Ontario Court Of Appeal Orders Rehearing Of Environmental Charter Challenge



In *Mathur v Ontario*, 2024 ONCA 762, the Court of Appeal for Ontario held that Ontario's *Cap and Trade Cancellation Act* (CTCA) was a voluntary assumption by the provincial government to combat climate change and, thus, required the government to ensure that the corresponding plans and targets align with the *Canadian Charter of Rights and Freedoms* (*Charter*). The Court found that the application judge incorrectly classified the application as a positive rights case and subsequently returned the application to the Superior Court of Justice for rehearing.

Background

Legislation in Issue

In 2018, the Government of Ontario (Ontario) enacted the CTCA and subsequently implemented a new greenhouse gas emission reduction target outlined in the "Preserving and Protecting our Environment for Future Generations—A Made-in-Ontario Environmental Plan" (Plan). The Plan aims for a 30 percent reduction in greenhouse gas emissions by 2030 from 2005 levels. This replaced the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, which had initially proposed a 37

percent reduction in greenhouse gas emissions by 2030 from 1990 levels.

The Application

The applicants, seven Ontario youth, sought a declaration that the revised target and the enabling provisions of the CTCA are unconstitutional, alleging that they violate sections 7 and 15 of the *Charter*. Section 7 of the *Charter* provides for the right to life, liberty and the security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice, while section 15 provides for equal protection and equal benefit of the law without discrimination, particularly with respect to various enumerated grounds, including age. The applicants also sought an order requiring Ontario to set a science-based emission reduction target and to revise its plan to align with international standards.

In 2020, Ontario moved to strike the application on the basis that the application is not justiciable; the application is based on unprovable speculation about future climate consequences of the greenhouse gas emissions reduction target; there is no positive constitutional obligations on Ontario to prevent harms associated with climate change; and the applicants have no standing to seek remedies for "future generations". We considered this motion in our previous post: *Are Climate Change Claims Based on Charter Rights Justiciable? Canadian Courts Render Conflicting Decisions*. The motion was denied, as was Ontario's application for leave to appeal to the Divisional Court.

The application was heard on its merits in 2023. The Ontario Superior Court of Justice dismissed the application, holding that this was a positive rights case and finding that the *Charter* does not impose positive obligations on Ontario to ensure that each person enjoys life, liberty or security of the person or to remedy social inequalities or enact remedial

legislation, including by obliging it to take specific steps to combat climate change. Despite dismissing the application, the application judge made various notable findings of fact, including that young people and Indigenous youth are disproportionately impacted by climate change.

The Decision of the Court of Appeal

The applicants appealed. The issue on appeal was whether Ontario's alleged failure to comply with its voluntarily imposed statutory obligations to combat climate change amounted to a breach of sections 7 and/or 15 of the *Charter*.

In allowing the appeal, the Court of Appeal concluded that the application judge's characterization of the application as one seeking to impose positive obligations on Ontario was erroneous and caused her to err in her analysis of whether the appellants' *Charter* rights had been violated. The Court clarified that the application does not challenge the constitutional compliance of the legislative scheme itself, but rather the constitutional compliance of Ontario's measures taken under the scheme.

The Court also noted an "apparent inconsistency" in the application judge's findings regarding causation. With respect to section 7, the application judge concluded that, by failing to produce a target that would further reduce greenhouse gas emissions, Ontario is contributing to an increase in the risk of death and in the risks disproportionately faced by the appellants and others with respect to the security of the person. However, in her section 15 analysis, the application judge concluded that the disproportionate impact of climate change on young people was due to climate change itself rather than the CTCA or the Plan. The Court noted that the factual findings about the impact of climate change and Ontario's contribution to it are necessarily the same for both analyses.

Ontario also contested the relief sought on the application,

suggesting that it was essentially a request for the courts to take control over environmental and climate policy. The Court dismissed this argument, concluding that courts can grant declaratory relief and order the government to produce a constitutionally compliant target, while leaving it to the government to determine the precise steps it needs to take to comply with the *Charter*.

Next Steps

Ultimately, the Court of Appeal did not decide the application, choosing instead to remit it to the Superior Court of Justice. It noted that the seriousness of the issues, the potential need for further evidence, and the additional issues raised by many interveners rendered the application better suited to be heard by a court of first instance, which has an "institutional advantage in making the determinations necessary to a fair treatment".

Various issues raised by the interveners had not been addressed by the application judge in the first instance, including "whether the Target breached the Charter rights of Indigenous peoples in Ontario and their section 35 rights under the *Constitution Act, 1982*; the integration of the public trust doctrine; the application of international law, including international environmental law, in the interpretation of *Charter* rights; the application of the best interests of the child principle; and the recognition and impact of certain unwritten constitutional principles, including societal preservation and ecological sustainability." The Court alluded to the possibility of the applicants amending their materials to include these issues at the rehearing.

The Court similarly kept the door open for Ontario to address the application of section 1 of the *Charter*, which the latter had not done at the original hearing.

Key Takeaways

- **Not a positive obligation case.** The Court of Appeal noted that Ontario voluntarily assumed the obligation to combat climate change in its legislation, and as a result, the applicants were not seeking to impose a positive obligation on the province. The Court did not rule on the *Charter* compliance of the Plan and the associated CTCA provisions. Instead, it provided guidance for the lower court on how to assess whether Ontario violated sections 7 and/or 15 of the *Charter*.
- **This is a justiciable issue and courts can review actions by governments to address climate change alleged to violate the *Charter*.** The Court of Appeal agreed with the application judge that the issues raised are justiciable because "the Constitution requires that courts review legislation and state action for *Charter* compliance when citizens challenge them, even when the issues are complex, contentious and laden with social values." Without foreclosing the range of potential remedies, the Court of Appeal noted that courts can order governments to take measures to become Charter compliant, with the specifics of these measures being left to the governments to decide.
- **New hearing, (potentially) new issues.** The Court of Appeal left it to the parties to consider whether to amend their materials to address any further issues the parties wish to pursue, including those raised by the interveners and the application of section 1 of the *Charter*. With these potential changes, the new hearing may look quite different than the original hearing of the application.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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