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"A Hot Day in Iqaluit"?

Environmental Rights in Canada's Constitutional Cul-de-Sac

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Stepan Wood[1]

Abstract

Proposals to include an explicit right to a healthy environment in Canada's constitution have been advanced since the early 1970s, but Canada is stuck in a decades-long impasse that precludes substantial constitutional amendment. This article uses the metaphor of the cul-de-sac to explore the prospects for legal recognition of environmental rights in this situation. It canvasses past efforts to entrench general and Indigenous environmental rights in Canada's constitution, introduces culs-de-sac metaphorical and real, and highlights the irony of one commentator's 2005 quip that it will be "a hot day in Iqaluit" when Canada's constitution undergoes significant amendment. It then surveys current efforts to find a right to a healthy environment in ss 7 and 15 of the *Charter*; recent developments in the recognition of Indigenous environmental rights via section 35 of the *Constitution* and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); incorporation of a right to a healthy environment into federal environmental legislation; and initiatives to recognize the rights of rivers. It concludes that, like a real-world cul-de-sac, Canada's constitutional one requires advocates of a legally enforceable right to a healthy environment to take longer and more circuitous routes to elusive destinations, and pushes them onto crowded arterial roads of existing constitutional rights and environmental statutes. That said, recent developments suggest some hope that the residents of this cul-de-sac might yet achieve a sense of community (with all beings), neighbourly interaction (of settler-colonial and Indigenous legal orders) and a safer and stabler environment for young people (and future generations).

Keywords

Environmental rights; constitutional law; cul-de-sac; right to a healthy environment; Indigenous rights; Canadian Charter of Rights and Freedoms; Section 7; Section 15; Section 35; youth climate litigation; justiciability; negative rights; positive rights; principles of

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fundamental justice; age discrimination; unwritten constitutional principles; future generations; standing; United Nations Declaration on the Rights of Indigenous Peoples; UNDRIP implementation acts; free, prior and informed consent; cumulative impacts; treaty rights; Canadian Environmental Protection Act; environmental bill of rights; rights of nature

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"It will be a hot day in Iqaluit when we next see a constitutional amendment of any national consequence."
– Richard S Kay, December 2005[2]

"On Monday, the mercury [in Iqaluit] went up to a sizzling 26.8 C, which is the warmest reading on record for the city"
– CBC News, July 2008[3]

1. Introduction

The idea that Canadians should have a constitutional right to environmental protection has long been mooted. Such a right can take at least three forms. One is a general right to a healthy environment, which would entitle individuals to make a range of procedural and substantive claims against governments. Another is specific to Indigenous peoples and includes inherent and treaty-based rights to hunt, fish, harvest and otherwise practise their lifeways and cultures; to their territories; and to self-government—all of which imply a right not just to live in but to care for an environment capable of supporting the exercise of these rights. A third, more recent possibility, is the rights of nature itself, an idea that is spreading quickly worldwide. The road to constitutional entrenchment of environmental rights in Canada is long, winding and incomplete. To the extent that it requires further constitutional amendment, it appears for practical purposes to be a dead end.

In this article I take stock of the prospects for realization of environmental rights in Canada in this constitutional impasse. The time is ripe for this stock-taking. In the last two years Parliament finally enacted legislation recognizing a human right to a healthy environment,[4] Canadian courts issued landmark decisions on environmental rights under the *Charter* in three important cases,[5] and they issued four major decisions on the international and domestic law of Indigenous rights with implications for environmental rights and self-government.[6] Further landmark decisions are imminent. In Part 2, I canvas the halting progress towards constitutional entrenchment of general and Indigenous environmental rights in Canada. This part closes with Richard Kay's characterization of Canada's current constitutional landscape as a cul-de-sac. In Part 3 I introduce the debate over the cul-de-sac as urban form and expose the irony of Kay's quip that it will be "a hot day

[2] Richard S Kay, "Book Review Essay: Canada's Constitutional Cul de Sac" (2005) 35 *Am Rev Can Stud* 705 At 711.
[3] CBC News, "Iqaluit Sweats in Record Heat Wave," *CBC News* (23 July 2008), online: CBC.ca, https://www.cbc.ca/news/canada/north/iqaluit-sweats-in-record-heat-wave-1.747636.
[4] *Strengthening Environmental Protection for a Healthier Canada Act*, SC 2023, c 12 [*Strengthening Environmental Protection Act*].
[5] *La Rose v Canada*; *Misdzi Yikh v Canada*, 2023 FCA 241 [*La Rose/Misdzi Yikh* FCA], *rev'g in part La Rose v Canada*, 2020 FC 1008 [*La Rose* FCTD] and *Misdzi Yikh v Canada*, 2020 FC 1059 [*Misdzi Yikh* FCTD]; *Mathur v Ontario*, 2024 ONCA 762 [*Mathur* ONCA], rev'g 2023 ONSC 2016 [*Mathur* ONSC]. All are discussed in Part 4.1.
[6] *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680; *R c Montour*, 2023 QCCS 4154; *Reference re An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, 2024 SCC 5 [*Bill C-92 Reference*]; *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10. All are discussed in Part 4.2.

in Iqaluit when we next see a constitutional amendment of any national consequence."[7] This article is not, however, about Iqaluit or the Arctic. Iqaluit's changing climate serves only to illustrate the irony of Kay's quip and the seriousness of the ecological crises facing Canadian society.

Part 4 is devoted to exploring the prospects for legal realization of environmental rights in Canada's constitutional cul-de-sac. In Section 4.1, I explore efforts to read environmental rights into existing *Charter* provisions, especially sections 7 and 15. In Section 4.2, I consider the prospects for settler-colonial courts to interpret section 35 of the *Constitution Act, 1982* and the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP")[8] as a basis for recognizing not just an Indigenous right to a healthy environment but Indigenous environmental jurisdiction. Section 4.3 assesses the federal government's modest integration of the human right to a healthy environment into the *Canadian Environmental Protection Act, 1999 (CEPA 1999)*.[9] Section 4.4 looks at innovative efforts at legal recognition of the environment itself as a legal subject with rights, including Mutehekau Shipu/Magpie River in Quebec. Part 5 concludes.

2. Plodding towards Recognition

2.1 The right to a healthy environment

Efforts to take what some scholars call the "fundamentally important step" of entrenching a constitutional right to a healthy environment[10] have been underway since the early 1970s, when witnesses urged a Parliamentary committee to recognize "constitutional guarantees of full protection for every aspect of our environment … as an irreducible primary right without which all other rights become meaningless."[11] The committee's final report did not mention this proposal, however.[12]

The campaign for legal recognition of environmental rights made "plodding" progress through the 1970s.[13] The right of every person "to a healthy environment and to its protection, and to the protection of the living species inhabiting it" was added to Quebec's *Environmental Quality Act* in 1978.[14] Environmental rights eventually also found their way

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[7] Kay, *supra* note 2 at 711.
[8] GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [UNDRIP].
[9] SC 1999, c 33.
[10] Lynda M Collins and David R Boyd, "Non-Regression and the *Charter* Right to a Healthy Environment" (2016) 29 *J Envtl L & Prac* 285 at 290.
[11] Testimony of Jim Egan, Vice-President of the Society for Pollution and Environmental Control, quoted in Cynthia Williams, "The Changing Nature of Citizen Rights," in Alan Cairns and Cynthia Williams, eds, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 99 at 114. This and similar submissions are documented in David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) 42-44.
[12] Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Constitution of Canada: Final Report* (Ottawa: Queen's Printer, 1972).
[13] John Swaigen, "Annual Survey of Canadian Law: Environmental Law 1975-1980" (1980) 12 *Ottawa L Rev* 439 at 450. *See also* RT Franson and PT Burns, "*Environmental Rights for the Canadian Citizen: A Prescription for Reform"* (1974) 12 *Alta L Rev* 153; David Estrin and John Swaigen, *Environment on Trial: A Citizen's Guide to Ontario Environmental Law* (Toronto: Canadian Environmental Law Research Foundation, 1974); John Swaigen, ed, *Environmental Rights in Canada* (Toronto: Butterworths, 1981).
[14] CSQ, c Q-2, s 19.1, enacted by SQ 1978, c 64, s 4.

into legislation in the Northwest Territories,[15] Yukon[16] and Ontario in the early 1990s.[17] In 2006, Quebec once again led the way, adding the right of every person "to live in a healthful environment in which biodiversity is preserved" to the *Quebec Charter of Human Rights and Freedoms* – albeit only "to the extent and according to the standards provided by law."[18]

In the early 1980s, New Democratic MP Svend Robinson championed the inclusion of a right to a healthy environment in the new *Canadian Charter of Rights and Freedoms*,[19] but the right did not find its way into the final document.[20] It was similarly omitted from both the 1987 Meech Lake and 1992 Charlottetown Accords.

2.2 Indigenous environmental rights

The story of efforts to incorporate Indigenous environmental rights into Canada's constitution is longer and more complicated. It starts with Indigenous nations' longstanding and widespread practices of making treaties with one another and with European colonial powers. These practices are fundamental to Canadian constitutionalism.[21] As frameworks to share the land and its gifts with Europeans while continuing Indigenous ways of life, these treaties were concerned directly with what are now understood as environmental rights, responsibilities and powers.[22] For the most part they stood outside Canada's formal constitutional framework as understood by colonial authorities.[23] Ignoring, denying and suppressing the fact of this foundation of nation-to-nation treaty-making is as much a part of the project of settler colonialism as is systematic violation of the treaties themselves.[24]

When it comes to late 20th century movements for constitutional reform, including patriation of Canada's written constitution and entrenchment of Indigenous environmental rights in it, the story is defined by profound ambivalence on the part of Indigenous peoples. Throughout this period Indigenous peoples "were very active in advancing their aspirations in relation to the Canadian state," whether by engaging in or eschewing constitutional conversations.[25] Some Indigenous organizations supported the project of patriation while others resisted it. Similarly, some supported the inclusion of aboriginal and treaty rights in the constitution, others opposed it.

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[15] *Environmental Rights Act*, RRNWT 1988, c 83 (Supp), enacted by SNWT 1990, c 38, repealed & replaced by *Environmental Rights Act*, SNWT 2019, c 19.
[16] *Environment Act*, RSY 2002, c 76, s 6, enacted by SYT 1991, c 5, s 6.
[17] *Environmental Bill of Rights*, 1993, SO 1993, c 28.
[18] CSQ, c C-12, s 46.1, enacted by SQ 2006, c 3, s 19.
[19] *Constitution Act, 1982* (being Schedule B to the *Canada Act 1982* (UK), 1982, c 11), Part I [*Charter*].
[20] Colin P Stevenson, "A New Perspective on Environmental Rights after the Charter" (1983) 21 *Osgoode Hall L J* 390 at 401.
[21] *See, eg*, James (Sa'ke'j) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241; James (Sa'ke'j) Youngblood Henderson, *Wabanaki Compact: The Foundations of Treaty Federalism in North America, 1621-1728* (Saskatoon: Indigenous Law Centre, University of Saskatchewan, 2020); John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) 108.
[22] See Henderson, "Empowering Treaty Federalism," *ibid* at 258-269.
[23] For an exception, *see* Jean Teillet, *The North-West Is Our Mother: The Story of Louis Riel's People, the Métis Nation* (Toronto: HarperCollins, 2019) 272-274.
[24] See, eg, Peter Russell, "Can Canada Retrieve the Principles of its First Constitution?" in Kiera L Ladner & Myra J Tait, eds, *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal* (Winnipeg: ARP Books, 2017) 77; James (Sa'ke'j) Youngblood Henderson, "O Canada: 'A Country Cannot Be Built on a Living Lie'" in Ladner & Tait, *ibid*, 277; *Ontario (Attorney General) v Restoule*, 2024 SCC 27.
[25] Borrows, *Freedom & Indigenous Constitutionalism*, *supra* note 21 at 110.

Indigenous peoples and rights were excluded from constitutional reform discussions in the late 1960s and early 1970s, when assimilation was federal policy.[26] They played an increasingly influential role, however, between 1978 and 1982. The eventual result was sections 25, 35 and 37 of the *Constitution Act, 1982*.[27] Section 35 recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. Section 25 prevents the *Charter* from being construed so as to abrogate or derogate from aboriginal, treaty or other rights pertaining to aboriginal peoples of Canada. Section 37 required Ottawa to convene constitutional conferences with First Ministers and Indigenous organizations.

Some Indigenous people denied the constitution's legitimacy, resisted forcible inclusion in Canada, and continue to do so. Some worried that the constitutional conferences would not produce agreement on the meaning of section 35 rights. They were right. Some worried, also correctly, that settler-colonial courts would limit their rights.[28] Courts have recognized that environmental degradation can violate section 35 rights,[29] but these rights exist within an "(ab)originalist" straitjacket that severely cramps the recognition and exercise of their environmental dimensions.[30] Perhaps the biggest problem is the "failure to recognize and affirm the pre-existing and ongoing inherent rights to practise self-government," an issue that "still has not been addressed in any satisfactory way for Indigenous peoples."[31] All of this led one Indigenous legal scholar to lament that "the constitutional rooting of Aboriginal and treaty rights in Canada's constitution … has been another colonial disaster."[32]

Post-1982 constitutional reform efforts have delivered little for Indigenous peoples. The 1987 Meech Lake Accord was developed without consulting Indigenous peoples and said nothing about their distinct status or right to self-government. Understandably, they fought to defeat it. There was much greater Indigenous participation in the negotiation of the Charlottetown Accord and it showed in the final text, which would have recognized an Indigenous right of self-government within Canada. But that Accord failed a nationwide referendum in 1992.[33]

The failure of these Accords, and Ottawa's subsequent passage of legislation effectively giving several provinces a veto over future constitutional amendments,[34] pushed Canada into what Richard Kay in 2005 called a "constitutional cul-de-sac" from which he predicted it will not emerge until "a hot day in Iqaluit."[35]

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[26] *Ibid* at 114.
[27] *Supra* note 19.
[28] Borrows, *Freedom & Indigenous Constitutionalism*, *supra* note 21 at 122-123.
[29] See, eg, *Tsawout Indian Band v Saanichton Marina Ltd*, [1989] BCJ No 563, 57 DLR (4th) 161 (CA); *Halfway River First Nation v British Columbia (Ministry of Forests)*, [1997] BCJ No 1494, 39 BCLR (3d) 227 (SC); *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2001] FCJ No 1877, 214 FTR 48 (TD); *Haida Nation v Canada (Minister of Fisheries and Oceans)*, [2015] FCJ No 281, 2015 FC 290 (TD).
[30] Borrows, *Freedom & Indigenous Constitutionalism*, *supra* note 21 at 128-160.
[31] *Ibid* at 123.
[32] *Ibid* at 179.
[33] *Ibid* at 124-125.
[34] *An Act Respecting Constitutional Amendments*, SC 1996, c 1.
[35] Kay, *supra* note 2 at 711.

3. Speaking Figuratively about Constitutional Law

What, if anything, can the expressions "constitutional cul-de-sac" and "a hot day in Iqaluit" illuminate about the prospects for legal recognition of environmental rights in Canada's current constitutional climate? In this article I deploy these two figures of speech in a light-hearted way to provoke some serious reflections on this subject. I enlist both as rhetorical devices only, not as analytical or theoretical concepts.

3.1 Cul-de-Sac: The Built Environment as Metaphor for the Legal

Metaphor is a technique for likening one thing to another through language. To speak metaphorically is "to talk about two things at once; two different and disparate subject matters are mingled to rich and unpredictable effect."[36] The metaphor of a cul-de-sac introduces a secondary subject, street design, "with an eye to temporarily enriching our resources for thinking and talking about"[37] a primary subject, constitutional politics. For Kay and the few other scholars who have used it, this metaphor symbolizes an impasse, a dead-end street in which one will remain stuck unless one backtracks and finds another route. In Kay's case, the dead end represents the practical impossibility of significant constitutional amendment in Canada.[38] It represents other things to other commentators.[39]

What these commentators have in common is that they invoke the metaphor casually, without explication.[40] I ask the metaphor to do more work. I look at urban design scholars' claims about culs-de-sac[41] in the built environment and project these loosely onto the legal environment. I ask what sort of images the cul-de-sac metaphor evokes in light of debates

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[36] David Hills, "Metaphor," in Edward N Zalta and Uri Nodelman (eds), *Stanford Encyclopedia of Philosophy* (Fall 2022 Edition), https://plato.stanford.edu/archives/fall2022/entries/metaphor/.; see also W Martin, "Metaphor," in Roland Greene, et al (eds), *Princeton Encyclopedia of Poetry and Poetics*, 4th ed (Princeton: Princeton University Press, 2012).

[37] Hills, *ibid*.

[38] *See also* Errol P Mendes, "A 'Push-Pull' Plan for a Flexible Canadian Federalism," (1991) 14(1) *Canadian Parliamentary Review* 4 at 7 (using the metaphor to describe political obstacles to amending Canada's constitution in the wake of the failed Meech Lake Accord).

[39] See, eg, Nathan J Brown, "Egypt's constitutional cul-de-sac: Enabling military oversight and a security state in a nominally democratic order" (March 2014) *CMI Insight* (No 1) 1 (using the metaphor to describe obstacles to evolution of the Egyptian constitution towards greater democracy after its 2014 constitutional settlement); John C Jeffries Jr & Daryl J Levinson, "The Non-Retrogression Principle in Constitutional Law" (1998) 86:6 *Cal L Rev* 1211 at 1238 (using it to describe the US Supreme Court's creation of and later retreat from constitutional rules that became doctrinal dead ends); András Sajó, "Reading the Invisible Constitution: Judicial Review in Hungary" (1995) 15(2) *Oxford J Leg Stud* 253 at 264 (using it to describe the Hungarian constitution's supermajority requirement for legislation affecting fundamental rights); Daniel Reynolds, "The Constitutionalisation of Administrative Law: Navigating the Cul-de-Sac" (2015) *AIAL Forum* (No 74) 76 (using it to describe Australian courts' "freezing" of common law doctrines of judicial review by granting them constitutional status); Constantinos Kombos & Athena Herodotou, "The Supreme Court of Cyprus: The centre of gravity within the separation of powers," in Kálmán Pócza, ed, *Constitutional Review in Western Europe: Judicial-Legislative Relations in Comparative Perspective* (London: Routledge, 2024) 77 (using it to describe the paralysis in the administration of justice precipitated by the violent collapse of bi-communal Greek-Turkish power sharing in Cyprus).

[40] Eg Brown, *ibid* (mentioning "cul-de-sac" in the title but nowhere in the text).

[41] This is the plural according to the Oxford English Dictionary, but English language writers almost invariably (mis)spell it as "cul-de-sacs."

about real culs-de-sac as an urban design feature. I use these images to generate some light-hearted but earnest diagnostic insights into the current legal situation.

