THE NETHERLANDS v URGENDA FOUNDATION: LESSONS FOR USING INTERNATIONAL HUMAN RIGHTS LAW IN CANADA TO ADDRESS CLIMATE CHANGE

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I. INTRODUCTION: *URGENDA* AND GLOBAL ACTION ON CLIMATE CHANGE

In a decision hailed as the "'Strongest' Climate Ruling Yet,"[1] on December 20, 2019, the Dutch Supreme Court upheld the first court order for a government to address the threat of climate change by reducing its greenhouse gas ("GHG") emissions by a specified level within a specified time frame.[2] If its reasoning proves persuasive, the Dutch Supreme Court's decision in the appeal of *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation*[3] could offer lessons for litigants in other jurisdictions—including Canada.

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[1] John Schwartz, "In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action", *The New York Times* (20 December 2019), online: <www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html> [perma.cc/3UQ2-GE6K].

[2] Hoge Raad der Nederlanden (High Council of the Netherlands), 20 December 2019, *Urgenda Foundation v The Netherlands (Ministry of Economic Affairs and Climate Policy)*, ECLI:NL:HR:2019:2007, online: *de Rechtspraak* <uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AHR%3A2019%3A2007&fbclid=IwAR1DQ7g-JAD38BAwQH29tEwfdpN1VxYBoMrWuE81vCvZx6EQuj4uJJVpcOw> [perma.cc/NNC8-G9XM] (unofficial English translation) [*Urgenda*], aff'g Gerechtshof Den Haag (Hague Court of Appeal), 9 October 2018, *Urgenda Foundation v The Netherlands (Ministry of Economic Affairs and Climate Policy)*, ECLI:NL:GHDHA:2018:2610, online: <uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> (unofficial English translation) [perma.cc/NDY2-CN92] [*Urgenda* CA].

[3] *Urgenda*, *supra* note 2.

This case digest focuses on the Canadian implications of *Urgenda*—particularly with respect to current attempts to use human rights arguments to require more ambitious and immediate efforts to reduce Canadian GHG emissions. Although the Canadian Arctic (and Indigenous communities residing there) are particularly vulnerable to the threats posed by global climate change,[4] there has not yet been a court decision addressing Canada's continuing failure to meet its successive GHG emissions targets. With pending climate litigation invoking a human rights approach, it is only a matter of time before Canadian courts will be faced with deciding, among other things, whether the *Canadian Charter of Rights and Freedoms* requires governments in Canada to take more substantial and immediate action on climate change.[5] In addition to raising issues like the scope of human rights obligations in the environmental context (including the scope of the right to life and equality rights), these claims will require Canadian courts to explore issues such as the separation of powers between the judicial, and the legislative and executive branches of government and whether the global nature of the threat of climate change allows individual countries like Canada—which are failing to do their part to reduce GHG emissions—to avoid being ordered to do more.

Billed by the United Nations Secretary-General as the "defining issue of our time,"[6] the risk of climate change has been recognized internationally for decades. In 1988, it spurred the creation of the Intergovernmental Panel on Climate Change ("IPCC"), a body of the United Nations with a mandate "to provide policymakers with regular assessments of the scientific basis of climate change, its impacts and future risks, and options for adaptation and mitigation."[7] In 1992, after years of negotiation informed by the work of the IPCC, an

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[4] See e.g. Indigenous and Northern Affairs Canada, "Climate change in Indigenous and Northern communities" (2 April 2019), online: *Government of Canada* <www.aadnc-aandc.gc.ca/eng/1100100034249/1100100034253> [perma.cc/78RY-4PQT].

[5] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[6] António Guterres, "Remarks at High Level Event on Climate Change" (26 September 2018), online: *United Nations Secretary-General* <www.un.org/sg/en/content/sg/speeches/2018-09-26/remarks-high-level-event-climate-change> [perma.cc/NKT3-XBX3].

[7] Intergovernmental Panel on Climate Change, "What is the IPCC?" (30 August 2013) at 1, online (pdf): *IPCC* <www.ipcc.ch/site/assets/uploads/2018/02/FS_what_ipcc.pdf> [perma.cc/97XX-AMDZ].

international treaty entitled the *United Nations Framework Convention on Climate Change* ("*UNFCCC*") was concluded.[8] The *UNFCCC*'s "ultimate objective" is "to achieve … stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[9] Among other things, an initial GHG emissions reduction target was identified[10] for countries listed in Annex I[11] of the *UNFCCC*; however, the Convention did not impose binding GHG emissions targets on states parties or contain an enforcement mechanism.[12] As a framework convention, the principles contained within the *UNFCCC* have helped to guide the development of additional treaties aimed at achieving its objective. More specific, legally-binding GHG emission reduction targets for 2008 to 2012 were established under the *Kyoto Protocol* of 2005 for developed countries listed in Annex I of the Protocol.[13] However, despite these commitments and the ground-breaking nature of the *Kyoto Protocol*, it failed to lead to a significant reduction in global GHG emissions.

