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# Climate Change and the Courts: Balancing Stewardship and Restraint

BY SUSAN GLAZEBOOK

*Ka tokona e Tāne Mahuta ko Ranginui e tū nei ko Papatūānuku e takoto neikia puta te ira tangata ki te whaiao ki te ao mārama. E mihi ana ki ngā iwi taketake nō tēnei whenua e tū nei tātou. Nō reira, tēnā koutou katoa kua huihui mai nei.*

**A**s is customary in Aotearoa/ New Zealand I have greeted you in te reo Māori, the traditional language of the indigenous people. I started with the creation, where the Sky Father and the Earth Mother were separated by Tāne Mahuta, one of their sons, so that all their descendants could live in a world of light and enlightenment.<sup>1</sup> I have also offered greetings to the indigenous people from this land on which we stand. And finally, I have greeted everyone gathered here today.<sup>2</sup>

It is apt that I greet you in this way because a significant part of my talk today on climate change and the courts will concentrate on cases brought by youth and indigenous peoples. Although many of these cases are put on traditional grounds, what they are really seeking is a paradigm shift and what is arguably an expansion of the traditional horizons of law and policy.

But first some background.

## The Challenges of the Climate Crisis

The term climate change refers to long-term shifts in temperatures and weather patterns. It is now well accepted that the main driver of climate change since the 1800s has been human activity, primarily through the burning of fossil fuels.<sup>3</sup> The effects are not just rising global temperatures but also include intense droughts,<sup>4</sup> severe fires,<sup>5</sup> rising sea levels, flooding, melting polar ice,<sup>6</sup> catastrophic storms<sup>7</sup> and declining biodiversity.<sup>8</sup> These effects are felt at all levels of human, animal and plant life, as well as by the environment more generally.<sup>9</sup> And they are being felt now.

As climate risks grow in extent they also grow in complexity, requiring a more varied combination of adaptation and mitigation strategies to combat them.<sup>10</sup> Urgent action is needed. A recent report suggests that we risk approaching what is referred to as a “doom loop.”<sup>11</sup> This is a situation where the need to address the consequences of global warming, like wildfires and flooding, increasingly prevents societies from being able to devote resources to reducing global emissions. The

authors of the report use the analogy of a ship which has been approaching a storm for a long period of time, only to find the storm now looming on the horizon.<sup>12</sup> The ship’s erstwhile storm-deniers may become increasingly convinced that the storm is real, but now the overarching objective of evading the storm must be joined with the new, pressing objective of mitigating the storm’s effects.

It is also important to note that, although climate change affects everyone, it does not affect everyone equally.<sup>13</sup> The effects of climate change are felt most acutely by women and girls and those segments of the population who are already in vulnerable situations, including indigenous peoples, children, older persons and persons with disabilities.<sup>14</sup> LGBTQI+ people also suffer disproportionately, given factors like higher poverty rates and the exclusion of LGBTQ+ families from state emergency support.<sup>15</sup>

Groups which have faced present or historical discrimination, including groups which are otherwise barred from accessing political processes, are especially at risk from the consequences of the climate crisis. Further, these groups may also bear the brunt

of any negative economic effects which will accompany adaptation or mitigation measures, given their limited ability to withstand economic upheaval.<sup>16</sup>

There are differential impacts of climate change on different countries and regions. For example, small-island states like Tuvalu, Vanuatu and The Bahamas experience climate change as a threat to their very existence.<sup>17</sup> As the Prime Minister of Vanuatu, states:<sup>18</sup>

Vanuatu, like other climate vulnerable nations, is paying the highest price. A child born today will, by the end of their life, look out on an ocean without living coral. The waves will lap ever higher around their feet, as the ocean rises faster and faster. The rising sea will ruin our freshwater supply, our crops and our fishing. For many proud nations, abandoning homes and ancestors may be the only available response.

Bangladesh, with its low-lying geography, high population density and poverty has already faced disastrous effects from floods which have affected an estimated 7.2 million people.<sup>19</sup> More broadly, lower-income regions suffer from “adaptation gaps” where their ability to adopt climate adaptation measures is greatly restricted by the limited funds available for adaptation.<sup>20</sup>

The need to be attentive to differential impacts on different social groups is captured by the concept of ‘climate justice’. Asad Rehman, executive director of NGO War on Want, states that the idea of climate justice has largely been developed by activists from the global south who have argued that:<sup>21</sup>

[f]ixing the climate is only possible if we also fix all of the other

inequalities that exist because not only does climate reinforce all those things, but it also amplifies them – and it’s an expression of those things.

Director of NGO Power Shift Africa Mohamed Adow argues that climate justice is “an extension of the struggles of [global] southern, Indigenous and local communities for land, resources, sovereignty and anticolonialism.”<sup>22</sup> According to Professor Naomi Klein of Canada, climate justice is about “multi-tasking” and realising that “[w]e live in a time of multiple overlapping crises” such that “[w]e need responses that are truly intersectional.”<sup>23</sup>

### Response required

As must be obvious, a coordinated, global and urgent response to climate change is necessary. To this end, the Paris Agreement was adopted at COP21 in 2015, requiring states to take action to combat climate change.<sup>24</sup> The overarching aim is to hold the increase in global average temperatures to below 2°C above pre-industrial levels and preferably below 1.5°C, although the latter goal appears more and more elusive.<sup>25</sup>

It is not just states that must take action. The private sector plays a large role in climate change.<sup>26</sup> The ‘Carbon Majors’ (the 100 largest fossil fuel producers) have been responsible for just over half of global industrial greenhouse gases since the industrial revolution.<sup>27</sup> In some cases, these multinational corporations are worth more than the GDPs of some of the states in which they operate.<sup>28</sup>

The United Nations Guiding Principles on Business and Human Rights create a framework for businesses to ensure that their practices

are in accordance with human rights, including environmental protection.<sup>29</sup> According to the UN Commissioner of Human Rights, the responsibility of companies exists independently of states’ ability or willingness to respect, protect, and fulfil human rights including in the context of climate change.<sup>30</sup>

While businesses traditionally have not been good at factoring the far future into decisions,<sup>31</sup> it is vital that they now take both the current and long-term effects of climate change into account.<sup>32</sup> Regulators, both internationally<sup>33</sup> and within the United States,<sup>34</sup> are increasingly adapting corporate governance and disclosure (including financial disclosure) law to require company directors to consider and account for the effects of climate change.<sup>35</sup>

But this movement towards increased requirements for climate-related disclosure and governance is not universal. In 2022, the Trustees of the State Board of Administration in Florida passed a resolution directing that Florida’s state pension fund managers not consider environmental, social and governance (ESG) objectives in investment decisions,<sup>36</sup> and, in 2023, Florida’s House Commerce Committee voted to approve a bill which would expand this earlier directive to all funds invested by state and local governments and would also increase compliance costs for banks and prevent issuance of ESG bonds.<sup>37</sup> Beyond the state level, President Biden (in his first veto as President) utilised his veto power to preserve a Department of Labor regulation which allows (but does not require) managers of pension funds to take into account ESG objectives.<sup>38</sup> This debate over ESG is a broader trend amongst many prominent American politicians.<sup>39</sup>

What is notable about these anti-ESG

policies is that they involve using state intervention to oppose climate-aligned investment decisions. The straightforward dichotomy between interventionist state climate policy and non-interventionist free market liberalism is thus no longer reflective of a reality where executives and legislatures are taking increasingly interventionist steps to *oppose* climate action.<sup>40</sup> A further interesting issue posed by this debate is the fact that bans potentially create conflicts with fiduciary duties and corporate governance principles, as environmental issues can have both long and short-term impacts on financial returns.<sup>41</sup> For example, President Biden defended his veto not primarily by appealing to the need to protect the climate, but in terms of the need to allow fund managers to take into account important social and environmental issues which may negatively influence investments.<sup>42</sup>

So, what role have the courts played in combating climate change and what role will they play in the future?

### Climate-related litigation

Since 2015, the number of climate-change related cases has more than doubled, and 2023 will be an important year for climate litigation, with a number of significant international cases awaiting decision and trial, including many mounted by youth and indigenous plaintiffs.<sup>43</sup>

Much of this litigation will be in familiar areas for the courts. Climate-related disasters, for example, will generate disputes over insurance but the scale may be unprecedented.<sup>44</sup> More broadly, there will be cases seeking to enforce corporate obligations to address climate change in their reporting and decision-making.<sup>45</sup>

Another type of case which draws on

the traditional competency of courts is litigation relating to misleading conduct in trade including so-called greenwashing: a practice where companies create an impression of climate friendliness through disinformation about their products or services.<sup>46</sup>

An analysis published in January 2023 found that Exxon Mobil scientists had produced accurate internal climate projections between 1977 and 2003 but, despite this, ExxonMobil actively adopted a public communications strategy which sought to “emphasize uncertainty” surrounding scientific knowledge of the greenhouse effect.<sup>47</sup> Exxon Mobil has faced multiple lawsuits alleging greenwashing connected to its alleged efforts to deceive consumers about the purported environmental benefit of some of its products as well as distorting public information about climate change.<sup>48</sup>

A further potential future area of claims centres on ineffective carbon credits.<sup>49</sup> A recent investigation has claimed that more than 90 percent of the rainforest carbon offsets approved by the world’s largest certifier, Verra, are effectively worthless.<sup>50</sup> While Verra disputed the findings, it has since committed to changing its practices.<sup>51</sup> If companies were to advertise their products as carbon neutral while relying on ineffective carbon credits, this would create a risk of liability for greenwashing.