So, what can a physical cul-de-sac suggest about life in a metaphorical one? The term literally means "bottom of the sack." It refers to a street with only one outlet. Although some people use it interchangeably with "dead end," urban design scholars and real estate marketers usually reserve "cul-de-sac" for a residential street with a bulb-shaped turnaround at the closed end, around which houses are arrayed like flower petals, whereas a dead-end street ends abruptly with no bulb. The cul-de-sac has been a common feature of suburban development since the mid-twentieth century. It creates a tree-shaped street pattern in which short streets branch off a trunk, in contrast to a grid pattern. With few through streets, vehicular traffic concentrates on arterial roads, leaving culs-de-sac quiet.

Real estate agents and some urban design scholars praise the cul-de-sac for its safety, privacy, sense of community, low incidence of property crime, higher property value and encouragement of social interaction amongst residents—a quiet, often green refuge from the concrete jungle.[42] One scholar summarizes the argument: "they are quieter and safer for children; they provide the potential for more neighborly interaction; there is a greater sense of privacy; residents have a greater ability to distinguish neighbors from strangers; and there are generally lower burglary rates.[43]

Critics argue that culs-de-sac encourage social disconnection and exclusion, discourage walking, cycling and public transit, and lead to more driving, more vehicle emissions, and more traffic on major roads.[44] One urban design scholar complained that culs-de-sac "turn what should be a 100-yard walk into a two-mile drive" and lull parents into a false sense of security when the greatest vehicular danger to their young children is actually "being backed over by a motor vehicle – usually driven by their own parents in their own driveway."[45] By contrast, more compact and connected street networks are correlated with a lower incidence of obesity, diabetes, high blood pressure, heart disease and traffic

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[42] See, eg, Barbara B Brown and Carol M Werner "Social Cohesiveness, Territoriality, and Holiday Decorations: The Influence of Cul-de-Sacs" (1985) 17 *Envt & Behavior* 539; Shane D Johnson and Kate J Bowers, "Permeability and Burglary Risk: Are Cul-de-Sacs Safer?" (2010) 26 *J Quantitative Criminology* 89; Thomas R Hochschild Jr, "The Cul-de-Sac Effect: Relationship between Street Design and Residential Social Cohesion" (2015) 141(1) *J Urban Planning & Devel* Article 05014006; Ilkim Gizem Lee & Dilek Yildiz Ozkan, "The Effects of Spatial and Human-Based Factors on Social Interaction in Cul-de-Sacs" (2024) *J Urbanism: Int'l Research on Placemaking & Urban Sustainability* 1, https://doi.org/10.1080/17549175.2024.2324816.

[43] University of California Berkeley professor emerita Clare Cooper Markus, quoted in Robert Steuteville, "The advantages of the cul-de-sac," Public Square (1 March 2001), https://www.cnu.org/publicsquare/advantages-cul-de-sac. See also

[44] See, eg, William H Lucy and David L Phillips, *Tomorrow's Cities, Tomorrow's Suburbs* (New York: Routledge, 2006); Eric Charmes, "Cul-de-Sacs, Superblocks and Environmental Areas as Supports of Residential Territorialization" 2010) 15 *J Urban Design* 357; Wesley E Marshall and Norman W Garrick, "Effect of Street Network Design on Walking and Biking" (2010) 2198(1) *Transportation Research Record* 103; Timothy Welch, "Road to Nowhere: Why the Suburban Cul-de-Sac is an urban planning dead end," *The Conversation* (8 Jan 2023), https://theconversation.com/road-to-nowhere-why-the-suburban-cul-de-sac-is-an-urban-planning-dead-end-194628.

[45] Tanya Snyder, "Cul-de-Sacs Are Killing Us: Public Safety Lessons from Suburbia," *Streetsblog USA* (7 June 2011), https://usa.streetsblog.org/2011/06/07/cul-de-sacs-are-killing-us-public-safety-lessons-from-suburbia/.

fatalities.[46] Furthermore, while cul-de-sac street networks have lower burglary rates, they also impede quick access by first responders.[47]

As a result, many urban design scholars consider culs-de-sac to be socially and environmentally unsustainable,[48] though the evidence is not conclusive.[49] Journalist Emily Badger summarizes the critique:

> Cul-de-sacs carve up communities in a way that makes them unwalkable. They force people to drive more often and longer distances. As a result, they harm the environment. They're actually less safe than traditional street grids because drivers speeding through arterials in suburbia don't have to pay as much attention. And cul-de-sacs are harder to reach by fire, police and emergency crews.[50]

This brief account of physical culs-de-sac evokes an ambivalent image of Canada's constitutional cul-de-sac. On one hand, it could be a welcoming, safe, "green" enclave where environmental rights can flourish; on the other, an unhealthy, hostile space in which environmental rights risk being figuratively backed over before leaving the driveway of constitutional adjudication.[51] Before exploring this issue further, however, I need to consider the implications of Richard Kay's quip that it will be a "hot day in Iqaluit" when we emerge from Canada's constitutional cul-de-sac.

3.2 "A Hot Day in Iqaluit": Tongue-in-Cheek Hyperbole as Unintended Irony

Kay's 2005 remark was a play on the familiar idiom "a cold day in hell," which is an example of hyberbole: the use of flagrant exaggeration as a rhetorical device or figure of speech.[52] Like its close relative "when hell freezes over," "a cold day in hell" is a special type of hyperbole known as *adynaton*: hyperbole taken to such an extreme as to imply impossibility.[53] Since hell is understood to be a realm of everlasting fire, "a cold day in hell" will never occur. Kay's "hot day in Iqaluit" is not so obviously impossible, but was clearly

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[46] Wesley E Marshall and Norman W Garrick, "Does Street Network Design Affect Traffic Safety?" (2011) 43 *Accident Analysis & Prevention* 769; Wesley E Marshall, Daniel P Piatkowski and Norman W Garrick, "Community Design, Street Networks, and Public Health" (2014) 1 J *Transport & Health* 326.
[47] Michael G Van Buer et al, "The Effect of Vehicular Flow Patterns on Crime and Emergency Services: The Location of Cul-de-Sacs and One-Way Streets" (1996) 47 *J Operational Research Society* 1110.
[48] See, eg, John F Wasik, *The Cul-de-Sac Syndrome: Turning Around the Unsustainable American Dream* (New York: Bloomberg, 2009).
[49] Paul Cozens and David Hillier, "The Shape of Things to Come: New Urbanism, the Grid and the Cul-De-Sac" (2008) 13 *Intl Planning Stud* 51.
[50] Emily Badger, "The Case for Cul-de-Sacs," Bloomberg (17 October 2013), https://www.bloomberg.com/news/articles/2013-10-17/the-case-for-cul-de-sacs.
[51] Some readers may find my use of the cul-de-sac metaphor, or the metaphor of street design more generally, strained and unconvincing insofar as it appears, in the words of one anonymous reviewer, "to morph as convenient" between an environmentally unfriendly dead end and a potentially greener alternative. If a cul-de-sac can be both these things, does the metaphor have any value? But this is precisely what makes the metaphor interesting.
[52] K McFadden, "Hyperbole," in Greene, *supra* note 36.
[53] AW Halsall & TVF Brogan, "Adynaton," in *ibid*.

intended to convey improbability. Given that Iqaluit is in the Arctic and the Arctic is popularly thought to be very cold, "a hot day in Iqaluit" is a day that is unlikely to come soon.

Climate change made Kay's tongue-in-cheek phrase cruelly ironic. Iqaluit's hottest day ever was recorded just two-and-a-half years later, in 2008, at almost 27° C.[54] Human-induced global heating[55] has caused and will continue to cause average temperatures in Iqaluit and throughout the Canadian Arctic to increase at an alarming rate, far above the global average. Heat waves have become more frequent and severe in Iqaluit.[56] More worrying, even its autumns and winters are breaking high temperature records.[57]

Iqaluit will continue to heat up over the coming century. Mean annual temperature in the years 2051 to 2080 is expected to be 3.8-5.7°C higher than 1976 to 2005.[58] Over the same period the hottest summer temperature is expected to rise by 2.9-4.2°C and the coldest winter temperature by 6.0-9.3°C. Most alarmingly, 37-49 fewer very cold (below -30°C) days and 29-43 more frost free days are expected in the city each year.[59]

The impacts of climate change on Iqaluit and the Arctic are severe.[60] Shrinking and increasingly unreliable sea ice disrupts transportation, hunting, fishing, harvesting, food security and human relationships with the land, reduces coastal communities' protection from storm surges and wave action, increases coastal erosion and flooding, and increases shipping activity and the risk of marine accidents and spills. More precipitation and faster spring thaws result in damaging floods. Warming of permafrost puts infrastructure and archaeological sites at risk. Climate change is also having huge impacts on many Arctic

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[54] CBC News, *supra* note 3.

[55] For the rationale to prefer this term over "global warming," see Jonathan Watts, "Global warming should be called global heating, says key scientist," *The Guardian* (13 Dec 2018), https://www.theguardian.com/environment/2018/dec/13/global-heating-more-accurate-to-describe-risks-to-planet-says-key-scientist.

[56] See, eg, Miriam Hill, "Iqaluit Cooks in Record Heat Wave," Nunatsiaq News (3 August 2001), online: https://nunatsiaq.com/stories/article/iqaluit_cooks_in_record_heat_wave/; Bob Weber, "Nunavut sees warmer days than B.C. during 'unprecedented' heat wave," Global News (16 July 2019), online: https://globalnews.ca/news/5499198/nunavut-heat-wave-environment-canada/; Sarah Rogers, "Nunavut's High Arctic roasts under record heat," Nunatsiaq News (17 July 2019), online: https://nunatsiaq.com/stories/article/nunavuts-high-arctic-roasts-under-a-record-heat-wave/; CBC News, "Many northern communities were warmer than usual in 2022," CBC News (4 January 2023), online: https://www.cbc.ca/news/canada/north/northern-communities-weather-temperature-records-1.6703436.

[57] CBC News, "Iqaluit sets record high temperature for Jan. 19, reaching 0.5 C," CBC News (22 January 2021), online: https://www.cbc.ca/news/canada/north/iqaluit-sets-record-high-temperature-for-jan-19-reaching-0-5-c-1.5882621; CBC News, "Nunavut, Canada breaks 47 daily temperature records in 1st 6 days of October," Radio Canada International (11 October 2021), online: https://www.rcinet.ca/eye-on-the-arctic/2021/10/11/nunavut-canada-breaks-47-daily-temperature-records-in-1st-6-days-of-october/.

[58] Data source: Prairie Climate Centre, Climate Atlas of Canada, https://climateatlas.ca/.

[59] *Ibid*.

[60] See, eg, Office of the Auditor General of Canada, 2018 March Report of the Auditor General of Canada to the Legislative Assembly of Nunavut: Climate Change in Nunavut, https://www.oag-bvg.gc.ca/internet/English/nun_201803_e_42874.html; Emma Tranter, "Northern communities face one of biggest climate change risks, study says," Nunatsiaq News (8 July 2019), https://nunatsiaq.com/stories/article/northern-communities-face-one-of-biggest-climate-change-risks-study-says/; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 11 [*GGPPA References*].

species, especially ice-dependent ones including polar bears.[61] These changes contribute to high levels of stress and uncertainty amongst human inhabitants.[62]

Moreover, climate change is just one of three intersecting environmental crises facing humanity, alongside biodiversity loss and toxic pollution.[63] The window of opportunity to avoid planetary catastrophe is shrinking rapidly. It is now measured in a few years or decades.

This article does not explore the legal implications of Iqaluit's predicament, although they certainly merit urgent consideration. Rather, I mention them to highlight the irony of Kay's off-hand remark and the seriousness of the socio-ecological crises facing Canadian society. The juxtaposition of Kay's quip with these alarming developments prompts the rhetorical question: When will it be hot enough in Iqaluit for a constitutional right to a healthy environment to be a realistic prospect for Canadians?

Could environmental scientist and activist David Suzuki have been wondering this when he launched the "Blue Dot" campaign for a constitutional right to a healthy environment in 2014,[64] informed by David Boyd's groundbreaking work? Boyd's research confirmed that Canada was a notable laggard in this field: By 2012, 178 of 193 United Nations member states recognized environmental rights in some legally binding form, around 100 of them in their national constitutions.[65] This right has enjoyed faster global uptake than any other constitutional human right.[66] In 2022, the right to a healthy environment passed a new global landmark when the United Nations General Assembly for the first time recognized it as a human right.[67] Back in Boyd's home country, however, the prospects for an environmental rights amendment to the constitution remained dim. The focus of the Blue Dot campaign soon shifted to ordinary legislation, once again shelving the effort at a constitutional amendment.

It seems safe to assume that Canada will remain stuck in its constitutional cul-de-sac on a time scale that is relevant for addressing the triple planetary crisis. So the question becomes: what are the prospects for legal recognition of environmental rights in this constitutionally constrained environment?

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[61] Emily Chung, Tashauna Reid and Alice Hopton, "In the Arctic, 'everything is changing,' massive animal tracking study finds," CBC News (6 November 2020), https://www.cbc.ca/news/science/arctic-animal-archive-climate-1.5790992; World Wildlife Fund Arctic Programme, "Climate Change," https://www.arcticwwf.org/threats/climate-change/.

[62] Communities of Arctic Bay, Kugaaruk and Repulse Bay et al, *Unikkaaqatigiit – Putting the Human Face on Climate Change: Perspectives from Nunavut* (Ottawa: Inuit Tapiriit Kanatami, Nasivvik Centre for Inuit Health and Changing Environments at Université Laval and Ajunnginiq Centre at the National Aboriginal Health Organization, 2005).

[63] United Nations Climate Change, "What is the Triple Planetary Crisis?" https://unfccc.int/blog/what-is-the-triple-planetary-crisis.

[64] David Suzuki Foundation, "Blue Dot Movement," https://davidsuzuki.org/project/blue-dot-movement/.

[65] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) at 92-93.

[66] *Ibid* at 76.

[67] *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 76/300, UN Doc A/RES/76/300 (28 July 2022).

4. Living in a Constitutional Cul-de-Sac

In this section I explore four possible avenues to secure greater legal recognition of environmental rights in Canada's constitutional cul-de-sac: judicial interpretation of the *Canadian Charter of Rights and Freedoms* (Section 4.1); judicial interpretation of Section 35 and UNDRIP (4.2); passage of ordinary legislation (4.3); and rights of nature itself (4.4). These are not the only avenues that environmental rights advocates in Canada are exploring,[68] but they are where much of the current effort is focused. And as in a real cul-de-sac, they illustrate the fact that champions of constitutional environmental rights are forced to take longer, more circuitous routes to their desired destination, and that this destination remains largely elusive.

4.1 The *Charter*: Fitting a Square Peg in a Round Hole?

One avenue towards legal recognition of the right to a healthy environment in Canada's constitutional cul-de-sac is via judicial interpretation of existing constitutional rights. The unsalubrious features of a cul-de-sac dominate this constitutional neighbourhood. Champions of a constitutional human right to a healthy environment are forced to take the indirect route of fitting it into existing constitutional rights such as the rights to life, liberty, security of the person and equality. So far, these efforts have either been run over by established legal doctrines before leaving the driveway of constitutional adjudication, or squeezed onto busy arterial roads of existing constitutional rights that are unsuited and unfriendly to "green" alternatives.

The caselaw in this area is a rapidly moving target. My goal in this part is to sketch its trajectory and key themes.

4.1.1 How Did We Get Here?

From the *Charter*'s earliest days commentators[69] and litigants have argued that various environmentally harmful activities – including landfill operations,[70] nuclear accidents,[71]

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[68] For a discussion of these other avenues, *see* Lisa Benjamin & Sara Seck, "Mapping Human Rights-Based Climate Litigation in Canada" (2022) 13:1 *J Hum Rts & Envt* 178.

[69] See, eg, Stevenson, *supra* note 20; Dianne Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora, ON: Canada Law Book, 1990) 9; Andrew Gage, "Public Health Hazards and Section 7 of the Charter" (2003) 13 *J Envtl L & Prac* 1; Lynda M Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 *Windsor Rev Legal & Soc Issues* 7; Boyd, *Right to a Healthy Environment, supra* note 11 at 176-185; Nathalie Chalifour, "Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the Charter?" (2015) 28 *J Envtl L & Prac* 89; Lynda M Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) 71 *SCLR* 519; Lauren Worstman, "'Greening' the Charter: Section 7 and the Right to a Healthy Environment" (2019) 28 *Dal J Leg Stud* 245; Larissa Parker, "Not in Anyone's Backyard: Exploring Environmental Inequality under Section 15 of the *Charter* and Flexibility after *Fraser v Canada*" (2022) 27 *Appeal* 19.

[70] *Manicom v County of Oxford* (1985) 30 MPLR 100, 20 CRR 44, 34 CCLT 148, 4 CPC (2d) 113, 11 OAC 38, 21 DLR (4th) 611, 52 OR (2d) 137 (Div Ct).

[71] *Energy Probe v Canada (Attorney General)* (1989) 35 CPC (2d) 201, 37 Admin LR 1, 40 CRR 303, 3 CELR (NS) (2d) 262, 33 OAC 39, 14 ACWS (3d) 346, 68 OR (2d) 449, 58 DLR (4th) 513 (CA); *Energy Probe v Canada (Attorney General)* (1994) 17 OR (3d) 717 (Gen Div).

pesticide approvals,[72] waste incineration,[73] drinking water fluoridation,[74] sour gas wells,[75] wind turbines[76] and authorization of greenhouse gas (GHG) emissions[77] – violate section 7's guarantee of life, liberty and security of the person. Several cases have alleged that such actions violate section 15 equality rights[78] or section 2 religious freedom,[79] particularly of young or Indigenous people.

None of these arguments has yet ultimately prevailed in court, but they have generated a recent flurry of caselaw. After decades of roadblocks, the constitutional road seemed on the verge of opening up for environmental rights in 2012 when a court refused to strike a claim by members of the Aamjiwnaang First Nation in Ontario's "Chemical Valley" that the government's approval of increased air pollution emissions in their already polluted area endangered their health in violation of section 7 and discriminated against them as Indigenous persons living on reserve, in violation of section 15.[80] The lawsuit was withdrawn after Ontario promised to change the way it considered cumulative effects in air pollution approvals. As a result, the opportunity to set a precedent for or against environmental rights was bypassed.

