Constitutional Eco-Literacy in Canada: Environmental Rights and Obligations in the Canadian Constitution

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Global ecological crises like climate change pose an unprecedented threat to human rights around the world. In Canada, many people suffer human rights violations arising from avoidable pollution, and there is a concentration of polluting facilities in low-income, racialized, and Indigenous communities. However, unlike the majority of the world's constitutions, our own Charter of Rights and Freedoms *does not include the right to a healthy environment. This article argues that our Constitution is nonetheless capable of protecting Canadians from serious state-sponsored environmental harm. Such harm may violate* Charter *rights, such as freedom of religion, equality, life, liberty, and security of the person (as well as multiple Indigenous rights under section 35 of the Constitution). Extending* Charter *protection to environmentally mediated harm does not involve a reinterpretation or expansion of existing* Charter *rights; it simply requires an ecologically literate understanding of how such rights may be violated or respected. Beyond the* Charter*, this article argues that there is a deeper constitutional imperative to preserve the ecological systems upon which our society depends. Environmental stewardship has a long history among our founding juridical traditions and has been recognized by the Supreme Court of Canada as a "fundamental value" and a "public purpose of super-ordinate importance." Recognition of an unwritten constitutional principle of ecological*

Les crises écologiques mondiales comme le changement climatique constituent une menace sans précédent pour les droits de la personne, et ce, partout dans le monde. Au Canada, de nombreuses personnes subissent des violations des droits de la personne découlant d'une pollution évitable, et il y a une concentration d'installations polluantes dans les communautés à faible revenu, racialisées et autochtones. Cependant, contrairement à la majorité des constitutions du monde, notre propre Charte canadienne des droits et libertés *n'inclut pas la protection d'un droit à un environnement sain. Cet article soutient que notre Constitution est néanmoins en mesure de protéger les Canadiennes et les Canadiens contre les dommages environnementaux graves causés par l'État. De tels dommages peuvent violer les droits garantis par la* Charte*, tels que la liberté de religion, l'égalité, la vie, la liberté et la sécurité de la personne (ainsi que de multiples droits autochtones, en vertu de l'article 35 de la Constitution). L'extension de la protection de la* Charte *aux dommages causés par l'environnement n'implique pas une réinterprétation ou une expansion des droits existants de la* Charte*; elle exige simplement une compréhension écologique de la façon dont ces droits peuvent être violés ou respectés. Au-delà de la* Charte*, cet article soutient qu'il existe un impératif constitutionnel plus profond de préserver les systèmes écologiques dont dépend notre société. La question de l'environnement a une longue histoire parmi nos traditions*

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sustainability would provide guidance for environmental policy and would assist courts in adjudicating environmental claims against the state.

juridiques fondatrices et a été reconnue par la Cour suprême du Canada comme une « valeur fondamentale » et un « objectif public d'importance supérieure ». La reconnaissance d'un principe constitutionnel non écrit de protection de l'environnement permettrait d'orienter la politique environnementale et aiderait les tribunaux à statuer dans les litiges à nature environnementale contre l'État.

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I. Introduction

On October 8, 2021, the United Nations Human Rights Council formally recognized the human right to a "clean, healthy and sustainable environment."[1] This international recognition follows a decades-long "environmental rights revolution" in which the majority of the world's nations have explicitly codified environmental rights in domestic constitutions, legislation, and/or regional human rights treaties.[2] Though legal change is just one ingredient in the sweeping socio-political and economic transformation required to ensure a sustainable future for humanity,[3] a robust body of empirical data demonstrates that the protection of constitutional environmental rights improves environmental performance in meaningful ways.[4] Canada is in the minority of states whose constitutions do not recognize environmental rights, raising the question: do Canadians enjoy constitutional protection for the ecological prerequisites of human wellbeing? And is our Constitution relevant in the face of ecological crisis?[5] These difficult questions are currently before Canadian

1 United Nations Human Rights Council, Resolution 48/13 *The human right to a clean, healthy and sustainable environment,* A/HRC/RES/48/13, (18 October 2021).

2 David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) [Boyd, *Environmental Rights Revolution*]; James R May & Erin Daly, *Global Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2014); United Nations Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *Right to a Healthy Environment: Good Practices*, OHCHR, 43rd sess, UN DOC A/HRC/43/53 (2020) [*Good Practices Report*] at para 13.

3 See for example *Report of the Special Rapporteur on the Issue of Human Rights Obligations in Relation to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Human Rights Depend on a Healthy Biosphere*, OHCHR, 75th Sess, UN Doc A/75/161 (2020) at para 29: "Transformative change requires rethinking the goals of society, what makes us happy and what it means to live a good life, how we generate and use energy, the food that we eat and how we produce it, the way that we manufacture goods, how we design our cities and how we can reduce and eliminate waste." See also James Gustave Speth, *The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability* (New Haven: Yale University Press, 2008).

4 See for example Boyd, *Environmental Rights Revolution*, *supra* note 2; Christopher Jeffords, "On the Temporal Effects of Static Constitutional Environmental Rights Provisions on Access to Improved Sanitation Facilities and Water Sources" (2016) 7:1 J Hum Rts Envtl 74; Jeffords, Chris & Joshua C Gellers, "Constitutionalizing Environmental Rights: A Practical Guide" (2017) 9:1 J Hum Rts Prac 136; Joshua C Gellers & Chris Jeffords, "Towards Environmental Democracy? Procedural Environmental Rights and Environmental Justice" (2018) 18 Global Envtl Polit 99; Chris Jeffords & Joshua C Gellers, "Implementing Substantive Constitutional Environmental Rights: A Quantitative Assessment of Current Practices Using Benchmark Rankings" in Erin Daly and James R May, *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge: Cambridge University Press, 2018). For an excellent survey of both the strengths and limitations of constitutional environmental rights, see James R May, "The Case for Environmental Human Rights: Recognition, Implementation and Outcomes" (2021) 42 Cardozo L Rev 983. For a critique of constitutional environmental rights, see Jason McLean, "You Say You Want an Environmental Rights Revolution" (2018) 49:1 Ottawa L Rev 183.

5 See generally, Lynda Collins, *The Ecological Constitution* (Abingdon: Routledge, 2021) [*The Ecological Constitution*].

courts as litigants across the country pursue *Charter* claims arising from ecological degradation, notably climate change.

Fortunately, international human rights bodies and domestic courts around the world have paved the way for Canadian courts to take an ecologically literate[6] approach to our own Constitution.[7] Such an approach is cognizant of the "environmental realities"[8] underlying all constitutional provisions — notably, the absolute dependence of all constitutional rights on basic ecological services such as breathable air, drinkable water, and a climate that is viable for human communities. This article argues that the time has come for decision-makers in all branches of the Canadian state to recognize that both the *Canadian Charter of Rights and Freedoms* and section 35 of the *Constitution Act, 1982* prohibit serious state-sponsored environmental harm where it would interfere with any of the entitlements codified therein.[9] If ecological degradation and climate change is indeed now the greatest threat to the enjoyment of human rights in Canada and around the world,[10] then a constitutional order that remains silent on environmental rights is no longer tenable.

