Court of Appeal File No.: COA-23-CV-0457
Court File No. CV-19-00631627-0000

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-MENDARD, SHELBY GAGNON, ALEXANDRA NEUFELDT, MADISON DYCK and LINDSAY GRAY

Appellants
(Applicants)

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent
(Respondent)

FACTUM OF THE INTERVENOR, THE CANADIAN CIVIL LIBERTIES ASSOCIATION

November 6, 2023

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1

Andrew Lokan (31629Q)
Tel:416.646.4300
E: andrew.lokan@paliareroland.com

Danielle Glatt (65517N)
Tel:416.646.7440
E: danielle.glatt@paliareroland.com

Lawyers for the Intervenor,
The Canadian Civil Liberties Association

TO:

STOCKWOODS LLP
Toronto- Dominion Centre
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Nader R. Hasan (54693W)
E: naderh@stockwoods.ca
Tel: 416.593-1668

Justin Safayeni (58427U)
E: justins@stockwoods.com
Tel: 416.593-3494

Spencer Bass (75881S)
E: spencerb@stockwoods.com
Tel: 416.593-9345

ECOJUSTICE
77 Bay Street, Suite 1910
Toronto, ON M5G 2C8
Tel: 416.368.7533

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

Danielle Gallant (81328Q)
E: dgallant@ecojustice.com

Julie Croome (56747C)
E: jcroome@ecojustice.com

Reid Gomme(84568F)
E: rgomme@ecojustice.com

Bronwyn Roe(63840R)
E: broe@ecojustice.ca

Lawyer for the Appellants

AND TO:

MINISTRY OF THE ATTORNEY GENERAL
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M5G 1J5

S. Zachary Green (48066K)
E: Zachary.green@ontario.ca
Tel: 416.992.2327

Padraic Ryan (61687)
E: Padraic.ryan@ontario.ca
Tel: 647.588.2613

Sean Kissick (84753L)
Sean.d.kissick@ontario.com

Lawyers for the Respondent

AND TO: **BORDEN LADNER GERVAIS LLP**
22 Adelaide Street West, Suite 3400
Toronto, ON M5H 4E3

Teagan Markin (74337R)
tmarkin@blg.com
T:416.367.6728

Nadia Effendi (49004T)
neffendi@blg.com
T:416.367.6728

Lawyers for the Intervenor,
British Colombia Civil Liberties Association

AND TO: **ASSEMBLY OF FIRST NATIONS**
55 Metcalfe Street
Ottawa, on K1P 6L5

Stuart Wuttke (52078G)
swuttke@afn.ca

Adam Williamson(62751G)
awilliamson@afn.ca

Lacey Kassis(67528C)
lkassis@afn.ca

Lawyers for the Intervenor,
Assembly of First Nations

AND TO: **GOLDBALT PARTNERS LLP**
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Daniel Sheppard(59074K)
dsheppared@goldblattpartners.com

Erica Cartwright (82644B)
ecartwright@goldblattpartners.com

Lawyers for the Intervenor,
Canadian Association of Physicians for the Environment

AND TO: **PETER A. ALLARD SCHOOL OF LAW**
The University of British Columbia
Allard Hall- 1822 East Mall
Vancouver, British Columbia V6T 1Z1

Hassan M. Ahmad (64300K)
ahmad@allard.ubc.ca

Brooke MacKenzie (64135P)
brooke@brookemackenzie.ca

Lawyers for the Intervenor,
Citizens for Public Justice

AND TO: **HENEIN HUTCHISON ROBITALLE LLP**
235 King Street East
Toronto, ON M5A 1J9

Ewa Krajewska (57704D)
ekrajewska@hhllp.ca

Lawyers for the Intervenor,
David Centre for Constitutional Right

AND TO: **WEST COAST ENVIRONMENTAL LAW**
509 Richards Street, #700
Vancouver, BC V6B 2Z6

