Decolonization, Feminism, and Climate Change: A commentary on Misdzi Yikh v Canada

Verity Thomson*

Abstract: *This paper explores the intersection of climate change, feminism and colonialism through a critical analysis of the Statement of Claim and Federal Court decision in* Misdzi Yikh v Canada*, 2020 FC 1059.* Misdzi Yikh *is a climate change class action argued on the basis of human rights which was filed on behalf of two houses of the Wet'suwet'en Nation. This paper focuses primarily on the plaintiff's Statement of Claim to demonstrate the importance of this claim in the Canadian legal context and the complex history which underlies it. I use three theoretical lenses, Indigenous constitutionalism, feminist constitutionalism, and intersectionality, to demonstrate that* Misdzi Yikh *is an important step in bringing Indigenous constitutionalism to Canadian courts but fails to empower Indigenous women. The final part of this paper analyses the Federal Court's decision to strike the Statement of Claim and evaluates the plaintiff's arguments in their appeal.*

Résumé: *Cet article explore l'intersection du changement climatique, féminisme et colonialisme à travers une analyse critique de* Misdzi Yikh v Canada*, 2020 CF 1059.* Misdzi Yikh *est une action collective sur le changement climatique, basé sur les droits humains et déposé au nom de deux maisons de la nation Wet'suwet'en. Cet article se concentre sur la déclaration des demandeurs pour montrer l'importance de cette demande dans le contexte juridique canadien et l'histoire complexe qui la sous-tend. J'emploie trois approches théoriques, le constitutionnalisme autochtone, le constitutionnalisme féministe et l'intersectionnalité, pour démontrer que* Misdzi Yikh *est une étape importante dans l'introduction du constitutionnalisme autochtone dans les tribunaux canadiens, mais une qui n'autonomise pas les femmes autochtones. La dernière partie de cet article analyse la décision de la Cour fédérale d'annuler la déclaration et évalue les arguments des demandeurs en appel.*

Titre en français : Décolonisation, féminisme et changement climatique : un commentaire sur **Misdzi Yikh c Canada**

* Verity Thomson graduated from McGill's Faculty of Law in 2021 with a combined JD/ BCL and the Philip Meyerovitch, Q.C. and the Dawson A. McDonald, Q.C. Memorial Prizes. She's worked for Environment and Climate Change Canada, the Ship-source Oil Pollution Fund, the Ontario Ministry of Environment, Conservation and Parks, and for the Canada Research Chair in Human Rights, Health and the Environment. The author would like to thank the numerous friends and colleagues who provided their support during the publishing process. In particular, I'd like to thank the people who took time to read various drafts of this paper and provide their invaluable feedback, without which it would never have been published: Maya Gunnarsson, Nathaniel Reilly, Sam Gleave, John Thomson.

1. INTRODUCTION

Canada is widely considered a "laggard amongst the international community in the fight against climate change."[1] So far, no litigation has been successful in obtaining an order requiring the government to reduce the nation's greenhouse gas ("GHG") emissions.[2] On February 12, 2020, two houses of the Wet'suwet'en Nation, Misdzi Yikh and Sa Yikh, filed a legal challenge in the Federal Court of Canada alleging that Canada's failure to reduce its GHG production violates their rights under sections 2, 7, and 15 of the *Canadian Charter of Rights and Freedoms*.[3] *Misdzi Yikh v Canada* is a potentially ground-breaking case[4] which hopes to hold Canada accountable to its international commitments under the Paris Agreement and other international climate change agreements by asserting Indigenous and human rights.[5] Additionally, the parties are challenging the federal government's approval of high fossil fuel–exporting projects by requesting environmental assessment statutes be amended so that Canada can cancel its approval of such projects if it cannot meet its Paris Agreement commitment.[6] This suit is an important step for Indigenous peoples to assert their rights to a healthy environment and hold the Canadian government accountable in the face of climate change. However, while the Statement of Claim is filed on behalf of all members of the Sa Yikh and Misdzi Yikh houses, the voices of women appear absent from the document.

---

1 Dustin W Klaudt, "Can Canada's 'Living Tree' Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?" (2018) 31 J Environmental L & Practice 185 at 189.

2 *Ibid* at 191.

3 See *Misdzi Yikh v Canada*, 2020 FC 1059 (Statement of Claim) at para 81 [*Misdzi Yikh*, Statement of Claim].

4 See Jason Proctor, "'Walk the walk': Wet'suwet'en chiefs sue Ottawa to force Crown to act on climate change", *CBC News* (12 February 2020), online: <www.cbc.ca/news/canada/british-columbia/wet-suwet-en-climate-change-federal-court-1.5461273> (the lawyer representing the Wet'suwet'en Richard Overstall says, "I think all of these would be ground-breaking, because global warming and its effect on Indigenous people and young people and everybody, is ground-breaking in itself").

5 See *Misdzi Yikh*, Statement of Claim, *supra* note 3 at paras 3–6.

6 *Ibid* at para 81.

This paper engages in a critical analysis of the *Misdzi Yikh* Statement of Claim. Using three theoretical lenses, Indigenous constitutionalism, feminist constitutionalism, and intersectionality, I demonstrate that *Misdzi Yikh* is an important step in bringing Indigenous constitutionalism to the courts but fails to empower Indigenous women. By failing to recognize the gendered effects of the law they seek to contest, the plaintiffs overlook a possible basis of claim.[7] My analysis reveals that their case could have been strengthened by expanding their section 15(1) or section 28 *Charter* claims to include gender discrimination, which cannot be negated by section 1 of the *Charter*. This analysis helps decolonize Canada's relationship with Indigenous peoples by recognizing Indigenous legal orders and the harm suffered by Indigenous women as a result of colonialism. This paper will begin by providing context for the case by showing how it builds on other climate change class actions rooted in human rights claims. Then, I will engage with Indigenous constitutionalism to show how settler peoples in Canada can approach Indigenous constitutions to aid in decolonizing our relationships. Next, this paper will look at the key tenets of feminist constitutionalism and use them to critique the patriarchal structure and laws which the Wet'suwet'en seek to challenge. Finally, I will examine the Statement of Claim through an intersectional lens to show the unique discrimination Indigenous women face, which is reflected in the Statement of Claim. The last section of this paper examines how the plaintiffs fared in the Federal Court by analysing the decision of Justice McVeigh and the factums of both the appellants and respondents in the appeal, which should be heard by the Federal Court of Appeal this year.

2. CLIMATE CHANGE, CLASS ACTIONS, AND THE CONSTITUTION: BACKGROUND TO *MISDZI YIKH V CANADA*

2.1. Climate Change and Class Actions

Environmental class actions provide a mechanism to overcome some of the barriers inherent in cases of environmental damage. The Supreme Court of Canada recognized the value of class actions in cases of "widespread but individually minimal harm … because for any one plaintiff the expense of bringing suit would far exceed the likely recovery."[8] Environmental damage usually impacts multiple people in the same geographic location,[9] providing an obvious class of persons to challenge the polluter. However, environmental class actions in Canada have faced significant challenges in certification[10] and have generally not been a readily available means of redress.[11] For example, in *Pearson v Inco Ltd*, the plaintiffs were denied certification

---

7 The gender analysis in this paper is binary. This is not to erase the perspectives of two-spirit, queer, and gender diverse people, but because research on the gendered effects climate change is, at present, largely limited to the difference between men and women.

8 *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 29.

9 See Jamie Benidickson, *Environmental Law*, 5th ed (Toronto: Irwin Law, 2019) at 122.

10 See *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 BCCA 193. See also *Hollick v Toronto (City)*, 2001 SCC 68 ("lives have been affected or not affected, in a different manner and degree" at para 10); *Pearson v Inco Ltd*, 205 OAC 30, 2005 CanLII 42474 [*Pearson*]. For a general discussion of problems with certification, see Patrick Hayes, "Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification" (2009) 19 J Envtl L & Prac 189.