Alongside claims regarding directors’ duties (including financial) and misrepresentations, many plaintiffs have attempted to use tort law to hold companies and governments accountable — with mixed success to date.<sup>52</sup> Tort law is often regarded as being based on an underlying policy of attempting to achieve corrective justice<sup>53</sup> in cases where one person has harmed another. Defendants argue

that tort law is not apt to address the multi-national and multi-faceted nature of climate change. Tort-based claims also raise issues relating to standing, remoteness and causation.<sup>54</sup> These issues arise, but to a lesser extent, with human rights arguments which have also featured strongly in climate litigation.<sup>55</sup>

Some similar issues arise also with cases brought under general planning and environmental legislation but there have been successes for climate activists. In a recent decision, the Land Court of Queensland recommended that the Minister not grant permits for a coalmine, relying explicitly on the mine’s contribution to climate change.<sup>56</sup> The Court found that the mining project would place unjustifiable limits on various rights, including the culture of First Nations People and the protection of children.<sup>57</sup> The Court said that, wherever the coal is burnt, the emissions will contribute to environmental harm, including in Queensland.<sup>58</sup>

Cases have also been brought asking the courts to enforce compliance with legislation aimed at combating climate change. For example, the Irish Supreme Court quashed Ireland’s 2017 National Mitigation Plan as it failed to provide the level of specificity required by the legislation in order to meet the statutory objective.<sup>59</sup>

Courts must of course strike a balance between ensuring justice is done in individual cases and not usurping the functions of the other branches of government, and some cases have failed on the basis that climate action is for the other branches of government to address.<sup>60</sup> This concern was expressed by the majority in *Juliana v. United States*.<sup>61</sup> The majority emphasised that the Court lacked necessary policy expertise, which they found

to be problematic given that the requested declaratory and injunctive orders to mandate a change in state climate policy would require the Court “to pass judgment on the sufficiency of the government’s response” and “would necessarily entail a broad range of policymaking.”<sup>62</sup> Importantly, however, the majority recognised the gravity of climate change and that other branches of government had a “moral responsibility” to act.<sup>63</sup> This case is also significant for its extremely strong dissent, in which U.S. District Judge Josephine L. Staton of the Central District of California stated “[w]hen the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?”<sup>64</sup>

Industry groups have taken advantage of arguments about the proper role of the legislature and launched their own campaign of strategic litigation in order to prevent climate action.<sup>65</sup> These cases can be described as “anti-regulatory” in that they seek to challenge the validity of regulatory measures enacted under empowering legislation with the most prominent example being the Supreme Court decision last year in the *West Virginia* case related to the Clean Air Act.<sup>66</sup>

The case centred on a challenge to regulations passed under President Barack Obama which sought to introduce “generation shifting” (restructuring America’s electrical grid from higher to lower-emitting sources).<sup>67</sup> The majority held that Congress did not grant the EPA authority to implement emissions caps based on that generation shifting approach.<sup>68</sup>

In dissent, the minority characterised the effect of the majority’s decision as the Court appointing itself “instead of Congress or the expert agency” as “the

decision-maker on climate policy.”<sup>69</sup> The minority said that “[w]hatever else this Court may know about, it does not have a clue about how to address climate change.”<sup>70</sup>

The remarks in dissent highlight how constitutional and institutional competency concerns are relevant to *both sides* of the climate litigation debate.<sup>71</sup> Arguably, if courts should be wary of making decisions on combating climate change, then the same logic could apply to striking down the policies of expert regulatory agencies.

A more individually targeted form of non-climate-aligned litigation is the so-called ‘SLAPP’ (Strategic Litigation Against Public Participation).<sup>72</sup> These are cases filed against civil servants, climate activists and litigants in climate-aligned cases which seek to disincentivise individuals and civil society groups from trying to advance climate action through the courts. There are anti-SLAPP laws but, despite these, the United States remains a prominent site of SLAPPs.<sup>73</sup>

Another distinct area of litigation has emerged from the growing crisis of climate-induced displacement.<sup>74</sup> This is particularly an issue for developing small-island states in the Pacific, and low-lying areas generally, as I have already mentioned. The Refugee Convention’s definition of a refugee requires a fear of persecution, based on certain factors which may not include climate-displaced groups.<sup>75</sup>

In New Zealand, the Supreme Court had to consider the position of Mr. Ioane Teitiota from Kiribati, who argued that he should not be returned there because of the threat to his life from climate change.<sup>76</sup> The Court held that the threat was not imminent and, as such, the refugee definition was not met.<sup>77</sup> The Court also rejected the suggestion that the provisions of the

International Covenant on Civil and Political Rights (ICCPR) were relevant.<sup>78</sup> But the Court did not rule out the possibility of future, successful claims.<sup>79</sup>

The UN Human Rights Committee, where Mr. Teitiota then took his claim, held by majority that,<sup>80</sup> although his right to life was not violated on the facts, such claims could succeed in future.<sup>81</sup> The majority stated that environmental degradation and climate change “constitute some of the most pressing and serious threats” to the present and future enjoyment of the right to life.<sup>82</sup> Further, the majority made the important statement that:<sup>83</sup>

. . . without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the [ICCPR], thereby triggering the non-refoulement obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.

Thus, while Mr. Teitiota’s claim did not succeed, there is clearly scope, on the majority’s approach, for future claims to engage the non-refoulement obligations of states under international law.

As the effects of climate change grow in severity, displacement will become an increasing issue. According to the UNHCR (United Nations High Commissioner for Refugees), an annual average of 21.5 million people have been displaced by weather-related events since 2008.<sup>84</sup> And, according to international thinktank Institute for

Economics and Peace, 1.2 billion people could be displaced by 2050 due to the effects of natural disasters and climate change.<sup>85</sup>

I mention, too, that climate activists are increasingly taking direct action and therefore becoming the subject of criminal cases for civil disobedience or similar criminal charges.<sup>86</sup> They then rely on statements about climate change in an attempt to establish a defence of necessity.<sup>87</sup> So far, few have succeeded.<sup>88</sup>

Finally, it is not just national courts that are being asked to adjudicate on climate change but also international courts and tribunals. For example, the Pacific Island nation of Vanuatu, along with a number of other countries particularly affected by climate change, has filed a draft resolution which is now open for co-sponsorship by other states, asking for an advisory opinion from the International Court of Justice on the obligations of States in respect of climate change.<sup>89</sup>

As this brief survey shows, courts are increasingly being called on to adjudicate claims related to climate change. Most of the forms of litigation so far discussed fall within the traditional competencies of the courts. While climate change presents a novel situation, the fundamental legal issues involved in these cases are familiar.

### Expanded horizons?

However, there are dimensions of climate litigation which are challenging courts to consider whether the traditional horizons of the law should be expanded. Claims brought by indigenous peoples and youth are asking courts to look beyond law's traditional economic horizons and consider the effects of climate change on their identity, their future and on the envi-

ronment itself.

### Youth cases

Globally and within the United States, it is projected that 2023 will be a "watershed year" for climate litigation, with many claims involving or being led by youth plaintiffs.<sup>90</sup> A case filed by Korean youth awaits a hearing.<sup>91</sup> In the Canadian case of *Mathur et al v Her Majesty the Queen in Right of Ontario*, youth plaintiffs argued before the Superior Court of Ontario that Ontario violated the Canadian Charter of Rights and Freedoms by failing to address climate change.<sup>92</sup> Amongst various declarations, the plaintiffs seek an order stating that Ontario's emissions-reduction target was not in accordance with Ontario's necessary contribution to meeting the goals of the Paris Agreement. The Superior Court rejected the defendants' motion to dismiss on 12 November 2020.<sup>93</sup> The case has been heard but the decision is yet to be released.

And in June the First Judicial District Court in Montana will hear *Held v State of Montana*, a lawsuit mounted by youth plaintiffs between the ages of 2 and 18, seeking a declaration that Montana is failing to uphold their constitutional rights by promoting a fossil-fuel-driven economy.<sup>94</sup> [Editor's note: The Court ruled in favor of the youth plaintiffs, see: [Judge Rules in Favor of Montana Youths in Landmark Climate Case](#), *The New York Times*, Aug. 14, 2023.]

