Court File No. CV-19-00631627-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SOPHIA MATHUR, a minor by her litigation guardian CATHERINE ORLANDO, ZOE KEARY-MATZNER, a minor by her litigation guardian ANNE KEARY, SHAELYN HOFFMAN-MENARD, SHELBY GAGNON, ALEXANDRA NEUFELDT, MADISON DYCK and LINDSAY GRAY

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondent

and

INDIGENOUS CLIMATE ACTION, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, FRIENDS OF THE EARTH CANADA, FOR OUR KIDS, and DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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PART I - OVERVIEW

1. Judges do not decide cases without attention to the availability and manageability of remedies. The unprecedented and existential threat caused by climate change poses challenging questions to this remedial inquiry. The Superior Court has pre-existing, legitimate remedies available pursuant to its inherent jurisdiction and section 24(1) of the *Canadian Charter of Rights and Freedoms* to remediate the rights infringements.[1] And if a remedy has not previously been issued, the novelty of the claims should not dissuade this Court from issuing original remedies. Indeed, the novel and acute harms of climate change may require this. Declaratory relief as well as an order directing a constitutionally compliant greenhouse gas emissions target may be within the remedial competence of the Superior Court, and would be consistent with the court's expertise. Properly crafted as a two-track approach, such a remedy would not assume the function of the executive or legislative branches.

2. The Applicants seek declaratory relief that the the 2030 greenhouse gas ("GHG") reduction target set by Ontario under section 3(1) of the *Cap and Trade Cancellation Act, 2018,* S.O. 2018, c. 13 violates the section 7 and 15 *Charter* rights of the Applicants, youth in Ontario, and future generations, and is of no force and effect under section 52(1) of the *Constitution Act, 1982*. The Applicants have also requested mandatory relief directing that Ontario modify the GHG reduction target to one that is science-based and amend its climate change plan accordingly.

3. The David Asper Centre for Constitutional Rights (the "Asper Centre") intervenes to make submissions on the Superior Court's jurisdiction to grant an appropriate and responsive remedy if this Court ultimately finds that the Applicants' ss. 7 and 15 *Charter* rights have been unjustifiably infringed. The Asper Centre makes the following three submissions.

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[1] *Canadian Charter of Rights and Freedoms*, s 24(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4. First, granting declaratory relief, while one means of remediating a *Charter* infringement, is not always sufficient. Declaratory relief ensures that implicated *Charter* rights are realized while, at the same time, leaving the government with the flexibility necessary to exercise its institutional expertise and craft a response suitable to the circumstances.[2]

5. However, in urgent situations, the court ought to be concerned with the immediate implementation of its remedy and should consider retaining supervisory jurisdiction pursuant to the principles identified in *Doucet-Boudreau v Nova Scotia (Minister of Education)*.[3] Supervisory jurisdiction is within the remedial power of the Superior Court. To deny jurisdiction to grant a remedy risks fettering the broad constitutionally guaranteed remedial discretion of the Superior Court. A supervisory order is consistent with appellate precedent and is supported by the urgency of the situation and a policy consensus on the proper response.

6. Finally, the remedies sought by the Applicants are consistent with the general remedial trend in climate change litigation in other jurisdictions where the courts have granted appropriate and responsive remedies in recognition of the urgency of the harms caused by climate change.

PART II – SUMMARY OF FACTS

7. The Asper Centre takes no position on the facts or on the ultimate disposition of this application. The Asper Centre intervenes solely on the issue of the justiciability and availability of remedies in the context of climate change litigation.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. The Applicants' Remedial Requests are consistent with the Court's competence

a. The prayer for relief is carefully tailored

[2] *Mahe v Alberta*, [1990] 1 SCR 342.
[3] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62.

8. The Applicants' prayer for relief is carefully tailored and respects the Court's competence. The Asper Centre recognizes that in other cases litigating the catastrophic effects of climate change, the courts have shown reluctance to expand their remedial jurisdiction for fear of overstepping their constitutional role.[4] In these decisions, the courts have noted that it is not the role of the courts to evaluate the government's polycentric choices.[5] Rather, the courts are charged with upholding constitutional rights.

