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Mapping Human Rights-based Climate Litigation in Canada

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In line with global trends, there has been an increase in human rights-based climate litigation brought in Canadian courts in recent years. Some litigants invoke human rights as found in the Canadian Charter of Rights and Freedoms to push federal and provincial governments to take seriously the implementation of their climate obligations. Other litigants invoke procedural environmental human rights to engage in free speech and peaceful protest in the face of government action supporting fossil fuel consumption or expansion. At the same time, the Supreme Court of Canada has recognized that Canadian courts could develop civil remedies for corporate violations of customary international law, opening the door to future human rights-based corporate climate accountability litigation. Due to the nascent stage of climate litigation in Canada, this paper maps a broad variety of emerging cases into three interrelated sections: substantive, procedural and corporate accountability litigation. It also highlights emerging and potential future trends, such as the high level of youth and Indigenous plaintiffs. The paper aims to provide a critical overview of emerging Canadian developments in human rights-based climate litigation brought against the state, and reflects on potential strategies for future litigation, including against transnational corporate actors.

Keywords: human rights, climate litigation, corporate accountability, Canada, Charter of Rights and Freedoms

1 INTRODUCTION

In line with global trends, there has been an increase in human rights-based climate litigation brought in Canadian courts in recent years.[1] Some cases invoke human rights, such as those found in the Canadian Charter of Rights and Freedoms,[2] to push federal and provincial governments to take seriously the implementation of their climate obligations. In other cases, litigants invoke human rights to contest government action supporting fossil fuel consumption or expansion, or exercise their procedural environmental human rights, including rights to engage in free speech and peaceful protest.[3] At the same time, the Supreme Court of Canada has recognized that Canadian courts could develop civil remedies in domestic law for corporate violations of customary international law, opening the door to future innovative human rights-based climate corporate accountability litigation.[4] Our aim in this paper is twofold: first, to provide a critical overview of recent human

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[1] See generally the Sabin Center climate change litigation database, http://climatecasechart.com/climate-change-litigation/accessed 5 November 2021; J Setzer and C Higham, *Global trends in climate change litigation: 2021 snapshot* (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2021); UN Environment Programme (2020), *Global Climate Litigation Report: 2020 Status Review*, (Nairobi) https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y accessed 5 November 2021.

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[3] We adopt an expansive definition of procedural environmental human rights following the approach taken in the 2018 Framework Principles on Human Rights and the Environment. See UNGA, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to a Safe, Clean, Healthy and Sustainable Environment* (Framework Principles)(24 January 2018) UN Doc A/HRC/37/59.

[4] *Nevsun Resources Ltd v Araya* 2020 SCC 5.

rights-based climate litigation brought in Canadian courts; and second, to offer reflections on potential future directions for human rights-based climate actions. Our aim is to provide food for thought for legal researchers, as well as potential litigants and their lawyers in Canada and beyond. Climate litigation is Canada is a new and emerging field, and therefore concrete recommendations are inappropriate at this early stage. However, some developing trends and potential future strategies are identified.

In Part 2, we briefly introduce the nature of climate impacts on those living in Canada, including Indigenous peoples, as well as key Canadian law and policy responses to climate change. In Part 3, we consider climate litigation against federal and provincial governments that relies on one or both of the right to life or equality rights provisions of the Charter of Rights and Freedoms.[5] These may be understood as cases in which litigants are seeking to protect their substantive right to a safe climate system.[6] They are substantive human rights based claims, grounded in the Canadian Charter of Rights and Freedoms. In Part 4 we turn to cases in which procedural environmental human rights are invoked to enable climate-concerned citizens to engage in climate action or to protect themselves from prosecution. We define procedural environmental human rights expansively to include rights to access information, prior assessment of proposed policies and projects, freedom of association, freedom of expression and peaceful assembly, public participation in environmental decision-making, and access to justice and effective remedies.[7] Our aim in adopting an expansive definition of procedural rights is to include rights that are necessary to ensure the creation of a 'safe and enabling environment' for environmental human rights defenders.[8] We consider cases to protect such procedural environmental human rights as part of the Canadian human rights-based climate litigation landscape in recognition of the fact that the exercise of these rights, especially of free speech and peaceful protest, is essential for the protection of the environment, including a safe climate system.[9] Finally, we briefly consider the potential for human rights-based climate corporate accountability litigation to emerge in Canada in light of recent ground-breaking Supreme Court of Canada jurisprudence on corporate accountability. A fulsome consideration of human rights-based climate litigation must, in our view, also contemplate the potential of litigation to invoke the independent responsibility of business enterprises to respect human rights in accordance with the 2011 United Nations Guiding Principles on business and human rights.[10] The business responsibility is equally relevant to environmental human rights and to climate change,[11] and we argue that Canadian jurisprudence has opened the door to future claims. In conclusion, we seek to identify lessons emerging from the diverse landscape of nascent human rights-based climate litigation in

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[5] *Charter of Rights and Freedoms,* (n2) s.7 and s.15(1).

[6] See generally UNGA, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (Safe Climate) (15 July 2019) UN Doc A/74/161.

[7] Framework Principles (n3), Principles 5, 7, 8, 9, 10. We also recognize that non-discrimination (Principle 3), attention to vulnerability (Principle 14) and the self-determination of Indigenous Peoples and rights to free, prior and informed consent (Principle 15) are cross-cutting concerns.

[8] *Ibid,* Framework Principles 4. See also UNGA, *Resolution Adopted by the Human Rights Council on 21 March 2019: Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection, and sustainable development* (UN EHRDs) (2 April 2019) UN Doc A/HRC/RES/40/11.

[9] Framework Principles, *ibid,* Principles 1 and 2 and related commentary; Safe Climate (n6).

[10] United Nations Office of the High Commissioner for Human Rights (OHCHR), *Key Messages: Human Rights, Climate Change and Business,* <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>; OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN Guiding Principles) 2011, UN Doc A/HRC/17/31.

[11] See Framework Principle 12, (n3) para 35; Safe Climate report (n6) at paras 71-72; and OHCHR Key Messages on Climate Change and Business, ibid.

Canada and offer reflections on potential future litigation pathways, including how litigation could be used to further underlying issues of Indigenous self-determination.

2 CANADA AND CLIMATE CHANGE

Canada is vulnerable to the impacts of climate change, with temperatures currently increasing in much of the country at twice the global average.[12] Climate impacts vary across Canada based on geographic and historical factors,[13] with unique effects felt by Indigenous peoples.[14] Climate change is a daily reality in Northern Canada where there are already average temperature increases above 2°C and significant impacts on ecosystems, infrastructure, and traditional livelihoods.[15] Coastal communities face storm surges and sea-level rise while floods and thawing permafrost confront other communities.[16] In 2021, wildfires and extreme heat in Western Canada caused devastation as national temperature records were exceeded.[17]

In response to climate change, adaptation actions are being undertaken in all ten provinces and all three territories.[18] Indigenous peoples are also leading climate adaptation responses across the country[19] while at the same time coordinating Indigenous-led climate justice actions[20] and contesting federal climate policy.[21] Notably, Canadian Inuit, together with their Alaskan counterparts, have actively contributed to the development and recognition of human rights approaches to climate change, with Inuk Sheila Watt Cloutier driving the Inuit human rights petition to the Inter-American Commission on Human Rights in 2005.[22] While the Commission did not accept the petition at the

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[12] E Bush and DS Lemmen (eds), *Canada's Changing Climate Report* (Government of Canada, 2019) <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/Climate-change/pdf/CCCR_FULLREPORT-EN-FINAL.pdf> accessed 5 November 2021 [CCCR 2019]; Government of Canada, *Adapting to the Impacts of Climate Change in Canada: an update on the National Adaptation Strategy* (Environment and Climate Change Canada, 2021) (AICCC 2021), https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/national-adaptation-strategy/report-1.html accessed 5 November 2021 at 1. See also F Warren and N Lulham, (eds) *Canada in a Changing Climate: National Issues Report* (Government of Canada, Ottawa, ON, 2021).

[13] CCCR 2019, ibid; Expert Panel on Climate Change Adaptation and Resilience Results, *Measuring Progress on Adaptation and Climate Resilience: Recommendations to the Government of Canada* (Minister of Environment and Climate Change, 2018) <http://publications.gc.ca/collections/collection_2018/eccc/En4-329-2018-eng.pdf> accessed 5 November 2021.

[14] 'Indigenous Climate Hub' <https://indigenousclimatehub.ca/effects-on-indigenous-communities/> accessed 5 November 2021 ; see also references to Indigenous peoples in National Issues Report 2021 (n12).

[15] AICCC 2021 (n12) at 2.

[16] AICCC 2021 (n12) at 2.

[17] See 'World Weather Attribution', 7 July 2021, https://www.worldweatherattribution.org/western-north-american-extreme-heat-virtually-impossible-without-human-caused-climate-change/ accessed 5 November 2021

[18] See 'Map of Adaptation Actions' https://changingclimate.ca/case-studies/#reports accessed 5 November 2021.

[19] See 'Indigenous Climate Adaptation' <https://indigenousclimatehub.ca> accessed 5 November 2021.

[20] See 'Indigenous Climate Action: Our Story' <https://www.indigenousclimateaction.com/our-story> accessed 19 August 2021. ('Indigenous Climate Action (ICA) is an Indigenous-led organization guided by a diverse group of Indigenous knowledge keepers, water protectors and land defenders from communities and regions across the country. We believe that Indigenous Peoples' rights and knowledge systems are critical to developing solutions to the climate crisis and achieving climate justice.')

[21] See 'Amplifying Indigenous Voices' <https://www.indigenousclimateaction.com/amplifying-voices> accessed 5 November 2021.

[22] Inuit Circumpolar Council Canada, 'Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States' 7 December 2005 < https://www.inuitcircumpolar.com/press-releases/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america/> accessed 29 June 2021; S Watt-Cloutier, *The Right to Be Cold: One Woman's Story of Protecting Her Culture, the Arctic and the Whole Planet* (Penguin Group, 2015); S Jodoin, S Snow and A Corobow, 'Realizing the Right to

time, the petition has been credited with contributing to the now accepted understanding that climate change threatens the enjoyment of many human rights and is the most pressing human rights issue of our time.[23]

Canada is a party to the Paris Agreement, which established long-term goals to limit global temperature increases to well below 2°C, with an aspirational goal of holding increases in temperatures to 1.5°C above pre-industrial levels.[24] However, the Canadian economy is heavily dependent upon the fossil fuel industry. Canada is the fifth largest producer of crude oil in the world,[25] and has the third largest oil reserves in the world, most of which are in the Alberta oil sands.[26] A number of multinational enterprises (MNEs) operate in the oil sands and have been implicated in the release of associated emissions, as evidenced by Richard Heede's 2013 carbon majors study. [27] For this reason it is important to consider the possibility of future corporate-based climate litigation in Canada. Canada withdrew from the Kyoto Protocol in 2011, partly because it was unable to meet its targets,[28] despite the passage of legislation in the form of the Kyoto Protocol Implementation Act.[29] Two non-governmental organisations, Friends of the Earth[30] and Turp[31] brought litigation to attempt to, respectively, require Canada to meet its Protocol commitments and to prevent Canada's withdrawal. Both attempts were unsuccessful, with courts deciding the issue was not appropriate for judicial review.

A recent high profile example of Canadian climate litigation was initiated by Canadian provinces, including Saskatchewan, Alberta and Ontario, in an attempt to prevent federal implementation of carbon pricing legislation.[32] As part of its commitments under the Paris Agreement, Canada submitted a nationally determined contribution in 2017 and has relied on the Pan-Canadian Framework on Clean Growth and Climate Change as its primary regulatory tool to reduce emissions.[33] These high-emitting provinces alleged that the implementation of carbon pricing

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be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming' (2020) 54 Law & Soc'y Rev 168.

[23] SA Atapattu, 'Climate Change under Regional Human Rights Systems' in S Duyck, S Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018) 128-144; Agnieszka Szpak, 'Arctic Athabaskan Council's petition to the Inter-American Commission on human rights and climate change – business as usual or a breakthrough?' Climatic Change (2020) 162: 1575 – 1593 (analyzing the human rights-based legal arguments brought by Indigenous Athabaskans against Canada so that it reduces black carbon emissions or eliminates them).

[24] *The Paris Agreement*, FCCC/CP/2015/L.9, Article 2(1).

[25] Natural Resources Canada, 'Oil Supply and Demand' 16 December 2019, <https://www.nrcan.gc.ca/energy/oil-sands/18086> accessed 24 June 2021.

