not challenge the constitutionality of any "law" or sufficient state action. This argument is incorrect: the Application is squarely aimed at the unconstitutional actions of Ontario (through legislation and the Plan) in implementing the Target.

34. In this way, the Application is fundamentally distinguishable from *Tanudjaja v. Canada (Attorney General)*[39], on which Ontario places great reliance. In *Tanudjaja*, the claimants "expressly disavow[ed] any challenge to any particular legislation, nor [did] they allege that the particular application of any legislation or policy to any individual has violated his or her constitutional rights"; rather, they alleged that the "social conditions" caused by the governments' overall approach to homelessness violated their constitutional rights.[40]

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[34] *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545.
[35] *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, at para. 67.
[36] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, at para. 107 (Deschamps J. also explained that when social policies infringe *Charter* rights, "the courts cannot shy away from considering them" (para. 89).)
[37] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 472, per Wilson J; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545.
[38] *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, at para. 61.
[39] 2014 ONCA 852.
[40] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, at para. 10.

35. By contrast, this Application is aimed at a number of very specific measures — both legislation and policies passed pursuant to legislation — taken by Ontario, resulting in violations of *Charter* rights. The Target arose through the combination of ss. 3(1) and 16 of the *CTCA* and the Plan. These are all express actions undertaken by Ontario that infringe the rights of the Applicants.

36. In this way, the Application is similar to *Single Mothers' Alliance of BC Society v. British Columbia* ("*Single Mothers'*").[41] In that case, the plaintiffs challenged the provincial family law legal aid requirements under both ss. 7 and 15 of the *Charter*. The province brought a motion to strike, arguing that the claim disclosed no reasonable cause of action because it failed to target sufficient government action. In *Single Mothers'*, as in this case, the impugned conduct was the combination of the repeal of prior statutory provisions, the enactment of new legislation, and "extra-legislative" policies adopted by a government agency — a combination that "established the scaffolding for a discretionary regime in which key questions such as the Society's coverage areas and priorities were to be determined extra-legislatively… The plaintiffs' claim is, essentially, that this accountability framework authorizing and determining their access to legal aid services infringes constitutionally protected rights."[42]

37. Ultimately, the judge dismissed the motion to strike: it was not plain and obvious that the plaintiffs could not establish that the impugned scheme was "law" subject to *Charter* review.[43]

38. As in *Single Mothers'*, the intended effect of Ontario's actions is clear: through the *CTCA* Ontario repealed statutorily mandated standards with the "scaffolding for a discretionary regime in

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[41] 2019 BCSC 1427.
[42] *Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427, at para. 63 (emphasis added).
[43] *Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427, at paras. 75-76. See also *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2016 BCSC 1764, at para. 1002, rev'd (in part) on other grounds 2018 BCCA 305, leave to appeal granted [2018] S.C.C.A. No. 411 (the impugned "law" in that constitutional challenge included legislation, guidelines, policies and orders).

which key questions…were to be determined extra-legislatively". In repealing the previous targets and giving itself the power to set new, inadequate targets through policy (which it ultimately did through the adoption of the Target) Ontario violated the *Charter*.

39. To hold that the Target is non-justiciable in this case is to provide Ontario with a blueprint for shielding itself from constitutional scrutiny. Ontario could violate the *Charter* with impunity, provided that it repeals any specific legislation that may be constitutionally infirm and then (legislatively) bestows upon itself the power to act identically through policy. This would be a triumph of form over substance that would eviscerate the constitutional protections of Ontarians.

40. In addition, the majority in *Tanudjaja* accepted that constitutional violations "caused by a network of government programs" may still be justiciable, especially when they "may otherwise be evasive of review".[44] That is precisely the problem the Court faces here: a myriad of government decisions, programs, and conduct contribute to climate change in various ways and would otherwise be evasive of review. The Target is the coordinating mechanism and guiding principle underlying all of these elements. It is not plain and obvious that this case does not fall within the category of justiciability recognized by the majority in *Tanudjaja*.

41. Finally, the Target *itself* qualifies as a "law" under s. 52(1) of the *Constitution Act, 1982*, such that it could be struck down for inconsistency with the *Charter*. The Supreme Court has adopted "a broad interpretation of the concept of 'law'" in the s. 52(1) context, which includes binding rules of general application adopted by a government entity (for example, a transit authority's advertising policy).[45] Such rules "can have wide-ranging effects" making them

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[44] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, at para. 29.
[45] *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, at paras. 86-90.

appropriate candidates for a s. 52(1) remedy.[46] The Target falls in this same category and squarely engages the policy rationale articulated by the Court. At the very least, as in *Single Mothers*, it is not plain and obvious that the Target does not qualify as "law" for the purpose of s. 52(1).[47]

(iii) The Target is Ontario's Commitment on GHG Emissions

42. Ontario also argues that the Application cannot succeed because the Target does not "prohibit, permit or regulate anyone in doing anything".[48] But the Target governs the amount of GHG emissions in Ontario, including by impacting the policies, programs, and legislation regulating those emissions, as detailed in the Notice of Application.[49]

43. Ontario's position not only offends the principle that facts must be accepted as true on a motion to strike, but also reflects a stark inconsistency with how Ontario *itself* has described the Target. For example, the Plan "will ensure" that Ontario achieves emission reductions in line with the Target[50], sets out various policies designed to "put us on the path to meet our 2030 target"[51] and states that it will be reflected in the Statements of Environmental Values of various Ontario ministries[52] — the statutory tools that government decision makers are legally required to consider when exercising powers that may impact the environment.[53]

44. Ontario also relied heavily on the Plan in the *Reference re Greenhouse Gas Pollution Pricing Act* for this very purpose. Citing the Plan (including the Target), the Court of Appeal summarized Ontario's position as having "committed to reducing its emissions by 30 percent