9. In this case, the Applicants' prayer for relief is carefully drafted to respect the court's role and competence. The prayer for relief first and foremost seeks a declaration that the 2030 Target has failed to satisfy the minimal standards guaranteed in the *Charter*. Likewise, the Applicants' reliance on declaratory relief and the ability of Ontario's executive to set its own science-based target within a policy it itself has created reveals "the balance and moderation" of the Applicants' request.[6]

10. The Applicants' requested relief also demonstrates why it is in the interest of justice for the court to retain supervisory jurisdiction to ensure the implementation of the specific order that is sought. The requested remedies do not seek a particular target's implementation. However, should disputes arise, the parties could return to court and ask for review of the constitutionality of the newly set target.

11. The Superior Court is the default court of competent jurisdiction under both section 96 of the *Constitution Act, 1867* and section 24(1) of the *Charter.*[7] This constitutionally-entrenched role allows the Superior Court to grant any remedy it considers just and appropriate to provide a meaningful response to an established *Charter* violation.[8]

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[4] See e.g. *Misdzi Yikh v Canada,* 2020 FC 1059; *La Rose v Canada,* 2020 FC 1008.
[5] *Vriend v Alberta,* [1998] 1 SCR 493 at para 136, cited in *Doucet-Boudreau, supra* note 3 at para 35.
[6] *Doucet-Boudreau, supra* note 3 at para 13.
[7] *Doucet-Boudreau* at para 45.
[8] *Doucet-Boudreau*; *Mills v the Queen*, [1986] 1 SCR 863 at para 52 (holding that a provincial superior court will always be a court of competent jurisdiction under s. 24(1)).

12. Should the Applicants be successful, declarations to the effect that the current GHG reduction target is unconstitutional and retention of supervisory jurisdiction is within the broad remedial discretion of this court. It would not intrude in an improper manner on the role of either the legislature or the executive because it would allow those institutions to make policy choices about the precise manner with which to comply with the *Charter* in adopting a new target.

b. Declaratory relief can be an appropriate remedy

13. Declarations of unconstitutionality are meant to influence conduct, record violations of rights, and prevent future rights breaches.[9] Any court with jurisdiction over the issue at bar—in this case, a section 96 court—can properly issue a declaratory remedy.[10]

14. The Supreme Court of Canada has repeatedly recognized the important and useful role of declarations of unconstitutionality: declarations avoid wading into the pool of public policy making while still ensuring that the implicated parties' rights are realized and pronounced on.[11] Indeed, in the underlying motion to strike decision in this litigation, the availability of declaratory relief was a basis upon which the motions judge refused to strike the litigation.[12]

15. Declarations have been used to require government action outside of language rights cases.[13] In *Eldridge v. British Columbia*, a unanimous Supreme Court of Canada determined that declarations were an appropriate response to the government's failure to provide sign language interpretation required by patients protected under section 15 to receive essential medical services. In making the declaration, the Court made clear the government was to "move swiftly to correct the

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[9] Kent Roach, "Judicial Remedies for Climate Change" (2021) 1:17 JL & Equality 106 at 123 [Roach, "Remedies for Climate Change"]
[10] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 46 [*Khadr*].
[11] *Mahe v Alberta*, *supra* note 2 at 392; *Doucet-Boudreau*, *supra* note 3; *Khadr*, *supra* note 10.
[12] *Mathur v Ontario*, 2020 ONSC 6918 at para 257.
[13] See e.g. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; *Khadr*, *supra* note 10; *R. v Gamble*, [1988] 2 SCR 595.

unconstitutionality of the present scheme".[14]

16. The remedy in *Eldridge* was within the competency of the Superior Court. The court allowed the government to select the means to comply with the minimal and mandatory standards of the *Charter* while recognizing that governments have the expertise and institutional role to make choices between different policies.

