OSLER

First justiciable climate claim in Ontario – Mathur v. Ontario

JUN 5, 2023 8 MIN READ

Related Expertise

- Climate Change, Carbon Markets and Environmental Finance
- Corporate and Commercial Disputes
- Corporate Governance
- Environmental Disputes and Enforcement
- Environmental, Social and Governance (ESG)
- Regulatory, Indigenous and Environmental

Authors: Jennifer Fairfax, Ankita Gupta

On April 14, 2023, Justice Vermette released her reasons in *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316 (*Mathur*), the first Charter challenge in Ontario against a government actor for actions taken related to climate change to reach a full hearing on its merits in any Canadian court.

Background

The *Cap and Trade Cancellation Act* (CTCA) was enacted by Ontario in 2018. It repealed the *Climate Change Mitigation and Low-carbon Economy Act*, which had set out an emission reduction target of 37% below 2005 levels by 2030 in the province, and implemented a revised target of 30% emissions reduction below 2005 levels by 2030 (the Revised Target). In response, Ecojustice assisted seven youth environmental activists in filing an application against Ontario, contesting the constitutionality of the CTCA.

The applicants alleged that the Revised Target inadequately addressed the dangers posed by climate change, thereby infringing upon the rights of Ontario youth and future generations under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. In brief, the applicants argued that their section 7 right to life, liberty and security of the person was infringed because climate change poses dangerous and existential risks to the life and well-being of Ontarians. And they argued that their section 15 right to equality was infringed because the Revised Target creates a distinction based on the enumerated ground of age, as it imposes a heavier burden on younger Ontarians who will bear the brunt of climate change over time. Among other things, the applicants' sought a declaration that the Revised Target is unconstitutional and an order requiring Ontario to establish an amended science-based emissions target in line with Ontario's Paris Agreement commitments.

On April 15, 2020, Ontario filed a motion to dismiss the case on the grounds that the claim was not justiciable – in other words, a policy decision outside the purview of the court to decide. Ontario argued that the determination of emissions reductions was too political in nature to be properly adjudicated. Justice Brown denied the motion in 2020 ONSC 6918, finding that it was not plain and obvious that the Revised Target and the repeal of the *Climate Change Mitigation and Low-carbon Economy Act* would be unreviewable by a court. After clearing this procedural hurdle, the lawsuit was heard on its merits in September 2022.

The decision

A justiciability win

As a preliminary matter, in order for a court to decide a case on its merits, the subject matter must be suitable for judicial determination – it must be justiciable. In other words, the court must have "the institutional capacity and legitimacy to adjudicate the matter". If the question is purely political in nature and without a sufficient legal component, the judicial branch will not consider the issue, leaving it for the legislative or executive branch.

Significantly, Justice Vermette confirmed that the Charter issues raised by the applicants were generally justiciable because the issues concerned specific state action and legislation: the Revised Target and ss. 3(1) and 16 of the CTCA. However, Justice Vermette found that there was one aspect of the applicants' case which was not justiciable: what constitutes Canada's and Ontario's "fair" shares of the carbon budget. Justice Vermette found that such a multi-factored decision did not have a sufficient legal component to warrant the judicial intervention of an Ontario court, but the fact that the court was not in a position to determine Ontario's exact share of the remaining carbon budget was not fatal to the applicants' case.

Justice Vermette's determination that the *Mathur* lawsuit was suitable for judicial review is consistent with a recent ruling from the British Columbia Supreme Court in *Sierra Club of British Columbia Foundation v British Columbia (Minister of Environment and Climate Change Strategy)* case (Sierra Club).

In that case, the Sierra Club sought judicial review of the B.C. Minister's 2021 Accountability Report [PDF] (the Report) alleging that it did not meet its statutory reporting obligations under the *Climate Change Accountability Act* (CCAA), as it did not explain how the province would continue progressing towards achieving several of its pollution reduction targets. In response, the Minister argued that the emissions reductions plans were so political in nature that the court was not within its jurisdiction to consider the matter. Sierra Club argued that its petition was restricted to ensuring the Minister's compliance with their legal obligations under the CCAA, and not any discretionary issues of public policy. On this issue, Justice Basran agreed with Sierra Club, concluding that the question was more appropriately characterized as the interpretation and enforcement of the CCAA, and not a matter of climate change policymaking and it was therefore justiciable. However, the Court ultimately concluded that the CCAA did not require specific target achievement percentages and, mirroring *Mathur*, dismissed the Sierra Club's petition. While neither *Mathur* nor Sierra Club were successful, the determinations of justiciability were a departure from the previous climate cases in Canadian courts that have generally been dismissed on procedural grounds.

