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, 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 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 created by third parties in its value chain, especially "where these emissions form the majority of a company's carbon dioxide (CO_2) 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, 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 NGO 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.
- 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 is a case in which ClientEarth, as a shareholder of Shell, is taking 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.[18] 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".[19] ClientEarth has 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.

The complaint states that Shell faces a number of material climate-related risks arising from the physical impacts of the climate crisis: its facilities and infrastructure are heavily exposed to extreme weather events and rising sea levels caused by climate breakdown, including offshore drilling platforms, and power stations and refineries located in coastal areas.[20] 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 future.[21]

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.[22]

ClientEarth's claim is that the Shell board's mismanagement of climate risk puts directors in breach of their duties under the UK *Companies Act,*[23] which requires 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.[24]

Absent action by the directors and officers, ClientEarth will seek to commence a 'derivative action' against Shell in the UK in relation to the alleged breaches of duty by the Board, attempting to hold the directors personally liable for failure to properly prepare for the net-zero transition, and to pursue the board for wrongs allegedly committed against the company.[25]

ClientEarth hopes to persuade or compel Shell's board to strengthen its management of the material and foreseeable climate risk facing the company.[26] If the court action is ultimately successful, the court could require Shell's board to take certain steps in its management of the company, such as truly aligning the company's strategy with the goals of the Paris Agreement. The court could also declare the directors personally liable for breach of their legal duties.

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.

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.

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.

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, 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,[27] 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.[28]

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.[29]

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 it is insufficiently ambitious, and 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.[30] The Attorney General of Ontario sought to strike out their application on the ground that it has no reasonable prospect of success.[31]

Justice Carole Brown of the Ontario Superior Court applied the three-part test for granting public standing, as noted above.[32] 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.[33]

The Court held that the applicants met the test for standing on behalf of future generations.[34] 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.[35] 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.[36]

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 through the *Cap and Trade Cancellation Act*[37] 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 Climate Change Act by Ontario are governmental actions that are reviewable by the court for compliance with the *Charter*.[38] 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.[39]

The Court in Mathur noted that in the *Carbon Pricing Reference,* the Court of Appeal for Ontario 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.[40]

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.[41] The Court held that this application is *prima facie* justiciable, as the applicants are challenging very specific governmental actions and legislation.[42] The Court held that the application engages each of the section 7 *Charter* rights of life, liberty, and security, [43] the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice.[44] The Court held that it was not able to find, at this juncture, that the application has no reasonable prospect of success.[45]

The Court further held that the applicants have standing on behalf of their generation and of future generations of Ontarians, as they are all involved with various climate change initiatives and activism.[46] 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.[47] 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.[48]

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 reviewable by the courts.

- **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.

- **Remedies:** It is the first case to be heard on merits in Canada, merits' hearings were in September 2022 and judgment pending. The availability of mandatory relief in the circumstances is at issue.

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.[49]

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.[50]

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 Court found that, by failing to prevent deforestation, a threat to the future generations' fundamental rights had been established.[51] 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.[52]

The 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.[53]

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.

Pabai and Kabai v Commonwealth of Australia

The third example is a recent Australian case, Pabai and Kabai v Commonwealth of Australia.[54] A class action was commenced in 2021 by two Indigenous leaders from the Torres Strait Islands against the Australian government.[55] 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.[56] They claim that, in fulfilling its duty, the Commonwealth must have regard to the best available science in relation to climate change.[57]

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.[58] 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 islands uninhabitable.[59]

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.[60]

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 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.[61]

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, who they contend 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.[62]

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.[63] 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.[64]

The trial has been set for June 2023, and the applicants were given leave in July 2022 to file, serve, and rely on an amended statement of claim.[65] The Court held: "There 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."[66]

The issue for trial is whether the Commonwealth has legal responsibility for that reality, the Court noting there is considerable urgency in determining this matter.[67] 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.[68]

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.[69]
- The decision is also signalling the expectation of transparency and cooperation. The Court held: "No 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."[70]

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 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."[71] 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.[72]

For example, this year, 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.[73] 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 in the future.[74] Keurig settled a similar greenwashing case in the US for more than US$10 million dollars.[75]

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.[76] 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".[77] 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".[78] 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.[79] 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 environmental claims must be clear and that unqualified claims could mislead if they omit significant information.[80]

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.[81] 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.[82] The Annual Report stated that HSBC intends to continue funding thermal coal mining and power production to some degree until 2040.[83]

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.[84] 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.[85] 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.

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.[86] 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 *Act.*[87]

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.[88] The complaint 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.[89] Despite committing in February 2021 to net zero in its lending by 2050, RBC's lending and underwriting to 100 key coal, oil, and gas companies expanding fossil fuels increased by $3.5 billion (85%) between 2020 and 2021.[90]

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 that 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.[91] The application alleges that RBC's representation is misleading and false because RBC is providing what is 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."[92]

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.
>
> 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.[93]

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.[94]

The Competition Bureau of Canada advised the applicants on 29 September 2022 that it has opened an investigation,[95] 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.