[26] Natural Resources Canada, 'Oil Resources' 16 December 2019, https://www.nrcan.gc.ca/energy/energy-sources-distribution/crude-oil/oil-resources/18085 accessed 19 August 2021.

[27] R Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers 1854-2010' (2014) 122 Climatic Change 229. This paper was first published online by Climatic Change in 2013; R Heede, 'Carbon Majors: Updating Activity Data, Adding Entities, & Calculating Emissions: A Training Manuel' (Climate Accountability Institute, Snowmass, Colorado, September 2019).

[28] 'Canada Pulls Out of Kyoto Protocol'(*The Guardian*, 12 December 2011) <https://www.theguardian.com/environment/2011/dec/13/canada-pulls-out-kyoto-protocol> accessed 24 June 2021. See generally C Choquette, D Klaudt and LS Lynes, 'Climate Change Litigation in Canada' in F Sindico and MM Mbengue (eds), *Comparative Climate Litigation: Beyond the Usual Suspects* (Springer, 2021).

[29] *Kyoto Protocol Implementation Act,* SC 2007, c 30. The Act was not supported by the minority Conservative government.

[30] *Friends of the Earth v Canada* 2008 FC 1183, although Chalifour and Earle argue the decision was 'confounding' and very different than a *Charter* claim: N Chalifour and J Earle, 'Feeling the Heat: Climate Litigation under the Canadian Charter's Rights to Life, Liberty and Security of the Person' (2018) 42 Vt L Rev 689, 713.

[31] *Turp v Canada* 2012 FC 893.

[32] *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11.

[33] Pan-Canadian Framework on Clean Growth and Climate Change 2017, <https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html> accessed

by the federal government was *ultra vires* federal constitutional powers and an impermissible intrusion upon provincial powers.[34] While the issues raised in this case concerned the constitutional division of powers, human rights-based arguments about climate change appeared in numerous intervenor factums that were supportive of this legislative action,[35] and arguably appeared implicitly in the federal government's submissions.[36] The Supreme Court of Canada (SCC) held in favour of the federal government, and expressed in strong language that 'the effects of climate change have been and will be particularly severe and devastating in Canada' with temperature increases of 'roughly double the global average rate of increase' across Canada but closer to 'three times the global average' in the Arctic.[37] Importantly, the SCC recognized that climate change 'has also had a particularly serious effect on Indigenous peoples, threatening the ability of Indigenous communities in Canada to sustain themselves and maintain their traditional ways of life'.[38] Yet neither 'human rights' nor 'climate justice' ultimately appear in the text of the SCC decision, which is based on a detailed analysis of division of powers doctrine.

Overall, Canadian legislative approaches to climate change have been inadequate to meet the climate crisis, and Canada's track record on meeting its international climate commitments is historically very poor. Despite favourable talk about climate action by the current federal government, including new legislative action notably in the 2021 Canadian Net-Zero Emissions Accountability Act,[39] Canada continues to miss its greenhouse gas (GHG) targets. The country's

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24 June 2021. The Framework is based on four key pillars, including carbon pricing, complementary measures to reduce emissions, efforts at adaptation and resilience, as well as accelerating investment in clean technology and innovation. Canada committed to reducing GHG emissions by 30% against 2005 levels by 2030. See Canada's 2017 Nationally Determined Contribution Submission to the United Nations Framework Convention on Climate Change <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Canada%20First/Canada%20First%20NDC-Revised%20submission%202017-05-11.pdf>.

[34] See *Reference re Greenhouse Gas Pollution Pricing Act* 2019 ONCA 544; *Reference re Greenhouse Gas Pollution Pricing Act* 2019 SKCA 40. N Chalifour, 'Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act' (2019) 50(2) Ottawa L Rev, SSRN: <https://ssrn.com/abstract=3346795>.

[35] See for example *Reference re Greenhouse Gas Pollution Pricing Act* 2019 SKCA 40 (n 26) (Factum of Climate Justice Saskatoon) <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38663/FM050_Interverner_Climate-Justice-Saskatoon-et-al.pdf>, paras 3, 16, 20, and 30; (Factum of Athabasca Chipewyan First Nation) <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38663/FM080_Intervener_Athabasca-Chipewyan-First-Nation.pdf>, paras 3, 7, 12, 24, arguing in part that the GGPPA is not only *intra vires* but constitutionally imperative to avoid violations of s 35 Aboriginal and treaty rights; (Factum of Amnesty International Canada) <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38663/FM130_Intervener_Amnesty-International-Canada.pdf>, paras 5-13; (Factum of the Intergenerational Climate Coalition) <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38663/FM160_Intervener_Intergenerational-Climate-Coalition.pdf>, paras 1, 7, 22; (Factum of the National Association of Women and the Law and Friends of the Earth) <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38663/FM210_Intervener_National-Association-of-Women-and-the-Law-and-Friends-of-the-Earth.pdf>, paras 1, 4; (Factum of the Assembly of First Nations) <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38663/FM220_Intervener_Assembly-of-First-Nations.pdf>, paras 4, 9.

[36] ibid (Factum of the Attorney General of Canada) <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38663/FM015_Respondent_Attorney-General-of-Canada.pdf>. See for example the description of climate change as an 'existential threat' (para 3); that is 'happening now and is having real consequences on people's lives throughout Canada, and globally' (para 9); 'The decisions we make today are critical to ensuring a safe and sustainable world for everyone, now and in the future' (para 9); 'Indigenous Peoples are among the most vulnerable to climate change' (para 13); 'GHG emissions create a risk of harm to human health and the environment upon which life depends' (paras 15, 80).

[37] References re *Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11 at paras 9-11.

[38] References re *Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11 at para 12.

[39] Canadian Net-Zero Emissions Accountability Act, SC 2021, c 22 (assented to 2021-06-29) <https://laws-lois.justice.gc.ca/eng/annualstatutes/2021_22/>.

updated 2021 nationally determined contribution (NDC) does not represent a fair share of global emissions reductions.[40] Canada's 2021 NDC points to climate action taken not only at the federal level, but also actions taken or under consideration by all provinces and territories,[41] and actions (more closely relating to adaptation) contemplated by Indigenous peoples including First Nations, Inuit and Métis.[42] As we note below, Indigenous communities have been active in pushing the Government to implement more ambitious climate action.

An important consideration in the Canadian context is reconciliation with Indigenous peoples, and truth-telling about Canadian history.[43] Among the Truth and Reconciliation Commission (TRC)'s Calls to Action are recommendations that Canadian federal, provincial, and municipal governments fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[44] as a framework for reconciliation.[45] The TRC also asked the corporate sector to adopt UNDRIP as a framework for reconciliation, and to seek to obtain Indigenous peoples' free, prior and informed consent (FPIC) before proceeding with economic development projects involving Indigenous lands and resources.[46] As will be seen in Part 3, individual Indigenous persons may choose to appear as plaintiffs in climate litigation together with non-Indigenous individual litigants, relying upon Charter rights. However, Indigenous nations may alternately choose to bring an action as a collective, relying upon s 35 of the Constitution Act 1982, which recognizes and affirms the pre-existing rights of the Aboriginal peoples of Canada, including Inuit, First Nations, and Métis.[47] However, while litigation brought by Indigenous peoples challenging fossil fuel projects including pipelines, as well as green energy hydro projects, are a tremendously important part in the Canadian landscape of energy disputes, most of these cases do not appear in climate litigation databases.[48] This may be because the focus of these claims is respect for Indigenous rights rather than climate change, and because the cases concerning hydro dams may be classified as energy cases rather than climate mitigation cases.[49] For the purpose of this paper, cases found in the dominant climate litigation databases will be the predominant focus of analysis in

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[40] See Canada, 'Climate Action Tracker' <https://climateactiontracker.org/countries/canada/>. [updated July 2021 to account for Canada's updated NDC submission <https://climateactiontracker.org/climate-target-update-tracker/canada/> See Canada's 2021 Updated Nationally Determined Contribution Under the Paris Agreement <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Canada%20First/Canada%27s%20Enhanced%20NDC%20Submission%20EN.pdf>

[41] 2021 NDC, *ibid,* Annex 2

[42] 2021 NDC, *ibid,* Annex 3 Indigenous Climate Action. However, these are focused more on adaptation than emissions reductions.

[43] Truth and Reconciliation Commission of Canada, *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada* (2015), <www.trc.ca>.

[44] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

[45] Truth and Reconciliation Commission of Canada (n43) at Calls to Action #43-44.

[46] Truth and Reconciliation Commission of Canada (n43) at Calls to Action #92.

[47] Rights of Aboriginal Peoples of Canada, Part II of the Constitution Act 1982 (n2).
s35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[48] Compare Sabin (http://climatecasechart.com/climate-change-litigation/non-us-jurisdiction/canada/) and Grantham Institute (https://climate-laws.org/litigation_cases?geography%5B%5D=32) climate litigation databases; with energy disputes involving free, prior and informed consent of Indigenous peoples profiled on Yellowhead Institute (https://yellowheadinstitute.org/) .

[49]Grantham 2021 snapshot (n1) at 15.

Part 3 and Part 4. Nevertheless, this context will inform the analysis throughout, including the potential of human rights-based corporate climate litigation in Part 5, and the conclusions in Part 6.

3 SUBSTANTIVE HUMAN RIGHTS ARGUMENTS IN CLIMATE LITIGATION

Climate litigation can be designed to address a variety of climate challenges.[50] In particular, climate litigation has been used for several years to motivate or to challenge regulatory action on climate change.[51] Climate litigation can also be a way for particularly vulnerable communities to make their voices heard, and can be a route to enable their participation in policy decisions around climate change, even if their legal claims are not ultimately successful.[52] The Intergovernmental Panel on Climate Change (IPCC) has shown that Indigenous communities, along with coastal communities and those dependent on subsistence agriculture and fisheries, face disproportionate and escalating risks from climate change.[53] For certain Indigenous groups, the impacts of climate change involve loss and damage to their health and lands but also displacement and non-tangible losses such as impacts on cultural values, traditions, identity and loss of a sense of place.[54] Vulnerable groups can make rights-based claims to raise awareness of or seek to mitigate such impacts, particularly where the group are or will be disproportionately affected by the impacts of climate change. In Canada, these vulnerable groups are likely to include Indigenous communities, as described in Part 1 above. Claims made by vulnerable groups have been couched in substantive human rights language, rather than in terms of a specific right to a healthy environment. For example, in Canada climate litigation has relied on rights to life or to equality in the Charter of Rights and Freedoms, with varying levels of success.

Section 7 of the Charter provides that every Canadian has the right to life, liberty and security of the person.[55] Section 15(1) provides that every individual has the right to the equal protection and equal benefit of the law without discrimination, with enumerated categories of discrimination namely: discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[56] For most of its history, the Canadian Supreme Court has interpreted both Sections 7 and 15 using broad principles of rationality and proportionality.[57] In addition, its judicial interpretations have approached *Charter* claims grounded in human rights claims

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[50] See Sabin Center for Climate Change, 'Climate Litigation Databases' <http://climatecasechart.com> accessed 24 June 2021.

[51] D Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64(1) Florida Law Review 15, originally defined climate litigation as any piece of federal, state, tribal or local administrative or judicial litigation in which party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes or impacts; H Osfosky and J Peel, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015), define it as cases which have the issue of climate change at their core.

[52] For example, the plaintiffs in the *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), *rev'd and remanded*, No.18-36082 (case failed on standing, but despite this outcome settlement negotiations have been ordered on 13th May 2021, <https://fingfx.thomsonreuters.com/gfx/legaldocs/ygdvzobmapw/environment-climate-juliana-settlement-MINUTES.pdf)>. See also, L Benjamin, 'The responsibilities of corporations: new directions in environmental litigation' in Veerle Heyvaert and Leslie-Anne Duvic-Paoli *Research Handbook on Transnational Environmental Law* (Edward Elgar 2020).

[53] IPCC, '1.5°C Special Report – Summary for Policymakers' (6 October 2018) <https://www.ipcc.ch/sr15/,> 11.

[54] A Thomas and L Benjamin, 'Non-economic loss and damage: lessons from displacement in the Caribbean' (2020) 20 Climate Policy 715.

[55] *Charter* (n 2).

[56] ibid.

