The Unwritten Constitutional Principles and Environmental Justice: A New Way Forward?

Mari Galloway

ENVIRONMENTAL BENEFITS AND harms are unequally distributed in Canada. Environmental harms tend to disproportionately impact Indigenous peoples and people of colour as well as those who experience discrimination on the basis of gender, age, or socio-economic status. As it stands, this country's constitutional framework does not provide adequate protection against such environmental inequality. This paper explores how Canada's unwritten constitutional principles (UCPs) could play a role in filling this gap, and reduce the environmental injustices faced by Indigenous peoples. To do so, it explores how the UCPs have been applied by the courts to date. It also considers legal scholarship on environmental justice-oriented UCPs, including the proposed UCPs of ecological sustainability, substantive equality, the public trust doctrine, as well as the recognition of Indigenous peoples' relationship to land, resources, and other peoples as an underlying constitutional value. To demonstrate how the UCPs may let us look at constitutional questions through an environmental justice lens, the principles are applied to two contemporary case studies: the references on the constitutionality of the federal government's *Greenhouse Gas Pollution Pricing Act*, and the Asubpeeschoseewagong Netum Anishinabek's (ANA or Grassy Narrows First Nation) *Charter* challenge regarding mercury contamination in its territory.

LES BÉNÉFICES ET les préjudices environnementaux sont inégalement répartis au Canada. Les préjudices environnementaux ont tendance à affecter de manière disproportionnée les peuples autochtones et les minorités visibles, ainsi que les personnes victimes de discrimination sur la base du sexe, de l'âge ou du statut socio-économique. Dans sa forme actuelle, le cadre constitutionnel canadien n'offre pas de protection adéquate contre ces inégalités environnementales. Cet article examine comment les principes constitutionnels non écrits («PCNÉ») pourraient s'adresser à cette lacune et réduire les injustices environnementales auxquelles sont confrontés les peuples autochtones. Pour ce faire, l'article examine l'application des PCNÉ dans la jurisprudence. Il aborde également la doctrine sur les PCNÉ qui sont axés sur la justice environnementale, y compris les PCNÉ de la durabilité écologique, de l'égalité matérielle, de la fiducie publique ainsi que la reconnaissance comme valeur constitutionnelle de la relation des peuples autochtones avec la terre, les ressources et d'autres peuples. Pour démontrer comment les PCNÉ peuvent nous permettre d'examiner des questions de droit constitutionnel sous l'angle de la justice environnementale, les principes sont appliqués à deux études de cas contemporaines: d'une part, les renvois sur la *Loi sur la tarification de la pollution causée par les gaz à effet de serre* et d'autre part, la contestation fondée sur la *Charte*

d'Asubpeeschoseewagong Netum Anishinabek (« ANA » ou Première Nation de Grassy Narrows) concernant la contamination au mercure sur son territoire.

CONTENTS

The Unwritten Constitutional Principles and Environmental Justice: A New Way Forward?
Mari Galloway

I. Introduction **203**

II. Canada's UCPs: What Are They And How Are They Used? **205**
- A. Federalism **208**
- B. Democracy **209**
- C. Constitutionalism and the Rule of Law **210**
- D. Respect for, and Protection of, Minority Rights **212**
- E. Critiques of UCPs and Their Fluidity **214**

III. Existing Proposals for New UCPs and Their Application to Environmental Justice **216**
- A. The UCP of Ecological Sustainability **216**
- B. The Public Trust as a UCP **218**
- C. The UCP of Substantive Equality **219**
- D. The UCP of Respect for Indigenous Peoples' Relationship to the Land, its Resources, and Other Peoples **221**

IV. Applying The UCPs to Current Environmental Case Law **223**
- A. The Carbon Pricing Reference **223**
  1. The Saskatchewan AG **224**
  2. The Intergenerational Climate Coalition **224**
  3. The United Chiefs and Councils of Mnidoo Mnising **225**
  4. The Athabasca Chipewyan First Nation **226**
  5. The Decisions **226**
  6. What About the UCP of Respect for, and Protection of, Minorities? **228**
- B. UCPs and the *Charter*: The Case of Grassy Narrows First Nation **233**

V. Conclusion **238**

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I. INTRODUCTION

The link between exposure to environmental harm and social, economic, and cultural factors is often under-examined in mainstream approaches to regulating the environment.[1] But, as environmental justice scholars and increasing evidence demonstrate, environmental benefits and burdens are not distributed equally across society.[2]

Environmental harm disproportionately occurs where discrimination exists, be it discrimination based on race, gender, age, or socio-economic status.[3] In Canada, the impact of environmental harm is perhaps most severe for Indigenous peoples because of their close connection to the

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1 See Randolph Haluza-DeLay et al, "Speaking for Ourselves, Speaking Together: Environmental Justice in Canada" in Julian Agyeman et al, eds, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) 1 at 3.

2 For general scholarship on environmental racism in Canada, see Andil Gosine & Cheryl Teelucksingh, *Environmental Justice and Racism in Canada: An Introduction* (Toronto: Emond Publishing, 2008); Michael Mascarenhas, *Where the Waters Divide: Neoliberalism, White Privilege, and Environmental Racism in Canada* (Toronto: Lexington Books, 2012); Julian Agyeman et al, eds, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) [Agyeman et al, *Speaking for Ourselves*].

3 See 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.

land and water, and the proximity of their communities to resource developments.[4]

Federal and provincial laws often fail to meaningfully prevent or rectify this unequal distribution of environmental harm, and Canadian regulatory bodies repeatedly fail to consider the cumulative effects of their decisions on constitutionally protected Aboriginal and treaty rights.[5] This failure to protect Indigenous peoples from environmental injustice represents a fundamental gap in Canada's constitutional framework. As scholar Deborah McGregor bluntly states: "[c]urrent environmental laws are inadequate for protecting what is important to Aboriginal peoples."[6] It is an inadequacy that needs to be corrected. The purpose of this paper is to explore whether unwritten constitutional principles (UCPs), which breathe life into our Constitution, can play a role in filling constitutional

4 For example, the Fort Chipewyan First Nation and Mikisew Cree First Nation, whose territories are situated at the mouth of the Athabasca River, face pollutants flowing from Canada's oil sands. Concern over the high levels of arsenic and mercury in these nations' traditional foods forces community members to switch to store-bought food. See e.g. Jocelyn Edwards, "Oil Sands Pollutants in Traditional Foods" (2014) 186:12 CMAJ E444, online: <doi.org/10.1503/cmaj.109-4859>. The Aamjiwnaang First Nation's home—which neighbours Sarnia's "Chemical Valley," one of the most polluted places in Canada—continues to be exposed to the harmful impact of industrial air pollution. See Elaine MacDonald & Sarah Rang, "Exposing Canada's Chemical Valley: An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area" (October 2007), online (pdf): *Ecojustice* <www.ecojustice.ca/wp-content/uploads/2015/09/2007-Exposing-Canadas-Chemial-Valley.pdf>. In the Asubpeeschoseewagong Netum Anishinabek (ANA or Grassy Narrows First Nation) and Wabaseemoong First Nation communities, "community members have suffered the devastating effects of pervasive mercury contamination in the Wabigoon-English River system for over 60 years," a situation which persists in the face of decades of inaction by both the provincial and federal governments. See The Environmental Commissioner of Ontario, "Good Choices, Bad Choices: Environmental Rights and Environmental Protection in Ontario" (2017) at 8, online (pdf): <docs.assets.eco.on.ca/reports/environmental-protection/2017/Good-Choices-Bad-Choices.pdf> [Environmental Commissioner]; Masazumi Harada et al, "Mercury Poisoning in First Nations Groups in Ontario, Canada: 35 Years of Minamata Disease in Canada" (2011) 3 J Minamata Studies 3 at 30.

5 See e.g. Bruce E Johansen, *Environmental Racism in the United States and Canada: Seeking Justice and Sustainability* (ABC-CLIO, 2020) at 304. See also Bud Napoleon et al, "Caretakers of the Land and its People: Why Indigenous Trapline Holders' Legal Rights and Responsibilities Matter for Everyone" (2018), online (pdf): *West Coast Environmental Law* <www.wcel.org/sites/default/files/publications/wcel_caretakersland2018_report_final_web.pdf>. As this report states, "in British Columbia, it became clear that statutes like the *Wildlife Act* and its regulations were not intended to meet the trappers' land protection goals, and in many cases, have demonstrably failed to do so" (*ibid* at 7).

6 Deborah McGregor, "Honouring Our Relations: An Anishnaabe Perspective on Environmental Justice" in Agyeman et al, *Speaking for Ourselves*, *supra* note 2 at 29 [McGregor, "Honouring Our Relations"].

gaps in relation to environmental justice, particularly in the context of Indigenous peoples, and, if so, how.

The paper is structured in three parts. Section II discusses the UCPs that have been recognized as underlying the Canadian Constitution and their application in Canadian courts. Section III explores four UCPs relevant to environmental justice proposed by Canadian scholars:

1) Lynda Collins's proposal for the UCP of ecological sustainability;
2) Harry Wruck's proposal for a Canadian public trust doctrine;
3) Patricia Hughes's proposal for the UCP of substantive equality; and
4) John Borrows's proposal for the recognition of Indigenous peoples' relationship to land, resources, and other peoples as an underlying constitutional value.

Section IV examines how these UCPs, if recognized, could allow us to view two case studies through an environmental justice lens: first, the division of powers analysis in the Alberta, Ontario, and Saskatchewan references on the constitutionality of the federal government's *Greenhouse Gas Pollution Pricing Act* (*GGPPA*); second, the Asubpeeschoseewagong Netum Anishinabek's (ANA or Grassy Narrows First Nation)[7] *Charter* challenge of provincial (in)action regarding long-standing mercury contamination in its territory.