In 2015, the *Paris Agreement* was concluded under the *UNFCCC*.[14] The Agreement seeks to assist with implementing and achieving the objective of the *UNFCCC* and requires states parties "to undertake … ambitious efforts"[15]

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[8] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 170 (entered into force 21 March 1994) [*UNFCCC*].
[9] *Ibid*, art 2.
[10] *Ibid*, art 4(2)(b).
[11] See *ibid* (Annex I countries are those that are members of the Organization for Economic Cooperation and Development [excluding Mexico and South Korea] and 12 other countries with economies in transition, Annex I).
[12] See *The Berlin Mandate: Review of the adequacy of Article 4, subparagraph 2(a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up*, FCCC Dec 1/CP.1, UNFCCC COP, 1st Session, 1995, UN Doc FCCC/CP/1995/7/Add.1 (at the first conference of the parties, it was recognized, among other things, in the Berlin Mandate that the target of limiting Annex I countries' GHG emissions to 1990 levels was "not adequate" at 4).
[13] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) [*Kyoto Protocol*]. Facing exceeding its *Kyoto Protocol* target significantly, Canada withdrew from the Protocol in 2012.
[14] *Paris Agreement*, 12 December 2015, CTS 2016/9, art 3 (entered into force 4 November 2016).
[15] *Ibid*.

aimed at realizing the Agreement's purpose of "strengthen[ing] the global response to the threat of climate change, in light of the context of sustainable development and efforts to eradicate poverty."[16] The Agreement requires all states parties to, among other things, set individual nationally determined contributions ("NDCs") aimed at reducing GHG emissions and identifying measures to be taken to adapt to climate change.[17] While the Agreement does not contain a binding legal requirement on countries to reduce their GHG emissions by a specific level, it imposes binding procedural obligations on states parties to "prepare, communicate and maintain" progressive NDCs, which must be registered with the *UNFCCC* secretariat.[18] States parties must also report their efforts under their NDCs to the secretariat.[19]

Despite being notable because they require a transparent commitment by states parties to reduce their GHG emissions, current NDCs are not sufficient for states parties to meet collectively the purpose of the *UNFCCC*.[20] Even more concerning, many countries (including Canada) are not on track to meet the GHG emission targets included in the NDCs to which they have committed.[21] As UN Secretary-General Guterres has lamented, "[s]cientists have been telling us for decades [about the risk of climate change]. Over and over again. Far too many leaders have refused to listen."[22] Backed by the now virtually indisputable threat of climate change and the role that GHG emissions play in contributing to climate change, domestic court decisions following the lead of *Urgenda* could force leaders to not only listen, but to take more meaningful—and timely—action to mitigate the threats posed by climate change.

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[16] *Ibid*, art 2.
[17] *Ibid*, art 3.
[18] *Ibid*, art 4.
[19] *Ibid*.
[20] United Nations Environment Programme, "Emissions Gap Report 2019" (November 2019) at xiii, 25, online (pdf): *UNEP* <wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf> [perma.cc/6CWP-V253] ["Emissions Gap Report 2019"].
[21] *Ibid*.
[22] Somini Sengupta, "U.N. Chief Warns of Dangerous Tipping Point on Climate Change", *New York Times* (10 September 2018), online: <www.nytimes.com/2018/09/10/climate/united-nations-climate-change.html> [perma.cc/2C9C-8QCB].

II. *THE STATE OF THE NETHERLANDS (MINISTRY OF ECONOMIC AFFAIRS AND CLIMATE POLICY) v URGENDA FOUNDATION*

While the Netherlands had previously adopted a GHG emissions reduction target of 30% from 1990 levels by the end of 2020 because it then considered a reduction of 25 to 40% to be necessary to reach the goal of containing global warming to 2°C, in 2011 this target was lowered to 20%.[23] In 2013, the Dutch non-governmental organization Urgenda (a portmanteau of "Urgent Agenda") filed a lawsuit on behalf of residents in the Netherlands seeking an order for the Netherlands to reduce, by the end of 2020, its GHG emissions by 25 to 40% from 1990 levels. Urgenda advanced several causes of action to support its claim, including that the Netherlands had failed to meet its duty of care owed to—and had violated the human rights of—its residents. During the course of the litigation, the Netherlands did not dispute the risk that GHG emissions and resulting climate change pose.

In 2015, while it rejected Urgenda's human rights claims, the Hague District Court decided in favour of Urgenda on the basis of negligence and ordered the Netherlands to reduce its emissions by at least 25% by the end of 2020.[24] In 2018, the Hague Court of Appeal upheld the order of the Hague District Court; however, in doing so, it allowed Urgenda's cross-appeal

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[23] See *Urgenda*, *supra* note 2 at paras 7.4.1–7.4.2.

[24] Rechtbank Den Haag (Court of the Hague), 24 June 2015, *Urgenda Foundation v The Netherlands (Ministry of Economic Affairs and Climate Policy)*, ECLI:NL:RBDHA:2014:714 at paras 4.53–4.93. For a discussion of the lower court decisions in *Urgenda*, *supra* note 2, see e.g. Jolene Lin, "The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. the State of the Netherlands (Ministry of Infrastructure and the Environment)", Note, (2015) 5:1 Climate L 65; Josephine van Zeben, "Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?" (2015) 4:2 Transnational Environmental L 339; Suryapramit Roy, "Situating Urgenda v the Netherlands within Comparative Climate Change Litigation" (2016) 34:2 J Energy & Natural Resources L 165; Benoit Mayer, "The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of the Hague", Case Note, (2018) 8:1 Transnational Environmental L 167; Jacqueline Peel & Hari M Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7:1 Transnational Environmental L 37.

asserting that its claim could succeed based on the Netherlands' human rights obligations.[25]

