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Big Oil Liability in Canada: Lessons from the US and The Netherlands

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The number of nuisance and negligence tort claims in the US against "Big Oil" companies have grown significantly in the last five years. The Netherlands case of Milieudefensie et al v Royal Dutch Shell *represents the first major success of such a claim internationally. While the US cases and* Milieudefensie *demonstrate starkly different approaches as to how to seek accountability from Big Oil for climate change harms, the increasing judicial engagement on these issues may mean the time is right for similar lawsuits in Canada. Three Canadian common law causes of action are examined: nuisance, negligence, and unjust enrichment. Defences and arguments which stem from society's (and any potential plaintiff's) acquiescence and authorization to allow the defendants' conduct may present difficult barriers to success. This paper focuses on these types of defences, and argues that the responsibility of Big Oil for climate change harms should not be completely vitiated even if governments and plaintiffs have acquiesced, authorized, and arguably contributed to our climate crisis.*

Le nombre de plaintes pour nuisance et négligence déposées aux États-Unis contre les « grandes compagnies pétrolières » a considérablement augmenté au cours des cinq dernières années. L'affaire néerlandaise Milieudefensie et al contre Royal Dutch Shell *représente le premier succès majeur d'une telle plainte au niveau international. Si les affaires américaines et* Milieudefensie *témoignent d'approches très différentes quant à la manière de demander des comptes aux grandes compagnies pétrolières pour les dommages causés par les changements climatiques, l'engagement judiciaire croissant sur ces questions pourrait signifier que le moment est venu d'intenter des actions similaires au Canada. Trois causes d'action en common law canadienne sont examinées : la nuisance, la négligence et l'enrichissement sans cause. Les défenses et les arguments qui découlent de l'acquiescement et de l'autorisation de la société (et de tout plaignant potentiel) à permettre la conduite des défendeurs peuvent présenter des obstacles difficiles à surmonter. Cet article se concentre sur ces types de défenses et soutient que la responsabilité des grandes compagnies pétrolières dans les dommages causés par les changements climatiques ne devrait pas être complètement écartée, même si les gouvernements et les plaignants ont acquiescé, autorisé et sans doute contribué à notre crise climatique.*

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Introduction

Starting around 2017, what some authors have called a "second" or "new wave of strategic private climate litigation" began.[1] These lawsuits seek to hold the biggest fossil fuel companies, sometimes called "Big Oil" or the "Carbon Majors" accountable for the GHG emissions released from their extraction activities and the marketing and use of their products, usually in some form of a tort action for damages.

Relying on recent findings about the state of knowledge of Big Oil about the dangers of climate change and the role of fossil fuels in creating that danger, in July 2017, San Mateo Country, Marin County, and the City of Imperial Beach filed suit against Chevron, Exxon, BP, and Shell, as well as a number of other fossil fuel companies, in public and private

1. Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, "If at First You Don't Succeed: Suing Corporations for Climate Change" (2018) 38 Oxford J Leg Stud 841 at 849-850.

nuisance, strict liability, negligence, failure to warn, and trespass.[2] This lawsuit spurred dozens of other municipalities (and also some states) to file similar suits.[3] These suits are reminiscent of previous mass toxic tort cases involving tobacco or asbestos litigation—premised on manufacturer's knowingly and deceptively selling harmful products.

As discussed in this article, these US suits have been stalled in years of jurisdictional challenges and so there have been no rulings on the merits of these cases. However, in April 2019, a court in the Netherlands—which has become a leading jurisdiction in the realm of climate litigation due to the seminal *Urgenda*[4] case—ruled on the merits of a claim brought by a number of environmental NGOs against Shell.[5] The Court found Shell had violated its duty of care and its human rights obligations (in the context of the Dutch civil law equivalent of negligence) and ordered it to reduce its global GHG emissions consistent with the Paris Agreement. These emission cuts included those related to emissions from use of its products by end-users (i.e. consumers).

The explosion of private climate litigation against Big Oil has not yet led to a Canadian suit being launched. However, there is certainly increasing interest, including from municipalities,[6] NGOs,[7] and academics,[8] regarding a Canadian case.

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2. The complaints are near identical. For the San Mateo complaint, see *County of San Mateo v Chevron Corp*, 32 F (4th) 733 (9th Cir 2022) (Complaint, Plaintiff), online: <climatecasechart.com/wp-content/uploads/sites/16/case-documents/2017/20170717_docket-17CIV03222_complaint.pdf> [perma.cc/ESR7-TZUG].

3. The Sabin Center for Climate Change Law at Columbia Law School provides a useful database of the status of all the US common law claims against fossil fuel companies (as well as all other related climate litigation in the US and internationally). See Sabin Center for Climate Change Law, "Climate Change Litigation Databases," online: *Sabin Center for Climate Change Law* <climatecasechart.com> [perma.cc/YAS4-Q2KW].

4. Hoge Raad der Nederlanden [High Council of the Netherlands], the Hague, 20 December 2019, *Urgenda Foundation v The Netherlands (Ministry of Economic Affairs and Climate Policy)*, (2020), ECLI:NL:HR:2019:2007 [*Urgenda*], cited with approval by the Supreme Court of Canada in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 189.

5. Rechtbank Den Haag [District Court of the Hague], 26 May 2021, *Milieudefensie et al v Royal Dutch Shell PLC*, ECLI:NL:RBDHA:2021:5337 [*Milieudefensie*].

6. See e.g. Alyse Kotyk, "Vancouver city council pledges up to $660,000 to legal action against oil companies," *CTV News* (22 July 2022), online: <bc.ctvnews.ca/vancouver-city-council-pledges-660-000-to-legal-action-against-oil-companies-1.5996838> [perma.cc/4AKQ-XNK2]; Alastair Spriggs & Frances Bula, "City of Victoria recommends class-action lawsuit against oil and gas industry," *The Globe and Mail* (21 January 2019), online: <www.theglobeandmail.com/canada/british-columbia/article-city-of-victoria-recommends-class-action-lawsuit-against-the-oil-and/> [perma.cc/9YX7-BVBY].

7. See e.g. Andrew Gage, "Protecting Vancouver from climate change is costly—and Big Oil should help pay" (19 January 2022), online (blog): *Environmental Law Alert Blog* <www.wcel.org/blog/protecting-vancouver-climate-change-costly-and-big-oil-should-help-pay> [perma.cc/KJD7-QSME] [Gage, "Protecting Vancouver"].

8. See e.g. Logan Stack, "Warm Climate, Slow Change: Climate Tort Claims in Canada and the

Given this increasing interest—and spurred by the fact that US cases are for the most part successfully overcoming the first jurisdictional hurdle faced by the plaintiffs in those cases (to keep the claims in State courts), plus the unprecedented success of *Milieudefensie*—the timing may be right for a Canadian claim. After summarizing some of the background facts regarding the state of Big Oil's knowledge of climate change harms which provides the context for the US cases, the article will examine in more detail the US cases, and compare those cases with the *Milieudefensie* case. The aim of this examination is to see if there are any lessons that may be useful to a potential Canadian case. Ultimately, the substantive law applied in these cases will likely have little bearing on a Canadian case. However, these cases do highlight some of the fundamental tensions in climate tort cases—between issues of justiciability and separation of powers and the adaptability of the common law to novel and complex scenarios—and demonstrate that many judges are increasingly willing to engage with the issues and see a role for the courts and the common law in adjudicating civil liability for climate change harms.

The second half of the article will look at three potential causes of action in a Canadian case: nuisance, negligence, and unjust enrichment.[9] The difficulties of applying these causes of action to a climate case against Big Oil will be discussed. Causation may not be the most difficult barrier to overcome in such a case. Rather, defences or arguments relating to a potential plaintiff or the state's general acquiescence and their own contribution to the climate crisis may be more difficult issues to overcome. Even so, the basic theory of liability against Big Oil in tort and equity is sound and intuitively attractive. Fossil fuel companies should be responsible for their share of the costs to mitigate or remedy the harms from the pollution they cause, and particularly given their active concealment of the harms of their products, their share of responsibility is arguably much greater than what they themselves directly emit, and should cover up-stream and down-stream emissions.

I. *Big Oil's knowledge of fossil fuel harms*

Around the year 2017, there was a major push by investigative journalists and advocates to compile and report on the many uncovered records and documents demonstrating that the major oil and gas companies had known

Potential for Legislative Intervention" (2022) 55:1 UBC L Rev 251; Jasminka Kalajdzic, "Climate Change Class Actions in Canada" (2021) 100 SCLR 31, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1411&context=sclr> [perma.cc/V57U-8M2B].

9. The focus is on Canadian common law and this paper does not comment on the viability of an action brought in Quebec's civil law system.

for decades that their products would cause climate change and global warming, and that there would be catastrophic impacts if greenhouse gas ("GHG") emissions were not curtailed.[10]

For example, as early as 1969, an American Petroleum Institute ("API") report commissioned from Stanford Research Institute titled "Sources, Abundance, and Fate of Gaseous Atmospheric Pollutants" found that fossil fuel combustion was likely causing rising atmospheric CO_2, that there was "no doubt" that the potential damage to the environment would be severe, and that significant temperatures changes could occur by the year 2000. Anticipated impacts included melting ice caps, rise in sea levels, and warming oceans. The report recommended working towards bringing these CO_2 emissions under control.[11]

In 1977, an Exxon scientist presented to Exxon management a review of the GHG effect, and later circulated a memorandum dated 1978 based on the presentation and titled *The Greenhouse Effect*, which stated that "current opinion overwhelmingly favors attributing atmospheric CO_2 increase to fossil fuel combustion."[12] He further warned that "man has a time window of five to ten years before the need for hard decisions regarding changes in energy strategies might become critical."[13]

By 1979, the API had formed a task force called the "CO_2 and Climate Task Force" which consisted of scientists and engineers from the largest oil and gas companies. The Task Force received a presentation in 1980 entitled "The CO_2 Problem" which stated that there was "strong empirical evidence" that fossil fuel burning was causing the rise of atmospheric CO_2, predicting a 2.5°C rise by 2038, which would have major economic consequences and halt world economic growth. It predicted by 2067 a 5°C temperature rise bringing "globally catastrophic effects." The report mentions the possibility of building in resilience (i.e. adaptation to climate

10. Center for International Environmental Law, "Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis" (2017) at 7-15, online (pdf): <www.ciel.org/wp-content/uploads/2017/11/Smoke-Fumes-FINAL.pdf> [perma.cc/UJ6N-KKT7]; Geoffrey Supran & Naomi Oreskes, "Assessing ExxonMobil's climate change communications (1977-2014)" (2017) 12:8 Environmental Research Letters, DOI: <10.1088/1748-9326/aa815f>; Benjamin Franta, "Early oil industry knowledge of CO2 and global warming" (2018) 8:12 Nature Climate Change 1024, DOI: <10.1038/s41558-018-0349-9>. See generally Neela Banerjee et al, *Exxon: The Road Not Taken* (InsideClimate News, 2015).

11. E Robinson and RC Robbins, "Sources, Abundance, and Fate of Gaseous Atmospheric Pollutants Supplement" (1969) Stanford Research Institute, online (pdf): <chr.gov.ph/wp-content/uploads/2019/11/Exhibit-3I-Sources-Abundance-and-Fate-of-Gaseous-Atmospheric-Pollutants-Supplement.pdf>.