[57] D Beatty, 'The Canadian Charter of Rights: Lessons and Laments' (1997) 60(4) Modern Law Review 484.

with significant caution and deference to legislators.[58]

Canadian courts have traditionally provided a high degree of deference to legislative and executive branches of the government in the environmental context, especially in Charter-based rights claims.[59] Courts have traditionally deferred to legislators, particularly around Section 7 and 15 claims involving social and economic rights, in a way that has diminished the potential of these provisions to provide redress to litigants.[60] For example, in the *Friends of the Earth* and *Turp* cases discussed in Part 1 above about the failure by Canada to meet its Kyoto Protocol targets, it was evident that there was judicial reluctance to engage with the issue of climate change on the basis that it relates to domestic legislation and policy making. This judicial trend reappears in the cases discussed in Part 3. As many of these cases are in the procedural stages, it remains to be seen whether this reluctance will continue in the face of human rights-based climate claims grounded in *Charter* claims in the future.[61] The Canadian cases addressing climate change and human rights discussed in more detail in Part 3 are summarized in Table 1 below.

Table 1: Summary of substantive human rights cases

Case name:	**Plaintiffs:**	**Defendant:**	**Claim:**	**Defendant action:**	**Outcome:**
ENvironment JEUnesse v Attorney General of Canada [July 11, 2019. Superior Court, Quebec]	On behalf of all Quebec residents 35 and under (youth based plaintiffs)	Canada	Challenging national inaction on climate change: - Constitutional life, liberty, security infringement of youngest generation (violates class member provincial and Canadian charter rights). - Violates right to Equality pursuant to Section 15 of the Canadian Charter. - Violation of Quebec Charter right to a healthful environment in which biodiversity is preserved.	Class action not appropriate procedural vehicle for declaratory relief: - Non-justiciable-political question/ Respondent cannot stop alleged abuse. - Provincial charter does not apply to CA government.	Plaintiff's claims dismissed: - Plaintiff does not provide a factual/rational basis for the members of the class. - If potential non-justiciability issue and charter right violation alleged then at this stage case should not be dismissed as a result of potential justiciability issues. - Quebec Charter applies to federal government where crown is liable for damages.
La Rose v Canada and the Attorney General of Canada [January 02,	15 children and youth from across Canada (Indigenous	Canada	National inaction led to GHG level incompatible with stable climate system: - Violation of sections 7	Motion to Strike: - Non-justiciable. - Discloses no	Plaintiff's claim dismissed: - Non-justiciable - No reasonable cause of action; claims are

[58] ibid 481.
[59] K Lantz, 'The Netherlands v Urgenda Foundation: Lessons for Using International Human Rights Law in Canada to Address Climate Change' (2020) 41 WRLSI 145, 162.
[60] Beatty (n57) 493.
[61] C Feasby, D deVlieger and M Huys, 'Climate Change and the Right to a Healthy Environment in the Canadian Courts' (2020) 58 Alberta L Rev 213, 226–8, arguing that Canada does not have an equivalent political doctrine question to the US, but courts instead rely on general principles of justiciability.

2020. Federal Court, Ontario]	and youth based Plaintiffs)		and 15 under the Canadian Charter. - Failure to discharge public trust obligations pursuant to the public trust doctrine. - GHG targets inconsistent with best available science.	reasonable cause of action.	overbroad, political, and challenge public policy approach. - Only laws/actions resulting in infringement of rights are subject to review under the Charter. - Public trust doctrine is a justiciable, legal question that courts can resolve with no policy or political context but did not disclose reasonable cause of action.
Mathur v Ontario [November 12, 2020. Superior Court, Ontario]	Minors and youth (12-24) (Youth based Plaintiffs)	Ontario	Challenging Ontario's cancellation of the Climate Change Act and Preserving and Protecting our Environment for Future Generations: A in the Made in Ontario Environment Plan: - Violation of sections 7 and 15 under the Charter. - Violation of unwritten principle that government is prohibited from engaging in conduct that would reasonably be expected to result in a significant number of harm or suffering to its citizens.	Seeking dismissal: - Non-justiciable. - Unprovable speculations about future climate consequences of target. - No positive constitutional obligations to prevent climate change associated harms. - No standing on behalf of future generations.	Defendant's Rule 12 motion dismissed; case will proceed: - The plan is reviewable by the court for Charter compliance because the target and plan are quasi-legislative or soft law that has the force or effect of law since mandated by statute = more than just guidance document. - Plaintiff's claims are deemed to have been proven because scientific evidence can be used to establish harm. - Justiciable. Issue is whether policy violates Charter rights. Even if secondary political questions, Charter claims hold special status and therefore are justiciable where claim identifies specific government conduct/law that violates rights.

Lho'imggin v Canada [November 16, 2020. Federal Court Ontario]	Lho'imggin and all members of the Misdzi Yikh and Smogilhgim and all members of the Sa Yikh of the Wet'suwet'en Nation (Indigenous and youth based Plaintiffs)	Canada	National GHG policy objectives insufficient therefore: - Charter of Rights and Freedoms sections 7 and 15 Violations - by failing to establish national laws and policies to meet Paris Agreement commitments. - Violation of Section 91 of the Constitution Act under POGG powers by not ensuring low GHG emissions. - Violation of common law principles of Public Trust.	Motion to Strike: - Non-justiciable. - Discloses no reasonable cause of action. - Remedies not legally obtainable.	Plaintiff's claim dismissed: - Matter is non-justiciable. The issue is a political one. -Remedies sought would be inappropriate for the court.

In Canada, youth-led climate-related litigation was first initiated in 2018 by the Quebec NGO ENvironment JEUnesse. The NGO alleged that the government's failure to take climate mitigation action infringed upon the rights of the youth plaintiffs (being all residents of Quebec 35 years of age and under as of 26 November 2018) that are protected by the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms.[62] The NGO characterized Canada's behavior as 'grossly inadequate,' constituting 'bad faith' and 'intentional interference' with fundamental rights, due to the state's inability to meet its Kyoto Protocol and 2020 climate mitigation targets. In addition, the NGO claimed that Canada's emissions were disproportionately high compared with its population size. ENvironment JEUnesse alleged that this behavior constitutes an intentional violation of Quebec civil law under the Crown Liability and Proceedings Act.[63] It sought orders against the state to cease its infringements on the group members' fundamental rights, an order to pay $100 per member in punitive damages towards the implementation of remedial measures, and any other appropriate relief to ensure Canada's compliance with the fundamental rights of the group members.[64]

In response, the Government of Canada argued that the claim was not justiciable, as the orders sought would interfere with the other branches of government, and because the environment is a 'shared competency' that the federal government cannot remedy on its own. The Government also contended the applicable class action criteria were not met. The court agreed with the Government and dismissed on this last point. The Court also emphasized the urgent environmental challenge posed by climate change and took a broad interpretation of Charter rights, finding that the violations claimed were justiciable. However, it found the class description of all Quebecers aged 35 or younger was arbitrary, and therefore inappropriate, because it excluded, without reason, millions

[62] The NGO claimed rights to life, liberty and security and claimed that the right to equality and to a healthy environment are being infringed: *Environnement Jeunesse c Procuereur Général du Canada* 2019 QCCS 2885. This decision is under appeal. See Environnement Jeunesse website, <https://enjeu.qc.ca/justice-eng/> ; M Killoran, C Feasby and MM Huys, 'Climate Change Litigation Arrives in Canada' *Osler*, 5 February 2019, <https://www.osler.com/en/resources/regulations/2019/climate-change-litigation-arrives-in-canada>.

[63] *Environnement Jeunesse* ibid [13], citing *The Constitution Act*, 1982, c 11 in RSC 1985, Appendix II, No 44, Schedule B, *The Constitution Act*, 1982, Part I.

[64] ibid [3].

of Quebecers older than 35 who have or will experience the same violations of fundamental rights.[65] The court decided that a class action was not the procedurally correct legal avenue to bring such a climate case as it would be impossible for the court to identify any group that would reconcile fairness and effectiveness objectively.[66] However, this decision is under appeal, and it has been argued that the decision is inconsistent with an earlier similar class action brought against Volkswagen.[67] In that case, Volkswagen was sued for falsifying emissions test results and a punitive damages class action claim was allowed to proceed.[68]

A second case, *La Rose*, initiated in British Columbia (BC) courts in 2019 was brought by 15 child plaintiffs from across the country (both Indigenous and non-Indigenous).[69] The plaintiffs again alleged violations of Charter rights as well as the violation of the public trust doctrine (including by jeopardizing future rights to use resources such as the atmosphere, permafrost, navigable waters, foreshores and territorial sea) by the federal government.[70] Children and youth plaintiffs in the *La Rose* case grounded their claims in a failure by the Canadian Government to protect natural resources that are imperative for sustaining human life, by allowing GHGs to continue polluting the environment.[71] The plaintiffs claimed that Canada created a level of GHG emissions that is 'incompatible' with a stable climate system; failed to meet its own (largely inadequate) national GHG emission targets; and actively participated in and enabled the development, expansion, and operation of industries and activities involving fossil fuels that contribute to the nation's GHG levels.[72] The plaintiffs each alleged injuries particular to their age, including negative impacts on their physical, mental and social health, their cultural heritage, and hopes and aspirations for the future. The plaintiffs did not seek monetary damages, but instead requested declarations from the Court of the illegality of the Government's 'impugned conduct,'[73] and an order requiring the government to develop and implement a Climate Recovery Plan that is consistent with Canada's fair share of the global carbon budget.[74]

The Federal Court accepted the Government's motion to strike out the case in October 2020 on the basis that the section 7 and 15 Charter claims were not justiciable.[75] The court found that climate change required a holistic policy response, and therefore the claims were not justiciable as breaches of section 7 and 15, as any such determination touched upon political and economic questions that were unsuited to adjudication. On doing so the court took a traditional and deferential approach to the court's role in adjudicating Charter rights. The court held that issues

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[65] ibid [116–122].
[66] ibid [140].
[67] Association québécoise de lutte contre la pollution atmosphérique v. Volkswagen Group Canada, 2018 QCCS 174 (2018) QCCS 174.
[68] L Parker, 'The Disconnected Arrival of Climate Change Class Actions in Quebec: A Case Comment on ENvironnement JEUnesse v. Attorney General of Canada, 2019 QCCS 2885 and Association québécoise de lutte contre la pollution atmosphérique v. Volkswagen Group Canada, 2018 QCCS 174' (2020) 17(1) McGill Journal of Sustainable Development Law 100. The Supreme Court of Canada has dismissed the appeal of the class action certification in *Volkswagen. Volkswagen Group Canada Inc. v Association québécoise de lutte contre la pollution atmosphérique* 2019 SCC 53.
[69] *La Rose v Her Majesty the Queen* 2019 FCC, Court File No T-1750-19 (Statement of Claim of the Plaintiff) <http://climatecasechart.com/non-us-case/la-rose-v-her-majesty-the-queen/>.
[70] Ibid.
[71] *La Rose v Her Majesty the Queen* 2019 FCC, Court File No T-1750-19 (Statement of Claim of the Defendants) (paras 7–9) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200207_T-1750-19_reply.pdf>.
[72] ibid [5].
[73] ibid [5].
[74] ibid [9–10] .
[75] *La Rose v Her Majesty the Queen* 2020 FC 1008.

such as climate change could not be resolved through the application of law alone.[76] The court was not persuaded by the earlier decision in *Environnement Jeunesse*, which held that climate-related claims were justiciable under the Charter, stating simply that it was not bound by the earlier decision, and that the breadth of conduct claimed in the present case was broader than that claimed by *Environnement Jeunesse*.[77] The court did however rule that the public trust doctrine was justiciable. In relation to the public trust issue, it found that there was clearly a legal problem that the courts could resolve. However, the public trust claim was also dismissed, as the court ruled that the claim had no reasonable prospects of success.[78] The plaintiffs have since appealed.[79]

In a third case, *Mathur,*[80] seven young Canadian citizens, three of whom working specifically on Indigenous-led responses to climate impacts, sued the province of Ontario for government actions that allegedly violated the Charter. Unlike the *La Rose* case, here the plaintiffs did not focus on the public trust doctrine. Instead, they focused on Canada's international climate commitments under the Paris Agreement, as laid out in the province's GHG target to reduce of 30% by 2030, from 2005 levels, articulated in its Cap and Trade Cancellation Act, 2018.[81] The Cancellation Act, which is at the heart of this case, effectively reduced the GHG reduction target Ontario would have been subject to.[82] The plaintiffs pointed out that, per the Paris Agreement, state parties should progressively strengthen their emission targets over time—not weaken them.[83] This approach is similar to the strategy used in the *Urgenda* case in The Netherlands,[84] where parties focused both on human rights issues as well as the obligations of the Dutch state under the Paris Agreement. Unlike in The Netherlands, international treaty law is not directly binding in Canada, and so claims based on the Paris Agreement may not be as successful in Canada. The government's motion to dismiss was denied allowing this case to proceed.

