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## Fighting Climate Change with the Charter: An Inquiry into the Effects of Litigating the Right to a Healthy Environment

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**FIGHTING CLIMATE CHANGE WITH THE CHARTER: AN INQUIRY INTO THE  
EFFECTS OF LITIGATING THE RIGHT TO A HEALTHY ENVIRONMENT**

**KEVIN BERK**

**A THESIS SUBMITTED TO  
THE FACULTY OF GRADUATE STUDIES  
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF  
MASTER OF LAWS**

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### Abstract

This thesis examines whether the litigation of the legal right to a healthy environment can adequately advance the values of its supporters. This question is answered through examining scholarly arguments in favour of the right, promotional material from Environmental Non-Governmental Organizations (ENGOS) litigating the right, court documents, as well as the results of a select number of interviews with senior members of Canadian ENGOS. It is ultimately argued that the intervention of lawyers and the interpretation of judges will narrow the intended scope of the right. Additionally, it is argued that the act of choosing to litigate implicitly affirms the settler state's assumed authority over environmental governance in Canada. The narrowing of the scope of the right would likely then result in the potential legal right not fully reflecting the values that its proponents sought to advance, and thus would limit its efficacy.

### Acknowledgements

I would like to thank my supervisors Estair Van Wagner and Sonia Lawrence for sharing their knowledge, insight, and effort to ensure that this process was as enriching as possible, especially given the challenging nature of this year.

A special thank you to Jeffery Hewitt, Deborah McGregor, and Jennifer Nedelsky whose teaching and guidance has helped me grapple with, and better understand my responsibilities as a legally trained settler living on Indigenous land, a process which informs much of this research and which I continue to work on.

I would like to acknowledge the privilege I have had to be able to obtain legal education from the University of Windsor's Faculty of Law as well as Osgoode Hall Law School. I am especially thankful for the critical approach to law that I have been exposed to through my education at each school.

Lastly, thank you to my family and friends. I would not have been able to pursue this education and write this thesis without their support.

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## Chapter One: Introduction

“Strategic choices have costs.”<sup>1</sup> This simple but inescapable reality lies at the heart of this thesis. We are currently in the midst of a climate emergency. “Rapid, far-reaching, and unprecedented changes in all aspects of society” will be required in order to adequately respond.<sup>2</sup> In this context, it is easy to understand why responses theoretically offering rapid change would find widespread support among people concerned about climate change.

I approach this work as a legally trained settler Canadian, living and working on Anishinaabe land, seeking to use my training and position to contribute to efforts to address climate change within the communities I belong to. One prominent approach within the environmental law community is the ongoing effort to litigate the right to a healthy environment as a means to address climate change. Like any strategic choice, the litigation of the right to a healthy environment comes with costs. In this thesis I will examine the normative effects of litigating the right to a healthy environment in Canada. More specifically I seek to explore whether it is likely or possible for a potential right to a healthy environment to adequately advance the values of that its proponents seek to advance in the context of climate change litigation.

Ultimately, I argue that in the process of arriving at a right to a healthy environment as a litigation strategy the interventions of lawyers and judges will narrow the intended scope of the right. I contend that this narrowing would result in the proposed legal right not fully reflecting the values its proponents sought to advance. This would limit its efficacy as a tool to combat

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<sup>1</sup> Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change? Second Edition*, second edition ed (Chicago: University of Chicago Press, 2008) at 423.

<sup>2</sup> “Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments — IPCC”, online: <<https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/>>.

climate change and to promote ecological integrity more generally. I further argue that two major risks result from this narrowing.

First, there is serious risk that a right to a healthy environment will be misinterpreted by the non-legally trained public as a more substantive victory than is likely to be articulated by the courts, especially in the context of climate change. This could have the unintended consequence of leading those committed to fighting climate change to relax their efforts and instead rely on the legal right to produce social change in lieu of building further social and political movements.

Second, the strategic choice to litigate can foreclose work on other strategies to address climate change. I argue the litigation of the right to a healthy environment detracts from investment in efforts to transform relations between the settler state relationship and Indigenous peoples, as well as relations with the Earth. Furthermore, forgoing such work in favour of litigating has the unintended effect of implicitly reinforcing the settler state and its assumed authority to deal with these issues.

### The Right to A Healthy Environment Within the Canadian Context

In order to begin this analysis, I must first outline the origin and current state of the push for the recognition of a right to a healthy environment in Canada.

There is ample evidence that Canada is not doing enough to protect the environment. Despite having a relatively modest population, Canada is among the ten highest greenhouse gas emitting countries in the world.<sup>3</sup> Yale's Environmental Performance Index evaluates Canada as performing poorly in multiple indicators of ecosystem vitality, especially in relation to its efforts

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<sup>3</sup> *By the Numbers: Canadian GHG Emissions*, by Paul Boothe & Felix A Boudreault (London, ON: Lawrence National Centre for Policy and Management: Ivey Business School at Western University, 2016).



to preserve forests, fisheries, reduce air pollution, and addressing climate change and energy use.<sup>4</sup> Anishinaabe environmental law scholar Deborah McGregor, in an article cowritten with environmental researchers Steven Whitaker and Mahisha Sritharan, argues that such deficiencies are not newly occurring, but rather:

in the North American context, Indigenous peoples have arguably been concerned over ecosystem destruction since the arrival of Europeans over five centuries ago, long before dominant society officially recognized it as a crisis. From an Indigenous point of view, environmental injustices, including the climate crisis, are therefore inevitably tied to, and symptomatic of, ongoing processes of colonialism, dispossession, capitalism, imperialism/globalization and patriarchy.<sup>5</sup>

Following from this connection McGregor, Whitaker, and Sritharan argue that “failure to apply an analysis of historical and on-going colonialism to understand the depth and scope of environmental injustices that are affecting Indigenous communities means remedies will continue to fail.”<sup>6</sup>

As a result of Canada’s current position as an environmental laggard, much scholarly analysis has been devoted to comparative analyses of legal systems which are perceived to be more successful at protecting the environment.<sup>7</sup> A significant outcome of engaging in these comparative analyses has been increasing advocacy for environmental rights in Canada. This advocacy has been primarily organized around the potential recognition of the right to a healthy environment within the *Canadian Charter of Rights and Freedoms*.<sup>8</sup>

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<sup>4</sup> Yale Center for Environmental Law and Policy, “Environmental Performance Index: Canada”, online: <<https://epi.envirocenter.yale.edu/epi-country-report/CAN>>.

<sup>5</sup> Deborah McGregor, Steven Whitaker & Mahisha Sritharan, “Indigenous environmental justice and sustainability” (2020) 43 *Current Opinion in Environmental Sustainability* (Indigenous Conceptualizations of ‘Sustainability’) 35–40 at 36.

<sup>6</sup> *Ibid* at 37.

<sup>7</sup> For example this was the impetus behind Canadian environmental law scholar David Boyd’s 2011 book *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* which serves as an important entry point to the advocacy for the right to a healthy environment in Canada.

<sup>8</sup> *Canadian Charter of Rights and Freedoms*, s 16, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

A *Charter* right to a healthy environment builds on the recognition that over 145 countries have “deliberately expressed their commitment to environmental protection through constitutional changes in the past four decades.”<sup>9</sup> This recognition led prominent Canadian Environmental Law scholar David Boyd to publish two books on the topic including *The Environmental Rights Revolution* (2011) which examines the effectiveness of the right to a healthy environment in other jurisdictions,<sup>10</sup> and *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* (2012) which argues for the implementation of the right to a healthy environment in Canada.<sup>11</sup> According to Boyd:

compared to nations whose constitutions are silent on green issues, nations with environmental provisions in their constitutions have smaller ecological footprints, perform better on comprehensive rankings of environmental performance, have reduced air pollution much faster, are more effectively addressing climate change, and are more likely to ratify international environmental treaties.<sup>12</sup>

Boyd argues that Canada should amend its constitution in order to strengthen its environmental laws to be more in line with the nations who have been able to achieve these results. Boyd’s preferred method for this would be to amend section 7 of the *Charter* to include:

7.1 Everyone has the right to live in a healthy and ecologically balanced environment, including clean air, safe water, fertile soil, nutritious food, and vibrant biodiversity.<sup>13</sup>

As an alternative Boyd additionally advocates for a more “comprehensive approach” and provides a draft “Canadian Charter of Environmental Rights and Responsibilities”<sup>14</sup> which

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<sup>9</sup> David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* (Vancouver: UBC Press, 2012) at 196 [*The Right to a Healthy Environment*].

<sup>10</sup> David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2011) Google-Books-ID: iEYzN4bNQ3MC.

<sup>11</sup> Boyd, *supra* note 7.

<sup>12</sup> *Ibid* at 196-197.

<sup>13</sup> *Ibid* at 197.

<sup>14</sup> *Ibid* at 197-198.

“could be incorporated into the existing *Charter* or added to the handful of documents that collectively make up Canada’s constitution.”<sup>15</sup>

In the years since Boyd’s books were published there has been a significant amount of scholarly discussion regarding the right to a healthy environment. In contrast to Boyd’s preferred constitutional amendment strategy, these works mostly examine whether it would be possible to have the Supreme Court of Canada (SCC) judicially interpret a right to a healthy environment into the “right to life” under section 7 of the *Charter*.<sup>16</sup> Similar analyses have been undertaken in regard to establishing the right under section 15<sup>17</sup> and section 35<sup>18</sup> of the *Charter* as well. Boyd and Canadian Environmental Law scholar Lynda Collins have further argued for the necessity of recognizing the right to a healthy environment in order to provide a “constitutional backstop” which would prevent new governments from repealing laws to undo gains made by previous governments in the realm of environmental protection.<sup>19</sup> There have also been arguments that litigating the right to a healthy environment may lead to a win-win scenario for environmental activists. This argument is based on the idea that such litigation could lead to change even in the event of a loss, as “a loss at trial...[could be framed as] a political victory for climate change

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<sup>15</sup> *Ibid* at 197.

<sup>16</sup> Examples include: Nathalie Chalifour, “Environmental Justice and the Charter: Do environmental injustices infringe sections 7 and 15 of the Charter?” (2015) 28 *Journal of Environmental Law and Practice* 89 [*Environmental Justice and the Charter*]; Nathalie J Chalifour & Jessica Earle, “Feeling the Heat: Climate Litigation under the Canadian Charter’s Right to Life, Liberty, and Security of the Person” (2017) 4 *Vt L Rev* 689–770; Avnish Nanda, “Heavy Oil Processing in Peace River, Alberta: a Case Study on the Scope of Section 7 of the Charter in the Environmental Realm” (2015) 27:2 *Journal of Environmental Law and Practice*; Scarborough 109–140.

<sup>17</sup> See for example: Chalifour, “Environmental Justice and the Charter”, *supra* note 14.

<sup>18</sup> Examples include: Lynda Collins, “Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution” (2015) 71:1 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference*, online: <<https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/20>>; Andrew Stobo Sniderman & Adam Shedletzky, “Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy” (2014) 2 *W J Legal Stud* [i]-16.

<sup>19</sup> Lynda M Collins & David R Boyd, “Non-Regression and the Charter Right to a Healthy Environment” (2016) 29 *Journal of Environmental Law and Practice*; Scarborough 285–304.

activists-by framing climate change as a threat to rights and by requiring the government to justify its ongoing failure to reduce Canada's greenhouse gas emissions."<sup>20</sup>

Although there is a general consensus in the literature cited above that a right to a healthy environment would be useful, and that there is conceptual harmony between the proposed right and existing sections of the Charter, the need to utilize resources such as time, money, political will, and public commitment to fighting climate change poses a major barrier for the potential recognition of the right. The issue becomes further complicated when considering the efficacy of litigating for the right to a healthy environment as a strategy to specifically address climate change. In his 2015 article "Filling the Gaps in Canada's Climate Change Strategy: All Litigation, All the Time," Canadian environmental law scholar Cameron Jefferies argues the "prospect of successfully closing the significant gaps in Canada's climate change strategy through litigation is, at least for the time being, quite slim" and that "there is no panacea to the complex and multi-faceted climate change problem."<sup>21</sup> Another Canadian environmental law scholar, Jason MacLean, has similarly stated that:

Concentrating strategic resources on advocating for a constitutional amendment or prosecuting a strategic piece of *Charter* litigation is akin to the kind of "single-shot 'paradigmatic' solutions that (Kelly) Levin and her colleagues have identified as being 'inadequate to generate the necessary momentum or levers for the transformations of behavior and economic activity necessary to combat climate change.'<sup>22</sup>

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<sup>20</sup> Sniderman & Shedletsky, *supra* note 16 at 16.

<sup>21</sup> Cameron Jefferies, "Filling the Gaps in Canada's Climate Change Strategy: All Litigation, All the Time" (2015) 5 *Fordham Int'l LJ* 1371 at 1404.

<sup>22</sup> Jason MacLean, "You Say You Want an Environmental Rights Revolution: Try Changing Canadians' Minds Instead (of the Charter)" (2017) 1 *Ottawa L Rev* 183–220 at 152 citing Kelly Levin et al, "Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change" (2012) 45:2 *Policy Sci* 123–152.

## Current Cases

Despite such critiques, the desire to achieve greater environmental protection through a rights-based framework has persisted. This is most evident in the actions of Environmental Non-Governmental Organizations (ENGO's). The strategic choice to litigate the right to a healthy environment made by ENGOs are particularly important at the moment as three right to a healthy environment cases have been launched in the year that I have spent writing this thesis (September 2019-2020). Each case seeks to establish that the Canadian governments' inaction on climate change is infringing citizens' *Charter* rights.

The first of these claims, *La Rose et al. v Her Majesty the Queen*, was issued by 15 Canadian youths with the support of the David Suzuki Foundation. The "legal basis" for the claim, as outlined within the Plaintiffs' statement of claim, consists of relief sought to address damage done to the plaintiffs by climate change including: children and youth's rights to life, security of the person, and equality; and youth and future generations' ability to access resources "subject to a public trust."<sup>23</sup> The remedies sought within the claim specifically include an order that the Federal government "be required to develop and implement an enforceable plan that is consistent with Canada's fair share of the global carbon budget necessary to achieve GHG emissions reductions consistent with the protection of public trust resources subject to federal jurisdiction and the plaintiffs' constitutional rights."<sup>24</sup>

A second similar litigation campaign, *Mathur et al. v Ontario*, was launched one month later by Ecojustice on behalf of seven individuals, ages 12 to 23, from Ontario. These individuals are described within the Notice of Application as "Ontario residents with genuine interests in

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<sup>23</sup> *La Rose et al. v Canada* (25 October 2019), Vancouver T-1750-19 (FC) (Statement of Claim at paras 223-248).

<sup>24</sup> *Ibid* at para 9.

preventing catastrophic climate change that will pose pervasive and serious risks to health and wellbeing of those in their generation and future generations of Ontarians.”<sup>25</sup> The claim, which Ecojustice is dubbing as their “biggest climate lawsuit yet,” argues that the Ontario government’s 2030 emissions target is insufficient to meet “Ontario’s share of the minimum level of GHG reductions necessary to limit global warming to below 1.5C above pre-industrial temperatures or, in the alternative, well below 2C (i.e. the upper range of the Paris Agreement temperature standard)” and therefore violates their clients’ section 7 *Charter* right to life.<sup>26</sup> As a remedy to this insufficient action the Applicants are requesting the court to order the provincial government to “forthwith set a science-based GHG emissions target under s. 3(1) of the *CTCA* that is consistent with Ontario’s share of the minimum level of GHG reductions necessary to limit global warming to below 1.5C above pre-industrial temperatures or, in the alternative, well below 2C (i.e. the upper range of the Paris Agreement temperature standard)”<sup>27</sup> and to then subsequently “revise its climate change plan under s. 4(1) of the *CTCA* once it has set a science-based GHG reduction target.”<sup>28</sup> The Applicants are additionally seeking a declaration that:

ss. 3(1) and/or 16 of the *CTCA*, which repealed the *Climate Change Mitigation and Low-carbon economy Act, 2016*, S.O. 2016, c. 7 and allowed for the imposition of more lenient targets without mandating that they be set with regard to the Paris Agreement temperature standard or any kind of science-based process, violates sections 7 and 15 of the *Charter* in a manner that cannot be saved under s. 1, and is therefore of no force and effect.<sup>29</sup>

Finally, two Wet’suwet’en hereditary chiefs, with the support of the RAVEN Trust are bringing a legal challenge which “argues that Canada’s failure to do its fair share to avert a

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<sup>25</sup> *Mathur et al. v Ontario* (25 November 2019), Toronto CV-19-0063/627-0000 (ONSC) (Notice of Application at para 9).

<sup>26</sup> *Ibid* at para 8(f).

<sup>27</sup> *Ibid* at para 8(f).

<sup>28</sup> *Ibid* at para 8(g).

<sup>29</sup> *Ibid* at para 8(d).

climate catastrophe would breach the equal protection of the law guaranteed by the Canadian Charter of Rights and Freedoms.”<sup>30</sup> Thus, the litigants are arguing that “Canada has a constitutional duty to protect its citizens from climate catastrophe.”<sup>31</sup> The goal of establishing that such a duty exists would be to force “a comprehensive overhaul of Canada’s environmental legislation to enable urgent action on climate change.”<sup>32</sup> Such an overhaul would draw “a line against reckless fossil fuel developments that will push us past the tipping point.”<sup>33</sup> To that end the pending litigation will specifically name “Coastal Gas Link and Pacific Trails fracked gas pipelines along with LNG export facilities in Kitimat as particularly high-emitting fossil fuel projects that are likely to breach Canada’s (already inadequate) emissions targets.”<sup>34</sup>

It is necessary to recognize here that these three cases are most closely related through their focus on the impacts of climate change, and their desire to have Canadian governments’ climate change plans align with the goals set out in the Paris Agreement. At no point within the filed court documents, or the Wet’suwet’en press release, is there an explicit reference to seeking to establish a right to a healthy environment. Furthermore, it is arguable that climate change is a fundamentally different issue than what Boyd was originally arguing for in seeking a right to a healthy environment as climate change is an issue that cannot be bounded to place.

However, within this thesis I am presenting these climate change cases as an extension of the argument for the right to a healthy environment. The primary argument for this functional equivalency is that all three cases are framed primarily or exclusively in relation to the impacts of climate change on humans, specifically with regard to human health under section 7 and

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<sup>30</sup> “Stand Strong for Wet’suwet’en Yintah”, online: *RAVEN* <<https://raventrust.com/wetsuweten/>>.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

equality rights under section 15 of the *Charter*. In this way although the impact and scope of climate change is in some ways fundamentally different to that of other issues threatening ecological integrity, the core legal focus remains on the human experience of these environmental impacts rather than on the nature of the ecological impacts themselves. Thus, success in any of these cases, although only immediately applied specifically to the impacts of climate change, serve as a legal precedent that the Canadian government has a duty to abstain from action that would degrade ecological integrity in a manner that would affect the health or equality rights of Canadians. This interconnectedness is echoed within Ecojustice's messaging as well, as in their press release announcing the *Mathur* case they stated that "safe climate and healthy environment are the very basis of the long, full lives [the claimants] intend to lead."<sup>35</sup> Thus, due to this interrelatedness and strategic similarity, I treat climate change and the right to a healthy environment litigation as interchangeable within this thesis.

### *The Impact of the Legacy of Settler Colonialism*

*La Rose* and *Mathur* are each being supported by settler-founded ENGOs (through receiving funding and legal counsel from the David Suzuki Foundation and Ecojustice respectively). Each of these cases also directly involve Indigenous plaintiffs. As a result, and as detailed below in the literature review, the relationship between these organizations, the plaintiffs they are representing or funding, and the state will be shaped by settler colonialism. Indeed, any meaningful attempt to address climate change must address the roots of ecological crises in settler colonialism and capitalism.

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<sup>35</sup> Devon Page, "Seven young people from Ontario are suing Premier Ford", (26 November 2019), online: *Ecojustice* <<https://www.ecojustice.ca/gen-climate-action-our-biggest-climate-lawsuit-yet/>>.



