CITATION: Mathur v. Ontario, 2020 ONSC 6918
COURT FILE NO.: CV-19-00631627
DATE: 20201112

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SOPHIA MATHUR, a minor by her litigation guardian Catherine Orlando, ZOE KEARY-MATZNER, a minor by her litigation guardian Anne Keary, SHAELYN HOFFMAN-MENARD, SHELBY GAGNON, ALEXANDRA NEUFELDT, MADISON DYCK and LINDSAY GRAY, Applicants/Responding Party

AND:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, Respondent/Moving Party

BEFORE: Justice Carole J. Brown

COUNSEL: Nader R. Hasan, Justin Safayeni, Spencer Bass, Fraser Andrew Thomson, and Danielle Gallant for the Applicants

S. Zachary Green and Padraic Ryan for the Respondent

HEARD: July 13, 2020

REASONS FOR DECISION

[1] The moving party, the Attorney General of Ontario ("**Ontario**"), brings this motion to strike out an application pursuant to Rule 21 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, on the ground that it has no reasonable prospect of success.

[2] The Applicants seek declaratory and mandatory orders relating to Ontario's target and plan for the reduction of greenhouse gas ("**GHG**") emissions in the province by the year 2030. The Applicants submit that Ontario's target is insufficiently ambitious, and that Ontario's failure to set a more stringent target and a more exacting plan for combating climate change over the coming decade infringes the constitutional rights of youth and future generations.

[3] The issue to be determined by this Court is whether, pursuant to Rule 21, the Notice of Application (the "**Application**") should be struck. It must be determined whether it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action.

BACKGROUND

Greenhouse Gas Emissions and Mitigating Climate Change

[4] The Court of Appeal for Ontario has noted that "there is no dispute that global climate change is taking place and that human activities are the primary cause": *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, 146 O.R. (3d) 65 ("***Carbon Pricing Reference***"), at para. 7. These activities, which include the combustion of fossil fuels like coal, natural gas and oil and its derivatives, release GHGs into the atmosphere. When incoming radiation from the Sun reaches the Earth's surface, it is absorbed and converted into heat. GHGs act like the glass roof of a greenhouse, trapping some of this heat as it radiates back into the atmosphere, causing surface temperatures to increase: *Carbon Pricing Reference*, at para. 7.

[5] At appropriate levels, GHGs are beneficial. They surround the planet like a blanket, keeping temperatures within limits at which humans, animals, plants, and marine life can live in balance: *Carbon Pricing Reference*, at para. 8.

[6] However, an excess level of GHGs in the atmosphere is problematic because it leads to global warming. Since the beginning of the industrial revolution in the 18th century, and more particularly since the 1950s, the level of GHGs in the atmosphere has been increasing at an alarming rate. As a result, the global average surface temperature has increased by approximately 1.0 degree Celsius above pre-industrial levels (*i.e.*, prior to 1850). It is estimated that by 2040, the global average surface temperature will have increased by 1.5 degrees Celsius: *Carbon Pricing Reference*, at paras. 8-9.

[7] Global warming is causing climate change and its associated impacts. The Court of Appeal accepted that "uncontested evidence" shows that climate change is causing or exacerbating: increased frequency and severity of extreme weather events (including droughts, floods, wildfires, and heat waves); degradation of soil and water resources; thawing of permafrost; rising sea levels; ocean acidification; decreased agricultural productivity and famine; species loss and extinction; and expansion of the ranges of life-threatening vector-borne diseases, such as Lyme disease and West Nile virus: *Carbon Pricing Reference*, at para. 11.

[8] The Court of Appeal also found that recent manifestations of the impacts of climate change in Canada include: major wildfires in Alberta in 2016 and in British Columbia in 2017 and 2018; and major flood events in Ontario and Québec in 2017, and in British Columbia, Ontario, Québec and New Brunswick in 2018. The recent major flooding in Ontario, Québec and New Brunswick in 2019 was likely also fueled by climate change: *Carbon Pricing Reference*, at para. 11.

[9] One of the main methods to mitigate climate change is through pricing GHG emissions. Carbon dioxide ("**CO_2**") is the most prevalent GHG emitted by human activities; pricing GHG emissions is therefore commonly known as "carbon pricing": *Carbon Pricing Reference*, at para. 7. A pan-Canadian working group notes that "[m]any experts regard carbon pricing as a necessary policy tool for efficiently reducing GHG emissions": *Carbon Pricing Reference*, at para. 27.

[10] The United Nations Intergovernmental Panel on Climate Change, an international body that draws on the world's leading experts to provide objective, scientific information relevant to climate change, noted that global net anthropogenic CO_2 emissions must be reduced by approximately 45% below 2010 levels by 2030 and must reach "net zero" by 2050 in order to limit

global average surface warming to 1.5 degrees Celsius and to avoid the significantly more deleterious impacts of climate change. Deep reductions in other GHG emissions will also need to occur in order to limit global average surface warming to 1.5 degrees Celsius: *Carbon Pricing Reference*, at para. 16.

[11] Since the early 1990s, there have been global initiatives to mitigate climate change. In 1992, growing international concern regarding the potential impacts of climate change led to the adoption of the United Nations Framework Convention on Climate Change (the "**UNFCCC**"). The objective of the UNFCCC is to "stabiliz[e] [...] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Canada ratified the UNFCCC in December 1992 and it came into force on March 21, 1994. The UNFCCC has been ratified by 196 other countries: *Carbon Pricing Reference*, at para. 22.

[12] In December 1997, the parties to the UNFCCC adopted the Kyoto Protocol, which established GHG emissions reduction commitments for developed country parties. Canada ratified the Kyoto Protocol on December 17, 2002 and committed to reducing its GHG emissions for the years 2008 to 2012 to an average of 6% below 1990 levels. Canada did not fulfill its commitment and ultimately withdrew from the Kyoto Protocol in December 2012: *Carbon Pricing Reference*, at para. 23.

[13] In December 2015, the parties to the UNFCCC adopted the Paris Agreement. The parties committed to holding global warming to "well below" 2 degrees Celsius above pre-industrial levels and to making efforts to limit it to 1.5 degrees Celsius above pre-industrial levels. Canada ratified the Paris Agreement on October 5, 2016 and committed to reducing its GHG emissions by 30% below 2005 levels by 2030: *Carbon Pricing Reference*, at para. 25.

Efforts in Canada and Ontario to Mitigate Climate Change

[14] Following the adoption of the Paris Agreement in 2015, the Prime Minister of Canada met with all provincial and territorial Premiers to discuss strategies to mitigate climate change. It led to the formation of a Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms, which was tasked with reporting on the role and effectiveness of carbon pricing in meeting Canada's emissions reduction commitments. The Working Group produced a report, which stated that economy-wide carbon pricing is the most efficient way to reduce emissions and that carbon pricing would be a foundational element of Canada's response to climate change. Based on this report, the federal government announced the Pan-Canadian Approach to Pricing Carbon Pollution. The stated goal is to ensure that carbon pricing mechanisms of gradually increasing stringency apply to all Canadian jurisdictions by 2018, either in the form of an explicit price-based system (*e.g.*, a "carbon tax") or a "cap and trade" system: *Carbon Pricing Reference*, at para. 27.

[15] On December 9, 2016, eight provinces, including Ontario, and the three territories adopted the Pan-Canadian Framework on Clean Growth and Climate Change. At that point, British Columbia, Alberta, and Québec already had carbon pricing mechanisms, and Ontario had announced its intention to join the Québec/California cap and trade system: *Carbon Pricing Reference*, at para. 29.

[16] In the same year, Ontario enacted the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, S.O. 2016, c. 7 ("***Climate Change Act***"). The Act established a cap and trade program, "a market mechanism […] intended to encourage Ontarians to change their behaviour by influencing their economic decisions that directly or indirectly contribute to the emission of greenhouse gas": see s.2(2).

[17] Section 6(1) of the *Climate Change Act* established three targets for reducing the amount of GHG from the amount of emissions in Ontario: a reduction of 15% by the end of 2020, a reduction of 37% by the end of 2030, and a reduction of 80% by the end of 2050, compared to levels calculated in 1990.

[18] Section 6(2) of the *Climate Change Act* provided that the Lieutenant Governor in Council may increase the targets in s. 6(1) through regulations.

[19] Section 6(4) of the *Climate Change Act* expressly referenced and calibrated Ontario's policy to comply with the UNFCCC's standards: "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."

[20] Two years later, on June 21, 2018, the federal government enacted the *Greenhouse Gas Pollution Pricing Act,* S.C. 2018, c. 12, s.186 ("***Carbon Pricing Act***"), and established a federal GHG emissions pricing regime that ensured the existence of carbon pricing mechanisms throughout Canada. Provinces were also entitled to enact their own carbon pricing schemes that meet designated federal benchmarks.

[21] The federal *Carbon Pricing Act* became the subject of various court challenges throughout Canada. The Ontario government challenged the Act on the ground that it is unconstitutional. Ontario argued that Parliament is not entitled to regulate all activities that produce GHG emissions and that the jurisdiction Canada asserts under the *Carbon Pricing Act* "would radically alter the constitutional balance between federal and provincial powers": *Carbon Pricing Reference*, at para. 54.

[22] At the Court of Appeal for Ontario, Ontario submitted that it would continue to take its own approach to meet the challenge of reducing GHG emissions. It highlighted its own environmental plan, titled "Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan", released in November 2018, which proposes to find ways to "slow down climate change and build more resilient communities to prepare for its effects": *Carbon Pricing Reference*, at paras. 55-57. This plan is the subject of this Application.

[23] On June 28, 2019, the Court of Appeal held that the *Carbon Pricing Act* is constitutional. The decision was appealed and recently heard at the Supreme Court of Canada. A decision is pending.

Ontario Revokes Cap and Trade

[24] In July 2018, Ontario revoked cap and trade and prohibited trading of emissions allowances. It introduced the *Cap and Trade Cancellation Act, 2018*, S.O. 2018, c. 13 ("***Cancellation Act***"), which is the focus of the Application.

[25] Section 16 of the *Cancellation Act* repeals the *Climate Change Act*.

[26] Section 3(1) of the *Cancellation Act* states: "The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time."

[27] Section 4(1) of the *Cancellation Act* states: "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." Section 1(1) of the Act defines "Minister" as "the Minister of the Environment, Conservation and Parks or such other member of the Executive Council as may be assigned the administration of this Act under the *Executive Council Act*".

[28] Pursuant to s.4(1) of the *Cancellation Act*, the Ministry of the Environment, Conservation and Parks published a plan titled "Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan" in November 2018 (the "**Plan**"). This is the same plan Ontario cited at the Court of Appeal for Ontario in the *Carbon Pricing Reference*.

[29] The Plan states that Ontario will reduce its GHG emissions by 30% below 2005 levels by 2030 (the "**Target**"). This is the same as the target adopted in the Paris Agreement. (The Applicants note that this Target represents a 15% decrease compared to the previous target set out in the *Climate Change Act*, as that was calibrated against the baseline of 1990, and the new Target is against the baseline of 2005. They submit that if 37% based on 1990 levels is adjusted to the 2015 level, it would be about 45%.)

[30] The Applicants, Ontario residents between the ages of 12 and 24, brought the Application to challenge Ontario's cancellation of the *Climate Change Act* and its newly-enacted Target contained in the Plan.

[31] The Applicants seek the following relief on behalf of their generation and future generations of Ontarians:

- A declaration, under s.52(1) of the *Constitution Act, 1982*, that the Target violates the rights of Ontario youth and future generations under ss.7 and 15 of the *Charter* in a manner that cannot be saved under s.1, and is therefore of no force and effect;

- A declaration, under s.52(1) of the *Constitution Act, 1982*, that the Target violates the unwritten constitutional principle that governments are prohibited from engaging in conduct that will, or reasonably could be expected to, result in the future harm, suffering or death of a significant number of its own citizens;

- A declaration that s.7 of the *Charter* includes the right to a stable climate system, capable of providing youth and future generations with a sustainable future;

- A declaration, under s.52(1) of the *Constitution Act, 1982*, that ss.3(1) and/or 16 of the *Cancellation Act,* which repealed the *Climate Change Act* and allowed for the

imposition of more lenient targets without mandating that they be set with regard to the Paris Agreement temperature standard or any kind of science-based process, violate ss.7 and 15 of the *Charter* in a manner that cannot be saved under s.1, and are of no force and effect;

- In the alternative, the same declaratory relief sought in the paragraphs above pursuant to s.24(1) of the *Charter* and/or this Court's inherent jurisdiction;

- An order that Ontario forthwith set a science-based GHG reduction target under s.3(1) of the *Cancellation Act* that is consistent with Ontario's share of the minimum level of GHG reductions necessary to limit global warming to below 1.5 degrees Celsius above pre-industrial temperatures or, in the alternative, well below 2 degrees Celsius (*i.e.*, the upper range of the Paris Agreement temperature standard); and

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

[32] Ontario, the Respondent on the Application and the moving party on this motion, seeks to strike this Application in whole, pursuant to Rule 21.01(1)(b) of the *Rules*, on the ground that the Application discloses no reasonable cause of action.

[33] Just prior to the release of these reasons, the parties alerted me to the Federal Court decision of *La Rose v. Canada*, 2020 FC 1008, released on October 27, 2020. The *La Rose* action is similar to the Application, in that 15 plaintiffs, all children and youth from across Canada, launched a *Charter* claim under ss.7 and 15 to challenge the Government of Canada's "alleged conduct that the plaintiffs associate with GHG emissions" in Canada. The plaintiffs submitted that the increased emissions contributed to climate change.

[34] The Federal Court granted Canada's motion to strike the plaintiffs' Statement of Claim without leave to amend. The court found that the *Charter* claims were not justiciable and disclosed no reasonable cause of action. The court also found that the public trust doctrine, on which the plaintiffs relied, was justiciable, but did not disclose a reasonable cause of action. That doctrine is not at issue in the Rule 21 motion before this Court.

[35] Leaving aside the issue that *La Rose* does not bind this Court, that matter is distinguishable from the motion before this Court. The differences will be commented on throughout my reasons.

RULE 21

[36] Rule 21.01(1)(b) provides that a party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

[37] Under this Rule, a claim will only be struck if it is "plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action." Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect

of success exists, the matter should be allowed to proceed to trial: *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17.

[38] The Supreme Court has held that novelty alone is not a reason to strike a claim. As Wilson J. noted in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at p. 980 [emphasis added]:

> [I]f there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect […] should the relevant portions of a plaintiff's statement of claim be struck out […].