This article proceeds as follows. Part II examines the only established category of constitutional environmental rights in Canada — Indigenous environmental rights under section 35. Part III explores the emerging jurisprudence on the environmental dimensions of the *Charter* and argues that serious, state-sponsored environmental harm may violate rights to freedom of religion, equality, and life, liberty, and security of the person. Having reviewed the sources and extent of environmental rights in our Constitution, Part IV makes an argument

6 Ecological literacy can be defined as a basic understanding of the functioning of ecosystems, including the role that human beings play in the natural world. See generally Kenneth M Klemow, "Basic Ecological Literacy: A First Cut" (1991) 2:1 Ecological Society of America Education Section Newsletter 4**.**

7 For examples of international and domestic decisions that take an ecologically literate approach to human rights, see James R May & Erin Daly, *Judicial Handbook on Environmental Constitutionalism* (Nairobi: United Nations Environment Program, 2017); Lynda M Collins, "The United Nations, Human Rights and the Environment" in Louis Kotzé & Anna Grear, eds, *Research Handbook on Human Rights and The Environment* (London: Edward Elgar, 2015); Donald K Anton & Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge: Cambridge University Press, 2011); Dinah Shelton, ed, *Human Rights and the Environment* (Cheltenham, UK: Edward Elgar, 2011).

8 See "Environmental Literacy, Ecological Literacy, and Ecoliteracy: What Do We Mean and How Did We Get Here?" (2013) 4:5 Ecosphere 1 at 13.

9 Lynda Collins and Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap" (2010) 47:4 Alta L Rev 959 [Collins & Murtha].

10 See generally *Report of the Special Rapporteur on the issue of human rights obligations in relation to the enjoyment of a safe, clean, healthy and sustainable environment: Human rights depend on a healthy biosphere*, OHCHR, 75th Sess, UN Doc A/75/161 (2020).

for the recognition of an unwritten constitutional principle of ecological sustainability — one that imposes an *obligation* on the state to sustain the ecological bases of Canadian society. In Part V, the article concludes that constitutional evolution is a critical step in our collective path towards a sustainable future.

II. Indigenous Environmental Rights Under Section 35

Whether framed as Treaty rights or as inherent "Aboriginal rights," both of which are protected under section 35, Indigenous resource rights necessarily imply a right to the conservation of the ecosystems and non-human living beings which give these rights meaning.[11] This proposition is now well established in Canadian constitutional law.[12] In a recent illustrative decision from British Columbia, the provincial Supreme Court recognized that the Blueberry River First Nation's ability to hunt, fish, and trap and their overall "way of life … [is] dependant on healthy mature forests, a variety of wildlife habitats, [and] fresh clean water."[13] Because of the degree of ongoing government-permitted industrial encroachment and environmental degradation on their lands, the Applicants' constitutionally protected Treaty rights had been infringed. The British Columbia Supreme Court took an ecologically literate approach to the case, holding that "a piece-meal project-by-project approach to consultation"[14] was insufficient and that the province had to assess and curtail cumulative impacts in a manner sufficient to allow the Indigenous claimants to meaningfully exercise their Treaty rights. Despite the existence of multiple, overlapping regulatory agencies who were ostensibly managing environmental impacts in the claimants' territory, the Court looked to actual ecological results (i.e. what was happening to species and ecosystems) and their constitutional implications.

In addition to environmental quality or "ecological integrity,"[15] Indigenous rights under Section 35 include a right to ecological self-determination and self-governance.[16] Ecological self-governance gives Indigenous peoples the ability to

11 See Collins & Murtha, *supra* note 9.

12 See for example *Haida Nation v Canada (Minister of Fisheries and Oceans)*, [2015] FCJ No 281, 2015 FC 290 (FC); *Tsawout Indian Band v Saanichton Marina Ltd*, [1989] BCJ No 563, 57 DLR (4th) 161 (BCCA); *Halfway River First Nation v British Columbia (Ministry of Forests)*, [1997] BCJ No 1494, 39 BCLR (3d) 227 (BCSC); *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2001] FCJ No1877, 214 FTR 48 (FCTD).

13 *Yahey v British Columbia,* 2021 BCSC 1287 (CanLII).

14 *Ibid* at para 1735.

15 See generally Rakhyun E Kim & Klaus Bosselmann, "Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law" (2015) 24:2 RECIEL 194

16 See for example Rebecca Tsosie, "Climate Change, Sustainability, and Globalization: Charting the Future of Indigenous Environmental Self-Determination*"* (2009) 4:2 Environment & Energy L & Policy J 188; Theresa A McClenaghan, "Why Should Aboriginal Peoples Exercise Governance over

implement their own laws and cosmovisions, as in New Zealand, where a river, volcano, and mountain ecosystem have been recognised as legal persons with stewardship to be carried out by Maori-led bodies according to Maori law and traditional knowledge;[17] Ecuador, where the 2008 Constitution enshrines the Indigenous concept of *sumak kawsay*, or "living well," and recognises the rights of *Pacha Mama*, or Mother Earth;[18] and Colombia, where the courts have recognized "bio-cultural rights" that integrate both the inherent rights of nature and the rights of Indigenous and Afro-Colombian communities who live with and from the natural world.[19] However, while some Indigenous communities in Canada have achieved limited self-government rights over land use planning through modern treaties, there is much work to be done in this regard.[20]

In particular, if the project of reconciliation is to succeed, then it will be necessary to respect Indigenous legal perspectives in interpreting the scope and content of procedural and substantive environmental entitlements under section 35. The Supreme Court of Canada's decision in *Tsilhqot'in Nation v British Columbia* provides some reason for hope in this regard. In that case, the Court sustained a claim for Indigenous title over a large tract of land in British Columbia and held that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land."[21] Similarly, the Court held that Aboriginal title lands cannot be put to uses that would "destroy the ability of the land to sustain future generations of Aboriginal peoples."[22] The notion of a binding obligation of ongoing sustainability is otherwise absent from Canadian law but is an organizing principle in many Indigenous legal traditions across the country.[23] Thus *Tsilhqot'in* represents an important first step in recognizing Indigenous legal principles in Canadian constitutional law.

Environmental Issues?" (2002) 51 UNBLJ 211; Winona LaDuke, "Traditional Ecological Knowledge and Environmental Futures" (1994) 5:1 Colo J Intl Envtl L & Pol'y 127.

