IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI **SC 149/2021**

BETWEEN	**MICHAEL JOHN SMITH** Appellant
AND	**FONTERRA CO-OPERATIVE GROUP LIMITED** First Respondent
	GENESIS ENERGY LIMITED Second Respondent
	DAIRY HOLDINGS LIMITED Third Respondent
	NEW ZEALAND STEEL LIMITED Fourth Respondent
	Z ENERGY LIMITED Fifth Respondent
	NEW ZEALAND REFINING COMPANY LIMITED Sixth Respondent
	B T MINING LIMITED Seventh Respondent

SUBMISSIONS FOR THE HUMAN RIGHTS COMISSION | TE KĀHUI TIKA TANGATA AS INTERVENER

4 August 2022

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MAY IT PLEASE THE COURT:

1. The world, including New Zealand, is facing a climate emergency.[1] International courts and other bodies have recognised that human-induced climate change engages fundamental human rights,[2] including, in some instances, in the context of private law claims.[3] The question on this appeal is about the potential for New Zealand's common law to respond to this emergency and its consequences, for the purposes of strike-out.

2. The purpose of these submissions for the Human Rights Commission | Te Kāhui Tika Tangata (**HRC**) is to: (i) assist the Court on the relevance of human rights law (domestic and international) to human-induced climate change litigation in claims based on the common law; and (ii) draw the Court's attention to relevant materials in domestic and international judicial fora. These submissions are written to be informative, rather than positional.[4] In summary, the HRC respectfully submits the following.[5]

3. *First*, the development[6] of the common law torts is an act done by the judicial branch of government of New Zealand, within the meaning of s 3(a) of the New Zealand Bill of Rights Act 1990 (**NZBORA**). As such, the courts are required to ensure that those torts are developed in a manner that is not inconsistent with the rights and freedoms protected by NZBORA. In the context of the claim advanced by the plaintiff, at least the right not to be deprived of life in s 8 NZBORA and the right of minorities to enjoy their culture in s 20 NZBORA appear to be engaged.

4. *Second*, even if this Court holds that s 3(a) NZBORA is not engaged (or that neither of the two rights is directly implicated), as a matter of common

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1 Pacific Islands Forum Secretariat, Communiqué of the 51st Pacific Islands Forum Leaders Meeting, Suva (14 July 2022) at [33].

2 *The Netherlands v Urgenda* 19/00135, 20 December 2019 (Dutch Supreme Court); and *Neubauer v Germany* 1 BvR 2656/18 (24 March 2021) (German Constitutional Court).

3 See, for example, *Milieudefensie v Royal Dutch Shell Plc* C/09/571932 / HA ZA 19-379 (DC, Hague); UN General Assembly resolution *The human right to a clean, healthy and sustainable environment* A/76/L.75 (2022) [the **clean environment resolution**]; UN Human Rights Committee *General Comment No 36* UN Doc CCPR/C/GC/36; and UN Committee on Economic, Social and Cultural Rights *General Comment No 24* UN Doc E/C.12/GC/24.

4 The HRC understands that matters of tikanga will be addressed by others at the hearing.

5 These submissions were largely drafted when counsel became aware of Grice J's decision in *Smith v Attorney-General* [2022] NZHC 1693 [**Smith JR**]. The Judge dismissed the appellant's judicial review, including his NZBORA claims. Counsel will note where submissions presently advanced by the HRC differ from views expressed by Grice J.

6 That is, the articulation and application of principles and rules of the law of torts.

law methodology, the courts apply a strong presumption that New Zealand's domestic law, including the common law of tort, should be compatible with New Zealand's international obligations, including under both international human rights law and the international law of environmental protection. The Court may also have regard to New Zealand's international obligations in reappraising the common law.

5. *Third*, in any event, the Court may have regard to relevant international materials and comparative jurisprudence relating to human-induced climate change to the extent it assists the Court with its consideration of the present claim. This is likely to be relevant to: (i) considering a potential novel duty of care; and (ii) potential recognition of a new tort.