[39] The nature of the "radical defect" required to justify striking out a claim was described in very narrow terms by Epstein J., as she then was, in *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (S.C.), at para. 6:

> In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our courts. Only by restricting successful attacks of this nature to the narrowest of cases can the common law have a full opportunity to be refined or extended […].

[40] More recently, McLachlin C.J. elaborated on the proper approach to novel claims in *Imperial Tobacco*, at para. 21:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. […] The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [emphasis added]

[41] Ontario submits that the Application is "certain to fail" for four reasons: (1) the Application is not justiciable; (2) the Application is based on unprovable speculations about the future climate consequences of the Target; (3) there is no positive constitutional obligation on the Province to prevent harms associated with climate change; and (4) the Applicants have no standing to seek remedies for "future generations".

[42] In response, the Applicants submit: (1) the Application is justiciable; (2) the claims in the Application are capable of scientific proof; (3) the Application does not depend on positive obligations; and (4) the Applicants have standing on behalf of future generations.

[43] The overarching question that must be answered on this motion is whether this Application has a reasonable prospect of success on a full hearing. To answer this question, the following sub-questions must be addressed:

- Are the Target and the Plan reviewable by the courts?
- Are the claims in the Application capable of being proven?
- Is this matter justiciable? More specifically, do the *Charter* claims in the Application have a reasonable prospect of success?
- Does the Application depend on positive obligations on the Province?

[44] Once it is determined whether the Application has a reasonable prospect of success, three additional questions must be addressed:

- Do the Applicants have standing on behalf of future generations?
- What remedies are potentially available to the Applicants?
- Does this Court have jurisdiction to hear the Application?

ANALYSIS

A. Are the Target and the Plan reviewable by the courts?

[45] Ontario submits that if the Target and the Plan are not "law", then the court should not be making legal determinations about them (*i.e.*, they are not reviewable by the courts). It does not submit that the *Charter* does not apply to the Target and the Plan.

[46] Several sections of the *Cancellation Act* are especially relevant to this discussion [emphasis added]:

- Section 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."
- Section 4(1): "The [Minister of the Environment, Conservation and Parks], with the approval of the Lieutenant Governor in Council, shall prepare a climate change plan and may revise the plan from time to time."

[47] As mentioned above, pursuant to s.4(1) of the *Cancellation Act*, the Ministry of the Environment, Conservation and Parks published a climate change plan (the Plan) in November 2018. Several sentences from the Plan are especially relevant to this discussion [emphasis added]:

- Page 3: "With hard work, innovation and commitment, we will ensure Ontario achieves emissions reductions in line with Canada's 2030 greenhouse gas reduction targets under the Paris Agreement."

- Page 18: "The following chapter of our environment plan acts as Ontario's climate change plan, which fulfills our commitment under the *Cap and Trade Cancellation Act, 2018*."

- Page 21: "Ontario will reduce its emissions by 30% below 2005 levels by 2030. This target aligns Ontario with Canada's 2030 target under the Paris Agreement. This is Ontario's proposed target for the reduction of greenhouse gas emissions, which fulfills our commitment under the *Cap and Trade Cancellation Act, 2018*."

- Page 22: "The policies within this plan will put us on the path to meet our 2030 target, and we will continue to develop and improve them over the next 12 years."

Position of the Parties

[48] Ontario submits that the Target, published in the Plan, is "an expression of the provincial government's intentions and aspirations" and therefore "not a legal instrument like a statute or regulation". Ontario disagrees with the Applicants' assertion that the Target "governs" the amount of GHG emissions in the province.

[49] Ontario argues that these "aspirational statements" can also be found in other provincial statutes, such as the *Poverty Reduction Act, 2009*, S.O. 2009, c. 10, which states in the Preamble: "A principal goal of the Government's strategy published on December 4, 2008 is to achieve a 25 per cent reduction in the number of Ontario children living in poverty within five years." Ontario argues that it does not follow that courts are empowered to make a declaration that the goal of reducing child poverty by 25% is unlawful because it is insufficiently ambitious, and that the Constitution requires that the Government must instead make its goal the reduction of child poverty by, for example, 50% or 75%, or the eradication of poverty altogether.

[50] Ontario further submits that the Target has no legal effect on anyone, as the Target itself does not change the law that governs the burning of natural gases, since there are other statutes, regulations, and policies. Evaluating the Target's merits, therefore, is not a question with legal content, and, on that basis, the Application should be struck.

[51] Ontario also contends that the Plan is unlike a statute because it does not have a "fixed and definite meaning" and is unlike a regulation, which is similar to a statute that is enacted by the Lieutenant Governor in Council. The Plan is therefore more like a press release, a speech in the assembly, or a budget presentation. Ontario describes the Plan as essentially a tool "that lays out for the public in detail what the government intends to do."

[52] The Applicants submit that the Plan is "law" in that it is "promulgated pursuant to a statutory mandate [the *Cancellation Act*]". As excerpted above, the *Cancellation Act* requires the government to establish targets for the reduction of GHGs, and the Minister of the Environment,

with the approval of the Lieutenant Governor in Council, shall prepare a climate change plan: see ss.3(1) and 4(1).

[53] The Applicants also point out that Ontario has, in other proceedings, relied heavily on the Plan's existence for the purpose of "justifying its conduct". In the *Carbon Pricing Reference* (reviewed above in the background section), Ontario relied on the Plan to argue that the province did not need a federal carbon tax because it had its own scheme. As the Court of Appeal outlined in the Positions of the Parties section of the reasons:

> [57] Ontario's environmental plan ("Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan") [the Plan], released in November 2018, proposes to find ways to "slow down climate change and build more resilient communities to prepare for its effects", but it will do this in a "balanced and responsible" way, without placing additional burdens on Ontario families and businesses.
>
> [58] Ontario has committed to reducing its emissions by 30% below 2005 levels by 2030 [the Target], which aligns with Canada's target under the *Paris Agreement*. It will do so, for example, by updating its *Building Code*, O. Reg. 332/12, increasing the renewable content of gasoline, establishing emissions standards for large emitters, and reducing food waste and organic waste.

[54] The Applicants submit that the Respondent cannot, in one proceeding at the Court of Appeal, rely on the Plan to argue that there is no need for a federal carbon tax due to its own Plan and Target, while in this proceeding argue that the Plan is just a "glossy brochure", as Ontario described the Plan during oral submissions.

[55] The Applicants rely on *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, [2009] 2 S.C.R. 295 ("***GVTA***"), to argue that the Target and the Plan are "law".

[56] In *GVTA*, the Supreme Court of Canada considered whether policies of transit authorities restricting advertising on the sides of buses were "law", for the purpose of satisfying the "prescribed by law" requirement in s.1 of the *Charter*. There are two considerations. First, the court must ask itself whether the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application. The court must then consider whether the policies are sufficiently precise and accessible: at para. 50. Second, a distinction must be drawn between rules that are legislative in nature and rules that are administrative in nature: at para. 58. Administrative policies, intended for internal use within government as aids in the interpretation of regulatory powers, are often informal and inaccessible outside government, thereby not considered "law": at paras. 58-59, 63. Where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law": at para. 65.

[57] The Applicants submit that the Plan is "law" because it is not internal policy. It is policy of general application that was made pursuant to delegated rule-making authority (s.4(1) of the *Cancellation Act* indicates that the Minister of Environment shall set a target). Ontario also sets

out in the Plan that it is Ontario's fulfilment of the requirements under the *Cancellation Act*, making the Plan a "law".

[58] Ontario, in response, submits that the *Cancellation Act* empowered and required the Minister of Environment to make a plan and a target, not to establish rules. Ontario submits that both the Plan and the Target do not establish rules or affect the rights of any individuals. More importantly, the Plan and the Target do not themselves establish standards. For example, no GHG emitters are required to comply with any standards articulated in the Plan or the Target, as there are existing emission standards in Ontario to which GHG emitters are already subject.

Analysis and Conclusion

[59] *GVTA* has limited application on this motion as it is focused on whether a policy is "law" for the purpose of the s.1 test (*i.e.*, whether the policy is "prescribed by law"). At this stage of the proceedings, the question of whether the Target and Plan are "law" need not be answered.

[60] It is not disputed that the *Charter* applies to the Target and the Plan. Ontario merely argues that the Target and the Plan are not "law" and therefore not reviewable by the courts (*i.e.*, the court should not be making legal determinations about them). However, Ontario cannot escape judicial review for its preparation of the Plan and the Target simply by arguing that they are not law. The question of whether the Target and the Plan are "law" is therefore misguided.

[61] The fundamental question on this motion is whether the preparation of the Target and Plan is governmental action that is reviewable by the courts for compliance with the *Charter*. Later in these reasons, in the justiciability section, I discuss whether the matter as a whole is reviewable by the courts. At this juncture, I must first answer the threshold question of whether the Target and the Plan – both of which the Applicants argue violate their *Charter* rights – are reviewable by the courts.

[62] While Ontario argues that neither the Target nor the Plan "binds" anyone and is merely an "aspiration" that does not itself govern the amount of GHGs in the province, I am of the view that the preparation of the Target and the Plan is to be considered government action that is reviewable by the courts. There are three reasons for this.

[63] First, given that the Plan and Target are legislatively mandated by the Ontario legislature and sub-delegated to the Ministry of the Environment, Conservation and Parks and which is to be approved by the Lieutenant Governor in Council, it is a Cabinet decision. The Supreme Court has already found that Cabinet decisions are reviewable by the courts. In *Operation Dismantle*, [1985] 1 S.C.R. 441, the applicants alleged that the Government of Canada's decision to allow the U.S. to test cruise missiles in Canada violated s.7 of the *Charter*. The Supreme Court first considered whether this decision, made by the Government of Canada in relation to a matter of national defence and foreign affairs, is reviewable in the courts. Canada submitted that Cabinet decisions fell within the prerogative power of the Crown and that the *Charter*'s application must be restricted to the exercise of powers that derive directly from statute, not to an exercise of the royal prerogative, a source of power that exists independently of Parliament. The court disagreed with Canada and found that Cabinet decisions made pursuant to both statutory authority and the royal

prerogative fall within the ambit of the *Charter* and are therefore reviewable by the courts: at para. 50.

[64] Second, the Plan and Target can be subject to judicial review because they resemble quasi-legislation or "soft law". Unlike executive legislation, quasi-legislation has a hortatory, rather than mandatory, effect on legal decision-making, notably those involving the imposition of sanctions. In other words, quasi-legislation offers advice about activities regulated by law (*e.g.*, agriculture, waste disposal). See: John Mark Keyes, *Executive Legislation*, 2nd ed. (Toronto: LexisNexis Canada, 2010), at p. 50.

[65] At the very least, the Target and the Plan can be considered quasi-legislation or "soft law" that guide internal policy making within the government. While the Target and the Plan may not directly control the emission of GHGs in Ontario, they do reflect the Province's intentions, which would presumably guide policy-making decisions. Indeed, the Plan, at p. 35, states that one of the action steps the Ministry of Environment will take is to make climate change a cross-government priority, which would include updating the Statement of Environmental Values to reflect Ontario's environmental plan. Statements of Environmental Values are prepared by applicable ministries in Ontario. Section 7 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, states that these statements are to:

> (a) explain[] how the purposes of this Act [the *Bill of Rights*] are to be applied when decisions that might significantly affect the environment are made in the ministry; and
>
> (b) explain[] how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry.

Section 11 of the *Bill of Rights* further states: "The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry."

[66] Ontario has also indicated in another proceeding (the *Carbon Pricing Reference*) that federal policies should not apply to Ontario, as it already has its own provincial policy (the Plan). At the very least, this reflects the Province's intention of working toward meeting the Target. To do so, Ontario might decide to reduce the emission of GHGs by sectors such as transportation, industrial, building heating, agriculture, and waste disposal activities, which Ontario indicated in its factum are responsible for the great majority of GHG emissions in the Province. As the Court of Appeal noted in the *Carbon Pricing Reference*, Ontario already had plans to update its *Building Code*: at para. 58. In other words, the Target and the Plan would guide Ontario's policy making such that the Province could meet the Target it outlines in the Plan.

[67] Although quasi-legislation may not have binding legal effect, it often has something approaching it, and recent cases suggest that courts are prepared to give quasi-legislation increasing significance in adjudicating disputes: Keyes, at p. 51. A long line of cases also suggests that quasi-legislation is judicially reviewable when a legitimate basis for review is presented: at p. 58. See, *e.g.*: *Canadian Association of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (F.C.A.); *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2007 FCA 273, [2008]

2 F.C.R. 341; and *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (C.A).

[68] Lastly, the Plan and Target have the force of law and are therefore reviewable. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, the Supreme Court considered administrative guidelines issued under s. 6 of the *Department of the Environment Act*, R.S.C. 1985, c. E-10, which states:

> For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada […]. [emphasis added]

[69] La Forest J. held that the section cited above authorized guidelines that have a mandatory effect:

> Here […] we are dealing with a directive that is not merely authorized by statute, but one that is required to be formally enacted by "order", and promulgated under s. 6 of the *Department of the Environment Act*, with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority. To my mind this is a vital distinction. […]

[70] I have noted above that the Plan and the Target are akin to guidelines, in that they are quasi-legislation that could potentially guide internal policy-making decisions. The fact that they are statutorily mandated by the *Cancellation Act* suggests that they are more than just internal ministerial policy guidelines. La Forest J.'s comments above strongly suggest that the Target and the Plan would therefore have the force of law: they are authorized and required by statute, promulgated under ss.3(1) and 4(1) of the *Cancellation Act*, and required the approval of the Lieutenant Governor in Council.

[71] For all three reasons above, I find that the Target and the Plan are reviewable by the courts, regardless of whether they are considered "law" for the purpose of a *Charter* analysis. I leave the question of whether they are considered "law" to the application judge, if s/he deems it necessary to answer the question.

B. Are the claims in the Application capable of being proven?

[72] Generally, a motion to strike proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Imperial Tobacco*, at para. 22. Facts that are "manifestly incapable of being proven" include "bald conclusory statements of fact, unsupported by material facts": *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721, at para. 31.

[73] The long-standing rule that facts pleaded in a statement of claim must be taken as proven was first enunciated in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": [citation omitted].

