

Climate Change Litigation in Ontario:

Hot Prospects and International Influences

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OBA Institute 2016

Hot Topics in Climate Change: Ontario in the National and International Contexts

Wednesday, February 3, 2016, Toronto

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Climate change is a multifaceted problem, and multifaceted problems invite multifaceted legal responses. Various forms of litigation have emerged or are likely to emerge in Canada in response to this “super wicked problem.”² These forms, their prospects and key challenges are well canvassed elsewhere.³ My goal here is twofold: first, to single out three promising types of actions that have not received as much attention as they deserve, namely actions based on public nuisance, the public trust doctrine and enforcement of foreign judgments; and second, to explore the implications for Ontario law of a recent Dutch court decision holding the Netherlands liable in negligence for failing adequately to regulate greenhouse gas (GHG) emissions.

I. Three Interesting Avenues for Climate Change Litigation in Ontario

A. Public Nuisance

Of all the recognized torts, public nuisance appears particularly promising for Ontario plaintiffs seeking a remedy for harmful climate change, for three reasons: the broad scope of the tort, its potential to overcome the problem of causation, and its relaxed standing requirements in Ontario.

1. Broad scope

First, public nuisance is a capacious tort whose outer limits are unsettled. It captures “any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience,”⁴ including the public’s use of public lands, resources or highways and its exercise of public rights of navigation or fishing. It protects “the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference.” Factors to be considered in determining whether a particular interference with public rights is unreasonable include “the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood.”⁵

Few would disagree that anthropogenic GHG emissions are altering the global atmosphere and negatively affecting the climate, nor that these changes will cause (or are causing) inconvenience or discomfort, to say the least, to members of the Canadian public. If burning down a public forest is capable of constituting a public nuisance,⁶ there is a good argument that climate disruption, rising sea levels, loss of arctic sea ice, and associated impacts are too. But before getting carried away (figuratively, that is), we must confront the problem of causation.

2. Getting over the causation problem

Probably the biggest barrier to recovery in tort cases will be proof of causation. The plaintiff must prove that the defendant caused or at least contributed materially to the harm suffered by the plaintiff. This is

² Kelly Levin et al, “Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change” (2012) 45 *Policy Sciences* 123.

³ Eg John Terry and Alex Smith, “Litigation” in Dennis Mahony (ed), *The Law of Climate Change in Canada* (Toronto: Canada Law Book, looseleaf), Chapter 16.

⁴ *Ryan v Victoria (City)*, [1999] 1 SCR 201, 1999 CanLII 706, para 66.

⁵ *Ibid*, para 53.

⁶ *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38, para 66 [*Canfor*].

notoriously tricky in the case of climate change, given the global mixing of GHGs in the atmosphere, the complexity and length of causal chains, the pervasiveness of scientific uncertainty and the relatively tiny contributions of even the largest emitters.⁷

Andrew Gage of West Coast Environmental Law argues that public nuisance plaintiffs can overcome this challenge by conceptualizing the relevant harm as harm to the atmosphere itself, rather than harm to person or property.⁸ In *Canfor*, the Supreme Court noted that “The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law” and that the air was recognized as being subject to public rights in England as early as the thirteenth century.⁹

Building on *Canfor*, Gage argues that a public right to a healthy atmosphere is ripe for recognition in Canadian common law. He argues that such a right can be grounded in public rights in respect of air, public use of the atmosphere from time immemorial, and the atmosphere’s inherent incapability of being owned.¹⁰ Unreasonable interference with a public right to a healthy atmosphere would ground an action in public nuisance without the necessity to show any consequential damage.

Gage also points to the venerable law of riparian rights in support of his argument. A riparian owner has a right to the continued flow of water in its natural condition, undiminished in quality or quantity. To prevail in an action against a polluter she or he need only show that the pollution appreciably altered the natural condition of the water flowing past the riparian land. The plaintiff need not prove that the particular defendant’s pollution caused any damage to the plaintiff’s use and enjoyment of the water or of the abutting land. The facts that the defendant was one of many polluters and that its pollution alone made no practical difference are no defence. “In essence,” Gage summarizes, “the riparian rights cases do not ask whether, ‘but for’ the actions of the defendant would the plaintiff have suffered the loss, but instead focus on whether ‘but for’ the actions of the defendant, would the stream flow in its natural state.”¹¹

Gage argues that the same approach should apply in public nuisance cases. There is American authority to this effect.¹² Even absent proof that a defendant caused the particular damage suffered by the

⁷ See, eg, Shi-Ling Hsu, “A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit” (2008) 79 *U Colo L Rev* 701.

⁸ Andrew Gage, “Climate Change Litigation and the Public Right to a Healthy Atmosphere” (2013) 24 *J Env’t’l L & Prac* 257, reprinted by West Coast Environmental Law Association (October, 2014), <http://wcel.org/resources/publication/climate-change-litigation-and-public-right-healthy-atmosphere> (last accessed February 1, 2016) [cited to WCEL reprint].