12. JF Black, "The Greenhouse Effect" (Presentation delivered at the PERCC meeting, 18 May 1978) at VUGRAPH 7, online (pdf): <insideclimatenews.org/wp-content/uploads/2015/09/James-Black-1977-Presentation.pdf> [perma.cc/WY23-EPNC].

13. *Ibid* at 2.

change impacts). It also warned that there was "no leeway" in the time for action.[14]

In 1982, API had commissioned a report predicting a rise of global temperature of around 4°C, warning that such warming would have "serious consequences for man's comfort and survival since patterns of aridity and rainfall can change, the height of the sea level can increase considerably, and the world food supply can be affected."[15] That same year, an Exxon memo warned that there was "clear scientific consensus" that the rise in CO_2 would result in global temperature rise and that there was unanimous agreement in the scientific community about climate change.[16]

However, these uncovered documents also revealed that despite their knowledge, oil and gas companies publicly denied climate change and its impacts, and actively campaigned to sow uncertainty into the public discourse regarding the science on climate change. For example, in 1988, an Exxon internal memorandum stated Exxon's position on the GHG effect was to "emphasize the uncertainty in scientific conclusions regarding the potential enhanced greenhouse effect;" and "resist the overstatement and sensationalization of potential greenhouse effect which could lead to non-economic development of non-fossil fuel resources."

In 1989 Exxon, Chevron, Shell, BP and a number of other fossil fuel companies created and operated the Global Climate Coalition ("GCC"). Throughout the 1990s, the GCC spent millions on advertising and lobbying campaigns against climate action (notably to combat the UNFCCC "Earth Summit" in 1992 and to undermine support for the Kyoto Protocol).[17]

In 1998, an internal memo by the Global Climate Science Communications Team (members of which included Exxon, Chevron, and API) outlined an action plan to invest millions to manufacture uncertainty

14. See "1980 API CO_2 and Climate Task Force, 'The CO2 Problem; Addressing Research Agenda Development,'" online: *Climate Files* <www.climatefiles.com/climate-change-evidence/1980-api-climate-task-force-co2-problem/> [perma.cc/M9VC-8MHS].

15. Allan Oppenheim & William L Donn, "Climate Models and CO2 Warming: A Selective Review and Summary" (Washington, DC: American Petroleum Institute, 1982), online (pdf): <s3.documentcloud.org/documents/2805626/1982-API-Climate-Models-and-CO2-Warming-a.pdf> [perma.cc/Z6TM-CPEL].

16. See Memorandum from Roger Cohen to Al Natkin (2 September 1982) summarizing climate modeling and CO_2 greenhouse effect research done by Exxon, online: <www.climatefiles.com/exxonmobil/1982-exxon-memo-summarizing-climate-modeling-and-co2-greenhouse-effect-research/> [perma.cc/4EFF-ZAVM]. See also Memorandum from MB Glaser to Exxon management (12 November 1982) titled CO2 Greenhouse Effect, online: <www.climatefiles.com/exxonmobil/1982-memo-to-exxon-management-about-co2-greenhouse-effect/> [perma.cc/B4GQ-YBEK].

17. Andrew C Revkin, "Industry Ignored Its Scientists on Climate," *The New York Times* (23 April 2009).

on the issue of climate change. The action plan under the heading: "Victory Will Be Achieved When":

- Average citizens "understand (recognize) uncertainties in climate science; recognition of uncertainties becomes part of the "conventional wisdom"
- Media "understands" (recognizes) uncertainties in climate science
- Media coverage reflects balance on climate science and recognition of the viewpoints that challenge the current "conventional wisdom"
- Industry senior leadership understands uncertainties in climate science, making them stronger ambassadors to those who shape climate policy
- Those promoting the Kyoto treaty on the basis of extant science appear out of touch with reality.[18]

One of the "strategies and tactics" include the dissemination of educational materials to teachers and students to "begin to erect a barrier against further efforts to impose Kyotolike measures in the future."[19] One of the ways to measure progress was by the percentage of news articles that raised questions about climate change.[20]

In addition to these increasing reports on the knowledge of Big Oil about climate change, by 2017, there had also been notable developments in attribution science that could quantify the proportional contribution of specific oil and gas companies to the amount of GHG emissions they were responsible for, and also link such emissions to climate change impacts.[21] This not only assisted in identifying who potential defendants would be, but also provided a scientific method to determine causation in a potential lawsuit.[22]

For example, the Climate Accountability Institute began a series of publications identifying the major carbon emitters and the proportion of emissions each oil and gas company was historically responsible for. Its 2017 report found that since 1988, more than half of global industrial GHGs can be traced to just 25 corporate and state enterprises.[23] Also, since 1988,

18. Memorandum by Global Climate Science Communications Team for Michelle Ross & Susa Moya (3 April 1998) titled Global Climate Science Communications Action Plan at 3, online (pdf): <s3.documentcloud.org/documents/784572/api-global-climate-science-communications-plan.pdf> [perma.cc/PW4K-HRMU] ["Action Plan"].
19. *Ibid* at 6-7.
20. *Ibid* at 7.
21. See e.g. B Ekwurzel et al, "The rise in global atmospheric CO2, surface temperature, and sea level from emissions traced to major carbon producers" (2017) 144 Climatic Change 579.
22. Ganguly et al, *supra* note 1 at 852-855.
23. Dr Paul Griffin, "The Carbon Majors Database: CDP Carbon Majors Report 2017" (2017) at 8,

the fossil fuel industry has doubled its contribution to climate change, emitting as much greenhouse gas in the 28 years from 1988 to 2017 as in the 237 years between 1988 and the birth of the industrial revolution.[24] The top four multinational oil and gas conglomerates (excluding state owned enterprises) are Chevron, Exxon, BP, and Shell, estimated to be responsible for 6.5 per cent of cumulative GHG emissions generated between 1988 and 2015.[25]

II. *Foreign cases*

1. *US cases*

Authors have identified a "first wave" of private climate litigation in the US which spanned from 2005–2015.[26] The two main cases are *Comer* and *Kivalina*.[27] Both cases were struck on the basis that the claims raised non-justiciable political questions as well as the inability of the plaintiffs to establish causation to trace any particular alleged impact to any emission by the defendants.

The "second wave" of US tort claims against Big Oil companies started around 2017 and have largely been brought by municipalities, being spurred on by advances in climate science (particularly attribution science and the Carbon Majors Report) and the role of fossil fuel companies in obfuscating the harms as reviewed above. However, these claims were all stalled in jurisdictional challenges about whether the claims belong in federal courts or state courts. The reason for such lengthy fights over jurisdiction is due, ironically, to early success in a US climate change case: *Massachusetts v EPA*.[28]

In that case, various states and municipalities sued the Environmental Protection Agency ("EPA") for not setting emission standards for GHGs emitted by motor vehicles under the *Clean Air Act* ("*CAA*"). The EPA decided that the *CAA* did not provide it with the authority to regulate GHG emissions for climate change purposes, and that even if it did have such authority, it would not set any GHG emission standards for vehicles.

One of the main issues in this case was standing. Obtaining standing in US federal courts (known as "Article III standing") involves proving that

online (pdf): *Carbon Disclosure Project* <www.cdp.net/en> [perma.cc/67SR-SPUC].

24. *Ibid* at 7.

25. *Ibid*, Appendix I. For the purposes of this article, where there is reference to Chevron, Exxon, BP, and Shell, it is intended to be a reference to the corporate conglomerates—which includes the parent companies and all their subsidiaries.

26. Ganguly et al, *supra* note 1 at 846.

27. *Comer v Murphy Oil USA*, 607 F (3d) 1049 (5th Cir 2010); *Native Village of Kivalina v ExxonMobil Corp*, 696 F (3d) 849 (9th Cir 2012) [*Kivalina*].

28. *Massachusetts v EPA*, 549 US 497 (2007).

the claimant has suffered some actual or threatened injury, and that the injury was traceable to the defendant, and that the injury is likely to be redressed by a favourable decision. Considering the special status of Massachusetts as a sovereign state, the majority of the US Supreme Court ruled that the standing test was satisfied. In analyzing the injury, the majority noted that "the harms associated with climate change are serious and well recognized" and that the fact that "climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation." In terms of causation, the EPA conceded that GHG emissions cause global warming, but argued that its decision to not regulate GHG emissions from motor vehicles would only cause insignificant harm. The majority rejected this argument, holding that it "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." It also noted that the harm caused by GHG emissions from vehicles in the US, which was more than six per cent of global GHG emissions, was sufficient to make a "meaningful contribution to greenhouse gas concentrations." On the merits, the majority found that GHG emissions were an "air pollutant" for the purposes of the *CAA*. It found the EPA did not provide a sufficient explanation as to why it did not exercise its discretion to regulate GHG emissions, and remanded the issue back to the EPA to provide a reasoned explanation as to whether it would regulate or not regulate GHG emissions.

Because the US Supreme Court decided in *EPA* that GHG emissions were an "air pollutant" that could be regulated under the *CAA*, that resulted in the application of the displacement doctrine. In the US, the existence of a federal statute which occupies the field can displace a federal common law cause of action. This displacement doctrine is borne out of separation of powers concerns. The *CAA* had already been found to displace interstate water pollution disputes, with the US Supreme Court reasoning:

> The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress….
>
> When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," …the Court has found it necessary, in a "few and restricted" instances,…to develop federal common law. Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate

> division of functions between the Congress and the federal judiciary are inapplicable….We have always recognized that federal common law is "subject to the paramount authority of Congress."[29]

This doctrine was applied to GHG emissions in an early GHG emission tort case—*American Electric Power Co v Connecticut*.[30] In this case, a group of states, land trusts, and the City of New York sued American electric power companies in public nuisance over their GHG emissions. The US Supreme Court held, on the basis of the *EPA* case, that the *CAA* directly spoke to the issue of GHG regulation, and therefore displaced any tort action. The same was held by the Ninth Circuit in *Kivalina*, where a coastal Alaskan village sought damages from major greenhouse gas emitters and fossil fuel manufacturers in the United States in public nuisance.[31] The case was dismissed on the application of the displacement doctrine.

As such, the current wave of litigation launched by municipalities (and some states) has been bogged down in jurisdictional challenges brought by the Big Oil defendants, arguing such claims either belong in federal court and would therefore be displaced by the *CAA*, or that the *CAA* "preempts" state torts in this area.[32]

Fossil fuel companies had some success in the initial rounds of litigation moving cases to federal courts. However, the majority of the courts of appeal have ruled that these cases belong in state courts.[33]

One notable exception is the Second Circuit, which dismissed New York City's claims in April 2021 (*NYC*).[34] This case was not decided in the removal context (that is—an application to change the venue from federal to state court), but rather in a motion to dismiss as the case was originally filed in federal court. The Court relied heavily on the international scope of climate change, and the inability for courts to weigh in on such complex matters. The Court opened its decision stating:

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29. *City of Milwaukee v Illinois*, 451 US 304 (1981), at 312-313.
30. *American Elec Power Co v Connecticut*, 546 US 410 (2011).
31. *Kivalina*, *supra* note 27.
32. For a discussion on the difference between the displacement doctrine and the pre-emption doctrine, and their application to climate change tort cases in the US, see Jonathan H Adler, "Displacement and Preemption of Climate Nuisance Claims" (2022) 17:2 JL Economics and Policy 217, online: <scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=3123&context=faculty_publications> [perma.cc/2T9P-JTY4].
33. *County of San Mateo v Chevron Corp*, 32 F (4th) 733 (9th Cir 2022) [*San Mateo*]; *City of Oakland v BP PLC*, 960 F (3d) 570 (9th Cir 2020); *Board of County Commissioners of Boulder County v Suncor Energy*, 25 F (4th) 1238 (10th Cir 2022) [*Boulder* 2022]; *Mayor & City Council of Baltimore v BP PLC*, 31 F (4th) 178 (4th Cir 2022) [*Baltimore* 2022]; *State of Rhode Island v Shell Oil Products Co*, 35 F (4th) 44 (1st Cir 2022) [*Rhode Island*].
34. *City of New York v Chevron Corp*, 993 F (3d) 81 (2nd Cir 2021).

