THE UNWRITTEN CONSTITUTIONAL PRINCIPLE OF ECOLOGICAL SUSTAINABILITY: A SOLUTION TO THE PIPELINES PUZZLE?

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> "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 It is easily enacted and as easily repealed.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". [1]
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> "Our common future, that of every Canadian community, depends on a healthy environment."[2]

Abstract

This Article explores whether recognizing an obligation of ecological sustainability as an unwritten constitutional principle (UCP) would assist government decision-makers and courts in addressing the many competing imperatives raised by the problem of petroleum pipelines. I argue that if the rule of law is the foundation of our society, then ecological sustainability is the bedrock on which it stands. Moreover, an ecological UCP would assist courts hearing pipeline-related disputes in interpreting environmental legislation, supervising the discretionary decisions of environmental regulators, adjudicating environmental claims under the Charter, and/or determining environmental powers under sections 91 and 92 of the *Constitution Act, 1867*. In particular, the UCP of ecological sustainability strongly militates in favour of upholding environmental legislation where there is even a slight jurisdictional toe-hold for the relevant level of government. The Article will also contrast how a sustainability analysis of pipelines differs from one grounded in the right to a healthy environment – the other major avenue for constitutional environmental protection. The Article concludes that while the right to a healthy environment arguably does not clearly resolve the pipeline puzzle (since such a right could equally be violated by alternative methods of transporting petroleum products, notably train transport), an unwritten constitutional principle of ecological sustainability points clearly to the need to divest from fossil fuel infrastructure and aggressively invest in renewables.

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[1] *Hunter v Southam,* [1984] 2 SCR 145 at 155, 11 DLR (4th) 641.

[2] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 [*Spraytech v Hudson*].

1. Introduction: the Canadian pipelines conundrum

Fossil fuel pipelines implicate nearly every environmental question one can imagine.[3] Indeed, the catalogue of issues raised by pipelines reads like the syllabus of a typical environmental law course: constitutional jurisdiction over the environment, environmental justice, Indigenous environmental rights, environmental assessment, endangered species, pollution, ecological economics, etc. The economic argument for moving oil sands product to market through pipelines is relatively straightforward,[4] if one discounts the very serious economic implications of climate change[5] and pipeline spills.[6] However, the environmental costs of pipelines should give us pause. The impacts of building more pipelines range from temporary localized pollution to global repercussions reaching indefinitely into the future.[7] Canadian pipeline projects may threaten the health of whales – and humans – in Canada but may also contribute to global trends that endanger citizens of low-lying island nations halfway around the world.[8]

Pipelines raise legal challenges at the municipal, provincial, federal and international levels. In particular, the construction or expansion of major pipeline projects makes it virtually impossible for Canada to meet its international climate commitments under the *Paris Agreement*.[9] In Canada, pipelines exist to facilitate the exploitation of natural gas and tar sands oil that cause greenhouse gas emissions during their extraction, refining, and end use.[10] Thus, in addition to the particular effects of construction and operation, pipelines also connect unsustainable production to unsustainable consumption. At the same time, industry, several governments, some First Nations, and many ordinary Canadians seem to view petroleum pipelines as

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[3] Nathalie J Chalifour, "Drawing Lines in the Sand: Parliament's Jurisdiction to Consider Upstream and Downstream Greenhouse Gas (GHG) Emissions in Interprovincial Pipeline Project Reviews" (2018) 23:1 Rev Const Stud 130 at 131 [Chalifour, "Drawing Lines"].

[4] Elmira Aliakbari & Ashley Stedman, *The Cost of Pipeline Constraints in Canada* (May 2018), online (pdf): *Fraser Institute* <fraserinstitute.org/sites/default/files/cost-of-pipeline-constraints-in-canada.pdf>.

[5] National Roundtable on the Environment and the Economy, *Paying the Price: The Economic Impacts of Climate Change for Canada* (2011), online: <nrt-trn.ca/climate/climate-prosperity/the-economic-impacts-of-climate-change-for-canada/paying-the-price>.

[6] PennWest, *The Costs of a Pipeline Failure* (2013), online (pdf): *Alberta Energy Regulator* <aer.ca/PennWest-CostPipelineFailure.pdf>.

[7] See generally Wendy J Palen et al, "Consider the Global Impacts of Oil Pipelines" (2014) 510 Nature 465.

[8] *Ibid*; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*]; Jane McAdam, "Building International Approaches to Climate Change, Disasters, and Displacement" (2016) 33:2 Windsor YB Access Just 1.

[9] *Paris Agreement*, being an Annex to the *Report of the Conference of the Parties on its twenty-first session, held in parties from 30 November to 13 December 2015--Addendum Part two: Actions taken by the Conference of the Parties at its twenty-first session, 29 January 2016*, Decision 1/CP.21, CP, 21st Sess, FCCC/CP/2015/10/Add.1 at 21–36, online (pdf): *United Nations Framework Convention on Climate Change* <unfcc.int/resource/docs/2015/cop21/eng/10a01.pdf> [*Paris Agreement*].

[10] Jason MacLean, "Paris *and* Pipelines? Canada's Climate Puzzle" (2018) 32:1 J Envtl L & Prac 47 [MacLean, "Paris *and* Pipelines?"].

necessary conduits for the economic lifeblood of the country.[11] As Chalifour aptly puts it, "[i]f there were to be a competition for the most polarizing sustainability challenge in Canadian politics, pipelines might emerge as the winner."[12] How can law and policy solve the puzzle of pipelines?

This paper argues that Canadian environmental law – both generally and as applied to petroleum pipelines – is in need of a fundamental organizing principle. In particular, courts should recognize ecological sustainability as an unwritten principle of our Constitution (UCP). As a lodestar for environmental policy, ecological sustainability could clarify the limits of discretionary environmental decision-making, assist courts in interpreting environmental legislation, provide important context for division of powers arguments in environmental cases, facilitate a respectful relationship with Indigenous legal orders in Canada, and complement rights-based approaches to environmental protection under the *Charter*. In each case, the UCP of ecological sustainability would clarify the debate over Canada's climate policy in general and the puzzle of pipelines in particular.

The Article begins in Part 2 with an analysis of the fatal flaws in Canada's existing environmental law regime. Part 3 introduces an alternative approach to environmental law and governance – the ecological law paradigm – with its central concept of sustainability. Part 4 considers the place of ecological sustainability in Canada's constitution, imagining how a UCP of ecological sustainability would assist decision-makers in resolving environmental dilemmas across a range of issues. Part 5 applies the proposed UCP to the pipeline problem and demonstrates how a constitutional principle of ecological sustainability could guide courts in resolving the inevitable litigation that erupts around pipeline projects. The Article concludes that ecological sustainability is indeed an unwritten constitutional principle in Canada, and that such a principle points clearly to the need to divest from fossil fuel infrastructure, including pipelines.

2. The broken paradigm of conventional environmental law

Environmental law as we know it has achieved many significant victories, saving countless human lives, bringing certain species back from the brink of extinction, and improving quality of life for millions of people around the world.[13] However, when assessed against the crucial parameter of sustainability – that is, the capacity of societies to survive and thrive over the next 50 years and more – conventional environmental law has arguably been a "colossal failure"[14] in Canada and around the

[11] "We Are First Nations that Support Pipelines, When Pipelines Support First Nations", *Financial Post* (13 September 2018), online: <business.financialpost.com>; Angus Reid Institute, "Six-in-Ten Canadians Say Lack of New Pipeline Capacity Represents a Crisis in this Country", online: <angusreid.org/western-canada-pipelines/>; Geoffrey Morgan, "Pipeline Shortage to Cost the Economy $15.6 Billion this Year: Report", *Financial Post* (21 February 2018), online: <business.financialpost.com>.

[12] Chalifour, "Drawing Lines", *supra* note 3 at 131.

[13] See generally David R Boyd, *The Optimistic Environmentalist* (Toronto: ECW Press, 2015).

[14] Mary Christina Wood, "Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance" (2009) 39 Envtl

world. A robust body of scholarship demonstrates that conventional environmental law has not yet achieved sustainable environmental protection, even in well-resourced nations such as Canada.[15] Collectively we have failed to manage marine and terrestrial ecosystems and, crucially, the climate, in ways that can ensure the long-term survival of human societies.[16] The voluminous literature on point reveals that the reasons for this failure are many.

