Court File No. CV-19-00631627-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

SOPHIA MATHUR, a minor by her litigation guardian CATHERINE ORLANDO, ZOE KEARY-MATZNER, a minor by her litigation guardian ANNE KEARY, SHAELYN HOFFMAN-MENARD, SHELBY GAGNON, ALEXANDRA NEUFELDT, MADISON DYCK and LINDSAY GRAY

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\- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondent

\- and -

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PART I – OVERVIEW

1. To paraphrase the Supreme Court of Canada (SCC), "[t]he context of this [Application] includes the realization that our common future, that of every Canadian community, depends on a healthy environment."[1] Friends of the Earth Canada ("FOE") submits that this Court should interpret the Applicants' claims by reference to the unwritten constitutional principle ("UCP") of ecological sustainability which underlies every other provision of the Canadian Constitution, including the *Charter* rights at issue in this Application.

2. FOE also submits that this Court's analysis may benefit from the rich body of jurisprudence emerging from courts around the world which is based on a common set of scientific facts[2] and from which emerges a common approach to several of the issues that arise in this Application. Many of the relevant decisions are very recent and several are decisions of the relevant jurisdiction's highest level of court. In this factum, FOE will explain how courts from other jurisdictions have addressed the following issues of direct relevance to this case:

a. separation of powers and justiciability;
b. identification of a judicially manageable standard;
c. individual state responsibility for a collective global problem;
d. carbon budgets and allocations of responsibility across time and generations; and
e. constitutional interpretation in light of the unique realities of climate change.

PART II – FOREIGN JURISPRUDENCE SUPPORTS CONSTITUTIONAL REDRESS FOR CLIMATE-RELATED HARMS

(a) The separation of powers and justiciability

3. A review of recent global jurisprudence shows that courts almost always find claims relating to the constitutionality of government action on climate change justiciable. While explicitly acknowledging the separation of powers doctrine, foreign courts have consistently held that the judiciary plays a critical role in interpreting constitutional rights and evaluating potential infringements of such rights, even when the issues are complex, political, multifaceted, and engage

[1] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1 [*Spraytech*].
[2] The common scientific base for climate change is provided by the Intergovernmental Panel on Climate Change reports. See Intergovernmental Panel on Climate Change, "Reports" (2022) [A number of the recent IPCC reports have been filed with this Court by the Applicants in this Application].

socio-economic values, as they are in climate change cases. Foreign courts have also found such claims to be justiciable when based on inaction or insufficient government conduct.

4. For example, in *Urgenda* (the first case to crystallize the human rights dimensions of climate change), a group of Dutch citizens alleged the government's greenhouse gas ("GHG") emissions reductions efforts were insufficient and violated provisions of the Dutch Constitution, the European Convention on Human Rights ("ECHR"), and the Dutch civil code. The Dutch Supreme Court upheld the Hague District Court's decision finding the case justiciable and that the government had failed to adopt sufficient measures to prevent climate change. At the time, the Dutch government had a plan to cut GHG emissions by 17% below 1990 levels by 2020 – an ambitious target relative to many other countries. The court found this target was not aligned with what the scientific community had determined, and the parties to the United Nations Framework Convention on Climate Change ("UNFCCC") had agreed, was required of industrialized countries to avoid dangerous levels of climate change: reductions of 25-40% below 1990 levels by 2020. The court held that the failure to adopt a sufficiently ambitious GHG emissions reduction target violated constitutional rights and ordered the government to cut emissions by 25% below 1990 levels by 2020.[3]

5. The *Urgenda* decision illustrates the judiciary's role in identifying the appropriate science-based legal standard required to respect human rights, determining that there has been a breach of such rights, and deferring to the executive branch to determine *how* to meet that standard. The Dutch court showed additional deference to the executive branch by choosing the lower end of the 25-40% GHG emissions reduction range established as the legal standard.