Thus while Indigenous representation amongst the class of plaintiffs is important, and there may be a range of reasons individual Indigenous youth have joined these actions, it remains nonetheless important to critically consider how the claims may shape the Canadian state's response to climate change impacts on Indigenous communities. As detailed below, in chapter four, the current litigation is not designed to confront the ongoing legacy of settler colonialism in partnership with Indigenous peoples, or to recognize their jurisdiction to make decisions about their lands and health.<sup>36</sup> Rather, it reinforces the role of the Canadian state – at best minimizing damage to Indigenous peoples as it exercises its presumptive authority. The choice to litigate can then have the unintended yet harmful effect of legitimating the settler state's authority to decide not only how this damage will be addressed but environmental governance more broadly. As a result, if successful, the potential right to a healthy environment will be implemented through relationships which are fundamentally embedded in settler colonialism. In effect the litigants are asking the court, a body representative of the settler colonial systems responsible for the alleged harm, to unilaterally deliver a solution which can undo the harm. I note this at the outset because this colonial nature of litigation in Canadian courts will fundamentally impact the expression and efficacy of any rights derived from these cases. This context therefore necessarily underlies all of the analysis that is to follow in this thesis.

### Overview

I develop the arguments presented at the beginning of this chapter by first consolidating the available research in multiple strains of scholarships. I first examine scholarship outlining relational approaches to law, which I in turn connect to scholarship concerning the insidious

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<sup>36</sup> Such jurisdiction has been the topic of considerable scholarly treatment, specifically within Land Back literature. For a comprehensive overview of such work see Yellowhead Institute, *Land Back: A Yellowhead Institute Red Paper* (Toronto: Ryerson University, 2019).

nature of settler colonialism within the Canadian legal system. I then review literature regarding two key sites of intervention during the process of litigation: the involvement of lawyers, and judicial interpretation.

Following this literature review, my analysis explores how the lawyers involved in the litigation of the right to a healthy environment may significantly narrow the scope of the values that proponents of the right to a healthy environment intend to advance. I then explain how judges may be unwilling and unable to provide proactive remedies to compel the state to redistribute resources in the manner that is necessary to address climate change. Further, I argue judges may avoid making broad declarations that Canadians do not have a right to a healthy environment in order to avoid public questioning about the role of the courts. I argue that instead judges will likely recognize a right to a healthy environment with limited remedial capabilities, a result which will likely be mistaken as a success by members of the public who were committed to the litigation strategy, which in turn may undermine social and political movements to address climate change. Finally, in my concluding thoughts I reflect on how litigating the right to a healthy environment may not address the interrelated impacts of settler colonialism and climate change, and instead may distract from other efforts to do so.

## Chapter Two: Literature Review

In this chapter I present relational approaches to law as an overarching frame that I will be using to guide my analysis throughout the rest of this thesis. I detail how the relational approach is an effective framework to guide this research as it provides a coherent structure through which to both examine the potential impact of attempting to advance values through the Canadian legal system, and to hypothesize alternative interventions that could more adequately represent those same values.

I then turn my attention to scholarship detailing two key stages of arriving at a legal right which introduce new actors, concerns, and interests which may fundamentally change the range of values that a legal right ultimately protects: the intervention and influence of lawyers, and the ultimate judicial interpretation of the legal right.

### Relational Approaches and the Legacy of Settler Colonialism

The *Charter* and thus much of Canadian law is framed in terms of rights held against the state. However, As Canadian constitutional law scholar Andrew Petter argues, this is the result of a choice about how the Canadian legal system should be organized.<sup>37</sup> Choosing the rights frame has consequences. In the aptly named *Law's Relations: A Relational Theory of Self, Autonomy, and Law* Jennifer Nedelsky offers a relational theory of the self, autonomy, and law as an alternative to this prevailing Anglo-American individualistic theory.<sup>38</sup> Nedelsky's relational theory posits that the individual self is "constituted in an ongoing, dynamic way by the relationships through which each person interacts with others" and that "the values that people

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<sup>37</sup> Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda" (1987) 45 *Advocate* (Vancouver) 857 at 861.

<sup>38</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012).

experience as central to their selfhood, to the possibility of their flourishing, are made possible through relationships.”<sup>39</sup> As such, Nedelsky identifies that it is necessary to “shift habits of thought so that people routinely attend to the relations of interconnection that shape human experience, create problems, and constitute solutions.”<sup>40</sup> In order to do this Nedelsky makes a distinction between values and rights. “Values”, she argues, are abstract articulations of what a society sees as essential to humanity. Rights on the other hand, according to Nedelsky, are “institutional and rhetorical means of expressing, contesting, and implementing such values.”<sup>41</sup> She argues that relationships bridge abstract values and legal rights, and that the goal of rights is to foster relationships which advance our values.<sup>42</sup>

Although the focus of *Law's Relations* is on human relationships, the relational theory is directly applicable to relationships beyond those between humans. According to Nedelsky “[t]he very concept of ecology is relational. It is about fundamental interdependence.”<sup>43</sup> In order to demonstrate this, Nedelsky points to Thomas Berry’s influential book *The Dream of the Earth*, wherein Berry argues that in order to achieve greater environmental protection we must engage in a “complete reorientation in how we see the world and our place in it.”<sup>44</sup> Nedelsky further argues that “the dominant myths, institutions, and academic disciplines currently fail to provide the necessary respectful, relational perspective,” and instead proposes that a shift to her relational paradigm would invite “the kind of relational thinking that will promote a respectful relation to earth and her many life-forms.”<sup>45</sup>

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<sup>39</sup> *Ibid* at 3.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*. At 236-241

<sup>42</sup> *Ibid* at 236.

<sup>43</sup> *Ibid* at 12.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*.

Nedelsky's focus on relationships exposes a fundamental problem with comparative environmental law. As detailed above, environmental rights have seen success elsewhere in the world.<sup>46</sup> However, the European countries pioneering these rights were able to tailor the right such that existing relationships were capable of fostering the desired values. Simply applying these rights to the Canadian context without attenuating for the unique relationships that the Canadian state has with the public and the Earth may rely on relationships which cannot advance the values proponents hope the right will advance.

A major difference between the European context and the Canadian context, is that any interaction between the Canadian state and the Earth carries with it the legacy of settler colonialism. This importance of this legacy is well documented in the work of Anishinaabe legal theorists Deborah McGregor, Aaron Mills, and John Borrows.<sup>47</sup> McGregor explains that “for Native people, environmental justice is about colonization and racism, and not only about continued assaults on the environment.”<sup>48</sup> McGregor further argues that “because of their intimate relationship with the land, any injustice to Aboriginal people is an environmental injustice to the extent that it impairs the ability of Aboriginal people to fulfil their responsibilities to Creation. Conversely, any injustice to the environment that impedes the ability of Creation to fulfil its duties to Aboriginal people is an injustice to Aboriginal people.”<sup>49</sup> Due to this interrelatedness it is not possible for settlers to relate to the land without simultaneously engaging in relations with Indigenous peoples. Mills echoes this line of thinking by arguing that

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<sup>46</sup> Boyd, *supra* note 9.

<sup>47</sup> I make this distinction to avoid an overgeneralization of Indigenous law, as these authors to are each writing from an Anishinaabe perspective. As a settler living on Anishinaabe land this perspective is particularly informative for me in approaching this work. It is additionally worth noting that the Ecojustice office which is bringing the *Mathur* claim is located on Anishinaabe land, thus such perspectives are likely considered deeply by them as well.

<sup>48</sup> Deborah McGregor, “Honouring Our Relations: An Anishinaabe Perspective on Environmental Justice” in *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver, CANADA: UBC Press, 2010) at 27.

<sup>49</sup> *Ibid* at 29.

“colonialism isn’t merely a process of newcomer settlement and Indigenous displacement; it’s a mode of relationship between settler peoples, Indigenous peoples, and land in which all are harmed (albeit certainly not equally).”<sup>50</sup> Finally Borrows elucidates this logic in *Earth-Bound: Indigenous Resurgence and Environmental Reconciliation* in which he argues that:

Reconciliation between Indigenous peoples and the [Canadian] Crown requires our collective reconciliation with the earth. Practices and partnerships of resurgence and reconciliation must sustain the living earth and our more-than-human relatives for future generations. This will not occur without the simultaneous resurgence of Indigenous laws, governments, economies, education, relations to the living earth, ways of knowing and being, and treaty relationships.<sup>51</sup>

This interrelatedness is further illustrated by the inextricable connection between the legacy of settler colonialism and the efficacy of the Canadian state’s environmental efforts. In their 2019 study, Richard Schuster and his colleagues conducted a comprehensive analysis of vertebrate biodiversity on Indigenous managed lands, as well as state protected lands (i.e. national and provincial parks) in Canada, Australia, and Brazil. The study determined that vertebrate biodiversity is higher on Indigenous managed lands than in state protected areas in all three countries.<sup>52</sup> This study represents a particularly salient illustration of the efficacy of place-based Indigenous knowledge developed through living on and caring for this land from time immemorial.

Schuster and colleagues suggest that “collaborative agreements with Indigenous land stewards may be essential to insure persistence of many species in future, and to meet

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<sup>50</sup> Aaron Mills, “Rooted Constitutionalism: Growing Political Community” in *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto; Buffalo: University of Toronto Press, Scholarly Publishing Division, 2018) at 145.

<sup>51</sup> John Borrows, “Earth-Bound: Indigenous Resurgence and Environmental Reconciliation” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto; Buffalo: University of Toronto Press, Scholarly Publishing Division, 2018) at 69.

<sup>52</sup> Richard Schuster et al, “Vertebrate biodiversity on indigenous-managed lands in Australia, Brazil, and Canada equals that in protected areas” (2019) 101 *Environmental Science & Policy* 1–6 at 3.

[Convention on Biological Diversity] goals to prevent extinction in Australia, Brazil and Canada.”<sup>53</sup> Taken together with McGregor’s argument that any injustice to the land is an injustice to Indigenous peoples and vice-versa, it becomes clear that in order to be efficacious, efforts to promote ecological integrity in Canada must in part be expressed through the relationship between Indigenous peoples, the settler state, and the land. The task to adequately address Canada’s contributions to climate change then becomes more clear, but no less daunting, when applying this to logic the current climate crisis. As detailed at the beginning of this thesis climate change is “invariably tied to, and symptomatic of, ongoing processes of colonialism, dispossession, capitalism, imperialism/globalization and patriarchy;”<sup>54</sup> processes which fundamentally colour the current relationship of the settler state, Indigenous peoples, and the land.

The applicability of a relational approach to environmental rights is further supported by the example of New Zealand’s *Te Urewera* (2014) and *Te Awa Tupua (Whanganui River Claims Settlement)* (2017) Acts, which conferred legal personality to a (former) national park and a river respectively.<sup>55</sup> Despite the fact that Canadian analysts have upheld these Acts as paragons of the “rights of nature movement,”<sup>56</sup> the impetus for recognition was not based in a desire to spur or recognize such a hypothetical movement. In canvassing the history and process of implementing the Acts, Katherine Sanders determined that the intent and application of these Acts were not based on the abstract concept of legal personality and the rights of nature, but were rather a method of reframing the unique relationship between the Crown, the Maori *iwi*, and the land

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<sup>53</sup> *Ibid* at 4.

<sup>54</sup> McGregor, Whitaker & Sritharan, *supra* note 5 at 36.

<sup>55</sup> *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*. (2017, March 20). New Zealand Public Act No. 7; *Te Urewera Act 2014*, New Zealand Public Act No. 50. (2014, July 27).

<sup>56</sup> A prominent example is the repeated discussion of the Acts in: David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017) Google-Books-ID: 6mS1DgAAQBAJ.

itself.<sup>57</sup> Thus, these Acts can be seen to be more indicative of the possibility of engaging with relational conceptions of law in order to solve social problems. As such, much can be learned about what the final outcomes of environmental rights litigation in Canada by examining the degree to which it engages, or fails to engage, with repairing relationships that are fundamentally tainted by the legacy of settler colonialism.

I have chosen to adopt this relational frame due to its ability to provide both an evaluative criteria for legal rights, and also a concrete example of how to move forward while addressing the issues at the core of Canada's response to climate change and other issues of ecological integrity. As such the relational frame will be used throughout chapter four and five to evaluate how the input of lawyers and judges impacts how the values of proponents of the right to a healthy environment are ultimately expressed within the legal right. I will then continue to use the relational frame in the concluding chapter to examine other potential climate change interventions that have the potential to directly protect ecological values.

### The Effect of Environmental Litigation

Following Nedelsky's argument that legal rights are "institutional and rhetorical means of expressing, contesting, and implementing" broadly held values<sup>58</sup> the body of this thesis will be used to examine what the impact of institutional influences will be on whether the legal mechanism of the right to a healthy environment effectively promotes the values its proponents seek to advance. In order to undertake this analysis this thesis will examine two important

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<sup>57</sup> Katherine Sanders, "Beyond Human Ownership"? Property, Power and Legal Personality for Nature in Aotearoa New Zealand" (2018) 30:2 Journal of Environmental Law 207 at 231.

<sup>58</sup> Nedelsky, *supra* note 38 at 236-241.



interventions within a legal dispute which introduce new actors and sets of interests: the involvement of lawyers, and judicial interpretation.

### *The Role of Lawyers and Advocates*

Environmental rights litigation in Canada has recently been criticized by scholars for its lack of community orientation. In his critique of the use of *Charter* litigation to address climate change Jefferies argues, "we must remain focused on the actions that can be taken individually, or as members of a larger community."<sup>59</sup> MacLean comes to a similar conclusion while examining the limitations of using the *Charter* to address climate change: "the strategic question for environmental law and policy reform, then, is how to enhance public *demand for and participation in* policymaking -future pathways - actually capable of enhancing environmental protection, mitigating climate change, and promoting sustainability."<sup>60</sup>

Significantly, these deficiencies in broader community engagement may be the result of the nature of litigating and having lawyers take a leading role in environmental activism. In "Making Law, Making Place: Lawyers and the Production of Space" American legal geographers Deborah G. Martin, Alexander W. Scherr, and Christopher City make the argument that through the act of lawyering, lawyers play a crucial role in reinforcing or altering spatial norms.<sup>61</sup> The authors provide four dimensions of lawyers' activities which produce this result, a heuristic which I have incorporated into my data analysis, as discussed in chapter four below.

The first of these dimensions occurs when "lawyers *translate* meaning from one form to another," by narrowing "the meaning of the original data, limiting it to what particular legal rules

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<sup>59</sup> Jefferies, "Filling the Gaps in Canada's Climate Change Strategy", *supra* note 21.

<sup>60</sup> MacLean, "You Say You Want an Environmental Rights Revolution", *supra* note 22.

<sup>61</sup> Deborah G Martin, Alexander W Scherr & Christopher City, "Making law, making place: lawyers and the production of space" (2010) 34:2 Progress in Human Geography 175–192 at 175 [*Making law, making place*].

or processes recognize as useable.”<sup>62</sup> A second dimension is seen in how “lawyers may not only translate, but also *transform* the meaning of the conflict.”<sup>63</sup> According to the authors this transformation occurs in two manners: (1) through the lawyer adding “meanings embedded in the societal norms underlying law and legal process” while assessing “how legal rules and processes affect the concerns at play;” and (2) by introducing the lawyer’s own values into the conflict while filtering “information through the lens of their own values, values grounded in the spatialities of lawyers’ lives.”<sup>64</sup>

The third action the authors identify is the process of lawyers acting as “*agents*, introducing both role separation and transactional cost into potential resolutions.”<sup>65</sup> The authors describe ‘role separation’ as the “notion that lawyer and client exist within different networks of concerns, relationships and motivational realities,” meaning that “a lawyer will have commitments and concerns separate from the client” which are “inherently spatial, affecting how lawyers interpret and enact a client’s claims.” The role as agent furthermore “introduces increased transactional costs” including “both money and delay” which can “have a significant impact on the parties’ choices.”<sup>66</sup> For example, lawyers working for an ENGO will be receiving their income from donors to the ENGO as opposed to the plaintiffs themselves. This introduces a role separation as the lawyer will have added responsibilities to the ENGO and donors, groups that the plaintiffs would not have contact with otherwise. This in turn will change how the lawyers approach the dispute.

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<sup>62</sup> *Ibid* at 183.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid* at 184.

Finally, the authors observe that “lawyers *exert power*” both implicitly and explicitly. The implicit effect occurs through the inclusion of lawyers altering the power dynamics of a case because “as a member of a community elite, a lawyer’s status and access seems likely to alter the existing social dynamics between other participants.” The explicit contribution occurs through the intentional exertion of lawyers “through conscious, planned interventions, towards an outcome desired by one or more participants,” which results in lawyers’ strategic choices having a profound impact on the conflict.<sup>67</sup>

Taken together these four dimensions of lawyering demonstrate that in order for lawyers to effectively assist in community led (rather than lawyer designed) movements, they will need to critically and consciously operate in a different manner than the typical model of lawyering. Not engaging in this critical work may inevitably lead them to translate and transform spatial issues into conceptual ones and place themselves in a position of privilege within the conflict.

While *Making Law, Making Place* brings our attention to the broad impacts of a lawyers involvement in a dispute, British-Canadian legal geographer Nicholas Blomley’s concept of bracketing explains how and why lawyers make the individual decisions which come to define disputes in the manner that Martin et al. identify. Blomley explains bracketing as the “attempt to stabilize and fix a boundary within which interactions take place more or less independently of their surrounding context. That which is designated as inside the boundary must be, in some senses, disentangled from that identified as outside. Bracketing, in this broad sense, is a ubiquitous and seemingly inescapable dimension of experience and perception.”<sup>68</sup> Blomley further states that “although it is endemic to social life, bracketing takes on a particular force

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<sup>67</sup> *Ibid.*

<sup>68</sup> Nicholas Blomley, “Disentangling Law: The Practice of Bracketing” (2014) 10:1 Annual Review of Law and Social Science 133–148 at 135-136 [*Disentangling Law*].

within law.” Blomley establishes this claim based on the arguments that “law is particularly invested in producing clarity, legibility, and certainty through the drawing of distinctions,” and that due to its “institutionalization, law is a powerfully performative site.”<sup>69</sup>

Blomley additionally details legal practice as being responsible for creating bracketed spaces of “extralegality” through “temporal moves, such as the designation of issues as pre- or postlegal, or by their treatment as supralegal (that is, treating them as legally exogenous, beyond law’s grasp) or infralegal (characterizing them as marginal, incidental, and unworthy).”<sup>70</sup> This process however is not a “simplification (for it is often highly complicated)” or “an abstraction (as opposed to a contingent rearrangement of certain connections, entailing both cuts and connections).”<sup>71</sup> Rather, “the disentanglement that the legal bracket requires can be violent and disruptive. Bracketing, therefore, can become a political and ethical battle zone.”<sup>72</sup>

Shin Imai’s description of his experience of practicing law in Moosonee, Ontario, provides a concrete example to tease out the political implications of the practice of bracketing. Imai describes originally approaching treaty rights cases in terms of “legal principles found in court cases and legislation,” while his clients in the community were more focused with discussing “the right to Aboriginal sovereignty.”<sup>73</sup> This disconnect led some people at the meetings to “look at [him] suspiciously, like [he] was an agent of the government.”<sup>74</sup> Imai explains the disconnect as being the result of “being taught to structure reality” while he was being taught law in school. Imai further states that “In Moosonee, by dissecting a treaty rights

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<sup>69</sup> *Ibid* at 136.

<sup>70</sup> *Ibid* at 137.

<sup>71</sup> *Ibid* at 145.

<sup>72</sup> *Ibid*.

<sup>73</sup> Shin Imai, “A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering Papers Presented at the UCLA/IALS Conference on Problem Solving in Clinical Education” (2002) 1 *Clinical L Rev* 195–228 [*A Counter-Pedagogy for Social Justice*] at 218.

<sup>74</sup> *Ibid*.

dispute and organizing its components into legal categories, I was promoting the structure of reality that I had been taught in downtown Toronto.”<sup>75</sup>

The disconnect that Imai identifies neatly fits into Blomley’s theory of bracketing, as Imai was responsible for categorizing the concerns of the community regarding sovereignty as extralegal. Imai’s further analysis demonstrates that while bracketing the dimensions of the legal dispute he was not merely simplifying or abstracting the law, but rather unintentionally engaging in a highly political act of favouring the structure of reality taught in law schools in comparison to the reality experienced by the community of Moosonee.