For example, environmental regulatory agencies tend to be highly complex, isolated from each other and from ecological realities, inaccessible to the non-expert public, and vulnerable to political and economic pressures that have no respect for non-negotiable environmental imperatives.[17] Meanwhile, courts have habitually deferred to governmental decisions in the area of environment, even where such decisions are palpably unsustainable.[18] The Canadian context is particularly challenging; Canada's environmental governance has historically been weakened by jurisdictional ambiguity[19] and our economic over-dependence on natural resources, particularly fossil fuels.[20] Moreover, Canadian environmental regulators, especially in

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L 91 at 43 [Wood, "Sovereign Trust"]; see also Mary Christina Wood, *Nature's Trust* (Cambridge: Cambridge University Press, 2013) [Wood, *Nature's Trust*].

[15] See eg Michael M'Gonigle & Louise Takeda, "The Liberal Limits of Environmental Law" (2013) 30 Pace Envtl L Rev 1005; Klauss Bosselmann, "Losing the Forest for the Trees: Environmental Reductionism in the Law" (2010) 2:8 Sustainability 2424; Craig Collins, *Toxic Loopholes: Failures and Future Prospects for Environmental Law* (Cambridge: Cambridge University Press, 2010); David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) [Boyd, *Unnatural Law*]; James Gustave Speth, *The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability* (New Haven, CT: Yale University Press, 2008).

[16] United Nations, *Global Environmental Outlook – 6* (Nairobi: United Nations Environment Programme, 2019); Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, 2nd ed (New York: Routledge, 2017) at 12 [Bosselmann, *Principle of Sustainability*] ("The 'ecological ignorance' of modern environmental law is widely recognized in the literature and needs no further description").

[17] Wood, "Sovereign Trust", *supra* note 14 at 55–60; Boyd, *Unnatural Law*, *supra* note 15. The assessment of extractive projects in isolation, ignoring their cumulative effects, has been a particularly troublesome weakness in Canadian environmental law: see eg Palen et al, *supra* note 7 at 466; Canadian Council of Environment Ministers (CCME), *Regional Strategic Environmental Assessment in Canada Principles and Guidance* (Winnipeg: CCME, 2009) at 6.

[18] See generally Chris Tollefson & Jason MacLean, "Climate-Proofing Judicial Review after Paris: Judicial Competence, Capacity, and Courage" (2018) 31 J Envtl L & Prac 245 at 247–52; Lynda M Collins, "Judging the Anthropocene: Transformative Environmental Adjudication for the Anthropocene Era" in Louis Kotzé, ed, *Environmental Law for the Anthropocene* (Oxford: Hart Publishing, 2017); Andrew Green, "Discretion, Judicial Review and the *Canadian Environmental Assessment Act*" (2002) 27 Queen's LJ 785.

[19] Lynda Collins & David Richard Boyd, "Non-Regression and the *Charter* Right to a Healthy Environment" (2016) 29 J Envtl L & Prac 285 at 291 ("[F]or more than a century uncertainty about constitutional responsibility for environmental protection has undermined Canada's efforts to become more sustainable"); see also Nathalie J Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act" (2019) University of Ottawa Working Paper Series.

[20] See MacLean, "Paris *and* Pipelines?", *supra* note 10 arguing that Canada is a "carbon democracy" in which the interests of the fossil fuel industry have substantially distorted our political processes. See also Laurie E Adkin, ed, *First World Petro-Politics: The Political Ecology and Governance of Alberta* (Toronto: University of Toronto Press, 2016); David R Boyd, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC Press, 2015) [Boyd, *Cleaner,*

the oil and gas sector,[21] have been notoriously "subject to 'regulatory capture', meaning that the corporations and individuals subject to environmental regulation become 'clients' whose interests prevail over the broader public interest that the government is supposed to defend".[22] Under the pressure of multiple distractions from the core mandate of environmental protection, Canadian environmental law has too often ignored the ecological context in which pollution and development occurs.[23] In particular, it has chronically failed to adequately assess the cumulative impacts of environmentally destructive activities, regulating each project (or polluter) as if it existed in splendid isolation.[24] This approach is utterly divorced from ecological reality, and cannot produce a healthy environment for present or future human and non-human beings.[25]

Pipelines are a case in point.[26] As Palen et al have noted, the true environmental costs of pipelines result from "the cumulative effects of [extraction], refineries, ports, pipelines, railways and a fleet of transoceanic supertankers".[27] Moreover, while pipeline accidents may be locally or even regionally devastating,[28] by far the most serious impact of pipelines involves their contribution to climate change.[29] Yet both the National Energy Board and the federal government have historically been reluctant to address the cumulative GHG emissions that will flow from various proposed pipelines (although, this may change with the introduction of Bill C-69 reforming the National Energy Board and introducing the *Impact Assessment Act*).[30]

Greener, Healthier].

[21] *Ibid*.

[22] Boyd, *Unnatural Law*, *supra* note 15 at 256; see also Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 J Envtl L & Prac 111.

[23] David R Boyd "Sustainability Law: (R)evolutionary Directions for the Future of Environmental Law" (2004) 14 J Envtl L & Prac 357 at 365 ("The single greatest weakness of environmental law and policy is its failure to recognize the laws of nature and the fact that the Earth is finite").

[24] See eg Environmental Commissioner of Ontario, *Good Choices, Bad Choices: Environmental Rights and Environmental Protection in Ontario* at 130, online (pdf): <docs.assets.eco.on.ca/reports/environmental-protection/2017/Good-Choices-Bad-Choices.pdf> ("Ontario regulates each facility's air emissions as if it was the only emitter").

[25] Boyd, *Cleaner, Greener, Healthier*, *supra* note 20 at 114–26, 130–34; Olivia Woolley, *Ecological Governance: Reappraising Law's Role in Protecting Ecosystem Functionality* (Cambridge, UK: Cambridge University Press, 2014) at 27–36,153–63.

[26] Palen et al, *supra* note 7.

[27] *Ibid* at 466.

[28] For pipeline accident data see Transportation Safety Board of Canada, *Pipeline Transportation Safety Investigations and Reports*, online: <bst-tsb.gc.ca/eng/rapports-reports/pipeline/index.asp>; National Transportation Safety Board (US), *Pipeline Accident Reports*, online: <ntsb.gov/investigations/AccidentReports/Pages/pipeline.aspx>.

[29] See MacLean, "Paris *and* Pipelines?", *supra* note 10.

[30] See Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd

The consequences of Canada's confused and conflicted environmental law regime are severe. Nine in ten Canadians believe that the right to a healthy environment should enjoy constitutional protection.[31] However, despite the centrality of the environment to Canadian culture and economy,[32] Canada ranks very poorly in comparative analyses of environmental performance in developed countries.[33] For example, the Conference Board of Canada has consistently ranked Canada fifteenth out of seventeen large, wealthy industrialized nations on environmental performance.[34] Indeed, Canada has developed a reputation as an environmental "laggard in both policy innovation and environmental performance, known for inaction and obstruction."[35] Our under-protective environmental law threatens the sustainability of ecosystems; iconic Canadian species (such as the polar bear, woodland caribou, and right whale);[36] key industries such as agriculture, forestry and fisheries;[37] and human health throughout Canada.[38]

Perhaps most disturbingly, Canadian environmental law has utterly failed to rise to the challenge of global climate change. Indeed, MacLean makes a cogent argument that Canada's oil industry has successfully shifted our climate policies away from both science and the broader public interest,[39] and the evidence to support this

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Parl, 2018 (third reading 20 June 2018) [Bill C-69]; Chalifour, "Drawing Lines", *supra* note 3 at 138–45; MacLean, "Paris *and* Pipelines?", supra note 10 at 51–53.

[31] David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouer: UBC Press, 2012) at 5.

[32] See eg A Frizell & J Pammett, *Shades of Green: Environmental Attitudes in Canada and Around the World* (Montreal: McGill-Queen's University Press, 1997); see also Matto Mildenberger et al, "The Distribution of Climate Change Public Opinion in Canada" (2016) 11:8 PLOS ONE e0159774, online; Nadine Klopfer & Christof Mauch, eds, "Big Country, Big Issues: Canada's Environment, Culture, and History" (2011) 4 RCC Perspectives.

[33] See eg Thomas Gunton & KS Calbick, "The Maple Leaf in the OECD: Canada's Environmental Performance" (June 2010), online (pdf): *David Suzuki Foundation* <davidsuzuki.org/wp-content/uploads/2010/06/maple-leaf-OECD-canada-environmental-performance.pdf>.

[34] Conference Board of Canada, *How Canada Performs: A Report Card on Canada* (Ottawa: Conference Board, 2014).

