

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)

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July 31, 2023

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PART I - OVERVIEW

1. As the Supreme Court of Canada has recognized, climate change is “an existential threat to human life in Canada and around the world.”¹ With deadly heat waves, uncontrollable forest fires, tick-borne diseases and devastating floods, Ontarians are already suffering the perils of climate change. These impacts will get progressively worse if urgent action is not taken. For its part, Ontario “does not contest the fact of anthropogenic global climate change, its risks to human health and well-being, or the desirability of all nations taking action to mitigate its adverse effects”.² Ontario’s conduct, however, has only exacerbated this threat.

2. The Appellants — seven courageous youth who are climate activists in their respective communities — brought this Application because they know the harms that climate change will pose to the life and health of all Ontarians. They can see that Ontario’s response to this threat — setting a target that commits the province to a dangerously high level of greenhouse gas emissions (“GHG”) between now and 2030 — causes imminent harms to current and future generations of Ontarians. And they understand that Ontario is discriminating against youth and future generations on the basis of their age by forcing them to disproportionately bear the brunt of climate harms.

3. The Appellants’ largely uncontested expert evidence, which was accepted by the Application Judge, shows how the disaster will unfold. Hundreds to thousands more deaths from extreme heat events. The spread of deadly infectious diseases borne by ticks and mosquitos. Far more (and worse) wildfires, with increases in mortality and morbidity from wildfire smoke. Increases in historic floods in major Ontario cities. More harmful algal blooms and mercury in the water. The growing trend of negative mental health effects will continue, including depression and

¹ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [“*Carbon Price Reference*”], at ¶171.

² *Mathur et al. v Ontario*, 2023 ONSC 2316 [“*Decision*”], at ¶4.

suicidal ideation. While these devastating impacts will be broadly felt, youth, future generations and Indigenous Peoples will be uniquely and disproportionately impacted.

4. The Application Judge accepted the evidence before her that these harms are real, serious and imminent. She also accepted that Ontario's action falls severely short of what is required for the world to avert these catastrophic impacts. She explained that the gap between what is globally recognized as necessary to prevent the worst of these disasters and Ontario's 2030 GHG reduction target is "large, unexplained and without any apparent scientific basis".³ As a result, she found that Ontario's actions are contributing to an increase in the risk of death and serious harm for Ontarians.

5. Nevertheless, the Application Judge mischaracterized the Application and improperly imposed new limits on ss. 7 and 15 of the *Charter*, ultimately concluding that the Court "cannot, based on the current state of the law, find violations of the Charter in this case".⁴ In doing so, the Application Judge committed several significant errors. Once these errors are corrected, the inescapable conclusion is that Ontario's target — which guides and directs the authorization, regulation, facilitation and creation of GHG — violates the constitutional rights of Ontarians.

6. Canadian governments are contributing to the devastating harms of climate change, yet the decision below makes it impossible to hold them responsible. Courts *must* find a way to address this existential issue. Given the serious harms climate change has caused and will continue to cause, that is the only approach is consistent with the courts' role as guardians of the Constitution.

7. The Appellants respectfully ask that this appeal be allowed and the relief sought be granted, in order to give them and all Ontario youth a fighting chance against the unprecedented and existential threat climate change poses to current and future generations of Ontarians.

³ [Decision](#), at ¶146.

⁴ [Decision](#), at ¶5.

PART II - SUMMARY OF FACTS

A. The Appellants

8. The Appellants (now aged 16-28) are seven remarkable youth who have demonstrated a longstanding commitment to fighting climate change.⁵ Sophia, Zoe, Shaelyn, Shelby, Alexandra, Madison and Beze are growing up in the climate change-threatened cities, towns and First Nations of this province.⁶ They bring this case on behalf of all Ontario youth and future generations.

B. The global imperative to reduce GHG to avoid climate disaster

9. There is no greater threat to humanity's future than climate change.⁷ In the face of this now-imminent peril, the 195 government members of the United Nations Framework Convention on Climate Change ("UNFCCC") set an objective to stabilize GHG to "prevent dangerous anthropogenic interference with the climate system".⁸ The 2015 Paris Agreement specifically aims to hold the increase in the global average temperature to "well below 2°C above pre-industrial levels and pursu[e] efforts to limit the temperature increase to 1.5°C ..., recognizing that this would significantly reduce the risks and impacts of climate change" ("**Paris Standard**").⁹

10. The Intergovernmental Panel on Climate Change ("**IPCC**") has published "reliable, comprehensive and authoritative synthesis [reports] of existing scientific knowledge about climate

⁵ [Decision](#), at ¶3.

⁶ Sophia, Zoe, Alex and Madison are from Sudbury, Toronto, Ottawa and Thunder Bay respectively. Shaelyn, from Peterborough, is a member of Caribou clan from Timiskaming First Nation. Shelby, from Thunder Bay, is Anishnaabe and Cree of Aroland First Nation. Beze, from Tiny, is Anishnaabe of Aawmjiwnaang First Nation.

⁷ [Decision](#), at ¶17, citing to [Carbon Price Reference](#), at ¶2. See also ¶167, stating that climate change "is a threat of the highest order to the country, and indeed to the world".

⁸ [Decision](#), at ¶6. Canada is a member of the UNFCCC.

⁹ [Decision](#), at ¶¶7-8; citing to the [Paris Agreement](#), being an Annex to the *Report of the Conference of the parties on its twenty-first session, held in parties from 30 November to 13 December —15--Addendum Part two: Action taken by the Conference of the parties at its twenty-first session*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740, art 2 (entered into force 4 November 2016) [**"Paris Agreement"**]. Canada is a signatory to this Agreement.

change and its impacts” for over three decades.¹⁰ In a 2018 IPCC summary report, all 195 UNFCCC members, including Canada, endorsed¹¹ the IPCC’s key finding that global carbon dioxide (CO₂)¹² must be reduced by approximately 45% below 2010 levels by 2030 to limit global warming to 1.5°C (“**IPCC Prescription**”).¹³ The IPCC Prescription and its 1.5°C goal were endorsed by the 2021 Glasgow Climate Pact¹⁴ and represent the scientific consensus on the action required to avoid cataclysmic climate change.¹⁵

11. In 2021, the Supreme Court of Canada released its decision in the *References re Greenhouse Gas Pollution Pricing Act*. That judgement summarizes the key facts of climate change and the threats it poses to Canada and the world, which were adopted by the court below:¹⁶

- (a) Climate change is real, is caused by GHG from human activities and is a grave threat to humanity’s future. The only way to address climate change is to reduce GHG. States undertook to drastically reduce GHG in the Paris Agreement.¹⁷
- (b) GHG have increased at an alarming rate since the 1950s. As a result, the world has already warmed by 1°C and is expected to reach 1.5°C by 2040 if the current rate continues. We are already experiencing more extreme weather. Should warming reach or exceed 1.5°C, even more extreme consequences, with negative effects on human health including heat-related morbidity and mortality, will follow.¹⁸

¹⁰ [Decision](#), at ¶¶18-19; **Report of Dr. Robert McLeman (“McLeman Report”)**, Ex “B” to the Affidavit of Dr. Robert McLeman, sworn February 5, 2021, Appeal Book and Compendium (“ABC”) Vol 2, Tab 9, at pp 5635, 5637.

¹¹ UNFCCC members approve IPCC Summaries for Policymakers on a line-by-line basis: **Report of Dr. H. Damon Matthews (“Matthews Report”)**, Ex “B” to the Affidavit of Dr. H. Damon Matthews sworn February 12, 2021, ABC Vol 2, Tab 16, at p 6957; **Reply Report of Dr. Robert McLeman (“McLeman Reply Report”)**, Ex “B” to the (Reply) Affidavit of Robert McLeman, affirmed April 6, 2022, ABC, Tab 21, at p 7339.

¹² The IPCC Prescription is in relation to CO₂, the key GHG driving global warming. However, similar deep reductions in non-CO₂ GHG are also necessary to keep warming to 1.5°C: **IPCC SR1.5**, ABC, Vol 2, Tab 10, at p 5688; **Matthews Report**, ABC Vol 2, Tab 16, at p 6960.

¹³ [Decision](#), at ¶20, citing to **Global warming of 1.5°C (“IPCC SR 1.5”)**, Ex “E” to the Affidavit of Dr. Robert McLeman, sworn February 5, 2021, ABC, Vol 2, Tab 10, at p 5668. See also [Reference re Greenhouse Gas Pollution Pricing Act](#), 2019 ONCA 544 at ¶16.

¹⁴ [Decision](#), at ¶20, citing to the [Glasgow Climate Pact](#), UNFCCC, UN Doc FCCC/PA/CMA/2021/L.16, s 21-22 (entered into force 13 Nov 2021). Canada is a signatory of this Pact.

¹⁵ [Decision](#), at ¶¶144-145, 147.

¹⁶ For a review of climate science, see [Carbon Price Reference](#), at ¶¶7-8.

¹⁷ [Decision](#), at ¶17, citing to [Carbon Price Reference](#), at ¶2.

¹⁸ [Decision](#), at ¶17, citing to [Carbon Price Reference](#), at ¶¶8-9.

- (c) The effects of climate change have been and will be particularly severe and devastating in Canada, where temperatures have risen by 1.7°C, roughly double the global average rate, and are expected to continue to rise faster. Climate change has a particularly serious effect on Indigenous Peoples in Canada.¹⁹
- (d) Climate change is a unique issue: it has no boundaries. No province or country can address climate change on its own. It requires collective national and international action.²⁰ Every tonne of GHG contributes to the cumulative total and the resulting climate harms. Each province's GHG are measurable, contribute to the harms, and its failure to act threatens Canada's ability to meet its international obligations.²¹

12. Ontario does not contest the fact of anthropogenic global climate change, its risks to human health and well-being or that all nations should act together to face this threat.²²

C. The devastating impacts of climate change for Ontario

13. The Appellants adduced "extensive expert evidence" from renowned scientists across various disciplines, showing that the impacts of climate change are already devastating Ontarians' health and lives, and will only increase if global warming exceeds 1.5°C.²³

- (a) **Heat waves** in Ontario are becoming more frequent and intense, which will increase heat-related morbidity and mortality. Projections show a significant increase in heat-related deaths in this province if global warming exceeds 1.5°C.²⁴
- (b) The frequency and severity of **wildfires** across Canada are increasing. As wildfires increase, exposure to smoke will increase mortality and morbidity for Ontarians, including an increased number of respiratory infections among children.²⁵

¹⁹ [Decision](#), at ¶¶17, citing to [Carbon Price Reference](#), at ¶¶10-11; see also ¶¶187, 206.

²⁰ [Decision](#), at ¶¶17, citing to [Carbon Price Reference](#), at ¶¶12, 188-190; See also [Decision](#), at ¶149 recognizing that climate change is a collective action problem.

²¹ [Decision](#), at ¶17, citing to [Carbon Price Reference](#), at ¶¶188-190.

²² [Decision](#), at ¶4.

²³ [Decision](#), at ¶¶22-24. Some of the impacts have also been described by the Supreme Court: see [Decision](#), at ¶22, citing to [Carbon Price Reference](#), at ¶¶9-12.

²⁴ **Report of Dr. David Kaiser ("Kaiser Report")**, Ex "B" to the Affidavit of Dr. David Kaiser, sworn February 9, 2021, ABC, Vol 2, Tab 11, at p 6348; **Report of Dr. Yuen Tung Eunice Lo ("Lo Report")**, Ex "B" to the Affidavit of Dr. Yuen Tung Eunice Lo, sworn February 4, 2021, ABC, Vol 2, Tab 8, at pp 5616-17; (Supplemental) Report of Dr. Yuen Tung Eunice Lo ("**Lo Supplemental Report**"), Ex "B" to the Affidavit of Dr. Yuen Tung Eunice Lo (Supplemental), affirmed June 1, 2021, ABC, Vol 2, Tab 23, at pp 7446-47.

²⁵ **Report of Dr. Michael Flannigan ("Flannigan Report")**, Ex "B" to the Affidavit of Dr. Michael Flannigan, sworn February 11, 2021, ABC, Vol 2, Tab 13, at p 6380; **Report of Dr. Michael Brauer ("Brauer Report")**, Ex "B" to the Affidavit of Dr. Michael Brauer, sworn February 11, 2021, ABC Vol 2, Tab 14, at pp 6452-60.

- (c) Climate change has increased **infectious diseases** carried by insect vectors like ticks in Ontario and Canada. It is likely increasing and/or expected to increase other types of infectious diseases (due to other insect vectors, food and waterborne disease, fungal disease and parasites with complex life cycles).²⁶
- (d) Climate change is also increasing the frequency and magnitude of **flooding** in many Ontario cities. Floods can cause physical health impacts from contaminated drinking water and food, exposure to mold and carbon monoxide poisoning. People who live through floods are significantly more likely to have mental health issues.²⁷
- (e) Climate change will lead to further increases in the incidence, frequency and severity of harmful **algal blooms** in Ontario. These blooms can produce toxins that harm humans and wildlife and threaten water quality and fish stocks.²⁸
- (f) **Mercury** inputs to aquatic ecosystems in Ontario will increase above 2°C, leading to increased mercury in fish. Mercury exposure can have neurodevelopmental, cardiovascular and immunologic effects. Any mercury increase in fish could pose risks for food security and sovereignty, including for Indigenous communities.²⁹
- (g) Climate impacts lead to a range of serious and wide-ranging negative **mental health** impacts in Canada, including: depression, anxiety, post-traumatic stress disorder, grief, increased drug and alcohol use, social and family stress, increased suicide ideation, and loss of cultural knowledge and place-based connection.³⁰
- (h) Each additional degree of warming significantly increases the probability of **large-scale displacements**, regional food security crises and violence and conflict.³¹
- (i) Every incremental increase in temperature also increases the likelihood of crossing large-scale, devastating and essentially irreversible **tipping points**.³² Such tipping points — coral reef loss, ice sheet collapse, and major reorganisations of ocean and atmosphere circulation — will cause further impacts on Canada and Ontario such

²⁶ **Report of Dr. David Fisman (“Fisman Report”)**, Ex “B” to the Affidavit of David Fisman, sworn February 26, 2021, ABC, Vol 2, Tab 20, at p 7232.