6. In *Neubauer*, a group of German youth successfully challenged the country's legislated target for GHG emissions reduction as being insufficient and thereby violating their constitutional rights. The German Federal Constitutional Court (Germany's apex constitutional court) held that the claim was justiciable even though it alleged a violation of the protection of life under the German Constitution based on lack of government action. The court added that neither the absence of a specific GHG emissions reduction standard imposed by the constitution, nor the global

[3] *Urgenda Foundation v The State of the Netherlands,* Case No. 19/00135, Judgement of 20 December 2019 (Hoge Raad), Supreme Court of the Netherlands [*Urgenda*].

character of climate change, rendered the claim nonjusticiable.[4]

7. In *Future Generations,* twenty-five youth plaintiffs claimed their rights to a healthy environment, life, health, food, and water had been violated by the government's failure to fulfil a target for net-zero deforestation in the Colombian Amazon by 2020. The Colombian Supreme Court of Justice held that the claim against the government for failing to prevent deforestation (thereby contributing to climate change) was justiciable and that such failure violated the plaintiffs' constitutional rights.[5]

8. In *Friends of the Irish Environment,* the plaintiffs challenged Ireland's National Mitigation Plan for failing to include sufficient detail showing how Ireland would achieve its 2050 emissions reductions goals. The Irish Supreme Court held that the case was justiciable and that the court was obliged to consider whether the government's national climate plan complied with its obligations set out in relevant legislation.[6]

9. The Supreme Court of Nepal's decision in *Shrestha* offers another example of a court finding a claim that the government's response to climate change was inadequate to be justiciable, and subsequently holding that the plaintiff's constitutional rights had been violated. While it held that it was not the judiciary's role to dictate the specific contents of legislation, the court reasoned that it was competent to determine whether the constitution required the state to take action, and to establish the standards that the state would need to meet to discharge its constitutional duties. The court ordered the government to enact a new climate law to implement its commitment under the Paris Agreement.[7]

10. In *Notre Affaire à Tous,* a set of four non-profit organizations initiated a proceeding alleging the French government's failure to meet past climate targets, and insufficient current action on climate change, violated domestic and constitutional rights. The Administrative Court of Paris found the challenge justiciable and ordered the state to take immediate action to cut its

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[4] *Neubauer et al v Germany,* 1 BvR 2656/18, Order of 24 March 2021 (Federal Constitutional Court) [*Neubauer*].
[5] *Demanda Generaciones Futuras v Minambiente*, STC No. 4360-2018, April 4, 2018 (Supreme Court of Justice of Colombia) (Unofficial Translation of Excerpts from the Decision) [*Future Generations*].
[6] *Friends of the Irish Environment v Ireland*, [2020] IESC 49 (Supreme Court of Ireland) [*Friends of the Irish Environment*].
[7] *Paris Agreement*, being an Annex to *the Report of the Conference of the parties on its twenty-first session, held in parties from 30 November to 13 December 2015--Addendum Part two: Action taken by the Conference of the parties at its twenty-first session*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740 (entered into force 4 November 2016).

emissions and to repair the damages caused by its previous inaction by December 2022.[8]

11. In *Thomson v Minister for Climate Change Issues,* the plaintiff challenged the adequacy of New Zealand's emissions reductions targets for 2030 and 2050. While the High Court of New Zealand did not ultimately invalidate the existing targets, it made a point of stating that domestic courts have a proper role to play in evaluating government decision-making on climate change, given the significance of the issue for the planet and its inhabitants, even if the issue is global and involves the weighing of social, economic and political factors.[9]

12. In *VZW Klimaatzaak,* a large group of citizens and NGOs challenged the government's approach to reducing climate change as being insufficiently ambitious based on domestic law and constitutional rights.[10] The Belgian Court of First Instance found the claim to be justiciable and held that the government had breached a duty of care and human rights obligations by failing to take sufficient action to prevent the harmful effects of climate change. In a similarly framed case, the Prague Municipal Court found that the Czech Republic's failure to take adequate measures to reduce GHG emissions was unlawful and violated the plaintiffs' constitutional rights. The court ordered the state to take steps to reduce its emissions by 55% by 2030.[11]

13. In *Milieudefensie*, two NGOs, including FOE Netherlands, claimed Shell's contributions to climate change violate Dutch law and human rights obligations. Although the claim was against a private actor, the Hague District Court's ruling, which clarified that the judiciary has a role in adjudicating climate change disputes and that legislatures and political processes are not the only venues for addressing climate change, is relevant to the justiciability issue in this Application.[12]

14. In *Juliana v United States,* a group of youth challenged the government's conduct in relation to climate change as violating their constitutional rights. The 9th Circuit Court of Appeals ultimately dismissed the plaintiffs' claim but did so on the basis of a standing test and the "political