11 See Benidickson, *supra* note 9 at 24.

because medical causation was considered too individualized to make a class action claim.[12]

Climate change litigation, especially class actions, has been growing in global importance over the last 30 years as a mechanism for concerned groups to combat anthropocentric climate change.[13] Last year, cases were filed on six continents, demonstrating the widespread nature of such litigation.[14] Recently, several high-profile climate litigation cases were successful on the basis of human rights claims,[15] sparking over 39 similar cases in 23 nations.[16] The Dutch case *Urgenda Foundation v the State of the Netherlands* was the first decision in the world to successfully obtain a remedy from a domestic court for a government's failure to comprehensively address climate change,[17]and it was argued on human rights grounds.[18] Following the success of *Urgenda* in 2015, the human rights-based approach to climate litigation is being copied around the world. *Misdzi Yikh* is part of this trend.[19] Like *Misdzi Yikh*, most of these cases argue that reducing emissions is part of complying with human rights obligations. The most common rights asserted in these cases are the right to life and security of the person, and a corresponding right to environmental protection or to a healthy environment.[20]

2.2. *Misdzi Yikh* Statement of Claim

The *Misdzi Yikh* Statement of Claim is divided into seven sections: overview, parties, global warming, how Canada allows for GHG emissions causing global warming, global warming's impact on the plaintiffs, relief sought, and legal basis. The Statement of Claim outlines the seriousness of the threat posed by climate change, how the plaintiffs experience climate change

---

12 See *Pearson*, *supra* note 10, where Nordheimer J. of the Ontario Superior Court of Justice denied certification of an environmental class action on the basis that a class proceeding was not preferable. Justice Nordheimer reasoned that since proving medical causation was highly individualized, individual issues would predominate over common ones, negating the utility of a class action.

13 See Joana Setzer & Rebecca Byrnes, "Global trends in climate change litigation: 2020 snapshot" (2020) at 1, online (pdf): *Grantham Research Institute on Climate Change and the Environment Center for Climate Change Economics and Policy, London School of Economics and Political Science* <lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2020-snapshot/>.

14 *Ibid* at 4.

15 See The Hague District Court, Den Haag, 24 June 2015, *Urgenda Foundation v the State of the Netherlands* (2015), C/09/456689 (The Netherlands) [*Urgenda*].

16 See Setzer & Byrnes, *supra* note 13 at 15.

17 See Klaudt, *supra* note 1 at 210. See also Setzer & Byrnes, *supra* note 13 at 16; *Urgenda*, *supra* note 15.

18 See *Juliana v United States*, 217 F Supp (3d) 1224 (D Or 2016). See also *Foster et al v Washington State of Ecology*, Doc. 14-2-25295-1-69 (Wash King County, 29 April 2016); Tribunal de première instance francophone, Brussels, 17 June 2021, *VZW Klimaatzaak v Kingdom of Belgium and Others*, 2015/4585/A (Belgium) [*Klimaatzaak*]; *Ashgar Leghari v Federation of Pakistan,* [2015] 1 Lahore HC Green Bench 25501 (Pakistan) [*Leghari*].

19 See Setzer & Byrnes, *supra* note 13 at 15. See also S&L Partners, "Constitutional Complaint on behalf of Do-Hyun Kim and 18 others (Members of Youth 4 Climate Action)" (13 March 2020), online (pdf): *London School of Economics* <climate-laws.org/geographies/south-korea/litigation_cases/do-hyun-kim-et-al-v-south-korea>. This case argues very similar human rights claims to those in *Misdzi Yikh*: right to life and equality before the law.

20 See Klaudt, *supra* note 1 at 237.

as both a threat and responsibility,[21] the Canadian federal government's role in relation to climate change and its failure to regulate GHG emissions, and the plaintiffs' legal rights which are threatened by climate change.[22] After an introduction, the Statement of Claim explains who the plaintiffs are by providing a detailed explanation of the Wet'suwet'en legal order. This is analyzed in section 3 of this paper.

Next, the Statement of Claim outlines the mechanism and consequences of climate change in order to support the plaintiffs' claim that the Canadian federal government is responsible for emissions reductions.[23] The Statement of Claim makes clear that the burning of fossil fuels releases GHGs, which results in climate change through the greenhouse effect.[24] The plaintiffs argue that the Canadian federal government has both the jurisdiction and the duty to limit GHG production across the country. The plaintiffs claim that under section 91 of the *Constitution Act, 1867,* the national concern doctrine gives the federal government the constitutional authority to regulate to reduce GHG emissions.[25] At the time of filing,[26] this claim was untested; however, since *Misdzi Yikh* was filed, the Supreme Court of Canada upheld the plaintiffs' interpretation of section 91 in *References re Greenhouse Gas Pollution Pricing Act.*[27] This section of the Statement of Claim continues by outlining Canada's failure to meet various international commitments to reduce GHG emissions since 1988 and focuses on Canada's commitments under the Paris Agreement.[28] The plaintiffs argue Canada should use its powers of environmental assessment to withhold approval for high GHG-emitting projects, including liquefied natural gas projects and pipelines, [29] in order to meet its commitments under the Paris Agreement.[30]

The next section of the Statement of Claim outlines the effects of global warming on the plaintiffs. The plaintiffs state that climate change increases extreme weather events, degradation of soil and water resources, and the prevalence of vector-borne diseases.[31] They say that in addition to suffering from these climate change caused events, they will suffer uniquely from the reduction of forest animals for food and the depletion of salmon stocks.[32] They contend that this threatens not only their physical health as they become more food insecure, but also their social identity and cohesion.[33] The link between climate change and identity is further discussed in section 4 of this paper. The last section of the Statement of Claim examines the legal basis for the claim: constitutional rights, which are further analyzed below.

---

21 See *Misdzi Yikh*, Statement of Claim, *supra* note 3 at para 2.

22 *Ibid* at para 3.

23 *Ibid* at paras 33–41.

24 *Ibid* at para 34.

25 *Ibid* at para 38.

26 The case was filed in February 2020.

27 2021 SCC 11 [*Re GGPPA*].

28 See *Misdzi Yikh*, Statement of Claim, *supra* note 3 at paras 42–58.

29 *Ibid* at paras 62–68.

30 *Ibid* at paras 59–60.

31 *Ibid* at para 73.

32 *Ibid* at paras 76–77.

33 *Ibid* at para 79.

2.3. Charter Rights Claimed in *Misdzi Yikh*

The *Misdzi Yikh* Statement of Claim argues for protection from climate change on two human rights grounds, protected in Canada by sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.[34] *Misdzi Yikh* also argues for protection under Aboriginal rights, which will be discussed in the next section. *Misdzi Yikh* attempts to extend these two *Charter* rights to protection from climate change. Although this would be a novel application of both sections 7 and 15 if accepted by the courts, academics have discussed it for some time as a promising avenue for environmental justice.[35] Many scholars, including notably Lynda Collins, David Boyd, and Catherine Jean Archibald, have argued environmental rights should be read into the *Charter,* especially through sections 7 and 15.[36]

Section 7 reads, "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[37] To succeed in a constitutional challenge based on section 7, a plaintiff must show a deprivation on one of the three grounds and then establish that it was not in accordance with the principles of fundamental justice.[38] Collins, Boyd, and Archibald have all argued that section 7 should contain within it environmental rights and protections against pollution.[39] Nathalie Chalifour has examined the viability of using sections 7 and 15 to protect the environment and concluded that current judicial interpretation of section 7 supports this approach.[40] Dustin Klaudt notes that the constitutional right to life and security of the person has been extended to include environmental protection in Europe through the European Convention on Human Rights, and in Pakistan, India, and the United States.[41] He concludes that the living tree doctrine should "nouri[sh] the *Charter* to grow in that common direction."[42] Chalifour notes that the "main substantive challenge for environmental justice claims under [section] 7

---

34 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, ss 7, 15, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

35 See Lynda M Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26:1 Windsor Rev Leg Soc Issues 7; Lauren Wortsman, "Greening the Charter: Section 7 and the Right to a Healthy Environment" (2019) 28 Dal J Leg Stud 245; David WL Wu, "Embedding Environmental Rights in Section 7 of the Canadian *Charter:* Resolving the Tension between the Need for Precaution and the Need for Harm" (2015) 33 NJCL 191; David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81; Lynda M Collins, "Security of the Person, Peace of Mind: A Precautionary Approach to Environmental Uncertainty" (2013) 4:1 J Human Rights & Environment 79.

36 See Catherine Jean Archibald, "What Kind of Life: Why the Canadian Charter's Guarantees of Life and Security of the Person Should Include the Right to a Healthy Environment" (2013) 22:1 Tul J Intl & Comp L 1; David R Boyd, *The Environmental Rights Revolution* (Vancouver: UBC Press, 2012).

37 *Charter*, *supra* note 34, s 7.

38 See *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55 [*Carter*].

39 See Lynda M Collins, "Safeguarding the Longue Duree: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR 519 at 520; *Misdzi Yikh*, Statement of Claim, *supra* note 3.