A fourth case of human rights-based climate litigation takes a different approach. Brought not by youth plaintiffs, but rather by Indigenous communities, Dini Ze'(Lho'imggin), on behalf of two houses of the Wet'suwet'en, filed a legal challenge on 10 February 2020 against the Canadian Government.[85] Lho'imggin alleged that the Canadian Government's targets for the reduction of GHG emissions by 2030 were insufficient, and that as a result Canada violated the communities' constitutional and human rights under sections 7 and 15(1) of the Charter.[86] The claim is innovative as it foreground issues of climate justice for Indigenous communities and points to how the continuing impacts of racism, colonialism and discriminatory domestic policies in Canada contribute to the vulnerability of these communities.

Poverty and disadvantage are likely to increase in vulnerable populations as global warming

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[76] ibid [35–40].
[77] ibid [47].
[78] ibid [58].
[79] *La Rose v Her Majesty the Queen,* Court File No T-1750-19 (Notice of Appeal) http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201124_T-1750-19_appeal.pdf accessed 5 November 2021.
[80] *Mathur, et al. v Her Majesty the Queen in Right of Ontario* 2020 ONSC 6918, CV-19-00631627 (ON SC) (Reason for Decision).
[81] ibid [7].
[82] Cap and Trade Cancellation Act**,** S.O. 2018, c 13 https://www.ontario.ca/laws/statute/18c13.
[83] *Mathur* (n 80) [37–40].
[84] *Urgenda Foundation v State of The Netherlands* 2019 Case No 19/00135, Supreme Court.
[85] *Lho'immggin et al. v The Queen* [2020] FC 1059 (Statement of Claim of the Plaintiff) http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200210_NA_complaint.pdf [2, 27].
[86] *Lho'immggin et al. v The Queen*, [2020] FC 1059 (Decision [4].

increases.[87] Therefore claims by communities such as these are likely to increase in the future. Lho'imggin also claimed that Canada violated section 91 of the Constitution Act, 1867 by repeatedly failing to make laws under the statute's peace, order and good government power,[88] necessary to meet its commitments under the Paris Agreement,[89] and that these failures were contrary to the common law principles of public trust.[90] The plaintiffs sought a mixture of declaratory, mandatory and supervisory orders. They sought a declaration that existing statutory provisions that permit high-emission fossil-fuel export projects were unconstitutional, and a declaration that Canada is unable to meet its international global warming obligations — in particular, those under the Paris Agreement.[91] The plaintiffs also asked the court to require the defendant to establish an ongoing independent accounting of Canada's cumulative GHG emissions.[92]

In *Lho'imggin* the government's motion to strike was granted by the court but on the basis that section 91 of the Constitution Act, 1867[93] does not impose a duty on Canada to enact legislation, and that it exceeds the jurisdiction of the court to require the government to do so.[94] In addition, the claims made under sections 7 and 15 of the Charter were deemed too broad and therefore not justiciable.[95] The requirement of provincial co-operation in such a systemic issue also exceeded the jurisdiction of the court, and it was held that it would not be 'an economical and efficient investment of judicial resources' that would have a real effect on climate change'.[96] The Court stated that the issue of climate change, while undoubtedly important, lies in the realm of the executive and legislative branches of government, not the judicial branches.[97] The outcomes in this and the *La Rose* case mimic the approach taken by the United States Ninth Circuit in the *Juliana* case, which was based on equal protection provisions of the Fourteenth Amendment in the U.S. Constitution. In a 2:1 decision, the majority found that the plaintiffs had failed to prove standing. The court in *Juliana* found that the redress requested by the plaintiffs was beyond the jurisdiction and capacity of the courts to implement — it was too broad and required legislative action. In her dissenting opinion in the *Juliana* case, Judge Stanton critiqued this judicial reticence, accusing her fellow judges of 'throwing up their hands' and abdicating responsibility to act in the midst of the climate crisis.[98]

3.1 Successes and challenges in substantive human rights based arguments

Litigation, including class action suits, can play an important role in the face of regulatory blockages, as litigation can be a method of structurally 'going around' partisan political debates.[99] This could be the case in Canada, where existing legislative efforts fall below what is expected of countries under the Paris Agreement and demanded by successive scientific reports.[100] Climate litigation, often

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[87] IPCC (n 53), 8.
[88] *Lho'immggin et al.* (n 86) [11].
[89] ibid [10].
[90] ibid [13].
[91] ibid [7].
[92] ibid [8].
[93] This Constitutional provision is often referred to as the POGG power, authorizing the Government to 'make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces'.
[94] *Lho'immggin et al.* (n 86) [36].
[95] ibid [56, 62].
[96] ibid [74].
[97] ibid [77]. The plaintiffs have appealed this decision to the Federal Court of Appeal and a hearing is expected in the fall.
[98] *Juliana* (n 32), 33.
[99] HM Osofsky and J Peel, 'Energy Partisanship' [2017] 65 Emory LJ 695, 702, 761, 764.
[100] IPCC (n 53).

brought by youth plaintiffs, may be directed at governments to pressure them into taking their mitigation commitments seriously. There have been several examples of youth-led climate litigation around the world, with the *Juliana v United States* case attracting much attention in recent years.[101] Cases in the global South, brought by youth plaintiffs, have also gained traction.[102] This youth-led litigation trend has begun in earnest in Canada: the majority of Charter-based claims involve youth plaintiffs, as well as many members of Indigenous communities. The importance of Indigenous roles in climate litigation was highlighted in Part 2 above, and also appears to be an evolving trend in Charter-based claims in Canada. However, despite very similarly situated plaintiffs, not all cases in Canada have been successful, at least on their initial applications.

The cases reviewed above all rely on substantive rights as articulated in the Canadian Charter of Rights and Freedoms. Most of them involve climate-vulnerable constituents trying to protect their right to a safe climate, predominantly youth and/or Indigenous plaintiffs. While it is too early to determine whether these claims will be successful, as some of these cases are still pending, most of these cases have failed due to judicial reluctance to engage with the question of climate change and human-rights related climate harms.

The judicial reticence in Canadian climate litigation evident in the historical cases concerning the Kyoto Protocol has reappeared in these cases. This explains the judicial preference to dismiss most of the Charter-based cases summarized in Part 3 above on the basis of lack of justiciability. But it is not all doom and gloom for climate-related human rights claims. Canadian courts have also consistently stated that the Charter should be approached as a living tree, with broad and progressive judicial interpretations being favoured to ensure the Charter keeps pace with changing social norms.[103] Charter-based claims thus also benefit from a presumption of justiciability, and this presumption should be emphasized by plaintiffs going forward in any appeals. In addition, a recent Supreme Court case in 2020 evidences a progressive judicial interpretation of Section 15(1), taking a more expansive approach to equality rights,[104]and this more progressive approach could also be useful for plaintiffs to leverage in Charter based cases in the future.

The key difference between the *La Rose* and *Mathur* cases appears to be the way the claim was framed. Plaintiffs in *La Rose* brought objections to governmental conduct and inadequate GHG reduction targets writ large, whereas plaintiffs in *Mathur* tied the inadequate GHG reductions targets to specific Ontario legislation and highlighted regulatory inadequacies in provincial legislation that frustrate the ability to meet national and international climate commitments.[105] Narrower claims may

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[101] This case was a class action suit launched by young people in the US District Court for the District Court of Oregon, claiming that the actions of the federal government that caused climate change, as well as the government's inaction to prevent it, had violated the plaintiffs' Fifth Amendment Due Process rights by denying protection provided to previous generations. *Juliana v United States* 217 F. Supp. 3d 1224, 1233–34 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. Jan. 17, 2020). The procedural elements of the case are complex, but in January 2020, the Ninth Circuit ruled 2-1 to dismiss the lawsuit in *Juliana* 947 F.3d at 175, on the basis of lack of standing based on the inability of the court to provide redress. Judge Josephine Staton's dissent in the case, however, is notable. *See Juliana*, 947 F.3d at 1175–91 (Staton, J. dissenting).

[102] For example, in *Future Generations v Ministry of the Environment and Others* (2018), the Colombian Court also focused on the issue of human rights: PAA Alvarado and D Rivas-Ramírez, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court' (2018) 30(3) Journal of Environmental Law 519; J Setzer and L Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2019) Transnational Environmental Law 1.

[103] *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

[104] *Fraser v Canada* [2020] SCC 28. See also N Chalifour, J Earle and L Macintyre, (2021) 17(1) 'Coming of Age in a Warming World: The Charter's Section 15(1) Equality Guarantee and Youth-led Climate Litigation' Journal of Law and Equality 1.

[105] N Chalifour, J Earle and L MacIntyre, 'Detrimental Deference' *The Canadian Bar Association National Magazine*, 18 November 2020, <https://www.nationalmagazine.ca/en-ca/articles/law/opinion/2020/detrimental-deference>.

end up being a more successful approach for plaintiffs in these climate cases, making it easier for courts to avoid the non-justiciability route that broader claims seem to invite.

While the arguments put forward by plaintiffs in these two cases were both under section 7 and 15 of the Charter, the outcomes were different. Feasby et al. argue that the difference in the pleadings are a distinction without a difference, and in fact it was differing approaches of the courts to the character of Charter rights that explains the different outcomes.[106] Ontario Judge Brown in the *Mathur* case — decided just days after the final order in *La Rose* — denied the government's motion to dismiss, thus allowing the plaintiff's climate change case to move forward.[107] This decision was based on a more generous and open-ended interpretation of *Charter* rights, specifically on a progressive interpretation of the role of the court in enforcing them. The *La Rose* decision, on the other hand, takes a much narrower approach to justiciability, and consequently to the role of the courts in adjudicating climate change.[108]

There are similarities between the Lho'imggin outcome and the Canadian courts' tendency to invoke non-justiciability, deferring to legislators for the remedy sought by plaintiffs. Subsequently the plaintiffs in *Juliana* have amended their claim to request a declaratory remedy by the court, and plaintiffs in Canada should take note of this tactic. As discussed, two Canadian cases have already failed on issues of justiciability and the related question of whether courts are able to grant an appropriate remedy. A request for a declaratory judgment by the court that existing national climate action is insufficient might be a more successful tactic. Canadian courts might be more prepared to take a progressive interpretation of these Charter claims if the remedy requested is limited. Upon issuing declaratory judgments, Canadian courts could then leave it to legislators and politicians to determine the appropriate manner in which the State should meet its Charter obligations.[109] This was the approach taken recently by the Canadian Supreme Court in *Fraser v Canada*,[110] and would therefore not be a novel approach for the court to take.

There are, in fact, many scientific and policy tools that courts may look to in order to articulate a just and proportionate legal standard for Canada in such cases. To begin with, Canada's NDC, submitted under the Paris Agreement, anticipates a 30% reduction against 2005 levels by 2030, recently enhanced to a 40-45% reduction.[111] Revised and upgraded NDCs were expected to be submitted in 2021 in preparation for the next Conference of the Parties at the end of 2021 under the Paris Agreement. At the time of writing, a number of developed and developing countries have already agreed to net-zero emission targets by 2050, and this target will be reflected in their upgraded NDCs. Collective ambition is designed, under the Paris Agreement, to keep global temperature increases to a temperature threshold,[112] and the international climate agreement urges governments to work backwards from those temperature goals, using precise metrics,[113] to create national plans. These plans should be continuously upgraded to ensure they meet best available scientific targets, taking into account the needs of particularly vulnerable populations. Canada's new 2021 NDC

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[106] Feasby et al. (n 61), 246.
[107] *Mathur, et al.* (n 80) [268].
[108] Feasby et al. (n 61), 243.
[109] Chalifour et al. (n 104), 6.
[110] Fraser v Canada (n 104).
[111] Press Release, 'Prime Minister Trudeau announces increased climate ambition' (22 April 2021), <https://pm.gc.ca/en/news/news-releases/2021/04/22/prime-minister-trudeau-announces-increased-climate-ambition> accessed 24 June 2021.
[112] *The Paris Agreement* (n 24).
[113] See eg J Rogelj and others, 'Mitigation Pathways Compatible with 1.5ºC in the Context of Sustainable Development' in Valérie Masson-Delmotte et al. (eds), *Global warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018).

(referenced in Part 2) incorporates similar policy objectives. Canada and Canadian courts could follow suit to develop an enforceable Climate Recovery Plan by legislators that is consistent with upgraded NDCs, and therefore protective of Charter rights and compliant with any declaratory judgment issued by the courts.