> The question before us is whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions. Given the nature of the harm and the existence of a complex web of federal and international environmental law regulating such emissions, we hold that the answer is "no."
>
> Global warming presents a uniquely international problem of national concern. It is therefore not well-suited to the application of state law. Consistent with that fact, greenhouse gas emissions are the subject of numerous federal statutory regimes and international treaties. These laws provide interlocking frameworks for regulating greenhouse gas emissions, as well as enforcement mechanisms to ensure that those regulations are followed.
>
> The City of New York has sidestepped those procedures and instead instituted a state-law tort suit against five oil companies to recover damages caused by those companies' admittedly legal commercial conduct in producing and selling fossil fuels around the world. In so doing, the City effectively seeks to replace these carefully crafted frameworks—which are the product of the political process—with a patchwork of claims under state nuisance law.

The Court also noted the "vague" and "indeterminate" standards attached to nuisance law, and how such standards would be especially "ill-suited to address 'the technically complex area of environmental law'... particularly since it would be administered by federal judges who 'lack the scientific, economic, and technological resources" to deal with such issues.[35] The Court characterized the claim as an "extraterritorial nuisance action" and allowing the city to hold the fossil fuel producers responsible for "purely foreign activity...would require them to internalize the costs of climate change and would presumably affect the price and production of fossil fuels abroad."[36] The Court held that doing so would circumvent existing international treaties on GHG emissions (like the Paris Agreement) and infringe on the political branch's prerogative to dictate foreign policy.

This initial round of appellate litigation involved questions as to the extent to which appellate courts can review orders to remand cases to state courts. In May 2021, the US Supreme Court decided an appeal arising out of the *Baltimore* case and in a 7–1 decision found that the Fourth Circuit had erred in not reviewing the entirety of the decision and all the grounds for removal argued by the defendants.[37] It remanded the decision back to the Court. This has prompted the other appeal courts that had decided that

35. *Ibid* at 98.
36. *Ibid* at 103.
37. *BP PLC et al v Mayor and City Council of Baltimore*, 141 S Ct 1532 (2021).

the cases belonged in state courts to hear the fossil fuel defendants' other arguments as well.

Following the Supreme Court's decision, the plaintiffs in these cases have thus far all been successful in rehearings before the Appeals Courts. The Tenth Circuit released its decision on February 8, 2022, and the Court allowed Boulder County, San Miguel County, and the City of Boulder's claim to proceed in state court.[38] The Tenth Circuit distinguished the Second Circuit's decision in that the *NYC* case was brought in federal court, not state court at first instance. As such, the issues and tests to be applied in the removal context were not the same as in the motion to strike context.

On 7 April 2022, the Fourth Circuit released its decision in *Baltimore*.[39] It followed the Tenth Circuit's decision in concluding that the claims belong in state court, and also distinguished the Second Circuit's decision in *NYC*. However, the Fourth Circuit goes further, and casts considerable doubt in the correctness of *NYC*, saying that while these claims may impact federal interests, there was no substantive analysis on how they would *conflict* with federal interests:

> Second, City of New York suffers from the same legal flaw as Defendants' arguments: It fails to explain a significant conflict between the state-law claims before it and the federal interests at stake before arriving at its conclusions. *See id*. at 90–93. For instance, after recognizing federalism and the need for a uniform rule of decision as federal interests, *City of New York* confusingly concludes that federal common law is "most needed in this area" because New York's state-law claims touch upon the federal government's relations with foreign nations.6 Id. at 91-92. But it never details what those foreign relations are and how they conflict with New York's state-law claims. *See id*. at 92. The same is true *when City of New York* declares that state law would "upset[] the careful balance" between global warming's prevention and energy production, economic growth, foreign policy, and national security. *Id.* at 93. Besides referencing statutes acknowledging policy goals, the decision does not mention any obligatory statutes or regulations explaining the specifics of energy production, economic growth, foreign policy, or national security, and how New York law conflicts therewith. *See* id. It also does not detail how those statutory goals conflict with New York law. *See* id. *City of New York* essentially evades the careful analysis that the Supreme Court requires during a significant-conflict analysis.[40]

38. *Boulder* 2022, *supra* note 33.
39. *Baltimore* 2022, *supra* note 33.
40. *Baltimore* 2022, *supra* note 33 at 24-25.

The Ninth Circuit also released its decision in *San Mateo* on 19 April 2022, allowing the claim to proceed in state court. The Court held that the claims belong in state court despite the fact that the "plaintiffs raise novel and sweeping causes of action."[41] This was followed by the First Circuit in *Rhode Island*,[42] which affirmed its original remand order in 2020 in a decision on 23 May 2022, and the Third Circuit in *Hoboken* in a decision on 17 August 2022,[43] and the Eight Circuit in the *State of Minnesota* case on 23 March 2023.[44]

Lower courts have also found ways to distinguish the Second Circuit's decision in the *NYC* claim. For example, in a motion to dismiss filed by the fossil fuel company defendants, Judge Crabtree of the First Circuit Court of the State of Hawaii rejected the defendants' characterization of the claim as essentially being the same as the claim in *NYC*. Instead, the Court held:

> The tort causes of action are well recognized. They are tethered to existing well-known elements including duty, breach of duty, causation, and limits on actual damages caused by the alleged wrongs. As this court understands it, Plaintiffs do not ask for damages for all effects of climate change; rather, they seek damages primarily for the effects of climate change allegedly caused by Defendants' breach of long-recognized duties (without deciding the issue, presumably by applying Hawai'i's substantial factor test). Plaintiffs do not ask this court to limit, cap, or enjoin the production and sale of fossil fuels. Defendants' liability in this case, if any, results from alleged tortious conduct, and not on lawful conduct in producing and selling fossil fuels.[45]

The Court, in a section entitled "[t]he common law adapts," rejected the defendants' argument that the claim was simply artfully pleaded, concluding that:

> Here, the causes of action may seem new, but in fact are common. They just seem new—due to the unprecedented allegations involving causes and effects of fossil fuels and climate change. Common law historically tries to adapt to such new circumstances.[46]

41. *San Mateo*, *supra* note 33 at 58.
42. *Rhode Island*, *supra* note 33.
43. *City of Hoboken v Chevron Corp*, 45 F (4th) 699 (3rd Cir 2022).
44. *State of Minnesota v American Petroleum Institute*, 63 F (4th) 703 (8th Cir 2023).
45. *City & County of Honolulu v Sunoco LP*, Civ No 1CCV-20-0000380 at 3 (HI 1st Cir Ct 2022) (motion to dismiss) [*Honolulu*].
46. *Ibid* at 7. The fossil fuel companies have appealed the decision to the Ninth Circuit.

Further, the US Supreme Court has recently denied the fossil fuel companies in the *Boulder* action petition to review the Tenth Circuit's decision.[47] As such, it is clear these cases will be heard in the state courts.

While the US cases have been bogged down in jurisdictional battles, they do illustrate some of the competing tensions that may be front of mind for a court facing a similar claim in Canada. The *NYC* case in particular highlights some of the major concerns—the complexity of climate change, the international and political nature the issue, and the inability and inappropriateness of courts to deal with such issues—which have plagued many climate litigation cases.[48] These concerns echo the barriers which proved fatal in the first wave of climate litigation in cases like *Comor* and *Kivalina*. However, the tide does seem to have turned. Decisions like the one in *Baltimore* 2022 and *Honolulu* suggest that the concerns highlighted in *NYC* may be overstated, or at least ought not to stand in the way of the natural development of the common law in applying existing tort principles to the reality society faces today. There is reason for optimism for potential Canadian plaintiffs given that the majority of the appeal courts have allowed the claims to proceed.

2. Milieudefensie

The status of the US cases being tied in preliminary jurisdictional fights can be contrasted with the *Milieudefensie* case, which is the first major case finding tort liability on fossil fuel companies for GHG emissions.

On 5 April 2019, Milieudefensie, along with a number of other environmental NGOs (Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends, Jongeren Milieu Actief and ActionAid), filed a class action against Royal Dutch Shell PLC (RDS), which although did not itself produce much GHG emissions, did set policy for the Shell group of companies (which collectively, the Court noted, was responsible for more GHG emissions than many countries).[49]

The *Milieudefensie* claim is different from the claims launched by the US municipalities and states in recent years because it is not a damages claim, nor is it focused on the deliberate concealment of the harms of

47. *Board of County Commissioners of Boulder County v Suncor Energy* (24 April 2023), Colorado, 10th Cir 21-1550 (denial of petition for a writ of certiorari).

48. See e.g. *Juliana v United States*, 947 F (3d) 1159 (9th Cir 2020); *Sagoonick v State of Alaska*, 503 P (3d) 777 (AK Sup Ct 2022); *Aji P v State of Washington*, 480 P (3d) 438 (WA CA 2021), leave to Washington High Court denied. But there is reason for optimism for these types of constitutional challenges: see *Juliana v United States* (1 June 2023), Oregon, US Dist Ct 6:15-cv-01517-AA (granted motion for leave to amend complaint).

49. *Milieudefensie*, *supra* note 5 at para 4.4.37. There were also 17,379 individual claimants who had Milieudefensie assigned as their representative ad litem but the Court denied those individual claimants standing. See *ibid* at para 4.2.7.

fossil fuel products (although there was evidence to that effect). Rather, the claim sought essentially injunctive relief, and was focused on Shell's current policy targets for its GHG emissions. The claimants argued that Shell had breached its standard of care by failing to set adequate GHG emission targets consistent with the Paris Agreement.

This is of course starkly opposed to the US claims, where the plaintiffs were at pains to argue that they were not attempting to have courts limit or cap the production or sale of fossil fuels, as doing so would be stepping into the role of the political branch.

In a decision rendered April 2021, the Hague District Court allowed the claimants' claim.[50] The Court did have to deal with a justiciability argument, but dismissed it emphatically, holding:

> The court does not follow RDS' argument that the claims of Milieudefensie et al. require decisions which go beyond the lawmaking function of the court. The court must decide on the claims of Milieudefensie et al. Assessing whether or not RDS has the alleged legal obligation and deciding on the claims based thereon is pre-eminently a task of the court. In the following assessment, the court interprets the unwritten standard of care from the applicable Book 6 Section 162 Dutch Civil Code on the basis of the relevant facts and circumstances, the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.[51]

The "unwritten standard of care" from the Dutch Civil Code which formed the basis of liability against Shell allowed the Court to look at international law and other "soft law" instruments to determine the applicable standard of care. This included Articles two and eight of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was the basis of the claim in *Urgenda*, Articles six and seven of the International Covenant on Civil and Political Rights, as well as the UN Guiding Principles ("UNGP"), "an authoritative and internationally endorsed 'soft law' instrument, which sets out the responsibilities of states and business in relation to human rights."[52]

After reviewing these instruments, the Court stated: "It can be deduced from the UNGP and other soft law instruments that it is universally

50. The efficiency in which the Dutch court system was able to get to a decision on the merits in this type of claim (3 years) contrasts starkly with the inefficiency of the US and Canadian courts which are subject to lengthy preliminary motions and appeals.
51. *Milieudefensie*, *supra* note 5 at para 4.1.3 [footnote omitted].
52. *Ibid* at para 4.4.11.

endorsed that companies must respect human rights."[53] This means that "[c]ompanies may be expected to identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships."[54] The Court held that Shell did know the adverse human rights impacts of its activities—it had known for a long time of the dangerous consequences of GHG emissions, and knew how much GHG emissions it is responsible for emitting. Therefore, Shell needed to take "appropriate action" to prevent and mitigate such adverse effects.