For instance, in *Environnement Jeunesse v. Attorney General of Canada*, 2021 QCCA 1871, the applicant similar to *Mathur*, sought a declaration that their sections 7 and 15 Charter rights had been infringed by the federal government's response, or lack thereof, to climate change. However, the applicant did not identify the specific government action(s) alleged to have infringed their rights. The Court of Appeal dismissed the applicant's case on justiciability because they alleged "an overly broad and unquantifiable number of actions and inactions on the part of the [Canadian government]". *Misdzi Yikh v. Canada*, 2020 FC 1059 and *La Rose v. Canada*, 2020 FC 1008 are two additional examples of climate change cases where the plaintiff's lack of specificity in the impugned state action caused courts to rule the claims as inadmissible on the grounds of justiciability. In contrast, *Mathur* and Sierra Club show that the justiciability hurdle can be overcome in climate litigation if specific legislation and governmental conduct is challenged.

A loss on the merits: Charter rights not infringed

Like every other climate lawsuit brought in Canada to date, the applicants in *Mathur* were ultimately unsuccessful at convincing the court that the impugned government actions gave rise to violation of the Charter.

Section 7 analysis

In dismissing the applicants' section 7 Charter challenge, Justice Vermette's analysis largely rested on two findings. First, that the province's Revised Target was not arbitrary. The CTCA had the objective of reducing GHG emissions and the Revised Target was rationally connected to that reduction objective. Second, that since the issue before the court was that the government "did not go far enough" in reducing GHG emissions, the impact of a less "aggressive" target could not be said to be so harmful to an individual's life, liberty or security of person that it is "grossly disproportionate" to the purpose of the legislation.

Section 15 analysis

The applicants' argued that the CTCA was discriminatory on the basis of age as it disproportionately affected younger Ontarians in three different ways: (1) young people are particularly susceptible to negative physical and mental health impacts resulting from climate change; (2) youth and future generations will bear the brunt of worsening climate change impacts as they live longer into the future; and (3) young people's liberty and future life choices are being constrained by decisions being made today over which they have no control.

Justice Vermette did not find an infringement of section 15 based on any of these arguments. Although Justice Vermette acknowledged that young people are disproportionately impacted by climate change with respect to the first and second argument, she found that there was no nexus between the impugned government action and the disproportionate impact. Instead, the disproportionate impact is caused by climate change itself – not by the CTCA or its Revised Target. Justice Vermette refused to address the applicants' third argument for lack of evidence.

As the court found no violation of sections 7 or 15 of the Charter, it did not deal with the appropriateness of the remedies sought by the applicants.

Takeaways

Mathur is the first decision in Ontario to find that a climate lawsuit is justiciable. It confirms that precedent set in Sierra Club, that defining specific state action may be key to overcoming the justiciability hurdle in a climate lawsuit.

Although the Court dismissed the applicants' Charter challenge, two statements by the court in *Mathur* may be significant as future courts, successive governments and industry continue to grapple with climate change litigation.

First, Justice Vermette held:

"Based on the evidence before me, it is indisputable that, as a result of climate change, the Applicants and Ontarians in general are experiencing an increased risk of death and an

increased risk to the security of the person."

Second, Justice Vermette was harshly critical of Ontario's climate plan, stating:

"I find that Ontario's decision to limit its efforts to an objective **that falls severely short** of the scientific consensus as to what is required is sufficiently connected to the prejudice that will be suffered by the Applicants and Ontarians should global warming exceed 1.5˚C. By not taking steps to reduce GHG in the province further, **Ontario is contributing to an increase in the risk of death and in the risks faced by the Applicants and others with respect to the security of the person**." [Emphasis added.]

In this sense, *Mathur* builds on Canadian case law recognizing the catastrophic effects of climate change including the Supreme Court of Canada's decision in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, where the court held that "climate change is an existential challenge".

Nonetheless, this may not be the end for *Mathur*. Ecojustice has signaled that the applicants will be appealing the decision, joining other climate cases that allege violations of the Charter that are currently under appeal as well. Osler will continue to stay abreast of these developments as they wind their way through the courts.