[74] In *Operation Dismantle*, cited and discussed above, the Supreme Court heard an appeal on a motion to strike, in which the plaintiffs alleged that Canada's decision to allow the U.S. to test its air-launched cruise missile in Canada violated the *Charter*. The court wrestled with the rule in *Inuit Tapirisat* and the majority departed from that rule at para. 27:

> We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat*, *supra*, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

[75] Ultimately, the court concluded that the causal link between the actions of the Canadian government and the alleged violation of the plaintiffs' rights under the *Charter* was simply too uncertain, speculative, and hypothetical to sustain a cause of action: *Operation Dismantle*, at para. 3.

[76] *Operation Dismantle* is relevant to this Application as Ontario alleges that the facts pled by the Applicants cannot be taken as true and that their case is founded on speculative apprehensions about the link between the Target set by Ontario and harms that will be suffered by future generations.

[77] The Applicants argue that the facts in their pleadings are all capable of scientific proof and therefore not based on assumption or speculation.

The Law

[78] It is helpful to first review the facts in *Operation Dismantle* to understand why the court found the plaintiffs' claim to be "uncertain, speculative and hypothetical": at para. 3.

[79] In *Operation Dismantle*, the plaintiffs sought (i) a declaration that Canada's decision to permit the testing of the cruise missile was unconstitutional; (ii) injunctive relief to prohibit the testing; and (iii) damages.

[80] The court outlined the relevant portions of the plaintiffs' statement of claim at para. 4:

> The plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:

> (a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;
>
> (b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;
>
> (c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;
>
> (d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;
>
> (e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

[81] The court noted that to succeed, the plaintiffs must show that they had some chance of proving that the action of the Canadian government had caused a violation or a threat of violation of their rights under the *Charter*: at para. 10. In other words, the plaintiffs would have to demonstrate that the testing of the cruise missile would cause an increase in the risk of nuclear war: at para. 15. The court ultimately found that the plaintiffs could not establish the link between the Cabinet decision to permit the testing of the cruise missile and the increased risk of nuclear war: at para. 15.

[82] The court then ruled that the plaintiffs' claim essentially rested on an if-then assumption – *i.e.*, if the Canadian government allowed the U.S. government to test the cruise missile system in Canada, then there would be an increased risk of nuclear war: at para. 16. However, this assumption was contingent upon the possible reactions of the nuclear powers to the testing of the cruise missile in Canada and was based on major assumptions as to how foreign powers would react: at para. 19.

[83] The court focused on the fact that the claims were based on foreign policy decisions and found that they were speculative:

- Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise and the results that the appellants allege could never be proven: at para. 18.

- The parties make two assumptions with regard to the reaction of foreign powers: first, that they will not develop new types of surveillance satellites or new methods of verification, and second, that foreign powers will not establish new modes of co-operation for dealing with the problem of enforcement: at para. 19.

- Even if the testing results in an increased American military presence and interest in Canada, to say that this would make Canada more likely to be the target of a nuclear attack is to assume certain reactions of hostile foreign powers to such an increased American presence. Given the impossibility of determining how an independent sovereign nation might react, it can only be a matter of hypothesis whether an increased American presence would make Canada more vulnerable to nuclear attack. It would not be possible to prove it one way or the other: at para. 20.

- The plaintiffs assume that foreign states will not develop their technology in such a way as to meet the requirements of effective detection of the cruise and that there will therefore be an increased likelihood of a pre-emptive strike or an accidental firing, or both. Again, this assumption concerns how foreign powers are likely to act in response to the development of the cruise: at para. 21.

- The plaintiffs assert that the development of the cruise will lead to an escalation of the nuclear arms race. This again involves speculation based on assumptions as to how foreign powers will react: at para. 22.

- Exactly what the Americans will decide to do about development and deployment of the cruise missile, whether tested in Canada or not, is a decision that they, as an independent and sovereign nation, will make for themselves. Even with the assistance of qualified experts, a court could only speculate on how the American government may make this decision, and how important a factor the results of the testing of the cruise in Canada will be in that decision: at para. 24.

[84] A concurring opinion by Wilson J. departed slightly from the majority. Wilson J. followed the rule in *Inuit Tapirisat*, noting, at para. 78:

> It has been suggested [by the majority], however, that the plaintiffs' claim should be struck out because some of the allegations contained in it are not matters of fact but matters of opinion and that matters of opinion, being to some extent speculative, do not fall within the principle that the allegations of fact in the statement of claim must be taken as proved. I cannot accept this proposition since it appears to me to imply that a matter of opinion is not subject to proof. What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible.

[85] Wilson J. advocated for a more flexible approach to evidence and to the taking of the facts alleged as proven, *i.e.*, not dismissing the facts simply because they are a matter of opinion. However, she ultimately found that the facts could not constitute a violation of s. 7 of the *Charter*. Later in these reasons, I will elaborate on Wilson J.'s discussion of the standard required to prove causation in a s.7 claim.

Position of the Parties

[86] Ontario submits that the Applicants' burden is to prove that Ontario's target for the reduction of GHG emissions by the year 2030 will cause or contribute to future harms claimed. They also submit that the allegations in the Application are "manifestly incapable of being proven".

[87] Ontario also submits that this Application raises the same problems of proof as *Operation Dismantle*: it is not possible for this Court, even with the best available evidence, to do more than speculate upon the likelihood that the catastrophic climate scenarios pleaded will come to pass unless Ontario's Target is struck down or amended.

[88] During oral submissions, Ontario emphasized the global aspect of GHG reduction, which it argued involves "coordination problems with a variety of other jurisdictions, both national and subnational" and that "these are the kind of things that cannot be established through evidence", as "[t]here isn't sufficient probability."

[89] Notably, Ontario does not argue that climate change itself is speculative. It also does not contest the fact of anthropogenic climate change or the desirability of taking action to mitigate the adverse effects of climate change. However, it submits that the Application rests on a "chain of speculative assumptions, none of which is provable with evidence in court":

- that the actual GHG emissions in the Province of Ontario in the year 2030 will not be different from the current Target;
- that the Plan and the Target will not themselves change before the year 2030;
- that the climate policies of the Canadian federal government applicable in Ontario will have no effect (positive or negative) on GHG emissions in Ontario or on the future impact of the climate on Ontario's residents;
- that the impact on the climate of meeting Ontario's Target will not be offset (either positively or negatively) by the climate policies of and GHG emissions from other jurisdictions in Canada and throughout the world;
- that the catastrophic climate effects foretold by the Applicants for future generations can be avoided or mitigated at all by any target adopted today by the Government of Ontario; and
- that the future impacts of climate change on the health and well-being of Ontario residents, considered in conjunction with all other factors affecting the future health and well-being of future residents (including advances in medicine, engineering and climate mitigation), can be predicted with reasonable accuracy today on the available evidence.

[90] The Applicants submit that Ontario's "chain of speculative assumptions" is flawed for two reasons. First, they submit that it is Ontario's position that is speculative, as Ontario suggests that the actual GHG emissions may differ from the Target, or that the Target may change before 2030,

despite the fact that Ontario is in a position to control emissions through the Plan and that there is no date for revisiting the Target. They note further that Ontario ignores the fact that GHGs being released today pursuant to the Target will remain in the atmosphere and are part of the problem.

[91] The Applicants also submit that Ontario's assertion that the catastrophic effects of climate change cannot be avoided or mitigated at all by any GHG reduction target is itself speculative. The Applicants point to the Plan itself, which states that the people of Ontario have "played an important role in fighting climate change and mitigating the threats to our prosperity and way of life"; that by reducing emissions, Ontario will "maintain… a healthy environment" and "slow down climate change"; and that Ontario's actions "are important in the global fight to reduce emissions" (citing p. 17-18 of the Plan).

[92] The Applicants submit generally that Ontario cannot escape judicial review by arguing that the Application is based on theories about future events. They maintain that on Ontario's logic, the Target could never be subject to scrutiny until it is too late, when catastrophic climate change is irreversible. By extension, any constitutional challenge to legislation encompassing future harms would automatically fail because that law could theoretically change before the harms fully materialize.

[93] Additionally, the Applicants submit that the Application asks for something concrete and cognizable that can be determined with reference to "scientifically known and knowable standards" and expert evidence. They submit that experts can determine the specific amount of megatons to which Ontario must limit its emissions, in conformity with a scientifically specific standard that is not vague or amorphous.

[94] Lastly, the Applicants cite decisions in other countries to demonstrate that their claim is capable of scientific proof. For example, in *Urgenda et al. v. The State of the Netherlands (Ministry of Infrastructure and the Environment),* 19/00135 (Hoge Raad), the Supreme Court of the Netherlands affirmed that reduction in emissions was necessary for the Dutch government to protect human rights. The court recognized that "each additional molecule of GHG in the atmosphere causes a demonstrable increase in the harm, with a single molecule of carbon dioxide causing a warming effect." Citing other decisions in the U.S., New Zealand, Australia, and Colombia, the Applicants argue that many countries have already found causal links between local government policies, emissions levels, and increased risks of harm from climate change, regardless of the emissions of other nations.

Analysis and Conclusion

[95] At this stage of the proceedings, the facts in the Applicants' claim should be deemed to have been proven, pursuant to *Inuit Tapirisat*. Unlike the facts claimed in *Operation Dismantle*, I am satisfied, for the purposes of this Rule 21 motion, that the facts in the Applicants' pleadings are capable of scientific proof. As the Applicants pointed out during oral submissions, "whether or not we succeed is going to be a matter for a trier of fact" and based on the full evidentiary record. I agree with that statement.

[96] In contrast to fear of missile testing leading to nuclear war, I am satisfied, again for the purposes of this Rule 21 motion, that it is not plain and obvious that scientific evidence cannot be

marshalled to establish that GHG emissions cause harm. As well, I am satisfied that appropriate levels of global GHG emissions can be established through scientific evidence, based on the past and projected emission levels. In their Notice of Application, the Applicants cite various facts that are capable of scientific proof and about which courts are capable of making determinations, based on expert evidence, including the following:

- The total level of CO_2 in the atmosphere is rising and is now around 410 ppm, compared to the approximately 280 ppm level that was present through the relatively stable climate of the last 10,000 years;

- The buildup of CO_2 and other GHGs in the atmosphere has warmed the planet by approximately 1 degree Celsius on average since the pre-industrial period, with global temperature now increasing at the rate of 0.2 degree Celsius per decade;

- If all human-caused GHG emissions ceased immediately, the Earth's climate would still heat up by several tenths of a degree Celsius because of the latency time between GHG accumulation in the atmosphere and warming in the Earth's climate system;

- The Target allows for 30 megatonnes more in annual GHG pollution by 2030 than the 2030 target that was previously in place, or a total of 190 megatonnes of GHGs into the atmosphere's CO_2 stock between 2018 and 2030;

- The Target's annual increase of 30 megatonnes is equal to the annual emissions of more than 7 million passenger vehicles;

- Ontario has warmed about twice as fast as the global average since the pre-industrial period, at approximately 1.7 degrees Celsius; Ontario will continue to experience the impacts of global warming at an above-average rate;

- Devastating impacts of climate change will become more pronounced in Ontario as the Earth's climate warms to levels approaching and exceeding 2 degrees Celsius above pre-industrial levels;

- Canada's share of the remaining global carbon budget is (at most) 2,000 megatonnes of CO_2, in order to likely avoid the catastrophic consequences of global temperatures rising beyond 1.5 degrees Celsius above pre-industrial levels; and

- Under the Target, Ontario's total CO_2 emissions from now until 2030 will be 1,670 megatonnes, or between 250-363% greater than Ontario's share of the global carbon budget, and almost *all* of Canada's budget.

[97] In the *Carbon Pricing Reference*, the Court of Appeal for Ontario observed that various findings and standards can be projected or predicted with scientific accuracy. For example, the court found [emphasis added]:

- "[…T]he global average surface temperature has increased by approximately 1.0 degree Celsius above pre-industrial levels (*i.e.*, prior to 1850). It is estimated that by 2040, the global average surface temperature will have increased by 1.5 degrees Celsius.": at para. 9;

- "It is predicted that temperatures in Canada will continue to increase at a rate greater than the rest of the world.": at para. 10;

- "This global warming is causing climate change and its associated impacts. The uncontested evidence before this Court shows that climate change is causing or exacerbating: [various examples of the impact of climate change]": at para. 11; and

- "The United Nations Intergovernmental Panel on Climate Change recently reported that global net anthropogenic CO_2 emissions must be reduced by approximately 45 percent below 2010 levels by 2030, and must reach "net zero" by 2050 in order to limit global average surface warming to 1.5 degrees Celsius and to avoid the significantly more deleterious impacts of climate change. […]": at para. 16.

These examples demonstrate that unlike the assumptions in *Operation Dismantle* that cannot be predicted with scientific accuracy, it is probable, with evidence, that many of the Applicants' claims are capable of proof.

[98] As an additional example, in *Energy Probe v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449 (C.A.), the Court of Appeal for Ontario held that a non-governmental organization may be able to prove that Ontario's lax liability standards provided nuclear power operators with incentive to increase production of reactors, at the expense of greater risk of harm to the public. In the following paragraphs, the Court of Appeal distinguished the case from *Operation Dismantle*:

> [41] I see a difference between the level of speculation and ability to predict a result dependent upon actions of foreign governments [referring to *Operation Dismantle*], and the "speculation" here, which involves the impact of our tort laws upon industry and standards of care in a particular industry. If I were presented with an expert opinion which stated: "toys are safer for children today than they were 15 years ago, and it is because of the increasing awareness of tort liability," I would give that *prima facie* credence. It might not be proven; there may be regulatory rules that have led to the apparent result but, tested as a triable issue, the nexus between the allegation and the conclusion is very different from that between testing missiles and nuclear war. […]
>
> [42] I am not persuaded that the expert evidence in this case could not be translated into a finding of fact by a trial Judge associating exposure to liability with standard of care for the purpose of making the declaration which is sought. […]
>
> [43] It is therefore my conclusion that the appellants have "some chance of proving" that the Act [*Nuclear Liability Act*, R.S.C. 1985, c. N-28] violates rights protected by s. 7 of the *Charter*.

[99] Similarly, in this case, there is a difference between the level of speculation and ability to predict a result dependent upon actions of foreign governments and the facts pleaded here, which are capable of scientific proof. At this stage of the proceedings, therefore, it is premature to find that the Applicants' claim is "manifestly incapable of being proven", as expert evidence can be, and I understand will be, tendered to demonstrate the validity of the Applicants' claim.

