Court of Appeal File No.: COA-23-CV-0457
Court File No. CV-19-00631627-0000

COURT OF APPEAL FOR ONTARIO

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
(Applicants)

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent
(Respondent)

and

2471256 CANADA INC. (GREENPEACE CANADA) and STICHTING URGENDA

Co-Interveners

FACTUM OF THE CO-INTERVENERS, GREENPEACE CANADA AND STICHTING URGENDA

November 6, 2023

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PART I: OVERVIEW

1. This appeal raises questions about the justiciability of the adequacy of Ontario's greenhouse gas ("GHG") emissions reduction efforts in light of its legal obligations, including whether the consideration of Ontario's 'fair share' of reductions is justiciable.

2. The co-interveners, Greenpeace Canada and Stichting Urgenda, ask this Court to find that the adequacy of Ontario's emissions reduction efforts (including the issue of its 'fair share') is justiciable, at least to the extent required for Ontario courts to determine the legality of Ontario's impugned target in this matter.

PART II: STATEMENT OF ISSUES, LAW, AND AUTHORITIES

3. In the trial decision, the Ontario Superior Court of Justice found that the claim was generally justiciable.[1] However, it also stated:

> [T]he issue of the proper approach for determining Canada's and Ontario's "fair" shares of the remaining carbon budget is not justiciable. This Court does not have the institutional capacity and legitimacy to determine Canada's share compared to other states and Ontario's share compared to other provinces. … [T]he determination of a country's or province's fair share … as well as the factors referred to in Article 2(2) of the Paris Agreement – equity, common but differentiated responsibilities, respective capabilities and different national circumstances – do not have a sufficient legal component to warrant the judicial intervention of an Ontario court.[2]

4. The Court also commented that,

> Although … there are different ways in which a jurisdiction's "fair" share can be calculated, such "fair" share does not need to be calculated to conclude that the gap between the Target and the reduction percentage that is required globally by 2030 is large, unexplained and without any apparent scientific basis.[3]

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[1] *Mathur et al. v Ontario*, 2023 ONSC 2316 ["Decision"], at para. 109.
[2] Decision, at para. 109.
[3] Decision, at para. 146.

5. The Appellants have requested that this Honourable Court consider Ontario's 'fair share' of achieving the Paris Standard[4] in its review of the legality of the Government of Ontario's target to reduce GHG emissions by 30% below 2005 levels by 2030 (the "**Target**") as part of its section 7 analysis, and to order Ontario to set a science-based target consistent with this share.

6. The co-interveners respectfully submit that assessing the legality of the Target and considering Ontario's 'fair share' does not require the Court to "determine" either the fair share or the "proper approach" for determining that fair share. Rather, it requires assessing whether the Target falls manifestly short of *any* reasonable determination that could be made in light of best available science and relevant legal principles.

7. The co-interveners further submit that there is sufficient legal basis for the Court to adjudicate on the legality of the Target and order that a different target be set in accordance with criteria grounded in law. This is because of the existence of applicable legal obligations and principles, and a well-established body of academic literature known as 'effort sharing' that has been reported on by the International Panel on Climate Change ("**IPCC**"). This body of literature quantifies generally agreed principles of international law, such as common but differentiated responsibilities and equity ("**CBDR-RC**") (also referred to as 'fair share'), into still-available carbon budgets for countries that can inform emissions reduction targets. Foreign courts have relied upon 'effort sharing' literature and these legal obligations and principles when assessing the legality of emission targets pursuant to domestic human rights and constitutional law.[5]

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[4] Factum of the Appellants, at para. 9, fn 9; and paras. 88-90.

[5] For broader information concerning the general justiciability of climate cases in foreign case law, the co-interveners respectfully refer the Court to sections 3.1, 4.1 and 4.3 of Maxwell, Lucy and Mead, Sarah and van Berkel, Dennis, "Standards for Adjudicating the Next Generation of Urgenda-Style Climate

8. In this regard, foreign courts have been able to: (a) identify the 'fair share' range (or at least the lower end of the range) of minimum GHG reductions for a particular State to discharge its legal obligations to protect human rights, and (b) test the legality of a country's emissions reduction target on the basis of its 'fair share' of the remaining global carbon budget, pursuant to constitutional rights obligations.

9. There is a sufficient basis of facts and law for the Court to make such assessments in this case. Ontario's actions on climate change, including the related targets it sets, significantly affect the rights and interests of those to whom it owes related legal obligations, and occur within a framework of relevant international legal responsibilities with which it is internationally bound - and domestically presumed - to comply. This means that the question of the acceptable boundaries of its policy choices and actions is, at least in part, a question of law that Ontario courts can and ought to engage with.