⁹ *Canfor*, supra note 6, paras 74-76.

¹⁰ Gage, supra note 8.

¹¹ *Ibid* at 14.

¹² *Woodyear v Schaefer*, 57 Md 1 (1881) at 9-10 (“It is no answer to a complaint of public nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained... Each standing alone might amount to little or nothing. But it is when all are united together, and contribute to a common result, that they become important factors, in producing the mischief complained of”).

plaintiff, the plaintiff should still be entitled to injunctive relief and nominal damages for the injury to his or her right.¹³ Gage’s conclusion is worth repeating here:

If a court can be persuaded to adopt this approach in a climate change case, then it is quite arguable that large-scale emitters are directly violating the public’s rights in respect of a healthy global atmosphere, irrespective of whether the damages caused to a particular plaintiff can be tied to that defendant’s emissions.¹⁴

3. Standing

The causation problem resolved by Gage’s “public rights” approach may return under the heading of standing to sue, because a private plaintiff must show “special damage” to have standing to sue for public nuisance. Normally, a private plaintiff may sue for public nuisance only if he or she suffered interference with a private right or suffered “special damage peculiar to himself” or herself in the sense of having a special interest in the subject matter of the action beyond the general interest common to all members of society.¹⁵

The Ontario *Environmental Bill of Rights* relaxes the special damage requirement by providing that a private plaintiff who has suffered direct economic loss or direct personal injury as a result of public nuisance need not show that the damage is of a different kind or degree than that suffered by others.¹⁶ To fit within the Ontario exception, a plaintiff would still have to plead and prove direct loss or injury as a result of the public nuisance, thus raising the causation challenge discussed earlier.

Another way around the standing problem might be to persuade a court to take a broad view of “special damage” along the lines of the Supreme Court’s public interest standing jurisprudence.¹⁷ Such a conception of special damage could include not just individual harm caused by specific defendants but also special vulnerability to the impacts of climate change, however caused. It would, however, require an extension of the current law.

In short, the “public atmospheric rights” approach advocated by Gage may not be available to a private plaintiff in a public nuisance action unless the plaintiff also pleads and proves particular harm.

A public nuisance action may, however, be brought by the Crown in its *parens patriae* capacity against major private sector GHG emitters for damage to public resources.¹⁸ Such a suit may seek both injunctive and monetary relief. We know from the Supreme Court’s *Canfor* decision that the Crown may recover compensation in public nuisance not just for commercial losses but also for purely ecological or environmental damage.¹⁹ The same would be true for damage occasioned by climate change.

¹³ Gage, *supra* note 8, 14.

¹⁴ Gage, *supra* note 8, 16.

¹⁵ *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, 1986 CanLII 6 (SCC), paras 18-19.

¹⁶ *Environmental Bill of Rights*, SO 1993, c 28, s 103(1).

¹⁷ *Thorson v Canada (Attorney General)*, [1975] 1 SCR 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 SCR 265; *Canada (Minister of Justice) v Borowski*, [1981] 2 SCR 575; *Finlay*, *supra* note 15.

¹⁸ *Canfor*, *supra* note 6, para 52.

¹⁹ *Ibid*, para 81.

Numerous questions remain unanswered about the viability of public nuisance as an avenue for climate change litigation, including whether claims for “ecological damages” against private defendants would be disallowed for imposing indeterminate liability and whether a private plaintiff could sue a government defendant in public nuisance for inaction on climate change.²⁰ The cause of action nevertheless presents an interesting prospect.

B. The Public Trust Doctrine

Canfor did not just open the door to public nuisance claims for purely ecological damages. It also opened the door—a crack—to actions based on the public trust doctrine. The Court referred favourably to American public trust jurisprudence and suggested that there may be no legal barrier to the doctrine’s use in Canada, but declined to rule explicitly on this issue due to the “important and novel policy questions” raised by this prospect.²¹

The public trust doctrine has received scant and mostly hostile judicial attention in Canada. The Federal Court, Trial Division recently ruled in the *Burns Bog* case that if the public trust doctrine exists at all, it applies only to lands or resources owned by the government.²² The court opined that “[i]t is difficult to conceive of how a public trust duty could be imposed upon Canada concerning lands that it does not own.”²³ There is American authority, however, for application of the doctrine to resources not owned by government.²⁴

Climate change litigation might represent an opportunity to circumvent or expand the Federal Court’s narrow interpretation of the public trust doctrine in a couple of ways. First, climate change plaintiffs could take the *Burns Bog* ruling at face value and bring a claim for breach of public trust against a government defendant in respect of lands or resources owned by that defendant. Vast areas of boreal forest and the Arctic, including areas especially vulnerable to climate change, are owned by the federal or provincial Crowns. In *Burns Bog*, the land in question was owned by provincial and municipal governments. The obstacle thrown up by the Federal Court could be overcome simply by suing the correct government (of course, it would still be necessary to prove the content and breach of the public trust duty, which would be matters of first impression for a Canadian court).

