THE CLIMATE CHANGE CONUNDRUM – PRIVATE LITIGATION AS A MECHANISM TO ADVANCE PUBLIC INTERESTS?*

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Climate change has become an urgent matter. The effects of increasing frequency and intensity of acute events are everywhere. Hurricane Fiona recently caused an estimated CA$660 million in insured damage in this region.[1] In my home province of British Columbia, in the past 18 months alone, the Lytton wildfire destroyed over 90% of the town in minutes the day after it reached temperatures of 49.6 °C, the highest temperature ever recorded in Canada; 1,642 wildfires destroyed 869,279 hectares of British Columbia; a heat dome over Vancouver killed more than 400 people in less than one week; and atmospheric rivers stretching 1,600 kilometres long and 640 kilometres wide unleashed record-breaking rainfall, triggering devastating floods and mudslides, killing 640,000 livestock, and cutting off all land routes to Vancouver with significant disruption to supply chains.[2]

There is growing public sentiment that governments and the private sector are not moving fast enough to mitigate climate change and transition Canada to a net-zero greenhouse gas (GHG) emissions economy. When citizens become frustrated with democratic processes to shift policy and engage in meaningful action, they sometimes turn to litigation.

There has been an exponential increase in climate-related litigation globally in the past few years, with more than 2,000 cases. Private market actors, civil society, and local governments are using tort, nuisance, corporate and securities law, and a range of other litigation strategies to try to hold both public and private actors accountable for past inaction and past harms that have contributed to global warming,

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[1] "Hurricane Fiona caused CA$660 million in insured damage: initial estimate" (last modified 19 October 2022), online: *CTV News Atlantic* <https://atlantic.ctvnews.ca/hurricane-fiona-caused-660-million-in-insured-damage-initial-estimate-1.6115564> [https://perma.cc/H3QH-UQ4C].

[2] British Columbia Provincial Government, "Wildfire Season Summary" (31 October 2022), online: *British Columbia* <https://www2.gov.bc.ca/gov/content/safety/wildfire-status/about-bcws/wildfire-history/wildfire-season-summary>.

and to seek proactive forward-looking remedies that will advance decarbonization globally.

One question it raises is - can private litigation be a mechanism to advance public interests?

"Private litigation" is a broad term. Black's Law Dictionary tells us that it is "a contest in a court of justice, for the purpose of enforcing a right". Essentially, it means that one or more individuals or entities (that have legal personality) have some sort of right that gives them legal standing to bring a claim against another party. That plaintiff needs to demonstrate harm and/or have a sufficient interest in a forward-looking resolution to have a cognizable right of action. These limitations are important, as often the remedies available to a private litigant in respect of a particular harm are not remedies that generally advance the public interest.

With climate change, that limitation may be changing. Both the acute and chronic impacts of climate change are harming broader numbers of people, species, and economies, and private litigants are pursuing a range of litigation strategies that seek remedies for these local, regional, and global impacts.

In the limited time I have, I am going to look at this question by examining three recent strategies, giving a couple of examples of each: private parties bringing actions against private parties that seek to advance public interests; private parties seeking "public interest standing" to advance public interest claims against governments; and private parties using regulatory agencies and their statutory authority to advance public interest concerns.

Private Parties Bringing Actions Against Private Parties that Seek to Advance Public Interests

Turning first to private actions against private parties, not all private litigation involves seeking narrow remedies such as money compensation to a private party. Two recent examples relate to Royal Dutch Shell, one in the Netherlands and one in the United Kingdom (UK).

Vereniging Milieudefensie et al v Royal Dutch Shell plc

The first is the class action in *Vereniging Milieudefensie et al v Royal Dutch Shell plc,* in which environmental group Milieudefensie and co-plaintiffs brought a lawsuit alleging Royal Dutch Shell's (Shell or RDS) contributions to climate change violate its duty of care under Dutch law and its human rights obligations.[3] In May 2021, the

[3] *Vereniging Milieudefensie et al v Royal Dutch Shell plc* (25 April 2022), online: *Climate Case Chart* <https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/> [https://perma.cc/49VY-UCKM] [*Vereniging* Climate Case Chart].

Hague District Court held that Shell was in violation of the standard of care under Dutch law.[4] The Court used a science-based analysis.

The Court applied the standard of care to the company's policies, emissions, consequences of its emissions, and its human rights and international and regional legal obligations. The Court concluded that the standard of care included the need for companies to take responsibility for Scope 3 emissions, that is, those emissions created by third parties in its value chain, especially "where these emissions form the majority of a company's CO2 [carbon dioxide] emissions, as is the case for companies that produce and sell fossil fuels".[5] 85% of Shell's emissions are Scope 3 emissions.[6]

The Court held that the standard of care requires Shell to reduce all global emissions that will harm Dutch citizens. It acknowledged that Shell cannot solve this global problem on its own. To quote the court: "However, this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence."[7] The Court also commented on a balancing of the public interest with commercial interests:

> The compelling common interest that is served by complying with the reduction obligation outweighs the negative consequences RDS might face due to the reduction obligation and also the commercial interests of the Shell group, which are served by an uncurtailed preservation or even increase of CO2-generating activities.[8]

The Court made its decision provisionally enforceable, meaning Shell is required to meet its reduction obligations even if the case were to be appealed.[9] In weighing the parties' interests, the Court held that immediate compliance with the order by RDS outweighs RDS' possible interest in maintaining the *status quo,* and the Court expressly noted that the "provisional enforceability of the order may have far-reaching consequences for RDS, which may be difficult to undo at a later stage."[10]

In applying this standard of care, the Court concluded that Shell must reduce its Scope 1, 2, and 3 CO_2 emissions across its entire energy portfolio by 45% by 2030,

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[4] *Vereniging Milieudefensie et al v Royal Dutch Shell plc*, 26 May 2021, ECLI:NL:RBDHA:2021:5339 (Rechtbank Den Haag) [*Vereniging Milieudefensie*]. English court translation: Uitspraken, "ECLI:NL:RBDHA:2021:5339" (26 May 2021), online: *de Rechtspraak* <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339>. The Court wrote at 4.4.1: "RDS' reduction obligation ensues from the unwritten standard of care laid down in Book 6 Section 162 Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful."

[5] *Ibid* at 4.4.19.

[6] *Ibid* at 2.5.5.

[7] *Ibid* at 4.4.49. See also 4.4.33.

[8] *Ibid* at 4.4.54.

[9] *Ibid* at 4.5.7.

[10] *Ibid*.

relative to 2019 emission levels. The Court gave Shell flexibility in allocating emissions cuts between Scope 1, 2, and 3 emissions, so long as in aggregate, the total emissions were reduced by 45%.

The Court wrote: "With respect to the business relations of the Shell group, including the end-users, this constitutes a significant best-efforts obligation, in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO_2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible."[11] "A consequence of this significant obligation may be that RDS will forgo new investments in the extraction of fossil fuels and/or will limit its production of fossil resources."[12]

Shell began appeal proceedings in August 2021 and filed its statement of appeal with the Dutch Court of Appeal in The Hague in March 2022.[13] In April 2022, Milieudefensie sent a letter to Shell's chief executive officer, the executive committee, and the board of directors calling for urgent action to comply with the verdict and warning that directors face real risk of personal liability to third parties resulting from a failure to act.[14]

Insights:

Standing:

- The Court allowed the class action by six NGOs because the interests served in the class action aligned with the objectives stated in their articles of association; it rejected claims by ActionAid, because its operations were not geared toward Dutch citizens, and rejected the 17,000 individual claimants, because their interests were already served by the class action and they did not present independent interests.[15]

Rights at issue:

- The Court held the standard of care applied to the parent company and more than 1,000 subsidiaries, given Shell's vertical control structure.

- The Court found that the common interest or public interest in moving immediately to reduce emissions outweighed the commercial interests of Shell.

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[11] *Ibid* at 4.1.4.

[12] *Ibid* at 4.4.39.

[13] *Vereniging* Climate Case Chart, *supra* note 3.

[14] Letter from Milieudefensie to Shell's CEO, Executive Committee and Board of Directors (25 April 2022), online (pdf): *Climate Case Chart* <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220425_8918_na.pdf> [https://perma.cc/MB6P-G3V4]. The letter focused on Shell's actions and communications in response to the judgment of The Hauge District Court and the potential exposure of directors to personal liability towards third parties.

[15] *Vereniging Milieudefensie*, *supra* note 4 at 4.2.7–4.3.5.

- The Court recognized the notion that 'global emissions' harms Dutch citizens.[16]

Remedy Provided:

- The Court emphasized that Scope 3 emissions (85% of Shell's emissions) must be reduced, given their significance to its overall emissions.