The application of s 3 NZBORA to the acts done by the judiciary and rights engaged by human-induced climate change

6. This case concerns activities of privately- (and publicly-) owned corporations. Nonetheless, human rights norms are relevant to their activities due to the responsibility of the state (under domestic and international law) to ensure that rightsholders are protected from public and private interferences. A growing international jurisprudence recognises state responsibility for failure to curb corporate human rights interferences and concomitant obligations to ensure that the domestic legal system (including judge-made law) provides adequate remedies against corporate entities that cause actual or threatened harm to human rights.[7]

7. Under NZBORA, that same result is achieved through s 3. Like the legislative and executive branches of government, judges are required to perform their judicial function consistently with NZBORA.[8] That includes developing the common law, including its regulation of the relations between private individuals. Thus the rules and principles applied by the judiciary in private common law litigation must also be

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7 See, for example, the detailed discussion in UNCESCR *General Comment No 24*, above n 3, at [14]–[16].

8 See most recently *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [37] per Winkelmann CJ, [218] per Arnold and O'Regan JJ and [247] per Glazebrook J.

NZBORA-consistent; any tort law development that would limit a right or freedom protected by NZBORA must be demonstrably justified under s 5.[9]

Section 8 NZBORA

8. Section 8 guarantees the right not to be deprived of life other than in accordance with the principles of fundamental justice. The following points are relevant for the Court.

9. *First*, based on the appellant's claim, the s 8 right may be engaged in this case. The appellant does not claim that the respondents' conduct has ended or will imminently end his life. The scope of s 8, however, is broader. It covers both the shortening of life and matters that would prevent a person from living a dignified, meaningful life. This approach is consistent with both principles that NZBORA should be interpreted generously to give individuals the full measure of the rights guaranteed,[10] and in the light of its express purpose of affirming New Zealand's commitment to the International Covenant on Civil and Political Rights (**ICCPR**).[11] Thus the interpretation of NZBORA should be consistent with that of the ICCPR, to the extent its terms and purpose permit.[12]

10. The United Nations Human Rights Committee (**UNHRC**) has described art 6 of the ICCPR (the equivalent of s 8), in its General Comment No 36, as a right "to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity".[13] The views of the UNHRC are to be given "great

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9 *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 32, affirmed implicitly in *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 465–467; and *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [111]–[112], [114] and [130] per Gault and Blanchard JJ, [223]–[224], [229]–[230], [232] and [237] per Tipping J, [178]–[179], [208], [210], [220] and [222] per Keith J (dissenting), and [262], [266]–[267] and [271] per Anderson P (dissenting). See also *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [89]; and *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [67]. See further in relation to the offshore effects of a corporate's activities: UNCESCR *General Comment No 24*, above n 3, at [30].

10 See, for example, *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [31] per Glazebrook and Hammond JJ; *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 at [45] per Elias CJ and Keith J; and *Fitzgerald v R*, above n 8, at [41] per Winkelmann CJ.

11 NZBORA, long title, para (b). New Zealand ratified the ICCPR on 28 December 1978.

12 See, for example, the discussion in *Simpson v Attorney-General* [Baigent's Case] [1994] 3 NZLR 667 (CA) at 691per Casey J, 699 per Hardie Boys J and 704 per Gault J.

13 UNHRC *General Comment No 36*, above n 3, at [3].

weight" on matters relating to the interpretation of the ICCPR.[14] Accordingly, insofar as the appellant's claim (expressly or impliedly) asserts that the defendants' conduct will shorten his life or undermine its quality, s 8 may be engaged.

11. *Second*, although s 8 is framed negatively as a right "not to be deprived of life", it should not be read differently from a positively-framed "right to life". A person who has a right not to be deprived of something necessarily has a right to that thing. The two formulations are corollaries of each other.