Beyond providing an instructive example of what not to do while working with communities as a lawyer, Imai also sets out a framework of skills necessary for lawyer to play a positive role in working with communities. The framework which Imai refers to as a “counter-pedagogy for social justice” involves three skills: collaborating with a community, recognizing individuality, and taking a community perspective.<sup>76</sup> According to Imai, in order to foster a collaborative environment, lawyers must not position themselves as experts, but rather “establish a less hierarchical structure which facilitates interaction by everyone involved.”<sup>77</sup> The need to approach environmental lawyering in this manner has been prominently advocated for by American environmental lawyer Luke Cole who argued that “in a very real way, the legal groups are re-creating one of the roots of environmental injustice – the making of decisions by people not affected by those decisions.”<sup>78</sup> Imai’s framework provides a promising means to avoid perpetuating this root of environmental injustice. According to Imai in order to properly

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<sup>75</sup> *Ibid* at 219.

<sup>76</sup> *Ibid* at 201.

<sup>77</sup> *Ibid* at 206.

<sup>78</sup> Luke Cole, “Lawyers, the Law & Environmental Justice: Dangers for the Movement” (1994) 5:2/3 *Race, Poverty & the Environment* 3–7 at 6.

recognize individuality Imai suggests that lawyers need to foster a collaborative process which acknowledges “personal identities, race and individual emotional engagement as an integral part of problem-solving.”<sup>79</sup> Lastly, lawyers taking a community perspective involves beginning “from the reality perceived by the communities which they represent” and using “law as a tool for advancing community goals, not as a blueprint for re-constructing community realities.”<sup>80</sup>

Taken together then, the theories detailed above (the four dimensions from Making Law, Making Place; the concept of bracketing; and the counter-pedagogy for social justice) work to provide a framework for analysis to examine the impact lawyers have on transforming and translating community issues, deciding which concerns in a dispute are extralegal, and what lawyers would need to do to meaningfully engage with community work. In chapter four I apply the framework to the current right to a healthy environment cases to determine whether that litigation follows the patterns that these authors have observed.

### *Interests of Judges and Courts*

In his seminal book *The Hollow Hope: Can Courts Bring About Social Change?*, American political scientist and legal scholar Gerald Rosenberg examines “whether, and under what conditions, courts can produce significant social reform.”<sup>81</sup> In answering this question Rosenberg puts forth a theory of the “Constrained Court” and tests the theory against historical analyses of attempts to use American courts to “produce significant social reform in civil rights, abortion, women’s rights, the environment, reapportionment, criminal rights, and same-sex marriage.”<sup>82</sup> Rosenberg’s theory of sets out three constraints that need to be overcome in any

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<sup>79</sup> Imai, “A Counter-Pedagogy for Social Justice”, *supra* note 73 at 217.

<sup>80</sup> *Ibid* at 225.

<sup>81</sup> Rosenberg, *supra* note 1 at 420.

<sup>82</sup> *Ibid*.

case for American courts to be able to act as “effective producers of social reform.” In order to satisfy these constraints one must observe that in:

- 1) Overcoming Constraint I [the limited nature of constitutional rights], there is ample legal precedent for change; *and*,
- 2) Overcoming Constraint II [the lack of judicial independence], there is support for change from substantial numbers in Congress and from the executive; *and*,
- 3) Overcoming Constraint III [the judiciary’s lack of powers of implementation], there is either support from some citizens, or at least low levels of opposition from all citizens;

Additionally, Constraint III is mediated by the need for one of four conditions to be present:

- a) Positive incentives are offered to induce compliance (Condition I); or,
- b) Costs are imposed to induce compliance (Condition II); or,
- c) Court decisions allow for market implementation (Condition III); or,
- d) Administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind (Condition IV).<sup>83</sup>

According to Rosenberg, historical analyses of key litigation<sup>84</sup> demonstrated that determining whether these three constraints are overcome, and at least one of one of four conditions are met, best captures “the capacity of the courts to produce significant social reform.”<sup>85</sup> This conclusion is based in part on the finding that the American courts depend on political support to produce reform.<sup>86</sup> Rosenberg additionally argued that American courts cannot produce change if there is resistance because they do not have the power to implement change given resistance.<sup>87</sup> Finally

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<sup>83</sup> *Ibid* at 36.

<sup>84</sup> A particular emphasis was placed on analyzing *Brown v Board of Education* a decision from 1954 in which the Supreme Court of the United States (SCOTUS) determined that the racial segregation of schools was unconstitutional; and *Roe v Wade* a 1973 in which the SCOTUS determined that the American constitution protects a woman’s liberty to choose to have an abortion.

<sup>85</sup> Rosenberg, *supra* note 1 at 420.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*.

Rosenberg observed that existing precedent for change, as well as support from within the legal culture itself, was “the chief reason” that major legal cases were won.<sup>88</sup>

Following from the analysis of the conditions necessary for social reform Rosenberg concludes that:

*U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in the political context can rarely be solved by courts. As Scheingold puts it, the “law can hardly transcend the conflicts of the political system in which it is embedded” (Scheingold 1974, 145). Turning to courts to produce significant social reform substitutes the myth of America for its reality. It credits courts and judicial decisions with a power that they do not have.<sup>89</sup> [emphasis added]*

Based on this conclusion Rosenberg contemplates the consequences of investing in litigation for those seeking significant social reform:

*strategic choices have costs, and a strategy that produces little or no change and induces backlash drains resources that could be more effectively employed in other strategies. In addition, vindication of constitutional principles accompanied by small change may be mistaken for widespread significant social reform, inducing reformers to relax their efforts. In general, then, not only does litigation steer activists to an institution that is constrained from helping them, but also it siphons off crucial resources and talent, and runs the risk of weakening political efforts.<sup>90</sup> [emphasis added]*

Rosenberg concludes, “courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To ask them to produce significant social reform is to forget their history and ignore their constraints. It is to cloud our vision with a naive and romantic belief in the triumph of rights over politics.”<sup>91</sup>

Rosenberg is not alone amongst legal scholars in his concern that litigation can weaken political efforts. While Rosenberg describes this concern in terms of the capacity of judicial decisions to simultaneously mobilize opponents of social change while fostering complacency

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<sup>88</sup> *Ibid* at 421.

<sup>89</sup> *Ibid* at 422.

<sup>90</sup> *Ibid* at 423.

<sup>91</sup> *Ibid* at 429.



amongst proponents,<sup>92</sup> American legal historian Reva Siegel has examined another dimension of this phenomenon. In her article “The Rule of Love: Wife Beating as Prerogative and Privacy” Siegel formulates a theory of “preservation through transformation.”<sup>93</sup> According to Siegel the dynamic of “preservation-through-transformation” can be:

characterized in any way that indicates that elements of continuity *and* change are at stake in the process. A status regime is modernized (or deformed) when, despite changes in its rules and rhetoric, it continues to distribute material and dignitary privileges (“social goods”) in such a way as to maintain the distinctions that comprise the regime (e.g., constitute “race” or “gender”) in relatively continuous terms.<sup>94</sup>

Siegel uses the example of chastisement laws in the United States to demonstrate how “preservation-through-transformation” occurs. Siegel traces how notions of companionate marriage discredited the idea that men had legal entitlement to physically chastise their wives, leading courts to reject arguments in favour of such an entitlement.<sup>95</sup> However, while courts began to repudiate the rationale of male prerogative to chastisement, they began to invoke a “*supplementary rationale*” of marital privacy which would prevent the court from intervening to stop chastisement.<sup>96</sup> Thus although the courts repudiated the idea of prerogative chastisement, the courts in effect preserved the ability for men to chastise their wives by transforming the debate into one about the desirability of the court interfering with marital privacy.

Siegel argues that “civil rights reform may enhance the legal system's capacity to legitimate residual social inequalities among status-differentiated groups.”<sup>97</sup> In the marital chastisement example it is clear that the repudiation of men’s prerogative to chastise their wives

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<sup>92</sup> *Ibid* at 425.

<sup>93</sup> Reva Siegel, “‘The Rule of Love’: Wife Beating as Prerogative and Privacy” (1996) Faculty Scholarship Series, online: <[https://digitalcommons.law.yale.edu/fss\\_papers/1092](https://digitalcommons.law.yale.edu/fss_papers/1092)>.

<sup>94</sup> *Ibid* at 2184.

<sup>95</sup> *Ibid* at 2151.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid*.

was an alleviation of some “dignitary or material aspects” of the unequal marital relationship. However, the transformation of the issue into one of marital privacy allowed the court to preserve the status differential while realigning the rationale for the differential back in line with societal norms. Both Siegel and Rosenberg highlight a concern that even where litigation is successful groups seeking social change can be indisputably worse off “in their capacity to achieve further, welfare-enhancing reform of the status regime in which they were subordinated.”<sup>98</sup>

Although both Rosenberg and Siegel conducted their research in the American context, their conclusions are applicable to the Canadian context. In her 2012 article “Dollars Versus [Equality] Rights” Hester Lessard examined the history of SCC cases dealing with section 15 of the *Charter* from 1982 to 2012, and found similar results to what Rosenberg observed in the American context.<sup>99</sup> In the article Lessard categorizes cases based on whether the budgetary impact of recognition was ‘minimal’ or ‘serious’. Lessard found that no section 15 challenge with a ‘serious’ budgetary impact had been successfully litigated at the SCC, leading her to conclude that “a minimal budgetary impact is a necessary but not sufficient condition for a successful social benefit challenge under section 15, while a serious budgetary impact poses a serious, if not impossible, hurdle.”<sup>100</sup> Lessard further found that the reasons given for rejecting the claims with a serious budgetary impact were typically focused on concerns of institutional limitations in which the judges believed they had a “lack of institutional competence to make

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<sup>98</sup> *Ibid* at 2185.

<sup>99</sup> Hester Lessard, “‘Dollars Versus [Equality] Rights’: Money and the Limits on Distributive Justice” (2012) 58:1 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference*, online: <<https://digitalcommons.osgoode.yorku.ca/sclr/vol58/iss1/11>>.

<sup>100</sup> *Ibid* at 318.

complex budgetary decisions,” and that “decisions with a significant budgetary impact lie outside the appropriate constitutional role of the judicial branch in relation to the legislative branch.”<sup>101</sup>

Lessard’s data while concerning, was not unpredictable as even in the early days of the *Charter* critics argued that such a pattern would develop. In his 1987 article *Immaculate Deception: the Charter’s hidden agenda* Canadian constitutional law scholar Andrew Petter observed that the members of the Canadian judiciary, who are recruited exclusively from a class of successful and wealthy lawyers, do not “possess the experience, the training, or the disposition to comprehend the social impact of claims made to them under the Charter, let alone to resolve those claims in ways that promote or even protect, the interests of lower income Canadians.”<sup>102</sup> Petter further argues that this is problematic because “the attitudes of lawyers and judges tend to reflect the values of the legal system in which they were schooled and to which they owe their livelihood,” a system which creates a shared assumption among lawyers that property rights “flow from a natural system of private ordering.”<sup>103</sup> Allan Hutchinson, another prominent Canadian constitutional law scholar, demonstrates the problem with this type of pattern while tackling the myth that the court engages in objective interpretation. To Hutchinson “Charter adjudication is not about the objective interpretation of constitutional rules and their dispassionate application to a given sets of social facts. Rather judicial decision-making necessarily requires the courts to engage in ideological disputation.”<sup>104</sup> The consequence of this

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<sup>101</sup> *Ibid.*

<sup>102</sup> Petter, “Immaculate Deception”, *supra* note 37 at 861.

<sup>103</sup> *Ibid* at 861–862.

<sup>104</sup> Allan C Hutchinson, *Waiting for Coraf: a critique of law and rights* (Toronto: University of Toronto Press, 1995) at 714.

is that “the only consensus that may and does shape the work of courts is that among the community of legal elites.”<sup>105</sup>

A consequence of these trends, Petter argues, is that “deep in the judicial ethos there exists a special concern and reverence for property rights – a concern and reverence that over the course of time will guide and constrain judicial decision-making in Charter cases.”<sup>106</sup> It is this ideological reverence for property rights which can predict Lessard’s findings, as that data reflects that Canadian judges have a concern for property rights (i.e. the distribution of wealth) which constrains them from ruling in such a way that *Charter* rights will obscure that perceived “natural system of private ordering.” Thus, Lessard’s data when supported by the Petter and Hutchinson’s explanations suggest that the Canadian courts are constrained from leading social change in a similar way to what Rosenberg and Siegel observed in the American context.

The potential issues with the nature of the *Charter* and the Canadian legal system goes beyond the predispositions of judges. In fact, the bulk of decisions that are made which effect ecological integrity in Canada are not made by judges, but rather by administrative officials. Lynda Collins and Lorne Sossin explain how environmental laws in Canada are predominately exercised through statutory discretion which “arise[s] where the statute empowers officials to make a judgment-whether to exercise a specific authority or not, and if so, in what ways and at what times.”<sup>107</sup> According to Sossin and Collins “the judgment calls these officials make [...] have cumulatively come to define the state of environmental protection in Canada.”<sup>108</sup>

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<sup>105</sup> *Ibid.*

<sup>106</sup> Petter, “Immaculate Deception”, *supra* note 37 at 862.

<sup>107</sup> Lynda Collins & Lorne Sossin, “Approach to Constitutional Principles and Environmental Discretion in Canada” (2019) 52:1 UBC L Rev 293 at 294.

<sup>108</sup> *Ibid.*

Although strengthening environmental objectives in the *Charter* would improve what is being considered by administrative decision makers, it would not address a potentially more fundamental issue. In writing about the process of Indigenous consultation and consent, Deborah Curran considers the effects of the considerable power vested in administrative bodies and argues that, administrative exercises such as consultation can depoliticize the decision making process “rather than addressing the underlying issues about who is making decisions and has authority.”<sup>109</sup> According to Curran “to repoliticize, therefore, is to break out of state-sanctioned consultation processes to challenge the very basis of decision-making. It is to affirm the complex, multiscale and political nature of environmental governance.”<sup>110</sup> Following this logic, it becomes clear that the issue with the amount of statutory discretion present in Canadian environmental law cannot simply be remedied by controlling what is considered, instead we must critically consider who is making these decisions.

These pieces taken together cast doubt on whether courts and judges are capable of leading social change, as judges’ ideology and concerns about institutional limitations will colour how they decide any given case. Furthermore, as Sossin, Collins, and Curran argued, judges may not even be responsible for making the most important decisions related to environmental governance in Canada. In chapter five of this thesis I will measure the litigation strategies employed by proponents of the right to a healthy environment against this scholarship to determine whether judges and courts are capable of answering these calls for them to lead social change.

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<sup>109</sup> Deborah Curran, “Indigenous Processes of Consent: Repoliticizing Water Governance through Legal Pluralism” (2019) 11:3 *Water* 571 at 572.

<sup>110</sup> *Ibid.*

## Summary

In this chapter I integrated scholarship from several subdisciplines of legal studies which are relevant to determining the effect of litigating the right to a healthy environment. I began the chapter by detailing relational approaches to law: Nedelsky's theory of the relational self;<sup>111</sup> as well as approaches grounded in Anishinaabe law from Indigenous scholars McGregor, Mills, and Borrows' who call for collective reconciliation between the Crown, Indigenous Peoples and the land.<sup>112</sup> Each of these theories expand the legal imagination beyond the black letter law of the settler state. These perspectives will be used in subsequent chapters to determine to what extent a legal right to a healthy environment would be able to reflect the values of its proponents, as well as to provide suggestions for potential interventions that could adequately reflect such values.

I then examined two key interventions that will determine the shape and efficacy of the potential right to a healthy environment as detailed in scholarship: the effect of lawyers' involvement and the effect of judicial interpretation.

First, I considered the impact of lawyer's involvement within broader social movements. Here I considered the role that lawyers play in reinforcing, or altering spatial norms;<sup>113</sup> Blomley's conception of the practice of bracketing;<sup>114</sup> and Imai's counter-pedagogy for social justice.<sup>115</sup> These perspectives are used in chapter four to analyze how lawyers' input throughout the litigation of the right will transform the goals and strategies of Canadian environmental activists.

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<sup>111</sup> Nedelsky, *supra* note 38 at 3.

<sup>112</sup> McGregor, *supra* note 48; Mills, *supra* note 50; Borrows, *supra* note 51.

<sup>113</sup> Martin, Scherr & City, "Making law, making place", *supra* note 61 at 183.

<sup>114</sup> Blomley, "Disentangling Law", *supra* note 68 at 135.

<sup>115</sup> Imai, "A Counter-Pedagogy for Social Justice", *supra* note 73 at 201.

Through examining legal histories of litigation campaigns targeted at effecting social change I then examined Rosenberg's Constrained Court theory,<sup>116</sup> Siegel's concern of reform which does not eliminate power and status differentials enhancing "the legal system's capacity to legitimate residual social inequalities among status-differentiated groups,"<sup>117</sup> Lessard's exploration of differential success rates for *Charter* equality claims depending on whether budgetary impacts would be minimal or serious,<sup>118</sup> and Petter and Hutchinson's *Charter* critiques.<sup>119</sup> The work of these scholars demonstrates that there are significant barriers to Canadian courts being able to lead social change. Furthermore, through presenting Curran's as well as Collins and Sossin's analyses of the role of administrative law in environmental decision making I have identified procedural limitations that accompany these substantive concerns about the role of litigation in effecting social change.<sup>120</sup> In subsequent chapters I apply these theories and frameworks to assess the potential efficacy of litigating the right to a healthy environment and explore potential unintended consequences the litigation may have.

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<sup>116</sup> Rosenberg, *supra* note 1 at 420.

<sup>117</sup> Siegel, "The Rule of Love", *supra* note 93.

<sup>118</sup> Lessard, "Dollars Versus [Equality] Rights", *supra* note 99 at 318.

<sup>119</sup> Petter, "Immaculate Deception", *supra* note 37; Hutchinson, *supra* note 104.

<sup>120</sup> Curran, "Indigenous Processes of Consent", *supra* note 109 at 572; Collins & Sossin, *supra* note 107 at 294.

## Chapter Three: Methodology

### Documentary Analysis

My analysis begins with an examination of scholarly arguments in favour of the right to a healthy environment. These works (such as Boyd's body of work) are presented within this thesis as data to build an understanding of what the proponents of the right to a healthy environment are seeking. In this way my use of these sources is distinguishable from my use of other secondary sources, such as those which detail the factors which will influence the expression of the right to a healthy environment.

Following my examination of the argument for the litigation of the right to a healthy environment within scholarship, the next step was to examine documents published by ENGOs taking up the litigation. These sources provide important context for not only determining what the rationale for choosing to litigate is, but for also determining how such litigation is being advocated for to the public.

Lastly, primary court documents, specifically the statement of claim in *La Rose*<sup>121</sup> and the notice of Application in *Mathur*,<sup>122</sup> were analyzed. These documents were critical for identifying the legal arguments, and how they differ from the arguments previously made to the public while seeking their support.

### Interviews

While the above documentary analysis provides a rich understanding of the strategies ENGOs have adopted while litigating the right to a healthy environment, it does not provide full context regarding their decision making process. Although some ENGOs are adopting the

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<sup>121</sup> *Supra* note 23.

<sup>122</sup> *Supra* note 25.



strategy to litigate the right to a healthy environment, it does not mean that they have full faith that such litigation will successfully lead to social change. Rather, these organizations will likely have contemplated some or all of the critiques of the litigation which I have to offer in this thesis. In such a case these organizations may have nevertheless determined that despite these flaws, litigation offers the best choice out of a series of similarly flawed options for action during this climate emergency. In order to incorporate this type of nuance into my understanding and arguments I interviewed senior members of Canadian ENGOs, including one individual whose organization was involved in the litigation of the right to a healthy environment. The goal of these interviews was to gain a deeper understanding of the process and strategic considerations which go into ENGO decision making, with an emphasis on how such organizations make decisions to either litigate, or abstain from litigating.

Three interviews with senior members of ENGOs were completed to assist this analysis. Two of the participants were located in British Columbia. The third was located in Toronto. All of the interviews were conducted by phone due to either due location constraints, or because of concern for health and safety due to COVID-19.