The case was appealed to the Dutch Supreme Court. At the Supreme Court, the Netherlands argued that Articles 2 and 8 of the European *Convention on the Protection of Human Rights and Fundamental Freedoms* (commonly known as the "European Convention on Human Rights")[26]—which respectively protect the right to life and the right to private and family life—"do not imply an obligation for [the] State to take mitigating or other measures to counter climate change."[27] It also argued that the order was "impermissible" because it would effectively "create legislation and would contravene the political freedom accruing to the government and parliament and, thus, the system of separation of powers."[28] The Netherlands' Procurator General advised that the appeal should be rejected[29] and, ultimately, the Supreme Court did just that: it dismissed the appeal and upheld the Hague Court of Appeal's order that the Netherlands' human rights obligations require it to reduce its GHG emissions by at least 25% by the end of 2020.

a. Climate change as a "real and immediate" threat to human rights

Whether human activities and the release of GHG contribute to climate change was not disputed in *Urgenda*. Similarly, the Netherlands agreed that an international consensus exists that dire consequences will follow if the Earth warms by more than 2°C (and possibly even 1.5°C) from "pre-industrial levels"[30] and that there may be a "tipping point … result[ing] in abrupt climate change, for which neither mankind nor nature can properly prepare."[31] In light

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[25] *Urgenda* CA, *supra* note 2 at paras 35–45.
[26] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, art 2 (entered into force 3 September 1953) [*ECHR*].
[27] *Urgenda*, *supra* note 2 at para 2.2.3.
[28] *Ibid*.
[29] Procurator General of the Supreme Court of the Netherlands, "Conclusie" (13 September 2019) online: *de Rechtspraak* <uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026> [perma.cc/XZM5-8JXK] (unofficial English translation).
[30] See *Urgenda*, *supra* note 2 at paras 2.1, 4.2.
[31] *Ibid* at para 2.1.

of the consensus regarding the threat of "dangerous climate change"[32] and the need to act,[33] in the Supreme Court's view, the Hague Court of Appeal was correct to find that climate change posed a threat to the residents of the Netherlands capable of supporting violations of Articles 2 and 8 of the *ECHR*.[34] The Supreme Court rejected the arguments of the Netherlands that the threat was not sufficiently specific to violate Articles 2 and 8 of the *ECHR* and that a global threat like climate change is not covered by the Convention.[35]

Relying on jurisprudence from the European Court of Human Rights ("ECtHR"), the Supreme Court reasoned that the obligation to respect the right to life under Article 2 of the *ECHR* requires the Netherlands to take suitable measures to address threats to the right to life, even when the threat derives from environmental hazards that materialize over the long term.[36] This is because Article 2 imposes a "positive obligation to take appropriate steps to safeguard the lives of those within [the state's] jurisdiction"[37] and because the state must "take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk."[38] As the Supreme Court explained, to be considered "real and immediate", the risk must be "both genuine and imminent."[39] It further reasoned that "immediate" should be understood not as requiring "that the risk must materialise within a short period of time," but rather that "the risk in question is directly threatening the persons involved."[40]

The Supreme Court found that Article 8 applies in a similar manner as Article 2, with caselaw from the ECtHR having established that, "when it comes

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[32] *Ibid* at para 4.3.
[33] *Ibid*.
[34] *Ibid* ("the Court of Appeal concluded, quite understandably … that there was 'a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life'. The Court of Appeal also held … that it was 'clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced'" at para 4.7).
[35] *Ibid* at para 5.1.
[36] *Ibid* at para 5.2.2.
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*

to environmental issues, Article 8 … encompasses the positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment."[41] It explained that, "[t]he obligation to take measures exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. That risk need not exist in the short term."[42] The Supreme Court noted that the jurisprudence of the ECtHR had established that positive obligations under Articles 2 and 8 overlap: "In the case of environmentally hazardous activities, the state is expected to take the same measures pursuant to Article 8 … that it would have to take pursuant to Article 2."[43]

Invoking the precautionary principle,[44] the Supreme Court held that the obligations on the Netherlands under Articles 2 and 8 arise "even if the materialisation of … danger is uncertain."[45] As it explained, "[i]f it is clear that the real and immediate risk [of dangerous climate change] … exists, states are obliged to take appropriates steps without having a margin of appreciation."[46] While it noted that "states … have discretion in choosing the steps to be taken," such steps "must actually be reasonable and suitable" in light of the "circumstances of that case."[47] Courts can review actions taken by the state to assess whether they are reasonable and suitable,[48] although, in doing so, they must keep in mind that "Articles 2 and 8 … must not result in an impossible or… disproportionate burden being imposed on a state."[49]

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[41] *Ibid* at para 5.2.3.
[42] *Ibid.*
[43] *Ibid* at para 5.2.4.
[44] In international environmental law, the precautionary principle provides that scientific uncertainty regarding the potential for harm does not justify refusing to take action to prevent or mitigate harm. See e.g. United Nations Conference on Environment and Development, *1992 Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (vol I), 31 ILM 874 (14 June 1992) ("Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation", principle 15).
[45] *Urgenda*, *supra* note 2 at para 5.3.2.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid* at para 5.3.3.
[49] *Ibid* at para 5.3.4.