ClientEarth v Shell plc (2022)

The second example of private action is the use of derivative action provisions in corporate law statutes. Derivative actions are where a plaintiff seeks the court's permission to "step into the shoes of the company" and bring an action on behalf of the company against some or all of its directors and officers for a breach of their duties to the company.[17]

My example also involves Shell, which after the decision in the Netherlands, moved its head office to England.[18] ClientEarth, as a shareholder of Shell, has sought to bring a derivative action to compel Shell's board of directors to act in the best long-term interests of the company by strengthening its climate plans.[19] ClientEarth is an NGO that seeks to "use the power of law to bring about systemic change that protects the earth for – and with – its inhabitants".[20] ClientEarth sent a pre-action letter to Shell, notifying the company of its claim against the company's directors and officers, and giving the company the opportunity to respond, as is required before bringing a derivative action under the corporate law in many jurisdictions, including Canada.

Under the UK *Companies Act 2006,* a member (shareholder) can seek permission to pursue a derivative claim in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by one or more of the directors.[21] ClientEarth alleges breaches relating to the directors' response to the order made by the Hague District Court in *Milieudefensie v Royal Dutch Shell plc*, discussed above.[22] ClientEarth's complaint states that Shell's facilities and infrastructure are heavily exposed to extreme weather events and rising sea levels caused by climate change, including offshore drilling

[16] *Ibid* at 4.4.8, 4.4.10, 4.4.28.

[17] Robert Yalden et al, *Business Organizations: Practice, Theory and Emerging Challenges*, 2nd ed (Toronto: Emond, 2018) at 892–913.

[18] Now Shell Plc, formerly Royal Dutch Shell Plc.

[19] ClientEarth, "Redirecting Shell: About the Claim" online: *ClientEarth* <https://www.clientearth.org/redirecting-shell/#theclaim> [https://perma.cc/4X9Q-WKG9].

[20] ClientEarth, "Our Mission" online: *ClientEarth* <https://www.clientearth.org/about/who-we-are/mission/> [https://perma.cc/LT9F-A4XT]. ClientEarth currently has 168 active cases globally.

[21] *Companies Act 2006* (UK), ss 260(3), 261(1) [*Companies Act* (UK)]

[22] *Vereniging Milieudefensie*, *supra* note 4.

platforms, and coastal power stations and refineries.[23] The company is also exposed to the transition risks resulting from regulatory, market, and societal shifts spurred by the energy transition, as many of its assets are at serious risk of becoming stranded in the future.[24] The complaint specifies that Shell's 2021 announcement of "a target to become a net-zero emissions energy business by 2050" was accompanied by serious shortcomings in the company's plans, including that its net-zero emissions target is, by the board's own admission, not reflected in its operating plans or budgets; its Energy Transition Strategy contains strikingly low short- and medium-term targets that are not targets to reduce its absolute GHG emissions, but rather, are targets to reduce 'carbon intensity' of Shell's products; and its 50% Scope 1 and Scope 2 emissions reduction target only accounts for around 5% of the company's emissions.[25]

ClientEarth's claim is that the Shell board's mismanagement of climate risk puts directors in breach of their corporate law duties,[26] which require company directors to act in a way that they consider will best promote the success of the company for the benefit of its members as a whole, having regard to a range of factors, including the likely consequences of any decision in the long term, the interests of the company's employees, and the impact on the environment.[27] ClientEarth sought to commence a derivative action on behalf of the company in relation to the alleged breaches of duty, attempting to hold the directors personally liable for failure to properly prepare for the net-zero transition and for wrongs allegedly committed against the company.[28] The relief sought by ClientEarth is for a declaration that the directors have breached their duties and a mandatory injunction requiring the directors to adopt and implement a strategy to manage climate risk in compliance with their statutory duties and to comply immediately with the Dutch Court Order.[29]

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[23] ClientEarth, "ClientEarth shareholder litigation against Shell's Board: FAQs" (March 2022), online (pdf): *ClientEarth* <https://www.clientearth.org/media/puojyzvy/clientearth-shareholder-litigation-against-shell-s-board-faqs.pdf> [https://perma.cc/R4LH-A9DP] [ClientEarth Shareholder Litigation].

[24] ClientEarth,"We're taking Shell's Board of Directors to court" (last modified 19 May 2023), online: *ClientEarth* <https://www.clientearth.org/latest/latest-updates/news/we-re-taking-legal-action-against-shell-s-board-for-mismanaging-climate-risk/> [https://perma.cc/9DKL-57LL].

[25] *Ibid.*

[26] *Companies Act* (UK), *supra* note 21.

[27] ClientEarth Shareholder Litigation, *supra* note 23; *Companies Act* (UK), *supra* note 21, s 172(1).

[28] A derivative claim within the meaning of s 260(1) of the *Companies Act* (UK), *supra* note 21.

[29] *ClientEarth v Shell Plc, Re Derivative Claim, In the High Court of Justice Business and Property Courts of England and Wales Insolvency and Companies List (ChD)* [2023] EWHC 1137 (Ch), (Trower J) [*ClientEarth v Shell Plc*]. Trower J at para 13 states: "The claim which ClientEarth wishes to continue on behalf of Shell is pleaded in particulars of claim settled by counsel and verified by a statement of truth signed on behalf of ClientEarth by Mr. William Hooker, a partner in Pallas Partners LLP. He has also made a witness statement in support of the application for permission, as has a senior lawyer employed by ClientEarth, Mr. Paul Benson. Both parties have also lodged short supplementary submission letters from their solicitors."

In May 2023, Justice Trower of the UK High Court of Justice refused permission to bring a derivative action.[30] The judgment is a curious mix of reasoning that is worth unpacking. The Court held that section 261(1) of the UK *Companies Act* requires an applicant to establish a *prima facie* case that the company has a good cause of action that arises out of a directors' breach of duties and section 263(3) provides a number of factors that the court must consider - whether the member is acting in good faith in seeking to continue the claim; the importance that a person acting in accordance with their duty to promote the success of the company would attach to continuing it; whether any act or omission from which the cause of action arises would be likely to be authorized by the company; whether the company has decided not to pursue the claim; and whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in their own right rather than on behalf of the company.[31] Justice Trower held that the court is also required to have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.[32]

Trower J held that section 172 of the *Companies Act* imposes a duty on directors to act in good faith in the way that would be most likely to promote the success of the company for the benefit of its members as a whole, having regard, amongst other matters, to an identified list of considerations, such as the likely consequences of any decision in the long term and the impact of the company's operations on the community and the environment (subjective test) and section 174 requires a director to exercise the care skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill, and experience that may reasonably be expected of a person carrying out the functions they carry out, and the general skill and experience that director actually has (both subjective and objective elements).[33] Nothing surprising about this finding.

Trower J rejected ClientEarth's argument that the directors' duties include six necessary incidents of the statutory duties "when considering climate risk" - a duty to make judgments regarding climate risk that are based on a reasonable consensus of scientific opinion; a duty to accord appropriate weight to climate risk; a duty to implement reasonable measures to mitigate the risks to the long-term financial profitability and resilience of Shell in transition to a global energy system and economy aligned with the global temperature objective (GTO) of 1.5°C under the Paris Agreement on Climate Change; a duty to adopt strategies reasonably likely to meet Shell's targets to mitigate climate risk; a duty to ensure that the strategies adopted to manage climate risk are reasonably in the control of both existing and future directors; and a duty to ensure that Shell takes reasonable steps to comply with applicable legal obligations.[34] In rejecting this claim, Trower J held that such specific obligations on

[30] *Ibid*.

[31] *Ibid* at para 5.

[32] *Ibid*.

[33] *Ibid* at para 14.

[34] *Ibid* at para 16.

the directors as to how to manage climate risk was contrary to the well-established principle that directors themselves are to determine, acting in good faith, how best to promote the success of a company.[35] Each director is required to display the care, skill and diligence that would be exercised by a reasonably diligent person.[36] There is no surprise in this reasoning either. However, in assessing whether directors *are* exercising their duties pursuant to the law, the court should be able to assess evidence of the content of directors' decisions against evidence of their actions or failure to act.

Trower J further held that:

> "There is no established English law duty separate or distinct from the general duties owed by the directors" that requires them to take reasonable steps to ensure that the order of a foreign court is obeyed, let alone to ensure compliance with that order. It follows that, even if as a matter of Dutch law, the Directors were to owe duties to Shell to take reasonable steps to ensure that the Dutch Order is obeyed, that would be irrelevant to the claims sought to be made in these proceedings, governed as they are by English law.[37]

This finding is curious. First, Trower J does not address at all the fact that the Dutch court was not a "foreign court" at the time of the judgment, it was the court in the jurisdiction in which Shell was registered and headquartered and thus an assessment of directors' actions should be in response to their duties as they existed at the time of the order. The judgment may signal that a company can move to the UK and avoid the law of its own jurisdiction. Moreover, the judgment is silent on the issue of whether there are going to be consequences for the company throughout the European Union (EU) in terms of both reputational issues and remedies that may be sought in a large market, both of which go directly to the issue of harm to the company.