Since then environmental rights claimants have run into more roadblocks. In 2017 the Supreme Court rejected the Ktunaxa Nation's claim that the approval of a ski resort on a mountain would violate its members' freedom of religion by driving away Grizzly Bear Spirit, which resides in the mountain. The Court held that the claim did not fall within the scope of section 2(a) because the plaintiffs would still be free to hold their religious beliefs and to manifest those beliefs even if Grizzly Bear Spirit were gone.[81] This case highlights how Canada's metaphorical cul-de-sac forces more circuitous journeys to elusive destinations. To protect a sacred site, the Nation was pushed onto the avenue of freedom of religion, only to be stymied by a Western conception that separates the transcendent divine from the

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[72] *Kuczerpa v R* (1991) 29 ACWS (3d) 1169, 2 WDCP (2d) 654, 48 FTR 274 (TD), *aff'd* [1993] FCJ No 217, 14 CRR (2d) 307, 152 NR 207, 39 ACWS (3d) 388, 63 FTR 74 (note) (CA), *leave denied* [1993] 3 SCR vii (note), [1993] SCCA No 194, 160 NR 319 (note), 16 CRR (2d) 192 (note); *Wier v Environmental Appeal Board*, [2003] BCTC 1441, 8 Admin LR (4th) 71, 19 BCLR (4th) 178, 2003 BCSC 1441.

[73] *Coalition of Citizens for a Charter Challenge v Metropolitan Authority* (1993) 10 CELR (NS) (2d) 257, 122 NSR (2d) 1, 338 APR 1, 103 DLR (4th) 409 (SC), *rev'd* (1993) 20 Admin LR (2d) 283, 125 NSR (2d) 241 (CA), 349 APR 241, 108 DLR (4th) 145.

[74] *Locke v Calgary (City)* (1993) 15 Alta LR (3d) 70 (QB); *Millership v British Columbia*, 2003 BCSC 82.

[75] *Kelly v Alberta (Energy and Utilities Board)* (2008) 167 CRR (2d) 14, 34 CELR (3d) 4, 2008 ABCA 52; *Domke v Alberta (Energy Resources Conservation Board)* (2008) 432 AR 376, 2008 ABCA 232.

[76] *Fata v Director, Ministry of the Environment* (2014) 90 CELR (3d) 37, [2014] OERTD No 42; *Mothers Against Wind Turbines Inc v Ontario (Director, Ministry of the Environment and Climate Change)* [2015] OERTD No 19.

[77] *Environnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885, *aff'd* on other grounds 2021 QCCA 1871, *leave denied* 2022 CanLII 67615 (SCC); *La Rose* FCTD, *supra* note 5; *Misdzi Yikh* FCTD, *supra* note 5; *Mathur v Ontario*, 2020 ONSC 6918, *leave denied* 2021 ONSC 1624 (Div Ct) [*Mathur* motion to strike].

[78] *Millership*, *supra* note 74; *Lockridge v Ontario (Director, Ministry of the Environment)* (2012), 215 ACWS (3d) 815, 316 OAC 1, 350 DLR (4th) 720, 68 CELR (3d), 27 2012 ONSC 2316 (Div Ct); *Environnement Jeunesse, ibid*; *La Rose* FCTD, *ibid*; *Misdzi Yikh* FCTD, *ibid*; *Mathur* motion to strike, *ibid*.

[79] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386.

[80] *Lockridge*, *supra* note 78.

[81] *Ktunaxa Nation*, *supra* note 79.

physical place of worship, denying the unity of spirit and land that characterizes many Indigenous cosmologies.[82]

In 2020, the Federal Court dismissed a case brought by Indigenous hereditary chiefs representing two Houses of the Wet'suwet'en Nation in BC. The plaintiffs in *Misdzi Yikh* allege that Canada's failure to enact more stringent GHG emissions reduction legislation violated sections 7 and 15 of the Charter, a constitutional principle of intergenerational equity, common law principles of public trust and equitable waste, and a federal government duty to legislate for peace, order and good government.[83] The court granted Canada's motion to strike the claim without leave to amend. The judge ruled it unjusticiable because "[t]he issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government."[84] The judge also held that the case disclosed no reasonable cause of action because the federal government has no duty to legislate for peace, order and good government, the plaintiffs identified no specific laws or state actions that allegedly violated their rights, and they failed to plead facts that could establish a sufficient causal connection between the government's conduct and climate change. The Federal Court of Appeal partly reversed this decision in December, 2023, paving the way for a narrower claim to proceed.[85] I return to that decision below.

Three other recent cases comprise the Canadian branch of a worldwide movement: rights-based cases brought by children and youth against governments for their contributions to the climate crisis.[86] Such cases have been brought in almost two dozen countries and international fora.[87]

Children and youth have sued US federal and state governments claiming that their actions and inactions on climate change violate the plaintiffs' constitutional rights and governments' public trust duties. Refusing to dismiss one case, a judge declared in 2016 that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[88] Most of these US cases have not proceeded past a preliminary stage, but in 2023 one in Montana became the world's first such case to be decided after a full trial with live testimony and cross-examination.[89] In an historic victory, the court ruled that Montana's law forbidding state regulators to consider climate change when approving energy projects violates the plaintiffs' right to a clean and healthful environment, which is guaranteed by the state constitution.

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[82] Natasha Bakht & Lynda Collins, "'The Earth Is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62 *McGill LJ* 777.
[83] *Misdzi Yikh* FCTD*, supra* note 5.
[84] *Ibid* at para 77.
[85] *La Rose/Misdzi Yikh* FCA, *supra* note 5.
[86] Camille Cameron & Riley Weyman, "Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices" (2022) 34 *J Envtl L* 195; Elizabeth Donger, "Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization" (2022) 11 *Transnat Envtl L* 263; Larissa Parker et al, "When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World" (2022) 13:1 *J Human Rts & Envt* 64.
[87] Donger, *ibid;* Parker et al, *ibid*.
[88] *Juliana v United States*, 217 F.Supp.3d 1224 at 1250 (2016) (D Or), rev'd on other grounds 947 F.3d 1159 (9th Cir 2020).
[89] *Held v State of Montana*, No CDV-2020-307 (Montana 1st Jud Dist Ct, 14 August 2023).

A case in Hawaii survived a motion to dismiss in 2023[90] and resulted in a settlement in 2024 in which, for the first time in the world, a government agreed to work with youth plaintiffs to tackle climate change, acknowledging that the right to a healthy environment includes a right to a stable climate system and agreeing to develop and implement a plan to decarbonize the transportation system by 2045 under continuing judicial supervision.[91] Children's climate cases have also begun to rack up wins in a few other jurisdictions.[92]

The children's climate litigation wave reached Canada when three such cases were launched within a year. All allege that government conduct in relation to GHG emissions violates young people's rights under sections 7 and 15 of the *Charter*. The first, *Environnement Jeunesse*, began in November 2018. It alleged that the federal government's inadequate action on climate change violated section 7 and 15 rights of all Quebeckers 35 and younger.[93] The Quebec Superior Court ruled the case justiciable insofar as it alleged violations of constitutional rights, but found the age cutoff of 35 arbitrary. The Quebec Court of Appeal agreed that the age limit was arbitrary but also held that the case was not justiciable, because the issue of climate change policy is too political for judicial determination. The Court of Appeal also ruled that the plaintiffs could not prove a violation of section 15, saying that the fact that young people will suffer the impacts of climate change more than other people is due not to their age but to the fact that they will suffer longer.[94] The Supreme Court denied leave to appeal.

The second case, *La Rose*, was launched in Vancouver in October, 2019. 15 Indigenous and non-Indigenous youth from across the country allege that the federal government has caused, contributed to and allowed GHG emissions incompatible with a stable climate system, violating their section 7 and 15 rights and those of all present and future children and youth in Canada. The impugned government conduct includes a wide range of laws, policies and decisions causing and authorizing GHG emissions, adopting inadequate GHG emission targets, failing to meet these targets, and actively supporting and participating in fossil fuel activities.

In 2020, the Federal Court granted the government's motion to strike the claim without leave to amend, holding that while *Charter* claims are usually justiciable, these ones "are so political that the Courts are incapable or unsuited to deal with them."[95] The court concluded that by alleging an overly broad, diffuse and unspecified pattern of government conduct, the case put Canada's overall policy response to climate change on trial. The court also held that the *Charter* claims had no reasonable prospect of success since the plaintiffs failed to allege specific state actions or laws.

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[90] *NF v Dept of Transportation*, No Civ 1CCV-22-0000631 (JPC) (Hawaii 1st Cir Ct, 6 April 2023).
[91] Office of Governor Josh Green, MD, News Release, "Historic Agreement Settles Navahine Climate Litigation" (20 June 2024), online: https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-historic-agreement-settles-navahine-climate-litigation/; Our Children's Trust, "An Historic Settlement" (last visited 1 July 2024), online: https://navahinevhawaiidot.ourchildrenstrust.org/a-landmark-settlement/.
[92] Donger, *supra* note 86 at 270. In April 2024, the European Court of Human Rights dismissed a Portuguese children's climate change case on procedural and jurisdictional grounds, but simultaneously ruled for the plaintiffs in another climate change case brought by Swiss senior women. European Court of Human Rights, "Grand Chamber Rulings in the Climate Change Cases" (9 April 2024), online: https://www.echr.coe.int/w/grand-chamber-rulings-in-the-climate-change-cases.
[93] *Environnement Jeunesse, supra* note 77.
[94] *Ibid* at para 43 QCCA.
[95] *La Rose* FCTD, *supra* note 5 at para 40.

Many observers thought the third time would be the charm. Commenced in November, 2019, *Mathur* is an action by seven young Indigenous and non-Indigenous Ontarians who allege that Ontario's rollback of its former GHG reduction targets violates sections 7 and 15. They want the court to order Ontario to set a science-based GHG reduction target that is consistent with its fair share of the GHG reductions necessary to keep global warming below 1.5° or in any case well below 2° C—the target endorsed by the 2015 Paris Agreement.[96]

Unlike the first two Canadian children's climate cases, *Mathur* survived a motion to strike in 2020[97] and was heard on the merits in September, 2022.[98] It was the first case to decide on the merits, on the basis of a full evidentiary record, whether the *Charter* includes a right to a healthy environment, including a stable climate system.

In April, 2023, the court dismissed the case.[99] Vermette J ruled for the youth applicants on several key points including justiciability, the science of climate change and the disproportionate impact of climate change on young and Indigenous people. She also accepted that Ontario's weakened climate targets exposed the claimants to an increased risk of harm, and rejected Ontario's argument that its contribution to climate change is too small to matter. On the other hand, the court ruled that the alleged harms are not the result of the impugned government conduct, the applicants are claiming a "positive" rather than "negative" right,[100] the alleged violation of section 7 is not contrary to the principles of fundamental justice, and Ontario's actions do not create any distinction based on age.

The *Misdzi Yikh*, *La Rose* and *Mathur* decisions were overturned on appeal. In December, 2023, the Federal Court of Appeal breathed new life into the first two cases, allowing them to move forward on a narrower basis.[101] The decision sets a precedent for the justiciability of climate change claims, which has been a terminal roadblock for many such cases. The court held that the claims in both cases are justiciable despite being broad and diffuse and having substantial political dimensions. This ruling lowers a key hurdle to cases that launch holistic rather than piecemeal challenges to government conduct in a given policy domain. The court also overruled the lower court's holding on negative and positive rights, concluding that the claimants allege both and that both should be allowed to proceed to trial.

The court nevertheless found that the pleadings in both cases were too broad and diffuse. They failed to allege a sufficient nexus between specific government actions and the harm suffered by the plaintiffs. But the court gave the claimants the opportunity to file amended pleadings that correct this deficiency.

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[96] *Mathur* ONSC, *supra* note 5 at para 2. The Paris Agreement is an international treaty adopted in 2015 by the Conference of the Parties to the 1992 United Nations Framework Convention on Climate Change. *Paris Agreement*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740 (entered into force 4 November 2016).

[97] *Mathur* motion to strike, *supra* note 77.

[98] Although *Mathur* was heard on the merits before *Held*, supra note 89, was tried, it was not a civil action but an application heard in chambers without live testimony or cross-examination, thus preserving *Held*'s claim to be the world's first children's climate case to go to a full trial.

[99] *Mathur* ONSC, *supra* note 5. For an in-depth analysis of the decision, see Stepan Wood, "*Mathur v Ontario*: Grounds for Optimism about Recognition of a Constitutional Right to a Stable Climate System in Canada?" (2024) 69 *McGill LJ* 3 (Wood, "Grounds for Optimism").

[100] I discuss the positive/negative rights dichotomy in Part 4.1.2.4, below.

[101] *La Rose/Misdzi Yikh* FCA, *supra* note 5.

While opening the gate for the plaintiffs' section 7 claims to leave the judicial driveway, the court closed the gate on their other claims. It ruled that the disproportionate impact of climate change on young people "is not the kind of adverse effect that section 15 is to address."[102] It also upheld the lower courts' rulings that *La Rose*'s public trust claims and *Misdzi Yikh*'s claim that government has a duty (rather than a power) to legislate for peace, order and good government were baseless.

The *La Rose* plaintiffs filed an amended statement of claim in May, 2024, limited to s 7.[103] The government intends to bring another motion to strike the claim, to be heard in early 2025. If the lawsuit survives this motion, it is tentatively scheduled for a two-month trial between September 2026 and April 2027.[104]

Then in October 2024, the Ontario Court of Appeal reversed the lower court's dismissal of the *Mathur* case.[105] The court overturned Vermette J's ruling that the young claimants are alleging an unprecedented "positive" right. It ruled instead that when Ontario enacted its law repealing its old climate change targets and requiring it to set new ones, it voluntarily assumed a statutory obligation to produce a target and plan to combat climate change. Having done so, it was required to ensure that they comply with the *Charter*. The court sent both the s 7 and s 15 claims back to the lower court to determine whether this is the case. It also reinforced the lower court's decision that the case is justiciable, climate change has a disproportionate impact on young and Indigenous people, and Ontario's weakened climate change target contributes to increased risks to Ontarians' lives and health.

4.1.2 Where Are We Now?

We can summarize where things stand currently with a *Charter* right to a healthy environment under nine headings: environmental facts, justiciability, causal connections, negative and positive rights, liberty, principles of fundamental justice, age discrimination, unwritten constitutional principles and standing for future generations. Several of these issues apply to both s 7 and s 15 claims.

4.1.2.1 Environmental facts

Environmental rights claimants can take some comfort in knowing that the facts of climate change (though not necessarily other environmental problems) are effectively beyond dispute. In 2021 the Supreme Court confirmed that climate change is real, is caused primarily by anthropogenic GHG emissions, is having and will have particularly severe and devastating effects in Canada especially for Indigenous peoples, and poses an existential threat to Canada

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[102] *Ibid* at para 82.
[103] The amended statement of claim is available at Tollefson Law, "Canadian Youth File Amended Statement of Claim in Constitutional Climate Lawsuit" (press release) (31 May 2024), https://www.tollefsonlaw.ca/youth-amended-claim-climate-lawsuit/.
[104] This information is drawn from the online summary of the court file available at https://www.fct-cf.gc.ca/en/court-files-and-decisions/court-files (enter T-1750-19 in the "Search by court number" field).
[105] *Mathur* ONCA, *supra* note 5.

and the world.[106] It also held that provinces cannot escape responsibility for climate change by arguing that their individual emissions cause no measurable harm.[107]

Building on this foundation, *Mathur* confirms the anthropogenic drivers and worsening impacts of climate change, the risk of irreversible tipping points, the "carbon budget" for allowable emissions, the international consensus on GHG targets, and the large, unexplained gap between Ontario's target and this consensus.[108] It also confirms that children and youth are disproportionately vulnerable to the adverse impacts of climate change, including wildfire smoke, flooding, extreme heat, respiratory and vector-borne diseases, toxic pollution and psychological harm, and their vulnerability is increased by their dependence on adult caregivers. This vulnerability is magnified for Indigenous youth due to their greater exposure to climate change impacts, their strong ties to the land and the centrality of land-based practices to their individual and collective well-being.[109] It is worth noting that these enhanced vulnerabilities extend to other environmental harms including air pollution, unsafe drinking water, poor sanitation, hazardous chemicals, radiation and e-waste.[110] Finally, *Mathur* joins courts around the world in rejecting the argument that any given jurisdiction's contribution is too small to matter,[111] holding that every tonne of CO_2 adds to global warming and increases risks to life and health.[112]

La Rose/Misdzi Yikh, in turn, reiterated the Supreme Court's observations about climate change[113] and noted that it is "beyond doubt that the burden of addressing the consequences will disproportionately affect Canadian youth."[114] It also confirmed that governments cannot avoid liability by claiming that their contributions to climate change are too small.[115]

This growing consensus makes climate change an increasingly promising context for recognition of a *Charter* right to a healthy environment.

4.1.2.2 Justiciability

Mathur, *La Rose* and *Misdzi Yikh* have greatly reduced the risk that the doctrine of justiciability will crush claims of a *Charter* right to a healthy environment before they leave

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[106] *GGPPA References, supra* note 60 at paras 2, 7, 10-11, 167.
[107] *Ibid* at para 188.
[108] *Mathur* ONSC, *supra* note 5 at paras 21-24, 144-147; *Mathur* ONCA, *ibid* at paras 10-12, 23, 62, 66, 72.
[109] *Mathur* ONSC, *ibid* at para 25; *Mathur* ONCA, *ibid* at para 13.
[110] See, eg, World Health Organization, "Children's Environmental Health," https://www.who.int/health-topics/children-environmental-health; Ruth A Etzel, "The Special Vulnerability of Children" (2020) 227 *Int'l J Hygiene & Envt'l Health* 113516; Álvaro Fernández-Llamazares et al, "A State-of-the-Art Review of Indigenous Peoples and Environmental Pollution" (2020) 16(3) *Integrated Envt'l Assessment & Mgmt* 324.
[111] See, eg, *Massachusetts v Environmental Protection Agency* (2007) 549 US 497 at 523-24; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at paras 514-527; Hoge Raad [Supreme Court], Civil Division, 20 December 2019, *Urgenda Foundation v Netherlands*, No 19/00135 (Netherlands) at paras 5.7.1, 5.7.7-5.7.8; Bundesverfassungsgericht [Federal Constitutional Court], First Senate, 24 March 2021, *Neubauer et al v Germany*, Nos BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (Germany) at paras 202-203; *Held*, *supra* note 89, Findings of Fact at paras 236-7, 267-8; Conclusions of Law at paras 15-16. More generally, see Karinne Lantz, "*The Netherlands v Urgenda Foundation*: Lessons for Using International Human Rights Law in Canada to Address Climate Change" (2020) 41 *Windsor Rev Legal Soc Issues* 145.
[112] *Mathur* ONSC, *supra* note 5 at paras 148-149; *Mathur* ONCA, *ibid* at paras 15, 63.
[113] *La Rose/Misdzi Yikh* FCA, *supra* note 5 at paras 76, 116.
[114] *Ibid* at para 76.
[115] *Ibid* at para 134.

the driveway of constitutional adjudication, like a family SUV backing over hapless children.[116] These cases reaffirm that claims implicating governments' policy choices on deeply contentious environmental issues are justiciable, so long as they challenge identifiable state actions.[117] Claimants can even launch holistic challenges against governments' overall policy approaches to an environmental issue, provided they link the alleged deprivations to specific state actions.[118]

Just how to frame such holistic challenges remains somewhat unclear, however. *La Rose/Misdzi Yikh* acknowledges that Canada's entire pattern of action and inaction on climate change could, in principle, be the basis for a s 7 claim, but simultaneously instructs the claimants to amend their pleadings to "zero in on the specific provision or provisions which constitute a deprivation."[119] The court offered little guidance to square this circle other than to note that Canada should not be able to escape liability by saying the revised claims are too narrow.[120] The amended *La Rose* claim details how the deprivations suffered by the plaintiffs are causally linked to a catalogue of Canada's specific actions in relation to meeting its climate commitments, reducing its GHG emissions, operating its legislated carbon pricing scheme, adopting its legislated "net-zero" targets and plans, and authorizing and supporting GHG-emitting projects via approvals, regulation and subsidies. Whether this approach succeeds will be clearer after the federal government's new motion to strike is decided.