Anna Johnston (509953)
ajohnston@wcel.org

Andrew Gage (503343)
agage@wcel.org

Lawyers for the Intervenors,
Environmental Defence Canada Inc. and West Coast Environmental Law Association

AND TO: **BEAMISH LAW**
197 Spadina Avenue, Suite 402
Toronto, ON M5T 2C8

Sarah Beamish(70528B)
sarabeamish@beamishlaw.com

Veromi Arsiradam(85343W)
veromiarsiradam@beamishlaw.com

Lawyers for the Co- Intervenor,
Greenpeace Canada and Stichting Urgenda

AND TO: **Meaghan Daniel (56078V)**
6694 Rue Mazarin
Montreal, QC H4E 2X5

meg@meaghandaniel.com

Lawyers for the Intervenor,
For Our Kids/ For Our Kids Toronto

AND TO: **JFK LAW LLP**
100 King Street West, Suite 5600
Toronto, ON M5X 1C9

Robert Janes, KC (33646P)
Tel: (250) 405-3466
rjanes@jfklaw.ca

Laura Koerner-Yeo (75765B)
Tel: (647) 805-5675
lkoerneryeo@jfklaw.ca

Lawyers for the Intervener,
The Grand Council of Treaty #3

AND TO: **NICOLAS M. ROULEAU PROFESSIONAL CORPORATION**
41 Burnside Dr.
Toronto, ON M6G 2M9

Nicolas M. Rouleau (54515D)
Tel: (416) 885-1361
RouleauN@gmail.com

Vibhu Sharma (70130V)
Tel: (647) 668-3072
SharmaVibhu@outlook.com

Lawyers for the Interveners,
Canadian Lawyers for International Human Rights and Center for International Environmental Law

AND TO:

Nathalie Chalifour (37766O)
Erin Dobbelsteyn (65868S)
Tel: (613) 562-5800 x 3331
natchali@uottawa.ca
edobb061@uottawa.ca

Lawyers for the Interveners,
Friends of the Earth Canada

Table of Contents

PART I. OVERVIEW 1
PART II. FACTS 1
PART III. STATEMENT OF ARGUMENT 3
A. The Positive/Negative Rights Distinction is Artificial and Should Not be Applied 3
B. If a Positive Rights Analysis is Applied, the Existing s. 7 Framework can be Applied without Major Adaptation 4
1. Distinctive Features of Climate Change must be taken into account 4
2. Section 7 is Compatible with Positive Rights Claims 5
C. The Court has Jurisdiction and Institutional Competence to Retain Supervisory Oversight 7
PART IV. ORDER SOUGHT 10
SCHEDULE A – AUTHORITIES CITED 11
SCHEDULE B – RELEVANT STATUTES 13

PART I. OVERVIEW

1. Climate change poses an unprecedented threat to the life and health of all people in Ontario. This appeal challenges the constitutionality of legislative measures to address climate change that the Appellants say are woefully inadequate. The Canadian Civil Liberties Association (the "**CCLA**") intervenes as a friend of the court to address the analytical approach under s. 7 of the *Charter* and the proper approach to *Charter* remedies in this context.

2. The CCLA makes three submissions:

   (a) the negative/positive rights distinction is manipulable and artificial, and should not be applied to s. 7;

   (b) alternatively, if the "positive rights" analysis applies, existing doctrine can be applied without major adaptation; and

   (c) the Court has jurisdiction and institutional competence to retain supervisory jurisdiction if a breach of the *Charter* is found.

PART II. FACTS

3. The CCLA takes no position on any issue of disputed fact in this case.

4. In this application, the Appellants submitted that Ontario's reduced greenhouse gas ("**GHG**") emissions target (the "**Target**") – set pursuant to section 4(1) of the 2018 *Cap and Trade Cancellation Act* (the "**Act**") – infringed the ss. 7 and 15 *Charter* rights of Ontario's young people and future generations. The Appellants argued that climate change poses "dangerous and existential risks to the life and well-being of Ontarians and the world" and that the Target "effectively authorizes an overall amount of GHG that, in turn, will lead to section 7 deprivations"

of life and security of the person.[1] According to the Supreme Court of Canada ("**SCC**"), climate change "is a threat of the highest order to the country"[2].

