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In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada Special Section: Canada and Climate Change

IN SEARCH OF AN ECOLOGICAL APPROACH TO CONSTITUTIONAL PRINCIPLES AND ENVIRONMENTAL DISCRETION IN CANADA

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I. INTRODUCTION

One of the most important and least scrutinized areas of environmental policy is the exercise of administrative discretion. Those committed to environmental action tend to focus on law reform, international treaties, and political commitments—for example, election proposals for carbon taxes and pipelines, or environmental protections in global protocols and trade agreements. Many proponents of stronger environmental protection have focused their attention on the goal of a constitutional amendment recognizing an explicit right to a healthy environment,[1] while others seek recognition of environmental protection within existing *Charter* rights.[2] As the rights conversation evolves,[3] advocates

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1 See e.g. David Suzuki Foundation, "The Blue Dot", online: *Blue Dot* <bluedot.ca>; Margot Venton, Kaitlyn Mitchell, & Pierre Sadik, "Right to a Healthy Environment" online: *Ecojustice* <www.ecojustice.ca/case/right-to-a-healthy-environment>; David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) [Boyd, *The Right to a Healthy Environment*].

2 See e.g. Lynda M Collins, "An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*" (2009) 26 Windsor Rev Legal Soc Issues 7 [Collins, "Ecologically Literate"]; Nathalie J Chalifour, "Environmental Discrimination and the *Charter*'s Equality Guarantee: The Case of Drinking Water for First Nations Living on Reserves" (2013) 43 RGD 183 [Chalifour, "Environmental Discrimination"].

must continue to grapple with the day-to-day reality of how decisions that affect environmental preservation are currently made.

The daily reality of decision making in the environmental sphere most often turns on a group of public servants, working for federal, provincial, municipal, or Indigenous governments (or agencies, boards, and commissions) and exercising statutory discretion. Settings of statutory discretion arise where the statute empowers officials to make a judgment—whether to exercise a specific authority or not, and if so, in what ways and at what times. The judgment calls these officials make—which regulations will accompany environmental legislation, who will be appointed to environmental boards and regulatory agencies, which development proposals to approve, the nature and scope of mitigation requirements to put in place on those developments that are approved, whose voices will have input in the decision making, how statutory criteria will be interpreted, and more—have cumulatively come to define the state of environmental protection in Canada.

Because of the importance of discretion in so many critical areas for environmental preservation, we argue this area merits deeper scrutiny. We also see a compelling link between recognizing constitutional principles in the field of ecological sustainability on the one hand, and cohering the exercise of discretion around principles of environmental preservation on the other. Constitutional principles that guide administrative discretion may come from several sources. In this study, we focus on the potential of underlying or unwritten constitutional principles (UCP) to ensure environmental discretion is not exercised in ways that are inconsistent with the values of ecological sustainability.

This analysis will proceed in three stages. First, we explore the dynamics of discretion in environmental law in Canada. Second, we advance the view that ecological sustainability should be recognized as an underlying or unwritten constitutional principle, which could function as an effective constraint on environmental discretion. Third,

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[3] See e.g. Lynda M Collins, "Safeguarding the *Longue Durée*: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR (2d) 519 [Collins, "Safeguarding the *Longue Durée*"].

we analyze the principle of ecological sustainability through the lens of reconciliation with Indigenous peoples and section 35 of the *Constitution Act, 1982*.[4] We conclude that ecological sustainability is an underlying principle of the Canadian constitutional order and that its recognition by courts and governments could be a meaningful step towards securing our common future.

DISCRETION IN ENVIRONMENTAL LAW

Canadian environmental law is characterized by profound and pervasive discretion at every level of decision making.[5] While some discretion is clearly necessary and important to the day-to-day decision making of environmental regulators, there is a deep tension between the salutary text of many environmental statutes and the troubling results of discretionary decisions on the ground.[6] In this section, we explore the

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4 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5 See David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) [Boyd, *Unnatural Law*]; Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2015) 52:3 Osgoode Hall LJ 985 [Stacey, "Environmental Emergency"].

6 See Stacey, "Environmental Emergency", *supra* note 5. See also "Living Planet Report: Canada" (7 September 2017), online: *World Wildlife Fund Canada* <www.wwf.ca/newsroom/reports/lprc.cfm> ["Living Planet Report"]; Environmental Commissioner of Ontario, "Good Choices, Bad Choices: Environmental Rights and Environmental Protection in Ontario" (24 October 2017), online (pdf): *Environmental Commissioner of Ontario* <docs.assets.eco.on.ca/reports/environmental-protection/2017/Good-Choices-Bad-Choices.pdf> ["Good Choices, Bad Choices"]; David R Boyd, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC Press, 2015) [Boyd, *Cleaner, Greener, Healthier*]; Jan Burck, Franziska Marten & Christoph Bals, "The Climate Change Performance Index: Results 2014" (November 2013), online (pdf): *Germanwatch* <germanwatch.org/sites/germanwatch.org/files/publication/8599.pdf>; "Country Profile of Environmental Burden of Disease: Canada" (22 June 2009), online (pdf): *World Health Organization* <www.who.int/quantifying_ehimpacts/national/countryprofile/canada.pdf?ua=1>.

sources and exercise of discretion in environmental contexts, and the relationship between the exercise of discretion and the rule of law.

A. The Sources and Exercise of Environmental Discretion

Discretion may arise in many ways that are relevant to environmental decision making,[7] but in this study, we focus on two contexts. First, the executive branch is empowered under statutes to make regulations for the implementation or enforcement of statutory standards. While statutes are the subject of parliamentary debate and public scrutiny, regulations tend to be issued with far less attention and oversight. Second, executive officials under both statutes and regulations are empowered to exercise discretion over particular decisions (to approve or reject proposals, to issue or refuse to issue permits, etc.). Each of these settings of discretion has the potential to undermine the environmental protections that Parliament or provincial and territorial legislatures have put in place.

Parliament and the provincial legislatures have enacted broad framework statutes that appear highly protective but are chronically "undermined by their broadly discretionary nature".[8] As David R. Boyd has explained, "[e]nvironmental laws are almost always drafted in such a way as to give Canadian governments the *power* to take action or meet specified standards but *no duty* to take action or meet those standards."[9]

The hallmark of discretion as a legal concept is that decision makers may exercise choice and apply judgment where it is present. Those choices and judgments are always demarcated by legal authority and are guided in broader ways by the purposes and goals (whether explicit or implicit) that the statutory authority is intended to advance. Moreover, as Jocelyn Stacey notes:

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7 See generally Anna Pratt & Lorne Sossin, "A Brief Introduction of the Puzzle of Discretion" (2009) 24:3 CJLS 301.

8 Boyd, *Unnatural Law*, *supra* note 5 at 231.

9 *Ibid* [emphasis in original].

> Many of the details and difficult trade-offs required by environmental statutes are left to regulations. This means that the executive has discretion both over whether to issue regulations and what those regulations should say .... [R]egulations issued by the executive exist in a legal black hole: The failure to issue regulations is not justiciable, regulations are subject only to *vires* review, and they are not subject to the requirements of procedural fairness.[10]

Tensions emerge when the exercise of discretion appears out of alignment with the goals of the statutory authority. The discretion exercised through environmental regulations, for example, often appears inconsistent with the overarching goals of their enabling legislation. Consider the core charging provision of Ontario's *Environmental Protection Act*,[11] which states that "a person shall not discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment, if the discharge causes or may cause an adverse effect",[12] with "adverse effect" defined broadly to include, *inter alia*, "impairment of the quality of the natural environment for any use that can be made of it, injury or damage to property or to plant or animal life, harm or material discomfort to any person, [and] an adverse effect on the health of any person."[13] This provision would appear to provide meaningful protection for human health and ecological integrity in Ontario. However, under the regulation-making powers in the *EPA*,[14] the Lieutenant Governor in Council has authorized the discharge of a plethora of substances at levels that are known to cause serious harm to human health and the environment.[15] Indeed, the ministry even has the

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10 Stacey, "Environmental Emergency", *supra* note 5 at 1006.

11 RSO 1990, c E 19 [*EPA*].

12 *Ibid*, s 14(1).

13 *Ibid*, s 1(1).

14 *Ibid*, ss 175.1–177.

15 See e.g. "Good Choices, Bad Choices", *supra* note 6 ("Ontario's air standards for some pollutants do not sufficiently protect human health" at 127); Boyd, *Cleaner, Greener, Healthier*, *supra* note 6.

discretion to make regulations that set no emissions limit at all and make no attempt to reach health-based standards.[16]

In one of Canada's most polluted airsheds, the Indigenous community of Aamjiwnaang (near Sarnia),[17] for example, the Province of Ontario has negotiated a special technical standard with industry for the carcinogenic pollutant benzene. Instead of being required to meet the regular health-based standard that applies elsewhere in Ontario, the six petrochemical and petroleum facilities located closest to the Aamjiwnaang community are allowed "to install the best available technology that is 'economically achievable' rather than meet the health-based standard, regardless of the impact on Aamjiwnaang."[18] The new technical standard for benzene contains no hard limit on emissions

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16 "Good Choices, Bad Choices", *supra* note 6 at 129.

17 See "Sarnia Takes Title for Worst Air in Canada" (20 November 2012), online (blog): *Ecojustice* <www.ecojustice.ca/blog/sarnia-takes-title-for-worst-air-in-canada>; "Public Health, Environmental and Social Determinants of Health (PHE)" (last visited on 14 November 2018), online: *World Health Organization* <www.who.int/phe/health _topics/outdoorair/databases/en/index.html> (to access the World Health Organization's raw data). See also Dayna Nadine Scott, "Situating Sarnia: 'Unimagined Communities' in the New National Energy Debate" (2013) 25 J Envtl L & Prac 81 [Scott, "Situating Sarnia"]; Dayna Nadine Scott, "Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution" (2008) 46:2 Osgoode Hall LJ 293; 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; Emma McIntosh, "Ontario Government Ignored Health Warnings from Its Own Engineers about Sarnia's Chemical Valley, Report Claims", *The Star* (17 October 2017), online: <thestar.com/news/canada/2017/10/17/ontario-government-ignored-health-warnings-from-its-own-engineers-about-sarnias-chemical-valley-report-claims.html>.