17 See Craig Kauffman, "Managing People for the Benefit of the Land: Practising Earth Jurisprudence in Te Urewera, New Zealand" (2020) 27:3 ISLE 578.

18 See Craig M Kauffman and Pamela L Martin, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Cases Succeed and Others Fail" (2017) 92 World Dev 130.

19 See Elizabeth MacPherson et al, "Constitutional Law, Ecosystems and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects" (2020) 9:3 Transnat'l Envtl Law 1.

20 See for example *Nisga'a Final Agreement*, SC 200, c 7; *Métis Settlements Act*, RSA 2000, c M-14, Sched 1, ss 7, 9, 13, 18; Jennifer E Dalton, "Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements" (2006) 22 Windsor Rev Legal & Soc Issues 29.

21 *Ibid* at para 86.

22 *Ibid* at para 121.

23 See for example Leroy Little Bear, "Relationship of Aboriginal People to the Land and the Aboriginal Perspective on Aboriginal Title" in CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply & Services, 1996); John Borrows, "Earth-Bound: Indigenous Law and Environmental Reconciliation" in Michael Asch, John Borrows

While Indigenous individuals and communities are not monolithic and cannot be essentialized as uniformly ecological actors, there is no doubt that Indigenous legal systems are rich in "[norms and] knowledge about how to co-exist with the environment."[24] The recognition of the ecological dimensions of Indigenous rights under section 35 has been an important development since the promulgation of the *Constitution Act, 1982*. Hopefully, the coming decades will see a respectful and effective engagement with Indigenous legal orders and perspectives across all branches of the state advancing both reconciliation and ecological sustainability in Canada.

III. Environmental Rights Under the *Charter*

Beyond the unique environmental rights of Indigenous peoples in Canada, there is widespread scholarly consensus that the *Charter* also protects Canadians from environmental deprivations of their rights and freedoms.[25] It should be noted that finding constitutional protection for Canadians' irreducible environmental needs does not require a reinterpretation of existing *Charter* rights. On the contrary, all that is required is a common-sense approach to the ques-

& James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018).

24 John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning, and Democracy" (1997) 47:4 UTLJ 417 at 425.

25 See for example Nathalie Chalifour & Jessica Earle, "Feeling the Heat: Using the *Charter* to take on Climate Change in Canada" (2018) 42 Vermont L Rev 689; Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada: The First Step Is Admitting We Have a Problem" (2016) 29 J Env L & Prac 305; Lynda M Collins, "Safeguarding the *Longue Durée*: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR (2d) 519 [Collins, *Longue Durée*]; Avnish Nanda, "Heavy Oil Processing in Peace River, Alberta: A Case Study on the Scope of Section 7 of the *Charter* in the Environmental Realm" (2015) 27 J Env L & Prac 109; David W-L Wu, "Embedding Environmental Rights in Section 7 of the Canadian *Charter*: Resolving the Tension Between the Need for Precaution and the Need for Harm" (2014) 33 Nat'l J Const L 191; Nathalie Chalifour, "Environmental Discrimination and the *Charter* Guarantee of Equality: The Case of Drinking Water for First Nations Living on Reserves" (2013) 43 RGD 183; Lynda M Collins, "Security of the Person, Peace of Mind: A Precautionary Approach to Environmental Uncertainty" (2013) 4:1 Journal of Human Rights and the Environment 79; Dayna Nadine Scott, "Situating Sarnia: 'Unimagined Communities' in the New National Energy Debate" (2013) 25 J Env L & Prac 81; David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57(1) McGill LJ 81; Sophie Thériault & David Robitaille, "Les Droits Environnementaux Dans La Charte Des Droits Et Libertés De La Personne Du Québec: Pistes De Réflexion" (2011) 57 Revue de droit de McGill 211; Marguerite Moore, "THROWing the PreCAUTIONary Principle TO THE WIND: The *Green Energy Act*, a Permitting Process in Search of the Precautionary Principle and the Principle of Subsidiarity" (2010) 74 MPLR-ART 58; Lynda M Collins, "An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*" (2009) 26 Windsor Rev of Legal and Social Issues 7; Nickie Vlavianos, "Public Participation and the Disposition of Oil and Gas Rights in Alberta" (2007) 17 J Envtl L & Prac 205; Andrew Gage, "Public Health Hazards and s. 7 of the *Charter*" (2003), 13 J Envtl L & Prac 1.

tion of infringement. As Justice Weeramantry of the International Court of Justice (as he was in 1997) explained:

> The protection of the environment is … a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the *Universal Declaration* and other human rights instruments.[26]

If we take an ecologically literate approach to *Charter* rights — one that recognizes the biological prerequisites of human life — it is evident that environmentally relevant conduct by the state could infringe a variety of *Charter* rights. As I have argued elsewhere:

> An ecologically literate reading of laws designed to protect people is one that recognizes that in many cases, the protection of people will require the protection of the environment. In the realm of human rights, it may be as simple as recognizing that an individual who is killed by a state-permitted air emission is equally dead as one who is shot by state police. Both should be protected from the deprivation of life, even though the former death is mediated by environmental forces while the latter is not.[27]

The kind of state conduct that could violate *Charter* rights includes (among other things): operating polluting facilities, issuing pollution permits, inadequate environmental acts and regulations, chronic non-enforcement of existing regulations, and failing to regulate at all.[28] Any of these categories of state conduct should meet the test for state action under section 32 of the *Charter* and may result in what may be termed "serious, state-sponsored environmental harm."[29] Such harm may violate a number of *Charter* rights.

First, it seems clear that some forms of serious, state-sponsored environmental harm could violate Indigenous religious rights under section 2(a) of the *Charter,* in addition to Aboriginal and/or Treaty rights under section 35.[30]

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26 See *Gabcikovo-Nagymaros Project*, 37 ILM at 206.

27 Lynda M Collins, "Ecologically Literate Reading of the *Canadian* Charter" (2009) 26 Windsor Rev of Legal and Social Issues 7 at 8 [Collins, *Ecologically Literate*].

28 *Ibid* at 17-18.

29 *Ibid.*

30 John Borrows "Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Toronto, UBC Press, 2008) 161 at 168; Sarah Morales, "*Qat'muk*: *Ktunaxa* and the Religious Freedom of Indigenous Canadians" in Dwight Newman, ed, (2016, LexisNexis); Bryan Neihart, "*Awas Tingni v Nicaragua* Reconsidered: Grounding Indigenous Peoples' Land Rights in Religious Freedom" (2013) 42 Denv J Int'l L & Pol'y 77; Lynda Collins and Natasha Bakht, "The Earth is Our Mother: Protecting Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 1.