II. CANADA'S UCPS: WHAT ARE THEY AND HOW ARE THEY USED?

In the *Quebec Secession Reference*, the seminal case on UCPs, the Supreme Court of Canada established that unwritten principles are fundamental to the Constitution's architecture; they "inform and sustain the constitutional text."[8] Unwritten principles, the Court wrote, represent major elements of the Constitution's architecture—"its lifeblood"[9]—delineating "spheres of jurisdiction [and] the scope of rights and obligations."[10] UCPs

7 The Asubpeeschoseewagong Netum Anishinabek is the name with which this nation self-identifies. However, the Notice of Application for judicial review uses the name Grassy Narrows First Nation, and so for the purposes of discussing and analyzing their claim in this paper, I will use the name "Grassy Narrows First Nation" or "Grassy Narrows."

8 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 49, 161 DLR (4th) 385 [*Quebec Secession Reference*].

9 *Ibid* at para 51.

10 *Ibid* at para 52.

also fill gaps in the express provisions of the written text.[11] In the 1998 *Quebec Secession Reference,* the Court identified the following UCPs: federalism, democracy, constitutionalism and the rule of law, as well as respect for minority rights.[12] However, in the years since this reference, there has been much scholarly debate on exactly when, and how, these principles apply and what they achieve.

Writing extra-judicially, then-Chief Justice McLachlin has said that the UCPs "refer to unwritten norms that are essential to a nation's history, identity, values and legal system…best understood as providing the normative framework for governance."[13] They are rooted in conceptions of natural law that "transcend the exercise of state power" and give the law a "minimum moral content."[14] They espouse an understanding that there are certain fundamental norms that no law on the books can legitimately violate.

To illustrate, then-Chief Justice McLachlin gives this example: "if a state were to pass a genocidal law…it would clearly be the duty of the judges to deny the law's validity on the ground that it offended the basic norm that states must not exterminate their people."[15] As Justice McLachlin (as she then was) states in *New Brunswick Broadcasting*, the UCPs derive their normative force from being "part of the fundamental law of our land."[16] These sentiments are echoed in the *Manitoba Language Reference* in the context of the rule of law, where the Supreme Court states:

> Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence.[17]

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11 See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 95, 150 DLR (4th) 577 [*Provincial Judges Reference*].

12 *Quebec Secession Reference*, *supra* note 8 at para 49.

13 The Right Honourable Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 4:2 NZJPIL 147 at 149.

14 *Ibid* at 149–50.

15 *Ibid* at 153.

16 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 384, 100 DLR (4th) 212 [*New Brunswick Broadcasting*].

17 *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 750–51, 19 DLR (4th) 1 [*Manitoba Language Reference*].

In this vein, courts have found that UCPs can, and do, guide statutory interpretation and the exercise of judicial and executive discretion. The UCPs may also, in certain circumstances, give rise to substantive obligations that have "full legal force."[18] These obligations can be abstract and general in nature or more specific and precise, depending on the case.[19] However, they cannot directly contradict the written text. The Constitution, written and unwritten, must be read as a whole.[20]

In trying to characterize the application of these obligations, scholars such as Robin Elliot and Mark Walters argue that there are two types of UCPs. First, there are those UCPs that "can fairly be said to be generated by necessary implication from the text of the Constitution."[21] These have been referred to as "text-emergent unwritten constitutional norms."[22] Second, there are UCPs that do not arise from the text by implication but are said to underlie the Constitution.[23] These are "free-standing unwritten constitutional principles," whose normative force is derived from outside the written Constitution itself, whether common, customary, or natural law.[24] The former are on par with the written text and may create obligations, while the latter are better understood as interpretive guides, providing a basis for a purposive approach to constitutional provisions.[25]

Throughout the case law, the UCPs have played a key role in the "development and evolution of our Constitution."[26] The UCPs have been used to delineate jurisdiction (*Provincial Judges Reference*),[27] fill gaps in the written text (*Quebec Secession Reference*),[28] and guide the exercise of statutory discretion (*Babcock v Canada (AG)*),[29] but have not yet been used as a sole basis for invalidating legislation.

Rather, in applying UCPs, courts have grounded their analyses in the text of the Constitution. For example, the Supreme Court of Canada

18 *Quebec Secession Reference*, *supra* note 8 at para 54.
19 *Ibid*, citing *Re Resolution to amend the Constitution*, [1981] 1 SCR 753 at 845, 125 DLR (3d) 1.
20 *Quebec Secession Reference*, *supra* note 8 at para 50.
21 Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1/2 Can Bar Rev 67 at 83.
22 Mark D Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51:2 UTLJ 91 at 98.
23 Elliot, *supra* note 21 at 84.
24 Walters, *supra* note 22 at 98.
25 Elliot, *supra* note 21 at 84.
26 *Quebec Secession Reference*, *supra* note 8 at para 52.
27 *Supra* note 11.
28 *Supra* note 8
29 2002 SCC 57 [*Babcock*].

refused to strike down provisions of the *Tobacco Damages and Health Care Costs Recovery Act*[30] solely on the basis of the UCP of rule of law in *British Columbia v Imperial Tobacco Canada Ltd.* (*Imperial Tobacco*),[31] discussed in more detail below. And this past year, in the *Reference re Greenhouse Gas Pollution Pricing Act*, the Saskatchewan Court of Appeal held that the Act could not be struck down on the basis of the UCP of federalism alone.[32] To the contrary, as interveners to the *GGPPA Reference* argued, there may be potential for UCPs to expand environmental protections in the Constitution by guiding the interpretation of certain provisions according to environmental justice principles, providing one avenue of hope to end the environmental discrimination faced by Indigenous peoples.

Courts have used the unwritten principles to aid in interpreting the constitutionality of statutes and governmental actions.[33] In this vein, recognizing an environmental justice-oriented UCP could help to link environmental protection—which the Supreme Court of Canada has stated has "emerged as a fundamental value in Canadian society"[34]—with section 35 Aboriginal and treaty rights and *Charter* protections, including the section 7 protection of "life, liberty and security of the person"[35] and the equality guarantee under section 15. Such a link may provide a foundation within the Constitution from which to prevent environmental inequality.

A. Federalism

In the *Quebec Secession Reference*, the Supreme Court grappled with the question of Quebec's secession from Canada on the basis of the outcome of a majority "leave" referendum vote, an issue not dealt with in the written text of the Constitution. To develop a constitutional framework around this hypothetical, the Court relied upon the aforementioned UCPs: federalism, democracy, constitutionalism and the rule of law, as well as respect for, and

30 SBC 2000, c 30

31 2005 SCC 49 [*Imperial Tobacco*].

32 2019 SKCA 40 at para 9 [*Re GGPPA*, SKCA].

33 Walters, *supra* note 22.

34 *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 55, 125 DLR (4th) 385 [*Canadian Pacific*], quoted in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1 [*Spraytech*].

35 "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice": *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

the protection of, minority rights.[36] The Court found that if a clear majority of Quebecers voted in favour of secession, the province could legally leave Canada through secession negotiations as long as those negotiations were carried out in accordance with the above-mentioned UCPs.[37] In discussing the UCP of federalism, the Court stated that federalism was, and is, "a political and legal response to underlying social and political realities."[38]

As was the case in 1998 in the *Quebec Secession Reference*, the current constitutional framework must develop to meet the new challenges it faces, high among them being the problem of environmental injustice. As it stands, the Constitution has not been interpreted to allow adequate consideration of the unequal distribution of environmental benefits and burdens. This uneven distribution includes the deep-seated and systemic environmental injustice Indigenous peoples continue to face: air, water, and land pollution from industrial activities on or near traditional territories; risk to health, economy, and cultural identity; as well as broken treaty promises and land claim processes.[39] Like the UCP of federalism discussed in the *Quebec Secession Reference*, an environmental justice-oriented UCP could be one step forward to reforming and reconciling our current reality and constitutional framework with a more equitable and sustainable future.

B. Democracy

The principle of democracy is central to Canada's constitutional structure. But as the Supreme Court clarified in the *Quebec Secession Reference*, democracy is not only about majority rule.[40] While democracy includes a political system of majority rules, it is also about the process of government and the substantive goals of self-government and effective representation.[41] As the Supreme Court of Canada stated in *R v Oakes*:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs,

36 *Quebec Secession Reference*, *supra* note 8 at para 49.
37 *Ibid* at para 151.
38 *Ibid* at para 57.
39 See Deborah McGregor, "Reconciliation and Environmental Justice" (2018) 14:2 J Global Ethics 222 at 224–25 [McGregor, "Reconciliation and Environmental Justice"].
40 *Quebec Secession Reference*, *supra* note 8 at paras 65–67.
41 *Ibid* at paras 63–64.

> respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[42]

These values and goals align with the stated purpose of environmental justice seekers, who strive to amplify the minority voices that are not heard or heeded in the context of environmental harm.

C. Constitutionalism and the Rule of Law

The Supreme Court has held that the rule of law is "a fundamental postulate of our constitutional structure."[43] In *Babcock*,[44] the Court examined whether the UCPs of the rule of law, the independence of the judiciary, and the separation of powers could be used to strike down section 39 of the *Canada Evidence Act* (*CEA*).[45] Section 39 allows the federal executive to object to disclosure of Cabinet confidences in the context of litigation. The Court, unanimous on this point, weighed the UCPs against the principle of parliamentary sovereignty before concluding that the unwritten principles on their own were not a sufficient basis upon which to invalidate the provision.[46]

A few years later, the Supreme Court of Canada in *Imperial Tobacco* refused to strike down provisions of the *Tobacco Damages and Health Care Costs Recovery Act*[47] solely on the basis of the UCP of the rule of law.[48] The Act allowed the British Columbia government to sue tobacco companies for health care costs associated with tobacco-related illnesses. The appellants, the tobacco companies, argued that the Act violated the rule of law, specifically the requirements that laws "(1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial."[49] Justice Major found that the requirements of the UCP of the rule of law cited by the tobacco companies were "simply broader versions of rights

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42 *Ibid* at para 64, citing *R v Oakes*, [1986] 1 SCR 103 at 136, 26 DLR (4th) 200.