[100] I note, additionally, that *Operation Dismantle* was recently considered in a climate change context in *La Rose*, where the Federal Court disagreed with Canada's submission that the plaintiffs' claim was speculative, which would also apply to this Application:

> [74] The Defendants [Canada] further allege that the *Charter* claims are speculative because they are incapable of proof, owed to the cumulative and global nature of climate change. Climate change is driven from historical and global human activities and requires a comprehensive, international approach to address. In this way, the Defendants liken the current case to *Operation Dismantle*, where a "sufficient causal link" could not be established. In *Operation Dismantle*, the Federal Cabinet's decision to approve cruise missile testing could not be linked to the result the appellants were alleging – the increased threat of nuclear war. This amounted to speculation, which could never be proven (*Operation Dismantle* at para. 18).
>
> [75] I cannot find that there is no reasonable prospect of success on the basis of the speculation arguments alone. Unlike the speculation inherent in the assumption in *Operation Dismantle* - that the reaction of foreign powers to cruise missile testing will increase the risk of nuclear war, the Plaintiffs in this case are alleging that Canada's role in climate change has led to the alleged harms. Canada has a role in GHG emissions that is more than speculative in this current case. [emphasis added]

[101] Lastly, there exists an international body, established by the United Nations, the mission of which is to provide scientific information on climate change, further suggesting that the Applicants' claims are potentially capable of scientific proof. The United Nations Intergovernmental Panel on Climate Change is "the leading world body for assessing the most recent scientific, technical, and socio-economic information produced worldwide relevant to understanding climate change, its impacts and potential future risks, and possible response options": *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, [2019] 9 W.W.R. 377, at para. 16.

[102] As mentioned above, for the purposes of this motion, the facts pleaded in the Applicants' claim are to be taken as proven. I am satisfied that the claims in this Application are not "manifestly incapable of being proven" or as speculative as Ontario asserts. It is probable that they are capable of being scientifically proven. These facts are, by no means, as "uncertain, speculative and hypothetical" as the ones in *Operation Dismantle*, which mostly depended on the reaction of different nations to missile testing in Canada. I am satisfied that this Application meets the threshold of "capable of proof", leaving the question of whether the Applicants are able to prove their claims to the application judge, who will be presented with a full evidentiary record. Concluding, for the purposes of this Rule 21 motion, that the Application is capable of scientific proof, I will elaborate later in these reasons the Applicants' evidentiary burden under s.7 and s.15 to establish causation.

C1. Is this matter justiciable?

The Law

[103] When courts are asked to adjudicate matters of complex public policy, the question of whether the matter is justiciable may arise. In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012), Dean Lorne Sossin (as he then was) defines "justiciability" as follows:

> [J]usticiability may be defined as a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. The criteria used to make this determination pertain to three factors: (1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court: at p. 7.

[104] The doctrine of justiciability is largely focused on an inquiry into the "appropriateness" of judicial adjudication. As stated in *Canada (Auditor-General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49, "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision-making institutions of the polity": at pp. 90-91.

[105] The doctrine of justiciability ensures respect for the functional separation of powers among the legislative and judicial branches of government in Canada. As Dean Sossin (as he then was) observes:

> First, as a non-democratic (some would say anti-democratic) institution, courts do not have the resources or expertise to competently establish what policy or law best advances the public interest. Second, the legitimacy of judicial decision-making is more difficult to sustain where it appears that the judge is substituting her preferences for those of the legislative or executive branches: Sossin, at pp. 204-05.

[106] In *Operation Dismantle*, Wilson J. was careful to note that the wisdom of a government's legislative and policy choices could not be made the subject of a legal claim. However, she also emphasized that when *Charter* rights are violated, the court is obliged to review the governmental action:

> [63] It might be timely at this point to remind ourselves of the question the Court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s. 91(7) of the *Constitution Act, 1867* and that the federal executive has the powers conferred upon it in ss. 9-15 of that Act. Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the <u>effect</u> [emphasis in original] of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say

> that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. […]
>
> [64] I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.

[107] Ontario relies heavily on two cases to argue that the Application is not justiciable: *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, 123 O.R. (3d) 161 ("***Tanudjaja (ONCA)***"), aff'ing *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 5410, 116 O.R. (3d) 574 ("***Tanudjaja (SCJ)***"), and *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183, [2009] 3 F.C.R. 201, aff'd 2009 FCA 297, leave to appeal refused, [2010] S.C.C.A. No. 33469, the latter of which I will address later in these reasons. I will summarize *Tanudjaja (ONCA)* prior to outlining the parties' positions on it.

[108] In *Tanudjaja*, the Court of Appeal for Ontario upheld this Court's decision to strike out an application for non-justiciability. The application alleged that the action and inaction on the part of Canada and Ontario resulted in homelessness and inadequate housing. The trial judge described the application as follows:

> The Application is premised on an obligation said to be imposed, by the *Charter of Rights and Freedoms*, on the government of Canada and the government of Ontario […] to put in place policies and strategies that ensure that affordable, adequate and accessible housing is available for all Ontarians and Canadians. The Application relies on s. 7 (life, liberty and security of the person) and s. 15 (equal protection and equal benefit of the law without discrimination) of the *Charter* which, it alleges, have been breached. The breaches, as identified in the Application, arise out of changes to legislative policies, programs and services which are said to have resulted in increased homelessness and inadequate housing. The Application states that, beginning in the mid-1990's, both Canada and Ontario took decisions which have eroded access to affordable housing. It is said that these decisions were made, and the program changes which implemented them put in place, without appropriately addressing their impact on homelessness and inadequate housing and without ensuring that alternative measures have been provided to protect vulnerable groups from these effects. The Application seeks a broad set of remedies, including declarations that the failure of both Canada and Ontario to implement effective national and provincial policies to reduce and eliminate homelessness and inadequate housing has violated the rights of the applicants under s. 7 and s. 15 of the *Charter.* As remedial measures, the Application seeks mandatory orders that such strategies be developed and implemented "in consultation with affected groups" and include "timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms". The Application requests that the Court

> remain "…seized of supervisory jurisdiction to address concerns regarding implementation of the order": *Tanudjaja (SCJ)*, at para. 2.

[109] Notably, the applicants in *Tanudjaja* did not

> expressly […] challenge […] any particular legislation, nor do they allege that the particular application of any legislation or policy to any individual has violated his or her constitutional rights. They do not point to a particular law which they say "in purpose or effect perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1)". They do not identify any particular law which violates the s. 7 right to life, liberty and security of the person. Rather, they submit that the social conditions created by the overall approach of the federal and provincial governments violate their rights to adequate housing.: *Tanudjaja (ONCA)*, at para. 10.

[110] The Court of Appeal found *Tanudjaja* to be non-justiciable because the claims were problematic and there was no sufficient legal component to anchor the analysis. The court noted:

- The application did not challenge a specific state action or a specific law; there is therefore no sufficient legal component to engage the decision-making capacity of the courts: *Tanudjaja (ONCA)*, at para. 27.

- The diffuse and broad nature of the claims does not permit an analysis under s. 1 of the *Charter*. As indicated in *R. v. Oakes*, [1986] 1 S.C.R. 103, in the event of a violation of a right guaranteed by the *Charter*, the legislation will nonetheless be sustained if the objective of the legislation is pressing and substantial, the rights violation is rationally connected to the purpose of the legislation, the violation minimally impairs the guaranteed right, and the impact of the infringement of the right does not outweigh the value of the legislative object. In this application, in the absence of any impugned law, there is no basis to make that comparison: *Tanudjaja (ONCA)*, at para. 32.

- There is no judicially discoverable and manageable standard for assessing whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy: *Tanudjaja (ONCA)*, at para. 33.

[111] Neither party made submissions on *La Rose*, but that action was struck for reasons similar to those in *Tanudjaja*. Like the *Tanudjaja* applicants, the *La Rose* plaintiffs did not challenge specific governmental actions. Instead, they challenged Canada's "Impugned Conduct", which involved the following actions and inactions on the part of the government:

- Continuing to cause, contribute to and allow a level of GHG emissions incompatible with a Stable Climate System;

- Adopting GHG emission targets that are inconsistent with the best available science about what is necessary to avoid dangerous climate change and restore a Stable Climate System;

- Failing to meet the Defendants' own GHG emission targets; and

- Actively participating in and supporting the development, expansion and operation of industries and activities involving fossil fuels that emit a level of GHGs incompatible with a Stable Climate System: *La Rose*, at para. 8.

[112] Because of the "undue breadth and diffuse nature of the Impugned Conduct" above, the *La Rose* court found the action to be non-justiciable as a result: at para. 41.

Position of the Parties

[113] Ontario submits that this Application is not justiciable because a court should not involve itself in the review of actions or decisions of the Executive or Legislative branches where the subject matter of the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolve it. Ontario submits that the questions in this Application are simply unsuitable for adjudication in court.

[114] As mentioned earlier, Ontario also relies on *Friends of the Earth* to argue that this Application is not justiciable. That case largely focused on the Canadian government's actions after Parliament enacted the *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30 ("***KPIA***"). The *KPIA* requires the Minister of the Environment to prepare an annual Climate Change Plan that describes "the measures to be taken [by the federal government] to ensure that Canada meets its [Kyoto] obligations". When the federal government released a plan that was allegedly inadequate for meeting the obligations, the environmental organization Friends of the Earth brought a challenge.

[115] The Federal Court found the challenge to be non-justiciable and held that the court had no role to play in reviewing "the reasonableness of the government's response to Canada's Kyoto commitments within the four corners of the *KPIA*": *Friends of the Earth*, at para. 46. The court further held that "[w]hile the failure of the Minister to prepare a Climate Change Plan may well be justiciable, an evaluation of its content is not": at para. 34. In other words, the *KPIA* comprised many "policy-laden considerations which are not the proper subject matter for judicial review": at para. 40.

[116] Ontario relies on *Friends of the Earth* to argue that this Application is similarly non-justiciable. In its factum, Ontario argues that the Target is analogous to statements of public policy objectives, such as those found in the *Poverty Reduction Act, 2009*, cited and discussed above, which states in the preamble: "A principal goal of the Government's strategy published on December 4, 2008 is to achieve a 25 per cent reduction in the number of Ontario children living in poverty within five years."

[117] Ontario also argues that *Friends of the Earth* is very similar to this case, because just as there were no objective legal criteria which could be applied in *Friends of the Earth* to allow the

court to determine whether Canada's plan provided for an "equitable distribution of reduction levels among the sectors of the economy that contribute to greenhouse gas emissions", so too there are no legal criteria that could allow this Court to adjudicate the Applicants' claim for a mandatory order that "Ontario forthwith set a science-based GHG reduction target under s.3(1) of the *CTCA* that is consistent with Ontario's share of the minimum level of GHG reductions necessary to limit global warming to below 1.5°C." It submits further that determining "Ontario's share" of global GHG emissions should be determined based on population, gross domestic product, emissions since Confederation or over any other period of time, economic efficiency, or diplomatic strategy, which are all questions outside the court's institutional capacity.

[118] Ontario also relies heavily on *Tanudjaja*, where the court found the application to be "demonstrably unsuitable for adjudication" as there was not a "sufficient legal component to anchor the analysis": *Tanudjaja (ONCA)*, at paras. 35-36. Ontario submits that this Application is similar to the one in *Tanudjaja*, as plans to deal with global climate change are unsuited to judicial review. It submits that climate change plans are even less suitable for judicial review than housing policy, because while provincial housing policy is at least largely confined within provincial boundaries, climate change is notoriously planetary in scope.

[119] The Applicants submit that their Application is different from the one in *Tanudjaja*, as it is aimed at a number of very specific measures – both legislation and policies passed pursuant to legislation – taken by Ontario. The Applicants submit that the majority in *Tanudjaja (ONCA)* left the door open by noting that "[t]his is not to say that constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may otherwise be evasive of review": *Tanudjaja (ONCA)*, at para. 29. The Applicants submit that that is precisely what this Application is premised on: a myriad of government decisions, programs, and conduct contribute to climate change in various ways and would otherwise be evasive of review. They submit that the Target is the coordinating mechanism and guiding principle underlying all of these elements; it is therefore not plain and obvious that this case is not justiciable. I accept the Applicants' submissions on this point.

[120] Generally, the Applicants submit that the questions raised in the Application are well within this Court's institutional capacity. The questions all concern the alleged pressing threat to constitutional rights posed by Ontario's failure to act in order to protect its population from climate change, which are precisely the type of issue that engages this Court's obligation to interpret and apply the *Charter*.

[121] The Applicants also submit that non-justiciable cases are rare, especially when *Charter* rights are involved. They cite *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, a case I will discuss further below, where the Supreme Court stated, at para. 107:

> The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. In such circumstances, it is the court's *obligation* to decide the matter.

[122] The Applicants also cite the Federal Court of Appeal, which has stated that "*Charter* cases are justiciable regardless of the nature of the government action": *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 D.L.R. (4th) 737, at para. 61.

[123] Additionally, the Applicants disagree with Ontario's assertion that the Application will take this Court beyond its institutional capacity because, as Ontario asserts, the relief sought does not encompass judicially manageable standards. They submit that a "science-based GHG reduction target", a "stable climate system", and a "sustainable" future for youth and future generations are all standards based on a globally-recognized body of scientific research and prescriptive standards that make them both judicially manageable and discoverable. This Court will have the benefit of international scientific guidance, as well as expert evidence, when hearing the Application on its merits. These standards are unlike the ones in *Tanudjaja*, where the claimants sought recognition of a right to "adequate" housing and argued that federal and provincial governments gave the issue "insufficient priority". The Applicants submit that these standards were not judicially discoverable or manageable because they were infused with subjective considerations and unmoored from any standard that could be established through evidence. These are unlike the science of climate change, which they submit is likely one of the most thoroughly researched issues in recent scientific history, with thousands of scientists from all over the world assessing not only its causes, trajectory and consequences, but also the necessary GHG emission reductions to avoid the most catastrophic results.

[124] Lastly, the Applicants submit that courts in Canada and around the world have adjudicated similar issues and courts have ruled on questions involving a government's constitutional and legal obligations as regards GHG reductions. They cite cases from the Québec Superior Court (*Environnement Jeunesse c. Procureur Général du Canada*, 2019 QCCS 2885), the Dutch *Urgenda* decision (cited above), and other cases from the High Court in New Zealand, Australia, Lahore High Court in Pakistan, and Colombia.

