Court of Appeal File No.: COA-23-CV-0547
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

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

- and -

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

Interveners

FACTUM OF THE INTERVENER, GRAND COUNCIL OF TREATY #3

November 6, 2023

JFK LAW LLP
Suite 5600, 100 King Street West
Toronto, ON M5X 1C9

Robert Janes, KC (LSO #33646P)
Direct: 250-405-3466
Email: rjanes@jfklaw.ca
Karen Drake (LSO #55807F)
Email: kdrake@jfklaw.ca
Lara Koerner-Yeo (LSO #75765B)
Direct: 647-805-5675
Email: lkoerneryeo@jfklaw.ca

Lawyers for the Intervener, Grand Council of Treaty #3

TO: **REGISTRAR OF THIS HONOURABLE COURT**

Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2N5

AND TO: **STOCKWOODS LLP**
Barristers
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto ON M5K 1H1

Nader R. Hasan (LSO #54693W)
Tel: 416-593-1668
Email: naderh@stockwoods.ca

Justin Safayeni (LSO #58427U)
Tel: 416-593-3494
Email: justins@stockwoods.ca

Spencer Bass (LSO #75881S)
Tel: 416-593-1657
Email: spencerb@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

ECOJUSTICE
777 Bay Street
Suite 1910, PO Box 106
Toronto ON M5G 2C8

Fraser Andrew Thomson (LSO #62043F)
Email: fthomson@ecojustice.ca

Danielle Gallant (LSO #81328Q)
Email: dgallant@ecojustice.ca

Julia Croome (LSO #56747C)
Email: jcroome@ecojustice.ca

Reid Gomme (LSO #84568F)
Email: rgomme@ecojustice.ca

Bronwyn Roe (LSO #63840R)
Email: broe@ecojustice.ca

Tel: 416-368-7533
Fax: 416-363-2746

Lawyers for the Appellants

AND TO: **MINISTRY OF THE ATTORNEY GENERAL**

Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M5G 1J5

S. Zachary Green (LSO #48066K)
Tel: 416-992-2327
Email: Zachary.Green@Ontario.ca

Padraic Ryan (LSO #61687)
Tel: 647-588-2613
Email: Padraic.Ryan@Ontario.ca

Sean Kissick (LSO #84753L)
Tel: 437-522-7147
Email: Sean.D.Kissick@Ontario.ca

Lawyers for the Respondent

Table of Contents

I. Overview and Statement of Facts

1. Climate change is a global crisis that gravely impacts Treaty #3 territory (the "**Territory**") and the ability for Anishinaabe people who make up the Anishinaabe Nation in Treaty #3 (the "**Anishinaabe Nation**") to live and practice their way of life in the Territory. The Grand Council of Treaty #3 ("**Grand Council**") says this court should draw upon Canada's Aboriginal law as well as Indigenous Anishinaabe law in its analysis to find that the Application Judge erred in its characterization of the Target and s. 7 *Canadian Charter of Rights and Freedoms* ("**Charter**") analysis and thus hold that Ontario acted unconstitutionally in setting a target committing Ontario to meet a dangerously high level of greenhouse gas emissions ("**GHG**") between now and 2030 (the "**Target**"). This Court should also affirm the law in respect of an intersectional substantive equality analysis, making clear that a formalistic equality analysis anchored in a temporal distinction is incorrect at law.

II. Issue

2. The Grand Council makes submissions on three points: (1) societal preservation is a legal principle that aligns with Anishinaabe law and is of central importance to Anishinaabe peoples; (2) the Target is a form of justiciable, high-level strategic government decision; and (3) the requirements of an intersectional substantive equality analysis.

III. Argument

(1) Societal Preservation is a Principle of Fundamental Justice

3. Preserving a healthy earth and the present and future generations is of paramount concern to the Anishinaabe Nation and has expression in Anishinaabe law as a legal principle. This Court can rely on Anishinaabe law as authority to support the recognition of societal preservation as a principle of fundamental justice in Canada's common law.