The interviews were each forty-five minutes to an hour in length and the questions were open ended in nature. My approach to formulating and asking these questions was informed by American political scientist Jeffrey M. Berry's approach to elite interviewing. Berry specifically warns, "[I]nterviewers must always keep in mind that it is not the obligation of a subject to be objective and to tell us the truth. We have a purpose in requesting an interview but ignore the reality that subjects have a purpose in the interview too: they have something they want to

say.”<sup>123</sup> According to Berry if “all we want to know is the subject’s point of view” then “this problem doesn’t loom as large.”<sup>124</sup> I thus limited my questioning to questions designed purely to ascertain the participant’s point of view, their organization’s point of view, and their organization’s decision making procedure. These questions included, but were not limited to: “how does your organization evaluate the potential outcomes of prospective litigation?”; “does your organization believe that the *Charter* is a promising site for intervention for environmental protection?”; and “what is your organizations view on the possibility of adequately addressing climate change through political/legislative action?” One further benefit of adopting this type of interviewing approach was that I was able to purposely not ask any leading questions about the participant’s organization’s attempts to work in partnership with Indigenous peoples and nations. This approach was beneficial as if the subject’s organization was truly committed to forming such partnerships, that commitment would become apparent in discussions of the organization’s strategy even in the absence of explicit prompting.

#### Data Analysis and Limitations

Given the scope and timing of this project the interview data is quite limited and does not provide a full and complete representation of the decision-making process within ENGOs. The small sample size invalidates the ability to use this data to make any broad conclusions. Due to this recognition the data obtained from the interviews is used throughout this thesis to contextualize and add depth to my arguments and the arguments in favour of litigating the right to a healthy environment, rather than forming the heart of the analysis.

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<sup>123</sup> Jeffrey M Berry, “Validity and Reliability Issues in Elite Interviewing” (2002) 35:4 PS: Political Science and Politics 679–682 at 680.

<sup>124</sup> *Ibid.*

#### Chapter Four: The Lawyers' Impact

In this chapter I analyze the impact of actions and strategic choices made by lawyers, and their organizations, in the context of the litigation of the right to a healthy environment. I first argue that the decision to litigate alone is significant as it implicitly affirms the authority of the settler state over issues of environmental governance. I then examine the choices made by ENGOs and their lawyers in formulating arguments to bring to these courts. I argue that in making strategic choices aimed to maximize the chance of a successful disposition in litigating the right to a healthy environment, lawyers bracket some values that proponents of the right wish to advance as extralegal and thus place them outside the frame of the dispute. For example, the desire to ensure ecological integrity for its own sake may be important to supporters of the right, but is unlikely to be seen as cognizable by lawyers and courts. I further argue that in doing so these lawyers will transform the dispute in ways that are not easily understood by the non-legally trained public. This runs the risk of a narrow legal right to a healthy environment being mistaken for widespread social reform that it is not likely to be.

The analysis of the arguments that the ENGOs litigating the right to a healthy environment are making will be organized by applying the framework for analyzing the effect of lawyers on altering spatial norms forwarded by Deborah G. Martin, Alexander W. Scherr, and Christopher City in “Making Law, Making Place: Lawyers and the Production of Space.”<sup>125</sup> As mentioned previously Martin et al. identify four dimensions of lawyers’ activities which have the capacity to alter these norms: *translation*, *transformation*, acting as *agents*, and *exerting power*.

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<sup>125</sup> Martin, Scherr & City, “Making law, making place”, *supra* note 61.

As the concepts of *translation* and *transformation* are mutually reinforcing, the analysis begins with an investigation of these two effects.

### Litigation as an Affirmation of Settler State Authority

The *La Rose* and *Mathur* cases each directly involve Indigenous plaintiffs who are being supported by settler-founded ENGOs (through receiving funding and legal counsel from the David Suzuki Foundation and Ecojustice respectively). As a result, and as detailed in the literature review, the relationship between these organizations, the plaintiffs they are representing or funding, and the state will be shaped by settler colonialism. The decision to bring these claims to the settler state's courts as a means to mediate these relationships has consequences on its own.

If each case is intended to be brought in partnership with Indigenous peoples it will be essential to centre and expressly address the impacts of settler colonialism on the relationship involved. As Styres and Zinga argue:

It is highly unlikely that an Indigenous collaborator would be totally unaware of colonial influences; however, it is possible that a non-Indigenous collaborator may be largely or completely unaware of colonial influences. A non-Indigenous collaborator may be entering into the collaboration with good intentions but without an understanding of what the core principles really mean when they are enacted on a daily basis and without an appreciation of the depth and insidiousness of colonial relations.<sup>126</sup>

According to Anishinaabe sociologist Damien Lee this lack of awareness can result in “well meaning people” being “co-opted through state-controlled legislative frameworks to undermine Indigenous nations in the name of state interest in resources.”<sup>127</sup> Lee argues that

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<sup>126</sup> Sandra D Styres & Dawn M Zinga, “The Community-First Land-Centred Theoretical Framework: Bringing a ‘Good Mind’ to Indigenous Education Research?” (2013) 36:2 Canadian Journal of Education/Revue canadienne de l'éducation 284–313 at 304.

<sup>127</sup> Damien Lee, “Windigo Faces: Environmental Non-Governmental Organizations Serving Canadian Colonialism” (2011) 31:2 The Canadian Journal of Native Studies 133-153,188 at 144–145.

NGOs can be a vehicle for this type of co-opting as through “abiding state-affirming legislation rooted in Eurocentric and colonial ideologies,” NGOs “play a key role in ensuring federal and provincial governments in Canada gain and maintain access to resources in Indigenous territories.”<sup>128</sup> According to Lee this issue is not easily remedied as “the very fabric of state legislation within which NGOs operate and take for granted is the primary problem.”<sup>129</sup>

Thus, although it is essential for settler NGOs to ensure Indigenous representation and to strive to work in partnership with Indigenous peoples, they must also be cognizant of the effects of colonialism on their own structures and practices, and their potential role in perpetuating systems of colonial oppression. Not only must Settler NGOs avoid perpetuating the harmful influences of settler colonialism, they must also actively commit to tackling these influences in order to work in partnership with Indigenous peoples. Such an orientation would not only be necessary for ethical reasons, but also to ensure the efficacy of efforts to promote ecological integrity in Canada.

As detailed in the introduction McGregor, Whitaker, and Sritathan argue that “from an Indigenous point of view, environmental injustices, including the climate crisis” are “inevitably tied to, and symptomatic of, ongoing processes of colonialism, dispossession, capitalism, imperialism/globalization and patriarchy.”<sup>130</sup> This interconnectedness is echoed by Sámi Indigenous studies scholar Rauna Kuokkanen who argues “violence directed at the land, such as large-scale extractive industries and various forms of environmental destruction, is a central element of relations of domination.”<sup>131</sup> For Kuokkanen “Indigenous self-determination in its

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<sup>128</sup> *Ibid* at 135.

<sup>129</sup> *Ibid*.

<sup>130</sup> McGregor, Whitaker & Sritharan, *supra* note 5 at 36.

<sup>131</sup> Rauna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (Oxford University Press, 2019) at 12.

fullest sense—that is, containing the breadth of its individual and collective aspects and potential— cannot materialize or be exercised without restructuring *all* relations of domination... These relations are frequently interdependent and mutually reinforcing, and thus must be tackled together.”<sup>132</sup> Thus work to address climate change must also be work to address the ongoing relations of settler colonialism.<sup>133</sup> As Kuokkanen argues, the many intersecting oppressions that Indigenous communities are faced with today have real consequences for these communities. A prominent Canadian example of this can be seen in McGregor’s observation that “First Nations face serious problems in relation to water quality” and “do not enjoy the same level of protection as non-Aboriginal communities” with regards to water quality.<sup>134</sup> McGregor argues that these issues are not discrete but rather connected to “colonial history and ongoing institutionalized racism” which makes “resolving First Nations water quality concerns even more complex.”<sup>135</sup>

Kuokkanen identifies a tendency within Indigenous self-determination scholarship to “treat land and resource rights as oppositional to or unconnected from ‘social issues.’”<sup>136</sup> However, if we are to engage in a process of collective reconciliation with the earth, we will need to be prepared to address all relations of domination which effect ecological integrity. This means ecological integrity must not be treated as a discrete issue. This is additionally essential for any kind of co-management or partnership because as Styres and Zinga argue “the Indigenous party is not responsible for dealing with the colonial baggage that has been left

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> McGregor, *supra* note 48 at 34.

<sup>135</sup> *Ibid* at 35.

<sup>136</sup> Kuokkanen, *supra* note 131 at 216.

behind from historical colonial relations and research —that is the non-Indigenous party’s responsibility.”<sup>137</sup>

In both the *Mathur* and *La Rose* cases legal counsel has sought to recognize the consequences faced by Indigenous peoples as a result of the settler state’s contribution to climate change. The Statement of claim filed in the *La Rose* case presents the factual basis for its section 15 claim by arguing that “climate change is harming Indigenous peoples and communities in Canada” and that “Indigenous peoples are among the most vulnerable to climate change.”<sup>138</sup> Similarly the notice of application in *Mathur* states that “if global warming exceeds 1.5°C above pre-industrial temperatures, the impacts of climate change will include (...) an increase in harms to Indigenous peoples, including increased impacts on health, access to essential supplies, ability to carry out traditional activities, loss of livelihood and displacement.”<sup>139</sup>

What is important to note however, is that each of these arguments explicitly frame the involvement of Indigenous peoples in the case in relation to the “harm” that they experience as a result of the Canadian state’s actions. Unanga’s Critical Race and Indigenous Studies scholar Eve Tuck’s work highlights the consequence of this type of framing. Tuck calls on researchers to not centre damage narratives when collaborating with Indigenous communities. Tuck identifies “damage-centered research” as “research that operates, even benevolently, from a theory of change that establishes harm or injury in order to achieve reparation.”<sup>140</sup> Engaging in this type of work is dangerous because “it is a pathologizing approach in which the oppression singularly defines a community” as ‘broken’.<sup>141</sup> Tuck proposes the use of “desire-based research

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<sup>137</sup> Styres & Zinga, “The Community-First Land-Centred Theoretical Framework”, *supra* note 126 at 292.

<sup>138</sup> *Supra* note 23 at para 19.

<sup>139</sup> *Supra* note 25 at para 46(h).

<sup>140</sup> Eve Tuck, “Suspending Damage: A Letter to Communities” (2009) 79:3 *Harvard Educational Review* at 413.

<sup>141</sup> *Ibid.*

frameworks” which are “concerned with understanding complexity, contradiction, and the self-determination of lived lives” as an alternative.<sup>142</sup> Such a framework “is intent on depathologizing the experiences of dispossessed and disenfranchised communities so that people are seen as more than broken and conquered. This is to say that even when communities are broken and conquered, they are so much more than that—so much more that this incomplete story is an act of aggression.”<sup>143</sup>

Ermine’s conception of recognizing the “ethical space” between settlers and Indigenous peoples provides another promising way to reorient this tendency to engage in damage-centered approaches while fostering relationships with Indigenous communities, whether for the purpose of research or otherwise. Ermine argues that:

The conditions that Indigenous peoples find themselves in are a reflection of the governance and legal structures imposed by the dominant society. Indeed, what the mirror can teach is that it is not really about the situation of Indigenous peoples in this country, but it is about the character and honor of a nation to have created such conditions of inequity. It is about the mindset of a human community of people refusing to honor the rights of other human communities.<sup>144</sup>

Indigenous law scholar, and member of the Tanganekald, Meintang and Boandik First Nations, Irene Watson similarly wonders whether settlers are “able to comprehend their plight when for centuries they have known us as the ‘Indigenous victim’ and they don’t know how to begin to see the extent of their own losses?” Watson argues that colonialists “are losing the spirit and connection to the natural world, but they have yet to acknowledge that they have lost anything.”<sup>145</sup>

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<sup>142</sup> *Ibid* at 416.

<sup>143</sup> *Ibid*.

<sup>144</sup> Willie Ermine, “The Ethical Space of Engagement” (2007) 6:1 *Indigenous Law Journal*, online: <<https://jps.library.utoronto.ca/index.php/ilj/article/view/27669>> at 200.

<sup>145</sup> Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law*, 1 edition ed (Milton Park, Abingdon, Oxon; New York, NY: Routledge, 2016) at 87.



Indigenous representation amongst the class of plaintiffs within the current right to a healthy environment cases is important. Additionally, there is a range of reasons individual Indigenous youth have joined these actions. However, as detailed in the introduction of this thesis, it remains nonetheless important to critically consider how the claims may shape the Canadian state's response to climate change impacts on Indigenous communities. The current litigation is not designed to confront the ongoing legacy of settler colonialism in partnership with Indigenous peoples, or to recognize their jurisdiction to make decisions about their lands and health.<sup>146</sup> Rather, it reinforces the role of the Canadian state – at best minimizing damage to Indigenous peoples as it exercises its presumptive authority. The choice to litigate can then have the unintended yet harmful effect of legitimating the settler state's assumed authority to decide not only how this damage will be addressed but also over environmental governance more broadly. As a result, if successful, the potential right to a healthy environment will be implemented through relationships which are fundamentally embedded in settler colonialism. In effect the litigants are asking the court, a body representative of the settler colonial systems responsible for the alleged harm, to unilaterally deliver a solution which can undo the harm. In this way the decision to litigate carries with it profound implications which ought to be considered when lawyers choose whether or not to engage in such litigation.

### Translation and Transformation

Having detailed the consequences of the choice to litigate, I now turn to an analysis of the impact of the formulation of legal arguments. Central to Martin et al.'s arguments about the role that lawyers have in producing outcomes is their identification of the capacity for lawyers to

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<sup>146</sup> As previously detailed, such jurisdiction has been the topic of considerable scholarly treatment, specifically within Land Back literature. For a comprehensive overview of such work see Yellowhead Institute, *Land Back: A Yellowhead Institute Red Paper* (Toronto: Ryerson University, 2019).

engage in the related acts of *translation* and *transformation*.<sup>147</sup> The authors identify *translation* as occurring when lawyers take “data” gathered from their clients and other participants in a legal dispute and shape this input to fit particular legal rules or processes, to be general enough to fit legal contexts, or to speak to different audiences (i.e. a lawyer may outline the clients goals different if in a negotiation as opposed to a trial).<sup>148</sup> The related concept of *transformation* is observed as the result of a lawyers’ *translation* and speaks to how lawyers transform the meaning of conflicts through not only losing meaning while *translating*, but also by “affirmatively” adding new meaning by either (1) shaping the conflict to fit the legal process which has the effect of adding the meanings and norms inherent in the legal process; and/or (2) introducing their own values to a conflict, intentionally or not, by “filtering information through the lens of their own values, values grounded in the partialities of lawyers’ lives.”<sup>149</sup>

Martin et al.’s concept of *translation* additionally maps neatly to Nicholas Blomley’s observation of the practice of “bracketing”. As described in the literature review Blomley states that “law is particularly invested in producing clarity, legibility, and certainty through the drawing of distinctions.” Due to its “institutionalization, law is a powerfully performative site.”<sup>150</sup> The bracketing of issues as “extralegal” (being not relevant to a legal dispute) or “infralegal” (not important enough to be part of legal consideration) may seem to be a “ubiquitous and seemingly inescapable dimension” of conflict.<sup>151</sup> However, Blomley argues that

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<sup>147</sup> Martin, Scherr & City, “Making law, making place”, *supra* note 61 at 183.

<sup>148</sup> *Ibid.*

<sup>149</sup> Martin, Scherr & City, “Making law, making place”, *supra* note 61.

<sup>150</sup> Blomley, “Disentangling Law”, *supra* note 68 at 136.

<sup>151</sup> *Ibid* at 137.

this act is “violent and disruptive” to how a conflict is shaped and has the potential to create a “political and ethical battle zone.”<sup>152</sup>

Nedelsky’s relational rights model is helpful in demonstrating why the actions lawyers take in both removing ideas from a conflict through *translation* or bracketing, and also adding ideas to a conflict through *transformation* can create this “political and ethical battle zone.” As detailed in the literature review Nedelsky makes a distinction between values and rights. Values, she argues, are abstract articulations of what a society sees as essential to humanity. Rights on the other hand, according to Nedelsky, are “institutional and rhetorical means of expressing, contesting, and implementing such values.”<sup>153</sup> She argues that relationships bridge abstract values and legal rights, and that the goal of rights is to foster relationships which advance our values.<sup>154</sup>

If there is a gap between our values and our legal rights, then the process of arriving at these legal rights could be this “political and ethical battle zone” that Blomley identifies. It is here that lawyers engage in translating and transforming societal values to specific institutional and legal rights, and where relationships are bracketed as either relevant or irrelevant.

#### *The Values and Relationships Implicated with the Right to a Healthy Environment*

It is useful then, in the context of examining *Charter* rights, to examine what the legal relationships formed by these rights are. What do these relationships tell us about the values they attempt to uphold? In the case of the proposed right to a healthy environment the relationship at play is solely between the individual and the state. This is because an individual can only claim

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<sup>152</sup> *Ibid* at 145.

<sup>153</sup> Nedelsky, *supra* note 38 at 236–241.

<sup>154</sup> *Ibid* at 236.

the protection of *Charter* rights against a government actor,<sup>155</sup> a private entity carrying out government action,<sup>156</sup> or government inaction.<sup>157</sup>

Determining the values at play in the argument for the right to a healthy environment is not quite as clear. However, it is possible to trace the values environmental organizations appeal to garner support for the right to a healthy environment. In 2013 the David Suzuki Foundation (who are now supporting the *La Rose et al. vs. Her Majesty the Queen* right to a healthy environment challenge) published a report by David Boyd, now UN Special Rapporteur, outlining the importance of achieving constitutional recognition of the right to a healthy environment. This report is a particularly interesting entry point as it was published outside of the context of active litigation. As a result, the report reflects the values sought to be advanced by litigating right to a healthy environment before the translation and transformation inherent to such challenges occurs. In the report Boyd identified “six main reasons why constitutional recognition of the right to a healthy environment is imperative for Canada’s future” which included:

1. reflecting the fact that environmental protection is a core, fundamental value of Canadians;
2. strengthening Canada’s poor environmental performance and preserving this country’s beautiful landscapes, natural wealth and biodiversity;
3. protecting Canadians’ health from environmental hazards such as air pollution, contaminated food and water and toxic chemicals;
4. clarifying the responsibility of all governments to protect the environment;
5. acknowledging that environmental rights and responsibilities are core elements of indigenous law; and

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<sup>155</sup> *McKinney v. University of Guelph* [1990] 3 SCR 229, 1990 CanLII 60 (SCC) online: <http://canlii.ca/t/1fsqk>.

<sup>156</sup> *Eldridge v. British Columbia (Attorney General)* [1997] 3 SCR 624, 1997 CanLII 327 (SCC) online: <http://canlii.ca/t/1fqx5>.

<sup>157</sup> *Vriend v. Alberta* [1998] 1 SCR 493, 1998 CanLII 816 (SCC) online: <http://canlii.ca/t/1fqt5>.

6. keeping up with the evolution of international law.<sup>158</sup>

This list presents a host of different values and relationships which the right to a healthy environment should be striving to respect.<sup>159</sup> The relationships highlighted include the relationship between: individual Canadians and the natural world (as highlighted in the first reason); the state and the natural world (highlighted in the second and fourth reason); the state and individual citizens (as highlighted in reason three); the settler state and Indigenous peoples (reason five); and the Canadian state and global citizenry (reason six). The list also highlights multiple values including: the recognition of the inherent value of nature (reason one and two); the maintenance of human health and ability to thrive (reason three); and the need to fulfill responsibilities (reasons four, five, and six).

The breadth of reasons offered by Boyd stands in contrast to what is argued when right to a healthy environment cases are presented to courts. Take for example the notice of application filed for *Mathur et al. v Her Majesty the Queen in Right of Ontario* which sets its primary argument as being that “the Applicants are Ontario residents with *genuine interests* in preventing catastrophic climate change that will pose pervasive and serious risks to health and wellbeing of those in their generation and future generations of Ontarians” [*emphasis added*].<sup>160</sup> Additionally, in Ecojustice’s press release regarding the filing of the notice, three quotes were included from the applicants with regard to the notice:

Sophia Mathur, 12-year-old applicant from Sudbury, said:

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<sup>158</sup> *Executive Summary - The Importance of Constitutional Recognition of the Right to a Healthy Environment*, by David R Boyd, White Paper 1 (David Suzuki Foundation, 2013).

<sup>159</sup> It is important to recognize as well that this list of reasons was prepared by a legally trained individual in a professional context. As a result the list, despite not being a formal legal document, may include what Martin et al. would identify as the introduction of a lawyers own values which are “partial to a lawyers own life”, and thus may not even encapsulate the range of values that a lay person may be acting on in while supporting the right to a healthy environment.

<sup>160</sup> *Supra* note 25 at para 9.