18 "Good Choices, Bad Choices", *supra* note 6 at 129. See also Bruce Pardy, "In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem" (2005) 1:1 JSDLP 29 [Pardy, "Holy Grail"] (the uneven application of environmental laws arguably raises its own rule of law concerns. Pardy asks the reader to "consider a law that prohibited only selected categories of people from drinking and driving. If that law exempted some people, and thus allowed them to drive drunk—those who resided in particular neighbourhoods, perhaps—one would have no difficulty in concluding that the law was awry" at 51).

of this highly toxic chemical.[19] As explained below, such regulatory decisions are difficult to challenge under public law and the *EPA* has also attempted to exclude liability under private law.[20]

In addition to the important discretion to make regulations, environmental regulators enjoy a whole suite of discretionary powers to issue and amend site-specific approvals and administrative orders (such as stop orders or control orders), and to decide whether to investigate and/or prosecute environmental violations. Taking up the Aamjiwnaang example once again, the Environmental Commissioner of Ontario has identified a number of reasons for this community's remarkably high levels of pollution, including the ministry's failure to include certain kinds of emissions (notably gas flaring) in its regulatory calculations and its inadequate treatment of cumulative impacts from the multiple sources of pollution in Aamjiwnaang.[21] The Commissioner explains that "Ontario regulates each facility's air emissions as if it were the only emitter".[22] In communities with one or two significant polluters, this legal fiction may have little practical significance. In a pollution hotspot

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19 See "Good Choices, Bad Choices", *supra* note 6. See also Environmental Registry Policy Decision #012-6857 Re: *Petroleum Refining—Industry Standard under the Local Air Quality Regulation*, O Reg 419/05; Environmental Registry Policy Decision #012-6859 Re: *Petrochemical—Industry Standard under the Local Air Quality Regulation*, O Reg 419/05.

20 See *EPA*, *supra* note 11 ("[n]o action or other proceeding shall be brought against the Crown, the Minister or an employee or agent of the Crown because of anything arising out of or in relation to a matter carried on or purported to be carried on pursuant to a regulation that exempts a person from the requirement to obtain a licence, environmental compliance approval, renewable energy approval or permit" at s 177.1).

21 "Good Choices, Bad Choices", *supra* note 6 at 127-38.

22 *Ibid* at 130. See also Pardy, "Holy Grail", *supra* note 18 ("[o]ne of the main defects in modern environmental law is its disregard for total load, or the cumulative environmental impact created by all human activity—past, present, and future. Instead, to the extent that human actions are regulated, they are regulated as isolated events" at 38).

such as Aamjiwnaang, it is literally a life-threatening defect in environmental policy.[23]

The phenomenon of framework legislation whose goals of environmental protection can be undermined by the broad discretion accorded to public officials is mirrored at the federal level. For example, section 35(1) of the *Fisheries Act* prohibits "any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery",[24] but section 35(2) permits the Minister to "authorize such harm pursuant to whatever terms and conditions he or she deems fit."[25] Even in the national parks, where one might reasonably expect environmental protections to be strongest, section 67 of the *Canadian Environmental Assessment Act, 2012* (*CEAA*) grants parks officials the discretion to exempt certain projects from environmental assessment where they determine that a project is not likely to cause an adverse effect.[26] Freedom of information requests by the Canadian Parks and

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[23] In 2009, members of the Aamjiwnaang First Nation filed an application under Ontario's *Environmental Bill of Rights (EBR)*, requesting the government reassess the approach to air pollution regulation in communities with multiple sources of pollution. The *EBR* requires the Minister to respond to such Applications within a reasonable time. Eight years after filing the request, the Applicants still have yet to receive a response and they have now filed an application for judicial review alleging that this long delay is unreasonable. See e.g. Allison Jones, "Ontario First Nation Resident Seeks Long-Promised Air Pollution Review", *The Globe and Mail* (30 July 2017), online: <www.theglobeandmail.com/news/national/ontario-first-nation-resident-seeks-long-promised-air-pollution-review/article35840483>.

[24] RSC 1988, c F-14, s 35(1).

[25] See Martin Olszynski, "Environmental Laws as Decision-Making Processes (or, Why I Am Grateful for Environmental Groups this Earth Day)" (22 April 2015), online (blog): *ABlawg: The University of Calgary Faculty of Law Blog* <www.ablawg.ca/2015/04/22/environmental-laws-as-decision-making-processes-or-why-i-am-grateful-for-environmental-groups-this-earth-day>. See also Bruce Pardy, "Abstraction, Precedent, and Articulate Consistency: Making Environmental Decisions" (1998) 34:2 Cal WL Rev 427; Bruce Pardy, "Planning for Serfdom: Resource Management and the Rule of Law" (1997) NZLJ 69.

[26] SC 2012, c 19, s 52, s 67.

Wilderness Society have revealed that, between 2013 and 2016, "Parks Canada determined that none of 1533 projects approved in that time were likely to cause significant adverse environmental effects".[27] The provision that allows Parks Canada to exempt projects from environmental assessment was added to the *CEAA* as part of a suite of amendments made by the Canadian government under Prime Minister Harper in 2012, which "dramatically weakened [the *Act*], imposing short time periods for the completion of assessments, transferring decision-making powers to provincial and territorial governments, limiting public participation, and reducing the number of federal assessments from thousands each year to less than two dozen."[28]

In the same period, other steps were taken that significantly eroded environmental protections, including amendments to the *Fisheries Act* that eviscerated key habitat protection provisions, the repeal of the *Kyoto Protocol Implementation Act*, and the weakening of the *Species at Risk Act*.[29] The inconsistent efficacy of Canadian environmental legislation derives not only from administrative discretion (and habitual judicial deference, as discussed below), but also from the ever-present threat of such legislative rollbacks. In the absence of any constitutional limits, governments are free to sacrifice long-term environmental health to short-term political goals. The backward momentum in environmental law under the Harper government arguably could not have occurred with respect to employment equity or same-sex spousal rights, for example, because of the constitutional backstop.

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[27] Alison Woodley & Anne-Marie Syslak, "Restoring Legal Rigour to Environmental Assessments in National Parks: CPAWS Submission to the Expert Review Panel on Environmental Assessment" (23 December 2016) at 3, online (pdf): *Expert Panel: Review of Environmental Assessment Processes* <eareview-examenee.ca/wp-content/uploads/uploaded_files/cpaws-submission-to-review-panel-dec-23.pdf>.

[28] Lynda M Collins & David R Boyd, "Non-Regression and the *Charter* Right to a Healthy Environment" (2016) 29 J Envtl L & Prac 285 at 288. See also *Jobs, Growth, and Long-term Prosperity Act*, SC 2012, c 19.

[29] See Collins & Boyd, *supra* note 28 at 287–89.

To summarize, Canadian environmental law suffers from the pervasive effect of discretionary powers that allow the executive branch to pass regulations setting standards that fail to protect human or ecosystem health, and exempt industry from protective requirements that would otherwise apply, among other rules and decision making that appear at odds with the purpose of the statutes under which the regulations have been made. Additionally, the exercise of discretionary powers in Canada has proven susceptible to similar influences, such as decisions not to prosecute offenders when existing standards were violated.[30]

Decades worth of data demonstrate that regulatory discretion in environmental law is habitually exercised in favour of commercial rather than environmental interests,[31] and the results of this phenomenon are serious. The World Health Organization has estimated that environmental burdens cause or contribute to 36,800 premature deaths in Canada each year.[32] Canada's under-protective environmental regime also undermines the sustainability of agriculture, fisheries, and forestry—the lifeblood of millions of Canadians. Iconic Canadian species such as the polar bear, woodland caribou, and right whale are threatened or endangered.[33] Globally, Canada's environmental record is weak in comparison with other industrialized nations.[34] We have failed to do our part to prevent or mitigate climate change and, indeed, we continue to move forward with the exploitation of Alberta's oil sands, which contribute to both global climate change and local environmental

30 See Jason MacLean, "Striking at the Root Problem in Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29:1 J Envtl L & Prac 111; Lynda Collins, "Tort, Democracy and Environmental Governance: Crown Liability for Environmental Non-Enforcement" (2007) 15:2 Tort L Rev 107.

31 See e.g. Boyd, *Unnatural Law*, *supra* note 5; MacLean, *ibid.*

32 "Country Profile of Environmental Burden of Disease: Canada", *supra* note 6.

33 See "Living Planet Report", *supra* note 6.

34 See Boyd, *Cleaner, Greener, Healthier*, *supra* note 6 at 6–11; Laurel Sefton MacDowell, *An Environmental History of Canada* (Vancouver: UBC Press, 2012).

illness.[35] In addition to causing harm to human health and the environment, discretion in Canadian environmental law highlights the tension between the rule of public officials and the rule of law.

B. Environmental Discretion and the Rule of Law

There are a number of administrative law and constitutional principles that act as limits to the exercise of environmental discretion. For example, within the bounds of statutory authority, administrative law recognizes both procedural and substantive limits to the exercise of discretion at common law. As discussed below, however, this existing legal accountability under administrative law does little to actually guide the content of discretionary decision making, and too often amounts to an ineffective and cosmetic check on the problems with discretion.

Procedurally, administrative law requires that those affected by discretionary decisions have an opportunity to be heard before the discretion is exercised, and includes subsidiary rights to notice, disclosure, reasons, and so forth. Additionally, those affected by such decisions are entitled to a decision-making process that is sufficiently impartial and independent, which includes both individual features (to ensure a particular official exercising discretion is not biased in the mind of a reasonable observer) and institutional features (to ensure that decision makers generally are not subject to improper influences). Importantly, these procedural protections are limited to individual decision making and do not extend to the making of regulations.[36]

Moreover, because these are common law protections, they can be overridden by statute. In *Imperial Oil*,[37] for example, the Supreme Court

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[35] See MacDowell, *supra* note 34.

[36] See *Inuit Tapirisat et al v Canada (Attorney General)*, [1980] 2 SCR 735, 115 DLR (3d) 1. See also Geneviève Cartier, "Administrative Discretion: Between Exercising Power and Conducting Dialogue" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013), 381 at 383–84.