Trower J concluded that ClientEarth had failed to meet the onus to "show a *prima facie* case that there is no basis on which the directors could reasonably have come to the conclusion that the actions they have taken have been in the interests of Shell.[38] The Court held that witness statements by the applicant's lawyers were not expert evidence on which the court can rely that establishes a case that the directors are managing Shell's business risks in a manner not open to a board of directors acting reasonably.[39] Second, Trower J held that evidence does not support a *prima facie* case that there is a universally accepted methodology as to the means by which Shell might be able to achieve the targeted reductions such that a *prima facie* case had been made that the way in which Shell's business is being managed by the directors could not properly be regarded by them as in the best interests of Shell.[40] Trower J further held

[35] *Ibid* at para 19.

[36] *Ibid* at para 20.

[37] *Ibid* at paras 23–24.

[38] *Ibid* at paras 26, 59.

[39] *Ibid* at para 28.

[40] *Ibid* at para 47.

that the evidence does not engage with the issue of how the directors are said to have gone so wrong in their balancing and weighing of the many factors that should go into their consideration of how to deal with climate risk, or established that no reasonable director could properly have adopted the approach that they have.[41]

With respect to ClientEarth's allegations that the directors have failed to comply with the order of the Dutch Court imposing a 45% emissions reduction obligation on Shell to be achieved by 2030 and have not prepared a plan to ensure timely compliance, Trower J held that the mandatory orders currently sought by ClientEarth fall foul of the basic principle that a court will not grant mandatory injunctive relief if constant supervision is required.[42] The Court held that a mandatory injunction that Shell adopt and implement a strategy to manage climate risk in compliance with its statutory duties and comply immediately with the Dutch Order is too imprecise to be suitable for enforcement, and for that reason alone is an order that a court would be most unlikely to make.[43] Trower J also noted that the Netherlands Court held that "Shell has total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion".[44]

Curiously, although the court had already dismissed the application based on no *prima facie* case, Trower J goes on to make a number of comments about ClientEarth's level of shareholdings as indicia of not meeting the good faith requirement.[45] Trower J suggests that the good faith requirement is not just honest belief that the claim is in the long-term best interests of Shell, it may also require an assessment of whether the proceedings are sought for an ulterior purpose given *de minimis* shareholdings.[46] Trower J held: "it seems to me that where the primary purpose of bringing the claim is an ulterior motive in the form of advancing ClientEarth's own policy agenda with the consequence that, but for that purpose, the claim would not have been brought at all, it will not have been brought in good faith… the fact that ClientEarth is the holder of only 27 shares in Shell, but is proposing that it should be entitled to seek relief on behalf of Shell in a claim which on any view is of very considerable size, complexity and importance (and will be exceptionally expensive and time-consuming to pursue), gives rise to a very clear inference that its real interest is not in how best to promote the success of Shell for the benefit of its members as a whole".[47] The Court notes that support for ClientEarth's derivative claims is only among shareholders holding 12.2 million shares amounting to approximately 0.17% of Shell's shares, whereas 80% of shareholders at Shell's annual

[41] *Ibid* at para 48.

[42] *Ibid* at para 56.

[43] *Ibid* at para 57.

[44] *Ibid* at paras 52–53.

[45] *Ibid* at para 60.

[46] *Ibid* at para 63.

[47] *Ibid* at paras 64–65.

general meeting (AGM) support its progress report on emissions transition strategy,[48] and that notwithstanding the strong support (30.47% and 20.29%) by shareholders in favour of climate-related resolutions proposed at the 2021 and 2022 AGM, "they would fall well short of demonstrating any member support for action of the type contemplated by this application."[49]

The judgment inappropriately overemphasizes the amount of shareholdings; the statutory test is whether the action sought is in the best interests of the company, and imposing a bar (level of shareholdings) that the statute does not require seems an error in law. The UK statute is very clear than no minimum threshold of shareholdings is required to bring a derivative claim.[50] Moreover, aside from no threshold, such a provision clearly affords the court more discretion than one would understand from the judgment. While expert evidence may be adduced in derivative action permission hearings, some UK lawyers have suggested it is unusual at the first step, and if indeed expert evidence was required at this early stage, the court could have given direction rather than dismiss outright.

As these comments go to press, the UK Court of Appeal refused to hear ClientEarth's appeal as it concluded it did not have a realistic prospect for success.[51] It is unclear as to why ClientEarth did not go after Shell in the Netherlands for failure to comply with the order.

Insights:

Standing:

- ClientEarth is a private litigant as shareholder - but as an organization, its mandate is public interest and it has positioned itself as a private litigant to advance its mandate. In some jurisdictions, as here, the court

[48] *Ibid* at paras 68–69.

[49] *Ibid* at para 70.

[50] *Companies Act* (UK), *supra* note 21, s 261. Section 261 states:

> Application for permission to continue derivative claim (1) A member of a company who brings a derivative claim under this Chapter must apply to the court for permission (in Northern Ireland, leave) to continue it. (2) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave), the court— (a) must dismiss the application, and (b) may make any consequential order it considers appropriate. (3) If the application is not dismissed under subsection (2), the court— (a) may give directions as to the evidence to be provided by the company, and (b) may adjourn the proceedings to enable the evidence to be obtained. (4) On hearing the application, the court may— (a) give permission (or leave) to continue the claim on such terms as it thinks fit, (b) refuse permission (or leave) and dismiss the claim, or (c) adjourn the proceedings on the application and give such directions as it thinks fit."

[51] K Potter et al, "UK Court of Appeal Declines to Hear ClientEarth's Appeal in Landmark Climate Case Involving Shell plc ("Shell")" (4 December 2023), online: *Fasken* <https://www.fasken.com/en/knowledge/2023/12/uk-court-of-appeal-declines-to-hear-clientearths-appeal-in-landmark-climate-case> [https://perma.cc/Y4GE-9JGU].

discounts the application on the basis of small shareholdings and that it was not persuaded that ClientEarth was bringing the action in the best interests of the company.

- One would hope that under Canadian corporate law, the size of shareholdings would be irrelevant as long as the applicant met the statutory criteria for bringing a derivative action, otherwise, directors would always be insulated from a minority shareholder complaint.

Rights:

- A derivative action seeks to vindicate the rights of the company alone and requires arguing the case narrowly concerning the company's best interest, not the public interest unlike the case before the Netherlands courts.

- While the UK court has one of the highest thresholds globally for granting permission to bring a derivative action, the judgment is bound to be relied on elsewhere to prohibit climate-related derivative claims based on deference to the business judgment of the directors. It will require clear evidence that the directors' decisions, actions, or inaction are not in the best interests of the company.

Remedy:

- A derivative action can only advance the public interest where it coincides with the company's interests, but the remedy sought advances both private shareholder interests and a public interest.

- The court will be reluctant to grant any injunction that requires it to supervise the actions of the directors going forward, and thus remedies sought must be very focused and specific, such as "make a transition plan".

Alternative avenue:

- In Canada, there is also the oppression remedy under corporate statutes where directors' actions are found to be oppressive, unfairly prejudicial to, or unfairly disregard the interests of securityholders and where a court deems it appropriate, other parties – it protects reasonable expectations. Now, arguably, based on overwhelming scientific evidence, there is a reasonable expectation that directors and officers are managing climate-related risks. Although there are hurdles to getting standing for parties whose standing is subject to the court's discretion, oppression remedy claims may be another avenue for private litigants to advance claims that support both their interests and the public interest.

These cases illustrate that the intersection of the public interest in climate change mitigation with private rights can be advanced though legal action by those private right holders to vindicate their rights in a manner that benefits the public interest. However, limitations on the ability to advance the public interest may arise

from the nature of the rights being asserted, as it can affect the types of remedy available or even the availability of standing to assert the public interest. The next type of legal action to advance the public interest does not rely solely on private rights.

Private Actors Seeking "Public Interest Standing" to Advance Public Interest Claims Against Governments

Turning to the second avenue, private actors seeking public interest standing to advance climate-related public interest claims against governments, I have a Canadian, Colombian, and Australian example.

Generally, constitutional issues can be raised in court through many avenues, including by reference questions submitted by governments, such as Canada's carbon pricing legislation,[52] through private litigation on the scope or exercise of legislative authority, etc. Issues can also be raised by public interest standing. In Canada, the tests for public-interest standing are:

1) whether the case raises a serious justiciable issue;
2) whether the party bringing the action has a real stake or a genuine interest in its outcome; and,
3) whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court.[53]

Mathur et al and Government of Ontario

My Canadian example is the current case of *Mathur et al and Government of Ontario* - the applicants are seven youths between the ages of 12 and 24 who reside in Ontario.[54]

The applicants seek declaratory and mandatory orders relating to the Ontario government's (Ontario) target and plan for the reduction of GHG emissions in the province by the year 2030, submitting that Ontario's failure to set a more stringent target and exacting plan for combating climate change over the coming decade infringes the constitutional rights of youth and future generations.[55] The Attorney

[52] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

[53] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 at paras 2, 35 [*Downtown Eastside Sex Workers*].