My generation deserves a future. When I grow up, I want to be a lawyer. I also have lots of other hopes and dreams and I want the chance to make them come true. That’s why it was important for me to start striking for the climate in November 2018, and why I’m working with other young people to take the government to court today.”

Shaelyn Wabegijig, 22-year-old applicant from Peterborough, said:

“Climate change is hurting Indigenous and coastal communities that rely on the land and ocean for cultural and physical survival. I do not feel like I am secure or safe in my future, which is why I am committed to fighting for climate action. I do not want to bring children into a world that is dying, or where they’re at risk of illness or harm imposed by climate change.”

Alex Neufeldt, 23-year-old applicant from Ottawa, said:

“Open for business is Doug Ford’s favourite catchphrase. But if he really cared about protecting the economy for young entrepreneurs like me, he wouldn’t have rolled back the province’s climate targets. We can help stop climate change and also create jobs. But we need the political will to do it.<sup>161</sup>

What stands out from the above messaging is that the messages are focused entirely on the impact that governmental inaction with regard to climate change will have on the health and lives of the applicants and other young people. This stands in sharp contrast to Boyd’s rationale for a right to a healthy environment which acknowledged multiple values and relationships which such a right is intended to uphold.

It is possible that this focus is a strategic choice as well, as the notice further states that the Applicants “have significant *concerns* over the risks that climate change poses to their health and wellbeing, their futures, their lives, their communities as well as the environment” [*emphasis added*].<sup>162</sup> The operative change from the quote above is the change of the language from *interest* to *concern* when environmental protection is invoked. This is in itself an act of bracketing. The lawyers writing the notice are acknowledging that the Applicants right to life is a legal *interest*

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<sup>161</sup> Page, *supra* note 35.

<sup>162</sup> *Supra* note 25 at para 10.

and thus legally relevant, whereas the Applicants' *concern* about the environment is an extralegal fact that does not rise to the level of an interest.

This distinction demonstrates that as the clients' *concerns* are being translated into legal categories, those values which are relevant to the legal right are the focus – here the concern for their own health. Those deemed not to be relevant to the legal right (specifically concern for the environment in this case) are briefly mentioned but no relief is sought to oblige the government to address such concerns. It is worth noting here that it is possible that this disconnect is not due to constraints of the law alone. An additional variable, as discussed later in this chapter, is that these ENGOs have very specific case selections policies and may have formulated these legal arguments before finding clients whose experience fits those arguments. Such a process could theoretically lead to a lawyer-led litigation strategy that does not perfectly fit the clients' experience, however directly identifying such a trend is beyond the scope of this thesis.

This is further illustrated in the statement of claim filed by the applicants in the *La Rose et al.*, which is being supported in part by the David Suzuki Foundation, the same foundation which published the Boyd report cited above. In this statement of claim the applicants detail the “legal basis” for their claim. The “legal basis” outlined consists only of relief sought to address damage done to the plaintiffs by climate change including: children and youth's rights to life, security of the person, and equality; and youth and future generations' ability to access resources “subject to a public trust.”<sup>163</sup> The principled arguments about the need and desire to preserve Canada's “beautiful landscapes, natural wealth and biodiversity” because environmental protection is a “core Canadian value” which were present in the David Suzuki Foundation's

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<sup>163</sup> *Supra* note 23 at paras 223-248.

original plea for support for the right to a healthy environment<sup>164</sup> are now nowhere to be found when the “legal basis” is defined.

It is here that we see how bracketing fundamentally changes what values and relationships are at play. As Blomley argues “for a legal transaction to occur, a space must be marked out within which a subject, object, and set of relations specified as legally consequential are bracketed, and detached from entanglements (ethical, practical, ecological, ontological) that are now placed outside the frame.”<sup>165</sup> In the transactions detailed above the value of nature, the emphasis on responsibility, as well as the relationships between the individual, the state, and nature have been presented as “entanglements” which are not legally consequential and thus have been “placed outside the frame.” As a result the conceptual focus on this broader set of values and relationships is transformed into an exclusive focus on the anthropocentric elements of the argument for the right to a healthy environment, namely the state’s responsibilities to its’ citizens and the value of preserving human life and equality.

### *The Loss of the Value for Nature*

By framing the claim for a right to a healthy environment as only an anthropocentric entitlement to health the legal action reproduces a central dichotomy at the heart of the Canadian state’s legal system – the separation of humans from the natural world. Indeed, the failure of the proposed legal right to recognize any intrinsic value of ecological systems, undermines many of the other values and relationships originally set out by Boyd. This dichotomy is not unique to the proposal for the right to a healthy environment. Rather, it is central to the Canadian state’s legal system. As explored later in the concluding chapter, Indigenous and critical property law

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<sup>164</sup> Boyd, *supra* note 158.

<sup>165</sup> Blomley, “Disentangling Law”, *supra* note 68 at 136.



scholarship provide useful frameworks to understand the breadth of the problems created by this framing.

Education scholars Sandra Styres (“an Indigenous researcher residing on Six Nations of the Grand River Territory”)<sup>166</sup> and Dawn Zinga (“a non-Indigenous researcher (...) who is a several generations-removed immigrant” to Canada)<sup>167</sup> discuss this issue by making a distinction between ‘land’ as a general term and ‘Land’ as a proper name. To Styres and Zinga when one refers to the general term of ‘land’ they are referring to “landscapes as a fixed geographical and physical space that includes earth, rocks, and waterways.”<sup>168</sup> Conversely ‘Land’ as a proper name “extends beyond a material fixed space. Land is a spiritually infused place grounded in interconnected and interdependent relationships, cultural positioning, and is highly contextualized.”<sup>169</sup> Styres and Zinga make this distinction because they recognize that for Indigenous peoples ‘Land’ is the “central underpinning of all life and its relational nature has been recognized and embraced across the ages.”<sup>170</sup>

This way of seeing ‘Land’ is very different from how the laws of the settler state operates. Canadian environmental and property law scholar Estair Van Wagner argues that “central to the ownership model of property, and its role in colonial expansion, is the presumption of a dichotomy between nature and culture, whereby people (the owners) are detached from places (the owned).”<sup>171</sup> This legal ordering of land as property prevents us from engaging with the responsibilities that flow from our being on the Land. Australian property and

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<sup>166</sup> Styres & Zinga, “The Community-First Land-Centred Theoretical Framework”, *supra* note 126 at 287.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid* at 300-301.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> Estair Van Wagner, “Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning” (2013) 43 *rgd* 275 at 280-281.

environmental law scholar Nicole Graham further explores this dichotomy by arguing that “real property law is not about ‘things’, it is about ‘persons’, or more accurately, interpersonal relations. The concept of property works by excluding or abstracting the physical specificity of ‘things’ so that they no longer matter and the legal analysis can focus on the relativity of competing abstract rights.”<sup>172</sup> Graham continues,

Modern property law is thus essentially an intellectual exercise in what has been referred to as ‘dephysicalisation’. Dephysicalisation describes the gradual socio-legal process whereby the environment, or more technically the abstract ‘thing’ (such as land), became excluded from the property relation that had hitherto regulated legal relations between persons and things, but which now regulated only legal relations between persons. Consequently, land and natural resources are regarded by modern law, at least within the ‘fundamental’ and ‘basic’ category of private property law, as no more than an irrelevant ‘thing’... The abstraction or dephysicalisation of property into a discourse of rights between persons with respect to a fungible ‘thing’, rather than between persons and things, obscures the fact that the ‘thing’ is the actual and non-fungible condition of human existence.<sup>173</sup>

In the case of the *Charter*, the relationship being mediated is between the state and its citizens. As argued previously, this anthropocentric framing marks a departure from what the actual intent for seeking a right to a healthy environment is, as it significantly narrows the relationships such a right is intended to impact.

This then maps neatly on to the notion of dephysicalisation as detailed by Graham above. The anthropocentric framing of the litigation of the right to a healthy environment results in the real physical thing (the environment/nature in this case) being completely excluded from the legal argument. The relationship at the core of a right to healthy environment, is now between persons about the environment rather than a direct connection between the person and their place within Earth’s systems. Furthermore, individual *responsibility* to maintain a healthy environment

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<sup>172</sup> Nicole Graham, “This is Not a Thing: Land, Sustainability and Legal Education” (2014) 26:3 J Environmental Law at 414.

<sup>173</sup> *Ibid.*

has been replaced with language of an abstract *right* that individuals would possess against other persons, or in this case the state, to be entitled to a healthy environment. This is consequential.

Graham explains:

the problem here of course is that if the paradigm that underpins modern law is anthropocentric, then law remains itself a major barrier to the adaptation of the modern economy towards environmental sustainability. The system of law cannot maintain its abstract categories of ‘dephysicalised’ rights and relations between persons and also be effective in any responses it may develop to environmental problems of a necessarily physical nature. ‘Sustainability requires that human social systems and property-rights regimes are adequately related to the larger ecosystems in which they are embedded.’<sup>174</sup>

Graham concludes that there is a “need to align the rights of ownership with the responsibilities of ownership.”<sup>175</sup> Following this logic the right to a healthy environment must be aligned with the responsibility to ensure healthy relations *with* the environment, which the proposed right to a healthy environment does not do.

This need for alignment connects to Mill’s theory of rooted constitutionalism. Mills argues that Canadian constitutionalism fails “to treat earth as an always already connected family of beings with whom to stand in relationship. [Settlers] regard earth only as a set of resources to be used (or preserved) instrumentally.”<sup>176</sup> The consequence of the translation and transformation of values into rights results in exactly this. As such, lawyers are (most likely unintentionally) steering our values which could be rooted in the earth, or responsibility to the earth, and instead translating them into dephysicalised legal rights “growing away from the earth.”

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<sup>174</sup> *Ibid* at 415. Citing: Robert Costanza and Carl Folke, “The Structure and Function of Ecological Systems in Relation to Property Right Regimes” in Susan Hanna, Carl Folke and Karl-Goran Maler (eds), *Rights to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment* (Island Press 1996) 30.

<sup>175</sup> *Ibid*.

<sup>176</sup> Mills, *supra* note 50 at 158.

*The Effects of a Narrow Legal Right*

The potential complications of *translation* and *transformation* do not end with upholding the dephysicalised model of relations with Land. One interviewee when asked about climate litigation expressed that “if we believe in a just transition and we believe in all those things, it takes everybody to do it. I don’t think that there is just one route.” The interviewee continued on to explain that:

right now our *Charter* rights- we can’t apply them to independent actors. So what can we do about that? If there is a right to a healthy environment then the government can legislate for that. But then at some point we need corporations to think that they will be held accountable if they don’t comply with those things (...) Corporations are going to always claim that they aren’t public actors so they can’t be held responsible in the same way so how do we get at that when they are the ones who are causing the harm or they are the ones perpetuating these things.<sup>177</sup>

The interviewee answered their rhetorical question by suggesting that perhaps it will be necessary to engage in further litigation against carbon majors to fill this gap.<sup>178</sup> There are two problems with this possibility. First, each interviewee identified limited organizational resources as a serious consideration in pursuing environmental litigation. To address this concern some ENGOs are engaging in advocacy work to convince governmental bodies to sue carbon majors themselves. Greenpeace Canada’s briefing note to Toronto City Council’s Infrastructure and Environment Committee is a prime example of this.<sup>179</sup> In their note Greenpeace urges the city of Toronto to explore taking carbon majors to court in order to recoup the costs the city will incur in their efforts to ameliorate the impacts of climate change on their residents.<sup>180</sup> Such investment

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<sup>177</sup> Interview 2, March 13, 2020.

<sup>178</sup> Identifiable as the top 100 polluting companies in the world who are responsible for 71% of the world emissions, as identified in: *The Carbon Majors Database*, by Paul Griffin, CDP Carbon Majors Report (CDP Worldwide).

<sup>179</sup> City of Toronto, Infrastructure and Environment Committee, “6ix Reasons to Sue”, by Keith Stewart online: <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2019.IE4.4>

<sup>180</sup> *Ibid.*

into the litigation strategy by cities or other governmental bodies could be a major boon for the climate change litigation in Canada. However, to this point no governmental body has taken a leading role in this effort.

A second, and potentially more long-term problem, is the potential that a successfully litigated right to a healthy environment would reduce public pressure for further environmental protections. As noted in my literature review both Reva Siegel and Gerald Rosenberg have identified that changes to the law, even when not sufficient to remedy ongoing issues, can stifle social movements. This is illustrated in how Rosenberg argues that “vindication of constitutional principles accompanied by small change may be mistaken for widespread significant social reform, inducing reformers to relax their efforts.”<sup>181</sup> This result, Siegel argues has the effect that groups seeking changes to legal regimes which have undergone an incomplete transformation will be indisputably worse off “in their capacity to achieve further, welfare-enhancing reform of the status regime in which they were subordinated.”<sup>182</sup>

This possibility should be a serious concern for proponents of the right to a healthy environment, especially when considered in conjunction with the effects of this process of *translation* and *transformation*. The right to a healthy environment may find support among lay people for a variety of reasons, as demonstrated by the above analysis of Boyd’s reasoning for the David Suzuki Foundation.<sup>183</sup> The reality, however, is that the ultimate legal right, once *translated* and *transformed* from abstract values into a legal instrument, will not be designed to protect the range of values that the environmental movement seeks to protect. It is thus essential

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<sup>181</sup> Rosenberg, *supra* note 1 at 423.

<sup>182</sup> Siegel, “‘The Rule of Love’”, *supra* note 93 at 2151.

<sup>183</sup> Boyd, *supra* note 158.

to be open and honest about what this proposed right will do, and will not do, in order to ensure that the values that are not addressed are still strived towards through means beyond the scope of this litigation.

### Lawyers as Agents and Exerting Power

The second half of Martin et al.'s framework for examining the impact that lawyers have on spatial disputes includes examining how lawyers act as *agents* and how lawyers *exert power*.<sup>184</sup> The authors explain that when lawyers act as *agents* they introduce 'role separation' and transactional costs to a dispute. 'Role separation' may include the fact that lawyers have different commitments, concerns, and spatialities than the client. Transactional costs include the costs "associated with paying the lawyer and drawing an unfamiliar third party into the problem."<sup>185</sup> Meanwhile, lawyers *exert power* through altering power dynamics with their very presence, or through their conscious and strategic planned interventions towards a desired outcome.<sup>186</sup>

These two concepts are intimately related in the context of the right to a healthy environment litigation due to how significant monetary considerations are to pursuing the strategy. This concern was discussed by one of the interviewees, who is a practicing lawyer. They stated that litigation is not at the top of their organizations' list of strategies to engage with the "climate movement" because,

the importance is in the grassroots movement and the actual environmental movement. The lawyer's space is to supplement and support that, we shouldn't be at the top of that. I guess in our view it's how can litigation support or advance a lot of these causes and how can it fit into the bigger picture? Right now, we're not actively involved in active

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<sup>184</sup> Martin, Scherr & City, "Making law, making place", *supra* note 61 at 183–184.

<sup>185</sup> *Ibid* at 184.

<sup>186</sup> *Ibid*.

litigation. That doesn't mean that in the future we can't be but that would be very strategic, and it would be very significant because it's a costly undertaking and it takes up a lot of resources.<sup>187</sup>

Another interviewee described how their organization seeks to build “honest relationships of solidarity” with communities where the organization is not using the community “for a particular outcome.” This organization does proceed to litigation however, if the community “is concerned about [a] number of environmental issues and litigation would help that.” The interviewee further recognized that in the case selection phase the organization’s “board often has to make hard choices based on [their] capacity” because they “receive way more applications than [they] can deal with.”<sup>188</sup>

These challenges are not unique to the interviewee’s organization. As the first interviewee outlined above, litigation aimed at setting precedents is “a very costly undertaking” that takes up “a lot of resources.” As the organizations involved with this type of work are typically non-profit organizations,<sup>189</sup> an extra constraint of allocation of limited resources is added to the list of considerations when *Charter* litigation is contemplated.

Most organizations attempt to meet this challenge by creating a structured case selection policy. Take for example Ecojustice’s case selection policy which they created due to the reality that “there is simply more work than [they] can take on.”<sup>190</sup> The first question that Ecojustice asks is whether the issue is “an environmental priority.” In answering this question Ecojustice considers whether “it is or will become one of the most significant threats to the environment”;

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<sup>187</sup> Interview 2, March 13, 2020.

<sup>188</sup> Interview 3, March 25, 2020.

<sup>189</sup> As evidenced by how the three right to a healthy environment challenges mentioned in the literature reviews were launched in the past year are supported by non-profit organizations in Ecojustice, The David Suzuki Foundation, and RAVEN Trust.

<sup>190</sup> Devon Page, “Ecojustice 101: How we pick our cases”, (25 May 2017), online: *Ecojustice* <<https://www.ecojustice.ca/ecojustice-101/>>.

whether “it presents one of the greatest opportunities for significant environmental protection or restoration”; and whether “it is a prerequisite to succeeding on other environmental or legal priorities, and needs ecojustice’s legal expertise now.”<sup>191</sup> The analysis then turns to whether the issue is “a legal priority” considering whether “it is a root cause of why the law is not enabling significant public protection or restoration of the environment” or whether “it presents an opportunity for enabling the law to address threats to significant environmental protection or restoration.” The analysis next turns to considering “how will this case help change the future?” And finally, Ecojustice considers whether the case would “help advance the goals set out in [their] 2017-2020 strategic plan” which includes key considerations of fostering healthy communities, protecting nature, and addressing climate change.<sup>192</sup>

This case selection policy is highly contextualized and fits well into Martin et al.’s paradigm. In weighing cases in this matter organizations are introducing themselves to conflicts as third party *agents*. As can be seen above these agents exhibit role separation by not simply offering to assist the client in reaching their goals, but rather by entering the dispute with a different set of “concerns, commitments, and spatialities” than the client. This type of process additionally allows lawyers to exert power through choosing a set of facts to litigate which match their “strategic planned interventions towards a desired outcome.” One interviewee explained the issue with this separation by explaining that the relationship between a community and lawyers should be “a symbiotic relationship” in which everyone must:

make sure that lawyers don’t drive the process because, through our practice and our training, we have a narrower scope and view of the world because when we think of law we work within these walls and we work within rules and systems. But I think that when we have issues of justice you have to think beyond that. I don’t necessarily have the

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<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*



scope and perspective to do that, whereas people who actually live this day to day in the community do or people who have other perspectives can drive that.<sup>193</sup>

This type of model creates an additional unique circumstance when analyzing the lawyer as an *agent*. In the context that Martin et al. are discussing, a community has discovered their own legal claim and are seeking a third party lawyer to help bring the claim to court, which introduces the cost of the community paying for that lawyer. The transactional cost in our scenario however works differently as the legal organization becomes an intermediary between the community which has the claim, and the community of donors who are paying for the transactional cost of the claim. This introduces an additional layer of commitments, concerns, spatialities, and desired outcomes which do not necessarily correspond to the community's.

This creates a situation similar to what Cole observed when he wrote about environmental justice in the United States in the 1990's. At the time Cole observed that the "Big 10" environmental law groups in the United States "suck[ed] up much of the meager foundation money available for environmental justice work."<sup>194</sup> Cole argues that because "the disproportionate funding of legal groups" creates "greater stature, the legal groups are increasingly able, through their work and contacts in the press, to describe and define environmental justice." To Cole this is particularly problematic because "in a very real way, the legal groups are re-creating one of the roots of environmental injustice – the making of decisions by people not affected by those decisions."<sup>195</sup>

The litigation of the right to a healthy environment plays out in a similar way as organizations which have their own commitments to their donor base (whom the plaintiffs in

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<sup>193</sup> Interview 2, March 13, 2020.

<sup>194</sup> Cole, "Lawyers, the Law & Environmental Justice", *supra* note 78 at 5.

<sup>195</sup> *Ibid* at 6.

these cases may not have the resources to access), bring their own agency and power to a dispute which changes the goals of a dispute from being solely about their clients' experience, to also having the input and strategic choices of the monied organizations. This results in these organization's goals and strategies shaping the development of environmental law in much the same way as Cole observed with the "big 10" in the states.