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[46] *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, at para. 87.
[47] *Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427, at paras. 66, 76. See also *Williams v. Trillium Gift of Life Network*, 2019 ONSC 6159 (*Charter* challenge to government organ transplant policies).
[48] Moving Party's Factum, at paras. 31-33.
[49] NOA, at paras. 20-23, Motion Record, Tab 2.
[50] Plan, at p. 3, Motion Record, Tab 3.
[51] Plan, at p. 22, Motion Record, Tab 3.
[52] Plan, at p. 35, Motion Record, Tab 3.
[53] *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, s. 11.

below 2005 levels by 2030." [54] Ontario cannot boast of the Target's effectiveness to increase the scope of its constitutional authority in one proceeding, and now claim that it is worthless in order to avoid *Charter* review in a different proceeding.[55]

(iv) This Application Does Not Engage Concerns About Unmanageable Standards

45. Ontario also argues that the Application will take this Court beyond its institutional capacity because the relief sought does not encompass judicially manageable standards. But unlike the cases cited by Ontario, the Application is asking for something concrete and cognizable that can be determined by this Court with reference to international standards and expert evidence.

46. Ontario specifically attacks the Application's references to a "science-based GHG reduction target", a "stable climate system", and a "sustainable" future for youth and future generations. However, all of these terms can readily be defined both scientifically and legally. They are based on a globally-recognized body of scientific research and prescriptive standards that make them both judicially manageable and discoverable. Just like the numerous courts that have grappled with this issue around the world, this Court will have the benefit of this international scientific guidance, as well as expert evidence, when hearing the Application on its merits.

47. This fact moves the case far from the realm of *Tanudjaja*. In that case, the claimants sought recognition of a right to "adequate" housing and argued that federal and provincial governments gave the issue "insufficient priority". [56] These standards were not judicially discoverable or manageable because they were infused with subjective considerations and

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[54] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 , at paras. 57-58 (emphasis added).

[55] While Ontario refers to the Plan as the "draft Plan" in this proceeding, Ontario has previously confirmed that the draft was to be finalized in the weeks and months following January 2019: see Ontario Reply Factum (para 9) in the *Reference Re Greenhouse Gas Pollution Pricing Act* (ONCA). More recently, Ontario has confirmed that it has already "taken steps to implement" the Plan (no longer referring to it as a "draft" at all): see Ontario Factum (at para 15) in the *Reference Re Greenhouse Gas Pollution Pricing Act* (SCC).

[56] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, at para. 33.

unmoored from any standard that could be established through evidence. That is fundamentally distinct from the scientifically cognizable standards engaged by this case. Indeed, climate change is likely one of the most thoroughly researched issues in recent scientific history, with thousands of scientists from all over the world assessing not only its causes, trajectory and consequences, but also the necessary GHG emission reductions to avoid its most catastrophic results.[57]

48. This case is also distinguishable from *Friends of the Earth v. Canada (Governor in Council)* ("*FOTE*")[58], on which Ontario relies. *FOTE* did not involve a constitutional challenge and instead examined whether a statute created judicially reviewable obligations. The Court determined that the *statutory language* of "a just transition for workers" or an "equitable distribution" of reduction levels was not meant to invite determination by the courts.[59] As with *Tanudjaja*, the terms "just" and "equitable" in the statute at issue in *FOTE* could not be objectively determined by reference to scientific evidence, unlike the standards in this case.[60]

49. It is important to emphasize that the relief sought by the Applicants leaves Ontario with discretion in how to achieve GHG reductions. The Applicants are not asking for an order directing Ontario exactly what should be in the Plan or which policies to adopt in order to arrive at a constitutionally compliant target. These policy-laden decisions will remain within the domain of executive and legislative actors. Rather, the Applicants are simply asking this Court to declare that Ontario's current actions in establishing the Target are unconstitutional and to require it to develop a constitutionally-compliant target in line with the scientific evidence before the Court. This is well within this Court's core capacities in constitutional litigation.

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[57] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at para. 16; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, at paras. 397-400, 422 (per Wakeling J.A.).
[58] 2008 FC 1183.
[59] *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183, at para. 31.
[60] The Federal Court indicated that a challenge to Canada's withdrawal from the Kyoto Protocol would likely be justiciable if framed as a constitutional challenge: *Turp v. Canada (Justice)*, 2012 FC 893, at para. 18.

(v) Courts in Canada and Across the World Have Adjudicated Similar Issues

50. Questions involving a government's constitutional and legal obligations with respect to GHG reductions are a realm where courts have entered the fray before, both in Canada and abroad.

51. The Quebec Superior Court held that a proposed class action on behalf of all Quebec residents 35 and under alleging a breach of *Charter* rights due to Canada's failure to institute the necessary measures to fight climate change was justiciable. The Court explained that courts "[TRANSLATION] have a duty to rise above the political debate and cannot refuse to act when it comes to a debate concerning a violation of the rights protected by the *Charter*".[61]

52. The Quebec Superior Court is not alone. Courts around the world on *six different continents* have been willing to weigh into the complex issues surrounding climate change.

53. In *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, the Hague District Court ordered the government to comply with a legal duty to reduce the country's GHG emissions by 25% below 1990 levels by 2020.[62] This decision was upheld by the Court of Appeal[63] and the Dutch Supreme Court.[64] The Supreme Court explicitly addressed arguments of justiciability, holding that the courts can review whether the government's reduction of GHG emissions is within the limits of the law (even though the target was not codified in legislation), while leaving it to the government to determine what measures to take to achieve a lawful level.[65] This is very similar to what the Applicants seek to do in the present case.