[54] Ecojustice, "#GenClimateAction: Mathur et. al. v. His Majesty in Right of Ontario" (29 November 2019), online: *Ecojustice*, <https://ecojustice.ca/file/genclimateaction-mathur-et-al-v-her-majesty-in-right-of-ontario/> [https://perma.cc/DT4H-89WJ] [Ecojustice GenClimateAction].

[55] *Mathur v Ontario,* 2020 ONSC 6918 (Ont SCJ) [*Mathur* 2020].

General of Ontario sought to strike out their application on the ground that it has no reasonable prospect of success.[56]

Justice Carole Brown of the Ontario Superior Court applied the three-part test for granting public interest standing, as noted above.[57] The Court held that factors to consider in granting or refusing public interest standing include the plaintiff's capacity to bring forward a claim; whether the case is of public interest: does it transcend the interests of those most directly affected by the challenged law or action?; does it provide access to justice for disadvantaged persons in society whose legal rights are affected?; whether there are realistic alternative means that would favour a more efficient and effective use of judicial resources such as other potential plaintiffs or parallel proceedings?; and the potential impact of the proceedings on the rights of others who are equally or more directly affected.[58]

The Court held that the applicants met the test for standing on behalf of future generations.[59] The case raises a serious justiciable issue and a substantial constitutional issue; the applicants have demonstrated that they have a real stake and genuine interest in the outcome, given their age and activism; and the proposed suit is a reasonable and effective means to bring this application to court.[60] Among factors cited were that Ecojustice, a Canadian environmental law charity, is counsel for the applicants, which reflects the plaintiff's resources and expertise in presenting these issues in a sufficiently concrete and well-developed factual context; this case is of public interest, in that it transcends the interests of all Ontario residents, not just the applicants' generation or the ones that follow; given their age, the applicants do bring a useful and distinctive perspective to the resolution of the issues on this application; and granting the applicants standing on behalf of future generations does not create a conflict between private and public interests or affect the rights of others who are equally or more directly affected by climate change.[61]

The Court held that at its core, the case is about whether the government violated the applicants' sections 7 and 15 *Charter* rights by repealing the *Climate Change Act*,[62] through the *Cap and Trade Cancellation Act, 2018* (*CTCA*),[63] and by setting a target for the reduction of GHG emissions that is insufficiently ambitious. The Court held that both the preparation of the Target and Plan and the repeal of the

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[56] Pursuant to Rule 21 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194.

[57] On a preliminary motion to strike for lack of standing, the court should be prepared to terminate the application only in "very clear cases". See *Mathur* 2020*, supra* note 55 at para 240-41. The three-part test is set out in *Downtown Eastside Sex Workers*, *supra* note 53.

[58] *Mathur* 2020*, supra* note 55 at para 243.

[59] *Ibid* at para 250.

[60] *Ibid*.

[61] *Ibid*.

[62] *Climate Change Mitigation and Low-carbon Economy Act*, SO 2016 c 7.

[63] *Cap and Trade Cancellation Act, 2018*, SO 2018 c 13.

Climate Change Act by Ontario are governmental actions that are reviewable by the court for compliance with the *Charter*.[64] They are legislatively mandated by the Ontario legislature and sub-delegated to the Ministry of the Environment and to be approved by the Lieutenant Governor in Council, it is a Cabinet decision, and have the force of law, and are therefore reviewable.[65]

The Court in *Mathur* noted that in the *Carbon Pricing Reference,* the Ontario Court of Appeal observed that various findings and standards can be projected or predicted with scientific accuracy, including that the global average surface temperature has increased by approximately 1 degree Celsius above pre-industrial levels and it is estimated that by 2040, the global average surface temperature will have increased by 1.5 degrees Celsius; that temperatures in Canada will continue to increase at a rate greater than the rest of the world; and the United Nations Intergovernmental Panel on Climate Change (IPCC) recently reported that global net anthropogenic CO_2 emissions must be reduced by approximately 45% below 2010 levels by 2030, and must reach net zero by 2050, to avoid the significantly more deleterious impacts of climate change.[66]

On the question of justiciability, the Court held that the doctrine of justiciability is largely focused on an inquiry into the "appropriateness" of judicial adjudication, and the court will consider the capacities and legitimacy of the judicial process, the constitutional separation of powers, and the nature of the dispute before the court.[67] The Court held that this application is *prima facie* justiciable, as the applicants are challenging very specific governmental actions and legislation.[68] The Court held that the application engages each of the section 7 *Charter* rights of life, liberty, and security of the person,[69] and the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice.[70] The Court held that it was not able to find, at this juncture, that the application has no reasonable prospect of success.[71] The Court further held that the applicants have standing on behalf of their generation and of future generations of Ontarians, as they

[64] *Mathur* 2020*, supra* note 55 at para 266.

[65] *Ibid* at paras 62–68. At paragraph 70, the Court held: " I have noted above that the Plan and the Target are akin to guidelines, in that they are quasi-legislation that could potentially guide internal policy-making decisions. The fact that they are statutorily mandated by the *Cap and Trade Cancellation Act* suggests that they are more than just internal ministerial policy guidelines."

[66] *Ibid* at para 97.

[67] *Ibid* at paras 103–4 (citing *Canada (Auditor-General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49 at 90–91: "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision-making institutions of the polity.")

[68] *Mathur* 2020*, supra* note 55 at paras 132, 140.

[69] *Ibid* at para 147.

[70] *Ibid* at paras 145–46, citing *Bedford v Canada (Attorney General)*, 2012 ONCA 186.

[71] *Ibid* at para 237.

are all involved with various climate change initiatives and activism.[72] The Court noted that the Ontario Court of Appeal has held that no injury needs to have been committed in order to determine standing as long as the claimants can show that a potential injury affected them.[73] The Court held that future generations would not be able to bring the same claim against the current government for setting a Target that the applicants deem inadequate; the applicants therefore should be given standing for their generation, as well as for future generations.[74] An application for leave to appeal this decision was dismissed by the Ontario Superior Court of Justice Divisional Court.[75]

The hearing on the merits was presided over by a different judge of the Ontario Superior Court, Justice Marie-Andrée Vermette, who dismissed the action in May 2023, finding it justiciable but not a violation of *Charter* rights.[76] Here again, the judicial reasoning raises more questions than it answers.

Justice Vermette spends little time on the section 15 *Charter* analysis, only 12 paragraphs of a 189-paragraph judgment. In the reasons, Justice Vermette did not discuss at all the 2020 judgment of the Supreme Court of Canada ("SCC") in *Fraser v Canada (Attorney General*), which the plaintiffs relied on extensively and which seems to support the section 15 claims.

The SCC in *Fraser* highlighted that section 15(1) reflects a profound commitment to promote equality and prevent discrimination,[77] and to prove a *prima facie* violation of section 15(1), a claimant must demonstrate that the impugned law or state action, on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[78] The SCC held that at the heart of substantive equality is the recognition that identical or facially neutral treatment may frequently produce serious inequality and have disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.[79] To prove discrimination under section 15(1), claimants must show that a law or policy creates a distinction based on a protected ground, and that the law perpetuates,

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[72] *Ibid* at paras 238–39.

[73] *Ibid* at para 251.

[74] *Ibid* at para 253.

[75] *Mathur v Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1624 (Ont SCJ Div Crt).

[76] *Mathur v His Majesty the King in Right of Ontario,* 2023 ONSC 2316 (Ont SCJ) [*Mathur* 2023]

[77] *Fraser v Canada (Attorney General*), 2020 SCC 28 (SCC) [*Fraser*].

[78] *Ibid* at para 27.

[79] *Ibid* at para 30. The SCC held that there is no doubt that adverse impact discrimination violates the norm of substantive equality that underpins the court's equality jurisprudence and substantive equality requires attention to the full context of the claimant group's situation, to the actual impact of the law on that situation, and to the persistent systemic disadvantages that have operated to limit the opportunities available to that group's members. See paragraph 47.

reinforces or exacerbates disadvantage.[80] At the first step, in order for a law to create a distinction based on prohibited grounds through its effects, it must have a disproportionate impact on members of a protected group, and "if so, the first stage of the section 15 test will be met".[81] A law, for example, may include seemingly neutral rules, restrictions or criteria that operate in practice as "built-in headwinds" for members of protected groups.[82] The SCC held that two types of evidence will be especially helpful in proving that a law has a disproportionate impact on members of a protected group ─ evidence about the situation of the claimant group, including the physical, social, cultural or other barriers that provide the full context of the claimant group's situation and evidence about the outcomes that the impugned law or policy has produced in practice.[83] However, neither is mandatory and their significance will vary depending on the case.[84] Proof of discriminatory intent has never been required to establish a claim under section 15(1), and an ameliorative purpose is not sufficient to shield legislation from section 15(1) scrutiny. If claimants successfully demonstrate that a law has a disproportionate impact on members of a protected group, they need not also prove that the protected characteristic caused the disproportionate impact.[85] It is also unnecessary for them to prove that the law itself was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous. In addition, claimants need not show that the impugned law affects all members of a protected group in the same way.[86] The SCC held that the second step of the section 15 test — whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage — is to examine the impact of the harm caused to the affected group, which must be viewed in light of any systemic or historical disadvantages faced by the claimant group.[87] The presence of social prejudices or stereotyping are not necessary factors in the section 15(1) inquiry, and the perpetuation of disadvantage does not become less serious under section 15(1) simply because it was relevant to a legitimate state objective. The test for a *prima facie* breach of section 15(1) is concerned with the discriminatory impact of legislation on disadvantaged groups, not with whether the distinction is justified, an inquiry properly left to a section 1 analysis. Similarly, there is no burden on a claimant to establish that the distinction is arbitrary to prove a *prima facie* breach of section 15(1); it is for the government to demonstrate that the law is *not* arbitrary in its justificatory

[80] *Ibid* at para 50.

