Court File No. T-1750-19

FEDERAL COURT

BETWEEN:

CECILIA LA ROSE, by her guardian ad litem Andrea Luciuk, SIERRA RAINE ROBINSON, by her guardian ad litem Kim Robinson, SOPHIA SIDAROUS, IRA JAMES REINHART-SMITH, by his guardian ad litem Lindsey Ann Reinhart, MONTAY JESSE BEAUBIEN-DAY, by his guardian ad litem Sarah Dawn Beaubien, SADIE AVA VIPOND, by her guardian ad litem Joseph Conrad Vipond, HAANA EDENSHAW, by her guardian ad litem Jaalen Edenshaw, LUCAS BLAKE PRUD'HOMME, by his guardian ad litem Hugo Prud'homme, ZOE GRAMES-WEBB, by her guardian ad litem Annabel Webb, LAUREN WRIGHT, by her guardian ad litem Heather Wright, SÁJ MILAN GRAY STARCEVICH, by her guardian ad litem Shawna Lynn Gray, MIKAEEL MAHMOOD, by his guardian ad litem Asiya Atcha, ALBERT JÉRÔME LALONDE, by his guardian ad litem Philippe Lalonde, MADELINE LAURENDEAU, by her guardian ad litem Heather Dawn Plett and DANIEL MASUZUMI

PLAINTIFFS

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and THE ATTORNEY GENERAL OF CANADA

DEFENDANTS

WRITTEN REPRESENTATIONS OF THE PLAINTIFFS

[Defendants' Motion to Strike]

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WRITTEN REPRESENTATIONS OF THE PLAINTIFFS

I. Overview

1. The plaintiffs claim that Canada has breached its duties under the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and the public trust doctrine by causing, contributing to or permitting greenhouse gas ("GHG") emissions that cause serious and disproprotionate harm to the child and youth plaintiffs. Canada seeks to strike the entirety of the claim without leave to amend. Canada's argument fundamentally mischaracterizes the plaintiffs' claim, misapplies the law of justiciability in Canada as it relates to *Charter* claims, and conflates the application of science-based standards with "purely political" questions.

2. *Charter* claims are highly contextual, and it is undeniable that the broader context – climate change driven by GHG emissions – is unprecedented in scope and severity. The claim itself is also, as a result, unprecedented. Because it is not one single action of Canada, but the cumulative effects of its conduct that give rise to the harm, the claim is framed in more systemic terms than a typical *Charter* case. And because the negative impacts of Canada's actions are compounded by additional GHG emissions for which Canada is not responsible, the question of causation and the extent of Canada's responsibility to modify the conditions that give rise to the harm are complex. But that does not render the claim non-justiciable, or mean that it is bound to fail. The Constitution, as a "living tree," and the organic common law must be permitted to adapt to address this significant new challenge.

3. The individual plaintiffs have each suffered specific and individualized harms from climate change and there is no dispute that Canada knowingly caused or contributed to the conditions which cause those harms. This is not a case like *Operation Dismantle*[1] where the link between the state conduct and the harm was speculative – here there is a wealth of scientific evidence that demonstrates the clear causal connection between GHG emissions and the kinds of harms experienced by the plaintiffs. Indeed, Canada accepts that GHG emissions are the primary driver of climate

[1] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 [*Operation Dismantle*].

change, that climate change is already causing serious harms, and that if emissions were not drastically reduced, the results would be increasingly devastating and irreversible. But it argues that Canada's own conduct in contributing to such harms are immune from review.

4. First, Canada says the claim is non-justiciable because it does not challenge a specific law. The systemic approach adopted in the claim does not render it non-justiciable. The plaintiffs do not ask the court to review each decision that leads to GHG emissions, but rather to assess the constitutional impact of the cumulative effects of Canada's conduct. That is not fatal to the claim. Absent a systemic approach, Canada's conduct giving rise to significant harm would be wholly evasive of review.

5. Second, Canada says that there is no "legal standard for judging the wisdom of the federal government's overall approach to climate policy."[2] The plaintiffs' claim is not about the *wisdom* of climate policy but about whether Canada's conduct breaches the plaintiffs' *Charter* rights or is inconsistent with Canada's obligations under the public trust doctrine. These are legal, not policy questions. Determining whether legal rights are at issue is the "core of what courts do."[3] Under Canadian law, claims that the government has interfered with a plaintiff's s. 7 rights have never been held to be non-justiciable simply because they raise complex social, political, and economic issues.[4] The courts have in fact said just the opposite, including in a case about constitutional rights and climate change.[5]

6. The standard to be applied at trial to assess the constitutionality of Canada's actions will be based on the application of the established ss. 7 and 15 frameworks to the evidence that will be led. That evidence will demonstrate that Canada's conduct, has resulted in GHG emissions at a level that already causes harm to the plaintiffs and,

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[2] Canada's written representations, ¶¶44-49

[3] *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 [*Hupacasath*], ¶70

[4] For example, *Carter v. Canada (Attorney General)*, 2015 SCC 5; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [*Bedford*]; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [*PHS*]; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [*Chaoulli*]; *Victoria (City) v. Adams*, 2009 BCCA 563 [*Adams*]

[5] *Environnement Jeunesse c. Procureur général du Canada*, 2019 QCCS 2885 [*ENJEU*].

if left unabated, is consistent with catastrophic harm in the imminent future. The plaintiffs will argue that such conduct constitutes an interference with the plaintiffs' s. 7 interests in a manner that does not accord with one or more of the principles of fundamental justice set out in paragraph 228 of their Statement of Claim.

7. Canada further argues that even if there is an appropriate standard to be applied, the Court should decline to impose it because doing so "will not have practical impact on the Plaintiffs' legal rights."[6] Essentially, Canada is arguing that, because climate change has a global component, Canada cannot be held accountable under the *Charter* or the public trust doctrine for its own contribution to the harms caused to the plaintiffs and others. This ignores Canada's significant contribution to climate change.[7] Moreover, it has never been the case that the government's actions need to be the sole or even dominant cause of the harm suffered by a plaintiff for the government to be held responsible for its role in contributing to or worsening such harm.[8] Under Canada's logic, as a matter of law, because many countries contribute to climate change, no government is domestically liable for its own actions. It is not plain and obvious that Canadian law takes such an impoverished view of the government's constitutional duties.

8. Canada's final argument on justiciability is that the remedies sought by the plaintiffs "are not legal remedies."[9] This is plainly not the case. Canada ignores the declaratory relief that is sought, which is clearly a form of remedy available to the plaintiffs. It is also not plain and obvious that other remedies sought by the plaintiffs are beyond the scope of the the broad and flexible remedial discretion a court exercises under s. 24(1) of the *Charter*. This Court should be slow to prejudge how a trial judge might choose to exercise that discretion following a trial of the matters in issue.

9. Canada's argument that the claim raises no reasonable cause of action says little

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[6] Canada's written representations, ¶48

[7] As set out at ¶3 of the Statement of Claim, Canada is one of the ten highest emitters in the world. Canada's efforts to reduce its GHG emissions as detailed in the Statement of Defence demonstrate that it understands their significance.

[8] See ¶39, *infra* and cases cited therein.