17. In this case, the court has the benefit of having Ontario's chosen scheme to address climate change. The question is whether the target within the scheme is constitutional. It is well within the jurisdiction of the superior court to order a declaration that the target violates the rights of the applicants.

B. The Limits of declaratory relief and the need for supervision by the court

18. A declaration of unconstitutionality, without nothing more, risks being ineffective. Without further remedial orders, declarations end the court's jurisdiction over a case. This has historically required successful litigants to commence new litigation when disputes arise over compliance or meaning of the general pronouncements of entitlement made in declarations.[15]

19. In *Little Sisters v. Canada,* for example, a small bookstore targeted the Canadian customs bureaucracy for withholding imported literature deemed by customs as "obscene" for having LGBTQ representation.[16] The Supreme Court of Canada upheld the trial judge's section 24(1) declarations that the customs legislation had been construed and applied in a manner that was contrary to sections 2(b) and 15(1) of the *Charter.* These declarations did not prevent Canadian customs from taking the same action against further imports in the years following the Supreme

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[14] *Eldridge*, *supra* note 13 at paras 96-97.
[15] Roach, Remedies for Climate Change, *supra* note 9 at 122; See e.g. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 148. The Court comments that a declaratory remedy was insufficient because of the threat that litigation may break out anew. On this basis, the Court gave further mandatory relief.
[16] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69.

Court's ruling, resulting in another years-long litigation battle.[17]

20. If not properly followed or executed, declarations without further remedial support can undermine the court's legitimacy and deprive the applicants of full remedial relief. As exemplified, meaningful compliance and follow-ups to declarations prove problematic and pose the risk of having to spend years re-litigating issues. In the context of climate change, which is necessarily time-sensitive and expensive to litigate, additional support is needed for a remedy to be appropriate and just.

a. The Legitimate Role of Supervisory Jurisdiction

21. An order for the retention of this court's jurisdiction represents a middle ground between the potential pitfalls of declarations and the heavy-handed injunctive power that a mandatory order requires.

22. The Supreme Court has affirmed the legitimacy of supervisory jurisdiction as a section 24(1) remedy. In *Doucet-Boudreau,* Justices Iacobucci and Arbour state for the majority:

> […] the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts […] The change announced by s. 24 of the *Charter* is that the flexibility inherent in an equitable remedial jurisdiction may be applied to orders addressed to government to vindicate constitutionally entrenched rights.
>
> The order in this case was in no way inconsistent with the judicial function. There was never any suggestion in this case that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects. Hearing evidence and supervising cross-examinations on progress reports about the construction of schools are not beyond the normal capacities of courts.[18]

23. The Supreme Court of Canada affirmed the trial judge's exercise of remedial discretion under s. 24(1) of the *Charter*, holding that "generous and expansive interpretive approach holds equally

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[17] *Little Sisters Books and Art Emporium v. Canada (Commissioner of Customers and Revenue),* 2007 SCC 2.
[18] *Doucet-Boudreau, supra* note 3 at paras 73-74.

true for *Charter* remedies as for *Charter* rights".[19]

24. First, an appropriate and just remedy "meaningfully vindicates the rights and freedoms of the claimants," without being "smothered in procedural delays and difficulties".[20] On this point, the Court found that there was a "significant risk" that declaratory relief alone would be ineffective.[21]

25. Second, the Court held that it must consider what remedies are "appropriate and just" with consideration of constitutional legitimacy and the separation of powers, it is impossible to draw a "bright line" between the branches' functions in all cases. The Court said that appropriateness is not compromised by touching on principally executive functions, which is inevitable.[22]

26. Third, an appropriate and just exercise of remedial discretion invokes the "capacities and competence of courts" according to those tasks they normally perform, for which there are established procedures and precedent.[23]

27. In addition to the Supreme Court's *Re Manitoba Language Rights* reference decision which demonstrates the appropriateness of retaining jurisdiction in section 23 cases,[24] the Court found that the reporting order was fully consistent with the judicial function, as demonstrated by the wide variety of contexts in which courts plays a supervisory or managerial role during litigation or the implementation of court orders within complex private-law disputes (discussed more fully below).[25]

