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.

Dated: August 31, 2020

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III. List of Authorities

Cases

Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24 **[Defendants' Motion Record Vol. II, Tab 1]**

Allen v. Alberta, 2015 ABCA 277

Amnesty International Canada v. Canada (Canadian Forces), 2007 FC 1147

Apotex Inc. v. Eli Lilly and Company, 2012 ONSC 3808

Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19

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British Columbia v. Canadian Forest Products Ltd. (1999), 16 B.C.T.C. 110, 1999 CarswellBC 1871 (S.C.)

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British Columbia v. Canadian Forest Products Ltd., 2004 SCC 38 **[Defendants' Motion Record Vol. II, Tab 5]**

Burns Bog Conservation Society v. Canada (Attorney General), 2012 FC 1024 **[Defendants' Motion Record Vol. II, Tab 6A]**

Burns Bog Conservation Society v. Canada, 2014 FCA 170 **[Defendants' Motion Record Vol. II, Tab 6B]**

Canada (Attorney General) v. Bedford, 2013 SCC 72 **[Defendants' Motion Record, Vol. II, Tab 7]**

Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44 **[Defendants' Motion Record Vol. II, Tab 8]**

Canada (Prime Minister) v. Khadr, 2010 SCC 3 **[Defendants' Motion Record Vol. II, Tab 10]**

Carter v. Canada (Attorney General), 2015 SCC 5 **[Defendants' Motion Record, Vol. II, Tab 11]**

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 **[Defendants' Motion Record Vol. III, Tab 13]**

The Corporation of the City of Victoria v. Zimmerman, 2018 BCSC 321

Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 **[Defendants' Motion Record Vol. III, Tab 17]**

Dunmore v. Ontario (Attorney General), 2001 SCC 94

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 **[Defendants' Motion Record Vol. III, Tab 18]**

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