Societal Preservation of Distinct Concern to the Anishinaabe Nation

4. Canadian courts recognize the inextricably close relationship between Indigenous peoples and the natural ecosystem, which makes Indigenous peoples more susceptible to the

impacts of climate change.[1]

5. In the Territory, flooding, forest fires, heat waves, and droughts are more frequent and severe, lake and river ice is thinning, and freezing rain and snowstorms are becoming more unpredictable; such changes in the Territory's climate uniquely and gravely impact the Anishinaabe Nation, leading to loss of life, deteriorating mental and physical health outcomes, and an increasingly compromised ability to engage in Anishinaabe practices that are fundamental to the Anishinaabe way of life, including the exercise of constitutionally protected Aboriginal and Treaty rights.[2] Such grave impacts exemplify the interconnectedness between the Anishinaabe Nation and the natural ecosystem in the Territory and are a great cause for concern as the preservation of present and future Anishinaabe life and culture is increasingly in jeopardy in parts of the Territory.

Anishinaabe Law on Our Responsibilities to the Earth

6. This section draws on the laws of the Anishinaabe Nation, as reflected in *Manito Aki Inakonigaawin* ("MAI" or the "Great Earth Law") and the *Nibi Declaration* (or the "Water Declaration"),[3] as well as published scholarship by respected Anishinaabe scholars. The first-person voice is used to articulate Anishinaabe law and constitutional norms, consistent with the nature of enforcement under Anishinaabe law.[4]

7. The Anishinaabe legal principle that corresponds to the principle of societal preservation is as follows: according to Anishinaabe law, we have a responsibility to care for the earth

---

[1] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 11; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para. 12.
[2] Affidavit of Ogichidaa Francis Kavanaugh, affirmed September 21, 2023 ("**Ogichidaa Affidavit**"), at paras. 14-22.
[3] Ogichidaa Affidavit, at paras. 26, 32; Ogichidaa Affidavit, Ex. C: *Manito Aki Inaakonigewin Information Package* at p. 19; Ogichidaa Affidavit, Ex. D: *Nibi Declaration of Treaty #3*.
[4] Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished], Online: <https://dspace.library.uvic.ca/bitstream/handle/1828/10985/Mills_Aaron_PhD_2019.pdf?sequence=1&isAllowed=y> [**Mills**] at pp. 160-62.

in the same way that one has a responsibility to care for one's mother.[5] This responsibility of care includes a responsibility to ensure that the earth can fulfill its own maternal responsibilities to future generations.[6] This in turn requires that we ensure our environment is not degraded and that we maintain healthy habitats and clean water for future generations.[7]

8. The above Anishinaabe legal principle is grounded in the following Anishinaabe constitutional norms: the categories that operate within Anishinaabe law are the categories of gifts and needs.[8] Each member within a community has a responsibility to assess and understand the needs of other members, and to develop and offer one's own gifts to meet those needs.[9] These gift-giving and receiving responsibilities are known as *wiidookodaadiwin* or mutual aid.[10]

9. Our mutual aid responsibilities are structured by our kinship relationships.[11] The kinship category that applies in a relationship guides how one fulfills their mutual aid responsibilities in that relationship. Kinship relationships apply among, and often beyond, one's biological kin.[12]

10. The earth is a member of our community, or a relation.[13] We are in a mutual aid

---

[5] Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinaabe Understanding of Treaty One* (Saskatoon: Purich Publishing Ltd., 2013) at p. 95 [**Craft, *Breathing Life***]; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [**Borrows**] at p. 246; Ogichidaa Affidavit, Ex. B: *Manito Aki Inakonigaawin*, s. 11; Ogichidaa Affidavit, Ex. B at pp. 8, 10; Ogichidaa Affidavit at p. 19.
[6] Craft, *Breathing Life*, at pp. 98-99; Borrows, at p. 246; Ogichidaa Affidavit, Ex. C at pp. 31-32.
[7] Ogichidaa Affidavit, Ex. C at p. 19; Ogichidaa Affidavit, Ex. D.
[8] Mills, at pp. 69-72.
[9] Mills, at p. 88.
[10] Mills, at pp. 96-97, 98.
[11] Mills, at p. 114.
[12] Mills, at pp. 117, 119.
[13] Borrows, at p. 242; Mills, at p. 80; Aimée Craft, "Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)" (2018) in Aimée Craft et al, *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Centre for International Governance Innovation, 2018), online (pdf): <https://www.cigionline.org/sites/default/files/documents/UNDRIP%20II%20Special%20Report%20lowres.pdf> at pp. 57-58; Ogichidaa Affidavit, Ex. C at p. 17.

relationship with the earth, in the same way that we are in a mutual aid relationship with our biological kin and other members of our community. The kinship category that operates between the earth and us is the category of mother-offspring. Hence, the earth is known as *Gidaakiiminaan* (Mother Earth).[14] This means that the responsibilities that we owe to our mothers are the same responsibilities that we owe to the earth.