²⁷ **Report of Dr. Slobodan Simonovic (“Simonovic Report”)**, Ex “B” to the Affidavit of Dr. Slobodan Simonovic, sworn February 3, 2021, ABC, Vol 2, Tab 7, at p 5480; **Report of Dr. Mélissa Généreux (“Généreux Report”)**, Ex “B” to the Affidavit of Dr. Mélissa Généreux, sworn June 30, 2021, ABC, Vol 2, Tab 25, at pp 7510-14.

²⁸ **Report of Dr. Frances Pick (“Pick Report”)**, Ex “B” to the Affidavit of Dr. Frances Pick, sworn February 11, 2021, ABC, Vol 2, Tab 15, at pp 6573-75, 6583, 6585.

²⁹ **Report of Dr. Amanda Giang (“Giang Report”)**, Ex “B” to the Affidavit of Dr. Amanda Giang, sworn February 12, 2021, ABC, Vol 2, Tab 17, at pp 7024, 7031-32.

³⁰ **Report of Dr. Ashlee Cunsolo (“Cunsolo Report”)**, Ex “B” to the Affidavit of Dr. Ashlee Cunsolo, sworn February 3, 2021, ABC, Vol 2, Tab 6, at pp 5396, 5400-02.

³¹ **McLeman Report**, ABC, Vol 2, Tab 9, at pp 5632-35.

³² Where a small change in climate makes a big difference to a large part of the system: see [Decision](#), at ¶24.

as sea-level rise and coastal erosion, snowpack and major ecosystems loss, impacts on agriculture, forestry and infrastructure and amplified global warming.³³

14. The expert evidence also shows that climate change disproportionately impacts **young people** (under 18) and **youth** (under 30). This follows from the way children are particularly physiologically sensitive to heat and both respiratory (e.g. asthma) and communicable diseases.³⁴ Young people are also more vulnerable to wildfire smoke, flooding, extreme heat, vector-borne diseases and toxic contamination.³⁵ They rely on caregivers for protection and adaptation; another layer of vulnerability.³⁶ On top of this, youth suffer disproportionately from the mental health impacts of climate change, including post-traumatic distress after climate emergencies, the psychosocial impacts of watching family suffer and hopelessness for their future security.³⁷

15. **Indigenous Peoples** in Ontario are disproportionately impacted by the significant harmful effects of climate change, which affect traditional and subsistence practices such as fishing, hunting and plant harvesting with impacts on food and water security. The loss of traditional foods and cultural practice impacts their mental and physical well-being. Indigenous Peoples, including Indigenous youth, are particularly vulnerable to the mental health impacts such as anxiety, depression, loss of identity, increased likelihood of substance usage and suicide ideation.³⁸

³³ **Report of Dr. Timothy Lenton (“Lenton Report”)**, Ex “B” to the Affidavit of Dr. Timothy Lenton, sworn June 25, 2021, ABC, Vol 2, Tab 24, at pp 7458-59.

³⁴ **Decision**, at ¶**25**; **Report of Dr. Christopher Buse (“Buse Report”)**, Ex “B” to the Affidavit of Dr. Christopher Buse, sworn February 17, 2021, ABC, Vol 2, Tab 18, at p 7065.

³⁵ **Decision**, at ¶**25**; **Brauer Report**, ABC, Vol 2, Tab 14, at pp 6452, 6458-59, 6462 (wildfire smoke); **Généreux Report**, ABC, Vol 2, Tab 25, at pp 7507, 7515 (flooding); **Kaiser Report**, ABC, Vol 2, Tab 11, at p 6354 (extreme heat); **Fisman Report**, ABC, Vol 2, Tab 20, at pp 7243-45 (vector-borne diseases); **Giang Report**, ABC Vol 2, Tab 17, at p 7019 (toxic contamination).

³⁶ **Decision**, at ¶**25**; **Buse Report**, ABC, Vol 2, Tab 18, at p 7050; **Généreux Report**, ABC, Vol 2, Tab 25, at p 7515.

³⁷ **Decision**, at ¶¶**25, 177-178**; **Buse Report**, ABC, Vol 2, Tab 18, at pp 7065-66; **Cunsolo Report**, ABC, Vol 2, Tab 6, at pp 5419-5421.

³⁸ **Decision**, at ¶**25**; **Report of Dr. Kyle Powys Whyte (“Whyte Report”)**, Ex “B” to the Affidavit of Dr. Kyle Powys Whyte, affirmed August 30, 2021, ABC, Vol 2, Tab 27, at pp 8284, 94; **Cunsolo Report**, ABC, Vol 2, Tab 6, at pp 5403, 5406, 5408. See also **Carbon Price Reference**, at ¶¶**11-12, 187, 206**.

16. Most of the Appellants’ expert evidence of climate change-related harms was unchallenged below, while Ontario tendered only two experts, whose evidence was rejected.³⁹

D. Ontario’s Target sets the province on a path to climate disaster

i. Ontario commits to a weak GHG Target

17. In 2018, Ontario enacted the *Cap and Trade Cancellation Act*⁴⁰ (“**CTCA**”). Section 16 repealed the *Climate Change Mitigation and Low-carbon Economy Act*⁴¹ (“**Climate Change Act**”), which included a target to reduce GHG in the province by 37% below 1990 levels by 2030 (“**previous target**”).⁴² Section 3(1) of the *CTCA* requires Ontario to establish new targets to reduce GHG in the province. Section 4(1) requires the preparation of a climate change plan.

18. Ontario released the “Preserving and Protecting our Environment for Future Generations — A Made-in-Ontario Environmental Plan” (“**Plan**”) to fulfill ss. 3(1) and 4(1) of the *CTCA*.⁴³ The Plan states “Ontario will reduce its [GHG] by 30% below 2005 levels by 2030” (“**Target**”),⁴⁴ allowing Ontario to emit *200 megatonnes (“Mt”) more GHG by 2030 than the previous target*.⁴⁵

19. Ontario is one of the many jurisdictions worldwide translating the Paris Standard into GHG reduction targets. The Target represents Ontario’s commitment to act on climate change. The Plan also states that it “will ensure Ontario achieves emissions reductions in line with Canada’s 2030

³⁹ [Decision](#), at ¶¶19, 22.

⁴⁰ [Cap and Trade Cancellation Act](#), 2018, S.O. 2018, c. 13.

⁴¹ [Climate Change Mitigation and Low-carbon Economy Act](#), 2016, S.O. 2016, c. 7.

⁴² [Decision](#), at ¶¶10-11; see also ¶121.

⁴³ [Decision](#), at ¶¶1, 13; **Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environmental Plan (“Plan”)**, Ex “Y” to the Affidavit of Charlotte Ireland, sworn Jan 15, 2021 (“Jan 15 Ireland Affidavit”), ABC, Vol 1, Tab 5, at p 3181.

⁴⁴ [Decision](#), at ¶¶1, 13; **Plan**, Ex “Y” to Jan 15 Ireland Affidavit, ABC, Vol 1, Tab 5, at p 3181. The Plan states that it will be reviewed and revised on a four-year basis, but as of April 2022 and based on public statements made by Ontario, the Target remains unchanged: see [Decision](#), at ¶15.

⁴⁵ This is because Ontario decreased the percentage of GHG reduced (from 37% to 30%) and changed the reference year from 1990 to 2005 – a period during which Ontario’s GHG rose by 14%: see Report of Dr. **Hastings-Simon (“Hastings-Simon Report”)**, Ex “B” to the Affidavit of Dr. Sara Hastings-Simon, sworn February 18, 2021, ABC, Vol 2, Tab 19, at 7125; See also **Matthews Report**, ABC, Vol 2, Tab 16, at p 6970.

[GHG] reduction targets under the Paris Agreement”.⁴⁶ Such targets are arguably the only way to effectively translate the climate change collective action problem to the national and sub-national level needed for action. Ontario has strongly committed to the Target in its Plan,⁴⁷ before the Supreme Court⁴⁸ and in recent public updates⁴⁹ in unequivocal and mandatory terms.

ii. Ontario maps out a path to meet its weak Target

20. The Plan does more than set down the Target. It will “ensure” the Target is met by listing policies that put Ontario “on the path to meet” its Target.⁵⁰ Consistent with the terms of the Plan, Ontario’s own reporting demonstrates that it is following the path to the Target set out in its Plan.⁵¹

21. Ultimately, as the Application Judge found, the Target “is meant to guide and direct” Ontario’s actions in relation to GHG.⁵² As Ontario itself puts it, “virtually every activity regulated by the provinces generates [GHG]”.⁵³ Indeed, nearly all activities leading to GHG in the province are in some way authorized, regulated, facilitated and created by Ontario. One cannot drive a car or even light a campfire⁵⁴ in this province without encountering Ontario’s regulations affecting

⁴⁶ [Decision](#), at ¶¶12-13, citing to [Plan](#), Ex “Y” to the Jan 15 Ireland Affidavit, ABC, Vol 1, Tab 5, at pp 3163, 3176, 3181. The Target is set out in the chapter of the Plan titled “Addressing Climate Change” and subtitled “Continuing to Do our Share: Achieving the Paris Agreement Target”. In 2022, Canada changed its target under the Paris Agreement: 40-45% below 2005 levels by 2030, which “aims for more stringent GHG reduction than Ontario’s Target”: see [Decision](#), at ¶9. Canada’s target when the Plan was released was 30% below 2005 levels.

⁴⁷ [Decision](#), at ¶¶12-14, citing to [Plan](#), Ex “Y” to the Jan 15 Ireland Affidavit, ABC, Vol 1, Tab 5, at pp 3166-67, 3195.

⁴⁸ Ontario’s [Factum](#) on the [Carbon Price Reference](#) before the Supreme Court, at ¶2 (see also ¶¶15-16).

⁴⁹ [Ontario Emissions Scenario as of March 25, 2022](#), Appendix 1 to the [\(Reply\) Report of David Sawyer \(“Sawyer Reply Report”\)](#), Ex “B” to the Reply Affidavit of David Sawyer, affirmed April 14, 2022, ABC, Vol 2, Tab 22, at p 7349 (“the province remains steadfast in its commitment to meet the 2030 emissions reduction target”); [Ontario’s responsible and balanced approach](#), Appendix 2 to the [Sawyer Reply Report](#), ABC, Vol 2, Tab 22, at p 7430 (Ontario remains “committed to meeting our 2030 reduction target”).

⁵⁰ [Decision](#), at ¶¶12-13, citing to [Plan](#), Ex “Y” to the Jan 15 Ireland Affidavit, ABC, Vol 1, Tab 5, at pp. 3163, 3181 (see also pp 3182-84 and the measures described therein). See also [Reference re Greenhouse Gas Pollution Pricing Act](#), 2019 ONCA 544 at ¶58 (setting out measures through which Ontario will reach its Target).

⁵¹ [Ontario Emissions Scenario as of March 25, 2022](#), Appendix 1 to the [Sawyer Reply Report](#), Ex “B” to the Reply Affidavit of David Sawyer, affirmed April 14, 2022, ABC, Vol 2, Tab 22, at p 7424.

⁵² [Decision](#), at ¶123 (emphasis added).

⁵³ Ontario’s [Factum](#) on the [Carbon Price Reference](#) before the Supreme Court, at ¶3 (including, at ¶87, “home and office heating, land use planning, electricity generation, transportation, industrial processes, manufacturing, and waste management”). See also ¶73.

⁵⁴ [Forest Fires Prevention Act](#), R.S.O. 1990, c. F.24, s. 36; [Outdoor Fires](#), O. Reg. 207/96.

GHG. More specifically, the undisputed evidence in this case establishes that Ontario authorizes, regulates, facilitates and creates GHG from:

- (a) the **transportation sector** (≈ 62.8 Mt annually)⁵⁵ mainly from vehicles on roads, both of which are regulated, facilitated and subsidized by Ontario;⁵⁶
- (b) **industrial activities** (≈ 23 Mt annually), which require provincial approval if they discharge environmental contaminants;⁵⁷
- (c) **buildings** (≈ 38.6 Mt annually) through its *Building Code*, subsidizing natural gas systems and operating public sector buildings;⁵⁸
- (d) **agricultural activities** (≈ 9.6 Mt annually) and **waste disposal** facilities (≈ 6.7 Mt), which Ontario regulates;⁵⁹
- (e) the **electricity sector** (≈ 3.3 Mt annually). Ontario regulates and approves power generation and distribution and emits GHG through corporations it owns;⁶⁰ and
- (f) decisions favouring **fossil fuel** production (≈ 7.6 Mt annually from oil and gas) and use, such as canceling 752 renewable electricity contracts in 2018⁶¹ and providing the industry with half a billion dollars in tax concessions annually.⁶²

Ontario also has regulatory and administrative powers and the authority to establish measures for economic, financial and market approaches to regulate GHG in the province.⁶³

⁵⁵ The GHG quantities provided in this paragraph, expressed in Mt, are for 2019: **National Inventory Report 1990-2019: Greenhouse Gas Sources and Sinks in Canada, Part 3**, Ex “B” to the **Affidavit of Charlotte Ireland (supplemental)**, sworn July 2, 2021 (“**July 2 Ireland Affidavit**”), ABC, Vol 2, Tab 26, at pp 7720-22.