[35] Stepan Wood, Georgia Tanner & Benjamin J Richardson, "Whatever Happened to Canadian Environmental Law?" (2010) 37 Ecology LQ 981 at 982.

[36] See Max Foran, *The Subjugation of Canadian Wildlife: Failures of Principle and Policy* (Montreal: McGill-Queen's University Press, 2018); World Wildlife Fund, *Living Planet Report Canada: A National Look at Wildlife Loss* (2017), online (pdf): <assets.wwf.ca/downloads/WEB_WWF_REPORT_v3.pdf>.

[37] See eg Environment and Climate Change Canada, "Air Pollution Damage to Infrastructure and Industry", online: <canada.ca/en/environment-climate-change/services/air-pollution/quality-environment-economy/economic-issues/damage-infrastructure-industry.html>.

[38] Boyd, *Cleaner, Greener, Healthier*, *supra* note 20 at 14 ("The environmental burden of disease in Canada is much higher than generally recognized, causing thousands of premature deaths and millions of illnesses annually").

[39] MacLean, "Paris *and* Pipelines?", *supra* note 10 at 55.

view is overwhelming.[40] Chalifour and Earle summarize Canada's dismal record as follows:

> It would be an understatement to say that Canada's history in dealing with climate change has been disappointing. Although Canada endorsed the UNFCCC from the beginning, the country's response to climate change has been characterized by much rhetoric and little action, with the federal government historically alternating between failing to meet its own targets and ratcheting them back to less ambitious levels. For example, between 1990 and 2008, the beginning of the first Kyoto Protocol commitment period, GHG emissions in Canada grew by 24% relative to the 1990 baseline. This means that, rather than reducing emissions by 6% as promised in Kyoto, Canada allowed them to climb 31% higher than its Kyoto target. With no plan in place to meaningfully change this trajectory, Canada became the first signatory country to withdraw from the Protocol in 2011.
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> While the federal government continued to participate in UNFCCC proceedings after this withdrawal, its underwhelming climate change commitments continued. Under the Copenhagen Accord in 2010, Canada opted to lower the ambition of its target, committing to reduce emissions by 17% from 2005 levels by 2020 (the Copenhagen target). This is not only less ambitious than the Kyoto target, but even further removed from the IPCC 2020 benchmark. Canada's INDC, submitted prior to COP21, promised to cut GHG emissions 30% below 2005 levels by 2030 (the Paris target). The Paris target translates to emissions of 523 Mt CO2e by 2030, a far cry from the 367-458 Mt by 2020 that the IPCC 2020 benchmark requires…[41]

This poor performance has continued despite the ever-mounting scientific evidence of unprecedented environmental harm that will occur if climate change continues on its current trajectory.[42] In the same year that the people of Canada became the owners of a major pipeline project designed to ensure the continued exploitation of the tar sands,[43] the IPCC released its most alarming report yet, forecasting historic levels of environmental degradation if warming is not kept below 1.5 degrees Celsius.[44] The report also notes, however, that it is technically feasible to avert warming beyond 1.5 degrees, and economists have projected major fiscal benefits from doing so.[45]

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[40] *Ibid* at 57–62; Andrew Green, "On Thin Ice: Meeting Canada's Paris Climate Commitments" (2018) 32:1 J Envtl L & Prac 99 [Green, "On Thin Ice"].

[41] Nathalie J Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation Under the Canadian *Charter*'s Right to Life, Liberty, and Security of the Person" (2018) 42 Vermont L Rev 689 at 704–05.

[42] Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: an IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018), online: <ipcc.ch/sr15/> [*IPCC 2018 Report*].

[43] National Energy Board, *Trans Mountain Pipeline System Purchase Agreement FAQs*, online: <neb-one.gc.ca/pplctnflng/mjrpp/trnsmntnxpnsn/prchsgrmntfq-eng.html>.

[44] *IPCC 2018 Report*, *supra* note 42.

[45] Global Commission on the Economy and Climate, *Unlocking the Inclusive Growth Story of the 21st Century: Accelerating Climate Action in Urgent Times* (Washington, DC: New Climate Economy, 2018),

Unfortunately, although we have the means and motivation to reduce greenhouse gas emissions and avert catastrophic climate change, Canadian environmental decision-makers seem unable or unwilling to make the necessary transformations. As Andrew Green explains, "Canada's lack of vision and inability to meet its [climate] targets are intimately connected to the structure of environmental law and the related institutions."[46] Clearly, we are in need of a paradigm shift in Canadian environmental law.

3. The dawn of ecological law and the principle of sustainability

If the current state of climate science paints a picture of environmental law's darkest hour, it may be that this crisis will lead us to the dawn of a new paradigm for environmental regulation that better secures the future of humanity on Earth. In recent years, the ecological law movement has emerged as an alternative to conventional environmental law, advancing a paradigm shift that "internalizes the natural living conditions of human existence and makes them the basis of all law".[47] The theory of ecological law proposes a fundamental re-structuring of human relationships with the Earth, recognizing that "at a primary level, human society is a subset of the ecosphere."[48] If we accept that the laws of nature (ecology) are in fact the inescapable ground-rules of life on Earth, it makes sense that the highest forms of human-made law – constitutions and international conventions – should conform to these natural laws.[49] In other words, our legal orders need to be re-oriented in the direction of ecological sustainability.[50]

The history, scope, and status of the principle of ecological sustainability have been thoroughly canvassed by Bosselmann, Woolley, and others, and the scholarship in this area continues to evolve.[51] The principle of ecological sustainability is a

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online: <newclimateeconomy.report/2018/> (finding that effective climate policies could produce $26 trillion in economic benefits between now and 2030, including generating more than 65 million jobs and avoiding more than 700,000 premature deaths from air pollution).

[46] Green, "On Thin Ice", *supra* note 40 at 100.

[47] Ecological Law & Governance Association, *Oslo Manifesto for Ecological Law and Governance* (2016), online: <elga.world/oslo-manifesto/>; Woolley, *supra* note 25; see also L Kotzé & R Kim, "Earth System Law: The Juridical Dimensions of Earth System Governance" (2019) 1 Earth System Governance [pagination not yet available].

[48] John Borrows, "Living Between Water and Rock: First Nations, Environmental Planning and Democracy" (1997) 47 UTLJ 417 [Borrows, "Living Between Water and Rock"].

[49] See Jean Leclair, "Invisibility, Wilful Blindness and Impending Doom: The Future (If Any) of Canadian Federalism" in Peter John Loewen et al, *Canada and Its Centennial and Sesquicentennial: Transformative Policy Then and Now* (Toronto: University of Toronto Press, 2019) 106; 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 in 2019]; Wood, *Nature's Trust*, *supra* note 14.

[50] See generally Lynda Collins, "An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*" (2009) 26 Windsor Rev Legal Soc Issues 7 [Collins, "Ecologically Literate"].

[51] Bosselmann, *Principle of Sustainability*, *supra* note 16; Woolley, *supra* note 25; Rakhyun E Kim & Klaus Bosselmann, "Operationalizing Sustainable Development: Ecological Integrity as a *Grundnorm* of International Law" (2015) 24:2 RECIEL 194.

refinement of the much more ambiguous idea of "sustainable development"[52] and is closely connected with the concept of ecological integrity.[53] As with many, if not most, principles of environmental governance, ecological sustainability is a complex and contested concept.[54]

While a detailed exposition of ecological sustainability is beyond the scope of this article, its key tenets are readily explained. Ecological sustainability refers to the long-term viability or wellbeing of ecological systems, including human communities.[55] Importantly, ecological sustainability is a meaningful concept in both law and science.[56] Ecological sustainability is much more specific than the idea of sustainable development, which has come to mean all things to all people, thus losing its force as a normative principle.[57] At the same time, ecological sustainability is a broader concept than the anthropocentric human right to a healthy environment, and encompasses the survival of non-human living beings and the viability of the ecosphere for future generations of humans and non-humans alike.[58]

For proponents of ecological sustainability, a central problem is that of institutionalizing and implementing sustainability through legal mechanisms.[59] While there are myriad legal tools that could forward the project of ecological sustainability

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[52] Lynda Collins, "Revisiting the Doctrine of Inter-Generational Equity in Global Environmental Governance" (2007) 30 Dal LJ 73 at 87 [Collins, "Revisiting the Doctrine"] ("The sustainable development paradigm eschews the language of both rights and responsibility, lacks any mechanism for effective implementation, and is highly ambiguous as a policy framework"); Bosselmann, *Principle of Sustainability*, *supra* note 16 at 1 ("The concept of 'sustainable development' lost its core meaning somewhere between the 1980s and today).