12. *Third*, there is a positive obligation on the relevant s 3 actor (here, the judiciary) to ensure the right is protected.[15] This is inherent in the positive framing of the first limb of the NZBORA's purpose, which is to "affirm, protect, and promote" human rights and fundamental freedoms.[16] In this context, this means the courts have a positive obligation to do what is reasonably within their power to prevent threats to life,[17] even those arising from private entities (assuming such a threat can be established).[18]

13. *Fourth*, environmental harms and particularly the impact of climate change fall within the ambit of threats to life, thus engaging s 8.[19] The UNHRC's General Comment No 36 states that the positive duty to protect life implies that States parties should take measures "to address the general conditions in society" that threaten life or prevent enjoyment of life with dignity, such as "degradation of the environment" and "deprivation of indigenous peoples' land, territories and resources".[20] Thus the content of the right to life should be informed by international environmental law

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14 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p 639 at [66]. See also *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC) at 21.

15 *Wallace v Attorney-General* [2021] NZHC 1963 at [380]–[384]. *Wallace* has been appealed. The Court of Appeal's judgment is pending. Compare Smith JR, above n 5, at [192]–[193].

16 Long title, para (a).

17 In the wide sense.

18 UNHRC *General Comment No 36*, above n 3, at [21] (citations omitted).

19 See *Teitiota v New Zealand* UN Doc CCPR/C/127/D/2728/2016 (7 January 2020), where the UNHRC found that climate change could engage the right to life at [8.6], but found by majority that the right was not breached in the specific circumstances of that case at [10]. Compare Smith JR, above n 5, at [183], [193] and [195]. For emissions cases concerning the right to life currently before the European Court of Human Rights, see ECtHR "Environment and the European Convention on Human Rights" Factsheet (July 2022) at 2–3.

20 UNHRC *General Comment No 36*, above n 3, at [26].

obligations.[21] Further, the UNHRC has stated that "Environmental degradation, *climate change* and unsustainable development constitute some of the most pressing and *serious threats* to the ability of present and future generations to enjoy *the right to life*".[22] In particular, a person's quality of life (and potentially their life span) may be impacted by the deleterious effects of human induced climate change, such as: increased flooding, fires and infrastructure damage; displacement from coastal retreat; water contamination; food shortages; poorer mental health; reduced air quality; and the migration to New Zealand of new diseases.[23]

Section 20 NZBORA

14. Section 20 protects the right of minorities to enjoy their culture, profess and practise their religion, and use their own language. It is one of the most under-explored and under-theorised provisions in NZBORA. International guidance will thus be particularly useful in this context. The following points are relevant for the Court in this case.

15. *First*, as with the s 8 right, although s 20 is framed negatively, it imposes a positive duty to ensure the right is protected.[24]

16. *Second*, the purpose of s 20 should be interpreted broadly. While the 1985 White Paper stated that the draft version of s 20 was aimed at oppressive government action that would pursue a policy of cultural conformity,[25] that does not exhaust the scope of s 20. The UNHRC's General Comment No 23 states that art 27 ICCPR (the s 20 equivalent) has the purpose of securing the "survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society".[26]

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21 At [62] (citations omitted). See also Committee on the Elimination of Discrimination Against Women and others "Statement on Human Rights and Climate Change" UN Doc HRI/2019/1 (16 September 2019).

22 At [62] (citations omitted) (emphasis added). As to constitutional protection for future generations (in recognition of their right to life and the threat climate change poses to them), see *Neubauer*, above n 2, at [122] and [183].

23 The Royal Society | Te Apārangi "Human Health Impacts of Climate Change for New Zealand: Evidence Summary" (October 2017) at 5–10.

24 *Kamo v Minister of Conservation* [2018] NZHC 1983, [2018] NZAR 1334 at [83], citing UN Human Rights Committee *General Comment No 23* UN Doc CCPR/C/21/Rev.1/Add.5 at [6.1], upheld on appeal in *Kamo v Minister of Conservation* [2020] NZCA 1, [2020] 2 NZLR 746.

25 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" (1985) at [10.83].