5. The Honourable Justice Vermette ("**Application Judge**") dismissed the application. She found that although the issues raised were justiciable, the Appellants had not established any violation of ss. 7 or 15. In characterizing the state conduct at issue, she held that the Target was not a form of positive state action that itself could constitute a *Charter* violation, as it did not have the effect of "authorizing, incentivizing, facilitating and creating the very level of dangerous GHG that will lead to catastrophic consequences of climate change for Ontarians" as the Appellants argued.[3] Rather, the Target was merely "meant to guide and direct subsequent state actions with respect to the reduction of GHG in Ontario."[4] As such, for the Target to constitute a violation of the Appellants' s. 7 rights would require that "section 7 impos[e] positive obligations on the state."[5] The Application Judge further found that although the Appellants had made a "compelling case that climate change and the existential threat that it poses to human life and security of the person present special circumstances that could justify the imposition of positive obligations under section 7," she need not decide the issue because "any deprivation of the right to life or security of the person is not contrary to the principles of fundamental justice relied upon by the [Appellants]."[6] She held that in any event, in a positive rights case "it is very likely that a different framework of [s.7] analysis would need to be adopted."[7] She made no findings with respect to remedies.

[1] *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316 ("*Mathur*") at para. 48.
[2] *References re. Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 455 D.L.R. (4th) 1 ("*GHG Reference*") at para. 167.
[3] *Mathur*, 2023 ONSC 2316 at para. 122.
[4] *Mathur*, 2023 ONSC 2316 at para. 123.
[5] *Mathur*, 2023 ONSC 2316 at para. 124.
[6] *Mathur*, 2023 ONSC 2316 at paras. 138, 142.
[7] *Mathur*, 2023 ONSC 2316 at para. 139.

PART III. STATEMENT OF ARGUMENT

A. The Positive/Negative Rights Distinction is Artificial and Should Not be Applied

6. The CCLA submits that the distinction between positive and negative rights cases is manipulable and artificial and should not be applied outside of s. 2(b), in the unique circumstances reviewed by the Supreme Court of Canada in *Toronto (City) v. Ontario (Attorney General)*.[8]

7. In the decision below, the Application Judge stated that "it is very likely that a different framework of analysis would need to be adopted for [positive rights] claims" and suggested that "some of the general concepts developed under section 2 [in the *City of Toronto* case] with respect to positive claims may also be relevant under section 7". To the extent that the test developed in *Baier v. Alberta*[9] persists, it must be confined to the context of s. 2(b), where the majority of the SCC adverted to the practical "necess[ity]" of placing a higher onus on the claimant "given the ease with which [they] can typically show a limit to free expression under the *Irwin Toy* test."[10]

8. Whether the positive/negative rights framing survives outside the s. 2(b) context was a contested issue in *City of Toronto* that remained unresolved.[11]

---

[8] *City of Toronto v. Attorney General of Ontario*, 2021 SCC 34, 462 D.L.R. (4th) 1 ("*City of Toronto*"); The CCLA does not necessarily accept the majority's analysis and the CCLA should not be taken as agreeing with the distinction in the s.2(b) context, but that is not an issue in this Court.

[9] 2007 SCC 31, 283 D.L.R. (4th) 1.

[10] *City of Toronto*, 2021 SCC 34, 462 D.L.R. (4th) at para. 18; Imposing an exceptional, high threshold to succeed in claims asserting a "positive right" effectively immunizes those choices from review, especially in cases like this where the cumulative effect of those choices results in a scheme whose design – either by purpose or in effect – substantially interferes with the exercise of constitutional rights. A more onerous standard of analysis is not needed to address positive state obligations under section 7 of the Charter.

