

COURT OF APPEAL FOR ONTARIO

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

Appellants
(Applicants)

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent
(Respondent)

NOTICE OF APPEAL

THE APPELLANTS APPEAL to the Court of Appeal for Ontario from the Judgment of the Honourable Justice Vermette (“**Application Judge**”) dated April 14, 2023 (“**Judgment**”), made in Toronto.

THE RELIEF SOUGHT by the Appellants is that the Judgment be set aside and this Honourable Court make an order:

- (a) declaring that the 2030 greenhouse gas emissions (“**GHG**”) reduction target, as set by the Respondent (“**Ontario**”) under s. 3(1) of the *Cap and Trade Cancellation Act, 2018*, S.O. 2018, c. 13 (“**CTCA**”), and articulated in “Preserving and Protecting our Environment for Future Generations, A Made-in-Ontario

Environmental Plan” (“**Plan**”), which is to reduce GHG by only 30% below 2005 levels by 2030 (“**Target**”), is unconstitutional and violates the rights of Ontario’s youth and future generations under ss. 7 and 15 of the *Charter*, in a manner that cannot be saved under s. 1 of the *Charter*;

- (b) declaring that s. 3(1) of the *CTCA* is unconstitutional and violates ss. 7 and 15 of the *Charter*, in a manner that cannot be saved under s. 1 of the *Charter*, to the extent that it allows for the imposition of the Target without mandating that it be set with regard to the “Paris Standard”¹ or any kind of science-based process;
- (c) directing Ontario to set a science-based target for the allowable levels of GHG emissions under s. 3(1) of the *CTCA* that is consistent with Ontario’s share of the minimum level of GHG reductions necessary to limit climate change to the Paris Standard (“**Revised Target**”);
- (d) directing Ontario to revise its climate change plan under s. 4(1) of the *CTCA* once it has set the Revised Target; and
- (e) granting the Appellants their costs of the Application and this appeal.

¹ The “Paris Standard” reflects the commitment of the parties to the Paris Agreement to holding the increase in global average temperature to below 1.5°C above pre-industrial levels, in line with the consensus of the Intergovernmental Panel on Climate Change.

THE GROUNDS OF APPEAL are as follows:

- (a) The Application Judge erred in law and in principle in her treatment of the Application as one seeking a “freestanding positive obligation”. In particular, but without limitation, the Application Judge erred in this regard given:
 - (i) the Application Judge’s findings that the Target acts as a mechanism to “guide and direct subsequent state actions with respect to the reduction of GHG in Ontario”;
 - (ii) the uncontradicted evidence of Ontario’s control over and contributions to GHG in the province;
 - (iii) the Application Judge’s finding that Ontario’s conduct was sufficiently causally connected to the s. 7 deprivations in question;
 - (iv) the Application Judge’s inappropriate reliance on the remedy sought to conclude that this was a positive rights case; and
 - (v) the Application Judge mischaracterizing the Application as one seeking to “restore the status quo or an earlier statutory platform”.

- (b) In the alternative, to the extent that the Application Judge was correct that the Application required the recognition of “positive obligations”, the Application Judge erred in law and in principle in her legal approach to and analysis of such obligations, including by:

- (i) mischaracterizing the Application as seeking a “freestanding” positive obligation (rather than a focused one connected to specific harms); and
 - (ii) failing to recognize that so-called “positive” claims can and have been accepted under both s. 7 and s. 15 of the *Charter* and/or adopting an erroneously narrow view of when such claims can and have been accepted.
- (c) The Application Judge further erred in law and in principle in her consideration of the principles of fundamental justice under s. 7 of the *Charter*, including by:
- (i) failing to properly consider how the principles of fundamental justice apply in a positive obligations case or otherwise,
 - (1) by failing to properly consider the principle of fundamental justice of arbitrariness, including but not limited to by identifying the purpose of the Target and the Plan without any reference to or inclusion of the key concept that Ontario intended for the Target to reflect its “share” or “part” of global GHG reductions;
 - (2) by erroneously determining that the principle of gross disproportionality cannot have any application in this case; and
 - (3) by failing to recognize societal preservation as a principle of fundamental justice under s. 7 of the *Charter*.