40 See Nathalie J Chalifour, "Environmental Justice and the Charter: Do environmental injustices infringe sections 7 and 15 of the Charter?" (2015) 28 J Envtl L & Prac 89.

41 See Klaudt, *supra* note 1 at 237.

42 *Ibid*.

is the evidentiary burden,"[43] which necessitates proving a sufficient causal connection between the state action and the risk suffered.[44] Although the purpose of section 7, to protect people from state-imposed harm,[45] is well aligned with many environmental causes, there has yet to be a successful application of section 7 to environmental protection, largely because of the evidentiary burden. Should the class action be certified, this is likely to be a major hurdle for the plaintiffs in *Misdzi Yikh*.

Following these scholars, the Wet'suwet'en argue the Canadian government is infringing on their section 7 rights by allowing high GHG-emitting projects to operate in Canada now and approving their operation in the future.[46] They assert that the result of the Canadian laws and policies which approve such projects is climate change, and that climate change will deprive them of their right to life through the risk of premature death, their right to liberty by limiting their freedom to choose where to move and live on their territories, and their right to security of the person by increasing the risk of injury, disease, and mental illness.[47]

Section 15 protects equality rights in Canada. The plaintiffs' section 15 claim is rooted in the concept of intergenerational justice. [48] Intergenerational justice is the idea that there is a "moral responsibility to give the next generation a global environment at least no worse than the one we received from our predecessors."[49] Simply put, those that are older today contributed significantly to climate change but will not be alive to feel most of its effects. Instead, today's children will suffer the "disproportionately harmful impact of climate-induced changes in precipitation and extreme weather."[50] The idea of intergenerational justice has been gaining traction globally. For example, in 2018, 25 youth plaintiffs successfully argued that climate change and deforestation threatened their fundamental rights, notably their equality rights, at the Supreme Court of Colombia.[51] The Court ordered that the Government of Colombia create and execute an action plan to address deforestation in the Amazon rainforest.[52] In Canada, as an intervenor in *Re GGPPA*,[53] the Intergenerational Climate Coalition argued that the Court must consider the rights of children, youth, and future generations when determining the

---

43 Chalifour, *supra* note 40 at 22.

44 See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 75 [*Bedford*].

45 See Chalifour, *supra* note 40 at 16.

46 See *Misdzi Yikh*, Statement of Claim, *supra* note 3 at para 87.

47 *Ibid* at para 88.

48 See e.g. Elizabeth D Gibbons, "Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice" (2014) 16:1 Heal Hum Rights J 1–18; Burns H Weston & Tracy Bach, *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* (Vermont: Vermont Law School, 2009); United Nations International Children's Emergency Fund, *Climate change and children* (Florence: UNICEF, 2008).

49 Weston & Bach, *supra* note 48 at 17.

50 Gibbons, *supra* note 48 at 20.

51 See Corte Suprema de Justicia, Bogotá, April 5 2018, *Future Generations v Ministry of the Environment and Others ("Demanda Generaciones Futuras v Minambiente")* 11001-22-03-000-2018-00319-01 (Colombia).

52 *Ibid*.

53 See *Re GGPPA*, *supra* note 27.

impact of the *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*").[54] They said, "climate change poses a qualitatively different threat to children and future generations … for children and future generations, climate change is a threat to their very existence. What we do today may trigger destabilizing feedback loops that place effective mitigation out of reach, leaving future generations unable to thrive or even survive on the planet."[55] Their argument was not addressed by the Supreme Court, who found the *GGPPA* constitutional on other grounds; however, it is the same argument that the Wet'suwet'en make in their statement of claim.

The house groups argue that their children, youth, and future house members will be deprived of "the right … to good health, to knowledge of their territories, fisheries, social relations and laws, to fully participate in their society's institutions and decision-making, and to develop their full potential as heirs to their millennia-old culture and society" as a result of climate change.[56] There is robust scholarly debate about assigning rights to future generations;[57] however, the evidence is almost incontrovertible that the children and youth of today will bear the brunt of climate change,[58] giving the Wet'suwet'en a strong case on that basis. They argue the equality provisions enshrined in section 15 of the *Charter* should be applied to protect their children and youth against the inequalities caused by climate change.

In the context of *Misdzi Yikh,* it is important to note that the *Charter* has been and continues to be a divisive instrument in Indigenous communities. Many Indigenous people are uncomfortable with the language of rights because "they seem prima facie incompatible with Aboriginal approaches to land, family, social life, personality and spirituality."[59] As a result, the *Charter* is seen as a "further encroachment upon the cultural identity" of Indigenous people.[60] However, other Indigenous people argue that the *Charter* contains precepts that are or were traditionally endorsed by most First Nations people and should be used in the communal struggle against oppression.[61] For example, the Native Women's Association of Canada ("NWAC") argued in favor of the *Charter* during the constitutional amendment negotiations and wanted it to apply to Indigenous governments, to guarantee equal participation of Indigenous women in their self-governing communities.[62] While the plaintiffs in *Misdzi Yikh* choose to assert their

---

54 See *In The Matter of the Greenhouse Gas Pollution Pricing Act, Bill C-74, Part V and in The Matter of a Reference by the Lieutenant Governor in Council to the Court Of Appeal Under the Constitutional Questions Act, 2012, Ss 2012, C C-29.01 Between Attorney General of Saskatchewan (Appellant) and Attorney General Of Canada (Respondent)*, 2021 SCC 11 (Factum of the Intervenor: Intergenerational Climate Coalition).

55 *Ibid* at para 7.

56 *Misdzi Yikh*, Statement of Claim, *supra* note 3 at para 92.

57 Burns Weston and Tracy Bach summarize the difficulty with assigning rights to future generations this way: "Future persons, they argue, cannot have rights because they do not yet exist and therefore cannot have anything, including rights. Future human beings are indeterminate and contingent, not actual, and so lack identity" : Weston & Bach, *supra* note 48 at 17.

58 See Gibbons, *supra* note 48.

59 Mary Ellen Turpel, "Aboriginal Peoples and the *Charter*: Interpretive Monopolies, Cultural Differences" (1989) Can Hum Rts YB 3 at 37.

60 *Ibid* at 40.

61 See John Borrows, "Contemporary Traditional Equality: The Effect Of The Charter On First Nation Politics" (1994) 43 UNBLJ 19 at 20.

62 See Jennifer Koshan, "Aboriginal Women, Justice and the Charter: Bridging the Divide" (1998) 32:1 UBC L Rev 23 at 25.

Charter rights, not all Indigenous peoples in Canada would feel comfortable using the *Charter* to fight climate change.

3. TWO CONSTITUTIONS AT PLAY IN *MISDZI YIKH V CANADA*

In *Misdzi Yikh,* the Wet'suwet'en people are using the Canadian constitution and its protection of universal rights to assert power over their traditional lands. The case is a meeting of two constitutional orders. The Wet'suwet'en constitution underlies the claim by showing a worldview and legal order where environmental damage is unacceptable and where the hereditary chiefs have standing—as the ones responsible for the well-being of their houses[63]—to contest it. Canada's constitutional reform in the 1980s resulted in protected rights which "created space for meaningful contestation of certain kinds of oppression,"[64] which the Wet'suwet'en are hoping extends to the environmental oppression by climate change. This section outlines the two constitutions which meet in the Statement of Claim and argues that the Wet'suwet'en worldview outlined in the Statement of Claim demonstrates the legal order in which the case is rooted.

The worldview of the Misdzi Yikh and the Sa Yikh houses is not mere background to the claim, but rather a demonstration of the legal order from which the claim originates. The assertion of the Indigenous legal order alongside the Canadian constitutional system promotes Indigenous legal agency and helps to decolonize Canadian law. It does so by supporting "the building of non-colonial relationships among Indigenous peoples and between Indigenous peoples and Canada."[65] The recognition of Indigenous legal orders as legitimate and as working alongside of the Canadian constitution is an important step in decolonization, since it restores to Indigenous people a noncolonial method of dispute resolution. Mohawk legal scholar Patricia Monture-Angus explains that "I come from a peoples and a tradition that had rules and processes about dispute resolution that I experience as legitimate and viable. These rules and processes of dispute resolution are not simple, romantic visions of the past. They are present and viable in our communities today."[66] Furthermore, "no single theory is likely to capture the entirety of what must be taken into account when working with Indigenous legal issues,"[67] and the discussion of Wet'suwet'en legal order here is not meant to be comprehensive but a beginning point of analysis.