Importantly, appropriate action includes taking steps to reduce GHG emissions generated from up-stream suppliers and down-stream end users. In regards to up-stream suppliers, Shell did not dispute that through its purchase policy it could control and influence its suppliers' emissions. What was contentious was end-user emissions (which comprise a large part of what is called "scope 3" emissions), but the Court noted that Shell did "not contest that it can exert...control and influence through its energy package, and the composition thereof, produced and sold by the Shell group" and that despite Shell's existing contractual obligations, it was still "free to decide not to make new investments in explorations and fossil fuels, and to change the energy package offered by the Shell group, such as the reduction pathways require."[55] The Court also noted "it is internationally endorsed that companies bear responsibilities for Scope 3 emissions" relying heavily on a report by Oxford University.[56]

Shell also raised the fact that its emissions were already subject to the European Emissions Trading Scheme ("ETS"), as well as other cap and trade systems which its group of companies may be subject to. The Court found however that the ETS only covered a fraction of the emissions Shell was responsible for. To the extent that emissions were covered by the ETS, then Shell did not have to change its policy for those emissions and could rely on that regime. Ultimately however, "RDS' argument that the ETS system will be interfered with if the claims are allowed also does not hold."[57] Other permits that Shell relied on were also given short shrift by the Court, finding that it was not apparent that CO_2 emissions played any role in such permits and do not subtract from Shell's reduction obligation.[58]

53. *Ibid* at para 4.4.14.
54. *Ibid* at para 4.4.20.
55. *Ibid* at para 4.4.25.
56. *Ibid* at para 4.4.18, citing Oxford University Net Zero Network, "Mapping of current practices around net zero targets" (2020), online (pdf): <4bafc222-18ee-4db3-b866-67628513159f.filesusr.com/ugd/6d11e7_347e267a4a794cd586b1420404e11a57.pdf> [perma.cc/T52W-MVJV].
57. *Milieudefensie*, *supra* note 5 at para 4.4.47.
58. *Ibid* at para 4.4.48.

Throughout its judgment, the Court repeatedly emphasized that every GHG emission contributes to environmental damage, and therefore no reduction is too small.[59] Ultimately, the Court ordered that Shell directly, and via the other companies that make up the Shell group, limit CO_2 emissions by at least forty-five per cent by 2030, relative to 2019 levels. The case is currently under appeal.

3. *Lessons for a Canadian claim*

What lessons can be drawn from the US cases and the *Milieudefensie* case for a Canadian claim?

In the US, cases have been bogged down in jurisdictional battles due to the displacement doctrine, although most of these cases appear to have overcome such hurdles. The displacement doctrine does not exist in Canada. However, the underlying rationale behind the doctrine—the concern over the separation of powers and justiciability[60]—is one that will likely be on the minds of Canadian judges facing a private climate litigation claim against fossil fuel companies.

Some Canadian writers have noted that while "justiciability has been a significant barrier to resolving US climate tort cases to date...there are strong arguments that such cases are justiciable in Canada."[61] It may also be true that relative to their US counterparts, Canadian courts have more leeway to review questions that have a political dimension, especially in tort cases.[62] However, recent *Charter* climate litigation suggests Canadian courts will be similarly reluctant to step into climate change litigation. Three of four *Charter* claims alleging that Canada has breached ss 7 and 15 *Charter* rights by contributing to and allowing GHG emissions resulting in climate change impacts have been dismissed on justiciability

59. *Ibid* at paras 4.3.5, 4.4.37, 4.4.54. The Court for example stated "A characteristic feature of dangerous climate change is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this development" (*ibid* at para 4.4.54).

60. See The Honorable Luther J Strange III, "A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice" (2019) 70:3 SCLR 517, online: <scholarcommons.sc.edu/cgi/viewcontent.cgi?article=4281&context=sclr> [perma.cc/Y2GU-DR94]; Albert C Lin & Michael Burger, "State Public Nuisance Claims and Climate Change Adaption" (2018) 36:1 Pace Envtl L Rev 49 at 67-71, online: <digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1821&context=pelr> [perma.cc/ZC5C-3HN3].

61. Lynda Collins & Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (2014) 278. See also David Grinlinton, "The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges" (2017) 62:3 McGill LJ 633 at 645, online: <lawjournal.mcgill.ca/> [perma.cc/LZT9-MY8R]; Karine Péloffy, "Kivalina v. Exxonmobil: A Comparative Case Comment" (2013) 9:1 JSDLP 121.

62. Grinlinton, *supra* note 61 at 645 discussing *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 18 DLR (4th) 481; Collins & McLeod-Kilmurray, *supra* note 61 at 278.

grounds.[63] This judicial conservatism is consistent with how US courts have responded to constitutional cases against governments in relation to climate change,[64] and deviates from other international (and particularly European) cases which have found such claims to be justiciable and within the realm of the judiciary.[65] While these separation of powers concerns may not appear in the form of a motion to strike on the basis of justiciability per se, a Canadian court may be more mindful of certain defences which raise similar separation of powers rationales—such as the defence of statutory authority.

However, Canadian plaintiffs should be encouraged by the fact that the majority of US courts have now dismissed the fossil fuel defendants' jurisdictional arguments, and have shown a willingness to engage with the issues through the lens of tort law, despite how novel and unprecedented the claims are.

Because of such separation of powers and justiciability concerns, it may be that like the US plaintiffs, Canadian plaintiffs may be extremely reluctant to seek injunctive remedies like the ones in *Milieudefensie*, and only pursue damages as in a traditional tort action. On the other hand, having courts curtail the emissions and dictate emission policies of a state directly engages separation of powers concerns—whereas courts routinely grant injunctions against private companies and entities to refrain them from continuing tortious conduct. Therefore, separation of powers concerns ought to be minimal in seeking injunctive relief against Big Oil. Further, the benefits of only seeking injunctive relief means that one does not have to prove causation for particular or specific harms, and it also gets around the tricky issue of quantifying and apportioning damages.

However, *Milieudefensie* was successful in part because the claimants were able to file suit against the parent company of the Shell group of companies, and argue that policy it was setting for its group of companies was inadequate. The claimants were also able to rely on and use international

63. *La Rose v Canada*, 2020 FC 1008; *Misdzi Yikh v Canada*, 2020 FC 1059*; Environnement Jeunesse c Procureur general du Canada*, 2021 QCCA 1871, leave to SCC denied. *La Rose* and *Misdzi Yikh* are under appeal at the time of writing. The only case to survive a preliminary justiciability challenge has been *Mathur (Litigation guardian of) v Ontario*, 2020 ONSC 6918. Justiciability was argued again in the hearing on the merits and again dismissed. See *Mathur v His Majesty the King in Right of Ontario*, 2023 ONSC 2316 at paras 97-105. However, the claim failed on the merits, although an appeal has been filed.

64. See generally *supra* note 48.

65. See e.g. *Urgenda*, *supra* note 4; Bundesverfassungsgericht [German Federal Constitutional Court], 24 March 2021, *Bundesverfassungsgericht* [Federal Constitutional Court], Hamburg, 24 March 2021, *Neubauer v Germany*, 1 BvR 2656/18 (Germany); *Friends of the Irish Environment v Government of Ireland*, [2020] IESC 49; Tribunal Administratif de Paris, 3 February 2021, *Notre Affaire à Tous and Others v France*, No 1904967, 1904968, 1904972, 1904976/4-1.

human rights agreements and other "soft law" instruments to inform the standard of care. The difficulty in the Canadian context is that no parent company of the carbon majors (that is, Chevron, Exxon, BP and Shell) is headquartered in Canada.[66] As such, there may be jurisdictional issues with suing a parent company on the basis of negligent GHG emissions policy. Further, the application of international human rights law to actions against private corporate actors is still in its infancy in Canada.[67] There certainly is no established doctrine in Canada where courts can look to international human rights agreements and other soft law instruments to determine the standard of care and obligations of a corporate conglomerate. Nor to my knowledge have Canadian courts mandated corporate entities to satisfy international human rights obligations. As such, while there is much to like about a claim framed in the same way as *Milieudefensie*, such a claim would be novel to the Canadian courts.

Milieudefensie however does offer some useful insights regarding arguments on justiciability, causation, the impact of existing GHG regulatory regimes, and the responsibility of fossil fuel companies for the emissions caused by the downstream use of their products—all of which are highlighted in the section below.

In conclusion, the US cases and the *Milieudefensie* are instructive to review, and provide useful arguments and indications as to how Canadian courts or fossil fuel defendants may react to such a claim. However, none of these cases provide a complete roadmap to success for an analogous Canadian claim, although they do perhaps signal a changing attitude that courts are willing to engage with complex cases dealing with liability for climate change.

III. *Potential causes of action in a Canadian claim*

This section discusses three potential causes of action that a Canadian case may utilize in a climate claim against fossil fuel companies: nuisance, negligence, and unjust enrichment.

66. According to Griffin, *supra* note 23, the biggest oil and gas company based in Canada is Suncor. Also given that the Netherlands Court ordered Shell to reduce its global GHG emissions, there would be no use in filing a similar claim against Shell in Canada, or indeed in any other jurisdiction, for similar relief.

67. See e.g. *Nevsun Resources Ltd v Araya*, 2020 SCC 5. See also Penelope Simons and Heather McLeod-Kilmurray, "Canada: Backsteps, Barriers, and Breakthroughs in Civil Liability for Sexual Assault, Transnational Human Rights Violations and Widespread Environmental Harm" in Ekaterina Aristova and Uglješa Grušić, eds, *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (UK: Hart, 2022) at 109-134.

1. *Nuisance*

Nuisance is the primary cause of action in the US cases. Nuisance focuses on the harm suffered rather than on prohibited conduct, and therefore, whether the conduct is intentional or negligent is of no consequence.[68] That makes it a natural fit for climate tort actions.