26 UNHRC *General Comment No 23*, above n 24, at [9].

17. *Third*, while not possessing the character of a treaty, the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) is relevant to the interpretation of s 20 NZBORA as an elaboration of the existing art 27 ICCPR obligation in the specific circumstances of indigenous peoples (here, Māori).[27] UNDRIP represents the most authoritative expression of the existing international consensus regarding the rights of indigenous peoples, including the right of indigenous peoples to enjoy their own culture.[28] This includes the rights to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned … lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard" and the "conservation and protection of the environment".[29]

18. *Fourth*, whether an individual's rights under art 27 have been interfered with "cannot be determined in abstract but has to be placed in context".[30] Economic and communal activities essential to the minority's culture, for example hunting or fishing, are protected,[31] as are spiritual activities.[32]

19. *Fifth*, to the extent the effects of human-induced climate change impact upon the cultural, religious and social identity of minorities in New Zealand, including Māori, s 20 may be engaged.[33] For example, at the very least, increased flooding and displacement from coastal retreat,[34] may result in the displacement of many Māori from their traditionally owned

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27 James Anaya *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples* UN Doc A/HRC/9/9 (11 August 2008) at [40]-[41]. New Zealand courts have also relied on UNDRIP outside of NZBORA, such as when interpreting Treaty principles and in relation to Māori legal rights and interests generally; see, for example: *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [92]; *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [491].

28 At [43].

29 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007) at arts 25 and 29.

30 *Kitok v Sweden* UN Doc CCPR/C/33/D/197/1985 (27 July 1988) at [9.3] (footnote omitted).

31 *Kitok v Sweden*, above n 30, at [9.2]; and *Länsman v Finland* UN Doc CCPR/C/52D/511/1992 (11 June 1992) at [9.2].

32 See William A Schabas *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd ed, NP Engel, Germany, 2019) at 825–826 ([60] and [63]); and *Diergaardt v Namibia* UN Doc CCPR/C/69/D/760/1996, individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga (concurring): "indigenous communities … can very often show that their particular way of life or culture is … closely bound up with particular lands in regard to both economic and other cultural and spiritual activities".

33 Compare Smith JR, above n 5, at [213].

34 The Royal Society "Human Health Impacts of Climate Change", above n 23, at 6.

lands and/or loss of the ability to use other places of cultural significance impacted by coastal retreat (e.g., urupā).

The presumption of compatibility with New Zealand's international obligations and the obligations relevant to human induced climate change

20. As a matter of common law methodology, the courts seek to ensure compatibility between the common law and New Zealand's international law obligations, including international human rights obligations. In doing so, the courts give effect to a strong presumption in favour of interpreting New Zealand law, whether common law or statute, so as not to place New Zealand in breach of its international obligations.[35] This includes unincorporated treaty obligations.[36] The presumption applies where the common law is uncertain or developing.[37] New Zealand's international law obligations may also be relied upon by the courts to reappraise an area of the common law, confirm a particular view or interpretation of common law, or provide relevant background for consideration of the applicable common law.[38]

21. As already discussed, arts 6 and 27 ICCPR are engaged by issues of climate change, especially when interpreted in the light of UNDRIP. Other relevant international obligations that raise the presumption relevantly include: the right to respect for the family in art 23.1 ICCPR;[39] the right to an adequate standard of living in art 11 and the right to health in art 12 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);[40] the UN Framework Convention on Climate Change;[41] the

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35 *Hosking v Runting*, above n 9, at [6] per Gault and Blanchard JJ; and *C v Holland*, [2012] NZHC 2155, [2012] 3 NZLR 672 at [69]. See also *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 at [27] per Lord Hoffman. For further examples, see Shaheed Fatima *Using International Law in Domestic Courts* (Hart Publishing, Portland OR, 2005) at [10.4]. The presumption recognises that the acts of the New Zealand judiciary are attributable to New Zealand as a matter of the international law. See generally James Crawford *State Responsibility: The General Part* (Cambridge University Press, Cambridge, 2013) at 116–118; International Law Commission *Report of the work of the fifty-third session* (2001) at 26 (art 4); and *Responsibility of States for internationally wrongful acts: Report of the Sixth Committee* GA Res 62/446 (2007).

