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

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

Interveners

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

November 6, 2023

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto ON M5H 4E3

Teagan Markin (74337R)
tmarkin@blg.com
T: 416.367.6379

Nadia Effendi (49004T)
neffendi@blg.com
T: 416.367.6728

Lawyers for the Intervener,
British Columbia Civil Liberties Association

TO: **STOCKWOODS LLP**
Toronto-Dominion Centre
TD North Tower, Box 140
77 King St W, Suite 4130
Toronto ON M5K 1H1
T: 416-593-7200

Nader R. Hasan (54693W)
T: 416-593-1668
naderh@stockwoods.ca

Justin Safayeni (58427U)
T: 416-593-3494
justins@stockwoods.ca

Spencer Bass (75881S)
T: 416-593-1657
spencerb@stockwoods.ca

Lawyers for the Appellants

TO: **ECOJUSTICE**
777 Bay Street
Suite 1910, Box 106
Toronto ON M5G 2C8
T: 416-368-7533

Fraser Andrew Thomson (62043F)
fthomson@ecojustice.ca

Danielle Gallant (81328Q)
dgallant@ecojustice.ca

Julia Croome (56747C)
jcroome@ecojustice.ca

Reid Gomme (84568F)
rgomme@ecojustice.ca

Bronwyn Roe (63840R)
broe@ecojustice.ca

Lawyers for the Appellants

TO: **MINISTRY OF THE ATTORNEY GENERAL**
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M5G 1J5

S. Zachary Green (48066K)
T: (416) 992-2327
Zachary.Green@Ontario.ca

Padraic Ryan (61687)
T: (647) 588-2613
Padraic.Ryan@Ontario.ca

Sean Kissick (84753L)
T: (437) 522-7147
Sean.D.Kissick@Ontario.ca

Lawyers for the Respondent

AND TO: **ASSEMBLY OF FIRST NATIONS**
55 Metcalfe Street Suite 1600
Ottawa, ON, K1P 6L5, Canada

Stuart Wuttke (52078G)
swuttke@afn.ca

Adam Williamson (62751G)
awilliamson@afn.ca

Lacey Kassis (67528C)
lkassis@afn.ca

T: 613-241-67891
F: 613-241-5808

Lawyers for the Intervener, Assembly of First Nations

AND TO: **GOLDBLATT PARTNERS LLP**
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Daniel Sheppard (59074K)
T: 416-979-6442
dsheppard@goldblattpartners.com

Erica Cartwright (82644B)
T: 416-979-4638
ecartwright@goldblattpartners.com

Lawyers for the Intervener, Canadian Association of Physicians for the Environment

AND TO: **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1

Andrew Lokan (31629Q)
T: 416-646-4300
andrew.lokan@paliareroland.com

Danielle Glatt (65517N)
T: 416-646-7440
danielle.glatt@paliareroland.com

Lawyers for the Intervener, The Canadian Civil Liberties Association

AND TO: **Nicolas M. Rouleau Professional Corporation**
41 Burnside Dr.
Toronto ON M6G 2M9

Nicolas M. Rouleau (54515D)
T : 416-885-1361
RouleauN@gmail.com

Vibhu Sharma (70130V)
T: 647-668-3072
SharmaVibhu@outlook.com

Lawyers for the Interveners, Canadian Lawyers for International Human Rights and Center for International Environmental Law

AND TO: **PETER A. ALLARD SCHOOL OF LAW**
The University of British Columbia
Allard Hall - 1822 East Mall
Vancouver, British Columbia V6T 1Z1

Hassan M. Ahmad (64300K)
ahmad@allard.ubc.ca

Brooke MacKenzie (64135P)
brooke@brookemackenzie.ca

T: 604-822-3925
F: 604-822-8108

Lawyers for the Intervener, Citizens for Public Justice

AND TO: **HENEIN HUTCHISON ROBITIALLE LLP**
235 King Street East
Toronto, Ontario M5A 1J9

Ewa Krajewska (57704D)
ekrajewska@hhllp.ca

T: 416-368-5000
F: 416-368-6640

Lawyer for the Intervener, David Asper Centre for Constitutional Rights

AND TO: **WEST COAST ENVIRONMENTAL LAW**
#700 – 509 Richards Street
Vancouver, BC V6B 2Z6

Anna Johnston (509953)
T: 604-601-2508
ajohnston@wcel.org

Andrew Gage (503343)
T: 604-601-2506
agage@wcel.org

Lawyers for the Interveners, Environmental Defence Canada, Inc. and West Coast Environmental Law Association

