Private Law as a Tool for Climate Justice in Canada: Reflections on the New Zealand Court's Decision in Michael Smith v Fonterra Co-Operative Group Limited.*

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I. INTRODUCTION

Courts increasingly use private law to hold corporations accountable for human rights and environmental and climate abuses. In 2019, the United Kingdom Supreme Court in *Vedanta v Lungowe* recognized a tort action in negligence to hold corporations responsible for failure to discharge their duty of care to local communities in a parent-subsidiary corporate relationship.[1] Similarly, in 2021, the Netherlands' District Court in *Milieudefensie v Royal Dutch Shell* recognized corporations' duty of care regarding climate change.[2] The Dutch court established that corporations owe a duty of care, independent of state obligations, to reduce their CO2 and other GHG emissions.

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1 [2019] UKSC 20.

2 Vereniging Milieudefensie v Royal Dutch Shell PLC(RDS)Case No: ECLI:NL:RBDHA:2021:5339, online:<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true&keyword=shell>.

This case comment examines the recent New Zealand Supreme Court decision in *Michael Smith v Fonterra Co-Operative Group Limited* (*Smith*),[3] delivered on 7 February 2024 in light of global developments to hold corporations accountable for their CO2 and other GHG emissions. *Smith* is the first Supreme Court decision that acknowledges the justiciability of private law claims in public nuisance and a new tort of climate system damage in climate litigation. The decision is significant because it expands the cause of actions available to litigants. It also opens a new litigation strategy for Aboriginal Peoples in climate litigation. This comment discusses potential opportunities and challenges this case raises for Canadian courts, litigants, and advocacy groups as climate litigation cases grow in Canada.[4]

This comment proceeds as follows. Part II gives a background on *Smith*, teasing out the issues and arguments of the parties. Part III then draws lessons from *Smith*, discussing opportunities and challenges for corporate climate litigation in Canada. I conclude that *Smith* is an eye-opener that private law, especially torts, holds a promise for corporate accountability relating to climate change in Canada.

II. BACKGROUND

In 2019, the plaintiff, Mr. Smith, an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders, filed an action in the New Zealand High Court against seven New Zealand companies that operate in an industry that either emits greenhouse gases (GHGs) or supplies products that release GHGs when burned. He alleges that in 2020–2021, the corporations were responsible for more than one-third of New Zealand's reported GHG emissions (and just 15 companies were responsible for more than 75 percent).[5] Therefore, he claims that the corporations contributed materially to the climate crisis and have damaged and will continue to damage places of his customary, historical, nutritional, cultural, and spiritual heritage (whenua and moana) as an Indigenous person.

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3 Michael Smith v Fonterra Co-Operative Group Limited & Ors [2024] NZSC 5.

4 As of the time of writing, there are 38 climate change cases in Canadian courts. See Sabin Center for Climate Change Law, Climate Case Chart, online:<http://climatecasechart.com/non-us-jurisdiction/canada/>.

5 Smith, supra note 3 at par 52.

Mr. Smith framed his claims in negligence, public nuisance, and a new tort—damage to the climate system. Regarding his negligence claim, he alleges that the corporations owe him, and persons like him, a duty to take reasonable care not to operate their businesses in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system.[6] Similarly, the action of public nuisance is based on the allegation that corporations' emissions caused more harm to Mr. Smith than the public due to his connection to land and environment as an Indigenous person. Mr. Smith's third claim—a new tort of damage to the climate system—flows from the first two actions—that the corporations' anthropogenic interference is an independent injury that should be compensable in tort. He sought injunctions to mandate the corporations to reduce their emissions or, in the alternative, immediately seize their emission to a net zero level.

Mr. Smith's claim about Indigenous practices is important. Although he concedes the corporations do not directly owe him any obligations under tikanga Māori (Indigenous practices), he pleads that the Indigenous practices should inform the scope and content of the cause of actions in tort. This framing is influenced by the historical development of common law and the Indigenous practices in New Zealand.

The corporate respondents moved to strike out the Statement of Claim for failure to disclose a reasonably arguable cause of action. They argued that the Statement of Claim is vague and ambiguous, making it unsuitable for judicial determination. They also contend that the claim concerns complex regulatory matters that should be left to the parliament to decide. The corporations argue that if the court accepts Mr. Smith's claim, it will act outside its institutional competence because such a decision substantially changes the common law.