[9] Canada's written representations, ¶¶50-54

about the plaintiffs' s. 7 claim other than to assert that it is based on "positive rights" and that such a claim, as a matter of law, has no possibility of success. With respect, Canada is wrong on both points. The plaintiffs claim *both* that Canada's own conduct is causing dangerous climate change *and* that Canada is failing to limit or reduce GHG emissions. The first branch of their claim involves no "positive right" – it is not a claim that Canada must do anything, but rather that it must stop doing things which are causing or contributing to the harms being suffered by the plaintiffs. Without hearing evidence, this Court is not in a position to assess whether it is plain and obvious that this first "negative rights" branch of the plaintiffs' claim is doomed to fail. As for the second branch of the plaintiffs' claim, the case law is clear that *Charter* challenges that assert positive rights may succeed in special circumstances.[10] The extraordinary nature of climate change, including the severe and widespread nature of the harm, the urgency of the situation, and the special position of the child plaintiffs who have no ability to engage in the political process, may indeed constitute the special circumstances that can ground such a claim. At least, it is not plain and obvious that they do not. It is only with a proper factual record that the court will be able to understand whether the *Charter* can sustain the claim for positive rights.

10. With respect to s. 15, Canada has misapprehended the plaintiffs' claim entirely. The claim is based on allegations, which must be taken as true, that the government's actions (and inactions) relating to GHG emissions disproportionately impact children and youth because of personal characteristics associated with their age, and do so in a manner that is discriminatory. There is no radical defect in that claim.

11. As with its challenges to the plaintiffs' *Charter* claims, Canada's assertion that it is plain and obvious that the public trust doctrine does not exist in Canadian law is predicated on a mistaken understanding of the purpose of a Rule 221 motion. A motion to strike is a gate-keeping tool meant to eliminate clearly meritless claims; it is not a means of thwarting the potential of the law to adapt to changing circumstances. There can be no doubt that the resources which the plaintiffs claim are subject to a public trust have an inherently public character and fall squarely within federal government

[10] See ¶¶54-58, *infra*

jurisdiction. Public trust resources are typically ones that can often only secure protection by state action. The principle that government in such circumstances has a responsibility to ensure the integrity of those resources so that they are available for the benefit of current and future generations is deeply embedded in the common law in Canada. The plaintiffs are entitled to make their case about how this *sui generis* doctrine may apply in the specific and unprecedented context of climate change.

12. For Canada to succeed on this motion, it must demonstrate that it is plain and obvious that, no matter what evidence may be led at trial and no matter how strong the scientific consensus about the dangers of Canada's conduct and its impact on the plaintiffs, Canada's conduct cannot be subject to constitutional scrutiny. If this position were to be accepted, it would mean that the Constitution, and the protections it provides to Canadians, are largely irrelevant in addressing the most serious challenge humanity has ever faced, a challenge that threatens the viability of all of our public institutions and the rights and freedoms these institutions protect. The plaintiffs say it is much too early in the development of Canadian law relating to climate change for the Court to agree to immunize Canada's actions and inactions from judicial oversight. Canada's invitation to summarily dismiss the claim without the benefit of a full evidentiary record and legal arguments grounded in those facts ought to be rejected by this Court.

I. Facts Relevant to the Application

13. The plaintiffs do not accept the characterization of their claim as set out in Canada's Statement of Facts. More importantly, the repeated references to the Statement of Defence and to evidence, such as the Pan-Canadian Framework Report and various other government publications, are improper. No evidence is admissible on this motion and it is the facts pleaded by the plaintiffs which must be accepted as true. The assertions at paragraphs 11, 13-18, 20 and 21 of Canada's written representations should be disregarded insofar as they rely on inadmissible material. Notably, Canada omits any reference to its conduct that causes and contributes to climate change, referenced in the Statement of Claim.[11]

[11] If Canada's argument is correct on this motion, it does not matter whether Canada has taken any steps

14. This motion must proceed on the basis that all of the facts set out in the Statement of Claim are true. While Canada suggests that this does not apply to "allegations based on assumptions and speculation," it does not identify any paragraphs in the Statement of Claim that should be disregarded on that basis. As a result, this Court must assume all of the facts pleaded in the Statement of Claim are true.

II. Submissions

A. The Test on a Motion to Strike is an Onerous One

15. On a motion under Rule 221, the court must be satisfied that it is "plain and obvious" that the pleading in question is "certain to fail" to order that a pleading be struck.[12] The court is to exercise its discretion to strike only in the clearest of cases where the "pleadings are bound to fail on all reasonable theories of the case."[13] The court is "obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies."[14] Because Canada seeks to strike the claim without leave to amend, it must demonstrate that there is "no scintilla of a cause of action."[15]

16. It is well accepted that "[n]either the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case." It is important that "the common law have a full opportunity to be refined or extended," as it is "evolving continuously to meet the needs of a dynamic society."[16] A proceeding can only be struck if it contains some "radical defect."[17]

17. While the motion to strike can be a valuable housekeeping mechanism that

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at all to address climate change or whether it has recklessly and drastically increased emissions without regard to the impact. In Canada's view, the matter is beyond judicial scrutiny in any event.

[12] See e.g. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 [*Hunt*], at 980; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [*Imperial Tobacco*], ¶17.

[13] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶147 [*Nevsun*] per Brown and Rowe JJ., dissenting but not on this point.

[14] *Operation Dismantle*, at 451.

[15] *McKenzie v. Canada*, [1998] 142 F.T.R. 218 (FC), ¶5.

[16] *Apotex Inc. v. Eli Lilly and Company*, 2012 ONSC 3808, ¶12.

[17] *Hunt*, at 980.

promotes litigation efficiency, it is not meant to stymie the ability of the law to develop to address new situations. Because "the law is not static and unchanging," on a motion to strike "it is not determinative that the law has not yet recognized the particular claim." The approach "must be generous and err on the side of permitting a novel but arguable claim to proceed to trial."[18]

18. Canada argues that resolving novel questions of law is appropriate on a motion to strike, relying on Justices Brown and Rowe's dissenting judgment in *Nevsun.* But that decision makes clear that novel questions involving the interpretation of the *Charter* ought not to be decided on a motion to strike, even if they *could* be.[19] The more recent case of *Atlantic Lottery* illustrates when it is appropriate to decide a question of law on such a motion: there was no *Charter* or constitutional issue, there was considerable uncertainty in the law arising from the Supreme Court of Canada's decision not to decide the issue in an earlier case, and numerous commentators and legal developments had clarified the law since the matter was first addressed.[20]

19. The two previous cases in which this Court has addressed the justiciability of issues relating to climate change did not involve constitutional claims. In *Friends of the Earth*, Barnes J. was engaged in a statutory interpretation exercise about the appropriate mechanism for the enforceability of a particular statute.[21] In *Turp*, this Court considered a challenge to the decision to withdraw from the Kyoto Protocol and specifically held: "[*i*]*n the absence of a Charter challenge*, it appears that a decision made in the exercise of prerogative powers would not be justiciable."[22]

20. There are good reasons why the use of a motion to strike to dismiss *Charter* claims raises specific concerns. *Charter* litigation serves a wider purpose in defining and enforcing the principle of constitutionality of government action, such that even an unsuccessful *Charter* claim can assist in identifying the parameters of *Charter*

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[18] *Imperial Tobacco*, ¶21.
[19] *Nevsun*, ¶145.
[20] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [*Atlantic Lottery*], ¶¶16-22.
[21] *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183 [*Friends of the Earth*].
[22] *Turp v. Canada (Justice)*, 2012 FC 893 [*Turp*], ¶18 (emphasis added).

compliant government action.[23] The dynamic process of the evolution of *Charter* rights, especially in relation to ss. 7 and 15, demonstrates that "a hallmark of *Charter* litigation is that the particular facts and general circumstances in which a claim is advanced are often what provide the impetus for a court to expand the scope of a right or alter how it is conceived or applied."[24]

21. Because of the high threshold on a motion to strike, the dynamic nature of the rights, and the importance of the particular factual context (as revealed by evidence), courts are particularly reluctant to dismiss constitutional claims on a preliminary basis.