AND TO: **UNIVERSITY OF OTTAWA**
Fauteux Hall, 57 Louis-Pasteur Private
Ottawa, ON K1N 6N5

Nathalie Chalifour (37766O)
natchali@uottawa.ca

Lynda Collins (45365U)
Lynda.Collins@uottawa.ca

Erin Dobbelsteyn (65868S)
edobb061@uottawa.ca

T: 613-562-5800 x 3331

Lawyers for the Intervener, Friends of the Earth Canada

AND TO: **Meaghan Daniel** (56078V)
Barrister & Solicitor
6694 Rue Mazarin
Montreal, QC H4E 2X5

T: 514-944-8154
meg@meaghandaniel.com

Lawyer for the Intervener, For Our Kids / For Our Kids Toronto

AND TO: **JFK LAW LLP**
Suite 5600
100 King Street West
Toronto, ON M5X 1C9

Robert Janes, KC (33646P)
T: 250-405-3466
rjanes@jfklaw.ca

Lara Koerner-Yeo (75765B)
T: 647-805-5675
lkoerneryeo@jfklaw.ca

T: 1-888-687-8388

Lawyers for the Intervener, Grand Council of Treaty #3

AND TO: **BEAMISH LAW**
197 Spadina Avenue, Suite 402
Toronto, ON M5T 2C8

Sarah Beamish (70528B)
sarahbeamish@beamishlaw.com

Veromi Arsiradam (85343W)
veromiarsiradam@beamishlaw.com

T: 647-490-5219
F: 647-498-1649

Lawyers for the Co-Interveners, 2471256 Canada Inc. (Greenpeace Canada) and Stichting Urgenda

TABLE OF CONTENTS

Page

PART I - OVERVIEW

1. A challenge brought under s. 7 or 15 of the *Charter* should not be dismissed on the basis that it raises a "positive right". This Court should dispense with the use of a distinct positive rights analysis—including asking whether the claim is based on a "freestanding" positive obligation, asking whether the claim seeks to "constitutionalize" the government action, and asking whether the underlying infringement would not be remedied by eliminating the government action altogether—and affirm the application of the established *Charter* tests to all s. 7 and 15 claims.

2. First, a "positive rights" analysis is an unnecessary addition to the contextual frameworks developed under ss. 7 and 15, which identify impacts that can be attributed to the government and assess them against constitutional standards. The extent of the government's *Charter* obligations can be worked out within the substantive requirements of those frameworks, rather than a preliminary analysis based on the positive/negative rights distinction. Given that these frameworks already recognize that rights under ss. 7 and 15 may have positive or negative implications depending on the context, characterizing the right as "positive" at the outset tells us nothing about whether that right is protected by the *Charter*.

3. Second, undertaking a "positive rights" analysis where government action is challenged is not supported by Supreme Court of Canada jurisprudence. To the contrary, the Court has recognized numerous rights under ss. 7 and 15 with obvious positive obligations, and consistently refuted the argument that rights with positive implications should be equated with claims for "freestanding" positive obligations or dismissed on this basis.

4. Third, and most importantly, this form of "positive rights" analysis should be rejected because it could be used to reject any claim where the underlying government action is not constitutionally mandated. The government cannot be permitted to avoid *Charter* scrutiny simply

by pointing out that it was not obligated to act in the first place—such an approach is contrary to the basic concept of constitutionalism. If the government acts, then its actions should be subject to judicial review for compliance with constitutional standards. The *Charter* demands no less.

PART II - ISSUES/ LAW/ ARGUMENT

A. Undertaking a "positive rights" analysis is unnecessary given the contextual frameworks developed under ss. 7 and 15

5. First, it is not necessary to undertake a distinct analysis to determine whether a claim raises a "positive right", because this analytical work is already done within the contextual approaches developed in relation to ss. 7 and 15 of the *Charter*. These frameworks set a threshold for the required nexus between government action and the impact on *Charter* rights, and establish constitutional standards that apply to those effects. They have developed to recognize rights that have both positive and negative implications for the government. Nothing is added by the injection of a distinct "positive rights" analysis that cannot be accomplished within these frameworks.

6. The current test under s. 7 requires that that there be a "sufficient causal connection" between government action and a deprivation to life, liberty or security of the person.[1] However, the government need not be the only or even dominant cause of harm.[2] This causal standard implicitly acknowledges that the government does not act in a vacuum, and may be constitutionally responsible for remedying harm caused by private individuals and even other governments where it is sufficiently connected to state action.[3] In other words, the analysis under

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[1] *Bedford v. Canada (Attorney General)*, 2013 SCC 72 at paras. 75-76; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at para. 60.
[2] *Bedford v. Canada (Attorney General)*, 2013 SCC 72 at para. 76.
[3] *Bedford v. Canada (Attorney General)*, 2013 SCC 72 at paras. 87 and 89; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 at paras. 208-209; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at paras. 131-133; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at para. 84.

s. 7 already contemplates that the government may have positive obligations depending on the context and what the government has chosen to do.