The trial court partially agreed with the corporations—it struck out the claim in negligence and public nuisance but allowed the claim for a new tort of climate damage system. Both parties appealed the decision. The Court of Appeal dismissed Mr. Smith's appeal and allowed the corporations' appeal. The Court of Appeal noted that torts of public nuisance and negligence are not appropriate remedies for climate change cases. The court held that New Zealand's statutory intervention on climate change has "covered the field."[7]

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6 Ibid.

7 Smith, supra note 3 at par 100.

Therefore, there is no remedy based on common law torts. Furthermore, the court held that the proposed new tort of climate damages is not appropriate for judicial determination because its scope and content are incapable of scientific precision. The court concluded that

> ... the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts. It is quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination.[8]

Mr. Smith appealed to the New Zealand Supreme Court. I divide the court's decision based on the issues.

A. Do Statutes exclude Common Law Actions over GHG Emissions?

The Supreme Court held that New Zealand's statutory regime on climate change does not expressly prohibit common law claims.[9] Rather, statutes have "left a pathway open for the common law to operate, develop and evolve."[10] Therefore, statutes and common law claims can be mutually reinforcing.

B. Is the Public Nuisance Claim Justiciable?

The court, relying on English and Canadian authorities, discussed the elements of public nuisance, including (1) the plaintiff must plead actionable public rights, (2) the defendant's action must be independently illegal apart from other activities, (3) the plaintiff must prove that they suffered special damage above others, and (4) the plaintiff must prove that there was a "sufficient connection" between the pleaded harm and the defendant's activities.[11]

The court held that the effect of climate change on life, health, property, or comfort is enough to satisfy the public rights requirement. On the second requirement, the court held that there is no need for a plaintiff to prove independent unlawful activities in New Zealand. It suffices if the plaintiff can show that the defendant's activities had adverse effects.[12] Regarding the

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8 Smith, supra note 3 at 5.

9 Ibid at par 97.

10 Ibid at par 100.

11 Ibid at par 115.

12 Ibid at par 147.

special damages requirement, the Supreme Court held that a plaintiff in public nuisance need not prove a different harm in kind and degree than the public. The court noted that to account for the new kind of harm generated by climate change in the 21st century, there is a need to adopt a flexible approach to the special damage rule. Since Mr. Smith pleaded that the emissions affected his cultural and fishing rights on the coastal line and his spiritual connection to the land, it is enough to satisfy the special damages requirement.[13] According to the court, this damage goes beyond interference with public rights.

Turning to the last issue of causation, the court noted that this is the most challenging hurdle climate litigants must cross. A climate change claim based on the tort of public nuisance is difficult because it is difficult to scientifically prove each contributor's contributions. This is even more difficult when the aggregate of the harm involves an infinite number of known/unknown contributors, some of whom may not be before the Court. Relying on decisions from the United Kingdom, the United States, and Canada, the court held that it is no defence to an action on public nuisance that there are many contributors to the harm; every contributor is liable to a separate action.[14]

Similarly, the court noted that connecting corporate emissions with Mr. Smith's injury is difficult. The court declined to apply the "but for" causation test used in negligence for public nuisance. According to the court, issues of causation and sufficient connection should be left for trial court after the evidence and policy implications of the decision have been assessed.[15] The court noted, however, that although the emission may have caused harm to Mr. Smith's land, he must still prove that the emission amounted to substantial and unreasonable interference with public rights. This will be the crux of contention at the trial court. However, the court admonished that "[t]he principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity."[16]

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13 Ibid at par 152.

14 Ibid at par 164.

15 Ibid at par 166.

16 Ibid at par 172.

C. Can Indigenous Practices Can Inform Tort Actions?

The court held that Tikanga (Indigenous practice) has historically informed common law in New Zealand. Therefore, the court cannot avoid addressing and assessing matters of Tikanga when deciding tort claims of this nature.[17] Taking account of Tikanga practices would enable the court to consider conceptions of loss that are neither physical nor economical. The court held that Indigenous practices should inform Mr. Smith's claim.[18] This is because Mr. Smith's connection with whenua (land), wai (fresh water), and moana (sea) provides a foundation for his proof of special damages and substantial and unreasonable interference.