Beyond national courts, international and regional courts have also heard a host of youth claims. These claims tend to place an emphasis on human rights embedded in relevant regional instruments or international law. Plaintiffs also attempt to base their claims on the international obligations

of states with regards to combating climate change.

In September 2020, the first climate case to be heard by the European Court of Human Rights was filed by Portuguese youth against 33 countries (the 27 European Union countries alongside the United Kingdom, Norway, Switzerland, Russia, Turkey and Ukraine).<sup>95</sup> The claimants base their claim on the European Convention on Human Rights arts 2 (right to life) and 8 (right to private and family life), as well as art 14, which protects against discrimination. An important feature of the case is that the claim presumes that the respondents are responsible for the harmful effects that climate change poses to the claimants. The case awaits hearing before the 17-judge Grand Chamber (transferred to that Chamber because of its perceived importance).

On the international stage, 16 children, including climate activist Greta Thunberg, filed a petition arguing that five countries violated their rights under the United Nations Convention on the Rights of the Child by failing to cut greenhouse gases sufficiently and also failing to encourage polluters to curb pollution.<sup>96</sup> The Committee on the Rights of the Child ruled that the claim was inadmissible in 2021, holding that the plaintiffs had failed to exhaust their domestic remedies. However, in its rejection the Committee significantly accepted that states can be held responsible for the detrimental effects of emissions on children, even on those children *beyond their own territory*.

In an international claim which targets individuals rather than companies, a group of New Zealand law students are attempting to get the global prosecutor's office of the International Criminal Court to open an investigation into BP executives.<sup>97</sup>

Youth complaints are so common



because of the unique impacts of climate change on youth, and their lack of other political avenues to effect change. The Montana proceedings emphasise the fact that its youth plaintiffs are unable to vote and are thus subject to the whims of the state's majority.<sup>98</sup> The plaintiffs draw an analogy between their situation and the position of other youth who have faced "systematic constitutional violations," like youth who were disadvantaged due to segregated schooling.<sup>99</sup> The descriptions of the plaintiffs contains a number of strikingly personal accounts of the plaintiffs' relationship to the environments in which they live.<sup>100</sup> For example, plaintiffs Jeffrey K (age 6) and Nathaniel ("Nate") K (2) are both described as having respiratory issues which are aggravated by the "smoke-filled air caused by wildfires."<sup>101</sup> Alongside their health issues, Jeffrey and Nate also are prevented from going outside which is "difficult because Jeffrey and Nate both enjoy playing outside and being in Montana's beautiful natural environment."<sup>102</sup>

The loss of a treasured environment is captured by the concept of 'solastalgia'.<sup>103</sup> This is a term coined by Australian philosopher Glenn Albrecht and it refers to "the gripping sense of existential loss when treasured places are irreparably damaged or destroyed."<sup>104</sup> Claims by youth provide an avenue where plaintiffs can provide focused, personal narratives of the existential and psychological impacts climate change has on them.

This is a novel way of using the courts and expressing rights. Courts in a tortious context have certainly recognised the damaging effects of mental distress. But the invocation of the concept of solastalgia seems to go further than compensation for harm resulting from discrete instances of distress

which can be quantified in monetary terms. Instead, plaintiffs who rely on the concept of solastalgia are crossing into existential territory, arguing that a sense of psychological threat to the essential bounds of one's identity is justiciable. How the courts will react to this attempt to go beyond the traditional economic horizon of law remains to be seen.

#### *Indigenous cases*

Several of the plaintiffs in the Montana claim are indigenous youth.<sup>105</sup> One claimant is a member of the Confederated Salish and Kootenai Tribes who claims that her culture "is already in jeopardy and at risk of being lost."<sup>106</sup> Another two claimants, who are of Crow descent, face disruption to cultural practices "that are central to their spirituality and individual dignity."<sup>107</sup>

The sense of loss and solastalgia which is felt by all of the plaintiffs in that case has an added and more fundamental dimension for those of indigenous descent, due to the unique links which exist between indigenous peoples and the environment. A common feature of indigenous societies is collective possession of land, rooted in a deep spiritual connection to it, which transcends Western ideas of private property.<sup>108</sup> As Dennis Foley from the Gai-mariagal and Wiradjuri peoples in Australia states, "[t]he land is the mother and we are of the land; we do not own the land rather the land owns us. The land is our food, our culture, our spirit and our identity."<sup>109</sup> As a result of this deep connection, the harm of climate change to natural environments poses a distinctive challenge to indigenous ways of life.

In multiple places, the United Nations Declaration on the Rights of

Indigenous Peoples affirms that indigenous peoples have rights over the environment and the natural resources to which they have a connection.<sup>110</sup> For example, Article 25 affirms the right of indigenous peoples to maintain their "distinctive spiritual relationship[s]" with "lands, territories, waters and coastal seas and other resources."

Claims by indigenous people in climate change litigation are often founded on this spiritual connection and the related duties of guardianship, which include duties to future generations.<sup>111</sup> This is reflected in the Māori whakataukī (proverb): ko te whenua te waiū mō ngā uri whakatipu (the land will provide sustenance for future generations).

As such, there are important links between youth and indigenous climate litigation. Both classes of plaintiff tend to emphasise an intergenerational, future-oriented outlook which seeks to overcome the law's traditional, economic short-term horizon. Likewise, both classes of plaintiff emphasise the collective rights of particular communities, rather than the Western idea of the autonomous bearer of individual rights, and also emphasise duties to the environment in its own right. But it is also important not to conflate indigenous claims with other kinds of claim. English translations of indigenous concepts can never fully do them justice. Moreover, beyond issues surrounding the translation of individual concepts, indigenous knowledge systems are often rooted in fundamentally different ontologies to Western knowledge systems.<sup>112</sup> Further, indigenous knowledge systems are often inherently rooted within specific kinship structures, such that they cannot simply be taken and applied in the abstract by Western courts.<sup>113</sup> As such, judges and lawyers must always be care-

ful to avoid artificially appropriating indigenous concepts without sufficient knowledge of them.<sup>114</sup>

These claims, too, therefore challenge the traditional horizons of the courts.

### ***Environmental Legal Personhood***

An area closely related to indigenous climate litigation is the granting of legal personhood to natural entities like mountains or rivers.

In India, the Ganges and Yamuna rivers were granted the same legal rights as humans in 2017 by the Uttarakhand High Court as part of an effort to combat pollution.<sup>115</sup> Although this order was later stayed by the Indian Supreme Court,<sup>116</sup> courts in other Indian states have continued to invoke environmental personhood, including to describe nature as a whole.<sup>117</sup> And the Supreme Court of Justice of Colombia, in 2018, recognised the Amazon as a “subject of rights.”<sup>118</sup>

Elsewhere, similar measures have been instituted by legislation. In Aotearoa/New Zealand, legal personhood has been granted to Te Awa Tupua | Whanganui River and Te Urewera mountain range.<sup>119</sup> These decisions reflected the Māori view that “rivers and land are not objects of human control but part of an interrelated whole.”<sup>120</sup> Similar measures have also been implemented in other jurisdictions including Canada<sup>121</sup> and several countries in Latin America.<sup>122</sup>

The future legal and practical effect of these developments remains unclear. But a conceptual or symbolic revolution such as granting legal personhood can have wide-reaching impacts and has the potential to inspire more concrete developments in future. The most significant aspect of the conceptual revolution brought about by

these developments is the rejection of a human-centric worldview, wherein the environment only has value in its ability to sustain human life.<sup>123</sup>

### **Role of the Courts<sup>124</sup>**

Taken as a whole, what do all these cases tell us about the role of the courts in combating climate change?

#### ***Traditional role of courts***

The beginning of this talk referred to a range of areas in which judicial consideration of climate change, while not necessarily simple, fell within the purview of the courts in a way which did not require fundamental shifts in the role of the courts or the nature of the law. In areas like the interpretation of legislation, claims relating to corporate governance, greenwashing and insurance, and the prosecution of climate activists, the courts remain within the scope of their traditional role. These are all areas in which courts can fulfil their adjudicative function of applying the law to individual cases and of ensuring that the law is observed and that governments and private parties act within it.

But the traditional role of the courts also has its limitations in terms of combating climate change. Courts are fundamentally reactive, rather than proactive. They are usually restricted to adjudicating on past events. Courts are also restricted to the cases which plaintiffs bring before them and to the evidence presented in the particular case, which presents fundamental difficulties when dealing with an issue as wide-reaching and complex as climate change.