Secondly, climate change plaintiffs could challenge the *Burns Bog* ruling head on, arguing that the public trust corpus need not be owned by the public trustee. Convincing a court of this point will probably be necessary if a plaintiff alleges that the atmosphere itself is a public trust. This is, in fact, the main thrust of an international litigation campaign led by the American organization Our Children’s Trust, which has launched lawsuits on behalf of children against all 50 states and the US federal government in an attempt to force them to take greater action on climate change.²⁵ Alternatively, a plaintiff will need to

²⁰ *Ibid.*

²¹ *Ibid.*, paras 81-82.

²² *Burns Bog Conservation Society v Canada (Attorney General)*, 2012 FC 1024 (TD).

²³ *Ibid.*, para 111.

²⁴ *National Audobon Society v Superior Court*, 33 Cal.3d 419 (1983).

²⁵ See Our Children’s Trust, “Atmospheric Trust Litigation,” <http://ourchildrenstrust.org/at/> (last accessed February 1, 2016); Mary C Wood and Dan Galpern, “Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to

argue that the government owns the atmosphere (or at least relevant parts of it)—an argument that would not only be a legal stretch, but would also be in tension with the case for public atmospheric rights discussed earlier.

C. Enforcement of Foreign Judgments

A third avenue for climate change litigation in Ontario is worthy of note, though it is more circuitous than the others discussed here. Plaintiffs could sue major greenhouse gas emitters in a foreign jurisdiction where the chance of success is higher than in Canada, and if successful there, could sue to enforce the foreign judgment in Ontario. The fact that several global “carbon majors” (the organizations with the largest greenhouse gas emissions) have Canadian subsidiaries, are traded on the Toronto Stock Exchange, or both, makes such litigation a realistic prospect though it is of course contingent on plaintiffs first winning a climate change case somewhere else.

The jurisdictional hurdles to an action to recognize and enforce a foreign court judgment in Canada are low. The plaintiff in such an action need only demonstrate that the foreign court had a real and substantial connection with the parties or the underlying dispute, or that the traditional bases for jurisdiction are fulfilled.²⁶ In the Supreme Court of Canada’s 2015 *Chevron* decision, the fact that the foreign judgment debtor had attorned to the foreign court’s jurisdiction sufficed to establish jurisdiction with respect to the judgment debtor, while a substantial presence in Ontario sufficed to establish jurisdiction with respect to the judgment debtor’s indirect Canadian subsidiary. *Chevron* dealt with enforcement of an Ecuadorean judgment against Chevron for environmental contamination resulting from its predecessor Texaco’s oil operations in that country.

Even if an Ontario court has jurisdiction, a recognition and enforcement action would still face numerous hurdles. It could be stayed or dismissed on the basis of *forum non conveniens*, improper use of judicial resources, defences to enforcement (public policy, fraud or denial of natural justice), summary judgment (Rule 20) or determination of an issue before trial (Rule 21), all of which are likely to be relied on vigorously by defendants.

II. International Influences: *Urgenda* and its Implications

A. The *Urgenda* Decision

In June 2015, the Hague District Court ruled that the Dutch state had violated its duty of care to protect and improve the living environment by failing to take enough action to reduce Dutch greenhouse gas emissions.²⁷ The action was brought by the Urgenda Foundation, a Dutch NGO, on behalf of itself and almost 900 named individuals. The court found that “[d]ue to the severity of the consequences of

Restore a Viable Climate System” (2015) 45 *Env’t/L* 101. So far, no analogous action has been commenced in Canada.

²⁶ *Chevron Corp v Yaiguaje*, 2015 SCC 42.

²⁷ *Urgenda Foundation v Netherlands (Ministry of Infrastructure and the Environment)*, Hague District Court, Chamber for Commercial Affairs, No C/09/456689 / HA ZA 131396 (June 24, 2015), English translation available at <http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendaVStaat-24.06.2015.pdf> (last accessed January 25, 2016).

climate change and the great risk of hazardous climate change occurring—without mitigating measures ... the State has a duty of care to take mitigation measures.”²⁸ It held that the appropriate standard of care was established by an international scientific and political consensus that atmospheric greenhouse gas (GHG) concentrations should not exceed 450 ppm and global average surface temperature rise should not exceed two degrees Celsius, and that to achieve this goal, European Union (EU) member states, including the Netherlands, must reduce their greenhouse gas emissions 25%-40% below 1990 levels by 2020 and much more (on the order of 80%-95%) by 2050. The court found that the Dutch state had accepted this consensus and committed itself to achieving these targets, but was on track to achieve, at most, a 17% reduction by 2020. This reduction target, the court concluded, was “below the standard deemed necessary by climate science and the international climate policy”²⁹ and a breach of the government’s duty of care.³⁰

Taking the low end of the internationally agreed emissions reduction range as a conservative benchmark, the court ordered the Dutch state to ensure that 2020 Dutch emissions from all sources, public and private, are at least 25% below 1990 levels.³¹ The Dutch government is appealing the decision but has promised to start working towards the 25% reduction target pending final resolution of the appeal, which could take years.³²

B. Implications for Ontario

The *Urgenda* case has received worldwide attention. It was the first time a court held a government liable for its failure to take adequate measures to combat climate change or ordered a government to enhance its climate change policies. It set a precedent that will be watched closely around the world.