Moreover, all three cases confirm that requesting remedies that push the boundaries of the courts' competence does not preclude justiciability. The appropriateness of remedies should be addressed after a *Charter* violation is proved.[121] The Ontario Court of Appeal in *Mathur* also ruled that an order requiring a government to adopt a science-based target would not constitute a judicial takeover of climate policy but would leave the government room to decide what to do and how to do it. It also confirmed that clear scientific and legal standards exist to judge a target's adequacy.[122]

So, if justiciability once seemed a fatal barrier to climate litigation,[123] these decisions reduce it to a traffic-calming hump.

4.1.2.3 Causal connections

These decisions also reduce the risk that claimants may avoid the SUV of justiciability only to fall into the pothole of an insufficient causal connection between the impugned state action and the alleged harm. Claimants must establish, on a balance of probabilities, a reasonable inference that particular state actions contribute in a real way to the harm

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[116] SUV stands for "sport utility vehicle," the bigger, heavier, more polluting and more dangerous class of vehicle that has usurped the sedan as the standard Canadian family vehicle. Jaela Bernstien, "SUVs are more popular than ever, but do drivers need all that extra space?" CBC News (28 Mar 2023), online: https://www.cbc.ca/news/science/suv-survey-quebec-1.6792349.
[117] *La Rose/Misdzi Yikh* FCA, *supra* note 5 at paras 29-32; *Mathur* ONCA, *supra* note 5 at para 36.
[118] *La Rose/Misdzi Yikh* FCA, *supra* note 5 at paras 37-38, distinguishing *Tanudjaja v Canada (Attorney General)* 2014 ONCA 852 (ruling *Charter* challenge to housing policy non-justiciable because it targeted overall policy approach rather than particular laws or actions).
[119] *La Rose/Misdzi Yikh* FCA, *ibid* at para 128.
[120] *La Rose/Misdzi Yikh* FCA, *supra* note 5 at paras 133-134.
[121] *La Rose/Misdzi Yikh* FCA, *supra* note 5 at paras 48-51; *Mathur* ONSC, *supra* note 5 at para 108.
[122] *Mathur* ONCA, *supra* note 5 at paras 68-74.
[123] *See also Friends of the Earth v Canada (Environment)*, 2009 FCA 297, *aff'g* 2008 FC 1183.

suffered.[124] The *Mathur* claimants did this by showing that Ontario's weakened target contributes to an increased risk of injury and death.[125] As noted above, the *La Rose* claimants have amended their pleading to allege a clearer causal nexus.

The *Mathur* appeal also filled a pothole dug by the lower court. The claimants argue that Ontario's climate change act, target and plan are state actions that affirmatively cause them harm by authorizing, incentivizing, facilitating, creating and committing to a dangerous level of GHGs. The lower court disagreed, holding that the harms are caused by climate change, not by Ontario's impugned actions.[126] It said this despite finding that Ontario's "decision to limit its efforts to an objective that falls severely short of the scientific consensus as to what is required" contributes to increased risks to life and health.[127] It rationalized this apparent contradiction by reasoning that the claimants are really challenging Ontario's *failure to act* on climate change, rather than its *active contribution* to the problem.[128]

The appeal court rejected this reasoning. It held that the claimants "are not challenging the inadequacy of the Target or Ontario's inaction, but rather argue the Target itself, which Ontario is statutorily obligated to make, commits Ontario to levels of greenhouse gas emissions that violate their *Charter* rights."[129] It emphasized the contradiction between the finding that Ontario's decision to adopt a severely inadequate target contributes to increased risks to life and health, and the conclusion that the act, target and plan do not cause or contribute to a deprivation of the claimants' right to life and health or to climate change's disproportionate impacts on young people.[130] The court sent the case back to the lower court to reconsider whether Ontario's adoption of a weakened target, understood as an action rather than a failure to act, deprives young people of their rights.

The appeal court in *La Rose/Misdzi Yikh* similarly held that government measures that permit dangerous levels of GHG emissions can be challenged as actions that create or exacerbate risks to life and health, rather than as omissions.[131] Unlike *Mathur*, the *La Rose* plaintiffs claim that both actions and omissions cause or contribute to the deprivation of their rights, but either way, these two appellate decisions suggest that showing a sufficient causal connection should not be a major obstacle to *Charter* environmental claims.

4.1.2.4 Negative versus positive rights

The issue of causal connection is intertwined with that of negative and positive rights. The distinction between negative and positive rights is as stubborn as it is controversial,[132] but

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[124] *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at paras 75-76; *La Rose/Misdzi Yikh* FCA, *supra* note 5 at paras 90, 128.
[125] *Mathur* ONSC, *supra* note 5 at para 147; *Mathur* ONCA, *supra* note 5 at paras 33, 47, 62, 65.
[126] *Mathur* ONSC, *supra* note 5 at paras 178-179.
[127] *Ibid* at para 147.
[128] *Ibid* at para 122.
[129] *Mathur* ONCA, *supra* note 5 at para 41.
[130] *Ibid* at paras 33, 59, 65.
[131] *La Rose/Misdzi Yikh, supra* note 5 at para 110.
[132] See, eg, Martha Jackman and Bruce Porter, "Canada: Socio-Economic Rights under the Canadian *Charter*" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative law* (Cambridge: Cambridge University Press, 2009) 209; Nathalie J Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42 *Vt L Rev* 689 at 742; Colin Feasby, David DeVlieger & Matthew Huys, "Climate Change and the Right to a Healthy Environment in the Canadian Constitution" (2020) 58:2 *Alta L Rev* 213.

there are signs that it will not necessarily force claims of a human right to a healthy environment off the road. According to this distinction, a negative right merely requires the government to refrain from actively interfering with its enjoyment, while a positive right requires the government to take affirmative steps to ensure its enjoyment.

Canadian courts recognize that some *Charter* rights have positive dimensions, but resist expanding the range of positive rights despite acknowledging that the distinction is problematic.[133] The Supreme Court has emphasized that the *Charter* does not impose a freestanding positive obligation on the state to act affirmatively to redress social inequalities (s 15)[134] or ensure that everyone enjoys life, liberty and security of the person (s 7).[135] The *Gosselin* case famously left the door open to the recognition of positive rights under section 7 in exceptional circumstances,[136] but no court has yet stepped through it.

La Rose/Misdzi Yikh and *Mathur* offer encouragement for both negative and positive environmental rights in the context of climate change. First, they confirm that claimants who allege that state actions create or exacerbate risks to life, liberty or security of the person or discriminate on the basis of age are not asserting positive rights.[137] In *La Rose/Misdzi Yikh* these actions include implementing deficient legislative standards, authorizing GHG-emitting projects and subsidizing fossil fuels; in *Mathur*, adopting woefully inadequate climate targets.

This confirmation is important because the lower court insisted that the *Mathur* claimants are asserting positive rights under both sections 7 and 15.[138] It rejected their argument that the government actively interferes with their rights by putting in place a legislative scheme that authorizes and commits to dangerous GHG levels.[139] It likewise rejected their claim that they are not asking the government to take positive action to address a problem it did not create, but rather that having participated in creating the harm and having decided to put in place a legislative scheme to address it, it must ensure that the scheme complies with the *Charter*.[140] Vermette J ruled that the claimants were not complaining "that the state has intervened to create harm or to increase risk" (a negative rights claim) but rather "that the state has intervened to ameliorate harm and to decrease risk, but not enough or not as much as before" (a positive rights claim).[141] The court concluded that the claimants were "seeking to place a freestanding positive obligation on the

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[133] See, eg, *Vriend v Alberta*, [1998] 1 SCR 493 at para 53 [*Vriend*]; *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 20 (per Wagner CJ, Moldaver, Côté, Brown and Rowe JJ), 152, 155 (per Abella, Karakatsanis, Martin and Kasirer JJ, dissenting); *La Rose/Misdzi Yikh, supra* note 5 at paras 101-103.
[134] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 42 [*Alliance*]; *R v Sharma*, 2022 SCC 39 at para 63 [*Sharma*].
[135] *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 81 [*Gosselin*].
[136] *Ibid* at para 82.
[137] *La Rose/Misdzi Yikh* FCA, *supra* note 5 at paras 105-106, 110; *Mathur* ONCA, *supra* note 5 at paras 5, 49, 56.
[138] *Mathur* ONSC, *supra* note 5 at paras 124, 132-136 (s 7), 178-179 (s 15); *see also* Camille Cameron, Riley Weyman & Claire Nicholson, "Legal Hurdles and Pathways: The Evolution (Progress?) of Climate Change Adjudication in Canada" (2024) 47:2 Dal LJ 1 (construing the claims as positive rights).
[139] *Ibid* (Factum of the Applicants at paras 164-165), *see also Dixon v Director, Ministry of the Environment*, 2014 ONSC 7404 (Div Ct).
[140] *Ibid* (Factum of the Applicants at para 161).
[141] *Ibid* at para 133 (quoting *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140 at para 31 [*Barbra Schlifer*]).

state to ensure that each person enjoys life and security of the person, in the absence of a prior state interference" with their rights.[142]

The Court of Appeal rejected this characterization of the case:

> This is not a positive rights case. The application does not seek to impose on Ontario any new positive obligations to combat climate change. By enacting the *CTCA*, Ontario voluntarily assumed a positive statutory obligation to combat climate change and to produce the Plan and the Target for that purpose. Ontario was therefore obligated to produce a plan and a target that were *Charter* compliant.[143]

The court likened this case to *Chaoulli*, where the Supreme Court found that Quebec's prohibition on private medical insurance created delays that put patients' lives and health at risk. The Court opined famously that although s 7 does not confer a freestanding positive right to health care, if the government puts in place a scheme to provide health care, the scheme must comply with the *Charter*.[144] The Court of Appeal also invoked *Alliance*, where the Supreme Court stated that while s 15 does not impose a freestanding positive obligation to redress inequalities, it requires the state to ensure that whatever actions it does take do not have a discriminatory impact.[145]

The *Mathur* appeal decision thus removes the challenge of proving an unprecedented freestanding positive right. Instead, it fits the case into the well-established principle that where a government creates a legislative scheme to remedy a problem, the scheme must comply with the *Charter*.[146]

Second, *Mathur* and *La Rose/Misdzi Yikh* also make the road to recognition of a positive right to environmental protection a little smoother. The *La Rose* plaintiffs claim both positive and negative s 7 rights. The court allowed both claims to proceed toward trial. It acknowledged that the current and future effects of climate change—including loss of land and culture, food insecurity, injury and death—pose existential threats to Canada and the world. "If these do not constitute special circumstances" justifying recognition of a positive section 7 right, wrote the court, "it is hard to conceive that any such circumstances could ever exist."[147]

The *Mathur* claimants similarly made "a compelling case that climate change and the existential threat that it poses to human life and security of the person present special circumstances that could justify" recognition of a positive right under s 7.[148] The lower court declined, however, to decide there is such a right, because there is no clear legal standard for its existence.[149] Nevertheless, it found that if such a right exists, the claimants proved its deprivation. By failing to take steps to reduce GHG emissions further, Ontario has

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[142] *Ibid* at para 132.
[143] *Mathur* ONCA, *supra* note 5 at para 5; see also paras 49 (s 7), 56 (s 15).
[144] *Ibid* at para 40, citing *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 104 [*Chaoulli*].
[145] *Ibid*, citing *Alliance*, *supra* note 134 at para 42.
[146] Stepan Wood, "Recent Ontario appeal court ruling on youth-led climate case could be a constitutional 'game-changer'," *The Conversation* (10 Nov 2024), https://theconversation.com/recent-ontario-appeal-court-ruling-on-youth-led-climate-case-could-be-a-constitutional-game-changer-241727.
[147] *La Rose/Misdzi Yikh* FCA, *supra* note 5 at para 116.
[148] *Mathur* ONSC, *supra* note 5 at para 138.
[149] *Ibid* at paras 139-141.

contributed in a real, measurable and non-speculative way to an increase in risks to human life, health and safety.[150] The appeal court did not disturb this holding.

From here the traffic signals get confusing. For cases that assert positive rights, the two decisions provide little guidance for distinguishing between positive and negative elements of rights claims or for determining when a positive right to environmental protection arises under ss 7 or 15.[151]

Some uncertainty also remains for cases that do not assert positive rights. The court ruled that *Mathur* is not a positive rights case, but it did not say it is a negative rights case. Instead it emphasized that the province's voluntary adoption of a positive statutory obligation to act on climate change entailed a constitutional duty to ensure that its action complies with the *Charter*.[152] This focus on a self-imposed positive statutory obligation is absent from leading decisions holding that state interventions to provide social benefits or tackle collective problems entail such a duty. In those cases it was the state's creation of a legislative or policy scheme, not its assumption of a positive statutory obligation to act, that entailed this duty.[153] If the scheme causes or contributes to a significant risk to life or health, or to a disproportionate impact on the basis of a protected ground, it deprives those affected of their s 7[154] or s 15[155] rights, respectively. This is true whether or not the scheme includes a positive statutory obligation to act. To the extent that *Mathur* suggests otherwise, it is inconsistent with the caselaw.

Cases like this can be understood as involving negative rights, in the sense that courts find rights deprivations where the evidence establishes that a legislative or policy scheme, albeit created to provide benefits or ameliorate problems, causes or contributes to a risk to life, health or liberty or a disproportionate impact on the basis of a protected ground; but not where it does not.[156] By failing to classify *Mathur* explicitly as a negative rights case and instead emphasizing a "positive statutory obligation," the Ontario Court of Appeal underlined the ambiguity of the positive-negative rights distinction. On the plus side, this could hasten the dichotomy's demise and its replacement with a more robust approach to constitutional rights.

The current state of the law thus suggests that the road toward recognition of both negative and positive rights to a healthy environment under the *Charter* is beginning to open, at least in the context of climate change, but the traffic signals remain hard to decipher.

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[150] *Ibid* at paras 147-151.

[151] The *Mathur* claimants proposed applying a test from s 2 of the *Charter*, in which a positive right arises "where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms," but the court thought s 7 would need its own framework, which it was unwilling to supply. *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 25, quoting *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 361.

[152] *Mathur* ONCA, *supra* note 5 at paras 5, 32, 37, 53, 57-58.

[153] *See, eg*, *Chaoulli*, *supra* note 144; *Alliance*, *supra* note 134.

[154] *See, eg, Chaoulli, ibid*; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [*PHS*]; *Bedford, supra* note 124; *Sharma, supra* note 134.

[155] *See, eg, Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624 [*Eldridge*]; *Vriend, supra* note 133; *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 (CanLII), [2003] 2 SCR 504 [*Martin*]; *Alliance, supra* note 134.

[156] *See, eg, Gosselin, supra* note 135 (ss 7, 15); *Barbra Schlifer, supra* note 141 (s 7); *Sharma, supra* note 134 (s 15).

4.1.2.5 Liberty

Environmental s 7 claims focus mainly on rights to life and security of the person, as the preceding discussion suggests. The right to liberty has not been much explored in the environmental caselaw but offers a promising avenue. It protects an individual's ability to make decisions of fundamental importance that go to "the core of what it means to enjoy individual dignity and independence."[157] Though its scope is unsettled, it likely covers some basic life choices limited by climate change such as those about subsistence, education, occupation, health, diet, cultural practices, reproduction, child-rearing and where to live.[158]

The pleadings in *Mathur*, *La Rose* and *Misdzi Yikh* all allege deprivation of liberty. The decisions so far in *La Rose* and *Misdzi Yikh* have not examined these claims directly. In *Mathur*, the claimants invoked liberty under s 15. One of their grounds for arguing that Ontario's conduct impacts youth disproportionately was that "Young people's liberty and future life choices are being constrained by decisions being made today over which they have no control."[159] The lower court rejected this as an attack on the voting age,[160] missing the point that it is Ontario's climate change act, target and plan—not the voting age—that disproportionately limit young people's liberty by offloading the burden of drastic GHG cuts and catastrophic impacts onto them.

This claim would fit well under section 7. It is reinforced by a 2021 decision of the German Constitutional Court, which held that inadequate climate change targets violated young people's liberty by offloading GHG reduction burdens onto young people and potentially constraining them to future "radical abstinence" from carbon-emitting activities.[161] The court found that "Practically all forms of freedom are potentially affected because virtually all aspects of human life involve the emission of greenhouse gases … and are thus potentially threatened by drastic restrictions after 2030.[162] It concluded: "Climate action measures that are presently being avoided out of respect for current freedom will have to be taken in future – under possibly even more unfavourable conditions – and would then curtail the exact same needs and freedoms but with far greater severity."[163]

The right to liberty is, in short, a promising avenue for *Charter* litigation in the context of environmental problems like climate change, where present decisions constrain future choices.

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[157] *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55 at para 49.
[158] *See, eg*, *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at para 54; *R v Malmo-Levine/R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at paras 85-86; *R v Clay*, 2003 SCC 75, [2003] 3 SCR 735 at paras 31-32; *R v Ndhlovu*, 2022 SCC 38 at paras 45, 51. Whether choice of where to live is protected by s 7 is unsettled: *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 93; *Drover v Canada (Attorney General)*, 2023 ONSC 5529.
[159] *Mathur* ONSC, *supra* note 5 at para 177.
[160] *Ibid* at para 181.
[161] *Neubauer*, *supra* note 111 at para 193.
[162] *Ibid* at para 117.
[163] *Ibid* at para 120.

4.1.2.6 Principles of fundamental justice

Even if the claimants prove a deprivation of their section 7 rights, they will have to show that it does not accord with principles of fundamental justice. The road signs here are mildly encouraging. A principle of fundamental justice is "a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person."[164] Two established principles of fundamental justice are that a deprivation must not be arbitrary or grossly disproportionate to the ends pursued.