36 *A v Secretary of State for the Home Department* [2004] EWCA Civ 1123, [2005] 1 WLR 414 at [266].

37 *Derbyshire CC v Times Newspapers* [1992] QB 770 (CA) at 812; and *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) at 223 per Lord Cooke.

38 See Fatima *Using International Law in Domestic Courts*, above n 35, at [10.6].

39 Climate change is likely to affect individuals' wellbeing and prevent them from enjoying their homes in a way that adversely affects family life: see *Urgenda*, above n 2, at [5.2.3].

40 Ratified by New Zealand on 28 December 1978. Climate change is likely to have an adverse impact on human health and quality of life: see above at [13].

41 Adopted by New Zealand in 1992.

Kyoto Protocol;[42] and the Paris Agreement,[43] which seeks to hold global temperature increases to below 1.5°C (and well below 2°C) above pre-industrial levels.

22. These instruments do not reside in hermetically-sealed boxes. New Zealand's environmental commitments reinforce and should be interpreted harmoniously with New Zealand's commitment to human rights generally.[44] Consistency with New Zealand's environmental obligations is not only presumed as a matter of common law; it is *required* to ensure consistency with the New Zealand's obligations under ICCPR, because climate change directly engages ICCPR rights.[45] The link between human rights and environmental issues is further underscored by the UN General Assembly's recent recognition of "the right to a clean, healthy and sustainable environment as a human right",[46] and its specific recognition that climate change poses one of "the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights".[47]

23. To the extent that the United Nations Guiding Principles on Business and Human Rights (**UNGPs**)[48] (or similar instruments) are relevant in this context, they would also apply in respect of human rights issues implicated by human-induced climate change. The UNGPs: (i) set out complementary state and business responsibilities in relation to human rights, including the corporate responsibility to respect human rights as a "global standard of expected conduct";[49] (ii) state that, to implement their responsibility,

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42 Ratified by New Zealand on 19 December 2002.

43 Ratified by New Zealand on 4 October 2016.

44 UNHRC *General Comment No 36*, above n 3, at [62].

45 See Alan Boyle "Climate change, the Paris Agreement and human rights" (2018) 67 ICLQ 759 at 775; and John H Knox "Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment" UN Doc A/HRC/37/59, Annex at [4].

46 The clean environment resolution, above n 3,at 3. New Zealand voiced some concerns about the approach taken, but nevertheless voted in favour of the resolution: <https://press.un.org/en/2022/ga12437.doc.htm>.

47 At 3.

48 UN Human Rights Office of the High Commissioner *Guiding Principles on Business and Human Rights* (New York and Geneva, 2011) [**UNGP**]. The UNGPs do not create legally enforceable obligations but have been given recognition by numerous treaty monitoring bodies and UN organs: see, for example, the clean environment resolution, above n 3, at 3; and Beata Faracik, *Implementation of the UN Guiding Principles on Business and Human Rights* (European Parliament Study, 2017).

49 UNGP, above n 48, at 13.

corporations should undertake human rights due diligence to identify, prevent, mitigate and account for adverse human rights impacts;[50] and (iii) provide that there should be an effective remedy to business-related human rights breaches, including through judicial means.[51] As explained above, adverse human rights impacts include the effects of human induced climate change.

The New Zealand courts may have regard to international materials and comparative jurisprudence

24. In the light of the above, and drawing partly on considerations in *C v Holland* where the High Court accepted a new tort of intrusion into seclusion,[52] the following points may be relevant to the appellant's claims.

Novel duty of care

25. Proximity. The Federal Court of Australia recognised in *Sharma* that the precautionary principle "attunes" foreseeability of risk of harm because there should be "a heightened recognition" of those risks.[53] Furthermore, the UNGPs (and similar instruments) may inform the question of proximity in relation to a novel duty of care. For example, a business may have publicly endorsed the UNGPs and assumed responsibility for mitigating its adverse human rights impacts, thus creating certain expectations.[54] In *Milieudefensie v Royal Dutch Shell Plc*, however, the Hague District Court considered that the UNGPs are relevant as a guideline to interpret the unwritten standard of care regardless of whether a business had adopted them, because their content is "universally endorsed".[55]

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50 UNGP principle 15(b).