The Court highlighted that it is bound by the Dutch constitution to "apply every provision of the *ECHR* that is binding on all persons" and that it must interpret the *ECHR* in accordance with the jurisprudence of the ECtHR.[50] Extending the ECtHR's jurisprudence to climate change, it found that "no other conclusion can be drawn but that the State is required pursuant to Articles 2 and 8 … to take measures to counter the genuine threat of dangerous climate change if this were merely a national problem"[51] because it is clear that there is a "real and immediate risk" and "that the lives and welfare of Dutch residents could be seriously jeopardised."[52] In light of the precautionary principle, it held that "[t]he mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken."[53]

b. Shared and Individual Responsibility to Act

As the Supreme Court summarized, the Netherlands had argued that it was not obliged to do more than reduce its GHG emissions beyond 20% from 1990 levels as it had previously committed.[54] It supported this position on a number of grounds, including a form of the *de minimis* argument (discussed more fully below), as it asserted that "[t]he recommended extra reduction" in the country's GHG emissions would "have no measurable effect on the global rise in temperature" and "[t]he Netherlands cannot solve the global climate problem on its own."[55]

These arguments proved unpersuasive. The Court found that the Netherlands has an obligation to "do 'its part' in order to prevent dangerous climate change," despite climate change being a "global problem."[56] The Court supported this finding on the basis that, as recognized in the *UNFCCC*, "climate change is a global problem that needs to be solved globally"[57] and "each state

[50] *Ibid* at para 5.6.1.
[51] *Ibid* at para 5.6.2.
[52] *Ibid.*
[53] *Ibid* at para 5.6.3.
[54] *Ibid* at para 3.4.
[55] *Ibid*.
[56] *Ibid* at para 5.7.1.
[57] *Ibid* at para 5.7.2.

has an obligation to take the necessary measures in accordance with its specific responsibilities and possibilities."[58] Invoking the principle of international law that "countries must not cause each other harm," the Court also held that, in the context of climate change and GHG emissions, "each country is responsible for its part and can therefore be called to account in that respect."[59]

The Supreme Court firmly rejected the argument that the Netherlands was relieved of its obligations because climate change is a global threat that the Netherlands alone cannot address. It specifically rejected that (i) "a state does not have to take responsibility because other countries do not comply with their partial responsibility;" and, (ii) the Netherlands could not be held to account because its "own share in global greenhouse gas emissions is very small and … reducing emissions from [its] territory makes little difference on a global scale."[60] As the Court concluded, "acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries['] or its own small share" of GHG emissions on a global scale.[61] In addition, the Court noted that "rul[ing] out" these defences increases the prospect for other countries taking meaningful action on climate change because it allows each country to "be effectively called to account for its share of emissions" and maximizes the potential for "all countries actually making their contribution."[62]

c. 25% by 2020 as a Minimum Individual Emissions Reduction Target

Having found that the Netherlands was obliged under the *ECHR* "to take adequate measures to reduce greenhouse gas emissions from Dutch territory,"[63] the Court considered whether the Netherlands was taking adequate measures—and concluded it was not. It held that there was an obligation on the Netherlands to reduce its emissions by at least 25% by the end of 2020. This finding was not

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[58] *Ibid* at para 5.7.3.
[59] *Ibid* at para 5.7.5.
[60] *Ibid* at para 5.7.7.
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid* at para 6.1.

based on the fact that there is an unequivocally clear international obligation on countries to meet this target (currently, there is not), but, rather, because "there is a high degree of international consensus on the urgent need for [*UNFCCC*] Annex I countries to reduce greenhouse emissions by at least 25–40% by 2020 compared to 1990 levels, in order to achieve at least the two-degree target."[64] In the Court's view, this target "must be taken into account when interpreting and applying the ECHR."[65]

The Netherlands argued that the 25–40% target applied to Annex I countries as a group and not on the Netherlands individually; however, the Court concluded that it applied specifically to the Netherlands. In its view, the Netherlands failed to establish "why a lower percentage should apply" to it as an Annex I country—particularly in light of the fact that "the Netherlands is one of the countries [in Annex I] with very high per capita emissions of greenhouse gases."[66]

Significantly, the Court seized on the necessity of acting now, rather than accepting that the Netherlands could meet its obligation by taking less substantive measures in the short-term with the promise of more aggressive action in the future. On this point, the Court rejected the Netherlands' arguments that its 20% reduction target was sufficient because it would meet its obligations through future mitigation[67] and adaptation efforts (or, as the Court phrased it, "whereby measures are postponed for a prolonged period of time"[68]). Since postponing emissions reductions increases the risk of dangerous climate change due to the cumulative effects of GHGs,[69] the Supreme Court held that the Hague Court of Appeal had not erred when it concluded that the Netherlands "has insufficiently substantiated that it would be possible for a responsible policy to

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[64] *Ibid* at para 7.2.11.
[65] *Ibid.*
[66] *Ibid* at para 7.3.4.
[67] *Ibid* at para 7.4.2.
[68] *Ibid* at para 8.3.4.
[69] *Ibid* ("[a]ny postponement of the reduction of emissions therefore means that emissions in the future will have to be reduced on an increasingly large scale in order to make up for the postponement in terms of both of time and size. This means that, in principle, for each postponement of emissions reductions, the reduction measures to be taken at a later date will have to be increasingly far-reaching and costly in order to achieve the intended result, and it will also be riskier" at para 7.4.3).

prevent dangerous climate change to include a greenhouse gas emissions reduction target of less than at least 25% by 2020."[70] As the Supreme Court forcefully noted, to be reasonable, a target of reducing GHG emissions by 25% by the end of 2020 is "an absolute minimum."[71]