43 *Ibid* at para 70, citing *Roncarelli v Duplessis*, [1959] SCR 121 at 142, 16 DLR (2d) 689.

44 *Supra* note 29.

45 RSC 1985, c C-5, s 39 [*CEA*].

46 See Vincent Kazmierski, "Draconian but not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada" (2010) 41:2 Ottawa L Rev 245 at 272.

47 *Supra* note 30.

48 *Imperial Tobacco*, *supra* note 31 at para 59.

49 *Ibid* at para 63.

contained in the *Charter*."[50] More importantly, several other constitutional principles, including democracy and constitutionalism, weighed in favour of upholding the legislation.[51]

Justice Major's balancing approach in *Imperial Tobacco* is consistent with the Supreme Court's statement in the *Quebec Secession Reference* that the Constitution must be read as a whole, without any one principle trumping or excluding another.[52] Similarly, in the *Provincial Judges Reference*, the Court was asked to examine the validity of provincial legislation reducing judges' salaries. The Court made the controversial decision to outline a process through which to evaluate judicial salaries. Writing for the majority, Chief Justice Lamer held that any changes to judges' compensation must be done with reference to an independent remuneration commission's recommendations.[53] This conclusion was grounded in section 11(d) of the *Charter*, which the Court stated requires a de-politicized relationship between the legislature and the judiciary.[54]

Chief Justice Lamer also held that the principle of judicial independence was incorporated into the Constitution as a UCP, stating that "the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*."[55] This includes the *Charter*, "since the Constitution is to be read as a unified whole."[56] Rather than limiting the application of judicial independence, section 11(d) of the *Charter* expressly signaled application of the UCP of judicial independence across all courts and all cases.[57]

Like Justice Major's decision in *Imperial Tobacco*, the *Provincial Judges Reference* provides an example of how the UCPs may deepen and expand our understanding of the written text of the Constitution. For example, there are no express protections against climate change and other environmental harms in the Constitution, but it is well known that the wide-ranging effects of climate change—which include extreme weather events, the degradation of natural resources, air pollution, and the expansion of vector-borne illnesses—will particularly threaten Indigenous

50 *Ibid* at para 65.
51 *Ibid* at para 66.
52 *Quebec Secession Reference*, *supra* note 8 at para 49.
53 *Provincial Judges Reference*, *supra* note 11 at para 133.
54 *Ibid* at paras 107, 131.
55 *Ibid* at para 107.
56 *Ibid*.
57 *Ibid*.

cultures and communities.[58] As discussed below, an environmental justice-oriented UCP may be one way to help fill the gap caused by the lack of express environmental protections in the Constitution and the uneven distribution of environmental harms.[59]

D. Respect for, and Protection of, Minority Rights

In *Lalonde v Commission de restructuration des services de santé*, the Ontario Court of Appeal provided an in-depth analysis of the principle of respect for, and protection of, minorities.[60] There, this principle guided the review of a provincial government decision to close Ontario's only French-language teaching hospital, Montfort. As part of its review, the Court considered the interpretation of the *French Language Services Act*.[61] In doing so, the UCP of respecting and protecting minorities played a large part in the Court's analysis. The Court stated:

> 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. This is an area where, as the Supreme Court of Canada explained in the *Secession Reference*,…"[a] superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading". This structural feature of the Constitution is reflected not only in the specific guarantees in favour of minorities. It infuses the entire text and, as we have explained, plays a vital role in shaping the content and contours of the Constitution's other structural features: federalism, constitutionalism and the rule of law, and democracy.[62]

The Divisional Court at first instance had recognized the importance of the "right to receive health services in 'a truly francophone environment'."[63] The UCP of respect for, and protection of, minorities constrained the

58 See *La Rose v Canada*, 2020 FC 1008 at para 4 [*La Rose*].

59 See Harry J Wruck, "The Time Has Arrived for a Canadian Public Trust Doctrine Based Upon the Unwritten Constitution" (2020) 10:2 George Washington J Energy & Envtl L 67 at 78–79.

60 [2001] 56 OR (3d) 505, 208 DLR (4th) 577 [*Lalonde*].

61 RSO 1990, c F32.

62 *Lalonde*, *supra* note 60 at 626–27.

63 *Ibid* at 608.

Commission's exercise of its discretion,[64] and guided the Court in finding the correct interpretation of the *French Language Services Act*. It could also play an important role in guiding the exercise of statutory discretion to incorporate minority voices in discussions around environmental benefits and harms and the cumulative impact of industrial projects. In this vein, the UCP of respect for, and protection of, minorities could play a role in ensuring that statutory decision-makers provide space for Indigenous perspectives on environmental issues that affect Aboriginal rights or interfere with Indigenous laws and legal orders.

In the *Quebec Secession Reference*, the Supreme Court observed that the UCP of respect for minorities was both "an essential consideration in the design of our constitutional structure even at the time of Confederation" and "one of the key considerations motivating the enactment of the *Charter*."[65] In its discussion, the Court appeared to subsume Indigenous peoples within the UCP of respect for, and protection of, minorities. In the *Quebec Secession Reference*, it stated:

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing [A]boriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of [A]boriginal peoples. The "promise" of s. 35…recognized not only the ancient occupation of land by [A]boriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.[66]

However, the Court's analysis also left the door open to the possibility that Aboriginal and treaty rights and the rights of Indigenous peoples might, more generally, constitute a separate and distinct UCP, which could play a role in the context of environmental harms. As discussed in more detail below, Indigenous scholars have also argued that recognition of such a UCP is important. This is because there is an inherent tension in the characterization of Indigenous peoples as just one of many cultural minorities

64 See Lynda Collins & Lorne Sossin, "Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 UBC L Rev 293 at 315.

65 *Quebec Secession Reference*, *supra* note 8 at para 81.

66 *Ibid* at para 82.

in Canada because of the sovereign nature of Aboriginal rights and the nation-to-nation treaties between Indigenous peoples and the Crown.[67]

E. Critiques of UCPs and Their Fluidity

As demonstrated, the UCPs have been applied towards a variety of different purposes. But the substantive goals of equality, self-determination, and diversity remain a common thread. The range of ways UCPs have been employed in the case law has, however, also led to criticism. Several scholars have assailed the Supreme Court's endorsement of UCPs, in particular the idea that they can give rise to substantive obligations, citing judicial overreach.[68] A common criticism is that the application of unwritten principles upsets the separation of powers and allows judges to usurp the role of legislators by making, rather than interpreting, legislation.[69]

Scholar Peter Hogg writes that "[u]nwritten constitutional principles are vague enough to arguably accommodate virtually any grievance about government policy" before ultimately concluding that "[f]ortunately, lower courts have maintained a wise reluctance to invalidate governmental initiatives on the basis of unwritten constitutional principles, and the Supreme Court of Canada shows some sign of reining in its creative impulses."[70] However, it is the UCPs' malleability that may also be their strength. It is this malleability that allows them to ground and expand our understanding of the Constitution's protections, particularly in the context of justice and equality, where our understanding develops alongside evolving political, cultural, and legal realities.

Further, the idea that the Constitution consists of more than its written text is neither new nor novel, notwithstanding that the Supreme Court has stressed the continued primacy of the written text for the promotion of legal certainty and the legitimacy of constitutional review.[71] For

67 See Larry Chartrand, "Indigenous Peoples: Caught in a Perpetual Human Rights Prison" (2016) 67 UNBLJ 167 at 173–74 [Chartrand, "Perpetual Human Rights Prison"]; Dale A Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 67; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Difference" (1989-1990) Can Hum Rts YB 3 at 10.

68 See Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007) (loose-leaf revision 2018) at 15-54. See also Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389.

69 Leclair, *supra* note 68 at 392.

70 Hogg, *supra* note 68 at 15-54.

71 *Provincial Judges Reference*, *supra* note 11 at para 93.

instance, the preamble to the *Constitution Act, 1867* establishes the Canadian Constitution as "a constitution similar in Principle to that of the United Kingdom,"[72] a constitution that happens to be entirely unwritten.[73] Section 52(2) of the *Constitution Act, 1982* sets out a non-exhaustive list of statutory enactments included within the Constitution, leaving space for unwritten rules.[74]

As Justice Lamer (as he was then) stated in the *Patriation Reference*, "many Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the most familiar because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the constitution."[75] The office of the Prime Minister, for example, is not included in the constitutional texts, nor are constitutional conventions such as the confidence convention, wherein the head of the executive must have the support of the elected branch of the legislature.[76] Yet these underlying principles are foundational to Canadian democracy.

Similarly, several sections of the written text of the Constitution are no longer relevant. Consider, for example, the federal government's power of disallowance and reservation under section 90 of the *Constitution Act, 1867*.[77] If the federal government were to try to use section 90 today to invalidate provincial legislation, it would likely lead to a constitutional crisis rather than invalidity,[78] despite being an express provision of the Constitution.

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72 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, Preamble, reprinted in RSC 1985, Appendix II, No 5.

73 *Provincial Judges Reference*, *supra* note 11 at para 83.

74 *Constitution Act, 1982*, s 52(2), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

75 *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 877–78, (*sub nom Reference Re Amendment of the Constitution of Canada* (*Nos 1, 2 and 3*)) 125 DLR (3d) 1.

76 See Ian Binnie, "Charles Gonthier and the Unwritten Principles of the Canadian Constitution" (Paper delivered at the Responsibility, Fraternity and Sustainability in Law Symposium in Honour of Charles D Gonthier at the McGill University Faculty of Law, 20–21 May 2011) [unpublished] at 6–7, online (pdf): *Centre for International Sustainable Development Law* <www.cisdl.org/wp-content/uploads/2018/05/Confrence_Charles_D_Gonthier_-_Ian_Binnie.pdf>.

77 *Supra* note 72, s 90.