---

63 See *Misdzi Yikh*, Statement of Claim, *supra* note 3 at para 16.

64 Joyce Green, "Balancing Strategies: Aboriginal Women and Constitutional Rights in Canada" in Alexandra Dobrowolsky & Vivien Hart, eds, *Women Making Constitutions: New Politics and Comparative Perspectives* (Halifax: Fernwood Publishing 2003) at 38.

65 Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dortrecht: Springer, 2013) 229 at 230. See also Glen S Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6 Contemporary Political Theory 437.

66 Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 8.

67 John Borrows, "Aboriginal and Treaty Rights and Violence against Women" (2013) 50:3 Osgoode Hall LJ 699 at 204.

3.1. The Canadian Constitution and Indigenous Peoples

The Canadian constitution was asserted over Indigenous peoples in Canada as part of a process of colonialization with little input from them.[68] This colonial context underlies the dispute in *Misdzi Yikh*. Indigenous legal scholar Mary Ellen Turpel notes that in colonial contexts "such as in Canada … an alien political and legal culture has been imposed upon indigenous practices and institutions to bring about a new order."[69] She goes on to say that the laws and constitution imposed on Indigenous peoples ensure that they are always objects because it is "others (the Canadian colonial legal regime) who officially have the power to define aboriginal existence, experience and even aboriginal struggles against it."[70] Indigenous, feminist, and other constitutional scholars have identified biases embedded in the Canadian constitution. Joyce Green, an Indigenous scholar of Ktunaxa and Cree-Scots Métis descent, notes that the changes to Canada's constitution over its history have "been a cautious process driven by white male elites within colonial and federal-provincial relationships, in a context driven by capitalist rather than democratic interests."[71] Consequently, the current system "sustains the colonial and subsequently settler assumptions, values, cultures and practices in the apparently neutral apparatus of the state."[72] Indigenous peoples are often disenfranchised by the colonial status quo and the constitutional system that perpetuates it. *Misdzi Yikh* reflects the struggle of Indigenous peoples to assert their own experience of climate change and unique legal orders within the confines of the Canadian constitution.

3.2. Worldviews and Constitutions

Constitutions are rooted in, and reflect, worldviews and culture.[73] Anishinaabe legal scholar Aaron Mills cautions that to understand a legal system, one must first understand the worldview which informs its constitution.[74] He says that "Canadian law lives somewhere,"[75] so that "without at least an implicit understanding of the world beneath Canadian law—Canadian constitutionalism, which is a species of liberal constitutionalism—one has no hope of understanding Canadian law."[76] Similarly, Turpel notes that constitutional law "operates as a site for the construction of meanings and for the imposition of authoritative regimes of reality."[77] Both Mills and Turpel emphasize that constitutional law has a particular relationship

---

68 See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) (discussion of how treaties and treatymaking contributed to the Canadian constitution but were subsequently de-emphasized and delegitimized as important parts of the Canadian constitution).

69 Mary Ellen Turpel, "Home/Land" (1991) 10:1 Can J Fam L 17 at 18 [Turpel, "Home/Land"].

70 *Ibid* at 20.

71 Green, *supra* note 64 at 36.

72 *Ibid* at 38.

73 See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 850.

74 *Ibid* at 852. For simplicity's sake, I will be using the term *worldview* to refer to what Mills calls "lifeworld," which he defines as the set of ontological, cosmological, and epistemological understandings which situate us in creation and thus, allow us to orient ourselves in all our relationships in a good way.

75 *Ibid* at 850.

76 *Ibid* at 852.

77 Turpel, "Home/Land", *supra* note 69 at 17.

to members of a society, imposing not just a method of dispute resolution but also a way of life and a way of viewing the world. Mills powerfully illustrates this by describing his own experience in a Canadian law school, which leads him to conclude that "it isn't just the law but the context that creates and sustains it which is adverse to Indigenous peoples' well-being."[78]

The tension between the Wet'suwet'en worldview and the liberal worldview underlying the Canadian constitution is evident in *Misdzi Yikh*. Under a worldview they share with other Indigenous peoples across North America,[79] the Wet'suwet'en have close relationships with all landforms, ecosystems, and species in their territory. Indigenous scholars Russel Lawrence Barsh and Sakej Youngblood Henderson explain that for Aboriginal peoples,

> all species are regarded as kinfolk, and, like human kin, stand in varying individual and historical relationships to one another. Those with an especially close and important relationship may be regarded as the most sacred, but no element of the environment lacks some form of potentially significant, and useful power.[80]

The Wet'suwet'en worldview includes an idea of the world and the forces within it as sentient beings, resulting in an important emphasis on reciprocity with the environment.[81] In addition, people are seen as a part of the environment, rather than distinct from it.[82] Mary-Ellen Turpel describes the Indigenous understanding of the environment as follows:

> As the many distinct cultures, languages, and peoples who have always peopled Canada, we believe we were given the gift of this part of the Earth we call Turtle Island, and the responsibility to be stewards of it. Unlike the European settlers who saw this continent as land which existed for their people, we believe that as people we exist for the land. The land is not here at our disposal; we are here for it. This belief drives the consciousness of all First Nations peoples. We are here with a primary responsibility: to learn from and respect this great gift of the Earth.[83]

In the worldview of the Wet'suwet'en, the environmental degradation taking place in Canada through climate change is, quite literally, the destruction of their people.

3.3. The Wet'suwet'en Legal Order in *Misdzi Yikh*

The Wet'suwet'en have their own legal order,[84] which results from and is rooted in their distinctive worldview. Their legal order and worldview are described extensively in the

---

78 Mills, *supra* note 73 at 850.

79 See Svein Jentoft et al, eds, *Indigenous Peoples Resource Management and Global Rights* (Chicago: University of Chicago Press, 2003) at 49.

80 *Ibid.*

81 See Leslie M Johnson Gottesfeld, "Conservation, Territory, and Traditional Beliefs: An Analysis of Gitksan and Wet'suwet'en Subsistence, Northwest British Columbia, Canada" (1994) 22:4 Human Ecology 443 at 447.

82 *Ibid.*

83 Turpel, "Home/Land", *supra* note 69.

84 See Napoleon, *supra* note 65 at 231. Following Val Napoleon, I use *legal order* to describe what "is embedded in non-state social, political, economic, and spiritual institutions." Indigenous legal orders vary from nation to nation but are comparable to the Canadian constitution in that they govern relationships between people.

Statement of Claim, because the claim originates from this legal order.[85] The Statement of Claim outlines the operation of kinship and lineage,[86] the role and duties of the Dini Ze' or head chief,[87] the management of collective resources,[88] the operation of the houses,[89] and how decisions are made through feasts.[90]

The Wet'suwet'en hereditary governance predates the colonial governance structure imposed on them by the *Indian Act.*[91] In *Misdzi Yikh,* the plaintiffs are the Dini Ze' of the Fireweed and speak on behalf of their house. In the Wet'suwet'en legal tradition, the Dini Ze' were often chosen while in the womb and, before becoming a chief, would make an extended trip to stay alone in the wilderness to live with animals.[92] Upon returning, they would have to demonstrate what they learned from the animals to the community, ensuring a deep respect for both the human and animal worlds.[93] In *Misdzi Yikh*, the Dini Ze' initiated the claim rather than the chief and band council elected in accordance with the *Indian Act*. While the elected chiefs and band council only have the authority given to them through the *Indian Act*,[94] the Dini Ze' have different responsibilities, including the settling of disputes and breaches of Wet'suwet'en law,[95] the welfare of their house members, and the protection of their house's possessions, including their entire ancestral lands (in contrast to just reserve lands).[96]

Wet'suwet'en leaders see themselves as inherently responsible for mitigating human-caused climate change. Integral to the claim in *Misdzi Yikh* is that "under the Wet'suwet'en legal order, a House group is responsible to other Wet'suwet'en, to other peoples and to the spirit in the land for all acts on its territories."[97] In the Canadian constitutional worldview, the Wet'suwet'en may be threatened by climate change, but they are not assigned jurisdiction over many of the powers needed to fix it; they only have a limited set of powers over what happens on reserves, which are assigned to them by the *Indian Act*. However, under their own law, they are responsible for "any harm" on their territories,[98] and thus are making their claim against the Government of Canada to fulfill their legal obligations towards their people. Additionally, the Wet'suwet'en worldview creates the urgency for the claim. In the Statement of Claim they

---

85 See *Misdzi Yikh*, Statement of Claim, *supra* note 3, at paras 2, 5, 9–31, 79–80.

86 *Ibid* at paras 10–12.

