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A Landmark Decision in Canadian *Charter*-based Climate Litigation: *Mathur v Ontario*, 2024 ONCA 762

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Case commented on: *Mathur v Ontario*, 2024 ONCA 762 (CanLII)

The Ontario Court of Appeal recently released its decision in *Mathur v Ontario*, 2024 ONCA 762 (CanLII). ABlawg readers will know that this is one of three *Charter*-based climate lawsuits currently making their way through Canadian courts. The other two are *La Rose v Canada*, 2023 FCA 241 (CanLII), which involves a challenge to the federal government's climate policies, and *Dykstra et al v Saskatchewan Power Corporation*, which involves a challenge to the Saskatchewan government's and SaskPower's decisions to expand gas-fired electricity generation (see our previous post on *La Rose* here). In this post, we contrast the trial and appellate reasons in *Mathur* (and where relevant, in *La Rose* FCA) and offer our commentary on several key issues in this litigation.

Judicial History: Ontario Superior Court of Justice

In *Mathur v His Majesty the King in Right of Ontario*, 2023 ONSC 2316 (CanLII), the Applicants challenged Ontario's greenhouse gas (GHG) emissions reduction target developed pursuant to the Ford government's *Cap and Trade Cancellation Act, 2018*, SO 2018, c 13 (*CTCA*) as contrary to their s 7 (security of the person) and s 15 (equality) rights under the *Canadian Charter of Rights and Freedoms* (*Charter*). The application was permitted to proceed to a hearing on the merits after surviving the Ontario government's motion to strike, but was unsuccessful at trial.

Justice Marie-Andrée Vermette of the Ontario Superior Court of Justice (2023 ONSC 2316) found in favour of the Applicants on a number of important issues, including that the *Charter* claims are indeed justiciable (i.e., capable of judicial resolution, at paras 106 – 112) and that "Ontario's decision to limit its [GHG reduction] efforts to an objective that falls severely short of the scientific consensus…is sufficiently connected to the prejudice that will be suffered by the Applicants" (i.e., they were able to demonstrate the necessary causal link between the impugned state conduct and the alleged harms, at paras 143 – 151). However, Justice Vermette ultimately concluded that there was no violation of s 7. This was because the "Applicants have not demonstrated that any deprivation of their rights under s 7 of the Charter was contrary to the principles of fundamental justice …" (at para 171), as required by the second part of that section. Neither was there a breach of s 15, principally because any disproportionate impact that would be experienced by the Applicants as youth would be caused by climate change itself and not by Ontario's GHG reduction target (at paras 177 – 183).

As noted by the Court of Appeal (and further discussed below), much of Justice Vermette's analysis hinged on her characterization of the Applicants' claims as "positive rights" claims. Such claims are generally understood as requiring the state to take some action, whereas the *Charter* has been traditionally conceived of as protecting "negative rights", i.e., protecting persons *against* state interferences with their rights. Justice Vermette stated as follows:

> [132] In my view, this Application is seeking to place a freestanding positive obligation on the state to ensure that each person enjoys life and security of the person, in the absence of a prior state interference with the Applicants' right to life or security of the person. As pointed out by Ontario, the Applicants are not seeking the right to be free from state interference, i.e., they do not seek to be free from the Target or the Plan. Rather, they would prefer a more restrictive Target and Plan, and this is what they seek…
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> [134] I disagree with the Applicants that this is not a positive rights case because "Ontario's participation in creating the underlying harm, and its creation of the Target and the Plan pursuant to the *CTCA* triggers an obligation to ensure the resulting scheme is constitutionally compliant." The nature of Ontario's "participation in creating the underlying harm" in this case is no different than the state's "participation" in creating a number of social issues faced by our society in relation to poverty, homelessness, etc. Despite this, the Supreme Court found in *Gosselin* that section 7 does not impose a positive state obligation to guarantee adequate living standards, even in circumstances where the government had created a social assistance scheme.
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> [135] Further, the Applicants' argument that "Ontario is actively creating, incentivizing and facilitating GHG through its various agencies, programs, and policies" is an attempt to bring through the back door unspecified state actions, programs and policies that have not been challenged in this Application. The Applicants have made the strategic choice to challenge only the Target and subsection 3(1) of the *CTCA* in this Application and, consequently, they cannot shift the analysis from these impugned actions to other state actions. While the Court of Appeal in *Tanudjaja* left the door open with respect to "constitutional violations caused by a network of government programs", particularly when the issue may otherwise be evasive of review, this is not how this Application was structured.