Analysis and Conclusion

[125] As the Federal Court of Appeal has noted, the category of non-justiciable cases is very small: *Hupacasath First Nation*, at para. 67. The court also noted that even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a "very large margin of appreciation": *Hupacasath First Nation*, at para. 67.

[126] As indicated above, I have already found that Cabinet decisions are justiciable and reviewable. As Wilson J. eloquently summarized in *Operation Dismantle*, where a *Charter* challenge is involved, "it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so": at para. 64.

[127] Other courts have also noted the special status of a *Charter* claim in the context of a review of government action and the courts' role in ensuring the validity of government action.

[128] Lederer J., for example, noted in *Tanudjaja (SCJ)*, at para. 139: "There is no doubt that an application that involves allegations of breaches of the *Charter* is justiciable."

[129] In *Turp v. Canada*, 2012 FC 893, [2014] 1 F.C.R. 439, the Federal Court considered a challenge of the Canadian government's decision to withdraw from the Kyoto Protocol in 2011. The court found the matter to be non-justiciable but noted that a *Charter* challenge would have rendered it justiciable: at para. 18.

[130] Similarly, in *Friends of the Earth*, on which Ontario relies, the court expressed doubts that the court has any role to play in controlling or directing the other branches of government in the conduct of their legislative and regulatory functions outside of the constitutional context: at para. 40.

[131] Ontario states that the task of dealing with global climate change is an "enormously complex issue unsuited to judicial review" and that the Target falls within the realm of public policy that is inappropriate for judicial involvement.

[132] I have already found above that the Target and Plan are not pure policy decisions. However, I also note that this Application is very different from those in *Tanudjaja* and *La Rose*. In *Tanudjaja*, the applicants "did not challenge a specific state action or a specific law": *Tanudjaja (ONCA)*, at para. 27. In *La Rose*, the court noted that the plaintiffs were essentially challenging "Canada's overall approach to climate policy": at para. 22. Here, the Applicants are challenging very specific governmental actions and legislation. They are challenging policy decisions that were translated into law – in the form of the *Cancellation Act* – and by state action – in that the Ministry of Environment set the Target, pursuant to the *Cancellation Act*.

[133] Indeed, the *La Rose* court did not foreclose the possibility that policy can be justiciable, noting, "Policy choices must be translated into law or state action in order to be amenable to *Charter* review and otherwise justiciable": at para. 38 (also see discussion at para. 45).

[134] Additionally, both *Friends of the Earth* and *Tanudjaja* suggest that a matter is <u>not</u> non-justiciable simply because it may involve another branch of government.

[135] In fact, Dean Sossin (as he then was), in *Boundaries of Judicial Review*, suggests that the judge in *Friends of the Earth* should not have invoked the doctrine of justiciability due to concern over another branch of government relating to implementing a remedy. He also notes that the judge rejected an approach that would allow the court to separate the *KPIA* policy imperatives into justiciable and non-justiciable components: Sossin, at p. 247.

[136] Further, as the majority in *Tanudjaja (ONCA)* noted at para. 35:

> I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107.

[137] Lastly, while social and economic rights are not the main focus of the Application, they are collateral issues that are raised. As Feldman J.A. noted in her dissent in *Tanudjaja (ONCA)*, justiciability of social and economic rights is an open question:

> [79] [Dean Sossin] then concludes that the justiciability of social and economic rights under the *Charter* is an open question:
>
> > It is striking that, despite the rich jurisprudence which has developed under the *Charter*, such uncertainty remains with respect to a question of fundamental importance to the scope of judicial review of government action. For the moment, the justiciability of social and economic rights under the *Charter* remains an open question. [Sossin, at p. 244]
>
> […]
>
> [81] In *Gosselin*, the Supreme Court did not hold that claims for social and economic rights under the *Charter* were non-justiciable. As a result, courts should be extremely cautious before foreclosing any enforcement of these rights. In my view, to strike a serious *Charter* application at the pleadings stage on the basis of justiciability is therefore inappropriate. [emphasis added]

[138] Dean Sossin has also noted that the extent to which social and economic rights are incorporated into the Canadian Constitution remains unsettled: Sossin, at p. 242. Social and economic rights are wide-ranging and may include rights to adequate nutrition, clothing, housing, health, education, and welfare: Sossin, at p. 242. This further suggests that the courts have the institutional competence to determine these types of matters.

[139] To summarize, this Application is different from the ones considered in *Friends of the Earth*, *Tanudjaja*, and *La Rose*. As noted above, *Friends of the Earth* did not consider the government's action in the constitutional context. While the claim in *Tanudjaja* was based on the *Charter*, it failed to identify specific government conduct that led to a *Charter* violation. Rather, as the court pointed out, the application was largely focused on seeking recognition of an explicit positive obligation on the province to implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing. In *La Rose*, the plaintiffs did not challenge any specific legislation or governmental action. Leaving the question of positive obligations to later in these reasons, this Application is different, as it challenges specific government conduct (preparation of the Target and the Plan) and legislation (the *Cancellation Act*).

[140] This Application is, therefore, based on the foregoing, *prima facie* justiciable. The focus must now shift to whether there is any reasonable prospect that the *Charter* claims made by the Applicants can succeed.

C2. Do the *Charter* claims in the Application have a reasonable prospect of success?

a. Section 7: Life, Liberty, and Security

The Claim as Pleaded

[141] The Applicants pleaded the following facts in the Notice of Application, which, for the purpose of this motion, are taken as proven, as discussed above and pursuant to *Inuit Tapirisat*.

[142] The Applicants submit that there are myriad ways that climate change impacts the health, lives, liberty, and livelihood of current and future generations of Ontarians. They submit that if global warming exceeds 1.5 degrees Celsius above pre-industrial temperatures, the impacts of climate change in Ontario will include (but will not be limited to):

- An increase in the frequency and intensity of acute extreme heat events, resulting in an increase in fatalities, serious illness, and severe harm to human health;
- An increase in overall temperatures and heat waves, resulting in an increase in fatalities, serious illness, and severe harm to human health;
- An increase in the spread of infectious diseases such as Lyme disease and West Nile Virus, resulting in an increase in fatalities, serious illness, and severe harm to human health;
- An increase in the frequency and intensity of fire activity (including forest wildfires), resulting in an increase in fatalities, serious illness, displacement, and severe harm to human health;
- An increase in the frequency and intensity of flooding and other extreme weather events, resulting in an increase in fatalities, serious illness, displacement, and severe harm to human health;
- An increase in the spread of harmful algal blooms in water that Ontarians use for drinking and recreational purposes, with a resulting increase in serious illness, loss of livelihood, and severe harm to human health;
- An increase in exposure to contaminants such as mercury through food webs, with a resulting increase in severe harm to human health and negative impact on food security and sovereignty of certain Ontario communities;
- An increase in harms to Indigenous peoples, including increased impacts on health, access to essential supplies, ability to carry out traditional activities, loss of livelihood, and displacement; and
- An increase in serious psychological harms and mental distress resulting from the impacts of climate change, including but not limited to, the impacts set out in the paragraphs above.

[143] The Applicants submit that the Target violates the rights of Ontario's youth under s.7 of the *Charter* by compromising their right to life, liberty, and security of the person, in a serious and pervasive manner that does not accord with the principles of fundamental justice. Their Notice of Application outlines the following:

- The Target is inadequate to hold global average temperature increases to 1.5 or 2 degrees Celsius above pre-industrial levels and thereby avoid catastrophic climate change impacts. The Target will ensure a higher level of GHG emissions that will

cause or contribute to death, serious illness, and severe harm to the health of Ontario's youth and future generations, interfering with their right to life and security of the person.

- The Target violates the right to liberty of Ontario's youth and future generations because the impacts of climate change interfere with their ability to choose where to live, their right to personal autonomy, and their right to make other decisions of fundamental importance.

- The Target will materially increase the risk that Ontario's youth and future generations will suffer from the many harmful impacts of climate change.

[144] The Applicants submit that the Respondent's deprivation of the rights to the life, liberty, and security of Ontario's youth and future generations is not in accordance with the principles of fundamental justice in the following ways:

- The Target is grossly disproportionate to Ontario's stated objective of taking proactive action to address climate change, given the severity and extent of the harm caused by a high level of GHG emissions.

- The Target is arbitrary. Ontario's objective in adopting the Target was to take proactive action to address climate change. The Target bears no relation to and is inconsistent with that objective.

- To the extent Ontario may rely on economic justifications, the justifications ring hollow, and Ontario's inaction on climate change now will prove to be increasingly costly to Ontarians in the future.

Section 7 Jurisprudence and Analysis

[145] Section 7 of the *Charter* provides:

> 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.

[146] The constituent elements of a claim under s. 7 of the *Charter* were recently summarized succinctly by the Court of Appeal in *Bedford v. Canada (Attorney General)*, 2012 ONCA 186, 109 O.R. (3d) 1:

> [88] [Section] 7 creates a single constitutional right: the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. There is no free-standing right to life, liberty and security of the person: [citation omitted]. Legislation that limits the right to life, liberty and security of the person will attract s. 7 scrutiny. It will, however, survive that scrutiny and avoid judicial nullification unless it is shown to be contrary to the principles of fundamental justice.
>
> [89] An applicant alleging a breach of s. 7 must demonstrate on the balance of probabilities that (1) the challenged legislation interferes with or limits the applicant's right

> to life, or the right to liberty, or the right to security of the person; and (2) that the interference or limitation is not in accordance with the principles of fundamental justice. […]

[147] On its face, the Application engages each of the s.7 rights: life, liberty, and security.

Life Interest

[148] Since the enactment of the *Charter* in the early 1980s, s.7 jurisprudence has traditionally been tied to the penal system or the administration of justice. However, s.7 jurisprudence has since expanded into broader matters of social policy, starting with cases like *Chaoulli*, cited above: see J. Hendry, "Section 7 and Social Justice" (2009-10) 27 Nat'l J. Const. L. 93.

[149] In *Chaoulli*, the Supreme Court ruled that Québec statutes prohibiting private medical insurance in the face of long wait times violated the *Québec Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12. *Chaoulli* was one of the first cases that greatly expanded the understanding of the "life" interest in s.7 jurisprudence.

[150] This expanded understanding of s.7 was once again apparent in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 ("***PHS***"). The PHS Society operated Insite, a supervised drug injection site, in Downtown Eastside Vancouver, an area racked by high drug use. To operate, Insite was obliged to apply for renewable exemptions from the federal Minister of Health, as the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, prohibits the possession and trafficking of controlled substances. In 2008, the Minister of Health did not extend the exemption. The Supreme Court found that the Minister's failure to grant the exemption limited Insite users' s.7 *Charter* rights and breached the principles of fundamental justice. The life interest was engaged as clients of Insite were deprived of potentially lifesaving medical care: at para. 91.

[151] The expansion of the concept of right to life continued. In a case challenging the prohibition of assisted suicide, *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, the Supreme Court summarized, at para. 62:

> This Court has most recently invoked the right to life in *Chaoulli* [citation omitted], where evidence showed that the lack of timely health care could result in death [citation omitted], and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care [citation omitted]. In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. […]

[152] In a non-*Charter* context, the Supreme Court has also acknowledged that "certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health": see *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 127.

[153] The excerpt in *Carter* above suggests that right to life is engaged in this Application, as the Applicants argue that Ontario's actions in repealing the *Climate Change Act* and setting an inadequate Target increase the risk of death of Ontario's youth and future generations.

Liberty Interest

[154] Section 7's liberty interest is about more than physical freedom. The Supreme Court has found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 49. This interest also protects "the right to make fundamental personal choices free from state interference": *Blencoe*, at para. 54. In *Carter*, the Supreme Court also stated: "concerns about autonomy and quality of life have traditionally been treated as liberty and security rights": at para. 62.

[155] Additionally, in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, the Supreme Court found that the right to choose where to establish one's home falls within the scope of the liberty interest guaranteed by s.7 of the *Charter*, since this right to choice is so fundamentally or inherently personal such that, by its very nature, it implicates basic choices going to the core of what it means to enjoy individual dignity and independence: at para. 66.

[156] The Applicants submit in their Notice of Application that impacts of climate change will interfere with the Applicants' ability to choose where to live. On its face, that engages the "liberty" interest in s.7.

Security Interest

[157] Section 7's security interest is grounded in the idea of personal autonomy and protects both physical and psychological integrity. In *Carter*, the Supreme Court found that this interest is engaged when the state interferes with "an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering": at para. 64. To trigger protection under the psychological branch of security of the person, the Supreme Court outlined in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 60:

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. [emphasis added]

[158] In another context, the Supreme Court has also acknowledged that security of the person encompasses the right to be free from prospective harm. In other words, security of the person "must encompass freedom from the threat of physical punishment or suffering as well as freedom

from such punishment itself": *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 207.

[159] The Applicants, in their Notice of Application, submit that Ontario's inadequate Target could further contribute to climate change, which could lead to an increase in serious psychological harm and mental distress resulting from the impacts of climate change. While the Applicants will need to establish at the merits hearing that this harm is "greater than ordinary stress or anxiety", the Application, at this stage of the proceedings, *prima facie* engages the security interest in s.7.

Principles of fundamental justice

[160] The s.7 rights of life, liberty, and security of the person may only be infringed upon if in accordance with the principles of fundamental justice. The Supreme Court, in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, noted at para. 105:

> The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty, or security of the person by laws that violate these norms is not in accordance with the principles of fundamental justice.

[161] The Supreme Court also emphasized that courts are not to consider competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s.1 of the *Charter*: *Carter*, at para. 79, citing *Bedford*, at paras. 123 and 125.

[162] The Supreme Court outlined the basic principles of arbitrariness, overbreadth, and gross disproportionality in *Bedford* [emphasis in original]:

> [111] Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person [citation omitted]. A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. […]
>
> [112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. […] At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. […]
>
> [120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme

> cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. […]

[163] The Application has identified that the Target and ss.3(1) and/or 16 of the *Cancellation Act* were arbitrary and grossly disproportionate. Accordingly, for the purposes of the Rule 21 motion, I will proceed on the basis that the Applicants have properly pleaded breaches of two principles of fundamental justice.