The Court was also not satisfied by the Netherlands' promise of future adaptation measures: "although it is correct that the consequences of climate change can be mitigated by taking adaptation measures, it has not been demonstrated or made plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented by such measures."[72] Finally, the Netherlands did not establish that meeting the 25% reduction target would result in an impossible or disproportionate burden on it. In the Court's view, it was significant that the Netherlands had previously adopted a target of 30% and "other EU countries pursue much stricter climate policies" than the Netherlands.[73]

d. Political Discretion and Climate Change Action

Having concluded that the *ECHR* obliges the Netherlands to do its part to combat the threat posed by dangerous climate change and reduce its greenhouse gas emissions by at least 25% by the end of 2020, the Supreme Court considered whether such an order was "impermissible" because it (i) amounted to creating legislation, and (ii) was a political decision outside of the authority of the Dutch courts.[74] The Netherlands' arguments on both points were unsuccessful. First, the Court concluded that "this order does not amount to an order to take specific legislative measures" because it "leaves the State free to choose the measures to be taken in order to achieve a 25% reduction in greenhouse gas emissions by 2020" and "it remains for the State to determine what measures will be taken and what legislation will be enacted to achieve that reduction."[75]

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[70] *Ibid* at para 7.5.1.
[71] *Ibid*.
[72] *Ibid* at para 7.5.2.
[73] *Ibid* at para 7.5.3.
[74] *Ibid* at para 8.1.
[75] *Ibid* at para 8.2.7.

Second, the Court similarly concluded that ordering the Netherlands to reduce its GHG emissions would not result in the judiciary impermissibly wading into the political arena. As the Court recognized, the Dutch government and parliament enjoy "a large degree of discretion to make the political considerations that are necessary" to address climate change; however, the exercise of this discretion is subject to judicial review.[76] Accordingly, it "is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound."[77] Critically, these legal limits include those "arising from the ECHR."[78] As the Supreme Court reiterated, "Dutch courts are obliged under … the Dutch Constitution to apply [the ECHR's] provisions in accordance with the interpretation of the ECtHR" and "[t]he protection of human rights [this] provides is an essential component of a democratic state under the rule of law."[79]

Ultimately, one may arguably see the Court's recognition of the importance of maintaining an appropriate balance between the judicial and legislative branches of government in its underscoring of the "exceptional" nature of this case in its summary of its reasoning:

> This case involves an exceptional situation. After all, there is the threat of dangerous climate change and it is clear that measures are urgently needed. … The State is obliged to do 'its part' in this context. … Towards the residents of the Netherlands … that duty follows from Articles 2 and 8 ECHR, on the basis of which the State is obliged to protect the right to life and the right to private and family life of its residents. … The fact that Annex I countries, including the Netherlands, will need to reduce their emissions by at least 25% by 2020 follows from the view generally held in climate science and in the international community. … The policy that the State pursues since 2011 and intends to pursue in the future … whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this.[80]

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[76] *Ibid* at para 8.3.2.
[77] *Ibid*.
[78] *Ibid* at para 8.3.3.
[79] *Ibid*.
[80] *Ibid* at para 8.3.4.

III. *URGENDA* AND ITS SIGNIFICANCE FOR CANADIAN CLIMATE LITIGATION

There are at least three pending cases in Canada seeking orders for Canadian governments to do more to reduce GHG emissions based on the risk that insufficient climate action poses to human rights: *ENvironnement JEUnesse v Canada (Attorney General)*, *Mathur v Her Majesty the Queen in Right of Ontario*, and *La Rose v Canada*.[81] The Superior Court of Quebec denied certification of *ENvironnement JEUnesse* as a class action; however, this decision is being appealed.[82] Notably, in denying certification, the Court recognized that climate claims based on the *Charter* and the Quebec *Charter of Human Rights and Freedoms* may be justiciable.[83] Canada submitted its statement of defence in *La Rose* in February 2020; some of its arguments reflect those made by the Netherlands in *Urgenda*, as it acknowledges the risk posed by climate change but maintains that its climate change policy is not

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[81] *ENvironnement JEUnesse c Procureur général du Canada* (2018), 500-06-000955-183 (Qc Sup Ct) (Motion for Authorization), online (pdf): S*abin Center for Climate Change Law: Columbia University* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181126_500-06-000955-183_application-2.pdf> [perma.cc/DC76-3SAQ] (unofficial English translation); *Mathur v Her Majesty the Queen in Right of Ontario* (2019), CV-19-00631627 (Ont Sup Ct J) (Notice of Application), online (pdf): *Sabin Center for Climate Change Law: Columbia University* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-casedocuments/ 2019/20191125_CV-19-00631627_complaint.pdf> [perma.cc/SN9N-9L6Z]; *La Rose v Her Majesty the Queen* (2019), T-1750-19 (FC) (Statement of Claim), online (pdf): *Sabin Center for Climate Change Law: Columbia University* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-casedocuments/2019/20191025_T-1750-19_complaint.pdf> [perma.cc/DWU5-XCNF]. Past attempts not based on human rights that sought to hold Canada to its GHG commitments under the *Kyoto Protocol* using its implementing legislation and challenging Canada's withdrawal from the *Kyoto Protocol* failed: See *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183, aff'd 2009 FCA 297; *Turp v Canada (Justice)*, 2012 FC 893.

[82] *ENvironnement JEUnesse c Procureur général du Canada*, 2019 QCCS 2885, online (pdf): *Sabin Center for Climate Change Law: Columbia University* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190711_500-06-000955-183_decision-2.pdf> [perma.cc/M6UJ-BTPX] (unofficial English translation).