78 See Ian Binnie, "Charles Gonthier and the Unwritten Principles of the Canadian Constitution" (Paper delivered at the Responsibility, Fraternity and Sustainability in Law Symposium in Honour of Charles D Gonthier at the McGill University Faculty of Law, 20–21 May 2011) [unpublished] at 7–8, online (pdf): *Centre for International Sustainable Development Law* <www.cisdl.org/wp-content/uploads/2018/05/Confrence_Charles_D_Gonthier_-_Ian_Binnie.pdf>.

Examined from this perspective, it is unlikely that it is the *unwritten* nature of these principles that causes controversy. Rather, it is their application and, in particular, the substantive obligations they create. Nonetheless, there are strong arguments to recognize further obligations where gaps in the Canadian Constitution exist, such as in the context of ecological sustainability, equality, the public trust doctrine, and Indigenous peoples' relationship to the land, its resources, and other peoples, as discussed below.

III. EXISTING PROPOSALS FOR NEW UCPS AND THEIR APPLICATION TO ENVIRONMENTAL JUSTICE

A. The UCP of Ecological Sustainability

Environmental protection is often undermined by the broad discretion given to administrative decision-makers who overlook ecological sustainability for the sake of short-term political goals.[79] Whether it is deciding how much to protect or whether to greenlight an industrial project, environmental protection often runs secondary to economic goals.[80] As a result, scholar Lynda Collins argues that there is an urgent need for Canadian courts to recognize the UCP of ecological sustainability "to compensate for the weaknesses in Canadian environmental legislation."[81]

As Collins notes, when the Constitution was established, environmental issues, including the threats of climate change and human-induced environmental catastrophe, were not in the worldview of its founders.[82] Although Canadian courts have since developed jurisprudence around environmental protection, and the Supreme Court of Canada has framed environmental protection in quasi-constitutional terms,[83] there remains a

79 Collins & Sossin, *supra* note 64 at 301.

80 Napoleon et al, *supra* note 5 at 31–34.

81 Lynda Collins, "Ecological Sustainability as an Unwritten Constitutional Principle: Why Canadian Courts Should Recognize an Environmental UCP" (30 October 2017) at 2 [unpublished, archived], online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3061938>.

82 See Lynda Collins, "The Unwritten Constitutional Principle of Ecological Sustainability: A Solution to the Pipelines Puzzle?" (2019) 70 UNBLJ 30 at 40 [Collins, "The UCP of Ecological Sustainability"].

83 The Supreme Court of Canada has affirmed that constitutional and quasi-constitutional rights "play an essential role in a free and democratic society and embody key Canadian values": *Douez v Facebook, Inc*, 2017 SCC 33 at para 58. The Supreme Court has repeatedly referenced environmental protection in quasi-constitutional terms, recognizing it as a "fundamental value in Canadian society" and one that plays a "public purpose

strong need for an ecological bottom line.[84] In part, this is because, as Collins states, "[e]nvironmental acts and regulations grant decision-makers the *power* to take protective actions but rarely impose an *obligation* to do so, and years of data demonstrates that environmental discretion is too often exercised in service of business interests rather than human health and the environment."[85]

To reconcile this, and to better guide the exercise of administrative discretion, Collins, alongside scholars such as the Honourable Lorne Sossin, have proposed recognizing ecological sustainability as a UCP and an ecological bottom line. They argue that recognition of the UCP of ecological sustainability could affect both the formation of environmental policy and the courts' approach to its application, statutory interpretation, and division of powers questions.[86]

Just as other UCPs, such as democracy and the rule of law, have served to ground public discourse and social action across a variety of issues and institutions, Collins argues that the establishment of a UCP of ecological sustainability can help to promote broader action and commitment to enhancing environmental and ecological health. If constitutionalized, the "UCP of ecological sustainability would affect the exercise of environmental discretion, the resolution of division of powers debates in environmental regulation, the court's treatment of Indigenous legal principles dealing with the environment, and the adjudication of environmental claims under the *Charter*."[87]

The UCP of ecological sustainability could also have broader links to the goals of reconciliation between Canadian settlers and Indigenous peoples. Aboriginal rights and title are constitutionalized under section 35 of the *Constitution Act, 1982*.[88] Much of the Aboriginal rights and title case law under section 35 centers on the duty to consult and the government's exercise of its discretion in the allocation of environmental benefits and

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of superordinate importance." See *Canadian Pacific*, *supra* note 34 at para 55; *R v Hydro-Québec*, [1997] 3 SCR 213 at paras 85, 124, 151 DLR (4th) 32; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 16, 88 DLR (4th) 1; *Spraytech*, *supra* note 34 at para 1; *British Columbia v Canadian Forest Products Ltd (Canfor)*, 2004 SCC 38 at para 7 [*Canadian Forest*].

84 Collins & Sossin, *supra* note 64 at 313.

85 Collins, "The UCP of Ecological Sustainability", *supra* note 82 at 46–47 [emphasis in original].

86 Collins & Sossin, *supra* note 64.

87 *Ibid* at 46.

88 See Nathalie J Chalifour, "Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the *Charter*?" (2015) 28:1 J Envtl L & Prac 89.

harms. Unfortunately, more recent section 35 jurisprudence has set a low bar for what constitutes adequate consultation.[89] As Sossin and Collins argue, far from the Supreme Court's strong pronouncements on section 35 at its inception, the jurisprudence today has established that that "the duty to consult and accommodate under section 35 is fast becoming just another version of procedural fairness."[90]

As it stands, the courts and government do not need to include Indigenous peoples' perspectives on environmental protection and ecological sustainability in non-section 35 cases, such as the division of powers analyses in the *GGPPA* references discussed below. To this end, a UCP of ecological sustainability could act a potential "substantive ecological bottom line"[91] to overcome the procedural limitations that case law to date has created in the section 35 jurisprudence.

B. The Public Trust as a UCP

The public trust doctrine is a fiduciary or trust-like obligation imposed on the government in certain common law jurisdictions, such as the United States, to protect the integrity of inherently public resources such as navigable waters, the air, and permafrost.[92] As stated by scholar Harry Wruck, it is a legal mechanism that can be used to require governments to take the welfare of these resources into account when making decisions.[93] The public trust doctrine has not yet been formally recognized in Canadian common law.[94] However, in *British Columbia v Canadian Forest Products Ltd.* (*Canfor*), the Supreme Court held that "[t]he notion that there are public rights in the environment that reside in the Crown has deep roots in the common law...."[95]

Wruck argues that the lack of express environmental protections in the written text of the Canadian Constitution represents a fundamental gap in the written text, which could be remedied by the recognition of the public trust doctrine as a UCP.[96] As he notes, in cases such as the

89 See *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*].

90 Collins & Sossin, *supra* note 64 at 335.

91 *Ibid* at 339.

92 *La Rose*, *supra* note 58 at paras 81–83.

93 Wruck, *supra* note 59 at 68.

94 *Ibid* at 69.

95 *Supra* note 83 at para 74.

96 Wruck, *supra* note 59 at 78.

Quebec Secession Reference, the Supreme Court has recognized that UCPs guide the Court's decision-making when faced with gaps in the constitutional texts.[97] Similarly, courts could, and should, remedy the lack of express environmental protection in the constitutional texts by using the public trust doctrine.

This is exactly what plaintiffs argued in *La Rose v Canada*.[98] In that case, the plaintiffs, 15 children and youth from across Canada, brought a *Charter* challenge against the federal government on the basis of its climate policy. The plaintiffs claimed that by causing, contributing to, and allowing a level of greenhouse gas (GHG) emissions incompatible with a stable climate system, the Canadian government had violated their sections 7 and 15 *Charter* rights, and failed to discharge its obligations under the "public trust doctrine."[99] At the Federal Court, Justice Manson rejected the plaintiffs' submissions and dismissed the claim on a motion to strike, holding that there were insufficient material facts pleaded to support the public trust as a UCP.[100] The decision is being appealed, and it remains to be seen whether future climate litigation may rely on similar arguments grounded in environmental justice-oriented UCPs to fill gaps in Canada's constitutional environmental protections to ensure that inaction on climate change does not threaten other constitutionally protected rights, including Aboriginal rights and the rights of youth and future generations.[101]

C. The UCP of Substantive Equality

In her work on equality, scholar Patricia Hughes has proposed that substantive equality be recognized as a UCP.[102] The goal of equality has played a role throughout Canada's constitutional history. However, Hughes distinguishes between equality as an aspiration and its actual attainment, which a UCP of substantive equality could help achieve. She argues that the identification of principles such as substantive equality is important

97 *Ibid* at 77.

98 *Supra* note 58.

99 *La Rose*, *supra* note 58 at paras 6–7.

100 *Ibid* at paras 98–99.

101 The plaintiffs intend to appeal the decision of the Federal Court. See *La Rose v Canada* (24 November 2020), A-289-20 (Notice of Appeal), (FCA), online (pdf): *climatecasechart.com* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201124_T-1750-19_appeal.pdf>.