[37] *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at paras 25–28 [*Imperial Oil*].

affirmed the legislature's ability to significantly curtail procedural protections in the context of polluter pay legislation, provided the statute in question did not contravene constitutional standards. This case reaffirmed the common law nature of administrative law accountability—it can fill in gaps where the statute does not set out a specific process, but these procedural guarantees can also be modified or eliminated altogether where a statute expressly provides. This principle represents parliamentary supremacy on the one hand, but a key limitation of administrative law protections on the other hand.

Another limitation is that enforcing administrative law procedural protections requires that some person, group, or entity challenge a decision in court. Beyond the significant access to justice barriers, such as cost and complexity involved in judicial review, it is not always easy to determine the scope of affected parties when it comes to environmental decisions—is it the particular owner of an affected property, or people who live in the vicinity and whose air and water quality may be adversely affected, or a broader group that uses or needs access to an area for their well-being?[38]

With respect to substantive challenges to the exercise of administrative discretion in environmental contexts, administrative law recognizes a range of constraints that can be the subject of judicial review challenges (subject to the same challenges with respect to standing noted above). Significantly, in the context of specialized areas of public decision making, such as environmental law, decision makers will be accorded deference by the courts when reviewing their decisions on substantive grounds.[39] Generally, the question for the courts is whether a

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[38] See Jamie Benidickson & Heather C McLeod-Kilmurray, "The Role of the Judiciary in Environmental Governance: Canada" in Louis Kotze & Alexander R Paterson, eds, *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law International, 2009) at 209–48.

[39] See generally Andrew Green, "An Enormous Systemic Problem: Delegation, Responsibility and Federal Environmental Law" (2016) 28:2 J Envtl L & Prac 155 [Green, "An Enormous Systemic Problem"]; Jason MacLean & Chris Tollefson, "Climate-Proofing Judicial Review After Paris: Judicial Competence, Capacity, and Courage" (2018) 31:3 J Envtl L & Prac 245 at 247–52; Andrew Green, "Discretion,

minister or delegate's discretionary decision was "reasonable."[40] The grounds for alleging a discretionary decision was unreasonable include that it was exercised in bad faith or for improper or discriminatory purposes, failed to consider relevant factors or considered irrelevant factors, did not meet a standard of "justification, transparency[,] and intelligibility", or interpreted a statutory or regulatory provision in a way that cannot be reasonably sustained.[41]

Because of the limitations of administrative law in overseeing administrative discretion, it is important to explore accountability for discretionary decision making under the Constitution. It is to this question that our analysis now turns.

One aspect of such accountability under the Constitution flows from Canadian federalism.[42] In *R v Crown Zellerbach Canada Ltd*,[43] for example, the Supreme Court affirmed that environmental protection (in that case, the control of marine pollution) could constitute a matter of national concern enabling the federal government to legislate in areas that otherwise do not fall under federal jurisdiction. The Court held that:

> [T]o qualify as a matter of national concern, it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern, and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of

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Judicial Review and the *Canadian Environmental Assessment Act*" (2002) 27:2 Queen's LJ 785.

40 *Dunsmuir v New Brunswick*, 2008 SCC 9.

41 *Ibid* at paras 44–51.

42 See Errol Meidinger, Daniel Spitzer & Charles Malcomb, "Environmental Principles in US and Canadian Law" in Ludwig Krämer & Emanuela Orlando, eds, *Principles of Environmental Law* (Edward Elgar Publishing, 2016) 405. See also Herman Bakvis, Gerald Baier & Douglas Brown, "The Environmental Union" in *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Oxford University Press, 2009), 205; Alexis Bélanger, "Canadian Federalism in the Context of Combating Climate Change" (2011) 20:1 Const Forum Const 21.

43 [1988] 1 SCR 401, 49 DLR (4th) 161 [*Crown Zellerbach*].

> legislative power under the Constitution . . . . [I]t must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned.[44]

Because marine pollution affects Canada as a whole, it qualified as a matter of national concern falling within the federal peace, order, and good government power. A similar conclusion will almost certainly be reached in the ongoing lawsuits by several provinces challenging the federal government's constitutional capacity to set a baseline price on carbon emissions.[45]

The Supreme Court also has recognized broad federal jurisdiction over environmental protection based on its criminal law power under the *Constitution Act, 1867*. In *Hydro-Québec*,[46] the Court upheld contested provisions of the *Canadian Environmental Protection Act* (CEPA) as a valid exercise of criminal law. Since the *Hydro-Québec* decision, the Supreme Court has moderated the scope of this jurisdiction to some extent, recognizing that too broad a definition of criminal law presents risks. The Court in *Hydro-Québec* also expressed some reticence in relying on the national dimensions doctrine from *Crown Zellerbach*, given its even greater impact on the balance of powers within Canadian federalism.

While Canadian federalism represents an important context and backdrop for constitutional principles in relation to environmental protection, it does not advance a view that discretion under either the federal or provincial/territorial legislation should be exercised in ways that enhance environmental protection or ecological sustainability.

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[44] *Ibid* at paras 33–39.

[45] See Janyce McGregor, "Ontario Joins Saskatchewan in Opposing Federal Carbon Tax Plan" *CBC News* (19 July 2018), online: <www.cbc.ca/news/politics/carbon-tax-premiers-thursday-1.4752747>. See also Alastair R Lucas & Jenette Yearsley, "The Constitutionality of Federal Climate Change Legislation" (2012) 23:1 J Envtl L & Prac 171; Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Regulate GHG Emissions through Regulations, Cap and Trade or a National Carbon Tax" (2016) 36 NJCL 331.

[46] *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32 [*Hydro-Québec*].

A more substantive constitutional constraint on environmental discretion may flow from the *Charter*. Until (and unless) the *Charter* is amended to include an explicit environmental right,[47] such rights will need to be located within existing provisions of the *Charter*. More accurately, Canadian courts need to recognize that existing guarantees, such as the rights to equality, freedom of religion, life, liberty, and security of the person, can be violated by serious "state-sponsored environmental harm".[48] A robust body of scholarship supports the view that existing *Charter* rights can be (and have been) violated by government decisions in the realm of environment.[49] State-sponsored

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47 The benefits of such an explicit provision are many and well-supported by relevant empirical data. See Boyd, *The Right to a Healthy Environment*, *supra* note 1; James R May & Erin Daly, *Environmental Constitutionalism* (London: Edward Elgar Publishing, 2016); Collins & Boyd, *supra* note 28.

48 Collins & Boyd, *supra* note 28 at 291.

49 See e.g. 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; 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; Collins, "Safeguarding the *Longue Durée*", *supra* note 3; 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) 27:2 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) 33:2 NJCL 191; Chalifour, "Environmental Discrimination", *supra* note 2; Lynda M Collins, "Security of the Person, Peace of Mind: A Precautionary Approach to Environmental Uncertainty" (2013) 4:1 J Human Rights & Environment 79; Scott, "Situating Sarnia", *supra* note 17; 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 t Libertés de la Personne du Québec: Pistes de réflexion" (2011) 57:2 McGill LJ 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 (4th) 58; Collins, "Ecologically Literate", *supra* note 2; Nickie Vlavianos, "Public Participation and the Disposition of Oil and Gas Rights in Alberta" (2007) 17:3 J Envtl L & Prac 205; Andrew Gage,

environmental harm may occur in a variety of scenarios including: where the state directly engages in environmentally harmful activity (e.g., by operating a polluting power plant), affirmatively permits pollution (e.g., by issuing site-specific Certificates of Approval), sets regulatory and legislative standards that allow for serious harm to human health, or fails to enforce relevant environmental standards in circumstances where exposed citizens have no other means of preventing their exposure.

Charter approaches to environmental protection have the potential to control discretionary, environmental decision making at all three levels of the state: the legislative, executive, and judicial. The range of decisions that could be affected by *Charter* recognition is very broad. At the level of statute and regulation, for example, section 7 of the *Charter* could require governments to set standards that are protective of human health generally while section 15 might require that such standards are responsive to the needs of vulnerable populations in particular (for example, children, women of child-bearing age, Indigenous populations, people with disabilities). In the administrative sphere, ministry officials might be prevented from issuing approvals for additional discharges in a highly polluted airshed.[50] Similarly a minister might be required to refuse approval of a commercial development that would destroy an Indigenous sacred site, thus violating section 2(a).[51] In the judicial branch, a properly framed *Charter* claim could not be defeated by the discretionary doctrine of justiciability; where claimants have properly framed a constitutional question, the court must respond.[52]

"Public Health Hazards and Section 7 of the *Charter*" (2003) 13 J Envtl L & Prac 1. But see Jason MacLean, "You Say You Want an Environmental Rights Revolution" (2018) 49:1 Ottawa L Rev 183.

[50] This was the argument raised by the Applicants in *Lockridge v Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316. See also Collins, "Safeguarding the *Longue Durée*", *supra* note 3.

[51] See Natasha Bakht & Lynda M Collins, "The Earth is Our Mother: Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 777 at 781 [Bakht & Collins, "The Earth is Our Mother"].

[52] *Friends of the Earth – Les Ami(e)s de la Terre v Canada (Governor in Council)*, 2009 FCA 297.

Canadian case law thus far has left open the possibility that environmental harm could violate the *Charter*,[53] and a case currently under way is likely to be the first in which such a finding will be made. In *Grassy Narrows First Nation v Ontario (Minister of Natural Resources)*,[54] the applicants challenge 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 Grassy Narrows territory originates from a number of sources, including years of discharges by a chlor-alkali plant, and is exacerbated by logging, which releases mercury stored in soils into waterways.[55] Grassy Narrows has become world famous as a hot spot of mercury poisoning. In one study, more than half of the community members who participated exhibited signs of serious neurological dysfunction resulting from mercury exposure.[56] In her 2017 report, the Environmental Commissioner of Ontario summarizes the situation:

> After accepting financial 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.

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[53] See Chalifour, "Environmental Discrimination", *supra* note 49; Boyd, *The Right to a Healthy Environment*, *supra* note 1 at Appendix C.

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

[55] See "Good Choices, Bad Choices", *supra* note 6 at 102–06.

[56] See Masazumi Harada, et al, "Mercury Pollution in First Nations Groups in Ontario, Canada: 35 Years of Canadian Minamata Disease" (2011) J Minamata Studies 3 at Table 4.