Where development or pollution prevents Indigenous individuals or communities from engaging in important religious rituals, or degrades spiritually important species or ecosystems, a *prima facie* violation of section 2(a) should be found. Unfortunately, the Supreme Court of Canada declined to recognize religious rights relating to Indigenous sacred sites in its 2017 decision in *Ktunaxa Nation v BC*, the first case to raise this issue. However, the Court's complete failure to respect the relevant Indigenous legal and spiritual perspectives is inconsistent with reconciliation and will hopefully prove to be anomalous.[31]

Second, serious state-sponsored environmental harm may violate the right to equality under section 15. Historically, Canadian law has not provided equal environmental protection for marginalized populations, especially Indigenous communities. Rather, low income, racialized, and/or Indigenous communities have often been treated as "sacrifice zones" where government and commercial actors knowingly allow a concentration of harmful chronic pollution as an incident to industrial activity. [32]

In general, Canadian environmental law regimes do not regulate total emissions into a given area.[33] Instead, they often treat "each facility's … emissions as if it was the only emitter."[34] The inevitable result of such a system is the uneven distribution of environmental harm, and the creation of "pollution hotspots," which have frequently been concentrated in low income, Indigenous, and racialized communities.[35] Unfortunately, the phenomenon of environmental racism, or the discriminatory allocation of environmental benefits and burdens along racial lines, remains a major concern in this country.[36] Similarly, Canadian environmental policy has often failed to protect

31 See Kent Williams, "How the *Charter* Can Protect Indigenous Spirituality: Or the Supreme Court's Missed Opportunity in *Ktunaxa Nation v BC*" (2019) 77 UT Fac L Rev 1; Sarah Morales, "Implications of the Ktunaxa Nation-Jumbo Valley Case for Religious Freedom Jurisprudence" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016).

32 Dayna Nadine Scott, "Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution" (2008) Osgoode Hall LJ 293 at 318.

33 *Ibid* at 323. See also David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003).

34 "Good Choices, Bad Choices: Environmental Rights and Environmental Protection in Ontario" online: *Environmental Commissioner of Ontario* <www.auditor.on.ca/en/content/reporttopics/envreports/env17/Good-Choices-Bad-Choices.pdf> [perma.cc/6SNL-ACS4] at 131 [*Good Choices, Bad Choices*].

35 See David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) at 155-58 [Boyd, *The Right to a Healthy Environment*].

36 See Baskut Tuncak, *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes on his visit to Canada*, 4 September 2020 A/HRC/45/12/Add.1; Ingrid RG Waldron, *There is Something in the Water: Environmental Racism in Indigenous and Black Communities* (Black Point, Nova Scotia: Fernwood

the interests of women, children, the elderly, people living in poverty, and people with health disabilities involving a heightened vulnerability to environmental harms (asthma, for example).[37] Thus, much Canadian environmental law[38] and governance is discriminatory within the meaning of section 15(1): it creates a distinction on enumerated or analogous grounds (race, gender, age, dis/ability) and this distinction "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[39]

In the Canadian constitutional framework, the purpose of section 15 is to promote "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration,"[40] including in the allocation of legal benefits and protection. Obviously, state-sponsored environmental injustice violates these crucial interests. To paraphrase Chalifour writing on *Charter* rights related to water, a safe, healthy, and ecologically sustainable environment:

> … is one of the most basic human needs for survival, and lack of access to it undermines health, dignity and standard of living, increases the cost of living, and creates physiological and psychological stress. It can impede one's ability to care for one's

Publishing, 2018); Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada: The First Step Is Admitting We Have a Problem" (2016) 29 J Env L & Prac 305; Nathalie Chalifour, "Environmental Discrimination and the *Charter* Guarantee of Equality: The Case of Drinking Water for First Nations Living on Reserves" (2013) 43 RGD 183; David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57(1) McGill LJ 81; C Murdocca,"'There is Something in that Water': Race, Nationalism and Legal Violence" (2010) 35:2 Law and Social Inquiry 369.

37 See generally Andil Gosine & Cheryl Teelucksingh, *Environmental Justice in Canada* (Toronto: Emond Montgomery, 2008); Michael Buzzelli, Canadian Policy Research Networks, *Environmental Justice in Canada — It Matters Where You Live* (CPRN Research Report, December 2008); Jerrett et al, "A GIS-environmental justice analysis of particular air pollution in Hamilton, Canada" (2001) 33 Environment & Planning A 955; Nathalie Chalifour, "Environmental Justice and the *Charter*: Do Environmental Injustices Infringe Sections 7 and 15 of the *Charter*?" 28:1 JELP 89.

38 Note that proposed amendments to the *Canadian Environmental Protection Act* (which regulates toxic substances federally) would add greater consideration of impacts on "vulnerable populations" and would identify "environmental justice" as one of the principles to be considered in its administration. See Bill S-5 *An Act to amend the Canadian Environmental Protection Act, 1999, to make related amendments to the Food and Drug Act, and to repeal the Perfluorooctane Sulfonate Virtual Elimination Act* (First Reading February 9, 2022).

39 *Fraser v Canada*, 2020 SCC 28 at para 27. A significant body of international human rights jurisprudence confirms that unequal environmental protection may constitute discrimination against women, children, and racialized and Indigenous communities. See Lynda M Collins, "The United Nations, Human Rights and the Environment" in Louis Kotzé & Anna Grear, eds, *Research Handbook on Human Rights and The Environment* (London: Edward Elgar, 2015) at 235-238.

40 *Andrews v BC*, [1989] 1 SCR 143 at 171.

> family, to have adequate personal hygiene, and otherwise to be on an equal playing field with other Canadians… [41]

If, as the Supreme Court of Canada recently held, "section 15 reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups,"[42] then the provision must surely encompass discriminatory state conduct that implicates human beings' fundamental biological needs.

Third, serious, state-sponsored environmental harm will almost always constitute at least a *prima facie* violation of section 7 of the *Charter*, which guarantees the rights to life, liberty and security of the person but permits deprivations of such rights "in accordance with the principles of fundamental justice."[43] With respect to the first and most fundamental right protected under this provision, some forms of state-regulated environmental degradation do result in loss of life. In particular, state-regulated air pollution results in thousands of premature deaths in Canada every year.[44] Even where death has not occurred, since the Supreme Court's judgment in *Chaoulli v Quebec* it is clear that even a substantial *risk* to life may infringe section 7, and this is consistent with international human right law.[45]

In *EHP v Canada*,[46] for example, a citizens' group in Port Hope, Ontario alleged that the storage of nuclear waste in the community posed a significant risk to residents' right to life. The United Nations Human Rights Committee held that the claim "raise[d] serious issues, with regard to the obligation of States parties to protect human life." Though it dismissed the claim for failure to exhaust domestic remedies,[47] the Committee noted that:

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41 Chalifour, "Environmental Discrimination and the Charter Guarantee of Equality", *supra* note 36 at 211.

42 *Fraser v Canada*, 2020 SCC 28 at para 27.