D. Are Injunction or Compensatory Damages the Appropriate Remedy for Climate Change Claims?

Considering the compensatory nature of tort law, the court noted that Mr. Smith's request for a declaratory injunction is unusual. While damages seek compensation for past injury, injunctions seek to prevent future injuries. However, the court noted that injunctive reliefs should not be lightly dismissed in private law. This is more so because Mr. Smith did not claim for damages. Therefore, depending on the evidence provided at trial, the court can provide injunctive relief.

III. SIGNIFICANCE OF THE DECISION

Anne Marie Slaughter describes a community of global courts where judges from different countries see one another as participants in a common judicial enterprise.[19] This is particularly so among common law jurisdictions where national court decisions influence one another.[20] The New Zealand Supreme Court decision is a testament to Slaughter's conceptualization of a community of global courts. The Supreme Court cross-referenced decisions from English, Canadian, and US courts. Indeed, it has been noted

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17 Ibid at par 188.

18 Ibid.

19 See Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44:1 Harv Int'l LJ 191 at 193.

20 See Antje Wiener & Philip Liste, "Lost Without Translation? Cross-Referencing and a New Global Community of Courts" (2014) 21:1 Indiana Journal of Global Legal Studies 263.

that "there is still a strong tradition in New Zealand of looking to other common law jurisdictions for guidance."[21] New Zealand is not alone; the Supreme Court of Canada also engages in judicial dialogue, citing and referencing foreign cases in its judgments.[22] Considering that Canadian court decisions influenced *Smith*'s decision, what lessons can Canadian courts learn from New Zealand, which facilitates a dialogue between the two national courts?[23] In answering this question, I discuss the significance of the decision for Indigenous Peoples in Canada, the prospect of public nuisance and new tort claims in Canada, and the appropriateness of injunctive reliefs in public nuisance claims.

A. Public Nuisance—Connecting Common Law with Aboriginal Law

Smith's decision on public nuisance may be a beacon for litigants in common law jurisdictions, especially in Canada. Scholars in Canada have suggested ways litigants may prove public nuisance requirements.[24] *Smith* offers courts a fresh perspective when dealing with public nuisance actions involving Indigenous Peoples. One of the biggest hurdles plaintiffs must cross is showing that the damages they suffered are greater or different from those of the public. *Smith* is instructive on overcoming this challenge by recognizing that damages may go beyond economic and financial issues; they may be spiritual or relational. Furthermore, *Smith* acknowledges that Indigenous practices inform common law on public nuisance. Therefore, where a plaintiff can show that GHG emissions affect their spirituality and relationship to land, water, and the environment, *Smith* tells us that it may satisfy the special damage requirement.

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21 Janet McLean, "From Empire to Globalization: The New Zealand Experience" (2004) 11: 1 Indiana Journal of Global Legal Studies 161 at 165.

22 See Klodian Rado, The Transnational Judicial Dialogue of the Supreme Court of Canada and its Impact (PhD Thesis: Osgoode Hall Law School, York University Toronto, Ontario, 2018).

23 Slaughter, supra note 19 at 194.

24 Stepan Wood, "Climate Change Litigation in Ontario: Hot Prospects and International Influences" (2016) OBA Institute 1, online: <https://ejsclinic.info.yorku.ca/files/2016/03/S-Wood-OBA-Institute-2016-climate-change-litigation.pdf>; Andrew Gage, "Climate Change Litigation and the Public Right to a Healthy Atmosphere" (2013) 24 J Envt'l L & Prac 257, reprinted by West Coast Environmental Law Association (October 2014).