102 Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22:2 Dal LJ 5 at 7.

because "[t]he choice of values, concepts or organizational frameworks which enjoy the status of fundamental, foundational or organizing principles signifies the kind of concerns which occupy the society."[103]

The principle of a UCP of substantive equality strongly aligns with the goals of environmental justice seekers who aim to prevent the environmental harms that continue to occur disproportionately where discrimination exists due to race, gender, age, socio-economic status, *etc*.[104] Hughes's proposal could, for example, provide a strong basis for how the unequal distribution of environmental benefits and harms could ground subsequent constitutional analyses such as a claim under sections 7 or 15 of the *Charter*, where there is ample scope for protection of environmental justice claims.[105]

In support of the recognition of the UCP of substantive equality, Hughes focuses on untangling what she considers to be the three biggest barriers to its recognition: (1) the equality guarantee in section 15 of the *Charter*; (2) that equality is already subsumed in the recognition of the rule of law; and (3) that it is further recognized within the UCP of respect for, and protection of, minorities.[106]

First, Hughes argues that the equality guarantee in section 15 of the *Charter* should not preclude recognition of substantive equality as a UCP. Rather, recognizing the UCP of substantive equality would extend the scope of the equality guarantee beyond the *Charter*.[107] Hughes demonstrates this through analogy to the *Provincial Judges Reference*, where, as discussed above, the Court stated that the existence of section 11(d) grounded the application of the UCP of judicial independence across all judicial decision-making rather than limiting it.[108]

Second, Hughes notes that recognizing the UCP of equality would embed substantive equality within the Constitution's underlying principles. Although equality is recognized within the principle of the rule of law, the rule of law enshrines formal, rather than substantive, equality. Formal equality espouses treating all people equally. It is a powerful but limited protection because it fails to recognize that equal treatment does not result in the same opportunities for all. As Hughes notes, "formal equality is crucial in requiring all to obey the law, especially those in power" but is outmoded

103 *Ibid* at 16.
104 Haluza-DeLay et al, *supra* note 1 at 3; Harada et al, *supra* note 4 at 30.
105 *Charter*, *supra* note 35, ss 7, 15.
106 Hughes, *supra* note 102 at 27.
107 *Ibid* at 29–30.
108 *Ibid* at 28–29.

in other contexts where it is important to take differences into account.[109] This is why recognition of "substantive equality" as a UCP is critical.

Finally, Hughes argues that, while the courts have already recognized the UCP of respect for, and protection of, minorities, which also includes an element of equality, any overlap between related principles does not, and should not, preclude the recognition of substantive equality, which has its own distinct normative power. A critical difference between the two principles is that substantive equality deals with the individual as opposed to groups, which are often the focus of minority rights. The UCP of substantive equality would therefore be unencumbered by the notions of hierarchy and norm, which are inherent in majority-minority and group relations and could work towards a more intersectional view.[110]

D. The UCP of Respect for Indigenous Peoples' Relationship to the Land, its Resources, and Other Peoples

Scholar John Borrows has argued that the Supreme Court of Canada should recognize that "Indigenous peoples' relationship to the land, its resources, and other peoples could be considered one of the organizing features of Canada's unwritten constitution."[111] Recognizing the UCP of Indigenous peoples' relationship to the land, its resources, and other peoples may be one way to explicitly incorporate Indigenous laws and perspectives beyond section 35 and across Canadian constitutional law. As scholars such as Borrows have argued, "[t]he recognition of Indigenous legal traditions alongside common law and civil law traditions should be regarded as part of *the* same system. There is plenty of room for these traditions to interact within *one* framework."[112]

Despite recognition of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, and the Canadian government's support for the United Nations Declaration on the Rights of Indigenous People,[113] Canadian

109 *Ibid* at 33–34.

110 *Ibid* at 35.

111 John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 106 [Borrows, *Freedom and Indigenous Constitutionalism*].

112 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 152 [Borrows, *Canada's Indigenous Constitution*] [emphasis in original].

113 See *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Annex, Agenda Item 68, UN Doc A/Res/61/295 (2007), art 32. The Canadian government initially voted against the adoption of UNDRIP in 2007. In 2010, the Canadian government published a Statement of Support for UNDRIP and in 2016, the federal government

governments continue to override Indigenous peoples' inherent jurisdiction in their traditional territories and to infringe Aboriginal rights and Indigenous peoples' right to self-determination. Although Indigenous peoples have in the past been subsumed under the UCP of respect for, and protection of, minorities, this characterization can be problematic. Characterizing Indigenous peoples in terms of minority politics can play a normative role in downplaying or devaluing the political and sovereign nature of Aboriginal rights and nation-to-nation relationships between Indigenous peoples and the Crown.

The goals of the political emancipation of Indigenous peoples in Canada and Indigenous self-government can be lost within the minority rights frame.[114] As stated by scholar Larry Chartrand, characterizing Indigenous peoples as a "minority" or "ethnic" group devalues their inherent independent political status and agency and undermines their rightful place as self-governing entities in the Canadian confederation.[115] This can happen by

> mischaracterizing the basis of their rights as being equivalent to those required by other Canadian groups (such as visible minorities) in need of substantive equality to offset historical disadvantage. Such an approach tends to minimize or ignore an equally important basis of Aboriginal entitlement to recognition and protection of Aboriginal-specific interests as being grounded in the overall reparation of their status as independent polities.[116]

Indigenous peoples hold a distinct historical and constitutional position in Canada.[117] While section 35 recognizes and constitutionalizes Aboriginal

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removed its permanent objector status to UNDRIP. However, the government maintains that the document is an "aspirational document" and a "non-binding text." See Indigenous and Northern Affairs Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: *Government of Canada* <www.aadnc-aandc.gc.ca/eng/1309374239861>; Tim Fontaine, "Canada Removing Objector Status to UN Declaration on the Rights of Indigenous Peoples", *CBC News* (8 May 2016), online: <www.cbc.ca/news/indigenous/canada-position-un-declaration-indigenous-peoples-1.3572777>.

114 Chartrand, "Perpetual Human Rights Prison", *supra* note 67 at 177.

115 See Larry Chartrand, "The Aboriginal Sentencing Provision of the Criminal Code as a Protected 'Other Right' under Section 25 of the Charter" (2012) 57 SCLR (2d) 389 at 393.

116 Chartrand, "Perpetual Human Rights Prison", *supra* note 67 at 174.

117 *Constitution Act, 1982*, *supra* note 67, s 35.

and treaty rights, Aboriginal rights jurisprudence has failed to achieve the justice and reconciliation of Indigenous sovereignty envisioned in 1982.[118]

The government has a duty to consult with Indigenous peoples when section 35 rights are engaged, but this duty has been interpreted increasingly narrowly in recent jurisprudence.[119] In the environmental justice context, when Indigenous systems of environmental governance are in conflict with federal and provincial policies on development and environmental management, principles of Indigenous self-governance are under-incorporated in decision-making.[120] Currently, administrative decision-makers do not have to take into account Indigenous perspectives outside of the context of section 35.

This lack of recognition is linked to the unequal distribution of environmental benefits and burdens, and to the deep-seated and systemic environmental injustice that Indigenous peoples continue to face.[121] Critical to improving environmental justice in Canada, therefore, is the decolonization of environmental governance, as well as the fight for Indigenous peoples' self-determination, and their right to manage their lands and waters according to their own laws and knowledge systems.[122]

IV. APPLYING THE UCPS TO CURRENT ENVIRONMENTAL CASE LAW

A. The Carbon Pricing Reference

In 2019, three provinces (Ontario, Saskatchewan, and Alberta) brought references (collectively the "*References*") to challenge the constitutionality of the federal government's *GGPPA*,[123] which set a minimum national standard for provincial carbon pricing mechanisms in an effort to allow Canada to reach its Paris Agreement climate-change targets. Both the Ontario Court of Appeal and the Saskatchewan Court of Appeal upheld

118 Chartrand, "Perpetual Human Rights Prison", *supra* note 67 at 171.

119 See Tracey Lindberg & Angela Cameron, "SCC Rulings Suppress Indigenous Peoples' Rights to Their Land", *The Globe and Mail* (28 July 2017), online: <www.theglobeandmail.com/opinion/scc-rulings-suppress-indigenous-peoples-rights-to-their-land/article35828687>.

120 Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 111 at 110–11.

121 Oonagh E Fitzgerald & Kathleen Mahoney, "Environmental Challenges on Indigenous Lands" (27 June 2019) online: *Centre for International Governance Innovation* <www.cigionline.org/articles/environmental-challenges-indigenous-lands>.

122 McGregor, "Reconciliation and Environmental Justice", *supra* note 39 at 222–25.

123 SC 2018, c 12, s 186.

the constitutionality of the Act,[124] while the Alberta Court of Appeal held that the Act was unconstitutional.[125] In all three *References*, several of the parties and interveners based their arguments on constitutionality and division of powers on the UCPs of federalism or respect for, and protection of, minorities.

1. *The Saskatchewan AG*

In all three *References*, the Attorney General of Saskatchewan argued that the Act is unconstitutional and violates the UCP of federalism, which requires the uniform application of laws across the country.[126] Saskatchewan argued that constitutional principles are not just interpretive tools but rather hold "full legal force" and "can be relied upon to hold laws to be *ultra vires*."[127] Saskatchewan proposed that, because the Act allows the federal government to step in if a province refused to implement carbon-pricing mechanisms, it violated the principles of federalism and jurisdictional exclusivity, a fundamental feature of Canada's division of powers.[128]

2. *The Intergenerational Climate Coalition*

In both the Ontario and Saskatchewan references, the Intergenerational Climate Coalition (ICC) argued that youth and future generations constitute a "discrete and insular" minority under the UCP of protection for minorities.[129] The principle of respect for, and the protection of, minorities, it argued, supported a broad interpretation of Parliament's power, including its Peace, Order and Good Government (POGG) power, its trade-and-commerce power under section 91(2), and its criminal law power under

124 See *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Re GGPPA*, ONCA]; *Re GGPPA*, SKCA, *supra* note 32.

125 See *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at paras 22–24 [*Re GGPPA*, ABCA].

126 *Re GGPPA*, SKCA, *supra* note 32 (Factum of the Attorney General of Saskatchewan at para 39); *ibid* (Factum of the Intervenor Attorney General of Saskatchewan at para 84); *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervenor Attorney General of Saskatchewan at paras 8–9).

127 *Re GGPPA*, ABCA, *supra* note 125 (Factum of the Intervenor Attorney General of Saskatchewan at para 84). See also *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervenor Attorney General of Saskatchewan at para 8).

128 *Re GGPPA*, ONCA, *supra* note 124 (Oral argument, Intervenor Attorney General of Saskatchewan, online: *YouTube* <www.youtube.com/watch?v=-QjUOx0Oxe8> at 00h:48m:10s–00h:49m:25s).