[53] Klaus Bosselmann, "The Rule of Law Grounded in the Earth: Ecological Integrity as a Grundnorm" in L Westra and M Vilela, eds, *The Earth Charter, Ecological Integrity and Social Movements*, (Routledge, 2014) 3.

[54] See e.g. R Bratspies, "Sustainability: Can Law Meet the Challenge?" (2011) 34:2 Suffolk Transnat'l L Rev 283.

[55] See Bosselmann, *Principle of Sustainability*, *supra* note 16 at 5 ("[S]ustainability means maintenance of the integrity of the Earth's ecological systems"); Cameron La Follette & Chris Maser, *Sustinability and the Rights of Nature: An Introduction* (Boca Raton: Taylor & Francis Press, 2017) at 99 ("Sustainability is flexible but maintains Nature's integrity").

[56] See eg E Bennet & R Chaplin-Kramer, "Science for the Sustainable Use of Ecosystem Cervices" (2016) 5 F1000 2622, online: <ncbi.nlm.nih.gov/pmc/articles/PMC5105881/>; R Kates et al, "Sustainability Science" (2001) 292 Science 641, online: <science.sciencemag.org/content/292/5517/641>.

[57] Collins, "Revisiting the Doctrine", *supra* note 52 at 87 ("The sustainable development paradigm eschews the language of both rights and responsibility, lacks any mechanism for effective implementation, and is highly ambiguous as a policy framework"); Bosselmann, *Principle of Sustainability*, *supra* note 16 at 1 ("The concept of 'sustainable development' lost its core meaning somewhere between the 1980s and today).

[58] The human right to a healthy environment may or may not be viewed as encompassing interspecies and intergenerational justice. While the most straightforward application of environmental human rights involves pollution affecting human health, I have argued elsewhere that the right to a healthy environment should "be understood as encompassing both human-centred and eco-centric aspects – as in an environment that is both 'healthy' for humans and healthy in its own right (e.g. a healthy lake, a healthy forest, a healthy ecosystem)".

[59] Bratspies, *supra* note 54; Kim & Bosselmann, *supra* note 51.

– everything from carbon taxes to endangered species legislation – one potentially transformative approach is the recognition of ecological sustainability as a foundational legal principle. At the international level, this might involve the enactment of a binding convention codifying obligations with respect to sustainability,[60] while at the domestic level it would almost certainly require constitutional recognition.[61] In either case, the first step is convincing relevant decision-makers that ecological sustainability could be a useful and viable legal principle. Bosselmann has argued persuasively that "[ecological] sustainability has the historical, conceptual and ethical quality typical for a fundamental principle of law" and should "infor[m] the entire legal system, not just environmental laws".[62] It is broad enough to function as an overarching principle guiding all aspects of a legal system, yet specific enough to provide meaningful guidance in the formulation of particular policies. As a fundamental legal principle, ecological sustainability would reorient legal systems to recognize the primacy of the environment in all policy-making. While social and economic wellbeing remain valid and important policy imperatives, the principle of sustainability would require decision-makers to acknowledge that these goals are wholly dependent on a healthy environment. The legal principle of ecological sustainability development can also be fleshed out by reference to other recognized principles of environmental governance.

Because scientific uncertainty is unavoidable in environmental matters, achieving ecological sustainability requires a strong precautionary approach (the "Precautionary Principle") that emphasizes prevention of harm and preservation of ecosystem resilience.[63] Another corollary of the principle of sustainability is the state's responsibility as trustee of the natural environment.[64] Courts around the world have recognized the public trust doctrine, requiring states to steward natural resources for the benefit of their present and future citizens, and Wruck argues persuasively that this doctrine should itself be recognized as an unwritten constitutional principle.[65]

Some tribunals outside of Canada have already begun to recognize ecological sustainability as an implicit legal principle embedded within their respective legal

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[60] One model would be to codify the existing, non-binding *Earth Charter* into a binding international treaty; see Bosselmann, *Principle of Sustainability*, *supra* note 16 at 206–08.

[61] See e.g. Lynda Collins & Lorne Sossin, "Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 UBC L Rev 293; Bosselmann, *Principle of Sustainability*, *supra* note 16 at 158–59.

[62] Bosselmann, *Principle of Sustainability*, *supra* note 16 at 4; Woolley, *supra* note 25 at 96–98.

[63] See Woolley, *supra* note 25 at 8–9, 54–65; Paul Harremoës et al, eds, *The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings* (London: Earthscan Publications, 2002); Lynda M Collins, "Security of the Person, Peace of Mind: A Precautionary Approach to Environmental Uncertainty" (2013) 4:1 J Human Rights & Environment 79. For an innovative judicial application of precaution in the Canadian context, see *Haida Nation v Canada (Fisheries and Oceans),* 2015 FC 290.

[64] Michael C Blumm & Rachel D Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (2012) 45 UC Davis L Rev 741; Wood, *Nature's Trust*, *supra* note 14. See also Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: UN University Press, 1989).

[65] Wruck, *supra* note 49.

orders. For example, in *Minors Oposa*, a case concerning the environmental rights of future generations in the context of deforestation, the Supreme Court of the Philippines held that the right to a "balanced and healthful ecology" is unique "for it concerns nothing less than self-preservation and self-perpetuation[,] the advancement 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."[66] The US District Court for the District of Oregon cited *Oposa* when denying a motion to dismiss *Juliana v US*, a lawsuit brought by a coalition of young people who argue that government inaction on climate change has violated their right to "substantive due process".[67] In holding that a stable climate might constitute an "un-enumerated fundamental right", the court recognized that "a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'"[68] At the international level, former Vice President of the International Court of Justice, Christopher Weeramantry, has characterized ecological sustainability using the then-current language of sustainable development, as "not merely a principle of modern international law [but] also one of the most ancient ideas in the human heritage."[69]

Canadian courts have yet to recognize the constitutional status of ecological sustainability, but a review of relevant jurisprudence suggests that such a conclusion is ultimately inescapable.

4. Ecological sustainability in the Canadian constitution

When the *Constitution Act, 1867* was conceived, the prospect of human-induced environmental catastrophe was not within the contemplation of its authors.[70] While European nations had a long history of attempting sustainable management of some natural resources – notably forests[71] – the framers could not have understood the importance of constitutionalizing environmental protection at the time of drafting. Indigenous law, which had millennia of experience in relating sustainably with North American lands and waters, was not on the table. Instead, Canada's founding documents were drafted by political thinkers steeped in a colonial capitalist paradigm that viewed Canada's environment as a treasure trove of resources and/or a wilderness in need of civilizing. [72] The science of ecology was in its infancy and the modern

[66] See *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994), 33 ILM 173 at 187, cited in Sumudu Atapattu, "The Right to Life or the Right to Die Polluted" (2002) 16 Tul Envtl LJ 65 at 106–07.

[67] *Juliana v United States*, No 6:15-CV-01517-TC, 2016 WL 6661146 (D Or Nov 10, 2016) at 1.

[68] *Ibid* at 81 [citations omitted].

[69] *Case Concerning Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Vice-President Weeramantry, [1997] ICJ Rep 7 at 107.

[70] See Nathalie Chalifour, "Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes" 22:2 NJCL 119 at 173 [Chalifour, "Making Federalism Work"].

[71] See Bosselmann, *Principle of Sustainability*, *supra* note 16 at 12–21.

[72] See generally LS MacDowell, *An Environmental History of Canada* (Vancouver: UBC Press, 2012).

environmental movement was a century away. Even in the late 1970s when the *Charter* was being negotiated, decision-makers lacked crucial information on the scope of human-induced environmental harm, in particular the transformative potential of climate change.[73] It is not surprising, then, that our written Constitution is silent on the crucial underlying condition necessary for the continuation of our society – ecological sustainability. However,

> [i]f there was ever a time in modern history when an ecologically silent constitution was justifiable, that time has passed. In the *longue durée*, there is no project that merits constitutional recognition more than that of environmental protection. A constitution not grounded in a healthy, sustainable environment is a paper temple — a mere recitation of rights with no real guarantee of their survival over time.

Leclair notes that, though silent, the Constitution is not helpless in the face of our current ecological crisis. Rather, courts can empower the Constitution to address sustainability by expanding our understanding of the "fundamental and organizing principles" of our legal order.[74] "By explicitly referring to the non-human natural world and to future generations, courts would draw these constituent actors out of their present constitutional invisibility and legitimize their future invocation in political/constitutional discourses."[75] In particular, Canadian judges have every reason to recognize ecological sustainability as an unwritten constitutional principle.

a. An introduction to unwritten constitutional principles

In *Quebec Secession Reference*, the Supreme Court of Canada described unwritten constitutional principles as follows:

> Behind the written word 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.

