Court File No. COA-23-CV-0547

ONTARIO
COURT OF APPEAL

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

Appellants

\- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

\- and -

ASSEMBLY OF FIRST NATIONS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, THE CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS and CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, CITIZENS FOR PUBLIC JUSTICE, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, ENVIRONMENTAL DEFENCE CANADA, INC. AND WEST COAST ENVIRONMENTAL LAW ASSOCIATION, FRIENDS OF THE EARTH CANADA, FOR OUR KIDS / FOR OUR KIDS TORONTO, GRAND COUNCIL OF TREATY #3, 2471256 CANADA INC. (GREENPEACE CANADA) and STICHTING URGENDA

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THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

November 6, 2023

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PART I - OVERVIEW

1. The David Asper Centre for Constitutional Rights intervenes on two issues in this appeal: the proper interpretation and application of the causation requirement in s. 15(1) of the *Charter*, and how the remedies available under s. 24(1) of the *Charter* can meaningfully vindicate the rights and freedoms of vulnerable claimant groups.

2. Section 15(1) of the *Charter* has always embraced a flexible approach to the causation analysis, and it must continue to do so. Substantive equality — the touchstone of the s. 15 guarantee — calls on courts to look beyond facially neutral, well-intentioned laws and consider the actual effects of those laws. Importantly, those effects need not be the sole or even the dominant cause of a disproportionate impact on a *Charter*-protected group. Insisting on that level of causation, which the application judge below appears to have done, threatens to narrow the scope of s. 15(1) in a manner inconsistent with the foundational jurisprudence. A flexible approach to causation properly vindicates the commitment to true substantive equality, which takes account of the full spectrum of relevant social, political, economic and historical factors and acknowledges that that discrimination has deep, far-reaching roots. History's success in obscuring discrimination should not limit courts' ability to address it.

3. Novel issues require novel remedies. Section 24(1) of the *Charter* provides courts with a versatile tool capable of crafting any "appropriate and just" remedy. This versatility is available even where — perhaps especially where — a *Charter* breach is embedded in a complex factual matrix. Climate change presents one such matrix. In the climate change context, as indicated by persuasive international authorities, courts should not shy away from using the tools available to

them. Declining to do so risks long-term consequences for the young claimants in this case. Unnecessary remedial restraint is not a constitutionally enshrined principle. Equality is.

PART II – FACTS

4. The David Asper Centre takes no position on the facts or the disposition of the appeal.

PART III – LAW AND ARGUMENT

A. Section 15(1) of the *Charter* Requires a Flexible Approach to Causation

5. Causation decided the s. 15(1) question in this case. The application judge took the view that one of the "disproportionate impact[s]" alleged — that young people would suffer disproportionately from the negative physical and mental health impacts resulting from climate change — was "caused by climate change, not by the Target, the Plan or the [*Cap and Trade Cancellation Act*]".[1] She took the view that those measures also did not cause another alleged impact: the catastrophic impacts of climate change resulting from global temperatures rising, which would be borne by youth.[2] In the application judge's view, these impacts would worsen in the absence of the legislative measures and were not worsening more because of those measures.

6. Respectfully, the application judge's approach here risks eroding the Supreme Court's decades-long commitment to substantive equality by misreading *R. v. Sharma* as insisting on a stringent degree of causation. In *Sharma*, the Court recently emphasized that a claimant must establish a link or nexus between the impugned law and the discriminatory impact. This requirement takes jurisprudential form through the words "created" or "contributed to".[3] The

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[1] *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316 [*Mathur*], at para. 178 (emphasis added).
[2] *Mathur*, *a*t para. 179.
[3] 2022 SCC 9 [*Sharma*], at para. 44.

phrase "contributed to" recognizes that the impugned law need not be the only or the dominant cause of the disproportionate impact.[4] Once a claimant demonstrates that the impugned law or state action creates or contributes to the disproportionate impact on a group, they need not go further and show exactly *why* the law being challenged has that impact.[5]

7. This flexibility is a corollary of the *Charter*'s commitment to substantive equality, the "animating norm" of s. 15.[6] Substantive equality recognizes that formally neutral laws may well produce pernicious effects: as McIntyre J. put it decades ago in *Andrews v. Law Society of British Columbia*, "identical treatment may frequently produce serious inequality".[7] Accordingly, to realize 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".[8] The post-*Andrews* jurisprudence bears this out:

- In *Withler*, the Court stated that the s. 15(1) analysis focuses "on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group".[9]
- In *Quebec (Attorney General) v. A*, the Court contrasted formal equality, which assumes an autonomous, self-interested and self determined individual, with substantive equality, which not only looks at the choices available to individuals, but the social and economic environments in which the choices play out.[10]
- In *Fraser*, Abella J. drew an explicit link between substantive equality and adverse effects discrimination. The latter, she wrote, "occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an

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[4] *Sharma*, at para. 45.
[5] *Sharma*, at para. 46.
[6] *Fraser v. Canada (Attorney General)*, 2020 SCC 23 [*Fraser*], at para. 42, citing *Withler v. Canada (Attorney General)*, 2011 SCC 12 [*Withler*], at para. 2; *R. v. Kapp*, 2008 SCC 41; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, at para. 25.
[7] [1989] 1 SCR 143 [*Andrews*], at 164.
[8] *Andrews*, at 165.
[9] *Withler*, at para. 39.
[10] 2013 SCC 5 [*Quebec v. A.*], at para. 342, citing Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15", in Sanda Rodgers and Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (2010), 183, at pp. 190-91 and 196.

enumerated or analogous ground";[11] she had "no doubt, therefore, that adverse impact discrimination violates the norm of substantive equality which underpins [the] Court's equality jurisprudence".[12]

- Most recently, in *Sharma*, the Court emphasized that the two-part test under s. 15 serves to protect substantive equality,[13] and was explicit that a measure can undermine this ideal through its impacts."[14]

8. Put simply, the s. 15 analysis has never been exhausted by asking whether the impugned measure draws a distinction between the rest of society and the claimant group — here, young people — on its face. Courts must also address "the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group".[15] In this way, neither *Sharma* nor any other case demands an exclusive causal relationship between the impugned law and the disproportionate impact.

9. This commitment to substantive equality makes the s. 15(1) causation analysis flexible enough to account for preexisting problems — problems like climate change. This is apparent in the Supreme Court's analysis in two cases where Quebec legislation intersected with the longstanding economic disadvantage that women have endured.

10. First, in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, the Supreme Court addressed legislative measures implemented to tackle the wage gap. The measures replaced ongoing obligations on employers to maintain pay equity with a system of mandatory audits every five years. When an audit revealed the failure to maintain pay equity, the employer was only required to rectify the wages going forward. Unless

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[11] *Fraser*, at para. 30.
[12] *Fraser*, at para. 47.
[13] *Sharma*, at para. 38.
[14] *Sharma*, at para. 29.
[15] *Withler*, at para. 39.

the employer acted arbitrarily or in bad faith, they were not required to compensate for wage inequities that emerged between audits.[16]

11. Clearly, these legislative measures did not cause pay inequity between men and women. The history of the wage gap is far too complex to be explained by a 2009 Quebec policy. Rather, to paraphrase the Court in *Withler*, the gap in wages between men and women is the result of social, political, economic, and historical factors concerning the group[17]. But s. 15(1) does not require that the legislative measure be the sole or dominant cause of the disproportionate impact. All the claimant must show is that the legislative measures "contributes to" the disproportionate impact. In this case, the measure did so by tolerating the "undervaluation of women's work".[18]

12. Second, in *Quebec (Attorney General) v. A*, the Supreme Court concluded that Quebec's spousal support regime discriminated on the basis of marital status because it excluded "*de facto* spouses." The majority found that, in doing so, the *Act* perpetuated the economic vulnerability of unmarried spouses on the breakdown of a relationship,[19] a vulnerability that often falls on women.[20]

13. The exclusion of unmarried spouses from the spousal support regime was not the sole or predominant cause of their economic vulnerability on the breakdown of the relationship. Like the wage gap, their vulnerability is a complex phenomenon that cannot possibly be explained by a single legislative policy. Nevertheless, the measure had a disproportionate impact on unmarried spouses by failing to extend a protection on the *Charter*-protected ground of marital status. In

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[16] *Alliance*, at para. 2.
[17] *Withler*, at para. 39.
[18] *Alliance*, at para. 38.
[19] *Quebec v. A*, at para. 351.
[20] *Quebec v. A*, at para. 300.

doing so, it contributed to the historic disadvantage of unmarried spouses.[21]