7. Once s. 7 interests are engaged, the reviewing court must assess whether the government has acted in accordance with the principles of fundamental justice—the basic values underpinning our constitutional order.[4] The principles of arbitrariness, overbreadth, and gross disproportionality contemplate a misalignment between purpose and effect.[5] If government action has a causal connection to negative effects on life, liberty or security of the person, then a reviewing court should review whether those effects are out of step with the government's objective, whether the mismatch results from the government doing too much or not enough. For example, if the government's objective is to protect health and safety, but its refusal to allow a supervised injection site causes increased death and disease, that decision is arbitrary and grossly disproportionate, even if it may imply a positive obligation on the government to maintain the site.[6]

8. Notably, because this established analysis under s. 7 is not based on formalistic distinctions between state and private action, cases typically considered to raise "negative rights" have positive implications, while cases widely accepted to raise "positive rights" also have negative implications. For example, in *Morgentaler* and *Carter*, the Court held that criminal prohibitions on abortion and medically assisted death infringed s. 7 interests, based on the lack of access to the health care service in question.[7] Although the remedies in these cases could be considered "negative" because they involved striking down a legislative barrier to accessing health care, there is also a "positive" element to these cases in that they are based on *extending access* to the

[4] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 96; *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at p. 503.
[5] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 72.
[6] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 127-133.
[7] *R. v. Morgentaler*, [1988] 1 SCR 30; *Carter v. Canada (Attorney General)*, 2015 SCC 5.

government services in question. But whether the claim could be characterized as "positive" or "negative" is irrelevant to the question of whether the government caused harm to s. 7 interests in a manner contrary to the principles of fundamental justice.

9. On the other hand, cases under s. 7 recognizing explicit positive obligations on the government also have negative implications. The government has a "positive" obligation to conduct serious state proceedings implicating life, liberty and security of the person in accordance with principles of fundamental justice, including an obligation to provide state-funded counsel to indigent respondents in child protection proceedings.[8] But there is also a "negative" implication of this recognized right in that the government is *precluded* from pursuing these proceedings if they are inconsistent with fundamental justice. Again, characterization of the right as "positive" or "negative" is extraneous to the analysis as to whether the government has infringed s. 7—it is redundant to the analysis because it is already addressed within the contextual frameworks.

10. The established substantive equality approach under s. 15 of the *Charter* similarly addresses the extent of the government's positive obligations in relation to this right, rendering a distinct "positive rights" analysis unnecessary. The required nexus between government action and individual impact and consistency with constitutional standards are assessed under the two-step analysis which asks first, whether government action creates a distinction based on a protected ground, either on its face or in its impact, and second, whether it has the effect of perpetuating, reinforcing or exacerbating disadvantage.[9] Similar to s. 7, it is inherent in this analysis that the government may be responsible for ameliorating pre-existing social disadvantage.[10] Indeed, this is the central premise of the "animating norm" of substantive equality—that existing societal

[8] *New Brunswick (Minister of Health and Community Services) v. G(J)*, [1999] 3 S.C.R. 46;
[9] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 50.
[10] *R. v. Sharma*, 2022 SCC 39 at para. 52.

circumstances may demand differential treatment in order to ensure equality of outcomes, rather than formal equality in treating likes alike.[11]

11. The extent to which s. 15 imposes positive obligations on the government is already encompassed within the substantive equality approach. This was recognized by the Supreme Court's statement in *Eldridge:* "If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services."[12] This is not unique to adverse effect discrimination, but is part and parcel of the substantive equality approach, illustrated by cases like *Schachter* and *Vriend* in which the government was required to extend benefits to bring its legislation into compliance with s. 15.[13]

12. The precise contours of protection under ss. 7 and 15 continue to be worked out in the jurisprudence, including challenging questions about the extent to which the government can be held responsible by claimants in the courts for existing social conditions and private harms. But these debates can take place entirely within the existing frameworks, making use of the principles and nuance developed in those contextual approaches. Nothing useful is added by a distinct assessment of whether the claim raises a "positive right."