This positive rights framing had downstream effects on Justice Vermette's assessment of both the s 7 claim (especially in relation to the principles of fundamental justice), and the s 15 claim, as explained by the Court of Appeal and further discussed below.

The Court of Appeal's Decision

In a decision written by "the Court" (Justices Lois Roberts, Steve Coroza, and Sally Gomery), the Court of Appeal allowed the appeal, having concluded that Justice Vermette erred in her framing and analysis of the *Charter* claims. Rather than deciding those issues itself, however, it remitted the application for a new hearing before the same or another justice of the Superior Court, in accordance with its reasons. Because they ordered a new hearing, the Court of Appeal indicated

they took care to not decide the issues or limit the lower court's analysis (at para 8), accounting for the relative brevity of the judgment and limited discussion.

Not a Positive Rights Claim

The Court of Appeal's decision begins by clarifying its stance on why it did not consider this to be a positive rights claim:

> [5] In our view, the application judge erred in her analytical approach. This is not a positive rights case. The application does not seek to impose on Ontario any new positive obligations to combat climate change. By enacting the *CTCA*, Ontario voluntarily assumed a positive statutory obligation to combat climate change and to produce the Plan and the Target for that purpose. Ontario was therefore obligated to produce a plan and a target that were *Charter* compliant. The application judge did not address whether Ontario failed to produce a plan and a target that was *Charter* compliant in accordance with its statutory mandate. As a result, the ss. 7 and 15 *Charter* issues raised by the appellants remain to be determined.

Further on in its reasons, the Court of Appeal grounds its position in two Supreme Court of Canada decisions: *Chaoulli v Québec (Attorney General)* 2005 SCC 35 (CanLII) and *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (CanLII). The Court of Appeal summarized *Chaouilli* – a *Charter* challenge involving health care – as standing for the proposition that "while the *Charter* does not confer a freestanding positive right under s. 7 of the *Charter* to insist on government action… 'where the government puts in place a scheme' where it undertakes legislated actions, 'that scheme must comply with the *Charter*'" (at para 40). Similarly, with respect to s 15, the Court of Appeal quoted with approval a passage from *Alliance*, a Charter challenge to Quebec's pay equity law*:*

> The result of finding that Quebec's amendments breach s. 15 in this case is not, as Quebec suggests, to impose a freestanding positive obligation on the state to enact benefit schemes to redress social inequalities. Nor does it undermine the state's ability to act incrementally in addressing systemic inequality. But s. 15 does require the state to ensure that whatever actions it does take do not have a discriminatory impact…
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> (*Alliance* at para 42)

Having determined that this was not a positive rights claim, the Court of Appeal went on to identify the downstream errors that this framing had on Justice Vermette's Charter analysis. Under s 7, her incorrect framing affected her approach to arbitrariness and gross disproportionality as part of the analysis of whether any deprivations of life or security of the person were in accordance with the principles of fundamental justice (at paras 49 – 52).

Similarly, under s 15 Justice Vermette "erred in her assessment … principally because she again viewed the issue as a positive rights case" (at para 56). Ultimately, the Court of Appeal concluded that the "question before the application judge was not whether Ontario's Target did not go far enough in the absence of a positive obligation to do anything. Rather, she should have considered

whether, given Ontario's positive statutory obligation to combat climate change that it had voluntarily assumed, the Target was *Charter* compliant. She erred by failing to consider the correct question" (at para 53).

The Court of Appeal's analysis of this issue is welcome. Even the relatively well-accepted proposition from *Chaoulli, Alliance,* and earlier cases – that where the government puts in place a legislative scheme, its actions under that scheme must comply with *Charter* rights and freedoms – has proven difficult for courts to follow. Judicial reticence in this area has been particularly apparent in relation to s 15 equality rights, as seen in *Alliance* itself and a series of other recent Supreme Court decisions where there were strong dissents on the question of positive obligations under s 15 (for discussion of this topic by two of us, see e.g. *here*). This reticence was also seen in *La Rose*, where the Federal Court of Appeal allowed the litigation to proceed with amended pleadings on s 7 but not s 15. Justice Donald Rennie focused on the principle that governments are "free to address inequality incrementally" (at para 81) and characterized the plaintiffs' claim as being related to future inequalities and intergenerational inequity, such that it was not within the scope of the court's powers (at paras 82 – 83). Although present, these concerns did not rise to the same level with respect to the s 7 claim, which as we noted in our post on *La Rose* is difficult to reconcile.