⁵⁶ **July 2 Ireland Affidavit**, ABC, Vol 2, Tab 26, at pp 7662-7672, ¶¶8-29 and the exhibits cited therein; [Highway Traffic Act](#), RSO 1990, c H.8, ss 7, 32; [Vehicle Emissions](#), O. Reg. 169/22.

⁵⁷ **July 2 Ireland Affidavit**, ABC, Vol 2, Tab 26, at pp 7665-66, at ¶¶36-38 and the exhibits cited therein; [Environmental Protection Act](#), RSO 1990, c E.19 at Part III [“EPA”], ss 9, 20; [Ontario Water Resources Act](#), RSO 1990, c O.40. Ontario also facilitates industrial operations through subsidies in high-emitting industries: see **July 2 Ireland Affidavit**, ABC, Vol 2, Tab 26, at pp 7678-85, at ¶¶46-59.

⁵⁸ **July 2 Ireland Affidavit**, ABC, Vol 2, Tab 26, at pp 7690, at ¶¶75-77 and the exhibits cited therein (GHG from Ontario’s own public sector buildings were 2.586 Mt in 2018: see p 116, at ¶82); [Building Code](#), O Reg 332/12.

⁵⁹ **July 2 Ireland Affidavit**, ABC, Vol 2, Tab 26, at pp 7685-89, at ¶¶60-74 and the exhibits cited to therein; see also [Landfilling Sites](#), O Reg 232/08, s 15.

⁶⁰ **July 2 Ireland Affidavit**, ABC, Vol 2, Tab 26, at pp 7694-98, at ¶¶87-95 and the exhibits cited therein (see the discussion of Ontario Power Generation and Hydro One); [Ontario Energy Board Act, 1998](#), SO 1998, c 15, Sch B, s 57; [Environmental Assessment Act](#), RSO 1990, c E.18, s 9; [Electricity Projects](#), O Reg 116/01.

⁶¹ **Climate Action in Ontario: What’s Next?**, Ex “Z” to the Jan 15 Ireland Affidavit, ABC, Vol 1, Tab 5, at p 3291.

⁶² **July 2 Ireland Affidavit**, ABC, Vol 2, Tab 26, at pp 7699-70, at ¶¶99-101 and the exhibits cited therein.

⁶³ See for example [Greenhouse Gas Emissions: Quantification, Reporting and Verification](#), O Reg 390/18; [Greenhouse Gas Emissions Performance Standards](#), O Reg 241/19; [EPA](#), s 176.1.

iii. Ontario's Target is aligned with climate disaster

22. As the Application Judge found, Ontario's GHG contribute to climate change in a way that is "real, measurable and not speculative."⁶⁴ Every tonne of GHG leads to a quantifiable increase in global temperatures that is "essentially irreversible on human timescales."⁶⁵

23. The Target puts Ontario way out of sync with the IPCC Prescription, which is the minimum global requirement that must be met to avoid climate catastrophe. To meet the IPCC Prescription — i.e. lower GHG by approximately 45% below 2010 levels by 2030 — Ontario must reduce its GHG by about 52% below 2005 levels by 2030.⁶⁶ The Target only gets Ontario a little more than halfway (58%) there.⁶⁷ The Application Judge found this gap between the IPCC Prescription and the Target is "large, unexplained and without any apparent scientific basis."⁶⁸

24. The Target is also out of all proportion to the global "carbon budget" for limiting warming to 1.5°C.⁶⁹ Based on the relationship between each tonne of GHG and warming, the IPCC has calculated a global carbon budget which turns the Paris Standard (a temperature goal) into a global GHG limit.⁷⁰ As of 2018, there was only 420 billion tonnes of CO₂⁷¹ remaining in the budget, which only grants the entire world a 67% chance⁷² of remaining within 1.5°C of warming.⁷³ Unlike

⁶⁴ [Decision](#), at ¶¶148-149. See also [Carbon Price Reference](#), at ¶188.

⁶⁵ [Decision](#), at ¶149. See also [Carbon Price Reference](#), at ¶189.

⁶⁶ [Decision](#), at ¶¶21, 144; citing to **IPCC SR 1.5**, ABC, Vol 2, Tab 10, at p 5688.

⁶⁷ [Decision](#), at ¶144; See also **IPCC SR 1.5**, ABC, Vol 2, Tab 10, at p 5688.

⁶⁸ [Decision](#), at ¶146; See also **IPCC SR 1.5**, ABC, Vol 2, Tab 10, at p 5688.

⁶⁹ [Decision](#), at ¶30 and ¶147, citing to **Matthews Report**, ABC, Vol 2, Tab 16, at pp 6965-69.

⁷⁰ **Matthews Report**, ABC, Vol 2, Tab 16, at p 6958. The Paris Standard is a temperature range. In the more recent UNFCCC Glasgow Climate Pact, states have resolved to limit warming to the lower end of that range, 1.5°C, recognizing that climate impacts would be much lower than at 2°C: see *Glasgow Climate Pact*, Article 21.

⁷¹ Carbon budgets focus on CO₂ given its dominant role in climate change. Carbon budgets often also require reductions in other GHG (e.g. methane and nitrous oxide) to stay below 1.5°C. If those other GHG are not reduced, the CO₂ carbon budget will be even smaller: see **Matthews Report**, ABC Vol 2, Tab 16, at p 6960.

⁷² The confidence levels attributed to the carbon budget reflect known uncertainties associated with the climate response to CO₂. A 67% confidence level means that there is still a 33% chance of exceeding the temperature target even if total emissions do not exceed the budget: see **Matthews Report**, ABC Vol 2, Tab 16, at p 6958.

⁷³ **Matthews Report**, ABC Vol 2, Tab 16, at pp 6958, 6960.

the IPCC Prescription — which, if applied to individual jurisdictions, represents a uniform global reduction in GHG⁷⁴ — a *fair* allocation of the carbon budget between jurisdictions requires some conception of “fairness” to be taken into account, based on factors like population or historical responsibility.⁷⁵ The Target blows through even the most minimally “fair” allocation of Ontario’s remaining budget well before 2030.⁷⁶ If all jurisdictions took Ontario’s unfair approach in setting their GHG targets, the world would warm by as much as 3-5°C⁷⁷, leading to total climate disaster.

E. Procedural history

25. Ontario brought a motion to strike the Application under Rule 21.⁷⁸ In November 2020, Justice Brown of the Superior Court of Justice dismissed the motion in its entirety.⁷⁹ She found that the Application was *prima facie* justiciable⁸⁰ and disagreed that the case should be struck on the basis of seeking positive rights, noting that the Appellants were challenging policy choices that Ontario had translated into law and state action.⁸¹ She also found that the Appellants have standing for future generations,⁸² which Ontario did not challenge in its arguments on the Application itself.

26. In April 2023, Justice Vermette of the Superior Court of Justice dismissed the Application (“**Decision**”). The Application Judge found that the Application generally raises justiciable issues⁸³ and that the Target increases risks to Ontarians’ life and security of the person and engages

⁷⁴ [Decision](#), at ¶144, **Matthews Report**, ABC, Vol 2, Tab 16, at pp 6964-65.

⁷⁵ **Matthews Report**, ABC, Vol 2, Tab 16, at pp 6964-65.

⁷⁶ **Matthews Report**, ABC, Vol 2, Tab 16, at p 6968 (Table 2). The same holds true for a global carbon budget aimed at keeping warming below 1.75°C. Under the Target, Ontario would even expend its share of a 2°C budget immediately after 2030.

⁷⁷ **Matthews Report**, ABC, Vol 2, Tab 16, at p 6970.

⁷⁸ *Rules of Civil Procedure*, RRO 1990, Reg 194, [r. 21](#).

⁷⁹ *Mathur v. Ontario*, 2020 ONSC 6918, at ¶¶266-68, leave to appeal dismissed [2021 ONSC 1624](#) (Div Ct).

⁸⁰ *Mathur v. Ontario*, 2020 ONSC 6918, at ¶¶125-140.

⁸¹ *Mathur v. Ontario*, 2020 ONSC 6918, at ¶¶224-237 (and, in particular, ¶¶225-226).

⁸² *Mathur v. Ontario*, 2020 ONSC 6918, at ¶¶249-253.

⁸³ [Decision](#), at ¶¶106-112 The Application Judge found the issues raised in this Application to be justiciable with the exception of the determination of Ontario’s fair share of the global carbon budget: see ¶¶109-110.

s. 7 rights.⁸⁴ However, her subsequent analysis and findings were influenced by her view that the Application seeks “freestanding positive obligations” to protect Ontarians’ ss. 7 and 15 rights.⁸⁵ In her analysis, the Application Judge identified the Target’s objective in very broad terms as “[t]o reduce GHG in Ontario to address and fight climate change.”⁸⁶ With that broad objective in mind, she found that the Target was not arbitrary and did not violate s. 7.⁸⁷ She also rejected the s. 15 claim, finding that the disproportionate impacts on young people were caused by climate change itself, not state action, and that part of the discrimination claim was based on a temporal distinction, not age.⁸⁸ Ontario did not argue that the alleged *Charter* violations can be saved under s. 1; the Application Judge did not consider this issue due to her conclusions on the *Charter* breaches.⁸⁹

PART III - ISSUES AND THE LAW

27. This appeal raises the following issues:

- (a) Did the Application Judge err in finding that the Application sought to impose a “freestanding positive obligation”?
- (b) Did the Application Judge err in her treatment of the Appellants’ claim under s. 7 of the *Charter* in considering the principles of fundamental justice (“**PFJs**”)?
- (c) Did the Application Judge err in her treatment of the Appellants’ claim under s. 15?
- (d) Did the Application Judge err in finding that the determination of Ontario’s fair share of the global carbon budget is not justiciable?
- (e) Did the Application Judge err in her treatment of the unwritten constitutional principles (“**UCP**”) at issue?
- (f) What relief ought to be granted?

⁸⁴ [Decision](#), at ¶¶143-147, 151.

⁸⁵ [Decision](#), at ¶¶132. See ¶162 (the gross disproportionality principle cannot apply in a positive rights case) and ¶¶178-179, 182 (rejected the s. 15 claim because there is no general positive obligation on the state).

⁸⁶ [Decision](#), at ¶158.

⁸⁷ [Decision](#), at ¶¶158-160, 162, 170-171.

⁸⁸ [Decision](#), at ¶¶178-180, 182.

⁸⁹ [Decision](#), at ¶78.

A. THE STANDARD OF REVIEW ON THIS APPEAL IS CORRECTNESS

28. Constitutional questions like those raised in this appeal, reviewed in light of a fixed set of facts, are issues of law reviewed on a correctness standard.⁹⁰ This Court is entitled to come to its own conclusions on these issues.⁹¹

B. THE APPLICATION DOES NOT SEEK TO IMPOSE FREESTANDING POSITIVE OBLIGATIONS

29. The Application Judge erred in finding that this case seeks to impose a “freestanding” positive obligation on the state to ensure that each person enjoys life and security of the person in the absence of prior state interference with the rights in question, and that the Appellants are not seeking to be free from state action but rather for the state to do more to remedy a pressing societal problem.⁹² This error ignores a key aspect of the Appellants’ case, which the Application Judge accepted elsewhere in the judgment: it is Ontario’s *own state action* — by adopting a Target that guides and directs the province to emit a dangerously high level of GHG aligned with catastrophic climate change — that the Appellants challenge as a violation of Ontarians’ *Charter* rights.⁹³

i. The positive/negative rights dichotomy is unhelpful and should not be determinative

30. The Supreme Court recently noted that the distinction between positive and negative rights is “not always clearly made, nor always helpful”.⁹⁴ Many commentators go further and criticize the positive/negative rights dichotomy as artificial, misleading and problematic.⁹⁵

⁹⁰ [Ernst v. Alberta \(Energy Resources Conservation Board\)](#), 2014 ABCA 285 at ¶12, citing to [Consolidated Fastfrate Inc v Western Canada Council of Teamsters](#), 2009 SCC 53 at ¶26. See also [McAteer v. Canada \(Attorney General\)](#), 2014 ONCA 578, at ¶¶21-2, [Housen v. Nikolaisen](#), 2002 SCC 33, at ¶8, [Halpern v. Canada \(Attorney General\)](#), 2003 CanLII 26403, at ¶¶25, 30.

⁹¹ [Housen](#), at ¶8.

⁹² [Decision](#), at ¶132.

⁹³ [Decision](#), at ¶147.

⁹⁴ [Toronto \(City\) v. Ontario \(Attorney General\)](#), 2021 SCC 34 at ¶20. The four dissenting justices in that decision called the positive/negative rights distinction “an unhelpful lens for adjudicating *Charter* claims”: ¶152.

⁹⁵ E.g., N. Chalifour & J. Earle, “[Feeling the Heat: Climate Litigation under the Canadian Charter's Right to Life, Liberty, and Security of the Person](#)” (2018) 42:4 Vt L Rev 689, at p. 742 (and sources cited to).