11. The earth has given to us as a gift everything we need to live life in a good way (*bimaadiziwin*),[15] just as a mother does for her offspring.[16] We, in turn, have a reciprocal responsibility to care for the earth.[17] We can do this by minimizing our own needs and by using our gifts to ensure that the earth is able to fulfill its maternal responsibilities to future generations.[18] For example, Anishinaabe law can bar the clear-cutting of old growth forest, as explained by Gary Potts, former Chief of the Temagami First Nation:

> You assess what the forest needs to sustain itself and be healthy. You may find you can take 10 percent of the trees…and not interfere with the forest replenishing itself. But if the land can't support anymore, then you lay your chain saw down…. You find other ways to live….It [is] a process of nurturing our motherland to ensure that unborn generations have a base from which to grow.[19]

Courts can Consider Indigenous Law as Persuasive Authority in Determining Appeal

12. Canada is a multi-juridical nation-state with Indigenous, English, and French legal orders;[20] these legal orders, including Anishinaabe law as an Indigenous legal order,

---

[14] Craft, *Breathing Life*, at p. 95; Borrows, at p. 246; Ogichidaa Affidavit, Ex. C at p. 20.
[15] Ogichidaa Affidavit, Ex. C at p. 18.
[16] Mills, at pp. 68-69; Craft, *Breathing Life*, at pp. 88-90.
[17] Borrows, at p. 246.
[18] Craft, *Breathing Life*, at pp. 98-99; Borrows, at p. 246 citing Basil Johnston, *Ojibway Heritage* (Toronto: McClelland and Stewart, 1976) at pp. 24-25; Gary Potts, "The Land Is the Boss: How Stewardship Can Bring Us Together" in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Ontario: House of Anansi Press Limited, 1992) [**Potts**] at p. 37; Ogichidaa Affidavit, Ex. C at pp. 31-32.
[19] Potts, at pp. 35, 36, 37.
[20] *Pastion v. Dene Tha' First Nation*, 2018 FC 648 [***Pastion***] at para. 8; see e.g. *Connolly v. Woolrich*, [1867] Q.J. No 1; *Mitchell v. M.N.R.*, 2001 SCC 33; Claire L'Heureux-Dubé, "Bijuralism: A Supreme Court of Canada Justice's Perspective" (2002) 62:2 La L Rev 449, online (pdf):

make up part of Canada's origin story and continue to exist today. For much of Canada's history, "[d]espite the occasional recognition of Indigenous law by Canadian courts, the overall tendency was…one of denial and suppression [of Indigenous law]".[21] Today, a part of the work of reconciliation, requires decision-makers, and all legal practitioners, to make space for Indigenous legal orders.[22] This requires embracing an unbiased lens to Indigenous law and the role it can play in *Charter* interpretation.[23]

13. Making space for Indigenous law has often been sidelined to recognizing Indigenous law only to the extent that it is incorporated into Canadian domestic law by way of treaty, statute, or court declaration, or considering Indigenous law as fact evidence of the Indigenous perspective.[24] The Canadian judiciary in its decision-making ought to move beyond Indigenous law as mere "perspective" and accept Indigenous law as law that can be relied on in Canadian court decision-making.[25]

14. The Canadian judiciary turns to various sources for persuasive value, including academic scholarship, primary source materials, and other sources of law.[26] In the development of Canada's *Charter* jurisprudence, Canadian courts have routinely cited to other sources of

---

<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5924&context=lalrev> at p. 460.

[21] *Pastion* at para. 9.

[22] The Honourable Chief Justice Lance S.G. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper 2.1, Indigenous Legal Orders and the Common Law, 15 November 2012) CLEBC, at p. 2.1.2.

[23] See e.g. where courts have noted the need to move away from "biases and prejudices from another era in our history": *Simon v. The Queen*, [1985] 2 SCR 387 at para. 21; see also *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para. 453.

[24] *Coastal GasLink PipeLine Ltd. v. Huson*, 2019 BCSC 2264 at paras. 127-29; *George v. Heiltsuk First Nation*, 2022 FC 1786 at paras. 68-72.