B. It is Not Plain and Obvious that the Plaintiffs' Claims are Not Justiciable

i. The Legal Framework for Addressing Justiciability

22. Justiciability concerns require courts to differentiate between claims that have a "sufficient legal component" and therefore "warrant the intervention of the judicial branch," from those that are "purely political in nature" and are therefore outside the purview of judicial competence.[25] If the question before the court, "even if in part political, possesses a constitutional feature, it would legitimately call for [the Court's] reply."[26] Courts "should not decline to determine [a question] on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government"[27] so long as the question has a sufficient legal component.

23. Canada's constitutional democracy is "one of parliamentary sovereignty exercisable *within the limits* of a written constitution."[28] The Constitution itself *requires* Courts to consider the constitutionality of government action.[29] Canada's

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[23] Sinha, Vasuda; Sossin, Lorne; and Meguid, Jenna. "*Charter* Litigation, Social and Economic Rights & Civil Procedure." *Journal of Law and Social Policy* 26. (2017): 43-67, at 54.
[24] *Charter* Litigation, at 54.
[25] *Reference Re Canada Assistance Plan (BC)*, [1991] 2 S.C.R. 525, at 545 [*Re CAP*].
[26] *Reference Re Amendment of the Constitution of Canada* (1981), 117 D.L.R. (3d) 1 (MBCA), cited in *Re CAP*, at 545.
[27] *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at 632.
[28] *Singh v. Canada (Attorney General)*, [2000] 3 FC 185 (CA), ¶16 (emphasis added).
[29] *Allen v. Alberta*, 2015 ABCA 277, ¶20.

constitutional arrangement does not "exclude 'political questions' from judicial review where the Constitution itself is alleged to be violated."[30]

24. The Federal Court of Appeal has held that in Canada "the category of non-justiciable cases is very small." In *Hupacasath*, the Court held that the constitutionality of the exercise of prerogative powers is justiciable, noting that "*Charter* cases are justiciable regardless of the nature of the government action."[31] A First Nation claimed that Canada had breached the duty to consult enshrined in s. 35 of the *Constitution Act, 1982* when it entered into a treaty with China. The Court held that while an executive decision to sign a treaty, without more, is not justiciable, the court *can* decide whether constitutional rights have been infringed by such a decision, as this is at the "core of what Courts do." Stratas J.A. noted "[u]nder the constitutional separation of powers, determining this is squarely within our province."[32]

25. This is consistent with previous cases that have held that, "[w]hether or not [a] case involves a matter of high policy," the claim is justiciable to the extent that the application is framed "in *Charter* terms."[33]

ii. Constitutional Claims About Climate Change are Justiciable

26. Canada's arguments about the justiciability of *Charter* claims relating to the government's role in climate change have already been rejected by the Quebec Superior Court. In *ENJEU*, the Court considered a certification motion for a class action against Canada on, *inter alia*, claims based on *Charter* rights. The claimants argued that Canada's failure to set appropriate GHG emissions reduction targets, and to meet the targets that had been set, amounted to a violation of rights, including those under ss. 7 and 15 of *Charter*. Canada argued that the *Charter* claims were not justiciable because there was no challenge to a law, because the claim related to government inaction, and because the claim raised important social and political issues. The Court rejected these

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[30] *Chaoulli*, ¶183; See also *ibid*., ¶¶89, 183–85; *Operation Dismantle*, at 471-72.
[31] *Hupacasath*, ¶61.
[32] *Hupacasath*, ¶70.
[33] *Amnesty International Canada v. Canada (Canadian Forces)*, 2007 FC 1147, ¶¶123-25. See also *ibid*, ¶125.

arguments and held that the *Charter* claims were justiciable.[34] Canada has not attempted to distinguish *ENJEU* from the case before this Court or explained why this Court should not reach the same result.

27. Judges in other jurisdictions have found that claims that challenge government conduct relating to climate change do raise justiciable issues. The Supreme Court of the Netherlands held that the Netherlands was required to reduce GHG emissions to 25% below 1990 levels by 2020, based on the right to life and the right to respect for private and family life.[35] The Irish Supreme Court recently considered a claim that the government's national climate change mitigation plan infringed the right to life and right to bodily integrity guaranteed under the Irish Constitution. The Court found it unnecessary to decide the constitutional claim as it quashed the government's plan on administrative law grounds, and held that the public interest group did not have standing to raise the constitutional claim. However, it also stated that had a proper individual claimant come forward, it would have been "necessary" and appropriate for the Court to adjudicate the merits of the claim.[36] The Court noted that if such a claimant establishes that their constitutionally protected rights have been breached, "then the Court can and must act to vindicate such rights and uphold the Constitution… even if an assessment of whether rights have been breached or constitutional obligations not met may involve complex matters which can also involve policy."[37]

28. The *Juliana*[38] case in the United States involved a challenge to the U.S. federal government's actions relating to climate change. Two judges held that the claim was not justiciable on the narrow basis that the plaintiffs' injuries were not redressable by an Article III court under its standing doctrine, since the remedies sought would not prevent the plaintiffs from suffering harm due to climate change and a court could not effectively "order, design, supervise or implement" complex policy decisions. In a powerful dissent, Judge Stanton held that the questions raised by the claim were

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[34] *ENJEU*, ¶67.
[35] *State of Netherlands (Ministry of Economic of Affairs and Climate Policy) and Stichting Urgenda*, ECLINLHR20192007 [*State of Netherlands*]
[36] *Friends of the Irish Environment v. Government of Ireland*, [2020] IESC 49, ¶8.14 [*FIE*].
[37] *FIE*, ¶8.16.
[38] *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (petition for review *en banc* pending) [*Juliana*].

scientific, not political questions that could and should be addressed by the courts. Judge Stanton also found that the fact that the remedy sought would not entirely solve the problem of climate change did not deprive the court of jurisdiction, stating "… considering plaintiffs seek no less than to forestall the Nation's demise, even a partial and temporary reprieve would constitute meaningful redress."[39]

iii. The Plaintiffs' *Charter* Claims are Justiciable Through the Application of Settled Law to the Specific Factual Context

29. Canada cites only one case where a *Charter* claim was held to be non-justiciable: *Tanudjaja v. Canada*.[40] That case has never been relied on or followed by this Court. In any event, it is entirely distinguishable.[41]

30. Relying on *Tanudjaja*, Canada argues that the "breadth of the claim is incompatible with the basic rules of *Charter* analysis." In *Tanudjaja*, the Court was asked to rule on the constitutionality of a highly diverse range of programs, policies and decisions of both the federal and provincial government, including their delegation of duties to municipal governments and the lack of funding to carry out those responsibilities. In this case, the Court is not asked to examine individual programs and assess their constitutionality. Rather, the Court is asked to determine only if the overall cumulative impact of the GHGs permitted by Canada constitutes a *Charter* breach, and, if so, to provide a remedy. The Court's task is considerably more focussed that what was proposed in *Tanudjaja*.