43 See Collins, *Ecologically Literate*, *supra* note 27 at 28-31.

44 See Canada, Health Canada, *Health Impacts of Air Pollution in Canada: Estimates of Morbidity and Pre-mature Mortality Outcomes — 2021 Report* (Ottawa: Health Canada, 2021), online: *Government of Canada* <www.canada.ca/en/health-canada/services/publications/healthy-living/2021-health-effects-indoor-air-pollution.html> [perma.cc/AB6H-KA4A]. For an excellent analysis of how Canadian governments could save thousands of lives (and billions of dollars) through improved environmental regulation, see David R Boyd, *Cleaner Greener Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC Press, 2015).

45 *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791 [*Chaoulli*]. See also *Canada (Attorney General) v PHS Community Services Society*, [2011] SCJ No 44, [2011] 3 SCR 134, 2011 SCC 44; *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72.

46 Communication No 67/1980, in *United Nations, 2 Selected Decisions of the Human Rights Committee Under the Optional Protocol*, at 20, UN Doc CCPR/C/OP/2 (1990).

47 *Ibid* at para 8.

> … since Canada submitted its response to the communication of the author, the *Canadian Charter of Rights and Freedoms* has come into force on 17 April 1982. … Section 7 of the Charter states that "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 principle [*sic*] of fundamental justice." … If the author believes that the Government or an agency thereof, such as the Atomic Energy Control Board, is denying her the right to life in a manner contrary to the provisions of section 7, she can ask the Courts to remedy this situation … [48]

Security of the person guarantees against serious state-imposed harm or risk to physical health[49] and also protects an individual's psychological integrity.[50] Environmental harms like toxic pollution and climate change have the capacity to deprive people of both dimensions, and may therefore give rise to an infringement of section 7.[51] The liberty interest protected by section 7 includes the individual's right to make "important and fundamental life choices"[52] free from state interference, including the choice of where to live.[53] Again, various forms of environmental degradation have the potential to interfere with this protected interest.

Unfortunately, Canadian courts have yet to recognize an environmental violation of any provision of the *Charter*; most of the early cases were dismissed on procedural or evidentiary grounds.[54] However, multiple ongoing lawsuits across the country are making legal history in this area, as a series of high-profile, youth-led climate suits are currently working their way through the courts. Chalifour and others have produced superb analyses of all of these suits; for our purposes it suffices to examine just two examples.[55]

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48 *Ibid* at para 7.

49 See *Chaoulli*, *supra* note 45; *R v Morgentaler* (1988) 1 SCR 30 at 59; *Singh v Canada (Minister of Employment and Immigration)* (1985) 1 SCR 177 at para 47.

50 See for example *Carter v Canada*, [2015] 1 SCR 331 at para 64; *Rodriguez v British Columbia* [1993] 3 SCR 519; *New Brunswick (Minister of Health and Community Services) v G (J)* [1999] 3 SCR 46; *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 [*Blencoe*].

51 See generally Lynda M Collins, "Security of the Person, Peace of Mind: A Precautionary Approach to Environmental Uncertainty" (2013) 4:1 Journal of Human Rights and the Environment 79; see also John Gallacher et al, "Symptomatology Attributable to Psychological Exposure to a Chemical Incident: A Natural Experiment" (2007) 61:6 J Epidemiol Community Health 506; R Adamec, "Modelling Anxiety Disorders following Chemical Exposures" (1994) 10:4-5 Toxicol Ind Health 391.

52 *Blencoe*, *supra* note 50, at para 49 (per Bastarache J).

53 *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at paras 66-68.

54 See for example *Manicom v Oxford (County)*, 52 OR (2d) 137 (Ont Div Ct); *Energy Probe v Canada (Attorney General)*, 58 DLR (4th) 513 (Ont CA); *Coalition of Citizens for a Charter Challenge v Metropolitan Authority*, 10 CELR (NS) 257 (NSSC [In Chambers]), revd 108 DLR (4th) 145 (NSCA); *Millership v Kamloops (City)*, 2003 BCSC 82 (BCSC); *Locke v Calgary (City)*, 15 Alta LR 70 (Alta QB).

55 Nathalie Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The *Charter*'s Section 15 Equality Guarantee and Youth-Led Climate Litigation" (2021); Nathalie Chalifour

In *LaRose v Canada*, the youth applicants challenge a specific and comprehensive suite of federal acts and omissions that cause and contribute to climate change, including: fossil fuel subsidies, the acquisition of fossil fuel infrastructure, authorization of carbon-intensive industrial activities, inadequate regulatory standards, inadequate GHG (greenhouse gas) emissions targets, and other "grossly insufficient remedial measures."[56] They allege that the impugned acts and omissions violate their section 7 and 15 rights and infringe the public trust doctrine. The Federal Court's Trial Division characterized the suit as an overbroad challenge to the "entirety of Canada's policy response to climate change"[57] and dismissed the plaintiffs' *Charter* claims as non-justiciable. The plaintiffs have appealed to the Federal Court of Appeal and the matter is ongoing at the time of writing.

In *Mathur v Ontario*, seven youth applicants challenge the Province of Ontario's repeal of its previous GHG emissions reductions target (the "Target") and substitution of a less ambitious target that has no basis in science.[58] They allege, *inter alia,* that the government's inadequate Target will increase the likelihood of climate-related harms, "resulting in an increase in fatalities, serious illness, and severe harm to human health" and thus violates their section 7 rights. They also argue that such violations are not in keeping with principles of fundamental justice as they are arbitrary, grossly disproportionate to Ontario's goals, and not rationally connected to the government's economic justifications.[59]

With respect to the equality claim under section 15, the Applicants allege that "the Target violates [section] 15 of the *Charter* because Ontario's youth and future generations":

- are a uniquely vulnerable population by virtue of their age and, for some, their inability to influence political decisions at the ballot box;
- will be disproportionately impacted by the devastating impacts of climate change, which will significantly increase in severity and intensity as the years progress;

& Jessica Earle, "Feeling the Heat: Using the *Charter* to take on Climate Change in Canada" (2018) 42 Vermont L Rev 689. See also Colin Feasby, David de Vlieger & Matthew Huys, "Climate Change and the Right to a Healthy Environment in the Canadian Constitution" (2020) 58:2 Alta Law Rev 213 at 237-238.

56 *LaRose v Canada*, Statement of Claim, Court File No T-1750-19, online (pdf): *Climate Case Chart* <climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf> [perma.cc/8JUE-JZTH].

57 *LaRose v Canada*, 2020 FC 1008 (FCTD) at para 43.

58 *Mathur v Ontario,* 2020 ONSC 6918.

59 *Ibid* at 141 et seq.