Flexibility of s.7 and the Evidentiary Burden

[164] In *Blencoe*, a decision that first outlined the scope of s.7, the Supreme Court emphasized the flexible nature of this *Charter* section at para. 188:

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*. […]

[165] In a climate change context, Rennie J.A., speaking for a unanimous Federal Court of Appeal in *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223, 438 D.L.R. (4th) 148, stated at para. 139:

> I am cognizant of the fact that section 7 is not frozen in time, nor is its content exhaustively defined, and that it may, some day, evolve to encompass positive obligations – possibly in the domain of social, economic, health or climate rights. [Emphasis added]

[166] With that in mind, at this stage of the proceedings, it is not apparent that the Application cannot succeed. That being said, the Applicants will have a high evidentiary burden at the merit hearing. This still does not suggest that the Applicants cannot succeed.

[167] *Operation Dismantle*, discussed above, was one of the first s.7 cases that the Supreme Court heard, and the court wrestled with the standard to be applied to causation. The court noted that to succeed, the applicant must show that they have some chance of proving that the action of the Canadian government caused a violation or a threat of violation of their rights under the *Charter*: at para. 10. Applied to this case, Ontario submits that the Applicants' burden is to prove that Ontario's target for the reduction of GHG emissions by the year 2030 will cause or contribute to future harms.

[168] Wilson J.'s concurring opinion in *Operation Dismantle* suggests that the Applicant could potentially meet this burden. Wilson J. advocated for a more flexible approach to evidence required to prove causation. Departing from the majority, she held that "matters of opinion" can still be subject to proof through "evidentiary" facts. She then elaborated on different types of "facts" and provided examples where "opinions" can be proven [emphasis added]:

> [78] […] What we are concerned with for purposes of the application of the principle [in *Inuit Tapirisat*] is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand. […] Indeed, even a finding that an event "would cause" a certain result in the future is a finding of intangible fact. […]
>
> [79] In my view, several of the allegations contained in the statement of claim [in *Operation Dismantle*] are statements of intangible fact. Some of them invite inferences; others anticipate probable consequences. They may be susceptible to proof by inference from real facts or by expert testimony or "through the application of common sense principles": [citation omitted]. We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. It is not, however, the function of the Court at this stage [motion to strike] to prejudge that question.

[169] More recently, in *Bedford*, the Supreme Court also held that a more flexible standard of causation, the "sufficient causal connection" standard, should prevail. As the court noted:

> [75] I conclude that the "sufficient causal connection" standard should prevail. This is a flexible standard, which allows the circumstances of each particular case to be taken into account. Adopted in *Blencoe* [citation omitted], and applied in a number of subsequent cases […], it posits the need for "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" for s. 7 to be engaged (*Blencoe*, at para. 60 (emphasis added)).
>
> [76] A 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, and is satisfied by a reasonable inference, drawn on a balance of probabilities ([citation omitted]). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. […]

[170] In addition to affirming a flexible standard, *Bedford* also encouraged the use of expert witnesses to present social science evidence, which is included in the Application. Part of the Applicants' case depends on social and legislative facts, in addition to facts that are based on science. Social and legislative facts are facts about society at large, established by complex social science evidence: *Bedford*, at para. 48. The *Bedford* court noted that the use of social science evidence in *Charter* litigation has evolved significantly, and the Supreme Court has expressed a preference for social science evidence to be presented through an expert witness: at para. 53.

[171] As I have indicated above, this Application is capable of scientific proof and the Applicants have already included many facts based on scientific and social science findings. Pursuant to *Bedford*, the assessment of expert evidence relies heavily on the trial judge: at para. 53. The Applicants should therefore be afforded the opportunity to present their complete evidence in front of the application judge, especially in light of the flexible standard used to establish causation in a s.7 claim.

b. Section 15: Equality

The Claim as Pleaded

[172] The Applicants submit that the Target violates s.15 of the *Charter* because Ontario's youth and future generations:

- are a uniquely vulnerable population by virtue of their age and, for some, their inability to influence political decisions at the ballot box;
- will be disproportionately impacted by the devastating impacts of climate change, which will significantly increase in severity and intensity as the years progress;
- are among those who will suffer the most from the climate change impacts, including, but not limited to, extreme heat events, warming temperatures and heat waves, infectious diseases, fires, flooding, algal blooms, toxic contamination, and mental health challenges; and
- will have their pre-existing vulnerability and disadvantage heightened as a result of the impacts stated above.

[173] Ontario submits that the essence of the Applicants' discrimination claim is that Ontario residents of the future will suffer more harm than those of the present or of the past. Ontario submits that even if this could be proven, it is a temporal distinction, not one based upon enumerated or analogous grounds in the *Charter*.

[174] In response, the Applicants submit that they are particularly vulnerable because of the cumulative and compounding impacts of climate change that will play out over years and therefore impact them longer and more acutely. In addition, the Applicants submit that the specific physiological and psychological characteristics of young people would make them particularly susceptible to the negative health impacts of climate change.

Section 15 Jurisprudence and Analysis

[175] Section 15 (1) of the *Charter* provides:

> 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.

[176] In *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20, the Supreme Court identified two steps to the equality analysis under s.15(1):

> a) does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds; and

> b) if so, does the law fail to respond to the actual capacities and needs of the members of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage?

[177] Section 15 claims are typically fact-driven and highly contextual. The Supreme Court has noted that these claims are inherently comparative, in that claimants have to establish distinctive treatment (or effect) based on a prohibited ground: *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 62.

[178] The Applicants' s. 15 claim highlights the vulnerability of the Applicants by virtue of their age: some of them do not have the right to vote; most, if not all, of them will be proportionately affected by impacts of climate change and will suffer the most of all generations; but more importantly, these impacts will exacerbate their pre-existing vulnerability and disability.

[179] On the first stage of the test, the Applicants clearly identify an alleged distinction based on an enumerated ground, age. The second stage of the test, which generally answers the question of whether the distinction is discriminatory, is less straightforward.

[180] The Applicants' claim is essentially one of "adverse effects" or "adverse impact" discrimination, *i.e.*, indirect discrimination. In such cases, it is alleged that a particular law or rule, while neutral on its face, has a disproportionate adverse impact on a group characterized by a prohibited (enumerated or analogous) ground of discrimination: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 60-63.

[181] The Supreme Court has noted the difficulty of identifying indirect discrimination:

> In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). […] In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. […] In that kind of case, the claimant will have more work to do at the first step. Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group: *Withler*, at para. 64.

[182] The Supreme Court has also long noted the importance of substantive equity when considering whether there has been discrimination. Indeed, formal equality has been squarely rejected by the Supreme Court of Canada in favour of a substantive equality analysis: see *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464 ("***Alliance***"); *Québec v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, *Withler*; *Taypotat*.

[183] In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. anticipated the dangers of formal equality, in which likes are treated alike, at p. 165:

> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law […,] the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another. [emphasis added]

[184] More recently, in *Alliance*, Abella J. noted: "when the government passes legislation in a way that perpetuates historic disadvantage for protected groups, regardless of who caused their disadvantage, the legislation is subject to review for s. 15 compliance": at para. 41.

[185] Pre-existing disadvantage plays an important role in the substantive equality analysis. Indeed, while the equality analysis is inherently comparative, *disadvantage* rather than *distinction* lies at its heart: *Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427, at para. 129. As articulated by Abella J. in *Québec v. A*, at para. 332:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.

[186] Whether the Applicants are able to meet the second stage of the s.15 test outlined above remains to be seen. However, I am unable to say, at this stage, that the Applicants' claim under s.15 of the *Charter* has no prospect of success.

[187] First, it is acknowledged that evidentiary challenges for claimants may be more apparent in claims of "adverse effect" or "adverse impact" discrimination. To date, few decisions of the Supreme Court have dealt with adverse effect discrimination, perhaps because of the significant practical difficulties involved in adducing sufficient evidence to demonstrate adverse impacts on particular groups: see *Symes v. Canada*, [1993] 4 S.C.R. 695. However, where adverse impact claims have succeeded under the *Charter*, they have been based on self-evident societal patterns amenable to judicial notice, such as the disadvantage faced by deaf persons seeking to access medical services without the aid of sign language interpretation: see *Eldridge*, cited above. The adverse effects of climate change on younger generations – who presumably would have more years to live than current generations – may be considered self-evident, especially if the Applicants are able to present evidence of historical or sociological disadvantage that the Applicants have experienced as a result of their age.

[188] Second, it is not apparent that the Applicants cannot prove that Ontario's conduct widens the gap between the disadvantaged group (the Applicants, youth and future generations) and the rest of society (adults and current generations) rather than narrowing it, pursuant to Abella J.'s

comments in *Québec v. A*, cited above, particularly in light of the courts' shift to substantive, rather than formal, equality analysis.

[189] A liberal reading of the Applicants' Notice of Application suggests that they intend to prove, with admissible evidence, that Ontario's actions will have a disproportionate impact on youth and future generations by putting them at an increased risk of various health problems due to their age, an enumerated ground. Just as in the case of the Applicants' s.7 claim, the novelty of the s.15 claim will not prevent the claims from proceeding unless it can be established that the claim is unsustainable, which is not the case here.

D. Does the Application depend on a positive obligation on the Province?

[190] Ontario argues that even if the claim were justiciable and if it were possible to prove future harms, the Application must fail because it is premised on a legal theory that Ontario is constitutionally obliged to take positive steps to redress the future harms of climate change – *i.e.*, the Application is premised on a "positive obligation" on the state. They submit that the province has no constitutional obligation to take positive steps.

The Law

[191] In a labour rights case, *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, the Supreme Court considered the nature of positive and negative obligations in the context of s.2(d) of the *Charter* (freedom of association). The court noted that "positive obligations may be required 'where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms'": at para. 25. "Negative obligations" are generally understood to mean "that Parliament and the provincial legislatures need only refrain from interfering (either in purpose or effect) with protected associational activity [that guarantees fundamental freedoms]": at para. 19.

[192] One year later, in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, the Supreme Court left the door open for positive obligations on the state in the context of s.7. *Gosselin* centered around a claim under s.7 for a right to an adequate level of social assistance in Québec, as the province excluded citizens under age 30 from receiving full social security benefits. While the majority rejected the *Charter* challenge, McLachlin C.J. noted the following regarding positive obligations [emphasis added]:

> [82] <u>One day s. 7 may be interpreted to include positive obligations.</u> To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada* [citation omitted], the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": [citation omitted]. <u>It would be a mistake to regard s. 7 as frozen</u>, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe* [citation omitted] are apposite:
>
> > We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development

> of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.
>
> [83] I conclude that they do not. With due respect for the views of my colleague Arbour J. [dissenting], I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

[193] In the context of s.15, the Supreme Court found a "duty to take positive action" as early as 1997. In *Eldridge*, cited above, the Supreme Court found that the failure to provide services to deaf clients at a hospital was an omission that violated the claimant's *Charter* rights and ordered the provision of that service: at para. 80. The Court of Appeal for Ontario, in *Ferrel v. Ontario (Attorney General of)* 1998, 42 O.R. (3d) 97 (C.A.), a case Ontario cites, noted that *Eldridge* stands for the proposition that "the Supreme Court of Canada has left open the possibility, in some cases, that s. 15(1) may oblige the state to take positive actions to ameliorate the symptoms of systemic or general inequality": at para. 43.

Position of the Parties

[194] The Applicants submit that this is not a case of positive obligation, as "typical" positive rights cases seek relief that requires the government to take on spending or other obligations to improve a certain social welfare problem they did not create (*e.g.*, the homelessness problem in *Tanudjaja*). On the other hand, in this Application, the government is acting to cause the harm in question. By lowering the target for Ontario, the government is essentially authorizing, incentivizing, and itself creating the very GHGs that are the cause of the alleged *Charter* violations in the Application. The Applicants emphasize that none of the relief sought addresses specifically how the government should go about achieving the appropriate level of emissions reductions, meaning there is "very little in the way of positive obligations in the classic sense".

[195] Alternatively, the Applicants submit that even if this were a positive obligation case, it is a case that involves a "special circumstance", pursuant to *Gosselin*. They submit that as multiple appellate courts have already recognized, climate change is an existential threat. In this fundamental way, the issues and relief sought in this Application engage the very precondition to the enjoyment of all fundamental freedoms, making it unlike any of the cases Ontario cites. With climate change, the stakes could not be higher, and action is required at the governmental level in order to avoid its catastrophic impacts.

[196] In response, Ontario submits that no matter what the Applicants call it, what they really seek in this case is "a Plan and a Target that has a different number". Essentially, Ontario argues, the Applicants want the government to take a positive step to put in a different number for the Target and then meet that number. In other words, the Application entails "a duty to take steps to combat the adverse effects of climate change in the future by doing something today", no matter how the Applicants phrase it.

[197] Ontario largely relies on five cases to argue that (a) the *Charter* does not impose positive obligation on the state to take steps to address harms or to prevent future harms, and (b) Ontario does not have a constitutional obligation to do so in the first place. I will summarize these cases and outline the parties' positions on them: (1) *Ferrel*, cited above; (2) *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538, 91 O.R. (3d) 412; (3) *Tanudjaja (SCJ)*, cited above; (4) *Barbra Schlifer*, 2014 ONSC 5140, 121 O.R. (3d) 733; and lastly, (5) *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 1308, 144 O.R. (3d) 347. These cases discuss either s.7 or s.15, but Ontario argues that for the sake of this argument, the principles apply equally.

1. *Ferrel v. Ontario* (1998)

[198] *Ferrel* is a s.15 case that challenged the Ontario legislature's repeal of an act that comprised various employment equity provisions. The repealed Act imposed an obligation on employers to work toward the goal of a workplace that reflected the various groups that make up Ontario society: at para. 7. The Court of Appeal for Ontario rejected the challenge as it found that there was no constitutional obligation to enact the repealed Act in the first place, and s.15 does not impose the obligation on the state to do so.

[199] Ontario cites *Ferrel* for two propositions. First, in cases where there is no obligation to enact an act in the first place, the legislature, as the Court of Appeal wrote, is "free to return the state of the statute book to what it was before the [repealed Act], without being obligated to justify the repealing statute under s.1 of the *Charter*": at para. 36. Second, Ontario relies on the Court of Appeal's comments on the dangers of imposing a positive obligation on the state:

> [48] Finally, if it is thought that s. 15(1) imposes an obligation to enact employment equity legislation, what is the nature and scope of the obligation? A court is not competent to answer this question in a satisfactory way. It is a question that is not justiciable. Legislatures require substantial freedom in designing the substantive content, procedural mechanisms, and enforcement remedies in legislation of this kind. They are the appropriate branch of government to make these decisions, not courts working from the general terms of s. 15(1).
>
> [49] In this vein, what would be the constitutional minimum content of employment equity legislation? […] Considerations of this nature are further indications that it would not be sensible to interpret s. 15(1) as imposing an obligation to enact laws the constitutional adequacy of which would be subject to judicial review under the *Charter*.