51 UNGP principle 25.

52 *C v Holland*, above n 35.

53 *Sharma v Minister for the Environment* [2021] FCA 560, (2021) 391 ALR 1 at [255]–[256]. Although the final declaration was overturned on appeal, a majority of the Full Court of the Federal Court considered that reasonable foreseeability could not be ruled out: *Minister for the Environment v Sharma* [2022] FCAFC 35, (2022) 400 ALR 203 at [332]–[333] per Allsop CJ and [423] per Beach J.

54 See *Choc v Hudbay Minerals Inc* 2013 ONSC 1414, 116 OR (3d) 674 at [69], where the Ontario Superior Court of Justice considered it relevant to the question of proximity that the defendant company had made public representations about its commitment to respecting human rights, as it would have led to expectations on the part of the plaintiffs.

55 *Milieudefensie*, above n 3, at [4.4.11]. The Hague District Court also noted that the European Commission expects European businesses to meet their responsibilities to respect human rights.

26. Critically, for the identification of a class of entities to whom a new tortious duty could apply: (i) the UNGPs recognise that the extent of any human rights due diligence will vary with the size of the business, the risk of severe human rights impacts and the nature and context of business operations;[56] (ii) New Zealand law already recognises through the Climate Change Response Act 2002 (**CCRA**) (as amended) that certain emitters bear a greater responsibility to control their greenhouse gas emissions (**GHG**), depending on the activity carried out[57] and, in the case of mining coal or natural gas, the scale of the mining;[58] and (iii) the development of attribution science, which was not considered by the Court of Appeal, may facilitate a more sophisticated approach to ascribing responsibility for GHG emissions to particular emitters.[59]

27. Policy considerations. International materials and comparative jurisprudence may also shine a light on global standards and global perspectives relating to human induced climate change. For example, the Committee on Economic, Social and Cultural Rights has stated that "business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice".[60] The Committee has linked this statement to the regulation of business activities to support efforts by states to combat climate change.[61] In *Milieudefensie*, the Hague District Court considered the following policy factors: (i) the "twin challenge" of reducing climate change and meeting growing global energy demand; (ii) the emissions trading scheme system; (iii) the effectiveness of the proposed remedy; and (iv) the responsibility of states

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56 UNGP, above n 48, principle 17(b).

57 Climate Change Response Act 2002, s 54 and sch 3.

58 Section 204.

59 See Sophie Marjanac and Lindene Patton "Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?" (2018) 36 JERL 265.

60 UNCESCR *General Comment No 24*, above n 3, at [5].

61 CESCR "Climate change and the International Covenant on Economic, Social and Cultural Rights" UN Doc E/C.12/2018/1 (8 October 2018) at [8]. The latest literature from the United States on corporate governance theory suggests that relying on corporations alone to benefit stakeholders under current laws and structures would not be effective: see, for example, Christopher M Bruner "Corporate Governance Reform and the Sustainability Imperative" (2022) 131 Yale LJ 1217; Dorothy S Lund and Elizabeth Pollman "The corporate governance machine" (2021) University of Pennsylvania Carey Law School Institute for Law and Economics, Research Paper No 21-05; Stavros Gadinis and Amelia Miazad "Corporate Law and Social Risk" (2020) 73 Vand L Rev 1401; and Lucian A Bebchuk and Roberto Tallarita "The illusory promise of stakeholder governance" (2020) 106 Cornell L Rev 91.

and society.[62] And in *MC Mehta v Union of India*, the Supreme Court of India formulated a new tortious principle that an enterprise carrying out a hazardous activity is strictly liable for all harm caused by its activities, based on that enterprise's resources and ability to prevent the relevant harm.[63]