[81] *Ibid* at para 52.

[82] *Ibid* at para 53.

[83] *Ibid* at para 56.

[84] *Ibid* at para 67.

[85] *Ibid* at para 70.

[86] *Ibid* at para 72. The SCC noted that: "The fact that discrimination is only partial does not convert it into non-discrimination, and differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are mistreated."

[87] *Ibid* at paras 76–80.

submissions under section 1.[88] Section 1 allows the state to justify a limit on a *Charter* right as demonstrably justified in a free and democratic society.

It is difficult to see how the *Mathur et al* facts do not fit squarely within the guidance offered by the SCC in *Fraser.* It is unclear why Justice Vermette did not consider the most recent section 15 *Charter* decision from the SCC, particularly as it was specifically argued.

What Justice Vermette does say is that young people are disproportionately impacted by climate change, but this disproportionate impact is caused by climate change itself, not by the government's target, plan or the *CTCA*.[89] Justice Vermette does not deal at all with the issue that the government had previously enacted legislation that did safeguard youth from climate change and the impugned actions of the current government took those rights and protections away. One could analogize this to a provincial government changing the human rights code to eliminate protection of a particular group, for example, women. The court's reasoning in *Mathur* would treat this deprivation as merely a policy change and not a taking away of a fundamental protection for equality that would be subject to section 15(1) scrutiny. While Justice Vermette notes that there is no general, positive obligation on the state to remedy social inequalities or enact remedial legislation, the situation is different once such legislation is enacted and affords protections of a constitutional nature, governments should not be free to dismantle such rights and protection absent meeting the section 1 criteria. As the SCC held in *Fraser*, if the complainants can show a disproportionate impact on members of a protected or analogous group, the first stage of the section 15 test will be met.[90] In *Mathur*, Justice Vermette held that any discrimination is of a "temporal nature" rather than against youth and is thus not an enumerated or analogous ground.[91] This is a remarkable finding given the wealth of scientific evidence that youth and future generations will be profoundly negative affected by climate change. Such a finding appears to ignore the SCC's guidance in *Fraser* that, if claimants successfully demonstrate that a law has a disproportionate impact on members of a protected group, they need not also prove that the protected characteristic caused the disproportionate impact.

Justice Vermette spends more time on the section 7 *Charter* analysis, but here again, draws some curious conclusions. Justice Vermette finds that based on the evidence, "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."[92] However, Justice Vermette states that "a change in the law or government policy alone does not constitute deprivation of a right under section

[88] *Ibid* at para 80.

[89] *Mathur* 2023*, supra* note 76 at para 178.

[90] *Fraser*, *supra* note 77 at para 52.

[91] *Mathur* 2023, *supra* note 76 at para 180.

[92] *Ibid* at para 120.

7, even if the previous law provided greater life, liberty or security of the person".[93] Justice Vermette held that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly, but that the government's target is a target for the reduction of GHG in Ontario – no more, no less.[94] Justice Vermette focuses on caselaw concluding that there are no positive section 7 obligations and that section 7 "speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice", finding no deprivation exists in this case.[95]

Quite aside from the issue of any positive obligations, which continues to be contested under constitutional law, in this case, there appears to have been a clear deprivation from the repeal of the prior legislation. Justice Vermette acknowledges that the reductions contemplated by the target will only fulfil approximately 58% of the need to reduce GHG by approximately 45% below 2010 levels by 2030, and section 7 is engaged in this case, more particularly the right to life and the right to the security of the person;[96] and finds that as a result:

> …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 1.5ºC. 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.[97]

Then having rejected the idea of a positive obligation, Justice Vermette goes on to conclude that, in the event positive obligations can be imposed under section 7 in the special context of climate change, the applicants' rights to life and to the security of the person are engaged.[98] Justice Vermette finds that while the target falls short and its deficiencies contribute to increasing the risks of death and to the security of the person, it cannot be said that the effects of the target bear no connection to its objective.[99] Justice Vermette further rejected the idea that the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure and rejected the argument that as a fundamental principle, "a government cannot engage in conduct that will, or could reasonably be expected to, result in the future harm, suffering, or death of a significant number of its own citizens".[100]

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[93] *Ibid* at para 116.

[94] *Ibid* at paras 119, 122.

[95] *Ibid* at paras 125, 171 .

[96] *Ibid* at para 144.

[97] *Ibid* at para 147.

[98] *Ibid* at para 151.

[99] *Ibid* at para 160.

[100] *Ibid* at paras 161–63.

The judgment appears to ignore that the protections that youth had under the repealed *Climate Change Act* to reduce GHG emissions at a pace that reduces fundamental harm to their life, safety, and security gave them protections that were eliminated; treating the subsequent replacement legislation as if it was a case of first instance legislation that just fell short of being effective in protecting the youth. In fact, the impugned government actions deprived youth of section 7 rights as a result of the repeal of the *Climate Change Act* and the court's engagement with the debate about a positive obligation in respect of its replacement seems a distraction from this fact.

Another question raised by this judgment is that in considering the complainants' claim that the impugned law is contrary to the principles of fundamental justice, Justice Vermette held that the rule against gross disproportionality applies where the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes, taken at face value.[101] Elsewhere, the SCC has held that the right to life is engaged where the law or state action imposes an increased risk of death, either directly or indirectly,[102] and security of the person will be engaged where state action has the likely effect of seriously impairing a person's physical or mental health.[103] The SCC has also held that the gross disproportionality assessment targets laws that may be rationally connected to the objective but whose *effects* are so disproportionate that they cannot be supported, where the seriousness of the deprivation is totally out of sync with the objective of the measure.[104] Here Justice Vermette found the objective was "to reduce GHG in Ontario to address and fight climate change",[105] but then fails to take the next step in the analysis, specifically, to consider whether the effects are so disproportionate and the seriousness of the deprivation is totally out of sync with the objective of the measure. Here, why are the increased risks to life and health for millions of youth not disproportionate to the goal of the law? An appeal of this judgment has been filed and is scheduled to be heard in January 2024.[106]

Insights:

Standing:

- *Mathur et al* is the first Canadian case to overcome the 'justiciable hurdle' – a differentiator from the other youth cases may be that it focuses on specific legislative action of the government that is constitutionally reviewable by the courts. This finding of justiciability was upheld on appeal.

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[101] *Ibid* at para 161.

[102] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 62.

[103] *Chaoulli v Québec (Attorney General),* 2005 SCC 35 at paras 111–24.

[104] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 133.

[105] *Mathur* 2023*, supra* note 76 at para 158.

[106] Ecojustice GenClimateAction, *supra* note 54.

Rights:

- The Ontario Divisional Court rejected the government's attempt to overturn this judgment on issues of reasonable cause of action and justiciability. It is recognition that public interest in government action may be vindicated by private parties.

- One question is why, on the merits, the court failed to consider the SCC's most recent guidance on section 15 *Charter* cases, which offers a clear framework for approaching cases? Why did the court not consider the deprivation caused by repeal of the equality rights and protections granted by the *Climate Change Act*?

- Another question raised by the decision is that where a law that affords section 7 protections and the government substitutes a law that affords less protection, depriving youth of the previous protection, why is the disproportionate effects test not met, whereby "the seriousness of the deprivation is totally out of sync with the objective of the measure".[107]

Remedies:

- It is the first case to be heard on the merits in Canada. The case was dismissed in May 2023. The availability of mandatory relief as a remedy for constitutional violations is at issue on appeal.