14. These two cases stand in stark contrast with the formalistic, pre-*Charter* approach taken in, for example, *Bliss v. Attorney General of Canada*.[22] In that case, the Supreme Court found that a law limiting unemployment insurance for pregnant women did not violate the *Canadian Bill of Right*'s equality guarantee because it did not discriminate on the basis of sex; while it drew a distinction on the basis of pregnancy, the law treated all pregnant persons equally. The Court found that any inequality in this area was "not created by legislation but by nature".[23] As McIntyre J. later noted in *Andrews*, this case (among others) exposed the "shortcomings" of the pre-*Charter* approach to equality, which secured "equality before the law" only insofar as it ensured that members of particular groups were being discriminated against in the same way. Justice McIntyre found it "readily apparent that the language of s. 15 [of the *Charter*] was deliberately chosen in order to remedy some of the perceived defects" of that approach.[24] Likewise, the s. 15(1) jurisprudence following *Andrews* has consistently jettisoned the formalism that existed under the *Canadian Bill of Rights* in favour of flexibility.

15. Faithfully applying the flexible approach to causation is critical in this case. There cannot be any dispute that climate change will produce negative effects for everyone, including young people — as the Supreme Court has recognized, it is an "existential challenge" and a "threat of the highest order to the country, and indeed to the world".[25] The question was never limited to whether climate change would cause negative effects for everyone, or even disproportionate effects for

[21] *Quebec v. A*, at para. 306.
[22] [1979] 1 SCR 183 [*Bliss*].
[23] *Bliss*, at p. 190.
[24] *Andrews*, at p. 170.
[25] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA*], at para. 167.

young people. It plainly will. But that cannot end the inquiry.

16. The true question with respect to s. 15(1) is whether the measures at issue (i.e., the Target, the Plan, or the *Cap and Trade Cancellation Act*) contribute to the disproportionate impact of climate change on young people. Under s. 7, the Application judge accepted they did: she recognized that climate government's measures did "contribute to climate change and the increased risks that it creates" in a way that is "real , measurable and not speculative".[26] And she accepted that "young people are disproportionately impacted by climate change".[27] But she failed to draw the link between the fact that the measures would contribute to the risks of climate change and the fact that those risks would cause a disproportionate impact. This cannot be reconciled with the approach to causation set out in the leading jurisprudence, including *Sharma*.

17. Implicit in the application judge's reasons is the suggestion that a sole or predominant cause of a disproportionate impact can end the s. 15(1) analysis. This approach risks overlooking the full range of "social, political, economic and historical factors" that should inform the analysis.[28] It risks robbing s. 15(1) of its ability to respond to complex factual situations and legal regimes and, therefore, produce a thin and impoverished vision of substantive equality.[29] Respectfully, this has never been the law.

B. Climate Change Is a Novel Issue that Requires Novel Remedies

18. In the event that this Court finds that a *Charter* right has been infringed, the question of remedy will arise. In cases involving novel issues like climate change, the traditional declaratory

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[26] *Mathur*, at para. 148.
[27] *Mathur*, at para. 178.
[28] *Withler*, at para. 39.
[29] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, at para. 73.

relief may well prove insufficient. Something more will be required.

19. A right is guaranteed only to the extent that its infringement is met with an adequate remedy. Courts typically exercise their remedial discretion through declarations of constitutional invalidity. [30] Yet, in some cases, a declaration may not amount to an appropriate and just remedy in the circumstances. Indeed, the Supreme Court acknowledges that "there are situations in which our Constitution requires special remedies to secure the very order it envisages."[31]

20. Section 24(1) of the *Charter* reflects precisely this. It empowers courts to respond to infringements of constitutional rights with any remedy that is "appropriate and just in the circumstances". Such a remedy "meaningfully vindicates the rights and freedoms of the claimants".[32]

21. As McIntyre J. stated in *Mills v. the Queen*, "it is difficult to imagine language which could give the court a wider and less fettered discretion".[33] As a unanimous Supreme Court confirmed in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, s. 24(1) is able to evolve to meet the challenges and circumstances posed by novel cases. The Court has recognized that "[t]hat evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand."[34]

22. In the event that the question of remedy arises, this will be such a case. Climate change

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[30] *Ontario (Attorney General) v. G*, 2020 SCC 38, at para. 116.
[31] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*], at para. 53.
[32] *Doucet-Boudreau*, at para 55.
[33] [1986] 1 SCR 863, at 965.
[34] *Doucet-Boudreau*, at para. 59.

indisputably "poses a grave threat to humanity's future".[35] In such exigent circumstances, a declaration of invalidity would not meaningfully vindicate the rights and freedoms of the claimants. Indeed, unlike older adults, young people will experience more serious impacts over time, requiring a more immediate and robust remedy to protect their rights into the future.