28. While the "best efforts" remedy is technically injunctive, it would have been difficult to enforce such a vague order and make a finding that officials had violated the order and were therefore guilty of contempt. The retention of the court's jurisdiction was key to making the "best efforts"

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[19] *Doucet-Boudreau* at para 24.
[20] *Mills*, *supra* note 8 at 882 quoted in *Doucet-Boudreau*, *supra* note 3 at para 55.
[21] *Doucet-Boudreau* at para 66.
[22] *Doucet-Boudreau* at para 56.
[23] *Doucet-Boudreau* at para 57.
[24] *Re Manitoba Language Rights*, [1985] 1 SCR 721, *Re Manitoba Language Rights Order*, [1990] 3 SCR 1417.
[25] *Doucet-Boudreau*, *supra* note 3 at para 70.

order meaningful. This approach allows a court to supervise any action taken pursuant to an issued declaration, issue subsequent declarations resolving disputes about the meaning of declarations, and/or respond to changed circumstances. This maintains the non-coercive and flexible nature of declaratory relief while still allowing government the discretion to carry out its role in any manner that will remedy the rights violation. For this reason, Roach calls this type of order a "declaration plus".[26]

b. Canadian Authorities for Retention of Supervisory Jurisdiction

29. *Charter* applications in response to the catastrophic and imminent effects of climate change are an appropriate place to expand the role of supervisory jurisdiction outside of section 23 cases.

30. While the retention of supervisory jurisdiction has been employed fruitfully in section 23 cases,[27] courts have been hesitant to retain jurisdiction in other constitutional litigation. The novelty of the remedy, however, does not make it beyond this Court's competence. The Supreme Court has often affirmed that section 24(1) of the *Charter* may require the crafting of novel remedies,[28] and indeed, there is ample precedent for the courts retaining a supervisory or managerial role in many areas of private law disputes.

31. The retention of supervisory jurisdiction in constitutional litigation is limited but not unprecedented. In *Bacon v. Surrey Pretrial Services Centre,* an individual held in remand and solitary confinement brought a *Charter* application on the basis that his confinement and lack of ability to communicate with the outside world violated his *Charter* rights.[29] The judge made a

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[26] Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Carswell, 2013) at 12.700-12.910.
[27] See e.g. *Doucet-Boudreau, supra* note 3; *Association des parents francophones (Colombie-Britannique) v. British Columbia* (1998), 167 DLR (4th) 534 (BCSC); *Association des parents de l'ecole Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2012 BCSC 1614; *Lavoie v Nova Scotia (Attorney General)* (1988), 47 DLR (4th) 586; *Marchand v Simcoe (County) Board of Education* (1986), 29 DLR (4th) 596.
[28] *Mills supra* note 8; *R. v. 974649 Ontario Inc.*, [2001] 3 SCR 345; *Ward v. Vancouver*, [2010] 2 SCR 28.
[29] *Bacon v. Surrey Pretrial Services Centre,* 2010 BCSC 805.

number of declarations to the effect that the individual's sections 7 and 12 rights had been breached and made several "directions" to the respondent, such as restoring the prisoners telephone rights. The court retained jurisdiction to remain available to hear further challenges to the prisoner's treatment should they arise. When the prisoner and his counsel returned to court claiming further breaches, the trial judge made a further declaration and commented:

> I will not purport to direct a specific system for ensuring that this does not happen in the future. I will simply state flatly that it is the expectation of this Court that persons placed in the safekeeping of jailers […] will not be vulnerable to such breaches and that it will be demonstrable, in any given case, that this is so.[30]

32. In *Abdelrazik v. Canada*, Justice Zinn retained supervision after ordering that a passport be issued to allow a Canadian citizen—who was then on a U.N. list of persons associated with Al-Qaida—to exercise his section 6 *Charter* right to return to Canada.[31]

33. In both of the above cases, the retention of jurisdiction allowed the judges to resolve disputes that might have or did arise out of the original order. These cases further demonstrate that the broad remedial powers of section 24(1) can be exercised with respect to all *Charter* rights.