31. *Charter* rights often have negative *and* positive aspects. Section 11(b) of the *Charter* protects a defendant’s right not to be denied a trial within a reasonable time; it also imposes a corollary obligation on the government to *provide* such a trial.⁹⁶ Section 10(b) provides an accused with the right not to be deprived of the right to counsel,⁹⁷ and a corollary duty upon the state to *facilitate access* to counsel without delay.⁹⁸ Section 7 itself imposes a number of positive obligations on the state, including to *provide* disclosure in criminal proceedings⁹⁹ and to *seek assurances* that the death penalty will not be imposed before extradition.¹⁰⁰

32. The distinction between positive and negative rights is often illusory or in the eye of the beholder. This holds for cases involving broader social issues, including for example:

- (a) In *Leroux*, the Divisional Court found that a claim challenging the government’s failure and delays in providing services for adults with disabilities pursuant to legislation did not involve any state conduct and raised positive rights.¹⁰¹ On appeal, this Court disagreed, identifying *state action* — Ontario’s administration of waitlists — as the cause of the alleged s. 7 deprivations.¹⁰²
- (b) In *Chaoulli*, the Supreme Court held that Quebec’s prohibition on private health insurance violated s. 7 by depriving access to timely care, by *first* imposing the exclusivity of public healthcare and *then* failing to provide it.¹⁰³
- (c) In *PHS*, the Supreme Court found that the government’s refusal to exempt a supervised injection clinic from narcotics control legislation violated s. 7 rights by translating criminal and health policy into state action that was subject to the *Charter*, rejecting the notion that the harms were caused by drug users’ conduct.¹⁰⁴

⁹⁶ J. Cameron, “[Positive Obligations under sections 15 and 7 of the Charter: A Comment on Gosselin v. Québec](#)” (2003), 20 S.C.L.R. (2d) 65-92, at p. 71.

⁹⁷ *R. v. Burlingham*, [1995] 2 S.C.R. 206, at ¶¶13-14.

⁹⁸ *R. v. Sinclair*, 2010 SCC 35, at ¶27.

⁹⁹ *R. v. Stinchcombe*, [1991] 3 SCR 326.

¹⁰⁰ *United States v. Burns*, [2001] 1 SCR 283.

¹⁰¹ *Leroux v. Ontario*, 2021 ONSC 2269 (Div. Ct.), at ¶¶95, 107.

¹⁰² *Leroux*, at ¶¶81, 83. Note that the Application Judge relied on the Divisional Court’s decision in *Leroux* in finding that this case raises positive rights (see [Decision](#), at ¶¶130, 138); the ONCA’s decision in *Leroux* was released after the Decision. Similarly, the BC Supreme Court rejected a defendants’ argument that the case raised positive obligations to provide inmates quality of life, finding it clear that the state action at issue was the involuntary separation of incarcerated mothers and babies due to the cancellation of a program: see [Inglis v. British Columbia \(Minister of Public Safety\)](#), 2013 BCSC 2309, at ¶¶390-94.

¹⁰³ *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791, at ¶¶105-106.

¹⁰⁴ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at ¶¶105, 126.

- (d) In *Dixon*, the Divisional Court rejected arguments that a s. 7 challenge to the authorization of wind turbine farms sought positive rights to a particular regulatory regime because the government *authorized* the construction.¹⁰⁵

ii. The Application does not demand “freestanding positive obligations”

33. The Application Judge dismissed the Application because she understood the Target to merely represent “a target for the reduction of GHG” and the issue as Ontario not aiming “sufficiently high”.¹⁰⁶ There are two problems with this characterization of the Application.

34. **First**, any suggestion that the Target is only an objective, devoid of practical impact, cannot stand. The Target is mandated and passed pursuant to legislation and requires the approval of the Lieutenant Governor in Council. As the Application Judge found, the Target “guide[s] and direct[s] subsequent state actions with respect to the reduction of GHG in Ontario.”¹⁰⁷ Ontario refers to the Target as its *commitment* to GHG reductions that it *will* achieve.

35. **Second**, while the Target can be framed as a *reduction* in GHG, it equally represents the dangerously high amount of GHG that Ontario is *committing* to allowing until 2030.¹⁰⁸ This shows how the negative/positive rights dichotomy is too nebulous to be useful. At its core, the Target is a decision to set GHG levels beyond what is safe. That is what is being challenged here.

36. There is ample evidence that Ontario exerts authority and control over GHG in the province by authorizing, regulating, facilitating and creating them.¹⁰⁹ Contrary to the Application Judge’s comments, this evidence is not an “attempt to bring through the back door unspecified state actions, programs and policies that have not been challenged in this Application.”¹¹⁰ Rather, this evidence

¹⁰⁵ *Dixon v. Director, Ministry of the Environment*, 2014 ONSC 7404 (Div Ct) at ¶58.

¹⁰⁶ *Decision*, at ¶122.

¹⁰⁷ *Decision*, at ¶123 (emphasis added).

¹⁰⁸ See ¶¶17-21, *supra*.

¹⁰⁹ See ¶21, *supra*. See also Ontario’s Factum on the *Carbon Price Reference* before the Supreme Court at ¶3 (“virtually every activity regulated by the provinces generates greenhouse gas emissions”), ¶¶73, 87.

¹¹⁰ *Decision*, at ¶135.

demonstrates Ontario’s thorough involvement in causing the GHG that create the harms to s. 7 rights. Again, the Target is state action that “guides and directs” these “subsequent state actions,” and Ontario has affirmed this cause-and-effect relationship in front of this Court.¹¹¹

37. Crucially, in setting the Target, Ontario is *committing to 200 Mt more GHG* than the previous target.¹¹² The Application Judge ignored this active commitment to higher GHG by Ontario. That mistake informed her view that this case is about Ontario merely not doing enough.

iii. This case is analogous to negative rights cases and not positive rights cases

38. Courts typically see “positive rights” where claimants call on the state to *improve* a social welfare problem in an arena that is not subject to a comprehensive regulatory scheme, or to *extend* a social assistance program to address problems or circumstances the state did not create. Such cases, per Brown J., “arise in contexts very different from the case before this Court.”¹¹³

39. Indeed, Ontario has a near-monopoly on the levers impacting GHG in the province. Almost all GHG-emitting activity can be done only with the express imprimatur of the state — and Ontario is itself a significant emitter.¹¹⁴ The Target is the key mechanism that guides and directs state actions that influence and control GHG. The Appellants are not seeking a remedy to pre-existing social problems unconnected to Ontario’s conduct, but rather relief that prevents Ontario from taking unsafe action in allowing for GHGs — where it has thoroughly occupied the field.

40. That makes this case unlike any other so-called “positive rights” cases. In particular, the Application Judge erred in likening this case to *Barbara Schlifer*, a ss. 7 and 15 challenge to legislation repealing the long-gun registry. The cause of harm there was “violence perpetrated by

¹¹¹ [Decision](#), at ¶123; [Reference re Greenhouse Gas Pollution Pricing Act](#), 2019 ONCA 544, at ¶58.

¹¹² See ¶18, *supra*.

¹¹³ [Mathur v. Ontario](#), 2020 ONSC 6918 at ¶228 (and see earlier cases discussed at ¶¶198-213).

¹¹⁴ See ¶¶20-21, *supra*.

persons with firearms” and *not state action*.¹¹⁵ The state did not authorize the violence causing harm (and in fact prohibited it under the *Criminal Code*) — making it unlike the present case, where Ontario is guiding and directing unsafe GHG levels within the province via the Target. Other so-called “positive rights” cases cited by the Application Judge and Ontario, like *Gosselin*,¹¹⁶ *Flora*,¹¹⁷ and *Tanudjaja*,¹¹⁸ are distinguishable from the present case on the same basis.

41. The Application Judge also erred in finding the nature of Ontario’s participation in creating the harms flowing from GHG as no different than for social issues such as poverty and homelessness.¹¹⁹ Even putting aside that courts have found negative rights violations involving social issues when specific state action is involved,¹²⁰ the comparison is inapt. Again, Ontario’s involvement in creating the underlying harm of GHG has no parallel with issues like poverty or homelessness: with its right hand, Ontario sets a Target representing GHG levels in the province, while with its left, it controls the levers to allow or restrict GHG and thereby achieve the Target.¹²¹

42. Instead, this case is far more analogous to cases like *Chaouilli*, *PHS* and *Dixon*. In *Chaouilli*, the state created a comprehensive public healthcare scheme and then impeded access to that service. As the Supreme Court put it, “[t]he *Charter* does not confer a freestanding right to health care. However, where the government puts in place a scheme to provide health care, that

¹¹⁵ [Barbra Schlifer Commemorative Clinic v. Canada \(Attorney General\)](#), 2014 ONSC 5140 at ¶31.

¹¹⁶ In *Gosselin*, the Supreme Court found the challenge to Quebec’s age-based social assistance scheme to raise positive rights because the appellant had argued that s. 7 includes the right to receive a particular level of social assistance adequate to meet basic needs: [Gosselin v. Québec \(Attorney General\)](#), 2002 SCC 84, at ¶¶75, 81-83.

¹¹⁷ In *Flora*, this Court upheld the dismissal of the claim, which sought reimbursement for life-saving treatment received outside Ontario, because it challenged legislative limitations on the scope of a financial benefit, which s. 7 does not provide for: [Flora v. Ontario Health Insurance Plan](#), 2008 ONCA 538, at ¶108.

¹¹⁸ In *Tanudjaja*, this Court found that the ss. 7 and 15 challenges asserted that Canada and Ontario had given insufficient priority to issues of homelessness and inadequate housing and focused on the social conditions created by the governments’ overall approach, but the majority found it unnecessary to address the issue of positive rights. The Superior Court found that the case raised positive rights: [Tanudjaja v. Canada \(Attorney General\)](#), 2014 ONCA 852, leave to appeal to SCC refused, 36283 (25 June 2015), at ¶¶9-10; [Tanudjaja v. Attorney General \(Canada\) \(Application\)](#), 2013 ONSC 5410, at ¶34.

¹¹⁹ [Decision](#), at ¶134.

¹²⁰ See ¶32, *supra*, ¶¶42, 44, *infra*.

¹²¹ See ¶21, *supra*.

scheme must comply with the *Charter*.”¹²² The same logic applies here.¹²³ Again, Ontario has significant control over the GHG faucet in this province. The Target is the only meaningful way Ontario influences and controls the overall flow of GHG, and it must be constitutionally compliant. By setting the Target well above safely allowable amounts of GHG, Ontario is causing harm.

iv. Seeking positive action does not make this a “positive rights case”

43. The Appellants seek some positive action as part of the relief sought in this case, alongside traditional remedies like declaratory relief. But these requests do not somehow make this a “positive rights” or “freestanding positive obligations” case. The relief sought should not distract from the underlying inquiry of whether the case, at its core, challenges state action.

44. The Application Judge recognized that courts have imposed positive obligations under s. 7 after state interference with life, liberty or security of the person,¹²⁴ but she failed to consider whether this was such a case. For instance, in *G.(J.)*, the Supreme Court found s. 7 imposed a positive “constitutional obligation to provide state-funded counsel” for a single mother on social assistance who was unable to afford a lawyer to represent her in custody proceedings against the state.¹²⁵ However, the underlying s. 7 violation was the result of the government’s *failure* to provide the plaintiff with counsel after initiating proceedings against her.¹²⁶ Similarly, two s. 7 challenges to bylaws prohibiting temporary shelters in public parks engaged negative rights because they challenged state action, rather than seeking positive obligations to address the underlying issue of homelessness, distinguishing them from *Tanudjaja*.¹²⁷ The B.C. Court of

¹²² [Chaoulli](#), at ¶104. See also ¶107: the decision to adopt a certain type of health care system is for the Legislature, but “the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7” See also: [Canadian Foundation for Children, Youth and the Law v. Canada \(Attorney General\)](#), [2004] 1 S.C.R. 76 at ¶176 (*per* Arbour J., dissenting but not on this point) and [Gosselin](#), at ¶328 (*per* Arbour J., dissenting).

¹²³ See also [Mathur v. Ontario](#), 2020 ONSC 6918, at ¶226.

¹²⁴ [Decision](#), at ¶129.

¹²⁵ [New Brunswick \(Minister of Health and Community Services\) v. G. \(J.\)](#), [1999] 3 S.C.R. 46, at ¶3-6, 105.

¹²⁶ [G. \(J.\)](#), at ¶91.

¹²⁷ [Victoria \(City\) v. Adams](#), 2009 B563 at ¶¶86-88; [Abbotsford \(City\) v. Shantz](#), 2015 BCSC 1909, at ¶¶148, 188.

Appeal recognized that, while remedying the harm would likely require responsive action by the City to address inadequate shelter options, this relief did not create a positive rights case.¹²⁸ For decades, courts have also imposed positive obligations on the state to remedy s. 15 violations.¹²⁹

v. *This Application does not seek to restore a previous statute or the status quo*

45. The Application Judge relied on the challenge to s. 16 of the *CTCA*, which repealed the *Climate Change Act*, to buttress her conclusion that this case seeks positive rights.¹³⁰ Section 16 was barely mentioned in the Appellants' factum in the court below and the relief sought in relation to s. 16 was not pursued in oral argument. Simply put, s. 16 was never the focus of this case and should not be relied on to make this key determination about the framing of the Application.

46. This Application does not challenge the mere fact that Ontario changed the previous target, nor does it argue that the previous target should be restored. Rather, this Application challenges Ontario's new unconstitutional Target, and asks it to be struck down and replaced with a science-based target. While the previous target provides helpful context and background to Ontario's actions, this challenge could have been brought in the absence of any previous target. That makes this case unlike *Barbra Schlifer*, and the Application Judge erred in finding otherwise.¹³¹ The only state conduct at issue in *Barbra Schlifer* was the repeal of a long-gun registry and not, as here, the replacement of a previous action with a *new* unconstitutional action (the Target). This Application is not an attempt to set a "constitutional baseline" or restore the status quo. The legislature can change its approach, but its new actions still "[have] to be constitutionally compliant".¹³²

¹²⁸ [Victoria v. Adams](#), at ¶96.

¹²⁹ [Vriend v. Alberta](#), [1998] 1 SCR 493; [Eldridge v. British Columbia \(Attorney General\)](#), [1997] 3 SCR 624.

¹³⁰ [Decision](#), at ¶136.

¹³¹ [Decision](#), at ¶133. The Application Judge also referred to *City of Toronto*, which is distinguishable on the same basis: see [Decision](#), at ¶136, citing to [Toronto \(City\) v. Ontario \(Attorney General\)](#), 2021 SCC 34 at ¶¶30, 32.