[11] The dissenting justices argued against applying *Baier* to the claim before the Court, given that the Court had elsewhere adopted a "unified purposive approach to rights claims" – including under s. 2(d) – "whether the claim is about freedom from government interference in order to exercise a right, or the right to governmental action in order to get access to it": *City of Toronto*, 2021 SCC 34, 462 D.L.R. (4th) 1 at para. 152. The majority left the issue for another day: paras. 14-21.

9. Outside of s. 2(b), and in particular in this context, there are several problems with the distinction between positive and negative rights. The distinction obscures the reality that: (a) the state is always making deliberate choices when it prescribes what is required, prohibited, or permitted by law; and (b) those choices directly impact how people exercise their rights and freedoms under the *Charter* – including whether they hold or can exercise them at all. Climate change is distinctive in that the state comprehensively regulates most if not all activities that materially contribute to GHG emissions, precisely because of their "externalities". Virtually all such activities require licenses or permits and/or are subject to regulatory limits. As the SCC has repeatedly observed, there is no clear way to delineate between positive and negative rights.[12] Thus, deprivations of life and security of the person arising from climate change should be viewed as state infringements, if they are contrary to the principles of fundamental justice.

B. If a Positive Rights Analysis is Applied, the Existing s. 7 Framework can be Applied without Major Adaptation

10. In the alternative, if the positive/negative rights distinction is maintained, any s. 7 analysis should consider certain distinct circumstances relating to climate change, each of which militates against setting too high a threshold for finding a breach of the *Charter*. Further, the s. 7 framework can be applied to accommodate positive rights claims without major adaptation.

1. Distinctive Features of Climate Change must be taken into account

11. In this context, distinctive features of climate change that should be considered include:

(a) Climate change presents a ***collective action*** problem that cannot be adequately addressed by private actors who are unlikely to agree on and/or adhere to

[12] See, e.g., *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, 105 D.L.R. (4th) 577 at p. 1039; *Fraser v. Ontario (Attorney General)***,** 2011 SCC 20, [2011] 2 S.C.R. 3 at paras. 69-70**.**

coordinated measures necessary to meaningfully address the issue. Therefore, government action is required;

(b) Climate change requires long-term solutions that are ***structurally misaligned*** with the demands of the short-term electoral cycle. Governments may have the best of intentions to address GHG emissions, but other more immediate priorities tend to intervene. Governments have proved vulnerable to the temptation to put off the hardest work until some point in the future, several elections away;

(c) Climate change may serve to ***amplify and exacerbate rights infringements***, especially as its impacts become more drastic; and

(d) If not addressed, the burden of climate change will fall disproportionately on young people and future generations, and vulnerable or marginalized people – a '***discrete and insular minority***' whose interests may not be protected by the political process.

12. These features suggest that courts should not take an unduly deferential approach when considering whether a legislative scheme or lacuna imperils life, liberty or security of the person.[13]

2. Section 7 is Compatible with Positive Rights Claims

13. Section 7 is compatible with positive rights claims, whether it is interpreted through the ***unitary approach*** (which confers only one right: not to be deprived of life, liberty or security of

---

[13] See generally, UN Committee on the Rights of the Child, "General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change" Aug. 22, 2023, CRC/C/GC/26), paras. 20 right to life threatened by environmental degradation, 14-15 right to non-discrimination threatened because "[t]he impact of environmental harm has a discriminatory effect on certain groups of children, especially Indigenous children, children belonging to minority groups, children with disabilities and children living in disaster-prone or climate-vulnerable environments"; 73 "Children are far more likely than adults to suffer serious harm, including irreversible and lifelong consequences and death, from environmental degradation.". Canada is a signatory to the United Nations' *Convention on the Rights of the Child*; the *Charter* should be interpreted in a manner that gives effect to Canada's international obligations: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, 283 D.L.R. (4th) 40 at para. 69.

the person except in accordance with the principles of fundamental justice) or the ***two-rights approach*** (which confers two rights: 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).[14]

14. The conventional (unitary) approach to s.7 would allow a breach to be found where the state's choice of means to address climate change is ineffectual. The state is sufficiently implicated in the resulting deprivation of life and security of the person that it may be seen as responsible, even if it is not the sole contributor.[15] Alternatively, the word "deprivation" should not be interpreted so narrowly as to exclude activities by non-state actors that are heavily regulated by the state.