34. The retention of supervisory jurisdiction is frequently exercised by Canadian human rights tribunals.[32] The ability to supervise the implementation of remedies has been codified in the constituting legislation of these tribunals who have the power to order meaningful, timely, and effective remedies to individual and systemic rights violations alike in order to fullfill their purpose.[33]

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[30] *Bacon v. Surrey Pretrial Services Centre*, 2012 BCSC 1453 at para 51.
[31] *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580 at paras 167-68.
[32] See e.g. *Ontario v McKinnon*, 2004 CanLII 47147 (ONCA); *Ontario (Ministry of Correctional Services) v Ontario (Human Rights Comm.) (No. 4)*, 51 CHR 440, 2003 CanLii 89395 (ON SCDC); *McKinnon v Ontario (Correctional Services)*, 2007 HRTO 4; *McKinnon v. Ontario (Correctional Services)*, 2009 HRTO 862; *Canada (Attorney General) v Grover*, 1994 CanLII 18487 (FC).
[33] See e.g. *Human Rights Code*, RSO c H 19 at ss 45.2 (1)–2, 45.3 (1)–(2); see Ontario, *Official Report of Debates of the Legislative Assembly (Hansard)*, 38-2, vol 9, No 2 (6 December 2006) at 1600–1640 (Hon M Bryant).

35. Similarly, in the class actions context, courts frequently retain jurisdiction to supervise the administration and implementation of settlements, resolve disputes, and answer requests for directions.[34] As pointed out by the Supreme Court in the Indian Residential Schools Settlement, class proceedings legislation accords supervising judges broad discretion to make orders and impose terms as necessary to ensure fair and expeditious resolutions of class actions.[35] Moreover, the Court held that "in any instance where the scope of superior courts' powers granted by class action legislation does not expressly contemplate certain supervisory functions, superior courts retain residual supervisory powers under their inherent jurisdiction."[36]

36. This Court should not rely on the Federal Court's decision in *Misdzi Yikh v Canada* for the proposition that supervisory jurisdiction is not available. The decision in *Misdzi* was made in the context of a motion to strike where the Court found that the issues raised by the applicants were not justiciable. The applicants in *Misdzi* were not challenging a specific law or government action but rather sought declarations that the government had a broad constitutional duty to reduce global temperatures by 1.5' C to 2 C above pre-industrial levels.[37] As such, any remarks the Federal Court made with respect to whether supervisory jusidiction is available to accompany a declaration must be considered in that context and relied upon with caution.

37. Similarly, the discussion of supervisory jursidicton in *Canada (Attorney General) v Jodhan* must also be placed in its proper context. The Federal Court of Appeal upheld the application judge's order finding that the Treasury Board failed to develop, maintain and enforce the proper standards of accessibility. In so doing, the Federal Court of Appeal found that it was appropriate for the

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[34] See e.g. *Canada (Attorney General) v Fontaine*, 2017 SCC 47 [*Fontaine* (SCC)]; *Fontaine v Canada (Attorney General)*, 2006 YKSC 63; *Fantl v Transamerica Life Canada*, 2009 ONCA 377 at para 39; *Bodnar v The Cash Store Inc.*, 2011 BCSC 667.
[35] *Fontaine* (SCC), *supra* note 34 at para 32.
[36] *Fontaine* (SCC) at para 33.
[37] *Misdzi Yikh*, *supra* note 4 at paras 15, 55.

application judge to make a systemic order under section 24(1) of the *Charter*. However, with respect to retaining supervisory jurisdiction, the Federal Court of Appeal accepted the Attorney General's submission that the declarations will achieve their intended purpose and are a sufficient remedy. Importantly, the Federal Court of Appeal did not say, nor did the the Attorney General argue, that supervisory orders are not available -- simply, that the test in *Doucette-Boudreau* was not met. The application judge gave no reasons to justify the supervisory order. There was no evidence that the government had delayed implementing accessibility policies and there was no evidence of urgency.