[73] For a fascinating discussion of negotiations on the possible inclusion of an environmental right in the *Charter*, see David Richard Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver, UBC Press, 2012) at 37; see also Colin P Stevenson, "A New Perspective on Environmental Rights after the Charter" (1983) 21:3 Osgoode Hall LJ 390.

[74] Leclair, *supra* note 49.

[75] *Ibid*.

> 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"…[76]

It seems clear that ecological sustainability is a *sine qua non* for the ongoing evolution of our Constitution as a "living tree".[77] Though we frequently forget it, our legal system is in reality composed of biological beings with certain inescapable environmental needs. In the absence of a stable climate, clean drinking water, and safe air, the legal order prescribed by our constitution would be meaningless. The natural systems on which our society depends sustain the constitution; they are its lifeblood. Indeed, if rule of law can be viewed as the foundation of our society, then ecological sustainability is the bedrock on which it stands.

Chief Justice McLachlin, as she then was, has defined "unwritten constitutional principles [as] unwritten norms that are essential to a nation's history, identity, values and legal system",[78] and ecological sustainability meets this definition. Respect, and even love, for the natural world is embedded in Canadian art, culture, and identity.[79] Sustainability is also deeply rooted in Canada's multiple legal traditions, dating as far back as Roman law, which originated the public trust doctrine, [80] and the *Charter of the Forest*, the companion document to the *Magna Carta*.[81] Crucially, ecological sustainability is also a key component in Indigenous legal orders in the territory now known as Canada.[82] Thus, as elaborated below, recognition of

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[76] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 49–52, 161 DLR (4th) 385. Note the recurrence of biological language in this passage ("symbiosis", "lifeblood", "living tree"). There seems implicit in this an unconscious acknowledgment that all our human structures depend on our biological survival. In this sense there is no principle more fundamental than that of a healthy environment.

[77] For an interesting application of the living tree doctrine in an environmental context, 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 J Envtl L & Prac 185.

[78] The Right Honourable Beverley McLachlin, "Lord Cooke of Thorndon Lecture – Unwritten Constitutional Principles: What is Going On?" (2006) 4 NZJPIL 147 at 149.

[79] See e.g. John O'Brian & Peter White, *Beyond Wilderness: The Group of Seven, Canadian Identity and Contemporary Art* (Montreal: McGill-Queen's University Press, 2007); see also Geneviève Richard, "Nature and National Identity: Contradictions in a Canadian Myth", online (pdf): *Capstone Seminar Series* <capstoneseminarseries.files.wordpress.com/2012/04/genevieve-richard1.pdf>.

[80] See *British Columbia v Canadian Forest Products,* 2004 SCC 38 at paras 74–82.

[81] See Fritjof Capra & Ugo Mattei. *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland: Berrett-Koehler Publishers, Inc, 2015) at 53 ("The *Charter of the Forest* "represented an early, though failed, attempt to protect peasants' equal access to nature and its gifts of water, food, fuel and shelter, against centralized extractive control, both private (by the barons) and public (by the king)").

[82] See e.g. John Borrows, "Indigenous Constitutionalism: Pre-existing Legal Geneologies in Canada" in Nathalie Des Rosiers, Patrick Macklem & Peter Oliver, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 13; Jessica Clogg et al*,* "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envtl L & Prac 227; Benjamin Richardson, "The Ties that Bind: Indigenous Peoples and Environmental Governance" in

sustainability as a UCP would advance the project of reconciliation, [83] as well as re-animating the environmental ethic that is latent in western legal traditions.[84]

How would an unwritten constitutional principle of ecological sustainability operate in practice? Beyond its real potential as a catalyst for change in Canada's constitutional and legal culture,[85] a constitutional principle of ecological sustainability could affect the outcome of litigation in important environmental cases. As then Chief Justice Lamer explained in *Provincial Judges Remuneration Reference*:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligation (have "full legal force", as we described it in the *Patriation Reference* [Reference re Resolution to Amend the Constitution, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753]), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.

Courts have seldom invoked unwritten constitutional principles to strike down otherwise constitutional legislation,[86] but the Supreme Court has left open the possibility for these principles to form the basis for a finding of invalidity.[87] In general, UCPs inform the exercise of statutory interpretation in order to arrive at an outcome that complies with the relevant principle.[88]

Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) [Richardson, "Ties that Bind"].

[83] Leclair, *supra* note 49 (postulating that "if the non-human natural world and future generations were added to the list of our foundational principles, of our common mythsm … it could open up a space, within Canada's legal-constitutional thinking, for Indigenous legal/constitutional traditions that *do*, in their very vocabulary and substance, apprehend land as a source of law.").

[84] Capra & Mattei, *supra* note 81 at 31–37.

[85] Collins & Sossin, *supra* note 61 at 326–27; Leclair, *supra* note 49; 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) at 225.

[86] In his empirical review of the use of UCPs by Canadian courts, Di Fruscio reports that Canadian courts used UCPs to invalidate legislation only 14 times between 1982 and 2014, while they relied on UCPs to uphold legislation 15 times during the same period: see "Patriation, Politics and Power: The State of Balance between the Supreme Court and Parliament after Thirty Years of the Charter" (2014) 8 JPPL 29. See also Vincent Kazmierski, "Draconian but not Despotic: the 'Unwritten' Limits to Parliamentary Sovereignty in Canada" (2010) 41:2 Ottawa L Rev 245 at 249.

[87] See *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59.

[88] See e.g. *Wilder v Ontario (Securities Commission)* (2000), 47 OR (3d) 361, 184 DLR (4th) 165 (Sup Ct J); *Giroux v Ontario (Minister of Consumer and Business Services)* (2005), 75 OR (3d) 759, 199 OAC 153 (Sup Ct J); *Forum des maires de la Peninsule acadienne c Canada (Agence canadienne de l'inspection des aliments)*, 2004 FCA 263; *Gigliotti v Conseil d'administration du Collège des Grands Lacs* (2005), 76 OR (3d) 561, 200 OAC 101 (Sup Ct J); *Fédération franco-ténoise c Canada (Procureur général),* 2006 NWTSC 20; *TB c Québec (Ministre de l'Éducation)*, 2007 QCCA 1112; *HN c Québec (Ministre de l'Éducation)*, 2007 QCCA 1111; *Kilrich Industries Ltd v Halotier,* 2007 YKCA 12.

They may also be used to constrain the exercise of administrative discretion. In *Lalonde v Ontario*, for example, the Ontario Court of Appeal referenced the unwritten constitutional principle of respect for minorities when it quashed the decision of an administrative commission to close Ontario's only francophone teaching hospital: Hôpital Montfort. The Court held that the unwritten principle of respect for minorities required the Commission to seriously consider the significance of Montfort to the survival of the Franco-Ontarian community. Moreover, "[t]he fundamental [unwritten] constitutional principle of respect for and protection of minorities, together with the principles that apply to the interpretation of language rights, require that the *French Language Services Act* be given a liberal and generous interpretation".[89] A similar conclusion might be drawn with respect to the UCP of ecological sustainability and the interpretation of environmental legislation.

The Supreme Court of Canada has had recourse to unwritten constitutional principles in some of the most momentous cases of our time. For example, unwritten constitutional principles were invoked to prevent the province of Manitoba from becoming a lawless jurisdiction in *Manitoba Language Rights*,[90] to provide a just framework for the secession debate in *Quebec Secession Reference*,[91] and to preserve freedom of expression in the pre-*Charter Reference re Alberta Statutes*.[92] Where the problem before the court "…threatens the primary conditions of … community life within a legal order",[93] or is "…inconsistent with human society"[94] the court is willing to invoke UCPs to solve it.[95] Threats to ecological sustainability clearly meet this threshold of seriousness.

b. The unwritten principle of ecological sustainability

The Supreme Court of Canada has described environmental protection in terms that are commensurate with constitutional protection on a number of occasions.[96] In *British Columbia v Canadian Forest Products Ltd*,[97] the Supreme Court held that a provincial government could recover money damages for harm to natural resources and raised, as unresolved issues for another day, "the Crown's potential liability for *inactivity* in the face of threats to the environment [and] the existence or non-existence of

[89] *Lalonde v Ontario* (2001), 56 OR (3d) 505, 208 DLR (4th) 577 at para 188 (CA).