129 *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervenor Intergenerational Climate Coalition at paras 23–24); *Re GGPPA*, SKCA, *supra* note 32 (Factum of the Intervenor Intergenerational Climate Coalition at paras 24–25).

section 91(27), and allowed the Constitution to react to modern realities such as climate change.[130] The ICC submitted that this principle should inform the Court's interpretation of Parliament's authority to enact the *GGPPA*, and temper other UCPs, including federalism.[131]

3. The United Chiefs and Councils of Mnidoo Mnising

In Ontario's reference on the constitutionality of the federal government's carbon pricing legislation, the United Chiefs and Councils of Mnidoo Mnising (UCCMM) argued for the need to harmoniously interpret the division of powers with the protections of section 35 rights.[132] The UCCMM grounded its argument, in part, in the UCP of the protection of minorities, stating that jurisdictional disputes regarding the division of powers and use of statutory discretion should be exercised and reconciled in a manner that does not extinguish or render section 35 rights meaningless. Citing the principle's broader, normative power, the UCCMM submitted that "an organization of the Constitution consistent with the unwritten constitutional principle of the protection of minorities requires this Court to ensure that the division of powers does not create a jurisdictional gap resulting in the infringement of s. 35 rights."[133]

The UCCMM also submitted that, "as First Nations with constitutionally protected governance and jurisdictional authority,"[134] the division of powers should be reconciled in a manner that has the least impact on Indigenous governance. It further submitted that an interpretation of the division of powers that upholds the honour of the Crown "means ensuring the constitutional rights and jurisdiction of Indigenous communities are not rendered hollow by the effects of climate change as a result of a constitutional vacuum created by provinces…."[135]

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130 *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervenor Intergenerational Climate Coalition at paras 44–54); *Re GGPPA*, SKCA, *supra* note 32 (Factum of the Intervenor Intergenerational Climate Coalition at paras 43–54).

131 *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervenor Intergenerational Climate Coalition at paras 3, 18–20, 35–38); *Re GGPPA*, SKCA, *supra* note 32 (Factum of the Intervenor Intergenerational Climate Coalition at paras 3, 19–21, 35–38).

132 *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervener United Chiefs and Councils of Mnidoo Mnising at para 39).

133 *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervener United Chiefs and Councils of Mnidoo Mnising at para 40).

134 *Ibid* at para 47.

135 *Ibid* at para 48.

4. *The Athabasca Chipewyan First Nation*

In all three *References*, the Athabasca Chipewyan First Nation (ACFN) advanced evidence of how climate change has continued, and will continue, to negatively and disproportionately affect their Nation's customs, practices and traditions such as hunting, fishing, trapping, treaty rights, and jurisdictional rights, including the right to self-government.[136] Both the ACFN and UCCMM argued that, because climate change threatens to infringe and potentially extinguish their Aboriginal and treaty rights, section 35 is engaged.[137]

Reading the "individual elements of the Constitution" together, the ACFN submitted that section 35 weighed in favour of a finding that the legislation is *intra vires*.[138] It further argued that the ACFN and all First Nations should be considered "nations" for the purpose of the "national concern" and "national emergency" doctrines used to determine whether a matter falls under the federal government's POGG power.[139] Doing so would legally recognize the nation-to-nation relationships between Indigenous peoples and the Crown, and the evolution of the Constitution as a "living tree," in particular in the context of section 35 and reconciliation.[140]

5. *The Decisions*

Both the Alberta and Ontario Courts of Appeal referred to the normative, organizing, and interpretive roles of the UCP of federalism in a division of powers analysis. The Alberta Court of Appeal held:

> Federalism is always at stake in any division of powers case because a judicial determination must be made of where the line is drawn as between federal and provincial legislative power. Where that line is drawn cannot shift away from the constitutional text. Rather, the courts must recognize and respect the foundational character of Canadian federalism.[141]

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136 *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervener Athabasca Chipewyan First Nation at paras 9–14); *Re GGPPA*, ABCA, *supra* note 125 (Factum of the Intervener Athabasca Chipewyan First Nation at paras 7–14); *Re GGPPA*, SKCA, *supra* note 32 (Factum of the Intervener Athabasca Chipewyan First Nation at paras 9–15).

137 *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervener Athabasca Chipewyan First Nation at paras 27–28) (Factum of the Intervener United Chiefs and Councils of Mnidoo Mnising at paras 22–23).

138 *Re GGPPA*, ONCA, *supra* note 124 (Factum of the Intervenor Athabasca Chipewyan First Nation at para 30).

139 *Ibid* at para 33.

140 *Ibid* at paras 33–34.

141 *Re GGPPA*, ABCA, *supra* note 125 at para 142.

The Ontario Court of Appeal held:

> Although not expressed in precisely these terms, this aspect of the test for matters of national concern is a recognition of federalism as an applicable constitutional principle, which, as the Supreme Court said in *Securities Reference* (2011), at para. 61, "demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers."[142]

In turn, both the Ontario and Saskatchewan Courts of Appeal upheld the validity of the federal government's carbon pricing policy on the basis of the national concern branch of Parliament's power under section 91 of the *Constitution Act, 1867* to "make Laws for the Peace, Order, and good Government of Canada."[143] A matter falls under the POGG national concern test if it satisfies four elements:

1) it is a new matter which did not exist at Confederation, or it is a matter which was originally local or private nature in a province, but has since, in the absence of national emergency, become a matter of national concern;
2) it is single, distinct, and indivisible in a manner that clearly distinguishes it from matters of provincial concern;
3) the scale of impact on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution; and
4) there is provincial inability in the sense that provincial cooperation is insufficient and a national law is necessary because the failure of one province to cooperate creates adverse consequences for the rest of the provinces.[144]

Both the Ontario Court of Appeal and the Saskatchewan Court of Appeal rejected the argument that the Act's classification under the national concern branch of Parliament's POGG power would disrupt the structure of federalism.[145]

The Alberta Court of Appeal, however, stated that "understandable collective concerns about climate change do not, in themselves, justify

142 *Re GGPPA*, ONCA, *supra* note 124 at para 127.

143 *Constitution Act, 1867*, *supra* note 72, s 91; *Re GGPPA*, SKCA, *supra* note 32 at para 164; *Re GGPPA*, ONCA, *supra* note 124 at para 139.

144 *Re GGPPA*, ONCA, *supra* note 124 at paras 98–99.

145 *Ibid* at para 131; *Re GGPPA*, SKCA, *supra* note 32 at para 11.

overriding federalism."[146] The UCP weighed heavily on the Court's division of powers analysis, with the Court finding that "where a doubt arises about classification of a challenged law, the subsidiarity principle, which is an essential aspect of federalism, should weigh in favour of provincial jurisdiction."[147] The Court went on to complete the division of powers analysis, concluding that the Act is unconstitutional in its entirety.[148] The *References* were appealed to the Supreme Court of Canada and heard on September 22–23, 2020. The Court has yet to release its judgment.

6. What About the UCP of Respect for, and Protection of, Minorities?

Interestingly, while all three appellate courts discussed the UCP of federalism, no court engaged fully with the role of the UCP of protection of minorities in the context of the division of powers analysis or the issue of climate change.

Both the majority at the Saskatchewan Court of Appeal and the Alberta Court of Appeal held that the record before them did not provide a strong enough basis to address the question of how section 35 might influence the division of powers analysis.[149] Justice Feehan, in his dissent at the Alberta Court of Appeal, questioned the direct impact of section 35 and the honour of the Crown on the direct issues before the Court.[150] This argument was also only indirectly addressed in dissent at the Saskatchewan Court of Appeal in the context of cooperative federalism:

> although cooperative federalism is always at play in any resolution of jurisdictional disputes, the jurisprudence evinces a strong and explicit admonition that the constitutional division of powers and the maintenance of a constitutional balance between the two orders of government must be respected despite the pull of this principle.[151]

In its decision, the majority at the Ontario Court of Appeal recognized the disproportionate impact of climate change on Indigenous peoples, stating: "[t]he impact is greater in these communities because of the traditionally close relationship between Indigenous peoples and the land and waters

146 *Re GGPPA*, ABCA, *supra* note 125 at para 136.
147 *Ibid* at para 142.
148 *Ibid*.
149 *Re GGPPA*, SKCA, *supra* note 32 at paras 203–04; *Re GGPPA*, ABCA, *supra* note 125 at para 285.
150 *Re GGPPA*, ABCA, *supra* note 125 at paras 1051–54.
151 *Re GGPPA*, SKCA, *supra* note 32 at para 396.

on which they live."[152] The Court accepted that for the ACFN, "[a] declining barrenland caribou population, the reduction of surface water in lakes and rivers, and an increased risk of wildfires, each of which is caused or exacerbated by climate change, threaten the ACFN's ability to maintain its traditional way of life."[153]

The Ontario Court of Appeal also noted that for the UCCMM, "changes to the environment impair the UCCMM Nation's ability to sustain themselves by observing traditional practices, and threaten their continued existence as a self-determining people."[154] However, it did not go on to connect this fact to the UCCMM's constitutionalized Aboriginal and treaty rights, the UCP of respect for, and protection of, minorities, or the recognition of underlying constitutional values that speak to ecological sustainability, equality, or Indigenous peoples' connection to the land, its resources, and other peoples. It also did not explicitly factor section 35 rights into the analysis under POGG, for example by acknowledging section 35 rights as among those interests which could be, and already have been, negatively impacted by provincial inability to combat climate change.