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[61] *Environnement Jeunesse c. Procureur Général du Canada*, 2019 QCCS 2885, at para. 69.
[62] *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, C/09/456689/HA ZA 13-1396 (Rechtbank Den Haag) [unofficial English Translation].
[63] *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 200.178.245/01 (Gerechtshof Den Haag) [unofficial English Translation].
[64] *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 19/00135 (Hoge Raad) [unofficial English Translation].
[65] *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 19/00135 (Hoge Raad) at paras. 2.1(27), 5.3.2, 8.2.7, 8.3.2 [unofficial English Translation].; *Urgenda et al. v The State of the*

54. The High Court in New Zealand also recognized that the issue of climate policy is not beyond judicial intervention, judicially reviewing the government's 2030 GHG reduction target[66] (which, as in *Urgenda*, was not formally codified through legislation[67]).

55. Courts in Australia have assessed GHG emissions and their impact on climate change in cases concerning government projects and undertakings.[68] A court in Germany even allowed a claim by a Peruvian farmer to proceed, which claimed that emissions from a German energy company contributed to melting glaciers and resulting flooding near the plaintiff's home.[69] Other courts, including those in Canada, the U.K., and South Africa, have required governments to consider public projects' GHG emissions and climate change impacts before granting approvals.[70]

56. In 2015, the Lahore High Court, with reference to the rights to life and dignity under the Pakistani constitution, directed the government to identify and implement climate change adaptation measures and established a "Climate Change Commission" to help the courts monitor progress and implementation.[71] In 2018, a Colombian court ordered the government to formulate an action plan to reduce deforestation due to its resulting GHG emissions and climate impacts which violated intergenerational equity and the claimants' rights to life and health.[72]

Netherlands (Ministry of Infrastructure and the Environment), 200.178.245/01 (Gerechtshof Den Haag) at para. 67 [unofficial English Translation]; *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, C/09/456689/HA ZA 13-1396 (Rechtbank Den Haag) at paras. 4.101, 4.53 [unofficial English Translation].

[66] *Thomson v The Minister for Climate Change Issues*, [2017] NZHC 733, at paras. 112-140.

[67] *Thomson v The Minister for Climate Change Issues*, [2017] NZHC 733, at para 133-134.

[68] *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7; *Dual Gas Pty Ltd v Environment Protection Authority* 2012 VCAT 308.

[69] *Lliuya v. RWE AG,* February 1, 2018, Higher Regional Court of Hamm.

[70] *Pembina Institute for Appropriate Development et al. v. Canada (Attorney General)*, 2008 FC 302 at paras 70-81; *Plan B Earth and Others v. Secretary of State for Transport,* [2020] EWCA Civ 214, at paras 236-237; *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16), [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP).

[71] *Leghari v. Federation of Pakistan* , W.P. No. 25501/2015.

[72] *Future Generations v Ministry of the Environment and Others (Demanda Generaciones Futuras v. Minambiente)*, (2018) 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia), pp. 13, 34-35, 37, 39, 45-46

57. As with so many other courts around the world, this Court also possesses the institutional competency and expertise to adjudicate controversies relating to climate change.

58. Finally, Ontario challenges some of the remedies being sought, such as ordering Ontario to set a "science-based GHG reduction target". In light of the broad remedial discretion afforded by s. 24(1) of the *Charter*, it is not plain and obvious that such relief is categorically unavailable.[73] In any event, Ontario's position does not require striking the entire Application as this Court may, at the very least, issue declarations that Ontario's actions are violating the *Charter*.[74]

C. THE CLAIMS IN THE APPLICATION ARE CAPABLE OF SCIENTIFIC PROOF

59. Far from "manifestly incapable of being proven", as Ontario suggests, the allegations in the Application are all capable of proof, including by way of scientific expert evidence that will be adduced in this proceeding.[75] The Applicants should be afforded the opportunity to present this evidence and to have it tested by this Court — something that it is fully capable of doing.

60. The Notice of Application is detailed and specific. It outlines Ontario's contributions to climate change and the catastrophic impacts that will result from Ontario's conduct. It is "as fact-specific as the [Applicants] can be at this stage of the proceeding".[76] This pleading is inconsistent with the rare type of claim that is "manifestly incapable of being proven".

(i) Courts Around the World Have Made Findings on Similar Issues

61. Not only are the claims in the Application capable of being proven, courts in this country have *already* made factual findings with respect to similar issues.

[unofficial English Translation of Excerpts of Supreme Court Decision]

[73] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at paras. 52-53; *Vancouver (City) v. Ward*, 2010 SCC 27 at paras. 16-20.

[74] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paras. 46-48.

[75] NOA, at p. 31, Motion Record, Tab 2.

[76] *Trillium Power Wind Corp. v. Ontario (Natural Resources)*, 2013 ONCA 683, at para. 60.

62. The Ontario Court of Appeal found, based on scientific evidence, that "Canada has been disproportionately impacted by global warming", that temperatures in Canada will continue to increase at disproportionate rates, that certain regions will be hardest hit, and that climate change is causing or exacerbating a number of detrimental impacts including extreme weather events, the degradation of soil and water resources, rising sea levels, and expansion of vector-borne diseases.[77] Appellate courts in Saskatchewan and Alberta reached similar conclusions.[78]

63. Similarly, courts around the world have had little difficultly determining appropriate legal standards based on robust climate change science. For example, in *Urgenda*, the Dutch Supreme Court analyzed acceptable warming scenarios with reference to the concept of a climate budget, as well as assessing a country's minimum fair share of emissions.[79] An Australian court also relied on carbon budgeting as a scientific approach to determine that a proposed project, whose likely emissions were not aligned with the Paris Agreement Temperature Standard, was not in the public interest.[80] American courts have also recognized the unprecedented risks of climate change and found that these findings enjoy strong consensus among scientific experts.[81]

64. The Applicants are merely asking this Court to assess the same sorts of evidence and make similar conclusions to those Canadian and foreign courts have already made. It is not plain and

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[77] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, at paras. 10-11, 19

[78] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at paras. 4, 17; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, at para. 1.