Whether *Urgenda* is the start of a global trend is difficult to predict, however. Copycat cases are planned or underway in several European countries and Australia.³³ In September 2015, in an action brought by Pakistani farmer Ashgar Leghari, the Lahore High Court held the Pakistani government liable for failing to implement its own climate change policy framework.³⁴ The court ordered several government ministries to appoint climate change “focal persons” and to submit action plans by the end of the year. The court appointed a Climate Change Commission to oversee the government’s implementation of its climate change policy framework, at the government’s expense. *Leghari* dealt with adaptation rather

²⁸ *Ibid*, para 4.83.

²⁹ *Ibid*, para 4.31(vi).

³⁰ *Ibid*, para 4.93.

³¹ *Ibid*, para 4.103.

³² Urgenda Foundation, Press Release, “Despite pressure from parliament, the Dutch government refuses to pull appeal in landmark climate case” (29 September 2015), <http://us1.campaign-archive2.com/?u=91ffff7bfd16e26db7bee63af&id=c5967d141c&e=46588a629e> (last accessed 24 January 2016).

³³ Megan Darby, “Netherlands enters appeal against climate ruling,” Climate Home (October 1, 2015), <http://www.climatechangenews.com/2015/10/01/netherlands-enters-appeal-against-climate-ruling/> (last accessed January 31, 2016).

³⁴ *Leghari v Federation of Pakistan*, Lahore High Court, Green Bench (WP No 25501/2015) (September 4, 2015); *Leghari v Federation of Pakistan*, Lahore High Court, Green Bench (WP No 25501/2015) (September 14, 2015), summary and text of judgments available at http://edigest.elaw.org/pk_Leghari (last accessed January 25, 2016).

than mitigation and did not refer to *Urgenda*, but the cases are similar insofar as they held a government liable for inadequate action on climate change.

On the other hand, the peculiar context and details of the *Urgenda* case limit its applicability outside the Netherlands. The case nevertheless has some features that could help potential Ontario plaintiffs, which I canvass after surveying the main discrepancies between *Urgenda* and Ontario law.

1. Distinguishing features

The *Urgenda* case has several distinguishing features that limit its relevance in Ontario. The action was brought under specific provisions of the Dutch Civil Code dealing with general tortious acts and nuisance.³⁵ To a common lawyer, the case appears an odd hybrid of tort, constitutional and international law in which the analysis of duty of care and standard of care are thoroughly mixed together. Mapping it onto Canadian law is not a straightforward task.

(a) Proximity

The questions of duty and standard of care were central to the *Urgenda* decision, but the analysis was quite different from the approach a Canadian court would undertake. In Canada, a tort duty of care requires foreseeability of harm and sufficient proximity between the government defendant and the plaintiff(s).³⁶ The *Urgenda* court had a great deal to say about the former (see section 2(c), below), but did not address the latter. *Urgenda* and the named plaintiffs appeared to be in no different position than any other Dutch individuals or organizations. Indeed, the Dutch government was held liable for “acting negligently towards society,”³⁷ a concept unknown to Canadian common law.

Canadian courts have repeatedly refused to recognize a duty of care based on a relationship between a government actor and society at large.³⁸ A Canadian plaintiff would have to show a close and direct relationship with the government defendant based, for example, on representations made to a specific class of persons, a statutory regime giving a special role to a specific class of persons, or other evidence indicating that the government had (or ought to have had) the interests of a specific class of persons in mind.³⁹ Possible candidates might include parties affected disproportionately by the impacts of climate change or by climate change regulation.

That said, the Supreme Court has emphasized that this step of the duty of care analysis “presents a relatively low threshold” that is satisfied if “a relationship of ‘proximity’ existed between the parties such that it was reasonably foreseeable that a careless act by the [defendant] could result in injury to the [plaintiff].”⁴⁰ Thus there was proximity between a railway and a person thrown from a motorcycle when trying to cross the railroad track, because the track ran down an urban street “in direct proximity to the public” and it was “plainly foreseeable that carelessness by the Railways with respect to those

³⁵ Dutch Civil Code, Book 6, Section 162 (tortious act) and Book 5, Section 37 (nuisance), available at <http://www.dutchcivillaw.com/civilcodegeneral.htm>.

³⁶ Eg *Cooper v Hobart*, 2001 SCC 79.

³⁷ *Urgenda*, supra note 27, para 4.54.

³⁸ Eg *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42.

³⁹ Eg *Sauer v Canada (Attorney General)*, 2007 ONCA 454, para 62.