In Canada, as in the US, there are two torts of nuisance: private nuisance and public nuisance. Private nuisance is the unreasonable interference with an occupier's use and enjoyment of his or her land. Public nuisance meanwhile is the unreasonable interference with a public right.[69]

Public nuisance historically could only be brought by the Attorney General. However, the law recognizes that other persons or entities may bring such claims as long as they can prove "special damage." The test for special damage has gradually been relaxed. No longer do you need to prove a difference in both kind and degree of harm, as "the more modern view is that recovery is permitted in either case, as long as the damage to the plaintiff is 'more than mere infringement of a theoretical right which the plaintiff shares with everyone else.'"[70]

If a claim in Canada is modeled after the US claims, with local governments or even provincial governments being plaintiffs, standing to bring a public nuisance claim should not be an issue. Local governments have specific and unique responsibilities relating to maintaining infrastructure and providing essential services and climate change impacts significantly increase the costs of fulfilling these responsibilities. Local governments have a responsibility to design, build, operate and maintain infrastructure such as storm sewers and, in the case of coastal communities, sea walls. They also manage public lands for the benefit of their communities and in a manner that seeks to promote public safety. The harmful impacts of climate change on municipal infrastructure and public lands entails both immediate costs (i.e. adaptation and mitigation costs) and anticipated costs to address the future implications of climate change. Any failure to ensure public safety may potentially give rise to liability on the part of the municipal government. Indeed, local governments are often charged with protecting public rights (including addressing public nuisances) and should have standing to sue to enforce them even absent special damages. The Supreme Court has confirmed a legitimate role for

68. *St Lawrence Cement Inc v Barrette*, 2008 SCC 64 at para 77 [*St Lawrence Cement*].
69. *Susan Heyes Inc (Hazel & Co) v South Coast BC Transportation Authority*, 2011 BCCA 77 at paras 36-37 [*Heyes*].
70. *George v Newfoundland and Labrador*, 2016 NLCA 24 at para 113 [*George*].

local governments in pursuing claims to vindicate public rights, including by acting as a trustee of the environment.[71]

If a provincial government were to bring a public nuisance claim, they would have standing as of right. The costs to a province from climate change impacts are obvious in terms of infrastructure (e.g. damage from flooding to highways and bridges) and resource loss (e.g. forest fires). It would also include significant health care costs.[72]

The interference in both private and public nuisance needs to be both *substantial* and *unreasonable*.[73] The substantial threshold would be easily met, given that the interference simply needs to be non-trivial. The existential threat of climate change impacts would readily meet such a threshold.

The assessment of reasonableness in either private or public nuisance is more nuanced. It involves an exercise in balancing interests and involves a holistic assessment of all relevant circumstances.[74] Relevant factors that may be considered include the utility of the defendant's conduct, the severity of the harm, the difficulty of avoiding the interference, the quality of the interference and whether the defendant acted recklessly, carelessly or with malice. The list of relevant factors is not closed; the ultimate question is whether it is fair, in all of the circumstances, for the plaintiffs to bear the burden imposed by the defendant's activity without compensation.

a. *The social utility defence*

While not a true "defence," social utility is a factor to be considered in assessing the reasonableness of the interference in a nuisance claim. Fossil fuel extraction did have, and arguably still does have, social utility. The conduct may be characterized as not merely profit driven, but also as providing much needed energy to Canadians and the world. The argument would be that everyone, including any potential plaintiffs, benefited from the use of fossil fuels, and that it is not unreasonable to expect the municipality to bear its share of harm that flowed from that use.

The social utility of a defendant's conduct is usually considered in nuisance cases through balancing the importance of "public work"

71. *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38.

72. Dylan Clark et al, "The Health Costs of Climate Change: How Canada Can Adapt, Prepare, and Save Lives" (2021), online (pdf): *Canadian Institute for Climate Choices* <climatechoices.ca/wp-content/uploads/2021/06/ClimateChoices_Health-report_Final_June2021.pdf.> [perma.cc/H95S-WSF6].

73. *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at paras 18-24 [*Antrim*].

74. *George*, *supra* note 70 at para 91. See Andrew Gage, "The (Climate) Case against Big Oil," UNBLJ [forthcoming], for a comprehensive discussion how Big Oil companies may be liable in different circumstances under Canadian nuisance law [Gage, "Climate Case"].

against harm to the plaintiff. In such cases, courts have rejected "a simple balancing of the utility of a public work against the severity of the harm, since a high degree of public utility would always trump even very extensive interference."[75] The Supreme Court of Canada has stated that "private rights cannot be trampled upon in the name of the public good," the question being "not simply whether the broader public good outweighs the individual interference when the two are assigned equal weight" but rather "whether the interference is greater than the individual should be expected to bear in the public interest without compensation."[76] As the British Columbia Court of Appeal ("BCCA") has made clear, the question of the public utility of a project is very fact specific and a "matter of judgment." In *Heyes*, the BCCA accepted that the construction project for the Canada Line constituted a nuisance notwithstanding its social utility (although it ultimately found that it was justifiable in light of the defence of statutory authority).[77]

Potential plaintiffs could characterize the conduct not as a "public project" but rather the harm caused by the continuing manufacture, promotion, and sale of a product that generated immense profit for the defendants. Given that potential defendants withheld knowledge of the implications of the use of their product, it would be difficult for them to argue that what is fair in the circumstances is for the plaintiffs or the rest of society to shoulder completely the economic burden of adapting to the harm that society was powerless to prevent. This argument would vary in strength depending on who the plaintiffs are. Some plaintiffs, like higher levels of government, would be vulnerable to arguments that they too had long known about the dangers of GHG emissions, climate change, and the costs to society from climate change impact, but nevertheless continued to and still continue to authorize and promote such activities. This may weigh in favour of the reasonableness of the defendants conduct, or perhaps even sound in contributory negligence—which has been suggested could be a defence to nuisance.[78] Even if the plaintiffs are lower levels of government like municipalities, non-profits, or individuals, the authorizations by these higher-levels of government remain a basis for the defence of statutory authority, discussed below.

The fact that the product that caused the harm was a useful one does not mean that the defendants should not be held responsible for mitigating

75. *George*, *supra* note 70 at para 95.
76. *Antrim*, *supra* note 73 at paras 34-35.
77. *Heyes*, *supra* note 69 at paras 60-77, 146.
78. *Allison v Radtke*, 2014 BCSC 1832 at para 184.

the consequences of that harm at least in some proportionate manner. Many forms of industrial activities are useful—but Canadian law recognizes that where those activities have caused pollution and harm—industry ought to be liable for the full costs of such pollution and harm. The "polluter pays" principle is not only fair, but has been widely accepted in Canadian environmental law and recognized by the Supreme Court of Canada.[79]

b. *The defence of statutory authority*

The defence of statutory authority provides that "liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the 'inevitable result' or consequence of exercising that authority."[80] In the circumstances discussed, fossil fuel companies' activities in extracting, refining and selling fossil fuels have been subject to extensive regulation. The defence can apply to both public and private nuisances, but it is a narrow defence, and one courts are reluctant to accept.[81] Accordingly, the statute which is relied on as granting the authority will be strictly construed.[82] The onus is on the defendants to establish that the nuisance was the inevitable result of an activity that was performed pursuant to a statutory authority. As Sopinka J held in *Tock*:

> The burden of proof with respect to the defence of statutory authority is on the party advancing the defence. It is not an easy one. The courts strain against a conclusion that private rights are intended to be sacrificed for the common good. The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.[83]

Where there is some discretion available to the defendant as to how to exercise statutory authority, the defence will not apply. For example, in *Ryan*, the plaintiff was injured when the tire of his motorcycle became trapped in a "flangeway" gap when crossing a railway. The flangeways

79. *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 29 [*Orphan Well*]; *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at para 24; *St Lawrence Cement*, *supra* note 68 at para 80.

80. *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 54, 168 DLR (4th) 513 [*Ryan*].

81. *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 at para 102.

82. *Vancouver (City) v Robinson*, 2013 BCSC 1224 at para 41.

83. *Tock v St John's Metropolitan Area Board*, [1989] 2 SCR 1181 at 1226, [1989] SCJ No 122.

were between 3.75 and 3.94 inches wide, which was within the statutory direction that the gaps had to be between 2.5 and 4.75 inches in width. However, the defence was rejected because the Court held that the railway could have been constructed with a smaller gap (e.g. the minimum 2.5 inches). There was still discretion within the statutory direction as to how the railway was constructed.

Where the statutory authority provides no discretion, the defence is available. For example, in *Sutherland*, there was a nuisance claim arising from the noise of aircraft using a new airport runway.[84] There were permits and statutes that prescribed the location, construction and operation of the runway. Since the noise was an inevitable result of the operation of the runway, the defence was successful. The defence of statutory authority may also apply where there is no practical feasible alternative to construct a project, even where the method of construction is not exactly prescribed.[85]

The BC Supreme Court recently applied the defence in a major case involving the Saik'uz First Nation suing Rio Tinto for the construction and operation of the Kenney Dam which resulted in a decline in fish population and therefore a detriment to their Aboriginal rights to fish.[86] Both Canada and BC had approved the design, construction, and operation of the dam, and Rio Tinto had always operated within the parameters of its authorization. Therefore, the Court found that the defence of statutory authority clearly and appropriately shielded Rio Tinto from liability. Justice Kent held:

> [530] The design and construction plans for the Kenney Dam were specifically approved by both levels of government. The Dam was constructed in conformity with those plans. The water licences issued to RTA explicitly authorized and continue to authorize the diversion of water from the Nechako River.
>
> [531] The flow of water from the reservoir into the Nechako is governed by an Agreement between RTA and both levels of government and is incorporated into RTA's Water Licence. The regulation of that flow is directed by a Technical Committee constituted by that Agreement and comprising representatives from both levels of government and an independent expert, as well as a representative from RTA. Both governments are thus directly involved in setting the flow.
>
> [532] RTA has always operated within the parameters of its authorization. It has never diverted more than the diversion limit specified in its Water Licence.

84. *Sutherland v Vancouver International Airport Authority*, 2002 BCCA 416.
85. See e.g. *Heyes*, *supra* note 69 at para 146.
86. *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15.

The Court also found that the Province knew full well that the construction of the dams and reservoirs would "have substantial impact upon rivers and lakes in the region and hence potentially upon the fish/fishery in such waters and yet required no protection whatsoever for the fish" and that both BC and Canada "knew and expressly approved substantial quantities of water being diverted away from the Nechako River."[87]

In a case involving oil and gas companies, the defence of statutory authority may present a significant barrier to plaintiffs. Just like Rio Tinto, oil and gas companies possessed a variety of statutory authorizations to carry out their extraction activities, and the content of the fuels which can be marketed in Canada is subject to regulation. They would certainly try to rely on these authorizations in support of a statutory authority defence. Oil and gas companies would likely argue that the nuisance is practically impossible to avoid given that the whole purpose of the industry is to burn fossil fuels and this industry has been sanctioned by the legislature and government in various ways. The provinces and Canada certainly know, and have known for decades, that the burning of such fuels would cause GHG emissions and climate change. Indeed environmental assessments of such extraction activities require an assessment of GHG emissions. Fossil fuel companies may also point to the fact that they are still "authorized" to emit GHG despite now being subject to a number of regulatory regimes like carbon taxes or cap and trade regimes. Thus if the government has expressly authorized the extraction and use of such fuels knowing full well its climate change impacts—can the producers be held liable for the damage from the GHG emissions its products cause?

While the defence of statutory authority certainly presents a barrier over any tort liability of Big Oil, it is not a barrier that cannot be overcome. Plaintiffs may be able to argue that because Big Oil hid and denied the harms caused by their products, potential defendants have not only arguably escaped paying for the full cost of the harms caused by their products but have also obtained statutory authority for their activities in a deceptive manner. It may be difficult to prove however, that statutory authorizations would not have been provided even if the full harms were known—given the absence of other alternatives.[88] A similar argument can be made in a duty to warn claim, which is discussed in more detail below.

87. *Ibid* at para 529.