Another limitation is that domestic courts are limited to making rulings concerning their own jurisdictions

despite the transnational nature of climate change. This is partly why youth and indigenous plaintiffs have had recourse to international bodies. Further, there is the issue of institutional competence and the proper role of the courts. It has been argued that the issue of climate change is inherently political, not legal, and is in the realm of the executive and legislative branches of government.

Still, courts have a duty to act within the limits of their role to preserve justice as they see it. Relative institutional competency is necessarily particular to the circumstances of a given case. Further, how institutional competency is determined may depend on how the issue before the courts is characterised. The determination of institutional competency may be contingent on whether claims are viewed in terms of their direct nature (as claims for justice to be done in the case of individual plaintiffs) or in terms of their indirect, strategic effects. Insofar as climate litigation cases necessarily involve a blurry co-existence of *both* of these dimensions, questions of institutional competency and constitutional role are necessarily blurred as well.

#### ***Discourse***

Finally, in all of these cases, the success or failure of individual lawsuits is only part of the issue. Litigation, particularly when led by youth or indigenous plaintiffs, can have a large impact on societal discourse related to climate change. Proceeding through multiple interlocutory stages and appeals, these cases can generate publicity which spans a number of years. And this in turn puts pressure on governments, businesses and the global community.

This idea of discourse mirrors the dialogue model of constitutional

jurisprudence, which has origins in Canada.<sup>125</sup> In Westminster systems, where courts do not have the power to strike down legislation, nevertheless courts can, through their decisions, have influence on political processes.<sup>126</sup>

## Conclusion

Despite these difficult questions of appropriate boundaries, the courts remain important fora for climate action. Climate litigation (both successful and unsuccessful) offers an escape from the feeling of powerlessness that comes from majoritarian political processes. Those who, like the youth, are threatened by climate change but have

no avenue to effect political change can be granted a voice by the courts. Courts concretely focus on individual situations in a way that allows plaintiffs an opportunity to demonstrate that climate change is an issue of justice as much as it is a question of policy.

The cases brought by youth and indigenous peoples will require the courts to examine the horizons of traditional legal concepts and categories, and whether these concepts should be expanded to accommodate injustices occurring due to climate change. Courts will also be forced by these cases to consider whether the law's traditional reactive horizons and boundaries are appropriate when faced with a truly

existential and urgent threat.

But this expanded horizon does not only mean looking into the future. It means recognising that the line between future, present, and past is porous. Climate change, though many of its effects will be felt in the future, is already experienced now in terms of its economic consequences but also as a threat to life and health and as a sense of loss by those who see their treasured places and identity slipping away.

I leave you with a second whakataukī:  
Ka ora te whenua, ka ora te tangata.

When the land is well, we are well.

<sup>1</sup> There are a number of overlapping Māori creation accounts which vary between iwi and hapū, and even between individual tohunga. As such, the general sketch stated in this speech cannot be considered a substitute for a full understanding of the depth and breadth of the Māori account. For a fuller introduction, see Michael Reilly, *Te Timatanga mai o te Ao: the Beginning of the World*, in *Te Kō Para Para: An Introduction to the Māori World 12* (Michael Reilly et al. eds., 2018).

<sup>2</sup> This paper is a slightly expanded and footnoted version of a lecture given on February 28, 2023 at Duke Law School while I was serving as a Distinguished Judge in Residence. Thanks to my clerk, Christopher McCardle, for his invaluable assistance with this paper. I would also like to thank Justice Joe Williams and his clerk, Savanna Hiha, for providing the mihi and whakataukī for this speech. For further papers addressing similar themes, see Helen Winkelmann, Susan Glazebrook, & Ellen France, Chief Justice and Judges of the Supreme Court of New Zealand, Address at the Asia Pacific Judicial Colloquium: Climate Change and the Law (Asia Pacific Judicial Colloquium (May 28–30, 2019), <https://www.courtsofnz.govt.nz/assets/speechpapers/ccw.pdf>); Susan Glazebrook, Judge of the Supreme Court of New Zealand, Address at the Asia Pacific Judicial Conference: The Role of Judges in Climate Governance and Discourse (Nov. 2020), <https://www.courtsofnz.govt.nz/assets/speechpapers/Glazebrook-1-20201209.pdf> [hereinafter The Role of Judges in Climate Governance and Discourse]; Susan Glazebrook, Judge of the Supreme Court of New Zealand, Address at the Annual Meeting of Asociación de Mujeres Jueces de Argentina/Association of Women Judges of Argentina: Climate change is not gender neutral (Aug. 2022), <https://www.courtsofnz.govt.nz/assets/7-Publications/1-Speeches-and-papers/20220818-Women-and-Climate-Change.pdf>.

<sup>3</sup> See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY: SUMMARY FOR POLICYMAKERS (Cambridge Univ. Press ed., 2022). For the most recent, and highly significant, report, see INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SYNTHESIS REPORT OF THE IPCC SIXTH ASSESSMENT REPORT (AR6): SUMMARY FOR POLICYMAKERS (Cambridge Univ. Press ed., 2023).

<sup>4</sup> See Drew Costley, *Climate change made global summer droughts 20 times more likely*, PBS Newshour (Oct. 5, 2022, 5:38 PM), <https://www.pbs.org/newshour/science/climate-change-made-global-summer-droughts-20-times-more-likely>; see also Rodolfo Maino and Drilona Emrullahu *Climate Change in Sub-Saharan Africa's Fragile States Evidence from Panel Estimations*, 4 (Int'l Monetary Fund, Working Paper No. 22/54, 2022).

<sup>5</sup> See, e.g., Drew Costley, *Carbon emissions from boreal fires rose in 2021*, AP News (Mar. 3, 2023), <https://apnews.com/article/climate-change-wildfires-drought-carbon-boreal-forest-a371bd283fac930142d9609b0880892d>.

<sup>6</sup> Antarctic sea ice settles on record low extent, again, NAT'L SNOW & ICE DATA CTR.: ARCTIC SEA ICE NEWS & ANALYSIS (Feb. 27, 2023), <https://nsidc.org/arcticseaicenews/2023/02/antarctic-sea-ice-minimum-settles-on-record-low-extent-again/#:~:text=On%20February%2021%2C%20Antarctic%20sea,for%20the%20second%20straight%20year>.

<sup>7</sup> For a survey of resources concerning New Zealand, see The science linking extreme weather and climate change, MINISTRY OF THE ENV'T (Feb. 3, 2023), <https://environment.govt.nz/news/the-science-linking-extreme-weather-and-climate-change/>. For a similar survey of the United States, see Climate Change Indicators: Weather and Climate, EPA, <https://www.epa.gov/climate-indicators/weather-climate> (last visited Aug. 26, 2023).

<sup>8</sup> See Melese Genete Muluneh, *Impact of climate change on biodiversity and food security: a global perspective—a review article*, 10 AGRIC. & FOOD SEC. 1 (2021).

<sup>9</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 3.

<sup>10</sup> See Judy Lawrence et al., *Cascading climate change impacts and implications*, 29 CLIMATE RISK MGMT. 1, (2020).

<sup>11</sup> LAURIE LAYBOURN ET AL., 1.5°C – DEAD OR ALIVE? THE RISKS TO TRANSFORMATIONAL CHANGE FROM REACHING AND BREACHING THE PARIS AGREEMENT GOAL, 17 (Chatham House & Inst. for Pub. Pol'y Rsch. eds., 2023).

<sup>12</sup> *Id.* at 18.

<sup>13</sup> A significant international development is the United Nations General Assembly's 2022 resolution declaring the existence of the "right to a clean, healthy and sustainable environment as a human right[.]" GA Res 76/300, The human right to a clean, healthy and sustainable environment (Aug. 1, 2022). Importantly, the General Assembly's resolution acknowledges that the consequences of climate change are: "... felt most acutely by women and girls and those segments of the population that are already in vulnerable situations, including indigenous peoples, children, older persons and persons with disabilities[.]" *Id.*

<sup>14</sup> See Glazebrook, Climate change is not gender neutral, *supra* note 2. For further discussion of human rights and the environment, see Susan Glazebrook, *Human Rights and the Environment*, 40 VICTORIA UNIV. WELLINGTON L. REV. 293 (2009); Susan Glazebrook, *Keeping It Clean and Green: The Case for Constitutional Environmental Protection Rights*, in RECONSTITUTING THE CONSTITUTION 425 (Caroline Morris et al. eds., 2011); Susan Glazebrook, Judge of the Supreme Court of New Zealand, Address at the International Union for Conservation of Nature Academy of Environmental Law Colloquium: A human right to the