[90] *Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1 [*Re Manitoba Language Rights*].

[91] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

[92] *Ibid* at para 62.

[93] *Saumur v Quebec (City),* [1953] 2 SCR 299 at 329, [1953] 4 DLR 641.

[94] *Re Manitoba Language Rights*, *supra* note 90 at para 60.

[95] See Wruck, *supra* note 49.

[96] 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.

[97] 2004 SCC 38 [*BC v CANFOR*].

enforceable fiduciary duties owed to the public by the Crown in that regard[...]"[98] In the course of its decision, the Court summarized its understanding of environmental protection as follows:

> ...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:
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> > ...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... environmental protection [has] emerged as a *fundamental value* in Canadian society' ...[99]

In *Ontario v Canadian Pacific Ltd*,[100] the majority of the Supreme Court of Canada adopted the following passage from the Law Reform Commission of Canada's report, *Crimes Against the Environment,* recognizing "the right to a safe environment":

> To some extent, this right and value appears to be new and emerging, but in part because it is an extension of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as quality of life, and stewardship of the natural environment. At the same time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the sanctity of life, the inviolability and integrity of persons, and the protection of human life and health. [101]

Lower courts have repeatedly referred to the Supreme Court of Canada's environmentally progressive *dicta* and have described environmental protection in ways that suggest an importance beyond that of ordinary statutory objectives. In *TransCanada Pipelines Ltd*, the Ontario Superior Court of Justice held that provincial fire safety legislation applied to a federally regulated pipeline operation, noting that "[l]egal measures to protect the environment 'relate to a public purpose of super-ordinate importance'… It follows that courts should not be quick to render such legal

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[98] *Ibid* at para 81.

[99] *Ibid* at para 7 [emphasis added, citations omitted].

[100] [1995] 2 SCR 1031, 125 DLR (4th) 385.

[101] *Ibid* at para 55 [emphasis in original]. This passage was quoted again in *R v Hydro-Québec*, [1997] 3 SCR 213, 125 DLR (4th) 385 in which the Court upheld the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 as a valid exercise of federal power.

measures ineffective or inapplicable in the absence of compelling reasons to do so."[102] In *Labrador Inuit Assn v Newfoundland (Minister of Environment & Labour)*, the Newfoundland & Labrador Court of Appeal said:

> If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of [environmental] legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.[103]

Should courts connect the constitutional dots between the criteria for recognition as a UCP and the jurisprudence on environmental protection, a number of key areas of environmental litigation and practice would be affected. In particular, articulation of a UCP of ecological sustainability would affect the exercise of environmental discretion, the resolution of division of powers debates in environmental regulation, the court's treatment of Indigenous legal principles dealing with the environment, and the adjudication of environmental claims under the *Charter*.

i. Ecological sustainability and the exercise of discretion

Administrative discretion has played a major role in the failures of environmental law in Canada and beyond;[104] the problem of excessive discretion in Canadian environmental governance has been thoroughly canvassed in the literature.[105] To summarize this rich and complex area, Canadian environmental legislation is characterized by profound and pervasive discretion that has frequently allowed regulators to effectively circumvent the stated purposes of key environmental statutes.[106] Environmental acts and regulations grant decision-makers the *power* to take protective actions but rarely impose an *obligation* to do so, and years of data demonstrates that environmental discretion is too often exercised in service of business

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[102] *TransCanada Pipelines v Ontario (Ministry of Community Safety and Correctional Services),* [2007] OJ No 3014 at para 68 (QL) (Sup Ct J).

[103] (1997), 155 Nfld & PEIR 93, 152 DLR (4th) 50 at para 11.

[104] Collins & Sossin, *supra* note 61 at 296–303; Dayna Nadine Scott, "Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution" (2008) 46:2 Osgoode Hall LJ 293.

[105] See e.g. i*bid*; Andrew Green, "'An Enormous Systemic Problem'? Delegation, Responsibility and Federal Environmental Law" (2016) 28 J Envtl L & Prac 155; Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Oxford: Hart Publishing, 2018) at chapter 2 [Stacey, *Constitution*]; Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2015) 52:3 Osgoode Hall LJ 985 [Stacey, "Environmental Emergency"].

[106] Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 JELP 111; Boyd, *Unnatural Law*, *supra* note 15 at 256 (noting that Canadian environmental laws are chronically "undermined by their broadly discretionary nature").

interests rather than human health and the environment.[107] Although some degree of discretion is necessary to enable environmental regulators to respond to the ever-changing landscape of environmental protection,[108] the absence of any constitutionalized ecological principle has been a major defect in Canadian environmental governance.[109] This explains how a nation with such a rich web of environmental regulation at the federal, provincial, and municipal levels could suffer from such serious and chronic environmental challenges.[110]

An unwritten constitutional principle of ecological sustainability would draw an outer limit around the permissible exercise of discretion in environmental decision-making. In particular,

> the UCP of ecological sustainability could ensure that where a judgment call involves possible interpretations which will preserve ecological integrity or which will undermine it, the decision-maker would be obliged to choose from among the environmentally protective options. While balancing competing interests and possible interpretive paths would remain a key role for public officials, the constitutional thumb would be on the scale of protecting and preserving environmental wellbeing.[111]

Arguably, a constitutional principle of ecological sustainability could limit not only *how* discretion is exercised, but *how much* discretion is allocated to decision-makers in the first place. As already noted, most Canadian environmental legislation empowers, but does not require, regulatory officials to take action to ensure environmental protection. If the constitution includes a principle of ecological sustainability, it may be that legislation should be drafted or interpreted to include a positive obligation to take action to prevent or remedy serious environmental harm.

ii. Ecological sustainability and statutory interpretation

The presumption of constitutionality is a canon of statutory interpretation in Canada.[112] In other words, if courts can find a plausible interpretation of a given statute that complies with the Constitution, it will prefer this over competing interpretations that do not. As a result, the UCP of ecological sustainability could significantly change the dynamics of environmental litigation involving questions of statutory interpretation. While the Supreme Court of Canada has generally favoured an "expansive" and

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[107] *Ibid*.

[108] Stacey, "Environmental Emergency", *supra* note 105. See also Jocelyn Stacey, *Constitution*, *supra* note 105.

[109] Collins & Sossin, *supra* note 61 at 296–305.

[110] See e.g. Boyd, *Cleaner, Greener, Healthier*, *supra* note 20 (detailing serious human health effects due to preventable environmental factors).

[111] Collins & Sossin, *supra* note 61 at 324.

[112] Joseph Eliot Magnet, "The Presumption of Constitutionality" (1980) 18:1 Osgoode Hall LJ 87.

purposive interpretation of environmental legislation,[113] legal challenges continue to come forward and courts have occasionally weakened environmental protection through their decisions.[114] Perhaps most (in)famous is the decision of the Federal Court in *Friends of the Earth v Canada*.[115] There, the court held that a provision in the *Kyoto Protocol Implementation Act* requiring the government to produce a plan that "shall ensure" Canada's compliance with the *Kyoto Protocol* was not justiciable. The government's plan explicitly admitted that it would not even attempt compliance with Kyoto, the statute required it to seek such compliance, yet the courts denied any remedy. In the aftermath of *Friends of the Earth*, the federal government withdrew from the *Kyoto Protocol* and the pace of greenhouse gas emissions (GHG) in Canada accelerated.[116] This is particularly troubling given that, during this same period, climate science was signalling an increasingly urgent need for dramatic reduction in GHG emissions in Canada and globally. In *Friends of the Earth*, consistency with the UCP of ecological sustainability would hopefully have led the court to conclude that the term "shall" had its usual obligatory meaning and that the provision was justiciable.[117]

More broadly, recognition of the UCP of ecological sustainability might deter industries from embarking on costly litigation in which they advance unsustainable interpretations of environmental litigation. In *R v Kingston*, for example, the accused municipality argued that pollution could only be viewed as "deleterious" within the meaning of s 36(3) of the *Fisheries Act* if it rendered the entire receiving body of water (in this case the Cataraqui River) deleterious to fish. Although such an interpretation would almost certainly lead to an ecological "death by a thousand cuts", the Superior Court accepted it and overturned convictions by the Justice of the Peace. The Ontario Court of Appeal rejected this approach and restored the conviction, but the entire process consumed substantial government resources. A clear articulation of the constitutional status of ecological sustainability could take clearly under-protective interpretations off the table, reducing litigation, and allowing governments to focus their attention on improving environmental protection, rather than fighting to maintain the integrity of existing regulatory provisions.

iii. Ecological sustainability and the division of powers

Division of powers has been a major focus of litigation challenging the validity of key environmental statutes at both the federal and provincial levels.[118] As held by the

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[113] See e.g. *Castonguay Blasting Ltd v Ontario (Environment),* 2013 SCC 52 at paras 9–12.