[200] The Applicants submit that *Ferrel* does not apply to the case at bar because the issue was about systemic discrimination in the employment context, which is not conduct that Ontario

authorized or created. That makes it different than this case, where Ontario is actively authorizing and creating the very emissions that are causing harm.

2. *Flora v. OHIP* (2008)

[201] *Flora* centered on whether s.7 imposes an obligation on the government to fund life-saving surgery. In that case, Mr. Flora challenged a regulation that prevented him from recovering from the Ontario Health Insurance Plan ("**OHIP**") his half-million-dollar expenditure on a procedure that saved his life. The procedure had to be performed at a privately-funded hospital in the United Kingdom because it was not approved in Ontario and was therefore not an "insured service" for the purposes of reimbursement.

[202] Mr. Flora submits that his rights under s.7 were deprived because Ontario repealed an older law that would have paid for his treatment. The court relied on *Ferrel*, discussed above, and held that a *Charter* violation cannot be grounded on a mere change in law: *Flora*, at para. 104.

[203] Mr. Flora, relying on *Chaoulli*, cited and discussed above, argued that s. 7 imposes positive obligations on the state to fund the surgery. The Court of Appeal distinguished *Chaoulli*, stating that it was not a positive obligation case, as the claimants there did not seek an order requiring the government to fund their private health care or to spend more money on health care: *Flora*, at para. 107.

[204] The Court of Appeal, citing *Chaoulli*, held that because the *Charter* does not confer a freestanding constitutional right to health care, the Ontario government, in the case of OHIP, has "elect[ed] to provide a financial benefit that is not otherwise required by law": at para. 108. The court therefore concluded, at para. 108:

> On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature.

[205] Ontario cites *Flora* for the proposition that if there was no requirement to enact a protective measure in the first place, there cannot be a constitutional requirement not to repeal it.

[206] The Applicants, citing *Chaoulli*, submit that even if the *Charter* does not confer a freestanding constitutional right to a safe environment, Ontario must still ensure that the scheme it put in place to protect against climate change complies with the *Charter*, as it acted to do in the first place: see *Chaoulli*, at para. 104.

[207] They also submit that *Flora* does not apply to the case at bar because the underlying issue in *Flora* was about Ontario residents with diseases or disabilities that required medical treatment, which the Province was, once again, not responsible for.

3. *Tanudjaja v. Ontario* (SCJ) (2013)

[208] On the issue of positive obligation, Ontario cited this Court's decision in *Tanudjaja*, as the Court of Appeal's decision did not address this issue after finding the application not justiciable.

[209] Early in the reasons, the Court found that "[t]here cannot be a breach of the *Charter* that is based on the assertion of a positive obligation on the state to provide for life, liberty and the security of the person and there is no general obligation that all people will be treated equally": at para. 26.

[210] The applicants in *Tanudjaja (SCJ)* argued that they should have the chance to present a full evidentiary record to demonstrate that their case could be a "special circumstance" as outlined in *Gosselin.* That position was rejected, the Court stating:

> [56] It proposes that every time an application raises the prospect of a positive requirement being imposed on government in order to enforce compliance with s. 7 of the *Charter*, it will have to be the subject of a full hearing. The facts, as asserted, are to be taken as proved and, as a result of the decision in *Gosselin*, it will never be plain and obvious that the case cannot succeed. This is said to be so even in the face of the many cases that, in the years since *Gosselin* was decided, considered but have not recognized a positive obligation on the state to act to protect rights under s. 7.
>
> […]
>
> [58] […] As of this moment, there is no positive obligation placed on Canada or Ontario, arising out of an allegation of a breach of s. 7 of the *Charter*, having been found to apply in circumstances such as this. To the contrary, *Clark* and *Masse* [two cases similar to the one before Lederer J.] demonstrate the opposite. It may be that values, attitudes and perspectives will change, but this evolution is not sufficient to trigger reconsideration in the lower courts [….]

[211] Citing the paragraph above, Ontario submits that the test on a motion to strike cannot be premised on the fact that one day the law may change, as that would mean that all claims can survive a motion to strike.

[212] I note, as an aside, that the comments on positive obligation, set forth at para. 210 above, were heavily criticized by Feldman J.A. in her dissent at the Court of Appeal, an issue the majority did not address. Feldman J.A. observed that the Court in *Tanudjaja* "erred in stating that the s.7 jurisprudence on whether positive obligations can be imposed on governments to address homelessness is settled": at para. 52. Feldman J.A. further stated, at para. 56:

> While recognizing that the majority in *Gosselin* did not foreclose the possibility that, in "special circumstances" in a future case, a court could find that s. 7 imposes positive obligations on government, the motion judge nevertheless concluded the opposite.

[213] As with other cases, the Applicants submit that the underlying issue in *Tanudjaja*, homelessness, was not a problem or predicament that Ontario authorized or created.

4. *Barbra Schlifer Commemorative Clinic v. Canada* (2014)

[214] In *Barbra Schlifer*, the applicant, a specialized clinic for women who experience violence, challenged amendments to the *Firearms Act, 1995*, S.C. 1995, c. 39, which repealed the long-gun registry system that required the registration of non-restricted firearms. The applicants submit that the registry system protected against the risk of harm, and repealing the registry was contrary to ss.7 and 15.

[215] In that case, Morgan J. first stated that for a s.7 challenge to succeed, there must be *some* state-imposed burden or state-implemented deprivation of rights: at para. 22 [emphasis in original]. In other words, there must be some sort of state intervention.

[216] Applying *Barbra Schlifer*, Ontario argues that the only "state intervention" that is challenged here is the Target, and questions whether the Target itself creates risk and whether it is considered "state intervention". Ontario submits that if it is not state intervention, then the risk does not fall within the government's constitutional responsibilities.

[217] Morgan J. continued, stating that the *Charter* does not impose a positive obligation on the government to enact particular protective measures against the risk of firearm use or to maintain them once enacted. Ontario relies on this as another example of this Court finding that a positive example did not exist.

[218] The Applicants submit that there are at least two ways this Application is different from the one in *Barbra Schlifer*. First, they maintain that the only constitutional focus in *Barbra Schlifer* was a repeal, whereas here, Ontario put in place a legislative scheme with a target that allows for a dangerously high level of emissions. Second, Morgan J. found the connection between the state conduct and the non-state conduct (*i.e.*, violence perpetrated by persons with firearms) to be remote: see para. 31. The Applicants point out that, once again, in *Barbra Schlifer*, the government did not authorize the conduct that caused harm, but here, Ontario established a target that essentially allows GHG emitters to continue to emit GHGs into the atmosphere, thereby causing harm.

[219] The Applicants also point out that *Barbra Schlifer* did survive a motion to strike: see *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271.

5. *ETFO v. Ontario* (2019)

[220] Ontario cites *ETFO* as a more recent case that affirms *Flora* and *Ferrel* and one that largely supports their position. In *ETFO*, the Elementary Teachers' Federation of Ontario brought an application for judicial review at the Divisional Court to challenge Ontario's 2018 decision to issue a directive requiring Ontario's teachers to teach the sex education curriculum in place from 2010 to 2015 ("2010 curriculum"), instead of the new curriculum in place between 2015 and 2018 ("2015 curriculum"). The 2010 curriculum does not include topics that were in the 2015 curriculum, such as consent, specific names for body parts, gender identify and sexual orientation, online behaviour and cyberbullying, and sexually transmitted infections. The applicants submit that the directive infringes the *Charter* rights of teachers (s.2(b), right to freedom of expression), students (ss.7 and 15(1)), and parents (ss.7 and 15(1)).

[221] The court found that a *Charter* challenge cannot be made out in *ETFO*. On the s.7 issue, the court noted: "a change in the law or government policy alone does not constitute deprivation

of a right even if the previous law provided greater life, liberty or security of the person": at para. 139, citing *Flora* and *Barbra Schlifer*. On s.15, the court wrote, at para. 152:

> A section 15(1) *Charter* challenge cannot be based on the removal or omission of learning objectives referable to the 2015 Curriculum. As we have noted previously, that curriculum does not enjoy *Charter* protection: [citation omitted]. A *Charter* infringement cannot be grounded on a mere change in the law nor on a change of curriculum, even a change that no longer provides a benefit from the earlier curriculum.

[222] The court then cited, with approval, Ontario's summary of cases on this point, at para. 153:

> In a long line of *Charter* s. 15 cases, Ontario courts have held that "in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values." These *Charter* s. 15 cases include *Ferrel* (repeal of employment equity statute), *Lalonde* (closing a Francophone hospital), *Barbra Schlifer* (repeal of long-gun registry), *Tanudjaja* (reduction in housing programs), and *Irshad* (restricting OHIP eligibility). In every case, persons who benefitted from the previous law or policy alleged that its removal or replacement had a discriminatory effect. In every case, the Court rejected this argument.

[223] The Applicants do not dispute that the legislature is entitled to change its approach, but emphasizes that its actions must still be constitutionally compliant: *Alliance*, cited above, at para. 36. They submit that in this case, constitutional compliance requires Ontario to reduce its share of GHG emissions to protect its citizens based on internationally accepted science on the impacts of climate change, rather than imposing an inadequate and dangerous Target.

Analysis and Conclusion

[224] As the Applicants submit, the thrust of Ontario's submissions is that if there is no constitutional basis for the government to act in the first place, then repeal of legislation cannot, in and of itself, be unconstitutional.

[225] Ontario's line of reasoning assumes that the province is not constitutionally obliged to take positive steps to redress the future harms of climate change. However, that assumption is not clear at this stage of the proceedings. Cases such as *Gosselin* and *Eldridge*, discussed above, suggest that under very specific circumstances, a positive constitutional duty can be found. Also, the Applicants are seeking relief not only for the repeal of the *Climate Change Act* but also for the setting of the new Target by Ontario.

[226] The Applicants submit that if Ontario chose to put in a scheme to protect against climate change, it must do so in a way that complies with the *Charter*. It is of note that in *La Rose*, on this point, the court noted: "[…] when policy choices are translated into law or state action, that resulting law or state action must not infringe the constitutional rights of the Plaintiffs": at para. 45. In other words, once Ontario chose to translate policy choices into law and state action, which I have found to be the case here, Ontario has a responsibility to ensure that the same law and state action do not infringe the constitutional rights of Ontario residents.

[227] I note further that cases cited by Ontario were addressed on their merits, after the court had carefully considered the factual context and the full merits of the novel legal propositions put forward by the various applicants. A motion to strike is not the appropriate forum to make judicial findings on the complex issue of positive obligations. The Applicants should therefore be given the chance to make full submissions at a merits hearing.

[228] Additionally, the cases cited by Ontario are all judicial statements in contexts very different from the case before this Court. It is not clear that a case for positive obligation cannot be made out in the climate change context, and it is especially unclear if this Application could be a "special circumstance" described in *Gosselin* without the benefit of a full record.

[229] In fact, "special circumstance" has been considered in a climate change context in *La Rose*, where the court emphasized that it would be a mistake to regard s.7 as frozen. The court noted that the plaintiffs in that action "have pleaded facts that may support the existence of 'special circumstances'" and rejected Canada's argument that the plaintiffs' claim discloses no reasonable cause of action on the basis of a positive obligation alone: at para. 72.

[230] Indeed, in *Tanudjaja (SCJ)*, Lederer J. specifically stated that the application did not meet the "special circumstance" test in *Gosselin* because a right to housing had already been argued before the courts in previous cases: at para. 54.

[231] Similarly, in *Ferrel*, a case that pre-dates *Gosselin*, the court, after reviewing various cases, noted that "the judicial statements clearly preponderate against concluding that s.15(1) imposes a positive obligation on legislatures to enact employment equity legislation": at para. 66 [emphasis added].

[232] *Flora*, as the Court of Appeal stated, is a case involving solely economic rights: at para. 106.

[233] To date, no *Charter* cases have arisen in the context of a positive constitutional obligation on the state to provide a stable climate system. However, as Rennie J.A. noted in *Kreishan*, cited above, s.7 jurisprudence may someday evolve to encompass positive obligations in the domain of climate rights.

[234] Indeed, as Feldman J.A. (dissenting) concluded in *Tanudjaja*, the question of whether "special circumstances" exist should not be determined on a motion to strike based on the pleadings alone, an issue the majority did not address:

> Whether a party characterizes the circumstances as "special" is not determinative. What matters is whether the court considers them sufficiently special. That can be determined only after a consideration of the full record, as well as the response from the governments. For example, in *Gosselin* […], the court stated that there was not enough evidence to support the proposed interpretation of s. 7: at para. 65.

[235] Additionally, the *La Rose* court, after finding that the plaintiffs might have been able to support the existence of "special circumstances", observed further:

> [65] […] I will offer some comments in regards to the Defendants' [Canada's] argument in relation to the positive rights framing of the section 7 *Charter* claim. I do not find this argument sufficient to find that the claim discloses no reasonable cause of action for the reasons below.
>
> [66] The Defendants assert that the Plaintiffs' section 7 *Charter* claim discloses no reasonable cause of action because the claim is seeking recognition of positive rights to the climate change policies preferred by the Plaintiffs. Section 7 of the *Charter* does not instill positive obligations, rather it is premised on the finding of a deprivation resulting from law or state action. The Defendants further indicate that the Plaintiffs' claim is not consistent with an incremental step in the evolution of section 7 *Charter* interpretation and that there is allegedly a lack of special circumstances in this case that would allow for a positive rights framing.
>
> [67] I am not prepared to find that the Plaintiffs would be unable to argue a negative rights claim or that they are otherwise barred from arguing a positive rights claim at this stage in the proceedings. Therefore, this argument has not been accepted as an additional basis for striking the section 7 *Charter* claim.

[236] I am satisfied that the issue of positive obligation should be decided on a full evidentiary record, and not at the Rule 21 stage.

[237] I am therefore not able to find, at this juncture, that the Application has no reasonable prospect of success.

E. Do the Applicants have standing on behalf of future generations?

[238] The Applicants consist of seven youths who are between the ages of 12 and 24 and reside in Ontario. They brought the Application to seek relief on behalf of their generation and of future generations of Ontarians.