10. The co-interveners submit that: a) courts must consider international law when assessing whether the legality of the Target is justiciable; b) international law contributes significantly to the "legal component" required for justiciability; and c) foreign law is helpful in demonstrating the justiciability of states' emission reduction targets.

A. International Law

11. International human rights law and environmental law (including the UN *Framework Convention on Climate Change* ("**UNFCCC**") and the Paris Agreement, to which Canada is party) require GHG emission reduction efforts in order to prevent

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Cases" (November 2021). Journal of Human Rights and the Environment, Ex "E" to the Affidavit of Dennis van Berkel, affirmed September 22, 2023, MPMR, Tab 2, at pp. 102-131.

dangerous anthropogenic climate change and protect human rights. These bodies of law inform the content of governments' obligations.[6]

12. In July 2022 the United Nations General Assembly passed a resolution recognizing the human right to a clean, healthy, and sustainable environment.[7] The resolution was based on, and referred to, several international human rights and environmental instruments to which Canada is a party and/or that set out principles of customary international law that form part of Canadian common law. It also noted the particular threat that climate change poses to the enjoyment of all human rights.

13. In addition to international human rights law, the following international legal obligations and principles (contained in the UNFCCC and the Paris Agreement), inform the development of GHG emission reduction targets and efforts: the Paris Standard; equity and CBDR-RC; and the precautionary principle.

14. The Superior Court of Justice in this matter recognized CBDR-RC as an international law principle that reflects that the Paris Agreement will be equitably implemented in a way that reflects states' "respective capabilities, in the light of different national circumstances."[8]

15. The Supreme Court of Canada has recognized the precautionary principle as requiring states to take measures to prevent environmental damage, even when there is uncertainty about the intensity or degree of potential damages, and to refrain from

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[6] For example, see CRC, General Comment No. 26 (2023) on children's rights and the environment with a special focus on climate change, CRC/C/GC/26 (22 August 2023) at paras. 97-99.
[7] UNGA, The human right to a clean, healthy and sustainable environment, A/RES/76/300 (28 July 2022). Canada supported the resolution, and has since affirmed that "every individual in Canada has a right to a healthy environment" through the *Strengthening Environmental Protection for a Healthier Canada Act*, S.C. 2023, c. 12.
[8] Decision, at para. 28.

activities where it is unclear if they will cause adverse environmental effects.[9]

16. The Supreme Court of Canada has recognized that the obligation of courts to consider international law and apply a presumption of conformity with domestic law exists wherever matters before them engage Canada's international legal obligations. As it has explained:

> [T]he values and principles of customary and conventional international law form part of the context in which Canadian laws are enacted […] This follows from the fact that to interpret a Canadian law in a way that conflicts with Canada's international obligations risks incursion by the courts in the executive's conduct of foreign affairs and censure under international law.

B. Foreign Law

17. In respect of the assessment of whether emission reductions targets are adequate in light of the duty to protect and/or prevent interference with constitutional rights, decisions issued by apex courts in Germany and the Netherlands, summarized below, provide some of the most fulsome discussion and commentary.

i. Urgenda v Netherlands

18. This case was initiated in 2013 by the Urgenda Foundation and 886 Dutch citizens. The claimants alleged that the State's failure to take greater steps to reduce GHG emissions by 2020 was unlawful. In 2015, the District Court of the Hague found that the Government had a legal duty to protect its citizens from dangerous climate change.[10] The District Court ordered the Government to reduce Dutch emissions by at

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[9] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at paras. 30-32. See also *R. v. Michaud*, 2015 ONCA 585, at para. 102; *Ontario (Natural Resources and Forestry) v. South Bruce Peninsula (Town)*, 2021 ONCA 749 at para. 17.

[10] *Urgenda Foundation v the State of the Netherlands*, [2015] C/09/456689 / HA ZA 13-1396.

least 25% compared to 1990 levels by 2020. The judgment was upheld by the Court of Appeal in 2018 and the Supreme Court in 2019.[11]

19. The Supreme Court held that, on the basis of the rights to life and to private and family life, as laid down in articles 2 and 8 of the European Convention on Human Rights ("**ECHR**"), the State is obligated to do "its part" in reducing its GHG emissions in order to counter dangerous climate change.[12] The Supreme Court found that the State must "properly substantiate […] that it pursues a policy through which it remains above the lower limit of its fair share."[13] The Supreme Court derived this obligation from the State's binding obligations and non-binding commitments under the UNFCCC, the Paris Agreement, the "no harm" principle, principles of equity and CBDR-RC and soft law sources such as the UNFCCC Conference of the Parties ("**COP"**) decisions.[14]