c. Factors to Consider When to Retain Supervisory Jurisdiction

38. The Asper Centre submits that the factors, proposed by Justice Rouleau and Linsey Sherman in their commentary on *Doucet-Boudreau,* should be considered by the Court in deciding whether a supervisory order is appropriate in all the circumstances: reticence of the executive to comply, urgency of the matter, and whether there is policy consensus.[38]

39. Justice Rouleau and Sherman define reticence not as repeated litigation, but rather a factor that warrants the retention of supervisory jurisdiction if the court is concerned that, absent supervision, the executive may not abide or remedy the rights violation in a timely, and effective manner.[39] The authors argue that where the breach is the result of intransigence, a detailed mandatory order can be made and enforced through contempt proceedings.[40] However, assuming the government is acting in good faith,[41] a reporting requirement may be more appropriate.[42]

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[38] Honourable Paul S. Rouleau & Linsey Sherman, "Doucet-Boudreau, Dialogue and Judicial Activism: Tempest in a Teapot?" (2010) 41:2 Ottawa L Rev 171.
[39] Rouleau & Sherman at 197-98.
[40] Rouleau & Sherman at 198.
[41] *Doucet-Boudreau*, *supra* note 3 at paras 62, 111.
[42] Rouleau & Sherman at 198.

40. A second important factor is the degree of urgency to a case. Where government delay could result in irreparable harm, "the courts may be justified in resorting to supervisory orders to ensure timely compliance and avoid such harm".[43] In the Applicants' present case, the harm that will be brought about by climate change is irreparable and will be exacerbated should they have to bring the issue back to court in the event of non-compliance. This urgency factor was recognized by the majority in *Doucet-Boudreau* wherein the Court recognized that there was an immediate risk to francophones in Nova Scotia in the form of cultural erosion should the supervisory jurisdiction order not have been ordered.[44]

41. Finally, where there is policy consensus, a supervisory jurisdiction order is appropriate. Where there is disagreement amongst a means to an end or various methods of implementation are possible to solve an issue, it may be that the judiciary is ill-equipped to supervise this process. There is no dispute that the policy adopted by the government is a means to the end of slowing down the rate of claimate change by reducing the amount of GHG emitted. The narrow question at issue is the timing of implementation and the aggressiveness of the targets.

C. Available Canadian Climate Change Remedies are Consistent with International Jurisprudence

42. The remedies the Asper Centre has submitted as appropriate are consistent with the general remedial trend in climate change litigation in similarly placed jurisdictions.

43. In *Neubauer et al v. Germany*, the German Constitutional Court issued both declaratory and injunctive relief in an application brought by a group of German youth who challenged Germany's *Federal Climate Protection Act* claiming Germany's GHG-reduction target was inadequate and

[43] Rouleau & Sherman at 199.
[44] *Doucet-Boudreau*, *supra* note 3 at para 40; see also Rouleau & Sherman, *supra* note 38 at 199.

violated their rights under the German Constitution.[45] The Court held that the legislature had improperly designed the emission standards to disproportionately apply to future generations,[46] and ordered the German legislature to devise specific, reduced emission goals for the period of 2031 to 2050 in protection of the rights of the youthful litigants living in Germany.[47] The German Constitutional Court did not dictate the exact amount of that reduction. The Court also issued a suspended declaration of invalidity of parts of the 2019 *Climate Change Act* that required emission targets for 2030-50 to be formulated by 2025 and moved the timeline up to 2022.

44. The Netherlands Supreme Court used a more direct approach in the 2020 *Netherlands v. Urgenda* decision.[48] An environmental group in partnership with 900 Dutch citizens sued the Dutch government seeking a declaratory judgement and injunction to compel the government to increase it emission reduction target from 17% below 1990 levels to 25%. The court determined that the Dutch government had a duty to adopt more stringent climate change mitigation measures.[49] Instead of leaving it to the State to determine how much to increase its emission target, the Court ordered the Dutch government to reduce its GHG emissions by 25% pursuant to its remedial power under Article 13 of the *European Convention on Human Rights.*[50] The Court left the decision to the government to choose how to comply with its order.