> It is no coincidence that this environmental devastation primarily affects Indigenous communities.[57]

The immediate targets of the *Grassy Narrows* initial application for judicial review are 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.[58] The Applicants argue that the logging will release additional mercury into their already contaminated environment and would violate sections 7 and 15 of the *Charter*. In particular, they allege 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. They allege that the Applicants' liberty would be violated as the contamination would deprive them of the freedom to "choose an environment in which to reside and in which to practice their traditional way of life".[59] Finally, the section 15 guarantee of equality is engaged as the Applicants are disproportionately disadvantaged due to their Indigeneity, their on-reserve status, and, in some cases, their age and gender.

While a full treatment of this case would merit its own article, it is clear that the *Grassy Narrows* situation cries out for *Charter* protection. A vulnerable, historically marginalized community is subjected to years of toxic contamination by a succession of governments with knowledge of the pollution and its effects on human health and the environment. Technical solutions exist but are delayed by decades. Government then issues a permit for activity that will worsen the already acute contamination and refuses even to do an environmental assessment to evaluate the likely consequences. It seems clear that in such a situation, the *Charter* has been violated. As one American court has observed,

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57 "Good Choices, Bad Choices", *supra* note 6 at 111 [emphasis in original].

58 *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801 (Notice of Application to Divisional Court for Judicial Review) [*Keewatin v Ontario* (Application)].

59 *Ibid* at 16.

"[t]o hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink."[60] This would, in effect, create an environmental exemption from *Charter* obligations, since the government would not be constitutionally permitted to inflict arbitrary physical harm on a marginalized community in any other context.[61]

To its credit, the Government of Ontario has now committed to remedy the contamination in Grassy Narrows. In June of 2017, the provincial Minister of the Environment and Climate Change committed more than $85 million to remediate the Wabigoon-English River system.[62] If this remediation is successful, it will protect the health, spirituality, and culture of future members of the Grassy Narrows First Nation and Wabaseemoong peoples, restore aquatic ecosystems, and perhaps even allow commercial and recreational fisheries to re-open. Ecological restoration such as this reflects a basic premise of the Canadian social contract: Canadians are both beneficiaries and trustees of an immense natural trust. Indeed, the Supreme Court of Canada has held that "our common future, that of every Canadian community, depends on a healthy environment."[63]

The Supreme Court has also blended *Charter* and administrative law protections in relation to exercises of administrative discretion under the rubric of *Charter* values. As the Court has set out in *Doré*, *Loyola*, and *Trinity Western University*,[64] *Charter* values are derived from the *Charter* rights but may also include broader ideas (such as human dignity) that are not explicitly mentioned as *Charter* rights. Where *Charter* values are

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60 *Juliana v United States*, 217 F Supp (3d) 1224 at 1250 (Or Dist Ct 2016).

61 E.g. a pattern of racist police violence would clearly constitute a *Charter* violation even though mercury contamination is arguably even more harmful over a longer period of time.

62 See "Good Choices, Bad Choices", *supra* note 6 at 110.

63 *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1.

64 *Doré v Barreau du Québec*, 2012 SCC 12; *Loyola High School v Quebec (AG)*, 2015 SCC 12; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

at play, a discretionary decision maker is obligated to balance such values against the legitimate statutory objectives that the decision maker is pursuing. If this balancing is not apparent or not reasonable in the circumstances, a court may invalidate the discretionary decision.

It remains unclear whether the Court could, in time, recognize environmental protection or ecological sustainability as *Charter* values, particularly given the centrality of environmental well-being for concepts such as the right to life and the security of the person.

Ecological sustainability, however, cannot be seen solely through the eyes of human rights or self-preservation. At its core, ecological sustainability also recognizes legal rights and values in non-human life, whether in wildlife, plant life, or in the building blocks of life (such as water).[65] It is not necessary for our argument to define with precision the meaning of ecological sustainability.[66] Rather, this concept finds its meaning from a wellspring of sources, including scientific discovery, traditional Indigenous knowledge and treaties between the Crown and First Nations, shared social and political commitments expressed through environmental and wildlife protection, and international treaty and legal commitments, among others.[67] While this evolution in our understanding of environmental and ecological principles may well lead to *Charter* protections or additional accountability through the expansion of *Charter* values, there is a further opportunity to guide

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[65] See David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto, ECW Press, 2017); Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*, 2nd ed (White River Junction, VT: Chelsea Green Publishing, 2011).

[66] See generally Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, 2nd ed (New York: Routledge, 2017) [Bosselmann, *The Principle of Sustainability*].

[67] See e.g. *ibid*; Fritjof Capra & Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland: Berrett-Koehler Publishers, 2015); MacDowell, *supra* note 34; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Canada's Indigenous Constitution*]; Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Publishers, 1989).

administrative discretion through the recognition of ecological sustainability as an underlying or unwritten constitutional principle.

II. SUBSTANTIVE LIMITS TO DISCRETION: THE UCP OF ECOLOGICAL SUSTAINABILITY

In our view, the unwritten constitutional principle (UCP) of ecological sustainability could act as an important constraint on discretionary, environmental decision making in Canada. As explained above, the pervasive presence of administrative discretion has been a major impediment to the efficacy of environmental law in this country. While some statutes could be amended to reduce the scope of discretion, Stacey has argued convincingly that it cannot be abandoned altogether since environmental systems are in constant flux and emergencies can arise at any moment.[68] As a result, environmental regulators must have the capacity to be nimble and responsive. Similarly, legislatures need to be able to craft new environmental statutes and amend existing ones to respond to changing conditions. At the same time, there is a clear need for an enforceable ecological "bottom line"[69] if we are to ensure the sustainability of Canadian society. Recognition of some form of ecological obligation as an unwritten constitutional principle would assist courts in supervising the discretionary decisions of environmental regulators, interpreting environmental legislation, adjudicating environmental claims under the *Charter*, and determining environmental powers under sections 91 and 92. It could arguably provide the necessary guidance to reorient Canadian environmental law towards its stated aims.

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[68] Stacey, "Environmental Emergency" *supra* note 5 at 987. See also Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Oxford: Hart Publishing, 2018).

[69] Pardy, "Holy Grail", *supra* note 18 at 32, 36–37.

A. UNWRITTEN CONSTITUTIONAL PRINCIPLES 101: FORM AND FUNCTION

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.
>
> 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".[70]

These unwritten, or underlying principles are themselves tied to the rule of law and the function of the courts in demarcating the content, scope, and role of the rule of law in public decision making. The most common role that unwritten constitutional principles play is as a guiding framework, and in some cases a constraint, on the exercise of statutory discretion. To see how such principles can interact with discretionary authority, consider the example of *Lalonde v Ontario (Commission de*

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[70] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 49, 51–52, 161 DLR (4th) 385 [*Quebec Secession Reference*]. Note the recurrence of biological language in this passage ("symbiosis", "lifeblood", "living tree"). This language arguably reflects an implicit understanding 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.

restructuration des services de santé).[71] The case concerned a decision of the Health Services Restructuring Commission, an administrative body charged with decisions in the context of provincial hospitals. The decision of this body in relation to the decision to close a francophone hospital led to a judicial review. The Court found no protection under the *Charter* was violated by the decision to close the hospital.

The Court then turned to a consideration of the unwritten constitutional principle of respect for minorities—including but not limited to linguistic minorities. The Court reasoned that the principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both "explains and transcends the minority rights that are specifically guaranteed in the constitutional text."[72] This principle was said to infuse the text of the Constitution.[73]

By enacting legislation that committed Ontario to providing the services offered at Montfort unless it was "reasonable and necessary" to limit them, the Commission was obliged to offer a justification that it was reasonable and necessary to limit the services offered in French by Montfort to the community.[74] The Court found that the Commission's directions failed to respect the requirements of the Act. In other words, the UCP of respect for minority rights created a constraint on the Commission's exercise of its discretion.[75] The Court found that the Commission failed to give serious weight and consideration to the importance of Montfort as an institution to the survival of the Franco-Ontarian minority. In its analysis the Court affirmed that UCPs do have normative force.[76] The Court relied on the *Provincial Judges*

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71 (2001), 208 DLR (4th) 577, 56 OR (3d) 505 (CA) [*Lalonde* cited to DLR].

72 *Ibid* at para 114.

73 *Ibid* at para 104.

74 *Ibid* at paras 164–169.

75 For other examples of cases in which courts employ a UCP to control discretionary decision making, see *Grushman v Ottawa (City)* (2000), 29 Admin LR (3d) 41, 15 MPLR (3d) 167 (Ont Div Ct); *Gigliotti c Collège des Grands Lacs (Conseil d'administration)* (2005), 76 OR (3d) 561, 200 OAC 101 (Ont Div Ct) [*Gigliotti*].

76 *Lalonde*, *supra* note 71 at para 116.

Remuneration Reference and, in particular, then Chief Justice Lamer's characterization of the preamble of the *Constitution Act of 1867*:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference* [*Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753] at p. 845), 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.[77]

In other words, UCPs guide decision makers by requiring the interpretation of statutes that are most consistent with the UCPs.[78] UCPs also elevate the principles they contain to a priority beyond other (and potentially competing) policy priorities. Both considerations are particularly salient in the environmental context where statutory provisions are often open to disparate interpretations, and there is almost always an economic argument against regulation.[79]

Typically, unwritten constitutional principles do not form the basis, on their own, for findings that an inconsistent statutory provision is invalid.[80] However, the Supreme Court has left open the possibility for

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77 *Quebec Secession Reference*, *supra* note 70 at para 54, cited in *ibid* at 116.

78 See e.g. *Wilder v Ontario (Securities Commission)* (2000), 47 OR (3d) 361, 184 DLR (4th) 165 (Ont Div Ct); *Giroux v Ontario (Minister of Consumer and Business Services)* (2005), 75 OR (3d) 759, 199 OAC 153 (Ont Div Ct); *Canadian Food Inspection Agency v Forum des maires de la Péninsule acadienne*, 2004 FCA 263; *Gigliotti*, *supra* note 75; *Fédération Franco-Ténoise c Canada (PG)*, 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.