This approach also stands in stark contrast to Shin Imai's "counter pedagogy for social justice" which as described in the literature review outlines a set of skills necessary to counter how legal education teaches lawyers to "structure reality" in a standardized way which is not responsive to the needs and goals of communities that lawyers serve.<sup>196</sup> In order to avoid this structuring, which is functionally similar to the effects of lawyers that Martin et al. observe, Imai suggests that lawyers need to develop the skills of collaborating with a community, recognizing individuality, and taking a community perspective.<sup>197</sup>

Litigating the right to a healthy environment thus results in cases being chosen based on how they match with the agency and commitments of environmental organizations, and then are *translated and transformed* (or "*re-constructed*" as Imai would describe it)<sup>198</sup> from the realities experienced by the plaintiffs to cognizable legal categories for a judicial audience. This process is unfortunately far more consistent with the top-down impacts of lawyers which Martin et al. identify, than the counter pedagogy which Imai proposes. Furthermore, it would be challenging to avoid formulating climate change litigation in this manner, because climate change is not bound to any discrete place or felt by any single community alone. This reality makes it quite

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<sup>196</sup> Imai, "A Counter-Pedagogy for Social Justice", *supra* note 73 at 218.

<sup>197</sup> *Ibid* at 201.

<sup>198</sup> *Ibid* at 225.

difficult for an individual or community to bring such an all-encompassing claim which would carry burdensome costs. As such it may be necessary for ENGOs to develop cases in this manner in order to ensure that these critical issues are heard by Canadian courts.

However, even if the case selection process employed by ENGOs is necessary given the contours of climate change and the Canadian legal system, the process will still have inherent limitations. The chief limitation in the context litigation of the current right to a healthy environment, is that the lawyer-led nature of these cases will likely carry the dephysicalising and colonial properties of the settler legal system, while not accessing Imai's pedagogy's community empowering benefits.

#### A Narrowed Vision: Conclusion on the Influence of Lawyers

In this chapter I have argued that through litigating the right to a healthy environment lawyers fundamentally alter the claims borne from their clients' experience in a matter which fits the lawyers' own priorities, experiences and spatialities. In applying Martin et al.'s framework I have argued that the current approach to litigating the right to a healthy environment *translates* and *transforms* concerns about a wide array of commonly held values, and valued relationships, into a narrow legal construct which excludes much of these values and relationships. Further, I have shown lawyers input their *agency* and *exert power* over the conflict through the process of case selection. These influences together have the consequence of co-opting a movement that at its core is about the public's desire to protect the environment, and reforming the ideas into a dephysicalised and colonial framework of relations with the earth that fits the demands of the settler legal system. This further has the consequence of implicitly reinforcing settler states claimed authority over environmental governance. Crucially, the fact that many of the values and concerns of proponents of the right to a healthy environment have been effectively "left out of

the frame” is not immediately cognizable, especially to the lay person. This could have the dire unintended consequence of leading the non-legally trained public to believe the right to a healthy environment will protect values that it simply is not designed to protect. This could induce these individuals to relax their efforts to force social change to recognize the inherent value of Land, thus weakening larger efforts to ensure ecological integrity in Canada.

### Chapter Five: The Effect of Judicial Interpretation

In this chapter I explore the effect of having the Canadian courts rule on, and potentially implement, the right to a healthy environment. I argue that the outcomes sought in the current right to a healthy environment cases are either unlikely to be won in litigation, or unlikely to be as effective as hoped if secured and implemented. I argue that a primary problem is that the litigation strategy is framed around the need to fight climate change specifically, and includes telling the public that litigating the right to a healthy environment is an important part of the fight to halt climate change. As climate change is an issue which requires “rapid, far-reaching, and unprecedented changes in all aspects of society,”<sup>199</sup> I argue that judges will not be willing or able to lead this type of social change. As a result, this messaging allows for the possibility that courts will recognize the right to a healthy environment, but a very narrowly defined right which does not represent the values its proponents seek to advance and may be “mistaken for widespread social reform.”<sup>200</sup> Pushing rights litigation as a strategy could have dire unintended consequences, namely sapping the urgency of political efforts to mobilize the public to fight climate change.

In coming to this conclusion, I distinguish between litigation goals which would hope for proactive remedies (i.e. the court would direct Canadian legislatures to take action to prevent climate change) or reactive remedies (i.e. a remedy in which the court prohibits the government from taking action that will actively accelerate climate change) from the court. Following this analysis, I then explore the argument made by some proponents of litigating the right to a healthy environment that a “loss at trial could still provide a political victory for climate change

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<sup>199</sup> *Supra* note 2.

<sup>200</sup> Rosenberg, *supra* note 1 at 423.

activists—by framing climate change as a threat to rights and by requiring the government to justify its ongoing failure to reduce Canada’s greenhouse gas emissions.”<sup>201</sup>

### Proactive Remedies

A central thrust of the argument in favour of litigating the right to a healthy environment, is that successful litigation will result in remedies being granted by the court to force the government to take active steps to promote ecological integrity, including preventing climate change. However, this outcome relies on there being a realistic chance that such a remedy would be granted by the Canadian courts. As detailed in the literature review, Rosenberg has argued that courts can only be “effective producers of social reform” where there is: (1) the presence of “ample legal precedent for change”; (2) support for change from the legislative and executive branches; and (3) some support, or low opposition, from citizens, and the court has the power to implement change.<sup>202</sup> In this subsection I will apply Rosenberg’s “Constrained Court” model to the objectives of this kind of litigation to illustrate how unlikely these remedies are to be granted in the Canadian context.

#### *Precedent*

The first constraint that Rosenberg identifies is the need for ample legal precedent for change and support for such change within the broader legal culture. All of the current right to a healthy environment cases seek to require that the government take action to meet the science-based emissions targets of the Paris Agreement. The pending *Wet’suwet’en* case argues “Canada has a constitutional duty to protect its citizens from climate catastrophe, and draws a line against reckless fossil fuel developments that will push us past the tipping point”. It “specifically names

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<sup>201</sup> Sniderman & Shedletzky, *supra* note 20 at 16.

<sup>202</sup> Rosenberg, *supra* note 1 at 36.

Coastal Gas Link and Pacific Trails fracked gas pipelines along with LNG export facilities in Kitimat as particularly high-emitting fossil fuel projects that are likely to breach Canada's (already inadequate) emissions targets."<sup>203</sup> In *La Rose* the plaintiffs are seeking an order that the Federal government "be required to develop and implement an enforceable plan that is consistent with Canada's fair share of the global carbon budget necessary to achieve GHG emissions reductions consistent with the protection of public trust resources subject to federal jurisdiction and the plaintiffs' constitutional rights."<sup>204</sup> Meanwhile the *Mathur* case requests "an order directing Ontario to revise its climate change plan under s. 4(1) of the *CTCA* once it has set a science-based GHG reduction target."<sup>205</sup>

Importantly, as the IPCC has determined, meeting these science-based emissions targets would require "rapid, far-reaching, and unprecedented changes in all aspects of society."<sup>206</sup> Thus, in each of these cases the plaintiffs are requesting the court to make an order which will force a legislative or executive body to fundamentally change their economic and climate change plans. For example the Plaintiffs in *La Rose* argue that the Federal government contributes to climate change through promoting "fossil fuel transport, export and import by approving and regulating interprovincial and international fossil fuel infrastructure, including oil and gas transportation pipelines" as well as through "continuing to incentivise fossil fuel exploration, extraction, production and consumption through subsidies to the fossil fuel industry."<sup>207</sup> As the plaintiffs in *La Rose* recognize, a right to a healthy environment could not successfully address the contribution that the federal government makes towards climate change without compelling the

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<sup>203</sup> *Supra* note 30.

<sup>204</sup> *Supra* note 23 at para 9.

<sup>205</sup> *Supra* note 25 at para 8(g).

<sup>206</sup> *Supra* note 2.

<sup>207</sup> *Supra* note 23 at paras 48-49.

redistribution of these resources. Thus, the change sought can be described as redistributive in nature. Additionally, although those litigating the right to a healthy environment may view the litigation as merely a tool in the overall movement to address Canada's contributions to climate change, the requests outlined above would go beyond this in practice. Asking judges to make these types of orders that would require sweeping redistribution, would in effect be requiring judges to lead social change in reshaping Canada's climate change effort. Thus, even though the proponents of the right to a healthy environment may not be seeking to have judges take such a prominent role, they are in effect doing so by asking judges to take such action.

According to Rosenberg's model, in order for this redistributive litigation to succeed the court will need to be able to rely on doctrinal precedents for such redistribution, and supportive movements within the broader legal culture.<sup>208</sup> The distinction between citizens and "the broader legal culture" within Rosenberg's model is crucial for this application. One of the strengths of the proposed right to a healthy environment is that it could see support from a large majority of Canadian citizens. As Boyd argues:

According to public opinion polls, nine out of ten Canadians worry about the impacts of environmental degradation on their health and the health of their children and grandchildren. Nine out of ten are concerned or seriously concerned about climate change, the loss of biodiversity, and pollution. Nine out of ten believe that sustainability should be a national priority, and eight out of ten agree that we need stricter laws and regulations to protect the environment. Among the fifty-seven nations for whom recent data are available from the World Values Survey, Canadians rank behind only the citizens of Andorra, Norway, Argentina, and Switzerland in terms of favouring environmental protection over economic growth and job creation.<sup>209</sup>

Although the support from the Canadian population may be present, judges are not necessarily representative of the broad range of Canada's population. As detailed in the literature

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<sup>208</sup> Rosenberg, *supra* note 1 at 421.

<sup>209</sup> Boyd, *supra* note 9 at 5.



review there are many critics of the *Charter* who argue that judges are not willing or able to prompt the redistribution of wealth and power in Canada. A clear basis for such claims, as illustrated in the literature review, is that the judges tasked with interpreting the *Charter* are members of a community of legal elites, who through their training and experience have developed a shared assumption that property rights “flow from a natural system of ordering.”<sup>210</sup> Given this reality, these critics argue that over time *Charter* interpretation will trend towards protecting property rights as this is consistent with the interests and ideology of judges and the community of legal elites, rather than being representative of the interests of the public.<sup>211 212</sup>

These concerns have been borne out in reality, as the precedents set thus far by the SCC suggest that judges have been unwilling to engage in significantly redistributive action at the expense of property rights. As detailed in the literature review this reality is suggested by Lessard’s research in which she found that no section 15 challenge with a ‘serious’ budgetary impact had been successfully litigated at the SCC, leading her to conclude that “a minimal budgetary impact is a necessary but not sufficient condition for a successful social benefit challenge under section 15, while a serious budgetary impact poses a serious, if not impossible, hurdle.”<sup>213</sup> Lessard further found that the reasons given for rejecting the claims with a “serious” budgetary impact were typically focused on concerns of “institutional limitations” in which the judges believed they had a “lack of institutional competence to make complex budgetary decisions,” and that “decisions with a significant budgetary impact lie outside the appropriate constitutional role of the judicial branch in relation to the legislative branch.”<sup>214</sup>

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<sup>210</sup> Petter, “Immaculate Deception”, *supra* note 37 at 861–862.

<sup>211</sup> *Ibid.*

<sup>212</sup> Hutchinson, *supra* note 104.

<sup>213</sup> *Ibid* at 318.

<sup>214</sup> *Ibid.*

The *Charter* critiques combined with Lessard's data demonstrate that the broader legal culture, as well as the precedent set by Canadian courts, will constrain the current courts from being willing to provide the type of ultimately redistributive relief sought by litigation of the right to a healthy environment.<sup>215</sup>

### *Governmental Support and Implementation Powers*

Rosenberg's second and third constraints, namely the need for support from the legislative and executive branches, and the court's lack of implementation powers, are uniquely connected when applied to litigating the right to a healthy environment under the Canadian *Charter*. This connectedness begins with the reality that the *Charter* applies only to state actors (any body that is not substantively autonomous from the executive branch of the government),<sup>216</sup> or entities undertaking state action (i.e. implementing specific government policies and programs).<sup>217</sup> Furthermore, a common thread between the three current right to a healthy environment cases is the plaintiff's requests to have the court force Canadian governments to rectify their "failure to do [their] fair share to avert a climate catastrophe."<sup>218</sup> Both the *Wet'suwet'en*<sup>219</sup> and *La Rose*<sup>220</sup> cases target the federal government's inadequate actions. As detailed above, the *La Rose* case specifically claims "an order requiring the defendants to

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<sup>215</sup> I present this with the caveat that the current litigation is different than the cases that Lessard analyzed in a few ways. First, Lessard's work focuses mainly on section 15 cases, although some of the cases analyzed were joint section 7 and 15 claims as the current right to a healthy environment litigation is. Second, the financial impact of the cases Lessard examined were substantially lower than the cases I am examining here. Lastly, the cases Lessard examined involved a requested remedy in which the court would direct the government to spend money. With the right to a healthy environment cases the relief sought is not quite as direct, as potential compliance could be attained through the government refraining from investing in fossil fuels for example. Although this is not directing the government to spend, this would still involve the court directing the government to engage in an action which would significantly impact the government's budget. Thus, these cases may involve different types of budgetary impacts, however the focus here is that the similarity exists in the necessitating of budgetary changes at all.

<sup>216</sup> *Supra* note 155.

<sup>217</sup> *Supra* note 156.

<sup>218</sup> *Supra* note 30.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Supra* note 23 at para 28.

develop and implement an enforceable climate recovery plan that is consistent with Canada's fair share of the global carbon budget plan."<sup>221</sup> The *Mathur* case alternatively focuses on the provincial level and seeks an order that Ontario's government "forthwith set a science-based GHG emissions target under s. 3(1) of the *CTCA* that is consistent with Ontario's share of the minimum level of GHG reductions necessary to limit global warming to below 1.5C above pre-industrial temperatures or, in the alternative, well below 2C (i.e. the upper range of the Paris Agreement temperature standard."<sup>222</sup>

The orders sought in these cases reflect that even if the litigation is successful, Canadian courts lack the power to directly protect citizens' right to a healthy environment. As stated above the right can only apply to actions of the government. As such whether the proposed right can successfully enhance ecological integrity in Canada is directly reliant on whether federal and/or provincial legislative bodies are supportive of the principles and values advanced by the right. This would be particularly problematic for the specific goal that the current cases are seeking to achieve: the creation of a new legal means to strengthen Canada's response to climate change.

There are three main reasons why this reliance will be problematic. First, delaying tactics used by an uncooperative legislative or executive body can nullify the right to a healthy environment, as any such right needs to bring "rapid, far-reaching, and unprecedented change"<sup>223</sup> in order to be effective and meaningful. The potential for irreparable harm to be caused by governmental delay is well illustrated by the SCC's decision in *Doucet Boudreau v Nova scotia (Minister of Education)*. In that case the SCC determined that courts in some circumstances may need to supervise the progress of legislatures in implementing an order of the court in a timely

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<sup>221</sup> *Ibid* at 222(f).

<sup>222</sup> *Supra* note 25 para 8(f)

<sup>223</sup> *Supra* note 2.

manner in order to ensure “that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms.”<sup>224</sup> The potential necessity of court supervision is illustrative of the extent to which courts relies on legislative bodies to implement the changes that they see fit. Furthermore, as time to respond to the challenges that climate change poses is limited, such a supervisory order may be necessary in the current right to a healthy environment cases. This reality poses yet another barrier to the potential for a successful result from the current litigation, as a denial of a supervisory order could result in an uncooperative legislature preventing the meaningful protection of the right to a healthy environment.

Secondly, the institutional competency concerns that Lessard identified could lead the court to determine that they do not have the ability to provide specific proactive remedies to address climate change. As illustrated by the identification of the ways in which the government contributes to climate change by the plaintiffs in the *La Rose* case, there is not a discrete answer available for how to properly prevent climate change, as its’ causes and thus potential solutions are diffuse.<sup>225</sup> A court which believes that it has a “lack of institutional competence to make complex budgetary decisions,” will be unwilling and thus unable to direct legislative bodies on how to specifically address climate change, and thus it will likely be left to the elected legislatures to choose how to protect the right to a healthy environment.<sup>226</sup>

Lastly, even in the event that the court decides to recognize the right to a healthy environment, gives specific orders for how the legislature should protect the right, and chooses to

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<sup>224</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)* 2003 SCC 62 (CanLII), [2003] 3 SCR 3, online: <http://canlii.ca/t/4nx4>.

<sup>225</sup> *Supra* note 23 at paras 45-51.

<sup>226</sup> Lessard, “‘Dollars Versus [Equality] Rights’”, *supra* note 99 at 318.

supervise the implementation of those orders, a legislative body which does not wish to make these monumental changes will not have to. This is because the legislature may use section 33 of the *Charter* to pass legislation which would infringe a potential right to a healthy environment.<sup>227</sup> Ultimately then, the utility of the right to a healthy environment as a tool to combat climate change, will be determined by Canada's legislative bodies.

If the court relies on legislative and executive bodies to craft laws and make decisions which enhance Canada's efforts to maintain ecological integrity, then the court cannot be leading change as it will be relying on these bodies to be progressive enough to protect *Charter* rights. In this sense the courts will at best "second the social reform acts of other branches of government."<sup>228</sup> This in turn highlights a fundamental problem with turning to courts to create this type of social reform as such an idea "credits courts and judicial decisions with a power that they do not have."<sup>229</sup>

### *The Possibility of Proactive Remedies*

In sum, Rosenberg's theory, when applied to the Canadian context through the lens of the *Charter* critiques and Lessard's data, suggests that the nature of the *Charter*, and *Charter* litigation, is not compatible with allowing courts to lead social change on climate change. Furthermore, even if the court were to decide one of these right to a healthy environment cases in a manner that contradicts most precedents, it still would rely on the legislative and executive branches being willing to implement changes. Therefore, it is not likely that the litigation of the

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<sup>227</sup> *Supra* note 8 at s33(1).

<sup>228</sup> Rosenberg, *supra* note 1 at 422.

<sup>229</sup> *Ibid.*

right to a healthy environment will result in a victory which provides proactive remedies toward addressing climate change or other issues effecting ecological integrity.

### Reactive Remedies

Given the urgency of addressing climate change, the desire to have the courts provide proactive remedies is at the heart of the current claims. However, the right to a healthy environment in its ideal form would address all issues which effect ecological integrity, not just climate change. Thus, although proactive measures are necessary to address climate change,<sup>230</sup> litigating the right to a healthy environment could also prompt courts to provide reactive remedies to ensure overall ecological integrity.

### *Judicial Review and Deference*

One reactive remedy that is being sought in the right to a healthy environment cases can be found within the forthcoming Wet'suwet'en case which is being brought in part as a reaction to "high emitting fossil fuel projects" such as the "Coastal Gas Link and Pacific Trails fracked gas pipelines."<sup>231</sup> The Wet'suwet'en case is in part aimed at creating another required consideration for administrative bodies and, as a result, another ground on which to ask the courts to judicially review the decisions of administrative bodies and the cabinet. One interviewee discussed the potential of the right as a "a huge breath of fresh air because now it opens another legal avenue that wasn't there before" within larger legal campaigns that "have exhausted all other avenues to challenge government decisions."<sup>232</sup> This is critical because the bulk of decisions which impact ecological integrity are made by officials of the administrative

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<sup>230</sup> *Supra* note 2.

<sup>231</sup> *Supra* note 30.

<sup>232</sup> Interview 3, March 25, 2020.

state, and their decisions “have cumulatively come to define the state of environmental protection in Canada.”<sup>233</sup>

Concerningly however, the manner in which these decisions have defined environmental protection in Canada may not be favourable to a robust application of the proposed right to a healthy environment. This is the result of the great amount of discretion afforded to administrative decision makers. Take for example the Impact Assessment Act<sup>234</sup> from which the decision that the Wet’suwet’en case will be challenging was made. According to Canadian environmental studies scholar A. John Sinclair and Canadian environmental law scholar Meinhard Doelle, the Act “lacks appropriate detail in relation to many key [impact assessment] decisions and leaves these decisions for the most part to the discretion of Cabinet, the Minister and the Impact Assessment Agency.”<sup>235</sup> Sinclair and Doelle argue that this is a “central issue” with the reformed act because “many of the key decisions to be made under the Act such as public participation, scope, process options, and the public interest determination are left largely discretionary.”<sup>236</sup>

The consequence of this type of discretion is well illustrated by Canadian environmental law scholar Andrew Green’s article “An Enormous Systemic Problem” in which he completed an analysis of how “the courts have used their powers of review both in general and in the environmental area” by sampling the decisions of the federal court in such cases during 2005 and 2013.<sup>237</sup> Green found that:

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<sup>233</sup> Collins & Sossin, *supra* note 107 at 294.

<sup>234</sup> Impact Assessment Act, SC 2019, c 28, s 1.