In this vein, Chalifour and Earle note that Canadian courts could take a normative, purposive approach to sections 7 and 15 rights under the Charter.[114] Collins and Sossin note that Section 7 could be broadly interpreted to set standards that protect public health, and section 15(1) could require that these standards are responsive to the needs of vulnerable populations.[115] These are exercises that courts in other jurisdictions can, and have, undertaken. Courts in The Netherlands, and the French Administrative Court in Paris,[116] have conducted similar exercises regarding state emissions targets in the context of the long-term temperature goals in the Paris Agreement. While not directly effective in Canada, the European Convention on Human Rights, and therefore the *Urgenda* case that revolved around Convention rights, could be persuasive in Canada.[117] Other courts have also taken an oversight role in relation to domestic climate plans. For example, in the *Leghari v Federation of Pakistan* case in Pakistan,[118] Judge Syad Mansoor Ali Shah provided an extensive decision in 2015 based on Articles 9 and 11 of the Pakistani Constitution (protecting the rights to life, human dignity, property and information access), combined with international environmental law principles. He determined that together, these provisions provided a sufficient judicial toolkit for him to make a positive decision on the impacts of climate change.[119] His orders enforced existing laws and oversaw work by the Climate Change Commission, which led to increased and improved national targets.[120]

4. PROCEDURAL ENVIRONMENTAL HUMAN RIGHTS CLAIMS

Environmental human rights are well recognized in both international environmental and human rights law, and expansively elaborated in the 2018 Framework Principles on Human Rights and the Environment proposed by the former Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[121] Procedural environmental human rights, following Framework Principles, include rights to access information, prior assessment of proposed policies and projects, freedom of association, freedom of expression and peaceful assembly, public participation in environmental decision-making, and access to justice and effective remedies.[122] Moreover, the Framework Principles state that in order to ensure the exercise of these rights, a 'safe and enabling environment' should exist for 'individuals, groups and organs of society' dedicated to environmental human rights issues to 'operate free from threats, harassment, intimidation, and violence'.[123] These protections apply to Indigenous peoples,[124] and

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[114] Chalifour and Earle (n 30), 695.
[115] L Collins and L Sossin, 'Approach to Constitutional Principles and Environmental Discretion in Canada' (2019) 52(1) UBC L Rev 293, 308.
[116] J Lo, 'Court Condemns French Government over Climate Inaction with Symbolic €1 Fine' (Climate Home News, 3 February 2021) <https://www.climatechangenews.com/2021/02/03/court-condemns-french-government-climate-inaction-symbolic-e1-fine/> accessed 24 June 2021.
[117] Lantz (n 59), 159; Feasby et al. (n 61), 217.
[118] Lahore High Court P. No 25501/2015.
[119] J Setzer and L Benjamin, 'Climate Change Litigation in the Global South: Filling in Gaps' (2020) AJIL 59.
[120] ibid.
[121] Framework Principles (n3)
[122] ibid, Framework Principles 5, 7, 8, 9, 10.
[123] ibid, Framework Principles 4. The importance of non-discrimination (Principle 3), attention to vulnerability (Principle 14) and the rights of Indigenous Peoples (Principle 15) are cross-cutting concerns.
[124] Ibid, Framework Principle 4 at para 10;

additionally, before approving measures that might affect the lands, resources or territories of Indigenous peoples, states are obligated to seek their free, prior and informed consent (FPIC).[125] While the Special Rapporteur acknowledged in his introduction to the Framework Principles that 'not all States have formally accepted all of these norms', he nevertheless recommended that 'States should accept the framework principles as actual or emerging international human rights law' that 'at a minimum' represents best practices.[126]

Unlike many nations, Canada has chosen not to become a party to a procedural environmental rights treaty such as the Aarhus Convention.[127] While Canada now endorses the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),[128] governments and courts in Canada have also been slow to fully implement the rights of Indigenous peoples even where historic treaties are in place.[129] However, legislation specifically designed to implement UNDRIP has been passed in at least one province and new federal legislation implementing UNDRIP in response to the TRC Calls for Action came into force in June 2021.[130] It remains to be seen what difference these legislative initiatives might make for the protection of Indigenous rights in Canada. However, it is clear is that the exercise of procedural environmental human rights by environmental human rights defenders, including Indigenous peoples, plays an important role in pushing governments and businesses to take responsible climate action. For this reason Canadian cases that raise procedural rights issues also merit attention in any analysis of rights-based climate litigation.

In 2018, the newly elected Ontario government's first action was to enact the Cancelling Regulation,[131] which rendered inoperable the cap-and-trade program developed and implemented by the previous provincial government, and even made it an offence subject to imprisonment to engage in transactions under the old program.[132] However Ontario, unlike many provinces, has a long-standing Environmental Bill of Rights (EBR),[133] which mandates public consultation over governmental environmental action including regulation-making, and specifically mandates the posting of notice of government decisions, the invitation of public comments, that the government consider a public comments received, and that the government advises the public on how the public comments affected its decision.[134] Despite the new Ontario government's attempt to get around this legislated consultation requirement by posting an exemption notice, Greenpeace successfully argued that the cancellation of the cap-and-trade program regulations was unlawful unless there was compliance with the EBR. However, by the time the case was heard the government had complied with the procedural requirements of the EBR and lawfully repealed the cap-and-trade regulations. As a result, the majority found the application for a declaration would serve no purpose and was

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[125] Ibid, Framework Principles 15, especially at paras 51-52.
[126] ibid A/HRC/37/59 at p3 [8-9].
[127] Government of Canada, 'Convention on Access to Information: Public participation in the Aarhus Convention and the Kiev Protocol' < https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/convention-access-information-public-participation-aarhus-convention-kiev-protocol.html> accessed 5 November 2021. The more recent Latin American Escazu Agreement is limited to members of the region.
[128] UNGA, *United Nations Declaration on the Rights of Indigenous Peoples: resolution adopted by the General Assembly*, (2 October 2007) UN Doc A/RES/61/295.
[129] See generally J Borrows and M Coyle, (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, 2017). On FPIC and extractive companies, see S Imai, 'Consult, Consent, and Veto: International Norms and Canadian Treaties' in Borrows and Coyle, ibid, 370-408.
[130] *Declaration on the Rights of Indigenous Peoples Act*, SBC 201, c 44; Bill C-15 *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples,* 2nd Sess, 43rd Parl, 2021, cl 4(a)(b) (assented to 21 June 2021).
[131] *Prohibition Against the Purchase, Sale, and Other Dealings with the Emission Allowance and Credits Regulation*, O Reg 386/18.
[132] *Greenpeace Canada v Minister of the Environment (Ontario)* 2019 ONSC 5629, paras 9–10.
[133] *Environmental Bill of Rights, 1993*, SO 1993, c 28.
[134] Ibid, ss 15, 27, 35, 36(4); *Greenpeace Canada* (n 132), para 11.

moot.[135]

Subsequently, in 2019, the Ontario government enacted the Federal Carbon Tax Transparency Act,[136] which mandated (subject to penalty) that a sticker be visibly placed on every gas pump in Ontario criticizing the federal government's Greenhouse Gas Pollution Pricing Act,[137] that stated in part 'The federal carbon tax will cost you'.[138] The Canadian Civil Liberties Association (CCLA) successfully challenged this misleading sticker requirement as 'compelled speech' in violation of section 2(b) of the Charter that could not be justified under section 1.[139] Interestingly, the CCLA was granted standing in part because retailors were reluctant to appear in the case.[140] This reluctance existed despite the fact that business groups, including a petroleum marketers association, had expressed concern that the combination of a penalty with the political nature of the speech amounted to a rights violation that would be particularly detrimental to small business owners.[141] From the perspective of the 2018 Framework Principles, this case may be seen as not only raising a violation of freedom of expression (Principle 5), but also a breach of state obligations to provide public education and awareness of environmental matters (Principle 6) and to provide access to environmental information (Principle 7). State obligations to guarantee access to environmental information extend to information about the 'causes and consequences of the global climate crisis'.[142] According to the Office of the High Commissioner of Human Rights (OHCHR), businesses also have a responsibility to 'refrain from supporting information campaigns that are based on inaccurate, misleading and unfounded assertions' about climate change.[143] Yet on the facts here, compliance with that business human rights responsibility would have put businesses in violation of domestic Canadian law.

The current Alberta government has also been particularly hostile to environmentalists, supporting a 'public inquiry' into foreign funding of environmentalists and spending millions on a 'war room' designed to promote its belief that US-based groups are behind Alberta's oil and gas woes (despite no evidence that this is the case).[144] These initiatives have been described by prominent Canadian environmentalist David Suzuki as being 'designed to silence or stigmatize those who raise legitimate questions about an expanding fossil-fuel industry during a climate

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[135] *Greenpeace Canada* (n 132), paras 73, 82, 87–88, 111. The repeal of the legislation was an election promise.
[136] *Federal Carbon Tax Transparency Act, 2019,* SO 2019, c 7.
[137] *Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12.
[138] *Corporation of the Canadian Civil Liberties Association v Ontario (Attorney General)* 2020 ONSC 4838, [1–4].
[139] ibid [41–80]. Sections 2 and 1 of the *Charter* (n2) read as follows:
2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.
1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
[140] ibid [37-39].
[141] ibid [33-34].
[142] Safe Climate (n6) at para 64; Key Messages on Climate and Business (n10) at 7 (measure 02).
[143] Key Messages on Climate and Business (n10) at 7 (measure 03). However the Key Messages do not appear to contemplate a situation where it is the state that is mandating businesses to provide misinformation to the public.
[144] D Suzuki, 'Alberta's 'war room' is an attack on democracy' (*The Georgia Straight*, 11 February 2020) <https://www.straight.com/news/1359006/david-suzuki-albertas-war-room-attack-democracy> accessed 22 June 2021. See further N Kusnetz, 'In Attacks on Environmental Advocates in Canada, a Disturbing Echo of Extremist Politics in the US' (*Inside Climate News,* 24 February 2021) https://insideclimatenews.org/news/24022021/tar-sands-alberta-keystone-canada-climate-denial/ accessed 5 November 2021.

crisis'.[145] The public inquiry was unsuccessfully challenged by Ecojustice, a Canadian environmental law NGO, which had argued in court that the inquiry was unlawful and biased.[146] From the perspective of the 2018 *Framework Principles*, this example raises concerns over state obligations to provide a 'safe and enabling environment' for environmental human rights defenders to operate, 'free from threats, harassment, intimidation and violence' (Principle 4).

The Alberta government's hostility to environmentalists is in response to a long history of activist opposition to fossil fuel development and to pipelines designed to transport oil and gas from Alberta's oil sands to downstream refineries and users. This opposition has sometimes taken the form of legal action seeking judicial review of a government decision to approve a pipeline or a new oil and gas project due to a failure to adequately integrate consideration of GHG emissions into environmental assessment processes.[147] Such judicial review cases are an example of the exercise of rights of public participation and access to justice in environmental decision-making (Framework Principles 9 and 10). Yet these cases also reveal the challenges that arise in overcoming limitations in environmental legislation that does not adequately incorporate consideration of climate change in assessment and approval processes. Perhaps counterintuitively, as the social expectations of companies have evolved, the failure of federal and provincial regulatory processes to adequately address both climate change and Indigenous rights issues appears to also create challenges for fossil fuel companies. For example, regulatory uncertainty led to the withdrawal in 2020 of the Frontier Oil Sands project by the company CEO, before the environmental assessment process could be completed.[148]

Indigenous-led opposition to Canadian fossil fuel projects should also be understood as a form of human rights-based climate litigation, although the express purpose of such litigation is not primarily to address climate change, but rather to assert Indigenous self-determination. Some of these cases, such as *Tseil-Waututh Nation v Attorney General of Canada,* challenging the Trans Mountain pipeline, elaborate the nature of the government duty to consult and accommodate Indigenous peoples under Canadian constitutional law and the implications for government of failing to meet the duty.[149] Yet, once a court has concluded that its duty to consult and accommodate is met, as was the case in *Tseil-Waututh* upon appeal, and government approvals for the pipeline have been issued,[150] climate activists including Indigenous Peoples have few legal options. They might choose

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[145] ibid Suzuki.

[146] Ecojustice Canada Society v Alberta, 2021 ABQB 397. See also earlier decision denying Ecojustice's application for an injunction to stay to Public Inquiry proceedings, Ecojustice Canada Society v Alberta, 2020 ABQB 736.

[147] NJ Chalifour, 'Case Comment: A (Pre)Cautionary Tale about the Kearl Oil Sands Decision' (2009) 5(2) McGill Journal of Sustainable Development Law 251, 2009 CanLIIDocs 40, <http://www.canlii.org/t/284f>.