79 See e.g. *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183; *Kyoto Protocol Implementation Act*, SC 2007, c 30, as repealed by *Jobs, Growth, and Long-Term Prosperity Act*, SC 2012, c 19, s 699.

80 See Vincent Kazmierski, "Draconian But Not Despotic: the 'Unwritten' Limits to Parliamentary Sovereignty in Canada" (2010) 41:2 Ottawa L Rev 245 at 249.

these principles to form the basis for a finding of invalidity.[81] In his empirical review of the use of UCPs by Canadian courts, Dominic DiFruscio reports that Canadian courts used UCPs to invalidate legislation 14 times between 1982 and 2014, while they relied on UCPs to uphold legislation 15 times during the same period.[82]

To summarize, UCPs are foundational principles underlying our Constitution that are binding on courts and governments and can, on some occasions, influence outcomes in constitutional litigation. We argue that ecological sustainability is one such principle.

B. The Case for an Ecological UCP: Sustaining the Living Tree

For almost a century, the idea of our constitution as a "living tree" has been "the most enduring constitutional metaphor in Canada."[83] The living tree doctrine has allowed our constitutional law to keep pace with changes in Canadian society. But the metaphor also acts as a salutary reminder of the fundamental hierarchy between rule of law and rule of nature. Without a viable environment, there can be no legal system; nature literally constitutes law (and every other human institution). It is then perhaps unsurprising that ecological sustainability clearly meets the criteria for an unwritten constitutional principle as articulated by the Supreme Court of Canada.[84] Our environment sustains every aspect of

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81 See *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 at 39–41.

82 Dominic DiFruscio, "Patriation, Politics and Power: The State of Balance between the Supreme Court and Parliament after Thirty Years of the *Charter*" (2014) 8 JPPL 29 at 57.

83 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 at 187. See also Jean Leclair, "Invisibility, Wilful Blindness and Impending Doom: The Future (If Any) of Canadian Federalism", in Peter John Loewen et al (eds), *Policy Transformation in Canada: Is the Past Prologue* (Toronto: University of Toronto Press) [forthcoming in May 2019].

84 See Shalin M Sugunasiri, "Public Accountability and Legal Pedagogy: Studies in Constitutional Law" (2008) 2 JPPL 93 (for an excellent analytical framework for

the Canadian state, including the Constitution. It is the lifeblood of our society and our legal system. Indeed, all of the UCPs that have been recognized thus far depend upon a healthy environment. At the risk of stating the obvious, it also clear that "observance of and respect for [ecological sustainability] is essential to the ongoing process of constitutional development and evolution."[85] Without it, the Constitution would become "self-defeating";[86] to extend the metaphor, it would be a dying tree rather than a living one.

Writing extra-judicially, 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."[87] Ecological sustainability also meets this definition. Jean Leclair notes that "protection of health and the environment represent two values perceived by many as traditionally and typically 'Canadian' values[;] they also have the singular quality of enabling us to transcend the issues that constantly divide us. . . . They are values about which we can all agree."[88]

Stepan Wood, Georgia Tanner, and Benjamin J. Richardson elaborate:

> According to public opinion polls, Canadians are among the staunchest environmentalists in the world.... [T]hese apparently strong environmental values among Canadians [can be attributed] to the country's relatively vast areas of wilderness and the fact that the

assessing new UCPs. Ecological sustainability seems to comport with Sugunasiri's criteria).

85 *Secession Reference, supra* note 70 at para 52.

86 The Rt Hon Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (Lord Cooke of Thorndon Lecture delivered at the Victoria University of Wellington Law School, 1 December 2005), (2006) 4:2 NZJPIL 147 at 163.

87 *Ibid* at 149.

88 Jean Leclair, "The Supreme Court, the Environment, and the Construction of National Identity: *R. v. Hydro-Québec*" (1998) 4:2 Rev Const Stud 372 at 378–79.

> environment has been a seminal influence in Canada's art, literature, and other cultural domains.[89]

Environmental stewardship also has solid historical foundations in the multi-juridical edifice of Canadian law. In the West, the public trust doctrine has imposed on governments an obligation to steward the natural environment for present and future generations since Roman times.[90] The French *Civil Code* historically recognized public stewardship of water bodies[91] and a similar doctrine survived into English Common Law.[92] Indeed, the founding document in the Anglo-Canadian constitutional tradition, the *Magna Carta*, was complemented by a companion instrument known as the "*Charter of the Forest*", which guaranteed English free men their rights to access to vital natural resources, without which some the civil and political rights contained in the *Magna Carta* would have been meaningless.[93] The legal imperative of ecological sustainability has an even longer history in "Indigenous legal traditions [that] 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'".[94] Recognition of an environmental UCP would reflect the importance many

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89 Stepan Wood, Georgia Tanner & Benjamin J Richardson; "What Ever Happened to Canadian Environmental Law?" (2010) 37:4 Ecology LQ 981 at 1028.

90 See TC Sandars, *The Institutes of Justinian* (1876), Book II, Title I ("[b]y the law of nature these things are common to mankind—the air, running water, the sea" at 158), cited in *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 74.

91 See *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 75 [*BC v Canadian Forest Products*].

92 See *Bracton on the Laws and Customs of England*, translated by Samuel E Thorne (Cambridge, MA: Belknap Press, 1968) vol 2 ("[b]y natural law these are common to all: running water, air, the sea and the shores of the sea. All rivers and ports are public, so that the right to fish therein is common to all persons" at 39–40).

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

94 Borrows, *Canada's Indigenous Constitution*, *supra* note 67 at 108.

Indigenous legal orders place on respect for the environment, thus simultaneously advancing the goals of reconciliation and sustainability.[95] As Borrows points out, "[t]he Constitution, though a legal document, serves as a framework for life and for political action".[96] It seems clear that a legal framework for life must ensure the protection of the biophysical environment on which life depends.

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 cast environmental protection in quasi-constitutional terms.[97] The Court summarized its own holdings on this point in *British Columbia v Canadian Forest Products Ltd*:[98]

> As the Court observed in Canada *(Procureure Générale) c. Hydro-Québec*, legal measures to protect the environment 'relate to a public purpose of superordinate importance'. . . . In *R. v. Canadian Pacific Ltd.*, 'stewardship of the natural environment' was described as a fundamental value. . . . Still more recently, in *114957 Canada Ltée*

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[95] See *ibid* ("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" at 243–44); James (Sakej) Youngblood Henderson, "First Nations Legal Inheritances in Canada: The Mikmaq Model" (1995) 23 Man LJ 1 (noting that Mikmaq law extends legal personality to non-human members of the natural world and imposes obligations on humans towards their fellow beings at 19–21); Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envtl L & Prac 227; Benjamin J Richardson, "The Ties that Bind: Indigenous Peoples and Environmental Governance" in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing: Oxford, 2009) 337 at 337–70.

[96] Borrows, *Canada's Indigenous Constitution*, *supra* note 67 at 200.

[97] 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.

[98] *Supra* note 91.

(Spray-Tech, Société d'arrosage) v. Hudson (Ville), the Court reiterated at para. 1:

> [O]ur 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 adopted the following passage from the Law Reform Commission of Canada's report, *Crimes Against the Environment*:

> [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*. 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. It is increasingly understood that certain forms and degrees of environmental pollution can directly or

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99 *Ibid*, at para 7 [emphasis added, citations omitted]. See also *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, 4 OR (3d) 799 ("[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" at 254).

100 [1995] 2 SCR 1031, 24 OR (3d) 454.

> indirectly, sooner or later, seriously harm or endanger human life and human health.[101]

Throughout this robust body of *dicta* from the Supreme Court of Canada, one finds language suggestive of constitutional status (e.g. "superordinate" and "fundamental"). The observation that "everyone is aware"[102] that 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",[103] then preserving such an environment must be a fundamental function of the state, that is, an unwritten normative principle supporting the written constitution.

Chief Justice McLachlin (as she then was) suggests that UCPs may derive in part from natural law.[104] In the natural law paradigm, the legitimacy of human-made law is measured by the extent to which it comports with a transcendent, non-derogable moral law. In the context of our ongoing ecological crisis, it seems logical to measure the legitimacy of positive laws by the extent to which they comport with the non-derogable laws of nature. 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 of which may even be said to predate all governments and constitutions. As a matter of

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101 *Ibid* at para 56 [emphasis added, citation omitted]. This passage was quoted again in *Hydro Québec*, *supra* note 46, in which the Court upheld the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 as a valid exercise of federal power.

102 *Supra* note 91 at para 7.

103 *BC v Canadian Forest Products*, *supra* note 91 at para 7.

104 McLachlin, *supra* note 86 at 149–51.

> fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.[105]

The US District Court for the District of Oregon cited *Minors Oposa* when denying a motion to dismiss the recent lawsuit brought by a coalition of young people who argue that government inaction on climate change has violated their right to substantive due process under the American Constitution.[106] In holding that a stable climate might constitute an "unenumerated fundamental right",[107] the court recognized that "a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'"[108] In the Canadian legal order, interests that lie at the foundation of our society qualify for recognition as unwritten constitutional principles.

The logic of these decisions seems inescapable; physical self-preservation is a fundamental imperative for all human beings, and societal preservation is a fundamental imperative for the state. If our constitutional text fails to protect the ecosystems on which all of the enumerated rights and powers delineated therein depend, it must be because the principle of environmental protection is so fundamental as to be both implicit and obvious, much like the principle of democracy—a basic, underlying structure that supports every other provision in the written Constitution.

C. How Would an Ecological UCP Control Environmental Discretion?

The defining quality of discretion is exercising judgment and making choices among possible actions envisioned within the statutory scheme. In theory, the UCP of ecological sustainability could ensure that where a

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[105] "The Philippines: Supreme Court Decision in *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)*" (1994) 33:1 ILM 173 at 187 [*Minors Oposa*].

[106] *Juliana v United States*, *supra* note 60.

[107] *Ibid* at 1249.

[108] *Ibid* at 1250 [citations omitted].

judgment call involves possible interpretations that will preserve ecological integrity or that 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 well-being. This is, of course, an optimistic scenario, but we believe it is also achievable.