87 *Ibid* at paras 9, 16–18.

88 *Ibid* at para 14.

89 *Ibid* at paras 13–15, 19–20.

90 *Ibid* at paras 20–23.

91 RSC 1985, c 1 (5th Supp), ss 74–78; Kate Gunn & Bruce McIvor, "The Wet'suwet'en, Aboriginal Title, and the Rule of Law: An Explainer" (2020), online: *First Peoples Law* <www.firstpeopleslaw.com/public-education/blog/the-wetsuweten-aboriginal-title-and-the-rule-of-law-an-explainer>.

92 See Office of the Wet'suwet'en, "Our Culture: Governance", online: *Wet'suwet'en* <wetsuweten.com/culture/governance/>.

93 *Ibid*.

94 See *Indian Act*, *supra* note 91, ss 81–84.

95 See Office of the Wet'suwet'en, *supra* note 92.

96 See Gunn & McIvor, *supra* note 91. See also *Misdzi Yikh*, Statement of Claim, *supra* note 3 at para 9.

97 *Misdzi Yikh*, Statement of Claim, *supra* note 3 at para 2.

98 *Ibid* at para 15.

say, "the Likhts'amisyu Houses' identity, culture, legal order and sustenance is bound up with their land and fishing territories. They cannot be who they are at some other place."[99] While climate change poses a threat to all of humanity, it poses an existential threat in a unique way to Indigenous peoples because of the way their land and its ecology is integral to their identity.

Joyce Green advocates for a gendered decolonization process which will reinscribe Indigenous peoples, institutions, and processes as the response to a "legal and political system designed by and for race, class and male privilege."[100] This paper hopes to contribute to such a process by elucidating the ways in which the *Misdzi Yikh* Statement of Claim, as currently constructed, contributes to decolonization. However, it will also show how the gendered element of decolonization is missing and suggest how the claimants in *Misdzi Yikh* could improve their case through more substantial involvement of Wet'suwet'en women.

4. FEMINIST CONSTITUTIONALISM

While the *Misdzi Yikh* Statement of Claim is rooted in Indigenous constitutionalism, feminist constitutionalism can strengthen it by providing another basis of claim. Where Indigenous peoples have faced the forces of colonialist domination, Indigenous women have faced sexism as well. Women held a "second-class status" in law, which was "derived from constitutional structures and assumptions."[101] Feminist constitutional scholars point out:

> [T]here is no such thing as neutrality in the law … Dominant social and cultural norms about gender infuse legal concepts, principles, and practices, and making obvious the power dynamics in a given society explicates who is intended to benefit from 'the law.' Thus, in a legal system that exists in a patriarchal society and is premised on a liberal male subject and his experiences, *males are the intended beneficiaries of law*. Law should be understood as a site of gendered struggle.[102]

Feminist legal study seeks to counteract the gendered nature of law by "rethinking constitutional law in a manner that addresses and reflects feminist thought and experience."[103] To begin Green's gendered decolonization of law,[104] it is critically important that law is understood as gendered and that its gendered effects are understood. Sexism is a reality for Indigenous women, just as it is for non-Indigenous Canadians.[105] Indigenous communities are not immune from internal oppression and power imbalances, which they, "like anyone else[,] have to consciously guard against."[106] However, the experience of Indigenous women is complicated by colonialism because it pits Indigenous women against both settler women and Indigenous men.[107] Additionally, Green points out that "sexism within Aboriginal communities is often

---

99 *Ibid* at para 5.

100 Green, *supra* note 64 at 38.

101 Beverley Baines et al, eds, *Feminist Constitutionalism Global Perspectives* (UK: Cambridge University Press, 2012) at 1.

102 Emily Snyder, "Indigenous Feminist Legal Theory" (2014) 26:2 CJWL 365 at 369 [emphasis added].

103 Baines et al, *supra* note 101 at 1.

104 *Ibid.*

105 *Ibid*; Napoleon, *supra* note 65 at 243; Snyder, *supra* note 102 at 366.

106 Napoleon, *supra* note 65 at 243.

107 See Green, *supra* note 64 ("by the intersecting allegiances with other Aboriginal men and by the reality

minimized as only a consequence of colonialism."[108] The intersection between race and gender will be further explored in section 5, but in this section, I wish to clarify that sexism is a reality for Indigenous women both inside and outside of their communities.

Historically, the *Indian Act* has imposed sexism on Indigenous peoples. The *Indian Act* enforced patrilineal definitions for Indian status,[109] where women lost their status if they married a non-status Indian,[110] while non-Indigenous women were granted status for marrying Indigenous men.[111] As a result, many Indigenous women were denied the rights of Indian people, not allowed to live on reserve, and unable to access band services or programs. Additionally, all Indigenous women were barred from band council elections.[112] As Green says, "by defining 'Indian' consistently with colonial patriarchal social assumptions, and then bureaucratizing and enforcing this definition, the federal government stripped generations of women of their status as Indians under the *Indian Act*, simultaneously depriving them of the right to live in their communities, raise their children in their cultures, and participate in the social, economic and political life of their communities."[113] This leads her to conclude that Aboriginal women have suffered the consequences of colonialism "in general and also in gender-specific ways, including the loss of culture, traditional territories, identity and status, children and culturally respected gender roles."[114]

Removing the overtly sexist provisions of the *Indian Act* was long in coming and not without opposition. In 1974, the Supreme Court denied two Indigenous women the right to maintain their Indian status after marrying non-Indian men.[115] In its decision, the Court concluded that there was no inequality of treatment in enforcing section 12(1)(b) of the *Indian Act*.[116] Only in 1983 and 1985 were the sexist provisions finally addressed through

---

that settler women and men are complicit in and benefit from the colonial policies of their government" at 40).

108 *Ibid*.

109 See Government of Canada, "Consolidation of Indian Legislation" (2017) at 24, online (pdf): *Government of Canada Publications* <publications.gc.ca/collections/collection_2017/aanc-inac/R5-158-2-1978-eng.pdf> "The term 'Indian' means: First. Any male person of Indian blood reputed to belong to a particular band ; Secondly. Any child of such person ; Thirdly. Any woman who is or was lawfully married to such person".

110 *Ibid* at 25 ("(c) Provided that any Indian woman marrying any other than an Indian or a non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act, except that she shall be entitled to share equally with the members of the band to which she formerly belonged, in the annual or semi-annual distribution of their annuities, interest moneys and rents ; but this income may be commuted to her at any time at ten years' purchase with the consent of the band : (d) Provided that any Indian woman marrying an Indian of any other band, or a non-treaty Indian shall cease to be a member of the band to which she formerly belonged, and become a member of the band or irregular band of which her husband is a member").

111 See Green, *supra* note 64 at 42.

112 See Government of Canada, *supra* note 109, s 61 ("those entitled to vote at the council or meeting thereof shall be the male members of the band of the full age of twenty-one years").

113 Green, *supra* note 64 at 42.

114 *Ibid* at 41.