- environment – lofty ideal or attainable necessity (June 28, 2013); Susan Glazebrook, *Human Rights and the Environment*, in *THE SEARCH FOR ENVIRONMENTAL JUSTICE* 85 (Paul Martin et al. eds., 2015).
- 15 Mikyla Reta, *How Environmental and Climate Injustice Affects the LGBTQ+ Community*, CTR. FOR AM. PROGRESS (June 16, 2022), <https://www.americanprogress.org/article/how-environmental-and-climate-injustice-affects-the-lgbtqi-community/>.
- 16 For an example of intersectional analysis establishing this conclusion in the context of Indigenous women in Canada, see Verity Thomson, *Decolonization, Feminism, and Climate Change: A commentary on Misdzi Yikh v Canada*, 18 MCGILL J. SUSTAINABLE DEV. L. 157 (2022). For a broader analysis of the intersection between gender and climate change (including discussion of indigenous peoples), see U.N. Secretariat, *Differentiated impacts of climate change on women and men; the integration of gender considerations in climate policies, plans and actions; and progress in enhancing gender balance in national climate delegations*, U.N. Doc. FCCC/SBI/2019/INF.8 (June 12, 2019).
- 17 For a general report, see ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC: SUBREGIONAL OFFICE FOR THE PACIFIC, *PACIFIC PERSPECTIVES 2022: ACCELERATING CLIMATE ACTION* (2022).
- 18 Bob Loughman Weibur, *If we are to have a future, climate justice needs a legal footing*, AL JAZEERA (June 21, 2022), <https://www.aljazeera.com/opinions/2022/6/21/if-we-are-to-have-a-future-climate-justice-needs-a-legal-footing>.
- 19 MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH NATIONAL ADAPTATION PLAN OF BANGLADESH (2023-2050) i, 25 (2022).
- 20 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY: SUMMARY FOR POLICYMAKERS*, *supra* note 3, at 20.
- 21 Josh Gabbatiss and Ayesha Tandon, *In-depth Q&A: What is 'climate justice'?*, CARBONBRIEF (Oct. 4, 2021, 7:00 AM) <https://www.carbonbrief.org/in-depth-qa-what-is-climate-justice/>.
- 22 *Id.*
- 23 Madeleine de Trenquallye, *It's inequality that kills': Naomi Klein on the future of climate justice*, THE GUARDIAN (Feb. 13, 2023), <https://www.theguardian.com/books/2023/feb/13/its-inequality-that-kills-naomi-klein-on-the-future-of-climate-justice>. COP27, the 27th United Nations Climate Change Conference, was held from November 6–20, 2022. At the close of the Conference, an agreement was struck to create a "loss and damage fund" which will provide funds from developed nations to developing nations for damage and loss caused by climate change. U.N. Framework Convention on Climate Change Conference of the Parties, *Sharm el-Sheikh Implementation Plan*, (Nov. 20, 2022). How successful that will be remains to be seen.
- 24 Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, 3156 U.N.T.S. 1. See also Helen Briggs & Esme Stallard, *COP27 Why is the Paris climate agreement still important?*, BBC (Nov. 2, 2022), <https://www.bbc.com/news/science-environment-35073297>.
- 25 The authors of the doom loop report referred to above consider that the resignation which may accompany the belief that the Paris Agreement's targets will inevitably be overshoot, as well as the increasingly devastating effects of climate disasters, risks taking attention and resources away from reducing global emissions. Laybourn, Throp and Sherman, *supra* note 11. For concern that the 1.5°C goal may be already (or almost) overtaken, see Damian Carrington, *Revealed: 1,000 super-emitting methane leaks risk triggering climate tipping points*, THE GUARDIAN (Mar. 6, 2023), <https://www.theguardian.com/environment/2023/mar/06/revealed-1000-super-emitting-methane-leaks-risk-triggering-climate-tipping-points>; Catherine C Ivanovich et al., *Future warming from global food consumption*, 13 NATURE CLIMATE CHANGE 297 (2023); Denise Chow, *Urgent action on climate change needed 'to secure a liveable future'*, U.N. report warns, NBC NEWS (Mar. 1, 2023), <https://www.nbcnews.com/science/environment/urgent-action-climate-change-needed-secure-liveable-future-un-report-w-rcna17764>. Particularly see *Synthesis of the IPCC Sixth Assessment Report*, *supra* note 3.
- 26 See Helen Winkelmann, Susan Glazebrook, & Ellen France, *supra* note 2, at 34–37.
- 27 *Id.* at 34; PAUL GRIFFIN, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 2017, 5 (Carbon Disclosure Project ed., 2017).
- 28 See e.g., Joe Myers, *How do the world's biggest companies compare to the biggest economies?*, WORLD ECON. FORUM (Oct. 19, 2016), <https://www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/>. For an example of recent harmful action by private actors, see Michael Biesecker & Michael Rubinkam, *Leak at Pennsylvania gas storage well spewing methane*, ASSOCIATED PRESS (Nov. 19, 2022, 8:19 PM), <https://apnews.com/article/astronomy-science-pittsburgh-pennsylvania-climate-and-environment-f91cf3b1008813659a4d9bba0242ad08>.
- 29 United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, respect and Remedy" Framework*, HR/PUB/11/04 (2011).
- 30 *Id.* at 13.
- 31 See Lynne L Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 264, 265 (2012).
- 32 See Mark Carney, Governor of the Bank of England and Chairman of the Financial Stability Board, Address at Lloyd's of London: *Breaking the Tragedy of the Horizon – climate change and financial stability* (Sept. 29, 2015), <https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability.pdf>.
- 33 Legally required climate disclosure is increasingly being adopted by a range of jurisdictions across the Anglophone world. In the United Kingdom, legislation came into force from April 2022 requiring companies to disclose their climate-related risks and opportunities. See *The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022* (UK). In New Zealand, the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021 amended a range of New Zealand acts to require roughly 200 large financial entities to start making climate-related disclosures; in Australia, the Federal Government has begun a consultation process to explore the implementation of mandatory climate disclosures. See THE TREASURY, *CLIMATE-RELATED FINANCIAL DISCLOSURE: CONSULTATION PAPER* (2022). In Canada, following a commitment in the 2022 Budget to introduce mandatory disclosure requirements, the Office of the Superintendent of Financial Institutions (OSFI) released a Guideline on the management of climate-related risks in March of 2023. See OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS CANADA, *GUIDELINE NO. B-15: CLIMATE RISK MANAGEMENT* (2023).
- 34 Significantly, the SEC is considering new draft regulations which would require companies to disclose climate-related risks. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed March 21, 2022) (to be codified at 17 CFR 210.229, 232, 239, and 249). However, these regulations have faced significant backlash, and potential legal action. See e.g., Soyoungh Ho, *SEC Chair Responds to Questions on Potential Lawsuit on Climate Disclosure*, *Fast Paced Rulemaking*, THOMSON REUTERS (Mar. 8, 2023), <https://tax.thomsonreuters.com/news/sec-chair-responds-to-questions-on-potential-lawsuit-on-climate-disclosure-fast-paced-rulemaking/>; Jacqueline M Vallette & Kathryn M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (May 10, 2022) <https://corp.gov.law.harvard.edu/2022/05/10/secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges/>.
- 35 Helen Winkelmann, Susan Glazebrook & Ellen France, *supra* note 2, at 111–27.
- 36 Press Release, Governor Ron DeSantis, Governor Ron DeSantis Eliminates ESG Considerations from State Pension Investments (Aug. 23, 2022), <https://www.flgov.com/2022/08/23/governor-ron-desantis-eliminates-esg-considerations-from-state-pension-investments/>. Governor DeSantis states that investors should concentrate only on financial returns, thereby assuming that environmental issues will have no negative effect on financial returns. See e.g., Max Zahn, *What is ESG investing and why are some Republicans criticizing it?*, ABC NEWS (Feb. 16, 2023), <https://abcnews.go.com/Business/esg-investing-republicans-criticizing/story?id=97035891>.
- 37 Jim Turner, *Florida lawmakers move forward with targeting 'ESG' investments*, WUSF PUB. MEDIA (Mar. 9, 2023, 6:29 AM), <https://wusfnews.wusf.usf.edu/politics-issues/2023-03-09/florida-lawmakers-move-forward-esg-investments>.
- 38 Zeke Miller & Seung Min Kim, *Biden issues first veto, taking on new Republican House*, ASSOCIATED PRESS (Mar. 21, 2023), <https://apnews.com/article/joe-biden-veto-esg-labor-congress-woke-5971f2ee28c04b7d8727606185cc53f>.
- 39 For a survey of the debate over ESG and the various measures, see Leah Malone et al., *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Mar. 11, 2023), <https://corp.gov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/>.
- 40 For example, the regulation which Republicans