See also: *Environnement Jeunesse v. Procureur Général du Canada*, 2019 QCCS 2885, at para. 95 (describing the international evidence regarding climate change as robust and comprehensive); *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160 (where the federal courts reviewed leading international science to conclude that a renewable fuel requirement would reduce GHGs and the environmental harms they cause).

[79] *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 19/00135 (Hoge Raad), at paras. 2.1, 4.3-4.5, 5.7.1, 6.2-6.3, 7.2.7-7.2.8, 7.3.2, 7.3.4, 7.5.1 [unofficial English Translation].

[80] *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7, at paras. 441, 550-56.

[81] *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007), at pp. 5-6, 18-20; *Foster v. Washington Department of Ecology*, Doc. 14-2-25295-1Fo (Wash., King County, April 29, 2016), at pp. 19-20; *Coalition for Responsible Regulation v. EPA*, 684 F.3d 132 (D.C. Cir. 2012), at paras. 44, 53. See also *Thomson v The Minister for Climate Change Issues*, [2017] NZHC 733, at para. 8.

obvious that this Court cannot make such assessments or conclusions. Certainly, the factual allegations at issue do not meet the high bar of being "manifestly incapable of being proven".

(ii) This Case is Fundamentally Different from Operation Dismantle

65. This case is readily distinguishable from *Operation Dismantle* — the decision that grounds Ontario's arguments on this issue — where the plaintiffs' claim required knowing the subjective reactions and foreign policy decisions of different governments around the world.[82] That case sought a declaration that allowing the U.S. to test cruise missiles in Canada was a violation of the *Charter*, on the basis that it increased the risk of nuclear conflict due to the resulting actions taken by foreign leaders. In the context of a motion to strike the pleadings as disclosing no reasonable cause of action, the Supreme Court found that these alleged facts were "incapable of proof".

66. By contrast, the link between Ontario's GHG emissions and harms to Ontarians is based on science, not what lies in the mind of foreign leaders. As the Notice of Application sets out, incremental GHG emissions make global warming worse, and all governments must do their part in order to avoid the catastrophic impacts of climate change.[83] As other courts have already recognized[84], each additional molecule of GHG in the atmosphere causes a demonstrable increase in the harm, with a single molecule of carbon dioxide causing a warming effect.[85] In this key way, Ontario contributes to the harms set out in the Notice of Application, *regardless* of the actions of other states. These are not matters that are manifestly incapable of being proven.

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[82] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at pp. 452-54.
[83] NOA, at paras. 58-59, Motion Record, Tab 2.
[84] *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 19/00135 (Hoge Raad), at para. 5.7.8 [unofficial English Translation] ("each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget … no reduction is negligible.").
[85] NOA, at para. 26, Motion Record, Tab 2.

(iii) Ontario's "Chain of Speculative Assumptions" is Flawed

67. Ontario's "chain of speculative assumptions" misunderstands the Applicants' theory of the case, fails to appreciate the standard of proof for *Charter* violations, and would result in absurd consequences if relied upon to dismiss this Application at such an early stage.

68. **First**, Ontario suggests that the Applicants' claim is speculative because actual GHG emissions may differ from the Target, or that the Target may change before 2030. Given that the Target represents Ontario's commitment to reducing GHG emissions; that the *CTCA* requires the preparation of a climate change plan; that Ontario is in a position to control those emissions through the Plan; and that there is no date for revisiting the Target; it is *Ontario*'s position that is entirely speculative. Ontario also ignores the fact that GHGs being released *today* pursuant to the Target will remain in the atmosphere for hundreds of years and are part of the problem.[86]

69. At a more fundamental level, Ontario's argument amounts to another attempt to avoid any constitutional review of its response to climate change. On Ontario's logic, the Target could never be subject to scrutiny until it is too late and catastrophic climate change is irreversible. More broadly, any constitutional challenge to legislation encompassing future harms would automatically fail because that law could theoretically change before the harms fully materialize.[87] There is no authority for such a proposition, which would do serious violence to *Charter* rights.

70. **Second,** Ontario argues that the catastrophic effects of climate change cannot be avoided or mitigated at all by *any* GHG reduction target. But the Plan itself says just the opposite, stating that Ontario has "played an important role in fighting climate change and mitigating the threats to our prosperity and way of life"; that by reducing emissions Ontario will "maintain… a healthy

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[86] NOA, at para. 26, Motion Record, Tab 2.

[87] At the extreme, this argument would have even effectively defeated the claim in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, to prostitution legislation which was based on risks of increased future harms.

environment" and "slow down climate change"; and that Ontario's actions "are important in the global fight to reduce emissions".[88] At the very least, whether any target set by Ontario could impact on the harms alleged in this Application is not "manifestly incapable of proof".

71. **Finally**, Ontario alleges that the Application is speculative because GHG emissions resulting from the Target may theoretically be offset by other factors in the future (such as the actions of other jurisdictions, or technological advances). But such theoretical prospects are not sufficient to stop this Application at this early stage — particularly when one considers the appropriate standard for constitutional violations based on increased risks of future harms.