Section 35 of the Canadian Constitution protects Indigenous legal traditions.[25] Like New Zealand, Canadian courts also recognize the relationship between common law and Indigenous rights. In *Pastion v. Dene Tha' First Nation*, the Federal Court noted that:

> Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land. Chief Justice McLachlin of the Supreme Court of Canada wrote, more than fifteen years ago, that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty"...[26]

Indigenous principles have influenced constitutional, contractual, and tortious actions in Canada. For example, in *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc*, the British Colombia Supreme Court noted that where corporate activities impact Aboriginal titles and enjoyment of land without justification, the corporation may be liable for nuisance.[27] Therefore, like in New Zealand, Indigenous Peoples can rely on Indigenous rights and titles when suing corporations in tort, even if those rights and titles have not been proven in previous litigation.[28] Mr. Smith's framing of his Indigenous rights is a cue to Indigenous Peoples in Canada when suing for public nuisance relating to climate change. Mr. Smith did not sue for a direct breach of his Indigenous rights. Instead, he asks the court to take note of his custom when dealing with common law principles in tort.

B. Recognizing a New Tort of Climate Damage and Challenges to Plaintiffs

The New Zealand Supreme Court's decision to allow a new tort of climate system damage to proceed to trial is a unique approach to climate change litigation. The court recognizes New Zealand's commitment to international climate treaties, including the Paris Agreement and the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC),29 as treaties that aim to strengthen the global

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25 Part II of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35.

26 2018 FC 648 (CanLII), quoting Mitchell v. MRN, 2001 SCC 33, [2001] 1 SCR 911, at para. 10.

27 Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc., 2022 BCSC 15.

28 See Christina Maria Clemente, "More Than Just a Trapline: A Torts Law Approach to Protecting Indigenous Trappers' Environmental Rights" (2021) 4:2 Lakehead Law Journal 77.

29 Paris Agreement, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740; United Nations

response to the threat of climate change. Contrary to the corporate defendants' argument that it will be difficult to determine the scope of the new tort, the court noted that the scope of the new tort is likely to be influenced by New Zealand's legislation on climate change, including the Climate Change Response Act 2002 (CCRA).30

Recognizing a new tort is consistent with the New Zealand courts' approach to fully informed access to civil justice. This approach allows courts to hear those who have a tenable case that they have been harmed and who will otherwise go without remedy based on a pre-emptive evaluation only.[31] The approach is also consistent with climate justice. The United Nations Development Program on Climate Change defines climate justice as "putting equity and human rights at the core of decision-making and action on climate change."[32] It has been noted that parties "have their best chance of success [in climate litigation] by appealing to the judge's "sense of equity" and arguing that emerging norms and ineffective laws mean that the legal status quo does not afford justice."[33]

Like the New Zealand court, the Supreme Court of Canada (SCC) decision in *Nevsun Resources Limited v Araya* recognized the possibility of new torts based on customary international law norms. Given the preliminary stage of the proceedings, the SCC did not finally decide whether the claims should proceed with new torts (such as slavery) or existing torts (such as unlawful confinement).[34] Although Canadian and the US courts have recognized the justiciability of climate change claims,[35] it would be interesting to see how Canadian courts would respond to a proposal for a

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Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107.

30 Smith, supra note 3 at par 100.

31 Ibid at par 84.

32 UNDP Climate Promise, "Climate Change is a Matter of Justice – Here's why" (30 June 2023), online:< https://climatepromise.undp.org/news-and-stories/climate-change-matter-justice-heres-why>.

33 Jeff Todd, "A 'Sense of Equity' In Environmental Justice Litigation" (2020) 40 Harvard Environmental Law Review 169 at 175.

34 [2020] SCC 5.

35 See Mathur et al v Ontario [2023] ONSC 2316; Massachusetts v. Environmental Protection Agency, 549 U.S. 497. See also Camille Cameron & Riley Weyman, "Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices" (2022) 34 Journal of Environmental Law 195.

new tort of climate system damage, considering that such claims may not be rooted in customary international law norms. It is doubtful that a tort of climate system damage falls under existing torts in Canada because climate change is indirect and sometimes unintentional, unlike direct international torts in *Nevsun*. Therefore, unlike in cases where the SCC declined an invitation to recognize a new tort of sexual battery because there is an existing traditional framework for battery,[36] a new tort of climate harm requires courts to formulate a new framework against which the claim must be assessed.