[148] See letter from Don Lindsay to Minister Wilkinson (February 23, 2020): <https://www.teck.com/media/Don-Lindsay-letter-to-Minister-Wilkinson.pdf> accessed 5 Nove,ber 2021 (stating in part: 'global capital markets are changing rapidly and investors and customers are increasingly looking for jurisdictions to have a framework in place that reconciles resource development and climate change, in order to produce the cleanest possible products. This does not yet exist here today and, unfortunately, the growing debate around this issue has placed Frontier and our company squarely at the nexus of much broader issues that need to be resolved. In that context, it is now evident that there is no constructive path forward for the project. Questions about the societal implications of energy development, climate change and Indigenous rights are critically important ones for Canada, its provinces and Indigenous governments to work through.' See further IAAC, 'Frontier Oil Sands Project' <https://iaac-aeic.gc.ca/050/evaluations/proj/65505> accessed 5 November 2021.

[149] *Tsleil-Waututh Nation et al. v Attorney General of Canada et al.* 2018 FCA 153.

[150] *Tsleil-Waututh Nation v Attorney General of Canada, et al.* 2019 FCA 224, leave to appeal to the SCC dismissed with costs 5 March 2020 <https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/18179/index.do>.

to engage in peaceful protest and risk being subject to an injunction and arrest,[151] or bring human rights-based claims such as in *Lho'imggin*, as discussed above, which included among its arguments that current environmental assessment laws are inadequate.[152]

Recent Canadian Indigenous rights jurisprudence has taken an important step forward in recognizing that the cumulative impacts of resource development can have such significant adverse impacts as to amount to a breach of a treaty.[153] In the case of *Yahey v British Columbia* the Blueberry River First Nation alleged that (in the words of Justice Burke):

> the cumulative effects from a range of provincially authorized activities, projects and developments (associated with oil and gas, forestry, mining, hydroelectric infrastructure, agricultural clearing and other activities) within and adjacent to their traditional territory [ ] has resulted in significant adverse impacts on the meaningful exercise of their treaty rights, and that amount to a breach of the Treaty.

In finding in favour of the First Nation, Justice Burke concluded in part that:

> the extent of the lands taken up by the Province for industrial development (including the associated disturbances, impacts on wildlife, and impacts on Blueberry's way of life), means there are no longer sufficient and appropriate lands in Blueberry's territory to allow for the meaningful exercise by Blueberry of its treaty rights. The cumulative effects of industrial development authorized by the Province have significantly diminished the ability of Blueberry members to exercise their rights to hunt, fish and trap in their territory as part of their way of life and therefore constitute an infringement of their treaty rights. The Province has not justified this infringement.[154]

This June 2021 decision has been described as dropping a 'bombshell' on the natural gas industry in British Columbia.[155] Yet, climate change was not among the cumulative impacts at issue in this decision. Indeed, hydro-dam development, often touted as a green energy solution, was among the industrial activities found to infringe the Blueberry River First Nation's treaty rights, as well as oil and gas development. These concerns about the impacts of hydro projects on Indigenous rights are not isolated, and are consistent with concerns raised by other Indigenous peoples across Canada who have been challenging approvals of hydro projects in court, and after unsuccessful court actions, have faced arrest and jail for engaging in peaceful protest and blockades to prevent such projects.[156]

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[151] See A Brown and A Bracken, 'NO SURRENDER: Police Defend a Gas Pipeline Over Indigenous Land Rights, Protestors Shut Railways Across Canada' (*The Intercept,* 23 February 2020) <https://theintercept.com/2020/02/23/wetsuweten-protest-coastal-gaslink-pipeline/> accessed 24 June 2021.

[152] *Lho'imggin* (n 86), paras 15(e), 54, 67–68.

[153] *Yahey v British Columbia,* 2021 BCSC 1287 (at para 3 p8). The facts of this case concerned history Treaty 8. The BC government has decided not to appeal the decision. Andrew Kurjata, 'B.C. won't appeal landmark First Nation court victory' CBC News (28 July 20210 https://www.cbc.ca/news/canada/british-columbia/treaty-8-province-appeal-1.6121474 accessed 5 November 2021.

[154] Ibid (at para 3 p10)

[155] N Bennett, 'Court drops bombshell on B.C. natural gas industry' (*Business Intelligence for B.C. (BIV),* 30 June, 2021) <https://biv.com/article/2021/06/court-drops-bombshell-bc-natural-gas-industry> accessed 5 November 2021; see further R Hamilton & N Ettinger, 'Blueberry River First Nation and the Piecemeal Infringement of Treaty 8' (July 20, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/07/Blog_RH_NE_Blueberry_Treaty_Rights.pdf accessed 5 November 2021.

[156] See for example the Muskrat Falls hydro project where protestors raised concerns of methylmercury contamination of water and food sources. J Brake, 'Land protectors face criminal charges for protecting water, food, culture' (*The Independent,* 18 March 2017) <https://theindependent.ca/news/land-protectors-face-criminal-charges-for-defending-water-food-culture/> accessed 24 June 2021*; Grand Riverkeeper, Labrador Inc. v Canada (Attorney General)* 2012 FC 1520.

Framework Principle 5 speaks of the importance of states respecting and protecting the exercise of rights of peaceful assembly in relation to environmental matters.[157] Non-Indigenous Canadian climate activists protesting pipelines have also found themselves subject to contempt of court proceedings as a result of direct action to block pipeline development in contempt of injunctions ordered to keep them from disrupting pipeline development.[158] For example, in *Mivasair,* peaceful protesters blocked Trans Mountain Pipeline's access to terminal areas in British Columbia, and were charged with contempt of court for public disobedience because they continuing to block access to the terminal despite the company's successful application for an injunction preventing them from doing so.[159] Two of the protestors argued that they were entitled to a defence of necessity on the basis that the construction of the pipeline could not be reconciled with Canada's GHG reduction commitments.[160] Moreover, the protesters sought a declaration that section 7 of the Charter entitled them to a fundamental right to a stable climate.[161] Both arguments were unsuccessful. The first argument relating to the necessity defence was unsuccessful despite the fact the necessity defence had been successfully made out in other countries, as the court found that on the facts the protestors had legal alternatives such as an appeal.[162] The second argument was unsuccessful due in part to the court's conclusion that there was 'no clear and imminent peril' to the Charter rights given the process of climate change happens incrementally over many decades.[163] However, it is possible that in future this second argument might have more traction in light of the language used by the Supreme Court of Canada in the carbon pricing litigation, together with the impactful nature of the extreme heat dome of the summer of 2021.

In 2019, federal environmental assessment legislation was replaced by the Impact Assessment Act (IAA).[164] The new IAA now requires consideration of whether proposed projects 'hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change'.[165] However, a regional assessment of oil and gas exploration off the coast of Newfoundland and Labrador under the new IAA suggests that there is much more work to be done to ensure climate concerns are satisfactorily incorporated into environmental assessment and approval processes, and this regional assessment is now currently undergoing judicial review.[166] Plaintiffs in this case argue that the regional assessment failed to consider scientific reports on the impact of methane leakage arising from oil and gas activities on

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[157] Framework Principles (n3) Principle 5, see especially paragraph 13 of the commentary, stating in part that 'blanket restrictions on protests surrounding the operations of mining, forestry or other resource extraction companies are unjustifiable'.

[158] *Trans Mountain Pipeline ULC v Mivasair* 2019 BCSC 50, affirmed by *Trans Mountain Pipeline ULC v Mivasair* 2020 BCCA. However, Indigenous women have claimed they are more harshly targeted by police. See Justin Brake, 'Women speak out against criminalization of land defenders' (Aug 3, 2018) *APTN National News* <https://www.aptnnews.ca/national-news/women-speak-out-against-criminalization-of-land-defenders-water-protectors/> accessed 5 November 2021.

[159] *Mivasair* ibid [6–7].

[160] ibid [10–11].

[161] ibid [32].

[162] ibid [28–30, 53–61].

[163] ibid [54-55]. Nevertheless, see [32–52] which consider the impact of climate change and the right to a safe climate.

[164] SC 2019, c 28.

[165] SC 2019, c 28, s 22. See further M Doelle, 'Integating Climate Change Mitigation into the *Impact Assessment Act'* in M Doelle & A J Sinclair, eds, *The Next Generation of Impact Assessment: A Critical Review of the Canadian Impact Assessment Act* (Irwin Law, 2021). See also chapters on regional and strategic assessment.

[166] *Sierra Club et al., v Canada (AG), Minister of Environment and Climate Change* 2020 FC 663 (application for interim order denied; motion to dismiss also denied).

cumulative effects and climate change,[167] and failed to assess the effect of the drilling on Canada's ability to meet its climate change commitments.[168] At the time of writing, a decision on the merits is pending. Framework Principle 8 calls for the prior assessment of the environmental impacts of proposed projects, including 'potential effects on the enjoyment of human rights'.[169] While the new IAA is an improvement upon the previous version of the Act, it still does not explicitly incorporate a human rights approach.[170] This is not in accordance with Framework Principle 8, which endorses the business responsibility to respect human rights (BHR), including in the conduct of human rights impact assessments by proponents as part of the environmental assessment process.[171] This assessment should be informed by attention to the human rights implications of climate change.[172]

4.1 Overcoming procedural environmental human rights challenges

As explored in this Part, Canadian plaintiffs have sought to exercise a wide range of procedural environmental human rights in order to push back against governments and government decision-makers that are either hostile to climate action or reluctant to make decisions that would be contrary to industrial development. While some of the most effective litigation and peaceful protest against fossil fuel pipelines has been led by Indigenous peoples, these cases against fossil fuel pipelines have often been motivated primarily by Indigenous rights to self-determination rather than the need to combat climate change.[173] Yet, even as some Indigenous communities have resisted these projects, other Indigenous communities have been supportive of the same projects, in some cases even seeking an equity ownership stake in pipelines.[174] At the same time, Indigenous led groups such as Indigenous Climate Action are actively supporting youth-led climate action in opposition to extractive industries[175] and critiquing the federal government for failing to fully consult Indigenous peoples in the development of climate policy.[176] This suggests that the potential might exist for

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[167] ibid, (Statement of Claim of the Plaintiff) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200511_2020-FC-663_application.pdf> accessed 5 November 2021, [20].

[168] ibid [18, 20].

[169] Framework Principles (n3), Principle 8. This includes transboundary and cumulative effects. Commentary to Principle 8 at para 20.

[170] A Majekolagbe, SL Seck and P Simons, 'Human Rights and the Impact Assessment Act: Proponents and Consultants as Duty Bearers' in M Doelle and J Sinclair (eds), *The Next Generation of Impact Assessment: A Critical Review of the Canadian Impact Assessment Act* (Irwin Law, 2021).

[171] ibid; Framework Principles (n 3), Principle 8, Commentary [22]. See also Principle 12, Commentary [35].

[172] On human rights due diligence, carbon majors, and climate change, see C Higham, *Reimagining Responsibility: How Human Rights Due Diligence Practices Could Inform Judicial Responses to Climate Accountability Litigation* (LLM thesis, UBC, 2018).

[173] On potential of Indigenous led climate litigation see T Pacquette, 'The Inhabitants of an Imagined Body: The Crown's Duty to Consult and Accommodate Indigenous Communities in the Artic Adversely Affected by Climate Change' (2021) 15(2) McGill Journal of Sustainable Development Law 155.

[174] K Balx, 'Plans to sell Trans Mountain pipeline to Indigenous groups take another step forward' *CBC News* (19 February 2021) <https://www.cbc.ca/news/business/bakx-tmx-pipeline-negotiations-1.5918712> accessed 24 June 2021 (noting that the Federal Court had found that of the 129 Indigenous communities potentially affected by the pipeline project, 120 either support it or do not oppose it). See also K Balx, 'B.C. First Nation and partners propose new $10B LNG megaproject' CBC News (19 July 2021) <https://www.cbc.ca/news/business/bakx-ksi-lisims-lng-1.6107901> accessed 5 November 2021

[175] Indigenous Climate Action, 'Producing Resources and Tools: Indigenous Climate Action Youth Wellness Awards' <https://www.indigenousclimateaction.com/resources> accessed 22 August 2021 (the purpose of these is stated in part as: 'ICA is committed to lifting up young Indigenous Peoples who are doing the hard work of climate justice organizing and engaging with frontlines that oppose extractive industries in order to protect our homelands / Mother Earth.')

[176] E Deranger, 'Climate Emergency & the Colonial Response' *Yellowhead Institute*, 2 July 2021, <https://yellowheadinstitute.org/2021/07/02/climate-emergency-colonial-response/> accessed 5 November 2021; See further Indigenous Climate Action, 'Decolonizing Climate Policy in Canada: Report from Phase I' (March 2021).

future litigation arguing that there has been a failure to consult Indigenous peoples in the development of climate policy.