31. The majority in *Tanudjaja* specifically noted that it was <u>not</u> holding that a constitutional violation caused by a network of government programs could never be addressed, especially when, as is the case here, the issue is otherwise evasive of review.[42] The concern of the majority was not the complexity of the claim but the lack of a legal component:

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[39] *Juliana*, at p. 33
[40] *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja*].
[41] It has also been the subject of criticism see, for example, the discussion by Sinha *et al.* in *Charter* Litigation cited at footnote 23. Justice Feldman wrote a strong dissent which was preferred and followed in *Williams v. London Police Services Board*, 2019 ONSC 227 [*Williams*], ¶¶30-32.
[42] *Tanudjaja*, ¶29.

> … complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107. Again, the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis.[43]

32. The majority's conclusion that the Court was asked to engage in an essentially political exercise was ultimately grounded in their finding that there was no "judicially discoverable standard" to be applied to assess the defendants' conduct. Canada tries to make the same claim here, arguing that the plaintiffs are inviting the Court to decide "whether the government's overall approach to entire field of public policy is 'wise'." At paragraph 49, Canada argues that there is no legal framework can that be meaningfully applied in this case.

33. The legal framework for assessing claims under both ss. 7 and 15 of the *Charter* is well established and there is no reason why it cannot be used in this case. The interference with life, liberty and security of the person is clearly pled; indeed Canada cannot deny that its conduct contributes to climate change impacts that interfere with the plaintiffs' bodily security, cause serious psychological stress, increase the risk of death, and interfere with fundamental personal choices about matters such as where to live. The plaintiffs have also clearly pled these deprivations are inconsistent with the principles of fundamental justice, and there is a clear legal standard that such principles must meet.[44]

34. In *Tanudjaja*, the majority's real concern was that there was no benchmark by which the Court could determine whether the defendant governments had "done enough" to address homelessness. In other words, there was no objective basis on which to define what the governments had to do to respect the asserted s. 7 right. Canada recycles that argument here, asserting that there is no "rule or standard" to be applied to assess the defendants' conduct and that instead the plaintiffs are asking the Court to "make decisions based on its own ideological and political views."[45]

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[43] *Tanudjaja*, ¶35.
[44] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, ¶113.
[45] Canada's written representations, at ¶54.

35. It is surprising, and indeed disturbing, that the federal government argues that the question of the level of GHG reduction required to stabilize the climate is an ideological one, rather than one based on science. While the decision about *how* to achieve any given level of emissions is clearly one that must be left to the government to determine, characterizing as political the question of *how much* or *whether* such emissions reductions are necessary to avoid catastrophic impacts and prevent further infringement of *Charter* rights is a deeply problematic approach. The need for significant and immediate reductions in order to avoid further widespread and significant harm is a scientifically provable fact, which Canada says it accepts, and it is the objective and immutable nature of this fact which leads to the urgent need for action.

36. The standard to assess the constitutionality of Canada's conduct will be based on scientific evidence about what level of GHG emissions is consistent with avoiding catastrophic harms arising from climate instability (or, said another way, whether Canada's conduct is incompatible with the "Stable Climate System" as defined in the Statement of Claim). Utilizing that evidence, the plaintiffs will argue that Canada's conduct constitutes an interference with their life, liberty and security of the person interests that is not in accordance with the principles of fundamental justice. This is a legal question which the Court is well equipped to address.

37. Canada claims that the concept of a Stable Climate System is not a standard amenable for judicial determination. But, the concept of a Stable Climate System is a scientific question that can be answered by expert evidence. As the plaintiffs plead, there is already virtually unanimous scientific consensus that GHG emissions resulting in the Earth's temperature rising to over 1.5°C is unsafe and that "rapid and far reaching" reductions in human caused emissions of GHGs are required.[46] Likewise, the "best and available most current climate science indicates that in order to prevent dangerous climate change, ensure maintenance of a Stable Climate System and mitigate, reverse and prevent Climate Change Impacts average global atmospheric CO_2 concentrations must be reduced to below 350 ppm by 2100 and large amounts of carbon

[46] Statement of Claim, ¶59.

must be sequestered from the atmosphere and into the Earth's soil."[47] As well, the plaintiffs claim that the court can and must order Canada to implement an enforceable plan that is consistent with Canada's fair share of the global carbon budget. In developing the plan, Canada will presumably consider an "immense array of policy outcomes," but the plaintiffs are not asking the Court to write the plan or make those policy determinations. The consideration and application of this scientific evidence to the plaintiffs' claims are all matters that are within the Court's jurisdiction and are accordingly justiciable.

38. Canada also argues that the claim is non-justiciable because, even if Canada reduces its emissions to comply with any applicable standard, the climate will still be affected by emissions of other countries. To the extent that this is a causation question, it should be addressed in the context of the evidence at trial. Government conduct does not have to be the sole or primary cause of the harm suffered by the plaintiffs; it is sufficient if the government's action makes the plaintiffs more vulnerable or exacerbates the harm or risk to health that the plaintiffs might otherwise experience.[48] If there is sufficient causal connection between Canada's actions and the harm experienced by the plaintiffs, the *Charter* is engaged, even if another country or countries also contribute to or cause the harm.[49] The plaintiffs say that Canada cannot hide behind the emissions of other countries to avoid its own responsibility for its contribution to climate change.

39. It is thus not plain and obvious that Canadian constitutional law is as ineffective in holding Canada responsible for its own contribution to a global problem as Canada's argument suggests.[50] While it is true that any order made by this Court will not entirely insulate the plaintiffs from the harm of climate change, that does not mean that the Court has no role to play. In the *State of Netherlands* case, the Netherlands Supreme

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[47] Statement of Claim, ¶63.

[48] *Bedford*, ¶¶60, 63, 87; *PHS*, ¶¶90, 93; *Adams*, ¶¶86-89; *Single Mothers' Alliance of BC Society v. British Columbi*a 2019 BCSC 1427 [*Single Mothers*], ¶107.

[49] *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, ¶54, *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 [*Khadr*], ¶19.

[50] Chalifour, Nathalie J. & Earle, Jessica. "Feeling the Heat: Climate Change Litigation under the Canadian *Charter*'s Right to Life, Liberty, and Security of the Person" (2018) 42:1 *Vt L. Rev.* 689.

Court rejected the state's argument that it could not be required to act because its own contribution to global emissions was so small that any steps it took alone would be ineffective to address the problem, noting, that at this point no reduction in GHGs is negligible.[51] This finding is consistent with Judge Stanton's dissent in *Juliana*, where she addressed the federal government's argument that the court order sought would not effectively vindicate the plaintiffs' rights:

> The majority portrays any relief we can offer as just a drop in the bucket. *See* Maj. Op. at 22–25. In a previous generation, perhaps that characterization would carry the day and we would hold ourselves impotent to address plaintiffs' injuries. But we are perilously close to an overflowing bucket. These final drops matter. *A lot*. Properly framed, a court order - even one that merely postpones the day when remedial measures become insufficiently effective - would likely have a real impact on preventing the impending cataclysm. Accordingly, I conclude that the court could do something to help the plaintiffs before us.
>
> And "something" is all that standing requires.[52]

40. In *State of Netherlands*, the Netherlands Court also went on to consider the broader implications of accepting a defence based on the fact that the remedy would not effectively solve the global climate change problem, holding that this:

> … would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC cited above in 5.7.2.[53]

41. More recently, an Australian superior court has likewise rejected the notion that a jurisdiction can escape its responsibility to address climate change simply due to the global nature of the problem, citing various Australian and international cases.[54]

42. The principle that governments have a responsibility to address problems that transcend their borders is well accepted in Canadian environmental law. As La Forest J. stated, "the protection of the environment is a major challenge of our time. It is an

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[51] *State of Netherlands*, at ¶5.7.8.
[52] *Juliana*, at pp 45-46.
[53] *State of Netherlands*, ¶¶5.7.7-5.7.8.
[54] *Gloucester Resources Limited v. Minister of Planning*, [2019] NSWLEC 7, ¶¶514-24.

international problem, one that requires action by governments at all levels."[55] Canada has repeatedly committed to fulfil its 'share' of a global effort to reduce emissions.[56]

iv. The Plaintiffs Seek Legal Remedies

43. The final basis for Canada's argument that the plaintiffs' claim is non-justiciable is an assertion that the remedies sought "are not legal remedies." First, Canada ignores the plaintiffs' claim for declaratory relief. There is no reason why a declaratory remedy focussing on the government's overall conduct, rather than specific law, is plainly and obviously not a "legal remedy." A declaration is a discretionary remedy that the court can issue "so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it."[57] All those criteria are met here, and the court must hear the evidence before deciding how to exercise its discretion.