[114] See e.g. *Canadian Parks and Wilderness Society v Maligne Tours,* 2016 FC 148.

[115] 2008 FC 1183, aff'd 2009 FCA 297.

[116] Chalifour & Earle, *supra* note 41.

[117] See *Re Manitoba Language Rights*, *supra* note 90 at paras 31ff.

[118] For recent examples, see eg *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181 [*BC Reference*] (reference considering constitutionality of BC's regulation of bitumen to be carried in TransMountain pipeline); OIC 194/2018, online: *Government of Saskatchewan* <publications.saskatchewan.ca/#/products/90892> [Saskatchewan OIC]; OIC 1014/2018, online: *Government of Ontario* <ontario.ca/orders-in-council/oc-10142018> [Ontario OIC] (challenging federal

Supreme Court of Canada, environmental protection is an "abstruse matter that does not comfortably fit within the existing division of powers without considerable overlap and uncertainty".[119] Moreover, "[t]he all-important duty of Parliament and the provincial legislatures to make full use of the legislative powers respectively assigned to them in protecting the environment has inevitably placed upon the courts the burden of progressively defining the extent to which these powers may be used to that end."[120]

For the most part, environmental legislation has survived challenges based on the division of powers. The Supreme Court of Canada has recognized environmental protection as an area of shared jurisdiction and has been consistent in upholding crucial environmental legislation enacted at the federal, provincial, and even municipal levels.[121] The language of these judgments makes clear that the Supreme Court is motivated in large part by the importance of environmental interests. As noted above, the Court has consistently described environmental protection as a compelling underlying value militating in favour of upholding environmental legislation.[122] Thus, in *R v Hydro Quebec*, where the Court upheld the *Canadian Environmental Protection Act* under the federal criminal law power, the court noted that environmental protection is a "public purpose of superordinate importance". In *Ontario v Canadian Pacific Ltd*, in finding the core charging provision of Ontario's *Environmental Protection Act* applicable to a federally regulated railway, the Court described "stewardship of the natural environment" as a "fundamental value". In *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v Hudson (Town)*, in which the Court upheld a municipality's power to ban the non-essential use of pesticides, the Court opened its judgment with the observation that "[o]ur common future, that of every Canadian community, depends on a healthy environment."[123]

Lower courts have also relied on the importance of environmental protection in sustaining the constitutionality of environmental regulation. In its 2018 decision in *Groupe Maison Candiac v Canada*,[124] the Federal Court upheld a habitat protection provision in the *Species at Risk Act* under the federal criminal law power. In so doing, the Court held that the provision was properly designed to suppress an "evil", namely "an imminent threat, caused by human activity, to the survival or recovery of a species at risk, which, like all other species, is essential to maintaining life-sustaining systems

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government's carbon tax); *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100; and *Syncrude Canada Ltd v Attorney General of Canada*, 2014 FC 776.

[119] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 17, 64, 88 DLR (4th) 1.

[120] *R v Hydro-Quebec*, [1997] 3 SCR 213 at para 86, 151 DLR (4th) 32.

[121] See e.g. Neil Hawke, "Canadian Federalism and Environmental Protection" (2002) 14:2 J Envtl L 185; Chalifour, "Making Federalism Work", *supra* note 70.

[122] 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.

[123] *Spraytech v Hudson*, *supra* note 2 at para 7 [emphasis added, citations omitted].

[124] 2018 FC 643.

of the biosphere, the depletion of which, by human activity, no longer needs to be demonstrated, nor does the impact of this depletion on the quality of the environment."[125]

Recognition of an unwritten constitutional principle of ecological sustainability would buttress the courts' purposive approach to division of powers analysis in environmental cases. Although the language used to describe environmental values is commensurate with constitutional protection ("superordinate", "fundamental"), the identification of ecological sustainability as a normative part of our constitutional law would clarify the courts' analysis. Where there is any support at all for the relevant level of government's jurisdiction, the UCP of ecological sustainability suggests that impugned environmental regulation should be upheld whenever necessary to preserve the environmental prerequisites of our legal order.

These guiding principles are particularly timely as ongoing litigation on climate change has brought the question of environmental federalism to the fore once again. As readers of this special issue are no doubt aware, two provinces (Ontario and Saskatchewan) have challenged the federal government's constitutional jurisdiction to set a national minimum price on carbon,[126] and the federal government has challenged British Columbia's power to regulate the transport of [bitumen] across the province.[127] The provincial challenge to federally imposed carbon pricing appears to be largely a political gesture. In her impressive body of scholarship on point, Professor Chalifour has demonstrated authoritatively that the federal government has ample constitutional jurisdiction to regulate climate change through a wide array of regulatory measures including carbon taxes.[128] The UCP of ecological sustainability is not necessary to the resolution of this litigation, but it would be a good opportunity for courts to recognize it, since climate change poses such a fundamental threat to sustainability. In the British Columbia reference regarding provincial regulation of bitumen transport, the UCP of ecological sustainability may well provide helpful guidance to the court, and this will be discussed in more detail in Part 5.

iv. Ecological sustainability and Indigenous law

A crucial aspect in the ongoing process of Reconciliation with Indigenous peoples in Canada is the revitalization and recognition of Indigenous law. "Indigenous legal traditions 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'".[129]

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[125] *Ibid* at para 110.

[126] Saskatchewan OIC, *supra* note 118; Ontario OIC, *supra* note 118.

[127] *BC Reference*, *supra* note 118.

[128] Chalifour, "Making Federalism Work", *supra* note 70; see also Bryan P Schwartz, "The Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals" (2018) 41 Man LJ 211.

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

A central pillar of Indigenous legal traditions in Canada, and around the globe, is right relationship with other members of the natural world.[130] Borrows has demonstrated that Indigenous law enriches the legal toolkit for environmental protection, reflects the agency of Indigenous peoples in the project of sustainability, and entails a paradigm shift away from modes of thought that have produced our current ecological crisis and towards philosophical and legal structures that have the potential to support a sustainable inter-species community on Earth.[131] As one Canadian Indigenous advocate has argued, traditional sources of Indigenous law, including stories and spiritual beliefs, can function as highly effective mechanisms to ensure ecological sustainability:

> In Indigenous legal systems, Creation stories are often crucial. They explain how we got here, how we relate to the land and to other living things, and what our responsibilities are. The stories are law. They do what law does: they regulate behaviour. [Indigenous] "beliefs" about what is allowed in [sacred sites] have been as effective, in terms of what people have done there ("practices") for thousands of years, as any zoning by-law, or any provincial land use law.[132]

While it is important to avoid romantic stereotypes that may constrain or fossilize Indigenous legal principles, there is no question that Indigenous peoples have a long history of relating sustainably to their lands over time.[133] Some governments are waking up to this reality, and Indigenous perspectives have already had a major impact on legislative and constitutional provisions and judicial decisions in countries such as Ecuador, Bolivia, New Zealand, and India.[134]

The Supreme Court of Canada implicitly recognized the centrality of sustainability to Indigenous peoples in its decision in *Tsilhqot'in Nation v British*

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[130] See e.g. *ibid* at 243–44 ("The land's sentience is a fundamental principle of Anishinabek law" and contributes to "a multiplicity of citizenship rights and responsibilities for Anishinabek people and the Earth"); JSY Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model" (1996) 23 Man LJ 1 (noting that Mi'kmaq law extends legal personality to non-human members of the natural world and imposes obligations on humans towards their fellow beings); Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envt L & Prac 227; Richardson, "Ties that Bind", *supra* note 82 at 337–70.

[131] Borrows, *Indigenous Constitution*, *supra* note 129; John Borrows, *Living Law on a Living Earth: Aboriginal Religion, Law and the Constitution* (Toronto: Faculty of Law, University of Toronto, 2006); Borrows, "Living Between Water and Rock", *supra* note 48; John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill LJ 629.

[132] Paul Williams, *Factum of the Intervenor, Passamaquoddy Nation at Schoodic*, *Ktunaxa Nation v BC*, SCC No 36664 (Canada). Unfortunately, the Supreme Court of Canada declined to give effect to this argument, rendering a decision that is uncharacteristically regressive and arguably inconsistent with the project of Reconciliation.