The institutional separation of power between the judiciary and the executive is a potential jurisdictional barrier to Canada's new tort of climate change.[37] This is because Canadian courts have preferred an incremental over a substantive change in the common law. *Smith* suggests that where a state is a signatory to or has domesticated international climate change treaties, it is arguable that recognizing a new tort of climate system damage furthers states' executive policies and legislation. Canada is a signatory to climate treaties and Agreements, including the Paris Agreement and the UNFCCC.[38] Indeed, in 2021, Canada committed to a higher emission reduction target of 40% and 45% below 2005 levels by 2030.[39] Canada also has domestic legislation on climate change, including the *Net-Zero Emissions Accountability Act* and the *Greenhouse Gas Pollution Pricing Act*.[40]

However, the fact that Canada has signed a treaty does not automatically amount to domestication because Canada operates a dualist system.[41] While the Court has accepted (as it did in *Nevsun*) that customary international law is part of Canada's common law (absent an inconsistent

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36 Non-Marine Underwriters, Lloyd's of London v Scalera [2000] 1 SCR 551.

37 See Jillian Sprenger, "The Separation of Powers Doctrine: A Barrier to Climate Litigation?" (22 November 2023) Canada Climate Law Initiative (blog), online:<https://ccli.ubc.ca/the-separation-of-powers-doctrine-a-barrier-to-climate-litigation/>.

38 Canada's Commitments and Actions on Climate Change, Office of the Auditor General of Canada, online:<www.oag-bvg.gc.ca/internet/English/att__e_43947.html>.

39 Ibid.

40 Net-Zero Emissions Accountability Act, S.C. 2021, c. 22; Greenhouse Gas Pollution Pricing Act S.C. 2018, c. 12.

41 See R v Hape, [2007] 2 SCR 292; Quebec (Attorney General) v 9147-0732 Québec Inc,[2020] 3 SCR 426)

statutory rule), it has been strongly of the view that a treaty obligation is not enforceable in Canadian courts unless Parliament or the provincial legislatures have domesticated the obligation. Given the SCC's strongly dualist approach, would a Canadian court have the same latitude in considering Canada's treaty obligations to recognize a new tort?[42]

Even when provinces have domesticated treaties, Canadian courts have declined to recognize a new tort where existing legislation has covered the field, as the court of appeal in *Smith* puts it. For example, the SCC in *Seneca College v Bhadauria*,[43] refused to create a tort of discrimination because there was existing human rights legislation that prohibited discrimination. The Court declined an invitation to recognize the tort because the statutory regime was comprehensive. Now that Canada has legislation that attempts to regulate GHG emissions, the question arises whether that too is sufficiently comprehensive that Canadian courts would find the legislation precludes the creation of a new tort.[44]

The arguments above mirror the decision at the Court of Appeal in *Smith*. My response is two-pronged. First, as the Supreme Court in *Smith* noted, common law torts only complement Canada's international obligation. Canadian courts' recognition of a new tort should not depend on whether Canada has domesticated an international instrument, although it can be influenced by it. Second, the Supreme Court in *Smith* decided that when courts recognize a new climate damage system tort, they reinforce the country's international commitments and domestic legislation. Even in cases where Canada has domesticated an instrument, this should not be interpreted as covering the field. For example, the Ontario Court of Appeal in *Jones v Tsige* recognized a tort of intrusion upon seclusion tort flowing from Canadian legislation on privacy.[45] Common law plays a mutually complementing role with statutes in these cases.

C. Jurisdictional and Evidential Challenges

Considering the territorial challenges in tort litigation,[46] it is doubtful whether the residence of the plaintiffs or the *lex loci delicti* (the law of the

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42 Thanks to an anonymous peer reviewer on this point.

43 [1981] 2 SCR 181.

44 Thanks to an anonymous peer reviewer on this point.

45 Jones v. Tsige, 2012 ONCA 32 (CanLII).

46 See Ekaterina Aristova, Tort Litigation against Transnational Corporations: The

place of the wrong or tort) would limit the court's jurisdiction to recognize a new climate tort in Canada because GHG emission is a global problem that transcends beyond territories and boundaries. Vincent Bellinkx calls it a common concern of humankind.[47] Even if courts recognize climate change as global harm, the doctrine of separate legal persons between parent and subsidiary companies is another hurdle plaintiffs must cross in Canada.[48] To the extent that climate change also affects Canadian residents, *Smith* may serve as a persuasive precedent to courts in Canada.