- are among those who will suffer the most from the climate change impacts, including, but not limited to, extreme heat events, warming temperatures and heat waves, infectious diseases, fires, flooding, algal blooms, toxic contamination, and mental health challenges; and

- will have their pre-existing vulnerability and disadvantage heightened as a result of the impacts stated above.[60]

As a remedy for these violations, the Applicants in *Mathur* seek a court order requiring the government of Ontario to set a science-based GHG target and revise its climate change plan accordingly. They also seek declarations:

- … that the Target violates the rights of Ontario youth and future generations under [sections] 7 and 15 of the *Charter* in a manner that cannot be saved under [section] 1, and is therefore of no force and effect;

- … that the Target violates the unwritten constitutional principle that governments are prohibited from engaging in conduct that will, or reasonably could be expected to, result in the future harm, suffering or death of a significant number of its own citizens [and]

- … that [section] 7 of the *Charter* includes the right to a stable climate system, capable of providing youth and future generations with a sustainable future.[61]

The Ontario Superior Court dismissed the government's motion to strike the claim in *Mathur* and the Divisional Court refused leave to appeal. These decisions evince a high level of ecological literacy with respect to the issue of climate change.[62] Indeed, there are many promising signs of growing ecological literacy on this issue among the Canadian judiciary.[63] As a result, ongoing and future climate suits have an increased likelihood of success compared to previous environmental *Charter* claims. Certainly, the wave of constitutional climate litigation in Canada can be expected to grow in coming years, as climate-related harms become more evident and the urgency of the climate crisis intensifies.[64]

60 *Ibid* at para 172.

61 *Ibid* at para 31.

62 *Ibid* (see for example paras 7-13).

63 See for example *Reference Re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11. See also Laurel Besco, "Judicial Education for Sustainability" (2018) 14:1 MJSDL 1.

64 See Dustin W Klaudt, "Can Canada's 'Living Tree' Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?" (2018) 31:3 JELP 185; Cameron Jefferies, "Filling the Gaps in Canada's Climate Change Strategy: 'All Litigation, All the Time'?" (2015) 38:5 Fordham Int'l LJ 1371; Andrew Gage, "Climate Change Litigation and the Public Right to a Healthy Atmosphere" (2013) 24 JELP 257.

In addition to these climate cases, an important suit in Ontario alleges *Charter* violations arising from toxic water pollution. In *Grassy Narrows First Nation v Ontario*,[65] the Applicants challenged provincial action and inaction in the face of massive mercury contamination of the community's traditional waters, the Wabigoon-English River system. The mercury in the First Nation's territory originated from a number of sources, including years of discharge by a provincially regulated plant, and was exacerbated by provincially permitted logging, which released mercury stored in the soil into waterways.[66] Grassy Narrows has accordingly become a world famous "hot-spot" of mercury poisoning.[67] In her 2017 report, the Environmental Commissioner of Ontario summarized the situation as follows:

> After accepting … responsibility for the mercury contamination, the Ontario government declined to take action for decades, largely ignoring the suffering of the Grassy Narrows First Nation and Wabaseemoong peoples. Over and over, the Ontario government chose to do nothing. It chose *not* to remove the [contaminated] sediment, *not* to investigate in more detail, *not* to monitor whether mercury levels were indeed declining. In other words, it chose to allow the ongoing poisoning of the communities … It is no coincidence that this environmental devastation primarily affects Indigenous communities.[68]

The immediate targets of the *Grassy Narrows* Application for Judicial Review were the Ministry of Natural Resources' decision to permit logging in the contaminated area and the Ministry of Environment and Climate Change's refusal to do an individual environmental assessment of the proposed logging. The Applicants argued that the logging would release additional mercury into their already contaminated environment and would violate sections 7 and 15 of the *Charter*.[69] In particular, they alleged that the increased contamination would violate their rights to life and security of the person — both physical and psychological — by increasing their risk of death and serious illness.[70] They also alleged that their liberty would be violated, as the contamination would deprive them of the freedom to "choose an environment in which to live and in

65 Toronto (446/15), filed 1 September 2015, further amended 4 April 2016 (Further Amended Notice of Application to Divisional Court for Judicial Review).

66 *Good Choices, Bad Choices*, *supra* note 34 at 102-106.

67 See for example Masazumi Harada et al, "Mercury Pollution in First Nations Groups in Ontario, Canada: 35 years of Canadian Minamata Disease" (2011) 3 Journal of Minamata Studies 3.

68 *Good Choices, Bad Choices*, *supra* note 34 at 111 (emphasis in original).

69 Grassy Narrows Notice of Application, para 1(i)(A), online (pdf): *Canadian Environmental Law Association* <cela.ca/wp-content/uploads/2019/07/Notice-of-Application-GN.pdf> [perma.cc/6NS3-C6PX].

70 *Ibid* at para 2(t).

which to practice their traditional way of life."[71] Finally, the Applicants' argued that the impugned conduct violated section 15, as they were disproportionately disadvantaged due to their Indigeneity, their on-reserve status, and, in some cases, their age and gender.[72]

In the author's view, the *Grassy Narrows* suit is extremely strong, both on the facts and the law. Given the obvious government involvement in very serious toxic pollution of a vulnerable Indigenous community, it is highly likely that a court would sustain the claims. The provincial government may have come to the same conclusion, as it has now committed to suspend all logging in the area in question throughout the 2021-2022 seasons, and the application for judicial review has therefore been held in abeyance.[73] *Grassy Narrows* is thus an example of how an ecologically literate understanding of the *Charter* may improve outcomes not only through litigation but also through negotiation, and perhaps even voluntary government action.

To summarize, although there has yet to be a definitive win for environmental rights under the *Charter*, there is every reason to believe that Canadian courts will soon close that gap and recognize the environmental dimensions of freedom of religion and equality, as well as the right to life, liberty, and security of the person. This development would be consistent with international precedent and common sense. A deeper, more cross-cutting question concerns the possible existence of ecological principles outside of or underlying the *Charter*. Beyond the duty to avoid environmentally mediated violations of *Charter* rights, do governments in Canada have a constitutional obligation to manage our shared environment sustainably?

IV. The Unwritten Constitutional Principle of Ecological Sustainability

In addition to the environmental rights implicit in the *Charter* and in section 35 of the Constitution, a strong argument can be made that there is also a broader environmental unwritten constitutional principle (UCP) at the very foundation of our legal order.[74] In the *Quebec Secession Reference*, the Supreme Court of Canada described UCPs as follows:

71 *Ibid* at para 1(i)(A).

72 *Ibid* at paras 2(v)-(y).

73 See "Casework: Grassy Narrows First Nation and Environmental Injustice" (15 November 2021), online: *Canadian Environmental Law Association* <cela.ca/casework-grassy-narrows-first-nation-and-environmental-injustice/> [perma.cc/56GP-BJUK].