72. *Charter* claims based on future harms require proof, on a balance of probabilities, of a "threat of a violation" or "probable future harm".[89] *Charter* claims have also succeeded where state action imposes an increased risk of harm.[90] For s. 7 cases, one need only show a "sufficient causal connection" between the action and the anticipated harm, which is satisfied by reasonable inferences and is flexible to the circumstances of the case.[91] As Professor Roach has noted, "threats to a person's security or life deserve special preventive attention from the courts."[92]

73. Moreover, government need not be the only or the dominant cause of harm to establish a *Charter* breach. The Supreme Court has also rejected arguments that the causal connection will be negated by pointing to third parties, who can prevent the harm by choosing to act differently.[93]

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[88] Plan, at pp. 17-18, Motion Record, Tab 3. See also Plan at p. 22.
[89] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 51; *F.H. v. McDougall*, 2008 SCC 53, at para. 40; *Frank v. Canada (Attorney General)*, 2019 SCC 1, at para. 43.
[90] *Carter v.Canada (Attorney General)*, 2015 SCC 5, at para. 62; *Canada (Attorney General) v. Bedford*, 2013 SCC 72; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1; *R v. Morgentaler*, [1988] 1 S.C.R. 30 at pp.58-59; *Singh v Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.
[91] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at paras. 75-78.
[92] Roach, *Constitutional Remedies in Canada*, 2nd ed., at para. 5.590,Book of Authorities, Tab 1.
[93] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at paras. 76. 79-92. See also: *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at paras. 131-134.

74. Against this backdrop, it is not plain and obvious that the Applicants will be manifestly incapable of proving that Ontario's conduct in establishing the Target bears a sufficient causal connection to an increased risk of future harms relating to climate change. Courts in many countries have found causal links between local government policies, emissions levels, and increased risks of harm from climate change — regardless of the emissions of others.[94] The Applicants should be afforded the same opportunity here.

D. THE APPLICATION DOES NOT DEPEND ON "POSITIVE OBLIGATIONS"

75. The Application does not require this Court to accept that the constitution imposes "positive obligations" on Ontario — a characterization that depends on a positive/negative rights dichotomy that commentators have criticized as artificial and problematic.[95] However, even if it did, it is not plain and obvious at this stage that such a claim would fail.

(i) This Application Does Not Require Recognizing Positive Constitutional Rights

76. Relying on this Court's decision in *Barbra Schlifer Commemorative Clinic v. Canada*[96] — a ss. 7 and 15 challenge to legislation amending the long-gun registry — Ontario attempts to frame the Applicants' complaint as Ontario "not doing enough to prevent foreseeable harms caused by others". Unlike *Barbra Schlifer*, however, this Application alleges that Ontario is heavily and directly involved in the emission of GHGs, including through its own emissions, regulation of

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[94] *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 19/00135 (Hoge Raad), at paras. 5.7.1, 5.7.7-5.7.8 [unofficial English Translation]; *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007), at pp. 21-23; *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7, at paras. 515-516; *Genesis Power Ltd. and the Energy Efficiency and Conservation Authority v. Franklin District Council*, [2005] NRRMA 541, at para. 223; *Future Generations v Ministry of the Environment and Others (Demanda Generaciones Futuras v. Minambiente)*, (2018) 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia), at pp. 34-37 [unofficial English Translation of Excerpts of Supreme Court Decision].

[95] See, *e.g.*, Chalifour & Earle, "Feeling the Heat: Climate Litigation under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42:4 Vermont L Rev 689, at p. 742 (and the sources cited therein), Book of Authorities, Tab 2.

[96] *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140

high-emitting industries, and economic policies.[97] That is enough to defeat a motion to strike. A claimant who asserts a *Charter* violation based on government authorization of an activity allegedly causing them harm "assert[s] a reasonable *Charter* cause of action at law."[98]

77. Moreover, even if the *Charter* does not confer a freestanding constitutional right to a safe environment, since Ontario has acted to put in place a scheme to protect against climate change, that scheme must comply with the *Charter*.[99]

78. In any event, it is important to note that before this Court dismissed *Barbra Schlifer* on its merits, it dismissed Canada's motion to strike under rule 21.01(1)(b), notwithstanding the novelty of the ss. 7 and 15 arguments being advanced.[100]

79. Ontario mischaracterizes the Application as an attempt to set the *Climate Change Act* as a constitutional "baseline". That is not what the Applicants seek to do. As the Supreme Court recently reaffirmed, the legislature is entitled to change its approach, but its actions still "[have] to be constitutionally compliant".[101] In this case, constitutional compliance requires that Ontario reduce its share of GHG emissions to protect its citizens, based on internationally accepted science on the impacts of climate change, rather than imposing an inadequate and dangerous Target.

80. With respect to the s. 15 claim, Ontario mischaracterizes the Applicants' argument: the claim is not that these youth and future generations are disproportionately disadvantaged merely

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[97] NOA at paras. 20-23, Motion Record, Tab 2. Indeed, Governments authorize, enable, and facilitate most GHG emissions in Canada; private individuals could not emit the same amount were it not for government permission: see *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, at paras. 4, 262-80; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at para. 128; Chalifour & Earle, "Feeling the Heat: Climate Litigation under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42:4 Vermont L Rev 689, at p. 716, Book of Authorities, Tab 2.

[98] *Dixon v. Director, Ministry of the Environment*, 2014 ONSC 7404 at para 58. See also: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at paras. 75-76.

[99] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, at para. 104.

[100] *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271, at paras. 73, 87.