[8] *Notre Affaire à Tous and Others v France,* CE, 14 October 2021 (Paris Administrative Court) (English translation).
[9] *Thomson v Minister for Climate Change Issues*, [2017] NZHC 733.
[10] *ABSL Klimaatzaak v Kingdom of Belgium & Others* (2021) (Belgium) Francophone First Instance Court, 4th chamber, Brussels, 17 June 2021 (English translation) [*Klimaatzaak*]. Note that the judgment is under appeal.
[11] *Klimatická žaloba ČR v. Czech Republic*, Prague Municipal Court, 15 June 2022 (on appeal to the Supreme Administrative Court). No English translation of the case available at the time of writing. Link is to summary.
[12] *Milieudefensie v Royal Dutch Shell Plc,* District Court of the Hague, ECLI: NL: RBDHA: 2021:5339 [*Milieudefensie*].

questions doctrine", which are respectively unique to the United States Constitution and US jurisprudence.[13] *Juliana* is distinguishable from the Application before this Court for many reasons, including key differences in how the two cases are framed, the broader range of remedies sought in *Juliana*, and the fact that neither the US Constitution's standing test nor the political questions doctrine apply in Canada.

15. In sum, while there are differences among the individual cases, there is widespread judicial consensus that courts have a critical role to play in determining whether state conduct relating to climate change infringes human rights, regardless of whether the claim is of a systemic nature (targeting the government's overall target or a discretionary set of climate policies), alleges inadequate action, or addresses a failure to act. FOE submits that the questions raised in this Application are similarly justiciable, as the issue of whether Ontario's conduct violates the Applicants' *Charter* rights is a legal question of the utmost importance.

(b) Judicially manageable standards

16. Unlike cases such as *Tanudjaja v Attorney General of Canada,*[14] in this case there is a judicially manageable standard upon which to evaluate the alleged *Charter* infringements. The existence of a quantifiable, knowable standard allows the judiciary to determine whether the government is meeting that standard, and if not, whether the failure to do so amounts to a rights violation. As detailed below, there are a growing number of examples of foreign courts identifying and applying a judicially manageable standard upon which to adjudicate claims of constitutional breaches in the context of climate change.

17. The standards in climate change cases are determined by reference to the now-consensus body of climate science which provides clear, measurable, and well-accepted benchmarks upon which to evaluate a government's conduct with respect to climate change.[15] These benchmarks have widespread scientific support and many have been formally approved by signatories to the UNFCCC, including Canada. The relevant, science-based standards include global temperature

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[13] *Juliana v United States*, 947 F (3d) 1159 at 5 (9th Cir 2020).
[14] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, leave to appeal to SCC refused, 36283 (25 June 2015).
[15] The Summary for Policy-Makers produced by the Intergovernmental Panel on Climate Change (IPCC) is subject to a detailed, line-by-line discussion and agreement by governments. As such, it would be difficult for governments to contest the veracity of the contents in these reports. See IPCC, "About the IPCC"; IPCC, "Preparing Reports".

thresholds contained in the Paris Agreement, threshold concentrations of carbon dioxide equivalent in the atmosphere (measured in parts per million), and levels of national emissions reductions required to avoid crossing those thresholds (such as achieving net zero by 2050). As illustrated below, courts around the world refer to these thresholds in their decisions when evaluating alleged breaches of constitutional rights or other legal obligations.

18. For instance, the Dutch Supreme Court in *Urgenda* used the scientific standard articulated by the Intergovernmental Panel on Climate Change ("IPCC") and endorsed by the parties to the UNFCCC for determining the level of GHG emissions reductions required by prescribed states to prevent dangerous climate change (a 25-40% reduction below 1990 levels by 2020).

19. The Hague District Court in *Milieudefensie* offered a clear judicial determination that the temperature threshold of 1.5 degrees Celsius informs a legal standard of conduct, even if such standard is not made explicit in legislation. Relying on this threshold to evaluate the government's conduct, the court recognized that: "(t)he goals of the Paris Agreement represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change."[16]

20. In *Neubauer,* the German Federal Constitutional Court not only referenced the 1.5-2 degrees Celsius temperature threshold as an appropriate legal standard upon which to evaluate progress, but stated that the legislature has a permanent constitutional obligation to continuously adapt its laws in light of the latest science if, for instance, the current temperature thresholds in the Paris Agreement are found to be inadequate.[17]