74 Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 UBC L Rev 293 [Collins & Sossin]; see also Lynda

> Behind the written word [of the Canadian Constitution] is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based … These defining principles function in symbiosis. …
>
> Although these underlying principles are not explicitly made part of the Constitution by any written provision … it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.
>
> *The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions*. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree"… [75]

The principle of ecological sustainability meets all of the criteria for an unwritten constitutional principle as articulated by the Supreme Court of Canada.[76] Indeed, environmental preservation is arguably more fundamental to the Canadian Constitution than any of the currently recognized UCPs. Our environment "sustains" every aspect of the Canadian state, including the Constitution. It is the lifeblood of our society and our legal system and, at the risk of stating the obvious, it is also clear that "observance of and respect for [ecological sustainability] is essential to the ongoing process of constitutional development and evolution." Without it, the Constitution would quite literally become "self-defeating."[77]

Chief Justice McLachlin (as she then was) has characterized "unwritten constitutional principles [as] unwritten norms that are essential to a nation's history, identity, values and legal system."[78] Respect for the environment also meets this definition. As Wood et al have explained:

M Collins, "The Unwritten Constitutional Principle of Ecological Sustainability: A Solution to the Puzzle of Pipelines?" (2019) 70 UNBLJ 30 [Collins, *Puzzle of Pipelines*]; Collins, *Longue Durée*, *supra* note 25. See also Mari Galloway, "The Unwritten Constitutional Principles and Environmental Justice: A New Way Forward?" (2021) 52:2 Ottawa L Rev 5 [Galloway].

75 *Reference re Secession of Quebec*, [1998] 2 SCR 217, at paras 49-52 (emphasis added) [*Quebec Secession Reference*].

76 See also Shalin M Sugunasiri, "Public Accountability and Legal Pedagogy: Studies in Constitutional Law" (2008) 2 JPPL 93 for an excellent analytical framework for assessing new UCPs. The right to a healthy environment seems to comport with Sugunasiri's criteria.

77 The Right Honourable Beverley McLachlin, "Lord Cooke of Thorndon Lecture — Unwritten Constitutional Principles: What Is Going On?" (2006) 4 NZJPIL 147 at 163.

78 *Ibid* at 149.

> According to public opinion polls, Canadians are among the staunchest environmentalists in the world … [T]hese apparently strong environmental values among Canadians … [may be attributed] to the country's relatively vast areas of wilderness and the fact that the environment has been a seminal influence in Canada's art, literature and other cultural domains.[79]

Environmental stewardship also has solid foundations in the historical edifice of Canadian law. In the Western legal tradition, the public trust doctrine has imposed an obligation on states to preserve the natural environment for present and future generations since Roman times.[80] The French *Civil Code* historically recognized public ownership in water bodies[81] and this doctrine similarly survived into English Common Law.[82] With respect to land-based obligations, as far back as 1217, the *Charter of the Forest* guaranteed British subjects rights of access to vital natural resources, which reinforced the civil and political rights contained in its companion document, the *Magna Carta*.[83] The legal imperative of ecological sustainability has an even longer history in "Indigenous legal traditions [which] are among Canada's unwritten normative principles and, with common and civil law, can be said to 'form the very foundation of the Constitution of Canada.'"[84] Recognition of an environmental UCP would arguably reflect Indigenous legal principles, thus serving both reconciliation and sustainability.[85]

While the Supreme Court of Canada has not yet had the opportunity to consider whether ecological sustainability is an unwritten principle of the Constitution, its jurisprudence has described environmental protection in terms that are consistent with constitutional status.[86] The Court summarized its own holdings on this point in *British Columbia v Canadian Forest Products Ltd*:[87]

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79 Stepan Wood, Georgia Tanner & Benjamin J Richardson, "What Ever Happened to Canadian Environmental Law?" (2010) 37 Ecology Law Quarterly 981 at 1028.

80 "By the Law of Nature These Things Are Common to Mankind — The Air, Running Water, the Sea" in T C Sandars, *The Institutes of Justinian* (1876), Book II, Title I, at 158 (see also early American cases).

81 *British Columbia v Canadian Forest Products Ltd*, [2004] 2 SCR 74 at para 75.

82 *Bracton on the Laws and Customs of England* (1968), vol 2, at 39-40; see also Harry J Wruck, "The Time has Arrived for a Canadian Public Trust Doctrine Based Upon the Unwritten Constitution" (2020) 10:2 Geo Wash J Energy & Envtl L 67.

83 See Sir William Blackstone, *The Great Charter and Charter of the Forest* (Oxford: Clarendon Press, 1759).

84 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 108.

85 See Boyd, *The Right to a Healthy Environment*, *supra* note 35.

86 See generally Jerry V DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" (2007) 17(3) J Envtl L & Prac 159.

87 [2004] 2 SCR 74.

> As the Court observed in *R. v. Hydro-Québec* … legal measures to protect the environment "relate to a public purpose of *superordinate importance*"… In *Ontario v. Canadian Pacific Ltd.* … "stewardship of the natural environment" was described as *a fundamental value* … Still more recently, in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Town)* … the Court reiterated, at para. 1:
>
> > Our common future, that of every Canadian community, depends on a healthy environment. … This Court has recognized that "(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment … [and that] environmental protection [has] emerged as a *fundamental value* in Canadian society" … [88]

In another case, *Ontario v Canadian Pacific Ltd*,[89] the majority of the Supreme Court adopted a passage from the Law Reform Commission of Canada's report, *Crimes Against the Environment*, acknowledging that "a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the *right to a safe environment*."[90]

Throughout this robust body of *dicta* from the Supreme Court of Canada, one finds language suggestive of constitutional status (for example, "superordinate" and "fundamental"). The observation that "everyone is aware" we are responsible for environmental preservation suggests that this underlying environmental obligation is both implicit and incontestable. Similarly, if "our common future … depends on a healthy environment" then preserving such an environment must be a fundamental function of the state — i.e. an unwritten normative principle supporting the written Constitution.

The Supreme Court of the Philippines eloquently captured this idea in its celebrated decision in *Minors Oposa*, a case concerning the environmental rights of future generations:

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation[,] the advancement

88 *Ibid* at para 7 (emphasis added, citations omitted). See also *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 at para 234 ("[r]egulatory legislation is essential to the functioning of our society and to the protection of the public. It responds to the compelling need to protect the health and safety of the members of our society and to preserve our fragile environment").

89 [1995] 2 SCR 1031.

90 *Ibid* at para 55 (emphasis in original). This passage was quoted again in *R v Hydro-Québec*, [1997] 3 SCR 213, in which the Court upheld the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 as a valid exercise of federal power.