[101] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, at para. 36.

due to a temporal change in the law. These groups are particularly vulnerable because of the cumulative and compounding impacts of climate change that will play out over years and therefore impact these individuals longer and more acutely. In addition, the specific physiological and psychological characteristics of young people make them particularly susceptible to the negative health impacts of climate change. For example, they may be at greater risk of respiratory illness, asthma, heat-related disorders, infectious diseases, developing mental illnesses, and death.[102]

(ii) It is Not Plain and Obvious a Positive Rights Argument Would Fail

81. In any event, it is not plain and obvious that a claim based on a positive obligation under s. 7 requiring Ontario to reduce GHG emissions and mitigate the worst impacts of climate change would have no prospect of success. Indeed, the Quebec Superior Court has already concluded a similar positive rights argument was not bound to fail.[103]

82. In *Gosselin*, the Supreme Court explicitly left open the possibility that a positive rights claim under s. 7 could be made in "special circumstances". [104] Courts have relied on this authority to refuse to strike claims because they pleaded positive rights.[105] If motions to strike routinely succeed on this basis, the door left open in *Gosselin* would effectively be closed, and the Court's warning not to "regard s. 7 as frozen" would become a reality.[106]

83. A motion to strike is not the appropriate venue to determine whether special circumstances exist. In *Tanudjaja*, Feldman J.A. (dissenting) concluded that the motion judge erred in finding no

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[102] NOA, at para. 47, Motion Record, Tab 2.
[103] *Environnement Jeunesse v. Procureur Général du Canada*, 2019 QCCS 2885, at paras. 61-67.
[104] 2002 SCC 84 at paras 82-83 (*per* McLachlin C.J., for the majority). Arbour J. in dissent found a positive obligation had been established in that case.
[105] *Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427, at para. 112; *Barbra Schlifer Commemorative Clinic v. Canada (Attorney General)*, 2012 ONSC 5271; *Grant v. Canada (Attorney General)* (2005), 77 O.R. (3d) 481 (SC), at paras. 54-55.
See also *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, at paras. 60-68, where Feldman J.A. (dissenting) concluded that the motion judge erred by finding that it was settled law that a positive rights claim would fail.
[106] *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, at para. 82.

"special circumstances" based on the pleadings, since that is a question that "can be determined only after a consideration of the full record, as well as the response from the governments."[107] (The majority did not engage on this issue as they dismissed the claim on justiciability grounds.[108])

84. In any event, this case falls within the category of "special circumstances" from *Gosselin*. Positive obligations "may be required where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms."[109] This is such a case: as multiple appellate courts have already recognized, climate change is an existential threat.[110] In this fundamental way, the issues and relief sought in this Application engage the very precondition to the enjoyment of *all* fundamental freedoms, making it unlike any of the cases Ontario cites to suggest it discloses no reasonable cause of action. With climate change, the stakes could not be higher, and action is required at the governmental level in order to avoid its catastrophic impacts.

(iii) The Unwritten Constitutional Principle Argument is Not Bound to Fail

85. Ontario mischaracterizes the Applicants' unwritten constitutional principle argument as prohibiting the government from doing anything that might reasonably be expected to cause harm. In fact, the principle requires harm to "a significant number of its own citizens" to the extent it implicates "societal preservation".[111] Properly construed, this principle is not engaged by the examples Ontario provides (*e.g.* military action or firearm ownership).

86. The novelty of the Applicants' argument does not render it plain and obvious that it will fail. The Supreme Court has recognized the possibility for unwritten constitutional principles to

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[107] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, at para. 64.
[108] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, at para. 37.
[109] *Dunmore v. Ontario*, 2001 SCC 94, at para. 25.
[110] *Reference re: Greenhouse Gas Pollution Pricing Act* (ONCA), at para. 55; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at paras. 4, 236, 476.
[111] NOA, at para. 8(b), Motion Record, Tab 2 (emphasis added).

form the basis, or part of the basis, for invalidating legislation[112] and has recognized that the list of existing unwritten constitutional principles is not exhaustive.[113]

E. APPLICANTS HAVE STANDING ON BEHALF OF FUTURE GENERATIONS

87. Ontario does not dispute that the Applicants have public interest standing *generally* — only that they do not have standing to seek remedies on behalf of future generations.[114] There is no basis for this Court to strike aspects of the Application on this basis.

88. Ontario must prove that the Applicants do not qualify for public interest standing on behalf of future generations. Applications should only be struck on this basis in very clear cases.[115]

89. Public interest standing requires a contextual analysis of whether: (1) the case raises a serious justiciable issue, (2) the party bringing the action has a real stake or a genuine interest in its outcome, and (3) the proposed suit is a reasonable and effective means to bring the case to court.[116]

90. As outlined above, the Application raises a serious justiciable issue. The question of whether courts can find violations of the *Charter* rights of future generations is a novel issue that should be determined on a full factual record. It is not plain and obvious that such an argument cannot succeed, particularly in the unique context of alleged *Charter* violations relating to climate change. The Application alleges that future generations will be discriminated against because, through no fault of their own, they are *born* at a later point in time. In this way, such a claim does not appear to have been alleged in the past and it differs significantly from rights claims on behalf

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[112] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at paras. 38-40; *Conference des juges de paix magistrats du Quebec v Quebec (Attorney General)*, 2016 SCC 39, at paras. 5, 31.

[113] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32.

[114] Ontario does not appear to be challenging the Applicants' public interest standing generally, just their ability to "represent" future generations: Moving Party's Factum, at paras. 62-64.

[115] *Fraser v. Canada (Attorney General)* (2005), 51 Imm. L.R. (3d) 101 (ONSC), at para. 53.

[116] *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, at para. 2.

of unborn foetuses in the abortion context.[117] Future generations of Ontarians would not be able to bring the same case against a future Ontario government: the failure to reduce GHG emissions and consequent violations of their rights would already be locked in before their lifetime even began.

91. In terms of the second prong of the standing test, there is no suggestion that the Applicants do not have a real stake or a genuine interest in the case.