[83] *Ibid* at paras 46–78.

reviewable.[84] (The Statement of Defence also describes in detail the actions that the Government of Canada has taken, and plans to take, to address the threat of climate change, from which one may infer that it is prepared to defend its policies as reasonable should the court conclude that the matter is justiciable.[85]) At the time of publication, Ontario had not filed its defence in *Mathur*.

While it is beyond the scope of this case digest to assess how these cases are likely to be decided, there are a number of reasons why *Urgenda* may be significant in Canadian climate litigation.[86] First, *Urgenda* may offer lessons for Canadian litigants because, like the pending Canadian cases, it involved a

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[84] *La Rose v Her Majesty the Queen* (2019), T-1750-19 (FC) (Statement of Defence), online (pdf): *Sabin Center for Climate Change Law, Columbia University* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200207_T-1750-19_reply.pdf> [perma.cc/36F2-NEAP] [*La Rose* (Statement of Defence)] ("climate change is real, measurable, and documented. It is not a distant problem, but one that is happening now and that is having very real consequences on people's lives. Its impacts will get more significant over time" at para 3; "Notwithstanding its global nature, climate change is having a particularly significant impact in Canada … Changes in climate are increasingly affecting Canada's natural environment, economic sectors and the health of Canadians, and climate change is increasingly exacerbating the impacts of other stressors on natural ecosystems in Canada and on the well-being of Canadians" at para 19; "While climate change is a global phenomenon, it has significant and particular impacts on Canada and Canadians" at para 22; "Addressing climate change is the shared responsibility of a multitude of different actors" at para 104; "Only the executive and legislative branches of government may make policy, pass laws and authorize the allocation of public funds" at para 105; "The Plaintiffs' claims fall well outside the realm of permissible review by the courts. The claim does not target any particular law or its application. Rather, in essence, the claim asks the courts to decide whether the executive is governing well and to mandate that Parliament exercise its jurisdiction in a particular manner. Ultimately, these matters are not justiciable, nor do they give rise to any valid causes of action either under the Constitution or pursuant to common law" at para 7).

[85] *Ibid* at paras 36–44, 54–100.

[86] For a detailed analysis of legal issues arising in human rights based Canadian climate litigation, see e.g., Nathalie J Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation under the Canadian Charter's Right to life, Liberty, and Security of the Person" (2018) 42:4 Vt L Rev 689. It should be noted that courts considering *ENvironnement JEUnesse*, *La Rose*, and *Mathur* on their merits will be faced with an additional issue not addressed in *Urgenda*; namely, whether inadequate action on climate change infringes the equality rights younger generations since young people face a disproportionate burden of the negative effects of the government failing to take reasonable steps to address climate change. Such "intergenerational" climate change cases are pending before the courts in a number of countries; see e.g. *Juliana v The United States*, 217 F.Supp.3d, 1224, 83 ERC 1598 (US Dist Ct, Dist Or 2016).

claim based, in part, on the right to life. Second, the Dutch Supreme Court considered a number of defences likely to be raised in Canadian cases, including that it is impermissible for courts to review climate change policies and the *de minimis* contribution to climate change argument.

An issue to note at the outset is that the way in which Canadian courts approach the right to life issue may be different than the Dutch courts due to how international law is received in the Canadian legal system. As noted in *Urgenda*, the *ECHR* applies directly in the Netherlands and Dutch courts are bound to apply the (relatively rich and progressive) jurisprudence of the ECtHR.[87] As such, Urgenda was able to base its claims on the *ECHR*. In contrast to the Netherlands, although Canada is party to a number of international treaties obliging it to respect international human rights within its jurisdiction (including the right to life[88]), Canadian claims need to be based on domestic law—most obviously, the *Charter*. This is because, in Canada, violations of international treaty obligations do not provide a domestic cause of action unless the treaty obligation in question has been implemented into Canadian law, which is generally achieved by passing implementing legislation.[89] International human rights law may nevertheless remain significant in Canadian climate change litigation because the *Charter* may be viewed as implicitly implementing some of Canada's treaty-based international human rights obligations.[90] The Supreme Court of Canada has also recognized repeatedly that the *Charter* should be interpreted so that it provides at least as much protection as binding relevant international human rights law.[91]

In addition, although it has no binding precedential effect in Canada, jurisprudence from bodies like the ECtHR may influence the interpretation of

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[87] *Urgenda*, *supra* note 2 at paras 5.6.1, 8.3.3.
[88] See e.g. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 6 (entered into force 23 March 1976, accession by Canada 19 May 1976).
[89] See e.g. Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed (Irwin Law: Toronto, 2008), ch 7; John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 235.
[90] See e.g. *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193 ("[o]ur *Charter* is the primary vehicle through which international human rights achieve a domestic effect" at para 73); van Ert, *supra* note 89 at 333–35.
[91] See e.g. *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, [1989] SCJ No 45 (QL) at para 23; *R v Hape*, 2007 SCC 26 at para 55.

the *Charter* because non-binding international human rights law may be considered "relevant and persuasive" by Canadian courts when they are interpreting analogous Canadian law.[92] It is worth highlighting how international human rights law can affect the interpretation of the *Charter* because it often goes unaddressed in Canadian litigation; it was initially not raised, for example, by the plaintiffs in *ENvironnement JEUnesse*, although the Quebec Court of Appeal has allowed Amnesty International Canada to intervene in order to present international law arguments in the upcoming appeal.[93] How international human rights law affects the interpretation of the *Charter* could be an important matter. The potential for international human rights law to spur a more expansive interpretation of *Charter* rights will be particularly strong if cases like *Urgenda* represent a new or "emerging consensus"[94] on how international human rights—such as the right to life—are interpreted in the climate change context.