⁴⁰ *Ryan*, supra note 4, para 23.

tracks could cause injury to users of the street.”⁴¹ A climate change plaintiff might argue by analogy that the atmosphere and climate are in direct proximity to the public and that it is plainly foreseeable that carelessness by the government with respect to the atmosphere and climate could cause injury to users of the atmosphere and its climate stabilization functions.

(b) Policy decisions

Even if a Canadian plaintiff could establish sufficient proximity, a duty of care could be negated at the second stage of the duty of care analysis, which asks whether a *prima facie* duty of care is negated by contrary policy considerations.⁴² One such consideration arises from the distinction between policy and operational decisions. The *Urgenda* court recognized that the Dutch government has a substantial range of discretion within which to act on climate change, but held that this did not negate a duty of care. Canadian courts would likely agree that the existence of discretion alone does not negate a duty of care, but they would go on to say that certain discretionary decisions—namely, policy as opposed to operational decisions—are immune from liability.⁴³

In Canada, government actors are not liable in negligence for policy decisions—that is, decisions that involve the weighing of social, economic, and political considerations to arrive at a course or principle of action.⁴⁴ Government decisions setting (or declining to set) GHG emission reduction targets and timetables, allocating them among sectors or regions, or choosing policy instruments to achieve them, are likely policy decisions that would be insulated from negligence liability in common law Canada. Moreover, if the initial decision to set emission reduction targets is a policy decision, it is hard to imagine a Canadian court holding that a subsequent relaxation of those targets (as was at issue in *Urgenda*) is not also a policy decision.

(c) Other residual policy considerations

Other considerations that could negate a duty of care in Canada include indeterminate liability to an unlimited class of plaintiffs over which the government has no control,⁴⁵ the preferability of a legislative rather than judicial resolution of the problem of climate change,⁴⁶ and possibly the chilling effect such liability could have on Canada’s participation in international climate change negotiations and agreements.⁴⁷

(d) Constitutional rights

Another distinction between *Urgenda* and potential Ontario litigation is the absence of a constitutional right to a healthful environment in Ontario. The *Urgenda* court held that Article 21 of the Dutch constitution, which states “It shall be the concern of the authorities to keep the country habitable and to

⁴¹ *Ibid*, para 41.

⁴² *Cooper*, supra note 36.

⁴³ *Imperial Tobacco*, supra note 38, paras 88-90.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*; *Cooper*, supra note 36.

⁴⁶ Eg *Childs v. Desormeaux*, 2002 CanLII 17070 (ON SC), paras 135-138, *aff’d on other grounds* 2004 CanLII 15701 (ON CA), *aff’d* 2006 SCC 18.

⁴⁷ The *Urgenda* court recognized that a court should exercise restraint in the face of this possibility, but this did not prevent it from holding the government liable in negligence. *Urgenda*, supra note 27, para 4.100.

protect and improve the environment,” imposes a public law duty on the State and indirectly supports the existence of a private law duty of care.⁴⁸ There is no analogous provision in the *Canadian Charter of Rights and Freedoms*.⁴⁹ Moreover, even if government climate change policies were shown to contravene the *Charter*, enactment of an unconstitutional measure does not give rise to a tort action for breach of a duty of care.⁵⁰

(e) International law

Another difference is that the *Urgenda* court gave more weight to international law in determining the government’s duty and standard of care than Ontario courts have to date. The court relied on the European Convention on Human Rights, European Court of Human Rights rulings, various European Union (EU) laws and decisions (including GHG reduction targets and their allocation among EU members), the United Nations Framework Convention on Climate Change (UNFCCC), and numerous principles of customary international law in support of a duty of care.⁵¹ The principles it relied on ranged from well-established to controversial and emerging: the “no harm” principle, the precautionary principle, intergenerational equity, the principle of common but differentiated responsibilities, and the principles of prevention, sustainability and a high level of protection.

International treaties are not automatically part of Canadian law and would not by themselves ground a tort duty of care, though legislation implementing treaty obligations would be relevant to a duty of care analysis. The Supreme Court has held that prohibitive rules of customary international law are automatically part of Canadian common law,⁵² and Canadian courts have used emerging principles of international law, including the precautionary principle, as aids for statutory interpretation.⁵³ But most of the international legal principles invoked in *Urgenda* are not prohibitive⁵⁴ and Canadian courts have not generally given norms of customary international law legal force in domestic law unless they are incorporated into a statute.

2. Commonalities and Prospects

Notwithstanding these distinguishing features, the *Urgenda* decision is likely to be an important precedent for climate change litigation in Ontario in several respects.

(a) Nature and urgency of the problem

First, the *Urgenda* decision’s forceful endorsement of the global nature and pressing urgency of climate change could reinforce an Ontario plaintiff’s case for government or private sector liability. The *Urgenda* court held that the global scale of the problem and of the task facing the Netherlands made

⁴⁸ *Ibid*, paras 4.36 & 4.52.

⁴⁹ Contrast the Quebec *Charter of Human Rights and Freedoms*, CQLR c C-12, s 46.1 (“Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law”).