- (ii) in the alternative, by failing to consider whether the principles of fundamental justice apply at all in the unique context of a so-called “positive obligations” case;
- (d) The Application Judge erred in law and in principle in her consideration of the Appellants’ claim made under s. 15 of the *Charter*, including by:
 - (i) imposing a heightened requirement of causation for the s. 15 claim;
 - (ii) reaching a conclusion on causation that is inconsistent with her causation analysis under s. 7 of the *Charter*; and
 - (iii) failing to recognize the Appellants’ s. 15 claim as one based on age or, in the alternative, a ground analogous to age.
- (e) The Application Judge erred in law and in principle by concluding that determining Ontario’s “fair” share of the world’s remaining carbon budget is not justiciable.
- (f) The Application Judge erred in law and in principle by finding it unnecessary to determine whether societal preservation and/or ecological sustainability are unwritten constitutional principles by determining, in error, that they would have no impact on her s. 7 or s. 15 analysis.

THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS:

- (a) *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(b).
- (b) The order appealed from is final.

(c) Leave to appeal is not required.

May 15, 2023

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Lawyers for the Appellants

SOPHIA MATHUR, et al.

and HIS MAJESTY THE KING IN
RIGHT OF ONTARIO

Court File No. CV-19-00631627-0000

Appellants

Respondent

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Proceeding commenced at TORONTO

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APPELLANTS' CERTIFICATE

The Appellants certify that the following evidence is required for the appeal, in the Appellants' opinion:

1. The affidavit evidence of:
 - a. Dr. H. Damon Matthews, sworn February 12, 2021;
 - b. Dr. H. Damon Matthews, affirmed April 14, 2022;
 - c. Dr. Yuen Tung Eunice Lo, sworn February 4, 2021;
 - d. Dr. Yuen Tung Eunice Lo, sworn June 1, 2021;
 - e. Dr. David Kaiser, sworn February 9, 2021;
 - f. Dr. Michael Flannigan, sworn February 11, 2021;
 - g. Dr. Michael Flannigan, affirmed April 13, 2022;
 - h. Dr. Michael Brauer, sworn February 11, 2021;
 - i. Dr. David Fisman sworn, February 26, 2021;
 - j. Dr. Christopher Buse, sworn February 17, 2021;
 - k. Dr. Ashlee Cunsolo, sworn February 3, 2021;
 - l. Dr. Amanda Giang, sworn February 12, 2021;
 - m. Dr. Frances Pick, sworn February 11, 2021;

- n. Dr. Slobodan Simonovic, sworn February 3, 2021;
 - o. Dr. Slobodan Simonovic, affirmed April 7, 2022;
 - p. Dr. Sara Hastings-Simon, sworn February 18, 2021;
 - q. Dr. Sara Hastings-Simon, affirmed April 13, 2022 (excluding appendix 2);
 - r. David Sawyer, sworn February 10, 2021;
 - s. David Sawyer, affirmed April 14, 2022;
 - t. Dr. Timothy Lenton, sworn June 25, 2021;
 - u. Dr. Robert McLeman, sworn February 5, 2021 (excluding all exhibits except for Ex. “E”, Global warming of 1.5°C (“IPCC SR 1.5”));
 - v. Dr. Robert McLeman, affirmed April 6, 2022;
 - w. Dr. Melissa Généreux, sworn June 30, 2021;
 - x. Dr. Kyle Powys Whyte, affirmed August 30, 2021;
 - y. Charlotte Ireland, sworn January 15, 2021 (only Ex. “Y”: Ontario: A Made-in-Ontario Environment Plan (2018))
 - z. Charlotte Ireland, affirmed July 2, 2021;
 - aa. Charlotte Ireland, affirmed August 27, 2021: excluding all exhibits, except:
 - i. Ex. “B”: Ontario Power Generation’s Sustainable Development Report of 1999;
 - ii. Ex. “C”: Ontario Power Generation’s Sustainable Development Report of 2005;
 - iii. Ex. “D”: Excerpts of the Ontario Climate Change Overview, dated June 2018; and
 - iv. Ex. “Z”: Climate Action in Ontario: What’s Next?;
2. Transcripts of the cross-examination of:
- a. Dr. Damon Matthews on June 2, 2022.

May 15, 2023

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