This third avenue seems to have been largely untapped, yet may contain much potential for advancing the public interest. Regulatory agencies, by their very natures 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.

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*,[96] 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.[97] 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.[98]

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.

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,[99] 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: https://youtu.be/EJdZ1OCxkjM.

Thank you.

Janis Sarra

Endnotes

[1] CTV News, Hurricane Fiona caused CA$660 million in insured damage: initial estimate, Oct. 19, 2022, Canadian Press, Fiona caused estimated $660 million in insured damage | CTV News.

[2] BC Government, "Wildfire Season Summary" (2022), Wildfire Season Summary - Province of British Columbia (gov.bc.ca); Janis Sarra, "Enhancing Effective ESG and Climate Governance in Pension Fund Oversight", (11 May 2022), Enhancing Effective ESG and Climate Governance in Pension Fund Oversight - Canada Climate Law Initiative (ubc.ca).

[3] Vereniging Milieudefensie et al v Royal Dutch Shell plc, Milieudefensie et al. v. Royal Dutch Shell plc. - Climate Change Litigation (climatecasechart.com).

[4] *Vereniging Milieudefensie et al v Royal Dutch Shell plc,* Hague District Court Judgment 26 May 2021**,** 20210526_8918_judgment-1.pdf (climatecasechart.com). The Court wrote: "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* at 4.5.7.
[11] *Ibid* at 4.1.4.
[12] *Ibid* at 4.4.39.
[13] Notice of Appeal (22 March 2022).
[14] Letter re Shell's actions and communications in response to the judgment of the District Court of The Hague and the potential exposure of directors to personal liability towards third parties (25 April 2022), KM_C75922042216510 (climatecasechart.com).
[15] *Vereniging Milieudefensie et al v Royal Dutch Shell plc,* note 4 at 4.3.5 – 4.2.7.
[16] *Ibid* at 4.4.8, 4.4.10, and 4.4.28.
[17] R Yalden *et al*, *Business Organizations: Practice, Theory and Emerging Challenges*, (Toronto: Emond, 2017).
[18] ClientEarth, About the Claim, Redirecting Shell | ClientEarth.
[19] Our mission | ClientEarth. It has 168 currently active cases globally.
[20] ClientEarth shareholder litigation against Shell's Board.
[21] ClientEarth, "We're taking legal action against Shell's Board for mismanaging climate risk" (15 March 2022), We're taking legal action against Shell's Board for mismanaging climate risk | ClientEarth (hereafter ClientEarth).
[22] *Ibid.*
[23] UK *Companies Act 2006,* 2006, c 46.
[24] ClientEarth, note 21. Section 172(1), UK *Companies Act,* note 23.
[25] ClientEarth, note 21.
[26] *Ibid.*
[27] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.
[28] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45, [2012] 2 SCR 524 at paras 2, 35.
[29] Ecojustice, "Mathur *et al* v Her Majesty in Right of Ontario", (2022), #GenClimateAction: Mathur et. al. v. Her Majesty in Right of Ontario (ecojustice.ca).
[30] *Mathur et al v Ontario,* 2020 ONSC 6918 (Ont SCJ) (hereafter *Mathur*).
[31] Pursuant to Rule 21 of the Rules of Civil Procedure, RRO 1990, Reg 194.
[32] On a preliminary motion to strike for lack of standing, the court should be prepared to terminate the application only in "very clear cases, *Mathur,* note 30 at para 240. The three-part test is set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at paras 2, 35; *Mathur*, note 30 at para 241.
[33] *Mathur,* note 30 at para 243.
[34] *Ibid* at para 250.
[35] *Ibid* at para 250.
[36] *Ibid* at para 250.
[37] *Cap and Trade Cancellation Act,* 2018, SO 2018, c 13
[38] *Mathur,* note 30 at para 266.
[39] *Ibid* at paras 62-68. At para 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 *Cancellation Act* suggests that they are more than just internal ministerial policy guidelines."
[40] *Ibid* at para 97.
[41] *Ibid* at paras 103, 104, citing As stated in *Canada (Auditor-General) v. Canada (Minister of Energy, Mines & Resources)*, 1989 CanLII 73 (SCC), [1989] 2 SCR 49, "[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", at 90-91.
[42] *Mathur,* note 30 at paras 132, 140.
[43] *Ibid* at para 147.
[44] *Ibid* at paras 145, 146, citing *Bedford v. Canada (Attorney General)*, 2012 ONCA 186, 109 OR (3d) (Ont CA).
[45] *Ibid* at para 237.
[46] *Ibid* at paras 238, 239.
[47] *Ibid* at para 251.
[48] *Ibid* at para 253.
[49] *DeJusticia (Rodríguez Peña and others) v Colombia,* Supreme Court of Colombia, (5 April 2018) STC4360-2018, No 11001-22-03-000-2018-00319-01.
[50] *Ibid.*
[51] *Ibid.*