[25] See e.g. Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" online (pdf): <https://www.law.utoronto.ca/utfl_file/count/users/mdubber/CAL/13-14/Napoleon%20and%20Friedland,%20Roots%20to%20Renaissance,%20formatted.pdf>.

[26] Gerald V. La Forest, "The Use of American Precedents in Canadian Courts" (1994) 46:2 Me L Rev 211, online (pdf): <https://core.ac.uk/download/pdf/234112137.pdf> [**Forest**]; *McQuarrie Hunter v. Foote*, 1981 CanLII 662 (BCSC), 129 DLR (3d) 437 at para. 11; *R. v. Beamish (D.L.) (1996)*, 144 Nfld & PEIR 338 at para. 20; *AARC Society v. Canadian Broadcasting Corporation*, 2019 ABCA 125 at para. 148; *R. v. D.B.*, 2008 SCC 25 at paras. 60, 67; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at paras. 30, 37.

law beyond Canada's common and civil law.[27]

15. Even though there are "readily apparent" differences between Canadian and American legal traditions, American law, for example, has provided powerful assistance to Canadian courts with the Supreme Court of Canada relying heavily on American jurisprudence in developing *Charter* law in Canada.[28]

16. As the Supreme Court of Canada cites to American law in interpreting and developing the ambit of *Charter* rights, this Court can cite to Anishinaabe law in its *Charter* decision-making. To do so is to take a step forward in making space for Indigenous law in Canada's common law not as "perspective" but as law and to recognize that Indigenous law ought to have at least the same amount of persuasive value as foreign sources of law when deciding on the scope of *Charter* rights.

Anishinaabe Law Aligns with Societal Preservation as a Principle of Fundamental Justice

17. ***Societal preservation is a legal principle with societal consensus***. Anishinaabe law ought to provide persuasive value to this Court that societal preservation is a legal principle in Canada with societal consensus. The societal preservation principle[29] advanced by the Appellants finds expression and support in Anishinaabe law.

18. The Supreme Court of Canada has held that principles of fundamental justice "may be distilled from 'the legal principles which have historically been reflected in the law of this [Canada] and other similar states".[30] In advancing *Charter* jurisprudence on cognizable principles of fundamental justice in Canada, principles of fundamental justice ought to be distilled from legal principles historically reflected in Canada's law and the law of other legal systems within Canada, including Indigenous Anishinaabe law.

---

[27] *Linklater v. Thunderchild First Nation*, 2020 FC 1065 at para. 45.
[28] Forest, at pp. 213-215; Christopher P. Manfredi, "The Use of United States Decisions by the Supreme Court of Canada under the Charter of Rights and Freedoms" 23:3 (1990) Canadian Journal of Political Science; see e.g. *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 where the SCC cites to seven American decisions for guidance.
[29] Appellants' Factum, July 31, 2023, at para. 59; *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316 [**Decision**] at para. 163 (Appeal Book ("AB"), Tab 3, at p. 60).
[30] *R. v. Ruzic*, 2001 SCC 24 at para. 28.

(2) High Level-Strategic Government Decisions are Justiciable

19. The Application Judge erred in characterizing the Target as "an objective" or "result" when her reasons underscore the function of the Target as a high-level strategic decision.[31] This Court should draw on s. 35 Aboriginal law jurisprudence on this point.

20. The setting of the Target:[32] (i) is a ministerial level decision made pursuant to statute, ss 3(1) of *the Cap and Trade Cancellation Act*; (ii) is a strategic planning decision on the reduction of GHG emissions in Ontario; (iii) is a key part of Ontario's Made-in-Ontario Environment Plan (the "plan"); and (iv) guides and directs subsequent state action with respect to the reduction of GHG in Ontario with downstream government decisions to authorize, incentivize and facilitate GHG emissions informed by the Target and plan.

21. The nature of the decision to set the Target aligns with key characteristics of justiciable, strategic high-level decisions as follows:[33] (i) they are high-level management or ministerial decisions; (ii) they relate to strategic planning, such as strategic planning for a resource or the setting of an objective to be subsequently carried out; (iii) they can provide for the establishment of a structure or a structural change; and (iv) they set the stage for subsequent decisions that are made in accordance with the high-level decision.