DeJusticia (Rodríguez Peña and others) v Colombia

The second example is from Colombia in *DeJusticia (Rodríguez Peña and others) v Colombia.* The Colombia Supreme Court approved a case brought by young people in respect of deforestation of the Amazon.[108] Twenty-five youth aged 7 to 25 filed a *tutela,* a type of constitutional case against the government to protect individual rights, claiming that their right to a healthy environment and life in the future is being violated. The District Court had ruled against the *tutela.* On appeal, the Supreme Court of Colombia overruled the lower court, deciding that the conditions for filing a *tutela* were sufficiently met, because the connection between environmental deterioration, violation of fundamental rights, and direct harm to the individual was established, and the judicial order would be oriented towards restoring individual rights, not collective ones.[109]

The Supreme Court ruled that the fundamental rights of life, health, minimum subsistence, freedom, and human dignity are substantially linked to, and are determined by, the environment and the ecosystem. Applying the principle of precaution, intergenerational equity, and solidarity, the Supreme Court found that, by

[107] *Mathur* 2023*, supra* note 76 at para 161.

[108] Supreme Court of Colombia, Bogotá, (5 April 2018) *DeJusticia (Rodríguez Peña and others) v Colombia,* STC4360-2018, No 11001-22-03-000-2018-00319-01 (Colombia) [*DeJusticia*].

[109] *Ibid.*

failing to prevent deforestation, a threat to the future generations' fundamental rights had been established.[110] As to the rights of nature, the Supreme Court regarded the Colombian Amazon rainforest as the "lungs of the world" and held that the Colombian state's failure to protect the Amazon rainforest affected the fundamental rights of all Colombian citizens, and in an historic ruling, the Supreme Court recognized Colombian Amazon as an entity that has rights entitled to protection, maintenance, and restoration by the state.[111]

The Supreme Court issued mandatory orders: formulate short-, medium-, and long-term action plans to tackle deforestation and climate change impacts; create, with wide public participation, an Intergenerational Pact for the Life of the Colombian Amazon (PIVAC) to reduce deforestation and GHG emissions; all municipalities must update and implement Land Management Plans and include an action plan to reduce deforestation; and the corporate defendants must create an action plan to tackle deforestation.[112]

Insights:

Standing:

- The District Court had found that a *tutela* was not an appropriate action because of the collective nature of the issue; however, the Supreme Court found that a *tutela* can be filed where there is a connection between the violation of collective and individual rights if the person filing the *tutela* is directly affected, the violation of rights at stake is clearly demonstrated, and the action sought is oriented towards restoring individual rights, and not collective ones.

Rights:

- The Supreme Court recognized for the first time that the Colombian Amazon is a "subject of rights" entitled to protection, conservation, maintenance, and restoration led by the state and the territorial agencies.

- The judgment paves the way for citizens to demand protection of the forest when the government fails to tackle deforestation.

Remedy:

- The multi-faceted remedy ordered affected both public authorities and private parties.

[110] *Ibid.*

[111] *Ibid.*

[112] *Ibid.*

Pabai and Kabai v Commonwealth of Australia

The third example is a recent Australian case, *Pabai v Commonwealth of Australia*.[113] A class action was commenced in 2021 by two Indigenous leaders from the Torres Strait Islands against the Australian government.[114] The representative applicants allege that the Commonwealth of Australia (Commonwealth) owes a duty of care to Torres Strait Islanders, arising from the Torres Strait Treaty and the *Native Title Act 1993* (Cth) to take reasonable steps to protect them, their culture, and their environment from the harms caused by climate change.[115] They claim that, in fulfilling its duty, the Commonwealth must have regard to the best available science in relation to climate change.[116]

Torres Strait Islanders, whose homelands are the islands and reefs of the Torres Strait, are especially vulnerable to the impacts of climate change. They are already experiencing sea level rise, storm surges, coastal erosion, inundation and flooding of their villages, contamination of freshwater sources with saltwater, ocean acidification and degradation of the marine environment, and more frequent and severe heatwaves, with impacts on human health.[117] The projected impacts of climate change are even more severe: loss of freshwater sources, increased undernutrition resulting from diminished food production, and increased health harms from food- and water-borne diseases and vector-borne diseases. The claim specifies that, if unchecked, the projected impacts of climate change in the Torres Strait would render the islands uninhabitable.[118]

The issue is whether the Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them, their traditional way of life, and the marine environment in and around the Torres Strait Islands from climate change impacts.[119]

The lawsuit alleges that the Commonwealth has breached its duty of care by failing to implement measures to reduce Australia's GHG emissions; that in determining its GHG emission reduction targets, it has failed to take into account and engage with the best available science on emissions, failed to assess and address

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[113] *Pabai v Commonwealth of Australia,* [2022] FCA 836 [*Pabai*].

[114] The Torres Strait Islands, or Zenadth Kes, are the approximately 274 islands in an area of shallow open seas of approximately 48,000km^2 between the Cape York Peninsula and Papua New Guinea. The population is approximately 4,500 persons.

[115] Brett Spiegal, "(Applicant) Concise Statement, No. 622 of 2021 Federal Court of Australia" (31 March 2022) at para 25, online (pdf): *Climate Case Chart* <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220331_VID6222021_na-1.pdf> [https://perma.cc/4UCL-GMRM].

[116] *Ibid* at para 27.

[117] *Ibid* at para 15.

[118] *Ibid* at paras 17–18.

[119] *Ibid.*

current and projected climate-related harms to Torres Strait Islanders, including reduction of GHG emissions so as to halt further climate change and minimize harms; and that adaptation measures, such as the Commonwealth's construction of a sea wall on Sabai Island, have been inadequate.[120]

Justice Mortimer of the Federal Court of Australia, in a July 2022 judgment, noted that the case is a representative class proceeding in which the applicants seek relief on their own behalf and on behalf of all persons of Torres Strait Islander descent. The applicants contend they are suffering loss and damage as a result of the conduct of the Commonwealth; contending that the Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them and their traditional way of life, including taking steps to preserve *Ailan Kastom* (a body of customs and traditions), and the marine environment in and around the protected zone, as defined by a treaty between Australia and Papua New Guinea regarding the Torres Strait Islands, from the current and projected impacts of climate change in the Torres Strait Islands.[121]

The applicants seek an injunction requiring the Commonwealth to implement such measures as are necessary to protect the land and marine environment of the Torres Strait Islands and the cultural and customary rights of the Torres Strait Islanders from GHG emissions into the Earth's atmosphere; reduce Australia's GHG emissions consistent with the best available science target; and otherwise avoid injury and harm to Torres Strait Islanders from GHG emissions.[122] They also seek damages for degradation of the land and marine environment, including life and coral reef systems, loss of *Ailan Kastom*, damage to their native title rights, and physical and psychological injury as a result of ongoing breaches of the Commonwealth's alleged duty of care.[123]

The trial commenced in 2023, with hearings to be held in Boigu, Badu, Saibai, and Cairns.[124] The Court held: "[t]here is no denying the unremitting march of the sea onto the islands of the Torres Strait. The reality for the people of the Torres Strait is that they risk losing their way of life, their homes, their gardens, the resources of the sea on which they have always depended and the graves of their ancestors."[125]

The issue for trial is whether the Commonwealth has legal responsibility for that reality, the Court noted there is considerable urgency in determining this matter.[126]

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[120] *Ibid* at paras 20–23.

[121] *Pabai*, *supra* note 113.

[122] *Ibid* at paras 4, 31.

[123] *Ibid* at paras 5–6.

[124] *Pabai*, *supra* note 113 at para 17. *Pabai & Anor v Commonwealth of Australia*, Amended Statement of Claim, (15 March 2023). The applicants were given leave in July 2022 to file an Amended Statement of Claim, by Order of Justice Wigney.

[125] *Ibid* at para 28.

[126] *Ibid* at para 29.

It held that the applicants, and the Torres Strait Islanders they represent, are entitled to know whether the Commonwealth is legally responsible in the way alleged, or not. The Court held that appropriate way forward is to split the trial into tranches - first to take all the lay evidence from both parties, including taking evidence in the Torres Strait, and then expert evidence.[127]

Insights:

Standing:

- Although no issue appears to have been raised, these individuals are clearly rights holders under the common law and treaties, as they are alleging damage from violation of those rights, and the court need only assess whether the individuals are the best representatives of the affected class.

Rights:

- In this case, the rights asserted are a combination of common law tort claims and a violation of contractual/public law duties arising from treaties/legislation due to government action/inaction. The court is signalling to the parties the urgency of getting to trial, stating: "There is a strong public interest in this matter being decided with reasonable expedition. By June 2023 the proceeding will have been on foot for more than 18 months. In most people's lives, that is a long time. For the people of the Torres Strait, it is a long time to be waiting, and watching the march of the sea on a daily basis. It is in the interests of all parties that the important questions raised by this proceeding be determined, one way or the other, as soon as reasonably practicable.[128]

- The decision is also signalling the expectation of transparency and cooperation. The Court held: "[n]o Court acting reasonably is going to refuse to order production of key documents with real probative value, and no litigant such as the Commonwealth acting reasonably is going to refuse to produce them, unless on a ground such as public interest immunity, which the Court can readily and expeditiously determine during the trial process."[129]

In these cases, the private parties assert damage to rights held by the public generally or a broad section of the public to seek standing to assert the public interest against the government or public authority and seek remedies accordingly. Here, the scope of the alleged damage is so widespread, but so diffuse that an affected individual seeking an individual remedy may have little effect on the activity or duty violation causing the harm. The only effective action would seem to be one that addresses the collective harm and seeks remedies that address it. These three cases offer some

[127] *Ibid* at paras 30–32.