⁵⁰ *Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957.

⁵¹ The court held that although the international law does not impose a private law duty directly on the state, it helps determine the scope of its private law duty, the standard of care, and the degree of discretion afforded to the government in meeting its private law duty. *Urgenda*, supra note 27, paras 4.42-4.44, 4.52.

⁵² *R v Hape*, 2007 SCC 26.

⁵³ Eg *114957 Canada Ltée (Spray-Tech, Société d’Arrosage v Hudson (Town))*, [2001] 2 SCR 241.

⁵⁴ Of the customary principles cited by the court, only the “no harm” principle is clearly prohibitive.

international law and policy centrally relevant to the existence and scope of a duty of care.⁵⁵ An imaginative Canadian court might be similarly persuaded to give international law and policy substantial weight in establishing a duty and standard of care due to the global nature of the problem.

The Dutch court went on to hold that the need for a precautionary and preventive approach, the inadequacy of current measures, the urgent need for rapid mitigation, the likelihood of severe harm, the ability and responsibility of developed countries to take the lead, and the relative benefits of early action—all of which were acknowledged by the international community and the Dutch government—impose a duty on the state to take rapid and ambitious action to reduce Dutch GHG emissions.⁵⁶ It held that since “there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures.”⁵⁷

Elaborating on these themes, the court wrote:

Since it is an established fact that the current global emissions and reduction targets of the signatories to the UN Climate Change Convention are insufficient to realise the 2° target and therefore the chances of dangerous climate change should be considered as very high – and this with serious consequences for man and the environment, both in the Netherlands and abroad – the State is obliged to take measures in its own territory to prevent dangerous climate change (mitigation measures). Since it is also an established fact that without far-reaching reduction measures, the global greenhouse gas emissions will have reached a level in several years, around 2030, that realising the 2° target will have become impossible, these mitigation measures should be taken expeditiously. After all, the faster the reduction of emissions can be initiated, the bigger the chance that the danger will subside. ... The court also takes account of the fact that the State has known since 1992, and certainly since 2007, about global warming and the associated risks. These factors lead the court to the opinion that, given the high risk of hazardous climate change, the State has a serious duty of care to take measures to prevent it.⁵⁸

All of this led the court to conclude that the Dutch government has a duty to reduce GHG emissions as fast and as deeply as possible:

in view of the latest scientific and technical knowledge it is the most efficient to mitigate and it is more cost effective to take adequate action than to postpone measures in order to prevent hazardous climate change. The court is therefore of the opinion that the State has a duty of care to mitigate as quickly and as much as possible.⁵⁹

⁵⁵ *Urgenda*, supra note 27, para 4.55.

⁵⁶ *Ibid*, para 4.56 ff.

⁵⁷ *Ibid*, para 4.74.

⁵⁸ *Ibid*, para 4.65.

⁵⁹ *Ibid*, para 4.73.

(b) Reduction paths and the carbon budget

The *Urgenda* case stands for the proposition that not all paths toward stabilizing and reducing atmospheric GHG concentrations are equal. Reducing emissions quickly is preferable to reducing them gradually even if the final emission level is the same, because a slower reduction trajectory results in a larger accumulation of GHGs in the atmosphere and brings the climate system closer to the 450 ppm and 2C targets quicker. Moreover, it increases the risk of overshooting the targets, unleashing severe impacts and passing unknown tipping points. The court thus held that a policy that aims to achieve the 2C target by postponing action now and promising deeper cuts later does not meet the standard of care.⁶⁰ This holding could be ammunition for an Ontario climate change plaintiff.

Just as important, an Ontario plaintiff could cite the court's endorsement of the concept of a carbon budget: the total amount of carbon that can be emitted into the atmosphere to keep achievement of the 2C limit likely. The United Nations Environment Program (UNEP) and the IPCC have calculated the available carbon budget and regularly track the gap between this budget and countries' commitments. They project substantial carbon budget deficits (ie emissions in excess of the budget) in 2020 and 2030. The Dutch court relied upon the global carbon budget and these projected deficits in establishing the standard of care and in finding that the Netherlands had not met it.⁶¹

(c) Foreseeability of harm

Ontario plaintiffs may find the *Urgenda* decision useful for establishing foreseeability of harm, which will be a central issue in many potential types of climate change lawsuits in Ontario. Establishing what a defendant knew or ought to have known about the risks of climate change, and when, will be important. The *Urgenda* court found that the State "has known since 1992, and certainly since 2007 [the date of the IPCC's Fourth Assessment Report], about global warming and the associated risks."⁶² What the government knew or ought to have known was based on the following findings of fact, which reflect an international scientific and policy consensus that the Dutch government has accepted:

- Climate change is already occurring and there is a substantial threat of further change;
- Climate change threatens to have serious and irreversible consequences for humans and the environment;
- The likelihood of such consequences is high, if mitigation measures are not taken;
- To avoid the worst consequence of climate change, global average surface temperature rise from preindustrial times must not exceed 2C;
- For achievement of this target to be likely (66% probability), atmospheric GHG concentrations must be limited to 450 ppm;
- To realize the 450 ppm scenario, Annex I (industrialized) countries as a group need to reduce their emissions in a range of 25-40 per cent below 1990 levels by 2020;
- Current pledges and emissions of UNFCCC members are insufficient to realize the 2C target;
- The likelihood of dangerous climate change is therefore very high;

⁶⁰ *Ibid*, para 4.85.