However, this is not the whole story. A limitation of the survey of Canadian rights-based climate cases in both Part 3 and 4 of the present article is that it does not capture those plaintiffs who choose not to bring court actions or might be reluctant to engage the courts, nor does it capture those who might wish to exercise their environmental human rights through taking direct action, yet are prevented from doing so because they fear the consequences of arrest. This is a serious issue in Canada due challenges concerning access to justice that are particularly evident in the environmental context. It is possible that Canada's failure to become a party to the Aarhus Convention together with its slow embrace of UNDRIP have contributed to these failings.[177] Another barrier to bringing litigation is that costs rules create uncertainty for plaintiffs who, if they lose, might find themselves paying a portion of the legal costs of defendants.[178] The risk of adverse cost orders have been frequently identified as a major deterrent for public interest environmental litigation and for Indigenous plaintiffs.[179] Even though protective costs orders are available, they are rarely granted and the fact that plaintiffs must bring a motion to secure them creates its own costs risks and disincentives.[180] Securing class action certification of environmental actions has also proved challenging in much of Canada.[181] While Quebec has often been put forward as the exception, the experience of ENvironment JEUnesse as discussed in Part 3 suggests that certification could be even more challenging in the climate context.

One key theme that emerges from the procedural environmental human rights cases canvassed here is that governments might not only be reluctant to embrace climate action, but might be so hostile to it that they force businesses to engage in climate mis-information, or actively seek to undermine the work of environmental organizations. Given this reality, an expansive understanding of environmental human rights is necessary in order to present a full picture of the extent to which legal actions can support climate action, and the extent to which barriers exist. When barriers to access to justice are sufficiently high, peaceful protest or direct action becomes a necessary step for those willing to take this step. This reality points to the importance of acknowledging and challenging the criminalization of land and water defenders, including Indigenous women,[182] as well as understanding that the recommendations of the National Inquiry Into Missing and Murdered Women and Girls with regard to extractive industries are a crucial piece of the puzzle.[183]

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[177] S Robinson, 'Procedural Environmental Rights in Canada and the Promising Possibilities of the Aarhus Convention' (unpublished paper, March 2021, on file with author).

[178] M Twigg, 'Costs immunity: banishing the bane of costs from public interest litigation' (2013) 36(1) Dalhousie Law Journal 193-238 at 205-207; M Molavi, 'Law's financialization: litigation finance and multilayer access to justice in Canada' (2018) 33(3) Canadian Journal of Law and Society 425-445. See also *Lockridge v Director, Minister of the Environment*, 2012 ONSC 2316.

[179] Canadian Environmental Law Association, Ecojustice, and Environmental Law Centre, 'Costs and Access to Justice in Public Interest Environmental Litigation: Submissions to the Federal Court of Appeal and Federal Court Rules Committee' (November 23, 2015).

[180] Ibid at pp11-13.

[181] M Molavi, 'Access to justice and the limits of environmental class actions in Ontario' (2020) 35(3) Canadian Journal of Law and Society 391-412.

[182] Anya Zoledziowski, 'Governments That Are Occupying Land Are Criminalizing Indigenous Peoples for Occupying Land' (22 April 2021), *Vice,* <https://www.vice.com/en/article/z3xeae/governments-that-are-occupying-land-are-criminalizing-indigenous-peoples-for-occupying-land> accessed 5 November 2021. See further Yellowhead Institute.

[183] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls,* vol 1A (2019) at 584-94. The calls to justice explicitly note the need to ensure the safety of Indigenous women and girls at all stages of extractive operations including project planning and assessment. Ibid at 196 ('Calls to Justice: Calls for Extractive and Development

5. TRANSNATIONAL CORPORATE ACCOUNTABILITY HUMAN RIGHTS-BASED CLIMATE ACTIONS

A complete consideration of Canadian human rights-based climate litigation must also contemplate the potential of litigation to invoke the independent responsibility of business enterprises to respect human rights in accordance with the 2011 UNGPs.[184] However, to date, no human rights-based climate litigation in Canada has been brought directly against corporate actors.[185] Indeed, to date there has been little if any discussion of the possibility that plaintiffs from outside of Canada might also consider using Canadian courts to sue Canadian-based companies to seek to reduce their emissions, or to recover from those companies the costs of climate harm. Yet it may be only a matter of time before such litigation might be initiated. In addition, human rights claims against corporations by particularly vulnerable communities within Canada are also a distinct possibility.[186] Over twenty years ago, the first tort claim brought in Canadian courts by foreign plaintiffs against a Canadian-based transnational corporation raising allegations of environmental harms overseas was dismissed before the merits stage on the basis of the discretionary doctrine of *forum non conveniens*.[187] After many unsuccessful attempts,[188] several human rights-based cases are proceeding and some have even settled, although many hurdles remain.[189] Of particular interest is the recent Supreme Court of Canada decision in *Nevsun,* which opens the door to the possibility that claims against transnational corporations could be brought in Canadian courts, alleging violations of customary international law human rights norms.[190] Might such a claim be framed against a carbon-intensive fossil fuel company (or carbon major)?

If fully exploited, it has been alleged that the oil sands would exhaust 16% of the global carbon budget to limit warming to 1.5°C.[191] Many actors in the Canadian oil sands are or were multinational companies. Up to 2017, companies such as ConocoPhilips, ExxonMobil, Royal Dutch Shell and BP owned significant stakes in the area.[192] Since 2017, a number of these MNEs have sold their stakes to domestic companies, leaving over 70% of activity in the oil sands in the hands of Canadian companies such as Canadian Natural Resources, Cenovus, Suncor Energy and Imperial

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Industries 13.1 – 13.5'). The report adopts an inclusive definition of women and girls encompassing the rights of '2SLGBTQQIA people'.

[184] See OHCHR Key Messages on Climate Change and Business (n10); UNGPs; (n10) Safe Climate report (n6).

[185] A possible exception is the *Volkswagen* class action (n 68 and accompanying text). See further NRCan, National Issues Report 2021, Chapter 8 <https://changingclimate.ca/national-issues/chapter/8-0/> accessed 5 November 2021, at Chapter 8.7 (climate litigation against the private sector).

[186] See for example *Milieudefensie v Royal Dutch Shell* [2021] C/09/571932 / HA ZA 19-379.

[187] *Recheches Internationales Québec v Cambior Inc* [1998] QJ No 2553 (QL); SL Seck, 'Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law' (1999) 37 Can YB Int'l Law 139.

[188] See, for example, *Yassin v Green Park International Inc* 2010 QCCA 1455 (CanLII), leave to appeal to SCC dismissed with costs, *Bil'in (Village Council) v Green Park International Inc.* 2011 CanLII 10843 (SCC), leave to appeal to SCC dismissed with costs; *Piedra v Copper Mesa Mining Corp* 2010 ONSC 2421, aff'd 2011 ONCA 191.

[189] *Choc v Hudbay Minerals Inc* (2013), 116 OR (3d) 674 (Ont. SCJ); *Garcia v Tahoe Resources Inc.* 2017 BCCA 39 (BC CA), leave to appeal refused *Tahoe Resources Inc. v Adolfo Agustin Garcia, et al.* 2017 CarswellBC 1553 (SCC).

[190] *Nevsun* (n 4).

[191] Oil Change International, 'Climate on the Line: Why New Tar Sands Pipelines Are Incompatible with Paris Goals' (January 2017), 4.

[192] Rainforest Action Network, 'List of Tar Sands Companies' Reserves as at end of 2016' <https://www.ran.org/list-tar-sands-companies> accessed 5 November 2021.

Oil.[193] An assessment of the contribution of MNEs such as these has been calculated by Richard Heede, who focused on the historical emissions of the largest emitting companies and state-owned enterprises. Within Heede's top 20 emitters' are a number of MNEs that have or have had a stake in the Canadian oil sands. Additionally, Canadian companies appear within Heede's study in the list of 90 carbon majors, including Encana at number 62, Suncor at number 67, Canadian Natural Resources at 76, and Talisman at number 79.[194] Many of these same companies have formed a net zero alliance, with ambitions to achieve net zero emissions by 2050.[195] It remains to be seen what concrete plans these companies will adopt to achieve these ambitions, however, their stated commitments illustrate growing investor pressure to present themselves as being proactive on climate responsibilities.

The role of transnational litigation is particularly relevant for multinational entities such as the carbon majors, which have subsidiaries and/or operations in disparate jurisdictions around the world. MNEs are sensitive to judicial decisions in various jurisdictions due to their global footprints. While litigation against carbon majors has exploded in the United States and in a few other jurisdictions, Canada has so far seen no litigation initiated against carbon majors in Canadian courts. However, as both the impacts of climate change and of litigation amplify in the coming years, it is likely that Canada, and Canadian carbon majors, will face suits. In this connection, it is interesting that the approach of Canadian courts to the doctrine of *forum non conveniens* has thus far diverged from the approach taken by UK courts. Canadian courts have agreed to hear select transnational corporate accountability cases alleging human rights violations that occurred in states whose judicial systems offer no possibility of access to justice.[196] Furthermore, recent Canadian jurisprudence emerging from litigation over the enforcement of the foreign judgment in the litigation known colloquially as Chevron-Ecuador, has confirmed that overcoming the doctrine of separate legal personality may be challenging in Canadian courts.[197] This is despite arguments from legal scholars that overcoming this doctrine is essential for environmental and climate justice.[198]

Nevertheless, the 2020 *Nevsun* decision offers a potentially promising development for future human rights-based climate litigation in Canada, although the facts in that case raised issues of forced labour in Eritrea rather than environmental or climate concerns.[199] In *Nevsun*, the majority of the Supreme Court of Canada held that corporations may be held liable if they have breached customary international law (CIL) norms, as international law has evolved in such a way that it is not plain and obvious that corporations enjoy a blanket exclusion under CIL from direct liability for violations of 'obligatory, definable, and universal norms of international law.'[200] However, ultimately

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[193] C Varcoe, 'Foreign Sell-off of Oilsands Shouldn't Spark Anxiety' (*Calgary Herald*, 10 April 2017) <https://calgaryherald.com/business/energy/varcoe-foreign-sell-off-of-oilsands-shouldnt-spark-alberta-anxiety> accessed 24 June 2021.

[194] Heede (n 27), Supplementary Table 3, 7.

[195] Reuters, 'Canada's oil sands producers form alliance to achieve net-zero emissions by 2050' (12 June 2021) https://www.reuters.com/business/sustainable-business/canadas-oil-sands-producers-form-alliance-achieve-net-zero-emissions-by-2050-2021-06-09/ accessed 5 November 2021.

[196] See *Tahoe Resources* (n 189), and *Araya v Nevsun Resources Ltd.* 2017 BCCA 401 (BC CA). On the origin of the divergence between the UK and Canadian approach to *forum non conveniens,* see Seck (n 187).

[197] *Yaiguaje v Chevron Corporation* 2018 ONCA 472, leave to appeal to the SCC dismissed with costs, *Yaiguaje v. Chevron Corporation*, 2019 CanLII 25908 (SCC). See also earlier decision in *Chevron Corp v Yaiguaje* 2015 SCC 42.

[198] L Benjamin, 'Group Companies and Climate Justice' (2021) Current Legal Problems, 1-33 ; SL Seck, 'Relational Law: Re-imagining Tools for Environmental and Climate Justice' (2019) 31(1) Canadian Journal of Women and the Law (special issue edited by SL Seck and P Simons, 151–177), 160-162; SL Seck, 'A Relational Analysis of Enterprise Obligations and Carbon Majors for Climate Justice' (2021) 11(1) Oñati Socio-Legal Series 254.

[199] *Nevsun* (n 4).