¹³² [Quebec \(Attorney General\) v. Alliance du personnel professionnel et technique de la santé et des services sociaux](#), 2018 SCC 17, at ¶36.

C. THE APPLICATION JUDGE ERRED IN DISMISSING THE S. 7 CLAIMS

47. The Appellants rely on the PFJs that laws that infringe life, liberty or security of the person must not be arbitrary or grossly disproportionate. As the Supreme Court has explained, “laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed.”¹³³ Properly analyzed against its objective and effects, the Target is fundamentally flawed and aligned with climate disaster. The Target is therefore arbitrary and grossly disproportionate. It also imperils societal preservation, which is a properly conceived PFJ.

i. Under any definition of its objective, the Target is arbitrary

48. The Application Judge erred in misidentifying the Target’s objective, which is to do Ontario’s “share to address climate change and protect our environment” (as per the express terms of the Plan).¹³⁴ The Target has no connection to achieving this objective. In any event, even on the Application Judge’s flawed definition of the Target’s objective — to “address and fight climate change” — there is no connection between the Target and its purpose.

49. A law is arbitrary where “there is no connection between the effect of a provision and its purpose”¹³⁵ or “where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person”.¹³⁶ Because the objective of the law drives so much of the arbitrariness analysis, it is crucial to correctly identify that objective. A properly defined objective strikes a balance between abstraction akin to animating social values and mere repetition of the law divorced from its context.¹³⁷ It must pertain specifically to the impugned

¹³³ [Canada \(Attorney General\) v. Bedford](#), 2013 SCC 72 at ¶105.

¹³⁴ **Plan**, Ex “Y” to the Jan 15 Ireland Affidavit ABC, Vol 1, Tab 5, at p 3167.

¹³⁵ [R. v. Sharma](#), 2022 SCC 39, at ¶111.

¹³⁶ [Carter v. Canada \(Attorney General\)](#), 2015 SCC 5, at ¶83.

¹³⁷ [Decision](#) at ¶154, citing to [Sharma](#), at ¶87.

measure (here, the Target within the Plan, set under the *CTCA*), be precisely defined, and not be concerned with competing social interests properly addressed under s. 1.¹³⁸

50. The Application Judge acknowledged the Plan as the best source to determine the objective of the Target, and that it refers several times to Ontario doing its “share” or “part” to reduce GHG. However, she was unable to determine what those references were intended to mean and found that including “share” and “part” in the objective would “inject imprecision” in the analysis. She defined the objective as: “To reduce GHG in Ontario to address and fight climate change”.¹³⁹

51. Respectfully, it is the Application Judge’s definition that is overly broad and imprecise. In *Bedford*, the Supreme Court found the objective of “deter prostitution” too vague, as it was not “confined to measures directly targeted by the law”.¹⁴⁰ In *Carter*, “the preservation of life” was too broad to provide parameters to determine whether the means to achieve the objective infringe PFJs.¹⁴¹ Similarly, the Application Judge’s objective in this case is so general it could apply to *any* measure — from a *Building Code* provision to a comprehensive carbon pricing regime — to reduce GHG, and suggests that *any* GHG target is sufficiently connected to addressing climate change.¹⁴²

52. Such a result is not only at odds with the proper arbitrariness analysis, but is also inconsistent with the Application Judge’s finding that the Target falls “severely short” of what is necessary to address harmful climate change and actually contributes to the risks to s. 7 rights.¹⁴³

¹³⁸ *Carter*, at ¶¶76-80. The Application Judge was correct to reject Ontario’s proposed objective — “to balance a healthy economy with a healthy environment” — as “too broad, multifactorial and insufficiently related to the Target and climate change”: Decision, at ¶157.

¹³⁹ Decision, at ¶¶156-8.

¹⁴⁰ *Carter*, at ¶78 citing to *Bedford*, at ¶¶131-32.

¹⁴¹ *Carter*, at ¶78.

¹⁴² Decision, at ¶160.

¹⁴³ Decision, at ¶147.

53. Including “share” as part of the objective, as the Appellants propose, correctly focuses the objective on *why* Ontario created the Target: to execute Ontario’s share of global responsibility to achieve the Paris Standard. In the Plan, Ontario intentionally introduces the Target under the section titled “Continuing to do our share: Achieving the Paris Agreement Target” and continuously links the Target to Ontario doing its “share” or “part”.¹⁴⁴ The Plan does not just set out to merely reduce GHG *generally*, but to an extent that represents Ontario’s *share* of achieving the Paris Standard. This must be reflected in any formulation of the objective, but the Application Judge expressly declined to do so. Once this error is remedied, it is clear from the evidence in this case that Ontario’s Target is in no way connected to any conception of its share of the global fight against climate change.¹⁴⁵

54. Even if this Court accepts the Application Judge’s definition of the objective, the Target does not “address and fight climate change”. It retreats from that fight. The conclusion that the Target is not arbitrary is premised on the flawed logic that *any* target is inherently better than no target at all¹⁴⁶, which fails to recognize that the Target commits to, guides and directs a specific — and dangerously high — amount of GHG. Again, the Target effectively *increases* GHG by 200 Mt compared to the previous target,¹⁴⁷ which the Application Judge failed to consider. Quite apart from any increase over the previous target, in order for the Target to be connected to addressing

¹⁴⁴ **Plan**, Ex “Y” to the Jan 15 Ireland Affidavit ABC Vol 1, Tab 5, at p 3181 (emphasis added). Ontario doing its “share” or “part” to address GHG or climate change is mentioned over a dozen times in the Plan. See also: 3167 (“We will continue to do our **share** to address climate change and protect our environment”), 3163 (The Minister’s cover message for the Plan says Ontario will “continue to do our **share** to reduce greenhouse gases”), 3166 (the Plan will “support Ontarians to continue to do their **share** to reduce greenhouse gas emissions”), 3163 (“Our plan describes the actions Ontario is proposing to take and the ways we will enable industry, business, communities and people to continue to do their **part**”), 3167 (“We will help others do their **part**...making it easier for people and companies to go the extra mile to reduce emissions”) and 3195 (“**DOING OUR PART**: Government Leadership...Ontario is committed to doing its **part** to address climate change”) (emphasis added).

¹⁴⁵ See, e.g., an equal share of the IPCC Prescription: [Decision](#), at ¶¶146-147; or a fair share of the remaining global carbon budget: **Matthews Report**, ABC, Vol 2, Tab 16, Figure 1, at p 6969.

¹⁴⁶ [Decision](#), at ¶160.

¹⁴⁷ See ¶18 *supra*.

and fighting climate change, it must, at a minimum, align with the IPCC Prescription for the necessary climate action globally (*i.e.* the global consensus on what is necessary to “address and fight climate change”).¹⁴⁸ As the Application Judge found, the Target falls “severely short” of the achieving (or even aiming to achieve) this objective, leaving a “large, unexplained” gap with the IPCC Prescription “without any apparent scientific basis”.¹⁴⁹

55. As the adage goes, *sola dosis facit venenum* (the dose makes the poison). GHG in scientifically prescribed safe doses are compatible with a stable and safe climate. A dose above those amounts will be catastrophic. Far from fighting climate change, the Target commits Ontario to dangerously high GHG levels, far beyond prescribed safe levels. This Court recently confirmed that such “ad hoc, unreasonable” administration of a government scheme could be arbitrary action in the face of s. 7 deprivations.¹⁵⁰ As such, even if the Application Judge is correct and the purpose of the Target is to “address and fight climate change”, the Target bears no connection with that objective. It is arbitrary and a violation of s. 7.

ii. The Application Judge erred in assessing gross disproportionality

56. The Application Judge erred by concluding that the PFJ of gross disproportionality cannot have any application where “the government did not go far enough”.¹⁵¹ As set out above, this case does not challenge Ontario’s inaction, nor the mere inadequacy of its Target, but rather claims that the Target *itself* is a commitment to a dangerous and harmful levels of GHG.

¹⁴⁸ The IPCC Prescription, representing the global political and scientific consensus, is the minimum because it does not include any conception of fairness which would require that Ontario reduce its GHG further than the global average in line with its fair share: see [Decision](#), at ¶¶144, **Matthews Report**, ABC, Vol 2, Tab 16, at pp 6964-5.

¹⁴⁹ [Decision](#), at ¶¶146-147.

¹⁵⁰ [Leroux](#), at ¶¶83, 88.

¹⁵¹ [Decision](#), at ¶162.

57. Gross disproportionality asks whether the “seriousness of the deprivation is totally out of sync with the objective of the measure” by comparing the law’s purpose, “taken at face value”, with its negative effects on the rights of the claimant.¹⁵²

58. The Target’s effects are grossly disproportionate to any conceivable objective. The s. 7 deprivations at issue are not merely serious; they are “existential”, as the Supreme Court has recognized.¹⁵³ The unchallenged evidence, endorsed by the Application Judge,¹⁵⁴ shows that extreme heat events beyond 1.5°C warming will result in *hundreds to thousands of additional deaths across just four Ontario cities*.¹⁵⁵ This is but a fraction of the devastating harms to Ontarians in such a warming scenario¹⁵⁶ — and the Target is aligned with exactly this result. These effects are completely out of sync with the objective of “addressing and fighting climate change” (whether in terms of Ontario’s “share” or not), and indeed with *any* conceivable objective. In short, by perpetuating the devastating harms of climate change, the Target is grossly disproportionate.

iii. The Application Judge erred in failing to recognize the PFJ of societal preservation

59. The Target is aligned with climate harms that are so substantial that the preservation of society, including its legal system, is at risk. Societal preservation — defined as the principle that “a government cannot engage in conduct that will, or could reasonably be expected to, result in the future harm, suffering, or death of a significant number of its own citizens” — is a properly conceived PFJ: it is a legal principle, reflecting significant societal consensus, and is defined with sufficient precision. The Application Judge erred in holding otherwise.

¹⁵² [Carter](#), at ¶89, citing to [Bedford](#), at ¶125. E.g. in [Bedford](#), criminal offences increased the risk of danger to sex workers — an effect totally out of sync with and counteracting the objective of deterring community disruption: [Bedford](#), at ¶136. In [PHS](#), the denial of an exemption needed for a safe injection site perpetuated harm rather than supporting the objective of protecting health and safety: [PHS](#), at ¶133.

¹⁵³ [Carbon Price Reference](#), at ¶¶167, 171.

¹⁵⁴ [Decision](#), at ¶23.

¹⁵⁵ **Lo Supplemental Report**, ABC Vol 2, Tab 23, at pp 7446-47; **Lo Report**, ABC Vol 2, Tab 8, at pp 5616-17.

¹⁵⁶ See ¶¶13-15, *supra*.

60. The Application Judge erred in finding societal preservation is not a **legal principle** because it overlaps with broader social values and cannot be found with a CanLII search.¹⁵⁷ Principles reflecting basic tenets of the legal system can qualify as PFJs.¹⁵⁸ Overlap with broader social values is not disqualifying: courts should “not exclude legal principles that have some moral content or that have parallels in morality.”¹⁵⁹ A search for an exact term is insufficient to deny the existence of a principle that may be articulated differently in Canadian and international law.

61. Preserving a functioning society is at the heart of the *Charter*: s. 1 balances limits on rights with preserving “fundamental principles of a free and democratic society”.¹⁶⁰ The societal preservation principle is analogous to domestic¹⁶¹ and international legal doctrines¹⁶² prohibiting conduct by the state that inflicts harm on its own people, such as torture, genocide, and extradition to face torture. It shares similarities with established environmental law standards like the precautionary principle.¹⁶³ Societal preservation also underlies Indigenous legal principles, such as the Haudenosaunee “Seventh Generation Principle” requiring that present-day decisions preserve society and the environment for the next seven generations.¹⁶⁴ This principle is part of

¹⁵⁷ [Decision](#), at ¶¶165-6.

¹⁵⁸ [Canada \(Attorney General\) v. Federal of Law Societies of Canada](#), [2015] 1 S.C.R. 401, at ¶89.

¹⁵⁹ H. Stewart, *Fundamental Justice* (2nd ed) at p 124.

¹⁶⁰ [R v Oakes](#), 1986 CanLII 46 (SCC), 1 SCR 103 at ¶65.

¹⁶¹ See e.g. [United States v. Johnstone](#), 2013 BCCA 2 at ¶50; [Suresh v. Canada \(Minister of Citizenship and Immigration\)](#), 2002 SCC 1 at ¶56.

¹⁶² See e.g. [Steen v. Islamic Republic of Iran](#), 2013 ONCA 30 at ¶30.

¹⁶³ The Supreme Court recognized that the precautionary principle as a principle of international law properly used to interpret the application of statute or regulation so that preventative actions against serious environmental threats are not precluded simply due to some degree of scientific uncertainty: [114957 Canada Ltée \(Spraytech, Société d'arrosage\) v. Hudson \(Town\)](#), 2001 SCC 40 at ¶¶30-32. See also [R. v. Michaud](#), 2015 ONCA 585, at ¶102; [Ontario \(Natural Resources and Forestry\) v. South Bruce Peninsula \(Town\)](#), 2021 ONCA 749 at ¶17.

¹⁶⁴ See N. Chalifour, J. Earle & L. Macintyre, “[Coming of Age in a Warming World: The Charter’s Section 15\(1\) Equality Guarantee and Youth-Led Climate Litigation](#)” (2021) 17 *J L & Equality* 1 at 62. See also David W-L Wu, “[Tsilhqot’in Nation as a Gateway Towards Sustainability: Applying the Inherent Limit to Crown Land](#)” (2015) 11 *JSDLP* 124 at 130; [R. v. Tommy](#), 2008 BCSC 1095 at ¶¶57-58 (7th generation principle as interpretive aid to find “sustainability” is integral to legal concept of “conservation”).