⁶¹ See especially *ibid*, paras 2.30, 2.32, 4.30 & 4.32.

⁶² *Ibid*, para 4.65.

- In the absence of far-reaching reduction measures, GHG emissions will soon reach a level at which achievement of the 2C target becomes impossible;
- Climate change mitigation measures should therefore be taken as quickly as possible.⁶³

These factual findings could be influential in a Canadian court, since the Canadian government—like the Dutch—has endorsed the IPCC’s key findings (the IPCC Summaries for Policymakers, for example, are carefully vetted by governments) and the relevant UNFCCC decisions, including the 2C goal.⁶⁴

(d) Causation

As mentioned in Section I.A.2, above, causation is likely to be a big issue in most climate change litigation. Individual emitters and even entire industry sectors or countries might argue that their contribution is so small and the phenomenon of climate change so diffuse that their action or inaction cannot be said to cause any particular plaintiff’s harm. The *Urgenda* court rejected this contention decisively.

The Dutch government argued that it does not cause climate change because, first, individuals and companies—not the government—emit GHGs; and second, that collective Dutch emissions (representing around 0.5% of global emissions) are too small to affect climate change. The court ruled, first, that even if the government does not itself emit GHGs, it has the power to control collective Dutch emission levels; and second, all emissions, however small, contribute to climate change:

It is an established fact that climate change is a global problem and therefore requires global accountability. ... The fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures in view of the State’s obligation to exercise care. After all, it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase of CO₂ levels in the atmosphere and therefore to hazardous climate change.⁶⁵

The court found further that climate change is occurring partly due to Dutch GHG emissions and that adverse impacts are already being felt in the Netherlands.⁶⁶ Based on the foregoing considerations, the court concluded:

it follows that a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch living

⁶³ *Ibid*, paras 4.63-4.65.

⁶⁴ The Conservative federal government embraced the 2C goal contained in the UNFCCC’s 2010 Cancun Agreements. Laura Payton, “China’s climate concession won’t move Canada on Kyoto,” CBC News (December 5, 2011), <http://www.cbc.ca/news/politics/china-s-climate-concession-won-t-move-canada-on-kyoto-1.1000063> (last accessed January 31, 2016). The Liberal federal government elected in 2015 has gone farther, endorsing a 1.5C goal at the COP21 conference in Paris in December, 2015. Bruce Cheadle, “COP21: Catherine McKenna endorses goal of limiting warming to 1.5 degrees C,” CBC News (December 8, 2015) <http://www.cbc.ca/news/politics/mckenna-cop21-paris-goal-1.3355409> (last accessed January 31, 2016).

⁶⁵ *Urgenda*, supra note 27, para 4.79.

⁶⁶ *Ibid*, para 4.89.

climate. The fact that the current Dutch greenhouse gas emissions are limited on a global scale does not alter the fact that these emission contribute to climate change.⁶⁷

In effect, the *Urgenda* court took the same approach to multiple causation as Andrew Gage proposes for public nuisance and the courts already appear to apply to riparian rights. It is not clear how an Ontario court would receive this logic. The result will likely depend on the cause of action, the magnitude of the defendants' emissions, the type of harm alleged (the logic may be more convincing, for example, if the alleged harm is to the atmosphere itself rather than to person or property), and whether the court believes the criteria for application of a "material contribution" rather than "but-for" test are present.⁶⁸

(e) Justiciability

Justiciability of disputes related to government climate change policy has already proven to be an obstacle to climate change litigation in Canada.⁶⁹ The *Urgenda* decision provides future plaintiffs with an argument in favour of justiciability of such disputes. The court held that although the case raised broad social and political issues, it was essentially about the provision of legal protection and the application of law to settle a legal dispute. It therefore fell within the court's legitimate role of reviewing the lawfulness of elected political bodies' actions, which is an essential feature of the rule of law.⁷⁰ The court concluded that "[t]he task of providing legal protection from government authorities, such as the State, pre-eminently belong[s] to the domain of a judge."⁷¹

Whether this precedent would be persuasive to Canadian judges remains to be seen, but plaintiffs in an *Urgenda*-style case against a government defendant would likely face an uphill battle on this issue.