45. A good example of the utility of retaining jurisdiction to enforce deadlines is seen in *Leghari v. Pakistan*—a decision by the Green Bench of the Lahore High Court in Pakistan.[51] The legal

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[45] *Neubauer, et al. v Germany*, 1 BvR 2656/18 (2021), the Federal Constitutional Court of Germany, at para 1 [*Neubauer*].
[46] The Court held that that "one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom". See *Neubauer* at para 192.
[47] *Neubauer* at para 109.
[48] *Urgenda Foundation v. State of the Netherlands*, C-565/19 P, C/09/456689 / HA ZA 13-1396 (English translation) (2015), at para 5.1 [*Urgenda*].
[49] *Urgenda*.
[50] *Urgenda* at para 8.2.7.
[51] *Leghari v Pakistan*, No:HCJD/C-121 (2015) [*Leghari*].

challenge was brought by a farmer arguing that his fundamental right to life was infringed by the national government's failure to implement the National Climate Change Policy (2012) and the Framework for the Implementation of Climate Change Policy (2014-2030). The Lahore High Court ruled in favour of the farmer, finding that the government's delay in implementing the climate change measures infringed the farmer's right to life and human dignity under articles 9 and 14 of the Pakistan Constitution.[52] As a remedy, the Court set deadlines for the preparation of action plans by multiple ministries, and ordered the national government to create a Climate Change Commission with a range of specified members to monitor the government's progress.[53] In 2018, the Pakistan appellant court dissolved the Climate Change Commission after receiving a report demonstrating that 66% of the action plan priorities were met.[54]

46. The limits of declaratory relief are exemplified in both an advisory opinion from the Inter-American Court of Human Rights (IACtHR) and New Zealand's legislative strategy to climate change.

47. In 2016, Colombia sought an advisory opinion from the IACtHR on the scope of several articles of the *American Convention on Human Rights* in relation to international environmental law.[55] Through its advisory opinion, the IaCTHR declared the existence of a right to a sustainable environment. The IACtHR further ruled that States have an obligation to ensure that their actions (including their decision to not act) do not undermine the right to a healthy environment of both their

[52] *Leghari* at para 7.
[53] *Leghari* at para 8.
[54] *Leghari v Pakistan*, No. 25501 (2018).
[55] There are no English translations of the advisory opinion, see summary at "Summary of Advisory Opinion OC-23/17", Environmental Law Alliance, (February 26, 2018) [*Advisory Opinion OC-23/17*].

constituents and individuals outside of their borders.[56] The high rates of non-compliance with the IACtHR's declaration are demonstrative of the pitfalls of declarations.[57]

48. New Zealand's climate change legislation limits the courts' involvement to declaratory relief should the court find that an emissions target or budget is not met. The legislation provides for a commission who report on annual targets and any judicial declaration in the legislature. While this approach aims to involve political actors in a dialogue with the courts, it deprives the courts of stronger remedies.[58]

49. In conclusion, the nature, scale and severity of the catastrotophic effects of climate change requires urgent action. If this Court finds that the rights violations are severe and that a remedy is urgently required, then a declaration that the Target is unconsistutional may not be a sufficient remedy. Where action is urgently required and the policy choices are narrow, a two-track approach as endorsed by Professor Roach may be appropriate. This approach does not dictate a specific outcome, but would require the government to develop a constitutionally-compliant target that is consistent with the scientific evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of July, 2022.

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[56] *Advisory Opinion OC-23/17*.
[57] Roach, "Remedies for Climate Change", *supra* note 9 at 107.
[58] *Climate Change Response (Zero Carbon) Amendment Act 2019* (NZ), 2019/61, at para 5ZM; see also Roach at 123.

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SOPHIA MATHUR et al.	-and-	HER MAJESTY THE QUEEN	and	DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS et al.
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