The Ontario Court of Appeal's ruling in *Mathur* – effectively side-stepping the question of positive obligations – is more internally consistent and consistent with the case law in this area, although we acknowledge that this is an area of law where there is significant disagreement. The courts are a long way from recognizing freestanding positive obligations that are not tethered to existing statutory obligations but, at least insofar as *Mathur* is concerned, such arguments are for another time and place. In Ontario, and indeed in every province there is *currently* legislation and regulation aimed at reducing GHG emissions, albeit to varying levels of ambition. Such legislation – like all legislation in Canada – must be constitutionally compliant. And while we acknowledge the concerns expressed by some that this may tempt governments to repeal existing regimes (rather than ensuring that they are *Charter*-compliant), we suspect that such risks are easily overstated – at least in the climate change context. In the climate change context, such regimes are fundamentally tied not only to international agreements and obligations to reduced GHG emissions, but also to ongoing investor-driven efforts in the environmental, social, and governance (ESG) space. More concretely, and bearing in mind that the number of civil claims for climate-related harms grows every year, large GHG emitters are likely to be desirous of existing regimes to the extent that they may be invoked in attempts to shield emitters from potential liability (e.g., through the defence of statutory authorization). A comprehensive answer to this question would require its own post but, in any event, the repeal of such laws would be the time for making a positive obligations claim, buttressed by the reality of prior state involvement as discussed in *La Rose* (at paras 101 – 103).

Causation: Section 7 vs. Section 15

In order to establish a breach of *Charter* obligations, the plaintiff in any particular case must be able to show that there is a sufficient causal connection between the impugned government action (or inaction) and alleged deprivation of the plaintiff's *Charter* rights.

At trial, Justice Vermette dealt with causation separately for s 7 and s 15. In the context of s 7, she wrote as follows:

> In order for section 7 to be engaged, an applicant must show that the impugned law or state action is sufficiently connected to the prejudice suffered. This sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant. While a sufficient causal connection is sensitive to the context of the particular case, it requires a real, as opposed to a speculative, link. This standard is satisfied by a reasonable inference, drawn on a balance of probabilities. (Trial decision (2023 ONSC 4550), at para 143)

Ontario's position at trial was that the Applicants had not been able to establish "a causal link between the Target and a material increase in the risk of catastrophic climate consequences," principally because Ontario's emissions were insignificant in global terms and that any reduction in its emissions "would be unmeasurably small and would be vastly outweighed by emissions from other countries" (Trial decision, at para 61). Justice Vermette noted that this sort of argument had been rejected in other jurisdictions and instead elected to measure Ontario's efforts against the scientific consensus as to the reductions required globally "to limit global average surface warming to 1.5ºC and to avoid the significantly more deleterious impacts of climate change" (at para 144). She expressed this in the following terms:

> … in order to reduce its emissions by 45% by 2030 relative to the 2010 level, Ontario would have to reduce its emissions by approximately 52% below 2005 levels by 2030. This would require a 73% increase of the Target. Put differently, the reductions contemplated by the Target will only fulfil approximately 58% of the need to reduce GHG by approximately 45% below 2010 levels by 2030. (Trial decision, at para 144)

She found that the decision of Ontario to limit its efforts "is sufficiently connected to the prejudice that will be suffered by the Applicants and Ontarians should global warming exceed 1.5ºC. By not taking steps to reduce GHG in the province further, Ontario is contributing to an increase in the risk of death and in the risks faced by the Applicants and others with respect to the security of the person" (at para 147). While that contribution might be small, "it is real, measurable and not speculative" (at para 148). Justice Vermette went on to say that "Every tonne of CO_2 emissions adds to global warming and lead to an [sic] quantifiable increase in global temperatures that is essentially irreversible on human timescales" (at para 149).

The Court of Appeal did not interfere with this conclusion on causation (ONCA at para 44). Importantly, this represents the second, distinct legal context in which arguments about the insignificance of some subset of GHG emissions (e.g., Canadian emissions, provincial emissions) has been rejected by Canadian courts. They were first rejected by the Supreme Court of Canada in References re *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, in the context of assessing whether minimal national carbon pricing standards met the revised test for establishing a "matter of national concern" pursuant to Parliament's "peace, order and good government" (POGG) power (at para 188):

> … I reject the notion that because climate change is "an inherently global problem", each individual province's GHG emissions cause no "measurable harm" or do not have "*tangible* impacts on other provinces": Alta. C.A. reasons, at para. 324; I.F., Attorney General of Alberta, at para. 85 (emphasis in original). Each province's emissions are clearly measurable and contribute to climate change. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail.