Even if plaintiffs cross the jurisdictional hurdle, *Smith* accentuates the difficulty in proving causation damages in tort cases. This may not be the case in Canada because the Federal Court of Appeal in *La Rose v Canada* held that there is "no reason to conclude that harms flowing from climate change and climate-related legislation are manifestly incapable of proof."[49] However, assuming it may be difficult for plaintiffs, Canadian tort law comes to the rescue. The Supreme Court of Canada in *Snell v Farrell* and *Clements v Clements* has developed a pragmatic and material contribution to risk approach to causation.[50] The approach requires the plaintiff to establish causation on the balance of probabilities and not to scientific certainty, especially in cases where there are two or more defendants, and it is impossible to determine who caused the injury. This framework is based on justice and fair play. In determining when it is impossible to prove causation, the court will assess whether (1) there are several tortfeasors, (2) all of them are at fault, and one or more has, in fact, caused the plaintiff's injury, (3) the plaintiff would not have been injured "but for" their negligence, viewed globally, (4) however, because each can point the finger at each other, it is impossible for the plaintiff to show on the balance of probabilities that any of them in fact caused the injury. Since it is almost impossible to prove which defendant emitted the GHG that caused the

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Challenge of Jurisdiction in English Courts (Oxford: Oxford University, Press, 2024).

47 Vincent Bellinkx et al, "Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind" (2022) 11:1 Transnational Environmental Law 69 ("territorial jurisdiction and the causation-based allocation of obligations does not match the global nature of climate change impacts and their indirect causation").

48 See Lisa Benjamin & Sara L Seck, "Mapping Human Rights-based Climate Litigation in Canada" (2021) 13:1 Journal of Human Rights and the Environment 178.

49 La Rose v Canada [2023] FCA 241.

50 Snell v Farrell [1990] 2 SCR 311; Clements v Clements [2012] 2 SCR 181.

damage, *Snell* and *Clements* relieve the burden on plaintiffs, especially in negligence cases. I see no reason why these cases should not be extended to public nuisance cases when considering tort law's compensatory nature—where there is a right, there should be a remedy (*Ubi jus ibi remedium*).

D. Are Injunctive Reliefs Appropriate in Public Nuisance Claims?

Smith did not expressly prohibit injunction as a remedy in climate litigation based on public nuisance. It, therefore, stands to reason that what is not expressly prohibited is permitted. However, the question is how a Canadian court might respond to requests for injunctive relief on public nuisance. Since Canadian courts can grant common law and equitable remedies, courts grant an equitable remedy of injunction. However, the possibility of granting injunctive remedies in public nuisance claims remains contentious.

Matthew Miller argues that an injunctive remedy is not appropriate in climate change cases based on public nuisance because the court is called upon to make executive and legislative decisions on matters of state policy.[51] He argues that "[n]either judicial precedents or tort principles provide courts with climate change resolution standards that are sufficiently 'principled, rational, and based on reasoned distinctions."[52] Miller concludes that "[g]ranting an injunction on emissions would provide hollow, practically meaningless relief, and relief would be conjectural anyway."[53] These are thought-provoking comments that Canadian courts must grapple with, more so because *Smith* provides little guidance on these considerations. I offer some thoughts.

As the court in *Smith* notes,[54] the question a trial court must answer when a plaintiff requests an injunction is whether climate-infringing activities may continue at all, and if so, on what terms? Drawing an analogy from environmental pollution cases, injunctive relief requires balancing public and private rights. The court would have to balance the corporations' rights to continue operations and the need to protect the environment, a

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51 Matthew E. Miller, "The Right Issue, the Wrong Branch: Arguments against Adjudicating Climate Change Nuisance Claims" (2010) 109 MICH. L. REV. 257.