22. Section 35 jurisprudence includes myriad examples of justiciable high-level decisions, including decisions to transfer licenses, approve multi-year natural resource and community plans, and establish review processes.[34] Such high-level decisions set a framework to which subsequent government decisions implicating that matter adhere.[35]

23. This section 35 jurisprudence can be used to develop *Charter* jurisprudence (especially

---

[31] Decision, at paras. 122-23 (AB, Tab 3, at p. 49).
[32] *Cap and Trade Cancellation Act, 2018,* S.O. 2018, c. 13, ss. 3(1) and 4(1); Decision, at para. 123 (AB, Tab 3, at p. 49).
[33] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras. 42-45.
[34] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 [***Dene Tha'***] aff'd 2008 FCA 20; *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345; *Squamish Nation v. British Columbia (Minister of Community, Sport and Cultural Development)*, 2014 BCSC 991.
[35] *Dene Tha'*.

where the *Charter* issues implicate Indigenous interests). The Supreme Court of Canada has recognized Part I and II of the *Constitution Act, 1982* as "sister provisions" and in its decision-making, drawn analogies between *Charter* and Aboriginal rights reasoning.[36]

(3) Application Judge's Decontextual, Formal Equality Analysis Must be Overturned

24. ***Section 15 Substantive Equality Analysis is Contextual.*** The s. 15 analysis is "contextual, not formalistic, grounded in the actual situation of the [claimant] group and the potential of the impugned [state decision] to worsen their situation".[37] The court's analysis must focus on the impugned state action's impact on the claimants and "take full account of the social, political economic and historical factors" that inform the claimants' situation.[38] The contextual substantive equality analysis requires a decision-maker to be "alive to the intersectionality of disadvantage"[39] and "flexible enough … to recognize that personal characteristics may overlap or intersect".[40]

25. ***Court Must Consider Intersectionality when Engaged***. Where multiple enumerated or analogous grounds are engaged courts are obliged to consider the intersecting grounds advanced by the claimants, irrespective of whether the court decides the discrimination claim on a single-axis analysis (*i.e.* on the basis of only one ground).[41] *Charter* equality

---

[36] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 141-42.
[37] *Withler v. Canada (Attorney General)*, 2011 SCC 12 [***Withler***] at paras. 35-37 [emphasis added]; *R. v. Kapp*, 2008 SCC 41 [***Kapp***] at para. 32; *Quebec (Attorney General) v. A*, 2013 SCC 5 [***A***] at para. 331.
[38] *Law v. Canada (Minister of Employment and Imigration)*, [1999] 1 SCR 497 at paras. 59-75; *Withler* at paras. 2, 37-39; *A* at paras. 324, 327-29; *R. v. Turpin*, [1989] 1 SCR 1296 [***Turpin***] at pp. 1331-32; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paras. 193-94.
[39] *R. v. Sharma*, 2022 SCC 39 at para. 196.
[40] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [***Corbiere***] at p. 253.
[41] *Dixon v. 930187*, 2010 HRTO 256 at para. 53; *Flamand v. DGN Investments*, 2005 HRTO 10 at para. 140; see e.g. *R. v. C.M.*, 1995 CanLII 8924 (ON CA), 23 OR (3d) 629 [***C.M.***] where the court decides on ground of sexual orientation when age and marital status where also engaged; see e.g. *Fraser v. Canada (Attorney General)*, 2020 SCC 28 [***Fraser***] at para. 116 where the court decides the discrimination claim on the basis of sex with "a robust intersectional analysis of gender and parenting … carried out under the enumerated ground of sex".

and human rights law in Canada, which "should be as congruous as possible",[42] recognize that "intersecting group membership tends to amplify discriminatory effects" and can lead to a form of compounded discrimination.[43]

26. ***Formalism an Error***. The Application Judge adopted a long-rejected decontextualized, formal equality approach in denying the s. 15(1) claim based on a temporal distinction. The Application Judge dismissed the s. 15 claim because "the impacts of climate change will be experienced by all age groups in the future", concluding that the distinction is based in time (*i.e.* a temporal distinction), which is fatal to a s. 15 claim.[44] The reasons are untethered from the claimants' lived experiences and devoid of context, ignoring the broader social, economic, political and historical context which s. 15 demands. Reasoning that everyone will experience climate change in the future – akin to arguments that there is no discrimination because everyone is subject to the same government law or action[45] – smacks of formalism, a rejected, impoverished concept of equality that treats everyone in a similar situation the same way.[46]

27. Indigenous youth are not in the same situation as non-Indigenous youth, adults, or other segments of the population. The effects of climate change and the Target (*i.e.* a dangerously high level of GHG by 2030), on them are not the same, rather the prejudicial

---

[42] Ontario Human Rights Commission, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims" (9 October 2001), online (pdf): <https://www3.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf>, at p. 18; see also *British Columbia (Public Service Employee Relations Commissioner) v. BCGSEU*, [1999] 3 SCR 3.