44. It is also not plain and obvious that the less conventional remedies sought by the plaintiffs are unavailable to them. Section 24(1) "commands a broad and purposive interpretation. … and must be construed generously, in a manner that best ensures the attainment of its objects."[58] The provision must be given a "large and liberal" interpretation[59] and must be permitted to evolve "novel and creative features" in order to be "responsive to the needs of a given case."[60] As McIntyre J. observed in *Mills*, "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion."[61] Whether the remedy sought by the plaintiffs falls within that wide discretion is not for this court to decide on this motion. The question is whether it plainly and obviously does not.[62]

45. *Charter* remedies must meaningfully vindicate the rights and freedoms of the

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[55] *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 [*Hydro-Québec*], ¶127.
[56] See ¶¶52-58 of the Statement of Claim.
[57] *Khadr*, ¶46.
[58] *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 [*Dunedin*], ¶18.
[59] *Ibid*.
[60] *Doucet-Boudreau v. Nova Scotia (Ministry of Education)*, 2003 SCC 62 [*Doucet-Boudreau*], ¶59.
[61] *Mills v. The Queen*, [1986] 1 S.C.R. 863, at 965, as cited by McLachlin C.J. in *Dunedin*, ¶18.
[62] *Williams*, ¶¶57-58.

claimants, and be fair to the party against whom the order is made.[63] The concept of meaningful vindication is "inevitably highly contextual and subject to dispute;"[64] it requires "examination of all the circumstances,"[65] and in that regard is far more effectively considered at trial by a judge with the benefit of factual and legal context of both the alleged infringement and remedy sought.

46. A declaration of a *Charter* violation, an order for government to develop a policy to give effect to that right, and the retention of supervisory jurisdiction do not require judicial policymaking.[66] In *Doucet-Boudreau*, the Court held that an order that a province use its "best efforts" to provide school facilities and for court supervision of such efforts, "took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy."[67] It was appropriate and just for the trial judge "to craft the remedy so that it vindicated the rights of the parents while leaving the detailed choices of means largely to the executive."[68] As the Netherlands court recognized, there is a meaningful distinction between requiring the government to develop a policy in accordance with judicially defined standards and requiring the government to adopt a judicially developed policy.

47. The judiciary is uniquely equipped to declare and uphold minimum standards conducive to the protection of guaranteed rights and freedoms.[69] While "issues of broad economic policy and priorities are unsuited to judicial review"[70] requiring the government to develop a plan which meets GHG emissions thresholds, without mandating plan's content, does not engage the court in such matters.

48. If the plaintiffs demonstrate that Canada's conduct causing them specific, demonstrable and serious harm raises not just a political problem, but a constitutional

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[63] *Doucet-Boudreau*, ¶¶55 and 58.
[64] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, ¶166; citing *Canadian Foundation for Children, Youth and the Law*, 2004 SCC 4, ¶11.
[65] *R. v. Kokopenace*, 2015 SCC 28, ¶292.
[66] See *e.g.*, *Operation Dismantle*, at 471-72.
[67] *Doucet-Boudreau*, ¶68.
[68] *Doucet-Boudreau*, ¶69.
[69] See e.g. *Operation Dismantle*, at 471-72.
[70] *Tanudjaja*, ¶33.

one, they are entitled to a remedy to ensure that Canada does not continue to shirk its *Charter* obligations. The plaintiffs rights are "particularly vulnerable to government delay or inaction,"[71] as we near what courts have recognised as "a point of no return."[72] As the Statement of Claim asserts, "[t]here is a domestic and international scientific consensus that global GHG emissions and temperatures are rapidly approaching a critical threshold, which if surpassed would lock in catastrophic and dangerous Climate Change Impacts for these children and generations to come."

C. It is Not Plain and Obvious that the Claim Under Section 7 of the *Charter* Cannot Succeed

49. Canada asks this Court to find that the plaintiffs' s. 7 claim has no prospect of success on two bases. First, they argue that both constitutional claims are "speculative and inherently incapable of proof." Second, they assert that the claim is solely one for a positive right and can be dismissed on that basis.

50. Canada does not identify which factual assertions it says are "inherently capable of proof." Unlike in *Operation Dismantle*, there is no factual dispute between the parties here about whether GHG emissions cause climate change or whether climate change causes serious harms as suffered by the plaintiffs. Contrary to what Canada likens to the "threat of nuclear conduct," the harms associated with climate change are real and happening now in Canada, even if the ultimate solution requires coordination on a global scale. The plaintiffs plead a reasonable cause of action not because they "hope" that success will spur similar initiatives in other jurisdictions, but because Canada's present conduct is causing them real harm. So long as Canada, together with the rest of the countries of the world maintain their existing emissions that conduct creates the very significant risk of the planet's destruction. There is nothing fanciful or even hyperbolic about that conclusion and it is clearly a matter of scientific proof.

51. The only other objection raised by Canada to the s. 7 claim is an assertion that it is based on a "positive right." The first answer is that the claim involves both Canada's

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[71] *Doucet-Boudreau*, ¶29.

[72] See *e.g.*, *Juliana*, at p. 15: both the majority and minority acknowledged the urgent nature of the climate crisis, the judgments merely differed on the question of whether the court had a role to play in ameliorating it.

actions and inactions. Canada has caused and permitted GHG emissions both by its own direct actions and by affirmatively authorizing the activities of the actions of third parties that it regulates. This is a classic negative rights claim. In these circumstances, the claim cannot be struck.

52. In *Gosselin*, the Chief Justice, speaking for the majority, recognized that s. 7 may be interpreted to include positive obligations, although there was no proper evidentiary basis for a positive rights claim in that case. The Chief Justice referred to the *Charter* as a "living tree", and held that "[i]t would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases." She referred to Justice LeBel's statement about the importance of safeguarding a degree of flexibility in the interpretation and evolution of s. 7. The Chief Justice concluded:

> The question therefore is not whether s. 7 has ever been - or will ever be - recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.
>
> I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.[73]

53. The Federal Court of Appeal has recently confirmed that s. 7 may well evolve to recognize positive rights claims. Relying on the Chief Justice's holding in Gosselin, Rennie J.A., speaking for a unanimous Court, held:

> I am cognizant of the fact that section 7 is not frozen in time, nor is its content exhaustively defined, and that it may, some day, evolve to encompass positive obligations – possibly in the domain of social, economic, health or *climate rights*. I have therefore given careful consideration to whether this case falls within the scope of the "special circumstances" left open by the Supreme Court in *Gosselin*, which would require an affirmative obligation on government.[74]

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[73] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 [*Gosselin*], ¶¶82-83.
[74] *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223, ¶139 (emphasis added).