- in Congress attempted to overturn *allowed* (but did not mandate) fund managers to consider ESG objectives. The Congressional bill would therefore reduce the autonomy of private actors, which is paradoxical given the traditional free-market ideology of the Republican Party.
- 41 See Hughey Newsome, *Opinion: Florida and the politics of ESG investing*, CITY & STATE FLA. (Feb. 16, 2023) <https://www.cityandstatefla.com/opinion/2023/02/opinion-florida-and-politics-esg-investing/383022/>.
- 42 Eleanor Mueller, *Biden issues first veto, knocks Marjorie Taylor Greene*, POLITICO (Mar. 20, 2023), <https://www.politico.com/news/2023/03/20/biden-vetoes-climate-investing-roll-back-00087835> (“This bill would risk your retirement savings by making it illegal to consider risk factors MAGA House Republicans don’t like”).
- 43 JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2022 SNAPSHOT 1 (Grantham Resch. Inst. on Climate Change & Env’t & Ctr. for Climate Change Econ. and Pol’y eds., 2022). For the purposes of the report, cases must generally be brought before judicial bodies and raise an issue of law or fact relating to climate change as a significant issue. The report relies predominantly on the Climate Change Laws of the World (CCLW) database, accessible at [climate-laws.org](http://climate-laws.org). For a regularly updated database which canvasses a wider range of cases, see *Climate Change Litigation Databases*, SABIN CTR. FOR CLIMATE CHANGE L., [climatecasechart.com](https://climatecasechart.com) (last visited Aug. 28, 2023).
- 44 See e.g., Cheryl L Pollak et al., *‘Hurricane’ Sandy: A Case Study of the Eastern District of New York’s Effort to Address Mass Litigation Resulting from the Effects of Climate Change*, 5 TEX. A&M J. PROP. L. 157 (2018).
- 45 For example, the NGO ClientEarth has filed a personal lawsuit, backed by several large pension funds and investors, against the 11 directors of Shell. Holding a small shareholding in Shell, the plaintiffs argue that “the board is persisting with a transition strategy that is fundamentally flawed, despite the board’s legal duty to manage [climate] risks[.]” Press Release, Client Earth, ClientEarth files climate risk lawsuit against Shell’s Board with support from institutional investors (Feb. 9, 2023), <https://www.clientearth.org/latest/press-office/press-clientearth-files-climate-risk-lawsuit-against-shell-s-board-with-support-from-institutional-investors/>.
- 46 See Sebastião Viera de Freitas Netto et al., *Concepts and forms of greenwashing: a systematic review*, 32(19) ENV’T SCI. EUR. 1 (2020).
- 47 Geoffrey Supran et al., *Assessing ExxonMobil’s global warming projections*, 379 SCI. 1, 6 (2023).
- 48 See *Commonwealth v. Exxon Mobil Corp.*, 187 N.E.3d 393 (2022). For updates on the case, see *Commonwealth v Exxon Mobil Corp.*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/case/commonwealth-v-exxon-mobil-corp/> (last visited Aug. 28, 2023). See also “*Ramirez v Exxon Mobil Corporation*” SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/case/ramirez-v-exxon-mobil-corp/> (last visited Sept. 4, 2023); “*People of the State of New York v Exxon Mobil Corp*” SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/case/people-v-exxon-mobil-corporation/> (last visited Sept. 4, 2023); Chris McGreal, *Exxon must go to trial over alleged climate crimes, court rule*, THE GUARDIAN (May 24, 2022), <https://www.theguardian.com/environment/2022/may/24/exxon-trial-climate-crimes-fossil-fuels-global-heating#:~:text=The%20Massachusetts%20high%20court%20on,role%20in%20worsening%20environmental%20devastation.>
- 49 See Fiona Harvey, *Greenwashing or a net zero necessity? Climate scientists on carbon offsetting*, THE GUARDIAN (Jan. 18, 2023), <https://www.theguardian.com/environment/2023/jan/18/greenwashing-or-net-zero-necessity-climate-scientists-on-carbon-offsetting-aoe.>
- 50 Patrick Greenfield, *Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis shows*, THE GUARDIAN (Jan. 18, 2023), <https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe.>
- 51 Patrick Greenfield, *Biggest carbon credit certifier to replace its rainforest offsets scheme*, THE GUARDIAN (Mar. 10, 2023), <https://www.theguardian.com/environment/2023/mar/10/biggest-carbon-credit-certifier-replace-rainforest-offsets-scheme-verra-aoe.>
- 52 Helen Winkelmann, Susan Glazebrook & Ellen France, *supra* note 2, at 101-108. For a significant example in New Zealand, see *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552; *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394. Mr Smith lodged a claim against seven major New Zealand companies, alleging that they are substantial emitters of greenhouse gas and that these emissions cause continuous damage to his whenua (land). The Court of Appeal struck-out the claim, leave to appeal to the Supreme Court was granted. The decision on that appeal is currently reserved. For a significant Australian example see *Minister for the Environment v Sharma* [2022] FCAFC 35; overturning *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560. For an American example see *County of Santa Cruz v. Chevron Corp.* This claim alleges that the defendants breached their duty to “use due care” in their fossil fuel activities. This case is still to be decided. For updates, see *County of Santa Cruz v. Chevron Corp.*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/case/county-santa-cruz-v-chevron-corp/> (last visited Aug. 28, 2023).
- 53 Though this rationale is open to challenge, it is difficult to divorce tort law from the underlying idea that one person ought to be held responsible for harm done to another. See STEPHEN TODD, *TODD ON TORTS* 14-16 (8th ed, Thomson Reuters ed., 8th ed. 2019).
- 54 See *The Role of Judges in Climate Governance and Discourse*, *supra* note 2, at 17-26.
- 55 There are a range of example of cases, both successful and unsuccessful, which have relied on arguments rooted in human rights law. For unsuccessful examples, see *Greenpeace Nordic Association v Ministry of Petroleum and Energy* 18-060499ASD-BORG/03, 23 January 2020 (Bogarting Court of Appeal) at 234 (Norway). For an unofficial English translation, and for updates on this case, see *Nordic Ass’n v. Ministry of Petroleum and Energy (People v Arctic Oil)*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/> (last visited Aug. 28, 2023). See also *Friends of the Irish Environment v. Government of Ireland* [2020] 205/19. For a significant case which is a successful example of this strategy see HR 20 december 2019 (Urgenda Foundation/Kingdom of the Netherlands). For the latter, the English judgment is available at see *Urgenda Foundation v. State of the Netherlands*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/> (last visited Aug. 28, 2023).
- 56 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [No 6] QLC 21 (Austl.). For updates on the case, see *Youth Verdict v. Waratah Coal*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/non-us-case/youth-verdict-v-waratah-coal/> (last visited Aug. 28, 2023). *Waratah Coal* can be contrasted with the outcome of *Sharma*, *supra* note 52 where at first instance the Court held that the Minister for the Environment had a duty of care to avoid causing personal injury to the children of Australia when approving projects which would increase greenhouse gas emissions, but the decision was overturned on appeal.
- 57 *Id.* at 1297-1694.
- 58 *Id.* at 26.
- 59 *Friends of the Irish Environment v Government of Ireland*, *supra* note 55. For commentary, see Orla Kelleher “A critical appraisal of *Friends of the Irish Environment v Government of Ireland*” 30 REV. EUR., COMPAR. & INT’L ENV’T L. 138 (2021).
- 60 See, e.g., *Misdzi Yikh v. Canada* [2020] FC 1059, [2020] FC 1109, 77 (remarking that the issue of climate change “is inherently political, not legal, and is in the realm of the executive and legislative branches of government”). See also *Friends of the Irish Environment v Government of Ireland*, *supra* note 55, at 6.27.
- 61 *Juliana v. United States*, 947 F 3d 1159, 1173 (9th Cir. 2020). In this case 21 youth plaintiffs argued that the federal government had violated their constitutional rights by causing dangerous concentrations of carbon dioxide to be emitted. The Ninth Circuit have rejected the plaintiffs’ petition for a rehearing en banc. For updates, see *Juliana v. United States*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/case/juliana-v-united-states/> (last visited Aug. 28, 2023). For updates from the plaintiffs, see *Youth v Gov: Juliana v. US*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/juliana-v-us> (last visited Aug. 28, 2023).
- 62 *Juliana v. United States*, 947 F 3d at 1172.
- 63 *Id.* at 1175.
- 64 *Id.* at 1191 (Staton, J. dissenting).
- 65 Setzer and Higham, *supra* note 43, at 22-23.
- 66 *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).
- 67 *Id.* at 2603.
- 68 The majority concluded this partly on the basis of the ‘major questions doctrine’, which is that courts will interpret the empowering legislation of regulatory agencies conservatively if the regulatory agency is claiming a power that is of vast economic and political significance. In such situations, the courts may require express Congressional authorisation before a power is upheld. While the majority as a whole relied on