<sup>235</sup> Meinhard Doelle & A John Sinclair, “The new IAA in Canada: From revolutionary thoughts to reality” (2019) 79 *Environmental Impact Assessment Review* 106292.

<sup>236</sup> *Ibid* at 167.

<sup>237</sup> Andrew Green, “‘An Enormous Systemic Problem’? Delegation, Responsibility and Federal Environmental Law” (2016) 28:2 *Journal of Environmental Law and Practice*; Toronto 155–197 at 167.

environmental law is based heavily on discretionary powers and in general decisions by the executive in the environmental area are likely to be reviewed on a reasonableness basis, whether they are challenged on questions of law or discretion.<sup>238</sup>

This trend is important as “the courts tended to affirm decisions at a higher rate when using the reasonableness standard of review,”<sup>239</sup> and can explain why:

overall (...) if we look at the role played by courts in actual judicial reviews, the courts have tended to not look like a tight monitor of government decisions, particularly given the characteristics of environmental decisions. If you look specifically at environmental as opposed to other regulatory decisions, the courts appear to take an even lighter hand. They affirmed environmental decisions at a higher rate than other decisions overall, and found for the government at an above average rate compared to other areas.<sup>240</sup>

Logically, this trend would likely apply to decisions regarding *Charter* rights as well. The SCC has established that “administrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision”<sup>241</sup> and that “the fact that *Charter* interests are implicated does not argue for a different standard.”<sup>242</sup> Thus the judicial review of administrative tribunals’ decisions regarding the right to a healthy environment will likely be afforded the same level of deference as their interpretation of any other environmental law.

It is true that a potential right to a healthy environment would create another required consideration for administrative bodies dealing with environmental issues. However, given the discretionary nature of these decisions, coupled with the deferential nature of the court towards administrative bodies, it is unlikely that the right to a healthy environment would robustly protect

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<sup>238</sup> *Ibid* at 195.

<sup>239</sup> *Ibid*.

<sup>240</sup> *Ibid* at 196.

<sup>241</sup> *Nova Scotia (Workers’ Compensation Board) v. Martin; Nova Scotia (Workers’ Compensation Board) v. Laseur* [2003] 2 S.C.R. 504, 2003 SCC 54 at para 3.

<sup>242</sup> *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 at para 45.



Canadian citizens from administrative decisions which would negatively effect ecological integrity.

As discussed in the literature review, delegation to administrative bodies does not affirm “the complex, multiscalar and political nature of environmental governance” as the act of doing so “can channel and dissipate dissent, thus depoliticizing these processes and rendering them administrative exercises rather than addressing the underlying issues about who is making decisions.”<sup>243</sup> Herein lies the problem with litigating the right to a healthy environment as a strategy to address these decisions which “have cumulatively come to define the state of environmental protection in Canada.”<sup>244</sup> The current litigation fails to challenge the authority of administrative bodies to make these decisions. In doing so it attempts to remedy a problem without addressing its core cause. Thus, the courts once again will not likely be able to lead social change by awarding such a remedy.

### *Constitutional Backstop*

Another reactive remedy that could be granted on the basis of protecting the proposed right to a healthy environment can also be found in the desire to use it as a “constitutional backstop” by challenging laws which erode environmental protections put in place by previous government.<sup>245</sup> This is a goal of the *Mathur* case which seeks a declaration that:

“ss. 3(1) and/or 16 of the *CTCA*, which repealed the *Climate Change Mitigation and Low-carbon economy Act, 2016*, S.O. 2016, c. 7 and allowed for the imposition of more lenient targets without mandating that they be set with regard to the Paris Agreement temperature standard or any kind of science-based process, violates sections 7 and 15 of the *Charter* in a manner that cannot be saved under s. 1, and is therefore of no force and effect.”<sup>246</sup>

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<sup>243</sup> Curran, “Indigenous Processes of Consent”, *supra* note 109 at 572.

<sup>244</sup> Collins & Sossin, *supra* note 107 at 294.

<sup>245</sup> Collins & Boyd, *supra* note 19.

<sup>246</sup> *Supra* note 25 at para 8(d).

This relief would be substantially different from the proactive remedies also sought in the same case and detailed above. This is because the court could deem the impugned act to be unconstitutional which would restore the previous emissions targets, creating real change to Ontario's climate target without having to rely on the government to change it themselves. However, this is not requesting a court to lead social change with regards to environmental protection, but merely asking the court to prevent new governments from repealing environmental protections unless replacing them with more stringent requirements. For instance, in *Mathur* the plaintiffs request that the court order Ontario to set a new emissions target after finding the current target unconstitutional.<sup>247</sup> This request reflects that the courts power to enhance ecological integrity by preventing the reversal of environmental laws is quite limited. In this case, although a finding that the repealing of the previous target was unconstitutional would improve Ontario's response to climate change, the response will still be inadequate without further proactive measures.

There is merit to litigating for the recognition of a right to a healthy environment for this reactive remedy. In fact, the recognition of a limited right to a healthy environment which provides such remedies can create crucial legal precedent, which may allow the court to expand the scope of the right in the future. The problem here however is that the current cases are framed around the need to address climate change. As discussed above, climate change being a time sensitive issue limits the efficacy of these types of long-term efforts. Due to the litigation of the right being framed as a means to prevent climate change, it will be necessary that such a reactive remedy is not the only immediate victory won. If this were to be the only remedy

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<sup>247</sup> *Ibid* at paras 8(f-g).

awarded the public may mistakenly believe that these incremental changes represent the widespread social reform that the litigants are asking for.

*Limiting Effect of the Awarding of Reactive Remedies*

The potential for these reactive remedies to be “mistaken for widespread social reform” becomes clearer when examining a final argument in favour of the utility of litigating the right to a healthy environment: namely that a “loss at trial could still provide a political victory for climate change activists—by framing climate change as a threat to rights and by requiring the government to justify its ongoing failure to reduce Canada’s greenhouse gas emissions.”<sup>248</sup>

The Canadian public cares deeply about environmental protection. Thus, it may be true that a declaration that Canadians do not have a right to a healthy environment would be met with public backlash which could mobilize public demand for climate action. However at the same time as discussed above and illustrated in Lessard’s work, Canadian judges are motivated to act in manner which protects the courts’ institutional legitimacy.<sup>249</sup> As a result, it is likely that judges would avoid making a declaration that the right does not exist. This is because such a declaration would likely lead the public to question whether the courts adequately protect their rights and thus would question the courts role.

There is little reason to believe that Canadian courts would be willing to compel governments to take specific proactive measures to maintain ecological integrity on the basis of a newly recognized a right to a healthy environment. However, a court could recognize a right to a healthy environment but then provide only the reactive remedies.

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<sup>248</sup> Sniderman & Shedletzky, *supra* note 20 at 16.

<sup>249</sup> Lessard, ““Dollars Versus [Equality] Rights””, *supra* note 99.

Recognizing a negative right to a healthy environment may make a positive contribution to the legal tools for maintaining ecological integrity. However, this small gain would likely come at a great cost. As Siegel argues “we can see that civil rights reform may alleviate certain dignitary or material aspects of the inequalities that subordinated groups suffer; *but we can also see that civil rights reform may enhance the legal system's capacity to legitimate residual social inequalities among status-differentiated groups.*”<sup>250</sup> This would occur in this case in part because the current litigation of the right to a healthy environment has been framed as a means to combat climate change. If the right were to be recognized in this limited form, this “vindication of constitutional principles accompanied by small change may be mistaken for widespread significant social reform.”<sup>251</sup> This could induce those who were the most committed to making change to address climate change to relax their efforts because they may no longer see an emergency where one still exists. In this way the recognition of a limited right to a healthy environment could leave climate reformers indisputably worse off “in their capacity to achieve further welfare-enhancing reform” of the regime which allows for Canada’s wholly inadequate response to climate change and other issues of ecological integrity.<sup>252</sup>

The public messaging about litigation efforts contributes to the possibility that any recognition might be “mistaken for widespread significant social reform.” For example, the FAQ’s about the *Mathur* case published on Ecojustice’s website include: “a case like this is likely going to be an uphill battle, but with Premier Ford doing less on the climate at precisely the time he needs to be doing more, our clients have no choice but to turn to the courts to defend their futures.” Additionally, Ecojustice’s website’s donation page tells potential donors that their

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<sup>250</sup> Siegel, “‘The Rule of Love’”, *supra* note 93 at 2184.

<sup>251</sup> Rosenberg, *supra* note 1 at 423.

<sup>252</sup> Siegel, “‘The Rule of Love’”, *supra* note 93 at 2184.

“support fuels high-impact lawsuits and law reform to tackle the most urgent environmental challenges we face” including cases related to the “climate emergency” (the *Mathur* case has been billed by Ecojustice as their “biggest climate law suit yet”)<sup>253</sup> which fights “to rapidly reduce greenhouse gas emissions and accelerate the shift to clean energy sources.”<sup>254</sup> Claims that litigation of the right to a healthy environment is a key tool in combatting climate change may create an inaccurate picture of what such litigation can achieve, and what the alternatives are. For example, with the messaging that there was “no choice” other than litigation available to Ecojustice’s clients in the *Mathur* case, a supporter of that case may believe that any success, no matter how qualified or limited, is the best possible outcome and not see the need, or possibility, for further action. This is particularly problematic because as Rosenberg argues “strategic choices have costs (...) not only does litigation steer activists to an institution that is constrained from helping them, but also it siphons off crucial resources and talent, and runs the risk of weakening political efforts.”<sup>255</sup>

#### Limited Recognition: Conclusion on the Impact of Judicial Interpretation

In this chapter I examined arguments in favour of litigating the right to a healthy environment and their application within the current cases being brought before courts. I have argued the current cases litigating the right to a healthy environment seek both proactive and reactive remedies.

I argued that the proactive remedies sought by the litigation of the right to a healthy environment would require the courts to lead social reform to combat climate change by compelling legislative and executive bodies to pass laws which are redistributive in nature. In

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<sup>253</sup> Page, *supra* note 35.

<sup>254</sup> “Fight for a safer future”, online: <<https://www.support.ecojustice.ca/page/31853/donate/1?locale=en-CA>>.

<sup>255</sup> Rosenberg, *supra* note 1 at 423.

examining the feasibility of using the courts to achieve such change I applied the goals to Rosenberg's "Constrained Court" model. In applying this model I argued that the proponents of litigating the right to a healthy environment are crediting "courts and judicial decisions with a power that they do not have."<sup>256</sup> In fact courts are both unlikely to rule in a way that would provide robust protection and would have difficulty ruling in ways that would provide robust protections. These predictions are supported by a review of the history of rights-based broad redistribution claims, by critical legal studies claims about judges-as-property-owning-wealthy elites who are unlikely to be motivated to support broadly redistributive forms of change, from the structure of the Charter itself, and the court's lack of implementation powers. These factors all demonstrate that it will be unlikely that the court will be able to play a leading role in the promotion of social reform to promote ecological integrity, a role that would be necessary for the court to assume in granting the remedies sought by the litigants in the current right to a healthy environment cases.

Although the courts will not be likely to lead social reform, this does not mean that a potential right to a healthy environment is without merit. Rather, the right could provide particularly useful reactive remedies against laws and administrative decisions which would harm ecological integrity. This usefulness is qualified however, as the current deferential trend in judicial review of environmental administrative action limits the usefulness of the right as a check on environmentally harmful decisions of the executive, and does not challenge their authority to make these decisions. Additionally, although the right may be useful to prevent newly elected governments from overturning laws which promote ecological integrity put in

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<sup>256</sup> *Ibid.*

place by previous governments, this role cannot be described as “leading” as it definitionally only follows the actions of previous legislatures.

Finally, I argued that due to institutional legitimacy concerns judges will refrain from definitively proclaiming that people do not have a right to a healthy environment. I suggested that alternatively, the court may recognize a narrow right to a healthy environment which ultimately will only be able to provide reactive remedies, thus preserving the status quo in terms of environmental governance in Canada. In this way the interests and concerns of the court may animate the eventual expression of the right to a healthy environment to be less reflective of the values that its proponents seek to advance and more responsive to the demands of the Canadian legal system.

In this case ENGOs seeking support from the public by arguing that the right to a healthy environment would be an effective means to lead social change to combat climate change may be siphoning off resources (including time, money, mental energy, commitment, and talent) that could be put towards more direct interventions aimed at addressing this monumental and time sensitive issue. The strategy and messaging also risks a victory in court being widely “mistaken for widespread social reform,” which could have the unintended but not unpredictable consequence of weakening political efforts to mobilize the public to take action against climate change.<sup>257</sup>

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<sup>257</sup> *Ibid.*

## Chapter Six: Conclusion

### Moving Towards Climate Justice

In the previous two chapters I detailed the effect of asking lawyers and judges to lead social change in tackling climate change through the current litigation of the right to a healthy environment. In those chapters I argued that in presenting the courts with arguments in favour of adopting the right to a healthy environment lawyers are narrowing the scope of the values that are protected by such a right by deeming some values to be infralegal (i.e. the desire to protect human health) and others extralegal (i.e. “respecting that environmental protection is a core fundamental value”<sup>258</sup> of Canadian society). I then argued that judges have a belief about the role of courts, and the judiciary as an institution itself has limitations, which makes it unlikely that judges will lead social change. Finally, I argued that although judges are unlikely to lead social change, their concern for the institutional legitimacy of the courts could lead them to recognize a right to a healthy environment. However, they are likely to interpret such a right narrowly, foreclosing the potential for proactive remedies to combat climate change. This narrow interpretation would compound the narrowed scope of the right presented to the court by lawyers. Therefore, any potential legal right to a healthy environment recognized by Canadian courts is unlikely to be representative of the values that its proponents originally sought to advance.

Following from the logic that a potential right to a healthy environment will be narrowly defined and not reflective of the values which would adequately promote ecological integrity. I will use the start of this concluding chapter to discuss potential alternative pathways for action on climate change, and addressing the current ecological crisis more generally, through

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<sup>258</sup> Boyd, *supra* note 158.



confronting settler colonialism. Below I argue that settler advocates can simultaneously address the settler colonial foundations of the Canadian state's relationship with the Land, and Crown-Indigenous relations, by centring our relationship with earth and reaffirming treaties. Further, through such an approach settlers can ethically promote the maintenance and use of Indigenous Traditional Knowledge (TK), which is essential to the goal of maintaining ecological integrity on these Lands.

### *Centering Earth*

As discussed in chapter four, the *Mathur* and *La Rose* cases have effectively bracketed concern for environmental protection for its own sake as extralegal. These cases have instead strategically focused on the impacts of climate change on humans. This is reflected in the damage-centred language regarding Indigenous communities outlined above. The court in these cases are only being asked to consider legal remedies for impacts that the human communities will face. Such a framing has the effect of foreclosing an analysis of the relationship between settlers, Indigenous peoples, and the Land, substituting such an analysis with a simple examination of the relationship between the settler state and Indigenous peoples.

An examination of Anishinaabe legal theory scholarship<sup>259</sup> illustrates how bracketing the relationship between human communities and the earth outside of the frame within the litigation of the right to a healthy environment may be inconsistent with Indigenous law. As such, this framing will be unlikely to foster necessary meaningful partnerships between settlers and Indigenous peoples to address settler colonialism and promote ecological integrity in Canada. A

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<sup>259</sup> As mentioned previously I make this distinction to avoid an overgeneralization of Indigenous law, as the authors examined below (Mills and Borrows) are each writing from an Anishinaabe perspective. As a settler living on Anishinaabe land this perspective is particularly informative for me in approaching this work. It is additionally worth noting that the Ecojustice office which is bringing the *Mathur* claim is located on Anishinaabe land, thus such perspectives are likely considered deeply by them as well.

prominent example of a call to place the earth at the forefront of partnership efforts is Mills' theory of rooted constitutionalism. Reconciliation in Mills' paradigm means listening across differences, affirming our interdependence and sharing our gifts to meet one another's need."<sup>260</sup>

Mills concludes that:

once we see the other's rootedness, we see that we can have a good relationship, no matter the degree of difference in our norms. Of course, having a good relationship can still be a great deal of hard work. But once we see that we come from and return to the same place, that we just have different ways of moving through the circle, a good relationship is, at least, always possible.<sup>261</sup>

Mills further argues that "if we're always already connected in relations of deep interdependence, then the question of freedom is never about standing apart from the other and always about *how* to stand with it."<sup>262</sup> Thus, what Mills details is that human societies must recognize their connection and dependence, or rootedness, to the earth. This rootedness to earth then must be reflected within constitutional orders. When fully acknowledged this common but distinct rootedness provides a basis for separate constitutional orders to stand together in relationship.

This connection, however, does not insinuate that these constitutional orders, or life ways as Mills identifies, will be subsumed into one singular order. Mills argues that "rooted constitutionalism rejects any reconciliatory vision calling Indigenous peoples to resign themselves to violence to their life ways... since there exists no space beyond a life way, such calls are necessarily also calls for Indigenous peoples to reconcile themselves *to* the life ways of another: a relation of power-over."<sup>263</sup> Rooting constitutional orders in the earth can lead to a

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<sup>260</sup> Mills, *supra* note 50 at 156.

<sup>261</sup> *Ibid* at 157-158.

<sup>262</sup> *Ibid*.

<sup>263</sup> *Ibid*.

good relationship; however, neither party can be subjected to the constitutional order of the other.

Mills points to the shortcomings of settler society's relations with the Earth rather than taking a damage-centered approach to Indigenous research to explain why reconciliation is so difficult: "Canadian constitutionalism isn't a disclosure of the earth way; it finds its origin in a social contract story." It recognizes "only earth, not earth way, and as such fail[s] to treat earth as an always already connected family of beings with whom to stand in relationship. [Settlers] regard earth only as a set of resources to be used (or preserved) instrumentally."<sup>264</sup> Following from Mills, the colonial foundations of the Canadian state's relationship with the earth is central to its failure to be in good relationship with Indigenous nations in Canada. Further, the presumptive authority of the Canadian constitutional order leaves no room for relationship with Indigenous legal orders. Mills' theory of rooted constitutionalism builds on the work of John Borrows, who has argued that "reconciliation between Indigenous peoples and the [Canadian] Crown requires our collective reconciliation with the earth. Practices and partnerships of resurgence and reconciliation must sustain the living earth and our more-than-human relatives for future generations."<sup>265</sup> Noting the potential for the Canadian state to build on Indigenous legal orders, Borrows argues "we are earthbound, and our laws and practices must be revitalized to recognize and respond to this vital fact."<sup>266</sup>

The current litigation of the right to a healthy environment however does not do this type of work to challenge the settler colonial foundations of our relations with the earth. By framing efforts to combat climate change in terms suitable to fit the settler state's laws and the

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<sup>264</sup> *Ibid.*

<sup>265</sup> Borrows, *supra* note 5.

<sup>266</sup> *Ibid.*

competencies of the court as an institution, not only is an opportunity to unsettle these relations lost, but the legitimacy of these institutions to determine our relations with the earth are upheld. Thus, in forgoing this important work the litigation of the right to a healthy environment may not only fall short of being able to bring the social change that is being asked for within the legal arguments, it can also be seen as an example of settlers imposing their constitutional order, or life way, onto indigenous peoples, rather than working in partnership and recognizing Indigenous constitutionalism.

### *Treaty Law*

It is important to note that proponents of the right to a healthy environment litigation may not think that this is the perfect solution and may recognize the limitations of not including the relationship to the earth and Indigenous law in the process. Such proponents would likely see litigating the right as the best choice out of series of flawed options they hope would immediately force the Canadian government to reverse course and take action on climate change. As mentioned previously one interviewee described how this type of litigation can be “a huge breath of fresh air because now it opens another legal avenue that wasn’t there before” within larger legal campaigns that have exhausted all other avenues to challenge government decisions.<sup>267</sup>

However, this perspective overlooks existing treaties with Indigenous peoples, which are powerful laws at the foundation of the relationship between the settler state, Indigenous peoples, and the Land, as a potentially fruitful way to push for better environmental protection. Anishinaabe legal scholar Aimee Craft argues for renewed attention to treaties because

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<sup>267</sup> Interview 3, March 25, 2020.