54. The Chief Justice of the British Columbia Supreme Court recently declined to strike a claim involving a positive right.[75] Like Rennie J.A., Hinkson C.J. relied on Chief Justice McLachlin's holding in *Gosselin* and found that the question in each case is whether the special circumstances for recognizing such a positive right are present.[76]

55. The question is thus whether the requirement for special circumstances is met. In this case, that cannot be determined without a full evidentiary record and legal argument. The existential threat to children's health and security posed by climate change, the irreversible nature of the potential damage, the urgency of the situation, Canada's repeated failure to meet its own emissions commitments, the special situation of children who have no political voice and the inability of their parents to effectively protect them from this harm, and the need for government to address emissions from a variety of sources in accordance with clear scientific evidence may indeed constitute such special circumstances.[77] It is not plain and obvious that they do not.

56. Beyond the presumption that a case lacking evidence of "actual hardship" does not constitute "special circumstances" the *Gosselin* majority did not articulate any criteria or considerations that animate the requirement.[78] Other cases have addressed "special circumstances" in relation to claims about *Charter* rights generally. In *Dunmore,* the Supreme Court recognised a positive obligation on the government under s. 2(d) of the *Charter,* finding that "positive obligations may be required 'where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms'."[79] The Supreme Court in *PHS* recognized "special circumstances" when "[t]he infringement at stake is serious; it threatens the health, indeed the lives of the claimants and others like them."[80]

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[75] *Single Mothers*, ¶112.
[76] *Gosselin*, ¶82, relied on in *Kreishan*, ¶139 and in *Single Mothers*, ¶112.
[77] Latimer, Alison M. "A Positive Future for Section 7?: Children and *Charter* Change." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 67. (2014).
[78] While Arbour J. dissented on the question of whether the positive right was proven in that case, many of her comments about the appropriate analysis to be applied to positive rights and the limits on their content are consistent with the plaintiffs' claim. There is nothing in the majority's decision which would cast any doubt that on that approach in the right case.
[79] *Dunmore v. Ontario (Attorney General),* 2001 SCC 94, ¶25 (emphasis in original).
[80] *PHS*, ¶148.

57. This case differs from many positive rights claims under s. 7 because the plaintiffs are not seeking a material benefit to be provided by the state but protection from harm imposed either by Canada itself or by third parties whose actions contributing to the harm are essentially permitted to do so by the state. The plaintiffs are thus alleging a *deprivation* attributable to the state much like the claim in *Dunmore*. Combined with the dire and irreversible consequences for children which are at least as serious to those existing in *PHS*, this may indeed establish the "special circumstances" and actual hardship required under *Gosselin* for recognition of a positive right. It is at least not plain and obvious that the claim is "doomed to fail."

D. It is Not Plain and Obvious that the Claim Under Section 15 of the *Charter* Cannot Succeed

58. Canada claims that "there is no allegation that the burdens and benefits imposed by [Canada's legislative and policy choices] are distributed unequally on the basis of a prohibited ground."[81] This is simply inaccurate. The allegations set out in the Statement of Claim, if true (as they must be taken to be on this motion) conclusively demonstrate that the burdens of Canada's conduct which leads to dangerous climate change fall disproportionately on children and youth.[82] The s. 15 claim cannot be dismissed on the basis that the plaintiffs have not pled any disproportionate burden – they have. They have also properly asserted that the effect of this burden is substantively discriminatory.

59. However, it is notable that the distinction between legislative action and inaction is particularly problematic in the context of s. 15, and equality cases can involve elements of positive rights.[83] In any event, the claim is based on Canada's actions, not just its inactions. The right to equality under the law includes what the plaintiffs have characterized as the Impugned Conduct. Canada has not met its burden to demonstrate that it is plain and obvious that the equality claim of these children and youth cannot possibly succeed.

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[81] Canada's written representations, ¶69.
[82] See ¶¶78-87 of the Statement of Claim.
[83] *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17.

E. Conclusion on the *Charter* claims

60. This case is not demonstrably unsuitable for adjudication and does not ask a court to weigh in on moral, strategic, ideological or policy considerations. The plaintiffs do not ask the court to opine on the wisdom of climate change policy *writ large*; they simply ask a court to determine whether their rights have been violated and to remedy this violation by both conventional declaratory orders and to some extent by some more innovative orders.[84] The claim is based on settled scientific research on climate change, substantially admitted in government documents, establishing the link between the government's ongoing action and current and future harms to the plaintiffs. The application of the well-established s. 7 and s. 15 legal frameworks does not take the court beyond its constitutional or institutional competence, and there is no basis to conclude that the claims are doomed to fail.

F. It is Not Plain and Obvious that the Plaintiffs' Claims with Respect to the Public Trust Doctrine are Doomed to Fail

61. Canada invites this Court to dismiss the plaintiffs' public trust doctrine-based claims without leave to amend contending it is plain and obvious that these claims are doomed to fail : see paragraphs 15-21 *supra*.

62. Canada's invitation should be emphatically declined. While Canada is correct that no Canadian court has yet recognized the public trust doctrine, this does not mean that the doctrine does not exist. Indeed, Canadian jurisprudence including the leading Supreme Court of Canada decision in *Canfor*[85] and Canadian legal scholars are uniformly of the view that the existence and hence nature of the public trust doctrine remains very much an open question.

63. While Canada denies the existence of the public trust doctrine, it simultaneously argues that if the doctrine does exist it is governed by principles arising in the private trust and fiduciary law context. This straw man argument cannot succeed. Among other things, it flies in the face of the caselaw and scholarship which explain that the public trust doctrine, should it be recognized by Canadian courts, must be understood as a *sui*

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[84] See e.g. *Williams*, ¶¶20-26.
[85] *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38 [*Canfor*].

generis concept to which private law trust and fiduciary principles are inapplicable.

64. Finally, Canada also invites this Court to reject summarily the plaintiffs' claim that the common law-based public trust doctrine enjoys constitutional status as an unwritten constitutional principle. Here again, no substantive argument is offered in support of this invitation other than the bare tautological assertion that "no such principle exists" because no such principle has so far been "recognized".[86]

65. The plaintiffs acknowledge, and indeed underscore, that determining whether and to what extent the public trust doctrine has a place in Canadian law raises "important," "novel" and "difficult" questions.[87] These questions deserve to be grappled with on the basis of a robust legal and factual record. They also require careful reflection on the deep and tangled roots of the doctrine in Canadian law, and on how this concept should be understood going forward, mindful of our multi-jural legal heritage including our French civil, English common law, and Indigenous law traditions.[88] In this regard, the plaintiffs underscore that the doctrine is a "dynamic one that is responsive to changing circumstances" and not frozen in time.[89]

i. The Plaintiffs' Public Trust Claims

66. While Canadian courts have yet to recognize the public trust doctrine, the notion that there are public rights in the environment, particularly to assets or property held in common for the public good, is one that has "deep roots in the common law."[90]

67. As Binnie J. opines in *Canfor*, a case upon which Canada relies, these roots extend back many centuries to Roman law which recognized public rights "in the air, running water, the sea…".[91] Binnie J. also observes that the rights that the doctrine has historically sought to protect have deep roots in the civil law tradition. In this regard,