The lower court in *Mathur* ruled that even if the claimants proved a deprivation of a positive right, it was not contrary to the principles of fundamental justice. The court reasoned that the principles of arbitrariness and gross disproportionality are premised on active state interference with the right to life, liberty and security of the person and are not well adapted to positive rights cases.[165] This logic is suspect: the arbitrariness and proportionality of a deprivation depend on its relationship to the purpose it serves, not on whether it is occasioned by action or inaction.[166] In any case, the appeal court's decision that this is not a positive rights case avoids this novel issue.

Whether a deprivation is arbitrary or grossly disproportionate depends heavily on how courts construe the purpose of the impugned state action. This is case-specific and hard to predict. The lower court in *Mathur* held that the purpose of Ontario's climate change act, target and plan was to reduce Ontario's GHG emissions to address and fight climate change, but not to do its fair share, avoid dangerous climate change or protect the environment for future generations.[167] This enabled the court to conclude that the deprivation was neither arbitrary, since even deficient emissions reductions are rationally connected to this modest goal, nor grossly disproportionate, since the claimants support the government's objective but simply want it to pursue that goal more aggressively.[168] If the claimants can convince the court, upon rehearing, that Ontario's target and plan actively exacerbate climate harms, they should be able to argue the deprivation is arbitrary because it contradicts the law's purpose to fight climate change.[169] This prospect is reinforced by the appeal court's ruling that the target and plan must actually "do something about climate change."[170] The more claimants can convince courts that the urgency and magnitude of environmental problems and policy responses are integral to the purpose of state actions, the more likely they are to prove that state actions that exacerbate these problems are arbitrary or grossly disproportionate.

Mathur also rejected the claimants' submission that "societal preservation" is a principle of fundamental justice. They argued that this principle prohibits a government from engaging in conduct "that will, or could reasonably be expected to, result in the future harm, suffering, or death of a significant number of its own citizens."[171] The court held that societal preservation is, if anything, a fundamental state interest or public policy, not a legal

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[164] *Mathur* ONSC, *supra* note 5 at para 164.
[165] *Ibid* at paras 160, 162.
[166] *Sharma, supra* note 134 at paras 86-87.
[167] *Mathur* ONSC, *supra* note 5 at paras 157-158.
[168] *Ibid* at para 162.
[169] See, eg, Martin, supra note 155; PHS, supra note 154; Alliance, supra note 134
[170] *Mathur* ONCA, *supra* note 5 at para 37.
[171] *Mathur* ONSC, *supra* note 5 at para 163.

principle.[172] The ironic upshot seems to be that it is too fundamental to be a principle of fundamental justice. The appeal court left this issue unresolved.

La Rose/Misdzi Yikh did not address principles of fundamental justice, but it did weigh in on the issue of age discrimination, which constitutes the next major obstacle to claims of a *Charter* right to a healthy environment.

4.1.2.7 Age discrimination

The road toward recognizing that environmental harm can violate the right to equality looks rough after *Mathur* and *La Rose/Misdzi Yikh*, even though courts accept that climate change has a disproportionate impact on children, youth and Indigenous peoples.[173] So far, age has been the predominant focus of environmental claims under section 15—specifically, discrimination against children and youth.[174] Only a couple cases have alleged another ground, namely discrimination against Indigenous peoples.[175]

Environmental section 15 claims usually involve adverse effect discrimination rather than laws that discriminate on their face. In adverse effect discrimination cases, the claimant must demonstrate that the impugned state action (1) creates or contributes to a disproportionate impact on a protected group on the basis of an enumerated or analogous ground (including age or Indigeneity), and (2) imposes burdens or denies benefits with the effect of reinforcing, perpetuating or exacerbating disadvantage.[176] Leaving a protected group's pre-existing situation *unaffected* is insufficient at both steps.[177]

The claimants in *Mathur* and *La Rose* make two types of age discrimination claims. One is that young people are more vulnerable to the impacts of climate change than adults, whenever those impacts occur. This is now an established fact, as already mentioned. The other claim is that young and future people will suffer more from these impacts because they will be alive when the worst impacts are felt.[178] The first can be understood as a matter of *intra*generational equity insofar as it differentiates among people alive at the same time, the second as *inter*generational equity insofar as differentiates among people living at different times.[179]

The *Mathur* lower court dismissed the first type of age discrimination claim on the basis that it is climate change, not Ontario's act, target or plan, that disproportionately impacts young people. This state action simply allows an existing gap between members of

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[172] *Ibid* at para 166, quoting *United States v Burns*, 2001 SCC 7 at para 71.
[173] *See supra*, sections 4.1.1, 4.1.2.1.
[174] *Millership, supra* note 74; *Environnement Jeunesse, supra* note 77; *Misdzi Yikh* FCTD, supra note 5; *La Rose* FCTD*, supra* note 5; *Mathur* ONSC*, supra* note 5.
[175] *Lockridge, supra* note 78 (Indigenous peoples living on reserve); *La Rose* FCTD*, supra* note 5 (Indigenous children and youth). In 2021 a court approved the settlement of a national class action which alleged that the federal government's failure to supply safe drinking water on First Nations reserves violated sections 2(1), 7 and 15 of the *Charter*, but the court did not adjudicate the *Charter* claims. *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 MBQB 275.
[176] *Sharma*, *supra* note 134 at para 28.
[177] *Ibid* at paras 40, 52 (emphasis in original).
[178] In *Mathur*, the claimants argued this second type on the basis of age and, alternatively, on the basis of the novel analogous ground of "generational cohort." The lower court rejected both.
[179] *See* Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Dobbs Ferry, NY: Transnational, 1989).

a protected group and others to persist. It does not widen the gap or worsen the impacts.[180] The appeal court ruled that the lower court's error in treating this as a positive rights case tainted her s 15 analysis.[181] This opens the door for the claimants to show that Ontario's target and plan do create or contribute to a disproportionate impact on young people by authorizing and committing to dangerous GHG emissions that affect young people disproportionately. It will then be up to the government to prove that this age-based discrimination is demonstrably justified in a free and democratic society.

The lower court's dismissal of the second type of age discrimination claim will be harder to overcome. Like the Quebec Court of Appeal *Environnement Jeunesse*, the court treated this as a temporal rather than age-based distinction, insofar as everyone alive in the future will experience the impacts of climate change.[182] Temporal distinctions have been held not to violate section 15.[183] Treating people differently based on when they were injured,[184] married[185] or infected[186] is not unconstitutional. But this logic does not apply clearly to this case. First, even if the impugned distinction is not based strictly on age, it is based on when one is born, which is an immutable personal characteristic shared by people who lack political power (ie, minors and future generations), and could therefore be recognized as an analogous ground. Second, unlike the aforementioned distinctions, this one does not appear on the face of the law and is not created by a change in the law or an injury the law seeks to remedy. It is created by the law's authorization of excessive GHG emissions now and its deferral of drastic cuts to a future when the impacts of climate change will be experienced disproportionately by those alive then.

The court in *La Rose/Misdzi Yikh* slammed the door on these issues, striking the section 15 claims with no opportunity to amend. The court made two key negative holdings. First, it construed the plaintiffs' claims as concerned only with intergenerational equity, saying they were really about how the state action will affect them when they are older and alleged no "present harm to which the section 15 challenge can anchor itself."[187] The court thus effaced their intragenerational claim that the impugned conduct is now having, and will at any given time have, a greater impact on young people than adults. Second, it opined that intergenerational equity is outside the scope of section 15 and implicates policy choices about allocating resources between the present and future, which are for the legislature and executive.[188] If this reasoning stands, it will block the way for intergenerational equity claims even if they differ from "temporal distinction" claims.

Finally, *La Rose/Misdzi Yikh* is also problematic because it struck the section 15 claims in their entirety without even discussing the issue of discrimination against Indigenous peoples. So, the court not only slammed the door of the section 15 bus on the youth claimants' fingers, it kicked the Indigenous claimants right off the bus.

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[180] *Mathur* ONSC, *supra* note 5 at paras 177-179.
[181] *Mathur* ONCA, *supra* note 5 at paras 57-58.
[182] *Mathur* ONSC, *supra* note 5 at para 180; *Environnement Jeunesse*, *supra* note 77 at para 43 (QCCA).
[183] *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 37.
[184] *Downey v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 65, at para 31; *Vail & McIver v WCB (PEI)*, 2012 PECA 18 at para 25, leave denied, 2013 CanLII 8400 (SCC).
[185] *Bauman v Nova Scotia (Attorney General)*, 2001 NSCA 51, 192 NSR (2d) 236, 197 DLR (4th) 644 at para 65.
[186] *Guild v Canada (Attorney General)*, 2006 FC 1529, 305 FTR 172 at para 13, aff'd 2007 FCA 311.
[187] *La Rose/Misdzi Yikh* FCA, *supra* note 5 at para 124.
[188] *Ibid* at paras 83, 123.

4.1.2.8 Unwritten constitutional principles

Mathur and *La Rose/Misdzi Yikh* suggest that unwritten constitutional principles will not be much help in securing a right to a healthy environment. Unwritten constitutional principles are the baseline principles implicit in the creation and operation of Canada's constitutional architecture. [189] They include parliamentary sovereignty, federalism, democracy, constitutionalism, the rule of law, the separation of powers, judicial independence, minority protection, parliamentary privilege, the honour of the Crown, the duty to consult and the doctrine of paramountcy.[190] Their legal effect is debated.[191] Courts use them for various interpretive and gap-filling purposes, but not as standalone grounds to invalidate state action. [192] Commentators have proposed several environmentally friendly unwritten constitutional principles, including ecological sustainability, [193] the right to a healthy environment, [194] non-regression, [195] the public trust, [196] substantive equality [197] and recognition of Indigenous laws and legal relationships.[198]

The plaintiffs in *La Rose* alleged that the public trust doctrine is both an unwritten constitutional principle and a common law doctrine, according to which the state holds certain common and public resources in a sort of trust and owes the public a legal duty to preserve and protect them. The doctrine is well established in the United States but not Canada. In 2004, in the course of ruling that the Crown may enforce public rights in the environment against private parties, the Supreme Court left open the questions of "the Crown's potential liability for *inactivity* in the face of threats to the environment" and "the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard."[199] This seemed to open the path to environmental public trust claims. But in 2012 the Federal Court rolled a boulder across the path, dismissing a public trust claim against the federal government in relation to its approval of a highway through a privately owned wetland over which the federal government held a conservation covenant. The court found it "difficult to conceive of how a public trust duty could be imposed upon Canada

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[189] *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721.
[190] Vanessa A MacDonnell, "Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making" 2019 65:2 *McGill LJ* 175 at 178-9.
[191] *See, eg,* Mari Galloway, "The Unwritten Constitutional Principles and Environmental Justice: A New Way Forward?" (2021) 52:2 *Ottawa L Rev* 1; Vincent Kazmierski, "'Untethered': How the Majority Decision in *Toronto (City) v Ontario* Tries (but Fails) to Break Away from the Supreme Court of Canada's Unwritten Constitutional Principle Jurisprudence" 2023 54:2 *Ottawa L Rev* 197.
[192] *Toronto (City), supra* note 133.
[193] Lynda Collins, "The Unwritten Constitutional Principle of Ecological Sustainability: A Solution to the Pipelines Puzzle?" (2019) 70 UNBLJ 3; Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52 *UBC L Rev* 239.
[194] Lynda M Collins, "Safeguarding the *Longue Durée*: Environmental Rights in the Canadian Constitution" (2015) 71 *SCLR (2d)* 519.
[195] Collins & Boyd, *supra* note 10.
[196] Harry J Wruck, "The Time Has Arrived for a Canadian Public Trust Doctrine Based Upon the Unwritten Constitution" (2020) 10:2 *George Washington J Energy & Envtl L* 67.
[197] Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22:2 *Dal LJ* 5.
[198] Galloway, *supra* note 191.
[199] *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 81 (emphasis in original).

concerning lands that it does not own," and concluded that there was no legal basis for a public trust duty to protect the environment generally or this site in particular.[200]

La Rose raised this boulder into a wall. The motions judge held that the public trust doctrine "does not exist in Canadian law."[201] The appeal court agreed and said that the claim rests "on an entirely non-existent cause of action."[202] The court highlighted the tension between a trustee's duty to act in the best interest of specific persons and the federal government's duty to act in the best interest of Canada as a whole, and between the trust law principle that a trustee owns the trust assets and the proposition that a government owes public trust duties in respect of resources it does not own. Both objections are surmountable: a public trust duty is owed to the public at large, not specific persons; and American jurisprudence holds that a government can owe public trust duties in respect of resources it does not own.[203] But the wall is high.

The claimants in *Mathur* argued that societal preservation is an unwritten constitutional principle. An intervener argued the same for ecological sustainability. The court said there was no need to decide these points because these principles' only role would be help interpret sections 7 and 15, and no such help was needed.[204] The appeal court declined to wade in but noted that the principle of societal preservation may need reconsideration at the new hearing.[205] While the principle of societal preservation is novel, that of ecological sustainability finds support in numerous Supreme Court decisions and probably enjoys widespread societal consensus. In addition, the principle of non-regression would create a constitutional ratchet that prevents rollback of the level of environmental protection provided by law. The principle is recognized to varying degrees in international human rights law, international environmental law, North American trade law and several countries' constitutional laws.[206]

The path to recognition of environmentally friendly unwritten constitutional principles is overgrown with brambles. Strenuous bushwhacking will be needed to clear it.

4.1.2.9 Standing for future generations

Finally, in Canada's constitutional cul-de-sac it is unclear whether future generations can take their seat on the litigation bus with today's children or will have to wait until the neighbourhood is devastated by wildfires, drought, floods, tornadoes, heat waves and novel pests.

Standing to sue on behalf of future generations has been recognized only by a handful of courts in a handful of countries, including Colombia, Netherlands, Philippines and the United States.[207] In 1993, the Philippine Supreme Court famously had "no difficulty"

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[200] *Burns Bog Conservation Society v Canada*, 2012 FC 1024 at para 111, *aff'd* 2014 FCA 170.
[201] *La Rose* FCTD, *supra* note 5 at para 93.
[202] *La Rose/Misdzi Yikh* FCA, *supra* note 5 at para 59.
[203] *National Audubon Society v Superior Court*, 33 Cal.3d 419 (1983).
[204] *Mathur* ONSC, *supra* note 5 at para 187.
[205] *Mathur* ONCA, *supra* note 5 at para 77. The court ruled that the principle of ecological sustainability should be considered at the new hearing only if the claimants amend their pleadings to include it. *Ibid* at para 78.
[206] Collins & Boyd, *supra* note 10 at 295-300.
[207] *Future Generations v Colombian Ministry of the Environment* (2018) Supreme Court of Colombia STC4360-2018; *Urgenda*, *supra* note 111 (not interfering with lower court ruling); *Oposa v Factoran* (1993) 33 ILM 173

concluding that young people could sue "for themselves, for others of their generation and for the succeeding generations," reasoning that such standing "can only be based on the concept of intergenerational responsibility" in which "every generation has a responsibility to the next to preserve" the environment.[208]

Public interest standing is well established in Canada,[209] but extending it to future generations is a novel proposition that raises several questions. One is whether this would prejudice the rights of other equally or more directly affected parties.[210] Would granting today's youth standing prejudice future generations' right to assert their own claims? On a preliminary motion in *Mathur*, the court thought not, since members of future generations can neither travel back in time to bring the same claim against the current government, nor will they be able to they bring it in the future as the world will likely be different then.[211] By the time they are able to bring their own claim, it will be too late.[212]

The second issue is whether granting standing to sue on behalf of future generations implies standing to sue on behalf of unborn foetuses, which the Supreme Court has rejected[213] but which has been made newly salient by developments south of the border.[214] The claimants in *Mathur* argued that it does not, stating that they seek only "to ensure that those in future generations *who will be born* are not deprived of their constitutional rights as a result of Ontario's contributions to climate change, simply because of when they were born."[215] The court did not decide this issue.

The court hearing the preliminary motion held that the youth had met the test for standing on behalf of future generations.[216] At the merits stage, neither the lower nor the appeal court ruled on this issue. Nor did the courts in *La Rose*, where the plaintiffs also assert standing to sue for future generations.

To conclude, although they are not the final word, the most recent decisions in *La Rose/Misdzi Yikh* and *Mathur* are bellwethers of the status of environmental rights in Canada's constitutional cul-de-sac. At present, however (and at risk of straining the reader's tolerance for metaphors), it is not clear whether they are leading the flock towards the greener pastures of environmental rights or the abbatoir of judicial dismissal.[217]

(Philippines Sup Ct) [*Oposa*]; *Juliana*, *supra* note 88 (holding plaintiffs adequately pleaded standing on behalf of future generations except for redressability).

[208] *Oposa*, *ibid* at 185.

[209] *See Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.

[210] *Ibid* at para 51.

[211] *Mathur* motion to strike, *supra* note 77 at paras 250, 253.

[212] *Mathur* ONSC, *supra* note 5 (Factum of the Applicants at paras 132-133).

[213] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 (denying standing to sue on behalf of unborn foetuses to challenge abortion legislation).

[214] See, eg, *LePage v Center for Reproductive Medicine, PC*, 2024 WL 656591 (Ala Sup Ct); Megan Messerly, "'Scratching their heads': State lawmakers take a closer look at personhood laws in wake of Alabama ruling," *Politico* (29 February 2024), online: https://www.politico.com/news/2024/02/29/states-fetus-personhood-alabama-ivf-00143973.

[215] *Mathur* ONSC, *supra* note 5 (Factum of the Applicants at para 134 (emphasis in the original)).

[216] *Mathur* motion to strike, *supra* note 77 at paras 250, 253.

[217] This is a play on the literal meaning of bellwether, the castrated ram that leads a flock of sheep, wearing a bell on its neck.

4.2 Aboriginal and Treaty Rights: Section 35 to Stay Alive?[218]

The *Charter* is not the only existing constitutional avenue into which environmental rights could be driven. Section 35, which guarantees aboriginal and treaty rights, could be an avenue for recognition of Indigenous environmental rights.[219] Courts have recognized that environmental degradation can violate section 35 resource rights,[220] something they have not yet done for *Charter* rights. And they have said that aboriginal title includes a responsibility to manage title lands sustainably for the benefit of future generations.[221] They have been slow, however, to recognize either an Indigenous right of environmental self-governance or a right to the environmental conditions that make the exercise of aboriginal rights possible.[222]

Culs-de-sac supposedly foster greater social cohesion and neighbourly interaction amongst their inhabitants.[223] But what about the original inhabitants who were pushed aside to create these neighbourhoods? Like real-world residential subdivisions,[224] Canada's constitutional cul-de-sac was built on land stolen from Indigenous peoples. Can it accommodate neighbourly interaction between colonizing newcomers and first peoples? Two recent developments suggest that it could be becoming more amenable to Indigenous environmental rights and self-government: Canada's endorsement and legislative implementation of UNDRIP; and judicial recognition of the cumulative impacts of industrial development as a violation of section 35 treaty rights.