Canadian law¹⁶⁵ and has echoes in international law.¹⁶⁶ Finally, societal preservation is reflected in the obligation to safeguard and preserve the human environment from massive pollution, arguably a *jus cogens* norm.¹⁶⁷ Such norms “can generally be equated with [PFJs]”.¹⁶⁸

62. Societal preservation also carries **significant societal consensus**. A PFJ ought to reflect “a legal order committed to respecting human dignity and the rule of law”, as “these values themselves constitute the societal consensus necessary to the recognition of a [PFJ]”.¹⁶⁹ Societal preservation is reflected in the *Charter*’s goal of sustaining a free and democratic society, and as a natural extension of other fundamental values, such as respect for human dignity and the sanctity of life.¹⁷⁰ Consensus can be found in “the shared assumptions upon which our system of justice is grounded”.¹⁷¹ No assumption is more crucial to the justice system than sustaining the society from which our constitutional order flows. As Professors Collins and Sossin (as he then was) explained, elements preserving society, such as “ecological sustainability”, are “underlying principle[s] of the Canadian constitutional order”.¹⁷² The same logic applies to societal preservation.

¹⁶⁵ *Pastion v. Dene Tha' First Nation*, 2018 FC 648 at ¶8. See also *Mitchell v. M.R.N.*, 2001 SCC 33, at ¶10.

¹⁶⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007 (A/RES/61/295) [UNDRIP], art 25. UNDRIP is a valid source of interpretation in Canadian law: see *Attawapiskat First Nation v. Ontario* 2022 ONSC 1196 (Div Ct.) at ¶96. The use of UNDRIP to interpret Canadian law has also been endorsed in the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (s. 4(a) affirms UNDRIP as a “universal human rights instrument with application in Canadian law”).

¹⁶⁷ The UN International Law Commission states that obligations requiring the “safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas”, are arguably *jus cogens* norms: “[Report of the International Law Commission to the General Assembly on the work of its seventy-third session](#)” (UN Doc A/77/10), Chapter IV at pp. 88-9, citing to *Yearbook of the International Law Commission 1976*, vol 2, part 2, pp 95-95, regarding art 19, para 3(d) of the Draft articles on State responsibility, read in conjunction with paragraphs (17) and (18) of the commentary to that article (*ibid*, p 102).

¹⁶⁸ *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, at ¶151.

¹⁶⁹ H. Stewart, *Fundamental Justice* (2nd ed) at 125.

¹⁷⁰ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 592 (“Respect for human dignity underlines many of the rights and freedoms in the *Charter*... [it] is the genesis for many principles of fundamental justice...”); *Carter*, at ¶63 (“The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life.”)

¹⁷¹ *Canadian Foundation for Children*, at ¶8.

¹⁷² L. Collins and L. Sossin, “[Approach to Constitutional Principles and Environmental Discretion in Canada](#)” (2019) 52:1 U.B.C.L. Rev. 239 at pp 295, 323.

63. Third, the societal preservation principle is **sufficiently precise** to yield a manageable standard. It is not a “vague generalization about what our society considers to be ethical or moral”,¹⁷³ but rather focused on specific state conduct with judicially measurable consequences.¹⁷⁴ It is at least as precise as the PFJ prohibiting state conduct that “shocks the conscience”.¹⁷⁵

64. The Application Judge was concerned that societal preservation (1) collapses the two-step inquiry under s. 7, (2) raises questions about what a “significant number of its own citizens” could mean and (3) does not account for situations where most courses of action could result in mass suffering, such as a pandemic. These concerns are misplaced. First, while harm to one individual can trigger s. 7, societal preservation concerns the viability of society at large. Second, the term “significant” has been recognized as judicially cognizable in other contexts and the same should apply here,¹⁷⁶ informed by the fact that for society to be imperiled, so many people would be impacted that societal systems face destabilization and breakdown. The accepted facts in this case leave little doubt that the Target contributes to exactly such a result. Third, Ontario does not *cause* pandemics, it responds to them. Societal preservation only protects against state conduct that causes harm and imperils society, such as nuclear war, genocide and climate change. As for any s. 7 violation, the court would then analyze the conduct under s. 1.

¹⁷³ H. Stewart, *Fundamental Justice* (2nd ed) at 124.

¹⁷⁴ See *e.g.* actual or constructive knowledge, and the significance of a particular event or consequence: see [Winko v. British Columbia \(Forensic Psychiatric Institute\)](#), [1999] 2 S.C.R. 627 at ¶57 (test of whether someone poses a “significant threat to public safety”); [Ezokola v. Canada \(Citizenship and Immigration\)](#), [2013] 2 S.C.R. 678 at ¶36 (test of whether someone made a “significant contribution” to a crime or criminal purpose of a group).

¹⁷⁵ [Suresh](#), at ¶49.

¹⁷⁶ See, *e.g.*, [Winko](#), at ¶57 (whether someone poses a “significant threat to public safety”); [Ezokola](#), at ¶36 (whether someone made a “significant contribution” to a crime or criminal purpose).

D. IN THE ALTERNATIVE, THE APPLICATION JUDGE FAILED TO PROPERLY CONSIDER HOW PFJs APPLY IN A POSITIVE RIGHTS CASE

65. This case does not depend on the recognition of freestanding positive rights under s. 7. However, should this Court decide that it does, this case represents the “special circumstances” that the Supreme Court contemplated in *Gosselin*.¹⁷⁷

66. In *Dunmore*, the Supreme Court found positive obligations “may be required where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms.”¹⁷⁸ There is extensive evidence that climate change will cause widespread harm and death to Ontarians and represents a “threat of the highest order to the country, and indeed to the world” and a “grave threat to humanity’s future”.¹⁷⁹ Climate change threatens the very preconditions to the enjoyment of *all* fundamental freedoms enshrined in the *Charter*. The unprecedented crisis at issue makes this case unlike any so-called “positive rights” cases that have been considered by Canadian courts to date. The stakes could not be higher. If the existential dangers of climate change are not “special circumstances”, then the door for positive rights under s. 7 left open in *Gosselin* may as well be slammed shut.

67. The Application Judge accepted that this case could raise the special circumstances meriting the imposition of positive obligations, and that, for such cases, “it is very likely that a different framework of analysis would need to be adopted” and “some of the traditional principles of fundamental justice may need to be adapted when applied in a positive claim context”.¹⁸⁰ But

¹⁷⁷ *Gosselin*, at ¶¶82-83 (*per* McLachlin C.J., for the majority).

¹⁷⁸ *Dunmore v. Ontario*, 2001 SCC 94, at ¶25 (emphasis added).

¹⁷⁹ *Decision*, at ¶17, citing to *Carbon Price Reference*, at ¶¶2, 167. This is in contrast to the “frail” record in *Gosselin*: see *Gosselin*, at ¶83. See also *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 1308 (Div Ct) at ¶4, 144-145.

¹⁸⁰ *Decision*, at ¶¶138-140.

she did not explore an alternative framework, instead rejecting the claim and finding that traditional PFJs are “not well-adapted” or “cannot have any application” to a positive claim.¹⁸¹

68. In such “special circumstances”, this Court can take guidance from Arbour J’s dissent in *Gosselin*. Justice Arbour explained that a PFJ analysis is not required in a positive rights claim, as a “deprivation” does not need to be identified. Rather, the s. 7 violation is inherent from the state’s inaction in the face of certain harm and death, contrary to the rights to life and security of the person, although it would still be subject to potential justification under s. 1.¹⁸² Thus, the Appellants need not establish any PFJ has been violated at all: the deprivation caused by Ontario’s inaction, as found by the Application Judge, is sufficient.

69. No s. 1 justification is made out. Climate change is a “grave threat to humanity’s future” and an “existential threat to human life in Canada and around the world”.¹⁸³ Unsurprisingly, Ontario does not contest this, and did not even advance a s. 1 argument in the court below.¹⁸⁴

E. THE APPLICATION JUDGE ERRED IN ASSESSING THE SECTION 15 CLAIM

70. The Appellants submit that, in its effects, the Target creates a distinction based on the enumerated ground of age because (1) young people are particularly susceptible to the negative physical health impacts of climate change, and youth will bear a disproportionate burden of the mental health impacts; and (2) youth and future generations will bear the brunt of climate impacts, which will worsen and compound during their lifetimes as global temperatures rise. Impacts on Indigenous youth and future generations are amplified due to their intersecting group membership. The Application Judge made several errors in her treatment of the s. 15 claim.

¹⁸¹ [Decision](#), at ¶¶160, 162.

¹⁸² [Gosselin](#), at ¶¶386-87. The majority did not criticize Arbour J.’s analytical framework for PFJs in the event that a positive obligation could be made out in special circumstances in future cases: see [Gosselin](#), at ¶83.

¹⁸³ [Carbon Price Reference](#), at ¶¶2, 167, 171.

¹⁸⁴ [Decision](#), at ¶¶1, 78.

i. The Application Judge erred in imposing a heightened causation threshold

71. To establish a s. 15 claim, the state action must (1) create a distinction based on enumerated or analogous grounds, on its face or in its impact; and (2) impose a burden or denies a benefit in a manner that reinforces, perpetuates or exacerbates disadvantage.¹⁸⁵ In adverse impact cases, the first question is whether the *impact* of the state action *creates or contributes to* a disproportionate impact based on a protected ground.¹⁸⁶ This “is not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases”.¹⁸⁷ The provisions “need not be the only or dominant cause” of the impact; there must merely be a “link or nexus” between them.¹⁸⁸

72. It is “indisputable” that because of climate change Ontarians are “experiencing an increased risk of death and an increased risk to the security of the person.”¹⁸⁹ The Application Judge found that young people and Indigenous Peoples are disproportionately impacted, based on the unchallenged expert evidence in this case, including the fact that young people are particularly susceptible to the harmful physical and mental health impacts of climate change.¹⁹⁰ Moreover, the evidence shows how the catastrophic impacts of climate change will worsen over time as global temperatures continue to rise¹⁹¹ — meaning that youth and future generations will bear the brunt of these impacts as they live longer into the future. These disadvantages are uniquely amplified for Indigenous young people and future generations due to their intersecting group membership, and the Application Judge erred by failing to consider this reality as part of her s. 15 analysis.¹⁹²

¹⁸⁵ [Decision](#) at ¶172, citing [Sharma](#), at ¶28.

¹⁸⁶ [Decision](#) at ¶174, citing [Sharma](#), at ¶¶42, 45.

¹⁸⁷ [Quebec \(Attorney General\) v. Alliance du personnel professionnel et technique de la santé et des services sociaux](#), 2018 SCC 17 at ¶26; [Ontario \(Attorney General\) v. G.](#), 2020 SCC 38 at ¶41.

¹⁸⁸ [Sharma](#), at ¶¶44-45. See also [Fraser v Canada \(Attorney General\)](#), 2020 SCC 28 at ¶71.

¹⁸⁹ [Decision](#) at ¶120.

¹⁹⁰ [Decision](#) at ¶¶25, 178. See also ¶¶14-15, *supra*.

¹⁹¹ **IPCC AR6 WGI**, ABC Vol 2, Tab 28, at pp 8337-38, see B.1 and Table SPM.1.

¹⁹² [Ontario v. G.](#), at ¶47. Intersecting group memberships can “create unique discriminatory effects not visited upon any group viewed in isolation”.

73. The Application Judge also erred in identifying climate change as the distinct cause of the disproportionate impact, with no causal connection to the Target.¹⁹³ This is fundamentally inconsistent with her factual findings (mainly made in her s. 7 causation analysis) that:

- (a) Ontario’s GHG “contribute to climate change and the increased risks that it creates” in a way that is “real, measurable and not speculative.” Every tonne of GHG leads to a quantifiable increase in global temperatures that is essentially irreversible.¹⁹⁴
- (b) The Target is a state action taken pursuant to a statute that “guide[s] and direct[s] subsequent state actions” to reduce GHG in Ontario.¹⁹⁵
- (c) The Target “falls severely short of the scientific consensus” on the required climate action, is “sufficiently connected to” the harms of global warming above 1.5°C, and “is contributing to increased risks of death” and security of the person.¹⁹⁶

74. The Application Judge’s (correct) findings that the Target is causally connected to climate change’s harms under s. 7 cannot be reconciled with her (incorrect) view under s. 15 that the Target is disconnected from those harms, which disproportionately impact youth and future generations. Consistent with the Application Judge’s own findings of fact, and applying the modest causal threshold that the impugned conduct must merely “contribute to” the uncontested disproportionate impacts on youth and future generations in this case, the first step of the s. 15 analysis is satisfied.

ii. The Application Judge mischaracterized the s. 15 claim as seeking positive rights

75. The Application Judge erred in dismissing the s. 15 claim on the basis that it seeks to impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation.¹⁹⁷ As outlined above, the Appellants do not seek to impose such an obligation, and this case does not require it. Simply put, in setting a Target that “falls severely short of the scientific

¹⁹³ [Decision](#) at ¶178-9.

¹⁹⁴ [Decision](#) at ¶¶148-9 (emphasis added).

¹⁹⁵ [Decision](#) at ¶123.

¹⁹⁶ [Decision](#) at ¶147 (emphasis added).