[128] *Ibid* at para 37.

[129] *Ibid* at para 33.

strategies for accomplishing this goal. A third strategy involves private parties gaining access to regulatory remedies that are expressly designed to further the public interest.

Private Parties Using Regulatory Agencies to Advance Public Interest Concerns

The third avenue I want to discuss is in respect of private parties using regulatory agencies and their statutory authority to advance public interest concerns. In Canada, the *Competition Act*'s purpose is to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."[130] Part VII.1 of the *Competition Act* deals with deceptive marketing practices, with section 74.01 prohibiting misrepresentations to the public for the purpose of promoting, directly or indirectly, the supply or use of a product.[131]

For example, in 2022, Keurig Canada Inc. settled a case with the Competition Bureau of Canada to resolve concerns over false or misleading environmental claims made to consumers about the recyclability of its single-use Keurig K-Cup pods.[132] Keurig Canada agreed to pay a CA$3 million penalty and donate CA$800,000 to a Canadian charitable organization focused on environmental causes; pay additional CA$85,000 for the costs of the Bureau's investigation; change its recyclable claims and the packaging of the K-Cup pods; publish corrective notices about the recyclability of its product on its websites, social media, national and local news media, and in the packaging of all new brewing machines; and enhance its corporate compliance program to promote compliance with the laws and prevent deceptive marketing issues

[130] *Competition Act,* RSC 1985, c C-34, s 1.1 [*Competition Act*].

[131] *Ibid* at s 74.01(1). Section 74.01(1) states:

> A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, (a) makes a representation to the public that is false or misleading in a material respect; (b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or (c) makes a representation to the public in a form that purports to be (i) a warranty or guarantee of a product, or (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

[132] Competition Bureau of Canada, "Keurig Canada to pay $3 million penalty to settle Competition Bureau's concerns over coffee pod recycling claims" (6 January 2022), online: *Government of Canada* <https://www.canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html>.

in the future.[133] Keurig settled a similar greenwashing case in the US for more than US$10 million dollars.[134]

But what about private actors using complaints to regulatory watchdog agencies when the representation on its face appears true? Here we have two interesting case examples.

HSBC UK Bank plc G21-1127656

The first is a decision rendered in the UK in October 2022 by the Advertising Standards Authority (ASA), the UK's independent advertising regulator, in respect of ads by global bank HSBC in the UK.[135] The ASA had received 45 complaints that two ads were misleading because they omitted significant information about HSBC's contribution to CO_2 and GHG emissions.

The poster ads appeared on 'high streets' in October 2021. The first poster featured an aerial image of waves crashing on a shore with text that stated "Climate change doesn't do borders. Neither do rising sea levels. That's why HSBC is aiming to provide up to $1 trillion in financing and investment globally to help our clients transition to net zero".[136] The second poster featured an image of tree growth rings with text that stated "Climate change doesn't do borders. So in the UK, we're helping to plant 2 million trees which will lock in 1.25 million tonnes of carbon over their lifetime".[137] The ASA found that consumers would understand the claims "to mean that HSBC was making, and intended to make, a positive overall environmental contribution as a company" and would understand that HSBC was committed to ensuring its business and lending model would help support businesses' transition to models that supported net-zero targets.[138] Additionally, the ASA found that consumers would understand that HSBC is undertaking an environmentally beneficial activity by planting trees that would make a meaningful contribution towards the sequestration of GHG in the atmosphere. The ASA concluded that the use of imagery from the natural world, and in particular the image of waves crashing on a beach, contributed to that impression. The UK advertising rules (CAP Code) require that the basis of

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[133] *Ibid.*

[134] *Smith v Keurig Green Mountain, Inc*, Docket Number: 4:18-cv-06690 (ND Cal 2022). The United States Federal Court approved class action settlement in case alleging misrepresentations of recyclability as plastic waste "a significant potential, cause of global climate change" because it releases methane as it degrades. The settlement requires the defendant to make a US$10 million payment for payments to class members and for legal and administration fees and amend claims of recyclability.

[135] Advertising Standards Authority, "ASA Ruling on HSBC UK Bank plc" (19 October 2022), online: *Advertising Standards Authority* <https://www.asa.org.uk/rulings/hsbc-uk-bank-plc-g21-1127656-hsbc-uk-bank-plc.html> [https://perma.cc/M2SY-A8B7] [Advertising Standards Authority].

[136] *Ibid.*

[137] *Ibid.*

[138] *Ibid.*

environmental claims must be clear and that unqualified claims could mislead if they omit significant information.[139]

The ASA found that consumers would not expect that HSBC, in making unqualified claims about its environmentally beneficial work, would also be simultaneously involved in the financing of businesses that made significant contributions to CO_2 and other GHG emissions and would continue to do so for many years into the future.[140] HSBC's commitment in its 2021 Annual Report is to invest $750 billion to $1 trillion globally to help its clients transition to net zero; however, it also indicated that its current financed emissions – emissions related to the customers it financed – stood at the equivalent of around 65.3 million tonnes of CO_2 per year for oil and gas alone, and the figure was likely to be much higher once other carbon-intensive industries such as utilities, construction, transport, and coal mining had been analyzed and included.[141] The Annual Report stated that HSBC intends to continue funding thermal coal mining and power production to some degree until 2040.[142]

The ASA found that HSBC is continuing to significantly finance investments in businesses and industries that emit notable levels of CO_2 and other GHG, and consumers would not know that was the case.[143] The ASA considered it was material information that was likely to affect consumers' understanding of the ads' overall message, and so should have been made clear in the ads. It concluded that the ads were therefore misleading.[144] The ads were banned and HSBC UK Bank plc was told to ensure that future marketing communications featuring environmental claims were adequately qualified and did not omit material information about its contribution to CO_2 and GHG emissions.

Insights:

Standing:

- The case provides an example of private parties pressing a regulatory agency to act to ensure compliance of private actors with market legislation; thus a private actor seeking a public interest type remedy.

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[139] Committee of Advertising, "The CAP Code: The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing" (1 September 2010) at 58, online (pdf): *Committee of Advertising* <https://www.asa.org.uk/static/c6be0fb9-2c66-4248-ba5b824bf26fd3d3/dcecd068-4b77-4cd0-ae5c2e953b8978c1/The-CAP-Code.pdf> [https://perma.cc/A5Z8-U6B2]. In the United Kingdom, the advertisement industry writes the rules (through CAP) that advertisers have to abide by. See also: Government of the United Kingdom, "Guidance: Consumer Protection from Unfair Trading Regulations - businesses: OFT979" (1 March 2008), online *GOV.UK*: <https://www.gov.uk/government/publications/consumer-protection-from-unfair-trading-regulations-businesses> [https://perma.cc/M3E3-2E7N].

[140] Advertising Standards Authority, *supra* note 135.

[141] *Ibid.*

[142] *Ibid.*

[143] *Ibid.*

[144] *Ibid.* The ASA held that the advertisements breached CAP Code Rules 3.1 and 3.3 (Misleading Advertising), and 11.1 (Environmental Claims).

Rights:

- Public interest in the fairness of market actors was vindicated by private complaints generating regulator enforcement action. It signals that regulators may look past the accuracy of the words used in ads to assess whether the overall messaging is misrepresentation.

Remedies:

- May offer a signalling effect to financial institutions to be transparent in the full range of their financing activities that both tackle and perpetuate emissions related to climate change.

Kukpi7 Judy Wilson, Chief of the Skat'sin te Secwepemc-Neskonlith Indian Band and others v RBC

The other case is in Canada. Kukpi7 Judy Wilson, Chief of the Skat'sin te Secwepemc-Neskonlith Indian Band, Eve Saint, a Wet'suwet'en Land Defender and four others, supported by Ecojustice and Stand.earth, filed an application for an inquiry with the Competition Bureau of Canada stating that Royal Bank of Canada's (RBC) advertising on climate action is false and misleading.[145] The application is made under section 9 of the *Competition Act* asking for an inquiry into whether grounds exist for making an order under section 74.01(1) of the *Competition Act.*[146]

The complaint states that a footnote to RBC's target of reducing emissions 70% by 2025 notes that this reduction only applies to its operations, which are a small part of the total emissions; RBC claims to follow the Greenhouse Gas Protocol, but does not disclose the Scope 3 emissions of its clients, even though these can be the largest source of emissions for its clients, contrary to the Protocol.[147] The complaint further states that in 2021, RBC provided a total of CA$34.4 billion in loans and underwriting to the fossil fuel industry and, by the end of 2021, held a total of CA$50.4 billion in shares and bonds of fossil fuel companies.[148] Despite committing in February 2021 to net zero in its lending by 2050, RBC's lending and underwriting to 100 key

[145] Kukpi7 Judy Wilson et al., "Application for inquiry regarding the Royal Bank of Canada's apparent false and misleading representations about action on climate change while continuing to finance fossil fuel development" (19 April 2022), online (pdf): *Ecojustice* <https://ecojustice.ca/wp-content/uploads/2022/04/2022-04-14-Complaint-to-Competition-Bureau-re_-RBC-climate-representations.pdf> [https://perma.cc/5PZN-SJDS] [Ecojustice Royal Bank Inquiry]. See also: Ecojustice, "Members of the public submit complaint claiming RBC advertising on climate action is misleading" (21 April 2022), online: <https://ecojustice.ca/news/members-of-the-public-submit-complaint-claiming-rbc-advertising-on-climate-action-is-misleading/> [https://perma.cc/25ME-6H8L].