20. In relation to its assessment of the sufficiency of the State's mitigation efforts, while the Supreme Court recognized that the determination of the level of emissions reductions in principle belongs to the "political domain,"[15] courts are obliged to assess whether there are "clear views, agreements and/or consensus" (which should be based on insights from climate science) on what can be regarded as the State's "minimum fair share."[16]

21. The Supreme Court then drew upon the assessment of effort-sharing literature in the IPCC's Fourth Assessment Report as the basis for determining the Netherlands' minimum levels of emissions reductions to discharge its legal obligations. This report

[11] *Urgenda Foundation v the State of the Netherlands*, [2018] 200.178.245/01 (The Hague Court of Appeal) (unofficial translation to English); *Urgenda Foundation v the State of the Netherlands*, [2019] 19/00135 (The Dutch Supreme Court) ["*Urgenda v Netherlands*, Supreme Court"].
[12] *Urgenda v Netherlands*, Supreme Court, at para. 5.7.5.
[13] *Urgenda v Netherlands*, Supreme Court, at para. 6.5.
[14] *Urgenda v Netherlands*, Supreme Court, at paras. 5.7.1-5.8.
[15] *Urgenda v Netherlands*, Supreme Court, at para. 6.2.
[16] *Urgenda v Netherlands*, Supreme Court, at para. 6.3.

found that, to have a likely chance (66%) to stay below 2°C (the relevant temperature level considered 'safe' at the time), developed country governments such as the Netherlands needed to reduce their emissions by between 25 to 40% by 2020 compared to 1990 levels.[17]

22. The Supreme Court found that, while the IPCC's findings were not binding in law on their own, there was a high degree of consensus in the international community, as well as in science, on the need to reduce emissions in line with the IPCC's recommendation to prevent warming of more than 2°C. In doing so, the Supreme Court accepted the view of its independent legal advisors, the Procurator General and Advocate General, that while the IPCC did not provide "cut-and-dried answers", it was a "reasoned proposal" because it was derived from the latest scientific studies and covered a broad spectrum of effort-sharing methodologies, and thus could be taken as a starting point for specifying the duty of care of the Dutch State.[18]

23. The Supreme Court subsequently determined that, on the basis of the precautionary principle, "more far-reaching measures should be taken", rather than less,[19] and that the State had failed to provide proper substantiation that a lower target is "nevertheless responsible."[20] In light of these findings, the Supreme Court concluded that a science-based reduction target of at least 25% by 2020 was to be regarded as "an absolute minimum" for the State to discharge its positive obligations under Articles 2 and 8 of the ECHR.[21]

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[17] *Urgenda v Netherlands*, Supreme Court, at paras. 7.2.1, 7.3.6.
[18] Advisory Opinion on Cassation Appeal of the Procurator General in the Matter between the *Netherlands v Urgenda*, [2019] 19/00135 (Public Prosecutor's Office at the Dutch Supreme Court), at paras. 4.129, 4.137.
[19] *Urgenda v Netherlands*, Supreme Court, at para. 7.2.10.
[20] *Urgenda v Netherlands*, Supreme Court, at para. 7.5.1.
[21] *Urgenda v Netherlands*, Supreme Court, at para. 7.5.1.

ii. Neubauer v Germany

24. In February 2020, nine young people filed a complaint with the German Federal Constitutional Court. The claim challenged the provisions of Germany's Climate Protection Act ("**CPA**") that established a GHG emissions reduction target of 55% by 2030 compared to 1990 levels, on the basis that it was insufficient in light of scientific evidence and violated constitutionally protected fundamental freedoms.

25. In the Constitutional Court's decision *Neubauer v Germany*,[22] it referred to the Paris Standard as the relevant constitutional standard.[23] In its assessment of the reduction target, the Constitutional Court referred extensively to evidence from the German Advisory Council on the Environment ("**GACE**"), on the remaining German "national CO2 budget" which the GACE had determined on the basis of the IPCC's estimates of the remaining global CO2 budget to remain below the Paris Agreement temperature limit.[24] In its report, GACE took a per capita approach to calculating the remaining carbon budget for Germany.[25]

26. The Constitutional Court acknowledged that there are uncertainties associated with the methodological approaches available to estimate Germany's national CO2 budget and that the Constitution did not specify which share of the remaining global budget "would be appropriate for Germany in light of fairness considerations."[26] However, the Constitutional Court considered that these uncertainties did not make it permissible for the reduction target to be "chosen arbitrarily", nor that the constitutional