More specifically, *Urgenda* could influence how Canadian courts interpret the *Charter*, including whether climate change poses a recognizable risk to *Charter* rights and, if so, whether Canada is under a positive obligation to mitigate this risk. In *Urgenda*, the Dutch Supreme Court relied on ECtHR caselaw to find that climate change posed a sufficiently "real and immediate risk" for the purposes of the *ECHR* even when the risk "may only materialise in the longer term" and that the Netherlands is under a positive obligation to reduce its GHG emissions on account of the risk.[95] In contrast, the Supreme Court of Canada has not yet recognized that section 7 of the *Charter* imposes positive obligations on the state to protect the right to life.[96] In line with this reasoning,

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[92] See e.g. *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 1987 CanLII 88 at paras 57–60, Dickson CJ, dissenting; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 69 [*SFL*].

[93] *Amnistie internationale Canada c Environnement Jeunesse*, 2020 QCCA 223 at paras 22–27.

[94] See e.g. *SFL*, *supra* note 92 at paras 69, 71–75: the majority of the Supreme Court of Canada used, among other sources, non-binding international human rights law including jurisprudence from the ECtHR to support overturning its prior jurisprudence and recognize that freedom of association under section 2(b) of the *Charter* includes the right to strike.

[95] See *Urgenda*, *supra* note 2 at paras 5.2.2, 5.2.1–5.2.4.

[96] *Gosselin v Québec (Attorney General)*, 2002 SCC 84 ("[s]ection 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles

for section 7 to be violated, there must be a "real or imminent" deprivation of life, liberty, or security of the person in a manner inconsistent with the principles of fundamental justice.[97] It remains to be seen whether the Supreme Court of Canada would (i) recognize that Canada is under a positive obligation to reduce its GHG emissions to avoid infringing section 7, and (ii) adopt an arguably expansive notion of "a real and immediate risk" in line with the reasoning in *Urgenda* and the caselaw of the ECtHR. Given, however, that the Supreme Court of Canada has asserted that the *Charter* ought to be interpreted in a way that provides at least as much protection as binding international human rights law, this may provide an opening for Canadian climate litigation plaintiffs to persuade Canadian courts to follow the reasoning in *Urgenda*. With the UN Human Rights Committee recently finding that Canadian courts have too narrowly interpreted Canada's right to life obligations under the *International Covenant on Civil and Political Rights* by not recognizing positive obligations in the context of healthcare,[98] it may only be a matter of time until the Supreme Court of Canada recognizes that, in certain circumstances, the right to life imposes positive obligations on the state. Given the shift necessary in the approach to the right to life under section 7 of the *Charter*, it may be difficult for current Canadian litigants to convince the judiciary that positive obligations exist in the climate change context; however, the underlying right-to-life argument will be strengthened for future cases if *Urgenda* marks the beginning of a trend in international human rights law of courts recognizing a broader

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of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar. … One day s. 7 may be interpreted to include positive obligations. … It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases" at paras 81–82); see also *La Rose* (Statement of Defence), *supra* note 84 (Canada has argued that section 7 "do[es] not impose positive obligations to legislate or mobilize public resources in any particular way" at para 110).

[97] See *Scott v Canada (AG)*, 2017 BCCA 422, leave to appeal to SCC refused, 2018 CanLII 80680 (SCC).

[98] *Views adopted by the Committee under article 5(4) of the Optional Protocol concerning communication No. 2348/2014*, HRC Dec 2348/2014, UNHRC, 2018, CCPR/C/123/D/2348/2014; *contra Toussaint v Canada (AG)*, 2011 FCA 213; *Toussaint v Canada (AG)*, 2010 FC 810.

understanding of the right to life such that it imposes an obligation on countries to take more meaningful and immediate action against the threat of climate change.

Urgenda may also be significant because the Dutch Supreme Court addressed a number of arguments that will likely be made during the course of Canadian climate litigation and Canadian courts might consider its reasoning persuasive. One such argument is that action on climate change is, ultimately, a matter for the legislative and executive branches of government—and not the courts—to determine. Although this argument was firmly rejected in *Urgenda*, it remains to be seen how Canadian courts—which have tended to show a high degree of deference to the legislative and executive branches of government in the environmental context—will address this issue. It is possible that the Supreme Court of Canada could follow the lead of the Dutch Supreme Court and find that Canada has an obligation under the *Charter* to take reasonable action to address the threat of climate change. Like the Dutch Supreme Court, Canadian courts could be satisfied that, by assessing the reasonableness of Canadian climate policies without mandating the specific measures to be taken, they are providing appropriate deference because the legislative and executive branches would still have the authority (and responsibility) to determine precisely how to meet Canada's climate change obligations.[99]

Canadian climate litigation will also no doubt address the *de minimis* defence, by which the government may attempt to avoid a finding that its climate policies infringe *Charter* rights on the basis that since "Canada [or a province/territory, as the case may be] contributes only a small proportion of global GHG emissions … it is not responsible for resulting harm."[100] Canada has made a form of this argument in *La Rose*, as it has submitted that:

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[99] Canada has committed to a target of reducing its GHG emissions by 30% from 2005 levels by 2030; whether this would be considered "reasonable" in the eyes of Canadian courts to address the threat posed by climate change remains to be seen, as does to what extent Canadian courts may prove willing to scrutinize the adequacy of efforts to meet this target; see Canada, "Canada's 2017 Nationally Determined Contribution Submission to the United Nations Framework Convention on Climate Change" at 1, online (pdf): *UNFCCC* <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Canada%20First/Canada%20First%20NDC-Revised%20submission%202017-05-11.pdf> [perma.cc/7JUU-3VBG].