115 See *Attorney General of Canada v Lavell*, [1974] SCR 1349, 1973 CanLII 175 (SCC).

116 *Ibid.*

constitutional and legislative amendments.[117] However, these changes were vehemently opposed by male-dominated band councils and Indigenous organizations, who accused the women and their allies of being complicit in colonization and racism by appealing to feminism and human rights law.[118] Turpel is not very optimistic about the 1985 revision to the *Indian Act,* saying, "sexual (i.e. gender-based) discrimination under the *Act* had plagued Canadian governments for decades. Eliminating it required tampering with a piece of legislation fundamentally unacceptable and racially discriminatory throughout. Attempts to reform it, even in an apparently commendable direction, were destined to fail."[119]

There is disagreement within Indigenous communities and scholarship about the compatibility of feminism and Indigenous sovereignty.[120] On the one hand, "gender equality (and the corresponding equality rights discourse) is a colonial or Western-Eurocentric construct" and as such, part of the colonial culture which Indigenous people fight against.[121] This leads many scholars to question the compatibility of Indigenous nationalism and sovereignty with feminism and ask if it can positively affect women's rights.[122] On the other hand, scholars such as Turpel and Monture-Angus argue that an understanding of cultural difference is needed to move beyond the equality discourse of mainstream feminist theory.[123] They emphasize that Indigenous traditions are largely women-centered and that, by reclaiming the tradition, Indigenous communities can undo the violence, inequality, and mistreatment of colonialism.[124] Jo-Anne Fiske and Joanne Barker provide another point of view. They contest the incompatibility of feminism with Indigenous sovereignty and decolonization. Fiske traces the strategies used by the NWAC and its fights against the Assembly of First Nations to conclude that "in rejecting the humanity claims of women as a colonial/Western text, Aboriginal leaders have recuperated the very rationalist discourse they seek to transcend. The new order they envision is imprisoned in a gendered world of derivative discourse, whatever neotraditional symbols are extracted to distinguish it from the colonial world it opposes."[125] Barker says, "[t]he idea that by affirming Indian women's rights to equality, Indian sovereignty is irrevocably undermined affirms a sexism in Indian social formations that is not merely a residue of the colonial past but an agent of social relationships today."[126] To combat this, Barker emphasizes

---

117 See *Indian Act*, *supra* note 91, s 6.

118 See Joanne Barker, "Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism" (2006) 7:1 Meridians 127 at 127.

119 Mary Ellen Turpel, "Discrimination and the 1985 Amendments to the Indian Act: Full of Snares for Women" (1987) Rights & Freedoms 6.

120 See Kiera L Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13:1 Australian Indigenous L Rev 62 at 63.

121 *Ibid*.

122 *Ibid.*

123 See Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989) Can Hum Rts YB 3 at 4.

124 See Monture-Angus, *supra* note 66 at 133–147, 179.

125 Jo-anne Fiske, "The Womb is to the Nation as the Heart is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement" (1996) 51:1 Studies Political Economy 65 at 86.

126 Barker, *supra* note 118 at 149.

that the "decolonization of Native governance and lands … must be concurrent."[127] For Barker, equality rights can and must be used in a decolonization process which includes dismantling governance systems that oppress women.

The Canadian laws which the Wet'suwet'en contest are rooted in this patriarchal legal order. It is no coincidence that in a patriarchal society where men held the vast majority of political offices,[128] decisions were made to sacrifice the environment for economic gain.[129] The Statement of Claim points out that "since at least 1988, the defendant has assured the plaintiffs and all Canadians that it would establish laws and policies to meet its international climate commitments to keep global warming to tolerable levels. Such laws and policies were either not implemented, were not enforced, or were overruled causing Canada's emissions of greenhouse gases to rise alarmingly."[130] Studies in Canada show that women are more likely than men to perceive climate change as a significant personal risk.[131] Globally, women are more vulnerable to its adverse effects,[132] while in Canada, women may experience climate change through pregnancy complications,[133] increased sexual violence,[134] worse mental health outcomes,[135] and increased poverty.[136] Men will not experience climate change in the same way as women.[137] By failing to combat climate change, Canada has ignored women's voices and is allowing the continued marginalization of women, because women suffer differently and disproportionately from the effects of climate change. In this light, the lack of enforcement, accountability, and implementation of environmental protections is evidence of the gendered nature of law, because women care more about and are more impacted by these issues than men.

The *Misdzi Yikh* Statement of Claim does not recognize the gendered nature of the laws it contests nor their gendered effects. Consequently, the plaintiffs overlooked a potential basis of claim. Their case could have been strengthened by expanding their section 15(1) analysis to

---

127 *Ibid* at 154.

128 See House of Commons, *Elect Her: A Roadmap for Improving the Representation of Women in Canadian Politics: Standing Committee on the Status of Women*, 42-1, no 14 (April 2019) (Chair: Karen Vecchio) ("in 2018, women remain under-represented at every level of government in Canada" at 11).

129 See also Karen Morrow, "Ecofeminism and the Environment: International Law and Climate Change" in Vanessa Munro, ed, *The Ashgate Research Companion to Feminist Legal Theory* (New York: Ashgate Publishing, 2013) 432 (ecofeminism, while beyond this paper's scope, helps explain the link between sexism and environmental exploitation).

130 *Misdzi Yikh*, Statement of Claim, *supra* note 3 at para 4.

131 See Sam Sellers, "Climate change and Gender in Canada: A Review" (March 2018) at 10, online (pdf): *Women's Environment and Development Organization* <wedo.org/wp-content/uploads/2018/04/GGCA-CA-RP-07.pdf>.

132 See e.g. Morrow, *supra* note 129 ("[w]omen, in many guises, including as farmers, mothers, workers and members of indigenous communities are among the most seriously affected in social and economic terms by environmental degradation" at 432).

133 See Sellers, *supra* note 131 at 9–10.

134 *Ibid* at 9.

135 *Ibid*.

136 See Lewis Williams, "Climate Change, Colonialism, and Women's Well-Being in Canada: What is to be Done?" (2018) 109 Can J Public Health 268 at 269.

137 See Sellers, *supra* note 131 at 9–12.

include sex as a basis of discrimination in addition to age, or by claiming a section 28 violation due to gender discrimination.[138] These changes would not only have strengthened their case legally, but would have drawn more attention to the experiences of Indigenous women and girls, further undoing the sexist harms caused by the *Indian Act*.

5. WHEN SEXISM MEETS RACISM: INTERSECTIONALITY ANALYSIS

Indigenous women are markedly absent from the Wet'suwet'en Statement of Claim as are the specific ways in which they will be affected by climate change. Both claimants are men, and no gender analysis is provided in the Statement of Claim. This section provides intersectional analysis of the Statement of Claim to show how it could have been expanded and strengthened. Kimberlé Crenshaw coined the term intersectionality in relation to Black women in the United States,[139] but the term has been extended to consider overlapping gendered, racialized, and colonial discrimination against Indigenous women in Canada.[140] Crenshaw says, "often [Black women] experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination but as Black women."[141] Indigenous women too sit at the intersection of race and sex, so they experience racism, colonialism, sexism, and the unique mix of intersectional discrimination.

Unfortunately, Indigenous women are subject to intersectional discrimination both inside and outside of their communities. Snyder says, "it is well documented that Indigenous women face gendered oppression and systemic sexism in settler society and within their own communities. Indigenous women have less access to resources and face high rates of violence both within their communities and beyond. They are also frequently excluded from formal self-governance and self-determination practices."[142] As explained in the previous section, the sexist policies of the *Indian Act* contributed to causing and exacerbating this double discrimination.[143]

The disenfranchisement of Indigenous women through the colonial system continues to impact them. The exclusion of Indigenous women in Indigenous legal cases is a precedented phenomenon and the result of intersectional discrimination. Val Napoleon writes, "if one examines the Aboriginal rights and title case law and discussion, it appears that Indigenous women have *been erased from both the geographical and the legal landscape*."[144] This double dynamic of discrimination is at play in *Misdzi Yikh,* as evidenced through the absence of women both in the Statement of Claim and in the grounds on which the plaintiffs chose to

---

138 See *Charter*, *supra* note 34, s 28. This section begins "Notwithstanding anything in this Charter", making it exempt from a section 1 analysis.

139 See Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chicago Legal F 139.

140 See e.g. Sarah A Radcliffe, *Dilemmas of Difference: Indigenous Women and the Limits of Postcolonial Development Policy* (Durham: Duke University Press, 2015); Raoul S Liévanos, "Air-Toxic Clusters Revisited: Intersectional Environmental Inequalities and Indigenous Deprivation in the US Environmental Protection Agency Regions" (2019) 11:2 Race & Soc Problems 161.