¹⁹⁷ [Decision](#) at ¶¶178, 179, 182, citing to [Sharma](#), at ¶¶40, 63.

consensus as to what is required”,¹⁹⁸ Ontario is committing to levels of GHG that will create or contribute to a disproportionate impact on youth and future generations due to their age.

iii. The Application Judge erred in finding claim is based on a “temporal distinction”

76. By virtue of their age, youth and future generations will bear the brunt of the impacts of climate change: climate harms will increase with global temperatures over time, and youth and future generations will live out most or all of their lives in that future.¹⁹⁹ The Application Judge erred in finding this ground is based on a “temporal distinction”, and not on an enumerated or analogous ground, because the impacts of climate change will be experienced by all age groups in the future.²⁰⁰ She illustrated her point by looking at one snapshot year, 2050, to conclude that the impacts of climate change will be experienced by all Ontarians who will be alive at that time.²⁰¹

77. But this ignores that youth and future generations are and will be *disproportionately* impacted by climate harms now, in 2050, and beyond. A young Ontarian today, whose average lifetime will extend past 2050, will live through more frequent and severe climate impacts as compared to an adult Ontarian who has already lived most of their life in relative climate safety.²⁰²

78. The Application Judge’s conclusion on this issue is at odds with the Supreme Court’s robust approach to interpreting enumerated grounds.²⁰³ Properly understood, the s. 15 claim in this case is an age-based claim that is grounded in the Target’s disproportionate impacts. If a person’s

¹⁹⁸ [Decision](#) at ¶147.

¹⁹⁹ [Decision](#) at ¶¶23-25. See also **IPCC AR6 WGI**, ABC Vol 2, Tab 28, at pp 8337-38, see B.1 and Table SPM.1.

²⁰⁰ [Decision](#), at ¶180.

²⁰¹ [Decision](#), at ¶180.

²⁰² This is a result both of the fact that the devastating impacts of climate change resulting from the Target will continue into the future, and will worsen and become more severe as they compound over time. The same logic applies to youth and future generations in 2050, who will live longer than adults in 2050.

²⁰³ [Fraser](#), at ¶116.

age or date of birth can be construed as a mere “temporal distinction”, it is hard to see how one could ever successfully advance an adverse effects claim based on a law’s impact on age.²⁰⁴

79. The Application Judge’s reliance on *Hislop* is misplaced:²⁰⁵ in that case, the Supreme Court *rejected* Ontario’s attempts to mischaracterize that claim as one based on a temporal distinction.²⁰⁶

Where temporal distinctions fail to ground s. 15 claims, they are not inherent to the personhood of the claimants — age, year of birth or generational cohort — but are instead tied to the timing of some extraneous event such as the date of an injury or the date a person contracted an illness.²⁰⁷

80. Finally, the Application Judge’s reliance on the “temporal distinction” has no application to the first category of adverse effects that the Appellants identified: that young people and youth are disproportionately impacted by the physical and mental health impacts of climate change.²⁰⁸

iv. In the alternative, the Application Judge failed to consider analogous grounds

81. The Application Judge erred by failing to even consider the Appellants’ alternative claim on the ground of “generational cohort” — one that bears strong similarities to the enumerated ground of age and should benefit from s. 15’s protection.²⁰⁹ This failure is contrary to the Supreme Court’s recent warning that “claims based on s. 15 are not secondary issues” and the “*Charter* should not be treated as if it establishes a hierarchy of rights in which s. 15 occupies a lower tier.”²¹⁰

82. The assessment of analogous grounds “must be undertaken in a purposive and contextual

²⁰⁴ On the Application Judge’s logic, even laws with “cut-off” age restrictions could be construed as mere temporal distinctions since most people will eventually pass the threshold as they age.

²⁰⁵ [Decision](#) at para 180, citing to [Canada \(Attorney General\) v. Hislop](#), 2007 SCC 10 at ¶39.

²⁰⁶ [Hislop](#), at ¶¶37, 39.

²⁰⁷ [Vail & McIver v. WCB \(PEI\)](#), 2012 PECA 18 at ¶25; [Downey v. Nova Scotia \(Workers’ Compensation Appeals Tribunal\)](#), 2008 NSCA 65 at ¶31; [Guild v. Canada](#), 2006 FC 1529 at ¶13; aff’d [2007 FCA 311](#).

²⁰⁸ [Decision](#), at ¶¶23-25, 180.

²⁰⁹ [Corbiere v. Canada](#), [1999] 2 SCR 203 at ¶13 (per McLachlin CJ).

²¹⁰ [Canadian Council for Refugees v. Canada \(Citizenship and Immigration\)](#), 2023 SCC 17 at ¶¶180-181.

manner”²¹¹ in order to realize the strong remedial purpose of the equality guarantee.²¹² The timing of one’s birth bears the classic hallmark of s. 15’s enumerated and analogous grounds: it is an immutable personal characteristic.²¹³ Further, a central characteristic of analogous grounds is whether “those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked”.²¹⁴ This is an apt description of young people (and, *a fortiori*, future generations), which have long been recognized to lack political power and are vulnerable to having their interests overlooked or disregarded.²¹⁵

v. The Target’s disproportionate impact reinforces and exacerbates disadvantage

83. Once the Application Judge’s errors are corrected, it is apparent that the Target creates a distinction based on enumerated or analogous grounds. The Target imposes a burden in a manner that reinforces, perpetuates or exacerbates disadvantage under the second branch of s. 15.

84. The second stage of the s. 15 analysis must remain flexible and can consider a broad range of harms.²¹⁶ Where government conduct “widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory”.²¹⁷

85. The historic disadvantage of young people is well-established. Due to their age, they have “heightened vulnerability”²¹⁸ and are “a highly vulnerable group”.²¹⁹ As McLachlin C.J. wrote, “a court assessing an equality claim involving children must do its best to take into account the subjective viewpoint of the child, which will often include a sense of relative disempowerment

²¹¹ [Corbiere](#), at ¶59 (per L’Heureux-Dubé J).

²¹² [Law v. Canada \(Minister of Employment and Immigration\)](#), [1999] 1 SCR 497 at ¶¶6, 23.

²¹³ [Corbiere](#), at ¶13 (per McLachlin CJ).

²¹⁴ [Corbiere](#), at ¶60 (per L’Heureux-Dubé J); See also [Andrews v. Law Society of British Columbia](#), [1989] 1 SCR 143 at 152, per Wilson J.

²¹⁵ See ¶85, *infra*.

²¹⁶ [Fraser](#), at ¶76. These include economic exclusion, social exclusion, psychological harms, physical harms, and political exclusion.

²¹⁷ [Quebec \(Attorney General\) v. A.](#), 2013 SCC 5 at ¶332.

²¹⁸ [R. v. C.P.](#), 2021 SCC 19, at ¶¶79, 85 (per Abella J.); [R. v. D.B.](#), 2008 SCC 25, at ¶41.

²¹⁹ [Canadian Foundation for Children](#), at ¶56. See also ¶225 (per Deschamps J., dissenting).

and vulnerability”.²²⁰ Young people are also “lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated”.²²¹

86. The Target reinforces, perpetuates and exacerbates these disadvantages in two key ways. *First*, it exacerbates the disproportionate burden young people already bear from environmental hazards leading to preventable illness and death,²²² as well as the existing youth mental health crisis.²²³ By contributing to climate change and the significant harms that will result, the Target reflects an abdication of the state’s role to protect youth, and sends the message that their lives and health are less worthy of protection. This runs directly counter to s. 15’s purpose to “promote a society where all persons are considered worthy of respect and consideration”.²²⁴

87. *Second*, Ontario’s actions amount to making fundamental decisions regarding the world that young persons and future generations will be forced to inhabit without taking their interests into account²²⁵ — in a scenario where the harms in question may soon become irreversible.²²⁶ This propagates the patterns of powerlessness and paternalism to which young persons and future generations are already subjected. By condemning them to bear the brunt of climate change’s harms and burdens — based only on when they happen to be born — Ontario has drastically “widened the gap” between this historically disadvantaged group and the rest of society, rather than narrowing it. The gap is particularly pronounced for Indigenous young persons and future generations, given their intersecting group membership. That is discrimination.

²²⁰ [Canadian Foundation for Children](#), at ¶53.

²²¹ [Andrews](#), at 152 and 195.

²²² **Buse Report**, ABC, Vol 2, Tab 18, at p 7065; **Impacts of Climate Change on Inequities in Child Health**, Appendix 2 to the **Buse Report**, ABC, Vol 2, Tab 18, at pp 7095-96.

²²³ **Cunsolo Report**, ABC, Vol 2, Tab 6, at pp 5411, 5421-22.

²²⁴ [Corbiere](#), at ¶5.

²²⁵ See [Neubauer et al v Germany](#), (2021) Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (Germany) [[unofficial English Translation](#)] at ¶192.

²²⁶ See: N. Chalifour, J. Earle, and L. Macintyre, “[Coming of Age in a Warming World: The Charter’s Section 15\(1\) Equality Guarantee and Youth-Led Climate Litigation](#)”, (2021) 17 J L & Equality 1 at 87.

F. ONTARIO'S FAIR SHARE OF THE CARBON BUDGET IS JUSTICIABLE

88. The Application Judge generally found the issues in this Application justiciable,²²⁷ but she erred in finding the question of Ontario's "fair share" of the global carbon budget to be beyond the court's institutional capacity, comparing it to the fairness of inviting cousins to a wedding.²²⁸

89. While the ss. 7 and 15 claims can be made out based solely on the finding that Ontario's Target falls significantly short of the IPCC Prescription (which does not require the Court to consider fairness),²²⁹ the "fair share" analysis further highlights the Target's unconstitutionality.

90. Determining a fair share is grounded in science and the best expertise available on equitably addressing climate change. This case asks this Court to consider the only two *realistic* methods which leave Ontario with *any* fair share until 2030.²³⁰ Courts are regularly called upon to determine what is "fair" based on the evidence before them, and there is substantial uncontradicted evidence here on what share of the global carbon budget is fair for Ontario.²³¹ Further, courts around the world have had little difficulty assessing conceptions of fairness with respect to a country's share of the global carbon budget.²³² Canadian courts are in no different position.

G. THE APPLICATION JUDGE ERRONEOUSLY DISMISSED UCP

91. The Application Judge acknowledged that UCP can assist in interpreting constitutional provisions and developing new structural doctrines to "fill gaps and address important questions on which the text of the Constitution is silent",²³³ but found it unnecessary to consider UCP in this

²²⁷ [Decision](#), at ¶¶106-7.

²²⁸ [Decision](#), at ¶¶109-110.

²²⁹ [Decision](#), at ¶¶27 and 144.

²³⁰ **Matthews Report**, ABC, Vol 2, Tab 16, at pp 6963-64 (federal per-capita, provincial grandfathered emissions); **Matthews Cross**, at pp 31-32, ABC, Vol 2, Tab 29, at p 8393-94 (federal and provincial per-capita).

²³¹ **Matthews Report**, ABC Vol 2, Tab 16, at p 6962-69.

²³² See for example, *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda*, (2019) 19/00135) at ¶¶2.1(27), 6.2 [[unofficial English Translation](#)]; Bundesverfassungsgericht [Federal Constitutional Court], 24 March 2021, *Neubauer et al v Germany*, (2021) Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (Germany), at 192, 225 [[unofficial English Translation](#)].

²³³ [Decision](#), at ¶186.

case.²³⁴ This was erroneous, particularly as she also found that the “current state of the law” may not be equipped to undertake the requisite *Charter* analysis.²³⁵ Societal preservation and/or ecological sustainability should be recognized as UCP for the same reasons advanced in part C(iii).

H. THIS COURT OUGHT TO GRANT THE RELIEF SOUGHT

92. This is an appropriate case for this Court to exercise its discretion to grant the relief sought.²³⁶ None of the Application Judge’s factual findings are under dispute on this appeal, and the record before this Court is full and allows for the fair adjudication of the issues.²³⁷ Given the urgent nature of climate change, there is no time to waste.

93. The declaratory relief sought by the Appellants ought to be granted pursuant to s. 52(1) of the *Constitution Act, 1982*. The Target qualifies as a “law” and can be struck down for inconsistency with the *Charter*.²³⁸ In the alternative, this declaratory relief is available pursuant to s. 24(1) of the *Charter*²³⁹ and this Court’s inherent jurisdiction to grant declaratory relief.²⁴⁰

94. The further remedial orders sought by the Appellants ought to be granted pursuant to the “generous and expansive”²⁴¹ scope to grant such relief as is “appropriate and just in the circumstances” under s. 24(1) of the *Charter* and/or pursuant to this Court’s inherent jurisdiction.²⁴² These orders can be characterized as a “declaration plus”-type remedy: an “intermediate remedy between a general declaration and a specific injunction” that “combines the generality of the

²³⁴ [Decision](#), at ¶187.

²³⁵ [Decision](#), at ¶5.

²³⁶ *Courts of Justice Act*, RSO 1990, c C. 43, s. 134(1). This Court has been prepared to grant relief in constitutional challenges: see, for example, *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, at ¶¶138-140, rev’d on other grounds 2011 SCC 20; *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139, at ¶¶142-144.

²³⁷ *Flood v. Boutette*, 2021 ONCA 515, at ¶110.

²³⁸ *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31 at ¶¶86-90.

²³⁹ *Greater Vancouver Transportation Authority*, at ¶87.

²⁴⁰ *BCCLA v. Canada (Attorney General)*, 2019 BCCA 228 at ¶266.

²⁴¹ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at ¶24.

²⁴² *BCCLA*, at ¶266.

declaration with the court’s retention of jurisdiction.”²⁴³ The essence of a “declaration plus” is that the Court (i) sets a general goal but then allows the state to decide the best means to achieve the goal; and (ii) retains jurisdiction to supervise the process, and can order supplemental relief.²⁴⁴

95. The Appellants’ request reflects a “two-track” approach: immediate relief by declaring the Target to be unconstitutional and a longer-term, systemic remedy for a new target — the kind of remedy that is “crucial in climate change litigation if we are to make the necessary emission reductions in the future to save the planet.”²⁴⁵ This “remedially modest approach”²⁴⁶ avoids dictating how Ontario must arrive at a constitutionally compliant target, what that new target should be or how the new target should be met. Rather, the Appellants simply seek to have the Target declared unconstitutional and to require Ontario to develop a constitutionally compliant target in line with science and Ontario’s share of the required GHG reductions.