23. The experience of the Inter-American Court of Human Rights (IACtHR) demonstrates the limits of declaratory relief in this context. 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.[36] 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 constituents and individuals outside of their borders.[37] The high rates of non-compliance with the IACtHR's declaration are demonstrative of the pitfalls of declarations.[38]

24. While the IACtHR was limited by its advisory capacity, other courts — like this Court — are not. Two international apex courts have recognized the importance of creatively exercising their discretion to craft meaningful remedies in response to the exigencies of climate change.

25. First, 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 Change Act*.[39] The Court held that the current emissions

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[35] *GGPPA*, at para. 2.
[36] *Advisory Opinion OC-23/17* of November 15, 2017, Series A No. 23. 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*].
[37] *Advisory Opinion OC-23/17*.
[38] Kent Roach, "Judicial Remedies for Climate Change", (2021) 17 JL & Equality 105, at 107.
[39] 1 BvR 2656/18 (2021) [*Neubauer*].

standard disproportionately affected future generations,[40] and ordered the legislature to revise their standards so as to protect the rights of young persons living in Germany.[41]

26. Second, the Supreme Court of the Netherlands deployed a more direct approach in *Urgenda Foundation v. State of the Netherlands*.[42] An environmental group, in partnership with 900 Dutch citizens, sought an injunction compelling the Netherlands to increase its emissions reduction target from 17% below 1990 levels to 50%. The Court agreed that the Dutch government was required to adopt more stringent climate change measures and ordered the government to reduce its GHG emissions by 25% pursuant to its remedial power under Article 13 of the *European Convention on Human Rights.*[43]

27. The nature, scale, and severity of climate change exposes the limits of declaratory relief. Something more is required to offer the claimants an "appropriate and just" remedy. This Court has the tools to ensure that climate change does not become the exclusive burden of the young. This Court could return this matter to the supervisory jurisdiction of the Superior Court. In the David Asper Centre's submission, this is the appropriate time and context to use such tools. The next opportunity may present itself too late.

PART IV - ORDER REQUESTED

28. The David Asper Centre for Constitutional Rights requests that the appeal be adjudicated in accordance with the submissions above.

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[40] *Neubauer*, at para. 192.
[41] *Neubauer*, at para. 266.
[42] C-565/19 P, C/09/456689 / HA ZA 13-1396 (English translation) (2015) [*Urgenda*].
[43] *Urgenda* at para 8.2.7.

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

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Schedule "A"
List of Authorities

1. *Advisory Opinion OC-23/17* of November 15, 2017, Series A, No. 23.

2. *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

3. *Bliss v. Attorney General of Canada*, [1979] 1 SCR 183.

4. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62.

5. *Fraser v. Canada (Attorney General)*, 2020 SCC 23.

6. *Neubauer et al v. Germany*, 1 BvR 2656/18 (2021), the Federal Constitutional Court of Germany.

7. *Ontario (Attorney General) v. G*, 2020 SCC 38.

8. *Quebec (Attorney General) v. A*, 2013 SCC 5.

9. *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17.

10. *R. v. Kapp*, 2008 SCC 41.

11. *R. v. Sharma*, 2022 SCC 9.

12. *Reference re Impact Assessment Act*, 2023 SCC 23.

13. *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

14. *Urgenda Foundation v. State of the Netherlands*, C-565/19 P, C/09/456689 / HA ZA 13-1396 (English translation) (2015).

15. *Withler v. Canada (Attorney General)*, 2011 SCC 12.

Secondary Sources

1. "Summary of Advisory Opinion OC-23/17", Environmental Law Alliance, (February 26, 2018).
2. Kent Roach, "Judicial Remedies for Climate Change" (2021) 1:17 JL & Equality 106.

Legislation

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

SOPHIA MATHUR et al. and **HIS MAJESTY THE KING** and **DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

Applicants | Respondent | Intervener

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