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[22] *Neubauer et al. v Germany,* [2021] 1 BvR 2656/18; 1 BvR 78/20; 1 BvR 96/20; 1 BvR 288/20 (German Federal Constitutional Court) ["*Neubauer v Germany*"].
[23] *Neubauer v Germany*, at para. 120.
[24] *Neubauer v Germany*, at para. 216.
[25] *Neubauer v Germany*, at para. 225.
[26] *Neubauer v Germany*, at para. 225.

obligation could be invalidated by simply arguing that Germany's national CO2 budget is "impossible to determine."[27] In this context, the Constitutional Court noted that "indications regarding distribution methods can be derived from international law,"[28] such as the principle of CBDR-RC enshrined in the UNFCCC and the Paris Agreement, and that Germany's contribution to global mitigation efforts "must be determined in a way that promotes mutual trust in the willingness of the Parties [of the Paris Agreement] to take action,"[29] thereby underlining that the national CO2 budget must be determined in the context of what is collectively needed at the international level.

27. While acknowledging that the national CO2 budget, as determined by the GACE, could not serve as an "exact numerical benchmark,"[30] the Constitutional Court found that, in view of the risk of irreversible climate change, the estimates of the national budget must be taken into account when determining reduction targets. Scientific uncertainty that relates to irreversible harm to the environment impose a "special duty of care" on the State to even take account of "mere indications pointing to the possibility of serious or irreversible impairments."[31] In this context, the Constitutional Court referred to the precautionary principle as expressed in the UNFCCC, and the fact that any scientific uncertainty regarding the national budget meant that it could be smaller than existing studies estimated.

28. On the basis of the national CO2 budget determined by the GACE, the Constitutional Court found that the legislated reduction target implied that the national

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[27] *Neubauer v Germany*, at para. 225.
[28] *Neubauer v Germany*, at para. 225.
[29] *Neubauer v Germany*, at para. 225.
[30] *Neubauer v Germany*, at para. 229.
[31] *Neubauer v Germany*, at para. 229.

budget would be "largely used up" by 2030.[32] The Court found that this would create a "drastic reduction burden" for the period after 2030 that would force the future generation *to* "engage in radical abstinence,"[33] which would risk the impairment of fundamental rights after 2030. On this basis, the Constitutional Court found the legislation to be "*unconstitutional*" and ordered the legislator to amend the CPA.[34]

PART III: CONCLUSION

29. Canada's international law obligations inform the justiciability of the issue of Ontario's emissions reduction efforts, and decisions of foreign courts demonstrate how such matters can be adjudicated without improper interference in the policy sphere.

30. The co-interveners ask that this Court find that the issue of Ontario's emissions reduction efforts (including the issue of its 'fair share') is justiciable, at least to the extent required for Ontario courts to determine the legality of the impugned Target in this matter.

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

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[32] *Neubauer v Germany*, at para. 231.
[33] *Neubauer v Germany*, at paras. 192-3.
[34] *Neubauer v Germany*, at paras. 243, 266.

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SCHEDULE "A"

LIST OF AUTHORITIES

Tab	Case Law	Paragraph
1	*Mathur et al. v. Ontario*, 2023 ONSC 2316	28, 109, 146
2	*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40	30-32
3	*R. v. Michaud*, 2015 ONCA 585	102
4	*Ontario (Natural Resources and Forestry) v. South Bruce Peninsula (Town)*, 2021 ONCA 749	17
5	*Urgenda Foundation v the State of the Netherlands*, [2015] C/09/456689 / HA ZA 13-1396	
6	*Urgenda Foundation v the State of the Netherlands*, [2018] 200.178.245/01	
7	*Urgenda Foundation v the State of the Netherlands*, [2019] 19/00135	5.1, 5.7.1-5.8, 5.7.5, 6.2, 6.3, 6.5, 7.2.1, 7.2.10, 7.3.6, 7.5.1
8	Advisory Opinion on Cassation Appeal of the Procurator General in the Matter between the *Netherlands v Urgenda*, [2019] 19/00135	4.129, 4.137
9	*Neubauer et al. v Germany,* [2021] 1 BvR 2656/18; 1 BvR 78/20; 1 BvR 96/20; 1 BvR 288/20	120, 192-3, 216, 225, 229, 231, 243, 266

SCHEDULE "B"

RELEVANT INTERNATIONAL LEGAL INSTRUMENTS

Tab	
10	United Nations Convention on the Rights of the Child, General Comment No. 26 (2023), CRC/C/GC/26
11	United Nations General Assembly, The human right to a clean, healthy and sustainable environment, A/RES/76/300

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ONTARIO
COURT OF APPEAL

Proceeding commenced at Toronto

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