52 Ibid at 275.

53 Ibid at 280.

54 Smith, supra note 3 at par 171.

delicate exercise considering that the impact of the defendants' emissions is difficult to measure. In the *Board of Commissioners of Ohio County v. Elm Grove Mining Co.*,[55] the Supreme Court of West Virginia, a US court, the plaintiff filed a claim of public nuisance against the air pollution caused by a mining company that had been dumping combustible mining refuse on a burning "gob pile" 200 feet wide and 1000 feet long, filling the air with sulfur.[56] The court recognized this as a nuisance affecting public health. However, it recognized that granting an injunction against refuse dumping could eliminate coal mining from the state. The court awarded the equitable relief, concluding that public health comes first. This decision represents a delicate balance between public and private rights, which may help courts exercise discretion.

The UK Supreme Court in *Coventry v Lawrence* also provides guidance on when an injunction should be granted in nuisance claims.[57] The court held that it would not be appropriate to grant injunctions when It will not be appropriate to grant an injunction where (1) the injury to the claimant's legal rights is small, (2) the injury to the claimant is capable of being estimated in money, (3) the injury to the claimant can be adequately compensated by a small money payment, (5) the case is one in which it would be oppressive to the defendant to grant an injunction, and (5) It is against public policy. In offensive odors and fumes cases, Canadian courts have also addressed instances when an injunction was appropriate in *Appleby v. Erie Tobacco Co*, *Black v Canadian Copper*, and *Canada Paper Company v Brown*.[58] Therefore, contrary to Miller's claim that there are no judicial precedents or reasoned decisions from which courts can rely, courts' decisions in environmental pollution cases in Canada and abroad may help Canadian courts determine whether an injunctive remedy is appropriate.

Also, Millar argued that injunctive relief may be "conjectural" and "meaningless" because it may not achieve its intended effect—stopping the harm altogether—especially when other violators continue rights-infringing activities. The New Zealand Supreme Court, citing the British Columbia

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55 9 S.E.2d 813 (W. Va. 1940).

56 James Drabick, "Private' Public Nuisance and Climate Change: Working Within, and Around, the Special Injury Rule" (2005) 16:3 Fordham Environmental Law Review 503 at 520.

57 *Coventry v Lawrence* [2014] UKSC 46.

58 *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533; *Black v. Canadian Copper Co.*, [1917] O.W.N. 243 (H.C.). *Canada Paper Co. v. Brown* (1922) 63 SCR 243

Supreme Court decision in *the Attorney-General for the Dominion of Canada v Ewen*,[59] held that it is irrelevant whether all the violators are not before the court; so far, the aggregate of the nuisance is proved. More emphatically, the court held that "a defendant must take responsibility for its contribution to a common interference with public rights; its responsibility should not be contingent on the absence of co-contribution or be in effect discharged by the equivalent acts of others."[60] Although granting an injunction, in this case, does not stop the emission, it may serve as a deterrence for others, which is one of the goals of tort law.[61] Therefore, an injunction may not be "meaningless" as Miller calls it.

IV. CONCLUSION

This comment examined New Zealand's decision in *Smith v Fonterra* as the first Supreme Court decision that recognized the justiciability of public nuisance claims and a new tort of climate system damage in climate litigation against corporations. It discussed the significance of the decision for the climate litigation movement in Canada. As climate litigation grows in Canada, I commented on Mr. Smith's litigation strategy as an Indigenous person in New Zealand and proposed the same strategy for Indigenous Peoples in Canada. This comment then explored the possibility of Canadian courts recognizing public nuisance and a new tort of climate system damage in Canada. Although some potential jurisdictional and procedural challenges exist, including the separate legal personality and institutional competence doctrines, I argued that they are not insurmountable if Canadian courts recognize that private law should not stand still in the face of existential climate crises. However, even if plaintiffs cross these hurdles, I commented on the propriety of granting injunctive reliefs as a remedy for public nuisance claims. I argued that courts must balance private and public rights to determine whether an injunction is an appropriate equitable remedy. This aligns with a climate justice approach.

Overall, the New Zealand Supreme Court decision shows that private law has the potential to deliver climate justice, especially in cases where

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59 (1895) 3 BCR 468 (BCSC).

60 *Smith*, supra note 3 at par 164.

61 See Stephen F. Williams, "Second Best: The Soft Underbelly of Deterrence Theory in Tort" 1993) 106:4 Harvard Law Review 932.

litigants are from marginal groups. Canadian courts would do well to follow suit in this area.