

WHAT DOES THE HAGUE COURT OF APPEAL'S DECISION IN URGENDA MEAN FOR CARBON EMISSION REGULATION IN CANADA?

By Stanley Berger

The Action On October 9, 2018 the Court of Appeal in the Hague, Netherlands upheld the District Court's order that the State of the Netherlands reduce CO₂ emissions by 25% relative to 1990 levels by the end of 2020. <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>

The State of the Netherlands had refused to commit to more than a 20% reduction by that date . A civil action had initially been brought by the foundation Urgenda or "Urgent Agenda", whose stated purpose was to stimulate and accelerate the transition process to a more sustainable society. The *Dutch Civil Code* provides for class actions of interest groups. The Appeal Court, in upholding the foundations' standing to sue, referred to the parliamentary history of the Civil Code which acknowledged that a class action may be based on broader "idealistic" rather than simply financial interests. In addition, Urgenda was permitted to bring action on behalf of its individual members who were entitled to invoke Article 2 (right to life) and Article 8 (right to respect of private and family life, home and correspondence) under the *European Convention on Human Rights*.

The Decision The Appellate Court concluded that "a reduction obligation of at least 25% by end - 2020 as ordered by the district court, is in line with the State's duty of care." (at par.53) The Court cites amongst other sources, the *2007 Report of the Intergovernmental Panel on Climate Change* which stated that the higher 25% reduction in CO₂ emissions was necessary to constrain a rise in global temperature of no more than 2°C at any time. Anything above that level would, according to the expert reports, result in dangerous and irreversible climate change. The *Paris Agreement*, which entered into force on November 4, 2016 and covered the period from 2020 onward, was also cited by the Court. It went further, providing that global warming must remain well below the 2°C increase relative to pre-industrial levels. The Paris target aimed for a temperature increase of no more than 1.5°C.

The Appellate Court rejected the State's argument that there were multiple reduction pathways to achieving the higher threshold of 2°C aside from the 25% emissions reduction. The State provided no evidence to substantiate their



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assertion and the Court therefore concluded that the technology to achieve these pathways was uncertain and unrealistic. (par.49) The Appellate Court also applied the precautionary principle included in the *U.N. Framework Convention on Climate Change* and case-law from the European Court of Human Rights as support for taking positive measures, as opposed to refraining from further action:

"...The circumstances that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking therefore does not mean that the State is entitled to refrain from taking further measures. High plausibility, as described above, suffices." (par.63)

The Court further rejected the State's argument that ordering the government to comply with the higher CO₂ emission reduction would be ineffective because other states could not be similarly ordered. This argument would invariably result in no legal remedy ever being available since Urgenda "does not have the option to summon all eligible states to appear in a Dutch court." (64) One of the State's stronger arguments was that the separation of powers between the legislature and the courts should not be interfered with and for that reason, only the government should be responsible for the attendant policy choices. This argument was rejected as well:

"...the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order." (at par.67)

HOW MIGHT THE URGENDA CASE IMPACT ON CANADIAN CARBON EMISSION REGULATION?

At the Climate Conference 21 in Paris in 2015 the Canadian government endorsed the goal of limiting global temperature increase to 1.5°C. An endorsement though does not invest the 1.5 threshold with the force of law. Only a statute can do that. See e.g. *Ainsley Financial Corp. v Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) Nevertheless, the Supreme Court of Canada has evidenced a willingness to use the precautionary principle as a guide in interpreting for example, the duty to report a discharge into the natural environment. See *Castonguay Blasting Ltd. v Ontario (Environment)* [2013] 3 S.C.R. 323. This would suggest that plaintiffs may find it easier to establish that they deserve more protection, while leaving it to government to determine how to effect that protection. Challenges will however, remain for Canadian applicants/plaintiffs. In the Urgenda litigation, the State did not contest the accuracy of the many international reports and the work of various Dutch national organizations. There was therefore no real dispute as to the maximum level of carbon emission necessary to ensure a safe environment. Further, under Canadian law plaintiffs would need to show a duty of care which went beyond the mere relationship between government and society at large. See Stepan Wood, "*International Influences: Urgenda and its Implications*" *Climate Change Litigation in Ontario: Hot Prospects and International Influences*, Ontario Bar Association Institute February 3, 2016, <http://ejscclinic.info.yorku.ca/files/2016/03/S-Wood-OBA->

[Institute-2016-climate-change-litigation.pdf](#) and James Rendell "*Urgenda Foundation v. State of the Netherlands-Precedents and Pitfalls of an Innovative Approach to State Liability for Climate Change*, in *Key Developments in Environmental Law 2017*, 139, at p.148 edited by Stanley Berger, Thomson Reuters. There's no doubt that this decision will have profound implications on ongoing and future climate change litigation. Plaintiffs have initiated litigation for example in Belgium, New Zealand and Switzerland alleging that governments are not meeting their emissions reduction obligations and must undertake adequate mitigation measures. (See *Rendell* at 146). In Canada at least 4 Provinces have abandoned the federal government's call for a carbon tax and a good argument can be made that the federal plan itself is not aggressive enough to have any positive impact on future temperatures. With recent extreme weather patterns occurring around the world with greater frequency and reputable scientists raising alarms that time is running out this debate is likely to carry into both the courts, provincial legislatures and the Canadian Parliament.