[146] *Competition Act, supra* note 130 at s 74.01(1).

[147] Ecojustice Royal Bank Inquiry, *supra* note 145 at 18.

[148] *Ibid* at 23.

coal, oil, and gas companies expanding fossil fuels increased by $3.5 billion (85%) between 2020 and 2021.[149]

The complaint alleges that until RBC stops financing fossil fuels, advertising itself as Paris Agreement-aligned is greenwashing. RBC's claim that it will offer sustainable financing ignores the fact that its sustainable financing is not pinned to reducing emissions. The application alleges RBC is currently working against net-zero goals by providing billions of dollars in financing to the oil and gas industry and lacks a credible plan to reach its stated goals.[150] The application alleges that "RBC's representation is misleading and false because RBC is providing [what it calls] "sustainable financing" to companies that are not necessarily contributing to addressing climate change as well as to companies that are actively undermining climate-related sustainability by expanding fossil fuel production and increasing GHG emissions."[151]

The complaint sets out the remedy sought. If the inquiry finds that RBC has made materially false and misleading representations to the Canadian public, the Applicants submit that RBC should be required to, at a minimum:

1) Remove all public representations that RBC supports the Paris Agreement and will achieve net-zero emissions by 2050 in its lending or investing until RBC:
    a) ceases financing for new and expanded fossil fuel developments;
    b) commits to winding down its financing to the fossil fuel industry in line with an emissions trajectory that achieves the 1.5°C Goal; and
    c) measures and discloses all of its financed emissions, including Scope 3 emissions from its high-emitting clients, and includes these emissions in its net zero lending and investing targets and plans.

2) Remove all public representations about the contribution of "sustainable finance" to RBC's climate goals until RBC:
    a) publishes clear, quantitative criteria relating to climate action that recipients must achieve in order to receive sustainable financing;
    b) lists the recipients of this financing and specifies the recipients' contribution to addressing climate change; and
    c) requires recipients to publish information that demonstrates how RBC financing is supporting actions that are aligned with the goals of the Paris Agreement and mitigate and/or adapt to climate change.

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[149] *Ibid* at 22–23.

[150] James Bradshaw, "Competition Bureau launches inquiry into RBC's green advertising" (11 October 2022), online: *The Globe and Mail* < https://www.theglobeandmail.com/business/article-rbc-green-advertising-competition-bureau/> [https://perma.cc/82EY-EM36].

[151] Ecojustice Royal Bank Inquiry, *supra* note 145 at 27.

3) Pay a $10 million fine, credited to the Environmental Damages Fund and to be paid to an organization, preferably Indigenous-led, for the purposes of climate mitigation and adaptation in Canada.[152]

The CA$10 million fine sought is 0.012% of the amount of RBC's loans, underwriting, and investments to fossil fuel companies in 2021 alone.[153]

The Competition Bureau of Canada advised the applicants on 29 September 2022 that it has opened an investigation,[154] and the matter is pending.

Insights:

Standing:

- Other regulatory statutes may provide avenues for private parties to enlist regulatory agencies and their statutory authority into a more proactive stance to further the public interest through the complaint process.

Rights:

- If the Competition Bureau of Canada analyses the complaint in the same manner as the UK, many of Canada's financial institutions and companies with high-carbon emissions will have to replace or reframe many of their advertisements.

Remedies:

- The reputational harm arising from a finding of misrepresentation might be serious enough to incentivize financial institutions to take transition financing more seriously. It could lead to more transparent reporting and advertising, and in an ideal world, more action to reduce emissions – it is likely a pivotal moment in the role of the Competition Bureau of Canada.

This third avenue seems to have been largely untapped, yet may contain much potential for advancing the public interest. Regulatory agencies, by their very nature, are ostensibly designed to advance the public interest. To the extent their authorizing statutes permit, their statutory power can be activated through complaint or even through common law remedies such as *mandamus*. The question remains whether this untapped potential will be utilized.

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[152] *Ibid* at 29–30.

[153] *Ibid* at 30.

[154] Letter from Adam Zimmerman of Competition Bureau Canada to Matt Hulse and Andhra Azevedo of Ecojustice, (29 September 2022) "RE: Notice of Inquiry Commencement into Royal Bank of Canada" online (pdf): *Ecojustice* < https://ecojustice.ca/wp-content/uploads/2022/10/2022-09-29-Notice-of-Inquiry-Commencement-RBC-complaint-to-Competition-Bureau.pdf> [https://perma.cc/7MC6-WZWZ].

Conclusion

I have given just three examples of private action as a mechanism to advance public interests. They illustrate growing willingness by the courts to link the interests of private individuals in respect of harms caused by climate change to much broader public interests. It may mark a new era in remedies that redress both the harm to the private litigant and to the many people, species, and ecosystems for which they seek remedies.

In preparing for this lecture, I searched Justice Rand's name with the words 'climate change' in legal databases, not expecting anything to come up. I was wrong, Justice Rand's reasoning in *Roncarelli v Duplessis*,[155] was relied on by the Ontario Superior Court in a 2018 judgment in *Tesla Motors Canada ULC v Ontario (Ministry of Transportation*), overturning an executive decision by the Ontario Government in respect of subsidies for electric vehicles.[156] Justice Rand was cited at 140:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the 'Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.[157]

The Court in *Tesla* held that the Ontario government's discretionary decision to exclude Tesla from the transition in winding-down of a subsidy program for electric vehicles by limiting the transition program to only franchised dealerships was arbitrary and unrelated to the purposes of the statutory or regulatory discretion being exercised. The Court held that it was egregious because, not only was it made for an improper purpose, but because the minister singled out Tesla for reprobation and harm without providing Tesla any opportunity to be heard or any fair process whatsoever. The appropriate remedy was to quash the minister's unlawful decision to implement the transitional program.

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[155] *Roncarelli v Duplessis*, [1959] SCR 121 at 140, 143 [*Roncarelli*]. In *Roncarelli*, the Premier of Québec had intervened in a liquor licence proceeding and directed that Mr. Roncarelli's business be denied its liquor licence because he was a member of the Christian religious sect. The SCC found the Premier's intervention unlawful.

[156] *Tesla Motors Canada ULC v Ontario (Ministry of Transportation,* 2018 ONSC 5062.

[157] *Roncarelli*, *supra* note 155 at 143.

Roncarelli was decided in 1959, and while there is growing evidence that the oil and gas industry knew at that time about the very harmful effects of emissions,[158] climate change would have been far from Justice Rand's mind. Yet, his caution about the safeguards needed to protect against absolute and untrammeled discretion may well find their place in respect of private litigation seeking remedies that advance the public interest.

Clearly, I think the answer to the question in the title of this talk is Yes! Private party litigation can advance the public interest in the right circumstances.

I want to end with a short clip of a song we sang during a performance called *Risk! A Climate Cabaret* at a recent large international conference for the financial sector, which a group of professors, creatives, students, and others put together in three days - this clip is a song that is a humorous look at greenwashing, and seems a fitting way to conclude: "'Greenwashing', a song from the 'Risk!' cabaret project"[159]

Thank you,

Dr. Janis Sarra

[158] Benjamin Franta, "What Big Oil knew about climate change in 1959" (3 November 2021), online: *GreenBiz* < https://www.greenbiz.com/article/what-big-oil-knew-about-climate-change-1959> (citing a transcript from a symposium: Columbia University, Graduate School of Business, "Energy and man: a symposium" (2 February 2021), online: *Internet Archive* <https://archive.org/details/energymansymposi0000unse/mode/2up> [https://perma.cc/RL6W-KFNG]). See also Benjamin Franta, "On its 100th birthday in 1959, Edward Teller warned the oil industry about global warming" (1 January 2018), online: *The Guardian* <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/jan/01/on-its-hundredth-birthday-in-1959-edward-teller-warned-the-oil-industry-about-global-warming> [https://perma.cc/QX5J-TS8T].

[159] LiveCanonPoetry, "'Greenwashing', a song from the 'Risk!' cabaret project" (17 October 2022), online (video): *YouTube* <https://www.youtube.com/watch?v=EJdZ1OCxkjM> [https://perma.cc/D6DE-FREJ].