(c) States have a responsibility to reduce GHG emissions regardless of the size of their share of global emissions (courts reject the *de minimus* argument)

21. Courts around the world have firmly rejected the *de minimus* argument and instead endorsed the domestic legal responsibility of states for their contributions to a global phenomenon. Variations of the *de minimus* argument suggest that countries with relatively small emissions should not be held responsible for GHG emissions reductions, or that the actions of a given

[16] Milieudefensie, *supra* note 12 at para 4.4.27.
[17] Neubauer, *supra* note 4 at para 211.

jurisdiction are meaningless given the global nature of the issue and/or the potential for a particular state's reductions to be offset by increased emissions elsewhere. Courts around the world, as well as the Supreme Court of Canada,[18] have resoundingly rejected this argument on the basis that all GHG emissions, from all sources, contribute to climate change. We are aware of no domestic court that has accepted this argument as a defense to climate-related claims.

22. For example, the United States Supreme Court rejected the *de minimus* argument in *Massachusetts v Environmental Protection Agency,* noting that "(a) reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[19] In *Urgenda,* the Supreme Court of the Netherlands upheld the Hague District Court's finding that "any anthropogenic greenhouse gas emission, no matter how minor, contributes to . . . hazardous climate change."[20] In *Neubauer,* the German Federal Constitutional Court held that the obligation to take climate action is not invalidated by the fact that climate change cannot be resolved by the mitigation efforts of any one state on its own, given the international dimensions of emissions.[21] In *VZW Klimaatzaak v Kingdom of Belgium and Others,* the Brussels Court of First Instance held that the global nature of climate change is no basis for evading judicial scrutiny.[22]

23. The Supreme Court of Canada has also rejected the *de minimus* argument, noting that every province's "emissions are clearly measurable and contribute to climate change."[23] The court added that the "underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail."[24] It is worth noting that Canada has been a very significant global GHG emitter, particularly when calculated on a per-capita basis.[25] As such, the *de minimus* argument is even weaker in the Canadian context than in the context of jurisdictions that contribute to a much smaller proportion of global emissions.

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[18] See para 24, *below*.
[19] *Massachusetts v EPA*, 549 US 497 (2007) at p 526.
[20] *Stichting Urgenda v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196, at para 4.79, upheld on appeal: *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, ECLI:NL:HR:2019:2007 (para 4.6).
[21] *Neubauer*, *supra* note 4.
[22] *Klimaatzaak, supra* note 10 at 61.
[23] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 188 [*GGPPA References*].
[24] *GGPPA References*, *supra* note 23 at para 188.
[25] Affidavit of Philip Cross sworn February 28, 2022 at p 7, 9.

24. The foreign jurisprudence reflects a shared understanding that the global nature of climate change requires states to do their fair share to reduce GHG emissions even if the national legislator is not capable of addressing the problem on its own and can only do so through international cooperation. In other words, the jurisprudence supports the principle that states cannot escape liability for their contributions to climate-related harms by pointing the finger at other climate wrongdoers.[26]

(d) Carbon budgets and allocations of responsibility across time and generations

25. There are several accepted methods for calculating a country's fair share of global GHG emissions[27] and for setting emissions reduction targets within a jurisdiction.[28] Courts around the world have approached the allocation of responsibility across time and generations using concepts such as carbon budgeting, responsibility for missed emissions targets, and fair share.

26. For example, the Administrative Court of Paris found that the failure to meet past GHG emissions reductions targets has already caused significant ecological damage and held the government responsible for part of that damage. The German Federal Constitutional Court held that "one generation must not be allowed to consume large parts of the CO2 budget under a comparatively mild reduction burden if this would at the same time leave future generations with a radical reduction burden . . . and expose their lives to serious losses of freedom."[29] The Irish Supreme Court recently quashed a national climate plan because it failed to provide sufficient detail about what actions would be taken between 2030 and 2050 to achieve net zero.[30] As recently as July 18, 2022, the UK High Court of Justice held the state had failed to clearly demonstrate how it would meet its emissions targets under the *Climate Change Act 2008* and ordered the government to prepare a fresh report outlining precisely how its climate policies will enable it to meet its carbon budgets.[31]

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[26] *Neubauer*, *supra* note 4 at para 201.
[27] *Neubauer*, *supra* note 4 at para 225.
[28] *Neubauer*, *supra* note 4 at para 225.
[29] *Neubauer*, *supra* note 4 at para 192.
[30] *Friends of the Irish Environment*, *supra* note 6.
[31] *Friends of the Earth v BEIS*, (2022) EWHC 1841 (Admin) (the court refused the government's request for permission to appeal).