88. This argument may not carry as much weight for more current authorizations where alternative sources of energy are more economic

Milieudefensie may also offer some assistance to counter this defence. Arguments could be made that the authorizations and permits fossil fuel companies received—at least historically—had little to do with GHG emissions or would not have expressly contemplated GHG emissions. To the extent that fossil fuel defendants raise arguments of current regulatory regimes like cap and trade being authorizations for emissions, then like the court found in *Milieudefensie*, it could be argued that such regimes only deal with a small part of the emissions that these companies may be responsible for.

The defence is also vulnerable to being altered, or abolished altogether. Some 30 years ago, the Supreme Court of Canada did come close to substantially curtailing or even abolishing the defence. In *Tock*, Wilson J writing for herself and two others, sought to limit the defence to cases involving either mandatory duties or statutes which specify the precise manner of performance. La Forest J (Dickson CJ concurring) took the more extreme view that the defence should be abolished entirely unless there is an express statutory exemption from liability. As neither of those positions carried a majority, the traditional rule as expressed by Sopinka J's majority reasons in *Tock* continues to apply in Canada.[89]

Now, over 30 years later, there are some compelling reasons to revisit and adopt La Forest J and Dickson CJ's original view of the test. The defence of statutory authority arose in a time of rapid industrialization to protect infant industries constructing railways, roads, canals, and hospitals. Professor Linden states that "[p]erhaps the most important policy reason for the creation of the immunity was the desire to promote industrial expansion and refrain from saddling infant industries with legal responsibility for their nonnegligent conduct."[90] It is no longer the case that these companies are vulnerable. This is especially true with oil and gas companies, which are some of the most profitable, powerful and largest companies in the world, and have significant influence over domestic, regional, and international regulation of their activities, and "should be expected to shoulder the losses generated by these activities."[91]

The rationale for the defence was also linked to the available remedies. Historically, there was a concern that individuals who were suffering nuisance could successfully obtain injunctions to stop works of great societal benefit.[92] This rationale may no longer hold as much

89. *Ryan*, *supra* note 80 at para 55.
90. Allen M Linden, "Strict Liability, Nuisance and Legislative Authority" (1966) 4:2 Osgoode Hall LJ 196 at 199, online: <digitalcommons.osgoode.yorku.ca/> [perma.cc/F6XM-KLL7].
91. *Ibid* at 200.
92. *Ibid* at 215-216.

weight in modern nuisance litigation. Injunctions are subject to a balance of convenience test and will generally not be granted where monetary compensation is possible.[93] Plaintiffs often seek damages as the sole remedy in a claim in nuisance, particularly in claims against major public works.[94]

The Supreme Court of Canada appears to be leaning towards requiring an express clause exempting the defendant from liability, stating as follows in *St. Lawrence Cement*:

> The statute relied on by SLC [the defendant] provides no basis for this defence. Although the SLC Special Act authorized the operation of the plant while requiring that the best means available be used, it in no way exempted SLC from the application of the ordinary law. When the legislature excludes the application of the ordinary law, it generally does so expressly.[95]

The BCCA has concluded that *St. Lawrence Cement* did not change the common law on the defence of statutory authority on the basis that the case was decided under the Quebec civil law,[96] despite the fact that the Court in *St. Lawrence Cement* held that the civil liability provisions in the Quebec Civil Code at issue were directly analogous to the law of nuisance under the common law, and took no issue with the fact that the common law defence of statutory authority was applicable to Quebec civil law.[97] At least one academic commentator has challenged the BCCA's conclusion in this regard and endorsed the express clause test in *St. Lawrence Cement* as being fully applicable outside Quebec.[98] If the claim was filed outside BC, other appellate courts in other Provinces may take a different view on the matter and decline to follow the BCCA.[99]

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93. *RJR – MacDonald Inc v Canada (Attorney General),* [1994] 1 SCR 311 at 341, [1994] SCJ No 17.

94. See e.g. *Heyes*, *supra* note 69 at para 1; *Antrim*, *supra* note 73 at para 1; *Sutherland v Attorney General of Canada*, 2001 BCSC 1024 at paras 1, 312-350.

95. *St Lawrence Cement*, *supra* note 68 at para 98.

96. *Heyes*, *supra* note 69 at para 168.

97. *St Lawrence Cement*, *supra* note 68 at para 97.

98. Meredith James, "Case Comment: Susan Heyes Inc (Hazel & Co) v South Coast BC Transportation Authority" (2011) 23 J Envtl L & Prac 87 at 97, online: <www.siskinds.com/wp-content/uploads/JAMES.pdf> [perma.cc/86EQ-Q29D].

99. A claim in Quebec would also likely avoid this defence, although the author is not familiar with the Civil Code to assess what other issues might arise from a claim emanating in Quebec. Legislatures may also step-in to create legislation expressly holding Big Oil companies liable in the same way as tobacco companies or pharmaceutical companies for opioids. See e.g. *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, c 30, ss 3(3), 7(3)(b); *Opioid Damages and Health Care Costs Recovery Act*, SBC 2018 c 35, ss 3(3), 7(3)(b). See also Samantha Lawson, "The Conundrum of Climate Change Causation: Using Market Share Liability to Satisfy the Identification Requirement in Native Village of Kivalina v. Exxonmobil Co." (2010) 22:2 Fordham Envtl LJ 433; Stack, *supra* note

c. *Causation*

In order to succeed against a fossil fuel company in claim in nuisance for damages, one would need to prove various links of causation. Primarily it can be broken down into three steps where they must prove: (a) that the defendants' fossil fuel activities created GHG emissions which have accumulated in the atmosphere, (b) that this accumulation has led to the destabilisation of the climate system, resulting in climate change impacts, such as sea level rise, fires and floods, and (c) that these climate change impacts caused the specific harm for which the plaintiff seeks damages.

Much has been written on causation in these types of cases, including the need to use other types of causation tests other than "but for," such as "material contribution of risk" or "market share liability."[100] Arguably, the science has advanced to the point where a change to the traditional "but for" test is likely not necessary.

First, all the Big Oil companies now acknowledge that the burning of their products results in GHG emissions which causes climate change. The main issue for proving this step is whether they can be responsible for the GHG emissions from end users of their products. While Big Oil companies themselves produce massive amounts of GHG emissions from extraction activities, it is the multitude of individuals and other consumers that burn their products which cause the bulk of the pollution. Given the finding of *Milieudefensie*, there is reason to believe an oil and gas company will be held responsible for the GHG emissions from the end-use of their product.[101]

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8 at 283-307.

100. See Stack, *supra* note 8 at 257-278. The material contribution of risk tests arises from *Clements v Clements*, 2012 SCC 32 at para 46. For academic commentary on this test, see Emir Crowne & Omar Ha-Redeye, "Clements v. Clements: A Material Contribution to the Jurisprudence—The Supreme Court of Canada Clarifies the Law of Causation" (2012) 2:2 Western J Leg Studies 1. The material contribution test has also been used in UK environmental tort litigation. See e.g. *Fairchild v Glenhaven Funeral Services Ltd*, [2002] UKHL 22; *Barker v Corus UK Ltd*, [2006] UKHL 20; *Sienkiewicz v Greif (UK) Ltd*, [2011] UKSC 10; *Holtby v Brigham & Cowan (Hull) Ltd*, [2000] EWCA Civ 111. The market share liability test arises from *Sindell v Abbott Laboratories*, 26 Cal (3d) 588 (CA Sup Ct 1980), at 611-612. For academic commentary on this test as applied to climate litigation see Lawson, *supra* note 99.

101. To my knowledge, Canadian courts have not found manufacturers liable in nuisance for the use of their products by consumers. Rather, there is some authority to the opposite. See *Hoffman v Monsanto Canada Inc*, 2005 SKQB 225 at para 122, aff'd 2007 SKCA 47, leave to appeal to the SCC refused, 2007 CanLII 55334. This case may be factually distinguishable given that was about the release of genetically modified canola but did not allege that such genetically modified crops was harmful per se. Indeed the Court distinguishes the US decision of *In re StarLink Corn Products Liability Litigation, Marvin Kramer v Aventis CropScience USA Holding Inc*, 212 F Supp (2d) 828 (ND Ill 2002) at paras 118-112, where the manufacturer failed to strike a nuisance claim when the genetically modified crops did cause harm. See also Gage, "Climate Case," *supra* note 74, for a more comprehensive discussion on *Hoffman* and why it may be distinguishable in a case against fossil fuel

But even if Canadian courts do not hold oil and gas companies responsible for the GHG emissions of the end-use of their products, the emissions that the companies themselves directly generate from their extraction activities is large. As discussed further below, the science is now able to attribute certain climate change impacts to individual emitters of GHGs—that is, there are methodologies to quantify a company's contributions to extreme weather events and other changes to the climate.[102]

Similarly, there is now a scientific consensus that GHG emissions cause numerous climate change impacts, like sea level rise, fires, and floods. The only potential argument for a fossil fuel company is that the amount of GHG emissions they are responsible for is too negligible to contribute to these climate change impacts—particularly if the end-use of their product is not considered in the analysis. But as the courts in the Netherlands have held in *Urgenda* and now *Milieudefensie*, every emission contributes to the harm, and therefore no reduction is negligible. This holding in *Urgenda* was endorsed by the Supreme Court of Canada in the *Reference re Greenhouse Gas Pollution Pricing Act*. The Supreme Court of Canada in the same paragraph also endorsed *Gloucester Resources Limited v Minister for Planning*, a notable decision in the New South Wales Land and Environment Court which used a carbon budget analysis to find that a proposed coal mining project's GHG emissions were not negligible, and that all emissions were important because they all cumulatively contribute to destabilising the global climate system.[103] The limited amount of GHG emissions an individual fossil fuel company may be responsible for is more of an issue in terms of determining the appropriate quantum of damages, rather than an issue of causation.

Proving the third link to the actual harm will require proving that emissions specifically contributed to the event—whether it be a flood or wildfire—that the plaintiff is claiming damages for. The attribution science is now sufficient to do this: "Existing methods can quantify the contribution of GHG emissions to specific events, including (1) extreme events, including storms, droughts, heatwaves or floods, (2) long-term trends in glacier lengths or sea levels and (3) persistent changes, for

companies.

102. See e.g. B Ekwurzel et al, *supra* note 21 at 579-590; R Licker et al, "Attributing ocean acidification to major carbon producers" (2019) 14:12 Environmental Research Letters 124060, DOI: <10.1088/1748-9326/ab5abc>. See generally Marjanac S & Patton L "Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?" (2018) 36(3) Journal of Energy & Natural Resources Law 265, DOI: <10.1080/02646811.2018.1451020>.

103. *Gloucester Resources Limited v Minister for Planning*, [2019] NSWLEC 7.

instance in mean temperatures or precipitation."[104] This includes the attribution of climate change impacts to individual emitters of GHGs: "Scientific evidence on the influence of individual actors' GHG emissions is available for existing and projected impacts."[105]

This third link in the causation chain may not even need to be proven depending on the type of claim that is pursued. For example, if a claim analogous to *Milieudefensie* is pursued, and the claim is not for damages—this last link will not need to be proven. Similarly, if the claim is in public nuisance is pursued and the public right alleged to be interfered with is the right to a healthy atmosphere, that may not require the plaintiffs to prove that any specific climate change impact (e.g. weather event) was responsible for a particular harm of the plaintiff.[106] That is, the theory of liability is premised on damage from the alteration of the environment or air, and so as long as that alteration is proven, then liability should follow.