- this doctrine, Gorsuch and Alito JJ's concurring opinion laid out the doctrine the most comprehensively. *See id.* at 2616-27 (Gorsuch, N. concurring). For a survey of this doctrine's history by authors critical of the Supreme Court's decision, see Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 *ADMIN. L. REV.* 217, 224-235 (2022).
- <sup>69</sup> *West Virginia v. EPA*, 142 S. Ct. at 2644 (Kagan, E. dissenting).
- <sup>70</sup> *Id.*
- <sup>71</sup> As already stated, the majority in *Juliana* relied on similar arguments to oppose *pro-climate* intervention (at 26). *See also* ., *Misdzi Yikh v. Canada* [2020] FC 1059, [2020] FC 1109, 77.
- <sup>72</sup> Setzer and Higham, *supra* note 43, at 23. *See for example* in Canada, *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCSC 50, which concerned Trans Mountain Pipeline's ULC's successful attempt to obtain an injunction blocking access to work sites connected to the construction of an oil pipeline extension. The defendant protestors unsuccessfully applied to be allowed to adduce evidence to establish the common law defence of necessity and to be allowed to mount an argument based on s 7 of the Canadian Charter of Rights and Freedoms. The protestors failed on both applications.
- <sup>73</sup> EARTHRIGHTS INTERNATIONAL, THE FOSSIL FUEL INDUSTRY'S USE OF SLAPPS AND JUDICIAL HARASSMENT IN THE UNITED STATES: POLICY BRIEF (2022).
- <sup>74</sup> *See, e.g., Rights of Indigenous People in Addressing Climate-Forced Displacement*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/non-us-case/rights-of-indigenous-people-in-addressing-climate-forced-displacement/> (last visited Aug. 28, 2023); *Tribes Claim US Government Violates Human Rights by Failing to Address Climate-Forced Displacement*, STATE OF THE PLANET (Mar. 3, 2020), <https://news.climate.columbia.edu/2020/03/03/tribes-climate-forced-displacement/>.
- <sup>75</sup> Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, art. 1(A)(2). Note that many commentators argue that the Refugee Convention is not (and should not be modified to be) engaged by climate displacement. *See, e.g., Jane McAdam, Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, 23 *INT'L J. REFUGEE L.* 2 (2011); Dina Ionesco, *Let's Talk About Climate Migrants, Not Climate Refugees*, UNITED NATIONS (June 6, 2019), <https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/>.
- <sup>76</sup> *Teitiota v. Chief Executive Ministry of Business, Innovation and Employment* [2015] NZSC 107.
- <sup>77</sup> The Court stated that the applicant would not face "serious harm" if he was returned home, and that there was no evidence that the Government of Kiribati was failing to take steps to protect its citizens. *Id.* at 12.
- <sup>78</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
- <sup>79</sup> *Teitiota v. Chief Executive Ministry of Business, Innovation and Employment* [2015] NZSC 107, 13.
- <sup>80</sup> U.N. Hum. Rts. Comm., *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016*, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) [hereinafter *Views adopted by the Committee under article 5 (4) of the Optional Protocol*]. Committee members Duncan Laki Muhumuza and Vasilka Sancin dissented from the decision, both holding that the right to life was violated.
- <sup>81</sup> The majority surveyed each of the various threats to life raised by Mr Teitiota, concluding that, while there was evidence behind all of them, none reached a sufficient threshold to establish a reasonably foreseeable risk of the impairment of Mr Teitiota's right to life if he were forced to return. *Id.* at 9.1-9.12. On the important issue of rising sea levels, the majority remarked that "the time frame of 10 to 15 years . . . could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and . . . relocate its population[.]" *Id.* at 9.12. In a recent article, Michelle Foster and Jane McAdam argue that this statement should not be taken as introducing an 'imminence' requirement to the assessment of whether there had been a violation of Mr Teitiota's rights under the ICCPR. Rather, they argue, the majority's discussion of potential state action should be taken as a component of the assessment of the likelihood or foreseeability of harm. Michelle Foster & Jane McAdam, *Analysis of 'Imminence' in International Protection Claims: Teitiota v New Zealand and Beyond*, 71 *INT'L AND COMPAR. L.Q.* 975, 981 (2022).
- <sup>82</sup> *Views adopted by the Committee under article 5 (4) of the Optional Protocol, supra* note 80, at 9.4.
- <sup>83</sup> *Id.* at 9.11.
- <sup>84</sup> *Frequently asked questions on climate change and disaster displacement*, UNHCR (Nov. 6, 2016), <https://www.unhcr.org/news/stories/frequently-asked-questions-climate-change-and-disaster-displacement>.
- <sup>85</sup> Press Release, Inst. for Econ. & Peace, Over one billion people at threat of being displaced by 2050 due to environmental change, conflict and civil unrest (Sept. 9, 2020); *see also* Sean McAllister, *There could be 1.2 billion climate refugees by 2050. Here's what you need to know*, ZURICH (Jan. 18, 2023), <https://www.zurich.com/en/media/magazine/2022/there-could-be-1-2-billion-climate-refugees-by-2050-here-s-what-you-need-to-know>.
- <sup>86</sup> *See, e.g., Court of Appeals in Renens*, September 22, 2020, *Credit Suisse Protesters Trials* 317. For updates on the case, *see Credit Suisse Protesters Trials*, SABIN CTR. FOR CLIMATE CHANGE L., <http://climatecasechart.com/non-us-case/credit-suisse-protesters-trial/> (last visited Aug. 28, 2023); Emma Farge, *Activists take Credit Suisse climate case to Europe human rights court*, REUTERS (Nov. 5, 2021), <https://www.reuters.com/business/cop/activists-take-credit-suisse-climate-case-europe-human-rights-court-2021-11-05/>.
- <sup>87</sup> For an extensive overview of cases, *see CLIMATE DEFENSE PROJECT, CLIMATE NECESSITY DEFENCE CASE GUIDE* (2019), <https://climatedefenseproject.org/wp-content/uploads/2021/05/CDP-Climate-Necessity-Defense-Case-Guide.pdf>. *See also* Lange N. Long & Ted Hamilton, *The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases*, 38 *STAN. ENV'T L.J.* 57 (2020).
- <sup>88</sup> An interesting recent example of legal action against climate protestors was the prosecution of the Insulate Britain protestors. *See Insulate Britain activists jailed over M25 protest*, BBC (Feb. 2, 2022), <https://www.bbc.com/news/uk-england-london-60233793>. A Judge who fined a group of the protestors commented that "[t]hey have inspired me and personally I intend to do what I can to reduce my own impact on the planet... I have heard your voices[.]" Nina Lloyd, *Judge sentencing Insulate Britain protesters 'inspired' into climate action*, THE INDEP. (Apr. 13, 2022, 12:34 AM), <https://www.independent.co.uk/climate-change/news/insulate-britain-m25-protest-judge-inspired-b2056790.html>. By contrast, several protestors were jailed for contempt of court for breaching rulings which barred them from mentioning the climate crisis to the jury. Sandra Laville, *Court restrictions on climate protesters 'deeply concerning', say leading lawyers*, THE GUARDIAN (Mar. 8, 2023, 1:00 AM), <https://www.theguardian.com/environment/2023/mar/08/court-restrictions-on-climate-protesters-deeply-concerning-say-leading-lawyers>. Protestors have also publicly commented on the stress of the court proceedings with one protestor describing the Court process as an "absolute trauma[.]" Damien Gayle & Sandra Laville, *An absolute trauma: Insulate Britain activists on anguish of court trials*, THE GUARDIAN (Feb. 24, 2023, 7:17 AM), <https://www.theguardian.com/uk-news/2023/feb/24/insulate-britain-activists-trauma-climate-court-trials>.
- <sup>89</sup> U.N. General Assembly, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, UN Doc A/77/L.58 (Mar. 1, 2023).
- <sup>90</sup> Isabella Kaminski, *Why 2023 will be a watershed year for climate litigation*, THE GUARDIAN (Jan. 4, 2023, 8:08 AM), <https://www.theguardian.com/environment/2023/jan/04/why-2023-will-be-a-watershed-year-for-climate-litigation>.
- <sup>91</sup> For updates on the case, *see Do-Hyun Kim et al v South Korea*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea/#:-:text=Summary%3A.live%20and%20a%20clean%20environment>. (last visited Aug. 28, 2023). Also notable is that, in Mexico, the Supreme Court has released its ruling on the case of *Julia Habana et al v Mexico*, a challenge to the 2021 Electric Industry Law, holding that the plaintiffs did not have legal standing. Suprema Corte de Justicia de la Nación [SCJN], 2022, *Julia Habana Cervantes Magaloni y Otros. Julia Habana et al. v. Mexico* is one of a number of cases related to amendments to the 2021 Electric Industry Law, which greatly strengthen Mexico's state-owned electricity company, the Federal Electricity Commission (FCE). The FCE generates most of its power through conventional sources, and the amendments create a new structure which would remove the preference for clean energy generation. 214 young people between the ages of 15 and 28 mounted a challenge to the amendments. They relied on Article 4 of the Constitution, which enshrines a right to an adequate environment.
- <sup>92</sup> For updates on this case, *see Mathur, et al. v Her Majesty the Queen in Right of Ontario*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/non-us-case/mathur-et-al-v-her-majesty-the-queen-in-right-of-ontario/> (last visited Aug. 28, 2023). The case has been heard. Lynda Collins et al., *The first climate rights lawsuit in Canada had its day in court. It won't be the last*, TORONTO STAR (Oct. 2, 2022), <https://www.thestar.com/opinion/contributors/the-first-climate->