13. Moreover, given that the contextual frameworks under ss. 7 and 15 already recognize that rights may have positive implications, it would be inappropriate to conclude at the outset that a claim in respect of government action does not fall under *Charter* protection simply because it

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[11] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 42; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 2; *R. v. Kapp*, 2008 SCC 41 at paras. 15-16; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 25; *R. v. Kapp*, 2008 SCC 41 at para. 15; *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, pp. 165-167 (per McIntyre J.).
[12] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para. 77.
[13] *Schachter v. Canada*, [1992] 2 SCR 679; *Vriend v. Alberta*, [1998] 1 SCR 493.

could be characterized as positive. This form of distinct "positive rights" assessment short-circuits the court's analysis based on a preliminary conclusion— reached entirely outside of the established frameworks—that the claim should not succeed. The Court should reject this approach and affirm the application of the existing contextual frameworks to all *Charter* claims.

B. Undertaking a "positive rights" analysis is not supported by Supreme Court of Canada jurisprudence

14. The requirement of a "positive rights" analysis prior to considering whether government action infringes ss. 7 or 15 is also not supported by Supreme Court of Canada jurisprudence. To the contrary, the Court has explicitly stated that rights with obvious positive implications should not be equated with "freestanding" positive obligations and dismissed on this basis.

15. The basis for undertaking a positive rights analysis is often grounded in *Gosselin*. In that case, the Court concluded that no positive obligations arose under s. 7 because there was no evidence that a 'workfare' social assistance program deprived life, liberty or security of the person, since individuals could access government subsistence by attending training or education programs.[14] The deprivation was not established by "evidence of actual hardship".[15] Although the Court questioned whether s. 7 "places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person", it explicitly left open the possibility that in other circumstances, with stronger evidence of hardship caused by the government action, positive obligations would be warranted under s. 7.[16] The Court's finding was ultimately grounded in its assessment of the relationship between the government action in question and the impact on the claimants—not the fact that the right would have been "positive".

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[14] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at para. 83.
[15] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at para. 83.
[16] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at paras. 81 and 83.

16. Since *Gosselin*, which was decided in 2002, the Court has recognized numerous rights under ss. 7 and 15 with obvious positive obligations, and refuted arguments that attempted to equate these claims with "freestanding" positive obligations. In *Chaoulli*, the Court found that excessive wait times for government health care and a prohibition on private insurance infringed s. 7 because individuals were prevented from accessing health care.[17] Although the core of this right was, similar to *Morgentaler* and *Carter*, access to health care (either from the government or private providers), the Court clarified that this did not mean the claim was based on a "freestanding constitutional right to health care."[18] The government has already established a scheme to provide health care, so the question was whether that scheme complied with the *Charter*.[19]

17. The Court also rejected an argument from the Ontario government in *Bedford* that a s. 7 challenge to criminal prohibitions that imposed dangerous conditions on sex work was in fact a "veiled assertion of a positive right to vocational safety".[20] Although the Court's decision in *Bedford* that government action must be responsive to the social conditions of sex workers, including risk posed by the actions of third parties, could imply positive obligations on the government to protect the safety of vulnerable individuals who are impacted by criminal laws, the Court did not accept that this was the same as recognizing a "freestanding" positive right.

18. Arguments that claims with positive aspects are actually seeking "freestanding positive obligations" have also been rejected by the Court under s. 15.[21] In *Alliance*, the Court stated that its finding that pay equity legislation which in effect denies women equal compensation infringes s. 15 does not "impose a freestanding positive obligation on the state to enact benefit schemes to

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[17] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.
[18] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 104.
[19] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 104.
[20] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 81 and 88.
[21] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 42; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras. 132-133.

redress social inequalities".[22] Rather, "s. 15 does require the state to ensure that whatever actions is *does* take do not have a discriminatory impact."[23] The Court repeated this rejection in *Fraser*, a successful challenge to negative pension consequences that disproportionately impacted women.[24]

19. In these cases, the Court specifically found that the positive implications of a claim under s. 7 or s. 15 did not transform it into a claim for "freestanding" positive obligations, or justify its dismissal. It is somewhat ironic that the Court's statements *rejecting* arguments that these types of claims raise "freestanding" positive obligations have been refashioned into a justification for the dismissal of challenges on exactly this basis. This approach is not supported by the Court's jurisprudence and should be rejected by this Court.

C. A "positive rights" analysis can shield any *Charter* claim from scrutiny

20. Finally, the broader problem with undertaking a distinct "positive rights" analysis at the outset—including by asking whether the claim is based on a "freestanding" positive obligation, asking whether the claim seeks to "constitutionalize" the underlying government action, or asking whether the infringement would not be remedied by eliminating the government action altogether—is that it risks undermining all *Charter* rights in respect of government action. That is because *any* right claimed in respect of government action could be defeated by simply arguing that the government was under no constitutional obligation to act in the first place, or has no constitutional obligation to continue to act. Any claim that relies at least to some extent on the existence of government regulation—which is pervasive in nearly every area of social life—could be transformed into a "positive" right.