4.2.1 UNDRIP: Transforming Settler-Colonial Law?

UNDRIP is the leading international statement of Indigenous peoples' legal rights and states' corresponding duties.[225] The principle of free, prior and informed consent ("FPIC") features prominently in the Declaration,[226] as do Indigenous peoples' rights to self-determination, culture, language, lands, territories, resources, and their own legal and other institutions.[227] Provisions with clear environmental dimensions include rights to conservation and protection of the environment and the productive capacity of Indigenous lands, territories and resources; to maintain and strengthen relationships with and intergenerational

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[218] This, in turn, is a play on the slogan "1.5 to stay alive," championed by small island states in international climate negotiations.
[219] *Constitution Act, 1982*, supra note 19, s 35.
[220] See, eg, *Tsawout Indian Band v Saanichton Marina Ltd*, [1989] BCJ No 563, 57 DLR (4th) 161 (CA); *Halfway River First Nation v British Columbia (Ministry of Forests)*, [1997] BCJ No 1494, 39 BCLR (3d) 227 (SC); *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2001] FCJ No 1877, 214 FTR 48 (TD); *Haida Nation v Canada (Minister of Fisheries and Oceans)*, 2015 FC 290 (TD).
[221] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.
[222] See, eg, Collins, Longue Durée, supra note 69 at 526; Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: the Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap" (2010) 47:4 *Alta LR* 959; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).
[223] See *supra*, notes 42-43 and accompanying text.
[224] See, eg, Julien Gignac, "1492 Land Back Lane," *The Canadian Encyclopedia* (January 23, 2023), online: https://www.thecanadianencyclopedia.ca/en/article/1492-land-back-lane.
[225] *Supra* note 8.
[226] *Ibid*, Arts 10, 11, 19, 28, 29, 32.
[227] *Ibid*, Arts 3-5, 7, 8, 10-13, 18, 20, 25-27, 29, 31-33, 37.

responsibilities toward lands, territories and resources; to own, use, control, develop and determine priorities and strategies for lands, territories and resources; and to FPIC to projects that affect Indigenous lands, territories or resources and to deposit of hazardous materials.[228]

UNDRIP is formally non-binding but widely recognized as expressing "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[229] Canada was one of just four countries to vote against it, claiming that it was overbroad, vague and inconsistent with Canadian constitutional law.[230] A few years later it endorsed the Declaration grudgingly as an aspirational, non-binding instrument that did not change Canadian law or reflect international law.[231] In 2016, a new federal government dropped these caveats, endorsed UNDRIP "without qualification" and announced its intent to implement it domestically[232] after the Truth and Reconciliation Commission (TRC) called on settler-colonial governments and other institutions to do so "as the framework for reconciliation."[233]

BC was first out of the gate. Its *Declaration on the Rights of Indigenous Peoples Act*, adopted in 2019, requires the provincial government, in consultation and cooperation with Indigenous peoples, to take "all measures necessary to ensure the laws of British Columbia are consistent with" UNDRIP.[234] The government must prepare and implement an action plan to achieve the Declaration's objectives and report annually on its implementation.[235] The government may also enter agreements with Indigenous governing bodies that provide for joint exercise of statutory decision-making powers, or prior Indigenous consent to the province's exercise of such powers.[236] Finally, it requires the government, when implementing the act, to consider the diversity of Indigenous peoples in BC, including their distinct legal traditions, knowledge systems, institutions, governance structures and relationships with territories.[237]

Parliament followed in 2021 with the *United Nations Declaration on the Rights of Indigenous Peoples Act*. It is similar to the BC act but differs mainly in including a lengthy preamble, prescribing the content and timing of the action plan in more detail and remaining silent on agreements with Indigenous governments.[238] The Northwest Territories passed its

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[228] *Ibid*, Arts 25-27, 29, 32.
[229] *Ibid*, Art 43; see also Larry Chartrand, Oonagh E. Fitzgerald & Risa Schwartz, "Preface," in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) ix at xiii.
[230] CBC News, "Canada votes 'no' as UN native rights declaration passes," *CBC News* (13 Sept 2007), online: https://www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160.
[231] CBC News, "Canada Endorses Indigenous Rights Declaration," *CBC News* (12 Nov 2010), online: https://www.cbc.ca/news/canada/canada-endorses-indigenous-rights-declaration-1.964779.
[232] Tim Fontaine, "Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples," *CBC News* (10 May 2016), online: https://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272.
[233] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).
[234] SBC 2019, c 44, s 3 [*DRIPA*].
[235] *Ibid*, ss 4-5.
[236] *Ibid*, ss 6-7.
[237] *Ibid*, s 1(2).
[238] SC 2021, c 14 [*UNDRIPA*].

own act two years later,[239] after a lengthy cooperative process with most Indigenous governing bodies in the Territories.[240] The act includes a lengthy preamble; requirements to ensure consistency of territorial laws with UNDRIP, develop and implement an action plan, report on it annually, and consider the diversity of Indigenous peoples; and authorization of joint decision-making and FPIC agreements with Indigenous governments. It is more ambitious than the others in some respects, as we shall see.

These acts raise several questions relevant to this article, including: do they give UNDRIP the force of law domestically; do they turn the Crown's duty to consult and accommodate into a duty to obtain FPIC; do they recognize and support Indigenous rights to environmental self-government; what does the Crown's statutory duty to ensure that laws are consistent with UNDRIP entail; and is it enforceable?

4.2.1.1 Legal effect

Even though one of the stated purposes of each act is to affirm UNDRIP's application to domestic law,[241] all three acts studiously avoid the language usually used to give an international instrument binding legal force in domestic law. They therefore fall short of giving UNDRIP the force of law.[242] UNDRIP can nevertheless affect Canadian law in at least three ways. First, some[243] and perhaps many[244] of its provisions do not create new rights but restate rights already contained in binding international human rights treaties.[245] These likely include rights to self-determination, self-government, traditional lands, language, culture, knowledge, economic and social improvement, equality and redress for breaches.[246]

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[239] SNWT 2023, c 36 [*UNDRIPIA*].
[240] Northwest Territories Council of Leaders, press release, "NWT Council of Leaders working together to implement the United Nations Declaration on the Rights of Indigenous Peoples" (29 March 2023), online: *Tłı̨chǫ Government*, https://tlicho.ca/news/united-nations-declaration-rights-indigenous-peoples.
[241] *DRIPA*, *supra* note 234, s 1(2); *UNDRIPA, supra* note 238, s 4(a); *UNDRIPIA*, *supra* note 239, s 5(a).
[242] Gib van Ert, "The Impression of Harmony: Bill C-262 and the Implementation of the UNDRIP in Canadian Law," Canadian Legal Information Institute, 2018 CanLIIDocs 252, https://canlii.ca/t/2cvr (van Ert, "Impression of Harmony"); Nigel Bankes, "Implementing UNDRIP: An Analysis of British Columbia's *Declaration on the Rights of Indigenous Peoples Act*" (2021) 53:4 *UBC L Rev* 971 [Bankes, Implementing UNDRIP]; Ryan Beaton, "Performing Sovereignty in a Time of Ideological Instability: BC's Bill 41 and the Reception of *UNDRIP* into Canadian Law" (2021) 53:4 *UBC L Rev* 1017 at 1034; *Gitxaala, supra* note 6 at paras 444-470.
[243] Gib van Ert, "Three Good Reasons Why UNDRIP Can't Be Law - And One Good Reason Why It Can" (2017) 75: 1 *Advocate* 29 at 35 n 5 (van Ert, "Three Good Reasons").
[244] Roger Townshend, Kevin Hille & Jaclyn McNamara, "Bill C-15 (UNDRIP Act) Commentary," Olthuis Kleer Townshend LLP blog (23 Mar 2021), online: https://www.oktlaw.com/bill-c-15-undrip-act-commentary/.
[245] Inter-Parliamentary Union et al, *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians No. 23* (Geneva: Inter-Parliamentary Union, 2014) 13.
[246] International Law Association, Committee on Rights of Indigenous Peoples, Interim Report (2010), online: https://www.ila-hq.org/en/documents/conference-report-the-hague-2010-13; International Law Association, Committee on Rights of Indigenous Peoples, Final Report (2012), online: https://www.ila-hq.org/en/documents/conference-report-sofia-2012-10.

Some of these are found in instruments ratified and implemented by Canada. To that extent, they already have the force of law domestically.[247]

Second, to the extent UNDRIP reflects customary international law, it is part of Canadian law.[248] Customary international law is established by consistent state practice backed by a sense of legal obligation. Whereas treaties must be implemented by statute to have the force of law domestically, customary international law is automatically incorporated into Canadian common law unless it conflicts with statute.[249] Many of UNDRIP's provisions probably reflect customary international law, including Indigenous peoples' rights to self-determination, self-government, their own laws and legal institutions, their lands and resources, cultures, redress for wrongs, fulfillment of Crown-Indigenous treaties, and prior consultation (and in some cases consent) regarding activities that affect them significantly.[250]

Third, UNDRIP can guide the interpretation of domestic laws.[251] To the extent it reflects international law, it benefits from the presumption of conformity: domestic laws should be interpreted so as to comply with binding international law, if such interpretation is possible.[252] But even if UNDRIP is not international law, it is still a persuasive source for interpreting domestic law, including the constitution.[253] Any doubt on this point is removed by the acts' purposes sections, noted above, combined with sections stating that nothing in the acts may be construed as delaying the application of UNDRIP to domestic law, and (in the case of the federal and NWT acts) preambular statements affirming it as a source for interpreting domestic law.[254] The NWT act and 2021 amendments to BC's *Interpretation Act* take a step farther, requiring rather than merely permitting domestic laws to be construed as consistent with UNDRIP.[255] This extends the presumption of conformity to all of UNDRIP regardless of whether it reflects international law.

This is all well and good in theory, but what about practice? Many observers have been frustrated by the lack of progress in aligning settler-colonial governments' laws, policies, practices and attitudes with UNDRIP.[256] Governments have issued UNDRIP action

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[247] See, eg, Townshend, Hille & McNamara, *supra* note 244.
[248] Brenda L Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" (2021) 53:4 *UBC L Rev* 1065 at 1079-1080.
[249] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 94-96.
[250] International Law Association, Interim Report, *supra* note 246 at 51-2; International Law Association, Final Report, *supra* note 246 at 29-31.
[251] Gunn, *supra* note 248 at 1080-1083.
[252] *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 46; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras 47-49, 58; see also Van Ert, "Three Good Reasons," *supra* note 243 at 30.
[253] Eg, *Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445 at paras 351-356; *Wesley v Alberta*, 2022 ABKB 713 at para 144; *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at para 212 [*Thomas & Saik'uz*]; *Servatius v Alberni School District No 70*, 2022 BCCA 421 at paras 42-47, 106-107.
[254] *DRIPA*, *supra* note 234, s 1(4); *UNDRIPA*, *supra* note 238, preamble & s 2(3); *UNDRIPIA*, *supra* note 239, preamble & s 6(3); see also Bankes, Implementing UNDRIP, *supra* note 242 at 997-999.
[255] *UNDRIPIA*, *supra* note 239, s 6(2); *Interpretation Act*, RSBC 1996, c 238, s 8.1, added by *Interpretation Amendment Act*, SBC 2021, c 36, s 1.
[256] Eg Bruce McIvor, *Standoff: Why Reconciliation Fails Indigenous People and How to Fix It* (Gibsons, BC: Nightwood, 2021) 151, 174-176; Matt Simmons, "Two Years After B.C. Passed its Landmark Indigenous Rights Act, Has Anything Changed?" *The Narwhal* (13 Dec 2021), online: https://thenarwhal.ca/bc-undrip-two-years/.

plans that are promising in some respects[257] and have concluded a few consent or joint decision-making agreements with Indigenous governing bodies,[258] but "[a]s is typically the case with reconciliation initiatives, implementation is where good intentions go to die."[259] Governments have made few changes to existing laws to conform with UNDRIP and have withdrawn some modest changes that sparked opposition.[260]

After numerous sporadic and inconsistent references to UNDRIP including some limited use of it as an interpretive aid,[261] Canadian courts issued four major decisions about it in quick succession in 2023 and 2024. In September, 2023, the *Gitxaala* decision ruled that BC's free entry mining claims system violates the province's duty to consult and accommodate Indigenous peoples.[262] The court held, in line with the recent changes to BC's *Interpretation Act*,[263] that "if there are two (or more) possibly valid interpretations of [an Act], then I am to construe the Act in a manner that is consistent with UNDRIP," and that this consideration is integrated throughout the statutory interpretation process.[264] It was not clear, however, that UNDRIP consistency played any role in the court's analysis of the meaning and constitutionality of the mining law.[265]

The court also held that the BC act did not implement UNDRIP into domestic BC law and that UNDRIP "remains a non-binding international instrument."[266] As noted above, the first proposition is probably correct but the latter ignores the likelihood that some UNDRIP provisions are part of Canadian law via ratified treaties and customary international law.[267] An appeal is pending.

Several weeks later a Quebec court issued a decision that could transform the landscape of aboriginal rights in Canada. The court in *Montour* held that the federal excise tax on tobacco imports unjustifiably infringed Mohawk defendants' aboriginal and treaty rights.[268] To reach this conclusion, the court rejected the Supreme Court's *Van der Peet*

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[257] Government of British Columbia, *Declaration on the Rights of Indigenous Peoples Act Action Plan 2022-2027* (Victoria: Ministry of Indigenous Relations and Reconciliation, 2022); Government of Canada, *The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan* (Ottawa: Department of Justice Canada, 2023)

[258] Canadian Press, "B.C. and Tahltan Nation sign agreement requiring consent for changes to mine," *CBC News* (1 November 2023), online: https://www.cbc.ca/news/canada/british-columbia/bc-tahltan-nation-agreement-1.7015953.

[259] Hayden King, "The UNDA 101: Canada's Declaration Action Plan," *Yellowhead Institute* (28 Mar 2023), online: https://yellowheadinstitute.org/2023/03/28/unda-action-plan/.

[260] Jackie McKay, "B.C. pauses plans to amend Land Act," *CBC News* (21 February 2024), online: https://www.cbc.ca/news/indigenous/b-c-land-act-first-nations-1.7121999; Eric Murphy, "Amending British Columbia's Land Act: Effecting Reconciliation and Increasing Efficiency of Project Permitting," *Centre for Law & the Environment blog* (25 June 2024), online: https://allard.ubc.ca/about-us/blog/2024/amending-british-columbias-land-act-effecting-reconciliation-and-increasing-efficiency-project.

[261] Gunn, *supra* note 248 at 1083-1089.

[262] *Gitxaala*, *supra* note 6.

[263] *Supra* note 255.

[264] *Gitxaala*, *supra* note 6 at paras 416, 417.

[265] Nigel Bankes, "The Legal Status of UNDRIP in British Columbia: *Gitxaala v British Columbia (Chief Gold Commissioner),*" *ABlawg* (5 Oct 2023), online: https://ablawg.ca/2023/10/05/the-legal-status-of-undrip-in-british-columbia-gitxaala-v-british-columbia-chief-gold-commissioner/ [Bankes, *Gitxaala*].

[266] *Gitxaala*, *supra* note 6 at para 470.

[267] Bankes, *Gitxaala*, *supra* note 265.

[268] *Montour*, *supra* note 6.

test,[269] which had long been criticized for freezing Indigenous rights in the past, denying their inherent and generic character, limiting their commercial exercise and downplaying the role of Indigenous peoples' own laws in their definition.[270]

UNDRIP was central to the court's reasoning. According to the court, the evidence showed "that Canada intended to elevate [UNDRIP] a step beyond an 'aspirational,' 'non-legally binding' document that does not change Canadian laws."[271] Instead, UNDRIP has the same weight as a binding international instrument and attracts the presumption of conformity, according to which the constitution should be construed to provide protection at least as great as that afforded by UNDRIP.[272]

From there, the court held that Canada's unqualified endorsement of UNDRIP and adoption of the UNDRIP act fundamentally changed the parameters of aboriginal rights jurisprudence, justifying a departure from precedent and demanding a new test that allows Indigenous rights to take contemporary forms, recognizes their inherent and generic character, contemplates their exercise on a commercial scale and makes Indigenous laws crucial to their definition.[273] The new test, rather than requiring the claimant to prove that the specific activity in question is a continuation of a practice that was integral to the distinctive culture of the Indigenous people concerned before European contact, asks claimants to identify the collective right at stake in generic terms, prove that it is protected by their Indigenous legal system, and show that the specific activity at issue is an exercise of it.[274] The court relied heavily on UNDRIP to focus the test on rights that are collective, generic and inherent to all Indigenous peoples, rather than individual, specific and proved case by case.[275] It also relied on UNDRIP to characterize the right at stake broadly as the Mohawk nation's right to freely pursue economic development,[276] rather than a narrow right to transport tobacco cross-border within historic Mohawk territory.[277]

While this decision gave UNDRIP unprecedented weight, it did not analyze whether or to what extent UNDRIP reflects international law or has been incorporated into domestic law via the routes discussed above. It referred to UNDRIP as an interpretive aid, yet used it not just to interpret but to change settled law. The decision stretches the line between using international norms to interpret constitutional rights and using them to redefine or change them, something commentators and courts have warned against.[278] Like *Gitxaala*, the decision is under appeal.