15. Further, recognized principles of fundamental justice may be adapted to this case. As noted above, the burden of ineffectual action to address climate change will fall disproportionately on marginalized groups with little or no political power (discrete and insular minorities).[16]

16. Both arbitrariness and gross disproportionality may be engaged with some adaptation. If the state has a positive obligation to address climate change, then it cannot do so in an arbitrary or grossly disproportionate manner. An ineffectual choice of means may be considered arbitrary

---

[14] *Re. B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500 and 523: The conventional reading of s. 7 is that it only confers one right: not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice (the unitary approach). However, in *Re B.C. Motor Vehicle Act*, Lamer J. expressly left this issue open, and Wilson J. appeared to accept the two-right interpretation, because she stated that even if fundamental justice were satisfied s. 1 would also have to be satisfied.

[15] This is similar to the analysis in *Dunmore v. Ontario*, 2001 SCC 94, 207 D.L.R. (4th) 193 at paras. 23-29, where the majority found that underinclusive labour legislation that excluded agricultural workers substantially interfered with their freedom of association, in part because "[o]nce the state has chosen to regulate a private relationship such as that between employer and employee, … it is unduly formalistic to consign that relationship to a "private sphere" that is impervious to *Charter* review" (para. 29).

[16] The SCC has long recognized the existence of "discrete and insular minorities" lacking in political power, as a marker of discrimination: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, pp. 151-153, 157, 183, citing *United States v. Carolene Products Co*., 304 U.S. 144 (1938), at pp. 152-53, fn. 4 (existence of "discrete and insular minorities" may require "more searching judicial inquiry").

and/or grossly disproportionate if it substantially fails to protect the s.7 interests of politically powerless minorities.[17] If an *ad hoc*, unreasonable administration of a waitlist for required services can be considered arbitrary,[18] a legislative scheme that results in deprivations of s.7 rights falling most heavily on a discrete and insular minority can hardly be in a better position. Likewise, one form of gross disproportionality may be a grossly disproportionate impact on vulnerable groups.[19]

17. Under the "two rights" approach, the right to life, liberty, and security of the person is seen as a freestanding right (an interpretation supported by the French text, as noted by Arbour J. in *Gosselin v. Québec (A.G.)*), and there is no need to show state "deprivation".[20] If this approach is adopted, the state's failure to safeguard the s.7 interests of Ontarians, and in particular children and youth, is a breach of s.7 in and of itself. Notably, however, the distinctive features of climate change set out above that support judicial intervention in this case may not apply in all contexts.

C. The Court has Jurisdiction and Institutional Competence to Retain Supervisory Oversight

18. If the Appellants establish breaches of s. 7 and or s. 15, the court should not limit its remedy to declaratory relief but should also retain supervisory jurisdiction in this matter.[21]

---

[17] These considerations overlap with the s.15 arguments, but may also be raised in the interpretation of s.7: *New Brunswick (Min. Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, at paras. 112-115 *per* L'Heureux-Dubé J. (Gonthier and McLachlin JJ. concurring).

[18] *Leroux v. Ontario*, 2023 ONCA 314, 481 D.L.R. (4th) 502 at paras. 83, 88.

[19] Nathalie Chalifour and Jessica Earle, "Feeling the Heat: Climate Litigation under the *Charter*'s Right to Life, Liberty and Security of the Person" (2017) 42 Vermont Law Review 689 at p. 762.

[20] This approach was explored by Arbour J. in her dissenting judgment in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, 221 D.L.R. (4th) 257 at paras. 336-343.