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[22] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 42.
[23] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 42.
[24] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras. 132-133.

21. If these arguments are accepted, then cases like *Morgentaler*, *Carter* and *Chaoulli* could all have failed on the preliminary basis that the government has no obligation to provide health care. If the Court in *Bedford* had started its analysis with the Ontario government's argument that the claimants had no positive right to vocational safety, this straightforward s. 7 challenge to a criminal prohibition could have been dismissed without even considering its harmful impacts.[25] Nearly any s. 15 claim could be dismissed out of hand based on the nature of equality and equal access to government benefits—discrimination claims as obvious as racially segregated water fountains could be dismissed prematurely based on the argument that the government has no "freestanding" positive obligation to provide water fountains.

22. Rather than a "positive rights" approach, Supreme Court of Canada jurisprudence follows the "*if… then*" principle. If the government provides health care—and it does—then it must be provided in a manner consistent with the *Charter*. If the government uses the criminal law to define and prosecute offences—and it does—then it must do so in accordance with the principles of fundamental justice. And if the government regulates greenhouse gas emissions—and it does—then that regulation can be reviewed for *Charter* compliance. Whether the government was constitutionally obliged to do any of these things in the first place is irrelevant for the purpose of *Charter* analysis. Under this approach, the proper focus of the *Charter* analysis is the substantive constitutional standards that apply in each area, not the positive/negative dichotomy.

D. Conclusion

23. A "positive rights" analysis is not necessary to adjudicate *Charter* claims and is unsupported by Supreme Court of Canada jurisprudence. It can also be used to shield almost any claim from *Charter* review, contrary to the basic concept of constitutionalism enshrined in the

[25] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 81.

Charter. This case provides the Court with the opportunity to correct course and reaffirm the application of the established *Charter* frameworks to all claims, regardless of their positive or negative implications. The government is active in areas such as health care, social assistance, and climate regulation—whether it has a "freestanding" constitutional obligation to do so or not—because they impact people in fundamental ways. For the same reason, these impacts must be subject to review for compliance with *Charter* standards.

24. To be clear, that does not mean every challenge will succeed, or that it will be simple to determine what the *Charter* requires in each of these contexts. To the contrary, the rejection of formalistic approaches to *Charter* interpretation under ss. 7 and 15 means that there are no easy answers in defining government obligations or limits. What it does mean is that the government will be subject to *Charter* scrutiny for any action that implicates fundamental rights under ss. 7 and 15, as required by the basis principle of constitutionalism.

PART III - ORDER REQUESTED

25. The BCCLA takes no position on this Appeal. It does not seek costs and asks that no costs be awarded against it.

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

Teagan Markin / Nadia Effendi
BORDEN LADNER GERVAIS LLP
Lawyers for the Intervener, British Columbia Civil Liberties Association

SCHEDULE "A" – AUTHORITIES CITED

1. *Abbotsford (City) v. Shantz*, 2015 BCSC 1909
2. *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143
3. *Bedford v. Canada (Attorney General)*, 2013 SCC 72
4. *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17
5. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44
6. *Carter v. Canada (Attorney General)*, 2015 SCC 5
7. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35
8. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624
9. *Fraser v. Canada (Attorney General)*, 2020 SCC 28
10. *Gosselin v. Québec (Attorney General)*, 2002 SCC 84
11. *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62
12. *New Brunswick (Minister of Health and Community Services) v. G(J)*, [1999] 3 S.C.R. 46
13. *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17
14. *R. v. Kapp*, 2008 SCC 41
15. *R. v. Morgentaler*, [1988] 1 SCR 30
16. *R. v. Sharma*, 2022 SCC 39
17. *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486
18. *Schachter v. Canada*, [1992] 2 SCR 679
19. *Vriend v. Alberta*, [1998] 1 SCR 493
20. *Withler v. Canada (Attorney General)*, 2011 SCC 12

SCHEDULE "B" – LEGISLATION CITED

<u>*Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.</u>

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 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, et al	-and-	HIS MAJESTY THE KING IN RIGHT OF ONTARIO	Court of Appeal File No.: COA-23-CV-0457 Court File No. CV-19-00631627-0000
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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto ON M5H 4E3
F: 416.367.6749

Teagan Markin (74337R)
tmarkin@blg.com
416.367.6379

Nadia Effendi (49004T)
neffendi@blg.com
416.367.6728

Lawyers for the Intervener,
British Columbia Civil Liberties Association