[133] See Richardson, "Ties that Bind", *supra* note 82 at 337–70.

[134] See *Constitution of the Republic of Ecuador*, art 71, online: *Political Database of the Americas* <pdba.georgetown.edu/Constitutions/Ecuador/english08.html>; Erin Daly, "The Ecuadorian Exemplar" (2012) 21:1 RECIEL 63; Catherine J Iorns Magallanes, "Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment" (2015) 21:2 Widener L Rev 273.

Columbia.[135] There, the Court held that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land",[136] and further that Aboriginal title lands cannot be put to uses that would "destroy the ability of the land to sustain future generations of Aboriginal peoples."[137] While this is an encouraging recognition both of Indigenous legal principles and the imperative of sustainability, this holding needs to be generalized to non-Indigenous people within Canada. Rather than imposing a normative obligation of sustainability uniquely on Indigenous peoples in relation to their Aboriginal title lands, the Supreme Court should recognize an unwritten constitutional principle of ecological sustainability that binds all state actors, including courts, throughout Canada.[138] Leclair elaborates:

> What would happen if the non-human natural world and future generations were added to the list of our foundational principles, of our common myths? First of all, it could open up a space, within Canada's legal-constitutional thinking, for Indigenous legal/constitutional traditions that *do*, in their very vocabulary and substance, apprehend land as a source of law. Anishinaabe law, for instance, is partly developed from observation of the physical world. If such Indigenous legal traditions were allowed to permeate our general understanding of law, it could lead us to endow natural physical entities with specific legal interests.[139]

While acknowledgment of an ecological UCP is only one small step in the recognition of Indigenous law, it could be a significant one. As Indigenous peoples struggle against pipelines and other extractive projects throughout the country,[140] it would be helpful to be able to invoke, as a fundamental principle of Canada's constitution, an ecological principle that is cognizable in Indigenous legal orders.

v. Ecological sustainability and environmental rights under the *Charter*

Since the *Stockholm Declaration* of 1972, rights-based approaches to environmental protection have risen to prominence in regional, international and domestic constitutional law around the world. Globally, a strong majority of states recognize an environmental right – typically framed as "the right to a healthy environment" – in their constitutions either explicitly or by reference to regional treaties that include such

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[135] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44.

[136] *Ibid* at para 86.

[137] *Ibid* at para 121.

[138] See Leclair, *supra* note 49.

[139] Leclair, *supra* note 49, citing John Borrows "Anishinaabe Language and Law", unpublished manuscript; e.g. John Borrows, "Indigenous Constitutionalism: Pre-existing Legal Geneologies in Canada" in Nathalie Des Rosiers, Patrick Macklem & Peter Oliver, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 13.

[140] See generally Dayna Nadine Scott, "Situating Sarnia: 'Unimagined Communities' in the New National Energy Debate" (2013) 25 J Envtl L & Prac 81.

a right.[141] Several countries that have not codified environmental rights in their constitutions have nonetheless acquired them through judicial interpretation. Courts in India, Nigeria, and Kenya, for example, have interpreted the constitutional right to life to include the right to adequate environmental conditions for a life of dignity.[142] Such a ruling has yet to occur in Canada, but the theory is clearly applicable in our constitutional context. As I have explained elsewhere, success on an environmental claim under the *Charter* does not depend on convincing a court to import any new content into existing *Charter* rights. It simply requires the court to recognize that existing rights may be violated by serious state-sponsored environmental harm.[143]

While Canadian courts have been slow to recognize environmental rights, the recognition that state-sponsored environmental harm can violate the *Charter* is almost inevitable.[144] In particular, such a pronouncement is highly likely to emerge as a result of ongoing litigation concerning the Ontario government's role in contaminating the Grassy Narrows First Nation with mercury over a period of decades.[145] If indeed it is only a matter of time before environmental protection makes its way into Canadian constitutional law via the *Charter*, one might reasonably question the added value of an unwritten constitutional principle of ecological sustainability. In this context, the UCP of ecological sustainability could operate in at least four ways.

First, just as the UCP of respect for minorities supports the equality guarantee in section 15, an ecological UCP would provide general support for the more specific environmental entitlements that may be found under various sections of the *Charter* – or indeed under an explicit right to a healthy environment that may be added to the constitutional text in the future. Second, the UCP of ecological integrity would play a particularly significant role in *Charter* claims under section 7. Although

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[141] See David Richard Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (Vancouver: UBC Press, 2012).

[142] 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 Tul J Int'l & Comp L 1 at 34–35 (collecting examples).

[143] See generally Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada: The First Step Is Admitting We Have a Problem" (2016) 29 J Envtl L & Prac 305; Lynda M Collins, "Safeguarding the *Longue Durée*: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR (2d) 519 [Collins, "Safeguarding the *Longue Durée*"]; Chalifour & Earle, *supra* note 41; 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 J Human Rights & Environment 79; see also Sophie Thériault and David Robitaille, "Les Droits Environnementaux Dans La Charte Des Droits Et Libertés De La Personne Du Québec: Pistes De Réflexion" (2011) 57 RD McGill 211; David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81; Collins, "Ecologically Literate", *supra* note 50. For a definition of "serious state-sponsored environmental harm", see Collins, "Ecologically Literate", *supra* note 50 at 17–18.

[144] See Collins, "Ecologically Literate", *supra* note 50; Collins, "Safeguarding the *Longue Durée*", *supra* note 143; e.g. Nathalie Chalifour, "Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the *Charter*?" (2015) 28 JELP 89 [Chalifour, "Environmental Justice"].

[145] See Collins & Sossin, *supra* note 61 at 309–11.

environmental claims under section 15[146] and perhaps section 2(a)[147] are clearly viable, section 7 is probably the most natural home of generally applicable environmental rights in the *Charter*.[148] One of the challenges for litigants who allege that serious state-sponsored environmental harm has violated their life, liberty, or security of the person is that proof of this first branch of the section 7 test is not sufficient. Having established the relevant deprivation, claimants must go on to show that the deprivation was not in accordance with the principles of fundamental justice. If the deprivation was consistent with such principles then there is no remedy. Recognition of an unwritten constitutional principle of ecological sustainability would help litigants in *Charter* environmental cases implicating environmental harm that is severe or widespread enough to be viewed as a threat to sustainability over the long term, such as climate change.[149] In such cases, the environmental deprivation of an individual's life, liberty, or security of the person could never be viewed as in accordance with the principles of fundamental justice since unwritten constitutional principles undoubtedly fall into this category.

Third, the UCP of ecological sustainability imports a crucial intergenerational and eco-centric aspect to constitutional environmental entitlements. While one constitutional option would be simply to recognize ecological sustainability as a principle of fundamental justice under section 7, this would not help stakeholders – such as future generations and non-human living things[150] – who have no viable claim under that provision. Under an existing rights approach, it is difficult to imagine how a court could adequately protect the rights of future Canadians who are immensely vulnerable to poor environmental decision-making in the present yet lack political representation or even legal personality.[151] Ecological sustainability is an inherently inter-temporal concept and this is a major advantage over a traditional *Charter* rights

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[146] See e.g. Chalifour, "Environmental Justice", *supra* note 144; note that Indigenous environmental rights are well established under s 35, which does not form part of the *Charter*; Collins, "Safeguarding the *Longue Durée*", *supra* note 143 at 526–28; Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap" (2010) 47:4 Alta L Rev 959; Monique M Ross & Cheryk Y Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap, and Fish Under Treaty 8" (1998) 36 Alta L Rev 645; Geoffrey WG Leane, "Indigenous Peoples Fishing for Justice: A Paradigmatic Failure in Environmental Law" (1997) 7 J Envtl L & Prac 279.

[147] Indigenous religious rights in land should be protected by the religious freedom guarantee under the *Charter.* Unfortunately, the Supreme Court of Canada rejected this argument in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*], but the issue will no doubt return to the highest court and one can hope for a more progressive treatment of the issue in future. See Natasha Bakht & Lynda Collins, "The Earth is Our Mother: Protecting Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 1.

[148] Collins, "Safeguarding the *Longue Durée*", *supra* note 143 at 516; Collins, "Ecologically Literate", *supra* note 50; Andrew Gage, "Public Health Hazards and s. 7 of the *Charter*" (2003), 13 J Envtl L & Prac 1. See also 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 Envtl 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 NJCL 191.

[149] See Chalifour & Earle, *supra* note 41.

[150] See generally Leclair, *supra* note 49.

[151] *Ibid*.