[21] The risk of requiring under-resourced plaintiffs to relitigate if/when the government's response to a declaration is unsatisfactory is amplified in the context of climate change due to the nature of the harm that may befall youth and future generations: the longer governmental failure to adequately reduce GHG emissions persists, the more significant the future harm to future generations may be. It is not a scenario in which an inadequate government response may be remedied by subsequent litigation (however costly). Rather, it is a scenario in which time is of the essence – the longer the delay in mounting an adequate governmental response, the more severely the rights and interests of youth and future generations will be harmed. See, e.g., *Little Sisters v. Canada*, 2000 SCC 69, 193 D.L.R. (4th) 193.

19. The court has both the jurisdiction to retain supervisory oversight and the institutional competence to manage such supervision. The grave and urgent context of this case and the broad remedial discretion conferred on the court by s. 24(1) call for a tailored remedy that will result in immediate remediation of the harm.

20. It is uncontroverted that the impacts of climate change have reached critical levels. The SCC held in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* that declarative relief may well be inappropriate where "governments have failed to comply with their … constitutional obligations to take positive action in support of [a] right".[22] The distinctive features of climate change – it is a collective action problem, structurally misaligned with electoral politics, that amplifies and exacerbates rights infringements, and the burdens of policy failure fall on discrete and insular minorities – support broader remedies.

21. The circumstances of this case call for the court's use of discretion to fashion relief that proactively remediates the harm caused by the insufficient emissions target. A declaration coupled with ongoing supervisory jurisdiction by the court – not unlike the remedy at issue in *Doucet-Boudreau* – would be an appropriate means of ensuring accountability by the government in delivering on its Charter obligations. Indeed, such a remedy "fits squarely within the court's role to ensure governments protect and uphold the constitution."[23]

22. In deciding whether to retain supervisory jurisdiction the Court should consider whether:

---

[22] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, 232 D.L.R. (4th) 577 ("*Doucet-Boudreau*") at para. 66.

[23] Paul S. Rouleau and Linsey Sherman, "*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot?" (2010) 41:2 Ottawa Law Review 171 at 186.

(a) the facts of the case reveal some recalcitrance on the part of public bodies to comply with their constitutional obligations;

(b) there is "some urgency" in the need for the remedy;

(c) ensuring respect for a right will require a prolonged implementation process as opposed to a simple, discreet act; and

(d) there is "substantial [agreement] as to the manner in which a right should be respected".[24]

23. Here, each of these factors weighs in favour of ongoing supervisory jurisdiction. Further, in a case like the present, the urgency factor ought to be given considerable weight. Climate change "represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries."[25] Its impacts on life, liberty and security do not lend themselves to the typical, years-long timelines of ordinary constitutional litigation. Nor do they lend themselves to a single judicial order. As noted in the court below, "every incremental increase in global temperature increases the likelihood of large-scale, devastating climate tipping points being crossed."[26]

24. Finally, ongoing court supervision is more appropriate where there is little disagreement as to the ends sought and the policy means of achieving them.[27] There is broad agreement in this case around "the fact of anthropogenic global climate change, its risks to human health and well-being, [and] the desirability of … taking action to mitigate its adverse effects."[28] The policy

---

[24] Rouleau and Sherman at 197-201.
[25] *GHG Reference*, 2021 SCC 11, 455 D.L.R. (4th) 1 at para. 13.
[26] *Mathur*, 2023 ONSC 2316 at para. 24.
[27] Rouleau and Sherman at 200-201.
[28] *Mathur*, 2023 ONSC 2316 at para. 4.

tension in this case is akin to that in *Doucet-Boudreau*, where the government agreed that "the applicants had the right to send their children to French language schools" but "simply asserted that given budgetary constraints, it should be entitled to continue delaying implementation."[29]

25. Granting the court ongoing supervisory jurisdiction in this case does not equate to the court "being called upon to referee a policy debate." Rather, it equips the court with the ability to ensure that Ontario's approach remains constitutionally compliant in real time. This is particularly important in the climate change context for the reasons described at paragraph 11 above.