As counsel for the Anishinabek Nation and the UCCMM highlighted in their submissions at the Supreme Court of Canada, Chief Justice Strathy of the Court of Appeal for Ontario, in his majority decision, did cite the Attorney General for British Columbia's summary of the "singleness, distinctiveness, and indivisibility" requirements under the *Crown Zellerbach* test, which included reference to Indigenous rights:

> (1) singleness requires that the matter be characterized as specifically and narrowly as possible, at the lowest level of abstraction consistent with the fundamental purpose and effect of the statute; (2) distinctiveness requires that the matter be one beyond the practical or legal capacity of the provinces because of the constitutional limitation on their jurisdiction to matters "in the Province"; and (3) indivisibility means that the matter must not be an aggregate of matters within provincial competence, but must have its own integrity – this normally occurs *where the failure of one province to take action primarily affects extra-provincial interests, including the interests of other provinces, other countries and Indigenous and treaty rights*.[155]

152 *Re GGPPA*, ONCA, *supra* note 124 at para 12.
153 *Ibid* at para 13.
154 *Ibid* at para 14.
155 *Ibid* at para 113 [emphasis added].

Chief Justice Strathy described this summary as a "helpful guide" but did not go on to address Indigenous and treaty rights in his analysis.[156]

The failure to address section 35 rights represents a missed opportunity and one that is hopefully rectified by the Supreme Court. As established by the Court, the constituent parts of the Constitution must be read as a cohesive whole.[157] Recognizing section 35 rights through a UCP that speaks to environmental justice, whether the UCP of ecological sustainability, the public trust doctrine, equality, or Indigenous peoples' relationship to the land, its resources, and other peoples, could be one way to ground a division of powers analysis. This includes an analysis under POGG that considers the disproportionate impact of environmental harms such as climate change on Indigenous rights, territory, and self-governance.

As stated above, current understanding of section 35 and Aboriginal rights in Canada's constitutional framework fails to adequately incorporate or recognize Indigenous peoples' inherent right to self-determination, a nation-to-nation relationship between the Crown and Indigenous nations, and Indigenous knowledge, laws, and legal orders.[158] As counsel for the Anishinabek Nation and UCCMM wrote in its *GGPPA Reference* factum to the Supreme Court, the Court should prefer constitutional approaches that provide "Indigenous groups, including the member Nations of the [Anishinabek Nation] and UCCMM, with an effective remedy for the impacts that GHG emissions and climate change have had, and will continue to have, on their constitutionally-protected rights, which lie at the heart of their very existence as distinctive Anishinabek peoples."[159]

As stated by Borrows in *Canada's Indigenous Constitution*, the Anishinabek, for example, often manage their resources through kinship allocations that create reciprocal rights and obligations in relation to resource allocation and use.[160] Anishinabek laws and legal orders include stewardship-like concepts (*bimeekumaugaewin*) and stories that apply to land, plants, and others, and building relationships and reciprocity among them.[161] These laws have many sources, including sacred laws that relate

156 *Ibid*.

157 *Quebec Secession Reference*, *supra* note 8 at para 50.

158 See Dave Turner, "Reconciliation in Contemporary Aboriginal Politics" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada Critical Perspectives on the Culture of Redress* (Toronto: University of Toronto Press, 2013) 100 at 101.

159 *Reference re Greenhouse Gas Pollution Pricing Act*, Court File 38781 (Factum of the Intervener Anishinabek Nation and United Chiefs and Councils of Mnidoo Mnising at para 32).

160 See Borrows, *Canada's Indigenous Constitution*, *supra* note 112 at 77–78.

161 *Ibid* at 79.

to the Creator and creation stories, customary law developed through repeated behaviours and practices, natural law developed through observation of the natural world and the Earth's teachings (*Aki-noomaagewin*), as well as deliberative laws formed through deliberation, council, and discussion about the past, present, and future, and which demonstrate the living nature of Anishinabek laws and legal traditions.[162]

These obligations, remedies, and sources of Anishinabek laws and legal traditions vary greatly from those found in Canadian common and civil law. However, as Borrows states in advocating for a multi-juridical perspective and reconciliation, "for effective constitutional governance *in our current context*[, w]e must design systems of government that accommodate deeply differing and contrasting points of view."[163]

To this end, as the final *Report of the Royal Commission on Aboriginal Peoples* states:

> Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.[164]

Citing this passage in *Mitchell v MNR*, Justice Binnie highlighted the distinct constitutional framework envisaged by the respondent, a member of the Mohawk Nation, in respect of section 35 Aboriginal rights. The Mohawk Nation is a member of the Haudenosaunee, also known as the Iroquois Confederacy. The Haudenosaunee are united by the Great Law of Peace, *Kaianerekowa*, one of the best-known Indigenous constitutions.[165] For the Haudenosaunee, section 35 Aboriginal rights may perhaps be better understood as a step towards the manifestation of the more fundamental relationship between Canada and the Haudenosaunee that is

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162 See John Borrows, "Aki-noomaagewin (Earth's Teachings): Stories of the Fall, Indigenous Law and Reconciliation" (Dalhouse University), online: <vimeo.com/88384840>.

163 John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 31 [emphasis in original].

164 See Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Vol 2, Restructuring the Relationship* (Ottawa: The Commission, 1996) at 228.

165 See Borrows, *Canada's Indigenous Constitution*, *supra* note 112 at 73.

memorialized by the "Two-Row" Wampum.[166] The "Two-Row" Wampum represents, as Justice Binnie stated in *Mitchell*, "in a phrase, partnership without assimilation."[167]

The Two-Row Wampum Belt consists of three lines of white quahog shells divided by two lines of purple shells beaded to depict two boats on a river. It symbolizes the normative underpinning of treaties between the Haudenosaunee and the Dutch in 1645, and subsequently with the French, British, and Americans.[168] The three white rows depict peace, friendship, and respect.[169] They are separated by the two purple paths for two vessels; the Haudenosaunee canoe on one, and the Dutch ship on the other. Each vessel symbolized its people, laws and customs: "[t]his metaphor explains how the two nations would agree to exist, living side by side, but never interfere in each other's government or way of life. So water is both the 'river of life' and, importantly, the medium or backdrop of the *Kaswentha*."[170]

As Borrows highlights, because Haudenosaunee law seems to maintain independence from other legal traditions, the Haudenosaunee may be less likely "to support or embrace the application of their laws as part of the Canadian legal system."[171] However, it likely that "many Haudenosaunee would welcome seeing their legal traditions given greater recognition."[172]

In the context of the division of powers analysis, the POGG test could, for example, be modified to consider:

- The "scale of impact" on provincial jurisdiction *and on equality and reconciliation*; and
- The impact of a province's failure to deal with issues on other provinces, federal interests *and on equality and reconciliation*.

Updating the POGG national concern or recognizing an environmental justice-oriented UCP are two ways to link the interpretation of the Constitution as a whole, with the promise of section 35 to include Indigenous perspectives and jurisdiction alongside those of the provincial and federal governments, particularly in the environmental context.

166 See *Mitchell v MNR*, 2001 SCC 33 at para 127.

167 *Ibid* at para 130.

168 *Ibid*. See also Borrows, *Canada's Indigenous Constitution*, *supra* note 112 at 76.

169 *Ibid* at 76.

170 Joyce Tekahnawiiaks King, "The Value of Water and the Meaning of Water Law for the Native Americans Known as the Haudenosaunee" (2007) 16:3 Cornell JL & Pub Pol'y 449 at 460.

171 Borrows, *Canada's Indigenous Constitution*, *supra* note 112 at 75–76.

172 *Ibid*.

B. UCPs and the *Charter*: The Case of Grassy Narrows First Nation

Another area where UCPs may play a normative role in the field of environmental justice is under the *Charter*. Whether the *Charter* protects against environmental inequality is an important question in the field of Canadian environmental justice. The Supreme Court of Canada has yet to rule directly on whether environmental harm violates the *Charter*.[173] However, the Grassy Narrows First Nation's ongoing application for judicial review of two decisions by Ontario's Ministry of the Environment and Ministry of Natural Resources may represent an opportunity for the courts to consider this question. Grassy Narrows First Nation is challenging the Ontario ministries' decisions to authorize a ten-year clear-cut logging plan around the English-Wabigoon river system and adjacent watersheds. The Grassy Narrows First Nation has also challenged the province's refusal to conduct an individual environmental assessment (IEA) of whether logging could exacerbate mercury contamination of the waters that run through Grassy Narrows's traditional territory, and increase human health risks.[174]

The applicants argue that the decisions violate their right to life, liberty, and security of the person under section 7 by increasing their risk of death, illness, and other negative impacts posed by the consumption of mercury-contaminated fish, all of which are exacerbated by the authorized clear-cut logging. The applicants also argue that the decisions violate their right to equal protection under section 15 of the *Charter* by creating a disadvantage on the basis of gender and Aboriginality that perpetuates the history of prejudice experienced by Aboriginal peoples in Canada generally, and the long-standing mercury exposure suffered by members of Grassy Narrows.[175]

Members of Grassy Narrows live both on and off the English River 21 Reserve, which is located about 100 kilometers northeast of Kenora, Ontario. In 1873, ancestors of the Grassy Narrows signed Treaty 3, which includes the right to harvest non-reserve lands covered by the Treaty. For over half a century, members of Grassy Narrows have suffered from mercury poisoning after an upstream pulp and paper mill dumped approximately 9,000 kilograms of mercury into the river system that

173 Collins & Sossin, *supra* note 64 at 309.

174 See *Grassy Narrows First Nation v Ontario* (*Minister of Natural Resources*), Toronto 446/15 (Application for Judicial Review filed 1 September 2015).

175 *Charter*, *supra* note 35, ss 7, 15.

flows through their traditional lands. Successive provincial governments have known about the high levels of mercury contamination and the deleterious health effects on the community, but have refused to act. As stated by Ontario's Environmental Commissioner:

> 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 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.[176]

Decades of discriminatory governmental policy have contributed to widening the gap between the level of physical, psychological, cultural, and environmental health in Grassy Narrows and the levels in other communities across the province.

A healthy environment is critical to an individual's human dignity.[177] Today, government inaction is forcing members of Grassy Narrows to choose between giving up the fishing and other traditional activities that are of significant importance to their personal identity or to further expose themselves and their unborn children to harm. This choice comes at an unacceptable cost and is a choice that most other Canadians will never have to make.