When it came to s 15, Justice Vermette framed the causation issue as the obligation of the Applicants to "present sufficient evidence to prove that the impugned law, in its impact, creates or contributes to a disproportionate impact on the basis of a protected ground. The impugned law need not be the only or the dominant cause of the disproportionate impact" (Trial decision, at para 174). Justice Vermette then applied this test to the three different ways in which the Applicants framed the distinction based on age. The first framing claimed that "Young people are particularly susceptible to negative physical health impacts resulting from climate change, and youth will bear a disproportionate impact of the mental health impacts of climate change" (Trial decision, at para 177). Justice Vermette had no trouble accepting "that the evidence in this case shows that young people are disproportionately impacted by climate change" but concluded that

> … this disproportionate impact is caused by climate change, not by the Target, the Plan or the *CTCA*. As the Supreme Court stated in *Sharma* at paras. 40 and 63, section 15(1) of the *Charter* does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation, and leaving a gap between a protected group and non-group members unaffected does not infringe section 15(1). (Trial decision, at para 178)

The Applicants' second framing was to the effect that the "catastrophic impacts of climate change will worsen over time as global temperatures continue to rise. By virtue of their age, youth and future generations will bear the brunt of these impacts as they live longer into the future" (Trial decision, at para 177). This met with the same sort of response from Justice Vermette: "The worsening of the impacts of climate change are not caused by the Target, the Plan or the *CTCA*. The impacts of climate change would worsen in the absence of the Target, the Plan or the *CTCA* and such impacts are not worsening more because of the Target, the Plan or the *CTCA*" (Trial decision, at para 179).

Justice Vermette dealt with the third framing somewhat differently. That framing involved the claim that "Young people's liberty and future life choices are being constrained by decisions being made today over which they have no control" (Trial decision, at para 177). In this case, Justice Vermette concluded that the record was inadequate to support this claim although she also observed in causation terms that "the Target is not the reason why young people do not have control over decisions that are made today by the government and it leaves this "gap" unaffected" (Trial decision, at para 181).

The Court of Appeal was clearly troubled by the fact that Justice Vermette had reached different conclusions on causation with respect to the s 7 claims and the s 15 claims. As the Court noted,

"A claimant, in either a s. 7 or a s. 15 *Charter* claim, does not need to prove that the impugned state action is the only or the dominant cause of the prejudice suffered: *Bedford*, at para. 76; *Sharma*, at para. 45" (ONCA, at para 61). In sum:

> The application judge's conclusion about causation under s. 15 that climate change, and not the Target, the Plan or the *CTCA*, disproportionately impacts young people is difficult to reconcile with her conclusion about causation under s. 7, namely, that by failing to produce a Target that would further reduce greenhouse gas emissions, Ontario is contributing to an increase in the risk of death and in the risks disproportionately faced by the appellants and others with respect to the security of the person. The application judge did not explain this apparent inconsistency in light of her factual findings about the impact of climate change and Ontario's contribution to it that are necessarily the same under both issues. The judge hearing this matter afresh should be alive to this issue. (ONCA, at para 65)

We applaud this component of the Court of Appeal's decision as well. Just as decisions about positive obligations under ss 7 and 15 should be consistent, causation standards are similar for both sections, and an inconsistent conclusion on the cause issue is difficult to justify.

That being said, causation has been a particular problem in cases involving adverse effect discrimination and/or government inaction. In *R v Sharma*, 2022 SCC 39 (CanLII), for example, Justices Russell Brown and Malcom Rowe, writing for the majority, stated the causation requirement in terms of the law *increasing the gap* between the claimant group and others rather than simply leaving the gap unaddressed (at para 40; see a critique of this statement here). Having rejected the framing that Ontario's climate change target did not go far enough, the Court of Appeal in *Mathur* was able to avoid this problematic distinction from *Sharma*. But it may prove challenging in other climate change litigation where the issue can properly be framed as involving government inaction that adversely impacts particular groups.