There are at least two possible pathways of influence for the UCP of ecological sustainability: governmental and judicial. Internally, one can hope that governments that respect the rule of law would take the UCP of ecological sustainability seriously and re-shape their policies accordingly. Legislatures could take such a constitutional norm as a point of departure for drafting environmental statutes that more closely constrain discretionary decision making, imposing an ecological bottom line. The executive branch of government could develop, revise, and implement environmental regulations with the goal of achieving both the immediate protection of human health and the long-term preservation of natural systems that support the ongoing existence of humans, plants, and non-human animals. However, while constitutional provisions certainly help to shape governmental culture, it would be naïve to expect consistent compliance. As with other constitutional provisions, courts would undoubtedly be called upon to enforce the UCP of ecological sustainability where governments fail to respect it.

For the UCP of ecological sustainability to make a difference, the judiciary would need to articulate and give legal effect to the UCP within contexts of judicial review. From the judicial perspective, this UCP would be recognized as an aspect of what constitutes *intra vires* regulations, reasonable exercises of discretion, reconciliation enhancing Crown action, and constitutionally valid legislative provisions. Constitutional principles are not static features of the Constitution, but rather take their shape and form from social, political and cultural evolution. For example, the protection of minorities may have begun as a response to linguistic difference in the Canada of 1867, but had become

a far broader idea by the enactment of the *Constitution Act, 1982*.[109] Recognizing ecological sustainability as a UCP builds on long-standing commitments and responds to current (and future) challenges.

If the UCP of ecological sustainability is taken seriously by both governments and courts, the impacts could be significant; recognition of an ecological UCP could create real improvements in the lives of ordinary Canadians. In *Grassy Narrows*, for example, the UCP of ecological sustainability could have accelerated much-needed remediation of mercury contamination by years or decades. In Aamjiwnaang, an ecological UCP might require the Ministry of the Environment to address the cumulative effects of multiple air emissions rather than treating each polluter as if it were the only one. In the fisheries context, regulators might, in turn, be required to desist from issuing permits where the long-term sustainability of a given fishery is in peril. In toxics regulation (for example, through the *Canadian Environmental Protection Act*), a UCP of ecological sustainability would require the government to aggressively pursue the goal of zero discharge of persistent toxic chemicals—that is, those that stay in the environment indefinitely. In all cases, an ecological UCP would require Canadian governments and decision-making officials at all levels to become ecologically literate and to regulate ecological realities rather than legal fictions.

The foregoing instrumental considerations strengthen our previous argument that ecological sustainability should be recognized as a UCP simply because it clearly meets the definition of that concept as developed by the Supreme Court of Canada. Whether one views such recognition as a good thing depends largely upon one's views of UCPs as a category,[110] or indeed of constitutions as a whole.[111] Some observers

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[109] See *Quebec Secession Reference*, *supra* note 70 at paras 79–82.

[110] For a range of perspectives on this, see e.g. Heather MacIvor, "Unwritten Constitutional Principles" (2012) 6 JPPL 339; Kazmierski, *supra* note 80; Sugunasiri, *supra* note 84; Warren J Newman, "'Grand Entrance Hall, Back Door or Foundation Stone' The Role of Constitutional Principles in Construing and Applying the Constitution of Canada" (2001) 14:2 SCLR 197; Sujit Choudhry & Robert Howse, "Constitutional Theory and the Quebec Secession Reference"

criticize UCPs as anti-democratic or draconian,[112] while others view them as ambiguous or even useless.[113] However, as explained above, UCPs have been pivotal in a small body of case law, including several decisions of the Supreme Court of Canada. Depending on the scope and implications of a given lawsuit, even one victory based on an ecological UCP could have profound benefits for Canadian society. Climate litigation, for example, is likely to come before Canadian courts with increasing frequency in future years, framed in a variety of administrative and constitutional theories.[114] As courts grapple with highly complex and contested legal arguments on both sides, and confront the temptation to dismiss these suits and send the ball back to the political court, it may be that recognition of an ecological UCP tips the scale in favour of responsible judicial intervention.

Beyond the nuts and bolts of litigation tactics, "[t]here is also a vital normative role for constitutions, which express the deepest, most

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(2000) 13:2 Can JL & Juris 143; Marc Cousineau, "L'Affaire Montfort: Confirmation de la Valeur Des Principes Fondamentaux de la Constitution" (2002) 13 NJCL 485; Patrick J Monahan, "The Public Policy of the Supreme Court of Canada in the *Secession Reference*" (1999)11 NJCL 65.

111 See e.g. DiFruscio, *supra* note 82; Chris Jeffords & Lanse Minkler, "Do Constitutions Matter? The Effect of Constitutional Environmental Rights Provisions on Environmental Performance" (2016) 69:2 Kyklos 294; Xavier de Vanssay & ZA Spindler, "Freedom and Growth: Do Constitutions Matter?" (1994) 78:3–4 Public Choice 359.

112 See e.g. Jean Leclair & Yves-Marie Morrisette, "L'Indépendance Judicaire et la Cour Suprême: Reconstruction Historique Douteuse et Théorie Constitutionnelle de Complaisance" (1998) 36:3 Osgoode Hall LJ 485 at 490; Jean-François Gaudreault-DesBiens, "The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy, and Identity" (1998) 23:4 Vermont L Rev 793 at 839; Kazmierski, *supra* note 80; Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1&2 Can Bar Rev 67.

113 See e.g. Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" 27:2 Queens LJ 389.

114 See e.g. Klaudt, *supra* note 83; Chalifour & Earle, *supra* note 49.

cherished values of a society."[115] Unwritten constitutional principles should carry particular normative force because they stand at the very foundation of our legal order. The educative value of constitutional principles is especially relevant in the environmental context since it is widely recognized that the journey from crisis to sustainability is as much an intellectual, ethical, and social process as it is a technical, legal, and economic one.[116] Like law generally, constitutional principles can serve to encourage "a powerful sense of . . . interdependence, and shared responsibility".[117] At a more mundane level, the UCP of ecological sustainability can also animate education and training, as well as the development of policy, guidelines and practices to interpret and apply the environmental regulations and statutes.

Thus, in addition to its impact on specific instances of discretionary decision making, we believe recognition of ecological sustainability as a UCP will have a broader impact on public discourse and social action in Canada, just as respect for other constitutional principles, such as the protection of minorities and the promotion of both democracy and the rule of law, have become internalized as shared aspirations across many institutions, organizations, and communities. The impact on Canada's constitutional culture (and on Canada's ongoing contribution to the global conversation on constitutionalism and environmental protection) may be the most significant and enduring legacy in the recognition of the UCP of ecological sustainability.

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[115] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) at 4.

[116] See 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); Capra & Mattei, *supra* note 67; Douglas A Kysar, "Law, Environment and Vision" (2003) 97:2 Nw U L Rev 675. See also Aldo Leopold, "The Land Ethic" in Donald VanDeVeer & Christine Pierce, eds, *The Environmental Ethics & Policy Book*, 3d ed (Toronto: Nelson Thomson Learning, 2003) 215 ("[n]o important change in ethics was ever accomplished without an internal change in our intellectual emphasis, loyalties, affections, and convictions" at 218).

[117] Speth, *ibid* at 225.

While we argue that ecological sustainability is—and ought to be recognized as—a UCP, scholars and courts will need to elaborate on the scope and contours of such a principle over time, given its expansive potential (although no more expansive than other UCPs such as the rule of law and democracy).[118] Like other UCPs, the meaning of ecological sustainability will evolve with changes in the collective consciousness in Canada. Unlike other UCPs, ecological sustainability is rooted both in moral commitment and in scientific discovery. In that sense, it is a target that will become increasingly clear as science advances over time. For example, our scientific understanding of the causes and consequences of climate change has evolved with the emergence of increasingly compelling data over the years. While the status of ecological sustainability as a UCP may be static, its scope will change with our knowledge of sustainability itself and with the ethical evolution in our understanding of appropriate relationships between human beings and the rest of the natural world.

RECONCILIATION

The constitutional context of ecological sustainability as a UCP is closely tied to the constitutional goals of reconciliation with First Nations and Indigenous peoples. As the 2018 report of the Environmental Commissioner of Ontario observes, "[e]nvironmental justice must be part of the . . . government's pursuit of reconciliation with Indigenous people."[119] It is now well established that state-sponsored environmental harm can violate recognized Aboriginal Rights and Aboriginal Title under section 35 of the *Constitution*. The right to hunt, for example, includes a right to preservation of adequate habitat to

[118] See AE Dick Howard, "The Indeterminacy of Constitutions" (1996) 31:2 Wake Forest L Rev 383 ("[a]ny principle general enough to be a norm informing an entire constitutional system is likely to resist ready explication" at 389).

[119] "Good Choices, Bad Choices", *supra* note 6 at 99.

support populations of traditional prey species.[120] The right to "to carry on the fishery as formerly" was found to preclude the approval of a marina that would have destroyed shellfish habitat.[121] Fishing rights have also led the Federal Court to impose a moratorium on the herring fishery in BC when scientific uncertainty made it impossible to predict whether continued fishing could lead to a collapse in stocks.[122] The Supreme Court has even interpreted environmental sustainability as a fundamental aspect of Aboriginal title, holding in *Tsilhqot'in Nation* that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land"[123] 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."[124] The environmental rights of Indigenous peoples are thus firmly rooted in Canadian constitutional law—at least in theory. In practice, environmental protections for Indigenous peoples have often been illusory.

Much of the litigation around section 35 of the *Constitution Act, 1982*, has concerned the duty to consult and accommodate, and has focused on the procedures by which governments exercise discretion around the use of land that is subject to treaties or unresolved Indigenous land claims. This duty, in turn, flows from the Crown's fiduciary obligations to Aboriginal Peoples (as defined by section 35) and the Honour of the Crown. For example, in the opening words of *First Nation of Nacho Nyak Dun v Yukon*,[125] Justice Karakatsanis stated that "expressions of partnership between nations, modern treaties play a

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[120] See generally 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.

[121] *Tsawout Indian Band v Saanichton Marina Ltd* (1989), 57 DLR (4th) 161 at 167, 36 BCLR (2d) 79 (CA).

[122] *Haida Nation v Canada (Minister of Fisheries and Oceans)*, 2015 FC 290.

[123] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 86 [*Tsilhqot'in Nation*].