[52] *Ibid.*
[53] *Ibid.*
[54] Pabai & Kabai v Commonwealth of Australia, VID622/2021 (Federal Court of Australia) Pabai & Anor v Commwealth of Australia: Online File (fedcourt.gov.au).
[55] 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
[56] Concise Statement No 622 of 2021 Federal Court of Australia District Registry: Victoria Division: General PABAI First Applicant GUY PAUL KABAI Second Applicant COMMONWEALTH OF AUSTRALIA (31 March 2022), at 24, 20220331_VID6222021_na-1.pdf (climatecasechart.com) (hereafter Concise Statement).
[57] *Ibid* at 24.
[58] *Ibid* at 15.
[59] *Ibid* at paras 17, 18.
[60] *Ibid.*
[61] *Ibid* at paras 20-23.
[62] Judgment of Justice Mortimer, Justice Mortimer (18 July 2022), Pabai v Commonwealth of Australia [2022] FCA 836 (fedcourt.gov.au).
[63] *Ibid* at paras 4, 31.
[64] *Ibid* at paras 5, 6.
[65] *Ibid* at para 17.
[66] *Ibid* at para 28.
[67] *Ibid* at para 29.
[68] *Ibid* at paras 30-32.
[69] *Ibid* at para 37.
[70] *Ibid* at para 33.
[71] *Competition Act,* RSC, 1985, c C-34, section 1.1.
[72] 74.01 (1) 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, *ibid.*
[73] 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), https://www.canada.ca/en/competition-ureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html.
[74] *Ibid.*
[75] *Smith v Keurig Green Mountain, Inc* (ND Cal July 8, 2022) US 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.
[76] HSBC UK Bank plc - ASA | CAP.
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*
[80] Committee of Advertising Practice (CAP) Code. In the UK, the ad industry writes the rules (through CAP) that advertisers have to stick to, About the ASA and CAP - ASA | CAP. See also UK government, Consumer Protection from Unfair Trading Regulations - businesses: OFT979 Regulation, Consumer Protection from Unfair Trading Regulations - businesses: OFT979 - GOV.UK (www.gov.uk).
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.* The ASA held that the ads breached CAP Code (Edition 12) rules 3.1 3.3 (Misleading advertising), and 11.1 (Environmental claims).
[86] Kukpi7 Judy Wilson, Eve Saint, Chloe Tse, Jennifer Roberge, Jennifer Cox, and Richard Brooks, supported by Ecojustice and Stand.earth, 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), 2022-04-14-Complaint-to-Competition-Bureau-re -RBC-climate-representations.pdf (ecojustice.ca) (hereafter Application to Competition Bureau). See also Members of the public submit complaint claiming RBC advertising on climate action is misleading - Ecojustice.

[87] *Competition Act,* note 71.

[88] Application to Competition Bureau, note 86 at 3.1.2.

[89] *Ibid* at 3.3.1.A.

[90] *Ibid.*

[91] James Bradshaw, "Competition Bureau launches inquiry into RBC's green advertising", (11 October 2022), *The Globe and Mail,* Competition Bureau launches inquiry into RBC's green advertising - The Globe and Mail.

[92] Application to Competition Bureau, note 86 at 3.3.2.

[93] *Ibid* at Part IV.

[94] *Ibid* at Part IV.

[95] Competition Bureau of Canada, Notice of Inquiry Commencement into Royal Bank of Canada, (29 September 2022), Microsoft Word - 2022-09-22 DRAFT Notice of Inquiry Commencement.docx (ecojustice.ca).

[96] *Roncarelli v Duplessis*, [1959] SCR 121, [1959] SCJ No 1, at 140, 143. In that case, 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.

[97] *Tesla Motors Canada ULC v Ontario (Ministry of Transportation,* 2018 ONSC 5062, 144 OR (3d) 701 (Ont SCJ).

[98] *Roncarelli v Duplessis,* note 96 at 143.

[99] Benjamin Franta, "What Big Oil knew about climate change in 1959", (3 November 2021), *GreenBiz,* What Big Oil knew about climate change in 1959 | Greenbiz, citing a transcript from a symposium, Energy and man : a symposium : Columbia University. Graduate School of Business : Free Download, Borrow, and Streaming : Internet Archive; see also B Franta, "On its 100th birthday in 1959, Edward Teller warned the oil industry about global warming", *The Guardian,* On its 100th birthday in 1959, Edward Teller warned the oil industry about global warming | Climate crisis | The Guardian.