27. In *Future Generations*, the Colombian Supreme Court of Justice ruled in favour of twenty-five youth who claimed their rights to a healthy environment, life, health, food, and water had been violated by the government's failure to fulfil a target for net-zero deforestation in the Colombian Amazon by 2020. The court sought to minimize the burden imposed by present day conduct on future generations by ordering the government to formulate and implement action plans to address deforestation in the Amazon, holding that the environmental rights of future generations create legal obligations on present generations to protect natural resources.[32]

(e) Constitutional interpretation in light of the unique realities of climate change

28. Climate change has several unique features that courts around the world have integrated into their analyses of similar cases, including the gravity of harms, the fact that many of the harms will occur in future, the irreversibility of climate change, and the fact that harms will be experienced disproportionately by the world's most vulnerable peoples and regions. These features of climate change have influenced the interpretation of constitutional rights in comparable cases.

29. For instance, in *Leghari,* the court characterized the "dramatic alterations in our planet's climate system" as a "clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society."[33] In *Future Generations,* the Columbian Supreme Court underscored the existential nature of climate risks, stating that "(w)ithout a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations. Neither can the existence of the family, society or the state itself be guaranteed."[34] The Supreme Court of Canada held that the irreversibility and disproportionate impacts of harms from climate change were relevant considerations in the assessment of the scale of the impact of upholding the federal carbon pricing law under the national concern branch of POGG.[35] It also noted that temperatures in Canada are rising at roughly double the global average rate of increase and predicted to continue rising even faster.[36]

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[32] *Future Generations, supra* note 5.
[33] *Ashgar Leghari v Federation of Pakistan* (2015), WP No 25501/2015 (Lahore High Court, Pakistan) at para 6.
[34] *Future Generations, supra* note 5 at p 13.
[35] *GGPPA References*, *supra* note 23 at para 206.
[36] *GGPPA References*, *supra* note 23 at para 10.

30. Most recently, the Brazilian Supreme Federal Court characterized the Paris Agreement as a human rights treaty that enjoys 'supernational' status, meaning that any act or omission that conflicts with the climate treaty (which includes Brazil's nationally determined contribution under the Paris Agreement) is a violation of the Brazilian Constitution and human rights. This means there is essentially a constitutional duty to mitigate climate change.[37]

31. Courts have underlined the importance of accounting for future risks in their assessments of potential rights violations, given that the "global warming caused by anthropogenic greenhouse gas emissions is largely irreversible".[38] For example, the German Federal Constitutional Court stated that:

> [t]he possibility of a violation of the Constitution cannot be negated here by arguing that a risk of future harm does not represent a current harm and therefore does not amount to a violation of fundamental rights. Even provisions that only begin posing significant risks to fundamental rights over the course of their subsequent implementation can fall into conflict with the Basic Law... This is certainly the case where a course of events, once embarked upon, can no longer be corrected.[39]

32. The German Federal Constitutional Court in *Neubauer* also noted that when there is scientific uncertainty regarding causal relationships, especially those with irreversible consequences, the legislature "must even take account of mere indications pointing to the possibility of serious or irreversible impairments, as long as these indications are sufficiently reliable."[40] The legislature should also not postpone precautionary measures when there is the risk of serious or irreversible damage.[41] Similarly, the Dutch Supreme Court held that the government's obligation to protect constitutional rights encompasses "the duty of the state to take preventative measures to counter the danger (of climate change), even if the materialization of that danger is uncertain…consistent with the precautionary principle."[42]

33. Courts have accounted for the future risks and impacts of climate change by considering the perspective of future generations in interpreting constitutional rights. For example, in *DG Khan Cement Company Ltd. v Government of Punjab*, the Supreme Court of Pakistan recognized the

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[37] *PSB et al. v Brazil (on Climate Fund)*, 2022 ADPF 708 (Supreme Federal Court) (unofficial English translation).
[38] *Neubauer*, *supra* note 4 at para 108.
[39] *Neubauer*, *supra* note 4 at para 108.
[40] *Neubauer*, *supra* note 4 at para 229.
[41] *Neubauer*, *supra* note 4 at para 229.
[42] *Urgenda*, *supra* note 3 at 5.3.2.