The provincial governance framework around environmental and industrial decision-making effectively withholds from Grassy Narrows a benefit that other communities in Canada enjoy: access to reliable, safe drinking water. This in turn leads to physical, psychological, cultural, and economic burdens Grassy Narrows's members.[178]

On September 1, 2015, parties on behalf of the Grassy Narrows filed a Notice of Application for judicial review of the provincial government's decisions regarding development in the area, which could further contaminate their waterways. The applicants challenged the Minister of Natural Resources' decision to approve clear-cut logging of the Whiskey Jack Forest, which runs through much of the Grassy Narrows traditional territory.

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176 Environmental Commissioner, *supra* note 4 at 111.

177 See Erin Daly & James R May, "Environmental Dignity Rights" (2017) Widener University Delaware Law School Legal Studies Research Paper Series no 17-02 at 6, online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2885500>.

178 Environmental Commissioner, *supra* note 4 at 104–09.

They also challenged the Minister of Environment's refusal to order an IEA on whether the proposed clear-cut logging could lead to further mercury contamination in the surrounding area.[179]

Under section 35, the Crown has a duty to consult with Grassy Narrows when activity adversely affects their Treaty 3 rights, including the right to harvest on non-reserve lands.[180] If, as the Supreme Court held in the *Quebec Secession Reference*, "the individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole,"[181] the fact that these provincial decisions risk infringing Grassy Narrows's Aboriginal and treaty rights should lend support to a finding of a *Charter* violation. In addition, the infringement of Grassy Narrows's treaty rights and the provincial government's violation of Grassy Narrows's own environmental governance frameworks should be considered in the analysis. Grassy Narrows has declared its traditional territory to be an Indigenous Sovereignty Protected Area through the "Grassy Narrows Land Declaration" and asserts self-determination over land use in its territory.[182] As stated in the Land Declaration:

> Our way of life has been under attack by residential schools, flooding, relocation, mercury pollution, and racism. *What remains of that way of life is under threat from industrial logging.*
>
> For decades industrial logging damaged our Anishinabe Territory against our objections. Now our fish are unsafe, the moose and caribou are nearly gone, we have less marten, wild rice, and blueberries. Our medicines are tainted. In despair, our trappers end up on the streets in the cities to become homeless people living off the soup lines.
>
> *Our ability to traditionally harvest to feed and support our families, as we have for millennia, is at risk. This threatens to annihilate our very existence as a people. We cannot accept this anymore.*[183]

Looking at the internal structure of the Constitution as a whole and linking together its aggregate parts, government decision-making and

179 See *Grassy Narrows First Nation v Ontario* (*Minister of Natural Resources*), Toronto 446/15 (Application for Judicial Review filed 1 September 2015) at para 2(y).

180 See *Grassy Narrows First Nation v Ontario* (*Natural Resources*), 2014 SCC 48 at para 2. See also *Haida Nation*, *supra* note 119 at paras 32, 37, 43, 47.

181 *Quebec Secession Reference*, *supra* note 8 at para 50.

182 See Asubpeeschoseewagong Netum Anishinabek Chief and Council, "Grassy Narrows Land Declaration Bans All Industrial Logging" (10 October 2018), online: *Free Grassy Narrows* <freegrassy.net/2018/10/10/grassy-narrows-land-declaration-bans-all-industrial-logging>.

183 *Ibid* [emphasis in original].

industrial activity must be reconciled with both rights under section 35 of the *Constitution Act, 1982*, and the *Charter*.

Charter litigation such as the Grassy Narrows's application carries powerful normative power. It is a tool which, as scholars Sinha *et al* note,

> (i) ... exists to allow the courts to adjudicate the particular claims advanced by the claimant or applicant; and (ii) it can be understood to serve a wider purpose, in defining and enforcing the principle of constitutionality of government action.[184]

It speaks to a government's responsibility to act and protect. As Collins has argued, in this context the UCP of ecological sustainability alongside existing UCPs such as the respect for, and protection of, minorities could "provide general support for the more specific environmental entitlements that may be found under various sections of the *Charter* or indeed under an explicit right to a healthy environment that may be added to the constitutional text in the future."[185] Similarly, the UCP of Indigenous peoples' relationship to the land, its resources, and other people could also be used as a tool to ground a purposive analysis of *Charter*-protected rights, which is harmonious with the full interpretation of section 35. Such an analysis could more fully address the environmental injustices faced by Indigenous peoples by incorporating Indigenous peoples' human, cultural, and political rights.

The Canadian government has historically refused to acknowledge Indigenous peoples' inherent jurisdiction in their traditional territories according to their own laws, legal orders, and knowledge frameworks.[186] Grounding the analysis in, for example, the UCP of Indigenous peoples' relationship to the land, its resources, and other people may also help to navigate the fact that while Indigenous peoples and nations may seek

184 Vasuda Sinha, Lorne Sossin & Jenna Meguid, "Charter Litigation, Social and Economic Rights & Civil Procedure" (2017) 26 JL & Soc Pol'y 43 at 53.

185 Collins, "The UCP of Ecological Sustainability", *supra* note 82 at 53.

186 This is slowly changing, with pilot projects such as the federally funded Indigenous-led Indigenous Guardian programs and the co-governance agreement between the federal government and the Haida Nation, which allows for equal power sharing in managing the lands and water of Gwaii Haanas. Both represent leading examples of Indigenous peoples using their own laws and legal traditions to monitor ecological health and prevent environmental degradation. But these represent only a small step in the larger journey to recognizing Indigenous peoples' inherent right to self-government. For further information, see West Coast Environmental Law, "Guardian Watchmen: Upholding Indigenous Laws to Protect Land and Sea" (March 2018), online (pdf): <www.wcel.org/sites/default/files/publications/gw_laws_to_protect_land_and_sea_final.pdf>.

protection under the *Charter*, they are also seeking the emancipation of their own laws and ways of life from Canadian colonialism. As Chartrand states,

> [i]t is true that Indigenous individuals, to the extent they are integrated into Canadian society and exist apart from their political communities, do need and benefit from struggles that make Canadian citizenship meaningful by relying on human rights protections and substantive equality guarantees. But, at the same time, Indigenous peoples are also struggling for exclusion—the opposite of the human rights program as generally conceived.[187]

The Grassy Narrows people have a history of relating to their land that is guided by their own stories, values, laws, and legal orders, which differ greatly from the common law approach to environmental stewardship and environmental justice. As such, in the Court's analysis of whether there has been discrimination and environmental injustice under sections 7 and 15 of the *Charter*, what should be foundational are the Grassy Narrows's own laws and their perspective on environmental governance and industrial activity in their traditional territory.

The common law as far back as *Connolly v Woolrich* affirmed the authority of Indigenous laws and legal orders.[188] In the context of reconciliation, the Supreme Court of Canada in *Delgamuukw v British Columbia*[189] emphasized the importance of Indigenous legal perspectives. The Court has in other cases also recognized Indigenous peoples' inherent and inalienable right to self-government and unique status in Canada. In *R v Van der Peet*, the Court stated:

> when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.[190]

Similarly, courts in British Columbia have also already recognized that the Indigenous right to self-government is an "underlying value" of the Constitution based on the Supreme Court's jurisprudence on the unique

187 See Chartrand, "Perpetual Human Rights Prison", *supra* note 67 at 177.

188 (1867), 17 RJRQ 75 (Que SC) at 87.

189 [1997] 3 SCR 1010 at paras 114, 126, 132, 149, 153 DLR (4th) 193.

190 *R v Van der Peet*, [1996] 2 SCR 507 at para 30, 137 DLR (4th) 289 [emphasis in original].

relationship between Indigenous peoples and the Crown.[191] In *R v Pameajewon*, the Supreme Court also assumed that section 35 includes the right to self-determination.[192] Much of the litigation under section 35 has involved the duty to consult and accommodate in the context of industrial activity or environmental protection.[193] Recognition of UCPs that speak to the goals of equality, ecological sustainability, and reconciliation may be one means of requiring that decision-makers take into account the perspectives of Indigenous peoples whose constitutionalized rights are affected by approvals of industrial activities.

V. CONCLUSION

Throughout this paper, I have analyzed how and whether UCPs may serve to reduce the environmental injustices faced by Indigenous people. The UCPs help to link the individual elements of the Constitution and fill gaps in the protection afforded by the written text.[194] They are used to interpret constitutional and statutory provisions, guide the exercise of administrative discretion, and delineate spheres of jurisdiction. They carry "powerful normative force" that can give rise to substantive legal obligations and limit legislative power.[195] As the Supreme Court of Canada has said, the UCPs are critical when answering cases that combine "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity."[196]

If, as several scholars have called for, the Supreme Court recognizes a new ecological- and equality-oriented UCP, it could provide a basis for a multi-juridical approach to environmental justice. It also could provide a normative basis for both the courts and the executive to begin to engage more fully and respectfully with Canada as a legally pluralistic state, which includes civil law, common law, and Indigenous laws and legal traditions, in the context of environmental issues. A healthy environment is critical

191 See *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 81.

192 [1996] 2 SCR 821 at para 24, 138 DLR (4th) 204.

193 *Haida Nation*, *supra* note 119; *Taku River Tlingit First Nation v British Columbia* (*Project Assessment Director*), 2004 SCC 74; *Mikisew Cree First Nations v Canada* (*Minister of Canadian Heritage*), 2005 SCC 69; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53; *Chippewas of the Thames*, *supra* note 89; *Clyde River*, *supra* note 89.

194 *Provincial Judges Reference*, *supra* note 11 at para 95.

195 *Quebec Secession Reference*, *supra* note 8 at paras 54–55.

196 *Ibid* at para 1.

to the realization of the inherent dignity of each individual and to reconciliation. In turn, each individual's ability to realize their inherent dignity is critical to a healthy environment. Recognizing underlying constitutional principles in the context of environmental justice may provide a way for Canada to promote and protect human dignity and prevent environmental inequality.