The Supreme Court of Canada had an opportunity to clarify these issues three months later in the *Bill C-92 Reference*, which upheld the constitutionality of a federal statute that affirms Indigenous peoples' inherent right of self-government in relation to child and family services, recognizes their jurisdiction to enact laws on this subject, and gives such laws force

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[269] *R v Van der Peet*, [1996] 2 SCR 507.
[270] *Montour, supra* note 6 at paras 1244-1271; John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges," in Borrows et al, *supra* note 229, 29.
[271] *Ibid* at para 1190.
[272] *Ibid* at paras 1171, 1201.
[273] *Ibid* at paras 1204-1205, 1234-1235.
[274] *Ibid* at para 1297.
[275] *Ibid* at paras 1307-1311.
[276] *Ibid* at para 1376, citing UNDRIP, *supra* note 8, Arts 3, 4, 20.
[277] *Ibid* at para 1357.
[278] Van Ert, Three Good Reasons, *supra* note 243; *Quebec (Attorney General)* v *9147-0732 Québec Inc*, 2020 SCC 32.

as federal law even if they conflict with provincial laws. In the course of its opinion the Court asserted, with almost no analysis and after ignoring UNDRIP for decades, that the federal UNDRIP act incorporated UNDRIP "into the country's domestic positive law."[279] But neither the federal act nor UNDRIP played a significant role in the Court's analysis, and the Court provided no meaningful guidance on how to determine UNDRIP's legal status or impact. The basis for and implications of its oracular proclamation thus remain unclear. This is unfortunate given that it goes against the weight of opinion.[280] That said, the decision "dramatically elevated the normative status of the Declaration" by signalling that courts must take it seriously.[281]

The following month, the Supreme Court once again considered UNDRIP but failed to clarify its status and impact in *Dickson*, which upheld an Indigenous government's requirement that elected councillors reside in the nation's traditional territory.[282] The Court had to decide whether the *Charter* applies to a self-governing First Nation, whether the residency requirement infringes Section 15 of the *Charter* and if so, whether it is protected by Section 25 of the constitution.[283] Six of seven justices answered the first two questions affirmatively but disagreed on the third. Both the majority and dissenting opinions invoked UNDRIP and the federal UNDRIP act in answering the third question.[284] They cited UNDRIP to acknowledge that collective and individual Indigenous rights can coexist[285] but also to draw opposing conclusions about s 25. The majority invoked UNDRIP and the federal act to conclude that s 25 is a shield to protect collective rights to "Indigenous difference" against inappropriate erosion by individual *Charter* rights.[286] The dissent cited UNDRIP to conclude that s 25 is not a shield allowing collective Indigenous rights to self-government and protection of their distinctive institutions to trump individual equality rights.[287]

Unfortunately, the opinions failed to clarify UNDRIP's legal status. The majority asserted simply that UNDRIP was "brought into Canadian law" by the federal act.[288] The dissent stated that UNDRIP "is binding on Canada and therefore triggers the presumption of conformity."[289] Both opinions appear to rely on the *Bill C-92 Reference*'s holding that UNDRIP was incorporated into Canada's domestic law, but they leave us no closer to understanding

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[279] *Bill C-92 Reference, supra* note 6 at para 15. The term "positive" presumably refers to rules propounded by duly authorized human institutions, as opposed to immanent, universal "natural" laws.
[280] *See supra*, notes 242, 266 and accompanying text.
[281] Nigel Bankes & Robert Hamilton, "What Did the Court Mean When It Said that UNDRIP 'has been incorporated into the country's positive law'? Appellate Guidance or Rhetorical Flourish?" *ABlawg.ca* (28 February 2024), online: https://ablawg.ca/2024/02/28/what-did-the-court-mean-when-it-said-that-undrip-has-been-incorporated-into-the-countrys-positive-law-appellate-guidance-or-rhetorical-flourish/.
[282] *Dickson*, *supra* note 6.
[283] *Constitution Act, 1982*, *supra* note 19, s 25.
[284] The seventh justice dissented on the first issue and would have decided the case on that basis alone.
[285] *Dickson*, *supra* note 6 at paras 110 (majority), 318 (dissent).
[286] *Ibid* at paras 117-118 (citing UNDRIP Article 34, which protects Indigenous peoples' right to promote, develop and maintain their institutional structures, distinctive customs, procedures, practices and legal systems), 126 (citing the federal UNDRIP act's provision requiring the act to be construed as upholding s 35 rights).
[287] *Ibid* at paras 289, 318-319 (citing UNDRIP Articles 4, 5, 20 and 34, which protect Indigenous peoples' right to self-determination, self-government and distinct political, legal and other institutions, and Articles 2 and 9, which protect their collective and individual rights to equality and freedom from discrimination).
[288] *Ibid* at para 117.
[289] *Ibid* at para 317.

the logic of incorporation or whether UNDRIP is more than just an interpretive aid. The Court failed once again to provide a rigorous, comprehensive analysis of UNDRIP's legal status.[290]

Notwithstanding the continuing lack of robust guidance from Canada's top court on UNDRIP's status and effect, its recent pronouncements will surely increase UNDRIP's weight in aboriginal rights adjudication. But whether *Montour*'s conclusion that UNDRIP transforms rather than merely sheds new light on domestic law will be confirmed, and whether courts will find that UNDRIP has transformed other aspects of settler-colonial law, is difficult to predict.

4.2.1.2 FPIC and the duty to consult and accommodate

One question in this connection is whether UNDRIP elevates the Crown's constitutional duty to consult and accommodate into a duty to obtain FPIC to activities that affect Indigenous peoples, lands, territories or resources. The Crown has a duty to consult and accommodate Indigenous peoples when it contemplates action that could infringe constitutionally protected aboriginal and treaty rights.[291] The level of consultation and accommodation varies with the strength of the claim and the severity of the contemplated infringement. It can come close to consent in the strongest cases, but only in cases of proven aboriginal title does it clearly entail a duty to obtain consent, and even then the Crown may justify acting without consent in pursuit of pressing and substantial settler-colonial objectives.[292]

UNDRIP does not recognize an unqualified right to FPIC. Rather, it imposes a spectrum of requirements on states: an obligation to provide redress where Indigenous lands, territories, resources or cultural property are taken without FPIC;[293] a duty to consult and cooperate "in order to obtain" FPIC before adopting and implementing legislative or administrative measures that affect Indigenous peoples, or approving projects that affect their lands, territories or resources;[294] and a prohibition against forcible relocation of Indigenous peoples or placement of hazardous materials on their lands or territories without FPIC.[295] Only in the latter case is FPIC a clear precondition for state action; in most cases it is a goal that may or may not be achieved. And it is subject to limitations that are strictly necessary to protect others' rights and freedoms and meet the just and most compelling requirements of a democratic society[296]—admittedly a higher threshold than the Canadian test for infringement.[297]

Even with these caveats, UNDRIP's provisions on FPIC go well beyond the Supreme Court's jurisprudence and expand the range of circumstances in which actions affecting

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[290] Nigel Bankes and Jennifer Koshan, "The *Dickson* Decision, UNDRIP, and the Federal *UNDRIP Act*," *ABlawg.ca* (18 April 2024), online: https://ablawg.ca/2024/04/18/the-dickson-decision-undrip-and-the-federal-undrip-act/.
[291] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73.
[292] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 at paras 76, 88-92.
[293] UNDRIP, *supra* note 8, Arts 11, 28.
[294] *Ibid*, Arts 19, 32.
[295] *Ibid*, Arts 10, 29.
[296] *Ibid*, Art 46.
[297] Bankes, Implementing UNDRIP, *supra* note 242 at 1011.

Indigenous peoples, lands, waters and resources cannot be justified absent consent.[298] Whether they can be accommodated by incremental enlargement of existing doctrine or require its transformation is an open question.[299]

Whatever the answer, this question should not devolve into a debate about an Indigenous "veto" over land or resource use, a spectre often raised by FPIC opponents.[300] As many commentators have insisted, talk of a veto is misleading.[301] The goal of FPIC is to recognize Indigenous peoples' right to participate effectively in responsible decision-making, not to obstruct it. FPIC requires settler-colonial governments and Indigenous peoples to engage in good faith nation-to-nation negotiations aimed at reaching agreement, and in some cases where vital Indigenous interests are at stake, to reach agreement, unless very compelling interests dictate otherwise. While the circumstances in which consent is required or its absence is justified remain unsettled, UNDRIP and its Canadian endorsement exert a beneficial upward pull toward more vigorous recognition of Indigenous environmental rights.

4.2.1.3 Environmental self-government

Domestic emulation of UNDRIP's approach to FPIC would also strengthen Indigenous environmental self-government, because FPIC is inseparable from Indigenous peoples' right to self-determination. Reflecting this inextricability, UNDRIP "creates a framework to enable Indigenous peoples to make their own decisions about what is best for their nations and communities."[302] It articulates various dimensions of Indigenous peoples' right to self-determination, including the right to freely determine their political status; freely pursue their economic, social and cultural development; revitalize and practise their own cultures, customs, knowledges, laws and political institutions; maintain and strengthen their relationships with, and control the development or use of, their lands, territories, waters and resources; and have ways and means to finance their autonomous self-governmental functions.[303]

Self-determination necessarily implies effectuating Indigenous legal orders and laws. This includes making space for Indigenous laws regarding decision-making and dispute resolution in relation to environment and natural resources.[304] This is a challenge for settler-colonial governments, industries and courts, which remain largely wedded to a vision of reconciliation in which Indigenous peoples' legal and governance systems must be reconciled to the Crown's preeminent sovereignty over and radical title to the entire territory of Canada. The Supreme Court has continued to assert this limited and increasingly discredited vision even as it purports to reject the Doctrine of Discovery on which it is

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[298] *Ibid* at 1014; Dominique Leydet, "The Power to Consent: Indigenous Peoples, States, and Development Projects" (2019) 69:3 *UTLJ* 371; Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult," in Borrows et al, *supra* note 229, 65 at 74.
[299] See, eg, Joshua Nichols & Sarah Morales, "Finding Reconciliation in Dark Territory: Coastal Gaslink, Coldwater, and the Possible Futures of DRIPA" (2021) 53:4 *UBC L Rev* 1185
[300] See, eg, Sheryl Lightfoot, "A Leopard Cannot Hide Its Spots: Unmasking Opposition to the UN Declaration on the Rights of Indigenous Peoples" (2021) 53:4 *UBC L Rev* 1147 at 1159-1163.
[301] See, eg, Nichols & Morales, *supra* note 299; Morales, *supra* note 298.
[302] Nichols & Morales, *ibid* at 1227.
[303] UNDRIP, *supra* note 8, Arts 3-5, 11-13, 18, 20, 31-33, 25-27.
[304] Morales, *supra* note 298 at 78.

based.[305] It has also continued to resist recognizing an inherent Indigenous right of self-government even as it acknowledges that aboriginal rights and title imply some degree of self-government.[306]

Courts have begun to question these paradoxes. In 2022, a BC court acknowledged that "the whole construct" of Indigenous subordination to Crown sovereignty "is simply a legal fiction to justify the *de facto* seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada."[307] In 2023, *Montour* went farther, holding that it was time to abandon the prevailing vision of reconciliation in which Indigenous peoples must reconcile themselves to Crown sovereignty, in favour of the TRC's vision of reconciliation as mutually respectful relationships between sovereign, self-governing peoples.[308] *Montour* also insisted that Indigenous rights to self-determination and development are inherent, not delegated.[309] Both decisions relied on UNDRIP.[310]

The Supreme Court continues to dodge these questions, noting in *Dickson* that UNDRIP recognizes an Indigenous right to self-government[311] but holding in the *Bill C-92 Reference* that Indigenous child protection laws get their legal force from the federal government's power over "Indians," obviating the need to decide whether they also derive from an inherent right of self-government.[312] In this context it is not surprising that courts continue with alarming frequency to insist that there is "only one law" and it is settler-colonial law.[313]

The BC and NWT UNDRIP acts could help nudge settler-colonial institutions closer to upholding Indigenous environmental self-government and law, insofar as they require governments to take account of Indigenous peoples' distinct rights, legal traditions, institutions and governance structures, and authorize them to enter agreements that provide for joint decision-making or Indigenous consent.[314] BC has begun concluding such agreements, starting with one with the Tahltan Nation that provides for consent-based decision-making about a controversial mine.[315]

An essential aspect of self-determination is Indigenous peoples' authority "to determine for themselves their own governance models and decision-making processes," including which governing body is authorized to act on their behalf.[316] The BC act does not recognize this explicitly, though it may imply it.[317] The NWT act makes this explicit, defining

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[305] John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 *UBC L Rev* 701.
[306] See, eg, *R v Pamajewon*, [1996] 2 SCR 821 at paras 27-28; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 170; *Bill C-92 Reference*, *supra* note 6 at para 112.
[307] *Thomas & Saik'uz*, *supra* note 253 at para 198.
[308] *Montour*, *supra* note 6 at paras 1205-1233.
[309] *Ibid* at para 1309.
[310] *Ibid* at paras 1308, 1376; *Thomas & Saik'uz*, *supra* note 253 at paras 207-08.
[311] *Supra* note 282 at paras 47 (majority), 283 (dissent).
[312] *Supra* note 279.
[313] See, eg, *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 at para 40; Amanda Follett Hosgood, "Wet'suwet'en Law Cannot 'Coexist' with BC Court Order, Judge Determines," *The Tyee* (21 February 2024), online: https://thetyee.ca/News/2024/02/21/Wetsuweten-Law-Cannot-Coexist-BC-Court-Order/.
[314] *See supra*, notes 236-237, 240 and accompanying text.
[315] Canadian Press, *supra* note 258.
[316] Nichols & Morales, *supra* note 299 at 1222.
[317] *Ibid.*

an Indigenous government as one chosen by the Indigenous peoples concerned in accordance with their own procedures and decision-making institutions.[318] Moreover, it requires the government to co-develop and implement the UNDRIP action plan through a committee made up of Indigenous and territorial governments, and requires the action plan to be carried out via consensual decision-making with Indigenous governments as equal partners.[319] Other UNDRIP implementation legislation should follow this lead.

4.2.1.4 Duty to ensure consistency

The UNDRIP acts' potential to advance the recognition of Indigenous environmental rights and self-government also depends on the meaning and effect of the statutory duty to take all necessary ("reasonable" in the NWT) measures to ensure consistency of laws with UNDRIP.[320] What does this duty entail? Does it apply prospectively to new laws, or retrospectively to existing laws? Is it limited to statutes or does it extend to delegated legislation like regulations and municipal bylaws? What about approvals, cabinet orders and other statutory instruments? What about common law? And what is the timeline for taking the necessary measures? The acts leave these questions to be worked out through action plans and Crown-Indigenous cooperation.

A related question is whether courts will enforce the statutory duty against governments.[321] The court in *Gitxaala* held that, while the question of domestic laws' consistency with UNDRIP is justiciable in principle, the province's statutory duty to take all measures necessary to ensure consistency of BC laws with UNDRIP is not, partly because the act requires the government to discharge this duty in consultation with Indigenous peoples:

> It is not for the court to intervene and unilaterally determine what is meant by this provision. The provision contemplates ongoing cooperation between the government and the Indigenous peoples of BC to determine which of our laws are inconsistent with *UNDRIP*.[322]

There is some merit to the proposition that settler-colonial courts should keep out of this cooperative process and leave the implementation of UNDRIP to government-to-government negotiations.[323] Even so, it seems ironic that the first major judicial pronouncement on the statutory duty to ensure domestic laws' consistency with UNDRIP should deny a First Nation's request to enforce it.

The NWT act goes farther toward aligning domestic laws with UNDRIP than the BC or federal act. Not only does it require the government to take steps to ensure consistency of its laws with the Declaration, it requires the action plan to include a process or measures to review, revise or replace existing laws and introduce new ones to create such consistency.[324]

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[318] *UNDRIPIA*, *supra* note 239, s 1.
[319] *Ibid*, ss 9-11.
[320] *DRIPA*, *supra* note 234, s 3; *UNDRIPA*, *supra* note 238, s 5; *UNDRIPIA*, *supra* note 239, s 6. The choice of "reasonable" over "necessary" is the only point on which the NWT act appears less ambitious than the other two.
[321] Bankes, Implementing UNDRIP, *supra* note 242 at 1001.
[322] *Gitxaala*, *supra* note 6 at para 490.
[323] Bankes, *Gitxaala*, *supra* note 265; Beaton, *supra* note 242 at 1034.
[324] *Ibid*, s 11.

It also requires the act to be construed as upholding, and to be interpreted in accordance with, the rights recognized and affirmed by both s 35 and UNDRIP,[325] unlike the federal act, which only requires the act to be construed as upholding s 35 rights,[326] and the BC act, which merely declares that it "does not abrogate or derogate from" s 35 rights.[327] In addition, the NWT act requires all new bills introduced in the legislature to be accompanied by a statement indicating whether they are consistent with UNDRIP and s 35.[328] Finally, unlike the BC and federal acts, the NWT act explicitly binds the government,[329] which favours but does not guarantee its enforceability in court.[330]

4.2.1.5 Conclusions and a caveat

These moves toward implementing UNDRIP in Canadian law show some potential to make Canada's constitutional cul-de-sac a somewhat more salubrious neighbourhood for its first inhabitants. But there is an important caveat. To establish neighbourly interaction between settler-colonial and Indigenous legal orders, the job of implementing inherent Indigenous human rights domestically must be led by Indigenous peoples themselves via nation-to-nation negotiations with states. Allowing settler-colonial legislatures or courts to claim this job ultimately perpetuates colonialism and delays the full application of UNDRIP in Canadian law.[331] Achievement of neighbourly interactions in Canada's constitutional cul-de-sac will depend on its settler-colonial inhabitants recognizing their Indigenous neighbours as self-governing communities whose laws, governance systems and dispute resolution institutions are entitled to the same respect as their own.

4.2.2 Cumulative Impacts: Fortifying Treaty Promises?

Another development worth exploring is a 2021 BC court decision that may mark a watershed in the recognition of Indigenous environmental rights by settler-colonial courts and make Canada's constitutional cul-de-sac more amenable to peaceful co-existence of settler-colonial and Indigenous legal orders. In *Yahey*, the court ruled that industrial and extractive development in northeastern BC unjustifiably infringed the Blueberry River First Nations' rights under Treaty 8, signed in 1899.[332]

The first remarkable aspect of the decision is its recognition of the cumulative impacts of innumerable small-scale activities as a violation of treaty rights. The second is its acknowledgement that continuity of all elements of signatory First Nations' culture, identity

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[325] *Ibid*, s 2(2).
[326] *UNDRIPA*, *supra* note 238, s 1(2).
[327] *DRIPA*, *supra* note 234, s 1(3).
[328] *UNDRIPIA*, *supra* note 239, s 8.
[329] *Ibid*, s 4.
[330] See *Alberta Government Telephones v (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 SCR 225.
[331] See, eg, Gordon Christie, "Indigenous Legal Orders, Canadian Law and UNDRIP," in Borrows et al, *supra* note 229, 47; James (Sa'ke'j) Youngblood Henderson, "The Art of Braiding Indigenous Peoples' Inherent Human Rights into the Law of Nation-States," in *ibid*, 13 at 18; David Leitch, "A Misstep on the Road to Reconciliation," *ABlawg.ca* (19 July 2024), online: https://ablawg.ca/2024/07/19/a-misstep-on-the-road-to-reconciliation/.
[332] *Yahey v British Columbia*, 2021 BCSC 1287 [*Yahey*].

and way of life, including "the continued existence of healthy environments used for hunting, trapping and fishing and the continuation of other cultural and spiritual practices connected with those activities," were part of the treaty promise and are prerequisites for the exercise of treaty rights.[333] In other words, the treaty rights require healthy forests, wildlife habitats, fresh clean water, healthy wildlife populations, and "a relatively stable environment, so that the knowledge held by Blueberry members about the places to hunt, fish and trap is relevant and applicable."[334]

The third notable element is the remedy awarded. In an unprecedented move, the court issued an injunction prohibiting the provincial government from authorizing further infringing activities. This injunction changed the power dynamic between the parties and helped lead to a 2023 settlement that "will transform how the Province and First Nations steward land, water and resources together, and address cumulative effects in Blueberry River's Claim Area through restoration to heal the land, new areas protected from industrial development, and constraint on development activities while a long-term cumulative effects management regime is implemented."[335]

Two days later, the province announced agreements with four neighbouring First Nations.[336] A few months later, the Blueberry River First Nations and four other First Nations settled their longstanding treaty land entitlement claims with the provincial and federal governments in return for monetary compensation and more than 44,000 hectares of Crown land.[337] The agreements contemplate a substantial role for First Nations in decision-making that affects their territories and resources and returns a small portion of their land base to their direct control, though the extent to which they will effectuate Indigenous environmental law, jurisdiction and self-government remains to be seen.[338]

I will return to the issue of Indigenous environmental rights in Part 4.4, in conjunction with the question of rights for nature. Before that, I consider progress towards recognition of a right to a healthy environment via ordinary legislation.