> of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.[91]

The US District Court for the District of Oregon cited *Oposa* when denying an early motion to dismiss a lawsuit brought by a coalition of young people who argued that the American government's conduct in regards to climate change violated their right to substantive due process.[92] In holding that a stable climate might constitute an "unenumerated fundamental right," the Court recognized that "a stable climate system is quite literally the foundation of society."[93] Though *Juliana* ultimately failed on appeal to the Ninth Circuit, a compelling dissent by Justice Stanton framed the inquiry aptly, holding that it implicated the "most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction."[94] As Canadian climate litigation keeps coming, our courts will need to decide whether a similar principle exists at the foundation of our own constitutional order. In the author's view, such a principle is virtually inescapable, since "physical self-preservation is a fundamental imperative for all human beings, and societal preservation is a fundamental imperative for the state."[95]

There is some implicit recognition of this "obligation to endure"[96] in Supreme Court of Canada jurisprudence. In *Hunter v Southam*, for example, the Court stated: "[a] statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted *with an eye to the future*. Its function is to provide a *continuing* framework."[97] Similarly, in the *Quebec Secession Reference*, the Court held: "*[i]n order to endure over time*, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework."[98] Combining these holdings with the Court's acknowledgement that the future of "every Canadian community … depends on a healthy environment,"[99] one can infer that our Constitution is intended to preserve the ecosystems that Canadians call home. If our Constitution fails to mention the ecological foundation on

91 See *Minors Oposa*, *supra*, note 18, at 187, cited in Sumudu Atapattu, "The Right to Life or the Right to Die Polluted" (2002) 16 Tul Envtl LJ 65 at 106-107.

92 *Juliana v United States*, No 6:15-CV-01517-TC, 2016 WL 6661146 (D Or Nov 10, 2016)

93 Internal citations omitted, overturned on appeal.

94 *Juliana v United States* (2020) 947 F 3d 1159 at 1185 (dissent).

95 Collins, *Longue Durée*, *supra* note 25 at 537.

96 Rachel Carson, *The Obligation to Endure* (New York: McGraw-Hill Companies, 2000).

97 *Hunter v Southam*, [1984] 2 SCR 145 at para 16 (emphasis added).

98 *Quebec Secession Reference*, *supra* note 73 at para 32.

99 *Town of Hudson v Quebec*, *supra* at para 1.

which all of the enumerated rights and powers delineated therein rest, it must be because the principle of environmental protection is so fundamental as to be both implicit and obvious — a basic, underlying structure that supports every other provision in the written Constitution.[100]

Although there are limits on the reach of unwritten constitutional principles (the Supreme Court has rejected their use to invalidate legislation, for example),[101] an ecological UCP could still play a major role in promoting sustainability in this country. Recognition of some form of ecological obligation as an unwritten constitutional principle[102] would assist courts in supervising the decisions of environmental regulators, interpreting environmental legislation, determining environmental powers under sections 91 and 92, and adjudicating environmental claims under the *Charter*.[103] It would also have the potential to guide decision-making within the legislative and administrative branches of government.[104] In particular, Galloway argues persuasively that "[r]ecognizing underlying constitutional principles in the context of environmental justice may provide a way for Canada to promote and protect human dignity and prevent environmental inequality."[105]

At minimum, recognition of an ecological constitutional principle could tip the scales in some public interest environmental litigation. More optimistically, legal recognition of sustainability as a fundamental obligation of the state could potentially increase ecological consciousness and action across our entire legal system.[106] Moreover, the scope and content of an ecological constitutional principle would develop and grow with evolutions in socio-environmental

100 It is worth noting here that even within the colonial capitalist paradigm of "resource extraction" that was dominant at the time of Confederation, the entire edifice of the state, including its economy, was wholly dependent on functioning ecosystems. Thus, even for conservatives, it is difficult to dispute the constitutional centrality of ecological sustainability. See generally David W Orr, "Conservation and Conservatism" (1995) 9:2 Conservation Biology 242.

101 *Toronto v Ontario,* 2021 SCC 34 [*Toronto v Ontario*].

102 See for example Harry J Wruck, "The Time has arrived for a Canadian Public Trust Doctrine Based Upon the Unwritten Constitution" 10 Geo Wash J Energy & Envtl L (Forthcoming, 2019).

103 Collins & Sossin, *supra* note 72; see also *Toronto v Ontario*, *supra* note 99 at paras 55, noting that "unwritten principles assist with purposive interpretation, informing the character and the larger objects of the *Charter* itself" (internal citations omitted).

104 Collins, *Puzzle of Pipelines*, *supra* note 72 at 32, 46-55; Collins & Sossin, *supra* note 72 at 323 et seq.

105 Galloway, *supra* note 72 at 41. Galloway analyzes a range of unwritten constitutional principles that could apply in the context of environmental inequality, including the principle of ecological sustainability, the public trust doctrine, the principle of substantive equality, and the principle of "Indigenous peoples' relationship to land, resources, and other peoples as an underlying constitutional value" (*ibid* at 7).

106 Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 UBC L Rev 293.

movements and legal thinking. Most notably, as with all constitutional law, the unwritten principle of ecological sustainability should be interpreted consistent with the overriding imperatives of reconciliation with Indigenous peoples and respect for Indigenous law. Thus, the principle should be understood with reference to relevant Indigenous legal tenets, such as the agency, "spiritedness," and legal personhood of Nature.[107]

V. Conclusion

As Canada marks the 40th anniversary of the *Charter of Rights and Freedoms*, there is much to celebrate. Canadians enjoy a suite of new entitlements that have enriched life (same-sex spousal rights),[108] reduced suffering (the right to safe injection sites)[109] and empowered some of the most vulnerable communities in our society (children with disabilities).[110] However, the four decades since 1982 have witnessed an unprecedented ecological crisis that threatens the wellbeing of Canadian citizens and calls into question the sustainability of our communities over time. As Canada navigates the necessary transition towards sustainable modes of being, constitutional evolution will be a crucial step along the way. While change is evidently required across all fields of endeavor — including business, education, and culture — "constitutions have a superordinate importance in the governance, politics and social consciousness of a nation. An ecological constitution — one that makes a serious, scientifically literate attempt to sustain natural systems (including human communities) over time — could play a pivotal role in re-orienting our societies."[111]

107 See Aimée Craft & LeBihan, "Legal Personhood of Water and Indigenous Legal Mechanisms" (copy on file with authors); Gwendolyn J Gordon, "Environmental Personhood" (2018) 43:1 Colum J Envtl L 49; Craig M Kauffman & Pamela L Martin, "How Courts Are Developing River Rights Jurisprudence: Comparing Guardianship in New Zealand, Colombia, and India" (2019) 20:4 VJEL 260.

108 See for example *M v H*, [1999] 2 SCR 3.

109 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

110 *Moore v British Columbia (Education)*, 2021 SCC 61.

111 *The Ecological Constitution*, *supra* note 5 at 119.