need to account for the rights of future generations in the context of a claim by a cement company challenging a set of restrictions on the expansion of cement plants. The court noted that "the tragedy is that tomorrow's generations aren't here to challenge this pillaging of their inheritance. The great silent majority of future generations is rendered powerless and needs a voice."[43]

PART III – UNWRITTEN CONSTITUTIONAL PRINCIPLE OF ECOLOGICAL SUSTAINBILITY

34. Our Constitution is not indifferent to the survival of Canadian society nor useless in the face of ecological disaster. Rather, it includes an unwritten but binding obligation to sustain the ecological foundations of the Canadian state, including a stable climate.[44] Ecological sustainability – defined as "the long-term viability or well-being of ecological systems, including human communities"[45] – is the *sine qua non* for the continued existence of the Canadian state and is thus a fundamental constitutional imperative.

35. Ecological sustainability meets the definition of a UCP as described by the Supreme Court of Canada.[46] It is a "vital unstated assumption" that "inform[s] and sustain[s] the constitutional text".[47] Like democracy and the rule of law, ecological sustainability (including a stable climate) is the "lifeblood"[48] of our Constitution and our society.

36. As Collins and Sossin (now Justice Sossin) have argued:

> … physical self-preservation is a fundamental imperative for all human beings, and societal preservation is a fundamental imperative for the state. If our constitutional text fails to protect the ecosystems on which all of the enumerated rights and powers delineated therein depend, it must be because the principle of environmental protection is so fundamental as to be both implicit and obvious, much like the principle of democracy—a basic, underlying structure that supports every other provision in the written Constitution.[49]

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[43] *DG Khan Cement Company Ltd. v Government of Punjab* (2021), CP1290-L/2019 at para 19 (Supreme Court of Pakistan).
[44] Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 UBC L Rev 293.
[45] Lynda Collins, *The Ecological Constitution: Reframing Environmental Law* (London: Routledge, 2021) at 18 [Collins, *The Ecological Constitution*].
[46] Collins & Sossin, *supra* note 44 at 295, 314-323.
[47] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 49-52, 161 DLR (4th) 385 [*Secession Reference*].
[48] *Ibid*.
[49] Collins & Sossin, *supra* note 44 at 323. See also Lynda Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) 71:1 Sup Ct L Rev 519 at 537 [Collins, "Environmental Rights"].

37. Relevant jurisprudence describes ecological sustainability in terms commensurate with constitutional status. The Supreme Court of Canada has characterized environmental protection as "a public purpose of superordinate importance" and "stewardship of the natural environment" as "a fundamental value".[50] It has also held that "(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment."[51] Conversely, the Supreme Court has recognized that *un*sustainability – particularly climate change – "poses a grave threat to humanity."[52] Thus, ecological sustainability has the foundational, non-derogable quality of a constitutional principle.[53]

38. Environmental stewardship also has solid foundations in the historical edifice of Canadian law. In the Western legal tradition, the public trust doctrine has imposed an obligation on states to preserve the natural environment for present and future generations since Roman times.[54] The French *Civil Code* historically recognized public ownership in water bodies[55] and this doctrine similarly survived into English Common Law.[56] As far back as 1217, the *Charter of the Forest* guaranteed British subjects access to vital natural resources without which the rights contained in its companion document, the *Magna Carta,* would have been meaningless.[57]

39. The legal imperative of ecological sustainability has an even longer history in "Indigenous legal traditions [which] are among Canada's unwritten normative principles and, with common and civil law, can be said to 'form the very foundation of the Constitution of Canada'".[58] Recognition of an ecological UCP would arguably reflect Indigenous legal principles, thus serving the critical project of Reconciliation while advancing the long-term survival of all Canadian communities.