141 Crenshaw, *supra* note 139 at 149.

142 Snyder, *supra* note 102 at 366.

143 See pp 171–172, *above*, for more on this topic.

144 Napoleon, *supra* note 65 at 244 [emphasis added].

argue the case. Climate change and the resulting environmental degradation has the potential to erase women from the geographical landscape through its unique effects on women, as described in the section above, yet intersectional discrimination results in their erasure from the legal landscape and exclusion in *Misdzi Yikh.*

While the Statement of Claim is attentive to Indigenous legal orders, gender analysis is absent. Snyder attributes the lack of gender analysis in Indigenous legal theory to "male-centered versions of Indigenous laws [which] are pervasive and depicted as being for everyone."[145] Female voices and experiences are markedly absent from the Statement of Claim. For example, the adverse impacts of climate change on their way of life are all in relation to traditionally male activities such as hunting and fishing.[146] The only (indirect) mention of women is that clan identity is matrilineal, but this has the potential to essentialize women by only including them as mothers.[147] This absence is important because Indigenous women experience climate change in different ways than Indigenous men.[148] As the effects of climate change become more pronounced and permanent, Indigenous women's marginalized status will likewise worsen.[149]

The legacy of sexism and colonialism is also evidenced in the tensions within the Wet'suwet'en nation today.[150] The high fossil fuel–emitting projects complained of in the Statement of Claim were the subject of high-profile protests across Canada in January–February 2020. Ms. Tait-Day, a Wet'suwet'en matriarch, spoke out publicly against the hereditary chiefs' opposition to the pipeline, saying, "[t]hey have gone out of their way to take women out of the decision-making,"[151] and "[m]any of the male hereditary chiefs are acting out of internalized historical oppression. We face patriarchal domination."[152] *The Globe and Mail* pointed out that all of the female chiefs had been stripped of their hereditary titles following their mobilization

---

145 Snyder, *supra* note 102 at 368.

146 See *Misdzi Yikh*, Statement of Claim, *supra* note 3 at paras 76–77.

147 *Ibid* at para 10.

148 See Kyle Powys Whyte, "Indigenous Women, Climate Change Impacts and Collective Action" (2014) 29:3 Hypatia 599 ("[c]limate change impacts that degrade water in different ways will affect some of the core dimensions of Anishinaabe women's identities and their contributions within their communities, and will make their responsibilities to water more time-consuming and harder (if not impossible) to carry out" at 605); Sellers, *supra* note 132 at 9.

149 See Lewis Williams, "Women and Climate Change Impacts and Action in Canada: Feminist, Indigenous and Intersectional Perspectives" (2018), online (pdf): *Canada Research Institute for the Advancement of Women* <criaw-icref.ca/wp-content/uploads/2021/04/Women-and-Climate-Change_FINAL.pdf> ("[c]limate change is worsening existing social and economic inequities for these 'Fourth World' communities, with particular impacts on women's economic and social wellbeing" at 4).

150 See Nancy MacDonald, "'That's not the way of our ancestors': Wet'suwet'en matriarch speaks out about pipeline conflict", *The Globe and Mail* (20 February 2020), online: <theglobeandmail.com/canada/british-columbia/article-thats-not-the-way-of-our-ancestors-wetsuweten-matriarch-speaks/>. See also Wendy Stueck & Brent Jang, "Beyond bloodlines: How the Wet'suwet'en hereditary system at the heart of the Coastal GasLink conflict works", *The Globe and Mail* (11 February 2020), online: <theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc/>.

151 Stueck & Jang, *supra* note 150.

152 Kate Korte, "Wet'suwet'en Matriarchal Coalition funded by B.C., Coastal GasLink to 'divide and conquer'" (11 March 2020), online: *Martlet* <martlet.ca/wetsuweten-matriarchal-coalition-funded-by-b-c-coastal-gaslink-to-divide-and-conquer/>.

as the Wet'suwet'en Matrilineal Coalition in 2015.[153] Other Wet'suwet'en chiefs criticized the coalition for taking grants from Coastal GasLink and the Government of British Columbia.[154] Now, nine of the 13 hereditary house chief positions are filled by men, while the others are vacant.[155] It is telling that division on support for the pipeline project fell on gendered lines; it evidences the sexes' different points of view and experiences.

The absence of Indigenous women in the Statement of Claim or a gendered analysis, despite climate change's gendered effects, is evidence of the double discrimination Indigenous women face. Because they exist at the intersection of racial and sexual discrimination, they are erased from many dialogues and legal actions, and potentially dispossessed of any favourable outcomes. Until Indigenous women are substantially included in Indigenous claims, decolonization will never be a reality, because the overarching patriarchal aspects of colonialism are not being addressed or relieved.

6. CONCLUSION REGARDING THE STATEMENT OF CLAIM

The absence of women's perspectives and of gendered analysis in the *Misdzi Yikh* Statement of Claim is cause for concern. In Canada's common law constitutional system, legal acts both reflect the law and create it through binding precedent. An analysis that minimizes Indigenous women creates a law that ignores their interests and prolongs their marginalization. In addition, the compounded impacts of colonialism and sexism on Indigenous women must be revealed and addressed for a true decolonization process to take place. The inclusion of Indigenous women in the Statement of Claim would enable a gendered, and thus more complete, decolonization while strengthening the Statement of Claim by including a sex equality claim through section 15(1) or section 28. Plaintiffs, lawyers, and judges in both Indigenous and settler communities must consider gender if we are ever to move out of our patriarchal and colonial system and into a world of substantive equality.

7. OUTCOME IN COURT

Since the above was written, the Federal Court of Canada struck the *Misdzi Yikh* Statement of Claim on the basis of the parties' written representations because it was not justiciable and did not disclose any reasonable cause of action.[156] The Order and Reasons were delivered on November 16, 2020, by Justice McVeigh, and the Wet'suwet'en filed a notice of appeal to the Federal Court of Appeal ("FCA") on December 15, 2020. Memorandums of Fact and Law were filed with the FCA in the spring of 2021, and a requisition for a hearing was filed in July.[157] Two applications for intervenor status—one by Friends of the Earth Canada and the other by Canadian Lawyers for International Human Rights ("CLAIHR") and Center for International Environmental Law ("CIEL")—were summarily denied by the FCA on

153 See Stueck & Jang, *supra* note 150.

154 *Ibid*. See also Korte, *supra* note 152.

155 See Stueck & Jang, *supra* note 150.

156 See *Misdzi Yikh v Canada*, 2020 FC 1059 at paras 7–8 [*Misdzi Yikh*].

157 See *Misdzi Yikh v Canada*, 2020 FC 1059 (Memorandum of Fact and Law of the Appellant) [*Appellant's Memorandum*]; *Misdzi Yikh v Canada*, 2020 FC 1059 (Memorandum of Fact and Law of the Respondent).

September 24, 2021.[158] At the time of writing, no date has been set for a hearing by the Court.

7.1. Justiciability

Overall, Justice McVeigh found that the Wet'suwet'en claim did not sufficiently respect the division of powers and so was not justiciable. In numerous aspects of the claim, she found the Dini Ze' were asking the Court to do something outside of its constitutional powers.[159] Justice McVeigh's decision begins with an overview of the complex and somewhat unsettled law on justiciability. She says: "Not everything is suitable to be judged in a court of law. Generally, questions of policy, while not outside of the jurisdiction of the courts, should be left to the executive branches to determine, and law making to the legislature. It is hard to imagine a more political issue than climate change."[160] Justice McVeigh next delineated the role of the courts in constitutional questions, noting that "courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited."[161] She concluded that the *Misdzi Yikh* Statement of Claim asked the Court "to tell the legislature to enact particular laws" and that "this is not the role of the Court and thus not justiciable."[162]

In addition, Justice McVeigh found that the Wet'suwet'en did not impugn any specific laws or state actions which breach their rights but rather made "broad claims", which makes it "difficult to find sufficient legal elements in the *Charter* claims for them to be justiciable."[163] Moreover, Justice McVeigh found numerous issues in the remedies sought, which added to the claim being not justiciable.[164] In particular, she found that for there to be a decrease in Canada's GHG emissions, cooperation between the federal and provincial governments would be necessary, and mandating such cooperation is outside of the Court's jurisdiction.[165] Justice McVeigh also ruled that the Court was being asked to play a role outside of its jurisdiction in supervising the change of laws.[166] Lastly, the Dini Ze' asked the Court to read in certain provisions to the *Impact Assessment Act 2019*, which Justice McVeigh did not think sufficiently respected the division of powers.[167]

7.2. Reasonable Cause of Action

The other key issue in the judgment was if the Statement of Claim disclosed a reasonable cause of action. Although Justice McVeigh's finding that the claim was not justiciable was sufficient to strike the Statement of Claim, she continued her analysis to consider if it was

158 See *Misdzi Yikh v Canada* (24 September 2021), Ottawa, FC A-308-20 (order to deny motion to leave by intervenors).

159 See *Misdzi Yikh*, *supra* note 156 at paras 47, 56, 66.

160 *Ibid* at para 19.

161 *Ibid* at para 24.

162 *Ibid* at para 47.

163 *Ibid* at para 55.

164 *Ibid* at para 71.

165 *Ibid* at para 63.

166 *Ibid* at para 64.

167 *Ibid* at para 69.