92. On the final prong, the Applicants do not need to prove that they are "better placed than anyone else to represent the interests of future generations of Ontario residents" as Ontario alleges.[118] The salient question is whether the Application is a reasonable and effective means to bring the case to court — and it is. Indeed, if courts can grant constitutional remedies for violations of the rights of future generations — a novel proposition that cannot be dismissed at this stage — such a case could only ever be advanced through public interest standing.

93. Not granting public interest standing to the Applicants in this case would entitle Ontario to escape review for violating the *Charter* rights of future generations. If Ontario's arguments are accepted here, no case could ever be brought to remedy these very serious rights violations.

F. THIS COURT HAS JURISDICTION TO HEAR THE APPLICATION

94. At its core, this Application is a *Charter* challenge, not a judicial review. Accordingly, this Court — and not the Divisional Court — has jurisdiction to hear this Application.

95. When addressing the jurisdictional lines between this Court and the Divisional Court, the focus is on whether the application is "uniquely or even primarily a *Charter* challenge" or whether

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[117] See, for e.g.: *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925; *Borowski v Canada (Attorney General)* (1987), 39 D.L.R. (4th) 731 (Sask. C.A.); *R. v. Demers*, 2003 BCCA 28.

[118] Moving Party's Factum, at para. 63.

it is "in substance, an application for judicial review".[119] The former fall within the jurisdiction of the Superior Court[120], whereas the latter must be decided by the Divisional Court.[121]

96. This Application is a quintessential *Charter* challenge. This can be seen from the actions being challenged (the enactment of the *CTCA*, the repeal of previous legislated targets in the *Climate Change Act*, and the adoption of the Target pursuant to the *CTCA*), the legal theories on which the challenge is based (mainly on ss. 7 and 15 of the *Charter*), and the relief being sought (which is principally based on s. 52(1) of the *Constitution Act, 1982*, and s. 24(1) of the *Charter*). These features make this Application unlike *Alford v. The Law Society of Upper Canada*.[122]

97. In many ways, the Application is more similar to *Williams v. Trillium Gift of Life Network*[123], where the applicants challenged the constitutionality of the criteria for denying patients placement on organ transplant lists. The impugned "law" was a governmental policy adopted under the aegis of legislative authority. This Court denied a motion to have the application transferred to Divisional Court, emphasizing that the only relief being sought was constitutional remedies.[124] Similarly, the only relief being sought in the Application are constitutional remedies.

98. In short, the Application is not a disguised attempt at judicial review. It is, in all senses, a *Charter* challenge that falls within the competence and jurisdiction of this Court.

PART IV - ORDER REQUESTED

99. The Applicants respectfully request that this Court dismiss Ontario's motion, with costs.

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[119] *Alford v. The Law Society of Upper Canada*, 2018 ONSC 4269, at para. 41; *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579, at para. 48.

[120] See, for example, *Williams v. Trillium Gift of Life Network*, 2019 ONSC 6159, at para. 33; *Di Cienzo v. Ontario (Attorney General)*, 2017 ONSC 1351 at paras. 19-30.

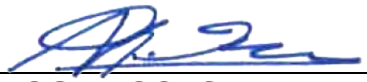
[121] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[122] *Alford v. The Law Society of Upper Canada*, 2018 ONSC 4269. In *Alford*, the applicant sought many grounds of relief — some of which related to the *Charter*, while others raised traditional grounds of judicial review (*i.e.* the *vires* and statutory authority to adopt particular policies): see paras. 14 and 41.

[123] 2019 ONSC 6159.

[124] *Williams v. Trillium Gift of Life Network*, 2019 ONSC 6159, at paras. 31, 36.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of June, 2020



STOCKWOODS LLP
Nader R. Hasan / Justin Safayeni / Spencer Bass

ECOJUSTICE
Fraser Andrew Thomson / Danielle Gallant

Lawyers for the Applicants (Responding Parties)

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Alford v. The Law Society of Upper Canada*, 2018 ONSC 4269
2. *Barbra Schlifer Commemorative Clinic v. Canada (Attorney General)*, 2012 ONSC 5577
3. *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271
4. *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140
5. *Biladeau v. Ontario (Attorney General)*, 2014 ONCA 848
6. *Borowski v Canada (Attorney General*, 39 D.L.R. (4th) 731 (Sask. C.A.)
7. *Canada (Attorney General) v. Bedford*, 2013 SCC 7
8. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3
9. *Canadian Civil Liberties Association v. Canada*, 2016 ONSC 4172
10. *Carter v.Canada (Attorney General)*, 2015 SCC 5
11. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35
12. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 132 (D.C. Cir. 2012)
13. *Conférence des juges de paix magistrats du Québec v Quebec (Attorney General*, 2016 SCC 39
14. *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2016 BCSC 1764
15. *Di Cienzo v. Ontario (Attorney General*), 2017 ONSC 1351
16. *Dixon v. Director, Ministry of the Environment*, 2014 ONSC 7404
17. *Doucet-Boudreau v. Nova Scotia (Minister of Education*, 2003 SCC 62
18. *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45
19. *Dual Gas Pty Ltd v Environment Protection Authority*, 2012 VCAT 308
20. *Dunmore v. Ontario*, 2001 SCC 94
21. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16), [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP)

22. *Environnement Jeunesse v. Procureur Général du Canada,* 2019 QCCS 2885

23. *F.H. v. McDougall,* 2008 SCC 53

24. *Foster v. Washington Department of Ecology,* Doc. 14-2-25295-1Fo (Wash., King County, April 29, 2016)

25. *Frank v. Canada (Attorney General),* 2019 SCC 1

26. *Fraser v. Canada (Attorney General)* (2005), 51 Imm. L.R. (3d) 101 (ONSC)