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[86] Canada's written representations, ¶¶84 and 87.
[87] *Canfor*, *supra* note 85, ¶¶81-82.
[88] Statement of Claim, ¶239; see also, Maguire, John C. "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997) 7 *J. Env. L. & Prac.* 1 [Maguire (1997)], at 41.
[89] Statement of Claim, ¶239.
[90] *Canfor*, *supra* note 85, ¶74.
[91] *Canfor*, *supra* note 85, ¶74.

he notes that rights to common property such as "navigable rivers and streams, beaches, ports, and harbours" have long enjoyed protection under French civil law.[92] Finally, Binnie J. also rehearses in some detail the influential role of the doctrine in American law often traced back to the landmark 1892 decision of the U.S. Supreme Court in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).[93]

68. The principle that the Crown is under a legal obligation to protect and preserve certain common resources in trust for the benefit of all citizens is well established at common law in Canada going back to the earliest days of our federation.[94]

69. Our common and civil law traditions, and our constitutional arrangements, provide a solid legal foundation for courts to elaborate a made-in-Canada conception of the doctrine.[95] While the Supreme Court of Canada in *Canfor* declined to tackle this challenge, it is one that a trial court will be well positioned to undertake based on the evidence the plaintiffs intend to adduce and the arguments they will advance.

ii. Canada Has Not Shown and Cannot Show That it is Plain and Obvious the Public Trust Doctrine Does Not Exist in Canada

70. Relying on *Canfor* and *Burns Bog*, Canada argues that the public trust doctrine does not exist in Canadian law. Neither of these cases stand for this proposition, nor do they offer support for Canada's motion.

71. Indeed, the majority reasons in *Canfor* make Canada's threshold argument, that the public trust doctrine does not exist in Canada, a non-starter. In nine carefully crafted paragraphs, Binnie J. says something quite different.[96] While Canada seeks to diminish the importance of these paragraphs by describing them as *obiter*,[97] their import is

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[92] *Canfor*, *supra* note 85, ¶75.
[93] *Canfor*, *supra* note 85, ¶79; see also, von Tigerstrom, Barbara. "The Public Trust Doctrine in Canada" (1997) 7 *J. Env. L. & Prac.* 379 [Tigerstrom (1997)], at 382-85 and Maguire (1997), *supra* note 88 at 4-15.
[94] See *e.g.*, *The Queen v. Meyers* (1853), 3 U.C.C.P. 305, at 357 *per* McLean J. (Upper Canada Court of Common Pleas); *The Queen v. Lord* (1864) 1 P.E.I. 245 (PEI SC), at 257; *The Queen v. Robertson* (1882), 6 S.C.R. 52, at 126.
[95] See *e.g.*, Tigerstrom (1997), *supra* note 93, at 388-401; Maguire (1997), *supra* note 88 at 25-40.
[96] *Canfor*, *supra* note 85, ¶74-82.
[97] Canada's written representations, ¶72.

undeniable: that it is entirely plausible that the doctrine is part of Canadian law but that the *Canfor* appeal was not an appropriate opportunity "to embark on a consideration of these difficult issues."[98]

72. That the Court in *Canfor* would decline the appellant's invitation to consider these public trust related issues is not surprising. The existence and applicability of the doctrine was not argued either at trial or before Court of Appeal.[99] Accordingly, the Court had well-founded concerns about the evidentiary and legal basis for the public trust doctrine claim. The threshold question deliberately left unanswered in *Canfor* remains unanswered. No court since *Canfor* has decided the question of whether the doctrine exists either as a matter of common law or constitutional law.

73. *Burns Bog* does not assist Canada either and, indeed, is quite helpful to the plaintiffs. In that case, the plaintiff sought to rely on the doctrine to compel Canada to take steps to protect a bog owned by two municipal governments and the Province of British Columbia. The bog owners had granted Canada a conservation covenant that restricted the activities the owners could carry out on the land. In dismissing the action on a motion for summary judgment, Russell J. held that there was no basis in classical trust law, fiduciary law, or public trust law for Canada to "owe any duty to the Plaintiff, the Bog or the general public."[100] The two overriding reasons for this conclusion were that the covenant had no language indicative of such a duty arising, and that Canada was not the owner of the bog.

74. In reaching this conclusion, Russell J. carefully considered *Canfor* and the plaintiff's argument that the public trust doctrine was triggered on these facts.[101] While acknowledging that post-*Canfor* the existence of the public trust doctrine in Canada remained an open question, he concluded it was clear that this arm of the plaintiff's claim could not succeed because, unlike in *Canfor*, the governmental entity in question

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[98] *Canfor*, *supra* note 85, ¶82.
[99] *British Columbia v. Canadian Forest Products Ltd.*, 2002 BCCA 217; *British Columbia v. Canadian Forest Products Ltd.* (1999), 16 B.C.T.C. 110, 1999 CarswellBC 1871 (S.C.).
[100] *Burns Bog Conservation Society v. Canada (Attorney General)*, 2012 FC 1024 [*Burns Bog #1*], ¶77.
[101] *Burns Bog #1*, *supra* note 100, ¶¶106-16.

did not own the subject lands, a feature that made the two cases "starkly different."[102]

75. The Federal Court of Appeal unanimously upheld Russell J.'s judgment, observing that he "carefully considered" *Canfor* and concluded it did not avail the plaintiff and, "at best… opens the door to the application of the public trust doctrine."[103]

76. The factual and legal differences between this case and *Burns Bog* are both obvious and profound. The plaintiffs ask the court to recognize a public trust duty over common resources "within federal jurisdiction."[104] Canada does not dispute that the subject matter common resources in the plaintiffs' claim are within federal jurisdiction, as Canada did in *Burns Bog*. Indeed, Canada has clear jurisdiction in respect of each of the public resources that the plaintiffs plead are subject to the public trust.[105]

iii. Canada Mischaracterizes the Principles that Govern the Application of the Public Trust Doctrine

77. Canada's fall-back argument is that, even if it is wrong to insist that the public trust doctrine does not exist in Canadian law, it is still plain and obvious that the plaintiffs' claim will not succeed. It claims this is because the public trust doctrine must only arise "out of the law of fiduciary duties or trusts."[106] Canada goes on to argue that the existing law of fiduciaries and classical trust law, as applied to this case, would inexorably lead a trial court to dismiss the plaintiffs' claims.[107]

78. This fall-back argument is hobbled by a variety of weaknesses. One goes to the issue of the role of this Court on a motion to strike. For reasons made clear in *Canfor*,

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[102] *Burns Bog #1*, *supra* note 100, ¶¶111-12.
[103] *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, ¶44.
[104] Statement of Claim, ¶240.
[105] In respect of the navigable waters, the foreshores and territorial sea, see: *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(10) & (12), reprinted in R.S.C. 1985, App. II, No. 5; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, ¶129; *The Corporation of the City of Victoria v. Zimmerman*, 2018 BCSC 321, ¶18. In respect of the air, see: *Hydro-Québec*; *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, Part VII, Division 6; in respect of the permafrost, most of which is situated within the territories that come within federal jurisdiction, see: Maguire (1997), *supra* note 88, at 35: "… the property regime in the territories … vests the underlying title to all ungranted public lands in the Crown in right of Canada." Further, Canada has jurisdiction over federal public property under the *Constitution Act, 1867*, s. 91(1A).
[106] Canada's written representations, ¶74.
[107] Canada's written representations, ¶¶75-80.

the question of whether the public trust doctrine exists is best suited to a judicial venue well equipped with a robust factual and legal record. Surely these concerns apply with even greater force where the court (here at the motions stage) is invited to speculate about the content of the doctrine as opposed to its existence. Again, Canada is offering an invitation to the court to engage in an inquiry that it should emphatically decline.