[43] *Baylis-Flannery v. DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28, 2003 CarswellOnt 8050 at paras. 143-45; *Turner v. Canada (Attorney General)*, 2012 FCA 159 at para 48; *Corbiere* at pp. 253, 259; *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 47; see Gracie Ajele & Jena McGill, "Intersectionality in Law and Legal Contexts" (2020), Women's Legal Education & Action Fund (LEAF), online (pdf): <https://www.leaf.ca/wp-content/uploads/2020/10/Full-Report-Intersectionality-in-Law-and-Legal-Contexts.pdf> at pp. 46-48.

[44] Decision, at para. 180 (AB, Tab 3, at p. 63); See e.g. *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, at para. 33.

[45] *Turpin*.

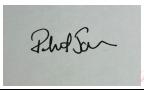
[46] *Andrews* at pp. 167-68; *Kapp*; *Withler*; *A*; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

effects against them are amplified on account of their intersecting group membership as youth and Indigenous peoples — a reality that is rendered invisible in the Application Judge's reasons because her analysis facially considers that everyone will experience climate change without examining the Target's adverse effects on the claimants themselves as required, *i.e.* how the claimants will be subject to the Target's adverse effects in a different, prejudicial way because of enumerated personal characteristics.[47] By defaulting to decontextualized formalism and in so doing bypassing the intersectional analysis required[48] and ignoring the prejudicial effects on the claimants' themselves, the Application Judge fundamentally erred in her s. 15 analysis.

IV. Costs

28. The Grand Council seek no costs for or against it.

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



DATED November 6, 2023

JFK LAW LLP
Suite 5600
100 King Street West
Toronto, ON M5X 1C9

Robert Janes, KC (LSO #33646P)
Karen Drake (LSO #55807F)
Lara Koerner-Yeo (LSO #75765B)

Lawyers for the Intervener, Grand Council of Treaty #3

[47] Decision, at paras. 178-83 (AB, Tab 3, at pp. 62-63).
[48] See e.g., *C.M.* and *Fraser* at para. 116; Appellants' Factum, at paras. 70, 72; Factum of the Applicants, August 23, 2022 (ON SC), at paras. 103, 107, 113-15, 211-13.

V. List of Authorities

Case Law

1. *AARC Society v. Canadian Broadcasting Corporation*, 2019 ABCA 125.
2. *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.
3. *Baylis-Flannery v. DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28, 2003 CarswellOnt 8050.
4. *British Columbia (Public Service Employee Relations Commissioner) v. BCGSEU*, [1999] 3 SCR 3.
5. *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345.
6. *Coastal GasLink PipeLine Ltd. v. Huson*, 2019 BCSC 2264.
7. *Connolly v. Woolrich*, [1867] Q.J. No 1.
8. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.
9. *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354.
10. *Dixon v. 930187*, 2010 HRTO 256.
11. *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9.
12. *Flamand v. DGN Investments*, 2005 HRTO 10.
13. *Fraser v. Canada (Attorney General)*, 2020 SCC 28.
14. *George v. Heiltsuk First Nation*, 2022 FC 1786.
15. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.
16. *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65.
17. *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.
18. *Law v. Canada (Minister of Employment and Imigration)*, [1999] 1 SCR 497.
19. *Linklater v. Thunderchild First Nation*, 2020 FC 1065.
20. *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316.
21. *McQuarrie Hunter v. Foote*, 1981 CanLII 662 (BCSC), 129 DLR (3d) 437.
22. *Mitchell v. M.N.R.*, 2001 SCC 33.
23. *Ontario (Attorney General) v. G*, 2020 SCC 38.
24. *Pastion v. Dene Tha' First Nation*, 2018 FC 648.
25. *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32.
26. *Quebec (Attorney General) v. A*, 2013 SCC 5.
27. *R. v. Beamish (D.L.) (1996)*, 144 Nfld & PEIR 338.