Environmental lawyer and author, Andrew Gage, has advocated for such an approach, analogizing it to riparian law. Riparian law has long dealt with multiple polluter situations where no one polluter is responsible for any harm which has occurred. The courts solved the problem by starting from the basis that the riparian owner was guaranteed a right to flow of water in its naturally occurring form. Consequently, if a defendant's pollution resulted in a detectable change, it was also actionable, even absent evidence of damages, and even if there were other polluters:

> In essence the riparian rights cases do not ask whether, "but for" the actions of the defendant would the plaintiff have suffered the loss, but instead focus on whether "but for" the actions of the defendant, would the stream flow in its natural state.[107]

Other courts have commented on the legal similarities between air and water, implying that some elements of the riparian rights approach may be more generally applicable.[108]

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104. Rupert F Stuart-Smith et al, "Filling the evidentiary gap in climate litigation" (2021) 11 Nature Climate Change 651 at 651 [citations omitted], DOI: <10.1038/s41558-021-01086-7>. See also M Burger, RM Horton, & J Wentz, "The law and science of climate change attribution" (2020) 45:1 Colum J Envtl L 57, DOI: <doi.org/10.7916/cjel.v45i1.4730>.

105. Stuart-Smith et al, *supra* note 104 at 653.

106. Although establishing such a right to a "healthy atmosphere" would be novel, it is arguably an extension of existing public rights over clean air and water, which courts have said are bases for public nuisance. See e.g. *Valeant Canada LP/Valeant Canada SEC v British Columbia*, 2022 BCCA 366 at para 181. GHG emissions not only pollute the air, but the water as well (causing ocean acidification).

107. Gage, "Protecting Vancouver," *supra* note 7 at 14.

108. *McKie v KVP Co Ltd*, [1948] OR 398, [1948] 3 DLR 201 at 210 (ONSC), aff'd with variation [1949] 1 DLR 39 (ONCA), aff'd [1949] SCR 698, quoting Blackstone's *Commentaries*, Book II, p 14: "… there are some things which, notwithstanding the general introduction and continuance of

Given the advances in science and the findings related to causation in other courts, as well as the potential ability to use different types of causation tests, there are many ways to effectively overcome issues of causation in nuisance.

2. *Negligence*

The fact that fossil fuel companies complied with applicable statutes cannot insulate them from a claim in negligence. In Canada, product liability is grounded in negligence: product liability claims require proof of negligent manufacture, negligent misrepresentation, negligent failure to warn or negligent design. Of these categories of negligence, the failure to warn is perhaps most applicable in an action against fossil fuel companies, and is one of the causes of action routinely raised in the US cases. As such, the focus of the discussion is on the duty to warn.[109]

a. *Duty to warn*

The duty to warn has been summarized as follows:

> The law may be simply stated. Manufacturers and suppliers are required to warn all those who may reasonably be affected by potentially dangerous products.... This duty extends even to those persons who are not party to the contract of sale.... The potential user must be reasonably foreseeable to the manufacturer or supplier manufacturers and suppliers (including a buildersupplier like SJSL) do not have the duty to warn the entire world about every danger that can result from improper use of their product.[110]

It is the inequality of information, and the nature of an implicit relationship of trust between the manufacturer and the users, that justifies such an obligation. In the seminal duty to warn case of *Hollis*, which involved a patient not being informed of the risk of a breast implant rupturing, La Forest J explained the rationale for the tort:

> The rationale for the manufacturer's duty to warn can be traced to the "neighbour principle", which lies at the heart of the law of negligence, and was set down in its classic form by Lord Atkin in *Donoghue v.*

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property, must still unavoidably remain in common; … Such (among others) are the elements of light, air, and water."

109. See Section II(3) above regarding the framing of a negligence claim in a similar fashion as *Milieudefensie*. While such a claim may be novel, but that is not to say novel claims should not be pursued. As Judge Crabtree stated in the *Honoloulu* case "Common law historically tries to adapt to such new circumstances." See *Honolulu*, *supra* note 45 at 7. In Canada, the novelty of a cause of action is not sufficient to strike a cause of action. See *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 989, [1990] SCJ No 93; *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 19.

110. *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210 at para 19 [citations omitted], [1997] SCJ No 11.

> *Stevenson*, [1932] A.C. 562 (H.L.). When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products, and are therefore put at risk if the product is not safe. The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product.[111]

Claims in breach of the duty to warn also require a plaintiff to establish that a failure of the defendant's duty to warn cause the plaintiff's injury. This causation issue is often tricky in duty to warn cases because with hindsight, the plaintiff will always say that the failure to warn caused the injury. For example, in *Hollis* one of the main issues was whether Ms. Hollis would still have elected to have the operation if she had been properly warned of the risk. Ultimately the Court found given the evidence at trial, she would have not elected to take the surgery.[112]

This causation issue may be particularly challenging in a duty to warn case against fossil fuel companies. Proving that the plaintiff actually suffered harm as a result of a failure to warn would require proof that they reasonably would have relied on a warning and the loss could have been avoided. In other words, the plaintiff would need to prove that if the defendants had been forthright and candid about the science and the harms caused by their fossil fuels (and indeed, had not actively concealed such harms), they would have done something differently and thus would have allowed the plaintiff to avoid the loss. As one author has noted:

> Even if warnings about the climate-changing carbon dioxide emissions of defendants' products had been provided, it is likely that most consumers' behavior would not have changed meaningfully. There would still be few viable alternatives to these products available to consumers. At best, a small percentage of consumers might have purchased, say, a slightly more fuelefficient car, and such purchases in the aggregate might have marginally reduced or mitigated the foreseeable risks from increased greenhouse gas concentrations. Finding the preclusion of this small reduction (if it would have existed) to be a "substantial" element in causing plaintiffs' harms, as is required for a finding of proximate causation, strains credibility.[113]

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111. *Hollis v Dow Corning*, [1995] 4 SCR 634 at para 21, [1995] SCJ No 104. Ms. Hollis underwent breast implant surgery without her doctor warning her of the risks of post-surgical complications or the possibility of an implant to rupture. One of her implants did end up rupturing, causing her harm.
112. *Ibid* at paras 43-52.
113. David A Grossman, "Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation" (2003) 28:1 Colum J of Envtl L 1 at 43. Although this argument decreases in strength over time and supposes better technology would not have been developed earlier had the dangers of fossil

One may argue that many private individuals, organizations, and governments are taking expedient action to limit climate change impacts.[114] Therefore, if consumers had known about the extent of the danger decades before, they would have acted to put in place mitigation and adaptation measures earlier—which would also have been significantly cheaper. This presumes that the potential plaintiff could actually have put in effect mitigation and adaptation measures to lesson the harms of climate change.

Further, it may be that fossil fuel companies' deception and intent to obfuscate did in fact result in considerable delay in the development of a broad public understanding of the relationship between the use of fossil fuel products and climate change impacts, leading to the current situation where there is no possibility of avoiding significant disruption associated with climate change and necessitating adaption and resulting costs.[115] It may be that the delay in recognizing the impacts of GHG emissions has not only significantly exacerbated the problems of climate change but rendered them essentially irremediable.[116] But again, such an argument may very well be dependent on who the plaintiffs are and what knowledge they had of the dangers of GHG emissions. On one hand, if the plaintiffs are individuals, it may be difficult to prove that had they relied on a warning about the dangers of GHG emissions and ended-up buying a more fuel-efficient car (as discussed in the quote above), that would have made any meaningful change. On the other hand, if the plaintiffs are governments (following in the footsteps of tobacco or opioid costs recovery litigation), there is a very real issue as to whether the evidence could prove that they would have acted any differently at all. Indeed, Canada itself has at the very latest known since 1988 about the dangers of CO_2 emissions and had pledged to reduce its GHG emissions at the International Conference on the Changing Atmosphere in Toronto. It has however failed to meet every GHG emission target it has set. Even today, while Canada acknowledges the existential threat of the climate crisis, it still is debatable whether Canada or any of the Canadian governments are doing enough to mitigate the harms. Given the track record of Canada and other Canadian governments—it seems questionable that Canada would

fuels not been obfuscated.

114. Although many would argue insufficient action despite long-time knowledge of the harms, hence the constitutional claims against government like in *La Rose*, *supra* note 63.

115. Deceit and conspiracy may themselves be causes of action pursued by plaintiffs, and have been pursued in some of the US claims.

116. Certainly at this point in time, many climate change impacts are irreversible. See Hans-Otto Pörtner et al, "Summary for Policy Makers" in Hans-Otto Pörtner et al, eds, *Climate Change 2022: Impacts, Adaptation, and Vulnerability* (Cambridge University Press, 2022) at 3-33, DOI: <10.1017/9781009325844.001>.

have relied on or acted differently if it had received a dire warning from fossil fuel companies.

Thus a claim based on the duty to warn suffers from similar fragilities as a claim in nuisance in regards to the defence of statutory authority. Framed in a favourable light—it is an argument that defendants should not be liable when the state has acquiesced and authorized their activities. Framed in a more negative light—it is an argument reflecting contributory negligence and hypocrisy of society—we should not be claiming liability when our actions (or lack thereof) have been a significant part of the problem. The strength of such arguments will depend heavily on who the plaintiffs are, what evidence can be brought to show the relative knowledge of the parties about the dangers of GHG emissions, and what evidence can be shown that with full knowledge, the plaintiffs would have taken steps to combat and mitigate climate change.

Even then, it is oil and gas companies who have deliberated concealed the dangers of their products to continue to make enormous profit. Even if the state or society acquiesced or authorized such conduct, and may have even benefited from the use of such product, should that absolve the responsibility of such companies to pay for the costs of their pollution? Completely vitiating Big Oil's responsibility in such circumstances seems unfair.

This brings us to the realm of equity. The inherent flexibility in equity may allow a claim where the moral considerations based on profiting from a harmful industry cannot be addressed by a strictly common law claim.

3. *Unjust enrichment*

The elements of unjust enrichment in Canadian law are well known. It requires an enrichment of or benefit to the defendant; a corresponding deprivation of the plaintiff; and an absence of juristic reason for the enrichment.[117]

Failing to abide by the "polluters pay" principle can fit within the framework and underlying rationales of unjust enrichment. By refraining from preventing or cleaning up the pollution, and allowing the costs associated with such remediation to fall on another, the company responsible for the pollution is enriched at the expense of the other. As Allan Kanner explains, the application of unjust enrichment to pollution cases is simple:

> In pollution cases, the unjust-benefit claim is that the polluter improperly benefited (1) by polluting rather than spending to control its pollution by

117. *Kerr v Baranow*, 2011 SCC 10 at para 32 [*Kerr*].

> properly disposing of its waste, and (2) by later refusing to spend to clean the resulting mess thoroughly.[118]

As applied to Big Oil and GHG emissions, the argument would be that fossil fuel companies have been enriched by emitting GHG emissions and refusing to properly mitigate or remedy the consequences of such pollution, at the expense of plaintiffs who have incurred costs to prevent or remedy the various harms caused by the activities and products of the defendant companies. As discussed further below, this is termed "negative" enrichment.[119] It relies on the idea that such companies have an equitable obligation to address their negative impacts, the costs of which have been borne by the plaintiffs instead.

a. *Negative enrichment and corresponding deprivation*

The theory of "negative unjust enrichment" applies where there are allegations that a manufacturer has not paid for the "negative externalities" (e.g. costs arising from harms) arising from consumer use of their products. US municipalities and governments have succeeded—at least in surviving motions to strike—in advancing unjust enrichment claims in mass tort cases against manufacturers of dangerous products, for example, in cases involving risks to human health arising from weapons and lead.