79. This is not to say that a motions judge can never decide novel legal questions. But before doing so, the court must be confident that the answer to the question can be derived from clear and settled legal principles. For example, the Supreme Court of Canada recently considered and settled the question of whether waiver of tort could be pleaded as a stand-alone tort. It was appropriate to "*definitively resolve* whether the novel cause of action proposed by the plaintiffs exists in Canadian law" because that area of law had "developed rapidly in recent years in ways that have deepened our understanding" of the applicable principles.[108] In this case, that depth of understanding as to the legal questions in play surrounding the public trust doctrine is entirely absent.

80. While the principles that might lend content to a future Canadian public trust doctrine remain uncertain, what does seem clear is that leading scholars reject Canada's suggestion that the doctrine should be seen as derivative of or defined by law of fiduciary duties and/or private trusts. For example, in his text on trusts, Dr. Donovan Waters opines that the public trust doctrine is a *sui generis* concept that does not depend upon or "invoke" the classical trust principles.[109]

81. There are many good reasons for concluding these leading legal scholars are precisely right to emphasize the *sui generis* nature of the public trust doctrine concept. The public trust doctrine is an emanation of public, not private, law. Fundamentally, it seeks to define the relationship between the citizen and state, and their respective rights and responsibilities in relation to public resources. It does not emanate from private law or seek to regulate relations between citizens *inter se* which is the domain of

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[108] *Atlantic Lottery*, ¶¶16-17 (emphasis added).

[109] Waters, Donovan W.M. ed., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at 602-03: "The public trust doctrine is a *sui generis* concept that does not invoke existing trust law such as the establishment of the three certainties."; see also, Maguire (1997), *supra* note 88 at 26, an article cited by Binnie J. in *Canfor*: *Canfor, supra* note 85, ¶74.

classical trust and fiduciary law.

82. Doctrinal genealogy aside, another reason why it is erroneous for Canada to suggest that the public trust doctrine is bound by classical trust principles relates to the nature of the interests the doctrine seeks to protect. Classical private trust principles focus on ensuring that trusts embody certainty: as to the intention of the party creating the trust, the subject matter of the trust and the identity of the beneficiaries.[110]

83. In contrast, the public trust doctrine is not triggered by the exercise of a party's intention but rather arises from the inherently public nature of certain common resources and the duties that attach to the Crown as sovereign. Certainty also plays a much diminished and different role within the public trust doctrine in other key respects. For example, the subject matter governed by the public trust doctrine is typically broader and more amorphous than it is in the classical trust setting. Likewise, the benefits conferred in the public trust setting tend to be more indeterminate due to the doctrine's intertemporal and intergenerational nature.

84. For similar reasons, Canada's claim that the public trust doctrine, if it exists, should be understood as derivative of the fiduciary law principles discussed in *Elder Advocates* is likewise misguided. Like classical trust principles, the law of fiduciaries is fundamentally a branch of private law, as *Elder Advocates* rightly emphasizes.[111] The project undertaken by the Court in *Elder Advocates* was to develop a framework to identify when the Crown should be held to owe a fiduciary duty "to an individual or class of individuals" by reason of that individual's special vulnerability or, potentially, undertakings to them made by or on behalf of government.[112]

85. The public trust duty the plaintiffs say arises here is not a duty owed to them as individuals or as a class of individuals. Rather, it is a duty that the Crown owes to the public at large. This *sui generis* duty, that the plaintiffs say attaches to certain public resources, in this case resources upon which human life depends, is inherent in the

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[110] As noted in Canada's written representations, ¶79.
[111] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*], ¶25.
[112] *Elder Advocates*, *supra* note 111, ¶37.

relationship between the Crown and its subjects and is therefore owed by Canada to all its citizens.[113] The plaintiffs allege that, in the circumstances of this case, they should be allowed to seek enforcement of this duty on behalf of all Canadians.

86. In short, Canada is inviting this Court to inscribe the public trust doctrine with attributes borrowed from private law that are inconsistent with its legal genealogy and its *sui generis* nature in a manner that runs contrary to the approach favoured by leading scholars. This is another invitation this Court should not hesitate to decline.

iv. Canada has Failed to Show that it is Plain and Obvious that the Public Trust Doctrine is Not an Unwritten Constitutional Principle

87. Canada's final argument bears close resemblance to its first one. Just as Canada argues that the public trust doctrine does not exist because no Canadian court has recognized it, here Canada argues that the public trust doctrine is not an unwritten constitutional principle because no court has recognized it as such.

88. While the plaintiffs would concede that persuading any court to augment the list of unwritten constitutional principles is not and should not be an easy task, the tautological argument made here by Canada surely cannot suffice to persuade this Court that the plaintiffs' efforts are doomed to fail. Yet, this is precisely what Canada contends, arguing the "claim that the public trust doctrine is an unwritten constitutional principle is bound to fail because no such principle exists."[114]

89. That courts have yet to recognize a legal right or principle is not logically probative of whether that right or principle exists as a matter of law. This is particularly true where the existence of the asserted right or principle has never before been litigated. Canada relies heavily on the *Secession Reference*, but that case states that the list of unwritten constitutional principles that the Court canvassed in that case is not

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[113] That the Supreme Court of Canada does not see its exposition in *Elder Advocates* on the fiduciary duties of government to individual members of the public as having implications for, or even being relevant to the quite different question of whether government is under a public trust-based to protect public resources for the benefit of the public at large is, perhaps, an inference that can be drawn from the fact that *Elder Advocates* makes no mention whatsoever of the public trust doctrine or *Canfor* (2004).
[114] Canada's written representations, ¶84.

exhaustive.[115] New principles can be, and have been, recognized.[116]

90. Furthermore, Canada bears the onus to show it is plain and obvious that the public trust doctrine can never be recognized as an unwritten constitutional principle. Canada has failed to meet its burden. While Canada canvasses some of the factors that it says are considered in the *Secession Reference* in determining what can be an unwritten constitutional principle, nowhere does Canada explain why, upon applying these factors, it is plain and obvious that the public trust doctrine is not such principle.

v. Conclusion on Public Trust Doctrine

91. The central question on this motion is whether Canada has shown it is plain and obvious that the plaintiffs' claims are doomed to fail. If this Court decides that there is any uncertainty as to the existence of the public trust doctrine, this Court must dismiss Canada's motion. Only if Canada establishes that it is plain and obvious the doctrine does not exist can this motion succeed.

92. Canada invites this Court to embark on an inquiry that the Supreme Court in *Canfor* specifically declined to undertake. This Court is not the appropriate venue to decide whether the public trust doctrine definitively exists, the scope of the duties that are imposed on the Crown if such a doctrine exists, who may have standing to enforce such public trust duties on behalf of Canadians at large, and the various other unanswered questions relating to the doctrine that Binnie J. enumerates in *Canfor*.

93. In due course, answers to these questions will emerge through the trial process, with the benefit of a fulsome evidentiary record and legal arguments. This is what the Court in *Canfor* concluded was the appropriate manner to grapple with the complex and important issues surrounding the doctrine. It remains the appropriate approach.

94. Given that Canada has wholly failed to show it is plain and obvious that the public trust doctrine does not exist in Canadian law, this Court must dismiss the motion in respect of the public trust doctrine.

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[115] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶32.
[116] See McLachlin, The Rt. Hon. Beverly. "Unwritten Constitutional Principles: What is going on?" (2005).

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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III. List of Authorities

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