40. The Applicants' *Charter* rights should be interpreted broadly and purposively by reference to the UCP of ecological sustainability and the corresponding constitutional imperative of societal

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[50] *British Columbia v Canadian Forest Products Ltd*., 2004 SCC 38 at para 7 [*Canadian Forest Products*].
[51] *Spraytech, supra* note 1 at para 1.
[52] *GGPPA References*, *supra* note 23 at paras 2, 61.
[53] See Collins, *The Ecological Constitution*, *supra* note 44 at 25-26.
[54] Collins & Sossin, *supra* note 44 at 319.
[55] *Canadian Forest Products,* supra note 50 at para 75.
[56] Collins & Sossin, *supra* note 44 at 319; see also e.g. Collins, *The Ecological Constitution*, *supra* note 45 at 56-58.
[57] See Collins & Sossin, *supra* note 44 at 319.
[58] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 108.

preservation, i.e. preserving the posterity of the Canadian state, including the well-being and survival of its citizens. At the uncertain edge of settled doctrine, "the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada."[59]

41. Ecological sustainability is quite literally the foundation of every aspect of the Canadian state, including every right and freedom enshrined in the Constitution. Without it, the *Charter* risks becoming "a paper temple — a mere recitation of rights with no real guarantee of their survival over time."[60] The right to life under section 7, for example, is an empty promise for those who will die in heat domes, wildfires, and other climate-related disasters. To give meaning to this right in the era of climate change, courts must take an ecologically literate approach to the *Charter* and to the Constitution as a whole, recognising a fundamental underlying obligation of sustainability that informs all judicial interpretation and application of constitutional law.

42. If recognized as a UCP and applied in this case, ecological sustainability would assist this Court in resolving the parties' conflicting interpretations of *Charter* rights in the context of climate change. As held by the Supreme Court of Canada, UCPs are binding on both courts and government[61] and

> assist in the interpretation of the text and the delineation of spheres of jurisdiction, *the scope of rights and obligations*, and *the role of our political institutions*. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree"…[emphasis added].[62]

43. The Supreme Court of Canada has referenced UCPs in response to matters implicating "the primary conditions of … community life within a legal order"[63] and where there is potential for an outcome that is "… inconsistent with human society".[64] Dangerous climate change meets both of

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[59] *Secession Reference*, *supra* note 47 at para 54, quoting *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 752.
[60] Collins, "Environmental Rights", *supra* note 49 at 537.
[61] *Secession Reference*, *supra* note 47 at para 54.
[62] *Secession Reference*, *supra* note 47 at paras 49, 51-52. Note the recurrence of biological language in this passage ("symbiosis", "lifeblood", "living tree"), which seems to implicitly acknowledge that all human structures depend on our biological survival. In this sense there is no principle more fundamental than ecological sustainability.
[63] *Saumur v. Quebec (City)*, [1953] 2 SCR 299 at 329.
[64] *Re Manitoba Language Rights*, [1985] 1 SCR 721 at para 60.

these criteria and is therefore an appropriate case for application of the UCP of ecological sustainability (or a related principle such as the imperative of societal preservation).

44. With respect to justiciability, "recognition of an ecological UCP tips the scale in favour of responsible judicial intervention" and strongly favours a finding that the instant application is justiciable.[65] In particular, since the youngest Applicants lack political and economic enfranchisement, recourse to courts may be their only way to ensure the sustainability of the country (and world) that they will inherit. Thus, a finding of non-justiciability would be inconsistent with the proposed UCP.

45. Regarding the Applicants' *Charter* claims, the UCP of ecological sustainability supports an interpretation of the rights at issue that recognizes their environmental dimensions and corresponding obligations of environmental protection. In other words, the UCP obligates this Court to take an "ecologically literate"[66] approach to *Charter* interpretation.

46. Such an approach recognizes that state conduct relating to GHG emissions violates section 7 when it contributes to dangerous climate change that poses a substantial risk to life, liberty and/or security of the person in a manner that is inconsistent with the principles of fundamental justice.

47. Similarly, state conduct in relation to GHG emissions violates the equality guarantee in section 15 when it contributes to dangerous climate change that imposes disproportionate burdens on young Canadians, women, Indigenous peoples, future generations and/or other vulnerable communities.

48. FOE respectfully submits that – at a minimum – the UCP of ecological sustainability obligates Canadian governments to make science-based, good-faith efforts to preserve Canadian ecosystems to the extent necessary to protect human rights and to avoid existential threats to Canadian society. In the context of climate change, this requires – at a minimum – the establishment of GHG emissions reduction targets that are based on credible science.

[65] Collins & Sossin, *supra* note 44 at 326.
[66] Lynda M Collins, "An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*" (2009) 26 Windsor Rev Legal Soc Issues 7.