26. Ongoing supervisory oversight is manageable and consistent with constitutional remedial jurisprudence domestically[30] and abroad.[31]

PART IV. ORDER SOUGHT

27. The CCLA does not seek costs and asks that no costs be awarded against it. The CCLA takes no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of November, 2023.

Andrew Lokan/ Danielle Glatt
PALIARE ROLAND ROSENBERG ROTHSTEIN
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

[29] Rouleau and Sherman at 201.

[30] See: *Doucet-Boudreau*, 2003 SCC 62; *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805; and *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580 for domestic examples. Supervisory jurisdiction is also routinely retained by the Court in Companies Creditors Arrangement Act (CCAA) matters, Bankruptcy and Insolvency matters, Canadian human rights tribunal matters and in the class action context.

[31] In addition to international climate change jurisprudence, a parallel can be drawn between school desegregation jurisprudence in the US and the response to the harms of climate change. American courts famously adopted strong remedies in response to the landmark *Brown v. Board of Education* with the US Supreme Court instructing trial courts to "take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases" *Brown v. Board of Educ. Of Topeka, Kan.*, 75 S.Ct. 753 at 301 (1955). The vigour with which courts were called upon to address desegregation may be seen as reflective of the consensus that the issue of racial segregation required urgent remediation. The context of climate change is similar – both in terms of consensus that urgent remediation is required and the seriousness of the issue.

SCHEDULE A – AUTHORITIES CITED

Jurisprudence

1. *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316
2. *References re. Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 455 D.L.R. (4th) 1
3. *City of Toronto v. Attorney General of Ontario*, 2021 SCC 34, 462 D.L.R. (4th) 1
4. *Baier v. Alberta*, 2007 SCC 31, 283 D.L.R. (4th) 1
5. *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995
6. *Fraser v. Ontario (Attorney General)***,** 2011 SCC 20, [2011] 2 S.C.R. 3
7. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, 283 D.L.R. (4th) 40
8. *Re. B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486
9. *Dunmore v. Ontario*, 2001 SCC 94, 207 D.L.R. (4th) 193
10. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
11. *United States v. Carolene Products Co*., 304 U.S. 144 (1938)
12. *New Brunswick (Min. Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46
13. *Leroux v. Ontario*, 2023 ONCA 314, 481 D.L.R. (4th) 502
14. *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, 221 D.L.R. (4th) 257
15. *Little Sisters v. Canada*, 2000 SCC 69, 193 D.L.R. (4th) 193.
16. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, 232 D.L.R. (4th) 577
17. *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805
18. *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580
19. *Brown v. Board of Educ. Of Topeka, Kan.*, 75 S.Ct. 753 (1955)

Secondary Sources

20. Nathalie Chalifour and Jessica Earle, "Feeling the Heat: Climate Litigation under the *Charter*'s Right to Life, Liberty and Security of the Person" (2017) 42 Vermont Law Review 689

21. Paul S. Rouleau and Linsey Sherman, "*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot?" (2010) 41:2 Ottawa Law Review 171

International Materials

22. UN Committee on the Rights of the Child, "General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change" Aug. 22, 2023, CRC/C/GC/26

23. United Nations Convention on the Rights of the Child (1989) Treaty no. 27531. United Nations Treaty Series, 1577, pp. 3-178.

SCHEDULE B – RELEVANT STATUTES

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

Targets, Plan and Progress Reports

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.

Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

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 Rights

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.

Affirmative action programs

15 (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Enforcement

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.

Court of Appeal File No.: COA-23-CV-0457
Court File No. CV-19-00631627-0000

SOPHIA MATHUR, et al..	-and-	**HIS MAJESTY THE KING IN THE RIGHT OF ONTARIO**
Appellants		Respondent

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE INTERVENOR,
THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1

Andrew Lokan (31629Q)
Tel:416.646.4300
E: andrew.lokan@paliareroland.com

Danielle Glatt (65517N)
Tel:416.646.7440
E: danielle.glatt@paliareroland.com

Lawyers for the Intervenor,
The Canadian Civil Liberties Association