- [rights-lawsuit-in-canada-had-its-day-in-court-it-won-t/article\\_05ec6942-93d8-5307-9933-97900c0e69d7.html](#).
- 93 *Mathur v Ontario*, [2020] ONSC 6918.
- 94 For updates on this case, see *Held v. State*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/case/11091/> (last visited Aug. 28, 2023).
- 95 An Emergency Like No Other, Global Legal Action Network, <https://youth4climatejustice.org/> (last visited Aug. 28, 2023); The Role of Judges in Climate Governance and Discourse, *supra* note 2, at 11.
- 96 For the decision concerning Argentina, see Comm. on the Rts. of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No.104/2019*, U.N. Doc. CRC/C/88/D/104/2019 (Oct. 8, 2021). For the CRC's decisions regarding the other states and for updates on this case, see *Sacchi, et al. v. Argentina, et al.*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/> (last visited Aug. 28, 2023).
- 97 Angelica Dino, *Law students sue oil company executives before the International Criminal Court*, NZ LAWYER (Jan. 13, 2023) [https://www.thelawyer.com/nz/practice-areas/environment-and-climate/law-students-sue-oil-company-executives-before-the-international-criminal-court/432705?e=dXNlckBleGFtcGxlLmN-ibQ&utm\\_content=&utm\\_campaign=Editorial-NZL-NS&utm\\_medium=social&utm\\_source=linkedin&hss\\_channel=icp-13672314](https://www.thelawyer.com/nz/practice-areas/environment-and-climate/law-students-sue-oil-company-executives-before-the-international-criminal-court/432705?e=dXNlckBleGFtcGxlLmN-ibQ&utm_content=&utm_campaign=Editorial-NZL-NS&utm_medium=social&utm_source=linkedin&hss_channel=icp-13672314); Olivia Wannan, *NZ students ask for oil company execs to be declared criminals*, STUFF (Jan. 6, 2023, 1:58 PM), <https://www.stuff.co.nz/environment/climate-news/130905413/nz-students-ask-for-oil-company-exec-to-be-declared-criminals>.
- 98 Complaint at 17-20, *Held v. State of Montana*, CDV-2020-307 (D. Mont. Mar. 13, 2020).
- 99 *Id.* at 9-10.
- 100 *Id.* at 14-81.
- 101 *Id.* at 62.
- 102 *Id.* at 63.
- 103 *Id.* at 178; see also Glenn Albrecht, 'Solastalgia': A New Concept in Health and Identity, 3 PAN 44 (2005).
- 104 Complaint at 17-20, *Held v. State of Montana*, CDV-2020-307 at 178.
- 105 *Id.* at 10-12, 23-26.
- 106 *Id.* at 28.
- 107 *Id.* at 71.
- 108 See, e.g., Sofia Olofsson, *Indigenous Peoples' Collective Right to Land Territories, and Resources – Where Do We Stand Today?*, GEO. PUB. POL'Y REV. (July 24, 2019), <https://gppreview.com/2019/07/24/indigenous-peoples-collective-right-land-territories-resources-stand-to-day/>.
- 109 *Connection to Country, Welcome to Country* (July 8, 2020), <https://experience.welcometocountry.com/blogs/learning/connection-to-country>.
- 110 G.A. Res. 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. A/RES/61/295 at pmbll., arts. 10, 11(1), 24(1), 25, 26, 29(1)-(2), 31(1) (Oct. 2, 2007).
- 111 For example, the Māori concept of *kaitiakitanga* has come to encapsulate an emerging ethic of guardianship or trusteeship, especially over natural resources. See TE MATĀPUNENGA: A COMPENDIUM OF REFERENCES TO THE CONCEPTS AND INSTITUTIONS OF MĀORI CUSTOMARY LAW 105-14 (Richard Benton et al. eds., 2013).
- 112 See e.g., Suzanne Duncan & Poia Rewi, *Tikanga: How Not to Get Told Off!*, in TE KŌ PARA PARA: AN INTRODUCTION TO THE MĀORI WORLD 30, 32-47 (Michael Reilly et al. eds., 2018) (discussing the links between the Māori ontological perspective and the norms of tikanga).
- 113 See *id.* at 32-33 (discussing how the Māori worldview is rooted within the particular historical experience of Māori, and how Māori values generally are rooted in Māori beliefs about the genealogical interconnectedness of the spiritual, human and natural worlds).
- 114 *Ellis v. R* [2022] NZSC 114, 120, 181, 270-71. For an earlier discussion of these concerns, see Natalie Coates, *The Recognition of Tikanga in the Common Law of New Zealand*, N. Z. L. REV. 1 (2015).
- 115 *Mohd Salim v State of Uttarakhand & Others*, WPPL 126/2014 (2019); see also *Lalit Miglani v Uttarakhand & Others*, WPPL 140/2015 (2017). For a discussion of the challenges of the reasoning in these cases, see Erin L. O'Donnell, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, 30 J. ENV'T L. 135 (2018). For a discussion of how the Court's decisions problematically rely on Hindu religious norms to the exclusion of other religious views which do not view rivers as sacred in the same way, see *id.* at 140.
- 116 Badra Sinha, *SC puts on hold Uttarakhand HC order declaring river Ganga a living entity*, HINDUSTAN TIMES (July 7, 2017, 8:55 PM), <https://www.hindustantimes.com/india-news/sc-puts-on-hold-uttarakhand-high-court-order-declaring-ganga-a-living-entity/story-IYqkaehoLhAyW-fjAP8GYOO.html>.
- 117 For a survey of other decisions, see Katie Surma, *Indian Court Rules That Nature Has Legal Status on Par With Humans—and That Humans Are Required to Protect It*, INSIDE CLIMATE NEWS (May 4, 2022), <https://insideclimatenews.org/news/04052022/india-rights-of-nature/>.
- 118 Corte Suprema de Justicia [C.S.J.] [Supreme Court], abril 5, 2018, STC4360-2018 (Colom.). The unofficial English translation is available at *Future Generations v. Ministry of the Environment and Others*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/> (last visited Aug. 28, 2023). The Court characterised the Amazon in a similar manner to the way the Colombian Constitutional Court had recognised the Atrato River as a subject of rights. Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, T622-2016 (Colom.). For discussion of new developments concerning riparian rights in the UK, see Frankie Elliott, *Sussex River to be the first in England to have its own rights*, SUSSEX EXPRESS (Feb. 22, 2023, 4:34 PM), <https://www.sussexexpress.co.uk/news/people/sussex-river-to-be-the-first-in-england-to-have-its-own-rights-4037652>.
- 119 Katherine Sanders, 'Beyond Human Ownership'? Property, Power and Legal Personality for Nature in Aotearoa New Zealand, 30(2) JEL 207 (2018); Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14; Te Urewera Act 2014, s 11.
- 120 Sanders, *supra* note 119, at 213.
- 121 *For the first time, a river is granted official rights and legal personhood in Canada*, CANADIAN PARKS AND WILDERNESS Soc'y (Feb. 23 2021), <https://cpaws.org/for-the-first-time-a-river-is-granted-official-rights-and-legal-personhood-in-canada/>.
- 122 See Bolivia (Plurinational State of)'s Constitution of 2009, prmbll.; Ley de Derechos de la Madre Tierra 2010, art. 3; Constitution of Ecuador 2008, revised 2021, art. 71.
- 123 Equally revolutionary is the recent international agreement on the conservation and sustainable use of marine biological diversity. U.N. General Assembly, Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (Mar. 4, 2023). Agreements like this are particularly important given the threat to biodiversity posed by climate change. See Muluneh, *supra* note 8.
- 124 For more discussion on the strengths and limitations of courts, see The Role of Judges in Climate Governance and Discourse, *supra* note 2, at 17-26.
- 125 See Peter Hogg & Allison Bushell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All*, 35 OSGOODE HALL L.J. 75 (1997).
- 126 Peter W Hogg et al., *Charter Dialogue Revisited—Or 'Much Ado About Metaphors'*, 45 OSGOODE HALL L.J. 1, 4 (2007).