At some point in the future, when discussing the type of adverse impact discrimination we see in *Mathur*, it may be helpful to recognize that the discrimination is intentional, even if there is no distinction on the face of the legislation. Adverse effects discrimination is intentional when the government knows or ought to know that their legislation or executive actions would probably affect groups (such as Ontario youth or Indigenous people) disproportionately but proceed anyway. The Ontario government's replacement of relatively strong GHG emissions reduction targets with one much weaker target allows more GHG to be emitted. Increased emissions and the increased impacts of climate change will most probably affect youth more negatively than others because youth live longer into the future – a fact the Ontario government must be taken to have known. The intentional nature of the change in legislation should make the disproportionate impact easier to see and harder to justify.

Remedies and the Separation of Powers in Climate and Energy Policy

In their claim, the Applicants sought an order "declaring their *Charter* rights have been violated and requiring Ontario to set a science-based emissions reduction target and to revise its climate change plan in accordance with international standards" (ONCA, at para 3; see also para 24). As

noted, the Court of Appeal declined to decide the case on the merits and sent it back to trial. The Court indicated that it was "not well placed to determine whether the declarations and directions sought should be granted" and noted that an amendment of pleadings and further evidence may be required to properly consider the arguments made by interveners (at para 7).

In its discussion of possible remedies, the Court of Appeal took the opportunity to address Ontario's argument, which is reflective of much of the critical public commentary regarding *Charter*-based climate litigation generally, that such litigation invites the judiciary to commandeer energy and climate policy: "Ontario sees this case as requesting that the court assume judicial control over environmental and climate policy" (at para 67). The trial judge did not comment on the remedies sought by the Applicants but agreed with the province that "the court did not have institutional capacity and legitimacy to determine … Ontario's "fair share" of the … carbon budget" (ONCA, at para 25).

While it is indisputable that applicants (in this case and the others) have been creative in the remedies they have sought, perhaps drawing their inspiration from similar and successful claims in other jurisdictions, the Court of Appeal signalled to all parties its awareness of the separation of powers issues at play and the role of *Charter* litigation in that context:

> [69] First, the appellants' requested relief includes declaratory relief, including a declaration that the Target violates their ss. 7 and 15 *Charter* rights, which may be ordered without the necessity of telling Ontario precisely what to do to make its Target *Charter* compliant. As the Supreme Court stated in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 47, a court can exercise its discretion to grant declaratory relief as a proper remedy and, "respectful of the responsibilities of the executive and the courts, … provide the legal framework for the executive to exercise its functions and to consider what actions to take … in conformity with the *Charter*."
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> (Emphasis added)

In our view, a declaratory remedy is the most probable outcome of this litigation. And while that may be a disappointment to some, bearing in mind the urgency and existential nature of the climate threat, we suggest that a declaration would be a significant outcome in its own right. Declaratory relief sets the parameters for future changes to law and policy and provides citizens with knowledge of how *Charter* rights are implicated in those decisions, which may be relevant at the ballot box.

The Science of Climate Change in the Courts of Law vs. the Court of Public Opinion

As a concluding thought, we cannot help but note that, as in all of the so-called Carbon Tax References, where none of the opposing provinces challenged the science of climate change (before the Courts of Appeal of Saskatchewan (at para 15), Ontario (at paras 7 and 11), Alberta (at para 1), and the Supreme Court of Canada (at para 167)), so too, here, Ontario "[did] 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" (at para 31).

And yet, in the court of public opinion (where, coincidentally, there are no rules of evidence), these provinces are relentless in their opposition to federal climate policy generally and the federal carbon pricing regime in particular – even while acknowledging that it's the most efficient approach for reducing emissions. Proposed federal clean electricity regulations have been disparaged as "absurd, illogical, unscientific." This weekend, Alberta's United Conservative Party is set to vote on a policy resolution to "recognize the importance of CO_2 to life and Alberta's prosperity," and consequently abandon "net-zero" targets and remove any provincial designations of CO_2 as a pollutant. While a radical departure from nearly every jurisdiction in the world, such an approach actually reflects Alberta's current and historical approach to GHG emissions reductions pretty well – Saskatchewan's too.

Viewed this way, *Charter*-based climate litigation might be best understood as simply requiring governments to walk the talk of their political rhetoric. If some provincial governments really do think that effectively addressing climate change is absurd and unscientific, then those provinces should be prepared to substantiate and defend their own approaches before our courts of law, which is essentially what *Charter* scrutiny entails.

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