96. The nature, scale and severity of the rights violations at issue here are unprecedented. They require a meaningful remedy beyond declaring the Target to be unconstitutional. This Court is being called upon to exercise its role in crafting a creative and effective solution, including ongoing supervisory jurisdiction within its proper institutional bounds.²⁴⁷ Recognizing constitutional violations, and instituting a fair process to remedy them, is well within this Court’s core capacities.

²⁴³ K. Roach, “[Judicial Remedies for Climate Change](#)” (2021) 17 JL & Equality 105 at 126. “In some cases, it may be appropriate for courts to issue declarations in the form of directions which may have some similarities to mandatory relief”: see Roach, *Constitutional Remedies in Canada*, 2nd ed., at s. 12:12. The decision in *Doucet-Boudreau* can be seen as a type of declaration plus relief: *Doucet-Boudreau*, at ¶¶7, 73-4, 87-9; Roach at 126.

²⁴⁴ K. Roach, “[Judicial Remedies for Climate Change](#)” (2021) 17 JL & Equality 105 at 126-29. Examples of supplemental relief or process include requiring reports, updates, or affidavits to be filed or tested.

²⁴⁵ K. Roach, “[Judicial Remedies for Climate Change](#)” (2021) 17 JL & Equality 105, at 136. Courts outside Canada have adopted similar two-track approaches for climate litigation: see pp 126-29, 137-39.

²⁴⁶ K. Roach, “[Judicial Remedies for Climate Change](#)” (2021) 17 JL & Equality 105, at 109.

²⁴⁷ *Doucet-Boudreau*, at ¶73.

97. Ultimately, the Appellants ask this Court to help address the defining existential threat of our lifetime, as courts around the world have done.²⁴⁸ By setting a dangerously high Target, Ontario is indisputably contributing to the devastating harms of climate change, which will wreak havoc on the lives of current and future generations of Ontarians. Given that Canadian courts have seemingly closed the door to challenging the totality of state conduct on climate change,²⁴⁹ the decision below effectively leaves Ontarians without any means of holding the state responsible for this conduct. Such a calamitous result must not stand.

PART IV - ORDER REQUESTED

98. The Appellants respectfully request that this Appeal be allowed and that this Court make an order granting the relief sought in the Notice of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2023.



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



Fraser Thomson / Danielle Gallant / Julia Croome /
Reid Gomme / Bronwyn Roe
Ecojustice

Counsel for the Appellants

²⁴⁸ See, for example, *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda*, (2019) 19/00135 [[unofficial English Translation](#)] (challenge to government's insufficient legislated target); *Neubauer et al v Germany*, (2021) Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (Federal Constitutional Court of Germany) [[unofficial English Translation](#)] (challenge to government's insufficient legislated climate target); *Friends of the Irish Environment v Ireland*, [2020] IESC 49 (Supreme Court of Ireland) (challenge to level of detail in climate plan); *Notre Affaire à Tous et al v France*, [2021] No 1904967, 1904968, 1904972, 1904976/4-1 [[unofficial English translation](#)] (challenge to government failure to meet climate targets); *Thomson v Minister for Climate Change Issues*, [2017] NZHC 733 (a challenge to the adequacy of the government's climate targets for 2030 and 2050).

²⁴⁹ See *Environnement Jeunesse c. Procureur général du Canada*, 2021 QCCA 1871, leave to appeal to SCC refused, 40042 (28 July 2022); *La Rose v. Canada*, 2020 FC 1008; (*La Rose* and *Midszi Yikh* are both awaiting decisions on appeal to the Federal Court of Appeal).

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)

APPLICATION UNDER Rules 14.05(3)(d) and 14.05(3)(h) of the *Rules of Civil Procedure*

CERTIFICATE

I estimate that 2.5 hours will be needed for our oral argument of the appeal. An order under
subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 31st day of July, 2023.



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

Lawyers for the Appellants

**SCHEDULE “A”
LIST OF AUTHORITIES**

CASES

1. [References re Greenhouse Gas Pollution Pricing Act](#), 2021 SCC 11
2. [Mathur et al. v Ontario](#), 2023 ONSC 2316
3. [Reference re Greenhouse Gas Pollution Pricing Act](#), 2019 ONCA 544
4. [Mathur v. Ontario](#), 2020 ONSC 6918
5. [Mathur v. Her Majesty the Queen in Right of Ontario](#), 2021 ONSC 1624
6. [Ernst v. Alberta \(Energy Resources Conservation Board\)](#), 2014 ABCA 285
7. [Consolidated Fastfrate Inc v Western Canada Council of Teamsters](#), 2009 SCC 53
8. [McAteer v. Canada \(Attorney General\)](#), 2014 ONCA 578
9. [Housen v. Nikolaisen](#), 2002 SCC 33
10. [Halpern v. Canada \(Attorney general\)](#), 2003 CanLII 26403
11. [Toronto \(City\) v. Ontario \(Attorney General\)](#), 2021 SCC 34
12. [R. v. Burlingham](#), [1995] 2 S.C.R. 206
13. [R. v. Sinclair](#), 2010 SCC 35
14. [R. v. Stinchcombe](#), [1991] 3 SCR 326
15. [United States v. Burns](#), [2001] 1 SCR 283
16. [Leroux v. Ontario](#), 2021 ONSC 2269 (Div. Ct.)
17. [Inglis v. British Columbia \(Minister of Public Safety\)](#), 2013 BCSC 2309
18. [Chaoulli v. Quebec \(Attorney General\)](#), [2005] 1 SCR 791
19. [Canada \(Attorney General\) v. PHS Community Services Society](#), 2011 SCC 44
20. [Dixon v. Director, Ministry of the Environment](#), 2014 ONSC 7404 (Div Ct)
21. [Barbra Schlifer Commemorative Clinic v. Canada \(Attorney General\)](#), 2014 ONSC 5140
22. [Gosselin v. Québec \(Attorney General\)](#), 2002 SCC 84
23. [Flora v. Ontario Health Insurance Plan](#), 2008 ONCA 538
24. [Tanudjaja v. Canada \(Attorney General\)](#), 2014 ONCA 852
25. [Tanudjaja v. Attorney General \(Canada\) \(Application\)](#), 2013 ONSC 5410
26. [Canadian Foundation for Children, Youth and the Law v. Canada \(Attorney General\)](#), [2004] 1 S.C.R. 76
27. [New Brunswick \(Minister of Health and Community Services\) v. G. \(J.\)](#), [1999] 3 S.C.R. 46

28. [Victoria \(City\) v. Adams](#), 2009 BCCA 563
29. [Victoria \(City\) v. Adams](#), 2008 BCSC 1363
30. [Abbotsford \(City\) v. Shantz](#), 2015 BCSC 1909
31. [Vriend v. Alberta](#), [1998] 1 SCR 493
32. [Eldridge v. British Columbia \(Attorney General\)](#), [1997] 3 SCR 624
33. [Quebec \(Attorney General\) v. Alliance du personnel professionnel et technique de la santé et des services sociaux](#), 2018 SCC 17
34. [Canada \(Attorney General\) v. Bedford](#), 2013 SCC 72
35. [R. v. Sharma](#), 2022 SCC 39
36. [Carter v. Canada \(Attorney General\)](#), 2015 SCC 5
37. [Canada \(Attorney General\) v. Federal of Law Societies of Canada](#), [2015] 1 S.C.R. 401
38. [R v Oakes](#), 1986 CanLII 46 (SCC), 1 SCR 103
39. [United States v. Johnstone](#), 2013 BCCA 2
40. [Suresh v. Canada \(Minister of Citizenship and Immigration\)](#), 2002 SCC 1
41. [Steen v. Islamic Republic of Iran](#), 2013 ONCA 30
42. [114957 Canada Ltée \(Spraytech, Société d'arrosage\) v. Hudson \(Town\)](#), 2001 SCC 40
43. [R. v. Michaud](#), 2015 ONCA 585
44. [Ontario \(Natural Resources and Forestry\) v. South Bruce Peninsula \(Town\)](#), 2021 ONCA 749
45. [R. v. Tommy](#), 2008 BCSC 1095
46. [Pastion v. Dene Tha' First Nation](#), 2018 FC 648
47. [Mitchell v. M.R.N.](#), 2001 SCC 33
48. [Attawapiskat First Nation v. Ontario](#) 2022 ONSC 1196 (Div Ct.)
49. [Kazemi Estate v. Islamic Republic of Iran](#), 2014 SCC 62
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51. [Winko v. British Columbia \(Forensic Psychiatric Institute\)](#), [1999] 2 S.C.R. 627
52. [Ezokola v. Canada \(Citizenship and Immigration\)](#), [2013] 2 S.C.R. 678
53. [Dunmore v. Ontario](#), 2001 SCC 94
54. [ETFO et al. v. Her Majesty the Queen](#), 2019 ONSC 1308 (Div Ct)
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56. [Fraser v Canada \(Attorney General\)](#), 2020 SCC 28
57. [Canada \(Attorney General\) v. Hislop](#), 2007 SCC 10
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59. [Downey v. Nova Scotia \(Workers' Compensation Appeals Tribunal\)](#), 2008 NSCA 65
60. [Guild v. Canada](#), 2006 FC 1529
61. [Guild v. Canada \(Attorney General\)](#), 2007 FCA 311
62. [Corbiere v. Canada](#), [1999] 2 SCR 203
63. [Canadian Council for Refugees v. Canada \(Citizenship and Immigration\)](#), 2023 SCC 17
64. [Law v. Canada \(Minister of Employment and Immigration\)](#), [1999] 1 SCR 497
65. [Andrews v. Law Society of British Columbia](#), [1989] 1 SCR 143
66. [Quebec \(Attorney General\) v. A.](#), 2013 SCC 5
67. [R. v. C.P.](#), 2021 SCC 19
68. [R. v. D.B.](#), 2008 SCC 25
69. [Fraser v. Ontario \(Attorney General\)](#), 2008 ONCA 760
70. [Working Families Coalition \(Canada\) Inc. v. Ontario](#), 2023 ONCA 139
71. [Flood v. Boutette](#), 2021 ONCA 515
72. [Greater Vancouver Transportation Authority v. Canadian Federation of Students](#), 2009 SCC 31
73. [BCCLA v. Canada \(Attorney General\)](#), 2019 BCCA 228
74. [Doucet-Boudreau v. Nova Scotia \(Minister of Education\)](#), [2003] 3 SCR 3
75. [Environnement Jeunesse c. Procureur général du Canada](#), 2021 QCCA 1871
76. [Environnement Jeunesse c. Procureur général du Canada](#), 2022 CanLII 67615 (CSC)
77. [La Rose v. Canada](#), 2020 FC 1008
78. [Misdzi Yikh v. Canada](#), 2020 FC 1059

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79. [Neubauer et al v Germany](#), (2021) Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (Germany) [[unofficial English Translation](#)]
80. [The State of the Netherlands \(Ministry of Economic Affairs and Climate Policy\) v Stichting Urgenda](#), (2019) 19/00135
81. Bundesverfassungsgericht [Federal Constitutional Court], 24 March 2021, [Neubauer et al v Germany](#), (2021) Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (Germany), at 192, 225 [[unofficial English Translation](#)]
82. [Friends of the Irish Environment v Ireland](#), [2020] IESC 49 (Supreme Court of Ireland) (challenge to level of detail in climate plan)
83. [Notre Affaire à Tous et al v France](#), [2021] No 1904967, 1904968, 1904972, 1904976/4-1 [[unofficial English translation](#)]
84. [Thomson v Minister for Climate Change Issues](#), [2017] NZHC 733

SECONDARY SOURCES

85. ["Feeling the Heat: Climate Litigation under the Canadian Charter's Right to Life, Liberty, and Security of the Person"](#) (2018) 42:4 Vt L Rev 689
86. J. Cameron, ["Positive Obligations under sections 15 and 7 of the Charter: A Comment on Gosselin v. Québec"](#) (2003), 20 S.C.L.R. (2d) 65-92
87. H. Stewart, *Fundamental Justice* (2nd ed)
88. N. Chalifour, J. Earle & L. Macintyre, ["Coming of Age in a Warming World: The Charter's Section 15\(1\) Equality Guarantee and Youth-Led Climate Litigation"](#) (2021) 17 J L & Equality 1
89. David W-L Wu, ["Tsilhqot'in Nation as a Gateway Towards Sustainability: Applying the Inherent Limit to Crown Land"](#) (2015) 11 JSDLP 124
90. ["Report of the International Law Commission to the General Assembly on the work of its seventy-third session"](#) (UN Doc A/77/10), Chapter IV
91. [Yearbook of the International Law Commission 1976](#)
92. L. Collins and L. Sossin, ["Approach to Constitutional Principles and Environmental Discretion in Canada"](#) (2019) 52:1 U.B.C.L. Rev. 239
93. K. Roach, ["Judicial Remedies for Climate Change"](#) (2021) 17 J L & Equality 105

**SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY - LAWS**

THE CONSTITUTION ACT, 1982

Primacy of Constitution of Canada

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

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* 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

Life, liberty and security of person

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.

Equality before and under law and equal protection and benefit of law

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.

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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

Targets

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.

Climate change plan

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. 2018, c. 13, s. 4 (1).

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, CHAPTER 7

Emission reduction targets

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.

Increase

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

Interim targets

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

Temperature goals

(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.

Courts of Justice Act
R.S.O. 1990, CHAPTER C.43

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b) order a new trial;
- (c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

Appellants

Respondent

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at TORONTO

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