Indigenous perspectives about treaties “have generally been disregarded by governments and courts.”<sup>268</sup> This is particularly problematic because, as Craft argues, “in order to interpret and implement a treaty, we look to its spirit and intent and consider what was contemplated by the parties at the time the treaty was negotiated. Both parties’ understandings of the treaty need to be taken into account in its interpretation.”<sup>269</sup>

Although the Canadian government and courts have not engaged in this kind of treaty interpretation, they do not hold the exclusive power to interpret and implement treaties. Craft argues that “given that treaties are living, breathing documents built on the foundations of indigenous laws, courts may not be the ultimate forum for treaty interpretation.”<sup>270</sup> Mills also emphasizes the role of treaties in shifting settler state relations with the earth:

Settler peoples [...] harm themselves in founding their political community upon violence, which slowly destroys it from within. So long as they maintain their earth alienated constitutional order, which treats non-humans as resources to be exploited, there is no escape from this fate, although settlers are always welcome to abandon their current constitutional project and, through treaty, root their political communities in earth.<sup>271</sup>

Research on existing treaties demonstrates intentionality to create a connection between Indigenous peoples, the settler state, and the Land. For example, in researching Treaty One negotiations Craft determined that “while the Crown has generally proceeded on the basis that Treaty One was a surrender of land, the record of the negotiations shows that, from the Anishinaabe perspective, the substantive agreement was to enter into a relationship of mutual assistance and care, in which land was to be shared with the white settlers.”<sup>272</sup> Craft expands on

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<sup>268</sup> Aimée Craft, “Living Treaties, Breathing Research” (2014) *Canadian Journal of Women and the Law*, online: <<https://www.utpjournals.press/doi/abs/10.3138/cjwl.26.1.1>> at 3.

<sup>269</sup> *Ibid* at 7.

<sup>270</sup> *Ibid* at 4.

<sup>271</sup> Mills, *supra* note 50 at 135.

<sup>272</sup> Craft, *supra* note 268 at 6.

this finding stating that “Anishinaabe concepts of sharing, kinship, and responsibility towards the land are equally important in understanding the approach to the treaty. A balanced and full understanding of the treaty requires an understanding of the Anishinaabe relationship to the land and the sacred commitment to share.”<sup>273</sup>

Similarly, while examining the Dish With One Spoon (a treaty between the Anishinaabe and Haudenosaunee in the area that it now known as southern Ontario), and the Welcoming and Sharing Three Figures Sacred Wampum, McGregor concludes that examining these wampum belts can “help others understand Indigenous Responsibilities to the Earth.”<sup>274</sup> McGregor continues to argue that:

We begin to see the importance of understanding the meaning of these wampum treaties at multiple levels, including the obligations and responsibilities of the parties required to ensure the treaties could be honoured (sustained). Such examination reveals that covenants with the natural world also form part of these treaties, and that, as with the agreements between nations, these covenants also require the honouring of responsibilities. Within such a context, TK (Traditional Knowledge) becomes fundamental to the detailed understanding of these treaties, and in turn of Indigenous principles of responsibility to the natural world. It is these principles of responsibility which may be of significant assistance in offering a way forward as we strive to achieve a sustainable world.<sup>275</sup>

Anishinaabe legal scholar Leanne Simpson similarly finds that in agreeing to the Dish with One Spoon treaty both the Anishinaabe and Haudenosaunee “parties knew they had a shared responsibility to take care of the territory, following their own culturally based environmental ethics to ensure that the plant and animal nations they were so dependent on carried on in a healthy state in perpetuity.”<sup>276</sup>

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<sup>273</sup> *Ibid.*

<sup>274</sup> Deborah McGregor, “Traditional Knowledge and Water Governance: The ethic of responsibility” (2014) 10:5 *AlterNative: An International Journal of Indigenous Peoples* 493–507 at 502.

<sup>275</sup> *Ibid.*

<sup>276</sup> Leanne Simpson, “Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships” (2008) 23:2 *Wicazo Sa Review* 29–42 at 38.

Another essential relationship governed by treaty comes in the form of the Two Row Wampum Belt. In *Canada's Indigenous Constitution* John Borrows describes this Wampum Belt as such:

The belt consists of two rows of purple wampum beads on a white background. Three rows of white beads symbolizing peace, friendship, and respect separate the two purple rows. The two purple rows symbolize two paths or two vessels travelling down the same river. One row symbolizes the Haudenosaunee people with their law and customs, while the other row symbolizes European laws and customs. As nations move together side-by-side on the River of Life, they are to avoid overlapping or interfering with one another.<sup>277</sup>

This Wampum Belt is not only of particular importance due to it being the first wampum belt shared between Indigenous peoples and settlers, but also because this foundational nature was reaffirmed in the Treaty of Niagara, 1764. The Treaty of Niagara included the British Crown presenting the Royal Proclamation, 1763, to Chiefs from twenty-four Indigenous nations, who in turn presented the Crown with the Two Row Wampum Belt to demonstrate each party's understanding of the treaty and the Royal Proclamation.<sup>278</sup> As a result, the Royal Proclamation, which in the Canadian state's law is the legal basis for all future treaties, must be read in accordance with the obligations of the Treaty of Niagara and the Two Row Wampum Belt. This means that all subsequent treaties carry with them the implied obligation to respect the Two Row Wampum Belt relationship of peace, friendship, respect, and non-interference.<sup>279</sup>

This type of treaty interpretation then proves to be fruitful for gaining insight into the means of maintaining proper relationships on this Land. Examining the four treaties detailed above alone demonstrates that settlers must maintain relationships with not only Indigenous

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<sup>277</sup> John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 76.

<sup>278</sup> John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) at 178.

<sup>279</sup> *Ibid* at 184.

peoples, but also the natural world, in ways which recognize the need for kinship, sharing, peace, friendship, respect, and non-interference.

The importance of looking to treaties is echoed by Ermine as a way to navigate the “ethical space” between Indigenous and non-Indigenous peoples: “the treaties still stand as agreements to co-exist and they set forth certain conditions of engagement between Indigenous and European nations.” A central theme that emerged from McGregor’s policy research with “Elders, TK holders and practitioners” in Ontario “is that respect for the spirit and intent of the treaties should form the basis of the relationships required to achieve co-existence and knowledge-sharing.”<sup>280</sup> According to McGregor “Elders have emphasized that relationships based on co-existence have already been considered and negotiated, and that approaches and principles necessary for their establishment have already been accepted by the parties in treaties.”<sup>281</sup> Thus, treaties provide an existing framework from which a renewed pathway to good relations can be built.

Looking to treaties as the framework for environmental decision making has two major consequences for the litigation of the right to a healthy environment. First, it might not make sense to invest scarce time, resources, and public commitment into creating new legal solutions to change the Canadian government’s behavior while these powerful existing legal obligations are not being honoured and upheld. As detailed above treaties set out the foundation of the intended relationship between the settler state, Indigenous peoples, and the Land but Indigenous perspectives about treaties “have generally been disregarded by governments and courts.”<sup>282</sup> Thus, a process of treaty interpretation in partnership with Indigenous peoples could

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<sup>280</sup> McGregor, “Traditional Knowledge and Water Governance”, *supra* note 274 at 498.

<sup>281</sup> *Ibid.*

<sup>282</sup> Craft, *supra* note 268 at 3.



fundamentally reshape the settler state's relationships in ways that litigation through settler courts cannot. Second, decolonizing the relationships between Indigenous peoples, the state, and the Land through reaffirming treaty law pushes us to look beyond the settler legal system. As such, it provides a way to strengthen these relationships in ways that foster the values proponents of litigating the right to a healthy environment seek to advance. Overlooking treaty law to instead ask the Canadian courts to create new solutions to combat climate change reinforces the notion that the Canadian state is the appropriate body to govern these issues. Thus, litigating the right to a healthy environment may both delay desperately needed change in the relationship between settlers, Indigenous peoples, and the Land while simultaneously reinforcing the settler state's one-sided interpretation of the treaties.

### *Traditional Knowledge*

One of the main benefits of the treaty law approach in the context of environmental advocacy is that it would support Indigenous peoples to restore intended relationships with the Land, and thus fulfill the responsibilities that arise from this relationship. Ensuring that Indigenous peoples are able to live in accordance with their own legal orders and obligations is important from both a social and ecological justice perspective. As noted above, Indigenous-owned and managed land has better environmental outcomes.<sup>283</sup> This trend has been linked to place-based Indigenous Traditional Knowledge (TK)<sup>284</sup> and systems of governance. In the context of water governance, McGregor argues that "First Nations peoples do want TK to form an integral part of water governance as they feel that the insights and values that TK would bring

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<sup>283</sup> Schuster et al, *supra* note 52.

<sup>284</sup> a term which according to Potawatomi scholar-activist Kyle Whyte refers "to systems of monitoring, recording, communicating, and learning about the relationships among humans, nonhuman plants and animals, and ecosystems that are required for any society to survive and flourish in particular ecosystems which are subject to perturbations of various kinds"; see Kyle Whyte, "Indigenous Climate Change Studies: Indigenizing Futures, Decolonizing the Anthropocene" (2017) 55 English language notes at 157.

to the dialogue are missing. In fact, many Elders, TK holders and practitioners have asserted that the lack of TK may account for why current water protection efforts continue to fail.”<sup>285</sup> As she notes, the willingness to share this knowledge is qualified by the need for meaningful partnership and respect for Indigenous knowledge: “the status quo in terms of incorporating TK in water governance is not considered acceptable and is not respectful of treaty relationships with First Nations.”<sup>286</sup> Currently “in Canada, we have progressed to the point where the *discourse* now routinely contains references to TK and the protection of Aboriginal rights. In practice, however, the *implementation* of such ideas has yet to be achieved in a meaningful way.”<sup>287</sup> Writing about Indigenous approaches to climate change, Whyte similarly observes that “many Indigenous persons are understandably concerned that climate scientists will intentionally or naively clamor around Indigenous communities to exploit the information Indigenous knowledges might possess that could fill in gaps in climate science research.”<sup>288</sup> As McGregor argues, this tendency of settlers to simply take or extract “TK from the community and inserting what is deemed relevant into environmental management regimes (the ‘knowledge extraction paradigm’) is an approach that is failing all parties.”<sup>289</sup>

This is not only a practical failure in terms of ecological outcomes, it also results in the “depoliticizing” of TK.<sup>290</sup> Simpson argues that “by depoliticizing we lose a potential opportunity to transform and to decolonize settler society, and it is the transformative potential of the processes and concepts embodied in Indigenous Knowledge systems that hold the greatest

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<sup>285</sup> McGregor, “Traditional Knowledge and Water Governance”, *supra* note 274 at 497.

<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid* at 502.

<sup>288</sup> Whyte, “Indigenous Climate Change Studies”, *supra* note 284 at 158.

<sup>289</sup> McGregor, “Traditional Knowledge and Water Governance”, *supra* note 274 at 498.

<sup>290</sup> Leanne R Simpson, “Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge” (2004) 28:3/4 *American Indian Quarterly* 373–384 at 376.

possibility for this kind of change.”<sup>291</sup> According to McGregor “what is needed is commitment to these initiatives, so that Aboriginal peoples may begin once again to live their responsibilities to the natural world.”<sup>292</sup>

The litigation of the right to a healthy environment, as it is currently constructed in the climate change lawsuits described above, does not demonstrate a commitment to the initiatives that Simpson and McGregor highlight. Instead it focuses on asking a settler institution, which is simultaneously responsible for eroding TK and is not capable of accessing TK, to lead social change in promoting ecological integrity. The inability of the right to promote the use of TK on this Land further limits its potential efficacy. Conversely, the process of reforming the relationship between the settler state and Indigenous peoples through centering the earth and reaffirming treaty relationships could provide a key promoting the use of TK, as these are acts that actively confront the legacy of colonialism.

### *Current Efforts*

The goal of reorienting the relationship between the settler state, Indigenous peoples, and the Land will take time, resources, and commitment to realize. As a result “First Nations are not waiting for government recognition and continue to collaborate with others to realize their responsibilities.”<sup>293</sup> ENGOs then can play an important role in this type of relationship building, and indeed some Canadian ENGO’s are currently in the process of doing so. One interviewee argued that “it isn’t even really possible to be an effective environmental practitioner without working with Indigenous nations who hold so much power in terms of how decision making

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<sup>291</sup> Simpson, *supra* note 290.

<sup>292</sup> McGregor, “Traditional Knowledge and Water Governance”, *supra* note 274 at 502.

<sup>293</sup> *Ibid*; see also Yellowhead Institute, *Land Back: A Yellowhead Institute Red Paper* (Toronto: Ryerson University, 2019) for details of various concrete examples of this type of work.

happens.”<sup>294</sup> As a result of this recognition the interviewee’s organization “is in the midst of a shift and [they] don’t know where that will take [them], but [they] are trying to take that openness and trying to be comfortable about not being as in control by being able to map out the directions but have it be informed by the relationships that we are building with [their] Indigenous colleagues and friends.”<sup>295</sup> The organization’s goal of engaging in this Indigenous led work is to better understand what it means “to live on [Indigenous] territory in a bi-legal relationship between human and non-human beings that are governed by [Indigenous] law and to invite settlers to begin to think that through.”<sup>296</sup>

It can be argued that this course of action, being work that would continue in perpetuity and will develop in unpredictable ways, also fails to deliver the rapid changes I have critiqued the right to a healthy environment for being unable to deliver. An important distinction however, as detailed earlier, is that the litigation of the right to a healthy environment is being presented to the public as a course of action which can help prevent climate change. In contrast, the relationship building approach is being presented to the public as a strategy with no fixed term. This is crucial as the messaging for the relationship building approach asks the public to commit to a project of relationship building, and to remain committed in order to maintain any positive results. As a result, the successes of the relationship building approach would not face the same risk of advocates relaxing their efforts that litigation does.

Furthermore, as detailed in the previous chapter, courts and judges deciding the right to a healthy environment are likely to be unwilling or unable to lead the social change proponents of the litigation are asking them to. As a result, the relationship building strategy, although a long-

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<sup>294</sup> Interview 1, March 6, 2020.

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

term strategy, offers the potential to lead social change by reshaping relationships between settlers, Indigenous peoples, and the Land in a manner that litigation cannot. The decolonizing work described above is already happening and is a course of action available to other advocates and organizations willing to build meaningful partnerships and take the lead from Indigenous communities and organizations. ENGOs must critically consider whether to invest in costly legal battles such as litigating the right to a healthy environment which could create real barriers to investing in and committing to this type of transformative change, while furthering a solution that will be inextricably bound up in the legacy of settler colonialism.

### Summary

In this thesis I analyzed scholarship, court documents, ENGO fundraising material, and interviews with senior members of ENGOs in order to determine whether litigating the right to a healthy environment in Canada could advance the ecological values that its proponents are seeking to promote.

In answering this question I identified *Mathur*, *La Rose*, and the pending *Wet'suwet'en* case as current efforts to litigate the right to a healthy environment in Canada. In the introductory chapter I analyzed the initial claims made by the ENGOs supporting these cases (Ecojustice, the David Suzuki Foundation, and RAVEN trust respectively), as well as the body of Canadian environmental law scholarship which forwards the argument for such litigation. I additionally argued that the legacy of settler colonialism is inextricably present within the settler legal systems and thus any litigation efforts made through said system. I argued that these influences thus underlie each stage of the process of transforming values into legal rights.

In the literature review I presented relational approaches to law as a guiding framework for the thesis. I then consolidated bodies of scholarship on two sites of intervention within any legal dispute: lawyers' input and judicial interpretation.

In chapter four I began my analysis by examining the impact of lawyers on the expression of the right to a healthy environment. Following Nedelsky's relational rights model I identified the values that proponents of the right to a healthy environment are seeking to advance. I then compared these values against the initial arguments in *Mathur* and *La Rose*. In doing so I determined that the lawyers in those cases made the strategic choice to focus on the impacts of climate change on humans while discussing their clients' legal interests, whereas the clients' concern for the maintenance of ecological systems for their own sake was "placed outside the frame" of the legal argument as an extralegal concern. In observing this transaction I concluded that the lawyers in these cases fundamentally transformed and translated the arguments for the right to a healthy environment, and thus have had a profound effect on the potential legal expression of the right.

The potential effect of the judicial interpretation of the right to a healthy environment was my focus in chapter five. In doing so I applied Rosenberg's constrained court theory, coloured for the Canadian context by Lessard's data on *Charter* disposition, as well as Petter and Hutchinsons' critiques of the *Charter*. In doing so I found that there is little reason to believe that Canadian courts will be willing or able to lead social change by granting proactive remedies to prevent climate change. This prediction was supported by a review of the history of rights-based broad redistribution claims, by critical legal studies claims about judges-as-property-owning-wealthy elites who are unlikely to be motivated to support broadly redistributive forms of change, from the structure of the *Charter* itself, and the from court's lack of implementation

powers including the threat of legislatures invoking the notwithstanding clause in section 33 of the *Charter*.

I further analyzed what I deemed to be reactive remedies that were being sought in the litigation of the right to a healthy environment including the desire to create a larger impetus for administrative actors to make decisions which promote ecological integrity, as well as the desire to create a “constitutional backstop” to prevent new governments from repealing and regressing environmental gains made by the previous administration. I argued that the attempt to use Charter litigation to address administrative decisions was misguided as such litigation does not confront the most important consideration, namely it does not challenge who has the authority to make these administrative decisions. On the other hand, I conceded that the idea of establishing a constitutional backstop may help the maintenance of ecological integrity in Canada. However, this gain would only garner long term benefits, or only reactive remedies in the short term. Unfortunately, this shortcoming would likely outweigh the benefit it would confer. I base this argument in part on my observation that it is likely that the court would prefer to recognize a limited right to a healthy environment (i.e. one that could only be used as a constitutional backstop) in order to avoid the public questioning of the role of the court that might follow an outright denial of any right to a healthy environment. This potential recognition of a limited right becomes problematic when combined with the messaging to the public that the litigants had “no other choice” but to litigate and that the right to a healthy environment would play a significant role in addressing climate change. The issue, I argue, is that because a narrow legal right to a healthy environment would not adequately protect the values that the litigants originally sought to protect the right could be misinterpreted by the non-legally trained public as a significant victory in the fight to prevent climate change, thus inducing supporters of the litigation to relax

their efforts (including providing funding support, prioritizing climate change as an issue when voting etc.) as they may perceive that the emergency they originally fought against will no longer exist.

In the beginning of this chapter I examined future pathways for efforts to address climate change in Canada which could fully advance ecological values, and avoid reinforcing the settler state and its assumed authority over environmental governance. In doing so I explored centring earth and relationship to earth in mediating the relationship between settlers and Indigenous peoples, as well as the need to reaffirm treaties which to date have been interpreted in a one sided fashion which benefits only the settler state as potential transformative actions. I argued that by engaging in these acts settler environmental activists could help ensure the promotion and use of Indigenous TK which is essential to efforts to enhance ecological integrity in Canada.

The main finding of this research then is that in the process of arriving at a right to a healthy environment as a legal mechanism the interventions of lawyers and judges will narrow the intended scope of the right. I contend that this narrowing would result in the potential legal right not fully reflecting the values that its proponents sought to advance, and thus would limit its efficacy as a tool to promote ecological integrity and to combat climate change.

I further identified two consequences of this divide between the legal right and the values it is intended to advance. The first of these consequences is that there is serious risk that a potential right to a healthy environment will be misinterpreted by the public as a greater victory than it may be, especially in the context of climate change. Taken together, the impact of lawyers and of judicial interpretation suggest that in order to fit the demands of the legal system a potential right to a healthy environment will be significantly altered from the values its proponents originally desired to protect. The changes that the right undergoes during this process



will not be easily cognizable to the non-legally trained public, especially when combined with the public messaging from ENGOs that there was “no other choice” or that the litigation is an important part of a climate change strategy. As stated many times throughout this paper, this result could have the unintended consequence of causing members of the non-legally trained public who are committed to fighting climate change to relax their efforts after being lulled into the false belief that the right can and will result in social change or on the ground change.

The second consequence is that the litigation of the legal right to a healthy environment is an important strategic choice that can foreclose work on other strategies to address climate change. The litigation of the right to a healthy environment detracts from investment in efforts to substantially change the settler state’s relationship to the Indigenous peoples and the earth. The act of forgoing such work in favour of litigating has the unintended effect of implicitly reinforcing the settler state and its assumed authority to deal with these issues.

Ultimately, I anticipate that one of these right to a healthy environment cases will be successful at trial and throughout the appeal process. Whether such a decision will be able to improve Canada’s response to climate change and ecological integrity more broadly remains to be seen.

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