In both Ohio and Massachusetts municipalities have sued gun manufacturers and advanced claims in unjust enrichment for the costs of the harm caused by their weapons.[120] The Ohio court declined to dismiss a claim in which the plaintiffs alleged that "the City has paid for what may be called the Defendants' externalities—the costs of the harm caused by Defendants' failure to incorporate safety devices into their handguns and negligent marketing practices."[121] In the Massachusetts claim, which also survived dismissal in part, the claimants stressed that the defendants "undertook the alleged wrongful conduct for the purpose of increasing their profits."[122]

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118. Allan Kanner, "Unjust Enrichment in Environmental Litigation" (2005) 20 J Envtl L & Litig 111 at 146, online: <scholarsbank.uoregon.edu> [perma.cc/8Q3M-UTNE]. See also Allan Kanner, "Equity in Toxic Tort Litigation: Unjust Enrichment and the Poor" (2004) 26:2 L & Policy 209, DOI: <doi.org/10.1111/j.0265-8240.2004.00010.x>.

119. *Kerr*, *supra* note 117 at para 43 recognizes that an enrichment "may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake."

120. *White v Smith & Wesson Corp*, 97 F Supp (2d) 816 (ND Ohio 2000) [*White*]; *City of Boston v Smith & Wesson Corp*, 2000 Mass Super LEXIS 352 (2000) [*Boston*].

121. *White*, *supra* note 120 at 829

122. *Boston*, *supra* note 120 at 78-79.

With regards to claims involving the lead industry, claims in Rhode Island and New York have survived motions to strike on a similar "externality" theory as advanced in the gun cases.[123] In the Rhode Island case, the Attorney General alleged that "the State's payment of lead related costs has allowed and continues to allow the defendants to derive economic gain from their promotion and sale of lead while, at the State's expense, avoiding responsibility for the damages it has caused."[124] Similarly, the Appellate Division of the Supreme Court of New York dismissed a motion to strike a similar claim in which the plaintiffs sought "restitution for their expenditures in abating the hazard, and treating its victims."[125]

There have also been US cases where, employing similar reasoning, courts have dismissed motions to strike where the substantive claim has asserted unjust enrichment for the externalities caused by discrete pollution incidents (such as oil and gas spills).[126]

Although this theory of negative enrichment is not widely utilized in the US and has not, to my knowledge, been used yet in Canada, there may be enough similarities between the US and Canadian legal principles to suggest that a court in Canada may well recognize a cause of action for unjust enrichment relating to the externalities of certain activities, as many American courts have been prepared to do.

While there are differences between climate change and, for example, a localized pollution spill scenario—there is a degree of separation between the enrichment and corresponding deprivation in that the pollution is generated from the normal use of a product from a consumer; and that technologically it may not be viable to "clean up" the pollution—these are not necessarily fatal barriers. Indeed, the lawsuits against gun manufacturers that have been allowed to proceed in the US suggest that negative unjust enrichment can be applied to manufacturers in contexts where the deprivation is borne by society arising from the use of a consumer product, even where there is no way to "clean up" the externality.

The Supreme Court of Canada has recently held that the correspondence between the deprivation and the enrichment need not be direct.[127] Justice C*ôté* held "a robust approach to the corresponding deprivation element

123. *State of Rhode Island v Lead Industries Assn*, No 99-5226, 2001 RI Super Ct LEXIS (2001) [*Lead Industries*]; *City of New York v Lead Industries Assn*, 190 AD (2d) 173 (NY App Div 1993) at 177 [*New York*].
124. *Lead Industries*, *supra* note 123 at 48-52.
125. *New York*, *supra* note 123 at 177
126. *Branch v Mobil Oil Corp*, 778 F Supp 35 (WD OK 1991); *Ergon v Amoco Oil Co*, 966 F Supp 577 (WD TN 1997).
127. *Moore v Sweet*, 2018 SCC 52 at paras 44-49.

focuses simply on what the plaintiff actually lost," and whether "we can say that the latter was enriched *at the expense* of the former."[128]

b. *Juristic reason*

The third element (of proving an absence of juristic enrichment) is perhaps more difficult than proving an enrichment and corresponding deprivation.

An absence of "juristic reason" for the enrichment means that "there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff."[129] A juristic reason includes, for instance, a contract between the parties or disposition of law requiring the enrichment by denying the plaintiff's recovery. However, there is no closed list of juristic reasons, and factors such as the expectations of the parties may be considered in addition to any common law, equitable, or statutory obligations.[130]

The difficulty with this element is similar to the difficulties around the social utility and statutory authority arguments in nuisance, and the reliance element in a duty to warn case—fossil fuel companies were at all times engaging in lawful activities, and had specific authorizations regarding the extraction of the products. They were not required to contribute to specific abatement or remediation efforts (meaning those related to climate change—not to their extraction projects), and therefore should not be retrospectively held liable for climate change impacts.

Further, fossil fuel companies may argue they have reasonable expectations that they would not be liable for the costs of climate change impacts considering the lengthy time period encompassing the status quo for the fossil fuel industry in these circumstances, particularly given the highly regulated nature of the industry.[131] On the other hand, one might argue that no such expectation existed, given that the fossil fuel companies were aware of and sought to conceal the harms of their products.

What may be critical in this analysis are residual policy considerations for and against restitution. The "polluter pays" principle, which "assigns polluters the responsibility of remedying environmental damage for which they are responsible,"[132] may point strongly towards restitution as an appropriate remedy, but only if the courts accept a robust interpretation of the principle. Unjust enrichment, rather than providing any "windfall"

128. *Ibid* at para 49 [emphasis in original].
129. *Kerr*, *supra* note 117 at para 40.
130. *Ibid* at para 41.
131. See e.g. *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 55.
132. *Orphan Well*, *supra* note 79 at para 29.

for the plaintiffs, is well suited to capture the full harms, including externalities, of pollution.

However, a robust understanding of the "polluter pays" principle is needed. Not only does that mean a broad understanding of the polluter being responsible for all environmental damage—including being responsible for remediating all damage to water, land, protected species, natural habitats, and risks to human health—but it also requires a nuanced understanding of who the "polluter" is.[133] A more conservative application of the principle would only internalize the costs of pollution that the defendants are themselves directly responsible for—e.g. emitting as part of their extraction and refining process. It would not capture emissions from the end-use of their products given the consumers are arguably the "polluters" for those emissions.

There is debate in the literature about who the "polluter" should be, but there are various approaches which go further than simply identifying who is directly using the product that emits the pollution. For example:

> The academic literature reveals a variety of views as to who is the polluter under the polluter pays principle. Is the manufacturer the polluter? Is the consumer? Perhaps it is both in most instances. In many instances the manufacturer or producer will simply pass on the costs to the consumer in any event, although this is not always feasible. What about others who enable the pollution? One approach is to identify the polluter via a "beneficiary pays" rationale which requires that the party who benefit economically from an activity should pay the costs of clean-up.[134]

The use of such a principle would strongly point towards fossil fuel companies as being the responsible polluter, given the billions of dollars in profit they have made.

Moreover, having fossil fuel companies be the responsible polluter for scope 3 emissions would align with the underlying rationales of the "polluter pays" principle, which has been described as:

- that efficiency internalizes environmental costs into the activity, thereby causing those engaging in activities to avoid excess environmental costs;

133. EC, *Commission Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage*, [2004] OJ, L 143/56 at preamble (4), (7), arts 1-2, online: <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004L0035-20130718> [perma.cc/Z559-H3P3].

134. Environmental Law Centre of Alberta, "The Polluter Pays Principle in Alberta Law, Environmental Law Centre of Alberta" (Edmonton: Environmental Law Centre, 2019) at 13 [footnotes omitted], online: <canlii.ca/t/sp6g> [perma.cc/3TA8-DBU6].

- the moral idea that people should be held accountable for consequences of their actions;
- the qualification of the moral notion that the polluter should be held liable only if they should have known better (i.e. liability based on claim of prior fault); and
- notions of economic benefit (since the polluter benefitted from the pollution, they should pay for the cleanup, as a matter of fairness).[135]

Identifying fossil fuel companies as the responsible "polluter" rather than the consumers would further these rationales, particularly given their knowledge, the economic benefit they gain, and the position they are in to internalize all external costs of GHG emissions and to cease continuing to extract and emit further GHGs. It would also be consistent with the holding in *Milieudefensie* finding Shell responsible for scope 3 emissions given its long-time knowledge of the dangers of its product and the substantial control and influence it has over downstream emissions.[136]

Even if such an interpretation of the "polluter pays" principle is not accepted by the courts, unjust enrichment and the principles of equity can nevertheless provide Canadian courts with a theory of liability from which they can remedy the unfairness of Big Oil making billions in profit off a climate destroying product—and concealing such dangers to continue such profits—while completely offloading all of the environmental harms and costs to remedy and mitigate such harms onto society.

Conclusion

There is no doubt that any Canadian case seeking damages or injunctive relief from Big Oil to hold them accountable for the climate change impacts of their products will be hard fought and be difficult to prosecute. None of the claims of nuisance, negligence, or unjust enrichment present a perfect fit, and each of these claims will present their own difficulties. However, in this author's view, the underlying theory of liability is intuitive and sound. Fundamentally, it is a "polluter pays" problem—if Big Oil is responsible for the some of the pollution in the form of GHG emissions, then they are responsible for at least some of the environmental damage of that pollution, no matter how catastrophic or costly that damage is.

The fact that they knew of the harms of these products and yet tried to hide these harms adds to the instinctive notion that fossil fuel companies

135. *Ibid* at 14, citing Nickie Vlavianos, "Creating Liability Regimes for the Clean-up of Environmental Damage: The Literature" (1999) 9 JELP 145.
136. *Milieudefensie*, *supra* note 5 at paras 4.4.20, 4.4.24, 4.4.25.

bear some, if not most, of the responsibility for the cost of climate change impacts. The extent that potential plaintiffs or Canadian governments have authorized or contributed to the problem may bear on what proportion of the damages Big Oil should be responsible for—but it should not absolve fossil fuel companies completely from any responsibility.

Simply put, fossil fuel companies should not be permitted to profit in the range of tens of billions of dollars annually while actively deceiving consumers about the harms of their products and be absolved from contributing to a substantial share of the mitigation, adaptation, and remediation costs from climate change that society now faces.

The US cases and the *Milieudefensie* case manifest this basic theory of liability in two starkly different approaches. The US cases seek damages, deliberately shying away from any international or foreign implications of their cases to limit separation of power concerns. The *Milieudefensie* case seeks injunctive relief and relies heavily on international and human rights law, treating Shell in many ways like a nation state. Both approaches have their benefits and drawbacks, and neither approach is a full answer as to how a Canadian claim should be litigated. These cases demonstrate that initial concerns of complexity, causation, and justiciability, which proved fatal in the first wave of private climate litigation, can now be overcome. Courts seem more amenable to engage with the issues and may see a need for tort law to adapt to the novel and unprecedented issues of our time. If nothing else, the successes so far in the US and in the Netherlands are reason for optimism for potential plaintiffs in Canada, demonstrating that arguments and claims can be crafted in different and creative ways that will be amenable to adjudication by courts.