28. *R. v. C.M.*, 1995 CanLII 8924 (ON CA), 23 OR (3d) 629.
29. *R. v. D.B.*, 2008 SCC 25.
30. *R. v. Kapp*, 2008 SCC 41.
31. *R. v. Ruzic*, 2001 SCC 24.
32. *R. v. Sharma*, 2022 SCC 39.
33. *R. v. Turpin*, [1989] 1 SCR 1296.
34. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.
35. *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.
36. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43.
37. *Simon v. The Queen*, [1985] 2 SCR 387.
38. *Squamish Nation v. British Columbia (Minister of Community, Sport and Cultural Development)*, 2014 BCSC 991.
39. *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.
40. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
41. *Turner v. Canada (Attorney General)*, 2012 FCA 159.
42. *Withler v. Canada (Attorney General)*, 2011 SCC 12.

Legislation

43. *Cap and Trade Cancellation Act, 2018*, S.O. 2018, c. 13 (excerpt)

Secondary Sources

44. Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished], Online: <https://dspace.library.uvic.ca/bitstream/handle/1828/10985/Mills_Aaron_PhD_2019.pdf?sequence=1&isAllowed=y>.
45. Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinaabe Understanding of Treaty One* (Saskatoon: Purich Publishing Ltd., 2013).
46. Aimée Craft, "Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)" (2018) in Aimée Craft et al, *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Centre for International Governance Innovation, 2018), online (pdf): <https://www.cigionline.org/sites/default/files/documents/UNDRIP%20II%20Special%20Report%20lowres.pdf>.
47. Christopher P. Manfredi, "The Use of United States Decisions by the Supreme Court of Canada under the Charter of Rights and Freedoms" 23:3 (1990) Canadian Journal of

Political Science.

48. Claire L'Heureux-Dubé, "Bijuralism: A Supreme Court of Canada Justice's Perspective" (2002) 62:2 La L Rev 449, online (pdf): <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5924&context=lalrev>.

49. Gary Potts, "The Land Is the Boss: How Stewardship Can Bring Us Together" in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Ontario: House of Anansi Press Limited, 1992).

50. Gerald V. La Forest, "The Use of American Precedents in Canadian Courts" (1994) 46:2 Me L Rev 211, online (pdf): <https://core.ac.uk/download/pdf/234112137.pdf>.

51. Gracie Ajele & Jena McGill, "Intersectionality in Law and Legal Contexts" (2020), Women's Legal Education & Action Fund (LEAF), online (pdf): <https://www.leaf.ca/wp-content/uploads/2020/10/Full-Report-Intersectionality-in-Law-and-Legal-Contexts.pdf>.

52. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

53. Ontario Human Rights Commission, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims" (9 October 2001), online (pdf): <https://www3.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf>.

54. The Honourable Chief Justice Lance S.G. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper 2.1, Indigenous Legal Orders and the Common Law, 15 November 2012) CLEBC.

55. Val Napoleon & Haldey Friedland, "Indigenous Legal Traditions: Roots to Renaissance" online (pdf): <https://www.law.utoronto.ca/utfl_file/count/users/mdubber/CAL/13-14/Napoleon%20and%20Friedland,%20Roots%20to%20Renaissance,%20formatted.pdf>.

Cap and Trade Cancellation Act, 2018, S.O. 2018, CHAPTER 13

TARGETS, PLAN AND PROGRESS REPORTS

Targets
3 (1) The Government shall establish targets for the reduction of greenhouse gas emissions in Ontario and may revise the targets from time to time.

Climate change plan
4 (1) The Minister, with the approval of the Lieutenant Governor in Council, shall prepare a climate change plan and may revise the plan from time to time. 2018, c. 13, s. 4 (1).

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

Legal Rights

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality Rights

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

SOPHIA MATHUR, a minor by her litigation guardian CATHERINE ORLANDO, et al.
Appellants

-and-

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

Court File No. COA-23-CV-0547

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

FACTUM

JFK LAW LLP
Suite 5600
100 King Street West
Toronto, ON M5X 1C9

Robert Janes, KC (LSO #33646P)
Direct: 250-405-3466
Email: rjanes@jfklaw.ca

Karen Drake (LSO #55807F)
Email: kdrake@jfklaw.ca

Lara Koerner-Yeo (LSO #75765B)
Direct: 647-805-5675
Email: lkoerneryeo@jfklaw.ca

Tel: 1-888-687-8388

Lawyers for the Intervener, Grand Council of Treaty #3