The following sample is an excerpt from a paper I wrote to analyze the potential and limitations for using class actions as a mechanism for environmental litigation in Canada:

I. The Use of Class Actions for Environmental Litigation

In theory, class actions increase access to justice, reduce the inefficiency and inconsistencies of repeated litigation for the same offence, and deter unscrupulous behaviour (Watson, 2001). Their applicability to cases of widespread damage is conducive to the resolution of environmental issues, but few class actions have been heard in Canadian courts. In part, this can be attributed to the existence of incorporated environmental groups (Grinlinton, 2017) and the ongoing evolution of Canadian legislation (Bogart, 1987), but class actions are also subject to underlying systemic and ideological barriers.

These barriers arise prior to a class action's inception, in the request for appropriate certification. The requirements for class action certification are outlined *Canadian Shopping Centres Inc. v. Dutton:* a definable class, a common issue, a situation in which success for one class member entails success for them all, and a representative plaintiff that reflects the interests of the class (Grinlinton, 2017). However, despite the Supreme Court encouraging a fair and flexible approach to certification, environmental cases have often been denied class action status (Seaborn, 2013), or have been forced to redefine, and consequently weaken, their claims in order to achieve such certification (McLeod-Kilmurray, 2007). This is apparent in the case of *Smith v. Inco,* where the action was certified only on the grounds of economic damage and was forced to drop related personal injury claims (Bowal, 2013). Class actions will never be an effective tool

for environmental legislation if the inflexibility of their certification continues to impose such strict barriers to their inception.

Another obstacle for class actions is the threat of costs to the representative plaintiff. In Canada courts, the allocation of fees generally follows the "English Rule," under which the losing party is responsible, at least in part, for the winning party's fees. In class actions, the representative plaintiffs are held accountable for these costs, but the degree of accountability varies between provinces (Watson, 2001). In Ontario, unsuccessful plaintiffs may be liable for millions of dollars in costs, but if successful, they will only receive their share of compensatory damages. The Ontario Class Proceedings Fund was established to protect plaintiffs and increase court access, and has been used for environmental class actions (Bowal, 2013), but its ability to compensate cases is often limited by lack of funds (Watson, 2001). As a result, the financial odds of environmental class actions remain high-risk, low-reward, and may be enough to deter even the most concerned activists.

While certification and funding structures are barriers to all class actions, environmental class actions themselves are often rendered ineffective by the underlying ideology of the Canadian legal system. Theoretically, class actions provide the public with an opportunity to present a shared interest in environmental protection, often with the goal of modifying the offender's behaviour rather than receiving compensation for damages (McLeod-Kilmurray, 2003). However, the courts' inherent emphasis on the individual and aversion to policymaking impose severe limitations on public success. That is, courts evaluate class actions as collections of individual claims seeking compensation for damages, which narrows their perception of cumulative adverse effects (McLeod-Kilmurray, 2007). This phenomenon is demonstrated in the law of torts, which have historically been used for individual cases, and have therefore been

proven difficult to apply to collective damages (McLeod-Kilmurray, 2003). In the environment, adverse effects are experienced both collectively and at the individual level. To consider only the latter is a misrepresentation of the environmental harm, yet it is common practice in Canadian courts.

Without sufficient structural and ideological changes, the potential of class actions in addressing environmental litigation will continue to go unrealized.