[239] The Applicants were – and are – all involved with various climate change initiatives and activism:

- Sophia Mathur, who is 12 years old and lives in Sudbury, was the first youth outside of Europe to strike from school in solidarity with a global movement (started by Swedish youth activist Greta Thunberg) and has played an active role within the "Fridays for Future" movement in Ontario;
    - Zoe Keary-Matzner, who is 13 years old and lives in Toronto, has also been actively involved with the "Fridays for Future" movement in Ontario and has spoken at many climate change-related rallies, press conferences, and other events within Ontario;
    - Shaelyn Hoffman-Menard, who is 22 years old and lives in Peterborough, has worked on issues of climate change, biodiversity, Indigenous-led conservation, youth and community engagement on environmental issues, and cultural and language revitalization initiatives;

- Shelby Gagnon, who is 23 years old and lives in Thunder Bay, has worked on Indigenous food sovereignty in northern Ontario communities and has taken local action to help her own community become more sustainable in response to climate change;
- Alexandra Neufeldt, who is 23 years old and lives in Ottawa, has been actively involved with Citizens Climate Lobby Canada through lobbying elected officials and doing public outreach to promote effective climate action;
- Madison Dyck, who is 23 years old and lives in Thunder Bay, has sailed through Lake Superior giving presentations on climate change impacts in surrounding communities and to youth; and
- Lindsay Gray, who is 24 years old, two-spirit, and lives in the Township of Tiny, is a community organizer focused on environmental, climate and Indigenous issues, including in their home community of Aamjiwnaang First Nation.

The Law

[240] On a preliminary motion to strike for lack of standing, the court should be prepared to terminate the application only in "very clear cases": *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211, at para. 25. The court added:

> At this stage of the proceeding [a motion to strike], the Court may not have all the relevant facts before it, or the benefit of full legal argument on the statutory framework within which the administrative action in question was taken. To the extent that the strength of the applicant's case, and other factors, are relevant to the ground of discretionary standing, the Court may not be in a position to make a fully informed decision that would justify a denial of standing: at para. 25.

While *Sierra Club* was a judicial review decision, these principles have been adopted by Ducharme J. of this Court on a Rule 21 ruling: see *Fraser v. Canada* (Attorney General), [2005] O.J. No. 5580 (S.C.).

[241] The three-part test for granting discretionary standing in a public law case is outlined in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524: (1) whether the case raises a serious justiciable issue, (2) whether the party bringing the action has a real stake or a genuine interest in its outcome, and (3) whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: at para. 2. Courts are to exercise this discretion to grant or refuse standing in a "liberal and generous manner": at paras. 2 and 35.

[242] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" or an "important one". The claim must be "far from frivolous", although courts should not examine the merits of the case in more than a preliminary manner. In *Downtown Eastside*, the Supreme Court noted, at para. 42:

> Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

[243] The third consideration, whether the proposed suit is a reasonable and effective means to bring the case to court, has often been expressed as a strict requirement. The court in *Downtown Eastside*, however, established a "flexible, discretionary and purposive approach to public interest standing", not applying this factor in a rigid manner: at paras. 44, 47. The court outlined some factors to be considered in granting or refusing standing, at para. 51:

- The plaintiff's capacity to bring forward a claim: the plaintiff's resources, expertise, and whether the issue will be presented in a sufficiently concrete and well-developed factual setting;

- Whether the case is of public interest: does it transcend the interests of those most directly affected by the challenged law or action? Does it provide access to justice for disadvantaged persons in society whose legal rights are affected?;

- Whether there are realistic alternative means that would favour a more efficient and effective use of judicial resources: are there other potential plaintiffs or parallel proceedings? In particular, courts should consider whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. For example, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing; and

- The potential impact of the proceedings on the rights of others who are equally or more directly affected: courts should pay special attention where private and public interests may come into conflict. (The court noted that the converse is also true: if those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.)

Position of the Parties

[244] Neither party disputes that the Applicants have public interest standing generally. The issue is whether the Applicants have standing on behalf of future generations.

[245] Ontario submits that the Applicants do not have standing on behalf of "people who do not yet exist." It submits that the category of "future generations" is too unbounded in scope to be amenable to a grant of public interest standing. It submits that granting this standing would take this Court's discretionary power "too far". It also notes that the Applicants did not attempt to explain why they are "better placed than anyone else" to represent the interests of future generations of Ontario residents.

[246] Citing *Downtown Eastside*, Ontario emphasizes that courts have been reluctant to grant public interest standing where "private and public interests may come into conflict." In this case, Ontario submits it would be impossible to determine if one such conflict exists, as the interests and wishes of future generations cannot be known.

[247] The Applicants submit that the issue of standing for future generations is a novel issue that should be determined on a full record. The Applicants note that their claim differs significantly

from rights claims on behalf of unborn foetuses in the abortion context (*e.g., Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342). The Applicants argue that they should be granted standing as future generations of Ontarians would not be able to bring the same case against a future Ontario government: the failure to reduce GHG emissions and consequent violations of their rights would already be "locked in" before their lifetime even began.

[248] Applying the test in *Downtown Eastside*, the Applicants submit, first, that this Application raises a serious justiciable issue. Second, the Applicants have demonstrated a serious and genuine interest in the subject matter of this Application. Further, this Application is a reasonable and effective way to bring various issues to the court because: (i) the claim at issue impacts all Ontario youth and future generations; (ii) the Applicants have the support of counsel with the expertise, resources, and commitment to bring this Application forward; and (iii) the Applicants are well-placed to bring this Application and it is unreasonable to expect that other children and young adults (or future generations) will bring a similar application at this point in time.

Analysis and Conclusion

[249] At this stage of the proceedings, it is not conclusive that the Applicants should not be granted standing on behalf of future generations. This Court is not able to review all the evidence or to benefit from full legal arguments on the impact of climate change on future generations. This is therefore not a "clear case" where this Court can find that the Applicants lack standing on behalf of future generations.

[250] At a preliminary level, the Applicants have met the test for standing on behalf of future generations:

- As I have found above, this case raises a serious justiciable issue and a substantial constitutional issue.

- The Applicants have demonstrated that they have a real stake and genuine interest in the Application's outcome, given their age and various examples of activism, as outlined above.

- The proposed suit is a reasonable and effective means to bring this Application to court. I have considered the following factors:

    i. Ecojustice, a Canadian environmental law charity, is counsel for the Applicants, which reflects the plaintiff's resources and expertise in presenting these issues in a sufficiently concrete and well-developed factual context;

    ii. This case is of public interest, in that it transcends the interests of all Ontario residents, not just the Applicants' generation or the ones that follow;

    iii. Given their age, the Applicants do bring a useful and distinctive perspective to the resolution of the issues on this Application. There could very well be other persons with different interests in the issues, but the Applicants will provide a unique perspective as young Ontarians; and

iv. Granting the Applicants standing on behalf of future generations does not create a conflict between private and public interests or affect the rights of others who are equally or more directly affected by climate change. The Respondents have not demonstrated that there are parallel proceedings or that other parties with more direct and personal stakes in the matter have deliberately refrained from filing an application. As the Applicants have argued, future generations are unlikely to be able to bring the same suit as the Applicants against current or future Ontario governments, as the state of the world will likely be different. At this preliminary stage, granting the Applicants standing on behalf of future generations does not preclude future generations from bringing other climate change-related claims against the Ontario government at a future time.

[251] I note, additionally, that the Court of Appeal for Ontario has held that no injury needs to have been committed in order to determine standing as long as the claimants can show that a potential injury affected them:

> There is no suggestion that these appellants have suffered any present damage or losses that could be compensable in damages, their expressed purpose being to reduce the risk of a future nuclear incident and to assure compensation if one occurs. They invoke the preventative role of the declaratory judgment as referred to by Wilson J. in *Operation Dismantle*, [citation omitted] quoting from Edwin Borchard, *Declaratory Judgments* [citation omitted]:
>
> > [N]o 'injury' or 'wrong' need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant.

See *Energy Probe v. Canada (Attorney General)*, cited above, at para. 45.

[252] Ontario submits that the Applicants did not explain why they are "better placed than anyone else" to represent the interests of future generations of Ontario. Ontario did not provide jurisprudence to support that this is required for a determination of standing.

[253] As I have reviewed above in the sections discussing the Applicants' ss.7 and 15 claims, the Applicants have made various claims – which are deemed valid and proven at this point of the proceedings – that their, and future, generations will bear the brunt of various impacts of climate change. Future generations would not be able to bring the same claim against the current government for setting a Target that the Applicants deem inadequate. The Applicants therefore should be given standing for their generation, as well as for future generations.

F. What remedies are potentially available to the Applicants?

[254] In both written and oral submissions, Ontario took issue with two of the Applicants' relief sought. Specifically, it argues that the Applicants' request for orders requiring Ontario to set a

"science-based GHG reduction target" in order to ensure a right to a "stable climate system" and a "sustainable future" for future generations are all matters that would take the court "well beyond its institutional capacity."

[255] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, cited in Feldman J.A.'s dissent in *Tanudjaja (ONCA)* at para. 85, should alleviate Ontario's concerns on this Application. In *Khadr*, the Supreme Court was required to consider whether a remedy sought was precluded as an option to the courts, as it touched on the Crown's prerogative power with respect to matters of foreign affairs. Mr. Khadr was a Canadian citizen who had been detained by the United States at Guantanamo Bay since he was apprehended as a minor in Afghanistan in 2002. Mr. Khadr turned to the judicial system to request that courts make an order compelling the Canadian government to request his repatriation to Canada.

[256] The Supreme Court concluded that the Canadian government's conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice and violated his s.7 rights: *Khadr*, at paras. 24-26. The court ultimately held that it is possible to balance protection of *Charter* rights with Crown prerogative through declarations:

> [44] […] The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. […] It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.
>
> […]
>
> [46] In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle* [citation omitted]. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble* [citation omitted]. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

[257] The *Khadr* case suggests that it is possible for courts to avoid venturing into questions of public policy – one of Ontario's assertions on this Application – by limiting the available remedy to declarations and by leaving it to the government to determine the best means forward.

[258] Indeed, applying *Khadr* to *Friends of the Earth*, Dean Sossin (as he then was) writes: "in light of *Khadr*, the better approach to have taken in the […] case would have been to acknowledge the remedial limits on the court and issue declaratory relief": Sossin, at p. 247.

[259] In this case, the final decision as to any relief to be accorded rests with the application judge, but the Application should not be struck simply because the relief sought – or some of it – would take this Court beyond its institutional capacity.

G. Does this Court have jurisdiction to hear the Application?

[260] The final issue to be addressed is where this Application should be heard. Ontario submits that the Application is, at its core, an application for judicial review, as it challenges the lawfulness of the government's actions in preparing the Plan or establishing the Target under the *Cancellation Act*. The Applicants submit that the Application is, in substance, primarily a *Charter* challenge and not an application to review the Province's actions. I have already found that the Target and the Plan were statutorily mandated and reviewable by this Court.

[261] The Application is a *Charter* challenge. (See discussion in *Alford v. The Law Society of Upper Canada*, 2018 ONSC 4269, at para. 41.) First, the Applicants are seeking relief under s.52(1) of the *Constitution Act, 1982* and s.24(1) of the *Charter*, unlike the applicant in *Alford*, a case Ontario relies on. Second, by seeking various constitutional remedies, the Applicants are clearly doing more than "raising *Charter* issues in support of their arguments": *Williams v. Trillium Gift of Life Network*, 2019 ONSC 6159, at para. 35.

[262] I also rely on comments from this Court on this issue. In *Di Cienzo v. Attorney General of Ontario*, 2017 ONSC 1351, 138 O.R. (3d) 41, Belobaba J. held that while applications for declarations pursuant to s.51(1) of the *Constitution Act, 1982* can be heard in the Divisional Court, the Superior Court nonetheless maintains jurisdiction in such matters. In declining to transfer an application challenging a provincial regulation on constitutional grounds to the Divisional Court, Belobaba J. stated, at para. 3:

> In my view, the applicant is not in the "wrong court." The Superior Court of Justice as a court of general jurisdiction has long granted the declaration that is sought herein (that an impugned regulation is inconsistent with the *Charter of Rights* and is thus of no force or effect under s. 52(1) of the *Constitution Act*) and has done so either in an action or by way of a Rule 14.05 application. The fact that the Divisional Court on occasion has done this as well under the *JRPA* [*Judicial Review Procedure Act*] is not contested in this case and, in any event, is a matter that is best addressed by the Divisional Court. But the existence of a possible parallel route by way of judicial review does not nullify the Superior Court's well-established jurisdiction to hear a *Charter*-based constitutional challenge to subordinate legislation by way of a Rule 14.05 application. […]

[263] Another case, cited by Belobaba J., made similar comments regarding s.24(1) remedies:

> Declarations of unconstitutionality on *Charter* grounds, consequent to an application for a remedy under s. 24(1) of the *Charter* are, for the most part, obtained from a court of original jurisdiction — a trial court — by way of action, or […] by way of application […]: *Falkiner v. Ontario Ministry of Community and Social Services* (1996), 140 D.L.R. (4th) 115 (Ont. Div. Ct.), at para. 22.

[264] The Divisional Court is not a court of original or general jurisdiction; it is a statutory court that has "no inherent jurisdiction such as is vested in each individual Judge of the [Superior Court]": *Di Cienzo*, at para. 33, citing *Chramer et al. v. The Queen* (1974), 3 O.R. (2d) 602 (Div. Ct.), and *Marlatt v. Woolley* (2000), 129 O.A.C. 328 (Div. Ct.).

[265] I am satisfied that the Superior Court of Justice, therefore, is the appropriate venue to hear this *Charter*-based constitutional challenge.

DISPOSITION

[266] This is a novel application. At its core, it is about whether the Respondent, Ontario, violated the Applicants' ss.7 and 15 rights by repealing the *Climate Change Act* through the *Cancellation Act* and by setting a target for the reduction of GHG emissions that is insufficiently ambitious. As I have already found, both the preparation of the Plan and the repeal of the *Climate Change Act* by Ontario are governmental actions that are reviewable by the court for compliance with the *Charter*.

[267] For the reasons given above, I find that it is not plain and obvious that the Application discloses no reasonable cause of action or that it has no reasonable prospect of success.

[268] I thereby dismiss the motion of the Respondent, Ontario, seeking to strike out the Application under Rule 21.01(b).

COSTS

[269] I would strongly urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to five pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within sixty days of the release of these Reasons.

Carole J. Brown, J.

Date: November 12, 2020