"plain and obvious that there is no reasonable cause of action."[168]

Canada claimed the Wet'suwet'en based their allegations on "assumptions and speculations."[169] Justice McVeigh noted that her finding in the earlier section—that Canada has no duty to legislate based on section 91 of the *Constitution Act, 1867*—applied equally to this analysis and so there was no cause of action.[170]

Second, with regards to the section 7 and 15 *Charter* claims, Canada argued the Wet'suwet'en position was "inherently speculative and hypothetical" and therefore did not disclose a reasonable cause of action.[171] Justice McVeigh considered the law on causality and if there was sufficient causality between the harms complained of—the effects of climate change—and the state action that failed to reduce GHGs.[172] She concluded by saying, "while there is a causal link between the emissions of GHG to climate change, *because of the myriad of provincial and international actors, proving a causal link between specific Canadian laws and the effects* felt because of climate change would be *near impossible* given the specific laws are not pled."[173] Justice McVeigh again emphasized that without a particular law or government action isolated by the Dini Ze' in their statement of claim, "it is an impossible task to evaluate an alleged breach of the *Charter*."[174] The Court found that due to the lack of causation and the failure to isolate particular laws or government action, it was "plain and obvious" that there was no reasonable cause of action.[175]

7.3. Analysis

The Federal Court's judgment highlights a key difference between the Canadian and Wet'suwet'en worldviews and constitutions. In the Wet'suwet'en worldview, the Dini Ze' always have a positive duty to protect their house members,[176] and it is from this positive duty that they bring their claim. By contrast, in Canadian constitutionalism, the courts can rarely impose a positive duty to legislate on the government, and Justice McVeigh found that section 91 of the *Constitution Act, 1867*—known as the peace, order and good government ("POGG") powers—provides no basis for imposing such a positive obligation.[177] In addition, the claim is rooted in a violation of sections 7 and 15 of the Canadian *Charter,* both of which provide for negative rights, and courts have been very reluctant to impose any positive duty on governments as a result of similar claims.[178] However, Canada would be following in the footsteps of both Germany and Ireland if it found that the right to life, enshrined in section 7

168 *Ibid* at para 79.

169 *Ibid* at para 83.

170 *Ibid* at para 84.

171 *Ibid* at para 86.

172 *Ibid* at paras 89, 96.

173 *Ibid* at para 89 [emphasis added].

174 *Ibid* at para 93.

175 *Ibid* at para 104.

176 See *Misdzi Yikh*, Statement of Claim, *supra* note 3 at para 16.

177 *Ibid* at para 46.

178 See e.g. Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality" (2011) 30 Windsor Rev Legal Soc Issues 37 at 37.

of the *Charter*, required better climate change action by state governments.[179]

Justice McVeigh's finding that the claim violates the division of powers is linked to her categorization of climate change as a highly political topic,[180] which is "beyond the reach of judicial interference."[181] She says with regards to the claim:

> I do not find that there is a sufficient legal component to anchor the analysis as this action is a political one that may touch on moral/strategic/ideological/historical or policy-based issues and determinations within the realm of the remaining branches of government.[182]

This conclusion ignores that climate change poses an existential threat to the Wet'suwet'en, and that the courts provide the last protection from government action which exacerbates climate change. Climate change may be a politically charged issue, but this does not alter its profound effects on health and wellbeing, values which the *Charter* exists to protect.[183] Indeed, Justice McVeigh admits that political issues can merit judicial interference, "especially when the allegations are of the constitutionality of policy or law, or a breach of someone's constitutional rights."[184]

Part of Justice McVeigh's reasons for not allowing for judicial interference regarding climate change is the difficulty in addressing an inherently international issue through Canadian law. She notes that meaningful GHG reduction will require provincial and federal cooperation, which the federal courts cannot mandate[185] and, consequently, cannot hope to effectively address. Additionally, Justice McVeigh found the claim not justiciable because the remedies sought "attempt to simplify a complex situation in a way that would be ineffective at actually addressing climate change given the polycentric and international nature of the problem."[186] Later in the judgment, she concludes that there is an insufficient causal connection between the effects of climate change on the Wet'suwet'en and GHGs allowed by Canadian laws because there is a "myriad of provincial and international actors" contributing to climate change.[187]

Justice McVeigh's reasoning ensures perpetual climate inaction. Climate change is a complex issue requiring action from thousands of national and subnational governments, but if all governments reason that because they cannot address it entirely, they should not do anything at all, no change will ever take place. Several courts in Europe have recognized that although climate change is an international problem, a nation's government still has an

---

179 See Supreme Court of Ireland, Dublin, 24 April 2020, *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General*, [2021] IESC 49 (Ireland)*;* Bundesverfassungsgericht (Federal Constitutional Court), Karlsruhe, 24 March 2021, *Neubauer et al v Germany* [2021] BvR 2656/18- (Germany) [*Neubauer*].

180 See *Misdzi Yikh*, *supra* note 156 at para 19.

181 *Ibid* at para 72.

182 *Ibid.*

183 See the Supreme Court of Canada's rulings on other politically charged issues, such as abortion: see e.g. *R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90; and euthanasia: see e.g. *Carter*, *supra* note 38.

184 *Misdzi Yikh*, *supra* note 156 at para 20.

185 *Ibid* at para 63.

186 *Ibid* at para 57.

187 *Ibid* at para 89.

obligation to reduce omissions.[188] It is disappointing that Justice McVeigh chose not to follow their legal reasoning. She could have found that despite the complexity of the issue, Canada is not absolved of responsibility, even if provincial governments or international governments also contribute to GHG production.

Interestingly, the Wet'suwet'en address this issue in their appellate materials by citing the Supreme Court of Canada's recent finding in *Re GGPPA.*[189] They quote the Supreme Court's finding that even though climate change is an "inherently global problem," each province must be held to account for their individual GHG emissions, even if an individual province's emissions cause "no measurable harm or do not have tangible impacts on other provinces."[190] Perhaps the FCA will choose to apply this conclusion to *Misdzi Yikh v Canada.*

The Memorandum of Fact and Law that the Dini Ze' filed for their appeal emphasizes that although they are asking the Court to apply the causes of action to a novel issue, their causes of action are well established, and their claim is justiciable.[191] The Dini Ze' sought to amend their Statement of Claim to focus on Canada exceeding its constitutional power rather than Canada having breached its duty. The Federal Court would not allow for a positive duty created by section 91 of the *Constitution Act* and, in anticipation of this finding, the plaintiffs tried to amend their arguments. In the Amended Statement of Claim, the plaintiffs argue Canada "has exceeded and continues to exceed its law-making powers under the 'peace, order and good government of Canada'" clause,[192] and POGG powers limit Canada's power to pass laws inconsistent with its constitutional duty to the Dini Ze' and its international commitments.[193] Justice McVeigh did not allow the Dini Ze' to amend their Statement of Claim because the amendments did not represent "changes in the substance of the argument."[194] Instead, she accepted Canada's position that the amendments "simply turn what was first pled as a positive duty to legislate into a negative one," and that as a result the government "cannot be found to have acted in an *ultra vires* manner by not acting."[195] In their Memorandum of Fact and Law, the Dini Ze' clarify that they are not pleading that Canada has a duty to legislate but rather that Canada's law-making powers are limited by section 91 of the constitution.[196] It remains to be seen if the FCA will accept this distinction or if they will find again that the change is merely semantic.

In *Misdzi Yikh v Canada,* Canadian courts fail to follow other jurisdictions in allowing rights-based legal challenges to laws which permit GHGs that will cause warming exceeding two degrees Celsius. This claim brings a unique perspective to climate change litigation by rooting the claim in Indigenous constitutionalism. Rather than embracing Indigenous constitutionalism, the Federal Court judgment highlighted the differences between the

188 See *Urgenda*, *supra* note 15; *Neubauer*, *supra* note 179 at para 149; *Klimaatzaak*, *supra* note 18 at 74.

189 See *Appellant's Memorandum*, *supra* note 157 at para 45.

190 *Ibid* at para 45, citing *Re GGPPA*, *supra* note 27 at para 188.

191 *Ibid* at para 14.

192 *Ibid* at paras 18–19.

193 *Ibid* at para 20.

194 *Misdzi Yikh*, *supra* note 156 at para 114.

195 *Ibid* at paras 112–114.

196 See *Appellant's Memorandum*, *supra* note 157 at para 24.

worldviews underlying their constitutions. The result is the continued harm to Indigenous peoples, and indeed to all Canadians, by climate change.