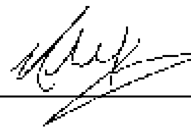
49. As a UCP, ecological sustainability is a relevant consideration in the identification and application of the relevant principles of fundamental justice ("PFJ") in the section 7 analysis.[67] Like ecological sustainability, the constitutional imperative of societal preservation, which is a novel PFJ advanced by the Applicants in this case, flows from the rule of law and is essential to the legal order underlying the Constitution.

PART IV – CONCLUSION

50. The experience of jurisdictions from around the world demonstrates that the question of whether a government's conduct infringes human rights, as measured with reference to scientifically-backed standards, is justiciable. The body of foreign jurisprudence also illustrates the ways in which courts account for the risk of future harms and the balancing of responsibility among current and future generations and across time. Finally, it shows how the unique realities of climate change, including its grave, irreversible harms and disproportionate impacts, influence the interpretation of human rights.

51. At a minimum, the UCP of ecological sustainability mandates Canadian governments to make science-based, good-faith efforts to preserve Canadian ecosystems (including the climate) to the extent necessary to protect human rights and to avoid existential threats to Canadian society.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of July, 2022



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[67] See *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para 55 & *Secession Reference*, *supra* note 47 at para 52 regarding the use of UCPs in constitutional interpretation.

SCHEDULE "A"

LIST OF AUTHORITIES

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

2. *British Columbia v Canadian Forest Products Ltd.*, 2004 SCC 38

3. *Re Manitoba Language Rights*, [1985] 1 SCR 721

4. *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11

5. *Reference re Secession of Quebec*, [1998] 2 SCR 217

6. *Saumur v Quebec (City)*, [1953] 2 SCR 299

7. *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, leave to appeal to SCC refused, 36283 (25 June 2015)

8. *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34

International Jurisprudence

9. *ASBL Klimaatzaak v Kingdom of Belgium & Others* (2021) Francophone First Instance Court, 4th chamber, Brussels, 17 June 2021 (Belgium) (English translation)

10. *Ashgar Leghari v Federation of Pakistan* (2015), WP No 25501/2015 (Lahore High Court, Pakistan)

11. *Demanda Generaciones Futuras v Minambiente*, STC No. 4360-2018, April 4, 2018 (Supreme Court of Justice of Colombia)

12. *DG Khan Cement Company Ltd. v Government of Punjab* (2021), CP1290-L/2019 (Supreme Court of Pakistan)

13. *Friends of the Earth v BEIS*, (2022) EWHC 1841 (Admin)

14. *Friends of the Irish Environment v Ireland*, [2020] Appeal No 205/19 (Supreme Court of Ireland)

15. *Juliana v United States*, 947 F (3d) 1159 at 5 (9th Cir 2020)

16. *Klimatická žaloba ČR v. Czech Republic,* 2022. No English translation of the case available at the time of writing. Summary available here: http://climatecasechart.com/non-us-case/klimaticka-zaloba-cr-v-czech-republic/)

17. *Massachusetts v EPA*, 549 US 497 (2007)

18. *Milieudefensie v Royal Dutch Shell Plc.*, District Court of the Hague, ECLI: NL: RBDHA: 2021:5339

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20. *Notre Affaire à Tous and Others v France*, [2021] CE, 14 October 2021 (Paris Administrative Tribunal) (English translation)

21. *PSB et al. v Brazil (on Climate Fund)*, (2020) ADPF 708 (unofficial English translation).

22. *Shrestha v Office of the Prime Minister et al*. (2018), 074-WO-0283 (Supreme Court, Nepal)

23. *Stichting Urgenda v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196

24. *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, ECLI:NL:HR:2019:2007

25. *Thomson v Minister for Climate Change Issues*, [2017] NZHC 733

26. *Urgenda Foundation v The State of the Netherlands*, Case No. 19/00135, Judgement of 20 December 2019 (Hoge Raad), Supreme Court of the Netherlands

Secondary Sources

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

28. Lynda Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) 71:1 Sup Ct L Rev 519

29. Lynda M Collins, "An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*" (2009) 26 Windsor Rev Legal Soc Issues 7

30. Lynda Collins, *The Ecological Constitution: Reframing Environmental Law* (London: Routledge, 2021)

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

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

None

SOPHIA MATHUR, et al.	and	HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	Court File No. CV-19-00631627-0000
Applicants		Respondent	

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

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