28. Formulation of the novel duty of care. In considering a novel duty of care, the Court may have regard to existing legislation and comparative jurisprudence. As to the latter, in *The Netherlands v Urgenda*, the Supreme Court of the Netherlands held that the Dutch government was required to reduce GHG emissions by at least 25 per cent compared to 1990 by 2020 to protect Dutch citizens from the effects of climate change.[64] And, building on that decision, in *Milieudefensie*, the Hague District Court ordered Royal Dutch Shell to reduce the Shell group's CO2 emissions by net 45% in 2030 compared to 2019 levels. This shows that there are materials available to formulate a meaningful and concrete duty. In the New Zealand context, the Court could draw on the CCRA's purpose of contributing to limiting global average temperature increases and the codification of certain targets for emissions reductions,[65] as well as the standards articulated in the UNGPs (or similar instruments).

Recognition of new tort

29. Values recognised as worthy of protection. Both the legislature and executive have recognised that mitigating the harmful effects of human-induced climate change is worthy of protection. Parliament enacted the CCRA "to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels" and reduce emissions to net zero by 2050.[66] New Zealand has also consistently supported international instruments combatting climate change.[67]

30. Institutional appropriateness. New Zealand law already seeks to give effect to the reduction of GHG through the CCRA. It provides a framework for

62 *Milieudefensie*, above n 3, at [4.4.2].
63 *MC Mehta v Union of India* 1987 SCR (1) 819; AIR 1987 965.
64 *Urgenda*, above n 2. Compare Smith JR, above n 5, at [194].
65 Sections 3 and 5Q.
66 Section 5Q.
67 See treaties described at [21] above, as well as voting in favour of the resolution recognising the right to a healthy environment discussed at [22] above.

New Zealand to develop policies "to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels". Is that regulatory requirement enough? Does it exclude a role for tort? The status of the judiciary as a state organ and the presumption of consistency with international obligations[68] suggest that it is both appropriate for courts to develop tort law where it would meet human rights and environmental needs, and incumbent on them to do so. As Tipping J explained in *Hosking v Runting*, the existence of legislation does not necessarily preclude common law developments in the absence of any express statement to that effect.[69]

31. Relief. Under the ICCPR, an effective remedy[70] requires appropriate reparation,[71] as well as the need to take measures to prevent recurrence of the violation.[72] And, in some circumstances, an effective remedy may require provisional measures to avoid continuing violations,[73] or to ensure "the prevention of harm through, for example, injunctions".[74] Rights-centred relief need not be limited to compensation.[75] It should be "appropriately adapted so as to take account of the special vulnerability of certain categories of person".[76]

4 August 2022

A S Butler / R A Kirkness / H Z Yáng

Certified as suitable for publication under cl 7, Supreme Court Submissions Practice Note 2021

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68 See above at [20].

69 *Hosking v Runting*, above n 9, at [227] per Tipping J: "In the absence of any express statement that the Privacy Act was designed to cover the whole field, Parliament can hardly have meant to stifle the ordinary function of the common law, which is to respond to issues presented to the Court in what is considered to be the most appropriate way and by developing or modifying the law if and to the extent necessary". Common law and statute should not be seen as "oil and water": see Michael Taggart *Private Property and Abuse of Rights in Victorian England* (Oxford University Press, Oxford, 2002) at 197, citing J Beatson "Has the Common Law a Future?" [1997] CLJ 291 at 309. See further J Beatson "The role of statute in the development of common law doctrine" (2001) 117 LQR 247.

70 Although remedies are not provided for under NZBORA, it is accepted that effective remedies should be available: *Baigent's Case*, above n 12, at 676–677 per Cooke P, 692 per Casey J, 702–702 per Hardie Boys J.

71 UN Human Rights Committee *General Comment No 31* UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at [16].

72 At [17].

73 At [20].

74 UNGP, above n 48, at 27 (commentary to principle 25).

75 See also *Baigent's case*, above n 12, at 703 per Hardie Boys J.

76 UNHRC *General Comment No 31*, above n 71, at [15].