4.3 Ordinary Legislation: Is There a Plan(et) B?[339]

Another avenue to recognize environmental rights is via ordinary legislation. As mentioned earlier, a handful of provinces and territories have done this, starting with Quebec in 1978.[340] These environmental rights statutes are largely procedural, enshrining rights to participate in government environmental decision-making via notice, comment and requests for law reform; rights of access to environmental information; and rights of access to justice via

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[333] *Ibid* at para 272.
[334] *Ibid* at para 437.
[335] Government of British Columbia, press release, "Province, Blueberry River First Nations reach agreement" (18 January 2023), online: https://news.gov.bc.ca/releases/2023WLRS0004-000043.
[336] Government of British Columbia, press release, "B.C., Treaty 8 First Nations build path forward together" (20 January 2023), online: https://news.gov.bc.ca/releases/2023PREM0005-000060.
[337] Government of British Columbia, press release, "Five First Nations reach settlement with B.C., federal governments on Treaty Land Entitlement claims" (15 April 2023), online: https://news.gov.bc.ca/releases/2023IRR0019-000539.
[338] Matt Simmons, "Blueberry River First Nations beat B.C. in court. Now everything's changing," *The Narwhal* (25 January 2023), online: https://thenarwhal.ca/blueberry-river-treaty-8-agreements/.
[339] Another play on words, borrowed from climate change activists' slogan "There Is No Planet B."
[340] See *supra* notes 14-17 and accompanying text.

appeals of certain government decisions, requests to investigate environmental law violations, and statutory citizen suit provisions that have almost never been used.[341] Those that include substantive guarantees generally have caveats that limit their force.[342]

Legislative recognition was lacking at the federal level until recently, but not for lack of trying. Private members' bills aimed at enacting environmental rights in federal legislation failed repeatedly over decades, most recently in December 2023.[343] Explicit recognition of Canadian's right to a healthy environment was finally included in a government bill in 2021 and eventually became law in 2023.

The *Strengthening Environmental Protection for a Healthier Canada Act*[344] requires that the federal government, in administering *CEPA 1999*,[345] "protect the right of every individual in Canada to a healthy environment as provided under this Act, subject to any reasonable limits."[346] It also amends *CEPA 1999*'s preamble to recognize "that every individual in Canada has a right to a healthy environment as provided under this Act."[347] It requires the federal government, within two years, to develop and publish a framework to set out how the right to a healthy environment will be considered in the administration of *CEPA 1999*, including principles, mechanisms and reasonable limits.[348] The government must report annually on the implementation of the framework, and conduct research and monitoring to support the government's protection of the right.[349] In effect, this new statute is a plan to make a plan to protect the right to a healthy environment within the context of one federal statute.

The modesty of these changes is illustrated by comparing them to earlier unsuccessful attempts to enact a *Canadian Environmental Bill of Rights*, typified by a 2009 private member's bill, Bill C-469.[350] The first difference is the new statute's lack of an explicit statutory guarantee of the right, unlike Bill C-469, which stated "Every resident of Canada has a right to a healthy and ecologically balanced environment."[351] Second, under Bill C-469 the federal government would have had an obligation to protect this right generally within its jurisdiction,[352] whereas under the new statute it has this duty only in administering *CEPA 1999*. Third, Bill C-469 provided that the federal government owes a public trust duty to preserve the environment for the benefit of present and future generations,[353] a proposition absent from the new statute and rejected by the courts.[354] Fourth, Bill C-469 included

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[341] *See, eg,* NWT *Environmental Rights Act*, *supra* note 15; Yukon *Environment Act*, *supra* note 16; Ontario *Environmental Bill of Rights*, *supra* note 17.
[342] *See, eg,* Quebec *Environmental Quality Act*, *supra* note 14; *Quebec Charter of Rights & Freedoms*, *supra* note 18, s 46.1.
[343] Bill C-219, An Act to enact the Canadian Environmental Bill of Rights and to make related amendments to other Acts, 44th Parl, 1st Sess, https://www.parl.ca/LegisInfo/en/bill/44-1/c-219.
[344] *Strengthening Environmental Protection Act*, *supra* note 4.
[345] *Supra* note 9.
[346] *Strengthening Environmental Protection Act*, *supra* note 4, s 3(2), amending s 2(1) of *CEPA 1999*.
[347] *Ibid*, s 2(1).
[348] *Ibid*, s 5.
[349] *Ibid*, ss 5, 7.
[350] An Act to Establish a Canadian Environmental Bill of Rights, 2nd Sess, 40th Parl (1st reading 29 October 2009).
[351] *Ibid*, s 9(1).
[352] *Ibid*, s 9(2).
[353] *Ibid*, ss 6(b), 9(3).
[354] See *supra*, Part 4.1.2.8.

procedural rights to participate in all government environmental decision-making, have access to environmental information, request reform of federal environmental laws and request investigation of environmental violations.[355] *CEPA 1999* has had limited forms of these procedural rights for decades, which the new statute does not expand. Finally, and more radically, Bill C-469 would have given every resident of Canada the right to sue the federal government for failing to fulfill its environmental trustee duties, failing to enforce an environmental law or violating the right to a healthy environment.[356] There is no hint of such judicial recourse in the new statute.

Canada took another legislative step towards realizing environmental rights in 2024, when the *National Strategy Respecting Environmental Racism and Environmental Justice Act*, introduced as a private member's bill by Green Party MP Elizabeth May and supported by the federal government, became law.[357] The act requires the federal government to develop a national strategy to promote nationwide efforts to advance environmental justice and to assess, prevent and address environmental racism. The strategy must include studies of the incidence of environmental injustice and measures to combat it. The government must table the strategy in Parliament and report every five years on its effectiveness. The act does not mention environmental rights but complements them, since environmental justice entails fulfillment of procedural rights to participate in environmental decision-making and substantive rights to equality and a healthy environment while environmental racism involves deprivation of these rights on the basis of race.

In short, ordinary legislation on environmental rights tints the foliage in Canada's constitutional cul-de-sac a brighter shade of green, but how much of this effect is created by the "plastic trees" of inconsequential procedures is unclear.[358] Moreover, instead of building a new avenue to advance environmental rights generally at the federal level, the *CEPA* amendments push environmental rights claims onto the existing road of *CEPA 1999* where they will be restricted to the matters covered by that statute. Notwithstanding these limitations, *CEPA 1999*'s explicit recognition of a right to a healthy environment is a significant breakthrough after decades of effort, which the new environmental justice strategy statute might reinforce.

4.4 Rights of Nature: Are Rivers People Too?

Finally, some inhabitants of Canada's constitutional cul-de-sac are experimenting with new manifestations of an old idea: that nature and its components are alive and deserve recognition as legal subjects. In this view, everything is interconnected, all beings are imbued with life force and have mutual responsibilities and entitlements in relation to one another,

[355] *Ibid*, ss 10-15.
[356] *Ibid*, s 16.
[357] SC 2024, c 11.
[358] With apologies to Laurence Tribe, "Ways Not to Think About Plastic Trees: New Foundations for Environmental Law" (1974) 83 *Yale LJ* 1315.

and humans' relationship with the biosphere is one of asymmetric interdependence: we are dependent on the biosphere for our survival whereas the reverse is not true.[359]

Nowadays these ideas are often manifested in campaigns for legal personhood or rights for nature.[360] Such campaigns burgeoned globally for almost two decades before achieving their first formal success in Canada in 2021, when the Innu Council of Ekuanitshit and the municipality of Minganie, Quebec, passed parallel resolutions declaring Mutehekau Shipu/Magpie River to be a legal person with nine enumerated rights including rights to live, exist and flow; to respect for its natural cycles; to evolve naturally, be preserved and protected; to restoration and regeneration; to maintain its biodiversity; to perform essential ecological functions; to be free from pollution; and to take legal action. The resolutions also declare that as a living entity with fundamental rights, the river will be represented by guardians appointed by the Innu and the municipality.[361] Campaigns are underway to recognize the rights of other natural entities.[362] In 2023 the Assembly of First Nations Quebec-Labrador unanimously adopted a resolution endorsing legal personhood and rights for the St Lawrence, Canada's second-largest river.[363]

A key issue for such initiatives is whether they advance decolonization and revitalization of Indigenous law and jurisdiction, or assimilate Indigenous laws into Western legal categories and continue the project of colonialism. Much depends on how and by whom such initiatives are undertaken. The Magpie River resolutions were a joint effort of the Innu community, the local municipality and environmental groups, with impetus from Innu youth.[364] Although the operative provisions are couched in the settler-colonial legal language of personhood, rights and standing, the Innu version is full of references to Innu history, worldview, cosmology, culture, law and the nation's intimate relationship with and responsibilities to the river and the rest of their territory. It also asserts that recognizing the rights of nature in a context of legal pluralism—exemplified by the parallel Indigenous and non-Indigenous resolutions—ensures respect for Indigenous self-determination, biocultural rights and legal traditions.[365]

Two individuals involved in the development of the Magpie River resolutions argue that the resolutions advance the resurgence of Innu cosmology and the decolonization of the

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[359] See, eg, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) 20; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) 242-244.

[360] See, eg, Council of Canadians et al, eds, *The Rights of Nature: The Case for a Universal Declaration of the Rights of Mother Earth* (Ottawa: Council of Canadians, 2011); David R Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (Toronto: ECW, 2017).

[361] Conseil des Innu de Ekuanitshit, Résolution nº 919-082 (18 January 2021); Municipalité Régionale de Comté De Minganie, Résolution nº 025-21, Reconnaissance de la personnalité juridique et des droits de la rivière Magpie – Mutehekau Shipu (16 February 2021).

[362] Yenny Vega Cárdenas & Daniel Turp, eds, *Une personnalité juridique pour le Fleuve Saint-Laurent et les Fleuves du monde* (Montréal: Éditions JFD, 2021) (English translation published as Yenny Vega Cárdenas & Daniel Turp, eds, *A Legal Personality for the St. Lawrence River and other Rivers of the World* (Montréal: Éditions JFD, 2023)).

[363] Joe Lofaro, "First Nations chiefs adopt resolution declaring St. Lawrence River a legal person," *CTV News Montreal* (25 April 2023), online: https://montreal.ctvnews.ca/first-nations-chiefs-adopt-resolution-declaring-st-lawrence-river-a-legal-person-1.6369335.

[364] Yenny Vega Cárdenas & Uapukun Mestokosho, "Recognizing the Legal Personality of the Magpie River/Mutehekau Shipu in Canada," in Vega Cárdenas & Turp, *A Legal Personality for the St Lawrence River and other Rivers of the World, supra* note 362, 113.

[365] Conseil des Innu de Ekuanitshit, *supra* note 361.

Canadian legal system.[366] They report that the Innu consider Mutehekau Shipu a living entity, an ancestor and relative with its own spirit and agency. It does not surprise them that the Innu would affirm this ancestral river as a person with rights. The resolutions, in their view, place Innu epistemology at the heart of the evolution of Canadian environmental law and translate into Western law what water means to the Innu. Personhood and rights for the river, in their view, give effect to an Indigenous worldview in which rivers are not objects to be exploited or polluted, but subjects for which the whole community has a responsibility to care. Recognition as the river's guardians affirms Innu people's duty to protect rivers and brings them into closer contact with their ancestors who performed this duty. Moreover, by helping heal the river and restoring its power to heal, the resolutions will help heal colonial violence. Similar claims have been made by Māori scholars about the conferral of legal personality on ancestral relatives like the Whanganui River and Te Urewera forest in Aotearoa New Zealand.[367]

If movements for rights or personhood for nature in Canada are propelled by Indigenous peoples and their allies as part of efforts to revitalize Indigenous law and jurisdiction, the dangers of assimilation and further colonial violence will recede. It is important also that any such work build on work Indigenous nations have already done, often without the media fanfare accompanying explicit rights of nature campaigns. The Heiltsuk (Haíłzaqv) Nation, for example, based its 2018 adjudication of a fuel spill in its waters on its own laws that recognize kinship ties and reciprocal legal obligations between human and other beings.[368] The Tŝilhqot'in Nation's *ʔElhdaqox Dechen Ts'edilhtan* (ʔEsdilagh Sturgeon River Law) of 2020 declares that people, animals, fish, plants, land and water have rights.[369] And a 2021 summary of the laws of the peoples of the lower Fraser River states that all beings have inherent rights to live in a good way to contribute to a harmonious cycle of life, including a right to biodiverse, fully functioning ecosystems; have agency and a role to play in decision-making according to their gifts; hold a life force that connects them to each other, the Creator, transformers, ancestors and the land; and have a responsibility to practise respect for all things including by treating the fish peoples as relatives and teachers.[370]

These recent examples suggest that rights or personhood for nature can in some circumstances support the struggle for recognition of Indigenous peoples' inherent right of self-government. An open issue is how settler-colonial law can make space for and give effect to Indigenous laws that recognize kinship with, obligations to, and entitlements of other-

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[366] Vega Cárdenas & Mestokosho, supra note 364.
[367] See, eg, Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Vancouver: UBC Press, 2016) 98; Jacinta Ruru, "First Laws: Tikanga Māori in/and the Law" (2018) 49 *Victoria U Wellington L Rev* 211; Jacinta Ruru, "Listening to Papatūānuku: A call to reform water law" (2018) 48:2-3 *J Royal Society of New Zealand* 215.
[368] Heiltsuk Tribal Council, *Dáduqvḷá1 qṇtxv Ǧviḷásax̌ / To look at our traditional laws: Decision of the Heiltsuk (Haíłzaqv) Dáduqvḷá Committee Regarding the October 13, 2016 Nathan E. Stewart Spill* (Bella Bella, BC: Heiltsuk, Tribal Council, 2018) 30-31, 38.
[369] Tŝilhqot'in Nation, ʔElhdaqox Dechen Ts'edilhtan (ʔEsdilagh Sturgeon River Law), adopted by ʔEsdilagh First Nation Chief and Council 27 May 2020; endorsed by the Tŝilhqot'in Council of Chiefs 28 May 2020.
[370] Lower Fraser Fisheries Alliance and Revitalizing Indigenous Law (RELAW), *Legal Traditions of the Peoples of the Lower Fraser: Summary Report* (Abbotsford, BC: Lower Fraser Fisheries Alliance, 2021).

than-human beings. There are many possible ways to make such openings in the fabric of settler-colonial law, but space does not permit discussion of them here.[371]

5. Green Refuge or Dead End?

Canada's constitutional cul-de-sac is not a complete dead end for environmental rights, but progress to date has been limited. The possibilities for legal recognition of environmental rights will continue to be shaped and constrained by the characteristics of this distinctive constitutional landscape. At risk of straining the metaphor past the breaking point, I conclude by summarizing some analogies between culs-de-sac in the built environment and metaphorical culs-de-sac in the legal environment.

Like life in a suburban cul-de-sac, living in a constitutional cul-de-sac forces advocates of a legally enforceable right to a healthy environment, or rights of nature itself, to take longer, more circuitous routes to their desired destinations. And the destinations have so far proved mostly elusive. Moreover, advocates are often pushed onto already crowded arterial roads of existing constitutional provisions and general environmental protection statutes like *CEPA 1999*, where greener means of getting around are often unwelcome and metaphorically fatal encounters more frequent.

There are hopeful developments, however. Denizens of Canada's constitutional cul-de-sac have begun to show more willingness to share the space with the neighbourhood's first inhabitants. Settler-colonial legislatures and courts have begun to take UNDRIP seriously, even to the extent of declaring it part of Canadian law.[372] A few courts have gone so far as to hold that section 35 now protects inherent, generic Indigenous rights including self-government, requires Indigenous rights to be defined according to Indigenous law, and presupposes an Indigenous right to a healthy environment.[373] They have begun to award remedies that give the latter right real teeth.[374] And Indigenous and settler-colonial governing bodies have begun to recognize the rights and legal personhood of other-than-human entities in ways that seem at least potentially consistent with respecting Indigenous jurisdiction, law and cosmology.

Much depends on how a few ongoing legal disputes are resolved by the settler-colonial courts. *Mathur*, *La Rose* and *Misdzi Yikh* will indicate how open the cul-de-sac is to the greening of the *Charter of Rights*. *Gitxaala* and *Montour* will indicate how open it is to recognition of Indigenous environmental rights and self-government.

As the efforts and experiments described in this article continue to unfold, there is a chance that they will enable the residents of Canada's constitutional cul-de-sac to achieve some of the advantages touted by the champions of real world culs-de-sac, including a sense

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[371] See, eg, Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can B Rev 1. One option worth exploring is the incorporation of Indigenous law into the common law, a point on which the courts in Aotearoa New Zealand are well ahead of their Canadian counterparts. See *Ellis v The King*, [2022] NZSC 114; Kent McNeil, "Tikanga Māori: The Application of Māori Law and Custom in Aotearoa/New Zealand" (17 November 2022), online: *ABlawg.ca*, https://ablawg.ca/2022/11/17/tikanga-maori-the-application-of-maori-law-and-custom-in-aotearoa-new-zealand/; Te Aka Matua o te Ture/Law Commission, *He Poutama* (NZLC Study Paper 24) (Wellington, NZ: Te Aka Matua o te Ture/Law Commission, 2023).
[372] *Bill C-92 Reference*, *supra* note 6; *Dickson*, *supra* note 6.
[373] *Montour*, *supra* note 6; *Yahey*, *supra* note 332.
[374] *Yahey*, *ibid*.

of community (with all beings, human and otherwise), neighbourly interaction (between settler-colonial and Indigenous legal orders), a safer and stabler environment for children (and future generations), and, in the long run, a climate in Iqaluit capable of supporting the cultures, livelihoods and environments that have sustained human presence there for millennia.