[124] *Ibid* at para 121.

[125] 2017 SCC 58 [*Nacho Nyak Dun*].

critical role in fostering reconciliation. Through [section] 35 of the *Constitution Act, 1982*, they have assumed a vital place in our constitutional fabric."[126]

The duty to consult and accommodate was first set out in detail in *Haida Nation* (2004),[127] and is based on the following rationale:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests. . . .[128]

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s 35.(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation".[129]

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126 *Ibid* at para 1.

127 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation* (2004)].

128 *Ibid* at para 25.

129 *Ibid* at para 32 [emphasis removed].

Many of the cases elaborating the duty to consult have arisen against the backdrop of environmental discretion. For instance, in *Nacho Nyak Dun*, the Court considered the implications for environmental protections of a modern comprehensive treaty between Yukon and First Nations. The Court characterized the case as a judicial review of a land use plan developed according to the terms of a treaty, and held that the provisions of this treaty required a more collaborative process to the management of a watershed than that engaged in by the Yukon Government.

The dispute grew out of a process to govern the Peel Watershed in Yukon. In 2004, a commission was established to develop a regional land use plan for the Peel Watershed. Following an extensive process, the Commission submitted its Recommended Peel Watershed Regional Land Use Plan to Yukon and the affected First Nations. Near the end of the approval process, and after the Commission had released a Final Recommended Plan, Yukon proposed and adopted a final plan that made substantial changes to increase access to and development of the region.

Justice Karakatsanis, writing for the Court, noted that in a judicial review concerning the implementation of modern treaties, a court should focus on the legality of the impugned decision, rather than closely supervise the conduct of the parties at each stage of the treaty relationship. She observed that "reconciliation often demands judicial forbearance",[130] notwithstanding that under section 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts must continue to perform an important role in safeguarding the rights they enshrine.

The Court held that while Yukon had the power to make minor modifications to land use plans, it did not have the authority to make the extensive changes that it made to the Final Recommended Plan for the Peel Watershed, and that the trial judge therefore appropriately quashed Yukon's approval of its plan and returned the matter to a stage of further consultation. While Yukon was not necessarily constrained in pursuing

[130] *Supra* note 125 at para 33.

the development projects to which the revised land use plan was directed, it had failed to act honourably within the requirements of section 35 of the *Constitution Act, 1982* in the process it undertook to finalize this plan.

Even the modest procedural obligations of Canadian governments affirmed in *Nacho Nyak Dun*, however, seemed uncertain in the companion cases, *Chippewas of the Thames* and *Clyde River*.[131] *Haida Nation* (2004) and subsequent case law left open the extent and contexts in which Canadian governments could delegate the duty to consult and accommodate to regulatory agencies, tribunals, and other arm's length executive branch entities.

In *Chippewas of the Thames*, the Supreme Court addresses whether the regulatory process established by the National Energy Board (NEB) in relation to the approval of a pipeline project could satisfy the duty to consult and accommodate. The NEB issued notice to Indigenous groups, including the Chippewas of the Thames First Nation, informing them of the project, the NEB's role, and the NEB's upcoming hearing process. The Chippewas were granted funding to participate in the process, and they filed evidence and delivered oral argument delineating their concerns that the project would increase the risk of pipeline ruptures and spills, which could adversely impact their use of the land. The NEB eventually approved the project and was satisfied that potentially affected Indigenous groups had received adequate information and had the opportunity to share their views. The NEB also found that potential project impacts on the rights and interests of Aboriginal groups would likely be minimal and would be appropriately mitigated.

Writing for the Court, Justices Karakatsanis and Brown held that the NEB's process satisfied the duty to consult and accommodate. The Court found that as a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal

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[131] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 [*Chippewas of the Thames*]; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*].

and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Consequently, the Crown, through the NEB, had an obligation to consult. The Crown, in discharging its duty, may rely on steps taken by an administrative body to fulfill its duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances. To discharge its constitutional duty in this way, it must be made clear to the affected Indigenous group that the Crown is relying on this arm's length body to satisfy the consultation process, as the Court found was the case in the context of the NEB and the Chippewas of the Thames.

Even taking the strength of the Chippewas' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was clearly adequate in the eyes of the Court. Potentially affected Indigenous groups were given early notice of the NEB's hearing and were invited to participate in the process. The Chippewas accepted the invitation and appeared before the NEB. They were aware that the NEB was the final decision maker. Moreover, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. The Court concluded that the circumstances of this case made it sufficiently clear to the Chippewas that the NEB process was intended to constitute Crown consultation and accommodation.

In the companion case of *Clyde River*,[132] which involved similar issues and a similar decision-making process through the NEB, the outcome was the opposite. The proponents in *Clyde River* applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. The proposed testing could negatively affect the treaty rights of the Inuit of Clyde River, who opposed the seismic testing, alleging that the duty to consult had not been fulfilled in relation to it. The NEB granted the requested authorization. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that Aboriginal groups had an adequate opportunity to participate in the NEB's process.

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[132] *Supra* note 131.

The NEB also concluded that the testing was unlikely to cause significant adverse environmental effects.

Applying a similar test as *Chippewas of the Thames*, in this case, the Court quashed the decision of the NEB because it failed to meet the standard of adequate consultation. Once again writing for the Court, Karakatsanis and Brown JJ found that when affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must address those concerns in reasons. In this case, the Court found that the NEB's inquiry was misdirected. The NEB considered the environmental impact of the proposed project, but the consultative inquiry should have been on the Indigenous group's section 35 rights. Here, the NEB gave no consideration to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights. Second, although the Crown relied on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Finally, the NEB made available only limited opportunities for participation and consultation by Inuit groups (for example, there were no oral hearings or participant funding, as in the *Chippewas of the Thames*).

While the Court's decision in *Clyde River* represented a significant victory for the appellants in the case, which should not be minimized, this judgment, along with the *Chippewas of the Thames*, arguably represents a step backwards (or at least sideways) in the journey toward reconciliation. Emerging from the Crown's fiduciary obligations and the Honour of the Crown, the duty to consult and accommodate was elaborated in *Haida Nation* (2004) (and the companion case *Taku River*)[133] as a hopeful initiative to ensure section 35 rights were top of mind as the Crown makes decisions affecting territories subject to Indigenous claims.[134] In light of these most recent decisions, it appears that the Crown need not design processes with Indigenous rights in

[133] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku River*].

[134] See e.g. Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009).

mind at all. Rather, as long as existing statutory bodies such as the NEB have mandates to consult, and the Crown provides notice to affected Indigenous groups that consultations by the arm's length body will constitute the Crown's consultation, the Crown can rely on such bodies to discharge their constitutional duties, even where these bodies do no more than permit Indigenous groups to participate on similar terms to all other stakeholders. In other words, the duty to consult and accommodate under section 35 is fast becoming just another version of procedural fairness, and the Court seems to have retrenched from the initial position expressed by Chief Justice McLachlin (as she then was) in *Haida Nation* (2004) that "[t]he honour of the Crown cannot be delegated."[135]

These cases also signify that Indigenous peoples' distinct perspective on environmental protection and ecological sustainability will play no role in elaborating the obligations under section 35.[136] This limitation of section 35 was highlighted in the decision of the Supreme Court in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*.[137] This decision involved a challenge to a proposed ski resort development in the traditional territories of the Ktunaxa First Nation in BC (a place known as Qat'muk, which has spiritual significance as home to Grizzly Bear Spirit, a principal spirit within Ktunaxa religious beliefs and cosmology).

The Ktunaxa were consulted about this proposed development and raised concerns about the impact of the project, which led to some modifications to the proposal and additional consultations. After these further consultations, the Ktunaxa adopted the position that accommodation was impossible because the project would drive Grizzly Bear Spirit from Qat'muk and therefore irrevocably impair their religious beliefs and practices. The BC Government declared that reasonable consultation had occurred and approved the project.

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135 *Haida Nation* (2004), *supra* note 127 at para 53.

136 See generally John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning, and Democracy" (1997) 47:4 U Toronto LJ 417 at 425.

137 2017 SCC 54 [*Ktunaxa*].

Writing for a majority of the Court, McLachlin CJC (as she then was) and Rowe J, held that the Minister's decision did not violate the Ktunaxa's section 2(a) right to freedom of religion, as their concern was an object of belief, not the Ktunaxa's freedom to hold their beliefs or their freedom to manifest those beliefs.[138] The juxtaposition between the freedom to believe and the objects of that belief flows from an expressly non-Indigenous approach to spirituality, as opposed to an approach attempting to reconcile Western and Indigenous spiritual approaches or between Western and Indigenous law.[139]

Beyond the religious freedom aspect of the decision, the Court also considered the Minister's decision that the Crown had met its duty to consult and accommodate under the *Constitution Act, 1982*. The Court noted that the Minister's decision to approve a project for development is entitled to deference and that review of "an administrative decision under [section] 35 does not decide the constitutional issue de novo for itself. Rather, [the court asks] whether the administrative decision maker's finding on the issue was reasonable."[140] That is, had the Crown reasonably met the duty to consult and accommodate in these circumstances?

Framed in this way, the Court need only conclude that it was reasonable that the Minister determined that the consultation and accommodation process was adequate. A reasonable standard creates a lower threshold for a minister's decision, which need be neither appropriate nor correct, and allows that a minister's determination represents only one of the possible findings that could be made in the circumstances. The Court further noted that Aboriginal rights must be proven by "tested evidence"; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of

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138 *Ibid* at para 75.

139 See Sarah Morales, "*Qat'muk*: *Ktunaxa* and the Religious Freedom of Indigenous Canadians" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016); Bakht & Collins, "The Earth is Our Mother", *supra* note 51.