(f) Standard of care

Assuming that an Ontario plaintiff overcomes the obstacles to establishing a duty of care or pleads a tort such as nuisance, the *Urgenda* decision could be relevant to establishing the standard against which a defendant's conduct will be measured. Following *Urgenda's* lead, a plaintiff could point to the international scientific and policy consensus and principles of international law mentioned earlier as evidence of the appropriate standard. The court held, for example, that a defendant may not postpone cost-effective actions only because of a present lack of scientific certainty about their effects, and that it must base its action on the principle that prevention is better than cure.⁷²

The court also held that the principle of fairness requires developed countries to make "a more than proportional contribution to reduction, in view of a fair distribution between industrialised and developing countries" and that the government, "in choosing measures, will also have to take account of

⁶⁷ *Ibid*, para 4.90.

⁶⁸ *Resurfice Corp v Hanke*, [2007] 1 SCR 333.

⁶⁹ See *Friends of the Earth Canada v Canada (Minister of the Environment)*, 2008 FC 1183, aff'd 2009 FCA 297, leave to appeal refused [2009] SCCA No 497.

⁷⁰ *Urgenda*, supra note 27, paras 4.95-4.98.

⁷¹ *Ibid*, para 4.97.

⁷² *Ibid*, para 4.76.

the fact that the costs are to be distributed reasonably between the current and future generations.”⁷³ And if “it turns out to be cheaper on balance to act now, the State has a serious obligation, arising from due care, towards future generations to act accordingly.”⁷⁴

The court went beyond these qualitative considerations to quantify the standard of care as requiring at least a 25 percent reduction in Dutch GHG emissions below 1990 levels by 2020.⁷⁵ In doing so the court emphasized that the Netherlands has accepted the international consensus, reflected in the Cancun Agreements of 2010, that to avoid the worst impacts of climate change, Annex I (developed) countries as a group would have to reduce emissions in a range of 25-40 percent below 1990 levels by 2020.⁷⁶

The fact that Canada has also accepted the Cancun Agreements could help an Ontario plaintiff establish 25-40 percent below 1990 levels by 2020 as the applicable standard of care. In Canada’s national statement to COP17 in Durban in 2011, Environment Minister Peter Kent stated that “the Cancun Agreements ... provide a sound conceptual and practical framework to advance our collective engagement to address climate change” and that “Canada supports the blueprint put forward at Cancun.”⁷⁷ That said, actual Canadian targets have been less ambitious than the Cancun target for Annex I countries. A plaintiff might argue that Canadian governments’ actual targets establish the requisite standard and that they have failed even to meet these less ambitious targets.

The preceding considerations are relevant mostly for government defendants, but the court also identified factors that would apply to both public and private sector defendants. These factors include cost-effectiveness, the preferability of mitigation over adaptation, the availability of technical fixes, and the fluid nature of the standard of care.

First, the court found that early action is more cost-effective than delayed action and that the defendant had not shown that its backtracking on GHG reduction targets and timetables was based on cost-benefit considerations.⁷⁸

Second, the court held forcefully that mitigation of climate change is better than adaptation to its harmful effects, and that the standard of care requires a focus on mitigation, first and foremost.⁷⁹

Third, the court ruled that trusting in future CO2 capture and storage technology does not exhibit due care because it cannot be implemented quickly enough to solve the problem.⁸⁰

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, para 4.86.

⁷⁶ *Ibid.*, para 4.31(ii), referring to Conference of the Parties to the UNFCCC, Decision 1.CMP.6, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session, UN Doc FCCC/KP/CMP/2010/12/Add.1 at 3, available at <http://unfccc.int/resource/docs/2010/cmp6/eng/12a01.pdf> (last accessed January 31, 2016).

⁷⁷ Peter Kent, Minister of Environment, “Canada’s climate change statement in Durban” (December 7, 2011), available at <http://www.cbc.ca/news/world/canada-s-climate-change-statement-in-durban-1.1024891> (last accessed January 31, 2016).

⁷⁸ *Urgenda*, supra note 27, para 4.67-4.70.

⁷⁹ *Ibid.*, paras 4.71, 4.73 & 4.75.

Finally, the case stands for the proposition that the continuing rapid evolution of scientific understanding should not prevent a court from determining the standard of care. The standard of care may be a moving target, but current scientific knowledge is sufficient to identify the minimum action needed to demonstrate due care.

(g) Inadequacy of historic and current actions

Finally, a central theme of *Urgenda* is that there comes a point when governments should be legally accountable for their failure to do what they know must be done to combat a real and present danger to their citizens and environments. The court referred repeatedly to the Dutch government's and the international community's acknowledgement of the inadequacy of current climate change policies to achieve the goal of limiting average temperature rise to 2C.⁸¹ The case shows in detail how the Netherlands and other countries understood the nature and magnitude of the risks of climate change and embraced the goals needed to manage these risks, yet then pursued policies and implemented measures they knew were inadequate to achieve the agreed goals.

This theme resonates in Canada, where a succession of federal governments, starting with the Liberal government that signed the Kyoto Protocol in 1997, has been accused of "over-promising and under-delivering."⁸²

⁸⁰ *Ibid*, para 4.72.

⁸¹ Eg *ibid*, para 4.84.

⁸² Cheadle, *supra* note 64.