[100] Chalifour & Earle*, supra* note 86 at 751.

> [e]ven if governments in Canada were to adopt measures that would reduce their share of GHG emissions needed to limit global warming to 1.5 degrees Celsius, this would not, on its own, be sufficient to ensure a reduction of global warming. This is because the rate of warming is dependent on a myriad of external factors, which include the actions of foreign states and other actors involved in the global fight against climate change.[101]

Underlying this argument is the irrefutable fact that, even if it aggressively reduces its GHG emissions, Canada alone is unable to mitigate the risks climate change poses to Canadians. Given the global nature of climate change (in terms of both cause and effect), there may be a strong argument that Canadian action on GHG emissions cannot mitigate the risks related to climate change. But, is it legally significant that what Canada does alone may ultimately have no demonstrable effect on climate change—and therefore on the *Charter* rights of Canadians—because Canada accounts for too small of a proportion of global emissions?

Urgenda suggests that the answer to such a question could be "no". As the Dutch Supreme Court reasoned, climate change is a global threat requiring concerted global action and, while there is a shared global responsibility to combat climate change, there necessarily must be a recognizable and enforceable individual responsibility on each country to do its part. Ultimately, the Dutch Supreme Court's conclusion on this point was bolstered by the facts that the Netherlands emits a disproportionately large share of GHG emissions, it had adopted a less stringent GHG emissions reduction policy than other comparable countries, and it did not show that meeting a higher target would be an undue burden. If similar reasoning is employed by Canadian courts, statistics may be on the side of Canadian plaintiffs and applicants: Canada plays a more significant role in climate change than the Netherlands (by, for example, emitting more carbon dioxide on per capita and total bases[102]), it has committed

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[101] *La Rose* (Statement of Defence), *supra* note 84 at para 113.

[102] In 2014, the most recent year for which the World Bank data is available, Canada emitted 15.2 kt of carbon dioxide per capita and 537,193 kt of carbon dioxide in total, compared to 9.9 kt per capita and 167,303 kt total for the Netherlands; see World Bank, "CO2 emissions (metric tons per capita)" (last visited 30 April 2020), online: *CO2 emissions (metric tons per capita)* <data.worldbank.org/indicator/EN.ATM.CO2E.PC> and World Bank, "CO2

to a lower emissions target than the Netherlands for 2030,[103] it is not on track to meet its target,[104] and Canada ought to be able to "reduce its GHG [emissions] without major economic repercussions."[105] In addition, as Chalifour and Earle have highlighted, "[a]lthough at 1.6%, Canada's emissions as a proportion of global emissions might be argued to be relatively small and thus insignificant, Canada is still among the top ten global emitters of GHGs on an absolute basis, and in the top three on a per capita basis."[106]

IV. CONCLUSION

This case digest has only touched the surface of the ways in which *Urgenda* may be significant to Canadian climate litigation. What is clear is that Canadian courts—like many around the world—will soon be faced with deciding similar issues as the Dutch Supreme Court did in *Urgenda*, including: whether the right to life requires the government to take more meaningful and timely action on climate change; if it is appropriate from a separation of powers perspective for courts to review climate change policies; and whether the concept of an individual but shared global responsibility to address the threat posed by climate change renders the *de minimis* defence unpersuasive.

How Canadian courts handle these issues remains to be determined; however, if *Urgenda* marks the beginning of a trend of domestic courts ordering governments to take more effective and timely action against the threat of

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emissions (kt)" (last visited 30 April 2020), online*: CO2 emissions (kt)* <data.worldbank.org/indicator/EN.ATM.CO2E.KT>.

[103] See Latvian Presidency of the Council of the European Union, "Submission by Latvia and the European Commission on Behalf of the European Union and Its Member States" (6 March 2015) online (pdf): *UNFCC* <www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Austria%20First/LV-03-06-EU%20INDC.pdf> [perma.cc/CNQ8-34VX] (the Netherlands has committed to a 40% reduction by 2030 at Annex).

[104] "Emissions Gap Report 2019", *supra* note 20 at 10–11, 15 (multiple studies have concluded that Canada is on track to miss its target by 15% or more).

[105] Chalifour & Earle, *supra* note 86 at 753, 762–63.

[106] *Ibid* at 752, citing Paul Boothe & Félix A Boudreault, "By the Numbers: Canadian GHG Emissions" (2016) at 4, online (pdf): *Lawrence National Centre for Policy and Management* <www.ivey.uwo.ca/cmsmedia/2112500/4462-ghg-emissions-report-v03f.pdf> [perma.cc/22BZ-NDFZ].

climate change due to their human rights obligations, it may only be a matter of time until climate claims based on human rights prevail in Canada. At the very least, given its ground-breaking nature, in any assessment, *Urgenda* will likely be considered—which, as its legal counsel has asserted, is Urgenda's hope: "These human rights, they're not unique to the Netherlands … We think and expect that other lawyers and courts will be looking at this judgment for inspiration about how to deal with this issue."[107]

[107] Schwartz, *supra* note 1.