140 *Ktunaxa*, *supra* note 137 at para 82.

consultation and accommodation.[141] In other words, the subject matter was whether the consultations were adequate, not whether the impact on the affected Indigenous community justified objecting to the project. For Chief Justice McLachlin (as she then was) and Justice Rowe, consultation and accommodation will not resolve underlying claims, but rather constitute the best available legal tool. They observe:

> The Ktunaxa reply that they must have relief now, for if development proceeds Grizzly Bear Spirit will flee Qat'muk long before they are able to prove their claim or establish it under the B.C. treaty process. We are not insensible to this point. But the solution is not for courts to make far-reaching constitutional declarations in the course of judicial review proceedings incidental to, and ill-equipped to determine, Aboriginal rights and title claims. Injunctive relief to delay the project may be available. Otherwise, the best that can be achieved in the uncertain interim while claims are resolved is to follow a fair and respectful process and work in good faith toward reconciliation. Claims should be identified early in the process and defined as clearly as possible. In most cases, this will lead to agreement and reconciliation. Where it does not, mitigating potential adverse impacts on the asserted right ultimately requires resolving questions about the existence and scope of unsettled claims as expeditiously as possible. For the Ktunaxa, this may seem unsatisfactory, indeed tragic. But in the difficult period between claim assertion and claim resolution, consultation and accommodation, imperfect as they may be, are the best available legal tools in the reconciliation basket.[142]

The Court held that the record in *Ktunaxa* supported the reasonableness of the Minister's conclusion that the section 35 obligation of consultation and accommodation had been met, and underscored that Indigenous peoples would have no constitutional veto over projects on environmental, spiritual, or other grounds. *Ktunaxa* demonstrates the limits of a framework of consultation and accommodation. Ultimately, where a First Nation or Indigenous

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[141] *Ibid* at para 77.

[142] *Ibid* at para 86.

community is simply opposed to a project, as here, the framework tends to favour the Crown as long as it demonstrates that it appreciates the objections and makes some modifications to the project in light of the objection. The Court concluded in this context, for example, that while the Minister did not offer the ultimate accommodation demanded by the Ktunaxa—complete rejection of the ski resort project—the Crown met its obligation to consult and accommodate by modifying the proposal. As the Court expressly notes, section 35 guarantees a process, not a particular result or a veto, and that where adequate consultation has occurred, environmental discretion may be exercised with or without consent of affected Indigenous communities, and whether or not the project in question comports with the goal of ecological sustainability.[143]

The dissonance between the duty to consult and accommodate framework as articulated in *Ktunaxa* and the United Nations Declaration on the Rights of Indigenous Peoples,[144] and its emphasis on "free, prior and informed" consent by Indigenous peoples with respect to use of their territory,[145] is striking. And this dissonance has come to a head in the struggles over the Trans Mountain Pipeline project, which the federal government took over from Kinder Morgan the spring of 2018, and which a number of BC Indigenous communities continue to oppose on grounds, among others, of inadequate consultation.[146] The Squamish Nation and Tsleil-Waututh Nation have successfully challenged the project in federal court,[147] and the fate of the pipeline likely will be resolved by the Supreme Court of Canada.

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143 *Ibid.*

144 *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295, online (pdf): <www.un.org/development/desa/indigenous peoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.

145 *Ibid*, art 11.2.

146 See Shawn McCarthy, "First Nations Leaders Claim Ottawa Did Not Properly Consult BC Communities on Trans Mountain Project", *The Globe and Mail* (4 May 2018) online: <www.theglobeandmail.com>.

147 See *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153.

The construction of new infrastructure to support the highly polluting fossil fuel industry is arguably inherently unsustainable. However, under existing regulatory regimes, pipelines can be approved even if relevant environmental assessment processes reveal serious threats to the environment. The section 35 jurisprudence does not equip Indigenous communities in Canada to defend their territories against such threats, since it expressly excludes an Indigenous veto over destructive development. While the Supreme Court implicitly acknowledged in *Tsilhqot'in Nation*[148] that the ecological sustainability of Indigenous lands and waters is fundamental to their survival and wellbeing, its section 35 jurisprudence as a whole provides largely procedural protections. There is no substantive ecological bottom line of section 35 to guarantee crucial environmental interests. It is difficult to see how reconciliation can be achieved in the face of this profound tension in our constitutional relationship with Indigenous peoples. We would argue that recognition of a UCP of ecological sustainability could help to reorient judicial analysis in cases such as those discussed above, to focus on substantive ecological outcomes rather than mere procedural protections.

The far-reaching implications of reconciliation (both within and beyond section 35) also open up a different implication of recognizing ecological sustainability as a UCP, which relates to standing. Part of the limitations of environmental litigation is that non-human life does not have standing to make arguments in Court[149] (though sometimes NGOs will be granted intervention to advance arguments on their behalf).[150] Other jurisdictions have explored novel mechanisms to overcome this

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148 *Supra* note 123.

149 See Christopher Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (New York: Oxford University Press, 2010).

150 See e.g. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 in which the World Wildlife Fund, the Sierra Club of Canada, and several other environmental NGOs were granted intervention at the Supreme Court of Canada to offer perspectives on the legality of a municipal by-law restricting the use of pesticides.

procedural limitation. For example, New Zealand has recognized the Whanganui River as having standing in litigation affecting its well-being, through the Maori community that is recognized as descendants of and a guardian for the river.[151] Ecuador has recognized the rights of Mother Earth (or "Pacha Mama") in its Constitution in keeping with the legal and spiritual understandings of its Indigenous peoples.[152] In Canada, recognition of a UCP of ecological sustainability would go a long way towards enshrining Indigenous environmental law in our constitutional order.

To conclude, reconciliation under section 35 and the duty to consult and accommodate have proven limited in providing legal accountability over environmental discretion affecting Indigenous communities. On the other hand, this constitutional jurisprudence may provide an important foundation for the recognition of a UCP for ecological sustainability, particularly with respect to understanding environmental well-being as significant beyond its utility for human well-being, including meaningful concern for the health of wildlife, plant life, air quality, and water quality as constitutional values in and of themselves.

CONCLUSION

In recent years, a large and compelling body of scholarship has demonstrated convincingly that environmental law in Canada (and around the world) has thus far failed to secure our common future.[153] Put

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[151] See Eleanor Ainge Roy, "New Zealand River Granted Same Legal Rights as Human Being", *The Guardian* (16 March 2017), online: <www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> (another model for constitutional recognition). See also Michael Safi, "Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings", *The Guardian* (21 March 2017), online: <www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings> (India granting legal personhood to two rivers and cites the New Zealand precedent).

[152] *Constitution of the Republic of Ecuador, 2008*, art 71, online: <pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

[153] See e.g. Boyd, *Unnatural Law*, *supra* note 5; Boyd, *Cleaner, Greener, Healthier*, *supra* note 6; Craig Collins, *Toxic Loopholes: Failures and Future Prospects for*

simply, humans have now eroded natural systems on a global scale and to an extent that threatens the present and future wellbeing of people, plants, animals, and ecosystems. But science and history also teach us that there is hope; the same human ingenuity that created this unprecedented problem can be mobilized to solve it.[154] In many cases, technological solutions exist to meet the daunting environmental challenges of our time.[155] If we collectively commit to mitigate, reverse, and prevent environmental harms, a sustainable future is possible. This process will arguably require broad-based engagement by nearly every sector and community on Earth, but some actors enjoy a unique power to catalyze the necessary shift away from environmentally destructive modes of living and towards long-term sustainability.[156] Constitutionally independent courts, insulated from the political short-termism inherent in electoral democracies,[157] could play a leading role in transforming environmental governance in the public interest, but only if they are willing and able to control the exercise of environmental discretion by the other branches of government.

In this exploratory study, we have argued that environmental discretion is a key challenge in charting Canada's path towards a sustainable future. We have advanced the recognition of the UCP of ecological sustainability as a promising approach to addressing this challenge. We have explored the various sources of the unwritten constitutional principles of ecological sustainability, and the potential impact of recognizing ecological sustainability as a UCP. The principle

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Environmental Law (New York: Cambridge University Press, 2010); Mary Christina Wood, *Nature's Trust: Environmental Law for A New Ecological Age* (New York: Cambridge University Press, 2014); Speth, *supra* note 116.

154 See David R Boyd, *The Optimistic Environmentalist: Progressing Towards A Greener Future* (Toronto: ECW Press, 2015).

155 See e.g. Guy Dauncey, *The Climate Challenge: 101 Solutions to Global Warming* (Gabriola Island, BC: New Society Publishers, 2009).

156 See Louis J Kotzé, "Rethinking Global Environmental Law and Governance in the Anthropocene" (2014) 32:2 JERL 121.

157 See generally Weiss, *supra* note 67.

of ecological sustainability operates alongside, and is complementary to, other constitutional and law reform initiatives aimed at clarifying the legal infrastructure of environmental protection. Finally, we have suggested specific and meaningful benefits that would flow from the recognition of the UCP of ecological sustainability, including a more consistent and compelling framework for guiding environmental discretion, a mechanism for enhancing reconciliation with Indigenous peoples, and a catalyst for political, social, and cultural change.

Critics may understandably doubt the wisdom, or even utility, of adding a new principle to the already controversial category of unwritten constitutional principles. It is certainly true that an ecological UCP will serve little purpose if judges fail to use it and regulators fail to respect it. One can certainly imagine a world in which the UCP of ecological sustainability is just one more item in a catalogue of promising legal principles that failed to have an impact on environmental outcomes. On the other hand, it is equally possible that enlightened legislators and progressive jurists could employ the UCP of ecological sustainability to great effect. In particular, such a UCP could counter the "[c]ategorical, presumptive, and ultimately excessive judicial deference to executive and administrative decision-making" that has too often characterized environmental case law in Canada.[158] The effective oversight of environmental decision making requires judicial courage,[159] and a commitment to remain relevant in the realm of sustainability.[160] We believe that recognition of an ecological UCP could be a useful tool for judges as they face increasingly urgent and challenging environmental lawsuits.

Ultimately, in our view, Canadian constitutional law will need to find more holistic and coherent ways to address ecological sustainability than it has to date. As it does, the crucial parameters within which discretion

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158 MacLean & Tollefson, *supra* note 39 at 250.

159 See generally MacIvor, *supra* note 110 (lamenting the Supreme Court's unwillingness to use UCPs to defend the rule of law from government incursion under the Harper administration).

160 Wood, *supra* note 153.

is exercised, both in the promulgation of regulations and their application, will need to align more clearly with the statutory purposes and constitutional values of environmental protection. The crucial message for decision makers at all levels is this: if our constitution is a living tree, then ecological sustainability is the ground in which it is rooted.