[200] *Nevsun* (n 4), [113].

it is left to the trial judge to determine whether the 'specific norms [of customary international law] relied on' by the plaintiffs in each case 'are of such character' as to qualify as obligatory universal norms, and, if so, 'whether the common law should evolve so as to extend the scope of these norms to bind corporations.'[201] The majority noted that Canadian laws do not conflict with the adoption of CIL norms as part of Canadian common law, and that government policy including the establishment of the Canadian Ombudsperson for Responsible Enterprise (CORE) is consistent with the expectation that Canadian-based transnational corporate actors should respect human rights norms.[202] While the CORE itself does not make reference to climate change, it does endorse the responsible business conduct guidelines of the OECD, which do consider climate change albeit incompletely.[203]

5.1 A future for human rights-based corporate climate accountability litigation in Canada?

While the discussion of human rights-based corporate climate accountability litigation is theoretical, for the moment, the *Nevsun* case does open up significant possibilities for this type of litigation to emerge in Canada. Corporate climate accountability litigation is gaining traction in many jurisdictions around the world, particularly in the global North.[204] Moreover, the expectation that companies should undertake human rights due diligence in accordance with the UNGPs could inform future corporate climate accountability litigation. This expectation was evident in the recent Dutch climate case against Shell, which also referred briefly to the environment chapter of the OECD MNE Guidelines.[205] While some may view it to be a significant leap to interpret CIL norms to include a right to a safe climate, the urgency of the climate crisis is gaining traction in at least some courts. This urgency is also evident in the work of legal experts who have recently developed a definition of the international crime of ecocide.[206]

It remains to be seen whether *Nevsun* will inspire novel transnational or domestic human rights-based corporate accountability litigation in Canadian courts, including human rights-based climate claims. Given developments in other jurisdictions, and the extensive contributions of

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[201] *Nevsun* (n 4), [113]. The majority further observed that domestic common law could develop appropriate remedies for breaches of CIL norms and that Canada has international law obligations to ensure effective remedy to victims of human rights violations. Canadian courts could therefore develop a civil remedy in domestic law for corporate violations of CIL norms that are inherently different from existing domestic torts as they have a 'public nature' and should 'shock the conscience.' The trial judge would need to determine the mechanism for proceeding with such novel claims, whether as new nominate torts, or directly as CIL is part of Canadian common law. The majority further observed that remedying violations of CIL and *jus cogens* norms may require different and stronger responses than for typical torts. *Nevsun* (n 4), [117–129].

[202] *Nevsun* (n 4), para 115. See further Government of Canada, 'CORE ORCE' <https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng> accessed 5 November 2021; and Government of Canada, 'Human Rights and Responsible Business Conduct' <https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/human_rights-droits_personne.aspx?lang=eng> accessed 5 November 2021. However, a limitation of the CORE is that it applies only to operations outside of Canada. This should not be understood as suggesting that business responsibilities in relation to human rights do not apply within Canada.

[203] See OECD, 'Responsible Business Conduct: OECD Guidelines for Multinational Enterprises' <http://mneguidelines.oecd.org/rbc-and-climate-change.htm> accessed 5 November 2021.

[204] G Ganguly et al., 'If at First You Don't Succeed: Suing Corporations for Climate Change,' (2018) 38 Oxford J Legal Stud 841, 842; L Benjamin, 'The Road to Paris Leads Through Delaware: Climate Litigation and Directors' Duties' (2020) Utah Law Review 313.

[205] *Milieudefensie v Royal Dutch Shell* (n186) paras 4.4.11 – 4.4.21.

[206] Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text,* June 2021, <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf> accessed 29 June 2021. See also LJ Kotzé and W Muzangaza, 'Constitutional international environmental law for the Anthropocene?' (2018) 27 RECIEL 278-292.

Canadian-based fossil fuel companies to climate change, we would suggest there is room for domestic or foreign plaintiffs alike to explore the potential of *Nevsun*.

Alternatively, or in addition, it is of note that several Canadian companies were mentioned in the petition to the Philippines human rights commission. The investigation by the human rights commission concluded that carbon majors companies could be found legally and morally liable for human rights violations arising from climate change in certain circumstances.[207] The investigation focused on circumstances involving obstruction, deception, fraud, or where the relevant *mens rea* (criminal intent) may exist to hold companies accountable under criminal as well as civil laws. The Philippines investigation serves largely as an expository exercise to highlight the damaging role these carbon majors continue to play in causing climate change, while also elevating the voices of the climate vulnerable. A similar type of investigation could also be contemplated in Canada given the vast role of private entities in the Canadian oil sands.

Tying Parts 3 and 4 together, we also consider the distinct possibility of claims by Indigenous litigants not only against fossil fuel companies but also against the Government on procedural, rather than Charter, grounds. As noted above, the duty to consult and to accommodate Indigenous communities is constitutionally protected in Canada. Pacquette notes that this duty could be triggered not just by actions that increase GHG emissions, but also by executive policies that increase GHG emissions.[208] This duty could include approval of new pipelines projects, which are a major obstacle to the achievement of climate targets in Canada.[209] Government inaction, in particular the failure of the Government to reduce or eliminate black carbon, has also been contemplated as the basis of human-rights based legal arguments brought by Athabaskans against Canada.[210] While these claims would not be direct litigation against a private entity, they would significantly affect corporations by impacting the approval of fossil fuel projects.

6. CONCLUSIONS

There is increasing evidence of litigation in Canadian courts at the intersection of climate change and human rights. In this article we have provided an overview of claims that (at the time of writing) are moving through Canadian courts, and have also briefly considered the possibility of future transnational or domestic corporate climate accountability cases. Canada is a high GHG emitting country, yet public discourse around climate change routinely ignores the global climate justice implications of historic and contemporary emissions that far exceed Canada's fair share of the global carbon budget. The country's federal plan commits Canada to reaching net zero by 2050. This is a legislative step in the right direction, but the road to achieving these targets is a difficult one, primarily due to the Canadian economy's heavy reliance on fossil fuels.[211] It is therefore possible that the federal plan, including newly introduced legislation, might reduce *or* increase the volume of climate litigation, particularly if Canada fails to meet its stated targets. Such a failure to meet emission reduction targets would have dire consequences for climate vulnerable constituents in the

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[207] I Kaminski, 'Carbon Majors Can Be Held Liable for Human Rights Violations, Philippines Commission Rules' *Climate Liability News* 9 December 2019, Business & Human Rights Resource Centre <https://www.business-humanrights.org/en/latest-news/carbon-majors-can-be-held-liable-for-human-rights-violations-philippines-commission-rules/> accessed 5 November 2021.

[208] Pacquette (n173).

[209] Ibid, 159.

[210] Szpak (n23).

[211] L Hughes, 'How Canada intends to achieve its 2030 targets' Policy Options (19 July 2021) https://policyoptions.irpp.org/magazines/july-2021/how-canada-intends-to-achieve-its-2030-emissions-targets accessed November 5, 2021.

country, particularly Indigenous communities, as well as those most vulnerable to climate harms around the world.

The cases assessed in this article bring issues of climate justice to the fore, highlighting the challenges facing vulnerable youth and Indigenous populations. The outcomes of some of these Section 7 and 15(1) cases to date reinforce the traditional, deferential approach of Canadian courts to legislators and reflect the heavy reliance of the country on fossil fuels. The fact that Canada is so economically dependent upon oil sands development makes Canada a difficult jurisdiction within which to bring climate-related claims: the degree of national economic dependence on oil and gas inevitably contributes to climate change, and, as a result, climate litigation is intimately connected to economic policy making. Climate related cases might therefore be more likely to face judicial hesitancy to intervene, as some courts may feel that decisions on climate change are more appropriately left to the legislature and to politicians, precisely because such decisions involve national economic and political considerations concerning energy access and independence. This trend has been confirmed in some of the cases to date. In particular, the issue of justiciability has posed challenges for climate litigation, especially for Charter-based claims, as has been illustrated in the previous sections. Plaintiffs should acknowledge and seek strategies to combat this judicial tendency.

However, it is early days for rights-based climate litigation in Canada, and, despite the trend noted above, we argue that Charter claims still hold potential for redressing the grievances of Canada's climate vulnerable populations. Such potential might be more likely to be realised where plaintiffs ask for less from the courts. In particular, Charter-based claims appear more likely to be more successful when they are narrowly framed. Lessons can also be learned from successes and failures from other jurisdictions, in particular the outcomes and tactics used in the *Urgenda* and *Juliana* litigation. For example, future plaintiffs could frame their claims in the wake of national and progressive Charter-based decisions, and they could choose to request a declaratory judgment from the court. This approach might provide less opportunity for courts to fall back on the old and familiar grounds of non-justiciability to dismiss the case.

Our analysis has also shown that it is important to pay attention to the procedural environmental human rights dimensions of climate litigation, as the ability to exercise rights to freedom of expression, protest, participation in decision-making and ultimately access to justice in the case of environmental harm are essential to ensure protection of substantive rights including the right to a safe climate. This is particularly the case in Canada given that the country continues to struggle to overcome colonial legacies, and often fails to support environmental human rights defenders, including Indigenous communities who oppose fossil fuel development or the imposition of green energy mega projects on their lands.

Our inclusion of Indigenous rights cases within the discussion of procedural environmental human rights raises some unanswered questions about the sort of cases which fall within the scope of what is considered to be 'climate litigation'. Climate litigation databases often leave out cases brought by Indigenous peoples seeking to exercise their rights to self-determination and to protect local resources from industrial harm, whether perpetuated by fossil fuel projects or hydro dams. Yet reconciliation with Indigenous peoples is a central pre-occupation in Canada, and must be part of the overall assessment of the merit and success of human rights-based climate litigation. Another finding that emerges from the analysis of the broader legal context is the number of challenges facing public interest litigants and Indigenous peoples in accessing justice through the courts. While the procedural environmental human rights cases canvassed in Part 4 show evidence that some Canadians are attempting to exercise their rights in the interests of a safe climate, concern over adverse costs awards and class certification challenges among others may lead potential plaintiffs to pursue peaceful protest rather than litigation, despite the risk of arrest. That potential plaintiffs

might be deterred from pursuing litigation due to various legal barriers might dampen the optimism of climate lawyers who hope to see climate litigation grow and to secure change in Canada. These issues merit further research, alongside further research about what ratification and implementation of the Aarhus Convention could achieve.

Despite potential dampening factors, given that insurance companies are likely to increasingly withdraw from coverage of many climate-related harms,[212] and government disaster relief funds will be capped,[213] it is to be expected that many other potential climate plaintiffs will emerge from within Canada over time. Building on Indigenous claims, we also expect to see future claims based on the failure of the Crown to consult climate-vulnerable communities. The statements by the majority of the Supreme Court of Canada in the *References re the Greenhouse Gas Pollution Pricing Act,* covered in Part 2 above concerning the disproportionate impacts of climate change on Canadian Indigenous communities should be leveraged by Indigenous plaintiffs in climate cases moving forward. Claims of this nature could have significant consequences for ongoing or future fossil-based projects, including by private industry. The heavy dependence of the national economy on the oil sands also opens up potential new fronts of climate litigation, particularly against carbon major corporations. Existing jurisprudence on corporate liability suggests such a claim might find success, and that the potential exists for foreign plaintiffs to raise human rights-based claims. These industries are already under pressure by investors to reduce emissions, and human rights based claims are likely to increase such pressure.

In addition, the implications of climate change for biodiversity in Canada will also be immense, potentially opening the door to future claims on behalf of natural systems.[214] Claims around the costs and inevitability of adaptation measures are also likely to emerge.[215] These are likely to include human-rights based arguments as they have in other jurisdictions, and so if they do arise, will form an important plank in human rights-based climate litigation in Canada.

This article has illustrated that the potential for rights-based climate litigation in Canada is vast. We assume, without being emphatic in doing so, that climate-based claims will increase significantly in Canada and could take a variety of legal forms. Whether these claims will be successful in securing change in Canada remains to be seen, but the landscape, as our analysis suggests, is ripe for such efforts.

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[212] C Brown and SL Seck, 'Insurance Law Principles in an International Context: Compensating Losses caused by Climate Change' (2013) 50(4) Alberta Law Review 541; L Coxen, 'Climate Change is Upending the Home Insurance Industry. And it's Going to Cost You' (*LowestRates.ca Home Insurance,* 25 April 2019) < https://www.lowestrates.ca/blog/homes/climate-change-home-insurance-going-to-cost-you > accessed 24 June 2021.

[213] *Insurance-Canada.ca,* 'Quèbec Launches New Disaster Relief Program with Cap on Flood Compensation'(*Insurance-Canada.ca*, 16 April 2019) <https://www.insurance-canada.ca/2019/04/16/quebec-new-disaster-relief-program/> accessed 24 June 2021.

[214] WWF-Canada, 'Living Planet Report Canada: A National Look at Wildlife Loss' (WWF-Canada, 2017) < https://wwf.ca/wp-content/uploads/2020/07/LPRC-Executive-Summary.pdf> accessed 29 June 2021; M Doelle and SL Seck, 'Loss & Damage from Climate Change: From Concept to Remedy?' (2020) 20(6) Climate Policy (special issue: Loss & Damage after the Paris Agreement) 669.

[215] See, for example, the numerous claims in the United States brought by cities and states claiming the costs of adaptation against large multinational companies summarized in Benjamin, (n 204) ; J Peel and H Osofsky, 'Sue to Adapt?' (2015) 99 Minnesota Law Review 2177.