27. *Friends of the Earth v. Canada (Governor in Council),* 2008 FC 1183

28. *Future Generations v Ministry of the Environment and Others* (*Demanda Generaciones Futuras v. Minambiente*), (2018) 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia)

29. *Genesis Power Ltd. and the Energy Efficiency and Conservation Authority v. Franklin District Council,* [2005] NRRMA 541

30. *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7

31. *Gosselin v. Quebec (Attorney General),* 2002 SCC 84

32. *Grant v. Canada (Attorney General)* (2005), 77 O.R. (3d) 481 (SC)

33. *Greater Vancouver Transportation Authority v. Canadian Federation of Students,* 2009 SCC 31

34. *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959

35. *Hupacasath First Nation v. Canada (Minister of Foreign Affairs,* 2015 FCA 4

36. Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62

37. *Leghari v. Federation of Pakistan,* W.P. No. 25501/2015

38. *Lliuya v. RWE AG,* February 1, 2018, Higher Regional Court of Hamm

39. *Massachusetts v Environmental Protection Agency,* 549 US 497 (2007)

40. *Nevsun Resources Ltd. v. Araya,* 2020 SCC 5

41. *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46

42. *Odhavji Estate v. Woodhouse,* 2003 SCC 69

43. *Operation Dismantle v. The Queen,* [1985] 1 S.C.R. 441

44. *Pembina Institute for Appropriate Development et al. v. Canada (Attorney General),* 2008 FC 302

45. *Plan B Earth and Others v. Secretary of State for Transport*, [2020] EWCA Civ 214

46. *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux,* 2018 SCC 17

47. *R v. Morgentaler,* [1988] 1 S.C.R. 30

48. *R. v. Demers,* 2003 BCCA 28

49. *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42

50. *Reference Re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525*

51. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544

52. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40

53. *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74

54. *Singh v Minister of Employment and Immigration,* [1985] 1 S.C.R. 177

55. *Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427

56. *Suresh v. Canada (Minister of Citizenship and Immigration*, 2002 SCC 1

57. *Syncrude Canada Ltd. v. Canada (Attorney General),* 2016 FCA 160

58. *Tanudjaja v. Canada (Attorney General),* 2014 ONCA 852

59. *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario,* 2018 ONSC 579

60. *Thomson v The Minister for Climate Change Issues*, [2017] NZHC 733

61. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59

62. *Trillium Power Wind Corp. v. Ontario (Natural Resources),* 2013 ONCA 683

63. *Turp v. Canada (Minister of Justice),* 2012 FC 893

64. *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 200.178.245/01 (Gerechtshof Den Haag)

65. *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, C/09/456689/HA ZA 13-1396 (Rechtbank Den Haag)

66. *Urgenda et al. v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 19/00135 (Hoge Raad)

67. *Vancouver (City) v. Ward*, 2010 SCC 27

68. *Williams v. Trillium Gift of Life Network*, 2019 ONSC 6159

69. *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925

SCHEDULE "B" – TEXT OF STATUTES, REGULATIONS & BY - LAWS

The Constitution Act, 1982

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Canadian Charter of Rights and Freedoms

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

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.

Cap and Trade Cancellation Act, 2018, S.O. 2018, c. 13

3 (1) The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time.

…

4 (1) The Minister, with the approval of the Lieutenant Governor in Council, shall prepare a climate change plan and may revise the plan from time to time.

…

16 The *Climate Change Mitigation and Low-carbon Economy Act, 2016* is repealed.

Climate Change Mitigation and Low-carbon Economy Act, 2016, S.O. 2016, c. 7

6 (1) The following targets are established for reducing the amount of greenhouse gas emissions from the amount of emissions in Ontario calculated for 1990:

1. A reduction of 15 per cent by the end of 2020.

2. A reduction of 37 per cent by the end of 2030.

3. A reduction of 80 per cent by the end of 2050.

(2) The Lieutenant Governor in Council may, by regulation, increase the targets specified in subsection (1).

(3) The Lieutenant Governor in Council may, by regulation, establish interim targets for the reduction of greenhouse gas emissions.

(4) When increasing the targets specified in subsection (1) or establishing interim targets for the reduction of greenhouse gas emissions, the Lieutenant Governor in Council shall have regard to any temperature goals recognized by the Conference of the Parties established under Article 7 of the United Nations Framework Convention on Climate Change.

Environmental Bill of Rights, 1993, S.O. 1993, c. 28

11 The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry.

Rules of Civil Procedure, R.R.O. Reg 14

21.01 (1) A party may move before a judge,

…

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence

SOPHIA MATHUR, et al.	and	HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	Court File No. CV-19-00631627-0000
Applicants		Respondent	

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

FACTUM OF THE APPLICANTS
(RESPONDING PARTIES)
(motion to strike)

ECOJUSTICE
777 Bay Street
Suite 1910, Box 106
Toronto ON M5G 2C8

Fraser Andrew Thomson (62043F)
fthomson@ecojustice.ca

Danielle Gallant (BQ# 324967-1)
dgallant@ecojustice.ca

Tel: 416-368-7533
Fax: 416-363-2746

Lawyers for the Applicants (Responding Parties)

STOCKWOODS LLP
Toronto-Dominion Centre
TD North Tower, Box 140
77 King St W, Suite 4130
Toronto ON M5K 1H1

Nader R. Hasan (54693W)
Tel: 416-593-1668
naderh@stockwoods.ca

Justin Safayeni (58427U)
Tel: 416-593-3494
justins@stockwoods.ca

Spencer Bass (75881S)
Tel: 416-593-1657
spencerb@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

Lawyers for the Applicants (Responding Parties)